

# OUR FACULTY



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# How the Courts Influence Public Schools

Justin Driver is a Professor of Law at Yale Law School

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*Driver, who joined Yale from the University of Chicago Law School, studies constitutional law, constitutional theory, and education law. His debut book, *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind*, was published in 2018. *The Schoolhouse Gate* has received acclaim from both popular publications and law reviews across the country. The New York Times called it “indispensable,” and the Washington Post labeled it “masterful.” Berkeley Law Dean Erwin Chemerinsky deemed it “magnificent” in the Michigan Law Review, and the Yale Law Journal declared it “destined to influence the field for years to come.” In addition to being named a Notable Nonfiction Book of the Year by the Washington Post and an Editors’ Choice by the New York Times Book Review, it was a finalist for the American Bar Association’s Silver Gavel Award and was shortlisted for Phi Beta Kappa’s Ralph Waldo Emerson Book Award.*

*Upon Professor Driver’s arrival in New Haven, we sat down with him to discuss *The Schoolhouse Gate*’s contributions to legal scholarship.*

## **Yale Law Report** What are the central aims of *The Schoolhouse Gate*?

**Justin Driver** At its heart, *The Schoolhouse Gate* analyzes the intersection of two vital American institutions: the public school and the Supreme Court. I argue that it is impossible to understand either institution without contemplating the other. In fleshing out this claim, the book provides a panoramic view of students’ constitutional rights — including matters involving freedom of speech, due process, equal protection, cruel and unusual punishment, criminal procedure, free exercise, and the Establishment Clause. After stepping back to take in the wide array of contentious instances where the Court has evaluated students’ rights, it becomes possible to appreciate that the public school is the nation’s most significant site of constitutional interpretation. I seek to reinvigorate the field of education law, and — more broadly — to transform dominant understandings of the Supreme Court’s role in American society.

## **How have the courts changed and influenced public schools?**

One of the book’s primary goals is to demonstrate how the Supreme Court’s education decisions have suc-

cessfully vindicated students’ constitutional rights, even though majorities bitterly opposed those rights being protected. Recovering the Court’s counter-majoritarian capacity pushes against modern scholarly sensibilities, as many distinguished constitutional theorists express profound doubts about both the ability and the wisdom of the Court seeking to safeguard minority rights. Consider two prominent examples of the judiciary successfully swimming against the tide of public opinion. First, in 1969, *Tinker v. Des Moines Independent Community School District* protected student speech in the context of protests against the Vietnam War.



Justin Driver gave a book talk on *The Schoolhouse Gate* at Yale Law School on October 29, 2019.

Writing for the Court, Justice Fortas — in a passage that supplied the title for my book — proclaimed: “It can hardly be argued that...students... shed their constitutional rights...at the schoolhouse gate.” But, in fact, contemporaneous polling data indicated that most Americans thought students should not enjoy free speech rights. Second, in 1982, *Plyler v. Doe* invalidated a Texas measure that sought to exclude unauthorized immigrants from public schools. While Texas was the first state in the nation to adopt such a statute, we know very well today that many other states would have followed suit — had the Court not effectively interred the movement. As a result, many children across the nation have been able to receive an education who otherwise would have been denied one.

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For a more detailed listing of faculty scholarship and activities, visit [law.yale.edu/facultynews](http://law.yale.edu/facultynews)

DRIVER (CONTINUED)

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*Tinker* and *Plyler v. Doe* thus challenged prevailing conceptions, and in so doing shaped current realities. In this sense, education decisions have influenced not only American public schools, but America itself.

