

2020

## Lessons from Disaster: Assessing the COVID19 Response in Youth Jails & Prisons

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### Recommended Citation

Madalyn K. Wasilczuk, Lessons from Disaster: Assessing the COVID19 Response in Youth Jails & Prisons, 2 Ariz. St. L. J. Online 221 (2020).

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# Lessons from Disaster: Assessing the COVID-19 Response in Youth Jails & Prisons\*

Madalyn K. Wasilczuk\*\*

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## INTRODUCTION

The COVID-19 pandemic has laid bare many of the cruel and inhumane conditions that persist in U.S. jails and prisons.<sup>1</sup> Headlines have highlighted

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\* This paper was published in January 2021 during the COVID-19 pandemic. All dates and time descriptions refer to the 2020–21 COVID-19 pandemic unless otherwise stated.

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1. Though this essay focuses on the response to COVID-19 in the U.S. juvenile legal system, the traumatic harms to children are of equal concern in other countries where governments are likewise failing to safeguard confined children from the virus in ways that preserve their mental health. See *Detained Children Left Out of COVID-19 Response*, HUM. RTS WATCH (May 14, 2020, 1:00 AM), <https://www.hrw.org/news/2020/05/14/detained-children-left-out-covid-19-response> [<https://perma.cc/4Q6L-TVPU>]; THE INT’L LEGAL FOUND. & UNICEF, PRE-TRIAL RELEASE OF CHILDREN IN CONFLICT WITH THE LAW DURING COVID-19: TECHNICAL NOTE TO

the lack of access to adequate cleaning supplies and personal hygiene materials, restrictions on hand sanitizer, under-resourced medical facilities, and the costliness of phone calls and video visits for people in custody.<sup>2</sup> Jails, prisons, and detention centers are some of the most virulent hotspots for transmission,<sup>3</sup> and lawyers, activists, and family members have mobilized to depopulate carceral facilities as a mitigation measure.<sup>4</sup> Less attention has been paid to the plight of the approximately 48,000 children confined away from home on any given night.<sup>5</sup> Of those children, about 20% are held pre-adjudication, meaning they have not been adjudicated delinquent for any offense.<sup>6</sup> Though state juvenile legal systems have a range of underlying justifications, they are premised on a rehabilitative model—some solely and some in part.<sup>7</sup> In Louisiana, for example, the juvenile legal system is “non-

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RELEVANT MYANMAR JUSTICE PRACTITIONERS AND AUTHORITIES 1 (2020), <https://www.unicef.org/myanmar/media/5581/file/English%20Version.pdf> [<https://perma.cc/SD4S-WN9R>].

2. See Lauren Gill, *Prisoners Inside Georgia’s Clayton County Jail Describe Desperate Efforts To Avoid COVID-19*, APPEAL (Aug. 7, 2020), <https://theappeal.org/prisoners-inside-georgias-clayton-county-jail-describe-desperate-efforts-to-avoid-covid-19> [<https://perma.cc/3K6Y-LBVK>]; Casey Tolan, *Hand Sanitizer Is Still Considered Contraband in Some Prisons Around the Country*, CNN, <https://www.cnn.com/2020/05/05/us/coronavirus-prison-hand-sanitizer-contraband-invs/index.html> [<https://perma.cc/9EYY-RBMX>] (May 5, 2020, 6:02 AM). Wanda Bertram, *Prisons and Jails Are Rolling Back Free Phone and Video Calls. They Should Be Extending Them Instead.*, PRISON POL’Y INITIATIVE (Sept. 11, 2020), <https://www.prisonpolicy.org/blog/2020/09/11/free-calls/> [<https://perma.cc/PRR4-RWUR>].

3. See Elizabeth Weill-Greenberg, *New York City Jails Have an Alarming High Infection Rate, According to an Analysis by the Legal Aid Society*, APPEAL (Mar. 26, 2020), <https://theappeal.org/new-york-city-jails-coronavirus-covid-19-legal-aid-society/> [<https://perma.cc/8Q8H-6R8P>]; *Responses to the COVID-19 Pandemic*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html> [<https://perma.cc/PNL7-6KNN>] (Dec. 14, 2020).

4. See Richard Winton et al., *Amid COVID-19, California Releases Some Inmates Doing Time for Murder. Advocates Push To Free More*, L.A. TIMES (Aug. 9, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-08-09/covid-19-california-releases-violent-crime-murder-prisoners> [<https://perma.cc/Y4ZB-LMVH>]; Jeremy Loudenback, *Calls To Release Youth from Lockups Due to Virus Threat Grow Nationwide*, IMPRINT (Apr. 1, 2020, 5:49 PM), <https://imprintnews.org/justice/juvenile-justice-2/calls-to-release-youth-from-lockups-due-to-virus-threat-grow-nationwide/41950> [<https://perma.cc/4YFN-BKG3>]. See generally The Movement for Black Lives, *Free Them All: Prison Is No Place for a Pandemic*, VIMEO (Jun. 8, 2020, 1:40 PM), <https://vimeo.com/427095246> [<https://perma.cc/WF66-SW99>] (recording an April 23, 2020, livestream discussing the risk of COVID-19 among incarcerated populations).

5. Press Release, Wendy Sawyer, Prison Pol’y Initiative, Youth Confinement: The Whole Pie 2019 (Dec. 19, 2019), <https://www.prisonpolicy.org/reports/youth2019.html> [<https://perma.cc/9J7H-Z8LQ>].

6. *Id.*

7. See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-02 (West 2020); 42 PA. CONS. STAT. § 6301(b) (2020); Alexander S. *ex rel. Bowers v. Boyd*, 876 F. Supp. 773, 781 (D.S.C.

criminal,” with a “focus on rehabilitation and individual treatment.”<sup>8</sup> Even so, during the COVID-19 pandemic, rehabilitative programming has been sharply curtailed in youth jails and prisons.<sup>9</sup> Still, governors, administrators, and courts have largely dismissed the situations inside these facilities as insufficiently precarious to warrant mass releases.<sup>10</sup>

The COVID-19 pandemic must be understood as a disaster.<sup>11</sup> During a disaster and in its wake, children have distinct needs—needs that are best met in relationship with others.<sup>12</sup> Yet disaster sociologists have long understood

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1995); *In re C.B.*, 97-2783, p. 10 (La. 3/4/98); 708 So. 2d 391, 396–97 (first citing *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); then citing *Santosky v. Kramer*, 455 U.S. 745 (1982); then citing *In re Winship*, 397 U.S. 358 (1970); and then citing *In re T.M.*, 742 P.2d 905 (Colo. 1987)). Despite these rehabilitative goals, even before the pandemic, youth jails and prisons often failed to live up to the ideals of the juvenile legal system. See, e.g., JONATHAN E. SHERIN, L.A. CNTY. DEP’T OF MENTAL HEALTH, REPORT RESPONSE ON THE OFFICE OF INSPECTOR GENERAL INVESTIGATION AND IMPROVING MENTAL HEALTH TREATMENT AND SAFETY IN THE JUVENILE FACILITIES 1 (2019), [https://witnessla.com/wp-content/uploads/2019/06/Report-Response-on-the-OIG-Investigation-and-Improving-Mental-Health-Treatment-and-Safety-in-the-Juvenile-Facilities\\_Item7-Agenda-of-February-19-2019\\_4\\_22\\_2019\\_F.pdf](https://witnessla.com/wp-content/uploads/2019/06/Report-Response-on-the-OIG-Investigation-and-Improving-Mental-Health-Treatment-and-Safety-in-the-Juvenile-Facilities_Item7-Agenda-of-February-19-2019_4_22_2019_F.pdf) [https://perma.cc/4QSR-PYQW] (“[Los Angeles] County’s juvenile justice system is the product of a juvenile incarceration model that is flawed and fundamentally fails to adequately meet the current developmental and mental health needs of youth and their families.”); Christian Piekos, *KSLA Investigates: State Finds Numerous Violations at Youth Detention Center Following Suicides*, KSLA NEWS 12 (Mar. 7, 2019, 7:31 PM), <https://www.ksla.com/2019/03/07/ksla-investigates-state-finds-numerous-violations-youth-detention-center-following-suicides-4/> [https://perma.cc/6AW9-G3MH]. The Los Angeles County Department of Mental Health also noted that the facilities were often “counter-therapeutic.” SHERIN, *supra*, at 5. Indeed, many have argued that the juvenile legal system does a great deal more harm than good. See generally THE ANNIE E. CASEY FOUND., ELIMINATE CONFINEMENT AS A RESPONSE TO PROBATION RULE VIOLATIONS (2020), <https://www.aecf.org/m/resourcedoc/aecf-eliminateconfinementasresponse-2020.pdf> [https://perma.cc/CNZ3-6N3P] (documenting various harms caused by juvenile confinement).

8. *In re C.B.*, 97-2783, p. 10 (La. 3/4/98); 708 So. 2d at 396–97.

9. See JOSH ROVNER, THE SENT’G PROJECT, YOUTH JUSTICE UNDER THE CORONAVIRUS 19–20 (2020), <https://www.sentencingproject.org/wp-content/uploads/2020/09/Youth-Justice-Under-the-Coronavirus.pdf> [https://perma.cc/Q4HM-L6NQ].

10. See Erica L. Green, ‘Pacing and Praying’: Jailed Youths Seek Release as Virus Spreads, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/politics/coronavirus-juvenile-detention.html> [https://perma.cc/U6FT-2NAV].

11. *The Disaster and Health Nexus amid the COVID-19 Pandemic: Challenges of Protecting At-Risk Communities*, UNITED NATIONS ECON. & SOC. COMM’N FOR ASIA & THE PAC. (Sept. 17, 2020), <https://www.unescap.org/blog/disaster-and-health-nexus-amid-covid-19-pandemic-challenges-protecting-risk-communities> [https://perma.cc/98MU-9NWW].

