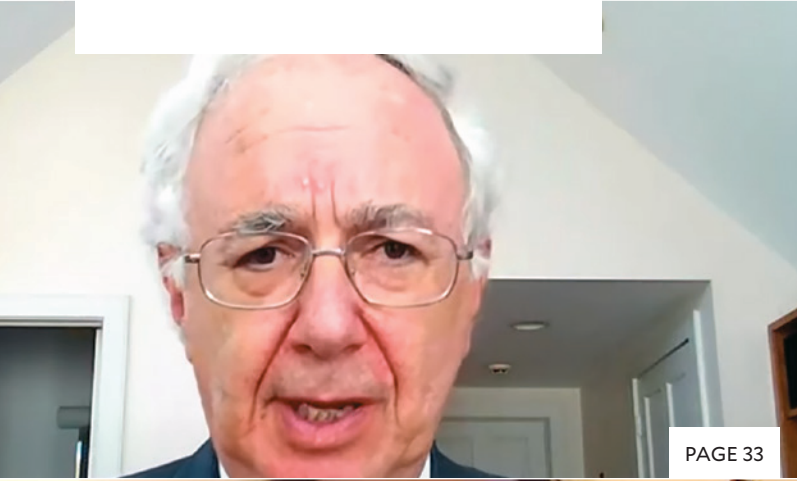


OUR FACULTY



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Sentencing and Rehabilitation

Miriam Gohara is a Clinical Associate Professor at Yale Law School.



Miriam Gohara spent 16 years representing death-sentenced clients in post-conviction litigation, first as assistant counsel at the NAACP Legal Defense Fund (LDF) and then as a specially designated federal public defender with the Federal Capital Habeas Project. She teaches and writes about capital and non-capital sentencing, incarceration, and the historical and social forces implicated in culpability and punishment. She leads the Challenging Mass Incarceration Clinic.

Yale Law Report You are set to publish a paper that highlights the work of your Challenging Mass Incarceration Clinic at Yale Law School. Can you tell us more about that?

Miriam Gohara My new paper, “Narrating Context and Rehabilitating Rehabilitation: Federal Sentencing Work in Yale Law School’s Challenging Mass Incarceration Clinic,” is the third in a series that builds on a theory I developed while practicing capital post-conviction litigation. That theory proposes that just as defense lawyers’ intensive, interdisciplinary investigation and presentation of capital defendants’ life histories saves their lives from the death penalty, the same quality of social history mitigation can spare noncapital defendants years in prison. In my capital practice, I learned that invariably my clients had survived extreme violence, poverty, and neglect well before they ever harmed anyone else. When capital litigators win life sentences, it is because they have done two things: they have investigated, presented, and explained the behavioral impacts of the extremely adverse experiences their clients have survived; and they have shown that their clients have the capacity for rehabilitation and redemption, even if they serve the rest of their lives in prison. I began to toy with the idea that non-capital defense attorneys should do the same for their

clients in order to persuade judges to mete out sentences that account for defendants’ own lifetime adversity and provide a meaningful opportunity for rehabilitation. “Narrating Context” describes how clinic students’ sentencing advocacy explains our clients’ life experiences and demonstrates that rehabilitating our clients outside of prison promotes lasting public safety by addressing the underlying deprivations that have contributed to their crimes in the first place.

What are some of the highlights of the clinic work?

