

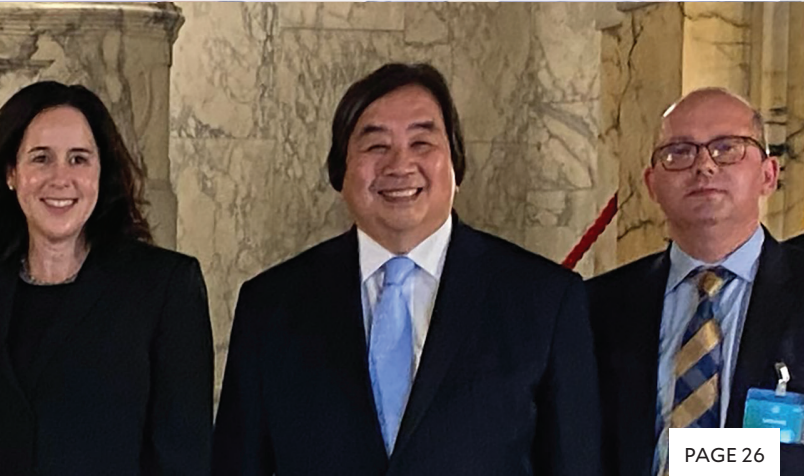
# OUR FACULTY



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# AI and the First Amendment

Jack M. Balkin is Knight Professor of Constitutional Law and the First Amendment at Yale Law School.



*Professor Jack Balkin is the founder and director of Yale's Information Society Project, an interdisciplinary center that studies law and new information technologies. He is the author of more than 140 articles in different fields, including constitutional theory, internet law, freedom of speech, reproductive rights, jurisprudence, and the theory of ideology. YLR asked Balkin about AI and what legal repercussions may occur as the technology advances.*

**Yale Law Report** How does the First Amendment apply to AI-generated expression? Do artificial intelligence programs have First Amendment rights? Is the content AI generates protected by the First Amendment?

**Jack Balkin** The programs themselves don't have First Amendment rights. Nor does it make sense to treat them as artificial persons like corporations or associations. The law gives corporations and associations First Amendment rights because they are groups of human beings who work together on common projects. It's convenient to use the fiction of legal personhood to assign rights to the collective project. You don't need to do this in the case of generative AI.

Nevertheless, people and companies that use AI to produce content that they claim as their own have First Amendment rights as speakers. And people have rights to read or listen to content produced by AI, even though AI itself has no First Amendment rights.

Conversely, when speech is otherwise unprotected, people can't avoid liability by substituting AI speech for human speech. A health provider that uses AI to give medical advice to patients is still subject to malpractice liability. Interesting problems arise when a company hosts an AI program that generates responses to prompts by end users, and the prompts cause the program to generate speech that is both unprotected and harmful. For example, generative AI programs sometimes "hallucinate": they produce false speech upon prompting. Currently it's pretty easy to generate an AI response that defames a person, for example. The courts will have to decide where responsibility lies — with the company hosting the AI or the prompter — and what degree of intention is required to impose liability, because the AI program itself lacks human intentions.

**How will works created by generative AI be treated under copyright law?**

Artificial intelligence raises a host of new problems. One question is the extent to which works produced by AI are copyrightable and who, if anyone, is the author. If I use AI as a tool to create first drafts of works that I edit or modify, the law will probably treat me as the author of the work for purposes of copyright law. But what if I simply write a prompt for the AI program and it spits out a completed work? Generative AI leads to a world in which the "author" is the prompt engineer rather than the people we ordinarily think of as the artist or composer. A second issue concerns training data. Is it fair use when companies train their AI programs on mountains of copyrighted content? AI companies might argue that it is fair use by analogy to the Google Books case, *Authors Guild, Inc. v. Google, Inc.*, where Google made copies of copyrighted books in order to enable text search that reproduced only small snippets of text. A third problem concerns the texts, poems, musical compositions, and art produced by AI. Many of these AI-generated works will have similarities to copyrighted works. Under what conditions should the law treat these as infringing works or, alternatively, as fair uses?

