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CASENOTE

Supreme Court Holds Juvenile Preventive Detention Under New York Statute Not Violative of Due Process: *Schall v. Martin*¹ Over the past two decades the United States Supreme Court consistently has recognized the failure of the juvenile justice system to live up to its original goals of informality and flexibility,² and yet still afford juveniles the due process guaranteed by the fourteenth amendment.³ In its opinions dealing with the juvenile justice system the Court has been critical of the lack of procedural regularity in delinquency proceedings and the resulting debilitating effect on the constitutional rights of juveniles.⁴ A factor which has been significant in shaping the Court's position throughout its decisions in this area is its recognition of the potential consequences faced by juveniles held to be delinquent: incarceration for a lengthy period of time in a facility closely approximating a prison; exposure to other delinquents which may be psychologically or physically injurious; and the lasting stigma of being adjudged a juvenile delinquent.⁵ Finding little to distinguish these penalties from those encountered by adult criminals, the Court has taken the position that accused juvenile delinquents should have the benefit of many of the same procedural protections that are available in a criminal proceeding.

In determining which procedural safeguards are required by the due process clause, the Court has developed a standard of "fundamental fairness." As defined by the Court,

¹ 104 S. Ct. 2403 (1984).

² The juvenile court had its genesis in the desire to provide a distinctive procedure and setting to deal with the problems of youth. *Breed v. Jones*, 421 U.S. 519, 528 (1975). The idea of crime and punishment was to be abandoned. *In re Gault*, 387 U.S. 1, 15 (1967). Juvenile proceedings were designated as civil, rather than criminal, as the courts were theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. *Kent v. United States*, 383 U.S. 541, 554 (1966). This "parental" role assumed by the state, termed *parens patriae*, was the justification for denying children procedural rights. *Gault*, 387 U.S. at 17. Early reformers believed that the parental goals of the juvenile court could best be achieved by a system that was flexible and informal, rather than constrained by the procedural safeguards attendant upon adult criminal proceedings. *Id.* at 15.

³ See, e.g., *Breed v. Jones*, 421 U.S. 519, 528 (1975) (Supreme Court decisions in recent years have recognized gap between originally benign conception of the juvenile system and its realities); *In re Winship*, 397 U.S. 358, 365-66 (1970) (civil labels and good intentions do not obviate the need for criminal due process safeguards in juvenile courts); *In re Gault*, 387 U.S. 1, 19 (1967) (departures from established principles of due process frequently have resulted not in enlightened procedure, but in arbitrariness); *Kent v. United States*, 383 U.S. 541, 554-55 (1966) (question as to whether actual performance of juvenile justice system measured up to its theoretical objectives of providing guidance and rehabilitation).

⁴ See, e.g., *Kent*, 383 U.S. at 555 (whether juvenile justice system could continue to tolerate immunity of the process from the reach of constitutional guarantees applicable to adults); see *supra* note 3.

⁵ As to the incarceration of juveniles, see *Winship*, 397 U.S. at 374 (Harlan, J., concurring) (as in a criminal case, the accused juvenile is exposed to a complete loss of personal liberty through state-imposed confinement); *Gault*, 387 U.S. at 27 (when a child is incarcerated his world is "peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide"). Concerning the stigma attached to juvenile delinquency, see *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 n.5 (1971) (in theory the juvenile court was to affix no stigmatizing label; in fact, a delinquent is generally viewed by society as a criminal); *Gault*, 387 U.S. at 23-24 (disconcerting that the term "delinquent" has come to involve only slightly less stigma than the term "criminal" applied to adults).

fundamental fairness requires that procedures followed in delinquency proceedings measure up to the essentials of due process and fair treatment mandated by the fourteenth amendment.⁶ The standard does not require a particular procedure, but merely dictates that the steps followed incorporate procedural regularity sufficient to protect juveniles from the oppression of the state or a biased or eccentric judge.⁷ In applying the fundamental fairness test, the Court has gradually incorporated into the juvenile justice system a number of procedural protections designed to shield juveniles from the procedural arbitrariness that could violate their right to due process. The Court has held, for example, the following constitutional protections applicable to delinquency proceedings: notice of charges, right to counsel, privilege against self-incrimination, and the right to confront and cross-examine;⁸ proof beyond a reasonable doubt;⁹ and the guarantee against double jeopardy.¹⁰

In the recent case of *Schall v. Martin*, however, the Court departed from this general trend when it upheld the constitutionality of the pretrial preventive detention of juveniles. *Schall* dealt with a due process challenge to section 320.5(3)(b) of New York's Family Court Act.¹¹ Section 320.5(3)(b) authorizes pretrial detention of an accused juvenile delinquent based on a finding that there is a serious risk that the child may, before his or her fact-finding hearing, commit a crime.¹² There are no statutorily mandated criteria which a family court judge must consider in reaching the decision on whether to detain an accused juvenile.¹³ Such a decision is generally based on a brief interview of the juvenile, who usually has no effective assistance of counsel, together with limited background information supplied by the probation office.¹⁴ The judge need not even make a finding that there is probable cause to believe that the juvenile committed the charged offense before ordering detention.¹⁵ If the judge decides to detain the youth, the juvenile may be held in a detention facility for up to seventeen days prior to his or her fact-finding hearing.¹⁶ In upholding the constitutionality of this statute, the Supreme Court retreated from its critical stance toward the lack of procedural regularity in juvenile

⁶ See *Gault*, 387 U.S. at 27; *Kent*, 383 U.S. at 562.

⁷ *McKever*, 403 U.S. at 544 (Brennan, J., concurring) (quoting *Singer v. United States*, 380 U.S. 24, 31 (1965), and *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

⁸ *Gault*, 387 U.S. at 31-59.

⁹ *Winship*, 397 U.S. at 364.

¹⁰ *Breed*, 421 U.S. at 541.

¹¹ *Schall*, 104 S. Ct. at 2408.

¹² *Id.* at 2405. The pertinent text of the statute is as follows:

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

....

3. The court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained; . . . (b) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime.

N.Y. FAM. CT. ACT § 320.5 (McKinney 1983).

¹³ *Schall*, 104 S. Ct. at 2420 (Marshall, J., dissenting) (quoting *United States ex rel. Martin v. Strasburg*, 513 F. Supp. 691, 701 (S.D.N.Y. 1981)).

¹⁴ *Id.* at 2420-21 (Marshall, J., dissenting).

¹⁵ *Id.* at 2420 (Marshall, J., dissenting).

¹⁶ *Id.* at 2413.

proceedings and resurrected the idealistic view of the system that, in its prior decisions, it had consistently disparaged.¹⁷

The litigation in *Schall* arose when Gregory Martin was arrested on December 13, 1977 and charged with first-degree robbery, second-degree assault, and criminal possession of a weapon.¹⁸ Martin was fourteen years old at the time, and therefore came within the jurisdiction of New York's Family Court.¹⁹ A petition of delinquency was filed against Martin, who made his initial appearance in Family Court on December 14, accompanied by his grandmother.²⁰ The judge, citing possession of the loaded weapon, the false address given to the police, and the lateness of the hour when Martin was arrested as evidencing a lack of supervision, ordered Martin detained under section 320.5(3)(b) until his fact-finding hearing.²¹ Martin was preventively detained for a total of fifteen days prior to his hearing.²² A probable cause hearing for Martin was not held until five days after he was placed in detention, although at the hearing probable cause was found to exist for all the crimes charged.²³ At the fact-finding hearing held on December 27 through December 29, Martin was found guilty of robbery and criminal possession of a weapon and was placed on two years probation.²⁴ Ironically, therefore, although Martin was remanded for preventive detention at his initial appearance in juvenile court, prior even to a probable cause hearing, he was released immediately after he had been found guilty of the crimes charged.

While still in preventive detention, Martin instituted a habeas corpus class action in the United States District Court for the Southern District of New York.²⁵ The class members sought a declaratory judgment that New York's preventive detention provision, section 320.5(3)(b), violated the due process clause of the fourteenth amendment to the United States Constitution.²⁶ The federal district court, ruling on this class action, held pretrial detention under section 320.5(3)(b) violative of due process on three principal grounds.²⁷ First, the court found that the provision gives the judge license to act arbi-

¹⁷ See *supra* note 2.

¹⁸ *Schall*, 104 S. Ct. at 2406.

¹⁹ *Id.* The facts which pertain to the other two named plaintiffs in the class action, Luis Rosario and Kenneth Morgan, are substantially similar to those in Martin's case. Rosario was charged with attempted first-degree robbery and second-degree assault. Probable cause was found six days after he had been remanded under Section 320.5(3)(b). Twenty-one days later Rosario was released to his father, and the case was later terminated without adjustment. Morgan was charged on March 27, 1978 with attempted robbery and attempted grand larceny. He had been arrested four previous times, and his mother refused to come to court this time. A probable cause hearing was not held until April 4. Morgan was found guilty of harassment and petty larceny and was placed with the Department of Social Services for 18 months. *Id.* at 2407-08.

²⁰ *Id.* at 2406.

²¹ *Id.* at 2407.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 2408.

²⁶ *Id.* The district court certified the class, and also held that the petitioners were not required to exhaust their state remedies before resorting to federal habeas, as the highest state court of New York already had rejected an identical challenge to the statute. *Id.* The petitioners also brought an equal protection claim, but did not raise it on appeal. *Id.* at 2408 n.11.

