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Introduction: Thank you for joining us for this episode of The American Law Institute’s podcast Reasonably Speaking. Today our panel is going to discuss the treatment of children in two distinct areas of the law – child welfare and juvenile justice. This program was originally recorded as a CLE program in partnership with ALI CLE.

Our first panelist is Kristin Henning. Kristin is a professor at the Georgetown Law Center where she also serves as Special Advisor to the Dean on Community and Justice, and Director of the Juvenile Justice Clinic and Initiative. Previously, she was with the Public Defender Service for the District of Columbia where she served for several years as the lead attorney for the Juvenile Unit. She has been active in local, regional and national juvenile justice reform, and has served as an expert consultant to a number of state and federal agencies, including the US Department of Justice’s Civil Rights Division.

Our second panelist is Clare Huntington of Fordham University School of Law. Clare is an expert in the fields of family law and poverty law. She has published widely on the intersection of these two fields, including in her book *Failure to Flourish: How Law Undermines Family Relationships*. Prior to Fordham, Clare was an Attorney Advisor in the Justice Department’s Office of Legal Counsel. She currently serves as Associate Reporter on the Restatement of Children and the Law.

The third panelist on the program is Marsha Levick, co-founder of the Juvenile Law Center. Throughout her legal career, Marsha has been an advocate for children’s and women’s rights and is a nationally recognized expert in juvenile law. Marsha oversees Juvenile Law Center’s litigation and appellate docket. She has successfully litigated challenges to unlawful and harmful laws, policies and practices on behalf of children in both the juvenile justice and child welfare systems.

Today’s program is moderated by Elizabeth Scott of Columbia Law

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School. Elizabeth is a leading authority on juvenile justice, having written extensively on juvenile crime and delinquency, adolescent decision making, and marriage, divorce, cohabitation, and child custody. In her research, she takes an interdisciplinary approach, applying behavioral economics, social science research, and developmental theory to family and juvenile law and policy issues. She is the Reporter for the American Law Institute’s Restatement of Children and the Law. Elizabeth will now begin the program.

Elizabeth Scott: The most vulnerable communities in our society have experienced the harmful impact of COVID directly. And the children in the justice system and children and families in the child welfare system are among the most vulnerable communities. And what we want to look at today is the impact of this pandemic on children in the justice system and the child welfare system, on the operation of those systems, and on the role of lawyers as they try to represent children to protect their legal rights, and to keep them safe during this extraordinary time.

Scott: And so, we thought we would begin by just an overview of looking at the big picture and how the operation of these two systems have changed during the time of COVID. And then, to look more closely at some of the effects, some of the consequences for children, for lawyers and for the system itself of operating and existing during this time. So, Clare, could you say a little bit about the impact of COVID generally on the operation of the child welfare system and how things have changed since February or March of 2020?

Clare Huntington: Sure. Thanks, Elizabeth. Well, I think the first place to start is what the child welfare system should be doing, absent a pandemic. And we really lay this out quite clearly in the Restatement that the goal of the child welfare system is to promote child wellbeing. And that the way to do that in the vast majority of cases is to keep children at home, but to give families the support that they need to deal with the underlying issues that led to the family's involvement in the child welfare system. So, usually what this looks like is a family is identified for almost always neglect, not abuse. And I can say more about that in a few minutes. And they're brought into the system. And then the question is, how does the system respond?

Huntington: And really one of the main obligations, and we talk about this in Section 2.31, is for the state to provide services to the family, to keep the child safely at home, to ensure the child is safe, but to try and keep

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the child at home and not lead to the removal of the child. If the child is removed, then the obligation of the state is to try to reunify the family, to bring the family back together after the child has been in foster care. And one of the key parts of that is to maintain contact between parents and children. This is important for children of any age, but it's particularly important for children of a very young age.

Huntington: So, the two pieces of that, providing services to keep families together and children safely at home, and ensure contact between children who are in foster care, but between children who are in foster care and their parents, both of those have been profoundly affected by COVID. So, on the front end, ensuring that we are getting services to families that need it, this is harder both because it's certainly the reports of child abuse and neglect have gone down, and that's because children are not in the public spaces, primarily schools where they ordinarily are and reports come in.

Huntington: But so fewer cases are coming in, which in some ways is a good thing, because there are lots of, and we'll talk about this more today, lots of ways in which the child welfare system often does not in fact improve child wellbeing. So, maybe it's better to keep the state out. But it is also a way to ensure that families get services. So, families aren't being identified as needing services, then the child welfare system isn't providing those. So, that's one way in which it's affecting it, is not the families that need services and then providing those services.

Huntington: But then, and this is where we really are seeing a devastating impact is for children who have already before the pandemic been removed from their homes and are living in foster care, the ability for the parents and children to see each other is just extraordinarily difficult right now. And I can talk more about that, but just as a basic overview, that's the main problem. Those are the two main problems.

