Note

Juveniles Locked in Limbo: Why Pretrial Detention Implicates a Fundamental Right

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A fifteen-year-old boy named James allegedly stole a bus pass, and the police detained him for the offense.[1] Despite the fact that James and his mother attended all his scheduled court dates, the juvenile court denied his request to be released before his trial.[2] For the trivial act of stealing a bus pass, the court decided to detain him and set his bail at $1500.[3] James's family could not afford his bail.[4]

At the age of fifteen, a girl named Maria spent eight weeks in a juvenile detention center before trial.[5] What was her offense? Allegedly, she brought a small metal nail file to school.[6]

The police found a boy named Kenny with a group of kids peering into a vandalized car on the street.[7] Prosecutors charged him with receiving stolen property and requested his

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1. ROBIN L. DAHLBERG, LOCKING UP OUR CHILDREN: THE SECURE DETENTION OF MASSACHUSETTS YOUTH AFTER ARRAIGNMENT AND BEFORE ADJUDICATION 21 (2008), *available at* http://www.aclu.org/files/pdfs/racialjustice/locking_up_our_children_web_ma.pdf.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 24.

6. *Id.*

7. *Id.* at 22.

bail be set at $150.[8] Unfortunately for Kenny, the court set bail at $300, twice the amount requested. Unable to pay, Kenny waited an agonizing five days before trial.[9]

These cases are not anomalies.[10] On any given day, a startling 27,000 juveniles are incarcerated while waiting for their court dates.[11] Pretrial detentions for juveniles have risen since the 1970s,[12] with an astounding seventy-two percent increase since the 1990s.[13] Most of these juveniles either committed nonviolent, minor offenses or will eventually be acquitted of the charges.[14] Nevertheless, they are kept isolated from their families, friends, and schools until the adjudication of their guilt.[15]

Juveniles do not have a meaningful opportunity to contest pretrial detention.[16] Juvenile courts have limited procedural and substantive safeguards in place for juveniles at the pretrial detention stage.[17] Statutes authorizing judges to detain juveniles usually do not provide satisfactory criteria for judges to use when making the decision to detain a juvenile.[18] Often,

8. *Id.*

9. *See id.*

10. Carol Rose & Amy Reichbach, *Locking Up Our Children*, BAY ST. BANNER, May 15, 2008, *available at* http://www.baystatebanner.com/Opinion58-2008-05-15.

11. COAL. FOR JUVENILE JUSTICE, UNLOCKING THE FUTURE: DETENTION REFORM IN THE JUVENILE JUSTICE SYSTEM 1 (2003), *available at* http://www.juvjustice.org/media/resources/public/resource_114.pdf.

12. Jeffrey Fagan & Martin Guggenheim, *Preventative Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415, 415 (1996).

13. COAL. FOR JUVENILE JUSTICE, *supra* note 11.

14. *Id.* (explaining that in 1999, nearly seventy percent of juveniles in pretrial detention had allegedly committed nonviolent offenses).

15. *Id.*

16. Schall v. Martin, 467 U.S. 253, 285–86 (1984) (Marshall, J., dissenting) (asserting that in order to make a pretrial detention decision, "each judge must rely on his own subjective judgment, based on the limited information available to him at court intake and whatever personal standards he himself has developed in exercising his discretionary authority under the statute" (quoting United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 702 (S.D.N.Y. 1981))).

17. Charles E. Frazier & Donna M. Bishop, *The Pretrial Detention of Juveniles and Its Impact on Case Dispositions*, 76 J. CRIM. L. & CRIMINOLOGY 1132, 1132 (1985) ("Unlike the adjudicatory stage of delinquency case processing, the detention stage traditionally has been unrestrained by either strict substantive or procedural legal safeguards.").

18. *Id.* at 1135; *id.* at 1151 ("[D]uring the course of this research, juvenile justice personnel suggested to us that detention criteria are so broad that virtually every child charged with a delinquent act could be said to meet these criteria.").

statutes allow judges to detain juveniles if they believe the juvenile is likely to commit a crime again.[19] The inability of juveniles to contest these detentions and the lack of objective criteria in statutes foster arbitrary decisions.[20]

At the birth of the juvenile court, reformers attempted to develop a system that melded child welfare concerns with crime control.[21] Despite the founders' original intentions, however, the juvenile court system has moved away from the therapeutic model to a punitive model. The increasingly punitive nature of the system warrants a second look at the due process safeguards courts afford—or do not afford—juveniles. In *In re L.M.*, the Kansas Supreme Court decided, based on the increasingly punitive nature of the juvenile justice system, that juveniles should have a constitutional right to a jury trial.[22] This decision analogously provides support for the argument that juveniles deserve more due process safeguards at the point of pretrial detention. Other jurisdictions have not yet followed this approach.

This Note argues that courts should recognize that the ability to contest pretrial detention is a fundamental right, protected by the Due Process Clause of the Constitution. Part I of this Note discusses the evolution of the juvenile court and the due process safeguards it affords juveniles. It outlines the seminal cases regarding a juvenile's right to contest pretrial detention. Part II of this Note critiques the reasoning behind the placement of so many juveniles in pretrial detention and examines statutes that permit judges to detain juveniles. Finally, Part III advocates that in light of the increasingly punitive nature of the system, all juveniles should be given greater procedural safeguards including the right to contest pretrial detention. Enacting statutes with specific criteria would give juveniles a meaningful opportunity to contest pretrial detention.

I. TREAT CHILDREN LIKE CHILDREN: THE BEGINNINGS OF THE JUVENILE COURT

Prior to the nineteenth century, England and the United States lumped children older than seven years into the same

19. *Id.* at 1135.
20. *See id.* at 1132.
21. DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 4 (2004).
22. 186 P.3d 164, 170–72 (Kan. 2008).

system as adult offenders.[23] Juveniles faced the same punishments as adults, including death by hanging and incarceration.[24] In the early nineteenth century, Progressive reformers sought to change the way the justice system treated juveniles.[25] Progressives believed that the justice system should treat children differently in light of their vulnerability, innocence, and dependent nature.[26] In particular, the reformers focused on the idea that children experienced different development stages, including childhood and adolescence.[27] In light of this progressive view of child development, reformers advocated the formation of a juvenile court.[28] They wanted the justice system to recognize that children have a lower level of culpability than adults.[29]

Lucy Flowers, "the mother of the juvenile court,"[30] developed a system that recognized the principle "that a child should be treated as a child."[31] The juvenile court relied on the principle of parens patriae.[32] This concept supported the notion that a state should act like a parent when it intervenes in a troubled youth's life.[33] Whereas the juvenile justice system doled out rehabilitative sentences as punishment, the adult system focused on punitive measures.[34] The juvenile court endeavored to de-

23. Candace Zierdt, *The Little Engine that Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F. L. REV. 401, 403 (1999); Julie J. Kim, Note, *Left Behind: The Paternalistic Treatment of Status Offenders Within the Juvenile Justice System*, 87 WASH. U. L. REV. 843, 847 (2010).

24. Zierdt, *supra* note 23.

25. BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION 2 (3d ed. 2009) ("During the early nineteenth century, the social construction of *adolescence* as a developmental stage distinct from adulthood and new sensibilities about children began to pose problems for the criminal justice system.").

26. *Id.* at 3.

27. *Id.* at 2–3.

28. *See id.* at 3–4.

29. *Id.*

30. TANENHAUS, *supra* note 21 (explaining that social settlement leader Graham Taylor referred to Lucy Flowers as "the mother of the juvenile court" because she called for the creation of a juvenile court in 1888).

31. *Id.* at 23.

32. *Id.* at 58, 104.

33. FELD, *supra* note 25, at 4. *See generally* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY xxix (2d ed. 1977) (providing useful background information on the Progressive era, including the notion that "[p]aternalism was a typical ingredient of most reforms in the Progressive era").

34. FELD, *supra* note 25, at 4.

cide which course of action would be in the best interests of the offender.[35] The rest of Part I discusses the juvenile justice system's departure from its original rehabilitative principles.