12. Wendy K. Silverman & Annette M. La Greca, *Children Experiencing Disasters: Definitions, Reactions, and Predictors of Outcomes*, in HELPING CHILDREN COPE WITH DISASTERS AND TERRORISM 11, 28 (Annette M. La Greca et al. eds., 2002) (“Children’s perceived social support from significant others has been found to mitigate the impact of natural disasters on children and adolescents.”).

that disasters are not “equal opportunity events.”<sup>13</sup> Children in custody, particularly children of color, are uniquely vulnerable during the COVID-19 disaster.<sup>14</sup> Their vulnerability stems not only from the increased risk of viral transmission in congregate-care settings threatening their physical health, but also from the pandemic response in custodial settings jeopardizing their mental health.<sup>15</sup> What’s more, confined children are among those most vulnerable to crisis due to higher prevalence of disability, trauma, mental illness, poverty, and systemic injustice affecting communities of color.<sup>16</sup>

This essay argues that the juvenile legal system’s response to the coronavirus pandemic fails children by ignoring their unique developmental needs and the trauma of confinement during disaster. Those with the power to free youth from jails and prisons must reckon with the long-term harms of the system’s coronavirus response if they hope to avoid deleterious effects on children and public safety. Part I of this essay will describe the state of youth jails and prisons during the pandemic. Part II will discuss the factors that influence children’s recovery from disaster. Part III will argue that the juvenile legal system has ignored the long-term effects of environmental risk factors intensified by the system’s pandemic response in ways that violate confined youths’ Eighth and Fourteenth Amendment rights. By taking lessons from disaster, the juvenile legal system could adopt a more holistic understanding of rehabilitation and safety that enhances post-disaster outcomes for children and their communities.

## I. COVID-19 IN YOUTH JAILS AND PRISONS

Youth jails and prisons, like their adult counterparts, nursing homes, and shelters, are congregate-living facilities in which COVID-19 transmission is highly likely.<sup>17</sup> Public health experts have advised that depopulation of

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13. ALICE FOTHERGILL & LORI PEEK, CHILDREN OF KATRINA 4 (2015).

14. ROVNER, *supra* note 9, at 19–21; *see* CRYSTAL WATSON ET AL., COVID-19 AND THE US CRIMINAL JUSTICE SYSTEM: EVIDENCE FOR PUBLIC HEALTH MEASURES TO REDUCE RISK 5 (2020), [https://www.centerforhealthsecurity.org/our-work/pubs\\_archive/pubs-pdfs/2020/20201015-covid-19-criminal-justice-system.pdf](https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2020/20201015-covid-19-criminal-justice-system.pdf) [<https://perma.cc/P689-6D2J>].

15. *See* WATSON ET AL., *supra* note 14, at 1, 18–20.

16. *See* LEILA MORSY & RICHARD ROTHSTEIN, ECON. POL’Y INST., TOXIC STRESS AND CHILDREN’S OUTCOMES 1, 3, 6, 8, 14 (2019), <https://files.epi.org/pdf/164823.pdf> [<https://perma.cc/YDU7-D8LW>]; OFF. OF JUV. JUST. & DELINQ. PREVENTION, YOUTHS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN THE JUVENILE JUSTICE SYSTEM 1 (2017), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/intellectual-developmental-disabilities.pdf> [<https://perma.cc/47C4-X3N4>].

17. *See* WATSON ET AL., *supra* note 14, at 1.

these facilities is necessary to reduce the spread of the virus within them.<sup>18</sup> Nevertheless, responses to COVID-19 in the juvenile legal system have tended to focus on the low death rate among children rather than incipient long-term harms caused by the virus itself and by mitigation measures designed to control it.<sup>19</sup>

Children face different risks than adults when infected with the coronavirus and have made up a relatively low proportion of those hospitalized.<sup>20</sup> But the virus can cause serious harm to children. Studies show that one in three hospitalized children must be sent to the ICU, and the long-term effects of the coronavirus on children remain unclear.<sup>21</sup> Some infected children or children with infected family members develop an inflammatory syndrome known as multisystem inflammatory syndrome in children (MIS-C) or pediatric inflammatory multisystem syndrome temporarily associated

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18. Open Letter from AIM Health Institute et al. to Robert R. Redfield, Kyle McGowan, Mitch Wolfe & Robin Ikeda, Ctrs. for Disease Control & Prevention (Apr. 9, 2020), [https://www.drugpolicy.org/sites/default/files/cdc-letter-decarceration\\_0.pdf](https://www.drugpolicy.org/sites/default/files/cdc-letter-decarceration_0.pdf) [<https://perma.cc/EXU4-MJHY>]; Declaration of Craig W. Haney, Professor of Psych. & U.C. Presidential Chair, Univ. of California, Santa Cruz, ¶ 18, *In re J.B.*, No. COA-MISC-0019-2019 (Md. Apr. 3, 2020), <https://www.clearinghouse.net/chDocs/public/JI-MD-0005-0001.pdf> [<https://perma.cc/8VME-ASQ8>]; Affidavit of Joshua Yukich, Fac. Member, Tulane Univ. Sch. of Pub. Health & Tropical Med. ¶ 7 (Apr. 5, 2020) (on file with author).

19. *Compare* Findings of Fact and Conclusions of Law ¶ 54, *J.H. ex rel. N.H. v. Edwards*, No. 20-293-JWD-EWD (M.D. La. June 24, 2020), 2020 WL 3448087 (“Plaintiffs’ two medical experts admitted that they have no evidence to calculate the probability or even approximate the likelihood that a Youth in OJJ’s secure care facilities will die due to COVID-19 or will develop serious COVID-19 complications such as respiratory failure, severely damaged lung tissue, neurological damage, deep venous thrombosis and other coagulopathies like bleeding disorders, COVID-19 induced asthmas, Gillian Barr Syndrome, myocarditis, inflammatory multi-organ dysfunction, or PIMS.”), *with* Haney, *supra* note 18, ¶ 17 (discussing the broader risks confined children face due to COVID-19). While the COVID-19 pandemic is rapidly unfolding, children had already died as a result of the coronavirus by the time of the court’s ruling. Class Action Complaint for Declaratory & Injunctive Relief & Petition for Writ of Habeas Corpus ¶ 35 n.57, *J.H. ex rel. N.H. v. Edwards*, No. 3:20-cv-00293-JWD-EWD (M.D. La. May 14, 2020), 2020 WL 2508548. In the meantime, Louisiana has seen four children die of coronavirus-linked illnesses. Emily Woodruff, *4th Louisiana Child Dies from Coronavirus-Linked Illness Even Though It’s ‘Mathematically Rare’*, NOLA.COM (Aug. 11, 2020, 12:30 AM), [https://www.nola.com/news/coronavirus/article\\_613ce6e4-db33-11ea-a663-6f107f896ea1.html](https://www.nola.com/news/coronavirus/article_613ce6e4-db33-11ea-a663-6f107f896ea1.html) [<https://perma.cc/HG8C-M57F>].

20. Lindsay Kim et al., *Hospitalization Rates and Characteristics of Children Aged <18 Years Hospitalized with Laboratory-Confirmed COVID-19—COVID-NET, 14 States, March 1–July 25, 2020*, 69 CDC MORBIDITY & MORTALITY WKLY. REP. 1081, 1081 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6932e3-H.pdf> [<https://perma.cc/H8DU-V3AG>].

21. *Id.*; Jonas F. Ludvigsson, *Case Report and Systematic Review Suggest that Children May Experience Similar Long-Term Effects to Adults After Clinical COVID-19*, ACTA PAEDIATRICA, Nov. 2020, at 1–2, <https://onlinelibrary.wiley.com/doi/epdf/10.1111/apa.15673> [<https://perma.cc/F5NP-HF8K>].

with SARS-CoV-2 (PIMS-TS).<sup>22</sup> Others, like twelve-year-old Maggie Flannery, become COVID “long-haulers” who continue to suffer symptoms like fatigue and difficulty focusing for months after infection.<sup>23</sup> Across the country, 927,518 total child COVID-19 cases had been reported by November 5, 2020, and children represented 11.3% of all cases.<sup>24</sup> Among school-aged children, adolescents aged twelve to seventeen—an age group that includes the majority of confined children—made up more than 60% of laboratory-confirmed cases.<sup>25</sup> Moreover, trends among children generally belie the reality for youth in custody. In August 2020, “the prevalence of active COVID-19 cases among youth in detention . . . was three and a half times higher than for the United States population as a whole.”<sup>26</sup> This puts youth of color, who are overrepresented in the juvenile legal system and whose families are overrepresented in coronavirus case numbers, at greatest risk.<sup>27</sup>

#### A. *The Spread of COVID-19 in Youth Facilities*

On March 23, 2020, the first confined child in the United States tested positive for COVID-19.<sup>28</sup> The child was held in a thirty-six-bed facility in St.

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22. Perri Klass, *Caring for Children with Multisystem Inflammatory Syndrome*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/2020/06/29/well/family/caring-for-children-with-multisystem-inflammatory-syndrome.html> [https://perma.cc/MD4N-RC5Q].

23. David Tuller, *At 12, She’s a COVID ‘Long-Hauler’*, N.Y. TIMES (Oct. 23, 2020), <https://www.nytimes.com/2020/10/22/well/family/coronavirus-symptoms-kids-children-long-hauler.html> [https://perma.cc/8TSK-6YDC].

24. *Children and COVID-19: State-Level Data Report*, AM. ACAD. OF PEDIATRICS, <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/children-and-covid-19-state-level-data-report/> [https://perma.cc/TV3J-M5VX] (Nov. 9, 2020).

