UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALEXANDER GRINIS, MICHAEL GORDON, and ANGEL SOLIZ, on behalf of themselves and those similarly situated, *Petitioners*, v. STEPHEN SPAULDING, Warden of Federal Medical Center Devens, and MICHAEL CARVAJAL, Director of the Federal Bureau of Prisons, in their official capacities, *Respondents*.	No. 20-cv-10738-GAO Leave to file excess pages granted on April 24, 2020 [D.E. 37]

PETITIONERS' REPLY TO RESPONDENTS' OMNIBUS RESPONSE

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INTRODUCTION

Petitioners and other Class members remain in imminent danger of infection, illness, and death from COVID-19 despite the steps Respondents claim to have taken. That is because too many prisoners remain at FMC Devens. There is no question that a significant reduction of the population would greatly reduce the dangers to the prisoners who leave FMC Devens, the prisoners and staff who remain, and the surrounding community. Yet Respondents have made the deliberate and unconstitutional choice to keep almost all prisoners where they are—in a large, congregate setting that is extremely vulnerable to a rapid outbreak because social distancing, a "cornerstone" of prevention, is impossible. Although Respondents use words like "required criteria" and "ineligible" to describe their decision to bar so many people from being transferred to home confinement, they cannot defeat a claim of deliberate indifference by arguing they have tied their own hands with bureaucratic red tape. That is not a defense; it's a confession.

Since Petitioners filed this action on April 15, confirmed COVID-19 infections among BOP prisoners and staff have grown to 1,118 across 45 BOP facilities,[1] including the first confirmed infection at FMC Devens. Twenty-seven prisoners have died. During that same period, confirmed prisoner cases at FMC Forth Worth, an administrative security medical center like FMC Devens that holds many elderly and medically vulnerable men, exploded from 4 to 232 (three have already died).[2] Eight of the top ten COVID-19 clusters in the United States are now

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[1] *See* https://www.bop.gov/cornavirus (last visited Apr. 26, 2020). As noted in the Petition, this total is artificially suppressed due to inadequate testing. *See also* Declaration of Prof. Lauren Brinkley-Rubinstein, (Apr. 26, 2020) ("Brinkley-Rubinstein Decl.") ¶¶ 9-11, 13, attached as Exhibit A. In addition, BOP apparently removes those who have "recovered" from its cumulative count of "open" cases.

[2] *See* Exhibit B (screenshots of FMC Devens weekly census data).

in prisons and jails.[3] Nursing homes—congregate facilities that share many features with FMC Devens—account for over 1,300 COVID-19 deaths in Massachusetts, more than half of the state total.[4]

Meanwhile, notwithstanding Respondents' assurances that they are expeditiously discharging their obligation to maximize transfers out of the facility, the population of FMC Devens has remained essentially static, near capacity in normal times.[5] That is deliberate indifference.

Date	Camp	FMC
April 9	108	914
April 16	108	906
April 23	106	905

In the face of rampant illness and numerous prisoner deaths in its facilities, Respondents have decided to carry out a policy that denies home confinement to prisoners – regardless of their vulnerability to COVID-19 – unless they meet numerous criteria.[6] Respondents have already used this policy as a basis to keep numerous prisoners inside FMC Devens, including Petitioner Gordon, who Respondents determined did "not qualify for priority consideration" because he has served 36.6% rather than 50% of his sentence.[7]

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[3] *See* https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html.

[4] Miriam Wasser & Bob Oakes, "COVID-19 Hits Elder Care Facilities in Mass. the Hardest, with More than 1,300 Now Dead," *WBUR* (Apr. 24, 2020), *available at* https://www.wbur.org/commonhealth/2020/04/24/seniors-coronavirus-nursing-homes-testing.

[5] *See* Ex. C (weekly data compiled from https://www.bop.gov/about/statistics/).

[6] *See* Respondents' Response to Petition for Writ of Habeas Corpus and Opposition to Petitioners' Motion for Immediate Bail and Injunctive and Declaratory Relief [D.E. 32] ("Resp.") at 18-20; *see also* Declaration of Amber Bourke [D.E. 32-2], ¶ 21 (April 22, 2020) ("Bourke Decl."); Declaration of Amber Bourke [D.E. 36-1], ¶¶ 18-19 (April 24, 2020) ("Bourke Supp. Decl.").

[7] *See* Bourke Supp. Decl. ¶ 28.

Even the eight prisoners reportedly approved for transfer to home confinement remain at FMC Devens, "quarantined" for 14 days[8] in punitive isolation that serves no public health purpose.[9] Although Respondents highlight a laundry list of "appropriate measures to protect" prisoners,[10] they concede that strict physical distancing, a necessary "cornerstone" of COVID-19 prevention, remains impossible at FMC Devens given the current population levels.[11]

"Courts cannot blithely defer to the supposed expertise of prison officials when it comes to the constitutional rights of inmates." *Wolff v. McDonnell*, 418 U.S. 539, 599 (1974). Respondents' arbitrary and convoluted compassionate release and home confinement screening policies are not an excuse but a deliberate and deadly bottleneck that risks the lives of prisoners, staff, and civilians alike. FMC Devens today remains filled with elderly men in their 70s and 80s, men with debilitating medical conditions, and men within months of completing their sentences, many of whom could be transferred to home confinement immediately with no danger

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[8] *See* Resp. at 19.

[9] *See* Declaration of Professor Seth Prins, ¶¶ 5-18 ("Prins Decl."), attached as Exhibit D.

[10] *See* Resp. at 4-13, 30-34.

[11] Moreover, undersigned counsel have been unable to discuss the Respondents' filings with Petitioners. Counsel twice requested, on April 23 and 24, that Respondents facilitate legal phone calls with the named Petitioners in advance of today's hearing, but no such calls were accommodated. Counsel understand that, sometime last week, Gordon was transferred out of FMC Devens for emergency medical care related to his liver transplant and then returned to the facility on April 24. Counsel last heard from Grinis by Corrlinks e-mail on April 19, when he reported that prison staff commented, "no one is being released," removed a typewriter, and limited the amount of paper available to prisoners, with the effect of restricting their access to the courts. Then, on April 22, Respondents alleged that "Grinis is refusing to enter the required quarantine before his pending release to home confinement . . . result[ing] in a disciplinary action and the loss of his pending pre-release placement." Bourke Decl. ¶ 23, n.1. It is darkly ironic that, having apparently voiced genuine terror at the prospect of two weeks of solitary isolation in "quarantine," Grinis was sent to isolation anyway — as punishment — and now may remain at FMC Devens indefinitely, notwithstanding Respondents' earlier determination that he is "at high risk for COVID-19." *Id.*

to public safety. Contrary to Respondents assertions, this section 2241 habeas petition is a proper legal vehicle to bring the Petitioners' claims challenging unconstitutional confinement. Given the extraordinary circumstances of the COVID-19 pandemic, Petitioners readily satisfy the criteria for emergency injunctive release and class certification.

A substantial number of prisoners must be promptly evacuated from FMC Devens to save lives and mitigate the public health crisis that will otherwise decimate the Devens community. This Court should order Respondents to do so forthwith, as federal courts have done at other facilities. *See, e.g., Wilson v. Williams*, No. 4:20-cv-00794, 2020 U.S. Dist. LEXIS 70674, at *25 (N.D. Ohio Apr. 22, 2020) (ordering transfers out of FCI Elkton "through any means"); *Roman v. Wolf*, No. 20-cv-0768-TJH (C.D. Cal. Apr. 23, 2020), D.E. 55 at 2 (ordering respondents to "immediately reduce the detainee population" at ICE detention facility "to such a level that would allow the remaining detainees to maintain a social distance of 6 feet from each other at all times and at all places"), *administrative stay granted* (9th Cir. Apr. 25, 2020) (No. 20-55436). Alternatively, this Court should exercise its inherent habeas authority to release a sufficient number of class members on bail, as another court in this District has done for dozens of ICE detainees in Bristol County. *See Savino v. Hodgson,* No. 20-cv-10644-WGY, 202 U.S. Dist. LEXIS 61775, at *28 (D. Mass. Apr. 8, 2020) ("[T]he Court follows the light of reason and the expert advice of the CDC in aiming to reduce the population in the detention facilities so that all those who remain (including staff) may be better protected").

ARGUMENT

I. This Court has authority to order the relief that Petitioners request.

A. Section 2241 authorizes Petitioners' COVID-19-related claims.

Respondents contend that "habeas relief is unavailable" because Petitioners challenge the "conditions of their confinement." Resp. at 21-22. Respondents are wrong for two reasons:

(1) Petitioners attack "the fact or duration" of their unconstitutional confinement, for which the only appropriate class-wide relief is the immediate, substantial reduction of the population, whether by compassionate release, home confinement, furlough, bail, or other means; and (2) there is no legal bar against habeas claims that challenge "the conditions" of confinement.

1. Petitioners challenge "the fact or duration" of their confinement at FMC Devens, where social distancing is impossible.

By characterizing the Petition as an ordinary "conditions of confinement" claim akin to a complaint about inadequate "medical care," Respondents misapprehend the issues. "Whereas many medical needs claims might appropriately be addressed through § 1983 litigation, claims concerning COVID-19 are not so easily classified." *Wilson*, 2020 U.S. Dist. LEXIS 70674, at *13; *see Money v. Pritzker*, Nos. 20-cv-2093 & 2094, 2020 U.S. Dist. LEXIS 63599, at *25-26 (N.D. Ill. Apr. 10, 2020) (recognizing "the unique context in which litigation over COVID-19 arises . . . because the sudden threat to mortality from the spread of virus in a congregate setting may affect the fact or duration of confinement").[12] In this case, Petitioners are not making traditional, individualized "quality of care" demands for orthopedic shoes, *see Warner v. Spaulding*, No. 18-cv-10850-DLC, 2018 U.S. Dist. LEXIS 70032 (D. Mass. Sept. 24, 2018), at *1-2; cataract surgery, *see Crooker v. Grondolsky*, No. 12-cv-12016, 2013 U.S. Dist. LEXIS 2071 (D. Mass. Jan. 4, 2013), at *1; Hepatitis C therapy, *see Kane v. Winn*, 319 F. Supp. 2d 162, 173-74 (D. Mass. 1998), or similar medical devices or services.

[12] In *Money*, the court relied on a declaration from Professor Judith Resnik, a habeas scholar who has opined that, given the "unprecedented circumstances, . . . 'COVID-19 claims ought to be cognizable under both provisions.'" 2020 U.S. Dist. LEXIS. 63599, at *25-26. Thus, the court ultimately reviewed the plaintiffs' claims under both § 1983 and § 2254; it dismissed the habeas claims because the plaintiffs, who were state prisoners, failed to exhaust available state remedies. *See id.* at *17, 46. That exhaustion issue is not present here. Prof. Resnik's declaration is separately attached hereto as Exhibit D.

Instead, Petitioners and the Class whom they seek to represent allege that their collective confinement at current population levels exposes them to deadly infection with a highly contagious virus in violation of the Eighth Amendment. They "ultimately seek to challenge the fact or duration of confinement," not simply "the dangerous conditions within the prison created by the virus." *Wilson*, 2020 U.S. Dist. LEXIS 70674, at *13. And for that reason, remedying the constitutional violations alleged in this case could not be accomplished simply by providing Petitioners and the putative Class members with more Virucide or with access alcohol-based sanitizers. The requested remedy, on a class basis, is necessarily the release or transfer of a sufficient number of class members from unconstitutional custody to allow for effective social distancing. *See id.* (recognizing that by prisoners at FCI Elkton brought habeas claims alleging that "continued imprisonment . . . is unconstitutional given the COVID-19 outbreak").[13]

Thus, the Petition properly pursues habeas relief. *See, e.g.*, *Francis v. Maloney,* 798 F.3d 33, 36 (1st Cir. 2015) ("[A]n individual may invoke § 2241 . . . to challenge placement (or lack thereof) in a community confinement center, or to contest one's imprisonment in a specific facility."); *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 873 (1st Cir. 2010) (explaining that when prisoner seeks "quantum change in the level of custody. . . then habeas corpus is his remedy"); *Brennan v. Cunningham*, 813 F.2d 1, 4-5 (1st Cir. 1987) (permitting habeas challenge to transfer from halfway house to state prison); *Putnam v. Winn*, 441 F. Supp. 2d 253, 256 (D. Mass. 2006) (finding habeas jurisdiction to consider challenge to rule prohibiting transfer to halfway house); *Fox v. Lappin*, 441 F. Supp. 2d 203, 206 (D. Mass. 2005) ("[W]here transfer or release are at issue, a habeas petition is warranted."); *Monahan v. Winn*, 276 F. Supp. 2d 196, 204 (D. Mass.

[13] Many other courts have accepted habeas petitions as proper vehicles to address the COVID-19 pandemic in custodial settings. *See* Ex. F (compilation of cases).

2003) ("It is well-established that challenges to the 'manner, location, or conditions of a sentence's execution' are proper subjects of a habeas corpus action under § 2241.").

2. Petitioners may also challenge "the conditions" of their confinement.

Although Petitioners have appropriately brought this case as a habeas action because they challenge the fact or duration of their confinement, they may also use habeas to challenge the unconstitutional conditions at FMC Devens. The First Circuit has expressly rejected the Respondents' argument that conditions habeas is unavailable to challenge conditions. *See Brennan*, 813 F.2d at 4 ("We reject this contention.").

In *Brennan*, the petitioner, serving a life sentence for murder, was transferred from the New Hampshire state prison to a halfway house to participate in a work-release program. After that assignment was terminated and the petitioner was sent back to state prison, he filed a § 2254 petition. The district court granted habeas relief. On appeal, the warden argued – like the Respondents here – the action could not be "maintain[ed] . . . under the federal habeas corpus statute," because "the claim for reinstatement" to the halfway house "challenge[d] the conditions of confinement and not the fact or length of confinement." *Id.* The warden further asserted – like Respondents – that "the proper vehicle for such a challenge" was § 1983. *Id.*

The First Circuit rejected that jurisdictional contention: "We do not agree that *Prieser* would mandate that the reinstatement claim be brought as a § 1983 action *even if we were to accept the [warden]'s characterization of the claim as a challenge to the conditions of confinement.*" *Id.* (emphasis added).