A. DUE PROCESS SAFEGUARDS FOR JUVENILES

When the juvenile court was established, Progressive reformers did not envision the need for due process safeguards.[36] The Due Process Clause of the Fourteenth Amendment purports that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[37] The reformers thought that the rehabilitative purpose of the juvenile court made the safeguards unnecessary.[38] Juvenile courts exercised discretion over cases in an informal manner.[39] Juveniles could not request a jury or contact a lawyer for assistance.[40] In essence, the reformers hoped to distinguish juvenile courts from the adult criminal courts.[41] Therefore, the reformers wished to equip judges with enough discretion to determine what would be in the best interests of the young offenders.[42] The proceedings were not supposed to mirror the adversarial nature of the criminal courts; instead, the reformers intended to fashion a system that was civil in nature.[43] Some reasoned that juvenile proceedings should be considered civil rather than criminal in nature because unlike adults, juveniles had no rights.[44] The proceedings would simply determine the custody of a child, which meant that these proceedings would not be subject to the

35. Sacha M. Coupet, Comment, *What to Do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1308 (2000).

36. TANENHAUS, *supra* note 21, at 25, 104; Kim, *supra* note 23.

37. U.S. CONST. amend. XIV, § 1.

38. Kim, *supra* note 23.

39. FELD, *supra* note 25, at 4.

40. *Id.* (explaining that the courts rejected the need for procedural safeguards prevalent in adult criminal court because the juvenile justice system focused on rehabilitation, not punishment).

41. *See id.* (arguing that removing children from the adult criminal court system would help courts "diagnose the causes of and prescribe the cures for delinquency").

42. *See id.*

43. Kim, *supra* note 23; *see also In re* Gault, 387 U.S. 1, 74–77 (1967) (Harlan, J., concurring in part and dissenting in part) (arguing that juvenile proceedings are supposed to be civil, not criminal, in nature). *But see* Breed v. Jones, 421 U.S. 519, 529 (1975) (arguing that the Court should "eschew 'the 'civil' label-of-convenience which has been attached to juvenile proceedings'").

44. *In re Gault*, 387 U.S. at 17.

same requirements as adult proceedings, when a state restricts a person's liberty.[45]

In 1966, the Supreme Court began to depart from the reformers' original model for a juvenile court in *Kent v. United States*.[46] Prior to trial, the juvenile court detained Kent, a fourteen-year-old, for a week and subsequently transferred his case to adult criminal court without a hearing.[47] The Court held that the juvenile court could not disregard Kent's statutorily conferred right to have a hearing before waiver into adult court.[48] The Court expressed concern with the lack of due process safeguards in juvenile courts.[49] The Court asserted "that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[50]

Shortly after *Kent*, the Court granted juveniles several due process safeguards in *In re Gault*.[51] A lower court judge sentenced Gault, a fifteen-year-old boy, to incarceration for six years for making a prank phone call[52] and acting in a habitually immoral way.[53] The Court explained that absent adequate legal counsel, juveniles are at a substantial disadvantage in the courtroom.[54] When a juvenile faces incarceration, he is "subjected to the loss of his liberty for years" which "is comparable in seriousness to a felony prosecution."[55] The Court recognized that neither the judge nor the probation officer may act as a representative for a juvenile delinquent and that the presence

45. *Id.*

46. 383 U.S. 541 (1966); Kim, *supra* note 23, at 852.

47. *Kent*, 383 U.S. at 543–49.

48. *Id.* at 557.

49. *Id.*; *see also* MICHAEL D. GRIMES, PATCHING UP THE CRACKS: A CASE STUDY OF JUVENILE COURT REFORM 10 (2005) ("Thus, what seemed to progressive reformers to be a better way to address the unique needs of children in a more informal and individualized way would later be seen as a system that denied children their rights to due process.").

50. *Kent*, 383 U.S. at 556.

51. 387 U.S. 1 (1967).

52. *Id.* at 29. One author characterized Gault's sentence as "an extreme miscarriage[] of justice." David N. Sandberg, *Resolving the* Gault *Dilemma*, 48 N.H. B.J. 58, 58 (2007).

53. *In re Gault*, 387 U.S. at 9. The judge defended his ruling that Gault acted in a habitually immoral way by explaining that Gault had stolen a baseball mitt at the age of thirteen and subsequently lied to the police about it. Sandberg, *supra* note 52, at 59, 66 n.15.

54. *In re Gault*, 387 U.S. at 36–37.

55. *Id.* at 36.

of an attorney for a child in such a complex system is critical to make certain due process is carried out.[56]

In re Gault is a seminal case because it secured a number of due process safeguards for juveniles for the first time.[57] Specifically, the Court held that juveniles have (1) the right to counsel,[58] (2) the right to adequate notice of a hearing,[59] (3) the right to written notice to a parent or guardian,[60] and (4) the right against self-incrimination.[61] When a juvenile faces lengthy incarceration, the Due Process Clause of the Fourteenth Amendment ensures that the individual receives "fair treatment."[62] The Court's recognition of these due process safeguards significantly changed the juvenile justice system.[63]

The *In re Gault* decision marked a substantial departure from the reformers' original vision of the juvenile court.[64] Some worried that granting juveniles due process rights would blur the line between the criminal court and juvenile court and would detract from juvenile court's rehabilitative underpinnings.[65] Whereas Justice Abe Fortas believed the due process safeguards would not alter the basic structure of the juvenile court, Justice Potter Stewart worried that *In re Gault* "sounded the death knell for the juvenile court."[66] Justice Fortas asserted that the juvenile court could retain its unique features if the

56. *See id.*

57. Sandberg, *supra* note 52.

58. *In re Gault*, 387 U.S. at 36.

59. *Id.* at 33.

60. *Id.*

61. *Id.* at 47 ("It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children.").

62. *Id.* at 30. Justice Black took a different stance in his concurrence, arguing that if a court denies these rights to a juvenile, it would constitute "invidious discrimination" and violate the Fourteenth Amendment's Equal Protection Clause. *Id.* at 61 (Black, J., concurring).

63. Sandberg, *supra* note 52.

64. *See* Michele Benedetto Neitz, *A Unique Bench, a Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97, 102 (2011); Sandberg, *supra* note 52.

65. Sandberg, *supra* note 52; *see also* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 560–62 (1998) (noting the Court's hesitancy to grant additional due process safeguards to juveniles rested in the belief that it would ruin the traditional juvenile court model).

66. Neitz, *supra* note 64, at 103 ("The [*Gault*] Court acknowledged the unique benefits of the juvenile system, but believed that the imposition of due process standards would not disrupt such benefits."); Sandberg, *supra* note 52.

new due process procedures were "intelligently and not ruthlessly administered."[67]

A few years later, the Court determined that the Due Process Clause entitles juveniles to the application of a beyond a reasonable-doubt standard of proof for a criminal conviction.[68] Without the reasonable-doubt standard, the Court stated juveniles would be subjected to a "disadvantage amounting to a lack of fundamental fairness."[69] In the context of juvenile justice, the Court held that the relevant inquiry is whether the procedural safeguards are "necessary to guarantee the fundamental fairness of juvenile proceedings."[70]

After initially recognizing that juveniles have several due process rights, the Court became reluctant to extend any more due process protections.[71] In 1971, the Court in *McKeiver v. Pennsylvania* cautioned against providing juveniles with additional due process safeguards.[72] The *McKeiver* Court did not want to provide juveniles with juries because it worried that juries would prejudge the juveniles.[73] The Court believed that juries, unlike judges with special expertise, would not take social and psychological factors into account.[74] The use of juries, the Court thought, would ruin the juvenile court's rehabilitative mission.[75]

The majority in *McKeiver* applied the fundamental fairness due process standard.[76] The Court inquired whether the right to trial by jury is a "necessary component of accurate

67. *In re Gault*, 387 U.S. at 21 (1967); *see also* Sandberg, *supra* note 52, at 61.

68. *In re* Winship, 397 U.S. 358, 368 (1970).

69. *Id.* at 363.

70. *In re Gault*, 387 U.S. at 74 (Harlan, J., concurring in part and dissenting in part).