Scott: Thanks, Clare. And Marsha, can you say something about the overall impact on the operation of juvenile justice and the juvenile justice system?

Marsha Levick: Sure. And I think I'll really start in the way that Clare did, which is to also talk about the purposes, the overarching purposes of the juvenile justice system, and to the extent that children are found culpable for delinquent activity. We expect the system to provide programming and rehabilitation services to these youth at the same time that we're holding

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them accountable. And obviously, whether children are in juvenile correctional facilities or residential programs, or whether they are home in their communities, the pandemic has significantly cramped the ability of services to continue to maintain contact with these kids. So, whether it is in-person programming in juvenile correctional facilities, in-person school programs, mental health counseling for youth in the community, the ability to continue to receive probation services, for example, other kinds of community resources that traditionally would require in-person contact, all of that has essentially been, if not completely shut down, significantly shut down, limited, altered by a consequence of the pandemic. And the consequence of that is that youth are being retained in a system that is largely incapable of meeting the function and purposes for which it was set up.

Levick: It's also important to recognize, of course, that not only are the facilities the end part of the juvenile justice system struggling to maintain the functions and services, but the entry part of the system, which I know Kris will talk about is suffering in its own way. For many months when the pandemic really shut down much of what was happening across the country, courts shut down. And so, the traditional beginning of the pipeline for children to come into the system, courts were not operating.

Levick: On the one hand, that was a good thing because it meant that youth were not being brought into the system, but there was also frankly, an inability to get youth out of the system, to the extent that courts weren't operating, agencies were hampered in their ability to conduct in the usual fashion. It meant that it was more difficult to release children from facilities who either were ready to be released, youth who were medically vulnerable who needed to be placed in a setting that would place them at less risk. All of the systems, as I said, if they didn't completely shut down, they came close to shutting down. And it just made it incredibly challenging to frankly run business as usual. It was anything but business as usual.

Scott: So, Kris, can I turn to you and ask you to tell us a bit about your role as a lawyer representing youth and trying to protect their legal rights as they face delinquency adjudications, and some of the challenges that you faced in this time of COVID.

Kristin Henning: Sure. And I'll pick up right where Marsha left off. I mean, that's exactly right. At the beginning of the pandemic, I mean, many courts all, but shut down and became dysfunctional, thereby depriving kids of any

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semblance of due process. But even since then, even in the weeks that followed, I think we have seen due process rights compromised even more than they were before the pandemic.

Henning:

So, just to give a few examples, I think access to counsel to children in detention facilities, for example, before hearings was difficult before the pandemic. And I think the pandemic provides, or has provided many systems with a ready excuse to make that even more difficult. So, either denying attorneys access to their clients altogether in facilities, limiting or denying phone calls to young people, listening in even more on phone calls. Many of the facilities aren't equipped with the technology for Zoom hearings. And then, in hearings, access to counsel for those courthouses that shifted to virtual hearings, access to counsel became even more complicated.

We as lawyers can't pass our client's notes. We have difficulty getting our clients as we know many adolescents and many children have a hard time paying attention. And it's even harder with the limited technology that many of our clients have, both to understand what's being said, and then to engage appropriately when they're asked to during the court hearings, and just to pay attention and to stay focused.

And so, for example, I mean, these are some of the challenges that lawyers have had to take on, filing motions to compel the city to provide access to youth and facilities, in demanding that cities invest in the technology. Actually, many lawyers have been creative and have gotten law firms to donate laptops to various facilities to ensure that kids can communicate with their counsel. Things like that, partnering with civil rights lawyers to challenge impediments, to access the council.

So, that's just one area. I mean, a couple of other areas we're talking about are confrontation clause issues. Young people, the accused, adults and children have a right to be physically present when witnesses are testifying against them. And so, defense counsel are in this very difficult position of trying to decide whether or not to object to virtual hearings altogether or to allow them to proceed, so that we don't find ourselves in the conundrum that Marsha talked about, which is that kid gets stuck because there aren't hearings and that nobody is moving the kids. But using the law, using Maryland versus Craig and some of the other constitutional cases to argue that virtual hearings or virtual arrangements aren't adequate to preserve the confrontation rights.

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Henning: And I could go on from there, speedy trial issues, decision-making without client's presence or input, the right to present a defense, access to discovery, the inability of the government to complete forensic testing. These are just some of the many, many challenges that defense counsel has had to deal with on the front end of the system.

Scott: Thanks Kris. The challenges seem pretty extraordinary. And I know that you and your students are doing a great [inaudible 00:13:49] under very difficult circumstances. So, Clare, I know you don't do direct representation in the child welfare system, but do you think that those decisions when, either the investigation or the role of lawyers in those cases when the state is seeking to remove a child, are severely or substantially affected by the situation we're in with COVID?