**How should governments regulate AI? Do we need a new government agency?**

Regulation of AI seems inevitable, especially since it's already occurring in Europe. The technologies are developing rapidly and becoming more powerful every day. The issues will be wide-ranging, not just the small number I've mentioned above. It's unlikely that courts will be able to deal with the mounting problems without Congress developing a statutory framework, and it's unlikely that Congress will be able to adequately address all the issues without delegation to an administrative agency with the relevant expertise. Above all, it's important to recognize that AI runs on the collection and analysis of enormous amounts of data. Data is the source both of AI's power and many of its potential dangers. Unlike Europe, the U.S. still lacks a comprehensive digital privacy statute regulating the collection, use, and sale of data collected from human beings. We should have begun solving the problems of the digital age years ago. It's time to catch up.

## The Markup

**Scott Shapiro '90** in "Living in a World of Cyber Threats and God Bots," *The Markup*, Oct. 7, 2023:

"We live in an information society where wealth, prestige, and status depend on the transfer, manipulation, and storage of information. We also live in a world where even knowledge workers don't understand anything about how information is processed."



**Robert Post '77** spoke about whether one's own image is intellectual property in a video by Yale University released in July.

## RESEARCH

## Connecticut Education Funding Increase Aligns with Research by Professor Liscow



**Zachary Liscow**

To provide equitable education opportunities for all K-12 students, Connecticut legislators included an additional \$150 million in the most recent state budget to benefit lower-income school districts. The decision is in line with recommendations outlined by Professor of Law Zachary Liscow '15 in a 2017 paper in the *New York University Law Review* on equitable state funding. Liscow's paper argues that more state and federal funding for lower-income school districts is not only fair but efficient.

"Students in low-income school districts should also have good educations," Liscow said. "When schools are financed purely locally, there is a strong disincentive for people to move to low-income communities because schools will tend to be poor and taxes will tend to be high. This is economically inefficient. We want people to live where they are most productive and happiest, not to have to distort where they live because of these artificial costs arising from whom you happen to live near."



Taisu Zhang '08 taught a class in July at Yenching Academy titled "The Ideological Foundations of Qing Taxation" that discussed how belief systems shaped traditional political ethics and how politics shaped fiscal institutions.

## APPOINTMENTS

## Keith Whittington to Join Yale Law School Faculty



**Keith Whittington**

Keith Whittington will join the Yale Law School faculty as a chaired Professor of Law later this year.

Whittington is the William Nelson Cromwell Professor of Politics in the Department of Politics at Princeton University, where his teaching and scholarship focus on American constitutional theory, American political and constitutional history, judicial politics, the presidency, and free speech and the law. At the Law School, Whittington will launch a new center devoted to the study of free speech and academic freedom with the generous support of the Stanton Foundation.

"As a leading figure in constitutional theory and history, Keith Whittington will greatly enhance the intellectual life of our community and enrich our conversations," said Dean Heather K. Gerken. "I'm also very proud that Professor Whittington will continue his important work on academic freedom and free speech through a new center at the Law School."

Whittington is the author of *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (2019) and *Speak Freely: Why Universities Must Defend Free Speech* (2018), as well as *Constitutional Interpretation* (1999), *Political Foundations of Judicial Supremacy* (2007), and other works on constitutional theory and law and politics. He is currently completing book projects on the First Amendment and legislative restrictions on public universities, the impeachment power, constitutional crises in the United States, and the intellectual history of democracy in the United States.

Whittington is the founding chair of the Academic Committee of the Academic Freedom Alliance and a Hoover Institution Visiting Fellow. He has been a John M. Olin Foundation Faculty Fellow, an American Council of Learned Societies Junior Faculty Fellow, a National Center for Free Speech and Civic Engagement Fellow, and a Visiting Scholar at the Social Philosophy and Policy Center. In the fall of 2020, he served as Visiting Professor of Law at Georgetown University Law Center and has previously been Visiting Professor of Law at Harvard Law School and the University of Texas School of Law. He is a member of the American Academy of the Arts and Sciences and served on the Presidential Commission on the Supreme Court of the United States.

A graduate of Yale and the University of Texas Austin, Whittington has also written extensively for a general audience in *The Washington Post*, *The Wall Street Journal*, *The New York Times*, *The Atlantic*, *Reason*, and *Lawfare*. He blogs at The Volokh Conspiracy and is the host of The Academic Freedom Podcast.

## AWARDS

## Professor Tom R. Tyler Awarded Stockholm Prize in Criminology for Pioneering Research

**Professor Tom R. Tyler** has been awarded the prestigious Stockholm Prize in Criminology for pioneering and advancing research on legitimacy and procedural justice to increase trust in policing.

Tyler is the Macklin Fleming Professor of Law and Professor of Psychology and co-founder of The Justice Collaboratory at Yale Law School.