**Are there any cases on the horizon that you are following that may have an impact on the landscape of public education?**

There are two major issues that the Supreme Court seems poised to settle that I address in *The Schoolhouse Gate*. First, sooner or later, the Court will decide whether transgender students have the right to use restrooms that are congruent with their gender identities. Although lower courts initially resolved these cases on a statutory basis, lower courts are now considering these claims under the Equal Protection Clause. Second, I hope that the Court will agree to reconsider *Ingraham v. Wright*, its 5-4 decision from 1977 that refused to rein in even egregious inflictions of corporal punishment in schools. Although many people now believe that the practice no longer exists, I am sorry to report that teachers and school administrators continue to strike students with foreign objects in more than 15 states, most prevalently in the deep South. Students are the sole remaining group of people who government officials may hit with impunity. If I have any single ambition for *The Schoolhouse Gate*, I hope it elevates the salience of this archaic practice, and persuades the Court to abolish it.



On Twitter  
**Richmond Law**  
 @URLawSchool  
 September 13, 2019

Prof. James Forman Jr. (@jformanjr) of @YaleLawSch sat down with students from the Criminal Law Society, Black Law Students Association, and the Student Bar Association to explore issues surrounding mass incarceration.

KYSAR

**Kysar Wins Teaching Award**

**Douglas Kysar**, Deputy Dean and Joseph M. Field '55 Professor of Law, was among the winners of Yale School of Management's 2018-19 MBA for Executives Teaching Awards. Kysar is an Adjunct Professor at SOM, where he has taught on climate change. Faculty were honored in each of the MBA for Executives program's three focus areas — healthcare, sustainability, and asset management. Kysar was honored in the sustainability focus area.



**Douglas Kysar**

Kysar said it is especially gratifying to be honored by the program's students, whom he knew to be talented, smart, diverse, and committed. "What I didn't expect was for the students to also be so fun, so compelling, and so downright inspiring," he said. "It was a privilege to work with them."  
 Kysar also received the award in 2017.

BALKIN

**Balkin Receives Funding to Study Digital Public Sphere**

The **John S. and James L. Knight Foundation** announced a commitment of nearly \$50 million in research to better understand how technology is transforming our democracy and the way we receive and engage with information. Amid a growing debate over technology's role in our democracy, these investments will help ensure society is equipped to make evidence-based decisions on how to govern and manage the now-digital public square.



**Jack Balkin**

Jack Balkin, Knight Professor of Constitutional Law and the First Amendment and Director of the Information Society Project at Yale Law School, will receive \$2 million from the Knight Foundation to launch a new ISP initiative. Balkin's Project on Governing the Digital Public Sphere will produce legal and policy recommendations to improve the functioning of the digital public sphere. Looking at external and internal governance, the initiative will study topics from antitrust and privacy to content moderation and digital propaganda.

Knight's investment will fund new, cross-disciplinary research at 11 American universities and research institutions, including the creation of five new centers of study. In addition, Knight has opened a new funding opportunity for policy and legal research addressing major, ongoing debates about the rules that should govern social media and technology companies.

The other Yale recipient is Fiona Scott Morton, the Theodore Nierenberg Professor of Economics, who has received an investment to study competition and antitrust in the digital economy. The funding will support the launch and development of the Thurman Arnold Project at the Yale School of Management.

FORMAN

**Legal Assistance Association Honors James Forman Jr. '92**



**James Forman Jr.**

**James Forman Jr. '92**, the J. Skelly Wright Professor of Law at Yale Law School, was honored by New Haven Legal Assistance Association at its Equal Access to Justice Reception on June 11, 2019. The organization, which exists to provide high quality legal services to individuals and groups who face barriers in obtaining these services, annually recognizes honorees who share its commitment to justice.

FISS

## Professor Fiss Receives Honorary Doctorate from the University of Chile



Sterling Professor Emeritus of Law Owen M. Fiss and University of Chile Rector Ennio Vivaldi at a ceremony honoring Fiss with an honorary doctorate

**The University of Chile** awarded an honorary doctorate to Sterling Professor Emeritus of Law Owen M. Fiss, recognizing his contributions to human rights in Latin America and to legal scholarship in general. Fiss received the Honoris Causa on June 13, 2019, at the University's Santiago campus in a ceremony attended by students, faculty, and university officials.