²⁷ *Id.* at 2408 n.12. See *United States ex rel. Martin v. Strasburg*, 513 F. Supp. 691 (S.D.N.Y. 1981).

trarily and capriciously in predicting the likelihood of future criminal conduct.²⁸ Second, the court held that pretrial detention without a prior adjudication of probable cause is a per se violation of due process.²⁹ Third, pretrial preventive detention is constitutionally impermissible, according to the court, because the detainee is punished before he or she has been adjudicated guilty.³⁰

In affirming the district court's holding, the United States Court of Appeals for the Second Circuit concluded that the provision was not utilized principally for preventive purposes, but rather to impose punishment for unadjudicated criminal acts.³¹ The appeals court stressed that the vast majority of detained juveniles either have their petitions dismissed before an adjudication of delinquency or are released after adjudication.³² In addition, the court of appeals found that the state's interest in preventing crime was not sufficiently compelling in this instance to justify upholding the provision.³³

On appeal, the United States Supreme Court reversed the court of appeals' decision,³⁴ and held that preventive detention under the New York Family Court Act does not violate the due process rights guaranteed to juveniles by the fourteenth amendment.³⁵ Applying the "fundamental fairness" standard it had developed in its past juvenile justice cases,³⁶ the Court determined that section 320.5(3)(b) serves the legitimate state objective of protecting both the community and the juvenile from the consequences of crime.³⁷ The Court further found that the procedural protections afforded pretrial detainees under the New York statute satisfy the requirements of the due process clause.³⁸

Schall's principal significance lies in the Supreme Court's shift in emphasis from the liberty and due process rights of the juvenile, which were the focus of its prior opinions in the area of juvenile justice, to the crime prevention interests of the state. The Court now appears to view the state's crime prevention interests as overriding, perhaps due to the rise in serious juvenile offenses. This change in perspective does not, however, provide support for the Court's holding in *Schall*, which subjects juveniles to consequences that are comparable to those suffered by adult criminals without providing the corresponding procedural protections. The Court reaches this outcome by giving insufficient consideration to the realities of conditions in juvenile detention facilities, and by reviving a view of the juvenile court system as functioning in a parental, or "parens patriae," capacity toward the juvenile. In its previous decisions in this area, however, the Court itself has disavowed such an idealistic view of juvenile delinquency proceedings.

²⁸ *Martin*, 513 F. Supp. at 712-13.

²⁹ *Id.* at 717. The district court here relied on the Supreme Court's decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975), in which the Court held pretrial detention of adults without a finding of probable cause per se unconstitutional. *Id.* at 114.

³⁰ *Martin*, 513 F. Supp. at 716.

³¹ *Martin v. Strasburg*, 689 F.2d 365, 372 (2d Cir. 1982).

³² *Id.* at 369 n.18.

³³ *Id.* at 372-73.

³⁴ *Schall*, 104 S. Ct. at 2405-06. Justice Rehnquist was joined in the majority opinion by Chief Justice Burger, along with Justices White, Blackmun, Powell, and O'Connor. *Id.* at 2405. The dissenting opinion was authored by Justice Marshall, who was joined by Justices Brennan and Stevens. *Id.* at 2419 (Marshall, J., dissenting).

³⁵ *Id.* at 2405-06.

³⁶ *Id.* at 2409.

³⁷ *Id.* at 2415.

³⁸ *Id.* at 2417.

In *Schall* the Court, relying on the *parens patriae* concept, upheld a broad pretrial detention scheme without providing any guidelines by which the detention decision should be made. Content to allow review of detention decisions to be made on a case by case basis, the Court did not adequately address the difficulties inherent in individual review, one of which is that a detainee would find it difficult to convince an appellate court that he or she would not have committed a crime if released. The Court's general position in *Schall* is one of detachment from the juvenile delinquency process in an effort to maintain an anachronistic goal of "flexibility and informality" within the system.

This casenote will analyze the *Schall* decision and discuss its potential ramifications on both future Supreme Court cases in the area of juvenile due process and on the juvenile justice system itself. First the casenote will present a historical overview of Supreme Court opinions concerning constitutionally required protections for juveniles in delinquency proceedings. Second, the reasoning of both the majority and the dissenting opinions in *Schall* will be discussed. The casenote will then analyze these opinions, and will conclude that the dissenting opinion is more historically consistent in its reasoning and outcome with the Court's prior decisions. Finally, the potential ramifications of the *Schall* Court's holding on the juvenile justice system will be discussed, as well as *Schall's* effect on future Supreme Court decisions in this area.

I. THE FUNDAMENTAL FAIRNESS TEST AND THE GROWTH OF ITS APPLICATION TO JUVENILE DUE PROCESS

An examination of the Supreme Court's major juvenile justice opinions during the past twenty years reveals the Court's doubt as to whether the separate, civil juvenile delinquency proceedings have sufficiently protected juveniles' due process rights. Acknowledging that the lack of procedural requirements has had a detrimental effect, particularly in light of its recognition that the penalties and trauma to which the juvenile delinquent is subjected closely approximate those visited upon adult criminals, the Court developed a "fundamental fairness" standard by which it measures juvenile justice cases. This test requires procedural regularity in delinquency proceedings such that juveniles do not find themselves the victims of the very "flexibility" that was intended to be the advantage of a separate juvenile system. Over the past two decades the Court has found that juveniles' due process rights could be protected by the application of some criminal procedural safeguards to the delinquency proceeding. Although the increase in procedural protections served to lessen the system's informality, the Court generally took the position that, while the informality concern is a valid one, it cannot take precedence over due process if the juvenile proceedings are to comport with the fundamental fairness required by the fourteenth amendment.

In the 1966 case of *Kent v. United States*³⁹ the Supreme Court first evaluated the juvenile justice system in light of its intended purposes, its general failure to accomplish those purposes, and the remedies which were needed to bring juvenile delinquency proceedings within the boundaries of the due process clause. The defendant in *Kent* was sixteen years old and on probation when he was arrested for rape and robbery.⁴⁰ He was detained at the Receiving Home for Children for almost a week without an arraign-

³⁹ 383 U.S. 541 (1966).

⁴⁰ *Id.* at 543.

ment or a determination of probable cause by a judicial officer.⁴¹ In his pretrial motions, Kent sought to be placed in psychiatric care, and also requested that his counsel be given access to his Social Service file to aid in the preparation of his defense.⁴² The judge did not rule on either motion, but proceeded to waive jurisdiction over Kent pursuant to a District of Columbia statute,⁴³ remanding his case to the United States District Court for the District of Columbia for trial without reciting any reasons for the decision.⁴⁴

The Supreme Court concluded that the procedure followed in *Kent* violated the juvenile's due process rights.⁴⁵ The Court held that Kent was entitled to a hearing on the issue of whether the juvenile court should waive jurisdiction over his case.⁴⁶ It was also required, added the Court, that the juvenile court judge provide a statement of reasons for the waiver decision.⁴⁷ The Court in reaching its holding examined the procedures followed to determine whether they comported with "the essentials of due process and fairness."⁴⁸ This approach, which was to become a standard in later Supreme Court juvenile justice cases,⁴⁹ focused on the need for procedural regularity.⁵⁰ Applying this standard to *Kent*, the Court stated that while the statute governing waiver of jurisdiction over a juvenile grants the judge a substantial degree of discretion, it assumes procedural regularity sufficient, under the circumstances, to satisfy the basic requirements of the fourteenth amendment.⁵¹ These necessary safeguards were not being employed in the application of the District of Columbia waiver statute, and thus the Court found the procedure unconstitutional. Statutory discretion does not, the Court emphasized, confer upon the juvenile court judge a license for arbitrary procedure.⁵²

In holding that the waiver procedure in *Kent* violated the juvenile's due process rights, the Supreme Court expressed its growing concern as to whether the juvenile

⁴¹ *Id.* at 544. The Court noted that, in the case of adults, arraignment before a magistrate for determination of probable cause is provided for by law and regarded as fundamental. *Id.* at 545 n.3.

⁴² *Id.* at 545-46.

⁴³ The District of Columbia waiver of jurisdiction statute provides as follows:

When a child 16 years of age or over is charged with an offense which if committed by a person 18 years of age or over is a felony, or when a child under 18 years of age is charged with an offense which if committed by a person 18 years of age or over is punishable by death or life imprisonment, a judge may, after full investigation, waive jurisdiction and order the child held for trial under the regular procedure of the court which would have jurisdiction of the offense if committed by a person 18 years of age or over

D.C. CODE ENCYCL. § 11-1553 (West 1966). While the above-cited provision is the most current, the statute under which jurisdiction was waived in *Kent*, D.C. CODE ANN. § 11-914 (1961), contained substantially the same language.

⁴⁴ *Kent*, 383 U.S. at 546.

⁴⁵ *Id.* at 554.

⁴⁶ *Id.* at 557.

⁴⁷ *Id.*

⁴⁸ *Id.* at 553.

⁴⁹ *See, e.g.*, *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971) (applicable due process standard is fundamental fairness); *In re Winship*, 397 U.S. 358, 365 (1970) (proof beyond a reasonable doubt is among essentials of "due process and fair treatment" required during juvenile adjudicatory stage).

⁵⁰ *Kent*, 383 U.S. at 553.

⁵¹ *Id.* The Juvenile Court Act provision at issue in *Kent* expressly provided only for a "full investigation." *Id.* at 547; *see* D.C. CODE ENCYCL. § 11-1553 (West 1966). It contained no standards to govern the judge's decision as to waiver of jurisdiction. *Kent*, 383 U.S. at 547.