Since the Challenging Mass Incarceration Clinic began in September 2016, Yale Law students have, along with the Federal Defender’s Office for the District of Connecticut, represented 10 clients in federal sentences. The clinic’s clients have been sentenced to an average of five years below the bottom range of the Federal Sentencing Guidelines. In four of the 10 cases, the clinic students’ advocacy has persuaded judges that alternatives to prison are proportionate, sufficient, and effective sentences for our clients. That has made an enormous difference to clients who have, as a result, been able to receive drug treatment, mental health services, begin or continue law-abiding employment opportunities, and continue to support their families. Most recently, the clinic’s work uncovered the reason that a client in his 30s who had pled to narcotics dealing had been unable to succeed educationally or in traditional employment settings. The students’ investigation of his educational records and social history gave an expert psychologist enough information to diagnose him with intellectual disability, which opened up a world of rehabilitative options and disability supports for our client, none of which he would

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The New York Times

Akhil Reed Amar ’84 with coauthors Vikram David Amar ’88 and Neal Kumar Katyal ’95 in “The Supreme Court Should Not Muck Around in State Election Laws on October 28, 2020:

“Allowing federal courts to muck around with state election laws is dangerous and destabilizing. States generally set uniform rules for federal and state elections; giving federal courts latitude to topple state rules, but only for federal elections, eviscerates in-state uniformity.”



Bruce Ackerman ’67 was named one of the world’s top 50 thinkers for the COVID-19 age by *Prospect Magazine*.

APPEARANCES



Daniel Markovits

Daniel Markovits ’00 spoke on Prosperity and Suffering in a Time of Crisis, a Slifka Center online salon at Yale on June 29, 2020.



Tracey Meares was a panelist on July 22, 2020, at Yale’s School of Medicine, discussing Anti-Blackness, Abolition, and Criminal Justice.

GOHARA (CONTINUED)

→ Sentencing and Rehabilitation (from page 27)

have received in prison. The students' brief and our client's incredibly hard work at achieving his sobriety and participating in appropriate work and educational programs persuaded the court to sentence him to three months of time served in jail, instead of the 63 months of prison he was facing at the low end of the Sentencing Guidelines, which the prosecutor had recommended.

You have written about your work with an innovative program in a Connecticut prison that is modeled on German approaches to rehabilitation. Can you tell us more about that?

I was enormously gratified to receive an Oscar M. Ruebhausen grant from YLS to travel to three prisons in Germany to learn about their approaches to rehabilitating the people in their custody. My interest was sparked by my clinic students' work with clients in a unit modeled on German programs here in Connecticut at the Cheshire Correctional Institution. Our clients are men serving decades-long or life sentences whom the Department of Correction has hired to provide counseling, educational, and life-skills mentoring to younger men incarcerated in the unit. Their work is based on the German ideal that incarceration is punishment enough and that the conditions of incarceration should rehabilitate and heal people in custody rather than cause further harm. The program, which has garnered national attention from outlets like The Marshall Project and *60 Minutes*, has transformed the lives of our clients and the young men they mentor. All the mentors have been trained in trauma-informed communication and mentoring. Some have earned college degrees; others have participated in restorative justice programs. Our clinic is advocating for a second chance at life in the free world for these clients in whom the DOC has placed enough faith and trust to hire them to rehabilitate others. Working with these remarkable clients has been transformative for clinic students and has informed my research and writing about healing clients' trauma through creative defense lawyering.

MOYN / SCHLEICHER



The cover art of the new "Digging a Hole: The Legal Theory Podcast" with David Schleicher and Samuel Moyn. Cover art by Carlos Jurado. To listen, visit diggingaholepodcast.com.

New Legal Theory Podcast

Henry R. Luce Professor of Jurisprudence Samuel Moyn and Professor of Law David Schleicher have collaborated to create Digging a Hole: The Legal Theory Podcast. On the show, Moyn and Schleicher interview legal scholars about their recent work and dig into the debates heard inside law school halls.

"There are a lot of podcasts out there by law professors. But no one had captured what we actually do most of the time — talk about and challenge each other's work," Schleicher said. "So we thought we would try to bring the law school workshop to the world. Also, we just seemed like the kind of people who would host a podcast in 2020."

Early episodes have included discussions with Jack Goldsmith about political reform, Amy Kapczynski '03 on law and political economics, Steven Teles on conservative elites, and Cristina Rodríguez '00 and Adam Cox on their book *The President and Immigration Law*.