71. Jay D. Blitzman, Gault*'s Promise*, 9 BARRY L. REV. 67, 76 (2007) ("[A] mere four years later *McKeiver* held that juveniles were not entitled to the panoply of due process rights that adults have in criminal proceedings."); Perry L. Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285, 296 (2008) ("[The Court] has expressly refused to grant juveniles all of the procedural rights afforded adults.").

72. 403 U.S. 528, 545–50 (1971).

73. *But see id.* at 568–69 (Douglas, J., dissenting) (arguing that juries would provide juveniles a chance not to be judged on their backgrounds).

74. *But see id.*

75. *See id.*

76. *Id.* at 543 (plurality opinion).

factfinding."[77] The majority held that jury trials are not the only way to engage in a fact-finding mission.[78] Finally, it worried that requiring jury trials would disrupt the states' ability to experiment with methods to help young offenders.[79]

In summary, the Supreme Court provided juveniles with some due process safeguards but, as time went on, became reluctant to provide any more.[80] Juvenile courts became "quasi-criminal" in nature because they offered some rights and safeguards, but not others.[81] These courts struggled with their original rehabilitative foundation and the State's purported interest of controlling crime.[82]

B. THE MOVE TOWARDS A PUNITIVE JUVENILE JUSTICE SYSTEM

In the mid-1980s and early 1990s, juvenile crime spiked.[83] In response, state legislatures passed "get tough on crime" laws.[84] Public outcry against rising juvenile crime led forty-seven states and the District of Columbia to enact laws aimed at juveniles who commit serious and violent crimes.[85] The punitive nature of the juvenile justice system is evidenced by substantive changes in five areas of the law: (1) facilitating the transfer of juveniles to the adult criminal justice system; (2) expanding sentencing options to include punitive measures; (3)

77. *Id.*; *see also* Guggenheim & Hertz, *supra* note 65, at 562 ("[A] critical premise of the Court's analysis in *McKeiver* was that judges can be as fair as juries in deciding cases.").

78. *McKeiver*, 403 U.S. at 543.

79. Moriearty, *supra* note 71.

80. *See, e.g.*, *McKeiver*, 403 U.S. at 545 (denying that a jury trial in juvenile courts is a constitutional requirement).

81. Moriearty, *supra* note 71, at 287.

82. *See* LARRY J. SIEGEL & BRANDON C. WELSH, JUVENILE DELINQUENCY: THEORY, PRACTICE, AND LAW 446 (10th ed. 2009).

83. Connie M. Tang et al., *Effects of Trial Venue and Pretrial Bias on the Evaluation of Juvenile Defendants*, 34 CRIM. JUST. REV. 210, 210 (2009).

84. *Id.*; Christine D. Ely, Note, *A Criminal Education: Arguing for Adequacy in Adult Correctional Facilities*, 39 COLUM. HUM. RTS. L. REV. 795, 798 (2008).

85. Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy*, 48 WM. & MARY L. REV. 397, 407 (2006); Tang et al., *supra* note 83. For example, in Michigan, the legislature lowered the age at which a juvenile could be waived into adult court from fifteen to fourteen. Robert E. Shepherd, Jr., *Sentencing a Child for Murder in a "Get Tough" Era*, CRIM. JUST., Spring 2000, at 70, 71. In Minnesota, the legislature attempted to lower the age from fourteen to thirteen. Bob Collins, *Should More Juveniles Be Charged as Adults?*, MINN. PUB. RADIO (Mar. 13, 2008, 11:55 AM), http://minnesota.publicradio.org/collections/special/columns/news_cut/archive/2008/03/should_more_juveniles_be_charg.shtml.

reducing or removing confidentiality; (4) focusing on victims' rights; and (5) correctional programming.[86]

From 1992 to 1995, forty states adopted laws making it easier for juvenile delinquents to be charged, tried, and convicted in adult criminal court.[87] Many state legislatures amended their juvenile codes' purpose clause to include punitive language, marking a departure from their previously rehabilitative focus.[88] Many states enacted statutes for mandatory-minimum and determinate sentencing and reduced the confidentiality with court records juveniles enjoyed under the old statutes.[89] Thirty-one state legislatures increased options for sentencing juveniles, and all but three states eliminated confidentiality protections, enabling public access to juvenile proceedings and records.[90] Research indicates that from 1988 to 1992, discretionary judicial transfers of juvenile to adult court increased by sixty-eight percent.[91]

In addition to state legislatures passing "get tough" legislation, Congress passed similar laws to transform the juvenile court into a punitive institution, departing from its rehabilitative roots.[92] In the 1990s, Congress amended the Juvenile Justice and Delinquency Prevention Act of 1974 to create a more punitive system.[93] The reluctance of the courts to implement more due process safeguards combined with increasingly punitive legislation marked a departure from the juvenile court's original rehabilitative mission.

86. RICHARD LAWRENCE & MARIO HESSE, JUVENILE JUSTICE 21–22 (2010).

87. Beale, *supra* note 85; *see also* Ely, *supra* note 84, at 798–99 (detailing the types of laws adopted in that timeframe).

88. Moriearty, *supra* note 71, at 297.

89. *Id.*

90. Courtney P. Fain, Note, *What's in a Name? The Worrisome Interchange of Juvenile "Adjudications" with Criminal "Convictions*,*"* 49 B.C. L. REV. 495, 504 (2008).

91. Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 715.

92. *See* Kelly M. Angell, Note, *The Regressive Movement: When Juvenile Offenders are Treated as Adults, Nobody Wins*, 14 S. CAL. INTERDISC. L.J. 125, 130 (2004).

93. *Id.*

In Ohio, a recent class action lawsuit prompted a thorough investigation of its juvenile detention facilities.[94] The majority of the Ohio Department of Youth Services facilities were "overcrowded, understaffed, and underserved in such vital areas as safety, education, mental health treatment and rehabilitative programming."[95] The independent investigators discovered that:

> Excessive force and the excessive use of isolation, some of it extraordinarily prolonged, is endemic to the ODYS system.
>
> Juvenile Correctional Officers (JCOs) bitterly complained about the excessive use of mandated overtime, a practice at least partly driven by understaffing . . . . JCOs function now more like prison guards (or police officers) than trained partners in a shared rehabilitative effort.[96]

A mere twenty-one percent of juveniles in detention facilities are charged with serious, violent crimes.[97] One chief probation officer succinctly explained, "These are kids we are angry at, not kids we are scared of."[98] Whereas the juvenile court system used to focus on the social welfare of the children, it has now become a "second-class criminal court for young people."[99]

C. THE ABILITY OF A JUVENILE TO CONTEST PRETRIAL DETENTION

In light of the punitive legislation passed, juveniles lack sufficient due process safeguards to contest pretrial detention. Preventative detention was historically used as a tool in adult criminal court to detain defendants, but its use has been extended to juvenile court.[100] Courts traditionally detained juveniles prior to trial only to ensure that the youth attended all future court dates.[101] This Note considers the precedent, purposes, and interests implicated in order to understand the

94. FRED COHEN, FINAL FACT-FINDING REPORT: S.H. V. STICKRATH, i (2008), *available at* http://www.dys.ohio.gov/DNN/LinkClick.aspx?fileticket=lDovnn7P96A%3D&tabid=81&mid=394.

95. *Id.*

96. *Id.* at ii.

97. THE ANNIE E. CASEY FOUND., TWO DECADES OF JDAI: A PROGRESS REPORT FROM DEMONSTRATION PROJECT TO NATIONAL STANDARD 7 (2009).

98. *Id.*

99. Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 68 (1997).

100. *See* Moriearty, *supra* note 71, at 299.

101. *Id.* at 303.

deprivation of due process involved when a juvenile is detained prior to adjudication.