> In *Prieser*, the Court explicitly left open the possibility that a challenge to prison conditions, cognizable under § 1983, might also be brought as a habeas corpus claim.

Id. (citing *Dickerson v. Walsh*, 750 F.2d 150, 153-54 & n.5 (1st Cir. 1984) ("Federal prisoners have been permitted to contest the conditions of confinement by means of habeas proceedings

even though the conditions were not the cause of detention and even though release was not the appropriate remedy.") (collecting cases)); *see also United States v. DeLeon*, 444 F.3d 41, 59 (1st Cir. 2006) ("If the conditions of incarceration raise Eighth Amendment concerns, habeas corpus is available."); *Miller v. United States*, 564 F.2d 103, 105 (1st Cir. 1997) ("Section 2241 provides a remedy for a federal prisoner who contests the conditions of confinement.").

To understand how Respondents have misread the case law, it helps to revisit *Prieser,* on which Respondents mistakenly rely. Resp. at 21. *Prieser* involved a § 1983 action by state prisoners in New York who claimed that, as a result of disciplinary infractions, they had been wrongfully denied "good time" credit. 411 U.S. at 476. The procedural question whether "habeas corpus is the exclusive remedy in these circumstances" was, as the Supreme Court noted, of "considerable practical importance." *Id.* at 477. Proceeding under § 1983, rather than § 2254, allowed the plaintiffs to avoid the burdensome exhaustion requirements for habeas petitions; put another way, if the state prisoners had filed individual habeas petitions (or a single class petition), they could have not sought intervention by the federal court until they had first sought and been denied relief by the state court. *See id*. at 477, 488 (noting plaintiffs brought § 1983 claims "so as to avoid the necessity of first seeking relief in a state forum").

In resolving that procedural issue, the Supreme Court characterized claims that "attack[] the very duration of . . . physical confinement itself" as "within the core of habeas corpus." *Id.* at 487-88; *see id.* at 498 (holding "state prisoner's challenge to the fact or duration of his confinement . . . is just as close to the core of habeas as an attack on the prisoner's conviction"). Because the plaintiffs brought "core" claims, their "sole federal remedy" was § 2254, not § 1983. But in describing the "core" of habeas, the Supreme Court did not define its border. *See id.* at 499 (stating "we need not in this case explore the appropriate limits of habeas corpus as an

alternative remedy to a property action under § 1983"). It merely held "a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not the fact or length of his custody." *Id.* And the Court offered an important clarification: "*That is not to say that habeas corpus may not also be available to challenge such prison conditions.*" *Id.* (emphasis added).

"*Prieser* . . . in no way decided that habeas corpus would not lie to challenge conditions of confinement; it decided only that a state prisoner who was seeking to challenge the length of confinement could not utilize 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3), to avoid the exhaustion requirements of § 2254(b) and (c)." *Kahane v. Carlson*, 527 F.2d 492, 498 (2d Cir. 1975) (Friendly, J., concurring). "The Court's central concern, in *Prieser* and its progeny, has been with how far the general remedy provided by § 1983 may go before it intrudes into the more specific realm of habeas, not the other way around." *Dockens v. Chase*, 393 F.3d 1024, 1028 (9th Cir. 2004). Thus, by insisting that "conditions" claims may *only* be brought in § 1983 actions, but not § 2241 petitions, Respondents attempt to constrain habeas corpus in a way that the Supreme Court and First Circuit have never endorsed.

Following *Prieser*, other federal appeals courts have agreed with the First Circuit that, although a § 1983 action can only challenge the "conditions" of confinement, but not the "fact or duration" of confinement, a habeas action can challenge either or both. *See, e.g.*, *Dockens*, 393 F.2d at 1027 (explaining "both the majority and dissent in *Prieser* suggested that there are some circumstances concerning prison conditions in which *both* habeas corpus and § 1983 suits may lie") (emphasis in original); *In re U.S. Parole Comm'n*, 793 F.2d 338, 344-45 (D.C. Cir. 1986) (holding "it [is not] necessary that litigation over the conditions of prison life proceed in habeas corpus" but can also establish § 1983 claims); *Boudin v. Thomas*, 732 F.2d 1107, 1111 (2d Cir.

1984) (holding "habeas might sometimes be available to challenge the *conditions* of confinement" and, thus, that petitioner's complaint seeking transfer from administrative segregation to general population could be brought as habeas petition) (emphasis in original); *Roba v. United States*, 604 F.2d 215, 219 (2d Cir. 1979) (holding "challenge to [petitioner's] transfer while seriously ill would be a challenge to the conditions of confinement, for which habeas corpus relief under § 2241 would be available").[14]

Closing the door completely to habeas claims concerning prison conditions that render confinement unlawful would not only run counter to Supreme Court and First Circuit precedent, it would also raise serious constitutional concerns about the Suspension Clause. *See* U.S. Const., Art. I, § 9, cl. 2; *Boumediene v. Bush*, 553 U.S. 723, 746 (2008) (opting "not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ"); *INS v. St. Cyr*, 533 U.S. 289, 305 &

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[14] The overlap in remedies for unconstitutional prison conditions may explain why later cases, including decisions that the Respondents cite, Resp. 21-22, have consistently used qualified or hortatory language when distinguishing between habeas and § 1983 or *Bivens* claims. For example, in *Crooker*, this Court stated: "Claims for inadequate medical treatment are *most properly* characterized as conditions of confinement claims, which are *generally* not cognizable under § 2241; that *most* challenges to the constitutional adequacy of medical care *should* proceed as a civil rights action pursuant to *Bivens*." 2013 U.S. Dist. LEXIS 2071, at *5-6 (emphasis added); *see also Sperling v. Grondolsky*, No. 17-cr-12075, 2018 U.S. Dist. LEXIS 66936, at *3 (D. Mass. Apr. 20, 2018) ("*Typically*, a *Bivens* action is the appropriate means for a federal prisoner to challenge the adequacy of his medical treatment.") (emphasis added); *Sanchez v. Sabol*, 539 F. Supp. 2d 455, 459 n.1 (D. Mass. 2008) ("Notwithstanding the possible overlap of remedies, challenges to medical treatment remain *most squarely* in the realm of civil rights litigation under *Bivens* rather than habeas corpus.") (emphasis added); *Kane v. Winn*, 319 F. Supp. 2d. 162, 213-15 (D. Mass. 2004) ("For most conditions of confinement claims, . . . and particularly for those involving inadequate medical treatment, courts *usually* hold that habeas relief is not available.") (emphasis added). While it may be "generally," "typically," or "usually" true, it is not "necessarily" true. No Supreme Court or First Circuit case lays down such a rule. *See id.* Indeed, in "both state and federal prisoner cases, there are many indications that habeas will in fact lie for certain conditions of confinement claims." *Kane*, 319 F. Supp. 2d at 214.

n.13 (2001) (recognizing "the desirability of avoiding" have to "resolv[e] . . . a serious and difficult constitutional issue" about whether AEDPA and IIRIRA violate the Suspension Clause); *cf. Devitri v. Cronen*, 290 F. Supp. 3d 86, 93 (D. Mass. 2017) (finding jurisdiction under § 2241 and § 1331 in immigration proceedings, because otherwise, "the jurisdictional bar in 8 U.S.C. § 1252(g) . . . would violate the Suspension Clause as applied").

Finally, the COVID-19 pandemic constitutes "extreme circumstances" that justify exercising habeas jurisdiction over Petitioners' claims, even under the narrowest interpretation of habeas. *Crooker*, 2013 U.S. Dist. LEXIS 2071, at *9 (recognizing "extreme circumstances" may inform the "interpretation of the scope of § 2241"); *see Kane*, 319 F. Supp. 2d at 215 (holding habeas jurisdiction exists for "extreme cases" involving medical-treatment claims "where transfer or release might be a necessary remedy"); *see also Crooker v. Grondolsky*, No. 12-cv-12024-RGS, 2012 U.S. Dist. LEXIS 156760, at *4 n.2 (D. Mass. Nov. 1, 2012) (finding no habeas jurisdiction over "medical treatment" claim because the case presented "[n]o extreme circumstances"). This Court should not hesitate to act to prevent a public health catastrophe for the prisoners and staff at FMC Devens as well as the surrounding community.

B. The PLRA Does Not Bar Petitioners' Habeas Claims.

Respondents are incorrect that the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626, "precludes the relief that Petitioners seek." Resp. at 22-26. As defined in the PLRA, "the term 'civil action with respect to prison conditions' . . . does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2). Because Petitioners' COVID-19 claims are "properly before the Court as a habeas action," the PLRA "does not apply." *Wilson*, 2020 U.S. Dist. LEXIS 70674, at *24. Indeed, while "habeas proceedings are essentially civil actions, the Supreme Court has long recognized that the label is ill-fitting and that habeas is in fact a unique creature in the law." *Martin v. Bissonette*, 118 F.3d

871, 874 (1st Cir. 1997) (internal citations omitted). "All the circuits that have addressed this question have agreed that *the PLRA does not apply to habeas petitions*." *Id.* (adopting consensus; emphasis added); *see also Monahan*, 276 F. Supp. 2d at 204 (explaining "PLRA does not apply to section 2241 proceedings").[15]

Regardless, the PLRA's limitations on "release orders," § 3626(a)(3), on which Respondents rely, Resp. at 23-25, would not preclude the relief Petitioners request: ordering the BOP to exercise its existing authority to *recommend* compassionate release (which only underlying sentencing courts could grant), *transfer* inmates to home confinement (a form of BOP custody), or use other authority to reduce the facility's population (*e.g.*, furloughs). Alternatively, use of the Court's inherent habeas bail authority would constitute legal "enlargement" of class members' custody rather than the termination their sentences or "release." *Wilson*, 2020 U.S. Dist. LEXIS 70674, at *25 (explaining order to depopulate FCI Elkton "is not ordering the release of prisoners" because "inmates will remain in BOP custody, but the conditions of their confinement will be enlarged").

II. Failure to reduce substantially the FMC Devens population constitutes deliberate indifference to the known, deadly risk of COVID-19.

"A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 828 (1994).

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[15] The COVID-19 cases on which Respondents rely, Resp. at 24, are inapposite. *See Money v. Pritzker*, Nos. 20-cv-2093 & 2094, 2020 U.S. Dist. LEXIS 63599 (N. D. Ill. Apr. 10, 2020), primarily asserted claims against state prison officials under § 1983 and the Americans with Disabilities Act. *See id*. at *7-8. Likewise, *Plata v. Newsom*, No. 01-cv-01351-JST, 2020 U.S. Dist. LEXIS 70271 (N.D. Cal. Apr. 17, 2020), involved decades-old civil rights (not habeas) litigation against state officials arising from chronic overcrowding and inadequate medical care. On the merits, unlike Respondents, the *Plata* defendants moved 1,300 prisoners "out of dormitory housing 'to available space in other prison[s] to create more space and allow greater physical distancing in the dorms.'" *Id*. at *14-15.

Respondents' submissions describe changes the BOP has made within FMC Devens in response to the deadly risk of COVID-19. Resp. 3-13; 26-34; Declaration of Dr. Megan Shaw [D.E. 32-1] (April 22, 2020), ¶¶ 7-65 ("Shaw Decl."). But even assuming these measures are actually being implemented consistently,[16] they still reflect a deliberate and therefore unconstitutional, choice not to take the more substantial steps that would be required to actually address the risk that Petitioners and the putative Class members face from COVID-19. That is because Respondents neither dispute that "[i]ndividuals must be able to practice physical social distancing for hygiene to have a meaningful impact" on the risk of infection, *see* Declaration of Dr. Joe Goldenson [D.E. 4-1] (April 14, 2020) ("Goldenson Decl.") ¶ 16, nor do they suggest that *any* of their changes enable such distancing within each housing unit of 150 people. Because strict social distancing, including within housing units, is the only effective means to prevent the spread of this fatal disease, this failure constitutes unconstitutional deliberate indifference.

A. Protective measures at FMC Devens are inadequate.

"At this moment, a deadly virus is spreading amongst [FMC Devens] population and staff." *Wilson*, 2020 U.S. Dist. LEXIS 70674, at *20. As of April 26, there was at least one confirmed positive COVID-19 prisoner at FMC Devens.[17] Because FMC Devens is testing only symptomatic prisoners—not those who are pre-symptomatic or asymptomatic—this is likely

[16] Due to the obstacles in communication with prisoners at FMC Devens noted above, undersigned counsel are unable at this time to present additional sworn statements from class members. However, communications that counsel have received indicate that many of the measures described by Dr. Shaw are being implemented inconsistently, if at all.

[17] https://www.bop.gov/coronavirus/.

only "the tip of the iceberg." *See* Brinkley-Rubinstein Decl. ¶ 13.[18] Exposure to a fatal disease that has caused international shuttering of non-essential businesses to avoid infection constitutes an "unsafe, life-threatening condition" that endangers "reasonable safety." *Helling v. McKinney*, 509 U.S. 25, 33, 26 (1993); *cf. Wilson*, 2020 U.S. Dist. LEXIS 70674, at *19 (holding risk of exposure to COVID-19 "obviously" satisfies the objective component of the Eight Amendment).[19]

Critically, the measures detailed in Respondents' submissions – such as increased education, distribution of PPE, and the provision of hygiene supplies – do not meaningfully alleviate this substantial risk of harm at FMC Devens because these measures "are critically deficient with respect to social distancing." Supplemental Declaration of Dr. Joe Goldenson (April 26, 2020) ("Goldenson Supp. Decl.) ¶ 3 (Exhibit G); *see also id.* ¶ 2 (noting these changes have "not meaningfully addressed the fundamental component of social distancing"). While it is true that while COVID-19 "puts everyone at some degree of risk of getting sick," Resp. at 28, not everyone is forced to live within less than six feet of more than 100 individuals. The changes at FMC Devens have not altered that dangerous daily reality for its prisoners. Indeed, while Dr. Shaw describes efforts to provide "separation *between* different units, she does not describe any social distancing *within* each unit, which she herself describes as composed of approximately

[18] *See, e.g., id*. ¶ 12 (noting that when North Carolina's Neuse Correctional Institution tested all 700 prisoners within its facility, it was discovered that 65% of them had COVID-19, and 95% of those were infected were not experiencing symptoms at the time of the test).

