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ESSAYS

NO EXIT: HOW LITIGATION FAILED INCARCERATED YOUTH DURING THE COVID-19 PANDEMIC

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ABSTRACT

As the COVID-19 pandemic swept across the nation, hundreds of thousands of incarcerated individuals, including tens of thousands of youth, were trapped in highly contagious, congregate care correctional facilities that exponentially increased their risk of infection. Incarcerated youth were cut off from family and denied essential, often court-ordered programming because entry into facilities from the outside was sharply curtailed. To protect these incarcerated populations from the spread of COVID-19 as well as the loss of treatment, education, and other programming opportunities, advocates for youth filed litigation in several jurisdictions.

This Essay offers a snapshot of how youth plaintiffs fared in litigation that they brought to reduce population in these facilities or to modify and eliminate harmful institutional practices and policies during the COVID-19 pandemic. In most of these cases, relief was limited or nonexistent. This Essay examines these efforts and addresses the limitations of current constitutional jurisprudence to protect vulnerable populations during a public health emergency.

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INTRODUCTION

For most people, the world changed in mid-March 2020.[1] As with all of life's traumatic markers, individuals will always remember where they were when the pandemic took hold—their last day in the office, at the grocery store, or at school. They will remember where they were when the streets emptied, businesses shuttered, and the motor of life wound down. They will remember the shock of the word "pandemic," the new meaning of "essential workers,"[2] the panic of toilet paper shortages,[3] and the stunning ignorance about what laid before them. They will remember a feeling of shared anxiety and anguish, as the initial days of quarantine stretched to weeks and then months, and winter gave way to spring and then summer, fall, and winter again.[4] The seasons continued their forward march even as the days remained unfailingly the same.

They will remember when work and life boundaries blurred, weekdays merged with weekends, and daily schedules were ruptured.[5] They will remember when the novelty of home-centered life became the drudgery of never leaving home and how a chance encounter with an old friend or colleague seemed momentarily thrilling. They will remember when Zoom became a verb, when family members became Zoom tiles,[6] when

1. On March 11, 2020, the World Health Organization declared the novel coronavirus outbreak (COVID-19) a global pandemic. Domenico Cucinotta & Maurizio Vanelli, *WHO Declares COVID-19 a Pandemic*, 91 ACTA BIOMEDICA 157, 157 (2020).

2. *See, e.g.*, Zachary Jaggers, *When We Say 'Essential Workers', We Really Mean Essential Work*, MARKETWATCH (May 11, 2020, 8:27 AM), http://www.marketwatch.com/story/when-we-say-essential-workers-we-really-mean-essential-work-2020-05-08 [https://perma.cc/4QVT-7E9L].

3. *See* Andrew Moore, *How the Coronavirus Created a Toilet Paper Shortage*, N.C. ST. U.: COLL. OF NAT. RESOURCES NEWS (May 19, 2020), http://cnr.ncsu.edu/news/2020/05/coronavirus-toilet-paper-shortage/ [https://perma.cc/M9DF-MKZA].

4. Indeed, experts predicted early on that shutdowns could continue into 2022. Ellie Silverman, *COVID-19 Shutdowns Could Continue into 2022, Harvard Experts Predict*, PHILA. INQUIRER (Apr. 14, 2020), http://www.inquirer.com/health/coronavirus/newsletter/coronavirus-covid19-philadelphia-pennsylvania-social-distancing-cases-new-jersey-20200414.html [https://perma.cc/7VMB-PYRR].

5. *See* Corinne Purtill, *How Lockdown Redefines Our Weekends*, BBC: REMOTE CONTROL (Apr. 3, 2020), http://www.bbc.com/worklife/article/20200402-how-lockdown-redefines-our-weekends [https://perma.cc/C8YC-WCYV].

6. *See* William Antonelli, *What Is Zoom? A Comprehensive Guide to the Wildly Popular Video-Chatting Service for Computers and Smartphones*, BUS. INSIDER (Nov. 18, 2020, 2:52 PM), http://www.businessinsider.com/what-is-zoom-guide [https://perma.cc/8PJK-YWEK].

sleepwear became daywear,[7] and when masks became a health statement, a fashion statement, a political statement, and a statement for or against something and everything.[8] They will remember "before" as they awaited "after."

These people were the lucky ones.

While it was consistently reported that COVID-19 knew no boundaries—that it was an equal opportunity infection spreading everywhere and anywhere, afflicting the rich and poor, the healthy and sick, and the young and old alike[9]—the effects of the pandemic did not land evenly.[10] It decimated older residents in nursing homes, ravaged communities of color, and raced through prisons and jails like wildfire.[11] It exposed structural racism in America even as it fed on it. Racial tensions crystalized across the country as law enforcement killed several unarmed Black people through the spring and summer of 2020.[12] The ensuing nationwide Black Lives Matter protests formed a Venn diagram with COVID-19, overlapping the pandemic with racial strife to reveal the national schism on race while simultaneously fueling an urgent call for racial reckoning.[13]

The convergence between race and COVID-19 was most evident in America's correctional facilities, where disproportionately Black and Brown incarcerated populations were among those most at risk of infection but also the least able to seek safety.[14] In the juvenile justice system, Black youth are nine times more likely to be

7. *See* Karen Heller, *This Is Our Pajama Moment*, WASH. POST (Dec. 7, 2020, 6:00 AM), http://www.washingtonpost.com/lifestyle/style/pajamas-sleepwear-christmas-winter/2020/12/04/1d1580ae-331f-11eb-b59c-adb7153d10c2_story.html [https://perma.cc/5ZE6-K73T].

8. *See, e.g.*, Patrick Van Kessel & Dennis Quinn, *Both Republicans and Democrats Cite Masks as a Negative Effect of COVID-19, But for Very Different Reasons*, PEW RES. CTR.: FACTTANK (Oct. 29, 2020), http://www.pewresearch.org/fact-tank/2020/10/29/both-republicans-and-democrats-cite-masks-as-a-negative-effect-of-covid-19-but-for-very-different-reasons/ [https://perma.cc/4XRE-CHTG].

9. *See* Allison Smith, *'This Is a Disease That Has an Equal Opportunity Infection': Rural Health Care Professionals React to Spike in COVID-19 Cases*, FOX8 (Nov. 16, 2020, 11:06 PM), http://myfox8.com/news/coronavirus/this-is-a-disease-that-has-an-equal-opportunity-infection-rural-health-care-professionals-react-to-spike-in-covid-19-cases/ [https://perma.cc/84QB-9W45]; Armstrong Williams, *COVID-19 Is an Equal Opportunity Killer*, WINCHESTER STAR (Dec. 11, 2020), http://www.winchesterstar.com/winchester_star/armstrong-williams-covid-19-is-an-equal-opportunity-killer/article_5125d8f4-ac5b-5795-b478-817cd64c0ec5.html [https://perma.cc/6PMG-P2PX].

10. *E.g.*, *In America, COVID-19 Has Not Been an Equal Opportunity Virus*, R.I. COLL. (June 16, 2020), http://www.ric.edu/news/Pages/In-America,-COVID-19-Has-Not-Been-an-Equal-Opportunity-Virus.aspx [https://perma.cc/VN4T-QSQ6].

11. *See* Jasmine E. Harris, *Detention Centers and Jails Have Become COVID-19 Hotbeds. It's Time for Community-Based Solutions*, MS. (Nov. 13, 2020), http://msmagazine.com/2020/11/13/custodial-spaces-detention-centers-jails-covid-19-community-based-solutions-decarceration/ [https://perma.cc/X4ZU-XNJS].

12. *See* Kim Parker, Juliana Menasce Horowitz & Monica Anderson, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RES. CTR. (June 12, 2020), http://www.pewsocialtrends.org/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/ [https://perma.cc/HY8D-P3CV]; *see also* Jeffrey A. Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 955–59 (2020).

13. *See* Nicole Chavez, *2020: The Year America Confronted Racism,* CNN, http://www.cnn.com/interactive/2020/12/us/america-racism-2020/ [https://perma.cc/D9Z9-XHML] (last visited Apr. 1, 2021).

14. *See* Harris, *supra* note 11 ("In prisons and jails, more than 252,000 people have been infected and at least 1,450 inmates and correctional officers have died of coronavirus."); *see also* ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 4 (2016)

incarcerated, and Latinx and Native American youth are three times more likely to be incarcerated than white youth.[16] These disparities were only exacerbated by COVID-19. A 2021 survey found that "the population of Black youth in juvenile detention on Feb[rurary] 1, 2021, reached a pandemic high, while that of white youth was the second lowest recorded in more than a year."[15] Moreover, "Black youth stayed longer in detention than their white peers—and even longer than before the pandemic began."[16] The survey noted, "[t]he difference in release rates between youth of color and white youth was the largest ever recorded in this survey."[17] Studies have also shown that youth of color are disproportionately affected by racial and ethnic health disparities; Black and Latinx youth suffer from most major chronic diseases, including asthma, diabetes, obesity, and cardiovascular issues, at higher rates than their white peers.[18]

Yet, as they remained locked in congregate care settings with scant control over their day-to-day fates, the limitations of constitutional protections were laid bare as courts across the country rejected advocates' pleas to "decarcerate" correctional facilities as the only humane way to manage the looming public health crisis.[19] These rulings left incarcerated individuals facing increased use of solitary confinement and lockdown and left management of the crisis almost exclusively in the hands of correctional officials and employees.[20] While adult incarcerated individuals faced the gravest risks inside large, overcrowded prisons, children in youth correctional and other congregate care settings were also at great risk and likewise were left largely empty-handed in the courts.[21]

Americans' collective journey through this "once in a century pandemic"[22] will undoubtedly yield numerous books, articles, and commentaries on how the country got

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(discussing the disproportionate number of African Americans and Hispanics in state prisons); THE SENTENCING PROJECT, BLACK DISPARITIES IN YOUTH INCARCERATION (2017), https://www.sentencingproject.org/publications/black-disparities-youth-incarceration/ [https://perma.cc/DB36-9BFV] ("Forty-four percent of [imprisoned youth] were African American, despite the fact that African Americans comprise only 16 percent of all youth in the United States.").

