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## Youth Incarceration, Health, and Length of Stay

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# YOUTH INCARCERATION, HEALTH, AND LENGTH OF STAY

Thalia González\*

## ABSTRACT

*For youth from marginalized communities, the pathway into the juvenile justice system occurs against a backdrop of disproportionately high levels of stress, complex trauma, and adverse childhood experiences. Despite overall reductions in the percentage of youth in confinement from recent state-level reforms, the lengths of stay for many youth often exceed evidence-based timelines, as well as a state's own guidelines and criteria. This occurs despite a large and growing body of empirical research that documents the health status of system-involved youth and the association between incarceration during adolescence and the range of subsequent health and mental health outcomes in adulthood. Presently, advocates for length of stay reform rely on two primary arguments: recidivism and costs of confinement. This Article argues that this framing misses a critical component, as a better understanding of the linkages between length of stay, health, and mental health are essential for achieving the foundational goals of the juvenile justice system—i.e., rehabilitation, decreased recidivism, and improved community reintegration. Through an examination of juvenile sentencing typologies, release decision-making, and empirical research on the health and mental health needs of at-risk and system-involved youth, this Article aims to fill this gap and expand current lines of debate, discourse, and advocacy.*

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## TABLE OF CONTENTS

Introduction .....	46
I. The Health Status of At-Risk and System-Involved Youth .....	55
A. Prior to Incarceration .....	55
1. Adverse Childhood Experiences .....	55
2. Health and Mental Health .....	59
3. Trauma and Post-Traumatic Stress Disorder.....	60
4. Poverty.....	62
B. The Effects of Incarceration: Compounding Existing Trauma and Health Disparities.....	62
1. Inadequate Treatment During Incarceration .....	62
2. The Compounding Effects of Incarceration.....	64
3. The “Dose Measure” of Youth Incarceration .....	66
II. Sentencing, Release Decision-Making, and Length of Stay.....	67
A. Typologies of Juvenile Justice Sentencing .....	68
B. Sentencing Reform .....	70
C. Release Determinations and Length of Stay .....	72
D. The Current Trend: Excessive Lengths of Stay.....	75
Conclusion.....	80

## INTRODUCTION

Length of stay is a pressing civil and human rights issue at the intersection of juvenile justice and health policy. As research shows, the effects of incarceration during adolescence or young adulthood (“youth incarceration”) are associated with damaged social networks,<sup>1</sup> decreased educational opportunities,<sup>2</sup> severe functional

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1. See JAMES AUSTIN, KELLY DEDEL JOHNSON & RONALD WEITZER, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, ALTERNATIVES TO THE SECURE DETENTION AND CONFINEMENT OF JUVENILE OFFENDERS 2 (2005); Doug Nelson, ANNIE E. CASEY FOUND., *A Roadmap for Juvenile Justice Reform*, in 2008 NATIONAL KIDS COUNT DATA BOOK (2008); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); John Schnittker, *Enduring Stigma: The Long-Term Effects of Incarceration on Health*, 48 J. HEALTH S. BEHAV. 115 (2007).

2. See BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 9 (2006), [http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers\\_of\\_detention.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers_of_detention.pdf) [https://perma.cc/F58U-7EPC]. See generally NAT’L JUVENILE JUSTICE NETWORK, IMPROVING EDUCATIONAL OPPORTUNITIES FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM (2016); COUNCIL OF STATE GOV’TS JUSTICE CTR., LOCKED OUT: IMPROVING EDUCATIONAL AND VOCATIONAL OUTCOMES FOR INCARCERATED YOUTH 3 (2015); Anna Aizer &

limitations,<sup>3</sup> and worsened health and mental health outcomes.<sup>4</sup> Over the last decade, juvenile justice reform has focused on reducing entry into the system with the goal of decreasing the overall population of youth in confinement.<sup>5</sup> In some states, policy makers have adopted a top down approach, introducing changes such as increased access to and eligibility for restorative justice,<sup>6</sup> reduced bed caps,<sup>7</sup> fiscal incentives for community based services,<sup>8</sup> and improved inter-agency collaboration by forming commissions or task forces.<sup>9</sup> In other states, less restrictive responses to delinquency<sup>10</sup> and the closure of juvenile facilities have reduced the overall population.<sup>11</sup> Regardless of the individualized approach taken in a given jurisdiction, from 2003 to

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Joseph J. Doyle, *Juvenile Incarceration, Human Capital, and Future Crime: Evidence from Randomly Assigned Judges*, 130 Q.J. ECON. 759 (2015); Ashley Nellis, *Addressing the Collateral Consequences of Convictions for Young Offenders*, THE CHAMPION, July–Aug. 2011, at 20.

3. See HOLMAN & ZIEDENBERG, *supra* note 2, at 9–10; Karen M. Abram et al., U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention, *Functional Impairment in Delinquent Youth*, JUV. JUST. BULL., Dec. 2013, at 1, <https://www.ojjdp.gov/pubs/239996.pdf> [<https://perma.cc/T9XU-NP3E>]; Schnittker, *supra* note 1.

4. See NAT’L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, BETTER SOLUTIONS FOR YOUTH WITH MENTAL HEALTH NEEDS IN THE JUVENILE JUSTICE SYSTEM 1–2 (2014); Elizabeth S. Barnert et al., *Juvenile Incarceration & Health*, 16 ACAD. OF PEDIATRICS 99 (2016); Christopher B. Forrest et al., *The Health Profile of Incarcerated Male Youths*, 105 PEDIATRICS 286 (2000); Wade Askew, Note, *Keeping Promises to Preserve Promise: The Necessity of Committing to a Rehabilitation Model in the Juvenile Justice System*, 20 GEO. J. ON POVERTY L. & POL’Y 373, 394–96 (2013).

5. See, e.g., ANNIE E. CASEY FOUND., JUVENILE DETENTION ALTERNATIVES INITIATIVE, <http://www.aecf.org/work/juvenile-justice/jdai/> [<https://perma.cc/DG74-5M72>] (providing an overview of the Juvenile Detention Alternatives Initiative).

6. See, e.g., COLO. REV. STAT. § 18-1-901 (2017); HAW. REV. STAT. ANN. § 571-31.4(b) (West 2017); WASH. REV. CODE ANN. § 13.40.020 (West 2017).

7. See, e.g., COLO. REV. STAT. § 19-2-1201 (2017). In Colorado, this has meant limiting the number of available juvenile detention beds from 469 to 382.

8. See 730 ILL. COMP. STAT. ANN. 110/16.1 (West 2017); S. Con. Res. 35, 2013 Gen. Assemb., Reg. Sess. (Ky. 2013). For example, in Illinois, the State provides specific funding to counties to provide community based services in lieu of confinement.

9. JUSTICE POLICY INST., COMMON GROUND: LESSONS LEARNED FROM FIVE STATES THAT HAVE REDUCED JUVENILE CONFINEMENT BY MORE THAN HALF 3 (2013).

10. See, e.g., NEV. REV. STAT. ANN. § 62B.320 (West 2017); 18 PA. CONS. STAT. AND CONS. STAT. ANN. § 1102 (West 2017); ANNIE E. CASEY FOUND., *supra* note 5 (almost 300 jurisdictions in 39 states utilize the Juvenile Detention Alternatives Initiative).

11. See JUSTICE POLICY INST., *supra* note 9; see also NEB. REV. STAT. ANN. §§ 83-4,132 to -4,134 (West 2017).

2013, national rates of juvenile detention decreased by forty-seven percent.<sup>12</sup>

Despite a growing emphasis on alternatives to detention and the reductions in rates of national youth detention achieved to date, the United States continues to incarcerate youth, in particular marginalized youth of color,<sup>13</sup> at higher rates than anywhere in the world.<sup>14</sup> For example, the most recent Office of Juvenile Justice and Delinquency Prevention (“OJJDP”) data indicate that nationally, African American youth are more than four times as likely to be confined as their white peers.<sup>15</sup> Similar disparities exist for Latino<sup>16</sup>

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12. See Melissa Sickmund et al., *Easy Access to the Census of Juveniles in Residential Placement*, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION PROGRAM (2015), <http://www.ojjdp.gov/ojstatbb/ezacjrp/> [<https://perma.cc/9ARB-9WTR>].

13. See JOSHUA ROVNER, THE SENTENCING PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS 1 (2016) (reporting racial disparate rates across a range of measures). “Youth of color remain far more likely to be committed than white youth. Between 2003 and 2013, the racial gap between black and white youth in secure commitment increased by 15%.” *Id.* See generally Megan Annitto, *Juvenile Justice on Appeal*, 66 U. MIAMI L. REV. 671 (2012) (outlining overall disparities for minorities at each decision-point in the juvenile justice system); Perry L. Moriearty, *Combating Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285 (2008) (discussing meta-analyses of disproportionate minority contact and the role that race plays in the juvenile justice system); Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607 (2013) (highlighting the disparate treatment and outcomes for minority youth at multiple stages of the juvenile justice system).

14. ANNIE E. CASEY FOUND., REDUCING YOUTH INCARCERATION IN THE U.S. 1 (2013) (estimating that at least 50,821 “justice involved” youth are held in state custody); Sarah Hockenberry et al., U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Residential Facility Census, 2014: Selected Findings*, JUV. JUST. BULL., Sept. 2016, at 2, <https://www.ojjdp.gov/pubs/250123.pdf> [<https://perma.cc/L63N-7TP6>] (analyzing data from 2429 juvenile facilities housing justice-involved youth on October 22, 2014 for the 2014 census); *Unbalanced Youth Justice*, W. HAYWOOD BURNS INST. FOR JUSTICE, FAIRNESS & EQUITY, <http://data.burnsinstitute.org/about#about-the-data> [<https://perma.cc/E4ZQ-PG3Y>] (noting that the United States “incarcerate[s] youth at . . . five times the rate of South Africa; 15 times the rate of Germany and 30 times the rate of Italy”).

15. See ROVNER, *supra* note 13, at 1; see also CHRISTOPHER HARTNEY, NAT’L COUNCIL ON CRIME & DELINQUENCY, NATIVE AMERICAN YOUTH AND THE JUVENILE JUSTICE SYSTEM 6 (2008) (discussing rates of Native American youth detainment in comparison to white youth as greater than two-and-a-half times); Gary Ford, *The New Jim Crow: Male and Female, South and North, from Cradle to Grave, Perception & Reality: Racial Disparity and Bias in America’s Criminal Justice System*, 11 RUTGERS RACE & L. REV. 323, 345 (2010) (noting that in the highest rates of disproportionate confinement of African American youth, rates were between “twelve and twenty-five times” that of white youth).

16. See ROVNER, *supra* note 13, at 1 (finding that when comparing rates of confinement, sixty-one percent of Latino youth are more likely to be placed in juvenile justice facilities than their white peers). See generally John Owens &

and American Indian youth.<sup>17</sup> Simply put, numerous studies show that youth of color are arrested and charged at higher rates than their white counterparts,<sup>18</sup> thus moving them swiftly into the juvenile justice system.<sup>19</sup> Once system-involved, youth of color are detained for longer periods of time<sup>20</sup> than their white peers.<sup>21</sup> While youth of

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Yoshiko Takahasi, *Disproportionate Minority Contact in a Latino Majority County: A Descriptive Study*, 12 J. ETHNICITY IN CRIM. JUST. 264 (2014); *Race and Incarceration in the United States: Human Rights Watch Press Backgrounder*, HUMAN RIGHTS WATCH (Feb. 27, 2002), <http://www.hrw.org/legacy/backgrounder/usa/race/> [<https://perma.cc/JDV6-P7EQ>] (discussing state-level data for Latino youth). When looking at length of stay, across every offense category the average length of confinement was longer for Latino/a youth than for any other group. See ANNIE E. CASEY FOUND., RACE MATTERS: UNEQUAL OPPORTUNITIES FOR JUVENILE JUSTICE 11 (2006).

17. See ROVNER, *supra* note 13, at 4 (reporting that American Indian youth are nearly four times as likely to be committed to juvenile justice facilities than white youth); see also ANNIE E. CASEY FOUND., *supra* note 16, at 14 (indicating that, in twenty-six states, American Indian youth are disproportionately placed in secure confinement).

18. See sources cited *supra* notes 13, 15–16.

19. While outside the scope of this Article, there is a significant body of research documenting the trajectory of youth of color in the juvenile justice system through the “school-to-prison pipeline.” See, e.g., DANIEL LOSEN ET AL., THE EQUITY PROJECT AT IND. UNIV., DISCIPLINE DISPARITIES COLLECTIVE, ELIMINATING EXCESSIVE AND UNFAIR EXCLUSIONARY DISCIPLINE IN SCHOOLS: POLICY RECOMMENDATIONS FOR REDUCING DISPARITIES 4–5 (2014); DANIEL J. LOSEN & RUSSELL J. SKIBA, S. POVERTY LAW CTR., SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 8, 11 (2010); RUSSELL J. SKIBA ET AL., THE EQUITY PROJECT AT IND. UNIV., DISCIPLINE DISPARITIES COLLECTIVE, NEW AND DEVELOPING RESEARCH ON DISPARITIES IN DISCIPLINE 3, 5 (2014); COUNCIL OF STATE GOV’TS JUSTICE CTR., THE SCHOOL DISCIPLINE CONSENSUS REPORT (2014); Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 282–83, 287–89, 291–94 (2012); Michael P. Krezmien et al., *Juvenile Court Referrals and the Public Schools: Nature and Extent of the Practice in Five States*, 26 J. CONTEMP. CRIM. JUST. 273, 274 (2010); S. David Mitchell, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 WASH. U. L. REV. 271, 277–79 (2014); Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American & Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85, 101 (2011); Russell J. Skiba et al., *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1086 (2010); Donald H. Stone & Linda S. Stone, *Dangerous and Disruptive or Simply Cutting Class: When Should Schools Kick Kids to the Curb?: An Empirical Study of School Suspension and Due Process Rights*, 13 J.L. & FAM. STUD. 1, 13, 25 (2011); see also U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE 1, 6 (2014).