Before the Supreme Court granted certiorari in *Schall v. Martin*, the Second Circuit heard the case.[102] The critical issue centered on juvenile pretrial detention rights.[103] The New York Family Court Act allowed a juvenile offender to be detained if the judge found "that there is a 'serious risk' that the child 'may before the return date commit an act which if committed by an adult would constitute a crime.'"[104] Although the Supreme Court later reversed the decision, the Second Circuit Court of Appeals held that the provision was "unconstitutional as to all juveniles" because the statute is administered in such a way that "the detention period serves as punishment imposed without proof of guilt established according to the requisite constitutional standard."[105] The statute allowed juvenile courts to place presumptively innocent offenders in detention.[106] It enabled judges to detain juveniles without holding a probable cause hearing at their initial appearance.[107]

Regardless of the Second Circuit's ruling, the *Schall* Court authorized preventative detention based on the future dangerousness of the offender.[108] The Court applied the fundamental-fairness due process standard and found that preventative detention statute in question did not violate due process because it served a legitimate regulatory purpose.[109] The *Schall* opinion contended that pretrial detention of juveniles serves a legitimate governmental interest of protecting society and the offender from the "potential consequences of his criminal acts."[110]

102. Schall v. Martin, 467 U.S. 253, 254 (1984).

103. *See id.* at 255–57.

104. *Id.* at 255 (quoting N.Y. JUD. LAW § 320.5(3)(b) (McKinney 1983)).

105. Martin v. Strasburg, 689 F.2d 365, 373, 374 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 467 U.S. 253 (1984).

106. *Id.* at 372–74.

107. *See id.* at 369–70; Corey Steinberg, Note, *"Justice Delayed is Justice Denied": The Abuse of Pre-Arraignment Delay*, 9 N.Y.L. SCH. J. HUM. RTS. 403, 415 (1992) (summarizing the holding in *Strasburg*).

108. *Schall*, 467 U.S. at 278 ("[F]rom a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct."); *see* Meghan Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rational for the Executions it Supports*, 35 AM. J. CRIM. L. 145, 165 (2008).

109. *Schall*, 467 U.S. at 268, 274.

110. *Id.* at 264 (citation omitted).

Additionally, preventative detention helped the government avoid the "serious risk"[111] to public safety the juvenile poses.[112]

The Court based its holding in part on parens patriae.[113] Juveniles, presumably, are constantly under adult supervision and control.[114] The Court equated state custody with being in the custody of a parent.[115] Thus, the Court reasoned that when juveniles commit crimes, it means that their parents failed to properly supervise them.[116] The State is simply temporarily taking over the parenting role.[117] In the eyes of the Court, the State must step in and detain the juvenile to "preserv[e] and promot[e] the welfare of the child."[118]

Ultimately, the Court held that the governmental interest in detaining juveniles outweighs the deprivation of a juvenile's liberty interest.[119] Since *Schall*, states have broadened their statutes to enable courts to detain juveniles on the basis of a multitude of other factors.[120] Notably, during the ten years following the *Schall* decision, detention of juveniles has risen by seventy-two percent.[121]

This Note addresses the implication that a juvenile's liberty interest amounts to something less than a fundamental right. As the juvenile justice system becomes increasingly punitive, courts' analyses of due process challenges have largely remained the same. Given the sharply punitive nature of the system, the Supreme Court should revisit past decisions and reconsider its current legal standard. Part II analyzes the flaws

111. *Id.* at 278.

112. Bernard P. Perlmutter, *"Unchain the Children":* Gault*, Therapeutic Jurisprudence, and Shackling*, 9 BARRY L. REV. 1, 42 (2007).

113. *Schall*, 467 U.S. at 265 ("But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody.").

114. *See id.* ("They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.").

115. *Id.*

116. *Id.*

117. *Id.* at 266 (asserting that the State should take a parental role to protect the juvenile from any further consequences of his "criminal activity").

118. *Id.* at 265 (citation omitted); Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT'L SECURITY J. 85, 131 (2011) (noting that the *Schall* Court held that juveniles have only a "'qualified' liberty interest [because] unlike adults, [they are] 'always in some form of custody'" (quoting *Schall*, 467 U.S. at 265)).

119. *See* Moriearty, *supra* note 71.

120. *Id.* at 303 (including factors such as future dangerousness and adequate supervision and care).

121. *Id.*

in precedent and statutes pertaining to the pretrial detention of juveniles. It demonstrates that juveniles facing pretrial detention lack adequate due process safeguards.

II. AN EXAMINATION OF STATUTES AND PRECEDENT: THE LACK OF FUNDAMENTAL FAIRNESS IN THE JUVENILE JUSTICE SYSTEM

This Part examines *Schall v. Martin* and its deleterious impact on the juvenile justice system. First, this Part assesses the gravity of a juvenile's liberty interest to be free from physical restraint. Second, this Part examines the stigmatization of juveniles who are detained prior to trial. Finally, this Part critiques the current statutory framework pertaining to the preventative detention of juveniles. It argues that the criteria listed in the current statutes lead to arbitrary and capricious judicial decision making and due process violations.

A. REVISITING *SCHALL V. MARTIN*

The Supreme Court decided *Schall* in 1984[122]—before the "get tough on crime" era and the spike in juvenile crime in the 1990s.[123] This Section reexamines the *Schall* decision in light of the changes that resulted from new legislation. In addition, it urges the reconsideration of the use of parens patriae given the legislature's departure from the rehabilitative model for the juvenile court system. The legal and political climates have substantially changed following the spike in juvenile crime in the 1990s.[124] In order to ensure the system offers juveniles adequate due process protection, the reasoning behind *Schall* must be reexamined.

1. Reconsidering the Magnitude of a Juvenile's Liberty Interest

In order to determine whether a fundamental right is at issue in a Due Process challenge, a court must first identify the right in question.[125] The Supreme Court has explained that "[t]he Due Process Clause guarantees more than fair process, and the liberty it protects includes more than the absence of

122. *Schall*, 467 U.S. at 253.
123. Tang et al., *supra* note 83.
124. *Id.*
125. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

physical restraint."[126] One methodology protects those rights which are "objectively, 'deeply rooted in this Nation's history and tradition . . . .'"[127] Fundamental rights are those which are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[128] The Court has consistently held that Due Process includes the right to be free from physical restraint.[129] When a fundamental right is implicated, the Court applies strict scrutiny.[130] Under strict scrutiny, the government must have a compelling interest and its means of regulation must be narrowly tailored to that interest.[131]

The *Schall* Court recognized that juveniles have a "substantial"—rather than "fundamental"—interest to be free from physical restraint.[132] The Court downplayed the interest by relying on the idea that children are always in some form of custody.[133] Children have a diminished liberty interest because the doctrine of parens patriae supports the idea that the State should take a parental role if necessary.[134] The post-*Schall* juvenile justice system's emphasis on the individualized treatment for each juvenile enables judges to exercise a great degree of control over juvenile offenders' lives.[135]

Following the "get tough on crime" legislation in the 1990s, the juvenile justice system has lost sight of the principle of

126. *Id.* at 719 (internal quotation marks omitted).

127. *Id.* at 720–21 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

128. *Glucksberg*, 521 U.S. at 721 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)); *see also* Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (relying on similar language).

129. Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part) (citing Ingraham v. Wright, 430 U.S. 651, 673–74 (1977)).

130. Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved . . . regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (citations omitted)).

131. *Id.*

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

133. *Id.*

134. *Id.*

135. *Id.* at 264; *see also* Michael H. Langley, *The Juvenile Court: The Making of a Delinquent*, 7 LAW & SOC'Y REV. 273, 274 (1972) (pointing out that juvenile courts "establish value priorities" to help guide each juvenile through the system).

parens patriae.[136] Yet continued reliance on the principle of parens patriae gives a great deal of discretion to judges over a multitude of decisions, including the decision to detain a juvenile pending trial.[137] The original justification for giving judges discretion over juvenile detention was to facilitate the rehabilitative process for juvenile offenders.[138] Judges, however, have been using pretrial detention as a teaching tool without regard to the detrimental consequences youth face.[139] Since the system has become more punitive, the justification for judicial discretion is no longer applicable. Regardless of the severity of the offense, the strength of the evidence, or the sentence the juvenile faces after the trial, the judge remains free to detain the offender.[140]

In addition, courts should abandon the parens patriae principle because the detainment of a juvenile in a state institution is not comparable to the control a parent exerts over a child.[141] Parental custody is markedly different from state incarceration.[142] The majority opinion in *In re Gault* emphasizes the distinct differences between state incarceration and parental custody:

> 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 delinquents confined with him for anything from waywardness to rape and homicide.[143]

The differences between parental and state custody highlighted in the *In re Gault* opinion should not be ignored.

136. Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1120 (1991) ("[T]he paternalistic tendencies that juvenile court engenders in its functionaries undermines the norm of litigant process control . . . . All of these divergences from procedural justice norms strongly suggest that, in the eyes of juvenile respondents, the legitimacy of juvenile court is suspect."); Tang et al., *supra* note 83.

137. TANENHAUS, *supra* note 21, at 58, 104.

138. Charles E. Frazier & Donna M. Bishop, *The Pretrial Detention of Juveniles and Its Impact on Case Dispositions*, 76 J. CRIM. L. & CRIMINOLOGY 1133 (1985).

139. DAHLBERG, *supra* note 1, at 8.

140. Frazier & Bishop, *supra* note 138, at 1135.

141. *In re* Gault, 387 U.S. 1, 27 (1967).

142. *Id.*

143. *Id.* (citations omitted).

The secure juvenile detention facilities at issue in *Schall* "subjected [juveniles] to strip-searches," forced them to wear "institutional clothing," and demanded that they abide by an "institutional regimen."[144] Juveniles could also be placed in nonsecure facilities, which were comparable to halfway houses for adults.[145] At the time the Court decided *Schall*, courts placed roughly six times as many juveniles in secure-detention facilities as into nonsecure facilities.[146] The nature of the juvenile detention centers support the proposition that state custody is distinct from parental custody.

Juveniles should enjoy a fundamental right to be free from physical restraint, not merely a "substantial interest."

2. Pretrial Detention is a Punitive Measure that Stigmatizes Presumptively Innocent Juveniles

Pretrial detention has a profound impact upon children. The use of pretrial detention as a punishment tool ostracizes presumptively innocent children. Separating children from their communities and removing them from their schools has harsh and deleterious effects.

The use of pretrial detention as punishment violates the principle of fairness enshrined in the Due Process Clause. *Schall* explained that to avoid violation of the Due Process Clause "a pretrial detainee [can]not be punished."[147] However, the majority regarded the pretrial detention of juveniles as a legitimate regulatory measure that, absent an express intent to punish, did not rise to the level of unconstitutionality.[148] The *Schall* Court did not consider that the removal of a juvenile from his or her family results in the isolation of children from their communities and families.

Justice Thurgood Marshall quoted the experienced family court judge in the case to describe the true nature of juvenile pretrial detention:

> Then again, Juvenile Center, as much as we might try, is not the most pleasant place in the world. If you put them in detention, you are liable to be exposing these youngsters to all sorts of things. They are liable to be exposed to assault, they are liable to be exposed to sexual assaults. You are taking the risk of putting them together with

144. Schall v. Martin, 467 U.S. 253, 287–88 (1984) (quoting United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 695 n.5 (1981)).

145. *Id.* at 271.

146. *Id.* at 287 n.10.

147. *Id.* at 269 (citing Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979)).

148. *Id.*

> a youngster that might be much worse than they, possibly might be, and it might have a bad effect in that respect.[149]

The overuse of pretrial detention of juveniles presents serious legal, sociological, and economic consequences.[150] Pretrial detention should not be viewed as a therapeutic measure.[151] A recent report found that in Massachusetts, at least one in twelve detained youth experience a serious incident, which includes peer-on-peer conflict, threatening or disruptive conduct, or suicidal tendencies.[152] The average stay of each juvenile is a lengthy sixteen days in Massachusetts.[153] In addition to the impact detention has on juveniles, the taxpayer bears the brunt of the economic consequence of pretrial detention. Detaining just one juvenile costs Massachusetts taxpayers a hefty $15,000.[154]

The separation of a juvenile from his or her family prior to trial has detrimental effects on the youth.[155] The complete separation of a juvenile from his or her community, home, school, and life is a substantial burden.[156] One author explains that, "[e]ven juveniles who remain housed with other juveniles can suffer permanent and debilitating harm just by virtue of being incarcerated."[157] Separating juveniles from their families represents another reason why the pretrial detention of juveniles is a punitive decision.[158]

Stigmatizing juveniles is contrary to the concept of parens patriae. The objective of parens patriae can be viewed as twofold.[159] First, the principle helps to legitimize the State's inter-

149. *Id.* at 290 (Marshall, J., dissenting) (citations omitted).

150. *See id.* at 291 ("Such serious injuries to presumptively innocent persons—encompassing the curtailment of their constitutional rights to liberty—can be justified only by a weighty public interest that is substantially advanced by the statute."); Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1337 (1989) ("The overuse and abuse of pretrial detention is a recurrent theme in juvenile justice.").

151. *See Schall*, 467 U.S. at 290 (Marshall, J., dissenting) ("The majority's . . . characterization of preventative detention . . . is difficult to take seriously.").

152. DAHLBERG, *supra* note 1, at 7.

153. *Id.*

154. *Id.*

155. *See* Angell, *supra* note 92, at 142.

156. *Id.*

157. *Id.*

158. *See id.* at 142–43 (discussing the stigmatization of detention).

159. Langley, *supra* note 135, at 281.

vention into the youth's life.[160] Second, the protective, caring role of the judge attempts to minimize the criminal stigmatization of juvenile offenders.[161] Nonetheless, in today's punitive system, incarceration, even if only for a week, has the effect of labeling the juvenile as an offender.[162] It stigmatizes the juvenile and alienates him or her from the community.[163] Attaching stigma to an alleged juvenile offender does not serve the system's rehabilitative purpose or the purported objective of parens patriae.[164]

In addition to the sociological effects, the pretrial detention of juveniles has serious legal consequences. Numerous empirical studies have shown that the pretrial-detainment decision substantially influences the juvenile court judge's ruling later in the case.[165] In fact, the pretrial detention decision constitutes the "second most important determinate" in subsequent sentencing decisions to remove juveniles from their homes.[166] The imprisonment of young offenders leads to higher rates of recidivism.[167]

Juveniles cannot easily get rid of the stigma that even temporary incarceration brings.[168] Taking punitive measures to deal with juvenile crime may have the effect of turning youth into hardened criminals.[169] The stigma may cause the juveniles to believe they are delinquents and to start acting that way.[170] Simply put, the incarceration of juveniles prior to adjudication has serious, lasting effects, and the deleterious effects of deten-

160. *Id.*

161. *Id.*

162. Andrew Walkover, *The Infancy Defense in Juvenile Court*, 31 UCLA L. REV. 503, 527 (1984) ("Concluding that contact with the juvenile court is a key event in the creation of further deviant behavior, labeling theorists urged a broad prohibition against unwarranted and potentially counterproductive juvenile court intervention into the lives of children experiencing deviant episodes.").

163. Langley, *supra* note 135, at 278.

164. *See id.* at 281 (listing the objectives of parens patriae).

165. Feld, *supra* note 150, at 1337–38.

166. *Id.* at 1338.

167. Ethel Reyes Hernandez, *In Re* L.M.*: Following Kansas Down the Path to Juvenile Justice*, 35 T. MARSHALL L. REV. 257, 271–72 (2010); *see also* Angell, *supra* note 92, at 142 ("In addition, when 'ties to the conventional community are broken[, i]nmate groups provide subcultural support for crime,' which further encourages recidivism." (quoting Donna M. Bishop et al., *Juvenile Justice Under Attack: An Analysis of the Causes and Impact of Recent Reforms*, 10 U. FLA. J.L. & PUB. POL'Y 129, 152 (1998))).

168. Angell, *supra* note 92, at 142.

169. Hernandez, *supra* note 167; Angell, *supra* note 92, at 126–27.

170. Angell, *supra* note 92, at 142.

tion call for greater due process safeguards.