15. *Survey: A Pandemic High For Black Youth In Detention*, ANNIE E. CASEY FOUND. (Mar. 26, 2021), http://www.aecf.org/blog/survey-a-pandemic-high-for-the-number-of-black-youth-in-juvenile-detention/ [https://perma.cc/S3AZ-HWWX] Among the survey's key findings:

- Releases from detention were slower to occur in January 2021 than during any month since the pandemic began, especially for Black and Latino youth of color.
- The population of Black and Latino youth grew 14% and 2%, respectively, from May 1, 2020, through Feb. 1, 2021, while the population of white, non-Latino youth fell 6%.
- Overall, the youth detention population rose by more than 6% from May 1 to Feb. 1, driven by Black and Latino youth lingering longer in detention.

Id.

16. *Id.*

17. *Id.*

18. James H. Price, Jagdish Khubchandani, Molly McKinney & Robert Braun, *Racial/Ethnic Disparities in Chronic Diseases of Youths and Access to Health Care in the United States*, BIOMED RES. INT'L, Sept. 23, 2013, at 1, 1.

19. See *infra* Section III for a discussion regarding litigation aimed at reducing detention center populations and improving conditions amid the COVID-19 pandemic.

20. *See infra* notes 67–69 and accompanying text.

21. *See infra* Section III.

22. David Murdoch, *The Next Once-a-Century Pandemic Is Coming Sooner than You Think – But COVID-19 Can Help Us Get Ready*, CONVERSATION (June 14, 2020, 3:56 PM), http://theconversation.com/

here, how people suffered, how they endured, and what they learned. As a decades-long civil rights lawyer for children, I offer my own preliminary reflections about how incarcerated children fared as advocates turned to the courts for relief and sought to enforce constitutional protections. I conclude "not so well," as even the unique circumstances of a pandemic could not disrupt the entrenched "othering" in America. Caring is for us, not them.

Section I of this Essay reviews the data to give the reader a sense of not only the scale of the pandemic inside correctional facilities but also the disproportionate numbers of Black and Brown youth affected. Section II describes what happened inside these facilities when the pandemic hit, including the loss of critical education and treatment programs, as well as increased use of isolation to manage the health crisis. Section III takes a close look at some of the lawsuits brought to stem the health risks incarcerated individuals faced inside and to promote a more humane response to those left behind. The Essay concludes with some personal observations about the legal system's response to COVID-19.

I. COVID-19: THE NUMBERS

It is a fool's errand to talk about COVID-19 numbers when, at the time of drafting this Essay, America was counting nationwide deaths per minute and new cases by the hour.[23] But much like the daily death toll during the Vietnam War, which brought the death and casualties of that war into American living rooms through the nightly news on our televisions,[24] the weight of COVID-19 was pressed upon Americans daily by the unceasing data points populating their various screens: number of tests, number of new cases, number of hospitalizations, number of deaths. Americans switched from studying "dashboards" to measure work outcomes[25] to studying dashboards as a measure of communal grief. As the United States consistently led the world in case numbers and deaths,[26] the COVID-19 numbers inside America's prisons, jails, and detention centers also remained persistently high.[27]

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the-next-once-a-century-pandemic-is-coming-sooner-than-you-think-but-covid-19-can-help-us-get-ready-139976 [https://perma.cc/FF7Q-48M5].

23. *See* Tim Moran, *Deaths from Coronavirus Taking Place at Almost 2 Per Minute*, PATCH (Dec. 3, 2020, 11:46 PM), http://patch.com/us/across-america/deaths-coronavirus-are-coming-2-minute [https://perma.cc/KHG9-DLPJ]; Lisa Shumaker, *U.S. Records a Coronavirus Death Every Minute as Total Surpasses 150,000*, REUTERS (July 29, 2020, 6:09 AM), http://www.reuters.com/article/us-health-coronavirus-usa-casualties/u-s-records-a-coronavirus-death-every-minute-as-total-surpasses-150000-idUSKCN24U1FA [https://perma.cc/F5D9-VBAG].

24. *Vietnam: The First Television War*, NAT'L ARCHIVES: PIECES OF HIST. (Jan. 25, 2018), http://prologue.blogs.archives.gov/2018/01/25/vietnam-the-first-television-war/ [https://perma.cc/CEN2-CW5V].

25. *See, e.g.*, Judy Gold, Jenny Riley & Greet Peersman, *Data Dashboard*, BETTEREVALUATION, http://www.betterevaluation.org/en/evaluation-options/data_dashboard [https://perma.cc/8MC5-Z3NV] (last updated Aug. 26, 2020).

26. *See WHO Coronavirus Disease (COVID-19) Dashboard*, WORLD HEALTH ORG., http://covid19.who.int/?gclid=CjwKCAiAiML-BRAAEiwAuWVggm1IFk47j8xRlgEd3eOhIPe4BBEQ1cVBrx1x6dk4BLvTWEnlQlgZPhoCpNEQAvD_BwE [https://perma.cc/68MN-W5U5] (last updated Mar. 18, 2021).

27. *See National COVID-19 Statistics*, COVID PRISON PROJECT, http://covidprisonproject.com/data/national-overview/ [https://perma.cc/PK3H-L6UY] (last visited April 1, 2021).

Through March 2021, there were more than 397,740 cases of COVID-19 reported among prisoners nationwide; during the same time period, there were nearly 2,439 deaths.[28] Data show that one-in-five prisoners had tested positive, compared to one-in-twenty in the general population.[29] The infection rate tracked pervasive racial disparities; with Black Americans incarcerated at five times the rate of whites, they were also more likely to become sick and more likely to have a family member or friend who died from COVID-19.[30] The number of infections in juvenile correctional facilities was markedly lower; through March 2021, 3,935 cases were reported nationwide.[31] This substantially lower number of cases among incarcerated youth is consistent with the significantly lower number of incarcerated youth versus incarcerated adults.[32] To date, no incarcerated children have died from COVID-19, but there have been reported deaths among staff.[33] Among detained youth, COVID-19 cases have been reported in forty-one states, the District of Columbia, Guam, and Puerto Rico.[34] Staff cases have been reported in forty-three states, the District of Columbia, and Guam.[35]

It is undisputed—and unsurprising—that correctional facilities were consistently placed among the top epicenters of COVID-19 spread in America.[36]Congregate care facilities, including correctional facilities and nursing homes, are like petri dishes for cultivation and growth of the virus.[37] Correctional settings are particularly "rich" environments. Incarcerated individuals may be double-celled;[38] cell design and cellblock

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28. *Id.*

29. Beth Schwartzapfel, Katie Park & Andrew Demillo, *1 in 5 Prisoners in the U.S. Has Had COVID-19*, MARSHALL PROJECT (Dec. 18, 2020, 6:00 AM), http://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19 [https://perma.cc/A8KK-GTUC].

30. *Id.*

31. E-mail from Joshua Rovner, Senior Advocacy Assoc., The Sentencing Project, to author (Apr. 19, 2021) (on file with author); *see also* Josh Rovner, *COVID-19 in Juvenile Facilities*, SENTENCING PROJECT, http://www.sentencingproject.org/publications/covid-19-in-juvenile-facilities/ [https://perma.cc/G5KW-VC6F] (last updated Feb. 22, 2021) [hereinafter Rovner, *COVID-19*] (providing reported youth cases nationwide through February). In juvenile detention centers specifically, the number of COVID-19 cases peaked in December 2020 and January 2021. *Survey: A Pandemic High For Black Youth In Detention*, *supra* note 15.

32. Every day, over forty-eight thousand youth are confined in facilities away from home as a result of juvenile or criminal justice system involvement. WENDY SAWYER, PRISON POL'Y INITIATIVE, YOUTH CONFINEMENT: THE WHOLE PIE 2019 (2019), http://www.prisonpolicy.org/reports/youth2019.html [https://perma.cc/66CM-P9N7]. The adult prison population at the close of 2019 (federal and state) was 1,430,800. E. Ann Carson, *Prisoners in 2019*, BJS BULL. (U.S. Dep't of Justice, Washington, D.C.), Oct. 2020, at 1, 1.

33. *See* Rovner, *COVID-19*, *supra* note 31.

34. *Id.*

35. *Id.*

36. Edmund L. Andrews, *Why Prisons and Jails Have Become COVID Hotspots*, STAN. ENGINEERING (Sept. 23, 2020), http://engineering.stanford.edu/magazine/article/why-prisons-and-jails-have-become-covid-hotspots [https://perma.cc/34CM-HKB8].

