

OUR FACULTY



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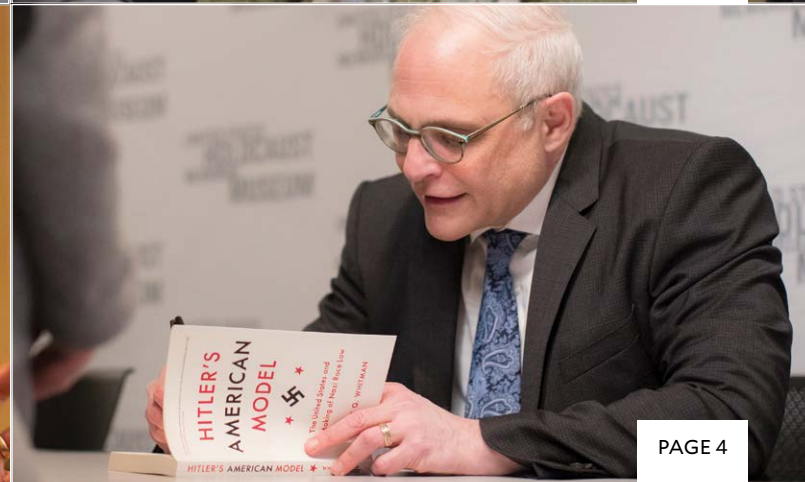
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Executive Power and Immigration

Cristina Rodríguez '00 is the Leighton Homer Surbeck Professor of Law at Yale Law School.



*In her research, Rodríguez has used immigration law and related areas as vehicles through which to explore how the allocation of power shapes the management and resolution of legal and political conflict. Her forthcoming book *The President and Immigration Law*, coauthored with Adam Cox, describes how presidents have influenced and changed immigration policy.*

Yale Law Report How have presidential administrations shaped the course of U.S. immigration policy? Have recent administrations had unique influence?

Cristina Rodríguez The president's role in shaping immigration policy has become highly visible over the last two administrations. Presidents Barack Obama and Donald Trump have maximized their authority over the vast enforcement bureaucracy to offer competing visions of the role of immigrants in American life, with very real consequences for non-citizens and their communities. But as Adam Cox and I show in our forthcoming book on presidential power in immigration law, presidents have played the role of immigration policy-maker-in-chief since the 19th century, originally through their treaty-making power, and eventually by exploiting various tools of the administrative state. Presidential crisis management has played an important role in this story, but so has the ordinary executive obligation to enforce the law.

What role have the judicial and legislative branches played in enabling or limiting presidential power?

The Immigration and Nationality Act, our immigration code, is famously vast and complex. Since its enactment in 1952, and in numerous amendments since then, Congress has set the parameters within which the executive operates. But a particular feature of the Code helps explain why the president nonetheless wields significant power over the system: the law makes deportable many more people than the government has the capacity to remove, necessitating that the administration exercise judgment over when the law applies.

This shadow system that Cox and I describe empowers the executive and accounts for perhaps the central immigration dilemma of our time. Millions of non-citizens who lack immigration status nonetheless have become embedded in the life of the nation, while remaining subject to the ongoing threat of enforce-

ment—a state of affairs that produces instability and oppression for non-citizens and erodes public perceptions of the system's legitimacy. Courts historically have had little role to play in overseeing this shadow system because of legal and political conventions that restrain them from second-guessing executive discretion and the immigration line drawing of Congress. But through the application of the Due Process Clause of the Fifth Amendment, courts for decades have provided limited but meaningful checks on the most abusive government treatment, particularly with respect to detention. This area of the law is now in significant flux, however, and has produced bitterly divided Supreme Court opinions in just the last two terms.

What does the national emergency over the border wall that Trump declared in February imply about the separation of powers in our system today?

Several actions of the Trump administration have shined light on old statutes that contain sweeping delegations by Congress to the President—statutes that give the president broad power to address public safety threats but that can also be cynically employed. President Trump's declaration of a national emergency arguably conforms to the formal parameters of the National Emergencies Act of 1976. Some of the statutory powers unlocked by the declaration of emergency could provide sources of funding for a wall. But the administration's turn to this framework is best understood as a political gambit—a way around congressional resistance to the president's political goals.