⁵² 383 U.S. at 553.

justice system as a whole was performing its function in such a way as to provide juveniles with fair treatment.⁵³ The theoretical objectives of a separate, civil juvenile justice system, according to the Court, were to provide guidance and rehabilitation for the child and protection for society, and not to fix criminal responsibility.⁵⁴ Because the state was supposed to proceed in a *parens patriae* manner toward the child, the Court observed, courts in the past had relied on the premise that the proceedings were civil in nature, and not criminal, to assert that the child could not have the benefit of important rights available in criminal cases.⁵⁵ The Court acknowledged, however, that serious questions were being raised by commentators as to whether the system's actual performance sufficiently protected juveniles' rights so as to tolerate immunity of the process from the reach of constitutional guarantees applicable to adults.⁵⁶

Doubts concerning whether a juvenile's due process rights were sufficiently protected under the existing separate juvenile system continued to plague the Court when in 1967 it decided the case of *In re Gault*.⁵⁷ In *Gault*, a fifteen year old boy was adjudged a delinquent for making lewd telephone calls, and was committed to an Industrial School for six years by an Arizona juvenile court.⁵⁸ No notice was given to the boy's parents that he had been taken into custody, and they were not served with a copy of the petition alleging delinquency.⁵⁹ The complainant, the recipient of the telephone call, did not attend the boy's hearing, and no record was made of the proceedings.⁶⁰ The Supreme Court reversed the sentence on due process grounds, holding that certain procedural rights not present in the disposition of *Gault's* case were guaranteed the juvenile by the Constitution.⁶¹ These rights included adequate notice of charges,⁶² the right to counsel,⁶³ the right of cross-examination,⁶⁴ and the privilege against self-incrimination.⁶⁵

In concluding that the Arizona procedure was unconstitutional, the *Gault* Court applied the *Kent* standard of due process and fairness to the juvenile delinquency proceeding at issue, and adopted an even stronger stance in affirming the applicability of the fourteenth amendment to the juvenile system.⁶⁶ The Court again criticized the lack of substantive standards and procedural rules in delinquency proceedings as compared with those available in criminal trials.⁶⁷ The Court noted that if *Gault* had been over the age of eighteen, he would have been subject to a lesser sentence, and further, would have been entitled to substantial procedural rights under both the United States and Arizona Constitutions.⁶⁸

⁵³ *Id.* at 555-56.

⁵⁴ *Id.* at 554.

⁵⁵ *Id.* at 555. The Court stressed, however, that the purpose of the juvenile judge — to function in a "parental" relationship — was not an invitation to procedural arbitrariness. *Id.*

⁵⁶ *Id.*

⁵⁷ 387 U.S. 1 (1967).

⁵⁸ *Id.* at 7-8.

⁵⁹ *Id.* at 5.

⁶⁰ *Id.* at 5-6.

⁶¹ *Id.* at 30-31.

⁶² *Id.* at 33.

⁶³ *Id.* at 41.

⁶⁴ *Id.* at 57.

⁶⁵ *Id.* at 55.

⁶⁶ *Id.* at 13, 18-31.

⁶⁷ *Id.* at 18-19.

⁶⁸ *Id.* at 29.

In reaching its decision to overturn the juvenile's sentence, the Court stated that the separate juvenile justice system was originally based on the belief that the state should proceed in a *parens patriae* capacity in juvenile proceedings. Acting in such a capacity, the Court continued, the state was not to determine the child's guilt or innocence, but was to ascertain what the child's circumstances were and what was best to be done in his interest and in the interest of the state.⁶⁹ The Court observed that the right of states to deny children procedural rights had been justified by early proponents of a separate juvenile system with the assertion that a child was always in some form of custody.⁷⁰ Therefore, a child being committed to the custody of the State, the Court noted, had not been viewed in the same light as an adult in similar circumstances.⁷¹ The *Gault* Court asserted that both the justification for and the results of the system were deeply troubling, and stated that departures from established principles of due process had frequently resulted not in enlightened procedure, but rather in arbitrariness.⁷² The failure to observe the fundamental requirements of due process, according to the Court, had also been responsible for instances of unfairness, inadequate or inaccurate findings of fact, and unfortunate prescriptions of remedy.⁷³ In concluding its overview of the juvenile justice system, the Court found that the history of that system had demonstrated that unbridled discretion, however benevolently motivated, was frequently a poor substitute for principled procedure.⁷⁴

The *Gault* Court was, overall, unwilling to accept the "civil" label-of-convenience" that had been applied to the juvenile justice system.⁷⁵ The "civil" label, according to the Court, was used by proponents of a separate, minimally regulated juvenile system in an attempt to distinguish juvenile proceedings and their consequences from full-fledged criminal trials.⁷⁶ The Court, however, found this distinction artificial.⁷⁷ The Court further stressed that it was of no constitutional consequence that the institution to which the juvenile was committed in *Gault* was called an "industrial school."⁷⁸ The Court stated that the "school" was merely an institution in which the child was incarcerated with his world "peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide."⁷⁹ In order to expose a juvenile to such conditions, the Court required a hearing that would incorporate the essentials of due process and fair treatment.⁸⁰

⁶⁹ *Id.* at 16; see Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109-10 (1909).

⁷⁰ *Gault*, 387 U.S. at 17.

⁷¹ *Id.*

⁷² *Id.* at 18-19.

⁷³ *Id.* at 19-20.

⁷⁴ *Id.* at 18. The Court stated:

The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.

Id. at 18-19.

⁷⁵ *Id.* at 49-50.

⁷⁶ *Id.*

⁷⁷ *Id.* at 50.

⁷⁸ *Id.* at 27.

⁷⁹ *Id.*

⁸⁰ *Id.* at 30 (quoting *Kent*, 383 U.S. at 562).

In the 1970 case of *In re Winship*,⁸¹ the Court continued its expansion of the protections available to the juvenile in delinquency proceedings. The Court in *Winship* struck down a twelve year old's six year sentence to a training school for stealing a pocketbook,⁸² and held the criminal evidentiary requirement of proof beyond a reasonable doubt applicable to juvenile fact-finding hearings.⁸³ As it had in the two previous cases of *Gault* and *Kent*, the Court applied the "essentials of due process and fair treatment" standard,⁸⁴ and concluded that the same considerations that demand extreme caution in fact-finding to protect adults apply equally to children.⁸⁵ The Court found this caution to be particularly important in light of the *Gault* decision, where it had explicitly rejected the theory that juvenile proceedings were not designed to punish but purely to rehabilitate the child.⁸⁶

The Court was not ready, however, to give up completely on the concept of a separate juvenile justice system. While acknowledging the persistent shortcomings of juvenile proceedings, the Court sought to preserve what it believed to be a beneficial aspect of the system's separateness: maintenance of a certain degree of informality and flexibility in dealing with youthful offenders.⁸⁷ Therefore, in reaching its decision in *Winship*, the Court noted that applying the reasonable doubt requirement to juvenile proceedings would not affect the informality, flexibility, or speed of the fact-finding hearing.⁸⁸

Chief Justice Burger, in dissent, criticized the Court's holding for its lack, in his view, of sufficient emphasis on the flexibility concern.⁸⁹ According to Chief Justice Burger, the juvenile system needed not more but less judicial formalism in order to survive as a separate process.⁹⁰ In declaring his opposition to the "further strait-jacketing of an already overly restricted system,"⁹¹ Chief Justice Burger's dissent was indicative of his apprehension that the juvenile system's original goals of informality and flexibility, qualities that he still considered important to the uniqueness of the system, were being unduly suppressed by the Court's opinions in favor of more rigid, trial-type proceedings.

In *McKeiver v. Pennsylvania*,⁹² decided one year after *Winship*, the Supreme Court applied the same reasoning as it had in its prior opinions, but concluded that it was unnecessary to transfer a particular criminal constitutional right to juvenile adjudication. In a plurality opinion, the *McKeiver* Court held that trial by jury was not a constitutional requirement in juvenile proceedings.⁹³ Joseph McKeiver, age sixteen, was charged with robbery, larceny, and receiving stolen goods as acts of juvenile delinquency under Penn-

⁸¹ 397 U.S. 358 (1970).

⁸² *Id.* at 360-61.

⁸³ *Id.* at 368.

⁸⁴ *Id.* at 367.

⁸⁵ *Id.* at 365.

⁸⁶ *Id.*

⁸⁷ *Id.* at 367.

⁸⁸ *Id.* at 366. This consideration seems slightly at variance with the rest of the opinion's strong reliance on *Gault's* critical view of the often unjust results of the minimally regulated juvenile court system.

⁸⁹ *Id.* at 376 (Burger, C.J., dissenting).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² 403 U.S. 528 (1971).

⁹³ *Id.* at 528, 545.

sylvania law.⁹⁴ McKeiver's actual offense was participating with twenty or thirty youths in pursuing three young teenagers and taking twenty-five cents from them.⁹⁵ McKeiver was represented by counsel at his adjudication hearing, but he did not meet his counsel until immediately prior to the hearing and was allowed only a five minute interview.⁹⁶ McKeiver's request for a jury trial was denied; he was adjudged a delinquent and placed on probation.⁹⁷

In reaching its holding that a jury trial was not necessary in a delinquency proceeding, the Court stated that juveniles were not entitled to all rights available to adult criminal defendants.⁹⁸ Instead, the Court reasoned that only those rights which are necessary to proper fact-finding and which would not substantially impair speed and informality would be required.⁹⁹ Pointing out that trial by jury is not even a necessary fact-finding element of every criminal proceeding,¹⁰⁰ the Court concluded that it would not be a safeguard necessary to comport with the fundamental fairness required in a juvenile proceeding.¹⁰¹ The Court stated that it did not wish to hasten the potential result of imposing a jury requirement — delay and formality that might turn the juvenile hearing into a full adversary proceeding.¹⁰²

The Supreme Court in *McKeiver*, however, as it had in its prior decisions, noted its general disappointment with the performance of the juvenile justice system.¹⁰³ Although reasoning that "too often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged,"¹⁰⁴ the Court nonetheless concluded that the right to a jury trial would not cure this problem,¹⁰⁵ which seemed more a function of the issue of the proper role of a juvenile court judge than of his or her fact-finding ability. Thus, while the *McKeiver* Court did not find a jury trial to be necessary to juvenile due process, it did not depart from its traditional approach to juvenile justice cases of requiring fair procedures which would satisfactorily protect the juvenile's liberty interest.

The decision of the Court four years later, in *Breed v. Jones*,¹⁰⁶ demonstrated that *McKeiver* did not represent a true break from the Court's earlier juvenile justice cases. In *Breed*, a unanimous Court held that a juvenile found guilty of robbery in juvenile court and subsequently tried in state superior court for the same crime had been unconstitutionally subjected to double jeopardy.¹⁰⁷

⁹⁴ *Id.* at 534-35.

