Reviving the Presumption of Youth Innocence Through a Presumption of Release: A Legislative Framework for Abolition of Juvenile Pretrial Detention

Sara S. Hildebrand*

ABSTRACT

Juvenile courts were established at the beginning of the twentieth century by a group of reformers who called themselves "Child Savers." Those founders believed that fundamental differences between adults and children—such as children's developmental immaturity and malleability—required the establishment of a court for youth, separate from adult criminal court, that focused on youth rehabilitation. Over time, the focus in most juvenile courts has shifted away from rehabilitation towards retribution, punishment, and protection of public safety—principle aims of the adult criminal system. These policy changes have facilitated an exponential increase in the number of youths detained during the pretrial period of their cases in juvenile court.

In 2018, over 195,000 presumptively innocent youth were detained between arrest and final disposition of their juvenile delinquency case. Troublingly, the procedures designed to ensure objectivity and fairness in pretrial detention decision-making instead invite subjective judgments and result in disproportionate pretrial detentions of youth of color. Moreover, an earnest assessment of peer-reviewed studies reveals that pretrial detention of youth fails to serve its intended objectives of protecting the safety of high-risk youth and ensuring their appearance in court. While in pretrial detention, youth often do not get the educational or mental-health support they need and are frequently exposed to

* Clinical Teaching Fellow, University of Denver, Sturm College of Law. J.D., University of Denver, Sturm College of Law. Thanks to Profs. Nicole Godfrey, Tammy Kuennen, Christopher N. Lasch, Catherine E. Smith, Tania Valdez, Robin Walker Sterling, and Lindsey Webb for their guidance and feedback. Thanks also to the members of the Rocky Mountain Collective on Race, Place, and Law for their comments, and to and Ashley Cordero for her excellent research assistance. I am indebted to my former juvenile clients, who inspired me to write this Article; your resilience is extraordinary.

unconscionable violence, abuse, and negative influences that inhibit their healthy development.

This Article focuses on the iatrogenic nature of pretrial youth detention and suggests a framework for legislative abolition of youth pretrial detention. In this moment, when communities are rethinking the efficacy of entrenched institutions like policing to effectuate public safety, lawmakers may find public support for legislative efforts like those suggested in this Article. The time is now to end the caging of presumptively innocent children—to shift resources from carceral institutions to programs and community supports that honor the unique characteristics and needs of youth.

Table of Contents

INTRODUCTION

The juvenile delinquency system was established separate from the adult criminal system in the early twentieth century based on the Child Savers' appreciation of the fundamental differences between children and adults. Namely, these juvenile-court founders recognized that children are developmentally less mature than adults cognitively, socially, emotionally, and neurologically, which mitigates their culpability. The Child Savers also recognized that youth are more malleable than adults and, as a result, more able to correct lawbreaking behavior.

In the 1990s, in response to a perceived epidemic of youth crime, the juvenile system's focus shifted away from rehabilitation and towards retributive and punitive goals. This focal shift in the juvenile system was accompanied by a substantial increase in the use of practices focused on protection of community safety, such as pretrial detention.

Pretrial detention was designed both to ensure that youth will not commit crimes during the pretrial period of their juvenile delinquency case and to guarantee that they appear in court as required. While detaining a youth pretrial may increase the likelihood of their appearance in court, studies show that incarcerating children stymies their healthy brain and behavior development and may increase their likelihood of recidivism as both juveniles and adults. This Article's focus is on the iatrogenic effects of youth incarceration during the pretrial period—between a youth's arrest and final disposition of their juvenile delinquency case.[1]

Because of the tremendously crucial development that occurs during adolescence, incarceration impacts youth in different and more harrowing ways than it does adults. When a youth is detained pretrial, it interrupts their education, tears them away from the structure and consistency offered by family and community, and puts them in a rigid environment in which they are likely to encounter unhealthy peers and be at increased risk to suffer physical, emotional, verbal, and sexual violence. Further, incarcerating a juvenile has also been shown to increase their chances of implication in the juvenile and adult criminal systems after their release.

Deplorably, the harms of pretrial detention are not suffered equally among youth. Across races, children commit crimes at roughly the same rates, but in 2018, when Black[2] youth represented just 14% of the youth

1. This Article uses "pretrial detention" to describe incarceration of presumptively innocent youth between arrest and final resolution of their juvenile delinquency case. Some youth detained pretrial stand accused of committing new crimes, and other youth are detained because they are accused of violating one or more conditions of their probation or parole. In this Article, "pretrial detention" includes youth in both situations. Some literature and scholarship on this topic refer to the practice as "preventative detention"; this Article does not use that phrase because, as discussed in Part II, there is little evidence that youth subject to pretrial detention would have committed crimes had they been at liberty in the community during the pretrial period. *See infra* Part II.

2. I follow the lead of scholars Professors Robin Walker Sterling, Kimberlé Williams Crenshaw, and others, and an increasing number of media organizations such as the *New York Times* and the *Washington Post*, in capitalizing "Black" when I refer to Black youth and the Black community in this Article. Professor Crenshaw explains, "Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). Blackness is an ethnic identity, inclusive of Black people from the African diaspora as well as from Caribbean and Central and South

population in the United States, 42% of boys and 35% of girls in pretrial youth detention were Black.[3] Juvenile and racial justice advocates have lobbied to address these racial disparities in youth pretrial detention through legislative reform. In an effort to reduce subjectivity and improve fairness and accuracy in predicting the risk a youth poses for pretrial misbehavior, many juvenile courts implemented tools like the juvenile pretrial risk assessment instrument ("JRAI") to guide detention or release decisions.

Regrettably, JRAIs often yield inaccurate risk assessments, and as a result, youth who do not present a high risk for recidivism during the pretrial period are subject to the trauma of detention. In 2018, for example, over 195,000 juveniles were jailed pretrial in America's youth detention facilities.[4] Of those 195,000 youth, 39,000 were needlessly sent to pretrial detention and then released when the government opted not to pursue formal prosecution of their cases.[5] Additionally, about 97,500 of the youth detained pretrial in 2018 were jailed and then released when they were acquitted at trial or their cases were dismissed pretrial by the prosecution.[6]

To make matters worse, JRAIs can also yield racially biased risk assessments. Because of long-entrenched racially biased policing and prosecution practices, some of the factors deemed to increase a youth's

---

American countries. For many, Blackness represents a shared sense of history and identity—for some, to capitalize "Black" may be to acknowledge that slavery "deliberately stripped" those who, and whose ancestors were, forcibly shipped overseas "of all other ethnic/national ties." *See* Mike Laws, *Why We Capitalize 'Black' (and not 'white')*, COLUM. JOURNALISM REV. (June 16, 2020), https://bit.ly/3otdbJ2 (quoting the author's colleague, Alexandria Neason). By extension, I choose not to capitalize "white" in this Article because doing so would not have parallel significance: "whites do not constitute a specific cultural group." Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 n.6 (1991). Racial prejudice in the juvenile system is not limited to Black youth; while the treatment of Black youth is discussed in several places in this Article, it is important to note that other youth of color, particularly Latinx and Native American youth, are also disproportionately harmed by pretrial detention and at other points in the juvenile delinquency system.

3. *See* Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Dec. 19, 2019), https://bit.ly/3aEGB3a.

4. *See Delinquency Cases*, OFF. JUV. JUST. & DELINQ. PREVENTION, https://bit.ly/3otg10G (last visited Mar. 14, 2021).

5. These cases were dismissed or diverted outside the juvenile system. When a case is diverted outside the juvenile delinquency system, the government opts not to file a formal complaint or petition in juvenile court; instead, the case is resolved informally through dismissal or a diversion agreement. A diversion agreement is an agreement pursuant to which a case is dismissed after a youth fulfills agreed-upon conditions within an agreed-upon period.

6. *See Nat'l Council of Juvenile & Family Court Judges: Nat'l Ctr. for Juvenile Justice*, EASY ACCESS TO JUVENILE COURT STATISTICS: 1985–2018, https://bit.ly/3c3I9EF [hereinafter *Juvenile Court Statistics*] (last updated Mar. 31, 2020).

risk for pretrial crime commission on JRAIs serve as proxies for race. When these factors are considered, the risk scores of youth of color are inflated in relation to their actual risk level, which increases the chance that youth of color will be erroneously deemed high risk and unfairly subject to the dangers of detention.

In 1984, the Supreme Court in *Schall v. Martin*[7] held that juvenile pretrial detention under the New York Family Court Act afforded youth sufficient pre-detention procedural protections to pass due process muster.[8] Evidenced by its more than 30 years of staying power, the holding and analysis in that seminal case present significant challenges for juvenile litigants looking to secure meaningful pre-detention procedural protections.

Since *Schall*, scholars have offered strategies to challenge the constitutionality of youth pretrial detention on due process and equal protection grounds[9] and the legality of the conditions in pretrial youth detention centers.[10] Further, they have argued for the need for limits on the duration for which a youth can remain in pretrial detention.[11] For example, in 2001, the Coalition for Juvenile Justice and the Annie E. Casey foundation partnered to initiate the "Alternatives to Juvenile Detention Initiative," the goals of which were manifold: to reduce the number of children inappropriately detained, minimize juvenile crime commission and the incidence of youth failure to appear in juvenile court, reduce public expenditures and redirect public funds to successful reform strategies, and improve public safety and the conditions of

7. Schall v. Martin, 467 U.S. 253, 281 (1984).

8. *Id.*

9. *See, e.g.*, Shana Conklin, *Juveniles Locked in Limbo: Why Pretrial Detention Implicates a Fundamental Right*, 96 MINN. L. REV. 2150, 2160–63 (2012) (arguing that courts should recognize that the ability to contest pretrial detention is a fundamental due process right); Jean Koh Peters, Schall v. Martin *and the Transformation of Judicial Precedent*, 31 B.C. L. REV. 641, 683–92 (1990) (discussing how the ripple effects of *Schall* had already altered the established path of five constitutional doctrines in criminal and civil jurisprudence and suggesting areas for further research and investigation); Perry L. Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285, 343 (2008) (considering the gains that could be made in juvenile pretrial-detention reform through an equal-protection challenge to the disproportionate pretrial detention of minority youth in the juvenile justice system); Hillela B. Simpson, *Parents Not Parens: Parental Rights Versus the State in the Pre-Trial Detention of Youth*, 41 N.Y.U. REV. L. & SOC. CHANGE 477, 491–502 (2017) (explaining how parents' liberty interests are implicated in the decision to detain juveniles and recommending reform through litigation based on assertion of those liberty interests).

10. *See generally* Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. REV. 675 (1998) (exploring the role of litigation in advocating for juvenile detainees).

11. *See* Rebecca Rosefelt, *Children in Limbo: The Need for Maximum Limits for Juvenile Pretrial Detention*, 28 MINN. J. INT'L L. 239, 240–47 (2019).

pretrial detention.[12] While efforts like these have contributed to significant reductions in pretrial detention populations in participating jurisdictions, thousands of youth remain at risk of and are subject to harm in pretrial detention facilities. One in five youth in a detention facility is presumptively innocent.[13] The government has an obligation in its role as *parens patriae* to ensure that juveniles of whom it has custody are safe and that their basic needs are met.[14] Because states often fail to honor that obligation for youth in pretrial detention, the practice of detaining presumptively innocent youth must end.

In the wake of recent high-profile anti-Black police violence, many have demonstrated willingness to rethink entrenched institutions related to public safety and criminal systems. With that momentum, the time is now to reimagine the juvenile system's response to alleged youth crime commission.

Policymakers should promulgate laws that allow for an anti-racist juvenile system in which youth are once again viewed as different from adults and deserving of opportunities for healthy development. This Article goes one step further than past reform efforts and offers a suggested legislative framework to abolish youth pretrial detention.

This Article proceeds in three parts. Part I provides a discussion of the principles upon which the juvenile delinquency system was founded and explains how the system has two faces—one for white children and another for children of color. This Part addresses how, throughout the history of juvenile courts, Black children have been treated more harshly and afforded less opportunity for support and services than similarly situated white children. Next, Part II examines the troubling current landscape of youth pretrial detention from substantive and procedural standpoints. Through a look at the majority opinion in *Schall v. Martin*, the seminal U.S. Supreme Court case that established the procedural requirements of the Due Process Clause where youth pretrial detention laws are concerned, this Part then looks to the lack of meaningful procedural safeguards required before a youth may be subject to pretrial detention. Finally, Part II examines juvenile detention risk assessment

12. *See Juvenile Detention Alternatives Initiative*, COALITION FOR JUV. JUST., https://bit.ly/3ctSslS (last visited Jan. 31, 2021).

13. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://bit.ly/2L1Tcnb.