25. See Rebecca T. Leeb et al., *COVID-19 Trends Among School-Aged Children—United States, March 1–September 19, 2020*, 69 CDC MORBIDITY & MORTALITY WKLY. REP. 1410, 1412 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6939e2-H.pdf> [https://perma.cc/NY52-C79F].

26. *Growing Numbers of Latino and Native Youth in Juvenile Detention Buck Trend*, THE ANNIE E. CASEY FOUND. (Sept. 23, 2020), <https://www.aecf.org/blog/growing-numbers-of-latino-and-native-youth-in-juvenile-detention-buck-trend/> [https://perma.cc/6BTR-QKB9].

27. John Sciamanna, *Disparities in Release Rates for Black Youth in Juvenile Detention*, CHILD. WELFARE LEAGUE AM., <https://www.cwla.org/disparities-in-release-rates-for-black-youth-in-juvenile-detention/> [https://perma.cc/A5H8-MP4X]; Daniel Wood, *As Pandemic Deaths Add Up, Racial Disparities Persist—And in Some Cases Worsen*, NPR (Sept. 23, 2020, 1:01 PM), <https://www.npr.org/sections/health-shots/2020/09/23/914427907/as-pandemic-deaths-add-up-racial-disparities-persist-and-in-some-cases-worsen> [https://perma.cc/H7FB-6R2U].

28. ROVNER, *supra* note 9, at 7.

Louis, and the facility isolated him to prevent an outbreak.<sup>29</sup> Even so, by the end of June, twenty-three of the twenty-eight children at the facility had been infected along with fifteen staff members.<sup>30</sup> All of the infected children were Black.<sup>31</sup>

Facilities across the country have seen similar outbreaks. Through October 2020, the Sentencing Project had identified cases among confined youth in thirty-eight states, the District of Columbia, Guam, and Puerto Rico.<sup>32</sup> Staff cases had been confirmed in forty-three states, the District of Columbia, and Guam.<sup>33</sup> As of September 23, 2020, 1,805 youth and 2,537 staff in youth facilities had tested positive for COVID-19.<sup>34</sup> Positive test numbers mask vastly different testing procedures and levels of transparency across states and localities.<sup>35</sup> In Louisiana, the state posts positive cases in youth prisons (but not total tests) on the website for the Office of Juvenile Justice (OJJ), the agency that oversees post-adjudication facilities.<sup>36</sup> There, twenty-eight out of the thirty children tested in April were positive.<sup>37</sup> These cases do not reflect all cases in OJJ custody, however. The agency does not post information about cases in its non-secure facilities, though it gathers that data.<sup>38</sup> By contrast, across state lines, Texas decided to test all 700 youth and 1,700 employees in its five secure facilities after seventeen youth and twenty-eight

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29. *Id.*; see Jack Suntrup, More Than Half of Youth at State Facility in St. Louis Infected with Coronavirus, St. Louis Post-Dispatch (June 10, 2020), [https://www.stltoday.com/news/local/metro/more-than-half-of-youth-at-state-facility-in-st-louis-infected-with-coronavirus/article\\_93f10fea-feb1-5349-b541-98d925503c47.html](https://www.stltoday.com/news/local/metro/more-than-half-of-youth-at-state-facility-in-st-louis-infected-with-coronavirus/article_93f10fea-feb1-5349-b541-98d925503c47.html) [https://perma.cc/QC9W-T6U5] (explaining that the Hogan Street Regional Youth Center, where this child was held, houses boys between ages fourteen and twenty-one).

30. ROVNER, *supra* note 9, at 7.

31. *Id.*

32. The Sentencing Project regularly updates a dashboard tracking the virus in youth facilities. Up-to-date case numbers are available at Josh Rovner, *COVID-19 in Juvenile Facilities*, THE SENT'G PROJECT (Oct. 30, 2020), <https://www.sentencingproject.org/publications/covid-19-in-juvenile-facilities/> [https://perma.cc/ZQZ5-A7DA].

33. *COVID-19 in Juvenile Facilities*, *supra* note 32.

34. ROVNER, *supra* note 9, at 9; Josh Rovner (@JoshRovner), TWITTER (Sept. 23, 2020, 1:01 PM), <https://twitter.com/JoshRovner/status/1308858932362907648> [https://perma.cc/2DXL-BDH8].

35. See ROVNER, *supra* note 9, at 11–12.

36. *OJJ COVID-19 Information*, STATE OF LA. OFF. JUV. JUST., <https://ojj.la.gov/ojj-covid-19-information/> [https://perma.cc/M2K9-SPYF] (Nov. 17, 2020).

37. Findings of Fact and Conclusions of Law, *supra* note 19, ¶ 37. Between then and June, OJJ ceased testing, asserting that no additional children exhibited symptoms. *Id.* ¶ 50–51. As of November 17, 2020, the OJJ COVID-19 dashboard reflected a total of thirty-four positive youth within OJJ prisons with thirty-three youth recovered. STATE OF LA. OFF. JUV. JUST., *supra* note 36.

38. ROVNER, *supra* note 9, at 12.



staff tested positive.<sup>39</sup> Since some facilities decline to test or test only symptomatic youth while others refuse to disclose testing results, known coronavirus cases in youth jails and prisons almost certainly represent an undercount of total cases.<sup>40</sup>

### B. Responses to COVID-19 in the Juvenile Legal System

In some ways, the responses of the juvenile legal system to community spread of COVID-19 track those of the adult criminal legal system: court closures, detention facility lockdowns, and emergency orders suspending speedy trial rights.<sup>41</sup> Yet outbreaks of COVID in youth jails and prisons have been met with far less urgency.<sup>42</sup> Governors, agencies overseeing youth jails and prisons, and the courts have failed to take systemic approaches to depopulate youth facilities.<sup>43</sup> At the same time, protocols adopted to curb

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39. Jolie McCullough, *After 17 Youths Test Positive for the Coronavirus, Texas Juvenile Lockups To Begin Mass Testing*, TEX. TRIB. (July 1, 2020, 9:00 AM), <https://www.texastribune.org/2020/07/01/texas-juvenile-lockups-coronavirus/> [<https://perma.cc/P9TS-2FFQ>].

40. By and large, state-run facilities have been more open with testing results, while private facilities have withheld data or even engaged in cover-ups of outbreaks. ROVNER, *supra* note 9, at 9–11. Nevertheless, widespread testing does not always reveal extensive outbreaks. *See generally* Press Release, N.C. Dep’t of Pub. Safety, *Juvenile Justice Provides Coronavirus Testing for All Juveniles in State Secure Custody* (July 2, 2020), <https://www.ncdps.gov/news/press-releases/2020/07/02/juvenile-justice-provides-coronavirus-testing-all-juveniles-state> [<https://perma.cc/2EGY-XRDA>]; Paul Edward Parker, *3 Youth, 8 Staff Test Positive for Coronavirus at R.I. Training School*, PROVIDENCE J. (May 15, 2020, 5:36 PM), <https://www.providencejournal.com/news/20200515/3-youth-8-staff-test-positive-for-coronavirus-at-ri-training-school> [<https://perma.cc/E7VC-QGYU>]; Jessica Wade, *Three Youths, Another Staff Member Test Positive for COVID-19 at Juvenile Center in Kearney*, LIVE WELL NEB. (Apr. 8, 2020), [https://omaha.com/livewellnebraska/health/three-youths-another-staff-member-test-positive-for-covid-19-at-juvenile-center-in-kearney/article\\_5e9ade9a-6795-52ac-9575-527219d64faa.html](https://omaha.com/livewellnebraska/health/three-youths-another-staff-member-test-positive-for-covid-19-at-juvenile-center-in-kearney/article_5e9ade9a-6795-52ac-9575-527219d64faa.html) [<https://perma.cc/BTL2-C7C7>]; RANDALL A. LIBERTY, ME. DEP’T OF CORR., **DASHBOARD: COVID-19 RELATED INFORMATION**, <https://www.maine.gov/corrections/sites/maine.gov.corrections/files/inline-files/MDOC%20COVID19%20WebDashboard10-23-2020.pdf> [<https://perma.cc/2MJF-AV6K>] (Oct. 5, 2020).

41. *See Criminal Justice System Responses to COVID-19*, NAT’L CONF. OF ST. LEGISLATURES (Nov. 16, 2020), <https://www.ncsl.org/research/civil-and-criminal-justice/criminal-justice-and-covid-19.aspx> [<https://perma.cc/QVG3-HEE6>].

42. *Order Denying Petition for Writ of Mandate at 6, All Youth Detained in Juv. Halls & Camps in L.A. Cnty. v. Super. Ct.*, No. JW2020-01 (Sup. Ct. 2020), <https://imprintnews.org/wp-content/uploads/2020/05/Final-order.pdf> [<https://perma.cc/HRB4-Z4JX>].

43. *See generally* ROVNER, *supra* note 9, at 15–20.

virus transmission have taken a tremendous toll on children and their families.<sup>44</sup>

As states began to respond to the coronavirus pandemic, youth jail and prison administrators had to decide how to change operations to prevent the spread of the virus. Social distancing is a major challenge in congregate-care settings where staff interact with youth; youth interact with one another; and the places children eat, study, play, and sleep are not conducive to maintaining six feet of separation.<sup>45</sup> Administrators responded with a range of measures, including suspended visitation, eliminated communal meals, and curtailed programming to reduce the number of people coming and going from the facilities.<sup>46</sup>

Unlike the adult criminal legal system, the primary focus of the juvenile legal system is rehabilitation.<sup>47</sup> As a result, reductions in programming, especially cuts to behavioral health treatment and education, have been particularly acute for children.<sup>48</sup> Confined children attend school like their peers in the community, but when COVID ended in-person instruction, facilities implemented distance learning via online modules, web conference

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44. See *COVID-19 Parental Resources Kit—Early Childhood*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/parental-resource-kit/early-childhood.html> [<https://perma.cc/2MTA-YVH3>] (Aug. 20, 2020).