Huntington: I really can't speak to what the lawyers are seeing, because as you say that those are not the cases that I'm doing on the ground. But I can talk more generally about, again, what the state is supposed to be doing when it substantiates a case of either abuse or neglect. And here, this seems like a really important to talk about what kinds of cases come into the child welfare system. They are overwhelmingly cases of poverty related neglect, right?

So, if we look at the federal statistics from FYI 2019, which are the most recent that we have, which are pre pandemic. Only, and I don't say that lightly, because these can be difficult cases, but only 13% of the kids who came into foster care, so who were removed from their homes, but who came into foster care, came in as a result of physical abuse, the vast majority. And really only 4% were as a result of sexual abuse.

So, the vast majority fall under this umbrella of neglect. And there are specific things. So, it can be substance abuse, was 34% of the cases, inadequate parental supervision, 14%, housing, 10%. These are all issues that are really driven by poverty, right? So, families across the income spectrum struggle with substance abuse, mental illness, the stress of parenting. But it's for low income families that these problems, that the poverty really exacerbates again, the problems that many, many families face.

And so, the question is, what do we do with this poverty related neglect? Now, many people will say, well, far too often, what we don't

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have is a much more robust system that would prevent these problems to begin with and support families in all kinds of ways. But the way the child welfare system works is that we wait until families really are right on the brink, because they're really, these problems have pushed the families, again, exacerbated by poverty, really pushed the problems in a place that children in some kind of danger, typically from neglect. And then the state comes in and tries to assess what should be done.

Huntington: And almost always the first step, unless there's a really severe imminent harm to the child, but the first step is to try to provide services to the child at home, and to the parents and the child at home. And that's, again, what is really severely impacted by COVID is the ability to visit with families, to identify their needs. And then also, as Marsha was saying before, to actually then get the services, right? If a parent needs substance abuse, if a family needs to be able to change housing, if the family needs childcare or other kinds of supervision, help supervising children. All of those services are so much harder to provide during the pandemic.

And the truth is we don't really know yet what's happening. You hear reports that there is a spike in the actual rate of child maltreatment, others say, "We don't know." And this we will find out I'm sure more over time. But right now, what we do know is that in many states, the reports of neglect and abuse have gone down. But again, that's partly because children are not maybe seeing doctors, but probably less so than ordinarily, but they have not largely been in schools, which is one of the main sources of referrals.

So, we don't actually know what the child maltreatment rate is. And even again, without the pandemic, it's hard to know what the actual child maltreatment rate is. And certainly the child welfare system doesn't catch all cases. But right now we know we're not providing services to the families who need them.

Scott: Well, one of the unknown, another unknown fact is that what kinds of decisions judges are making about removal when kids actually do come, when families do come to court and the state is seeking to remove them. There is a speculation that courts should be less willing to remove children in a time of COVID. That they should leave those to put the child in a new environment, it's just to create a risk that didn't have to exist. But also it's the case that poor communities have suffered, as I said at the outset, have suffered from COVID more than other

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communities.

And children of color and children in poor families have lived in environments that have been subject to COVID to a greater extent than other communities. I know some lawyers who work in the system are worried that courts might see removing children from families, where there are a lot of family members living together, in an environment that has a lot of COVID might be better for the child, which seems like another negative impact of COVID.

Huntington: I mean, that would certainly be deeply problematic, especially given the evidence that we have that children, albeit there are a very small number of children who really have devastating impact, including some children dying. But by and large children are not affected by this disease.

Scott: That's true, yeah.

Huntington: Right. So, it's really not the children who are at risk, it's their parents and really their grandparents who are at risk. But what we do know for sure is that children are at terrible risk of poor outcomes when they're removed from their families, right? That the simple act of removing a child from their home can have devastating and long-term impact on a child, which is not to say that it shouldn't be done in a small number of cases, right? There are times when it is clearly worse for a child to remain at home than it is to be removed. But really that should be safe for only a very small number of cases where it's absolutely critical to protect the safety of the child. And much more often it's better for the child to be able to provide services to the family.

Scott: And so, Kris, I'm curious as to whether you have seen judges, if cases do come before a judge, are judges more likely not to put kids in detention because putting a youth into that kind of congregate setting is clearly increasing the danger of COVID. Have detention placements gone down in this time?

Henning: So, I think the answer to that depends on where you are in the country. That being said, I would say based on certainly my experience in the District of Columbia and my communication with defenders and other jurisdictions, that by and large that COVID has given the country an opportunity to realize that we can reduce the number of children in detention facilities without radically compromising public safety.

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And so, amid fears of liability within detention facilities, and as a result of some legitimate compassion and humanity for young people, we have seen some reduction in detention. So, I think judges across the country have been more inclined to release children pending trial at the time of arrest. They'd been more inclined to release children who have been previously placed in detention facilities.