3. The Denigration of Parens Patriae in State Legislation

The *Schall* Court based its decision largely on the principle of parens patriae.[171] A 2003 survey revealed that a mere nine states continue to use language from the Standard Juvenile Court Act, which is based on the principle of parens patriae.[172] The purpose of the Standard Juvenile Court Act was that:

> [E]ach child coming within the jurisdiction of the court shall receive . . . the care, guidance, and control that will conduce to his welfare . . . and . . . when he is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which they should have given him.[173]

Only three states and the District of Columbia use language in statutes to explain the sole or primary purpose of the juvenile justice system is to promote the best interests and welfare of the juveniles.[174] For instance, Massachusetts requires that accused juveniles be "treated, not as criminals, but as children in need of aid, encouragement and guidance."[175] West Virginia declares that it intends to implement "all reasonable means and methods that can be established by a humane and enlightened state, solicitous of the welfare of its children, for the prevention of delinquency and for the care and rehabilitation of juvenile delinquents . . . ."[176] Conversely, a number of states now cite "punishment and/or offender accountability" as a goal.[177] The policy differences highlight the fact that juvenile justice system has effectively moved away from the original rehabilitative foundation.[178] In light of the denigration of parens patriae, *Schall* must be reconsidered.

4. The Doctrine of Stare Decisis Does Not Prevent the Reversal of *Schall*

The Supreme Court noted in *Lawrence v. Texas* that "[t]he doctrine of *stare decisis* . . . is not . . . an inexorable command."[179] The *Lawrence* Court cautioned overruling decisions

171. Schall v. Martin, 467 U.S. 253, 265 (1984).
172. Angell, *supra* note 92, at 131.
173. *Id.* at 131 n.48.
174. *Id.* at 131.
175. MASS. ANN. LAWS ch. 119, § 53 (LexisNexis 2009).
176. W. VA. CODE ANN. § 49-5B-2 (LexisNexis 2009).
177. Angell, *supra* note 92, at 131.
178. *Id.*
179. Lawrence v. Texas, 539 U.S. 558, 577 (2003).

which recognized a constitutional liberty interest that resulted in "individual or societal reliance" on such a liberty.[180] *Schall* did not induce the sort of detrimental individual or societal reliance that could justify upholding the decision.[181] On the contrary, reversal would alleviate the hardship on juveniles who are facing the detrimental consequences of pretrial detention. Since *Schall*, the juvenile justice system has become increasingly punitive, straying from its rehabilitative mission.[182] Overruling the decision would offer much-needed protection to juveniles.

The *Lawrence* Court overturned *Bowers v. Hardwick* due to *Bowers*'s erroneous holding that the Due Process Clause did not encompass the liberty interest to engage in consensual, intimate relations.[183] The same reasoning should apply in *Schall*. The *Schall* Court failed to recognize that juveniles have a fundamental constitutional right under the Due Process Clause of the Fourteenth Amendment.[184] The Due Process Clause of the Fourteenth Amendment endeavors to protect, not oppress, individuals.[185] As such, the doctrine of stare decisis cannot justify the deprivation of constitutional rights, and it should not prevent the Court from overruling *Schall* to protect minors in the juvenile justice system.

B. BROAD STATUTES LEAD TO THE OVERUSE OF PRETRIAL DETENTION AND DEGRADE DUE PROCESS PROTECTIONS

As mentioned previously, the shift of the juvenile justice

180. *Id.* (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855–56 (1992)).

181. *See, e.g.*, *id.* at 577–78 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), in part because it did not induce detrimental reliance); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (upholding *Roe v. Wade* because that decision induced "reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation").

182. For a discussion of the increasingly punitive juvenile justice system, see *supra* Part I.B.

183. *See Lawrence*, 539 U.S. at 578 (overruling *Bowers* in part because it "was not correct when it was decided, and it is not correct today").

184. *See* Schall v. Martin, 467 U.S. 253, 265 (1984) (defining the right as substantial rather than fundamental).

185. *See Lawrence*, 539 U.S. at 578–79 ("Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

system from rehabilitation to punitive punishment is reflected in the passage of the "get tough on crime" legislation in the 1990s.[186] The seventy-two percent increase in the pretrial detention of juveniles from 1985 to 1995[187] lends credence to the idea that the juvenile justice system has become more punitive in nature.[188] The change in the political climate is mirrored by the change in the legal system.[189]

Vague statutes grant the judiciary a wealth of discretion over the fate of juveniles facing pretrial detention.[190] For example, the relevant Ohio statute provides a number of ways for the court to legally detain a juvenile, including "an order for placement of the child in detention or shelter care . . . made by the court."[191] The statute itself does not specify the criteria on which a judge should base that determination.[192] The Ohio statute enables courts to detain juveniles prior to trial for reasons that have nothing to do with unlawful conduct. The following language in the statute substantiates this assertion:

> A child taken into custody shall not be confined . . . unless detention or shelter care is required to protect the child from immediate or threatened physical or emotional harm . . . because the child has no parents, guardian, or custodian or other person able to provide supervision and care for the child and return the child to the court when required . . . .[193]

186. Ely, *supra* note 84.

187. Moriearty, *supra* note 71, at 303.

188. *See* Sean E. Smith, *Sealing Up the Problem of California's "One Strike and You're Out" Approach for Serious Juvenile Offenders*, 32 T. JEFFERSON L. REV. 339, 352–53 (2010) (asserting that many states moved away from the rehabilitative model for juvenile courts).

189. *See id.* at 349 (explaining that politicians used "tough on crime" campaigns to win elections while legal scholars focused on how the rehabilitative goals of the juvenile justice system had failed).

190. *See* Feld, *supra* note 150, at 1338 ("Detention constitutes a highly arbitrary and capricious process of short-term confinement with no tenable or objective rationale. Once it occurs, however, it then increases the likelihood of additional post-adjudication sanctions as well. In operation, detention almost randomly imposes punishment on some juveniles for no obvious reason and then punishes them again for having been punished before."); Kim, *supra* note 23, at 857 ("The denial of these and other rights is especially troubling because the legal criteria for certain status offenses are very vague. The lack of clarity in these statutes allows for a great deal of discretion for juvenile court judges.").

191. OHIO REV. CODE ANN. § 2151.31(C)(1) (LexisNexis 2011); *see also* Claudia Worrell, Note, *Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the* Parens Patriae *Doctrine*, 95 YALE L.J. 174, 176 n.13 (1985) (listing various child-detention statutes).

192. *See* OHIO REV. CODE ANN. § 2151.31.

193. *Id.* § 2151.31(C)(1); *see also* Worrell, *supra* note 191.

Not surprisingly, in 2006, forty-five percent of the 5438 juvenile offenders in detainment in Massachusetts had been charged with misdemeanors.[194] Following pretrial detainment, at least eighty percent of the alleged offenders returned home after the disposition of their cases.[195] No public documents substantiated a claim that the detained children had failed to appear for court dates or that they posed a danger to the community.[196]

The reliance on the idea that a juvenile may be dangerous in the future leads to the overuse of pretrial detention.[197] Although the Supreme Court acknowledges the presumption of innocence,[198] it validates the use of the imprecise factor of the probability that the alleged offender will recidivate.[199] With no way to accurately quantify a presumptively innocent juvenile's tendency to commit future crimes, courts make arbitrary determinations.[200]

The statute in question in *Schall* allowed judges to place juveniles in pretrial detention prior to holding a fact-finding hearing to determine whether the juvenile posed a risk to society.[201] In fact, the statute allowed juveniles to remain in detention for five days before holding the probable cause hearing.[202] This five-day waiting period constituted a punitive measure which stigmatizes the alleged offender and amounts to a lack of fundamental fairness.[203]

Broad statutes facilitate the overuse of pretrial detention and denigrate the few due process protections juveniles retain during the pretrial detention phase. Statutes should employ the use of specific criteria to avoid giving the judiciary excessive discretion.

194. DAHLBERG, *supra* note 1, at 6.

195. *Id.*

196. *Id.*

197. Shapiro, *supra* note 108.

198. *In re* Winship, 397 U.S. 358, 363 (1970).

199. Schall v. Martin, 467 U.S. 253, 278 (1984).

200. *Id.* (discussing the concern that courts cannot accurately predict future behavior and that such predictions are arbitrary).

201. *Id.* at 255.

202. Martin v. Strasburg, 689 F.2d 365, 367 (2d Cir. 1982), *rev'd sub nom. Schall*, 467 U.S. at 253.

203. *Id.* at 373–74.

