Journal of Criminal Law and Criminology

Volume 75
Issue 3 *Fall*

Article 16

Fall 1984

Fourteenth Amendment--Due Process and the Preventive Detention of Juveniles

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0091-4169/84/7503-855
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 75, No. 3
 Printed in U.S.A.

FOURTEENTH AMENDMENT—DUE PROCESS AND THE PREVENTIVE DETENTION OF JUVENILES

Schall v. Martin, 104 S. Ct. 2403 (1984).

I. INTRODUCTION

In *Schall v. Martin*,[1] the Supreme Court upheld a New York statute that provided for the preventive detention of juveniles accused of a crime, who present a "serious risk" that they may commit another crime before trial.[2]

Schall v. Martin is the first time that the Court has sanctioned detention of an individual prior to a finding of guilt for a purpose other than to ensure that the person will appear at trial.[3] The decision is particularly disturbing for two reasons. First, a juvenile may be detained based solely on the judge's prediction that the juvenile is likely to commit a crime. Second, the statute lacks the procedural requirements necessary to ensure fair application of the procedure.[4]

This Note begins by explaining the New York procedure for handling arrested juveniles.[5] The Note then discusses particular aspects of *Schall v. Martin*, including the facts of the case[6] and the majority and dissenting opinions.[7] Finally, this Note will analyze three aspects of the Court's decision: the legitimate state interest,[8] the

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1 104 S. Ct. 2403 (1984).

2 N.Y. FAM. CT. ACT § 320.5(3)(b) (McKinney 1983). The statute at issue in the lower court cases was a forerunner of the current New York Family Court Act. *See* N.Y. FAM. CT. ACT. § 739(a)(ii) (McKinney 1982). Article 3 of the Family Court Act became effective July 1, 1983 and applies to all delinquency proceedings including appeals and post-judgment proceedings. N.Y. FAM. CT. ACT § 301.3(1) (McKinney 1983). Because the preventive detention statutes are identical, the Court found that the case was not moot. 104 S. Ct. at 2405 n.2 (citing Brockington v. Rhodes, 396 U.S. 41, 43 (1969)).

3 *See* Comment, *The Supreme Court and Pretrial Detention of Juveniles: A Principled Solution to a Due Process Dilemma*, 132 U. PA. L. REV. 95, 95-96 (1983). The Court of Appeals for the District of Columbia Circuit has upheld the constitutionality of a District of Columbia statute that permits the preventive detention of adults to protect society. *See* United States v. Edwards, 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).

4 *See infra* notes 102-56 and accompanying text.

5 *See infra* notes 11-19 and accompanying text.

6 *See infra* notes 20-42 and accompanying text.

7 *See infra* notes 43-95 and accompanying text.

8 *See infra* notes 106-30 and accompanying text.

concept of punishment,[9] and the due process implications of the New York statute.[10]

II. The New York Juvenile Court Procedure

In New York, juveniles accused of conduct that would be a crime if committed by an adult may be prosecuted as juvenile delinquents in family court.[11] The New York Family Court Act establishes the framework for adjudicating juveniles delinquent.[12] Section 320.5(3)(b) of the Act provides for the pretrial detention of a juvenile if "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."[13] An initial appearance before a family court judge takes place soon after the juvenile's arrest. The judge typically reviews the petition for delinquency, a recommendation on whether to detain or release the juvenile, and statements by the juvenile and his or her representatives.[14] The judge then decides whether to detain the juvenile pending adjudication of the delinquency. A juvenile detained under the statute is entitled to a probable cause hearing three to six days after detention. A trial must follow three to fourteen days after the probable cause hearing.[15] If adjudicated a delinquent, the court will then hold a dispositional hearing to determine what sentence to impose. The judge may choose from a variety of sentencing alternatives, including suspending judgment, probation, placement at home or with other people, placement in a treatment center, or incarceration.[16] In making this sentencing decision, the court considers the best interests of the juvenile and generally views dentention as a "harsh solution."[17] Frequently, the court finds that the time served during the pretrial detention period is sufficient

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9 *See infra* notes 131-47 and accompanying text.

10 *See infra* notes 148-56 and accompanying text.

11 United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 694 (S.D.N.Y. 1981), *aff'd*, Martin v. Strasburg, 689 F.2d 365 (2d Cir. 1982), *rev'd*, Schall v. Martin, 104 S. Ct. 2403 (1984). *See* N.Y. Penal Law § 30.00 (McKinney 1984).

12 N.Y. Fam. Ct. Act § 302.1(1) (McKinney 1984). The New York Family Court Act applies to juveniles between the ages of seven and sixteen who commit acts that, if committed by an adult, would constitute a crime. *Id.* at § 301.2(1).

13 *Id.* at § 320.5(3)(b).

14 Martin v. Strasburg, 689 F.2d 365, 369-70 (2d Cir. 1982) (citing testimony of Judge Cesar Quinones, Transcript of Trial Proceedings, at 463).

15 689 F.2d at 367. The trial generally begins three days after the filing of the petition against the juvenile unless the juvenile is charged with an act that would be a felony if committed by an adult. In that case, the trial may be delayed for fourteen days. *Id.* at 367 n.5.

16 *Id.* at 368. Some of these alternatives are subject to the availability of space or resources. *Id.*

17 *Id.* at 370.

punishment and will not incarcerate the juveniles further. Also, judges appear reluctant to sentence juveniles to additional time in a detention facility when treatment facilities are unavailable.[18] As a consequence, the majority of juveniles detained under the New York statute are released either before or immediately following the dispositional hearing.[19]

III. THE FACTS IN *SCHALL V. MARTIN*

On December 13, 1977, Gregory Martin was arrested and charged with robbery,[20] assault,[21] and criminal possession of a weapon[22] after he allegedly struck another youth on the head with a loaded revolver and stole the youth's jacket and sneakers.[23] When the police arrested Martin, he still possessed the gun. Because he was fourteen years old, Martin came under the jurisdiction of the New York Family Court. Pursuant to the Family Court Act, Judge Ferrara of the Family Court held a hearing to determine whether Martin should be detained before his trial.[24] Although Martin had no previous record, the judge ordered Martin detained under New York's preventive detention statute.[25] Judge Ferrara based his decision on three considerations: the crime occurred late at night, Martin possessed a weapon, and Martin had lied to police.[26]

At a probable cause hearing on December 19, the court found probable cause for all crimes charged.[27] From December 27 to 29 the court held a fact-finding hearing and found Martin guilty of robbery and criminal possession of a weapon.[28] At a dispositional hearing on February 14, 1978, the court sentenced Martin to two years probation.[29] In all, Martin was detained under the New York statute

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18 *Id.* at 371.