14. *See* DeShaney v. Winnebago County, 489 U.S. 189, 199–200 (1989). *Parens patriae* describes "the state in its capacity as provider of protection to those unable to care for themselves." *Parens patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* E.P. v. Dist. Court of Garfield Cty., 696 P.2d 254, 258 (Colo. 1985) (explaining that the state in its role as *parens patriae* has a responsibility to provide for the protection of children within its borders).

instruments ("JRAIs") and how those tools enable racially biased decision-making while cloaked in due process clothing.

Part III then explains why abolition is a more prudent path forward than continued reform efforts, and Part IV sets forth a three-pronged approach to legislative efforts to abolish pretrial juvenile detention.

I. THE TWO FACES OF THE JUVENILE DELINQUENCY SYSTEM

Juvenile courts were founded separate from adult criminal courts by a group of primarily white, middle-class women reformers who called themselves "Child Savers."[15] The Child Savers were driven by the belief that children are fundamentally different than adults with respect to their developmental immaturity, which lessens both their culpability and malleability.[16]

The Child Savers recognized the difficulties an adult criminal record could cause in a juvenile's life. They endeavored, through juvenile courts, to find individualized rehabilitative interventions that would enable children, particularly European immigrant and poor white children, to assimilate into American society and become "Middle Class Americans."[17]

From the early days of juvenile courts, though, Black youth have not enjoyed Child Savers' solicitude. Racist social norms from the prior 150 years persisted, and Black youth's cases were considered in a separate juvenile system in which they did not benefit from the individualized care, concern, and opportunity that the juvenile system was designed to afford all children.[18]

Early juvenile-court judges were not concerned with whether or not a youth had committed a crime, but rather who the youth was, how the youth became what they were, and what course of action was in the youth's best interest and in the interest of the state to "save [the youth]

---

[15] *See* Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335, 1346–47 (2013) (internal citation omitted). Before juvenile courts came to be, "children's courts" were established in states such as Massachusetts and New York. In these courts, youth were convicted of criminal offenses like adults but were treated differently based on their status as children after conviction. *See generally* Hastings H. Hart, *Distinctive Features of the Juvenile Court*, 36 ANNALS AM. ACAD. SOC. SCI. 57 (1910), *available at* https://bit.ly/3vLo2CT).

16. *See* Butler, *supra* note 15, at 1349. The first juvenile court law was passed in Chicago, Illinois, in 1899. *See* ELIZABETH J. CLAPP, MOTHERS OF ALL CHILDREN: WOMEN REFORMERS AND THE RISE OF JUVENILE COURTS IN PROGRESSIVE ERA AMERICA 2 (1998).

17. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 48–49 (1980).

18. *See* Robin Walker Sterling, Symposium, "*Children Are Different": Implicit Bias, Rehabilitation and the "New" Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019, 1024 n.16 (2013) (citing GEOFFREY WARD, THE BLACK CHILD SAVERS: RACIAL DEMOCRACY AND JUVENILE JUSTICE (2012)).

from a downward career."[19] Because early juvenile courts enjoyed broad discretion and were not subject to the procedural requirements of adult criminal court, Black youth were disproportionately punished for engaging in behavior like "associat[ing] with immoral people."[20]

As the twentieth century wore on, the marginalization of Black children continued. A 1940 report based on a review of 53 juvenile courts across the country indicates that cases in which Black boys were charged were less frequently dismissed than those in which white boys were charged, that Black boys were committed to an institution or reform school much more frequently than white boys, and that when committed, Black boys were often given longer sentences than white boys.[21]

Before 1954, when the Supreme Court decided *Brown v. Board of Education*,[22] detained Black youth were segregated from their white peers in Southern states. The differences in the two groups' treatment are striking. In Memphis, Tennessee, for example, white youth were detained in a clean facility equipped with a swimming pool,[23] and a judge formally presided over and made decisions in juvenile court proceedings.[24] Meanwhile, across town, Black youth were detained in a shack-like structure with no running water and open sewage in the backyard, and a local police officer presided over and made decisions in juvenile court proceedings.[25] Even without comparison, this treatment dehumanized committed Black youth and sent a message to the public that Black youth were viewed as inferior and not worthy of rehabilitative opportunities.[26]

In the decades following desegregation, inaccurate tropes of Black youth as delinquent persisted in public discourse. In the 1980s and 1990s, mass media coverage portrayed juvenile crime as rising, primarily violent, and mostly perpetrated by youth of color—many Black—against

19. *Id.* at 1047 (citing Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909)).

20. *See* Butler, *supra* note 15, at 1361.

21. *See* Mary H. Diggs, *The Problems and Needs of Negro Youth as Revealed by Delinquency and Crime Statistics*, J. NEGRO EDUC., July 1940, at 311, 316.

22. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that segregation of children in public schools solely on the basis of race, even when physical facilities and other tangible factors may be equal, deprives children of the minority group of equal educational opportunities, in contravention of the Equal Protection Clause of the Fourteenth Amendment).

23. *See* Florence Kelley, *A Burglar Four Years Old in the Memphis Juvenile Court*, THE SURV.: SOC., CHARITABLE, CIVIC: A J. CONSTRUCTIVE PHILANTHROPY, June 30, 1914, at 318–19.

24. *See id.*

25. *See* Clinton Lacey, *Racial Disparities and the Juvenile Justice System: A Legacy of Trauma*, NAT'L CHILD TRAUMATIC STRESS NETWORK (2013), https://bit.ly/3tes5Xi.

26. *See, e.g.*, Sterling, *supra* note 18, at 1048.

white victims.[27] The public fear that ensued impelled politicians, who did not want to be seen as being "soft" on crime, to take action.[28] In the 1990s, many states amended their juvenile codes to de-emphasize rehabilitation as a goal of the juvenile system and to instead emphasize punishment, accountability, and public safety as new goals.[29] Many of those amended laws, which aligned the juvenile system in many respects with the adult criminal system, remain in place today.

The number of youth in secure detention facilities nationwide increased by 72% between 1985 and 1995.[30] During that decade, the number of white youth in pretrial detention decreased, while the number of detained youth of color grew by 76%.[31] This trend continues today; in 2017, Black youth were nearly five times more likely than white youth to be detained pretrial.[32]

The next Part explores the harrowing experience youth often encounter in pretrial detention.

II. THE TROUBLING CURRENT LANDSCAPE OF YOUTH PRETRIAL DETENTION

Kalief Browder was only 16 years old in 2010 when he was ordered detained at Rikers Island after being accused of stealing a backpack.[33] He spent 1,110 days in that locked facility—800 of which were in solitary confinement—because his court dates were continued 30 times. Eventually, his case was dismissed.[34] While at Rikers Island, Kalief suffered "unimaginable abuse" and described the experience as "hell on

27. *See id.* at 1056 n.292 (citing Lori Dorfman & Vincent Schiraldi, *Off Balance: Youth, Race & Crime in the News*, JUST. POL'Y INST. (Apr. 1, 2001), https://bit.ly/2P1IqPs); *see also* Philip J. Cook & John H. Laub, *The Unprecedented Epidemic in Youth Violence*, CRIME & JUST., 1998, at 27, 27 (claiming that "the epidemic of youth violence that began in the mid-1980s has been demographically concentrated among black male youths").

28. *See Juvenile Justice History*, CTR. OF JUV. & CRIM. JUST., https://bit.ly/3unAJmC (last visited Mar. 14, 2021).

29. Sterling, *supra* note 18, at 1060 n.320.

30. *See* VINCENT SCHIRALDI & JASON ZIEDENBERG, REDUCING DISPROPORTIONATE MINORITY CONFINEMENT: THE MULTNOMAH COUNTY OREGON SUCCESS STORY AND ITS IMPLICATIONS 1 (2002), https://bit.ly/39FXp9h.

31. *See* Sterling, *supra* note 18, at 1048. During this time, youth of color came to represent the majority of youth in pretrial detention facilities. *See id.*

32. *See Juveniles in Detention: Demographics*, U.S. DEP'T OF JUST.: OFF. OF JUV. JUST. & DELINQ. PREVENTION (2017), https://bit.ly/31yUECb.

33. *See* Robert L. Listenbee, *OJJDP Supports Eliminating Solitary Confinement for Youth*, U.S. DEP'T OF JUST.: ARCHIVES (Apr. 19, 2016), https://bit.ly/3tbmoJu.

34. *See id.*

earth."[35] Kalief struggled with his mental health after his release and completed suicide in 2015.[36]

Pretrial detention is intended to protect youth by preventing them from committing crimes and to ensure their appearance in court during the pretrial period. But, as seen in Kalief Browder's case, locked pretrial detention facilities are often places of intense brutality, violence, and dehumanization. Even a brief period of pretrial incarceration can thwart a youth's healthy brain development and affect their behavior and opportunities as an adult. This Section argues that the conditions of pretrial detention are sufficiently horrendous to warrant abolition of the practice.

A. Pretrial Detention Stymies Healthy Adolescent Development

Adolescence is a developmental stage between childhood and adulthood, occurring roughly between 10 and 19 years of age.[37] It is a time of enormously important physical, emotional, and social change. During this period, youth experience shifts in the way they think, behave, and view themselves and in relation to others, their culture, and their community.

Brain development, which leads to maturation of cognitive and behavioral capabilities, is a key component of growth during adolescence. Development of the prefrontal cortex occurs primarily during adolescence. Understanding some of the behavioral manifestations of an underdeveloped brain is key to understanding adolescent behavior and decision-making. The prefrontal cortex, which continues to develop through adolescence, is associated with decision-making, the ability to plan and anticipate consequences of decisions and actions, experience empathy, solve problems, resist peer influence, and control impulses.[38] Structural maturation in the brain during adolescence involves two main facets: myelination and an increase in the density of gray matter. Myelination is a process that increases the efficiency of electrical transmission, which allows for better flow of information among brain systems.[39] Gray matter is the part of the brain responsible

35. *Id.*

36. *See id.*

37. *See* Diane Sacks, *Age Limits and Adolescents*, 8 PAEDIATRICS & CHILD HEALTH, Nov. 2003, at 577, 577. Some youth, and young men in particular, are known to experience growth associated with adolescence until as late as 25 years of age. *See id.*

38. *See* RICHARD J. BONNIE & EMILY P. BACKES, THE PROMISE OF ADOLESCENCE: REALIZING OPPORTUNITY FOR ALL YOUTH 37–76 (2019).

39. *See* BERNARD BAARS & NICOLE GAGE, FUNDAMENTALS OF COGNITIVE NEUROSCIENCE 396 (2013); *see also* Abigail A. Baird, *The Developmental Neuroscience of Criminal Behavior*, *in* THE IMPACT OF BEHAVIORAL SCIENCES ON CRIMINAL LAW 81, 99 (Nita A. Farahany ed. 2009).

for, among other things, emotional regulation, decision-making and self-control; an increase in its density improves a person's ability to engage with these processes.[40] Studies have shown a relationship between reduced or impaired brain functioning and impulsivity and criminal behavior.[41] Moreover, stressors experienced during adolescence can negatively affect this structural maturation and contribute to an increase in mental health challenges such as anxiety and depression.[42] In short, whether youths' brains fully develops during adolescence has profound impacts on their cognition and behavior later in life and, accordingly, their quality of adult life.[43]

Optimal development of the prefrontal cortex depends on a plethora of factors, including healthy sleep patterns, nutritional food, healthy relationships, and safe and supportive environments.[44] The experiences youth often endure in pretrial detention tend to undermine that healthy brain development, the adverse effects of which can affect youth for the rest of their lives.

An ideal environment for adolescent brain development is one that is stable and predictable.[45] When youth are detained pretrial, they are physically and emotionally separated from their homes, families, friends, and familiar environments. While structure is an important component of development, the extreme rigidity of a carceral environment can stifle the process of a youth's individuation, particularly for older youth who need a degree of freedom to develop a unique sense of self.[46] Youth in pretrial detention are in unfamiliar environments with unfamiliar people and are required to wear institution-issued clothing. They have nearly every minute of their days pre-planned by detention staff—they wake, shower, study, eat, and turn in each day when ordered to do so. This combination

40. *See* Efstathios D. Gennataset al., *Age-Related Effects and Sex Differences in Gray Matter Density, Volume, Mass, and Cortical Thickness from Childhood to Young Adulthood*, 37 J. NEUROSCIENCE 5065, 5065 (2017).

41. Manuel Fernando Santos Barbosa & Luiss Manuel Coelho Monteiro, *Recurrent Criminal Behavior and Executive Dysfunction*, 11 SPAN. J. PSYCHOL. 259, 259–65; *see also* James M. Ogilvie et al., *Neuropsychological Measures of Executive Function and Antisocial Behavior: A Meta-Analysis*, 49 CRIMINOLOGY 1063, 1063–1107 (2011).

42. *See* Russell D. Romeo, *The Teenage Brain: The Stress Response and the Adolescent Brain*, 22 CURRENT DIRECTIONS PSYCHOL. SCI. 140, 140–45 (2013).

43. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS.: OFF. OF ADOLESCENT HEALTH, ADOLESCENT DEVELOPMENT EXPLAINED 7–9 (Nov. 2018), https://bit.ly/3pMdXlR.

44. *See* Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT, Apr. 2, 3013, at 449, 450. According to this study, other factors that influence adolescent brain development are pre and postnatal insult, pharmacotherapy, surgical interventions during early childhood, drug abuse, and sex hormones. *See id.*

45. *See generally* NAT'L RESEARCH COUNCIL & INST. OF MED., COMMUNITY PROGRAMS TO PROMOTE YOUTH DEVELOPMENT 86–88 (Jacquelynne Eccles & Jennifer Appleton Gootman eds., 2002).

46. *See id.* at 92.

of change, unfamiliarity, and rigidity takes its toll on detained youth. At least one-third of incarcerated youth are diagnosed with depression—the onset of which occurs after the beginning of a period of incarceration. Worse yet, the risk that youth will harm themselves increases when they are incarcerated.[47]

Abhorrently, many youth suffer physical, verbal, and emotional abuse at the hands of officers, staff, and even other detainees while in pretrial detention.[48] For example, staff at one San Diego juvenile detention facility were "using pepper spray routinely and indiscriminately [even to quell minor misbehavior] as a first resort to gain compliance rather than only as a last resort."[49] Similarly, prior to a court order requiring the practice to cease, staff at an Arkansas Juvenile Detention Center restrained youth with a device called a WRAP—a "motorcycle helmet covered in duct tape . . . and decorated with a cartoonish, hand-drawn face."[50] Youth restrained with a WRAP were required to sit upright with their legs immobilized and arms handcuffed

47. *See* BARRY HOLMAN & JASON ZIEDENBERG, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 2 (2006) [hereinafter DANGERS OF DETENTION], https://bit.ly/3aqEjTX. For one-third of incarcerated youth diagnosed with depression, the onset of depression symptoms manifest after they begin a period of incarceration. *See* J.H. Kashani et al., *Depression Among Incarcerated Delinquents*, 3 PSYCH. RES. 185, 185–91 (1980). For statistics related to increased youth suicide rate, see D.E. Mace et al., *Psychological Patterns of Depression and Suicidal Behavior of Adolescents in a Juvenile Detention Facility*, 12 J. JUV. JUST. & DETENTION SERV. 1, 18–23 (1997). Previous studies found that incarcerated youth experience from double to four times the suicide rate of youth in community. *See generally* DALE G. PARENT ET AL., CONDITIONS OF CONFINEMENT: A STUDY TO EVALUATE CONDITIONS IN JUVENILE DETENTION AND CORRECTIONS FACILITIES (1993), https://bit.ly/3fHfgQM. From September 2018 to August 2019, the Department of Juvenile Justice reported 421 instances of suicidality. *See* Maureen Washburn & Renee Menart, *A Blueprint for Reform: Moving Beyond California's Failed Youth Correctional System* 6 (2020), https://bit.ly/3j9UUPU.

48. *See* DANGERS OF DETENTION, *supra* note 47, at 8; *see also* Amber Ly, *What Happens to Incarcerated Youth When a Juvenile Hall Closes?*, YR MEDIA (July 9, 2019), https://bit.ly/2Ys9o47 (describing the pretrial detention of Shamann Walton, who was incarcerated as a youth). From October 2018 to September 2019, for example, the California Division of Juvenile Justice administrators reported 535 incidents of staff use of force against youth. *See* Washburn & Menart, *supra* note 47; *see also* J.B. *ex rel.* Benjamin v. Fassnacht, 801 F.3d 336, 347 (3d Cir. 2015) (upholding "LYIC's strip search policy of all juvenile detainees admitted to general population").

49. RICHARD A. MENDEL, MALTREATMENT OF YOUTH IN U.S. JUVENILE CORRECTIONS FACILITIES: AN UPDATE 21 (2015), https://bit.ly/2NVaeEp. Pepper spray "inflicts intense burning, swelling, redness, occasionally blistering and exacerbation of allergic reactions and the serious risk of complications for youth with respiratory or mental health problems." *Id.* (internal parenthesis omitted). Nonetheless, according to these reports, San Diego detention staff used pepper spray "on youth at risk of suicide; youth with respiratory, cardiovascular and skin problems; and youth being treated with psychotropic medications." *Id.*

50. *See id.*

behind their backs in near-total darkness, sometimes for hours at a time.[51] Likewise, the Multi-County Detention Center in northern Ohio was accused in a federal lawsuit of keeping youth locked in dangerously cold isolation cells while staff withheld blankets and warm clothing. As a result of this practice, some youth suffered symptoms of frostbite and hypothermia.[52]

Youth have also been victims of sexual assault while in pretrial detention. In a 2018 Bureau of Justice Statistics study of over 6,000 youth, 7.1% said they had experienced sexual victimization in the previous 12 months in detention.[53] That study also showed that L.G.B.T. youth were abused at much higher rates than their straight and cis-gender peers.[54]

Predictably, youth who witness and/or fall victim to violence while in detention often experience symptoms of P.T.S.D., such as depression, emotional dysregulation, and aggression, long after an incidence of violence occurs.[55] Prolonged stress caused by fear for one's safety is associated with deleterious effects on the brain and can cause a youth to cope in maladaptive ways.[56]

Studies show that adolescents tend to thrive when they have longer-term relationships with adults who are attentive and responsive to their unique needs and experiences.[57] In pretrial detention, staff typically take a one-size-fits-all approach to interactions with detained youth. These relationships range in duration but tend not to offer the type of support

51. *See id.* The practice of using WRAPs on detained youth was dangerous and found to have no therapeutic value. *See id.* at 21–22.

52. *See id.* at 22. Because of the crowding in youth detention facilities and the proximity within which youth are confined in them, the risk of COVID-19 transmission presents a novel threat to detained juveniles' physical safety. Particularly for immunocompromised youth, contracting the virus can be deadly. *See* Josh Rovner, *COVID-19 in Juvenile Facilities*, SENTENCING PROJECT (Feb. 22, 2021), https://bit.ly/36mzGsQ (updated regularly) [hereinafter *COVID-19 in Juvenile Facilities*]. Among detained youth, COVID-19 cases have been reported in 32 states, the District of Columbia, and Puerto Rico. *Id.* Cases among staff in those facilities have been reported in 40 states and the District of Columbia. *Id.* While several states have made efforts to release youth from pretrial detention to prevent or slow the spread of the virus, others have responded to this risk by quarantining youth in isolation, a particularly traumatic experience for juveniles that is prohibited under international human rights standards and by federal and many state laws. *Id.*

53. *See* BUREAU OF JUSTICE STATISTICS, NCJ-253042, SEXUAL VICTIMIZATION REPORTED BY YOUTH IN JUVENILE FACILITIES 1, 5–6 (2018). Some facilities considered in the study had victimization rates as high as 30%. *See id.*

54. *See id.*

55. *See* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., SMA 13-4801, TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES 61 (2014).

56. *See* COMMUNITY PROGRAMS TO PROMOTE YOUTH DEVELOPMENT, *supra* note 45, at 89.

57. *See id.* For one, youth with these types of adult relationships have better mental health outcomes than youth without such relationships. *See id.*

needed for youth to thrive. For example, a study released by the federal government's Office of Juvenile Justice Delinquency Prevention found that correctional staff often respond to a youth's suicidal threats and/or behavior by placing them in isolation, which further endangers the youth.[58] Most detention facilities lack staff who specialize in treating mental-health disorders, which is problematic given the high rates of suicidal ideation and attempt within juvenile detention facilities. Overall, youth do not develop relationships with staff while in detention that serve their developmental needs.

The education youth receive while in detention also tends to be more fragmented than—and inferior to—the education received by nonincarcerated youth.[59] At least one in three youth in the juvenile system has a disability that qualifies them for special-education services under the Individuals with Disabilities Education Act—nearly four times the rate of youth in public schools.[60] Less than half of those incarcerated youth receive special-education services while in custody.[61] Additionally, despite high rates of drug and alcohol use among youth detainees, only 36% of juvenile correctional facilities in the U.S. offer drug or alcohol treatment, and only 16% of the youth who need that treatment gain access to it.[62]

Those familiar with juvenile development understand that as the adolescent brain develops, youth tend to be less impulsive and sensation-seeking and more able to engage with "an area of sober second thought" that enables them to effectively make judgments.[63] As this

58. DANGERS OF DETENTION, *supra* note 47, at 9. Youth solitary confinement is banned in the federal system. *See id.* State laws differ in relation to the allowance of youth solitary confinement. As of January 29, 2020, 15 states had no limits on solitary confinement for children and 20 states ban or limit the use of youth solitary confinement. *See* Anne Tiegen, *States that Limit or Prohibit Juvenile Shackling and Solitary Confinement*, NAT'L CONF. ON STATE LEGISLATURES (Jan. 29, 2020), https://bit.ly/3kh7P3g (defining solitary confinement or seclusion, as "the most extreme form of isolation in a detention setting and can include physical and social isolation in a cell for 22 to 24 hours per day").

59. *See* Ian Lambie & Isabel Randell, *The Impact of Incarceration on Juvenile Offenders*, 33 CLINICAL PSYCH. REV. 448, 448–59 (2013) (internal citations omitted) [hereinafter *The Impact of Incarceration*].

60. U.S. DEP'T OF EDUC.: OFF. OF SPECIAL EDUC. PROGRAMS, *Improving Outcomes for Youth with Disabilities in Juvenile Corrections: Educational Practice* (2015), https://bit.ly/3s1ztnY; *see also* COUNCIL OF STATE GOV'TS: JUSTICE. CTR., LOCKED OUT: IMPROVING EDUCATIONAL AND VOCATIONAL OUTCOMES FOR INCARCERATED YOUTH 1 (2015), https://bit.ly/3sUebZU.

61. *See* COUNCIL OF ST. GOV'TS: JUST. CTR., *supra* note 60, at 1.

62. *See id.*

63. *See* Emily Kaiser, *6 Facts About Crime and the Adolescent Brain*, MPR NEWS (Nov. 14, 2012, 9:00 PM), https://bit.ly/3pA7Lx8; *see also* Sarah Spinks, *Adolescent Brains are Works in Progress: Here's Why*, PBS: FRONTLINE (Mar. 9, 2000), https://to.pbs.org/3clNY0R.

developmental process occurs, youth often "age out" of delinquent and risky behavior without any criminal-system intervention.[64] For healthy social development, adolescents need positive opportunities to connect and build relationships with peers.[65] Youth are highly influenced by their environmental context, and those surrounding youth can support or dissuade them from engaging in prosocial or antisocial behavior.[66] Detaining a youth with other system-involved youth can interrupt the natural process of aging out of delinquent and risky behavior. The criminogenic effect of pretrial detention has been known for some time: In 1973, the National Advisory Commission on Criminal Justice Standards and Goals observed that "[t]here is overwhelming evidence that [detention] create[s] crime rather than prevent[s] it."[67]

The harms caused by jailing youth pretrial are not circumscribed to the duration of detention—they are far-reaching and touch nearly every aspect of life. Research shows that youth who lack proper adult relationships are less likely to re-engage with their education after release. For example, one study concluded that youth incarceration decreases a youth's likelihood of graduating from high school by 13 to 39 percentage points, as compared to the average public-school student in the youth's residential area.[68] Further, when formerly incarcerated youth do not re-enroll in school after release, they face a higher likelihood of unemployment and a substantially lower earning potential than those who resume and complete high school. According to another study involving 16 to 25-year-old youth, jailing young people reduced their work time over the decade following their release by 25–30%.[69] Without a high school or college education, the likelihood of re-implication in the criminal system increases. Indeed, one recent study that considered more than 46,000 juvenile cases across 32 jurisdictions found that even a short period of pretrial detention makes a youth 33%

64. Studies show that the prevalence of juvenile crime commission tends to peak in the teenage years, from 15–19, and then decline in one's early 20s. *See From Juvenile Delinquency to Young Adult Offending*, NAT'L INST. OF JUST. (Mar. 10, 2014), https://bit.ly/3urBI4J.

65. *See* COMMUNITY PROGRAMS TO PROMOTE YOUTH DEVELOPMENT, *supra* note 45, at 86.

66. *See id.*

67. Patrick McCarthy et al., *The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model*, NAT'L INST. OF JUST. 6 (Oct. 2016), https://bit.ly/2Nw3aOJ (hereinafter *The Future of Youth Justice*).

68. *See* Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital, and Future Crime: Evidence from Randomly-Assigned Judges* 1–33 (Nat'l Bureau of Econ. Research, Working Paper No. 19102, 2013).

