

OUR FACULTY

Faculty members teaching their courses on Zoom during the spring semester



Faculty Viewpoints

Members of the faculty at Yale Law School responded to the COVID-19 pandemic, offering expertise in their respective fields from healthcare to national security to the economy. Here are pieces by seven faculty members, demonstrating some of the ways they are contributing to the national dialogue.

ON COMMUNITY HEALTH CORPS

The New Politics of Care



**Gregg
Gonsalves**

As the COVID-19 crisis stretches from weeks to months — and in all likelihood years — we urgently need reforms that both curb the pandemic and address the vast wave of hardship that it has caused for working people and families. A massive new jobs program, a “Community Health Corps,” is one part of the solution. Funded federally and organized locally, it would put millions of Americans to work not only to track and trace the virus, but to support those in need, all while securing our health and building solidarity and trust in our institutions.

We can build on existing models, from

the WPA to the community health worker program, to roll out this new corps quickly, bringing jobs and care to vulnerable rural and urban communities.

The United States may have the most technologically advanced health care system in the world, but we’re leading the number of worldwide coronavirus cases because we’ve badly trailed other industrialized nations in health outcomes for years. Many of the hardest-hit communities in the COVID-19 pandemic have been reeling from long-term health crises, from the opioid epidemic and deaths of despair in Appalachia to the burden of maternal deaths and the ongoing HIV epidemic in the South, to an explosion of obesity across the country with its downstream effects: type 2 diabetes, hyperlipidemia, high blood pressure, cardiovascular disease, and cancer. The United States is sicker now with COVID-19, but we’ve been sick for a long while in many other ways.

Beyond helping to manage the current crisis, a Community Health Corps would help to improve the health of people historically left out of the circle of care. For too long we’ve focused at the top, spending on expensive, technologically advanced specialty care, while neglecting primary and community care and underpaying caregivers themselves. Even in the midst of the pandemic, community health centers, which

should be the core of our health approach, have teetered on financial ruin. Meanwhile, the domestic workers and home health aides who perform the essential act of care have been underpaid and left out of federal labor protections. Not to mention that much of the work of caring is still done at home, falling disproportionately on women and people of color.

Shoring up the foundations of U.S. health care by valuing care itself isn’t just the first step toward a more rapid, effective response to health threats in the future. It will also move us toward a new politics of care, that starts from the ground up, in the places we live, work, and socialize. A politics that builds power among the caregivers, as the act of caring becomes publicly recognized and compensated for the productive work it is. Done right these new jobs can be a source of power for those who have never been fully allowed a voice in our democracy.

By Gregg Gonsalves, Associate Professor
(Adjunct) of Law and Co-Director,
Global Health Justice Partnership, and
Amy Kapczynski ’03, Professor of Law and Faculty
Director, Global Health Justice Partnership
Adapted from *The Boston Review*
(see ylaw.us/3b4KnzK)

“A Community Health Corps would help to improve the health of people historically left out of the circle of care. For too long we’ve focused at the top, spending on expensive, technologically advanced specialty care, while neglecting primary and community care and underpaying caregivers themselves.”

The U.S. Is Getting National Security Wrong

The United States national security system is the best funded, best equipped, and most powerful the world has ever seen. In the years since the September 11 attacks, if a terrorist group anywhere in the world posed a potential threat to Americans, eradicating that threat became an immediate national priority. And yet, here we are today, contemplating the likelihood of more than 100,000 American lives lost to COVID-19.

This disconnect has revealed that our national security priorities have been completely wrong. It is past time to rethink what national security should mean.



Oona Hathaway

Just as the 9/11 attacks led to a reorientation of national security policy around a counterterrorism mission, the COVID-19 crisis can and should lead to a reorientation of national security policy. There should be a Commission styled on the 9/11 Commission to assess the failures of the U.S. government, both federal and local, to respond to the pandemic and to chart a better course forward. Until then, a few key steps that we should take are already clear:

“Just as the 9/11 attacks led to a reorientation of national security policy around a counterterrorism mission, the COVID-19 crisis can and should lead to a reorientation of national security policy.”

First, we should spend less time and resources on counterterrorism efforts abroad. Second, that money should be redirected in part to global health programs and rejuvenating international institutions capable of responding to global threats like COVID-19. Third, we should recognize that U.S. national security is put at risk by our inadequate health care system. Last, we should broaden the lens of national security to think about all serious global threats to human life. The assessment of threats should be based on scientific assessments of real global threats that require serious global solutions. That’s what “national security” must mean in the post-COVID-19 world.

By Oona Hathaway '97, Gerard C. and Bernice Latrobe Smith Professor of International Law
Adapted from *Just Security* (April 7, 2020)
(see ylaw.us/2SysH9x)

Economic Policy at the Federal and Local Level

Law and regulation are the only tools that can direct spending to channels that do not threaten public health. We therefore need to combine legal mandates that protect public health with funding for those mandates. Consider, for example, the paid-sick leave mandate that Congress passed on March 18. It protects public health by enabling workers feeling ill to stay at home without losing wages, reducing the spread of coronavirus. But it may cause employers to lay off workers before they get sick.