⁹⁵ *Id.* at 536.

⁹⁶ *Id.* at 535 & n.2.

⁹⁷ *Id.* at 535.

⁹⁸ *Id.* at 545-47. The Court still avoided, however, the "wooden approach" of labeling the juvenile procedure either "civil" or "criminal." *Id.* at 541.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 547.

¹⁰¹ *Id.* at 545. The Court, noting that the majority of states statutorily denied juveniles the right to a jury trial, observed that when a practice is followed by a large number of states, this at a minimum provides an inference of constitutionality. *Id.* at 548.

¹⁰² *Id.* In dissent, however, Justice Douglas stressed his belief that a child who feels he has been dealt with fairly and not merely expediently or as speedily as possible will be a better prospect for rehabilitation. *Id.* at 566 (Douglas, J., dissenting).

¹⁰³ *Id.* at 543-44.

¹⁰⁴ *Id.* at 544.

¹⁰⁵ *Id.* at 547.

¹⁰⁶ 421 U.S. 519 (1975).

¹⁰⁷ *Id.* at 531. Double jeopardy is defined by the United States Constitution as follows: "[N]or

In reaching its conclusion that the double jeopardy clause of the constitution had been violated, the Court again employed the fundamental fairness standard.¹⁰⁸ Noting the gap between the original intentions of the juvenile system and its present realities, the *Breed* Court reaffirmed that the civil label-of-convenience was no longer applicable to a juvenile fact-finding hearing.¹⁰⁹ The *Breed* Court found no meaningful distinction between the juvenile proceeding in *Breed* and a criminal prosecution in respect to the kinds of risks to which the juvenile was exposed.¹¹⁰ Such "risks" included incarceration for a lengthy period of time, exposure to potentially dangerous juvenile offenders, and the lasting stigma of a guilty finding.¹¹¹ Referring specifically to incarceration of the juvenile, the Court reaffirmed the position taken in *Gault*: incarceration remains incarceration, with all its potentially detrimental effects, regardless of its purportedly benevolent purposes.¹¹² The Court concluded that while the rehabilitative goals of the system are admirable, they do not change the drastic nature of the action taken.¹¹³ In terms of potential consequences, therefore, the *Breed* Court continued to find little to distinguish a juvenile adjudicatory hearing from a traditional criminal proceeding.¹¹⁴ In light of this similarity, the Court required that a hearing on the issue of whether the juvenile should be tried as an adult must take place prior to the juvenile court adjudication, so as to prevent the juvenile from being unconstitutionally tried twice for the same offense.¹¹⁵

The *Breed* Court did note that application of the rule against double jeopardy would not diminish flexibility and informality to the extent that those qualities relate to the goals of the juvenile court system.¹¹⁶ The Court made clear, however, that speed and informality were not to be the sole determinative factors in reviewing a constitutional challenge to juvenile proceedings.¹¹⁷ Although the application of any due process standard would in some measure diminish flexibility, the Court emphasized that this alone was an insufficient reason to refuse its application where warranted.¹¹⁸

As is apparent from the above line of decisions, the Supreme Court's principal concern in the juvenile justice area has been to protect the juvenile involved in a delinquency proceeding from the potential abuses that may arise from the lack of procedural and substantive standards in the juvenile justice system. While the Court has also manifested a valid concurrent interest in maintaining sufficient flexibility and informality within the system for it to properly handle the special needs of juvenile offenders, it has recognized that too great an emphasis on these concerns may result in due process violations. Thus, in these decisions the Court has asserted that, should there be a conflict between these different interests, the flexibility and informality concerns would not take precedence over the requirement of fundamental fairness in the proce-

shall any person be subject for the same offense to be twice put in jeopardy of life or limb"
U.S. CONST. amend. V.

¹⁰⁸ *Breed*, 421 U.S. at 531.

¹⁰⁹ *Id.* at 528-29.

¹¹⁰ *Id.* at 531.

¹¹¹ *Id.* at 530 n.12.

¹¹² *Id.* (quoting *Fain v. Duff*, 488 F.2d 218, 225 (5th Cir. 1973)).

¹¹³ *Id.*

¹¹⁴ *Id.* at 531.

¹¹⁵ *Id.* at 537-38.

¹¹⁶ *Id.* at 535.

¹¹⁷ *Id.* at 535 n.15.

¹¹⁸ *Id.*

ture at issue.¹¹⁹ In its prior opinions, however, the Court had dealt exclusively with the adjudicatory rights of juveniles. It was not until the 1984 case of *Schall v. Martin* that the Court for the first time considered the pre-adjudicatory rights of juveniles under the due process clause.

II. THE SCHALL OPINION

A. *The Juvenile Court System of New York*

Schall involved a due process challenge to section 320.5(3)(b) of the New York Family Court Act.¹²⁰ This section provides for pretrial preventive detention of any juvenile whom the judge believes would be substantially likely to commit a crime if released.¹²¹ In determining whether section 320.5(3)(b) violates the Constitution the primary focus is on the detention procedure itself and the extent to which it fails to provide protections which comply with the fundamental fairness standard established by the Supreme Court.¹²² Fundamental fairness implies procedural regularity sufficient to comport with the due process requirement of the fourteenth amendment.¹²³ Thus, this subsection will trace the application of the statute in the context of New York's juvenile justice system as a whole.

In New York, a child over the age of seven but less than sixteen who commits an act that would constitute a crime if committed by an adult comes under the jurisdiction of the Family Court.¹²⁴ When a juvenile is arrested, the arresting officer must immediately notify the parent or guardian.¹²⁵ The child then is usually released into the custody of his or her parent or guardian after being issued an "appearance ticket" requiring him to meet with the probation service on a specified day.¹²⁶ The first step in the juvenile delinquency process is termed "probation intake."¹²⁷ This involves a ten to forty minute interview of the juvenile, the arresting officer, and sometimes the parent or guardian by a probation officer.¹²⁸ On the basis of the information obtained in the interview together with the juvenile's record, the probation officer decides whether the case should be

¹¹⁹ See *supra* text accompanying notes 116-18. See also Comment, *The Supreme Court and Pretrial Detention of Juveniles: A Principled Solution to a Due Process Dilemma*, 132 U. PA. L. REV. 95, 100 (1983).

¹²⁰ For text of section 320.5(3), see *supra* note 12.

¹²¹ *Schall*, 104 S. Ct. at 2405.

¹²² *Id.* at 2409.

¹²³ *Kent*, 383 U.S. at 553.

¹²⁴ N.Y. FAM. CT. ACT §§ 301.2(1), 302.1(1) (McKinney 1983). Ironically, children aged 13 or over accused of murder and children aged 14 or over accused of kidnapping, arson, rape, or a few other serious crimes are exempted from coverage of the preventive detention provision and instead are prosecuted as juvenile offenders in the adult criminal courts. N.Y. PENAL §§ 10.00(18), 30.00(2) (McKinney Supp. 1983-1984). These juveniles are therefore not subject to preventive detention under this or any other provision. See *Schall*, 104 S. Ct. at 2419 n.2 (Marshall, J., dissenting).

¹²⁵ N.Y. FAM. CT. ACT § 305.2(3) (McKinney 1983).

¹²⁶ *Id.* § 307.1(1).

¹²⁷ *Schall*, 104 S. Ct. at 2420 (Marshall, J., dissenting). A juvenile may arrive at intake by one of three routes: he may be brought there directly by an arresting officer; he may be detained for a brief period after his arrest and then taken to intake; or he may be released upon arrest and directed to appear at a designated time. *United States ex rel. Martin v. Strasburg*, 513 F. Supp. 691, 701 (S.D.N.Y. 1981).

¹²⁸ *Schall*, 104 S. Ct. at 2420 (Marshall, J., dissenting).

disposed of informally or whether it should be referred to the Family Court.¹²⁹ If the probation officer decides to refer the case to the court, he or she makes an additional recommendation regarding whether the juvenile should be detained prior to his or her fact-finding hearing.¹³⁰ Section 320.5(3)(b) of the New York Family Court Act authorizes pretrial detention of an accused juvenile delinquent based on a finding that there is a "serious risk" that the child "may before the return date commit an act which if committed by an adult would constitute a crime."¹³¹ There are no criteria which are required to be considered when making this decision.¹³² Instead, the statute requires notice, a hearing, and a statement of reasons from the judge for the decision reached.¹³³ The judge at the detention hearing bases his or her decision on the following: a petition for delinquency prepared by a state agency which charges the juvenile with the offense; one or more affidavits attesting to the juvenile's involvement in the charged offense; and the report and recommendation of the probation officer.¹³⁴ The probation officer himself, however, rarely attends the hearing.¹³⁵ As the complainant generally also does not appear at this hearing, there is frequently no one present who has personal knowledge of the alleged offense, apart from the juvenile.¹³⁶

The judge appoints counsel for the juvenile when his case is called.¹³⁷ Often the lawyer has little opportunity to make an independent inquiry into the juvenile's background or to prepare arguments.¹³⁸ In addition, the judge rarely interviews the juvenile; he neither conducts an independent inquiry into the truth of the allegations,¹³⁹ nor determines probable cause.¹⁴⁰ A typical hearing lasts between five and fifteen minutes and the judge renders his decision immediately afterward.¹⁴¹ If the judge decides that detention is in order, the juvenile may be placed in either secure or nonsecure detention.¹⁴² "Secure" detention, according to the New York Family Court Act, is defined as a facility "characterized by physically restricting construction, hardware and procedures."¹⁴³ A juvenile may be so detained for a period of up to seventeen days.¹⁴⁴

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ N.Y. FAM. CT. ACT § 320.5(3)(b) (McKinney 1983).

