Where Have All the Children Gone?: The Supreme Court Finds Pretrial Detention of Minors Constitutional: Schall v. Martin

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NOTES

WHERE HAVE ALL THE CHILDREN GONE?
THE SUPREME COURT FINDS PRETRIAL
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SCHALL v. MARTIN

In 1967 the Supreme Court applied the constitutional guarantee of due process to juvenile delinquency hearings. That decision, In re Gault,1 established a mode of analysis for assessing due process requirements in the juvenile justice system. Subsequent to Gault, the Supreme Court decided only a few cases regarding the due process rights of children in the juvenile justice system.2 The Supreme Court has followed the Gault mode of analysis in these decisions, with only one exception. The recent case of Schall v. Martin3 is this exception.

The Schall Court considered a New York statute that allows pretrial, preventative detention of accused juveniles.4 Such detention is authorized by a court if it determines that there is a "serious risk" that a juvenile will commit a crime before the adjudication return date.5 The Schall Court held that the statute does not violate the due process clause of the fourteenth amendment.6 Schall is significant not only because it ignored the Gault mode of analysis, but also because it failed to establish a new standard of review to replace Gault. Schall represents the demise of the due process analysis that was previously used in juvenile justice system proceedings.

BACKGROUND

A. In re Gault: The Seminal Case
on Due Process Rights for Children

In re Gault established children's due process rights in juvenile delinquency proceedings.7 In Gault, a fifteen-year-old youth, Gerald Gault, was taken

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1. 387 U.S. 1 (1967).
2. See infra notes 29-55 and accompanying text.
5. Id.
6. 104 S. Ct. at 2412.
7. One year prior to the Gault decision, the Supreme Court considered juvenile delinquency proceedings in Kent v. United States, 383 U.S. 541 (1966). The Kent Court held that an accused juvenile delinquent has a right to due process before the state is allowed to try the child as an adult. Kent is not a major children's rights case, but it provides the constitutional framework for later cases. See, e.g., Kaufman, Protecting the Rights of Minors: On Juvenile Autonomy
into custody for allegedly making obscene phone calls to a neighbor. The police neither left notice at Gerald’s home that Gerald was in custody, nor attempted to inform Gerald’s parents that he had been arrested. The police detained Gerald for three days before they released him to his mother’s custody. At Gerald’s hearing, the judge ordered that Gerald be committed to a state industrial school for six years. Gerald’s parents then filed a petition for writ of habeas corpus in state court, but the petition was dismissed by the Arizona Supreme Court. Upon dismissal of the writ, Gerald’s parents sought review from the United States Supreme Court, urging that the Court find the Juvenile Code of Arizona in violation of the due process clause of the fourteenth amendment.

The United States Supreme Court in Gault held that due process requires that a child in a delinquency proceeding has the right to notice of charges, the right to counsel, the right to confront and examine witnesses, and the privilege against self-incrimination. In reaching these conclusions, the Gault Court enunciated a mode of analysis that balanced the goals of the juvenile justice system against juveniles’ due process rights. Under this balancing test, juveniles’ due process rights may be abrogated if the exercise of those rights impairs the goals of the juvenile justice system.

The analysis set forth in Gault was also used by the Court in three later cases dealing with due process in the juvenile justice system. This section initially explains how Gault and its progeny reviewed and analyzed the goals of the juvenile justice system. The Gault Court’s review of juveniles’ due process rights is also examined. Finally, this section discusses how the Court

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8. 387 U.S. at 4. Police arrested Gerald Gault after the neighbor complained of the phone calls. Id.
9. Id. at 5. When Gerald’s mother returned home from work, a neighbor told her that Gerald was in police custody. Neither Gerald nor his parents were given a copy of the delinquency petition filed with the court. Id.
10. Id.
11. Id. at 7. At the hearing, the judge asked Gerald for his account of the phone calls. While Gerald’s mother said that her son denied making the phone calls, the judge stated that Gerald admitted he called the neighbor. Id. at 6.
14. Id. at 33.
15. Id. at 41.
16. Id. at 56.
17. Id. at 55.
18. Id. at 18-31. See infra notes 56-78 and accompanying text.
balanced the goals of the juvenile justice system against due process rights in *Gault* and its progeny.

1. **Defining the Goals of the Juvenile Justice System**

   The *Gault* Court reviewed the historical background of the juvenile justice system. According to the Court, history revealed that the juvenile system was created to protect children from the "rigidities, technicalities, and harshness" of adult procedures and penalties. The founders of the juvenile justice system reasoned that the state should not act as a child's adversary, but as a parent. The goal was to rehabilitate, not to punish, the child.

   Intimacy and informality therefore characterized the delinquency proceeding.

2. **Establishing the Purpose of Due Process Guarantees**

   After the *Gault* Court outlined the historical foundation of the juvenile justice system, it considered whether children are entitled to due process in that system. The Court's discussion was not couched in terms of adults' or children's rights. It was, instead, a broad analysis of constitutional considerations. According to the Court, due process of law is the basis of the individual's right to be free from unreasonable state regulation.

   In particular, a person officially accused of criminal conduct has a right to notice of the charges in order to prepare a defense, and a right to counsel.

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20. 387 U.S. at 15.

21. *Id.* at 16. A separate juvenile court was first established in America in 1899 with the passage of the Illinois Juvenile Court Act. Act of Apr. 21, 1899, 1899 Ill. Laws 131 repealed by Act of Aug. 5, 1965, 1965 Ill. Laws 2585 [codified at Ill. Rev. Stat. ch.37, §§ 701-1 to 708-4]. This Act's goal was to ensure that the state provided "care, custody and discipline" to the child, as if it were the child's parent. *Id.* § 21, 1899 Ill. Laws 131, 137. The act mitigated the harshness of adult criminal courts by allowing the juvenile court judge to be personal and human. For a further discussion of the state's role in juvenile justice proceedings, see Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. Rev. 7, 10 (the state should not act as the child's enemy, but as the child's protector) and Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 107 (1909). See also Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L. Rev. 1187, 1213 (1970) (prior to 1899, direct referral to reform school allowed many juveniles to avoid a full-blown trial).


23. *Gault*, 387 U.S. at 18. The juvenile justice system was founded on individualized treatment of juvenile offenders. Feld, *supra* note 22, at 515. The system dispensed with the standard courtroom and replaced it with a room where the judge and child could sit next to each other. Juvenile proceedings were designed to allowed the child to feel the state's care and solicitude. Mack, *supra* note 21, at 120.

24. 387 U.S. at 10.

25. *Id.* at 20.

in order to guide the accused through the legal proceedings.\textsuperscript{27} An accused's privilege against self-incrimination is also necessary to ensure that any confession made by the accused is trustworthy and to prevent the state from coercing the accused into a confession.\textsuperscript{28}

In the subsequent case of \textit{In re Winship}\textsuperscript{29} the Court followed the \textit{Gault} analysis by first reviewing the historical foundation of the juvenile justice system and then discussing the purposes and goals of the reasonable-doubt standard in criminal proceedings.\textsuperscript{30} In \textit{Winship}, a twelve-year-old boy was accused of breaking into a locker and stealing money from a woman's purse.\textsuperscript{31} The boy was charged with delinquency because his acts, if committed by an adult, would be considered crimes. The New York Family Court Act provided that a guilty finding in a juvenile delinquency adjudication must be based on a preponderance of the evidence.\textsuperscript{32} Winship argued that due process required that proof be established beyond a reasonable doubt.\textsuperscript{33} The judge rejected this argument, found the youth guilty, and sentenced him to a minimum of eighteen months in a training school.\textsuperscript{34}

On appeal, the Supreme Court determined that a child is constitutionally entitled to proof beyond a reasonable doubt when charged with violating a criminal law.\textsuperscript{35} Following the \textit{Gault} analysis, the \textit{Winship} Court found that the purpose of the reasonable-doubt standard is to reduce the risk of erroneous convictions and prevent innocent individuals from being deprived of their liberty.\textsuperscript{36} Moreover, the reasonable-doubt standard is "indispensable to command the respect and confidence of the community."\textsuperscript{37} The Court explained that society should never fear that innocent people are being wrongly condemned by the government.\textsuperscript{38}

In \textit{McKeiver v. Pennsylvania},\textsuperscript{39} the Court again applied the \textit{Gault} mode of analysis by comparing the goals behind the juvenile justice system with the purposes of the due process guarantee of a jury trial.\textsuperscript{40} Joseph McKeiver, a sixteen-year-old, was charged with robbery, larceny, and receiving stolen goods.\textsuperscript{41}

\begin{itemize}
\item \textsuperscript{27} 387 U.S. at 36 (citing Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932)).
\item \textsuperscript{28} 387 U.S. at 47 (citing Miranda v. Arizona, 384 U.S. 436 (1966)).
\item \textsuperscript{29} 397 U.S. 358 (1970).
\item \textsuperscript{30} \textit{Id.} at 366.
\item \textsuperscript{31} \textit{Id.} at 360.
\item \textsuperscript{32} \textit{N.Y. FAM. CT. ACT} § 744(b) (McKinney 1983).
\item \textsuperscript{33} 397 U.S. at 360.
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.} at 365.
\item \textsuperscript{36} \textit{Id.} at 362 (citing Davis v. United States, 160 U.S. 469, 488 (1895)).
\item \textsuperscript{37} 387 U.S. at 364.
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} 403 U.S. 528 (1971).
\item \textsuperscript{40} \textit{Id.} at 530.
\item \textsuperscript{41} \textit{Id.} at 534. McKeiver's case was consolidated with another similar case from Pennsylvania and several similar cases from North Carolina. In each case, the youth, after being denied a jury trial, was found guilty by a judge of committing an act that would be a crime if committed by an adult. \textit{Id.} at 535-38.
\end{itemize}
The juvenile court denied McKeiver's request for a jury trial. The judge found McKeiver guilty and placed him on probation.