20. See Christopher A. Mallett et al., *Explicating Correlates of Juvenile Offender Detention Length: The Impact of Race, Mental Health Difficulties, Maltreatment, Offense Type, and Court Dispositions*, 21 SOC. WORK FAC. PUBLS. 134, 136 (2011) (noting that African American youth are six times more likely to be incarcerated in jails and detention facilities compared to white youth and are held, on average, sixty-one days longer).

color experience the clearest disproportionate treatment at the arrest and detention stages, this race-based disproportionality endures throughout all stages of incarceration.<sup>22</sup>

Entry into the juvenile justice system for these youth, the majority of whom live in urban communities, does not happen in isolation. Instead, the pathway to incarceration occurs against a backdrop of heightened surveillance, punishment, and criminalization.<sup>23</sup> Further,

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21. For youth, evidence for racial differences is greatest at the earliest point of contact, particularly at the stages of arrest, referral to court, and placement in secure detention. See NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH (2013); Tia Stevens & Merry Morash, *Racial/Ethnic Disparities in Boys' Probability of Arrest & Court Actions in 1980 & 2000: The Disproportionate Impact of "Getting Tough" on Crime*, 13 YOUTH VIOLENCE & JUV. JUST. 77, 78 (2015); see also JEFF ARMOUR & SARAH HAMMOND, NAT'L CONFERENCE OF STATE LEGISLATURES, MINORITY YOUTH IN THE JUVENILE JUSTICE SYSTEM: DISPROPORTIONATE MINORITY CONTACT 4-5 (2009); Jaya Davis & Jon R. Sorensen, *Disproportionate Juvenile Minority Confinement: A State-Level Assessment of Racial Threat*, 11 YOUTH & JUV. JUST. 296, 296-97 (summarizing the history of disproportionate minority contact legislation and reform). The Davis & Sorensen study, which analyzed thirty-eight states, showed that black juveniles were placed in residential facilities almost 90% more often than white juveniles controlling for arrest. *Id.* at 307. See Tammy Rinehart Kochel et al., *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 479, 498 (2011) (reporting that a meta-analysis of data collected at the encounter or suspect level reported that black individuals had an increased likelihood of being arrested as compared to white individuals even after controlling for factors such as demeanor, offense severity, quantity of evidence at the scene, prior record of the suspect, and requests to arrest by victims).

22. See, e.g., NAT'L CONFERENCE OF STATE LEGISLATURES, DISPROPORTIONATE MINORITY CONTACT: JUVENILE JUSTICE GUIDE BOOK FOR LEGISLATORS, 3-4 (2011); see also ROVNER, *supra* note 13.

23. See, e.g., HOLMAN & ZIEDENBERG, *supra* note 2, at 12-13; Rod K. Brunson & Donald Weitzer, *Police Relations with Black and White Youth in Different Urban Neighborhoods*, 44 URB. AFFAIRS REV. 858, 862 (2009); Jeffery Fagan et al., *Stop and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 FORDHAM URB. L.J. 539, 551-53 (2016); Jeffery Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L. J. 457, 496 (2000); Michelle Fine et al., *"Anything Can Happen With Police Around": Urban Youth Evaluate Strategies of Surveillance in Public Places*, 59 J. SOC. ISSUES 141, 144-45 (2003); Craig Futterman et al., *Youth/Police Encounters on Chicago's South Side: Acknowledging the Realities*, 2016 U. CHI. LEGAL F. 125, 187 (2016); Amy E. Lernman & Vesla M. Weaver, *Staying Out of Sight? Concentrated Policing and Local Police Action*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 202-203 (2014); Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765, 768-71 (2017); Carla Shedd, *What About the Other 99%?: The Broader Impact of Street Stops on Minority Communities*, URB. INST. RES. PAPER SERIES 24, 26 (2012); Carmen Solis et al., *Latino Youths' Experiences with and Perceptions of Involuntary Police Encounters*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 41 (2009); Brett Stoudt et al., *Growing up Policed in the Age of Aggressive Policing Practices*, 56 N.Y.L. SCH. L. REV. 1131, 1332-33 (2011/2012).

as discussed below,<sup>24</sup> marginalized youth and youth of color also tend to experience high levels of stress,<sup>25</sup> complex trauma,<sup>26</sup> and adverse childhood experiences.<sup>27</sup> Moreover, for youth exposed to high rates of community violence,<sup>28</sup> such exposure may amplify the cumulative

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24. See *infra* Part I.

25. See, e.g., Gary W. Evans & Kimberly English, *The Environment of Poverty: Multiple Stressor Exposure, Psychosocial Stress, and Socioemotional Adjustment*, 73 CHILD DEV. 1238, 1245 (2002); Marina Post et al., *Dimensions of Trauma & Specific Symptoms of Complex Posttraumatic Stress Disorder in Inner-City Youth: A Preliminary Study*, 29 VIOLENCE & VICTIMS 262, 262 (2014); Yadira M. Sanchez, Sharon F. Lambert & Michele Cooley-Strickland, *Adverse Life Events, Coping and Internalizing and Externalizing Behaviors in Urban African American Youth*, 22 J. CHILD & FAM. STUD. 38, 38 (2013); Mark Soler et al., *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. POVERTY L. & POL'Y 483, 513 (2009); Jeremy Taylor et al., *The Manifestation of Depression in the Context of Urban Poverty: A Factor Analysis of the Children's Depression Inventory in Low-Income Urban Youth*, 26 PSYCH. ASSESSMENT 1317, 1317 (2014).

26. See, e.g., JUSTICE POLICY INST., MINDFUL OF THE CONSEQUENCES: IMPROVING MENTAL HEALTH BENEFITS FOR D.C.'S YOUTH BENEFITS THE DISTRICT 5 (2012); James Garbarino, Kathleen Kostelny & Nancy Dubrow, *What Children Can Tell Us About Living in Danger*, 46 AM. PSYCHOLOGIST 376, 377 (1991); Gilda Graff, *Everything Has Changed, but Nothin' Has Changed: Shame, Racism, and a Dream Deferred*, 38 J. PSYCHOHISTORY 346, 355–57 (2011); Kathryn E. Grant et al., *Psychological Symptoms Affecting Low-Income Urban Youth*, 19 J. ADOLESCENT RES. 613, 625–28 (2004); Kristina Hood et al., *Stress Among African American Emerging Adults: The Role of Family and Cultural Factors*, 22 J. CHILD & FAM. STUD. 76, 77–78, 82 (2013); Kristin L. Hunt et al., *Risky Business: Trauma Exposure and Rate of Posttraumatic Stress Disorder in African American Children & Adolescents*, 24 J. TRAUMATIC STRESS 365, 366–68 (2011).

27. See, e.g., PETER LEONE & LOIS WEINBERG, CTR. FOR JUVENILE JUSTICE REFORM, ADDRESSING THE UNMET NEEDS OF CHILDREN AND YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS (2012) (surveying available research and identifying risk factors for youth in the juvenile justice system); Nadine Burke et al., *The Impact of Adverse Childhood Experiences on an Urban Pediatric Population*, 35 CHILD ABUSE & NEGLECT 408, 411–13 (2011); Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED. 245, 246 (1998) (detailing the seminal Kaiser study). See generally Roy Wade, Jr. et al., *Adverse Childhood Experiences of Urban Youth*, 134 PEDIATRICS 13 (2014); *Findings from the Philadelphia Urban ACE Survey*, INST. FOR SAFE FAMILIES (2013), <http://www.instituteforsafefamilies.org/philadelphia-urban-ace-study> [<https://perma.cc/PLL3-8RV8>]. For youth of color, the experience of individual and structural racism in itself is a form of stress. See NAT'L CHILD TRAUMATIC STRESS NETWORK, PRELIMINARY ADAPTATIONS FOR WORKING WITH TRAUMATIZED YOUTH LATINO/HISPANIC CHILDREN AND THEIR FAMILIES 4 (2007); see also JOHN RICH ET AL., CTR. FOR NONVIOLENCE & SOC. JUSTICE & DEP'T OF MED., DREXEL UNIV., HEALING THE HURT: TRAUMA INFORMED APPROACHES TO THE HEALTH OF BOYS AND YOUNG MEN OF COLOR 4 (2009) (noting that “exposure to discrimination, racism, oppression, and poverty” is an “insidious” form of trauma).

28. Researchers define the term exposure to community violence as: “both the witnessing of and/or direct victimization by an array of possible violent community events impacting individuals. These include exposure to street crimes such as gang



negative influences of early-life adversities on their physical and mental health in adulthood.<sup>29</sup> As a result, disproportionately negative outcomes and heightened risks of incarceration for youth of color<sup>30</sup> exacerbate already existing health disparities.<sup>31</sup>

Despite a large body of empirical research documenting the health status of system-involved youth, there is little discussion in the reform movement of the critical relationship between incarceration, length of stay (during adolescence), and subsequent negative health and mental health outcomes experienced in adulthood. Yet this association is of particular significance given the discordance between studies evaluating best practices for length of stay, length of stay guidelines and criteria in individual jurisdictions, and the actual time youth remain in confinement. Such discrepancies not only negatively affect youth as individuals, but also raise serious questions as to how extended lengths of stay—as a systemic structure—can be a meaningful measure or metric of rehabilitation.

For jurisdictions committed to finding better ways to address youth delinquency, the lack of attention given to the relationship between length of stay and future health and mental health outcomes is a missed opportunity. First, understanding this connection is essential for achieving key objectives of the juvenile justice system—i.e., rehabilitation, decreased recidivism, and improved community reintegration. Second, it also provides an avenue to integrate and restructure surrounding systems to promote improvements that extend beyond detention. Advocacy and research has shown that longer lengths of stay are not associated with reducing recidivism,<sup>32</sup>

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violence, physical assaults, rape, or any number of adverse community conditions.” Eunju Lee et al., *Exposure to Community Violence as a New Adverse Childhood Experience Category: Promising Results and Future Considerations*, 98 FAMS. SOC’Y: J. CONTEMP. SOC. SERVS. 69, 69 (2017).

29. *See id.* As a survey of the literature reveals, early-life exposure to community violence is a “predictive factor for adverse adult mental health” and “compounding trajectory with correlates, such as family dysfunction and neighborhood disadvantage, resulting in diminished economic and social supports, which may reduce social coping and have negative adulthood outcomes” ultimately leading to poorer mental health and physical health. *Id.* at 70–71.

30. Youth of color are over-represented at every stage of the juvenile justice system. *See, e.g.*, ANNIE E. CASEY FOUND., *supra* note 16; EILEEN POE YAMAGATA & MICHAEL A. JONES, NAT’L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF MINORITY YOUTH IN THE JUSTICE SYSTEM 37 (2007).

31. AM. ACAD. OF PEDIATRICS, POLICY STATEMENT, HEALTH CARE FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM 1219, 1220–24 (2011).

32. The core research on recidivism and length of stay is based on the Pathways to Desistance study. The study is a multidisciplinary, multisite longitudinal investigation

and are ultimately more expensive and less cost-effective than community supervision.<sup>33</sup> In light of these equally important

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of how serious juvenile offenders make the transition from adolescence to adulthood beginning in 2000. It has provided a foundation for multiple subsequent studies and analyses. *See generally, e.g.*, EDWARD P. MULVEY ET AL., PATHWAYS TO DESISTANCE—FINAL TECHNICAL REPORT (2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/244689.pdf> [<https://perma.cc/A4DV-G578>]; CAROL SCHUBERT, MODELS FOR CHANGE, RESEARCH ON PATHWAYS TO DESISTANCE: DECEMBER 2012 UPDATE (2012); Edward Mulvey & Carol A. Schubert, *Some Initial Findings and Policy Implications of the Pathways to Desistance Study*, 7 VICTIMS & OFFENDERS 407 (2012); Thomas A. Loughran et al., U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Studying Deterrence Among High-Risk Adolescents*, JUV. JUST. BULL., Aug. 2015; Edward Mulvey, U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders*, JUV. JUST. BULL., Mar. 2011. *See also* JESSICA FEIERMAN ET AL., JUVENILE LAW CTR., TEN STRATEGIES TO REDUCE JUVENILE LENGTH OF STAY 5 (2015). *See generally* JUSTICE POLICY INST., JUVENILE JUSTICE REFORM IN CONNECTICUT: HOW COLLABORATION AND COMMITMENT HAVE IMPROVED PUBLIC SAFETY AND OUTCOMES FOR YOUTH (2012); RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION (2011); PEW CHARITABLE TRS., RE-EXAMINING JUVENILE INCARCERATION: HIGH COST, POOR OUTCOMES SPARK SHIFT TO ALTERNATIVES 1 (2015); COUNCIL OF STATE GOV'TS JUSTICE CTR., REDUCING RECIDIVISM AND IMPROVING OTHER OUTCOMES FOR YOUNG ADULTS IN THE JUVENILE AND ADULT CRIMINAL JUSTICE SYSTEMS (2015); ELIZABETH SEIGLE ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR., CORE PRINCIPLES FOR REDUCING RECIDIVISM AND IMPROVING OTHER OUTCOMES FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM (2015); VA. DEP'T OF JUVENILE JUSTICE, GUIDELINES FOR DETERMINING THE LENGTH OF STAY (LOS) OF JUVENILES INDETERMINATELY COMMITTED TO THE DEPARTMENT OF JUVENILE JUSTICE (DJJ) 5–7 (2015) (presenting an overview of current research); Ian Lambie & Isabel Randell, *The Impact of Incarceration on Juvenile Offenders*, 33 CLINICAL PSYCHOL. REV. 448 (2013) (providing meta-analysis of recent studies on juvenile incarceration finding that incarceration in a secure residential setting had little to no benefits in the juvenile justice system); Thomas A. Loughran et al., *Estimating a Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders*, 47 CRIMINOLOGY 699, 726 (2009) (estimating the effect on recidivism of longer stays in placement through dose-response relationship analysis between length of stay and future rates of re-arrest and self-reported offending); Brian K. Lovins, *Putting Wayward Kids Behind Bars: The Impact of Length of Stay in a Custodial Setting on Recidivism* (2013) (Ph.D. dissertation, University of Cincinnati) (measuring recidivism as a subsequent commitment to a juvenile or adult correctional facility for a new offense within a three-year follow-up period); Kristin P. Winokur et al., *Juvenile Recidivism and Length of Stay*, 36 J. CRIM. JUST. 126 (2008) (measuring recidivism as a subsequent adjudication or conviction for an offense within twelve months of release to the community or to a conditional-release program); *Reform Trends*, JUV. JUST. EXCHANGE NETWORK, <http://jjie.org/hub/evidence-based-practices/reform-trends/> [<https://perma.cc/GSS7-CFWV>].