¹³² *Schall*, 104 S. Ct. at 2420 (Marshall, J., dissenting); see United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 701 (S.D.N.Y. 1981).

¹³³ *Schall*, 104 S. Ct. at 2416-17.

¹³⁴ *Id.* at 2420-21 (Marshall, J., dissenting).

¹³⁵ *Id.* at 2421 (Marshall, J., dissenting).

¹³⁶ *Id.* (quoting *Martin*, 513 F. Supp. at 702).

¹³⁷ *Id.*

¹³⁸ *Id.*; see *Martin*, 513 F. Supp. at 702, 708.

¹³⁹ *Schall*, 104 S. Ct. at 2421 (Marshall, J., dissenting).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* A sample hearing was set forth in Plaintiffs' Exhibit 18a, the operative parts of which follow:

COURT OFFICER: Will you identify yourself.

....

TYRONE PARSON: Tyrone Parson, age 15.

THE COURT: Miss Brown, how many times has Tyrone been known to the Court?

....

MISS BROWN: Seven times.

THE COURT: Remand the respondent.

Id.

¹⁴² *Id.* at 2413.

¹⁴³ N.Y. FAM. CT. ACT § 301.2(4) (McKinney 1983). The *Schall* Court found secure detention

B. *The Opinion of the Court*

The Supreme Court in *Schall* upheld the constitutionality of New York's pretrial juvenile preventive detention statute under the due process clause of the fourteenth amendment.¹⁴⁵ The Court concluded that detention under the statute serves the legitimate state objective of crime prevention. Furthermore, the Court found the procedural protections afforded pretrial detainees adequate to comply with the due process requirement of fundamental fairness.¹⁴⁶

In examining the constitutionality of juvenile preventive detention, the *Schall* Court first reaffirmed the principle that the due process clause of the fourteenth amendment is indeed applicable in juvenile proceedings.¹⁴⁷ Certain basic constitutional protections enjoyed by adults, the Court stated, also apply to juveniles.¹⁴⁸ The Court noted, however, that the Constitution does not require the elimination of all differences between the treatment of adults and juveniles.¹⁴⁹ According to the Court, there is a fundamental difference between the juvenile proceeding and the criminal trial: in juvenile cases the state has a *parens patriae* interest in promoting the welfare of the child which is absent in adult proceedings.¹⁵⁰ The Court stressed that it had always attempted to strike a balance between the intended informality and flexibility of the juvenile proceeding and the fundamental fairness required by the due process clause.¹⁵¹ In analyzing whether section 320.5(3)(b) strikes such a balance, the Court introduced a new two-prong test.¹⁵² The first prong focuses on whether juvenile preventive detention under section 320.5(3)(b) serves a legitimate state objective, and whether it does so without punishing the juvenile prior to finding him or her guilty of the charged offense.¹⁵³ The second prong asks whether the procedural safeguards implicit in the statute are adequate to authorize the pretrial detention of at least some juveniles charged with crimes.¹⁵⁴

Turning first to an analysis of the first prong of this new test, the Court discussed the objectives of section 320.5(3)(b) to determine whether they were "legitimate." In considering this issue, the Court cited a New York state case which had upheld the

to be "restrictive," but described it as approximating a dormitory, where misbehavior is punished by confinement to one's room. *Schall*, 104 S. Ct. at 2413. Judge Quinones, a New York family court judge, along with the *Schall* dissent, characterized secure detention in harsher terms. *See id.* at 2423-24 (Marshall, J., dissenting). Judge Quinones testified at the trial that juveniles in secure detention were liable to be exposed to both assault and sexual assault. *Id.* The dissent noted the further findings of the trial court that in a secure facility, the juveniles are subjected to strip-searches, wear institutional clothing, and follow an institutional regimen. *Id.* at 2422 (Marshall, J., dissenting) (quoting *Martin*, 513 F. Supp. at 695 n.5).

¹⁴⁴ *Schall*, 104 S. Ct. at 2413.

¹⁴⁵ *Id.* at 2406.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2409.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 2409, 2412. The "legitimate state objective" standard applied by the majority is not as stringent as that employed by the court of appeals, which sought a "compelling" state interest to justify the detention. *See Martin v. Strasburg*, 689 F.2d 365, 372 (2d Cir. 1982).

¹⁵⁴ *Schall*, 104 S. Ct. at 2409.

statute in the face of a similar constitutional challenge.¹⁵⁵ The New York state court had found that the statute was designed to protect both the child and society from the potential consequences of the juvenile's criminal acts.¹⁵⁶ Finding this purpose to be a legitimate and even compelling state interest,¹⁵⁷ the Court noted that the harm suffered by a crime victim is not dependent upon the age of the perpetrator.¹⁵⁸ In considering the juvenile's interest in freedom, on the other hand, the Court found such interest to be qualified by the fact that the juvenile is always in some form of custody.¹⁵⁹ The Court observed, however, that section 320.5(3)(b) could only be upheld upon a finding that the statute was not punishing the juvenile under the guise of deterring him or her from engaging in further criminal activity.¹⁶⁰ Absent express intent to punish, the Court's analysis turned on the "alternative purpose test" of whether a purpose other than punishment could be rationally assigned to the detention, and whether such detention appeared excessive in relation to that purpose.¹⁶¹ The Court found no indication that preventive detention was used or was intended to be used as punishment under section 320.5(3)(b).¹⁶² Under the statute, the detention is limited in time,¹⁶³ and there is an expedited fact-finding hearing for those detained.¹⁶⁴ Also, the detention conditions to which the juvenile is subjected, according to the majority, are not harsh.¹⁶⁵ The Court stressed the availability of both "nonsecure" and "secure" detention.¹⁶⁶ Although admitting that "secure" detention was restrictive, the Court still found the detention to be consistent with the state's legitimate regulatory purposes.¹⁶⁷ The Court stated briefly that any individual circumstance involving a due process violation may be examined on a case by case basis.¹⁶⁸ The Court concluded, therefore, that on balance the statute serves a legitimate regulatory purpose which is compatible with fundamental fairness.¹⁶⁹

Turning to the second prong of its analysis,¹⁷⁰ the Court inquired whether the procedures afforded the juvenile under section 320.5(3)(b) were sufficient under the fourteenth amendment to prevent erroneous and unnecessary deprivation of liberty.¹⁷¹ The Court initially dismissed an argument that detention of a juvenile without a deter-

¹⁵⁵ *Id.* at 2410 (citing *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 685, 350 N.E.2d 906, 907, 385 N.Y.S.2d 518, 519 (1976)).

¹⁵⁶ *Wayburn*, 39 N.Y.2d at 689-90, 350 N.E.2d at 909-10, 385 N.Y.S.2d at 521-22.

¹⁵⁷ *Schall*, 104 S. Ct. at 2410. The Court supported this conclusion in part by noting the existence of juvenile preventive detention statutes in every state in the United States. *Id.* at 2411-12.

¹⁵⁸ *Id.* at 2410.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* It is axiomatic, stated the Court, that "[d]ue process requires that a pretrial detainee not be punished." *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979)).

¹⁶¹ *Id.* at 2413 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

¹⁶² *Id.*

¹⁶³ *Id.* The detention may last for between three and seventeen days, depending on the severity of the crime. *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* See *supra* note 143 and accompanying text.

¹⁶⁷ *Schall*, 104 S. Ct. at 2413-14.

¹⁶⁸ *Id.* at 2415.

¹⁶⁹ *Id.* at 2412.

¹⁷⁰ *Id.* at 2415.

¹⁷¹ *Id.*

mination of probable cause is *per se* invalid.¹⁷² Although it had in a past decision required such a determination before pretrial detention of an adult in a criminal proceeding,¹⁷³ the Court stated that it had not "mandate[d] a specific timetable" as to when the determination must be made in juvenile delinquency proceedings.¹⁷⁴ Thus, the Court concluded that although a formal probable cause determination would at some point be necessary in the delinquency proceeding, it was not required prior to detention because the statutory provisions for notice, a hearing, and a statement of reasons from the judge for his or her decision were considered to be sufficient substitutes.¹⁷⁵

The Court therefore moved to the principal issue of the second prong of its analysis, and reviewed the general procedure followed under section 320.5(3)(b) to determine whether it complied with due process requirements.¹⁷⁶ The Court found the procedure adequate to prevent erroneous deprivation of liberty despite the fact that the great majority of detainees are released either prior to or after the fact-finding hearing.¹⁷⁷ Some overcaution on the part of the judge in reaching the initial decision on whether to detain, stated the Court, is to be expected.¹⁷⁸ The final disposition of the case, according to the Court, is therefore largely irrelevant to the initial decision to detain.¹⁷⁹ The Court noted that the plaintiffs did not suggest any additional procedures that would significantly improve the accuracy of the determination without unduly impinging on the achievement of the state's purposes.¹⁸⁰

Finally, the Court rejected the plaintiffs' contention that, as the statute specifies no governing criteria by which to make such a prediction, the judge's decisionmaking is necessarily both arbitrary and subject to a high degree of error.¹⁸¹ The plaintiffs argued that any procedure that incorporated such subjectivity is unconstitutionally vague and could not be considered adequate protection for the juvenile's liberty interest.¹⁸² The Court, however, found no reason why specific decisionmaking guidelines must be set forth in the statute itself in order for the statute to avoid unconstitutional vagueness.¹⁸³ The Court registered its approval of the judge's role in predicting future criminal conduct, pointing out that such determinations are an important element in many decisions made in the criminal justice system.¹⁸⁴ Content to allow case by case review, the Court repeated its earlier observation that individual litigation could be undertaken for specific violations of rights.¹⁸⁵

¹⁷² *Id.*

¹⁷³ *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

¹⁷⁴ *Schall*, 104 S. Ct. at 2415.

¹⁷⁵ *Id.* at 2416-17.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 2414.

¹⁷⁸ *Id.* at 2414-15 (quoting *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 690, 350 N.E.2d 906, 910, 385 N.Y.S.2d 518, 522 (1976)).

