

SCHALL V. MARTIN AND THE TRANSFORMATION OF JUDICIAL PRECEDENT†

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I. INTRODUCTION.....	642
II. OVERVIEW OF THE <i>SCHALL</i> OPINION	645
III. THE TRANSFORMATION OF PRECEDENT IN <i>SCHALL</i>	649
A. <i>The Formulation of the First Inquiry: The Truncation of Kennedy</i>	650
1. <i>Bell's Truncation of the Kennedy Criteria</i>	650
2. <i>Schall's Further Truncation of the Bell Criteria</i> ..	654
a. <i>Alternative Assignable Purpose</i>	654
b. <i>Explicit Punitive Intent</i>	658
c. <i>Excessiveness of Restriction Relative to Alternative Purpose</i>	659
B. <i>The Primacy of Custody Over Liberty: The Misrepresentation of Lehman and Gault</i>	662

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I dedicate this article to my father, Dr. Kwang Lim Koh. My father, who died shortly before this manuscript was accepted for publication, received his L.L.B. degree from Boston College Law School in 1955 after having received an L.L.B. degree in Korea, an L.L.M. and S.J.D. degree at Harvard, and a Ph.D. degree in Political Science from Rutgers. His profound respect for the integrity and power of legal reasoning in many ways inspired the concerns raised in this article. I dedicate these ideas to him with everlasting love and gratitude.

C. <i>The State's Parens Patriae Duty if Parental Control Falters: The Subversion of Santosky</i>	666
D. <i>The Formulation of the Second Inquiry: The Truncation of Mathews</i>	669
E. <i>The Expansion of Post-Arrest Administrative Detention: The Misreading of Gerstein</i>	673
F. <i>The Accuracy of Judicial Predictions of Dangerousness: The Bolstering of Jurek, Greenholtz, and Morrissey</i> ..	676
G. <i>Mathews Revisited: Schall's Distortions Summarized</i>	682
IV. THE RIPPLE EFFECT OF SCHALL	683
A. <i>The Revolution Within the Juvenile Justice Arena</i>	684
B. <i>The Revolution in Constitutional Arenas Beyond Juvenile Justice</i>	684
1. <i>Subtracting Substantive Due Process Limitations upon Regulation: Kennedy to Bell to Schall to Salerno</i>	686
2. <i>Legitimizing Detention after Arrest: Gerstein to Schall to Salerno</i>	688
3. <i>Dichotomizing the Three-Prong Analysis of Pro- cedural Due Process: Mathews to Schall to Salerno</i>	689
4. <i>Inverting the Presumption of Innocence</i>	691
V. CONCLUSION	693

" . . . we leave prior decisional law as we find it and simply apply it to the case at bar."

Justice William H. Rehnquist, writing for the Court in *Bell v. Wolfish*.¹

I. INTRODUCTION

In the spring of 1984, hopes ran high among advocates for children all over the country that the courts were sounding the deathknell for juvenile preventive detention. Preventive detention,² in any form, had never been upheld by the nation's highest Court.³

¹ 441 U.S. 520, 535 n.17 (1979).

² "Preventive detention" is post-arrest, pre-conviction detention of alleged criminals based upon a judicial finding that the criminal is dangerous. For the New York preventive detention statute, see *infra* note 28 and accompanying text.

³ See, e.g., *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982) (District of Columbia Court of Appeals held the D.C. adult preventive detention statute constitutional). As of April, 1985 the United States Supreme Court had not decided

A New York federal district court in *United States ex rel. Martin v. Strasburg* had already struck down the state's juvenile preventive detention statute as violative of due process on its face.⁴ The United States Court of Appeals for the Second Circuit subsequently affirmed *Strasburg*.⁵

The district court found that New York family court judges routinely remanded alleged juvenile delinquents to secure detention during an initial arraignment averaging only five to fifteen minutes.⁶ These judges, the district court found, detained children based on "intuition and [their] personal predilections, the antithesis of reasoned action."⁷ Eighteen years of constitutional jurisprudence, commencing with *In re Gault*,⁸ had construed the Constitution to protect the rights of accused juveniles through stringent procedural safeguards in order to avoid punishment of presumptively innocent persons. Thus, in the spring of 1984, many advocates for children were confident that the Supreme Court would definitively strike down preventive detention as unconstitutional.

In the summer of 1984, however, a 6-3 majority of the Supreme Court decided *Schall v. Martin*,⁹ and its decision has puzzled the juvenile justice community. Replete with citation to cases that

whether preventive detention statutes violate the eighth amendment of the United States Constitution. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 968 n.164 (1985).

⁴ 513 F. Supp. 691 (S.D.N.Y. 1981) [hereinafter *Strasburg I*].

⁵ *Martin v. Strasburg*, 689 F.2d 365 (2d Cir. 1982) [hereinafter *Strasburg II*].

⁶ See *Strasburg I*, 513 F. Supp. at 708. In 1981, when *Strasburg I* was decided, the New York Family Court Act defined a secure facility as a facility "characterized by physically restricting construction, hardware and procedures." N.Y. FAM. CT. ACT § 712(d) (McKinney 1975 & Supp. 1981) (currently N.Y. FAM. CT. ACT § 301.2(4) (McKinney 1983)). A "non-secure" facility was characterized by the absence of those features. N.Y. FAM. CT. ACT § 712(e) (McKinney 1975 & Supp. 1981) (currently N.Y. FAM. CT. ACT § 301.2(5) (McKinney 1983)). The district court noted that the "secure facility has a more authoritarian atmosphere." *Strasburg I*, 513 F. Supp. at 695 n.5.

City officials screen children for non-secure or secure detention after the judicial detention decision. See *Strasburg I*, 513 F. Supp. at 703. According to evidence adduced in *Strasburg I*, the majority of juvenile delinquents are admitted to secure facilities. In 1979, for instance, according to Director of Detention Services Michael Bigley, 8,557 juveniles were admitted to secure facilities and 1,216 to non-secure facilities. According to the report of the Chief Administrator for that same year, only 4,783 juveniles were placed in secure facilities; this, however, is still four times as many as were placed in non-secure settings. *Strasburg I*, 513 F. Supp. at 703 n.8.

⁷ *Id.* at 713.

⁸ 387 U.S. 1 (1967); see *infra* notes 83-97 and 115-29 for a discussion of the *Schall* majority's misuse of *In re Gault*.

⁹ 467 U.S. 253 (1984). Then Associate Justice Rehnquist wrote the majority opinion, joined by Chief Justice Burger, and Justices White, Blackmun, Powell and O'Connor. Justice Marshall filed a dissenting opinion in which Justices Brennan and Stevens joined. *Schall*, 467 U.S. at 281 (Marshall, J., dissenting).

might ordinarily lead to invalidation of pre-trial detention,¹⁰ the opinion nevertheless upheld pre-trial detention as constitutional.¹¹

Scholars and practitioners have been challenging the *Schall* decision since 1984. Many have explored the discontinuity between *Schall* and the line of juvenile rights cases surrounding *Gault*.¹² Others have focused upon the *Schall* opinion's effect on jurisprudence regarding adult criminal defendants.¹³ By focusing on the Court's reasoning in light of secure preventive detention, this article, however, will explore the extent to which distortion of precedent drives the *Schall* opinion. The *Schall* opinion, claiming to apply precedent, instead transforms established principles. The opinion claims support through citations to *Gault*,¹⁴ *Kennedy v. Mendoza-Martinez*,¹⁵ *Mathews v. Eldridge*,¹⁶ and *Gerstein v. Pugh*,¹⁷ but it is the distortion of these cases that forms the basis of the decision.

¹⁰ *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Gerstein v. Pugh*, 420 U.S. 103 (1975); *In re Gault*, 387 U.S. 1 (1967); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

¹¹ *Schall*, 467 U.S. at 281.

¹² For an excellent discussion and extensive bibliography of the genesis of the Juvenile Court movement and *Gault* and its progeny, including *Schall*, see Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 142-64, 191-209 (1984). Note, *Supreme Court Holds Juvenile Preventive Detention Under New York Statute Not Violative of Due Process: Schall v. Martin*, 26 B.C.L. REV. 1277, 1281-88 (1985); Note, *Juvenile Justice—Preventive Detention of Juveniles: Have They Held Your Child Today? Schall v. Martin*, 104 S. Ct. 2403 (1984), 1985 S. ILL. U.L.J. 315, 316-19 (1985) [hereinafter *Have They Held Your Child Today?*]. For a discussion of *Kent v. U.S.*, 383 U.S. 541 (1966), a precursor of *Gault*, in connection with the background and jurisprudence of the juvenile court see Note, *Constitutional Law—Pretrial Preventive Detention—Pretrial detention of an accused juvenile delinquent who poses a serious threat of recidivism does not violate due process*, *Schall v. Martin*, 104 S. Ct. 2403 (1984), 62 U. DET. L. REV. 145, 148-52 (1984); Note, *Juvenile Law—What Ever Happened to In Re Gault and Fundamental Fairness in Juvenile Delinquency Proceedings?*, 22 WAKE FOREST L. REV. 347, 349-57 (1987). For additional discussion of the juvenile court movement and jurisprudence in light of *Schall*, see Rosenberg, *Schall v. Martin: A Child is a Child*, 12 AM. J. CRIM. LAW 253, 256-58 (1984); Note, *Where Have All the Children Gone? The Supreme Court Finds Pretrial Detention of Minors Constitutional: Schall v. Martin*, 34 DE PAUL L. REV. 733, 734-40 (1985); Note, *The Constitutionality of Juvenile Preventive Detention: Schall v. Martin—Who Is Preventive Detention Protecting?*, 20 NEW ENG. L. REV. 341, 341-47 (1984-85) [hereinafter *Who is Preventive Detention Protecting?*]; Comment, *The Supreme Court and Pretrial Detention of Juveniles: A Principled Solution to a Due Process Dilemma*, 132 U. PA. L. REV. 95, 98-101 (1983) (also contains helpful references).

¹³ See, e.g., Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510 (1986); Ewing, *Schall v. Martin: Preventive Detention and Dangerousness Through the Looking Glass*, 34 BUFFALO L. REV. 173 (1985); Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1 (1985); Zenoff, *Controlling the Dangers of Dangerousness: The ABA Standards and Beyond*, 53 GEO. WASH. L. REV. 562 (1985); Comment, *Pretrial Detainment: The Fruitless Search for the Presumption of Innocence*, 47 OHIO ST. L.J. 277 (1986).

¹⁴ 387 U.S. 1 (1967).

¹⁵ 372 U.S. 144 (1963).

¹⁶ 424 U.S. 319 (1976).

¹⁷ 420 U.S. 103 (1975).

Once these distortions have been revealed, the ripple effect of the *Schall* transformation becomes evident. For example, the first case to rely upon *Schall*, *United States v. Salerno*,¹⁸ is grounded in *Schall*'s distortion of precedent. In *Salerno*, the Court upheld preventive detention for adults under the Federal Bail Reform Act of 1984.¹⁹ Through *Schall* and *Salerno*, five important constitutional doctrines have been dramatically transformed: (1) the interaction of the state's *parens patriae* duty and the juvenile's right to liberty, (2) the substantive due process distinction between an impermissibly punitive and a permissibly regulatory governmental practice, (3) the parameters of acceptable post-arrest detention, (4) the structure of procedural due process, and (5) the presumption of innocence. All of these transformations stem from distortions of the precedents upon which *Schall* and *Salerno* purport to rely. In view of its powerful effect, *Schall* represents a significant turning point in the law. Because its significance has been disguised because of the illusion of continuity with precedent, the distortions upon which the decision rests must now be brought to light.

Section two of this essay briefly describes the structure and conclusions of the *Schall* opinion.²⁰ Section three reviews six major precedential distortions in *Schall*, exploring the way these flaws pervade the structure and execution of the majority's legal analysis.²¹ Section four explores how the ripple effect from *Schall* has already altered the established path of five constitutional doctrines in both criminal and civil jurisprudence.²² Finally, the conclusion reflects on the dangers posed by the opinion in its broader context and suggests areas for further research and investigation.²³

II. OVERVIEW OF THE *SCHALL* OPINION

The *Schall* opinion is divided into three main sections. Section one discusses briefly the factual background and procedural history of the litigation.²⁴ Section two analyzes whether the preventive de-

¹⁸ *United States v. Salerno*, 107 S. Ct. 2095 (1987).

¹⁹ *Id.* at 2098, 2105.

²⁰ See *infra* notes 24–50 and accompanying text.

²¹ See *infra* notes 51–201 and accompanying text.

²² See *infra* notes 202–246 and accompanying text.

²³ See *infra* notes 247–252 and accompanying text.

²⁴ *Schall v. Martin*, 467 U.S. 253, 257–62 (1984).

tion statute satisfies the requirements of the due process clause.²⁵ Section three concludes by summarily rebutting arguments offered by the dissent against the majority's holding.²⁶

In *Schall*, three juveniles brought a class action habeas corpus proceeding for declaratory judgment invalidating the New York state juvenile preventive detention statute as unconstitutional under the due process and equal protection clauses of the fourteenth amendment.²⁷ The statute, Family Court Act ("FCA") section 739(a)(ii), provided:

[a]t the initial appearance, the court in its discretion may release the respondent or direct his detention. In exercising its discretion under this section, the court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained:

...
(ii) there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime.²⁸

In reviewing the case before it, the *Schall* majority stated that "[t]wo separate inquiries are necessary" to determine whether ju-

²⁵ See *id.* at 263-81.

²⁶ *Id.* at 281.

²⁷ *Id.* at 260-61.

²⁸ N.Y. FAM. CT. ACT § 739(a)(iii) (McKinney 1975 & Supp. 1981). The United States District Court for the Southern District of New York (Robert L. Carter, J.) held that the statutory scheme, which allowed five days incarceration before detention was justified, constituted a punitive measure violative of due process on its face and as applied. *Strasburg I*, 513 F. Supp. 691, 717 (S.D.N.Y. 1981). A three-judge panel of the United States Court of Appeals for the Second Circuit affirmed the district court's holding that the statutory scheme and practice violate due process to the extent that pretrial detention is used primarily to impose punishment before adjudication of guilt or innocence. *Strasburg II*, 689 F.2d 365, 366 (2d Cir. 1982). Although the Second Circuit held section 739(a)(ii) of the New York Family Court Act "unconstitutional as to all juveniles," *id.* at 373, the court stressed that its holding was a narrow one:

Our decision is strictly limited to the precise issue before us. We hold only that pre-trial detention may not be imposed for anti-crime purposes pursuant to a substantively and procedurally unlimited statutory authority when, in all likelihood, most detainees will either not be adjudicated guilty or will not be sentenced to confinement after an adjudication of guilt. In such circumstances, the detention period serves as punishment imposed without proof of guilt established according to the requisite constitutional standard. We intimate no view as to the constitutionality of preventive detention in other circumstances.

Id. at 374.

Since 1985, N.Y. FAM. CT. ACT § 739(a)(iii) (McKinney 1975 & Supp. 1981) has been renumbered N.Y. FAM. CT. ACT § 320.5(3)(b) (McKinney 1983). The wording of the statute remains the same.

venile preventive detention comports with the fundamental fairness required by the due process clause. The first inquiry is whether preventive detention under the New York statute serves a legitimate state interest.²⁹ The *Schall* Court then cited *Bell v. Wolfish*³⁰ and *Kennedy v. Mendoza-Martinez*.³¹ The second inquiry is whether the procedural safeguards in the FCA are sufficient to authorize the pre-trial detention of at least some juveniles who are charged with crimes.³² After framing this second inquiry, the *Schall* majority cited *Mathews v. Eldridge*³³ and *Gerstein v. Pugh*.³⁴

In answering the first inquiry, the majority put forth two crucial propositions. First, the majority concluded, based upon its own reading of applicable precedent, that the juvenile's "undoubtedly substantial . . ." "countervailing interest in freedom . . ." "must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody."³⁵ For these propositions, the majority relied upon *Lehman v. Lycoming County Children's Services*,³⁶ and *In re Gault*.³⁷

Second, the majority asserted that "if parental control falters, the State must play its part as *parens patriae*."³⁸ "[I]n this respect," the majority continued, "the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's '*parens patriae*' interest in preserving and promoting the welfare of the child."³⁹ After this last statement, the Court cited *Santosky v. Kramer*.⁴⁰

In addressing its second inquiry concerning the adequacy of procedural safeguards, the majority considered "whether the procedures afforded juveniles detained prior to factfinding provide sufficient protection against erroneous and unnecessary deprivations of liberty."⁴¹ The *Schall* Court then cited to *Mathews v. Eldridge*.⁴² The analysis under this second inquiry included both an

²⁹ *Schall v. Martin*, 467 U.S. 253, 263-64 (1984).