So, when defense counsel are ambiguous about filing motions to reduce detention, we are getting a better response from the judges. We have been successful in getting some children removed from long-term residential placement facilities. We've had some success in getting children who are sent away out of state to return to the local jurisdiction where they can be closer to their families in this moment. So, I mean, I think there is some movement in this. I think so notwithstanding the fact that by and large children are doing better in response to COVID. In terms of medically, the reality is there are enough stories of children in detention facilities getting COVID, transmitting COVID to staff, staff dying as a result. And so, there's just been some movement.

And I think that, I mean, I know we'll come back and we'll talk about lessons. But the real lesson, the lesson is out, whether crime rates will stay down. But if our goal in this country is to have the least restrictive, the least intrusive juvenile legal system that keeps our country safe, I think COVID has taught us that there are alternative ways to make that happen.

Scott: Thanks, Kris. And Marsha, this seems like a good time to turn to you and the litigation that you've been involved in with kids who are already in the system, who are in now crowded facilities and at risk of COVID, and that your work to try to get them released. Could you talk to us a little about that and about the kinds of arguments you've made, and the success, or lack of success that you've had in that?

Levick: Yep, absolutely. Before I do that, and I do want to answer that question, I just want to pick up on some of Clare's comments, because I wanted to just make sure that we also talk about older youth. I think when we think about the child welfare system, we often think about younger children who are often victims of abuse and neglect, and concerned about where they are within the system in foster families, whether they can stay in their own homes. But there is a whole cohort of older teens, many of whom, thankfully, as a result of recent federal legislation have not actually had to age out of the system at 18, but have had

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opportunities to stay in care. Unfortunately, some of the rules and requirements that allow them to stay in care actually provide that they should be involved in some type of educational or employment program. In the times of COVID that has proven to be incredibly difficult.

Levick: Educational programs are not available. They're not accessible. Many older youth, many youth who are in the system who have the opportunity to get employment, some of them are working in the service sector, whether it's restaurants or other aspects of the service sector that have been the hardest hit by COVID. And so, suddenly what seemed like a perfectly reasonable set of criteria to allow for youth after they turn 18 to continue to receive services, of course, from our child welfare system, those opportunities are not available. And that has created a crisis for many of those youth who are facing real strains in terms of their housing opportunities. Those housing complications have led more of these youth into homelessness. The employment situation has forced many of them into an unemployment situation, which is increasing their financial stress and their financial vulnerabilities. So, this is just another cohort that is experiencing a very specific set of challenges as a consequence of COVID. And I want to make sure that we are talking about them as well.

Levick: With respect to the litigation that we have been involved in, let me share some numbers. And I want to give a shout out to the Sentencing Project, who is Josh Rovner. At the Sentencing Project has really been tracking how COVID is affecting literally, how it is spreading through juvenile correctional facilities across the country.

Latest numbers, and I'm sure these numbers they change every day, but roughly about 1800 youth across the country who are in facilities, congregate care facilities in the juvenile justice system have been infected with COVID. 2,500 staff have been infected. We have had some staff deaths, no deaths among children, and that's great news. Any deaths within the system is quite disturbing. So, this system is not immune.

And I know that and we've said it here today, it is true that youth are less vulnerable to COVID and to the risks of contracting COVID, but they do become infected. And it is of course, also a known fact that any type of congregate care facility, whether it is a juvenile setting, a nursing home, a prison, a group home are going to increase the risks

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that the individuals who are living in these facilities become infected.

And so, really because of that increased risk, we at Juvenile Law Center and colleagues across the country have also tried in addition to the kind of work that Kris is doing in the courtroom, day in and day out, case by case to save children from the ravages of COVID. We've also tried in a handful of locations to see whether or not we could get systemically relief for youth in juvenile justice facilities. This is mirrored to a large extent, the efforts that have been done in the adult criminal population as well, where there has been lots of litigation filed against both federal and state prisons.

Levick: So, I can talk about litigation in five States that we have either been directly or indirectly through consultation and support been involved in, Louisiana, Pennsylvania, Maryland, and New York, and in Los Angeles County. And honestly, it's not a great picture. I think that the federal and state courts have been reluctant to find that the risks posed to this young population in congregate care facilities is one that rises to a constitutional violation, or is one that can be fixed by a constitutional remedy.

So, what we have seen in these cases is that largely these cases are asserting, that to continue to house children in settings that we know, place them at greater risk is a violation of both their rights to be free from corporal unusual punishment and their rights to due process. And the due process arguments, which is really both procedural and substantive is coming out of what I said earlier. The juvenile justice system was created and continues to purport to be about providing rehabilitation and services to children. Yes, it's about holding them accountable, but it also does it in a way that ensures that they can come back into their communities and be productive members of those communities. When COVID shuts down those opportunities, when it makes it impossible to deliver schooling, education, rehabilitation, counseling, mental health services, it is appropriate, I think for us as lawyers to question, how is it that we can continue to retain youth in these facilities.