19 *Id.* at 369.

20 The adult criminal statute is N.Y. PENAL LAW §§ 160.00, 160.05, 160.10, 160.15 (McKinney 1984).

21 The adult criminal statute is N.Y. PENAL LAW §§ 120.00, 120.05, 120.10 (McKinney 1984).

22 The adult criminal possession statute is N.Y. PENAL LAW §§ 265.01, 265.02 (McKinney 1984).

23 *Martin*, 104 S. Ct. 2403, 2406 (1984).

24 *Martin*, 513 F. Supp. at 696. For a discussion of the procedure under the New York Family Court Act, see *supra* notes 11-17 and accompanying text.

25 *Martin*, 513 F. Supp. at 696.

26 *Martin*, 104 S. Ct. at 2407.

27 *Id.*

28 *Martin*, 513 F. Supp. at 696. The fact-finding hearing is analogous to a trial in an adult criminal case. The juvenile is entitled to counsel, evidence may be suppressed, and guilt must be proved beyond a reasonable doubt. *Martin*, 104 S. Ct. at 2407 n.8 (citing N.Y. FAM. CT. ACT §§ 330.2, 341.2, 342.2).

29 104 S. Ct. at 2407.

for a total of fifteen days.[30]

While in preventive detention, Martin began a *habeas corpus*, class action suit on behalf of "those persons who are, or during the pendency of this action, will be preventively detained pursuant to" the New York statute.[31] Appellees Luis Rosario and Kenneth Morgan joined the suit as named plaintiffs.[32] The class members sought a declaratory judgment that the New York statute violates the fourteenth amendment due process and equal protection clauses.[33]

After certifying the class, the district court held that appellees did not have to exhaust state remedies before petitioning the federal courts for relief because New York's highest court previously had rejected a challenge to this statute.[34] The district court then rejected the appellees' equal protection claim. It held, however, that because the pretrial detention of juveniles actually constituted a "punitive measure," it violated the juveniles' due process rights.[35] The court ordered the release of all juveniles then held pursuant to the statute.[36]

The Second Circuit affirmed the district court decision.[37] The court held that the statute was used primarily to impose punish-

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30 *Id.* Martin was detained from December 14 to December 29, the period between the initial appearance and the end of the fact-finding hearing. *Id.*

31 *Id.* at 2408.

32 *Id.* The district court opinion discussed the case histories of the named plaintiffs and 31 other members of the class. *Martin*, 513 F. Supp. at 695-700. The Supreme Court opinion, however, mentioned only Martin, Rosario, and Morgan.

33 104 S. Ct. at 2408.

34 *Id. See* People *ex rel.* Wayburn v. Schupf, 39 N.Y.2d 682, 350 N.E.2d 906, 385 N.Y.S.2d 518 (1976). In *Schupf*, the New York Court of Appeals held the state statute constitutional. The court found that the statute fulfilled two state concerns: to protect society from crime and to shelter juveniles who are in need of special care. *Id.* at 687, 350 N.E.2d at 908, 385 N.Y.S.2d at 520. The court held that the statute, therefore, did not violate equal protection or due process. *Id.* at 691, 350 N.E.2d at 911, 385 N.Y.S.2d at 522.

35 United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 717 (S.D.N.Y. 1981), *aff'd*, Martin v. Strasburg, 689 F.2d 365 (2d Cir. 1982), *rev'd*, Schall v. Martin, 104 S. Ct. 2403 (1984). The district court held that the statute did not violate equal protection under a rationality test. *Id.* at 706. The court refused to apply strict scrutiny because youth is not an "invidiously discriminatory classification[]," and because the right to personal liberty is not sufficient to warrant a strict scrutiny test. *Id.* In holding that the preventive detention statute violated due process, the court stated that the procedure lacked the fundamental fairness required in juvenile proceedings. *Id.* at 707. The court enumerated several reasons for its finding: the judge's prediction is unreliable, *id.* at 707, there has been no finding of probable cause, *id.* at 714, and the detention constituted punishment, *id.* at 715.

36 *Martin*, 104 S. Ct. at 2408-09.

37 Martin v. Strasburg, 689 F.2d 365 (2d Cir. 1982), *rev'd*, Schall v. Martin, 104 S. Ct. 2403 (1984).

ment, and not merely for preventive purposes.[38] Thus, the court concluded that the New York statute was unconstitutional.[39]

The Supreme Court noted probable jurisdiction,[40] and subsequently reversed the lower court decision in an opinion by Justice Rehnquist.[41] Justice Marshall wrote a dissenting opinion and was joined by Justices Brennan and Stevens.[42]

IV. THE SUPREME COURT OPINIONS

A. THE MAJORITY

Justice Rehnquist, in writing for the majority,[43] stated that the issue involved in this case was whether preventive detention of juveniles comports with the due process requirement of fundamental fairness. According to the majority, resolution of this issue depended upon answering two questions. First, does preventive detention serve a legitimate state objective? Second, does the New York statute provide adequate procedural protection to accused juveniles?[44]

Although the Court recognized the juveniles' substantial interest in freedom from institutional restraint,[45] the Court held that the pretrial detention of juveniles served the dual purpose of protecting juveniles from the consequences of their criminal acts and protecting society from the harm that juvenile delinquents may inflict.[46] These countervailing interests led the Court to conclude that preventive detention of juveniles "serves a legitimate regulatory purpose compatible with the 'fundamental fairness' demanded by the Due Process Clause in juvenile proceedings."[47]

The Court reached this conclusion by weighing a juvenile's interest in liberty against the " 'compelling state interest' in protecting the community from crime."[48] In addition to protecting the community from crime, the Court found that the state has an inter-

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38 *Id.* at 372.

39 *Id.* at 373.

40 103 S. Ct. 1765 (1983). Ellen Schall replaced Paul Strasburg as the Commissioner of the New York City Department of Juvenile Justice and thereafter became the named appellant. Brief for the Appellant at I, Schall v. Martin, 104 S. Ct. 2403 (1984).