[19] *See also Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) ("[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease"); *Powers v. Snyder*, 484 F.2d 929, 931 (7th Cir. 2007) ("[K]knowingly exposing a prisoner to hepatitis or other serious diseases could [] amount to cruel and unusual punishment in violation of the federal Constitution.");

150 prisoners." Goldenson Supp. Decl. ¶ 4. And within units, Respondents force Petitioners and other prisoners to engage in numerous activities, from lining up for meals to obtaining medications to using phones and computers, that involve clustering close together and being exposed to contaminated surfaces.

Respondents do not dispute that dozens of prisoners still "eat, sleep, recreate, shower, and use the bathroom under conditions where it is effectively impossible to follow the CDC's recommendation to maintain six feet of distance between themselves." *Id.* ¶ 5. The CDC recommends this social distancing not as an aspirational ideal, *cf.* Resp. at 30, but as "a cornerstone of reducing transmission of respiratory diseases such as COVID-19" in carceral settings.[20] Consequently, "'[s]heltering in place' under these conditions cannot effectively mitigate the risk of COVID-19 transmission, particularly within the vulnerable population housed at FMC Devens." Goldenson Supp. Decl. ¶ 5.

Respondents' attempt to compare imprisonment at FMC Devens with life among "roommates or family members" is absurd. Resp. at 29. Many members of the community live with other people. But few, if any, live with 150 of them, in close quarters over which they have no meaningful control. What is more, FMC Devens is not a closed environment. Goldenson Supp. Decl. ¶ 8. Medical staff and correctional officers routinely enter and exit the facility. Due to pre-symptomatic and asymptomatic viral shedding, FMC Devens' practice of taking temperatures and screening for symptoms before entry (even assuming the practice is implemented correctly and consistently) does not remove the "daily risk that these officers will

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[20] Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html.

unknowingly bring the disease into the facility with them, where it could spread like wildfire among the vulnerable population that is unable to practice effective social distancing." *Id.* ¶¶ 8-9, 11; *see also* Brinkley-Rubinstein Decl. ¶ 15. As a result, even accounting for the measures described in Respondents' submissions, FMC Devens remains "at high risk of a COVID-19 outbreak at its current population levels." Goldenson Supp. Decl. ¶ 13.

B. Failure to reduce the population constitutes deliberate indifference to the risk of infection with a deadly disease.

With respect to an infectious disease like COVID-19, deliberate indifference is satisfied when prison officials "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year," even when "the complaining inmate shows no serious current symptoms." *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993). Here, that life-threatening condition is the complete inability to practice social distancing at FMC Devens where such a practice is necessary to mitigate the risk of COVID-19 infection. Respondents' knowledge is apparent "from the very fact that the risk [is] obvious," while their actions and inactions reveal their unconstitutional "disregard." *Farmer*, 511 U.S. at 837. Specifically, Respondents' failure to make social distancing possible for the people in their custody is a deliberate choice, as they have declined to exercise powers at their disposal that actually *could* achieve this goal.

The BOP has several tools to reduce its incarcerated population, most directly through its authority to transfer prisoners to home confinement under 18 U.S.C. § 3624(c)(2) [hereinafter Section 3624]. Home confinement under Section 3624 requires approval of neither an Article III judge nor BOP Central, *compare with* 18 U.S.C. 4205(g) and 18 U.S.C § 3582(c)(1)(A), and can be accomplished directly by the Warden and the Regional Residential Reentry Manager. *Cf.* Bourke Suppl. Decl. ¶ 26. Described by Respondents' own expert as BOP's "general authority"

to place prisoners in home confinement, Bourke Decl." ¶ 18, the Bureau's power under Section 3624 is typically constrained only by the statutory requirement that an individual must have 6 months or 10% of their sentence remaining. *See* 18 U.S.C. § 3624(c)(2). Yet even that limitation has now been removed. The "Coronavirus Aid, Relief, and Economic Security Act" (CARES) Act, Pub. L. 116-136, authorizes the Bureau to remove this eligibility requirement "if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau," which Attorney General Barr did on April 3, 2020.[21] Eliminating this final statutory limitation on the BOP's authority, the Attorney General instructed the BOP "to immediately review all inmates who have COVID-19 risk factors" *including* those who were not previously eligible for transfer due to time restrictions.[22]

But the BOP forthrightly admits that it has chosen, during this pandemic, to implement a policy that excludes vast numbers of Class members as candidates for home confinement. While the Attorney General listed "discretionary factors" to be considered in assessing prisoners for release,[23] the Bureau is carrying out a policy that denies home confinement to prisoners who do not meet even one of ten "*required criteria*," such as "hav[ing] no incident reports in the past 12 months (regardless of severity level)" and "ha[ving] served 50% of their sentence." Resp. 18-19 (emphasis added). For example, the Bureau refused to transfer Petitioner Gordon to home confinement – and thus continues to subject him to the risk of catching and dying from COVID-

[21] Attorney General William Barr, Memorandum for Director of Bureau of Prisons [D.E. 4-6] (Apr. 3, 2020).

[22] *Id*.

[23] *Id*.

19 in prison – solely because he has served 36.6% rather than 50% of his sentence. Resp. 19-20; Bourke Suppl. Decl. ¶ 28.

Because of its deliberate choices, the Bureau has utterly failed to release people in any meaningful numbers. *See* Brinkley-Rubinstein Decl. ¶ 20. The 1,027 prisoners who have been transferred to home confinement since Attorney General Barr's April 3 directive encouraging the Bureau to use this authority represents just *half of one percent* of the people in BOP custody on April 1. *See* Brinkley-Rubinstein Decl. ¶ 20. The numbers at FMC-Devens are similarly paltry: out of 118 prisoners reviewed for home confinement, 91 (or 77%) were excluded as a matter of Bureau policy; eight (or 6.7%) were approved; and just two (or 1.7%) have transfer dates for this upcoming week. Bourke Suppl. Decl. ¶ 26. Even if the Bureau was unaware of the impact of its actions three weeks ago, it now must know that its self-imposed process is entirely incapable of achieving the necessary population reductions in time. Its continuation of the status quo in the face of such abject failure constitutes deliberate indifference. *Cf. Wilson*, 2020 U.S. Dist. LEXIS 70674, at *21 (finding deliberate indifference when defendant "has altogether failed to separate its inmates at least six feet apart").

Finally, Respondents compound their deliberate indifference by requiring the prisoners approved for transfers to first quarantine in solitary confinement for two weeks prior to transfer. *See* Bourke Decl. ¶ 22. This policy is unnecessary, as Attorney General Barr himself acknowledged the facility's discretion to allow prisoners to quarantine at home.[24] It is "ineffective as a health measure" to "constrain the spread of COVID-19 in a carceral setting. Prins Decl." ¶¶ 5, 10; *see also id.* at ¶ 5 (noting "I am unaware of any studies supporting solitary

[24] Attorney General William Barr, Memorandum for Director of Bureau of Prisons [D.E. 4-6] (Apr. 3, 2020).

confinement as a disease containment strategy in jails or prisons"). And it is inhumane. *See id.* ¶ 10. "Based on its severe psychological and physiological impacts"—which can manifest in as little as 10 days—"solitary confinement is frequently described as akin to torture." *Id*. ¶¶ 12, 13. After running the gauntlet of BOP's approval process, a prisoner "should not have to choose between continuing to face a heightened risk of COVID-19 infection within a prison, or experiencing the trauma of two-weeks solitary confinement before they can be released into the community." *Id*. ¶ 18. The imposition of this "illogical and self-defeating policy" which "appears to be inconsistent with the directive of the Attorney General, ungrounded in science, and a danger to both [prisoners] and the public health of the community," *United States v. Scparta*, No. 18-cr-578-AJN, 2020 U.S. Dis. LEXIS 68935, at *5-10(S.D.N.Y. Apr. 19, 2020), further violates the Eighth Amendment.

III. Petitioners are entitled to a TRO and/or preliminary injunction.

A. Petitioners are likely to succeed on the merits.

Petitioners have established a strong likelihood of success on the merits of their Eighth Amendment claims, as set forth in Section II above.

B. Petitioners will be irreparably harmed if this Court does not act.

Respondents argue that the mere "possibility" of harm does not warrant relief. Resp. at 40. But in "this moment of worldwide peril from a highly contagious pathogen, the government cannot credibly argue that [prisoners] face not 'substantial risk' of harm (if not 'certainly impending') from being confined in close quarters in defiance of the sound medical advice that all other segments of society now scrupulously observe." *Savino*, 2020 U.S. Dist. LEXIS 61775 at *13. Indeed, the "risk of contracting COVID-19 and the resulting complications, including the possibility of death, is the prototypical irreparable harm." *Banks*, 2020 U.S. Dist. LEXIS 68766,

at *37; *see also Wilson,* 2020 U.S. Dist. LEXIS 70674, at *21 (finding irreparable harm based on risk of COVID-19).

Respondents argue that Petitioners cannot show that, if released, "they will be safer from the risk of infection or have access to adequate care if infected." Resp. at 41. But the baseline risk of infection in society at large, and deficiencies in the U.S. health care system, cannot justify subjecting Petitioners to extraordinarily high risk in a dense carceral setting where social distancing is impossible. "From both a practical and epidemiological standpoint, sheltering at home with a handful of people in a space without daily staff shift changes is qualitatively different from living in a congregant environment with 150 other people and staff that circulate between the facility and the community every single day." Goldenson Supp. Decl. ¶12; *see also id.* ¶ 13 (noting that even accounting for "all of the measures articulate in Dr. Shaw's declaration . . . FMC Devens is at high risk of a COVID-19 outbreak at its current population levels"). Nor can the theoretical availability of individual applications for compassionate release or home confinement, Resp. at 41, remove the dangers to the Class, particularly where Respondents themselves, control important gateways to those mechanisms that they are failing to use. As the static tally of prisoners in the Medical Center and Camp attests, Respondents are not working to reduce the danger of COVID-19 at FMC Devens by reducing the population, notwithstanding Attorney General Barr's mandate to do so.

In this case, "[g]iven the gravity of [Petitioners'] asserted injury, as well as the permanence of death … [Petitioners] have satisfied the requirement of facing irreparable harm unless injunctive relief is granted." *Banks,* 2020 U.S. Dist. LEXIS 68766, at *39.

C. The balance of the equities and the public interest favor relief.

Respondents argue that "[t]he public would be placed at risk by release of criminally convicted inmates, without a release plan or conditions of release." Resp. at 42. They ignore that

Respondents, themselves could continue to exercise control over *how* to decrease population density — whom to release and under what conditions. *See Wilson*, 2020 U.S. Dist. LEXIS 70674, at *22-24 ("Petitioners do not ask this Court to throw open the gates to the prison and leave the inmates that are released to fend for themselves. Instead, Petitioners seek 'release' that consists of moving vulnerable inmates to various other types of confinement so that they are no longer at risk of dying from the virus"); *cf. Savino*, 2020 U.S. Dist. LEXIS 61775, at *23 ("The question is not so much whether any particular Detainee should be released …. Nor does it matter *how* the density of Detainees is [r]educed….").

The public safety risk of recidivism, Resp. at 42, is grossly overstated. Prisoners transferred to home confinement remain in BOP custody, subject to conditions and supervision. Every federal prisoner ultimately released from a custodial sentence also has a term of supervised release to follow, monitored by a local federal Probation Office. Moreover, the dangers posed by releasing elderly prisoners in their 70s and 80s, prisoners with debilitating medical conditions, and those who have no history of violence are negligible. And for prisoners set to finish their sentences in the next 18 months, whatever their offenses of conviction or prior histories, acceleration of that process could have little marginal effect on public safety.

Although some prisoners may lack a place to go, many others, such as Petitioners Grinis and Gordon, have families who could pick them up with an hour's notice (or with whom transportation arrangements could be made in a matter of days) and who could provide safe accommodations in private homes where prisoners could shelter-in-place and, if necessary, self-isolate. The inability of the Respondents to effectuate prompt community placements for those who need it is not excuse for continuing to perpetuate unconstitutional confinement.

Moreover, "granting injunctive relief which lessens the risk that Plaintiffs will contract COVID-19 is in the public interest because it supports public health." *Banks*, 2020 U.S. Dist. LEXIS 68766, at *39-40; *see also Wilson*, 2020 U.S. Dist. LEXIS 70674, at *22-24 ("there is a continued risk of harm to others, including prison staff, if inmates remain in the prison and the virus continues to thrive among the dense inmate population"). FMC Devens has outpatient care capacity only. *See* Shaw Decl. ¶ 2 (it provides "ambulatory care" and does "minor office-based procedures"). It has only 2 exam rooms and 6 physicians for nearly 1200 inmates, *id*. ¶¶ 2-3, the majority of whom will likely soon become infected. FMC Devens cannot actually *treat* COVID infections. All ill prisoners, therefore, will need to be transferred to local hospitals and will compete for limited healthcare resources in the surrounding community.

IV. The Court should certify the proposed Class and Subclasses.

Respondents' arguments against class certification, Resp. at 43-46, ignore that one court in this district and at least three other federal courts have already either certified, provisionally certified, or granted broad temporary relief applicable to a class of detained persons based on deliberate indifference claims concerning the threat of COVID-19. *See Savino*, 2020 U.S. Dist. LEXIS 61775, at *16-26 (certifying class of all ICE detainees at Bristol County jail, after provisionally certifying subclasses); *Wilson*, 2020 U.S. Dist. LEXIS 70674, at *15-19 & n.48 (conditionally certifying sub-class of inmates at FCI Elkton who are 65 years or older or have medical conditions, for purposes of preliminary injunction); *Banks*, 2020 U.S. Dist. LEXIS 68766, *13 (partially granting TRO to petitioners in D.C. correctional facilities without ruling on class certification but noting that named petitioners "have pled an injury which was caused by Defendants and is redressable by the relief requested" because "steps taken to reduce the risk of infection among any inmates… would also reduce the named Plaintiffs' risk"); *Roman*, No. 20-cv-00768-PVC (C. D. Cal. Apr. 23, 2020), D.E. 52 (provisionally certifying class of all detainees

at ICE detention facility). Respondents do not counter the analysis in any of these cases, much less attempt to justify the creation of an intra-district split of authority.