The Stockholm Prize in Criminology is the world's highest honor in the field of criminology. Since 2006, the prize has recognized outstanding achievements in criminological research or the application of research results by practitioners for the reduction of crime and the advancement of human rights.

In announcing the annual award, the Stockholm Prize in Criminology Foundation said that Tyler “has

made outstanding contributions to the criminology of legitimacy, especially at the microsocial level, with his theories of procedural justice shown by independent field experiments to increase community trust in democratic policing by changing the ways in which police interact with citizens.”

Established under the aegis of the Swedish Ministry of Justice, the Stockholm Prize in Criminology has a permanent endowment in the trust of the Stockholm Prize in Criminology Foundation. The prize is a distinguished part of the Stockholm Criminology Symposium, an annual event taking place during three days in June. It is awarded by the Stockholm Prize in Criminology Foundation in cooperation with Stockholm University and the Swedish National Council for Crime Prevention.

This year's prize was also awarded to Gary LaFree, author of *Losing Legitimacy: Street Crime and the Decline of Social Institutions in America* (1998) and founder of the National Consortium for the Study of Terrorism and Responses to Terrorism (START).



**Tom R.  
Tyler**



**Guido Calabresi '58** received an Honorary Doctorate from the Universidad de Palermo. Dean Fulvio G. Santarelli remarked that Calabresi's “dedication, expertise, and influence have set a precedent of excellence that has inspired generations of scholars and practitioners.”

## Scholars Convene to Honor Professor James Whitman



**On Oct. 13–14**, Yale Law School hosted a conference in honor of James Q. Whitman '88, the Ford Foundation Professor of Comparative and Foreign Law. The conference, titled “Comparative Legal History: A Conference on Themes in the Work of James Whitman,” convened scholars from around the globe for a series of panel discussions.

The conference began with welcome remarks from Dean Heather K. Gerken, who described Whitman as a pathbreaking thinker in the fields of comparative law and European legal history.

“Jim is a scholar's scholar who fuses a wide-ranging intelligence with a deep devotion to the historian's craft,” Gerken said. “He is an unfailingly

insightful commentator and a devoted colleague.” Whitman, she added, “embodies the very best values of academic life and the highest aspirations of this Law School.”

Friday featured four panels on the topics of “Criminal Justice,” “Comparativism and the Modern State,” “Roman Law and its Legacy,” and “Law and Theology.” Saturday featured two panels, titled “Comparative Law Methods” and “War and Empire.” Panelists included Yale Law School alumni Christian Burset '14, Charlie Donahue '65, Amalia Kessler '99, Adriaan Lanni '99, Andrea McDowell '98, Intisar A. Rabb '06, Noah Rosenblum '17, Katharina Isabel Schmidt '13 LL.M., Taisu Zhang '08, and Wang Zhiqiang '14 JSD.

Zhang and Law School faculty members William K. Townsend Professor of Law Nicholas Parrillo '04 and Simeon E. Baldwin Professor Claire Priest '00 served as moderators.

“The conference was a deeply enriching, historic event,” said Priest. “James Whitman is one of the great legal historians of our time, and the success of the conference was a testament to his broad-ranging, rigorous, and creative body of work.”

A forthcoming issue of the *Yale Journal of Law and the Humanities* will publish the papers in a symposium edition. The conference was supported by the Oscar M. Ruebhausen Fund at Yale Law School.



## Professor Koh Asks International Court of Justice to Decide Ukraine's Suit Against Russia

**Sterling Professor of International Law** Harold Hongju Koh, for the third time in the last two years, returned to the International Court of Justice (ICJ) in the Hague in September to argue on behalf of Ukraine against Russia. Koh, former U.S. State Department Legal Adviser and Assistant Secretary of State for Human Rights, presented two arguments on behalf of Ukraine in Court sessions that spanned nearly two weeks.

Koh's opening argument on Sept. 19 opposed Russia's preliminary objections moving to dismiss Ukraine's application for lack of subject matter jurisdiction. By falsely accusing Ukraine of genocide as a pretext for using force to invade its territory, Koh argued, Russia violated its obligations under the U.N. Convention for the Prevention and Punishment of Genocide.

On Sept. 20, 2023, a landmark day in the Court's history, 32 States who agreed to be bound by the Court's judgment intervened in support of Ukraine, arguing in a unified voice that the dispute before the Court raises a question of "interpretation, application, or fulfilment" of the Convention that falls under the Convention's dispute-settlement clause.

