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DENIAL OF FOURTH AMENDMENT PROTECTIONS IN THE PRETRIAL DETENTION OF JUVENILES

I. INTRODUCTION

Should juveniles be afforded the same guarantee as adults to a judicial determination of probable cause within forty-eight hours of a warrantless arrest?\(^1\) Not in California, according to the California Supreme Court. In *Alfredo A. v. Superior Court*,\(^2\) the California Supreme Court held that the forty-eight hour rule does not apply to juveniles.\(^3\) This decision marked a departure from the 1991 United States Supreme Court decision of *County of Riverside v. McLaughlin*,\(^4\) which provided “individuals” the right to a probable cause determination within forty-eight hours of a warrantless arrest.\(^5\)

The juvenile criminal justice system can be distinguished from the adult criminal justice system. The disparity between systems is quite obvious in that different statutes in different code sections govern a suspect’s adjudication.\(^6\) Both of these systems, however, are based on the same common law tradition upon which this country’s Constitution and accompanying Bill of Rights are founded. Although the Bill of Rights provides individual protections to “the people,”\(^7\) courts have held, in some circumstances, that juveniles are not to be considered part of “the people.”\(^8\) In effect, this means that constitutional protections granted in the Bill of Rights are not to be extended to juveniles.\(^9\) In other circumstances, adults and juveniles are treated equally.\(^10\) Disparate treatment\(^11\)

3. Id. at 71.
5. Id. at 56-57.
7. *See U.S. Const.* amend. I-X.
8. *See infra* notes 204-05 and accompanying text.
9. *See infra* notes 204-05 and accompanying text.
10. *See infra* notes 225-30 and accompanying text.
results from the judiciary's balancing of societal interests against the liberty interests of the individual.

Fourth Amendment jurisprudence has articulated and refined the protections against unreasonable seizures of the person. Currently, one of the Fourth Amendment protections is the requirement of a judicial determination of probable cause within forty-eight hours of a warrantless arrest. The key United States Supreme Court cases addressing this issue neither limit their holdings to adults, nor are they specifically inclusive of juveniles.

This comment examines whether juveniles should be extended the same constitutional guarantee as adults to a judicial determination of probable cause within forty-eight hours of a warrantless arrest by analyzing the California Supreme Court's holding in Alfredo A. v. Superior Court. This comment begins by reviewing the court's recognition and development of a constitutionally protected right to a prompt showing of probable cause following a warrantless arrest in Gerstein v. Pugh and County of Riverside v. McLaughlin. The relevant statutes governing California's juvenile system will also be examined. This comment then analyzes the Alfredo A. decision and concludes that Chief Justice Lucas' lead decision misapplies precedent and fails to justify its holding on Fourth Amendment grounds. In addition, Alfredo A. fails to adequately acknowledge the negative aspects of juvenile detention.

This comment proposes that the same standard be applied to juveniles and adults, and that the law require a judicial determination of probable cause within forty-eight hours of a warrantless arrest to justify further detention of a juvenile.

11. See infra notes 204-05 and accompanying text.
13. See infra notes 127, 130 and accompanying text.
16. McLaughlin, 500 U.S. at 44.
18. Chief Justice Lucas wrote the opinion of the court in which Justices Panelli and Baxter concurred. Alfredo A. v. Superior Court, 865 P.2d 56 (Cal.), cert. denied, 115 S. Ct. 86 (1994). Justice Arabian wrote a separate concurrence, providing different legal arguments for the result. Id. Justices Kennard and George joined in a dissent written by Justice Mosk. Id. Justice George also submitted a separate dissenting opinion. Id.
Such a result could be achieved through a judicial decision. Alternatively, statutory reform could be successfully employed by narrowing the scope of potential juvenile detainees to: 1) the truly dangerous; 2) those who have escaped from a facility to which they had been previously sentenced; 3) those who are likely to flee the jurisdiction; and 4) those who are verified to be fugitives from another jurisdiction and whose return has been requested.

A. The Standard of Probable Cause

The Fourth Amendment provides:

The right of the people to be secure in their persons . . . 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 person or things to be seized.

The underlying purpose of the Fourth Amendment is to forbid unwarranted intrusions through exploratory searches and seizures by the government. Perhaps the greatest of intrusions against which the Fourth Amendment protects occurs when an unwarranted arrest and detainment deprives one of his freedom of liberty.

Standards for arrest and detainment have been derived from the Fourth Amendment and its common-law antecedents. The Supreme Court has defined the standard for arrest as being the presence of probable cause. Probable cause has been 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.” Much like the standard for searches and seizures, this standard “represents a necessary accommodation between the in-

19. See infra part V.
20. See infra part V.A.
21. See infra part V.B.
22. U.S. Const. amend. IV.
26. Id.
individual's right to liberty and the State's duty to control
crime."

B. Gerstein v. Pugh

The focus of recent analysis regarding the Fourth Amendment's protection against unreasonable seizures of the person stems from the 1975 decision of *Gerstein v. Pugh.* Through this decision, the United States Supreme Court sought to clarify what constituted proper procedures for probable cause determinations following a warrantless arrest.

1. The Legal Landscape in Florida

In *Gerstein,* respondents Pugh and Henderson were arrested and detained for thirteen and seventeen days, respectively, charged under a prosecutor's information. Under Florida law, prosecutors were allowed to charge all crimes by information without obtaining leave of the court, with the exception of capital offenses. Furthermore, Florida courts had held that the filing of an information foreclosed the suspect's right to a preliminary hearing to test for probable cause, and a writ of habeas corpus could not be used "except perhaps in exceptional circumstances" to test for probable cause for detention. The only way for one arrested without a warrant to obtain a judicial determination of probable cause was through either a statute allowing for a preliminary hearing.

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28. *Gerstein,* 420 U.S. at 112. "The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating the often opposing interests of the individual's privacy and law enforcement's need to fight crime." *Brinegar v. United States,* 338 U.S. 160, 176 (1949).


30. *Gerstein v. Pugh,* 420 U.S. 103, 111 (1975). *Gerstein* addressed the following two questions: whether a person arrested and held for trial is entitled to a judicial determination of probable cause to warrant detention, and if so, whether an adversarial hearing is constitutionally required. *Id.*

31. *Id.* at 105. An information is used in place of a grand jury indictment to bring a person to trial. *Black's Law Dictionary* 779 (6th ed. 1990).


