

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

JAMES MONEY, WILLIAM RICHARD,)	
GERALD REED, AMBER WATTERS,)	
TEWKUNZI GREEN, DANNY)	
LABOSETTE, CARL REED, CARL "TAY)	
TAY" TATE, PATRICE DANIELS, and)	
ANTHONY RODESKY, on behalf of)	
Themselves and all similarly situated)	
Individuals,)	
)	
)	
Petitioners,)	No. 20 cv 2094
)	
v.)	
)	
JEFFREYS, ROB,)	
)	
Respondent.)	

**DECLARATION OF PROFESSOR JUDITH RESNIK REGARDING
PROVISIONAL REMEDIES FOR DETAINED INDIVIDUALS**

I have been asked to provide a declaration explaining my understanding of the remedies, both provisional and permanent, that federal judges can provide to people who are incarcerated and facing the threat of COVID-19. I declare that the following is a true and accurate account of what I believe are the pertinent legal principles and how they can apply in this unprecedented context. My views are based on my knowledge of the law and my experiences in cases. This opinion is mine and is not that of the institutions with which I am affiliated.

MY BACKGROUND

1. I am the Arthur Liman Professor of Law at Yale Law School where I teach courses, including on federal and state courts; procedure; large-scale litigation; federalism; and incarceration. Below, I provide a brief overview of my background; more details are in my resume, attached as Exhibit A to this Declaration.

2. Prior to joining the faculty of Yale Law School in 1997, I was the Orrin B. Evans Professor of Law at the University of Southern California (U.S.C.). During the decades before taking my current position, I was also a visiting professor at the law

schools of the University of Chicago, Harvard University, Yale University, and New York University.

3. At the beginning of my legal career, after I obtained a B.A. from Bryn Mawr College and a J.D. from N.Y.U. Law School where I was an Arthur Garfield Hays Fellow, I was a law clerk for the Honorable Charles E. Stewart in the United States District Court Southern District of New York.

4. I have worked on occasion as a lawyer, including in the clinical programs at Yale Law School and at U.S.C. I have appeared before the United States Supreme Court and in federal district and appellate courts. I have also been appointed by federal judges to assist in issues arising in large-scale litigation.

5. I have taught law for decades. Much of my focus has been on the role and function of courts, and the relationship of governments to their populations. Of particular relevance to this declaration is that I regularly teach the class, Federal and State Courts in the Federal System. Readings for students include materials on habeas corpus and on civil rights litigation, including 42 U.S.C. §1983.

6. I have been recognized for my scholarship and other work, and I have received awards from various organizations.

7. In 2018, I was awarded an Andrew Carnegie Fellowship to work on a book, tentatively entitled *Impermissible Punishments*, which explores the impact of the 1960s civil rights revolution on the kinds of punishments that governments can impose on people convicted of crimes. In that year, I also was awarded an honorary doctorate from University College London.

8. I am the Founding Director of the Arthur Liman Center for Public Interest Law. The Liman Center teaches classes yearly, convenes colloquia, does research projects, supports graduates of Yale Law School to work for one year in public interest organizations, and is an umbrella for undergraduate fellowships at eight institutions of higher education.

9. I write about the federal courts; adjudication and alternatives such as arbitration; habeas corpus and incarceration; class actions and multi-district litigation; the judicial role and courts' remedies; gender and equality; and about transnational aspects of these issues. In recent years, I have spent a good deal of time doing research related to prisons. I have helped to develop

a series of reports that provide information nation-wide on the use of solitary confinement.

10. I regularly speak at conferences, and topics have included the federal courts, remedies, habeas corpus, civil rights, and prison litigation.

11. Recent publications include essays on the challenges of access to courts for people with limited resources. See *Inability to Pay: Court Debt Circa 2020* (with David Marcus), 98 North Carolina Law Review 361 (2020). I have also written on the law and practices of solitary confinement. See, e.g., *Not Isolating Isolation*, in *Solitary Confinement: Effects, Practices, and Pathways toward Reform* 89-116 (Jules Lobel and Peter Scharff Smith, eds., Oxford University Press, 2020). In addition, I have addressed the boundaries of legal punishment. See *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin,"* 129 Yale Law Journal Forum 365 (2020).

12. I have testified before the United States Congress, in hearings of subcommittees of the U.S. Judicial Conference addressing federal rules, and I serve as a court-appointed expert and trustee. I have given workshops and lectures to groups of federal judges, including at the request of the Federal Judicial Center and at the conferences of some federal circuits.

13. In February of 2019, I testified before the U.S. Commission on Civil Rights at its hearing on women in prison and co-authored a statement related to the isolation of many facilities for women, their needs for education and work training, and the discipline to which they are subjected. See Statement submitted for the record, *Women in Prison: Seeking Justice Behind Bars*, before the U.S. Commission on Civil Rights, March 22, 2019. The report, citing the contributions of many includes reference to this testimony. See U.S. Commission on Civil Rights, *Women in Prison: Seeking Justice Behind Bars* (February 2020), available at <https://www.usccr.gov/pubs/2020/02-26-Women-in-Prison.pdf>.

**Remedies Available in the Federal Courts:
Habeas Corpus, Civil Rights Litigation, and Enlargement**

14. In light of my knowledge of the federal law of habeas corpus, Section 1983, state and federal court relations, procedure, and remedies, I have been asked by counsel for the petitioners/plaintiffs to address the range of responses available

to judges presiding in cases that raise claims related to COVID-19.

15. As I understand from public materials on the health risks of this disease, COVID-19 poses a deadly threat to the well-being and lives of people who contract this disease. To reduce the risk and spread of this disease, our governments have instructed us to stay distant from others and to take measures that are extraordinary departures from our daily lives and routines.

16. Applying these urgent medical directives to prisons poses challenges in every jurisdiction. Governing legal principles about prisoners' access to courts were not framed to address COVID-19's reality: that being inside prisons can put large numbers of people (prisoners and staff) at risk of immediate serious illness and potential death.

17. These unprecedented risks from and harms of COVID-19 in prison raise a new legal question: whether COVID-19 has turned sentences which, when imposed, were (or may have been) constitutional into unconstitutional sentences during the pendency of this crisis. When sentencing people to a term of years of incarceration, judges had no authority to impose putting a person at grave risk of serious illness and death as part of the punishment for the offense. Now, such grave risks and harms can arise from the fact of incarceration.

18. A recent Supreme Court case, *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), provides an analogous situation - a constitutional-when-sentenced but unconstitutional-now sentence. The Court determined that, in light of new understandings of the limits of brain development in juveniles, sentences of life without parole (LWOP) imposed on individuals who had committed crimes when under the age of eighteen were lawful when issued but became unconstitutional. As a consequence, parole boards or courts had to reconsider whether LWOP remained appropriate. COVID-19 raises a parallel question, as it requires courts to address whether sentences lawful at imposition can (at least temporarily) no longer be served in prisons because otherwise, the sentence would become an unconstitutional form of punishment. In normal times, using *Montgomery v. Louisiana* as a guide, federal judges could remit eligible individuals to state courts and parole boards. But in these abnormal times, the speed at which decisions are made is critical. Therefore, as I discuss below, provisional remedies (enabling enlargement and release for some individuals and de-densifying for others) are necessary.

19. As is familiar, the classic and longstanding remedy for relief from unconstitutional detention, conviction, and sentences is habeas corpus. Courts' jurisdiction and remedial authority under habeas is constitutionally enshrined, has a substantial common law history, and is codified in federal statutes. See generally Paul D. Halliday, *Habeas Corpus* (Harvard U. Press, 2012); Amanda L. Tyler, *Habeas Corpus in Wartime* (Oxford U. Press, 2017); Randy Hertz and James Leibman, *Federal Habeas Corpus Practice and Procedure* (2 volumes, 2019); Hart & Wechsler, *The Federal Courts and the Federal System*, Chapter X1, 1193-1164 (Richard H. Fallon, Jr, John F. Manning, Daniel J. Meltzer & David Shapiro, 7th ed., 2015). These citations are the tip of a vast and substantial literature that aims to understand the history and law of habeas corpus.

