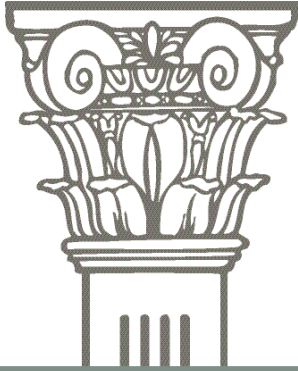




Legal Strategies to Reduce the Unnecessary Detention of Children

National Juvenile Defender Center
Advocacy and Training Guide



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Written by

Elizabeth Calvin

for the National Juvenile Defender Center

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Please feel free to adapt, copy or utilize these materials in any way you see fit to enhance your detention advocacy efforts.

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The mission of the **National Juvenile Defender Center** (NJDC) is to ensure excellence in juvenile defense and promote justice for all children. We believe that all youth have the right to zealous, well-resourced representation and that the juvenile defense bar must build its capacity to produce and support capable, well-trained defenders. We work to create an environment in which defenders have access to sufficient resources, including investigative and expert assistance as well as specialized training, adequate, equitable compensation and manageable caseloads.

NJDC provides training, technical assistance, resource development and policy reform support to juvenile defenders across the country. NJDC disseminates relevant and timely information in research reports, advocacy guides and fact sheets. Nine affiliated Regional Defender Centers provide similar services within their member states. NJDC, in conjunction with its Regional Centers and local partners, conducts state-based juvenile indigent defense assessments, examining critical issues related to access to counsel and quality of representation in delinquency proceedings.

For more information about the services and resources of the NJDC, or if you are interested in helping to organize a training in your jurisdiction, please email us at inquiries@njdc.info.







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Introduction

The typical initial detention hearing is rushed, a flash on an assembly line of quickly passing moments in court. Information is scarce, and unsupported allegations are routine. Defense counsel often must step up to the counsel table after only brief client contact and with spare knowledge of facts. The decision to detain can seem pre-ordained. Frequently, the realities that are unspoken are the strongest currents moving juvenile court. While pre-trial detention should not be imposed as either punishment or treatment, a decision to detain is often made when the court does not know what else to do with a child. Defenders sometimes wonder if their presence is even necessary.

The seemingly temporary nature of interim detention belies the impact of a decision to detain. Juvenile justice professionals know the threshold of temporary detention is the gateway to the juvenile correctional system. The children who are temporarily detained are the same children who receive longer sentences in secure confinement at disposition. In many places, detention halls are overcrowded and dangerous. Significantly, children from ethnic and racial minority groups are disproportionately confined at initial detention hearings and suffer the effects of detention more than other children.

Juvenile defenders can play a critical role in stopping the unnecessary detention of children. In many cases, it is the defender's lone voice that encourages alternatives to locking up a child. It is important that defenders are prepared for that role and enter delinquency cases as early as possible to present a persuasive case for release. This guide gives juvenile defense attorneys concrete ideas for a strong detention advocacy practice. Jurisdictions vary. The timing of appointment, the order of proceedings, terminology, and the very existence of representation at initial detention hearings all vary from state to state, even county to county. In some locations, children have access to counsel at the point of arrest. In other locations, children may be detained, arraigned, pled, and sentenced without ever seeing an attorney. While this guide focuses on developing practical skills to argue effectively, defenders need to tailor these materials to the particular aspects of practice in their home jurisdictions.

With this guide, we also urge defenders to consider important roles they play outside of the courtroom. Defenders can engage in many forms of policy reform, exposing abusive practices in detention, the overuse of detention, overcrowding, and disproportionate confinement. Along with community members and other juvenile justice professionals, defenders can be partners in changing detention practices and facilities.

Addressing problems with pre-trial detention is a big challenge. Whether in the courtroom or outside of it, defenders are in a unique position to be leaders for change. We offer this guide as a support in that endeavor.



Chapter 1

Advocating for Release in Detention Hearings

I. THE CHALLENGE OF ADVOCATING FOR RELEASE

It can be said without reservation: a safe place in the community is better for a child than a stay in detention. Social scientists agree that time spent in detention increases the likelihood that a child will be a repeat offender.¹ Child development experts agree that in detention, children may make some negative peer connections and that positive, community-based connections are interrupted.² Economists agree that juvenile justice dollars are better spent in the community than on secure detention.³ Trial lawyers know that a client who has been detained cannot assist as well in preparing for trial and doesn't make as good an impression in court as a client who has been released.

The *Institute of Judicial Administration/American Bar Association Juvenile Justice Standards* state that it should be “the duty of counsel [for children] to explore the least restrictive form of release” from detention.⁴ In criminal law the word “detain” refers to any time an individual is not free to leave, and in juvenile systems, that occurs for various reasons and at various stages of cases. For purposes of this guide, however, detention refers to confinement in a secure detention facility for the interim period between arrest and adjudication.

Advocating for your client's release at an initial hearing will call upon all your skills and talents as a defender. Your client, your client's family and the alleged victim are likely to be anxious and emotional at a first appearance hearing. In most detention hearings, no one present will have all the information about the

Juvenile defenders have a duty to seek out and fight for the least restrictive form of release for a client pending the outcome of a case.

case or the juvenile. Incomplete police reports and other vague information may allow for prosecutors or probation officers to speculate or present information that is not verified. As the defender, your pre-hearing negotiation must happen not only with the opposing party but also with probation officers and, in some cases, your client's family or school. In court you will need to make legal arguments and address social issues. You will think on your feet, arguing facts you have read only moments before. You will demand that the court hold carefully to the statutory standards while at the same time persuading the judge to take the risk of allowing for alternatives to traditional detention. You must do all of this when your relationship with your client is new. When you stand up to argue against detention at an initial hearing, you'll have less information than at any other time in the case.

Juvenile defenders have a duty to explore and fight for the least restrictive form of release for a client pending the outcome of a case. Fulfilling that duty is tough. This chapter will provide ideas about how to best fight for client release in juvenile court.

II. THE PURPOSE AND FLOW OF DETENTION HEARINGS

A. What is the purpose of a detention hearing?

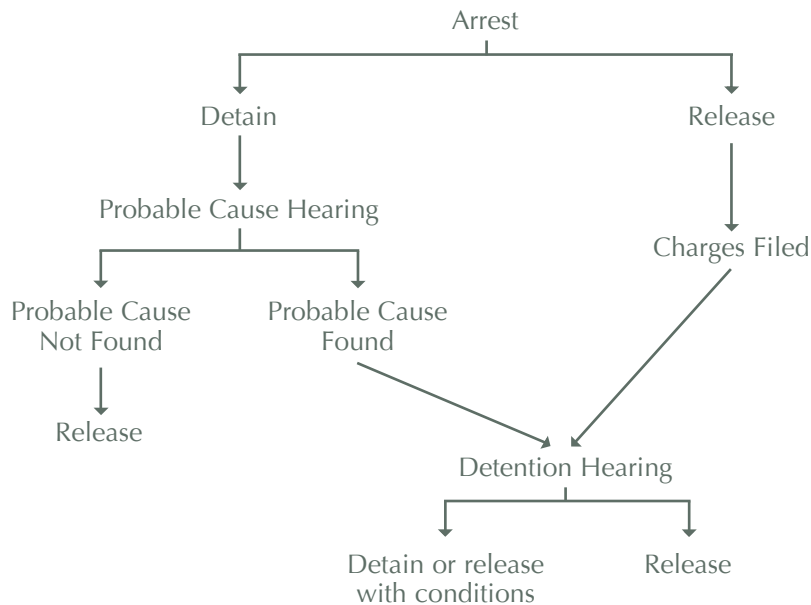
For juveniles, judicial review of detention typically has two components. A judge (or, depending on your jurisdiction, a commissioner, magistrate, master, hearing officer or referee, all of which are terms for officers of the court who perform judicial functions) will determine (1) whether probable cause exists and (2) if it does, whether the youth should be detained. In most states, both of these questions are answered at the same hearing. It may be called a "first appearance" hearing, a detention hearing or a probable cause hearing. In some locations, the judicial determination of probable cause does not occur in court. A judge may read the police statements and make a determination based on that alone. In other locations, a first appearance in court is solely a probable cause determination. In these jurisdictions, the issue of whether detention is appropriate is considered at a later hearing.

B. How does a detention hearing proceed?

The order and process of detention hearings vary from state to state and, to some degree, from county to county. Typically, as the defender, you can expect to be seated at counsel table when your client is brought in from a holding tank near the courtroom. You should have received a copy of the police officer's declaration of probable cause and been left enough time to review it and formulate arguments. The court will review the statement, give the defense the opportunity to argue against probable cause and allow the prosecution

to rebut those arguments. Then the judge will rule on whether probable cause exists. If the court finds that probable cause does not exist, that is the end of the hearing, and the youth will be released. If probable cause is found, the court then considers whether the young person should be detained pending the filing of charges. The probation officer, prosecutor and defense may all argue and give recommendations regarding release. The judge can choose to release, detain or release with court-ordered conditions.

The chart below shows the flow of events and decisions regarding detention.



C. Who has the burden of proof, and what is the standard of proof, in a detention hearing?

As a general rule, the state bears the burden of proof to show that probable cause exists and that the minor should be detained. Some state statutes, however, do not specify the burden or the standard of proof required.

The *IJA/ABA Juvenile Justice Standards* state:

The state should bear the burden at every stage of the proceedings of persuading the relevant decision-maker with clear and convincing evidence that restraints on an accused juvenile’s liberty are necessary, and that no less intrusive alternative will suffice.⁵

The *IJA/ABA Juvenile Justice Standards* are recommendations, not law. Although they do not have the force of legislation, they represent the thoughtful work of many experts and scholars, and defenders should argue that the *IJA/ABA Juvenile Justice Standards* are good

guidelines for measuring progress toward the goal of a better system. Some state courts have relied on the *Standards* and cited them with approval. The Colorado Supreme Court relied on the above IJA/ABA *Juvenile Justice Standard* in *L.O.W. v. District Court* and held that a finding by the court must be based on “clear and convincing evidence.”⁶

D. What if there is a rebuttable presumption of detention?

Once the prosecutor has proven probable cause, some state statutes provide for a presumption of detention if certain factors exist. For example, state law may have a rebuttable presumption in favor of detention if the youth is alleged to have committed a felony, one of a certain class of felonies, any crime with a gun, a sex offense, etc. The presumption may be that the juvenile is too dangerous to be released. A rebuttable presumption does not shift the burden from the prosecutor to the defense. Typically it means that the defense can present evidence to refute the presumption and then the prosecution must prove the basis for the presumption (e.g. dangerousness). Read your state statute, rules of evidence, court rules and case law to ascertain what standard of proof is required to rebut a presumption of detention. It may be that only “some” evidence or a scintilla of evidence contradicting the presumption is required to put the prosecutor in the position of proving the allegation.⁷

III. ARGUING THE ISSUE OF PROBABLE CAUSE

A. How do I argue against the existence of probable cause?

The U.S. Constitution requires judicial review of an arrest without a warrant if the suspect is subsequently detained. If a youth is detained pursuant to an arrest warrant, a hearing is not constitutionally required because it is presumed that a judge established the grounds for arrest when the warrant was signed.

A judicial officer’s review of probable cause is not a trial. In most jurisdictions, the judge will not examine evidence, hear testimony or assess the credibility of witnesses. The judge will rely on what is often a one- or two-paragraph statement of facts sworn to by the arresting officer. In some states an arrest report is attached.

The standard at probable cause hearings is the same for that at arrest.⁸ In general, a judge must decide:

- Whether probable cause exists to believe that the charged offense was committed, and
- Whether probable cause exists to believe that the accused committed the offense

Arguing against probable cause is the defender's first chance to win freedom for a detained client. If there is no legal or factual basis for probable cause, the juvenile must be released. Even the slimmest of arguments is worth making. It is the rare case in which there is something to lose with a creative argument against probable cause. Raise some issues no one has thought of before. Put the prosecutor on the defensive. Have some fun.

The state will have the burden of proof to show that probable cause exists, but the standard of proof and the type of evidence allowed is decided on a state-by-state basis. Some states permit hearsay, others do not. Some states permit the determination of probable cause based solely on evidence obtained illegally.

Before the hearing, the defense should be provided with or should demand a copy of the statement and review it carefully. The declaration of probable cause may be lacking the basic information or be incomplete. Read the probable cause declaration thoroughly and pay close attention to three points:

1. Attestation

Inspect the police statement for a proper attestation. Is it signed by the arresting officer? Only a person with personal knowledge can swear to knowing that facts are true. For example, if it is the local police department's practice to have supervisors complete paper work, defenders should argue against the declaration's admissibility. A police supervisor cannot swear that the facts are true, only that someone he or she supervises said the facts were true.

2. Elements of the Crime

Read the report to make sure that all the elements of a crime are factually present. A client who used someone else's discman but intended to return it—rather than having taken it with the purpose of permanently depriving the owner of its possession—did not commit larceny.

3. Connection to this Youth

Look at the references to your client. Does the declaration sufficiently tie your client to the crime? If the probable cause declaration states merely that a storekeeper told the police that three black youth stole a candy bar, and your client was caught two blocks away without the candy bar, argue that:

- No reference to gender makes the description meaningless
- "Black youth" is far too broad and is meaningless without other identifying factors
- No post-arrest identification by the storekeeper means there is insufficient ID
- No candy bar means there is an insufficient nexus to the crime

If you are allowed to cross-examine witnesses, the probable cause hearing may be a good opportunity to obtain statements under oath that can be used for impeachment later on in the case. If probable cause hearings are not recorded, the defender should bring a tape recorder and record testimony. Keep in mind, though, that if it appears that there is a chance of prevailing on the probable cause argument, defenders should be cautious about extensive cross-examination because it may result in bolstering the state's case.

Two rules at this stage are: (1) Never have the client testify regarding the alleged incident, and (2) Never make a statement like "My client tells me that..." Remember that at this point, no one in the court has all the information about the facts of the case. A defender should avoid putting anything on the record that places the juvenile at the scene or reveals any knowledge of the facts. A statement by the accused in court early on could serve to connect him to the events. A witness who seemed to state in the probable cause declaration that she was sure this youth was at the scene of the crime may turn out to have a different statement later. If you're tempted to have your client testify because the stakes don't seem too high, remember that additional facts may come out later that could make the charges much more serious than they initially appeared.

B. If a youth is arrested and detained, when will a probable cause hearing be held?

In *Gerstein v. Pugh*, the U.S. Supreme Court mandated *prompt* judicial determination of probable cause as a prerequisite to an extended pre-trial detention following a warrantless arrest.⁹ The meaning of "prompt," however, was left up to interpretation until the Supreme Court clearly defined a time limit for judicial determination in *County of Riverside v. McLaughlin*.¹⁰ *McLaughlin* held that judicial determinations of probable cause within 48 hours of arrest will usually meet the promptness requirement of *Gerstein*.¹¹

Gerstein and *McLaughlin* are cases about adults. There is no question that the Fourth Amendment protections enunciated in *Gerstein* apply to juveniles, and a prompt judicial determination of probable cause is required if a youth is detained on a warrantless arrest. The meaning of "prompt" in a juvenile case, however, may not be the same as *McLaughlin's* strict 48-hour rule.

In *Schall v. Martin*, the U.S. Supreme Court dealt with New York's juvenile pre-trial detention statute.¹² The *Schall* case was decided nine years before *McLaughlin*, and it does not provide a bright-line time frame in which judicial determination of probable cause is required. The *Schall* decision emphasizes that a probable cause determination is just one aspect of deciding whether to keep a juvenile in detention. The Court held that juvenile proceedings are different than those for adults, stating:

There is no doubt that the Due Process Clause is applicable in juvenile proceedings... We have held that certain basic constitutional protections enjoyed by adults accused of crimes also apply to juveniles... But the Constitution does not mandate elimination of all differences in the treatment of juveniles... The State has “a *parens patriae* interest in preserving and promoting the welfare of the child,”...which makes a juvenile proceeding fundamentally different from an adult criminal trial. We have tried, therefore, to strike a balance—to respect the “informality” and “flexibility” that characterize juvenile proceedings...and yet to ensure that such proceedings comport with the “fundamental fairness” demanded by the Due Process Clause.¹³

The statutory length of time between placement in detention and judicial review in juvenile cases varies from state to state. One statute requires a hearing “no later than the morning following the juvenile’s placement in detention,”¹⁴ while others allow 24, 48, 72 or more hours to pass. (Appendix A in this guide is a national survey of detention statutes and lists the lapse of time in which a hearing must be held in each state.) Note that guidelines can be deceptive if weekends and holidays are excluded from the time period counted. If an arrest happens on a Thursday evening before a Monday holiday in a jurisdiction with a 72-hour window, meaning three days will pass without counting toward the hearing deadline, the first appearance in court could be a week later.

Is this what is meant by “prompt judicial review” in *Gerstein*? *McLaughlin* held that “prompt” under *Gerstein* means no more than 48 hours and that the exclusion of weekends and holidays from the time computation violates the Fourth Amendment.¹⁵ Why would a longer period be appropriate for children?

For now, it appears that the question of promptness for juveniles will be answered on a state-by-state basis. A California case, *Alfredo A. v. Superior Court*, determined that the strict 48-hour rule in *McLaughlin* does not apply in juvenile cases and that the state’s requirement of a probable cause determination within 72 hours was constitutionally sufficient.¹⁶ But the *Alfredo* court also ruled that lengthening the time before a probable cause determination is made by excluding non-judicial days was impermissible.¹⁷

Alfredo lacks precedential value, but its majority and dissenting opinions are a good reference for the issues pertaining to this area of law. Justice Mosk’s dissent offers this perspective:

Extended restraint for a criminal offense in the absence of probable cause is no more reasonable for juveniles than adults. Arguably less so... Plainly, the “informality” and “flexibility” of juvenile proceedings—both in American jurisdictions generally and in California specifically—are designed to make the process more expeditious than that of criminal actions, not less... Thus, if any colorable attack could be mounted against *McLaughlin*’s definition of “promptness,” it would be that it is too long, not too short.¹⁸

Defenders should scrutinize their jurisdictions' position on the length of time a youth has to wait before a judicial determination of probable cause. Although *Schall* holds that some due process claims pertaining to pre-trial detention of juveniles "cannot be viewed in the same light as similar challenges to adult detentions,"¹⁹ there is no firm answer on how long a child must wait for a due process hearing. (See Appendix B for the full text of the decisions in these cases.)

IV. PREPARING FOR A DETENTION HEARING

Once a judicial determination of probable cause has been made, the court will decide whether detention is appropriate. Pre-trial detention of juveniles has two general purposes: (1) to protect public safety and (2) to ensure the youth's appearance at future hearings. All U.S. jurisdictions permit preventive detention of juveniles accused of crimes, and statutory descriptions of factors to be considered by a court in deciding whether to detain a youth vary. Some state laws require a "substantial" likelihood of failure to appear. Some states, like Florida, define danger to the public narrowly, requiring a "substantial risk of bodily harm as evidenced by recent behavior."²⁰ Kansas demands a youth have a "history of violent behavior toward others" or exhibit a "seriously assaultive or destructive behavior at the time of being taken into custody..."²¹ Colorado law prohibits the court, without the district attorney's consent, from releasing the child without a bond if, within the last year, the child was adjudicated for any felony or a class 1 misdemeanor.²² Washington State permits a juvenile to be detained if there is probable cause to believe he or she has committed a crime while another case was pending.²³ Many state juvenile justice statutes define "danger to the public" to include danger to self. Other states consider contempt of court or violation of a previous probation order as factors in detention decisions.

If a judge finds that factors warranting detention do not exist, then the youth must be released. But the reverse is not true. Even if a judge finds that a youth may be dangerous or unlikely to appear for court, the court may decide to release the youth with conditions. Detention should be a last resort.

A. What are steps that I can take to be prepared before I ever argue my first detention hearing?

You can prepare yourself and others in your office by analyzing the law and learning about your jurisdiction's detention facility and local alternatives to detention. With a little effort, you can put together tools that can help identify issues and options when you are later in the throes of a case.

Here are three steps you can take to prepare for detention hearings in general:

1. Know the state detention statute

Start with an analysis of the statutes pertaining to probable cause hearings, grounds for detention and the purpose of the juvenile justice act. Legally analyze them, word by word. Do a search on all state cases related to pre-trial detention of children. Review court rules. Look at legislative history.

Make a quick reference packet that you always carry with you into court. Copy the relevant statutes or court rules onto a single sheet if you can, and on the reverse side, list relevant case law with one-line summaries of each holding.

Make a file with lists that you and others in your office can refer to:

- List statutory timelines
- List relevant case law, with holdings and possible applications
- List a brainstorming of potential legal weaknesses in the statute, e.g., *“Is it a violation of Gerstein to exclude weekends and holidays from the probable cause hearing time?”*
- List key points for factual arguments, e.g. *“Under our statute, the risk of danger must be substantial. In state case law, substantial has been defined as...”*

2. Know your detention facilities

To effectively argue that detention is inappropriate for certain clients, you need to know what detention really offers. Ask for a tour of the facility, and ask facility personnel for information on the programs available. Ask for a copy of detention rules, and ask for a copy of guidelines or rules for staff. Talk with clients about what their experience has been, and see whether their actual experience matches up with what the detention facility claims as far as programming and safety. Talk with mental health professionals, and ask them for opinions and insights about the facility. Talk with people working at the facility who might be open to giving you an insider’s perspective. Submit a Freedom of Information Act request²⁴ and ask for staffing levels, the number of certified mental health staff, the number of teachers with credentials and special education certification, allegations of excessive force, criminal allegations, copies of staff training guides, discipline guidelines and statistics on the use of discipline.

Make a file you can refer to later:

- Outline what is and is not offered in detention, ideally divided by subtopic: *“Special education: The detention facility currently has no certified special education teachers. Reference: Staff list dated x/x/x.”*

- List sources of information you have gathered and the date of the information.

Policies, administrators and programs change, so be sure to review what is happening in your detention facility regularly.

3. Know the alternatives in the community

Alternatives come and go. They change population focus and funding sources in ways that make it difficult to keep up with what is available. Start by talking with probation officers and social workers, and when the chance arises, ask group home workers, mental health providers and anyone who works with high-risk kids what programs they recommend.

Consider using an intern from a local community college, a social work program or a law school to create a system for listing alternatives. If the system is computer-based, it can easily be updated.

- List programs under populations served, e.g. “Mental Health,” “After School” and “Anti-Gang.”
- Repeat listings for overlapping populations.
- Develop a plan for updating the system.

B. What should I do before a detention hearing?

Here are ten steps to prepare for your client’s detention hearing:

1. Obtain a copy of the declaration of probable cause or other police statements.

2. Obtain a copy of your client’s juvenile court record.

- Be prepared to object to references by probation officers or prosecutors to arrests or previously dismissed charges.
- Analyze the prior adjudications with your client and look for ways to distinguish this situation from others and to minimize past offenses.

3. Meet with your client.

- Explain what will be decided at the hearing, prepare your client for a conversation with the probation officer and get information from your client to support release.
- If this is your first contact with this client, understand it as beginning to build the foundation for your relationship. Take steps to establish trust with your client. Make sure you have enough time to listen to your client’s concerns.

4. Talk with your client's parent(s) or guardian(s).

- Explain your role as their child's lawyer.
- Listen to their concerns and help devise solutions.
- Advocate with them for your client's expressed interest.
- Determine if they or another responsible adult will take your client home.

5. Talk with the probation officer.

- At the very least, you may learn what the probation officer knows about the alleged incident and your client.
- Talking with the probation officer before the detention hearing is also an opportunity to negotiate on behalf of your client. In most juvenile courts, the bench gives the probation officer's recommendation great weight. If you meet with the probation officer before the hearing, you have the opportunity to convince the officer to recommend release.
- If you do not convince the probation officer to recommend release, learning what her concerns are gives you the opportunity to formulate arguments and plans.

6. If appropriate, talk with the prosecutor.

- Assess whether the prosecutor is willing to speak to you about the case.
- If he is, ask whether he will be requesting detention.

7. Assess the likelihood of your client's release.

- Review probable cause findings/police statements.
- Review any prior court records.
- Assess if there is an adult to supervise your client.

8. Make a plan for release.

- See Section VI below for specific suggestions about how to present plans for alternatives to detention.

9. Identify people who support your client.

- Decide who should attend the hearing, contact those people, and determine whether they should speak at the hearing, submit a letter of support or merely be at the hearing to show support.
- Prepare those who will be attending the hearing and give guidelines to those who will write letters of support.

10. Gather supporting documents, particularly in more serious cases and cases for which you will be proposing an alternative to detention.

- Consider seeking letters from employers, teachers, pastors or others who can vouch for the young person and offer support or supervision if she is released. You can ask your client’s parents, guardians or other supporters to gather letters of support for you, but give them a one or two-page outline of what should or should not be in the letter. (A set of support letter guidelines that defenders can use as a handout is included in this guide as Appendix C.)
- Get a letter if a treatment facility or shelter has agreed to admit your client. Even a two-sentence letter can be persuasive in conveying the message that this youth has resources and support in the community.
- Gather letters to provide evidence of activities in the community, positive change in school circumstances, and/or awards for school attendance or other accomplishments. Even if it seems like the document does not say that much, having something on paper is a powerful tool.
- Make copies of the letters or documents for the judge, prosecutor, and probation officer. If appropriate, make copies of the letters for your client so she can see what people have said and benefit from the support.

C. Should I prepare my client’s parent or guardian for an initial conversation with the probation officer?

Yes. If your client lives with his parents or guardians, the probation officer will probably contact them with the goal of finding out information to support a recommendation for release or detention. By preparing parents or guardians you can make sure they understand why the probation officer is contacting them and give them time to think clearly about what kind of information would be helpful to your client.

After you introduce yourself, lay out the law and procedure:

- This first hearing is about whether the child will be detained.
- It is not about guilt or innocence. The judge will first determine whether there is probable cause—reason to believe that a crime occurred and that this child may have been involved.
- The parents/guardians can help the most in the next part of the hearing in which the judge will consider:
 1. If the child is dangerous
 2. If the child will return to court
 3. Other state-specific detention factors

Explain to the parents or guardians that the probation officer will probably contact them to get information on the issue of dangerousness and likelihood of the child's failure to appear in court. Describe the importance of giving the probation officer information that supports release. It may be wise to remind them to say only what is true. Outline several areas of information that could be helpful. For example, here are several topics to cover, and the kinds of things a parent could say to a probation officer or in court:

School attendance	<i>"My daughter is attending school regularly and has had no problems at school."</i>
Other activities	<i>"She is involved in _____ [sports, hobbies, religious activities] X times a week."</i>
Parental control	<i>"I feel she will do as I say."</i>
Family limits	<i>"We will be enforcing a new curfew in our house as a result of this incident."</i>
Peers	<i>"She has a number of friends who are positive influences on her. I will be making sure she has contact with them, and limit her contact with other, less positive friends."</i>
Dangerousness	<i>"I don't believe she will be a danger to others if released."</i>
Ensuring return to court	<i>"I will be able to make sure she returns to court."</i>

Some states require a parent or guardian to sign a promise to make sure the child will return to court. In states where this is not required, it is still powerful to have a parent's promise to the probation officer or court that she will make sure the child returns for hearings.

D. What is the role of the parent or guardian in a detention hearing?

Many state juvenile justice systems enshrine a critical role for parents. Parents often sit at the counsel table next to their child during pre- and post-trial hearings. Not just a symbolic gesture, there is often an expectation of parental involvement, particularly in decision-making about detention and sentencing. In some states, judges are required to ask for parental input during sentencing. Even if that's not the case in your state, if a judge is wavering on the decision to release or detain, parental opinion can tip the scale. The probation officer may report to the court information gleaned from conversations with parents, and the court will want to know if the parents feel they can take charge of their son or daughter.

In some cases, the value of the parent's input is limited by her own circumstances. A parent may be perceived to be partially at fault for the youth's behavior because of the

home environment or poor parenting skills. It also is not uncommon in juvenile court for the parent to have a host of problems (addiction, instability, criminal history, mental illness) that appear to be worse than the youth's problems. A parent's credibility is also lost when the parent is irrational about the child – such as failing to see how her daughter could do any wrong.

The involvement of parents and family members is a factor that makes practicing in juvenile court different from adult court. If a client has a committed parent or guardian, a defender should view that person first as a potential ally. Many parents will work closely with their children's attorneys and may be relied on for information and support. It is not uncommon, however, to encounter a parent who expresses an interest at odds with the youth's stated interest, and that parent may welcome involvement in the juvenile justice system. Detention issues come early on in a case, however, when everyone is operating with limited information, so a parent may have an incomplete understanding of the juvenile justice system and what it means for his child to be charged with a crime. A parent may be frightened for her child, may assume the child is guilty of creating this mess, or may just hope the juvenile justice system is going to provide answers to her parenting problems. Having a son detained may seem like a big relief from nightly worry about his location or activities. You may be able to change these perspectives, however. A defender can think of the interaction with a client's parent as another forum for advocacy on behalf of the client and an opportunity to help create solutions to the problems that landed the youth in juvenile court in the first place.

In your first contact with parents, begin by explaining your role. Let them know that you are representing their child, but at this point it will probably not be necessary to go into a lot of detail. Save strong statements like "I represent your son, not you" for a situation in which it is needed. If a parent starts instructing you as if you are her attorney, explain clearly that you represent the child and must represent his interests in court. But defenders do their clients a disservice when they shut parents out of the case. When interests seem to clash, the defender must perform a balancing act: representing the interests of the client at all times while finding ways to involve the parent in a supporting role.

If a parent tells you, "Well, I think detention is the best place for James right now. I just can't control him," ask some questions that get to the heart of her concern. Work with the parent to see if there can be a mutually agreeable solution.

Defender: *"What makes you feel you can't control him?"*

Mother: *"He comes and goes as he pleases. Never comes home at the time I have told him to. I think detention would teach him a lesson."*

Defender: *"You must worry about him when he doesn't come home. Is this his first time in detention?"*

- Mother: *“Yes.”*
- Defender: *“Have you spoken with him since he has been in detention? How do you think he is doing in there?”*
- Mother: *“Well, last night he was crying when I talked with him over the phone. I hate to have him be so upset, but that’s what I mean. I think it will teach him a lesson.”*
- Defender: *“You know, kids tend to get used to detention and the initial fear of it wears off. It may be that he has learned enough of a lesson. What if the judge released him and gave him a curfew? What if a court order required him to come home when you say so, or he goes back into detention until the case is over?”*

E. Should I prepare my client for a conversation with the probation officer?

Yes. Explain to your client that the probation officer will be making a first-impression judgment about him and the case. Tell your client not to talk about the alleged incident with the probation officer before the adjudication hearing. The youth may feel uncomfortable telling the probation officer that he does not want to talk, so specifically suggest that he blame you: “My lawyer said I can’t talk about the case with anyone until later.” Explain the importance of giving information that may assist with release. Remind the client to be truthful and to avoid exaggeration.

V. DISPUTING RISK OF FLIGHT AND DANGEROUSNESS

A. What are effective arguments for release if it is alleged that my client is likely to fail to appear for future hearings?

Secure Adult Support

When failure to appear is a concern, the strongest argument for release is that the youth has support from credible adults. If your client has a reliable parent or guardian, ask her to address the court. If the parents are not very credible or don’t support the youth’s release, explore whether there exists another adult in the community who knows and supports your client. See if it is possible for a parent or adult supporter to tell the court that she:

- Takes this matter seriously
- Understands the importance of being present at court
- Believes the youth also understands this
- Will bring the youth to court or make arrangements for the youth to get to court

Provide Proof that Your Client is Not Likely to Miss Court Appearances

Assess the facts of your case and determine if you can argue that your client:

- Surrendered to the police or probation before this hearing
- Has appeared at prior court hearings
- Has kept appointments with probation officers, counselors or others
- Has a stable living situation
- Attends school, work, sports practices or other regular activities
- Has peers who are positive and not criminally involved
- Has no criminal history

Address Any Prior Failures to Appear

If your client has failed to appear at court in the past, assess whether you can argue that he:

- Was chronologically younger and less aware of the importance of coming to court at the time of the previous failure to appear
- Was less mature and more impulsive at the time of the previous failure to appear
- Has other factors in life that motivate him to take care of this matter in a responsible manner (position on a sports team, a job, etc.)
- Was in a living situation that was not conducive to ensuring appearance at court dates (unstable living situation, new to a foster home, no adult taking responsibility, conflict with adults, on the run, family in crisis, family illness, car problems, etc.)
- Had mental health or other problems that were not being addressed at the time of the previous failure to appear
- Has learned a lesson from incarceration or other restrictions due to the previous failure to appear
- Has appeared for court hearings since the failure to appear

Address Allegations of an Unstable Living Situation

If the prosecution or probation staff assert that your client is likely to fail to come to court for future hearings because of an unstable living situation, assess whether you can argue that he:

- Has attended appointments with attorneys, social workers or others
- Attends school or work on a regular basis
- Has a stable living situation and the assessment of the probation officer is culturally biased or based on an inaccurate understanding of the home situation
- May not have the support of an adult but has taken steps to be responsible for himself
- Has the support of adults in non-traditional roles (e.g., a neighbor, teacher, counselor or adult friend who will remind the youth of a court date or offer to drive the youth to court if necessary)

Address Fears that the Youth Will Run

If it is asserted that your client will actually flee the jurisdiction, assess whether you can argue that he:

- Has not run away before
- Ran away in the past but now has not run away for a long time, or the conditions that caused him to run have changed
- Has strong connections to friends, religious organizations, school, job, adults who are important, and/or family, including siblings
- Has lived in the area for a long time
- May have not lived in the area for a long time but is establishing the kind of ties that indicate he intends to be a long-time resident
- Has not expressed any inclination to run
- Expressed an inclination to run because of being emotionally overwrought but did not really mean it

Present an Alternative to Detention Plan that Makes it More Likely Your Client Will Return to Court

See Section VI below for a discussion of alternative detention plans. Components of a plan that specifically address the concern of failure to appear include:

- A written promise by an adult to ensure that the youth will come to court
- A plan for school attendance, treatment, counseling, curfew and/or restrictions on activities
- Specific scheduling of other appointments (counseling, treatment, probation officer meetings) the day before each court hearing so that the youth can be reminded and the service provider can help the youth think through a plan for how to get to court
- Specific plans for how the youth will get to court (who will drive, what bus he will take, etc.)
- Creative day-reporting involving the youth checking in daily with the probation officer, a social worker or other adult who will alert the court if the your client fails to report (the adult should not be you – a defender should never allow herself to be in the position of having to report to the court on the activities of a client, as that would present a potential conflict of interest and could violate attorney-client confidentiality)
- Participation in an existing day-reporting system
- Move pending the outcome of the case (with the guardian's approval or the courts' order) into the home of a relative or adult willing to take responsibility
- Electronic monitoring at home
- Placement in a treatment program
- Placement in a non-secure shelter or youth facility

B. What are effective arguments for release if my client is alleged to be dangerous?

Contradict the Assertion of Dangerousness

Without confirming or denying the underlying incident, provide information to the court that shows the youth is not dangerous. Assess whether you can present evidence of:

- Adults who can state that the youth has not exhibited violent behavior
- Adults who can give specific examples of behavior that contradicts the dangerousness allegation
- No criminal history of dangerous behavior
- Previous dangerous behavior being a long time ago
- Previous dangerous behavior being of a completely different nature than what is alleged here
- Previous dangerous behavior arising from circumstances that are very different from those that currently exist
- Client maturing since prior dangerous behavior

Argue the Weakness in the Probable Cause Finding

Make clear that you are not re-arguing the issue of probable cause, but suggest to the court that the weaknesses in the police report militate in favor of finding that your client is not dangerous.

Present an Alternative to Detention Plan that Provides Adequate Supervision in the Community

Again, see Section VI below for more discussion of alternative detention plans. To specifically address concerns about dangerousness, demonstrate to the court that there are sufficient controls, supervision and structure in a community setting to ensure that the youth will not be dangerous. Assess whether you can argue that the youth will:

- Be in circumstances different than those which existed prior to the alleged incident:
 - Increased attendance at school
 - Involvement in counseling
 - No contact with alleged victims or other individuals involved in the alleged incident (including co-respondents)
 - Family restrictions
 - Family or adult awareness of the need to be more involved with supervising the youth
- Be addressing problems that people generally agree may be underlying delinquent behavior, such as addiction, emotional issues and/or problems in school

- Agree to restrictions on his behavior, including meeting a curfew and/or not having contact with certain people or going to certain locations
- Have a strict schedule that has built-in supervision at each point: school, after school, etc.

VI. ADVOCATING FOR ALTERNATIVES TO DETENTION

A. May I ask that my client be allowed to post bail?

Children do not have an unqualified right to bail under the U.S. Constitution, and many state courts have held that denial of bail to juveniles does not violate state constitutions. There are compelling policy reasons to prohibit the use of bail for juveniles. Because young people rarely have their own money in the amounts typically required for bail, allowing bail effectively denies release. The *IJA/ABA Juvenile Justice Standards* state, “The use of bail bonds in any form as an alternative interim status should be prohibited.”²⁵ Some state statutes provide bail as an option for juveniles. (A survey of the state-by-state treatment of bail for juveniles is included in this guide at Appendix D.)

B. How should I analyze what kind of release plan to suggest for a client?

Look at detention from both sides: What is wrong on the inside? What is better on the outside?

Problems with detention

There will be problems that impact every child who is admitted to detention and problems that are specific to your client’s needs. The kinds of problems that make detention facilities inappropriate include:

Limited or no access to services that address the needs of your client

- Special education
- Mental health treatment
- Adequate medical care

Limited or no access to services that will enhance long-term placement

- Diagnosis
- Opportunity to be interviewed by staff from prospective alternative placement programs
- Opportunity to be involved in activities that make placement a viable option

Insufficient provision of basic needs

- Clean setting
- Safety
- Not over-crowded
- Adequate exercise
- Freedom to practice religion
- Ability to stay caught up in school
- Access to counsel

Alternatives to Detention

Alternatives to detention are not just formal programs or whatever the probation department has approved in the past. Alternatives are whatever a creative defender and community partners can come up with that provide the support and supervision necessary to keep a youth in the community. Examples include:

- A set daily schedule, with fixed locations and times
- Attendance at treatment, counseling sessions or school programs
- Curfew
- Informal daily reporting (such as calling or seeing probation officer or other person at a set time each day)
- Restrictions regarding contact with particular people
- Restrictions regarding movement/travel
- Required presence of adult at all times
- Electronic monitoring (an ankle bracelet constantly monitoring its wearer's location)
- Nights-only at detention (days in regular school, work, etc.)
- Day reporting (spending the day at detention school or other programming, then returning home at night)
- Home detention
- Placement with a family friend
- Placement in a foster home
- Placement in a non-secure shelter, treatment facility or group home setting
- Secure detention with release only for approved school or work
- Detention, with an agreed time for court review if factors change.

C. How should I present an alternative to detention plan to the court?

In less serious cases, or cases where it appears the probation officer or prosecutor are inclined to recommend release, an oral presentation is fine. In more serious cases and cases where release is an uphill battle, remember the power of paper, and present your plan in a report.

Whether your plan is presented orally or on paper, try using one of these three frameworks to present your argument:

1. Specifically address the issues of concern.

List terms of release for the court. For example:

- Agree to recommend a no-contact order with problem peers
- Set up an intake session for counseling services
- Explain that the parents are taking the matter seriously and will be setting a curfew and other restrictions (also known as the “Higher Authority” argument, as in, “When he gets home, his mother is going to punish him in ways that will make detention seem appealing”).

2. Present a plan based on spheres of life

Present your client’s life in spheres of activity, and show how each sphere is a supervised environment that makes release a good option. For example:

School

- An assessment for special education services has been requested
- Class schedule has been changed so there will be no contact with co-respondents
- The youth is now signed up for an after-school program, and the manager of the program is aware of the charges and feels able to manage the youth
- A teacher, coach or other school employee is willing to check-in with the child each day

Mental Health

- An intake assessment has been scheduled
- Mental health services have been set up

Home

- A space at a youth shelter is currently available and this child qualifies for it
- Alternative living arrangements have been made (such as with an aunt, grandmother, etc.)
- A dependency (abuse/neglect) petition will be filed

3. Present a chronological plan

Chronological order gives the impression of orderliness and control. Lay out your client’s day hour-by-hour and the plan will have its own force of logic. For example:

Time	Activity	Supervision
7:00 AM	Breakfast	Mother
7:45	Wait for bus to school	Mother
8:20	Arrive at school, check in	Vice-Principal Smith
8:30-9:20	Algebra	Teacher, Mr. Hernandez
9:30-10:20	P.E.	Coach Winingham
...
3:30-3:40 PM	Walk to after-school program office, check in	Mr. Kaganoff
3:40-5:00	After-school program	Mr. Kaganoff, Ms. Demsey
...

Here are a few Do’s and Don’t’s for alternatives to detention plans:

Don't suggest more supervision than is really needed – the more your client is being watched, the more chance there is for him to be “caught” doing something “wrong.”

Do rely on the opinions of professionals and others who know your client and his needs.

Don't over-anticipate what the court will be concerned about – you might end up making your client seem like more of a risk than he is.

Do be as realistic as possible so your plan does not set your client up for failure. It will usually be better for your client to have stayed in detention pending the outcome of the case than to have been released, violated the terms of release and sent back into detention. Whatever happens pending the outcome of the case will have an impact at disposition.

Don't put yourself in the position of reporting whether your client is failing to follow terms of release. This puts you in a position of violating the attorney-client privilege as well as creating a conflict of interest.

Do look at the detention plan as the beginning of a sentencing plan. Options can be tested, and issues that led to the delinquent behavior can already be in the process of being addressed by the time of the disposition hearing.

D. What should I do when my client wants to be released, but I think it is a bad idea?

The short answer is that an attorney needs to represent the interests of his client, and if your client instructs you to demand release you need to argue for release. But this short answer can short-shrift the unique attorney-child client relationship. It is clear: The role of the defender is to represent the “expressed interests” of the client, not what the defender perceives to be the “best interest” of the client. The *IJA/ABA Juvenile Justice Standards* state unequivocally, “[T]he determination of the client’s interests...is ultimately the responsibility of the client,”²⁶ and “[T]he lawyer’s principal duty is the representation of the client’s legitimate interests.”²⁷ Most state rules of professional responsibility echo this sentiment. But representing a child client is more complex than representing an adult, and defenders have to ask themselves difficult questions in the course of representation of a child. Let’s look at a case example to explore some of the issues.

You have a client who agrees that she needs treatment, and says that she is willing to go into a residential treatment facility. To be eligible for the residential treatment facility in your area, she needs an assessment and a formal diagnosis. The client has missed three assessment appointments while in the community. She is constantly running away from home and has put herself in what most people would agree are dangerous situations. Most recently she has been seen with an older man known to be violent and believed to run a prostitution ring. Now she has been picked up on a minor charge, and the probation officer argues that your client should be kept in detention until an assessment is completed. He frames it as a matter of life and death—an opportunity to snatch her from the brink. It appears that once she is assessed, a placement will be available almost immediately. When you meet with your client in the holding cell, she swears that, if she is released, this time she will show up for her assessment appointment. You do not believe her; no one in his right mind would. She tells you that she does not want to be in detention and wants you to argue for her release.

What do you do? Here are four potentially attractive but *wrong* choices:

- Try to convince your client that staying in detention is her best option, reminding her that she wants to go into residential treatment, and this is the best way;
- Tell her that there is no reason to argue for release because the judge will never grant it because of her dangerous behavior;
- Immediately agree that you will argue for her release, and then do so with gusto; or
- Agree that you will argue for release, but make a half-hearted argument, thinking you have to subtly let the court know your disagreement with this position to preserve your personal credibility.

Why are those choices wrong? None of them involve listening to the client. Although a reasonable attorney may be tempted to take the action that seems most efficient, there are

other choices that are better options and more appropriate for the unique attorney-child client relationship.

As an attorney, listening must be an interactive pursuit. The essence of an attorney's role is to provide counsel to a client. Contrary to popular opinion, an attorney should not be just a mouthpiece, doing whatever a client says without any analysis or input. At the same time, an attorney representing a young person has to be careful not to overpower the client with her opinion. To effectively counsel a client, the attorney must develop a trusting relationship, and to accomplish that, the attorney needs to listen. In state assessments of indigent juvenile defense by the American Bar Association Juvenile Justice Center through its National Juvenile Defender Center and its partners, heartfelt complaints from youth interviewed consistently reflected that no one, including their attorneys, listened to them.²⁸

Developing a Trusting Relationship in Ten Minutes or Less: You Can't Do it.

You need to spend time with a person to develop a trusting relationship. Time is an especially important ingredient in developing a relationship with a child. It might mean time spent discussing issues that do not seem related to the criminal charges. It might mean discussing the case-related issues without being focused on answers or your analysis of the issues. It definitely means spending more time listening and less time talking, a daunting prospect when you know that your job is to describe to your client her constitutional rights, the process ahead and the facts and law that pertain to this case.

In many places, attorneys prepare for detention hearings in ten minutes in the holding cell behind the courtroom. A better practice is to make arrangements to see your client before court, scheduling enough time that you can begin to build a relationship, get the information you need from the client and impart the legal information you need to give the client. This may seem like a crazy suggestion for a public defender with a jam-packed court schedule and more cases than you can count. But consider this: If you are better able to prepare for a detention hearing, it is more likely your client will be released. If she is released, you will have more time to prepare for her other hearings. Furthermore, if you lay the foundation of a good relationship from the beginning, you will save time later through more effective communication. At the very least, analyze your cases so that you can triage, choosing the more serious cases to meet with the client with sufficient time before the detention hearing. Finally, if you only have ten minutes, take a deep breath before you go to the holding cell. Slow down your speech. Set aside a few of those ten minutes to show the client that you know how to listen and that you want to hear what he has to say.

A Good Pre-Detention Hearing Client Meeting

Set aside at least 45 minutes to meet. Meet with the client without the pressure of the bailiff rapping his knuckles on the door saying that the judge is waiting. If necessary, ask to have the detention hearing held off to a later time. Meet in a private space where others cannot hear you.

At this first meeting, begin by describing your relationship, the attorney-client privilege and your role as defense counsel. Summarize for the client what the probable cause/detention hearing is about. Explain that you will have a chance to talk more about the case details at a later time. Then focus on your client. Let her talk about what is important to her.

- Ask open questions, not questions to which the answer is yes or no.
- Look at a clock to make sure that, for at least part of the time spent with the client, the ratio of talking is three to one—your client's voice to yours.
- Try responding by simply reflecting back what your client has said to you—not another question, not a judgment, not an answer or solution.
- Recognize and resist the feeling that you need to have answers and be resolving every issue your client raises.

If you talk about what is important to your client you will end up with a lot of information that is relevant to the detention hearing. Toward the end of your meeting you can ask questions directly on point with the issues at the detention hearing. Talk about options, and be open-minded about different possibilities. Try to understand his perspective so you can accurately represent it in court. When you feel you have listened and heard his perspective, provide him advice about strategy for the detention hearing, outlining step-by-step how you came to your conclusions. Write out options on paper and list pros and cons together under each one. Ask him if he needs more time to think.

The Bottom line: No Substitution of Judgment

It can be extremely tempting to become not just a child's attorney but also his savior and mentor. Many young people who end up in the juvenile justice system do not have a single healthy adult in their lives. There is no one who has consistently been there guiding and supporting them. They are often alone, trying to figure out hard issues in life before they should have to. In the example above, anyone would instinctively want to take on the role of protector for that young woman. The bottom line is that professional responsibility requires an attorney to not substitute her judgment for the client's.

E. Should I waive an argument for release when I just know there is no chance I will win?

A decision to waive an argument is a serious one. If the issue is that you are not prepared and the chances of winning release would be better if you had more time, consider a motion to continue the hearing or a motion to reserve an argument for release to a later date. Any decision to put off an argument for release should balance the additional time the youth will spend in detention with the improved chance of release if additional support is gained during the delay. If the case is high profile, or if the facts are sensational and witnesses and others are angry, it may be worthwhile to put off the argument for detention until things have cooled down a bit. The stakes are high, though, because in addition to leaving your client in detention for the intervening period, delay will make your client's detention the status quo and could make a future argument for release more difficult.

If you are feeling like no amount of preparation or delay is going to convince the judge to release your client, it does not necessarily mean the argument should be waived.

There are reasons to consider arguing for release even if you think you know your motion will be denied. Consider:

It builds trust between you and your client.

If a defender tells a client "I just know that there's no way the judge is going to release you so I don't think we should argue for release..." the client may gain respect for the defender's ability to assess the situation, but might also end up with the uneasy feeling that the defender is aligned with the prosecution.

The detention hearing is likely to be the first time your client is in court, and it is the first chance to see you in action. It is a powerful thing for a client to watch you stand up against what might be a room full of people who oppose you. It is powerful for a client to hear you speak on his behalf, putting a voice and words to his perspective. Even if you lose, your client will have seen you stand up on his behalf and know that you are willing to fight. This helps lay the foundation for trust in the attorney-client relationship, and as a result your client may speak with you more openly about issues that need to be addressed and also may be able to listen more openly to you as you work on the case together.

You don't really know what the judge will do.

Every defender has had the experience of unexpectedly happening to hit the right nerve at the right time. No matter how many times you have appeared in front of a judge, you cannot really know how she will respond to arguments,

because each argument is filled with different facts. If a defender does not make an argument for release, then the outcome is certain.

Regular argument can shift perspectives in a court community.

If defenders regularly argue for release and put before the court and juvenile justice professionals information about the harmful nature of detention and descriptions of alternatives to detention, perspectives can shift over time. Arguments for release can be a part of a bigger plan for educating those in the juvenile justice system and chipping away at old assumptions.

Persistence can pay off.

One school of advocacy uses the “bug ‘em until they beg you to go away” method. Even if your court is hell-bent on detention for many cases, eventually something you say will almost make sense, and combined with the fact that the judge wants you to just shut up, he will decide to release a client or two.

Losing an argument doesn’t mean losing credibility.

Particularly in smaller communities, defenders struggle with maintaining credibility and respect with the court. Some choose a route of appearing moderate or reasonable, only asking for what might be perceived to be a sensible resolution to an issue in a case. These defenders may think to themselves “The court will only listen to me if I say reasonable things when I am in court.” This is true, of course. Any lawyer in court wants the judge to believe that when she speaks, she will say something worth listening to. Lawyers do not build credibility with most judges, however, if they only argue what it seems the judge wants to hear. That stance is more likely to engender disdain or disrespect. The ABA Juvenile Justice Center state assessments of quality of counsel for juveniles consistently reported that many judges interviewed were concerned about the lack of zealous representation on the part of defenders and its effect in weakening the entire system.²⁹ Defense attorneys build credibility by being prepared, knowing the client’s needs as well as the resources in the community available to meet them, and stating what is true in a manner that is clear and not exaggerated. Defense attorneys build credibility by showing courage and fulfilling the role of defender in the system. In thinking about building credibility with a court, a defender should analyze, on a case-by-case basis: “Do I really have anything to lose by making a losing argument?” Certainly there will be times when it is best to save an argument for a winning issue. It is not completely unfounded to be concerned that if you make a weak argument, the judge will not listen to you on your next argument. It is a mistake, however, to

take that sentiment too far—the result can be a form of self-censorship that ultimately reduces a defender’s effectiveness.

Detention hearings have the advantage of being focused on discreet issues. The defender’s credibility on an entire case does not rest on what happens in a detention hearing. A losing argument, even what might be considered a far-fetched argument, can be made at a detention hearing and then it is over. The next hearing is likely to be on different issues that are unaffected by the detention argument.

F. How can I argue for release when our community does not have good placements outside of detention?

Available resources clearly have an effect on local detention policy and practice. Often children and youth are placed in secure detention not because they are flight risks or dangerous but because alternative programs are not available or because no less-restrictive alternative, short of unconditional release, has been previously accepted by the judge or in the jurisdiction.

The *IJA/ABA Juvenile Justice Standards* provide the following recommendation:

The attainment of a fair and effective system of juvenile justice requires that every jurisdiction should, by legislation, court decision, appropriations, and methods of administration, provide services and facilities adequate to carry out the principles underlying these standards. Accordingly, the absence of funds cannot be a justification for resources or procedures that fall below the standards or unnecessarily infringe on individual liberty. Accused juveniles should be released or placed under less restrictive control whenever a form of detention or control otherwise appropriate is unavailable to the decision-maker.³⁰

(See Appendix E for the full text of *IJA-ABA Juvenile Justice Standards Relating to Interim Status*.)

Most states’ statutes do not explicitly permit children and youth to be placed in detention merely because appropriate alternatives do not exist. Many children and youth end up in the juvenile justice system, however, because they have underlying problems and community service systems are failing them.

A typical victim of this pattern is a young person with serious mental health problems. It may be that everyone in the courtroom agrees he does not belong in detention, but it is clear that he should not be released without services in place, in the community or even in a residential treatment program. When the appropriate services do not exist, courts often make the decision to detain, reasoning that detention will be safer than release. A judge might state this directly: “I am not going to release you because there is no place to send

you.” A different judge might make the decision for the same reason, but state on the record, “The juvenile presents a danger to the community and so I am going to detain him.” In some cases this may in fact be true: without the proper treatment, the youth may be dangerous, but the fact remains that detention is not an appropriate placement.

There are a number of ways to challenge a decision to detain based on a lack of community resources in a detention hearing:

State What is Really Happening

Even if it is not stated directly in court, the defender should bring attention to the true motivation for detaining the youth. “Your Honor, I object to my client being detained. He is not being detained for statutorily permissible reasons, but because there is no placement for him. I ask that he be released pursuant to _____ [state detention law].” This statement can be important to make even if you do not believe it will change the judge’s mind. It is the kind of statement that can begin to shift the perspective of judges and other juvenile justice system personnel, which can be helpful in later cases or in efforts for systemic change. It may also help lay the foundation for an appeal.

Cross Examine the Probation Officer

Even though this is not normally done, consider cross-examining the probation officer.

“You have examined Ron’s records?”

“Spoken with his mother?”

“You are aware Ron has been diagnosed with a mental health disorder?”

“That the diagnosis is severe depression?”

“Ron has been in detention for three days?”

“And while in detention he has been involved in assaultive incidents?”

“In his three days in detention there have been three incidents of assault?”

“Ron has been removed from the general detention population?”

“He has been placed in an isolation cell?”

“He is only allowed to leave the cell for an hour of exercise a day?”

“It’s fair to say he is not doing well in detention?”

“You have looked for a placement for Ron outside of detention?”

“You didn’t have much luck, did you?”

“You looked for a placement outside of detention because you hoped to have Ron in a more appropriate setting than detention?”

“A setting that could better address his depression and behavior?”

“You are recommending Ron remain in detention?”

“You are making this recommendation because you were unable to secure an appropriate placement outside of detention?”

With affirmative responses to questions similar to these, you have established that at least part of the probation officer's motivation in recommending detention is not a statutory basis for detention. Don't fall into the trap of asking one too many questions... Depending on your relationship with the probation officer, you may not know what the answers will be, and it is unlikely that the probation officer will blurt out, "I want him detained because he is mentally ill." You can make that conclusion when you sum up the officer's testimony. If you push the probation officer, it is more likely that she will make a statement that ties the recommendation to a statutory purpose, such as "I want him in detention because his mental illness makes him dangerous."

Although the line of questions above helps a probation officer "save face" because it portrays his decision process as rational, the officer may still feel defensive. The officer may try to interject "But I think he is a danger to the public as well..." Follow up with questions to expose the problem with that reasoning.

"You are a level IV probation officer?"

"You have 10 years of experience?"

"You have received training regarding the mental health problems of adolescents?"

"You are aware that for adolescent boys, one symptom of depression can be aggressive behavior?"

"And another symptom of severe depression in adolescent boys can be reduced impulse control?"

Obviously this kind of questioning is very fact-specific, and the more details the defender can rally about the circumstances of the client's life and the detention facility, the more effective the questioning will be.

Recommend Second-Best Alternatives

In some cases, a defender can argue that even though the optimal alternative to detention is not available, the next best alternative should be ordered instead of detention. Frame your argument in terms of choices: on one hand, detention for which there are not legal grounds, on the other, an opportunity to order an alternative that will guard public safety, support appearance in court and provide at least some services.

Argue that Detention in this Case Violates the Purpose of the State Juvenile Justice Laws

Read your juvenile act or code carefully: What is the stated purpose of juvenile justice? Contrast it with the purpose of the adult criminal code. Craft an

argument that demonstrates detention of a juvenile for lack of resources is a violation of the purpose of the code.

Argue that this is an Abuse/Neglect Issue, or the Result of the Failure of a State Agency

Spend just one day in any juvenile court, and the connection becomes obvious. Many juvenile offender cases are really abuse/neglect cases where the state agency has failed to provide what the youth needs to survive. Perhaps mental health services were not provided or the child was moved from one inappropriate foster care placement to the next. The defender's role is to help identify those failures and draw the connection to the behavior that landed the young person in juvenile court.

Some states have laws that permit the juvenile court to join a delinquency case with an abuse/neglect case. In other states, it may be possible to have a state social service agency named as a party in the offender matter. The defender, or the client herself, may be able to file a dependency (abuse/neglect) petition. Other options include petitions for "Child in Need of Services" or "Persons in Need of Services."

Appeal Detention Decisions

Pre-trial detention issues do not get appealed very much. This may be due in part to the fact that the juvenile offender matter is moving forward and the defender's attention is focused on the important issues in the case. Consider appealing detention decisions if your court regularly detains young people because there are insufficient community resources for alternatives to detention. If your jurisdiction does not require that a record of the proceedings be made, bring your own tape recorder and record the hearing yourself. It is important to exert pressure for change from many different places. Read Chapter 3 of this guide for more ideas on systemic change.

G. If my motion for release is denied, when can I raise it again?

This will be determined by statute and court rule. Some states have regularly scheduled detention review hearings. Don't waive the time period for these hearings unless you have a case-specific strategy for doing so. If review hearings are not required by statute, then there is often a requirement that circumstances must have changed before an additional detention review is set. If additional facts supporting release can be brought before a judge, a detention review hearing should be held.

Set another detention hearing or raise the issue at other hearings

Raise your original arguments, but present additional facts and information that address the reasons the judge first denied your motion. Supplement those arguments with the reality of your client's detention. For example, when you can, argue that your client:

- Has spent more time in detention than he will receive as a sentence if found guilty.
- Has now missed X amount of time in the special education program she needs, or missed X number of sessions with a counselor with whom she has a relationship.
- Has done well in detention, learned a "lesson" and deserves a chance to try again on the outside.
- Has the opportunity to take advantage of additional services that did not exist at the time of the last detention hearing.
- Should be released to begin services that will likely be a part of her disposition.

Make your own tracking device

Defenders should consider developing a tracking system for the cases of detained clients, so there are automatic reminders to follow up. A simple system could entail a practice of always making a note on a future date in your calendar.

- When you get back from court, before the case file goes into the filing cabinet, you should make a note in your calendar.
- You should choose a date that follows your statutory timelines or just makes sense for this case.
- Your notation should be in a special color for detention issues, so you will know exactly what it is about when you look at that date in your calendar.
- You should list next to the note an action to take with regard to the case:

See probation officer: What is status of _____ [community-based alternative]?

Set review hearing.

Contact group home re: openings.

Go back to the probation officer

If your detention release plan fell on deaf ears in court, see if later you can convince the probation officer of the plan's validity. If another detention hearing is an option, you will have a better chance if the P.O. is with you.

Change your alternative detention plan into an alternative disposition plan

If it looks like pre-trial release is not going to happen, consider whether your detention alternative plan might be the foundation of a disposition alternative plan. Work to flush out

the details, and see if you can get the probation officer or prosecutor to agree to the plans you had begun to establish.

VII. OTHER STRATEGIES TO ARGUE FOR RELEASE

A. How should I analyze our jurisdiction's laws on pre-trial detention?

Whether pre-trial detention laws are lawful or not requires an inquiry as to whether the statutory scheme is compatible with the “fundamental fairness” required by due process.

In *Schall v. Martin*, the U.S. Supreme Court scrutinized New York's pretrial detention law permitting brief pretrial detention based on a finding of “serious risk” that an arrested juvenile may commit a crime before his return date.³¹ The court gave a two-tiered analysis of whether the New York statute violated due process rights:

Two separate inquiries are necessary to answer this question. First, does preventive detention under the New York statute serve a legitimate state objective?...And, second, are the procedural safeguards contained in the [New York law] adequate to authorize the pretrial detention of at least some juveniles charged with crimes?³²

The *Schall* court concluded that New York's statute was lawful and, therefore, certain youth can be subject to pretrial preventative detention.

Ask: Is there a legitimate state interest?

Pre-trial detention cannot be for the purpose of punishment. It must serve a legitimate governmental purpose. In juvenile court matters, the state has “a *parens patriae* interest in preserving and promoting the welfare of the child.”³³ Pre-trial detention can serve the legitimate state interest to protect “both the juvenile and society from the hazards of pretrial crime.”³⁴

Defenders should examine their states' pre-trial statutes and apply the analysis outlined in *Schall*. Examine whether there is a statutorily legitimate state interest, asking questions like:

- What is the statutory purpose of pre-trial detention?
- Is it punitive?
- Is it limited in time?
- If the stated purpose of the statute is not punishment, do the conditions of confinement in fact make pretrial detention punishment?
- Is there a range of detention options?

Ask: Are there procedural safeguards?

In *Schall*, the Court found New York’s procedural safeguards sufficient. They included notice, a hearing, a statement of facts and reasons prior to detention and a formal probable cause hearing held within a short period of time.³⁵

Examine whether there are sufficient procedural safeguards, asking questions like:

- Is a probable cause hearing required by statute?
- Is the hearing set in a prompt manner?
- Does the juvenile have a right to notice and information as to why he is being detained?
- Is there the opportunity to be represented by counsel?
- Is there the opportunity to argue against a recommendation of detention?
- Can witnesses be cross-examined and evidence presented?
- Must the court state its reasons for a decision of detention on the record?

Ask: Do the pre-trial detention laws violate the Fourth Amendment?

The protections afforded juveniles under the Constitution are not limited to the Due Process Clause. As described above in Section III, *The Issue of Probable Cause*, there is a strong argument that a detention scheme that allows a youth to be detained longer than 48 hours prior to a judicial determination of probable cause is a violation of the Fourth Amendment under the cases of *Gerstein* and *McLaughlin*.

Scrutinize your state laws or local rules. Don’t assume their constitutionality, and don’t be afraid to raise new issues.

B. What are other strategies I can use to gain release of my client if I did not succeed at the initial hearing or on review?

Once you have exhausted the standard procedures available to obtain your client’s release from detention (including direct appeal), the writs of habeas corpus, mandamus, and prohibition become available. Survivors from the old English writ system, these mechanisms remain a part of the common law and, in some states, have been codified in statutes. The writs are considered extraordinary remedies—measures that are not available to a party unless necessary to preserve a right that cannot be protected by a standard legal or equitable remedy. In the context of pre-adjudication detention, these writs can be used to protect the youth’s right to liberty when the juvenile court has illegally ordered his detention.

Before petitioning a court for a writ, you must determine which writ or combination of writs to seek and in which court to file. Both of these questions require a case-by-case, state-by-state analysis. The writ of habeas corpus is specifically aimed at illegal imprisonment and is the theoretically correct writ to use to challenge detention. However, phrasing the challenge as a request for mandamus or prohibition may be more likely to succeed in some cases, depending on how the jurisdiction in question has modified the common law. Multiple writs are frequently sought in the alternative (i.e. such that if one fails, the other is considered), especially mandamus and prohibition. (See Appendix F for basic examples of petitions for writs.)

The decision of which court to file in will be determined, in part, by state law, but also by the temperament of possible courts or judges. In making the ultimate decision about whether to seek an extraordinary remedy, be sure to ask your colleagues how the juvenile court judge involved might react to a decision to go over his head to challenge detention. Whether or not the youth is released, the original juvenile court judge will make the decisions on adjudication and disposition.

***Habeas corpus* (Latin “that you have the body”)**

The writ of *habeas corpus* is best known as a collateral attack on a conviction or sentence after a case has reached final judgment and all direct appeals have been exhausted, but it is not limited to that application. *Habeas corpus* can be used to challenge any illegal imprisonment or detention if no other remedy is available. A youth initiates *habeas corpus* proceedings by petitioning a court to issue the writ directed at the party that has actual custody and the ability to physically produce the youth (i.e., the officer in charge of the detention facility). Many state constitutions grant original jurisdiction over *habeas corpus* petitions to all of the state trial and appellate courts, but whether those courts can actually entertain such petitions can vary based on statutory rules. The petition is normally made to the lowest court of general jurisdiction in the county or district in which the person is restrained. Technically, an issued writ requires the jailer or warden to bring your client (the “body”) to an evidentiary hearing, but courts can skip this step and rule directly on the merits.

***Mandamus* (Latin “we command”)**

This writ is issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly. The proper respondent is the lower court judge or government officer. In this context, the higher court commands the juvenile court to perform its duty to make the detention decision correctly by not detaining the youth or orders the officer in charge of detention to release the youth.

Prohibition

This writ is issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a non-judicial officer or entity from exercising a power. Again, the proper respondent is the lower court judge or government officer. Here, the higher court prohibits the juvenile court from ordering the detention of the youth or the officer in charge of detention from detaining the youth.

A good example of the use of writs to challenge detention is the Florida case of *J.J. v. Fryer*.³⁶ At the detention hearing in that case, the Florida Department of Juvenile Justice (DJJ) indicated that the juvenile, J.J., had a score on the Risk Assessment Instrument (RAI) that was too low for detention. Nonetheless, the DJJ argued that the judge could raise the RAI score. Meanwhile, J.J.'s mother told the court that she wanted her son detained. The judge placed J.J. in detention. J.J.'s attorney filed a petition for a writ of *habeas corpus* in the District Court of Appeals (the next court up the ladder from the juvenile proceeding in Circuit Court). The District Court granted the writ, but rather than holding an evidentiary hearing, ruled on the ultimate matter as well, ordering J.J.'s release. The District Court held that the Circuit Court had violated the statute in ordering a detention not authorized by the RAI score, making J.J.'s detention illegal. (See Appendix B for full text of *J.J. v. Fryer*.)

Heightened levels of detention advocacy can have a profound effect not only on your case but on the life of your client. Preparation for and representation at detention hearings is crucial, but your clients can also benefit from other modes of advocacy. The next two chapters describe how juvenile defenders can strengthen their individual representation and their involvement in systemic reform. Chapter 4 provides concrete research and information about the detrimental impacts of detention that you can use to bolster your arguments inside and outside the courtroom.

Chapter 2

Detention Advocacy Outside of the Courtroom

I. BEYOND THE COURTHOUSE WALLS

Detention hearings are not the only place where decisions about detention get made, and judges are not the only people making the decisions. Assessment centers and detention facility workers make detention decisions when a police officer delivers custody of a youth. Before that, police officers consider whether to detain a juvenile suspect in every arrest they make. And, in a very real way, the laws, policies and practices of a region determine detention decisions before a child is ever arrested.

Whether negotiating with the police officer on the beat or organizing for systemic change, defenders can play an important role at many decision-making points. This chapter will offer suggestions on defender involvement in detention issues outside of the courtroom.

Whether negotiating with a police officer on the beat or organizing for systemic change, defenders can play an important role at many decision-making points.

II. DETENTION BY THE POLICE

A. Under what circumstances does a police officer decide to detain a youth in a detention facility before criminal charges are brought?

When the police stop a youth, the arresting officer becomes the first decision-maker on the issue of detention. A police officer must have probable cause to

detain any person on criminal allegations. Each state's laws and the federal Constitution define the meaning of probable cause for the jurisdiction in question.

In some jurisdictions, the police officer is the only pre-judicial decision-maker, and if she decides the youth should be detained, the youth will be put into detention. In other places, police bring a young person to a detention facility or assessment center, and the initial decision to detain is made there. The range of possible actions a police officer can take varies from state to state but can include:

- Release the youth outright
- Deliver him to a shelter providing shelter care, counseling or diversion services to minors
- Release the minor on her written promise to appear before a county juvenile probation officer
- Release the youth to a parent, guardian or other responsible relative, who may be required to sign a written promise to appear along with the juvenile
- Deliver the youth directly to the county probation officer, assessment center or detention facility
- Deliver the youth to the court

Check your state's statute for the specific range of options.

If a police officer decides to deliver the youth to a detention or assessment center, state or local law will probably require the police officer to prepare a written statement of probable cause that will be reviewed later by a judicial officer.

B. What factors does a police officer consider when deciding whether to put a young person into detention?

Some states have laws directing the police to consider specific factors in making a decision about whether to detain or deliver to a detention facility a youth who has been arrested. Other states leave the decision up to the police. Typically, a police officer focuses on the circumstances of the arrest as the major factor in deciding whether to detain a youth. Police will consider other factors, such as prior arrests, any known failure to appear at court in the past and the youth's home situation. It is also very common for police to figure in the "cooperation level" of the arrestee in weighing whether to take the youth home or not.

If you are a defender in a jurisdiction where the police have the responsibility to decide whether a child will be detained in a detention facility, it is likely that those decisions are being made without specialized knowledge about adolescents. Few police officers receive training specific to adolescent issues, leaving them without the tools necessary to make

good decisions. In Lancaster County, Nebraska, “when law enforcement officers pick up juveniles, they have to drive around trying to determine the appropriate means of dealing with the offender.”³⁷

Without direction, limits or guidelines, police decisions to detain are likely to reflect the interests, experience and bias of individual officers. A defender who later will argue against detention before a judge should explore ways to demonstrate the limited reliability of a police officer’s decision to detain. Perhaps the officer made a good on-the-street law enforcement decision, but by the time the matter has come to court, the considerations are different, and the decision-maker should have more complete information.

C. What role does a defender play when a police officer is deciding whether to detain a youth?

The fact is, in most situations, defenders will not have the opportunity to influence this earliest of decisions to detain. But sometimes you can. Every now and then, a parent will call and tell an attorney that the police have taken in her son or daughter. Occasionally a youth asks for and is given access to an attorney at this stage. Often, however, a defender won’t even know of the arrest until much later. Some areas have made efforts to close this gap. In Chicago, a program called “First Defense Legal Aid” provides 24-hour stationhouse representation with volunteer lawyers. Other places have an on-call public defender available day or night.

If you do learn that a client has been arrested, call the police station immediately and ask to speak to the arresting officer. If you are put off (“Gee, we don’t know which officer has arrested your client, and if we do know, we don’t know where the officer is...”) get the name of the person you are speaking to and make a clear statement:

“I represent this child. She wants to talk with her attorney right now and before making any statements. I am asking you to pass that information on to the arresting officer.”