33. *Id.* at 106. The writ was allowed only in exceptional circumstances to prevent them from being used for "fishing expeditions" to discover the state's evidence, and to ensure the orderly course of administration of the criminal law system. *Sullivan v. State ex rel. McCrory,* 49 So. 2d 794, 797 (Fla. 1951).
after thirty days, or arraignment, which often was delayed for a month or longer.\textsuperscript{34}

2. Gerstein's \textit{Holding}

Respondents argued that there existed a constitutional right to a judicial hearing on the issue of probable cause for pretrial restraint on liberty.\textsuperscript{35} The Supreme Court agreed, holding, "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention."\textsuperscript{36} The Court reached a "practical compromise" in balancing law enforcement needs to make warrantless arrests with the individual's liberty interest in granting the right to a probable cause determination.\textsuperscript{37} First, the Court recognized the need for a neutral and detached magistrate to rule on probable cause to effectuate, properly, the protections of the Fourth Amendment.\textsuperscript{38} Although maximum protection of the individual's rights would be guaranteed by requiring judicial review of factual circumstances prior to all arrests, this would have a crippling effect on legitimate law enforcement.\textsuperscript{39} In addition, the Court had never invalidated an arrest supported by probable cause simply because the officers failed to secure a warrant.\textsuperscript{40}

Ultimately, the Court was persuaded to grant the probable cause determination because of the significant, serious consequences resulting from prolonged detention. The Court clearly stated its position as follows:

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 in-

\textsuperscript{34} Gerstein v. Pugh, 420 U.S. 103, 106 (1975).
\textsuperscript{35} Id. at 106-07.
\textsuperscript{36} Id. at 126.
\textsuperscript{37} Id. at 113-14.
\textsuperscript{38} Id. at 112.
\textsuperscript{39} Gerstein v. Pugh, 420 U.S. 103, 113 (1975). The added time required to secure a warrant would delay law enforcement's response time to crime scenes where they anticipated making arrests. Furthermore, law enforcement would be unable to make arrests resulting from unfolding criminal activity.
\textsuperscript{40} Id. at 113.
creases 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. . . . 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.\(^{41}\)

The Gerstein Court, however, did not hold that the Fourth Amendment demanded an adversarial proceeding to fulfill its constitutional requirements.\(^{42}\) As a result of the lesser consequences involved and the nature of the proceeding, the Court concluded that a less formal procedure than an adversarial proceeding was justified for the judicial determination of probable cause.\(^{43}\)

The Court declined to rule on any specific time parameters or procedures which would be required to fulfill its dictate of a "prompt" judicial determination of probable cause.\(^{44}\) Instead, the Court left these issues to be resolved by the states.\(^{45}\) Sixteen years after Gerstein, the need for Court clarification as to what Gerstein required became evident, as lower courts were defining Gerstein's promptness mandate in a variety of conflicting ways.\(^{46}\)

C. County of Riverside v. McLaughlin

The question of what constituted a "prompt" judicial determination of probable cause served as the focus of the 1991

\(^{41}\) Id. at 114 (citation omitted). The Court also found historical support for its holding, noting "[a]t common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest." Id. at 116.

\(^{42}\) Id. at 126-27.

\(^{43}\) Id. at 121. The Court also expressed concern that requiring adversarial proceedings would exacerbate the problem of pretrial delay. Id. at 122 n.23.

\(^{44}\) Gerstein v. Pugh, 420 U.S. 103, 123 (1975).

\(^{45}\) Id. Justice Powell, writing for the majority, noted: "[t]here 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. . . . [W]e recognize the desirability of flexibility and experimentation by the States." Id.

\(^{46}\) The Fourth, Seventh, and Ninth Circuits interpreted Gerstein as requiring a probable cause determination immediately following completion of the administrative procedures incident to arrest. In contrast, the Second Circuit understood Gerstein to permit states to combine probable cause determinations with other pretrial proceedings. County of Riverside v. McLaughlin, 500 U.S. 44, 50 (1991).
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decision of County of Riverside v. McLaughlin. In the years following Gerstein, circuit courts interpreted the requirements of Gerstein in an inconsistent manner. The conflict in the circuit courts resulted in "a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local [jail-house] operations." To provide guidance to the lower courts, the Supreme Court established a bright-line rule in McLaughlin, holding that jurisdictions that provide judicial determinations of probable cause within forty-eight hours of arrest would, as a general matter, comply with Gerstein's promptness requirement.

1. Background in McLaughlin

In August 1987, Donald McLaughlin filed a complaint in the United States District Court for the Central District of California alleging that after being arrested without a warrant and incarcerated, Riverside County denied him a probable cause determination. The existing policy of the County provided for the determination of probable cause at the arraignment proceeding, which was to be conducted "without unnecessary delay" and, in any event, within two days of arrest, excluding weekends and holidays.

For those people arrested late in the week, the County's policy could result in prolonged detentions prior to any showing of probable cause. The district court held that the policy of the County violated the promptness requirement of Gerstein, and issued an injunction requiring the County to hold a probable cause hearing within thirty-six hours of a warrantless arrest. The County appealed the decision to the United States Court of Appeals for the Ninth Circuit which subsequently affirmed the district court's decision.

The Ninth Circuit reasoned that no more than thirty-six hours were needed to "complete the administrative steps inci-

47. Id. at 50.
48. Id.; see supra note 46.
49. McLaughlin, 500 U.S. at 56.
50. Id.
52. Id. at 47.
53. Id.
54. Id. at 49.
55. Id. at 50.
dent to arrest," and once those steps were completed, a showing of probable cause was required to further detain a suspect.56

2. O'Connor's Majority: Probable Cause Determination Within Forty-Eight Hours

As a result of the circuit courts' conflicting interpretations of Gerstein’s promptness requirement,57 the United States Supreme Court granted McLaughlin certiorari.58 Justice O'Connor authored the 5-4 majority decision in which the Court vacated the judgment of the Ninth Circuit and held that probable cause determinations occurring within forty-eight hours following a warrantless arrest, inclusive of weekends and holidays, were constitutionally permissible.59

Justice O'Connor urged that Gerstein did not require an immediate determination of probable cause.60 Rather, Gerstein required a prompt determination of probable cause.61 O'Connor cited the need for states to retain flexibility in their pretrial procedures in determining that forty-eight hours was a proper amount of time to meet the requirements of the Fourth Amendment.62 Here, O'Connor pronounced the following:

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 cause upon completing the administrative steps incident to arrest. Plainly, if a probable cause hearing is compelled the moment a suspect is finished being "booked," there is no room whatsoever for “flexibility and experimentation by the States.”63

O'Connor recognized that Gerstein did not constitute a “blank check” to the states and that Gerstein did limit the permissible amount of time that an individual may be de-

57. See supra note 46.
58. McLaughlin, 500 U.S. at 50.
59. Id. at 56.
60. Id. at 53. O'Connor interpreted the Fourth Amendment to permit reasonable postponements of probable cause determinations that result from police processing suspects through an overburdened criminal justice system. Id. at 55.
62. Id.
63. Id. at 53-54.
tained prior to a showing of probable cause. In defining Gerstein's promptness requirement at forty-eight hours, O'Connor recognized that the Fourth Amendment “contemplated a reasonable accommodation between the legitimate competing concerns” of the rights of individuals and the realities of law enforcement.

3. Marshall's Dissent: Probable Cause Determination Within Thirty-Six Hours

Justice Marshall dissented, urging affirmance of the Ninth Circuit's holding of a required showing of probable cause within thirty-six hours of a warrantless arrest. Marshall asserted that a probable cause hearing is sufficiently prompt under Gerstein only when provided immediately upon completion of the steps incident to arrest.