The Legal Thicket

20. By way of a brief overview, in federal courts, petitioners file under 28 U.S.C. §2254 (state prisoners), §2255 (federal post-conviction prisoners), as well as under §2241 (the general habeas statute).¹ In the mid-1970s, the Supreme Court provided rules and forms for §2254 and §2255 filings.

21. Congress has recognized that federal judges are authorized under the habeas statutes to "summarily hear and determine the facts, and dispose of the matter as law and justice require." See 28 U.S.C. §2243. In addition to this statutory authority, federal judicial power is predicated on the constitutional protection of the writ and on the common law.

22. As is familiar, Congress has channeled and circumscribed some of federal judicial authority through the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and, relatedly, under the Prison Litigation Reform Act (PLRA) of 1996. Moreover, the Supreme Court has issued many decisions interpreting the prior habeas statutes, the 1996 revisions in AEDPA, and the intersection

¹ In terms of the potential for concurrent bases for federal court jurisdiction, I will discuss the overlap with civil rights claims filed under 42 U.S.C. § 1983, on which a substantial amount of case law exists. In addition, habeas jurisdiction overlaps with other jurisdictional bases. For example, when I worked at Yale Law School in its clinical program, I filed lawsuits for federal prisoners predicated on 28 U.S.C. §2241 as well (in appropriate situations) as 28 U.S.C. §1331 (general question jurisdiction) and 28 U.S.C. §1361 (mandamus). Some of these cases, invoking both habeas and other jurisdictional provisions, were filed as class actions.

of habeas and civil rights claims brought under 42 U.S.C. §1983. The result is a dense arena of law and doctrine that can be daunting for litigants and jurists alike.

23. A good deal of case law in the Supreme Court and in the circuits addresses when §1983 (with jurisdiction based on 28 U.S.C. §1343) is the appropriate mode for prisoners to use, as contrasted with habeas corpus. Given the ability to plead in the alternative, proceeding under both would be possible as a matter of federal procedural rules. Yet because state prisoners who rely on 28 U.S.C. §2254 have to exhaust state judicial remedies, they may seek to use §1983, to which that requirement does not apply. And, because the PLRA affects §1983 litigants, prisoners may hope to avoid its strictures by filing under habeas.

24. In response, the Supreme Court has set forth distinctions to channel claims. The shorthand that reflects much of the case law is that, when the fact or duration of confinement is at issue and release is the remedy, habeas is the preferred route. If prisoners are challenging conditions of confinement, §1983 is the method. *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475 (1978); *Heck v. Humphrey*, 512 U.S. 477 (1994).

25. Yet the distinctions have been complex to apply in practice. Line-drawing has prompted many opinions that parse situations that entail overlaps, as exemplified by *Mohammad v. Close*, 540 U.S. 744 (2004), *Wilkinson v. Dotson*, 544 U.S. 74 (2005), and by other Supreme Court and lower court decisions.

26. COVID-19 poses a new and painful context in which to undertake that analysis. Some reported decisions addressing the constitutional right of prisoners that officials not be "deliberately indifferent to serious medical needs" consider those Eighth Amendment claims to be appropriate for §1983 because they relate to conditions. But this deadly disease turns ordinary conditions into potentially lethal threats of illness for which the remedy to consider is release of at least some prisoners because density puts people at medical risk. Thus, because COVID-19 can end people's lives unexpectedly and abruptly, COVID-19 claims turn the condition of being incarcerated into a practice that affects the fact or duration of confinement. In my view, COVID-19 claims, therefore, collapse the utility and purpose of drawing distinctions between what once could more coherently be distinguished. Therefore COVID-19 claims ought to be cognizable under both provisions.

27. Recognizing the availability of both forms of jurisdiction is only the beginning of a series of questions that courts have to address. If cases proceed under habeas, §1983, or both, courts need to consider how COVID-19 fits (or not) with conventional rules on exhaustion of judicial remedies for state court prisoners, many provisions of AEDPA, and the parameters of the PLRA. Again, new problems have emerged. For example, in terms of exhaustion of state judicial remedies, whatever the viability of state courts responding quickly, the concern is that day by day, the risk of illness increases for prisoners and staff. Those illnesses endanger others as well as stretch health care resources. Exhaustion would be "futile," not only if state courts cannot act quickly but also if people become sick, risks skyrocket, and deaths occur. "Futility" thus needs to be analyzed in terms not only of the capacity of institutions but in terms of the likelihood that the people seeking relief will be well enough to have the capacity to do so, and that the remedy provided will be effective given the alleged harm.

28. Many other legal issues exist, in addition to the relationship of habeas and §1983 and exhaustion. Courts will need to consider when class actions are appropriate and when the criteria of Rule 23 is met; many facets of AEDPA including questions of successive petitions and deference to state court rulings; and the merits of arguments about unconstitutional sentences and conditions; and the range of remedies.

The Availability of Provisional Remedies

29. The reason to flag some of the many issues that litigation of both habeas petitions and civil rights cases entail is to underscore the importance of considering provisional remedies when cases are pending. In general, time is required for lawyers to brief and for judges to interpret and apply the law. But waiting days in a world of COVID infections can result in the loss of life.

30. While courts have not faced COVID before, they have faced urgent situations, which is why provisional legal remedies exist. Because COVID-19 cases may be predicated both on habeas corpus petitions and on §1983, courts have two ways to preserve the *status quo* - which here means protecting to the extent possible the health of prisoners, staff, and providers of medical services. One route is the use of temporary restraining orders and preliminary injunctions. These remedies require no explanation because they are familiar procedures. See Fed. R. Civ. Pro. 65.

31. Another option is an aspect of federal judicial power that is less well-known. District courts have authority when habeas petitions are pending to "enlarge" the custody of petitioners. "Enlargement" is a term that, as far as I am aware, is used only in the context of habeas. (More familiar terms for individuals permitted to leave detention are "release" and "bail," and some decision that "enlarge" petitioners use those words rather than enlargement).

32. The distinction is that enlargement is not release. The person remains in custody - even as the place of custody is changed and thus "enlarged" from a particular prison to a hospital, half-way house, a person's home, or other setting. Enlargement is thus, a provisional remedy that modifies custody by expanding the site in which it takes place. In some ways, enlargement resembles a prison furlough.

33. Enlargement has special relevance in cases in which jurisdiction is based both on habeas and §1983, to which the PLRA has application. As I understand the PLRA's rules on the "release" of prisoners, enlargement would not apply, as enlargement is not a release order. And, of course, interpreting the many directives of the PLRA in light of COVID entails more elaboration than this brief mention. - The need to work through that statute and case law is another reason why the availability of provisional remedies is so important. Enlargement provides an opportunity for increasing the safety of prisoners, staff, and their communities while judges consider a myriad of complex legal questions.

34. I first encountered the provisional remedy of enlargement in the 1970s, when I represented a prisoner - Robert Drayton - who was confined at F.C.I. Danbury and who filed a habeas petition alleging that the U.S. Parole Commission had unconstitutionally rescinded his parole. The Honorable T.F. Gilroy Daly, a federal judge sitting in the District of Connecticut, granted Mr. Drayton's request for enlargement while the decision on the merits was pending. Mr. Drayton returned to his home in Philadelphia and came back to Connecticut for the merits hearing. Judge Daly thereafter ruled in his favor; that decision was upheld in part and reversed in part. *See Drayton v. U.S. Parole Commission*, 445 F. Supp. 305 (D. Conn. 1978), *affirmed in part, Drayton v. McCall*, 584 F.2d 1208 (2d Cir. 1978).

35. This provisional district court remedy of enlargement is not mentioned directly in in federal rules governing the lower federal courts. In contrast, at the appellate level, Federal Rule of Appellate Procedure (FRAP) 23 provides in part that:

While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that the prisoner be: (1) detained in the custody from which release is sought; (2) detained in other appropriate custody; or (3) released on personal recognizance, with or without surety. While a decision ordering the release of a prisoner is under review, the prisoner must - unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise - be released on personal recognizance, with or without surety.

As that excerpt reflects, the Rule uses language familiar in the context of bail, and provides that appellate courts may also determine that a petitioner be detained in "other appropriate custody."