Make a note of the name of the person you spoke with and the time of your phone call. Go up the chain of command, demanding to be told the location of your client. *“May I please speak to your supervisor?”* Legally, an attorney may not be able to independently assert the right to the Fifth Amendment privilege. It doesn’t hurt to try.

The first priority must be to help a client assert his or her right to remain silent. While not obviously related to the issue of detention, arresting officers will often tie the two together when interviewing a child. *“Cooperate with us, just tell us what happened, and we’ll be able to release you and let you go home. If you don’t give a statement, we’re going to have to take you to juvie.”* Some states have statutes regulating any interrogation during this

period between arrest and first appearance in court. Be sure you are familiar with your state's law on this point.

Remaining silent is related to detention in another important way: If the police do not have enough facts for probable cause without a client's statement, then the client cannot be arrested and detained. If your client talks, she may fill in just the right facts for probable cause.

It is best to meet with a client who is facing interrogation in person. In most cases this is not going to be possible, and you will only be able to advise your client over the phone. If it is a serious case, because either the crime is serious or it seems like the matter will be high profile, you should make every attempt to go to the police station to advise your client in person.

If you reach the arresting police officer, ask to speak with your client over the phone and ask that your client be given a private place to conduct the telephone conversation.

When you speak to your client over the phone:

- First ask your client if she has privacy — is she alone in the room? Has the police officer moved far enough away that the phone conversation cannot be heard? If not, tell the client to ask politely for privacy.
- Next explain to your client that you are not going to ask about the details of the case right now, but she will get a chance to talk with you about the case at a later time.
- Tell the client that the most important thing at this point is for her not to talk about the allegations with the police. Explain that she will have to tell the police officer that she does not want to talk.
- Ask your client questions to make sure he understands what you are saying. Many kids really do not understand the right to remain silent. For those who do, the ability to assert that right is tempered by their desire to please adults. In addition, if your client thinks he is not guilty of the accusations, the only thing he will want to do is explain everything and talk his way out of this problem. Or he may be worried about whether he is in big trouble and hope to make things better by cooperating.

"Do you understand why I am telling you not talk to the police right now?"

"You'll get a chance to explain things later. You'll be in a better position to do that after we have looked at the police report together."

"It's your legal right to not talk."

"Right now a statement could get you into more trouble."

"Do you agree that you shouldn't talk with the police right now?"

- Explain to your client that, regardless of what the police have said, giving a statement will not increase the likelihood of being sent home. It is difficult for

most adolescents to grasp that police officers can lie to them. Explicitly tell the client that case law permits an officer to make untrue statements to get a suspect to talk. If your client feels she is innocent, explain it is better to wait and see what the police investigation produces before giving a statement.

- Ask the client directly:

“Do you think you can tell the officer that you do not want to talk?”

With some younger clients, or clients who are upset, you may want to say:

“Practice saying it right now with me. Let’s hear how you’ll tell the officer.”

For many clients it is helpful to have them write out the words “I do not want to talk, I want to see my attorney,” on a piece of paper and hand it to the police officer.

If the client is crying while you talk, stop for a moment. Even over the phone you can say things that are reassuring:

“You’re not alone right now. I’m on your side. No matter what happened here we’ll work on it together.”

- Ask your client for basic information regarding her living situation:
 - Whether she can return home, and if not, whether there is another place she can go to stay
 - Whether she is attending school, working or participating in any other regular activities
- Tell your client you are going to ask the police officer to release her. Explain that the officer may decide to detain her anyway, and in that case, you will work on getting her released at the next court date.
- Give the client an approximate time she can expect to be in court.
- Don’t forget to ask if she has any questions.
- Ask your client to tell the police officer that you would like to speak with her again.

Once you are back on the phone with the officer, tell him that your client does not want to give a statement at this time and is asserting her right to remain silent. If you have information that could positively impact a detention decision, tell it to the officer *before* you ask whether he plans to detain the youth. Give the police officer reasons to release the youth before the officer has made a statement that would have to change after your input.

“Officer, I want to pass on to you that I have spoken to my client’s mother, and she can pick my client up at the station and take her home. My client has been attending school regularly, and when I have represented her in the past she has had no failures to appear. Is there any other information you need to release her?”

Stationhouse representation, either in person or by phone, can help ward off damaging and coerced statements by young respondents.

III. DETENTION SCREENERS AND ASSESSMENT CENTERS

A. Under what circumstances do screeners at detention facilities or assessment centers make a decision to detain?

State or local policies determine who makes the early decision to detain. Typically, a detention facility or assessment center takes custody of a youth after police finish processing the criminal case. In some jurisdictions, the police officer's decision to detain is the final one before the child appears in front of a judicial officer. Other jurisdictions have assessment centers with trained personnel or local detention facilities with designated "screeners" who gather information and make detention decisions. Even if the arresting officer does not have the final word on whether the youth will be detained, the police officer's opinion will influence the decision.

B. What are the grounds on which a youth may be detained by a screener at a detention facility or assessment center?

Just as when detention decisions happen in court, if a youth is brought in on a warrant or other court order, no further analysis needs to be made regarding detention. If a youth is arrested without a warrant, the police are required to establish probable cause. Once probable cause is established, the screener will primarily focus on public safety and the likelihood that the youth will return for future court hearings in determining whether to detain the youth.

Screeners may have additional grounds for detaining a minor, however. For example, many state statutes require detention of a youth who is alleged to have committed an act of domestic violence or a crime involving a firearm. In California, police turn over custody of an arrested minor to a probation officer, and state law requires the probation officer to detain the youth if, among other things, the child is in need of "effective parental care," is destitute, does not have a home or suitable place to live, or his home is unfit due to neglect, cruelty, depravity or physical abuse by the parents or by the guardian.³⁸ Although this seems like grounds for opening an abuse/neglect cause rather than detaining a child, it is the law in California.

C. What is the process used by a screener at a detention facility or assessment center to make the detention decision?

It is important to recognize that all juvenile justice systems have some kind of process for deciding which children should be detained and which should be released. The system may be as simple as a dog-eared page with a list of questions taped to the wall over the intake desk or instructions passed down from detention worker to worker to "admit all who come

in on violent crimes and release those alleged to have committed misdemeanors if you can reach the parents.” Other places will have trained personnel using risk analysis instruments that have been validated for the local population. Some states have fairly specific statutory guidelines. For example, the Florida statute provides:

(a) During the period of time from the taking of the child into custody to the date of the detention hearing, the initial decision as to the child’s placement into secure detention care, nonsecure detention care, or home detention care shall be made by the juvenile probation officer...

(b) The juvenile probation officer shall base the decision whether or not to place the child into secure detention care, home detention care, or nonsecure detention care on an assessment of risk in accordance with the risk assessment instrument and procedures developed by the Department of Juvenile Justice... However, a child charged with possessing or discharging a firearm on school property ... shall be placed in secure detention care...³⁹

In contrast, Nevada law gives very little guidance to those deciding whether to detain a youth in most cases. While mandatory detention is specified for several crimes, for most situations the law gives broad discretion:

Unless it is impracticable or inadvisable or has been otherwise ordered by the juvenile court, the child must be released to the custody of a parent or guardian or another responsible adult...⁴⁰

In many states, the people who run a detention facility will determine the process they will use.

It is important to recognize the detention facility’s process as a *system*, and not just a void, because institutions institutionalize. Institutions take practices and make them, either directly or indirectly, into rules — “the way things are done.” People get attached to the way things are done. Chapter 3 of this guide is a discussion of how to analyze and change detention practices, policies and rules regarding detention. An effective analyst will begin by recognizing the systems in place.

If there is no formal systematic method for determining which children are detained and which are released, then the biases of the screener will rule. Subjective perspectives will always play a role, but when there is no formal screening process, then the opinions of the screener become more significant. This is one place where racial and cultural biases come into play. In addition, the results of the screening will vary from one worker to another, depending on factors of experience and perspective.

But even systematic screening may produce bad results. Systems can be based on inaccurate assumptions or use methods that allow for a screener’s bias to pollute the outcome.

D. What is a “risk assessment instrument”?

A risk assessment instrument is a formalized analysis of risk factors used to predict future behavior. It is essentially a survey of the youth’s circumstances that assigns values to certain predetermined factors and produces a numerical risk “score.” In the context of a detention decision, risk assessment instruments are used to determine whether a youth is likely to be a public safety threat until the adjudication of the case or whether the child is likely not to appear for subsequent hearings.⁴¹ Factors may include:

- Age at first referral
- Prior referrals
- Family dynamics (family problems, parent control)
- School behavior or problems
- History of abuse and/or neglect
- Referrals for assault
- History of out-of-home placement
- Substance abuse
- History of parental incarceration

A good risk assessment can offer objective, valid grounds for deciding to put a child in detention. There are several things to watch for, however.

First, a risk assessment instrument should be locally validated. Some social scientists believe an assessment tool should be reviewed every few years. An evaluation of Arizona’s juvenile risk assessment process notes that a core set of risk factors appear “repeatedly, if not universally on empirically validated risk assessment instruments.” But the report points out that other factors have been shown to be reliable in some jurisdictions but not in others. The report concludes that “[a]n instrument developed in one site or at one point in time may not be transferable...without subsequent validation.”⁴²

Risk assessment tools can be intrinsically racially biased. However, a good risk-assessment tool actually can reduce bias in decision-making and result in the reduction of disproportionate minority incarceration. A bad one may exacerbate disproportionality. Multnomah County in Oregon has had success in reducing the over-representation of minority populations in detention, and that success is attributed in part to the design and implementation of its risk assessment instrument, which was carefully constructed to avoid racial bias. The Center on Juvenile and Criminal Justice’s report *Reducing Disproportionate Minority Confinement: The Multnomah County Oregon Success Story and its Implications* states:

...instead of relying on criteria like “good family structure,” which might be biased toward intact, nuclear families and, therefore, against minority youth, the instrument asks whether there is an adult willing to be responsible for assuring the

youth's appearance in court. Likewise, the risk assessment instrument dropped references to "gang affiliation" that might be biased against youth of color who are often characterized in this manner simply by virtue of where they live. Instead of exclusively using "school attendance" as a mitigating factor, the concept was expanded to include "productive activity." Both were considered good indices of appropriateness for community placement while, for a variety of reasons, the narrower "school attendance" criterion might have skewed the risk assessment instrument to the detriment of youth of color.⁴³

A second thing to watch for when risk assessment instruments are used is training. The people assessing detained youth must be trained to use the instrument. Furthermore, an internal quality control procedure may be a critical component of a successful system. Many risk assessment systems allow an "override" function, permitting the screener to ignore the test result if he disagrees with it. Another reason Multnomah County's risk assessment tool was found to be accurate was that it used a system of internal accountability. The county instituted "quality control checks on a daily basis to insure that youth were being processed expeditiously and that staff were faithfully adhering to the risk assessment instrument."⁴⁴

More and more jurisdictions are using risk assessment tools in detention decision-making. (See samples in Appendix G.) These instruments have the potential to yield positive results, but the opportunity for misuse is great as well. Many institutions do not have the wherewithal to maintain rigorous self-accountability schemes, and local jurisdictions may decide to cut plans for validation and ongoing evaluation when budgets are tight.

E. What role does a defender play when a screener at a detention facility or assessment center is deciding whether to detain a youth?

It is rare for a defender to have the opportunity to influence a detention facility's initial decision to detain. While youth in police custody facing interrogation may ask to speak to a lawyer, they rarely can during detention processing. If a youth is allowed to call an attorney, it is likely to be after he has been processed for admission. If you do have the opportunity to advise a client and/or a parent of a client before they speak with a screener, start by outlining the grounds for detention: public safety and the likelihood that the youth will return for future court dates. Help them focus on elements in the young person's life that demonstrate stability and an adult-controlled setting at home. Review the suggestions about how to form arguments for release in Chapter 1 of this guide.

One way defenders can have a real impact on the detention screening process is by examining the systemic aspects of the intake process and helping to change it for the better. Ideas for how to achieve systemic reform follow.

Chapter 3

The Defender's Role in Systemic Reform

I. SYSTEMIC PROBLEMS AND HOPE FOR CHANGE

Although broad-based reforms have had positive results in some courts, too many jurisdictions continue to suffer from overuse of detention, disproportionate minority confinement and insufficient and inappropriate programming in detention facilities. These problems are acute for youth with mental health problems, educational disabilities and needs unique to special populations, such as girls. In addition, health and safety issues plague old and dilapidated facilities into which youth are overcrowded.

Though defenders are often overworked and may feel stretched exceedingly thin, they are in a strong position to advocate for change in their detention systems. Their access to youth, facilities and the courts gives them the expertise and tools necessary to spark reform. Coordinating with foundation fellows or law clerks and encouraging co-workers and Chief Defenders (if you are in a Public Defender's office) can facilitate the process. There are a multitude of other creative ways to affect systemic change. Time contributed to reform efforts now, such as legal action, public education, and organizing and participating in coalitions, will only help to improve the status of your young clients now and in the future.

Though defenders are often overworked and may feel stretched exceedingly thin, they are in a strong position to advocate for systemic change.

II. USING LEGAL ACTION TO CHANGE THE SYSTEM

A. Individual Case Advocacy

Though raising issues in case after individual case is not likely to change an entire system, having the guts and persistence to raise important issues can have a ripple effect. If you regularly argue for release by presenting information about the harmful nature of detention and the importance of alternatives, you may shift the perspectives of other court personnel. Judges, probation officers and even prosecutors may hear something that puts the reality of detention into perspective. Practices and policies could change as a result. Arguments pointing out the dangerous nature of overcrowded facilities, disproportionate minority confinement or the lack of adequate mental health services – if made consistently, over time – may influence practices or decisions. The downside is that these changes are likely to be informal policies that never become institutionalized, so they could fall by the wayside when individuals move on. Even so, they are still valuable, especially in conjunction with other efforts.

Checklist: Case-by-Case Reform

- Identify issues
 - Determine which detention issues plague your jurisdiction
 - Talk with clients and parents
 - Talk with sympathetic probation officers and detention staff
 - Talk to people in other jurisdictions to get a sense of different practices and policies
- Meet with defenders
 - Discuss detention informally in the hallways or arrange a brown bag lunch to share detention concerns
 - Look for common issues that affect your clients
- Build consensus
 - Try to get agreement from other defenders to raise the issues in their cases
 - Appeal to the strength-in-numbers rationale
 - Talk about prior successes
- Devise a strategy
 - Consider focusing on a particular issue that could begin a ripple effect
 - Think about the goals for change
 - Analyze what arguments will lead to the intended goal
- Make it easy
 - Remember that defenders are busy
 - Create a clear outline of the factual issues and legal arguments
 - Generate stock motions and briefs in support that can be shared among defenders
 - Pass along experiences of defenders who have raised the issues

B. Affirmative Lawsuits/Impact Litigation

Overcrowding. Dangerous conditions. Personal injury claims. Failure to provide mandated services. Racially biased decision-making. Defenders are in the best position to spot these problems, but generally defenders do not have the time, expertise or authority to bring an affirmative civil suit on detention issues. Nonetheless, defenders can play an important role by helping to identify the problems with detention practices and connecting with other attorneys who can take on those issues.

This is not to say that suing over detention issues is the best way to address problems. Lawsuits take a lot of resources, and you don't always win. Even when you do, the ultimate resolution may be the opposite of what you hoped, such as if shutting down a detention center for unacceptable conditions becomes the impetus for funding a bigger facility with more beds. Five years down the line, the county could be detaining more children than ever before. However, even the threat of a lawsuit may put just the right amount of pressure on the right person to force improvements.

Checklist: Individual/Impact Litigation

- Promote individual cases
 - Maintain a list of local private and legal aid attorneys with experience in individual claims against detention
 - When an issue arises, provide clients and/or parents with the names of several attorneys and encourage them to choose one only after interviewing several
- Plan impact litigation
 - Meet with defenders and other people concerned about detention issues and discuss avenues of change
 - Invite local legal services attorneys to participate in the discussion and explore ways of working together
 - Identify issues that seem static and well-suited to legal action
 - Track cases with similar issues
 - Consult with national experts on detention reform to learn about the advantages and disadvantages of the lawsuit avenue
 - Review efforts in other parts of the country

C. Appealing a Decision to Detain

Detention decisions are infrequently appealed. Why? It may be hard for defenders to focus on an issue that seems tangential to the outcome of the case. Once the detention hearing is over, the rest of the case comes barreling down the tracks. There is a lot to be done and little time to do it. A detained client can seem like a temporary matter that will

be solved by resolution of the case itself. As will be discussed in Chapter 4, however, detaining a client impacts the outcome of a case. Another reason detention decisions are rarely appealed is that they are largely based on the judge's interpretation of the facts, and it is difficult to get a higher court to overturn the trial court decision. But some detention decisions—such as equal protection claims for female clients or Eighth Amendment cruel and unusual punishment violation claims—should be challenged, and winning a case on appeal can result in systemic change.

Checklist: Taking an Appeal

- Identify appealable detention issues
 - Discuss the issues with other defenders
 - Meet with attorneys who specialize in appellate work and ask them to describe what the ideal fact patterns would be for this issue

- Explore creating an appellate team
 - See if a private firm would be willing to work pro bono and take on the issue
 - Determine whether a team of defenders can be waiting in the wings to jump in on a case

- Prepare the appellate team
 - Identify issues ripe for appeal so the team can conduct preparatory legal analysis of existing law
 - Encourage the team to prepare briefs in advance to be ready to file appeals quickly
 - Alert appellate team when cases appropriate for appeal arise

III. ADVOCATING FOR CHANGE THROUGH COLLECTED VOICES

A task force or coalition of individuals with an interest in a just and effective juvenile justice system can be used to identify problem areas and advocate for the reform of detention practices. Depending on local conditions, such a group can be composed of internal participants in the juvenile justice system, such as defenders, prosecutors, probation officers, and judges or external community members drawn from community groups, religious groups, mental health providers, etc.

An internal task force has the advantage of starting with members knowledgeable about the juvenile justice system and may smooth the way to reform by galvanizing people within the system who have bought into the need for improvement. But system participants may also be closed-minded and committed to the status quo, limiting the possibility of advocating for real change. As an alternative, a broad-based coalition of individuals and groups drawn

from outside the courthouse, while it may take more work to assemble, can shine light on detention practices and policies and build the pressure necessary for change.

Checklist: Building an Internal Task Force

- Develop alliances with court personnel
 - Start with defenders
 - Talk to other attorneys who are disgusted with misuses of detention
 - Meet with judges and discuss general problems with detention
 - Find people who are usually on the “other side” (frustrated probation officers, detention staff, police officers who see the misuse of detention)
 - Consider a series of brown-bag lunch meetings, once a month for six months, to discuss detention and the problems the participants see with it, focusing on potential actions to take to address them

- Create a court-based detention task force
 - Determine if the chief judge (or other defenders, prosecutors or probation officers in leadership positions) would convene the group
 - Use the alliances you have developed to get participation from as many entities as possible
 - Set specific goals, and set a time frame

- Analyze potential problem areas
 - Existing detention practices
 - Lengths of stay in detention
 - Racial and ethnic makeup of detention population
 - Types of crimes, ages and gender of children being detained
 - Mental health services and educational programs available in the facility
 - Detention staffing, including numbers, training and education
 - Occurrences of assault, suicide and sexual assault

- Issue a report with recommendations
 - Describe why the group came together
 - Provide an overview of methods and information used to look at the problem
 - State the findings
 - Present recommendations for change
 - If possible, outline an action plan for implementing recommended reforms

- Disseminate the report and findings
 - Talk with national and local groups about how to make the best use of your report
 - Alert media of the release to attract press coverage
 - Present information to decision-makers (judges, agency heads, politicians, etc.)
 - Hold an evening presentation where personnel and participants speak about their experiences with detention

Checklist: Working with an External Coalition

- Strategize with people in the community
 - Connect with community groups, religious groups, neighborhood organizations, health care providers, shelters, youth groups, mental health providers, educators, etc.
 - Identify politicians who have shown a commitment to high-risk youth on their other issues
 - Strategize with politically savvy allies: Who might be a friend on this issue? Who might be willing to take a political risk and support? Which high-profile people might lend their support?

- Build diverse coalitions
 - Bring together people and groups that don't usually work together
 - Look for allies within the juvenile justice system who are willing to work with community-based groups for change
 - Identify points of similar concern
 - Encourage people to recognize that working together helps everyone reach their goals
 - Allow groups and individuals to play different roles, remembering that not everyone needs to be involved at the same level
 - Tap into the strengths of coalition members

- Help focus the coalition with achievable goals
 - Create momentum without burning people out
 - Hold public hearings for interested members of the community
 - Set up a task force or Blue Ribbon Review Committee to study the issue and make recommendations for change
 - Arrange meetings with legislators to educate them about the issues and strategize for change in the law
 - Ask community members to meet with the Chief Judge or Administrator of Juvenile Court

Chapter 4

Research on the Harmful Effects of Detention

I. PRESENTING STUDIES TO THE COURT

In addition to legal arguments about alternatives to detention, juvenile defenders should be prepared to present evidence about the negative impact of detention. Numerous research findings show that short-term detention can have negative ramifications for a child and that certain vulnerable populations are more likely to be placed in detention and to suffer for it. Citing studies and reports that demonstrate how harmful detention can be – to both a youth and his community – can help sway decision-makers against the use of detention. Using detention inappropriately, whether by disproportionately detaining certain groups of children or by keeping children who need and would benefit from treatment services in secure detention, runs counter to the goals of the juvenile justice system.

What follows is a collection of excerpts from relevant reports describing overuse and misuse of detention and its harmful effects. Where the complete report is available online, the web site is listed. Where the reports cite studies, the complete citation information is below the excerpt. (Footnote or endnote numbers are included as they appear in the original documents, denoted with asterisks to make clear that they are not endnotes to this guide.) Having this information directly from published experts should allow you to present it in court or to decision-makers.

A period of detention, however short, will have negative ramifications for a client and possibly for the outcome of the case.

II. RESEARCH ON THE NEGATIVE EFFECTS OF DETENTION

The following excerpts provide evidence that youth placed in detention will receive harsh punishments after adjudication, will feel stigmatized because they have been labeled “delinquent,” are more likely to recidivate than youth in community-based programs, and suffer physically and emotionally from crowded conditions in many facilities. Furthermore, placing youth in detention is far more expensive than enrolling them in alternative programs. Presenting these general findings to decision-makers should prove useful, but supplementing this information with facts about your particular jurisdiction’s facilities (e.g., the extent of overcrowding, the costs of a nearby detention facility, etc.) will bolster your arguments.

A. Post-Adjudication Ramifications

Juvenile Crime, Juvenile Justice

Joan McCord et al. eds., National Academy Press 2001

Available at <http://books.nap.edu/books/0309068428/html/index.html>

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Research consistently shows that juveniles who have been in detention are more likely to be formally processed and receive more punitive sanctions at disposition than those not placed in detention, after controlling for demographic and legal factors, such as current offense and history of past offenses (Frazier and Bishop, 1985; Frazier and Cochran, 1986a; McCarthy and Smith, 1986).

Citations

C. E. Frazier & J. C. Cochran, *Detention of Juveniles: Its Effects on Subsequent Juvenile Court Processing Decisions*, 17 *Youth & Society* 286-305 (1986).

C.E. Frazier & D.M. Bishop, *The Pretrial Detention of Juveniles and its Impact on Case Disposition*, 76(4) *J. Crim L. & Criminology* 1132-1152 (1985); B.R. McCarthy & B.L. Smith, *The Conceptualization of Discrimination in the Juvenile Justice Process; The Impact of Administrative Factors and Screening Decisions on Juvenile Court Dispositions*, 24 (1) *Criminology* 41-64 (1986).

B. Increased Recidivism

Unlocking the Future: Detention Reform in the Juvenile Justice System

Coalition for Juvenile Justice, 2003 Annual Report

Pages 22-26

The high price tag of secure detention might be more understandable and palatable if it produced the desired results. But research and experience show that over-reliance on secure detention does not guarantee low crime rates. In fact, reserving secure detention for only those who need it has been found to maintain and in some cases actually improve long-term public safety.^{*47} As San Jose, California, police

chief Bill Landsdowne puts it, “Locking up kids is the easiest way. But once they get in the juvenile justice system, it’s very hard to get them out.”

King County [Washington] prosecutor Norm Maleng also warns about the use of detention for offenders who are not a threat to public safety. “With these kids, the threat of detention can be as effective as detention itself. You don’t want them learning that they can serve time – it is better to use the threat to get them into alternatives that might change their underlying criminal behavior.”

This philosophy was put into practice in Tarrant County (Texas), with Fort Worth as its urban center, when a task force went against the tide by turning down funds from the state legislature to build a larger detention facility. “We looked at the long-range cost of operations and saw how expensive it would be,” recalls Juvenile Court Judge Jean Boyd, who was a member of the committee. “We hired a graduate student to conduct research and saw how locking kids up often increased the long range recidivism rate. It wasn’t a popular decision at the time and we took a lot of heat. But we concluded that our community would be better served and protected by using our dollars for community-based detention alternatives.”

The once unpopular decision has produced popular results. When Tarrant County boys and girls are referred into community-based alternative programs, they have a 93 percent success rate. Success is defined as attending hearings and completing the program without referral for a new offense, a violation of program schedule or unauthorized absences.^{*48}

Jim Stegmiller, former placement coordinator for the Multnomah County [Oregon] Department of Community Justice, keeps studies that examine Multnomah’s detention levels and recidivism rates at his fingertips. He notes that 92 percent of youth supervised in the community appear for their scheduled court hearings and 87 percent stay arrest-free while awaiting their hearings.^{*49} Since 1993, when detention reforms were first put into place, the overall county juvenile recidivism rate has remained very consistent, between 32 and 35 percent.^{*50}

Many studies illustrate that detention reform does not put the community at risk but actually enhances public safety:

- Since the implementation of reforms in King County (Washington), the juvenile detention population has fallen from 191 in 1998 to 118 in 2002, with no sudden upturn in the county’s juvenile crime rate.^{*51} The decrease can be attributed to several factors, such as the economic booms of the 1990s and community/school efforts. But county officials have also concluded that detention reform has substantially contributed to the progress.
- The arrest rate of youth in New York City who passed through alternative to detention programs ranges from 17 percent to 36 percent, compared with a re-arrest rate of 76 percent for youth released from secure facilities.^{*52}
- A San Francisco study sent 1,500 high-risk youth into an alternative to detention project. Upon completion of the project, participants were 26

percent less likely to be rearrested compared to similar youth who were released from secure detention facilities.^{*53}

- From 1993 to 1999 with new detention reforms in place, violent youth arrests in Cook County [Illinois] fell by 54 percent.^{*54} From 1994 to 2000, overall felony arrests for youth in Multnomah County [Oregon] declined by 45 percent.^{*55} These numbers suggest that putting into place less costly detention reforms does not spur a youth crime spree and in fact may contribute to improved public safety.

Citations

^{*47} Joan McCord, Cathy Spatz Widom, and Nancy A. Crowell, editors. Juvenile Crime, Juvenile Justice, executive summary. www.nap.edu/execusumm/0309068428.html (Washington, DC: National Academies Press, 2001).

^{*48} Tarrant County, Tarrant County Juvenile Services Program Description.

^{*49} Multnomah County Department of Community Justice. Juvenile Detention Reform Initiative Training Guide. (Portland, OR: Multnomah County Department of Community Justice, 1998).

^{*50} Ibid.

^{*51} Personal communication with Michael Gedeon, citing county studies.

^{*52} Correctional Association of New York. "Juvenile Justice Project Update - July 2002" [www.correctionalassociation.org/JJP Juvenile Detention Factsheet.htm](http://www.correctionalassociation.org/JJP/Juvenile%20Detention%20Factsheet.htm) (New York, NY: Correctional Association of New York, 2002).

^{*53} Center on Juvenile Crime and Criminal Justice [CJCJ]. "Detention Diversion Advocacy Project Evaluation, Sept. 1999." [www.cjcj.org/programs/detention diversion.php](http://www.cjcj.org/programs/detention%20diversion.php) (San Francisco, CA: CJCJ).

^{*54} Illinois Criminal Justice Information Authority, Sept. 2001, cited in Lisa Feldman, Michael Males, and Vincent Schiraldi, A Tale of Two Jurisdictions: Youth Crime and Detention Rates in Maryland and the District of Columbia. www.buildingblocksfor youth.org/dcמד (Washington, DC: Justice Policy Institute, 2001).

^{*55} Law Enforcement Data System Division, Oregon State Policy, Sept. 2001, cited in *ibid.*

C. Consequences of Overcrowding

Crowding in Juvenile Detention Centers: A Problem Solving Manual

National Juvenile Detention Association and Youth Law Center, December 1998

Information at <http://www.njda.com/learn-materials-pub-r0711.html>

Pages 5-10

Statistical reports that a facility is crowded do not begin to convey the day-to-day reality faced by the children and staff subjected to too many bodies, in too small a physical plant. Because many of those using this manual may be asked to explain the need for systemic intervention to reduce the use of detention in their jurisdiction, this section presents a brief review of the harms and costs associated with crowding.

Crowding affects every aspect of institutional life, from the provision of basic services such as food and bathroom access to programming, recreation, and education. It stretches existing medical and mental health resources and, at the same

time, produces more mental health and medical crises. Crowding places additional stress on the physical plant (heating, plumbing, air circulation) and makes it more difficult to maintain cleaning, laundry, and meal preparation. When staffing ratios fail to keep pace with population, the incidence of violence and suicidal behavior rises. In crowded facilities, staff invariably resort to increased control measures such as lockdowns and mechanical restraints.

The effects of crowding are determined both by spatial (square footage per juvenile) and social (the number of residents sharing a given area) density.^{*18} High social density, such as that experienced when many youth are crammed into a sleeping room designed for fewer youth, has been found to produce physical changes, such as increases in blood pressure and stress related chemicals present in urine. It also results in increased reports of behavioral incidents, assaults, suicides, illnesses, and psychiatric problems.^{*19}

Residents of crowded facilities are more likely to exhibit anger and hostility toward staff and other detainees.^{*20} There is some evidence, too, that staff in crowded, understaffed facilities are simply too overwhelmed to stop fights or protect vulnerable youth from intimidation or assaults.^{*21} Ironically, the residents increase their inappropriate behavior, but staff do less about it.^{*22} As a result, crowded facilities tend to have a higher incidence of disciplinary infractions, escapes, and violence.^{*23} The Conditions of Confinement study found an association between crowding and both juvenile-on-staff and juvenile-on-juvenile injuries for youth housed in dormitories.^{*24}

Crowding intensifies the worst aspects of institutional living. In an atmosphere where no one has enough space, and food and tangible goods are at a premium, life becomes a struggle in which older, more aggressive youth intimidate others for anything of value. Personal privacy is virtually nonexistent, and this increases irritability and tension. Daily routines such as watching television, eating snacks, getting clean laundry, or receiving packages from home become the source of fights. Sexual exploitation and gang attacks abound in this atmosphere, and youth not previously in gangs may affiliate for self-protection. Other youth may act “crazy” to be transferred into special rooms where they feel less vulnerable to attack.^{*25} Juveniles’ perceptions of safety decrease significantly in crowded institutional conditions.^{*26}

Classification becomes almost impossible in crowded detention facilities. Staff are much less able to separate younger, smaller youth, rival gang members, youth with known mental health problems, and aggressive or violent youth. Living unit assignments are made on the bases of institutional necessity, rather than according to the characteristics of individual youth.^{*27} These problems are especially pronounced in the many jurisdictions that use facilities not originally designed for secure detention.

In crowded facilities, security concerns may cause staff to allow only some of the youth in a living unit to be out of their rooms at a given time. This substantially increases the amount of time youth spend locked in their rooms.^{*28} Staff in crowded

facilities are also much quicker to use locked room confinement to deal with increased interpersonal conflict, especially if staffing ratios are not changed in response to increased population.^{*29}

For some juvenile institutions, crowding means that the traditional hardware of adult corrections – lockdown and/or mechanical and chemical restraints – are more frequently employed.^{*30} Even minor misbehavior that normally would be dealt with by informal counseling, such as talking back or acting silly, may result in lockdown by overburdened staff.^{*31} Also, because staff have less time to get to know and interact with youth in their care, they are less able to anticipate and diffuse problems before the crisis stage.

Crowding in secure detention centers makes it more difficult for staff to attend to the needs of youth with mental health and other special needs. Significantly, detention centers operating above their design capacity have higher rates of suicidal behavior. The Conditions of Confinement study attributes this to the fact that overburdened facilities have less ability to screen potentially suicidal youth properly, and have fewer staff resources to supervise and effectively intervene with them.^{*32}

Facilities operating with a population beyond their design capacity experience a reduced ability to provide outdoor recreation counseling, medical/mental health services, and other programming. Crowded facilities may also restrict visiting hours with families, even though family relationships may be central to the detention decision and the disposition of the case. Institutional schools may resort to double shifts in which children receive only half the scheduled school time. Other institutions may simply hold children back in the living unit, where they spend the day watching television or lying on their beds in locked rooms. Youth subjected to these conditions become bored, depressed, and/or angry.

Crowding also results in disturbing physical conditions for youth. When three children are required to sleep in rooms designed for one, one or two may be forced to sleep on thin mattresses on the floor, sometimes in close proximity to open toilets. Children may be forced to sleep in rooms not designed for sleeping, such as dayrooms, infirmaries or isolation rooms, or even bathrooms.^{*33} In facilities where single rooms lack toilets, youth may urinate in their rooms or defecate into towels because staff are unable to quickly respond to requests for bathroom release.^{*34}

Even the most basic services, such as meals and laundry, are difficult to provide in crowded facilities. Although mealtime is one of the most significant events in the institutional day, crowding may result in shortened times for eating or mean that some youth will eat in their rooms. Similarly, time for bathroom use and showering is often shortened to accommodate increased population. Crowding makes it harder to keep the facility clean and in good repair, and to provide sufficient bedding, clothing, and other equipment to meet institutional needs. The plumbing system is burdened and the effectiveness of the ventilation system (air movement, temperature regulation, removal of contaminants) is reduced. These shortages and deteriorated conditions further contribute to heightened tensions among youth and staff.^{*35}

Most of the youth detained in crowded facilities are detained prior to adjudication; they have not even been found “guilty” of a crime. A sizeable number will be cleared of the allegations in court, or found guilty of a lesser offense. Others will be released at detention or arraignment hearings based on findings that they do not need secure confinement. These youth are unnecessarily and unfairly prejudiced in the preparation of their cases. Because crowded conditions result in reduced visiting and delays in making contact with experts or service providers, the period of detention renders them less able to assist in their own defense and, thus, may result in additional time in detention.^{*36}

Working in crowded facilities also takes a terrible toll on staff, who must spend most of their waking hours faced with overwhelming responsibilities in an unhealthy, stressful, and sometimes frightening atmosphere. This is exacerbated by the fact that many staff lack training to enable them to diffuse and handle difficult situations appropriately. In times of crowding, it is especially hard to pull regular staff away from their duties for training. In the rush to provide at least minimally adequate staff coverage for overpopulated facilities, new employees and temporary help may begin supervision of youth without receiving even the most basic training.

For the many staff who came into juvenile work because they wanted to support and assist youth, it is frustrating to see their jobs transformed into little more than crowd control.^{*37} Indeed, crowding has been associated with increased staff burnout and workers’ compensation claims, as well as high staff turnover.^{*38}

Citations

^{*18} Parent, D.G., Lieter, V., Kennedy, S., Livens, L., Wentworth, D., & Wilcox, S. (Abt Associates, Inc.), Conditions of Confinement: Juvenile Detention and Corrections Facilities: Research Report, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice (August 1994) [hereinafter referred to as “Conditions of Confinement”], at 49.

^{*19} Conditions of Confinement, at 49-50; Ray, D.W. and Wandersman, A., “The Impact of Density in a Juvenile Correctional Institution,” 4 Evaluation and Program Planning, (1981) [hereafter referred to as “The Impact of Density in a Juvenile Correctional Institution”], at 185-193; McCain, Garvin, Cox, V.C., and Paulus, P.B., “The Relationship Between Illness Complaints and Degree of Crowding in a Prison Environment,” Environment and Behavior (1976), at 283-290; and Paulus, P.B., McCain, Garvin, and Cox, V.C., “Death Rates, Psychiatric Commitments, Blood Pressure, and Perceived Crowding as a Function of Institutional Crowding,” in Environmental Psychology and Nonverbal Behavior (1978), at 107-116.

^{*20} Darling, J.A., Overcrowding in Juvenile Detention Facilities and Methods to Relieve Its Adverse Effects, Department of the Youth Authority (July 1983) [hereafter referred to as “Overcrowding in Juvenile Detention Facilities”], at 7; “The Impact of Density in a Juvenile Correctional Institution,” at 190.

^{*21} Overcrowding in Juvenile Detention Facilities, at 7-8, and see, Lerner, S., Bodily Harm: The Pattern of Fear and Violence at the California Youth Authority, Common Knowledge Press (1986), at 12.

^{*22} “The Impact of Density in a Juvenile Correctional Institution,” at 191.

^{*23} One of the Assessment of Solutions to Overcrowding survey sites referred to these as “pressure cooker” effects, and confirmed that in times of overpopulation their facility

experienced a dramatic increase in breakout or attempts, staff assaults, destruction of property, and incidents demonstrating a lack of respect.

^{*24} Conditions of Confinement, at 223.

^{*25} DeMuro, P., DeMuro, A., and Lerner, S., Reforming the CYA: How to End Crowding, Diversify Treatment and Protect the Public Without Spending More Money, Commonweal Research Institute (1998) [hereafter referred to as "Reforming the CYA"], at 19.

^{*26} Roush, D., "Far From the Maddening Crowd: The Relationship Between Crowding and Safety in Juvenile Institutions," in The State of Corrections, American Correctional Association (1989), 171-180, at 178.

^{*27} Overcrowding in Juvenile Detention Facilities, at 8, citing Clements, "The Relationship of Offender Classification to the Problems of Prison Overcrowding" (1982).

^{*28} Reforming the CYA, at 20.

^{*29} Conditions of Confinement, at 201-202; Overcrowding in Juvenile Detention Facilities, at 19.

^{*30} Reforming the CYA, at 19-20; Baird, M.I., and Samuels, M., "Justice for Youth: The Betrayal of Childhood in the United States," 5 Journal of Law and Policy 177 (1996), at 182, 197-198; Previte, M.T., "Preventing security crises at youth centers (juvenile detention and correctional centers)," 59 Corrections Today 76 (February 1997), at 77.

^{*31} Reforming the CYA, at 20.

^{*32} Conditions of Confinement, at 208.

^{*33} Green, F., "Juvenile Detention Centers Criticized; Stuff of Dickens Seen in Crowding," supra, quoting from Burrell, S.L. and Wilber, S., "Letter to William F. Burke, Virginia Council on Juvenile Detention (Nov. 3, 1992).

^{*34} "Suit Charges Cruel Conditions in Colorado Detention Center," Child Protection Report (Jan 6, 1995), at 3.; and, e.g., factual findings in Bilbray v. Keith G., Superior Court No. 626554, (opinion filed Oct. 21, 1992), at 33; review dismissed Mar. 28, 1996, 51 Cal.Rptr.2d 200 (1996).

^{*35} Overcrowding in Juvenile Detention Facilities, at 16-20.

^{*36} Lubow, B., and Tulman, J.B., "Introduction: The Unnecessary Detention of Children in the District of Columbia," 3 The District of Columbia Law Review ix (1995), at xv-xvi.

^{*37} Overcrowding in Juvenile Detention Facilities, at 20-21.

^{*38} Overcrowding in Juvenile Detention Facilities, at 45.

D. Cost

Unlocking the Future: Detention Reform in the Juvenile Justice System

Coalition for Juvenile Justice, 2003 Annual Report

Pages 21-23

Secure detention is an expensive option for handling youth undergoing delinquency proceedings. Building new facilities and expanding existing ones are extremely expensive options. Over-reliance on detention can also lead to additional costs associated with high staff turnover, overtime payments and temporary help.^{*42} Plus,

jurisdictions can face litigation for poor conditions of confinement and have to bear the economic brunt of high attorney fees and costly settlements.

Heavy operating costs can mean spending money that would otherwise support crucial local services that benefit the community at large, such as education and recreation. Using detention for low-level offenders also diverts limited juvenile system resources that would be better suited for the relatively few youth who do commit serious, violent offenses.

As Kay Carter, director of Ada County (Idaho) juvenile court services, states, “Keeping kids in detention who shouldn’t be there is not good for the kids and it’s not good for the taxpayers.”

Research shows:

Across the country, the cost of detaining a youth ranges from \$60 to \$300 a day, depending on the number of staff, salaries, and security.^{*43} The annual cost ranges from a low of \$14,000 in Mississippi and Indiana to a high of \$63,000 in Connecticut.^{*44}

The cost to taxpayers of operating one detention bed over a 20-year period is between \$1.25 to 1.5 million, according to Earl Dunlap, executive director of the National Juvenile Detention Association. If the current rate of detention remains constant, American taxpayers will spend billions in operating costs over the next two decades.^{*45}

Research indicates that the cost of detention can be substantially reduced by use of less expensive, more effective and more humane community-based alternatives to detention. When used in the appropriate cases, programs report success rates of 90 percent and higher at a fraction of the cost of secure detention.^{*46} (Success is typically defined as a participant not committing new crimes while awaiting hearings and making scheduled court appearances.)

Compare the Costs

Cost alone should never be the determining factor when deciding on the use of secure detention or a particular alternative. Other factors, such as public safety and the individual needs and circumstances of youth, should be taken into account. True detention reform is multi-faceted, including systemic reform with a range of alternatives to detention and various levels of supervision and restrictions.

Still, it is helpful to see the cost savings of various alternatives which are typically far less costly as shown by these examples:

In New York City:

Cost of one youth in secure detention: \$385 a day.

Cost of one youth in an alternative to detention: \$16-\$24 a day.

Source: New York City Department of Juvenile Justice, 2001, cited in Correctional Association of New York Fact Sheet and Position Papers www.correctionalassociation.org/JJP_Juvenile_Detention_factsheet.htm

In Cook County [Illinois]:

Cost of one youth in secure detention: \$115 a day.

Cost of one youth in a reporting center: \$33 a day.

In Multnomah County [Oregon]:

Cost of one youth in secure detention: \$180-\$200 a day.

Cost of one youth in an alternative to detention: \$30-\$50 a day.

In North Dakota:

Cost of one youth in secure detention for an average of six days:
\$480-\$1,200 (\$80-\$200 a day).

Cost of one youth in holdover/attendant care for an average of one
day: \$288.

Source: North Dakota Association of Counties

In Tarrant County [Texas]:

Cost of one youth in secure detention: \$121 a day.

Cost of one youth in intensive advocacy program: \$30-\$35 a day.

Cost of one youth being electronically monitored: \$3.50-\$3.75 a day.

Source: Tarrant County Juvenile Services

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^{*42} D. Parent and Adt Associates. Conditions of Confinement (Washington DC: Office of Juvenile Justice and Delinquency Prevention, 1994).

^{*43} Sue Burrell, P. DeMuro, E. Dunlap, C. Sanniti and L. Warboys, Crowding in Juvenile Detention Facilities: A Problem Solving Manual. (Richmond, KY: National Juvenile Detention Association and Youth Law Center, 1998).

^{*44} Ibid.

^{*45} Based on the previously cited figure: On any given day, 27,680 boys and girls are in detention.

^{*46} Richard Mendel, Less Cost, More Safety. (Washington DC: American Youth Policy Forum. 2001).

III. RESEARCH ON THE EFFECTS ON SPECIAL POPULATIONS

Certain groups of youth are placed in detention in greater proportions than they appear in the general population or when they do not belong there. Reminding a judge, probation officer, or law enforcement official that the cumulative effect of her daily decisions contributes to the overuse of detention and that she can make better choices – including sending your client to mental health counseling, substance abuse treatment, or special education classes – can help keep your client out of detention.

A. Racial and Ethnic Minority Youth

Detention in Delinquency Cases, 1990-1999

Paul Harms, OJJDP Fact Sheet, Office of Juvenile Justice and Delinquency Prevention,
U.S. Department of Justice, September 2003

Available at <http://www.ncjrs.org/pdffiles1/ojjdp/fs200307.pdf>

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Between 1990 and 1999, the number of cases involving detention increased more for white juveniles (17%, from 173,900 to 203,500) than for black juveniles (3%, from 116,200 to 119,900), in part because the use of detention in cases involving person and drug offenses increased more for whites than blacks. The increase in detention for juveniles charged with person offenses was 8 times greater for whites than blacks (57% versus 7%), and the increase for drug offenses was 6 times greater for whites than blacks (124% versus 21%).

In spite of this trend, black juveniles were more likely to be detained than white juveniles during every year between 1990 and 1999. This was true for all offense categories.

Case type	Percent of all cases involving detention			Percent change in number of cases, 1990–99		Change in number of cases involving detention, 1990–99
	1990	1995	1999	All cases	Detained cases	
Total	23%	17%	20%	27%	11%	33,400
Person	27	22	23	55	32	21,700
Property	19	13	16	-9	-22	-31,800
Drugs	38	21	23	169	62	16,600
Public order	27	19	23	74	44	26,800
Male	24%	18%	21%	19%	4%	11,600
Person	29	23	25	42	20	11,600
Property	20	15	18	-14	-25	-32,300
Drugs	39	22	23	161	55	13,400
Public order	28	20	23	62	38	18,900
Female	18%	12%	16%	59%	50%	21,800
Person	20	17	19	107	102	10,100
Property	14	8	12	15	3	500
Drugs	28	16	20	219	121	3,300
Public order	26	15	20	122	69	7,900
White	20%	14%	18%	30%	17%	29,600
Person	24	19	21	72	57	18,800
Property	17	12	15	-9	-19	-17,900
Drugs	27	14	17	252	124	12,700
Public order	26	17	20	78	41	16,000
Black	29%	22%	25%	20%	3%	3,600
Person	31	25	25	32	7	2,200
Property	24	17	20	-8	-25	-12,100
Drugs	52	34	38	64	21	3,400
Public order	31	20	28	68	50	10,100

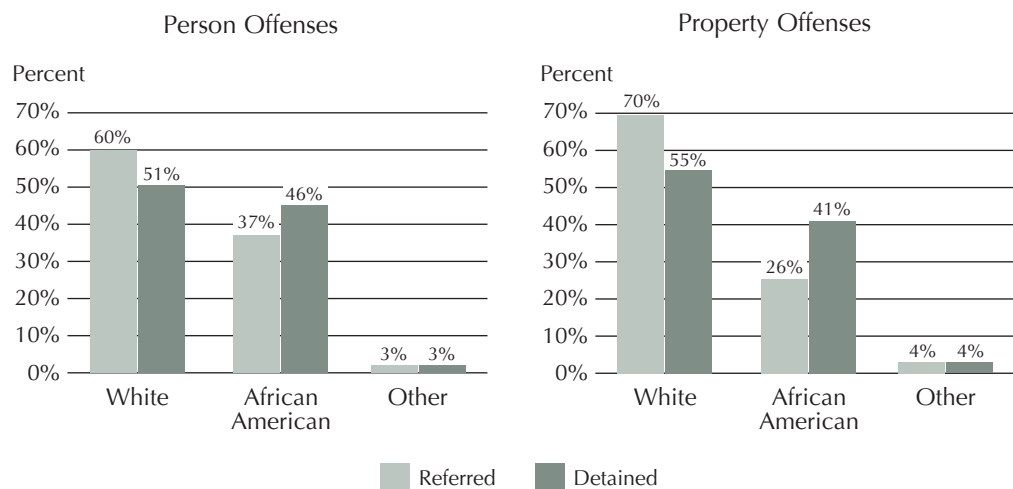
Percent change figures are based on unrounded numbers.

Detention

An estimated 326,800 delinquent youth were detained in 1997. With respect to their proportion in the referral population, White youth were underrepresented while African American youth were overrepresented in the detained population. [Although 66% of] youth referred to juvenile court [were white, they comprise only 53% of detention populations]. ... Of African American youth referred to juvenile court, a larger percentage were locked up in detention facilities (31% vs. 44%). Youth of other races had the same percentage of referred and detained cases (3%).

This pattern of disproportion was across all offense categories but was most dramatic among drug offense cases (Figures 1a & 1b). Cases involving White youth were 66% of those referred but only 44% of those detained. In contrast, drug offense cases involving African American youth were 32% of those referred but 55% of those detained. In every offense category, a substantially greater percentage of African American youth were detained than White youth.

Figure 1a: Racial Proportions of Referred and Detained Delinquency Cases, 1997



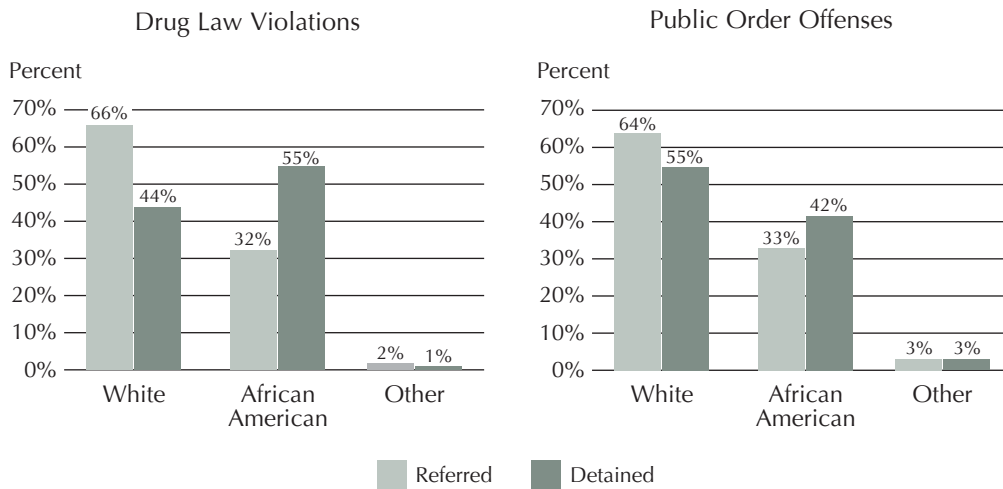
Source: *Easy Access to Juvenile Court Statistics: 1988-1997 [data presentation and analysis package]*. Office of Juvenile Justice and Delinquency Prevention (1999).

African American youth are more likely than White youth to be detained pretrial, even when charged with the same offense.

Overall, detention was used more often for African American youth (27%) and youth of other races (19%) than for White youth (15%) (Figure 2). This was true among each of

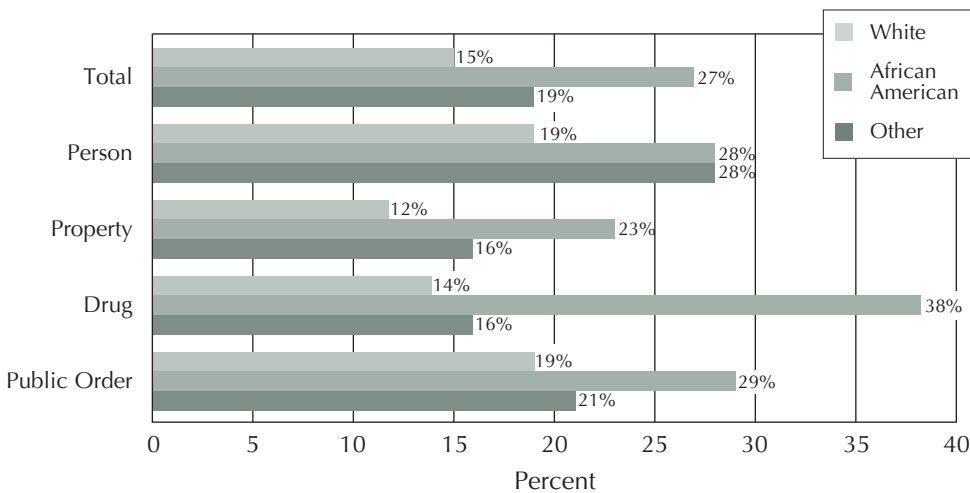
the four major offense categories as well. Thus, for youth charged with comparable offenses—whether person, property, drug, or public order offenses—minority youth, especially African American youth, were locked up in detention more often than White youth. Consequently, cases involving African American youth were more than twice as likely to be detained for a drug offense than were cases involving White youth or youth of other races (38%, 14%, and 16%, respectively). More than one in four (28%) person offense cases involving African American youth and youth of other races were detained compared to less than one in five (19%) White youth.

Figure 1b: Racial Proportions of Referred and Detained Delinquency Cases, 1997



Source: *Easy Access to Juvenile Court Statistics: 1988-1997 [data presentation and analysis package]*. Office of Juvenile Justice and Delinquency Prevention (1999).

Figure 2: Percent of Delinquency Cases Involving Detention by Race, 1997



Source: *Easy Access to Juvenile Court Statistics: 1988-1997 [data presentation and analysis package]*. Office of Juvenile Justice and Delinquency Prevention (1999).

... The State Perspective

a. Detention

A 1992 amendment to the Juvenile Justice and Delinquency Prevention Act of 1974 required states receiving funds under the Juvenile Justice and Delinquency Prevention Act to identify and assess disproportionate minority representation of youth in the juvenile justice system. According to a 1997 report* summarizing state data submitted to the OJJDP in compliance with these mandates, the minority proportion of detained youth exceeded their proportion in the general population in all states but one.** An index of minority overrepresentation was used to identify overrepresentation by dividing the minority proportion of detained youth by the proportion of minorities in the youth population. A resulting index value of over 1.0 indicates minority overrepresentation. With regard to minority overrepresentation in juvenile detention, the 1997 report showed an average index of 2.8 among 43 of the 44 states reporting detention data (i.e. the proportion of youth in detention who were minorities was 2.8 times or 280% higher than the proportion of minority youth in the general population). A high index of 7.9 was seen in Iowa and low of .7 in Vermont (Figure 10).

Among states reporting data, the index of overrepresentation for detained African American youth ranged from 10.7 in Minnesota to .7 in Vermont (Table 6). For Latino youth in detention, the index of overrepresentation ranged from 4.8 in Connecticut to .9 in California (Table 7).

Citations

* Hamparian, D., & Leiber, M. (1997). *Disproportionate confinement of minority juveniles in secure facilities: 1996 national report*. Champaign, IL: Community Research Associates.

** It should be noted that the current status of minority representation may differ from the summarization found in Hamparian & Leiber (1997).

Table 6: Indices of Overrepresentation for African American Youth in Detention

Alabama	1.3	Delaware	2.3	Massachusetts	5.9	Oregon	4.2
Alaska	1.6	District of Columbia	1.1	Minnesota	10.7	South Carolina	1.7
Arizona ^a	4.0	Florida	1.7	Missouri	3.3	Tennessee	3.7
Arizona ^b	3.2	Illinois	3.1	Nevada ^c	3.3	Texas	2.6
Arkansas	1.3	Indiana	4.1	New Jersey	3.8	Vermont	0.7
California	3.0	Kansas	4.5	New Mexico	1.5	Virginia	1.8
Colorado	4.4	Louisiana	1.6	New York	3.2	Washington	4.0
Connecticut	4.8	Maryland	2.8	North Carolina	1.7	Wisconsin	6.6

Note: The indices of minority overrepresentation were calculated by dividing the African American proportion of detained youth by the proportion of African Americans in the juvenile population.

^a Maricopa County only.

^b Pima County only.

^c Washoe County only.

Source: *Disproportionate Confinement of Minority Juveniles in Secure Facilities: 1996 National Report*. Community Research Associates (1997).

Table 7: Indices of Overrepresentation for Latino Youth in Detention

Arizona ^a	1.5	Connecticut	4.8	Nevada ^c	1.4	Oregon	1.3
Arizona ^b	1.0	Florida	.7	New Jersey	1.5	Texas	1.0
California	0.9	Illinois	.1	New Mexico	1.2	Washington	1.1
Colorado	1.9	Massachusetts	2.1	New York	1.6		

Note: The indices of minority overrepresentation were calculated by dividing the Latino proportion of detained youth by the proportion of Latinos in the juvenile population.

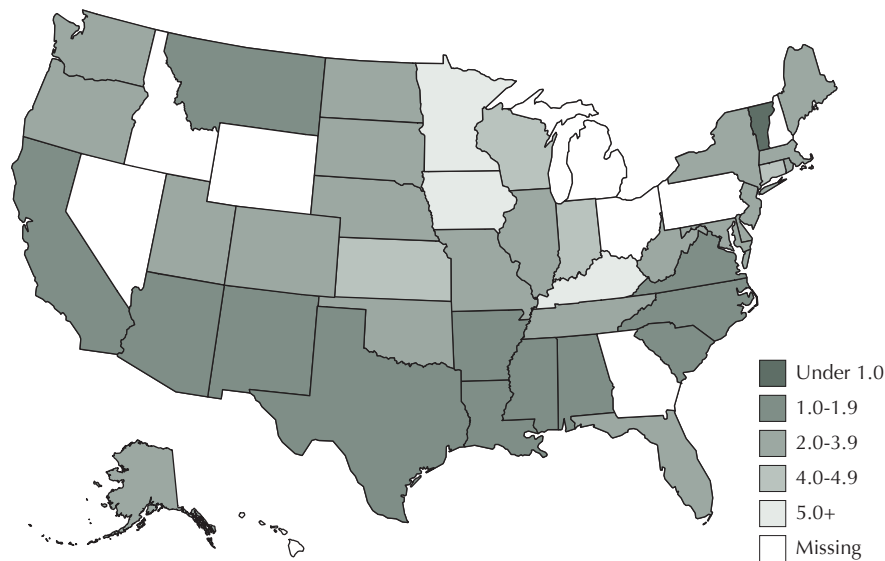
^a Maricopa County only.

^b Pima County only.

^c Washoe County only.

Source: *Disproportionate Confinement of Minority Juveniles in Secure Facilities: 1996 National Report*. Community Research Associates (1997).

Figure 10: Indices of Overrepresentation for Minority Youth in Detention



Note: The indices of minority overrepresentation were calculated by dividing the minority proportion of detained youth by the proportion of minorities in the juvenile population.

- Arizona reported data for Maricopa and Pima Counties only.
- In Illinois, state data were not available for minority juvenile population. System data are provided through the Assessment Report based on sample counties.
- The minority juvenile population in Maine does not exceed 1% of the total juvenile population.
- In Maryland, data are for the African American population only.
- Mississippi data were not available for minority juvenile population. System data are provided through the Assessment Report based on sample counties.
- Data from Missouri are primarily for the African American population.
- The data for Washoe County, Nebraska are provided by each specific minority group.

Source: *Disproportionate Confinement of Minority Juveniles in Secure Facilities: 1996 National Report*. Community Research Associates (1997).

All told, racial and ethnic minorities have been – in the words of researcher J.T. Gibbs – “misabeled and miseducated by the schools; mishandled by the juvenile justice system, mistreated by mental health agencies and neglected by the social welfare system.” For example:

- Incarcerated African American adolescents are less likely than their white counterparts to have previously received mental health services (Marsteller, 1997). ...
- Upon arrest, young American Indian offenders living on reservations can be confined in facilities hundreds of miles away from their tribes. This disconnects them from loved ones at a time when emotional support is crucial for their emotional well-being (Coalition for Juvenile Justice).
- Because of the shortcomings and failures of the juvenile justice system, youth of color are therefore less likely to undergo a thorough psychological assessment and less likely to receive therapeutic treatment, according to the National Mental Health Association.

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B. Girls

Detention in Delinquency Cases, 1990-1999

Paul Harms, OJJDP Fact Sheet, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, September 2003
Available at <http://www.ncjrs.org/pdffiles1/ojjdp/fs200307.pdf>
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The most dramatic change in the detention population was the influx of female juveniles charged with person offenses

In general, the proportion of delinquency cases ordered to detention remained relatively steady between 1990 and 1999. Juveniles were detained in 23% of the cases processed in 1990, compared with 20% of the cases processed in 1999. However, the profile of the national detention population shifted during this period, with a greater proportion of youth charged with person and drug offenses and a greater proportion of females in the detention population by 1999.

During the 1990-99 period, there was a surge in the number of female delinquency cases entering detention (a 50% increase, compared with 4% for males). The large increase was tied to the growth in the number of delinquency cases involving females charged with person offenses (102%).

Investing in Girls: A 21st Century Strategy

Leslie Acoca, Juvenile Justice Volume VI Number 1, October 1999

Available at <http://www.ncjrs.org/html/ojjdp/jjjournal1099/invest2.html>

Many girls report and, in some instances, NCCD [National Council on Crime and Delinquency] field researchers have observed that certain abuses follow girls into the juvenile justice system. Specific forms of abuse reportedly experienced by girls from the point of arrest through detention include the consistent use by staff of foul and demeaning language, inappropriate touching, pushing and hitting, isolation, and deprivation of clean clothing. Some strip searches of girls were conducted in the presence of male officers, underscoring the inherent problem of adult male staff supervising adolescent female detainees. Of special concern were the routine nature of these acts and the pervasive atmosphere of disrespect toward the girls that they reported permeates not just juvenile justice settings, but also other community institutions.

Handle With Care: Serving the Mental Health Needs of Young Offenders

Coalition for Juvenile Justice 2000 Annual Report

Information at <http://www.juvjustice.org/publications/2000ar.html>

Pages 30-34

Yet over and over, when it comes to getting support and services, girls fall through the cracks, often because their uniquely “female” behavior is misread and/or not taken into consideration. The neglect runs throughout the system from a lack of gender-specific research, prevention, diagnosis, treatment and aftercare.

- Early signs of mental illness frequently go unrecognized and unaddressed, which puts girls at great risk of future delinquency. Unlike boys who typically act out and get attention by aggressive acts, girls are more likely to internalize their frustrations. “When girls are angry, frightened, or unloved, they are more likely to strike inward. They may hurt themselves by abusing drugs, prostituting their bodies, starving or even mutilating themselves,” according to researcher Joanne Belknap. This behavior makes them appear to be less of a threat and thus easier to overlook in crowded schools and stressed communities.
- The legal system often treats female offenders more harshly than boys because there are fewer community-based services for them and fewer placement options, particularly for girls with mental health problems. As a result, detention typically last five times longer for girls than for boys (Girls Incorporated 1996).

- Within facilities, mental health screening and assessment tools have traditionally been geared to boys. A girl's warning signs can easily be overlooked. A GAINS Center report emphasizes that females in the system are rarely asked "specific questions about issues relevant to adolescent girls. The lack of sensitive and uniform assessment...sends an implied message to girls that they are better served by remaining silent."
- When they do receive treatment, girls are typically squeezed into mental health programs designed for young men. Therefore, gender-specific issues, such as sexual abuse, pregnancy, promiscuity and self-abuse, are not addressed in any meaningful fashion.
- Such male-centered programs also fail to take advantage of and build upon female "strengths," (e.g. the high value that girls place on verbal communication and emotional relationships).
- Institutional policies and procedures can frequently worsen existing mental health problems. For behavior control, girls may be surrounded, restrained and then strapped to their beds spread eagle by a group of male staff. In the name of suicide prevention, girls may be forced to disrobe in front of male staff. Given the high history of sexual abuse, such insensitive "interventions" can mirror previous rapes or incest and escalate pre-existing feelings of shame, humiliation and vulnerability.

Ignoring the unique gender-specific needs of female adolescents has long-term consequences.

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Girls Incorporated. (1996). Prevention and Parity: Girls in Juvenile Justice Report. Indianapolis, IN: Girls Incorporated.

C. Children with Mental Health Needs

Youth With Mental Health Disorders: Issues and Emerging Responses

Joseph J. Cocozza and Kathleen R. Skowyra, National Center for Mental Health and Juvenile Justice (Originally from *Juvenile Justice*, Volume 7(1): 3-13, April 2000, Office of Juvenile Justice and Delinquency Prevention, Washington, D.C.)

Available at http://www.ncmhjj.com/pdfs/publications/Youth_with_Mental_Health_Disorders.pdf

Pages 5-7

Prevalence of Mental Health Disorders Among Youth

Despite the growing concern, there is a paucity of adequate research on the prevalence and types of mental health disorders among youth in the juvenile justice system. A comprehensive review of the research literature (Otto et al., 1992) found the research to be scarce and methodologically flawed. Other reviews have reached similar conclusions (Wierson, Forehand, and Frame, 1992). Methodological problems include inconsistent definitions and measurements of mental illness; use of biased,

nonrandom samples; reliance on retrospective case report data; and use of nonstandardized measurement instruments.

Despite these problems, some general conclusions can be drawn:

- **Youth in the juvenile justice system experience substantially higher rates of mental health disorders than youth in the general population.** This is a major conclusion drawn from a review of 34 studies (Otto et al., 1992) and is also consistent with the finding that mental illness prevalence rates in adult corrections populations are two to four times higher than the rates in the general adult population (Teplin, 1990).

- **A high percentage of youth in the juvenile justice system have a diagnosable mental health disorder.** One difficulty in addressing mental health issues in the juvenile justice system centers around the varying uses and definitions of the terms “mental health disorder” and “mental illness.” One critical distinction is between youth with a diagnosable mental health disorder and youth with a serious mental health disorder or serious emotional disturbance (SED). Youth with a diagnosable mental health disorder are those that meet the formal criteria for any of the disorders listed in the Diagnostic and Statistical Manual of Mental Disorders: Fourth Edition, DSM-IV (American Psychiatric Association, 1994) such as psychotic, learning, conduct, and substance abuse disorders. The terms “serious mental health disorder” and “SED” – defined and measured in a number of different ways – are used to identify youth experiencing more severe conditions that substantially interfere with their functioning. The term “serious mental health disorder” often refers to specific diagnostic categories such as schizophrenia, major depression, and bipolar disorder. “SED,” a term used for youth, includes those youth with a diagnosable disorder for whom the disorder has resulted in functional impairment affecting family, school, or community activities. With regard to diagnosable mental health disorders in general, research has found that most youth in the juvenile justice system qualify for at least one diagnosis. It is not uncommon for 80 percent or more of the juvenile justice population to be diagnosed with conduct disorder (Otto et al., 1992; Wierson, Forehand, and Frame, 1992; Virginia Policy Design Team, 1994). Given the broad definitional criteria for conduct disorder, Melton and Pagliocca (1992) point out that such a finding is not surprising, although many of these youth qualify for more than one diagnosis (Virginia Policy Design Team, 1994).

- **It is safe to estimate that at least one out of every five youth in the juvenile justice system has serious mental health problems.** Estimates of the prevalence of serious mental health disorders among these youth are particularly unreliable because of the problems with research and, as mentioned above, the varying definitions and measures of serious mental illness. If the prevalence rate of SED for youth in the general population is estimated at 9-13 percent (Friedman et al., 1996) and the prevalence rate of disorders for youth in the juvenile justice system is consistently found to be at least twice as high (Otto et al., 1992), one can reasonably expect the prevalence rate of serious mental health disorders for youth in contact with the juvenile justice system to be at least 20 percent. This estimate is consistent

with the findings other researchers have reported (Schultz and Mitchell-Timmons, 1995). A more accurate estimate will require further research. It is clear, however, that while most youth in the juvenile justice system have a diagnosable mental illness and could benefit from some services, there is a sizable group of youth who critically need access to mental health services because they are experiencing serious problems that interfere with their functioning.

• **Many of the youth in the juvenile justice system with mental illness also have a co-occurring substance abuse disorder.** Over the past several years, there has been greater recognition and documentation of the high level of co-occurring substance abuse disorders among individuals with mental health disorders. Kessler et al. (1996) found that 50.9 percent of the general adult population with serious mental health disorders have a co-occurring substance abuse disorder, while Teplin, Abram, and McClelland (1991) found that 73 percent of adult jail detainees with serious mental health disorders had a co-occurring substance abuse disorder. Although research has just begun to focus on youth, Greenbaum, Foster-Johnson, and Petrila (1996:58) found that “approximately half of all adolescents receiving mental health services” in the general population are reported as having a dual diagnosis. Among the juvenile justice system population, the rates may be even higher (Otto et al., 1992; Milin et al., 1991).

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Incarceration of Youth Who Are Waiting for Community Mental Health Services in the United States

Prepared for Rep. Henry A. Waxman and Sen. Susan Collins, U.S. House of Representatives, Committee on Government Reform – Minority Staff, Special Investigations Division, July 2004

Available at http://govt-aff.senate.gov/_files/040707juvenilereport.pdf

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A major consequence of the failure to provide sufficient mental health care is the inappropriate use of juvenile detention centers to hold youth with mental disorders. Some youth are placed in detention without any criminal charges pending against them, solely to wait for community mental health services to become available. In other cases, youth with mental illness who have been charged with crimes are incarcerated only because no mental health treatment is available. The misuse of detention centers as holding areas for mental health treatment is unfair to youth, undermines their health, disrupts the function of the detention centers, and is costly to society.*⁸

...

Detention Facilities Are Generally Not Equipped to Provide Adequate Care to Youth with Mental Illness Who Are Incarcerated while Waiting for Treatment Services

[In a survey with 524 facilities responding,]juvenile detention administrators report that incarcerated youth who are waiting for community mental health services suffer from a range of serious mental disorders, including depression (noted in 315 facilities), substance abuse (315 facilities), attention deficit hyperactivity disorder (302 facilities), retardation and learning disorders (234 facilities), and schizophrenia (137 facilities). Other conditions noted by administrators among children unnecessarily incarcerated include anorexia nervosa, post-traumatic stress disorder, and autism.

Many administrators do not feel that their facilities are equipped to provide care to youth who are inappropriately detained. Of the 347 facilities that held youth waiting for services, 95 (27%) report poor, very poor, or no mental health treatment for youths in detention.

Even when treatment is available, the staff is often ill-equipped to handle the youth. Of the 347 facilities that held youth waiting for services, 187 (54%) report that staff receive poor, very poor, or no mental health training. As a North Carolina administrator commented, "This population is very difficult to manage due to staff not being trained adequately to deal with mental health issues." A Tennessee administrator wrote, "Upon admission we screen for mental illness, but the only training we've received is a seminar."

Juvenile detention administrators also commonly report frustration with the quality of services provided by outside agencies. For example, an Arizona administrator wrote, "The community behavioral health specialist agency does a poor job of working closely with detained juveniles." An Indiana administrator wrote that the local mental health agency "does not have the ability to deal with them on the Inpatient unit. They try to tell us the juveniles would be better off in our facility." A Minnesota administrator commented, "We have very few resources in the state of Minnesota to refer these youths, especially inpatient facilities." And a North Dakota administrator noted, "We have limited time with psychiatric services."