41 *See infra* notes 43-61 and accompanying text.

42 *See infra* notes 62-95 and accompanying text.

43 Chief Justice Burger and Justices White, Blackmun, Powell, and O'Connor joined Justice Rehnquist in the majority opinion.

44 104 S. Ct. at 2409.

45 *Id.* at 2410.

46 *Id.* at 2410-11.

47 *Id.* at 2412.

48 *Id.* at 2410.

est both in protecting juveniles from injuring themselves while engaging in criminal conduct and in preventing "the downward spiral of criminal activity into which peer pressure may lead the child."[49] The Court held that these state interests outweighed the juvenile's liberty interest.[50] Thus, preventive detention complies with the fundamental fairness requirement. In reaching this conclusion, the Court referred to the fifty state laws that allow some form of preventive detention of juveniles, and the eight state courts that have upheld these statutes.[51]

Justice Rehnquist next addressed whether pretrial detention of juveniles constitutes punishment. According to a previous Supreme Court decision, if pretrial detention constitutes punishment, it would violate juveniles' due process rights.[52] To conform with constitutional requirements, the confinement must be compatible with legitimate state regulatory purposes.[53] The Court concluded that preventive detention of juveniles was not punishment because the statute did not state that the detention was meant as punishment and the circumstances of the incarceration did not constitute punishment.[54] The Court found it sufficient to rely on a case-by-case adjudication of the validity of pretrial detention decisions because the New York statute is not invalid on its face.[55]

The Court next examined the sufficiency of the procedural protections afforded juveniles and found them to be constitutionally adequate. Appellees had argued that, at the very least, the Court's decision in *Gerstein v. Pugh*[56] required a finding of probable cause before any incarceration.[57] The Court rejected this argument on

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49 *Id.* at 2411.

50 *See id.* at 2412.

51 *Id.* at 2411-12. The Court acknowledged that the widespread use of the practice is not conclusive as to its constitutionality. *Id.* at 2412. The Court used this information as evidence of the "uniform legislative judgment that pretrial detention of juveniles properly promotes the interests both of society and the juvenile . . . ." *Id.*

52 *Id.* at 2412 (citing Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979)).

53 *Id.* (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).

54 *Id.* at 2413. The Court was convinced that preventive detention was not meant to be punishment because the detention was limited in time, the juvenile was entitled to probable cause and fact-finding hearings, and the juvenile cannot be detained for more than 17 days under the statute. *Id.* In addition, the Court stated that the conditions of confinement, whether in secure or nonsecure detention, reflect a regulatory rather than a punitive purpose for the detention. *Id.*

55 *Id.* at 2415.

56 420 U.S. 103 (1975).

57 In *Gerstein*, the Court held that the fourth amendment requires a judicial finding of probable cause before a person may be subjected to an extended restraint of liberty. *Id.* at 114. The Court did not impose a strict timetable, nor did it require the use of "adversary safeguards" during the probable cause hearing. The Court noted that although *Gerstein* arose in a fourth amendment context, "the same concern with 'flexibil-

two grounds. First, *Gerstein* provided states with the flexibility to experiment with a variety of procedures to ensure conformance with due process, and not with rigid, probable cause requirements.[58] Second, the Family Court Act provides more procedural protections than the Court had required in *Gerstein*.[59] Thus, the Court concluded that the procedures authorized by the New York statute are constitutionally adequate under the fourteenth amendment and as decided in *Gerstein*.[60]

The majority observed that the Court is neither a legislature nor a committee formed to draft a model statute. Rather, the Court's function should be restricted to reviewing the constitutionality of the New York statute. Under such a restricted review, the Court found that the regulatory purpose of the preventive detention of juveniles comports with the due process clause of the fourteenth amendment.[61]

B. THE DISSENT

Justice Marshall, joined by Justices Brennan and Stevens, dissented because he disagreed with the majority in both findings that were essential to the decision.[62] First, the dissent disagreed that the government objectives involved outweighed the adverse effect of incarceration on juveniles.[63] Second, the dissent disagreed with the majority's holding that the New York statute provides juveniles with adequate procedural protections.[64]

The dissent stated that the New York statute had to satisfy two requirements to comply with fundamental fairness: the statute must advance goals that justify the burdens it imposes on juveniles' constitutional rights, and the statute must not punish juveniles.[65] The dissent found that neither requirement was satisfied by the New York statute.

Although the dissent characterized the test as a two part analysis, the discussion focused mainly on the punishment aspects

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ity' and 'informality,' while yet ensuring adequate predetention procedures, is present in this context." 104 S. Ct. at 2415-16.

58 *Id.* at 2415.

59 *Id.* at 2416. The protections given to juveniles under the Family Court Act include full notice of charges, a record of the hearing, representation by counsel, and a statement of facts and reasons for the detention. *Id.*

60 *Id.* at 2417.

61 *Id.* at 2419.

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

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

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

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

of the pretrial detention.[66] First, the dissent discussed the burdens the statute imposed on juveniles' constitutional rights. The dissent indicated that it "is difficult to take seriously" the majority's claim that preventive detention is merely a transfer of custody from parent to the state.[67] The dissent stated that "[t]he majority seeks to evade the force . . . [of] the impact on a child of incarceration."[68] Juveniles, like adults, are subjected to stigmatization and restricted freedom of movement as a result of their incarceration.[69] Furthermore, the dissent cited the district court opinion which found that juveniles in secure detention were subjected to strip searches and some of them were detained with juveniles who were institutionalized for long-term care.[70]

Second, the dissent agreed with the majority that the pretrial detention of juveniles must not constitute punishment or it is constitutionally infirm. The dissent disagreed, however, with the majority's contention that a legitimate state objective would justify the preventive detention.[71] Nonetheless, the dissent found that the statute does not advance a legitimate state objective, and thus, the statute is unconstitutional because it imposes punishment prior to the adjudication of guilt.[72] The dissent based this conclusion on two grounds. First, when juveniles are preventively detained, the state objectives of protecting the juvenile and society from juvenile crime are at best minimally protected. Second, cases in which the state objective is advanced cannot be distinguished from those situations where the detention served no purpose.[73]

The dissent supported its conclusion by emphasizing three

66 *Id.* at 2423-25(Marshall, J., dissenting).