45. See Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *CLINICAL INFECTIOUS DISEASES* 1047, 1047 (2007); *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> [<https://perma.cc/T5UT-CY4J>] (Oct. 21, 2020).

46. See, e.g., John Futtly, *Franklin County Prosecutor Objects to Some of Youths Released amid COVID-19 Outbreak at Juvenile Lockup*, COLUMBUS DISPATCH (May 6, 2020, 4:58 PM), <https://www.dispatch.com/news/20200506/franklin-county-prosecutor-objects-to-some-of-youths-released-amid-covid-19-outbreak-at-juvenile-lockup> [<https://perma.cc/T5WE-QQWU>]; Order Denying Petition for Writ of Mandate, *supra* note 42, at 8; Brief of Petitioners at 7–8, 17–18, *In re* J.B., No. COA-MISC-0019-2019 (Md. Apr. 3, 2020), <https://www.clearinghouse.net/chDocs/public/JI-MD-0005-0001.pdf> [<https://perma.cc/8VME-ASQ8>].

47. See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-02 (West 2020); *id.* § 3-8A-02(a)(7); 42 PA. CONS. STAT. § 6301(b) (2020); Alexander S. *ex rel.* Bowers v. Boyd, 876 F. Supp. 773, 781 (D.S.C. 1995); *In re* C.B., 97-2783, p. 10 (La. 3/4/98); 708 So. 2d 391, 396–97 (first citing *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971)); then citing *Santosky v. Kramer*, 455 U.S. 745 (1982); then citing *In re* Winship, 397 U.S. 358 (1970); and then citing *In re* T.M., 742 P.2d 905 (Colo. 1987)).

48. Tyler Kingkade, *Coronavirus in Juvenile Detention Is a ‘Nightmare Scenario,’ Doctors and Advocates Say*, NBC NEWS (March 27, 2020, 11:37 AM), <https://www.nbcnews.com/news/us-news/coronavirus-juvenile-detention-nightmare-scenario-doctors-advocates-say-n1170256> [<https://perma.cc/EAM9-FZ7R>].

programs, or printed packets.<sup>49</sup> The quality of education varied dramatically, and advocates argued that the material provided was not appropriate to the youths' education status, was exceedingly limited in scope, and sometimes provided little or no opportunity for feedback.<sup>50</sup>

The facilities also had to cope with limited medical capacity and, in the beginning, long testing result wait times. For some children, this meant being “medically isolate[d]” in rooms that would be used for punitive solitary confinement under normal circumstances.<sup>51</sup> In Louisiana, for example, OJJ violated its own policies by holding children in “behavioral intervention rooms” for more than eight hours at a time.<sup>52</sup> While the children were allowed writing and reading materials in the rooms, the conditions were otherwise the same as solitary confinement.<sup>53</sup> Advocates in Los Angeles also noted the use of isolation similar to solitary confinement to prevent the spread of disease.<sup>54</sup> Likewise, facilities in Maryland gave children only an hour per day outside their cells to shower or exercise.<sup>55</sup> Some children testified that the consequence of reporting symptoms— isolation—prevented children from disclosing symptoms to staff.<sup>56</sup>

For children in custody, uncertainty about the fate of their families and loved ones contributes to strains on mental health. Caregivers have expressed concerns about the lack of transparency regarding their children's symptoms and treatments.<sup>57</sup> Children and families' mental and emotional health harms

49. *Id.*; Findings of Fact and Conclusions of Law, *supra* note 19, ¶¶ 140–42. *See generally Resources and Examples: Learning in the Time of COVID-19*, LEARNING POL'Y INST., <https://learningpolicyinstitute.org/issue/covid-19-resources> [<https://perma.cc/UY7M-7G7V>].

50. Findings of Fact and Conclusions of Law, *supra* note 19; Declaration of J.B. ¶ 19, *In re J.B.*, No. COA-MISC-0019-2019; Declaration of L.H. ¶ 12, *In re J.B.*, No. COA-MISC-0019-2019; Declaration of L.S. ¶ 13, *In re J.B.*, No. COA-MISC-0019-2019; Declaration of R.P. ¶ 13, *In re J.B.*, No. COA-MISC-0019-2019.

51. ROVNER, *supra* note 9, at 20.

52. *See* Findings of Fact and Conclusions of Law, *supra* note 19, ¶¶ 121–22, 127.

53. *Id.* ¶ 121. AMEND, a project of University of California, San Francisco, has made recommendations to distinguish medical isolation from solitary confinement. *COVID-19 in Correctional Facilities: Medical Isolation*, AMEND, <https://amend.us/covid-19-in-correctional-facilities-medical-isolation/> [<https://perma.cc/TH8H-THRR>].

54. Order Denying Petition for Writ of Mandate, *supra* note 42, at 8 n.1.

55. Rachel Baye, *At Baltimore Detention Center, Youth with COVID-19 Are Held in Isolation*, WYPR (July 22, 2020), <https://www.wypr.org/post/baltimore-detention-center-youth-covid-19-are-held-isolation> [<https://perma.cc/6TGC-ZRK4>].

56. Public health experts state that inappropriate use of solitary confinement rather than medical isolation contributes to confined people's fears of informing facilities of symptoms and of getting tested. WATSON ET AL., *supra* note 14, at 12.

57. Frances Madeson, *Amidst COVID-19 Pandemic, Parents and Advocates Push for a Release of Juvenile Inmates*, LA. ILLUMINATOR (July 22, 2020), <https://ailluminator.com/2020/07/22/amidst-covid-19-pandemic-parents-and-advocates-push->

are further compounded by enforced separation as a result of coronavirus precautions.<sup>58</sup> While some facilities have increased free communication time through video and phone calls, that has come at the expense of furloughs and family visits,<sup>59</sup> which serve as important lifelines for children. The increases in free calling have also been relatively modest. Utah officials have taken a more expansive approach by providing free video calls along with technical support and equipment to families so that they can take advantage of the service.<sup>60</sup> This support is crucial since even free video conferencing may be inaccessible to families who lack reliable internet or data services. Virtual solutions are also often less accessible for children with disabilities, who may be unable to engage in video conferences or phone calls.<sup>61</sup>

Other social distancing protocols have likewise circumscribed children's social worlds. Some facilities have reduced or eliminated interaction between dormitories or units within the facility, in hopes that if one group of children became infected, the others would not.<sup>62</sup> Nevertheless, confined children's own experiences with social distancing demonstrate the near-impossibility of implementing safety protocols without depopulation—a course few states and localities have taken, with notable exceptions.<sup>63</sup> In Colorado and Michigan, the governors issued executive orders to release youth.<sup>64</sup> Colorado

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for-a-release-of-juvenile-inmates/ [https://perma.cc/SF2F-QJLJ] (“Treyjon’s had symptoms of COVID, has asked to be tested, but wasn’t,” Porter [a mother of a child in a youth prison] said. “It’s really hard for a mother not to be in control of her child’s healthcare.”).

58. See WATSON ET AL., *supra* note 14, at 12.

59. Findings of Fact and Conclusions of Law, *supra* note 19, ¶¶ 84–85.

60. ROVNER, *supra* note 9, at 19.

61. Matt Villano, *Students with Special Needs Face Virtual Learning Challenges*, CNN, <https://www.cnn.com/2020/09/24/health/special-needs-students-online-learning-wellness/index.html> [https://perma.cc/TQ4L-SVRL] (Sept. 24, 2020, 3:52 AM).

62. Findings of Fact and Conclusions of Law, *supra* note 19, ¶¶ 88–90.

63. Brad Bennett, *SPLC Fights To Keep Children Out of Juvenile Detention, Other Confined Settings During Pandemic*, S. POVERTY L. CTR. (May 11, 2020) <https://www.splcenter.org/news/2020/05/11/splc-fights-keep-children-out-juvenile-detention-other-confined-settings-during-pandemic> [https://perma.cc/2KH7-9AQA] (“It was impossible to do social distancing in such a small cabin for 10 people,” said Denise, 17, whose name has been changed to protect her identity. “They gave us a brief talk about it, explaining what the symptoms are and how to not get them. Social distancing wasn’t really enforced by the group leaders. They didn’t really take steps to protect us from COVID-19.”); Erica L. Green, *supra* note 10 (reporting that another teen, recently released from a Baltimore detention center, said, “I was trying to stay six feet away from people, but we really can’t in there—it’s tight . . . . And then I was thinking: It doesn’t even matter. Everybody was breathing the same air.”).

64. Colo. Exec. Order No. D 2020 034, <https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20034%20CDHS.pdf> [https://perma.cc/KAV3-ZLW3]; Mich. Exec. Order No. 2020-29, [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-523422--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-523422--,00.html) [https://perma.cc/B4WJ-4G3Q].

released twenty-two children on parole in early April before any children in its facilities tested positive.<sup>65</sup> Likewise, Fresno County, California, released thirty-eight children from custody,<sup>66</sup> Georgia released ninety-nine youth,<sup>67</sup> and Massachusetts reduced its detention population by 20% in mid-to-late-April.<sup>68</sup> Youth facilities were also better positioned to confront the pandemic than many adult facilities due to the steady decrease in youth incarceration over the past two decades,<sup>69</sup> but questions remain about the adequacy of pandemic releases.<sup>70</sup>

Juvenile defenders have pushed juvenile legal systems to release youth to stem the spread of the virus. The litigation fits into three main categories: motions to modify disposition,<sup>71</sup> individual or mass writs of habeas corpus, and civil suits alleging constitutional violations.<sup>72</sup>

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65. Jennifer Brown, *Colorado Is Releasing Incarcerated Kids Early Because Of Coronavirus*, COLO. SUN (Apr. 3, 2020, 4:00 AM), <https://coloradosun.com/2020/04/03/colorado-youth-corrections-coronavirus-precautions> [<https://perma.cc/XBY4-3CRN>].