A Texas administrator described a case of an incarcerated youth with "auditory and visual hallucinations and is homicidal/suicidal." The administrator explained what happened:

We immediately contacted [the mental health department]. They came and did a brief assessment and identified a need for hospitalization. However, we were told it would be at least a month before he could even see the psychiatrist. He was not of top priority because he was in a secure environment. The psychiatrist then refused to see him without a parent present. I explained that the court had placed him in our care . . . I was told this was my problem. I finally got him into a psychiatrist 45 mins away, because the local [mental health department] was being so difficult. He is now on medication and doing well.

Even when care is available, the juvenile detention facility is not an optimal setting. For example, a Maine detention facility administrator noted, "Due to the high turnover, it is difficult to do long-term treatment."

Citation

^{*8} See, e.g., Anne E. Casey Foundation, *Juvenile Detention Alternatives Initiative* (2004) (online at <http://www.aecf.org/initiatives/jdai/>); National Juvenile Detention Association and Youth Law Center, *Juvenile Detention Center and Training School Crowding: A Clearinghouse of Court Cases* (Aug. 1998); American Academy of Child and Adolescent Psychiatry, *Recommendations for Juvenile Justice Reform* (Oct. 2001).

Position Statement: Use of Juvenile Detention Facilities for Youth with Severe Mental Health Issues

National Juvenile Detention Association

Available at <http://www.njda.com/learn-guiding-ps8.html>

The National Juvenile Detention Association (NJDA) strongly advocates that juvenile offenders with severe mental health issues, who have been identified by a qualified mental health professional, be placed in the appropriate therapeutic environment, instead of juvenile detention facilities.

When juvenile detention facilities are forced to house youth with severe mental health issues, NJDA promotes the provisions of adequate services by appropriately trained and licensed specialists.

D. Children with Learning Disabilities

Improving Education Services for Students in Detention and Confinement Facilities

Peter E. Leone & Sheri Meisel, National Center on Education, Disability, and Juvenile Justice

Available at http://www.edjj.org/Publications/pub12_20_99.html

While a few studies have attempted to determine the prevalence of young people with disabilities in correctional institutions, methodological problems and variability in policies across jurisdictions have made it extremely difficult to come up with reliable figures. Studies have identified 42% of all juvenile offenders in Arizona as disabled and as many as 60% of all juvenile offenders in Florida and Maine.^{*20} To address this problem, Casey and Keilitz conducted a meta-analysis of all of the prevalence studies of developmentally and learning disabled juvenile offenders.^{*21} They reported that approximately 12.6% of juvenile offenders had developmental disabilities and 35.6% of juvenile offenders had learning disabilities.^{*22} Casey and Keilitz also reported that the quality and number of studies of young people with emotional disturbance in juvenile corrections was not sufficient to conduct a meta-analysis of studies for this population.^{*23} In contrast, a recent analysis of studies on the prevalence of mental disorders among young people in the juvenile justice system estimates that approximately 22% of those incarcerated have significant mental health problems.^{*24} Whether one accepts 30%, 60%, or a higher percentage as a reliable estimate for the prevalence of disabling conditions in juvenile corrections is beyond the focus of this discussion. What we do know is that the percentage of young people in juvenile correctional facilities who were previously identified and served in special education programs before their incarceration is at least three to five times the percentage of the public school population identified as disabled.^{*25}

Citations

*21. Pamela Casey and Ingo Keilitz, Estimating the Prevalence of Learning Disabled and Mentally Retarded Juvenile Offenders: A Meta-Analysis, in UNDERSTANDING TROUBLED AND TROUBLING YOUTH 82-101 (P.E. Leone ed. 1990). Casey and Keilitz reported that a sufficient number of studies of young people with emotional disabilities was not available to conduct an metanalysis for that population.

*22. Id. at 89-94

*23. Id.

*24. See R.K. Otto, et al, Prevalence of Mental Disorders Among Youth in the Juvenile Justice System, in RESPONDING TO THE MENTAL HEALTH NEEDS OF YOUTH IN THE JUVENILE JUSTICE SYSTEM (J.J. Cocozza ed. 1992)

*25. According to the U.S. DEPARTMENT OF EDUCATION'S 15TH ANNUAL REPORT TO CONGRESS ON IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (1993), the percentage of school-aged children identified as disabled during the 1991-92 school year was 10.1%.

Special Education and the Juvenile Justice System

Sue Burrell and Loren Warboys, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000
Available at http://www.ncjrs.org/html/ojjdp/2000_6_5/contents.html

Youth taken into secure custody at the time of arrest are entitled to judicial review of the detention decision within a statutory time period. Depending on the jurisdiction and characteristics of the case, the length of detention may range from several hours to several months. Many professionals view the detention decision as the most significant point in a case. Detention subjects the youth to potential physical and emotional harm. It also restricts the youth's ability to assist in his or her defense and to demonstrate an ability to act appropriately in the community.

Unfortunately, youth with disabilities are detained disproportionately (Leone et al., 1995). Experts posit that one reason for this is that many youth with disabilities lack the communication and social skills to make a good presentation to arresting officers or intake probation officers. Behavior interpreted as hostile, impulsive, unconcerned, or otherwise inappropriate may be a reflection of the youth's disability. This is another reason why it is important to establish the existence of special education needs or suspected disabilities early in the proceedings. Juvenile justice professionals must be sensitive to the impact of disabilities on case presentation at this initial stage and work to dispel inaccurate first impressions at the detention hearing.

In some cases, it may be appropriate for the court to order the youth's release to avoid disrupting special education services. This is particularly true if adjustments in supervision (e.g., modification of the IEP or behavioral intervention plans) may reduce the likelihood of further misbehavior pending the jurisdictional hearing. Similarly, if there are early indications that a special education evaluation is needed, it may be important for the youth to remain in the community to facilitate

the evaluation. Many jurisdictions have home detention programs that facilitate this type of release by imposing curfews or other restrictions on liberty that allow the youth to live at home and attend school pending the outcome of the delinquency proceedings.

Reference

Leone, P.E., Zaremba, B.A., Chapin, M.S., and Iseli, C. 1995. *Understanding the overrepresentation of youth with disabilities in juvenile detention*. District of Columbia Law Review 3 (Fall): 389-401.

IV. CONCLUSION

When a defender takes on a case, many priorities compete for attention, including developing the attorney-client relationship, flushing out the facts of the case, finding witnesses, identifying legal issues, arguing motions, negotiating with the prosecutor and probation officer, fighting the potential sentence at disposition and addressing the social and personal issues facing the client. Every step seems important, and everything can seem as if it will be the definitive element determining the outcome of the case. It is no wonder that interim detention decisions have often gone unchallenged. Many experienced defenders, however, have seen the spiral of negative consequences that detention wraps around their clients. Making zealous arguments for release could mean the difference between a child who falls deeper into the justice system and one who has a temporary detour on the path to a successful future.



Endnotes

- ¹ Coalition for Juvenile Justice, *Unlocking the Future: Detention Reform in the Juvenile Justice System*, Annual Report, 25 (2003).
- ² *Id.* at 3.
- ³ *Id.* at 22-23.
- ⁴ Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition*, Standard 8.2 (1980).
- ⁵ *Id.*, at Standard 4.2 Burden of Proof.
- ⁶ *L.O.W. v. District Court*, 623 P.2d 1253, 1259-60 (1981).
- ⁷ See generally *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979); *Sandstrom v. Montana*, 442 U.S. 510 (1979)(discussing rebuttable presumptions in criminal cases).
- ⁸ *Gerstein v. Pugh*, 420 U.S. 103 (1975).
- ⁹ *Id.* at 114.
- ¹⁰ *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).
- ¹¹ *Id.* at 56.
- ¹² *Schall v. Martin*, 467 U.S. 253 (1984).
- ¹³ *Id.* at 263.
- ¹⁴ N.J. Rev. Stat. Ann. § 2A: 4A-38 (West, WESTLAW through 2004).
- ¹⁵ *McLaughlin*, 500 U.S. at 58-59.
- ¹⁶ *Alfredo A. v. Superior Court (People)*, 865 P.2d 56 (1994).
- ¹⁷ *Id.* at 68-69.
- ¹⁸ *Id.* at 82, 83 (Mosk, J., dissenting, Kennard J. and George, J., concurring)(emphasis in original). See also *In re Doe*, 73 P.3d 29, 37 (2003) (provides a good description of the ambiguous law in this area).
- ¹⁹ *Id.* at 58 (discussing *Schall*, 467 U.S. 253 (1984)).
- ²⁰ Fla. Stat. Ann. § 985.213.
- ²¹ Kan. Stat. Ann. § 38-1640.
- ²² Colo.Rev. Stat. § 19-2-509.
- ²³ Wash. Rev. Code § 13.40.040(2)(v).
- ²⁴ Freedom of Information Act, 5 U.S.C. 552.
- ²⁵ IJA/ABA, *supra* note 4, at Standard 4.7 Prohibition Against Money Bail.
- ²⁶ IJA/ABA, *supra* note 4, at Standard 8.1 The Nature of the Relationship.
- ²⁷ *Id.*
- ²⁸ See generally American Bar Association Juvenile Justice Center, *Selling Justice Short: Juvenile Indigent Defense in Texas* (2000); American Bar Association Juvenile Justice Center, *The Children Left Behind: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana* (Gabrielle Celeste & Patricia Puritz eds., 2001); American Bar Association Juvenile Justice Center, *Georgia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (Patricia Puritz & Tammy Sun eds., 2001); American Bar Association Juvenile Justice Center, *Virginia:*

An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings (Patricia Puritz et al. eds., 2002); American Bar Association Juvenile Justice Center, *Kentucky, Advancing Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (Patricia Puritz and Kim Brooks eds., 2002); American Bar Association Juvenile Justice Center, *An Assessment of Counsel and Quality of Representation in Delinquency Proceedings in Ohio* (Kim Brooks & Darlene Karmine eds., 2003); American Bar Association Juvenile Justice Center, *Maine: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); American Bar Association Juvenile Justice Center, *Maryland: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (Elizabeth Cumming et al. eds., 2003); American Bar Association Juvenile Justice Center, *Montana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (Brock Albin et al. eds., 2003); American Bar Association Juvenile Justice Center, *North Carolina: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (Lynn Grindall ed., 2003); Laval S. Miller-Wilson, American Bar Association Juvenile Justice Center, *Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); Elizabeth Calvin, American Bar Association Juvenile Justice Center, *Washington: An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters* (2003).

²⁹ *Id.*

³⁰ IJA/ABA, *supra* note 4, at Standard 3.6 Availability of Adequate Resources.

³¹ *Schall*, 467 U.S. at 263.

³² *Id.* at 263-264 (emphasis added).

³³ *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

³⁴ *Schall*, 467 U.S. at 274.

³⁵ *Id.* at 277.

³⁶ *JJ v. Freyer*, 765 So.2d 260 (Fla. App. 2000).

³⁷ Chinn Planning, Inc., Lancaster Juvenile Justice System, *Comprehensive Juvenile Justice System Study Lancaster County Juvenile Detention Center, Final Report Phase I Needs Assessment* (1998).

³⁸ Cal. Welf. & Inst. Code § 628.

³⁹ Fla. Stat. § 985.215(1).

⁴⁰ Nev. Rev. Stat. § 62C.010(1)(c).

⁴¹ Faye S. Taxman & Douglas Young, University of Maryland, *Using Risk and Needs Assessment Tools to Improve Decision-Making in Maryland's Juvenile Justice System* (2001).

⁴² Craig W. LeCroy et. al., Arizona Supreme Court, *Empirical Validation of the Arizona Risk/Needs Instrument and Assessment Process* (1998).

⁴³ Center on Juvenile & Criminal Justice, *Reducing Disproportionate Minority Confinement: The Multnomah County Oregon Success Story and its Implications* (2002).

⁴⁴ *Id.*



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STATE DETENTION STATUTES

State	Code Section and Rules of Court	Detention Hearing	Appointed Counsel at Detention Hearing
AL	Ala. Code §§ 12-15-56 through § 12-15-60 (Westlaw 2003). AL R JUV P, Rules 10 and 11 (Westlaw 2003).	Within 72 hours of detention, weekends and holidays included.	Yes, counsel may be appointed at commencement of hearing (AL R JUV P, Rule 11).
AK	Alaska Stat. §§ 47.12.090, 47.12.240, 47.12.250 (Westlaw 2003). AK R JUV P, Rules 12, 13 (Westlaw 2003).	Within 48 hours of notice to court of detention.	Yes, unless waiver. Waiver requires consultation with counsel in felony cases (Alaska Stat. § 47.12.090).
AZ	Ariz. Rev. Stat. §§ 8-221, 8-303, 8-305, 8-307, 15-913, 41-2816 (Westlaw 2004). AZ ST JUV CT, Rules 10, 14, 17, 23 (Westlaw 2004).	Within 24 hours of filing of petition.	Yes, shall be appointed prior to hearing unless waived by child and parent (Ariz. Rev. Stat. § 8-221, AZ ST JUV CT, Rule 10).
AR	Ark. Code Ann. §§ 9-27-313, 9-27-326, 9-27-336 (Westlaw 2003).	Within 72 hours of custody. If that falls on a weekend or holiday, then the next business day.	Unlikely. Notice of rights given at detention hearing (Ark. Code Ann. § 9-27-326).
CA	Cal. Welf. & Inst. Code §§ 200-223, 625-641, 657 (Westlaw 2004). CA ST TRIAL CT Rules 1404-5, 1471-1476 (Westlaw 2004).	As soon as possible, but at least before the expiration of the next day after the petition is filed.	Maybe. Juvenile to be informed of right to counsel at all stages upon appearance before the court. Court to appoint counsel if it appears counsel is desired (Cal. Welf. & Inst. Code §§ 633, 634).
CO	Colo. Rev. Stat. §§ 19-2-502, 19-2-508, 19-2-509, 19-2-706, 19-2-911 (Westlaw 2004). CO ST JUV P Rule 3, 3.1, 3.7, 3.8. (Westlaw 2004).	Within 48 hours of detention, excluding weekends and legal holidays.	Maybe. Counsel may be appointed if requested or court deems it necessary (Colo. Rev. Stat. § 19-2-706, CO ST JUV P Rule 3).
CT	Conn. Gen. Stat. §§ 46b-133 through 46b-135 (Westlaw 2003).	Business day next following arrest.	Unlikely. Court gives notice of right to counsel at commencement of any proceeding (Conn. Gen. Stat. § 46b-135).
DE	Del. Code Ann. tit. 10 §§ 1004, 1005, 1007 (Westlaw 2003). DE ST FAM CT RCRP Rules 5, 5.1 (Westlaw 2003).	Peace officer takes youth, "without unreasonable delay," to Family Court for detention hearing or to another court until the Family Court's next session.	Unlikely. Court gives notice of right to counsel at detention hearing (DE ST FAM CT RCRP Rule 5.1).
DC	D.C. Code Ann. §§ 16-2308, 16-2309, 16-2310, 16-2312, 16-2320 (Westlaw 2004). DC R JUV Rules 44, 105, 106 (Westlaw 2004).	No later than the next day (excluding Sundays) after taken into custody.	Yes. The juvenile "shall be represented" at all hearings (DC R JUV Rule 44(a)(1), D.C. Code Ann. § 16-2312).

FL	Fla. Stat. Ann. §§ 985.203, 985.207, 985.21, 918.211, 985.213, 985.214, 985.215 (Westlaw 2004). Fla.R.Juv.P. Rules 8.005, 8.010, 8.013, 8.015 (Westlaw 2004).	Within 24 hours of custody, unless detained for failure to appear, then within 72 hours.	Yes. Right to counsel prior to hearing, notice of right at hearing, automatic appointment if non-indigent parents do not employ counsel for detention hearing; all subject to waiver (Fla. Stat. Ann. § 985.203).
GA	Ga. Code Ann. §§ 15-11-45, 15-11-46, 15-11-46.1, 15-11-47, 15-11-48, 15-11-49, 15-11-50 (Westlaw 2004). GA R UNIF JUV CT Rules 6.8, 8.1 through 8.6 (Westlaw 2004).	Within 72 hours after placed in detention, unless deadline falls on Saturday, Sunday or holiday, in which case by the next business day.	Unlikely. Informed of right prior to detention hearing (Ga. Code Ann. §§ 15-11-49).
HI	Haw. Rev. Stat. §§ 571-11, 571-31, 571-31.1, 571-31.2, 571-32 (Westlaw 2003). HI R FAM CT Rules 130, through 136, 155.	Child shall be taken without unnecessary delay to court, no precise deadline.	Maybe. Right to counsel at all stages and judge may appoint on own motion, but appointment is discretionary (HI R FAM CT Rule 155, Haw. Rev. Stat. § 571.32).
ID	Idaho Code §§ 20-514, 20-516, 20-517, 20-518 ID R JUV Rules 7-9, 11	Within 24 hours of preliminary decision to release or detain following apprehension, excluding weekends and holidays.	Maybe. Notice of right given prior to detention hearing. If youth indigent, court shall appoint, unless waiver. Also, court shall appoint if no parent or guardian present (ID R JUV Rule 9, Idaho Code § 20-514).
IL	705 Ill. Comp. Stat. §§ 405/1-2(3)(a), 405/5-401, 405/5-410, 405/5-415, 405/5-501 (Westlaw 2004).	Within 40 hours of detention, excluding weekends and holidays.	Yes. "No hearing may be held unless the minor is represented by counsel" (705 Ill. Comp. Stat. § 405/5-501).
IN	Ind. Code §§ 31-37-4 through 31-37-11 (Westlaw 2003).	No later than 48 hours excluding weekends and holidays.	Yes. Counsel shall be appointed at the detention hearing or initial hearing, whichever comes first, unless waiver (Ind. Code §§ 31-32-2-2, 31-32-2, 31-37-6-5).
IA	Iowa Code §§ 232.11, 232.19 through 232.23, 232.28, 232.44 (Westlaw 2003). IA R 8.16.	Within 24 hours of detention, excluding weekends and holidays.	Yes. Unwaivable right to counsel from detention forward (Iowa Code § 232.11).
KS	Kan. Stat. Ann. §§ 38-1606, 38-1624, 38-1632, 38-1640, 13-1691 (Westlaw 2003).	Within 48 hours of detention, excluding weekends and holidays.	Yes. Mandatory assistance of counsel. Appointed if not retained (Kan. Stat. Ann. § 38-1606).
KY	Ky. Rev. Stat. Ann. §§ 610.010, 610.265, 610.280, 610.290, 630.010, 630.040, 630.080, 15A.210 (Westlaw 2003). KY ST RCRP Rules 3.05, 3.14 (Westlaw 2003).	Within 48 hours of detention, excluding weekends and holidays; within 24 hours of detention, excluding weekends and holidays, if status offender.	Unlikely. Juvenile has right to counsel at detention hearing (Ky. Rev. Stat. Ann. § 610.290). Juvenile must demonstrate indigency to be eligible for appointment. All subject to waiver (KY ST RCRP Rule 3.05).

LA	LA Ch.C. art. 306, 808, 809, 810, 814, 815, 817, 819, 820, 821, 886 (Westlaw 2004).	Judge reviews police statement on probable cause within 48 hours of custody. If child not released, continued custody hearing within 3 days of entry into detention center.	Maybe. Juvenile given notice of right to counsel at continued custody hearing. Judge shall appoint if indigent. Juvenile can waive after receiving advise of counsel or other adult advisor (La. Ch.C. art. 809, 810, 821).
ME	Me. Rev. Stat. Ann. tit. 15 §§ 3201-3205, 3306, 3306-A (Westlaw 2003).	Within 48 hours of detention, excluding weekends and holidays.	Unlikely. Court shall appoint counsel if requested (Me. Rev. Stat. Ann. tit. 15 § 3306).
MD	Md. Code Ann. Cts. & Jud. Proc. §§ 3-8A-14, 3-8A-15, 3-8A-20, 3-8A-22 (Westlaw 2004). MD RULES 4-251, 11-106, 11-112 (Westlaw 2004).	No later than next day after petition filed (petition must be filed immediately upon detention).	Unlikely. Juvenile entitled to counsel and notified of rights before waiver, but not entitled to public defender at detention hearing (Md. Code Ann. Cts. & Jud. Proc. § 3-8A-20, MD RULE 11-106).
MA	Mass. Gen. Laws ch. 119 §§ 66, 67, 68 (Westlaw 2004). MA DIST CT Order 2-88. MA R S CT Standing Orders, Time Standards. MA R S CT Rule 3:10. MA ST RCRP Rules 7, 8.	Within the next day of entering any detention facility.	Maybe. Counsel may be appointed at initial appearance if indigent and right not waived (MA ST RCRP Rules 7, 8. MA R S CT Rule 3:10).
MI	Mich. Comp. Laws §§ 712A.15, 712A.16, 712A.18, 764.27a (Westlaw 2004). MI R SPEC P 3.915, 3.934, 3.935, 5.935, 5.993, 6.909, 6.937 (Westlaw 2004).	Within 24 hours of being taken into custody, excluding Sundays and holidays.	Maybe. Juvenile notified of rights at detention hearing. No hearing without counsel if parent not present. Waiver of counsel requires approval of parent (MI R SPEC P 3.915, 3.935).
MN	Minn. Stat. §§ 260B.175, 260B.176, 260B.178, 260B.181, 260B.185 (Westlaw 2004). MN ST JUV DEL Rules 5.03, 5.04, 5.05, 5.07, 5.08, 13.02 (Westlaw 2004).	Within 36 hours, excluding weekends and holidays if held in juvenile facility; within 24 hours, excluding weekends and holidays, if held in adult facility.	Yes. Notice of detention is sent to public defender. MN ST JUV DEL Rule 5.05. If right is waived, stand-by counsel appointed (Minn. Stat. § 260B.163). However, no right for petty offenses (Minn. Stat. § 260B.143).
MS	Miss. Code Ann. §§ 43-21-301, 43-21-302, 43-21-303, 43-21-307, 43-21-309, 43-21-311, 43-21-313 (Westlaw 2003).	Within 48 hours of detention, excluding weekends and state holidays.	Unlikely. Notice of right at time of custody (Miss. Code Ann. § 43-21-311).
MO	Mo. Rev. Stat. §§ 211.061, 211.063 (Westlaw 2003) MO R JUV P Rules 111.01 through 111.10. (Westlaw 2003).	Within 3 days of detention, excluding weekends and holidays.	Maybe. Notice of right given prior to hearing, and judge may continue hearing to provide time for juvenile to obtain counsel. All subject to waiver (MO R JUV P Rules 111.05, 111.08).
MT	Mont. Code Ann. §§ 41-5-321 through 323, 41-5-331 through 334, 41-5-341, 41-5-342, 41-5-349, 41-5-1413 (Westlaw 2003).	Within 24 hours of being taken into custody, excluding weekends and legal holidays.	Maybe. Notice provided prior to hearing (Mont. Code Ann. § 41-5-331). Unwaivable right to counsel attaches after petition is filed, which can occur up to 7 days after detention (Mont. Code Ann. § 41-5-1413).

NE	Neb. Rev. Stat. §§ 43-423, 43-248, 43-248.01, 43-249, 43-250, 43-423-251, 43-251.1, 43-253 through 255, 43-257, 43-259, 43-260.01, 43-272 (Westlaw 2003).	Within 24 hours of custody, excluding days court is not in session.	Maybe. Right to phone lawyer in custody (Neb. Rev. Stat. § 43-248.01). Informed of right at hearing and may request appointed attorney (Neb. Rev. Stat. § 43-272).
NV	Nev. Rev. Stat. 62.170, 62.172, 62C.010, 62C.020, 62C.030, 62C.040, 62C.060, 62D.030 (Westlaw 2003).	Within 72 hours of detention, excluding weekends and holidays; within 24 hours if the juvenile submits a written application for hearing.	Maybe. Attorney shall be appointed if no retained attorney at hearing and it is apparent attorney will not be retained. Right can still be waived (Nev. Rev. Stat. 62D.030).
NH	N.H. Rev. Stat. Ann. §§ 169-B:9, 169-B:11, 169-B:14, 621-A:6 (Westlaw 2003).	Within 24 hours of custody, Sundays and holidays excluded.	Yes. "[T]he court shall appoint" an attorney at the time of arraignment (N.H. Rev. Stat. Ann. §169-B:12).
NJ	N.J. Stat. Ann. §§ 2A:4A-31 through 2A:4A-35, 2A:4A-37 through 2A:4A-39 (Westlaw 2004). NJ R CH DIV FAM PT R. 5:21-2 through 5:21-5, 5:22-3 (Westlaw 2004).	No later than the morning after placement in detention including weekends and holidays.	Yes. Automatic second detention hearing (within 2 days of first) if juvenile was not represented at first hearing, but was detained; juvenile shall be represented by the public defender if circumstances require (NJ R CH DIV FAM PT R. 5:21-3).
NM	N.M. Stat. Ann. §§ 32A-2-9 through 32A-2-14 (Westlaw 2004). NM R CHILD CT Rules 10-207 through 212 (Westlaw 2004).	Within 24 hours of filing of petition, excluding weekends and holidays. The petition must be filed within 24 hours of custody.	Maybe. Notice of rights given at detention hearing and judge "shall appoint counsel, if appropriate." (N.M. Stat. Ann. § 32A-2-13, NM R CHILD CT Rule 10-208B).
NY	N.Y. Fam. Ct. Act §§ 305.2, 307.3, 307.4, 320.2, 320.5, 325.1 (Westlaw 2004). N.Y. Crim. Proc. Law § 51.015 (Westlaw 2004).	Within 72 hours of whichever comes first: detention or the next day court is in session.	Yes. Law guardian (attorney) must be appointed if no independent legal representation available at court (N.Y. Fam. Ct. Act 320.2).
NC	N.C. Gen. Stat. §§ 7B-1900, 7B-1903, 7B-1905, 7B-1906 (Westlaw 2003).	Within 5 calendar days if held in secure custody; 7 calendar days if non-secure	Yes. If there is no retained counsel at hearing then the court shall appoint an attorney. N.C. Gen. Stat. § 7B-1906.
ND	N.D. Cent. Code §§ 27-20-13 through 27-20-17, 27-20-26 (Westlaw 2003).	Promptly, and no later than 96 hours after detention.	Maybe. Notice of right given before hearing. If juvenile appears without counsel, then court inquiry and possible appointment. Judge must appoint counsel if no parent or guardian present at hearing (N.D. Cent. Code §§ 27-20-17, 27-20-26).
OH	Ohio Rev. Code §§ 2151.31, 2151.311, 2151.314, 2152.26 (Westlaw 2004). OH ST JUV P Rules 6 and 7 (Westlaw 2004).	Promptly, but no later than 72 hours after detention.	Maybe. Notice of right provided before hearing and instructions given on obtaining appointed attorney (Ohio Rev. Code § 2151.314).

OK	Okla. Stat. tit. 10 §§ 24, 7303-1.1, 7304-1.1, 7304-1.3 Okla. Stat. tit. 22 § 1355.6 (Westlaw 2004)	By next day after custody, or by 2 judicial days if good cause is shown.	Unlikely. When it appears that juvenile desires counsel but is indigent, court shall appoint counsel (Okla. Stat. tit. 10 § 24). Indigent defense system responsible for defending all indigent juveniles (Okla. Stat. tit. 22 § 1355.6).
OR	Or. Rev. Stat. §§ 419C.109, 419C.130, 419C.133, 419C.136, 419C.139, 419C.142, 419C.145, 419C.150, 419C.153, 419C.200, 419C.453 (Westlaw 2003).	Within 36 hours of detention, excluding weekends and judicial holidays, except on order of the court.	Unlikely. Only if requested by parent, guardian, or juvenile (Or. Rev. Stat. § 419C.200).
PA	42 Penn. Cons. Stat §§ 6324, 6325, 6326, 6331, 6332, 6335, 6337 (Westlaw 2004). Penn. Code tit. 37 §§ 200.1 through 200.5, 200.101 (Westlaw 2004).	Within 72 hours of detention.	Maybe. Informed of right before detention hearing (42 Penn. Cons. Stat. § 6332). If juvenile appears without counsel, then court inquiry into knowledge of right. Court may continue the proceeding to enable juvenile to obtain counsel. But parent (without conflict) can waive juvenile's right to counsel (42 Penn. Cons. Stat. § 6337).
PR	P.R. Laws Ann. tit. 34 §§ 2206, 2218, 2219, 2220 (Westlaw 2001). P.R. Laws Ann. tit. 34 § Ap. I-A R. 2.1, 2.4, 2.5, 2.6, 2.7, 2.9 (Westlaw 2001) (Court Rules - Minors' Matters).	Probable cause hearing to be held within 7 days of apprehension, or "without unnecessary delay" if apprehended under court order.	Unlikely. Notice of right before hearing (P.R. Laws Ann. tit. 34 § Ap. I-A R. 2.7). Court may appoint if juvenile lacks means to pay for counsel (P.R. Laws Ann. tit. 34 § 2206).
RI	R.I. Gen. Laws §§ 14-1-2, 14-1-20, 14-1-21, 14-1-22, 14-1-25, 14-1-26.1, 14-1-31 (Westlaw 2003). RI R JUV P Rule 8 (Westlaw 2003).	A child shall be referred to the Family Court within 24 hours of detention.	Yes. Juvenile shall consult with public defender or other attorney at hearing (RI R JUV P Rule 8). Before any hearing, notice is given to child and parent or guardian that he is entitled to services of public defender if indigent (R.I. Gen. Laws § 14-1-31).
SC	S.C. Code Ann. §§ 20-7-7205, 20-7-7210, 20-7-7215, 20-7-7220 (Westlaw 2003). SC FAM CT Rules 31 and 32 (Westlaw 2003).	Within 48 hours of custody, excluding weekends and holidays.	Yes. No child shall proceed without counsel unless right to counsel is waived after consultation with counsel (S.C. Code Ann. § 20-7-7215).
SD	S.D. Codified Laws Ann. §§ 26-7A-13.2, 26-7A-15, 26-7A-16, 26-7A-18, 26-7A-21, 26-7A-30 (Westlaw 2004).	Within 48 hours of custody, excluding weekends and holidays.	Unlikely. Parents and juvenile notified of right at first appearance (S.D. Codified Laws Ann. § 26-7A-30).
TN	Tenn. Code Ann. §§ 37-1-113 through 37-1-116, 37-1-117, 37-1-126 (Westlaw 2004). TN R JUV P Rule 5, 6, 7, 15	Within 3 days of detention, excluding days court is not in session.	Maybe. If juvenile appears without counsel then court inquiry into knowledge of right. Court may continue the proceeding to enable juvenile to obtain counsel (Tenn. Code Ann. § 37-1-126).

TX	Tex. Fam. Code Ann. §§ 51.12, 52.01, 53.02, 54.01, 54.011, 54.012 (Westlaw 2004). Tex. Crim. Proc. Art. 45.058 (Westlaw 2004).	No later than the second business day after the child is taken into custody. If juvenile is detained on a Friday or Saturday, then no later than the first working day.	Maybe. Notice of right provided prior to hearing. If juvenile appears at hearing without parents or guardian, court shall appoint counsel or guardian ad litem (Tex. Fam. Code Ann. § 54.01).
UT	Utah Code Ann. §§ 78-3a-113, 78-3a-114, 78-3a-913 (Westlaw 2003). UT R JUV Rules 8, through 11 (Westlaw 2003).	Within 48 hours of being taken into custody, excluding weekends and holidays, unless a continuance has been granted.	Maybe. Notice of right prior to hearing. UT R JUV Rule 8. Counsel shall be appointed to indigent juvenile if requested. Court may appoint counsel without a request if it deems it necessary in interest of minor or other parties (Utah Code Ann. § 78-3a-913).
VT	Vt. Stat. Ann. tit. 33 §§ 5510 through 5515 (Westlaw 2004). VT RULE FAM P Rule 1 (Westlaw 2004).	Within 48 hours of initial court order of custody, excluding weekends and holidays.	Yes. Counsel appointed at detention hearing (VT RULE FAM P Rule 1).
VA	Va. Code Ann. §§ 16.1-246, 16.1-247, 16.1-248.1, 16.1-249, 16.1-250, 16.1-250.1 16.1-255, 16.1-266 (Westlaw 2003).	On next day in which the court sits within city or county where child taken into custody; if court does not sit on next day, no later than 72 hours.	Current law: Maybe. Notice of right prior to hearing; if no counsel at hearing and if juvenile requests counsel, automatic rehearing with counsel (Va. Code Ann. § 16.1-150.1). Effective July 1, 2005: Yes. Prior to detention hearing, juvenile's indigence is presumed and counsel is appointed (Va. Code Ann. §§ 16.1-266).
WA	Wash. Rev. Code §§ 13.40.038, 13.40.040, 13.40.050, 13.40.100, 13.40.120 (Westlaw 2004). WA R JUV JuCR 7.3 (Westlaw 2003).	Probable cause determination within 48 hours of being taken into custody (if no arrest warrant). Detention hearing within 72 hours of filing of petition, which must be filed within 72 hours of placement in custody.	Unlikely. Notice of right prior to hearing, only appointed upon affirmative request by indigent juvenile (Wash. Rev. Code §§ 13.40.050, 13.40.140).
WV	W. Va. Code §§ 49-5-8, 49-5-8a, 49-5A-2, 49-5A-3 (Westlaw 2004).	Without delay, and no later than the next day after custody.	No. If no counsel at detention hearing appointment to be made as soon as practicable (W. Va. Code § 49-5-8a).
WI	Wis. Stat. §§ 938.19, 938.20, 938.205, 938.208, 938.209, 938.21, 938.23 (Westlaw 2003).	Within 24 hours after the end of the day on which the decision to detain was made, excluding Saturdays, Sundays and legal holidays.	Yes. Juvenile shall be represented at every stage. Only juveniles 15 and over can waive right (Wis. Stat. § 938.23).
WY	Wyo. Stat. §§ 14-6-205, 14-6-206, 14-6-207, 14-6-209, 14-6-210, 14-6-214, 14-6-222 (Westlaw 2003).	Within 72 hours of being taken into custody if juvenile detained without court order.	Maybe. Notified of right at first appearance. Counsel may be appointed upon arrest (Wyo. Stat. § 14-6-222).

RELATED CASE DECISIONS

Supreme Court of the United States

Richard E. GERSTEIN,
State Attorney for Eleventh Judicial Circuit of
Florida, Petitioner,
v.
Robert PUGH et al.

No. 73-477
420 U.S. 103

Argued March 25, 1974.

Reargued Oct. 21, 1974.

Decided Feb. 18, 1975.

Florida prisoners brought class action, under the Civil Rights Act, against various Dade County judicial and prosecutorial officials claiming a constitutional right to a judicial hearing on the issue of probable cause for pretrial detention and requesting declaratory and injunctive relief. The United States District Court for the Southern District of Florida, 355 F.Supp. 1286, rendered judgment for plaintiffs, and defendants appealed. The Court of Appeals, 483 F.2d 778, affirmed in part and vacated in part. The State Attorney's petition for writ of certiorari was granted. The Supreme Court, Mr. Justice Powell, held that habeas corpus was not the exclusive remedy, that claim was not barred by the equitable restrictions on federal intervention in state prosecutions, that conviction of named plaintiffs did not moot the claims of the unnamed class members, that standards and procedures for arrest and detention are derived from the Fourth Amendment and its common-law antecedents, that such Amendment requires a judicial determination of probable cause as a prerequisite to an extended restraint of liberty following arrest, that prosecutor's assessment of probable cause does not alone meet the constitutional requirements, that Florida procedure whereby a person arrested without a warrant and charged by information may be jailed without an opportunity for probable cause determination is unconstitutional, that pretrial detention without an opportunity for such a hearing does not void a following conviction and that a probable cause determination is not a 'critical stage' in the proceedings requiring appointed counsel.

Affirmed in part, reversed in part, and remanded.

Mr. Justice Stewart filed an opinion concurring in Parts I and II of the opinion and in which Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Marshall joined.

****858 Syllabus [FN*]**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*103 1. The Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. Accordingly, the Florida procedures challenged here whereby a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination are unconstitutional. Pp. 861-866.

(a) The prosecutor's assessment of probable cause, standing alone, does not meet the requirements of the Fourth Amendment and is insufficient to justify restraint of liberty pending trial. Pp. 864--865.

(b) The Constitution does not require, however, judicial oversight of the decision to prosecute by information, and a conviction will not be vacated on the ground that the defendant was detained pending trial without a probable cause determination. Pp. 865-866.

2. The probable cause determination, as an initial step in the criminal justice process, may be made by a judicial officer without an adversary hearing. Pp. 866--869.

(a) The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings, and this issue can be determined reliably by the use of informal procedures. Pp. 866--867.

(b) Because of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel. Pp. 867--868.

483 F.2d 778, affirmed in part, reversed in part, and remanded.

*104 Leonard R. Mellon for petitioner.

Raymond L. Marky, Tallahassee, Fla., for the State of Florida, as amicus curiae, by special leave of Court.

Bruce S. Rogow, Coral Gables, for respondents.

Paul L. Friedman, Washington, D.C., for the United States, as amicus curiae, by special leave of Court.

***105 Mr. Justice POWELL delivered the opinion of the Court.**

The issue in this case is whether a person arrested and held for trial under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty.

I

In March 1971 respondents Pugh and Henderson were arrested in Dade County, Fla. Each was charged with several offenses under a prosecutor's information. [FN1] Pugh was denied bail because one of the charges against him carried a potential life sentence, and Henderson remained in custody because he was unable to post a \$4,500 bond.

FN1. Respondent Pugh was arrested on March 3, 1971. On March 16 an information was filed charging him with robbery, carrying a concealed weapon, and possession of a firearm during commission of a felony. Respondent Henderson was arrested on March 2, and charged by information on March 19 with the offenses of breaking and entering and assault and battery. The record does not indicate whether there was an arrest warrant in either case.

****859** In Florida, indictments are required only for prosecution of capital offenses. Prosecutors may charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court. Fla.Rule Crim.Proc. 3.140(a); *State v. Hernandez*, 217 So.2d 109 (Fla.1968); *Di Bona v. State*, 121 So.2d 192 (Fla.App.1960). At the time respondents were arrested, a Florida rule seemed to authorize adversary preliminary hearings to test probable cause for detention in all cases. Fla.Rule Crim.Proc. 1.122 (before amendment in 1972). ***106** But the Florida courts had held that the filling of an information foreclosed the suspect's right to a preliminary hearing. See *State ex rel. Hardy v. Blount*, 261 So.2d 172 (Fla.1972). [FN2] They had also held that habeas corpus could not be used, except perhaps in exceptional circumstances, to test the probable cause for detention under an information. See *Sullivan v. State ex rel. McCrory*, 49 So.2d 794, 797 (Fla.1951). The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing after 30 days, Fla.Stat. Ann. s 907.045 (1973), [FN3] and arraignment, which the District Court found was often delayed a month or more after arrest. *Pugh v. Rainwater*, 332 F.Supp. 1107, 1110 (S.D.Fla.1971). [FN4] As a result, a person charged by information could be detained for a substantial period solely on the decision of a prosecutor.

FN2. Florida law also denies preliminary hearings to persons confined under indictment, see *Sangaree v. Hamlin*, 235 So.2d 729 (Fla.1970); Fla.Rule Crim.Proc. 3.131(a) but that procedure is not challenged in this case. See *infra*, at 117 n. 19.

FN3. This statute may have been construed to make the hearing permissive instead of mandatory. See *Evans v. State*, 197 So.2d 323 (Fla.App.1967); Fla.Op.Atty.Gen. 067--29 (1967). But cf. *Karz*

v. Overton, 249 So.2d 763 (Fla.App.1971). It may also have been superseded by the subsequent amendments to the Rules of Criminal Procedure. In re Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla.1972).

FN4. The Florida rules do not suggest that the issue of probable cause can be raised at arraignment, Fla.Rule Crim.Proc. 3.160, but counsel for petitioner represented at oral argument that arraignment affords the suspect an opportunity to 'attack the sufficiency of the evidence to hold him.' Tr. of Oral Arg. (Mar. 25, 1974) at 17. The Court of Appeals assumed, without deciding, that this was true. 483 F.2d 778, 781 n. 8 (C.A.5 1973).

Respondents Pugh and Henderson filed a class action against Dade County officials in the Federal District ***107** Court, [FN5] claiming a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief. [FN6] Respondents Turner and Faulk, also in custody under informations, subsequently intervened. [FN7] Petitioner Gerstein, the State Attorney for Dade County, was one of several defendants. [FN8]

FN5. The complaint was framed under 42 U.S.C. s 1983, and jurisdiction in the District Court was based on 28 U.S.C. s 1343(3).

FN6. Respondents did not ask for release from state custody, even as an alternative remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. 332 F.Supp. 1107, at 1115--1116 (S.D.Fla.1971). Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973); see *Wolff v. McDonnell*, 418 U.S. 539, 554, 555, 94 S.Ct. 2963, 2973, 41 L.Ed.2d 935 (1974).

FN7. Turner was being held on a charge of auto theft, following arrest on March 11, 1971. Faulk was arrested on March 19 on charges of soliciting a ride and possession of marihuana.

FN8. The named defendants included justices of the peace and judges of small-claims courts, who were authorized to hold preliminary hearings in criminal cases, and a group of law enforcement officers with power to make arrests in Dade County. Gerstein was the only one who petitioned for certiorari.

After an initial delay while the Florida Legislature considered a bill that would have afforded preliminary hearings ****860** to persons charged by information, the District Court granted the relief sought. *Pugh v. Rainwater*, *supra*. The court certified the case as a class action under Fed.Rule Civ.Proc. 23(b)(2), and held that the Fourth and Fourteenth Amendments give all arrested persons charged by information a right to a judicial hearing on the question of probable cause. The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable ***108** cause for further detention. [FN9] It also ordered them to submit a plan providing preliminary hearings in all cases instituted by information.

FN9. The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The injunction was not directed at the state prosecutions as such, but only at the

legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits. See *Conover v. Montemuro*, 477 F.2d 1073, 1082 (CA3 1972); cf. *Perez v. Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971); *Stefanelli v. Minard*, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951).

The defendants submitted a plan prepared by Sheriff E. Wilson Purdy, and the District Court adopted it with modifications. The final order prescribed a detailed post-arrest procedure. 336 F.Supp. 490 (SD Fla.1972). Upon arrest the accused would be taken before a magistrate for a 'first appearance hearing.' The magistrate would explain the charges, advise the accused of his rights, appoint counsel if he was indigent, and proceed with a probable cause determination unless either the prosecutor or the accused was unprepared. If either requested more time, the magistrate would set the date for a 'preliminary hearing,' to be held within four days if the accused was in custody and within 10 days if he had been released pending trial. The order provided sanctions for failure to hold the hearings at prescribed times. At the 'preliminary hearing' the accused would be entitled to counsel, and he would be allowed to confront and cross-examine adverse witnesses, to summon favorable witnesses, and to have a transcript made on request. If the magistrate found no probable cause, the accused would be discharged. He then could not be charged with the same offense by complaint or information, but only by indictment returned within 30 days.

*109 The Court of Appeals for the Fifth Circuit stayed the District Court's order pending appeal, but while the case was awaiting decision, the Dade County judiciary voluntarily adopted a similar procedure of its own. Upon learning of this development, the Court of Appeals remanded the case for specific findings on the constitutionality of the new Dade County system. Before the District Court issued its findings, however, the Florida Supreme Court amended the procedural rules governing preliminary hearings statewide, and the parties agreed that the District Court should direct its inquiry to the new rules rather than the Dade County procedures.

Under the amended rules every arrested person must be taken before a judicial officer within 24 hours. Fla.Rule Crim.Proc. 3.130(b). This 'first appearance' is similar to the 'first appearance hearing' ordered by the District Court in all respects but the crucial one: the magistrate does not make a determination of probable cause. The rule amendments also changed the procedure for preliminary hearings, restricting them to felony charges and codifying the rule that no hearings are available to persons charged by information or indictment. Rule 3.131; see *In re Rule 3.131(b)*, Florida Rules of Criminal Procedure, 289 So.2d 3 (Fla.1974).

In a supplemental opinion the District Court held that the amended rules had not answered the basic constitutional objection, since a defendant charged by information still could be detained **861 pending trial without a judicial determination of probable cause. 355 F.Supp. 1286 (SD

Fla.1973). Reaffirming its original ruling, the District Court declared that the continuation of this practice was unconstitutional. [FN10] The Court of Appeals *110 affirmed, 483 F.2d 778 (1973), modifying the District Court's decree in minor particulars and suggesting that the form of preliminary hearing provided by the amended Florida rules would be acceptable, as long as it was provided to all defendants in custody pending trial. *Id.*, at 788-- 789.

FN10. Although this ruling held a statewide 'legislative rule' unconstitutional, it was not outside the jurisdiction of a single judge by virtue of 28 U.S.C. s 2281. The original complaint did not ask for an injunction against enforcement of any state statute or legislative rule of statewide application, since the practice of denying preliminary hearings to persons charged by information was then embodied only in judicial decisions. The District Court therefore had jurisdiction to issue the initial injunction, and the Court of Appeals had jurisdiction over the appeal. On remand, the constitutionality of a state 'statute' was drawn into question for the first time when the criminal rules were amended. The District Court's supplemental opinion can fairly be read as a declaratory judgment that the amended rules were unconstitutional; the injunctive decree was never amended to incorporate that holding; and the opinion in the Court of Appeals is not inconsistent with the conclusion that the District Court did not enjoin enforcement of the statewide rule. See 483 F.2d, at 788--790. Accordingly, a district court of three judges was not required for the issuance of this order. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 152--155, 83 S.Ct. 554, 559--560, 9 L.Ed.2d 644 (1963); *Flemming v. Nestor*, 363 U.S. 603, 606--608, 80 S.Ct. 1367, 1370--1371, 4 L.Ed.2d 1435 (1960).

State Attorney Gerstein petitioned for review, and we granted certiorari because of the importance of the issue. [FN11] *111 414 U.S. 1062, 94 S.Ct. 567, 38 L.Ed.2d 467 (1973). We affirm in part and reverse in part.

FN11. At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention therefore has ended. This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly 'capable of repetition, yet evading review.'

At the time the complaint was filed, the named respondents were members of a class of persons detained without a judicial probable cause determination, but the record does not indicate whether any of them were still in custody awaiting trial when the District Court certified the class. Such a showing ordinarily would be required to avoid mootness under *Sosna*. But this case is a suitable exception to that requirement. See *Sosna*, supra, 419 U.S. at 402 n. 11, 95 S.Ct. at 559 n. 11; cf. *Rivera v. Freeman*, 469 F.2d 1159, 1162--1163 (CA9 1972). The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain

that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case.

II

As framed by the proceedings below, this case presents two issues: whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required by the Constitution.

A

Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See *Cupp v. Murphy*, 412 U.S. 291, 294--295, 93 S.Ct. 2000, 2003, 36 L.Ed.2d 900 (1973); *Ex parte Bollman*, 4 Cranch 75, 2 L.Ed. 554 (1807); *Ex parte Burford*, 3 Cranch 448, 2 L.Ed. 495 (1806). The standard for arrest is probable cause, defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense.' *112 *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964). See also *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959); *Brinegar v. United States*, 338 U.S. 160, 175--176, 69 S.Ct. 1302, 1310--1311, 93 L.Ed. 1879 (1949). This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime.

'These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.' *Id.*, at 176, 69 S.Ct. at 1311.

To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle appears in *Johnson v. United States*, 333 U.S. 10, 13--14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948):

'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists *113 in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'

See also *Terry v. Ohio*, 392 U.S. 1, 20--22, 88 S.Ct. 1868, 1879--1880, 20 L.Ed.2d 889 (1968). [FN12]

FN12. We reiterated this principle in *United States v. United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). In terms that apply equally to arrests, we described the 'very heart of the Fourth Amendment directive' as a requirement that 'where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation.' *Id.*, at 316, 92 S.Ct., at 2136.

Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, *Beck v. Ohio*, *supra*, 379 U.S. at 96, 85 S.Ct., at 228; *Wong Sun v. United States*, 371 U.S. 471, 479--482, 83 S.Ct. 407, 412--414, 9 L.Ed.2d 441 (1963), it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant. See *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); *863 *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959); *Trupiano v. United States*, 334 U.S. 699, 705, 68 S.Ct. 1229, 1232, 92 L.Ed. 1663 (1948). [FN13]

FN13. Another aspect of *Trupiano* was overruled in *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950), which was overruled in turn by *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

The issue of warrantless arrest that has generated the most controversy, and that remains unsettled, is whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest. See *Coolidge v. New Hampshire*, 403 U.S. 443, 474--481, 91 S.Ct. 2022, 2042--2045, 29 L.Ed. 564 (1971); *id.*, at 510--512 and n. 1, 91 S.Ct., at 2060--2061 (White, J., dissenting); *Jones v. United States*, 357 U.S. 493, 499--500, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958).

Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification *114 for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly.

The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. See R. Goldfarb, *Ransom* 32-91 (1965); L. Katz, *Justice Is the Crime* 51-62 (1972). Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty. See, e.g., 18 U.S.C. ss 3146(a)(2), (5). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.

This result has historical support in the common law that has guided interpretation of the Fourth Amendment. See *Carroll v. United States*, 267 U.S. 132, 149, 45 S.Ct. 280, 283, 69 L.Ed. 543 (1925). At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest. 2 M. Hale, *Pleas of the Crown* 77, 81, 95, 121 (1736); 2 W. Hawkins, *Pleas of the Crown* 116--117 (4th ed. 1762). See also *Kurtz v. Moffitt*, 115 U.S. 487, 498--499, 6 S.Ct. 148, 151--152, 29 L.Ed. 458 (1885). [FN14] The justice of **864 the peace *115 would 'examine' the prisoner and the witnesses to determine whether there was reason to believe the prisoner had committed a crime. If there was, the suspect would be committed to jail or bailed pending trial. If not, he would be discharged from custody. 1 M. Hale, *supra*, at 583--586; 2 W. Hawkins, *supra*, at 116--119; 1 J. Stephen, *History of the Criminal Law of England* 233 (1883). [FN15] The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. 2 W. Hawkins, *supra*, at 112--115; 1 J. Stephen, *supra*, at 243; see *Ex parte Bollman*, 4 Cranch, at 97--101. This practice furnished the model for criminal procedure in America immediately following the adoption of the *116 Fourth Amendment, see *Ex parte Bollman*, *supra*; [FN16] *Ex parte Burford*, 3 Cranch 448, 2 L.Ed. 495 (1806); *United States v. Hamilton*, 3 Dall. 17, 1 L.Ed. 490 (1795), and there are indications that the Framers of the Bill of Rights regarded it as a model for a 'reasonable' seizure. See *Draper v. United States*, 358 U.S., at 317--320, 79 S.Ct., at 335--336 (Douglas, J., dissenting). [FN17]

FN14. The primary motivation for the requirement seems to have been the penalty for allowing an offender to escape, if he had in fact committed the crime, and the fear of liability for false imprisonment, if he had not. But Hale also recognized that a judicial warrant of commitment, called a mittimus, was required for more than brief detention.

'When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

'1. He may carry him to the common gaol, . . . but that is now rarely done.

'2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, . . . or to a justice of peace

to be examined, and farther proceeded against as case shall require. . . .

'3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

'And the bringing the offender either by the constable or private person to a justice of peace is most usual and safe, because a gaoler will expect a Mittimus for his warrant of detaining.' 1 M. Hale, *Pleas of the Crown* 589--590 (1736).

FN15. The examination of the prisoner was inquisitorial, and the witnesses were questioned outside the prisoner's presence. Although this method of proceeding was considered quite harsh, 1 J. Stephen, *supra*, at 219--225, it was well established that the prisoner was entitled to be discharged if the investigation turned up insufficient evidence of his guilt. *Id.*, at 233.

FN16. In *Ex parte Bollman*, two men charged in the Aaron Burr case were committed following an examination in the Circuit Court of the District of Columbia. They filed a petition for writ of habeas corpus in the Supreme Court. The Court, in an opinion by Mr. Chief Justice Marshall, affirmed its jurisdiction to issue habeas corpus to persons in custody by order of federal trial courts. Then, following arguments on the Fourth Amendment requirement of probable cause, the Court surveyed the evidence against the prisoners and held that it did not establish probable cause that they were guilty of treason. The prisoners were discharged.

FN17. See also N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 15--16 (1937). A similar procedure at common law, the warrant for recovery of stolen goods, is said to have furnished the model for a 'reasonable' search under the Fourth Amendment. The victim was required to appear before a justice of the peace and make an oath of probable cause that his goods could be found in a particular place. After the warrant was executed, and the goods seized, the victim and the alleged thief would appear before the justice of the peace for a prompt determination of the cause for seizure of the goods and detention of the thief. 2 M. Hale, *supra*, at 149--152; T. Taylor, *Two Studies in Constitutional Interpretation* 24--25, 39--40 (1969); see *Boyd v. United States*, 116 U.S. 616, 626--629, 6 S.Ct. 524, 530--531, 29 L.Ed. 746 (1886).

B

Under the Florida procedures challenged here, a person arrested without a warrant and charged by information may be jailed or subjected to other restraints pending trial without any opportunity for a probable cause determination. [FN18] Petitioner defends this practice on the *117 ground that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial. Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of the Florida procedure. In *Albrecht v. United States*, 273 U.S. 1, 5, 47 S.Ct. 250, 251, 71 L.Ed. 505 (1927), the Court held that an arrest warrant issued solely upon a **865 United States Attorney's

information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment. [FN19] More recently, in *Coolidge v. New Hampshire*, 403 U.S. 443, 449--453, 91 S.Ct. 2022, 2029--2031, 29 L.Ed.2d 564 (1971), the Court held that a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in **118Shadwick v. City of Tampa*, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution. See also *United States v. United States District Court*, 407 U.S. 297, 317, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752 (1972). [FN20] The reason for this separation of functions was expressed by Mr. Justice Frankfurter in a similar context:

FN18. A person arrested under a warrant would have received a prior judicial determination of probable cause. Under Fla.Rule Crim.Proc. 3.120, a warrant may be issued upon a sworn complaint that states facts showing that the suspect has committed a crime. The magistrate may also take testimony under oath to determine if there is reasonable ground to believe the complaint is true.

FN19. By contrast, the Court has held that an indictment, 'fair upon its face,' and returned by a 'properly constituted grand jury,' conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte United States*, 287 U.S. 241, 250, 53 S.Ct. 129, 131, 77 L.Ed. 283 (1932). See also *Giordenello v. United States*, 357 U.S. 480, 487, 78 S.Ct. 1245, 1250, 2 L.Ed.2d 1503 (1958). The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution. See *United States v. Calandra*, 414 U.S. 338, 342--346, 94 S.Ct. 613, 617--619, 38 L.Ed.2d 561 (1974).

FN20. The Court had earlier reached a different result in *Ocampo v. United States*, 234 U.S. 91, 34 S.Ct. 712, 58 L.Ed. 1231 (1914), a criminal appeal from the Philippine Islands. Interpreting a statutory guarantee substantially identical to the Fourth Amendment, Act of July 1, 1902, s 5, 32 Stat. 693, the Court held that an arrest warrant could issue solely upon a prosecutor's information. The Court has since held that interpretation of a statutory guarantee applicable to the Philippines is not conclusive for interpretation of a cognate provision in the Federal Constitution, *Green v. United States*, 355 U.S. 184, 194--198, 78 S.Ct. 221, 227--229, 2 L.Ed.2d 199 (1957). Even if it were, the result reached in *Ocampo* is incompatible with the later holdings of *Albrecht*, *Coolidge*, and *Shadwick*.

'A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despot. The awful instruments of the criminal law cannot

be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication.' *McNabb v. United States*, 318 U.S. 332, 343, 63 S.Ct. 608, 614, 87 L.Ed. 819 (1943).

In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Beck v. Washington*, 369 U.S. 541, 545, 82 S.Ct. 955, 957, 8 L.Ed.2d 98 (1962); *Lem Woon v. Oregon*, 229 U.S. 586, 33 S.Ct. 783, 57 L.Ed. 1340 (1913). Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction. *Frisbie v. Collins*, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952); *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886). Thus, as the ***866* Court of Appeals noted below, although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause. 483 F.2d, at 786--787. Compare *Scarborough v. Dutton*, 393 F.2d 6 (CA5 1968), with *Brown v. Fauntleroy*, 143 U.S.App.D.C. 116, 442 F.2d 838 (1971), and *Cooley v. Stone*, 134 U.S.App.D.C. 317, 414 F.2d 1213 (1969).

III

Both the District Court and the Court of Appeals held that the determination of probable cause must be accompanied by the full panoply of adversary safeguards--counsel, confrontation, cross-examination, and compulsory process for witnesses. A full preliminary hearing of this sort is modeled after the procedure used in many States to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. See *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); Y. Kamisar, W. LaFave & J. Israel, *Modern Criminal Procedure* 957--967, 996--1000 (4th ed. 1974). The standard of proof required of the prosecution is usually referred to as 'probable cause,' but in some jurisdictions it may approach a prima facie case of guilt. **120* ALI, *Model Code of Pre-arraignment Procedure*, Commentary on Art. 330, pp. 90--91 (Tent. Draft No. 5, 1972). When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination. This kind of hearing also requires appointment of counsel for indigent defendants. *Coleman v. Alabama*, supra. And, as the hearing assumes increased importance and the procedures become more complex, the likelihood that it can be held promptly after arrest diminishes. See ALI, *Model Code of Pre-arraignment Procedure*, supra, at 33--34.

These adversary safeguards are not essential for the probable cause determination required by the Fourth

Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. [FN21] That standard-- probable cause to believe the suspect has committed a crime--traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

FN21. Because the standards are identical, ordinarily there is no need for further investigation before the probable cause determination can be made.

'Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'" *Mallory v. United States*, 354 U.S. 449, 456, 77 S.Ct. 1356, 1360, 1 L.Ed.2d 1479 (1957).

'Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, *121 to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

'In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The **867 standard of proof is accordingly correlative to what must be proved.' *Brinegar v. United States*, 338 U.S., at 174--175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879.

Cf. *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967).

The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt. See *F. Miller, Prosecution: The Decision to Charge a Suspect with a Crime* 64-109 (1969). [FN22] This is not to say that confrontation and *122 cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause. [FN23]

FN22. In *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. 408 U.S., at 487, 92 S.Ct., at 2603;

411 U.S., at 786, 93 S.Ct., at 1761. That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred. 408 U.S., at 485, 92 S.Ct., at 2602; 411 U.S., at 782--783, n. 5, 93 S.Ct., at 1759--1760. Moreover, revocation proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied of probable cause. See ABA Code of Professional Responsibility DR 7--103(A) (Final Draft 1969) (a prosecutor 'shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause'); American Bar Association Project on Standards for Criminal Justice, *The Prosecution Function* ss 1.1, 3.4, 3.9 (1974); American College of Trial Lawyers, *Code of Trial Conduct*, Rule 4(c) (1963).

FN23. Criminal justice is already overburdened by the volume of cases and the complexities of our system. The proceeding of misdemeanors, in particular, and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine requiring adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay.

Because of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel. The Court has identified as 'critical stages' those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel. *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); *United States v. Wade*, 388 U.S. 218, 226--227, 87 S.Ct. 1926, 1931--1932, 18 L.Ed.2d 1149 (1967). In *Coleman v. Alabama*, where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution, the majority and concurring opinions identified two critical factors that distinguish the Alabama preliminary hearing from the probable cause determination required by the Fourth Amendment. First, *123 under Alabama law the function of the preliminary hearing was to determine whether the evidence justified charging the suspect with an offense. A finding of no probable cause could mean that he would not be tried at all. The Fourth Amendment probable cause determination is addressed only to pretrial custody. To be sure, pretrial custody may affect to some extent the defendant's ability to **868 assist in preparation of his defense, but this does not present the high probability of substantial harm identified as controlling in *Wade* and *Coleman*. Second, Alabama allowed the suspect to confront and cross-examine prosecution witnesses at the preliminary hearing. The Court noted that the suspect's defense on the merits could be compromised if he had no legal assistance for exploring or preserving the witnesses' testimony. This consideration does not apply when the prosecution is not required to produce witnesses for cross-examination.

Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature

of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer, [FN24] *124 see *McNabb v. United States*, 318 U.S., at 342--344, 63 S.Ct., at 613--614, or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some States, existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment, such as acceleration of existing preliminary hearings. Current proposals for criminal procedure reform suggest other ways of testing probable cause for detention. [FN25] Whatever *125 procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint **869 of liberty, [FN26] and this determination must be made by a judicial officer either before or promptly after arrest. [FN27]

FN24. Several States already authorize a determination of probable cause at this stage or immediately thereafter. See, e.g., Hawaii Rev.Stat. ss 708-- 9(5), 710--7 (1968); Vt. Rules Crim.Proc. 3(b), 5(c). This Court has interpreted the Federal Rules of Criminal Procedure to require a determination of probable cause at the first appearance. *Jaben v. United States*, 381 U.S. 214, 218, 85 S.Ct. 1365, 1367, 14 L.Ed.2d 345 (1965); *Mallory v. United States*, 354 U.S., at 454, 77 S.Ct., at 1359.

FN25. Under the Uniform Rules of Criminal Procedure (Proposed Final Draft 1974), a person arrested without a warrant is entitled, 'without unnecessary delay,' to a first appearance before a magistrate and a determination that grounds exist for issuance of an arrest warrant. The determination may be made on affidavits or testimony, in the presence of the accused. Rule 311. Persons who remain in custody for inability to qualify for pretrial release are offered another opportunity for a probable cause determination at the detention hearing, held no more than five days after arrest. This is an adversary hearing, and the parties may summon witnesses, but reliable hearsay evidence may be considered. Rule 344.

The ALI Model Code of Pre-arraignment Procedure (Tent. Draft No. 5, 1972, and Tent. Draft No. 5A, 1973) also provides a first appearance, at which a warrantless arrest must be supported by a reasonably detailed written statement of facts. s 310.1. The magistrate may make a determination of probable cause to hold the accused, but he is not required to do so and the accused may request an attorney for an 'adjourned session' of the first appearance to be held within two 'court days.' At that session, the magistrate makes a determination of probable cause upon a combination of written and live testimony:

'The arrested person may present written and testimonial evidence and arguments for his discharge and the state may present additional written and testimonial evidence and arguments that there is reasonable cause to believe that he has committed the crime of which he is accused. The state's submission may be made by means of affidavits, and no witnesses shall be required to appear unless the court, in the light of the evidence and arguments submitted by the parties, determines that there is a basis for believing that the appearance of one or more witnesses for whom the arrested person seeks

subpoenas might lead to a finding that there is no reasonable cause.' s 310.2(2) (Tent. Draft No. 5A, 1973).

FN26. Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. See 18 U.S.C. s 3146; American Bar Association Project on Standards for Criminal Justice, Pretrial Release s 5.2 (1974); Uniform Rules of Criminal Procedure, Rule 341 (Proposed Final Draft 1974). We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.

FN27. In his concurring opinion, Mr. Justice STEWART objects to the Court's choice of the Fourth Amendment as the rationale for decision and suggests that the Court offers less procedural protection to a person in jail than it requires in certain civil cases. Here we deal with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial. Part II--A, supra. Moreover, the Fourth Amendment probable cause determination is in fact only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct. The relatively simple civil procedures (e.g., prior interview with school principal before suspension) presented in the cases cited in the concurring opinion are inapposite and irrelevant in the wholly different context of the criminal justice system.

It would not be practicable to follow the further suggestion implicit in Mr. Justice STEWART's concurring opinion that we leave for another day determination of the procedural safeguards that are required in making a probable-cause determination under the Fourth Amendment. The judgment under review both declares the right not to be detained without a probable-cause determination and affirms the District Court's order prescribing an adversary hearing for the implementation of that right. The circumstances of the case thus require a decision on both issues.

*126 IV

We agree with the Court of Appeals that the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention, and we accordingly affirm that much of the judgment. As we do not agree that the Fourth Amendment requires the adversary hearing outlined in the District Court's decree, we reverse in part and remand to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

Affirmed in part, reversed in part, and remanded.

Mr. Justice STEWART, with whom Mr. Justice DOUGLAS, Mr. Justice BRENNAN, and Mr. Justice MARSHALL join, concurring.

I concur in Parts I and II of the Court's opinion, since the Constitution clearly requires at least a timely judicial determination of probable cause as a prerequisite to pretrial detention. Because Florida does not provide all defendants in custody pending trial with a fair and reliable determination of probable cause for their detention, the respondents and the members of the class they represent are entitled to declaratory and injunctive relief.

Having determined that Florida's current pretrial detention procedures are constitutionally inadequate, I think it is unnecessary to go further by way of dicta. In particular, I would not, in the abstract, attempt to specify those procedural protections that constitutionally need not be accorded incarcerated suspects awaiting trial.

*127 Specifically, I see no need in this case for the Court to say that the Constitution extends less procedural protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account, **870 *North Georgia Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751; the custody of a refrigerator, *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406, the temporary suspension of a public school student, *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725, or the suspension of a driver's license, *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90. Although it may be true that the Fourth Amendment's 'balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases,' ante, at 869 n. 27, this case does not involve an initial arrest, but rather the continuing incarceration of a presumptively innocent person. Accordingly, I cannot join the Court's effort to foreclose any claim that the traditional requirements of constitutional due process are applicable in the context of pretrial detention.

It is the prerogative of each State in the first instance to develop pretrial procedures that provide defendants in pretrial custody with the fair and reliable determination of probable cause for detention required by the Constitution. Cf. *Morrissey v. Brewer*, 408 U.S. 471, 488, 92 S.Ct. 2593, 2603, 33 L.Ed.2d 484. The constitutionality of any particular method for determining probable cause can be properly decided only by evaluating a State's pretrial procedures as a whole, not by isolating a particular part of its total system. As the Court recognizes, great diversity exists among the procedures employed by the States in this aspect of their criminal justice systems. Ante, at 868.

There will be adequate opportunity to evaluate in an appropriate future case the constitutionality of any new procedures that may be adopted by Florida in response to the Court's judgment today holding that Florida's present procedures are constitutionally inadequate.

**COUNTY OF RIVERSIDE and Cois Byrd, Sheriff of
Riverside County, Petitioners,**

v.

Donald Lee McLAUGHLIN, et al.

**No. 89-1817
500 U.S. 44**

Argued Jan. 7, 1991.
Decided May 13, 1991.

Arrestees brought class action seeking injunctive and declaratory relief under § 1983 alleging that county violated the Fourth Amendment by failing to provide prompt judicial determinations of probable cause to persons arrested without a warrant. The United States District Court for the Central District of California, Richard A. Gadbois, Jr., J., granted class certification and subsequently issued preliminary injunction requiring that all persons arrested by county without a warrant be provided probable cause determinations within 36 hours of arrest, except in exigent circumstances. County appealed. After consolidation with a similar case against another county, the United States Court of Appeals for the Ninth Circuit, 888 F.2d 1276, affirmed. Counties petitioned for certiorari. The Supreme Court, Justice O'Connor, held that: (1) plaintiffs had standing; (2) although named plaintiffs' claims were subsequently rendered moot by their receipt of probable cause hearings or their release from custody, they preserved merits of controversy for review by obtaining class certification; (3) Fourth Amendment does not compel immediate determination of probable cause upon completion of administrative steps incident to warrantless arrest; (4) a jurisdiction that chooses to combine probable cause determinations with other pretrial proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest; and (5) although county was entitled to combine probable cause determination with arraignment, it was not immune from systemic challenges such as instant class action, where its regular practice of offering combined proceedings within two days, exclusive of Saturdays, Sundays or holidays, could result in delays exceeding permissible 48-hour period.

Vacated and remanded.

Justice Marshall filed dissenting opinion in which Justices Blackmun and Stevens joined.

Justice Scalia filed dissenting opinion.

Opinion on remand, 943 F.2d 36.

****1663 Syllabus [FN*]**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*44 Respondent McLaughlin brought a class action seeking injunctive and declaratory relief under 42 U.S.C. § 1983, alleging that petitioner County of Riverside (County) violated the holding of *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54, by failing to provide "prompt" judicial determinations of probable cause to persons who, like himself, were arrested without a warrant. The County combines such determinations with arraignment procedures which, under County policy, must be conducted within two days of arrest, excluding weekends and holidays. The County moved to dismiss the complaint, asserting that McLaughlin lacked standing to bring the suit because the time for providing him a "prompt" probable cause determination had already passed and he had failed to show, as required by *Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675, that he would again be subject to the allegedly unconstitutional conduct. The District Court never explicitly ruled on the motion to dismiss, but accepted for filing a second amended complaint-- the operative pleading here--which named respondents James, Simon, and Hyde as additional individual plaintiffs and class representatives, and alleged that each of them had been arrested without a warrant, had not received a prompt probable cause hearing, and was still in custody. The court granted class certification and subsequently issued a preliminary injunction requiring that all persons arrested by the County without a warrant be provided probable cause determinations within 36 hours of arrest, except in exigent circumstances. The Court of Appeals affirmed, rejecting the County's Lyons -based standing **1664 argument and ruling on the merits that the County's practice was not in accord with *Gerstein's* promptness requirement because no more than 36 hours were needed to complete the administrative steps incident to arrest.

Held:

1. Plaintiffs have Article III standing. At the time the second amended complaint was filed, James, Simon, and Hyde satisfied the standing doctrine's core requirement that they allege personal injury fairly traceable to the County's allegedly unlawful conduct and likely to be redressed by the requested injunction. See, e.g., *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556. Lyons, supra, distinguished. Although the named *45 plaintiffs' claims were subsequently rendered moot by their receipt of probable cause hearings or their release from custody, they preserved the merits of the controversy for this Court's review by obtaining class certification. See, e.g., *Gerstein*, 420 U.S., at 110-111, n. 11, 95 S.Ct., at 861, n. 11. This Court is not deprived of jurisdiction by the fact that the class was not certified until after the named plaintiffs' claims became moot. Such claims are so inherently

transitory, see, e.g., *id.*, at 110, n. 11, 95 S.Ct., at 861, n. 11, that the “relation back” doctrine is properly invoked to preserve the case’s merits for judicial resolution, see, e.g., *Swisher v. Brady*, 438 U.S. 204, 213-214, n. 11, 98 S.Ct. 2699, 2705-2706, n. 11, 57 L.Ed.2d 705. Pp. 1666-1667.

2. The County’s current policy and practice do not comport fully with Gerstein’s requirement of a “prompt” probable cause determination. Pp. 1667-1671.