C. THE IMPORTANCE OF DUE PROCESS SAFEGUARDS OUTWEIGHS EFFICIENCY CONCERNS

Opponents of granting juveniles more due process safeguards cite efficiency concerns. Specifically, they argue that additional due process safeguards would result in a backlog of hearings and impede the functionality of the juvenile court.[204] On the contrary, experience demonstrates that allowing juveniles the right to a jury has not seriously halted the juvenile justice system.[205] Similarly, providing juveniles with an additional hearing which allows them a meaningful opportunity to contest pretrial detention will not impede the functioning of the system.[206]

In fact, providing juveniles with additional safeguards, such as jury trials, aids the rehabilitative aims of the juvenile court.[207] Offering a disgruntled minor a chance to have his or her case heard before an objective jury may help rebuke the notion that the system treated the individual unfairly.[208] A jury trial can help instill a sense of responsibility and self-esteem in a juvenile.[209] Correspondingly, a hearing prior to pretrial detention and other procedural safeguards may help the juvenile believe the system operates fairly and with a sense of justice.

Efficiency concerns must not supersede the Due Process Clause of the Fourteenth Amendment. Juveniles deserve fair judicial hearings on the matter of pretrial detention. Without an adequate and meaningful opportunity to dispute pretrial detention, juveniles will be separated from their communities and face undue stigmatization. Their constitutional right to be free from bodily restraint[210] should not be diminished.

204. PRESTON ELROD & R. SCOTT RYDER, JUVENILE JUSTICE: A SOCIAL, HISTORICAL, AND LEGAL PERSPECTIVE 126 (3d ed. 2011).

205. *Id.*

206. *Cf. id.* (arguing that trials would not impede the functioning of the court).

207. *Id.*

208. *Id.*

209. *Id.*

210. Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part) ("Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

III. TOWARD THE RECOGNITION OF A NEW FUNDAMENTAL RIGHT: ENSURING FUNDAMENTAL FAIRNESS FOR JUVENILES

The judiciary has the power to end the lack of procedural safeguards available to juveniles at the pretrial detention stage. The United States Supreme Court must recognize, as the Kansas Supreme Court boldly did, that the nature of the juvenile justice system has changed drastically.[211] New legislation and court decisions have moved the system away from its once rehabilitative foundation.[212] The fundamental alteration of the system demands that courts take a second look at the due process safeguards provided for juveniles.[213] In a system that favors punitive measures to punish the so-called juvenile superpredators,[214] the Court must step in to ensure the fundamental fairness of the system. The Court should grant the same procedural safeguards that adults enjoy to juvenile offenders.

The recognition that physically detaining juveniles implicates a fundamental right will lead to the creation of national guidelines and criteria for detainment. Stricter guidelines will reduce the number of juveniles in pretrial detention. This will alleviate the burden on state resources and foster the development of diversionary programs. Utilizing diversionary programs, rather than pretrial detention, will help the juvenile justice system return to its rehabilitative underpinnings.

A. THE COURT SHOULD RECOGNIZE THAT JUVENILE OFFENDERS DESERVE A PROBABLE CAUSE HEARING AND THE RIGHT TO REASONABLE BAIL

The first step toward fixing the lack of fundamental fairness in the juvenile justice system is recognizing that juveniles, like adults, have a fundamental right to be free from physical restraint, not just a substantial interest.[215] Justice Thurgood Marshall proclaimed, "If the 'liberty' protected by the Due Pro-

211. *See In re* L.M., 186 P.3d 164, 169 (Kan. 2008) ("Sentencing of juveniles has become much more congruent with the adult model.").

212. *See id.* (describing the change in the juvenile justice system in Kansas).

213. *See, e.g.*, *id.* at 168–70 (noting that, due to the change in the system, the court was not bound by old decisions and needed to reconsider due process for juveniles).

214. *See* Amy McCarthy, *Punishing Juveniles: Is Life Without Parole Too Cruel?*, 15 PUB. INT. L. REP. 99, 100 (2010) (explaining that Professor John Dilulio, Jr., of Princeton University coined the term "juvenile super-predators" following the spike in juvenile crime).

215. United States v. Salerno, 481 U.S. 739, 750 (1987).

cess Clause means anything, it means freedom from physical restraint."[216] The essence of the Due Process Clause is ensuring people the right to be free from physical restraint. Therefore, the Court should recognize that a juvenile's liberty interest amounts to a fundamental right, not just a substantial interest.

The distinction between a fundamental right and a substantial interest is crucial. A fundamental right may only be burdened if the government holds a compelling interest.[217] Forcing the government to demonstrate that a very important interest exists coincides with precedent relating to pretrial detention.[218] For adult defendants, a state "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."[219] The State must prove there is probable cause to believe the person committed the crime charged in order to hold him pending further proceedings.[220]

Considering the severity of "prolonged detention," the Court has forbidden pretrial incarceration for adults without a probable cause determination.[221] Likewise, the Court recognized that if the government wishes to set bail for adults "at a figure higher than an amount reasonably calculated to" ensure the defendant attends court dates, then a hearing must be held to ensure the amount does not violate the defendant's Eighth Amendment rights.[222]

Courts are already paving the way toward more procedural safeguards for pretrial detention of juveniles. For example, a court in Louisiana held that providing bail to juveniles prior to trial was necessary to comport with the fundamental fairness standard outlined in *Gault*.[223] It based its decision on the prem-

216. Schall v. Martin, 467 U.S. 253, 288 (1984) (Marshall, J., dissenting).

217. *Id.*

218. *See id.* (discussing the fundamental liberty interest implicated by detention); Gerstein v. Pugh, 420 U.S. 103, 113–14 (1975) (holding that, due to the fundamental liberty interest inherent in the Fourth Amendment, probable cause is required before prolonged detention); Stack v. Boyle, 342 U.S. 1, 4–5 (1951) (connecting the right to liberty with the concept of bail).

219. *Gerstein*, 420 U.S. at 125.

220. *See id.* at 120 (discussing the difference between probable cause and the state's burden of proof).

221. *Id.* at 113–14.

222. *Stack*, 342 U.S. at 4–5.

223. FELD, *supra* note 25, at 425 (citing State in Interest of Banks, 402 So. 2d 690 (La. 1981)).

ise that the presumption of innocence may only be preserved if the court grants juveniles the right to bail.[224] Most state courts, however, conclude that denial of the right to bail to juveniles is permissible because pretrial detention statutes provide an "adequate substitute."[225]

In adult criminal court, many judicial decisions are based on predicative factors, such as potential for future dangerousness.[226] Yet, the Due Process Clause of the Fourteenth Amendment effectively constrains judicial decision making in adult cases.[227] The Court recognizes that adults have a "strong liberty interest" in being free from physical restraint.[228] A criminal defendant's "strong liberty interest" may only be subordinated to the "greater needs of society" if "the government's interest is sufficiently weighty."[229] Compare this to the Court's recognition that a juvenile has a "substantial" interest to be free from physical restraint which may be overcome simply by the government's "legitimate interest."[230]

A comparison of the similarities in the sentencing guidelines for adults and juveniles sheds light on the situation.[231] For example, in Kansas, adults and juveniles face a myriad of similar consequences.[232] Adults and juveniles may be sentenced to probation, community-based programs, house arrest, incarceration in an institution, drug and alcohol assessments, and

224. *Id.*

225. *See id.* (noting the tendency of the juvenile statutory regime to not offer bail for juveniles). Some courts have held that juvenile-detention statutes provide an adequate substitute to bail when they faithfully follow the following principles outlined by Congress:

> (1) the child shall receive such care and guidance, preferably in his own home, as will serve his welfare and the best interests of the District; and (2) the child's family ties shall be conserved and strengthened whenever possible, and, except when his welfare or the safety and protection of the public cannot be adequately safeguarded without his removal, he may not be removed from the custody of his parent; and (3) when the child is removed from his own family, the court shall secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given him by his parents.

Fulwood v. Stone, 394 F.2d 939, 943 (D.C. Cir. 1967) (quoting D.C. Code § 16-2316).