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

68 *Id.* (Marshall, J., dissenting).

69 *Id.* at 2424 (Marshall, J., dissenting).

70 *Id.* at 2422 (Marshall, J., dissenting) (citing *Martin*, 513 F. Supp. at 695 n.5).

71 *Id.* at 2423 (Marshall, J., dissenting). The dissent noted that although the phrase "legitimate state objective" appeared in *Wolfish*, the majority inappropriately relied on the standard applied in that case. *Id.* at 2423 n.12 (Marshall, J., dissenting). The *Wolfish* standard applies only to the conditions of confinement and not to the legitimacy of the confinement in the first instance. *Id.* (Marshall, J., dissenting). *See infra* notes 134-40 and accompanying text.

72 *Martin*, 104 S. Ct. at 2429-30 (Marshall, J., dissenting). The dissent cited several instances of judges using pretrial detention as a punishment. The record indicated that many juveniles are released after they are found guilty because "the judge decides that their pretrial detention constitutes sufficient punishment." *Id.* at 2429 (Marshall, J., dissenting) (citing *Martin*, 689 F.2d at 370-71 & nn.27-28). Another judge admitted punishing one of the juveniles in the sample by ordering him detained before trial. *Id.* at 2429-30 (Marshall, J., dissenting) (citing *Martin*, 513 F. Supp. at 708).

73 *Id.* at 2425 (Marshall, J., dissenting). The dissent also stated that the lower courts found that "only occasionally and accidentally does pretrial detention . . . prevent the commission of a crime." *Id.* (Marshall, J., dissenting).

points. First, judges are incapable of determining which juveniles would commit crimes upon release.[74] Second, the statute does not differentiate between those juveniles likely to commit future offenses and those who have been arrested for trivial offenses or have no prior record.[75] Third, the lower courts found no reason to believe that the detained juveniles were likely to commit crimes during their period of release.[76] In fact, many juveniles had been released after arrest, and although they had not engaged in criminal conduct, they were subsequently detained after their initial appearance and before the fact-finding hearing.[77] The dissent stated that "it is not appparent why a juvenile would be more likely to misbehave between his initial appearance and his trial than between his arrest and initial appearance."[78]

The dissent reasoned that because of these infirmities, the state's goal of protecting both the juvenile and society are fatally undercut. Juveniles clearly do not benefit by this incarceration and the state fails in its role as *parens patriae*.[79] In addition, "the public reaps no benefit from incarceration of the majority of the detainees who would not have committed any crimes had they been released."[80]

The dissent also criticized the majority for authorizing a case-by-case adjudication of pretrial detention situations. Because of the limited time of incarceration, a particular juvenile's case would be

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74 *Id.* (Marshall, J., dissenting). The dissent emphasized that the state of modern psychology does not provide the tools for predicting human behavior. *Id.* (Marshall, J., dissenting). The district court stated that " 'no diagnostic tools have as yet been devised which enable even the most highly trained criminologists to predict reliably which juveniles will engage in violent crime.' " *Id.* (Marshall, J., dissenting) (quoting *Martin*, 513 F. Supp. at 708).

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

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

77 *Id.* (Marshall, J., dissenting). The dissent referred to one case where a juvenile was detained for five days for playing three-card monte. The petition against him was later dismissed because the offense was not against the law. *Id.* at 2426 n.21 (Marshall, J., dissenting) (citing *Martin*, 513 F. Supp. at 698-99).

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

79 Under the doctrine of *parens patriae*, the juvenile court system was created to help and to rehabilitate the delinquent child. Theoretically, the child's natural parents have failed in their role as parents, so the state intervenes to reform the child. *See* Comment, *Waiver in Indiana—A Conflict with the Goals of the Juvenile Justice System*, 53 IND. L.J. 601 (1978); *see generally* Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

80 104 S. Ct. at 2427 (Marshall J., dissenting). Justice Marshall was particularly disturbed that under the *parens patriae* doctrine, the juvenile justice system is meant to help juveniles, yet the preventive detention statute harms more juveniles than it helps. *Id.* (Marshall, J., dissenting). Most juveniles detained under the statute are not helped because they would not have committed crimes had they been released. These same juveniles are deprived of their liberty and may be stigmatized by the label of "delinquent." *Id.* (Marshall, J., dissenting).

moot before the constitutionality of the statute could be challenged.[81] In addition, detainees seeking to challenge the constitutionality of their detention would have to demonstrate that, if they had been released, they would not have committed a crime and therefore they were unconstitutionally detained.[82] The dissent concluded that "to protect the rights of a majority of juveniles whose incarceration advances no legitimate state interest, § 320.5(3)(b) must be held unconstitutional 'on its face.' "[83]

Next Justice Marshall criticized the statute's lack of adequate procedural safeguards.[84] The statute provides judges with no guidance to determine what evidence they should consider when deciding whether to incarcerate a juvenile, and the statute does not require judges to consider the juvenile's past criminal record or the severity of the crime.[85] Thus, because the statute fails to provide direction, judges are vested with unbridled discretion when making pretrial detention decisions.[86]

In addition, the dissent found that the procedural protections provided by the New York statute would fail to prevent the erroneous detention of juveniles who do not constitute a threat to society.[87] The dissent based this conclusion on the three part test announced in *Mathews v. Eldridge*.[88] First, because personal liberty is

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81 *Id.* at 2428 (Marshall, J., dissenting).

82 *Id.* at 2429 (Marshall, J., dissenting). The dissent also claimed that the detained juveniles would have difficulty obtaining standing to seek equitable relief. *Id.* at 2428-29 (Marshall, J., dissenting) (comparing INS v. Delgado, 104 S. Ct. 1758, 1763 n.4 (1984) (plaintiffs' allegation of an ongoing policy by the Immigration and Naturalization Service of entering their workplace to determine whether illegal aliens are present sufficient to establish standing), with City of Los Angeles v. Lyons, 461 U.S. 95, 106 (1983) (plaintiff failed to demonstrate case or controversy because he did not allege either that all police officers always apply chokeholds to arrestees, or that the city authorized such conduct)).

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

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

85 *Id.* (Marshall, J., dissenting).

