University of Baltimore Law Review

Volume 15
Issue 2 *Winter 1986*

Article 10

1986

Casenotes: Criminal Procedure — Juveniles — State Law Authorizing Pretrial Detention of Juveniles upon a Finding of Risk of Future Criminal Behavior Upheld as Valid under the Due Process Clause. Schall v. Martin, 104 S. Ct. 2403 (1984)

Kim Detrick
University of Baltimore School of Law

CRIMINAL PROCEDURE—JUVENILES—STATE LAW AUTHORIZING PRETRIAL DETENTION OF JUVENILES UPON A FINDING OF RISK OF FUTURE CRIMINAL BEHAVIOR UPHELD AS VALID UNDER THE DUE PROCESS CLAUSE. *Schall v. Martin*, 104 S. Ct. 2403 (1984).

Three juveniles, detained before trial pursuant to section 320.5(3)(b) of the New York Family Court Act,[1] instituted a habeas corpus class action in the United States District Court for the Southern District of New York seeking a declaratory judgment that the Act violated the due process clause of the fourteenth amendment.[2] After a full trial on the merits, the district court declared the statute unconstitutional.[3] The Court of Appeals for the Second Circuit affirmed.[4] The United States Supreme Court reversed, holding that section 320.5(3)(b) does not violate due process because preventive detention serves a legitimate state interest sufficient to justify abridgment of the detained juvenile's liberty interest.[5] The Court also held that the Act contains adequate procedural safeguards to prevent unnecessary or arbitrary impairment of constitutionally protected rights.[6]

The constitutional rights of juveniles have developed within the framework of a court system separate from that dealing with adults.[7] At

---

1. New York Family Court Act, N.Y. JUD. LAW § 320.5(3)(b) (1983). Section 320.5(3)(b) provides:
   > The Court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained;
   > (a) there is a substantial probability that he will not appear in court on the return date; or
   > (b) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime.

   Id.
2. United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691 (S.D.N.Y. 1981), *aff'd*, 689 F.2d 365 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984). The juveniles also alleged that the statute violated equal protection because it applied only to juveniles and not to adults. The district court dismissed this claim, holding that the states do have a right to differentiate between adults and juveniles. *Id.* at 706.
3. United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 717 (S.D.N.Y. 1981), *aff'd*, 689 F.2d 365 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984). The district court held that the statute violated due process because: (1) it gives the judge a license to act arbitrarily in predicting the likelihood of future criminal conduct; (2) pretrial detention without a prior adjudication or probable cause is *per se* unconstitutional; and, (3) pretrial detention constitutes punishment that is constitutionally prohibited under the due process clause. *Id.* at 707.
4. Martin v. Strasburg, 689 F.2d 365 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984). The court of appeals found that most juveniles considered sufficiently dangerous by the family court to justify pretrial detention are actually released within days or weeks. *Id.* at 369. Thus, the court concluded that the vast majority of pretrial detention involves either mistakes in judgment fostered by the procedurally and substantively unlimited terms of section 320.5(3), or imposition of incarceration solely as punishment for unadjudicated crimes. *Id.* at 373.
5. Schall v. Martin, 104 S. Ct. 2403, 2406 (1984).
6. *Id.* at 2417.
7. Comment, *The Supreme Court and Pretrial Detention of Juveniles: A Principled Solution to a Due Process Dilemma*, 132 U. PA. L. REV. 95, 98 (1983).

the inception of the juvenile court system,[8] wide differences were tolerated between the procedural rights given to adults and those given to children.[9] Treatment and rehabilitation, rather than punishment, formed the goals of the juvenile court movement.[10] It was believed that these goals could best be achieved by relaxing strict rules of evidence and procedure and allowing the "fatherly" family court judge broad discretion in determining each child's needs.[11]

In recent years, however, the Supreme Court has recognized a gap between the originally benign ideals of the juvenile court system and its realities.[12] The Court has noted, "there is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children."[13] Thus, the Court has held that certain basic constitutional protections enjoyed by adults accused of a crime must also be made available to juveniles involved in delinquency proceedings.[14] Furthermore, the Court has held that delinquency proceedings must also comply with the "fundamental fairness" requirement of due process.[15] Only where a due process right might destroy the traditional character of juvenile proceedings and where other available procedural rights will give the juvenile sufficient protections, has the Court refused to extend adult due process protections to the juvenile system.[16]