66. Yesenia Amaro, *Nearly 40 Fresno County Low-level Juvenile Offenders Set Free To Slow Coronavirus Spread*, FRESNO BEE (Apr. 18, 2020, 8:34 AM), <https://www.fresnobee.com/news/coronavirus/article242060706.html> [<https://perma.cc/6DDL-8YH8>].

67. Andy Pierrotti, *Georgia Releases 99 Youth Offenders To Limit Coronavirus Exposure*, WKYC (Apr. 27, 2020, 8:36 PM), <https://www.wkyc.com/article/news/investigations/georgia-releases-99-youth-offenders-to-limit-coronavirus-exposure/85-175854cf-48e5-4c24-94a7-9e0ceaea959b> [<https://perma.cc/JTK8-HYYU>].

68. Laura Rosbrow-Telem, *MA Youth Detention Population Drops More than 20% Within Weeks*, PUB. NEWS SERV. (Apr. 30, 2020), <https://www.publicnewsservice.org/2020-04-30/juvenile-justice/ma-youth-detention-population-drops-more-than-20-within-weeks/a70055-1> [<https://perma.cc/ZNY6-DECR>].

69. ROVNER, *supra* note 9, at 13–14 (noting that overcrowding in youth jails and prisons has diminished since 2000, and that there are fewer large facilities now than in the early 2000s).

70. For example, one study of the adult jail in Dane County, Wisconsin, demonstrated that the jail would have had at least ninety coronavirus cases, as opposed to the fifty-two that it had, had the sheriff's office not released more than 200 people. Kelly Davis, *Coronavirus in Jails and Prisons*, APPEAL (Aug. 10, 2020), <https://theappeal.org/coronavirus-in-jails-and-prisons-40/> [<https://perma.cc/M7T9-2PKR>]. This data demonstrates the risks of failing to decarcerate, which are particularly applicable to larger youth prisons.

71. In juvenile legal systems, courts typically retain the power to review and modify dispositions, the juvenile equivalent of an adult sentence, and children often retain the right to representation at post-disposition review hearings. This can result in children's early release from confinement or other dispositional conditions. *See generally* Sandra Simkins, Marty Beyer & Lisa M. Geis, *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation*, 38 WASH. U. J.L. & POL'Y 241, 242–44 (2012); Sandra Simkins & Laura Cohen, *The Critical Role of Post-Disposition Representation in Addressing the Needs of Incarcerated Youth*, 8 J. MARSHALL L.J. 311, 320–27 (2015).

72. As a juvenile defender in Louisiana, I worked with colleagues engaged in all three types of litigation in the early stages of the pandemic.

The success of motions to modify disposition and individual writs of habeas corpus, though almost certainly used more frequently than mass habeas petitions or constitutional civil suits, is difficult to track, in part due to the confidentiality of juvenile proceedings in many states. It is clear, however, that individual motions faced challenges across the country as courts grappled with balancing public health and due process. In some jurisdictions, courts resisted holding hearings, and juvenile defenders struggled to contact their clients due to the suspension of visitation. In Los Angeles County, for example, half of the juvenile court judges were not holding hearings early in the pandemic.<sup>73</sup> Judges also denied motions for early parole without holding hearings, even for children who were at high risk if they contracted COVID due to verifiable physical health conditions.<sup>74</sup> Judges also refused to release children held in custody for technical violations of probation or parole, those who were very near the end of their custodial disposition, and those whose release had the support of their probation or parole officers.<sup>75</sup> Children in Los Angeles also reported being unable to speak confidentially with their attorneys.<sup>76</sup> In New Orleans, the juvenile court stated it would remain open for emergency matters in compliance with the Louisiana Supreme Court's order requiring certain types of hearings to continue.<sup>77</sup> In reality, the juvenile court closed. As a result, children were arrested and detained without an independent probable cause determination for more than the forty-eight hours allowed by law until an appellate court ordered the juvenile court to resume detention hearings.<sup>78</sup> To challenge their clients' unlawful detentions, lawyers were forced to email motions and writs to the judges because the clerk's office had closed, and the court had not provided any official filing method.<sup>79</sup>

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73. James Queally, *Despite Probation Approval, L.A. Blocks Release of At-Risk Juvenile Offenders*, L.A. TIMES (April 20, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-04-20/as-coronavirus-spreads-in-l-a-county-jails-and-prisons-some-young-offenders-with-asthma-are-denied-release> [<https://perma.cc/SX46-XZXS>].

74. *Id.*

75. *Id.*

76. Petition for Writ of Mandate at 33, *All Youth Detained in Juv. Halls & Camps in L.A. Cnty. v. Super. Ct.*, No. JW2020-01 (Super. Ct. 2020), <https://www.cdfca.org/wp-content/uploads/sites/4/2020/04/Petition-for-a-Writ-of-Mandate-in-the-Supreme-Court-of-California.pdf> [<https://perma.cc/483L-6AR5>].

77. La. Order of Closure, [https://www.lasc.org/COVID19/Orders/2020-04-27\\_OrleansJuv.pdf](https://www.lasc.org/COVID19/Orders/2020-04-27_OrleansJuv.pdf) [<https://perma.cc/S38K-TMMK>].

78. *State v. R.W.*, 2020-0209 (La. App. 4 Cir. 4/21/20).

79. La. Order of Closure, *supra* note 77. The order of closure directs filings to the Clerk of Court and goes on to order that the Clerk of Court temporarily close.

Unlike litigation on behalf of single clients, mass litigation largely failed to achieve the widespread release of youth. Courts ruled against youth in suits brought in Alabama,<sup>80</sup> Pennsylvania,<sup>81</sup> Louisiana,<sup>82</sup> and Texas.<sup>83</sup> In a partial success, in Maryland, the state supreme court denied juvenile defenders' request for mass release but subsequently ordered the Maryland Department of Juvenile Services to review children's cases, resulting in the release of 200 youth.<sup>84</sup>

One troubling trend as the pandemic continues is that the same COVID fatigue affecting people's willingness to comply with public health-related restrictions seems to be seeping into the juvenile legal system.<sup>85</sup> Release rates are diminishing, with the Annie E. Casey Foundation reporting that one in three children detained on August 1, 2020, would have been free had release rates remained at their March levels.<sup>86</sup> Moreover, despite worsening virus prevalence in youth jails and prisons, the population has remained flat, and racial disparities have worsened.<sup>87</sup>

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80. Bennett, *supra* note 63.

81. Peter Hall, *Pa. Supreme Court Denies Request To Release Children in Juvenile Facilities During Coronavirus Pandemic*, MORNING CALL (Apr. 7, 2020, 8:49 PM), <https://www.mcall.com/coronavirus/mc-nws-coronavirus-pennsylvania-supreme-court-juvenile-detention-20200407-gvqc3vznubhlvmpz26gpyfhyam-story.html> [https://perma.cc/CV8Q-YD99].

82. Matt Sledge, *Federal Judge Denies Request To Free Louisiana Youth Prisoners Because of Coronavirus Outbreak*, NOLA.COM (July 4, 2020, 10:20 PM), [https://www.nola.com/news/coronavirus/article\\_5cb01eac-bcb1-11ea-abbd-e77f8359a275.html](https://www.nola.com/news/coronavirus/article_5cb01eac-bcb1-11ea-abbd-e77f8359a275.html) [https://perma.cc/PF56-4LWT].

83. Green, *supra* note 10.

84. Luke Broadwater, *Maryland Releases About 200 Juveniles from Detention Centers amid Coronavirus Pandemic*, BALT. SUN (Apr. 27, 2020, 7:48 PM), <https://www.baltimoresun.com/coronavirus/bs-md-pol-juvenile-release-coronavirus-20200427-4mjlk5pawbnafusvm7a7b7g4-story.html> [https://perma.cc/5496-M6BJ]; *see also* Corrected Order, *In re* J.B., No. 0019-2019 (Md. Apr. 10, 2020), <https://www.clearinghouse.net/chDocs/public/JI-MD-0005-0002.pdf> [https://perma.cc/245K-SSKE]; Order Guiding the Response of the Circuit Courts Sitting as Juvenile Courts to the COVID-19 Emergency as It Relates To Those Juveniles Who Are Detained, Committed Pending Placement or in Commitments, <https://www.clearinghouse.net/chDocs/public/JI-MD-0005-0003.pdf> [https://perma.cc/VN5C-Z2U6].

85. *See* "COVID Fatigue" Is Hitting Hard. Fighting It Is Hard, Too, Says UC Davis Health Psychologist, U.C. DAVIS HEALTH (July 7, 2020), <https://health.ucdavis.edu/health-news/newsroom/covid-fatigue-is-hitting-hard-fighting-it-is-hard-too-says-uc-davis-health-psychologist/2020/07> [https://perma.cc/W8LC-YLFG].