³⁰ 441 U.S. 520, 534 n.15 (1979) (as cited by the *Schall* Court).

³¹ 372 U.S. 144, 168-69 (1963) (as cited by the *Schall* Court).

³² *Schall*, 467 U.S. at 264.

³³ 424 U.S. 319, 335 (1976) (as cited by the *Schall* Court).

³⁴ 420 U.S. 103, 114 (1975) (as cited by the *Schall* Court).

³⁵ *Schall*, 467 U.S. at 265.

³⁶ 458 U.S. 502, 510-11 (1982) (as cited by the *Schall* Court).

³⁷ 387 U.S. 1, 17 (1967) (as cited by the *Schall* Court).

³⁸ *Schall*, 467 U.S. at 265.

³⁹ *Id.*

⁴⁰ 455 U.S. 745, 766 (1982) (as cited by the *Schall* Court).

⁴¹ *Schall*, 467 U.S. at 274 (footnote omitted).

⁴² 424 U.S. 319, 335 (1976) (as cited by the *Schall* Court).

examination of acceptable post-arrest detention under *Gerstein v. Pugh*⁴³ and also an examination of case law involving judicial predictions of dangerousness.

In its first examination, the majority listed the procedural safeguards provided to accused juveniles under the Family Court Act, concluding that "[i]n sum, notice, a hearing, and a statement of facts and reasons are given prior to any detention under § 320.5(3)(b). A formal probable-cause hearing is then held within a short while thereafter, if the factfinding hearing is not itself scheduled within three days."⁴⁴ The *Schall* Court went on to conclude that these flexible procedures had been found constitutionally adequate⁴⁵ under the fourth amendment and *Gerstein v. Pugh*,⁴⁶ and under the due process clause and *Kent v. United States*.⁴⁷

In its second examination, the majority countered appellees' claim, with which the district court agreed, that "it is virtually impossible to predict future criminal conduct with any degree of accuracy."⁴⁸ The majority noted that "[o]ur cases indicate, however, that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct."⁴⁹ The majority stated that "[s]uch a judgment forms an important element in many decisions."⁵⁰

⁴³ 420 U.S. 103, 114 (1975).

⁴⁴ *Schall*, 467 U.S. at 277.

⁴⁵ *Id.*

⁴⁶ 420 U.S. 103 (1975) (as cited by the *Schall* Court).

⁴⁷ 383 U.S. 541, 557 (1966) (as cited by the *Schall* Court).

⁴⁸ *Schall*, 467 U.S. at 278.

⁴⁹ *Id.*

⁵⁰ *Id.* at 278 (citing *Jurek v. Texas*, 428 U.S. 262, 274-75 (1976); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 9-10 (1979); and *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)). The majority continued:

we have specifically rejected the contention, based on the same sort of sociological data relied upon by appellees and the District Court, "that it is impossible to predict future behavior and that the question is so vague as to be meaningless."

Id. at 278-79 (citing *Jurek*, 428 U.S. at 274).

The majority notes as well that they "have also recognized that a prediction of future criminal conduct is 'an experienced prediction based on a host of variables' which cannot be readily codified." *Id.* at 279 (citing *Greenholtz*, 442 U.S. at 16). In these cases,

the decision is based on as much information as can reasonably be obtained at the initial appearance. [citation omitted].

Given the right to a hearing, to counsel, and to a statement of reasons, there is no reason that the specific factors upon which the Family Court judge might rely must be specified in the statute.

Id. at 279.

The Court then considered the post-detention and review procedures which "provide a

Section three of this essay will examine these two inquiries in the *Schall* opinion, highlighting in each inquiry three crucial logical turning points in the Court's argumentation. In each of these six instances, the majority claimed to rely upon established judicial precedent while it in fact created new directions in the law.

III. THE TRANSFORMATION OF PRECEDENT IN *SCHALL*

Despite the ample citation creating the illusion of continuity, the *Schall* opinion, in fact, operates to distort significantly settled constitutional law. Three crucial uses of precedent in each of the majority's two due process inquiries expose this metamorphosis of important constitutional principles. The discussion below will track arguments in the opinion, first providing a brief summary of the Court's arguments.

The *Schall* Court framed the issue before it as whether juvenile preventive detention pursuant to section 320.5 (3)(b) comports with the "fundamental fairness" that due process requires.⁵¹ The first due process inquiry was whether the New York statute serves a legitimate state interest.⁵² The *Schall* Court then cited *Bell v. Wolfish*⁵³ and *Kennedy v. Mendoza-Martinez*.⁵⁴ The Court then stated that the juvenile's equally strong interest in being free from institutional restraints must be qualified by acknowledging that juveniles, unlike adults, are always in custody.⁵⁵ In support of this proposition, the *Schall* majority cited *Lehman v. Lycoming County Children's Services*⁵⁶ and *In re Gault*.⁵⁷ Noting that the faltering of parental control causes the state to have to play its part as *parens patriae*, the *Schall* Court stated that this *parens patriae* interest of the state in promoting the child's welfare may, in certain circumstances, outweigh the juvenile's liberty interest.⁵⁸

The second due process inquiry for the *Schall* Court was whether the procedures for juveniles who are detained prior to any factfinding provide adequate protection against mistaken and un-

sufficient mechanism for correcting, on a case-by-case basis, any erroneous detentions ordered under § 320.5(3)." *Id.* at 281.

⁵¹ *Schall*, 467 U.S. at 263.

⁵² *Id.* at 263-64.

⁵³ 441 U.S. 520, 534 n.15 (1979) (as cited by the *Schall* Court).

⁵⁴ 372 U.S. 144, 168-69 (1963) (as cited by the *Schall* Court).

⁵⁵ *Schall v. Martin*, 467 U.S. 253, 265 (1984).

⁵⁶ 458 U.S. 502, 510-11 (1982) (as cited by the *Schall* Court).

⁵⁷ 387 U.S. 1, 17 (1967) (as cited by the *Schall* Court).

⁵⁸ *Schall*, 467 U.S. at 265.

necessary deprivations of liberty.⁵⁹ The Court then cited *Mathews v. Eldridge*⁶⁰ as authority. The *Schall* majority then cited *Gerstein v. Pugh*⁶¹ to support the proposition that New York's Family Court Act contained procedures that were constitutional under the fourth amendment.⁶² The Court then stated that no prior case or legal theory would preclude a court from making a prediction about future criminal conduct.⁶³

A. *The Formulation of the First Inquiry: The Truncation of Kennedy*

The *Schall* majority framed its first inquiry by asking whether preventive detention under the New York statute serves a legitimate state objective. The majority implied that this "legitimate state objective" standard was derived from *Kennedy v. Mendoza-Martinez*. The majority, however, misrepresented that precedent by such an implication.

The *Schall* Court performed its transformation of *Kennedy* in two stages. First, it relied on *Bell's* previous truncation of *Kennedy* in framing its first inquiry. Then, it further truncated *Kennedy* by collapsing *Bell's* three criteria into two.

1. *Bell's* Truncation of the *Kennedy* Criteria

The majority relied on the Court's prior opinions in *Bell v. Wolfish*⁶⁴ and *Kennedy v. Mendoza-Martinez*⁶⁵ in formulating the first inquiry. In *Bell*, criminal defendants, who acknowledged that they were legitimately detained after arraignment to ensure their presence at trial, challenged the conditions of their detention. In considering the detainee's challenge to crowding in cells, restrictions on mail and packages, and searches of cells and anal and genital body cavities, the *Bell* opinion, written by Justice Rehnquist, focused on whether the practices constituted "punishment in the constitutional sense:"⁶⁶

Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination gen-

⁵⁹ *Id.* at 274.

⁶⁰ 424 U.S. 319, 335 (1976) (as cited by the *Schall* Court).

⁶¹ 420 U.S. 103, 114 (1975) (as cited by the *Schall* Court).

⁶² *Schall*, 467 U.S. at 277.

⁶³ *Id.* at 278.

⁶⁴ 441 U.S. 520 (1979).

⁶⁵ 372 U.S. 144 (1963).

⁶⁶ *Bell*, 441 U.S. at 561.

erally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'⁶⁷

The majority pulled the latter part of the quoted sentence from *Kennedy v. Mendoza-Martinez*.⁶⁸ In this analysis, *Bell* misrepresented the standards enunciated in *Kennedy v. Mendoza-Martinez* for determining whether challenged government sanctions are punitive or regulatory.

In *Kennedy*, two former American citizens challenged the constitutionality of acts of Congress that divested Americans of their citizenship because of their absence from the United States during wartime or national emergency in order to avoid training and service in the United States armed forces. In order to determine whether the federal legislation was penal or regulatory in character, the *Kennedy* Court enunciated a test that required, first, a review of legislative history to search for explicit punitive intent, and then, if no overt penal motive was found, an evaluation of the statute in light of seven criteria. The *Kennedy* Court derived these seven tests from earlier Supreme Court opinions. The tests, in the *Kennedy* Court's own words, are:

[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applied is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.⁶⁹

In the same sentence, the Court in *Kennedy* continued that "all" factors are "relevant to the inquiry, and may often point in differing directions."⁷⁰

Thus *Kennedy*, properly read, requires a court first to examine the statutory intent for punitive motives, and if it finds none, then to apply *all seven tests* to determine if the statute is penal or regu-

⁶⁷ *Id.* at 538.

⁶⁸ 372 U.S. 144, 168–69 (1963) (as cited by the *Schall* Court).

⁶⁹ *Kennedy*, 372 U.S. at 168–69 (numbering added; seven footnotes omitted).

⁷⁰ *Id.* at 169 (emphasis added).

latory. Although the *Kennedy* Court concluded that punitive legislative intent was manifest in the act of Congress there at issue, *Kennedy* nevertheless stressed that in cases where congressional intent is unclear, the seven factors "must be considered in relation to the statute on its face."⁷¹

The *Bell* Court relied upon *Kennedy* for the proposition that, where legislative intent is unclear, determination of a practice's penal character will turn on whether a non-punitive alternative purpose can be assigned to the restriction and whether the practice appears excessive in relation to that non-punitive purpose. By so relying on *Kennedy*, the *Bell* Court effectively amputated the first five *Kennedy* criteria.⁷² The *Bell* Court never evaluated the challenged conditions of detention in light of five of the seven required *Kennedy* factors.⁷³

Similarly, the *Schall* opinion, which cited both *Kennedy* and *Bell*, never evaluated the New York preventive detention statute in light of the first five *Kennedy* factors. *Schall* did not even acknowledge the existence of those five factors. Instead, *Schall* cited *Kennedy* as the source of its "legitimate state objective" standard.⁷⁴ This truncation of *Kennedy* allowed the *Schall* Court to grapple only with the question of express punitive intent, and then, if no overt penal motives were present, only with the last two *Kennedy* factors, the only ones relating to the notion of a legitimate state objective. Significantly, the word "legitimate" never appeared in the *Kennedy* criteria.⁷⁵

All seven factors, as applied to the sanction of detention of a juvenile in a locked facility prior to a probable cause hearing, indeed "point in differing directions," as *Kennedy* anticipated.⁷⁶ *Schall*, however, did not acknowledge these differing directions. Had all seven

⁷¹ *Id.* (emphasis added).

⁷² See *Bell*, 441 U.S. at 538.

⁷³ It is even more troubling that *Kennedy* was never an appropriate precedent for *Bell*, because *Bell* appropriated *Kennedy*'s tests for acts of Congress and applied them to regulations promulgated by state administrators. The Court in *Bell* thus transformed the standards for review of legislative decisions to the administrative realm, without justifying according equal deference to Congressional and Executive regulations. Justice Marshall protested this transformation in his *Bell* dissent. *Bell*, 441 U.S. at 565 (Marshall, J., dissenting).

Kennedy did apply more closely to *Schall*, which involved a state statute. Had *Schall* relied directly upon *Kennedy*, instead of upon *Kennedy* truncated by *Bell*, all seven factors should have been considered.

⁷⁴ *Schall v. Martin*, 467 U.S. 253, 263-64 (1984).

⁷⁵ See *infra* note 97 for a further discussion of the absence of the word "legitimate" in the *Kennedy* opinion.

⁷⁶ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963).

factors been considered in the *Schall* opinion,⁷⁷ the following analysis might have ensued:

Factor one: Because secure detention involves a locked facility in which a child's freedom of movement is restricted physically, New York preventive detention is a penal sanction.

Factor two: Because incarceration in a locked facility in which freedom of movement is restricted has historically been regarded as a punishment, New York preventive detention is a penal sanction.

Factor three: Preventive detention is imposed upon certain arrested juveniles, based upon the judge's projection of the individual child's future state of mind and particular behavior. It is not imposed upon all arrested juveniles on a general, indiscriminate basis. Therefore, it is a penal sanction.⁷⁸

Factor four: Because the operation of detention will promote the traditional aims of punishment—retribution and deterrence—it is a penal sanction.⁷⁹

Factor five: Because the behavior for which preventive detention is imposed is future crime that the judge predicts the child may commit, by definition this future behavior is "already a crime." Therefore, preventive detention is a penal sanction.⁸⁰

⁷⁷ The district court prefaced its consideration of whether preventive detention constituted punishment with a recitation of all seven *Kennedy* factors. *Strasburg I*, 513 F. Supp. 691, 716 (S.D.N.Y. 1981).

⁷⁸ *Kennedy* cited two cases to support factor three. The Child Labor Tax Case, 259 U.S. 20, 37–38 (1921), distinguished between a tax and a penalty, holding that scienter is associated with penalties, not taxes. In this case, an employer was required to pay a premium only if he knew that the child he employed was under the specified age limit. Payment depended upon the employer's knowledge; therefore, because of this scienter requirement, the payment was held to be a penalty rather than a tax. *Helwig v. United States*, 188 U.S. 605, 610–12 (1902), similarly distinguished between a revenue-directed importation duty and a penalty, holding that the payment was a penalty because it was imposed not upon the importation of goods, in general, but rather upon the individual importer, in response to his or her particular behavior, i.e., his or her undervaluation of the goods.

⁷⁹ One commentator suggests that under this factor, the FCA is penal because "after eventually being adjudicated delinquent, many juveniles are not sentenced to further incarceration because the pretrial detention period is 'considered sufficient punishment by the Family Court.'" Comment, *The Supreme Court and Pretrial Detention of Juveniles: A Principled Solution to a Due Process Dilemma*, 132 U. PA. L. REV. 95, 109 (1983).

⁸⁰ *Kennedy* cited three cases to support factor five. All three cases, in the context of selling liquor in violation of Prohibition, distinguished a tax from a penalty, holding that payment constitutes a penalty if it relates to behavior already deemed to be a crime. *United States v. Constantine*, 296 U.S. 287, 295 (1935); *United States v. La Franca*, 282 U.S. 568, 572–73 (1931); *Lipke v. Lederer*, 259 U.S. 557, 562 (1922).

Factor six: Because an alternative purpose, like crime prevention, to which pre-trial detention *may rationally be* connected *can* be assigned and the standard for the connection is very low, it is a regulatory sanction.

Factor seven: Because incarceration of juveniles based on a low accuracy predictive showing will tend to incarcerate far more juveniles than those who actually would commit acts amounting to a crime before the adjournment date, the sanction is excessive in relation to the alternative purpose, and it is a penal sanction.

The full application of all seven *Kennedy* factors reveals that six out of seven tend to condemn New York's preventive detention scheme as a penal sanction.⁸¹

2. *Schall's* Further Truncation of the *Bell* Criteria

When the *Schall* Court actually applied its truncated *Kennedy* analysis, the majority did not explicitly explain each step of its analysis.⁸² In fact, *Schall* further transformed the *Kennedy* criteria, beyond *Bell*, by misapplying each of the *Bell* factors. The following analysis examines the *Schall* Court's application of *Bell's* three *Kennedy* criteria: explicit punitive intent, alternative assignable purpose, and non-excessiveness of restriction relative to purpose. Because *Schall* considered the alternate assignable purpose first, and collapsed the other two, we will consider them in that order.

a. *Alternative Assignable Purpose*

The *Schall* majority argues that preventive detention in New York "is purportedly designed to protect the child and society from the potential consequences of his criminal acts."⁸³ Shortly thereafter,

⁸¹ For another assessment of the FCA against the *Kennedy* "laundry list," see Comment, *The Supreme Court and Pretrial Detention of Juveniles: A Principled Solution to a Due Process Dilemma*, 132 U. PA. L. REV. 95, 108-09, 111 (1983). This commentator, however, does not include factors three and five in the analysis. See *id.* at 109. This commentator also concludes that the *Kennedy* analysis results in a finding that juvenile preventive detention is punitive. See *id.* at 111.