36. Federal courts at all level are authorized by Congress to decide habeas cases "as law and justice requires." 28 U.S.C. §2243. The case law also references that, at the district court level, the authority to release a habeas petitioner pending a ruling on the merits stems from courts' inherent powers. See, e.g., *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001). And, as I noted, in these reported decisions, the terms "bail" or "release" are sometimes used instead of or in addition to "enlargement."

37. In the last weeks, the saliency of enlargement has prompted me to review the law surrounding it. To gather materials and opinions on enlargement, I asked two law students, Kelsey Stimson of Yale Law School and Ally Daniels of Stanford Law School, to help me research what judges have said about enlargement and what others have written. Below I detail some of the governing case law. The Hertz & Liebman *Treatise on Habeas* also has a section (§14.2) devoted to this issue.

38. Some of the decisions involve requests for release when habeas petitions were pending from state prisoners, and others from federal prisoners, or from people in immigration detention. Further, several appellate cases address the issue of whether a district court order on enlargement was appealable as of right or subject to mandamus.

39. My central point is that, amidst these various debates about appealability and the test for enlargement/release, most circuits have recognized that district courts have the authority

to order release. See e.g., *Woodcock v. Donnelly*, 470 F.2d 93, 43 (1st Cir. 1972); *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001); *Landano v. Rafferty*, 970 F.2d 1230, 1239 (3d Cir. 1992); *Calley v. Callaway*, 496 F.2d 701, 702 (5th Cir. 1974); *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir. 1990); *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985); *Martin v. Solem*, 801 F.2d 324, 329 (8th Cir. 1986); *Pfaff v. Wells*, 648 F.2d 689, 693 (10th Cir. 1981); *Baker v. Sard*, 420 F.2d 1342, 1342-44 (D.C. Cir. 1969).

40. The Fourth and Eleventh Circuits appear, albeit less directly, to recognize enlargement authority. See *Gomez v. United States*, 899 F.2d 1124, 1125 (11th Cir. 1990); *United States v. Perkins*, 53 F. App'x 667, 669 (4th Cir. 2002). A Ninth Circuit opinion from 1989 likewise appears to recognize the power of district courts to grant release pending a habeas decision where there are "special circumstances or a high probability of success." See *Land v. Deeds*, 878 F.2d 318 (9th Cir. 1989). Thereafter, another decision, *In re Roe*, described the Circuit as not having ruled on the issue in terms of state prisoners. See 257 F.3d 1077 (9th Cir. 2001).²

41. A discrete question is the standard for enlarging petitioners. To obtain an order for release pending the merits of habeas decision, the petitioner must demonstrate "extraordinary circumstances" and that the underlying claim raises "substantial claims." See e.g. *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001). Courts have also discussed that release is appropriate when "necessary to make the habeas remedy effective." *Mapp*, 241 F.3d at 226; see also *Landano v. Rafferty*, 970 F.2d 1230, 1239 (3d Cir. 1992). As that Third Circuit decision explained, release was "available 'only when the petitioner has raised substantial constitutional claims upon which he has a high probability of success, and also when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective.'"

42. Some judges have interpreted the "substantial questions" prong to require the underlying claim to have a "high probability

² Subsequent lower court cases debated whether district courts do possess such authority. See, e.g., *Hall v. San Francisco Sup. Ct.*, 2010 WL 890044, at *2 (N.D. Cal. Mar. 8, 2010) ("Based on the overwhelming authority [of other circuit courts] in support, the court concludes for purposes of the instant motion that it has the authority to release Hall pending a decision on the merits."); *United States v. Carreira*, 2016 U.S. Dist. LEXIS 31210, at *4, (D. Haw. Mar. 10, 2016) ("[T]his Court declines to address the merits of Petitioner's bail requests in the absence of definitive guidance from the Ninth Circuit regarding the scope of this Court's bail authority.").

of success." See *Hall v. San Francisco Superior Court*, No. C 09-5299 PJH, 2010 WL 890044, *1 (N.D. Cal. Mar. 8, 2010); *In re Souels*, 688 F. App'x 134, 135 (3d Cir. 2017). That test resembles standards for preliminary injunctive relief and for stays, which include an assessment of the likelihood of success on the merits and of whether the balance of hardships tips in favor of altering the status quo. (And, of course, more can be said about the nuances of these bodies of law as well.)

43. A few cases focus on the health of a petitioner as central to the conclusion that "extraordinary circumstances" exist. For example, in *Johnston v. Marsh*, the petitioner, Alfred Ackerman, brought a habeas claim alleging that he was convicted in Pennsylvania through a trial that lacked "due process." 227 F.2d 528 (3d Cir. 1955). Ackerman asked for release pending a decision on the merits of his habeas petition; he argued that he had advanced diabetes and was "rapidly progressing towards total blindness." *Id.* at 529. The district court authorized Ackerman to be released to a private hospital. The prison warden (Frank Johnston) went to the Third Circuit invoking sought writs of prohibition and mandamus to order the district court (Judge Marsh) to change his ruling. Rejecting the petitions, the Third Circuit affirmed that district courts possessed the authority to order relocation while the habeas petition was pending. *Johnson v. Marsh* has been cited in more recent cases to illustrate that findings of extraordinary circumstances may "be limited to situations involving poor health or the impending completion of the prisoner's sentence." *Landano*, 970 F.2d at 1239.

44. The court in *In re Souels* addressed what showing of health problems constituted extraordinary circumstances. See 688 F. App'x at 135-36. Sean Souels, who was serving a 46-month federal prison sentence, petitioned for a writ of mandamus directing the court to rule on his writ of habeas corpus and sought release pending the decision. *Id.* at 134. The court denied Souels bail because "he [did] not describe his medical conditions in any detail or explain how he cannot manage his health issues while he is in prison." *Id.*

45. Health is not the only extraordinary circumstance that has been the basis for enlargement. For example, in *United States v. Josiah*, William Josiah brought a writ of habeas corpus after the Supreme Court invalidated the residual clause of the Armed Career Criminal Act (ACCA) and altered the method for determining whether prior convictions qualify as violent felonies under the ACCA. 2016 WL 1328101, at *2 (D. Haw. Apr. 5, 2016). Josiah, who was serving a federal prison sentence argued that his prior

convictions did not qualify as violent felonies and that he should not be subject to the fifteen-year mandatory minimum. The district court concluded that because the issue of retroactivity was pending before the Supreme Court and Josiah would have served his full sentence if the Court held its prior ruling retroactive, release pending the higher court's ruling was appropriate. *Id.* at *4-6.

46. Another case involved enlargement in the context of the military. See *Gengler v. U.S. through its Dep't of Def. & Navy*, 2006 WL 3210020, at *6 (E.D. Cal. Nov. 3, 2006). As that court explained, a "district court has the inherent power to enlarge a petitioner on bond pending hearing and decision on his petition for writ of habeas corpus." *Id.* at *5. The judge also noted that a "greater showing must be made by a petitioner seeking bail in a criminal conviction habeas 'than would be required in a case where applicant had sought to attack by writ of habeas corpus an incarceration not resulting from a judicial determination of guilt.'" The court used the test of "exceptional circumstances and, at a minimum, substantial questions as to the merits." *Id.* at 13. The court found exceptional circumstances" based on the fact that the petitioner had been admitted to business school, had been granted permission by his commanding officer to attend, and would be forced to drop out if his custody were not enlarged. The court also ruled that "substantial questions as to the merits" existed because of alleged government's errors in drafting the petitioner's service agreement. *Id.* at *6.