Yair Listokin

A mix of mandates and fiscal policy is the best response to the unique combination of public health and economic pressures we now face. If Congress had funded the paid sick leave mandate with public money, then public health would be protected at the same time that unemployment was reduced.

There are other policy changes that can be done at the state and local level. The poor spend a disproportionate amount on utilities, and lower utility prices increase their discretionary income and spending—exactly what we need during a recession. If regulators hold down prices in recessions, then they need to allow prices to increase in booms so that utilities earn a fair rate of return over the business cycle.

Another set of policies that could be very effective is temporary changes in zoning laws. Housing construction tends to plunge in recessions. To avoid this outcome, housing developers and financiers need a reason not to wait until the recession ends to start new building projects. A temporary loosening of zoning regulations would do the trick. This type of incentive, passed at the state level, could be enough to stimulate construction spending, mitigating what might otherwise be a terrible downturn in the sector.

By Yair Listokin '05, Shibley Family Fund
Professor of Law (see more at ylaw.us/2W0pUrJ)

ON LOCAL GOVERNMENT

State Strengths and Weaknesses

The COVID-19 pandemic exposed some long-standing trends and tensions in state and local government law.

In the early days of the crisis, governors seized the stage, stepping into a breach created by polarization and inaction at the federal level. Strong gubernatorial administration has been a quietly growing theme in state politics for years. In an era when voter



David Schleicher

knowledge of state and local politics has diminished, governors have taken advantage of the fact they alone are known by voters in state politics to seize greater control of state apparatus. Further, state power over local governments has been another major growing trend. Using emergency laws and the politics that followed, many governors exercised greater control over state governance than ever before, pushing aside state legislatures and local governments to respond to the crisis. COVID-19 created national heroes and villains — and dominant local forces — out of state chief executives.

However, the story of COVID-19 is not only about triumphant governors, but also about state governmental weakness. The COVID-19 recession created giant holes in state and local budgets — huge amounts of lost income and sales tax revenue, plus tons of new expenses. Because of their needs to keep budgets balanced and limits on their legal and practical capacities to finance deficits with debt, states — ascendant as first responders to the virus — face huge fiscal problems that will curtail their capacity to make policy in any other areas. The problem of pro-cyclical in state finance has been well known for years, but in this crisis, we have seen how brutal this problem is, with states and cities needing to cut spending and raise taxes during the middle of an economic catastrophe. Both Congress and the Federal Reserve have developed policies and allocated money to help states and cities through this, and may do more going forward, but this has left states dependent on federal largess and conditions. Where the fiscal picture will end is, of course, still to be determined, but we can say that the tensions inherent in fiscal federalism broke into full view.

By David Schleicher, Professor of Law

ON HEALTH INSURANCE

The Way the ACA Has Protected Us and What Still Needs to Be Done

One of the most remarkable things about the COVID-19 pandemic is what has gone unremarked: we do not have the kind of crisis in healthcare access and insurance coverage that we would have had just a few years ago. That is because of the Affordable Care Act. The ACA turned 10 quietly in March.



Abbe R. Gluck

The ACA's safety net subsidizes insurance for families making up to \$103,000 a year; it guarantees coverage that otherwise might not be available for the more than 100 million with preexisting conditions. Before the ACA, most states did not cover childless adults through Medicaid at all. Now, 17 million more are covered, plus three million children.

But the ACA's supports also highlight unacceptable gaps that remain. Fourteen states still haven't expanded Medicaid, which leaves some 2–4 million uninsured. More than half the states still refuse to run their own ACA insurance markets. As a result, the President controls them — and for weeks so far he has refused to reopen the insurance rolls to let new people on. These inequities must be eliminated.

Institutionalized populations — especially the incarcerated and the elderly — also have suffered tragic losses that expose serious gaps in regulation and capacity and, in some instances, a greater, and immoral, tolerance for deaths among those populations. And we have fallen short in protecting and shoring up our health care workforce.

Our public health infrastructure — tracing, testing, vaccine development — is a different kind of crisis that must be addressed. But even with these gaps, the ACA has significantly ameliorated what could have been another massive hit — millions unable to afford or access healthcare during this unprecedented pandemic.

By Abbe R. Gluck '00, Professor of Law and Faculty Director of the Solomon Center for Health Law and Policy

“Fourteen states still haven’t expanded Medicaid, which leaves some 2–4 million uninsured... These inequities must be eliminated.”

Protecting Prisoners in Pandemics is a Constitutional Must



Judith Resnik

Social distancing is what governments have mandated. What happens to people in prison in light of that prescription? COVID-19 is an unprecedented event that has raised the legal question of whether sentences (that had been lawful when they were imposed) cannot lawfully be served when the setting puts an individual in a position of untenable risk. Not only does the Eighth Amendment protect against putting people deliberately into harm's way, it also requires that prison officials not be deliberately indifferent to known serious medical needs. (See more thoughts on this at ylaw.us/2WmMOto.)