86. THE ANNIE E. CASEY FOUND., *supra* note 26.

87. *Id.*

*C. Race and Disability Disparities in Youth Facilities During COVID-19*

Though children in youth jails and prisons are all facing difficult circumstances because of the pandemic, children's backgrounds and social circumstances have resulted in uneven burdens. At the outset of the pandemic, national admission rates to youth jails diminished proportionally across races, but the release rate gap between white and Black children widened. Prior to the pandemic, white children were released from detention at a rate 7% higher than that of Black children.<sup>88</sup> As of May 2020, the white release rate had increased to 17% higher than that of Black children.<sup>89</sup> By July, the release rate was 61% for white youth but only 55% for Black youth, 52% for Latinx youth, and 50% for Native youth.<sup>90</sup>

Children in jails and prisons overrepresent families from lower income brackets,<sup>91</sup> many of whom are facing severe economic hardship because of the pandemic.<sup>92</sup> Families of color are even more likely to be facing economic loss. Latinx families are most likely to have experienced job loss or cut hours due to the pandemic, but Black families' economic circumstances are not much better.<sup>93</sup>

Economic vulnerability and dislocation also come with increased health risks. Communities of color are more likely to work in jobs that require them to report to work in person while failing to provide sufficient personal protective equipment (PPE).<sup>94</sup> The same communities are more likely to suffer from underlying health conditions that put them at risk of more severe infections and to lack adequate access to medical care.<sup>95</sup> These systemic disparities mean that Black, Latinx, and Native American people are

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88. *Youth Detention Admissions Remain Low, but Releases Stall Despite COVID-19*, THE ANNIE E. CASEY FOUND. (July 8, 2020), <https://www.aecf.org/blog/youth-detention-admissions-remain-low-but-releases-stall-despite-covid-19/> [<https://perma.cc/89KZ-6PSW>].

89. *Id.* This data is available based on surveys the Annie E. Casey Foundation conducted in jurisdictions that are Juvenile Detention Alternatives Initiative (JDAI) sites. *Id.* Since there is a lag in release of national youth jail and prison censuses, complete data on racial disparities is unavailable. ROVNER, *supra* note 9 at 17.

90. THE ANNIE E. CASEY FOUND. *supra* note 26.

91. See *Economic Justice*, JUV. L. CTR., <https://jlc.org/issues/economic-justice> [<https://perma.cc/QH6N-PV2U>]; Press Release, Wendy Sawyer, *supra* note 5.

92. Kim Parker, Juliana Menasce Horowitz & Anna Brown, *About Half of Lower-Income Americans Report Household Job or Wage Loss Due to COVID-19*, PEW RSCH. CTR. (Apr. 21, 2020), <https://www.pewsocialtrends.org/2020/04/21/about-half-of-lower-income-americans-report-household-job-or-wage-loss-due-to-covid-19/> [<https://perma.cc/9GDJ-ZE52>].

93. *Id.*

94. WATSON ET AL., *supra* note 14, at 5.

95. *Id.*



disproportionately becoming ill and dying of COVID-19.<sup>96</sup> The disparity in case severity and mortality rates affects children as well. Black, Latinx, American Indian, and Alaskan Native children and youth accounted for 78% of COVID-19 deaths under the age of 21 as of July 31, 2020.<sup>97</sup> And while information about how underlying conditions affect the course of the virus in children is not available,<sup>98</sup> youth of color are disproportionately likely to suffer from the underlying conditions that the CDC has warned may increase morbidity and mortality rates in adults.<sup>99</sup> A study in New York City also demonstrated that Black and Latinx children are disproportionately likely to suffer from MIS-C.<sup>100</sup> Systemic racism only compounds the risks of COVID-19 to confined children of color.<sup>101</sup>

## II. COVID-19 AS A DISASTER

To understand the effects of the COVID-19 pandemic on children, it is useful to think of the pandemic as a disaster. Disasters are “overwhelming events that involve the destruction of property, include injury or loss of life, affect large communities, and are shared by many children and families.”<sup>102</sup> They are traumatic events beyond the scope of daily life.<sup>103</sup> Though the word

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96. *The Disproportionate Impact of COVID-19 on Communities of Color: Hearing Before the H. Comm. on Ways & Means*, 116th Cong. (2020) (statement of the American Hospital Association), <https://www.aha.org/system/files/media/file/2020/05/disproportionate-impact-of-covid-19-on-communities-of-color-testimony-5-27-2020.pdf> [<https://perma.cc/E9GJ-L3JC>]; Liz Mineo, *For Native Americans, COVID-19 Is ‘the Worst of Both Worlds at the Same Time’*, HARV. GAZETTE (May 8, 2020), <https://news.harvard.edu/gazette/story/2020/05/the-impact-of-covid-19-on-native-american-communities/> [<https://perma.cc/XZ26-PVM8>].

97. Danae Bixler et al., *SARS-CoV-2–Associated Deaths Among Persons Aged <21 Years—United States, February 12–July 31, 2020*, 69 CDC MORBIDITY & MORTALITY WKLY. REP. 1324, 1325 (2020).

98. Kaitlyn Kamleiter, *COVID-19 and Preexisting Conditions: What You Need To Know*, CHILD.’S MINN., <https://www.childrensmn.org/2020/04/30/covid-19-preexisting-conditions/> [<https://perma.cc/39VM-EQQ3>] (June 2, 2020).

99. *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [<https://perma.cc/6R3T-7P5C>] (Nov. 2, 2020). For example, low-income and minority youth are disproportionately likely to suffer from asthma, obesity, and substance use disorders or be immunocompromised. *Asthma Disparities in America*, ASTHMA & ALLERGY FOUND. OF AM., <https://www.aafa.org/asthma-disparities-burden-on-minorities.aspx> [<https://perma.cc/D6YA-JC9Y>]; Brief for Petitioners, *supra* note 46, at 19–21.

100. Mariawy Riollano-Cruz et al., *Multisystem Inflammatory Syndrome in Children Related to COVID-19: A New York City Experience*, J. MED. VIROLOGY 2 (forthcoming), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/jmv.26224> [<https://perma.cc/8VNS-SYWF>].

101. WATSON ET AL., *supra* note 14, at 5.

102. Silverman & La Greca, *supra* note 12, at 12.

103. *Id.*

disaster typically calls to mind a natural disaster, like a hurricane, earthquake, tornado, or flood, the definition is more expansive, including residential fires, toxic waste spills, mass transit disasters, motor vehicle accidents, and community violence.<sup>104</sup>

The pandemic is rightly understood in this context: it is a period marked by prolonged, rolling emergency shelter-in-place orders across the United States, massive economic dislocation, widespread prolonged illness, and a climbing death count. Viewing the COVID-19 pandemic through a disaster lens can help decision makers in the juvenile legal system understand the unique vulnerabilities of children in confinement during this time.

Studies of prior disasters and their effects, including their specific toll on children, demonstrate the need for strong institutions in the wake of disaster.<sup>105</sup> Already, experts have called for government-wide attention to the traumatic effects of COVID-19 and for institutions that care for children to be attuned to the mental health harms of this disaster.<sup>106</sup> Importantly, experts have warned that “the exposure of the COVID-19 pandemic may increase children’s risk for subsequent maltreatment and adversity.”<sup>107</sup>

While children have different experiences of and responses to disaster, they frequently experience “posttraumatic stress disorder, . . . depression, anxiety, academic problems, and other developmental issues” in disaster’s wake.<sup>108</sup> Children are also vulnerable to psychological problems,<sup>109</sup> though not all children have pathological responses to disaster, nor do all children’s responses lead to psychological disorders.<sup>110</sup> To understand why some children suffer while others recover well after a disaster, it is important to consider risk factors and protective factors. Risk and protective factors come from three bases: (1) children’s individual attributes, (2) their families’ attributes, and (3) the attributes of their larger environments.<sup>111</sup> For example, a child with a mental or physical disability is more likely to struggle after a

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104. *Id.*

105. FOTHERGILL & PEEK, *supra* note 13, at 121–25.

106. Gene Griffin, *Defining Trauma and a Trauma-Informed COVID-19 Response*, 12 PSYCH. TRAUMA S279, S279 (2020); Chavez Phelps & Linda L. Sperry, *Children and the COVID-19 Pandemic*, 12 PSYCH. TRAUMA S73, S74 (2020).

107. Phelps & Sperry, *supra* note 106, at S74.

108. Silverman & La Greca, *supra* note 12, at 14.

109. Emily Goldmann & Sandra Galea, *Mental Health Consequences of Disasters*, 35 ANN. REV. PUB. HEALTH 169, 174 (2014), <https://www.annualreviews.org/doi/pdf/10.1146/annurev-publhealth-032013-182435> [<https://perma.cc/T9LB-P87C>].

110. Sharon K. Hall, *Disasters and Psychological Risk in Children*, in CHILDREN, LAW, AND DISASTERS: WHAT WE HAVE LEARNED FROM KATRINA AND THE HURRICANES OF 2005, at 43, 52 (2009).

111. *Id.* at 44.

disaster because their disability is a risk factor.<sup>112</sup> Similarly, lack of adequate means or adequate schools can portend difficult, halting recoveries for children.<sup>113</sup>

When examining children’s responses to COVID-19, it is also important to acknowledge how a pandemic is different from other forms of disaster. One of the most obvious differences is the length of time of the ongoing emergency. Stay-at-home orders in the United States have dragged on over months, with vacillating restrictions on behavior. School has been disrupted for almost a year. Social interaction with peers, an important aspect of development, has drastically decreased. Therefore, while researchers who study disaster divide disasters into stages, the “impact” stage, in which the event occurs, is longer and more difficult to bound in the context of the COVID-19 pandemic.<sup>114</sup>

The uncertain bounds of the coronavirus disaster have placed additional stress on caregivers, who do not know how long their children will be out of school or how long economic dislocation will continue. Caregivers’ responses to disaster are of the utmost importance for children’s wellbeing.<sup>115</sup> Researchers discovered that parents who feared the 2009 swine flu pandemic “transmitted this threat information to their children, which caused the children to be fearful of the disease.”<sup>116</sup> Children also rely heavily on caregivers to be their advocates and a source of stability during and after a disaster, but parents and guardians who are experiencing increased stress and economic dislocation of their own are not always able to provide such support.<sup>117</sup> Children who have had prior academic difficulties or attention problems are also more likely to struggle after a disaster than those who did not have such issues.<sup>118</sup>

Understanding the factors that lead to success for children after a disaster, as well as the vulnerabilities they face, can help the juvenile legal system more appropriately respond to the dangers of the COVID-19 disaster for confined children.