One week later, Koh opened Ukraine's closing round on Sept. 27, arguing that the sole question before the Court at the jurisdictional stage was "may a power-



Members of the delegation of Ukraine, on the opening day of the hearings on Sept. 18, 2023, including Professor Harold Hongju Koh (center, in red tie).

ful State falsely accuse its neighbor of genocide, then use illegal force to kill its citizens, devastate their homeland, and destabilize the global legal order on the pretext of preventing and punishing genocide?" A ruling is expected in early 2024.

In addition to Koh, Ukraine is represented before the ICJ by a team of litigators from Covington & Burling LLP led by Marney Cheek, Jonathan Gimblett, and David Zions, which includes recent Yale Law School graduates Paul Strauch '18 and Gaby Vasquez '21. They appeared alongside Professor Jean-Marc Thouvenin of Paris-Nanterre University and Ukraine's Co-Agents before the Court, Anton Korynevych and Oksana Zolotaryova, Ambassador-at-Large and Director of the International Law Department in the Ministry of Foreign Affairs of Ukraine, respectively.



On Sept. 13, 2023, **Akhil Amar '84** was a panelist at the National Constitution Center's National First Amendment Summit. He discussed "The Origins of the First Amendment and Its Central Role in Democracy" along with Jacob Mchangama, Stephen Solomon, and moderator Jeffrey Rosen '91.

**Bruce Ackerman '67**, in his presentation to the Chilean Constituent Assembly on States of Emergency, Aug. 1, 2023, translated by Ackerman from Spanish:

"Although it is relatively easy for a sitting President to gain the support of Congressional allies, opposition political parties will predictably vote against the demand for emergency powers — except when there is very broad public recognition of a compelling need for their use."



**Heather K. Gerken**

## Dean Gerken Named to ABA Task Force for American Democracy

**Yale Law School Dean** Heather K. Gerken has been appointed to the American Bar Association's (ABA) newly created Task Force for American Democracy.

"Our democracy is in peril," said Mary Smith, the President of the ABA. "Attempts to overturn election results, the politicization of election processes, and threats to election administrators and election officials have shown the necessity for the bar, the business community, and all Americans to act to fortify our democracy."

Members of the task force are politically diverse, with expertise in government, democracy, and the rule of law, the ABA said.

Former Judge J. Michael Luttig, who served on the U.S. Court of Appeals for the 4th Circuit, and former U.S. Secretary of Homeland Security Jeh Johnson will co-chair the Task Force. As part of its mission, the Task Force will host listening tours, public conversations, and smaller discussions "with a broad spectrum of Americans to hear their concerns, experiences, and suggestions for restoring and preserving our democracy," according to the announcement.

The Task Force plans to issue a report with its findings and begin acting on recommendations in August at the ABA Annual Meeting in Chicago.

## Q &amp; A

## Professor Sanga on Opening Up Access to Federal Court Records

*Professor of Law Sarath Sanga '14 joined Yale Law School in July 2023 and teaches courses in corporate law, contract law, arbitration, and law and economics. In addition to his J.D. from Yale Law School, Sanga holds a Ph.D. in economics from the University of California, Berkeley. His work has appeared in leading journals, including the Journal of Political Economy, the Journal of Law and Economics, and Science. He recently discussed his work.*

**Yale Law Report** Tell us about your work co-founding SCALES, which works to make federal court records free and accessible to the public, and what you hope to accomplish with this use of artificial intelligence.

**Sarath Sanga** The federal judiciary maintains an abominable policy of denying the public access to court records. The records are all online, but if you want to look up the details of a federal court case — details that are a matter of public record and are in the public domain — you'll have to first surrender your credit card details so that the federal judiciary can charge you. A single case might cost you \$10, \$20, or even \$100 depending on the number of documents involved.

This policy is an affront to democracy, not to mention common sense. It costs almost nothing to maintain the records online, and the benefits of letting the people know what their government is doing are self-evident. No other branch of the federal government does this. Congress makes the *Congressional Record*, roll call votes, and every other online document free. The same goes for every federal agency. Only the judiciary puts up a paywall to block access, and the judiciary has resisted every attempt, both from Congress and in private litigation, to make the records free.

The upshot is that it is impossible to conduct any kind of systematic empirical analysis of the federal courts. An entire branch of government is shielded from scrutiny. One wonders whether this is in fact the purpose.