⁸² See generally *Schall*, 467 U.S. at 269-74.

⁸³ *Id.* at 264. The majority finds this purpose in the 1976 New York Court of Appeals *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 690, 350 N.E.2d 906, 910 (1976), holding that the New York preventive detention provision does not violate the equal protection or due process provisions of the Federal or New York State Constitutions. On the pages noted in *Schall*, the *Schupf* court notes flatly that "[a]nalytically, the compelling State interest is to prevent the commission of further criminal acts." *Schupf*, 350 N.E.2d at 910, 39 N.Y.2d at

the majority relied upon *In re Gault* to support the importance of the state objective of crime prevention.

In conjunction with this discussion, the *Schall* majority cited *Gault* twice in quick succession. The first citation appeared after the majority's statement that the "weighty"⁸⁴ social objective of crime prevention "persists undiluted in the juvenile context" and referred

690. Basing its decision on "significant, even compelling, differences between children and adults," *id.* at 909, the *Schupf* court noted that

[t]his statute reflects the merger of two fundamental concerns of the State—to protect the community prospectively from the perpetration of serious crimes and to protect and shelter children who in consequence of grave antisocial behavior are demonstrably in need of special treatment and care The statute *omits to specify* whether, on the basis of such a predicate finding, detention may be ordered for the protection of the public or for the benefit of the juvenile or both

Id. at 908 (emphasis added).

Thus, contrary to the majority's reading of the statute, only *Schupf*, not the statute on its face, discusses protection of the juvenile. Nor does the Court of Appeals discuss any legislative history revealing such a motivation. Despite the lack of legislative intent or express language in section 320.5(3)(b) of the N.Y. FAM. CT. ACT supporting this formulation of the purpose of preventive detention, the *Schall* majority takes this purpose as the starting point for its first inquiry.

The *Schall* majority continued by noting that the delinquency statute directs the Family Court judge to consider the "needs and best interests of the juvenile as well as the need for the protection of the community." *Schall*, 467 U.S. 253, 264 (citing N.Y. FAM. CT. ACT § 301.1 (McKinney 1983)). The majority did not reflect on the absence of discussion in the statute of detention for the protection of the *child*; neither did the majority consider the child's protection in the context of other "needs and best interests" of the child, for instance, the importance of remaining in his home, pursuing an uninterrupted education, or being spared the experience in a juvenile detention center such as Spofford. Rather, the majority summarily concluded that

[a]s an initial matter, therefore, we must decide whether, in the context of the juvenile system, the *combined* interest in protecting both the community and the juvenile himself from the consequences of future criminal conduct is sufficient to justify such detention.

Id. at 264 (emphasis added).

⁸⁴ *Id.* The *Schall* Court stated that the Court had "stressed before that crime prevention is a 'weighty social objective.'" *Id.* (citing *Brown v. Texas*, 443 U.S. 47, 52 (1979)). *Brown* does use that language in the fourth amendment context to describe a Texas "stop and frisk" statute, but determined in the sentence earlier that:

[i]n the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy *tilts in favor of freedom from police interference.*

Brown, 443 U.S. at 52. By lifting "weighty" from this inappropriate context, the majority could then measure the "weighty" governmental interest against the juvenile's "qualified" liberty interest. See *infra* notes 115–29 and accompanying text for a discussion of the *Schall* Court's analysis of the juvenile's interest in liberty. Because the *Schall* Court relieved itself of the duty to explore the risk of error in governmental procedures, see *infra* notes 141–201 and accompanying text for a discussion of these governmental procedures, the use of the word "weighty" here succeeded in tipping the due process balance in favor of preventive detention.

to *Gault's* statistics on juvenile proceedings in 1965, nineteen years before *Schall*.⁸⁵ The second citation followed *Schall's* proposition that "the harm to society generally may even be greater in this context given the high rate of recidivism among juveniles."⁸⁶ This passage referred to *Gault's* recidivism rates from the calendar year 1965 and the fiscal year 1966. The *Schall* majority's liberal citation of *Gault* created the overall impression that *Schall* stood in unity with *Gault*. Scrutiny of these citations reveals, however, that the majority cited *Gault* for its most irrelevant aspect: its outdated statistics.⁸⁷

In fact, *Gault* stands neither for the proposition that the state's crime prevention objective continues undiluted in the juvenile context, nor for the earlier suggestion that the juvenile's interest and the community's interests must be jointly protected. Reversing the Arizona Supreme Court's affirmance of the state court dismissal of a writ of habeas corpus sought by the parents of a fifteen year old boy committed to a state industrial school after an informal juvenile court procedure, the Court in *Gault* held that juveniles facing delinquency charges enjoy the right to notice of the charges, the privilege against self-incrimination, and the rights to confront and cross-examine witnesses pursuant to their rights under the due process clause of the federal Constitution.⁸⁸ The court in *Gault* concluded flatly that "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."⁸⁹

The unity of interest between the society and the juvenile suggested by the majority early in the *Schall* opinion contrasts dramatically with the vision of state-child relations set forth in *Gault*. The *Gault* opinion depicts a hostile and overreaching state that deprives

⁸⁵ *Schall v. Martin*, 467 U.S. 253, 264 (1984) (citing *In re Gault*, 387 U.S. 1, 20 n.26 (1967)).

⁸⁶ *Id.* at 265 (citing *Gault*, 387 U.S. at 22).

⁸⁷ Between these two successive citations of *Gault*, the *Schall* Court in footnote 14 discussed Federal statistics noting that juveniles under 16 accounted for 17.3% of all arrests for violent and serious property crimes, and 7.5% of all arrests for violent crimes in 1982. The Court does not discuss recent recidivism rates, nor rates of crimes committed by juveniles released pending trial on criminal charges. Interestingly enough, the 1982 statistics appear on the surface to represent an improvement over *Gault's* 1965 statistics (showing persons under 18 accounting for about 20% of all arrests for serious crimes and over 50% of serious property crimes).

⁸⁸ See generally *In re Gault*, 387 U.S. 1 (1967).

⁸⁹ *Id.*

the child and his or her parents of the time needed to prepare the child's defense against restrictive state sanctions and that may well have overpowered the child's will to defend himself against state accusations.⁹⁰

Justice Fortas, writing for the Court in *Gault*, incorporated into his opinion the strong language of the Court in *Haley v. Ohio*,⁹¹ in which the Court excluded a fifteen-year-old boy's confession to murder after a night-long police interrogation because he was deemed "an easy victim of the law," a "ready victim of the inquisition," no match for the police in such a "contest."⁹² The *Haley* Court, cited by Fortas, noted that during the nighttime questioning, the child "needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him."⁹³

The *Gault* Court itself noted that one of the purposes of the fifth amendment is to prevent the state, "whether by force or by psychological domination, from overcoming the mind and will of the person under investigation."⁹⁴ All this imagery and rhetoric⁹⁵ conveyed the *Gault* Court's profound distrust for the state and the Court's resolve to protect the individual from state overreaching. Rather than a strong identification between the state and the child, the imagery from *Gault* and *Haley* portrays the state and child radically at odds, with the parents defending the child from state domination. Far from a state protecting a wayward child from himself or the dangers of crime, *Gault* depicts the boy's parents as *protecting* their son *from* state overreaching and domination.

Because *Gault* is strongly oriented toward the protection of juvenile rights, it is absurd that the *Schall* majority cited its irrelevant statistics to support the importance of crime prevention as the purpose of the juvenile detention statute. The majority misrepresented *Gault* for the first time⁹⁶ in pursuing its truncated *Kennedy* analysis.⁹⁷

⁹⁰ See *infra* notes 130–40 and accompanying text for a discussion of the relationship of *Schall* to parents' rights jurisprudence.

⁹¹ 332 U.S. 596 (1948).

⁹² *Gault*, 387 U.S. at 45–46 (citing *Haley v. Ohio*, 332 U.S. 596, 599–600 (1948)).

⁹³ *Id.* at 46 (citing *Haley*, 332 U.S. at 599–600).

⁹⁴ *Id.* at 47.

⁹⁵ For more on imagery as the core of rhetoric and legal argument, see R. Parker, *Political Vision in Constitutional Argument* (Feb. 1979) (unpublished manuscript on file in Harvard Law School Library).

⁹⁶ See *infra* notes 115–29 and accompanying text for a discussion of the second misrepresentation.

⁹⁷ In continuing its analysis of the "legitimacy" of the state objective, the *Schall* majority supports its proposition that the state interests presumably underlying New York's preventive

b. *Explicit Punitive Intent*

The *Schall* Court combined its examination of whether New York's FCA contained explicit punitive intent with its consideration of the seventh *Kennedy*/third *Bell* factor, "whether [the restriction] appears excessive in relation to the alternative purpose assigned [to it]."⁹⁸ The Court examined the language of the statute alone, but,

detention statute are legitimate by collecting the rulings of eight state courts mentioning protection of the juvenile and fifty state statutes and the District of Columbia statute, all allowing preventive detention. The majority concludes:

[i]n light of the uniform legislative judgment that pretrial detention of juveniles properly promotes the interests both of society and the juvenile, we conclude that the practice serves a legitimate regulatory purpose compatible with the "fundamental fairness" demanded by the Due Process Clause in juvenile proceedings.

Schall v. Martin, 467 U.S. 253, 268 (1984) (footnote omitted) (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 548 (1971) (plurality opinion)).

This conclusion is doubly unjustified. First, even if we accept that the prevalent practice is *per se* legitimate, the Court does not demonstrate that the fifty state legislatures instituted preventive detention to protect both society and the juvenile. To the contrary, a survey of the fifty states demonstrates that only eighteen expressly authorize preventive detention both "when it is in the juvenile's 'best interest' or when it is necessary to protect the juvenile . . . [and] when it is necessary for the protection of the community and general public." *Have They Held Your Child Today?*, *supra* note 12, at 320. See also *id.* at 320-21 nn. 49-50.

As we have seen above, New York is in fact *not* among those eighteen states. See *supra* note 83 for a discussion of the argument that the New York statute is not explicitly aimed at the protection of the juvenile. Of the eight state high courts mentioned, three were among the eighteen states whose statutes expressly stated the double protection purpose. *L.O.W. v. District Court of Arapahoe*, 623 P.2d 1253 (Colo. 1981) (compare COLO. REV. STAT. § 19-2-103(3)(a)(I) (Supp. 1985)); *Pauley v. Gross*, 1 Kan. App. 2d 736 (1977) (compare KAN. STAT. ANN. § 38-815b(c)(1) (1981)); and *Baker v. Smith*, 488 S.W.2d (Ky. App. 1971) (compare KY. REV. STAT. ANN. § 208.192(4)(c) (*Michie/Bobbs-Merrill*) (1982)). New York was included in the five remaining.

Even if we credit the New York Court of Appeals' unsubstantiated declaration of state purpose in *Schupf*, see *supra* note 83 for a discussion of *Schupf*, no more than twenty-three of fifty-one jurisdictions using juvenile preventive detention do so for the dual purpose of community and juvenile protection. Thus, the fact that fifty states have some kind of preventive detention or another hardly justifies the conclusion that New York's preventive detention is part of a "practice serv[ing] a legitimate regulatory purpose." *Schall*, 467 U.S. at 268. In fact, even if there is a majority practice, New York is among a minority of states who pursue this particular dual purpose. For more on the differences among the fifty preventive detention statutes, see *Have They Held Your Child Today?*, *supra* note 12, at 319-22.

Second, the Court offered no reason why legitimacy should be based upon prevalence among the states in the first place. This suggested that "legitimate" means "widely shared," implying a judgment solely about the *prevalence* of the practice as opposed to its *substantive content*. This definition is never explicitly justified.

Because the word "legitimate" never appeared in *Kennedy*, this nose-counting definition of "legitimate" is yet another innovation of *Schall*.

⁹⁸ *Schall v. Martin*, 467 U.S. 253, 269 (1984) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963)).

in so doing, ultimately failed to apply the explicit punitive intent test in a manner consistent with *Kennedy*.

The *Kennedy* Court had struck down the statute upon a finding of a specific punitive intent, even though the statutory language was *not* found to be explicitly punitive. Rather, the *Kennedy* Court had based its holding on an examination of legislative history that revealed not only a predecessor statute that had called the measure a "penalty," but also legislative memoranda and floor debates replete with punitive language, and no suggestion of an alternative governmental purpose.⁹⁹ By contrast, the *Schall* majority scrutinized only the statutory language for explicit punitive intent, making no reference to legislative history. Clearly, the *Schall* Court narrowed this examination of intent required by the *Kennedy* Court. After *Schall*, *Kennedy's* explicit punitive intent standard appears to stand for mere inspection of the statute itself for penal legislative motive.

c. Excessiveness of Restriction Relative to Alternative Purpose

The *Schall* majority also stayed within the four corners of the statute to evaluate New York's preventive detention scheme in light of the third *Bell* factor: whether the restriction exceeds the requirements of the alternative purpose assigned to it. The majority pointed out that, first, the detention is "strictly limited in time,"¹⁰⁰ and, second, that the conditions of confinement "also appear to reflect the regulatory purposes relied upon by the State."¹⁰¹

With respect to the first observation, the *Schall* majority noted that the juvenile is entitled to a probable-cause hearing within three days of the conclusion of the initial appearance, after which detention may only be continued upon an additional finding of necessity. The juvenile also is entitled to an expedited fact-finding hearing within three to fourteen days, depending on the seriousness of the alleged acts amounting to a crime. Because the "maximum possible detention" is six to seventeen days,¹⁰² the majority concluded that

⁹⁹ See *Kennedy*, 372 U.S. at 170-84.

¹⁰⁰ *Schall*, 467 U.S. at 269.

¹⁰¹ *Id.* at 270.

¹⁰² *Id.* The majority erred in calculating the maximum possible pre-trial detention. Section 307.3 of the N.Y. Family Court Act allows a child to be held for up to seventy-two hours (for instance, over a long holiday weekend), if arrested while on a non-working day. In addition, section 307.4(4)(c) of the FCA allows a Family Court judge to hold a child in the absence of a petition based upon a section 320.5(3)(b) finding; a petition need be filed and probable cause hearing held within four days. N.Y. FAM. CT. ACT § 307.4(7) (McKinney 1983). Thus, a child could be held up to seven days without the filing of a petition and

“[t]hese time frames seem suited to the limited purpose of providing the youth with a controlled environment and separating him from improper influences pending the speedy disposition of his case.”¹⁰³

The *Schall* opinion’s rhetoric evokes the images of a kindly, concerned parental state providing a safe haven for the wayward child while, at the same time, conscientiously restraining its intervention (“limited purpose”) and pursuing the child’s procedural rights (“speedy disposition of his case”).¹⁰⁴ This imagery flowed straight from the idea of the state as the benign custodian who steps in to protect the child “if parental control falters.”¹⁰⁵ The majority inferred that such benign, protective legislation is neither explicitly punitive nor excessive given its dual protective purpose.

The *Schall* majority’s remarkable depiction continues as it discusses, second, the “conditions of confinement [that] also appear to reflect the regulatory purposes relied upon by the State.”¹⁰⁶ In so doing, however, the majority failed to follow the mandates of Federal Rule of Civil Procedure 52, which provides that a district court’s “[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”¹⁰⁷ The *Schall* majority completely disregarded the district court’s findings of fact in *Strasburg I*. The district court found that the juveniles detained pre-trial at facilities like Spofford often undergo strip-searches, wear institutional clothing,

without probable cause to believe he or she committed the offense charged, and up to twenty-one days altogether. For a discussion of the constitutional limits on detention before probable cause is shown, and *Schall*’s consideration of them, see *infra* notes 151–70 and accompanying text.

¹⁰³ *Schall*, 467 U.S. at 270.

¹⁰⁴ My own experience with juvenile detention personnel in the Manhattan Family Court between 1983 and 1986 has shown me that there are exceptionally kind, warm and caring professionals employed in the juvenile detention system in New York. Nevertheless, the overall experience of children I represented in secure detention accords more closely with the district court’s findings about the inadequacy of Spofford Juvenile Center and *Gault*’s general claims about juvenile incarceration. See *infra* notes 115–29 and accompanying text for a discussion of *Gault*.