69. Another study of youth (ages 14–24) found that youth who spent time incarcerated experienced three weeks less work per year (for African-American youth, five weeks less work per year) as compared to youth who had no history of incarceration. *See id.* at 28.

more likely to be arrested for a felony offense and 11% more likely to be arrested for a misdemeanor offense in the 12 months following their release.[70]And a youth who has experienced incarceration is 23 to 41 percentage points more likely to be incarcerated as an adult than the average public-school student in the same area.[71]

Jailing youth has long-term effects on both their physical and mental health. Existing literature on the longitudinal health effects of youth incarceration in adulthood suggests that "any [period of] incarceration during adolescence or young adulthood is associated with worse general health, severe functional limitations, stress-related illnesses such as hypertension, and higher rates of overweight and obesity during adulthood."[72] Even less than a month of confinement during adolescence has been linked to higher rates of depression decades after a youth's release from custody.[73]

Subjecting even one youth to the horrors described here is one too many; the proven nefarious effects are alone sufficient to warrant abolition of pretrial detention. That youth of color are disproportionately detained and disproportionately forced to endure these nefarious effects increases the time-sensitivity of the need to abolish the practice. Racial inequities in pretrial detention stem in part from *Schall v. Martin*,[74] the seminal U.S. Supreme Court case on youth pretrial detention. The holding of that case allows for subjectivity in pretrial detention decision-making within the confines of the Due Process Clause.

Beginning with an overview of *Schall v. Martin*, the next Section explains how the tools used to improve objectivity and accuracy in youth pretrial detention decision-making instead fail to accurately identify a youth's risk level and yield racially biased risk assessments.

70. *See* Sarah Cusworth Walker & Jerald R. Herting, *The Impact of Pretrial Juvenile Detention on 12-Month Recidivism: A Matched Comparison Study*, 23 CRIME & DELINQ. 1, 1 (2020).

71. *See* John Wihbey, *Juvenile Incarceration and Its Impact on High School Graduation Rates and Adult Jail Time*, JOURNALIST'S RESOURCE (Feb. 4, 2015), https://bit.ly/3key9en.

72. *See* Elizabeth S. Barnert et al., *How Does Incarcerating Young People Affect Their Adult Health Outcomes?*, 139 PEDIATRICS, Feb. 2017, at 1, https://bit.ly/2NuMN58.

73. Controlling for current health as an adolescent, findings revealed that those who were incarcerated for less than a month during adolescence were more likely to have depressive symptoms as an adult. *See id.* According to one study, 43% of youth who received remedial education services while in detention did not re-enroll in school after release, and for those who did re-enroll, 16% of them dropped out after just five months. *See* THE DANGERS OF DETENTION, *supra* note 47, at 9.

74. Schall v. Martin, 467 U.S. 253 (1984).

B. Lack of Meaningful Safeguards Prior to Youth Pretrial Detention

Pretrial detention is intended to temporarily and safely house youth who are deemed at high risk for self-harm, crime commission, or failure to appear during the pretrial period of their delinquency case. Regrettably, the procedural protections afforded youth before a court enters a pretrial detention order fail to ensure that pretrial detention is serving its stated aims. Pretrial detention decisions are based on subjective judgment, which allows for infiltration of implicit and explicit bias. Moreover, unlike adult criminal defendants, children who are detained pretrial lack a right to pretrial bail in most states.[75] Without an opportunity to secure their release on bond, juveniles who are detained pretrial are put between a rock and a hard place—left with the choice to either accept an early plea offer or suffer in confinement until they can negotiate a more favorable offer or until their cases are resolved at trial.[76]

Because juvenile courts were designed to be fundamentally different than adult criminal courts in their aim and function, juvenile courts were allowed to reject the formalized procedures employed in adult criminal courts in favor of "informality, flexibility, [and] speed" for over 60 years.[77] In 1966, the U.S. Supreme Court in *Kent v. United States*[78] for the first time signaled prescient concern about the lacking procedural protections afforded juveniles in delinquency proceedings. The Court worried that youth were getting the "worst of both worlds . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[79]

Through *Kent* and a number of subsequently decided juvenile procedural-rights cases, the Court established that the fundamental-fairness requirement of the Due Process Clause is the provision in which juvenile procedural rights are rooted.[80] The procedural rights to which

75. *See A Right To Liberty: Juvenile Cash Bail Reform*, NAT'L JUV. DEFENDER CTR., https://bit.ly/2Mpn6Cr (last visited Mar. 14, 2021) (finding that most state courts have denied juveniles a constitutional right of bail on the ground that juvenile court proceedings are civil, not criminal in nature, and that therefore constitutional provisions giving a right to bail are inapplicable); *see also* L.O.W. v. District Court, 623 P.2d 1253, 1258 n.8 (Colo. 1981) (en banc); *In re* Daniel C., 830 N.Y.S.2d 647, 650 (Fam. Ct. 2007).

76. *See Statistical Briefing Book*, OFFICE OF JUVENILE JUSTICE & DELINQ. PREVENTION, https://bit.ly/3ar5u0P (last visited Mar. 20, 2021); *see also Juvenile Court Statistics*, *supra* note 6.

77. *See In re* Winship, 397 U.S. 358, 366 (1970).

78. Kent v. United States, 383 U.S. 541, 556 (1966).

79. *Id.*

80. *See, e.g.*, Breed v. Jones, 421 U.S. 519, 530–31 (1975) (holding that due process protects juveniles against double jeopardy); McKeiver v. Pennsylvania, 403 U.S. 528, 532, 550–51 (1971) (finding that due process does not include right to jury trial for

juveniles are entitled are much more opaque than those to which adult criminal defendants are entitled, which are rooted in the Sixth Amendment.[81] There are few bright-line rules regarding what procedures fundamental fairness requires in juvenile delinquency proceedings. Accordingly, juveniles who challenge the constitutionality of procedural rights on due process grounds are forced to aim at a moving target. In no case is that moving-target principle more apparent than in *Schall v. Martin*.[82] What *Schall* makes clear, however, is that subjectivity in pretrial detention decision-making is acceptable under the Due Process Clause.

1. *Schall v. Martin* and the Role of Subjectivity in Pretrial Detention Decision-Making

In December 1977, then 14-year-old Gregory Martin was arrested with two other youth—the three accused of hitting a fourth youth with a loaded gun and stealing his jacket and sneakers.[83] Martin spent that night in a juvenile detention facility. The next day, a family court judge ordered him detained pending trial pursuant to the New York Family Court Act ("NYFCA"), which allowed pretrial detention of juveniles after a judicial determination that there was a "serious risk" that the juvenile may commit a crime before his next court date.[84] In support of the pretrial detention order, the judge noted that Martin was allegedly in possession of a loaded gun at the time of his arrest, had lied to police about his address, and was apparently lacking supervision, given the late hour at which his crimes were allegedly committed.[85]

Martin and a group of other juveniles who were subject to pretrial detention argued before the Supreme Court that the procedural protections afforded under the NYCFA were inadequate safeguards of their freedom from restraint, thus violating their right to due process under the Fourteenth Amendment. However, in a 6-3 decision, the Court

juveniles); *Winship*, 397 U.S. at 368 (holding that due process requires proof beyond reasonable doubt); *In re* Gault, 387 U.S. 1, 34, 41, 57 (1967) (holding that due process requires written notice of charges, right to counsel, privilege against self-incrimination, and right to confrontation and cross-examination of witnesses).

81. *See* U.S. CONST. amend. VI (stating, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense").

82. Schall v. Martin, 467 U.S. 253 (1984).

83. *See id.* at 257.

84. *See id.* at 255.

85. *See id.* at 257–58.

held that pretrial juvenile detention under the NYFCA met the fundamental fairness requirements of the Due Process Clause.[86]

First, based on the intents/effects test from *Kennedy v. Mendoza-Martinez*,[87] the Court determined that the NYFCA was regulatory and not punitive in nature.[88] Because the law was not deemed punitive, the Court proceeded with its inquiry.[89]

The *Schall* majority framed the two questions of constitutional importance as (1) whether pretrial detention under the NYFCA served a legitimate state objective;[90] and if so, (2) whether the Act provided adequate procedural protections such that pretrial detention of certain juveniles pursuant to the Act was constitutionally permissible.[91]

After a cursory examination of the trial-court record, the Court concluded that pretrial detention of certain juveniles under the NYFCA served New York's "legitimate and compelling state interest" in protecting the community from crime and in protecting juveniles from the consequences of their own folly.[92] The Court then turned to the balancing test set forth in *Mathews v. Eldridge*,[93] which serves as a

86. *See id.* at 281. The dissenting Justices in *Schall* argued that the standard of "serious risk" in the NYFCA was too vague and too easily satisfied, given the limited information in the possession of the family court judge and the juvenile's lawyer at the time of the initial hearing. The dissenters also argued that the psychological harms of subjecting a juvenile who is presumed innocent to a carceral environment far outweigh the "abstract" benefits to society, and that, given the near impossibility of predicting whether a juvenile will commit a crime in the near future, "drastic" measures such as pretrial detention could not be justified under the Due Process Clause. *Id.* at 282–309 (Marshall, J., dissenting); *see also id.* at 294 n.20.

87. The first step in this analysis is whether the legislature intended for the law to be punitive. Only where punitive intent is not found do courts move on to the second step. Based on a seven-factor analysis, courts at the second step determine whether the law has a punitive effect. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–70 (1963).

88. *Schall*, 467 U.S. at 274; *see also* Peters, *supra* note 9, at 654–56 (arguing that consideration of the other five *Kennedy* factors would have led to a determination that the preventative juvenile detention statute was punitive in nature).

89. Punishment cannot be constitutionally imposed without due process of law. *See Kennedy*, 372 U.S. at 186.

90. *Schall*, 467 U.S. at 263–64.

91. *See id.* at 264.

92. *Id.* at 264–65. According to Justice Marshall's dissent in *Schall*, the burden on juveniles' liberty interests through pretrial incarceration was much greater than what the majority recognized, and the question should have been couched in terms of whether the law advanced goals that justified the burdens imposed on juveniles' constitutional rights through preventative detention. *See id.* at 288–90 (Marshall, J., dissenting); *see also* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 196, 202–03 (1989) (asserting that the purpose of the Due Process Clause is to "protect the people from the State, not to ensure that the State protected them from each other" and holding that the State was not liable under § 1983 for its failure to protect a boy from being badly beaten by his father, where at the time of the father's beatings state actors were aware of the father's past abuse of the boy).

93. Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

framework for courts to determine the specific dictates of due process in a given scenario. Under *Mathews*, the factors to be considered are: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of [that private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[94] The Court in *Schall*, however, failed to earnestly engage with any of the *Mathews* factors.

Under the NYFCA, pretrial detention decisions were typically made after a 5 to 15 minute-long hearing, which was often the first time a juvenile appeared before the presiding judge.[95] The NYFCA gave judges a list of circumstances to consider[96] and directed them to rely "on [their] own subjective judgment, based on the limited information available to [them] at court intake and whatever personal standards [they] ha[ve] developed in exercising [their] discretionary authority under the statute."[97] Under the NYFCA, a judge usually appointed counsel for the youth as the youth's case was being called.[98] This practice significantly undermined that counsel's effectiveness, as counsel could not independently investigate the youth's case, background, or character and could not meaningfully contest the factual allegations on which the youth was to be detained.[99] The judge ordinarily did not interview the youth or inquire into the truth of the underlying allegations, so the presumption of innocence lost its protective quality at those hearings.[100]

Considering the first *Mathews* factor, the Court in *Schall* concluded that juveniles have a substantial—but not fundamental—interest in freedom from institutional restraint because they are always in some form of custody; thus, a juvenile placed in pretrial detention is simply

94. *Id.* (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1970)).

95. *Schall*, 467 U.S. at 285 (Marshall, J., dissenting).

96. The NYFCA directed courts to consider the following factors in making a determination about whether to detain or release a juvenile: (1) the nature and seriousness of the charges; (2) whether the charges were likely to be proved at trial; (3) the juvenile's prior record; (4) the adequacy and effectiveness of the juvenile's home supervision; (5) the juvenile's school situation; (6) the time of day of the alleged crime as evidence of its seriousness and a possible lack of parental control; and (7) any special circumstances that might be brought to the court's attention by the probation officer, the child's attorney, parents, relatives, or responsible persons accompanying the child. *See id.* at 279 (majority opinion). Many of the circumstances suggested for consideration under the NYFCA are employed in JRAIs today. *See infra* Part III.

97. *Schall*, 467 U.S. at 285–86 (Marshall, J., dissenting).

98. *See id.* at 284.

99. *See id.* at 284–85.

100. *See id.* at 285.