Respondents argue that because the proposed class-members have different vulnerabilities to COVID-19 and different characteristics that may bear on release, "[t]here simply is no commonality and typicality." Resp. at 44-45. But any such differences are immaterial for purposes of class certification. *See Savino*, 2020 U.S. Dist. LEXIS 61775, at *23 ("The case law supports a finding of commonality for class claims against dangerous detention conditions, even when some detainees are more at risk than others."); *Roman*, *supra*, D.E. 52 at 4 (explaining that differences among petitioners are "immaterial" and shared legal issues are sufficient even if remedies may vary); *Wilson,* 2020 U.S. Dist. LEXIS 70674, at *17 (noting that class-wide relief would still permit "individualized determination as to where each subclass member should be placed, because "Petitioners do not seek to open the prison gates to allow its inmates to run free," and the remedy "might look different for different inmates").

As the First Circuit has explained, "what really 'matters to class certification . . . is not the raising of common 'questions' as much as 'the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13, 28 (1st Cir. 2019) (quoting *Wal-Mart v. Dukes*, 564 U.S. 338, 350 (2011)) (emphasis and ellipsis in original). Accordingly, class certification is warranted when the unconstitutional harm is created by a common set of policies or practices, including prison polices and practice. *See id.* (citing *Parsons v. Ryan*, 754 F.3d 657, 679 (9th Cir. 2014) (prison case)). The unconstitutionality here – Respondents' failure to ensure social distancing despite the known dangers of COVID-19 – "can be [resolved] in a single stroke." *Parsons*, 754 F.3d at 679. Decreasing population density to permit physical distancing

will resolve the unconstitutional harm *for the entire class*. To the extent the existing named petitioners could be somehow insufficiently "typical" of the class (an argument the Respondents have not explained or developed), additional petitioners could be joined or substituted – indeed, many Class members have already filed *pro se* requests to do just that.

Respondents also question adequacy of representation, arguing that Petitioners "do not have an identical interest[ ] and in fact are ineligible for release" and therefore their interests conflict with those of the class. Resp. at 45. Not so. The core claim of this case is that reducing density to permit social distancing mitigates the risk of infection and death for *all* class-members, those who are released *and* those who remain. *See Savino*, 2020 U.S. Dist. LEXIS 61775, at *25 (ruling class of all detainees at detention facility would be entitled to a "uniform remedy" – a reduction in population – even though some would be released or transferred from the facility and some would not).

CONCLUSION

For the foregoing reasons, as well as those set forth in Petitioner's opening papers, the Court should deny Respondents' request to dismiss the Petition, order emergency relief, and certify the proposed class.

Respectfully submitted,

ALEXANDER GRINIS, MICHAEL GORDON, ANGEL SOLIZ,
and others similarly situated,

By their attorneys,

/s/ William W. Fick

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on April 27, 2020.

/s/ William Fick

Exhibit A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ALEXANDER GRINIS, MICHAEL GORDON, and ANGEL SOLIZ, on behalf of themselves and those similarly situated, Petitioners, v. STEPHEN SPAULDING, Warden of Federal Medical Center Devens, and MICHAEL CARVAJAL, Director of the Federal Bureau of Prisons, in their official capacities, Respondents.	Civil Action No. 1:20-cv-10738

DECLARATION OF PROFESSOR LAUREN BRINKLEY-RUBINSTEIN

Pursuant to 28 U.S.C. § 1746, I, Professor Lauren Brinkley-Rubinstein, declare as follows:

1. I am an Assistant Professor of Social Medicine at UNC-Chapel Hill. I received my undergraduate degree in sociology from Western Kentucky University and my doctorate in community research and action from Vanderbilt University. I completed a post-doctoral fellowship studying HIV, incarceration and other complications of substance abuse in the infectious diseases division of the Warrant Alpert Medical School at Brown University. My CV is attached as Exhibit 1.

2. For the past decade, my work has centered on assessing the health impact of incarceration, with a particular focus on infectious and communicable diseases. Much of my work has focused on HIV transmission, prevention and treatment in the carceral setting. In this capacity, I have become very familiar with the conditions of confinement, including housing and health care, in jails and prisons.

3. Given my particular expertise, my work has almost entirely shifted to studying the transmission of COVID-19 in the carceral setting since the outbreak of the pandemic. Over the past month, I have been collecting all available data from state and federal prisons to better understand the spread of COVID-19 in the carceral setting. Specifically, I have been trying to discern prevalence rates, the transmission and spread of COVID-19 in prisons over time, and how prisons are related to community spread of the disease.

4. We now know that a significant number of individuals infected with COVID-19 either do not exhibit symptoms until several days after they are infected (what is known as pre-symptomatic) or never exhibit any symptoms at all (what is known as asymptomatic).[1] The CDC Director Dr. Robert Redfield estimates that 25% of people with COVID-19 may be asymptomatic.[2]

5. Critically, both asymptomatic individuals and pre-symptomatic individuals can and do spread the virus through viral shedding. Indeed, even for individuals who eventually become symptomatic, the CDC estimates that viral transmission can occur up to 48 hours *before* any symptoms.[3]

6. Unless asymptomatic individuals are tested, this silent transmission of the disease can lead to a rapid spreading of COVID-19 that is entirely hidden until it suddenly, and fatally, explodes into view in a massive outbreak. For example, according to a new model of the spread of the disease by researchers at Northeastern University, while there were only 23 confirmed cases of coronavirus in Boston, Seattle, Chicago, San Francisco and New York on March 1, 2020, there could have been as many as 28,000 infections in those cities by that time.[4]

7. Social distancing is the primary way to prevent the transmission of COVID-19. Recent research has shown that asymptomatic spread is rampant in congregant living spaces where social distancing is not possible.

8. In an April 23, 2020 press release announcing the expansion of asymptomatic testing "at select facilities," the BOP itself acknowledges, "asymptomatic inmates who test positive for COVID-19 can transmit the virus to other inmates."[5]

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[1] Centers for Disease Control and Prevention, *Recommendations for Cloth Face Covers*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html#studies.

[2] Apoorva Mandavilli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders,* N.Y. Times (Apr. 20, 2020), https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html.

[3] Sam Whitehead and Carrie Feibel, *CDC Director on Models for the Months to Come: 'This Virus is Going to Be With Us'*, NPR (Mar. 31, 2020), https://www.npr.org/sections/health-shots/2020/03/31/824155179/cdc-director-on-models-for-the-months-to-come-this-virus-is-going-to-be-with-us.

[4] Benedict Carey and James Glanz, *Hidden Outbreaks Spread Through U.S. Cities Far Earlier Than Americans Knew, Estimates Say*, N.Y. Times (Apr. 23, 2020), https://www.nytimes.com/2020/04/23/us/coronavirus-early-outbreaks-cities.html.

[5] Press Release, *Bureau of Prisons Expands COVID-19 Testing*, (Apr. 23, 2020), attached as Exhibit 2.

9. I have read the declaration that Dr. Megan Shaw, Clinical Director at FMC Devens, submitted in this case. Based on my review, it is my understanding that FMC Devens is testing only symptomatic prisoners. *See* Shaw Decl. ¶¶ 23, 26.

10. In my professional opinion, this testing protocol is dangerously flawed.

11. It is impossible to know the breadth of the COVID-19 infection rate within FMC-Devens based on testing that is limited to prisoners with symptoms of the disease. Based on my research, I know that you can only discover the true rate of COVID-19 infections within a facility by testing both symptomatic and asymptomatic prisoners.

12. For example, when North Carolina's Neuse Correctional Institution tested all 700 prisoners in its facility, it was discovered that at least 65% had the virus.[6] Ninety-five percent of those infected with COVID-19 were not experiencing symptoms at the time of their test.[7] We have seen similar results in Michigan—where broad testing at Lakeland Prison revealed that 73% of the first 535 prisoners tested positive—and Ohio—where universal testing at Marion Correctional Institution and Pickaway Correctional Institution revealed 2,000 and 1,500 COVID-19 positive prisoners, respectively.[8]

13. In contrast, according to my review of publicly available data, as of April 26, 2020 FMC-Devens was reporting a single confirmed prisoner case of COVID-19.[9] But because the facility is testing only symptomatic prisoners, this data point is not meaningful. It certainly does not mean that the facility is safe. Everything we know about the presentation and transmission of this disease points to the fact that when you have one confirmed case under a symptomatic protocol, it is fair to assume that there are many more cases at that facility. In my professional opinion, this single confirmed case is the tip of the iceberg at FMC Devens.

14. Relying exclusively on symptomatic testing is dangerous not just for the prisoners within FMC Devens, but for the staff, their families, and the surrounding community as well.

15. Based on my review of Dr. Shaw's declaration, FMC Devens is taking the temperature of every staff member, and screening them for symptoms, before they can enter the facility. Shaw Decl. ¶ 25. Due to asymptomatic and pre-symptomatic viral shedding, this will not prevent the virus from entering the facility. Similarly, the symptomatic testing of prisoners will not protect staff members from contracting the virus from prisoners and taking it back to

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[6] Cary Aspinwall and Joseph Neff, *These Prisons are Doing Mass Testing for COVID-19 – And Finding Mass Infections*, The Marshall Project (Apr. 24, 2020), https://www.themarshallproject.org/2020/04/24/these-prisons-are-doing-mass-testing-for-covid-19-and-finding-mass-infections.
[7] *Id.*
[8] *Id.*
[9] BOP, *COVID-19 Cases,* https://www.bop.gov/coronavirus/.

their family members and communities. The unchecked spread of the virus inside FMC Devens will therefore lead to the spread of the virus outside the facility.

16. We have already seen the grave consequences of insufficient testing in congregant settings through the rapid spread of COVID-19 in nursing homes throughout the country.[10] On April 24, 2020, the national number of nursing home deaths from COVID-19 surpassed 11,000.[11] New York Governor Andrew Cuomo accurately described the spread of COVID-19 in nursing homes as "fire through dry grass."[12]

17. Reflecting this understanding, the Massachusetts Department of Public Health (DPH) now recommends that nursing home facilities using it mobile testing program "order tests for all residents and staff, NOT just symptomatic individuals."[13]

18. When it comes to disease transmission, jails and prisons are similar to nursing homes. They both house a large number of individuals in close quarters. And much like nursing homes, the incarcerated population is more vulnerable to COVID-19 than the general population due to age and medical risk factors.

19. It is therefore not surprising that we have also seen large outbreaks at BOP facilities that have not decreased their population to allow for social distancing. As of April 25, 2020, BOP was reporting 217 confirmed COVID-19 positive prisoners and 2 COVID-19 prisoner deaths at FMC Forth Worth, as well as 51 confirmed COVID-19 positive prisoners, 48 confirmed COVID-19 positive staff and 6 COVID-19 prisoner deaths at FCI Elkton.[14]

20. These outbreaks make it all the more troubling that since the Attorney General's April 3 memo encouraging the BOP to use home confinement to decrease its prison population, "the number of people allowed to serve the rest of their sentence in home confinement went up by only 1,027" which is "about half of one percent of the more than 174,000 people in the bureau's custody at the start of the month."[15] Throughout the month of April, the total federal prison population decreased by approximately 3,400 people—including people

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[10] Associated Press, *11,000 Deaths: Ravaged Nursing Homes Plead for More Testing*, N.Y. Times (Apr. 23, 2020), https://www.nytimes.com/aponline/2020/04/23/us/ap-us-virus-outbreak-nursing-home-testing.html.
[11] *Id.*
[12] *Id.*
[13] Massachusetts COVID-19 Nursing Home, Rest Home, and ALR Mobile Testing Program, Revised Guidance: April 13, 2020, attached as Exhibit 3.
[14] BOP, *COVID-19 Cases,* https://www.bop.gov/coronavirus/.
[15] Joseph Neff and Keri Blakinger, *Few Federal Prisoners Released Under COVID-19 Emergency Policies*, The Marshall Project (Apr. 25, 2020), https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies.

whose sentences ended in April—which is 300 *less* than the 3,700 people the BOP released on average every month last year.[16]

21. The same reasons that animate DPH's testing recommendation suggests that a similar approach would be necessary to understand the size of the COVID-19 infection rate at FMC Devens. There is no reason to take a different approach to protect the health of those who live in nursing homes than to protect the health of those who live within our federal prisons.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 26th day of April 2020.

Lauren Brinkley-Rubinstein, PhD

[16] *Id.*

Exhibit 1

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EDUCATION

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01/12 – 05/15	Ph.D., Community Research and Action Vanderbilt University, Nashville, TN
05/13	Graduate Certificate, Scholarship of Teaching and Learning Scholars Vanderbilt, University, Nashville, TN
08/09 – 12/11	M.S., Community Research and Action Vanderbilt University, Nashville, TN
08/04 – 12/06	M.A., Criminal Justice Policy City University of New York (CUNY), John Jay College of Criminal Justice, New York, NY
08/01 – 05/04	B.A., Sociology Western Kentucky University, Bowling Green, KY

PROFESSIONAL EXPERIENCE

04/19—Present	Adjunct Assistant Professor of Health Behavior, Gillings School of Public Health, University of North Carolina at Chapel Hill
06/16 – Present	Assistant Professor of Social Medicine, University of North Carolina at Chapel Hill
06/16 – Present	Core Faculty in the Center for Health Equity Research, University of North Carolina at Chapel Hill
06/16 – Present	Research Fellow at the Sheps Center for Health Services Research, University of North Carolina at Chapel Hill
06/16 – Present	Affiliated Faculty at the Center for Prisoner Health and Human Rights at Brown University
09/17 – Present	Health Criminology Research Consortium Faculty Fellow, Saint Louis University

09/07 – 6/10 Research Associate, Metro Nashville Public Health Department

08/05 – 12/06 Research Assistant, Vera Institute of Justice

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Books and Chapters

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Commentaries

Brinkley-Rubinstein, L. (2014). Drug users need treatment, not punishment, *The Tennessean,* 14A.