112. *Id.*

113. *Id.* at 58.

114. Disaster researchers describe the impact of disaster on survivors during the following stages to guide their work: (1) preimpact, the period before the disaster; (2) impact, when the event occurs; (3) recoil, immediately after the event; (4) postimpact, days to weeks after the event; and (5) recovery and reconstruction—months or years after the event. Silverman & La Greca, *supra* note 12, at 14.

115. See FOTHERGILL & PEEK, *supra* note 13, at 34 (“[W]hen . . . caregivers, siblings, or other family members began to struggle emotionally, economically, or otherwise after the storm, so too did the children.”).

116. Phelps & Sperry, *supra* note 106, at S74.

117. See FOTHERGILL & PEEK, *supra* note 13, at 34, 37.

118. Silverman & La Greca, *supra* note 12, at 27.

### III. ASSESSING THE PANDEMIC RESPONSE IN YOUTH JAILS & PRISONS

Courts' focus on mortality rates when ruling on challenges to youth incarceration during the pandemic fails to consider incarcerated youths' unique vulnerabilities to disaster. Their risk factors include mental illness, trauma, disability, and academic challenges that occurred prior to contact with the juvenile legal system, along with the juridogenic harms of the system itself and the particular precarities of adolescence.

#### A. *Confined Children's Vulnerability to the COVID Disaster*

Confined children often have significant mental health challenges before coming into the juvenile legal system. Approximately two thirds of youth in jails and prisons have at least one diagnosable mental health condition, as compared to between 9% and 22% of youth in the community.<sup>119</sup> Youth in the juvenile legal system also tend to have had significant trauma exposure. One study indicates that 70–90% of children experienced trauma prior to custody.<sup>120</sup>

Even children in the system who have not experienced trauma often have a high prevalence of adverse childhood experiences (ACEs), which can have long-term consequences, including “disrupted neurodevelopment; social, emotional, and cognitive impairment; adoption of health-risk behaviors; disease, disability, and social problems; and early death.”<sup>121</sup> These pre-existing conditions make children in custody more susceptible to trauma symptoms, anxiety, and depression during the pandemic because of isolating facility policies that separate them from peers and their loved ones while at the same time facing a scary, unknown, and dangerous virus.

The juvenile legal system in turn inflicts its own harms on children's mental health and wellbeing. Harms that result from “legalistic approaches to decision making [that] violate what is in the best interest” of the child are known as “juridogenic harm.”<sup>122</sup> Juridogenic harms can result from attempts

119. OFF. OF JUV. JUST. & DELINQ. PREVENTION, INTERSECTION BETWEEN MENTAL HEALTH AND THE JUVENILE JUSTICE SYSTEM 2–3 (2017), <https://www.ojjdp.gov/mpg/litreviews/Intersection-Mental-Health-Juvenile-Justice.pdf> [<https://perma.cc/6XTX-KMGU>].

120. Karen M. Abram et al., *Posttraumatic Stress Disorder and Trauma in Youth in Juvenile Detention*, 61 ARCHIVES GEN. PSYCHIATRY 403 (2004); <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/481985> [<https://perma.cc/ST65-VTLZ>].

121. Phelps & Sperry, *supra* note 106, at S73 (citing Katie A. Ports et al., *Adverse Childhood Experiences and Sexual Victimization in Adulthood*, 51 CHILD ABUSE & NEGLECT 313 (2016)).

122. Autumn R. Ascano & Joseph A. Meader, *Juridogenic Harm and Adverse Childhood Experiences*, 62 S.D. L. REV. 797, 800 (2017) (internal quotation marks omitted).

to implement competing interests or from the inherent tensions between an adversarial legal system and rehabilitation.<sup>123</sup> Confinement in youth jails and prisons is one important source of juridogenic harm, and that harm can be immediate or long-term. For one-third of confined youth diagnosed with depression, their depressive symptoms began after incarceration.<sup>124</sup> Youth in jails and prisons also experience higher rates of depression and suicidal ideation.<sup>125</sup> Adolescent incarceration also predicts long-term mental and physical health adversities. In one study, less than one cumulative month of incarceration during adolescence predicted subsequent adult depressive symptoms, while a duration of one to twelve months predicted worse subsequent adult general health, and a duration of greater than one year predicted subsequent adult functional limitations, adult depressive symptoms, and adult suicidal thoughts.<sup>126</sup>

Children in custody are also more likely to have had prior academic difficulties that predict poor outcomes after disaster. Youth in jails and prisons have a higher-than-average incidence of special educational needs.<sup>127</sup> Many confined children also enter youth jails and prisons behind their peers in school, with higher rates of course failure and grade retention, placing them at a higher risk of not graduating high school.<sup>128</sup> Dropping out creates other

123. *Id.*

124. BARRY HOLMAN & JASON ZIEDENBERG, JUST. POL'Y INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 2 (2007), [www.justicepolicy.org/uploads/justicepolicy/documents/dangers\\_of\\_detention.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers_of_detention.pdf) [<https://perma.cc/XGQ9-SLD4>].

125. *Id.*

126. Elizabeth S. Barnert et al., *How Does Incarcerating Young People Affect Their Adult Health Outcomes?*, PEDIATRICS, Feb. 2017, at 6, <https://pediatrics.aappublications.org/content/pediatrics/139/2/e20162624.full.pdf> [<https://perma.cc/L555-L6SM>].

127. Wendy Cavendish, *Academic Attainment During Commitment and Postrelease Education-Related Outcomes of Juvenile Justice-Involved Youth with and Without Disabilities*, 22 J. EMOTIONAL & BEHAV. DISORDERS 41, 41 (2014) [https://journals.sagepub.com/doi/pdf/10.1177/1063426612470516?casa\\_token=YVUd\\_36XOycAAAAA:ryl6YUfUQ7DO9\\_YifZ6IH9cVI8DTaOMlnFK2ZvP1zYIppD\\_Q588PwXyO8QsqLm-EwDNxmaHYb1Wz](https://journals.sagepub.com/doi/pdf/10.1177/1063426612470516?casa_token=YVUd_36XOycAAAAA:ryl6YUfUQ7DO9_YifZ6IH9cVI8DTaOMlnFK2ZvP1zYIppD_Q588PwXyO8QsqLm-EwDNxmaHYb1Wz) [<https://perma.cc/JGF8-L9V5>] (“[M]ore than one in three youths entering juvenile justice or correctional facilities have previously received special education services[,] . . . [and] students with disabilities are up to 4 times more likely to be committed to a juvenile justice facility than their nondisabled peers.”); Jackie Mader & Sarah Butrymowicz, *Pipeline to Prison: Special Education Too Often Leads to Jail for Thousands of American Children*, HECHINGER REP. (Oct. 26, 2014), <https://hechingerreport.org/pipeline-prison-special-education-often-leads-jail-thousands-american-children/> [<https://perma.cc/STM3-3JLM>] (comparing the percentage of students statewide who qualified for special education with the much higher percentage of qualifying children in detention facilities).

128. Cavendish, *supra* note 127, at 42; *see also* HOLMAN & ZIEDENBERG, *supra* note 124, at 9.

challenges that ripple through youths' lives. Failure to complete high school correlates with poorer health, lower lifetime earnings, higher unemployment, and an increased risk of rearrest.<sup>129</sup>

Confined children also lack meaningful access to an important protective factor: their caregivers. The caregivers most accessible to confined youth are correctional staff, and they, too, have been hit hard by the virus.<sup>130</sup> The pandemic and mitigation measures have limited youths' contact with familiar therapeutic and educational service providers,<sup>131</sup> reduced close contact with supportive adults,<sup>132</sup> created staffing shortages because of illness,<sup>133</sup> and induced an environment of fear.<sup>134</sup> Underscoring the anxious, fearful environments and staffing problems, multiple youth facilities have seen uprisings during the pandemic.<sup>135</sup>

Incarceration always erects barriers to meaningful relationships between incarcerated youth and their caregivers in the community, and those barriers only grew when facilities introduced pandemic mitigation measures. It is almost inevitable that youths' concerns about their families' wellbeing would be exacerbated during a pandemic. This is especially true for those youth whose guardians have underlying health conditions, work in essential jobs, or have become unemployed. The stresses of the pandemic and policies

129. HOLMAN & ZIEDENBERG, *supra* note 124, at 9.

130. *See* Rovner, *supra* note 32.

131. ROVNER, *supra* note 9, at 19.

132. *Id.* at 19–20.

133. *Id.* at 20.

134. Green, *supra* note 10; *see* Jan Ransom & Alan Feuer, 'We're Left for Dead': Fears of Virus Catastrophe at Rikers Jail, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/03/30/nyregion/coronavirus-rikers-nyc-jail.html> [<https://perma.cc/C94X-4T8H>]; Keith L. Alexander & Dan Morse, *As Virus Spreads in Jails and Prisons, Correctional Officers Fear for Themselves and Their Loved Ones*, WASH. POST (May 4, 2020, 1:48 PM), [https://www.washingtonpost.com/local/public-safety/as-virus-spreads-in-jails-and-prisons-correctional-officers-fear-for-themselves-and-their-loved-ones/2020/05/04/cb5d26f0-8643-11ea-ae26-989cfce1c7c7\\_story.html](https://www.washingtonpost.com/local/public-safety/as-virus-spreads-in-jails-and-prisons-correctional-officers-fear-for-themselves-and-their-loved-ones/2020/05/04/cb5d26f0-8643-11ea-ae26-989cfce1c7c7_story.html) [<https://perma.cc/PPH8-GSJ2>]; David M. Reutter, *Florida Guards and Prisoners Fear COVID-19 Infection*, PRISON LEGAL NEWS (July 1, 2020), <https://www.prisonlegalnews.org/news/2020/jul/1/florida-guards-and-prisoners-fear-covid-19-infection/> [<https://perma.cc/CP3Y-AXNU>]; Tanya Eiserer & Jason Trahan, 'I'm Scared Every Day': Correctional Officers, Inmates Say Texas Prisons Botched Covid-19 Response, WFAA (June 10, 2020, 10:32 PM), <https://www.wfaa.com/article/news/investigations/correctional-officers-inmates-say-texas-prisons-botched-covid-19-response/287-73ebc3a9-14ea-4110-8670-92568a5ad5f3> [<https://perma.cc/4XVS-BC5L>]; Cary Johnson & Maurice Chammah, *As a Mom Working in a Prison, I Worry About Bringing Coronavirus Home*, MARSHALL PROJECT (Apr. 1, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/01/as-a-mom-working-in-a-prison-i-worry-about-bringing-coronavirus-home> [<https://perma.cc/V27F-PZN5>].