The podcast is available on Spotify and other platforms.

The New York Times

Abbe R. Gluck '00 and Gillian E. Metzger in "Her Black Coffee Always Brewed Strong," September 20, 2020, on the legacy of Ruth Bader Ginsburg:

"The magnitude of her legal legacy cannot be overstated. But her impact was even greater because she modeled for us and for women and girls around the world how to live a life that reflected her legal vision."



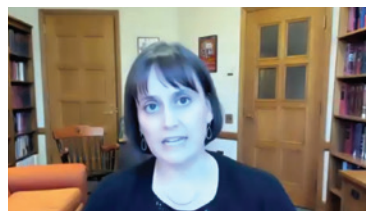
Judith Resnik in "The size of the Supreme Court is only part of the problem," October 14, 2020:

"But democracy does tell us what we want: fair and equal treatment of all people. It also tells us what we don't want: a small cadre of political partisans deciding who holds the power of judgment for decades."

APPEARANCES



Marisol Orihuela '08 was a panelist discussing COVID-19 & the Incarcerated as part of the Solomon Center's COVID-19: Law, Economics, Governance virtual workshop series on August 26, 2020.



Cristina Rodríguez '00 was a panelist on a National Constitution Center panel on The President and Immigration Law on October 8, 2020.

AWARDS AND ACCOLADES

Faculty Receive Honors

Sterling Professor Emeritus of Law Owen Fiss has been awarded the 2020 Henry M. Phillips Prize in Jurisprudence by the American Philosophical Society. Established in 1888, the Henry M. Phillips Prize in Jurisprudence is awarded in recognition of outstanding lifetime contributions to the field of jurisprudence and important publications which illustrate that accomplishment. In the 125 years since its inception, the Society has bestowed the prize only 26 times.

Shibley Family Fund Professor of Law **Yair Listokin** '05 has been awarded the Gaddis Smith International Book Prize for *Law and Macroeconomics: Legal Remedies to Recessions*. In the book, Listokin argues that law offers an underdeveloped but desperately needed tool for stabilizing depressed economies when monetary and fiscal policy prove inadequate.

Jack M. Balkin, the Knight Professor of Constitutional Law and the First Amendment, has been elected to the American Law Institute (ALI). The new class includes 38 members who bring a range of perspectives to ALI's work of clarifying, modernizing, and improving the law. Balkin's specialties are constitutional law

and technology law. He is the founder and director of the Law School's Information Society Project, an interdisciplinary center that studies law and new information technologies. He also directs the Law School's Abrams Institute for Freedom of Expression, and the Knight Law and Media Program.

Michael Wishnie '93 received the Carol Weiss King Award from the National Immigration Project of the National Lawyers Guild in fall 2020. The Award is presented annually for excellence in the pursuit of social justice through organizing, litigating, and teaching. Carol Weiss King (1895-1952) specialized in immigration law and the defense of the civil rights of immigrants and was a founding member of the National Lawyers Guild.

Robert R. Slaughter Professor of Law **Justin Driver** was awarded the Steven S. Goldberg Award for Distinguished Scholarship in Education Law for his book, *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind*. The award is given annually by the Education Law Association to a singular author whose scholarly excellence impacts education law.



The Center for Global Legal Challenges at Yale Law School and Yale's Jackson Institute for Global Affairs held a virtual discussion series on the effects of the coronavirus pandemic on the global order and whether its effects will last long after the pandemic ends. Oona Hathaway '97 was the moderator of a discussion on October 8 about The Future of U.S. National Security. (See page 10.)



Owen Fiss



Yair Listokin



Jack M. Balkin



Michael Wishnie



Justin Driver



Ralph Winter, 1935-2020

As this issue of the *Yale Law Report* was being finalized, we learned of the death of Judge Ralph Karl Winter Jr. '60, a former Chief Judge of the United States Court of Appeals for the Second Circuit and former William K. Townsend Professor of Law at Yale Law School. He was 85.