86 *Id.* (Marshall, J., dissenting). This leads to the possibility that juveniles will be detained "under circumstances in which no public interest would be served by their incarceration," *id.* at 2430-31, and that the process is arbitrary and infringes on fundamental rights, *id.* at 2431 (Marshall, J., dissenting).

87 *Id.* at 2432 (Marshall, J., dissenting).

88 424 U.S. 319 (1976). *Mathews* involved the procedure a state agency must follow to terminate disability insurance benefits under the Social Security Act. The *Mathews* Court articulated three factors to consider to comply with due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. at 335.

at stake, the dissent found that the Court should require adequate procedural protections. Second, there is a serious risk that juveniles will be mistakenly detained.[89] Third, the administrative burdens that would result from additional protective devices would be insubstantial.[90]

Finally, Justice Marshall stated that he would have struck down the New York preventive detention statute on vagueness grounds.[91] He analogized the *Schall v. Martin* situation to cases where the Court has struck down city ordinances that gave officials "standardless discretion" to impose sanctions that violate procedural due process.[92] Justice Marshall found that these precedents compel the rejection of the present situation where the "absence of meaningful guidelines creates opportunities for judges to use illegitimate criteria when deciding whether juveniles should be incarcerated pending their trials."[93]

In conclusion, Justice Marshall feared that the statute is "bound to disillusion its victims regarding the virtues of our system of criminal justice" because "no public purpose advanced by the statute [is] sufficient to justify the harm it works."[94] Although the state has the power and the responsibility to protect children, Justice Marshall emphasized that the Court had upheld a statute that is overwhelmingly detrimental to a majority of the juveniles affected by the statute.[95]

V. ANALYSIS

The philosophy underlying the juvenile justice system has been to rehabilitate rather than to punish youthful offenders.[96] Since Illinois established the first juvenile court in 1899, every state has

89 104 S. Ct. at 2431 (Marshall, J., dissenting).

90 *Id.* at 2432 (Marshall, J., dissenting).

91 *Id.* at 2432-33 (Marshall, J., dissenting). The dissent cited Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), where the Court struck down a local vagrancy ordinance on the grounds that the ordinance placed too much discretion in the hands of police. *Id.* at 2432 (Marshall, J., dissenting). *See also* Zablocki v. Redhail, 434 U.S. 374 (1978) (due process clause prohibits conditioning the right to marry on the fulfillment of child support obligations); Staub v. City of Baxley, 355 U.S. 313 (1958) (fourteenth amendment does not allow city to require members of an organization to obtain permit to solicit new members).

92 104 S. Ct. at 2433 (Marshall, J., dissenting) (quoting Zablocki v. Redhail, 434 U.S. 374, 402 n.4 (1978) (Powell, J., concurring in the judgment)).

93 *Id.* (Marshall, J., dissenting).

94 *Id.* (Marshall, J., dissenting).

95 *Id.* (Marshall, J., dissenting).

96 Peuler, *Juveniles Tried as Adults: Waiver of Juvenile Court Jurisdiction*, 3 J. CONTEMP. L. 349, 349 (1977). For a general discussion of the history of the juvenile justice system, see Comment, *supra* note 3, at 98-101.

adopted a separate set of proceedings for juvenile offenders.[97] The state often has assumed the role of *parens patriae* and has adopted a variety of procedures whereby juveniles may be rehabilitated. These sentencing alternatives range from court supervision of a juvenile, to transfer of custody to a foster home or other facility designed for juvenile offenders.[98]

If parents fail in their supervisory role and their children are found to be delinquent, the state may intervene as *parens patriae* and assume custody of the child.[99] Because juvenile courts act in the child's best interests and merely transfer custody from the parents to the state, the proceedings are viewed as civil rather than criminal in nature.[100] Thus, juveniles are not entitled to assert all the fundamental constitutional rights that are available to adults in criminal proceedings.[101]

In juvenile proceedings, juveniles may assert only the fundamental right to fair treatment afforded by the due process clause of the fourteenth amendment.[102] This fundamental fairness standard has been used to decide many due process challenges of juvenile court proceedings.[103] It remains the only basis on which a juvenile may challenge the constitutionality of a juvenile delinquency proceeding.

In *Schall v. Martin*, the Court determined that the fundamental fairness of the New York statute may be resolved by considering three issues. First, to comport with fundamental fairness, the state may justify the deprivation of a juvenile's liberty only in the presence of a legitimate state objective. Second, according to the

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97 *In re* Gault, 387 U.S. 1, 14 (1967).

98 Peuler, *supra* note 96, at 349. Juveniles may remain with their families while under court supervision or they may be placed in an institution for juvenile delinquents. Other alternatives include probation or temporary transfer of custody to an individual or agency capable of providing appropriate care for juveniles. *Id.*

99 *Gault*, 387 U.S. at 17.

100 Kent v. United States, 383 U.S. 541, 555 (1966).

101 *See* Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 656 (1980); *see also* McKeiver v. Pennsylvania, 403 U.S. 528, 533-34 (1971) (plurality opinion).

102 *Kent*, 383 U.S. at 355 (citing Pee v. United States, 107 U.S. App. D.C. 47, 274 F.2d 556 (1959)). U.S. CONST. amend. XIV, § 1 states: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

103 *See, e.g.*, Breed v. Jones, 421 U.S. 519 (1975) (due process protects juveniles against double jeopardy); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (due process does not include right to jury trial for juveniles); *In re* Winship, 397 U.S. 358 (1970) (due process requires proof beyond reasonable doubt); *In re* Gault, 387 U.S. 1 (1967) (due process requires written notice of charges, right to counsel, privilege against self-incrimination, and right to confrontation and cross-examination of witnesses).

Court's decision in *Bell v. Wolfish*,[104] the pretrial detention is constitutionally infirm if it constitutes punishment. Finally, the statute must provide adequate procedural safeguards to ensure that the statute does not violate the constitutional rights of detained juveniles.[105]

A. THE LEGITIMATE STATE OBJECTIVE

The majority opinion emphasized society's " 'legitimate and compelling state interest' in protecting the community from crime,"[106] and only cursorily mentioned the juvenile's interest in freedom from restraint.[107] The Court then concluded that preventive detention of juveniles is justified on the grounds that it protects juveniles from the consequences of their own folly and protects society from the harm that young offenders may cause. Thus, the Court found that "the practice serves a legitimate regulatory purpose compatible with the 'fundamental fairness' demanded by the Due Process Clause in juvenile proceedings."[108]

The Court mentioned only two reasons to justify its conclusion that pretrial detention of juveniles comports with due process. First, the Court found that juveniles have only minimal liberty interests, for "juveniles, unlike adults, are always in some form of custody."[109] Although the juvenile justice system traditionally was based on this concept of a transfer of custody, the logic of adhering to this rationale has been questioned for years.[110] Parental "confinement" cannot seriously be compared to institutional confinement where juveniles may be strip searched and forced to wear

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104 441 U.S. 520 (1979).