47. As of this writing, I have located two reported cases on COVID. (Given the pace of litigation, I assume that more may have been filed and some may have been decided.) On April 7, the Honorable Jesse Furman, sitting in the Southern District of New York, granted on consent a motion styled "for bail" (the term used in the Second Circuit *Mapp* decision). Judge Furman ordered immediate release under specified conditions, pending the adjudication of the Section 2255 Motion. See *United States v. Nkanga*, No. 18-CR-00730 (S.D.N.Y., Apr. 7, 2020). The other case has less relevance as it was brought by an unrepresented litigant, Richard Peterson, who had originally sought habeas corpus relief on a claim about education credits and then filed an emergency request for release from a California state prison due to COVID-19. No. 2:19-CV-01480, 2020 WL 1640008, at *1 (E.D. Cal. Apr. 2, 2020). A class action seeking state-wide population reductions was pending at the time the district court ruled. The *Peterson* decision viewed the issue as one about conditions, to be litigated as a civil rights claim; the court also ruled that the petitioner had not shown he met the test for granting release. *Id.* at *2. Soon thereafter, the *Coleman/Plata* three-judge court held that the

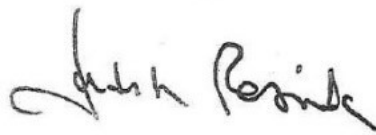
issue was not for it to decide. See *Plata, et al. v. Newsom*, No. C01-1351-JST (N.D. Cal. Apr. 4, 2020) (Dckt. 3261); *Coleman, et al., v. Newsom*, No. 2:90-cv-0520 KJM DB P (N.D. Cal. Apr. 4, 2020) (Dckt. 3261). On April 6, Judge Mueller issued his order calling for immediate information on the constitutional implications of requirements for social distancing. *Coleman, et al., v. Newsome, et al.*, No. 2:90-cv-0520 KJM DB P (N.D. Cal. Apr. 6, 2020) (Dckt. 6580).

48. The pro se *Peterson* case brings me back to the question of the relationship of habeas petitions based on COVID to civil rights claims based on conditions in a prison. As I discussed above, COVID-19 is an unprecedented event that, in my view, raises the legal question of whether the government-mandated protection for the disease means that sentences (that had been lawful when they were imposed and that remain lawful until sometime in February or March of 2020) cannot lawfully be served in settings of extreme risk. Thus, habeas corpus - which addresses the constitutionality of sentences and offers the possibility of release and enlargement - properly provides a jurisdictional basis and remedies for this situation. Further, as I have discussed, §1983 claims may also be appropriate, given that the distinction between conditions and duration becomes less plausible when confinement poses a risk of death, and thereby horribly altering the "fact" and "duration" of confinement. Class treatment of claims joined under habeas and §1983 enable layers of remedies, including the release of some individuals that will de-densify facilities to improve the safety for prisoners who remain the staff who work there.

49. By way of conclusion, I need to remind the Court that the Supreme Court has, in recent years, raised questions in many contexts about the remedial powers of federal judges. Whether the topic is nationwide injunctions or contracts, debates have occurred within the Court about the authority of federal judges.

50. Those cases do not address the extraordinary and painful moment in which we are all living. Ordinary life has been up-ended in an effort to keep as many people as possible alive and not debilitated by serious illness. Moreover, Supreme Court opinions have not focused on the relevance of remedial debates to the situation where confinement can put entire staffs and detained populations at mortal risk. Therefore, judges have the obligation and the authority to interpret statutes and the Constitution to preserve the lives of people living in and working in prisons. It is my hope that this dense account of case law and doctrine will be of service to this Court and to the parties in understanding the meaning and import of American law.

Dated: April 8, 2020

A handwritten signature in black ink, appearing to read "Judith Resnik". The signature is written in a cursive, flowing style.

Judith Resnik

EXHIBIT A

Judith Resnik

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Employment

Arthur Liman Professor of Law, Yale Law School, 1997-present
Founding Director, Arthur Liman Center for Public Interest Law
Honorary Visiting Professor, University College London
Faculty of Law, 2009-2021
Visiting Professor, Dauphine Université Paris, March 2016
Visiting Professor, Université Panthéon-Assas Paris II, May 2015
Convening Professor, Constituting Federalism, a seminar for the Institute for
Constitutional History in conjunction with the New York Historical
Society, February 2014
Scholar in Residence, Columbia Law School, Spring 2011; 2012
Distinguished Visiting Professor, University of Toronto School of Law, 2005
Parsons Visitor, Sydney University School of Law, 2004

Visiting Professor, New York University School of Law, 1996-1997
Visiting Professor, Harvard Law School, Fall 1989
Visiting Professor, Yale Law School, Spring 1989
Visiting Professor, University of Chicago Law School, Fall 1988

Orrin B. Evans Professor of Law, University of Southern California, 1989-1997;
Professor of Law: 1985-1989; Associate Professor: 1982-1985;
Assistant Professor: 1980-1982
Member, Faculty, The Salzburg Seminar on U.S. Legal Institutions, July 1988

Acting Director, Daniel and Florence Guggenheim Program in Criminal Justice,
Yale Law School, 1979-1980

Lecturer in Law and Supervising Attorney, Yale Law School, 1977-1979

Instructor, New York University School of Law, 1976-1977

Law Clerk, Honorable Charles E. Stewart, United States District Court,
Southern District of New York, 1975-1976

Selected Professional Activities

Chair of Fellows Selection Committee and Founding Director, Arthur Liman Center for Public Interest Law, Yale Law School, 1997-present

Chair, Yale Law School Global Constitutionalism Seminar, A Part of the Gruber Program for Global Justice and Women's Rights, 2012-present

Member, Board of Managerial Trustees, International Association of Women Judges, 2001-present

Chair, Order of the Coif Book Award Committee, 2018-2020

Fellow, Whitney Humanities Center, 2020-2021

Chair, American Association of Law Schools, Section on Law and Humanities, 2020

Chair, American Association of Law Schools, Section on its Sections, 2019-2022

Advisor, American Law Institute, Project on Sexual and Gender-Based Misconduct on Campus, 2015-present

Member, Task Force on Federal Judicial Selection, Project on Government Oversight of The Constitution Project, 2019

Steering Committee, Women Faculty Forum, Yale University, 2001-present

Co-chair, 2001-2003, 2006-2008

Co-Chair, Judicial-Academic Network, National Association of Women Judges, 2009-2019, 1998-2001

Academic Fellow, Pound Civil Justice Institute, 2016-present

Fellow, Davenport College, Yale University, 2002-present

Former Chair, Section on Civil Procedure, American Association of Law Schools; 2018, 2003, 1991

Member, Executive Committee, Section on Federal Courts, American Association of Law Schools, 1999-2004, 2014-present; chair, 2002

Member, Executive Committee, Section on Law and the Humanities, American Association of Law Schools, 2015-present

Member, Academic & Scientific Council, The Gender Equality Project, Switzerland, 2009-present

Advisor, European Law Institute and International Institute for the Unification of Private Law Project, From Transnational Principles to Rules of European Civil Procedure, 2015-2016

Member, Executive Session, State Courts in the Twenty-First Century, The Kennedy School, Harvard University, 2008-2011

Member, Advisory Group, Principles of the Law of Aggregate Litigation, American Law Institute, 2004-2009

Member, Standing Committee on Federal Judicial Improvements, American Bar Association, 2006-2010 (prior three-year term in the late 1990s);
Chair, Academic Advisory Committee to the Standing Committee on Federal Judicial Improvements, American Bar Association, 2010-2014

Member, Editorial Board, Yale Journal of Law and Feminism

Member, Editorial Advisory Board, Yale Journal of Law and the Humanities

Member, Advisory Board, Journal of Law and Ethics of Human Rights

Member, Advisory Board, Litigation and Procedure, and Negotiation and Dispute Resolution eJournals (Social Science Research Network, online)
Member, Advisory Board, Women's Studies Quarterly