226. Moriearty, *supra* note 71, at 303–04.

227. *Id.*

228. United States v. Salerno, 481 U.S. 739, 750–51 (1987).

229. *Id.*

230. Schall v. Martin, 467 U.S. 253, 264–66 (1984).

231. *See In re* L.M., 186 P.3d 164, 168–70 (Kan. 2008).

232. *Id.*

counseling.[233] Courts may also impose fines, restitution, and community service for juvenile and adult offenders.[234] Juvenile offenders face many of same penalties adults do in the judicial system,[235] yet juveniles lack most of the Due Process safeguards adults receive.

Unlike adults, in most states, juvenile offenders do not have the right to bail.[236] The Court has interpreted the Eighth Amendment to grant the right to reasonable bail for adults.[237] Many argue that juveniles do not need the constitutional right to reasonable bail because statutes authorize judges to release children to the custody of their parents.[238] Nonetheless, this argument fails to address the reality that judges retain the discretion to refuse to release juveniles to their parents and instead place juveniles in pretrial detention.[239] Given the punitive nature of the juvenile system, courts should, at a minimum, grant children the same procedural safeguards that adults
enjoy.

B. THE SUPREME COURT SHOULD IMPLEMENT A CLEAR AND CONVINCING EVIDENCE STANDARD IN JUVENILE PRETRIAL DETENTION HEARINGS

Once the Court recognizes that juvenile offenders have a fundamental right to contest their pretrial detention, it should implement a heightened evidentiary standard. Logic demands, given the fundamental nature of the right at stake, that the Court institute a clear and convincing evidence standard in these proceedings.

The Bail Reform Act ensures a number of procedural safeguards are available to adults:

> The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. The Government must prove its case by clear and convincing evidence. Finally, the judicial officer must include written findings of fact and a written state-

233. *Id.*
234. *Id.*
235. *Id.*
236. Moriearty, *supra* note 71, at 304.
237. SIEGEL & WELSH, *supra* note 82, at 501.
238. *Id.*
239. *See id.*

> ment of reasons for a decision to detain. The Act's review provisions, provide for immediate appellate review of the detention decision.[240]

Under the Bail Reform Act of 1984, prosecutors must establish "'by clear and convincing evidence' that the defendant will fail to return to court, obstruct justice, or intimidate a witness or juror, and that there are no conditions of release which would reasonably ensure the public's safety."[241] The clear and convincing evidence burden of proof should rest on the prosecution when confining juveniles to pretrial detention as well.[242] The heightened burden of proof creates an "adversarial and formal" hearing process,[243] which would protect a juvenile's fundamental right to be free from physical restraint.

C. SUPREME COURT RECOGNITION OF A FUNDAMENTAL RIGHT WILL FACILITATE THE IMPLEMENTATION OF A NATIONAL STANDARD

Historically, the judiciary has granted juveniles a number of Due Process safeguards, as explained in detail in Part I.A of this Note. Unlike state legislatures, the Supreme Court is insulated from political pressure surrounding the spike in juvenile crime. The courts have always been responsible for protecting the rights of minorities because of their unique position in the political system. This insulation from political pressure makes the courts well-suited to start recognizing that juveniles have a fundamental right to be free from physical restraint.

Once the Court recognizes that vague and overly broad pretrial detention statutes violate a juvenile's constitutional right to be free from physical restraint, the legislature will be forced to amend those laws. Legislatures will have to provide clear criteria to guide judicial decision making. The revisions to these statutes should mirror those present in the adult pretrial detention statutes. Additionally, these criteria should reflect the detrimental sociological consequences juveniles face when detained.

The Juvenile Detention Alternatives Initiative (JDAI) offers states a model to reduce the number of juveniles detained, reduce the financial burden on taxpayers, promote public safe-

240. United States v. Salerno, 481 U.S. 739, 751–52 (1987) (citations omitted).

241. Moriearty, *supra* note 71, at 304 (citing 18 U.S.C. § 3142(e) (2006)).

242. *See id.* at 304–05 (discussing the stark difference in prosecutorial burden between the adult and juvenile contexts).

243. *Id.* at 304.

ty, and reduce racial disparities.[244] JDAI encourages the adoption of plans that focus on alternatives to detaining youth.[245] Currently, jurisdictions in twenty-seven states utilize the JDAI model, encompassing seventeen percent of the nation's juvenile population.[246] While the number of states that use JDAI is growing, the Supreme Court's recognition of a fundamental right would provide a uniform national standard and ensure all juveniles have procedural safeguards.

The judiciary has the responsibility to recognize that juveniles have a fundamental, constitutional right to contest pretrial detention. Stricter criteria in statutes coupled with the recognition of a fundamental right will reduce the number of juveniles in detention facilities.

D. STATES SHOULD ENCOURAGE THE USE OF DIVERSIONARY PROGRAMS AS AN ALTERNATIVE TO PRETRIAL DETENTION

In order to return to the rehabilitative roots of the juvenile justice system, states should utilize diversionary programs as an alternative to pretrial detention. First and foremost, judges should strongly consider returning juveniles to the care of a guardian. When that is not practicable, judges should place juveniles in diversionary programs and connect them with community-based resources. As a last resort, judges can consider pretrial detention in an institutional facility.

Diversionary programs frequently exist at the sentencing stage, but community-based resources should be utilized as soon as a juvenile is detained for the first time. A program in San Francisco called Detention Diversion Advocacy Program (DDAP) focuses its energy on connecting repeat offenders with services to reduce recidivism rates.[247] This type of program is referred to as a "wraparound" approach.[248] Wraparound programs develop a "complex, multifaceted intervention strategy" aimed at keeping youth out of institutions and at home.[249]

244. THE ANNIE E. CASEY FOUND., *supra* note 97, at 14–25.

245. *Id.* at 8–10.

246. *Id.* at 10.

247. *Detention Diversion Advocacy Program*, CENTER JUV. & CRIM. JUST., http://www.cjcj.org/detention_diversion_advocacy_program (last visited May 25, 2012).

248. *Wraparound/Case Management*, OFFICE JUV. JUST. & DELINQ. PREVENTION, http://www.ojjdp.gov/mpg/progTypesCaseManagementInt.aspx (last visited May 25, 2012).

249. *Id.*

Wraparound programs offer juveniles a plethora of community-based support networks and individualized services.[250]

The screening process for wraparound programs should occur in place of juvenile pretrial detention. If a judge decides to place a juvenile in a diversionary program, then qualified case managers, in conjunction with the youth's family, will create a case plan. Wraparound programs assess the mental health, physical health, academic, and social needs of youth.[251] Since this screening would begin prior to the adjudication of guilt, these programs would not focus on the guilt or innocence of the juvenile. Instead, the programs would take into account the needs of the youth and work with them accordingly.

Opponents of using these rehabilitative programs may argue that they are too costly. Conversely, there are simple ways to defray the costs associated with these programs. If courts reduced their reliance on pretrial detention, then the costs associated with detaining a juvenile would decrease. Since wraparound programs often address health issues, Medicaid is often used to cover the costs.[252] Programs could also request a contribution from the juvenile's parents, provided they are not indigent. Additionally, policymakers advocate for investing in rehabilitative programs for juveniles to avoid paying to prosecute and incarcerate these individuals in their adult lives.[253]

CONCLUSION

The shift away from the rehabilitative roots and focus on the doctrine of parens patriae fundamentally altered the nature of the juvenile justice system. The increasingly punitive juvenile justice system warrants a second look at due process safeguards afforded to juvenile delinquents. The Supreme Court should recognize that juveniles facing pretrial detention currently do not have a meaningful opportunity to contest it. The Court should recognize that pretrial detention is starkly different from parental custody. Overly broad statutes grant judges vast discretion over the outcome. Juveniles should have a fundamental right, not just a substantial interest, to be free from physical restraint. At a minimum, juveniles should enjoy the

250. *Id.*

251. *See id.*

252. *Id.*

253. *Detention Diversion Advocacy Program*, *supra* note 247 (discussing evaluations of a rehabilitation program and the program's ability to stop juveniles from re-offending as they age).

same Due Process protections present in the adult criminal system. Court recognition of a juvenile's fundamental right to be free from bodily restraint would resolve the lack of fairness in the punitive juvenile justice system.