¹⁰⁵ *Schall*, 467 U.S. at 265. For discussion of how Supreme Court jurisprudence, epitomized by *Gault*, has consistently rejected this imagery, see *infra* notes 115–29 and accompanying text.

¹⁰⁶ *Schall*, 467 U.S. at 270.

¹⁰⁷ FED. R. CIV. P. 52(a). Note that when *Schall* was decided, the phrase “whether based on oral or documentary evidence” was not part of the language of the rule. FED. R. CIV. P. 52(a) advisory committee’s notes, 1985 Amendment. See also *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

and mingle with adjudicated juvenile delinquents awaiting placement.¹⁰⁸

The *Schall* Court never suggested that these findings were clearly erroneous. Instead, the Court relied upon testimony about Spofford from the trial record even though it had not been adopted by the trier of fact, whose "opportunity . . . to judge of the credibility of the witnesses" the Rule requires to be given "due regard."¹⁰⁹

The *Schall* majority wrote that a juvenile "cannot, absent exceptional circumstances, be sent to a prison or lockup where he would be exposed to adult criminals,"¹¹⁰ and thus the state continues to "protect" him during this pre-trial phase. The majority stated that even Spofford Juvenile Center's secure detention was "still consistent with the regulatory and *parens patriae* objectives relied upon by the state."¹¹¹

Children are assigned to separate dorms based on age, size, and behavior. They wear street clothes provided by the institution and partake in educational and recreational programs and counseling sessions run by trained social workers. Misbehavior is punished by confinement to one's room [citation omitted]. We cannot conclude from this record that the controlled environment briefly imposed by the State on juveniles in secure pre-trial detention "is imposed for the purpose of punishment" rather than as "an incident of some other legitimate governmental purpose."¹¹²

The *Schall* majority failed to state its reasons for crediting this testimony over the testimony of a former New York City Deputy Mayor for Criminal Justice, that "Spofford [Juvenile Detention Center] is, in many ways, indistinguishable from a prison."¹¹³ The *Schall*

¹⁰⁸ *Strasburg I*, 513 F. Supp. 691, 695 n.5 (1981). Trial testimony by a family court judge further revealed his belief that by putting a child in detention, "you are liable to be exposing these youngsters to all sorts of things" including assault and sexual assault. *Schall*, 467 U.S. at 290 (Marshall, J., dissenting).

¹⁰⁹ FED. R. CIV. P. 52 (a).

¹¹⁰ *Schall v. Martin*, 467 U.S. 263, 270 (1984).

¹¹¹ *Id.* at 271.

¹¹² *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 538 (1979)). Mr. Kelly, then Deputy Commissioner of Operations, New York City Department of Juvenile Justice, testified at the district court. The district court did not adopt this testimony as a finding of fact.

¹¹³ *Schall*, 467 U.S. at 290 n.13 (Marshall, J., dissenting). Even accepting the Court's depiction of Spofford as realistic, its theory of children's welfare does not withstand scrutiny. Commentators have discussed the "social and psychological negative impacts" of pretrial detention. *Who is Preventive Detention Protecting?*, *supra* note 12, at 360. One commentator, reviewing both legal and social science literature on the effects of detention, notes the ill

majority's analysis of the excessive nature of the restriction in relation to its alternative purpose thus favored isolated testimony drawn from the appellate record and disregarded the district court findings to which the Supreme Court is required to give deference.

The majority's description of New York's secure detention facility focused on the timing and conditions of detention in determining that the restriction was not excessive. Focusing on the conditions of detention was appropriate in *Bell*, where those conditions, and not detention itself, were challenged. In *Schall*, however, the detention, not the conditions of detention, was at issue.

Thus, the *Schall* majority's discussion of detention was doubly inadequate. The majority first minimized the fact that the detention is locked and involuntary. It then focused on a misrepresentation of the district court's findings as to the conditions in detention as they actually exist.¹¹⁴

In effect, the *Schall* majority further distorted the *Bell* criteria, which in fact were a distortion of the *Kennedy* criteria. The *Schall* majority examined the detention, in considering its excessiveness in relation to its alternative purpose, for the wrong characteristics: its timing and conditions rather than its restrictive, involuntary nature. Furthermore, in examining the *Schall* detention conditions, the majority misrepresented the findings of fact of the lower court. The *Kennedy* criteria were first truncated, and then improperly applied. Thus, *Schall* has worked a remarkable transformation on *Kennedy*'s substantive due process analysis.

B. *The Primacy of Custody Over Liberty: The Misrepresentation of Lehman and Gault*

The Supreme Court in *Schall* further transformed precedent in its discussion of the liberty interests of juveniles. The *Schall* majority asserted that "the juvenile's . . . interest in freedom,"¹¹⁵ in

effects of detention on a youngster's self-image, her learning independence, her outside responsibilities and opportunities, her morale, preparation of her legal case, her outlook upon society and the law, the probability of her recidivism, and her sophistication in crime. *Id.* at 360-64 [citations omitted]. Thus, both the binding district court findings concerning the reality of Spofford's detention and scholarly literature on detention demonstrate the extent to which the majority's depiction of preventive detention betrays rather than safeguards the "welfare of the child."

¹¹⁴ See *infra* notes 151-70 and accompanying text for a discussion of the fact that the timing of the detention is much more problematic, in light of *Gerstein*, than the *Schall* majority admitted.

¹¹⁵ *Schall*, 467 U.S. at 265.

support of which the Court properly cited *Gault*, "must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody."¹¹⁶ For this later proposition, the majority relied upon *Lehman v. Lycoming County Children's Services* and *Gault*.¹¹⁷ These cases do not support the proposition for which they are cited.

In *Lehman*, a biological mother, whose parental rights to her three sons had been legally terminated, invoked title 28, section 2254 of the United States Code, a federal habeas corpus statute, on behalf of the three boys, in an attempt to regain her custody and guardianship rights. The *Lehman* Court there addressed the issue of

whether federal habeas corpus jurisdiction, under [28 U.S.C.] § 2254, may be invoked to challenge the constitutionality of a state statute under which a State has obtained custody of children and has terminated involuntarily the parental rights of their natural parent.¹¹⁸

The six-justice majority concluded that, as a jurisdictional matter, the children were not "in custody" within the meaning of the federal habeas corpus statute. The *Lehman* Court stressed that the boys were in the custody of their foster parents "in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents."¹¹⁹

The Court in *Lehman* was careful to note that the children involved were not in the custody of a state institution or in the criminal justice system.¹²⁰ The *Lehman* boys' "situation in this respect differs little from the situation of other children in the public generally; they suffer no unusual restraints not imposed on other children."¹²¹ The *Lehman* Court specifically declined to comment on the availability of federal habeas corpus when a child is "actually confined in a state institution rather than being at liberty in the custody of a foster parent pursuant to court order."¹²² Because the

¹¹⁶ *Id.*

¹¹⁷ *Id.* (citing *Lehman v. Lycoming Children's Servs.*, 458 U.S. 502, 510-11 (1982); *In re Gault*, 387 U.S. 1, 17 (1967)).

¹¹⁸ *Lehman*, 458 U.S. at 507.

¹¹⁹ *Id.* at 510.

¹²⁰ "Her sons, of course, are not prisoners. Nor do they suffer any restrictions imposed by a state criminal justice system. These factors alone distinguish this case from all other cases in which this Court has sustained habeas challenges to state-court judgments." *Lehman*, 458 U.S. at 510.

¹²¹ *Id.* at 510-11.

¹²² *Id.* at 511 n.12.

Lehman Court explicitly addressed the construction of the term "custody" solely in the context of the federal habeas statute, and because it overtly declined to comment on children's confinement to state institutions, it is wholly inapposite in the context cited by *Schall*.

As a second authority for the proposition that juveniles enjoy a lesser liberty interest than adults, the *Schall* majority cited *Gault*.¹²³ While *Gault* does contain the language quoted in *Schall*, *Gault* used it in order to criticize that same language later in the opinion. The quotation appeared in a section of the *Gault* opinion describing the fact that "the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context."¹²⁴ The results have "not been entirely satisfactory."¹²⁵ The *Gault* Court noted there that the "right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty but to custody.'"¹²⁶

The *Gault* Court did *not* embrace the *Schall* conclusion that juveniles have a lesser, qualified right to liberty because they are always in custody. To the contrary, Justice Fortas in *Gault* reiterated that, for the purposes of his discussion of the privilege against self-incrimination, "at least," that "commitment [to a juvenile facility] is a deprivation of liberty."¹²⁷

The *Gault* majority strongly distinguished between the custody of the state and the custody of parents:

It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours" Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and

¹²³ *Schall*, 467 U.S. at 265 (citing *Gault*, 387 U.S. at 17).

¹²⁴ *In re Gault*, 387 U.S. 1, 17 (1967).

¹²⁵ *Id.* at 18.

¹²⁶ *Id.* at 17 (emphasis added).

¹²⁷ *Id.* at 50.

“delinquents” confined with him for anything from waywardness [footnote omitted] to rape and homicide.¹²⁸

The majority in *Schall* ignored this distinction, contending that preventive detention is merely a *custody TRANSFER of the child between the family and the state*, in which the one who transfers and the one who receives custody makes no essential difference to the child. The Court in *Gault*, however, depicted the delinquency proceeding as essentially a *custody BATTLE for the child between the family and the state*, where the one who wins and the one who loses makes a tremendous difference to the child.¹²⁹

The *Lehman* Court, in construing the federal habeas statute, denied that the foster children involved were in state custody at all. The *Gault* Court portrayed custody by parents and custody by the state as vastly different, antagonistic situations and used the language later cited by the *Schall* Court for the purpose of refuting it. Thus, the two cases, cited as precedent in *Schall*, simply do not stand for *Schall's* proposition that a juvenile's liberty interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. The *Schall* majority, in fact, betrayed precedent by formulating such a significant restriction on juvenile rights.

¹²⁸ *Gault*, 387 U.S. at 27.

¹²⁹ Experts on child development and custody have concluded that the question of the child's best interests turns not on the fact of custody, but rather the fact of *whose* custody the child enjoys. The noted interdisciplinary team of Joseph Goldstein, Anna Freud, and Albert Solnit, authors of the trilogy considering the appropriate criteria for state intervention into the family, insist that those who care about children must care more about the quality of the child's relationship with the custodian than the mere existence of custody. Their studies have struggled carefully with the issue of when “parental control” can be deemed to have “faltered” sufficiently that it is both just and best for the child that the parent's custody should be supplanted. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (1979).

Whereas the majority would opine that the mere transfer of the custody of the child would not harm the “welfare of the child” nor the child's *right* to custody, Goldstein, Freud, and Solnit would stress the necessary continuity of the *relationship* between the child and his long-term caretaker, a crucial component to the child's healthy development. For instance, Goldstein, Freud, and Solnit's criteria suggest that the identity of the person who does all this assigning, punishing, giving out street clothes, teaching, playing, and counseling, matters much more than the mere fact that it is done. When a parent punishes a child by sending him to his room, it is qualitatively different from an anonymous counselor's exerting the same authority. Even if a counselor at Spofford could develop a lasting, healthy relationship with a child, Goldstein, Freud, Solnit and Goldstein would caution against a professional and a specialist attempting to play the generalized role in a child's life that only a parent can play. J. GOLDSTEIN, A. FREUD, A. SOLNIT & S. GOLDSTEIN, *IN THE BEST INTERESTS OF THE CHILD* (1986).

C. *The State's Parens Patriae Duty if Parental Control Falters: The Subversion of Santosky*

In its third major distortion in the first due process inquiry, *Schall* created the illusion that *Santosky v. Kramer*¹³⁰ supports a proposition that instead it contradicts. The *Schall* majority asserted that:

[i]f parental control falters, the State must play its part as *parens patriae* In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's '*parens patriae*' interest in preserving and promoting the welfare of the child.'¹³¹

While *Santosky* was indeed the source of the phrase "*parens patriae* interest in preserving and promoting the welfare of the child," *Santosky* does *not* support *Schall's* proposition that the juvenile's liberty interest must be subordinated to the state's interest in his welfare. In *Santosky*, the Court invalidated the civil standard of proof in the New York termination of parental rights statute, holding that due process requires proof by clear and convincing evidence of parental unfitness before a state may terminate parental rights. In the same paragraph referred to above, the *Santosky* Court noted that:

while there is still reason to believe that a positive, nurturing parent-child relationship exists, the *parens patriae* interest favors preservation, not severance of natural familial bonds. . . . '[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents.'¹³²

Despite *Santosky's* strong emphasis on preservation of the family and avoidance of state intervention, *Schall* cited *Santosky* to support its claim that even allegations that one's child had committed a minor crime could be held to constitute a "faltering" of "parental control" justifying his separation from his parents and his "transfer to the custody" of the state.

Moreover, *Santosky* recognized that natural parents have a "fundamental liberty interest" in the "care, custody, and management of their child."¹³³ In finding the statutory "preponderance of the evidence standard" too low to satisfy the resultant due process

¹³⁰ 455 U.S. 745 (1982).

¹³¹ *Schall v. Martin*, 467 U.S. 253, 265 (1984) (citing *Santosky*, 455 U.S. at 766).

¹³² *Santosky*, 455 U.S. at 766-67 (citing *Stanley v. Illinois*, 405 U.S. 645, 652 (1972)).

¹³³ *Id.* at 753.

requirements, the *Santosky* Court relied heavily on cases following *In re Winship*.¹³⁴ The *Santosky* Court focused on the post-*Winship* requirement of a higher level of scrutiny, "necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.'"¹³⁵

Thus, both of the propositions for which *Santosky* stands contradict crucial assumptions underlying *Schall*. First, *Santosky* raised the parental custody interest to a constitutional level, making transfer of the child from parental custody to the custody of the state a significant, constitutionally protected event.¹³⁶ *Santosky* suggested that mere "falter[ing]" of "parental control," which is all that *Schall* requires for state exercise of *parens patriae*,¹³⁷ would be an insufficient basis for the state's disruption of the family.¹³⁸

Second, *Santosky*'s reverence for the role of standard of proof in assigning risk of factual error among the parties requires that, even if "faltering of parental control" grounds is accepted as sufficient grounds for intervention, the state must still prove "faltering of parental control" with greater evidence than the mere arrest of their child. For instance, a juvenile, living in an intact home with two responsible parents, might still be arrested. Can the majority definitively conclude that parental control is necessarily "faltering" simply because a police officer feels justified in arresting a child for any crime in New York?¹³⁹

¹³⁴ 397 U.S. 358 (1970); cases relied upon by the Court include *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment); *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350 (1960) (denaturalization); and *Schneiderman v. United States*, 320 U.S. 118 (1943) (denaturalization).

¹³⁵ *Santosky*, 455 U.S. at 756 (citing *Addington*, 441 U.S. at 425, 426).

¹³⁶ *Gault* also includes the parents as beneficiaries of notice of rights implicated in the criminal prosecution of their child and thus supports this deference to the parents' interest. See, e.g., *In re Gault*, 387 U.S. 1, 41 (1967) ("We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel . . ." (emphasis added)). See also J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 128-29 (1979). See *supra* notes 115-29 and accompanying text for a discussion of *Gault*'s disdain for the *parens patriae* rationale.

¹³⁷ *Schall*, 467 U.S. at 265.

¹³⁸ By contrast, for example, in New York, the only other grounds for removal of the child from the parents against their will are "abuse or neglect" of the child, grounds significantly more serious than "faltering." See, e.g., N.Y. FAM. CT. ACT § 1022(a)(ii) (McKinney 1983).

¹³⁹ See *infra* notes 151-69 for a discussion of the point that detention is ordered even absent a showing of probable cause that the juvenile committed the acts charged.

In sum, the majority's conclusion that the juvenile's liberty interest may, in appropriate circumstances, be *subordinated* to the state's *parens patriae* interest and the majority's application of this conclusion to the context of pre-trial juvenile detention clearly contravenes settled constitutional law concerning the rights of parents and children. Despite claims to the contrary, the subordination of the child's liberty interest is, in fact, another new, literally unprecedented premise in constitutional jurisprudence.¹⁴⁰

¹⁴⁰ Two red flags, portending a major shift in juvenile delinquency jurisprudence, had preceded this section of *Schall*.