Although the Court had sketched the constitutional framework of juvenile adjudicatory rights prior to *Schall v. Martin*,[17] it had never confronted issues concerning juvenile preadjudicatory rights.[18] The Court also had never ruled on the constitutionality of detaining any individual, adult or juvenile, for the purpose of preventing future crime.[19] The traditional justification for pretrial detention has been the state's interest in

8. The first American juvenile court was established in Cook County, Illinois in 1899. For a discussion of the development of the juvenile court system, see generally S. DAVIS, THE RIGHTS OF JUVENILES 1 (1974).
9. *In re* Gault, 387 U.S. 1, 14 (1966).
10. *Id.* at 15-16.
11. S. DAVIS, *supra* note 8, at 3.
12. Breed v. Jones, 421 U.S. 519, 528 (1975).
13. Kent v. United States, 383 U.S. 541, 556 (1966).
14. *E.g.*, Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy); *In re* Winship, 397 U.S. 358 (1970) (proof beyond a reasonable doubt); *In re* Gault, 387 U.S. 1 (1967) (notice of charges; right to counsel; privilege against self-incrimination; right to confrontation and cross-examination).
15. *See* Breed v. Jones, 421 U.S. 519, 531 (1975); McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971).
16. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (no right to jury trial in juvenile proceeding because a full adversary process might end the idealistic concept of an informal, protective proceeding).
17. 104 S. Ct. 2403 (1984).
18. Comment, *supra* note 7, at 100.
19. Schall v. Martin, 104 S. Ct. 2403, 2410 (1984).

ensuring the presence of the accused at trial,[20] and the Court has held that detention for this limited purpose is not a violation of due process.[21] In *Bell v. Wolfish*,[22] however, the Court specifically left open whether any governmental interest other than ensuring a detainee's presence at trial may constitutionally justify pretrial detention.[23] Although only the District of Columbia permits pretrial detention of adults for the purpose of preventing harm to the community,[24] several states allow detention of juveniles accused of committing a crime for reasons other than ensuring their presence at trial, such as protecting the community and the juvenile from the possibility of future criminal conduct.[25] At least eight state courts have upheld the constitutionality of juvenile preventive detention statutes.[26]

The mere invocation of a legitimate state interest, however, will not justify restrictions and conditions of pretrial detention that amount to punishment.[27] Due process also requires that a person not be punished prior to a finding of guilt.[28] Therefore, it is necessary to determine whether detention has been instituted for a punitive purpose. This determination generally depends upon whether there is any alternative purpose to which the restriction rationally may be connected, and whether the restriction appears excessive in relation to the alternative purpose assigned.[29] The Court of Appeals of the District of Columbia has applied

20. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 376-77 (1970).
21. Bell v. Wolfish, 441 U.S. 520, 534 (1979); *see also* Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (government may lawfully detain a suspect prior to a determination of guilt); Stack v. Boyle, 342 U.S. 1, 4 (1951) (right to release before trial is conditioned upon adequate assurance of presence at trial and submission to sentence if found guilty).
22. 441 U.S. 520 (1979).
23. *Id.* at 534 n.15.
24. D.C. CODE ANN. §§ 23-1321 to 1322 (1981 & Supp. 1983). The Court of Appeals of the District of Columbia upheld the constitutionality of this statute in United States v. Edwards, 430 A.2d 1321 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1022 (1982).
25. *E.g.*, ALA. CODE § 12-15-59(a)(1)-(4) (1975); DEL. FAM. CT. R. 60; ILL. REV. STAT. ch. 37, §§ 703-4 (1983-84 Supp.); MD. CTS. & JUD. PROC. CODE ANN. § 3-815(b) (1984); 42 PA. CONS. STAT. ANN. § 6325 (1982); VA. CODE § 16.1-248 (1982); *see also* Comment, *A Due Process Dilemma: Pretrial Detention in Juvenile Delinquency Proceedings*, 11 J. MAR. J. PRAC. & PROC. 513, 518-25 (1978) (containing a thorough review of the preventive detention statutes in all fifty states).
26. Aubrey v. Gadbois, 50 Cal. App. 3d 470, 123 Cal. Rptr. 365 (1975); L.O.W. v. District Court of Arapahoe, 623 P.2d 1253 (Colo. 1981); Pauley v. Gross, 1 Kan. App. 2d 736, 574 P.2d 234 (1977); Baker v. Smith, 477 S.W.2d 149 (Ky. 1971); State v. Gleason, 404 A.2d 573 (Me. 1979); People *ex rel.* Wayburn v. Schupf, 39 N.Y.2d 682, 350 N.E.2d 906, 385 N.Y.S.2d 518 (1976); Commonwealth *ex rel.* Sprawal v. Hendrick, 438 Pa. 435, 265 A.2d 348 (1970); Morris v. D'Amario, 416 A.2d 137 (R.I. 1980).
27. Schall v. Martin, 104 S. Ct. 2403, 2412 (1984).
28. Bell v. Wolfish, 441 U.S. 520, 535 (1979).
29. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). Although other criterion for determining whether a restraint constitutes punishment were also men-

