

OUR FACULTY



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A Critical Eye on the Implications of Misdemeanor Crimes

Issa Kohler-Hausmann '08 is an Associate Professor of Law at Yale Law School.



In her most recent book, Kohler-Hausmann turns a critical eye to the often overlooked topic of misdemeanor crimes. Over the past several years, she has studied the Broken Windows police tactics of the early 1990s in New York City, which held that rigorous enforcement of low-level offenses was the key to urban order and crime suppression. There was little information on what happens to the hundreds of thousands of people arrested as part of this strategy once they reached criminal court. In Misdemeanorland, Kohler-Hausmann argues that lower courts in the era of Broken Windows largely abandoned the adjudicative model of criminal law administration in which questions of factual guilt and legal punishment drive case outcomes.

Yale Law Report Few people have closely examined punishment other than imprisonment in the criminal justice field. Why did you decide to tackle this?

Issa Kohler-Hausmann The short answer is that there are just *more* misdemeanor arrests than felony arrests — a lot more. I was curious if the things that we know about how felony criminal courts work or how inequality is reproduced through criminal convictions or prison are the same on the lower end of the criminal justice system. Mass incarceration has garnered substantial public and scholarly interest over recent decades. As well it should; it is an urgent political and moral question. But most people who encounter the criminal justice system will encounter it through a citation for a municipal infraction or a misdemeanor arrest, not through a felony arrest. Prison is not even the most common outcome from a felony arrest. So my research question started out incredibly broadly, asking what was happening in New York City's lower criminal courts after they were flooded with arrests from its signature policing tactics and how do defendants experience the process?

How did your time practicing in New York State handling issues of felony and misdemeanor crime shape your scholarly interests?

It provided me a firsthand experience of the tensions and demands that legal actors face on a daily basis in court, how uncertainty, resource and time constraints, and strategic considerations vis-à-vis other actors in

the criminal justice system play out to create certain predictable patterns. For example, one critique that you hear a lot in lower criminal courts is how long cases drag out. Working in court you realize that both sides have opportunities to engage in delay for strategic purposes at different times and under different conditions, and that often the only leverage the defense has is to refuse a plea offer and wait.

Another important thing that I learned was to be attentive to the diverse ways that entanglement with police and courts affects people. We have thought a lot about the permanent mark of a felony conviction — the lasting stigma that can impede employment, housing, and family formation. But much larger swaths of people experience temporary markers in the form of an open case or conditional dismissal, the prolonged hassle of going back and forth to court, the personal degradation of arrest and pretrial detention, or losing jobs because of court dates.

How has having a background in both criminal law and sociology influenced the way you examined the issues in your book?

As a sociologist, I was trained to investigate the substantive meaning of quantitative data and trends. The human costs I mentioned in the prior answer would be invisible if you just looked at the formal legal outcome of the case. Most misdemeanor cases in New York City end in some form of dismissal, so unless you are attentive to those qualitative dimensions that are not captured by formal legal categories you will miss it. The fact that the criminal conviction rate from misdemeanor arrests went down substantially over the Broken Windows era does not mean that that the courts were not exercising a form of social control over the populations that flowed through their doors. The use of qualitative data in the book was to explain how precisely people experienced the penal power of the state.

What do you hope people take away from reading *Misdemeanorland*?

The study of mass misdemeanors — like that of mass incarceration — ultimately points out larger political questions about what role we, as a democratic society, will countenance for criminal justice in establishing social order. The grand majority of the misdemeanor



Miriam S. Gohara in "In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reshape Sentencing," *American Journal of Criminal Law*, 2018

"The aim of this article is to operationalize an argument I pioneered that best practices in capital mitigation ought to be applied to noncapital sentencing. Specifically, this article proposes that defense lawyers need to create records in a breadth and depth of noncapital cases explaining why trauma is relevant to their clients' punishments so that courts will begin to change their approaches to sentencing."