4. Scalia's Dissent: Probable Cause Determination Within Twenty-Four Hours

In a separate dissent, Justice Scalia argued that the majority of the Court had strayed from the standard of reasonableness in its analysis. Scalia maintained that one of the most important protections found at common law against an unreasonable seizure of the person was that a person arresting a suspect without a warrant must take the suspect before a magistrate as soon as is reasonably possible. According to Scalia, the only factor bearing on the reasonableness of the delay was “not such circumstances as the pressing need to conduct further investigation, but the arresting officer's ability, once the prisoner has been secured, to reach a magistrate who could issue the needed warrant for further detention.”

64. Id. at 55.
65. Id. at 57-58. The Court's "reasonable accommodation" reflected the same considerations as the "practical compromise" discussed by the Gerstein Court. See supra notes 37-39 and accompanying text.
67. Id.
68. Id. at 60-61 (Scalia, J., dissenting). Scalia noted that the "practical compromise" reached by the majority was inappropriate, as the reasonableness standard set forth in the Fourth Amendment already encompassed a balancing of interests. The reasonableness standard was a clear and well-adhered to principle, in place since 1791, and preserved in the Bill of Rights. Id. at 60.
69. Id. at 60-61.
70. Id. at 61 (Scalia, J., dissenting).
Although Scalia did not interpret \textit{Gerstein} to require an immediate determination of probable cause, he believed the delay could not be attributed to something other than completing the administrative steps incident to arrest and arranging for an available magistrate.\textsuperscript{71}

Scalia determined that the Fourth Amendment's prohibition of unreasonable seizures would be violated if a probable cause determination following a warrantless arrest was delayed 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."\textsuperscript{72} Scalia based the twenty-four hour standard on federal and state court holdings, the American Bar Association and American Law Institute's recommendations, and the writings of legal scholars.\textsuperscript{73}

D. \textit{The California Juvenile System and its Governing Statutes}

The \textit{parens patriae} doctrine exists at the core of the philosophy of the juvenile court system.\textsuperscript{74} \textit{Parens patriae} in the juvenile system refers to the role of a state as sovereign and guardian acting on behalf of children when the parents of the child are unable or unwilling to meet their parental responsibilities, or when the child poses a community crime problem.\textsuperscript{75} The doctrine's two goals are to provide guidance and rehabilitation for the child, and to provide protection for society.\textsuperscript{76}

The Welfare and Institutions Code governs the juvenile criminal justice system in California, and details the State's \textit{parens patriae} role.\textsuperscript{77} A brief overview of the Welfare & Institution Code reveals that its statutory provisions allow for

\textsuperscript{71} Country of Riverside v. McLaughlin, 500 U.S. 44, 63-64 (1991). Scalia argued that the administrative convenience of combining the probable cause hearing with other pretrial procedures was not grounds for warranting detention of a possibly innocent person. \textit{Id.} at 64.

\textsuperscript{72} \textit{Id.} at 70.

\textsuperscript{73} \textit{Id.} at 68-70.


\textsuperscript{75} Worrell, \textit{supra} note 74, at 175.

\textsuperscript{76} \textit{Id.}

prettrial detentions in excess of forty-eight hours. Under the California juvenile criminal justice system, a peace officer may, without a warrant, take a minor into custody if the officer has reasonable cause to believe that the minor has violated the law. When a minor is arrested and detained on suspicion of having committed a crime, the minor is not formally charged with a crime, as would be a similarly situated adult. Instead, the officer's discretion governs the decision of whether to release the minor or continue to hold him in custody.

To guide the officer in determining which disposition of the minor is most appropriate, section 626 states, "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." In the event the minor is held in custody, the officer must "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." Section 628 lists the criteria a probation officer must consider when determining whether a minor should be detained pending a probable cause hearing.

78. Id.
79. Id. §§ 602, 625. Section 602 states: "Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

Id. § 602. Section 625 provides, in part, that, "[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." Id. § 625.
80. Id. § 626.
81. Id.
82. Id.
83. Id. § 627(a).
84. Id. § 628. Section 628(a) states:

Upon delivery to the probation officer of a minor who has been taken into temporary custody under the provisions of this article, the probation officer shall immediately investigate the circumstances of the minor and the facts surrounding his being taken into custody and shall immediately release such minor to the custody of his parent, guardian, or responsible relative unless one or more of the following conditions exist: (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
A minor taken into custody must be released within forty-eight hours, excluding non-judicial days, unless the prosecuting attorney files a wardship petition pursuant to section 602 and a judge or referee of the juvenile court orders the minor to be detained pursuant to section 635. If a wardship petition is filed, section 632(a) provides that the minor shall:

as soon as possible but in any event before the expiration of the next judicial day after a petition to declare the minor a ward or dependent child has been filed, be brought before a judge or referee of the juvenile court for a hearing to determine whether the minor shall be further detained.

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. (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 reasonable necessity 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 disability, disorder or abnormality.

Id. § 628(a).


87. Id. §§ 631(b), 635. Section 635 details under what circumstances a minor should be released or further detained. It states:

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 the 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.

Id. § 635.
Such a hearing shall be referred to as a "detention hearing." 88

Because a petition need not be filed until forty-eight hours after the arrest, 89 and the minor need not be brought before the court for a hearing to determine probable cause until the first judicial day after the petition is filed, 90 a juvenile could be held in custody without a showing of probable cause for a period of time in excess of forty-eight hours. The governing statutes, therefore, allow for potential conflicts with the forty-eight hour rule stated in McLaughlin. 91 Such a conflict occurred in Alfredo A., where the California Supreme Court ruled on whether the McLaughlin standard applied to juveniles. 92

E. Alfredo A. v. Superior Court

1. Factual and Procedural Background

Alfredo A., a minor, was arrested on July 24, 1991, and taken into custody without a warrant on suspicion of having possessed cocaine base for sale. 93 The following day, Alfredo A. filed a petition for a writ of habeus corpus in the Court of Appeals for the Second Appellate District seeking his immediate release. 94 The petition alleged 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. 95

88. Id. § 632(a).
89. Id. § 631(a).
90. Id. § 632(a).
93. Id. at 59. Alfredo A. was taken into custody pursuant to sections 602 and 625 of the California Welfare and Institutions Code. Id.
94. Id.
95. Id. Shortly after McLaughlin was decided, the presiding judge of the Los Angeles County Juvenile Court sent a memorandum to all juvenile court judges, commissioners, and referees indicating the “official position” of the Los Angeles County Juvenile Court to be that McLaughlin’s forty-eight hour rule
On that same day, the prosecuting attorney filed a wardship petition in the juvenile court alleging that Alfredo A. came within the provisions of section 602 by violating Health and Safety Code sections 11351 and 11351.5. Three days later, on the next "judicial day," Alfredo A. appeared in court. Alfredo A.'s probation officer, however, failed to provide a detention report to the court in preparation for the detention hearing and, as a result, the court ordered Alfredo A.'s release.

Although petitioner Alfredo A. acknowledged that his release from custody rendered his petition moot as to him, the Court of Appeals decided to hear his mandamus petition. The Court of Appeals held the County's process to be constitutional based on the following reasoning:

[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.