¹⁷⁹ *Id.* at 2415.

¹⁸⁰ *Id.* at 2417.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 2418. The Court here again appeared primarily concerned with the maintenance of flexibility and informality in the juvenile justice system. The Court also stressed that it was not a legislature, and therefore need not determine whether the statute could have been better drafted. *Id.* at 2419.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 2419.

C. *The Dissenting Opinion*

In his dissenting opinion, which was joined by Justices Brennan and Stevens,¹⁸⁶ Justice Marshall also applied the fundamental fairness standard in assessing the constitutionality of New York's juvenile pretrial detention statute.¹⁸⁷ Unlike the majority, however, Justice Marshall determined that section 320.5(3)(b)'s procedural protections were inadequate to justify the impairment of the juvenile's fundamental liberty interest.¹⁸⁸

According to the dissent, fundamental fairness initially requires that the statute advance goals commensurate with the burdens imposed on constitutionally protected interests, and in so doing not punish the juvenile.¹⁸⁹ Applying this standard to *Schall*, the dissent found it manifest that the application of section 320.5(3)(b) impinged upon the juvenile's fundamental interest in liberty,¹⁹⁰ and thus its use could only be justified by a weighty public interest substantially advanced by the statute.¹⁹¹ The state's purported crime prevention goals in this case, even if legitimate, were not, according to Justice Marshall, sufficiently promoted by the statute to justify abridging the juvenile's constitutional rights.¹⁹² The dissent found support for this conclusion in the outcome of the cases in which juveniles were detained under the statute.¹⁹³ As the great majority of juveniles preventively detained were released either prior to or immediately following their adjudications,¹⁹⁴ the dissent could see no advancement of the state's crime prevention goals in the manner in which section 320.5(3)(b) was implemented by the juvenile court system. Consequently, Justice Marshall concluded that neither the juvenile nor the public benefits from the juvenile's preventive detention under the statute.¹⁹⁵

The dissent also found that section 320.5(3)(b) did not comply with fundamental fairness because it punished the presumptively innocent juvenile.¹⁹⁶ Even under the majority's "alternative purpose" test,¹⁹⁷ the dissent contended that the statute, as administered, was excessive in relation to the putatively legitimate objectives assigned to it, and thus must be characterized as punitive.¹⁹⁸ Since the pretrial detainees had not yet been

¹⁸⁶ *Id.* (Marshall, J., dissenting).

¹⁸⁷ *Id.* at 2423 (Marshall, J., dissenting).

¹⁸⁸ *Id.* at 2420 (Marshall, J., dissenting).

¹⁸⁹ *Id.* at 2423 (Marshall, J., dissenting).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 2424 (Marshall, J., dissenting). Justice Marshall criticized the majority for discounting the child's liberty interest and for using a mere "legitimate state interest" standard in evaluating the provision. *Id.* at 2423 (Marshall, J., dissenting).

¹⁹² *Id.* at 2420 (Marshall, J., dissenting).

¹⁹³ *Id.* at 2427 (Marshall, J., dissenting).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 2427-28 (Marshall, J., dissenting). The dissent noted that:

only in occasional cases does incarceration of a juvenile pending his trial serve to prevent a crime of violence and thereby significantly promote the public interest. Such an infrequent and haphazard gain is insufficient to justify curtailment of the liberty interests of all the presumptively innocent juveniles who would have obeyed the law pending their trials had they been given the chance.

Id.

¹⁹⁶ *Id.* at 2430 (Marshall, J., dissenting).

¹⁹⁷ See *supra* note 161 and accompanying text.

¹⁹⁸ *Schall*, 104 S. Ct. at 2429 (Marshall, J., dissenting). The dissent found especially distressing, and unsupportable on the record, the Court's benign characterization of the detention facilities. *Id.*

adjudicated guilty of the charged offenses, Justice Marshall found that application of the statute was a per se violation of due process.¹⁹⁹ The inference that section 320.5(3)(b) was punitive was supported by the record, noted the dissent, as a family court judge and even the state's counsel acknowledged that preventive detention was often used to punish juveniles for their alleged offenses.²⁰⁰

Fundamental fairness, according to the dissent, also required procedural protections adequate to prevent unwarranted impairment of the juvenile's liberty interest.²⁰¹ Section 320.5(3)(b) lacked these safeguards, the dissent stated, to the extent that the statute was both impermissibly vague and subject to unconstitutionally arbitrary application.²⁰² The dissent viewed the majority's depiction of the adequacy of the decisionmaking process employed in detention proceedings as "hopelessly idealized."²⁰³ As the statute by its terms required family court judges to predict future criminal behavior, the dissent agreed with the trial court's finding that such predictions are virtually impossible to make, particularly with the paucity of data available at the detention hearings.²⁰⁴ The prediction is made even more subjective, Justice Marshall stated, due to the lack of statutory guidance as to which factors a judge should consider, and what standard of proof he should employ, in the determination.²⁰⁵ The dissent found that detention was not even limited to those classes of juveniles whose past conduct suggested that they were more likely to misbehave in the immediate future.²⁰⁶ On the contrary, Justice Marshall noted that the trial court had found that the circumstances surrounding most cases suggested that the detainees would not have committed a crime if released.²⁰⁷ This creates an excessive risk, according to the dissent, that juveniles will be detained erroneously and fosters arbitrariness and inequality in the decisionmaking process.²⁰⁸ The dissent stated that its overriding concern was that excessive discretion may foster inequality, and can mask the use of illegitimate criteria.²⁰⁹ The addition of some procedural safeguards, according to the dissent, would create insubstantial administrative burdens.²¹⁰

at 2430 (Marshall, J., dissenting). The dissent cited testimony of a New York family court judge, who described Juvenile Center as a place where juveniles are exposed to physical and sexual assault, and where they are in contact with other detainees who may be "much worse" than they are. *Id.* at 2429-30 (Marshall, J., dissenting).

¹⁹⁹ *Id.* at 2423 (Marshall, J., dissenting).

²⁰⁰ *Id.* at 2425-27 (Marshall, J., dissenting). The dissent noted that there need not be a finding of probable cause that the child committed the offense; that the provision applies to all juveniles regardless of the severity of the offense or their prior records; and that no standard of proof beyond "serious risk" is spelled out in the statute. *Id.*

²⁰¹ *Id.* at 2431-32 (Marshall, J., dissenting).

²⁰² *Id.* at 2432-33 (Marshall, J., dissenting). According to the dissent, therefore, the judges necessarily relied on their own subjective criteria. *Id.* at 2430 (Marshall, J., dissenting).

²⁰³ *Id.* at 2430 (Marshall, J., dissenting).

²⁰⁴ *Id.* at 2425-26 (Marshall, J., dissenting). Justice Marshall noted that the majority's comment that predictions of future criminal conduct are the bases of many decisions does not take into account that in all of those decisions the person had already been convicted of a crime. *Id.* at 2426 n.20 (Marshall, J., dissenting).

²⁰⁵ *Id.* at 2426 (Marshall, J., dissenting).

²⁰⁶ *Id.* at 2427 (Marshall, J., dissenting); see *Martin*, 513 F. Supp. at 705. Justice Marshall stressed that in a significant proportion of the cases the juvenile had been released immediately following his arrest and had not committed any reported crimes prior to his initial hearing. *Schall*, 104 S. Ct. at 2427 (Marshall, J., dissenting).

²⁰⁷ *Id.* at 2430-31 (Marshall, J., dissenting).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 2431-32 (Marshall, J., dissenting).

²¹⁰ *Id.* As an example of an additional safeguard, Justice Marshall suggested that the family

Finally, the dissent took issue with the majority's statement that the constitutionality of juvenile detention procedures should be determined on a case by case basis.²¹¹ As the detention period is relatively brief, the dissent questioned whether the issue of mootness could be overcome.²¹² Justice Marshall further asserted that even if the mootness issue could be skirted, it would be impossible to prove that the juvenile would have comported with the law if he or she had not been detained.²¹³ As the provision is written and administered, the dissent found that cases in which the state's goals are advanced cannot be distinguished from those in which they are not.²¹⁴ Based on its conclusion that such individual adjudication would be an ineffective means of protecting the juvenile's constitutional rights, the dissenting opinion argued that the provision should be found unconstitutional on its face.²¹⁵

III. A CRITIQUE OF *SCHALL*: THE TRIUMPH OF FLEXIBILITY OVER FUNDAMENTAL FAIRNESS

The *Schall* decision evidences the Supreme Court's renewed attempt to maintain a juvenile justice system separate from the criminal proceeding and its attendant procedural protections. After twenty years of painful recognition of the juvenile justice system's inequities, and of attempting to provide juveniles with procedures that are fair and in compliance with due process, the Supreme Court no longer seems concerned with protecting the juvenile from the system's failings. The Court in *Schall* exalts informality, speed, and a questionably advanced goal of crime prevention over an individual's fundamental right to liberty. Thus, while the Court continues to employ the "due process and fundamental fairness" standard which it has followed since *Kent*, in *Schall* it distorts this standard by overemphasizing the state's interest in crime prevention in contrast to the juvenile's fundamental interest in liberty. This shift in emphasis, combined with the Court's arguably belated attempt to maintain informality and flexibility within the juvenile system, signifies a divergence from the Court's prior cases in this area and heralds a "hands off" approach in future juvenile justice cases.

While reaffirming the applicability of the fourteenth amendment to juvenile delinquency proceedings,²¹⁶ the Supreme Court in *Schall* placed inordinate emphasis on the principle it had first begun to develop in *McKeiver* — that the Constitution and fundamental fairness do not require that all differences between juvenile proceedings and criminal trials be eliminated.²¹⁷ In *McKeiver*, the Court was not dealing with the regulation of an existing procedure, but rather with the issue of whether the addition of a new procedure which was not even guaranteed in all criminal cases should be applied to the juvenile system. Thus, the factual justification present in *McKeiver* for refusing to require

court judges be required to state on the record the significance they give to the seriousness of the charged offense and to the juvenile's background. *Id.*

²¹¹ *Id.* at 2428–29 (Marshall, J., dissenting).