Winter taught securities regulations as well as constitutional law, antitrust law, labor law, evidence, and sports law at Yale Law School. After he entered judicial service in 1982, he continued teaching as an adjunct professor. At Yale Law School, the Judge Ralph Winter Lectureship on corporate law and corporate governance was established in 2002 to commemorate his foundational corporate law scholarship and distinguished career as a jurist.

A fuller remembrance of Winter will be published in the next issue of the *Law Report*.



Monica C. Bell '09 on "The Case for Racism Response Funds — A Collective Response to Racist Acts," on July 17, 2020:

"RRFs [Racism Response Funds] can shift strategy: Instead of targeting punishment solely at individual racists, they recognize racism as a collective catastrophe and respond directly to the suffering it inflicts. These shifts might ultimately lay better groundwork for approaching more ambitious horizons of accountability for the nation's racial sins."

APPOINTMENTS

Benton, Hinton, Torres Receive Secondary Appointments



Gerald Torres

Leading scholars Gerald Torres '77, Elizabeth Hinton, and Lauren Benton joined the Yale Law School faculty on July 1, 2020 with secondary appointments as Professors of Law, bringing a range of new expertise on critical areas of the law to the community.



Elizabeth Hinton

Torres, an acclaimed global scholar of environmental law, critical race theory, and federal Indian law, received a primary appointment at the Yale School of the Environment last year. Hinton, a leading author and historian who studies the persistence of poverty, racial inequality, and urban violence in the 20th-century United States, has joined the Department of History and the Department of African American Studies at Yale. And Benton, a comparative and world historian whose research focuses on law in European empires, the history of international law, and Atlantic world history, has joined Yale in the Department of History.



Lauren Benton

"These appointments offer us a chance to strengthen interdisciplinary ties, diversify our faculty, and build intellectual connections across campus," said Dean Gerken. "We are grateful to have a chance to partner with the University on these efforts."

MOYN

Q&A Professor Samuel Moyn on Supreme Court Reform

Samuel Moyn is Henry R. Luce Professor of Jurisprudence at Yale Law School and a Professor of History at Yale University. His areas of interest in legal scholarship include international law, human rights, the law of war, and legal thought, in both historical and current perspective. In a California Law Review article titled, "Democratizing the Supreme Court," Moyn and his coauthor Professor Ryan Doerfler argue that the goal of reform shouldn't be to make the Court less ideological, but to make it less powerful. We talked to Professor Moyn about what inspired his interest on this topic and what types of reforms he thinks should be considered in this highly polarized moment.



Samuel Moyn

Yale Law Report: What inspired your recent Law Review article on this topic of Supreme Court reform?

Samuel Moyn Several students came and "drafted" me after a contentious semester at the school. They wondered how they could make their coursework even more relevant, after the confirmation at the Supreme Court of Brett Kavanaugh '90. Their basic question was: what are the imaginable institutional reforms to the Supreme Court, and how can we compare and contrast those reforms with each other? The students organized a course, we hosted many eminent guests from inside and outside the school, and they produced legal analysis that proved foundational to making their website. I would never have embarked on this scholarship without the impetus and stimulus the students provided in staging the course.



James Forman Jr. '92 in "The Complicated Role of Black Leaders in Shaping the Criminal Justice System," October 16, 2020:

"[W]ithin the Black community, we do see this class and educational divide. And that ends up being so important, because who are the people that are actually making the decisions? Who are the prosecutors? Who are the judges? Who's voting at the city council? These are folks that, almost by definition, are in the Black elite. They may not all have been born into the Black elite, but they've now made it. And they are now in a position of being able to make decisions and pass laws."

Jonathan R. Macey is the chair of an expert committee to guide the University as it evaluates its investment policies in relation to companies producing fossil fuels. The new committee is charged with recommending a set of principles that will inform Yale's Corporation Committee on Investor Responsibility (CCIR) as it applies the University's ethical investment policy to fossil fuel companies. The CCIR works in consultation with the Advisory Committee on Investor Responsibility (ACIR).