37. *See, e.g.*, Sarah True, Juliette Cubanski, Rachel Garfield, Matthew Rae, Gary Claxton, Priya Chidambaram & Kendal Orgera, *COVID-19 and Workers at Risk: Examining the Long-Term Care Workforce*, KFF (Apr. 23, 2020), http://www.kff.org/coronavirus-covid-19/issue-brief/covid-19-and-workers-at-risk-examining-the-long-term-care-workforce/ [https://perma.cc/4FX8-ZMGU].

38. *See, e.g.*, Christie Thompson & Joseph Shapiro, *Doubling Up Prisoners in 'Solitary' Creates Deadly Consequences*, NPR (Mar. 26, 2016, 7:00 AM), http://www.npr.org/2016/03/24/470824303/doubling-up-prisoners-in-solitary-creates-deadly-consequences [https://perma.cc/6LKC-EDZU].

layouts do not allow for ongoing social distancing, if at all;[39] sanitizing and cleaning products are limited or unavailable, conditions are notoriously unsanitary;[40] and lack of widespread testing creates widespread vulnerability.[41]

Although overcrowding is less of an issue in the juvenile justice system, where incarceration rates have dropped by sixty percent since 2000,[42] many youth are housed in dormitory-style facilities across the country that allow as many as a dozen youth to share sleeping quarters.[43] Others live in more traditional cell-like designs with shared bathroom, recreation, and dining facilities.[44] Cleaning and sanitizing challenges, the obstacles to social distancing, and the risks posed by nonuniform testing protocols in adult prisons are not mitigated in youth correctional facilities.[45] Importantly, research

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39. *See, e.g.*, Aleks Kajstura & Jenny Landon, *Since You Asked: Is Social Distancing Possible Behind Bars?*, PRISON POL'Y INITIATIVE (Apr. 3, 2020), http://www.prisonpolicy.org/blog/2020/04/03/density/ [https://perma.cc/ASR5-VT2L]; *see also* Verified Petition for Writ of Habeas Corpus at 12, People *ex rel.* Freeman v. Hansell, No. 451130/2020, 2020 N.Y. Misc. LEXIS 2630 (N.Y. Sup. Ct., N.Y. Cty. Apr. 17, 2020).

40. *See, e.g.*, Trisha Korioth, *AAP Outlines Needs of Youths in Justice System Including During Pandemic*, AAP NEWS (May 6, 2020), http://www.aappublications.org/news/2020/05/06/juvenilejustice050620 [https://perma.cc/3B6A-VKRV].

41. *See, e.g.*, Max Marin, *Over 75% of People Tested in Philly Jails Are Positive for COVID-19*, BILLY PENN (May 4, 2020, 8:30 AM), http://billypenn.com/2020/05/04/over-75-of-people-tested-in-philly-jails-are-positive-for-covid-19/ [https://perma.cc/6ZL3-8CVD]. In a September 2020 study of the spread of COVID-19 in specific jails and prisons, coauthored by Stanford Engineering researchers, the authors concluded that the reproduction ratio of COVID-19 in correctional facilities:

> indicates that outbreaks of COVID-19 in correctional facilities will continue and community rates of infection will not decrease if jails are not a central focus of public health strategies to mitigate the spread of the epidemic. Such measures would include wide-scale testing in jails inclusive of correctional officers, providing protective equipment and public health education for correctional officers as first responders, and coordinating large-scale release of individuals from jails to allow for adequate social distancing prior to future outbreaks.

Lisa B. Puglisi, Giovanni S.P. Malloy, Tyler D. Harvey, Margaret L. Brandeau & Emily A. Wang, *Estimation of COVID-19 Basic Reproduction Ratio in a Large Urban Jail in the United States*, 53 ANNALS EPIDEMIOLOGY 103, 105 (2021) (footnote omitted).

42. SAWYER, *supra* note 32.

43. ANDREA J. SEDLACK, WESTAT, SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT: CONDITIONS OF CONFINEMENT 24 (2016) ("[N]early one-fourth of youth in correction programs (24%) share their room with 10 or more other residents."); *see also* RICHARD A. MENDEL, ANNIE E. CASEY FOUND., THE MISSOURI MODEL: REINVENTING THE PRACTICE OF REHABILITATING YOUTHFUL OFFENDERS 19 (2010).

44. *See The Facts Report*, NO KIDS IN PRISON, http://www.nokidsinprison.org/the-facts# [https://perma.cc/2TPD-XXAY] (last visited Apr. 1, 2021) ("For many young people, entering a youth prison closely resembles the experience of entering an adult prison."); *see also* SAWYER, *supra* note 32 ("Two out of every three confined youth are held in the most restrictive facilities—in the juvenile justice system's versions of jails and prisons, or in *actual* adult jails and prisons.").

45. The CDC instructed that individuals should wash their hands for twenty seconds regularly and after sneezing, coughing, blowing their nose, eating or preparing food, before taking medication, and after touching garbage. *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html [https://perma.cc/LB5A-UPU5] (last updated Feb. 19, 2021) [hereinafter *Current CDC Guidance*]. Yet, youth in correctional facilities often lack soap, or even access to a sink, and do not have regular access to hand sanitizer. Korioth, *supra* note 40. The CDC also instructs that staff clean and disinfect commonly touched surfaces and shared equipment several times a day. *Current CDC Guidance*, *supra*. In juvenile detention and correctional

also shows that youth who are involved in the juvenile justice system are more likely to have medical vulnerabilities that place them in a higher risk category.[46] For instance, a nationally representative study of system-involved youth revealed that these youth experienced significantly higher rates of asthma or hypertension diagnoses than youth reporting no justice system involvement.[47]

While older individuals have consistently faced greater chances of serious illness or death from COVID-19, young people were also quite susceptible to contracting the virus[48] and faced many of the same dangers as the older population, including death.[49] A large study of pediatric COVID-19 patients in China showed that, in spring 2020, approximately seven percent of infected children and eleven percent of infected infants had severe or critical cases,[50] and U.S. data showed a growing number of pediatric cases requiring intensive care.[51] These cases included children and infants who suffered from respiratory failure, shock, encephalopathy, heart failure, coagulation dysfunction, acute kidney injury, and life-threatening organ dysfunction.[52] Even when asymptomatic, these

facilities, youth share toilets, sinks, and showers, without disinfection between each use, and staff do not regularly decontaminate surfaces. *See, e.g.*, Declaration of Anne Marie Ambrose et al. at 3, *In re* C.Z., 229 A.3d 240 (Pa. 2020) (per curiam).

46. Molly Buchanan, Erin D. Castro, Mackenzie Kushner & Marvin D. Krohn, *It's F**king Chaos: COVID-19's Impact on Juvenile Delinquency and Juvenile Justice*, 45 AM. J. CRIM. JUST. 578, 584 (2020).

47. *Id.*; Comm. on Adolescence, Am. Acad. of Pediatrics, *Health Care for Children and Adolescents in the Juvenile Correctional Care System*, 107 PEDIATRICS 799, 799–800 (2001).

48. *See Coronavirus Disease 2019 (COVID-19): Situation Report – 70*, WORLD HEALTH ORG. (Mar. 30, 2020), http://www.who.int/docs/default-source/coronaviruse/situation-reports/20200330-sitrep-70-covid-19.pdf?sfvrsn=7e0fe3f8_4 [https://perma.cc/Y6UQ-746J]; *Current CDC Guidance*, *supra* note 45; *United States of Disparities*, W. HAYWOOD BURNS INST., http://usdata.burnsinstitute.org/decision-points/39/pennsylvania [https://perma.cc/FU7H-3GA7] (last visited Apr. 1, 2021); *see also* Sheri Fink, *Worst-Case Estimates for U.S. Coronavirus Deaths*, N.Y. TIMES (Mar. 18, 2020), http://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html?auth=login-email&login=email [https://perma.cc/5VKM-RAFH] ("Unlike with seasonal influenza, the entire population is thought to be susceptible to the new coronavirus.").

49. Stephanie Nebehay, *WHO Message to Youth on Coronavirus: 'You Are Not Invincible,'* REUTERS (Mar. 20, 2020, 2:29 PM), http://www.reuters.com/article/us-health-coronavirus-who-idUSKBN21733O [https://perma.cc/P4TT-YXZK]; *see also* CDC COVID-19 Response Team, *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19) – United States, February 12–March 16, 2020*, *in* MORBIDITY & MORTALITY WKLY. REP. 343, 343 (Ctrs. for Disease Control & Prevention, No. 12, 2020); Taryn Luna, Rong-Gong Lin II, Colleen Shalby, Hannah Fry, Sarah Parvini, Richard Winton & Jaclyn Cosgrove, *L.A. County Reports First Death of a Possible Coronavirus Patient Under 18 as COVID-19 Cases Top 660*, L.A. TIMES (Mar. 24, 2020, 8:38 PM), http://www.latimes.com/california/story/2020-03-24/california-coronavirus-cases-surge-to-2-200-the-worst-is-yet-to-come [https://perma.cc/9G3S-KEKH]; Jennifer Millman, *'It Attacks Everyone:' NYC Loses 1st Child to Virus as State Deaths Eclipse 1,300; NJ Cases Soar*, NBC N.Y. (Mar. 31, 2020, 1:05 AM), http://www.nbcnewyork.com/news/local/nyc-virus-deaths-leap-from-0-to-776-in-15-days-emergency-hospital-help-arrives-monday/2350357/ [https://perma.cc/6GDF-EHLA].