²¹² *Id.*

²¹³ *Id.* at 2429 (Marshall, J., dissenting).

²¹⁴ *Id.* at 2425 (Marshall, J., dissenting).

²¹⁵ *Id.* at 2429 (Marshall, J., dissenting). Justice Marshall concluded that while the Court claimed that the State has a responsibility to protect the interests of children, it upheld a statute whose net impact on juveniles is overwhelmingly detrimental. *Id.* at 2433 (Marshall, J., dissenting).

²¹⁶ *Id.* at 2409.

²¹⁷ *Id.* See *McKeiver v. Pennsylvania*, 403 U.S. 528, 533 (1971).

a jury trial in juvenile cases was absent in *Schall*, where the Court was faced with an existing broad preventive detention process with great potential for arbitrariness and error.

In its approach to the *Schall* case, therefore, the Court was not consistent with its prior juvenile justice decisions, in which the protection of the juvenile from the dangers inherent in minimally regulated procedures was the paramount concern. The *Schall* Court stated that it had, in its prior cases, attempted to delineate where the differences between juvenile and criminal proceedings lay by striking a balance between the requirement of fundamental fairness and the desire to maintain flexibility in the juvenile process.²¹⁸ The Court in *Schall*, however, placed much greater weight on the latter concern than it had in its past opinions, and justified this shift by downgrading both the juvenile's interest in liberty and the significance of the detention itself.²¹⁹

The Court accomplished this end by departing substantially from the reasoning undergone in its earlier juvenile justice cases at several points in the *Schall* opinion. First, the Court failed to follow the *Kent* decision's mandate of requiring procedural regularity in the application of the statute.²²⁰ Instead, the Court was content to allow the New York Family Court judges to continue to apply subjective criteria in the juvenile detention hearings.²²¹ The Court briefly stated that no additional procedures had been proposed that would improve the accuracy of the detention process without unduly impinging on the achievement of the state purposes.²²² The majority opinion failed to demonstrate, however, how suggested factors that are designed to provide limiting guidelines for a Family Court judge to follow in juvenile detention proceedings²²³ would result in more lengthy, formal proceedings with no counterbalancing improvement in decisionmaking accuracy. Even if the juvenile judge's decisionmaking flexibility would be hampered by statutorily mandated criteria, the Court in *Breed* expressly stated that a lessening of flexibility alone was an insufficient ground on which to refuse application of a particular procedure to the juvenile courts.²²⁴ The *Schall* Court disregards this consideration in its apparent eagerness to heed Chief Justice Burger's criticism in his *Winship* dissent about overly restricting the administration of the juvenile justice system.²²⁵

The second example of the *Schall* Court's failure to follow precedent is in its resurrection of the *parens patriae* justification for the absence of substantive standards and procedural rules in juvenile proceedings.²²⁶ The *Schall* Court stated that a juvenile proceeding is fundamentally different from an adult criminal trial because the State is concerned not with convicting the juvenile, but instead with protecting and rehabilitating

²¹⁸ *Schall*, 104 S. Ct. at 2409.

²¹⁹ *Id.* at 2410-11, 2413-15.

²²⁰ See *Kent v. United States*, 383 U.S. 541, 553 (1966).

²²¹ *Schall*, 104 S. Ct. at 2418. Justice Marshall emphasized his concern over this unfettered discretion, stating that discretion can mask the use by officials of illegitimate criteria in allocating important goods and rights. *Id.* at 2432 (Marshall, J., dissenting).

²²² *Id.* at 2417.

²²³ Judge Newman, concurring in *Martin v. Strasburg*, 689 F.2d 365, 375 (2d Cir. 1982) (Newman, J., concurring), suggested the following statutory improvements: limitations on crimes for which the juvenile has been arrested or which he is likely to commit if released; a determination of the likelihood that the juvenile committed the crime; an assessment of the juvenile's background; and a more specific standard of proof. *Id.* at 377.

²²⁴ *Breed v. Jones*, 421 U.S. 519, 535 n.15 (1975).

²²⁵ See *In re Winship*, 397 U.S. 358, 376 (1970) (Burger, C.J., dissenting).

²²⁶ See *In re Gault*, 387 U.S. 1, 16 (1967).

the child.²²⁷ In prior cases, however, the Court had voiced strong criticism of the *parens patriae* justification, and had refused to apply a civil label-of-convenience to the juvenile proceeding in light of the potential penalties suffered by the child.²²⁸ The *Schall* Court was thus attempting to revive the original conceptual difference between the juvenile and adult processes after it had earlier conceded the invalidity of that proposition.

Finally, the Court appears almost naive in its characterization of the juvenile detention conditions as benign.²²⁹ The Court upheld the validity of preventive detention in part because a child is always in some form of custody,²³⁰ indicating therefore that detention of a juvenile is somehow not as significant to the child as it would be to an adult. This position is in direct contradiction with the Court's decision in *Gault*, in which it sharply criticized this justification for disregarding a juvenile's interest in liberty.²³¹ In further support of its position that the detention of juveniles does not infringe upon any constitutionally protected right, the Court described the availability of nonsecure and secure detention — secure detention being more restrictive but still, in the Court's opinion, consistent with the state's *parens patriae* objectives.²³² The Court also relied on the fact that, absent exceptional circumstances, a juvenile cannot be sent to an adult prison.²³³ The *Schall* dissent is correct in finding the majority's depiction of the nature of the confinement unsupportable on the record.²³⁴ Secure detention under section 320.5(3)(b) entails incarceration in a facility closely approximating a jail, and pretrial juvenile detainees are sometimes mixed with juveniles who have already been found to be delinquent.²³⁵ Preventively detained juveniles are, therefore, potential targets for both assault and sexual abuse.²³⁶ The Court in its prior decisions recognized the grim reality of juvenile incarceration, and such prior discussions belie the naive view of the nature of juvenile confinement taken in *Schall*. In *Gault*, for example, the Court admitted that

²²⁷ *Schall*, 104 S. Ct. at 2409.

²²⁸ See *Winship*, 397 U.S. at 365–66; see also *Breed*, 421 U.S. at 530.

²²⁹ See *Schall*, 104 S. Ct. at 2413–14.

²³⁰ *Id.* at 2410.

²³¹ *Gault*, 387 U.S. at 17. In its consideration of the assertion that the right of a state to deny a child procedural rights is justified by the fact that the child is always in "custody," the *Gault* Court found this theoretical basis for this "peculiar system" to be, at the least, "debatable." *Id.*

²³² *Schall*, 104 S. Ct. at 2413–14. According to the majority:

Nonsecure detention involves an open facility in the community, a sort of "halfway house," without locks, bars or security officers

Secure detention is more restrictive, but is still consistent with the regulatory and *parens patriae* objectives relied upon by the State. Children are assigned to separate dorms based on age, size and behavior. They wear street clothes provided by the institution and partake in educational and recreational programs and counseling sessions run by trained social workers. Misbehavior is punished by confinement to one's room.

Id. at 2413.

²³³ *Id.* at 2413.

²³⁴ *Id.* at 2423 (Marshall, J., dissenting).

²³⁵ *Id.* at 2424 (Marshall, J., dissenting). The trial court stated that in a secure facility, "[t]he juveniles are subjected to strip-searches, wear institutional clothing, and follow institutional regimen" *Martin*, 513 F. Supp. at 695 n.5.

Judge Quinones, a family court judge, also testified as to the conditions at the facility, stating, *inter alia*, that juveniles are liable to be exposed to both assault and sexual assault.

Schall, 104 S. Ct. at 2423–24 (Marshall, J., dissenting).

²³⁶ *Schall*, 104 S. Ct. at 2424 (Marshall, J., dissenting).

an "industrial school" was still incarceration which took the child away from his or her family, and exposed him or her to disinterested custodians and potentially dangerous fellow inmates.²³⁷ The *Breed* opinion also eschewed the notion that calling commitment "rehabilitation" made it any less incarceration.²³⁸ The two purported purposes of section 320.5(3)(b) are to protect both the community and the juvenile. Despite the grim realities of juvenile detention,²³⁹ the Supreme Court in *Schall* took the view that the "protective" atmosphere of the detention facility will better serve the juvenile than will release, with its potential for exposure to negative influences.

Apart from the traditional due process issues raised by New York's juvenile preventive detention scheme, the *Schall* Court also considered whether pretrial detention punishes the presumptively innocent juvenile.²⁴⁰ If the statute did provide for punishment in the guise of prevention, application of that statute would be a per se violation of due process.²⁴¹ The *Schall* Court stated that the lower court mistakenly equated detentions that do not lead to continued confinement after an adjudication of guilt with "punitive detentions."²⁴² This high incidence of released detainees, however, is relevant to the issue of whether or not the provision is punitive because it indicates that the purported crime prevention goal of the section is not substantially advanced.²⁴³ While the *Schall*

²³⁷ *Gault*, 387 U.S. at 27.

²³⁸ *Breed*, 421 U.S. at 530.

²³⁹ *Schall*, 104 S. Ct. at 2424 (Marshall, J., dissenting). As the dissent pointed out: "the impressionability of juveniles may make the experience of incarceration more injurious to them than to adults; all too quickly juveniles subjected to preventive detention come to see society at large as hostile and oppressive and to regard themselves as irremediably 'delinquent.'" *Id.* See also Aubry, *The Nature, Scope and Significance of Pre-Trial Detention of Juveniles in California*, 1 BLACK L.J. 160, 164 (1971), in which the author observed that:

[j]uvenile hall attendants have expressed surprise at the speed with which relative [sic] innocent youngsters succumb to the infectious miasma of 'Juvy' and its practices, attitudes and language. But this is not surprising. The experience tells the youngster that he is 'no good' and that society has rejected him. So he responds to society's expectation, sees himself as a delinquent, and acts like one.