Daniel Esty '86 gave a talk on his book *A Better Planet: 40 Big Ideas for a Sustainable Future* for the Franke Program in Science and the Humanities at Yale on October 15, 2020.

KOHLER-HAUSMANN

In your *Law Review* article, you note that there are two types of reforms. One is to adjust the personnel of the Supreme Court. The second focuses on “disempowering reforms” which makes the Court itself less powerful. Can you detail some of those ideas and explain why you think that is a better concept?

Remedies like “court-packing” alter the personnel on the Supreme Court, but do not affect its institutional power. That means that outcomes depend on how the personnel use their judicial authority; there is a risk of tit-for-tat court packing or other personnel adjustment every time Congress changes hands. By contrast, reforms like changing the Supreme Court’s jurisdiction, or inviting it to reach a supermajority of justices to invalidate federal legislation on constitutional grounds, shift authority to the political branches and away from the Court — no matter who staffs it. That shift would make our nomination fights less intense and provide less reason to engage in tit-for-tat warfare over the personnel on the Supreme Court in general.

What are the biggest benefits of some of these disempowering reform options that you think can appeal to both sides in such a divided moment?

Conservatives have been calling for Supreme Court reform for much of the period since World War II, and our position is that the disempowering reforms, which merely transfer power to the political branches, are meant to be as appealing to all Americans who believe in democratic self-determination. If one or more of the disempowering reforms were successful, we would no longer have to rely on the self-enforcement by judges of restraint, because less would be up to them, and more to the rest of us. It might also lead us in law schools to make judges — especially Supreme Court justices — less central to how we imagine the purposes of the law, and the highest lives within it.

Scholarship on Nudging People to Appear in Court

In an article in *Science*, Professor of Law Issa Kohler-Hausmann ’08 responds to recent research on how behavioral nudges can decrease “failure to appear” (FTA) rates in court.

Small behavioral nudges such as form redesign and text message reminders to appear in court have been shown to decrease the FTA rate, which in New York City in 2015 was as high as 40 percent. Such absences usually result in the issue of an arrest warrant and other collateral consequences. But Kohler-Hausmann writes that the recent research fails to capture the many mental states a person might have when they “choose” not to go to court, beyond insufficient awareness of one’s legal obligations.

“To live in poverty and in highly policed neighborhoods in America is to be constantly subjected to such demands — from police, courts, welfare agencies, child services, landlords — and to hear a persistent message that one’s failure to successfully perform is proof of one’s unfitness for concern and respect in our polity,” she writes. The hundreds of thousands of summonses and misdemeanor arrests in New York City are concentrated in poor and minority communities, according to the article.

Behavioral interventions, she says, may improve court attendance but do not qualify as true criminal legal reform. “Changing the approach to penal and welfare policy in our country will require interventions that are much more radical than cost-neutral behavioral nudges that everyone can agree on,” Kohler-Hausmann writes.

Read the *Science* article at law.yale.edu/Kohler-Hausmann-Science

“To live in poverty and in highly policed neighborhoods in America is to be constantly subjected to demands....” ISSA KOHLER-HAUSMANN ’08



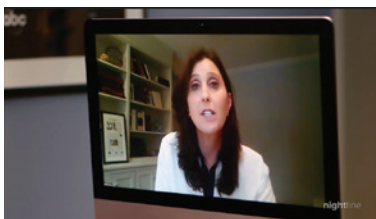
Issa Kohler-Hausmann

The New York Times

John Fabian Witt ’99 in “Republican Judges Are Quietly Upending Public Health Laws,” October 15, 2020:

“All of this is a sharp departure from a long history of judicial solicitude toward state powers during epidemics. In the past, when epidemics have threatened white Americans and those with political clout, courts found ways to uphold broad state powers. Now a new generation of judges, propelled by partisan energies, looks to deprive states of the power to fight for the sick and dying in a pandemic in which the victims are disproportionately Black and brown.”