KOHLER-HAUSMANN (CONTINUED)

arrests over the past two decades have been of Black and Hispanic men. The Broken Windows policing tactics are spatially concentrated in the city's poor and minority neighborhoods. To the extent that these policing techniques bring down violent crime in those spaces, which is of course debated, these communities reap the benefit of lower violence and social harm. But they also bear the costs. And the costs are tremendous.

As long as we rely on the criminal justice system as the primary institution of social control over these spaces that will continue to be the case, and we will create a substantial population that is, to use Megan Comfort's evocative phrase, "at once legally free, but palpably bound." And this, I think, is really the crux of the policy implications I draw from this research.

Don Elliott and Carol Rose Elected Members of ALI

Adjunct Professor of Law **E. Donald Elliott '74** and Gordon Bradford Tweedy Professor Emeritus of Law **Carol M. Rose** were elected to The American Law Institute (ALI) on October 18, 2018. The new class includes 31 members who bring a wide range of perspectives and areas of expertise to ALI's work of clarifying the law through restatements, principles, and model penal codes.

ALI is the leading independent organization in the United States producing scholarly work to clarify, modernize, and improve the law.



On Twitter
Vicki Schultz
@VickiSchultzLaw
Sept 30

My interview by @kkelkar on PBS @NewsHour about sexual harassment and assault and the larger context for the #KavanaughHearings was heavily trafficked on their site yesterday. People are hungry for intellectual, not just partisan, analysis! @YaleJournal @YaleLawSch @StanLRev

The New York Times

Reva Siegel in "The End of Abortion," June 28, 2018:

"We can and will argue about harm to women, but it is equally urgent to confront these restrictions by asking when and how government protects life. Expanding the frame beyond abortion, we can ask: Does government protect new life in ways that respect and support women's choices — for instance, through sexual education, contraception, health care, income assistance, and accommodating pregnancy and parenting in the workplace? Or does government protect life selectively, in ways that restrict women's choices?"

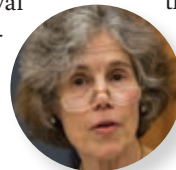
RESNIK



Judith Resnik received an honorary degree from UCL in July.

Professor Resnik Awarded Honorary Doctorate of Laws by UCL

On July 3, 2018, at the University College London Law Faculty graduation held at Royal Festival Hall in London, Professor Judith Resnik received an honorary doctorate of laws. In presenting the Doctor of Laws Honoris Causa (LLD), Professor Dame Hazel Genn described Professor Resnik, the Arthur Liman Professor of Law, as "an academic and legal practitioner of outstanding productivity and distinction, whose interests range very widely across constitutionalism, the impact of democracy on government services, court procedure and adjudication, prisons, gender, citizenship and access to justice."



Judith Resnik

In Professor Resnik's remarks to the graduating class and their families and friends, she reflected on graduations as a time of both celebration and separation. She told the graduates that they were "coming of age in the law at a time when separation is more of a theme that many of us would have wanted."

After the ceremony, Resnik expressed her delight in receiving the honor from UCL. "Being part of UCL is to be part of a remarkable university whose commitment to inclusion dates from its inception," said Resnik. "UCL was ahead of its peers in welcoming individuals of all religions, in admitting women, and in committing itself to innovative and radical critique. In the current world, this provides shining examples of values to celebrate. I am deeply honored to receive the honorary doctorate."

ELLIOT

ACUS Adopts Recommendation by Professor Elliott and Chas Tyler '13

In June, the Administrative Conference of the United States (ACUS) adopted a formal recommendation that originated as a one-on-one discussion of severability clauses in federal regulations between Adjunct Professor of Law E. Donald Elliott '74 and Charles (Chas) W. Tyler '13.

According to the ACUS, the new recommendation “encourages federal agencies that anticipate litigation over their rules to consider early in the rulemaking process whether a rule is severable,” or able to be divided into independently functioning portions. The recommendation also provides “steps agencies should take if they intend that portions of a rule should continue in effect even though other portions have been held unlawful on judicial review.”

Elliott and Tyler’s initial conversations about severability clauses in statutes began at Yale Law School over lunch and in a section of Administrative Law taught by Elliott when Tyler was in his class.