(a) Contrary to the Court of Appeals’ construction, Gerstein implicitly recognized that the Fourth Amendment does not compel an immediate determination of probable cause upon completion of the administrative steps incident to arrest. In requiring that persons arrested without a warrant “promptly” be brought before a neutral magistrate for such a determination, 420 U.S., at 114, 125, 95 S.Ct., at 863, 868, Gerstein struck a balance between the rights of individuals and the realities of law enforcement. *Id.*, at 113, 95 S.Ct., at 862. Gerstein makes clear that the Constitution does not impose on individual jurisdictions a rigid procedural framework for making the required determination, but allows them to choose to comply in different ways. *Id.*, at 123, 95 S.Ct., at 867. In contrast, the Court of Appeals’ approach permits no flexibility and is in error. Pp. 1667- 1669.

(b) In order to satisfy Gerstein’s promptness requirement, a jurisdiction that chooses to combine probable cause determinations with other pretrial proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest. Providing a probable cause determination within that timeframe will, as a general matter, immunize such a jurisdiction from systemic challenges. Although a hearing within 48 hours may nonetheless violate Gerstein if the arrested individual can prove that his or her probable cause determination was delayed unreasonably, courts evaluating the reasonableness of a delay must allow a substantial degree of flexibility, taking into account the practical realities of pretrial procedures. Where an arrested individual does not receive a probable cause determination within 48 hours, the burden of proof shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance, which cannot include intervening weekends or the fact that in a particular case it may take longer to consolidate pretrial proceedings. Pp. 1669-1671.

(c) Although the County is entitled to combine probable cause determinations with arraignments, it is not immune from systemic challenges *46 such as this class action. Its regular practice exceeds the constitutionally permissible 48-hour period because persons arrested on Thursdays may have to wait until the following Monday before receiving a **1665 probable cause determination, and the delay is even

longer if there is an intervening holiday. Moreover, the lower courts, on remand, must determine whether the County’s practice as to arrests that occur early in the week--whereby arraignments usually take place on the last day possible--is supported by legitimate reasons or constitutes delay for delay’s sake. P. 1671.

888 F.2d 1276 (CA 9, 1989), vacated and remanded.

O’CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, KENNEDY, and SOUTER, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, post, p. 1671. SCALIA, J., filed a dissenting opinion, post, p. 1671.

Timothy T. Coates argued the cause for petitioners. With him on the briefs were Peter J. Ferguson, Michael A. Bell, and Martin Stein.

Dan Stormer argued the cause for respondents. With him on the brief were Richard P. Herman, Ben Margolis, and Elizabeth Spector.*

*Briefs of amici curiae urging reversal were filed for the State of California by John K. Van de Kamp, Attorney General, Richard B. Iglehart, Chief Assistant Attorney General, Harley D. Mayfield, Senior Assistant Attorney General, and Robert M. Foster and Frederick R. Millar, Jr., Supervising Deputy Attorneys General; and for the District Attorney, County of Riverside, California, by Grover C. Trask, II, pro se.

Robert M. Rotstein, John A. Powell, Paul L. Hoffman, and Judith Resnik filed a brief for the American Civil Liberties Union as amicus curiae urging affirmance.

Briefs of amici curiae were filed for the State of Hawaii et al. by Warren Price III, Attorney General of Hawaii, and Steven S. Michaels, Deputy Attorney General, Don Siegelman, Attorney General of Alabama, Ron Fields, Attorney General of Arkansas, John J. Kelly, Chief State’s Attorney of Connecticut, Charles J. Oberly III, Attorney General of Delaware, James T. Jones, Attorney General of Idaho, Neil F. Hartigan, Attorney General of Illinois, Linley E. Pearson, Attorney General of Indiana, James E. Tierney, Attorney General of Maine, Frank J. Kelley, Attorney General of Michigan, Mike Moore, Attorney General of Mississippi, Marc Racicot, Attorney General of Montana, Robert M. Spire, Attorney General of Nebraska, Robert J. Del Tufo, Attorney General of New Jersey, John P. Arnold, Attorney General of New Hampshire, Hal Stratton, Attorney General of New Mexico, Brian McKay, Attorney General of Nevada, Lacy H. Thornburg, Attorney General of North Carolina, Robert H. Henry, Attorney General of Oklahoma, T. Travis Medlock, Attorney General of South Carolina, Roger A. Tellinghuisen, Attorney General of South Dakota, Jeffrey L. Amestoy, Attorney General of Vermont, and Joseph P. Meyer, Attorney General of Wyoming; for the County of Los Angeles et al. by De Witt W. Clinton and Dixon M. Holston; for the California District Attorneys Association by Michael R. Capizzi; and for the Youth Law Center by Mark I. Soler and Loran M. Warboys.

***47 Justice O'CONNOR delivered the opinion of the Court.**

In *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), this Court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. This case requires us to define what is "prompt" under *Gerstein*.

I

This is a class action brought under 42 U.S.C. § 1983 challenging the manner in which the County of Riverside, California (County), provides probable cause determinations to persons arrested without a warrant. At issue is the County's policy of combining probable cause determinations with its arraignment procedures. Under County policy, which tracks closely the provisions of Cal.Penal Code Ann. § 825 (West 1985), arraignments must be conducted without unnecessary delay and, in any event, within two days of arrest. This 2-day requirement excludes from computation weekends and holidays. Thus, an individual arrested without a warrant late in the week may in some cases be held for as long as five days before receiving a probable cause determination. Over the Thanksgiving holiday, a 7-day delay is possible.

The parties dispute whether the combined probable cause/arraignment procedure is available to all warrantless arrestees. Testimony by Riverside County District Attorney Grover Trask suggests that individuals arrested without *48 warrants for felonies do not receive a probable cause determination until the preliminary hearing, which may not occur until 10 days after arraignment. 2 App. 298-299. Before this Court, however, the County represents that its policy is to provide probable cause determinations at arraignment for all persons arrested without a warrant, regardless of the nature of the charges against them. *Ibid.* See also Tr. of Oral Arg. 13. We need not resolve the factual inconsistency here. For present purposes, we accept the County's representation.

In August 1987, Donald Lee McLaughlin filed a complaint in the United States District Court for the Central District of California, seeking injunctive and declaratory relief on behalf of himself and "all others similarly situated." The complaint alleged that McLaughlin was then currently incarcerated in the Riverside County Jail and had not received a probable cause determination. He requested "an order and judgment requiring that the defendants and the County of Riverside provide in-custody arrestees, arrested without warrants, prompt probable cause, bail and arraignment hearings." Pet. for Cert. 6. Shortly thereafter, McLaughlin moved for class certification. The County moved to dismiss the complaint, asserting that McLaughlin lacked standing to bring the suit because he had failed to show, as required by *Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), that he

**1666 would again be subject to the allegedly unconstitutional conduct--i.e., a warrantless detention without a probable cause determination.

In light of the pending motion to dismiss, the District Court continued the hearing on the motion to certify the class. Various papers were submitted; then, in July 1988, the District Court accepted for filing a second amended complaint, which is the operative pleading here. From the record it appears that the District Court never explicitly ruled on defendants' motion to dismiss, but rather took it off the court's calendar in August 1988.

*49 The second amended complaint named three additional plaintiffs-- Johnny E. James, Diana Ray Simon, and Michael Scott Hyde--individually and as class representatives. The amended complaint alleged that each of the named plaintiffs had been arrested without a warrant, had received neither a prompt probable cause nor a bail hearing, and was still in custody. 1 App. 3. In November 1988, the District Court certified a class comprising "all present and future prisoners in the Riverside County Jail including those pretrial detainees arrested without warrants and held in the Riverside County Jail from August 1, 1987 to the present, and all such future detainees who have been or may be denied prompt probable cause, bail or arraignment hearings." 1 App. 7.

In March 1989, plaintiffs asked the District Court to issue a preliminary injunction requiring the County to provide all persons arrested without a warrant a judicial determination of probable cause within 36 hours of arrest. 1 App. 21. The District Court issued the injunction, holding that the County's existing practice violated this Court's decision in *Gerstein*. Without discussion, the District Court adopted a rule that the County provide probable cause determinations within 36 hours of arrest, except in exigent circumstances. The court "retained jurisdiction indefinitely" to ensure that the County established new procedures that complied with the injunction. 2 App. 333-334.

The United States Court of Appeals for the Ninth Circuit consolidated this case with another challenging an identical preliminary injunction issued against the County of San Bernardino. See *McGregor v. County of San Bernardino*, decided with *McLaughlin v. County of Riverside*, 888 F.2d 1276 (1989).

On November 8, 1989, the Court of Appeals affirmed the order granting the preliminary injunction against Riverside County. One aspect of the injunction against San Bernardino County was reversed by the Court of Appeals; that determination is not before us.

*50 The Court of Appeals rejected Riverside County's Lyons-based standing argument, holding that the named plaintiffs had Article III standing to bring the class action for injunctive relief. 888 F.2d, at 1277. It reasoned that, at the time plaintiffs filed their complaint, they were in custody and suffering injury as a result of defendants' allegedly unconstitutional action. The court then proceeded to the

merits and determined that the County's policy of providing probable cause determinations at arraignment within 48 hours was "not in accord with Gerstein's requirement of a determination 'promptly after arrest' " because no more than 36 hours were needed "to complete the administrative steps incident to arrest." *Id.*, at 1278.

The Ninth Circuit thus joined the Fourth and Seventh Circuits in interpreting Gerstein as requiring a probable cause determination immediately following completion of the administrative procedures incident to arrest. *Llaguno v. Mingey*, 763 F.2d 1560, 1567-1568 (CA7 1985) (en banc); *Fisher v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1133, 1139-1141 (CA4 1982). By contrast, the Second Circuit understands Gerstein to "stres[s] the need for flexibility" and to permit States to combine probable cause determinations with other pretrial proceedings. *Williams v. Ward*, 845 F.2d 374, 386 (1988), cert. denied, 488 U.S. 1020, 109 S.Ct. 818, 102 L.Ed.2d 807 (1989). We granted certiorari to resolve this conflict among the Circuits as to what constitutes a "prompt" probable cause determination under Gerstein.

II

As an initial matter, the County renews its claim that plaintiffs lack standing. It explains that the main thrust of plaintiffs' suit is that they are entitled to "prompt" probable cause determinations and insists that this is, by definition, a time-limited violation. Once sufficient time has passed, the County argues, the constitutional violation is complete because a probable cause determination made after that point^{*51} would no longer be "prompt." Thus, at least as to the named plaintiffs, there is no standing because it is too late for them to receive a prompt hearing and, under *Lyons*, they cannot show that they are likely to be subjected again to the unconstitutional conduct.

We reject the County's argument. At the core of the standing doctrine is the requirement that a plaintiff "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984), citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). The County does not dispute that, at the time the second amended complaint was filed, plaintiffs James, Simon, and Hyde had been arrested without warrants and were being held in custody without having received a probable cause determination, prompt or otherwise. Plaintiffs alleged in their complaint that they were suffering a direct and current injury as a result of this detention, and would continue to suffer that injury until they received the probable cause determination to which they were entitled. Plainly, plaintiffs' injury was at that moment capable of being redressed through injunctive relief. The County's argument that the constitutional violation had already been "completed" relies on a crabbed reading of the

complaint. This case is easily distinguished from *Lyons*, in which the constitutionally objectionable practice ceased altogether before the plaintiff filed his complaint.

It is true, of course, that the claims of the named plaintiffs have since been rendered moot; eventually, they either received probable cause determinations or were released. Our cases leave no doubt, however, that by obtaining class certification, plaintiffs preserved the merits of the controversy for our review. In factually similar cases we have held that "the termination of a class representative's claim does not moot the claims of the unnamed members of the class." See, e.g., *Gerstein*, 420 U.S., at 110-111, n. 11, 95 S.Ct., at 861, n. 11, citing *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975); *Schall v. Martin*, 467 U.S. 253, 256, n. 3, 104 S.Ct. 2403, 2405, n. 3, 81 L.Ed.2d 207 (1984). That the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction. We recognized in *Gerstein* that "[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 399, 100 S.Ct. 1202, 1210, 63 L.Ed.2d 479 (1980), citing *Gerstein*, supra, 420 U.S., at 110, n. 11, 95 S.Ct., at 861, n. 11. In such cases, the "relation back" doctrine is properly invoked to preserve the merits of the case for judicial resolution. See *Swisher v. Brady*, 438 U.S. 204, 213-214, n. 11, 98 S.Ct. 2699, 2705 n. 11, 57 L.Ed.2d 705 (1978); *Sosna*, supra, 419 U.S., at 402, n. 11, 95 S.Ct., at 559, n. 11. Accordingly, we proceed to the merits.

III

A

In *Gerstein*, this Court held unconstitutional Florida procedures under which persons^{**1668} arrested without a warrant could remain in police custody for 30 days or more without a judicial determination of probable cause. In reaching this conclusion we attempted to reconcile important competing interests. On the one hand, States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity, even where there has been no opportunity for a prior judicial determination of probable cause. 420 U.S., at 112, 95 S.Ct., at 862. On the other hand, prolonged detention based on incorrect or unfounded suspicion may unjustly "imperil [a] suspect's job, interrupt his source of income, and impair his family relationships." *Id.*, at 114, 95 S.Ct., at 863. We sought to balance these competing concerns by holding that States "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." *Id.*, at 125, 95 S.Ct., at 868-869 (emphasis added).

^{*53} The Court thus established a "practical compromise" between the rights of individuals and the realities of law

enforcement. *Id.*, at 113, 95 S.Ct., at 863. Under *Gerstein*, warrantless arrests are permitted but persons arrested without a warrant must promptly be brought before a neutral magistrate for a judicial determination of probable cause. *Id.*, at 114, 95 S.Ct., at 863. Significantly, the Court stopped short of holding that jurisdictions were constitutionally compelled to provide a probable cause hearing immediately upon taking a suspect into custody and completing booking procedures. We acknowledged the burden that proliferation of pretrial proceedings places on the criminal justice system and recognized that the interests of everyone involved, including those persons who are arrested, might be disserved by introducing further procedural complexity into an already intricate system. *Id.*, at 119-123, 95 S.Ct., at 865-868. Accordingly, we left it to the individual States to integrate prompt probable cause determinations into their differing systems of pretrial procedures. *Id.*, at 123-124, 95 S.Ct., at 867-868.

In so doing, we gave proper deference to the demands of federalism. We recognized that “state systems of criminal procedure vary widely” in the nature and number of pretrial procedures they provide, and we noted that there is no single “preferred” approach. *Id.*, at 123, 95 S.Ct., at 868. We explained further that “flexibility and experimentation by the States” with respect to integrating probable cause determinations was desirable and that each State should settle upon an approach “to accord with [the] State’s pretrial procedure viewed as a whole.” *Ibid.* Our purpose in *Gerstein* was to make clear that the Fourth Amendment requires every State to provide prompt determinations of probable cause, but that the Constitution does not impose on the States a rigid procedural framework. Rather, individual States may choose to comply in different ways.

Inherent in *Gerstein*’s invitation to the States to experiment and adapt was the recognition that the Fourth Amendment does not compel an immediate determination of probable *54 cause upon completing the administrative steps incident to arrest. Plainly, if a probable cause hearing is constitutionally compelled the moment a suspect is finished being “booked,” there is no room whatsoever for “flexibility and experimentation by the States.” *Ibid.* Incorporating probable cause determinations “into the procedure for setting bail or fixing other conditions of pretrial release”-- which *Gerstein* explicitly contemplated, *id.*, at 124, 95 S.Ct., at 868-- would be impossible. Waiting even a few hours so that a bail hearing or arraignment could take place at the same time as the probable cause determination would amount to a constitutional violation. Clearly, *Gerstein* is not that inflexible.

**1669 Notwithstanding *Gerstein*’s discussion of flexibility, the Court of Appeals for the Ninth Circuit held that no flexibility was permitted. It construed *Gerstein* as “requir[ing] a probable cause determination to be made as soon as the administrative steps incident to arrest were completed, and that such steps should require only a brief period.” 888 F.2d, at 1278 (emphasis added) (internal

quotation marks omitted). This same reading is advanced by the dissents. See *post*, at 1671 (opinion of MARSHALL, J.); *post* at 1672- 1673, 1674 (opinion of SCALIA, J.). The foregoing discussion readily demonstrates the error of this approach. *Gerstein* held that probable cause determinations must be prompt--not immediate. The Court explained that “flexibility and experimentation” were “desirab[le]”; that “[t]here is no single preferred pretrial procedure”; and that “the nature of the probable cause determination usually will be shaped to accord with a State’s pretrial procedure viewed as a whole.” 420 U.S., at 123, 95 S.Ct., at 868. The Court of Appeals and Justice SCALIA disregard these statements, relying instead on selective quotations from the Court’s opinion. As we have explained, *Gerstein* struck a balance between competing interests; a proper understanding of the decision is possible only if one takes into account both sides of the equation.

Justice SCALIA claims to find support for his approach in the common law. He points to several statements from the *55 early 1800’s to the effect that an arresting officer must bring a person arrested without a warrant before a judicial officer “ ‘as soon as he reasonably can.’ ” *Post*, at 1672 (emphasis in original). This vague admonition offers no more support for the dissent’s inflexible standard than does *Gerstein*’s statement that a hearing follow “promptly after arrest.” 420 U.S., at 125, 95 S.Ct., at 869. As mentioned at the outset, the question before us today is what is “prompt” under *Gerstein*. We answer that question by recognizing that *Gerstein* struck a balance between competing interests.

B

Given that *Gerstein* permits jurisdictions to incorporate probable cause determinations into other pretrial procedures, some delays are inevitable. For example, where, as in Riverside County, the probable cause determination is combined with arraignment, there will be delays caused by paperwork and logistical problems. Records will have to be reviewed, charging documents drafted, appearance of counsel arranged, and appropriate bail determined. On weekends, when the number of arrests is often higher and available resources tend to be limited, arraignments may get pushed back even further. In our view, the Fourth Amendment permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system.

But flexibility has its limits; *Gerstein* is not a blank check. A State has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause. The Court recognized in *Gerstein* that a person arrested without a warrant is entitled to a fair and reliable determination of probable cause and that this determination must be made promptly.

Unfortunately, as lower court decisions applying *Gerstein* have demonstrated, it is not enough to say that probable *56

cause determinations must be “prompt.” This vague standard simply has not provided sufficient guidance. Instead, it has led to a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations. See, e.g., *McGregor v. County of San Bernardino*, decided with *McLaughlin v. County of Riverside*, 888 F.2d 1276 (CA9 1989); *Scott v. Gates*, Civ. No. 84-8647 (CD Cal., Oct. 3, 1988); see also *Bernard v. Palo Alto*, 699 F.2d 1023 (CA9 1983); *Sanders v. Houston*, 543 F.Supp. 694 (SD Tex.1982), *aff’d*, 741 F.2d 1379 (CA5 **1670 1984); *Lively v. Cullinane*, 451 F.Supp. 1000 (DC 1978).

Our task in this case is to articulate more clearly the boundaries of what is permissible under the Fourth Amendment. Although we hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds. Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. For this reason, such jurisdictions will be immune from systemic challenges.

This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay’s sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the *57 often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.

Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.

Justice SCALIA urges that 24 hours is a more appropriate outer boundary for providing probable cause determinations. See *post*, at 9. In arguing that any delay in probable cause

hearings beyond completing the administrative steps incident to arrest and arranging for a magistrate is unconstitutional, Justice SCALIA, in effect, adopts the view of the Court of Appeals. Yet he ignores entirely the Court of Appeals’ determination of the time required to complete those procedures. That court, better situated than this one, concluded that it takes 36 hours to process arrested persons in Riverside County. 888 F.2d, at 1278. In advocating a 24-hour rule, Justice SCALIA would compel Riverside County—and countless others across the Nation—to speed up its criminal justice mechanisms substantially, presumably by allotting local tax dollars to hire additional police officers and magistrates. There may be times when the Constitution compels such direct interference with local control, but this is not one. As we have explained, *Gerstein* clearly contemplated a reasonable *58 accommodation between legitimate competing concerns. We do no more than recognize that such accommodation can take place without running afoul of the Fourth Amendment.

Everyone agrees that the police should make every attempt to minimize the time a presumptively innocent individual spends in jail. One way to do so is to provide a judicial determination of probable cause immediately upon completing the administrative steps incident **1671 to arrest—i.e., as soon as the suspect has been booked, photographed, and fingerprinted. As Justice SCALIA explains, several States, laudably, have adopted this approach. The Constitution does not compel so rigid a schedule, however. Under *Gerstein*, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly. This necessarily means that only certain proceedings are candidates for combination. Only those proceedings that arise very early in the pretrial process—such as bail hearings and arraignments—may be chosen. Even then, every effort must be made to expedite the combined proceedings. See 420 U.S., at 124, 95 S.Ct., at 868.

IV

For the reasons we have articulated, we conclude that Riverside County is entitled to combine probable cause determinations with arraignments. The record indicates, however, that the County’s current policy and practice do not comport fully with the principles we have outlined. The County’s current policy is to offer combined proceedings within two days, exclusive of Saturdays, Sundays, or holidays. As a result, persons arrested on Thursdays may have to wait until the following Monday before they receive a probable cause determination. The delay is even longer if there is an intervening holiday. Thus, the County’s regular practice exceeds the 48-hour period we deem constitutionally *59 permissible, meaning that the County is not immune from systemic challenges, such as this class action.

As to arrests that occur early in the week, the County’s practice is that “arraignment[s] usually tak[e] place on the last day” possible. 1 App. 82. There may well be legitimate reasons for this practice; alternatively, this may constitute

delay for delay's sake. We leave it to the Court of Appeals and the District Court, on remand, to make this determination.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice MARSHALL, with whom Justice BLACKMUN and Justice STEVENS join, dissenting.

In *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), this Court held that an individual detained following a warrantless arrest is entitled to a "prompt" judicial determination of probable cause as a prerequisite to any further restraint on his liberty. See *id.*, at 114-116, 125, 95 S.Ct., at 863-864, 868. I agree with Justice SCALIA that a probable-cause hearing is sufficiently "prompt" under *Gerstein* only when provided immediately upon completion of the "administrative steps incident to arrest," *id.*, at 114, 95 S.Ct., at 863. See *post*, at 1673. Because the Court of Appeals correctly held that the County of Riverside must provide probable-cause hearings as soon as it completes the administrative steps incident to arrest, see 888 F.2d 1276, 1278 (CA9 1989), I would affirm the judgment of the Court of Appeals. Accordingly, I dissent.

Justice SCALIA, dissenting.

The story is told of the elderly judge who, looking back over a long career, observes with satisfaction that "when I was young, I probably let stand some convictions that should have been overturned, and when I was old, I probably set aside some that should have stood; so overall, justice was *60 done." I sometimes think that is an appropriate analog to this Court's constitutional jurisprudence, which alternately creates rights that the Constitution does not contain and denies rights that it does. Compare *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (right to abortion does exist), with *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (right to be confronted with witnesses, U.S. Const.Amdt. 6, does not). Thinking that neither **1672 the one course nor the other is correct, nor the two combined, I dissent from today's decision, which eliminates a very old right indeed.

I

The Court views the task before it as one of "balanc[ing] [the] competing concerns" of "protecting public safety," on the one hand, and avoiding "prolonged detention based on incorrect or unfounded suspicion," on the other hand, *ante*, at 1668. It purports to reaffirm the "'practical compromise' between these concerns struck in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), *ante*, at 1668. There is

assuredly room for such an approach in resolving novel questions of search and seizure under the "reasonableness" standard that the Fourth Amendment sets forth. But not, I think, in resolving those questions on which a clear answer already existed in 1791 and has been generally adhered to by the traditions of our society ever since. As to those matters, the "balance" has already been struck, the "practical compromise" reached--and it is the function of the Bill of Rights to preserve that judgment, not only against the changing views of Presidents and Members of Congress, but also against the changing views of Justices whom Presidents appoint and Members of Congress confirm to this Court.

The issue before us today is of precisely that sort. As we have recently had occasion to explain, the Fourth Amendment's prohibition of "unreasonable seizures," insofar as it applies to seizure of the person, preserves for our citizens the traditional protections against unlawful arrest afforded by the common law. See *61 *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). One of those--one of the most important of those--was that a person arresting a suspect without a warrant must deliver the arrestee to a magistrate "as soon as he reasonably can." 2 M. Hale, *Pleas of the Crown* 95, n. 13 (1st Am. ed. 1847). See also 4 W. Blackstone, *Commentaries* * 289, * 293; *Wright v. Court*, 107 Eng.Rep. 1182 (K. B. 1825) ("[I]t is the duty of a person arresting any one on suspicion of felony to take him before a justice as soon as he reasonably can"); 1 R. Burn, *Justice of the Peace* 276-277 (1837) ("When a constable arrests a party for treason or felony, he must take him before a magistrate to be examined as soon as he reasonably can") (emphasis omitted). The practice in the United States was the same. See e.g., 5 Am.Jur.2d, *Arrest*, § 76, 77 (1962); *Venable v. Huddy*, 77 N.J.L. 351, 72 A. 10, 11 (1909); *Atchison, T. & S.F.R. Co. v. Hinsdell*, 76 Kan. 74, 76, 90 P. 800, 801 (1907); *Ocean S.S. Co. v. Williams*, 69 Ga. 251, 262 (1883); *Johnson v. Mayor and City Council of Americus*, 46 Ga. 80, 86-87 (1872); *Low v. Evans*, 16 Ind. 486, 489 (1861); *Tubbs v. Tukey*, 57 Mass. 438, 440 (1849) (warrant); *Perkins*, *The Law of Arrest*, 25 Iowa L.Rev. 201, 254 (1940). Cf. *Pepper v. Mayes*, 81 Ky. 673 (1884). It was clear, moreover, that the only element bearing upon the reasonableness of delay was not such circumstances as the pressing need to conduct further investigation, but the arresting officer's ability, once the prisoner had been secured, to reach a magistrate who could issue the needed warrant for further detention. 5 Am.Jur.2d, *Arrest*, *supra*, § 76, 77 (1962); 1 *Restatement of Torts* § 134, *Comment b* (1934); *Keefe v. Hart*, 213 Mass. 476, 482, 100 N.E. 558, 559 (1913); *Leger v. Warren*, 62 Ohio St. 500, 57 N.E. 506, 508 (1900); *Burk v. Howley*, 179 Pa. 539, 551, 36 A. 327, 329 (1897); *Kirk & Son v. Garrett*, 84 Md. 383, 405, 35 A. 1089, 1091 (1896); *Simmons v. Vandyke*, 138 Ind. 380, 384, 37 N.E. 973, 974 (1894) (dictum); *Ocean S.S. Co. v. Williams*, *supra*, at 263; *Hayes v. Mitchell*, 69 Ala. 452, 455 (1881); *Kenerson v. Bacon*, 41 Vt. 573, 577 (1869); *62 *Green v. Kennedy*, 48 N.Y. 653, 654 (1871); *Schneider v. McLane*, 3 Keyes 568 (NY App. 1867); *Annot.*, 51 L.R.A. 216 (1901). Cf. *Wheeler v. Nesbitt*, 24 How. 544, 552, 16 L.Ed. 765 (1860). Any detention beyond the period within which a warrant could have been obtained

rendered the officer liable for false imprisonment. See, e.g., **1673 *Twilley v. Perkins*, 77 Md. 252, 265, 26 A. 286, 289 (1893); *Wiggins v. Norton*, 83 Ga. 148, 152, 9 S.E. 607, 608-609 (1889); *Brock v. Stimson*, 108 Mass. 520 (1871); Annot., 98 A.L.R.2d 966 (1964). [FN1]

FN1. The Court dismisses reliance upon the common law on the ground that its “vague admonition” to the effect that “an arresting officer must bring a person arrested without a warrant before a judicial officer ‘as soon as he reasonably can’” provides no more support than does *Gerstein v. Pugh’s*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), “promptly after arrest” language for the “inflexible standard” that I propose. Ante, at 1669. This response totally confuses the present portion of my opinion, which addresses the constitutionally permissible reasons for delay, with Part II below, which addresses (no more inflexibly, I may say, than the Court’s 48-hour rule) the question of an outer time limit. The latter—how much time, given the functions the officer is permitted to complete beforehand, constitutes “as soon as he reasonably can” or “promptly after arrest”—is obviously a function not of the common law but of helicopters and telephones. But what those delay-legitimizing functions are—whether, for example, they include further investigation of the alleged crime or (as the Court says) “mixing” the probable-cause hearing with other proceedings—is assuredly governed by the common law, whose admonition on the point is not at all “vague”: Only the function of arranging for the magistrate qualifies. The Court really has no response to this. It simply rescinds the common-law guarantee.

We discussed and relied upon this common-law understanding in *Gerstein*, see 420 U.S., at 114-116, 95 S.Ct., at 863-864, holding that the period of warrantless detention must be limited to the time necessary to complete the arrest and obtain the magistrate’s review.

“[A] policeman’s on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody ... the reasons that justify dispensing *63 with the magistrate’s neutral judgment evaporate.” *Id.*, at 113-114, 95 S.Ct., at 863 (emphasis added).

We said that “the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty,” *id.*, at 114, 95 S.Ct., at 863, “either before or promptly after arrest,” *id.*, at 125, 95 S.Ct., at 869. Though how “promptly” we did not say, it was plain enough that the requirement left no room for intentional delay unrelated to the completion of “the administrative steps incident to arrest.” Plain enough, at least, that all but one federal court considering the question understood *Gerstein* that way. See, e.g., *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 437 (CA7 1986), cert. denied, 481 U.S. 1028, 107 S.Ct. 1952, 95 L.Ed.2d 525 (1987); *Bernard v. Palo Alto*, 699 F.2d 1023, 1025 (CA9 1983) (per curiam); *Fisher v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1133, 1140 (CA4 1982); *Mabry v. County of Kalamazoo*, 626 F.Supp. 912, 914 (WD Mich.1986); *Sanders v. Houston*, 543 F.Supp. 694, 699-701 (SD Tex.1982), *aff’d*, 741 F.2d 1379 (CA5 1984); *Lively v. Cullinane*, 451 F.Supp. 1000, 1004 (DC 1978). See also *People ex rel. Maxian v. Brown*, 164

App.Div.2d 56, 62-64, 561 N.Y.S.2d 418, 421-422 (1990), *aff’d*, 77 N.Y.2d 422, 568 N.Y.S.2d 575, 570 N.E.2d 223 (1991); Note, *Williams v. Ward: Compromising the Constitutional Right to Prompt Determination of Probable Cause Upon Arrest*, 74 *Minn.L.Rev.* 196, 204 (1989). But see *Williams v. Ward*, 845 F.2d 374 (CA2 1988), cert. denied, 488 U.S. 1020, 109 S.Ct. 818, 102 L.Ed.2d 807 (1989).

Today, however, the Court discerns something quite different in *Gerstein*. It finds that the plain statements set forth above (not to mention the common-law tradition of liberty upon which they were based) were trumped by the implication of a later dictum in the case which, according to the Court, manifests a “recognition that the Fourth Amendment does not compel an immediate determination of probable cause upon completing the administrative steps incident to arrest.” Ante, at 1668 (emphasis added). Of course *Gerstein* did not say, nor do I contend, **1674 that an “immediate” determination *64 is required. But what the Court today means by “not immediate” is that the delay can be attributable to something other than completing the administrative steps incident to arrest and arranging for the magistrate—namely, to the administrative convenience of combining the probable-cause determination with other state proceedings. The result, we learn later in the opinion, is that what *Gerstein* meant by “a brief period of detention to take the administrative steps incident to arrest” is two full days. I think it is clear that the case neither said nor meant any such thing.

Since the Court’s opinion hangs so much upon *Gerstein*, it is worth quoting the allegedly relevant passage in its entirety.

“Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State’s pretrial procedure viewed as a whole. While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect’s first appearance before a judicial officer, ... or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some States, existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment, such as acceleration of existing preliminary hearings. Current proposals for criminal procedure reform suggest other ways of testing probable cause for detention. Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this *65 determination must be made by a judicial officer either before or promptly after arrest.” 420 U.S., at 123-125, 95 S.Ct., at 868-869 (footnotes omitted; emphasis added).

The Court’s holding today rests upon the statement that “we recognize the desirability of flexibility and experimentation.” But in its context that statement plainly

refers to the nature of the hearing and not to its timing. That the timing is a given and a constant is plain from the italicized phrases, especially that which concludes the relevant passage. The timing is specifically addressed in the previously quoted passage of the opinion, which makes clear that “promptly after arrest” means upon completion of the “administrative steps incident to arrest.” It is not apparent to me, as it is to the Court, that on these terms “[i]ncorporating probable cause determinations ‘into the procedure for setting bail or fixing other conditions of pretrial release’ ... would be impossible,” ante, at 1668; but it is clear that, if and when it is impossible, Gerstein envisioned that the procedural “experimentation,” rather than the Fourth Amendment’s requirement of prompt presentation to a magistrate, would have to yield.

Of course even if the implication of the dictum in Gerstein were what the Court says, that would be poor reason for keeping a wrongfully arrested citizen in jail contrary to the clear dictates of the Fourth Amendment. What is most revealing of the frailty of today’s opinion is that it relies upon nothing but that implication from a dictum, plus its own (quite irrefutable because entirely value laden) “balancing” of the competing demands of the individual and the State. With respect to the point at issue here, different times and different places—even highly liberal times and places—have struck that balance in different ways. Some Western democracies currently permit the executive a period of detention without impartially adjudicated cause. In England, for example, the Prevention of Terrorism Act 1989, § 14(4), 5, permits suspects to be held without presentation **1675 and without charge for seven days. 12 Halsbury’s Stat. 1294 (4th *66 ed. 1989). It was the purpose of the Fourth Amendment to put this matter beyond time, place, and judicial predilection, incorporating the traditional common-law guarantees against unlawful arrest. The Court says not a word about these guarantees, and they are determinative. Gerstein’s approval of a “brief period” of delay to accomplish “administrative steps incident to an arrest” is already a questionable extension of the traditional formulation, though it probably has little practical effect and can perhaps be justified on de minimis grounds. [FN2] To expand Gerstein, however, into an authorization for 48-hour detention related neither to the obtaining of a magistrate nor the administrative “completion” of the arrest seems to me utterly unjustified. Mr. McLaughlin was entitled to have a prompt impartial determination that there was reason to deprive him of his liberty—not according to a schedule that suits the State’s convenience in piggybacking various proceedings, but as soon as his arrest was completed and the magistrate could be procured.

FN2. Ordinarily, I think, there would be plenty of time for “administrative steps” while the arrangements for a hearing are being made. But if, for example, a magistrate is present in the precinct and entertaining probable-cause hearings at the very moment a wrongfully arrested person is brought in, I see no basis for intentionally delaying the hearing in order to subject the person to a cataloging of his personal effects, fingerprinting, photographing, etc. He ought not be exposed to those indignities if there is no proper basis for constraining his

freedom of movement, and if that can immediately be determined.

II

I have finished discussing what I consider the principal question in this case, which is what factors determine whether the postarrest determination of probable cause has been (as the Fourth Amendment requires) “reasonably prompt.” The Court and I both accept two of those factors, completion of the administrative steps incident to arrest and arranging for a magistrate’s probable-cause determination. Since we disagree, however, upon a third factor—the Court *67 believing, as I do not, that “combining” the determination with other proceedings justifies a delay—we necessarily disagree as well on the subsequent question, which can be described as the question of the absolute time limit. Any determinant of “reasonable promptness” that is within the control of the State (as the availability of the magistrate, the personnel and facilities for completing administrative procedures incident to arrest, and the timing of “combined procedures” all are) must be restricted by some outer time limit, or else the promptness guarantee would be worthless. If, for example, it took a full year to obtain a probable-cause determination in California because only a single magistrate had been authorized to perform that function throughout the State, the hearing would assuredly not qualify as “reasonably prompt.” At some point, legitimate reasons for delay become illegitimate.

I do not know how the Court calculated its outer limit of 48 hours. I must confess, however, that I do not know how I would do so either, if I thought that one justification for delay could be the State’s “desire to combine.” There are no standards for “combination,” and as we acknowledged in Gerstein the various procedures that might be combined “vary widely” from State to State. 420 U.S., at 123, 95 S.Ct., at 868. So as far as I can discern (though I cannot pretend to be able to do better), the Court simply decided that, given the administrative convenience of “combining,” it is not so bad for an utterly innocent person to wait 48 hours in jail before being released.

If one eliminates (as one should) that novel justification for delay, determining the outer boundary of reasonableness is a more objective and more manageable task. We were asked to undertake it in Gerstein, but declined—wisely, I think, since we had before us little data to support any figure we might choose. As the Court notes, however, Gerstein **1676 has engendered a number of cases addressing not only the scope of the procedures “incident to arrest,” but also their duration. *68 The conclusions reached by the judges in those cases, and by others who have addressed the question, are surprisingly similar. I frankly would prefer even more information, and for that purpose would have supported reargument on the single question of an outer time limit. The data available are enough to convince me, however, that certainly no more than 24 hours is needed. [FN3]

With one exception, no federal court considering the

question has regarded 24 hours as an inadequate amount of time to complete arrest procedures, and with the same exception every court actually setting a limit for a probable-cause determination based on those procedures has selected 24 *69 hours. (The exception would not count Sunday within the 24-hour limit.) See *Bernard v. Palo Alto*, 699 F.2d, at 1025; *McGill v. Parsons*, 532 F.2d 484, 485 (CA5 1976); *Sanders v. Houston*, 543 F.Supp., at 701-703; *Lively v. Cullinane*, 451 F.Supp., at 1003-1004. Cf. *Dommer v. Hatcher*, 427 F.Supp. 1040, 1046 (ND Ind.1975) (24-hour maximum; 48 if Sunday included), rev'd in part, 653 F.2d 289 (CA7 1981). See also *Gramenos v. Jewel Companies, Inc.*, 797 F.2d, at 437 (four hours "requires explanation"); *Brandes, Post-Arrest Detention and the Fourth Amendment: Refining the Standard of Gerstein v. Pugh*, 22 Colum.J.L. & Soc.Prob. 445, 474-475 (1989). Federal courts have reached a similar conclusion in applying Federal Rule of Criminal Procedure 5(a), which requires presentment before a federal magistrate "without unnecessary delay." See, e.g., *Thomas, The Poisoned Fruit of Pretrial Detention*, 61 N.Y.U.L.Rev. 413, 450, n. 238 (1986) (citing cases). And state courts have similarly applied a 24-hour limit under state statutes requiring presentment without "unreasonable delay." New York, for example, has concluded that no more than 24 hours is necessary from arrest to arraignment, *People ex rel. Maxian v. Brown*, 164 App.Div.2d, at 62-64, 561 N.Y.S.2d, at 421-422. Twenty-nine States have statutes similar to New York's, which require either presentment or arraignment "without unnecessary delay" or "forthwith"; eight States explicitly require presentment or arraignment within 24 hours; and only seven States have statutes explicitly permitting a period longer than 24 hours. *Brandes, supra*, at 478, n. 230. Since the States requiring a probable-cause hearing within 24 hours include both New York and Alaska, it is unlikely that circumstances of population or geography demand a longer period. Twenty-four hours is consistent with the American Law Institute's Model Code. ALI, Model Code of Pre-Arrest Procedure § 310.1 (1975). And while the American **1677 Bar Association in its proposed rules of criminal procedure initially required that presentment simply be *70 made "without unnecessary delay," it has recently concluded that no more than six hours should be required, except at night. Uniform Rules of Criminal Procedure, 10 U.L.A. App., Criminal Justice Standard 10-4.1 (Spec.Pamph.1987). Finally, the conclusions of these commissions and judges, both state and federal, are supported by commentators who have examined the question. See, e.g., *Brandes, supra*, at 478-485 (discussing national 24-hour rule); *Note*, 74 Minn.L.Rev., at 207-209.

FN3. The Court claims that the Court of Appeals "concluded that it takes 36 hours to process arrested persons in Riverside County." Ante, at 1670. The court concluded no such thing. It concluded that 36 hours (the time limit imposed by the District Court) was "ample" time to complete the arrest, 888 F.2d 1276, 1278 (CA9 1989), and that the county had provided no evidence to demonstrate the contrary. The District Court, in turn, had not made any evidentiary finding to the effect that 36 hours was necessary, but for unexplained reasons said that it "declines to

adopt the 24 hour standard [generally applied by other courts], but adopts a 36 hour limit, except in exigent circumstances." *McLaughlin v. County of Riverside*, No. CV87-5597 RG (CD Cal., Apr. 19, 1989). 2 App. 332. Before this Court, moreover, the county has acknowledged that "nearly 90 percent of all cases ... can be completed in 24 hours or less," Briefs for District Attorney, County of Riverside, as Amicus Curiae 16, and the examples given to explain the other 10 percent are entirely unpersuasive (heavy traffic on the Southern California freeways; the need to wait for arrestees who are properly detainable because they are visibly under the influence of drugs to come out of that influence before they can be questioned about other crimes; the need to take blood and urine samples promptly in drug cases) with one exception: awaiting completion of investigations and filing of investigation reports by various state and federal agencies. *Id.*, at 16-17. We have long held, of course, that delaying a probable-cause determination for the latter reason--effecting what Judge Posner has aptly called "imprisonment on suspicion, while the police look for evidence to confirm their suspicion," *Llaguno v. Mingey*, 763 F.2d 1560, 1568 (CA7 1985)--is improper. See *Gerstein*, 420 U.S., at 120, n. 21, 95 S.Ct., at 866, n. 21, citing *Mallory v. United States*, 354 U.S. 449, 456, 77 S.Ct. 1356, 1360, 1 L.Ed.2d 1479 (1957).

In my view, absent extraordinary circumstances, it is an "unreasonable seizure" within the meaning of the Fourth Amendment for the police, having arrested a suspect without a warrant, to delay a determination of probable cause for the arrest either (1) for reasons unrelated to arrangement of the probable-cause determination or completion of the steps incident to arrest, or (2) beyond 24 hours after the arrest. Like the Court, I would treat the time limit as a presumption; when the 24 hours are exceeded the burden shifts to the police to adduce unforeseeable circumstances justifying the additional delay.

* * *

A few weeks before issuance of today's opinion there appeared in the *Washington Post* the story of protracted litigation arising from the arrest of a student who entered a restaurant in Charlottesville, Virginia, one evening, to look for some friends. Failing to find them, he tried to leave--but refused to pay a \$5 fee (required by the restaurant's posted rules) for failing to return a red tab he had been issued to keep track of his orders. According to the story, he "was taken by police to the Charlottesville jail" at the restaurant's request. "There, a magistrate refused to issue an arrest warrant," and he was released. *Washington Post*, Apr. 29, 1991, p. 1. That is how it used to be; but not, according to today's decision, how it must be in the future. If the Fourth Amendment meant then what the Court says it does now, the student could lawfully have been held for as long as it would *71 have taken to arrange for his arraignment, up to a maximum of 48 hours.

Justice Story wrote that the Fourth Amendment "is little more than the affirmance of a great constitutional doctrine of the common law." 3 J. Story, *Commentaries on the Constitution* 748 (1833). It should not become less than that. One hears the complaint, nowadays, that the Fourth

Amendment has become constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all. By failing to protect the innocent arrestee, today's opinion reinforces that view. The common-law rule of prompt hearing had as its primary beneficiaries the innocent--not those whose fully justified convictions must be overturned to scold the police; nor those who avoid conviction because the evidence, while convincing, does not establish guilt beyond a reasonable doubt; but those so blameless that there was not even good reason to arrest them. While in recent years we have invented novel applications of the Fourth Amendment to release the unquestionably guilty, we today repudiate one of its core applications so that the presumptively innocent may be left in jail. Hereafter a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days--never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made. In my view, this is the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own.

I respectfully dissent.

111 S.Ct. 1661, 500 U.S. 44, 114 L.Ed.2d 49, 59 USLW 4413

Supreme Court of the United States

**Ellen SCHALL, Commissioner of New York City
Department of Juvenile Justice**

v.

Gregory MARTIN et al.

Robert ABRAMS, Attorney General of New York

v.

Gregory MARTIN et al.

**Nos. 82-1248, 82-1278
467 U.S. 253**

Argued Jan. 17, 1984.

Decided June 4, 1984.

Juveniles who had been detained under a section of New York Family Court Act authorizing pretrial detention brought habeas corpus action seeking declaratory judgment that the statute in question violated, *inter alia*, the due process clause. The United States District Court for the Southern District of New York, 513 F.Supp. 691, struck down the statute. On appeal, the United States Court of Appeals for the Second Circuit, 689 F.2d 365, affirmed, and probable jurisdiction was noted, 103 S.Ct. 1765. The Supreme Court, Justice Rehnquist, held that section of New York Family Court Act authorizing pretrial detention of accused juvenile delinquent based on finding that there was "serious risk" that juvenile "may before the return date commit an act which if committed by an adult would constitute a crime" did not violate due process clause.

Reversed.

Justice Marshall filed dissenting opinion in which Justices Brennan and Stevens joined.

Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Section 320.5(3)(b) of the New York Family Court Act authorizes pretrial detention of an accused juvenile delinquent based on a finding that there is a "serious risk" that the juvenile "may before the return date commit an act which if committed by an adult would constitute a crime." Appellees, juveniles who had been detained under § 320.5(3)(b), brought a habeas corpus class action in Federal District Court, seeking a declaratory judgment that § 320.5(3)(b) violates, *inter alia*, the Due Process Clause of the Fourteenth Amendment. The

District Court struck down the statute as permitting detention without due process and ordered the release of all class members. The Court of Appeals affirmed, holding that since the vast majority of juveniles detained under the statute either have their cases dismissed before an adjudication of delinquency or are released after adjudication, the statute is administered, not for preventive purposes, but to impose punishment for unadjudicated criminal acts, and that therefore the statute is unconstitutional as to all juveniles.

Held: Section 320.5(3)(b) is not invalid under the Due Process Clause of the Fourteenth Amendment. Pp. 2409-2419.

(a) Preventive detention under the statute serves the legitimate state objective, held in common with every State, of protecting both the juvenile and society from the hazards of pretrial crime. That objective is compatible with the "fundamental fairness" demanded by the Due Process Clause in juvenile proceedings, and the terms and condition of confinement under § 320.5(3)(b) are compatible with that objective. Pretrial detention need not be considered punishment merely because a juvenile is subsequently discharged subject to conditions or put on probation. And even when a case is terminated prior to factfinding, it does not follow that the decision to detain the juvenile pursuant to § 320.5(3)(b) amounts to a due process violation. Pp. 2410-2415.

*254 (b) The procedural safeguards afforded by the Family Court Act to juveniles detained under § 320.5(3)(b) prior to factfinding provide sufficient protection against erroneous and unnecessary deprivations of liberty. Notice, a hearing, and a statement of facts and reasons are given to the juvenile prior to any detention, and a formal probable-cause hearing is then held within a short time thereafter, if the factfinding hearing is not itself scheduled within three days. There is no merit to the argument that the risk of erroneous and **2405 unnecessary detention is too high despite these procedures because the standard for detention is fatally vague. From a legal point of view, there is nothing inherently unattainable about a prediction of future criminal conduct. Such a prediction is an experienced one based on a host of variables that cannot be readily codified. Moreover, the postdetention procedures--habeas corpus review, appeals, and motions for reconsideration-- provide a sufficient mechanism for correcting on a case-by-case basis any erroneous detention. Pp. 2415-2419.

689 F.2d 365 (2nd Cir.1982), reversed.

Judith A. Gordon, Assistant Attorney General of New York, argued the cause for appellants in both cases. With her on the briefs for appellant in No. 82- 1278 were Robert Abrams, Attorney General, pro se, Peter H. Schiff, Melvyn R. Leventhal, Deputy First Assistant Attorney General, George D. Zuckerman, Deputy Solicitor General, and

Robert J. Schack, Assistant Attorney General. Frederick A.O. Schwarz, Jr., Leonard Koerner, and Ronald E. Sternberg filed a brief for appellant in No. 82-1248.

Martin Guggenheim argued the cause for appellees in both cases. With him on the brief were Burt Neuborne, Janet R. Fink, and Charles A. Hollander. [FN†]

FN† A brief of amici curiae urging reversal was filed for Commonwealth of Pennsylvania et al. by LeRoy S. Zimmerman, Attorney General of Pennsylvania, Kathleen F. McGrath, Deputy Attorney General, and by the Attorneys General for their respective jurisdictions as follows: Charles Graddick of Alabama, Norman C. Gorsuch of Alaska, Robert K. Corbin of Arizona, John K. Van De Kamp of California, Jim Smith of Florida, Tany S. Hong of Hawaii, Jim Jones of Idaho, Neil F. Hartigan of Illinois, Linley E. Pearson of Indiana, Robert T. Stephan of Kansas, William J. Guste, Jr., of Louisiana, Frank J. Kelley of Michigan, Michael T. Greeley of Montana, Paul L. Douglas of Nebraska, Gregory H. Smith of New Hampshire, Anthony J. Celebrezze, Jr., of Ohio, Dave Frohnmayer of Oregon, T. Travis Medlock of South Carolina, David L. Wilkinson of Utah, John J. Easton, Jr., of Vermont, Kenneth O. Eikenberry of Washington, A.G. McClintock of Wyoming, and Aviata F. Faalevao of American Samoa.

Briefs of amici curiae urging affirmance were filed for the American Bar Association by Wallace D. Riley, Andrew J. Shookhoff, and Steven H. Goldblatt; for the Association for Children of New Jersey by Dennis S. Brotman; for the National Juvenile Law Center by Harry F. Swanger; for the National Legal Aid and Defender Association by Michael J. Dale; for the Public Defender Service for the District of Columbia by Francis D. Carter and James H. McComas; and for the Youth Law Center et al. by Mark I. Soler, Loren M. Warboys, James R. Bell, and Robert G. Schwartz.

David Crump filed a brief for the Texas District and County Attorneys Association et al. as amici curiae.

***255 Justice REHNQUIST delivered the opinion of the Court.**

Section 320.5(3)(b) of the New York Family Court Act authorizes pretrial detention of an accused juvenile delinquent based on a finding that there is a “serious risk” that the child “may before the return date commit an act which if committed by an adult would constitute a crime.” [FN1] Appellees brought suit on behalf of a class of all juveniles detained pursuant *256 to that provision. [FN2] The District Court struck down § 320.5(3)(b) as permitting detention without due process of law and ordered the immediate release of all class members. *United States ex rel. Martin v. Strasburg*, 513 F.Supp. 691 (SDNY1981). The Court of Appeals for the Second Circuit affirmed, holding the provision “unconstitutional as to all juveniles” because the statute is administered in such a way that “the detention period serves as punishment imposed without proof of guilt established according to the requisite constitutional standard.” *Martin v. Strasburg*, 689 F.2d 365, 373- 374 (1982). We noted probable jurisdiction, 460 U.S. 1079, 103 S.Ct. 1765, 76 L.Ed.2d 340 (1983), [FN3] and now reverse.

We conclude that preventive detention under **2406 the FCA serves a legitimate state *257 objective, and that the procedural protections afforded pretrial detainees by the New York statute satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

FN1. New York Jud.Law § 320.5 (McKinney 1983) (Family Court Act (hereinafter FCA)) provides, in relevant part:

“1. At the initial appearance, the court in its discretion may release the respondent or direct his detention.

* * *

3. The court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained;

“(a) there is a substantial probability that he will not appear in court on the return date; or

“(b) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime.” Appellees have only challenged pretrial detention under § 320.5(3)(b). Thus, the propriety of detention to ensure that a juvenile appears in court on the return date, pursuant to § 320.5(3)(a), is not before the Court.

FN2. The original challenge was to § 739(a)(ii) of the FCA, which, at the time of the commencement of this suit, governed pretrial release or detention of both alleged juvenile delinquents and persons in need of supervision. Effective July 1, 1983, a new Article 3 to the Act governs, inter alia, “all juvenile delinquency actions and proceedings commenced upon or after the effective date thereof and all appeals and other post- judgment proceedings relating or attaching thereto.” FCA § 301.3(1). Article 7 now applies only to proceedings concerning persons in need of supervision.

Obviously, this Court must “review the judgment below in light of the ... statute as it now stands, not as it once did.” *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 201, 24 L.Ed.2d 214 (1969). But since new Article 3 contains a preventive detention section identical to former § 739(a)(ii), see FCA § 320.5(3), the appeal is not moot. *Brockington v. Rhodes*, 396 U.S. 41, 43, 90 S.Ct. 206, 207, 24 L.Ed.2d 209 (1969).

FN3. Although the pretrial detention of the class representatives has long since ended, see *infra*, at 2406-2408, this case is not moot for the same reason that the class action in *Gerstein v. Pugh*, 420 U.S. 103, 110, n. 11, 95 S.Ct. 854, 861 n. 11, 43 L.Ed.2d 54 (1975), was not mooted by the termination of the claims of the named plaintiffs.

“Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly ‘capable of repetition, yet evading review.’ ” See also *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 686-687, 385 N.Y.S.2d 518, 519-520, 350 N.E.2d 906, 907-908 (1976).

I

Appellee Gregory Martin was arrested on December 13, 1977, and charged with first-degree robbery, second-degree assault, and criminal possession of a weapon based on an incident in which he, with two others, allegedly hit a youth on the head with a loaded gun and stole his jacket and sneakers. See petitioners' Exhibit 1b. Martin had possession of the gun when he was arrested. He was 14 years old at the time and, therefore, came within the jurisdiction of New York's Family Court. [FN4] The incident occurred at 11:30 at night, and Martin lied to the police about where and with whom he lived. He was consequently detained overnight. [FN5]

FN4. In New York, a child over the age of 7 but less than 16 is not considered criminally responsible for his conduct. FCA § 301.2(1). If he commits an act that would constitute a crime if committed by an adult, he comes under the exclusive jurisdiction of the Family Court. § 302.1(1). That court is charged not with finding guilt and affixing punishment, *In re Bogart*, 45 Misc.2d 1075, 259 N.Y.S.2d 351 (1963), but rather with determining and pursuing the needs and best interests of the child insofar as those are consistent with the need for the protection of the community. FCA § 301.1. See *In re Craig S.*, 57 App.Div.2d 761, 394 N.Y.S.2d 200 (1977). Juvenile proceedings are, thus, civil rather than criminal, although because of the restrictions that may be placed on a juvenile adjudged delinquent, some of the same protections afforded accused adult criminals are also applicable in this context. CF. FCA § 303.1.

FN5. When a juvenile is arrested, the arresting officer must immediately notify the parent or other person legally responsible for the child's care. FCA § 305.2(3). Ordinarily, the child will be released into the custody of his parent or guardian after being issued an "appearance ticket" requiring him to meet with the probation service on a specified day. § 307.1(1). See n. 9, *infra*. If, however, he is charged with a serious crime, one of several designated felonies, see § 301.2(8), or if his parent or guardian cannot be reached, the juvenile may be taken directly before the Family Court. § 305.2. The Family Court judge will make a preliminary determination as to the jurisdiction of the court, appoint a law guardian for the child, and advise the child of his or her rights, including the right to counsel and the right to remain silent.

Only if, as in Martin's case, the Family Court is not in session and special circumstances exist, such as an inability to notify the parents, will the child be taken directly by the arresting officer to a juvenile detention facility. § 305.2(4)(c). If the juvenile is so detained, he must be brought before the Family Court within 72 hours or the next day the court is in session, whichever is sooner. § 307.3(4). The propriety of such detention, prior to a juvenile's initial appearance in Family Court, is not at issue in this case. Appellees challenged only judicially ordered detention pursuant to § 320.5(3)(b).

*258 A petition of delinquency was filed, [FN6] and Martin made his "initial appearance" in Family Court on December 14th, accompanied by his grandmother. [FN7] The Family Court Judge, citing the possession of the loaded weapon, the false address given to the police, and the lateness of the hour, as evidencing a lack of supervision, ordered Martin detained under § 320.5(3)(b) (at that time § 739(a)(ii); see n. 2, *supra*). A probable cause hearing was held five days later, **2407 on December 19th, and probable cause was found to exist for all

the crimes charged. At the factfinding hearing held December 27-29, Martin was found guilty on the robbery and criminal possession charges. He was adjudicated a delinquent and *259 placed on two years' probation. [FN8] He had been detained pursuant to § 320.5(3)(b), between the initial appearance and the completion of the factfinding hearing, for a total of 15 days.

FN6. A delinquency petition, prepared by the "presentment agency," originates delinquency proceedings. FCA § 310.1. The petition must contain, *inter alia*, a precise statement of each crime charged and factual allegations which "clearly apprise" the juvenile of the conduct which is the subject of the accusation. § 311.1. A petition is not deemed sufficient unless the allegations of the factual part of the petition, together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the juvenile committed the crime or crimes charged. § 311.2(2). Also, nonhearsay allegations in the petition and supporting deposition must establish, if true, every element of each crime charged and the juvenile's commission thereof. § 311.2(3). The sufficiency of a petition may be tested by filing a motion to dismiss under § 315.1.

FN7. The first proceeding in Family Court following the filing of the petition is known as the initial appearance even if the juvenile has already been brought before the court immediately following his arrest. FCA § 320.2.

FN8. The "factfinding" is the juvenile's analogue of a trial. As in the earlier proceedings, the juvenile has a right to counsel at this hearing. § 341.2. See *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Evidence may be suppressed on the same grounds as in criminal cases, FCA § 330.2, and proof of guilt, based on the record evidence, must be beyond a reasonable doubt, § 342.2. See *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If guilt is established, the court enters an appropriate order and schedules a dispositional hearing. § 345.1.

The dispositional hearing is the final and most important proceeding in the Family Court. If the juvenile has committed a designated felony, the court must order a probation investigation and a diagnostic assessment. § 351.1. Any other material and relevant evidence may be offered by the probation agency or the juvenile. Both sides may call and cross-examine witnesses and recommend specific dispositional alternatives. § 350.4. The court must find, based on a preponderance of the evidence, § 350.3(2), that the juvenile is delinquent and requires supervision, treatment, or confinement. § 352.1. Otherwise, the petition is dismissed. *Ibid*.

If the juvenile is found to be delinquent, then the court enters an order of disposition. Possible alternatives include a conditional discharge; probation for up to two years; nonsecure placement with, perhaps, a relative or the Division for Youth; transfer to the Commissioner of Mental Health; or secure placement. § 353.1-353.5. Unless the juvenile committed one of the designated felonies, the court must order the least restrictive available alternative consistent with the needs and best interests of the juvenile and the need for protection of the community. § 352.2(2).

Appellees Luis Rosario and Kenneth Morgan, both age 14, were also ordered detained pending their factfinding hearings. Rosario was charged with attempted first-degree robbery and second-degree assault for an incident in which he, with four others, allegedly tried to rob two men, putting a gun to the head of one of them and beating both about the head with

sticks. See petitioners' Exhibit 2b. At the time of his initial appearance, on March 15, 1978, Rosario had another delinquency petition pending for knifing a student, and two prior petitions had been adjusted. [FN9] Probable cause was *260 found on March 21. On April 11, Rosario was released to his father, and the case was terminated without adjustment on September 25, 1978.

FN9. Every accused juvenile is interviewed by a member of the staff of the Probation Department. This process is known as "probation intake." See Testimony of Mr. Benjamin (Supervisor, New York Dept. of Probation), App. 142. In the course of the interview, which lasts an average of 45 minutes, the probation officer will gather what information he can about the nature of the case, the attitudes of the parties involved, and the child's past history and current family circumstances. *Id.*, at 144, 153. His sources of information are the child, his parent or guardian, the arresting officer, and any records of past contacts between the child and the Family Court. On the basis of this interview, the probation officer may attempt to "adjust," or informally resolve, the case. FCA § 308.1(2). Adjustment is a purely voluntary process in which the complaining witness agrees not to press the case further, while the juvenile is given a warning or agrees to counseling sessions or, perhaps, referral to a community agency. § 308.1 (Practice Commentary). In cases involving designated felonies or other serious crimes, adjustment is not permitted without written approval of the Family Court. § 308.1(4). If a case is not informally adjusted, it is referred to the "presentment agency." See n. 6, *supra*.

Kenneth Morgan was charged with attempted robbery and attempted grand larceny for an incident in which he and another boy allegedly tried to steal money from a 14-year-old girl and her brother by threatening to blow their heads off and grabbing them to search their pockets. See petitioners' Exhibit 3b. Morgan, like Rosario, was on release status on another petition (for robbery and criminal possession of stolen property) at the time of his initial appearance on March 27, 1978. He had been arrested four previous times, and his mother refused to come to court because he had been in trouble so often she did not want **2408 him home. A probable-cause hearing was set for March 30, but was continued until April 4, when it was combined with a factfinding hearing. Morgan was found guilty of harassment and petit larceny and was ordered placed with the Department of Social Services for 18 months. He was detained a total of eight days between his initial appearance and the factfinding hearing.

On December 21, 1977, while still in preventive detention pending his factfinding hearing, Gregory Martin instituted a *261 habeas corpus class action on behalf of "those persons who are, or during the pendency of this action will be, preventively detained pursuant to" § 320.5(3)(b) of the FCA. Rosario and Morgan were subsequently added as additional named plaintiffs. These three class representatives sought a declaratory judgment that § 320.5(3)(b) violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

In an unpublished opinion, the District Court certified the class. App. 20- 32. [FN10] The court also held that appellees were not required to exhaust their state remedies before

resorting to federal habeas because the highest state court had already rejected an identical challenge to the juvenile preventive detention statute. See *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 385 N.Y.S.2d 518, 350 N.E.2d 906 (1976). Exhaustion of state remedies, therefore, would be "an exercise in futility." App. 26.

FN10. We have never decided whether Federal Rule of Civil Procedure 23, providing for class actions, is applicable to petitions for habeas corpus relief. See *Bell v. Wolfish*, 441 U.S. 520, 527, n. 6, 99 S.Ct. 1861, 1868, n. 6, 60 L.Ed.2d 447 (1979); *Middendorf v. Henry*, 425 U.S. 25, 30, 96 S.Ct. 1281, 1285, 47 L.Ed.2d 556 (1976). Although appellants contested the class certification in the District Court, they did not raise the issue on appeal; nor do they urge it here. Again, therefore, we have no occasion to reach the question.

At trial, appellees offered in evidence the case histories of 34 members of the class, including the three named petitioners. Both parties presented some general statistics on the relation between pretrial detention and ultimate disposition. In addition, there was testimony concerning juvenile proceedings from a number of witnesses, including a legal aid attorney specializing in juvenile cases, a probation supervisor, a child psychologist, and a Family Court Judge. On the basis of this evidence, the District Court rejected the equal protection challenge as "insubstantial," [FN11] but agreed with appellees that pretrial detention under the FCA violates due process. [FN12] *262 The court ordered that "all class members in custody pursuant to Family Court Act Section [320.5(3)(b)] shall be released forthwith." *Id.*, at 93.

FN11. The equal protection claim, which was neither raised on appeal nor decided by the Second Circuit, is not before us.

FN12. The District Court gave three reasons for this conclusion. First, under the FCA, a juvenile may be held in pretrial detention for up to five days without any judicial determination of probable cause. Relying on *Gerstein v. Pugh*, 420 U.S., at 114, 95 S.Ct., at 863, 43 L.Ed.2d 54, the District Court concluded that pretrial detention without a prior adjudication of probable cause is, itself, a per se violation of due process. *United States ex rel. Martin v. Strasburg*, 513 F.Supp. 691, 717 (SDNY1981).

Second, after a review of the pertinent scholarly literature, the court noted that "no diagnostic tools have as yet been devised which enable even the most highly trained criminologists to predict reliably which juveniles will engage in violent crime." *Id.*, at 708. A fortiori, the court concluded, a Family Court judge cannot make a reliable prediction based on the limited information available to him at the initial appearance. *Id.*, at 712. Moreover, the court felt that the trial record was "replete" with examples of arbitrary and capricious detentions. *Id.*, at 713. Finally, the court concluded that preventive detention is merely a euphemism for punishment imposed without an adjudication of guilt. The alleged purpose of the detention--to protect society from the juvenile's criminal conduct--is indistinguishable from the purpose of post-trial detention. And given "the inability of trial judges to predict which juveniles will commit crimes," there is no rational connection between the decision to detain and the alleged purpose, even if that purpose were legitimate. *Id.*, at 716.

The Court of Appeals affirmed. After reviewing the trial record, the court opined that “the vast majority of juveniles detained **2409 under [[§ 320.5(3)(b)] either have their petitions dismissed before an adjudication of delinquency or are released after adjudication.” 689 F.2d, at 369. The court concluded from that fact that § 320.5(3)(b) “is utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts.” *Id.*, at 372. The early release of so many of those detained contradicts any asserted need for pretrial confinement to protect the community. The court therefore concluded that § 320.5(3)(b) must be declared unconstitutional as to all juveniles. Individual litigation would be a practical impossibility because the periods of detention are so short that the litigation is mooted before the merits are determined. [FN13]

FN13. Judge Newman concurred separately. He was not convinced that the record supported the majority’s statistical conclusions. But he thought that the statute was procedurally infirm because it granted unbridled discretion to Family Court judges to make an inherently uncertain prediction of future criminal behavior. 689 F.2d, at 377.

*263 II

There is no doubt that the Due Process Clause is applicable in juvenile proceedings. “The problem,” we have stressed, “is to ascertain the precise impact of the due process requirement upon such proceedings.” *In re Gault*, 387 U.S. 1, 13-14, 87 S.Ct. 1428, 1436-1437, 18 L.Ed.2d 527 (1967). We have held that certain basic constitutional protections enjoyed by adults accused of crimes also apply to juveniles. See *Id.*, at 31-57, 87 S.Ct., at 1445-1459 (notice of charges, right to counsel, privilege against self-incrimination, right to confrontation and cross-examination); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (proof beyond a reasonable doubt); *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975) (double jeopardy). But the Constitution does not mandate elimination of all differences in the treatment of juveniles. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (no right to jury trial). The State has “a *parens patriae* interest in preserving and promoting the welfare of the child,” *Santosky v. Kramer*, 455 U.S. 745, 766, 102 S.Ct. 1388, 1401, 71 L.Ed.2d 599 (1982), which makes a juvenile proceeding fundamentally different from an adult criminal trial. We have tried, therefore, to strike a balance--to respect the “informality” and “flexibility” that characterize juvenile proceedings, *In re Winship*, *supra*, 397 U.S., at 366, 90 S.Ct., at 1073, and yet to ensure that such proceedings comport with the “fundamental fairness” demanded by the Due Process Clause. *Breed v. Jones*, *supra*, 421 U.S., at 531, 95 S.Ct., at 1786; *McKeiver*, *supra*, 403 U.S., at 543, 91 S.Ct., at 1985 (plurality opinion).

The statutory provision at issue in these cases, § 320.5(3)(b), permits a brief pretrial detention based on a finding of a “serious risk” that an arrested juvenile may commit a crime before his return date. The question before us is whether

preventive detention of juveniles pursuant to § 320.5(3)(b) is compatible with the “fundamental fairness” required by due process. Two separate inquiries are necessary to answer this question. First, does preventive detention under the *264 New York statute serve a legitimate state objective? See *Bell v. Wolfish*, 441 U.S. 520, 534, n. 15, 99 S.Ct. 1861, 1871 n. 15, 60 L.Ed.2d 447 (1979); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 83 S.Ct. 554, 567-568, 9 L.Ed.2d 644 (1963). And, second, are the procedural safeguards contained in the FCA adequate to authorize the pretrial detention of at least some juveniles charged with crimes? See *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976); *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S.Ct. 854, 863, 43 L.Ed.2d 54 (1975).

A

Preventive detention under the FCA is purportedly designed to protect the child and society from the potential consequences of his criminal acts. **2410 *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d at 689- 690, 385 N.Y.S.2d, at 521-522, 350 N.E.2d, at 910. When making any detention decision, the Family Court judge is specifically directed to consider the needs and best interests of the juvenile as well as the need for the protection of the community. FCA § 301.1; *In re Craig S.*, 57 App.Div.2d 761, 394 N.Y.S.2d 200 (1977). In *Bell v. Wolfish*, *supra*, at 534, n. 15, 99 S.Ct., at 1871 n. 15, we left open the question whether any governmental objective other than ensuring a detainee’s presence at trial may constitutionally justify pretrial detention. As an initial matter, therefore, we must decide whether, in the context of the juvenile system, the combined interest in protecting both the community and the juvenile himself from the consequences of future criminal conduct is sufficient to justify such detention.

The “legitimate and compelling state interest” in protecting the community from crime cannot be doubted. *De Veau v. Braisted*, 363 U.S. 144, 155, 80 S.Ct. 1146, 1152, 4 L.Ed.2d 1109 (1960). See also *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968). We have stressed before that crime prevention is “a weighty social objective,” *Brown v. Texas*, 443 U.S. 47, 52, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979), and this interest persists undiluted in the juvenile context. See *In re Gault*, *supra*, at 20, n. 26, 87 S.Ct. 1440, n. 26, 18 L.Ed.2d 527. The harm suffered by the victim of a crime is not dependent *265 upon the age of the perpetrator. [FN14] And the harm to society generally may even be greater in this context given the high rate of recidivism among juveniles. *In re Gault*, *supra*, at 22, 87 U.S., at 22, 87 S.Ct., at 1440.

FN14. In 1982, juveniles under 16 accounted for 7.5 percent of all arrests for violent crimes, 19.9 percent of all arrests for serious property crime, and 17.3 percent of all arrests for violent and serious property crimes combined. U.S. Dept. of Justice, Federal Bureau of Investigation, *Crime in the United States 176-177* (1982) (“violent crimes” include murder, nonnegligent manslaughter, forcible rape, robbery, and aggravated assault; “serious property crimes” include burglary, larceny- theft, motor vehicle theft, and arson).

The juvenile's countervailing interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial as well. See *In re Gault*, supra, at 27, 87 S.Ct., at 1443. But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 510-511, 102 S.Ct. 3231, 3237-3238, 73 L.Ed.2d 928 (1982); *In re Gault*, supra, 387 U.S., at 17, 87 S.Ct., at 1438. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. See *State v. Gleason*, 404 A.2d 573, 580 (Me.1979); *People ex rel. Wayburn v. Schupf*, supra, at 690, 385 N.Y.S.2d, at 522, 350 N.E.2d, at 910; *Baker v. Smith*, 477 S.W.2d 149, 150-151 (Ky.App.1971). In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae* interest in preserving and promoting the welfare of the child." *Santosky v. Kramer*, supra, at 766, 102 S.Ct., at 1401, 71 L.Ed.2d 599.

The New York Court of Appeals, in upholding the statute at issue here, stressed at some length "the desirability of protecting the juvenile from his own folly." *People ex rel. Wayburn v. Schupf*, supra, at 688-689, 385 N.Y.S.2d, at 520-521, 350 N.E.2d, at 909. [FN15] *266 Society has a legitimate **2411 interest in protecting a juvenile from the consequences of his criminal activity--both from potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child. See *L.O.W. v. District Court of Arapahoe*, 623 P.2d 1253, 1258-1259 (Colo.1981); *Morris v. D'Amario*, 416 A.2d 137, 140 (R.I.1980). See also *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 876, 71 L.Ed.2d 1 (1982) (minority "is a time and condition of life when a person may be most susceptible to influence and to psychological damage"); *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S.Ct. 3035, 3044, 61 L.Ed.2d 797 (1979) (juveniles "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them").