Other Activities

Co-chair of the Board, Fansler Foundation, 2003-2014
Member, National Board of Academic Advisors for the William H. Rehnquist Center on the Constitutional Structures of Government, 2007-2009
Member, Advisory Board of the Science for Judges Project, Brooklyn Law School, 2003-2007
Board Member, Lawyers' Committee for Civil Rights, 2004-2007
Liaison, American Association of Law Schools to the American Bar Association Commission on Women, 2000-2005
Member, Advisory Board of the Center for Judicial Process, Albany Law School, 2000-2004
Member, Editorial Board, Law and Social Inquiry, 1998-2004
Member, Committee on Diversity in Legal Education of the Section of Legal Education and Admissions to the Bar of the American Bar Association, 1996-2002
Consultant, RAND, Institute for Civil Justice, 1980-2002
Member, Editorial Board, The Justice System Journal
Member, Board of Governors, Society of American Law Teachers, 1980-1997
Co-Chair, University of Southern California Feminist Council, 1990-1996
Member, Ninth Circuit Gender Bias Task Force, 1990-1994
Co-Chair, Robert M. Cover Memorial Public Interest Retreat, Society of American Law Teachers, 1988-1992
Member of and a general reporter for the International Association of Procedural Law, 1991 Conference
Member, Planning Committee, ABA-AALS Conference on Women in Legal Education, 1990
Member, Advisory Panel to a Subcommittee of the Federal Courts Study Committee, 1989-1990
Member, Steering Committee for the Center for Feminist Research, University of Southern California, 1990-1994
Member, American Bar Association, Litigation Section, Federal Initiatives Task Force, 1991-1993
Chair, Section on Women in Legal Education, American Association of Law Schools, 1989
Member, Twentieth Century Fund Task Force on Judicial Responsibility, 1988-1989
Member, Board of ACLU of Southern California, 1985
Chair, Bryn Mawr College Centennial Campaign for Southern California, 1983-1985

Publications

Books and Monographs

Fragile Futures and Resiliency: Litigating Climate Change, Judging Under Stress (co-editor Clare Ryan, Yale Global Constitutionalism Seminar, A Part of the Gruber Program for Global Justice and Women's Rights, 2019)

Ability to Pay (co-editors Anna VanCleave, Alexandra Harrington, Jeff Selbin, Lisa Foster, Joanna Weiss, Faith Barksdale, Alexandra Eynon, Stephanie Garlock, and Daniel Phillips, Arthur Liman Center for Public Interest Law Colloquium, 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3387647

Working to Limit Restrictive Housing: Efforts in Four Jurisdictions to Make Changes (editor, Arthur Liman Center for Public Interest Law and Association of State Correctional Administrators, 2018).

Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell (co-author, Arthur Liman Center for Public Interest Law and Association of State Correctional Administrators, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264350

Global Reconfigurations, Constitutional Obligations, and Everyday Life (co-editor Clare Ryan, Yale Global Constitutionalism Seminar, A Part of the Gruber Program for Global Justice and Women's Rights, 2018)

Who Pays? Fines, Fees, Bail, and the Cost of Courts (co-editors Anna VanCleave, Kristen Bell, Skylar Albertson, Natalia Friedlander, Illyana Green, and Michael Morse, Arthur Liman Center for Public Interest Law Colloquium, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3165674

Reconstituting Constitutional Orders (co-editor Clare Ryan, Yale Global Constitutionalism Seminar, A Part of the Gruber Program for Global Justice and Women's Rights, 2017)

Aiming to Reduce Time-In-Cell: Reports from Correctional Systems on the Numbers of Prisoners in Restricted Housing and on the Potential of Policy Changes to Bring About Reforms (co-author, Yale Law School Arthur Liman Public Interest Program and Association of State Correctional Administrators, 2016)

Rethinking 'Death Row': Variations in the Housing of Individuals Sentenced to Death (co-authors Celina Aldape, Ryan Cooper, Katie Haas, April Hu, Jessica Hunter, and Shellie Shimizu, Arthur Liman Public Interest Program, 2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2874492

Acts of State, Acts of God (editor, Yale Global Constitutionalism Seminar, A Part of the Gruber Program for Global Justice and Women's Rights, 2016)

Time-in-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison (co-author, Yale Law School Arthur Liman Public Interest Program and Association for State Correctional Administrators, 2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2655627

The Reach of Rights (editor, Yale Global Constitutionalism Seminar, A Part of the Gruber Program for Global Justice and Women's Rights, 2015)

The Invention of Courts, *Daedalus: Journal of the American Academy of Arts and Sciences* (co-editor Linda Greenhouse, Summer 2014)

Isolation and Reintegration: Punishment Circa 2014 (co-editors Hope Metcalf and Megan Quattlebaum, Arthur Liman Public Interest Program Colloquium, 2014)

Sources of Law and of Rights (editor, Yale Global Constitutionalism Seminar, A Part of the Gruber Program for Global Justice and Women's Rights, 2014)

Governments' Authority (editor, Yale Global Constitutionalism Seminar, A Part of the Gruber Program for Global Justice and Women's Rights, 2013)

Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of State and Federal Correctional Policies (co-authors Hope Metcalf, Jamelia Morgan, Samuel Oliker-Friedland, Julia Spiegel, Haran Tae, Alyssa Work, and Brian Holbrook, Arthur Liman Public Interest Program, 2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2286861

Law's Borders (editor, Yale Global Constitutionalism Seminar, A Part of the Gruber Program for Global Justice and Women's Rights, 2012)

Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms (with Dennis E. Curtis, Yale University Press, 2011)

Federal Courts Stories (co-editor Vicki Jackson, Foundation Press, 2010)

Migrations and Mobilities: Citizenship, Borders, and Gender (co-editor Seyla Benhabib, New York University Press, 2009)

The Processes of the Law: Understanding Courts and Their Alternatives (Foundation Press, 2004)

Adjudication and Its Alternatives: An Introduction to Procedure (with Owen Fiss, Foundation Press, 2003)

The Effects of Gender: The Final Report of the Ninth Circuit Gender Bias Task Force (July 1993) (with The Hon. John C. Coughenour, The Hon. Proctor Hug, Jr., The Hon. Marilyn Patel, Terry W. Bird, Deborah R. Hensler, M. Margaret McKeown, and Henry Shields, Jr.), also reprinted in 67 *Southern California Law Review* 745 (1994)

Procedure (with Robert Cover and Owen Fiss, Foundation Press, 1988)

The Federal Procedural System: A Rule and Statutory Source Book (with Robert Cover and Owen Fiss, Foundation Press, 1988, 1989, 1991)

Chapters in Books

Not Isolating Isolation, in *Solitary Confinement: History, Effects, and Pathways to Reform* at 89-114 (Jules Lobel and Peter Scharff-Smith, eds., Oxford University Press, 2020)

Courts and Economic and Social Rights/Courts as Economic and Social Rights, in *The Future of Economic and Social Rights* at 259-286 (Katharine G. Young, ed., Cambridge University Press, 2019)

The Functions of Publicity and of Privatization in Courts and their Replacements (from Jeremy Bentham to #MeToo and Google Spain) in *Open Justice: The Role of Courts in a Democratic Society* at 177-252 (Burkhard Hess and Ana Koprivica, eds., Max Planck Institute, Luxembourg, Nomos, 2019)

Judicial Methods of Mediating Conflicts: Recognizing and Accommodating Differences in Pluralist Legal Regimes, in *Judicial Power: How Constitutional Courts Affect Political Transformations* at 250-280 (Christine Landfried, ed., Cambridge University Press, 2019)

On Darkness and Light in Legal Imagination and in Practice, in *The Dark Sides of the Law: Perspectives on Law, Literature, and Justice in Common Law Countries* at 13-29 (Geraldine Gadbin-George, Yvonne-Marie Rogez, Armelle Sabatier, and Claire Wrobel, eds., Editions Michel Houdiard, 2019)

Bordering by Law: The Migration of Law, Crimes, Sovereignty, and the Mail, in *Nomos LVII: Immigration, Emigration, and Migration*, at 79-201 (Jack Knight, ed., New York University Press, 2017)

Why Eyes? Cautionary Tales from Law's Blindfolded Justice (with Dennis E. Curtis), in *Blinding as a Solution to Bias in Biomedical Science and the Courts: A Multidisciplinary Approach*, at 227-247 (Aaron Kesselheim and Christopher Robertson, eds., Elsevier Press, 2016)