105 Both the majority and dissenting opinions mentioned only two issues to resolve. The majority combined the legitimate state objective and punishment issues, *Martin*, 104 S. Ct. at 2409, most likely because of its contention that the test in Bell v. Wolfish, 441 U.S. 520 (1979), states that incarceration constitutes punishment in the absence of a legitimate government objective. *Martin*, 104 S. Ct. at 2412-13. By finding a legitimate state objective, therefore, the majority automatically resolved the punishment issue. The dissent, however, treated the questions of punishment and legitimate state objectives as two separate issues. *Id.* at 2423, 2425 (Marshall, J., dissenting). For clarity these two issues will be similarly treated here. The dissent did not mention procedural issues as part of a test to be applied in this case. The fact that the dissent ultimately addressed this issue, however, indicates its importance to the case. *See id.* at 2430 (Marshall, J., dissenting).

106 *Martin*, 104 S. Ct. at 2410 (quoting DeVeau v. Braisted, 363 U.S. 144, 155 (1960)).

107 *Id.*

108 *Id.* at 2412.

109 *Id.* at 2410.

110 *See, e.g.*, *Gault*, 387 U.S. at 17 ("[T]he constitutional and theoretical basis for this particular system is—to say the least—debatable."); *see also In re* Winship, 397 U.S. 358, 365-68 (1970).

institutional clothing and follow institutional regimen.[111]

Second, the Court relied on the fact that every state allows pretrial detention of juveniles accused of crime, and that some states have expressly upheld their state statutes permitting preventive detention.[112] Although the Court recognized that uniform state practice does not indicate that the action conforms with due process, the Court cited these statutes and cases to indicate "the uniform legislative judgment that pretrial detention of juveniles properly promotes the interests both of society and the juveniles."[113]

The majority does not articulate the relevance of this uniform legislative judgment. Instead, the majority seems to use this information as evidence of the legitimacy of its assumption that preventive detention of juveniles protects society. Yet no empirical evidence supports this assumption.[114] The district court found that trained criminologists could not predict which juveniles would engage in crime,[115] and one expert witness testified that judges could predict future criminal conduct only four percent better than chance.[116] Evidence also indicates that psychologists are unable to accurately predict future criminal conduct.[117] Yet the New York statute requires judges to determine whether juveniles will commit a crime during the three to fourteen days following their initial appearance.[118] Certainly, the prediction of future criminal conduct, especially for such a short period of time, is speculative at best.[119]

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111 *Martin*, 513 F. Supp. at 695 n.5.

112 *Martin*, 104 S. Ct. at 2411-12.

113 *Id.* at 2412.

114 *Id.* at 2425-26 n.19 (Marshall, J., dissenting) (collecting authorities). *See, e.g.*, AM. PSYCHIATRIC ASS'N, CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL 27-28 (1974); Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1094-1101 (1976); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1974); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974); Schlesinger, *The Prediction of Dangerousness in Juveniles: A Replication*, 24 CRIME & DELINQ. 40, 47 (1978); Steadman & Cocozza, *Psychiatry, Dangerousness and the Repetitively Violent Offender*, 69 J. CRIM. L. & CRIMINOLOGY 226, 229-31 (1978); Wenk, Robinson & Smith, *Can Violence Be Predicted?*, 18 CRIME & DELINQ. 393, 401 (1972); *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 289 (1971).

115 *Martin*, 513 F. Supp. at 708.

116 *Id.*

117 *See supra* note 114 and accompanying text.

118 *See* N.Y. FAM. CT. ACT § 320.5(3)(b) (McKinney 1983).

119 *See Martin*, 104 S. Ct. at 2425-26 (Marshall, J., dissenting). A particularly interesting study resulted from the Supreme Court decision in Baxstrom v. Herold, 383 U.S. 107 (1966). In *Baxstrom*, the Court held that prisoners confined in Department of Corrections hospitals after their prison terms expired must be released or be civilly committed. *Id.* at 115. The decision affected 969 patients whom psychiatrists had determined

Although the Supreme Court has upheld the use of psychological predictions of dangerous behavior in various contexts, never before has the Court sanctioned the confinement of an individual before an adjudication of guilt based on a mere prediction that the person will commit a crime.[120] Previously, the Court has sanctioned the use of predictions of future dangerous conduct in limited contexts. *Schall v. Martin*, however, marks the first time that the Court has allowed a judge to make an independent and untutored prediction of dangerousness.[121]

The Court has upheld the use of predictions of dangerous conduct in a number of other situations. In *Jurek v. Texas*,[122] the Court upheld a state death penalty statute that allowed the jury to consider the likelihood that the defendant would engage in future anti-social conduct.[123] The Court held that parole boards qualify as predictors of dangerous conduct in *Greenholtz v. Nebraska Penal Inmates*[124] and *Morrissey v. Brewer*.[125] In both cases, the Court approved of parole board decisions that necessarily involved predictions of future dangerous conduct.[126]

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were too dangerous or too mentally ill to be released or transferred. Despite these predictions, one year after the patients were transferred following *Baxstrom*, 147 had been discharged and the 702 who remained presented no special disciplinary problems. Only seven required recommitment to a Department of Corrections hospital (figures exclude deaths, transfers, etc.). *See* Hunt & Wiley, *Operation* Baxstrom *After One Year*, 124 AM. J. PSYCHIATRY 974 (1968). After several years, twenty-seven percent of the patients had been released and only nine had been convicted of crimes. *See* Ennis & Litwack, *supra* note 114, at 712 (citing Steadman & Keveles, *The Community Adjustment and Criminal Activity of the* Baxstrom *Patients: 1966-1970*, 129 AM. J. PSYCHIATRY 304 (1972)).

