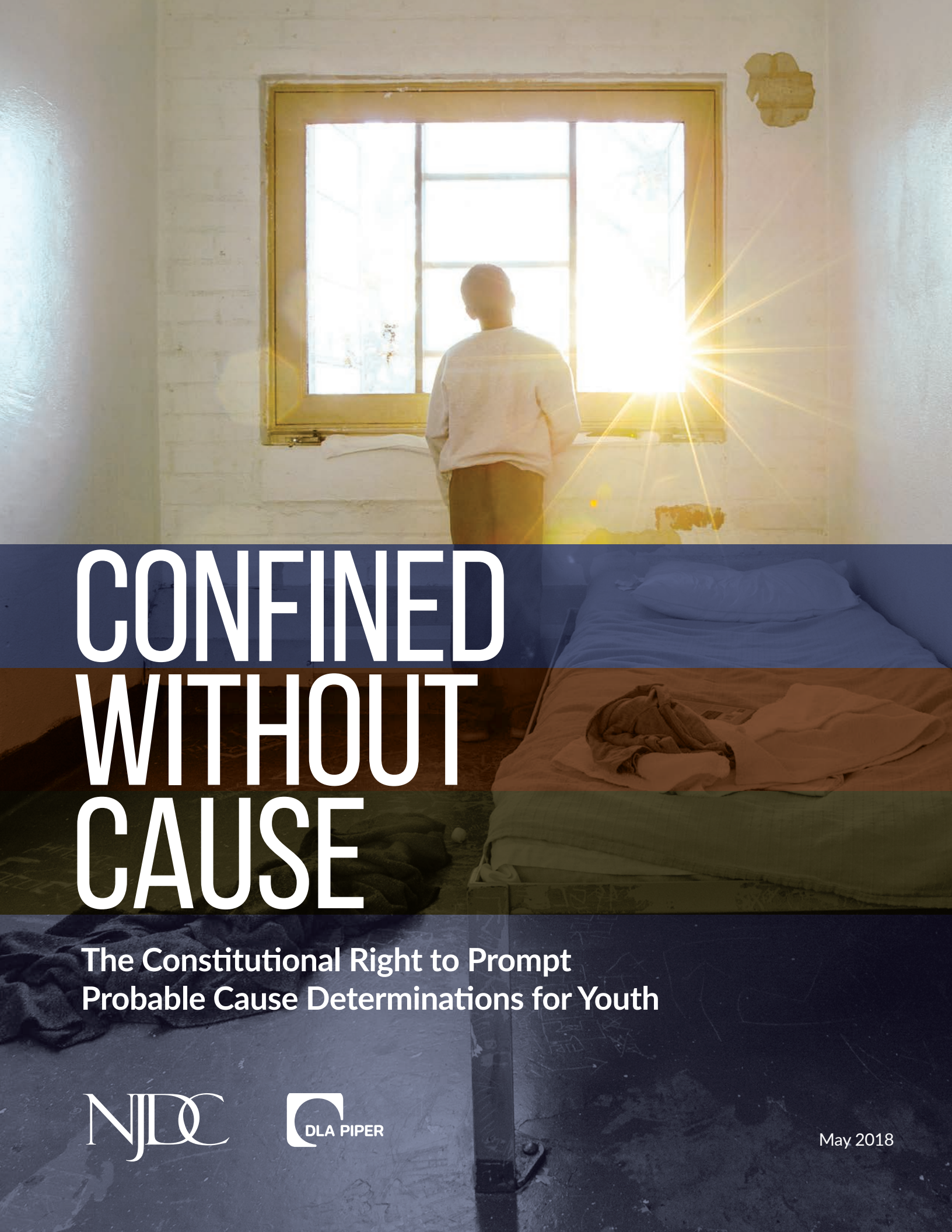

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The Constitutional Right to Prompt Probable Cause Determinations for Youth

NJDC

DLA PIPER

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I. INTRODUCTION

> "[Before a probable cause hearing,] 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."
>
> *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting).

A. AN OVERVIEW OF JUVENILE DETENTION

The standards and rules governing the "Dickensian bureaucratic machine"[1] that is the juvenile justice system affect thousands of youth. Every day, the government holds 25,000 youth in detention centers while they await preliminary hearings, trials, or placements.[2] Around 60,500 youth are confined in other facilities, such as "group homes, residential treatment centers, bootcamps, wilderness programs, or county-run youth facilities (some of them locked, others secured only through staff supervision)."[3] "For perspective, that's more adolescents than currently reside in mid-sized American cities," such as Louisville, Nashville, Baltimore, or Portland.[4] Forty percent of committed youth in the U.S. "are held in locked long-term youth correctional facilities," which "typically operate in a regimented (prison-like) fashion, and feature correctional hardware such as razor-wire, isolation cells, and locked cell blocks."[5]

Racial disparities in juvenile detention are especially troubling.[6] Black youth are "more than 4 times as likely as white [youth] to be committed to secure facilities" in most states;[7] and in six states, the likelihood of confinement increases

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[1] Cty. of Riverside v. McLaughlin, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting).

[2] Richard Mendel, The Annie E. Casey Found., No Place for Kids: The Case for Reducing Juvenile Incarceration 2 (2011) [hereinafter No Place for Kids], http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf; Office of Juvenile Justice & Delinquency Prevention, Juvenile Offenders and Victims: 2014 National Report 190 [hereinafter Juvenile Offenders and Victims], https://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf.

[3] No Place for Kids, *supra* note 2.

[4] *Id.*

[5] No Place for Kids, *supra* note 2. *See also* Juvenile Offenders and Victims, *supra* note 2, at 201 (providing the most current description of juvenile facilities). This construct no longer resembles the benevolent motivations of the original juvenile justice system, which was established to ensure children were treated appropriately while balancing the needs of the children, their families and their communities. *See* Nat'l Council of Juvenile & Family Court Judges, Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases 11-12 (2005) [hereinafter Improving Court Practice], http://www.ncjfcj.org/sites/default/files/juveniledelinquencyguidelinescompressed%5B1%5D.pdf.

[6] The Sentencing Project, Policy Brief: Racial Disparities in Youth Commitments and Arrests (2016) [hereinafter Policy Brief: Racial Disparities], http://www.sentencingproject.org/wp-content/uploads/2016/04/Racial-Disparities-in-Youth-Commitments-and-Arrests.pdf.

[7] *Id.* at 1.

tenfold.[8] Hispanic youth are 60 percent more likely to be in placement than their white peers; in Connecticut, New Hampshire, Massachusetts, and New Jersey, Hispanic youth are "more than five times as likely as white [youth] to be committed."[9] Similarly, American Indian youth are "nearly four times as likely as white youth to be committed"; in Minnesota, Illinois, and Vermont, "American Indian youth are more than 10 times as likely as white [youth] to be committed."[10] Moreover, such disparities are becoming worse. From 2003 to 2013, disproportionate detention of Black youth increased by 15 percent.[11] And disproportionate detention of American Indians increased by 50 percent.[12]

B. VARIANCE IN STATES' PROBABLE CAUSE DETERMINATION PROCEDURES

States do not apply the same limits on pre-trial detention to adults and youth, and state practices diverge with respect to the criteria courts weigh when considering continuing the detention of youth. It is well-established U.S. Supreme Court precedent that the government must make a probable cause determination for detained persons within 48 hours of an arrest,[13] but states do not uniformly apply this 48-hour rule to adolescents.[14] Some states require the government to make a probable cause determination in cases involving youth within 48 hours or less in compliance with the constitutional mandate; many other states either exclude weekends and holidays when measuring this period of time or allow detention of youth absent a probable cause determination for more than 48 hours.[15] Detaining youth without a prompt probable cause hearing—especially over weekends and holidays—is unconstitutional.

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[8] *Id.*
[9] *Id.* at 3.
[10] *Id.* at 4.
[11] *Id.* at 5.
[12] *Id.*
[13] *Riverside*, 500 U.S. at 58.
[14] *See* Sandra Newcombe, *The DOJ Comes to Town: An Argument for Legislative Reform When the Juvenile Court Fails to Protect Due-Process Rights*, 44 U. Mem L. Rev 921, 963-67 (2014).
[15] *Id.* at 965-66.

C. THE DEPARTMENT OF JUSTICE'S POSITION: THE 48-HOUR RULE APPLIES TO YOUTH

The U.S. Department of Justice (DOJ) has stated that detaining youth for more than 48 hours without a finding of probable cause is unconstitutional. In 2012, the DOJ asserted that Shelby County, Tennessee could not detain youth over the weekend.[16] The DOJ found that, between 2005 and 2009, Shelby County "detained approximately 815 children for three days or more before holding a detention hearing and making a probable cause determination."[17] A Tennessee statute allowed detaining children for three days before a detention hearing (and, presumably, a finding of probable cause), but the DOJ stated, "on its face, [the statute] appear[ed] to violate the Constitution."[18] Quoting a case from the U.S. Court of Appeals for the Sixth Circuit, *Cox v. Turley*, the DOJ clarified that a prompt determination of probable cause is a "mandate that protects [youth] as well as adults."[19]

[16] U.S. Dep't of Justice, Civil Rights Div., Investigation of The Shelby County Juvenile Court 17-18 (2012) [hereinafter Shelby County Juvenile Court], https://www.justice.gov/sites/default/files/crt/legacy/2012/04/26/shelbycountyjuv_findingsrpt_4-26-12.pdf.