- Constructing the “Foreign:” American Law’s Relationship to Non-Domestic Sources, in *Courts and Comparative Law*, at 437-471 (Mads Andrenas and Duncan Fairgrieve, eds., Oxford University Press, 2015)
- Epistemological Doubt and Visual Puzzles of Sight, Knowledge, and Judgment: Reflections on Clear-Sighted and Blindfolded Justices (with Dennis E. Curtis), in *Genealogies of Legal Vision*, at 201-242 (Peter Goodrich and Valérie Hayaert, eds., London: Routledge, 2015)
- Federalism(s)’s Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations, in *Nomos LV: Federalism and Subsidiarity*, at 363-435 (James E. Fleming and Jacob T. Levy, eds., New York University Press, 2014)
- Constructing Courts: Architecture, the Ideology of Judging, and the Public Sphere (with Dennis E. Curtis and Allison Tait), in *Law, Culture & Visual Studies*, at 547-572 (Richard K. Sherwin and Anne Wagner, eds., Springer Publishing Company, 2013)
- “Hear the Other Side:” *Miranda*, Guantánamo, and Public Rights to Fairness and Dignity, in *Law and the Quest for Justice*, at 85-109 (Marjorie S. Zatz, Doris Marie Provine, and James P. Walsh, eds., Quid Pro Books, 2013)
- Old and New Depictions of Justice: Reflections, Circa 2011, on Hill-Thomas, in *I Still Believe Anita Hill*, at 51-70 (Amy Richards and Cynthia Greenberg, eds., The Feminist Press, 2012)
- Changing the Climate: The Role of Translocal Organizations of Government Actors (TOGAs) in American Federalism(s), in *Navigating Climate Change Policy: The Opportunities of Federalism*, at 120-143 (Edella C. Schlager, Kirsten H. Engel, and Sally Rider, eds., The University of Arizona Press Tucson, 2011)
- Sisterhood, Slavery and Sovereignty: Transnational Women’s Rights Movements from 1840 through the Beginning of the Twenty-first Century, in *Women’s America: Seventh Edition*, at 781-790 (Linda Kerber, Cornelia Hughes Dayton, and Jane De Hart, eds., Oxford University Press, 2010)
- New Federalism(s): Translocal Organizations of Government Actors (TOGAs) Reshaping Boundaries, Policies, and Laws, in *Why the Local Matters: Federalism, Localism, and Public Interest Advocacy*, at 83-99 (published by the Liman Public Interest Program at Yale Law School, and the National State Attorneys General Program at Columbia Law School, 2010)
- Managerial Judges, Jeremy Bentham and the Privatization of Adjudication, in *Common Law, Civil Law and the Future of Categories*, at 205-224 (Janet Walker and Oscar

G. Chase, eds., LexisNexis Canada, 2010), also published in 49 *S.C.L.R.* (2d) 205 (2010)

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Gendered Borders and United States' Sovereignty, in *Women and Immigration Law: New Variations on Classical Feminist Themes*, at 44-63 (S.K. Van Walsum and T. Spijkerboer, eds., Routledge-Cavendish Press, 2006)

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Democratic Responses to the Breadth of Power of the Chief Justice, in *Reforming the Court: Term Limits for Supreme Court Justices*, at 181-200 (Paul D. Carrington and Roger C. Cramton, eds., Carolina Academic Press, 2006)

Composing a Judiciary: Reflections on Proposed Reforms in The United Kingdom on How to Change the Voices of and the Constituencies for Judging, in *Constitutional Innovation: The Creating of A Supreme Court for the United Kingdom; Domestic, Comparative and International Reflections, A Special Issue of Legal Studies*, at 228-252 (Derek Morgan, ed., LexisNexis, United Kingdom, 2004)

The Story of *Goldberg*: Why This Case Is Our Shorthand, in *Civil Procedures Stories: An In-Depth Look at the Leading Civil Procedure Cases*, at 473-508 (Kevin M. Clermont, ed., Foundation Press, 2004; 2nd ed., 2007)

- Federalism(s), Feminism, Families, and the Constitution, in *Women and the United States Constitution: History, Interpretation, and Practice*, at 127-152 (Sybil A. Schwarzenbach and Patricia Smith, eds., Columbia University Press, 2004)
- The Rights of Remedies: Collective Accountings for and Insuring Against the Harms of Sexual Harassment in *Directions in Sexual Harassment Law*, at 247-271 (Reva Siegel and Catherine MacKinnon, eds., University Press, 2004)
- Civil Processes, in *Oxford Handbook of Legal Studies*, at 478-772 (Peter Cane and Mark Tushnet, eds., Oxford Press, 2003)
- Women, Meeting (Again), In and Beyond the United States, Afterword to *The Difference Difference Makes: Women and Leadership*, at 203-216 (Deborah L. Rhode, ed., Stanford University Press, 2003)
- Procedure: Legal Aspects (Vol.18), in *International Encyclopedia of the Social & Behavioral Sciences*, at 12136-12141 (Neil J. Smelser and Paul B. Baltes, eds., Elsevier Press, 2001)
- Contested Identities: Task Force on Gender, Race, and Ethnic Bias and the Obligations of the Legal Profession (with Deborah Hensler) in *Ethics in Practice, Lawyers' Roles, Responsibilities, and Regulation*, at 240-263 (Deborah L. Rhode, ed., Oxford University Press, 2000)
- Federal Judicial Role (Vol. III); Single-Sex Education (Vol. V); Procedural Due Process Civil (Update I, Vol. IV), in *The Encyclopedia of the American Constitution*, 2nd edition, (Leonard Levy, Kenneth L. Karst, Adam Winkler, Dennis J. Mahoney, and John G. West, Jr., eds., Macmillan, 2000)
- Singular and Aggregate Voices: Audiences and Authority in Law & Literature and in Law & Feminism, in *Law and Literature: Current Legal Issues*, Vol. II, at 687-727 (Michael Freeman and Andrew D. E. Lewis, eds., Oxford University Press, 1999)
- Foreword (with Carolyn Heilbrun) to *Beyond Portia: Women, Law & Literature in the United States*, at 11-52 (Jacqueline St. Joan and Annette Bennington McElhiney, eds., Northeastern University Press, 1997)
- Procedure, in *Looking at Law School*, at 177-195 (Stephen Gillers, ed., Penguin Books, NY, 4th ed., 1997; 3rd ed., 1990)
- From the Senate Judiciary Committee to the County Courthouse: The Relevance of Gender, Race, and Ethnicity to Adjudication, in *Race, Gender, and Power in America, The Legacy of the Hill-Thomas Hearings*, at 177-227 (Anita Hill and Emma Jordan, eds., Oxford Press, 1995)

Gender in the Courts: The Task Force Reports, in *The Woman Advocate, Excelling in the 90's*, at 3-38 (Jean Maclean Snyder and Andra Barmash Greene, eds., Prentice Hall Law & Business, 1995)

Finding the Factfinders, in *Verdict: Assessing the Civil Justice System*, at 500-530 (Robert E. Litan, ed., Brookings, May 1993)

Independent and Inter-dependent: The Ninth Circuit and the Federal Judiciary, in *Restructuring Justice*, at 321-330 (Arthur Hellman, ed., Cornell Press, 1990)

The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences (with E. Allan Lind, Robert MacCoun, Patricia Ebener, William L.F. Felstiner, Deborah R. Hensler, and Tom R. Tyler), The RAND Corporation, Institute for Civil Justice (1989)

Should Prisoners Be Classified by Sex?, in *Criminal Corrections: Ideals and Realities*, at 109-123 (J. Doig, ed., Mass: Lexington Books, Fall 1982)

Discrimination in Education, Chapter XXVIII in Dorsen, Bender, Neuborne, and Law, in *Political and Civil Rights in the United States*, at 107-173 (Little Brown, 1979, Supplement, 1981)

Prisoners of Their Sex: Health Problems of Incarcerated Women (with Nancy Shaw) in *Prisoners' Rights Sourcebook: Theory, Practice, and Litigation*, Vol. II, at 319-413 (Ira Robbins, ed., N.Y.: Clark Boardman, 1980, reprinted in 3 *Prison Law Monitor* 57-58, March 1981)

Federal Prisoners' Access to Federal Courts: Jurisdiction and Related Procedural Matters, *Prisoners Rights*, at 85-158 (N.Y.: PLI, 1979)

Undelivered Care: The Incapacitated and the Mentally Ill New York City Defendant, A Report to the Mayor's Criminal Justice Coordinating Council (August 1973) (co-authored)

Articles

Constituting Security and Fairness: Reflecting on Charles Reich's Imagination and Impact, 129 *Yale Law Journal Forum* 707 (2020)