Similarly, early in his administration, President Trump capitalized on section 212(f) of the Immigration and Nationality Act, which gives the president the power to suspend the entry of “all aliens or any class of aliens” he deems detrimental to the interests of the United States. The administration's executive orders and purported justifications for them fit within the statute's terms, but the exclusions the president put in place struck many lower courts and scholars, myself included, as fulfilling an animus-inspired campaign promise to check Muslim immigration.

Both of these episodes suggest that it is time for Congress to reconsider delegations that might make sense in theory but that enable misuse and abuse of power, though this sort of legislative reform is aspirational. As for the prospects for judicial review, the Supreme Court's 2018 decision in *page 4* →



Doug Kysar was a panelist at University of California-Irvine on February 9, 2019 on *Fire and Ice: The Shifting Narrative of Climate Change*.

RODRÍGUEZ

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Trump v. Hawaii suggests that the Court is unlikely to police the exploitation of these dramatic delegations. The National Emergencies Act, in particular, contains no standards by which to judge the President’s declaration of an emergency, which makes judicial invalidation of the declaration itself unlikely.

The skirmish over the border wall does highlight that real immigration crises occur. But the construction of a border wall will not address the continuing arrival of people fleeing extreme violence in Central America. Neither the Obama nor the Trump administrations had the capacity to manage this problem humanely—the enforcement mentality thwarts that very objective, as does the ubiquitous problem of limited resources. Public attention to the President’s power over our immigration system can bring these structural limitations (and not just the President’s character) to light. The goal of such revelations, in turn, should be to make the system the President oversees more sensitive to the human toll of mass enforcement.

Jim Whitman ’88 was a panelist at the United States Holocaust Memorial Museum on March 12, discussing Nazi Ideology and Racism in the Jim Crow South.



Post Named to American Law Institute Torts Project

The American Law Institute (ALI) announced on January 28, 2019, that Sterling Professor of Law Robert C. Post ’77 has been named a Co-Reporter for its ongoing Restatement (Third) of Torts: Defamation and Privacy.



Judge Barrington D. Parker ’69, Sterling Professor of Law Robert C. Post ’77, Chief Judge Robert A. Katzmann ’80.

Post Delivers Inaugural Thurgood Marshall Lecture at the Second Circuit

Sterling Professor of Law Robert C. Post ’77 delivered the inaugural Thurgood Marshall Lecture at the Second Circuit Court of Appeals in New York City on December 12, 2018.

Post’s lecture, titled “Marshall as a Judge” explored the contemporary significance of Marshall’s legacy and his time as a judge on the Second Circuit from 1961 to 1965.

Post delivered his remarks after a welcome by Chief Judge for the Second Circuit Robert A. Katzmann ’80 and an introduction by Judge Barrington D. Parker ’69. In the talk, Post spoke not only about Marshall’s career as a judge but about his accomplishments that led him to the bench and influenced him for the rest of his career.

DRIVER

Professor Justin Driver Joins Yale Law School Faculty

Justin Driver joined the Yale Law School faculty as Professor of Law on July 1, 2019.



Justin Driver

Driver was the Harry N. Wyatt Professor of Law at the University of Chicago Law School. A graduate of Brown, Oxford, and Harvard Law School, Driver clerked for Judge Merrick B. Garland, Justice Stephen Breyer, and Justice Sandra Day O’Connor.

Driver teaches and writes in the area of constitutional law and is the author of *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind*, which was published in 2018. A recipient of the American Society for Legal History’s William Nelson Cromwell Article Prize, Driver has a distinguished publication record in the nation’s leading law reviews. He has also written extensively for lay audiences, including pieces in *Slate*, *The Atlantic*, *The New York Times*, *The Washington Post*, and *The New Republic*, where he was a contributing editor.

ON THE HILL AND IN THE COURTROOM

Professor Resnik Speaks to U.S. Commission on Civil Rights on Women in Prison

Arthur Liman Professor of Law Judith Resnik was among the experts who spoke at a public briefing at the U.S. Commission on Civil Rights on February 22, 2019. Resnik, the founding director of The Arthur Liman Center for Public Interest Law, submitted a statement to the briefing titled, “Women in Prison: Disparate Treatment, Disparate Impact, and the Duty of Care.”