this test to its adult preventive detention statute and has held that the intent of the legislature to protect the community is a valid "alternative purpose" sufficient to qualify the statute as regulatory rather than penal.[30] The *Schall* decision, however, was the first Supreme Court holding authorizing pretrial detention to protect the community and the juvenile.

Even if there is no punitive purpose behind preventive detention, the denial of individual liberty still requires compliance with the mandates of procedural due process.[31] In determining the scope of procedural protections required by the due process clause, the Supreme Court in *Mathews v. Eldridge*[32] developed a test requiring a balancing of three factors: the private interests affected by a proceeding, the countervailing governmental interests involved, and the risk that the procedures chosen will lead to an erroneous decision.[33]

The private interests implicated when an individual is faced with incarceration are obvious. The Supreme Court has recognized in the adult context the "serious impact on the individual" that pretrial detention entails: the disruption of personal and professional life, the subjection to stark conditions of the person detained, and the serious consequences of confinement on trial preparation.[34] The Court has implied that the private interests at stake in juvenile proceedings are comparable to those at stake in adult criminal prosecutions.[35] In addition, numerous courts[36] and commentators[37] have recognized the specific detriment to which a detained juvenile may be subjected. No matter how

---

tioned in *Mendoza-Martinez*, the Supreme Court in *Schall* focused on "alternative purpose." Schall v. Martin, 104 S. Ct. 2403, 2413 (1984).

30. United States v. Edwards, 430 A.2d 1321, 1331-32 (D.C. 1981) (upholding the constitutionality of the District of Columbia's preventive detention statute), *cert. denied*, 455 U.S. 1022 (1982).
31. U.S. CONST. amend. XIV, § 1 provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."
32. 424 U.S. 319 (1976).
33. *Id.* at 335; *see also* Santosky v. Kramer, 455 U.S. 745, 754 (1982) (applying *Eldridge* test); Lassiter v. Department of Social Service, 452 U.S. 18, 27 (1981) (same).
34. Barker v. Wingo, 407 U.S. 514, 532-33 (1972).
35. *See, e.g.*, Breed v. Jones, 421 U.S. 519, 530 (1975) (In terms of potential consequences, there is little to distinguish a juvenile adjudicatory hearing with a traditional criminal prosecution); *In re* Winship, 397 U.S. 358, 365 (1970) (the same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child); *In re* Gault, 387 U.S. 1, 36 (1967) (a proceeding where the issue is whether the child will be found "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution).
36. *See, e.g.*, Moss v. Weaver, 525 F.2d 1258, 1260 (5th Cir. 1976) ("[p]retrial detention is an onerous experience, especially for juveniles"); Cox v. Turley, 506 F.2d 1347, 1359 (6th Cir. 1974) ("courts also particularly take judicial notice that it is not uncommon to find the indiscriminate mixing of hardened criminals, including sexual assaulters, with young offenders"); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1364 (D.R.I. 1972) ("[i]nstead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees and delinquents confined with him"); *In re* William M., 3 Cal. 3d 16, 31 n.25, 473 P.2d 737, 747 n.25, 89 Cal. Rptr. 33, 43 n.25 (1970) ("[it] is difficult

brief, pretrial detention has an adverse impact on a child's schooling and work opportunities.[38] Furthermore, because children are often more vulnerable and impressionable than adults,[39] incarceration may actually be a more devastating experience for a child than it would be for an adult.[40] Thus, whether a potential detainee is a juvenile or an adult, the interest in remaining free from institutional restraint is substantial.[41]