Inability to Pay: Court Debt Circa 2020 (with David Marcus), 98 *North Carolina Law Review* 361 (2020)

(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin," 129 *Yale Law Journal Forum* 365 (2020)

- Book Review: The Challenges of Engaging “The Art of Law: artistic representations and iconography of law and justice in context, from the middle ages to the first world war,” in 7 *Comparative Legal History* 239 (2019)
- Sentencing Inside Prisons: Efforts to Reduce Isolating Conditions (with Kristen Bell), 87 *University of Missouri Kansas City Law Review* 133 (2018)
- A2J/A2K: Access to Justice, Access to Knowledge, Economic Inequalities, and Open Courts and Arbitrations, 96 *North Carolina Law Review* 605 (2018)
- Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation, 92 *New York University Law Review* 1017 (2017)
- “Vital” State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts, 165 *University of Pennsylvania Law Review* 1765 (2017)
- Lawyers’ Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes, 85 *Fordham Law Review* 1899 (2017)
- Accommodations, Discounts, and Displacement: The Variability of Rights as a Norm of Federalism(s), 17 *Jus Politicum* 209 (2017)
- “Within Its Jurisdiction”: Moving Boundaries, People, and the Law of Migration, 160 *Proceedings of the American Philosophical Society* 117 (2016)
- Revising Our “Common Intellectual Heritage”: Federal and State Courts in Our Federal System, 91 *Notre Dame Law Review* 1831 (2016)
- Time-In-Cell: Isolation and Incarceration (with Sarah Baumgartel and Johanna Kalb), 125 *Yale Law Journal Forum* (2016); <http://www.yalelawjournal.org/forum/time-in-cell-isolation-and-incarceration>
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Gideon at Guantánamo: Democratic and Despotism Detention (with Hope Metcalf), 122 *Yale Law Journal* 2504 (2013)

Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of State and Federal Correctional Policies (with Hope Metcalf, Jamelia Morgan, Samuel Oliner-Friedland, Julia Spiegel, Haran Tae, Alyssa Work, and Brian Holbrook) (2013)

The Democracy in Courts: Jeremy Bentham, ‘Publicity’, and the Privatization of Process in the Twenty-First Century, *NoFo* 10 (2013)

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Opening the Door: Ruth Bader Ginsburg, Law’s Boundaries, and the Gender of Opportunities, 25 *Columbia Journal of Gender and Law* 81 (2013)

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- Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s), 5 *Law & Ethics of Human Rights* 226 (2011)
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- Reading Reinhardt: The Work of Constructing Legal Virtue (*Exempla Iustitiae*), 120 *Yale Law Journal* 539 (2010)
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- Interdependent Federal Judiciaries: Puzzling about Why and How to Value the Independence of Which Judges, *Daedalus* 28 (2008)
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Statement submitted for the record, Sunshine in Litigation Act: Does Court Secrecy Undermine Public Health and Safety, Hearing before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Committee on the Judiciary, 110th Cong. 181, December 11, 2007

Hearings on the Judicial Nomination of John G. Roberts, Jr., to be Chief Justice of the United States, held by the Committee on the Judiciary of the United States Senate, Washington, D.C., September 15, 2005

Hearings on the Judicial Selection before the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, held by the House of Commons, Ottawa, Canada, April 20, 2004

Hearings on the Proposed Amendments to Federal Rule of Civil Procedure 23, held by the Committee on Rules of Practice and Procedure, Judicial Conference of the United States, January 2002

Hearings on the Senate's Role in the Nomination and Confirmation Process: Whose Burden?, held by the Senate Committee on the Judiciary, Subcommittee on

Administrative Oversight and the Courts, 107th Cong. , September 4, 2001, also published in *50 Drake Law Review* 539 (2001-02)

Hearings on the Proposed Amendment to Federal Rule of Civil Procedure 23, held by the Committee on the Rules of Practice and Procedure, Advisory Committee to the Standing Committee on the Rules of Practice and Procedure of the United States Judicial Conference, November 1996

Hearings on the Proposed Long Range Plan of the Judicial Conference of the United States, held by the Committee on Long Range Planning, December 16, 1994

Hearings on the Proposed Changes in the Federal Rules of Civil Procedure, held by the Standing Committee on Rules of Practice and Procedure of the United States Judicial Conference, November 1991

Hearings on the Tentative Report of the Federal Courts Study Committee, held by members of the Committee, San Diego, California, January 29, 1990

Hearings on the Proposed Amendments to Rule 63 of the Federal Rules of Civil Procedure, held by the Advisory Committee to the Standing Committee on the Rules of Practice and Procedure of the United States Judicial Conference, January 1990

Hearings on the Confirmation of Robert H. Bork to be an Associate Justice of the United States Supreme Court, held by the Committee on the Judiciary, United States Senate, September 25, 1987

Hearings on Proposed Amendments to Rule 52(a) of the Federal Rules of Civil Procedure, held by the Subcommittee on Criminal Justice of the Judiciary Committee of the U.S. House of Representatives, June 26, 1985

Hearings on Proposed Amendments to Rule 68 of the Federal Rules of Civil Procedure, held by the Advisory Committee to the Standing Committee on the Rules of Practice and Procedure of the United States Judicial Conference, 1985

Hearings on Proposals to Amend the Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings in the United States District Courts, held by the Advisory Committee to the Standing Committee on the Rules of Practice and Procedure of the United States Judicial Conference, 1984

Female Offender: 1979-80, Part 1: Hearings before the Subcommittee on Courts, Civil Liberties, and Administration of Justice of the House Committee. on Judiciary, 96th Cong. 59, October 11, 1979

Drug Abuse Treatment: Part 2: Hearings before the Select Committee on Narcotics Abuse and Control, House of Representatives, 96th Cong., July 25, 1978

Honors and Awards

Andrew Carnegie Fellowship, 2018-2020

Honorary Doctorate of Laws, University College London, 2018

Visiting Scholar, Max Planck Institute for Procedural Law, Luxembourg, February 2018

Establishment of the Resnik-Curtis Fellowship in Public Interest Law on the 20th anniversary of the Liman Program at Yale, 2017

Visiting Scholar, Phi Beta Kappa, 2014-2016

Recipient, Arabella Babb Mansfield Award, National Association of Women Lawyers, July 2013

Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms (with Dennis E. Curtis)

Selected as one of the “Best legal reads of 2011” by The Guardian

Recipient, SCRIBES Award from the American Society of Legal Writers, 2012

Recipient, PROSE Award, Excellence in Social Sciences, 2012

PROSE Award, Excellence in Law & Legal Studies, 2012

Selected as an Outstanding Academic Title of the Year by Choice Magazine, January 2012

Recipient, The Order of the Coif Biennial Book Award, January 2014

New York University Alumna of the Month Award, June 2012,

<http://www.law.nyu.edu/alumni/almo/pastalmos/2011-12almos/judithresnikjune>

Elizabeth Hurlock Beckman Award, Awarded to Outstanding Faculty in Higher Education in the Fields of Psychology or Law, Columbia University, March 2011

Migrations and Mobilities: Citizenship, Borders, and Gender, Selected as an Outstanding Academic Title of the Year by Choice Magazine, January 2011

Outstanding Scholar of the Year Award 2008, from the Fellows of the American Bar Foundation

Oral History, 2007, Women Trailblazers in the Law Project, American Bar Association Commission on Women in the Profession, deposited in the Library of Congress, 2009

Convocation Speaker, Bryn Mawr College Commencement, May 2006

Member, American Philosophical Society, elected Spring 2002

Fellow, American Academy of Arts and Sciences, elected Spring 2001

Recipient, Margaret Brent Women Lawyers of Achievement Award, American Bar Association Commission on Women in the Profession, August 1998

Recipient, NYU School of Law, Legal Teaching Award, Spring 1995

Recipient, USC Associates Award for Creativity in Research, Spring 1994

Recipient, Florence K. Murray Award, National Association of Women Judges, Fall 1993

Recipient, "Big Splash Award" from the Program of Women and Men in Society (SWMS), University of Southern California, 1992