33. For example, the Utah Juvenile Justice Working Group found that:

Out-of-home placement costs up to 17 times more than community supervision, but results in similar rates of re-offending. Community supervision costs up to \$7,500 per youth per year compared to as much as \$127,750 per year for some JJS non-secure out-of-home placements. But

considerations, length-of-stay reform should be understood as a bipartisan<sup>34</sup> issue that can maximize state resources to “prioritize the use of costly facilities and intensive programming for serious offenders who present a higher risk of reoffending, while supporting effective community-based programs for others.”<sup>35</sup>

By explicating the nexus between physical health, mental health, and length of stay, this Article seeks to transcend the dominant lines of argument for reform—recidivism and cost of confinement—and simultaneously invite all stakeholders in the juvenile justice system to consider the presumptions, approaches, and goals of contemporary sentencing systems to address unnecessarily lengthy confinement. This Article proceeds as follows: Part I presents empirical research on the health status of system-at-risk and system-involved youth. An examination of this research is essential to connect the negative outcomes of extended lengths of stay within a broader discussion of the life trajectories of marginalized youth. Part II introduces the typologies of juvenile sentencing and outlines the different categories of release decision-making. It situates both sentencing and release decisions in light of research on length of stay and provides specific

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roughly half of youth released from both state custody and probation are convicted of another crime within two years.

UTAH JUVENILE JUSTICE WORKING GRP., FINAL REPORT 4, 9 (2016) (reporting costs of confinement in Utah); *see also* HOLMAN & ZIEDENBERG, *supra* note 2, at 10–12; JUSTICE POLICY INST., STICKER SHOCK: CALCULATING THE FULL PRICE TAG FOR YOUTH CONFINEMENT 2 (2014); NAT’L JUVENILE JUSTICE NETWORK, COMMUNITY-BASED SUPERVISION: INCREASED PUBLIC SAFETY, DECREASED EXPENDITURES 1 (2014), [http://www.njjn.org/uploads/digital-library/NJJN-YAP\\_CBA-costs\\_Nov2014\\_FINAL2.pdf](http://www.njjn.org/uploads/digital-library/NJJN-YAP_CBA-costs_Nov2014_FINAL2.pdf) [<https://perma.cc/XF5K-J27J>]; PEW CHARITABLE TRS., GEORGIA’S 2013 JUVENILE JUSTICE REFORM: NEW POLICIES TO REDUCE SECURE CONFINEMENT, COSTS, AND RECIDIVISM 2–3 (2013); Sarah Cusworth Walker & Asia Sarah Bishop, *Length of Stay, Therapeutic Change, and Recidivism for Incarcerated Juvenile Offenders*, 55 J. OFFENDER REHABILITATION 355, 356 (2016) (presenting a literature review of institutional versus non-institutional sentences finding that non-institutional sentences were more effective and less costly); *Advances in Juvenile Justice Reform: Facility Closures and Downsizing*, NAT’L JUVENILE JUSTICE NETWORK, <http://www.njjn.org/our-work/juvenile-justice-reform-advances-facility-closures-and-downsizing> [<https://perma.cc/MS79-CTNP>] (highlighting costs savings in such states as Alabama, Arizona, Connecticut, Georgia, Florida, Illinois, and Tennessee).

34. This Article notes that the reduction of youth incarceration has been bipartisan issue, but the right-left coalition has not focused specifically on length of stay in the juvenile justice system. For example, Right on Crime and other conservative groups have viewed reductions through diversion, and more recently, re-entry. They have also been driven by the relationship between costs and recidivism. Significantly less attention has been paid to length of stay. *See* Email from Robert G. Schwartz, Visiting Fellow, Stoneleigh Found., Exec. Dir. Emeritus, Juvenile Law Ctr., to author (July 4, 2017, 7:57 AM) (on file with author).

35. PEW CHARITABLE TRS., *supra* note 32, at 1.

examples of state practices and policies, which can lead to excessive and counterproductive confinement.<sup>36</sup> Although Part II discusses indeterminate sentencing at greater length, it does not aim to detract from the pressing need to revise both indeterminate and determinate statutory schemes to address the associated harms of excessive lengths of stay. The Article concludes that successful reform of the juvenile justice system in general, and length of stay in particular, requires advancing policy changes to address the health and mental health outcomes associated with extended lengths of stay. By squarely placing length of stay and the need for reform in the context of trauma, adverse childhood experiences, and health disparities, this Article widens the reform movement's discourse and encourages state-level innovation aimed at minimizing the negative cumulative effects of incarceration.

## I. THE HEALTH STATUS OF AT-RISK AND SYSTEM-INVOLVED YOUTH

Two main arguments currently frame efforts to reform length of stay—recidivism and cost of incarceration. While each of these arguments present compelling reasons for jurisdictions to consider structural reform, this Article aims to interject into the discourse a new, complementary lens, grounded in empirical research on health and mental health. With this in mind, the following sections present a snapshot of current research on the health status of system-at-risk and system-involved youth. Rather than simply asking whether incarcerating youth affects their adult health outcomes as an isolated question, Part I examines research linkages between adverse childhood experiences, trauma, health, and delinquency through a life experience trajectory.

### A. Prior to Incarceration

#### 1. *Adverse Childhood Experiences*

For youth at risk of entering the juvenile justice system and those that are already involved in the system, the use of incarceration, and lengthy stays in particular, poses unique immediate and long-term health and mental health risks. This is especially true when

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36. For example, in most states while the sentencing system appears to promote indeterminate length of stay, in practice, judges set determinate sentences regularly. Those sentences vary based on the “whims of the judge” and are “tied to the judge’s view of the offense or of the treatment needs.” Email from Robert G. Schwartz, *supra* note 34.

considering the prevalence of adverse childhood experiences in the lives of youth from marginalized communities<sup>37</sup> and the distinct relationship between those experiences and delinquency. As a large body of literature has revealed, the presence of adverse childhood experiences in a youth's life places the youth at greater risk for entering the juvenile justice system,<sup>38</sup> compounds complex trauma,<sup>39</sup> and increases health disparities.<sup>40</sup> Each adverse childhood experience—or traumatic event—negatively affects a young person's trajectory for positive health, behavior, and/or psychological development.<sup>41</sup> For those youth who are exposed to multiple adverse experiences, studies have shown an exponentially more harmful or “dose” effect.<sup>42</sup> This is particularly true for youth who have experienced four or more of certain categories of adverse childhood experiences (namely, childhood abuse or household dysfunction)<sup>43</sup>; their odds of experiencing long-term negative health outcomes can be up to twelve times greater than youth who have not had the same exposure.<sup>44</sup> While the original adverse childhood experience study<sup>45</sup> provided an essential baseline to assess exposure to a range of trauma and substantiated a graded relationship between childhood adversity and negative adult outcomes, the measures used excluded chronic

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37. See *supra* notes 25–26.

38. See discussion *infra*. As Cannon, Davis, Hsi, and Bochette identify:

The toxic stress arising from the effects of [adverse childhood experiences] helps explain the significance of the impact of suffering four or more [adverse childhood experiences] in early childhood that lead to involvement in greater numbers of health risk behaviors in youth. Greater health risk behaviors lead to lifelong poorer health outcomes, with those having more [adverse childhood experiences] experiencing more of the conditions that lead to early morbidity and death.

Yael Cannon et al., N.M. SENTENCING COMM'N, ADVERSE CHILDHOOD EXPERIENCES IN THE NEW MEXICO JUVENILE JUSTICE POPULATION 3 (2016); see also Yael Cannon & Andrew Hsi, *Disrupting the Path From Childhood Trauma to Juvenile Justice: An Upstream Health and Justice Approach*, 43 FORDHAM URB. L.J. 425, 440 (2016).

39. See CANNON ET AL., *supra* note 38.

40. See sources cited *supra* notes 26–27.

41. See Felitti et al., *supra* note 27, at 245.

42. This is also referred to as a “dose response.” See Felitti et al., *supra* note 27, at 249.

43. The adverse childhood experiences (“ACEs”) are grouped into two categories (childhood abuse or household dysfunction) of ten childhood experiences: “emotional abuse, physical abuse, sexual abuse, emotional neglect, physical neglect, violent treatment towards mother, household substance abuse, household mental illness, parental separation or divorce, and a having an incarcerated household member.” CANNON ET AL., *supra* note 38, at 1.

44. See Felitti et al., *supra* note 27, at 245.

45. See *id.*

adverse childhood experiences specific to low-income urban communities<sup>46</sup> or correlations to delinquency. These gaps have since been addressed within the literature.

For example, in 2014, Wade et al. conducted an adverse childhood experience assessment specific to low-income urban youth. They found that additional factors, such as community violence, discrimination, poverty, and peer victimization, are unique contributors to health disparities among urban youth.<sup>47</sup> These findings are central to understanding the relationship between childhood adversity and delinquency.<sup>48</sup> They also shed light on the significant existing health disparities that urban youth face once they enter the juvenile justice system. Across a range of types of adverse childhood experiences, including exposure to parental incarceration, childhood physical abuse, domestic violence, and other forms of trauma, there has been a demonstrated association with delinquency.<sup>49</sup> As researchers conducting analysis of juvenile populations in New Mexico noted, there is a fifty-nine percent increase in delinquency arrests for children with documented maltreatment, as compared to children without such documented abuse.<sup>50</sup> Other studies of abused and neglected children have found similar results. For example, the English et al. study concluded that children experiencing childhood adversity are “11 times more likely

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46. Wade et al., *supra* note 27.

47. *Id.*

48. CANNON ET AL., *supra* note 38, at 3 (presenting a sample of the literature on ACE and delinquency). Specific studies have been conducted in a range of areas demonstrating associations to delinquency and maladaptive behaviors. *See generally*, e.g., ROSS PARKE & ALLISON CLARKE-STEWART, EFFECTS OF PARENTAL INCARCERATION ON YOUNG CHILDREN (2002); Amanda Geller et al., *Parental Incarceration and Child Well-Being: Implications for Urban Families*, 90 SOC. SCI. Q. 1186 (2009); Joseph Murray & David P. Farrington, *Parental Imprisonment: Effects on Boys' Antisocial Behavior and Delinquency through the Life-Course*, 46 J. CHILD PSYCHOL. & PSYCHIATRY 1269 (2005); Rosie Teague et al., *Linking Childhood Exposure to Physical Abuse and Adult Offending: Examining Mediating Factors and Gendered Relationships*, 25 JUST. Q. 313 (2008).

49. Michael T. Baglivio & Nathan Epps, *The Interrelatedness of Adverse Childhood Experiences Among High-Risk Juvenile Offenders*, 14 YOUTH VIOLENCE & JUV. JUST. 179, 191–92 (2015); Michael T. Baglivio et al., *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, 3 J. JUV. JUST. 1, 13–14 (2014); Bryanna Hahn Fox et al., *Trauma Changes Everything: Examining the Relationship Between Adverse Childhood Experiences and Serious, Violent and Chronic Juvenile Offenders*, 46 CHILD ABUSE & NEGLECT 163, 164–65 (2015).