SCALES is an attempt to right this wrong. Our goal is to make court records free and accessible to the public. So far, we have acquired a small fraction of the records and are using them to develop an online platform where people can query the records and generally make sense of them. This means developing AI-backed systems and using recent advances in large language models to sort through the millions of pages of records.

We intend to launch a public version of our system later this year.

**How would you describe your research to students and alumni?**

In business law, as in so many other legal fields, there is often a chasm between theory and practice. For example, the economic theories of contracting produce extremely complicated “optimally designed” deals, with all kinds of contingencies and complicated payment schemes. Yet in practice, one finds relatively simple transactions. Does this mean the theory is irrelevant? Maybe. I do not doubt that there are plenty of theories that are perhaps best left in the classroom.

But I also believe that the problem is often not one of relevance but of translation. Even if a theory is “correct,” it is not always obvious just how each piece of the theory fits into the complex and messy world of reality. Throughout my work, I try to bridge that gap between theory and practice, to take abstract ideas from economics and statistics and apply them to the real world.



**Sarath Sanga**



**Michael Wishnie '93** was a panelist in September at the Migration Policy Institute's Immigration Law and Policy Conference



Sarath Sanga '14 with his small group during orientation in 2023

**“Only the judiciary puts up a paywall to block access, and the judiciary has resisted every attempt, both from Congress and in private litigation, to make the records free.”**

PROFESSOR OF LAW SARATH SANGA '14



## COMMITTEES

## Professor Claudia Flores Appointed to U.N. Working Group on Women and Girls



**Claudia Flores**

The United Nations Human Rights Council has appointed Clinical Professor of Law Claudia Flores to its five-member Working Group on Discrimination Against Women and Girls. Flores, Director of the Allard K. Lowenstein International Human Rights Clinic and Faculty Co-Director of the Orville H. Schell Jr. Center for International Human Rights, will assume the membership seat reserved for Western Europe and Other States.

The Working Group seeks to eliminate discrimination against women in law and in practice by reinforcing states' obligations to respect, protect, and fulfill women's human rights. It also works to ensure that women are centered in efforts to hold States ac-

countable for implementing civil, political, economic, social, and cultural rights according to international standards.

The Human Rights Council — a body within the United Nations system responsible for promoting and protecting human rights — confirmed Flores's appointment to the Working Group at the end of the Council's 54th regular session in Geneva, Switzerland. The Consultative Group that nominated Flores noted her vast expertise and experience in the field of the mandate, both at the academic and practical levels.

"I have dedicated my career to advocating for remedies and reforms that address inequality, especially for women and girls — and I am eager to continue that advocacy with the Working Group," said Flores.

## SCHOLARSHIP

## Journal Devotes Special Issue to Professor Paul Kahn

The latest issue of the *German Law Journal* is devoted entirely to the scholarship of Professor Paul W. Kahn '80, providing an opportunity for scholars and readers to revisit his work.

In 2020, the journal featured an interview with Kahn, introducing readers to his method of inquiry — a broadly humanist form of interpretation that has been labeled "cultural analysis of law." The interview sought to show the potential application of this meth-



**Paul Kahn**

od to legal systems other than that of the United States, which has been the focus of Kahn's own work. The new issue — "Law and Political Imagination: The Perspective of Paul Kahn" — shifts from a focus on method to the broad range of subjects upon which Kahn has written, including constitutionalism, democracy, political theology, sacrifice, localism, and volunteerism.

"At a moment when fundamental categories of modernity and modern order are being reimagined, understanding law as part of the cultural practices that orient such a process bears immediate consequences," Klaas Hendrik Eller wrote on behalf of the journal's editors-in-chief in an email introducing the issue. "Law builds social worlds not just through 'regulation' and measurable effects but through the production of meaning and horizons of imagination. This makes Kahn's cultural analysis the domain of humanities rather than of the social sciences."

The project's co-editors, Neil Walker and Marco Goldoni, explain in the introduction that the essays range from direct inquiries into Kahn's work to applications of Kahn's approach in new contexts. Walker (Edinburgh Law School) and Goldoni (University of Glasgow School of Law) were the organizers of a 2022 international conference on Kahn's work at the Edinburgh Law School Centre for Legal Theory.

## Eskridge Appointed Alexander M. Bickel Professor of Public Law

William N. Eskridge Jr. '78, a national expert on statutory interpretation and sexuality, gender, and the law whose work has transformed both fields, has been appointed the Alexander M. Bickel Professor of Public Law.