[17] *Id.* at 18.

[18] *Id.*

[19] *Id.* at 17 (quoting Cox v. Turley, 506 F.2d 1347, 1353 (6th Cir. 1974)).

II. THE HARMS OF DETENTION

> "It is difficult for an adult who has not been through the experience to realize the terror that engulfs a youngster the first time he loses his liberty and has to spend the night or several days or weeks in a cold, impersonal cell or room away from home or family."
>
> *In re William M.*, 3 Cal. 3d 16, 31 n.25 (Cal. 1970).

Detaining youth who may have been confined without probable cause is troubling for many reasons and requires immediate attention because of detention's attendant harms. In detention centers, youth are at a high risk of being physically abused. Isolation from family and friends in an alien and impersonal environment with a looming threat of punishment or violence causes psychological trauma or exacerbates preexisting trauma. Detention increases the chance that the youth will exhibit risky behavior later in life, drop out of school, and have low-wage employment.[20]

Children frequently face abuse and maltreatment in detention, including violence, sexual assault, and isolation.[21] "Nearly 10 percent of youth incarcerated in state-operated or state-funded juvenile corrections facilities reported being victimized sexually by staff or other youth in their facilities, and half of the victimized youth reported incidents involving physical force, threats or other forms of coercion *and* unwanted genital contact."[22] Horrifyingly, the younger the individual, the more likely it is that they will be a victim of sexual assault, physical assault, or robbery while in custody.[23] "More than [25%] of youth younger than 13 experienced some type of violence in custody, compared with 9% of 20-year-olds," for example.[24]

Isolation from family and friends in an alien and impersonal environment with a looming threat of punishment or violence causes psychological trauma or exacerbates preexisting trauma.

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[20] Barry Holman & Jason Ziedenberg, Justice Policy Inst., The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities (2006) [hereinafter Dangers of Detention], http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers_of_detention.pdf; Bruce Western & Katherine Beckett, *How Unregulated Is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 Am. J. Soc. 1030, 1048 (1999), http://www.nyu.edu/gsas/dept/politics/seminars/western.pdf.

[21] Richard A. Mendel, The Annie E. Casey Found., Maltreatment of Youth in U.S. Juvenile Corrections Facilities: An Update 2-3 (2015) [hereinafter Maltreatment of Youth], https://www.ncmhjj.com/wp-content/uploads/2015/07/aecf-maltreatmentyouthuscorrections-2015.pdf.

[22] *Id.* at 3 (emphasis in original).

[23] Juvenile Offenders and Victims, *supra* note 2, at 216.

[24] *Id.*

Sexual abuse disproportionately affects LGBTQI-GNC (lesbian, gay, bisexual, transgender, queer, intersex, and gender non-conforming) youth.[25] For example, while only 1.9 percent of heterosexual boys are victimized by their peers in facilities, 20.6 percent of gay and bisexual boys face sexual assault or mistreatment.[26] And LGB youth are 10 times as likely to report being sexually victimized by a peer while in custody compared to their heterosexual peers.[27]

Numerous instances of maltreatment have been documented in detention centers, where youth are usually confined pending their detention hearing.[28] In a San Diego detention center, state officials used pepper spray on youth 461 times in 2011 and 414 times in 2012.[29] Officials used pepper spray even for minor misbehaviors, including "failing to follow instructions or [] being verbally defiant."[30] In Arkansas, the staff at the Yell County Juvenile Detention Center used a restraining device,

> plus a motorcycle helmet covered in duct tape (covering the face shield) and decorated with a cartoonish, hand-drawn face until 2014. Youth restrained in this manner were made to sit upright, sometimes for hours at a time, with their legs immobilized and arms handcuffed behind their backs in near-total darkness.[31]

In 2014, a detention center in Ohio kept the cells at such low temperatures that youth developed frostbite on their fingers and toes.[32]

Even absent abuse or maltreatment, detention is psychologically harmful[33] and often exacerbates preexisting traumas.[34] Approximately 90 percent of detained youth have been previously exposed to trauma, such as being threatened with a weapon, suffering a traumatic loss, or being physically assaulted.[35] Non-detained youth are

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[25] Bianca D.M. Wilson et al., *Disproportionality and Disparities among Sexual Minority Youth in Custody*, 46 J. Youth Adolescence 1547, 1554 (2017).
[26] *Id*.
[27] Juvenile Offenders and Victims, *supra* note 2, at 219.
[28] *Id*. at 201 (defining "detention center" as "a short-term facility that provides temporary care in a physically restricting environment for [youth] in custody pending court disposition and, often, for [youth] who are adjudicated delinquent and awaiting disposition or placement elsewhere, or are awaiting transfer to another jurisdiction.").
[29] Maltreatment of Youth, *supra* note 21, at 21.
[30] Youth Law Ctr., Complaint Against the County of San Diego Department of Probation Regarding the Excessive Use of Pepper Spray and Other Civil Rights Violations in San Diego Juvenile Detention Facilities 9-11 (2014) (The following is a description of one such occurrence: "Two minors were staring at each other. Staff instructed all minors to their seats, and all minors, including the two who were staring at each other, complied. When staff gave the command to cover, they continued to stare at each other. Staff sprayed both in the face. Both minors received forty-eight hours of room confinement."),
http://www.ylc.org/wp/wp-content/uploads/DOJ%20Complaint.pdf.
[31] Maltreatment of Youth, *supra* note 21, at 21.
[32] *Id*. at 22.
[33] Maltreatment of Youth, *supra* note 21.
[34] Julian Ford, John Chapman, Daniel Connor & Keith Cruise, *Complex Trauma and Aggression in Secure Juvenile Justice Settings*, 39 Crim. Just. & Behav.
694 (2012).
[35] *Id*. at 697.

Numerous instances of maltreatment have been documented in detention centers, where youth are usually confined pending their detention hearing.

three times less likely to have suffered similar trauma.[36] Moreover, system-involved youth often struggle to cope with other traumatic stressors such as strained family relationships, exposure to community violence, and victimization.

Detention exacerbates a youth's mental health problems. Given that "[a]bout one of every five youth in custody has a mental health disturbance that significantly impairs their capacity to function,"[37] incarcerated youth have relatively high rates of mental health problems. Symptoms of such problems are compounded by the stress of incarceration and the conditions of confinement.[38] Isolation within the facility and from the youth's family is common; 55 percent of youth reported being isolated—"locked up alone or confined to their room with no contact with other residents"[39]—for more than 24 hours,[40] and "28% said their families would have to travel 3 hours or more to see them."[41]

Detention increases the rate of depression in youth.[42] One-third of youth detainees report feeling that life is hopeless[43] and more than 10 percent have attempted suicide.[44] "[R]ates of completed suicide are between two and four times higher among youth in custody than among youth in the community."[45]

Detention, even for a short period of time, also increases the likelihood of recidivism.[46] Youth who are detained, compared to youth who remain in the community under probation supervision, are more likely to be rearrested.[47] Too often, incarceration sets youth up for failure rather than building on their strengths and skills that can lead to

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[36] Julian Ford, J. Kirk Hartman, Josephine Hawke & John F. Chapman, *Traumatic Victimization, Posttraumatic Stress Disorder, Suicidal Ideation, and Substance Abuse Risk Among Juvenile Justice-Involved Youth*, 1 J. Child & Adolescent Trauma 75, 76 (2008).
[37] No Place for Kids, *supra* note 2, at 24.
[38] Dangers of Detention, *supra* note 20, at 8.
[39] Juvenile Offenders and Victims, *supra* note 2, at 214.
[40] *Id*.
[41] *Id*.
[42] Karen Abram et al., U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, Suicidal Thoughts and Behaviors Among Detained Youth (2014) [hereinafter Suicidal Thoughts and Behaviors], OJJDP Juv. Just. Bull., http://www.ojjdp.gov/pubs/243891.pdf; Sue Burrell, The Nat'l Child Traumatic Stress Network, Trauma and the Environment of Care in Juvenile Institutions (2013), http://www.njjn.org/uploads/digital-library/NCTSN_trauma-and-environment-of-juvenile-care-institutions_Sue-Burrell_September-2013.pdf.
[43] Suicidal Thoughts and Behaviors, *supra* note 42, at 4.
[44] *Id*. at 5.
[45] Karen Abram et al., *Suicidal Ideation and Behaviors Among Youth in Juvenile Detention*, 47 J. Am. Acad. Child Adolescent Psychol. 291 (2008).
[46] Patrick McCarthy, Vincent Schiraldi & Miriam Shark, Nat'l Inst. of Justice, The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model 13 (2016), https://www.ncjrs.gov/pdffiles1/nij/250142.pdf.
[47] No Place for Kids, *supra* note 2, at 10-11.