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GRANTS

Active

U01DA050442 (Brown University) 08/2019 – 07/2024
$11,457,579
National Institute of Drug Abuse
Multiple Principal Investigator (15% of salary)
Using Implementation Interventions and Peer Recovery Support to Improve Opioid Treatment Outcomes in Community Supervision
We propose to conduct an implementation and outcome evaluation to improve medication assisted treatment uptake at sites in North Carolina, Rhode Island, and Pennsylvania.

UG1DA050072-01 (Yale University) 08/2019 – 07/2024
$11,828,050
Site Principal Investigator and Co-Investigator (20% of salary)
Transitions Clinic Network: Post Incarceration Treatment, Healthcare, and Social Support Study
We propose to adapt the Transitions Clinic Network model to use community health workers to connect individuals leaving jails in New Haven, Durham, San Juan, the Bronx, and Milwaukee to community-based medication assisted treatment.

R01MD013573 (University of North Carolina, Chapel Hill) 09/2018 – 08/2023
$2,721,528
National Institute of Minority Health Disparities
Principal Investigator (20% of salary)
The Southern Pre-Exposure Prophylaxis (PrEP) Cohort Study: Longitudinal PrEP initiation and adherence among Parolees.
In this study, we are conducting an observational PrEP cohort study among parolees in three Southern states: NC, KY, and FL.

U54MD002329 11/2017 – 10/2022
$1,402,893
National Institute of Minority Health Disparities (University of Arkansas for Medical Sciences)
Co-Investigator (20% of salary)
Linking High-Risk Jail Detainees to HIV pre-exposure prophylaxis: Pre-Exposure Prophylaxis (PrEP)-LINK
In this study, we are assessing the facilitators and barriers to PrEP uptake among high-risk jail detainees to optimize a future PrEP intervention.

R01AI129731 (University of North Carolina, Chapel Hill) 07/2017 – 06/2021
$681,959
National Institute of Allergy and Infectious Disease
Co-Investigator (7% of salary)
Leveraging Big Data to understand and improve continuity of care among HIV positive jail

Inmates
In this study, we are developing a database combining jail and state HIV records, use the database to examine burden of known HIV in county jails, assess inmates' use of HIV services before, during and after incarceration, and identify inmate and facility factors associated with services before, during and after incarceration.

R34MH114654 (Brown University) 07/2017 – 06/2020
$681,959
National Institute of Drug Abuse
Co-Investigator (5% of salary)
Linkage to Community-Based HIV Pre-Exposure Prophylaxis Care Among at Risk Women upon Release from Incarceration
In this study, we will test a HIV prevention intervention among women at the Rhode Island Department of Corrections.

Completed

Robert Wood Johnson Foundation (University of North Carolina at Chapel Hill) 11/2018-11/2019
$149,245
Principal Investigator (no salary support)
Focusing a special issue of the American Journal of Public Health on how incarceration exacerbates health disparities
This grant funds a special issue of the American Journal of Public Health and pays for the coordination of the issue.

R21DA043487-Supplement 10/2018 – 09/2019
$150,000
Co-Investigator (7% of salary)
Adapting an Agent Based Model to Understand the Impact of Medication Assisted Treatment Accessibility during Prison and Jail on Overdose Outcomes in the Community
In this study, we are using agent-based modeling to demonstrate the effect that access to medication assisted treatment while incarcerated has on overdose outcomes in the community post-release.

Center for AIDS Research Supplement 09/2018 – 08/2019
$150,000
Co-Principal Investigator (15% of salary)
PrEP-aring for Prison Release
In this study, we are conducting qualitative research on how to adapt a community health worker intervention to aid in linkage to PrEP care after release from prison.

R01MD010403 (Yale University) 09/2016 – 08/2019
$1,314,190
National Institute of Minority Health Disparities
Co-Investigator (9.8% of salary)
Building Resilient Neighborhoods and Positive Social Networks to Prevent Gun Violence

We are applying a novel framework to mitigate the impact of gun violence in New Haven neighborhoods by defining gun violence as a chronic, manmade disaster, where prevention efforts can be planned and include the participation of neighborhood residents most impacted.

R21DA043487 (Brown University) 08/2017 – 07/2019
$476,602
National Institute of Drug Abuse
Co-Investigator (10% of salary)
Evaluating the implementation and impact of a novel medication assisted treatment program in a unified jail and prison system
In this study, we are evaluating the implementation and impact of a comprehensive medication assisted treatment program at the Rhode Island Department of Corrections.

The John and Laura Arnold Foundation (Brown University) 08/2017 – 07/2019
$296,234
Improving the Treatment of Opioid Use Disorders among People Transitioning through Correctional Settings
Co-Investigator (10% of salary)
In this study, are evaluating the post-release treatment follow-up of individuals who participate in the Rhode Island Department of Corrections comprehensive medication assisted treatment program.

UNC Committee of Faculty Research and Scholarly Leaves 01/2018 – 01/2019
$10,000
Principal Investigator (no salary support)
Small Grant to supplement other research activities
This is an internal UNC grant that will be used to pay for research assistance.

UNC Center for AIDS Research Developmental Award 01/2018 – 12/2018
Principal Investigator (no salary support)
Exploring the use of pre-exposure prophylaxis among people who inject drugs in Durham County, North Carolina
This project includes conducting qualitative interviews with people who inject drugs to explore HIV risk behaviors, drug use trajectory, and interest in pre-exposure prophylaxis.

R25DA037190 (Brown University)
National Institute of Drug Abuse 05/2015 – 05/2017
Trainee
Criminal Justice Research Program on Substance Use and HIV
This program provided mentoring to promote training in clinical research for new investigators in clinical research with a focus on HIV/AIDS, criminal justice, substance use, mental illness, global health and health disparities.

R25DA035692 (University of California, Los Angeles)
National Institute of Drug Abuse 05/2015 – 05/2017
Trainee
HIV/AIDS, Substance Abuse and Trauma Training Program

This program provided multi-disciplinary, state-of-the-art training to better equip postdoctoral fellows and early career investigators to submit and receive grant funding.

T32DA013911 (Brown University)
National Institute of Drug Abuse 05/2015 – 06/2016
Trainee
Training in HIV and Other Infectious Consequences of Substance Abuse
This training program provided multi-disciplinary training in clinical research in the areas of prevention, diagnosis and treatment of HIV and other infectious aspects of substance abuse.

INVITED PRESENTATIONS

Brinkley-Rubinstein, L. (2019, October). *Incarceration as a Social Determinant of Health.* Invited talk at University of Buffalo, Buffalo, NY.

Brinkley-Rubinstein, L. (2019, March). *HIV infection among people who are incarcerated.* Invited talk at the Southeast AIDS Education and Training Center coordinated by Vanderbilt University, Nashville, TN.

Brinkley-Rubinstein, L. (2019, March). *Barriers and facilitators to implementation of a medication assisted treatment program in a statewide unified correctional setting in Rhode Island.* Invited talk at the Mental Health Seminar Series at Duke University, Durham, NC.

Brinkley-Rubinstein, L. (2019, January). Fentanyl-contaminated heroin among communities of color. Invited talk at the Drug Policy Alliance, New York, NY.

Brinkley-Rubinstein, L. (2018, October). *Opioid use among incarcerated populations.* Invited talk at St. Louis University, St. Louis, MO.

Brinkley-Rubinstein, L. (2018, October). *Initiating medication assisted treatment in incarcerated populations.* Invited talk at the Vermont Center on Behavior and Health, Burlington, VT.

Brinkley-Rubinstein, L. (2018, September). *Understanding substance use, mental illness, and involvement in the criminal justice system: Theory, interventions, and opportunities.* Invited talk at the AHEC, Raleigh, NC.

Brinkley-Rubinstein, L. (2018, June). *Introduction to the social determinants of health and health equity.* Center for Health Equity Research Summer Training Program, University of North Carolina at Chapel Hill, Chapel Hill, NC.

PEER-REVIEWED CONFERENCE PRESENTATIONS

Brinkley-Rubinstein, L. (2019, March). Solitary Confinement is Associated with Increased Risk of Death. Presented at the Academic and Health Policy Conference on Correctional Health. Las Vegas, NV.

Neher, T.L., **Brinkley-Rubinstein, L.,** Marshall, S.A., Zielinski, M., & Zaller, N.D. (2018,

November). *HIV risk factors and PrEP knowledge of incarcerated women in a county jail.* Presented at the meeting of the American Public Health Association, San Diego, CA.

Macmadu, A., **Brinkley-Rubinstein, L**, & Rich, J. (2018, March). *Fentanyl*. Paper presented at the Academic and Health Policy Conference on Correctional Health. Houston, TX.

Ashkin, E., Rosen, D., & **Brinkley-Rubinstein, L**. (2018, March). *NC Re-missioning*. Presented at the Academic and Health Policy Conference on Correctional Health. Houston, TX.

Zaller, N., **Brinkley-Rubinstein, L.,** Cloud, D., & Peterson, M. (2018, March). *The CJ continuum for opioid users at risk of overdose.* Presented at the Academic and Health Policy Conference on Correctional Health. Houston, TX.

Brinkley-Rubinstein, L. (2017, March). *Exploring knowledge, interest, and barriers related to PrEP use among criminal justice involved men who have sex with men.* Presented at the Academic and Health Policy Conference on Correctional Health. Atlanta, GA.

Marshall, B.D.L., King, M., Macmadu, A., **Brinkley-Rubinstein, L.,** Sanchez, J., Beckwith, C.G., Altice, F.L., & Rich, J.D. (2016, June). *The effect of incarceration on HIV care continuum outcomes in the United States: An agent-based modeling approach.* Presented at the Epidemiology Congress of the Americas, Miami, FL.

Brinkley-Rubinstein, L. & Eckstrand, K. (2015, November). *Exploring the health experiences of transgender individuals in a local jail.* Presented at the American Public Health Association Annual Meeting, Chicago, Illinois.

Brinkley-Rubinstein, L. (2015, March). *Health and incarceration of HIV positive individuals.* Presented at the Academic and Health Policy Conference on Correctional Health. Boston, Massachusetts.

Brinkley-Rubinstein, L. (2014, November). *Measuring the health impact of incarceration on the HIV positive individuals.* Presented at the American Public Health Association Annual Meeting, New Orleans, Louisiana.

Brinkley-Rubinstein, L., & Griffith, D. (2014, November). *How do African American men define health and what implications do these definitions have for health practices?* Presented at the American Public Health Association Annual Meeting, New Orleans, Louisiana.

Brinkley-Rubinstein, L. (2014, October). *The usefulness of mixed methods in assessing the health of formerly incarcerated individuals*. Presented at the American Evaluation Association Annual Meeting, Denver, Colorado.

Brinkley-Rubinstein, L. (2014, March). *Measuring the health impact of incarceration on HIV positive individuals.* Presented at the Academic and Health Policy Conference on Correctional Health, Houston, Texas.

Griffith, D.M., **Brinkley-Rubinstein, L.,** & Metzl, J. (2013, December). *How do African American men*

define health and what implications do these definitions have for health practices? Presented at the meeting of International Congress on Men's Health, Arlington, Virginia.

Brinkley-Rubinstein, L. (2013, October). *Dual identities of formerly incarcerated HIV positive individuals and the impact on health.* Presented at the American Public Health Association Annual Meeting, Boston, Massachusetts.

Brinkley-Rubinstein, L. & Turner, W.L. (2013, August). *Incarceration as an exacerbation of worsening health among African American HIV positive men.* Presented at the Annual Meeting of the American Sociological Association, New York, New York.

Brinkley-Rubinstein, L. (2013, March). *Difficult pasts, uncertain futures: An exploration of the lived experiences of formerly incarcerated HIV positive African American males.* Presented at the 5th Annual Health Disparities Conference at Teachers College, Columbia University, New York, New York.

Brinkley-Rubinstein, L. & Turner, W.L. (2013, March). *Understanding the compounding effect of stigma among formerly incarcerated HIV positive African Americans: A qualitative exploration.* Presented at the 6th Academic and Health Policy Conference on Correctional Health, Chicago, Illinois.

Brinkley-Rubinstein, L. & Mann, A. (2013, February). *The complexity of culture: Using an intersectional and social ecological lens to examine the impact of culture on health disparities.* Presented at the Cross Cultural Health Care Conference, Honolulu, Hawaii.

Brinkley-Rubinstein, L. (2012, October) *Incarceration as a catalyst for worsening health.* Presented at the Annual Meeting of the American Public Health Association, San Francisco, CA.

Meinbresse, M. & **Brinkley-Rubinstein, L.** (2012, September). *Exploring the incidence of violence among high-risk homeless populations.* Presented at the National Association for Community Health Centers Annual Conference. Orlando, FL.

Craven, K., Geller, J., Doykos, B., O'Connor, B., **Brinkley-Rubinstein, L**. & Bess, K. (2012, February). *Contextual barriers to collective action and community organizing in a high poverty, high crime neighborhood.* Presented at the Annual Meeting of the Association of American Geographers, New York, NY.

Brinkley-Rubinstein, L., Craven, K.L. & McCormack, M.M. (2011, November*). Incarceration as exposure: An assessment of the efficacy of community organization to mediate involvement with the juvenile justice system.* Presented at the International Conference on Urban Health, Belo Horizonte, Brazil.

Brinkley-Rubinstein, L. (2011, August). *The cascading effects of social capital: From parenting to mediating sexual behavior.* Presented at the Society for the Study of Social Problems Annual Meeting. Las Vegas, NV.

Brinkley-Rubinstein, L. (2011, July) *Type of charge most often associated with HIV positive prisoners.* Presented at the International AIDS Society Biannual Meeting. Rome, Italy.

DiPietro, B. & **Brinkley-Rubinstein, L**. (2011, June). *Show me the (UDS) Data: Difference between homeless & non-homeless health center patients.* Presented at the National Health Care for the Homeless Conference & Policy Symposium. Washington, DC.