FN15. "Our society recognizes that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified or firmly adopted....

"For the same reasons that our society does not hold juveniles to an adult standard of responsibility for their conduct, our society may also conclude that there is a greater likelihood that a juvenile charged with delinquency, if released, will commit another criminal act than that an adult charged with crime will do so. To the extent that self-restraint may be expected to constrain adults, it may not be expected to operate with equal force as to juveniles. Because of the possibility of juvenile delinquency treatment and the absence of second-offender sentencing, there will not be the deterrent for the juvenile which confronts the adult. Perhaps more significant is the fact that in consequence of lack of experience and comprehension the juvenile does not view the commission of what are criminal acts in the same perspective as an adult.... There is the element of

gamesmanship and the excitement of 'getting away' with something and the powerful inducement of peer pressures. All of these commonly acknowledged factors make the commission of criminal conduct on the part of juveniles in general more likely than in the case of adults." *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d, at 687-688, 385 N.Y.S.2d, at 520-521, 350 N.E.2d, at 908-909.

The substantiality and legitimacy of the state interests underlying this statute are confirmed by the widespread use and judicial acceptance of preventive detention for juveniles. Every State, as well as the United States in the District of *267 Columbia, permits preventive detention of juveniles accused of crime. [FN16] A number of model juvenile justice Acts also contain provisions permitting preventive detention. [FN17] And the **2412 *268 courts of eight States, including the New York Court of Appeals, have upheld their statutes with specific reference to protecting the juvenile and the community from harmful pretrial conduct, including pretrial crime. *L.O.W. v. District Court of Arapahoe*, supra, at 1258-1259; *Morris v. D'Amario*, at 139-140; *State v. Gleason*, 404 A.2d, at 583; *Pauley v. Gross*, 1 Kan.App.2d 736, 738-740, 574 P.2d 234, 237-238 (1977); *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d, at 688-689, 385 N.Y.S.2d, at 520-521, 350 N.E.2d, at 909-910; *Aubrey v. Gadbois*, 50 Cal.App.3d 470, 472, 123 Cal.Rptr. 365, 366 (1975); *Baker v. Smith*, 477 S.W.2d, at 150-151; *Commonwealth ex rel. Sprowal v. Hendrick*, 438 Pa. 435, 438-439, 265 A.2d 348, 349-350 (1970).

FN16. Ala.Code § 12-15-59 (1975); Alaska Stat. Ann. § 47.10.140 (1979); Rule 3, Ariz.Juv.Ct.Rules of Proc., Ariz.Rev.Stat. Ann. (Supp.1983- 1984 to Vol. 17A); Ark.Stat. Ann. § 45-421 (Supp.1983); Cal.Welf. & Inst.Code Ann. § 628 (West Supp.1984); Colo.Rev.Stat. § 19-2-102 (Supp.1983); Conn.Gen.Stat. § 46b-131 (Supp.1984); Del.Fam.Ct.Rule 60 (1981); D.C.Code § 16-2310 (1981); Fla.Stat. § 39.032 (Supp.1984); Ga.Code Ann. § 15-11-19 (1982); Haw.Rev.Stat. § 571-31.1 (Supp.1984); Idaho Code § 16-1811 (Supp.1983); Ill.Rev.Stat., ch. 37, § 703-4 (1983); Ind.Code § 31-6-4-5 (1982); Iowa Code § 232.22 (1983); Kan.Stat. Ann. § 38-1632 (Supp.1983); Ky.Rev.Stat. § 208.192 (1982); La.Code Juv.Proc. Ann. Art. 40 (West 1983 Pamphlet); Me.Rev.Stat. Ann., tit. 15, § 3203 (1964 and Supp.1983-1984); Md.Cts. & Jud.Proc.Code Ann. § 3-815 (1984); Mass.Gen.Laws Ann., ch. 119, § 66 (West Supp.1983-1984); Mich.Comp.Laws § 712A.15 (1979); Minn.Stat. § 260.171 (1982); Miss.Code Ann. § 43-23-11 (1972); Mo.Juv.Ct.Rule 111.02 (1981); Mont.Code Ann. § 41-5-305 (1983); Neb.Rev.Stat. § 43-255 (Supp.1982); Nev.Rev.Stat. § 62.140 (1983); N.H.Rev.Stat. Ann. § 169B:14 (Supp.1983); N.J.Stat. Ann. § 2A:4-56 (Supp.1983-1984); N.M.Stat. Ann. § 32-1-24 (1981); N.Y. FCA § 320.5(3) (McKinney 1983); N.C.Gen.Stat. § 7A-574 (Supp.1983); N.D.Cent.Code § 27-20-14 (1974); Ohio Rev.Code Ann. § 2151.311 (1976); Okla.Stat., Tit. 10, § 1107 (Supp.1983); Ore.Rev.Stat. § 419.573 (1983); 42 Pa.Cons.Stat. § 6325 (1982); R.I.Gen.Laws § § 14-1- 20, 14-1-21 (1981); S.C.Code § 20-7-600 (Supp.1983); S.D.Codified Laws § 26-8-19.2 (Supp.1983); Tenn.Code Ann. § 37-1-114 (1984); Tex.Fam.Code Ann. § 53.02 (1975 and Supp.1984); Utah Code Ann. § 78- 3a-30 (Supp.1983); Vt.Stat. Ann., Tit. 33, § 643 (1981); Va.Code § 16.1-248 (1982); Wash.Rev.Code § 13.40.040 (1983); W.Va.Code § 49-5- 8 (Supp.1983); Wis.Stat. § 48.208 (1981-1982); Wyo.Stat. § 14-6-206 (1977).

FN17. See U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Standards for the Administration of Juvenile Justice, Report of the National Advisory Committee for

Juvenile Justice and Delinquency Prevention 294-296 (July 1980); Uniform Juvenile Court Act § 14, 9A U.L.A. 22 (1979); Standard Juvenile Court Act, Art. IV, § 16, proposed by the National Council on Crime and Delinquency (1959); W. Sheridan, Legislative Guide for Drafting Family and Juvenile Court Acts § 20(a)(1) (Dept. of HEW, Children's Bureau, Pub. No. 472-1969); see also Standards for Juvenile and Family Courts 62-63 (Dept. of HEW, Children's Bureau, Pub. No. 437-1966). Cf. Institute of Judicial Administration/American Bar Association Project on Juvenile Justice Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition § 3.2(B) (Tent. Draft 1977) (detention limited to "reducing the likelihood that the juvenile may inflict serious bodily harm on others during the interim").

"The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Snyder v. Massachusetts, 291 U.S. 97, 105 [54 S.Ct. 330, 332, 78 L.Ed. 674] (1934)." Leland v. Oregon, 343 U.S. 790, 798, 72 S.Ct. 1002, 1007, 96 L.Ed. 1302 (1952). In light of the uniform legislative judgment that pretrial detention of juveniles properly promotes the interests both of society and the juvenile, we conclude that the practice serves a legitimate regulatory purpose compatible with the "fundamental fairness" demanded by the Due Process Clause in juvenile proceedings. Cf. McKeiver v. Pennsylvania, 403 U.S., at 548, 91 S.Ct., at 1987 (plurality opinion). [FN18]

FN18. Appellees argue that some limit must be placed on the categories of crimes that detained juveniles must be accused of having committed or being likely to commit. But the discretion to delimit the categories of crimes justifying detention, like the discretion to define criminal offenses and prescribe punishments, resides wholly with the state legislatures. Whalen v. United States, 445 U.S. 684, 689, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715 (1980); Rochin v. California, 342 U.S. 165, 168, 72 S.Ct. 205, 207, 96 L.Ed. 183 (1952). See also Rummel v. Estelle, 445 U.S. 263, 275, 100 S.Ct. 1133, 1139, 63 L.Ed.2d 382 (1980) ("the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime"). More fundamentally, this sort of attack on a criminal statute must be made on a case-by-case basis. United States v. Raines, 362 U.S. 17, 21, 80 S.Ct. 519, 522, 4 L.Ed.2d 524 (1960). The Court will not sift through the entire class to determine whether the statute was constitutionally applied in each case. And, outside the limited First Amendment context, a criminal statute may not be attacked as overbroad. See New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

*269 Of course, the mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment. It is axiomatic that "[d]ue process requires that a pretrial detainee not be punished." Bell v. Wolfish, 441 U.S., at 535, n. 16, 99 S.Ct., at 1872, n. 16. Even given, therefore, that pretrial detention may serve legitimate regulatory purposes, it is still necessary to determine whether the terms and conditions of confinement under § 320.5(3)(b) are in fact compatible with those purposes. Kennedy v. Mendoza-Martinez, 372 U.S., at 168-169, 83 S.Ct., at 567-568. "A court must decide whether the disability is

imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." Bell v. Wolfish, supra, 441 U.S., at 538, 99 S.Ct., at 1873. Absent a showing of an express intent to punish on the part of the State, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." Kennedy v. Mendoza-Martinez, supra, 372 U.S., at 168-189, 83 S.Ct., at 567-578. See Bell v. Wolfish, supra, 441 U.S., at 538, 99 S.Ct., at 1874; Flemming v. Nestor, 363 U.S. 603, 613-614, 80 S.Ct. 1367, 1373-1375, 4 L.Ed.2d 1435 (1960).

There is no indication in the statute itself that preventive detention is used or intended **2413 as a punishment. First of all, the detention is strictly limited in time. If a juvenile is detained at his initial appearance and has denied the charges *270 against him, he is entitled to a probable-cause hearing to be held not more than three days after the conclusion of the initial appearance or four days after the filing of the petition, whichever is sooner. FCA § 325.1(2). [FN19] If the Family Court judge finds probable cause, he must also determine whether continued detention is necessary pursuant to § 320.5(3)(b). § 325.3(3).

FN19. For good cause shown, the court may adjourn the hearing, but for no more than three additional court days. FCA § 325.1(3).

Detained juveniles are also entitled to an expedited factfinding hearing. If the juvenile is charged with one of a limited number of designated felonies, the factfinding hearing must be scheduled to commence not more than 14 days after the conclusion of the initial appearance. § 340.1. If the juvenile is charged with a lesser offense, then the factfinding hearing must be held not more than three days after the initial appearance. [FN20] In the latter case, since the times for the probable-cause hearing and the factfinding hearing coincide, the two hearings are merged.

FN20. In either case, the court may adjourn the hearing for not more than three days for good cause shown. FCA § 340.1(3). The court must state on the record the reason for any adjournment. § 340.1(4).

Thus, the maximum possible detention under § 320.5(3)(b) of a youth accused of a serious crime, assuming a 3-day extension of the factfinding hearing for good cause shown, is 17 days. The maximum detention for less serious crimes, again assuming a 3-day extension for good cause shown, is six days. These time frames seem suited to the limited purpose of providing the youth with a controlled environment and separating him from improper influences pending the speedy disposition of his case.

The conditions of confinement also appear to reflect the regulatory purposes relied upon by the State. When a juvenile is remanded after his initial appearance, he cannot, absent exceptional circumstances, be sent to a prison or lockup where he would be exposed to adult criminals. *271FCA § 304.1(2). Instead, the child is screened by an "assessment unit" of the Department of Juvenile Justice. Testimony of Mr. Kelly

(Deputy Commissioner of Operations, New York City Department of Juvenile Justice), App. 286-287. The assessment unit places the child in either nonsecure or secure detention. Nonsecure detention involves an open facility in the community, a sort of “halfway house,” without locks, bars, or security officers where the child receives schooling and counseling and has access to recreational facilities. *Id.*, at 285; Testimony of Mr. Benjamin, *id.*, at 149-150.

Secure detention is more restrictive, but it is still consistent with the regulatory and *parens patriae* objectives relied upon by the State. Children are assigned to separate dorms based on age, size, and behavior. They wear street clothes provided by the institution and partake in educational and recreational programs and counseling sessions run by trained social workers. Misbehavior is punished by confinement to one’s room. See Testimony of Mr. Kelly, *id.*, at 292-297. We cannot conclude from this record that the controlled environment briefly imposed by the State on juveniles in secure pretrial detention “is imposed for the purpose of punishment” rather than as “an incident of some other legitimate governmental purpose.” *Bell v. Wolfish*, 441 U.S., at 538, 99 S.Ct., at 1873.

The Court of Appeals, of course, did conclude that the underlying purpose of § 320.5(3)(b) is punitive rather than regulatory. But the court did not dispute that preventive detention might serve legitimate regulatory purposes or that the terms and conditions of pretrial confinement in New York are compatible with those purposes. Rather, the court invalidated a significant aspect of New York’s juvenile justice system based solely on some case histories and **2414 a statistical study which appeared to show that “the vast majority of juveniles detained under [§ 320.5(3)(b)] either have their petitions dismissed before an adjudication of delinquency or are released after adjudication.” 689 F.2d, at 369. The court assumed that dismissal of a petition or failure to confine a juvenile at *272 the dispositional hearing belied the need to detain him prior to fact-finding and that, therefore, the pretrial detention constituted punishment. *Id.*, at 373. Since punishment imposed without a prior adjudication of guilt is *per se* illegitimate, the Court of Appeals concluded that no juveniles could be held pursuant to § 320.5(3)(b).

There are some obvious flaws in the statistics and case histories relied upon by the lower court. [FN21] But even assuming it to be the case that “by far the greater number of juveniles incarcerated under [[§ 320.5(3)(b)] will never be confined as a consequence of a disposition imposed after an adjudication of delinquency,” 689 F.2d, at 371-372, we find that to be an insufficient ground for upsetting the widely shared legislative judgment that preventive detention serves an important and legitimate function in the juvenile justice system. We are unpersuaded by the Court of Appeals’ rather cavalier equation of detentions that do not lead to continued confinement after an adjudication of guilt and “wrongful” or “punitive” pretrial detentions.

FN21. For example, as the Court of Appeals itself admits, 689 F.2d, at 369, n. 18, the statistical study on which it relied mingles indiscriminately detentions under § 320.5(3)(b) with detentions

under § 320.5(3)(a). The latter provision applies only to juveniles who are likely not to appear on the return date if not detained, and appellees concede that such juveniles may be lawfully detained. Brief for Appellees 93. Furthermore, the 34 case histories on which the court relied were handpicked by appellees’ counsel from over a 3-year period. Compare Petitioners’ Exhibit 19a (detention of Geraldo Delgado on March 5, 1976) with Petitioners’ Exhibit 35a (detention of James Ancrum on August 19, 1979). The Court of Appeals stated that appellants did not contest the representativeness of these case histories. 689 F.2d, at 369, n. 19. Appellants argue, however, that there was no occasion to contest their representativeness because the case histories were not even offered by appellees as a representative sample, and were not evaluated by appellees’ expert statistician or the District Court in that light. See Brief for Appellant in No. 82-1278, pp. 24-25, n. **. We need not resolve this controversy.

Pretrial detention need not be considered punitive merely because a juvenile is subsequently discharged subject to conditions *273 or put on probation. In fact, such actions reinforce the original finding that close supervision of the juvenile is required. Lenient but supervised disposition is in keeping with the Act’s purpose to promote the welfare and development of the child. [FN22] As the New York Court of Appeals noted:

FN22. Judge Quinones testified that detention at disposition is considered a “harsh solution.” At the dispositional hearing, the Family Court judge usually has “a much more complete picture of the youngster” and tries to tailor the least restrictive dispositional order compatible with that picture. Testimony of Judge Quinones, App. at 279-281.

“It should surprise no one that caution and concern for both the juvenile and society may indicate the more conservative decision to detain at the very outset, whereas the later development of very much more relevant information may prove that while a finding of delinquency was warranted, placement may not be indicated.” *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d, at 690, 385 N.Y.S.2d, at 522, 350 N.E.2d, at 910.

Even when a case is terminated prior to fact finding, it does not follow that the decision to detain the juvenile pursuant to § 320.5(3)(b) amounted to a due process violation. A delinquency petition may be dismissed for any number of reasons collateral to its merits, such as the failure of a witness to testify. The Family Court judge cannot be expected to anticipate such developments at the initial hearing. He makes his decision based on the information available to him at that time, and the propriety of the decision must be judged in that light. Consequently, the final disposition of a **2415 case is “largely irrelevant” to the legality of a pretrial detention. *Baker v. McCollan*, 443 U.S. 137, 145, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979).

It may be, of course, that in some circumstances detention of a juvenile would not pass constitutional muster. But the validity of those detentions must be determined on a case-by-case basis. Section 320.5(3)(b) is not invalid “on its face” by *274 reason of the ambiguous statistics and case histories relied upon by the court below. [FN23] We find no justification for the conclusion that, contrary to the express language of the statute and the

judgment of the highest state court, § 320.5(3)(b) is a punitive rather than a regulatory measure. Preventive detention under the FCA serves the legitimate state objective, held in common with every State in the country, of protecting both the juvenile and society from the hazards of pretrial crime.

FN23. Several amici argue that similar statistics obtain throughout the country. See, e.g., Brief for American Bar Association as Amicus Curiae 23; Brief for Association for Children of New Jersey as Amicus Curiae 8, 11; Brief for Youth Law Center et al. as Amicus Curiae 13-14. But even if New York's experience were duplicated on a national scale, that fact would not lead us, as amici urge, to conclude that every State and the United States are illicitly punishing juveniles prior to their trial. On the contrary, if such statistics obtain nationwide, our conclusion is strengthened that the existence of the statistics in these cases is not a sufficient ground for striking down New York's statute. As already noted: "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder v. Massachusetts*, 291 U.S. 97, 105 [54 S.Ct. 330, 332, 78 L.Ed. 674] (1934)." *Leland v. Oregon*, 343 U.S. 790, 798, 72 S.Ct. 1002, 1007, 96 L.Ed. 1302 (1952).

B

Given the legitimacy of the State's interest in preventive detention, and the nonpunitive nature of that detention, the remaining question is whether the procedures afforded juveniles detained prior to fact-finding provide sufficient protection against erroneous and unnecessary deprivations of liberty. See *Mathews v. Eldridge*, 424 U.S., at 335, 96 S.Ct., at 903, 47 L.Ed.2d 18. [FN24] In *Gerstein v. Pugh*, 420 U.S., at 114, 95 S.Ct., at 863, 43 L.Ed.2d 54, we held that a judicial *275 determination of probable cause is a prerequisite to any extended restraint on the liberty of an adult accused of crime. We did not, however, mandate a specific time-table. Nor did we require the "full panoply of adversary safeguards--counsel, confrontation, cross-examination, and compulsory process for witnesses." *Id.*, at 119, 95 S.Ct., at 866. Instead, we recognized "the desirability of flexibility and experimentation by the States." *Id.*, at 123, 95 S.Ct. at 868. *Gerstein* arose under the Fourth Amendment, but the same concern with "flexibility" and "informality," while yet ensuring adequate predetention procedures, is present in this context. In *re Winship*, 397 U.S., at 366, 90 S.Ct., at 1074, 25 L.Ed.2d 368; *Kent v. United States*, 383 U.S. 541, 554, 86 S.Ct. 1045, 1054, 16 L.Ed.2d 84 (1966).

FN24. Appellees urge the alleged lack of procedural safeguards as an alternative ground for upholding the judgment of the Court of Appeals. Brief for Appellees 62-75. The court itself intimated that it would reach the same result on that ground, 689 F.2d, at 373-374, and Judge Newman, in his concurrence, relied expressly on perceived procedural flaws in the statute. Accordingly, we deem it necessary to consider the question.

In many respects, the FCA provides far more predetention protection for juveniles than we found to be constitutionally required for a probable-cause determination for adults in *Gerstein*. The initial appearance is informal, but the accused

juvenile is given full notice of the charges against him and a complete stenographic record is kept of the hearing. See 513 F.Supp., at 702. The juvenile appears accompanied by his parent or guardian. [FN25] He is first informed **2416 of his rights, including the right to remain silent and the right to be represented by counsel chosen by him or by a law guardian assigned by the court. FCA § 320.3. The initial appearance may be adjourned for no longer than 72 hours or until the next court day, whichever is sooner, to enable an appointed law guardian or other counsel to appear before the court. § 320.2(3). When his counsel is present, the juvenile is informed of the charges against him and furnished with a copy of the delinquency petition. § 320.4(1). A representative from the presentment agency appears in support of the petition.

FN25. If the juvenile's parent or guardian fails to appear after reasonable and substantial efforts have been made to notify such person, the court must appoint a law guardian for the child. FCA § 320.3.

The nonhearsay allegations in the delinquency petition and supporting depositions must establish probable cause to *276 believe the juvenile committed the offense. Although the Family Court judge is not required to make a finding of probable cause at the initial appearance, the youth may challenge the sufficiency of the petition on that ground. FCA § 315.1. Thus, the juvenile may oppose any recommended detention by arguing that there is not probable cause to believe he committed the offense or offenses with which he is charged. If the petition is not dismissed, the juvenile is given an opportunity to admit or deny the charges. § 321.1. [FN26]

FN26. If the child chooses to remain silent, he is assumed to deny the charges. FCA § 321.1. With the consent of the court and of the presentment agency, the child may admit to a lesser charge. If he wishes to admit to the charges or to a lesser charge, the court must, before accepting the admission, advise the child of his right to a factfinding hearing and of the possible specific dispositional orders that may result from the admission. *Ibid.* The court must also satisfy itself that the child actually did commit the acts to which he admits. *Ibid.*

With the consent of the victim or complainant and the juvenile, the court may also refer a case to the probation service for adjustment. If the case is subsequently adjusted, the petition is then dismissed. § 320.6.

At the conclusion of the initial appearance, the presentment agency makes a recommendation regarding detention. A probation officer reports on the juvenile's record, including other prior and current Family Court and probation contacts, as well as relevant information concerning home life, school attendance, and any special medical or developmental problems. He concludes by offering his agency's recommendation on detention. Opposing counsel, the juvenile's parents, and the juvenile himself may all speak on his behalf and challenge any information or recommendation. If the judge does decide to detain the juvenile under § 320.5(3)(b), he must state on the record the facts and reasons for the detention. [FN27]

FN27. Given that under *Gerstein*, 420 U.S., at 119-123, 95 S.Ct., at 865-868, a probable-cause hearing may be informal and

nonadversarial, a Family Court judge could make a finding of probable cause at the initial appearance. That he is not required to do so does not, under the circumstances, amount to a deprivation of due process. Appellees fail to point to a single example where probable cause was not found after a decision was made to detain the child.

*277 As noted, a detained juvenile is entitled to a formal, adversarial probable-cause hearing within three days of his initial appearance, with one 3- day extension possible for good cause shown. [FN28] The burden at this hearing is on the presentment agency to call witnesses and offer evidence in support of the charges. § 325.2. Testimony is under oath and subject to cross- examination. *Ibid.* The accused juvenile may call witnesses and offer evidence in his own behalf. If the court finds probable cause, the court must again decide whether continued detention is necessary under § 320.5(3)(b). Again, the facts and reasons for the detention must be stated on the record.

FN28. The Court in *Gerstein* indicated approval of pretrial detention procedures that supplied a probable-cause hearing within five days of the initial detention. *Id.*, at 124, n. 25, 95 S.Ct., at 868, n. 25. The brief delay in the probable-cause hearing may actually work to the advantage of the juvenile since it gives his counsel, usually appointed at the initial appearance pursuant to FCA § 320.2(2), time to prepare.

In sum, notice, a hearing, and a statement of facts and reasons are given prior to any detention under § 320.5(3)(b). A formal probable-cause hearing is then held **2417 within a short while thereafter, if the factfinding hearing is not itself scheduled within three days. These flexible procedures have been found constitutionally adequate under the Fourth Amendment, see *Gerstein v. Pugh*, and under the Due Process Clause, see *Kent v. United States*, supra, 557, 86 S.Ct., at 1055, 16 L.Ed.2d 84. Appellees have failed to note any additional procedures that would significantly improve the accuracy of the determination without unduly impinging on the achievement of legitimate state purposes. [FN29]

FN29. Judge Newman, in his concurrence below, offered a list of statutory improvements. These suggested changes included: limitations on the crimes for which the juvenile has been arrested or which he is likely to commit if released; a determination of the likelihood that the juvenile committed the crime; an assessment of the juvenile's background; and a more specific standard of proof. The first and second of these suggestions have already been considered. See nn. 18 and 27, supra. We need only add to the discussion in n. 18 that there is no indication that delimiting the category of crimes justifying detention would improve the accuracy of the § 320.5(3)(b) determination in any respect. The third and fourth suggestions are discussed in text, *infra*.

*278 Appellees argue, however, that the risk of erroneous and unnecessary detentions is too high despite these procedures because the standard for detention is fatally vague. Detention under § 320.5(3)(b) is based on a finding that there is a "serious risk" that the juvenile, if released, would commit a crime prior to his next court appearance. We have already seen that detention of juveniles on that ground serves legitimate regulatory purposes. But appellees claim, and the District Court agreed, that it is virtually impossible to predict

future criminal conduct with any degree of accuracy. Moreover, they say, the statutory standard fails to channel the discretion of the Family Court judge by specifying the factors on which he should rely in making that prediction. The procedural protections noted above are thus, in their view, unavailing because the ultimate decision is intrinsically arbitrary and uncontrolled.

Our cases indicate, however, that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions, [FN30] and we have specifically rejected *279 the contention, based on the same sort of sociological data relied upon by appellees and the District Court, "that it is impossible to predict future behavior and that the question is so vague as to be meaningless." *Jurek v. Texas*, 428 U.S. 262, 274, 96 S.Ct. 2950, 2957, 49 L.Ed.2d 929 (1976) (opinion of Stewart, POWELL and STEVENS, JJ.); *id.*, at 279, 96 S.Ct., at 2959 (WHITE, J., concurring in judgment).

FN30. See *Jurek v. Texas*, 428 U.S. 262, 274-275, 96 S.Ct. 2950, 2957-2958, 49 L.Ed.2d 929 (1976) (death sentence imposed by jury); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 9-10, 99 S.Ct. 2100, 2104-2105, 60 L.Ed.2d 668 (1979) (grant of parole); *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 2599, 33 L.Ed.2d 484 (1972) (parole revocation).

A prediction of future criminal conduct may also form the basis for an increased sentence under the "dangerous special offender" statute, 18 U.S.C. § 3575. Under § 3575(f), a "dangerous" offender is defined as an individual for whom "a period of confinement longer than that provided for such [underlying] felony is required for the protection of the public from further criminal conduct by the defendant." The statute has been challenged numerous times on the grounds that the standard is unconstitutionally vague. Every Court of Appeals considering the question has rejected that claim. *United States v. Davis*, 710 F.2d 104, 108-109 (CA3), cert. denied, 464 U.S. 1001, 104 S.Ct. 505, 78 L.Ed.2d 695 (1983); *United States v. Schell*, 692 F.2d 672, 675-676 (CA10 1982); *United States v. Williamson*, 567 F.2d 610, 613 (CA4 1977); *United States v. Bowdach*, 561 F.2d 1160, 1175 (CA5 1977); *United States v. Neary*, 552 F.2d 1184, 1194 (CA7), cert. denied, 434 U.S. 864, 98 S.Ct. 197, 54 L.Ed.2d 139 (1977); *United States v. Stewart*, 531 F.2d 326, 336-337 (CA6), cert. denied, 426 U.S. 922, 96 S.Ct. 2629, 49 L.Ed.2d 376 (1976).

We have also recognized that a prediction of future criminal conduct is "an experienced prediction based on a host of variables" which cannot be readily codified. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 16, 99 S.Ct. 2100, 2108, 60 L.Ed.2d 668 (1979). Judge Quinones of the **2418 Family Court testified at trial that he and his colleagues make a determination under § 320.5(3)(b) based on numerous factors including the nature and seriousness of the charges; whether the charges are likely to be proved at trial; the juvenile's prior record; the adequacy and effectiveness of his home supervision; his school situation, if known; the time of day of the alleged crime as evidence of its seriousness and a possible lack of parental control; and any special circumstances that might be brought to his attention by the probation officer, the child's attorney, or any parents, relatives, or other responsible persons accompanying the child. Testimony of Judge

Quinones, App. 254-267. The decision is based on as much information as can reasonably be obtained at the initial appearance. *Ibid.*

Given the right to a hearing, to counsel, and to a statement of reasons, there is no reason that the specific factors upon which the Family Court judge might rely must be specified in the statute. As the New York Court of Appeals concluded, *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d, at 690, 385 N.Y.S.2d, at 522, 350 N.E.2d, at 910, “to a very real extent Family Court must exercise a substitute parental control for which there can be *280 no particularized criteria.” There is also no reason, we should add, for a federal court to assume that a state court judge will not strive to apply state law as conscientiously as possible. *Sumner v. Mata*, 449 U.S. 539, 549, 101 S.Ct. 764, 770, 66 L.Ed.2d 722 (1981).

It is worth adding that the Court of Appeals for the Second Circuit was mistaken in its conclusion that “[i]ndividual litigation ... is a practical impossibility because the periods of detention are so short that the litigation is mooted before the merits are determined.” 689 F.2d, at 373. In fact, one of the juveniles in the very case histories upon which the court relied was released from pretrial detention on a writ of habeas corpus issued by the State Supreme Court. New York courts also have adopted a liberal view of the doctrine of “capable of repetition, yet evading review” precisely in order to ensure that pretrial detention orders are not unreviewable. In *People ex rel. Wayburn v. Schupf*, *supra*, at 686, 385 N.Y.S.2d, at 520, 350 N.E.2d, at 908, the court declined to dismiss an appeal from the grant of a writ of habeas corpus despite the technical mootness of the case.

“Because the situation is likely to recur ... and the substantial issue may otherwise never be reached (in view of the predictably recurring happenstance that, however expeditiously an appeal might be prosecuted, fact-finding and dispositional hearings normally will have been held and a disposition made before the appeal could reach us), ... we decline to dismiss [the appeal] on the ground of mootness.”

The required statement of facts and reasons justifying the detention and the stenographic record of the initial appearance will provide a basis for the review of individual cases. Pretrial detention orders in New York may be reviewed by writ of habeas corpus brought in State Supreme Court. And the judgment of that court is appealable as of right and may be taken directly to the Court of Appeals if a constitutional question is presented. *281 N.Y.Civ.Prac.Law § 5601(b)(2) (McKinney 1978). Permissive appeal from a Family Court order may also be had to the Appellate Division. FCA § 365.2. Or a motion for reconsideration may be directed to the Family Court judge. § 355.1(1)(b). These postdetention procedures provide a sufficient mechanism for correcting on a case-by-case basis any erroneous detentions ordered under § 320.5(3). Such procedures may well flesh out the standards specified in the statute.

III

The dissent would apparently have us strike down New York’s preventive detention statute on two grounds: first, because the preventive detention of juveniles constitutes poor public policy, with the balance of harms outweighing any positive benefits either to society or to the juveniles themselves, *post*, at 2423-2425, 2433, and, second, **2419 because the statute could have been better drafted to improve the quality of the decisionmaking process, *post*, at 2431-2432. But it is worth recalling that we are neither a legislature charged with formulating public policy nor an American Bar Association committee charged with drafting a model statute. The question before us today is solely whether the preventive detention system chosen by the State of New York and applied by the New York Family Court comports with constitutional standards. Given the regulatory purpose for the detention and the procedural protections that precede its imposition, we conclude that § 320.5(3)(b) of the New York FCA is not invalid under the Due Process Clause of the Fourteenth Amendment.

The judgment of the Court of Appeals is Reversed.

Justice MARSHALL, with whom Justice BRENNAN and Justice STEVENS join, dissenting.

The New York Family Court Act governs the treatment of persons between 7 and 16 years of age who are alleged to have committed acts that, if committed by adults, would *282 constitute crimes. [FN1] The Act contains two provisions that authorize the detention of juveniles arrested for offenses covered by the Act [FN2] for up to 17 days pending adjudication of their guilt. [FN3] Section 320.5(3)(a) empowers a judge of the New York Family Court to order detention of a juvenile if he finds “there is a substantial probability that [[the juvenile] will not appear in court on the return date.” Section 320.5(3)(b), the provision at issue in these cases, authorizes detention if the judge finds “there is a serious risk [the juvenile] may before the return date commit an act which if committed by an adult would constitute a crime.” [FN4]

FN1. N.Y.Jud.Law § § 301.2(1), 302.1(1) (McKinney 1983) (hereinafter Family Court Act or FCA). Children aged 13 or over accused of murder and children aged 14 or over accused of kidnaping, arson, rape, or a few other serious crimes are exempted from the coverage of the Act and instead are prosecuted as “juvenile offenders” in the adult criminal courts. N.Y.Penal Law § § 10.00(18), 30.00(2) (McKinney Supp.1983-1984). For the sake of simplicity, offenses covered by the Family Court Act, as well as the more serious offenses enumerated above, hereinafter will be referred to generically as crimes.

FN2. Ironically, juveniles arrested for very serious offenses, see n. 1, *supra*, are not subject to preventive detention under this or any other provision.

FN3. Strictly speaking, “guilt” is never adjudicated under the Act; nor is the juvenile ever given a trial. Rather, whether the juvenile committed the offense is ascertained in a “factfinding

hearing.” In most respects, however, such a hearing is the functional equivalent of an ordinary criminal trial. For example, the juvenile is entitled to counsel and the State bears the burden of demonstrating beyond a reasonable doubt that the juvenile committed the offense of which he is accused. See FCA § 341.2(1), 342.2(2); cf. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (establishing constitutional limitations on the form of such proceedings in recognition of the severity of their impact upon juveniles). For convenience, the ensuing discussion will use the terminology associated with adult criminal proceedings when describing the treatment of juveniles in New York.

FN4. At the time appellees first brought their suit, the pertinent portions of FCA § 320.5(3) were embodied in FCA § 739(a). I agree with the majority that the reenactment of the crucial provision under a different numerical heading does not render the case moot. See *ante*, at 2405, n. 2.

*283 There are few limitations on § 320.5(3)(b). Detention need not be predicated on a finding that there is probable cause to believe the child committed the offense for which he was arrested. The provision applies to all juveniles, regardless of their prior records or the severity of the offenses of which they are accused. The provision is not limited to the prevention of dangerous crimes; a prediction that a juvenile if released may commit a minor misdemeanor is sufficient to justify his detention. Aside from the reference to “serious risk,” the requisite likelihood that the juvenile will misbehave before his trial is not specified by the statute.

The Court today holds that preventive detention of a juvenile pursuant to **2420§ 320. 5(3)(b) does not violate the Due Process Clause. Two rulings are essential to the Court’s decision: that the provision promotes legitimate government objectives important enough to justify the abridgment of the detained juveniles’ liberty interests, *ante*, at 2415; and that the provision incorporates procedural safeguards sufficient to prevent unnecessary or arbitrary impairment of constitutionally protected rights, *ante*, at 2417, 2418. Because I disagree with both of those rulings, I dissent.

I

The District Court made detailed findings, which the Court of Appeals left undisturbed, regarding the manner in which § 320.5(3)(b) is applied in practice. Unless clearly erroneous, those findings are binding upon us, see *Fed.Rule Civ.Proc.* 52(a), and must guide our analysis of the constitutional questions presented by these cases.

The first step in the process that leads to detention under § 320.5(3)(b) is known as “probation intake.” A juvenile may arrive at intake by one of three routes: he may be brought there directly by an arresting officer; he may be detained for a brief period after his arrest and then taken to intake; he may be released upon arrest and directed to appear at a designated time. *284 *United States ex rel. Martin v. Strasburg*, 513 F.Supp. 691, 701 (S.D.N.Y.1981). The heart of the intake procedure is a 10-to-40-minute interview of the juvenile, the arresting officer, and sometimes the juvenile’s parent or guardian. The

objectives of the probation officer conducting the interview are to determine the nature of the offense the child may have committed and to obtain some background information on him. *Ibid*.

On the basis of the information derived from the interview and from an examination of the juvenile’s record, the probation officer decides whether the case should be disposed of informally (“adjusted”) or whether it should be referred to the Family Court. If the latter, the officer makes an additional recommendation regarding whether the juvenile should be detained. “There do not appear to be any governing criteria which must be followed by the probation officer in choosing between proposing detention and parole....” *Ibid*.

The actual decision whether to detain a juvenile under § 320.5(3)(b) is made by a Family Court judge at what is called an “initial appearance”—a brief hearing resembling an arraignment. [FN5] *Id.*, at 702. The information on which the judge makes his determination is very limited. He has before him a “petition for delinquency” prepared by a state agency, charging the juvenile with an offense, accompanied with one or more affidavits attesting to the juvenile’s involvement. Ordinarily the judge has in addition the written report and recommendation of the probation officer. However, the probation officer who prepared the report rarely attends the hearing. *Ibid*. Nor is the complainant likely to appear. Consequently, “[o]ften there is no one present with personal knowledge of what happened.” *Ibid*.

FN5. If the juvenile is detained upon arrest, this hearing must be held on the next court day or within 72 hours, whichever comes first. FCA § 307.3(4).

In the typical case, the judge appoints counsel for the juvenile at the time his case is called. Thus, the lawyer has no opportunity to make an independent inquiry into the juvenile’s background or character, and has only a few minutes to *285 prepare arguments on the child’s behalf. *Id.*, at 702, 708. The judge ordinarily does not interview the juvenile, *id.*, at 708, makes no inquiry into the truth of allegations in the petition, *id.*, at 702, and does not determine whether there is probable cause to believe the juvenile committed the offense. [FN6] The **2421 typical hearing lasts between 5 and 15 minutes, and the judge renders his decision immediately afterward. *Ibid*.

FN6. The majority admits that “the Family Court judge is not required to make a finding of probable cause at the initial appearance,” but contends that the juvenile has the option to challenge the sufficiency of the petition for delinquency on the ground that it fails to establish probable cause. *Ante*, at 2416. None of the courts that have considered the constitutionality of New York’s preventive-detention system has suggested that a juvenile has a statutory right to a probable-cause determination before he is detained. The provisions cited by the majority for its novel reading of the statute provide only shaky support for its contention. FCA § 315.1, which empowers the juvenile to move to dismiss a petition lacking allegations sufficient to satisfy § 311.2, provides that “[a] motion to dismiss under this section must be made within the time provided for in section 332.2.” Section 332.2, in turn, provides that pretrial motions shall be made within 30 days after the initial appearance and before the factfinding hearing. If the juvenile has been detained,

the judge is instructed to “hear and determine pre-trial motions on an expedited basis,” § 332.2(4), but is not required to rule upon such motions peremptorily. In sum, the statutory scheme seems to contemplate that a motion to dismiss a petition for lack of probable cause, accompanied with “supporting affidavits, exhibits and memoranda of law,” § 332.2(2), would be filed sometime after the juvenile is detained under § 320.5(3)(b). And there is no reason to expect that the ruling on such a motion would be rendered before the juvenile would in any event be entitled to a probable- cause hearing under § 325.1(2). That counsel for a juvenile ordinarily is not even appointed until a few minutes prior to the initial appearance, see *supra*, at 2421, confirms this interpretation. The lesson of this foray into the tangled provisions of the New York Family Court Act is that the majority ought to adhere to our usual policy of relying whenever possible for interpretation of a state statute upon courts better acquainted with its terms and applications.

Neither the statute nor any other body of rules guides the efforts of the judge to determine whether a given juvenile is likely to commit a crime before his trial. In making detention decisions, “each judge must rely on his own subjective *286 judgment, based on the limited information available to him at court intake and whatever personal standards he himself has developed in exercising his discretionary authority under the statute.” *Ibid.* Family Court judges are not provided information regarding the behavior of juveniles over whose cases they have presided, so a judge has no way of refining the standards he employs in making detention decisions. *Id.*, at 712.

After examining a study of a sample of 34 cases in which juveniles were detained under § 320.5(3)(b) [FN7] along with various statistical studies of pretrial detention of juveniles in New York, [FN8] the District Court made findings regarding the *287 circumstances in which the provision habitually is invoked. Three of those findings are especially germane to appellees’ challenge to the statute. First, a substantial number of “first offenders” are detained pursuant to § 320.5(3)(b). For example, at least 5 of the 34 juveniles in the sample had no prior contact with the Family Court before being **2422 detained and at least 16 had no prior adjudications of delinquency. *Id.*, at 695-700. [FN9] Second, many juveniles are released-- for periods ranging from five days to several weeks--after their arrests and are then detained under § 320.5(3)(b), despite the absence of any evidence of misconduct during the time between their arrests and “initial appearances.” Sixteen of the thirty-four cases in the sample fit this pattern. *Id.*, at 705, 713-714. Third, “the overwhelming majority” of the juveniles detained under § 320.5(3)(b) are released either before or immediately after their trials, either unconditionally or on parole. *Id.*, at 705. At least 23 of the juveniles in the sample fell into this category. *Martin v. Strasburg*, 689 F.2d 365, 369, n. 19 (CA2 1982); see 513 F.Supp., at 695-700.

FN7. The majority refuses to consider the circumstances of these 34 cases, dismissing them as unrepresentative, *ante*, at 2414, n. 21, and focuses instead on the lurid facts associated with the cases of the three named appellees. I cannot agree that the sample is entitled to so little weight. There was uncontested testimony at trial to the effect that the 34 cases were typical. App. 128 (testimony of Steven Hiltz, an attorney with 8 1/2

years of experience before the Family Court). At no point in this litigation have appellants offered an alternative selection of instances in which § 320.5(3)(b) has been invoked. And most importantly, despite the fact that the District Court relied heavily on the sample when assessing the manner in which the statute is applied, see 513 F.Supp., at 695-700, appellants did not dispute before the Court of Appeals the representativeness of the 34 cases, see *Martin v. Strasburg*, 689 F.2d 365, 369, n. 19 (CA 2 1982). When the defendants in a plaintiff class action challenge on appeal neither the certification of the class, see *ante*, at 2408, n. 10, nor the plaintiffs’ depiction of the character of the class, we ought to analyze the case as it comes to us and not try to construct a new version of the facts on the basis of an independent and selective review of the record.

FN8. As the Court of Appeals acknowledged, 689 F.2d, at 369, n. 18, there are defects in all of the available statistical studies. Most importantly, none of the studies distinguishes persons detained under § 320.5(3)(a) from persons detained under § 320.5(3)(b). However, these flaws did not disable the courts below from making meaningful--albeit rough--generalizations regarding the incidence of detention under the latter provision. Especially when conjoined with the sample of 34 cases submitted by appellees, see n. 7, *supra*, the studies are sufficient to support the three findings enumerated in the text. Even the majority, though it chastises appellees for failing to assemble better data, *ante*, at 2414, and n. 21, does not suggest that those findings are clearly erroneous.

FN9. The figures in the text are taken from the District Court’s summary of the 34 cases in the sample. Review of the transcripts of the hearings in those cases reveals the actual number to be 9 and 23, respectively. See Petitioners’ Exhibits 6a, 11a, 12a, 14a, 15a, 16a, 19a, 24a, 35a.

Finally, the District Court made a few significant findings concerning the conditions associated with “secure detention” pursuant to § 320.5(3)(b). [FN10] In a “secure facility,” “[t]he juveniles are subjected to strip- searches, wear institutional clothing and follow institutional regimen. At Spofford [Juvenile Detention Center], which is a secure facility, some juveniles who have had dispositional determinations and were awaiting *288 placement (long term care) commingle with those in pretrial detention (short term care).” *Id.*, at 695, n. 5.

FN10. The state director of detention services testified that, in 1978, approximately six times as many juveniles were admitted to “secure facilities” as to “non-secure facilities.” See 513 F.Supp., at 703, n. 8. These figures are not broken down as to persons detained under § 320.5(3)(a) and persons detained under § 320.5(3)(b). There seems no dispute, however, that most of the juveniles held under the latter provision are subjected to “secure detention.”

It is against the backdrop of these findings that the contentions of the parties must be examined.

II

A

As the majority concedes, *ante*, at 2409, the fact that § 320.5(3)(b) applies only to juveniles does not insulate the provision from review under the Due Process Clause. “[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.” *In re Gault*, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d

527 (1967). Examination of the provision must of course be informed by a recognition that juveniles have different needs and capacities than adults, see *McKeiver v. Pennsylvania*, 403 U.S. 528, 550, 91 S.Ct. 1976, 1988, 29 L.Ed.2d 647 (1971), but the provision still “must measure up to the essentials of due process and fair treatment,” *Kent v. United States*, 383 U.S. 541, 562, 86 S.Ct. 1045, 1057, 16 L.Ed.2d 84 (1966).

To comport with “fundamental fairness,” § 320.5(3)(b) must satisfy two requirements. First, it must advance goals commensurate with the burdens it imposes on constitutionally protected interests. Second, it must not punish the juveniles to whom it applies.

*289 The majority only grudgingly and incompletely acknowledges the applicability of the first of these tests, but its grip on the cases before us is undeniable. It is manifest that § 320.5(3)(b) impinges upon fundamental rights. If the “liberty” protected by the Due Process Clause means anything, it means freedom from physical restraint. *Ingraham v. Wright*, 430 U.S. 651, 673-674, 97 S.Ct. 1401, 1413-1414, 51 L.Ed.2d 711 (1977); *Board of Regents v. Roth*, 408 U.S. 564, 572, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972). Only a very important government interest can justify deprivation of liberty in this basic sense. [FN11]

FN11. This principle underlies prior decisions of the Court involving various constitutional provisions as they relate to pretrial detention. In *Gerstein v. Pugh*, 420 U.S. 103, 113-114, 95 S.Ct. 854, 862-863, 43 L.Ed.2d 54 (1975), we relied in part on the severity of “[t]he consequences of prolonged detention” in construing the Fourth Amendment to forbid pretrial incarceration of a suspect for an extended period of time without “a judicial determination of probable cause.” In *Stack v. Boyle*, 342 U.S. 1, 4-5, 72 S.Ct. 1, 3-4, 96 L.Ed. 1 (1951), we stressed the importance of a person’s right to freedom until proved guilty in construing the Eighth Amendment to proscribe the setting of bail “at a figure higher than an amount reasonably calculated to” assure the presence of the accused at trial. Cf. *Baker v. McCollan*, 443 U.S. 137, 149-150, 153, 99 S.Ct. 2689, 2697-2698, 2699, 61 L.Ed.2d 433 (1979) (STEVENS, J., dissenting).

**2423 The majority seeks to evade the force of this principle by discounting the impact on a child of incarceration pursuant to § 320.5(3)(b). The curtailment of liberty consequent upon detention of a juvenile, the majority contends, is mitigated by the fact that “juveniles, unlike adults, are always in some form of custody.” *Ante*, at 2410. In any event, the majority argues, the conditions of confinement associated with “secure detention” under § 320.5(3)(b) are not unduly burdensome. *Ante*, at 2413. These contentions enable the majority to suggest that § 320.5(3)(b) need only advance a “legitimate state objective” to satisfy the strictures of the Due Process Clause. *Ante*, at 2406, 2409, 2415. [FN12]

FN12. The phrase “legitimate governmental objective” appears at several points in the opinion of the Court in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), e.g., *id.*, at 538-539, 99 S.Ct., at 1873-1874, and the majority may be relying implicitly on that decision for the standard it applies in these cases. If so, the reliance is misplaced. *Wolfish* was exclusively concerned with the constitutionality of conditions of pretrial incarceration under circumstances in which the legitimacy of the incarceration itself was undisputed; the Court avoided any discussion of the

showing a State must make in order to justify pretrial detention in the first instance. See *id.*, at 533-534, and n. 15, 99 S.Ct., at 1870-1871, and n. 15. The standard employed by the Court in *Wolfish* thus has no bearing on the problem before us.

The majority’s arguments do not survive scrutiny. Its characterization of preventive detention as merely a transfer of custody from a parent or guardian to the State is difficult to take seriously. Surely there is a qualitative difference between imprisonment and the condition of being subject to *290 the supervision and control of an adult who has one’s best interests at heart. And the majority’s depiction of the nature of confinement under § 320.5(3)(b) is insupportable on this record. As noted above, the District Court found that secure detention entails incarceration in a facility closely resembling a jail and that pretrial detainees are sometimes mixed with juveniles who have been found to be delinquent. *Supra*, at 2422. Evidence adduced at trial reinforces these findings. For example, Judge Quinones, a Family Court Judge with eight years of experience, described the conditions of detention as follows:

“Then again, Juvenile Center, as much as we might try, is not the most pleasant place in the world. If you put them in detention, you are liable to be exposing these youngsters to all sorts of things. They are liable to be exposed to assault, they are liable to be exposed to sexual assaults. You are taking the risk of putting them together with a youngster that might be much worse than they, possibly might be, and it might have a bad effect in that respect.” *App.* 270.

Many other observers of the circumstances of juvenile detention in New York have come to similar conclusions. [FN13]

FN13. All of the 34 juveniles in the sample were detained in Spofford Juvenile Center, the detention facility for New York City. Numerous studies of that facility have attested to its unsavory characteristics. See, e.g., Citizens’ Committee for Children of New York, Inc., *Juvenile Detention Problems in New York City* 3-4 (1970); J. Stone, R. Ruskin, & D. Goff, *An Inquiry into the Juvenile Centers Operated by the Office of Probation* 25- 27, 52-54, 79-80 (1971). Conditions in Spofford have been successfully challenged on constitutional grounds (by a group of inmates of a different type), see *Martarella v. Kelley*, 359 F.Supp. 478 (S.D.N.Y.1973), but nevertheless remain grim, see *Mayor’s Task Force on Spofford: First Report* v. viii-ix, 20-21 (June 1978). Not surprisingly, a former New York City Deputy Mayor for Criminal Justice has averred that “Spofford is, in many ways, indistinguishable from a prison.” *Petitioners’ Exhibit* 30, 6 (affidavit of Herbert Sturz, June 29, 1978).

*291 In short, fairly viewed, pretrial detention of a juvenile pursuant to § 320.5(3)(b) gives rise to injuries comparable to those associated with imprisonment of an adult. **2424 In both situations, the detainee suffers stigmatization and severe limitation of his freedom of movement. See *In re Winship*, 397 U.S. 358, 367, 90 S.Ct. 1068, 1074, 25 L.Ed.2d 368 (1970); *In re Gault*, 387 U.S., at 27, 87 S.Ct., at 1443. Indeed, the impressionability of juveniles may make the experience of incarceration more injurious to them than to adults; all too quickly juveniles subjected to preventive detention come to see society at large as hostile and oppressive and to regard themselves as irremediably “delinquent.” [FN14] Such serious

injuries to presumptively innocent persons--encompassing the curtailment of their constitutional rights to liberty--can be justified only by a weighty public interest that is substantially advanced by the statute. [FN15]

FN14. Cf. *Aubry*, *The Nature, Scope and Significance of Pre-Trial Detention of Juveniles in California*, 1 *Black L.J.* 160, 164 (1971).

FN15. This standard might be refined in one of two ways. First, it might be argued that, because § 320.5(3)(b) impinges upon "[l]iberty from bodily restraint," which has long been "recognized as the core of the liberty protected by the Due Process Clause," *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18, 99 S.Ct. 2100, 2109, 60 L.Ed.2d 668 (1979) (POWELL, J., concurring in part and dissenting in part), the provision can pass constitutional muster only if it promotes a "compelling" government interest. See *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 687, 385 N.Y.S.2d 518, 520, 350 N.E.2d 906, 908 (1976) (requiring a showing of a "compelling State interest" to uphold § 320.5(3)(b)); cf. *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969). Alternatively, it might be argued that the comparatively brief period of incarceration permissible under the provision warrants a slight lowering of the constitutional bar. Applying the principle that the strength of the state interest needed to legitimate a statute depends upon the degree to which the statute encroaches upon fundamental rights, see *Williams v. Illinois*, 399 U.S. 235, 259-260, 262-263, 90 S.Ct. 2018, 2031-2032, 2033, 26 L.Ed.2d 586 (1970) (Harlan, J., concurring in result), it might be held that an important--but not quite "compelling"--objective is necessary to sustain § 320.5(3)(b). In the present context, there is no need to choose between these doctrinal options, because § 320.5(3)(b) would fail either test.

The applicability of the second of the two tests is admitted even by the majority. In **292Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861, 1872, 60 L.Ed.2d 447 (1979), the Court held that an adult may not be punished prior to determination that he is guilty of a crime. [FN16] The majority concedes, as it must, that this principle applies to juveniles. *Ante*, at 2409, 2412-2413. Thus, if the only purpose substantially advanced by § 320.5(3)(b) is punishment, the provision must be struck down.

FN16. See also *Ingraham v. Wright*, 430 U.S. 651, 671-672, and n. 40, 673-674, 97 S.Ct. 1401, 1412-1413, and n. 40, 1414, 51 L.Ed.2d 711 (1977); *Gregory v. Chicago*, 394 U.S. 111, 112, 89 S.Ct. 946, 947, 22 L.Ed.2d 134 (1969); *Thompson v. Louisville*, 362 U.S. 199, 206, 80 S.Ct. 624, 629, 4 L.Ed.2d 654 (1960).

For related reasons, § 320.5(3)(b) cannot satisfy either of the requirements discussed above that together define "fundamental fairness" in the context of pretrial detention.

B

Appellants and the majority contend that § 320.5(3)(b) advances a pair of intertwined government objectives: "protecting the community from crime," *ante*, at 2410, and "protecting a juvenile from the consequences of his criminal activity," *ante*, at 2411. More specifically, the majority argues that detaining a juvenile for a period of up to 17 days prior to his trial has two desirable effects: it protects society at large from the crimes he might have committed during that period if released; and it protects the juvenile himself "both from

potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child." *Ante*, at 2410-2411.

Appellees and some amici argue that public purposes of this sort can never justify incarceration of a person who has not been adjudicated guilty of a crime, at least in the absence of a determination that there exists probable cause to believe he *2425 committed a criminal offense. [FN17] We need not reach that *293 categorical argument in these cases because, even if the purposes identified by the majority are conceded to be compelling, they are not sufficiently promoted by detention pursuant to § 320.5(3)(b) to justify the concomitant impairment of the juveniles' liberty interests. [FN18] To state the case more precisely, two circumstances in combination render § 320.5(3)(b) invalid in toto: in the large majority of cases in which the provision is invoked, its asserted objectives are either not advanced at all or are only minimally promoted; and, as the provision is written and administered by the state courts, the cases in which its asserted ends are significantly advanced cannot practicably be distinguished from the cases in which they are not.

FN17. Cf. *Sellers v. United States*, 89 S.Ct. 36, 38, 21 L.Ed.2d 64, 67 (1968) (Black, J. in chambers) (questioning whether a defendant's dangerousness can ever justify denial of bail).

FN18. An additional reason for not reaching appellees' categorical objection to the purposes relied upon by the State is that the Court of Appeals did not pass upon the validity of those objectives. See 689 F.2d, at 372. We are generally chary of deciding important constitutional questions not reached by a lower court.

1

Both of the courts below concluded that only occasionally and accidentally does pretrial detention of a juvenile under § 320.5(3)(b) prevent the commission of a crime. Three subsidiary findings undergird that conclusion. First, Family Court judges are incapable of determining which of the juveniles who appear before them would commit offenses before their trials if left at large and which would not. In part, this incapacity derives from the limitations of current knowledge concerning the dynamics of human behavior. On the basis of evidence adduced at trial, supplemented by a thorough review of the secondary literature, see 513 F.Supp., at 708-712, and nn. 31-32, the District Court found that "no diagnostic tools have as yet been devised which enable even the most highly trained criminologists to predict reliably which juveniles will engage in violent crime." *Id.*, at 708. The evidence supportive of this finding is overwhelming.*294 [FN19] An independent impediment to identification of the defendants who would misbehave if released is the paucity of data available at an initial appearance. The judge must make his decision whether to detain a juvenile on the basis of a set of allegations regarding the child's alleged offense, a cursory review of his background and criminal record, and the recommendation of a probation officer who, in the typical case, has seen the child only once. *Id.*, at 712. In view of this scarcity

assigned to the statute by the State and the majority. The argument that § 320.5(3)(b) serves “the State’s ‘*parens patriae*’ interest in preserving and promoting the welfare of the child,” ante, at 2410 (citation omitted), now appears particularly hollow. Most juveniles detained pursuant to the provision are not *297 benefited thereby, because they would not have committed crimes if left to their own devices (and thus would not have been exposed to the risk of physical injury or the perils of the cycle of recidivism, see ante, at 2425). On the contrary, these juveniles suffer several serious harms: deprivation of liberty and stigmatization as “delinquent” or “dangerous,” as well as impairment of their ability to prepare their legal defenses. [FN24] The benefits even to those few juveniles who would have committed crimes if released are not unalloyed; the gains to them are partially offset by the aforementioned injuries. In view of this configuration of benefits and harms, it is not surprising that Judge Quinones repudiated the suggestion that detention under § 320.5(3)(b) serves the interests of the detainees. App. 269-270.

FN24. See testimony of Steven Hiltz, App. 130-134 (describing the detrimental effects of pretrial detention of a juvenile upon the preparation and presentation of his defense); cf. *Barker v. Wingo*, 407 U.S. 514, 533, 92 S.Ct. 2182, 2193, 33 L.Ed.2d 101 (1972); *Bitter v. United States*, 389 U.S. 15, 16-17, 88 S.Ct. 6, 7, 19 L.Ed.2d 15 (1967) (per curiam); *Stack v. Boyle*, 342 U.S., at 8, 72 S.Ct., at 5; Miller, *Preventive Detention—A Guide to the Eradication of Individual Rights*, 16 *How.L.J.* 1, 15 (1970).

The argument that § 320.5(3)(b) protects the welfare of the community fares little better. Certainly the public reaps no benefit from incarceration of the majority of the detainees who would not have committed any crimes had they been released. Prevention of the minor offenses that would have been committed by a small proportion of the persons detained confers only a slight benefit on the community. [FN25] Only in occasional cases does incarceration of a juvenile pending his trial serve to prevent a crime of violence and thereby significantly promote the public interest. Such an infrequent and haphazard gain is insufficient to justify curtailment of the liberty *298 interests of all the presumptively innocent juveniles who would have obeyed the law pending their trials had they been given the chance. [FN26]

FN25. Cf. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 *Va.L.Rev.* 371, 381 (1970) (“[Under a statute proposed by the Attorney General,] trivial property offenses may be deemed sufficiently threatening to warrant preventive imprisonment. No tenable concept of due process could condone a balance that gives so little weight to the accused’s interest in pretrial liberty”).

FN26. Some amici contend that a preventive-detention statute that, unlike § 320.5(3)(b), covered only specific categories of juveniles and embodied stringent procedural safeguards would result in incarceration only of juveniles very likely to commit crimes of violence in the near future. E.g., Brief for American Bar Association as Amicus Curiae 9-14. It could be argued that, even though such a statute would unavoidably result in detention of some juveniles who would not have committed any offenses if released (because of the impossibility of reliably predicting the behavior of individual persons, see supra, at 2425), the gains consequent upon the detention of the large proportion who would have committed crimes would be

sufficient to justify the injuries to the other detainees. To decide the cases before us, we need not consider either the feasibility of such a scheme or its constitutionality.

2

The majority seeks to deflect appellees’ attack on the constitutionality of § 320.5(3)(b) by contending that they have framed their argument too broadly. It is possible, the majority acknowledges, that “in some circumstances detention of a juvenile [pursuant to § 320.5(3)(b)] would not pass constitutional muster. But the validity of those detentions must be determined on a case-by-case basis.” Ante, at 2415; see ante, at 2412, n. 18. The majority thus implies that, even if the Due Process **2428 Clause is violated by most detentions under § 320.5(3)(b) because those detainees would not have committed crimes if released, the statute nevertheless is not invalid “on its face” because detention of those persons who would have committed a serious crime comports with the Constitution. Separation of the properly detained juveniles from the improperly detained juveniles must be achieved through “case-by-case” adjudication.

There are some obvious practical impediments to adoption of the majority’s proposal. Because a juvenile may not be incarcerated under § 320.5(3)(b) for more than 17 days, it *299 would be impracticable for a particular detainee to secure his freedom by challenging the constitutional basis of his detention; by the time the suit could be considered, it would have been rendered moot by the juvenile’s release or long-term detention pursuant to a delinquency adjudication. [FN27] Nor could an individual detainee avoid the problem of mootness by filing a suit for damages or for injunctive relief. This Court’s declaration that § 320.5(3)(b) is not unconstitutional on its face would almost certainly preclude a finding that detention of a juvenile pursuant to the statute violated any clearly established constitutional rights; in the absence of such a finding all state officials would be immune from liability in damages, see *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). And, under current doctrine pertaining to the standing of an individual victim of allegedly unconstitutional conduct to obtain an injunction against repetition of that behavior, it is far from clear that an individual detainee would be able to obtain *300 an equitable remedy. Compare *INS v. Delgado*, 466 U.S. 210, 217, n. 4, 104 S.Ct. 1758, 1763, n. 4, 80 L.Ed.2d 247 (1984), with *Los Angeles v. Lyons*, 461 U.S. 95, 105-106, 103 S.Ct. 1660, 1666-1667, 75 L.Ed.2d 675 (1983).

FN27. The District Court, whose knowledge of New York procedural law surely exceeds ours, concluded that “[t]he short span of pretrial detention makes effective review impossible.” 513 F.Supp., at 708, n. 29. The majority dismisses this finding, along with a comparable finding by the Court of Appeals, see 689 F.2d, at 373, as “mistaken.” Ante, at 2418. But neither of the circumstances relied upon by the majority supports its confident judgment on this point. That the New York courts suspended their usual rules of mootness in order to consider an attack on the constitutionality of the statute as a whole, see *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d, at 686, 385 N.Y.S.2d, at 519-520, 350 N.E.2d, at 907- 908, in no way suggests

that they would be willing to do so if an individual detainee challenged the constitutionality of § 320.5(3)(b) as applied to him. The majority cites one case in which a detainee did obtain his release by securing a writ of habeas corpus. However, that case involved a juvenile who was not given a probable-cause hearing within six days of his detention—a patent violation of the state statute. See 513 F.Supp., at 708. That a writ of habeas corpus could be obtained on short notice to remedy a glaring statutory violation provides no support for the majority’s suggestion that individual detainees could effectively petition for release by challenging the constitutionality of their detentions.

But even if these practical difficulties could be surmounted, the majority’s proposal would be inadequate. Precisely because of the unreliability of any determination whether a particular juvenile is likely to commit a crime between his arrest and trial, see *supra*, at 2425-2426, no individual detainee would be able to demonstrate that he would have abided by the law had he been released. In other words, no configuration of circumstances would enable a juvenile to establish that he fell into the category of persons unconstitutionally detained rather than the category constitutionally detained. [FN28] Thus, to protect the rights of the majority of juveniles whose incarceration advances no legitimate state interest, § 320.5(3)(b) must be held unconstitutional “on its face.”

FN28. This problem is exacerbated by the fact that Family Court judges, when making findings justifying a detention pursuant to § 320.5(3)(b), do not specify whether there is a risk that the juvenile would commit a serious crime or whether there is a risk that he would commit a petty offense. A finding of the latter sort should not be sufficient under the Due Process Clause to justify a juvenile’s detention. See *supra*, at 2427-2428, and n. 25. But a particular detainee has no way of ascertaining the grounds for his incarceration.

**2429 C

The findings reviewed in the preceding section lend credence to the conclusion reached by the courts below: § 320.5(3)(b) “is utilized principally, not for preventive purposes, but to impose punishment for unadjudicated criminal acts.” 689 F.2d, at 372; see 513 F.Supp., at 715717.

The majority contends that, of the many factors we have considered in trying to determine whether a particular sanction constitutes “punishment,” see *Kennedy v. MendozaMartinez*, 372 U.S. 144, 168169, 83 S.Ct. 554, 567568, 9 L.Ed.2d 644 (1963), the most useful are “whether an alternative purpose to which [the sanction] may *301 rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned,” *ibid.* (footnotes omitted). See *ante*, at 24122413. Assuming, *arguendo*, that this test is appropriate, but cf. *Bell v. Wolfish*, 441 U.S., at 564565, 99 S.Ct., at 18871888 (MARSHALL, J., dissenting), it requires affirmation in these cases. The alternative purpose assigned by the State to § 320.5(3)(b) is the prevention of crime by the detained juveniles. But, as has been shown, that objective is advanced at best sporadically by the provision. Moreover, § 320.5(3)(b) frequently is invoked under circumstances in which it is

extremely unlikely that the juvenile in question would commit a crime while awaiting trial. The most striking of these cases involve juveniles who have been at large without mishap for a substantial period of time prior to their initial appearances, see *supra*, at 2422, and detainees who are adjudged delinquent and are nevertheless released into the community. In short, § 320.5(3)(b) as administered by the New York courts surely “appears excessive in relation to” the putatively legitimate objectives assigned to it.

The inference that § 320.5(3)(b) is punitive in nature is supported by additional materials in the record. For example, Judge Quinones and even appellants’ counsel acknowledged that one of the reasons juveniles detained pursuant to § 320.5(3)(b) usually are released after the determination of their guilt is that the judge decides that their pretrial detention constitutes sufficient punishment. 689 F.2d, at 370371, and nn. 2728. Another Family Court Judge admitted using “preventive detention” to punish one of the juveniles in the sample. 513 F.Supp., at 708. [FN29]

FN29. See transcript of the initial appearance of Ramon Ramos, # 1356/80, Judge Heller presiding, Petitioners’ Exhibit 42, p. 11:

“This business now of being able to get guns, is now completely out of proportion. We are living in a jungle. We are living in a jungle, and it is time that these youths that are brought before the Court, know that they are in a Court, and that if these allegations are true, that they are going to pay the penalty.

“As for the reasons I just state[d] on the record, ... I am remand[ing] the respondent to the Commissioner of Juvenile Justice, secure detention.”

*302 In summary, application of the litmus test the Court recently has used to identify punitive sanctions supports the finding of the lower courts that preventive detention under § 320.5(3)(b) constitutes punishment. Because punishment of juveniles before adjudication of their guilt violates the Due Process Clause, see *supra*, at 11, the provision cannot stand.

III

If the record did not establish the impossibility, on the basis of the evidence available to a Family Court judge at a § 320.5(3)(b) hearing, of reliably predicting whether a given juvenile would commit a crime before his trial, and if the purposes relied upon by the State were promoted sufficiently to justify the deprivations of liberty effected by the provision, I would nevertheless still strike down § 320.5(3)(b) because of the absence of procedural safeguards in the provision. As Judge Newman, concurring in the Court of Appeals observed, “New York’s statute is unconstitutional because it permits liberty to be denied, prior to adjudication of guilt, in the exercise of unfettered discretion as to an **2430 issue of considerable uncertainty-- likelihood of future criminal behavior.” 689 F.2d, at 375.

Appellees point out that § 320.5(3)(b) lacks two crucial procedural constraints. First, a New York Family Court judge is given no guidance regarding what kinds of evidence he

should consider or what weight he should accord different sorts of material in deciding whether to detain a juvenile. [FN30] For example, there is no requirement in the statute that the *303 judge take into account the juvenile's background or current living situation. Nor is a judge obliged to attach significance to the nature of a juvenile's criminal record or the severity of the crime for which he was arrested. [FN31] Second, § 320.5(3)(b) does not specify how likely it must be that a juvenile will commit a crime before his trial to warrant his detention. The provision indicates only that there must be a "serious risk" that he will commit an offense and does not prescribe the standard of proof that should govern the judge's determination of that issue. [FN32]

FN30. The absence of any limitations on the sorts of reasons that may support a determination that a child is likely to commit a crime if released means that the statutory requirement that the judge state "reasons" on the record, see ante, at 2417, does not meaningfully constrain the decisionmaking process.

FN31. See 513 F.Supp., at 713:

"Whether the juvenile was a first offender with no prior conduct, whether the court was advised that the juvenile was an obedient son or was needed at home, whether probation intake recommended parole, the case histories in this record disclose that it was not unusual for the court to discount these considerations and order remand based on a 5 to 15 minute evaluation."

FN32. Cf. *Addington v. Texas*, 441 U.S. 418, 431433, 99 S.Ct. 1804, 18121813, 60 L.Ed.2d 323 (1979) ("clear and convincing" proof constitutionally required to justify civil commitment to mental hospital).

Not surprisingly, in view of the lack of directions provided by the statute, different judges have adopted different ways of estimating the chances whether a juvenile will misbehave in the near future. "Each judge follows his own individual approach to [the detention] determination." 513 F.Supp., at 702; see App. 265 (testimony of Judge Quinones). This discretion exercised by Family Court judges in making detention decisions gives rise to two related constitutional problems. First, it creates an excessive risk that juveniles will be detained "erroneously"--i.e., under circumstances in which no public interest would be served by their incarceration. Second, it fosters arbitrariness and inequality in a decisionmaking process that impinges upon fundamental rights.

A

One of the purposes of imposing procedural constraints on decisions affecting life, liberty, or property is to reduce the *304 incidence of error. See *Fuentes v. Shevin*, 407 U.S. 67, 8081, 92 S.Ct. 1983, 19941995, 32 L.Ed.2d 556 (1972). In *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Court identified a complex of considerations that has proved helpful in determining what protections are constitutionally required in particular contexts to achieve that end:

"[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 335, 96 S.Ct., at 903.

As Judge Newman recognized, 689 F.2d, at 375376, a review of these three factors in the context of New York's preventive-detention scheme compels the conclusion that the Due Process Clause is violated by § 320.5(3)(b) in its present form. First, the private interest affected by a decision to detain a juvenile is personal liberty. Unnecessary **2431 abridgment of such a fundamental right, see *supra*, at 2423, should be avoided if at all possible.

Second, there can be no dispute that there is a serious risk under the present statute that a juvenile will be detained erroneously--i.e., despite the fact that he would not commit a crime if released. The findings of fact reviewed in the preceding sections make it apparent that the vast majority of detentions pursuant to § 320.5(3)(b) advance no state interest; only rarely does the statute operate to prevent crime. See *supra*, at 2427. This high incidence of demonstrated error should induce a reviewing court to exercise utmost care in ensuring that no procedures could be devised that would improve the accuracy of the decisionmaking process. Opportunities for improvement in the extant regime are apparent *305 even to a casual observer. Most obviously, some measure of guidance to Family Court judges regarding the evidence they should consider and the standard of proof they should use in making their determinations would surely contribute to the quality of their detention determinations. [FN33]

FN33. Judge Newman, concurring below, pointed to three other protections lacking in § 320.5(3)(b): "the statute places no limits on the crimes for which the person subject to detention has been arrested ..., the judge ordering detention is not required to make any evaluation of the degree of likelihood that the person committed the crime of which he is accused[] ... [and] the statute places no limits on the type of crimes that the judge believes the detained juvenile might commit if released." 689 F.2d, at 377. In my view, the absence of these constraints is most relevant to the question whether the ends served by the statute can justify its broad reach, see Part IIB, *supra*. However, as Judge Newman observed, they could also be considered procedural flaws. Certainly, a narrowing of the categories of persons covered by § 320.5(3)(b), along the lines sketched by Judge Newman, would reduce the incidence of error in the application of the provision.