Counsel for Alfredo A. petitioned the California Supreme Court for review of the appellate court decision arguing that his client's Fourth Amendment rights had been violated.
2. Lucas' Lead Decision

In a lead decision authored by Chief Justice Lucas, the California Supreme Court affirmed the Court of Appeal's decision. The court found the *Gerstein* holding to be limited in scope, because *Gerstein* involved an adult defendant, whereas *Alfredo A.* concerned a juvenile defendant. The court relied heavily on *Schall v. Martin,* a United States Supreme Court case decided in 1984, which specifically addressed the question of pretrial detention of juveniles.

In *Schall,* three juveniles were detained for more than six days before appearing before a judge for a probable cause hearing, in compliance with the applicable New York statutes. For juveniles detained upon arrest, the statutes provided for an initial appearance on the next court day or within seventy-two hours, whichever came first. At this appearance, which typically lasted five to fifteen minutes, the judge did not ordinarily interview the juvenile, inquire into the truth of the allegations stated in the petition, or make any inquiry into whether there was probable cause to believe that the juvenile committed the offense. The *Schall* Court looked at the statutory scheme as a whole and concluded that the lack of a requirement that factual probable cause be determined at the initial appearance "[would] not, under the circumstances, amount to a deprivation of due process."

In distinguishing the issue involved in *Alfredo A.* from the situation in *Gerstein,* and arguing for the applicability of the arguments posited in *Schall,* the California Supreme Court noted:

102. *Id.* at 57, 69. The plurality held one portion of the statutory scheme invalid. It struck down the statutory exception whereby detention could be extended if it occurred on a non-judicial day. The court stated that the Constitution requires that the juvenile be afforded a judicial determination of probable cause within the initial seventy-two hours following arrest, even if the seventy-two hour period immediately following arrest includes one or more judicial days. *Id.* at 68-69.


105. *Id.* at 255.

106. *Id.* at 257-60. See infra note 146 and accompanying text.

107. *Id.* at 257 n.5.

108. *Id.* at 284-85 (Marshall, J., dissenting).

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"—*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 pretrial detention of a juvenile arrested without a warrant for criminal activity.  

For similar reasons, the court was not persuaded that *McLaughlin* should apply in the juvenile setting. Because it did not concern juvenile detentions, the *McLaughlin* Court had no occasion 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 . . . [while ensuring] that such proceedings comport with the 'fundamental fairness' demanded by the Due Process Clause." As a result, the *Alfredo A.* court remained unconvinced that *McLaughlin* was necessarily controlling in juvenile cases.

The court also cited *Reno v. Flores* as authority for not applying the *McLaughlin* standard in the juvenile system. In *Flores*, the United States Supreme Court rejected a procedural due process claim of a class of alien juveniles. The juveniles were detained because officials suspected the youngsters could be subject to deportation. The rationale advanced by the *Flores* Court echoed that of the *Schall* Court. *Flores* argued that juveniles do not have the same rights as adults to be free from regulation over their movement because “juveniles, unlike adults, are always in some form of custody.” The holding in *Flores* served to reinforce the California Supreme Court's belief that a bright line prob-

111. *Id.* at 65-68.
112. *Schall*, 467 U.S. at 263.
116. *Id.*
117. *Id.* at 1447.
able cause rule "does not, in isolation, adequately address all of the constitutional concerns that arise in juvenile postarrest detention cases."^119

3. Arabian's Concurrence

In a concurring opinion, Justice Arabian argued that Lucas' opinion erred in failing to analyze the claim in the context of Fourth Amendment jurisprudence, as this was the sole basis of petitioner's claim.^120 Nonetheless, Arabian agreed that McLaughlin was not necessarily controlling in the juvenile setting.^121 Arabian then engaged in an examination of the nature of the Fourth Amendment guarantee of promptness, with its qualification of reasonableness, in the context of the particularized concerns of the juvenile justice system.^122

Arabian conceded that the promptness requirement of Gerstein applied to all warrantless detainees, regardless of age.^123 However, he concurred with the rationale of Schall, noting that the juvenile setting weighs heavily in determining whether and to what extent a constitutional protection applies to minors.^124 Arabian concluded that the need for maintaining flexibility when dealing with juvenile offenders provided a "rational basis on which to premise some latitude beyond the 48-hour limit delineated in McLaughlin."^125

4. Mosk's Dissent

Justice Mosk dissented, arguing that the Gerstein promptness requirement applied to juveniles and that the McLaughlin definition of promptness was also binding on juvenile offenders.^126 Mosk noted that the Gerstein Court extended its promptness requirement to "persons" and "individuals," and at no time attempted to limit or qualify its

^119. Alfredo A., 865 P.2d at 66.
^121. Id.
^122. Id. at 69-70.
^123. Id. at 70.
^124. Id. at 70-71.
^126. Id. at 76-78 (Mosk, J., dissenting).
constitutional protection with regard to juveniles. Using reasonableness as the criterion for Fourth Amendment analysis, Mosk argued, "[w]hen 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." Mosk's sentiment was clear: prolonged detention requires probable cause.

After finding Gerstein's promptness requirement applicable to juveniles, Mosk could not discern any basis on which to restrict the McLaughlin holding from applying to juveniles. McLaughlin at no point limited its scope to adults, nor did it qualify its applicability to juveniles. The vagueness of Gerstein's promptness requirement, which had spawned the McLaughlin holding, was no less vague in the juvenile setting, and "will surely lead to like challenges in juvenile proceedings—of which the present is only the first—invoking the state judiciary as well as the federal in matters that belong largely to the other branches of government."

Mosk's dissent discounted Lucas' reliance on Schall and Flores as not binding on Fourth Amendment questions, such as Alfredo A's. Schall was based on the Fourteenth Amendment's Due Process Clause, while Flores was based on the Due Process Clause of the Fifth Amendment. Mosk stated the court's long-standing belief that "[i]t is axiomatic that cases are not authority for propositions not considered." Therefore, Mosk argued, Lucas had failed to support his position with authoritative precedent.

When viewed against the backdrop of reasonableness, Mosk failed to see how it was reasonable to detain a juvenile

127. Id. at 76.
128. Id. at 77.
129. Id. at 77-78 (Mosk, J., dissenting).
131. Id. at 78.
134. Alfredo A., 865 P.2d at 78-80.
135. Schall, 467 U.S. at 255.
suspect longer than an adult suspect. In addition, he found Lucas' argument that the juvenile system's need for flexibility necessitated longer detainment unavailing.

While possibly conceding that the inquiry into the propriety of extended detention with a minor suspect is broader in scope than with an adult suspect, Mosk noted: "[t]hat the 'inquiry' is 'broader' than probable cause is a result of the Legislature's policy choice and not federal constitutional compulsion. But the fact remains: the 'inquiry' does indeed depend on probable cause." The standard of probable cause, based on reasonableness, does not change depending on whether the suspect is an adult or juvenile. Consequently, Mosk argued that it was not any more reasonable to detain a juvenile for a longer period of time than an adult.