50. *See* Yuanyuan Dong, Xi Mo, Yabin Hu, Xin Qi, Fang Jiang, Zhongyi Jiang & Shilu Tong, *Epidemiology of COVID-19 Among Children in China*, PEDIATRICS, June 2020, at 1, 3.

51. *See COVID-19 Data: North American Pediatric ICUs*, VIRTUAL PEDIATRIC SYS., http://covid19.myvps.org/ [https://perma.cc/3GD9-VKSM] (follow "Timeline Dashboard" hyperlink) (last updated Mar. 19, 2021).

52. Dong et al., *supra* note 50, at 4.

younger individuals still posed a very serious risk of transmission to those with whom they came in contact, including older, more vulnerable adults.[53]

In the earliest days of the outbreak, leading public health officials correctly warned that the "epicenter of the pandemic will be jails and prisons."[54] As the Centers for Disease Control and Prevention (CDC) explained, correctional facilities "present[] unique challenges for control of COVID-19 transmission among incarcerated/detained persons, [detention center] staff, and visitors."[55] These predictions were quickly validated by the data.

As the virus was just beginning its march across the country in spring 2020, more than forty of the fifty largest clustered outbreaks in the country occurred in jails and prisons.[56] Compared with the general population, the number of COVID-19 cases then were 5.5 times higher among people who are incarcerated.[57] December 2020 data are only marginally better: a study prepared for the National Commission on COVID-19 and Criminal Justice found the rate of coronavirus infections in federal and state prisons was still 3.7 times the national rate.[58]

II. THE RESPONSE INSIDE YOUTH CORRECTIONAL FACILITIES

The early—and persistent—public health advice about how to limit the infectious spread of COVID-19 was social distancing, sanitation, and testing.[59] By spring 2020, public use of masks was added as a recommended safety measure.[60]

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53. *See* Guoqing Qian, Naibin Yang, Ada Hoi Yan Ma, Liping Wang, Guoxiang Li, Xueqin Chen & Xiaomin Chen, *COVID-19 Transmission Within a Family Cluster by Presymptomatic Carriers in China*, 71 CLINICAL INFECTIOUS DISEASES 861, 861 (2020).

54. Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. TIMES (Mar. 16, 2020), http://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html [https://perma.cc/ND7E-W7BS].

55. *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Mar. 23, 2020) [hereinafter *March 2020 CDC Guidance*], *in* Memorandum from Betsy C. Jividen, Comm'r, Div. of Corr. & Rehab., to Facility Superintendents and Directors (Mar. 26, 2020), http://dhhr.wv.gov/COVID-19/Documents/COVID19_DCR_Jividen%20memo-CDC%20guidance_2020_03-26.pdf [https://perma.cc/U6N4-7U3Q].

56. Alexandria Macmadu, Justin Berk, Eliana Kaplowitz, Marquisele Mercedes, Josiah D. Rich & Lauren Brinkley-Rubinstein, *COVID-19 and Mass Incarceration: A Call for Urgent Action*, 5 LANCET PUB. HEALTH e571, e571 (2020) (citing *Coronavirus in the US: Latest Map and Case Count*, N.Y. TIMES, http://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html [https://perma.cc/A3HA-MQTE] (last updated Mar. 20, 2021)).

57. *Id.*

58. KEVIN T. SCHNEPEL, COUNCIL ON CRIMINAL JUSTICE, COVID-19 IN U.S. STATE AND FEDERAL PRISONS 3 (2020); *see also* Cid Standifer & Frances Stead Sellers, *Prisons and Jails Have Become a 'Public Health Threat' During the Pandemic, Advocates Say*, WASH. POST (Nov. 11, 2020, 7:05 PM), http://www.washingtonpost.com/national/coronavirus-outbreaks-prisons/2020/11/11/b8c3a90c-d8d6-11ea-930e-d88518c57dcc_story.html [https://perma.cc/5QL3-UXLK].

59. The CDC deemed social distancing a "cornerstone of reducing transmission of respiratory diseases such as COVID-19." *March 2020 CDC Guidance*, *supra* note 55, at 3.

60. Huo Jingnan, *Why There Are So Many Different Guidelines for Face Masks for the Public*, NPR: GOATS & SODA (Apr. 10, 2020, 3:29 PM), http://www.npr.org/sections/goatsandsoda/2020/04/10/829890635/why-there-so-many-different-guidelines-for-face-masks-for-the-public [https://perma.cc/E4SF-ZLDY].

The social distancing protocol was quickly adopted in many jurisdictions, as retail outlets and other spaces open to the public were transformed with paint, masking tape, and other markers to keep people six feet apart or more.[61] Testing improved, but the availability was limited and delays in obtaining results were common in most places.[62] Mask usage became a "political football" with no universal mandate throughout 2020.[63] As advocates turned their attention to implementation of these protocols in correctional settings, the challenge of social distancing was manifest: absent population reduction, it was likely impossible in most facilities.[64] Widespread and routine testing as well as mask-wearing (and availability of masks) were questions of both will and resources.[65] Additionally, as the country learned more about COVID-19, the heightened vulnerability of some individuals based on certain preexisting medical or physical conditions added to the risk in congregate care settings.[66]

To the extent that correctional facilities attempted to mitigate the physical risks, they exacerbated mental health risks for youth in particular. A common approach to ensure physical distancing was to simply place youth alone in a cell or room, or activate some other type of widespread lockdown within facilities.[67] Such isolation has particularly harmful effects on adolescents, causing anxiety, depression, self-harm, and even suicide.[68] It may be particularly harmful for the many youth in the justice system with histories of trauma and abuse.[69] Moreover, the pandemic itself posed a risk of emotional damage to children. Experts agreed that youth could best weather the emotional harms of the pandemic by spending time with family and receiving regular and consistent emotional reassurance and support.[70] Youth in juvenile justice settings,

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61. *See, e.g.*, CITY OF LODI, CAL., ESSENTIAL BUSINESS SOCIAL DISTANCING BEST PRACTICES, http://www.lodi.gov/DocumentCenter/View/3335/socialdistancing-business [https://perma.cc/ZWU5-A7C5] (last visited Apr. 1, 2021).

62. Ken Alltucker, *The Demand for COVID-19 Testing Is Up, Stressing Labs and Delaying Results*, USA TODAY (Nov. 26, 2020, 6:00 AM), http://www.usatoday.com/story/news/health/2020/11/26/covid-19-testing-delays-record-demand-thanksgiving/6417506002/ [https://perma.cc/69L6-6M2Z]; Sarah Mervosh & Manny Fernandez, *'It's Like Having No Testing': Coronavirus Results Are Still Delayed*, N.Y. TIMES (Aug. 4, 2020), http://www.nytimes.com/2020/08/04/us/virus-testing-delays.html [https://perma.cc/6WV7-TNY8].

63. *See* Lauren Aratani, *How Did Face Masks Become a Political Issue in America?*, GUARDIAN (June 29, 2020, 5:00 AM), http://www.theguardian.com/world/2020/jun/29/face-masks-us-politics-coronavirus [https://perma.cc/8B2S-PFQD]; Will Weissert & Jonathan Lemire, *Face Masks Make a Political Statement in Era of Coronavirus*, AP (May 7, 2020), http://apnews.com/article/7dce310db6e85b31d735e81d0af6769c [https://perma.cc/2H2X-3KZZ].

64. Kajstura & Landon, *supra* note 39.

65. Emily Widra & Tiana Herring, *Half of States Fail To Require Mask Use by Correctional Staff*, PRISON POL'Y INITIATIVE (Aug. 14, 2020), http://www.prisonpolicy.org/blog/2020/08/14/masks-in-prisons/ [https://perma.cc/PUF2-YFNZ].

66. *See supra* notes 46–53 and accompanying text.

67. *See* Joseph Calvin Gagnon, Letter to the Editor, *The Solitary Confinement of Incarcerated American Youth During COVID-19*, PSYCH. RES., June 10, 2020, at 1, 1; *see also* Rovner, *COVID-19*, *supra* note 31.

68. *See* AM. CIV. LIBERTIES UNION & HUMAN RIGHTS WATCH, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 24 (2012).

69. *See id.* at 34.