Judith Resnik

According to the Liman Center’s statement to the Commission, the number of women in state and federal prisons has increased dramatically during the past 40 years. “These women are underserved in prison, even as comparisons to men in prison are awkward, in that prison systems are not ‘good’ for anyone,” the Liman Center’s statement said. “Experiences are not binary; women and men of all colors, classes, and ages experience the problems of prison in different ways. Further, as media reports detail, transgender people face distinct and egregious harms when incarcerated.”

Issa Kohler-Hausmann and ACLU Challenge State’s Parole System

Associate Professor of Law Issa Kohler-Hausmann ’08 is among a group of lawyers who worked with ACLU Wisconsin to file a federal class-action lawsuit to halt the state’s refusals to release parole-eligible people sentenced to life imprisonment for crimes they committed while they were children.



Issa Kohler-Hausmann

The United States Supreme Court has held that states must give most juveniles sentenced to life in prison a chance to earn parole release based on a standard of rehabilitation and reform. The suit maintains that the current parole system, which gives parole commissioners unfettered discretion to deny release, fails to provide a meaningful second chance for people who committed crimes as children.

“In the wake of recent Supreme Court rulings requiring states to give redeemable juvenile lifers a meaningful opportunity for parole release, states across the country have revisited their parole systems to bring them into compliance with constitutional requirements,” wrote Kohler-Hausmann and co-counsel

Avery Gilbert. “Wisconsin has not, and it must now recognize that it is out of step with national trends and the constitution.”

In addition to Kohler-Hausmann and Gilbert, the legal team included two Wisconsin law firms, Quarles & Brady and Foley & Lardner, which both provided pro bono assistance. Hillary Vedvig ’17, an associate with Foley & Lardner, was one of the firm’s lawyers on the case. Saul Ramirez ’19 also contributed research and assistance.

Professor Kapczynski Testifies in D.C. on Drug Prices

Professor Amy Kapczynski ’03 testified before the U.S. House of Representatives Ways and Means Health Subcommittee on March 7, 2019, in Washington, D.C. The hearing was titled “Promoting Competition to Lower Medicare Drug Prices.”



Amy Kapczynski

Kapczynski outlined how the drug pricing problem is at its core a monopoly problem, where originator drug companies can set high launch prices and increase those prices with few constraints.

“These rights are granted by the government, in the form of patents—which are 20-year rights to exclude others from making, using, importing, or selling covered inventions—and other forms of market exclusivity, such as the exclusivities offered to companies via the FDA,” explained Kapczynski. “Although the pharmaceutical industry has historically argued that exclusive rights and high prices are needed to compensate for research and development (R&D), there is growing recognition that prices are not set in relation to R&D. Rather, prices are set in relation to what the market can bear, and that turns not on R&D costs but on the amount of market power a company can exercise.”



Carol Rose presented “Is Property a Human Right?” at the American Association of Law Schools, Section on Property, Capitalism, and Structural Inequality, in New Orleans, LA, on January 4, 2019.



Q+A Professor Zhang, Newly Tenured, Discusses His Writing and Scholarship

Taisu Zhang '08 received tenure and was appointed Professor of Law at Yale Law School on July 1, 2019. He studies comparative legal history—specifically, economic institutions in modern China and early modern Western Europe—comparative law, property law, and contemporary Chinese Law. “Taisu is an extraordinary scholar and a true polymath,” said Dean Heather Gerken. “His deep expertise in Chinese law and legal history shines a light for us on the country’s growing global influence.” His first book, The Laws and Economics of Confucianism: Kinship and Property in Pre-Industrial China and England, was published by Cambridge University Press in 2017. It has been awarded the Presidents Book Award from the Social Science History Association and the Gaddis Smith International Book Prize from the MacMillan Center for International and Area Studies for the best first book by a Yale ladder faculty member. On the occasion of Zhang’s promotion, the Law Report asked him a few questions about his research and work at the Law School.

Yale Law Report How did Chinese and English pre-industrial economic development go down different paths?

Taisu Zhang I am about 1.7 books into a trilogy of books on this subject, so any answer I give now necessarily involves some conjecture and hypothesis. Nonetheless, my current opinion is that it had much to do with the relative cost of capital versus labor: China was a relatively labor-rich economy with relatively little capital accumulation, whereas England was the opposite. Given that most early industrial technologies required substantial economies of scale to be cost-efficient, they had a very difficult time taking off in China throughout the 19th and early 20th centuries, despite numerous attempts at kickstarting the industrialization process by the state. Now, previous scholarship has covered the labor cost side of this analysis in some detail, but this literature is logically

incomplete, as many have pointed out, without a comparable account of capital accumulation costs—which is where my books make (or will make) their contribution.