APPEARANCES

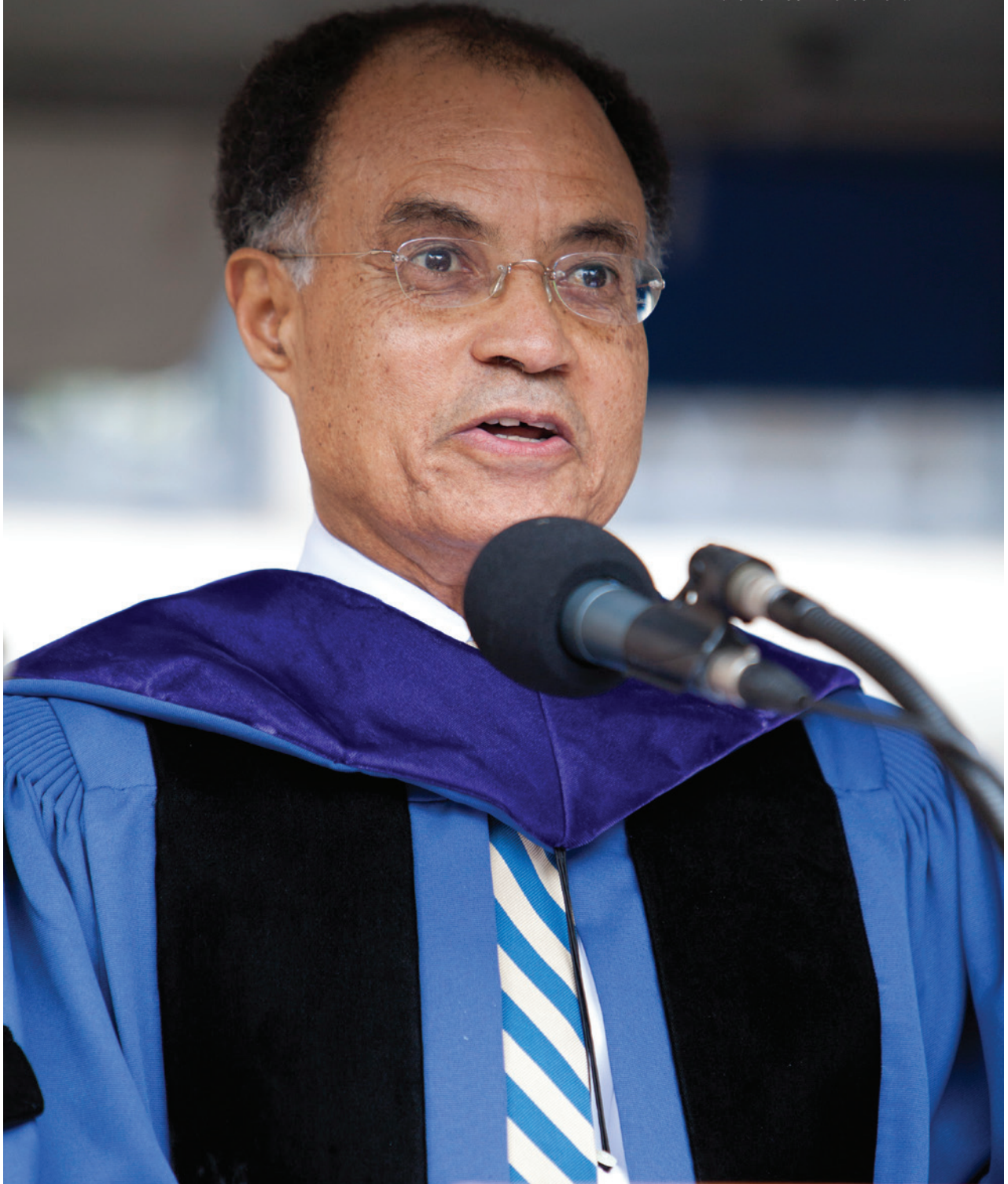


Abbe R. Gluck ’00 was interviewed on ABC’s *Nightline* about legal challenges to the Affordable Care Act on October 13.