University Rector Ennio Vivaldi praised Fiss's work to advance human rights in the aftermath of dictatorships, calling this work invaluable for building democracy in the region. In his introductory comments, University of Chile Law School Dean Pablo Ruiz-Tagle noted the long history of collaboration between Yale Law School and the University of Chile that was spearheaded by Fiss. This collaboration includes the Latin American Linkages student exchange program and SELA (Seminario en Latinoamérica de Teoría Constitucional y Política).

At the conclusion of the ceremony, Fiss delivered the keynote address, "Mill on Free Speech," an examination of John Stuart Mill's 1859 essay "On Liberty." In his talk, Fiss described how Mill defended free speech not simply because it does not cause harm to others — key to the formulation of Mill's principle of individual liberty — but because free speech is necessary to test the worth of one's beliefs.

"Only through free and open discussion can we learn whether our views are true or false," Fiss said. "No one is infallible, and if even after free and open discussion an individual adheres to the same beliefs, that individual will do so with a new appreciation and even firmer conviction of their truth."

LISCOW

## Zachary Liscow and Leah Brooks on Cost of Highway Construction

**A paper co-written by** Associate Professor of Law Zachary Liscow '15 suggests why Interstate highway construction costs have tripled over time, and the reasons have quickly drawn the attention of observers who follow infrastructure.



**Zachary Liscow**

The paper "Infrastructure Costs" was co-written with economist Leah Brooks of George Washington University. In the paper, Liscow and Brooks analyze data from the Federal Highway Administration and find that one mile of Interstate highway construction in the 1980s costs three times what it did in the 1960s, adjusted for inflation.

There are two main reasons, the authors conclude. First is the combination of rising incomes and higher house prices. "A richer population may demand more highways, no matter the cost," according to a Brookings Institute summary.

The second explanation is what Liscow and Brooks call citizen voice — a combination of legislative and judicial changes, as well as environmental and homeowner-led movements — that increased the ability of citizens to directly affect government decision making. As a result, environmental reviews required in later years have added time to planning and construction processes. Read the paper at [ylaw.us/386up8g](http://ylaw.us/386up8g)



**Harold Hongju Koh**



**Judith Resnik**

KOH &amp; RESNIK

## Professors Koh, Resnik Sign Amicus Brief in Separation of Powers Case

**As part of a group** of constitutional scholars, Professors Harold Hongju Koh and Judith Resnik signed an amicus brief in September in federal court arguing that a congressional committee has Article III standing to enforce a subpoena against the executive branch.

The brief was filed in a high-profile legal case in U.S. District Court in Washington, D.C., *Committee on Ways & Means v. Treasury Department*. The case centers around whether the House Committee on Ways & Means can subpoena the President's tax returns as part of an investigation.



**Professor Tracey Meares** (far left) moderated a panel on *Approaching Police Violence: A Writers' Conversation* in September at Yale as part of the 2019 Windham Campbell Prizes Festival. The panelists were David Chariandy, Raghu Karnad, and Rebecca Solnit.



**Susan Rose Ackerman**, Henry R. Luce Professor Emeritus of Jurisprudence, participated in an international seminar on June 12-13, 2019 at the Institut de Recerca TransJus of the Universitat de Barcelona on corruption, good governance, and artificial intelligence. She gave the inaugural lecture of the conference, titled "Corruption and Government."

*The Atlantic*

Anne Alstott '87 and Ganesh Sitaraman in "When Millions Can't Afford to Retire, the U.S. Needs a Better Option," July 11, 2019:

"A public option for retirement savings could go a long way toward addressing the retirement crisis in America. Instead of placing risks on individuals and then nudging them to save a few dollars more, the public option would offer universal access to a simple, effective annuity. And it would be a way to help millions of Americans reclaim their retirement years from the anxiety of making ends meet."