The majority purports to see no value in such additional safeguards, contending that activity of estimating the likelihood that a given juvenile will commit a crime in the near future involves subtle assessment of a host of variables, the precise weight of which cannot be determined in advance. *Ante*, at 24172418. A review of the hearings that resulted in the detention of the juveniles included in the sample of 34 cases

reveals the majority's depiction of the decisionmaking process to be hopelessly idealized. For example, the operative portion of the initial appearance of Tyrone Parson, the three-card monte player, [FN34] consisted of the following:

FN34. See n. 21, *supra*.

"COURT OFFICER: Will you identify yourself.

"TYRONE PARSON: Tyrone Parson, Age 15.

"THE COURT: Miss Brown, how many times has Tyrone been known to the Court?

*306 "MISS BROWN: Seven times.

"THE COURT: Remand the respondent." Petitioners' Exhibit 18a. [FN35]

FN35. Parson's case is not unique. The hearings accorded Juan Santiago and Daniel Nelson, for example, though somewhat longer in duration, were nearly as cavalier and undiscriminating. See Petitioners' Exhibits 13a, 22a.

This kind of parody of reasoned decisionmaking would be less likely to occur if judges were given more specific and mandatory instructions regarding the information they should consider and the manner in which they should assess it.

Third and finally, the imposition of such constraints on the deliberations of the Family Court judges would have no adverse effect on the State's interest in detaining dangerous juveniles and would give rise to insubstantial administrative burdens. For example, a simple directive to Family Court judges to state on the record the significance they give to the seriousness of the offense of which a juvenile is accused and to the nature of the juvenile's background would contribute materially to the quality of the decisionmaking process without significantly **2432 increasing the duration of initial appearances.

In summary, the three factors enumerated in Mathews in combination incline overwhelmingly in favor of imposition of more stringent constraints on detention determinations under § 320.5(3)(b). Especially in view of the impracticability of correcting erroneous decisions through judicial review, see *supra*, at 24282429, the absence of meaningful procedural safeguards in the provision renders it invalid. See *Santosky v. Kramer*, 455 U.S. 745, 757, and n. 9, 102 S.Ct. 1388, 1396, and n. 9, 71 L.Ed.2d 599 (1982).

B

A principle underlying many of our prior decisions in various doctrinal settings is that government officials may not be accorded unfettered discretion in making decisions that *307 impinge upon fundamental rights. Two concerns underlie this principle: excessive discretion fosters inequality in the distribution of entitlements and harms, inequality which is especially troublesome when those benefits and burdens are great; and discretion can mask the use by officials of illegitimate criteria in allocating important goods and rights.

So, in striking down on vagueness grounds a vagrancy ordinance, we emphasized the "unfettered discretion it places in the hands of the ... police." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168, 92 S.Ct. 839, 846, 31 L.Ed.2d 110 (1972). Such flexibility was deemed constitutionally offensive because it "permits and encourages an arbitrary and discriminatory enforcement of the law." *Id.*, at 170, 92 S.Ct., at 847. Partly for similar reasons, we have consistently held violative of the First Amendment ordinances which make the ability to engage in constitutionally protected speech "contingent upon the uncontrolled will of an official--as by requiring a permit or license which may be granted or withheld in the discretion of such official." *Staub v. City of Baxley*, 355 U.S. 313, 322, 78 S.Ct. 277, 282, 2 L.Ed.2d 302 (1958); accord, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151, 153, 89 S.Ct. 935, 938, 940, 22 L.Ed.2d 162 (1969). Analogous considerations inform our understanding of the dictates of the Due Process Clause. Concurring in the judgment in *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), striking down a statute that conditioned the right to marry upon the satisfaction of child-support obligations, Justice POWELL aptly observed:

"Quite apart from any impact on the truly indigent, the statute appears to 'confer upon [the judge] a license for arbitrary procedure,' in the determination of whether an applicant's children are 'likely thereafter to become public charges.' A serious question of procedural due process is raised by this feature of standardless discretion, particularly in light of the hazards of prediction in this area." *Id.*, at 402, n. 4, 98 S.Ct., at 690, n. 4 (quoting *Kent v. United States*, 383 U.S., at 553, 86 S.Ct., at 1053, 16 L.Ed.2d 84.

*308 The concerns that powered these decisions are strongly implicated by New York's preventive-detention scheme. The effect of the lack of procedural safeguards constraining detention decisions under § 320.5(3)(b) is that the liberty of a juvenile arrested even for a petty crime is dependent upon the "caprice" of a Family Court judge. See 513 F.Supp., at 707. The absence of meaningful guidelines creates opportunities for judges to use illegitimate criteria when deciding whether juveniles should be incarcerated pending their trials--for example, to detain children for the express purpose of punishing them. [FN36] Even the judges who strive conscientiously to apply the law have little choice but to assess juveniles' dangerousness on the basis of whatever standards they deem appropriate. [FN37] The resultant variation in detention decisions gives rise to a level of inequality in the deprivation of a fundamental **2433 right too great to be countenanced under the Constitution.

FN36. See n. 29, *supra*.

FN37. See 513 F.Supp., at 708:

"It is clear that the judge decides on pretrial detention for a variety of reasons--as a means of protecting the community, as the policy of the judge to remand, as an express punitive device, or because of the serious nature of the charge[,] among others" (citations omitted).

IV

The majority acknowledges--indeed, finds much of its argument upon--the principle that a State has both the power and the responsibility to protect the interests of the children within its jurisdiction. See *Santosky v. Kramer*, *supra*, at 766, 102 S.Ct., at 1401. Yet the majority today upholds a statute whose net impact on the juveniles who come within its purview is overwhelmingly detrimental. Most persons detained under the provision reap no benefit and suffer serious injuries thereby. The welfare of only a minority of the detainees is even arguably enhanced. The inequity of this regime, combined with *309 the arbitrariness with which it is administered, is bound to disillusion its victims regarding the virtues of our system of criminal justice. I can see--and the majority has pointed to--no public purpose advanced by the statute sufficient to justify the harm it works.

I respectfully dissent.

104 S.Ct. 2403, 467 U.S. 253, 81 L.Ed.2d 207

ALFREDO A., a Minor, etc., Petitioner,
v.
The SUPERIOR COURT of Los Angeles County,
Respondent;
The PEOPLE, Real Party in Interest.

No. S024618
6 Cal. 4th 1212

Jan. 24, 1994.

As Modified on Denial of Rehearing March 18, 1994.

Juvenile sought habeas corpus to obtain release following warrantless arrest. The Court of Appeal treated petition for writ of habeas corpus as petition for writ of mandate and directed the Los Angeles County Superior Court, No. T046723, to show cause why peremptory writ of mandate should not issue ordering that judicial probable cause determinations for extended postarrest detention of juveniles be made within 48 hours of arrest. The Supreme Court granted review, superseding Court of Appeal's opinion. The Supreme Court affirmed. On rehearing the Supreme Court, Lucas, C.J., held that: (1) constitutional requirement that prompt hearing be held following warrantless arrest applies to juveniles, and (2) Constitution does not require that hearing be held within 48 hours.

Affirmed.

Arabian, J., filed a concurring and dissenting opinion.

Mosk, J., filed a dissenting opinion in which George and Kennard, JJ., joined.

George, J., filed a dissenting opinion.

Opinion, 2 Cal.Rptr.2d 73, superseded.

***624 *1214 **57 Wilbur F. Littlefield, Public Defender, Laurence M. Sarnoff, Sue Robin Pollock and John Hamilton Scott, Deputy Public Defenders, for petitioner.

De Witt W. Clinton, County Counsel, and Frederick R. Bennett, Asst. County Counsel, for respondent.

Grover C. Trask II, Dist. Atty. (Riverside), and Gary B. Tranbarger, Deputy Dist. Atty., as amici curiae, on behalf of respondent.

Daniel E. Lungren, Atty. Gen., and Shirley A. Nelson, Deputy Atty. Gen., for real party in interest.

In *Gerstein v. Pugh* (1975) 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (hereafter *Gerstein*), the United States Supreme Court held that the Fourth Amendment requires a ***625 prompt judicial determination of "probable cause to believe the suspect has committed a crime" as a prerequisite to an extended pretrial detention following a warrantless arrest. (*Id.*, at pp. 114, 120, 95 S.Ct. at pp. 863, 866.) The court stopped short of mandating a specific **58 timetable for making a "prompt" determination of probable cause.

In *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, --, 111 S.Ct. 1661, 1664, 114 L.Ed.2d 49 (hereafter *McLaughlin*), the high court sought to further define the "promptness" requirement for making the probable cause determination mandated in *Gerstein*. The court held that, "Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." (*McLaughlin*, supra, 500 U.S. at p. --, 111 S.Ct. at p. 1670.)

Neither *Gerstein* nor *McLaughlin* was a juvenile detention case. In contrast, the United States Supreme Court's decision in *Schall v. Martin* (1984) 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (hereafter *Schall*) did directly address the constitutional parameters of a key provision of New York State's juvenile pretrial detention statute. *Schall* was decided nine years after *Gerstein* but seven years prior to *McLaughlin*. *Schall*, and other decisions of the high court, make it abundantly clear that Fourth Amendment and related due process claims pertaining to the pretrial detention of juveniles following warrantless arrests for criminal activity cannot be viewed in the same light as similar challenges to adult detentions. This is so because, in the words of the Supreme Court, juvenile proceedings are "fundamentally different" from adult criminal proceedings, requiring that a "balance" be struck between the "informality" and "flexibility" that must of necessity inhere in juvenile proceedings, and the further requirement that those proceedings comport with the juvenile's constitutional rights, and the "'fundamental fairness' demanded by the Due Process Clause." (*Schall*, supra, 467 U.S. at p. 263, 104 S.Ct. at p. 2409.)

In July of 1991, the Los Angeles County Juvenile Court, after consultation with county counsel, adopted the "official position" that *McLaughlin's* strict 48-hour rule does not apply in juvenile detention proceedings. We granted review in this case to determine whether that position passes constitutional muster, or whether *McLaughlin's* 48-hour rule strictly applies to the *1216 pretrial detention of adults and juveniles alike following warrantless arrest for criminal activity. [FN1]

FN1. We filed our initial opinion in this case on May 4, 1993. Although neither party petitioned for a rehearing, we ordered a rehearing on the court's own motion in order to clarify the

operative effect of our holding on “detention hearings” which are mandated under the provisions of Welfare and Institutions Code section 632, subdivision (a). All further statutory references are to this code unless otherwise indicated.

It is beyond dispute that Gerstein’s constitutional requirement of a prompt judicial determination of probable cause for the extended pretrial detention of any person arrested without a warrant applies to juveniles as well as adults. However, for reasons to be explained, and having considered the comprehensive analysis the court invoked in Schall to scrutinize the constitutionality of the juvenile detention provisions there at issue, we have concluded that the high court did not intend that the strict 48-hour rule subsequently announced in McLaughlin—a ruling handed down in a case involving the pretrial detention of adults—should automatically apply in the juvenile detention setting. To conclude otherwise we would have to ignore the fundamental differences between adult and juvenile proceedings recognized in all of the high court’s cases that have specifically addressed juvenile detention issues.

As will be explained, California’s juvenile detention statutes basically afford juvenile detainees who have been arrested without a warrant a formal, adversarial “detention hearing” within 72 hours of a warrantless ***626 arrest, which proceeding incorporates the “probable cause” determination mandated under Gerstein, supra, 420 U.S. 103, 95 S.Ct. 854. The relevant statutes also prescribe various other procedures designed to ensure that an arrested juvenile will be released, in accordance with well-established and codified policies, at the earliest possible time following arrest, preferably to the custody of a parent or legal guardian. Given the fundamental difference in purpose and procedure between the treatment of adult and juvenile **59 detainees, we have further concluded that juvenile detainees are constitutionally entitled to a judicial “probable cause” determination within 72 hours of arrest, consistent with the integrated provisions of our juvenile detention statutory scheme.

I. FACTS AND PROCEDURAL HISTORY

On July 24, 1991, petitioner Alfredo A., a minor, was taken into custody without a warrant pursuant to Welfare and Institutions Code sections 602 *1217 and 625 [FN2] on suspicion of having possessed cocaine base for sale on that date. (Health & Saf.Code, § 11351.5.)

FN2. Section 602 provides, in pertinent part: “Any person who is under the age of 18 years when he violates any law of this state ..., is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.”

Section 625 provides, in relevant part: “A peace officer may, without a warrant, take into temporary custody a minor: [] (a) Who is under the age of 18 years when such officer has reasonable cause for believing that such minor is a person described in Section ... 602....”

On July 25, 1991, petitioner sought his immediate release by filing a petition for a writ of habeas corpus in the Court of

Appeal for the Second Appellate District. He based his challenge to his postarrest detention on the holding in McLaughlin, supra, 500 U.S. 44, 111 S.Ct. 1661, alleging that he was a juvenile who had been arrested without a warrant the previous day for commission of a criminal offense, and that: “Pursuant to the Fourth Amendment to the United States Constitution, petitioner is entitled to a judicial determination of probable cause for his continued detention within 48 hours of his arrest. No such judicial determination has been made, and no determination will be made within the 48-hour period. This is because the Los Angeles County Superior Court, Juvenile Court, has adopted as its ‘official position’ that a juvenile is not entitled to such a prompt probable cause determination.”

Several weeks prior to petitioner’s arrest, the Presiding Judge of the Los Angeles County Juvenile Court sent a memorandum to all juvenile court judges, commissioners, and referees, indicating that county counsel had furnished the juvenile court with an opinion concluding that McLaughlin’s 48-hour rule does not apply in juvenile court proceedings. County counsel based that determination on the reasoning of Schall, supra, 467 U.S. 253, 104 S.Ct. 2403, in which a New York juvenile “preventive detention” statute was found facially valid under the due process clause of the Fourteenth Amendment. The presiding judge and supervising judges thereafter unanimously agreed to adopt county counsel’s position as the Los Angeles County Juvenile Court’s “official position.”

By an order to show cause filed the following day, the Court of Appeal determined to treat the petition for a writ of habeas corpus as a petition for a writ of mandate, and directed respondent Los Angeles County Superior Court to show cause why a peremptory writ of mandate should not issue ordering that judicial probable cause determinations for the extended postarrest detention of juveniles be made within 48 hours of their arrest.

On that same day, July 26, 1991, a wardship petition was filed in the juvenile court alleging petitioner came within the provisions of section 602 *1218 by having violated Health and Safety Code sections 11351 and 11351.5 on July 24, 1991. However, when petitioner appeared in court on the next “judicial day” (July 29, 1991), no detention report was provided to the juvenile court in preparation for the detention hearing, and petitioner was ordered immediately released. He thereafter waived the statutory time limitations for arraignment.

***627 In the mandamus proceeding, petitioner acknowledged that his release after spending five days in custody rendered the petition moot as to him. The Court of Appeal nonetheless determined to hear and decide petitioner’s systemic challenge to the juvenile court’s “official position,” concluding that similar claims had proved “capable of repetition, yet evading review” because “review usually takes longer than the [challenged] temporary detention....” (See **60Schall, supra, 467 U.S. at p. 256, fn. 3, 104 S.Ct. at p. 2405,

fn. 3; Gerstein, supra, 420 U.S. at pp. 110-111, fn. 11, 95 S.Ct. at p. 861, fn. 11.)

In its opinion, the Court of Appeal reviewed the relevant provisions of the Welfare and Institutions Code governing pretrial detention of juvenile arrestees. After determining that the juvenile detention issue in this case must be evaluated in light of the constitutional analysis conducted in Schall, supra, 467 U.S. 253, 104 S.Ct. 2403, the court concluded that California's statutory postarrest juvenile detention scheme withstands constitutional scrutiny, reasoning that: "[The] statutes provide procedural safeguards that accommodate the individual's right to liberty and the state's duty to control crime. They reflect the balance that must be struck between the informality and flexibility of juvenile proceedings even as they comport with the fundamental fairness required by due process. The statutory scheme protects a minor's right to freedom, consistent with the state interest in protecting the minor and society." Implicit in these conclusions was the court's rejection of petitioner's claim that McLaughlin's strict 48-hour rule applies to juvenile as well as adult postarrest detention proceedings.

II. DISCUSSION

A. Mootness of Petitioner's Claim

[2] As noted, petitioner acknowledges that his release after spending five days in pretrial custody has technically rendered this proceeding moot as to him. The Court of Appeal nevertheless determined to hear and decide the claim. We agree that the issue, as presented in this case, is ripe for resolution. The high court reached a similar conclusion in Schall and Gerstein:

"Although the pretrial detention of the class representatives has long since ended, ... this case is not moot for the same reason that the class action in *1219 Gerstein v. Pugh, 420 U.S. 103, 110, [fn. 11, 95 S.Ct. 854, 861, n. 11, 43 L.Ed.2d 54 (1975), was not mooted by the termination of the claims of the named plaintiffs. 'Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."'" (Schall, supra, 467 U.S. at p. 256, fn. 3, 104 S.Ct. at p. 2405, fn. 3.)

B. Relevant Statutory Provisions

In order to meaningfully examine and apply the controlling constitutional principles and case law, we need a brief overview of the relevant statutory provisions that govern juvenile detentions following warrantless arrests in California.

Under our juvenile criminal justice system, a peace officer can take a minor into temporary custody for violating a federal

or state law, or a local ordinance. (§ § 602, 625, subd. (a); see, ante, at p. 626, fn. 2 of 26 Cal.Rptr.2d, at p. 59, fn. 2 of 865 P.2d.) When a minor is arrested and detained on suspicion of having committed a crime, the minor is not formally "charged" with the crime in the sense that adult arrestees are criminally prosecuted. Rather, a determination is made whether to commence wardship proceedings with the filing of a petition by the prosecuting attorney pursuant to section 602. (§ 650, subd. (c).)

Various official functions must be performed at the time of the juvenile's arrest, and within the initial 24- to 48-hour period following the arrest--all patently designed to ***628 ensure that the detained minor is afforded every reasonable opportunity for his or her immediate release, preferably to a parent or guardian.

Hence, the arresting officer may release the minor outright (§ 626, subd. (a)), deliver him or her to a public or private shelter facility in contract with the city or county to provide shelter care, counseling, or diversion services to such minors (id., subd. (b)), or release the minor on his or her written promise to appear before a county juvenile probation officer, or to a parent, guardian, or other responsible relative, who may also be required to execute a written promise to appear **61 along with the minor (id., subd. (c)). If the arresting officer elects instead to deliver custody of the minor directly to the county probation officer, the officer must prepare a concise, written statement of the probable cause for taking the minor into temporary custody, to *1220 be furnished along with custody of the minor to the juvenile probation officer within 24 hours of the initial detention following the arrest. (Id., subd. (d).)

The policy underlying this choice of dispositions provided for in section 626 is expressly set forth in the statute: "In determining which disposition of the minor to make, the officer shall prefer the alternative which least restricts the minor's freedom of movement, provided that alternative is compatible with the best interests of the minor and the community." (§ 626, italics added.)

When custody of the minor is transferred to a probation officer at a juvenile hall or any other place of confinement, the detaining officer is further required to "take immediate steps to notify the minor's parent, guardian, or responsible relative that such minor is in custody and the place where he is being held." (§ 627, subd. (a).)

Section 628 requires the juvenile probation officer to "immediately investigate the circumstances of the minor and the facts surrounding his being taken into custody," and further requires the officer to "immediately release the minor to the custody of his parent, guardian, or responsible relative unless one or more ... [specified] conditions exist..." (See post, at pp. 628-629 of 26 Cal.Rptr.2d, at pp. 61-62 of 865 P.2d.)

Like the arresting officer, the county juvenile probation officer is empowered with discretion at the intake-investigatory stage to "adjust the situation which brings the

minor within the jurisdiction [or probable jurisdiction] of the court” by “delineat[ing] specific programs of supervision for the minor,” or referring the case to another agency, arranging for informal supervision, or requesting the district attorney to prepare a wardship petition for filing. (§ 654.)

A minor taken into custody must be released within 48 hours, excluding “nonjudicial days,” unless a wardship petition is filed within that initial 48- hour period. (§ 631, subd. (a).) If a section 602 petition is filed, the minor must be afforded a formal, adversarial “detention hearing” in juvenile court “as soon as possible but in any event [no later than] the expiration of the next judicial day after a petition to declare the minor a ward ... has been filed”--i.e., 48 to 72 hours after arrest (excluding “nonjudicial days”). (§ 632, subd. (a).)

If the offense for which the minor is taken into custody is “a misdemeanor that does not involve violence, the threat of violence, or possession or use of *1221 a weapon, and if the minor is not currently on probation or parole,” then the minor must be released within 48 hours after having been taken into custody (again, excluding “nonjudicial days”) unless a wardship petition is filed and “the minor has been ordered detained by a judge or referee of the juvenile court pursuant to Section 635” within that initial 48-hour period. (§ 631, subd. (b).)

Most significantly, when a minor is detained on suspicion of criminal activity, in contrast to an adult detained under similar circumstances, the inquiry into the propriety of the extended detention is much broader in scope than a determination, in the strict Fourth Amendment sense, of whether “factual” probable cause exists to believe the minor committed the crime for which he was taken into custody. Section 628 lists seven “conditions,” ***629 one or more of which must be found to exist in order to warrant detaining the minor and scheduling a detention hearing within 72 hours of his or her arrest (again, excluding “nonjudicial” days). These conditions include whether:

“(1) The minor is in need of proper and effective parental care or control and has no parent, guardian, or responsible relative; or has no parent, guardian, or responsible relative willing to exercise or capable of exercising such care or control; or has no parent, guardian, or responsible relative actually exercising such care or control.

“(2) The minor is destitute or is not provided with the necessities of life or is not provided with a home or suitable place of abode.

**62 “(3) The minor is provided with a home which is an unfit place for him by reason of neglect, cruelty, depravity or physical abuse of either of his parents, or of his guardian or other person in whose custody or care he is.

“(4) Continued detention of the minor is a matter of immediate and urgent necessity for the protection of the minor or reasonably necessary for the protection of the person or property of another.

“(5) The minor is likely to flee the jurisdiction of the court.

“(6) The minor has violated an order of the juvenile court.

“(7) The minor is physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality.” (§ 628, subd. (a).)

Section 635 sets forth the factors to be considered by the juvenile court at the detention hearing, and the standard the court must apply, in evaluating *1222 the probation officer’s findings pursuant to section 628 and determining whether to continue the minor’s detention or order his or her release from custody. The section provides:

“The court will examine such minor, his parent, guardian, or other person having relevant knowledge, hear such relevant evidence as the minor, his parent or guardian or their counsel desires to present, and, unless it appears that such minor has violated an order of the juvenile court or has escaped from the commitment of the juvenile court or that it is a matter of immediate and urgent necessity for the protection of such minor or reasonably necessary for the protection of the person or property of another that he be detained or that such minor is likely to flee to avoid the jurisdiction of the court, the court shall make its order releasing such minor from custody. [] The circumstances and gravity of the alleged offense may be considered, in conjunction with other factors, to determine whether it is a matter of immediate and urgent necessity for the protection of the minor or reasonably necessary for the protection of the person or property of another that the minor be detained.” (§ 635.)

The minor and his or her parent or guardian have the right to be represented by counsel at every stage of the detention proceedings. (§ 633.) If the minor or the parent or guardian is indigent or cannot otherwise afford an attorney, counsel will be appointed by the court. (§ 634.) In any case in which it appears to the court that there is a conflict of interest between a parent or guardian and the minor, separate counsel may be appointed for the minor and the parent or guardian. (Ibid.)

As is evident from the foregoing summary of the relevant statutory provisions, the determination whether to detain a minor following a warrantless arrest for criminal activity is a complex one, requiring consideration of various factors personal to the minor and his family situation (§ 628), and the application of several important statutory presumptions favoring the minor’s early release to a parent, guardian or responsible relative (§§ 626, 628, 631, subd. (a)), or, if extended detention is warranted, selection of the detention alternative most “compatible with the best interests of the minor ...,” and “which least restricts the minor’s freedom of movement” (§ 626). These presumptions, and the policies they implement, are unique to juvenile detention proceedings and are not implicated when a judicial determination is made whether factual probable cause exists to extend the detention of an adult arrestee.

Bearing these distinctions in mind, we turn next to the opinions in ***630Gerstein, supra, 420 U.S. 103, 95 S.Ct. 854, Schall, supra, 467 U.S. 253, 104 S.Ct. 2403, *1223McLaughlin, supra, 500 U.S. 44, 111 S.Ct. 1661, and most recently, Reno v. Flores (1993) 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (hereafter

Flores), to see if those decisions will support an inference that the high court intended the strict 48-hour rule announced in *McLaughlin* to apply in juvenile detention proceedings.

C. Applicability of *McLaughlin's* 48-Hour Rule to Juvenile Detention Proceedings

In *Gerstein*, *supra*, 420 U.S. 103, 95 S.Ct. 854, the United States Supreme Court held unconstitutional Florida procedures under which persons arrested without a warrant could be kept in police custody for 30 days or more without a probable cause determination. **63 The court held that the Fourth Amendment requires a prompt judicial determination of “probable cause to believe the suspect has committed a crime” as a prerequisite to an extended pretrial detention following a warrantless arrest. (*Id.*, at pp. 114, 120, 95 S.Ct., at pp. 863, 866.)

In *McLaughlin*, *supra*, 500 U.S. 44, 111 S.Ct. 1661, the court reiterated some of the competing policy concerns underlying its earlier holding in *Gerstein*:

“In reaching this conclusion we attempted to reconcile important competing interests. On the one hand, States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity, even where there has been no prior opportunity for a prior judicial determination of probable cause. 420 U.S., at 112 [95 S.Ct. at 862] On the other hand, prolonged detention based on incorrect or unfounded suspicion may unjustly ‘imperil [a] suspect’s job, interrupt his source of income, and impair his family relationships.’ *Id.*, at 114 [95 S.Ct., at 863] We sought to balance these competing concerns by holding that States ‘must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.’ *Id.*, at 125 [95 S.Ct., at 868-869] (emphasis added).

“[We] thus established a ‘practical compromise’ between the rights of individuals and the realities of law enforcement. *Id.*, at 113 [95 S.Ct., at 862] Under *Gerstein*, warrantless arrests are permitted but persons arrested without a warrant must promptly be brought before a neutral magistrate for a judicial determination of probable cause. *Id.*, at 114 [95 S.Ct., at 863] Significantly, the Court stopped short of holding that *1224 jurisdictions were constitutionally compelled to provide a probable cause hearing immediately upon taking a suspect into custody and completing booking procedures. We acknowledged the burden that proliferation of pretrial proceedings places on the criminal justice system and recognized that the interests of everyone involved, including those persons who are arrested, might be disserved by introducing further procedural complexity into an already intricate system. *Id.*, at 119-123 [95 S.Ct., at 865-868] Accordingly, we left it to the individual States to integrate prompt probable cause determinations into their differing systems of pretrial procedures. *Id.*, at 123-124 [95 S.Ct. at 867- 868].” (*McLaughlin*, *supra*, 500 U.S. at p. ---, 111 S.Ct. at p. 1668.)

In *Gerstein*, the court explained that the Fourth Amendment does not require that the arrestee be afforded the “full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses” in connection with a judicial determination of probable cause. (*Gerstein*, *supra*, 420 U.S. at p. 119, 95 S.Ct. at p. 865.) The court delineated the scope of that determination as follows: “The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings.... The standard is the same as that for arrest. That standard--probable cause to believe the suspect has committed a crime--traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony....” (*Id.*, at p. 120, 95 S.Ct. at p. 866, fn. omitted.)

In contrast, the constitutional parameters of juvenile detentions were directly at issue ***631 in *Schall*, *supra*, 467 U.S. 253, 104 S.Ct. 2403, a case decided nine years after *Gerstein*, *supra*, 420 U.S. 103, 95 S.Ct. 854. In *Schall*, the court found the juvenile “preventive detention” provisions of the New York Family Court Act facially valid under the due process clause of the Fourteenth Amendment. The New York statute authorized the detention of a juvenile arrested for the commission of a crime when there is a “serious risk” the juvenile “may before the return date commit an act which if committed by an adult would constitute a crime.” (*Schall*, *supra*, 467 U.S. at p. 255, 104 S.Ct. at p. 2405, fn. omitted.)

Whereas the sole issue in *Gerstein* was whether there was factual probable cause to detain the adult arrestee pending further proceedings--i.e., the same standard as that for arrest: “probable cause to believe the suspect has committed a crime” **64(*Gerstein*, *supra*, 420 U.S. at p. 120, 95 S.Ct. at p. 866)--*Schall* makes it abundantly clear that, where juvenile detentions are concerned, such a factual probable cause determination is but one component of the broader inquiry implicated in the determination whether to extend the *1225 pretrial detention of a juvenile arrested without a warrant for criminal activity.

In *Schall*, three juveniles were detained for more than six days before being afforded a “probable cause” hearing--the functional equivalent of a “detention hearing”--pursuant to the provisions of the New York Family Court Act. (*Schall*, *supra*, 467 U.S. at pp. 257-260, 104 S.Ct. at pp. 2406-2408.) The juveniles were brought before the family court for an “initial appearance” within one day following their arrests. (*Ibid.*) Under New York law, at the “initial appearance” the family court judge makes a preliminary determination as to the jurisdiction of the court, appoints counsel, and advises the minor of his or her rights. (*Id.*, at pp. 257-258, fn. 5, 104 S.Ct. at pp. 2406-2407, fn. 5.) If the family court is not in session, the “initial appearance” must be conducted “within 72 hours or the next day the court is in session, whichever is sooner.” (*Schall*, *supra*, 467 U.S. at pp. 257-258, fn. 5, 104 S.Ct. at p. 2406, fn. 5, referring to the New York Family Court Act, § 307.3(4).)

The high court first explained in *Schall*: “There is no doubt that the Due Process Clause is applicable in juvenile

proceedings. ‘The problem,’ we have stressed, ‘is to ascertain the precise impact of the due process requirement upon such proceedings.’ In re Gault, 387 U.S. 1, 13-14 [87 S.Ct. 1428, 1436, 18 L.Ed.2d 527] (1967). We have held that certain basic constitutional protections enjoyed by adults accused of crimes also apply to juveniles. See *id.*, at 31-57 [87 S.Ct. at 1445-1459] (notice of charges, right to counsel, privilege against self-incrimination, right to confrontation and cross-examination); In re Winship, 397 U.S. 358 [90 S.Ct. 1068, 25 L.Ed.2d 368] (1970) (proof beyond a reasonable doubt); *Breed v. Jones*, 421 U.S. 519 [95 S.Ct. 1779, 44 L.Ed.2d 346] (1975) (double jeopardy). But the Constitution does not mandate elimination of all differences in the treatment of juveniles. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528 [91 S.Ct. 1976, 29 L.Ed.2d 647] (1971) (no right to jury trial). The State has ‘a *parens patriae* interest in preserving and promoting the welfare of the child,’ *Santosky v. Kramer*, 455 U.S. 745, 766 [102 S.Ct. 1388, 1401, 71 L.Ed.2d 599] (1982), which makes a juvenile proceeding fundamentally different from an adult criminal trial. We have tried, therefore, to strike a balance—to respect the ‘informality’ and ‘flexibility’ that characterize juvenile proceedings, In re Winship, *supra*, [397 U.S.] at 366 [90 S.Ct. at 1074] and yet to ensure that such proceedings comport with the ‘fundamental fairness’ demanded by the Due Process Clause. *Breed v. Jones*, *supra*, [421 U.S.] at 531 [95 S.Ct. at 1786]; *McKeiver*, *supra*, [403 U.S.] at 543 [91 S.Ct. at 1985] (plurality opinion).” (Schall, *supra*, 467 U.S. at p. 263, 104 S.Ct. at p. 2409.)

The court in Schall did initially indicate, in a footnote to its opinion, that the propriety of any detention “prior to a juvenile’s initial appearance in *1226 Family Court” was not directly at issue in that case. (Schall, *supra*, 467 U.S. at pp. 257-258, fn. 5, 104 S.Ct. at pp. 2406-2407, fn. 5.) This was so because the petitioners had been afforded an “initial appearance,” and therefore were not directly challenging the period of detention from arrest ***632 until their first appearance in court. But one must read on in Schall, for the high court had elected to decide the class members’ facial challenge to the constitutionality of the New York juvenile preventive detention statute even though petitioners’ individual cases were moot due to their release from custody. (Schall, *supra*, 467 U.S. at p. 256, fn. 3, 104 S.Ct. at p. 2405, fn. 3.) The court then went on to consider the “initial appearance” requirement along with the other procedural components of the statutory juvenile detention scheme. Acknowledging that the “initial appearance” could be adjourned for up to 72 hours, and that “the Family Court judge is not required to make a finding of probable cause at the initial appearance,” the court [FN3] nevertheless concluded that the lack of a requirement that factual probable cause be determined at the “initial appearance” “[did] not, under the circumstances, amount to a deprivation of due process.” **65(Schall, *supra*, 467 U.S. at pp. 275-276, and fn. 27, 104 S.Ct. at p. 2416, and fn. 27.)

FN3. At the “initial appearance,” the juvenile was entitled to challenge the sufficiency of the delinquency petition, thereby raising the issue of probable cause. (Schall, *supra*, at pp. 275-276.) This fact, however, does not appear essential to Schall’s analysis. The Schall majority emphasized that postponement

of a probable-cause determination until the formal, adversarial probable-cause hearing did not offend due process. Moreover, as noted, the Schall majority expressed no concern that the “initial appearance” could itself be postponed for up to 72 hours after the juvenile’s arrest.

The high court went on to explain that New York’s preventive detention statute served the dual legitimate state objectives of protecting both society and the juvenile from the hazards of further criminal activity, by undertaking enforcement of the criminal law for the sake and protection of the community generally, while also serving as *parens patriae* for the benefit of the minor- detainee. (Schall, *supra*, 467 U.S. at pp. 264-274, 104 S.Ct. at pp. 2409- 2415.) The court ultimately concluded the procedural protections afforded postarrest juvenile detainees under the New York statute satisfied the requirements of the due process clause of the Fourteenth Amendment, and found the statutory scheme facially valid. (*Ibid.*)

For purposes of responding to petitioner’s Fourth Amendment claim in this case, it is important to note that the high court in Schall, in scrutinizing the constitutional claims of the class members therein, examined all the procedural components of New York’s statutory scheme—the “initial appearance” requirement (for appointment of counsel and advisement of rights); the formal “probable cause” hearing that followed 72 hours thereafter (analogous to our “detention hearing”); and the “factfinding hearing” (analogous to our “jurisdictional hearing”)—and concluded that, taken together, they comprised “[such] flexible procedures [as] have been found constitutionally adequate under the Fourth Amendment, see *Gerstein v. Pugh* [supra, 420 U.S. 103, 95 S.Ct. 854], and under the Due Process Clause, see *1227*Kent v. United States* [(1966) 383 U.S. 541], at 557 [86 S.Ct. 1045 at 1055, 16 L.Ed.2d 84].” (Schall, *supra*, 467 U.S. at p. 277, 104 S.Ct. at pp. 2416-2417, italics added.) [FN4]

FN4. This court has likewise observed that in the context of juvenile wardship proceedings, a minor’s constitutional right to be free from unreasonable searches, seizures and arrests derives not only from the guarantee of freedom from unreasonable searches and seizures embodied in the Fourth Amendment to the United States Constitution and article I, section 13, of the California Constitution, but also from the minor’s constitutional rights to privacy, and the guarantee under the Fourteenth Amendment against deprivation of liberty without due process of law. (See, e.g., In re William G. (1985) 40 Cal.3d 550, 557, 221 Cal.Rptr. 118, 709 P.2d 1287, and cases cited; *Skelton v. Superior Court* (1969) 1 Cal.3d 144, 149, 81 Cal.Rptr. 613, 460 P.2d 485.)

Seven years after Schall was decided, the high court decided *McLaughlin*, *supra*, 500 U.S. 44, 111 S.Ct. 1661. The court set out in *McLaughlin* to further define the “promptness” requirement for making the Fourth Amendment probable cause determination required under *Gerstein*. The court concluded: “[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of ***633 *Gerstein*.” (*McLaughlin*, *supra*, 500 U.S. at p. ----, 111 S.Ct. at p. 1670.)

Unlike Schall, the facts in *McLaughlin* did not present the court with an opportunity to reach or discuss the Fourth Amendment probable cause requirement in the specific context of juvenile detention proceedings. Critically, the court had no occasion in *McLaughlin* to consider the fundamental necessity, in the administration of juvenile criminal justice systems, to “strike a balance ... respect[ing] the ‘informality’ and ‘flexibility’ that characterize juvenile proceedings [citation] ... [while ensuring] that such proceedings comport with the ‘fundamental fairness’ demanded by the Due Process Clause. [Citations].” (Schall, *supra*, 467 U.S. at p. 263, 104 S.Ct. at p. 2409.)

Most recently, however, the high court had the opportunity, in a post- *McLaughlin* case, to reaffirm some of the constitutional principles found relevant to juvenile detentions in Schall. In *Flores*, *supra*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1, a class of alien juveniles who had been arrested by the Immigration and Naturalization Service (hereafter INS) on suspicion of being deportable were detained pending deportation hearings pursuant to a regulation (8 C.F.R. § 242.24 (1992)) providing for the release of detained minors only to their parents, close relatives, or legal guardians, except in unusual and compelling circumstances. Pursuant to a consent decree entered into in the litigation, juveniles who were not released under the regulation’s provisions had to be placed in juvenile care facilities that met or exceeded **66 state licensing requirements for the provision of such services to dependent *1228 children. The juvenile class members in *Flores* contended they had a right under the federal Constitution and immigration laws to be routinely released into the custody of other “responsible adults.”

Relying on principles reiterated in its earlier opinions in *Santosky v. Kramer* (1982) 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 and Schall, *supra*, 467 U.S. 253, 104 S.Ct. 2403, the court reaffirmed that the state’s *parens patriae* interest in “preserving and promoting the welfare of the child” (*Santosky v. Kramer*, *supra*, 455 U.S. at p. 766, 102 S.Ct. at p. 1401) renders juvenile proceedings fundamentally different from adult criminal proceedings. The court once again emphasized that “‘juveniles, unlike adults, are always in some form of custody,’ Schall, *supra*, [467 U.S.] at 265 [104 S.Ct. at 2410] and where the custody of the parent or legal guardian fails, the government may (indeed, we have said must) either exercise custody itself or appoint someone else to do so. *Ibid.*” (*Flores*, *supra*, 507 U.S. at p. ---, 113 S.Ct. at 1447, 123 L.Ed.2d at p. 17, italics in original.)

The high court in *Flores* therefore rejected the respondent class members’ “procedural due process” claim under the Fifth Amendment. [FN5] The court’s conclusions regarding the constitutionality of the INS juvenile detention procedures under scrutiny in that case bear repeating here, for they reinforce our conclusion that the high court’s analysis that gave rise to the strict 48- hour rule announced in *McLaughlin* does not, in isolation, adequately address all of the constitutional concerns that arise in juvenile postarrest detention cases.

FN5. The due process claim in *Flores* arose under the Fifth Amendment because aliens have a right to due process of law at deportation proceedings under the Fifth Amendment. (*Flores*, *supra*, 507 U.S. at p. ---, 113 S.Ct. at pp. 1449-1450, 123 L.Ed.2d at pp. 19-20; see *The Japanese Immigrant Case* (1903) 189 U.S. 86, 100-101, 23 S.Ct. 611, 614-615, 47 L.Ed. 721.) The discussion of Fifth Amendment procedural due process in *Flores* is functionally analogous to the Fourteenth Amendment procedural due process discussed in Schall.

The court in *Flores* explained that the deportation process ordinarily begins with a warrantless arrest by an INS officer who has reason to believe that the arrestee is in the United States in violation of an immigration law or regulation and is likely to escape before a warrant can be obtained. (*Flores*, *supra*, 507 U.S. at p. ---, 113 S.Ct. at pp. 1449-1450, 123 L.Ed.2d at p. 20.) Arrested aliens are almost always offered the choice of departing the country voluntarily, and the great majority apparently take that course. By statute, however, before the INS can seek ***634 execution of a voluntary departure form by a juvenile arrestee, the juvenile must communicate with either a parent, adult relative, friend, or with an organization found on the free legal services list. If the juvenile does not seek voluntary departure, the relevant statutes require that he or she be brought before an INS examining officer within 24 hours of his or her arrest. *1229 The “examining officer” must be someone other than the arresting officer, but is still a staff member of the INS’s enforcement division, and is not a judge or magistrate. If the examiner finds *prima facie* evidence that the arrested alien is illegally in the United States, a formal deportation hearing is initiated through the issuance of an order to show cause, and within 24 hours the decision is made whether to continue the alien juvenile in custody or to release him. (*Ibid.*)

The INS must notify the alien juvenile of the commencement of a deportation proceeding, and of the decision as to custody, by serving a written form notice in English and Spanish. The front of the form notifies the alien of the allegations against him or her and the date of his or her deportation hearing. The back contains a section entitled “Notice of Custody Determination,” in which the INS officer checks a box indicating whether the alien will be detained in the custody of the INS, released on his or her own recognizance, or released under bond. The form also advises the alien that he or she may request the “Immigration Judge” to redetermine the custody decision. The “Immigration Judge” is a quasi-judicial officer in the Executive Office for Immigration Review, a division “separated” from the INS enforcement**67 staff. The alien juvenile must check one of two boxes, indicating he or she does or does not seek such review, and sign and date the form. If the alien requests a hearing before the “Immigration Judge” and is dissatisfied with the outcome, he or she may obtain further review by the Board of Immigration Appeals, and by the federal courts. (*Flores*, *supra*, 507 U.S. at pp. --- - ---, 113 S.Ct. at pp. 1450-1451, 123 L.Ed.2d at pp. 20-21.)

The high court in *Flores* rejected the conclusion of the United States District Court and the en banc Court of Appeals

for the Ninth Circuit that the INS procedures are flawed because they do not provide for automatic review by an “Immigration Judge” of the initial deportability and custody determinations. The court explained: “At least insofar as this facial challenge is concerned, due process is satisfied by giving the detained alien juveniles the right to a hearing before an immigration judge.” (Flores, *supra*, 507 U.S. at p. ---, 113 S.Ct. at p. 1450, 123 L.Ed.2d at p. 21, italics in original.) The court further rejected respondents’ contention that the regulations were infirm because they failed to set forth a time period within which the hearing before the “Immigration Judge,” when requested, must be held. (*Ibid.*)

In rejecting respondents’ further claim that “the regulation is an abuse of discretion because it permits the INS, once having determined that an alien juvenile lacks an available relative or legal guardian, to hold the juvenile indefinitely,” the court explained: “That is not so. The period of custody is inherently limited by the pending deportation hearing, which must be concluded with ‘reasonable dispatch’ to avoid habeas corpus. *12308 U.S.C. § 1252(a)(1); cf. [United States v. Salerno], 481 U.S. 739, 747 [107 S.Ct. 2095, 2101, 95 L.Ed.2d 697] (1987) (noting time limits placed on pretrial detention by the Speedy Trial Act). It is expected that alien juveniles will remain in INS custody an average of only 30 days [under the terms of the consent decree].... There is no evidence that alien juveniles are being held for undue periods pursuant to regulation 242.24 [8 C.F.R. § 242.24 (1992)], or that habeas corpus is insufficient to remedy particular abuses.” (Flores, *supra*, 507 U.S. at p. ---, 113 S.Ct. at pp. 1453-1454, 123 L.Ed.2d at pp. 24-25, fn. omitted.)

The court concluded in Flores: “We think the INS policy now in place is a reasonable response to the difficult problems presented when the Service arrests unaccompanied ***635 alien juveniles. It may well be that other policies would be even better, but ‘we are [not] a legislature charged with formulating public policy.’ Schall v. Martin, 467 U.S., at 281 [104 S.Ct., at 2419]. On its face, INS regulation 242.24 accords with both the Constitution and the relevant statute.” (Flores, *supra*, 507 U.S. at p. ---, 113 S.Ct. at p. 1454, 123 L.Ed.2d at p. 25.)

We recognize, of course, that the holding in Flores is of limited precedential value here, since that case arose under the due process clause of the Fifth Amendment (but see *ante*, at p. 633, fn. 4 of 26 Cal.Rptr.2d, at p. 66, fn. 4 of 865 P.2d), involved a class of deportable juvenile aliens who may not have enjoyed the same Fourth Amendment rights as juvenile citizens (see *United States v. Verdugo-Urquidez* (1990) 494 U.S. 259, 265-275, 110 S.Ct. 1056, 1060-1066, 108 L.Ed.2d 222), and involved the interpretation of immigration statutes as well as the terms of a consent decree. We nonetheless believe that the underpinnings of the high court’s constitutional analysis in Flores, *supra*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1, and its express reliance in that case on several of the basic principles pertaining to juvenile detentions discussed in Schall, *supra*, 467 U.S. 253, 104 S.Ct. 2403, reinforce our conclusion that, in the context of juvenile detention proceedings, the high court

would not today find rigid application of the 48-hour rule of *McLaughlin*, *supra*, 500 U.S. 44, 111 S.Ct. 1661, compelled under a strict application of Fourth Amendment principles.

We emphasize that we do not today suggest a juvenile arrestee facing postarrest detention has no Fourth Amendment liberty interest in a prompt determination of the legal cause for his or her extended detention. The Fourth Amendment principles at the core of the holding in *Gerstein*, *supra*, 420 U.S. 103, 95 S.Ct. 854, apply to juveniles as **68 well as adults. The high court expressly reaffirmed as much eight years ago in *Schall*, *supra*, 467 U.S. at pp. 264, 276-277, and fn. 27, 104 S.Ct. at pp. 2409, 2416-2417, and fn. 27. Indeed, although the court in *Schall* twice characterized its earlier holding in *Gerstein* to be “that a judicial determination of probable cause is a prerequisite to any *1231 extended restraint on the liberty of an adult accused of crime” (*Schall*, *supra*, 467 U.S. at pp. 274-275, 104 S.Ct. at p. 2415, italics added), we think that such characterization cannot, in reason or fairness, be understood as an attempt by the court to limit the fundamental principles announced in *Gerstein* solely to adult detentions. The court subsequently made it clear in *Schall* that children have a protected liberty interest in “freedom from institutional restraints.” (*Id.*, at p. 265, 104 S.Ct. at p. 2410; see *In re Gault* (1967) 387 U.S. 1, 27, 87 S.Ct. 1428, 1443, 18 L.Ed.2d 527.)

California’s postarrest juvenile detention statutes are plainly designed to protect the arrested minor’s Fourth Amendment rights. The arresting officer must, within 24 hours of the arrest, prepare a written summary of the probable cause for taking the minor into temporary custody. (§ 626, subd. (d).) In contrast to adult criminal proceedings, the statutory presumptions require “immediate release” of the minor to the custody of his or her parents or legal guardian unless specific factors warranting extended detention are found to exist. (§ 628.) Even when such factors supportive of further detention are found to exist, the juvenile arrestee must nonetheless be released within 48 hours unless a wardship petition is filed within that initial 48-hour period. (§ 631, subd. (a).) And, if a wardship petition is filed, a formal, adversarial detention hearing, which incorporates a probable cause determination, and at which counsel is provided for both the minor and his parents or guardian, must be conducted “as soon as possible but in any event [no later than] the expiration of the next judicial day after a petition to declare the minor a ward ... has been filed” (i.e., no later than 72 hours after arrest, excluding “nonjudicial days”). (§ 632, subd. (a).) At that detention hearing, the juvenile court will consider “[t]he circumstances and gravity of the alleged offense” in determining whether extended pretrial detention is warranted under all the facts and circumstances. (§ 635.)

***636 In light of the foregoing, we therefore conclude that the United States Supreme Court’s adoption of the strict 48-hour rule in *McLaughlin*, *supra*, 500 U.S. 44, 111 S.Ct. 1661 was neither foreseen nor intended by that court to be rigidly operable in juvenile postarrest detention proceedings. Given the fundamental differences between juvenile and adult

detention proceedings recognized in a long line of that court's decisions, we will not infer otherwise, absent an express and definitive ruling from the high court to the contrary.

As has been shown, our Legislature, in its wisdom, has enacted a comprehensive statutory scheme governing postarrest juvenile detention that is designed to implement specific policies and procedures deemed to be in the juvenile detainees' best interests, while balancing their fundamental constitutional rights against the well-recognized need for "informality" and "flexibility" in juvenile criminal justice systems. *1232(Schall, supra, 467 U.S. at p. 263, 104 S.Ct. at p. 2409.) Our juvenile courts, of course, are duty bound to comply with both constitutional and statutory requirements. Having examined the integrated components of California's juvenile detention statutes, we conclude that the Constitution, as interpreted by the United States Supreme Court's pertinent decisions reviewed herein, requires no more than that juvenile arrestees be afforded a judicial determination of "probable cause" for any postarrest detention extending beyond the 72-hour period immediately following a warrantless arrest.

In light of these conclusions, it follows that the formal detention hearing provided for in section 632, subdivision (a), may also serve to fulfill the constitutional requirement when the court at such a hearing, where it is held within 72 hours of the juvenile's arrest, makes a determination that sufficient probable cause exists for the extended postarrest detention of the juvenile. Consistent with our analysis and conclusions herein, if the 72-hour period immediately following **69 arrest includes one or more "nonjudicial days," such that the juvenile court is unable or unwilling to provide a full statutory detention hearing within that period, then the Constitution independently requires that the juvenile be afforded a separate, timely judicial determination of probable cause for any extended period of detention beyond the 72 hours following arrest. [FN6]

FN6. We note further that, in 1992, the Legislature added subdivision (c) to Code of Civil Procedure section 134, which specifically provides: "In any superior, municipal, or justice court, one or more departments of the court may remain open and in session for the transaction of any business which may come before the department in the exercise of the civil or criminal jurisdiction of the court, or both, on a judicial holiday or at any hours of the day or night, or both, as the judges of the court prescribe." (Stats.1992, ch. 460, § 2.)

III. CONCLUSION

The judgment of the Court of Appeal is affirmed.

PANELLI and BAXTER, JJ., concur.

ARABIAN, Justice, concurring and dissenting.

I concur in the lead opinion in-so-far as it requires prompt probable cause determinations for juveniles within 72 hours of warrantless arrest. (See, ante, p. 636 of 26 Cal.Rptr.2d, pp. 68-69 of 865 P.2d.) I respectfully dissent, however, from the due process analysis by which the lead opinion reaches this conclusion. Petitioner does not dispute his postarrest detention on that basis; nor does he raise such a challenge to any provision of the juvenile court law governing wardship detentions in general (Welf. & Inst.Code, § 602 et seq.). Rather, he asserts that, like any adult in comparable circumstances, a detained minor is entitled to a probable cause determination of suspected criminal activity within 48 hours of a *1233 warrantless arrest as mandated by the United States Supreme Court's decision in *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (McLaughlin). As framed by petitioner, the only issue before us is whether the rule of ***637 *McLaughlin* applies to juveniles. [FN1] Accordingly, we are constrained to reframe his contentions solely through a Fourth Amendment prism, for that is the limited nature of the constitutional claim. (Cf. *Gerstein v. Pugh* (1975) 420 U.S. 103, 111, 95 S.Ct. 854, 861, 43 L.Ed.2d 54 ["Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents."].) The specificity of the question demands an equally precise answer, not the due process circuitry submitted in the lead opinion. (See, e.g., *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 [4th Amend. search and seizure claim].)

FN1. Indeed, as the lead opinion notes (ante, p. 626 of 26 Cal.Rptr.2d, p. 59 of 865 P.2d), the original habeas corpus petition challenged the "official position" of the Los Angeles County Superior Court, based on an opinion of county counsel, that juveniles are not entitled to a prompt probable cause determination under *McLaughlin*, supra, 500 U.S. 44, 111 S.Ct. 1661. For this reason, I agree with Justice Mosk and Justice George that the lead opinion is nonresponsive and therefore unpersuasive to the extent the analysis relies on *Schall v. Martin* (1984) 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207, a case decided on Fourteenth Amendment due process grounds, and *Reno v. Flores* (1993) 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1, a Fifth Amendment due process decision.

While I agree with Justice Mosk that we should pursue a Fourth Amendment tack in resolving this case, I conclude that for juvenile detainees a probable cause determination within 72 hours satisfies the constitutional mandate of "promptness." I am unpersuaded *McLaughlin*, supra, 500 U.S. 44, 111 S.Ct. 1661, is dispositive or controlling here. Factually, that case involved only adults. In assessing the protections afforded minors, the United States Supreme Court has consciously "refrained ... from taking the easy way with a flat holding that all rights constitutionally assured for the adult accused are to be imposed on the state juvenile proceeding." (*McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 545, 91 S.Ct. 1976, 1986, 29 L.Ed.2d 647; *id.*, at p. 541, 91 S.Ct. at p. 1984.) Thus, I do not construe the holding in *McLaughlin* to extend perforce to

juveniles simply because it does not expressly restrict its scope to adults. In my view, the issue **70 warrants an independent examination, bearing in mind both the general nature of the Fourth Amendment guaranty with its rubric of reasonableness and the particularized concerns of the juvenile justice system. (403 U.S. at p. 545, 91 S.Ct. at p. 1986; cf. *New Jersey v. T.L.O.*, supra, 469 U.S. at pp. 337-343, 105 S.Ct. at pp. 740-744.)

Since any official detention can adversely affect a minor as critically and undeniably as it does an adult, juveniles do have a protectible liberty interest *1234 with respect to such restraint, even though they are generally subject to greater restriction of their freedom by virtue of their minority. (*Schall v. Martin*, supra, 467 U.S. at p. 265, 104 S.Ct. at p. 2410.) Moreover, while juveniles do not ipso facto possess the same constitutional rights as adults (see, e.g., *New Jersey v. T.L.O.*, supra, 469 U.S. at p. 342, fn. 8, 105 S.Ct. at p. 743, fn. 8), it is now a settled proposition that the “promptness” requirement of *Gerstein v. Pugh*, supra, 420 U.S. at pages 111-116, 95 S.Ct. at pages 861-864, embraces all warrantless detentions regardless of the detainee’s age. (See, e.g., *R.W.T. v. Dalton* (8th Cir.1983) 712 F.2d 1225, 1230; *Moss v. Weaver* (5th Cir.1976) 525 F.2d 1258, 1259-1260.) The question remains, however, to quantify the mandate of *Gerstein* for juveniles as the United States Supreme Court has done for adults in *McLaughlin*, supra, 500 U.S. at page ---, 111 S.Ct. at page 1670. Although we lack a direct answer, decisions of the high court provide some useful contours to the analytical framework.

In general, the juvenile context is highly relevant in determining whether and to what extent a particular constitutional principle applies to minors. (See, e.g., *Schall v. Martin*, supra, 467 U.S. at p. 265, 104 S.Ct. at p. 2410.) Depending upon the interest at stake, this circumstance may dictate that juveniles have rights coextensive with adults, may debar them entirely, or may necessitate some modification of rights. (See ***638 *McKeiver v. Pennsylvania*, supra, 403 U.S. at pp. 533-534, 91 S.Ct. at pp. 1980- 1981.)

For example, in *McKeiver v. Pennsylvania*, supra, 403 U.S. 528, 91 S.Ct. 1976, the Supreme Court declined to extend the right of jury trial to juvenile adjudications. (*Id.*, at p. 545, 91 S.Ct. at p. 1986.) In the court’s view, superimposing this requirement on such proceedings would not appreciably enhance the factfinding process, while at the same time it would impair the laudatory, if not always successful, goals of the system. (*Id.*, at pp. 547- 550, 91 S.Ct. at pp. 1987-1989.) On the other hand, the court has ruled that minors are entitled to proof beyond a reasonable doubt (*In re Winship* (1970) 397 U.S. 358, 368, 90 S.Ct. 1068, 1075, 25 L.Ed.2d 368) and the defense of double jeopardy (*Breed v. Jones* (1975) 421 U.S. 519, 531, 95 S.Ct. 1779, 1786, 44 L.Ed.2d 346) to the same extent these guaranties protect adults because “there is little to distinguish” between adjudications and criminal trials relative to the underlying constitutional principles. (*Id.*, at p. 530, 95 S.Ct. at p. 1786.) In each instance, the minimal infringement on the traditional informality of juvenile proceedings did not outweigh the substantial concerns of the minor in the fair determination of

delinquency and a limitation on multiple hearings. (*Id.*, at pp. 536-539, 95 S.Ct. at pp. 1789-1791; *In re Winship*, supra, 397 U.S. at pp. 366-368, 90 S.Ct. at pp. 1073-1075.)

*1235 In other cases, the Supreme Court has sought to harmonize the protectible interests of minors with their correlative constitutional underpinnings. In the seminal case of *In re Gault* (1967) 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527, it determined that a juvenile’s right to due process when taken into custody for suspected criminal activity included, inter alia, the privilege against self-incrimination. (*Id.*, at p. 55, 87 S.Ct. at p. 1458.) At the same time, the court acknowledged “that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique--but not in principle--depending upon the age of the child and the presence and competence of parents.” (*Ibid.*; see also *id.*, at pp. 33-34, 87 S.Ct. at pp. 1446- 1447 [due process requires notice of charges to juvenile’s parents as well as juvenile]; *Haley v. Ohio* (1948) 332 U.S. 596, 599-601, 68 S.Ct. 302, 303- 305, 92 L.Ed. 224 [admissions and confessions of juveniles require special caution].)

**71 In *New Jersey v. T.L.O.*, supra, 469 U.S. 325, 105 S.Ct. 733, the court considered “what limits, if any, the Fourth Amendment places on the activities of school authorities” who search students. (469 U.S. at p. 332, 105 S.Ct. at p. 737.) Although schoolchildren have an expectation of privacy (*id.*, at pp. 337-339, 105 S.Ct. at pp. 740-742), the need to maintain order in the classroom “requires some easing of the restrictions to which searches by public authorities are ordinarily subject.” (*Id.*, at p. 340, 105 S.Ct. at p. 742.) Thus, in striking the balance of reasonableness, considerations unique to their particular circumstance qualified the scope of constitutional protection available to juveniles.

Regardless of its ultimate conclusion in these cases, the Supreme Court has continually emphasized in its analyses the need to maintain a measure of flexibility to accommodate the special attention with which our society still endeavors to treat youthful offenders. (See, e.g., *New Jersey v. T.L.O.*, supra, 469 U.S. at p. 340, 105 S.Ct. at p. 742; *Breed v. Jones*, supra, 421 U.S. at p. 540, 95 S.Ct. at p. 1791; *McKeiver v. Pennsylvania*, supra, 403 U.S. at p. 547, 91 S.Ct. at p. 1987.) I believe this concern to maximize individualized response is particularly relevant to the question of probable cause determinations because the detention of juveniles implicates additional considerations related to their minority. (See, ante, pp. 627-629 of 26 Cal.Rptr.2d pp. 60-62 of 865 P.2d.) It also segues with the explicit premise of the Fourth Amendment, which proscribes only “unreasonable” seizures. (Cf. *New Jersey v. T.L.O.*, supra, 469 U.S. at pp. 340-341, 105 S.Ct. at pp. 742- 743.)

These collateral matters do not necessarily preclude probable cause determinations within a shorter period; indeed, as both Justice Mosk and Justice George argue in their dissents, ***639 every effort should be made to minimize the *1236 period of detention at this juncture in the adjudicatory process. Nevertheless, they provide a rational basis on which

to premise some latitude beyond the 48-hour limit delineated in *McLaughlin*. (Cf. *Schall v. Martin*, supra, 467 U.S. at pp. 265-266, 104 S.Ct. at pp. 2410-2411.) Moreover, even with respect to adult detentions, the Supreme Court has reiterated that “probable cause determinations must be prompt--not immediate” to maintain a necessary measure of “ ‘flexibility’ and ‘experimentation’ ” within each state’s criminal justice system. (*McLaughlin*, supra, 500 U.S. at p. ---, 111 S.Ct. at p. 1669; see *Gerstein v. Pugh*, supra, 420 U.S. at p. 123, 95 S.Ct. at p. 867.) These latter considerations are all the more significant in the juvenile justice system, which seeks to provide intervention and rehabilitation, not simply punishment. (See, e.g., *Welf. & Inst.Code*, § § 626, 626.5, 628, 628.1.)

I therefore conclude that under the Fourth Amendment the circumstances of a juvenile differ sufficiently from those of an adult that the “promptness” requirement of *Gerstein v. Pugh*, supra, 420 U.S. 103, 95 S.Ct. 854, is satisfied if a juvenile detainee is provided a probable cause determination within 72 hours following a warrantless arrest with no extension of time for nonjudicial days. (Cf. *McLaughlin*, supra, 500 U.S. at p. ---, 111 S.Ct. at p. 1671 [“Under *Gerstein*, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly.”].)

MOSK, Justice, dissenting.

The Fourth Amendment to the United States Constitution--one of the core provisions of the Bill of Rights--declares: “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” [FN1]

FN1. The Fourth Amendment, of course, is applicable to the states through the due process clause of the Fourteenth Amendment. (*Wolf v. Colorado* (1949) 338 U.S. 25, 27-28, 69 S.Ct. 1359, 1360-1361, 93 L.Ed. 1782, overruled on another point, *Mapp v. Ohio* (1961) 367 U.S. 643, 643- 660, 81 S.Ct. 1684, 1684-1694, 6 L.Ed.2d 1081.)

In *Gerstein v. Pugh* (1975) 420 U.S. 103, 111-116, 123-125, 95 S.Ct. 854, 861-864, 867-869, 43 L.Ed.2d 54 (hereafter sometimes *Gerstein*), the United States Supreme Court held **72 that the Fourth Amendment mandates, as a prerequisite to extended restraint of liberty, a prompt judicial determination that there is probable cause to believe that a person has in fact committed a criminal offense following a warrantless arrest based on suspicion thereof.

*1237 In *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, ---, 111 S.Ct. 1661, 1670, 114 L.Ed.2d 49 (hereafter sometimes *McLaughlin*), the court defined “promptness” under *Gerstein* as generally within 48 hours of the warrantless arrest.

Thus, under the Fourth Amendment as construed by *Gerstein* and *McLaughlin*, a law-abiding person wrongfully arrested without a warrant is guaranteed his freedom within about 48 hours.

Today, a majority of this court refuse to honor that guaranty when the person in question happens to be a juvenile.

I cannot join in such a breach of our constitutional obligation.

I

On July 25, 1991, petitioner Alfredo A. submitted a petition for writ of habeas corpus to the Court of Appeal for the Second Appellate District. His allegations were to the following effect.

On July 24, 1991, petitioner, who was then 16 years of age, was arrested in Los Angeles without a warrant for possession of cocaine base for sale. (*Health & Saf.Code*, § 11351.5.) He was placed in the custody of the probation department in juvenile hall. He was, or would soon be, restrained of his liberty in violation of the Fourth Amendment without a prompt judicial probable cause determination ***640 within 48 hours of his warrantless arrest, as required by *Gerstein* and *McLaughlin*. As a general matter, the juvenile court law (*Welf. & Inst.Code*, § 200 et seq.) does not mandate such a determination for a juvenile. It does, however, specify a formal, adversarial probable cause or “detention” hearing as many as seven days after a juvenile’s warrantless arrest. (*Id.*, § 632 et seq.) The superior court sitting as the juvenile court had earlier adopted as its “official position”-- in accordance with a requested opinion by the county counsel based on *Schall v. Martin* (1984) 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (hereafter sometimes *Schall*)--that *Gerstein*’s promptness requirement, at least as defined by *McLaughlin*, is not applicable to juveniles.

Through these allegations, petitioner effectively made a “systemic” Fourth Amendment challenge to the superior court’s “official position.” In his prayer for relief, he sought immediate release from custody or an immediate judicial probable cause determination.

On July 26, 1991, Division Three of the Court of Appeal for the Second Appellate District caused its clerk to issue an order (1) deeming petitioner’s *1238 submission to be a petition for writ of mandate against the superior court and (2) directing that court to show cause why a peremptory writ of mandate should not issue compelling it to comply with *Gerstein*’s promptness requirement, as defined by *McLaughlin*, with regard to juveniles as well as adults. The superior court subsequently filed opposition as respondent.

Also on July 26, 1991, the People submitted a petition to the juvenile court to declare petitioner a ward of the court. (*Welf. & Inst.Code*, § 602.) They alleged that he came within its jurisdiction on the ground that on July 24, 1991, he was in possession of cocaine (*Health & Saf.Code*, § 11351) and cocaine base (*id.*, § 11351.5) for sale.

On July 29, 1991, petitioner was brought to the juvenile court and released from custody, apparently because the probation department had not submitted a detention report. He waived time for arraignment. The matter was then continued to August 19, 1991. Further proceedings, if any, are not reflected in the record.

On December 5, 1991, rejecting petitioner's systemic Fourth Amendment challenge to the superior court's "official position," the Court of Appeal denied his petition. At the outset, it determined that the issue presented, even though moot as to petitioner because of his release from custody, remained suitable for resolution because, in words it quoted from Gerstein, the underlying question was "'capable of repetition, yet evading review.'" **73(Gerstein v. Pugh, supra, 420 U.S. at p. 110, fn. 11, 95 S.Ct. at p. 861, fn. 11.) It then set out to answer the question posed, viz., whether the superior court's "official position" is contrary to the Fourth Amendment as construed by Gerstein and McLaughlin, by addressing a question not posed, viz., whether the juvenile court law is compatible with "fundamental fairness" under the Fourteenth Amendment's due process clause as interpreted in Schall. It purported to hold that the superior court's "official position" did not offend the Fourth Amendment.

On January 8, 1992, petitioner filed a petition for review. On February 20, 1992, we granted his request in order to determine whether Gerstein's promptness requirement is applicable to juveniles and, if so, whether McLaughlin's definition of "promptness" operates in this setting. On May 4, 1993, we handed down our original "decision," which comprised four opinions, none commanding more than three votes. On July 15, 1993, we ordered rehearing on our own motion.

II

Before the issue on which this court granted review may properly be resolved, its suitability of resolution must be addressed. Little discussion is *1239 called for. In fact, the words the Court of Appeal quoted from Gerstein are sufficient: the point is "'capable of repetition, yet evading review.'" (Gerstein v. Pugh, supra, 420 U.S. at p. 110, fn. 11, 95 S.Ct. at p. 861, fn. 11.) As the Gerstein court explained: "Pretrial detention is by nature ***641 temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures." (Ibid.)

III

The question before the court is bipartite. Is Gerstein's promptness requirement applicable to juveniles? If so, does McLaughlin's definition of "promptness" operate in this setting?

A

In Gerstein, the United States Supreme Court held that the Fourth Amendment mandates a prompt judicial probable cause determination as a prerequisite to extended restraint of liberty following a warrantless arrest. (Gerstein v. Pugh, supra, 420 U.S. at pp. 111-116, 123-125, 95 S.Ct. at pp. 861-864, 867- 869.)

In reaching this conclusion, the Gerstein court sought to reconcile or at least accommodate an individual's Fourth Amendment rights and the state's legitimate interest in law enforcement. (Gerstein v. Pugh, supra, 420 U.S. at pp. 111-113, 95 S.Ct. at pp. 861-862.)

Under what the Gerstein court called its "practical compromise," "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. [Citations.] Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of *1240 liberty. [Citation.] When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty." (Gerstein v. Pugh, supra, 420 U.S. at pp. 113-114, 95 S.Ct. at pp. 862-863.)

Thus, the Gerstein court made plain that the prompt judicial probable cause determination mandated by the Fourth Amendment **74 must be "prompt" in terms of the time that is required for the state "to take the administrative steps incident to arrest" (Gerstein v. Pugh, supra, 420 U.S. at p. 114, 95 S.Ct. at p. 862), such as booking, photographing, and fingerprinting (County of Riverside v. McLaughlin, supra, 500 U.S. at p. ----, 111 S.Ct. at p. 1671).

The Gerstein court also made plain that this prompt judicial probable cause determination does not require the "full panoply of adversary safeguards" of "counsel, confrontation, cross-examination, and compulsory process..." (Gerstein v. Pugh, supra, 420 U.S. at p. 119, 95 S.Ct. at p. 865.) Rather, "a nonadversary proceeding [based] on hearsay and written testimony" is sufficient. (Id. at p. 120, 95 S.Ct. at p. 866.) "The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. That standard--probable cause to believe the suspect has committed a crime--

traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony....” (Ibid., fn. omitted.) The court noted: “Because the standards [for arrest and detention] are identical, ordinarily there is no need for further investigation before the probable cause determination can be ***642 made.” (Id. at p. 120, fn. 21, 95 S.Ct. at p. 866, fn. 21.)

The Gerstein court “recognize[d] that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State’s pretrial procedure viewed as a whole.” (Gerstein v. Pugh, supra, 420 U.S. at p. 123, 95 S.Ct. at p. 867.) It also “recognize[d] the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect’s first appearance before a judicial officer, [citation], or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some States, existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment....” (Id. at pp. 123-124, 95 S.Ct. at pp. 867-868, fn. omitted.) But it declared: “Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant *1241 pretrial restraint of liberty, and this determination must be made by a judicial officer ... promptly after arrest” when the arrest itself is made without a warrant. (Id. at pp. 124-125, 95 S.Ct. at pp. 868-869, fn. omitted.)

B

In *McLaughlin*, the United States Supreme Court undertook to define “promptness” under Gerstein. (*County of Riverside v. McLaughlin*, supra, 500 U.S. at p. ----, 111 S.Ct. at p. 1665.) The facts there are similar to those here. At issue was Riverside County’s policy of combining judicial probable cause determinations with its arraignment procedures, which resulted in a delay of as many as seven days after a person’s warrantless arrest. The Courts of Appeals were in conflict as to the meaning of “promptness.” The Fourth, Seventh, and Ninth Circuits declared or suggested that a judicial probable cause determination is “prompt” only if it is provided immediately after the state has “take[n] the administrative steps incident to arrest” (*Gerstein v. Pugh*, supra, 420 U.S. at p. 114, 95 S.Ct. at p. 863). (See *Fisher v. Washington Metro. Area Transit Authority* (4th Cir.1982) 690 F.2d 1133, 1139-1140; *Llaguno v. Mingey* (7th Cir.1985) 763 F.2d 1560, 1567-1568 (in bank); *McLaughlin v. County of Riverside* (9th Cir.1989) 888 F.2d 1276, 1278, vacated sub nom. *County of Riverside v. McLaughlin*, supra, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49.) The Second Circuit held against the requirement of “immediacy.” (See *Williams v. Ward* (2d Cir.1988) 845 F.2d 374, 385-386.)