50. CANNON ET AL., *supra* note 38, at 3 (citing CATHY S. WIDOM & MICHAEL G. MAXFIELD, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, RESEARCH IN BRIEF: AN UPDATE ON THE “CYCLE OF VIOLENCE” (2001)).

to be arrested for criminal behavior.”<sup>51</sup> Indeed, the “linkage between delinquency and prior abuse is reproduced with some significant degree of correlation in the overwhelming majority of studies that examine the issue.”<sup>52</sup>

When compared to the general population, juvenile justice system-involved youth also show an increased prevalence of multiple and interrelated adverse childhood experiences.<sup>53</sup> Higher-risk juvenile offenders “are 13 times less likely to have exposure to zero [adverse childhood experiences] and 4 times more likely to have [adverse childhood experience] scores of 4 or above.”<sup>54</sup> Although there are few examples of state-level analysis using adverse childhood experiences in juvenile justice populations, research has been conducted in Washington,<sup>55</sup> Florida,<sup>56</sup> and New Mexico.<sup>57</sup>

Using risk assessment instrument data to measure the prevalence of adverse childhood experiences in Washington State, researchers in the Tacoma Urban Network and Pierce County Juvenile Court found that rates of adverse childhood experiences were three times higher than those reported in the original study among juvenile justice system-involved youth.<sup>58</sup> They also determined that youth with higher adverse childhood experience scores<sup>59</sup> engaged in more substance abuse, self-harm behaviors, and school-related problems such as disruptive behaviors, substandard performance, and truancy.<sup>60</sup>

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51. *Id.* (citing Diana J. English et al., *Another Look at the Effects of Child Abuse*, NAT’L INST. JUST. J., no. 251, July 2004, at 23).

52. *Id.*

53. *See supra* notes 37–50 and accompanying text. Initially identified as risk factors, ACEs are now understood to have a cumulative and powerful effect on human development. *See generally, e.g.*, Robert F. Anda et al., *Building a Framework for Global Surveillance of the Public Health Implications of Adverse Childhood Experiences*, 39 AM. J. PREVENTATIVE MED. 93 (2010); Robert F. Anda et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology*, 256 EUR. ARCHIVES PSYCHIATRY & CLINICAL NEUROSCIENCE 174 (2006); Michael T. Baglivio, *The Assessment of Risk to Recidivate Among a Juvenile Offending Population*, 37 J. CRIM. JUST. 596 (2009); Baglivio et al., *supra* note 49; Daniel P. Chapman et al., *Adverse Childhood Events as Risk Factors for Negative Mental Health Outcomes*, 37 PSYCHIATRIC ANNALS 359 (2007).

54. Baglivio & Epps, *supra* note 49, at 192 (examining the interrelatedness of adverse childhood experiences among 64,329 juvenile offenders found).

55. *See infra* note 69.

56. *See generally* Baglivio et al., *supra* note 49.

57. *See generally* CANNON ET AL., *supra* note 38.

58. *See* Baglivio et al., *supra* note 49, at 2.

59. An individual’s adverse childhood experience score represents the total number of reported adverse childhood experiences.

60. *Id.*

In New Mexico, researchers collaborating with the New Mexico Sentencing Commission reported that, of the incarcerated youth sampled, eighty-six percent experienced four or more adverse childhood experiences—seven times higher than the original adverse childhood experience study.<sup>61</sup> The Florida study found a similar prevalence of adverse childhood experience indicators.<sup>62</sup> Researchers also identified a key positive correlation between high adverse childhood experience scores and increased risk of reoffending.<sup>63</sup>

## 2. Health and Mental Health

Across a range of measures, system-involved and at-risk youth are a high-risk population.<sup>64</sup> While some youth have regular access to health and mental health care in their communities, many have inconsistent or non-existent care.<sup>65</sup> Given this disparate access to health care—especially for marginalized youth of color—youth enter the juvenile justice system with elevated rates of unmet physical, developmental, and mental health needs.<sup>66</sup> For example, one study estimated that approximately forty-six percent of newly detained youth have acute medical needs that require immediate attention.<sup>67</sup> Additionally, these youth are more likely to have existing mental disorders,<sup>68</sup> to have experienced chronic trauma, and to report

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61. CANNON ET AL., *supra* note 38, at 1.

62. Ninety percent (62,536) of the sample reported at least one adverse childhood experience. See Baglivio et al., *supra* note 49, at 20.

63. *Id.* at 20–24.

64. Am. Med. Ass'n, Council on Sci. Affairs, *Health Status of Detained and Incarcerated Youth*, 263 JAMA 987, 987 (1990); Mana Golzari et al., *The Health Status of Youth in Juvenile Detention Facilities*, 38 J. ADOLESCENT HEALTH 776, 776 (2006); Andrea J. Sedlak & Karla S. McPherson, U.S. Dep't of Justice, Office Juvenile Justice & Delinquency Prevention, *Youth's Needs and Services*, JUV. JUST. BULL., Apr. 2010, at 2.

65. AM. ACAD. OF PEDIATRICS, *supra* note 31, at 1219.

66. See, e.g., JUSTICE POLICY INST., HEALING INVISIBLE WOUNDS: WHY INVESTING IN TRAUMA-INFORMED CARE FOR CHILDREN MAKES SENSE 1–2 (2010); Julian D. Ford et al., *Complex Trauma and Aggression in Secure Juvenile Justice Settings*, 39 CRIM. JUST. & BEHAVIOR 694, 694–95 (2012).

67. Elizabeth S. Barnert et al., *How Does Incarcerating Young People Affect Their Adult Health Outcomes*, 139 PEDIATRICS 1, 2 (2017).

68. Seena Fazel et al., *Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systemic Review and Meta-regression Analysis of 25 Surveys*, 47 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1010, 1015–17 (2008) (finding adolescents in detention and correctional facilities were approximately ten times more likely to suffer from psychosis than the general adolescent population); see also NAT'L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, *supra* note 4. The most common mental health disorders for juvenile justice system-involved youth include: affective disorders (major depression, persistent



adverse childhood experiences.<sup>69</sup> Such exposure to trauma and other forms of early childhood adversity prior to incarceration is consistently linked to increased health risks and associated health problems, including impairment in early neurodevelopment.<sup>70</sup>

### 3. *Trauma and Post-Traumatic Stress Disorder*

Trauma that occurs prior to incarceration plays a significant role in the lives of system-involved youth. Studies indicate that one third of youth in the juvenile justice system have been exposed to multiple forms of trauma each year,<sup>71</sup> 90% have experienced some form of a traumatic event in childhood,<sup>72</sup> and up to 30% meet the criteria for post-traumatic stress disorder.<sup>73</sup> When juvenile justice system-involved youth are compared with youth not involved in the juvenile justice system, researchers estimate that system-involved populations experience post-traumatic stress disorder (based on events prior to incarceration) at rates of four to eight times greater than non-system involved youth.<sup>74</sup> An analysis by the Northwestern Juvenile Project

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depression, and manic episodes), psychotic disorders, anxiety disorders (panic, separation anxiety, generalized anxiety, obsessive-compulsive disorder, and post-traumatic stress disorder), disruptive behavior disorders (conduct, oppositional defiant disorder, and attention-deficit hyperactivity disorder), and substance use disorders. See Linda A. Teplin et al., U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Psychiatric Disorders of Youth in Detention*, JUV. JUST. BULL., Apr. 2006, at 1, 2.

69. Research has consistently shown a correlated and graded relationship between accumulated adverse childhood experiences and health risks and problems. The National Center for Mental Health and Juvenile Justice reports: least 75% of youth in the juvenile justice system have experiences traumatic victimization; 93% of youth in detention reported exposure to adverse events (accidents, serious illness, physical and sexual abuse, domestic and community violence) with the majority exposed to six or more; and 65% to 70% of youth in contact with the juvenile justice system demonstrating a diagnosable mental health disorder. NAT'L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, *supra* note 4, at 2; see also JULIAN D. FORD ET AL., NAT'L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, *TRAUMA AMONG YOUTH IN THE JUVENILE JUSTICE SYSTEM: CRITICAL ISSUES AND NEW DIRECTIONS* 1–3 (2007).

70. CANNON ET AL., *supra* note 38, at 3 (reviewing the literature on childhood maltreatment and neurobiology).

71. Baglivio et al., *supra* note 49, at 13–14 (citing Carly B. Dierkhising et al., *Trauma Histories Among Justice-Involved Youth: Findings from the National Child Traumatic Stress Network*, 4 EUR. J. PSYCHOTRAUMATOLOGY (2013)); see also Teague et al., *supra* note 48, at 313 (finding that childhood physical abuse and other forms of maltreatment led to higher rates of self-reported total offending, violent offending, and property offending).

72. Fox et al., *supra* note 49, at 164.

73. *Id.*

74. Julian D. Ford et al., *Traumatic Victimization, Posttraumatic Stress Disorder, Suicidal Ideation, and Substance Abuse Risk Among Juvenile Justice-Involved*

revealed that more than 92% experienced at least one traumatic event, 84% experienced two, and more than 56% were exposed to six or more traumatic events prior to their incarceration.<sup>75</sup> Similarly, a study examining youth in a large urban juvenile detention center affirmed these trends, finding that more than 90% of youth reported a history of at least one psychologically traumatic experience,<sup>76</sup> and approximately 10% met the criteria for post-traumatic stress disorder.<sup>77</sup> For system-involved girls, research shows that “trauma-related stress and diagnoses . . . is *more than 200 times* the national average.”<sup>78</sup>

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*Youth*, 1 J. CHILD & ADOLESCENT TRAUMA 75, 76 (2008). While outside the scope of this Article, it is important to note that there is a large body of literature finding that experiencing trauma related to sexual or physical abuse is linked to a host of negative psychological, behavioral, and health-related outcomes among adolescents and adults, including entry into the juvenile justice system. See, e.g., BARBARA BLOOM ET AL., NAT’L INST. OF CORR., GENDER-RESPONSIVE STRATEGIES FOR WOMEN OFFENDERS: A SUMMARY OF RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS 1, 5 (2005); Naomi Breslau et al., *Traumatic Events and Posttraumatic Stress Disorder in an Urban Population of Young Adults*, 48 ARCHIVES OF GEN. PSYCHIATRY 216, 216 (1991); John Briere & Marsha Runtz, *Child Sexual Abuse: Long-Term Sequelae and Implications for Psychological Assessment*, 8 J. INTERPERSONAL VIOLENCE 312, 312 (1993); Richard Dembo et al., *Gender Differences in Service Needs Among Youths Entering a Juvenile Detention Center: A Replication Study*, 12 J. CORRECTIONAL HEALTH CARE 191, 193 (1993); see also Juliette Noel Graziano & Eric F. Wagner, *Trauma Among Lesbian and Bisexual Girls in the Juvenile Justice System*, 17 TRAUMATOLOGY 45, 45 (2011) (“[P]revalence of traumatic stress and PTSD among juvenile justice populations (primarily male) has been estimated to be at least 8 times greater than found in adolescent community samples.”).

75. Abram et al., *supra* note 3, at 1 (studying a random sample of juveniles detained over a three-year period in an urban juvenile justice facility). The report also noted that of the youth sampled more than eleven percent met the criteria for PTSD within the prior year. See also Linda A. Teplin et al., U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention, *The Northwest Juvenile Project: Overview*, JUV. JUST. BULL., Feb. 2013, at 3 (presenting data and outlining the goals of the project: (1) assessment of the “prevalence, development, and persistence of psychiatric disorders as youth in the juvenile justice system become adults;” (2) examination of “the dynamic relationships among patterns of psychiatric disorders, risky behaviors, mortality, and other long-term outcomes in adulthood;” and (3) consideration of “how patterns of incarceration during adolescence and adulthood affect long-term outcomes in adulthood”).

76. Karen M. Abram et al., *Posttraumatic Stress Disorder and Trauma in Youth in Juvenile Detention*, 61 ARCHIVES OF GEN. PSYCHIATRY 403, 403 (2004).

77. *Id.*

78. Graziano & Wagner, *supra* note 74; see, e.g., CANNON ET AL., *supra* note 38 (finding that girls in the juvenile justice system reported higher ACE “scores” (i.e., greater incidence of trauma) than their male counterparts: 23% of females reported scores of 9 or 10—the highest and most vulnerable extreme of the trauma spectrum—compared to just 3% of boys); Baglivio et al., *supra* note 49, at 8 (girls reported higher scores than boys across all ten categories of adverse childhood experiences); NAT’L

#### 4. Poverty

While adverse childhood experiences—including community violence<sup>79</sup> and parental incarceration<sup>80</sup>—all influence disparities among incarcerated youth, poverty<sup>81</sup> is also a significant factor, especially for youth of color. The American Academy of Pediatrics noted:

Underlying the poorer health status of youth in the juvenile justice system is SES [socio-economic status]. Just as lower SES is correlated with juvenile delinquency, lower SES—specifically, income inequality—has been shown to correlate with teen births, overweight, and mental health problems. Minority youth, including black and Hispanic youth, who are overrepresented in the juvenile justice system in the United States, are more likely to live in lower-SES environments and have been found to have overall poorer health care than their white counterparts. Studies have shown significant disparities between white and minority youth aged 0 through 17 years in insurance coverage, lack of a usual source of care, use of the emergency department, and not receiving adequate mental health care, dental care, or prescription medications.<sup>82</sup>

### B. The Effects of Incarceration: Compounding Existing Trauma and Health Disparities

#### 1. Inadequate Treatment During Incarceration

For youth with existing health and mental health issues, once incarcerated, these needs—and the relative disparities based on race, ethnicity, gender, sexual identity, and sexual orientation, as well as socio-economic status—become increasingly pronounced.<sup>83</sup> This is

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CRITTENTON FOUND., SUMMARY OF RESULTS: CRITTENTON ADVERSE CHILDHOOD EXPERIENCES (ACE) PILOT 4 (2012), <http://www.nationalcrittenton.org/wp-content/uploads/2015/03/ACEresults.pdf> [<https://perma.cc/3KUB-LC8L>]; NAT'L CRITTENTON FOUND., BEYOND ACE: SUMMARY FINDINGS FROM THE CRITTENTON FAMILY OF AGENCIES 2014–2015 ADMIN. OF THE ADVERSE CHILDHOOD EFFECTS (ACE) SURVEY 8 (2016), [http://nationalcrittenton.org/wp-content/uploads/2016/09/ACE\\_RE-PORT\\_nalsm.pdf](http://nationalcrittenton.org/wp-content/uploads/2016/09/ACE_RE-PORT_nalsm.pdf) [<https://perma.cc/W7FY-LSEH>].