Gideon Yaffe giving the Wesley Newcomb Hohfeld Inaugural Lecture

## Q&A Professor Yaffe on Philosophy and Psychology of Criminal Justice

*Gideon Yaffe is Wesley Newcomb Hohfeld Professor of Jurisprudence, Professor of Philosophy, and Professor of Psychology at Yale. His research interests include the philosophy of law, particularly criminal law; the study of metaphysics including causation, free will, and personal identity; and the study of intention and the theory of action. In September, Yaffe gave the inaugural Wesley Newcomb Hohfeld Lecture.*

**Yale Law Report** In your lecture on "The Norm-Shift Theory of Punishment," you discussed the importance of a definition of punishment in order to have a just system of punishment. Why is this the case?

**Gideon Yaffe** The government frequently wants to do things to people that they don't want done to them — taxes, fees, licenses, quarantines, punishments, etc. When what the government has in mind is a punishment, it has to abide by a bunch of rules.

Because the label "punishment" comes with these additional restrictions, sometimes the government wants to avoid abiding by the restrictions. We've seen this in action: In the Supreme Court case of *Smith v. Doe*, the government of Alaska wanted to force sex offenders to register even when their offenses preceded the creation of the registries. That would be a violation of the ex post facto clause of the Constitution — if forced registration is punishment. If we are going to have a just system of punishment — one where the government abides by the restrictions on punishment, restrictions that don't apply to other things — we need to know when the government is cheating by denying the label "punishment" to what it wants to do to people.

The idea of my lecture was motivated by a simple observation: a very important difference between being incarcerated by the government for an offense, and being kidnapped by a mob as revenge for the offense, is that when you're incarcerated it's illegal for you to escape; not so when you're kidnapped. The idea that legal change is a defining feature of government punishment has a lot of implications.

**You worked on a study that used brain scans to determine whether people were in a knowing or reckless state of mind. What did the study find?**

That study was part of a strand of my research aimed at using neuroscience to give insight into issues that matter to criminal adjudication and punishment. Our question was whether we could sort people into standard mens rea categories based solely on their brain activity. We ask jurors to do this in trials: they need to figure out, for instance, whether the defendant knew that there was 100 pounds of marijuana in his trunk when he drove across the border, or was, instead, just aware of a risk of the possibility. In a sense, we ask jurors to read minds. We wanted to know whether we could perform that same mind-reading task not by looking at behavior and testimony and the usual things that jurors use, but, instead, by looking just at brain activity. We scanned people's brains while they played a game where they needed to decide whether to carry a suitcase across the border when they either knew that it contained contraband, or were merely aware of a risk that it did. Then we tried to use the information we recorded about their brain activity, all by itself, to sort them into these two mens rea categories. We could do it with high accuracy in some conditions, but not in all. So the study was a kind of proof of concept: brain scanners can read criminal minds, although not all the time,

## YAFFE (CONTINUED)

and not without help. There's a lot more work on this kind of thing to be done.

**You wrote an op-ed in October for Slate about juveniles in the court system. Why is disenfranchisement a better reason for different treatment than brain development?**

The op-ed took the central idea from a recent book of mine (*The Age of Culpability: Children and the Nature of Criminal Responsibility*) and explained its implications for a case before the Supreme Court concerned with the sentences for people who committed terrible crimes as juveniles. I don't think they should be given life without parole sentences, even when such a sentence would be appropriate for an adult who committed the same crime. Kids are owed a break. What it is about kids that warrants leniency, in comparison to otherwise identical adults, for criminal behavior?

I don't think that psychological or neural immaturity is the answer. My suggestion is that what really matters is political rights. We deny kids political rights—notably the right to vote, but also full, unadulterated rights to freedom of speech—even when they are plenty mature to participate fully in politics. So when we are contemplating punishing them for their crimes, we are contemplating using full government force against second-class citizens. The book argues that when you are a second-class citizen of this kind you are reduced in criminal culpability. I think if this point were front and center in the legal system (which it is not!) it would provide a better and more secure foundation for leniency towards child criminals.