Id.

²⁴⁰ *Schall*, 104 S. Ct. at 2412-13. See Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371 (1970). In his analysis of President Nixon's proposed legislation requiring pretrial detention for recidivists, Tribe found the measure punitive: "[T]he proposed system of pretrial preventive detention would inflict punishment rather than merely impose a restraint, for it would imprison persons on the basis of a finding that, if given the opportunity, they would make a morally culpable choice to commit a crime." *Id.* at 396.

See *United States v. Brown*, 381 U.S. 437, 458 (1965), in which the Court observed: "Punishment serves several purposes: retributive, rehabilitative, deterrent — and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *Id.*

Even defendant's counsel acknowledged that one reason detainees are released after determination of their guilt is that the judge decides that their pretrial detention constituted sufficient punishment. *Schall*, 104 S. Ct. at 2429 (Marshall, J., dissenting); see *Martin*, 689 F.2d at 370-71 & nn.27-28. A family court judge even admitted using preventive detention specifically to punish the juvenile. *Martin*, 513 F. Supp. at 708.

See also *Bell v. Wolfish*, 441 U.S. 520, 569 (1979) (Marshall, J., dissenting) ("For in terms of the nature of the imposition and the impact on detainees, pretrial incarceration . . . is essentially indistinguishable from punishment.").

²⁴¹ *Schall*, 104 S. Ct. at 2412.

²⁴² *Id.* at 2414.

²⁴³ *Id.* at 2427 (Marshall, J., dissenting).

Court found this point "irrelevant,"²⁴⁴ it is difficult to justify the provision as serving a preventive purpose when the majority of juveniles who were found too dangerous to release prior to their fact-finding hearings are then released even after they have been found guilty. The results of the juvenile cases indicate that judges, in the exercise of what the majority found to be suitable overcaution, incarcerate a large number of juveniles who upon some further examination are found to pose no threat to society.

Apart from the question of whether the outcome of a juvenile detention case is relevant to the constitutionality of the initial decision to detain, the broader issue of whether a court is qualified to predict future behavior, and furthermore whether to use such a prediction in carrying out its judicial function, pervades the *Schall* case.²⁴⁵ Again, aside from certain documents that the Family Court is required to consider,²⁴⁶ there are no requirements as to which criteria must be considered by the judge in forming his or her opinion.²⁴⁷ One need only examine the *Schall* data concerning subsequently released detainees, of whom few engage in subsequent criminal activities, to become aware of the substantial tendency of the family court judges to overpredict and to identify as potentially dangerous those persons who, if released, would engage in no further violent or even criminal behavior.²⁴⁸ Although the Court readily condoned such predictions as being the foundation for many decisions in the criminal justice system,²⁴⁹ Justice Marshall's dissent correctly observed that, in all such instances, the person whose future conduct was at issue had already been convicted of a crime.²⁵⁰ Under *Schall*, a determination of probable cause for the alleged crime is not even necessary before the judge decides whether the juvenile would "again" violate the law.²⁵¹

Finally, while the majority stated more than once that due process violations which might arise during juvenile preventive detention procedures could be examined on a case by case basis,²⁵² there are several major flaws with this position. First, the nature of

²⁴⁴ *Id.* at 2415.

²⁴⁵ *Id.* at 2417-18, 2426 n.20 (Marshall, J., dissenting).

²⁴⁶ *Id.* at 2420-21 (Marshall, J., dissenting). The judge employs in his or her decisionmaking a petition for delinquency prepared by a state agency, and a written report and recommendation of the parole officer. *Id.*

²⁴⁷ *Id.* at 2420 (Marshall, J., dissenting).

²⁴⁸ Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515, 542 (1977-1978). For a criticism of the ability to predict future conduct, see Schlesinger, *The Prediction of Dangerousness in Juveniles: A Replication*, 24 CRIME & DELINQ. 40, 48 (1978) (no significant relationships found in study investigating application of predictor variables in predicting dangerousness).

²⁴⁹ *Schall*, 104 S. Ct. at 2417.

²⁵⁰ *Id.* at 2426 n.20 (Marshall, J., dissenting).

²⁵¹ It is somewhat surprising, in light of the Court's decision in *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (person arrested and held for trial is constitutionally entitled to a judicial determination of probable cause before pretrial restraint of liberty), that the appellees and the dissent did not base their arguments more strongly on this issue. The majority briefly referred to a juvenile's right to challenge detention for lack of probable cause, but sidestepped *Gerstein* by stating that it did not mandate a specific timetable for a probable cause determination. *Schall*, 104 S. Ct. at 2415. The Court could have merely stated that *Gerstein* did not apply in the juvenile context, and therefore have avoided the probable cause issue altogether, but instead it chose the tactic of appearing to consider *Gerstein's* requirements on the one hand and dismissing them on the other. The dissent, while noting its dissatisfaction with this approach, did not press the issue any further. *Id.* at 2420, 2425 (Marshall, J., dissenting).

²⁵² *Schall*, 104 S. Ct. at 2412 n.18, 2415.

the procedure as conducted under section 320.5(3)(b) is such that its mistakes are virtually undetectable when the error is on the side of overcaution. The system will appear to be malfunctioning only when it releases persons who prove to be worse risks than anticipated. When the system detains those who could safely have been released, its errors will be invisible.²⁵³ How can a detainee prove that he or she would not have committed a crime, and, thus, should not have been detained? Second, the Court set forth no guidelines as to which errors in decisionmaking would constitute grounds for relief; it merely stated rather vaguely that the propriety of the decision of the family court judge must be evaluated in light of the information available to him or her at the time.²⁵⁴ The Court did not even require procedural regularity in the exercise of the judges' broad discretion, as it had in previous decisions.²⁵⁵ Such a subjective procedure, under which judges may remand juveniles according to standards as varied as the judges themselves, is insufficient to guarantee proper protection of the juvenile's constitutional right to liberty. The standard for appeal thus appears to be as subjective as the initial procedure itself. According to *Schall* a juvenile may not even use his subsequent release as evidence of a mistaken decision to detain, as the Court found the final outcome of a case to be irrelevant to the propriety of the initial decision to detain.²⁵⁶ It is difficult to conceive, therefore, of the particular circumstances under which a juvenile would be granted relief. It is unfortunate that the Court decided in the *Schall* case to renew its distance from the juvenile justice system in order to revive those aspects of the system which it believes to be beneficial for both the juvenile and the state.²⁵⁷ The Court has upheld with little truly probative examination a statute that, while perhaps advancing somewhat the goal of flexibility, takes a significant step backward in the protection of a juvenile's fundamental right to liberty.

CONCLUSION

The Supreme Court in *Schall v. Martin* held that the pretrial preventive detention of juveniles under New York's Family Court Act does not violate the due process clause because the Court found that the detention serves the legitimate state objective of crime prevention, and further that there are sufficient procedural protections in the application of the statute.²⁵⁸ The Court stated that no specific criteria need be considered by the judge in the detention decision,²⁵⁹ and individual claims of due process violations would be handled on a case by case basis.²⁶⁰

The *Schall* Court's unwillingness to restrict the application of preventive detention may be in part due to its concern over the increasing seriousness of juvenile crime. Citing recent statistics on juvenile involvement in serious crime,²⁶¹ the Court stressed

²⁵³ Tribe, *supra* note 240, at 375.

²⁵⁴ *Schall*, 104 S. Ct. at 2415.

²⁵⁵ See, e.g., *Kent*, 383 U.S. at 553.

²⁵⁶ *Schall*, 104 S. Ct. at 2415.

²⁵⁷ *Id.* at 2409-10.

²⁵⁸ *Id.* at 2406.

²⁵⁹ *Id.* at 2418.

²⁶⁰ *Id.* at 2415.

²⁶¹ *Id.* at 2410 n.14. In 1982, juveniles accounted for 7.5% of all arrests for violent crimes, 19.9% of all arrests for serious property crime, and 17.3% of all arrests for the two categories combined. *Id.* (citing United States Dep't of Justice, 1982 Crime in the United States, 176-77 (1983)).

that the harm suffered by a crime victim is not dependent upon the age of the perpetrator.²⁶² This point, however distressing, does not support the Court's holding. If the crimes committed by juveniles are virtually indistinguishable from those perpetrated by adults, then juveniles who are brought to justice for such acts should not be subject to severe penalties such as pretrial detention, which may not even be applicable to adults, without benefit of the same procedural protections available in the criminal justice system. Assuming that juvenile crime is becoming more serious, it is incongruous that the Court in *Schall* should use the traditional fundamental fairness theory to justify the treatment of juvenile offenders in a manner that is more harsh and arbitrary than that suffered by adult criminals.

The significance of the *Schall* decision will not be lost on juvenile court judges, whose preventive detention decisions will now be virtually insulated from review due to the lack of guidelines from the Court and due to the inherent nature of the process itself. There is little incentive for a judge to make a thoughtful decision based on sufficient factual data when the Supreme Court requires that no specific criteria be considered in the judge's decisionmaking process, nor even that the minimal procedural regularity mandated in its earlier decisions be observed.

In the area of juvenile preventive detention, therefore, errors will continue to be made on the side of overcaution, as such detention may become the accepted norm in juvenile delinquency proceedings. If the Supreme Court follows the ideological shift set forth in *Schall* in its future decisions in this area, juveniles may well find themselves in the same position as they were prior to *Kent*: being exposed to virtually the same stigma and penalties as an adult offender without benefit of the adult's constitutionally mandated rights in facing those consequences. Should this trend continue, it will be necessary for the individual states of their own volition to institute procedural guidelines attendant to juvenile preventive detention proceedings in order to protect the juvenile's fundamental interest in liberty.

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²⁶² *Schall*, 104 S. Ct. at 2410.