I believe there are institutional/legal explanations for the relative lack of capital accumulation in the Chinese economy, and also that there are deeper cultural and ideological explanations for the institutional/legal phenomena. Each book in the trilogy will cover one part of this argument: book one looks at property rights and their sociocultural foundations, book two looks at the ideological origins of tax policy and the fiscal state, while book three examines corporate institutions, and then pulls all of this into a unified thesis.



Taisu Zhang

What are the implications we see today from these differences in development?

Given that a lack of capital accumulation was one of the primary culprits (both real and perceived) for China’s industrial underdevelopment prior to the creation of the People’s Republic in 1949, the new Communist state invested heavily in getting the economy over what you might call “the capital accumulation barrier.” As a result, it immediately began to confiscate land, centralize commercial assets, and spend heavily on infrastructure. To a large extent, these industrial policies laid the foundation for the state-centric mode of economic development that the contemporary Party-state continues to rely on even today. In that sense, the “China model” of development that we see today at least partially continues to be a response to the perceived weaknesses of the pre-1949 economy.

What are some of your other research interests?

I’ve tried to maintain at least two strands of research on the side of my book projects, splitting time between them and the books roughly 30/70: I write occasionally on what one might call private law theory, with an emphasis on property; and also on the contemporary Chinese legal system and underlying currents in Chinese political and legal culture. The unifying theoretical theme behind these different strands of writing is a sustained interest in the interaction between “soft” factors like culture and ideology and “harder” phenomena like legal, institutional, and economic change. That kind of interdisciplinary theoretical inquiry is what has always drawn me to the intellectual life of the Yale Law School, which is about as perfect a true and serious interdisciplinary hub for the law-related social sciences and humanities as one could possibly imagine.

The Washington Post

Samuel Moyn in “If the liberal world offered more economic security, maybe authoritarians would lose their appeal,” March 22, 2019:

“Not preaching the virtues of American freedom alone, but a broad and global program of economic fairness, will remain the best counter to authoritarianism here and elsewhere in the years to come.”

wshu

Public Radio

Judith Resnik in Criminal Justice Reform roundtable, April 30, 2019:

“At the moment, we’re seeing a national understanding that keeping millions in prison in the U.S. is not a way to keep the country safe or help the communities from which they came.”

“That kind of interdisciplinary theoretical inquiry is what has always drawn me to the intellectual life of the Yale Law School.” PROFESSOR TAISU ZHANG

Yale Law Faculty Reflect on First Step Act

In December 2018, Congress passed the First Step, a rare piece of bipartisan legislation that takes initial steps to reform the criminal justice system and ease punitive prison sentences at the federal level.

The bill's biggest changes aim to reduce certain mandatory minimum sentences under federal law and ease the "three strikes rule" in which those with three or more convictions automatically get 25 years in prison.

"This is an important and bipartisan accomplishment," said Professor Kate Stith, who teaches criminal law and procedure and is a former federal prosecutor. "We should be pleased and give credit where credit is due. But there is much more to do, as the name of the legislation makes clear."

Professor Gideon Yaffe, who studies the philosophy of law, particularly criminal law, hailed the bill for making genuine progress and improving the prospects of federal prisoners in the United States. However, Yaffe noted that the modest improvements do not mean that policy makers should stop looking for other ways to improve the system.

"There needs to be action in line with what the report recommends," said Yaffe. "The Act does not actually expand medication-assisted opioid addiction treatment, or allocate money for the purpose, leaving

that to be done by later laws or administrative actions. Will such laws ever be produced, or will our legislators and our Bureau of Prisons administrators simply congratulate themselves on producing an impressive report? Only time will tell."