The McKeiver Court relied on the Gault mode of analysis by setting out the purposes underlying the due process right to a jury trial. The McKeiver Court observed that the right to an impartial jury in criminal prosecutions is guaranteed by the Constitution and is "fundamental to the American scheme of justice." One purpose of the jury requirement is to assure that criminal defendants have an impartial and accurate fact-finding proceeding. In McKeiver, however, the Court determined that a jury trial is not guaranteed in juvenile delinquency proceedings for various reasons.

The Gault Court's analysis was again used in Breed v. Jones. In Breed, a seventeen-year-old boy was charged with and found guilty of armed robbery. At a later disposition hearing, the court determined that the youth was not amenable to the care, treatment, and training program of the juvenile court, and declared that he was unfit for treatment as a juvenile. The judge therefore ordered that the youth be prosecuted as an adult. The youth filed a petition for writ of habeas corpus, claiming that another trial would place him in double jeopardy. The petition was denied; the youth was tried in the superior court and found guilty.

In deciding that the child was protected from double jeopardy, the Breed Court found that a trial placed "psychological, physical, and financial" burdens on the accused person. The purpose of the Constitution's prohibition against double jeopardy is to ensure that an individual is subjected

42. Id. at 535.
43. Id.
44. Id. at 540 (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968); Bloom v. Illinois, 391 U.S. 194, 210-11 (1968)).
45. 403 U.S. at 540-44.
46. The Court enumerated 13 reasons for rejecting the juvenile's right to a jury trial: (1) the Court should not turn Gault into a guaranteed incorporation of all due process guarantees in juvenile court proceedings, id. at 545; (2) a jury would disrupt the intimate and informal setting of the proceedings, id.; (3) the President's Commission on Law Enforcement and Administration of Justice did not recommend a jury trial in its juvenile justice Task Force Report, id. at 545-46; (4) a jury is not even required in some adult proceedings, id. at 547; (5) a jury would not enhance the reliability of fact-finding in a juvenile proceeding, id.; (6) states should be allowed to experiment with juvenile justice procedures, id.; (7) providing a jury trial would not rectify the abuses perceived in the juvenile justice system, id. at 547-48; (8) the juvenile court judge has the discretion to provide a jury in difficult juvenile cases under state law, id. at 548; (9 & 10) most states, by statute or judicial law, reject the juvenile's right to a jury trial, id. at 548-49; and (11) professionals in the field of juvenile justice reject the use of a jury in juvenile proceedings, id. at 549-50. The twelfth and thirteenth reasons reiterated the second reason. Id. at 550.
47. 421 U.S. 519 (1975).
48. Id. at 521.
49. Id. at 523.
50. Id. at 524.
51. Id. at 525.
52. Id. at 520.
53. Id. at 530.
to this harrowing experience only once for the same offense. The Court concluded that any burden on the juvenile justice system caused by double jeopardy is outweighed by the due process benefits to the juvenile.

3. Balancing the Juvenile Justice Goals and the Due Process Guarantees

By clearly defining the goals of the juvenile justice system and the objectives of due process, the Gault Court balanced the significance of the due process guarantee to the juvenile against the juvenile justice system’s need for simplified procedures. The Gault Court first noted that the principle of treating the child separately from the adult is not undermined by recognizing the child’s rights to notice, counsel, confrontation, and against self-incrimination. Second, when a relaxed procedural setting is followed by stern discipline, the Court reasoned that a child may feel deprived and resist rehabilitative efforts. Most importantly, in reality a youth charged with misconduct may be committed to an institution for a number of years. The Constitution requires the “exercise of care” with respect to due process. In examining the delinquency hearing setting, the Gault Court noted that the goals of the juvenile justice system are actually enhanced by recognition of certain procedural safeguards.

The Court in Winship also balanced the goals of the juvenile justice system against the accused’s due process interest in requiring that proof beyond a reasonable doubt be established. The Court found that using the reasonable-doubt standard has no effect on the distinctive juvenile proceeding. The informality, flexibility, and speed of the adjudicatory hearing is unimpaired.

The Winship Court, like the Gault Court, took a realistic view of the juvenile

54. Id. (citing Green v. United States, 355 U.S. 184, 187 (1957)).
55. 421 U.S. at 536. Before the state can transfer the child to the adult court, the state must give the accused a hearing and observe other aspects of due process. See Kent v. United States, 383 U.S. 541, 557 (1966).
56. 387 U.S. at 22. The Court responded to the argument that the unique benefits of juvenile justice would offset any disadvantage caused by a lack of due process. The Court concluded that depriving a juvenile of due process did not reduce juvenile crime rates, and that special juvenile procedures would not be impaired when due process is applied. Id. at 21-22.
57. Id. at 26 (citing S. WHEELER & L. COTTRELL, JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL (1966)). The Court relied on a sociological study which concluded that unless juveniles receive due process they will consider the juvenile justice system to be unfair and will resist efforts for their rehabilitation. See infra note 126.
58. 387 U.S. at 27. Gerald Gault was adjudicated a delinquent and sentenced to six years in a state industrial school. Id. at 7. See supra text accompanying notes 10-11. The Supreme Court noted that had Gault been an adult, his maximum sentence would have been a fine of five to 50 dollars, or imprisonment for a maximum of two months. 387 U.S. at 29.
59. Id. at 28.
60. See supra notes 56-57.
61. 397 U.S. at 368.
62. Id. at 366.
63. Id. The standard does not affect the opportunity for review of the child’s social history or individualized treatment during the post-adjudicatory or dispositional hearing, and does not affect the unique proceedings prior to the adjudicatory hearing. Id.
delinquency hearing: since the state has many advantages in the hearing, the accused's due process right to proof beyond a reasonable doubt is essential to protect innocent defendants.\textsuperscript{64}

In \textit{McKeiver}, the Court again followed the mode of analysis established in \textit{Gault}, but concluded that a jury trial is not constitutionally mandated for juvenile delinquency hearings.\textsuperscript{65} The \textit{McKeiver} Court determined that a jury trial would place the juvenile proceeding in an adversarial setting, and would destroy the intimate and informal atmosphere of the proceeding.\textsuperscript{66} If a jury were required, the Court reasoned, the juvenile proceeding would become a true criminal trial,\textsuperscript{67} and would possibly eliminate the court's opportunity to be sympathetic and paternal.\textsuperscript{68} Moreover, the Court found that a jury trial would not strengthen the fact-finding process.\textsuperscript{69} The Court concluded that the goals and interests of the juvenile justice system outweigh the defendant's interest in having a jury trial at the juvenile delinquency hearing.\textsuperscript{70}

The \textit{Gault} mode of analysis was also used in \textit{Breed}, which held that a child tried in juvenile court cannot subsequently be prosecuted later as an adult for the same offense.\textsuperscript{71} According to the \textit{Breed} majority, avoidance of double jeopardy requires that the child be transferred to the adult court before the juvenile hearing.\textsuperscript{72} The Court further stated that if transfer hearings were performed prior to juvenile delinquency adjudications, the goals of the juvenile justice system would actually be strengthened. As the Court noted, the informal and paternal nature of the juvenile justice system would be hampered if juveniles knew that they might subsequently be transferred to the adult court and subjected to a second trial for the same offense.\textsuperscript{73}