120 *See* Barefoot v. Estelle, 103 S. Ct. 3383 (1983) (Court held psychiatrist could testify at penalty phase of capital case regarding likelihood that defendant would engage in future criminal conduct); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) (Court held Nebraska procedure for granting parole satisfied due process requirements); Jurek v. Texas, 428 U.S. 262 (1976) (Court upheld Texas death penalty statute that required jury to decide whether defendant would commit future acts of violence); Morrissey v. Brewer, 408 U.S. 471 (1972) (Court held that parole board must follow minimum due process requirements when revoking parole).

121 In *Greenholtz* and *Morrissey*, the state parole boards rendered decisions regarding parole. The Court held that the procedural safeguards imposed by the board in *Greenholz* were adequate for deciding whether to grant parole, *Greenholz*, 442 U.S. at 16. The Court established guidelines for parole boards to ensure compliance with due process when revoking parole in *Morrissey*, 408 U.S. at 488-89. In *Jurek*, the Court upheld the Texas capital sentencing scheme that allowed jurors to consider whether the defendant was likely to engage in future violent behavior. *Jurek*, 428 U.S. at 276.

122 428 U.S. 262 (1976).

123 *Id.* at 276.

124 442 U.S. 1 (1979).

125 408 U.S. 471 (1972).

126 *Greenholtz*, 442 U.S. at 10; *Morrissey*, 408 U.S. at 480. In *Greenholz*, the Court upheld the parole board decision. *Greenholz*, 442 U.S. at 16. In *Morrissey*, the Court found the record inadequate to decide the constitutionality of the parole board's process. *Morris-*

Most recently, in *Barefoot v. Estelle*,[127] the Court upheld the constitutionality of the testimony of a psychiatrist at the penalty phase of a capital case. The psychiatrist's testimony indicated that the convicted murderer was likely to engage in future violent acts. The Court held that the adversary nature of the proceeding permitted the defendant to rebut the claims of the testifying psychiatrist.[128] Two factors distinguish the present situation from *Barefoot*. First, in *Schall v. Martin*, the *judge* is making the prediction of future criminal conduct, and, as indicated above, there is no evidence that judges are qualified to perform this function.[129] Second, the Court in *Barefoot* upheld the psychiatrist's testimony because the expert was subject to cross-examination and the presentation of contrary evidence.[130] Clearly, a judge's opinion that a juvenile presents a "serious risk" of committing a crime before trial is not subject to the same protections afforded by the adversarial process. Thus, *Barefoot* does not justify the Court's decision to uphold the judge's prediction of future dangerous conduct in *Schall v. Martin*.

Overall, there is no empirical evidence that justifies the majority's conclusion that the preventive detention of juveniles protects society. The assertion of this government interest alone, without more, should not be sufficient to deprive juveniles accused of crime of their right to freedom.

B. PUNISHMENT

In *Bell v. Wolfish*,[131] the Supreme Court established the conditions under which an adult may be preventively detained before trial. *Wolfish* involved the confinement of pretrial detainees who were held to ensure their presence at trial.[132] There was no question that the adults were constitutionally detained in *Wolfish*. The issue in *Wolfish* was whether the administrative rules imposed on the pretrial detainees constituted punishment before the adjudication of

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sey, 442 U.S. at 490. The Court did, however, establish minimum due process requirements that implicitly allow for predictions of future conduct. *Id.* at 489.

127 103 S. Ct. at 3383 (1983).

128 *Id.* at 3397.

129 *See supra* notes 114-21 and accompanying text.

130 *Barefoot*, 103 S. Ct. at 3396.

131 441 U.S. 520 (1979).

132 *Id.* at 540. This rationale is an established justification for detaining an individual prior to a finding of guilt. *See, e.g.*, *Ex parte* Milburn, 34 U.S. (9 Pet.) 704, 710 (1835). A court may not set bail higher than an amount reasonably necessary to ensure the accused's presence at trial. United States v. Motlow, 10 F.2d 657 (7th Cir. 1926) (Butler, J., as Circuit Justice). The Court has never decided whether adults may be preventively detained if it is probable that they may commit crimes before their trials.

guilt.[133]

The Court in *Wolfish* found that punishment may take three forms: a statute that expressly states that an action is punishment;[134] state action that is arbitrary or purposeless;[135] and state action that does not fulfill a legitimate state objective.[136] Applying this test to the facts in *Wolfish*, the Court found that the pretrial detention of adults under these conditions did not constitute punishment because there was no express intent to punish the adults, nor was the action so arbitrary or purposeless that a court could infer that the state action was punishment.[137] The Court held that the rules imposed on the inmates fulfilled a legitimate regulatory purpose.[138] The rules were imposed upon adults who were constitutionally detained to ensure the safety of other prisoners and guards.[139]

In contrast, the issue in *Schall v. Martin* was not merely whether the conditions of confinement constitute punishment, but rather whether the juveniles may be confined prior to trial at all. The *Wolfish* definition of punishment is inadequate to resolve this issue because the *Wolfish* definition should apply only to the conditions of confinement for those who are constitutionally detained.[140] A legitimate regulatory purpose alone should not be sufficient to categorize the preventive detention of juveniles as non-punitive because individual liberty is at stake. Thus, the Court's finding of a regulatory purpose should not be sufficient to preventively detain juveniles.

Although the majority found support in the record for its proposition that "conditions of confinement also appear to reflect the regulatory purposes relied upon by the State,"[141] the dissenting opinion makes a much more convincing argument that, at least in some cases, the conditions to which juveniles are subjected in pretrial detention are inadequate. Preventively detained juveniles may be incarcerated with juveniles who have been found guilty of committing crimes, and preventively detained juveniles often are subjected to strip searches.[142] In addition, the procedural aspect of the statute provides no guarantee that the reasons for confinement will

133 *Wolfish*, 441 U.S. at 523, 534.
134 *Id.* at 538.
135 *Id.* at 539.
136 *Id.*
137 *Id.* at 561.
138 *Id.*
139 *Id.* at 558-59, 561.
140 *See Martin*, 104 S. Ct. at 2423 n.12 (Marshall, J., dissenting).
141 *Id.* at 2413.
142 *Id.* at 2422 (Marshall, J., dissenting).

be ascertained adequately.[143] When these factors are weighed against the speculative nature of the protection afforded society,[144] the conclusion that this state action constitutes punishment is unavoidable.[145]

This conclusion is supported further by evidence in the record that indicates that judges use the New York statute as a punitive measure. For example, the district court found that the family court may incarcerate juveniles in a facility closely resembling a jail and that judges frequently order that juveniles be detained with other juveniles who have been found to be delinquent.[146] In addition, juveniles often are released after being detained under the New York statute because "the judge decides that their pretrial detention constitutes sufficient punishment."[147] Thus, despite the Supreme Court's decision that this conduct does not constitute punishment, family court judges clearly apply the law in this unconstitutional manner.