successful outcomes. It is not uncommon for adults who intersect with the criminal justice system to have spent some time incarcerated in the juvenile system, which lacks adequate supports to facilitate successful reentry into society.[48]

Grouping youth together behind bars and separating them from their families and communities may result in negative peer effects. As one researcher concluded, "[t]he evidence for peer influence on adolescent delinquency and criminal behavior is so over-whelming that criminologists have considered delinquency to be a team activity."[49] Instead of reducing problem behaviors, detention often has the opposite effect, exacerbating the problem by congregating youth. In 2003, 16 percent said they had been offered alcohol, drugs, or weapons *since arriving* at their facility.[50] Research demonstrates that young people "[take] more risks, focus[] more on the benefits than the costs of risky behavior, and [make] riskier decisions when in peer groups than alone"; this effect is particularly strong for adolescents.[51] Therefore, the "unintended consequences of grouping children at-risk for externalizing disorders may include negative changes in attitudes toward antisocial behavior, affiliation with antisocial peers, and identification with deviancy."[52] It is no surprise, then, that the most rigorous study of this problem found that "the intensity of juvenile justice interventions was associated with escalating problem behavior."[53]

Negative peer effects interrupt the natural process of "aging out" of delinquency. The U.S. Supreme Court has endorsed this view:

> For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.[54]

Too often, incarceration sets youth up for failure rather than building on their strengths and skills that can lead to successful outcomes.

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[48] *Id.* at 12.

[49] Thomas J. Dishion & Jessica M. Tipsord, *Peer Contagion in Child and Adolescent Social and Emotional Development* [hereinafter *Peer Contagion*], 62 Ann. Rev. Psychol. 189, 200 (2011).

[50] Juvenile Offenders and Victims, *supra* note 2, at 213.

[51] Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Dev. Psych. 625, 625 (2005).

[52] Dangers of Detention, *supra* note 20, at 5.

[53] *Peer Contagion*, *supra* note 49, at 200 (citing Uberto Gatti et al., *Iatrogenic Effect of Juvenile Justice*, 50 J. Child Psychol. Psychiatry 991, 991-98 (2009)).

[54] Roper v. Simmons, 543 U.S. 551, 570 (2005) (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychol. 1009, 1014 (2003)).

Generally, after the age of 17, the likelihood that a person will commit a violent offense plummets.[55] However, for youth who are detained before age 17, the negative peer effects and networks created while in detention may *increase* the likelihood of risky behavior.[56]

Incarceration as a youth reduces the chance of high school graduation by as much as 39 percent.

Detention harms educational attainment, which causes lower employment rates and lower earnings. Incarceration as a youth reduces the chance of high school graduation by as much as 39 percent.[57] Furthermore, the educational harms disproportionately fall on the most vulnerable students. "Studies find that youth in correctional confinement score four years below grade level on average,"[58] and 43 percent of youth with special educational needs do not return to school after they are released.[59] Partly because of these educational harms, youth incarceration reduces the formerly incarcerated individual's wages "by 10 to 20 percent and diminishes their wage growth by approximately 30 percent."[60] These negative effects on future employment also disproportionately affect Black youth, who suffer a nine percent reduction in hours worked four years after release compared to a five percent reduction for formerly incarcerated youth on average.[61]

For all of the harms detention inflicts on detained youth, minority children are disproportionately affected.[62] In 2010, "[i]n every state but Vermont, the residential placement rate for Black youth offenders exceeded the

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[55] Delbert S. Elliott, *Serious Violent Offenders: Onset Developmental Course, and Termination*, 32 Criminology 1, 6 (1994).

[56] *See Peer Contagion*, *supra* note 49, at 200.

[57] *See* Anna Aizer & Joseph J. Doyle, Jr., The Nat'l Bureau of Econ. Research, Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges 3 (2013), http://www.mit.edu/~jjdoyle/aizer_doyle_judges_06242013.pdf. *See also* Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement,* 23 Jus. Q. 462, 473 (2006) (A first-time arrest during high school doubles the likelihood that a youth will drop out and a court appearance quadruples that likelihood.); Randi Hjalmarsson, *Criminal Justice Involvement and High School Completion*, 63 J. Urban Econ. 613, 613 (2008) (Arrested youth are 11 percent less likely to graduate from high school and incarcerated youth are 26 percent less likely to graduate.).

[58] No Place for Kids, *supra* note 2, at 24.

[59] Dangers of Detention, *supra note* 20, at 9.

[60] Justice Policy Inst., Sticker Shock: Calculating the Full Price Tag for Youth Incarceration 29 (2014), http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf. *See also* Bruce Western & Katherine Beckett, *How Unregulated Is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 Am. J. Soc. 1030, 1048 (1999) ("Adult employment lost through youth incarceration exceeds the large negative effects of dropping out of high school or living in a high unemployment area."), http://www.nyu.edu/gsas/dept/politics/seminars/western.pdf.

[61] No Place for Kids, *supra* note 2, at 12.

[62] *See* Policy Brief: Racial Disparities, *supra* note 6. *See also* Nat'l Council on Crime & Delinquency, And Justice for Some: Differential Treatment of Youth of Color in the Justice System 2 (2007) [hereinafter Justice for Some], http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf ("Although [Black] youth are 16% of the adolescent population in the United States, they are 38% of the almost 100,000 youth confined in local detention and state correctional systems.").

rate for whites," and "[i]n more than half of all states, the ratio of the minority placement rate to the nonminority placement rate exceeded 3.5 to 1."[63] Additionally, Black youth are more likely to be sexually abused by staff,[64] more likely to suffer negative labor effects in the future,[65] more likely to be confined longer for the same offense,[66] more likely to be sentenced to adult prisons for "identical charges and offending histories,"[67] and more likely to be arrested for a drug crime even though they use drugs less often than their white counterparts.[68]

[63] Juvenile Offenders and Victims, *supra* note 2, at 197.
[64] *Id.* at 219.
[65] No Place for Kids, *supra* note 2, at 12.
[66] Justice for Some, *supra* note 62, at 29.
[67] No Place for Kids, *supra* note 2, at 23.
[68] Juvenile Offenders and Victims, *supra* note 2, at 65.

III. THE LAW

"[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."

In re Gault, 387 U.S. 1, 27 (1967).

A. THE SUPREME COURT AND PROBABLE CAUSE DETERMINATIONS

Courts must take special care to ensure the appropriateness of warrantless arrests for both adults and minors. The U.S. Supreme Court noted in *Beck v. Ohio*: "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."[69] Such after-the-event justifications, however, are sometimes necessary as a balance "between the individual's right to liberty and the State's duty to control crime."[70]

The Supreme Court held in *Gerstein v. Pugh* that the Fourth Amendment requires a judge to make a probable cause determination "promptly" after arrest.[71] The state may arrest and detain people without a warrant only "for a brief period of detention to take the administrative steps incident to arrest."[72] After that brief period, "the reasons that justify dispensing with the magistrate's neutral judgment evaporate" because there is no longer any danger that the suspect will escape or commit further crimes.[73] Conversely, the "suspect's need for a neutral determination of probable cause increases significantly" because the consequences of detention—including the "impair[ment] of . . . family relationships"—become more serious.[74] The Court did not explicitly exclude juvenile proceedings from its holding.

Sixteen years after *Pugh*, the Supreme Court expressly clarified the meaning of "prompt" by establishing a 48-hour rule for probable cause determinations in *County of Riverside v. McLaughlin*.[75] In that case, the Court held that the county's policy of holding probable cause hearings within two days after arrest was unconstitutional under the Fourth Amendment because the county excluded weekends and holidays when computing the time.[76] Because holidays and weekends were excluded, "an individual arrested without a warrant late in the week [would] in some cases be held for

[69] Beck v. Ohio, 379 U.S. 89, 96 (1964).
[70] Gerstein v. Pugh, 420 U.S. 103, 112 (1975).
[71] *Id.* at 125.
[72] *Id.* at 114.
[73] *Id.*
[74] *Id.*
[75] *See Riverside*, 500 U.S. at 58.
[76] *Id.* at 58-59.

as long as five days before receiving a probable cause determination."[77] The Court held that a 48-hour period including weekends and holidays was feasible.[78] The bright-line rule also "provid[ed] some degree of certainty so that states and counties [could] establish procedures with confidence that they fall within constitutional bounds."[79] The government would only stay within those constitutional bounds when it detained someone for more than 48 hours if it could "demonstrate the existence of a bona fide emergency or other extraordinary circumstance."[80] Importantly, the Court did not exclude juvenile proceedings from its holding.[81] Therefore, as explained below, jurisdictions that do not make a probable cause determination for detained youth within 48 hours are in direct conflict with *Riverside*.