The first red flag appeared in the *Schall* Court's offhand statement early in the opinion that juvenile proceedings, in light of the state statutory scheme and state case law, are civil rather than criminal. *Schall*, 467 U.S. at 257 n.4.

The majority preceded the above statement with this sentence:

[The Family Court] is charged not with finding guilt and affixing punishment [citation omitted], but rather with determining and pursuing the needs and best interests of the child insofar as those are consistent with the need for the protection of the community.

Id. (citing N.Y. FAM. CT. ACT § 301.1 (McKinney 1983) and *In re Craig*, 57 A.D.2d 761, 394 N.Y.S.2d 200 (1977)). Article Three of the Family Court Act, New York's juvenile delinquency statute, however, stands for more than a simple determination of the child's best interests and the protection of the community. Section 301.1 of the Family Court Act in its entirety reads:

The purpose of this article is to establish procedures in accordance with due process of law (a) to determine whether a person is a juvenile delinquent and (b) to issue an appropriate order of disposition for any person who is adjudged a juvenile delinquent. In any proceeding under this article, the court shall consider the needs and best interest of the respondent as well as the need for protection of the community.

As the practice commentary to the FCA notes, the intent of Article Three, passed in 1982 as the first major revision of New York's juvenile delinquency laws since the 1962 establishment of the Family Court, "is the establishment of uniform procedures to govern every aspect of delinquency proceedings from arrest through appeal." Sobie, *Introductory Practice Commentary to Fam. Ct. Act*, Art. 3 at 260 (McKinney 1983). While section 301.1 of the FCA notes the purposes mentioned by the majority, formal procedures protecting due process rights of accused juveniles are a concomitant clear priority of Article Three, unmentioned by the majority. *Schall*, 467 U.S. at 267.

This procedural regularity had been increasingly required by the Supreme Court's own cases which have, since 1967, treated juvenile delinquency proceedings as "criminal." The Court in *Gault* concluded flatly that

[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.

Gault, 387 U.S. at 36.

In this portion of the *Gault* opinion, the Court granted fifth amendment protection to all statements by juveniles regarding alleged delinquent behavior even though Arizona called delinquency proceedings "civil" proceedings. Accepting Arizona's appellation, the *Gault* Court noted, "would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings." *Gault*, 387 U.S. at 50. The *Gault* Court also found that "commitment to a state institution" is "a deprivation of liberty

D. *The Formulation of the Second Inquiry: The Truncation of Mathews*

The *Schall* majority also examined whether the procedures afforded juveniles detained prior to factfinding provided sufficient

. . . . It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" *Id.* at 49–50. See also *Schall*, 467 U.S. at 282 n.3 (Marshall, J., dissenting).

Thus, although the *Schall* Court labeled these juvenile proceedings as "civil," its own precedents had long since obliged the Court to incorporate into these civil proceedings most of the constitutional protections afforded criminal defendants. By so distorting precedent, the *Schall* Court signalled its departure from basic tenets of juvenile rights jurisprudence and laid the foundation for the continuing revisionist history of settled constitutional principle.

The second red flag appeared in a preliminary discussion of *parens patriae*. In *Schall*, the majority states its version of *Gault* and its progeny and introduces its two pronged due process analysis by noting that "[t]he state has 'a *parens patriae* interest in preserving and promoting the welfare of the child,' which makes a juvenile proceeding fundamentally different from the adult criminal trial." *Schall*, 467 U.S. at 263 (citing *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)). *Santosky* is only relevant because it supplies the necessary words. The decision did not pertain at all to the delinquency context and does not support yet another of the majority's unprecedented pronouncements on the juvenile delinquency proceeding. In *Gault*, the Court had, in fact, noted in its review of the history of the juvenile court movement, that:

[The early reformers' goals] were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as *parens patriae* [footnote omitted]. The Latin phrase proved to be of great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child [footnote omitted]. But there is no trace of the doctrine in the history of criminal jurisprudence. At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders [footnote omitted]. In these old days, the state was not deemed to have authority to accord them fewer procedural rights than adults.

In re Gault, 387 U.S. 1, 16–17 (1967).

Several commentators have focussed upon the return to pre-*Gault* jurisprudence through the resurrection of *parens patriae* doctrine. A very thoughtful student note capably explores *Schall's* *parens patriae* bent. Note, *Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the Parens Patriae Doctrine*, 95 YALE L.J. 174 (1985).

With this inapposite citation of *Santosky*, the Court revived the long-abandoned *parens patriae* reasoning in juvenile justice jurisprudence. Subsequent state and federal cases have relied upon this re-emergence of *parens patriae* reasoning in this area. *United States v. Melendez-Carrion*, 790 F.2d 984 (2nd Cir. 1986); *Sadler v. Sullivan*, 748 F.2d 820 (1984); *In the Matter of L.Z., C.R.P., and S.L.P.*, 396 N.W.2d 214 (Minn. 1986); *In the Matter of Shannon B.*, 122 A.D.2d 268, 505 N.Y.S.2d 179 (A.D. 2 Dept. 1986); *In the Matter of Terence G.*, 109 A.D.2d 440, 429 N.Y.S.2d 365 (A.D. 1st Dept. 1985). At least one court has criticized the revival. *Bergren v. City of Milwaukee*, 811 F.2d 1139 (7th Cir. 1987). With these two red flags waving, the majority began its two-inquiry analysis of due process considerations.

protection against erroneous and unnecessary deprivations of liberty. This analysis rested upon a transformation of the procedural due process analysis of *Mathews v. Eldridge*.¹⁴¹

In *Mathews v. Eldridge*, the Court held that the due process clause of the fifth amendment does not require that a recipient of Social Security disability benefits be afforded an opportunity for an evidentiary hearing prior to the administrative termination of benefit payments. The *Schall* Court referred to *Mathews*, in which Justice Powell enunciated three distinct factors generally required for the identification of the specific dictates of due process:

- (1) First, the private interest that will be affected by the official action;
- (2) second, (a) the risk of erroneous deprivation of such interest through the procedures used, and (b) the probable value, if any, of additional or substitute procedural safeguards; and
- (3) finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁴²

Based upon its misrepresentation of *Lehman* and *Gault*, the *Schall* majority had concluded that the first *Mathews* factor, the private interest affected, was a qualified liberty interest enjoyed by the juvenile. In conjunction with its truncated *Kennedy* analysis and its misappropriation of *Santosky*, the *Schall* majority had also already concluded that the third *Mathews* factor, the Government's interest, was "legitimate"¹⁴³ and "weighty."¹⁴⁴ The remaining second factor, (a) the risk of error and (b) the probable value of other procedural safeguards remained to be discussed.

The majority's analysis of (2)(a), the risk of error in current procedure, included a review of pre-detention procedure in light of *Gerstein v. Pugh* and a discussion of the case law involving judicial prediction of future criminal conduct and the good faith of the family court judges in current procedures.¹⁴⁵ *Schall* summarily and

¹⁴¹ 424 U.S. 319 (1976).

¹⁴² *Id.* at 335 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1976)) (numbering and lettering supplied).

¹⁴³ See *supra* note 97 for a discussion of the *Schall* Court's analysis of the government's interest as "legitimate."

¹⁴⁴ See *supra* note 84 for a discussion of the *Schall* Court's analysis of the government's interest as "weighty."

¹⁴⁵ See *infra* notes 151-70 and accompanying text for a discussion of the majority's treatment of *Gerstein*. See *infra* notes 171-201 and accompanying text for a discussion of the accuracy of judicial predictions of future criminal conduct.

inconclusively addressed (2)(b), the probable value of additional or substitute procedures, in a single sentence followed by one footnote. "Appellees have failed to note any additional procedures that would significantly improve the accuracy of the determination without unduly impinging on the achievement of legitimate state purposes."¹⁴⁶

This formulation contains two unfounded assumptions. First, *Mathews* never suggested that failure of the plaintiffs to plead the necessity of additional procedures relieved the Court of the duty to conceive and require such procedures. In *Schall*, the plaintiff juveniles could only have so pleaded at the expense of their theory of the case that the judicial predictions of dangerousness are so fatally flawed that no additional procedures could possibly increase their accuracy.

Second, *Schall*'s statement presumed that the proceedings had been found to be accurate at some foundational level. Because the majority had not addressed the accuracy of the determination up to this point in the analysis, and never did address this point, the Court, in fact, had not made a baseline evaluation of accuracy.¹⁴⁷ The Court was, therefore, in no position to analyze whether the proceedings' accuracy had been improved. On the other hand, if the *Schall* Court accepted the plaintiffs' contention that additional procedures could not enhance the accuracy of the proceedings, then only issue (2)(a) would remain: is the risk of error in the existing procedures acceptable?¹⁴⁸ Either way, this statement required the *Schall* majority to address squarely an issue that it in fact ignored: how accurate is the detention determination made by the family court?¹⁴⁹ In short, the *Schall* opinion never fulfilled its duty, enun-

¹⁴⁶ *Schall v. Martin*, 467 U.S. 253, 277 (1984).

¹⁴⁷ See *supra* notes 171-201 and accompanying text for a discussion of the district court's finding that the assessment of dangerousness in the proceedings is generally inaccurate.

¹⁴⁸ See *infra* notes 151-201 and accompanying text for a discussion of this aspect of the analysis.

¹⁴⁹ To examine in more depth how this premature analysis confuses rather than aids the reader, consider the following analysis made by the *Schall* majority in its footnotes. In the footnote to the single sentence that discussed the *Mathews* (2)(b) factor, the probable value of additional or substitute procedures, the majority noted that Judge Newman, concurring in *Strasburg II* did offer four statutory improvements:

[(i)] limitations on the crimes for which the juvenile has been arrested or which he is likely to commit if released; [(ii)] a determination of the likelihood that the juvenile committed the crime [e.g. probable cause] [(iii)] an assessment of the juvenile's background; and [(iv)] a more specific standard of proof.

Schall, 467 U.S. at 277 n.29.

ciated in the (2)(b) requirement of *Mathews*, to explore the probable accuracy-enhancing value of any additional or substitute procedures.¹⁵⁰

Rather than considering the accuracy of current procedures and then considering the probable additional value of each recommended procedure, as *Mathews* requires, the majority instead dismissed each in turn perfunctorily.

With respect to (i) and (ii), the majority wrote, "[t]he first and second of these suggestions has already been considered." *Id.* at 277 n.29 (referring the reader back to footnotes 18 and 27 of the opinion). Footnote 18, however, simply states that limiting the categories of crimes that justify detention resides wholly with the state legislature. It further states that because the overbreadth doctrine does not apply outside first amendment analysis, such a challenge must be made on a case-by-case, rather than class, basis. *Id.* at 268 n.18. Even if plaintiffs misstructured their constitutional challenge or asked the Court to exert a legislative function, such mistakes by plaintiffs do not absolve the Court from addressing the *Mathews* (2)(b) criterion: whether the additional procedure, *however implemented*, would improve the accuracy of the procedure. Footnote 18 did not dispose of the Court's duty under *Mathews* to consider that improvement.

The majority added to this discussion that there is no indication that delimiting the category of crimes justifying detention would improve the accuracy of the detention determination in any respect. The majority stated this flat conclusion without further discussion or citation. No facts or reasoning supported this conclusory statement of the issue that the majority was required, by *Mathews*, to explore in depth.

Footnote 27 addressed whether (ii) a determination of the likelihood that the juvenile committed the crime would enhance the accuracy of the procedures. Footnote 27 suggested only that a family court judge *could* make a finding of probable cause, if she so desired, and noted that plaintiffs failed to point to a "single example" where probable cause was not later established. *Id.* at 276 n.27. Again, the majority shifted its own burden to the plaintiffs, irrelevantly, because *Mathews* obliged the Court to consider whether *requiring* the family court judge to find probable cause or else dismiss the petition at the initial appearance would lower the risk of error in detention. Thus, Judge Newman's second improvement went unaddressed.

The *Schall* Court contended that it addressed in later text the probable accuracy-enhancing value of (iii) an assessment of the juvenile's background. *Schall*, 467 U.S. at 278 n.29. Yet, the sole reference to such an assessment appeared in the majority's summary of the testimony of one family court judge as to what evidence judges currently consider in detention determinations. This is not an assessment that the Family Court Act requires all judges to make. Nor did the *Schall* majority consider whether requiring such an assessment would reduce the risk of error in detention decisions. The *Schall* Court, therefore, also failed to explore fully this potential improvement.

The majority also contended that it addressed in later text the probable accuracy-enhancing value of (iv) a more specific standard of proof for "serious risk that the juvenile" will commit a crime before the return date. *Schall*, 467 U.S. at 278 n.29. On the four pages that follow this footnote, however, the *Schall* majority makes no reference to a standard of proof.

The footnote to the single sentence, therefore, shed no light on the application of the *Mathews* (2)(b) requirement to the *Schall* context.

¹⁵⁰ For an examination of the accuracy-enhancing value of the safeguards suggested by Judge Newman, see Ewing, *supra* note 13, at 200-06. Professor Ewing concludes that the risk of erroneous deprivations of liberty interests under the New York preventive detention statute is reduced *very little* by the suggested procedural safeguards. *Id.* at 206.

E. *The Expansion of Post-Arrest Administrative Detention: The Misreading of Gerstein*

In the context of both pre-detention procedure and judicial prediction of future criminal conduct, the *Schall* majority consistently focused on irrelevant factors in existing procedures and in the case law. Further, the Court ignored altogether central holdings or premises in controlling precedents. After examining the discussion of *Gerstein v. Pugh*¹⁵¹ in this section and the judicial prediction cases in the next, the article briefly revisits the *Mathews* factors to examine the *Schall* opinion as a whole.

Schall relied upon *Gerstein* to support its conclusion that the length of pre-trial preventive detention can be flexible without violating the fourth amendment. *Schall's* conclusion, while claiming to rest on *Gerstein*, in fact distorted *Gerstein's* ruling on the issue of probable cause.

In *Gerstein*, the Court, speaking again through Justice Powell, addressed two issues: (1) "whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention, and, if so"¹⁵² (2) whether an adversary hearing is required by the fourth amendment for that determination.¹⁵³ The *Gerstein* Court held that (1) "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest"¹⁵⁴ and that (2) the fourth amendment does not require that the determination be made in an adversarial hearing.¹⁵⁵

In its analysis of probable cause, the *Gerstein* Court noted that:

[t]he consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. [citations omitted]. Even pre-trial release may be accompanied by burdensome conditions that effect a significant restraint of liberty. [citations omitted]. When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish

¹⁵¹ 420 U.S. 103 (1975).

¹⁵² *Id.* at 111.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 114. This holding is on the page cited by the majority in *Schall*.

¹⁵⁵ *Id.* at 120.

meaningful protection from unfounded interference with liberty.¹⁵⁶

The *Gerstein* Court expressly denied that “prosecutorial judgment standing alone meets the requirement of the Fourth Amendment.”¹⁵⁷ The *Schall* Court, in contrast, authorized pre-trial detention merely on a prosecutorial showing of good cause. In requiring the *judicial* pre-detention probable cause determination, Justice Powell expressly defined probable cause to be “facts and circumstances ‘sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.’”¹⁵⁸

In its analysis of the need for an adversarial hearing, the *Gerstein* Court noted that “the nature of the probable cause determination usually will be shaped to accord with a State’s pre-trial procedure viewed as a whole,”¹⁵⁹ and explicitly “recognize[d] the desirability of flexibility and experimentation by the States.”¹⁶⁰ In that same paragraph, the *Gerstein* majority concluded:

[w]hatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause *as a condition* for any significant pretrial restraint of liberty and this determination must be made by a judicial officer either before or promptly after arrest.¹⁶¹

In short, the *Gerstein* Court held that a judge must find probable cause for arrest *before* ordering significant pre-trial restraint, endorsing flexibility only in the *form* of that judicial determination. Justice Powell endorsed detention before the judicial determination of probable cause solely for the “brief period of detention to take the administrative steps incident to arrest.”¹⁶²

Nevertheless, when the *Schall* majority reported the *Gerstein* requirement of a judicial determination of probable cause as a condition of detention, it stated that “[the Court] did not . . . mandate a specific timetable.”¹⁶³ The majority focused on the *Gerstein* Court’s use of the word “extended,” assuming a fact never approved by the *Gerstein* Court, that a probable cause determination

¹⁵⁶ *Id.* at 114.

¹⁵⁷ *Gerstein*, 420 U.S. at 117.

¹⁵⁸ *Id.* at 111 (brackets in original; citations omitted).