70. *See* GABRIELA RAMOS & STEFANO SCARPETTA, OECD, COMBATTING COVID-19'S EFFECT ON CHILDREN 16–17 (2020); *see also* Eli Hager, *"I Want To See My Child." Juvenile Lockups Cut Visits over COVID-19 Fears*, MARSHALL PROJECT (Mar. 23, 2020, 6:00 AM), http://www.themarshallproject.org/

and especially those subjected to stringent physical distancing rules, were quickly deprived of these supports as administrators rushed to shut youth in and shut the public out.[71]

The rush to isolate and separate youth also led to substantial reductions in education, counseling, and other programming as facilities sought to limit personal contact and increase physical distance.[72] Unlike children outside of these facilities, who were also limited in their opportunities for school and typical social interaction, youth in confinement were often left with no forms of social, educational, or physical activity at all.[73] The harms of isolation and programming deprivation can be particularly devastating for teenagers; during adolescence, the brain reaches what is referred to as the "second period of heightened malleability."[74] As a result, youth are uniquely responsive to environmental changes—and uniquely susceptible to harm from adverse experiences.[75] If there is "[a] lack of stimulation or aberrant stimulation" for youth during this period, the results can lead to "lasting effects on physical and mental health in adulthood."[76] Youth especially need positive social interactions to help them "develop a healthy functioning adult social identity"[77] and build their social skills, so that they can successfully "reintegrate into the broader community upon release" from confinement.[78]

III. THE LITIGATION TO REDUCE POPULATION AND IMPROVE CONDITIONS

Confining young or adult persons in a correctional, congregate care setting during the pandemic raised serious constitutional concerns. In *Helling v. McKinney*,[79] the Supreme Court held that the notion "[t]hat the Eighth Amendment protects against future harm to inmates is not a novel proposition."[80] The Eighth Amendment requires that

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2020/03/23/i-want-to-see-my-child-juvenile-lockups-cut-visits-over-covid-19-fears [https://perma.cc/AYT4-T9M3].

71. *See, e.g.*, MAUREEN WASHBURN & RENÉE MENART, CTR. ON JUVENILE & CRIMINAL JUSTICE, CALIFORNIA'S DIVISION OF JUVENILE JUSTICE FAILS TO PROTECT YOUTH AMID COVID-19, at 5 (2020).

72. *See, e.g.*, *id.* at 6.

73. *See, e.g.,* Pat Eaton-Robb, *Child Advocate: COVID-19 Lockdowns Harming Youth in Prison*, AP (Nov. 17, 2020), http://apnews.com/article/mental-health-coronavirus-pandemic-prisons-028006a7836eed34a4281ebdeea56b31 [https://perma.cc/8HJD-4QS3].

74. Delia Fuhrmann, Lisa J. Knoll & Sarah-Jayne Blakemore, *Adolescence as a Sensitive Period of Brain Development*, 19 TRENDS COGNITIVE SCI. 558, 559 (2015) (quoting LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 9 (2014)).

75. *See* Laura Dimon, *How Solitary Confinement Hurts the Teenage Brain*, ATLANTIC (June 30, 2014), http://www.theatlantic.com/health/archive/2014/06/how-solitary-confinement-hurts-the-teenagebrain/373002 [https://perma.cc/68U9-FLUB]; *see also* V.W. v. Conway, 236 F. Supp. 3d 554, 570–71 (N.D.N.Y. 2017); Andrew B. Clark, *Juvenile Solitary Confinement as a Form of Child Abuse*, 45 J. AM. ACAD. PSYCHIATRY L. 350, 352 (2017).

76. Fuhrmann et al., *supra* note 74, at 560–61.

77. Anthony Giannetti, Comment, *The Solitary Confinement of Juveniles in Adult Jails and Prisons: A Cruel and Unusual Punishment*, 30 BUFF. PUB. INT. L.J. 31, 47 (2011–2012) (quoting Matt Olson, *Kids in the Hole*, PROGRESSIVE, Aug. 2003, at 26, 27).

78. 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, 256 (2012) (quoting Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 333 (2006)).

79. 509 U.S. 25 (1993).

80. *Helling*, 509 U.S. at 33.

"inmates be furnished with . . . 'reasonable safety,'"[81] and the Supreme Court has explicitly recognized that the risk of contracting "serious contagious diseases" may constitute such an "unsafe, life-threatening condition" that it threatens "reasonable safety."[82] *Helling* involved a risk from secondhand smoke;[83] other courts have found claims of future harms cognizable under the Eighth Amendment that involved the risks posed by poisonous water,[84] use of chemical toilets,[85] and paint toxins.[86] One would reasonably assume a potential COVID-19 outbreak posed at least such a substantial risk of serious harm to every incarcerated person, youth or adult, in the United States.

For youth, these constitutional obligations are also heightened. Over the course of the last half century, the U.S. Supreme Court has repeatedly reaffirmed that "[c]hildren have a very special place in life which law should reflect."[87] The basic principle that the "distinctive attributes of youth" require heightened constitutional protections is widely recognized.[88] For children in state custody, this principle takes on even greater importance. These children, who have been involuntarily removed from the custody of their parents and often have complex histories and personal needs, are entirely dependent upon the state for their care, safety, and well-being.[89] Moreover, most state juvenile court legislation provides—as a condition of the state taking custody of children—that the state provide care and treatment.[90]

In addition to claims under the Eighth Amendment, incarcerated youth also have a right to care and treatment under the Fourteenth Amendment. Under long-standing Supreme Court precedent, the State has a heightened duty to any pretrial detainee, child

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81. *Id.* (quoting DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989)).

82. *Id.* at 33–34 (citing Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980)); *see also* Hutto v. Finney, 437 U.S. 678, 682–85 (1978) (recognizing the need for a remedy where prisoners were crowded in cells and some had infectious diseases).

83. *Helling*, 509 U.S. at 27–28.

84. *See* Carroll v. DeTella, 255 F.3d 470, 472 (7th Cir. 2001) ("Poisoning the prison water supply or deliberately inducing cancer in a prisoner would be forms of cruel and unusual punishment, and might be even if the harm was probabilistic or future rather than certain and immediate.").

85. *E.g.*, Masonoff v. DuBois, 899 F. Supp. 782, 797 (D. Mass. 1995).

86. *E.g.*, Crawford v. Coughlin, 43 F. Supp. 2d 319, 325–26 (W.D.N.Y. 1999).

87. May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring); *see also* J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011) ("'[O]ur history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults." (quoting Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982))).

88. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 472 (2012) ("[C]hildren are constitutionally different from adults for purposes of sentencing."); *J.D.B.*, 564 U.S. at 272 (explaining that children "'are more vulnerable or susceptible to . . . outside pressures' than adults" and adopting a "reasonable child" standard for determining the scope of Miranda protections (omission in original) (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005))); Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 375–77 (2009) (relying on the unique vulnerability of adolescents and their heightened expectation of privacy to hold a suspicionless strip search unconstitutional in the school context); Ginsberg v. New York, 390 U.S. 629, 641–43 (1968) (recognizing that exposure to obscenity may be harmful to minors even when it would not harm adults).

89. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 317 (1982) ("When a person is institutionalized—and wholly dependent on the State— . . . a duty to provide certain services and care does exist.").

90. *See, e.g.*, 42 PA. STAT. AND CONST. STAT. ANN. § 6301(b)(1.1) (West 2020) (stating that one purpose of the Juvenile Act is "[t]o provide for the care, protection, safety and wholesome mental and physical development of children coming within the provisions of this chapter").

or adult.[91] Based upon the Supreme Court's reasoning in cases like *Youngberg v. Romeo,*[92] where the Court ruled that "[w]hen a person is institutionalized—and wholly dependent on the State[,] . . . a duty to provide certain services and care does exist,"[93] and *Bell v. Wolfish*,[94] where the Court held that because pretrial detainees have not been "convicted of any crimes," they cannot be subjected to conditions that "amount to punishment,"[95] courts around the country have concluded that the Fourteenth Amendment also provides increased protections to youth held post-adjudication.[96]

Like pretrial detainees and involuntarily committed patients, youth in state custody due to a delinquency adjudication are not confined for punitive purposes.[97] Under the Fourteenth Amendment, all youth, whether held in pretrial detention or confined following an adjudication of delinquency, must be protected from punishment and known risks of harm.[98] Exposing youth to a high risk of contracting COVID-19 violates these rights to be protected from a serious risk of harm and to be free from punishment. The Fourteenth Amendment also guarantees youth the right to treatment and rehabilitation.[99] Depriving youth of programming, education and social interactions while also isolating them under conditions known to cause long-term psychological harm falls far short of this standard.

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91. *See* Bell v. Wolfish, 441 U.S. 520, 535, 545 (1979) (holding that pretrial detainees cannot be subjected to conditions that "amount to punishment" because they have not been "convicted of any crimes"); *see also* Kingsley v. Hendrickson, 576 U.S. 389, 397–99 (2015) (clarifying that the Fourteenth Amendment excessive force standard, applicable to pretrial detainees is indeed more protective than the Eighth Amendment standard); *Youngberg*, 457 U.S. at 321–22 (clarifying that involuntarily committed individuals "are entitled to more considerate treatment and conditions of confinement" than individuals post-conviction whose conditions of confinement are "designed to punish").

92. 457 U.S. 307 (1982).

93. *Youngberg*, 457 U.S. at 317.

94. 441 U.S. 520 (1979).

95. *Bell*, 441 U.S. at 535, 545.