Levick: The courts as I said, have not embraced these constitutional arguments. And I think that the way that I would sum up the way that the courts have responded is that they have to a large extent, rejected straight up constitutional challenges to the placement of youth in these facilities, and then either suggested indirectly or in a softer manner that it really

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would be a good idea if judges would examine and consider COVID in making both release and confinement decisions. And so, we're seeing that judges, local judges, juvenile court judges in the jurisdictions that I cited, for example, or executive agencies that are running juvenile justice systems in some of these jurisdictions are on their own getting this indirect message, "You really do need to take COVID into account, but we, as a court may not order you to actually do anything." And so, we're seeing reductions in population. We're seeing changes in programming.

Levick:

So, I know Kris talked about, obviously things just shut down in March and April. Youth weren't being arrested. Courts were completely dysfunctional. Courts weren't really open for business. The numbers that I've seen, I think on average, prior to March and April, we might've been seeing around 200 kids a day across the country coming into placement. That number is now down to about a hundred a day. That's dramatic. We've cut that number by 50%. And I am sure that it is a consequence of three things, fewer arrests. We know that. A consequence of the day-to-day work of Kris and her colleagues, who now are back in court and who are making arguments against placement. And this as I said, indirect urging, indirect suggestion to judges around the country, "Even if we can't order you to do this, we think it would be a good idea if you would do this."

And so, in Pennsylvania, for example, we saw direct relief from the Pennsylvania Supreme Court, asking them to essentially order that juvenile court judges across the state explicitly take COVID into account, and to begin to depopulate juvenile correctional facilities. Our Pennsylvania Supreme Court said no to that specific ask and then said, "But we really urge you all to do this." And so, we have seen the numbers in Pennsylvania dropped by anywhere between 25% and 30% of incarcerated youth. That's a good number. It should be lower. But we have seen that happen without actually a formal directive for the Pennsylvania Supreme Court.

The exact same thing happened in Maryland. Advocates in Maryland sort a specific order from the Maryland court of appeals to reduce populations, raising the kinds of constitutional claims that I have identified. Maryland Court of Appeal said no. But then three days later, the court, the justices of the court issued a general directive pointing out the risks of COVID and encouraging juvenile court judges to take it into account, and to begin to try to depopulate facilities. And their

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residential numbers have gone down in the justice system by somewhere around 30% or 40%. Again, an indirect, but very positive outcome.

Levick: In Louisiana, we brought litigation in federal court, sought a TRO raising the same kinds of due process and Eighth Amendment claims. Federal judge denied our temporary restraining order. And I think what I want to point out here, which I think is important to this conversation that we're seeing in really jurisdictions across the country. When I talked about this reluctance to really embrace this as a constitutional problem, there's also a willingness to say, they're doing the best they can, right? Which is interesting because these are challenging times for everyone. We understand staff are affected. Staff are becoming infected. We appreciate the challenges of even running public schools in this environment.

So, there is a reluctance on the part of courts, I think to hold systems accountable for something that is beyond their control, which is COVID. At the same time that that reluctance of course, places children in jeopardy.

Levick: So in Louisiana, the federal judge denied the temporary restraining order, but at the same time has now encouraged the parties to enter into a settlement. And the agency that runs the facilities in Louisiana has indeed brought in-person programming back into the facility. They now have in-person schooling back into the facilities. They have begun to utilize their furlough program more aggressively to begin to release kids. So again, this indirect response to direct asks for specific relief.

I just want to talk about the Los Angeles County case because I think it highlights something else that Elizabeth, you alluded to in your comments just a few minutes ago. Similar action brought in LA County, different legal remedy. The advocates there's thought a writ of mandamus to really compel the facilities in Los Angeles County to release youth. And the court denied that writ of mandamus.

And I think one of the things that disturbed all of us in the field is that the court in denying that alluded to the fact that he wasn't really so convinced the kids would be safer in their home communities, and in their homes than they were in publicly run facilities. And all of us read that as a very racist trope, that it was that classic view that kids aren't safe, kids of color are unsafe in communities of color. You mentioned

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this as well, Elizabeth, as I said, in your remarks just a few minutes ago. And deeply disturbing.

Levick:

We had a little bit of this as well in our Louisiana decision where the federal judge also said, "The plaintiffs have asked for kids to go home on furloughs, but we don't really know anything about what their home situation is, what their family environment is like and whether or not that will, in fact, be safe environment." We shouldn't make the assumptions that they're not. And we shouldn't be raising questions about the ability of these families in these communities to keep their families and to keep their kids safe.