¹⁵⁹ *Id.* at 123.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 124–25 (footnote omitted; emphasis added).

¹⁶² *Id.* at 114.

¹⁶³ *Schall v. Martin*, 467 U.S. 253, 275 (1984).

would still be considered "pre-detention" if it happened within several days of the arrestee's arrest, that is, before "extended restraint" on his liberty.¹⁶⁴

The *Schall* majority thus transposed the virtue of flexibility from the form to the timing of the probable cause determination. The *Gerstein* Court allowed the *form* of the pre-detention probable cause determination to be flexible, but not the time frame in which it occurred. The *Schall* majority applied that flexibility inappropriately to the timing of the probable cause determination. Thus, even though the New York statutory scheme did not mandate a probable cause determination until three days, and sometimes six days,¹⁶⁵ of detention had passed, the *Schall* Court concluded that such "flexible" procedures pass constitutional muster.

In *Schall's* footnote 28, the majority asserted that the *Gerstein* Court had "indicated approval" of "pre-trial detention procedures that supplied a probable-cause hearing within five days of the initial detention."¹⁶⁶ In fact, *Gerstein* never indicated such approval. Rather, the *Gerstein* footnote to which the *Schall* Court referred described a *proposed* draft of the Uniform Rules of Criminal Procedure that in fact entitled the arrestee to *two* probable cause determinations. First, upon arrest, the arrestee would be entitled to a determination "without unnecessary delay . . . before a magistrate . . . that grounds exist for issuance of an arrest warrant."¹⁶⁷ Second, the arrestee, if he remained in custody for inability to qualify for pre-trial release, would be entitled to "*another opportunity* for a probable cause determination at the detention hearing, held no more than five days after arrest."¹⁶⁸

Thus, the post-detention probable-cause determination "approved" by the *Gerstein* Court was actually a second level of deter-

¹⁶⁴ *Id.* at 275. As the passages cited earlier from page 120 of *Gerstein* suggest, Justice Powell may have been leaving the door open to the conclusion that a post-arrest pre-trial release with conditions also had to be preceded by a judicial determination of probable cause. That possibility may well be the reason for the *Gerstein* majority's use of the word "extended," because a pretrial period for a defendant out in the community (who may be reporting weekly to a probation officer, etc.) during a long adjournment pending trial would also, under its reasoning, constitute an "extended restraint on liberty." If so, the majority may have had no intention of leaving the door open to the distortion the *Schall* analysis has worked.

¹⁶⁵ N.Y. FAM. CT. ACT § 325.2 (McKinney 1983) (three days with potential extension for good cause shown). See *supra* note 102 for a more precise calculation of maximum potential detention periods.

¹⁶⁶ *Schall*, 467 U.S. at 277 n.28 (citing *Gerstein*, 420 U.S. at 124 n.25).

¹⁶⁷ *Gerstein*, 420 U.S. at 124 n.25 (emphasis added).

¹⁶⁸ *Id.* (emphasis added).

mination; the first determination must have taken place immediately after arrest. The scheme approved in the *Gerstein* footnote protects the criminal defendant by affording him two probable cause hearings within five days. By contrast, under *Schall*, the state may detain the juvenile after arrest a full six days without a single probable cause hearing.¹⁶⁹ Thus, by transposing "flexibility of form of the determination" into "flexibility of timing," the *Schall* Court marshalled the precedential force of *Gerstein* for a cause utterly repugnant to its spirit.¹⁷⁰

F. *The Accuracy of Judicial Predictions of Dangerousness: The Bolstering of Jurek, Greenholtz and Morrissey*

As a second part of its analysis of accuracy under *Mathews*, the *Schall* Court rejected plaintiffs' claim, supported by the district court, in *Strasburg I*¹⁷¹ that it is virtually impossible to predict future criminal conduct with any degree of accuracy. The *Schall* majority held instead that "from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct."¹⁷² The majority stressed that "[s]uch a judgment forms an

¹⁶⁹ Later lower courts examining *Schall* noted this error by the Court. *Faheem-El v. Klincar*, 814 F.2d 461, 474-75 (7th Cir. 1987); *United States v. Garza*, 754 F.2d 1202, 1211 n.2 (1985).

¹⁷⁰ The majority also contended that the "flexible" procedures of the FCA "have been found constitutionally adequate . . . under the Due Process Clause." *Schall*, 467 U.S. at 277 (citing *Kent v. United States*, 383 U.S. 541 (1966)). Yet *Kent*, a precursor to the *Gault* opinion, explicitly declined to address the constitutionality of pre-trial detention schemes.

On page 557 of the *Kent* opinion, the page cited in *Schall*, the *Kent* Court concluded that a sixteen-year old respondent was entitled both to a hearing assisted by counsel enjoying ample discovery and to a statement of reasons from the court before his delinquency proceeding was transferred from the state juvenile court to the federal district court. While the procedures approved in *Kent* mildly resembled the New York procedures, the *Kent* Court considered them in a wholly different context: not the context of detention, but rather the context of waiver of exclusive jurisdiction in favor of a higher-sentencing court. *Kent*, 383 U.S. at 543, 546, 552, 557.

The *Kent* Court explicitly refused to address the issue of detention at two points in the opinion. In footnote 3, Justice Fortas in *Kent* describes the 1965 District of Columbia procedures for arraignment for probable cause after arrest. While noting the differences between treatment of adults and juveniles, Justice Fortas concluded "[w]e indicate no view as to the legality of these practices." *Id.* at 545 n.3. And on pages 551 and 552 of the opinion, the Court first lists the petitioner's grounds for reversal, including the unlawfulness of the detention, and concludes "[h]owever, because we remand the case on account of the procedural error with respect to waiver of jurisdiction, we do not pass on these questions." *Id.* at 552 (footnote omitted).

Kent, like *Gerstein*, did not validate the New York Family Court Act arraignment and detention procedures.

¹⁷¹ *Strasburg I*, 513 F. Supp. 691 (1981).

¹⁷² *Schall*, 467 U.S. at 278.

important element in many decisions” and invoked *Jurek v. Texas*¹⁷³ (“*Jurek*”); *Greenholtz v. Nebraska Penal Inmates*¹⁷⁴ (“*Greenholtz*”); and *Morrissey v. Brewer*¹⁷⁵ (“*Morrissey*”) to support its position.¹⁷⁶

The *Schall* majority ignored the issue raised by the *Mathews* (2)(a) criterion, risk of erroneous deprivation of private interest, by focusing not upon the question of whether a prediction can be accurate, but rather upon the far more simplistic question of whether the prediction can be made or “attain[ed].” The *Schall* majority enshrined current practice, refusing to question whether that practice might be so inaccurate as to be constitutionally infirm. As a result, the *Schall* majority never refuted the clear finding of the *Strasburg* district court that predictions of future criminal conduct cannot be made accurately.

The district court in *Strasburg I* had relied upon expert literature supporting the contention by experts at trial that

no method had yet been devised which could predict with any acceptable degree of accuracy that a juvenile shall commit a crime, particularly the commission of an offense in a short space of time, as the judge must do in making his [FCA § 320.5 (3)(b)] decision.¹⁷⁷

One expert at trial asserted that he would be surprised if recommendations, based on family court intake interviews by probation officers prior to the initial appearance, were any “better than chance.” This same expert assessed the judge’s subjective prediction as “only 4% better than chance.”¹⁷⁸ The district court therefore concluded that “no reliable method of predicting dangerousness, whether clinical or actuarial in nature exists at this time.”¹⁷⁹ The district court concluded also that a family court judge’s opinion, lacking any methodological refinement, is “*a fortiori*” “also unreliable,” ruling that “it is clear that juveniles who are subject to [FCA § 320.5(3)(b)] detention have their freedom curtailed by judgments that are untrustworthy and uninformed and without the requisite rationality which due process mandates.”¹⁸⁰

¹⁷³ 428 U.S. 262, 274–75 (1976) (as cited in footnote 30 of the *Schall* opinion).

¹⁷⁴ 442 U.S. 1, 9–10 (1979) (as cited in footnote 30 of the *Schall* opinion).

¹⁷⁵ 408 U.S. 471, 480 (1972) (as cited in footnote 30 of the *Schall* opinion).

¹⁷⁶ *Schall*, 467 U.S. at 278.

¹⁷⁷ *Strasburg I*, 513 F. Supp. at 708.

¹⁷⁸ *Id.* See also Ewing, *supra* note 13.

¹⁷⁹ *Strasburg I*, 513 F. Supp. at 712.

¹⁸⁰ *Id.*

The *Schall* Court never addressed these district court findings, and thus never refuted them.

The cases upon which the *Schall* Court relied held merely that, in many circumstances, judges *do* make predictions of future criminal conduct. These cases never addressed whether judges make those predictions *accurately*. Furthermore, *Morrissey*, *Jurek*, and *Greenholtz* examined predictions undertaken after a conviction, and undertaken on the basis of hearings in which counsel presented evidence and arguments. In such cases, the hearing examiners had before them "all possible relevant information."¹⁸¹ Neither *Morrissey*, nor *Jurek*, nor *Greenholtz* justified the use of a prediction to detain a presumptively innocent juvenile absent a finding of probable cause to believe that the juvenile committed the crime of which he was accused.

In *Morrissey*,¹⁸² the Court held that the due process clause requires a state to afford an individual certain procedures prior to revoking his parole.¹⁸³ In so ruling, the *Morrissey* Court began "with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."¹⁸⁴ Thus, the *Morrissey* parolee, unlike the *Schall* juvenile arrestee, enjoyed no presumption of innocence because the parolee stood convicted of criminal activity either by proof beyond a reasonable doubt or by a plea of guilty. Nevertheless, the parolee under *Morrissey* is entitled, after arrest, to a hearing before an "independent officer"¹⁸⁵ "conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available."¹⁸⁶ The purpose of the hearing is to determine whether or not there exists probable cause

¹⁸¹ Ewing notes the Court's repeated emphasis throughout the case law on the importance of the extensive information made available to the decision-maker. See Ewing, *supra* note 13, at 208 and n.238.

¹⁸² 408 U.S. 471 (1972).

¹⁸³ *Id.* at 489. These safeguards were: (a) written notice of claimed violations of parole; (b) disclosure to parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless good cause for suspending right is shown); (e) a neutral and detached hearing body (may be non-judicial) and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. *Id.* The *Morrissey* Court did not reach or decide the question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if indigent.

¹⁸⁴ *Morrissey*, 408 U.S. at 480. This is the page cited by the majority in *Schall*.

¹⁸⁵ *Id.* at 486.

¹⁸⁶ *Id.* at 485.

to believe the parolee committed an act violating a condition of his parole.¹⁸⁷ Thus, the parolee in *Morrissey*, even with his truncated civil rights, enjoyed a right denied to the New York juvenile arrestee under *Schall*: a prompt objective determination upon arrest that there is probable cause to believe that he committed acts violating his parole. Because the *Morrissey* decision never considered the accuracy of the determination, one can only wonder how the *Schall* majority could rely upon *Morrissey* in fulfilling the *Schall* Court's mandate to examine the accuracy of judicial proceedings.

In *Jurek*,¹⁸⁸ a three-justice plurality allowed a sentencing jury in a capital case to address "the probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."¹⁸⁹ The plurality noted that "prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system."¹⁹⁰ Again, *Jurek* focused simply on the fact that courts frequently make predictions, and did not address whether these frequent predictions are accurate.

Jurek stressed that "what is essential [for the jury's determination] is that the jury have before it *all possible relevant information* about the individual defendant whose fate it must determine."¹⁹¹ The *Jurek* scheme thus provided for a full sentencing hearing, with counsel presenting evidence and arguments to the jury on the advisability of the death penalty. In contrast, the *Schall* preventive detention scheme involves no equally thorough hearing. The *Jurek* Court noted that the Texas law "clearly assures" that all possible relevant information "will be adduced." *Jurek* emphasized this point, while in contrast, the majority in *Schall* failed even to mention it.¹⁹²

¹⁸⁷ See *id.* at 479–80, 487.

¹⁸⁸ 428 U.S. 262 (1976).

¹⁸⁹ *Id.* at 277.

¹⁹⁰ *Id.* at 275. The *Jurek* plurality cited decisions in only three contexts: (1) bail hearings in capital cases; (2) sentencing; and (3) parole determinations. Moreover, even these examples in *Jurek* relied upon citations to drafts of model statutes, rather than existing statutory law. *Id.* at 275–76 nn.9–11.

¹⁹¹ *Jurek*, 428 U.S. at 276 (emphasis added).

¹⁹² Significantly, *Jurek* never even addressed the issue for which it was cited by the *Schall* majority.

The *Jurek* plurality never addressed the accuracy of predictions, focussing instead solely on the fact that such predictions are made "countless times each day throughout the American system of criminal justice." *Id.* at 276. Nowhere in the *Jurek* opinion is statistical data of the kind presented in *Strasburg I* even acknowledged. See text accompanying notes 177–80, *supra*, for the statistical data used by the *Strasburg I* Court. The majority quotes *Jurek* in *Schall* for the proposition that the Court has already specifically rejected the contention "that it is

Finally, in *Greenholtz*,¹⁹³ the Court held that a prisoner does not have a protectable liberty interest in a discretionary parole-release determination made by a state board of parole. In *Greenholtz*, the majority focused upon the deprivation of rights worked by the prisoner's conviction of a crime: "the conviction, with all its procedural safeguards, has extinguished that liberty right: '[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.'"¹⁹⁴ In distinguishing *Morrissey*, the *Greenholtz* Court stressed the difference between "being deprived of a liberty one has," such as revocation of parole, and "being denied a conditional liberty that one desires," such as initial release on parole.¹⁹⁵

After invoking *Morrissey*, *Jurek* and *Greenholtz*, the majority in *Schall* noted that the family court judge based her decision on "as much information as can be obtained at the initial appearance." The *Schall* majority appeared to have equated the initial appearance with the exhaustive Texas jury hearing in *Jurek*, the statutory factors in *Greenholtz*, and the *Morrissey* parole revocation hearings, all of which follow a conviction of guilt. In contrast, the brief hearing concerning detention in *Schall*, held as part of the initial appearance, occurred only hours after arrest and only minutes after appointment of counsel for the presumptively innocent juvenile arrestee.

impossible to predict future behavior and the question is so vague as to be meaningless." *Schall*, 467 U.S. at 279 (quoting *Jurek*, 428 U.S. at 274).

Interestingly enough, the *Jurek* plurality responded to the quoted challenge by calling the determination "difficult," but capable of being made. The Court in *Jurek* never suggested with what accuracy that decision could be made.

For a more thoroughgoing and far more eloquent critique of *Jurek*, see C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 111-34 (1981).

¹⁹³ 442 U.S. 1 (1979).

¹⁹⁴ *Greenholtz*, 442 U.S. at 7 (citing *Meachum v. Fano*, 427 U.S. 215, 224 (1976)).

¹⁹⁵ *Id.* at 9. The majority in *Greenholtz* cited *Mathews* for the proposition that "the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error." *Greenholtz*, 442 U.S. at 13. The *Greenholtz* Court concluded that because the Nebraska parole procedure affords an opportunity to be heard and notice as to the reason why parole is denied, it affords the process that is due. In that regard, the Court noted:

No ideal, error-free way to make parole-release decisions has been developed; the whole question has been and will continue to be the subject of experimentation involving analysis of psychological factors combined with fact evaluation guided by the practical experience of the actual parole decisionmakers in predicting future behavior.

Id. Finally, the *Greenholtz* Court appends to its opinion the statutory factors that the board must consider in deciding whether or not to grant parole. *See id.* at 16-18.

Note that Justice Marshall, in his dissent in *Greenholtz*, criticized the Court's "purported reliance" on *Morrissey* and *Mathews*. *See Greenholtz*, 442 U.S. at 32-35 (Marshall, J., dissenting).

The *Schall* majority's discussion of family court procedure in light of *Morrissey*, *Jurek*, and *Greenholtz* was completely irrelevant in light of *Mathews*'s second requirement that judicial procedures affecting due process interests be accurate. All three cases address the mere prevalence of predictions of a defendant's future dangerousness, and not the accuracy of those predictions. All three cases involve proceedings wholly distinguishable from those at issue in *Schall*. The family court in *Schall* made the prediction about presumptively innocent juveniles in a preliminary context after arrest and before trial. The Courts in *Jurek*, *Morrissey*, and *Greenholtz* made the predictions about adults in a post-conviction context.