Those informal discussions eventually became a full-fledged article, published in the *Yale Law Journal* in 2015. The article showed empirically that as of 2015, federal administrative agencies infrequently included severability clauses in their rules. Congress, on the other hand, often includes severability clauses in statutes.

“If anything, we thought the opposite should be true,” said Tyler, “since federal administrative agencies are in a better position to say whether they would prefer that portions of a rule remain in effect, even if other portions are held to be unlawful.” The article posited that agencies seldom use severability clauses because they have generally not been given much weight by courts. As a result, courts often invalidate an entire rule when portions are found unlawful.

Elliott and Tyler’s proposals were first fully implemented in the Environmental Protection Agency’s Clean Power Plan rule, the Obama Administration’s major policy on climate change. Additionally, several federal district courts have cited their *YLJ* article when determining what remedy to order after finding a portion of a federal regulation to be unlawful.

DOHERTY

Professor Doherty Cited in Federal Ruling on Supervised Release

A federal judge in the Eastern District of New York issued a ruling in July 2018 holding that he would no

longer send people back to prison for marijuana use while on supervised release.

The judge also held that he would impose shorter terms of supervised release and give more consideration to the appropriateness of conditions.

The opinion extensively cited the work of Professor Fiona Doherty '99, who is an expert on supervised release,

probation, and parole.

Judge Jack B. Weinstein referred to Doherty’s paper “Indeterminate Sentencing Returns: The Invention of Supervised Release,” several times throughout his 42-page opinion. The article was published in the *New York University Law Review* in 2013.

Judge Weinstein cited the article in explaining the “shaky theoretical underpinnings” of supervised release and in highlighting the ways in which supervised release can interfere with the reintegration of released prisoners and encourage unwarranted incarceration.



Fiona Doherty



At the United Nations headquarters in New York on October 22, 2018, **Oona Hathaway '97** and **Scott Shapiro '90** addressed the historical, political, and legal factors that led to the prohibition of the use of force. Their presentation was part of an event marking the 90th anniversary of the Kellogg-Briand Pact, a 1928 treaty under which signatories renounced the use of war as a means for dispute resolution.



Oona A. Hathaway '97, William S. Holste '17, Scott J. Shapiro '90, Jacqueline Van De Velde '17, and Lisa Wang Lachowicz '17 in “War Manifestos,” *The University of Chicago Law Review*, Vol. 85, 2018

“War manifestos give scholars direct access to the international legal arguments sovereigns made to one another, and therefore to the kinds of legal claims they considered valid.”



Susan Rose-Ackerman was celebrated by the Dean and faculty on October 24 to mark her retirement from Yale Law School. (left to right) **Bruce Ackerman '67, Susan Rose-Ackerman, and Dean Heather Gerken**

Q+A Professor Bell on Qualitative Study on Attitudes toward Unplanned Pregnancy in Youth

Associate Professor of Law Monica C. Bell '09 and co-authors Kathryn Edin, Holly Michelle Wood, and Geniece Crawford Mondé published an article, "Relationship Repertoires, the Price of Parenthood, and the Costs of Contraception" on their sociological study in the Social Service Review. The study, part of an evaluation of the U.S. Department of Housing and Urban Development's Moving to Opportunity (MTO) experiment, involved 150 in-depth qualitative interviews of the children of MTO — young people (in this case, all African American) who had started out in low-income Baltimore housing projects, but some of whose parents had received special housing vouchers to move into low-poverty neighborhoods in the 1990s.

Yale Law Report What did you and your co-authors set out to achieve with this study?

Monica C. Bell With MTO, we were interested not only in outcomes like employment and school performance, but also in wide-ranging subjective perspectives on family planning and romantic relationships. While teen pregnancy has sharply declined since the 1990s, unplanned pregnancy is still relatively high, especially in contexts of intersecting race and class subjugation. We were interested in learning generally how these young people thought about family formation and made meaning of sexual behavior, relationships, contraception, and condoms.

How was this study designed to address different angles than past studies?