## GLUCK

## Gluck Named Adviser for American Law Institute Publication



**Abbe R. Gluck**

**The American Law Institute** has named Abbe R. Gluck '00, Professor of Law and Faculty Director of the Solomon Center for Health Law and Policy, an adviser for the institute's new publication, *Restatement of the Law Third, Torts: Concluding Provisions*.

*Torts: Concluding Provisions* will address medical liability, vicarious liability, wrongful death, survival actions, and other topics not addressed in the previous edition, plus topics updated from the last publication.

## LANGBEIN

## Langbein Wins Frankel Fiduciary Prize



**John H. Langbein**

**The Institute for the Fiduciary Standard** announced on August 8, 2019 that Sterling Professor Emeritus of Law and Legal History John H. Langbein has been awarded the 2019 Frankel Fiduciary Prize. 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 (ERISA); Anglo-American, European legal history; and modern comparative law.

The Frankel Fiduciary Prize Selection Committee announced the prize through a statement by Deborah A. DeMott, David F. Cavers Professor of Law, Duke Law and Chair of the Committee:

"John Langbein was a compelling choice as the recipient of this year's Frankel Fiduciary Prize. His innovative scholarship led the way to the prudent investor rule, which modernized fiduciary investing to the benefit of millions. Professor Langbein has made noteworthy contributions to scholarship in all of the fields on which he has focused, ones that invigorate debate and reorient a field. The Selection Committee is delighted to recognize his accomplishments over a distinguished career."



**Professor Akhil Amar '84** was filmed at the Law School in October for a documentary about the Electoral College.



**Professor Bill Eskridge '78** gave the 2019 Cutler Lecture at William & Mary Law School in October. William and Mary Law Dean Davison M. Douglas '83 looked on as Professor Eskridge spoke about "Why Marriage Equality Prevailed—and Lessons for Other Social Movements."

## Hartford Courant

**Ian Ayres '86 and Brendan Costello '19** in "Temporary restraining orders in Connecticut don't always take effect; that needs to change," October 6, 2019:

"Our study provides evidence that a Yale Law School program, where students provide clerical assistance and reminder phone calls to applicants, is associated with an 11 percentage point increase in in-hand service."



**Innovation Snowballing and Climate Law**, 95 Wash. U. L. Rev. 385 (2017) (by Zachary Liscow '15 and Quentin Karpilow '18) was selected as one of the five environmental law articles of the year by leading professors and practitioners and reprinted in the *Land Use and Environment Law Review*.



## NeJaime Gives Inaugural Anne Urowsky Lecture

**Douglas NeJaime**, the Anne Urowsky Professor of Law at Yale Law School, gave the inaugural Anne Urowsky Lecture on October 28, 2019. In his lecture titled “The Constitution of Parenthood,” NeJaime challenged the conventional assumption that the Constitution protects only biological parent-child relationships and made an affirmative case for constitutional protection of nonbiological parents.

Family law in a growing number of states legally recognizes nonbiological parents in a range of families — including nonmarital families, families headed by same-sex couples, and families formed through assisted reproduction. But in some states, nonbiological parents who have not adopted are treated as legal strangers to their children, according to NeJaime. When these parents turn to the Constitution by asserting a liberty interest in their parent-child relationship, NeJaime has found through his scholarship that they often find no relief. Supreme Court precedents from the 1970s and 1980s involving the rights of unmarried fathers and the status of foster parents have led courts to conclude that only biological parents possess a right to parental recognition protected by the Due Process Clause.



**Cristina Rodríguez '00** opened Smith College's 2019–20 Presidential Colloquium series with a talk on “The President, Immigration Law, and the Politics of Constitutional Structure.” The event, which was held in conjunction with Smith's observance of Constitution Day, was held on September 19.