An individual's interest in pretrial liberty must be weighed against the countervailing governmental interests in pretrial detention. The governmental interests asserted as justification for pretrial detention are the protection of the community and the juvenile from the possibility of future criminal conduct by the juvenile.[42] The interest in preventing future crime is of great importance and the Supreme Court has stressed that crime prevention is a "weighty social objective."[43] The state's interest in guarding against future crime, however, is valid only to the extent that pretrial detention actually prevents the commission of a crime.[44]

The difficulty in predicting whether a juvenile will commit a crime if not detained requires consideration of the third factor of the *Eldridge* test: the risk that the procedures used will lead to erroneous and unnecessary deprivation of liberty. Several commentators believe that there is an inherent risk of error in detention decisions that call for predictions of future criminal conduct because there are no diagnostic tools available that would enable even the most highly trained criminologists to predict which individuals will engage in future crime.[45] The Supreme Court, however, has rejected the contention that procedures calling for predic-

---

for an adult who has not been through the experience to realize the terror that engulfs a youngster the first time he loses his liberty.").

37. *E.g.*, R. SARRI, UNDER LOCK AND KEY: JUVENILES IN JAILS AND DETENTION (1974); Aubry, *The Nature, Scope and Significance of Pre-Trial Detention of Juveniles in California*, 1 BLACK L.J. 160, 164 (1971); Komisaruk, *Psychiatric Issues in the Incarceration of Juveniles*, 21 JUV. CT. JUDGES J. 117 (1971).
38. *See* Brief for Appellee at 55, Schall v. Martin, 104 S. Ct. 2403 (1984).
39. Eddings v. Oklahoma, 455 U.S. 104, 115 n.11 (1982).
40. Schall v. Martin, 104 S. Ct. 2403, 2424 (1984) (Marshall, J., dissenting).
41. *In re* Gault, 387 U.S. 1, 27 (1967) ("The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement. . . .").
42. *See supra* note 25 and accompanying text. Prior to *Schall*, the Supreme Court had never ruled on whether any governmental objective other than ensuring the detainee's presence at trial could constitutionally justify pretrial detention. Schall v. Martin, 104 S. Ct. 2403, 2410 (1984); *see also supra* notes 18-22 and accompanying text.
43. Brown v. Texas, 443 U.S. 47, 52 (1979).
44. *See* Martin v. Strasburg, 689 F.2d 365, 377 (2d Cir. 1982) (Newman, J., concurring) (pretrial detention does not further crime prevention if the prediction of further criminal behavior is highly uncertain), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984).
45. *E.g.*, Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1094-1101 (1976); Diamond, *The Psychiatric Predictions of Dangerousness*, 123 U. PA. L. REV. 439, 440 (1974); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 696 (1974); Ervin, *Preventive Deten-*

tions of future criminality are inherently unsound.[46] The Court has held that such predictive judgments invariably become an important element in many decisions affecting liberty interests,[47] and, therefore, the difficulty of such determinations does not mean that they cannot be made.[48]

In *Schall v. Martin*,[49] the Supreme Court decided for the first time whether pretrial detention of juveniles for the purpose of preventing future crime is compatible with the "fundamental fairness" required by due process.[50] The Court noted that to answer this question two separate inquiries were necessary: first, whether preventive detention serves a legitimate state interest; and, second, whether there are adequate procedural safeguards available to authorize detaining an individual.[51]

Answering the first inquiry, the *Schall* Court noted that there is a legitimate and compelling state interest in protecting the community from crime.[52] Furthermore, society has an interest in protecting a juvenile from the consequences of his criminal conduct.[53] In recognizing the legitimacy of the state's interest in preventive detention, the Court found significant the widespread use, and judicial acceptance among the states, of preventive detention of juveniles.[54] Although the Court acknowledged that juveniles have a countervailing interest in remaining free from institutional restraint, it reasoned that this interest is lessened because juveniles are "always in some form of custody."[55] Children are assumed to be subject to the control of their parents, or of the state if parental

---

tion: An Empirical Analysis, 6 HARV. C.R.-C.L. L. REV. 289, 378 (1970); Tribe, *supra* note 20, at 378.