Brinkley-Rubinstein, L. (2011, June). *Investigating the premises of empirical desert.* Presented at the Law and Society Annual Meeting. San Francisco, CA.

Brinkley-Rubinstein, L. (2011, May). *Perceived barriers to successful reintegration after release from prison.* Presented at the 7th Annual International Congress of Qualitative Inquiry. Champaign-Urbana, IL.

Brinkley-Rubinstein, L., Rhodes, L., & O'Connor, B. (2011, April). *Examining spatial distribution of incidence rates of sexually transmitted diseases and socio-economic measures.* Presented at the American Association of Geographers Annual Meeting, Seattle, WA.

Rhodes, J., & **Brinkley-Rubinstein, L.** (2010, October). *Examining incidence rates of sexually transmitted infections and socio-economic measures: A cross-sectional study in Nashville/Davidson County, TN*. Presented at the 9th Annual International Conference on Urban Health, New York City, NY.

Brinkley-Rubinstein, L. (2010, July). *Demographics and other characteristics associated with increased risk of incarceration and re-incarceration among HIV positive individuals*. Presented at the International AIDS Conference, Vienna, Austria.

Brinkley-Rubinstein, L., Rhodes, J., McKelvey, B., & Solivan, A. (2010, June) *Demographics and characteristics associated with the incidence of HIV among youth*. Presented at the NIMH Annual International Research Conference on the Role of Families in Preventing and Adapting to HIV/AIDS, Nashville, TN.

Brinkley-Rubinstein, L. & Rhodes, J. (2010, March). *Syphilis and HIV co-infection in Nashville/Davidson Co., Tennessee: A case for improving syphilis and STI testing among persons living with HIV*. Presented at the 4th Annual Southeast Regional HIV/AIDS Conference sponsored by the Jefferson Comprehensive Care System, Inc., Little Rock, AR.

Brinkley-Rubinstein, L., & Rhodes, J. (2010, March). *Early Syphilis and HIV syndemic in Nashville/Davidson Co., Tennessee: Implications for improving syphilis screening for people living with and at risk for HIV*. Presented at the National STD Prevention Conference, Atlanta, GA.

TEACHING ACTIVITIES

University of North Carolina, Chapel Hill, Chapel Hill, NC
Instructor of Record, Fall 2018

- Taught Social and Health Systems III to 16 second year medical students. This class focused on incarceration and health and covered the following subtopics: women and incarceration, substance use, HIV/AIDS, post-release healthcare access issues, how incarceration affects known social determinants of health (housing, employment, etc.), and healthcare delivery in correctional settings.

University of North Carolina, Chapel Hill, Chapel Hill, NC
Instructor of Record, Fall and Spring, 2017, 2018

- Taught Social and Health Systems I & II to 15 first year medical students
- Lectures given encompassed topics such as: influence of race, culture, gender, and sex on health outcomes and health disparities; health reform; bioethics; and health policy as clinically relevant for medical professionals.

Brown University, School of Public Health, Providence, RI
Co-Instructor of Record, Spring, 2016

- Taught the Tri-Lab: Designing better education for prisoner and community health
- Gave lectures related to race and incarceration, community-based participatory research methods, and the impact of incarceration on health
- Mentored student groups who were designing education interventions to improve prisoner health. Group topics included: Hepatitis C, PrEP, navigating the healthcare system post-release, and PTSD

Vanderbilt University, Department of Human and Organizational Development, Nashville, TN
Co-Instructor of Record, Spring, 2015

- Taught HOD 3600: Ethnography
- Gave lectures related to field work, data analysis, ethnographic methods
- Mentored students to develop ethnographic research projects and research proposals

HONORS AND AWARDS

2014- 2016	Recipient, Langeloth Scholarship for the Academic and Health Policy Conference on Correctional Health
2015	Participant, SBSRN Mentor Day
2015	Winner, Newbrough Award for best scholarly work in the Department of Human and Organizational Development at Vanderbilt University
2013-2014	Winner, Society for Community, Research & Action Southeast region graduate student of the year
2012-2014	Recipient, Peabody College Honor Scholarship
2010-2014	Recipient, Peabody College tuition and stipend award
2014	Recipient, of a Vanderbilt Graduate School dissertation enhancement grant
2013	Recipient, Social Justice Institute Training for Mass Incarceration Scholarship
2012-2013	Nominated, Vanderbilt University Teaching Award

PROFESSIONAL SERVICE

Associate Editorial Board: *BMC Public Health, 2017-Present; BMC Infectious Diseases 2018-Present*

Editorial Board: *Health & Justice 2016-Present*

Peer Reviewer 2018-2019: *PLOSone, Journal of Healthcare for the Poor and Underserved, SAHARA-J: Journal of Social Aspects of HIV/AIDS, AIDS Care, HIV/AIDS and Social Services, Health & Justice, Drug and Alcohol Dependence, Addictive Behaviors, Preventive Medicine, American Journal of Public Health, American Journal of Preventive Medicine, Annals of Internal Medicine, AIDS & Behavior, American Journal of Public Health*

Local Host Committee: Academic and Health Policy Conference on Correctional Health 2020 annual meeting

Executive Steering Committee Member: Justice, Substance Use, HIV/AIDS Involved Populations Inter-CFAR working group

DSMB Member: Integrated Treatment Adherence Program for Bipolar Disorder at the Time of Prison Release (R34MH117198; PI: Weinstock, Lauren)

DSMB Member: Kentucky Communities and Researchers Engaging to Halt the Opioid Epidemic (CARE2HOPE) (UH3DA44798; PIs: Young, April & Cooper, Hannah)

PROFESSIONAL AFFILIATIONS

American Public Health Association
International Association of Urban Health
International AIDS Society
Society for Community Research and Action
Academic Consortium on Criminal Justice and Health

Exhibit 2

U.S. Department of Justice
Federal Bureau of Prisons

FOR IMMEDIATE RELEASE
April 23, 2020

Contact: Office of Public Affairs
202-514-6551

Bureau of Prisons Expands COVID-19 Testing

WASHINGTON – Recently, the Bureau of Prisons (BOP) began expanding COVID-19 testing of inmates utilizing the Abbott ID NOW instrument for Rapid RNA testing at select facilities experiencing widespread transmission. The BOP continues to provide testing for COVID-19, symptomatic inmates, as recommended by the Centers for Disease Control and Prevention (CDC).

The BOP received ten Abbott ID NOW instruments on April 10, 2020, and a day later, 264 test kits were deployed to institutions with known COVID-19 cases. Their primary role is for rapid testing of newly symptomatic cases to confirm the diagnosis quickly and isolate them appropriately. Expanding the testing with the Abbott ID NOW instruments on asymptomatic inmates will assist the slowing of transmission with isolating those individuals who test positive and quarantining contacts.

Next week the BOP will receive ten additional Abbott ID NOW instruments. The deployment of these additional resources will be based on facility need to contain widespread transmission and the need for early, aggressive interventions required to slow transmission at facilities with a high number of at-risk inmates such as medical referral centers.

Asymptomatic inmates who test positive for COVID-19 can transmit the virus to other inmates. The testing of asymptomatic inmates will assist in slowing transmissions within a correctional setting along with increasing the number of COVID-19 positive tests reflective on the BOP.gov website.

Expanding COVID-19 testing for asymptomatic inmates with the Abbott ID NOW instrument and collaboration with public health entities will improve the BOP's ability to manage COVID-19 at facilities experiencing widespread transmission. The COVID-19 testing of inmates utilizing the Abbott ID NOW instrument will provide BOP's facilities the opportunity to implement a more comprehensive approach to medical isolation of inmates infected with the virus, whether asymptomatic, pre-symptomatic or symptomatic.

Exhibit 3

MASSACHUSETTS COVID-19 NURSING HOME, REST HOME, AND ALR MOBILE TESTING PROGRAM

REVISED GUIDANCE: APRIL 13, 2020

Older adults living in congregate care settings, such as nursing homes, rest homes and assisted living residences are vulnerable to COVID-19. This program allows for safe, onsite sample collection by either medical personnel at your facility or trained personnel from the Massachusetts National Guard or Fallon EMS Service. Nursing homes, Rest homes, and ALRs (Facilities) in Massachusetts are eligible for the program. **All residents and employees, symptomatic or asymptomatic, are eligible to be tested.** To participate:

Healthcare personnel at a facility identify the need to test the facility due to COVID-19 infection concerns.

- You MUST have orders from a licensed provider for all tests. For facilities with ordering providers on-site (medical directors), the medical director or licensed independent provider on-call may serve as the ordering provider. For facilities with multiple on-site providers, ensure you have orders for all residents.
- For facilities without ordering providers associated with the facility, facility personnel should obtain orders from individuals' providers.
- **It is recommended that you order tests for all residents and staff, NOT just symptomatic individuals.**
- Due to supply constraints at this point, we can only support **one-time testing of the full facility to provide a baseline.**

Facility Administrator or designee calls mobile testing hotline at 617-366-2350. The hotline is staffed 7 days a week from 8AM-4PM ET.

OPTION 1 FOR ALL FACILITIES WITH ON-SITE OR AFFILIATED MEDICAL STAFF: request testing kits for your facility (preferred)

- **Order:** Facilities use the Broad Institute requisition form which will be e-mailed to the medical director (ordering provider) after you request test kits on the mobile testing hotline. It will be pre-populated with your ordering physician name and facility information, such that you only need to fill in resident name, date of birth and sample information.
- **Delivery:** Call center will arrange a courier service to deliver the specimen collection materials to your facility. The specimen collection kit will include test kits and barcodes to label the samples.
- **Sampling:** Licensed health care personnel should don PPE following CDC guidance. When collecting diagnostic respiratory specimens from an individual who may be infected with COVID-19, the health care professional should wear an N95 respirator (or facemask if N95 not available), eye protection, gloves, and a gown. Facilities without sufficient PPE should use traditional channels to request (link).

- **Labeling samples:** Label each test by attaching one barcode to tube and the other to the requisition form. Write Resident/Employee Name and Date of Birth on swab tube and on pre-filled paper requisition. Place swab (break in half) in tube and close tube tightly. Place tube and paper requisition in bag and seal.
- **Paperwork:** One form must be completed for each person tested. This must be PRINTED and attached to the sample. Please also ensure the full facility name, address, zip code, and phone number are on every form. It is crucial that this information is filled-out in full for epidemiological tracking and patient reporting. Incompletely labeled samples may be rejected for testing.
- **Sending samples:** When finished taking patient samples, please call the courier number provided with your test kit delivery to schedule pick-up.
- **Resulting:** Your ordering provider should expect to receive results from the Broad Institute through a secure electronic manifest.

OPTION 2: FACILITIES WITHOUT ON-SITE OR AFFILIATED HEALTH CARE PERSONNEL: Schedule in-facility testing by MA National Guard or Fallon Emergency Medical Service

- **Ordering:** Through this option, you can request (via the mobile testing hotline) for personnel to come to your facility to collect patient specimens.
- **Complete ALL paperwork prior to arrival:** For each resident being tested, you must print one requisition form, complete all fields, and attach to the sample. It is extremely important that this information is filled-out in full for proper epidemiological tracking and patient reporting. Ensure the full name of the facility, address, zip code and phone number are on every form. Incompletely labeled samples may be rejected for testing. If paperwork is incomplete when testing team arrives, testing may not be completed.
- **Testing team arrives:** If MA National Guard is servicing your facility, you will be notified both the evening before and the morning of, when MANG is coming the next day. If Fallon is servicing your facility, you will receive a phone call the day before they arrive, letting you know when they will arrive for testing. We cannot take requests for either set of personnel.
    - Personnel will arrive at the Facility entrance in PPE. Please ensure security is aware of their visit.
- Personnel will doff PPE before leaving the building. A red PPE disposal container must be provided at the entrance of the building to allow the personnel to dispose of their PPE.
- **Await test results.** Tests requested via this program will be paid for by the state. The results will be communicated back with the ordering provider listed on the requisition form.

WHAT TO DO WHILE AWAITING RESULTS:

Symptomatic individuals should be presumed positive while awaiting test results and should be isolated. Please consult with your local Board of Health for protocols on isolation and/or reach out to the DPH Epidemiology Line (24/7): 617-983-6800.

Negative results, especially in asymptomatic individuals, should be interpreted with caution, as they merely represent a point in time and individuals who test negative could still be within the

incubation period of disease. Further, individuals potentially exposed but testing negative should still be closely monitored and quarantined as appropriate, if still within 14 days of exposure.

Employees who test positive, even while asymptomatic, should not be returning to work until a minimum of 7 days following the positive result.

Additionally, please visit DPH's website that provides up-to-date information on COVID-19 in Massachusetts: https://www.mass.gov/2019coronavirus.

Exhibit D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ALEXANDER GRINIS, MICHAEL GORDON, and ANGEL SOLIZ, on behalf of themselves and those similarly situated, Petitioners, v. STEPHEN SPAULDING, Warden of Federal Medical Center Devens, and MICHAEL CARVAJAL, Director of the Federal Bureau of Prisons, in their official capacities, Respondents.	Civil Action No. 1:20-cv-10738

DECLARATION OF PROFESSOR SETH PRINS

Pursuant to 28 U.S.C. § 1746, I, Professor Seth Prins, declare as follows:

1. I am an Assistant Professor of Epidemiology and Sociomedical Sciences at Columbia University Mailman School of Public Health. My work integrates methods from epidemiology with theory from sociology and criminology to identify and explain the collateral public health consequences of mass incarceration. A copy of my CV is attached as Exhibit 1.

2. I received my undergraduate degree in psychology from McGill University, and my Masters in Public Health and Doctorate in Epidemiology from Columbia University.

3. I have worked at the intersection of public health and the criminal legal system for over a decade. Before becoming an epidemiologist, I was a Senior Policy Analyst at the Council of State Governments Justice Center for five years. There, I worked at the local, state, and federal levels with legislators, judges, executive branch agency directors, district attorneys, public defenders, and advocates to improve collaboration between the mental health and criminal justice systems. In this capacity, I also toured a solitary confinement facility in Orlando, Florida. I also provided technical assistance to grantees and authored policy guides and position papers on behalf of the Bureau of Justice Assistance and the National Institute of Corrections.