The *McLaughlin* court adhered to, and indeed reaffirmed, the holding of Gerstein that the Fourth Amendment mandates

a prompt judicial probable cause determination as a prerequisite to extended restraint of liberty following a warrantless arrest. **75(*County of Riverside v. McLaughlin*, supra, 500 U.S. at pp. ---- - ----, 111 S.Ct. at pp. 1667-1669.)

The *McLaughlin* court also remained faithful to Gerstein’s view that “promptness” must be measured in terms of the time that is required for the state “to take the administrative steps incident to arrest” (*Gerstein v. Pugh*, supra, 420 U.S. at p. 114, 95 S.Ct. at p. 863). (See *County of Riverside v. McLaughlin*, supra, 500 U.S. at p. ----, 111 S.Ct. at p. 1671.) In its own words: “Under Gerstein, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly. This necessarily means that only certain proceedings are candidates for combination. Only those proceedings that arise very early in the pretrial process--such as bail hearings and arraignments--may be chosen.” (Id. at p. ----, 111 S.Ct. at p. 1671.) The reason is plain. To allow “promptness” to be defined with *1242 reference to other “steps” that a state might desire to “take” beyond those “incident to arrest”--for example, the holding of a preliminary examination--would render the requirement nugatory. A federal constitutional mandate that is designed to constrain the states cannot be dependent on ***643 the individual policy choices that any given state might happen to make.

All the same, the *McLaughlin* court recognized that the bare mandate of a “prompt” judicial probable cause determination had proved inadequate. It stated: “Unfortunately, as lower court decisions applying Gerstein have demonstrated, it is not enough to say that probable cause determinations must be ‘prompt.’ This vague standard simply has not provided sufficient guidance. Instead, it has led to a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations.” (*County of Riverside v. McLaughlin*, supra, 500 U.S. at p. ----, 111 S.Ct. at p. 1669.)

The *McLaughlin* court declined to hold that a judicial probable cause determination is “prompt” only if it is provided immediately after the state has “take[n] the administrative steps incident to arrest” (*Gerstein v. Pugh*, supra, 420 U.S. at p. 114, 95 S.Ct. at p. 862). It stated: “Taking into account the competing interests articulated in Gerstein, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of Gerstein. For this reason, such jurisdictions will be immune from systemic challenges.” (*County of Riverside v. McLaughlin*, supra, 500 U.S. at p. ----, 111 S.Ct. at p. 1670.)

The *McLaughlin* court then added: “This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing [[FN2]] may nonetheless violate Gerstein if the arrested individual can prove that his or her probable cause determination was delayed unreasonably.” (*County of Riverside v. McLaughlin*, supra, 500 U.S. at p. ----, 111 S.Ct. at p.

1670.) But “[w]here an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the *1243 existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.” (Id. 500 U.S. at p. ---, 111 S.Ct. at p. 1670.)

FN2. At this and a few other places in *McLaughlin*, the court referred to a “probable cause hearing” as the subject of *Gerstein*. “But this unfortunate phrase (used much less often than the more accurate term, ‘probable cause determination’) should not be taken to suggest an adversary hearing is required.” (2 *LaFave*, Search and Seizure (2d ed. 1994 pocket supp.) § 5.1, p. 123, fn. 198.4.)

It must be noted that *McLaughlin* was not a unanimous decision. In a dissenting opinion in which Justice Blackmun and Justice **76 Stevens joined, Justice Marshall would have defined “promptness” under *Gerstein* to incorporate the “immediacy” requirement, i.e., a judicial probable cause determination is “prompt” only if it is provided immediately after the state has “take[n] the administrative steps incident to arrest.” (*Gerstein v. Pugh*, supra, 420 U.S. at p. 114, 95 S.Ct. at p. 862; *County of Riverside v. McLaughlin*, supra, 500 U.S. at p. ---, 111 S.Ct. at p. 1671 (dis. opn. of Marshall, J.)) In a separate dissenting opinion, Justice Scalia would have adopted a similar definition. (Id. at pp. --- - ---, 111 S.Ct. at pp. 1672-1675 (dis. opn. of Scalia, J.)) He would also have rejected the court’s “outer time limit” of 48 hours in favor of a line drawn at “certainly no more than 24 hours.” (Id. at p. ---, 111 S.Ct. at p. 1676 (dis. opn. of Scalia, J.)) [FN3]

FN3. In *Jenkins v. Chief Justice of Dist. Court* (1993) 416 Mass. 221, 232, 239 [619 N.E.2d 324, 332, 335], the Supreme Judicial Court of Massachusetts recently held in the course of a scholarly and unanimous opinion that article 14 of the Massachusetts Declaration of Rights, the state constitutional counterpart to the later-adopted Fourth Amendment, “embodies the common law guarantee that a warrantless arrest must be followed by a judicial determination of probable cause no later than reasonably necessary to process the arrest and to reach a magistrate,” and that, “in the usual circumstance, no more than a twenty-four hour time period is needed to reach the magistrate.”

***644 IV

As stated above, the question before this court is whether *Gerstein*’s promptness requirement is applicable to juveniles and, if so, whether *McLaughlin*’s definition of “promptness” operates in this setting.

A

The first issue is the applicability of *Gerstein*’s promptness requirement to juveniles.

Gerstein declares, both expressly and impliedly, from beginning to end, that the Fourth Amendment’s protection extends to “persons” or “individuals.” It does not purport to limit the constitutional guaranty to adults or even to qualify its benefit to juveniles.

*1244 I find no reason within *Gerstein*’s four corners to cabin its conclusion. The *Gerstein* court did not itself choose to restrict the scope of the requirement that it established. I decline to do what it did not.

Neither do I discern outside *Gerstein* any ground to delimit its holding.

It was firmly established almost a decade before *Gerstein* was handed down that “the Bill of Rights is [not] for adults alone.” (In re *Gault* (1967) 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527.)

Indeed, this court itself has expressly held that among the rights of the United States Constitution to which juveniles are entitled “is the guarantee of freedom from unreasonable searches and seizures contained in the Fourth Amendment....” (In re *William G.* (1985) 40 Cal.3d 550, 557, 221 Cal.Rptr. 118, 709 P.2d 1287; accord, e.g., *People v. Chard* (Colo.1991) 808 P.2d 351, 353 [holding that the “constitutional guarantees” to which juveniles are entitled include “protection from unreasonable searches and seizures under the fourth amendment”]; In re *Fingerprinting of Juvenile* (1989) 42 Ohio St.3d 124, 126, 537 N.E.2d 1286 [stating that “it is well-settled that a juvenile is as entitled as an adult to the constitutional protections of the Fourth Amendment”]; *Roberts v. Mills* (1981) 290 Or. 441, 444, 622 P.2d 1094 [holding in substance that the Fourth Amendment covers juveniles as well as adults].)

To be sure, the particular commands and prohibitions of the Fourth Amendment may vary in some respects for adults and juveniles. The basic criterion of the constitutional provision is, of course, “reasonableness.” (E.g., *Florida v. Jimeno* (1991) 500 U.S. 248, ---, 111 S.Ct. 1801, 1803, 114 L.Ed.2d 297 [“The touchstone of the Fourth Amendment is reasonableness.”].)

Whatever differentiation may be justified in some areas for adults and juveniles under the Fourth Amendment is not justified here. In *McLaughlin*, the court predicated *Gerstein*’s promptness requirement on the proposition that “[a] State has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause.” **77(*County of Riverside v. McLaughlin*, supra, 500 U.S. at p. ---, 111 S.Ct. at p. 1669.) This applies to all individuals--whether or not they have attained the age of majority. When probable cause is lacking, detention is unsupported as a matter of law. That proposition does not depend on how old the detainee is. The presence of youth does not make up for the absence of probable cause.

I recognize that the state, as *parens patriae*, may have a legitimate interest in detaining a juvenile for criminal activity prior to trial. That interest, *1245 however, is not served by holding Gerstein's promptness requirement inapplicable. Without question, an adult arrested without probable cause must be released as soon as reasonably possible. The reason: grounds for detention are lacking. So too, a juvenile arrested without probable cause must be released as soon as reasonably possible. The reason is the same. Absent probable cause, the state's exercise of its power to preserve and promote the welfare of the child is without support. For juveniles as for adults, Gerstein's promptness requirement operates to conserve and allocate ***645 resources by limiting the class of detainees to those who are properly subject to detention. Of course, the state, as *parens patriae*, may have a legitimate interest in detaining a juvenile for reasons unrelated to criminal activity. But no such interest is implicated here.

I also recognize that, in detaining a juvenile for criminal activity prior to trial, the state may use means and/or facilities different from those it uses for adults. That fact, however, is not determinative. It simply cannot be said that the restraint of liberty imposed on a juvenile is somehow less significant, in and of itself, than that imposed on an adult. Indeed, "[p]retrial detention is an onerous experience, especially for juveniles..." (Moss v. Weaver (5th Cir.1976) 525 F.2d 1258, 1260, italics added; see *In re William M.* (1970) 3 Cal.3d 16, 30-31, 89 Cal.Rptr. 33, 473 P.2d 737 [to similar effect].)

Moreover, it appears that since Gerstein was decided, all reported decisions that have considered the question to resolution have held or stated, expressly or impliedly, that Gerstein is applicable to all "persons" or "individuals," juveniles as well as adults. (See, e.g., *R.W.T. v. Dalton* (8th Cir.1983) 712 F.2d 1225, 1230 [holding that under Gerstein, "juveniles who are detained because they are suspected of committing criminal acts must be afforded a prompt probable-cause hearing"--thereby deciding a question left open in *United States v. Allen* (8th Cir.1978) 574 F.2d 435, 439 & fn. 11]; *Moss v. Weaver*, supra, 525 F.2d at pp. 1259-1260 [holding that Gerstein's promptness requirement is applicable to juveniles]; *JV-114246 v. Superior Court* (Ct.App.1988) 159 Ariz. 357, 358, 767 P.2d 705, 706 [same], following *Bell v. Superior Court in & for Cty. of Pima* (Ct.App.1977) 117 Ariz. 551, 553-554, 574 P.2d 39, 41, 42 [same]; *J.T. v. O'Rourke* in and for the Tenth Jud. Dist. (Colo.1982) 651 P.2d 407, 409 [holding that under Gerstein, "a juvenile who is detained is entitled to a preliminary [probable cause] hearing by constitutional mandate"]; *Roberts v. Mills*, supra, 290 Or. at p. 444, 622 P.2d at p. 1095 [holding in substance that Gerstein's promptness requirement is applicable to juveniles].)

Therefore, I conclude that Gerstein's promptness requirement is indeed applicable to juveniles.

*1246 B

The second issue is whether McLaughlin's definition of

"promptness" operates in the juvenile setting.

McLaughlin declares, both expressly and impliedly, from beginning to end, that its definition of "promptness" extends to "probable cause determinations" generally. It does not purport to limit its scope to adults or even to qualify its meaning for juveniles.

I do not see in McLaughlin itself any basis to restrict its definition of "promptness" against juveniles. Quite the contrary. The reasoning of the McLaughlin court is premised on an assessment that the "undefined" promptness requirement of Gerstein is simply too "vague" a "standard." (*County of Riverside v. McLaughlin*, supra, 500 U.S. at p. ----, 111 S.Ct. at p. 1669.) That assessment holds as true for juvenile proceedings relating to minors as for criminal actions involving adults. Perhaps truer. For if "it **78 is not enough to say that probable cause determinations must be 'prompt' " for criminal actions (id. at p. ----, 111 S.Ct. at p. 1669), which are governed by a procedural law that is relatively well defined, a fortiori it is not nearly enough for juvenile proceedings, which are guided by norms of another sort. Similarly, if the "undefined" promptness requirement has already "led to a flurry of systemic challenges to city and county practices [in criminal actions], putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations" (id. at p. ----, 111 S.Ct. at p. 1669), it will surely lead to like challenges in juvenile proceedings--of which the present is, apparently, only the first-- involving the state judiciary as well as the federal in matters that belong largely to the other branches of government.

***646 Neither do I discover any support outside McLaughlin to condition its definition of "promptness" against juveniles. As stated, juveniles as well as adults are entitled to the protections of the Fourth Amendment. As also stated, the basic criterion of the constitutional provision is "reasonableness." The definition articulated by the McLaughlin court serves to give content to this test. No reason appears to deny its benefit to juveniles. Unquestionably, "it is not enough to say that probable cause determinations must be 'prompt' " (*County of Riverside v. McLaughlin*, supra, 500 U.S. at p. ----, 111 S.Ct. at p. 1669) when the state acts as enforcer of the criminal law for the sake of the community generally. The same is true when the state acts as *parens patriae* for the benefit of the child. The word "prompt" is no less "vague" in the latter situation than in the former. As noted, under the Fourth Amendment as construed by Gerstein and McLaughlin, a law-abiding person wrongfully arrested without a warrant is guaranteed *1247 his freedom within about 48 hours. It would be unreasonable to hold that when the person in question happens to be a juvenile, the guaranty is illusory.

Therefore, I conclude that McLaughlin's definition of "promptness" does in fact operate in the juvenile setting.

C

In conducting my analysis, I have not overlooked *Schall v. Martin*, supra, 467 U.S. 253, 104 S.Ct. 2403, which was decided nine years after *Gerstein* and seven years before *McLaughlin*.

In *Schall*, the United States Supreme Court held that a section of the New York Family Court Act was not invalid under the due process clause of the Fourteenth Amendment. (*Schall v. Martin*, supra, 467 U.S. at pp. 256-257, 263-281, 104 S.Ct. at pp. 2405-2406, 2409-2418.) The provision in question authorized court-ordered “preventive detention” of a juvenile accused of delinquency, i.e., pretrial detention based on a judicial finding that there is a “serious risk” that the juvenile “may before the return date commit an act which if committed by an adult would constitute a crime.” (Id. at p. 255, 104 S.Ct. at p. 2405.) The court expressly noted that the propriety of detention based on a warrantless arrest was “not at issue”: the sole question concerned “judicially ordered detention.” (Id. at p. 258, fn. 5, 104 S.Ct. at p. 2406, fn. 5, italics added.)

In scrutinizing the New York statutory scheme, the *Schall* court asked whether the authorization of court-ordered preventive detention was compatible with “fundamental fairness” under the Fourteenth Amendment’s due process clause. (*Schall v. Martin*, supra, 467 U.S. at p. 263, 104 S.Ct. at p. 2409.) It identified two subsidiary inquiries. First, did court-ordered preventive detention under the statutory provision serve a legitimate state objective? (Id. at pp. 263-264, 104 S.Ct. at pp. 2409-2410.) Second, were the procedural safeguards contained therein adequate against erroneous and unnecessary restraints of liberty? (Id. at p. 264, 104 S.Ct. at p. 2409.)

At the outset, the *Schall* court observed: “There is no doubt that the Due Process Clause is applicable in juvenile proceedings. ‘The problem ... is to ascertain the precise impact of the due process requirement upon such proceedings.’” (*Schall v. Martin*, supra, 467 U.S. at p. 263, 104 S.Ct. at p. 2409.) It went on: “[C]ertain basic constitutional protections enjoyed by adults accused of **79 crimes also apply to juveniles. [Citations.] But the Constitution does not mandate elimination of all differences in the treatment of *1248 juveniles. [Citation.] The State has ‘a *parens patriae* interest in preserving and promoting the welfare of the child,’ [citation], which makes a juvenile proceeding fundamentally different from an adult criminal trial.” (Ibid.) In view thereof, it had “tried ... to strike a balance—to respect the ‘informality’ and ‘flexibility’ that characterize juvenile proceedings, [citation], and yet to ensure that such proceedings comport with the ‘fundamental fairness’ demanded by the Due Process Clause.” (Ibid.)

The *Schall* court concluded that the New York statutory scheme with its authorization ***647 of court-ordered preventive detention was indeed compatible with “fundamental fairness” under the Fourteenth Amendment’s due process clause. It did so because it answered each of the two subsidiary inquiries in the affirmative.

First, the *Schall* court held that court-ordered preventive detention under the New York statutory scheme served the

legitimate state objective of protecting both society and the juvenile from the hazards of pretrial crime. (*Schall v. Martin*, supra, 467 U.S. at pp. 264-274, 104 S.Ct. at pp. 2409-2415.) On this point, it explained that in aiming at such protection, the state undertook to act as enforcer of the criminal law for the sake of the community generally and also as *parens patriae* for the benefit of the child. (Id. at pp. 264-266, 104 S.Ct. at pp. 2409-2410.)

Second, the *Schall* court held that the procedural safeguards contained in the New York statutory scheme were adequate against erroneous and unnecessary restraints of liberty. (*Schall v. Martin*, supra, 467 U.S. at pp. 274-281, 104 S.Ct. at 2415-2419.) In this regard, it observed that under both the Fourth Amendment as construed by *Gerstein* and the Fourteenth Amendment’s due process clause as interpreted in various decisions involving juvenile proceedings, there was a common concern with “flexibility” and “informality.” (Id. at p. 275, 104 S.Ct. at 2415.) It indicated that *Gerstein* had found certain “flexible procedures,” which included a formal, adversarial probable cause hearing within five days of a warrantless arrest, to be adequate for the Fourth Amendment. (Id. at p. 277 & fn. 28, 104 S.Ct. at p. 2416 & fn. 28.) It made clear that it found similar procedures under the New York statutory scheme, which included a formal, adversarial probable cause hearing within at most nine days of a warrantless arrest, to be sufficient for the Fourteenth Amendment’s due process clause.

After even brief consideration, it becomes plain that *Schall* does not affect the conclusion that *Gerstein*’s promptness requirement is indeed applicable to juveniles and that *McLaughlin*’s definition of “promptness” does in fact operate in this setting.

*1249 “It is axiomatic,” of course, “that cases are not authority for propositions not considered.” (*People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7, 82 Cal.Rptr. 724, 462 P.2d 580; accord, *McDowell & Craig v. City of Santa Fe Springs* (1960) 54 Cal.2d 33, 38, 4 Cal.Rptr. 176, 351 P.2d 344.)

To begin with, *Schall* is based on the Fourteenth Amendment’s due process clause. *Gerstein* and *McLaughlin*, by contrast, rest on the Fourth Amendment. Indeed, the *Schall* court effectively declared that its reach did not extend to the Fourth Amendment question presented here when it expressly noted that it was solely concerned with “judicially ordered detention.” (*Schall v. Martin*, supra, 467 U.S. at p. 258, fn. 5, 104 S.Ct. at p. 2406, fn. 5, italics added.) Moreover, the *Schall* court referred only to formal, adversarial probable cause hearings, and not the informal, nonadversarial judicial probable cause determinations discussed in *Gerstein* and *McLaughlin*. Lastly, and perhaps most important, the *Schall* court dealt with a situation in which the juvenile was already detained pursuant to court order—unlike the situation here, where he was not.

To be sure, at one point in its opinion the *Schall* court stated: “In *Gerstein* ..., we held that a judicial determination of probable cause is a prerequisite to any extended restraint on the liberty of an adult accused of crime.” (*Schall v. Martin*, supra, 467 U.S. at pp. 274-275, 104 S.Ct. at pp. 2415-2416, italics

added to “adult.”) And at another point: “In many respects, the [New York **80 statutory scheme] provides far more pre-detention protection for juveniles than we found to be constitutionally required for a probable-cause determination for adults in *Gerstein*.” (Id. at p. 275, 104 S.Ct. at p. 2415, italics added to “adults.”)

The Schall court’s dicta, isolated and irrelevant as they are, cannot reasonably be read as an after-the-fact attempt to limit *Gerstein* to adults, but must be viewed merely as a reflection of the general factual context out of which *Gerstein* arose. Indeed, it appears ***648 that no reported decision—with the singular exception of the opinion of the Court of Appeal below—has construed these words to impose such a limitation. This is certainly true of *McLaughlin*. In that case, the court could easily have used this language, which was cited by the parties and amici curiae therein, to limit *Gerstein* to adults. Conspicuously, it did not do so.

It can perhaps be argued that there is tension between Schall and *McLaughlin*. The former implies that a formal, adversarial probable cause hearing within at most nine days of the warrantless arrest of a juvenile who is already in court-ordered preventive detention suffices for the Fourteenth Amendment’s due process clause. By contrast, the latter holds that a judicial *1250 probable cause determination, albeit informal and nonadversarial, is required by the Fourth Amendment generally within 48 hours of a warrantless arrest.

Any such tension, however, must necessarily be resolved in favor of the later-decided *McLaughlin* and against the earlier-decided Schall. By its terms, the Schall implication depends on *Gerstein*’s “undefined” promptness requirement and *Gerstein*’s consequent approval of a delay of five days between a warrantless arrest and a formal, adversarial probable cause hearing. The *McLaughlin* holding, however, expressly defines “promptness” as generally within 48 hours and thereby withdraws approval of a 5-day delay. Therefore, the Schall implication simply does not survive the *McLaughlin* holding.

In conducting my analysis, I have also not overlooked *Reno v. Flores* (1993) 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (hereafter *Flores*).

In *Flores*, the United States Supreme Court rejected a constitutional challenge, based solely on the due process clause of the Fifth Amendment, to an Immigration and Naturalization Service regulation governing the detention of allegedly deportable alien juveniles. It cited Schall. But it did not even allude to the Fourth Amendment, less still *Gerstein* or *McLaughlin*. That, of course, is not surprising. It appears that deportable aliens are not even within the protection of the Fourth Amendment. In *United States v. Verdugo-Urquidez* (1990) 494 U.S. 259, 265, 110 S.Ct. 1056, 1060, 108 L.Ed.2d 222, the court stated, albeit only in dictum, that “ ‘the people’ protected by the Fourth Amendment ... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community”—among whom

deportable aliens do not seem to number.

Since a case, like Schall, is not authority for a proposition it did not consider, a fortiori, a case, like *Flores*, cannot be authority for a proposition it could not have considered.

V

Like the Court of Appeal below, the lead opinion sets out to answer the question posed—viz., whether the superior court’s “official position” that *Gerstein*’s promptness requirement, at least as defined by *McLaughlin*, is not applicable to juveniles, is contrary to the Fourth Amendment as construed by those decisions—by addressing a question not posed—viz., whether the juvenile court law is compatible with “fundamental fairness” under the Fourteenth Amendment’s due process clause as interpreted in Schall. The *1251 fatal flaw of such analysis is evident: it is altogether nonresponsive. The lead opinion may just as well have attempted to determine whether the superior court’s “official position” is contrary to the Fourth Amendment by considering whether the juvenile court law violates the Eighth Amendment’s prohibition against cruel and unusual punishments.

Perhaps the lead opinion means to declare that whether and to what extent the Fourth **81 Amendment is applicable to juveniles in the juvenile setting somehow implicates the due process clause of the Fourteenth Amendment. No reason or authority is presented in support of such a proposition. None is evident. The coverage of the Fourth Amendment, of course, is determined by the ***649 Fourth Amendment. True, the guaranty of due process protects those who have not attained the age of majority. But it protects as well those who have.

The lead opinion is much taken with Schall. Too much so.

The lead opinion implies that Schall is “authoritative” on the Fourth Amendment standards governing the detention of juveniles. But at most, it is such only as to court-ordered preventive detention. Detention of that sort, however, is not what is involved here. The lead opinion attempts to avoid the limited scope of Schall. But it trips on the opinion’s very words: the propriety of detention based on a warrantless arrest was “not at issue”; the sole question concerned “judicially ordered detention.” (*Schall v. Martin*, supra, 467 U.S. at p. 258, fn. 5, 104 S.Ct. at p. 2406, fn. 5, italics added.)

The lead opinion also implies that Schall requires examination of “all the procedural components” of the juvenile court law because Schall itself examined “all the procedural components” of the New York Family Court Act. (Lead opn., ante, at p. 632 of 26 Cal.Rptr.2d, p. 22 of 865 P.2d.) That is not so. Schall’s consideration of the New York statute was dictated solely by the fact that, in that case, the statute had been challenged as invalid under the due process clause of the Fourteenth Amendment. The juvenile court law is not challenged here at all.

Lastly, the lead opinion assumes that the “authority” of Schall is unaffected by *McLaughlin*. But, as explained, in part

relevant here the earlier-decided Schall does not even survive the later-decided McLaughlin.

The lead opinion then suggests that Gerstein's promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because in juvenile proceedings the state assertedly acts as *parens patriae* to preserve and promote the welfare of the child, whereas in criminal actions it acts as enforcer of the criminal law to mete out punishment.

*1252 Even if the lead opinion's premise is sound, its conclusion is simply incorrect. Whenever the state predicates detention on criminal activity--in whatever proceeding, under whatever role, or for whatever objective--probable cause is crucial for Fourth Amendment purposes. And whenever probable cause is crucial, Gerstein's promptness requirement, as defined by McLaughlin, is applicable. A prompt judicial probable cause determination generally within 48 hours of a juvenile's warrantless arrest--a determination that may be informal and nonadversarial--is altogether consistent with the juvenile court law, the goals of which include the expeditious resolution of issues in a relatively open and cooperative setting.

I recognize that under the juvenile court law, the state may detain a juvenile for reasons unrelated to criminal activity--although only in a separate nonsecure facility segregated from those suspected of crime (Welf. & Inst.Code, § 206)--as when the minor appears in public suffering from a sickness or injury that requires care (*id.*, § 305, subd. (d)). In such a situation, Gerstein and McLaughlin are not implicated by their very terms. But such a situation does not obtain here.

In a word, when the state detains a person for criminal activity, it must establish probable cause. It is now settled that "[a] State has no legitimate interest in detaining ... individuals who have been arrested without probable cause" generally beyond 48 hours. (*County of Riverside v. McLaughlin*, *supra*, 500 U.S. at p. ---, 111 S.Ct. at p. 1669, italics added.) It is inconceivable that a "legitimate interest" could somehow spring into being when the individual in question turns out to be a juvenile.

The lead opinion also suggests that Gerstein's promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because their interest in freedom from restraint of liberty under the Fourth Amendment is assertedly less substantial than that of adults. But as stated, the basic **82 criterion of the constitutional provision is "reasonableness." Extended restraint for a ***650 criminal offense in the absence of probable cause is no more reasonable for juveniles than adults. Arguably less so. In California at least, adults generally have the right to release on bail. (See Cal.Const., art. I, § 12; Pen.Code, § 1268 et seq.) Juveniles do not. (*Aubry v. Gadbois* (1975) 50 Cal.App.3d 470, 471-475, 123 Cal.Rptr. 365 (per Kaus, P.J.) [rejecting claims substantially based on, among other provisions, Cal.Const., art. I, § 12, and Pen.Code, § 1268 et seq.]) "[D]etaining ... individuals who have been arrested without probable cause" beyond 48 hours is presumptively unreasonable. (*County of Riverside v. McLaughlin*, *supra*, 500 U.S. at p. ---, 111 S.Ct. at p. 1669.) It is unexplained how the

individual's status as a juvenile can change the rule.

*1253 Similarly, the lead opinion suggests that Gerstein's promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because restraint of liberty under the juvenile court law is assertedly more limited than restraint of liberty under the criminal law. But what matters for Gerstein and McLaughlin is the fact of restraint and not its character. Indeed, as the Gerstein court itself observed, "Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty." (*Gerstein v. Pugh*, *supra*, 420 U.S. at p. 114, 95 S.Ct. at p. 863, italics added.)

Most prominently, I believe, the lead opinion suggests that Gerstein's promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because the juvenile court law assertedly has more "procedural safeguards" than the criminal law. The short answer is that none of these "protections" even purports to be an equivalent for a prompt judicial probable cause determination. Indeed, the provisions cited by the lead opinion generally relate to the disposition of the detained juvenile within the juvenile system. They do not primarily concern whether the juvenile ought to have been detained within the system in the first place. That is the function of a prompt judicial probable cause determination. The cited "procedural safeguards" "protect" the juvenile who has been arrested without probable cause in much the same way as prison health and safety regulations "protect" an inmate who has been wrongfully convicted. They are too little, too late. In brief, they simply do not guarantee that a law-abiding juvenile wrongfully arrested without a warrant will regain his freedom within about 48 hours.

I acknowledge that in certain instances the probation officer appears obligated to investigate the question of probable cause. But, by definition, the prompt judicial probable cause determination mandated by the Fourth Amendment as construed by Gerstein and McLaughlin must be made by a judicial officer. Obviously, the probation officer is not such. He has responsibility to law enforcement, seeing that he is possessed of the "powers and authority conferred by law upon peace officers...." (Welf. & Inst.Code, § 283.) The United States Supreme Court expressly recognized as much in *Fare v. Michael C.* (1979) 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197, which dealt with the status of the probation officer under the juvenile court law. "[T]he probation officer is the employee of the State which seeks to prosecute the alleged offender. He is a peace officer, and as such is allied, to a greater or lesser extent, with his fellow peace officers. He owes an obligation to the State, notwithstanding the obligation he may also owe the juvenile under his supervision. In most cases, the probation officer is duty bound to report wrongdoing by the juvenile when it comes to his attention, even if by communication from the juvenile himself." (*Id.* at p. 720, 99 S.Ct. at p. 2569; accord, *1254 *In re Michael C.* (1978) 21 Cal.3d 471, 478-479, 146 Cal.Rptr. 358, 579 P.2d 7 (conc. opn. of Mosk, J.), *revd.* on other grounds sub nom. *Fare v. Michael C.*, *supra*, 442 U.S. 707, 99 S.Ct. 2560.) The probation officer's "responsibility to law enforcement is inconsistent with the

constitutional role of a neutral and detached magistrate.” (Gerstein v. Pugh, supra, 420 U.S. at p. 117, 95 S.Ct. at p. 864.)

***651 What the lead opinion may mean to suggest in alluding to the “procedural safeguards” of the juvenile court law is that, in Gerstein’s words, “existing procedures ... satisfy the requirement of the Fourth **83 Amendment.” (Gerstein v. Pugh, supra, 420 U.S. at p. 124, 95 S.Ct. at p. 868.) If it does, it is wrong. As stated, the cited “protections” simply do not guarantee that a law-abiding juvenile wrongfully arrested without a warrant will regain his freedom within about 48 hours.

The lead opinion next suggests that Gerstein’s promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because it is assertedly incompatible with the “ ‘informality’ and ‘flexibility’ that characterize juvenile proceedings....” (Schall v. Martin, supra, 467 U.S. at p. 263, 104 S.Ct. at p. 2409.) No such incompatibility, however, is apparent.

Plainly, the “informality” and “flexibility” of juvenile proceedings--both in American jurisdictions generally and in California specifically--are designed to make the process more expeditious than that of criminal actions, not less. The review by the lead opinion proves the point as to the juvenile court law. Thus, if any colorable attack could be mounted against McLaughlin’s definition of “promptness,” it would be that it is too long, not too short.

Further, it is evident that a prompt judicial probable cause determination generally within 48 hours of a juvenile’s warrantless arrest--like similar determinations routinely and quickly made on application for an arrest warrant--can readily be accommodated. I note that in a case such as this, the arresting officer must presently prepare a “concise written statement of ... probable cause” “without necessary delay”--and specifically within 24 hours if the criminal offense in question is a misdemeanor. (Welf. & Inst.Code, § 626, subd. (d).) I also note, in words from Gerstein, that “[b]ecause the standards [for arrest and detention] are identical, ordinarily there is no need for further investigation before the [judicial] probable cause determination can be made.” (Gerstein v. Pugh, supra, 420 U.S. at p. 120, fn. 21, 95 S.Ct. at p. 866, fn. 21.) Evidently, a longer “period of detention” is not required for the state “to take the administrative steps incident to arrest” for a juvenile than for an adult. (Id. at p. 114, 95 S.Ct. at p. 862.) Indeed, at oral argument on rehearing, counsel for respondent effectively conceded the point: a judicial probable cause determination, he admitted, is “not ... difficult” to make.

*1255 It may be true, as the lead opinion asserts, that “when a minor is detained on suspicion of criminal activity, in contrast to an adult detained under similar circumstances, the inquiry into the propriety of the extended detention is much broader in scope”--and more “complex”--“than a determination, in the strict Fourth Amendment sense, of whether ‘factual’ probable cause exists to believe the minor committed the crime for which he was taken into custody.” (Lead opn., ante, at pp. 628, 629 of 26 Cal.Rptr.2d, pp. 61, 62, of 865 P.2d.) That this “inquiry” may be “broader” and more

“complex” than probable cause is a result of the Legislature’s policy choice and not federal constitutional compulsion. But this “inquiry” does indeed depend on probable cause narrowly and simply defined.

It may also be true, as the lead opinion asserts, that the so-called “factual probable cause determination is but one component of the broader inquiry....” (Lead opn., ante, at p. 631 of 26 Cal.Rptr.2d, p. 64 of 865 P.2d, italics omitted.) But this “component” is the first to be decided both in time and in logic.

To repeat: “A state has no legitimate interest in detaining ... individuals who have been arrested without probable cause” generally beyond 48 hours (County of Riverside v. McLaughlin, supra, 500 U.S. at p. ---, 111 S.Ct. at p. 1669, italics added)--whether or not such individuals have attained the age of majority. Surely, the state may have a “legitimate interest” in continuing to detain juveniles who have been arrested without probable cause beyond 48 hours when there exists a supported basis for doing so separate and independent from the unsupported suspicion of criminal activity, as for example the ***652 presence of sickness or injury that requires care (see Welf. & Inst.Code, § 305, subd. (d)). In such cases, the state may continue to detain without implicating Gerstein and McLaughlin.

**84 The foregoing assessment of the feasibility of a prompt judicial probable cause determination generally within 48 hours of a juvenile’s warrantless arrest is confirmed by experience. Petitioner represents, without dispute, that a number of the state’s largest counties, including San Diego, Orange, Santa Clara, Sacramento, San Francisco, Fresno, and San Mateo, are successfully providing determinations of this kind. At oral argument on rehearing, counsel for respondent conceded that Los Angeles is doing the same, at least for most juveniles.

The lead opinion then suggests, most curiously, that Gerstein’s promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because the commands laid down by the United States Constitution should yield to the preferences indicated in California law.

Of course, under the supremacy clause, the reverse is true.

*1256 Thus, the state may choose under the juvenile court law to fully investigate the circumstances of a detained juvenile, his parents, and his home before it decides whether and how to release him. (See Welf. & Inst.Code, § 628.) But it cannot extend the juvenile’s detention as it pursues its investigation without a prompt judicial probable cause determination generally within 48 hours of his warrantless arrest--which establishes whether the juvenile should have been detained in the first place. To permit the state to grant itself such an extension would allow it to avoid the promptness requirement entirely--surely an untenable result. To repeat yet again: “A State has no legitimate interest in detaining ... individuals who have been arrested without probable cause” generally beyond 48 hours (County of Riverside v. McLaughlin, supra, 500 U.S. at p. ---, 111 S.Ct. at p. 1669, italics added)--whether or not such individuals have attained the age of majority.

In any case, the state's furtherance of the choices it has decided to pursue under the juvenile court law is not adversely affected by the Fourth Amendment's mandate of a prompt judicial probable cause determination generally within 48 hours of a juvenile's warrantless arrest.

The experience in Orange County appears typical. In a letter in support of the petition for review, the Orange County Public Defender represented that "[i]n response to [McLaughlin], law enforcement agencies ... prepare and submit single page pre-printed forms which, when completed, summarize the basis of a warrantless arrest"; the "arresting agency ... submits a 'probable cause' sheet to Juvenile Hall intake officers when booking a minor"; twice a day when court is in session and once a day when it is not, a judicial officer reviews the "'probable cause' sheets," either directly or over the telephone, and "makes the necessary determination"; "[t]hroughout the foregoing procedures, the minor's normal Juvenile Hall routine is never interrupted or delayed and no changes have been made in this routine as a result of the above McLaughlin procedure"; "[a]t no time is the minor transported to a courtroom or holding area in conjunction with a 'probable cause' determination"; "[a]t no time is the district attorney or public defender's office consulted as to any probable cause determination"; the "determination is non-adversarial and there are no court appearances by the minor, counsel or any law enforcement personnel."

The lead opinion also implies that "promptness" for purposes of the prompt judicial probable cause determination mandated by the Fourth Amendment as construed by Gerstein and McLaughlin may be measured in terms of the time that is required for any given state to "take" whatever "steps" it chooses beyond those "incident to arrest" *1257(Gerstein v. Pugh, supra, 420 U.S. at p. 114, 95 S.Ct. at p. 862). That cannot be. As stated, a federal constitutional mandate that is designed to constrain the states cannot be ***653 dependent on such individual policy choices. Otherwise, that mandate would be rendered empty: each individual state would effectively be allowed to define "promptness" for itself.

One thing remains to be said. And it is important. The lead opinion's reasoning does not express the views of a majority of this court. As a result, its analysis "lacks authority as precedent" **85(Board of Supervisors v. Local Agency Formation Com. (1992) 3 Cal.4th 903, 918, 13 Cal.Rptr.2d 245, 838 P.2d 1198) and hence cannot bind. Therefore, its mischief is limited to this case and to this case alone.

VI

For the reasons stated, I conclude that Gerstein's promptness requirement is indeed applicable to juveniles and that McLaughlin's definition of "promptness" does in fact operate in this setting.

From this conclusion, it follows that petitioner's systemic Fourth Amendment challenge to the superior court's "official position" that Gerstein's promptness requirement, at least as

defined by McLaughlin, is not applicable to juveniles is successful.

I would therefore reverse the judgment of the Court of Appeal with directions to cause issuance of a peremptory writ of mandate compelling the superior court to comply with Gerstein's promptness requirement as defined by McLaughlin with regard to juveniles as well as adults.

In closing, I quote, with minor modifications, Justice Scalia's final words in his dissenting opinion in McLaughlin.

"Justice Story wrote that the Fourth Amendment 'is little more than the affirmance of a great constitutional doctrine of the common law.' [Citation.] It should not become less than that. One hears the complaint, nowadays, that the Fourth Amendment has become constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all. By failing to protect the innocent [juvenile] arrestee, today's [decision] reinforces that view.... Hereafter a law-abiding [juvenile] wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to [three] days--never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made. *1258 In my view, this is the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own." (County of Riverside v. McLaughlin, supra, 500 U.S. at p. ----, 111 S.Ct. at p. 1677 (dis. opn. of Scalia, J.).)

Accordingly, I dissent.

KENNARD and GEORGE, JJ., concur.

GEORGE, Justice, dissenting.

I previously have expressed my view that generally worded constitutional and statutory provisions typically do not lend themselves to application through fixed, mechanical rules established by judicial decree. [FN1] The United States Supreme Court has spoken in the present context, however, holding in County of Riverside v. McLaughlin (1991) 500 U.S. 44, ----, 111 S.Ct. 1661, 1670, 114 L.Ed.2d 49, that a state's criminal statutory scheme does not comply with the Fourth Amendment unless it provides that a "person" (without differentiation between adults and juveniles), arrested and detained without a warrant, will be afforded a judicial determination of probable cause within 48 hours of arrest. That federal constitutional rule is now settled and, of course, binding upon this court.

FN1. With reference to the statutory mandate that an adult suspect be taken before a magistrate for arraignment without unnecessary delay and within two days of arrest, see

Youngblood v. Gates (1988) 200 Cal.App.3d 1302, 1343-1350, 246 Cal.Rptr. 775 (dis. opn. of George, J.).

Although, as the lead opinion recognizes, the procedures constitutionally mandated in juvenile proceedings need not mirror in all respects the procedures required in adult criminal proceedings, I agree with Justice Mosk's conclusion that the People have not identified any state interest that would justify incarcerating a juvenile, detained solely ***654 because law enforcement authorities believe he or she has committed a crime, for a period of time (before according the juvenile an impartial judicial determination of probable cause) longer than the time the state could detain an adult under similar circumstances. Indeed, in this context, I believe the need for a very prompt judicial determination of probable cause may be a more crucial factor in assessing the "reasonableness" of the "seizure" of a juvenile than of an adult, because the consequences of even a relatively brief, **86 wrongful incarceration are likely to be more detrimental and long-lasting to an innocent, vulnerable child than to an innocent adult. (See, e.g., *In re William M.* (1970) 3 Cal.3d 16, 31, fn. 25, 89 Cal.Rptr. 33, 473 P.2d 737.) In my view, the lead opinion's conclusion to the contrary is not supported either by *Schall v. Martin* (1984) 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207, or the very *1259 recent decision in *Reno v. Flores* (1993) 507 U.S. 292, 113 S.Ct. 1439, [123 L.Ed.2d 1], because neither case purported to address the propriety of an extended detention of a juvenile who could be released to the custody of his or her family but has been detained solely because he or she is suspected of committing a crime.

26 Cal.Rptr.2d 623, 6 Cal.4th 1212, 865 P.2d 56

District Court of Appeal of Florida, Fourth District.

J.J., a child, Petitioner,

v.

**Ron FRYER, Superintendent, Broward Regional Juvenile
Detention Center, Respondent.**

No. 4D00-2711

765 So.2d 260

Aug. 15, 2000.

After juvenile's arrest for grand theft auto, the Circuit Court, Broward County, Dorian Damoorgian, J., ordered that juvenile be held in secure detention. Juvenile petitioned for writ of habeas corpus. The District Court of Appeal, Farmer, J., held that trial court's failure to state in writing the reasons for exceeding the risk assessment instrument (RAI) required grant of petition and juvenile's restoration to home detention as provided in RAI.

Writ granted.

*261 Alan H. Schreiber, Public Defender, and Sarah W. Sandler, Assistant Public Defender, Fort Lauderdale, for petitioner.

Robert A. Butterworth, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for respondent.

FARMER, J.

A 13-year old juvenile seeks a writ of habeas corpus to overturn a trial judge's order that he be held in secure detention. The facts underlying his detention began with Hollywood Police spying a 1999 Ford Explorer at a high rate of speed near the central business area of Young Circle. An officer in the vicinity investigating an unrelated accident saw the vehicle with 3 youths in it, petitioner in the front passenger seat. The officer gave chase, siren wailing and blue lights flashing. He pursued the vehicle through residential areas at speeds of up to 65 mph. When he *262 finally caught up with the vehicle in Dania, the 3 youths fled. Petitioner was apprehended soon after. He admitted that he knew the vehicle was stolen but said that the juvenile driving had actually stolen it. Petitioner was charged with grand theft.

The Department of Juvenile Justice (DJJ) prepared a risk assessment instrument (RAI). See § 985.213, Fla. Stat. (1999). It reflected 7 points for the third degree felony of grand theft auto, with an additional point for two prior misdemeanors. He was thereupon released for home detention.

On the day after his arrest, the court conducted a hearing. There was no issue as to probable cause. Initially, the trial court indicated that home detention would be continued. A representative from DJJ noted that petitioner was a codefendant with a case heard just prior to the present case and stated that:

"It's my understanding there are several outstanding issues with some juveniles in that jurisdiction with regard to these auto thefts. Judge, I'm going to ask the Court to consider placing [J.J.] on electronic monitoring if that's possible...."

We have no way of knowing what "several outstanding issues ... with regard to auto thefts" might mean or whether it was intended to convey the thought that petitioner was likely to commit new crimes if not placed in monitoring. We do note that at this point DJJ was not asking for secure detention in spite of the results of its own risk assessment. At that, the court indicated that it would order monitoring.

Defense counsel objected and asked to continue the home detention without any monitor. That prompted petitioner's mother to advise the court that she thought that he and the other two involved juveniles should be detained for the maximum of 21 days. The court noted that his score was 8, and that "aggravation" would be limited to an additional 3 points, still not enough to order secure detention. The court further explained that with monitoring, an electronic signal would be transmitted through the home telephone if petitioner left without authorization. The mother responded that the monitoring devices were not effective, that her other sons were able to avoid these devices and implied that the devices on her phone were an inconvenience to her while of doubtful utility.

DJJ once again weighed in, this time to urge that the trial judge is not limited to a 3-point aggravation, and that the 3-point limit was directed only to DJJ in making the initial risk assessment. DJJ further argued that if there is clear and convincing evidence that petitioner is a danger to himself or to the community, or if he would not appear in court, the court could go outside the 3 point aggravation.

Defense counsel interjected that petitioner's mother did not understand the limitations on detention before final hearing. She pointed out that petitioner has a "very small history," only two misdemeanors and no violent offenses. She argued that there was no legally valid reason to impose secure detention. The assistant state attorney responded that petitioner should be placed in secure detention for the maximum of 21 days because the operation of the vehicle during the flight put "life in jeopardy." Defense counsel noted that petitioner was not the driver, merely a passenger. The assistant state attorney retorted that all the suspects fled when the vehicle was finally stopped, thereby taking him out of the category of a mere passenger, presumably showing instead a purpose to flee from apprehension.

The court now addressed petitioner's mother again, inquiring as to his regular behavior: whether he listened to his mother, talked back to her, refused to do what he was asked to do, was disrespectful, or stayed out late at night. To all of these, mother answered "No." She added that she did not know "how he got out with this crowd." She explained that her two other sons had gotten into trouble and no one helped her. She stated that "by letting *263 [J.J.] get away with this, he might do something worse." The court replied that he could be held in secure detention for 21 days at most. Mother responded:

"That's OK with me, long as he knows what--that he can't go out and keep doing these things. Keep letting those kids go is the reason why they keep doing these things right now."

In context, this last sentence is an abstract statement on punishment generally, rather than personal evidence that her son is likely to commit new offences if not securely detained before his final hearing.

The trial court decided to impose secure detention for 21 days, explaining its ruling as follows:

"having now gleaned from the mother's testimony that she believes that this young man is a threat to himself as well as society, that he's been hanging around the wrong group of kids, and that there are circumstances in which she fears that he may engage in this kind of conduct in the future, I'm going to aggravate his score points, hence he's going to be securely detained for 21 days."

It is from this order that petitioner has brought this petition for habeas corpus.

The petition argues that secure detention was not authorized by the RAI prepared by DJJ in this case. The offense allowed for only 7 points, and his history added only 1 additional point. With a total of 8 points, only nonsecure or home detention were authorized. Moreover the RAI itself provides for an "aggravating" factors, but only up to an additional 3 points, and thus there is no legal basis for the trial judge to supply sufficient points simply to be able to order secure detention. Consequently, the petition argues, he is entitled to the writ and should be released to home detention.

We begin by observing that pretrial detention of juveniles is now governed entirely by statute. *S.W. v. Woolsey*, 673 So.2d 152, 154 (Fla. 1st DCA 1996) ("The power to place those charged with ... a delinquent act in detention is entirely statutory in nature."). Section 985.213(2)(a) requires, with certain exceptions not here applicable, that:

"all determinations and court orders regarding placement of a child into detention care shall comply with all requirements and criteria provided in this part and shall be based on a risk assessment of the child...."

We must therefore examine the statutes to see if this secure detention order for 21 days "compl[ies] with all requirements and criteria" set forth in the statutes and is based on a risk assessment of the child.

We begin with section 985.213(1), [FN1] which commands that:

FN1. See § 985.215(2), Fla. Stat. (1999). Unless otherwise indicated, all statutory references are to Florida Statutes (1999).

"All determinations and court orders regarding the use of secure, nonsecure, or home detention shall be based primarily upon findings that the child:

- (a) Presents a substantial risk of not appearing at a subsequent hearing;
- (b) Presents a substantial risk of inflicting bodily harm on others as evidenced by recent behavior;

(c) Presents a history of committing a property offense prior to adjudication, disposition, or placement;

(d) Has committed contempt of court by 1. Intentionally disrupting the administration of the court; 2. Intentionally disobeying a court order; or 3. Engaging in a punishable act or speech in the court's presence which shows disrespect for the authority and dignity of the court; or

(e) Requests protection from imminent bodily harm."

*264 The most careful study of what occurred at the detention hearing, as well as the RAI prepared by DJJ, discloses that none of these criteria apply in this case. There is no evidence that petitioner presents any risk of inflicting bodily harm on others or of not appearing at further hearings; that he has a history of committing property offenses prior to disposition of charges; or that he has committed any contempt of court.

Therefore we turn to section 985.215(2), which provides that a child placed into any kind of detention may be continued in detention by the court if:

"(a) The child is alleged to be an escapee or an absconder from a commitment program, a community control program, furlough, or aftercare supervision, or is alleged to have escaped while being lawfully transported to or from such program or supervision.

"(b) The child is wanted in another jurisdiction for an offense which, if committed by an adult, would be a felony.

"(c) The child is charged with a delinquent act or violation of law and requests in writing through legal counsel to be detained for protection from an imminent physical threat to his or her personal safety.

"(d) The child is charged with committing an offense of domestic violence as defined in s. 741.28(1) and is detained as provided in s. 985.213(2)(b)3.

"(e) The child is charged with possession or discharging a firearm on school property in violation of s. 790.115.

"(f) The child is charged with a capital felony, a life felony, a felony of the first degree, a felony of the second degree that does not involve a violation of chapter 893, or a felony of the third degree that is also a crime of violence, including any such offense involving the use or possession of a firearm.

"(g) The child is charged with any second degree or third degree felony involving a violation of chapter 893 or any third degree felony that is not also a crime of violence, and the child 1. Has a record of failure to appear at court hearings after being properly notified in accordance with the Rules of Juvenile Procedure; 2. Has a record of law violations prior to court hearings; 3. Has already been detained or has been released and is awaiting final disposition of the case; 4. Has a record of violent conduct resulting in physical injury to others; or 5. Is found to have been in possession of a firearm.

"(h) The child is alleged to have violated the conditions of the child's community control or aftercare supervision."

After these enumerated factors, section 985.215(2) then states in pertinent part:

“Unless a child is detained under paragraph (d) or paragraph (e), the court shall utilize the results of the risk assessment performed by the juvenile probation officer and, based on the criteria in this subsection, shall determine the need for continued detention. A child placed into secure, nonsecure, or home detention care may continue to be so detained by the court pursuant to this subsection. If the court orders a placement more restrictive than indicated by the results of the risk assessment instrument, the court shall state, in writing, clear and convincing reasons for such placement.”

We shall call this last sentence the “departure provision.”

The state argues that, while the departure provision allows the judge to exceed the RAI upon clear and convincing reasons, “[t]here is no indication that those reasons have to be those listed in the statute.” In any event, argues the state, the RAI in this case “indicates that he meets the criteria listed in [subdivisions (g)2 and (g)3].” The state’s argument stops there, however, and fails to elaborate as to why it thinks the evidence shows reasons consistent with subdivisions (g)2 and (g)3. Petitioner responds that past law violations are already factored into the *265 RAI prepared by DJJ. It is also plain that petitioner has not actually been found after an adjudicatory hearing to have committed a delinquent act, so there is no occasion yet to consider whether there is evidence that he may likely not appear at the hearing for the final disposition in the case.

We have carefully examined the RAI in this case, and it does expressly add 1 point for petitioner’s two past misdemeanor violations. Apart from having previously committed two misdemeanors, there is no evidence that petitioner is likely to commit additional violations. His mother’s statement that “by letting [J.] get away with this, he might do something worse” is plainly not evidence that he is likely to do so unless he is detained securely before the adjudicatory hearing. The DJJ representative’s statement regarding outstanding issues regarding these auto thefts is facially not evidence of anything. Mother’s incomprehension as to how petitioner “got out with this crowd” is understandable, but hardly an affirmation that he is a member of a gang, or persistently associates with other youngsters or even adults who are “bad influences.” Petitioner thus argues that the evidence does not support or constitute “clear and convincing reasons” for departing from the RAI.

We dispense with DJJ’s argument at the hearing that the trial judge has authority to “aggravate” the recommendation, by which we understand DJJ to argue for judicial amendment of the RAI result to enhance the restrictiveness of the RAI recommendation. As we read the statutes, any questions of aggravating or mitigating factors are for the officials preparing the RAI, not for the judge as such. Instead, the judge is later given the power to order a more restrictive placement than recommended by the RAI, but if the judge does so it must be based on clear and convincing reasons gleaned from the record and evidence and consistent with the statutes.

As we have just repeated, the authority to depart from an RAI and order more severe detention must be based on “clear and convincing reasons” which the judge must state in writing. See § 985.215(2) (“If the court orders a placement more restrictive than indicated by the [RAI], the court shall state, in writing, clear and convincing reasons for such placement.”). In this instance the trial judge did not state in writing his reasons for exceeding the RAI. Instead, we merely have the transcript of the detention hearing furnished by petitioner in his appendix accompanying the petition for writ of habeas corpus.

In *S.W. v. Woolsey*, the court stated that section 985.215(2) “is much like a sentencing guidelines scoresheet, in that it assigns point values to a variety of circumstances.” 673 So.2d at 154. That may be true, but we note that section 985.215 lacks a counterpart to section 921.0016(1)(c)’s specific authority to file a transcript of orally stated reasons within 7 days of sentencing for a formal written statement of reasons for departing from the RAI.

We think the requirement for a written statement when departing from the RAI was not merely precatory. The legislature has carefully crafted an entire statutory scheme to control juvenile detention. It replaces a former scheme largely reposing discretion in juvenile court judges on the delinquency issues of disposition and detention. The current statutory framework supplants discretion with specific rules governing the judge and the disposition. From them, we discern a purpose to make the matter of juvenile detention in delinquency cases less subject to individualized variations by judges. Thus, the judge is commanded to “comply with all requirements and criteria provided in this part” and that the detention of children charged with committing delinquent acts “shall be based on a risk assessment of the child.” Moreover, the judge is directed to use the RAI results, with continued detention based “on the criteria in this *266 subsection ...” § 985.215(2) (“the court shall utilize the results of the risk assessment performed by the juvenile probation officer and, based on the criteria in this subsection, shall determine the need for continued detention.”).

The requirement to state departure reasons in writing is obviously purposeful. As the supreme court said in *State v. Jackson*, 478 So.2d 1054 (Fla.1985), receded from on other grounds, *Wilkerson v. State*, 513 So.2d 664 (Fla.1987), where the court considered an argument that noncompliance with the same kind of requirement under the sentencing guidelines could be tolerated:

“the development of the law would best be served by requiring the precise and considered reasons which would be more likely to occur in a written statement than those tossed out orally in a dialogue at a hectic sentencing hearing. The efforts of the State of Florida to provide badly needed reforms in the sentencing aspect of the criminal justice system are in the embryonic stages. A mammoth effort has been expended by the Legislature and by the Sentencing Guidelines Commissions, past and present, to develop some

uniformity and to respond to some of the major problems which surround the entire sentencing process. For the first time in this state, a body of law is being developed regarding considerations which may or may not be appropriate in sentencing criminal defendants. This effort would best be served by requiring the thoughtful effort which “a written statement providing clear and convincing reasons” would produce. This, in turn, should provide a more precise, thoughtful, and meaningful review which ultimately will result in the development of better law.”

478 So.2d at 1056 (quoting from *Boynton v. State*, 473 So.2d 703, 706-707 (Fla. 4th DCA 1985)). By forcing a juvenile judge to take the time to set down in a written order the reasons the judge concluded were “clear and convincing” the legislature has decided that departures from its requirements in juvenile delinquency detention cases will be both more reasoned and therefore consistent with the statute and, at the same time, less frequent. Were we to casually dispense with the writing requirement and hold that a transcript of the detention hearing would serve the same purpose, we should thereby eliminate a provision that the drafters have carefully calibrated to achieve more uniform and predictable results.

We also note that the departure provision requires “clear and convincing reasons,” not clear and convincing evidence. We do not understand this text to be accidental. In *In re Adoption of Baby E.A.W.*, 658 So.2d 961 (Fla.1995), cert. denied, 516 U.S. 1051, 116 S.Ct. 719, 133 L.Ed.2d 672 (1996), the supreme court held that the clear and convincing evidence standard does not allow an appellate court to conduct de novo review to reweigh testimony and evidence. 658 So.2d at 967. We interpret the provision for clear and convincing reasons, rather than evidence, to refer to the legality and sufficiency of the reasons given by the trial judge for imposing more severe detention than provided by the RAI.

We thus conclude that, because we are not asked to consider whether the evidence is clear and convincing but instead whether the judge’s reasons are clear and convincing, our review in this instance is de novo. In short we are required to assess for ourselves whether the reasons supported by the evidence are weighty and important enough to validate a variation from the risk assessment required by the statute. This cannot be a deferential kind of review. Otherwise, the judge’s decision would be subsumed by the traditional abuse of discretion test formerly applied. To do so would eviscerate the legislature’s amendment of the former scheme.

Accordingly, we grant the petition for writ of habeas corpus, and order petitioner’s *267 immediate release from secure detention and his restoration to home detention as provided in the RAI and initially imposed.

WARNER, C.J., and DELL, J., concur.

765 So.2d 260, 25 Fla. L. Weekly D1944

Sample Letter

Your Name
Your Address
City, State ZIP

Name of Witness
Address
City, State ZIP

Date of Letter

Dear (Supportive Witness),

Thank you for agreeing to write a letter on behalf of _____. The issue at this first hearing is whether s/he will be released or not pending the outcome of the case. The hearing is scheduled for _____ at juvenile court in Courtroom _____. The court is located at _____. Your letter of support could be very helpful. If you are not going to be present at the hearing, please deliver the letter me at my office by _____. My office is located at _____.

I have included some suggestions for the kind of information to include in your letter. It would be helpful if you could follow these guidelines as you write your letter. These are just suggestions, and the examples are not related to this case, they are just to help you think of things to write that would be most useful at this hearing. It is best if the letter is type-written, but a hand-written letter is fine, as long as it is easy to read. Call me if you have any questions. My phone number is _____.

Thank you.

Sincerely,
(Name of defender)

What to include in the Letter of Support

Your letter should be addressed to Judge _____. Example: Start off with “Dear Judge _____:”

Begin the letter by explaining who you are, and write one or two sentences about your work or any role you have in the community that gives you credibility. Example: “My name is Sam Smith. I work in the City Licensing Department, and I am also a deacon at the 1st Church on Second Ave.”

Describe how you know the youth and for how long. If appropriate, give an example of the kind of contact you have with the youth. Example: “I have known Matthew Hawkins for three years. We know each other from church, and I coach Matt’s baseball team. I see him several times a week and he often talks with me about things going on in his life.”

Ask that the court release the youth from detention, and give a reason as to why you think this is a good idea. Example: “I am asking that you release Matthew until this case is resolved. I think it is important that he not miss school and continue with his involvement in positive activities, like baseball.”

State positive traits you know about the youth. Example: “Matthew has always been considerate of elderly people in our church. He comes to baseball regularly and works very hard at practice. I know that he wants to please his mother.”

State whether you think the youth is dangerous or unlikely to return to court. Example: “I think Matthew will not cause any trouble if he is released, and I believe he will come to all his court dates.”

If appropriate, state what your role will be in helping the youth if he is released. Example: “If Matthew is released, I will meet with him on a regular basis to see how he is doing. If he needs a ride to court, I will take him.” Or: “I get off work at 3pm. I have spoken with his mother and we have made arrangements for Matthew to spend afternoons after school at my house until the case is resolved.”

Close the letter with your name, and a phone number. Example: “Thank you very much. Please call me with any questions. My phone number is: _____. Sincerely, _____.”

What to not put in a letter of support

- Any discussion about the alleged crime or related incidents.
- Any comments on a sentence if the youth is found guilty in the future.
- Broad statements about the youth’s innocence or guilt. (Don’t say something like “I just know he couldn’t have done what they said!” Or “The witness is a liar, and everyone knows it.”)
- Anything that is not true or an exaggeration.

STATE STATUTES IN REGARD TO BAIL FOR JUVENILES

STATE	BAIL/NO BAIL	WESTLAW CITE	BLUEBOOK CITE
AL	No Bail	Ala. Code 1975 § 12-15-58 (Current through 2003 Sess.)	Ala. Code § 12-15-58 (WESTLAW through 2003 Sess.)
AK	No Bail	AK ST. § 47.12.080, § 47.12.250 (Current through August 12, 2003)	Alaska Stat. § 47.12.080 (WESTLAW through Aug. 12, 2003) Alaska Stat. § 47.12.250 (WESTLAW through Aug. 12, 2003)
AZ	No Bail	A.R.S. § 8-303 17B A.R.S. Juv. Ct. Rules of Proc. Rule 23 (Current through May 17, 2004)	Ariz. Rev. Stat. Ann. § 8-303 (WESTLAW through May 17, 2004 legislation)
AR	Bail (Bond)	A.C.A. § 9-27-326 (Current through end of 2003 Reg. Sess.)	Ark. Code Ann. § 9-27-326 (West, WESTLAW through 2003 Reg. Sess.)
CA	No Bail	West's Ann. Cal. Welf. & Inst. Code § 626 (Current through 2004)	Cal. Welf. & Inst. Code § 626 (West, WESTLAW through 2004 Reg. Sess.)
CO	Bail	C.R.S.A. § 19-2-508 (Current through Chapter 55 of the 2nd Reg. Sess. of the 64th General Assembly)	Colo. Rev. Stat. Ann. § 19-2-508 (West, WESTLAW through Chapter 55 of 2nd Reg. Sess.)
CT	Bail	C.G.S.A. §46b-133 (Current through 2003)	Conn. Gen. Stat. Ann. § 46b-133 (West, WESTLAW through 2003 Jan. Reg. Sess.)
DE	Bail	DE ST TI 10 §1005, 1007 (Current through 2003)	Del. Code Ann. tit. 10, § 1005 (WESTLAW through 2003 Reg. Sess.) Del. Code Ann. tit. 10, § 1007 (WESTLAW through 2003 Reg. Sess.)
DC	No Bail	DC ST § 16-2312 (Current through February 17, 2004)	D.C. Code Ann. § 16-2312 (WESTLAW though Feb. 17, 2004)
FL	No Bail	West's F.S.A. § 985.211 (Current through May 12, 2004)	Fla. Stat. Ann. § 985.211 (West, WESTLAW through 2004 legislation)
GA	Bail	GA. Code. Ann § 15-11-47 (Current through 2003)	Ga. Code Ann. § 15-11-47 (WESTLAW through 2003 Reg. Sess.)
HI	No Bail	HI ST. §571.32 (Current through 2003)	Haw. Rev. Stat. Ann. § 571.32 (WESTLAW though 2003 Reg. Sess.)
ID	No Bail	ID ST § 20-516 (Current though 2003 Sess.) ID ST JUV Rule 23 (Current through April 21, 2003)	Idaho Code § 20-516 (WESTLAW though 2003 Sess.) Idaho Rules of Court, Juv. Rule 23 (West, WESTLAW through Jan. 1, 2004)
IL	No Bail	705 ILCS 405/5-415 (Current through 2004)	705 Ill. Comp. Stat. Ann. 405/5-415 (West, WESTLAW through 2004 Reg. Sess.)
IN	No Bail	IC 31-37-6-9 (Current through 2004)	Ind. Code Ann. § 31-37-6-9 (West, WESTLAW though 2004 2nd Reg. Sess.)
IA	No Bail	I.C.A. §232.19, 232.20 (Current through 2003)	Iowa Code Ann. § 232.19 (West, WESTLAW through 2003 Sess.) Iowa Code Ann. § 232.20 (West, WESTLAW through 2003 Sess.)

KS	Bail (Bond)	KS ST § 38-1632 (Current through 2003)	Kan. Stat. Ann. § 38-1632 (WESTLAW through 2003 Reg. Sess.)
KY	No Bail	KRS § 610.190 (Current through 2003)	Ky. Rev. Stat. Ann. § 610-190 (Banks-Baldwin, WESTLAW through 2003 Reg. Sess.)
LA	Bail	LSA-Ch.C Art. 817, 823 (Current through 2004)	La. Children's Code Ann. art. 817 (West, WESTLAW through 2004) La. Children's Code Ann. art. 823 (West, WESTLAW through 2004)
ME	No Bail	15 M.R.S.A. § 3203-A (Current through 2003)	Me. Rev. Stat. Ann. tit. 15, § 3203-A (West, WESTLAW through 2003)
MD	No Bail	Md. Code Courts and Judicial Proceedings § 3-814	Md. Code Ann., Cts. & Jud. Proc. § 3-814 (West, WESTLAW through May 11, 2004)
MA	Bail	M.G.L.A. 119 § 39H (Current through 2004)	Mass. Gen. Laws Ann. ch. 119, § 39H (West, WESTLAW through 2004 Annual Sess.)
MI	Bail	MI R RCRP MCR 6.909 (Current through January 1, 2004)	Mich. Ct. Rules, Crim. Proc. § 6-609 (West, WESTLAW through 2004)
MN	No Bail	M.S.A. § 260B.176 (Current through 2004)	Minn. Stat. Ann. § 260B.176 (West, WESTLAW through 2004 Reg. Sess.)
MS	No Bail	Miss. Code Ann. § 43-21-313 (Current through 2003)	Miss. Code Ann. § 43-21-313 (West, WESTLAW through 2003 Reg. Sess.)
MO	No Bail	V.A.M.S. 211.061, 211.141 (Current through 2003)	Mo. Ann. Stat. § 211.061 (West, WESTLAW through Gen. Assembly 2003) Mo. Ann. Stat. § 211.141 (West, WESTLAW through Gen. Assembly 2003)
MT	Bail	MT ST 41-5-323 (Current through 2003)	Mont. Code Ann. § 41-5-322 (WESTLAW through 2003 Reg. Sess.)
NE	Bail	NE ST § 43-253 (Current through 2003)	Neb. Rev. Stat. §43-253 (WESTLAW through 2003)
NV	Bail	NV ST 1 DIST CT Rule 23 (Current through Feb. 1, 2004)	Nev. Rev. Stat. Ann., Dist. Ct. Rule 23 (West, WESTLAW through Feb. 1, 2004)
NH	No Bail	N.H. Rev. Stat. § 169:B11 (Current through 2003)	N.H. Rev. Stat. Ann. § 169:B11 (WESTLAW through 2003 Reg. Sess.)
NJ	No Bail	N.J.S.A. 2A:4A-40 (Current through 2004) BUT juvenile can be released (conditionally) on his/her own recognizance N.J.S.A. 2A:4A-35	N.J. Stat. Ann. § 2A:4A-40 (West, WESTLAW through L.2004) N.J. Stat. Ann. § 2A:4A-40 (West, WESTLAW through L.2004)
NM	No bail	N.M.S.A. 1978, §32A-2-14 (Current through 2004)	N.M. Stat. Ann. § 32A-2-14 (West, WESTLAW through Spec. Sess. 2004)
NY	No Bail	McKinney's Family Court Act §320.5 (Current through 2004)	N.Y. Fam. Ct. Act § 320.5 (McKinney, WESTLAW through L.2004)
NC	No Bail	N.C.G.S.A. § 7B-1901 (Current through 2003)	N.C. Gen. Stat. § 7B-1901 (West, WESTLAW through 2003 2nd Ex. Sess.)

ND	No Bail	ND ST 27-20-15 (Current through 2003)	N.D. Cent. Code § 27-20-15 (WESTLAW through 2003)
OH	No Bail	R.C. § 2151.311 (Current through 2004)	Ohio Rev. Code Ann. § 2151.311 (West, WESTLAW through 2004)
OK	No Bail	10 Okl. St. Ann. § 7303-1.1 (Current through 2004)	Okla. Stat. Ann. tit 10, § 7303-1.1 (West, WESTLAW 2004 2nd Reg. Sess.)
OR	No Bail	O.R.S. § 419C.103, 419C.109 (Current through 2001)	Or. Rev. Stat. § 419C.103 (West, WESTLAW through 2001 Reg. Sess.) Or. Rev. Stat. § 419C.109 (West, WESTLAW through 2001 Reg. Sess.)
PA	No Bail	42 Pa.C.S.A. § 6326, 6325 (Current through 2004)	42 Pa. Cons. Stat. Ann. § 6326 (West, WESTLAW through 2004) 42 Pa. Cons. Stat. Ann. § 6325 (West, WESTLAW through 2004)
RI	No Bail	RI ST § 14-1-20, 21 (Current through January 2003)	R.I. Gen. Laws § 14-1-20 (WESTLAW through Jan. 2003) R.I. Gen. Laws § 14-1-21 (WESTLAW through Jan. 2003)
SC	No Bail	Code 1976 § 20-7-7205 (Current through 2003)	S.C. Code Ann. § 20-7-7205 (Law, Co-op, WESTLAW through 2003 Reg. Sess.)
SD	No Bail	SDCL. § 26-8C-3 (Current through 2004)	S.D. Codified Laws § 26-8C-3 (WESTLAW through 2004 Reg. Sess.)
TN	No Bail	T.C.A. §37-1-115 (Current through April 30, 2004)	Tenn. Code Ann. § 37-1-115 (West, WESTLAW through 2nd Reg. Sess. 2004)
TX	No Bail	V.T.C.A. Family Code § 52.02 (Current through 2003)	Tex. Fam. Code Ann. § 52.02 (Vernon, WESTLAW through 2003 Sess.)
UT	No Bail	UT ST § 78-3a-114 (Effective until July 1, 2004)	Utah Code Ann. § 78-3a-114 (WESTLAW until July 1, 2004)
VT	No Bail	VT ST T. 33 § 5511 (Current through 2003-2004)	Vt. Stat. Ann. tit. 33, § 5511 (WESTLAW through 2003-2004 legislation session)
VA	No Bail	Va. Code Ann. § 16.1-248.1 (Current through 2003)	Va. Code Ann. § 16.1-248.1 (West, WESTLAW through 2003 Reg. Sess.)
WA	Bail (Bond)	West's RWCA 13.40.050 (Current through May 3, 2004)	Wash. Rev. Code Ann. § 13.40.050 (West, WESTLAW through May 3, 2004)
WV	Bail	W. Va. Code § 49-5-8a (Current through April 15, 2004)	W. Va. Code Ann. § 49-5-8a (West, WESTLAW through April 15, 2004)
WI	No Bail	W.S.A. 938.20 (Current through 2003)	Wis. Stat. Ann. § 938.20 (West, WESTLAW through 2003 Act 137)
WY	No Bail	WY ST § 14-6-206 (Current through 2003)	Wyo. Stat. Ann. § 14-6-206 (WESTLAW through 2003 Reg. Sess.)

*Interim Status:
The Release, Control, and Detention of Accused
Juvenile Offenders Between Arrest and Disposition*

Part I: Introduction

STANDARD 1.1 SCOPE AND OVERVIEW

The standards in this volume set out in detail the decision making process that functions between arrest of a juvenile on criminal charges and final disposition of the case. By limiting the discretion of officials involved in that process, and by imposing affirmative duties on them to release juveniles or bear the burden of justification for not having done so, the standards seek to reduce the volume, duration, and severity of detention, and of other curtailment of liberty during the interim period.