79. *Supra* notes 28–29.

80. See generally Geller et al., *supra* note 48; Joseph Murray & David P. Farrington, *The Effects of Parental Incarceration on Children*, 37 CRIME & JUST. 133 (2008).

81. The medical literature refers to poverty as low socioeconomic status (“SES”). AM. ACAD. OF PEDIATRICS, *supra* note 31, at 1220.

82. *Id.* at 1221.

83. See Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641, 674–76, 692 (2016) (presenting a review of literature describing trauma among system-involved youth); Randee J. Waldman et al., *Addressing the Mental*

true for at least two reasons. First, health and mental health issues often remain undiagnosed,<sup>84</sup> especially for youth of color as compared to their white peers.<sup>85</sup> Second, many youth fail to receive necessary mental health services or treatment during confinement due to limited staff, inadequate training and capacity, and an overall lack of resources.<sup>86</sup> While the inability of youth to access health and mental health services during state custody is problematic in isolation (meriting attention and corrective reform), one must position this issue in the context of current sentencing practices that contribute to unnecessary and excessive lengths of stay.<sup>87</sup>

For example, as discussed in greater detail below, indeterminate sentencing systems presuppose timely rehabilitation, which requires substantive treatment during incarceration and programs to address youth risks and needs. But instead of receiving interventions or access to rehabilitative resources, youth are retraumatized<sup>88</sup> and

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*Health Needs of Youth in the Juvenile Justice System*, 17 FLA. COASTAL L. REV. 43, 51–58 (2015) (characterizing the diverse mental health needs of youth in detention facilities).

84. See Buckingham, *supra* note 83; Waldman et al., *supra* note 83; see also HOLMAN & ZIEDENBERG, *supra* note 2, at 8.

85. AM. ACAD. OF PEDIATRICS, *supra* note 31, at 1224. The American Academy of Pediatrics analysis also reveals gender differences in psychiatric diagnosis, PTSD and “greater persistence of emotional problems and worse outcomes complicated by relationship and parenting issues, drug problems, and suicidality.” *Id.* at 1225.

86. See, e.g., LESLIE ACOCA ET AL., THE HENRY H. KAISER FAMILY FOUND., THE KAISER COMMISSION ON MENTAL HEALTH AND THE UNINSURED, HEALTH COVERAGE AND CARE FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM: THE ROLE OF MEDICAID AND CHIP 4 (2014); NISHA AJMANI & ERICA WEBSTER, CTR. ON JUVENILE & CRIMINAL JUSTICE, FAILURE AFTER FARRELL: VIOLENCE AND INADEQUATE MENTAL HEALTH CARE IN CALIFORNIA’S DIVISION OF JUVENILE JUSTICE 6–7 (2016); Shay Bilchik et al., *A Roadmap for Change: How Juvenile Justice Facilities Can Better Serve Youth with Mental Health Issues*, 31 FOCAL POINT: YOUTH, YOUNG ADULTS, & MENTAL HEALTH 13, 13 (2017); Rani A. Desai et al., *Mental Health Care in Juvenile Detention Facilities: A Review*, 34 J. AM. ACAD. PSYCHIATRY & L. 204, 207 (2006); Peter Greenwood, *Prevention and Intervention Programs for Juvenile Offenders*, 18 FUTURE CHILD 185, 205 (2008); Fazel et al., *supra* note 68, at 1010; Thomas Grisso, *Adolescent Offenders with Mental Disorders*, 18 FUTURE CHILD 143, 144 (2008); Simone S. Hicks, Note, *Behind Prison Walls: The Failing Treatment Choice for Mentally Ill Minority Youth*, 39 HOFSTRA L. REV. 979, 986 (2011).

87. As a recent Harvard Law School report noted, “judges may have been inclined to sentence juveniles with certain mental health conditions to longer periods of incarceration in hope that they would received [sic] treatment in the detention facility.” See HARVARD LAW SCH. MISSISSIPPI DELTA PROJECT, IMPROVING MENTAL HEALTH & SUBSTANCE ABUSE TREATMENT IN JUVENILE DETENTION FACILITIES 11 (2014). This belief is both misinformed and counterproductive, translating directly into a longer, less effective, and harmful time in state custody.

88. See *infra* 92–102.

placed at greater risk of developing new health and mental health issues. As the Juvenile Law Center notes, a “common length-of-stay problem arises when youth release is tied to treatment, but the facility fails to provide needed or appropriate treatment.”<sup>89</sup> This can be a vicious cycle. When disposition review and release criteria require an assessment of a youth’s progress, but there is an absence of actual services, it becomes increasingly difficult for youth to show the necessary progress needed for release and their chances of extended confinement under the auspices of treatment increase.<sup>90</sup> This not only has negative implications for an individual’s development, but also undermines the aim of the juvenile justice system and the purpose of indeterminate sentencing.<sup>91</sup>

## 2. *The Compounding Effects of Incarceration*

The negative impact that extended lengths of stay can have on the health of youth populations with pre-existing trauma is not limited to lack of therapeutic, rehabilitative, or evidence-based services. As countless studies have shown, the experience of being confined is profoundly traumatic in itself.<sup>92</sup> Nationally, 56% of youth in residential facilities reported at least one form of violent victimization

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89. FEIERMAN ET AL., *supra* note 32, at 7. *See generally* KORT C. PRINCE ET AL., UTAH CRIMINAL JUSTICE CTR., DETERMINANTS OF LENGTH OF STAY IN UTAH’S JUVENILE SECURE CARE FACILITIES (2014).

90. FEIERMAN ET AL., *supra* note 32, at 7.

91. *See* ILL. JUVENILE JUSTICE COMM’N, YOUTH REENTRY IMPROVEMENT REPORT 18–19 (2011), [http://www.dhs.state.il.us/OneNetLibrary/27896/documents/By\\_Division/DCHP/RFP/IJJC\\_YouthReentryImprovement.pdf](http://www.dhs.state.il.us/OneNetLibrary/27896/documents/By_Division/DCHP/RFP/IJJC_YouthReentryImprovement.pdf) [<https://perma.cc/RP8L-YWKR>] (“Indeterminate sentencing systems presuppose timely rehabilitation, which requires substantive in-facility treatment and programs to address youth risks and needs. However, the Commission found that the Department of Juvenile Justice fails to identify youth needs and does not match identified needs with the services provided to the youth during incarceration.”).

92. *See* Karen M. Abram et al., U.S. Dep’t of Justice Office, Juvenile Justice & Delinquency Prevention, *Suicidal Thoughts and Behaviors Among Detained Youth*, JUV. JUST. BULL., July 2014, at 2 (a review of literature and discussion of conditions associated with confinement that increase risk of suicide); Schnittker, *supra* note 1 (exposure to communicable diseases and physical or sexual trauma while incarcerated increases subsequent health outcomes); Michael Massoglia, *Incarceration, Health, and Racial Disparities*, 42 L. & SOC’Y REV. 275, 279–280 (2008) (reviewing social epidemiology literature to find that incarceration may heighten exposure to disease). *See generally* SUE BURRELL, NAT’L CHILD TRAUMATIC STRESS NETWORK, TRAUMA AND THE ENVIRONMENT OF CARE IN JUVENILE JUSTICE INSTITUTIONS (2013); RICHARD A. MENDEL, ANNIE E. CASEY FOUND., MALTREATMENT OF YOUTH IN U.S. JUVENILE CORRECTIONS FACILITIES, AN UPDATE (2015) (a comprehensive report of maltreatment of youth in juvenile detention).

while in custody.<sup>93</sup> As the 2015 report, *Maltreatment of Youth in U.S. Juvenile Corrections Facilities*, documents, fear of violence and staff maltreatment is a constant reality for incarcerated youth.<sup>94</sup> As one study highlighted, 42% of youth in secure corrections facilities or camp programs report that “they were somewhat or very afraid of being physically attacked, while [45%] reported that staff ‘use force when they don’t really need to,’ and [30%] said that staff place youth into solitary confinement or lock them up alone as discipline.”<sup>95</sup> As Waldman et al. notes:

The staff of many facilities are not trained to handle the needs of a mentally ill inmate; their limited understanding of mental illness and the lack of adequate resources prevent them from being able to intervene appropriately, so instead they turn to inappropriate uses of segregation, seclusion, and restraints, which further contributes to the decomposition of the youth’s physical and mental well-being.<sup>96</sup>

Other factors, such as overcrowding, violence, and general disorder, also contribute to worsened physical and mental health later in adulthood.<sup>97</sup> As the Justice Policy Institute’s report, *Dangers of Detention*, notes “[f]ar from receiving effective treatment, young people with behavioral health problems simply get worse in detention, not better.”<sup>98</sup> Strikingly, about one-fifth of incarcerated youth are diagnosed with depression, with onset occurring after the start of incarceration.<sup>99</sup> Moreover, “incarcerated youth die by suicide

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93. HOLMAN & ZIEDENBERG, *supra* note 2, at 8. As a recent Annie E. Casey Foundation report highlighted, issues of sexual violence and maltreatment continue to be widespread:

In 2013, the federal Bureau of Justice Statistics (BJS) published a national survey regarding sexual victimization of confined youth. Conducted in 2012, the study revealed a continuing national epidemic of sexual abuse in state-funded juvenile corrections facilities. Nearly 10 percent of youth incarcerated in state-operated or state-funded juvenile corrections facilities reported being victimized sexually by staff or other youth in their facilities, and half of the victimized youth reported incidents involving physical force, threats or other forms of coercion *and* unwanted genital contact.

MENDEL, *supra* note 92, at 3 (emphasis in original).

94. *See* MENDEL, *supra* note 92, at 3.

95. *Id.* at 7. In many states, juvenile facilities fail to address the distinct mental health needs of youth, and despite known histories of trauma and victimization, staff utilize “traditional punitive correctional approaches proven to be ineffective, as opposed to strength-based, therapeutic interventions.” Bilchik et al., *supra* note 86, at 13.

96. Waldman et al., *supra* note 83, at 53.

97. HOLMAN & ZIEDENBERG, *supra* note 2, at 8.

98. *Id.*

99. Javad H. Kashani et al., *Depression Among Incarcerated Delinquents*, 3 PSYCHIATRY RESOURCES 185, 190 (1980); *see also* Todd L. Grande et al., *Using the*

at a rate two to three times higher” than the general youth population.<sup>100</sup> According to OJJDP data, 11,000 youth in the juvenile justice system engage in more than 17,000 acts of suicidal behavior annually.<sup>101</sup> A longitudinal examination of 1829 youth ages ten to eighteen in an urban detention center reiterated these national numbers, finding that approximately one in ten juvenile detainees “thought about suicide in the past 6 months, and 11 percent had attempted suicide.”<sup>102</sup>

### 3. *The “Dose Measure” of Youth Incarceration*

Complex relationships exist between youth incarceration and health. Despite the significant body of research documenting the health status of juvenile justice system-involved youth, there was little evidence regarding a “dose measure of incarceration”—that is, an association or correlation between length of stay as an adolescent and young adult and worsened health outcomes in adulthood—until a recent study filled this important gap in the literature.<sup>103</sup> In 2017, Barnert et al. published a longitudinal analysis of data from over 14,000 young adults indicating temporal connections between the length of incarceration during adolescence and subsequent negative health and mental health outcomes for adults.<sup>104</sup> Assessing general health (physical health, mental health and psychosocial well-being) as well as functional limitations, depression, and suicidal thoughts, they determined that “any length of incarceration was associated with higher odds of having worse adult health”<sup>105</sup> but that cumulative duration of incarceration (one to twelve months) as a juvenile predicted worse health and mental health outcomes as an adult.<sup>106</sup>

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*BASC-2 to Assess Mental Health Needs of Incarcerated Juveniles: Implications for Treatment and Release*, CORRECTIONS TODAY, Dec. 2011, at 100–02 (noting that fifty to seventy-five percent of the two million youth encountering the juvenile justice system meet criteria for a mental health disorder); Hicks, *supra* note 86, at 987 (identifying that once youth enter the juvenile justice system, mental health disorders are exacerbated and for those youth entering without preexisting conditions they are at a high risk to develop mental health disorders).

100. Abram et al., *supra* note 92, at 1; *see also* Ford et al., *supra* note 74, at 76 (reviewing literature examining high suicide rates among juvenile populations).

101. DALE G. PARENT ET AL., U.S. DEP’T OF JUSTICE, OFFICE JUVENILE JUSTICE & DELINQUENCY PREVENTION, CONDITIONS OF CONFINEMENT: JUVENILE DETENTION & CORRECTIONS FACILITIES, Executive Summary-10 (1994).

102. Abram et al., *supra* note 92, at 1.

103. Barnert et al., *supra* note 67, at 2.

104. *Id.* at 4.