III. IDENTIFICATION OF PROBLEM

In holding that minors may be detained in excess of forty-eight hours prior to a determination of probable cause following a warrantless arrest, the California Supreme Court decided that minors do not have the same Fourth Amendment rights as adults in this area of Fourth Amendment jurisprudence. The Alfredo A. court, while recognizing that the guarantees of the protect juveniles, failed to state convincingly why juvenile suspects should be afforded less right to a prompt pretrial determination of probable cause than that given to adult suspects. The court's rationale rested largely on the differences between the juvenile and adult criminal systems, and the differing inquiries authorities must make when determining whether a suspect should face prolonged detention.

The argument that, because the systems are different, juveniles can be afforded different constitutional rights is perfunctory and lacks solid legal principles and articulable facts to support it. Nonetheless, such logic has been used to deprive juveniles of their deserved Fourth

138. Id. at 81-82. As found in the text of the Fourth Amendment, reasonableness is the standard against which detainments are to be judged constitutionally permissible. See U.S. Const. amend. IV.
139. Alfredo A., 865 P.2d at 82-83.
140. Id. at 83.
141. See supra note 137.
143. Id. at 61-63.
Amendment rights and could potentially be used to strip juveniles of other constitutional protections.

IV. ANALYSIS

A. Application of Precedent

1. Misguided Application of Precedent By Lucas

Chief Justice Lucas, writing for three members of the 4-3 plurality in *Alfredo A.*, based his decision on the holding of *Schall v. Martin*, in which juveniles were afforded different constitutional protections than adults regarding pretrial detention. Lucas' reliance on *Schall* appears misplaced and poorly chosen.

In *Schall*, the question before the United States Supreme Court was whether section 320.5 of the New York Family Court Act satisfied the requirements of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. While recognizing the existence of the then-current standard, enunciated in *Gerstein*, regarding Fourth Amendment pretrial detentions, the holding of *Schall* was based on due process grounds. Lucas' application of Fourteenth Amendment legal principles to the Fourth Amendment question involved in *Alfredo A.* did not properly address the legal question at issue.

Pretrial detention can be held unlawful as a result of violations of differing constitutional protections. It is not unusual for a freedom to receive protection from more than one constitutional guarantee. For instance, a person subject to criminal prosecution has a right to counsel protected by both the Fifth Amendment and the Sixth Amendment. Likewise, a suspect detained on suspicion of criminal activity has constitutional protections against unlawfully protracted detentions under the Fourth, Fifth, and Fourteenth Amendments.
Amendments. Instances will occur when an action is lawful under one constitutional guarantee while unlawful under another. For example, a suspect unwillingly deprived of counsel during a custodial interrogation held prior to the initiation of criminal proceedings against him has not had his Sixth Amendment rights violated, but has suffered a deprivation of his Fifth Amendment right to counsel. Depending on the facts of the case, a petitioner may argue that one or more of these constitutional protections has been violated.

Once the petitioner makes the argument that a specific constitutional right has been violated, it is the responsibility of the respondent to refute that specific legal challenge. In *Alfredo A.*, petitioner argued that his Fourth Amendment rights were violated. He did not argue that his Fourteenth Amendment due process rights were violated. Nonetheless, both the California Court of Appeal and the California Supreme Court held that Alfredo A.'s detention was constitutional because, in large part, his due process rights under the Fourteenth Amendment had not been violated. Both courts failed to address the specific constitutional question before them: whether the Fourth Amendment was violated as a result of Alfredo A.'s detention in excess of forty-eight hours without a showing of probable cause.

2. Concurrence's Recognition of Lucas' Misapplication of Precedent

In an opinion concurring in judgment, Justice Arabian recognized Chief Justice Lucas' failure to properly address the constitutional question at issue before the court. While believing that the *McLaughlin* standard was not "necessarily controlling" in the juvenile setting, Justice Arabian rejected

153. U.S. CONST. amend. V.
154. U.S. CONST. amend. XIV.
155. See Massiah v. United States, 377 U.S. 201 (1964) (holding Sixth Amendment right to counsel attaches once criminal judicial proceedings have been instituted).
158. Id. at 60, 64-65, 68.
159. See id. at 69 (Arabian, J., concurring).
160. Id. at 69.
Chief Justice Lucas' due process analysis.\textsuperscript{161} Justice Arabian agreed with the dissent in this regard, noting:

Petitioner does not dispute his postarrest detention [on due process grounds]; nor does he raise such a challenge to any provision of the Juvenile Court Law governing wardship detentions in general. 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 warrantless arrest as mandated by the United States Supreme Court's decision in \textit{County of Riverside v. McLaughlin}. As framed by petitioner, the only issue before us is whether the rule of \textit{McLaughlin} applies to juveniles. Accordingly, we are constrained to refract his contentions solely through a Fourth Amendment prism, for that is the limited nature of his constitutional claim. The specificity of the question demands an equally precise answer, not the due process circuity submitted in the lead opinion.\textsuperscript{162}

3. \textit{Dissent's Recognition of Lucas' Misapplication of Precedent}

Justice Mosk's dissent also perceived Lucas' misapplication of legal theory.\textsuperscript{163} In concluding that the forty-eight hour standard announced in \textit{McLaughlin} was applicable to juveniles and adults alike, Justice Mosk grounded his arguments in Fourth Amendment precedent.\textsuperscript{164} He found that the lead opinion had not based its position on Fourth Amendment precedent and was "fatal[ly] flaw[ed]" as it was non-responsive to the legal question at issue.\textsuperscript{165} The question before the court was whether the superior court's position was correct, in that \textit{Gerstein}'s promptness requirement as defined by \textit{McLaughlin} was not applicable to juveniles and not violative of the Fourth Amendment.\textsuperscript{166} Instead, the lead opinion addressed the question of whether the juvenile court

\textsuperscript{161} Id.
\textsuperscript{163} See id. at 79-81 (Mosk, J. dissenting).
\textsuperscript{164} Id. at 76-78.
\textsuperscript{165} Id. at 80.
\textsuperscript{166} Id.
law complied with the Fourteenth Amendment's Due Process Clause as interpreted in Schall.167

B. Proper Application of Precedent

Proper application of Fourth Amendment precedent to Alfredo A.'s case should result in the same standard for a probable cause determination for both juvenile and adult suspects. The Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to extended restraint of liberty following a warrantless arrest.168 Juveniles are entitled to this protection.169

When the United States Supreme Court decided McLaughlin, it clarified the vague standard of promptness.170 This new standard was equally vague as it related to juvenile proceedings.171 Without clarification, the danger existed that the practices of local law enforcement would violate Fourth Amendment rights, including those of juveniles.

1. Neutral and Detached Magistrate

In California, the statutory scheme does not provide for an appearance before a magistrate for up to seventy-two hours after the minor is taken into custody.172 Prior to appearing before a magistrate, the decision to keep the minor detained lies within the discretion of the arresting officer and a juvenile probation officer,173 both of whom have direct or indirect ties with law enforcement. For a proper implementa-

167. Alfredo A. v. Superior Court, 865 P.2d 56, 80 (Cal.), cert. denied, 115 S. Ct. 86 (1994) (Mosk, J. dissenting). By applying specialized constitutional arguments to a different constitutional claim, Justice Mosk noted that the lead opinion could just as well have cited precedent to show that the statutory scheme did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Id. This, however, would not respond to the question of whether the statutory scheme violated the protections of the Fourth Amendment. Furthermore, Chief Justice Lucas seemingly chops off the legal legs upon which his opinion stands by noting the "limited precedential value" of applying specialized constitutional arguments to a different constitutional claim. Id. at 67.