B. FUNDAMENTAL FAIRNESS

When assessing the constitutionality of detaining a minor for more than 48 hours without a probable cause determination, a court is likely to use the fundamental fairness standard. In the context of Fourteenth Amendment due process,[82] constitutional standards for youth are crafted with two goals in mind. First, constitutional standards must "respect the 'informality' and 'flexibility' that characterize juvenile proceedings."[83] Second, constitutional standards must "ensure that [the] proceedings comport with the 'fundamental fairness' demanded by the Due Process Clause."[84] (While the 48-hour rule stems from the Fourth Amendment, not the Fourteenth, the Supreme Court has stated that the Fourth Amendment has the same "concern with 'flexibility' and 'informality,' while yet ensuring adequate predetention procedures.")[85]

To assess whether a juvenile procedure is fundamentally fair, courts must ask two questions. First, does the procedure serve a legitimate state objective?[86] Second, does the procedure "provide sufficient protection against erroneous and unnecessary deprivations of liberty"?[87]

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[77] *Id.* at 47.
[78] Justice Scalia asserts in dissent, however, that the lower court concluded 36 hours was "'ample' time" and that "[t]he data available are enough to convince me . . . that certainly no more than 24 hours is needed." *See Riverside*, 500 U.S. at 68 n.3.
[79] *Id.* at 56.
[80] *Id.* at 57.
[81] *Id.* at 57-58 ("Everyone agrees that the police should make every attempt to minimize the time a presumptively innocent individual spends in jail.").
[82] Section 1 of the Fourteenth Amendment contains the due process clause, which provides that the "state [shall not] deprive any person of life, liberty, or property, without due process of law." *See* U.S. Const. art. XIV, § 1.
[83] Schall v. Martin, 467 U.S. 253, 263 (1984).
[84] *Id.*
[85] *Id.* at 275.
[86] *Id.* at 264.
[87] *Id.* at 274.

As more fully explained below, many states' probable cause procedures for youth fail both prongs of fundamental fairness. The failure to provide probable cause determinations for detained youth over a holiday weekend, for example, serves no legitimate objective. All pre-hearing detention of youth leads to the harmful and unnecessary deprivation of liberty for vulnerable young people who, because a neutral party has not yet determined probable cause, do not have sufficient protection against wrongful arrest.

All pre-hearing detention of youth leads to the harmful and unnecessary deprivation of liberty for vulnerable young people who, because a neutral party has not yet determined probable cause, do not have sufficient protection against wrongful arrest.

C. THE CONSTITUTION AND YOUTH

With the fundamental fairness standard as the foundation, the U.S. Supreme Court has extended many constitutional protections to youth. "These protections include the right to counsel, the privilege against self-incrimination, the right to confrontation and cross-examination, proof beyond a reasonable doubt, and protection against double jeopardy."[88]

The Court in *In re Gault* recognized that juvenile court proceedings must comport with constitutional requirements.[89] In *Gault*, 15-year-old Gerry Gault was accused of "making lewd or indecent remarks" over the phone to a neighbor."[90] Without a lawyer or the ability to put on a defense, he was committed to a rehabilitative school for six years.[91] The Court, reversing the sentence, emphasized how far juvenile courts had strayed from their early conception "in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help 'to save him from a downward career.'"[92] In reality, the Court said, the juvenile system was anything but this benevolent, paternalistic fantasy:

> The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for youth is an institution of confinement in which the child is incarcerated for a greater or lesser time.

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[88] Richard S. Baum, *Denial of Fourth Amendment Protections in the Pretrial Detention of Juveniles*, 35 Santa Clara L. Rev. 689, 719 (1995) [hereinafter *Denial of Fourth Amendment Protections*], https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1575&context=lawreview (citing *In re* Gault, 387 U.S. 1 (1967)).

[89] *See In re* Gault, 387 U.S. 1 (1967).

[90] *Gault*, 387 U.S. at 4. *See also* Nat'l Research Council of the Nat'l Academies, Reforming Juvenile Justice: A Developmental Approach 35 (2013) [hereinafter Reforming Juvenile Justice].

[91] *Gault*, 387 U.S. at 5-8. *See also* Reforming Juvenile Justice, *supra* note 90, at 35.

[92] *Gault*, 387 U.S. at 26.

> His world becomes "a building with whitewashed walls, regimented routine and institutional hours . . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.[93]

As the Court had earlier stated in *Kent v. United States*, in this situation "the child receives the worst of both worlds" because "he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[94] Such a situation, according to the Court, was constitutionally unacceptable: "Under the United States Constitution, the condition of being a boy does not justify a kangaroo court."[95]

D. YOUTH AND THE 48-HOUR RULE

Courts have long recognized that the Fourth Amendment applies to youth. In *Cooley v. Stone*, a 1969 case decided by the U.S. Court of Appeals for the District of Columbia, a 16-year-old boy was arrested for burglary and "detained at the Receiving Home for Children."[96] "A detention hearing was held the next day but, despite counsel's request for a judicial inquiry into probable cause, the only matter explored was the advisability of releasing appellee to his mother's custody."[97] Eight days later, the teenager again sought a determination of probable cause, but was again denied.[98] In response, he sought relief by *habeas corpus*.[99] After 16 days of confinement, the district court granted the writ, stating that the Fourth Amendment's mandate of a "prompt judicial determination of probable cause . . . applies to [youth] as well as adults."[100] The court held that "[c]ertainly by the stage of the initial hearing, a probable cause hearing when requested is required under the Constitution to support the continued penal custody of a [young person] in this jurisdiction."[101]

A year later, in *Brown v. Fauntleroy*, the U.S. Court of Appeals for the District of Columbia held that the same protection—the right to a determination of probable cause—applies even for a child released to a parent pending adjudication.[102] In *Fauntleroy*, a 16-year-old boy was arrested for unauthorized use of a vehicle but released to his mother shortly thereafter.[103] The court stated that its "grant to a [youth] . . . of a means of obtaining the same test

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[93] *Id.* at 27.
[94] Kent v. United States, 383 U.S. 541, 556 (1966).
[95] *Gault*, 387 U.S. at 28.
[96] Cooley v. Stone, 414 F.2d 1213, 1213 (D.C. 1969).
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 1214.
[102] Brown v. Fauntleroy, 442 F.2d 838 (D.C. 1970).
[103] *Id.* at 839.

[as an adult under the probable cause criterion of the Fourth Amendment] demonstrate[d] [its] view that the right derives from the Constitution itself."[104] The court, moreover, noted that a rule allowing for longer waiting periods before probable cause determinations for youth was not justified by the nature of juvenile proceedings:

> Clearly to be seen from *Kent*, *Gault*, and *Winship* is the view that a constitutional guarantee of a fundamental right cannot be denied by reference to a proceeding as civil, when the nature of the proceeding, however denominated, calls for the protection afforded by the guarantee. This is especially true where, as in *Kent*, *Gault*, *Winship*, and the present case, denial to [youth] of rights available to adults is not offset, mitigated, or explained by action of the Government as *parens patriae* evidencing a special solicitude for youth.[105]

Similarly, the fact that the child was left in the custody of his mother did not obviate the requirements of the Fourth Amendment, because "the right to be free of a seizure made without probable cause does not depend upon the character of the subsequent custody."[106] On the contrary, "[i]t is the arrest, not simply continued detention, to which the [Fourth] Amendment attaches."[107]

In 1974, the U.S. Court of Appeals for the Sixth Circuit also held that the Fourth Amendment applies to youth in *Cox v. Turley*.[108] Sixteen-year-old Duane Cox was arrested for violating curfew while "walking down a street . . . on a summer evening" in Kentucky.[109] "He was doing nothing to attract attention and, apparently, was only visiting the town in the county in which his cousin lived."[110] Nevertheless, a police officer arrested him and took him to "jail and lodged him there on the verbal telephoned orders of defendant, Robert Turley, a non-lawyer judge, in charge of such juvenile affairs, as is the established custom of the defendants."[111] Officials denied Duane's requests to telephone his father and made no attempt to notify his parents, and the judge did not hold any hearings until the fifth day after the arrest.[112] The Sixth Circuit, in a scathing decision, held that the detention was unconstitutional in part because of the lack of a probable cause determination.[113]

> A boy 16 years old is not to be slighted and his rights bandied about because of his youth by a lay judge who knows nothing of the treatment to be accorded citizens, due to his lack of experience and training in the rigorous discipline of the law.[114]

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[104] *Id.*
[105] *Id.* at 841.
[106] *Id.* at 842.
[107] *Id.* at 841.
[108] Cox v. Turley, 506 F.2d 1347 (6th Cir. 1974).
[109] *Id.* at 1349.
[110] *Id.*
[111] *Id.*
[112] *Id.* at 1350.
[113] *Id.* at 1351.
[114] *Id.* at 1352.