In courts around the country, individuals and classes of prisoners have sought relief based on sentencing statutes, civil rights acts, and the “great writ” of habeas corpus. I have provided declarations in several cases to explain the provisional remedies available to judges, including a little known facet of habeas — enlargement, through which judges can order the custody “enlarged” (for example to a person’s home or hospital or halfway house) while deciding the merits of the many legal issues raised. While courts have not faced COVID-19 before, they have faced urgent situations, which is why such provisional legal remedies exist.

It is an extraordinary and painful moment in which we are all living. Ordinary life has been upended in an effort to keep as many people as possible alive and not debilitated by serious illness. The people at risk include prison staff and the communities in which prisons are located. In these circumstances, 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.

By Judith Resnik, Arthur Liman Professor of Law
Adapted from a declaration submitted to the
United States District Court for the District of
New Jersey



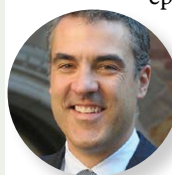
U.S. Office of War Information employees receiving free inoculation against smallpox, diphtheria, and typhoid in 1943.

The Legal History of Contagious Disease

Professor John Fabian Witt '99 has produced a series of short Zoom lectures on the legal history of epidemics and infectious diseases in the U.S. (View them at ylaw.us/2XgcabT.)

The lectures were initially given as part of Witt's American Legal History course at Yale.

The central thesis of the lecture series is that domestically and for elites, American public health law has been liberal, or “sanitationist” to use the language of public health history. But at the border and for the poor and for non-whites, according to Witt, the law of epidemics has been authoritarian or “quarantinist.” Either way, the history of public health crises illuminates the enduring significance of our legal institutions in shaping public health policies. Yale University Press will be publishing a book on the topic by Witt in the fall, titled *American Contagions: A Short History of Law and Democracy in Crisis*.



John Fabian Witt

A poster encouraging truck drivers to report to proper authorities cases of communicable diseases encountered on their routes, c. late 1930s.



MEARES

Professor Tracey Meares Selected as Phi Beta Kappa Visiting Scholar

The Phi Beta Kappa Society has selected Tracey Meares, the Walton Hale Hamilton Professor of Law and a Founding Director of The Justice Collaboratory, as a 2020–2021 Phi Beta Kappa Visiting Scholar. Since 1956, the Society's Visiting Scholar Program has been offering undergraduates the opportunity to spend time with some of America's most distinguished scholars. The purpose of the program is to contribute to the intellectual life of the institution by making possible an exchange of ideas between the Visiting Scholars and the resident faculty and students.

Each year, members of the Committee on the Visiting Scholar Program select top scholars in the liberal arts and sciences to travel to universities and colleges where Phi Beta Kappa chapters are located. Visiting Scholars spend two days on each campus meeting informally with undergraduates, participating in classroom lectures and seminars, and giving one major lecture open to the academic community and general public.



Tracey Meares

RODRÍGUEZ

Cristina Rodríguez Elected to the American Academy of Arts & Sciences

The American Academy of Arts & Sciences, one of the nation's most prestigious honorary societies, has elected Leighton Homer Surbeck Professor of Law Cristina Rodríguez '00 to its 2020 member class.



Cristina Rodríguez

The 240th class of new members includes the election of 276 artists, scholars, scientists, and leaders in the public, nonprofit, and private sectors.

The Academy was founded in 1780 by John Adams, John Hancock, "and others who believed the new republic should honor exceptionally accomplished individuals and engage them in advancing the public good," according to the Academy.

Rodríguez's research interests include constitutional law and theory, immigration law and policy, administrative law and process, language rights and policy, and citizenship theory.

The Academy's projects and publications are focused on the arts and humanities, democracy and justice, education, global affairs, and science.

AAP ASSOCIATION OF AMERICAN PUBLISHERS

Honors for Faculty Books

Origins of Order: Project and System in the American Legal Imagination by Paul W. Kahn (Yale University Press) and *Law and Macroeconomics* by Yair Listokin (Harvard University Press) were finalists for the Association of American Publishers' 2020 Prose Awards.

THE TIMES

The Times of London named Daniel Markovits's *The Meritocracy Trap* one of the 50 best books of 2019.

KAHAN

Report by Dan Kahan Surveys Science Video Audiences

Research by Elizabeth K. Dollard Professor of Law and Professor of Psychology Dan Kahan has helped Northern California public radio station KQED learn more about its audiences, and specifically, why more women weren't watching its "Deep Look" science video series.



Dan Kahan

The series, which is produced by KQED and presented on YouTube by PBS Digital Studios, has 1.2 million subscribers and reaches millennials, an audience that PBS is eager to serve. But the percentage of women who watch the series is considerably lower than the percentage of men.

KQED received a grant award from the National Science Foundation for the project Cracking the Code: Influencing Millennial Science Engagement. Kahan is among a team of academic researchers from Texas Tech University's Science Communication and Cognition Lab and Yale Law School's Cultural Cognition Project working in partnership with KQED on the project.



Monica Bell gave the Seymour Lecture at University of Tulsa College of Law on January 16.