46. *See* Jurek v. Texas, 428 U.S. 262, 274-75 (1976).
47. *E.g.*, Hewitt v. Helms, 459 U.S. 460 (1983) (segregation of a prisoner); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981) (commutation of a sentence); Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979) (grant or denial of parole); Jurek v. Texas, 428 U.S. 262 (1976) (imposition of the death penalty); Morrissey v. Brewer, 408 U.S. 471 (1972) (revocation of parole).
48. Jurek v. Texas, 428 U.S. 262, 274-76 (1976).
49. 104 S. Ct. 2403 (1984).
50. *Id.* at 2409.
51. *Id.* The Court noted that in Bell v. Wolfish, 441 U.S. 520, 534 n.15 (1979), it had specifically left open whether any governmental objective other than ensuring a detainee's presence at trial could constitutionally justify pretrial detention. Schall v. Martin, 104 S. Ct. 2403, 2410 (1984).
52. *Schall*, 104 S. Ct. at 2410 (citing DeVeau v. Braisted, 363 U.S. 144, 155 (1960)). *DeVeau* involved a challenge to a state statute that disqualified from office any person convicted of a felony. The Court held that the challenged state legislation was part of a program to vindicate a legitimate and compelling state interest in combatting local crime infesting a particular industry. *DeVeau*, 363 U.S. at 155.
53. *Schall*, 104 S. Ct. at 2411 (childhood "is a time and condition of life when a person may be most susceptible to influence and to psychological damage") (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).
54. *Schall*, 104 S. Ct. at 2411. The Court noted that all states and the District of Columbia have statutes authorizing preventive detention of juveniles and that eight states have upheld the constitutionality of their statutes with specific reference to protecting the juvenile and the community from pretrial crime. *Id.*; *see supra* notes 24-25 and accompanying text.
55. *Schall*, 104 S. Ct. at 2410.

control falters.[56] Thus, the Court characterized detention as merely a transfer of custody from the parent to the state, and held that, in appropriate circumstances, the juvenile's liberty interest may be subordinate to the state's *parens patriae* interest in preserving the welfare of the child.[57] The Court concluded that preventive detention of juveniles serves a legitimate regulatory purpose compatible with due process.[58]

After weighing the private and state interests involved in pretrial detention, the Court noted the due process requirement that punishment not be imposed prior to an adjudication of guilt.[59] Thus, the *Schall* Court found it necessary to decide whether pretrial detention is instituted for the purpose of punishment, or whether it serves some other "alternative purpose."[60] Applying this test to the New York preventive detention statute, the Court first found that the limited time frames[61] and conditions[62] of confinement reflected a regulatory purpose for detention rather than a punitive purpose.[63] The Court also rejected the contention that, because the vast majority of juveniles detained either have their petitions dismissed before adjudication or are released immediately following adjudication, the underlying purpose of the statute is punitive.[64] The Court reasoned that a delinquency petition can be dismissed for numerous reasons collateral to the merits of the case, such as the failure of a witness to testify, and, therefore, the final disposition of a case is "largely irrelevant" to the legality of the pretrial detention.[65]

The majority applied the third factor of the *Eldridge*[66] test to answer whether the procedures of New York's preventive detention statute provide sufficient protection against erroneous and unnecessary deprivation of liberty.[67] The Court first noted that the Act entitles a juvenile to