"transferred" from his parents' custody to the custody of the State.[101] Consequently, the diminishment in constitutional significance of this liberty interest meant the Court would not strictly scrutinize the extent to which pretrial detention of youth under the NYFCA served the State's interests.[102]

The Court then disregarded the trial court's finding, based on expert testimony and peer-reviewed literature, that "no method had yet been devised which could predict with any acceptable degree of accuracy that a juvenile shall commit a crime, particularly the commission of an offense in a short space of time, as the judge must do in making his . . . decision [under the preventative detention law]."[103] Without explanation, the Court concluded that there is "nothing inherently unattainable about a prediction of future criminal conduct."[104]

---

101. *See id.* at 279–80 (majority opinion); *see also* Shana Conklin, *Juveniles Locked in Limbo: Why Pretrial Detention Implicates a Fundamental Right*, 96 MINN. L. REV. 2150, 2162–63 (2012).

102. *See Schall*, 467 U.S. at 264. Where an individual liberty interest is deemed "fundamental," government infringement on that interest must further a compelling governmental interest that cannot be served by alternative means less burdensome to the suspect class or fundamental right or interest. *See* Youngberg v. Romeo, 457 U.S. 307, 316 (1982) (asserting that among the rights which are considered fundamental, "[liberty] from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action").

103. *See* United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 708 (S.D.N.Y. 1981) (statute omitted). The district court in *Strasburg I* relied upon expert literature supporting the contention by experts at trial that no method had yet been devised that could predict with any acceptable degree of accuracy the likelihood that a juvenile would commit a crime, particularly the commission of an offense in a short space of time, as the judge must do in making his FCA § 320.5(3)(b) decision. *See id.* One expert at trial asserted that he would be surprised if recommendations, based on family court intake interviews by probation officers prior to the initial appearance, were any "better than chance." *See id.* This same expert assessed the judge's subjective prediction as "only 4% better than chance." *See id.* The district court therefore concluded that "no reliable method of predicting dangerousness, whether clinical or actuarial in nature exists at this time." *Id.* The district court also concluded that a family court judge's opinion, lacking any methodological refinement, is "a fortiori . . . also unreliable," and that "juveniles subject to detention under the New York law have their freedom curtailed by judgments that are untrustworthy and uninformed and without the requisite rationality which due process mandates." *Id.* at 712.

104. *Schall*, 467 U.S. at 254, 278–79 n.30. (citing Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 6 (1979), Jurek v. Texas, 428 U.S. 262, 274 (1976), and Morrissey v. Brewer, 408 U.S. 471, 480 (1972) in support of its holding that, "from a legal point of view, there is nothing inherently unattainable about a prediction of future criminal conduct"). Unlike *Schall*, all three of the cited cases involved adult defendants who had been convicted of a crime, or crimes, and involved laws that guaranteed the defendants hearings where they could present evidence and arguments prior to continued deprivation of their liberty. *See, e.g.*, *Greenholtz*, 442 U.S. 1; *Jurek*, 428 U.S. 262; *Morrissey*, 408 U.S. 471. Like in *Schall*, the Supreme Court in these three cited cases failed to address the requirements of the constitution with respect to the accuracy of predictions of future dangerousness.

The Court also did not consider the second *Mathews* factor regarding the probable value that would be afforded youth through additional or substitute procedural protections because none had been suggested by Martin.[105] As a result, the Court disregarded the final *Mathews* factor related to the impact on the government of any substitute or additional procedural protections.

Based on this superficial *Mathews* analysis, the Court, prior to fact-finding, held that the NYFCA afforded youth adequate protections against erroneous and unnecessary deprivations of their liberty.[106] Consequently, *Schall* approved of pretrial detention laws that guarantee youth very few meaningful protections prior to entry of a pretrial detention order. This left little room for juvenile litigants to challenge the constitutionality of pretrial detention laws as a violation of their due process right to fundamental fairness.[107]

In the years following *Schall*, concern arose among juvenile advocates about the subjectivity involved in pretrial detention decisions and how biases might unfairly contribute to those decisions. In the early 1990s, to reduce the frequency of pretrial detention in juvenile cases, reformers set out to improve objectivity and uniformity in pretrial detention decision-making.[108] To serve that end, many juvenile courts developed and implemented juvenile detention risk assessment instruments ("JRAIs").[109] Regrettably, implementation of JRAIs has not

105. *Schall*, 467 U.S. at 277.

106. *See Schall*, 467 U.S. at 254, 281.

107. *See id.* at 285–86 (Marshall, J., dissenting) (noting that in light of the majority's reasoning, "each judge must rely on his own subjective judgment, based on the limited information available to him at court intake and whatever personal standards he himself has developed in exercising his discretionary authority under the statute" (internal quotations omitted) (quoting *Strasburg*, 513 F. Supp. at 702, *aff'd sub nom.*, 689 F.2d 365 (2d Cir. 1982))), *rev'd sub nom.*, *Schall*, 467 U.S. at 253.

108. *See* JUVENILE LAW CTR. & JUVENILE DETENTION ALTERNATIVES INITIATIVE, EMBEDDING DETENTION REFORM IN STATE STATUTES, RULES, AND REGULATIONS 12, 36 (2014) [hereinafter EMBEDDING DETENTION REFORM].

109. *See* DAVID STEINHART & JUVENILE DETENTION ALTERNATIVES INITIATIVE, JUVENILE DETENTION RISK ASSESSMENT: A PRACTICE GUIDE TO JUVENILE DETENTION REFORM 8–10 (2006) [hereinafter JUVENILE RISK ASSESSMENT]; *see also* McCarthy et al., *supra* note 67, at 14 (noting that various forms of the JRAIs are employed in 300 jurisdictions in 39 states across the country and in Washington, D.C.). In Florida, for example, a juvenile court judge may order continued detention if, in pertinent part, result of the risk assessment instrument indicates secure or supervised release detention. *See* FLA. STAT. ANN. § 985.255(1)(a) (West 2020). In New Mexico, a juvenile can only be detained pretrial if a detention risk assessment instrument is completed and a determination is made that the child: (1) poses a substantial risk of harm to himself; (2) poses a substantial risk of harm to others; or (3) has demonstrated that he may leave the jurisdiction of the court. *See* N.M. STAT. ANN. § 32A-2-11(A)(1)–(3) (West 2020). In Kansas, a juvenile court "shall not enter an order removing a juvenile from the custody of a parent pursuant to this section unless" the court first finds that a detention risk assessment has either assessed the juvenile as detention-eligible or there are grounds to

made pretrial detention decision-making more accurate, objective, or uniform.

2. Inaccuracy in Future Dangerousness Predictions

In many jurisdictions, youth deemed to present a high risk for crime commission during the pendency of their case are detained pretrial. Basing pretrial detention decisions on predictions of a youth's future behavior is problematic for two primary reasons. First, predicting any human's likelihood to engage in future dangerous behavior is nearly impossible, and, as described below, the unique characteristics of youth further complicate such predictions. Second, the factors employed to support risk predictions on JRAIs invite subjectivity and racial bias, which often results in scorers inflating the risk scores of youth of color.

Fundamentally, predicting future human behavior requires looking to past events and circumstances and making a guess about the likelihood that those events and circumstances will recur in the future.[110] The likelihood that a person will repeat past behavior during a limited period in the future under circumstances identical to those in the past is extremely difficult to gauge because human behavior is dependent on a plethora dynamic factors such as race, culture, gender, age, perception, and attitude.[111]

In most juvenile courts, pretrial detention is ordered under limited circumstances: where a youth presents a high risk to either commit a crime or fail to appear during the pretrial period of their case. Today, JRAIs inform pretrial detention or release decisions in many jurisdictions across the country.[112] JRAIs are point-scale instruments, where points are assigned based on the presence or absence of factors deemed to indicate an increased or decreased risk for pretrial crime commission or failure to appear. The points assigned for each risk factor are tallied by a scorer to produce a total risk score.[113] The scorer then looks to a scale found within the tool, which drives a recommendation to the court about whether the youth should be detained or released and, if the

override the results of a detention risk assessment tool. *See* KAN. STAT. ANN. § 38-2331(a)(1)(A)–(B) (West 2020). The court must also find probable cause that: "(1) Community-based alternatives to detention are insufficient to secure the presence of the juvenile at the next hearing as evidenced by a demonstrable record of recent failures to appear at juvenile court proceedings and an exhaustion of detention alternatives; or protect the physical safety of another person or property from serious threat if the juvenile is not detained." *See id.*

110. *See* Sandra Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2255, 2270 n.191 (2019).

111. *See id.*

112. *See* McCarthy et al., *supra* note 67, at 14.

113. *See id.* at 9.

recommendation is for release, whether the court should impose pretrial conditions.[114] Courts typically make pretrial detention decisions based upon the JRAI scorer's recommendation.[115]

Methodologies used to develop JRAIs vary, but only one major jurisdiction, New York City, employed computer and data scientists to develop its youth-risk-assessment instrument.[116] The New York JRAI looks to historical group data and algorithms using a "statistical design method" to make risk predictions.[117] Most other jurisdictions develop JRAIs using a "stakeholder consensus approach," which is "essentially a hybrid of prediction science and local policymaking."[118] While risk prediction based on algorithms is far from perfect, the stakeholder consensus approach is a much less scientifically rigid approach than algorithmic-risk prediction and, for the reasons discussed below, often yields inaccurate risk predictions.[119]

Risk factors are chosen for inclusion on JRAIs based on "the experience, knowledge, and informed guesswork of local juvenile justice stakeholders."[120] The weight or number of points assigned to each risk factor is frequently based on stakeholder discussion and estimates of the effects on detention populations, not on exacting data analysis.[121] The

114. *See id.* Many JRAIs include an option for a "detention override," where a scorer recommends pretrial detention despite a youth's low-risk score on the instrument. Many juvenile advocates take issue with overrides because they allow subjectivity in the detention or release decision process; these advocates are concerned that detention overrides could become a rule-swallowing exception. *See, e.g.*, John Kelly, *Detention Overrides Can Become a Rule-Eating Exception*, IMPRINT (Nov. 5, 2015, 7:22 AM), https://bit.ly/2YB94A8.

115. Before JRAIs were implemented in juvenile courts, detention or release decisions were based on the subjective exercise of judicial discretion alone. *See* McCarthy et al., *supra* note 67, at 5. JRAIs are intended to improve the objectivity of judicial detention or release decisions, but as described in Part III, *infra*, they fail to demonstrably improve the accuracy of those decisions.

116. *See* JENNIFER FRATELLO ET AL., JUVENILE DETENTION REFORM IN NEW YORK CITY: MEASURING RISK THROUGH RESEARCH 6 (2011).

117. *See id.* This design method has been dismissed by some as being "exacting, time-consuming and costly." *See* JUVENILE RISK ASSESSMENT, *supra* note 109, at 12. When designing a risk-assessment tool using statistics, data scientists employ techniques to verify the relationship between risk factors and outcomes. *See id.* A well-designed, statistically based risk-assessment tool considers factors such as racial bias in the selection of risk factors. *See id.* "Some researchers, sensitive to [the concern of racial bias in selection of risk factors] have recommend[ed] testing risk instruments for racially biased variables, then using alternative variables in lieu of those having suspected racial effects." *Id.*

118. JUVENILE RISK ASSESSMENT, *supra* note 109, at 12–13.

119. *See id.*

120. *See id.* at 13–14. The stakeholders that are typically involved in the creation of JRAIs are probation officers, pretrial services officers, police, prosecutors, public defenders, school officials, and mental-health professionals. *See id.*

121. *See id.* at 13, 75.

detention/release recommendation scale is typically selected in the same manner.[122]

JRAIs do not take a youth's age or stage of brain development into consideration when assessing their risk level; consequently, these assessments overlook key dynamic factors that inform the youth's likely future behavior. The distinction between youth and adults is not simply one of age but one of motivation, impulse control, judgment, culpability, and physiological maturation.[123] Many youths' impulsivity, sensation-seeking and risk-taking behavior, and inability to see the long-term consequences of their behavior can be directly linked to their immature brain state.[124] The difficulty in accurate prediction of future youth behavior is compounded because the adolescent brain typically develops in ways that tend to improve the youth's decision-making capacity and reduce the likelihood of their engaging in risky behavior.[125] Because JRAI risk assessment involves great deal of subjectivity and does not take adolescent brain development into account, JRAIs often yield inaccurate and racially biased risk predictions.

Despite implementation of JRAIs, data suggests that youth are often detained pretrial despite being neither high risk for pretrial crime commission nor failure to appear. First, pretrial detention is ordered in 26% of juvenile cases in the United States; juvenile courts deem one out of every four juveniles too risky for release during the pretrial period.[126] Also telling, two-thirds of youth detained pretrial stand accused of low-level property offenses, drug offenses, or status offenses like probation-condition violations.[127] Case numbers from 2018 reveal the extent to

122. *See id.* at 13. The scale in the JRAI used in Santa Clara, California classifies juveniles as follows: juveniles with 0–6 points are recommended for release; those with 7–9 points are recommended for release with restrictions and those with 10 or more points are recommended for continued detention. *See id.* at 100. Notably, this study asserts that an RAI design group on a local level may decide that a certain offense, firearm possession for example, is a mandatory-detention offense, despite the fact that a nexus between that crime and recidivism has not been empirically validated. *See id.* at 75. Some of the choices made by design/working groups are based wholly on local policy and some are based on group data from some past period. *See id.* at 13. For example, a design group may decide that firearm possession (or some other targeted crime) is a mandatory-detention offense for a reason the group deems sufficient, even if the nexus between the offense and recidivism or failure to appear (FTA) has not been empirically validated. *See id.* at 92.