A large proportion of the research on risk for unintended pregnancy is quantitative and based on observational data, meaning it can tell us a lot about correlates of unintended pregnancy. But — obviously — not everyone who is statistically more likely to experi-

ence unintended pregnancy actually has that experience. So, we wanted to have conversations with a group of youth and young adults who, according to the statistics, fall within a group deemed most likely to experience unintended fertility. While ours is far from the first study to investigate this question qualitatively, it has some characteristics that are unusual for other qualitative studies on this topic: (1) we have a larger sample than usual, which gave us more material to work with for achieving solid internal validity through our coding process; (2) we interviewed both young men and young women, while a lot of studies — especially in earlier years — focused only on young women as if they were sole actors in the family formation process; and (3) we included both current parents and non-parents, which is important because a lot of the research on this topic focuses on current parents and asks them retrospectively about their fertility choices.

Our analysis differs from some other work by engaging with race and culture in a serious way. We center our findings and prescriptions in an understanding of the fraught American history of efforts to control the fertility of poor people and African Americans, so we are leery of treating pregnancy as a “problem” that needs to be resolved through contraception — though we cannot ignore the ways that institutions make it difficult for especially young women to further their education and become economically stable when they have children. So, we examine the relational context surrounding the risk of unintended pregnancy, but we avoid assuming that this relational context is “bad” or problematic.

What legal or policy implications might come out of this research into unplanned pregnancy?

Our results support efforts to increase educational and employment opportunity for both young women and young men as an effort to reduce unintended fertility. Our results also support efforts to ensure that once a young woman gives birth, she does not lose educa-



Abbe R. Gluck '00 and **Nicole Huberfeld** in “What Is Federalism in Healthcare For?,” *Stanford Law Review*, Volume 70, Issue 6, June 2018

“Without a clear conception of the U.S. healthcare system’s goals, how can we know which structural arrangements serve it best, much less whether they are working? If healthcare federalism is a mechanism to produce particular policy outcomes, we should determine whether locating a particular facet of healthcare design in the states versus the federal government positively affects, for example, healthcare cost, access, or quality.”



Monica Bell

DISCUSSIONS AND APPEARANCES



Kate Stith interviewed the Hon. Janet Bond Arterton in August 2018 as part of The Connecticut Bar Foundation History of Connecticut Women in the Legal Profession.



Samuel Moyn gave a lecture, moderated by Jayne Huckerby, at Duke University School of Law titled “Humane: The Politics and Poetics of Endless War” on September 7, 2018.



On July 30, 2018, Monica Bell '09 participated in a conference at T.C. Beirne School of Law in Brisbane, Australia, about the future of sentencing and incarceration.

tional and economic opportunity by losing access to traditional schooling, be it at the K-12 or college level.

We also support educational outreach to help young people think more about condoms and hormonal birth control in ways that might escape the usual disjuncture between intentions and behavior. Sexual education curricula could help youth to better develop their relationship and communication skills so that they can communicate directly with one another about the status of their relationship, rather than rely on signals like condom disuse.

Currently, early pregnancy prevention interventions tend to be focused on women, not men. But if the relational context is a driving force in contraceptive decision making, improving young marginalized men's future prospects may be especially vital. We should question approaches like harsh child support enforcement that reinforce gender asymmetry by targeting services to mothers and children while extracting money from men. These policies fail to address men's limited opportunity costs.

Do you find a connection between the gender asymmetry in how people perceive unplanned fertility and the asymmetry in how sex education is usually delivered?

Absolutely. One of our policy suggestions is to ensure that young men and masculine gender-nonconforming people, not just young women who seem biologically able to carry children, receive pregnancy education and prevention attention. Currently, many institutions administer sex education in a sex-segregated fashion. This approach is old-fashioned, given our increasing understanding of the complexities of sex and gender identity that make segregation along binary lines obsolete.



Yale Scholars Tackle Opioid Crisis in Groundbreaking Journal Issue

More than two dozen Yale professors, doctors, and students have pub-

lished a series of articles on the opioid crisis in the *Journal of Law, Medicine and Ethics*.