105. *Id.*

106. *Id.*

Specifically, the study concluded that incarceration greater than one month “is associated with worse general health,” and greater than one year “is associated with worse mental health and adult functional limitations.”<sup>107</sup>

## II. SENTENCING, RELEASE DECISION-MAKING, AND LENGTH OF STAY

The dispositional framework of the juvenile justice system rests on principles of informality and flexibility facilitated by discretionary decision-making to balance the state’s interest in public safety with the rehabilitation of youth offenders.<sup>108</sup> As Barry Feld, a juvenile justice scholar, notes, “[h]istorically, the premise of sentencing in the juvenile court system was the ‘best interests’ of the child-offender implemented through indeterminate and non-proportional dispositions.”<sup>109</sup> Presently, there are two typologies of sentencing in the juvenile system that define length of stay in detention: indeterminate and determinate.<sup>110</sup> While the general distinction between the two should be self-evident from the terms themselves, in actuality there is significant variation across jurisdictions as to the formal definitions of indeterminate and determinate based on a

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107. *Id.* at 7.

108. Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. Rev. 821, 851–52 (1988) (“Indeterminacy is based on the assumption that the goal of rehabilitation can be achieved and that the technical means to achieve it are available.”).

109. *Id.* at 848 (“Indeterminate sentences were the norm as long as the view prevailed that offenders should be treated rather than punished, that the duration of confinement should relate to rehabilitative needs.”); *id.* at 852; *see, e.g.*, *McKeiver v. Pennsylvania*, 403 U.S. 528, 551–52 (1971):

For the most part, the juvenile justice system rests on more deterministic assumptions [than the criminal justice system]. Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control. Hence the state legislative judgment not to stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that punishment is required to deter him or others . . . Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties . . . A typical disposition in the juvenile court where delinquency is established may authorize confinement until age 21, but it will last no longer and within that period will last only so long as his behavior demonstrates that he remains an unacceptable risk if returned to his family. Nor is the authorization for custody until 21 any measure of the seriousness of the particular act that the juvenile has performed.

*Id.* (White, J., concurring).

110. Feld, *supra* note 108, at 848 (characterizing the basic differences between determinate and indeterminate sentences in terms of dispositional outcomes).



model of dichotomy. And this variation means that, while formally distinct, indeterminate and determinate sentencing practices really exist along a continuum. For purposes of clarity, this Article adopts the most commonly used definitions of indeterminate and determinate sentences.<sup>111</sup>

### A. Typologies of Juvenile Justice Sentencing

Three elements mark an indeterminate sentence: (1) an unspecified period of confinement, i.e., length of stay;<sup>112</sup> (2) a release decision made after confinement begins, based, in part, on observations of youth behavior during confinement; and (3) a release decision based on “factors associated with the [youth’s] progress toward rehabilitation.”<sup>113</sup> In contrast, determinate sentencing systems include: (1) a presumptive sentence or dispositional length of stay; (2) an early determination of length of stay “set either at the time of adjudication or shortly thereafter;”<sup>114</sup> and (3) a formal sentence based on specific standards.<sup>115</sup> This structure is analogous to adult sentencing systems.<sup>116</sup>

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111. Martin Forst et al. originally set forth these definitions in the seminal national study of approaches to commitment and release decision-making. They note that their definitions of indeterminate and determinate sentencing are “by design rather broad; they allow for significant diversity in the structure and process of each sentencing approach.” Martin L. Forst et al., *Indeterminate and Determinate Sentencing of Juvenile Delinquents: A National Study of Approaches to Commitment and Release Decision-Making*, 36 JUV. & FAM. CT. J. 1, 4 (1985).

112. There is no consistent determination across jurisdictions for the minimums and maximums of confinement. However, given the statutorily defined age limits in the juvenile justice system, the length of stay in state custody *should* be typically less than the adult criminal system. However, this is not always the case. Even if one sets aside status offenses, there are circumstances in which a juvenile could spend more time incarcerated for a misdemeanor, for example, than an adult under typical sentencing statutes. See Email from Beth Colgan, Asst. Professor of Law, UCLA School of Law, to author (July 6, 2017, 9:23 AM) (on file with author).

113. Forst et al., *supra* note 111, at 4. For example, the Illinois General Assembly mandates an indeterminate, rehabilitative juvenile justice system to “equip juvenile offenders with competencies to live responsibly and productively” and Illinois juvenile court judges “commit youth to indeterminate, rehabilitation-dependent sentences.” ILL. JUVENILE JUSTICE COMM’N, *supra* note 91, at 18 (quoting 705 ILL. COMP. STAT. 405/5(1) (2016)).

114. Feld, *supra* note 108, at 851 (citing Forst et al., *supra* note 111, at 4).

115. *Id.* at 851 (“To the extent that the length of the sentence is determined by a judge at trial or shortly after commitment, it reflects the offender’s prior conduct. Alternatively, if the sentence is determined by an administrative agency during the later stages of confinement, it is more likely to reflect the offender’s conduct during confinement.”).

116. While commonly accepted definitions of determinate sentences do not include explicit reference to rehabilitation, one can reasonably argue that they include an

More than half the states (and the District of Columbia) have adopted indeterminate sentencing systems,<sup>117</sup> with the remaining states either sentencing juvenile offenders to indeterminate and/or determinate sentences or strictly determinate sentences.<sup>118</sup> In those states where judges set indeterminate sentences, confinement ranges from one day to multiple years<sup>119</sup> or until the youth offender reaches the age of majority or some other statutorily determined age of

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element of rehabilitation as every state juvenile code provides that the system as a whole is designed to rehabilitate youth offenders.

117. States with indeterminate sentencing systems include: Alaska, Arkansas, California, Connecticut, Washington, D.C., Florida, Georgia, Iowa, Kansas, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Pennsylvania, South Dakota, Utah, Vermont, West Virginia, and Wyoming. *See, e.g.*, ARK. CODE ANN. § 9-27-331(a)(1)(2) (2009); CAL. WELF. & INST. CODE §§ 731, 1719 (West 2016); CONN. GEN. STAT. § 46b-141 (West 2016); ME. REV. STAT. ANN. tit. 15, § 3316(2)(A) (2017); UTAH CODE ANN. § 62A-15-705(3) (West 2017); VT. STAT. ANN. tit. 33, § 5284(d) (2015).

118. States that allow for determinate sentences include Alabama, Arizona, Colorado, Kentucky, Minnesota, Rhode Island, and Washington. *See, e.g.*, COLO. REV. STAT. § 19-2-909(1)(a) (2008); MINN. R. JUV. DEL. P. 15.05(3) (2017); 14 R.I. GEN. LAWS § 14-1-36.1 (2016). In addition to indeterminate and determinate sentencing, a few states utilize blended sentencing. Blended sentencing approaches are viewed as combining the treatment benefits of the juvenile system with the greater emphasis on punishment in the adult system once in confinement. In Texas, for example, the Texas Family Code:

[A]llows a juvenile court to enter a disposition requiring a youth to complete a specific ‘sentence’ or period of time in a state-run secure correctional facility . . . [the] juvenile may receive a determinate sentence of up to 40 years and may serve the adult portion of their sentence in prison or on adult parole.

COUNCIL OF STATE GOV’TS JUSTICE CTR., CLOSER TO HOME: AN ANALYSIS OF THE STATE AND LOCAL IMPACT OF THE TEXAS JUVENILE JUSTICE REFORMS 10 (2015); *see also* Press Release, Cty. of El Paso, A Brief Explanation About the “Determinate Sentence” Statute in Juvenile Criminal Cases (Sept. 23, 2006) (explaining the determinate sentencing statute in juvenile criminal cases).

119. *See* GA. DEP’T OF JUVENILE JUSTICE, POPULATION FORECAST 7 (2010) (reporting that the average length of stay was 1504 days for several years); ILL. DEP’T OF JUVENILE JUSTICE, ANNUAL REPORT 3 (2014) (“Youth committed . . . spent, on average, nine months in facilities”); KY. LEGISLATIVE RES. COMM’N, REPORT OF THE 2013 TASK FORCE ON THE UNIFIED JUVENILE CODE 5 (2013) (average length of stay was six to seven months); STATE OF ME. JUVENILE JUSTICE ADVISORY GRP., COMPREHENSIVE THREE YEAR PLAN FOR JUVENILE JUSTICE & DELINQUENCY PREVENTION 11 (2015) (average length of stay was sixty-eight days); Letter from Fla. Dep’t of Juvenile Justice to Hon. Joe Negron, Chairman, Hon. Seth McKeel, Chairman, and Cynthia Kelly, Dir. (Dec. 31, 2013) <http://www.fjja.org/links/Proviso%20Letter%20and%20Interagency%20Education%20Report.pdf> [<https://perma.cc/T6EL-GZVX>] (“Youth [in low-risk residential placement] have an anticipated length of stay of three to six months . . . Youth in maximum-risk programs may be retained until their 22nd birthday but the average length of stay is between 18–36 months.”).

release and the length of confinement is based on rehabilitation.<sup>120</sup> In states where judges sentence youth to a determinate time in confinement, the length of stay is a set term, based on an individual's offense.<sup>121</sup> Although jurisdictions vary as to the specific requirements, determinate sentencing is typically used for more serious offenses.<sup>122</sup>

## B. Sentencing Reform

States used indeterminate sentencing as the long-standing norm in the juvenile system until the 1970s and 1980s, when they revised their systems based on political pressures.<sup>123</sup> Current systems in many states still reflect these changes. Despite a handful of states engaging in recent reforms to address length of stay,<sup>124</sup> such as step-down

120. See Feld, *supra* note 108, at 848 (characterizing the basic differences between determinate and indeterminate sentences in terms of dispositional outcomes); see also ILL. JUVENILE JUSTICE COMM'N, *supra* note 91, at 16. For example, in Illinois "the use of a[n] indeterminate, rehabilitative juvenile justice system to 'equip juvenile offenders with competencies to live responsibly and productively.'" *Id.* at 18. Illinois juvenile court judges therefore commit youth to indeterminate, rehabilitation-dependent sentences." See *id.*

121. See, e.g., COUNCIL OF STATE GOV'TS JUSTICE CTR., *supra* note 118, at 10.

122. See HAW. REV. STAT. ANN. § 706-667(3) (West 2016) (establishing a system in which youth may be sentenced indeterminately, except for those convicted of felonies); 705 ILL. COMP. STAT. ANN. 405/5-750(3) (West 2016) (juvenile sentences are indeterminate except in first-degree murder cases); N.Y. PENAL LAW § 70.05(1), § 60.02 (McKinney 2017) (establishing indeterminate sentences for misdemeanors, and determinate sentences for felonies); OHIO REV. CODE ANN. § 2152.16 (West 2016) (serious crimes are punished with determinate sentences; other crimes can be punished with indeterminate sentences); OKLA. STAT. tit. 10A, §§ 2-2-503(5), 2-5-209(B) (2016) (serious offenders can receive determinate sentences; others receive indeterminate sentences); TENN. CODE ANN. §§ 37-1-137(a)(1)(A), 37-1-137(a)(1)(B) (2017) (establishing that sentences will generally be indeterminate, but that particularly serious crimes can be punished with determinate sentences); VA. CODE §§ 16.1-278.8(A)(14), -272, -285.1, -272(A)(2) (2017) (juvenile crimes are generally punished with indeterminate sentences unless particularly serious). However, in the state of Washington (where state juvenile code *requires* a determinate sentence), a judge may set a sentence as low as fifteen weeks. See WASH. STATE FORECAST COUNCIL, 2015 WASHINGTON STATE JUVENILE DISPOSITION GUIDELINES MANUAL 22 (2015), [http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Juvenile\\_Disposition\\_Manual\\_2015.pdf](http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Juvenile_Disposition_Manual_2015.pdf) [<https://perma.cc/Z7CQ-NAXQ>].

123. Forst et al., *supra* note 111, at 1–2 (discussing the trend to reform the indeterminate and individualized model of sentencing).

124. In 2014, Kentucky limited the amount of time a juvenile may be held by the Department of Juvenile Justice in out-of-home placement for treatment, and the total amount of time a youth may be committed or under court supervision. See PEW CHARITABLE TRS., KENTUCKY'S 2014 JUVENILE JUSTICE REFORM 8 (2014), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2014/07/kentucky-2014-juvenile-justice-reform> [<https://perma.cc/VET6-FM89>]. In West Virginia statutory reform is aimed at reducing the placement of low-level youth offenders in

placements (moving youth into less restrictive settings as time progresses),<sup>125</sup> improved case management,<sup>126</sup> pre-court interventions,<sup>127</sup> and coordinated community placements,<sup>128</sup> a significant gap remains across jurisdictions. In practice, whether adjudicated under a determinate or indeterminate sentencing system, youth continue to face excessive lengths of stay.<sup>129</sup>

Given the explicit focus on rehabilitation of indeterminate sentences, this Article argues there is greater potential for stakeholder alignment and reform to occur within indeterminate sentencing systems.<sup>130</sup> This is particularly true when one considers that in many instances structural failures, such as a lack of statutory language providing guidance for objective determinations of length of stay for indeterminate systems, translate into youth spending more time than necessary in confinement. For example, in 2016 the Utah

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state-funded facilities and providing increased resources to community-based services. These “changes are projected to cut the number of committed youth by at least 16 percent over five years.” PEW CHARITABLE TRS., WEST VIRGINIA’S 2015 JUVENILE JUSTICE REFORM 1 (2016), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/05/west-virginias-2015-juvenile-justice-reform> [<https://perma.cc/QWY6-VQEZ>]. In 2013, Georgia eliminated the mandatory minimum sentence for certain felony offenses and reduced the maximum term for less serious felony offenses from five years to 18 months. *See* PEW CHARITABLE TRS., GEORGIA’S 2013 JUVENILE JUSTICE REFORM, *supra* note 33, at 6.