### KOHLER-HAUSMANN

## Kohler-Hausmann Receives Tenure; Secures Ruling in Class Action Lawsuit

**Issa Kohler-Hausmann '08** was promoted to Professor of Law in December. Her primary research interests are in criminal law, sociology of law, empirical legal studies, social and legal theory. Her book *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing* (Princeton, 2018) is a mixed method multi-year study of New York City's lower criminal courts in the era of mass misdemeanor arrests.



**Issa Kohler-Hausmann**

Kohler-Hausmann and partners recently won a major ruling in federal court for the constitutional rights of people sentenced to life in prison for crimes committed as children and who, after serving the minimum sentence required by the legislature, are denied parole despite showing clear signs of rehabilitation.

The plaintiffs in the class action case were all sentenced to indeterminate sentences of some number of years to life with the possibility of parole after hav-

ing committed serious offenses in New York while they were under the age of 18. The lawsuit is against the New York State Board of Parole and argues that people serving parole-eligible life sentences for crimes committed as children must be provided a “realistic and meaningful opportunity for release based on current demonstrated maturity and rehabilitation.”

Ruling on a motion to dismiss, U.S. District Court Judge Vincent L. Briccetti sided with the plaintiffs holding that “an Eighth Amendment right attaches to life-sentenced juvenile offenders' parole proceedings” and that “the Constitution mandates” that the parole process “must amount to a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” The court also held that the Board must follow procedures sufficient to provide plaintiffs a meaningful opportunity for release.

Kohler-Hausmann and Gilbert are working with the firm Cravath, Swaine & Moore LLP in representing the plaintiffs.

DINEEN

## Yale Law School Mourns the Passing of Francis X. Dineen '61

**Francis X. Dineen '61 LLB**, former Visiting Clinical Lecturer in Law at Yale Law School, died on September 25, 2019 at the age of 84. As Senior Counsel at New Haven Legal Assistance Association (NHLAA), he was one of the longest-serving legal services lawyers in the country. He received his A.B. from Dartmouth and his LL.B. from Yale Law School.

Dineen was one of two lawyers hired in 1963 to run Community Progress, Inc. in New Haven, a model of the Kennedy administration's Office of Economic Opportunity funded by the Ford Foundation.

He began teaching and supervising Yale Law School students in 1964 as director of New Haven's Municipal Legal Aid Bureau, working with approximately 20 volunteer Yale Law students on a large number of civil cases. In June 1966, the Legal Aid Bureau merged with NHLAA, and Dineen became Deputy Director, a title he held for more than 30 years.

Dineen was involved in many landmark cases, including the Supreme Court case *Boddie v. Connecticut*, which established the right to free access to the courts in cases of fundamental rights. As a result, every state and the federal system have established fee waiver mechanisms. Dineen is also credited with reinventing landlord/tenant practice in Connecticut. Dineen began teaching at the Law School in 1977 and taught Trial Practice as well as Civil Legal Assistance. He taught in the Landlord-Tenant Clinic beginning in 1985.

"Frank Dineen was a wonderful colleague to the Law School's clinical faculty, and a role model for law students," said Stephen Wizner, William O. Douglas Clinical Professor Emeritus of Law. "He devoted his life to providing legal assistance to the poor and disadvantaged, and to teaching students the skills and ethics of being effective and socially responsible lawyers. He has left his mark on generations of law students through his teaching and by the example of his life."

Dineen was the recipient of numerous awards during his career, including the Distinguished Service Award from Yale University and Yale Law School in 1981, for his work in legal services and with Yale Law students; and the Charles J. Parker Legal Services Award from the Connecticut Bar Association for his work in legal services. He was also designated a James W. Cooper Fellow by the Connecticut Bar Foundation in 1994.

When he was awarded the Distinguished Service Award, Dineen spoke of being drawn to legal services work out of compassion for the underprivileged and poor and his concern that the legal system be fair and available to all.

"A system of justice which systematically excludes a large segment of the population from its coverage is immoral," he said. "We cannot tolerate such a system."