123. *See* Kaiser, *supra* note 63.

124. *See* L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REV. 417, 439 (2000).

125. *See Teen Brain: Behavior, Problem Solving, and Decision Making*, AM. ACAD. CHILD & ADOLESCENT PSYCH.: FACTS FOR FAMILIES GUIDE (Sept. 2016), https://bit.ly/2MF6q9E.

126. About 16,000 juveniles are detained pretrial on any given day. *See* Sawyer, *supra* note 3.

127. *See id.*

which low-risk youth are detained during the pretrial period: That year, when over 195,000 youth were detained pretrial, case outcomes demonstrate that over half of those youth should have remained in the community during the pretrial period.[128] For example, after 41,858 of those youth were jailed, the government subsequently opted not to pursue formal charges in their cases.[129] Further, the cases of nearly 26% of the youth detained pretrial in 2018 were dismissed before trial, and about 7% were found not guilty at trial.[130]

A closer look at the youth who are detained pretrial reveals, troublingly, that Black youth are detained at rates far greater than their proportion of the population without valid reason. Illustratively, in 2017, when youth crime commission was roughly even across races, Black youth constituted only 14% of the total United States youth population but comprised 40% of the juvenile pretrial detention population.[131] The risk factors employed on JRAIs may be facially race-neutral, but because of systemic patterns of racial discrimination, some of those factors lead to the inflation of risk scores of youth of color in relation to their actual risk level, which unfairly results in racial disparities in pretrial-detention populations.

To understand the racial bias inherent in some JRAI risk factors, one must look to historical trends of racial disparate treatment in the juvenile system. Black youth have long been arrested and detained pretrial more frequently than white youth at rates disproportionate to their representation in the population.[132] Black youth are also more often formally prosecuted in juvenile court for more serious crimes and receive harsher sentences than their similarly situated white peers.[133] Further, on many JRAIs, a youth's risk score is increased based on previous delinquency adjudications.[134] An increase in risk score due to prior adjudications is problematic because an abundance of research shows

128. *See Juvenile Court Statistics*, *supra* note 6.

129. *See id.* In these cases, prosecutors either chose not to pursue the case at all or deemed it suitable for diversion outside the juvenile delinquency system. When a case is diverted, the government opts not to file a formal complaint or petition in juvenile court; instead, the case is resolved informally through dismissal or a diversion agreement. *See supra* note 5.

130. *See Juvenile Court Statistics*, *supra* note 6.

131. *See Status and Trends in the Education of Racial and Ethnic Groups*, NAT'L CTR. FOR EDUC. STAT., https://bit.ly/3tm4qUY (last updated Feb. 2019).

132. For example, Black boys are three times more likely to be arrested at school than their white male peers. *See* Evie Blad & Alex Harwin, *Analysis Reveals Racial Disparities in School Arrests*, PBS (Feb. 27, 2017 4:09 PM), https://to.pbs.org/39qNip3.

133. *Juvenile in Corrections*, DEP'T JUST.: OFF. JUV. JUST. & DELINQ. PREVENTION https://bit.ly/3agbdqx (last visited Mar. 20, 2021).

134. For example, the tool used in Santa Clara, CA elevates a youth's risk by three points if he has suffered a felony adjudication in the 36 months preceding the current arrest. *See* JUVENILE RISK ASSESSMENT, *supra* note 109, at 37.

that a youth's criminal history is strongly influenced by their race.[135] Racialized policing and the war on drugs, which disproportionately impact communities of color, contribute to the composition of a youth's history of adjudications.[136]

Moreover, adjudications often result from guilty pleas rather than a determination of delinquency at trial.[137] Youth who are detained pretrial are forced to choose between accepting a plea offer and suffering in detention; understandably, most choose the former to secure their release. To measure a juvenile's risk for crime commission during the pretrial period based on prior adjudications is to measure practices that systematically target communities based on race and socioeconomic conditions. To inflate a Black youth's risk score relative to their true risk based on their prior adjudications both undermines the fairness of the detention or release decision-making process and subjects Black youth to the harms of pretrial detention at greater rates than their white counterparts.[138] In a system that purports to champion racial equality, neither can be tolerated.

A youth's prior arrests can also increase their JRAI risk score, regardless of the outcome of that prior case. The tool used in Santa Clara, California, for example, increases a youth's risk score by six points if they have a felony case or a "serious person misdemeanor" pending at the time of arrest.[139] To increase a risk score based on prior arrests is problematic for at least two reasons. First, because a youth who has been arrested for a crime is presumed innocent of that offense, their arrest, without an adjudication of delinquency, should not increase their risk score. Second, this practice leads to erroneously inflated scores for youth of color. Because communities of color are overpoliced, more youth are arrested in those communities as compared with communities in which white youth live.[140] To increase risk scores for youth of color because of

135. *See* NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 211–40 (2013).

136. *See* Kelly Hannah-Moffat, *Actuarial Sentencing: An "Unsettled" Proposition*, 30 JUST. Q. 270, 283–84 (2013).

137. *See* Allison D. Redlich and Reveka A. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 L. & HUM. BEHAV. 611, 611 (2016).

138. *See generally* Joe Soss & Vesla Weaver, *Police Are Our Government: Politics, Political Science, and the Policing of Race-Class Subjugated Communities*, 20 ANN. REV. POL. SCI. 565–91 (2017).

139. *See* JUVENILE RISK ASSESSMENT, *supra* note 109, at 37.

140. *See* Marc Mauer, *The Endurance of Racial Disparity in the Criminal Justice System*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 40–46 (2017). Modern police in the United States evolved out of slave patrols, which endeavored to control movement of and enforce discipline on enslaved people. *See* PHILIP S. FONER, HISTORY OF BLACK AMERICANS: FROM AFRICA TO THE EMERGENCE OF THE COTTON KINGDOM 206 (1975).

racially biased policing practices is discriminatory and should not be tolerated.

Further, most JRAIs increase a youth's risk score based on the number and type of charges in the pending case. For example, the Santa Clara tool increases a youth's risk score by ten points if they stand charged with possessing a firearm, drug distribution, or an offense enumerated in California's WIC section 707(b), which includes but is not limited to offenses like homicide, arson, robbery, and sex offenses. The tool also increases a youth's risk score by one point if the youth is charged with more than one offense.[141] Increasing a youth's risk score based on these factors is problematic because police and prosecution levy more—and more serious—charges against youth of color and poor youth than they do against similarly situated white and more affluent youth.[142]

Conversely, a youth's lack of arrests or citations may be deemed mitigating factors on JRAIs, which tends to disadvantage poor youth and youth of color. The Santa Clara JRAI subtracts one risk point for a juvenile who has not been arrested or cited for a crime in the 12 months preceding the instant arrest. Since communities of color are overpoliced—which results in disparate rates of arrests in those communities—this mitigating factor disproportionately benefits affluent youth and youth from white communities.

On many JRAIs, a juvenile's prior failure to appear in court also increases that juvenile's risk score.[143] Inclusion of this factor, too, presents an issue because scorers are not instructed to consider whether prior failure(s) to appear were purposeful attempts to evade prosecution when tallying the youth's score. Many juveniles rely on adults to take them to court, and there are many reasons why a juvenile, regardless of whether he or she is reliant on an adult for transportation, might miss court. For example, a youth's family's poverty may result in housing instability; when a youth is worried about whether he'll have a roof over his head on a given night, it interferes with his ability to keep track of future court dates and times. Poverty may also lead to difficulty accessing reliable transportation and result in a youth's inability to get to court. Other systemic issues associated with poverty and racial oppression, such as access to healthcare, may also impact a youth's ability to get to court as required. Where youths' socioeconomic situations and reliance on others because of their age cause them to miss court, it is unfair to allow this factor to increase their chances of being subject to the horrors of detention.

---

141. *See* JUVENILE RISK ASSESSMENT, *supra* note 109, at 56.

142. *See Juveniles in Corrections*, *supra* note 133.

143. *See* JUVENILE RISK ASSESSMENT, *supra* note 109, at 12; *see also id.* at 97 (describing Virginia's Risk Assessment tool).

A review of JRAIs from around the country[144] did not generate any examples of instructions for scorers or courts to consider racially biased policing or prosecution patterns in the juvenile's community in relation to pretrial-detention decisions. As a result, detention or release decisions based on those tools often handicap youth from poor communities and communities of color. Because JRAIs often yield inaccurate and racially biased risk predictions, because pretrial detention fails to achieve its sought-after objectives, and because youth detained pretrial endure horrendous abuses that undermine their healthy brain development, the time has come to end the practice of jailing presumptively innocent children.

III. WHY ABOLITION

In his *Schall* dissent, Justice Marshall acknowledged what social science has since repeatedly affirmed: the net impact of pretrial detention "on the juveniles who come within its purview is overwhelmingly detrimental."[145] Whether the costs and benefits of pretrial detention are weighed in terms of tax dollars, community safety, or young people's futures, by detaining youth, the State is damaging the very people it is supposed to help.[146]

Juvenile-violent-offense rates are at historic lows; the latest arrest data from the U.S. Office of Juvenile Justice and Delinquency Prevention shows that, as of 2018, youth arrests were down 72% from their 1996 peak.[147] Nonetheless, the youth-control complex, managed through the juvenile delinquency system, has come to rely on pretrial detention as an acceptable response to alleged youth-crime commission. Social science and financial data, however, demonstrate that pretrial detention of presumptively innocent youth is not an effective option in terms of outcome or cost.

Detaining youth pretrial is extremely expensive. In a survey of state expenditures on youth confinement in 46 states, the Justice Policy Institute found that the average cost of the most expensive confinement option for a juvenile was $407.58 per day, or $148,767 per year.[148] As the Director of the New York State Office of Children and Family Services put it: "We could send [a youth] to Harvard for [what we pay

144. *See, e.g.*, *See* JUVENILE RISK ASSESSMENT, *supra* note 109, at 91–98.

145. *Schall v. Martin*, 467 U.S. 253, 308 (1984) (Marshall, J., dissenting).

146. *See The Future of Youth Justice*, *supra* note 67.

147. CHARLES PUZZANCHERA, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE STATISTICS: JUVENILE ARRESTS 1 (June 2020), https://bit.ly/3rrOBd4.

148. *See Sticker Shock: Calculating the Full Price Tag for Youth Incarceration*, JUST. POL'Y INST. (Dec. 9, 2014), https://bit.ly/3fFexzJ.

for incarceration], and [incarceration does not yield] very good outcomes."[149]

The government fails in its role as *parens patriae* when it detains youth pretrial. According to *Schall* and its progeny, where parental control falters, the State must intervene in its role as *parens patriae*.[150] To heed its obligation as *parens patriae*, the government must promote family integrity, defer to parental authority, and protect and promote the welfare of youth in its custody.[151] When the State takes custody of youth for purposes of pretrial detention without a meaningful understanding of their family situation, it necessarily fails to hew the first two of those obligations. Worse, though, as explained in Section II.A, *supra*, subjecting youth to pretrial detention puts them in danger of physical and emotional trauma and undermines the likelihood that they will attain normal, healthy development. It is unconscionable for the government to put youth in a situation that will likely impose barriers to their future success and undermine their wellbeing. Because the government fails to honor its obligations as *parens patriae* when it subjects youth to pretrial detention, lawmakers must seek solutions other than incarceration in response to alleged youth crime commission.

A growing body of social-science research shows that youth are better positioned for future success when they remain in and engage with their community in pro-social ways during the pretrial period. For example, boys in community-based programs in Oregon had fewer subsequent arrests, fewer days of incarceration, less self-reported drug use, fewer violent-offense referrals, and fewer self-reported incidents of violence than their detained peers.[152] Other research demonstrates that youth in community-based treatment versus youth in confinement have

149. *Id.* at 4.

150. *Schall*, 467 U.S. at 265.

151. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 652 (1972) (affirming claim that the state of Illinois had legitimate interests in protecting "'the moral, emotional, mental, and physical welfare of the minor and the best interests of the community' and to 'strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal'"); *see also* Endress v. Iowa Dep't of Human Servs., 944 N.W.2d 71, 79 (Iowa 2020) (asserting that "it is the state's obligation, as *parens patriae*, to ensure every child receives proper care and treatment"); *see also* A.C., IV v. People, 16 P.3d 240, 242 (Colo. 2001) (asserting that "the state's role in juvenile proceedings is not that of a prosecutor, but rather that of *parens patriae* to protect the welfare of the child. . . . One of the fundamental differences between the juvenile system of justice and an adult criminal prosecution "is the overriding goal of the Children's Code to provide guidance and rehabilitation to an adjudicated delinquent child in a manner consistent with the best interest of the child and the protection of society rather than fixing criminal responsibility, guilt, and punishment").