So, it has been frustrating. I think to Kris's point, the numbers are down and I know we're going to talk about some of lessons learned and observations that we're all making at this time, in both the justice and the child welfare systems. As a litigator, it is frustrating to me that the courts are unwilling to recognize the urgency of the moment and to recognize that our constitution can provide remedies to these kinds of urgent moments that place youth at risk. But we are nevertheless seeing these kinds of, as I say, indirect reductions and incarceration and placement.

Scott:

So, courts are not ordering, but nudging-

Levick:

That is exactly right.

Scott:

... in the right direction. I want to return in a couple of minutes to the issue of the relationship between COVID and race or the response to COVID and race. But first, to just say a few words about kids who are in foster care. Because Clare, mentioned earlier that the state's first priority is to keep children in their families and to provide services needed. And that ability to provide services is disrupted by COVID. But when kids are removed from their families and placed in foster care, COVID in the same way, has disrupted the provision of services that might allow children to return to their families.

And so, what's happened in some jurisdictions is that few services are provided, therapeutic services, services to parents to allow them to resume custody. And foster care plans have not been subject to review. The court in most states is supposed to review foster care plans on a regular basis to see if the child can be returned to the parents. And in the time of COVID, that's just not happening and certainly not

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happening with the regularity that it should be happening.

Scott: The other issue that has arisen during COVID, as Clare mentioned, is family visitation. And for quite a while in March and April and into the spring, parents were unable to see their children at all. And very unsatisfactory remote virtual visits had to be a substitute. In some jurisdictions have returned to in-person visitation by parents. But that also has been somewhat controversial, with some advocates arguing that the return that visitation by parents may introduce COVID into the foster home.

And I spoke with one advocate a couple of weeks ago, who said that he was in a small group of child advocates who was worried about visitation. Most child advocates, I think, and I would imagine Clare shares this view, think that visitation and maintaining that bond between parents and children is so important that the risks are worth taking even during this time. And especially as Clare suggested, when now we have the statistics on children getting COVID, suggest that the risk is much lower. So, both of these systems have been very much disruptive and that the underlying goals of child welfare system have really been impacted by COVID.

Scott: I want to return to the issue that that Marsha raised, and that is the intersection of COVID and race, and the extent to which the response to COVID in these two systems is tainted by race. And Marsha described the Los Angeles case. And it represents what I spoke of earlier, the concern that these children are living in dangerous communities, children of color, and therefore it's better for them not to be with their families in their communities. And I wonder, Kris, if you could say more about the way you see race as important and affecting the response to COVID.

Henning: Yeah. I mean, the race question is critical. I mean, we all know that COVID has had a drastically disproportionate impact on people of color period, separate and apart from their involvement in the juvenile criminal legal systems and the child welfare systems. But Marsha is exactly right, I mean, not only are we seeing a persistence in racial disparity and maybe even an increase in racial disparity as a result of these deeply ingrained attitudes about black children and black families, and the presumption that black families aren't able to supervise their children. And particularly in a moment of crisis, that they aren't able to provide adequate care and supervision when children aren't in school

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and the like, instead of understanding and recognizing the resilience of communities of color, that call upon extended families, right? To provide those resources and support.

So, there's deeply ingrained presumptions about motherhood and fatherhood in black communities, that I think is having a significant effect. Also the deeply ingrained attitudes and perceptions about black children as being dangerous has not gone away in the midst of COVID. And I think that it is probably a given life and given fodder, given that many poor children are often find themselves outside maybe during school hours, because school is virtual and they don't have access to the technology, or because of poverty, their apartments are tight and cramped. And so, they go outside for air. And I say all of that to say that I fear that there has been an increase of police contact with young children of color, in particularly young black children in places like Washington DC and Latin X children in jurisdictions where the Latin X population is higher.

And so, one of the things that I want to highlight for us is that I think, although this CLE is about COVID, we cannot forget that the pandemic started or coincided, or let me put it this way that George Floyd was killed while we were in the middle of a pandemic. And it is impossible, I think, to disentangle those two realities as we think about the impact of policing and COVID on children of color.

Henning: So, I have been thinking a lot about the psychological trauma that black children in particular are experiencing in this moment. And what does it mean to be stopped and frisked in the midst of COVID, right? So, a stop and frisk is traumatic in and of itself, particularly in heavily surveilled communities of color, but now with a potential increase justifications or potential justifications for police officers to stop young children who are outside without a mask, or who are in violation of social distancing rules.

Henning: And so, that you've got police officers now stopping and frisking black children with gloves on and masks on, in ways that enhance the very dehumanizing nature of what is already a very dehumanizing experience. And so, I just think it's really important for us to think about what that looks like and to think about how our systems, I would argue both the juvenile legal system and the child welfare system are woefully inadequate to account for and respond to the trauma that comes from system involvement in and of itself, but that comes from racial trauma that is very much intertwined with systems involvement.