Bruce Ackerman ’67 was interviewed on France 24 about the possibility of the U.S. Supreme Court intervening in the 2020 election on October 27, 2020.

Days addressing graduates at
the 2011 Commencement.



*“He was one of the moral centers
of the Yale Law School in the late-20th century.”*

HAROLD HONGJU KOH

A Civil Rights Warrior

Drew S. Days III '66

1941 – 2020



Drew Saunders Days III '66, the Alfred M. Rankin Professor of Law at Yale Law School, died on November 15, 2020 at the age of 79.

Born in Atlanta, Georgia on August 29, 1941, and raised in Tampa and New York, Days graduated from Hamilton College in 1963. Inspired by civil rights leaders, Days attended Yale Law School to pursue a career as a civil rights lawyer.

While in law school, Days fostered his interest in singing by joining the Yale Russian Chorus. It was through the chorus that he met his future wife, Ann Langdon, then a student at Connecticut College studying Russian.

Following law school, Days worked briefly for a labor firm in Chicago before entering the Peace Corps, where he and Ann served together as volunteers in Comayagua, Honduras from 1967–1969.

In 1969, Days began work at the NAACP Legal Defense Fund in New York City, where he litigated cases in the areas of school desegregation, police misconduct, employment discrimination, and prisoners' rights until 1977. At the age of 30, Days won a lawsuit that desegregated his childhood Tampa schools as part of the trial team in *Mannings v. Board of Public Instruction of Hillsborough County, Florida*.

President Jimmy Carter nominated him to be the first African American Assistant Attorney General for the Civil Rights Division at the U.S. Department of Justice in 1977. In that capacity, he was responsible for nationwide enforcement of federal civil and criminal civil rights laws. In 1978, he led the successful effort to endorse affirmative action programs in the landmark case *Regents of the University of California v. Bakke*.

Days joined the Yale Law faculty in 1981. At Yale, his teaching and writing was in the fields of civil procedure, federal jurisdiction, Supreme Court practice, antidiscrimination law, comparative constitutional law (Canada and the United States), and international human rights. He was also the founding director of the Orville H. Schell Jr. Center for International Human Rights at Yale Law School. From 1993–1996, Days served as the Solicitor General of the United States for the Clinton Administration.

“Drew was a gentle, courageous lawyer of principle, deeply committed to human and civil rights. He always spoke quietly and modestly, but with such moral authority,” said former Dean and Sterling Professor of International Law Harold Hongju Koh. “Along with his mentor Burke Marshall, another former head of the Civil Rights Division, he was one of the moral centers of the Yale Law School in the late-20th century. He cared nothing for titles or recognition, because his client was always the Constitution, not the political powers of the moment. His life will be remembered as a reminder of the moral urgency of putting principle first.”

Julie Suk '03, a Florence Rogatz Visiting Professor of Law at Yale Law School during the fall semester, remembered taking Procedure from Days: “His strong sense of justice as a civil rights advocate shone in his teaching of cases that used traditional procedural doctrines to challenge racism, such as *Hansberry v. Lee*. He drew out the importance of such cases not only for racial justice but also for ideas of procedural fairness that people across the racial conflict spectrum could appreciate.”

Days is survived by his wife, Ann Langdon-Days; daughters Alison and Elizabeth; a sister; and two granddaughters.



Ann Langdon and Drew Days in 2007.



Days received the Award of Merit at Alumni Weekend 2003. Tony Kronman '75 presented the award to Days during the weekend.



Days addressing students from atop The Table in the 1980s