152. *The Future of Youth Justice*, *supra* note 67.

better educational outcomes.[153] In Missouri, for example, a state that emphasizes community-based treatment, 65.4% of youth who were discharged from the juvenile system within the three previous years had not been re-implicated in either the juvenile or adult justice systems.[154]

Due to the ineffectiveness, harmful outcomes, and prohibitive costs associated with youth pretrial detention, some large communities are choosing to close juvenile pretrial-detention facilities.[155] For example, the San Francisco Board of Supervisors voted to close the city's "Juvenile Hall" by the end of 2021, making San Francisco the first major city in the United States to plan a closure of a pretrial-detention facility in an effort to eliminate the jailing of children.[156] Hillary Ronen, a sponsor of legislation that led to the facility's closure, said, "It just doesn't make sense any more in this day or age, with all our modern understanding of the youth brain, to keep using these outdated modes that are extremely expensive."[157] The city's goal is to develop loving, supportive, homelike settings for youth during the pretrial period rather than locking them in cells.[158] To effectuate closure of the youth jail, the city of San Francisco appointed an expert with decades of expertise in development of youth detention alternatives to "re-imagin[e] a local system that will better support the county's youth."[159]

153. *See, e.g.*, Pam Clark, *Ch. 2 Types of Facilities*, NAT'L INST. CORRECTIONS: DESKTOP GUIDE FOR WORKING WITH YOUTH IN CONFINEMENT, https://bit.ly/3m3E0nG (last visited Mar. 14, 2021).

154. *The Future of Youth Justice*, *supra* note 67.

155. Union County, New Jersey closed its detention center and transferred the youth detained there to a youth detention center in a nearby county. *See* Suzanne Russell, *Union County Juvenile Detention Center in Linden to Close in 2019*, MYCENTRALJERSEY.COM (Oct. 1, 2018, 7:00 AM), https://bit.ly/3oxsBMy. It should be noted that abolition can incorporate the goal of eradicating prisons and can include a "gradual project of decarceration," during which prison is replaced by other sentencing options or gradually phased out through a series of legal and social reforms. *See* Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 148–49 n.109–110 (2018).

156. *See* Lauren Favre, *San Francisco Board Votes to Close Juvenile Justice Center*, U.S. NEWS (June 10, 2019, 4:19 PM), https://bit.ly/3cpsBvF. A co-sponsor of that bill said that San Francisco was spending an enormous amount of money on an "ineffective system." Joe Vaquez, *San Francisco Supervisors Push to Shut down Juvenile Hall*, CBS (Apr. 8, 2019, 11:08 PM), https://cbsloc.al/2MII7YM.

157. Vivan Ho, *'Outdated and Expensive': San Francisco To Close Juvenile Hall in Pioneering Move*, GUARDIAN (June 6, 2019, 6:00 AM), https://bit.ly/3s56eAz.

158. *Id.* If a youth is placed out of his or her home, those who surround them are trained in trauma-informed practices. Renee Menart, *CJCJ Executive Director Helps Plan SF Juvenile Hall Closure, and More!*, CTR. ON JUV. & CRIM. JUST. (Nov. 1, 2019), https://bit.ly/3oy6eXc.

159. Menart, *supra* note 158.

Minnesota's Ramsey and Hennepin counties are also closing youth correctional facilities in favor of community-based programs.[160] In support of this decision, Ramsey County officials cited "declining juvenile crime and a consensus among prosecutors, judges and elected officials that troubled teens do better when they receive treatment at home and in their communities."[161] As one Ramsey County official put it, "The evidence was showing us detention was not a helpful intervention for our young people."[162] Further, Hennepin County District Judge David Piper said that research shows "[c]ommunity-based alternatives are more likely to return juveniles to law-abiding behavior."[163]

Sea change like that proposed through abolition of youth pretrial detention may be hard for some to imagine. As activist and Professor Angela Y. Davis put it, "[p]rison abolitionists are dismissed as utopians and idealists whose ideas are at best unrealistic and impracticable, and, at worst, mystifying and foolish."[164] However, in light of evidence pertaining to the harms caused by youth pretrial detention and the efficacy of community-based services, abolition of that practice is not an idealistic fantasy—it is arguably essential as a matter of law.

IV. SUGGESTED LEGISLATIVE FRAMEWORK TO ABOLISH YOUTH PRETRIAL DETENTION

Rather than respond to alleged youth crime commission with incarceration—shown to be ineffective and harmful to youth—communities should instead work to understand the needs of youth implicated in the juvenile system and connect them with the resources they need. Whether a youth could benefit from drug and alcohol treatment, counseling, or an after school or family-support program, a shift away from incarceration is needed to keep communities safe and position youth for success in adulthood.

This Part suggests a three-pronged approach to legislative abolition of pretrial detention. The first prong proposes amendments to juvenile-code purpose clauses to re-focus juvenile courts on the unique characteristics and needs of youth. The second piece of the proposed framework calls for the scheduled release of all juveniles currently in

160. *See* Associated Press, *Youth Correctional Facilities Closing*, U.S. NEWS (May 28, 2019, 11:31 AM), https://bit.ly/39xhAXi.

161. Shannon Prather, *Ramsey, Hennepin Counties Close Youth Correctional Programs in Favor of Community-Based Care*, MINNEAPOLIS STAR TRIBUNE (May 28, 2019), http://strib.mn/3bOVGi7.

162. *See id.* (attributing the statement to Ramsey County Commissioner Toni Carter).

163. *See id.*

164. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 9–10 (2003).

pretrial detention and the creation of a related process through which youth can gain access to needed pretrial supports in their community. To prevent government-inflicted traumatization of youth and to avoid youth implication in the juvenile system, legislative reform should include a plan to reduce youth contact with police and youth arrests. Finally, the framework below calls for a presumption of immediate release for youth who are arrested, with access to needed community-based support services.

A. Purpose Clause Amendments

A central purpose of juvenile codes should be to promote both healthy youth development and safety and to encourage youth to engage in lawful behavior. Amendments to juvenile codes should acknowledge those aims and require that the means by which they are pursued both recognize and honor the unique characteristics of youth: their limited capabilities as a result of their developmental immaturity and their capability for positive growth and change. Purpose clause amendments should also involve removal of punishment and incapacitation as permissible aims of the juvenile justice system.[165]

B. Release of Currently Detained Youth

Because research shows that a youth's health, development, and safety are better supported in the community than in a carceral environment, legislative reform should include the scheduled release of all currently detained youth.[166] Upon each youth's release, communities might use an empirically developed needs-assessment tool to identify needed community resources and to connect youth with those resources.

Communities that lack infrastructure with robust wrap-around resources for youth should identify existing community-support resources such as teachers, social workers, family members, and others willing to support youth as they transition back into the community.

165. For examples of states that have amended their juvenile-code purpose clauses, see MINN. STAT. ANN. § 260B.001 (West 2020) (stating that amended purpose clause applies to youth alleged or adjudicated delinquent and requires that purposes of juvenile code be pursued "through means that are fair and just, that recognize the unique characteristics and needs of children, and that give children access to opportunities for personal and social growth"). *See also* ALA. CODE § 12-15-101(7) (2009) (stating that amended purpose clause calls for courts to hold a child found delinquent accountable for his or her actions to the extent of their "age, education, mental and physical condition and background of the child and to provide a program of supervision, care and rehabilitation").

166. To slow the spread of COVID-19 and to protect vulnerable youth and family members, jurisdictions should prioritize the release of immunocompromised youth and youth with an immunocompromised household member.

Willing volunteers can be valuable for youth after their release as they develop daily structure and positive friendships, engage in pro-social activities, and re-engage with their education. These measures can be employed during a transitionary period in which communities identify areas of need and reallocate resources that would otherwise be allocated to pretrial incarceration to the provision of needed resources.[167]

Development of mutual-aid projects is another way to support youth as they transition back into the community.[168] Some communities have food projects to help youth who are food insecure find healthy food; others have housing projects where people open their doors to individuals and families experiencing homelessness for a time.[169] Childcare collectives may also be helpful to juveniles with children or young siblings. Affording no-cost childcare through such a program can encourage and enable youth and their parents to appear in court during the pretrial period. Another mutual-aid project that could facilitate youths' pretrial court appearances is a calling schedule, where participants take on responsibility for calling youth to remind them about upcoming court dates, offer them rides to court, or offer to pay for a ride-sharing service so they can get to court as required. To show youth support and encouragement, community-support groups can also organize and take turns accompanying a youth to court.

Mutual-aid projects are beneficial because they foster relationship-building among community members and youth, encourage youth to develop planning and communication skills, and make youth feel like a part of a cooperative enterprise as opposed to "deviant" or "delinquent."[170] These projects can also help communities identify where support systems work and where there are gaps that should be filled.

167. Some communities might seek funding from grants like The Youth Services Grant Program, which is designed to support non-profit, tribal, and community-based organizations in developing and implementing direct advocacy services to youth and young-adult victims of domestic violence, dating violence, sexual assault, or stalking. *See Grants.gov Youth Funding Opportunities*, YOUTH.GOV, https://bit.ly/3iZqRKR (last visited Mar. 20, 2021). Where one study shows the average cost to detain a youth is about $150,000/year, communities willing to completely divest themselves of pretrial detention facilities will have sufficient resources to invest in the community. *See id.*

168. Mutual aid has been defined as "the radical act of caring for each other while working to change the world." *See generally* DEAN SPADE, MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT) (2020); Dean Spade, *Solidarity Not Charity*, 38 SOC. TEXT 131, 136–40 (2020).

169. *See, e.g.*, Antonio Roman Alcala, *Op-ed: We Can Build a Better Food System Through Mutual Aid*, CIVIL EATS (June 26, 2020), https://bit.ly/3f0dI40.

170. *See infra* Section IV.C (discussing labeling theory).

C. Fewer Youth Arrests

Every year, an estimated 2.1 million youth under the age of 18 are arrested in the United States.[171] Black youth are two-and-a-half times more likely to be arrested than white youth.[172] Even without subsequent detention, an arrest can have effects far beyond the immediate stress associated with the youth being torn away from their families and familiar environments. Studies show that a youth's initial arrest does not have the "scared straight" effect that some hope it will, but rather increases the likelihood that the youth will be arrested again in the future.[173]

Two branches of labeling theory[174] may explain the increased likelihood of future arrest. First, the increased likelihood of re-arrest may be a result of the youth's internalization of a notion that they are "deviant" or "delinquent" and organization of the youth's life around that self-identification.[175] A youth who sees themself according to these negative labels may associate with more deviant peers, withdraw from conventional pursuits, and ultimately engage in criminal behavior at a greater rate than those who do not see themselves as "deviant" or "delinquent."[176] The second hypotheses for the increased chance of re-arrest is based on the "snowball effect" of external social and societal responses to youth who are seen as "deviant" by their community. For example, increased surveillance by parents, police, or school officials can limit a youth's autonomy. A youth seen as "deviant" may not have an opportunity to re-engage in a traditional school and instead may be forced to choose between abandoning educational pursuits or enrolling in an alternative school, where there is a higher likelihood of exposure to negative peer influence. Youth labeled "deviant" or "delinquent" may also be denied employment opportunities, which increases the likelihood of future engagement in criminal behavior.[177]

---

171. *See Youth Involved with the Juvenile Justice System*, YOUTH.GOV, https://bit.ly/3rSaB0V (last visited May 19, 2021).

172. *See Statistical Briefing Book: Law Enforcement & Juvenile Crime*, OFFICE OF JUVENILE JUSTICE & DELINQ. PREVENTION (2017), https://bit.ly/3fIzBFA.

173. *See* Akiva Liberman et al., *Labeling Effects of First Juvenile Arrest: Secondary Deviance and Secondary Sanctioning*, 52 CRIMINOLOGY 345, 363 (2014).

174. Labeling theory is a sociological hypothesis that posits that a person's self-identity and behavior may be determined or influenced by the terms used to describe or classify them. *See Labeling Theory*, AMERICAN PSYCH. ASSOCIATION DICTIONARY, https://bit.ly/3fHuu8E (last visited Apr. 27, 2021).

175. *See* Liberman et al., *supra* note 173, at 347.

176. *See id.*

177. *See id.* at 348. The external effects of labeling may operate in conjunction with or independent of the effects of internal labeling. *See id.* at 364.

When a youth is not arrested, the likelihood of that youth's future re-arrest is decreased.[178] Given the clear detrimental effects of arresting youth, lawmakers and school officials should strive to reduce youth arrests.