56. *Id.*
57. *Id.*
58. *Id.* at 2412.
59. *Id.* (citing Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979)).
60. *Id.* at 2413 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).
61. *Id.* Detention pursuant to the Act is strictly limited in time. A juvenile accused of committing a serious crime can be detained no longer than seventeen days prior to a fact-finding hearing. A juvenile accused of committing a less serious crime can be detained no longer than six days. New York Family Court Act, N.Y. JUD. LAW § 340.1 (1983).
62. *Schall*, 104 S. Ct. at 2413. Nonsecure detention involves an open facility in the community without locks, bars, or security officers. Secure detention is more restrictive, but children are still assigned to separate dorms based on age, size, and behavior, and they are provided with educational and recreational programs. *Id.* A juvenile cannot, absent exceptional circumstances, be sent to a prison where he would be exposed to adult criminals. New York Family Court Act, N.Y. JUD. LAW § 304.1(2) (1983).
63. *Schall*, 104 S. Ct. at 2414.
64. *Id.*
65. *Id.* at 2415.
66. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). For a discussion of the *Eldridge* test see *supra* notes 32-33 and accompanying text.
67. Schall v. Martin, 104 S. Ct. 2403, 2415 (1984).

a formal probable cause hearing within three days of detention.[68] The juveniles who had been detained, however, claimed that detention decisions are intrinsically arbitrary because the statute contains no objective criteria to guide the judge in deciding who should be detained.[69] The Court rejected this claim by holding that the right to a hearing, to counsel and to a statement of facts, make it unnecessary to list in a statute specific factors that a judge must follow in the detention decision.[70] The Court found no reason for a federal court to assume that a state judge would not apply state law as conscientiously as possible.[71] The *Schall* Court further reasoned that because the family court must exercise a substitute parental function, a juvenile detention statute should not contain any particularized criteria.[72]

The detained juveniles also claimed that pretrial detention decisions are inherently arbitrary because they are based on a prediction of future crime, a prediction that is virtually impossible to make accurately.[73] The *Schall* Court, reaffirming earlier decisions,[74] held that a prediction of future criminal conduct can be made accurately.[75] The Court stated that such a prediction is an experienced one based upon a number of variables that cannot be easily codified. Furthermore, there are adequate post-detention procedures, such as habeas corpus review, appeals, and motions for reconsideration, that provide a sufficient mechanism for correcting any erroneous detention on a case by case basis.[76]

In a strongly worded dissent, Justice Marshall found persuasive the findings of the lower court[77] that the vast majority of juveniles detained under the Act are released prior to or immediately following adjudication.[78] These findings indicate that most juvenile detainees, when examined more carefully than at their initial appearance, are deemed insufficiently dangerous to warrant further incarceration.[79] The dissent stated that this situation seems to undercut the governmental purpose

68. *Id.* at 2416; *see* Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (a judicial determination of probable cause is a prerequisite to any extended restraint of an adult accused of a crime). The *Gerstein* Court did not, however, mandate a specific timetable of what was to be considered "extended restraint" or how soon after detention a probable cause hearing was to be held. *Schall*, 104 S. Ct. at 2415.

69. *See* Brief for Appellee at 64-65, Schall v. Martin, 104 S. Ct. 2403 (1984) (the seriousness of the crime, the nature of the proof, and the necessary degree of probability are all relegated to the discretion of the family court judge).

70. *Schall*, 104 S. Ct. at 2418.

71. *Id.*

72. *Id.*

73. *Id.* at 2417; *see supra* note 45 and accompanying text.

74. *See supra* notes 46-48 and accompanying text.

75. *Schall*, 104 S. Ct. at 2417.

76. *Id.* at 2418 (citing Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 16 (1979)).

77. Martin v. Strasburg, 689 F.2d 365, 369 (2d Cir. 1982) (*aff'g* 513 F. Supp. 691 (S.D. N.Y. 181)), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984).

78. *Schall*, 104 S. Ct. at 2420-22 (Marshall, J., dissenting).