171. Alfredo A., 865 P.2d at 77-78 (Mosk, J., dissenting).

172. See supra notes 89-90 and accompanying text.

tion of Fourth Amendment protections, however, the United States Supreme Court requires that the existence of probable cause be determined by a neutral and detached magistrate whenever possible.174

The realities of law enforcement do not always permit an officer the opportunity to obtain a warrant prior to an arrest.175 Whereas the State's need for taking summary action in combatting crime subsides once the suspect is detained, the suspect's need to appear before a neutral and detached magistrate for a determination of probable cause increases dramatically.176

Consequently, following a warrantless arrest, the requirement of a judicial determination of probable cause satisfies the Fourth Amendment by ensuring that the arresting officer's judgment was correct in initially deciding to arrest the suspect. The United States Supreme Court has explained the need for a neutral and detached magistrate's determination of the existence of probable cause:

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 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.177

The danger of delaying or dispensing with the neutral and detached magistrate's role in determining probable cause lies in the prolonged detention with which the suspect is faced.

2. Seriousness of Detention

Alfredo A. and Schall asserted that the procedural safeguards found in the juvenile system which can require post-arrest detentions in excess of forty-eight hours are in place to protect juveniles.178 In a footnote, the Schall Court even argued that brief delays in the probable cause hearing may be

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175. See id. at 113 (stating that such a requirement would constitute an intolerable handicap for legitimate law enforcement).
176. Id. at 114.
beneficial to the detained juvenile, as the delay gives his counsel additional time to prepare for the hearing.\textsuperscript{179} Both precedent and common sense refute this specious argument.\textsuperscript{180}

The freedom of liberty holds a prized place in the common law tradition upon which the laws of the United States were founded. It is this freedom of liberty which exists at the core of the Fourth Amendment's protection against unreasonable seizures of the person.

Gerstein noted the seriousness of pretrial detainment, in stating that it could imperil the suspect's job, interrupt his source of income and impair his family relationships.\textsuperscript{181} In addition, the consequences of prolonged detention may be more serious than the interference occasioned by arrest.\textsuperscript{182} The situation also proves serious for juvenile detainees.\textsuperscript{183} In fact, pretrial detention has been characterized as an "onerous experience, especially for juveniles."\textsuperscript{184} The myth that the conditions of juvenile detention are non-punitive and benign "appears shaky when compared to the grim realities of incarceration in some of today's overcrowded juvenile detention facilities."\textsuperscript{185} Justice George argued the following in his dissent in Alfredo A.:

\textit{[T]he 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, wrongful incarceration are likely to be more detri-}

\begin{itemize}
  \item \textsuperscript{179} Schall, 467 U.S. at 277 n.28.
  \item \textsuperscript{180} It is reasonable to assume that legislatures allow sufficient time within the statutory schemes for counsel to prepare adequately for a probable cause hearing. For the juvenile to benefit from an additional delay, it would logically follow that the statutory scheme is flawed in failing to provide an adequate amount of time for counsel to prepare.
  \item \textsuperscript{181} Gerstein v. Pugh, 420 U.S. 103, 114 (1975).
  \item \textsuperscript{182} Id.
  \item \textsuperscript{183} See Comment, The Supreme Court and Pretrial Detention of Juveniles: A Principled Solution to a Due Process Dilemma, 132 U. Pa. L. Rev. 95, 96 (1983) (noting that the overwhelmingly negative impact of pretrial detention on juveniles often destroys any possibility of subsequent rehabilitation).
  \item \textsuperscript{184} Moss v. Weaver, 525 F.2d 1258, 1260 (5th Cir. 1976) (emphasis added).
\end{itemize}
mental and long-lasting to an innocent, vulnerable child than to an innocent adult.\textsuperscript{186}

By failing to give adequate recognition to the negative effects of pretrial detention on juveniles, the court skews its calculus in balancing the juvenile's liberty interest with law enforcement's need to control crime.\textsuperscript{187} This skewing yields an injustice for juveniles, whose prolonged detention is not adequately warranted by a sufficiently urgent law enforcement concern.

3. \textit{Prompt Determination of Probable Cause}

No United States Supreme Court opinion has required an immediate determination of probable cause following an arrest.\textsuperscript{188} Nor has any United States Supreme Court opinion required states to conform to uniform procedural steps in their criminal justice systems.\textsuperscript{189} However, while \textit{Gerstein} did allow for states to tailor their pretrial procedures to the states' wishes, it cautioned that "[w]hatever 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 determination must be made by a judicial officer either before or promptly after arrest."\textsuperscript{190} In addition, \textit{Gerstein} defined the promptness requirement as "a brief period... to take the administrative steps incident to arrest."\textsuperscript{191} \textit{Gerstein} did not, however, allow states to define the promptness requirement for themselves and to choose pretrial procedures that would violate the Supreme Court's federal constitutional mandate.\textsuperscript{192} Since \textit{McLaughlin} defined the promptness requirement at forty-eight hours, states must comply with its holding or violate

\textsuperscript{186} Alfredo A. v. Superior Court, 865 P.2d 56, 85-86 (Cal.) (George, J., dissenting), cert. denied, 115 S. Ct. 86 (1994); see Schall v. Martin, 467 U.S. 253, 291 (1984) (Marshall, J., dissenting) (arguing that the impressionability of juveniles may make the experience of incarceration more injurious to juveniles than to adults).

\textsuperscript{187} See generally supra notes 37-41 and accompanying text.


\textsuperscript{189} See id.

\textsuperscript{190} Gerstein v. Pugh, 420 U.S. 103, 124-25 (1975) (footnote omitted).

\textsuperscript{191} Id. at 114.

\textsuperscript{192} See McLaughlin, 500 U.S. at 63-65 (Scalia, J., dissenting).
the Supremacy Clause of the United States Constitution. Because *Alfredo A.* allows probable cause determinations to be held in excess of forty-eight hours following a warrantless arrest, California fails to comply.

C. *Forty-Eight Hours May Be Too Long*

The forty-eight hour standard announced in *McLaughlin* has been criticized as being too extended a period to detain a suspect prior to a determination of probable cause. *McLaughlin* was a 5-4 decision, which implies that there was hardly uniform agreement regarding the forty-eight hour standard. One of the dissenters, Justice Scalia, urged the application of a twenty-four hour standard. This view has garnered considerable support in the legal community.

As Justice Scalia noted, every federal court that had actually set a time-limit for a probable cause determination based on the time required to complete the steps incident to arrest had selected twenty-four hours. The American Law Institute’s Model Code requires that a suspect have an appearance before a court, where he or she could challenge probable cause, at the earliest time after arrest that a judicial officer of the court is available and, in any event, within twenty-four hours. In addition, the Federal Rules of Criminal Procedure require that adult suspects be brought before a magistrate “without unnecessary delay” and juvenile suspects “forthwith.”