The school-to-prison pipeline is a system of policies and practices that push students—particularly students of color—out of school and into the juvenile and adult criminal systems.[179] The starting point for this pipeline is in schools, where police officers increasingly patrol and issue tickets to students, charging them with criminal offenses based on events that occurred at school.

Particularly in the wake of George Floyd's murder at the hands of police, large school districts in cities like Minneapolis, Portland, Denver, and Seattle have seen the detrimental effects of police presence in educational environments and have voted to remove School Resource Officers ("SROs") from their schools. In support of that decision, Kim Ellison, a Minneapolis school-board chairwoman, said, "I value people and education and life . . . [n]ow I'm convinced, based on the actions of the Minneapolis Police Department, that we don't have the same values."[180] Jennifer Bacon, the President of the Denver Public School Board, said that the district did away with SROs "to alleviate the trauma and triggering presence of law enforcement to many people in our community."[181] Similarly, Seattle removed SROs from its public schools to improve the school climate for its Black students.[182] And in the absence of police officers in Portland's public schools, the district plans to increase funds allocated to social workers, counselors, and culture-specific supports for students.[183] To facilitate focus on education and to reduce the disproportionate implication of youth of color in the juvenile system based on alleged conduct at school, officials around the country should follow the lead of these large districts and remove police officers from patrolling school halls.[184]

178. *See id.* at 363.

179. Libby Nelson & Dara Lind, *The School to Prison Pipeline, Explained*, JUSTICE POLICY INST. (Feb. 24, 2015), http://www.justicepolicy.org/news/8775.

180. *See* Ryan Faircloth, *Minneapolis Public Schools Terminates Contract with Police Department over George Floyd's Death*, MINNEAPOLIS STAR TRIBUNE (June 2, 2020, 9:38 PM), http://strib.mn/39IqIbc.

181. *See* Dillon Thomas, *Denver Public Schools to Remove School Resource Officers*, CBS4 DENVER (June 12, 2020, 5:49 PM), https://cbsloc.al/3cPnPHB.

182. *See* Dahlia Bazzaz & Hannah Furfaro, *Police Presence at Seattle Public Schools Halted Indefinitely*, SEATTLE TIMES (June 24, 2020, 2:33 PM), https://bit.ly/2PACnll.

183. Eder Campuzano, *Portland Superintendent Says He's 'Discontinuing' Presence of Armed Police Officers in Schools*, OREGONIAN (June 4, 2020), https://bit.ly/3mlVxrq.

184. *See* Scott Simon, *Schools Vote to Remove School Resource Officers Amid Protests Against Police Violence*, NPR (June 20, 2020, 8:09 AM), https://n.pr/3j3OXDW.

Symptoms associated with health challenges also often lead to youths' implication in the delinquency system. In recent years, communities across the country have reported an increase in police contact with youth and adults experiencing substance use and mental-health related crises.[185] Police are often the de facto response to these crises, which can escalate matters. Escalation may be due to anxiety created by the presence of armed officers and police vehicles, or due to use of force by officers who often lack in-depth training on how to support a person experiencing a mental-health emergency.[186] Regrettably, law-enforcement responses to these crises often end with the person in an emergent situation landing in the emergency room, jail, or a juvenile-detention facility.[187] To more effectively support those experiencing mental-health issues, the Substance Abuse and Mental Health Services Administration recommends that mental-health professionals respond to mental-health crises instead of law enforcement.[188] Mental-health professionals can diffuse emergencies by offering both compassion and clinical expertise during an emergency. These professionals are also more knowledgeable about available community resources and can connect those in an emergency with the help they need to stabilize and access treatment. Importantly, dispatching mental-health professionals to emergency calls reduces the chances that the call will end in arrest and prosecution. To reduce the frequency of

---

At a minimum, schools unwilling to remove school resource officers should eliminate formal referrals of youth to the delinquency system where alleged delinquent acts occur on school grounds.

185. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., NATIONAL GUIDELINES FOR BEHAVIORAL HEALTH CRISIS CARE 10 (2020), https://bit.ly/2PD0QXc (stating that 65-70% of arrested youth have some type of mental health disorder); *see also* NAT'L CONFERENCE OF STATE LEGISLATURES, MENTAL HEALTH NEEDS OF JUVENILE OFFENDERS 2 (2007), https://bit.ly/3rQTtZe. Schools can use mobile crisis teams instead of calling law enforcement when a student experiences a mental health emergency. In 2018, SAMHSA reported that 44.3% of referrals to mobile crisis teams regarding youth came from schools. *See* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., EXECUTIVE ORDER SAFE POLICING FOR SAFE COMMUNITIES: ADDRESSING MENTAL HEALTH, HOMELESSNESS, AND ADDITION REPORT 21 (2020), https://bit.ly/3mrU7vu.

186. *See* NATIONAL GUIDELINES FOR BEHAVIORAL HEALTH CRISIS CARE, *supra* note 185, at 68. For example, a North Carolina teen was tackled to the ground, hit with a taser and punched by a sheriff's deputy while he was handcuffed, after his mother tried to bring him to the hospital for what she called a mental health "crisis." *See Teen Who Was Violently Arrested During Mental Health "Crisis" Strikes Plea Deal*, CBS NEWS (Feb. 18, 2020, 7:37 AM), https://cbsn.ws/3vqCFLa.

187. *See* EXECUTIVE ORDER SAFE POLICING FOR SAFE COMMUNITIES: ADDRESSING MENTAL HEALTH, HOMELESSNESS, AND ADDITION REPORT, *supra* note 185, at 1.

188. *See* Meera Jagannathan, *As Activists Call to Defund the Police, Mental-Health Advocates Say 'the Time is Now' to Rethink Public Safety*, MARKETWATCH (June 19, 2020, 9:56 AM), https://on.mktw.net/2MBLz7s; *see also LA City Council Votes to Slash $150 Million from the LAPD Budget*, NBC (July 1, 2020, 11:49 PM), https://bit.ly/3j2dglO.

juvenile arrests, communities can reallocate funds from police and youth detention facilities to mental-health resources.

Finally, juvenile courts and lawmakers can partner to reduce youth arrests by issuing a bright-line directive or law that forbids police from arresting juveniles in certain situations. For example, the law might allow juvenile arrests only where felonious violence against another person is alleged.[189]

D. Presumption of Release for All New Youth Arrestees

The final prong of this suggested framework calls for a presumption of immediate release of all new juvenile arrestees.

As a matter of constitutional law, youth—like adults—are presumed innocent until and unless they are adjudicated delinquent or plead guilty in court to some criminal offense.[190] Releasing youth instead of detaining them pretrial will have both short- and long-term benefits for the youth and their communities. First, thousands of youth whose cases are eventually dismissed or diverted outside the juvenile system will not suffer the lifelong consequences caused by their incarceration. Youth who are acquitted and those adjudicated delinquent for low-level nonviolent offenses will also be saved from the long-lasting impacts of detention. Releasing youth pretrial will also avoid the effects of primary and secondary labeling discussed in Section IV.C, *supra*. Finally, communities can use a youth's arrest as an opportunity to determine what needs they have and connect them with community-based services and programs that can meet youth where they are and help them succeed.

Under this framework, youth must be immediately released regardless of whether a motion for support services is filed and re-entitled to a hearing before a court can enter an order for any support services.[191] When a motion for support services is filed, the court orders

189. Prosecutors should consider dismissal of more minor cases and the expansion of diversion programs; this is prudent because studies show that a youth's formal implication in the juvenile delinquency system can, in and of itself, be criminogenic. *See* Richard A. Mendel, *No Place for Kids, the Case for Reducing Juvenile Incarceration*, ANNIE E. CASEY FOUND. 2, 32 (2011), https://bit.ly/3pV9Bcp.

190. *See generally* Coffin v. United States, 156 U.S. 432 (1985) (establishing the presumption of innocence for any persons accused of crimes).

191. Support services could include many things; a non-exhaustive list of possible services includes (1) parental supports, in which parents of system-involved youth are offered childrearing support and are taught caregiving skills, how to cope with stress, and where to find community resources for their children; (2) community building and empowerment programs, which tend to focus on realigning the political, financial, and institutional forces in neighborhoods; (3) school- and community-based health centers to give all youth better access to medical care; (4) alternative educational programs and environments for youth that directly address each youth's motivation; (5) school-to-work transition programs; (6) counseling programs; and (7) substance-use-prevention programs.

the youth to complete an individualized, age-specific, evidence-based needs assessment and, if it has not already, appoints counsel to represent the youth at the services hearing. To avoid traumatization of the youth, the assessment administrator must be trained on trauma-informed practices, cultural awareness, and implicit racial bias. After the assessment is administered and its results are sent to the parties and the court, the court must hold a hearing at which it hears evidence on the youth's future goals and argument as to why the youth would benefit from the specifically requested support services in relation to those goals. If the court finds by a preponderance of the evidence that one or more support services would be in service of the youth's goals, it can order the youth to engage with those services at no cost to the youth or the youth's family. Transportation must be provided for the youth where needed to enable engagement with any ordered support services. Additional support—and never incarceration—must be the only available remedy for a youth's non-compliance with court-ordered support services.

It is essential that courts avoid out-of-home placement whenever wrap-around care in the community could meet the youth's and his or her family's needs. While all youth are presumed eligible for immediate release, after consideration of evidence at a hearing with procedures described below, a youth may be subject to an out-of-home placement. An out-of-home placement should only be possible, however, where two conditions are satisfied: the youth is accused of a violent crime against another person that would be considered a felony if committed by an adult[192] and there are articulable facts supporting that the youth or specific members of the community are at risk of immediate harm if the youth is not placed outside his or her home. While group residential therapeutic settings have been shown to be effective for some youth, residential treatment facilities should be a last placement option for courts because non-therapeutic aspects of residential treatment facilities can create some of the same issues presented in mass youth detention facilities.[193]

192. Due to issues with systemic racism in charging decisions discussed *infra*, this Article does not suggest circumscribing the youth who could be placed out-of-home based on charged crimes. While this article does not define "violent," it should be understood that the spirit of the framework calls for juvenile courts to err on the side of pretrial release.

193. For example, one paper discusses how staff at residential treatment facilities may abuse the power they have over youth and may impose inappropriate punishments in response to problem behaviors. *See* S. De Valk et al., *Repression in Residential Youth Care: A Scoping Review*, ADOLESCENT RES. REV., Apr. 2016, at 195–96. The paper noted that in the Stanford Prison Experiment, a claim was made that power inherent in the role of guard inevitably led to brutality. *See id.* In settings where these abuses occur, residential care can be more harmful than effective in diminishing psychiatric or behavioral problems of youth. *See id.*

The procedures to be employed prior to an out-of-home placement must be robust so as to honor procedural-fairness principles and ensure that each youth's needs are met in an environment where each has an opportunity for healthy development. When the government seeks an out-of-home placement, it must present a motion setting forth a *prima facie* case for why the youth's needs would be better served in a specific out-of-home placement rather than by available community resources. If that showing is made, the court—if it has not already—appoints counsel for the youth and sets a hearing for a future date that allows the youth's counsel sufficient opportunity to investigate the youth's family and other supports, available community resources, and the circumstances surrounding the youth's pending case. A motion for out-of-home placement also triggers a court order requiring the youth to participate in an individualized, age-specific, evidence-based needs assessment, administered as described above. At a hearing on a motion for out-of-home placement, the court must find probable cause in relation to the allegations underlying the youth's case if that finding has not been previously made. If probable cause is not found, the court may not enter an out-of-home placement order, and the youth's case should be dismissed. Conversely, if probable cause is found, the court considers the results of the needs assessment as well as evidence and arguments. Only if the court finds that the government has met its burden of proof by clear and convincing evidence that the youth's needs would be better served in a specific out-of-home placement rather than by resources available in the community is such placement permitted. If a youth is placed outside the youth's home, the goal must be to transition him or her back to the community as expeditiously as possible.

CONCLUSION

Youth are fundamentally different from adults in both their malleability and their comparative cognitive, social, emotional, and neurological immaturity. Because of these differences, juvenile courts and the laws applicable to them should regard youth with particular solicitude. No minimal benefit realized from incapacitating youth in detention during the pretrial period could justify inflicting on them the type of acute harms such detention has been shown to wreak in their lives. Through pretrial detention, the State is inflicting the types of harm on youth from which it has an obligation to protect them. The need for immediate action is underscored when one considers the disproportionate rates at which youth of color are detained pretrial.

Today, thousands of youth are locked in detention facilities in which they are traumatized and exposed to negative influences minute after minute, day after day, week after week. The time is now—when

many communities have demonstrated willingness to rethink long-standing community-safety practices—to give the next generation a meaningful chance at success. Through the framework suggested in this Article, communities can—indeed, must—revive the presumption of youth innocence and build an anti-racist juvenile system in which all implicated youth have opportunities for healthy development.