96. *See, e.g.*, Vann v. Scott, 467 F.2d 1235, 1239 (7th Cir. 1972) (applying the Fourteenth Amendment because the purpose of the "delinquent" classification is "to afford the State an adequate opportunity to rehabilitate and safeguard delinquent minors rather than to punish them"); *see also* A.J. *ex rel.* L.B. v. Kierst, 56 F.3d 849, 854 (8th Cir. 1995) ("[T]he Due Process Clause of the Fourteenth Amendment, and not the Cruel and Unusual Punishments Clause of the Eighth Amendment, is the appropriate measuring stick for evaluating conditions in a juvenile facility."); Gary H. v. Hegstrom, 831 F.2d 1430, 1431–32 (9th Cir. 1987) ("[W]e conclude that . . . applying the due process clause, which implicitly incorporates the cruel and unusual punishments clause standards as a constitutional minimum . . . is the appropriate standard for reviewing conditions at [the juvenile facility]."); H.C. *ex rel.* Hewett v. Jarrard, 786 F.2d 1080, 1084 (11th Cir. 1986) ("[T]he fourteenth amendment, rather than the eighth amendment, provided the appropriate framework for assessing the constitutional ramifications of corporal punishment administered by public school teachers." (citing Ingraham v. Wright, 430 U.S. 651, 670–71 (1977))); Alexander S. *ex rel.* Bowers v. Boyd, 876 F. Supp. 773, 795–96 (D.S.C. 1995) ("[T]he Due Process Clause of the Fourteenth Amendment, which implicitly encompasses the protections of the Eighth Amendment, is the appropriate standard for reviewing the conditions at the DJJ facilities.").

97. *See supra* note 96.

98. *See, e.g.*, *A.J.*, 56 F.3d at 854.

99. *See* Nelson v. Heyne, 491 F.2d 352, 360 (7th Cir. 1974) (holding that youth have a right to "rehabilitative treatment" and because the State has assumed the role of the parent, such treatment must be "what proper parental care would provide"); *see also* C.P.X. *ex rel.* S.P.X. v. Garcia, 450 F. Supp. 3d 854, 902–09 (S.D. Iowa 2020) (holding that a juvenile facility's failure to provide appropriate mental health care violates a youth's substantive due process rights under the Fourteenth Amendment).

Or so we thought.

In several cases filed on behalf of incarcerated youth after the outbreak began, courts failed to find constitutional violations despite the obvious physical health risks and the significant adverse consequences of eliminating or substantially reducing programming in these facilities. A sampling of litigation filed across several states illustrates the challenges—and limits—of constitutional litigation for those caught "on the inside" in the middle of a pandemic.

The first lawsuit filed specifically seeking the release of youth was *People ex rel. Freeman v. Hansell*,[100] a state petition for a writ of habeas corpus filed in late March 2020 in the New York Supreme Court on behalf of twenty-two youth confined in both secure and nonsecure detention facilities in New York City.[101] As described in the petition, the secure Crossroads Juvenile Detention Facility, a key target of the litigation, confines youth in housing units comprised of individual cells connected by a common area with a shared bathroom.[102] The cells themselves lack sinks or toilets, and all residents eat in a communal dining hall.[103] The petition also cited the lack of risk mitigation measures, such as access to cleaning and sanitation supplies or routine testing, the suspension of family visits, and remote programming.[104]

Petitioners relied on both federal and state constitutional claims, citing the state's deliberate indifference to petitioners' risk of serious medical harm by refusing to release youth, the state's duty to protect youth with whom it has a special relationship under the Due Process Clause, and petitioners' right to be free from unconstitutional conditions of confinement under the New York Constitution.[105] The petition also cited statements from correctional and medical professionals urging the depopulation of correctional settings in response to the grave health risks posed by the exposure and transmission of COVID-19 in these settings.[106]

By the time the court held a hearing on the petition, claims on behalf of most of the named petitioners had been withdrawn, leaving just one youth seeking release.[107] In denying the requested relief, the court foreshadowed the analysis that would constrain subsequent lawsuits. Specifically, while the court found that there were "areas of deficiency" with respect to the sanitation and social distancing protocols, the court rejected petitioner's claims of deliberate indifference to serious medical harm, finding

100. No. 451130/2020, 2020 N.Y. Misc. LEXIS 2630 (N.Y. Sup. Ct., N.Y. Cty. Apr. 17, 2020); *see also Case Profile: Freeman v. Hansell*, U. MICH. L. SCH., CIV. RTS. LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=17454 [https://perma.cc/W7S5-H9EP] (last visited Apr. 1, 2021) (providing access to all court documents in *Freeman v. Hansell*).

101. *See* Verified Petition for Writ of Habeas Corpus at 3–4, *Freeman*, 2020 N.Y. Misc. LEXIS 2630.

102. *Id.* at 12.

103. *Id.*

104. *Id.* at 16.

105. *Id.* at 20–21.

106. *Id.* at 17–18 (citing, *inter alia*, Press Release, Colleen Shaddox, Youth Corr. Leaders for Justice, US Putting 43,000 Youth at Risk in Prison, Detention: Youth Corrections Leaders Call for Decisive Steps to Protect Them (Mar. 19, 2020), http://yclj.org/covid19pressrelease [https://perma.cc/2PYB-PMEB]; Letter from Physicians for Criminal Justice Reform, to State Governors, State & Local Juvenile Det. & Corr. Dep'ts, & Juvenile Court Judges & Magistrates (Mar. 22, 2020), http://njdc.info/wp-content/uploads/PFCJR-Statement.pdf [https://perma.cc/PD6T-M68D]).

107. Decision Order at 3, *Freeman*, 2020 N.Y. Misc. LEXIS 2630.

that there was "no evidence that respondent has acted recklessly or with deliberate indifference."[108] The court accepted the respondent's assertion that they were committed to keeping staff and youth "as healthy as possible."[109] This willingness to trust that facility personnel and administrators will do their best has essentially doomed pleas for release, even though government officials are otherwise generally reluctant to rely on such individual "best efforts" to protect the health of those living "on the outside."

Similar litigation followed quickly in Pennsylvania and Maryland. In both cases, unlike the New York lawsuit, petitioners sought relief directly from their state's highest courts, invoking the original jurisdiction of these courts to address urgent and emergent circumstances.[110] In the Pennsylvania case, *In re C.Z.*,[111] petitioners urged the court to exercise its extraordinary relief powers to minimize both the number of youth currently detained as well as those who would be admitted to youth detention or correctional facilities going forward.[112] The factual circumstances echoed those cited in *Freeman*: lack of proper sanitizing, use of isolation and lockdowns as a public health measure, and the elimination of family visitation and much of the programming and educational services available pre-pandemic.[113]

Petitioners likewise cited correctional and medical professionals that urged the depopulation of juvenile correctional facilities, noting both the physical and psychological risks inherent in the reliance on lock downs and elimination of family visits and programming to control the virus.[114] The petition asserted claims under the Eighth and Fourteenth Amendments, citing the state's duty of care, petitioners' rights to be protected from serious medical risks, and petitioners' rights to treatment while in state custody.[115] Petitioners asserted that all youth, regardless of the seriousness of their crime, have a right to safety and protection from contagion and that failure to reduce the number of youth in custody during the pandemic would greatly increase the risk of catastrophic health consequences for youth and staff.[116]

The Pennsylvania Supreme Court denied the requested relief.[117] Instead, the court directed:

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108. *Id.* at 21–22.

109. *Id.*

110. *See In re C.Z.*, 229 A.3d 240 (Pa. 2020) (per curiam); *J.B. v. Finan*, 226 A.3d 935 (Md. 2020) (Mem.).

111. 229 A.3d 240 (Pa. 2020) (per curiam); *see also In re C.Z.*, JUV. L. CTR., http://jlc.org/cases/re-cz [https://perma.cc/XEW7-XQTU] (last visited Apr. 1, 2021) (providing access to all court documents in *In re C.Z.*). The author served as co-counsel in the Pennsylvania litigation.

112. Specifically, petitioners sought an order immediately directing the release of all youth who did not pose an immediate, specific, and articulable risk of physical harm to others and prohibiting the detention of other specific youth for technical probation violations, failure or inability to pay fines, fees, or bail, or failure to appear. Application for Extraordinary Relief Under the Court's King's Bench Jurisdiction at 38–42, *In re C.Z.*, 229 A.3d 240 (No. 24 EM 2020).

113. *See id.* at 6–29. See also *supra* notes 100–106 and accompanying text for a discussion of *Freeman*.

114. *See* Application for Extraordinary Relief Under the Court's King's Bench Jurisdiction, *supra* note 112, at 16–18.

115. *See id.* at 34–38.

116. *See id.* at 1–5.

117. *In re C.Z.*, 229 A.3d at 240–41.

> President Judges, or their designees, to engage with all relevant county stakeholders to review immediately the current capabilities of residential placements within their counties where judges have placed juveniles to address the spread of COVID-19. President Judges should also consult with relevant county stakeholders to identify juveniles and/or classes of juveniles for potential release from placement to reduce the current and future populations of the institutions during this public health crisis with careful regard for the individual circumstances of juveniles in placement as well as their safety and the public's safety with awareness of any statutory rights of victims. Moreover, consistent with these considerations, judges are to undertake efforts to limit the introduction of new juveniles into the juvenile detention system during the COVID-19 pandemic.[118]

While the court was sympathetic to petitioners' concerns, it stopped well short of ordering any specific remedial action.[119] Moreover, perhaps confirming the toothless "direction" from the court, only four counties (out of sixty-seven) confirmed by a court filing that they had taken any action in response to the court's order.[120]

Litigation in Maryland was a mirror image of that filed in Pennsylvania. In *J.B. v. Finan*,[121] petitioners sought extraordinary relief in the Maryland Court of Appeals, requesting that the court release as many juvenile detainees as possible, similarly arguing that because the only known method of slowing or halting the spread of the illness was social distancing, it was imperative to lower the population of youth in juvenile detention centers to stop the spread.[122] Like the Pennsylvania Supreme Court, the Maryland Court of Appeals denied the requested relief.[123] In a separate order issued by Chief Judge Mary Ellen Barbera shortly after the denial of the petition—and similar to the directive from the Pennsylvania Supreme Court—the court offered a decidedly less robust instruction that judges "communicate with juvenile justice system stakeholders" in order to figure out who should be released on an individualized basis.[124] Factors to be considered included comorbidities, expressions of symptoms, whether release posed a risk to the juvenile or others, and whether the inmate's release was "in the interest of justice."[125]

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118. *Id.* at 241.