STANDARD 1.2 SEPARATE STANDARDS FOR DIFFERENT DECISION MAKERS

Separate rules should define the interim period authority and responsibility of police officers, intake officials, attorneys for the juvenile and the state, judges, and detention officials, to reflect differences in:

- A. their respective roles in the interim decision making process;
- B. the extent to which the discretion exercised by each is subject to control and review by others; and
- C. the time, information, and resources available to each at the time of decision.

STANDARD 1.3 GUIDELINES FOR MEASURING PROGRESS

To the extent that these standards require time-consuming or costly modifications in the law, practice, and facilities of a jurisdiction, they should be viewed as guidelines by which to measure the progress of the jurisdiction toward compliance with the stated goals. Detailed specifications are presented wherever possible, so that departures from them will be visible, and officials can be called to account for them.

Part II: Definitions

STANDARD 2.1 INTERIM PERIOD

The interval between the arrest or summons of an accused juvenile charged with a criminal offense and the implementation of a final judicial disposition. The term “interim” is used as an adjective reference to this interval, e.g., “interim status,” “interim liberty,” and “interim detention.”

STANDARD 2.2 ARREST

The taking of an accused juvenile into custody in conformity with the law governing the arrest of persons believed to have committed a crime.

STANDARD 2.3 CUSTODY

Any interval during which an accused juvenile is held by the arresting police authorities.

STANDARD 2.4 STATUS DECISION

A decision made by an official that results in the interim release, control, or detention of an arrested juvenile. In the adult criminal process, it is often referred to as the bail decision.

STANDARD 2.5 RELEASE

The unconditional and unrestricted interim liberty of a juvenile, limited only by the juvenile’s promise to appear at judicial proceedings as required. It is sometimes referred to as “release on own recognizance.”

STANDARD 2.6 CONTROL

A restricted or regulated nondetention interim status, including release on conditions or under supervision.

STANDARD 2.7 RELEASE ON CONDITIONS

The release of an accused juvenile under written requirements that specify the terms of interim liberty, such as living at home, reporting periodically to a court officer, or refraining from contact with named witnesses.

STANDARD 2.8 RELEASE UNDER SUPERVISION

The release of an accused juvenile to an individual or organization that agrees in writing to assume the responsibility for directing, managing, or overseeing the activities of the juvenile during the interim period.

STANDARD 2.9 DETENTION

Placement during the interim period of an accused juvenile in a home or facility other than that of a parent, legal guardian, or relative, including facilities commonly called “detention,” “shelter care,” “training school,” “receiving home,” “group home,” “foster care,” and “temporary care.”

STANDARD 2.10 SECURE DETENTION FACILITY

A facility characterized by physically restrictive construction and procedures that are intended to prevent an accused juvenile who is placed there from departing at will.

STANDARD 2.11 NONSECURE DETENTION FACILITY

A detention facility that is open in nature and designed to allow maximum participation by the accused juvenile in the community and its resources. It is intended primarily to minimize psychological hardships on an accused juvenile offender who is held out-of-home, rather than to restrict the freedom of the juvenile. These facilities include, but are not limited to:

- A. single family foster homes or temporary boarding homes;
- B. group homes with a resident staff, which may or may not specialize in a particular problem area, such as drug abuse, alcohol abuse, etc.; and
- C. facilities used for the housing of neglected or abused juveniles.

STANDARD 2.12 REGIONAL DETENTION FACILITY

A detention facility that serves a geographic area of sufficient population to require a maximum daily capacity for that facility of twelve juveniles.

STANDARD 2.13 CITATION

A written order issued by a law enforcement officer requiring a juvenile accused of violating the criminal law to appear in a designated court at a specified date and time. The form requires the signature either of the juvenile to whom it is issued, or of the parent to whom the juvenile is released.

STANDARD 2.14 SUMMONS

An order issued by a court requiring a juvenile against whom a charge of criminal conduct has been filed to appear in a designated court at a specific date and time.

STANDARD 2.15 TREATMENT

Any medical or psychiatric response to a diagnosis of a need for such response, including the systematic use of drugs, rules, programs, or other measures, for the purpose of either improving the juvenile’s physical health or modifying on a long-range basis the accused juvenile’s behavior or state of mind. “Treatment” includes, among other things, programs commonly described as “behavior modification,” “group therapy,” and “milieu therapy.”

STANDARD 2.16 TESTING

The use of measures administered to the accused juvenile for the purpose of:

- A. identifying medical or personal characteristics, the latter including such things as knowledge, abilities, aptitudes, qualifications, or emotional traits; and
- B. determining the need for some form of treatment.

STANDARD 2.17 PARENT

Any of the following:

- A. the juvenile’s natural parents, stepparents, or adopted parents, unless their parental rights have been terminated;
- B. if the juvenile is a ward of any person other than his or her parent, the guardian of the juvenile;
- C. if the juvenile is in the custody of some person other than his or her parent whose knowledge of or participation in the proceedings would be appropriate, the juvenile’s custodian; and
- D. separated and divorced parents, even if deprived by judicial decree of the respondent juvenile’s custody.

STANDARD 2.18 FINAL DISPOSITION

The implementation of a court order of

- A. release based upon a finding that the juvenile is not guilty of committing the offense charged; or
- B. supervision, punishment, treatment, or correction based upon a finding that the juvenile is guilty of committing the offense charged.

STANDARD 2.19 DIVERSION

The unconditional release of an accused juvenile, without adjudication of criminal charges, to a youth service agency or other program outside the juvenile justice system, accompanied by a formal termination of all legal proceedings against the juvenile and erasure of all records concerning the case.

Part III: Basic Principles

STANDARD 3.1 POLICY FAVORING RELEASE

Restraints on the freedom of accused juveniles pending trial and disposition are generally contrary to public policy. The preferred course in each case should be unconditional release.

STANDARD 3.2 PERMISSIBLE CONTROL OR DETENTION

The imposition of interim control or detention on an accused juvenile may be considered for the purposes of:

- A. protecting the jurisdiction and process of the court;
- B. reducing the likelihood that the juvenile may inflict serious bodily harm on others during the interim period; or
- C. protecting the accused juvenile from imminent bodily harm upon his or her request.

However, these purposes should be exercised only under the circumstances and to the extent authorized by the procedures, requirements, and limitations detailed in Parts IV through X of these standards.

STANDARD 3.3 PROHIBITED CONTROL OR DETENTION

Interim control or detention should not be imposed on an accused juvenile:

- A. to punish, treat, or rehabilitate the juvenile;
- B. to allow parents to avoid their legal responsibilities;
- C. to satisfy demands by a victim, the police, or the community;
- D. to permit more convenient administrative access to the juvenile;
- E. to facilitate further interrogation or investigation; or
- F. due to a lack of a more appropriate facility or status alternative.

STANDARD 3.4 LEAST INTRUSIVE ALTERNATIVE

Whenever an accused juvenile cannot be unconditionally released, conditional or supervised release that results in the least necessary interference with the liberty of the juvenile should be favored over more intrusive alternatives.

STANDARD 3.5 VALUES

Whenever the interim curtailment of an accused juvenile's freedom is permitted under these standards, the exercise of authority should reflect the following values:

- A. respect for the privacy, dignity, and individuality of the accused juvenile and his or her family;
- B. protection of the psychological and physical health of the juvenile;
- C. tolerance of the diverse values and preferences among different groups and individuals;
- D. ensurance of equality of treatment by race, class, ethnicity, and sex;
- E. avoidance of regimentation and depersonalization of the juvenile;
- F. avoidance of stigmatization of the juvenile; and
- G. ensurance that the juvenile receives adequate legal assistance.

STANDARD 3.6 AVAILABILITY OF ADEQUATE RESOURCES

The attainment of a fair and effective system of juvenile justice requires that every jurisdiction should, by legislation, court decision, appropriations, and methods of administration, provide services and facilities adequate to carry out the principles underlying these standards. Accordingly, the absence of funds cannot be a justification for resources or procedures that fall below the standards or unnecessarily infringe on individual liberty. Accused juveniles should be released or placed under less restrictive control whenever a form of detention or control otherwise appropriate is unavailable to the decision maker.

Part IV: General Procedural Standards

STANDARD 4.1 SCOPE

As an introduction to the standards in Parts V through IX, which create separate guidelines for each participant in the interim process, the procedures and prohibitions in Part IV are standards applicable to all interim decision makers.

STANDARD 4.2 BURDEN OF PROOF

The state should bear the burden at every stage of the proceedings of persuading the relevant decision maker with clear and convincing evidence that restraints on an accused juvenile's liberty are necessary, and that no less intrusive alternative will suffice.

STANDARD 4.3 WRITTEN REASONS AND REVIEW

Whenever a decision is made at any stage of the proceedings to adopt an interim measure other than unconditional release, the decision maker should concurrently state in writing or on the record with specificity the evidence relied upon for that conclusion, and the authorized purpose or purposes that justify that action. A decision or order to hold an accused juvenile in detention should be invalid if the reasons for it are not attached to it. The statement of reasons should become an integral part of the record, and should be subject to and available for review at each succeeding stage of the process.

STANDARD 4.4 USE OF SOCIAL HISTORY INFORMATION

Prior to adjudication, information gathered about the background of an accused juvenile for purposes of determining an interim status should be limited to that which is essential to a decision concerning unconditional release or the least intrusive alternative. Information so gathered should be disclosed only to the persons and to the extent necessary to reach, carry out, and review that decision, and should be available for no other purpose. If the juvenile is convicted, the information gathered in the preadjudication stage may be used in determining an appropriate disposition.

STANDARD 4.5 LIMITATIONS ON TREATMENT OR TESTING

A. Involuntary.

1. Prior to adjudication, an accused juvenile should not be involuntarily subjected to treatment or testing of any kind by the state or any private organization associated with the interim process except:
 - a. to test for the presence of a contagious or communicable disease that would present an unreasonable risk of infection to others in the same facility;
 - b. to provide emergency medical aid; or
 - c. to administer tests required by the court for determining competency to stand trial.
2. After adjudication, an accused juvenile may be subjected to involuntary, nonemergency testing only to the extent found necessary by a court, after a hearing, to aid in the determination of an appropriate final disposition.

B. Voluntary.

1. While in detention, an accused juvenile should be entitled to a prompt medical examination and to provision of appropriate nonemergency medical care, with the informed consent of the juvenile and a parent in accordance with subsection 2. below. Requirements of consent should be governed by the Rights of Minors volume.
2. Informed, written consent should be obtained before a juvenile may be required to participate in any program, designed to alter or modify behavior, that may have potentially harmful effects.
 - a. If the juvenile is under the age of sixteen, his or her consent and the consent of his or her parents both should be obtained.
 - b. If the juvenile is sixteen or older, only the juvenile's consent should be obtained.
 - c. Any such consent may be withdrawn at any time.

STANDARD 4.6 VIOLATION OF RELEASE CONDITIONS

A willful violation by an accused juvenile of the conditions of release, or a willful failure to appear in court in response to a citation or summons, should be grounds for the issuance by the court of a summons based on that violation or failure to appear. A violation of conditions or a failure to appear should not constitute a criminal offense for which dispositional sanctions may be imposed, but should authorize the court to review, modify, or terminate the release conditions.

STANDARD 4.7 PROHIBITION AGAINST MONEY BAIL

The use of bail bonds in any form as an alternative interim status should be prohibited.

Part V: Standards for the Police

STANDARD 5.1 POLICY FAVORING RELEASE

Each police department should adopt policies and issue written rules and regulations requiring release of all accused juveniles at the arrest stage pursuant to Standard 5.6 A., and adherence to the guidelines specified in Standard 5.6 B. in discretionary situations. Citations should be employed to the greatest degree consistent with the policies of public safety and ensuring appearance in court to release a juvenile on his or her own recognizance, or to a parent.

STANDARD 5.2 SPECIAL JUVENILE UNIT

Each police department should establish a unit or have an officer specially trained in the handling of juvenile cases to effect arrests of juveniles when arrest is necessary, to make release decisions concerning juveniles, and to review immediately every case in which an arrest

has been made by another member of the department who declines to release the juvenile. All arrest warrants, summonses, and possible citations involving accused juveniles should be handled by this unit.

STANDARD 5.3 DUTIES

The arresting officer should have the following duties with regard to the interim status of an accused juvenile:

- A. Inform juvenile of rights. The officer should explain in clearly understandable language the warnings required by the constitution regarding the right to silence, the making of statements, and the right to the presence of an attorney. The officer should also inform every arrested juvenile who is not promptly released from custody of the right to have his or her parent contacted by the department. In any situation in which the accused does not understand English, or in which the accused is bilingual and English is not his or her principal language, the officer should provide the necessary information in the accused's native language, or provide an interpreter who will assure that the juvenile is informed of his or her rights.
- B. Notification of parent. The arresting officer should make all reasonable efforts to contact a parent of the accused juvenile during the period between arrest and the presentation of the juvenile to any detention facility. The officer should inform the parent of the juvenile's right to the presence of counsel, appointed if necessary, and of the juvenile's right to remain silent.
- C. Presence of attorney. The right to have an attorney present should be subject to knowing, intelligent waiver by the juvenile following consultation with counsel. If the police question any arrested juvenile concerning an alleged offense in the absence of an attorney for the juvenile, no information obtained thereby or as a result of the questioning should be admissible in any proceeding.
- D. Recording of initial status decision. If the arresting officer does not release the juvenile within two hours, the reasons for the decision should be recorded in the arrest report and disclosed to the juvenile, counsel, and parent.
- E. Notification of facility. Whenever an accused juvenile is taken into custody and not promptly released, the arresting officer should promptly inform the juvenile facility intake official of all relevant factors concerning the juvenile and the arrest, so that the official can explore interim status alternative
- F. Transportation to facility. The police should, within [two to four hours] of the arrest, either release the juvenile or, upon notice to and concurrence by the intake official, take the juvenile without delay to the juvenile facility designated by the intake official. If the intake official does not concur, that official should order the police to release the juvenile.

STANDARD 5.4 HOLDING IN POLICE DETENTION FACILITY PROHIBITED

The holding of an arrested juvenile in any police detention facility prior to release or transportation to a juvenile facility should be prohibited.

STANDARD 5.5 INTERIM STATUS DECISION NOT MADE BY POLICE

The observations and recommendations of the police concerning the appropriate interim status for the arrested juvenile should be solicited by the intake official, but should not be determinative of the juvenile's interim status.

STANDARD 5.6 GUIDELINES FOR STATUS DECISION

- A. Mandatory release. Whenever the juvenile has been arrested for a crime which in the case of an adult would be punishable by a sentence of [less than one year], the arresting officer should, if charges are to be pressed, release the juvenile with a citation or to a parent, unless the juvenile is in need of emergency medical treatment (Standard 4.5 A. 1. b.), requests protective custody (Standard 5.7), or is known to be in a fugitive status.
- B. Discretionary release. In all other situations, the arresting officer should release the juvenile unless the evidence as defined below demonstrates that continued custody is necessary. The seriousness of the alleged offense should not, except in cases of a class one juvenile offense involving a crime of violence, be sufficient grounds for continued custody. Such evidence should only consist of one or more of the following factors as to which reliable information is available to the arresting officer:
 - 1. that the arrest was made while the juvenile was in a fugitive status;
 - 2. that the juvenile has a recent record of willful failure to appear at juvenile proceedings.

STANDARD 5.7 PROTECTIVE CUSTODY

- A. Notwithstanding the issuance of a citation, the arresting officer may take an accused juvenile to an appropriate facility designated by the intake official if the juvenile would be in immediate danger of serious bodily harm if released, and the juvenile requests such custody.
- B. A decision to continue or relinquish protective custody should be made by the intake official in accordance with Standard 6.7.

Part VI: Standards for the Juvenile Facility Intake Official

STANDARD 6.1 UNDER AUTHORITY OF STATEWIDE AGENCY

The juvenile facility intake official should be an employee of or subject to the authority of the statewide agency charged with responsibility for all aspects of nonjudicial interim status decisions, as that agency is described in Standards 11.1 and 11.2.

When, for political or geographic considerations, some agencies are within the jurisdiction of local government, the statewide department should be responsible for the setting and enforcement of standards and the provision of technical assistance, training, and fiscal subsidies.

STANDARD 6.2 TWENTY-FOUR-HOUR DUTY

An intake official should be available twenty-four hours a day, seven days a week, to be responsible for juvenile custody referrals.

STANDARD 6.3 LOCATION OF OFFICIAL

In order to facilitate prompt and effective interim decisions, and to reduce the unnecessary transportation and detention of arrested juveniles, the intake official should be located at the most accessible office and position in the interim process. This central office need not be a place of juvenile detention.

STANDARD 6.4 RESPONSIBILITY FOR STATUS DECISION

Once an arrested juvenile has been brought to a juvenile facility, the responsibility for maintaining or changing interim status rests entirely with the intake official, subject to review by the juvenile court. Release by the facility should be mandatory in any situation in which the arresting officer was required to release the juvenile but failed to do so.

STANDARD 6.5 PROCEDURAL REQUIREMENTS

- A. Provide information. The intake official should:
 1. inform the accused juvenile of his or her rights, as in Standard 5.3 A.;
 2. inform the accused juvenile that his or her parent will be contacted immediately to aid in effecting release; and
 3. explain the basis for detention, the interim status alternatives that are available, and the right to a prompt release hearing.
- B. Notify parent. If the arresting officer has been unable to contact a parent, the intake official should make every effort to effect such contact. If the official decides that the juvenile should be released, he or she may request a parent to come to the facility and accept release.
- C. Notify attorney. Unless the accused juvenile already has a public or private attorney, the intake official should promptly call a public defender to represent the juvenile.
- D. Reach status decision.
 1. The intake official should determine whether the accused juvenile is to be released with or without conditions, or be held in detention.
 2. If the juvenile is not released, the intake official should prepare a petition for a release hearing before a judge or referee, which should be filed with the court no later than the next court session, or within [twenty- four hours] after the juvenile's arrival at the intake facility, whichever is sooner. The petition should specify the charges on which the accused juvenile is to be prosecuted, the reasons why the accused was placed in detention, the reasons why release has not been accomplished, the alternatives to detention that have been explored, and the recommendations of the intake official concerning interim status.
 3. If the court is not in session within the [twenty-four-hour] period, the intake official should contact the judge, by telephone or otherwise, and give notice of the contents of the petition.
- E. Continue release investigation. If an accused juvenile remains in detention after the initial court hearing, the intake official should review in detail the circumstances of the arrest and the alternatives to continued detention. A report on these investigations, including any information that the juvenile's attorney may wish to have added, should be presented to the court at the status review hearing within seven days after the initial hearing.
- F. Maintain records. A written record should be kept of the incidence, duration, and reasons for interim detention of juveniles. Such records should be retained by the intake official and staff, and should be available for inspection by the police, the prosecutor, the court, and defense counsel. The official should continuously monitor these records to ascertain the emergence of patterns that may reflect misuse of release standards and guidelines, the inadequacy of release alternatives, or the need to revise standards.

STANDARD 6.6 GUIDELINES FOR STATUS DECISION

- A. Mandatory release. The intake official should release the accused juvenile unless the juvenile:
 1. is charged with a crime of violence which in the case of an adult would be punishable by a sentence of one year or more, and which if proven is likely to result in commitment to a security institution, and one or more of the following additional factors is present:
 - a. the crime charged is a class one juvenile offense;
 - b. the juvenile is an escapee from an institution or other placement facility to which he or she was sentenced under a previous adjudication of criminal conduct;
 - c. the juvenile has a demonstrable recent record of willful failure to appear at juvenile proceedings, on the basis of which the official finds that no measure short of detention can be imposed to reasonably ensure appearance; or
 2. has been verified to be a fugitive from another jurisdiction, an official of which has formally requested that the juvenile be placed in detention.
- B. Mandatory detention. A juvenile who is excluded from mandatory release under subsection A. is not, pro tanto, to be automatically detained. No category of alleged conduct in and of itself may justify a failure to exercise discretion to release.

C. Discretionary situations.

1. Release vs. detention. In every situation in which the release of an arrested juvenile is not mandatory, the intake official should first consider and determine whether the juvenile qualifies for an available diversion program, or whether any form of control short of detention is available to reasonably reduce the risk of flight or misconduct. If no such measure will suffice, the official should explicitly state in writing the reasons for rejecting each of these forms of release.
2. Unconditional vs. conditional or supervised release. In order to minimize the imposition of release conditions on persons who would appear in court without them, and present no substantial risk in the interim, each jurisdiction should develop guidelines for the use of various forms of release based upon the resources and programs available, and analysis of the effectiveness of each form of release.
3. Secure vs. nonsecure detention. Whenever an intake official determines that detention is the appropriate interim status, secure detention may be selected only if clear and convincing evidence indicates the probability of serious physical injury to others, or serious probability of flight to avoid appearance in court. Absent such evidence, the accused should be placed in an appropriate form of nonsecure detention, with a foster home to be preferred over other alternatives.

STANDARD 6.7 PROTECTIVE DETENTION

- A. Placement in a nonsecure detention facility solely for the protection of an accused juvenile should be permitted only upon the voluntary written request of the juvenile in circumstances that present an immediate threat of serious bodily harm to the juvenile if released.
- B. In reaching this decision, or in reviewing a protective custody decision made by arresting officer, the intake official should first consider all less restrictive alternatives, and all reasonably ascertainable factors relevant to the likelihood and immediacy of serious bodily harm resulting from interim release or control.

Part VII: Standards for the Juvenile Court

STANDARD 7.1 AUTHORITY TO ISSUE SUMMONS IN LIEU OF ARREST WARRANT

Judges should be authorized to issue a summons (which may be served by certified mail or in person) rather than an arrest warrant in every case in which a complaint, information, indictment, or petition is filed or returned against an accused juvenile not already in custody.

STANDARD 7.2 POLICY FAVORING SUMMONS OVER WARRANT

In the absence of reasonable grounds indicating that, if an accused juvenile is not promptly taken into custody, he or she will flee to avoid prosecution, the court should prefer the issuance of a summons over the issuance of an arrest warrant.

STANDARD 7.3 APPLICATION FOR SUMMONS OR WARRANT

Whenever an application for a summons or warrant is presented, the court should require all available information relevant to an interim status decision, the reasons why a summons or warrant should be issued, and information concerning the juvenile's schooling or employment that might be affected by service of a summons or warrant at particular times of the day.

STANDARD 7.4 ARREST WARRANT TO SPECIFY INITIAL INTERIM STATUS

- A. Every warrant issued by a court for the arrest of a juvenile should specify an interim status for the juvenile. The court may order the arresting officer to release the juvenile with a citation, or to place the juvenile in any other interim status permissible under these standards.
- B. The warrant should indicate on its face the interim status designated. If any form of detention is ordered, the warrant should indicate the place to which the accused juvenile should be taken, if other than directly to court. In each such case, the court should simultaneously file a written statement indicating the reasons why no measure short of detention would suffice.

STANDARD 7.5 SERVICE OF SUMMONS OR WARRANT

In the absence of compelling circumstances that prompt the issuing court to specify to the contrary, a summons or warrant should not be served on an accused juvenile while in school or at a place of employment.

STANDARD 7.6 RELEASE HEARING

- A. Timing. An accused juvenile taken into custody should, unless sooner released, be accorded a hearing in court within [twenty-four hours] of the filing of the petition for a release hearing required by Standard 6.5 D. 2.
- B. Notice. Actual notice of the detention review hearing should be given to the accused juvenile, the parents, and their attorneys, immediately upon an intake official's decision that the juvenile will not be released prior to the hearing.
- C. Rights. An attorney for the accused juvenile should be present at the hearing in addition to the juvenile's parents, if they attend. There should be a strong presumption against the validity of a waiver of any constitutional or statutory right of the juvenile, and no waiver should be valid unless made in writing by the juvenile and his or her counsel.
- D. Information. At the review hearing, information relevant to the interim status of an accused juvenile, other than information bearing on the nature and circumstances of the offense charged and the weight of the evidence against the accused juvenile, need not conform to the rules pertaining to the admissibility of evidence in a court of law.

- E. Disclosure. The juvenile and the attorney should have full access to all information and records upon which a judge relies in refusing to release the juvenile from detention, or in imposing conditions or supervision.
- F. Probable cause. At the time of the initial detention hearing, the burden should be on the state to demonstrate that there is probable cause to believe that the juvenile committed the offense charged.
- G. Notice of right to appeal. Whenever a court orders detention, or denies release upon review of an order of detention, it should simultaneously inform the juvenile, orally and in writing, of his or her rights to an automatic seven-day review under Standard 7.9 and to immediate appellate review under Standard 7.12.

STANDARD 7.7 GUIDELINES FOR STATUS DECISIONS

- A. Release alternatives. The court may release the juvenile on his or her own recognizance, on conditions, under supervision, including release on a temporary, non-overnight basis to the attorney if so requested for the purpose of preparing the case, or into a diversion program.
- B. Mandatory release. Release by the court should be mandatory when the state fails to establish probable cause to believe the juvenile committed the offense charged or in any situation in which the arresting officer or intake official was required to release the juvenile but failed to do so, unless the court is in possession of additional information which justifies detention under these standards.
- C. Discretionary situations. In all other cases, the court should review all factors that officials earlier in the process were required by these standards to have considered. The court should review with particularity the adequacy of the reasons for detention recorded by the police and the intake official.
- D. Written reasons. A written statement of the findings of facts and reasons why no measure short of detention would suffice should be made part of the order and filed immediately after the hearing by any judge who declines to release an accused juvenile from detention. An order continuing the juvenile in detention should be construed as authorizing nonsecure detention only, unless it contains an express direction to the contrary, supported by reasons. If the court orders release under a form of control to which the juvenile objects, the court should upon request by the attorney for the juvenile, record the facts and reasons why unconditional release was denied.

STANDARD 7.8 JUDICIAL PARTICIPATION

- A. Every juvenile court judge should visit each secure facility under the jurisdiction of that court at least once every [sixty days].
- B. Whenever feasible, a judge other than the one who presided at the detention hearing should preside at the trial.

STANDARD 7.9 CONTINUING DETENTION REVIEW

- A. The court should hold a detention review hearing at or before the end of each seven-day period in which a juvenile remains in interim detention. At the first detention review hearing after the expiration of the time prescribed for execution of the dispositional order, the judge must execute such order forthwith, or fully explain on the record the reasons for the delay, or release the juvenile.
- B. A list of all juveniles held in any form of interim detention, together with the length of such detention and the reasons for detention, should be prepared by the intake official and presented weekly to the presiding judge. Such reports, with names deleted, should simultaneously be made public to describe the number, duration, and reasons for interim detention of juveniles.

STANDARD 7.10 SPEEDY TRIAL

To curtail detention and reduce the risks of release and control, all juvenile offense cases should be governed by the following timetable:

- A. Each case should proceed to trial:
 1. within [fifteen days] of arrest or the filing of charges, whichever occurs first, if the accused juvenile has been held in detention by order of a court for more than [twenty-four hours]; or
 2. within [thirty days] in all other cases.
- B. In any case in which the juvenile is convicted of a criminal offense, a disposition should be carried out:
 1. within [fifteen days] of conviction if the juvenile is held in detention by order of a court following conviction; or
 2. within [thirty days] of conviction in all other cases.

The time prescribed for carrying out the disposition may be extended at the request of the juvenile, if necessary in order to secure a better placement.

- C. The limits stated in A. and B. may be extended not more than [sixty days] if the juvenile is released, and not more than [thirty days] if the juvenile is in detention, when:
 1. the prosecution certifies that a witness or other evidence necessary to the state's case will not be available, despite the prosecution's best efforts, during the original time limits;
 2. any proceeding concerning waiver of the juvenile court's jurisdiction is pending;
 3. a motion for change of venue made by either the prosecutor or the juvenile is pending; or
 4. a request for extradition is pending.
- D. The limits stated in A. and B. may also be extended for specified periods authorized by the court when:
 1. the juvenile is a fugitive from court proceedings; or
 2. deferred adjudication or disposition for a specific period has been agreed to in writing by the juvenile and his or her attorney.

- E. The limits in A. and B. may be phased in during a period not to exceed [twelve months] from the effective date of adoption of these standards, in order to enable a court to obtain the necessary resources to adjudicate cases on the merits. During such period, the maximum limit for detention cases should be [thirty days] from arrest to trial and [thirty days] from trial to final disposition.
- F. In any case in which trial or disposition fails to meet these standards, the charges should be dismissed with prejudice.

STANDARD 7.11 RELAXATION OF INTERIM STATUS

An intake official may at any time relax the conditions of a juvenile's interim status if, under rules prescribed by the court or under a specific court order, circumstances no longer justify continuing the restrictions initially imposed. Written notice of any such modification should be filed with the appropriate court. More stringent measures may not be imposed without prior notice to the court and counsel for the juvenile.

STANDARD 7.12 APPELLATE REVIEW OF DETENTION DECISION

The attorney for the juvenile may at any time, upon notice to the prosecutor, appeal and be entitled to an immediate hearing within [twenty-four hours] on notice or motion from a court order imposing detention or denying release from detention. A copy of the order and written statement of reasons should accompany such appeal, and decisions on appeal should be filed at the conclusion of the hearing.

STANDARD 7.13 STATUS DURING APPEAL

Upon the filing of an appeal of judgment and disposition, the release of the appellant, with or without conditions, should issue in every case unless the court orders otherwise. An order of interim detention should be permitted only where the disposition imposed, or most likely to be imposed, includes some form of secure incarceration and the court finds one or more of the following on the record:

- A. that the juvenile would flee the jurisdiction or not appear before any court for further proceedings during the pendency of the appeal; or
- B. that there is a substantial probability that the juvenile would engage in serious violence prior to the resolution of his or her appeal.

STANDARD 7.14 SPEEDY APPEAL

- A. The appeal of judgment and disposition filed by a juvenile held in interim detention for more than ten days pursuant to an order under Standard 7.13 should be resolved within ninety days of the date of such order, unless deferred consideration and resolution of the appeal has been agreed to in writing by the juvenile and his or her attorney.
- B. Failure to meet this time limitation should result in release of the juvenile.

Part VIII: Standards for the Defense Attorney

STANDARD 8.1 CONFLICTS OF INTEREST

The potential for conflict of interest between an accused juvenile and his or her parents should be clearly recognized and acknowledged. In every case, doubt as to a conflict should be resolved by the appointment of separate counsel for the child and by advising parents of their right to counsel and, if they are unable to afford counsel, of their right to have the court appoint such counsel. All parties should be informed by the initial attorney that he or she is counsel for the juvenile, and that in the event of disagreement between a parent or guardian and the juvenile, the attorney is required to serve exclusively the interests of the accused juvenile.

STANDARD 8.2 DUTIES

It should be the duty of counsel for an accused juvenile to explore promptly the least restrictive form of release, the alternatives to detention, and the opportunities for detention review, at every stage of the proceedings where such an inquiry would be relevant.

STANDARD 8.3 VISIT DETENTION FACILITY

Whenever an accused juvenile is held in some form of detention, the attorney should periodically visit the juvenile, at no less than seven day intervals, and review personally his or her well-being, the conditions of the facility, and opportunities to relax the conditions of detention or to secure release. A report on each such visit should be retained in the attorney's permanent file of the case.

Part IX: Standards for the Prosecutor

STANDARD 9.1 DUTIES

The prosecutor should review the charges, evidence, and the background of the juvenile prior to the initial court hearing in every case in which an accused juvenile is held in detention. On the basis of such review, the prosecutor should move at the initial hearing to dismiss the charges if prosecution is not warranted, to reduce charges to the extent excessive, and to eliminate detention or unduly restrictive control to the extent necessary to bring the juvenile's interim status into compliance with these standards.

STANDARD 9.2 POLICY OF ENCOURAGING RELEASE

It should be the policy of prosecutors to encourage the police and other interim decision makers to release accused juveniles with a citation or without forms of control. Special efforts should be made to enter into stipulations to this effect in order to avoid unnecessary detention inquiries and to promote efficiency in the administration of justice.

STANDARD 9.3 VISIT DETENTION FACILITIES

Each prosecutor should, in the same manner required of judges under Standard 7.8 and defense counsel under Standard 8.3, visit at least once every [sixty days] each secure detention facility in which accused juveniles prosecuted by his or her office are lodged.

Part X: Standards for Juvenile Detention Facilities

STANDARD 10.1 APPLICABILITY TO WAIVER OF JUVENILE COURT JURISDICTION

When jurisdiction of the juvenile court is waived, and the juvenile is detained pursuant to adult pretrial procedures, the juvenile should be detained in a juvenile facility and in accordance with the standards in this part.

STANDARD 10.2 USE OF ADULT JAILS PROHIBITED

The interim detention of accused juveniles in any facility or part thereof also used to detain adults is prohibited.

STANDARD 10.3 POLICY FAVORING NONSECURE ALTERNATIVES

A sufficiently wide range of nonsecure detention and nondetention alternatives should be available to decision makers so that the least restrictive interim status appropriate to an accused juvenile may be selected. The range of facilities available should be reviewed by all concerned agencies annually to ensure that juveniles are not being held in more restrictive facilities because less restrictive facilities are unavailable. A policy should be adopted in each state favoring the abandonment or reduction in size of secure facilities as less restrictive alternatives become available.

STANDARD 10.4 MIXING ACCUSED JUVENILE OFFENDERS WITH OTHER JUVENILES

- A. In nonsecure facilities. The simultaneous housing in a nonsecure detention facility of juveniles charged with criminal offenses and juveniles held for other reasons should not be prohibited.
- B. In secure facilities. Juveniles not charged with crime should not be held in any secure detention facility for accused juvenile offenders.

STANDARD 10.5 POPULATION LIMITS

- A. Individual facilities. The population of an interim detention facility during any twenty-four-hour period should not exceed [twelve to twenty] juveniles. This maximum may be exceeded only in unusual, emergency circumstances, with a written report presented immediately to each juvenile court judge and to the statewide agency described in Part XI.
- B. Statewide. A primary goal of each assessment effort should be to establish, within one year, a quota of beds available in all facilities within the state for the holding of accused juveniles in secure detention. The quota should be reduced annually thereafter, as alternative forms of control are developed. The quota should be binding on the statewide agency as a mandatory ceiling on the number of accused juveniles who may be held in detention at any one time; provided that it may be exceeded temporarily for a period not to exceed sixty days in any calendar year if the agency certifies to the governor of the state and to the legislature, and makes available to the public, in a written report, that unusual emergency circumstances exist that require a specific new quota to be set for a limited period. The certification should state the cause of the temporary increase in the quota and the steps to be taken to reduce the population to the original quota.

STANDARD 10.6 EDUCATION

All accused juveniles held in interim detention should be afforded access to the educational institution they normally attend, or to equivalent tutorial or other programs adequate to their needs, including an educational program for "exceptional children."

STANDARD 10.7 RIGHTS OF JUVENILES IN DETENTION

Each juvenile held in interim detention should have the following rights, among others:

- A. Privacy. A right to individual privacy should be honored in each institution. Because different children will desire different settings, and will often change their minds, substantial allowance should be made for individual choice, and for private as well as community areas, with due regard for the safety of others.
- B. Attorneys. A private area within each facility should be available for conferences between the juvenile and his or her attorney at any time between 9 a.m. and 9 p.m. daily.
- C. Visitors. Private areas within each facility should be available as contact visiting areas. The period for visiting, although subject to reasonable regulation by the facility staff, should cover at least eight hours every day of the week, and should conform to school regulations when the juvenile is attending school outside the facility. All regulations concerning visitors and visiting hours should be subject to review by the juvenile court.
- D. Telephone. Each juvenile in detention should have ready access to a telephone between 9 a.m. and 9 p.m. daily. Calls may be limited in duration, but not in content nor as to parties who may be contacted, except as otherwise specifically directed by the court. Local calls should be permitted at the expense of the institution, but should under no circumstances be monitored. Long distance calls in reasonable number may be made to a parent or attorney at the expense of the institution, and to others, collect.
- E. Restrictions on force. Reasonable force should only be used to restrain a juvenile who demonstrates by observed behavior that he or she is a danger to himself or herself or to others, or who attempts to escape. All circumstances concerning any use of force or unusual restrictions, including the circumstances that gave rise to such use, should be reported immediately to the juvenile facility administrator and the juvenile's attorney and parent.

- F. Mail. Mail from or to an accused juvenile should not be opened by authorities. If reasonable grounds exist to believe that mail may contain contraband, it should be examined only in the presence of the juvenile.

STANDARD 10.8 DETENTION INVENTORY

The statewide interim agency should, during its first year and annually thereafter, conduct an inventory of secure detention facilities to ascertain the extent of, reasons for, and alternatives to the secure detention of accused juveniles. The inventory should include:

- A. the places of secure detention;
- B. the daily population and turnover;
 - C. annual admissions;
 - D. range of duration of secure detention;
 - E. annual juvenile days of secure detention;
 - F. costs of secure detention;
 - G. trial status of those in secure detention;
 - H. reasons for termination of secure detention;
 - I. disposition of secure detention cases;
 - J. correlation of secure detention to postadjudication disposition;
 - K. qualifications and training of staff;
 - L. staffing patterns and deployment of staff resources.

The results of the inventory should be published annually. The agency should conduct a similar inventory of nonsecure detention facilities, beginning in the agency's second year. The inventory should draw attention to the differences in the use of detention by locality, and by characteristics of the detention population.

Part XI: General Administrative Standards

STANDARD 11.1 CENTRALIZED INTERIM STATUS ADMINISTRATION IN A STATEWIDE AGENCY

- A. To facilitate the creation of an adequate interim decision making process, with the resources necessary to implement it and an information system to monitor it, the responsibility for all aspects of nonjudicial interim status decisions involving accused juvenile offenders should be centralized in a single statewide agency. This centralization should include both personnel and facility administration. The agency should be part of the [executive] branch of the state government, although contracting with private nonprofit organizations should be permitted initially. All detention facility personnel, and all public employees involved in release, control, and supervision programs for accused juveniles should be employed by or otherwise responsible to this agency. The statewide agency should have responsibility for the coordination and review of all release and control of, and detention programs for, accused juveniles.
- B. Each juvenile court and local police department should have available to it representatives of the agency and facilities developed by the agency.
- C. The juvenile facility intake officials described in Part VI of these standards should be the local representatives of the statewide agency. They should be empowered to make or recommend the pre-trial release, control, and detention decisions authorized by these standards, and to relax the restrictions imposed on a juvenile in accordance with Standard 7.11.

STANDARD 11.2 GENERAL ADMINISTRATIVE STANDARDS: PLANNING, FUNDING, AND INSPECTION

- A. The statewide agency in each state, in consultation with the court and representatives of law enforcement and attorneys for the defense, should develop a statewide plan for the governance of local and regional facilities for accused juveniles, and for the necessary transportation between courts and facilities.
- B. The agency, in cooperation with the administrators of other youth services and public welfare, should develop a statewide program for the provision of nonsecure detention facilities for accused juveniles, in accordance with the Architecture of Facilities volume.
- C. To ensure that the standards are being met, representatives of the statewide agency should periodically and at least semiannually conduct unannounced inspections of all juvenile facilities in the state and file with the agency written reports within thirty days of each such inspection. Such reports should be periodically compiled and submitted to the legislature and the public. Current reports on any particular institution should be available on reasonable request. Whenever, on the basis of such reports, the agency or any court finds that a facility fails to meet promulgated standards, further detention of juveniles therein should be the subject of a warning. Copies of such warnings should be served upon the person in charge of the detention facility. Unless corrected and approved within sixty days after notification and publication of the warning, a facility that has been warned should thereafter be prohibited from housing any juvenile until such time as the warning is removed.

STANDARD 11.3 CONSTRUCTION MORATORIUM

An indefinite moratorium should be imposed on the construction or expansion of any facility for the detention of accused juveniles. No funds for any such purpose should be considered until an inventory of existing facilities has been completed and assessed, and until all reasonable release and control alternatives have been implemented and evaluated. Because a moratorium may have the effect of continuing substandard conditions in existing facilities, and of increasing the cost of eventual construction, its imposition should be accompanied by:

- A. establishment of a timetable for completing the required inventory, program development, and evaluations;
- B. public acknowledgment by all organizations in the juvenile justice system that alleviation of the volume, duration, and conditions of juvenile detention is their joint responsibility; and
- C. specification, in periodic reports to the courts, governor, legislature, bar, and public of the plans and progress of the reassessment and reform effort.

STANDARD 11.4 POLICY FAVORING EXPERIMENTATION

The standards for each type of interim status, particularly including secure and nonsecure detention facilities, should not remain static. As experience develops, the statewide agency's standards governing the nature and use of these alternatives and facilities should be elevated. Experimentation under published criteria should be encouraged, and innovative techniques from other jurisdictions continuously examined.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY

John Doe, a minor,)
 Petitioner,)
)
 v.)
)
 Jane Q. Public, Chief of Detention)
 Montgomery County Juvenile)
 Detention Center)
 Respondent.)

No. 1234567

PETITION FOR WRIT OF HABEAS CORPUS

The petition of John Doe, a minor, respectfully shows:

1. Petitioner is imprisoned and restrained of his liberty at the Montgomery County Juvenile Detention Center.
2. The officer by whom he is so imprisoned and restrained is Andrew Taylor, Chief of Detention for the Montgomery County Juvenile Detention Center.
3. The cause or pretense of the imprisonment and restraint of petitioner, according to his best knowledge and belief, is pre-trial detention pending an adjudication on the charge of shoplifting.
4. This imprisonment is illegal because John Doe has been held in detention for more than 72 hours and a petition against him has not been filed; Section 43-9-131 of the New Columbia Code requires that the petition against the juvenile must be filed within 72 hours of the juvenile’s detention.
5. No previous application has been made for the writ here applied for.
6. No alternative procedures in law or equity exist that would allow petitioner to challenge his detention.

WHEREFORE, petitioner requests that a writ of habeas corpus directed to Andrew Taylor, Chief of Detention for the Montgomery County Juvenile Detention Center issue for the purpose of inquiring into the cause of imprisonment and restraint of petitioner and of delivering him therefrom, pursuant to law.

Respectfully submitted,

 Mary Advocate, Esq.
 Counsel for John Doe, a minor

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY

John Doe, a minor,)
Petitioner,)
)
v.) No. 1234567
)
The Juvenile District Court for)
Montgomery County,)
Respondent.)

PETITION FOR WRIT OF MANDAMUS OR,
IN THE ALTERNATIVE, WRIT OF PROHIBITION

The petition of John Doe, a minor, respectfully shows:

1. Petitioner, John Doe, a minor, is now, and at all times mentioned in this petition was, a resident of Montgomery County, New Columbia.
2. On June 17, 2004, John Doe was taken into custody by members of the Montgomery County Sheriff's Office and placed in detention at 8:35 P.M.
3. On June 19, 2004, John Doe appeared at a detention hearing where the Juvenile District Court ordered his continued detention.
4. As of the filing of this petition in this court, no petition for delinquency has been filed in the Juvenile District Court against John Doe; thus, he has been held in detention for more than 72 hours without the filing of a petition against him.
5. Section 43-9-132 of the New Columbia Code requires that juveniles being held in pre-adjudication detention must be released if no petition has been filed within 72 hours of their detention.
6. Petitioner, John Doe's Motion For Release From Detention—based on the failure to release John Doe after 72 hours without a petition filed against him—was denied, without a hearing, on June 21, 2004. John Doe, therefore, has no adequate remedy, by appeal or otherwise, remaining.

WHEREFORE, petitioner requests the issuance of a writ of mandamus, directed to the Juvenile District Court, commanding that court to order the release of John Doe from the Montgomery County Juvenile Detention Center or the issuance of a writ of prohibition directed at the respondent court prohibiting the court from continuing the detention of John Doe. Petitioner also prays for such other and further relief as the Court deems proper.

Dated: June 22, 2004.

Respectfully submitted,

Mary Advocate, Esq.
Counsel for John Doe

LEGAL STATUS		(CIRCLE ALL THAT APPLY)
Currently under Juvenile Justice/OYA or other state or County supervision: (Check all that apply)	EITHER: Parole <input type="checkbox"/> Probation <input type="checkbox"/>	2
	OR: (If this section applies, score <u>either</u> 2 or 1, <u>not</u> both.) Deferred Disposition <input type="checkbox"/> Informal Disposition <input type="checkbox"/> Formal Accountability Agreement <input type="checkbox"/> DJJS Diversion <input type="checkbox"/> Other (Specify: _____) <input type="checkbox"/>	1
Above referenced status is for felony violent/assaultive law violation or domestic violence or unlawful possession of a firearm.		1
Pending trial (or disposition) on a law violation/probation violation (petition filed). Score only most serious pending offense using the "Most Serious Instant Offense" values. No score for misdemeanor petitions over 6 months old, unless there is an outstanding warrant.		17 12 8 7 6 5 3 1 0
Youth is on a conditional release. (Check all that apply, but score only 1 point.) Community Detention <input type="checkbox"/> Electronic Monitoring <input type="checkbox"/> House Arrest <input type="checkbox"/> Other (specify: _____) <input type="checkbox"/>		1
SCORE RANGE 0 - 21		SCORE TOTAL
ALL WARRANTS (EXCLUDING TRAFFIC AND DEPENDENCY) HISTORY:		
Score two (2) points for each warrant (excluding traffic and dependency warrants) during the past 18 months (maximum 20 points).		20 18 16 14 12 10 8 6 4 2
SCORE RANGE 0 - 20		SCORE
PRIOR SUSTAINED OFFENSE (IF APPLICABLE, CIRCLE HIGHEST SCORE)		
Two or more prior felony adjudications (true findings)		3
One prior felony adjudication, or three or more prior misdemeanor adjudications (true findings)		2
Two prior misdemeanor adjudications (true findings)		1
SCORE RANGE 0 - 3		SCORE

MITIGATING FACTORS		(CIRCLE ALL THAT APPLY)
Regular school attendance or employed		-1
Responsible adult to assure supervision and return to Court		-1
No Law Violation referrals within past year (<i>applies only to youth with a prior history of law violations</i>)		-1
First Law Violation referral at age 16 or older		-1
First Law Violation referral (instant offense)		-1
Not on probation, first UTL warrant and unaware of warrant.		-2
No FTA warrant history (<i>youth <u>must</u> have had a delinquency Court appearance history</i>)		-2
SCORE RANGE -9 to 0		SCORE TOTAL

AGGRAVATING FACTORS		(CIRCLE ALL THAT APPLY)
No verifiable local community ties		3
Possession of a firearm during instant offense without use or threatened use		2
Reported history of runaways from home within past six (6) months (2 or more) OR 1 run away from home and 1 run from placement		1
Reported history of runaways from out-of-home placement within past six (6) months (2 or more)		2
Multiple victims in instant offense		1
Documented threats to victim/witness (instant offense)		1
SCORE RANGE 0 - 10		SCORE TOTAL

TOTAL RISK	
SCORE	

DECISION SCALE/DECISION	Y	N	OVERRIDE
Special Detention Cases	<input type="checkbox"/>		Detain <input type="checkbox"/>
12 - Over	Detain	<input type="checkbox"/>	Conditional Release <input type="checkbox"/>
7 - 11	Conditional Release	<input type="checkbox"/>	Unconditional Release <input type="checkbox"/>
0 - 6	Unconditional Release	<input type="checkbox"/>	Approved by: _____
SUMMONS			Reason: _____
Preliminary Hearing Summons	<input type="checkbox"/>	<input type="checkbox"/>	_____
<small>(Summons to prelim if score over 6 or youth is being released on a warrant, on a charge involving a weapon, on a UUMV charge, domestic violence, or is being placed in a shelter care placement that requires a prelim.)</small>			_____
Shelter Placement	<input type="checkbox"/>	<input type="checkbox"/>	_____
Does youth meet statutory criteria for detention <input type="checkbox"/>			<input type="checkbox"/> Y <input type="checkbox"/> N <small>(If no, youth MUST be released.)</small>

REASON FOR ADMISSION OF YOUTH HELD PENDING A PRELIMINARY HEARING

Probable cause that one or more of the following exists:

- | | |
|--|--|
| <input type="checkbox"/> Committed any felony crime | <input type="checkbox"/> Probation/parole violator |
| <input type="checkbox"/> Committed a crime involving infliction of physical injury to another person | <input type="checkbox"/> Fugitive from another jurisdiction |
| <input type="checkbox"/> Possession of a firearm (ORS. 166.250) | <input type="checkbox"/> APB from state training school |
| <input type="checkbox"/> Escape from a juvenile detention facility | <input type="checkbox"/> Violation of conditional release |
| <input type="checkbox"/> Out-of-State runaway | <input type="checkbox"/> FTA after summons, citation or subpoena |

AND

- | | |
|--|--|
| <input type="checkbox"/> No means less restrictive of the youth's liberty gives reasonable assurance that the youth will attend hearing; OR | <input type="checkbox"/> The youth's behavior endangers the physical welfare of the youth or another person, or endangers the community. |
|--|--|

THIRTY-SIX (36)-HOUR HOLD (OVERRIDE/SUPERVISORY APPROVAL REQUIRED)

Youth can be held 36 hours from the time first taken into police custody to develop a release plan if: they are brought in on a law violation; a parent or guardian cannot be found or will not take responsibility for the youth, shelter is not available; and the youth cannot be released safely on recognizance or conditionally. What is the date and time of the police custody? _____ Release must be no later than:(date/time)

REASON: _____

Fill out the table below only when the electronic RAI is unavailable and only if youth is detained. The following table is the method used by the electronic RAI to automatically compute the CMS score.

COMPUTATION OF THE CMS SCORE

Client's Risk Assessment Instrument (RAI) Score	
Add CMS points for each of the current (police) allegations (not just most serious allegation)	
Add CMS points for each "Person" or "Property" allegation that has been filed in a petition	
Add CMS points for each allegation that has been found true	
Add 2 points for each warrant issued (excluding traffic/dependency warrants) within the last 18 months	
<u>Capacity Management System (CMS) Score TOTAL</u>	

This paper RAI does not include notification and narrative information found on the face sheet. Include this information when transferring to the electronic RAI.

ATTENTION: Fill out CMS Early Release Plan form on all youth detained with RAI score of less than 12.

1359458.PS/05/06/98
 Revised with III on 01/21/98 - Revised with Computation on 01/28/98 - Revised w/Judicial Officer info on 05/06/98

Multnomah County Department of Juvenile And Adult Community Justice
RISK ASSESSMENT INSTRUMENT (RAI) III
FACTOR DEFINITIONS

The Detention Risk Assessment Instrument (RAI) will be applied to all juveniles brought to detention admissions, even if it is apparent that the youth should be released. Below are the only exceptions at this point in time:

- Contracted Housing beds
- Parole, Close Custody or Community Safety beds
- Material Witness holds
- Measure 11 allegations (RAI is completed but youth is held regardless of score)
- Status offenders who are not on Probation or not out of state runaways
- AITP/Program Placements

The Intake worker will attempt to obtain objective, verifiable information in completing the RAI and will also include all available information from other counties and jurisdictions. When confirming information is not available, staff will otherwise rely on the youth's or parent's self-report. The following work day, JCCs will be responsible for filling out a work sheet to add or adjust any additional available information.

If a youth is detained based on their special detention status or upon accruing a risk score of twelve (12) or more, the youth will appear before a judicial officer on the following work day, unless they have been Court ordered to be held in detention.

SPECIAL DETENTION CASES

- **Escape from secure custody.** This applies to a youth who is on escape status from a youth correction facility or other "secure" detention setting.
- **Juvenile Corrections APB/Parole violator community safety hold.** APB (All Points Bulletin) issued by Oregon Department of Corrections/Oregon Youth Authority. Intake worker will contact the parole officer or youth correction facility to confirm the APB and to further confirm whether the youth should be held. The parole violator community safety hold is reserved only for those Department of Corrections/Oregon Youth Authority parole violators who have been ordered into designated "community safety beds" following a preliminary parole revocation hearing or as directed by specific Multnomah County Juvenile and Adult Community Justice staff responsible for these youth.
- **Arrest warrant.** All youth brought to detention following their arrest based on a warrant will be screened utilizing the RAI. If a Multnomah County Judicial Officer does not oppose release prior to the preliminary hearing, (indicated by **not** checking the related box on the warrant), the youth is eligible for release based on their RAI score. If released, the youth will **always** be put on the maximum supervision level of Community Detention and summonsed to appear at a preliminary hearing the next judicial day regardless of their RAI score.

If the judicial officer opposes release prior to the preliminary hearing (indicated by **checking** the related box on the warrant), the youth will be held in detention pending the preliminary hearing.

Warrants not covered under this procedure:

- Youth brought in on out of county or out of state delinquency warrants are held pending coordination with authorities from their original jurisdiction.
- Youth brought in on traffic warrants are generally released according to ORS 135.230 through ORS 135.295 with a signed Release Order and Agreement.
- **In-custody youth summoned for hearing.** Youth who are "in custody" at a youth correction facility or some other "secure" detention facility (perhaps from some other county) and are summoned to appear in Court as a witness or defendant at a hearing.
- **Court ordered.** Includes all youth ordered held in secure custody by a judicial officer.
- **Contract housing (Washington Co., Clackamas Co., I.N.S., etc.).** As a regional detention facility, youth brought to detention admissions by other counties or agencies (such as I.N.S.) with whom we have a contract, will be detained automatically and without the application of RAI.

MOST SERIOUS INSTANT OFFENSE

- **Intentional homicide (aggravated murder, murder).**
- **Attempted Murder or Class A Felonies involving violence or use or threatened use of a weapon (including Rape I, Sodomy I, and Unlawful Sexual Penetration I involving forcible compulsion).** Violence in this context involves the intentional use of physical force for the purpose or with the potential of causing death or serious physical injury. The use or threatened use of a weapon in this context involves the use or threatened use of a knife, gun, or any such object that is clearly capable of causing serious physical injury.
- **Class B Felonies involving violence or use or threatened use of a weapon.** The use or threatened use of a weapon in this context involves the use or threatened use of a knife, gun, or any such object that is clearly capable of causing serious physical injury.
- **Rape I, Sodomy I, Sexual Penetration I not involving forcible compulsion.** Typically, these are sexual offenses that are based on the victim's relatively young age or mental incapacity which makes them unable to consent to sexual behavior.
- **Class C Felony involving violence or use or threatened use of a weapon.** The use or threatened use of a weapon in this context involves the use or threatened use of a knife, gun, or any such object that is clearly capable of causing serious physical injury.
- **All other Class A and B Felonies.**
- **All other Class C Felonies.**
- **Misdemeanor involving violence or use or threatened use of a weapon.** The use or threatened use of a weapon in this context involves the use or threatened use of a knife, gun, or any such object that is clearly capable of causing serious physical injury.
- **All other misdemeanors.**
- **Probation/parole violation.** Youth is brought to detention for a technical violation of probation/parole conditions only. There is no new law violation being alleged.
- **Other, e.g., traffic offense, status offense (MIP, runaway, curfew, etc.).**

ADDITIONAL CURRENT OFFENSES

- **Two or more unrelated additional current felonies.** Unrelated additional current felonies relates to situations where a youth is arrested and brought to detention by law enforcement for two or more felony charges that are separated in time and or place and very often involve separate victims. As a general rule, there will be separate "incident" police reports.
- **One unrelated additional current felony.** Unrelated additional current felony relates to situations where a youth is arrested and brought to detention by law enforcement for two or more felony charges that are separated in time and or place and very often involve separate victims. As a general rule, there will be separate "incident" police reports.

LEGAL STATUS

- **Currently under Juvenile Justice/OYA Supervision: probation/parole/deferred disposition/informal disposition/other.** The youth is under the jurisdiction and/or supervision of the DJJS and/or the Oregon Youth Authority (OYA) or any other state or county jurisdiction and/or supervision.
- **Above-referenced status is for felony violent/assaultive law violation or domestic violence or unlawful possession of a firearm.** This refers to all felony "person" crimes, such as Homicide, Robbery, Assault, Kidnapping, and all felony sex offenses. It also refers to Assault IV-Domestic Violence and Unlawful Possession of a Firearm charges.
- **Pending trial (or disposition) on a law violation/probation violation (petition filed). Score only most serious pending offense using the "Most Serious Instant Offense" values. No score for misdemeanor petitions over 6 months old, unless there is an outstanding warrant.** This refers to an unresolved law violation or probation violation for which there is a filed petition and pending Court hearing.
- **Add only 1 point if the youth is on a Conditional Release on any pending law/probation violation.** This refers only to those youth who have been placed on a Conditional Release by a judicial officer on any pending law violation or a probation violation.

WARRANT HISTORY

- **Score 2 (two) points for each warrant (excluding traffic or dependency warrants) during the previous 18 months.** Failure to Appear (FTA), Probation Violations (WPV), Unable to Locate (UIL), Contempt of Court.

PRIOR SUSTAINED OFFENSE

- **Two or more prior felony adjudications (true findings).** A felony adjudication or "true finding" includes only those charges where jurisdiction has been established by the Court subsequent to a trial or admission by the youth.
- **One prior felony adjudication, or three or more prior misdemeanor adjudications (true finding)**
A felony adjudication or "true finding" includes only those charges where jurisdiction has been established by the Court subsequent to a trial or admission by the youth.

- **Two prior misdemeanor adjudications (true findings).** A misdemeanor adjudication or "true finding" includes only those charges where jurisdiction has been established by the Court subsequent to a trial or admission by the youth.

MITIGATING FACTORS

- **Regular school attendance or employed.** Allows for occasional truancy (two to three un-excused absences in most recent school month). Employed assumes at least 15 hours per week if not attending school.
- **Responsible adult to assure in supervision and return to Court.** Responsible adult would include a friend, neighbor, or relative who does not relate to the youth as a peer but rather as an individual who is concerned about the youth's best interests and clearly agrees to appropriately supervise the youth and *assure* their return to Court.
- **No Law Violation referrals within past year (applies only to youth with a prior history of law violations).** Law violation referrals exclude any status offense such as curfew or MIP but does include law violation referrals from any and all jurisdictions.
- **First Law Violation referral at age 16 or older.** Law violation referrals exclude any status offense such as curfew or MIP but does include law violation referrals from any and all jurisdictions.
- **First Law Violation referral (instant offense).** Law violation referrals exclude any status offense such as curfew or MIP but does include law violation referrals from any and all jurisdictions.
- **Not on Probation, in custody on first warrant which is an UTL and unaware of warrant.** This is for the rare situation where the youth and family really did not know about the UTL warrant and the youth is not on probation.
- **No FTA history (youth must have had a delinquency Court appearance history)** Youth has demonstrated the ability to make it to delinquency hearings and has no FTA history.

AGGRAVATING FACTORS

- **No verifiable local community ties.** The youth is unable to provide information that can be verified by the Intake worker regarding residence (independent living, with friends or relatives), school enrollment or employment. If the youth reports a residence address but no telephone number, the Intake worker will request police assistance to contact individuals at the reported address in order to verify said residence and community ties. The Intake worker will also make every effort to eliminate any language barriers through the use of appropriate Interpreters.
- **Possession of a firearm during instant offense, but without use or threatened use.**
Example: A youth found to be in possession of a gun when arrested for UUMV, PCS, Criminal Mischief or any such other law violation that did not require the use or threatened use of a gun.
- **Reported history of runaways from home within past six (6) months (2 or more) OR 1 run away from home and 1 run away from placement.** Runaways must have been reported to law enforcement or confirmed by parent/guardian/JCC to Intake worker.

- **Reported history of runaways from out-of-home placement within the past six (6) months (2 or more).** Runaways must have been reported to law enforcement or confirmed by parent/guardian/JCC to Intake worker.
- **Multiple victims in instant offense.** Determination of whether there are multiple victims is established by the police crime report or "incident" report which will clearly list each victim for the instant offense.
- **Victim/witness threats (instant offense).** Threats must be documented and made directly to victims or witnesses as opposed to angry statements made to an Intake worker or others regarding allegations that the youth claims to be false or inaccurate.

**ADDENDUM
MEASURE 11/SUCCESSOR STATUTE CRIMES**

Aggravated Murder	Kidnap II**
Murder	Rape I
Attempt Aggravated Murder	Rape II
Conspiracy to Commit	Robbery I
Aggravated Murder	Robbery II-(see ** below)
Attempt Murder	Sodomy I
Conspiracy to Commit Murder	Sodomy II
Manslaughter I	Unlawful Sexual Penetration I
Manslaughter II	Unlawful Sexual Penetration II
Assault I	Sexual Abuse I
Assault II (see **below)	Compelling Prostitution-(see ** below)
Kidnap I	Arson I-(see ** below)

****SB 1049...”Revises BM11...creates possibility of guideline sentence for assault 2, kidnap 2 and robbery 2 under certain circumstances of the crime and if the accused meets certain criminal history criterion. Also adds crimes of arson 1 if threat to serious physical injury, using child in sexually explicit display and compelling prostitution.”**

3153328.RGP/September 19, 1995/rdh 2-6-98

PEORIA COUNTY JUVENILE DETENTION CENTER

SCREENING INSTRUMENT

DATE: _____ TIME: _____

REFERRAL FROM: _____ WITH: _____
 (PRINT POLICE OFFICER'S NAME) (PRINT LAW ENFORCEMENT AGENCY'S NAME)

MINOR: _____ SCREENER: _____
 (PRINT JUVENILE'S NAME) (PRINT YOUR NAME)

REFER TO POINT VALUES PAGE (SCORE EACH ITEM)

SCORE

- A. **Most Serious Alleged Current Offense 0-12**
 (Choose only one item indicating the most serious charge)
 Charge: _____
- B. **Additional Current/Pending Offenses**
 Two or more additional current felonies 4
 One additional felony 3
 One or more additional current misdemeanors 1
 None 0
- C. **Prior Arrest**
 Two or more prior major (offenses in 12 category) felonies 5
 Three or more arrest in last 30 days 4
 One prior major felony; two or more other felonies 3
 One other felony 2
 Two or more prior misdemeanors; one prior misdemeanor weapons offense 1
 None 0
- D. **SUBTOTAL I (Sum of A, B, and C)** _____
- E. **Risk of Failure to Appear**
 Active delinquent warrant/request for apprehension/delinquent offense
 while on court-ordered home detention 10
 Absconded from court-ordered residential placement or violated home detention 8
 Habitual absconder or history of absconding to avoid court appearance 6
 Prior delinquent warrant issued 3
 None of above 0
- F. **SUBTOTAL II (Enter the larger of D or E)** _____
- G. **Legal Status**
 On parole 4
 On probation or supervision or previously on probation, parole, or supervision 3
 Pending court; pending prior delinquency referrals to S.A. for petition request 2
 None of above 0
- H. **TOTAL (Sum of F and G)** _____

AUTO HOLD – ALL CHARGES IN THE 12 or 10 CATEGORY; WARRANTS OR REQUEST FOR APPREHENSION, AS WELL AS ANY VIOLENT OFFENSE WHERE A LAW ENFORCEMENT OFFICER, TEACHER, OR SCHOOL ADMINISTRATOR, OR THE JUVENILE'S PARENT IS THE VICTIM (includes staff members of Court-ordered placement facilities)

SCORING: 10 AND UP Detain.
 7 to 9 May Release (non-secure options can be utilized if feasible and appropriate).
 0 to 6 Release to parent or guardian or to a responsible adult relative.

JUVENILE DETENTION SCREENING AND ASSESSMENT GUIDE

Last Name:		Sex:	Charge 1:	Fel. Misd.	Code:
First Name, MI:		DOB:	Charge 2:	Fel. Misd.	Code:
Ethnicity: (Circle all that apply) Hispanic Af-Am. White Nat.Amer. AsianAmer. Other:		Age:	Charge 3:	Fel. Misd.	Code:
Screening Date/Time:	Parents/Guardian:	Contact Information:			

SCREENING TREE

MANDATORY HOLD FACTORS and WARRANTS

Y N 1. Current crime of violence or weapon charge (CRS 18-2-204).
 Y N 2. OYS warrant or escape from secure.
 Y N 3. Active warrant or order from a district court. IF NONE

INDICATORS OF SERIOUS REPEAT DELINQUENCY

Y N 4. Prior felony adjudications.
 Y N 5. Pending felony charge(s) (excluding present charges).
 Y N 6. Currently under bond or release conditions.
 Y N 7. Past FTAs, violation of court conditions, or bond.
 Y N 8. Crimes against persons, arson, or weapons history. IF NONE

9. Age 14 or younger at first arrest. Y N
 10. Associates/identifies with delinquents/gang members. Y N

RISK OF SELF HARM

Y N 11. Suicidal or risk of self harm.
 Y N 12. Risk of victimization, prostitution history.
 Y N 13. History of running from placements.
 Y N 14. Severe substance abuse. IF NONE

PUBLIC SAFETY RISK

Y N 15. Prior history of violence.
 Y N 16. Arson or sex offense charges/history.
 Y N 17. History of weapon use.
 Y N 18. Threatens victims or witnesses. IF NONE

FAMILY OR COMMUNITY RESOURCES

Y N 19. Youth been victimized by family.
 Y N 20. Family has been victimized by youth.
 Y N 21. Youth is in custody of Social Services.
 Y N 22. History of repeated runaways. IF NONE

23. No stable school or work situation. Y N

N 24. Family or responsible adult can supervise. CAN SUPERVISE

Y 25. Current arrest is a felony charge. IF NOT

LEVEL 1
Secure Detention

LEVEL 2
Staff-Secure

LEVEL 3
Residential /Shelter

LEVEL 4
Home Detention/ Services

LEVEL 5
Release

INSTRUCTIONS:

The **SCREENING TREE** is used to make an initial placement decision based on information that is readily available at the point of law enforcement referral. Any Y (Yes) circled on the left side of a question takes you to the box below.

The **ASSESSMENT** column is completed after more information is collected and verified.

Please see the **Instruction Manual** for more information about using the Guide.

ASSESSMENT

ALL ITEMS MUST BE ADDRESSED

MANDATORY HOLDS

1. Y N _____
 2. Y N _____
 3. Y N _____

SERIOUS DELINQUENCY

4. Y N _____
 5. Y N _____
 6. Y N _____
 7. Y N _____
 8. Y N _____
 9. Y N _____
 10. Y N _____

RISK OF SELF HARM

11. Y N _____
 12. Y N _____
 13. Y N _____
 14. Y N _____

PUBLIC SAFETY RISK

15. Y N _____
 16. Y N _____
 17. Y N _____
 18. Y N _____

FAMILY / RESOURCES

19. Y N _____
 20. Y N _____
 21. Y N _____
 22. Y N _____
 23. Y N _____

RESPONSIBLE ADULT

24. N Y _____

FELONY CHARGE

25. Y N _____

REQUIRED DATA ENTRY

Level by Screening Tree (Circle):	1	2	3	4	5	Reason for Actual Placement:	Placement Code:
Level by Local Policy or Judgement:	1	2	3	4	5	Detention Hearing Recommendation:	1 2 3 4 5 No Hearing
Reason for Override:	Override Code:	Level Ordered by Court:	1	2	3	4	5
Actual Placement Level:	1	2	3	4	5	Court Finding:	Finding Code:

LOCAL USE

Screening Name:	Recommendation By:
County:	Agency:
Screening Notes:	Hearing Notes:

Screen Date: _____ Screen Time: A.M./P.M. _____ Screener: _____

Youth Officer: _____ District: _____

Minor Respondent: _____ DOB: _____ Age _____

Sex: Male Female Race: White Black Hispanic Asian Other YD: _____

Factor	Family Folder Number:	Score
1.	MOST SERIOUS INSTANT OFFENSE: <i>(Choose only one item indicating the most serious charge)</i> Automatic Transfer Cases Violent Felonies — (Murder, Armed Robbery with Handgun, Home Invasion, ACSA, UUW-Gun, Agg Batt - Bodily Harm, Agg Vehicular Invasion, Agg Discharge of a Firearm, Agg Battery with a firearm) Other Forcible Felonies — (Robbery, Kidnapping, Intimidation, CSA, Hate Crime, Agg Batt, Vehicle Invasion) Other Offenses Felony Sale of Cannabis (Class 1 or 2 felony amount, Arson, DCS PCS w/int deliver, Residential Burglary, UUW (not a gun), Possession Explosives Felony Possession of Narcotics/Drugs for Sale or Other Felonies , Misdemeanor Possession of Narcotics/Drugs or Other Weapons Possession Other Misdemeanors Not Picked up on New Offense (WARRANT)	15 15 10 10 7 5 3 2 0
2.	PRIOR COURT REFERRALS <i>(Choose only one item)</i> Prior IDOC commitment Prior court referral within the last 24 hour period Prior court referral within the last seven days Six or more total court referrals within the last 12 months (# _____) One to five court referrals within the last 12 months (# _____) No court referrals within the last 12 months	7 5 4 3 2 0
3.	PAST FINDINGS OF DELINQUENCY — CLOSED PROCEEDINGS <i>(Choose only one item)</i> Past Finding of Delinquency on a violent felony Past Finding of Delinquency on a felony Past Finding of Delinquency on a misdemeanor (# of findings x 1 up to a total of 3 points) No Past Finding of Delinquency	5 4 1/2/3 0
4.	CURRENT CASE STATUS <i>(Choose only one item)</i> IPS Probation (# _____) Supervision (# _____) Multiple Disposition Dates Probation (# _____) Supervision (# _____) Single Disposition Date Not an active case	6 5 3 0
5.	PETITIONS PENDING ADJUDICATION <i>(Choose only one item)</i> 3 Petitions Pending (# _____) 2 Petitions Pending 1 Petition Pending No Petitions Pending	3 2 1 0
6.	UNDER PRE-ADJUDICATORY ORDER OF HOME CONFINEMENT	4
7.	WARRANT CASES <i>(Choose only one item)</i> Category 1: Mandatory Detention Category 2: Non-Mandatory Detention	15 8
8.	VIOLATION OF JUVENILE ELECTRONIC MONITORING	15
TOTAL SCORE		

DECISION SCALE Score 0-9 **AUTHORIZE RELEASE** with notice of prioritized date for §5 - 12 Conference)
 Score 10-14 **COMPLETE NON-SECURE DETENTION OPTIONS FORM**
 Score 15 + **AUTHORIZE DETENTION** (for minors 13 years of age and older)
(Complete non-secure custody options for minors under 13 years of age before placement into secure detention)

ADMINISTRATIVE OVERRIDE *(Supervisory approval is required)*
 Yes No REASON: _____

FINAL DECISION Detain Release Release With Conditions

MR lives at: _____ Apt. _____ City: _____ State: _____ Zip: _____

MR lives with: _____ Relation: _____ Phone: _____

Source: Cook County Juvenile Probation Department Detention Screening Instrument



National Juvenile Defender Center

ensuring excellence in juvenile defense and promoting justice for all children

1350 Connecticut Avenue NW, Suite 304
Washington, DC 20036

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202.452.1205 (fax)

www.njdc.info