The special issue is notable for tackling the opioid epidemic from a variety of angles — including health law, criminal law, addiction science, and social justice and race. It features prominent voices from across Yale University, including Yale Law School, the Yale School of Medicine, the Yale School of Public Health, and the Yale Jackson Institute for Global Affairs.

"This issue is the product of a first-of-its-kind interdisciplinary seminar at Yale University that brought together faculty and students from a range of disciplines to explore the crisis and law's role in it," said Professor Abbe R. Gluck '00. "The seminar was built from the ground up, in response to overwhelming student and faculty demand from across the University to collaborate to study the crisis."

The end product was approximately 20 academic articles from Yale faculty and students culminating with the *Journal* issue published in July 2018. Professor Kate Stith noted that the articles cover a great range, including arguing for a constitutional right to opioid-use-disorder treatment in prison; questioning the use of involuntary civil commitment of those with the disorder; examining the particular toll of the crisis on Native Americans; probing the ethical difficulties doctors face in treating those suffering from addiction; and studying the unique litigation underway to resolve the crisis. The issue also includes an article co-authored by the former president of Mexico, Ernesto Zedillo, now at Yale's Jackson Institute, that investigates how the U.S. drug criminalization policy has contributed to the epidemic.

"So many in our nation have become opioid dependent, a dependence so great that even the risk of death does not deter," said Stith. "Worse, the stock of people with this dependence continues to grow, spurred by many factors including the ubiquitous presence of fentanyl, manufactured often in Mexico or China. This is a public health crisis that has to be addressed on many dimensions."



Jack Balkin gave the Mitchell Lecture at Buffalo Law School on April 13, 2018, on "The First Amendment in the Second Gilded Age." A related article is forthcoming in the *Buffalo Law Review*.

"Protecting freedom of speech in the Second Gilded Age requires us to focus on the political economy of digital speech: how we pay for the digital public sphere, the dangers the digital political economy creates for end users, and the kinds of reforms that would best protect their interests in speech and privacy."



Taisu Zhang

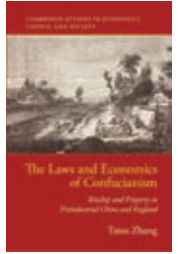
Professor Zhang Awarded Book Prizes

Associate Professor of Law Taisu Zhang '08 has been awarded two prizes for his first book, *The Laws and Economics of Confucianism: Kinship and Property in Preindustrial China and England*.

The Gaddis Smith International Book Prize is given to the best first book by the Whitney and Betty MacMillan Center for International and Area Studies at Yale. Recipients receive a research appointment at the MacMillan Center and a \$10,000 research award over two years.

The 2018 Presidents Book Award from the Social Science History Association is given annually to a first work by an early-career scholar and comes with a \$1,000 prize.

Zhang's book offers a novel argument as to why Chinese and English pre-industrial economic development went down different paths. The dominance of Neo-Confucian social hierarchies in Late Imperial and Republican China allowed many poor but senior individuals to possess status and political authority highly disproportionate to their wealth. In comparison, landed wealth was a fairly strict prerequisite for high status and authority in the far more "individualist" society of early modern England, essentially excluding low-income individuals from secular positions of prestige and leadership. Zhang argues that this social difference had major consequences for property institutions and agricultural production.



On Twitter
Marisol Orihuela
@MsolOG
July 16

Two families were reunited in CT today. It took four law students, over seven attorneys, and countless volunteers. And there are over 2,000 families left to go around the country.

#FamiliesBelongTogether
courant.com/breaking-news/hc-news-connecticut-family-separation-next-steps-20180716-story.html



Harold Hongju Koh visited the Institute of Politics at the University of Chicago in October 2018 to discuss his new book *The Trump Administration and International Law* with Law School professor David Strauss.