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We've got children who are still in detention, are in detention with reduced staff, reduced access to mental health, reduced access to programming, reduced access to support, reduced access to their families, denied family visits in the midst of COVID. And so, they're dealing with what they see on television and what they've experienced in their community as racial trauma. And we're not equipped. The systems are not equipped to deal with that. So, I really appreciate us elevating the race question in this moment and thinking about what we as advocates can do systemically and in individual cases to address that, and to make the system less dramatic than it already is.

Huntington: If I could jump in as well and talk a bit about the child welfare system, there is without a doubt, any detrimental impact that the child welfare system feels and experiences is going to be felt that much more so by black and native American children. So, those are the two groups of children who are disproportionately and extraordinary numbers, disproportionately represented in the child welfare system. And then once they are in the system, have disparate outcomes, less likely to return home, less likely to be adopted, more likely to age out, bringing it back to what Marsha was talking about before.

Huntington: And so, pre-pandemic we had this and have had really since the inception of the child welfare system, an extraordinary problem with the over-representation again of black and native American children in the child welfare system and have made efforts. So, the Indian Child Welfare Act is an effort to try and preserve native American families. There have been efforts made to try to address the racial disproportionality for black families. Some progress made on the disparate outcomes for black children, but really not much progress made on the disproportionality.

Huntington: And I just want to pick up on something that Kris said, which comes back to this point of whose parenthood do we value, right? Who do we see as a good mother or a good father? And then to tie this also to what Elizabeth was talking about with visitation, right? So, that is without a doubt, one of the most devastating impacts of COVID is for children in foster care, who are not able to see their parents and the parents are not able to see the children.

Huntington: So, the actual in-person visitation just plummeted, and the virtual visitation was also problematic. But what I want to underscore is that

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the children in foster care tend to be very young, right? So, the highest percentage of kids entering foster care in FYI 2019 was under the age of one. Nearly 20% of the children who entered foster care were infants. And so, you can't do a Zoom visit with an infant, right? And that critical bonding that happens between parents and children during those very early years is just being lost. And this is being disproportionately felt by black native American families.

Levick: I would also just add here that I think it's really important to recognize yet again the othering of black and brown communities and black and brown children. And as someone who approaches this work by trying to achieve systemic reform, these facilities are largely populated by black and brown youth. And I cannot help, but feel after decades of doing this work that they remain a population that is too easy to discard, a population that is too easy to look away from. And I firmly believe that that contributes to the unwillingness of our legal system largely, certainly a significant part of our legal system to be responsive to the urgency of what they are facing right now.

And I wanted to add one other aspect of this. We've talked a lot about the issues of visitation, equally important within juvenile justice settings, of course, access to counsel, as Kris mentioned. All of these things have been disrupted, altered, modified substantially as a consequence of COVID.

Levick: The other thing that has also happened in juvenile correctional facilities is that the lack of imagination about how to manage public health risks, like a pandemic, also meant that especially early on in March, April and May, facilities were just placing youth in solitary confinement. If someone was infected, if there was a concern about spread within the facility, the only tool that these administrators knew how to use was to simply isolate children. And we've seen this in the adult prison setting as well. Of course, the consequences of solitary confinement for children are so profound in terms of their overall development and emotional, and psychological wellbeing, and risks of not only acquiring traumatic experiences, but of course, exacerbating trauma.

Levick: Again, in Elizabeth's comment like nudging, not directing. The nudging has led to a reduction in the use of solitary confinement. But at the same time, with this conversation we're having generally in the country about testing, how much testing should we be doing? Facilities are also reluctant. We saw this in Louisiana. We've seen this in other

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communities. We've seen it across Pennsylvania. There's not this willingness to simply utilize the testing mechanism as a way of knowing what the risk of spread is within a facility so that you can in fact try to conduct life as normally as possible.

So, there is much that is wanting in these systems. I think it mirrors to some degree to Kris's point what is happening in the larger community around us. And I'd certainly agree that the confluence of the pandemic and the racial unrest and injustice that happens simultaneously has really contributed, I think to the dire, really emotional and psychological isolation and trauma that I think our youth are suffering in these systems.

Scott: Thanks. That was a really very useful and moving discussion of the relationship between race and this pandemic. And I think that the world understands that COVID has shed a harsh light on the poor health services that communities of color have. But I think what you are saying and what we are saying is that it's also shedding a harsh light on the juvenile justice and child welfare system, and making evident the very deep systemic problems that have long existed.

Scott: I want to have a few minutes at the end to talk about lessons we've learned. And that's probably one of them that we understand even better the racist underpinnings of the operation of these systems. But what other lessons have we learned about the response of these two systems to this pandemic? So, Kristin, you want to start telling us what lessons we've learned and how it might either change the way the systems operate in the future, or should we just get back to normal as quickly as possible, or what is your take?