By relying on cases that discuss not the accuracy, but simply the prevalence of predictions of future conduct in post-conviction criminal proceedings, the *Schall* majority avoided having to address the plaintiffs' challenge to the statistical reliability of judicial predictions. Essentially, the majority changed the question from "How accurate are the predictions made?" to "Are the predictions made 'based on as much information as can reasonably be obtained at the initial appearance?'"¹⁹⁶ The plaintiffs asked, "Should we not change the procedures because they are based on fundamentally inaccurate activity?"; and the majority answered, inappropriately, "The family court judges are doing the best they can."¹⁹⁷

Even if the family court judges *are* doing the best they can, expert literature led the district court in *Strasburg I* to conclude that there was "no reliable method of predicting dangerousness, whether clinical or actuarial in nature."¹⁹⁸ This simple and unrefuted finding by the district court suggested that the *Schall* majority's reliance on the good faith¹⁹⁹ of the family court judge missed the point. Infinite

¹⁹⁶ *Schall v. Martin*, 467 U.S. 253, 279 (1984).

¹⁹⁷ *See id.* at 278-80.

¹⁹⁸ *Strasburg I*, 513 F. Supp. 691, 712 (1981). Ewing offers an in-depth survey of the literature concerning the accuracy of the prediction of dangerousness and the literature's relationship to the FCA preventive detention statute. Ewing, *supra* note 13, at 181-206.

¹⁹⁹ The Burger and Rehnquist Courts have consistently used "good faith" analysis in their criminal jurisprudence. For instance, the good faith exception to the fourth amendment exclusionary rule provides that if evidence was obtained by a police officer who reasonably believed he had justification to search either because of probable cause, an ordinance that was later overturned, or a warrant invalidly issued by a magistrate, this evidence need not be suppressed. The Court has subsequently upheld the good faith exception. *E.g.*, *United States v. Leon*, 468 U.S. 897, 905-25 (1984) (evidence obtained by officers acting in reasonable reliance on a search warrant issued by a magistrate was acceptable even though the warrant was ultimately found to be invalid); *Massachusetts v. Sheppard*, 468 U.S. 981, 987-91 (1984) (evidence seized under defective warrant was admissible because police reasonably thought warrant was valid); *Michigan v. DeFillippo*, 443 U.S. 31, 35-40 (1979) (evidence obtained in

good faith and sincerity cannot change the fact that the family court judge is engaged in a fundamentally impossible task. In short, the *Schall* majority simply never addressed the relevance of the statistical evidence to the crucial second issue raised by *Mathews*: the risk of erroneous deprivation of a juvenile's interest in liberty through the detention procedures. However conscientiously the family court decisions might be made, the district court found by unrefuted evidence that such decisions, nonetheless, present an unacceptable risk of error.²⁰⁰ The Supreme Court in *Schall* ignored its duty to defer to the district court's findings of fact, assuming instead a completely contradictory position.²⁰¹

G. *Mathews Revisited: Schall's Distortions Summarized*

The structure of the *Schall* majority's analysis and its reliance upon inappropriate precedent reveals the fact that the *Schall* opinion is founded upon fundamental flaws in legal reasoning. The majority structured the *Schall* analysis in such a way that the *Mathews* tripartite approach was collapsed into two inquiries. In its first inquiry, the majority addressed the first *Mathews* factor, the private

search conducted under valid ordinance was admissible even though such ordinance was later declared unconstitutional). In a similar vein, Chief Justice Rehnquist wrote for the Court in two cases in which a prisoner was injured because of the negligence of prison officials. In each case, the Court held that the prisoner could not be compensated for mere lack of due care on the part of the official, notwithstanding the injury suffered. *See Daniels v. Williams*, 106 S. Ct. 662, 664-67 (1986) (prisoner injured because officials failed to exercise due care in protecting him from another inmate could not recover on due process grounds).

In all three cases the good faith of the official involved outweighed the constitutional rights of the other party—the Court focused on the behavior of the official rather than upon the injury suffered by the individual.

²⁰⁰ Similarly, the majority's discussion of post-detention procedures does not erase the unacceptable risk of error. The majority notes that the family court judge may reconsider her decision to detain and the state supreme court, appellate division, and even the court of appeals may review a detention decision under various review and *habeas* procedures. Yet, even if those reviews could happen instantaneously, the district court's findings that no procedure can provide an accurate prediction of the likelihood of future criminal behavior remains dispositive. A second consideration by a higher court or even the same judge has no greater accuracy in that attempt at prediction than did the family court judge in the first instance. These post-detention procedures not only fail to relieve the risk of error, but they also threaten to compound one flawed determination with additional ones.

One commentator, a former legal aid attorney representing juveniles, discussed the impossibility of timely effective review of wrongful detention. Rush, *The Warren and Burger Courts on State, Parent and Child Conflict Resolution: A Comparative Analysis and Proposed Methodology*, 36 HASTINGS L.J. 461 (1985).

²⁰¹ This is the second failure of the Court to follow the mandates of FED. R. CIV. P. 52(a). See *supra* note 107 and accompanying text for a discussion of the *Schall* Court's analysis of this rule.

interest affected, and the third *Mathews* factor, the governmental interest.

The *Schall* Court addressed the private interest affected in its discussions of custody and parental control. By misapplying *Lehman* to placement of children in state institutions, a context that *Lehman* had explicitly distinguished from its own, the *Schall* majority was able to conclude that children's liberty interests are qualified by their state of constant custody. By relying upon *Gault*, first for outdated statistics, and then for a proposition the *Gault* Court went on to repudiate, the majority was able to quote *Gault* frequently throughout the *Schall* opinion. The *Schall* majority used the *Santosky* name in support of a wholly new proposition that the child's liberty interest must be subordinated to the state's *parens patriae* duty, while ignoring the plain antidetention bent of *Santosky's* deference to parental rights. The *Schall* Court addressed the issue of governmental interest through its *Kennedy* analysis. By truncating the *Kennedy* analysis, however, the *Schall* Court was able to conclude that juvenile preventive detention was not punitive.

The *Schall* Court's second inquiry purported to address the remaining *Mathews* criterion, the accuracy of governmental procedures guaranteeing due process. The majority transformed *Gerstein's* narrow approval of post-arrest administrative detention into a broad mandate to the government to hold arrestees for indefinite periods of time. The *Schall* majority neither addressed nor refuted the *Strasburg* district court's finding that courts cannot predict dangerousness with accuracy. Had the *Schall* majority examined the accuracy, as opposed to the prevalence, of judicial determinations of dangerousness, the Court could not have skirted the necessary conclusion: that the risk of error feared in *Mathews* was rampant throughout family court detention determinations.

It would be disturbing enough merely to draw the conclusion that the *Schall* opinion was founded on a pattern of distortion of major precedents. Unfortunately, as section four demonstrates, *Schall's* contrived and contorted reasoning also presaged further revolution far beyond the juvenile detention context.

IV. THE RIPPLE EFFECT OF *SCHALL*

The thorough distortion of constitutional principle in the *Schall* opinion makes clear that *Schall*, in the guise of deference to precedent, has deeply disrupted the development of constitutional doctrine involving children. In addition, because of the way in which

constitutional principles develop over time, through a series of cases, *Schall* has had indirect consequences. It has worked a subtle revolution in substantive and procedural due process analysis, post-arrest detention, and the presumption of innocence. *United States v. Salerno*,²⁰² the first Supreme Court case to cite *Schall*, reflects this revolution.

A. *The Revolution Within the Juvenile Justice Arena*

Law review commentators have explored the ways in which the *Schall* opinion implicitly repudiated the spirit and letter of *Gault* and its progeny.²⁰³ These scholars, concerned about juvenile justice jurisprudence, have focused upon the direct effect that *Schall* has had upon constitutional doctrine involving children and juvenile delinquency proceedings. They have focused on the renunciation of *Gault*, the reversion to *parens patriae* rationales, the lesser liberty interest afforded children due to custody, and the unprecedented subordination of the child's liberty interest to legitimate state interests.

The hopes of some of these juvenile justice commentators, that *Schall's* effect would be limited by its juvenile-centered rationales, were dashed by the Court's opinion in *United States v. Salerno*.

B. *The Revolution in Constitutional Arenas Beyond Juvenile Justice*

The 1987 Supreme Court decision in *United States v. Salerno* made plain that *Schall's* distortions would not only infect the juvenile justice corpus of doctrine but also would cripple crucial precedents in other constitutional arenas. In *Salerno*, the district court had detained Anthony Salerno and Vincent Cafaro, who were charged with "wide-ranging conspiracies to aid" "La Cosa Nostra" "enterprises through violent means."²⁰⁴ Now Chief Justice Rehnquist,

²⁰² 107 S. Ct. 2095 (1987).

²⁰³ The best discussions of the discontinuity of *Schall* with *Gault* and its progeny are the sources cited in note 12, *supra*.

²⁰⁴ *Salerno*, 107 S. Ct. at 2099. As Justice Marshall detailed in his *Salerno* dissent, the pretrial detention issues as to both Salerno and Cafaro appear to have become moot by the time the case was argued to the Court on January 21, 1987. Salerno had been sentenced in a separate case by a separate district court to one hundred years imprisonment on January 13, 1987. Justice Marshall noted that the *Salerno* district court then "released" him pending further order of the court. Noting the findings required of the district court for release after sentencing, Justice Marshall wrote:

again writing for a six member majority,²⁰⁵ upheld adult preventive detention under the federal Bail Reform Act of 1984 ("the Act"). The Act allowed post-indictment pre-trial detention if the government demonstrates by clear and convincing evidence, after an adversary hearing, that no release conditions exist that "will reasonably assure . . . the safety of any other person and the community."²⁰⁶

A brief outline of the *Salerno* analysis evinces the majority's heavy reliance on *Schall*. With regard to the substantive due process challenge, the *Salerno* Court concluded that the Act's preventive detention provision did not constitute punishment, citing to *Kennedy* through *Bell* and *Schall*, and again applying only two of the seven *Kennedy* analytical factors to the specific detention at hand.²⁰⁷ The majority cited *Schall* for the proposition that preventing danger to the community is a legitimate regulatory goal.²⁰⁸ For reasons it did not explain, the *Salerno* majority applied the truncated *Kennedy* analysis more faithfully than the Court had in the *Schall* opinion. The *Salerno* Court considered the legislative history of the Act, which it failed to do in *Schall*. The Court also considered the seventh factor of *Kennedy*, which it ignored in *Schall*, noting that the Act "limits . . . detention . . . to the most serious of crimes."²⁰⁹

The Court characterized the Act's detention as a "carefully"²¹⁰ focused exception to the general rule against pre-conviction deten-

In short, the District Court which had sentenced Salerno to 100 years' imprisonment then found, with the Government's consent, that he was not dangerous, in a vain attempt to keep alive the controversy as to Salerno's dangerousness before this Court.

Id. at 2106 n.1 (Marshall, J., dissenting).

Cafaro had become a cooperating witness for the Government in October 1986, before the petition for certiorari on the preventive detention issue had been granted by the Supreme Court. He had been released on a personal recognizance bond of \$1,000,000, ostensibly for temporary medical care and treatment. He was plainly not in pretrial detention while this issue was being argued and decided before the Court. *Id.* at 2106-07 & nn.2-3.

²⁰⁵ Justices White, Blackmun, Powell, O'Connor, and Scalia joined the Chief Justice in his opinion. The *Schall* dissenters, Justices Marshall, Brennan, and Stevens, dissented in two opinions in *Salerno*.

²⁰⁶ *Salerno*, 107 S. Ct. at 2097 (quoting 18 U.S.C. § 3142(e) (1982 & Supp. III 1985)). One commentator has criticized Chief Justice Rehnquist for participating in the *Salerno* decision. See Alschuler, *supra* note 13, at 512 n.3. Alschuler notes that the District of Columbia Preventive Detention statute, upon which the Federal Bail Reform Act was modeled, was authored in part by the Chief Justice, when he served as Assistant Attorney General in charge of the Office of Legal Counsel.

²⁰⁷ *Salerno*, 107 S. Ct. at 2101-2102.

²⁰⁸ *Id.* at 2101.

²⁰⁹ *Id.* In *Schall*, the FCA had no limitation on the kind of charges for which preventive detention could be ordered. See *Schall*, 467 U.S. at 295 n.21 (Marshall, J., dissenting) (Tyrone Parson detained five days for "enticing others to play three-card monte.").

²¹⁰ *Salerno*, 107 S. Ct. at 2105.

tion, similar to the "exceptions" in *Schall* and *Gerstein*,²¹¹ and similar to detention rules during times of war or insurrection and rules allowing detention of mentally unstable or incompetent persons.²¹² The *Salerno* majority used the truncated *Mathews* analysis in defending the narrow focus of this new exception, and then briefly considered the procedural requirements of the Act in determining that the Act did not violate procedural due process requirements.²¹³

The *Salerno* Court neither acknowledged nor discussed the *Mathews* 2(a) or (b) criteria, the risk of error in current procedure and the probable value of additional or substitute procedures, respectively. After dismissing the respondents' eighth amendment cruel and unusual punishment claims, the Court briefly concluded its opinion, noting that the Act's provisions for pre-trial detention fall within a "carefully limited exception."²¹⁴

Thus, the *Salerno* Court relied heavily upon *Schall* to uphold detention under the Act. The article will next examine the four continuing distortions from *Schall*, as perpetuated in *Salerno*, to examine the ripple effect flowing from *Schall* beyond the juvenile justice realm.

1. Subtracting Substantive Due Process Limitations upon Regulation: *Kennedy* to *Bell* to *Schall* to *Salerno*

By relying on the distortion of *Kennedy* first undertaken in *Bell* and then perpetuated in *Schall*, the *Salerno* majority represented the *Kennedy* analysis as a new three step test:

Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to [it]."²¹⁵

The *Salerno* majority concluded that Congress intended detention under the Act to serve as "a potential solution to a pressing societal

²¹¹ The majority's mischaracterization of *Gerstein* as a justification for detention is discussed below.

²¹² *Salerno*, 107 S. Ct. at 2102.

²¹³ *Id.* at 2102-03.

²¹⁴ *Id.* at 2105.

²¹⁵ *Id.* at 2101.

problem.”²¹⁶ Again, though it failed to do so in *Schall*, the Court looked to legislative history, at least briefly, as did the *Kennedy* Court. The majority cited *Schall* for the proposition that “[t]here is no doubt that preventing danger to the community is a legitimate regulatory goal.”²¹⁷

The majority then concluded that “the incidents of pre-trial detention [are not] excessive in relation to the regulatory goal.”²¹⁸ As in *Schall*, for this portion of the analysis, the *Salerno* majority evaluated the incidents of detention based solely upon the four corners of the Act, noting, as in *Schall*, the rights to a prompt detention hearing and limits on the maximum length of pre-trial detention. The *Salerno* Court also noted that the Act requires that detainees be quartered in a “facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.”²¹⁹ As in *Schall*, the majority failed to look beyond the statute to examine the practical application of the statutory requirements.

In addition, in *Salerno*, the majority relied, as it could not in *Schall*, on the Act’s “carefully limit[ing] the circumstances under which detention may be sought to the most serious of crimes.”²²⁰ It also did not expose another distinction between the Act and the FCA: the Act administered preventive detention only after a finding of probable cause (by the grand jury, in issuing the indictment), while the FCA provided only for a judicial probable cause hearing within three, and sometimes six, days.

By the time the Court had written the *Salerno* opinion, the truncation of the *Kennedy* factors had become commonplace in our substantive due process jurisprudence. The *Salerno* majority, in its three paragraph “regulation/punishment” discussion, cited *Schall* five times for the elements of that analysis.²²¹

²¹⁶ *Id.* (citing S. REP. NO. 98-225).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 2102 (citing 18 U.S.C. § 3142(i)(2)).

²²⁰ *Id.* at 2101 (citing 18 U.S.C. § 3142(f)).

²²¹ Those reading the *Schall* opinion carefully most likely referred back to *Bell*, found the quoted language, and assumed its soundness. Careful readers of *Salerno* would have even a more difficult trail to *Kennedy*, because *Kennedy* is mentioned only once in the *Salerno* opinion, and there only within a citation to *Schall*.

Through *Bell*, *Schall*, and *Salerno*, *Kennedy* has come to stand for a definition of regulation contradicted by its own language.