135. ROVNER, *supra* note 9, at 20. Adult facilities in the U.S. and around the world have also seen coronavirus-related uprisings. *See* WATSON ET AL., *supra* note 14, at 13.

against visits make it difficult, despite families' best efforts, to maintain supportive relationships with their children. These disruptions are counter-productive to children's success when returning from custody, particularly in the context of disaster. Visits from family during incarceration diminish adolescents' likelihood of rearrest, help them more easily manage their mental health, and increase their educational attainment in custody.<sup>136</sup> Therefore, limits on visitation and complications with video and phone calls stack an additional layer of vulnerability on confined children.

Confined youth are also vulnerable by nature of their age and stage of development. Their brains are highly plastic, undergoing more changes during adolescence than during any period other than that from ages zero to three.<sup>137</sup> These changes mean that trauma can influence the rate and course of adolescent development.<sup>138</sup> Studies also suggest adolescents' developmental stage makes them particularly reactive to stress, which can have long-term effects on their health and wellbeing.<sup>139</sup> Though a detailed exploration of the effects of trauma, stress, and adverse experiences on adolescents is outside the scope of this essay, juvenile legal system decision makers must recognize that their decisions shape long-term youth behaviors by promoting their resilience or creating environments that further disadvantage them.

### *B. Applying Lessons from Disaster to Children's Conditions of Confinement*

Children's success after the COVID-19 pandemic will depend primarily on the risk and protective factors present in themselves, their families, and their environments.<sup>140</sup> Due to their underlying vulnerability and separation from their families, confined children's carceral environments will play a particularly important role in their post-disaster success. Nevertheless, as described above, those environments are replete with risk factors, and

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136. RYAN SHANAHAN & MARGARET diZEREGA, IDENTIFYING, ENGAGING, AND EMPOWERING FAMILIES: A CHARGE FOR JUVENILE JUSTICE AGENCIES 3, 12 (2016), <https://www.vera.org/downloads/publications/family-engagement-for-juvenile-justice-agencies.pdf> [<https://perma.cc/2NPQ-WNCY>].

137. LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 8–11 (2014).

138. Ashley Williams, *Early Childhood Trauma Impact on Adolescent Brain Development, Decision Making Abilities, and Delinquent Behaviors: Policy Implications for Juveniles Tried in Adult Court Systems*, 71 JUV. & FAM. CT. J. 5, 7–8 (2020).

139. Lisa Eiland & Russell D. Romeo, *Stress and the Developing Adolescent Brain*, 249 NEUROSCIENCE 162 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3601560/pdf/nihms426952.pdf> [<https://perma.cc/TLF8-EHCF>].

140. Hall, *supra* note 110, at 44; *see* FOTHERGILL & PEEK, *supra* note 13, at 4.

protective factors are more difficult to access because of pandemic mitigation measures. Even so, these environments are governed by the Eighth and Fourteenth Amendments, and as such, the courts have a role in applying what we know about children's trajectories after disaster when considering challenges to children's confinement during the pandemic.

The due process protections of the Fourteenth Amendment prevent youth held in pre-trial detention from being confined in conditions that "amount to punishment."<sup>141</sup> This pre-trial due process standard is more protective than the Eighth Amendment standard that applies to adults who have been convicted.<sup>142</sup> After adjudication, confined children remain protected by the Eighth and Fourteenth Amendments. Finding that the purpose of the juvenile legal system is rehabilitative rather than punitive, courts have held that a Fourteenth Amendment standard applies to confined children.<sup>143</sup> As a result, the conditions of children's confinement must bear a reasonable relationship to the system's rehabilitative purpose.<sup>144</sup> Children are further protected by the Fourteenth Amendment because of the State's role as *parens patriae*.<sup>145</sup> When the state affirmatively takes on a parental role toward children, the state must guarantee treatment that "proper parental care would provide."<sup>146</sup> The Eighth Amendment likewise governs the steps youth prison administrators must take to protect children in custody. Conditions that pose a risk of future harm thus failing to provide children with "reasonable safety" violate their rights to be free of cruel and unusual punishment.<sup>147</sup> In the past, threats to health conditions caused by a known risk of "serious contagious disease" have been sufficient to constitute such an unconstitutional condition.<sup>148</sup> In sum, to be constitutional, a custodial setting for a youth must be (1) rehabilitative rather than punitive, (2) afford parental care, and (3) ensure the youth's reasonable safety.

Many youth jails and prisons have failed to meet constitutional standards during the pandemic. Though some parents are struggling to meet their

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141. *Bell v. Wolfish*, 441 U.S. 520, 535, 541 (1979); *Vann v. Scott*, 467 F.2d 1235, 1239 (7th Cir. 1972); *A.J. ex rel. L.B. v. Kierst*, 56 F.3d 849, 854 (8th Cir. 1995); *Gary H. v. Hegstrom*, 831 F.2d 1430, 1431–32 (9th Cir. 1987); *H.C. ex rel. Hewett v. Jarrard*, 786 F.2d 1080, 1085 (11th Cir. 1986); *Alexander S. ex rel. Bowers v. Boyd*, 876 F. Supp. 773, 795–96 (D.S.C. 1995).

142. *See Kingsley v. Hendrickson*, 576 U.S. 389, 396–97 (2015).

143. *See In re S.D.*, 2002-0672, p. 25 (La. App. 4th Cir. 11/06/02); 832 So. 2d 415, 434 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

144. *Id.*

145. *See Nelson v. Heyne*, 491 F.2d 352, 359 (7th Cir. 1974); *In re S.D.*, 2002-0672, p. 26–27 (La. App. 4th Cir. 11/06/02); 832 So. 2d 415, 435–36; *Trial Order, C.P.X. ex rel. S.P.X v. Garcia*, 450 F. Supp. 3d 854, 867–68, (S.D. Iowa 2020).

146. *Heyne*, 491 F.2d at 360.

147. *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

148. *Id.* at 34.



children’s needs, it is hard to justify states’ isolation of children for twenty-three hours per day as “proper parental care” or as rehabilitative.<sup>149</sup> In fact, solitary confinement and lack of access to education and treatment portend short-term difficulties and negative long-term physical and mental health outcomes for adolescents.<sup>150</sup> Implementation of remedial measures against the coronavirus should not be allowed to create additional known, serious risks to confined children. If they do, those measures, like the unchecked spread of the virus itself, constitute violations of the Eighth and Fourteenth Amendments.

Thus far, courts have largely rejected advocates’ requests to free youth from custody during the pandemic, citing children’s low risk of death from COVID-19, the good intentions of those running youth facilities, and the need for individualized release determinations. Juvenile legal system administrators and governors have defended the lawsuits on similar bases.<sup>151</sup> But an analysis that conceives of rehabilitative environments only in terms of custodial options and reasonable safety only in terms of mortality rates fails to assess whether, once necessary steps are taken to mitigate the spread of the virus, the custodial environment meets constitutional standards.

To fulfill the rehabilitative aspirations of the juvenile legal system, decision makers must consider both the physical health risks of COVID-19 and the mental health harms that arise from pandemic protocols. In some jurisdictions, attendance to mental health outcomes is not just in the best interests of youth; it is legally mandated.<sup>152</sup> Such an assessment will put children on a path to emerge successfully from the COVID-19 disaster by fostering strong relationships between children and their families and removing them from anti-therapeutic environments. In turn, better outcomes for children ensure safer and healthier communities long promised but not delivered by long-standing carceral politics.

#### CONCLUSION

Past disasters teach us that children’s relationships and an environment conducive to support, education, and treatment are key to their success after a disaster. It is not lost on advocates that the system has failed to learn these lessons. As Gina Womack of Friends and Family of Louisiana’s Incarcerated

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149. Baye, *supra* note 55.

150. See WATSON ET AL., *supra* note 14, at 18–19; David H. Cloud et al., *Medical Isolation and Solitary Confinement: Balancing Health and Humanity in US Jails and Prisons During COVID-19*, 35 J. GEN. INTERNAL MED. 2738, 2738.

151. See, e.g., Findings of Fact and Conclusions of Law, *supra* note 19, ¶¶ 74, 86, 94.

152. See, e.g., 42 PA. CONS. STAT. § 6301(b) (2020).

Children explained, “It seems like there’s really no plan in place of the outbreak in the youth facilities, and it seems as if Katrina never happened.”<sup>153</sup> Instead, youth jails and prisons have operated during the coronavirus pandemic by using solitary confinement masquerading as medical isolation and severing children’s ties to their families. If the juvenile legal system is to play the role to which it aspires, it must be willing to recognize the centrality of mental health to children’s safety and rehabilitation and move away from its reliance on incarceration. The need for drastic change is particularly acute for youth of color, who are multiply marginalized by the juvenile legal system and disparately affected by the pandemic. For now, the juvenile legal system’s short-sighted and punitive pandemic response reveals the gulf between the system’s stated purpose and its reality.

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153. Loudenback, *supra* note 4.