Henning: So, I think we've got to take inventory. I think there are some things that have been blessings in disguise and some things that we have had to do that were necessary to accommodate, but that we should abandon as soon as we can.

Henning: And so, maybe I'll start with the good. I think one is, I mean, where we started, which is this question of release from detention and release from facilities, right? We have proven at least for the moment that we can reduce the footprint of the juvenile legal system on young people without drastically compromising public safety. Again, at least for the moment we need to track the data and make sure that's true. I think we also have to be careful if the data comes back and shows that crime does go up. We have to ask ourselves, what should we have been doing

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differently in this moment? As Marsha talked about the denial of services, are services in place, can we ensure that services are in place as we continue to keep our population low? So, that's one thing.

Another benefit I hope we take from this moment is that we can use technology to our advantage. Here's one that's we haven't talked about and that's out of the box. But access to counsel and interrogation, and you say, well, what in the world am I talking about? If we've demonstrated that we can use Zoom technology and other virtual technology to make counsel available in those places that have been able to make those accommodations, why can't we make that available at interrogation, at the front end of the system?

Henning: Now, of course I would prefer live, in-person council at the time of interrogation of young people. Obviously, I would also prefer no interrogation at all of young people. But the point is being, how can we use technology creatively? I think that is one way that we can do so. I think we can increase contact using the new technology that we have in facilities to increase contact more generally between young people and their families, young people and lawyers. A number of jurisdictions have suspended fines and fees in this moment because of the economic crisis tied to COVID. That should persist. Those kinds of things, I think we can learn from. One final benefit, and I'll just highlight a couple of harms.

Scott: We only have a couple more minutes, I think.

Henning: Great. I'll just say this is, I think we use a routine conditions of probation, right? Without being thoughtful and individualized. And I think in this moment of COVID, we have reduced the number of conditions of probation in many instances, not all. And so, that it shows that we don't need those.

Let me just say a couple of things that we did that I don't want us to see us continue, that is video arraignments and hearings. We had to adjust to accommodate, to move hearings forward, to get young people out of detention. So, we have been doing virtual hearings and arrangements. I don't want that to become the excuse for this as a business as usual once we get out.

And then I would just say the last thing is that we as defense counsel need to remember that we cannot get too comfortable with this new

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world of virtual contact with our clients, and that we need to quickly return to face-to-face contacts, home visits with our clients and the like.

Scott: So, Clare, what lessons do you see from that we can take from this period?

Huntington: Yeah. Well, I think we're going to get a lot more information, a lot more statistics, a lot more studies and outcomes over time. I think it's going to be hard to disentangle, what are the effects of what happened during this time? The simple fact that most children certainly were not in in-person school, and that we know that virtual school has really just been horrific and really basically nonexistent for many children, and the devastating impact of that. So, for example, just to use that as one example, it's going to be hard to disentangle the effect of not being in school from all the other things that we'll see go on with children.

Huntington: But one thing I think we are going to learn, and this is a real problem now, but hopefully will pay dividends down the road is again the importance of contact between parents and children. So, because it's, we know what we need to do. We know. And in fact, just in February of 2020 before the pandemic, the administration for children and families, that part of HHS that oversees the child welfare system, they issued something called an information memorandum that really doubled down on the importance of what they call family time, right? Not just visitation, but family time for parents and children in the child welfare system, and how that can reduce the trauma being removed and help child outcomes, and improve the parent child relationship, all of these things.

We know how critical that is. And now we're going through a period where it's not happening. And I think we're going to see really devastating impacts from that. And my hope is that that will lead all of us in the system to really to double down on it, once we are able to re-institute, especially in-person visitation between parents and children. So, we'll see that as even more of a core aspect of the child welfare system.

Scott: Marsha, lessons from the time of COVID?

Levick: I'll be quick. Kris said a lot that I agree with. So, I'm just going to focus on the depopulation issues. It is true that the footprint of the juvenile justice system has shrunk. The numbers of kids in juvenile correctional

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facilities on any given day is substantially less today than it was in February. And at the same time, we are having a very serious conversation right now, not only about making things better, but about abolishing aspects of our justice system. And so, I certainly hope that we will have an opportunity to examine how it worked out, that we were able to simply not bring children into the system.

Levick: There are counties across the country, Luzerne County in Pennsylvania, Fulton County in Georgia, that simply stopped detaining children 100% or zero, whichever way you're looking at it. No youth were detained. Those communities did not fall apart. They did not have crime waves. That's what I'm interested in. And that's what I hope we can take some lessons from.

Scott: Thank you. So, this has been such an important, interesting conversation. And thanks to all the panelists. I think you've given us a lot to think about, so thank you.

Levick: Thank you, Elizabeth.

Huntington: Thank you.