The arrest and detainment, the court held, violated Duane's "constitutional rights under the due process clause by reason of his confinement with the general jail population without a charge lodged against him, without being arraigned, and without being taken before any judicial officer, 'at the earliest practicable time' as prescribed in the case of *In Re Gault*."[115] Therefore, "[b]oth the Fourth Amendment and the Fifth Amendment were violated because there was no prompt determination of probable cause—a constitutional mandate that protects [youth] as well as adults."[116]

Soon after *Cox*, the U.S. Court of Appeals for the Fifth Circuit followed suit. In *Moss v. Weaver*, the court held that "[p]retrial detention is an onerous experience, especially for [youth], and the Constitution is affronted when this burden is imposed without adequate assurance that the accused has in fact committed the alleged crime."[117]

In *R.W.T. v. Dalton*, the U.S. Court of Appeals for the Eighth Circuit agreed that *Gerstein*'s probable cause determination requirement applied to youth.[118] "In recent years," the Eighth Circuit reasoned, "the Supreme Court has recognized that there is a gap between the originally benign conception of the [juvenile court] system and its realities, and that [youth] are entitled to the essentials of due process and fair treatment."[119] As in *Fauntleroy*, the court denied that probable cause hearings would undermine the functions of the juvenile courts:

> That requiring juvenile courts to hold probable-cause hearings will not impinge on their ability to function in a "unique manner" is evidenced by the number of decisions that have recognized that probable-cause hearings are fundamental to juveniles' rights to due process.[120]

The court also concluded that such a right is necessary for a free society: "The right not to be jailed for any substantial period of time without a neutral decision that there is probable cause is basic to a free society. Children should enjoy this right no less than adults."[121] In 2010, the Supreme Court of Kansas said it was "particularly persuaded" by *Dalton's* rationale.[122]

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[115] *Id.* The concurrence, too, states that "[i]t is, of course, well settled that a [young person], like an adult, is entitled to a probable cause hearing before being arrested and detained on a criminal charge, preferably before incarceration or at least within a reasonable time thereafter." *See Cox*, 506 F.2d at 1357 (Miller, W., concurring).
[116] *Id.* at 1353.
[117] Moss v. Weaver, 525 F.2d 1258, 1260 (5th Cir. 1976).
[118] R.W.T. v. Dalton, 712 F.2d 1225, 1230 (8th Cir. 1983) ("Although [*Gerstein*] involved only the right of adults to a probable-cause hearing, we believe that the right must be extended to [youth] as well.").
[119] *Id.* (internal citations and quotation marks omitted).
[120] *See Dalton*, 712 F.2d at 1230-31 (citing Moss v. Weaver, 525 F.2d 1258 (5th Cir. 1976); Cox v. Turley, 506 F.2d 1347 (6th Cir. 1974); Brown v. Fauntleroy, 442 F.2d 838 (D.C. Cir. 1971); Cooley v. Stone, 414 F.2d 1213 (D.C. Cir. 1969) (per curiam); Osorio v. Rios, 429 F. Supp. 570 (D.P.R. 1976) (three-judge court); Black Bonnet v. South Dakota, 357 F. Supp. 889 (D.S.D. 1973); Baldwin v. Lewis, 300 F. Supp. 1220 (E.D. Wis. 1969), *rev'd on other grounds*, 442 F.2d 29 (7th Cir. 1971); Bell v. Superior Court, 574 P.2d 39 (Ct. App. 1977); T.K. v. State, 190 S.E.2d 588 (1972) (by implication); *In re* Joshua, 327 So.2d 429 (La. App. 1976); *People ex rel.* Guggenheim v. Mucci, 298 N.E.2d 109 (N.Y. 1973); *In re* Edwin R., 303 N.Y.S.2d 406 (N.Y. Fam. Ct. 1969); *In re* Roberts, 622 P.2d 1094 (Or. 1981) (en banc)).
[121] *Id.* at 1231.
[122] *In re* D.E.R., 290 Kan. 306, 313-14 (Kan. 2010).

More recently, courts have followed this important precedent and extended the requirement for prompt probable cause hearings to youth. In *State ex rel. K.W.*, the Louisiana appellate court held that the "bedrock constitutional protections contained in *Riverside* also apply to [youth] in delinquency proceedings."[123] The court described the Fourth Amendment protection against

> being taken into custody without an order or warrant and being detained beyond—at the outside limit—forty-eight hours in the absence of a bona fide emergency or other extraordinary circumstance without a determination of probable cause by a neutral magistrate.[124]

"Because 'custody' in delinquency proceedings is the functional equivalent of an 'arrest' in adult criminal proceedings," the court noted, "the police officer's seizure of K.W. should be examined for constitutional purposes as a warrantless arrest."[125] The court found that, notwithstanding the difference between adults who are released from detention on their own recognizance and children who are released to the care of their parents or guardian, a child whose right to a timely determination of probable cause is violated must be immediately released from custody.[126]

Quoting the U.S. Supreme Court in *Gerstein*, the court noted that detention in excess of 48 hours can be detrimental to an adult and for a comparatively vulnerable child such prolonged detention is even more detrimental.[127] The court made clear that this was not merely a statutory mandate, but a constitutional one:

> Thus, when K.W. was taken into custody without a court order or judicial warrant at 12:32 P.M. on February 12, 2014, the constitution demands that by the latest at 12:32 P.M. on February 14, 2014, either a judicial officer will have made a finding of probable cause for his continued custody or that he is to be *immediately* released from custody.[128]

"The right not to be jailed for any substantial period of time without a neutral decision that there is probable cause is basic to a free society. Children should enjoy this right no less than adults."

[123] State *ex rel.* K.W., 137 So. 3d 798, 801 (La. Ct. App. 2014).
[124] *Id.* at 800.
[125] *Id.*
[126] *Id.* at 804 (internal citations and quotation marks omitted).
[127] *Id.* (citing Roper v. Simmons, 543 U.S. 551, 569 (2005)).
[128] *Id.* at 802.

Similarly, in *In re S.J.*, the D.C. Court of Appeals held that a trial court was without authority to detain a young person from Thursday to the following Tuesday,[129] even though the intervening Monday was the Memorial Day holiday.[130] The court stated that it was "express[ing] no view whether [a] court would be authorized to order the detention of a [young person] for a shorter period."[131] But after noting that the power to detain youth is limited by the Constitution[132] and citing *Riverside*,[133] the court held that "the trial court was without authority to order the detention . . . for the period of time ordered here without a finding that there was 'probable cause to believe that the allegations in the petition [were] true.'"[134]

Against this persuasive and substantial body of precedent, the California Supreme Court, in *Alfredo A. v. Superior Court*, upheld a statute requiring a probable cause hearing within 72 hours of a young person's warrantless arrest, excluding weekends and holidays.[135] The court was divided in this case, and the dissent is powerful and important. The dissent noted that *Gerstein* "declares, both expressly and impliedly, from beginning to end, that the Fourth Amendment's protection extends to 'persons' or 'individuals,'" and "[i]t does not purport to limit the constitutional guaranty to adults or even to qualify its benefit to [youth]."[136] The dissent acknowledged that procedures for youth may sometimes vary. For probable cause determinations, however, a different procedure was unjustified. "In *Riverside*, the [Supreme 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.'"[137] Therefore, the dissent reasoned, "When probable cause is lacking, detention is unsupported as a matter of law."[138] The dissent also rejected the argument that "the restraint of liberty imposed on a [young person] is somehow less significant, in and of itself, than that imposed on an adult," stating that detention could be *especially* detrimental for youth.[139]

The notion that detention is especially detrimental for youth is an important point supported by several U.S. Supreme Court cases decided since 2005.[140] These cases endorse a "developmental approach" that considers "the developmental differences between minors and adults and how such differences should be accounted for in doctrine."[141] In *Roper v. Simmons*, the Court declared that executing individuals who had been found guilty of committing crimes when they were minors is unconstitutional.[142] One of three important differences the Court

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[129] *In re* S.J., 686 A.2d 1024, 1026 (D.C. 1996).
[130] *Id.* at 1025 n.4.
[131] *Id.* at 1026.
[132] *Id.* at 1025.
[133] *Id.* at 1026 n.6.
[134] *Id.* at 1026.
[135] Alfredo A. v. Superior Court, 865 P.2d 56, 59 (Cal. 1994).
[136] *Id.* at 77 (Mosk, J., dissenting).
[137] *Id.* at 76.
[138] *Id.* at 77.
[139] *Id.*
[140] Emily Buss, *Developmental Jurisprudence*, 88 Temp. L. Rev. 741, 741 (2016) (discussing Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 500 U.S. 48 (2010); J.D.B. v. North Carolina, 564 U.S. 261 (2011)), https://www.templelawreview.org/lawreview/assets/uploads/2016/08/Buss-88-Temp.-L.-Rev.-741.pdf.
[141] *Id.*
[142] Roper v. Simmons, 543 U.S. 551 (2005).

emphasized to justify its holding was that youth "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[143] In *Graham v. Florida*, the court reiterated this crucial difference between adults and youth: "No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of [youth]. As petitioner's *amici* point out, developments in psychology and brain science continue to show fundamental differences between [youth] and adult minds."[144]

The Court extended this reasoning to custody procedures in *J.D.B. v. North Carolina*, in which the Court ruled that a child's age was relevant in considering proper *Miranda* procedures.[145] A child's age, the Court stated, "is a fact that 'generates commonsense conclusions about behavior and perception.'"[146] The same is true in the context of detention. Due to their ongoing cognitive and psychosocial development, significant trauma histories, and potential for desistence, youth must have heightened constitutional protections. These protections should be extended to pre-hearing detention and call for courts to hold probable cause hearings immediately upon arrest of youth.