125. MENDEL, ANNIE E. CASEY FOUND., *supra* note 32, at 16 (noting that a twelve-percent decrease in the length of stay was achieved through improved case management and increased use of step-down placements).

126. *Id.* at 18 (discussing Wraparound Milwaukee).

127. Press Release, Pew Charitable Trs., Pew Applauds Utah for Comprehensive Juvenile Justice Reform (Apr. 21, 2017), <http://www.pewtrusts.org/en/about/news-room/press-releases/2017/04/21/pew-applauds-utah-for-comprehensive-juvenile-justice-reform> [<https://perma.cc/2EEK-R837>] (discussing Utah’s reforms expanding pre-court interventions, development of local detention alternatives).

128. *See, e.g.*, NAT’L JUVENILE JUSTICE NETWORK, ADVANCES IN JUVENILE JUSTICE REFORM 25 (2011) (describing Ohio reforms to divert funds from youth prisons to community-based alternatives); PEW CHARITABLE TRS., SOUTH DAKOTA’S 2015 JUVENILE JUSTICE REFORM 1 (2016), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/01/south-dakotas-2015-juvenile-justice-reform> [<https://perma.cc/HKM9-S4LR>] (discussing South Dakota reforms); PEW CHARITABLE TRS., HAWAII’S 2014 JUVENILE JUSTICE REFORM 1 (2014), <http://www.pewtrusts.org/research-and-analysis/issue-briefs/2014/07/hawaiis-2014-juvenile-justice-reform> [<https://perma.cc/SH34-6SLH>] (discussing Hawaii’s reforms to reduce the use of secure confinement and increase community-based options); Sarah Barr, *Kansas Overhauls Juvenile Justice System, Emphasizes Community-Based Reinvestment*, JUV. JUST. INFO. EXCHANGE (Apr. 12, 2016), <http://jjie.org/2016/04/12/kansas-overhauls-juvenile-justice-system-emphasizes-community-based-reinvestment/> [<https://perma.cc/XNR6-PN2T>] (noting the Kansas reform efforts are aimed at increasing use of community-based treatment programs).

129. *See* MENDEL, ANNIE E. CASEY FOUND., *supra* note 32, at 9–12.

130. *See supra* Part II.

Juvenile Justice Working Group noted that, “[n]o statutory language restricts overall supervision length, probation length, or custody disposition length, except for the jurisdictional age of 21.”<sup>131</sup> This is one causal mechanism that allows discretionary decision-making and arbitrary determinations to extend length of stay without sufficient justification. Thus, while all youth may find themselves spending unnecessary, counterproductive, as well as harmful, time in confinement, youth who receive an indeterminate sentence may suffer the increased associated harms with lengthy stays simply due to structural failures in the system.

### C. Release Determinations and Length of Stay

Whether at disposition or during review processes and procedures while confined, youth face a series of decision-makers who ultimately determine their total length of stay in state custody.<sup>132</sup> Youth can spend excessive and harmful amounts of time in custody, depending on whether a judge sets a determinate or indeterminate sentence. This Article posits that the latter presents greater potential risks given the nature of such sentences, because the length of stay is essentially open-ended.<sup>133</sup> However, this structure makes it more amenable to evidence-based reforms aimed at improving health and mental health outcomes when positioned at the intersection of rehabilitation and recidivism. Further, as examples from multiple jurisdictions suggest, immediate reforms could be enacted to address structural issues, that is, the creation of streamlined systems, development of guidance and criteria, implementation of staff training, and reorganization of decision-making to eliminate bias or ad hoc and arbitrary determinations.<sup>134</sup>

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131. UTAH JUVENILE JUSTICE WORKING GRP., *supra* note 33.

132. *Juvenile Justice Services: Release Decision*, JUV. JUST., GEOGRAPHY, POL’Y, PRAC. & STAT., <http://www.jjgps.org/juvenile-justice-services#release-decision> [<https://perma.cc/P7F5-TJX3>] (noting that “every year, thousands of youth are released from state juvenile correctional facilities and considerable variation exists among states on how this decision is made and by whom”); *see also* VT. CTR. FOR JUSTICE RESEARCH, DETERMINANTS OF LENGTH OF STAY AT WOODSIDE JUVENILE DETENTION CENTER 8 (2004).

133. This description of “open ended” is of course limited by the fact the youth can age out of the juvenile system, i.e., reaching 21, and thus their indeterminate sentence ends.

134. *See* discussion *infra*. While issues of bias or discretion are present in determinate sentences and raise significant issues for youth, the sentence duration is statutorily limited. By contrast a model of sentencing without limits that is built explicitly on individualized decision-making presents serious issues for youth in terms of treatment access and capacity, oversight, and fairness in release determinations.

There are presently four models of release decision-making: agency, court, parole board, and agency and court.<sup>135</sup> In nearly half the states, the decision-making power and processes lie with a state agency.<sup>136</sup> However, in some jurisdictions, the gatekeeping function of release is assigned to either the court, an administrative parole board, or there is shared discretion between the two.<sup>137</sup> These differing structures present considerable variation and discretion in the criteria and procedures applied by each body when making length of stay decisions. For example, in Virginia, youth sentenced to an indeterminate stay are subject to a range (two to fifteen months) based on the tier of the offense, and the authority to release lies with the Department of Juvenile Justice.<sup>138</sup> For youth committed under a determinate sentence in Virginia, the sentencing judge makes the decision to release.<sup>139</sup> In Texas, youth who receive an indeterminate sentence are assigned a minimum length of stay of between nine and twenty-four months by the Texas Juvenile Justice Department.<sup>140</sup> Release decisions are based on an evaluation of their current offense, criminal history, and risk of reoffending.<sup>141</sup> Once the minimum length of stay has been completed a facility's review release panel makes subsequent decisions regarding additional length of stay based on a youth's "progress."<sup>142</sup> For those youth sentenced to a determinate sentence in Texas, the approval of release proceedings is under the purview of the Department of Sentenced Offender Disposition.<sup>143</sup> In Illinois, juvenile courts commit youth to an indeterminate sentence with release based on either: (1) a subjective assessment by the Prisoner Review Board "that the youth is no longer in need of further institutional programs and that parole is in the best interest of the youth and community" or (2) aging out of the system at 21.<sup>144</sup>

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135. *Juvenile Justice Services: Release Decision*, *supra* note 132; *see infra* Table 1.

136. *See infra* Table 1.

137. *Id.*

138. *See* VA. DEP'T OF JUVENILE JUSTICE, *supra* note 32, at 13–17.

139. *See* VA. CODE ANN. § 16.1-278.8(A)(4) (2017); *Juvenile Justice Services: Release Decision*, *supra* note 132.

140. TEX. FAM. CODE ANN. § 59.008 (West 2017).

141. *See Juvenile Justice Services: Release Decision*, *supra* note 132.

142. *Id.*

143. *Sentenced Offenders*, TEX. JUV. JUST. DEP'T, [http://www.tjjd.texas.gov/about/sentenced\\_offenders.aspx](http://www.tjjd.texas.gov/about/sentenced_offenders.aspx) [<https://perma.cc/YAZ5-C3TA>].

144. ILL. JUVENILE JUSTICE COMM'N, *supra* note 91, at 16.

Table 1. Models of Release Decision-Making by State<sup>145</sup>

STATE	AGENCY	COURT	PAROLE BOARD	AGENCY & COURT
Alabama				X
Alaska				X
Arizona	X			
Arkansas	X			
California			X	
Colorado			X	
Connecticut				X
Delaware	X			
District of Columbia				X
Florida		X		
Georgia	X			
Hawaii	X			
Idaho	X			
Illinois			X	
Indiana	X			
Iowa		X		
Kansas		X		
Kentucky				X
Louisiana		X		
Maine	X			
Maryland		X		
Massachusetts	X			
Michigan		X		
Minnesota	X			
Mississippi	X			
Missouri				X
Montana	X			
Nebraska	X			
Nevada	X			
New Hampshire			X	
New Jersey			X	
New Mexico	X			
New York			X	

145. See *Juvenile Justice Services: Release Decision*, *supra* note 132.

North Carolina	X			
North Dakota	X			
Ohio				X
Oklahoma	X			
Oregon				X
Pennsylvania		X		
Rhode Island		X		
South Carolina			X	
South Dakota				X
Tennessee				X
Texas	X			
Utah			X	
Vermont				X
Virginia	X			
Washington	X			
West Virginia		X		
Wisconsin	X			
Wyoming		X		

#### D. The Current Trend: Excessive Lengths of Stay

Empirical research indicates the following: (1) stays longer than six months do not reduce recidivism;<sup>146</sup> (2) longer lengths of stay increase the mental health<sup>147</sup> and health<sup>148</sup> disparities for system-involved youth—including trauma and post-traumatic stress disorder; and (3) for lengths of stay between three and thirteen months there is no marginal benefit to retaining an offender in institutional care for a longer period of time.<sup>149</sup> Nevertheless, current juvenile justice

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146. See FEIERMAN ET AL., *supra* note 32.

147. See discussion *supra* Section I.B.

148. See discussion *supra* Section I.B. While not the focus of this Article, it is important to note the gender disparities that exist within the length of stay. As Espinosa and Sorensen found, girls served significantly longer periods of confinement in local facilities than boys, even when controlling for other influential variables such as offense severity, prior record, age at referral, and facility type. Their research also indicated that girls with histories of trauma served longer periods in confinement than boys for violating their court-ordered conditions of probation. See Erin M. Espinosa & Jon R. Sorensen, *The Influence of Gender and Traumatic Experiences on Length of Time Served in Juvenile Justice Settings*, 43 CRIM. JUST. & BEHAV. 187, 187 (2015).

149. Loughran et al., U.S. Dep't of Justice, *supra* note 32.



policies and practices “almost uniformly allow youth to be held longer.”<sup>150</sup> “In fact, to the extent that state policy sets forth any clear time limit, the most common limit is two years, far longer than the research suggests is necessary or appropriate.”<sup>151</sup>

As the Juvenile Law Center highlighted in its recent report, *Ten Strategies to Reduce Juvenile Length of Stay*, of the over “40,000 youth held in secure placement . . . [a]pproximately one third had been confined for longer than six months . . . [and] [o]ver 2,000 youth had been in placement longer than a year.”<sup>152</sup> Similarly, OJJDP’s national average<sup>153</sup> for length of stay is reported at 8.4 months.<sup>154</sup> As a data point, this reported average signals the critical need to reform length of stay guidelines, but it must also be considered in context. The OJJDP data are based on a single census date collection and on “reported days in custody for juveniles with a legal status of ‘committed’ and placed in a long-term secure facility, but does not represent their final length of stay in secure confinement.”<sup>155</sup>

Despite variations in data collection across the country, the data show a trend of excessive and counterproductive lengths of stay under indeterminate sentences.<sup>156</sup> For example, in Utah, the average length of stay in a secure care facility is more than fourteen months<sup>157</sup> and in

150. FEIERMAN ET AL., *supra* note 32, at 1.

151. *Id.* at 2–3.

152. *Id.* at 2, 5 (noting that only Idaho has enacted legislation to prevent stays that exceed six months).

153. The collection of average length of stay data are not only important for jurisdictions to determine whether youth are staying in detention longer than necessary, but critical to address disparities that exist among youth, in particular marginalized youth and youth of color who may experience longer stays than their white peers for similar offenses.

154. *See* VA. DEP’T OF JUVENILE JUSTICE, *supra* note 32, at 5.

155. *See id.* (basing the national average for length of stay on “the average number of reported days in custody on the census date”).

156. *See generally* ARIZ. DEP’T OF JUVENILE CORR., FIVE-YEAR STRATEGIC PLAN 13 (2015) (reporting an average length of stay of 8.5 months); GA. DEP’T OF JUVENILE JUSTICE, *supra* note 119; ILL. DEP’T OF JUVENILE JUSTICE, *supra* note 119 (average length of stay of about 9 months); NORTH DAKOTA, THREE YEAR JUVENILE JUSTICE PLAN FISCAL YEARS 2009–2011, FISCAL YEAR 2009 TITLE II FORMULA GRANT APPLICATION 6 (2009), [http://juvjustice.org/sites/default/files/resource-files/resource\\_276\\_0.pdf](http://juvjustice.org/sites/default/files/resource-files/resource_276_0.pdf) [<https://perma.cc/2UR9-EV2P>] (reporting an average length of stay of 18 months); STATE OF ARK. BUREAU OF LEGISLATIVE RESEARCH, INTERIM STUDY ON THE EDUCATION SYSTEM OF THE DIVISION OF YOUTH SERVICES 6 (2012) (reporting average length of stay of about 5 months in 2011); Dana Amihere, *Juvenile Services Department Allots \$8.5 Million for Out-of-State Placements*, BALT. POST-EXAMINER (June 14, 2012), <http://baltimorepostexaminer.com/juvenile-services-department-allots-8-5-million-for-out-of-state-placements/2012/06/14> [<https://perma.cc/2D6U-HESK>] (reporting average lengths of stay in Maryland of about 10 months).