119. *See id.*

120. *See* Notice of Compliance & Administrative Order, *In re* 25th Judicial Dist., No. 56 MM 2020 (Pa. Ct. C.P., Clinton Cty. Apr. 14, 2020); Notice of Compliance & Administrative Order, *In re* 20th Judicial Dist., No. CP-31-MD-118-2020 (Pa. Ct. C.P., Huntingdon Cty. Apr. 14, 2020); Notice of Compliance: Juvenile Facilities, *In re* 24th Judicial Dist., No. 2020 MD 0003 (Pa. Ct. C.P., Blair Cty. Apr. 9, 2020); Emergency Order Extension & Amendment – Juvenile Delinquency & Dependency Matters, *In re* 32nd Judicial Dist., No. 5120-17 (Pa. Ct. C.P., Del. Cty. Mar. 23, 2020).

121. 226 A.3d 935 (Md. 2020) (mem.); *see also Case Profile: In re: J.B., L.H., L.S., R.P.*, U. MICH. L. SCH., CIV. RTS. LITIGATION CLEARINGHOUSE, http://clearinghouse.net/detail.php?id=17480 [https://perma.cc/6FBT-ZS5D] (last visited Apr. 1, 2021) (providing access to all court documents in *J.B. v. Finan*).

122. *See* Application for Immediate and Extraordinary Relief at 5, *J.B.*, 226 A.3d 935.

123. *J.B.*, 226 A.3d at 936.

124. Administrative 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 at 3–4, *J.B.*, 226 A.3d 935.

125. *Id.* In the wake of the order, Maryland did substantially reduce its juvenile incarcerated population, by nearly thirty percent. Luke Broadwater, *Maryland Releases About 200 Juveniles from Detention Centers Amid Coronavirus Pandemic*, BALT. SUN (Apr. 27, 2020, 7:48 PM), http://www.baltimoresun.com/coronavirus/

Two additional lawsuits filed in the spring of 2020 revealed the same reluctance to find constitutional violations despite the severe health risks—both medical and psychological—posed by the pandemic for incarcerated youth. In *All Youth Detained in Juvenile Halls and Camps in Los Angeles County v. Juvenile Division*,[126] petitioners sought a writ of mandate from the California Supreme Court requesting the immediate release of certain categories of youth in confinement, the suspension of all new admissions into detention facilities, and the expedited review of all other youth by the juvenile courts, as well as requiring the facilities to comply with CDC regulations, the provision of additional services, and the appointment of a special master.[127] The Supreme Court transferred the case to the Los Angeles Superior Court to issue a rule to show cause, "addressing whether juveniles detained in Los Angeles County juvenile facilities are being denied due process under the Fourteenth Amendment by being held in conditions that could subject them to contracting the COVID-19 virus and, if so, what remedies can be lawfully ordered."[128] The superior court denied the petition.[129]

Interestingly, the superior court agreed that youth were entitled to greater protection under the U.S. Constitution and applied the Fourteenth Amendment's somewhat more generous standard to petitioners' claims; the court noted that youth "are afforded more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[130] Further, the court wrote:

> To show a violation of Fourteenth Amendment due process rights in this context, a detainee must show the state's conduct was "such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment [of detainees] as to demonstrate that the person responsible actually did not base the decision on such a judgment."[131]

In denying the petition, the court acknowledged the unprecedented nature of the pandemic and the particular vulnerability of youth in detained settings, but nevertheless held that the petitioners had "not demonstrated that the County has failed to act reasonably to protect detained youth, or that youth are being held in conditions that could subject them to contracting the COVID-19 virus in a manner that rises to the level of a

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bs-md-pol-juvenile-release-coronavirus-20200427-4mjlk5pawnbpnafusvm7a7b7g4-story.html [https://perma.cc/YHZ6-TH23].

126. No. S261701, 2020 Cal. LEXIS 2853 (Cal. Apr. 22, 2020) [hereinafter *All Youth Detained*].

127. Petition for Writ of Mandate at 35–38, *All Youth Detained*, 2020 Cal. LEXIS 2853 (No. S261701).

128. *All Youth Detained*, 2020 Cal. LEXIS 2853, at *1.

129. Order Denying Petition for Writ of Mandate at 14, *All Youth Detained in Juvenile Halls & Camps in L.A. Cty. v. Superior Court of L.A. Cty.*, No. JW2020-01 (Cal. App. Dep't Super. Ct. May 12, 2020).

130. *Id.* at 5.

131. *Id.* (second alteration in original) (quoting Youngberg v. Romeo, 457 U.S. 307, 323 (1982)).

> In determining whether the State has met its duty in this respect, decisions made by the appropriate professional are entitled to a presumption of correctness. Such a presumption is necessary to enable institutions of this type—often, unfortunately, overcrowded and understaffed—to continue to function. A single professional may have to make decisions with respect to a number of residents with widely varying needs and problems in the course of a normal day.

Id. (quoting *Youngberg*, 457 U.S. at 324).

constitutional due process violation."[132] Stressing its preference for individualized determinations, the court also wrote:

> it is unclear—and factually unexplored by the parties—whether release of juveniles would result in a reduced health risk due to COVID-19, particularly considering the high and rapidly increasing infection rates throughout the population of Los Angeles County, the unknown, diverse and, in many cases, unstable circumstances to which juveniles would likely be released and the effects of those circumstances on the health and safety of juveniles, and the improving safety protocols and availability of health care services within juvenile facilities.[133]

Given the disproportionate number of youth of color detained in Los Angeles's detention facilities,[134] the assumption that many of these youth would be released to unstable and presumptively less safe environments is a reminder of how broadly racism infects decisionmaking in the justice system.

The four cases discussed above were all challenges filed in state courts, asserting Eighth and Fourteenth amendment violations of youths' rights. *J.H. ex rel. N.H. v. Edwards*[135] was a joint civil rights class action lawsuit and habeas petition filed in the U.S. District Court for the Middle District of Louisiana, in which plaintiffs sought declaratory and injunctive relief on behalf of children confined in four secure care facilities that the Louisiana Office of Juvenile Justice (OJJ) operated.[136] Specifically, plaintiffs alleged that the OJJ had not significantly reduced the population of confined children and had failed to implement an updated pandemic policy or a remedial plan in the four OJJ secure care facilities that complied with CDC guidance.[137] Moreover, they alleged that OJJ's policies placed children at a substantial risk of serious, long-term mental, developmental, and emotional harm, in part because of isolation and the cessation of therapeutic services.[138]

Plaintiffs sought a temporary restraining order.[139] Following a three-day virtual hearing, the court denied plaintiffs any relief.[140] The court wrote:

> The Court does not mean to downplay the difficulty Plaintiffs, the class members, and their families have experienced as a result of the COVID-19 pandemic. But these are sacrifices that all members of society have had to make in response to this crisis. Grandparents have been unable to hug their grandchildren. Many sons and daughters cannot communicate with their

132. *Id.* at 14.

133. *Id.* at 6.

134. Jeremy Loudenback, *New Report Paints Picture of Dysfunction, Racial Disproportionality in L.A.'s Juvenile Probation System*, LAIST (Oct. 25, 2017, 12:00 AM), http://laist.com/2017/10/25/probation.php [https://perma.cc/GS8J-LG7R].

135. No. 20-cv-00293-JWD-EWD, 2020 WL 3448087 (M.D. La. June 24, 2020). The author was co-counsel in this litigation.

136. Class Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus, *J.H.*, 2020 WL 3448087 (No. 20-cv-00293-JWD-EWD). The author was co-counsel in the Louisiana litigation. *See id.* at 44.

137. *Id.* at 3–4.

138. *Id.* at 20–22.

139. *Id.* at 40–44.

140. *J.H.*, 2020 WL 3448087, at *1, *49.

> parents in nursing homes, except by telephone or FaceTime. People have been unable to attend funerals of loved ones. And people have been separated from their friends, family, coworkers, fellow students, churches, and other communities.
>
> On the whole, the Court finds that OJJ's job in responding to the COVID-19 pandemic has been commendable. As stated throughout this opinion, the Court was highly impressed with the OJJ witnesses who testified, all of whom seemed like highly dedicated workers who were doing the best they could under harrowing and unprecedented circumstances. All of their actions were rationally related to legitimate objectives, and OJJ was certainly not deliberately indifferent in responding to the crisis.[141]

Of course, two things stand out about the court's ruling. While many have suffered hardships in their personal lives, one cannot compare the deprivations that many at home experienced to the complete loss of liberty that incarcerated individuals, who have no control over any aspect of their daily lives, experienced. Second, the court accepts the claims of public officials and facility personnel that they are doing the best they can and defers to their judgment on handling the pandemic going forward.