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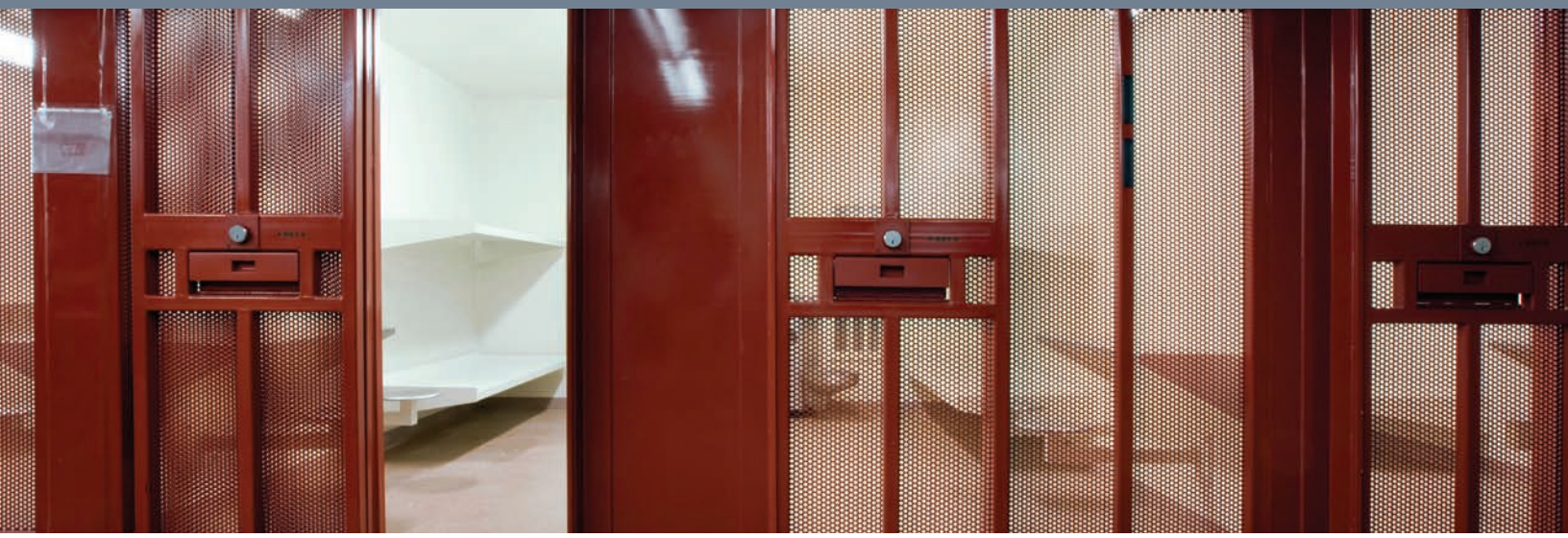

[143] *Id.* at 569.
[144] Graham v. Florida, 560 U.S. 48, 68 (2010).
[145] J.D.B. v. North Carolina, 564 U.S. 261 (2011).
[146] *Id.* at 272 (quoting Yarborough v. Alvarado, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)).

IV. YOUTH MUST RECEIVE PROMPT PROBABLE CAUSE DETERMINATIONS

> "A state has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause."
>
> *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 55 (1991).

The detention of youth without a prompt determination of probable cause violates both due process and the Fourth Amendment. Determining whether continued detention is allowable triggers an analysis of fundamental fairness under the Fourteenth Amendment, which "can be as opaque as its importance is lofty."[147] Just as the Fourteenth Amendment's opacity can lead to fewer protections for youth, its loftiness can support much stronger protections. The rare instances in which the U.S. Supreme Court has declined to extend constitutional protections to juvenile court procedures fall into two basic categories: (1) those in which the nature of juvenile proceedings was found sufficient, such that an extension of certain adult trial rights is unnecessary, and (2) those in which the nature of youth liberty was found to be less demanding of strenuous protections.

For example, in *McKeiver v. Pennsylvania*, the Court held that youth do not have the right to a jury trial under the Fourteenth Amendment.[148] The Court reasoned that requiring jury trials in juvenile proceedings might "remake the juvenile proceeding into a fully adversary process and . . . put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."[149] And, a jury trial would not "remedy the defects of the system" but would instead "place the [young person] squarely in the routine of the criminal process."[150] The Court instead reasoned that youth need a system of "fairness, of concern, of sympathy, and of paternal attention."[151] And in *Schall v. Martin*, the Court held that states may hold youth in preventive detention under the Fourteenth Amendment.[152] The Court recognized that while a young person's interest in freedom from detention "is undoubtedly substantial," that interest "must be qualified by the recognition that [youth], unlike adults, are always in some form of custody."[153]

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[147] Lassiter v. Durham Cty. Dep't Soc. Servs., 452 U.S. 18, 24 (1981).
[148] McKeiver v. Pennsylvania, 403 U.S. 528, 531 (1971).
[149] *Id.* at 545.
[150] *Id.* at 547.
[151] *Id.* at 550.
[152] *Schall*, 467 U.S. at 256-57.
[153] *Id.* at 265.

But *McKeiver* and *Schall* are wholly inapposite to the issues here. *McKeiver* has nothing to do with pretrial detention, and the *Schall* Court made clear the appellees did not seek review of the issue of detention prior to a probable cause hearing: "The propriety of such detention prior to a [young person]'s initial appearance in Family Court is not at issue in this case."[154] Given the Court's shift toward more developmental-focused jurisprudence for youth, it is clear that the Fourteenth Amendment requires a more stringent interpretation of "prompt" than that which suffices for adults.

Detention of youth without prompt probable cause determinations does not comport with fundamental fairness because it neither serves a legitimate state interest nor provides sufficient safeguards against unnecessary detention. Requiring courts to hold probable cause hearings immediately, and in no event longer than 48 hours, after youth are arrested would not undermine the supposed paternalistic goals of the juvenile court system. Considering the well-documented record of horrible conditions in detention facilities, it is unclear how extending detention qualifies as sympathetic paternalism. The *Gault* Court recognized that this paternalistic conception of the juvenile system has proven wrong in practice, a fantasy belied by the deplorable conditions of juvenile detention centers, impersonal and confusing procedures, and Draconian punishments. Further, "[t]he appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude [compared to procedural laxness] so far as the [young person] is concerned."[155]

Considering the well-documented record of horrible conditions in detention facilities, it is unclear how extending detention qualifies as sympathetic paternalism.

Requiring an immediate probable cause determination would neither lead to an adversarial system nor make juvenile court proceedings more formal, because those proceedings already have rules in place governing how long youth may be detained without a determination of probable cause. And setting the 48-hour rule as the absolute maximum for youth would merely limit the government's time to determine whether it has any right to continue detention to a period the U.S. Supreme Court has expressly ruled is feasible for such determinations.[156] The dissent in *Alfredo A.* provides ample support for this assertion:

> I recognize that the state, as *parens patriae*, may have a legitimate interest in detaining a [young person] for criminal activity prior to trial. That interest, 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 [young person] arrested without probable cause must be released as soon as reasonably possible. The reason is the same.

[154] *Id.* at 257 n.5.
[155] *Gault*, 387 U.S. at 26.
[156] *Riverside*, 500 U.S. at 56.