157. UTAH JUVENILE JUSTICE WORKING GRP., *supra* note 33, at 9.

a non-secure facility ten months.<sup>158</sup> A study in California determined the average length of stay is approximately two years.<sup>159</sup> In Idaho, the average length of stay for youth in the state's juvenile justice facilities is eighteen months,<sup>160</sup> and in Michigan the average length of stay is approximately one year.<sup>161</sup> In a comprehensive analysis of Virginia's length of stay and sentencing, data indicated an average actual length of stay<sup>162</sup> of 18.2 months (15.6 months for indeterminate commitments and 29.8 months for determinate commitments).<sup>163</sup> Engaging in a comparative analysis, the Virginia report also brought to light that the average length of stay for youth from six other states (Indiana, Missouri, Massachusetts, Maryland, Colorado, and Oregon) during the same timeframe was 9.1 months.<sup>164</sup> In Texas, the average length of stay was 18.2 months (decreasing from 19.5 months).<sup>165</sup>

Despite research showing that juvenile incarceration and lengthy stays can negatively affect both youth and society,<sup>166</sup> many jurisdictions continue to rely on decision-making structures that allow length of stay determinations to turn on a range of factors separate from a youth's unique needs or individual progress.<sup>167</sup> As the *Determinants of Length of Stay in Utah's Juvenile Secure Care Facilities* revealed, "staff decisions tended to rely exclusively on professional judgment without input from standardized assessments; this tendency may or may not align with evidence-based practices."<sup>168</sup> Similarly, the Illinois Juvenile Justice Commission found that release

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158. *Id.*

159. See KAREN HENNIGAN ET AL., UNIV. OF S. CAL., YOUTH LAW CTR., JUVENILE JUSTICE DATA PROJECT, PHASE 1: SURVEY OF INTERVENTIONS AND PROGRAMS A CONTINUUM OF GRADUATED RESPONSES FOR JUVENILE JUSTICE IN CALIFORNIA 21 (2007).

160. See IDAHO LEGISLATURE OFFICE OF PERFORMANCE EVALUATIONS, CONFINEMENT OF JUVENILE OFFENDERS 22 (2014).

161. FRANCES CARLEY, SENATE FISCAL AGENCY, A COMPARISON OF MICHIGAN'S RESIDENTIAL PLACEMENT OPTIONS FOR JUVENILE DELINQUENCY CASES 12 (2012).

162. For youth released between fiscal years 2013 and 2014.

163. VA. DEP'T OF JUVENILE JUSTICE, *supra* note 32, at 5.

164. *Id.*

165. COUNCIL OF STATE GOV'TS JUSTICE CTR., *supra* note 118, at 27.

166. See discussion *infra* Conclusion; see also, e.g., Uberto Gatti et al., *Iatrogenic Effect of Juvenile Justice*, 50 J. CHILD PSYCHOL. & PSYCHIATRY 991, 995 (2009) (finding that among relatively high-risk juvenile offenders, system involvement had a negative impact upon future criminality and that the more restrictive and more intense the intervention was, the greater its negative impact).

167. See Mulvey & Schubert, *supra* note 32, at 6 ("The length of a particular stay, however, is not the whole story. It is also important to consider what services the youth are provided during their time in the facility and how well the services provided match their needs.").

168. See PRINCE ET AL., *supra* note 89, at 46.

decisions were dependent on the composition,<sup>169</sup> training,<sup>170</sup> and in some instances, the willingness of the prisoner review board staff to engage in meaningful discussion with the youth.<sup>171</sup>

One Commissioner observed a hearing in which there was “no time for introduction or discussion. [The Prisoner Review Board hearing officer] was reading the wrong form and initially was going to deny parole. Then someone walked by and noticed the sheet did not match the kid sitting there. [The] youth was paroled.”<sup>172</sup>

Such inconsistency can significantly affect the duration of a youth’s incarceration. For example, an analysis by the Utah Department of Human Services Division of Juvenile Justice Services determined that the lack of clear and consistent criteria for release decisions led to three outcomes: (1) length of stays were “not based on time needed for effective treatment and efficient use of resource”; (2) in community residential placements, lengths of stay were “based largely on service provider discretion, and most providers do not clearly define the ‘dosage’ of services needed for effective treatment to guide length of stay and release decisions”; and (3) in secure facilities, the determinations made by the Youth Parole Authority were “based on . . . subjective ratings of progress, influenced by youth behavior and attitude.”<sup>173</sup> Given all of these factors, the analysis pointed out that in sixty-nine percent of placements, the actual length of stay exceeded the Youth Parole Authority guidelines by an average of ninety-five days.<sup>174</sup> Likewise, the *Illinois Juvenile Justice Commission Youth Reentry Improvement Report* found the lack of formal training for parole board members undermined the purpose of the indeterminate sentencing system.<sup>175</sup>

169. The report noted that:

Each PRB member has developed an idiosyncratic set of criteria to determine whether a youth ought to be released and the conditions of parole mandated for a youth; these criteria are unpublished and inconsistent among PRB members. Commissioners observed arbitrary release determinations and parole conditions with little review of available evidence such as the DJJ master file, and without established institutional guidance or oversight.

ILL. JUVENILE JUSTICE COMM’N, *supra* note 91, at 22.

170. *Id.* at 23–25.

171. *Id.* at 20–23.

172. *Id.* at 21 (some alteration in original).

173. UTAH DEP’T OF HUMAN SERVS., UTAH JUVENILE JUSTICE SYSTEM ANALYSIS AND RESPONSE TO LEGISLATIVE AUDIT AND THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER’S REPORT 3 (2015).

174. *Id.*

175. ILL. JUVENILE JUSTICE COMM’N, *supra* note 91, at 24–25. The report concluded that:

Not only are youth placed at greater risk of being exposed to the negative consequences of lengthy confinement due to inadequate training or a failure to follow evidence-based practices, but the lack of alternative placements or community resources can also extend length of stay. A state analysis and survey of caseworkers and judges in Vermont (both are involved in decisions to admit juveniles and discharge youth from the state's single secure juvenile facility) concluded that "the most frequently cited determinant of length of stay (identified by all but a few caseworkers and eight of [twelve] judges) is the inability to locate an appropriate, less-secure placement either because a facility is full or because it is unwilling to accept a youth."<sup>176</sup> The study also exposed that population management issues function as a main determinate of length of stay noting that the "inability to move youth out of [the] Woodside [secure confinement facility] because alternative placements are unavailable exerts pressure on Woodside."<sup>177</sup> In fact, one respondent stated, "[h]ow long a youth stays at Woodside has nothing to do with the needs of the kids. Rather, it too often is simply a population management issue for Woodside."<sup>178</sup> Population management simply should not be the primary factor in determining length of stay for juveniles in secure confinement.

While some states have not developed criteria, protocols, or evidence-based standards to ensure that release decisions are well informed, objective, consistent, and fair, policies and practices in other states are based on outdated models and ill-conceived assumptions of punishment.<sup>179</sup> For example, when the state of

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The state must therefore develop heightened qualifications for PRB members who will handle youth caseloads and meaningful measures to identify and retain qualified Board members. Youth-appropriate qualifications must be demonstrable prior to hearing a juvenile parole case, not acquired on the job or "as a result" of hearing youth cases, as is currently the situation. PRB members must also receive advanced, on-going professional development and training.

*Id.*

176. VT. CTR. FOR JUSTICE RESEARCH, *supra* note 132, at 5. While the study specifically analyzed length of stay in a secure facility, the same rationale applies when youth are ready to return home from non-secure settings, but remain because of the unavailability of community-based services.

177. *Id.*

178. *Id.*

179. While outside the scope of this Article there is significant discourse regarding punishment, racial bias and stereotypes as underpinning debates over juvenile sentencing policies beginning in the late 1980s. Not only a historical artifact, these "get tough" and "zero tolerance" policies continue to have present day outcomes for system-involved youth of color, especially those from urban communities.

Virginia recently sought to revise its length of stay guidelines it noted they had not been “substantively reviewed or substantially modified since 1998.”<sup>180</sup> When these guidelines were reviewed, it revealed that they failed to meet the best interests of juveniles in the state.<sup>181</sup> In analyzing the high rates of direct care recidivism and the “lack of improvement over the [fiscal years] examined” the report concluded that “current policies and practices are not effective in preparing juveniles to be successful citizens in the community.”<sup>182</sup> The report also found that, similar to other states, not only did youth in “direct care in Virginia . . . stay much longer than what research suggests is the best practice,”<sup>183</sup> but also the “average actual [length of stay] of juveniles admitted to [the Virginia Department of Juvenile Justice was] much higher when compared to national averages and comparable states.”<sup>184</sup>

While this Article does not undertake a comprehensive, fifty-state review of state-level length of stay practices, the above examples underscore the critical need for reform. For many youth, the likelihood that their length of stay will exceed evidence-based timelines, as well as a state’s own guidelines and criteria, is extremely high.<sup>185</sup> This practice not only undermines the goals of the juvenile justice system by placing them at a higher risk of reoffending, but simultaneously magnifies long-term negative health and mental health outcomes.<sup>186</sup>

### CONCLUSION

Length of stay is a critical issue that demands attention. Excessive lengths of stay undermine foundational goals of the juvenile justice

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180. See VA. DEP’T OF JUVENILE JUSTICE, *supra* note 32, at 4. These guidelines were passed at the end of the most punitive decade in juvenile justice history. See Email from Schwartz, *supra* note 34.

181. See VA. DEP’T OF JUVENILE JUSTICE, *supra* note 32, at 4.

182. *Id.*

183. *Id.* at 5.

184. *Id.*

185. Beyond the issues identified that can lead to excessive lengths of stay, research has examined how certain populations of youth are at even greater risk for longer stays, i.e., girls, youth with mental health issues, youth in private for-profit facilities, and youth adjudicated for sex-related offenses. FEIERMAN ET AL., *supra* note 32, at 4–5.

186. As Feierman et al. note, “given the clear evidence that race and ethnicity has a significant impact at almost every decision point in the juvenile justice system” excessive length of stay determinations increase the cumulative negative effects of incarceration disproportionately exhibited among youth of color from urban communities. *See id.*

system by magnifying long-term negative health and mental health outcomes and increasing the risk of recidivism.<sup>187</sup> They also compound existing disparities for at-risk and system-involved youth, marginalized urban youth, and youth of color in particular.<sup>188</sup> Despite reductions in the percentage of youth in secure confinement from recent reforms, for many youth, the likelihood that their length of stay will exceed evidence-based timelines, as well as a state's own guidelines and criteria, is extremely likely.<sup>189</sup> This occurs despite a large and growing body of empirical research that documents the health status of system-involved youth, and the association between incarceration during adolescence and the range of subsequent health and mental health outcomes in adulthood.<sup>190</sup>

To date, length of stay reform has rested on two primary arguments: recidivism and costs of confinement. Missing from the larger discourse within the juvenile justice reform movement has been the goal of rehabilitation, specifically within the context of this empirically recognized relationship between length of stay and subsequent health and mental health outcomes. Yet more than half of the jurisdictions across the country utilize indeterminate sentencing systems, which explicitly emphasize rehabilitation as a driving goal and, in theory, operationalize it into release decisions.<sup>191</sup> Indeed, it is this very aspect of indeterminate sentences that provides a key foothold and mechanism for emphasizing the health and mental health aspects of length of stay, adding a new dimension to the reform debate with significant potential for success.

Given current disparities in sentencing practices across jurisdictions, especially for indeterminate sentences, the goal of rehabilitation is undermined by a variety of factors that lead youth to be confined longer than necessary. Chief among them is that release decisions are rarely made based on objective, evidence-based criteria relevant to rehabilitation. Instead, resource constraints, such as population management and the number of beds in secure

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187. *See id.* at 2.

188. *See id.* at 4–5.

189. *See supra* notes 156–165 and accompanying text.

190. *See* Askew, *supra* note 4, at 4–5; Barnert et al., *supra* note 4, at 101; Forrest et al., *supra* note 4, at 289.

191. As Patricia Torbet noted, “[j]uvenile courts and probation departments have primary responsibility for achieving the juvenile justice system’s goals and ensuring that rehabilitation and treatment services and aftercare supervision encourage life success.” PATRICIA TORBET, NAT’L CTR. FOR JUVENILE JUSTICE, BUILDING PENNSYLVANIA’S COMPREHENSIVE AFTERCARE MODEL: PROBATION CASE MANAGEMENT ESSENTIALS FOR YOUTH IN PLACEMENT 5 (2008), <http://www.modelsforchange.net/publications/203> [<https://perma.cc/CD6H-NYZ4>].

confinement facilities compared to alternative juvenile justice facilities, drive decisions in some states.<sup>192</sup> In other states, release decisions depend on subjective assessments of behavior and attitude with significant room for exercises of discretion by a range of inadequately trained decision-makers and without objective measures informed by current understandings of rehabilitation.<sup>193</sup> In still other instances, even when rehabilitation is indeed prioritized by a decision-maker, there is misalignment between that intention and the harm caused by extended lengths of stay in facilities that lack sufficient access to the health and mental health services necessary to achieve that end.<sup>194</sup>

Successful reform of the juvenile justice system in general, and length of stay in particular, requires that we incorporate discussion of the relationship between length of stay and subsequent health and mental health outcomes into the policy debate. We also must grapple with understanding all the ways in which current sentencing practices exacerbate this connection, and the associated negative health outcomes, and undermine the driving goal of youth rehabilitation and community reintegration. This is essential for crafting juvenile justice policy to better address the needs of youth, communities, and society as a whole.

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192. *See generally* ARIZ. DEP'T OF JUVENILE CORR., *supra* note 156.

193. *See* ILL. JUVENILE JUSTICE COMM'N, *supra* note 91.

194. *See supra* note 86 and accompanying text.