Member, Phi Kappa Phi, elected by the USC Chapter, 1991

University Scholar, University of Southern California, 1982-1983

Recipient, Student Bar Association Outstanding Faculty Award, University of Southern California Law Center, 1982-1983

Arthur Garfield Hays Fellow, 1974-1975, New York University

Education

Bryn Mawr College, B.A., cum laude, 1972

New York University School of Law, J.D., cum laude, 1975

Bar Memberships

Connecticut

United States District Courts: District of Connecticut, Southern District of New York, Eastern District of New York

United States Court of Appeals for the First, Second, Third, Fourth, Ninth and Eleventh Circuits

United States Supreme Court

Selected Litigation

United States Supreme Court

Of counsel on Brief of Amici Curiae, Law Professors in Support of Petitioners (No. 18-622), on Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, *Whole Woman's Health, et. al. v. Texas Catholic Conference of Bishops* (2018) (on the question of standing)

- Of counsel on Brief of Amici Curiae, Former Judges, Former Prosecutors, Former Government Officials, Law Professors, and Social Scientists in Support of Respondents (No. 17-312), *United States of America v. Sanchez-Gomez* 138 S.Ct. 1532 (2018) (on the use of shackles for defendants in federal court)
- Of counsel on Brief of Amici Curiae, Professors of Federal Courts Jurisprudence, Constitutional Law, and Immigration Law in Support of Respondents (Nos. 16-1436 and 16-1540), *Donald J. Trump, et al. v. International Refugee Assistance Project, et al, Donald J. Trump, et al. v. State of Hawaii, et al.* (2017), 138 S.Ct. 2392 (2018) (on travel bans)
- Of counsel on Brief of Amici Curiae, Constitutional Law, Federal Courts, Citizenship, and Remedies Scholars in Support of Respondent Luis Ramon Morales-Santana (No. 15-1191), *Lynch v. Morales-Santana*, 136 S.Ct. 2545 (2016) (on citizenship and gender)
- Oral Argument and brief presented on behalf of the Respondent Norman Carpenter in *Mohawk Industries, Inc. v. Carpenter* (No. 08-678, 2009 WL 3169419) (argued October 5), 558 U.S. 100 (2009) (on appealability)
- Of counsel on Brief of Law Professors as Amici Curiae, in Support of Respondent Jacob Denedo (No. 08-267, 2009 WL 418793), *United States v. Denedo*, 556 U.S. 904 (2009) (on jurisdiction)
- Of counsel on Brief of Amici Curiae Professors of Constitutional Law and of Federal Jurisdiction, in Support of Petitioner Keith Haywood (No. 07-10374), *Haywood v. Drown*, 556 U.S. 729 (2009) (on state law and Section 1983)
- Of counsel on Brief of Amici Curiae Professors of Constitutional Law and of the Federal Courts, in Support of the Habeas Petitioners Omar and Munaf (Nos. 07-394, 06-1666), *Munaf v. Geren*, 553 U.S. 674 (2008) (on the scope of habeas corpus)
- Of counsel on Brief of Professors of Constitutional Law and of the Federal Jurisdiction as Amici Curiae, in Support of Petitioners Boumediene et al. (Nos. 06-394, 06-1196), *Boumediene v. Bush*, 553 U.S. 723 (2008) (on the scope of habeas corpus)
- Brief of Amici Curiae Norman Dorsen, Frank Michelman, Burt Neuborne, Judith Resnik, and David Shapiro, in Support of Petitioner Salim Ahmed Hamdan (No. 05-184), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (on due process)
- Brief of Amici Curiae of Law Professors in Support of Petitioner Paula Jones (No. 95-1853, 1996 WL48092), *Clinton v. Jones*, 520 U.S. 681 (1997) (on immunity)

Oral Argument presented on behalf of the Rotary Club of Duarte:

Board of Directors of Rotary International v. Rotary Club of Duarte,
481 U.S. 537 (1987) (on California public accommodations law and
associational rights under the First Amendment)

United States Courts of Appeals

Brief of Amici Curiae, Scholars of the Law of Prisons, the Constitution, and the Federal
Courts in Support of the Appellants (No. 16-4234), Delores Henry, et al., v. Melody
Hulett, et al. (7th Cir, rehearing en banc pending, 2020) (on constitutional rights in
prison)

Brief of Amici Curiae of Constitutional Law and Procedure Scholars Judith Resnik and
Brian Soucek in Support of Petitioner (No. 16-73801), submitted for the hearing
en banc, C.J.L.G. v. Jefferson B. Sessions III (9th Cir., , 880 F.3d 1122 (2019) (on
due process, right to counsel, and immigrant children)

Of counsel on Brief of Amici Curiae, Professors of Federal Courts Jurisprudence,
Constitutional Law, and Immigration Law in Support of Plaintiffs-Appellees, (No.
17-17168), Ninth Circuit, State of Hawaii, et al., v. Donald Trump (2017) (on
travel bans)

Of counsel on Brief of Amici Curiae, Professors of Federal Courts Jurisprudence,
Constitutional Law, and Immigration Law in Support of Plaintiffs-Appellees, (No.
17-2231 (L), 17-2232, 17-2233, 17-2240 (Consolidated)), Fourth Circuit,
International Refugee Assistance Project, et al., Iranian Alliances Across Borders,
et al., Eblal Zakzok, et al., v. Donald Trump (2017) (on travel bans)

Of counsel on Brief of Amici Curiae, Constitutional Law Professors in Support of
Appellees and Affirmance (No. 17-1351), International Refugee Assistance
Project et al. v. Donald J. Trump, et. al. (4th Cir. 2017) (on travel bans)

Appellate Counsel

In re San Juan Dupont Plaza Hotel Fire Litigation, 111 F.3d 220 (1st Cir. 1997)
(on awards of fees and costs in a mass tort multi-district litigation)

In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel
Fire Litigation, 56 F.3d 295 (1st Cir.1995)

In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel
Fire Litigation, 982 F.2d 603 (1st Cir. 1992)

United States District Court

Of Counsel on Motion for Leave to File Declaration of Correctional Expert Rick
Raemisch as Amicus Curiae, Savino et al. v. Hodgson et al. (D. Mass., No. 1:20-

cv-10617-WGY, granted March 31, 2020) (to provide the court and parties with expert information)

Of Counsel on Unopposed Motion for Leave to File Amicus Curiae Statement of Correctional Expert Rick Raemisch, *Coleman v. Newson* (E.D. Cal, No. 2:90-CV-00520-KJM-DB 2020), *Plata v. Newsom* (No. C01-1351 JST, N.D. Cal., granted April 2, 2020) (to provide the court and parties with expert information)

Court-appointed trustee in re: MDL-926 Global Breast Implant Settlement, 173 F.Supp.2d 1381 (Judicial Panel on Multidistrict Litigation, N.D. Alabama, N.D. Texas, 1994) (overseeing the court-created “common benefit fund”)

Expert appointed by the district court to assist the Special Master in *McLendon v. Continental Group, Inc.*, 802 F.Supp. 1216 (D.N.J. 1992) (assisting the court in relationship to a settlement in an ERISA class action)

Exhibits, Co-Curator

The Remarkable Run of a Political Icon: Justice as a Sign of the Law. Rare Book Exhibition Gallery, Lillian Goldman Law Library, Yale Law School, September – December 2011 (with Dennis E. Curtis, Allison Tait & Michael Widener); <http://library.law.yale.edu/justice-sign-law-exhibit>

Courts: Representing and Contesting Ideologies of the Public Sphere. Yale Art Gallery, Study Galleries, January – May 2011 (with Dennis E. Curtis)

Selected Media

Interview, WNPR – Connecticut Public Radio’s *Where We Live*, presented by John Dankosky, August 5, 2013; <http://wnpr.org/post/connecticuts-criminal-justice-system>

Interview, BBC Radio 4’s *Law in Action*, presented by Joshua Rozenberg, March 12, 2013; <http://www.bbc.co.uk/programmes/b01r5ln5>

Cameo in *Fair Game*, directed by Doug Liman, Fall 2010, and panel moderator, discussion of the film with Valerie Plame, Joseph Wilson, Emily Bazelon and Doug Liman, Paris Theatre, New York City, October 5, 2010