> Absent probable cause, the state's exercise of its power to preserve and promote the welfare of the child is without support. For [youth] as for adults, *Gerstein's* promptness requirement operates to conserve and allocate resources by limiting the class of detainees to those who are properly subject to detention.[157]

Any arguments that the nature of youth demands fewer protections in this context are similarly unpersuasive. In *Schall*, the Supreme Court held that a youth's liberty interests are lessened because they are "always in some form of custody,"[158] as if the form of the custody were irrelevant. The supposed equivalency of all forms of custody, as Justice Thurgood Marshall noted in his dissent in *Schall*, is, at best, "difficult to take seriously"[159] for two reasons. First, custody in a detention center—with all of the attendant harms discussed above—is wholly different than parental or school custody.[160] The Supreme Court itself had vividly described the difference in *In re Gault* almost 20 years earlier with the grim image of an idyllic childhood supplanted by the stark brutality of incarceration.[161] Other courts, too, have recognized "the terror that engulfs a youngster" upon being detained for days or even weeks in a "cold, impersonal cell . . . away from home or family."[162] But "cold" and "impersonal" are understatements. Detained youth have a documented increased risk of depression and suicide, educational and professional deficiencies, and physical and sexual assault.[163]

Second, parents and state actors do not value the interests of youth equally. The Supreme Court has noted that "parents are motivated by 'natural bonds of affection . . . to act in the best interests of their children,'"[164] and that "the importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association."[165] The officers and judges interacting with youth, on the other hand, are "usually strangers, with their sole contact a result of the [young person]'s alleged delinquent act."[166] The increasing militarization of local police forces across the United States reinforces the divide and exacerbates the harm to youth.[167]

"Absent probable cause, the state's exercise of its power to preserve and promote the welfare of the child is without support."

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[157] *Alfredo A.*, 865 P.2d at 77 (Mosk, J., dissenting).
[158] *Schall*, 467 U.S. at 265.
[159] *Id*. at 289 (Marshall, J., dissenting).
[160] *Denial of Fourth Amendment Protections*, *supra* note 88, at 717.
[161] *See Gault*, 387 U.S. at 27.
[162] *In re* William M., 473 P.2d 737, 747 (Cal. 1970).
[163] No Place for Kids, *supra* note 2.
[164] Claudia Worrell, *Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the Parens Patriae Doctrine*, 95 Yale L.J. 174, 180 (1985) [hereinafter *Pretrial Detention of Juveniles*] (quoting Parham v. J.R., 442 U.S. 584, 602 (1979)).
[165] Smith v. Foster Families Org., 431 U.S. 816, 844 (1977).
[166] *Pretrial Detention of Juveniles*, *supra* note 164, at 181.
[167] Radley Balko, *How Did America's Police Become a Military Force on the Streets?*, A.B.A. J. (2013), http://www.abajournal.com/magazine/article/how_did_americas_police_become_a_military_force_on_the_streets.

Moreover, the state does not act in the best interest of the young person, but instead balances two competing interests: those of the young person and of the community. "When these two interests compete, the State may wrongly choose . . . to further its community-protection interest at the unwarranted expense of the minor."[168]

The differences between the liberty interests for children and adults supports more protections in another respect. *Gerstein* reasoned that while detention assures that a suspect will not commit more crimes during confinement, any continued detention "may imperil the suspect's job, interrupt his source of income, and impair his family relationships."[169] Children who are released from the custody of detention to the custody of their parents or guardians will have more supervision than adults released on their own recognizance, and while not all youth have jobs or income disrupted by continued detention, all children have unique vulnerabilities to the harms of detention and their time away from their schooling and families.

Detained youth have a documented increased risk of depression and suicide, educational and professional deficiencies, and physical and sexual assault.

The Supreme Court recognized the vulnerability of youth in *Eddings v. Oklahoma*: "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."[170] More recently, the *Roper* Court reaffirmed its view that "[youth] are more vulnerable [and more] susceptible to negative influences and outside pressures, including peer pressure."[171] Therefore, even if youth are never free of some type of custodial treatment, custodial treatment where they are locked in a cell behind bars without an immediate probable cause determination is more harmful to them than to adults.

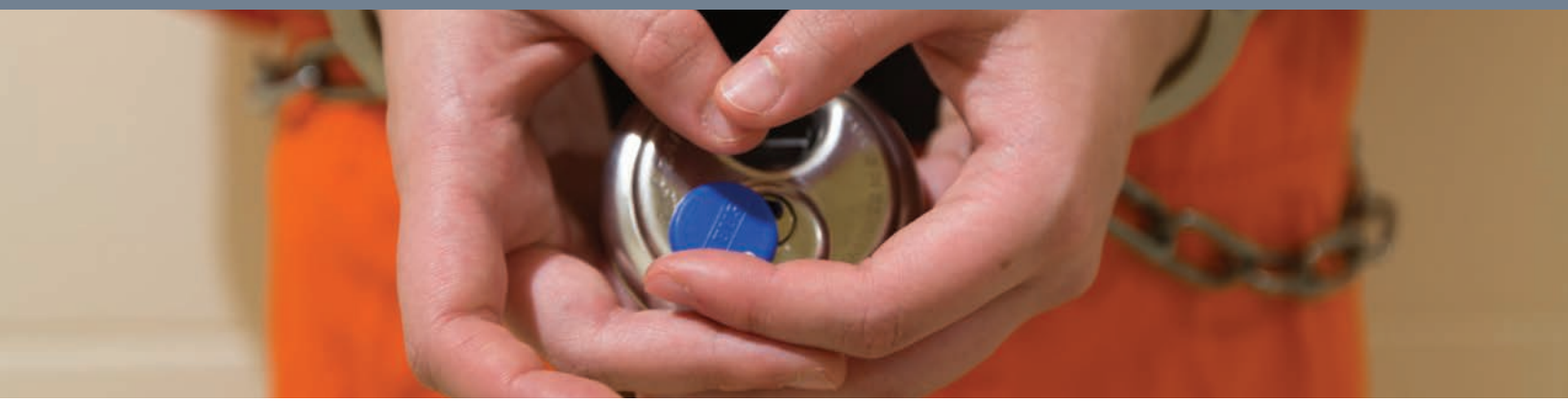
While the Fourteenth Amendment and the lofty requirement of fundamental fairness provide ample support for an immediate probable cause determination, the Fourth Amendment support is even stronger. The dissenting opinion in *Alfredo A.* reasoned that the promptness requirement in *Gerstein* applies to people of all ages: "The presence of youth does not make up for the absence of probable cause."[172] Further, the U.S. Supreme Court, in *Kimmelman v. Morrison*, stated that, "[a]lthough it is frequently invoked in criminal trials, the Fourth Amendment is not a trial right [and] the protection it affords against governmental intrusion into one's home and affairs pertains to all citizens."[173] Finally, concerns about resources do not justify the abrogation of Fourth Amendment rights. Although the California Supreme Court concluded in *Alfredo A.* that a detention inquiry for youth is "broader" than the probable cause inquiry for adults

[168] *Pretrial Detention of Juveniles*, *supra* note 164, at 181.
[169] *Gerstein*, 420 U.S. at 114.
[170] Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).
[171] *Roper*, 543 U.S. at 569.
[172] *Alfredo A.*, 865 P.2d at 77 (Mosk, J., dissenting).
[173] Kimmelman v. Morrison, 477 U.S. 365, 374 (1986).

and often includes considerations other than probable cause,[174] that does not mean the probable cause determination itself is any more demanding on resources in juvenile court or that it must be made in a formal detention hearing. In fact, in *Alfredo A.*, the state admitted at oral argument that such determinations are "'not . . . difficult to make"[175] and conceded that "a number of the state's largest counties . . . are successfully providing determinations of this kind."[176]

Perhaps most importantly, and as was noted in the dissenting opinion in *Alfredo A.*, the decision in *Riverside* was not unanimous.[177] Justice Marshall, joined by Justices Blackmun and Stevens, would have incorporated the immediacy requirement into the definition of prompt: "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.'"[178] And, Justice Scalia "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.'"[179]

"The presence of youth does not make up for the absence of probable cause."



[174] Even conceding that a probable cause determination would occur at a detention hearing, it is reasonable to mandate a 48-hour rule in such a circumstance. In fact, six states and the District of Columbia already do so. The states that already comply with the 48-hour rule through detention hearing procedures are Alaska, Arizona, Florida, Louisiana, New Jersey, and New Mexico. *See* Alaska Stat. Ann. § 47.12.250(c) (West 2001); Ariz. Juv. Ct. Proc., R. 23 (2001); D.C. Code Ann. § 16-2312(a)(2)(A) (West 2017); Fla. Stat. Ann. § 985.255(2)(b) (West 2017); La. Child. Code Ann. art. 814(D) (2008); N.J. Ch. Div. Fam. Part R. 5:21-3(b) (2016); N.M. Child. Ct. R 10-222(A) (2014). If a resource-strapped county is having difficulty fulfilling its Fourth Amendment obligations, it needs to assign more, or reallocate, resources. *See Riverside*, 500 U.S. at 67 (Scalia, J., dissenting) ("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.").

[175] *Alfredo A.*, 865 P.2d at 83 (Mosk, J., dissenting).

[176] *Id.* at 84.

[177] *Id.* at 75.

[178] *Id.* at 75-76 (citing Gerstein v. Pugh, 420 U.S. 103, 114 (1975); Cty. of Riverside v. McLaughlin, 500 U.S. 44, 59 (1991) (Marshall, J., dissenting)).

[179] *Id.* at 76 (citing Cty. of Riverside v. McLaughlin, 500 U.S. 44, 67-68 (1991) (Scalia, J., dissenting)).