The \textit{Gault} decision introduced a mode of analysis that has proven to be a rational and reasonable means of determining children's rights in the juvenile justice system. In cases subsequent to \textit{Gault}, the Court reviewed both the goals of the system and the importance of the particular procedure that affected the accused. The burdens of imposing the due process guarantees on the system were balanced against the benefits of due process to

\begin{thebibliography}{99}
\bibitem{64} Id.
\bibitem{65} 403 U.S. at 545.
\bibitem{66} Id.
\bibitem{67} Id. at 547. The juvenile justice system was established as a civil, rather than criminal, court system. The reformers wanted a system that would care for, and not punish the child. Mack, supra note 21, at 120. The founders of the juvenile justice system rejected the criminal procedure because the child was viewed as "society's child" and the interests of the state were the same as that of the child's. Because the interests coincided, there was no need for the criminal adversary procedure. Handler, supra note 21, at 10. See supra notes 21-22, infra note 112 and accompanying text.
\bibitem{68} 403 U.S. at 550.
\bibitem{69} Id. at 543 (citing Duncan v. Louisiana, 391 U.S. 145, 158 (1968)).
\bibitem{70} 403 U.S. at 550. \textit{But see The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 118 (1971)} (jury trial is "essential to the appearance of fairness, impartiality, and orderliness" to both the child and society).
\bibitem{71} 421 U.S. at 541.
\bibitem{72} Id. at 537.
\bibitem{73} Id. at 540.
\end{thebibliography}
the juveniles. This balancing assured that the juvenile justice system afforded the child "the essentials of due process and fair treatment." 74

B. Due Process Requirements of Pretrial Detention

The principal case on due process in the pretrial detention of adults is Gerstein v. Pugh. 75 In Gerstein, the Supreme Court held that the "Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." 76 The Court further held that this probable cause determination must be made either before or immediately after arrest. 77 The Gerstein Court recognized that the fourth amendment's protection against invasions of liberty usually requires judicial determination of probable cause before a police officer makes an arrest. 78 As a "practical compromise" 79 with law enforcement interests, however, the police are allowed to make warrantless arrests based upon an "on-the-scene assessment of probable cause." 80 Once an individual is arrested and taken into custody without a warrant, the state's need for summary action vanishes. 81 Meanwhile, the need for a probable cause hearing becomes important to protect the suspect's employment and prevent harmful effects on his family. Thus, the Gerstein Court reasoned that a judicial probable cause hearing held immediately after an arrest would protect individual liberty from state interference. 82

Another landmark case in the area of pretrial detention is Bell v. Wolfish. 83 In Bell, the Court considered the due process implications of pretrial detention. 84 The Court held that jail conditions may create constitutional violations

74. Gault, 387 U.S. at 30 (citing Kent v. United States, 383 U.S. 541, 562 (1966)).
75. 420 U.S. 103 (1975).
76. Id. at 114. A violation of the requirement to a probable cause hearing has no exclusionary remedy. The Gerstein Court specifically stated that an illegal detention does "not void a subsequent conviction." Id. at 119.
77. Id. at 125.
78. Id. at 113. Before an arrest is made, the police officer should obtain an arrest warrant that is based on probable cause. Probable cause exists when "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." Brinegar v. United States, 338 U.S. 160, 175-76 (1949). The warrant must be issued by a "neutral and detached magistrate." Johnson v. United States, 333 U.S. 10, 14 (1948).
80. Id. The Court found that a constitutional rule barring arrests without a prior review of probable cause would be an "intolerable handicap for legitimate law enforcement." Id. Law enforcement policy is made by the police. Their duties are such that they often exercise personal discretion in making an arrest. Therefore, the police "interpret the law" of probable cause in each situation that arises. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 10 (1967).
81. Gerstein, 420 U.S. at 114. Once suspects are in custody, they have little chance to escape or commit further crimes.
82. Id.
83. 441 U.S. 520 (1979).
84. Id. at 535.
when they amount to punishment of the detainee.\textsuperscript{85} The Court noted that the conditions of confinement and restriction would be considered punishment if they were imposed either arbitrarily or with an intent to punish.\textsuperscript{86} If, on the other hand, the conditions of confinement were reasonably related to a legitimate state purpose, no punishment would be deemed to have occurred.\textsuperscript{87} Relying on \textit{Gerstein}, the \textit{Bell} Court addressed the conditions of confinement rather than the constitutionality of pretrial detention itself. The \textit{Bell} Court determined that a state could only detain an accused before trial by complying with the constitutional requirements set forth in \textit{Gerstein}; a judicial determination of probable cause must be made before or immediately after arrest.\textsuperscript{88}

\section*{The Schall Decision}

\textbf{A. Facts and Procedural History}

Gregory Martin, a fourteen-year-old boy, was arrested and charged with first-degree robbery, second-degree assault, and criminal possession of a weapon.\textsuperscript{89} He was arrested pursuant to the New York Family Court Act (the Act)\textsuperscript{90} which governs all procedures within New York's juvenile justice system. The Act requires that police officers immediately notify a parent or legal guardian when a child is arrested.\textsuperscript{91} If the child is accused of committing a serious crime,\textsuperscript{92} or if a parent cannot be found, the child may appear directly before the family court.\textsuperscript{93} When the child appears directly, the judge must appoint a legal guardian for the child and advise the child of the right to counsel and the privilege against self-incrimination. Unless these or other special circumstances arise,\textsuperscript{94} the

\begin{itemize}
  \item \textsuperscript{85}Id. The Court noted that due process, not the eighth amendment, was the proper basis for regulating \textit{pretrial} detention. \textit{Id.} at 535 n.16. Since pretrial detainees have not been adjudicated guilty, due process prohibits their punishment. The eighth amendment's prohibition against "cruel and unusual punishment" is the constitutional basis for regulating \textit{post-conviction} incarceration. \textit{Id.}
  \item \textsuperscript{86} \textit{Id.} at 539.
  \item \textsuperscript{87} \textit{Id.} at 533-34.
  \item \textsuperscript{88} \textit{Id.} at 534 n.15 (citing Gerstein v. Pugh, 420 U.S. 103, 114 (1975)).
  \item \textsuperscript{89} United States \textit{ex rel.} Martin v. Strasburg, 513 F. Supp. 691 (S.D.N.Y. 1981).
  \item \textsuperscript{90} N.Y. \textit{Fam. Ct. Act} § 320.5(3)(b) (McKinney 1983). Section 320.5(3) states, in pertinent part:
    \begin{quote}
      The court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained;
      \begin{itemize}
        \item 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.
      \end{itemize}
    \end{quote}
    \textit{Id.}
  \item \textsuperscript{91} \textit{Id.}
  \item \textsuperscript{92} The category of serious crime includes murder, kidnapping, arson, assault, manslaughter, rape, sodomy, robbery, and burglary. \textit{Id.} § 301.2(8).
  \item \textsuperscript{93} \textit{Id.} § 305.2(4)(b).
  \item \textsuperscript{94} \textit{Id.} A special circumstance might arise if, for example, the family court is not in session and the parents cannot be found. Under these circumstances, the arresting officer may take the child directly to a juvenile detention facility. \textit{Id.} § 305.2(4)(c). If this occurs, the child must
child is issued an initial appearance ticket after arrest and is released to the custody of a parent or guardian.\textsuperscript{95} A delinquency petition,\textsuperscript{96} which initiates the legal proceeding, is then filed.\textsuperscript{97}

After the delinquency petition is filed, the accused juvenile must return to the court for the initial appearance,\textsuperscript{98} where the judge decides to either release or detain the accused until the fact-finding return date.\textsuperscript{99} Section 320.5(b) of the Act allows pretrial detention of an accused juvenile if the court finds there is a "serious risk" that the accused, before the return date, may commit an act that would be a crime if committed by an adult.\textsuperscript{100} The judge must state "facts and reasons"\textsuperscript{101} for detaining the juvenile. Nevertheless, such reasons need not be based on a specific finding of probable cause that the juvenile actually committed a crime.\textsuperscript{102} Moreover, the statute does not specify the factors to be considered, the standards of proof, or the procedures for the judge to follow in making the detention decision.

After Gregory Martin's arrest pursuant to the Act, a delinquency petition was filed.\textsuperscript{103} The family court judge ordered that Martin be detained pursuant

\textsuperscript{95} Id. § 307.1(1). The initial appearance ticket is a written notice directing the child and parent, or legal guardian, to appear at a probation service on a specified date.

\textsuperscript{96} Section 732 of the New York Family Court Act provides:

A proceeding to adjudicate a person to be in need of supervision is originated by the filing of a petition, alleging:

(a) the respondent is an habitual truant or is incorrigible, ungovernable, or habitually disobedient and beyond the lawful control of his parents, guardian or lawful custodian, and specifying the acts on which the allegations are based and the time and place they allegedly occurred;

(b) the respondent, if male, was under sixteen years of age and, if female, was under eighteen years of age at the time of specified acts; and

(c) the respondent requires supervision or treatment.