C. PROCEDURAL SAFEGUARDS

The majority in *Schall v. Martin* found that the New York statute provided adequate procedural safeguards to avoid arbitrary application of preventive detention.[148] A closer examination of the statute, however, reveals two serious inadequacies. First, the statute presents the family court judge with unbridled discretion in determining to whom the statute will apply. The problem arises because the statute fails to provide judges with guidance as to what factors to consider when imposing preventive detention on juveniles. Also, because future conduct cannot be predicted, judges are unable to apply the "serious risk" standard. Second, the New York statute provides no standard of review for appellate courts to apply in appeals of preventive detention decisions.

According to the statute, judges must determine that juveniles pose a "serious risk" of committing a crime between the initial appearance and their probable cause hearing to warrant their deten-

143 See *infra* notes 148-56 and accompanying text for a discussion of the procedural infirmities of the statute.

144 *See Martin*, 104 S. Ct. at 2427-28 (Marshall, J., dissenting); *see also supra* notes 112-30 and accompanying text.

145 *Cf. Martin*, 104 S. Ct. at 2429 (Marshall, J., dissenting).

146 *See Martin*, 513 F. Supp. at 695 n.5.

147 *Martin*, 104 S. Ct. at 2429 (Marshall, J., dissenting) (citing *Martin*, 689 F.2d at 370-71 nn.27-28). This conclusion was based on testimony by Judge Quinones, a family court judge, and was also conceded by appellants' counsel. *Id.* (Marshall, J., dissenting).

148 *Id.* at 2417.

tion.[149] Studies indicate that such determinations cannot be made by either psychiatrists or judges. For judges to find that a juvenile's conduct may constitute a serious risk to the public, the judge necessarily must predict the juvenile's future conduct. It is precisely this type of prediction that psychiatrists have found is impossible to make.[150] Thus, the statute fails to provide adequate procedural protections because a juvenile's incarceration is based only upon a judge's prediction that the juvenile may engage in criminal conduct.

Similarly, because the statute fails to provide a set of guidelines for judges to apply, judges may make preventive detention decisions based on any criteria they wish to use. Although judges may consider a juvenile's past criminal behavior, the child's home environment, and the seriousness of the crime of which the juvenile is accused, nothing requires judges to consider these factors.[151]

Previously, the Court has adhered to a standard that would prevent government officials from exercising "unfettered discretion in making decisions that impinge on fundamental rights."[152] The Court found that this unfettered discretion " 'permits and encourages an arbitrary and discriminatory enforcement of the law.' "[153] The same concerns that are at issue in these previous cases are at issue in *Schall v. Martin* because the judge is granted absolute discretion without statutory guidance. Although these previous cases, such as *Papachristou v. City of Jacksonville*[154] and *Staub v. City of Baxley*,[155] involved public officials other than judges, there is no reason judges should be granted unfettered discretion to make predictions that are beyond their expertise.

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

150 *See supra* notes 114-19 and accompanying text.

151 *Martin*, 104 S. Ct. at 2430 (Marshall, J., dissenting). In fact, the lower court opinion indicated that one judge chose to incarcerate a juvenile because " '[w]e are living in a jungle, and it is time that these youths . . . pay the penalty.' " *Id.* at 2430 n.29 (Marshall, J., dissenting) (quoting Plaintiffs' Exhibit 42 at 11). Nothing in the statute prevents a judge from so incarcerating a juvenile.

152 *Id.* at 2432 (Marshall, J., dissenting).

153 *Id.* (Marshall, J., dissenting) (quoting Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972)). The dissent analogized the situation in *Schall v. Martin* to that in *Papachristou* where the Court invalidated a local vagrancy ordinance on vagueness grounds. *Id.* (Marshall, J., dissenting). The Court in *Papachristou* held that the statute at issue was unconstitutional and emphasized the "unfettered discretion it place[d] in the hands of the . . . police." *Papachristou*, 405 U.S. at 168.

The dissent also analogized the *Martin* situation to the first amendment context where the Court has invalidated local ordinances that conditioned speech on the " 'uncontrolled will of an official.' " 104 S. Ct. at 2432 (Marshall, J., dissenting) (quoting Staub v. City of Baxley, 355 U.S. 313, 322 (1958)). *See also* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

154 405 U.S. 156 (1972).

155 355 U.S. 313 (1958).

Furthermore, the New York statute provides no standard of review for appellate courts to apply in appeals of preventive detention decisions. Just as the Court held in *Furman v. Georgia*[156] that the state death penalty statute did not provide a standard of review, and therefore was unconstitutional, the Court in *Schall v. Martin* should have similarly held that the inadequate standard of review in the New York statute rendered it unconstitutional. Appellate courts may be unable to hold that family court judges acted arbitrarily when the statute does not require a judge to consider particular factors. Thus, the Court should have found that the New York statute is unconstitutional because of its failure to provide a standard of review for appellate courts.

VI. Conclusion

In *Schall v. Martin*, the Court for the first time permitted the states to restrain liberty for a reason other than to ensure the accused's presence at trial. The basis for this confinement is a judge's independent determination that a juvenile is likely to engage in criminal behavior prior to trial. A prediction of short term antisocial conduct is beyond the expertise of judges and should not be allowed. Although predictions of future dangerous conduct have been allowed in other cases, these predictions have never before been implemented in a situation before the adjudication of guilt.

Although the holding in *Schall v. Martin* applies only to juveniles and only for a short period of time, it is the first step toward future restraints of liberty before the adjudication of guilt. The Court next may be asked to decide whether similar restraints of liberty are appropriate for adults, and *Schall v. Martin* may serve as convincing precedent in any such future case.

Lee A. Weiss

156 408 U.S. 238 (1972) (per curiam).