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193. U.S. CONST. art. VI, cl. 2; see Cook v. Moffat, 46 U.S. 295, 307 (1847) (stating state courts are bound to conform to decisions of the United States Supreme Court).
195. *Id.* at 46.
196. *See supra* note 73 and accompanying text.
197. *McLaughlin*, 500 U.S. at 68-69 (Scalia, J., dissenting). There was only one exception found in the cases cited by Justice Scalia to the twenty-four standard. *Id.* This lone exception would not count Sunday within the twenty-four limit. *Id.* at 69.
D. Precedent for Denying Juvenile Suspects Constitutional Protections

The plurality in *Alfredo A.* and the majority in *Schall* noted that the Constitution does not mandate elimination of all differences in the treatment of juvenile and adult suspects. Both decisions cited only one case, *McKeiver v. Pennsylvania*, to support this argument. In *McKeiver*, the Court held that juveniles were not entitled to the right to a jury trial. The Court reasoned that requiring jury trials would "put an effective end" to some of the defining characteristics of the juvenile system, namely that juvenile proceedings are intimate, informal, and not fully adversarial. In fact, requiring jury trials would eliminate many of the differences between the treatment of juvenile and adult suspects.

In contrast, granting juveniles the same treatment as adults regarding a prompt showing of probable cause would not tear at the fabric of the juvenile justice system. Neither the character of the proceedings, nor the treatment of the juveniles would be altered, as would occur with the requirement of jury trials. Only the amount of time allowed to elapse prior to the probable cause hearing would be changed.

E. Parens Patriae—*Parental v. State Custody*

Both *Alfredo A.* and *Schall* relied upon the parens patriae doctrine in justifying juvenile detentions. In rationalizing the detention of juveniles, *Alfredo A.* noted that "juveniles, unlike adults, are always in some form of custody." This statement implies that a juvenile has a limited liberty interest which can be subordinated to his custodian's...

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205. *Id.* at 545.
206. The hope that counties could provide probable cause hearings for juveniles within forty-eight hours of a warrantless arrest is entirely realistic. The most heavily populated counties in California are already providing probable cause hearings within forty-eight hours of a juvenile's arrest. See *infra* note 242 and accompanying text.
207. See *supra* notes 74-76 and accompanying text.
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wishes. Although it is true that juveniles are in some form of legal custody until they reach the age of majority or are emancipated, the analogy between parental and state custody is unfair. In his dissent in *Schall*, Justice Marshall argued:

\[\text{[the] characterization of preventative detention as merely a transfer of custody from a parent or guardian to the State is difficult to take seriously. Surely there is a qualitative difference between imprisonment and the condition of being subject to the supervision and control of an adult who has one's best interests at heart.}^{210}\]

There are three reasons to support Justice Marshall's observation of a qualitative difference in parental and state custody. First, there is a unique bond between parents and children which the courts have recognized.\(^{211}\) Natural family ties and the affection that derives therefrom give parents unique authority over their children.\(^{212}\) When custody of a juvenile is transferred to the State, it cannot be presumed that familial ties that lead a parent to act in the best interest of their child will exist in the State-juvenile relationship.\(^{213}\) Furthermore, the state agent and juvenile are likely to be strangers to one another.\(^{214}\) As a result, it is not reasonable to believe that the particular state agent will be as dedicated to the juvenile's best interests as would the juvenile's parent.

Second, it cannot be assumed that the State is necessarily looking out for the best interests of the child, as would a parent, because of the inherent conflict of interest that exists when the State acts in its *parens patriae* role. As such, the State's goals are to provide guidance and rehabilitation for the child, and to provide protection for society.\(^{215}\) These two interests do not operate in a vacuum. Instead, they compete against one another.\(^{216}\) It is not difficult to envision a scenario where a state, due to public or political pressure to "get tough on crime," acts in a manner conflicting with the best interests of the child. There is no such conflict, however, with

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\begin{align*}
210. & \quad \text{*Schall*, 467 U.S. at 289-90 (Marshall, J., dissenting).} \\
211. & \quad \text{Worrell, supra note 74, at 180-81.} \\
212. & \quad \text{Id. at 180.} \\
213. & \quad \text{Id.} \\
214. & \quad \text{Id. at 181.} \\
215. & \quad \text{Id. at 176.} \\
216. & \quad \text{Id. at 181.}
\end{align*}
\]
the parent as custodian.\textsuperscript{217} Clearly, the parent's greatest responsibility is to care for the child and act in his best interests. Although it is a parental concern to keep a child from harming the community, society has placed the primary responsibility for this task upon the State.\textsuperscript{218}

Third, a qualitative difference exists between the conditions that a juvenile faces during time spent in the custody of the State, and the conditions a juvenile faces with a parent. Instead of being with his family in the familiar surroundings of his home, a juvenile is forced to endure a foreign environment where he is exposed to sexual assault,\textsuperscript{219} "penned like cattle," and "often brutalized."\textsuperscript{220} These two experiences are hardly equivalent. Furthermore, juveniles subject to detention suffer stigmatization as a result of their detention.\textsuperscript{221} The damaging impact of detention on juveniles is recognized by mental health professionals and the judiciary.\textsuperscript{222} As a result, the need for a prompt probable cause hearing once a juvenile is in custody is of great importance.

\textbf{F. Probable Cause Hearing More Urgent for Juveniles Than Adults}

The Supreme Court first recognized that juveniles were entitled to constitutional protections in \textit{In re Gault}, where a juvenile was held to be protected by the Due Process Clause of the Fourteenth Amendment.\textsuperscript{223} In this case, the Court held that a juvenile was entitled to written notice of the specific charges and factual allegations to be considered at a de-

\textsuperscript{217} \textit{Id.} at 182.
\textsuperscript{218} \textit{Id.}
\textsuperscript{220} Feld, supra note 74, at 202.
\textsuperscript{221} \textit{Schall}, 467 U.S. at 291 (Marshall, J. dissenting). The California Supreme Court has given the following characterization to what a juvenile faces upon detention:

\begin{quote}
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. . . . The experience tells the youngster that he is "no good" and that society has rejected him. So he responds to society's expectation, sees himself as a delinquent, and acts like one.
\end{quote}


\textsuperscript{222} See supra notes 183-86, 219-21 and accompanying text.
\textsuperscript{223} \textit{In re} Gault, 387 U.S. 1 (1967).
Today, the Court recognizes that many constitutional protections enjoyed by adults also apply to juveniles in juvenile proceedings. 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. The Court, however, has not extended all constitutional protections to juveniles.

Differences in the rights afforded to juvenile and adult suspects exist in California as well. Adult suspects generally have the options of being released on their own recognizance and posting bail. Neither of these alternatives is available to juveniles in California. Consequently, juveniles have no way of ending their detention pending trial apart from a probable cause hearing. The urgency in having a probable cause determination, therefore, is arguably greater for juveniles than for adults, who have means of gaining release that are denied to juveniles. What could occur as a result of this process is that:

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.

Such a system casts a shadow over the criminal justice system's core principle of innocent until proven guilty.