\textsuperscript{97} Id. § 310.1(1).

\textsuperscript{98} Id. § 320.1.

\textsuperscript{99} Id. § 320.5(1). The fact-finding proceeding is the juvenile justice system's equivalent to a trial. The child has a right to counsel, id. § 341.2(1), evidence may be suppressed on the same grounds as in a criminal trial, id. § 330.2, and proof of guilt must be proved beyond a reasonable doubt. Id. § 342.2(2).

\textsuperscript{100} A crime is defined as a misdemeanor or felony, N.Y. PENAL LAW § 10.00(6) (McKinney 1975). In turn, a misdemeanor is an offense for which a sentence "of imprisonment in excess of fifteen days may be imposed," id. § 10.00(4), and a felony is an offense for which a sentence "of imprisonment in excess of one year may be imposed." Id. § 10.10(5). Thus a child accused of shoplifting (petty larceny) or sneaking onto private property (criminal trespass) could be detained because according to § 320.5(3)(b), a judge may order pretrial detention of a youth accused of any minor crime. The decision to detain is not necessarily based on the juveniles' dangerous or violent behavior. See Note, Justice for Juveniles? The Second Circuit Declares Juvenile Prevention Detention Unconstitutional, 50 BROOKLYN L. REV. 517, 530 n.44 (1984).

\textsuperscript{101} See supra note 90.

\textsuperscript{102} See, e.g., Schall, 104 S. Ct. at 2416 n.27 (judge not required to find probable cause when detaining accused juvenile); cf. People ex rel. Wayburn v. Schupf, 39 N.Y.2d 682, 685 n.2, 350 N.E.2d 906, 907 n.2, 385 N.Y.S.2d 518, 519 n.2 (1976) (court disregards question of whether facts on the record need to support the finding of judge to warrant continued detention of accused juvenile).

\textsuperscript{103} Schall, 104 S. Ct. at 2406 & n.6.
to section 320.5(b) of the statute. After five days of detention, the court held a probable cause hearing and found that there was probable cause that Martin had committed the crimes. While still in detention, Martin filed a habeas corpus class action seeking a declaratory judgment that the pretrial detention statute violated the due process and equal protection clauses of the fourteenth amendment. Martin’s suit was brought on behalf of a class of all juveniles detained pursuant to the Act’s pretrial detention provision.

The federal district court rejected the equal protection challenge as insubstantial, but found that the statutory provision violated the due process clause of the fourteenth amendment. The court declared that the provision was unconstitutional because it allows judges to make detention decisions arbitrarily. Because pretrial detention constitutes punishment, the court found that pretrial detention without prior adjudication of probable cause is a per se violation of the due process clause. The court of appeals affirmed the decision, stating that the law violated due process because its unlimited terms facilitate erroneous detention decisions and because the detention serves as punishment.

B. The Supreme Court’s Holding and Rationale

On appeal, the Supreme Court reversed the Second Circuit’s decision. The Court first found that the state’s interest as parens patriae in protecting the accused child and society from the child’s future criminal acts out-

104. The judge reasoned that Martin lacked supervision because he was arrested at 11:30 p.m. and possessed a loaded weapon. Id. at 2407.
105. Id. at 2408.
106. Id. Two other youths were class plaintiffs. Luis Rosario, a 14-year-old, was charged with attempted first-degree robbery and second-degree assault for allegedly trying to rob two men. He was detained six days before a fact-finding hearing was held. Twenty-one days after probable cause was found, he was released to his father’s custody. Id. at 2407. Fourteen-year-old Kenneth Morgan was charged with attempted robbery and grand larceny. Id. He was detained for eight days before probable cause was found. Id. at 2407-08.
108. Id. at 707-14.
109. Id. at 715-16.
110. Id. at 707-16. The Court found that § 739 was violative both on its face and as applied. Id. at 717.
112. Parens patriae was defined at common law as the King’s duty to take care of his subjects who were legally unable to care for themselves because of mental incapacity. See J. CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN 155 (1820). Parens patriae was traditionally viewed as one of the King’s royal prerogatives. I W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *237 (Lewis ed. 1899). The scope of parens patriae eventually included protection of children. Cogan, Juvenile Law, Before and After the Entrance of “Parens Patriae”, 22 S.C.L. REV. 147, 166 (1970).

Parens patriae was first used in America to justify statutory commitment of juveniles to a residential institute. Ex parte Crouse, 4 Whart. 9, 11 (Penn. 1839). In Crouse, the court stated that the purpose of the institute was to improve and reform the child by providing wholesome restraints and protection from depraved parents or an impoverished environment. Id. The juvenile justice system uses the state’s parens patriae power to accomplish its goal of rehabilitating the child. Under the parens patriae doctrine, the child is not treated as a criminal and is therefore saved from that stigmatization. Mack, supra note 21, at 109.
113. See infra notes 127-30 and accompanying text.
weighed the child's liberty interest. Second, the Court determined that the statute was not intended to punish the child; the detention is strictly limited in time, and the terms and conditions of confinement are compatible with the state's legitimate regulatory purposes. Third, the Court upheld the validity of the statute because, in its view, the procedure provides adequate protection against unnecessary pretrial detention.

114. 104 S. Ct. at 2410. The Court asserted that a child's liberty interests are not as strong as an adult's because the child is "always in some form of custody." Id. (citing Lehman v. Lycoming County Children's Serv., 458 U.S. 502, 510-11 (1982); In re Gault, 387 U.S. 1, 17 (1967)). See infra notes 168-70 and accompanying text.

115. 104 S. Ct. at 2413. The New York statute provides two types of confinement for juveniles. Non-secure detention is a halfway house, an open facility in the community, where the child receives schooling and counseling. Secure detention is a locked dormitory. After arrest, the court screens the accused and places the accused in one of these detention areas. Id.

116. Id. at 2417. The Court also explained that because the child is given "notice, a hearing, and a statement of facts and reasons" for the judge's decision, the statute is not constitutionally vague. Id. In contrast to the Supreme Court, the district court found that despite procedural safeguards, standardless decisions to detain youths because of the "serious risk" of future criminality resulted in too many unnecessary detentions. See supra text accompanying notes 108-10. The district court based this conclusion on expert testimony and numerous studies on the subject of predicting future criminality. 513 F. Supp. at 708-12. The testimony and studies revealed that judges could not predict criminality because the study of human behavior was not that advanced. Id. at 712. See Feld, Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court, 69 MINN. L. REV. 141, 197 n.189 (1984).

The Schall Court asserted that, from a "legal point of view," future criminality could be predicted. 104 S. Ct. at 2417. The Court explained that such predictions were often made in sentencing and parole proceedings. Id. (citing Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 9-10 (1979); Jurek v. Texas, 428 U.S. 262, 274-75 (1976); Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

The Court further explained that predictions of future criminality were also used to impose sentences under the "dangerous" special offender statute, 18 U.S.C. § 3575 (1982). 104 S. Ct. at 2417 n.30. The dangerous offender statute allows a sentence longer than that provided for the underlying felony to be imposed because the offender is considered dangerous. 18 U.S.C. § 3575(f). The purpose of the statute is to protect the public from the dangerous offender's anticipated future criminal conduct. Id. The Schall Court noted that the statute has been challenged unsuccessfully as unconstitutionally vague. 104 S. Ct. at 2417 n.30 (citing United States v. Davis, 710 F.2d 104 (3d Cir.), cert. denied, 104 S. Ct. 505 (1983); United States v. Schell, 692 F.2d 672 (10th Cir. 1982); United States v. Williamson, 567 F.2d 610 (4th Cir. 1977); United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977); United States v. Neary, 552 F.2d 1184 (7th Cir.), cert. denied, 434 U.S. 864 (1977); United States v. Stewart, 531 F.2d 326 (6th Cir.), cert. denied, 426 U.S. 922 (1976)).

The Schall Court stated that judges use their experience as well as "a host of variables" in predicting future criminal conduct. 104 S. Ct. at 2418. Such experience cannot be codified. Id. Supporting this conclusion in the context of the New York statute, the Court relied on a family court judge's testimony at the habeas corpus trial that determinations of pretrial detention under the New York statute are based on various factors: the nature and seriousness of the charges against the youth, the likelihood that the charges are true, the adequacy and effectiveness of home supervision, the time of day of the alleged crime, and the absence of parental supervision. Id.