2. Legitimizing Detention after Arrests: *Gerstein* to *Schall* to *Salerno*

The *Schall* Court's manipulation of *Gerstein* converted Justice Powell's holding that "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention"²²² into permission for detention of juveniles without a finding of probable cause. In *Salerno*, the majority completed the transformation of *Gerstein* from its original position as enunciator of individual rights to its current interpretation as protector of state prerogative.

The *Salerno* majority included *Gerstein* in a list of cases in which the Court has "repeatedly held that the government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."²²³ After listing examples in which the Court has upheld preventive detention in times of war or insurrection, with non-citizens, mentally unstable individuals, and juveniles, the *Salerno* majority cited *Gerstein* for the proposition that "[e]ven competent adults may face substantial liberty restrictions as a result of the operation of our criminal justice system."²²⁴ This proposition, on its face, appears to contradict the more accurate description of *Gerstein*'s "limited post-arrest detention" used later by the *Salerno* majority in comparing *Gerstein* to *Salerno*. The proposition is even more at odds with *Gerstein*'s own overt requirement of a probable cause determination as a condition of detention and its endorsement of detention only for the "brief period . . . to take the administrative steps incident to arrest."²²⁵

Through *Schall* and *Salerno*, the nature of *Gerstein*'s holding has been altered in the same manner in which *Kennedy* has been effectively transformed. After *Schall* and *Salerno*, it appears that one may cite *Gerstein* for the proposition that individuals may be detained lawfully during a protracted administrative process prior to a finding of probable cause. Thus, a challenge to a government's overly lengthy administrative process could be denied constitutional weight on the authority of *Gerstein* as cited through *Schall* and *Salerno*.²²⁶

²²² *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975).

²²³ *United States v. Salerno*, 107 S. Ct. 2095, 2101 (1987).

²²⁴ *Id.* at 2102. The majority also included in its list detention for risk of flight, which is not a crime prevention concern, and danger to witnesses, without citation.

²²⁵ *Gerstein*, 420 U.S. at 114.

²²⁶ See *Williams v. Ward*, 845 F.2d 374, 382-90 (2d Cir. 1988) (72 hour pre-arraignment detention upheld pursuant to *Gerstein* and *Schall*).

3. Dichotomizing the Three-Prong Analysis of Procedural Due Process: *Mathews* to *Schall* to *Salerno*

The *Salerno* majority perpetuated *Schall*'s amputation of the second *Mathews* criteria by ignoring the second criteria altogether. While the majority cited *Mathews* in discussing the requirement of procedural due process,²²⁷ it never addressed the second *Mathews* factor: "The risk of erroneous deprivation of the [private interest] through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."²²⁸

As in *Schall*, the Court in *Salerno* merged the third *Mathews* factor, "the Government's interest, including the function involved and the fiscal and administrative burdens," with the consideration of a "legitimate regulatory goal." After arguing that the society's interest in crime prevention in "these narrow circumstances" was "legitimate,"²²⁹ "compelling,"²³⁰ and "heightened,"²³¹ the *Salerno* Court suggested that the analysis had only two parts, by turning to "the *other* side of the scale, . . . the individual's strong interest in liberty."²³² The majority in *Salerno* could not depend upon the assertion in *Schall* that juveniles have a lesser right to liberty. Instead, the majority referred back to its list of exceptions and noted "as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society."²³³

Salerno thus treated the procedural due process analysis as a two-sided balancing process.²³⁴ The majority's response to a challenge to the statute on its face, however, suggests that it dismissed the importance of the second *Mathews* criterion. As in *Schall*, the majority in *Salerno* emphasized that a response to a facial challenge requires only that procedures be "adequate to authorize the pre-trial detention of at least some [persons] charged with crimes,"²³⁵

²²⁷ *Salerno*, 107 S. Ct. at 2101.

²²⁸ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²²⁹ *Salerno*, 107 S. Ct. at 2101, 2102.

²³⁰ *Id.* at 2102, 2103.

²³¹ *Id.* at 2103.

²³² *Id.* (emphasis added).

²³³ *Id.*

²³⁴ And because now *Schall* could be cited for the proposition that the governmental interest was "weighty," the result of the balancing test was a foregone conclusion. See *supra* note 84 for a discussion of the history of the *Schall* Court's conclusion that crime prevention is a weighty social objective.

²³⁵ *Salerno*, 107 S. Ct. at 2103 (quoting *Schall*, 467 U.S. at 264).

whether or not they might be insufficient in some particular circumstances.”²³⁶ The *Salerno* Court relied on *Schall* in its suggestion that, because the overbreadth doctrine has not been extended past the first amendment,²³⁷ any detention of an actually dangerous person that results from the operation of the Act would save the Act from a facial constitutional challenge. This analysis might, depending upon the petitioner’s framing of the legal issues before the Supreme Court, eliminate the second *Mathews* criterion from application because it seems to make irrelevant the question of whether the risk of erroneous detention is unacceptably high.

Had the *Salerno* majority applied the second *Mathews* criterion, as deference to precedent requires, it would have been obliged to evaluate not whether *any* detentions are justified, but rather whether the risk of erroneous detentions would be unacceptable. Instead, the majority repeated a *non sequitur* found in *Schall*. First, quoting *Schall*, the majority simplistically stated that “there is nothing inherently unattainable about a prediction of future criminal conduct.”²³⁸ Second, the *Salerno* Court examined the procedures in the Act “specifically designed to further the accuracy of that determination.”²³⁹ In this case, those procedures include a right to counsel at the detention hearing, rights to testify, present evidence and cross-examine witnesses, the right to proof by clear and convincing evidence, constraints on the judicial officer determining appropriateness of detention, and immediate appellate review of the detention decision. However “extensive” these “safeguards”²⁴⁰ might be, like the *Schall* procedures,²⁴¹ they remain irrelevant to the *Mathews* (2)(b) criterion, the “probable value, if any, of additional or substitute procedural safeguards,” if indeed *no* procedures, no matter how intricate, could *ever* make the procedure more accurate.²⁴² The *Salerno* opinion, like the *Schall* and *Jurek* opinions before it, dodged the hard question that *Mathews* required the Court to face: can predictions of dangerousness ever be accurate enough to be fair?

²³⁶ *Id.* at 2103 (emphasis added).

²³⁷ *Id.* at 2100 (citing *Schall*, 467 U.S. at 268–69 n.18).

²³⁸ *Id.* at 2103 (quoting *Schall*, 467 U.S. at 278).

²³⁹ *Id.*

²⁴⁰ *Id.* at 2104.

²⁴¹ See *infra* notes 151–70 and accompanying text for a discussion of the *Schall* procedures.

²⁴² Cf. Ewing, *supra* note 13, at 200–06 (analysis of the safeguards Judge Newman suggested in *Strasburg II*).

In the progression from *Mathews* to *Schall* to *Salerno*, the *Mathews* tripartite analysis has shrunk to a two-sided balancing test, still bearing the *Mathews* name.

4. Inverting the Presumption of Innocence

One result of *Schall's* incremental revisions of constitutional precedent has been a steady erosion in the presumption of innocence throughout the criminal process. As lamented by Justice Marshall in his *Schall* and *Salerno* dissents and by a number of commentators, *Schall* and *Salerno* have opened wide the circumstances in which an individual can be jailed before trial.²⁴³ Indeed, each small doctrinal revision has contributed significantly to this process.

This erosion of a presumption of innocence affects the government interest. The subtraction of five *Kennedy* factors and the variable application of the seventh narrowed the definition of punishment, allowing far more governmental activity to come under the "regulation" rubric. The deletion of the *Mathews* second criterion reduces the government's duty to provide reasonably accurate procedures and creates a two-sided balance between individual and governmental interests instead of the three-part analysis originally intended by *Mathews*. The Court has marshalled exceptions to the rule against detention without criminal conviction to demonstrate the importance of governmental objectives, and the substitution of the "legitimate regulatory interest" standard has tilted the new truncated *Mathews* balance firmly in the government's direction.

On the side of the individual's liberty, the recasting of *Gerstein* as an endorsement of pre-trial detention de-emphasized the accused's post-arrest pre-trial rights and legitimized his extended pre-trial detention. The *Schall* decision emphasized ways in which the juvenile's specific individual liberty interest in the case was weaker than most. The *Salerno* opinion, however, drew from *Schall* its supposed emphasis on the weightiness of the competing governmental interest.

Because of *Schall* and its progeny, the presumption of innocence now stands in considerable peril. The *Bell* Court laid the

²⁴³ United States v. Salerno, 107 S. Ct. 2095, 2109-11 (1987) (Marshall, J., dissenting). *Bell* leaves open the question of the scope of permissible treatment of a detainee once in custody. See *supra* notes 64-81 and accompanying text for a discussion of *Bell*.

foundation for a substantial inversion of the doctrine, by describing the presumption as little more than an evidentiary rule:

a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial But it has *no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.*²⁴⁴

The logical extension of *Bell*, as continued in *Schall* and *Salerno*, could destroy the protection provided by the presumption of innocence. Without the first five *Kennedy* factors, the loss of liberty suffered by pre-trial detainees will seldom be considered punishment. Without the protection of the second *Mathews* criterion, innocent defendants will be held in detention based on erroneous predictions about their dangerousness. With *Gerstein* recast in such a way as to justify protracted pre-trial detention and *Schall* and *Salerno* firmly in place, increasing numbers of wrongly detained, unconvicted defendants will be physically restrained, perhaps for long periods before trial, based on *no proof by any standard* that they have committed a crime. Such defendants would be released only after a trier of fact judged them to be not guilty.

Thus, the Supreme Court's lack of candor in transforming precedent has seriously jeopardized the presumption of innocence. The logical extension of the current trends leads to a system in which wrongly detained, unconvicted defendants will suffer a significant loss of liberty until proven innocent.²⁴⁵ Such a system reduces axiomatic concerns of earlier Supreme Courts to mere voices crying in the wilderness: "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."²⁴⁶

²⁴⁴ *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (emphasis added).

²⁴⁵ See, e.g., Comment, *The Supreme Court, 1983 Term: 4. Pretrial Detention of Juveniles*, 98 HARV. L. REV. 87, 130 (1984); Comment, *Pretrial Detainment: The Fruitless Search for the Presumption of Innocence*, 47 OHIO ST. L.J. 277 (1986); Note, *Juvenile Law—Pretrial Preventive Detention Under N.Y. Statute Upheld*, 19 SUFFOLK U.L. REV. 111 (1985); Note, *Criminal Procedure—Juveniles—State Law Authorizing Pretrial Detention of Juveniles Upon a Finding of Risk of Future Criminal Behavior Upheld as Valid Under the Due Process Clause*, 15 U. BALT. L. REV. 379 (1986).

²⁴⁶ *In re Winship*, 397 U.S. 358, 364 (1970).

V. CONCLUSION

In its *Schall* opinion, the six-justice Supreme Court majority certainly did not "leave prior decisional law as [it found] it and simply apply it to the case at bar."²⁴⁷ Distortions of influential constitutional precedent riddle the opinion. These distortions in the *Schall* opinion have now been "searchingly, even tediously, examined."²⁴⁸ In contrast to its own claims, the *Schall* majority, based on major misrepresentations of prior decisional law, has written a revisionist view of constitutional jurisprudence.

The *Salerno* opinion demonstrates the ripple effect caused by *Schall* even outside the juvenile justice arena. The cumulative impact of the doctrinal revisions worked by *Schall* suggests substantial danger to vital civil and criminal constitutional doctrines, most importantly the doctrine of the presumption of innocence.

Had the Court acknowledged that it was overruling *Gault* and its progeny as well as *Mathews*, *Kennedy*, and *Gerstein*, the magnitude of this revolution would have been apparent. The Court's decision to move constitutional jurisprudence in dramatic new directions could then have been openly understood and evaluated. Such dramatic shifts by the Court are not unprecedented, but historically they have been received by public debate, testing whether the Court's directions coincide with prevailing public values.

Instead, the *Schall* Court has disguised its purposes through distortion of precedent, imposing what might be called a form of preventive detention on settled precedent. Just as family court judges now may restrain and disempower children without probable cause in the name of protecting them, so too the Court in *Bell*, *Schall*, and *Salerno* has restrained and disempowered cases, like *Kennedy*, *Mathews*, and *Gerstein*, in the name of following them. Just as wrongly detained juveniles will not be released until advocates demonstrate their innocence to an authority powerful enough to free them, so too these wrongly construed precedents will remain

²⁴⁷ *Bell v. Wolfish*, 441 U.S. 520, 535 n.17 (1979).

²⁴⁸ BLACK, *supra* note 192, at 116. Black discussed the *Jurek* opinion at length to demonstrate the Texas statute's "plain shabbiness, . . . its self-speaking insufficiency as law." *Id.* at 118. In that connection he wrote:

A year ago, I would have thought that unnecessary. I would have thought that the trained intuition of any seasoned lawyer would recognize at once, in this grimly silly statute, something far beyond serious consideration—much as one can tell that a batter has struck out without calculating the number of nitrogen molecules between the bat and the ball.

Id. at 118–19.

caged in distortion until advocates convince the Court, or perhaps Congress, to free them.

Both opponents and proponents of the *Schall* result must view with disquiet the pervasive lack of judicial candor through which this result was reached. Scholars interested in pursuing the larger issue of judicial candor can draw profitably from several scholarly discussions of the issue,²⁴⁹ and judicial statements.²⁵⁰ Those who are disturbed that Chief Justice Rehnquist authored *Schall*, along with *Bell* and *Salerno*, may wish to consider this essay's conclusions in light of David Shapiro's early examination of the Chief Justice's decisional writing.²⁵¹ Scholars concerned with the development of juvenile jurisprudence can examine whether the *Schall* analysis has been consistently applied in subsequent cases involving children's constitutional rights.²⁵²

²⁴⁹ Cf. G. CALABRESI, A COMMON-LAW FOR THE AGE OF STATUTES, 172-81, 294-99 (1982); POSNER, *The Jurisdiction of Skepticism*, 86 MICH. L. REV. 827, 863-65 (1988); Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); Rosenfeld, *The Peppered Moth*, N.Y.L.J., Feb. 19, 1989 at 2, col. 3.

²⁵⁰ Cf. *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (Rehnquist, J., dissenting).

²⁵¹ Shapiro, in a 1976 critique of Justice Rehnquist's judicial craft, noted:

Justice Rehnquist has expressed the view that constitutional holdings are more open to reexamination than are other holdings. Given that his ideology is quite different from that of most Justices recently on the Court, and that he is intent upon implementing this ideology whenever an opportunity presents itself, one would expect that Justice Rehnquist would frequently advocate rejection of the holdings or rationales of prior decisions. What is called for in this process, I believe, is complete candor. If a decision is to be overruled, or its rationale rejected, it should be done with the fullest possible explanation of the reasons for doing so

. . . [T]oo often, his efforts to deal with prior decisions are singularly unpersuasive and leave the reader with the impression that the law is being changed without acknowledgment that candor would demand.

Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 349-50 (1976) (footnotes and citations omitted). Shapiro also notes, *inter alia*, that "Justice Rehnquist's opinions . . . are inconsistent with or make irrelevant much previous decisional law based on different conceptions of due process guarantees." *Id.* at 322.

²⁵² For instance, the Court in *DeShaney v. Winnebago County Department of Social Services* did not find that "the State must play its part as *parens patriae*" even in a case where parental control had clearly "faltered." 109 S. Ct. 998, 1004-06 (1989).

In *DeShaney*, the Court, by Chief Justice Rehnquist, held that a county's failure to protect a child at risk who had previously been in foster care did not amount to a violation of the child's due process rights. In that case, the state caseworker had, in the majority's words, "continuing suspicions that someone in the DeShaney household was physically abusing Joshua, but she did nothing more." *DeShaney*, 109 S. Ct. at 1001. The *Schall* opinion was not cited at all in the *DeShaney* decision. Yet, surely the State knew that parental control was faltering, if not worse. Must not the State, therefore, "play its part as *parens patriae*?" See *supra* notes 130-40 and accompanying text for a discussion of the state's *parens patriae* duty.

Even a preliminary analysis suggests that failure to cite *Schall* was a failure to extend logically the expansive legal propositions created in *Schall*.

Identifying the gap between stated and actual practice has been disturbing enough. By its disingenuous "faithfulness" to precedent, the Supreme Court has revised its own past history, confused its present audience and jeopardized the future of a coherent body of constitutional jurisprudence. The widespread effects of a case such as *Schall v. Martin* can only suggest that this Court's transformation of precedent must continue to be thoroughly and critically scrutinized.

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