Yale Law School Mourns Passing of Marcia Chambers '81 MSL

Longtime journalist Marcia Chambers, a Senior Research Scholar at Yale Law School, died on July 13, 2018. Chambers received her MSL degree in 1981 from Yale Law School and was a writing tutor and mentor to students participating in the Law School's Knight Fellowships in Law for Journalists program for many years. Chambers was a reporter for the Associated Press and *The New York Times*, a writer for *Golf Digest*, an adjunct professor of journalism at Columbia University, and a lecturer in journalism at the University of Southern California.

She turned her groundbreaking work in *Golf Digest* on discrimination into a book, *The Unplayable Lie: The Untold Story of Women and Discrimination in Golf* (1995).

In her most recent career move, she developed an online-only local news publication in conjunction with

the New Haven Independent/Online Journalism Project, in addition to a podcast series on legal issues.

A celebration of her life was held on October 13, 2018, at the Law School, where former dean Harold Hongju Koh recalled Chambers' role in "nurturing a generation of young journalists to find their own path as legal affairs reporters writing about public law." Former MSL students Charlie Savage of *The New York Times* and Luiza Savage of *Politico* also noted that "not only was she a pioneering woman hard-news journalist in her generation, but she later set her idealism and ambition on one of the great journalistic challenges of our current time: how to preserve accountability coverage of local government... reminding us that journalism's highest aspirations can't be fulfilled if we limit our work to New York and Washington."

Chambers was the widow of Ford Foundation Professor Emeritus of Law and jazz enthusiast Stanton Wheeler. She began the annual Stan Wheeler Jazz Concert after Professor Wheeler's death in 2007. Last April marked the tenth anniversary of the concert at Yale Law School. This year's concert is scheduled for Sunday, March 31.

NEJAIME

Article by Professor NeJaime Receives Dukeminier Award

Douglas NeJaime received a 2018 Dukeminier Award for his article “The Nature of Parenthood” from the Williams Institute at the UCLA School of Law. The awards recognize the best sexual orientation and gender identity law review articles of the year and are published in a volume together.

NeJaime’s article was originally published in the *Yale Law Journal* and discusses the legal status of those who form families through assisted reproductive technologies and may not have a biological connection to their children.



Douglas NeJaime

ORIHUELA

Orihuela Cited by Georgia’s Top Court

The Georgia Supreme Court cited the work of Clinical Associate Professor of Law Marisol Orihuela ’08 in a ruling on June 18, 2018, which held that a defendant’s due process rights were violated by automatic detention in his case.

The decision cited Orihuela’s article, “The Unconstitutionality of Mandatory Detention During Competency Restoration,” which was published in the *Berkeley Journal of Criminal Law*.

The ruling aligned with Orihuela’s prescription that mental incompetence does not necessarily equate with dangerousness to oneself or to others.



Marisol Orihuela

ACKERMAN

Professor Ackerman Receives Honorary Degree from the University of Trieste

Sterling Professor of Law and Political Science

Bruce Ackerman ’67 received an honorary doctorate in jurisprudence from the University of Trieste in Italy on October 8, 2018.

Ackerman was recognized by the university for his distinguished contributions to comparative constitutional law. His *Lectio Magistralis*, upon receiving the degree, presented the leading themes of his forthcoming book from Harvard University Press, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law*.

In a newspaper article in *Il Piccolo* reporting the event, Ackerman rejected the present tendency to treat “populism” in completely “negative terms.” He explained instead that the “progressive movement in the U.S. represents an effort to reclaim the fundamental principles of equality and liberty that represent the aspirations of populism at its best. It is an effort by ordinary citizens to respond to

a failing system.” The challenge in Europe is “to unite workers and professionals into a similar populist movement for greater equality of economic opportunity.”



Bruce Ackerman



Bruce Ackerman ’67 received an honorary degree from University of Trieste in October.

APPEARANCES



Owen M. Fiss gave a lecture, “Inequality in a Fragmented Society,” at The Brennan Center Jorde Symposium at the University of Chicago Law School in April 2018.



On October 5, 2018, **Tracey L. Meares** was the keynote speaker at Exploring #STL2039: Policies for a Better Future at Saint Louis University in Missouri, discussing “Synthesizing Narratives of Policing.”