The Schall Court stated that a statement of facts and reasons for the decision in a particular case may substitute for specific factors in the statute itself. Id. The Schall majority's analysis on this point is not convincing. In fact, the district court struck down the statute for nearly the same reasons the Supreme Court upheld it. The district court invalidated the statute because it believed that the law did not give a family court judge any guidelines in making the decision to detain a youth. Therefore, according to the district court, two judges could arrive at different
The dissent, written by Justice Marshall and joined by Justices Brennan and Stevens, disputed every major aspect of the majority opinion. The dissent reasoned that a state may detain citizens only if the detention is supported by an important state interest.\(^7\) The dissent challenged the majority's conclusion that the Act promotes the important state interest of protecting the child and society from the child's further criminal activity.\(^8\) The dissent also argued that the statute was used primarily to impose punishment for unadjudicated criminal acts.\(^9\) Finally, the dissent criticized the majority's finding that the statute provides safeguards against erroneous pretrial detention. There is great risk that children will be improperly detained, the dissent concluded, if the juvenile justice system provides no statutory or procedural constraints on a judge's ability to detain an accused youth.\(^10\)

conclusions in the same case under the New York law. 513 F. Supp. at 707. The judges' decisions are "moored to no concrete or reasonably determinable yardsticks . . . . Each judge utilizes his own personal standards." Id. The result is that decisions to detain accused delinquents are arbitrary and unpredictable. Id.

Recognizing the problems of pretrial detention for children, the Institute of Judicial Administration and the American Bar Association Joint Commission on Juvenile Justice Standards (the Commission) proposed standards to govern pretrial detention of juveniles. Institute of Judicial Administration & American Bar Association, Juvenile Justice Standards Project (1977) (Tent. Draft) [hereinafter cited as Standards]. See Guggenheim, Paternalism, Prevention, and Punishment: Pretrial Detention of Juveniles, 52 N.Y.U. L. REV. 1064, 1065 (1977). These standards are superior to existing statutes because they provide strict guidelines that a judge must use in deciding whether to detain a juvenile. For example, (1) the state has the burden of proof, by clear and convincing evidence, that detention of the accused youth is necessary and that no less-intrusive alternative will suffice. Standards, supra, at 4.2. See, e.g., Ark. Stat. Ann. § 45-421(f) (1983 Supp.); (2) when a child is detained, a petition for release must be filed within 24 hours of the arrest, and the release hearing must be held within 24 hours of the filing. Standards, supra, at 6.5(D)(2), 7.6(A); (3) to detain the child, the court must find both a statutory basis for detention and probable cause that the child committed the act for which the charge was made. Standards, supra, at 7.6(F).

These rigorous standards are beneficial. Excessive detention would be eliminated. The judge would have comprehensive standards to follow when making detention decisions. Most important, the accused would be able to understand the entire procedure. This understanding would begin a relationship of trust between the family court judge and the child.

117. 104 S. Ct. at 2423 (Marshall, J., dissenting) (citing Gerstein v. Pugh, 420 U.S. 103, 113-14 (1975)).

118. 104 S. Ct. at 2425 (Marshall, J., dissenting). According to Justice Marshall, society does not benefit under the New York scheme because, historically, few of the juveniles detained would have committed second crimes before their trial date. Also, detained children are not protected under the law; to the contrary, they may actually suffer serious injuries during incarceration, such as deprivation of liberty and stigmatization as "delinquent." Id. at 2427 (Marshall, J., dissenting). The benefit to those children who would have committed crimes if left to their own devices is far outweighed by the harms of detention. Id. (Marshall, J., dissenting).

119. Id. at 2429 (Marshall, J., dissenting). According to numerous case histories, children who did not commit crimes while at liberty prior to the initial appearance were subsequently detained after the initial appearance. Id. (Marshall, J., dissenting). One family court judge said that some children are released after a finding of guilt because they had been detained pursuant to section 320.5(3)(b) of the New York Family Court Act and the judge had decided that the pretrial detention "constitute[d] sufficient punishment." Id. (Marshall, J., dissenting); see also United States ex rel. Martin v. Strasburg, 689 F.2d 365, 370-71 (2d Cir. 1982).

120. 104 S. Ct. at 2431 (Marshall, J., dissenting). Justice Marshall further noted that the
ANALYSIS

The Schall Court permitted a major violation of due process. By deviating from the Gault analysis, the Schall Court upheld a statute that permits states to wield enormous power in detaining suspected juvenile offenders. The New York statute violates due process because it permits incarceration of a juvenile in a detention center before establishing probable cause that the child committed crimes. The majority initially observed that a balance must be struck between the "informal" juvenile proceeding and the "fundamental fairness" demanded of the due process clause, yet neither branch of this balancing test was genuinely scrutinized.

A. Defining the Goals of the Juvenile Justice System

Gault, Winship, McKeiver, and Breed each emphasized that the juvenile justice system was designed to protect the child from the harshness of the adult criminal justice system. The juvenile court achieved this objective by acting as a parent, and not as an adversary, to the child. The juvenile justice system, according to earlier decisions, was also designed to rehabilitate the child by keeping the juvenile proceedings flexible and informal. The Schall Court stated that the juvenile justice system should be informal and flexible in order to "promot[e] the welfare of the child." Yet, the Court unfortunately did not appreciate that the child's welfare is best promoted through rehabilitation and protection. Rehabilitation and protection, as aspects of the juvenile justice system, cannot be overlooked; informality and flexibility alone will not suffice. If the proceedings are informal and flexible, but

<table>
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<tr>
<th>Statute does not limit detention to those juveniles whose past conduct suggests that they are substantially more likely to misbehave in the future.</th>
<th>Id. at 2426 (Marshall, J., dissenting).</th>
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<td>121. The Court of Appeals of New York upheld the New York statute in People ex rel Wayburn v. Schupf, 39 N.Y.2d 682, 350 N.E.2d 906, 385 N.Y.S.2d 514 (1976). At the time of this decision, the provision in question was N.Y. FAM. CT. ACT § 739(b). That provision is identical to the provision at issue in Schall. The New York high court upheld the statute because the differences between children and adults permitted different procedures without denial of the child's constitutional right to due process. 39 N.Y.2d at 688-89, 350 N.E.2d at 909.</td>
<td>122. 104 S. Ct. at 2409.</td>
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<td>123. See supra notes 20-23 and accompanying text.</td>
<td>124. 104 S. Ct. at 2409 (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)). The language quoted in Schall defines the proceedings accurately within the juvenile justice system and explains why a juvenile proceeding is fundamentally different from an adult trial. Id. Interestingly, the Court cited Santosky, a case that considered the due process rights of parents in a hearing to terminate the parents' rights but did not deal with the juvenile justice system.</td>
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<td>126. If adjudicatory standards for juvenile offenders are informal and ill-defined, they become meaningless. Handler, supra note 21, at 8. Little has been published on the impact of informal proceedings have on the accused child. Id. at 19. The available studies indicate that too much informality in juvenile justice proceedings causes juveniles to be confused about the official's role and the proceeding's standards. The juvenile's confusion undermines the trust and rapport which are necessary elements for rehabilitation. Id. at 19; see also Studt, The Client's Image of the Juvenile Court in JUSTICE FOR THE CHILD 204 (Rosenheim ed. 1962).</td>
<td>Dr. Seymour Halleck, former associate professor of psychiatry at the University of Wisconsin</td>
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the child is neither protected nor rehabilitated, the proceedings do not achieve the purported goals of the juvenile justice system.

After discussing the general aspects of juvenile cases, the Schall majority stated that the specific purpose of New York's pretrial detention statute was to protect the child and society from the child's future criminal acts.127 According to the pretrial detention statute, the judge must consider both the best interests of the child and the need to protect the community from the child when deciding whether detention is appropriate.128 The Schall majority interpreted the "best interests" of the child to be freedom from "institutional restraints"129 and protection from the "downward spiral" of criminal activity.130 Although the interests delineated by the Court are legitimate, they are not the most important interests. Rather, the Court should have focused its analysis on whether detention would foster the rehabilitation, "encouragement," and "guidance" of the child.131 Informal and flexible proceedings can promote these objectives. The pretrial detention proceeding should be flexible enough to meet the particular needs of each individual youth who

Medical School, discovered that juveniles are subjected to a "large dose of lying, hypocrisy, and arbitrariness" by adults within the juvenile justice system. By the time the child is brought to a professional psychologist, the feeling of trust for adults in positions of power is replaced with feelings of contempt, fear, and cynicism. The ability to help the child is then greatly diminished. Halleck, The Impact of Professional Dishonesty on Behavior of Disturbed Adolescents, Soc. Work, Apr. 1963, at 48. The present treatment of children within the juvenile justice system "encourages or precipitates deviant behavior and destroys basic values and rights." Handler, supra note 21, at 20; see also Halleck, supra, at 49.

Other legal professionals have concluded that extremely informal proceedings within the juvenile justice system actually harm the child. See, e.g., F. Allen, The Borderland of Criminal Justice 20 (1964) (former University of Michigan Law School dean found that arbitrary and undisciplined power in juvenile justice system "retarded rather than advanced" the objectives of the system); M. Paulsen, The Problems of Juvenile Courts and the Rights of Children 108 (1975) (former University of Virginia Law School dean discovered that children's contact with juvenile courts leads to further delinquency).