V. REFORM

> "If . . . it took a full year to obtain a probable-cause determination . . . 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, the legitimate reasons for delay become illegitimate."
>
> *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 67 (1991) (Scalia, J., dissenting).

Requiring courts to hold probable cause hearings immediately, and in no event longer than 48 hours, after youth are arrested is feasible and necessary in every jurisdiction. Mandated weekend and holiday detention hearings for youth can be implemented in a variety of ways, such as a statutory requirement, a court rule establishing a hearing as a procedural requirement, or litigation presenting a constitutional challenge. Momentum for ensuring juvenile courts meet this constitutional mandate is rapidly growing; six states and the District of Columbia already have established this time limit.[180] And the 48-hour rule can feasibly be applied to youth no matter the size of a court's docket: "The most heavily populated counties in California are already providing probable cause hearings within forty-eight hours of a [young person]'s arrest,"[181] and New York City has held weekend hearings for youth since 2008.[182]

Moreover, requiring courts to hold prompt probable cause determinations is consistent with the opinion of subject matter experts—juvenile and family court judges. The National Council of Juvenile and Family Court Judges emphasizes the importance of timeliness in juvenile justice proceedings,[183] recommending that "juvenile delinquency courts hold detention hearings on Saturday mornings to avoid unnecessarily detaining a youth over the weekend."[184] In addition, juvenile court proceedings must be contemporaneous with the alleged crime to reinforce the idea that the law will hold youth accountable for their actions.[185] Timely proceedings also have the beneficial effect of proving to youth that the judicial system is fair and predictable, and can therefore be trusted.[186] If youth believe the system is fair and they are not forced to languish in detention before seeing a judge, they may be more likely to change their future behavior.

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[180] *See* sources, *supra* note 174.
[181] See *Denial of Fourth Amendment Protections*, *supra* note 88, at 716 n.206.
[182] Sue Burrell, *The 48-Hour Rule and Overdetention in California Juvenile Proceedings*, 20 UC Davis J. Juv. L. & Pol'y 1, 35 (2016).
[183] Improving Court Practice, *supra* note 5, at 43-44.
[184] *Id.* at 90.
[185] *Id.* at 43.
[186] *Id.* at 44.

The changes in Shelby County, Tennessee after pressure from the DOJ illustrate the power of litigation. A subsequent DOJ investigation found that Shelby County had already partially or substantially complied with the 48-hour rule two years after the DOJ's initial report.[187]

Statutory reform can accomplish the same goal.[188] New Jersey law requires immediate probable cause determinations, mandating that "[t]he initial detention hearing shall be held *no later than* the morning following the [young person]'s placement in detention including weekends and holidays."[189] In Alaska, a young person must be taken before the court "as soon as is practicable, but in no event later than 48 hours after notification to the court, including weekends and holidays."[190]

Louisiana shows how changing statutory language to mandate a 48-hour time limit is not only possible, but also not onerous for courts. Louisiana "quickly codified the 48-hour probable cause determination rule" in response to *Riverside*,[191] and Louisiana courts have found no evidence that the 48-hour limit was overly burdensome. "[C]ompliance with the 48-hour outside limit is hardly onerous," one court noted.[192] Compelling courts to hold probable cause hearings immediately, and in no event longer than 48 hours, after youth are arrested is not only urgently necessary to decrease harms caused by unwarranted detention but also undeniably attainable.

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[187] Shelby County Juvenile Court, *supra* note 16.
[188] Juvenile Law Ctr., Annie E. Casey Found. Juvenile Det. Alts. Initiative, A Guide to Juvenile Detention Reform: Embedding Detention Reform in State Statutes, Rules and Regulations 50 (2014).
[189] N.J. Stat. Ann. § 2A:4a-38(e) (West 1995) (emphasis added).
[190] *See* Alaska Ct. Delinq. R., r. 12(a) (1999), https://public.courts.alaska.gov/web/rules/docs/del.pdf.
[191] *See* State v. Wallace, 25 So. 3d 720, 723-24 (La. 2009).
[192] *See K.W.*, 137 So. 3d at 805.

VI. CONCLUSION

The Fourth Amendment requires that states demonstrate probable cause for detaining a person within 48 hours after arrest. Because young people's liberty interests and vulnerability exceed those of adults, in addition to the documented harms of the detention of youth, justice demands that courts hold probable cause hearings immediately, or at the very latest no more than 48 hours after a youth's arrest. Moreover, detaining youth without an immediate probable cause hearing clearly does not further the original flexible or paternalistic functions of the juvenile justice system.

Reform is long overdue. Advocacy groups and lawyers for youth should aggressively litigate issues of extended detention to protect and advance young people's Fourth Amendment rights. Activists should lobby state legislatures to modify relevant statutes. Reform is not only feasible, it is fundamental. Our juvenile justice systems must be better aligned with the unalienable rights of life and liberty afforded to all, including youth, and which governments are created to protect.

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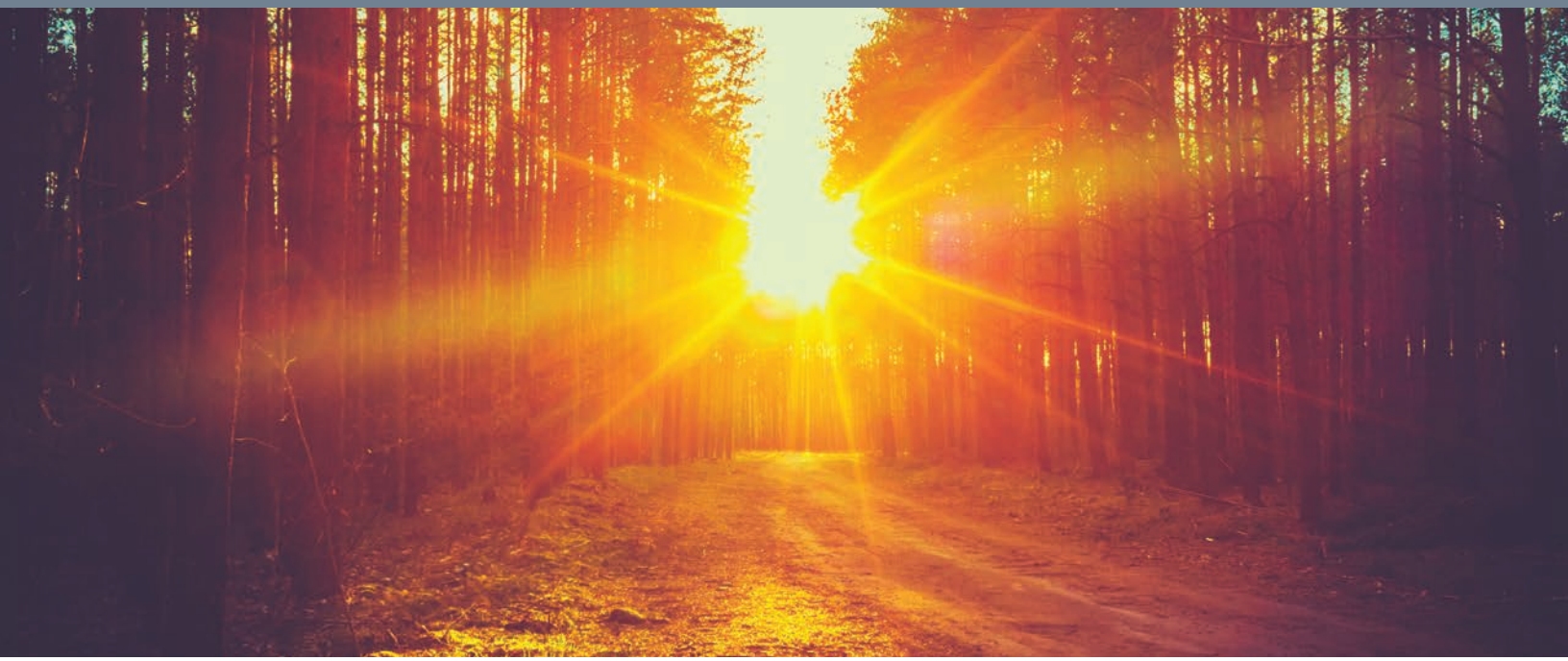

NATIONAL JUVENILE DEFENDER CENTER

The National Juvenile Defender Center (NJDC) is a nonprofit, nonpartisan organization dedicated to promoting justice for all children by ensuring excellence in juvenile defense. Through community building, training, and policy reform, we provide national leadership on juvenile defense issues with a focus on curbing the deprivation of young people's rights in the court system. Our reach extends to urban, suburban, rural, and tribal areas, where we elevate the voices of youth, families, and defenders to create positive case outcomes and meaningful opportunities for children. We also work with broad coalitions to ensure that the reform of juvenile court includes the protection of children's rights – particularly the right to counsel. To learn more about NJDC, please visit http://www.njdc.info.

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