4. My understanding is that FMC-Devens is currently requiring apparently healthy individuals, who are not exhibiting any COVID-19 symptoms to "quarantine" for two weeks in solitary

confinement in the Special Housing Unit ("SHU") or some similar setting within the facility, before they can be released.

5. I am unaware of any studies supporting solitary confinement as a disease containment strategy in jails or prisons, and based on my experience and professional knowledge, it would not effectively constrain the spread COVID-19 in a carceral setting. Unless the entire SHU was a negative pressure environment, the air-borne droplets of COVID-19 virus would be spread by air-circulation throughout the unit. The circulation of medical staff and correctional officers into and out of the unit would also transmit the virus to other parts of the facility and into the surrounding community.

6. In my professional opinion, even in the midst of the current pandemic, it is ineffective as a public health measure to hold prisoners in such inhumane conditions for two weeks before releasing them from a facility.

7. Jails and prisons in New York are releasing people without doing so. This makes sense. If the prisoner had been kept in the general population of the prison immediately prior to their release, than they should be able to be released to self-isolate in the community as well.

8. Even if a prisoner is infected and symptomatic, there are still many families that would prefer to take on the risk of having the individual self-isolate in their home rather than having their family member die in prison. They should be allowed to make this choice. Indeed, thousands of families of essential workers are grappling with this every day. There is no reason that we should apply a different standard of behavioral surveillance to a prisoner whom the Bureau of Prisons has already decided to release.

9. Finally, if a prisoner eligible for release is infected, symptomatic, and does not have a home in which they can self-isolate, the Bureau could use empty hotel rooms or dorm rooms for quarantine purposes. In other words, there are available, non-punitive options.

10. Isolation in solitary confinement is not only ineffective as a health measure, it is also inhumane.

11. Because of my professional focus on mental health in the carceral system, I am very familiar with the body of work reviewing the use of solitary confinement in jails and prisons. The literature makes clear that solitary confinement is extraordinarily punitive and can have a severe impact on prisoners in even a short period of time.

12. As Dr. Kenneth Appelbaum explains "The literature on the 'psychological, psychiatric, and sometimes physiological effects' of solitary confinement has been described as 'sizeable and

impressively sophisticated.'[1] A recent review stated that '[n]early every scientific inquiry into the effects of solitary confinement over the past 150 years has concluded that subjecting an individual to more than 10 days of involuntary segregation results in a distinct set of emotional, cognitive, social and physical pathologies.'[2],[3]

13. Based on its severe psychological and physiological impacts, solitary confinement is frequently described as akin to torture.

14. These severe impacts are true regardless of whether the individual is housed in the SHU or a different unit that similarly holds them in solitary confinement. Regardless of the name, forcing an individual to experience such extreme isolation cannot be made less punitive.

15. I have reviewed the declaration of Clinical Director Dr. Megan Shaw that was submitted in this lawsuit. She used the terms "Isolation Unit" and "Quarantined areas" to describe places where symptomatic prisoners and asymptomatic prisoners in the midst of screening, respectively, would be housed. *See, e.g.,* Shaw Decl. p. 4 & n.1. Based on the document, the conditions of these two units were not entirely clear to me.

16. As I understand the document, however, it appears that prisoners who report their symptoms may be placed in solitary confinement for isolation until they test negative for COVID-19 or are otherwise cleared by medical staff for release from isolation. *See* Shaw Decl. p. 6.

17. Such a practice would undermine efforts to contain the infection, as the punitive nature of solitary confinement will discourage people from self-reporting their symptoms.

18. Over the past decade, the movement in this country has been to decrease the use of solitary confinement due to its extraordinarily damaging impacts. To revive a practice that was otherwise being phased out in the context of a pandemic, especially where there is no reason to think that it will protect against the spread of COVID-19, is an especially punitive response. Incarcerated individuals should not have to choose between continuing to face a heightened risk of COVID-19 infection within a prison, or experiencing the trauma of two-weeks of solitary confinement before they can be released into the community.

[signature on next page]

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[1] P.A. Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, Crime & Just 34:441-528, 2006.

[2] D. H. Cloud, E. Drucker, A. Browne, et al, *Public Health and Solitary Confinement in the United States*, Am. J. Public Health, 105:18-26, 2015.

[3] Kenneth L. Appelbaum, *American Psychiatry Should Join the Call to Abolish Solitary Confinement*, The Journal of American Academy of Psychiatry and the Law 43, no. 4 (2015):10, http://jaapl.org/content/jaapl/43/4/406.full.pdf.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 25th day of April 2020.

_____

Seth Prins, PhD

Exhibit 1

Seth J. Prins

Assistant Professor of Epidemiology and Sociomedical Sciences

Columbia University Mailman School of Public Health, 722 W 168 Street Room 521, New York, NY 10032

sjp2154@columbia.edu | sethjprins.com | s_j_prins

Professional Appointments

Assistant Professor
Columbia University, Department of Epidemiology, Department of Sociomedical Sciences 2018-present

Postdoctoral Research Fellow
Columbia University, Department of Sociomedical Sciences and School of Social Work 2016-2018

Education

PhD in Epidemiology
Columbia University 2011-2016

- Dissertation title: Is criminogenic risk assessment a prisoner of the proximate? Challenging the assumptions of an expanding paradigm
- Dissertation sponsor: Sharon Schwartz. Committee and readers: Bruce G. Link, Lisa M. Bates, Adam Reich, Jennifer Skeem

MPH in Sociomedical Sciences
Columbia University 2008-2010

BA in Psychology
McGill University 2000-2004

Publications

Peer-Reviewed Articles

1. Kajeepeta, S, CG Rutherford, KM Keyes, AM El-Sayed, and SJ Prins (2020). County Jail Incarceration Rates and County Mortality Rates in the United States, 1987–2016. *American Journal of Public Health* 110(S1), S109–S115.
2. Prins, SJ and B Story (2020). Connecting the Dots Between Mass Incarceration, Health Inequity, and Climate Change. *American Journal of Public Health* 110(S1), S35–S36.
3. Reich, A and SJ Prins (2020). The Disciplining Effect of Mass Incarceration on Labor Organization. *American Journal of Sociology* In Press.
4. Eisenberg-Guyot, J and SJ Prins (2019). Relational Social Class, Self-Rated Health, and Mortality in the United States. *International Journal of Health Services* 50(1), 7–20.
5. Hatzenbuehler, ML, C Rutherford, S McKetta, SJ Prins, and KM Keyes (2019). Structural Stigma and All-Cause Mortality among Sexual Minorities: Differences by Sexual Behavior? *Social Science & Medicine*.
6. Prins, SJ (2019). Criminogenic or Criminalized? Testing an Assumption for Expanding Criminogenic Risk Assessment. *Law and Human Behavior*.
7. Prins, SJ, S McKetta, J Platt, C Muntaner, KM Keyes, and LM Bates (2019). Mental Illness, Drinking, and the Social Division and Structure of Labor in the United States: 2003-2015. *American Journal of Industrial Medicine* 62(2), 131–144.
8. Beardslee, J, S Datta, A Byrd, M Meier, SJ Prins, M Cerda, and D Pardini (2018). An Examination of Parental and Peer Influence on Substance Use and Criminal Offending During the Transition From Adolescence to Adulthood. *Criminal Justice and Behavior* 45(6), 783–798.

9. Keyes, KM, DS Gary, J Beardslee, SJ Prins, PM O'Malley, C Rutherford, and J Schulenberg (2018). Joint Effects of Age, Period, and Cohort on Conduct Problems Among American Adolescents From 1991 Through 2015. *American Journal of Epidemiology* 187(3), 548–557.
10. McKetta, S, SJ Prins, J Platt, LM Bates, and K Keyes (2018). Social Sequencing to Determine Patterns in Health and Work-Family Trajectories for U.S. Women, 1968-2013. *SSM - Population Health* 6, 301–308.
11. Prins, SJ and A Reich (2018). Can We Avoid Reductionism in Risk Reduction? *Theoretical Criminology* 22, 258–278.
12. Hatzenbuehler, ML, SJ Prins, M Flake, M Philbin, MS Frazer, D Hagen, and J Hirsch (2017). Immigration Policies and Mental Health Morbidity among Latinos: A State-Level Analysis. *Social Science & Medicine* 174, 169–178.
13. Cerdá, M, SJ Prins, S Galea, CJ Howe, D Pardini, M CerdÃ¡, SJ Prins, S Galea, CJ Howe, and D Pardini (2016). When Psychopathology Matters Most: Identifying Sensitive Periods When within-Person Changes in Conduct, Affective, and Anxiety Problems Are Associated with Male Adolescent Substance Use. *Addiction* 111(5), 924–35.
14. Platt, J, SJ Prins, L Bates, and K Keyes (2016). Unequal Depression for Equal Work? How the Wage Gap Explains Gendered Disparities in Mood Disorders. *Social Science & Medicine* 149(C), 1–8.
15. Schwartz, S, SJ Prins, UB Campbell, and NM Gatto (2016). Is the ``Well-Defined Intervention Assumption'' Politically Conservative? *Social Science & Medicine* 166, 254–257.
16. Muntaner, C, E Ng, H Chung, SJ Prins, H Chung, and SJ Prins (2015). Two Decades of Neo-Marxist Class Analysis and Health Inequalities: A Critical Reconstruction. *Social Theory & Health* 13(3-4), 267–287.
17. Muntaner, C, E Ng, SJ Prins, K Bones-Rocha, A Espelt, and H Chung (2015). Social Class and Mental Health: Testing Exploitation as a Relational Determinant of Depression. *International Journal of Health Services* 45(2), 265–284.
18. Prins, SJ, JL Skeem, C Mauro, and BG Link (2015). Criminogenic Factors, Psychotic Symptoms, and Incident Arrests among People with Serious Mental Illnesses under Intensive Outpatient Treatment. *Law and Human Behavior* 39(2), 177–88.
19. Sohler, N, BG Adams, DM Barnes, GH Cohen, SJ Prins, and S Schwartz (2015). Weighing the Evidence for Harm from Long-Term Treatment with Antipsychotic Medications: A Systematic Review. *American Journal of Orthopsychiatry* 86(5), 477.
20. Prins, SJ (2014). Why Determine the Prevalence of Mental Illnesses in Jails and Prisons? *Psychiatric Services* 65(8), 1074.
21. Prins, SJ (2014). Prevalence of Mental Illnesses in U.S. State Prisons: A Systematic Review. *Psychiatric Services* 65(7), 862–872.
22. Prins, SJ, FC Osher, HJ Steadman, PC Robbins, and B Case (2012). Exploring Racial Disparities in the Brief Jail Mental Health Screen. *Criminal Justice and Behavior* 39(5), 635–645.
23. Prins, SJ (2011). Does Transinstitutionalization Explain the Overrepresentation of People with Serious Mental Illnesses in the Criminal Justice System? *Community Mental Health Journal* 47(6), 716–722.

Chapter

1. Prins, SJ, JE Elliott, JL Meyers, R Verheul, and DS Hasin (2014). ``Substance Use Disorders''. In: *The American Psychiatric Publishing Textbook of Personality Disorders*. Ed. by JM Oldham, AE Skodol, and DS Bender. Washington, DC: American Psychiatric Publishing, pp.407–428.

Federal Reports

1. Fabelo, T, G Nagy, and SJ Prins (2011). *A Ten-Step Guide to Transforming Probation Departments to Reduce Recidivism*. Tech. rep. New York: Council of State Governments Justice Center.
2. Prins, SJ and L Draper (2009). *Improving Outcomes for People with Mental Illnesses Under Community Corrections Supervision: A Guide to Research-Informed Policy and Practice*. Tech. rep. New York: Council of State Governments Justice Center.
3. Prins, SJ and FC Osher (2009). *Improving Responses to People with Mental Illnesses: The Essential Elements of Specialized Probation Initiatives*. Tech. rep. New York: Council of State Governments Justice Center.

Under Review

1. Prins, SJ (2020). ``Individual Risks or Population Risks: Do Criminogenic Risk Factors Explain Group Differences in Arrest and Conviction Rates?'' Under Review.
2. Prins, SJ, S McKetta, J Platt, C Muntaner, KM Keyes, and LM Bates (2020). ``"The Serpent of Their Agonies": Exploitation As Structural Determinant of Mental Illness''. Under Review.
3. Prins, SJ and A Reich (2020). ``Criminogenic Risk Assessment: A Meta-Review and Critical Analysis''. Under Review.
4. Prins, SJ, Sandhya Kajeepeta, RF Pearce, J Beardslee, DA Pardini, and M Cerdá (2020). ``Identifying Sensitive Periods When Changes in Parenting and Peer Factors Are Associated with Changes in Adolescent Alcohol and Marijuana Use''. Under Review.
5. Seth J. Prins and Sharon Schwartz (2020). ``Toward a Dialectical Social Epidemiology''. Under Review.

Popular Press

1. Brett Story and Seth J. Prins (Aug. 28, 2019). A Green New Deal for Decarceration. *Jacobin*.
2. Prins, SJ, A Tergas, and S Goldberg (Oct. 16, 2019). Opinion | A Bad Post-Rikers Jail Plan for New York. *The New York Times. Opinion*.