CONCLUSION

This Essay paints a bleak description of how our response to the pandemic mirrored the historic ease with which society has routinely looked away from incarcerated populations. Initially, it appeared there might be a different story to tell. In the first few months of the pandemic, jurisdictions around the country voluntarily reduced populations in their correctional facilities,[142] prompting a breathless excitement that the silver lining behind COVID-19 would be a fresh look at America's addiction to incarceration, which would at last expose the lies of these punitive policies. Advocates wondered aloud if they might finally be able to disrupt the cycle of mass incarceration, breaking the chain of connection between prisons and public safety. But as the pandemic wore on, the depopulation leveled off or declined.[143] As optimism evaporated, advocates were reminded of how sturdy the wall between "us" and "them" still stands.

Across the country, the pandemic spawned dozens of lawsuits seeking a safe passage for incarcerated individuals down whatever road the pandemic traveled, from its beginning to its eventual end. While most of these lawsuits were filed on behalf of adults in both prisons and federal immigration detention centers, they concluded in much the same way as the litigation filed on behalf of youth: an acknowledgment of the extraordinary health risks COVID-19 presented but an inclination to trust that corrections administrators would do their best to protect the individuals locked up.

Of course, this deference to administrators "on the inside" is in stark contrast to the myriad rules and restrictions local and state officials imposed to keep those "on the

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141. *Id.* at *49.

142. Rovner, *COVID-19*, *supra* note 31.

143. *Youth Detention Admissions Remain Low, But Releases Stall Despite COVID-19*, ANNIE E. CASEY FOUND. (July 8, 2020), http://www.aecf.org/blog/youth-detention-admissions-remain-low-but-releases-stall-despite-covid-19/ [https://perma.cc/W42X-7R4U]; *see also* Emily Widra, *Visualizing Changes in the Incarcerated Population During COVID-19*, PRISON POL'Y INITIATIVE (Sept. 10, 2020), http://www.prisonpolicy.org/blog/2020/09/10/pandemic_population_changes/ [https://perma.cc/7NF2-UY3C].

outside" safe and infectious spread minimal, including specific and detailed measures to enforce social distancing and proper cleaning and sanitizing of public spaces. School closures were widespread to compel social distancing among youth, and orders prohibiting the numbers of individuals who may physically socialize became increasingly common as the virus surged.[144]

Judicial reluctance to order comparable measures like depopulation and proper use of personal protective equipment *inside* correctional facilities, or to ensure the recommended social distancing and mask wearing, has left incarcerated individuals stranded, often amid rampant spread of the infection, with dwindling avenues for recourse. In youth facilities, where infections are fewer, youth are also stranded, not only lacking recourse to the safety measures imposed on the outside but also cut off from family, limited to paper or online "packets" for education,[145] and facing substantial reductions or elimination of counseling, mental health services, and other treatment programs. Society's unwillingness to demand equal concern for all lives creates a kind of "Sophie's Choice,"[146] where we must choose whom we save and whom we let go.

This Essay began by lamenting the weakness of America's constitutional protections in the face of an extraordinary public health risk that propagated this grotesque valuing of one set of lives over another.[147] It concludes with the words of Justice Sotomayor from her statement in response to the denial of an application to the U.S. Supreme Court for a stay in *Valentine v. Collier*,[148] a case brought by adult prisoners

144. *See generally* Dena Bunis & Jenny Rough, *List of Coronavirus-Related Restrictions in Every State*, AARP, http://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions/ [https://perma.cc/5ZS9-RK9Q] (last updated Mar. 19, 2021).

145. Eli Hager, *Solitary, Brawls, No Teachers: Coronavirus Makes Juvenile Jails Look Like Adult Prisons*, MARSHALL PROJECT (May 12, 2020, 6:00 AM), http://www.themarshallproject.org/2020/05/12/solitary-brawls-no-teachers-coronavirus-makes-juvenile-jails-look-like-adult-prisons [https://perma.cc/FK6D-LUM5].

146. *Sophie's Choice* is the title of a 1979 novel by William Styron, and in 1982 *Sophie's Choice* was made into a film starring Meryl Streep. Taking place during World War II and its aftermath, Streep plays a character who must choose between the lives of her two children while she is imprisoned in the Nazi concentration camp Auschwitz; her choice will determine which child lives and which child dies. The "choice" has become an analogy for choices that are likewise impossible for the person making them—both choices are either equally undesirable or desirable. *See Sophie's Choice*, DICTIONARY.COM, http://www.dictionary.com/e/slang/sophies-choice/ [https://perma.cc/3BPP-QFNR] (last visited Apr. 1, 2021).

147. Importantly, the limitations of our constitutional guarantees in the fight for social justice are not limited to the shortcomings exposed in COVID-19 litigation. In *The Supreme Court Was Once a Champion of the Poor*, Dahlia Lithwick spoke with Adam Cohen, the author of *Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America*, about the Supreme Court's role in perpetuating the inequality gap in America. Dahlia Lithwick, *The Supreme Court Was Once a Champion of the Poor*, SLATE (Mar. 29, 2021, 5:39 PM), https://slate.com/news-and-politics/2021/03/supreme-court-poverty-income-inequality.html [https://perma.cc/3ZJH-HR59]. While Lithwick's article and Cohen's book focus on the Court's failure to lift the poor in this country despite decades of litigation providing opportunities to substantially ameliorate poverty, it is hard to ignore the common thread between these cases and the litigation discussed here. The inherently conservative nature of the Court—and the conservative ideology of individual justices—have proven more sword than shield in the fight for equal justice under law. *Id.*; *see also* ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY YEAR BATTLE FOR A MORE UNJUST AMERICA (2020).

148. 140 S. Ct. 1598 (2020) (mem.).

seeking an array of public health and safety measures as they confronted COVID-19 from inside their Texas prison cells.[149]

The federal district court had granted preliminary injunctive relief, but the order was overturned by the Fifth Circuit.[150] Plaintiffs asked the Supreme Court to stay the Fifth Circuit's order.[151] In her statement, joined by the late Justice Ginsburg, Justice Sotomayor captured the weakness of the constitutional inquiry: "The Fifth Circuit noted that the prison had submitted evidence of 'the protective measures it ha[d] taken as a result' of the COVID–19 pandemic, and so the question was simply whether the Eighth Amendment required the prison 'to do more.'"[152] She concluded:

> It has long been said that a society's worth can be judged by taking stock of its prisons. That is all the truer in this pandemic, where inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm. May we hope that our country's facilities serve as models rather than cautionary tales.[153]

The litigation outcomes discussed above suggest it is unlikely that our correctional facilities will in fact "serve as models rather than cautionary tales."[154] The constitutional bar is set low for permissible conduct and practices, even in the face of a deadly pandemic. While extreme measures have been urged—and in many jurisdictions imposed[155]—to protect the American population at home, the answer to whether correctional facilities themselves must do "more" under the U.S. Constitution is apparently "no."

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149. *Valentine*, 140 S. Ct. at 1598 (Sotomayor, J., statement respecting denial of application).

150. *See* Valentine v. Collier, 956 F.3d 797, 806 (5th Cir. 2020).

151. *See Valentine*, 140 S. Ct. at 1598 (Sotomayor, J., statement respecting denial of application).

152. *Id.* at 1600 (alteration in original) (quoting *Valentine*, 956 F.3d at 802).

153. *Id.* at 1601.

154. *Id.* Indeed, more recently, in *United States v. Mathews*, No. 20-1635, 2021 WL 855834 (6th Cir. Mar. 8, 2021), a panel of the Sixth Circuit affirmed the district's court's denial of an elderly prisoner's request for compassionate release from a federal prison with widespread COVID-19 infections, including the deaths of several incarcerated individuals, and where the Petitioner, Mr. Mathews himself, also suffered from multiple sclerosis. The Court ruled it was bound to accept the district court's reasoning under 18 U.S.C. § 3553(a), which focused on the numerous convictions Petitioner had for drug offenses. *Id.* at *1. While the author of the opinion expressed some sympathy for the Petitioner, restrictive legal requirements kept Mr. Mathews in prison nevertheless. *Id.* To underscore the rigid response of courts in these cases, one of the panel judges wrote a concurring opinion deriding the court's reliance on the COVID-19 data provided by the "agenda-backed reporting" of the Marshall Project. *Id.* at *6 (Readler, J., concurring).

155. *See, e.g.*, Jacob Gershman, *A Guide to State Coronavirus Reopenings and Lockdowns,* WALL STREET J. (May 20, 2020, 1:47 PM), http://www.wsj.com/articles/a-state-by-state-guide-to-coronavirus-lockdowns-11584749351 [https://perma.cc/CY9T-GKAD]; Noah Higgins-Dunn, *Cancel Thanksgiving, Stay Home, Wear a Mask – State and City Leaders Impose Targeted Coronavirus Restrictions To Curb Covid Without Tanking Economy*, CNBC (Nov. 18, 2020, 2:04 PM), http://www.cnbc.com/2020/11/18/coronavirus-states-impose-targeted-lockdowns-curfews-mask-mandates-ahead-of-thanksgiving.html [https://perma.cc/3XZT-3Y7U]; *see also COVID-19 Restrictions*, USA TODAY, http://www.usatoday.com/storytelling/coronavirus-reopening-america-map/ [https://perma.cc/DRY4-AXR9] (last updated Mar. 20, 2021).