127. 104 S. Ct. at 2410.

The purpose of the original Act had been to consider only the needs of the child. Note, supra note 100, at 519 n.4. After passage of the Reform Act, questions arose as to whether the child's best interest or the community's needs should be most important in the judge's decision. N.Y. Fam. Ct. Act § 301.1 (McKinney 1983) (practice commentary at 266). The New York courts interpreted the new clause to mean that the child's best interest must be the most important factor in the judge's decision to detain. See, e.g., In re Rudy S., 100 Misc. 2d 1112, 1116, 420 N.Y.S.2d 549, 556 (N.Y. Fam. Ct. 1979) (best interest of child is primary consideration); People v. Young, 99 Misc. 2d 328, 330, 416 N.Y.S.2d 171, 172 (N.Y. Fam. Ct. 1979) (child's interest in most important); In re Elizabeth J., 98 Misc. 2d 362, 364, 413 N.Y.S.2d 867, 868 (N.Y. Fam. Ct. 1979) (weigh need of community only after fact-finding proceeding has occurred).

129. 104 S. Ct. at 2410.
130. Id. at 2411.
appears before the judge. In the initial phase of this flexible proceeding, the judge must inquire whether the child committed the crime and, if so, why the crime was committed. The child's answers to the judge's inquiries are the first steps toward rehabilitation. This question-and-answer session should be informal to allow the judge to gain the child's trust and respect. The Schall majority, unfortunately, did not address the underlying rehabilitative aims of informal and flexible procedures.

B. Establishing the Purpose of Due Process Guarantees

The Schall Court's decision also rests on a misleading and inaccurate interpretation of Gerstein v. Pugh. According to the Schall Court, Gerstein simply held that "a judicial determination of probable cause is a prerequisite to any extended restraint on the liberty of an adult accused of crime." The Schall Court stated that Gerstein left open the timing of the probable cause hearing. Finally, the Court concluded that the several-day-delays of probable cause hearings under the New York statute are permissible under Gerstein. In fact, however, Gerstein did not leave room in its language for such delays. The Gerstein Court held that before or immediately after arrest, or before there is a significant restraint on an accused's liberty, a probable cause hearing must be held; otherwise, the accused's detention is unconstitutional. By omitting this aspect of the Gerstein holding, the Schall Court gave the impression that a probable cause hearing is not necessary until after the accused has been detained for an extended time. Thus, the Court silently repudiated its own precedent.

The Schall Court also ignored Gerstein's language on the importance of an immediate probable cause hearing, and highlighted the decision's secondary concern with the flexibility and informality of pretrial detention hearings. Because the initial hearing for a juvenile under the New York statute is flexible, the Schall Court found the proceeding to be constitutionally sound and in accordance with Gerstein's holding.

132. Children need special protection because they may not be mature enough to assert their own rights. Kaufman, The Child in Trouble: The Long and Difficult Road to Reforming the Crazy-Quilt Juvenile Justice System, 60 Wash. U. L.Q. 743, 747 (1982). The purpose of the parens patriae doctrine is to allow the state to promote the individual child's best interest. See supra note 112. The family court judge must take the time to understand the child's perspective on the justice system. This allows the judge to reach the underlying cause of the child's troubles and to "formulate the plan" to cure these troubles. Mack, supra note 21, at 119.

133. See supra notes 22-23.


135. 104 S. Ct. at 2415.

136. 420 U.S. 123, 125. See supra notes 77-78 and accompanying text. Lower federal courts interpret the statement "immediately after arrest" to be the Gerstein probable cause hearing standard. See, e.g., Fisher v. Washington Metropolitan Area Transit Auth., 690 F.2d 1133 (4th Cir. 1982) (probable cause found within 15 hours of arrest is constitutional as a brief period required for administrative purposes); Sanders v. City of Houston, 543 F. Supp. 694 (S.D. Tex. 1982), aff'd, 741 F.2d 1379 (5th Cir. 1984) (probable cause hearing must be held within 24 hours after arrest).

137. 104 S. Ct. at 2415.

138. Id. at 2417.
Court stated that a flexible pretrial procedure is desirable, it also held that due process would not permit a lengthy postponement of the probable cause hearing. The Gerstein Court correctly determined that whatever procedure a state uses in its pretrial detention practices, the procedure must provide a fair and reliable determination of probable cause. The Schall Court ignored this consideration.

The Schall opinion also avoided the difficult question of how long a probable cause hearing can be delayed while a defendant is in custody by taking language from Gerstein out of context. The Schall majority found that the New York statute allows the juvenile court to delay a probable cause hearing for up to six days after the initial hearing. In a footnote, the Schall Court explained that Gerstein approved a procedure in which the probable cause hearing was held after five days of detention. The Schall majority added this footnote to soften its harsh declaration that a child may be detained for six days before a probable cause investigation takes place.

The Court's footnoted explanation, however, was inaccurate. The actual passage in Gerstein described a proposed criminal procedure reform. Under that procedure, a person arrested without a warrant would be entitled to a hearing "without unnecessary delay," if kept in custody, to determine if there were grounds for an arrest warrant. If there was probable cause, the detainee would be offered a second probable cause hearing within five days of the arrest. This second hearing would be an adversarial hearing, at which the detainee could summon witnesses. In this passage, the Gerstein Court did not sanction the constitutionality of a procedure that allows the first probable cause hearing of a pretrial detainee to be held within five days of arrest. The Gerstein Court required that probable cause be found immediately after arrest. The accused could then be detained and a second, more formal, probable cause hearing would be offered within five days.

The Schall Court also misapplied the holding in Bell v. Wolfish when it determined that New York's pretrial detention procedure did not unconstitutionally punish juvenile defendants. The issue in Bell was whether certain conditions of pretrial detention were constitutional. The constitutionality of the detention procedure itself was not examined.

139. 420 U.S. at 125.
140. Id.
141. 104 S. Ct. at 2416. The New York law states that a detained youth is entitled to a probable cause hearing within three days, or within four days following the filing of a petition, whichever occurs sooner, with a possible three-day extension for good cause shown. N.Y. Fam. Ct. Act § 325.1(1), (2), (3) (McKinney 1983).
142. 104 S. Ct. at 2417 n.28.
143. 420 U.S. at 124 n.25. There is no judicial determination of probable cause at the time of a warrantless arrest. See supra note 78 and accompanying text.
144. Gerstein, 420 U.S. at 124 n.25.
145. Id.
146. 441 U.S. 520 (1979).
147. Schall, 104 S. Ct. at 2412.
148. See supra notes 86-88 and accompanying text.
majority, however, claimed that Bell found pretrial detention itself not to be punishment if the terms and conditions of pretrial confinement were compatible with the state's legitimate regulatory purposes. The dissent in Schall pointed out that Bell did not delineate what a state must do to justify pretrial detention. Although the terms and conditions of confinement may be constitutional, it does not necessarily follow that the preliminary decision to detain an accused before trial is also constitutional. The Schall majority did not comprehend this distinction.

C. Balancing the Juvenile Justice System Goals and the Due Process Guarantees

Unlike Gault and its progeny, Schall did not initiate its analysis of the New York statute with a fair and exact definition of the juvenile justice system's goals and purposes. The Schall Court also did not consider the due process requirements of imposing pretrial detention on an accused person. The Schall Court's cursory review of the juvenile justice system irrationally elevated the importance of informality in procedures for pretrial detention of children. Moreover, the Court's incorrect interpretations of Gerstein and Bell precluded a fair and exact definition of the due process requirements for detaining an adult prior to trial.

Premised on these incomplete definitions and inaccurate interpretations, the Schall decision did not correctly execute the final step of the Gault mode of analysis. Gault required that the burdens placed on the juvenile justice system by the inclusion of due process rights be balanced against the benefits to the child resulting from such rights. This test required that both sides of the balancing scale be accurately defined. The Schall majority did not attain this accuracy.