Fourth Amendment precedent does not support denying a juvenile a probable cause hearing within forty-eight hours of a warrantless arrest. Furthermore, the deleterious effects

224. Id. at 31-34.
225. Id. at 1.
226. Id.
227. Id.
231. McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (stating that juveniles do not have a constitutional right to a jury trial).
233. Id.
234. Id. at 85 (quoting County of Riverside v. McLaughlin, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting)).
of detention are particularly pronounced on juveniles. Pro-
longed pretrial detention subjects juveniles to extended expo-
sure to an unfriendly and dangerous environment, all the
while having no opportunity to prove their innocence.
Changes in the treatment of juvenile suspects in California
must cure this inequity.

V. PROPOSAL

Under the present system, juveniles may be held for sev-
enty-two hours prior to a hearing before a neutral and de-
tached magistrate without any showing of probable cause
that the juvenile has committed a crime. The length of
this detention must be shortened to comply with the dictates
of Fourth Amendment precedent. Two alternatives exist to
remedy this injustice. One option entails reform through a
judicial decision; the other option requires statutory revision.

A. Apply the McLaughlin Forty-Eight Hour Standard

The first option would be to apply the same standard to
juveniles and adults alike, and require a showing of probable
cause within forty-eight hours to justify further detention of
the suspect. In doing so, the promptness requirement
stated in Gerstein and defined in McLaughlin would be ful-
filled and Fourth Amendment precedent satisfied. Neither of
these cases contain language excluding, or in any way limit-
ing, juveniles from the protections set forth in their hold-
ings. Until the United States Supreme Court limits its
holding in McLaughlin to adults only, the Supremacy Clause
of the United States Constitution requires that California
law yield to McLaughlin’s holding, requiring probable cause

235. See Feld, supra note 74, at 200-03.
236. See supra notes 77-89 and accompanying text.
237. On May 31, 1994, petitioners in Alfredo A. filed for certiorari to the
United States Supreme Court. Alfredo A. v. Superior Court, 865 P.2d 56 (Cal.
1994), cert. denied, 115 S. Ct. 86 (1994). This provided the Court with the oppor-
tunity to adopt the reform proposed by this comment. The Court, however,
denied certiorari. Alfredo A. v. Superior Court, 115 S. Ct. 86 (1994). As a re-
result, the question of the applicability of McLaughlin to juveniles is yet to be
answered by the United States Supreme Court.
238. Alfredo A., 865 P.2d at 77-78 (Mosk, J., dissenting).
239. U.S. CONST. art. VI, cl. 2.
determinations for individuals within forty-eight hours of a warrantless arrest.240

Opponents to shorter time requirements for probable cause determinations often argue that speeding up the criminal justice mechanism would be too costly, as it would require hiring additional police officers and magistrates.241 Cost certainly remains a valid concern. Nonetheless, a review of statewide practices shows that the forty-eight hour standard would not impose an unbearable burden on the juvenile criminal justice system. A number of the state’s largest counties, including San Diego, Orange, Santa Clara, Sacramento, San Francisco, Fresno, and San Mateo, are already successfully providing probable cause hearings within forty-eight hours of warrantless arrest.242 By extending equal protection to juveniles and imposing the forty-eight hour standard on the pretrial detention of juveniles, the idea that the system should protect persons who are presumed innocent would be notably strengthened.

B. Statutory Revisions

Another option would be to change the criteria used by officials in determining who should be detained. This could simplify and expedite the process of determining which juveniles should face pre-trial detention. In place of the criteria stated in section 628(a) of the California Welfare and Institutions Code,243 criteria should instead target the more serious juvenile offenders and those who are at high-risk of fleeing the jurisdiction pending a probable cause hearing.

The American Bar Association (ABA) has drafted standards for juvenile detention, which, if followed, would limit the number of juveniles subject to preventative detention.244

242. Alfredo A. v. Superior Court, 865 P.2d 56, 84 (Cal. 1994) (Mosk, J., dissenting), cert. denied, 115 S. Ct. 86 (1994). At oral argument on rehearing, counsel for respondent conceded that Los Angeles County was also successfully providing probable cause hearings within the forty-eight hour period for most juveniles. Id.
243. CAL. WELF. & INST. CODE § 628(a) (West 1987 & Supp. 1994); see supra note 77.
244. INSTITUTE OF JUDICIAL ADMINISTRATION/ABA, JUVENILE JUSTICE STANDARDS RELATING TO INTERIM STATUS: THE RELEASE, CONTROL, AND DETENTION OF ACCUSED JUVENILE OFFENDERS BETWEEN ARREST AND DISPOSITION, Standard 6.6 (1979). These standards require, as a prerequisite to juvenile detention
The following proposed standards closely resemble those advocated by the ABA and should be adopted. The standard would require that, as a prerequisite to juvenile detention pending adjudication, the probation officer must find that the juvenile fits into one of the following categories: 1) the juvenile is accused of a violent crime, which would be punishable by a sentence of one year or more if committed by an adult and which, if proven, would be likely to result in confinement in a secure institution; or 2) 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; or 3) 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 4) the juvenile is verified to be a fugitive from another jurisdiction which has formally requested that the juvenile be placed in detention.

The foregoing criteria are slightly more inclusive in terms of the juveniles to be detained than the criteria put forth by the ABA. Studies have shown that when strict guidelines similar to those adopted by the ABA have been adhered to, the results have been: 1) a significant decrease in the number of juveniles detained; 2) a decrease in the length of their detainment; 3) a decrease in the number of juveniles rearrested on new charges; and 4) a minimal effect on the juvenile who is accused of a violent crime which would be punishable by a sentence of one year or more if committed by an adult and which, if proven, would be likely to result in confinement in a secure institution, and that 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; or 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) be verified as a fugitive from another jurisdiction which has formally requested that the juvenile be placed in detention.

245. These standards bear some resemblance to section 635 of the California Welfare and Institutions Code which lists the standards the court applies at the detention hearing itself to determine whether to continue the minor's detention or order his or her release from custody. Cal. Welf. & Inst. Code § 635 (West 1987 & Supp. 1994).

246. Institute of Judicial Administration/ABA, supra note 244, Standard 6.6.
The realities of juvenile detention have not been adequately considered in the calculus for determining the amount of time permissible before a probable cause determination is required. The grim experience of detention in today's overcrowded and often dangerous facilities is particularly injurious to vulnerable and impressionable juveniles. During this experience, the State assumes the role of the juvenile's custodian. The State, however, does not have the same vested interest and concern for the juvenile's best inter-

ests as does the juvenile’s parent. There is also a potential conflict of interest with the State serving in its parens patriae role, in protecting both the child and society, that is not present with the juvenile’s parent. Consequently, state custody cannot legitimately be analogized to parental custody.

When courts interpret the Constitution to determine how far Fourth Amendment protections are extended, the question boils down to one of reasonableness. The seventy-two hour standard enunciated by the Alfredo A. court strays from the parameters of reasonable seizures as guaranteed under the Fourth Amendment. A policy giving full efficacy to the protections of the Fourth Amendment’s language would result in a forty-eight hour standard for juveniles.

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