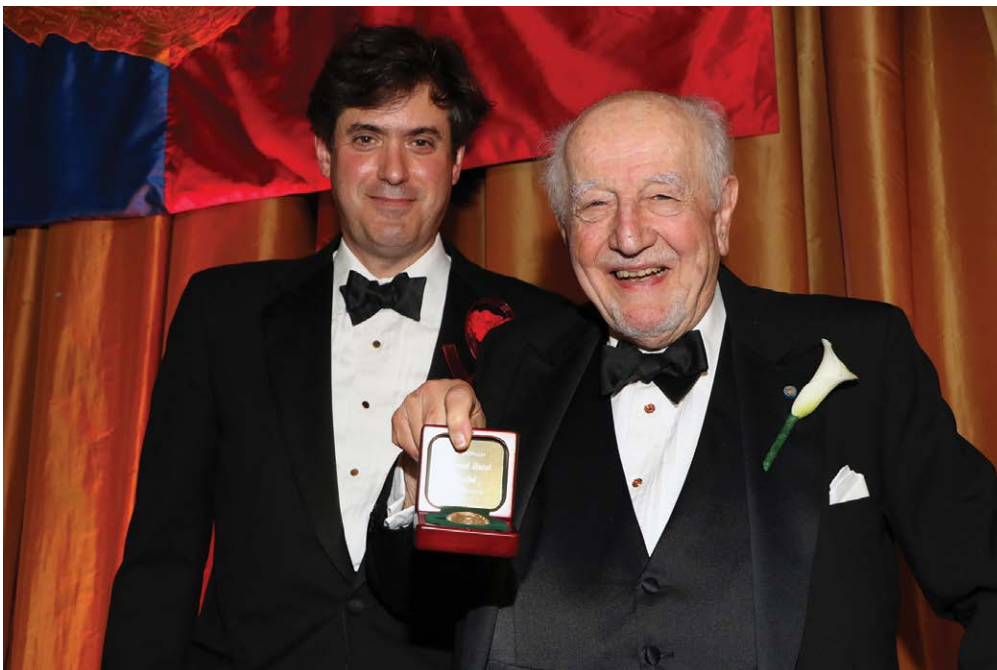
Clinical Associate Professor of Law Miram Gohara, who spent 16 years representing death-sentenced clients in post-conviction litigation, said it was encouraging to see a bill aimed at reducing incarceration rates and improving conditions at federal prisons for the first time in two generations.

Gohara noted that she was particularly pleased to see that the new legislation was making retroactive the 2010 Fair Sentencing Act's reduction in the disparity between crack and powder cocaine sentencing, which could make about 2,600 federal prisoners eligible for release earlier than their original end-of-sentence dates.

However, Gohara cautioned that, "the First Step Act's opportunity for prisoners to earn good-time credit off their sentences if they participate in vocational and rehabilitative programming will only be an effective one if programming is widely accessible, well-funded, and designed to provide meaningful educational programs, job training, and counseling to the men and women serving federal time."



Abbe Gluck '00 took part in a panel discussion on the role of litigation settlements in supporting prevention, treatment, and recovery efforts to address the opioid epidemic at the Bipartisan Policy Center in May.



Federal Bar Council president-elect Jonathan Moses presented the Learned Hand Medal for Excellence in Federal Jurisprudence to Guido Calabresi '58, Sterling Professor Emeritus of Law, at the annual Law Day dinner on May 2, 2019.

SILK

Professor James Silk '89 Receives Human Rights Award



Professor James Silk '89 accepts the M. Shanara Gilbert Human Rights Award from the Society of American Law Teachers (SALT).

THE CONVERSATION
Academic rigor, journalistic flair

Miriam Gohara in “A prison program in Connecticut seeks to find out what happens when prisoners are treated as victims,” March 7, 2019:

“The German correctional model is built on the principle that prisons owe training, education, and therapy to the people in their custody.”



James Silk

Binger Clinical Professor of Human Rights and Director of the Orville H. Schell, Jr. Center for International Human Rights James J. Silk '89 was awarded the M. Shanara Gilbert Human Rights Award by the Society of American Law Teachers (SALT) on January 4, 2019, in New Orleans.

In his remarks, Silk explained that “our goals first are for our students to learn the knowledge and the skills they need to be effective advocates for human rights. We also want students to develop certain principles and practices that I believe are a crucial foundation for that kind of work.”

PETERS

Jean Koh Peters Receives Bar Honor

On the eve of her retirement, Jean Koh Peters was honored by the Connecticut Bar Foundation for her decades of work representing vulnerable clients. The Legal Services Leadership Award honors a person or a group that has shown outstanding support of the foundation’s program that funds legal services to Connecticut residents with low incomes and the organizations that provide those services. Peters, the Sol Goldman Clinical Professor of Law, has centered her practice on children and refugees.