The Schall Court's analysis is irreconcilable with prior due process cases within the juvenile justice context in another respect. In all of the prior due process cases involving the juvenile system, the Court examined data related to delinquency, and the actual effects on the child of a decision granting or denying due process rights. The Schall Court, however, blatantly disre-

149. 104 S. Ct. at 2412, 2414.
150. Id. at 2423 n.12 (Marshall, J., dissenting).
151. See supra notes 55-59 and accompanying text.
152. The Gault Court, for instance, explained that the actual result of the statute in question was unfair. 387 U.S. at 27-31. After arrest, Gerald Gault was not given notice of the charges against him, was not advised of his right to an attorney, was not allowed to examine the witness, and was not provided the privilege against self-incrimination. After denial of all these rights, however, the youth, who committed a minor offense, was tried and sentenced to incarceration for six years. Id. at 29. See supra notes 8-11. In Winship, the Court indicated that the youth's conviction was based on a preponderance of the evidence and was sentenced to incarceration for up to six years. 397 U.S. at 360. The judge who tried and convicted the youth admitted that the proof in Winship's case might not establish guilt beyond a reasonable doubt. Id. In McKeiver, the Court denied juveniles the right to a jury trial. The Court reasoned that a jury is not a "necessary component of accurate fact-finding;" a trial in which the judge acts as fact-finder can be as fair and accurate as a jury trial. 403 U.S. at 543. Finally, the Breed Court incorporated the privilege against double jeopardy into juvenile proceedings because the alternative was to subject juveniles to the harrowing experience of a second trial for the same offense in the adult system. 421 U.S. at 523-24.
garded the actual effect of the New York statute on the child. The Court had more than just one youth's experience on which to base its conclusions. The district court received thirty-four case histories of youths detained pursuant to the statute. These histories convinced both lower courts that the statute was unconstitutional. Of the thirty-four youths included in the case histories, twenty-three were released either before or immediately after their trials. Sixteen children who were released during the period between their arrests and initial appearances did not commit crimes, even though they were detained after the initial appearance pursuant to the statute. Trial testimony indicated that the thirty-four cases were typical of all those brought pursuant to the statute, a point noted by the dissent. Furthermore, several amici briefs argued that the thirty-four cases histories were similar to nationwide statistics. The majority, however, did not consider this data in its analysis on the ground that it was flawed and unrepresentative.

Prior to Schall, Supreme Court decisions concerning the juvenile justice system scrutinized the practical impact of the particular proceeding in question. The Gault Court noted that without due process in the juvenile justice system, children could be improperly incarcerated. Likewise, the Winship Court acknowledged that if the juvenile court could rely on a preponderance of the evidence to find delinquency, rather than proof beyond a reasonable doubt, many more innocent children could possibly suffer a loss of liberty. While the McKeiver Court recognized that the juvenile justice system would become adversarial if a jury trial were allowed, the Breed Court observed that the paternal nature of the juvenile proceeding would be destroyed if the child were not protected from double jeopardy.

The New York statute challenged in Schall creates numerous unfair situations. For example, the statute allows children to be easily detained, and creates situations in which innocent children may be improperly incarcerated. A requirement that family court judges find probable cause before detaining juveniles would not create an adversarial hearing. Rather, a judge

154. Id.; United States ex rel. Martin v. Strasburg, 689 F.2d 365, 369 (2d Cir. 1982).
156. Id. at 693.
157. Schall, 104 S. Ct. at 2421 n.7 (Marshall, J., dissenting).
158. Id. at 2415 n.23.
159. See supra note 58 and accompanying text.
160. See supra note 64 and accompanying text.
161. See supra notes 66-68 and accompanying text.
162. See supra note 73 and accompanying text.
163. Most state statutes only allow pretrial detention of adults to ensure that the accused will be present at trial. But see D.C. Code Ann. §§ 23-1321 to 23-1322 (1981 & Supp. 1983) (pretrial detention of adults allowed to protect community); 18 U.S.C. § 3142(d)(2) (pretrial detention of adults allowed if judicial officer determines that accused "may flee or pose a danger to any other person or the community"). The New York statute's use of pretrial detention to protect society from criminal acts by juveniles could quite possibly result in an increased number of children being detained because a finding of probable cause is not required. See supra notes 102, 140 and accompanying text.
would be able to more easily maintain a paternal relationship with the accused child when the child knows that the risk of erroneous detainment is reduced.\textsuperscript{164} The \textit{Schall} majority, however, did not discuss the positive and negative impacts of the probable cause proceeding on the juvenile justice system.\textsuperscript{165} Unlike prior cases in this area, \textit{Schall} ignored the purposes of the juvenile justice system. The dissenters, relying on \textit{Gault} and its progeny, correctly concluded that the detention statute was unconstitutional because of the serious harm it placed on the child and the juvenile system with little reciprocal benefit to society.\textsuperscript{166} The majority rejected this conclusion, stating that the only question before it was whether the law conformed with constitutional standards.\textsuperscript{167} The majority's statement indicated that, despite the precedent of \textit{Gault}, the Court believed that special aspects of the juvenile justice system play no role in these constitutional determinations.

\section*{Impact}

The \textit{Schall} Court's treatment of children's constitutional rights was abysmal. The \textit{Schall} Court recognized that a child has a due process liberty interest in being free from unwarranted incarceration,\textsuperscript{168} but it qualified that interest by observing that a child is always in some form of custody.\textsuperscript{169} The Court's observation implied that children's due process rights are not as important as those of adults. This implication enabled the Court to downplay children's constitutional rights and forego a careful analysis of the due process requirements of pretrial detention in general.\textsuperscript{170} The Court's analysis sets a dangerous precedent. If the Court does not recognize that children's due process rights are as "fundamental"\textsuperscript{171} as adults', children will not be protected from unreasonable state regulations.\textsuperscript{172} If the Court does not

\begin{itemize}
\item \textsuperscript{164} See supra note 57 and accompanying text.
\item \textsuperscript{165} See supra notes 125-31 and accompanying text.
\item \textsuperscript{166} 104 S. Ct. at 2424, 2433 (Marshall, J., dissenting). The majority, on the other hand, held that the statute promoted the child and society. \textit{Id.} at 2404. Unfortunately, the majority did not investigate the possible harm to the child caused by detention.\textsuperscript{173}
\item \textsuperscript{167} \textit{Id.} at 2419.
\item \textsuperscript{168} \textit{Id.} at 2410.
\item \textsuperscript{169} The Court explained that children, because of their youth, are assumed to be unable to care for themselves. Therefore, children are "subject to the control" of parents, and if the parent "falters," the state, as \textit{pares patriae}, will step in to control the child. \textit{Id.} See supra note 112.
\item \textsuperscript{170} See supra notes 134-50 and accompanying text.
\item \textsuperscript{171} Fundamental rights are explicitly or implicitly guaranteed under the Constitution. For example, freedom of speech and freedom of religion are explicitly granted by the Constitution. U.S. Const. amend. 1. One implicitly guaranteed fundamental right is the right of privacy. See, e.g., \textit{Roe v. Wade}, 410 U.S. 113, 152 (1973) (constitutional right of privacy found in penumbra of first, third, fourth, fifth, and ninth amendments); \textit{Griswold v. Connecticut}, 381 U.S. 479, 485 (1965) (right to privacy is implied from penumbra of first amendment).
\item \textsuperscript{172} Rush, \textit{supra} note 7, at 495. Professor Rush contends that children have fundamental rights, which, if recognized, would allow children who are victims of unreasonable state regulations to challenge the state. \textit{Id.} On the other hand, if children's fundamental rights are not recognized, they have "no judicial outlet" unless their parent challenges the law on the children's behalf. \textit{Id.} If the parent brings a suit, however, the court will balance the state's interest in protecting children against the parent's interest in raising their children. \textit{Id.} Only by recognizing children's fundamental rights will the parameters of children's rights be explored. \textit{Id.} at 496.
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acknowledge children's due process rights, the state will be able to rely solely on its *parens patriae* power to justify its unfair treatment of the accused child.\(^{173}\) Furthermore, future decisions in children's rights cases will lack consistency and reliability; as the *Schall* Court implied, it is not necessary for a court to rigorously assess the due process guarantees granted to an adult in the analysis of due process rights to be given a child.\(^{174}\)

Another serious problem with the *Schall* decision is its deviation from the precedent set in *Gault*. The mode of analysis established in *Gault* is sound and can be followed by lower federal courts.\(^{175}\) The juvenile justice system is not identical to the criminal justice system because some rights given to adults are not given to children.\(^{176}\) Also, the juvenile system advances different goals than its adult criminal counterpart. The juvenile justice system exists to rehabilitate children, not to punish them. Different aspects of the juvenile system must be carefully analyzed in each case; the *Gault* analytical framework allows a court to make these decisions critically. The *Schall* Court, however, did not apply the *Gault* analysis. The majority in *Schall* stated that if a procedure within the juvenile justice system is informal and flexible, the child need not be afforded constitutional rights.\(^{178}\) The vague standard used in *Schall* does not provide a basis for commencing a constitutional analysis or reviewing a lower court's decision.