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

assigned to the statute by the majority, because the state's interest in preserving the welfare of the child and protecting the community is insufficient where the juvenile, if freed, would probably not have committed a crime.[80]

Justice Marshall also disagreed with the majority's finding that the statute provides adequate procedural guidelines to guard against erroneous deprivation of liberty.[81] He noted that the statute is not limited to classes of juveniles whose past conduct suggests that they are substantially more likely than the average person to commit a future crime. Furthermore, the statute permits detention of juveniles who have been arrested for even trivial offenses and who have no prior record.[82] The high rate of error in these detention decisions is reflected by comparing the number of juveniles held pretrial to the number ultimately incarcerated following adjudication.[83] Thus, the dissent concluded that the net effect of the statute is overwhelmingly detrimental, and that none of the asserted governmental interests sufficiently outweighs the harmful effect of the Act on the juveniles who come within its purview.[84]

Despite contrary precedent,[85] the *Schall* decision indicates that the liberty interests of juveniles are less vital than those of adults. Although the Court has held in *In re Gault*[86] and *In re Winship*[87] that delinquency proceedings must comport with the fundamental fairness required by the fourteenth amendment, its decision in *Schall* indicates weakened support for juvenile rights. In upholding a statutory scheme that is so clearly violative of due process,[88] the Court indicates its willingness to deal with juveniles outside established principles of law applicable to adult offenders.

As the dissent noted, "if the 'liberty' protected by the Due Process Clause means anything, it means freedom from institutional restraint."[89] The *Schall* majority downplayed the importance of this principle by discounting the impact of incarceration on juveniles. The Court implied

80. *Id.* (Marshall, J., dissenting).
81. *Id.* at 2427-30 (Marshall, J., dissenting).
82. *Id.* at 2430 (Marshall, J., dissenting). In contrast to the Family Court Act, the District of Columbia's adult detention statute, which was upheld in United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981), *cert. denied*, 455 U.S. 1022 (1982), authorizes detention only if the person is charged with one of a prescribed set of dangerous crimes and only if the judge finds there is a substantial probability that the defendant committed the crime. D.C. CODE ANN. § 23-1322(b)(2)(c) (1981).
83. *Schall*, 104 S. Ct. at 2427 (Marshall, J., dissenting). The vast majority of persons detained under the Family Court Act are released either before or immediately following their trials. *Id.* (Marshall, J., dissenting).
84. *Id.* at 2433 (Marshall, J., dissenting).
85. *See supra* note 35 and accompanying text.
86. 387 U.S. 1 (1967).
87. 397 U.S. 358 (1970).
88. One commentator alleges that the constitutional arguments against preventive detention are so numerous that "their recitation looks like the model answer to an issue-spotting question on a law school examination." Ervin, *supra* note 25, at 297.
89. *Schall*, 104 S. Ct. at 2423 (Marshall, J., dissenting).

that because juveniles are subject to parental control, their liberty interests are less important than those of an adult.[90] There is, however, a significant difference between parental control and imprisonment. In attempting to analogize the two, the majority disregards the realities of juvenile detention.[91]

The *Schall* Court would have better served both society and the juvenile justice system had it declared the New York preventive detention statute unconstitutional. Such a holding would have provided the legislature with an opportunity to reevaluate the entire process surrounding detention. Possibly, the legislature then could have developed detention procedures that were less arbitrarily applied and that offered some degree of respect for the due process rights of juveniles. For example, pretrial detention could have been limited to apply only to juveniles charged with one of a prescribed set of violent crimes and, even then, only if a judge found that there was probable cause to believe that the individual committed the crime. The statute could have been further limited to apply only to juveniles with a past record of criminal behavior or whose past conduct suggested that they were substantially more likely than the average person to commit a crime prior to trial. These objective criteria would have served as a guide to family court judges in deciding whether to detain and would have reduced the unbridled discretion that is permitted under the current preventive detention statute. However, the Supreme Court chose to allow the practice of discretionary detention of juveniles to continue. By so choosing, the Court disregards the widespread agreement that too many juveniles are unnecessarily and inappropriately detained throughout the United States.[92] Current detention practices have done much to undermine the credibility of the juvenile court system. Preventive detention imposes incarceration without a finding of guilt, thereby undermining the presumption of innocence. Such a practice downgrades the importance of an individual's right to be free from arbitrary and unnecessary confinement, and is at odds with our society's value system which places such high regard on freedom.

Kim Detrick

90. *Id.* at 2410.
91. *Id.* (Marshall, J., dissenting); *see supra* notes 36-37 and accompanying text.
92. *See* Amicus Brief, Youth Law Center and the Juvenile Law Center of Philadelphia, at 6, Schall v. Martin, 104 S. Ct. 2403 (1984).