Jean Koh Peters

“I dedicate this award to my clients and students over the last 36 years, and to all legal services practitioners in Connecticut who rise every day to serve poor clients in our state,” said Peters.

“Fireside Conversation” with Former National Security Advisors

In the fall, former national security advisors Stephen Hadley and Susan Rice participated in a “fireside conversation” at the Brookings Institution to discuss U.S.-China relations. The event, part of the first major collaboration between the Paul Tsai China Center at Yale Law School and the John L. Thornton Center at Brookings, and moderated by the Tsai Center’s Director, Professor Paul Gewirtz, showcased the current views about the U.S.-China relationship from two of the leading foreign policy figures in the Democratic and Republican parties. Their service in the most senior foreign policy positions in our government spanned the 16 years between 2001 and 2017, during the administrations of President George W. Bush and President Barack Obama.

They found common ground on current challenges and priorities. Both believe that the relationship with China has entered a new stage of significantly more competition and that the central challenge is to find effective ways to manage this more intense competition while also developing areas of cooperation. And they each enumerated a range of concrete steps to advance those goals in the time ahead.



Former National Security Advisors Stephen Hadley and Susan Rice discuss U.S.-China relations at the Brookings Institution. Professor Paul Gewirtz, Director of Yale Law School’s Paul Tsai China Center, moderated the discussion.

Jim Silk photo by Kyle Encar; James Forman Jr. photo by John Rossey

KAHAN

Dan Kahan Project Wins National Science Foundation Grant

Elizabeth K. Dollard Professor of Law and Professor of Psychology Dan Kahan is among a team of scholars whose research initiative on engaging millennials in science media received a \$2.7 million grant award from the National Science Foundation.



Dan Kahan

Northern California public radio station KQED announced on April 16, 2019, that it had received the grant for its project *Cracking the Code: Influencing Millennial Science Engagement*. According to KQED's announcement, the project, which builds upon research Kahan conducted with Asheley Landrum of the Science Communication and Cognition Lab of Texas Tech University, aims to:

- Identify and analyze the interests, motivations, and behaviors of millennials and their media habits in relation to various types of science content;
- Test a range of public media science content including text, audio, graphics, and video using multiple media platforms, audience research, and engagement tactics to learn how to better meet millennials' needs around scientific news and information;
- Develop best practices for journalists and media companies to reach and engage millennials with science media by using the expertise of science media professionals and science communication academics.

MEARES AND BAZELON

Tracey Meares and Emily Bazelon Elected to the American Academy of Arts and Sciences

Included among the more than 200 individuals newly elected to the American Academy of Arts and Sciences are Walton Hale Hamilton Professor of Law Tracey L. Meares and Senior Research Scholar in

Law and Truman Capote Fellow Emily Bazelon '00. The Academy announced

the election of its new members on April 17, 2019. The new class will be inducted at a ceremony in October 2019 in Cambridge, Massachusetts.



Tracey Meares



Emily Bazelon

FISS

California Law Review Symposium Includes Essay by Owen Fiss

The California Law Review published a symposium in its December 2018 issue including an essay by Sterling Professor Emeritus of Law Owen Fiss. The essay, titled "The Accumulation of Disadvantages," focuses on the disparate impact principle of *Griggs v. Duke Power Co.* and the attempt of the legal system to counteract the dynamics responsible for the perpetuation of racial inequalities.

Fiss originally presented the talk at the annual Brennan Center Jorde Symposium at the University of California, Berkeley School of Law and the University of Chicago Law School.



Owen Fiss



James Forman Jr. '92 gave the 2019 Murray Excellence in Scholarship Lecture on March 21 at Duquesne University School of Law.



Associate Professor of Law **Issa Kohler-Hausmann '08** has won several accolades for her book *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing* (Princeton University Press, 2018):

- Winner of the 2019 Herbert Jacob Book Prize from the Law and Society Association;
- Chosen as one of the best justice-related books of 2018 by the Vera Institute of Justice;
- Winner of the 2019 Mirra Komarovsky Book Award from the Eastern Sociological Society.



Zachary Liscow '15 and **Quentin Karpilow '18** in "Green New Deal is good economics," February 12, 2019:

"While carbon pricing is the most cost effective way to reduce emissions today, government subsidies are the most cost effective way to advance clean technologies tomorrow."