Fellowships

HIV, Substance Use, and Criminal Justice T32 Fellowship Program — 2016-2018
National Institute on Drug Abuse grant T32-DA-37801, Nabila El-Bassel and Lisa Metsch, Principal Investigators

Psychiatric Epidemiology Training Program Predoctoral Fellow — 2011-2016
National Institute of Mental Health grant 5-T32-MH-13043, Bruce G. Link, Principal Investigator

Invited Talks

Criminogenic or criminalized? Gendering, racialization, and the assumptions of criminogenic risk assessment — December 6, 2017
Seminar Series in Gender, Sexuality, and Health, Department of Sociomedical Sciences, Columbia University

How an epidemiologist encountered critical realism, and what critical realism might gain from debates about causal inference in epidemiology — August 8-10, 2017
Beyond Positivism: Theory, Methods, and Values in Social Science Conference. Quantitative Methods Plenary Panel, Montreal, QC

Moving beyond socioeconomic status to social class processes in public health — August 1, 2017
Region 2 Public Health Training Center Webinar

Health Disparities and the Criminal Justice System — October 21, 2016
Icahn School of Medicine at Mount Sinai

Conference Presentations

'The serpent of their agonies': Exploitation as structural determinant of mental illness — June 18 - 21, 2019
Society for Epidemiologic Research, Minneapolis, MN

Changes in county jail incarceration rates are associated with changes in county mortality rates in the United States from 1987-2016 — June 18-21, 2019
Society for Epidemiologic Research, Minneapolis, MN (Poster)

Relational Social Class, Self-Rated Health, and Mortality in the United States — June 18-21, 2019
Society for Epidemiologic Research, Minneapolis, MN (Poster)

Contemporary Class Relations as Structural Determinant of Mental Illness: Moving Beyond Stratification to Relational Social Processes — June 21-23, 2017
Society for Epidemiologic Research, Seattle, WA (Poster)

Testing Contemporary Class Relations as a Structural Determinant of Mental Illness: Moving Beyond Stratification to Relational Social Processes — April 27-29, 2017
Population Association of America, Chicago, IL

Substance use over the lifecourse: When do peers and parents matter most? — June 21-24, 2016
Society for Epidemiologic Research, Epidemiology Congress of the Americas, Miami, Florida

Awards and Recognition

'Anxious? Depressed? You might be suffering from capitalism', one of the top 10 articles mentioned across Sociology of Health & Illness's news and social media streams — 2016

The William Farr Award in Epidemiology, Department of Epidemiology, Columbia University — 2016

Research Positions

Collaborator, Trajectories of Substance Use and Comorbid Mental Illness, Magdalena Cerda, Principal Investigator, National Institute on Drug Abuse grant 5K01DA030449-05 — 2013 - 2015

Associate Researcher, University of Wisconsin School of Medicine and Public Health, County Health Rankings Project, Robert Wood Johnson Foundation. Bridget Catlin, PhD, MHSA, Co-Director — 2010-2011

Senior Policy Analyst, Council of State Governments Justice Center, Criminal Justice/Mental Health Consensus Project — 2005-2010

Teaching Positions

Instructor

Applications of Epidemiologic Research Methods II P9489, Columbia University Department of Epidemiology, second-year doctoral course	Spring 2019, 2020
Epidemiology, Bard Prison Initiative, Bard College, Woodbourne Correctional Facility	Fall 2015

Teaching Assistant

Publications, Presentations, and Grants, Columbia University, Department of Epidemiology, first-year doctoral course	2015
Psychiatric Epidemiology Reading Seminar, Columbia University Mailman School of Public Health	2014
Principals of Observational Epidemiology, Columbia University Mailman School of Public Health	2013, 2014
Principals of Epidemiology and Introduction to Biostatistical Methods, Columbia Summer Research Institute	2012, 2013
Social Epidemiology, Columbia University Mailman School of Public Health	2012, 2013
Masters Thesis I and II, Columbia University Mailman School of Public Health	2012, 2013
Epidemiology of Drug and Alcohol Problems, Columbia University Mailman School of Public Health	2012

Service to Profession

Peer Reviewer

Addiction Research & Theory
American Journal of Epidemiology
American Journal of Industrial Medicine
American Journal of Public Health
American Journal of Orthopsychiatry
BMC Psychiatry
Canadian Journal of Psychiatry
Criminal Behavior and Mental Health
Drug and Alcohol Dependence
Family Medicine and Community Health
International Journal of Health Services
Journal of Epidemiology & Community Health
JAMA Psychiatry
Journal of Occupational and Environmental Medicine
Psychiatry, Psychology, and Law
Occupational and Environmental Medicine
Social Psychiatry and Psychiatric Epidemiology
Social Science & Medicine
Society and Mental Health
Sociology of Health & Illness

Affiliations

American Psychopathological Association
American Public Health Association
American Sociological Association
Society for Epidemiologic Research

Service to Department

PhD Dissertation Committee, Emilie Bruzelius	2020
PhD Dissertation Committee, Sarah McKetta	2020
DrPh Dissertation Project, Trena Mukherjee	2020
PhD Dissertation Committee (Defended), Caroline Bancroft, Do alternatives to incarceration mitigate the health effects of criminal justice involvement? An examination of the effects of probation on chronic disease risk and access to care	Fall 2019
DrPH Qualifying Exam Committee, Trena Mukherjee	Fall 2019
Methods Exam Committee	2019-2020
Masters Academic Advisor, Alicia Singham-Goodwin, Chloe Young, Isabella Hill	2019-2021
Co-designer and co-facilitator, Power, Privilege, and Allyship training for faculty and teaching assistants on identifying and responding to microag- gressions in the classroom	2015
Facilitator, required journal club for masters student certificate in social determinants of health	2012-2015
Founding member, Columbia University Association for Public Health Action in Criminal Justice (now the Columbia University Association for Justice and Health)	2011-2013

Research Support

National Institute on Drug Abuse K01DA045955 — Role: Principal Investigator
Adolescent substance use as determinant and consequence of the school-to-prison pipeline: Disentangling individual risk, social determinants, and group disparities — Project period: 02/01/2019 - 01/31/2024

- Total direct costs: $862,573

National Institute on Minority Health and Health Disparities L60MD013029 — Role: Principal Investigator
Racial and LGBTQ disparities in the role of substance use as determinant and consequence of the school-to-prison pipeline: Disentangling individual risk and social determinants — Project Period 7/1/2018 - 6/30/2020

Selected Media Coverage

1. Bellstrom, K (Jan. 2016). Depressed? Anxious? Blame the Gender Pay Gap. *Fortune*.
2. McGregor, J (Jan. 2016). The Gender Wage Gap Isn't Just Unfair. It Also Ups the Odds Women Get Anxiety or Depression. *The Washington Post*.
3. Reuters (Jan. 2016). Depression and Anxiety in Women Linked to Male-Female Pay Gap. *The Guardian*.
4. Cha, AE (Aug. 2015). The Perilous Plight of Middle Managers. *The Washington Post*.

5. Dahl, M (Sept. 2015). Middle Management: The Worst of Both Worlds. *New York Magazine*.

6. Lam, B (Aug. 2015). The Secret Suffering of the Middle Manager. *The Atlantic*.

Exhibit E

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-19it 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 c 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 that 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

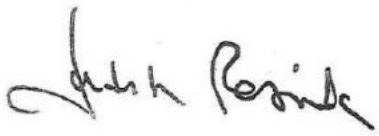
issue was not for it to decide. *See Plata, et al. v. Newsom,* No. C01-1351-JST (N.D. Cal. Apr. 4, 2020) (Dckt. 3261); *Coleman, et al., v. Newsom*, No. No. 2:90-cv-0520 KJM DB P (N.D. Cal. Apr. 4, 2020) (Dckt. 3261). On April 6, Judge Mueller issued his order calling for immediate information on the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



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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)

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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).

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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)

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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

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

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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

Exhibit G

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ALEXANDER GRINIS, MICHAEL GORDON, and ANGEL SOLIZ, on behalf of themselves and those similarly situated, Petitioners, v. STEPHEN SPAULDING, Warden of Federal Medical Center Devens, and MICHAEL CARVAJAL, Director of the Federal Bureau of Prisons, in their official capacities, Respondents.	Civil Action No. 1:20-cv-10738

SUPPLEMENTAL DECLARATION OF DR. JOE GOLDENSON

Pursuant to 28 U.S.C. § 1746, I, Dr. Joe Goldenson, declare as follows:

1. I previously submitted a declaration in this case based on my experience and my review of the declarations of Alexander Grinis, Michael Gordon, and Angel Soliz and the April 8, 2020 letter submitted by the United States Attorney in *United States v. James Turner*, No. 17-132. In that declaration, I detailed the particular danger that COVID-19 poses in carceral settings; described the central role that social distancing must play in any effort to effectively reduce the transmission of COVID-19; offered my professional opinion that FMC Devens was at high risk of a COVID-19 outbreak at its current population levels; and recommended that it must sufficiently reduce the prisoner population to allow for effective social distancing to meaningfully reduce this risk.

2. I am submitting this supplemental declaration to provide my professional opinion in response to the declaration that Dr. Megan Shaw, Clinical Director at FMC Devens, submitted in this case. Based on my review of the measures described in Dr. Shaw's declaration, it is clear to me that although FMC Devens has instituted changes at the facility, it has not meaningfully addressed the fundamental component of social distancing. As a result, it continues to be my professional opinion that to meaningfully reduce the risk of COVID-19 infections at FMC Devens, the facility must sufficiently reduce the prisoner population to allow for effective social distancing.

3. As noted above, Dr. Shaw's declaration describes some positive measures at FMC Devens including the distribution of masks and the provision of additional hygiene

supplies. *See, e.g.,* Shaw Decl. ¶ 31, 46-48. However, the facility's actions are critically deficient with respect to social distancing, which the CDC describes as a "cornerstone of reducing transmission of respiratory diseases such as COVID-19."[1]

4. Dr. Shaw also describes ways in which the facility has reduced contact between different housing units, including staggering recreation, mealtimes, programming and commissary for different units, and dispensing medication within each unit. Shaw Decl. ¶ 12, 31. However, although this allows for some separation *between* the different units, Dr. Shaw does not describe any social distancing *within* each unit, which she herself describes as composed of approximately 150 prisoners.

5. As a result, it is my understanding that each housing unit of approximately 150 prisoners still eat, sleep, recreate, shower and use the bathroom under conditions where it is effectively impossible to follow the CDC's recommendation to maintain six feet of distance between themselves. "Sheltering in place" under these conditions cannot effectively mitigate the risk of COVID-19 transmission, particularly within the vulnerable population housed at FMC Devens.

6. Dr. Shaw's declaration references "additional physical barriers, currently under construction, in order to decrease the number of inmates in each 'shelter in place' designated location." Shaw Decl. ¶ 31. It is not clear to me what this means, nor do I see any accounting for the effects of any "physical barriers" on the existing mechanical ventilation systems in the facility. It is my understanding that plastic sheets are being placed within some units to divide the space. Even if this could create a barrier against COVID-19 transmission—and I am not sure how that would be possible without complete and proper sealing, as well as regular cleaning of this additional contact surface—enclosing fewer people in a smaller space will not increase their ability to maintain six feet of distance from each other. The same would be true of a more permanent wall erected within a unit; indeed, this would likely *decrease* the overall available space because of physical footprint of the wall itself. Unless FMC Devens undertakes construction to substantially *increase* the overall available space, it will not enhance the facility's ability to allow for social distancing at current population levels.

7. In preparation for this supplemental declaration, I have also reviewed the Respondents' omnibus response filed in this case. Its comparison of a 150-prisoner housing unit to a "closed family unit" is entirely inapt. *See* Resp. Br. at p. 29. No family unit is sheltering in place with scores of individuals in a single home. And if they were, they would not be

[1] Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html.

in compliance with the CDC's recommendation to limit "mass gatherings" to ten people where, as at FMC-Devens, there is a high risk population.[2]

8. What is more, unlike a closed family unit, FMC-Devens is *not* a closed environment. Medical staff and correctional officers are entering the facility every single day. Taking their temperature and asking about their symptoms, while a good thing to do, does not preclude the possibility that they will bring the disease into the facility. *Cf*. Shaw Decl. ¶ 25. To the contrary, pre-symptomatic people can transmit the virus, as can what the CDC estimates to be the up to 25% of people infected with COVID-19 that remain asymptomatic throughout the entirety of their infection.[3]

9. Dr. Shaw describes the process by which prisoners who enter the facility are first "quarantine[d]" from the rest of the population for 14-days even if they do not have any symptoms. Shaw Decl. ¶ 26. But the officers who routinely enter the facility without any quarantine-period pose the exact same danger of transmission. Thus, there is a daily risk that these officers will unknowingly bring the disease into the facility with them, where it could spread like wildfire among the vulnerable population that is unable to practice effective social distancing.

10. My understanding is that as of April 22, 2020, FMC Devens had one confirmed positive case of COVID-19. *See* Resp. Br. at p. 5 n.3. In light of the incidence of asymptomatic and pre-symptomatic infections, and the fact that FMC Devens apparently does not test asymptomatic prisoners, this number is not a meaningful indicator of how many people are actually infected with COVID-19 at FMC Devens.

11. At least as important, whatever the current number of COVID-19 infections at FMC-Devens may be, there is also the potential for daily ingress of the virus through the staff. Given the continued inability to effectively practice social distancing at the facility, it is therefore still my professional opinion that persons currently detained at FMC Devens are at significantly greater risk of contracting COVID-19 than if they were permitted to shelter in place in their home communities.

12. The Respondents' contention to the contrary is entirely unsupported. It is true that "[e]very person in the United States, whether in prison or not, faces the risk of COVID-19 exposure." Resp. Br. at p. 41. But the *degree* of that risk varies greatly. From both a practical and epidemiological standpoint, sheltering at home with a handful of people in a space without daily staff shift changes is qualitatively different from living in a

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[2] Centers for Disease Control and Prevention, *Interim Guidance for Coronavirus Disease 2019 for Event Planners*, https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html.

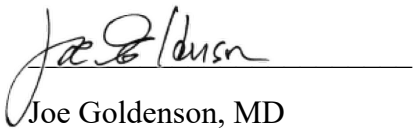
[3] Apoorva Mandavilli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, N.Y. Times (Mar. 31, 2020), https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html.

congregant environment with 150 other people and staff that circulate between the facility and the community every single day.

13. For that reason, taking into account all of the measures articulated in Dr. Shaw's declaration, it is still my professional opinion that FMC Devens is at high risk of a COVID-19 outbreak at its current population levels. As a result, taking into account all of the measures articulated in Dr. Shaw's declaration, my public health recommendation remains that in order to meaningfully decrease the risk of COVID-19 infections at FMC Devens, the facility must reduce the prisoner population sufficiently to ensure social distancing and permit personal hygiene in compliance with CDC guidelines.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 26th day of April 2020.



Joe Goldenson, MD