Eskridge, who joined the faculty at Yale Law School in 1998, was previously the John A. Garver Professor of Jurisprudence. The Bickel professorship recognizes leaders in the field who have made a substantial impact within the School and in the legal profession more broadly.

Eskridge, a member of the American Academy of Arts and Sciences, is one of the most cited legal scholars in the United States, having published more than a dozen books and numerous pioneering scholarly articles.



**William Eskridge**

Oona Hathaway '97 gave the 2023 Cecil A. Wright Memorial Lecture at the University of Toronto Law School on Oct. 12 on "The Past, Present, and Future of the Global Legal Order."

## HONORS

## Professor Koh Named 2023 Lemkin Rule of Law Guardian by Duke Law School

**Sterling Professor** of International Law Harold Hongju Koh, who has dedicated his career to defending human rights and promoting international law, was honored as a champion of the rule of law by Duke Law School. Koh was the 2023 recipient of the Raphael Lemkin Rule of Law Guardian Medal awarded by the school's Bolch Judicial Institute. He was presented the medal on Oct. 9 in Durham, North Carolina.

"Professor Koh is an outstanding exemplar of the core ideals embodied by the Lemkin Medal," Paul W. Grimm, the David F. Levi Professor of the Practice of Law and Director of the Bolch Judicial Institute at Duke Law School, said in a statement. "He has long used the law as a means to peacefully hold human rights abusers accountable, and his scholarship, writings, and advocacy have meaningfully advanced the rule of law."

"Harold Hongju Koh is one of the great figures in human rights and international law," said David F. Levi, president of the American Law Institute and Director Emeritus of the Bolch Judicial Institute at Duke Law. "He has made huge contributions as a scholar, a teacher, the leader of a great law school, in distinguished public service, and as an advocate. Whether in Haiti or Ukraine or elsewhere, when he sees injustice, he must act to end it using his formidable skills and passion, using the law. It is hard to imagine how he has accomplished so much in one lifetime. The Lemkin Medal is a fitting tribute to his devotion to the rule of law and the tremendous value and impact of his life's work."

The Lemkin Rule of Law Guardian Medal honors individuals who seek to advance and protect the rule of law in their everyday work. It is named for Raphael Lemkin, a onetime Duke Law faculty member and one of the leading 20th-century scholars of human rights who also coined the phrase "genocide." The medal is awarded by the director of the Bolch Judicial Institute in consultation with the Institute's leadership boards.

Lemkin also spent time as a lecturer in law at Yale Law School, and the Rafael Lemkin prize for the best student paper in international human rights is awarded annually by the Law School faculty in his honor.



Harold Hongju Koh  
at Duke Law School

## Professor John Langbein Receives Law Society's Top Honor

**Sterling Professor** Emeritus of Law and Legal History John Langbein has received the American Society of Comparative Law's Lifetime Achievement Award. The organization announced the award, its highest honor, at its annual meeting in October.

Established in 2003, the award honors living senior comparativists whose writings have changed the shape or direction of American comparative or private international law. Langbein joins a distinguished list of scholars who have won the award, including Sterling Professor of Law Emeritus Mirjan Damaška, the 2009 honoree.



John  
Langbein

Langbein is a leading authority on fiduciary law and a distinguished scholar of legal history. He teaches and writes in four fields: probate and trust law, pension and employee benefit law, Anglo-American and European legal history, and modern comparative law. His work on comparative law has advanced the position that European-style nonadversarial justice is fairer, more accurate, and more economical than Anglo-American procedures.

The American Society of Comparative Law is an organization of institutional and individual members devoted to research and writing on foreign and comparative law as well as private international law. It publishes *The American Journal of Comparative Law* and a comparative law book series.

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Noam Biale, **Elizabeth Hinton**, and Elizabeth Ross in "The Discriminatory Purpose of the 1994 Crime Bill," *Harvard Law and Policy Review*, 2021:

"Historical research indicates that federal lawmakers were well aware of the racially disparate impact of mandatory minimum sentencing schemes and the death penalty, yet chose to double down on those policies and reject alternative proposals that would have made the application of criminal law more equitable. This new frontier of historical research is not merely of academic interest; it has important implications for constitutional scholars and defense attorneys who can draw on these findings to challenge criminal statutes under the Equal Protection Clause."



Natasha Sarin spoke about taxes at the Code for America Summit in May 2023.