The unreliability of the *Schall* standard is apparent when applied to statutes that have already been reviewed by lower courts. In *Moss v. Weaver*,\(^{179}\) the Court of Appeals for the Fifth Circuit addressed the constitutionality of

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173. Rush, *supra* note 7, at 496-97. A court would apply a higher standard of analysis and reasoning in children's rights cases if it could not rely on *parens patriae*. *Id.* at 492. Reliance on *parens patriae*, however, is dangerous. Family interaction is fundamentally private; a state cannot achieve family-type relations with juveniles. Rosenberg, *supra* note 7, at 705.


The *Gault* mode of analysis has been used in children's cases outside the juvenile justice system as well. *See*, e.g., *Joseph A. By Wolfe v. New Mexico Dept. of Human Resources*, 575 F. Supp. 346, 352 (D.N.M. 1983) (children entitled to same constitutional rights as adults, but no case law indicates a constitutional right to foster or adopt family).

176. The only right the Supreme Court has denied to children is the right to a jury trial. *See* *supra* notes 65-70 and accompanying text. However, most jurisdictions do not give juveniles the right to bail. *But see* Ark. Stat. Ann. § 45-421(h) (1983 Supp.) (bail set to ensure appearance of juvenile in court); Del. Fam. Ct. Rule 60(a)(1) (release juvenile upon reasonable cash bond to assure appearance in court); Mass. Ann. Laws ch. 119, § 67 (Michie/Law. Coop. 1984 Supp.).

178. *See supra* notes 137-40 and accompanying text.

179. 525 F.2d 1258 (5th Cir. 1976).
Florida's juvenile pretrial detention statute. The statute required that three factors be weighed by the juvenile court in deciding whether to release or detain defendants: (1) whether detention was necessary to protect the person or property of the child or of others; (2) whether a parent was available to provide adequate care and supervision for the child; and (3) whether the parent could convincingly assure the court that the child could be present at the adjudicatory hearing. The statute did not require a finding of probable cause to detain the child prior to trial.

The Court of Appeals for the District of Columbia reviewed a similar statute in Cooley v. Stone. In the District of Columbia, a judge could detain an arrested child if the facts indicated that releasing the youth was inadvisable. A finding of probable cause was not a prerequisite for pretrial detention.

Both the Fifth Circuit and the District of Columbia Circuit courts used the Gault mode of analysis to hold that an immediate finding of probable cause is necessary to detain a youth prior to trial. The Moss court stated that under Gerstein, adults have a due process right to a probable cause hearing before prolonged pretrial detention is allowed. The Cooley court, which decided its case prior to Gerstein, stated that the fourth amendment usually requires a determination of probable cause before detention. Both courts also correctly reasoned that young alleged offenders would also benefit from a probable cause hearing. Each court weighed the benefits of requiring a probable cause hearing against the burden on the juvenile justice system of observing that requirement. The Moss court concluded that pretrial detention is an "onerous experience, especially for juveniles," and that without a finding of probable cause, the juvenile system does not afford the child the "fundamental fairness" of due process. Both the Moss and Cooley courts found that requiring an immediate finding of probable cause does not unduly burden the juvenile justice system. Each court concluded that juveniles have a due process right to an immediate probable cause hearing before extended incarceration.

If Moss and Cooley were brought today, and Schall were used as precedent, the Moss decision would be decided differently and the Cooley decision would remain the same. Schall established that pretrial detention of juveniles is constitutional if the procedure is flexible and informal and the detention serves the legitimate state interests of protecting the child and society from the child's future criminal activity. The procedures in both Moss and Cooley meet Schall's flexibility requirement. In both cases, the procedures require

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182. Id.
183. 525 F.2d at 1260 (citing Gerstein v. Pugh, 420 U.S. 103 (1975)).
184. 414 F.2d at 1213.
185. Moss, 525 F.2d at 1260; Cooley, 414 F.2d at 1214.
186. 525 F.2d at 1260.
187. Id.
188. Id.; Cooley, 414 F.2d at 1214.
the judge to assess each youth's individual circumstances to be assured that a parent is available to care for the child.\textsuperscript{189}

These two cases would fare differently, however, under the second part of the \textit{Schall} analysis. In the statute considered in \textit{Moss}, the judge must consider whether detention is necessary to protect the child and society.\textsuperscript{190} The pretrial detention is intended to serve the legitimate state interest and, therefore, would be upheld under \textit{Schall} despite the lack of an immediate probable cause hearing. The procedure in \textit{Cooley}, on the other hand, does not purport to advance any legitimate state purpose in detaining the child. The judge does not have to consider whether detention is necessary to protect the youth or society.\textsuperscript{191} Pretrial detention of juveniles within the District of Columbia juvenile system could therefore be struck down under \textit{Schall}. Although the procedures considered in these two statutes were similar, the results would be different if decided after \textit{Schall}, and the decisions would therefore appear inconsistent and unreliable.

Preventative detention is harmful to accused juveniles. Confining children prior to trial hinders their ability to prepare a defense.\textsuperscript{192} Incarceration prevents children from proving their ability to function at home and in society.\textsuperscript{193} Preventative detention also disregards the parent's interest in maintaining custody of children prior to trial.\textsuperscript{194} The \textit{Gault}, \textit{Winship}, and

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\item[189.] See supra text accompanying notes 180 and 182.
\item[190.] See supra text accompanying note 180.
\item[191.] See supra text accompanying note 182.
\item[192.] Guggenheim, \textit{supra} note 116, at 1064.
\item[194.] Parents have the primary responsibility for the child's upbringing under the law. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). See also Kaufman, \textit{supra} note 132, at 744 (parents responsible for providing protection and guidance); Kaufman, \textit{supra} note 7, at 1019 (family is primary force in society for developing child's potential); Rush, \textit{supra} note 7, at 493 (parent-child relationship is sacrosanct under law).

The Supreme Court recognized that in some contexts, parents have a constitutionally protected right to raise their children without state interference. See, e.g., Parham v. J.R., 442 U.S. 584, 604 (1979) (parents "have the [constitutional] right, coupled with the high duty, to . . . prepare [their children] for additional obligations) (quoting Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)); Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 846 (1977) (certain areas of family life entitled to procedural and substantive constitutional protection); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (Constitution protects liberty interest in right "to marry, establish a home and bring up children"). Therefore, it is difficult to understand how the \textit{Schall} Court justified the state's detention of juveniles prior to trial without consideration of the parent's interests. By denying parents the custody of their child, the state denies the child important developmental opportunities. This may lead to an increase in juvenile delinquency. Kaufman, \textit{supra} note 7, at 1019-20; see also \textit{The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime} 45 (1967).

The \textit{Schall} Court upheld the pretrial detention statute as a legitimate exercise of the state's \textit{parens patriae} power. See \textit{supra} note 112. \textit{Parens patriae} should be invoked only when the parent "fal ters" in the control of the child. \textit{Schall}, 104 S. Ct. at 2410. In her article, Professor Rush points out that the \textit{Schall} Court used the \textit{parens patriae} doctrine without evidence of, or
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Breed courts each noted that the denial of due process rights to an accused child was unfair. The Schall Court ignored this principle by overlooking the obvious unfairness that results from denying a child an immediate probable cause hearing. Unlike the previous cases, the decision to deny juveniles an immediate probable cause hearing does not comport with "the essentials of due process and fair treatment."  

CONCLUSION

Schall v. Martin discarded the Gault analysis for assessing due process violations in the juvenile justice system. Gault had established a standard of review that was logical and easily applied. Under Gault, a court should analyze due process challenges to the juvenile justice system by first accurately assessing what the due process requirements are for a defendant in the adult criminal justice system. The court should then determine how the addition or removal of the right would affect both the juvenile system and juvenile defendants. This balancing analysis focuses the court's attention on the unique needs of children. Special consideration must be given to the procedures necessary to accomplish the system's goal of rehabilitating the troubled child.

The Schall Court gave no special consideration to the juvenile justice system's goals. The Court purported to balance the "fundamental fairness" of due process and the "informal" qualities of juvenile proceedings. This balance, however, was never achieved. The Schall analysis inaccurately depicted the due process requirements for pretrial detention of adults, and also unrealistically appraised the impact of compulsory probable cause hearings on the juvenile justice system. The Schall decision, therefore, may seriously curtail due process rights for children because it established no balancing guidelines for courts to follow.

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even an investigation into, possible parental faltering. Rush, supra note 7, at 500. For example, one child discussed in Schall was accused of attempted robbery and assault, and was held for three weeks without a trial. The case was finally dismissed and the juvenile was released to his father's custody. 104 S. Ct. at 2407. By giving the father custody of the child, the court acknowledged that the father was, in fact, capable of taking care of the child. Because the state could not show parental "faltering," no interest was served in detaining the child in the first instance. The Court's reliance on parens patriae, therefore, was misplaced. Rush, supra note 7, at 501.

195. See supra notes 55-59.