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Schall v. Martin: Preventive Detention and Dangerousness through the Looking Glass

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Schall v. Martin: Preventive Detention and Dangerousness Through the Looking Glass

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IN Lewis Carroll's classic, *Through the Looking Glass*, the Queen told Alice:

> "[T]here's the King's Messenger. He's in prison now, being punished; and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all."
>
> "Suppose he never commits the crime?" asked Alice.
>
> "That would be all the better, wouldn't it?" the Queen said. . . .
>
> Alice felt there was no denying *that*. "Of course it would be all the better," she said: "but it wouldn't be all the better his being punished."
>
> "You're wrong *there*, at any rate," said the Queen. "Were *you* ever punished?"
>
> "Only for faults," said Alice.
>
> "And you were all the better for it, I know!" the Queen said triumphantly.
>
> "Yes, but then I had done the things I was punished for," said Alice: "that makes all the difference."
>
> "But if you *hadn't* done them," the Queen said, "that would have been better still; better, and better, and better!"[1]

INTRODUCTION

In the words of the old song: "Fairy tales can come true. It could happen to you, if you're young at heart."[2] Tyrone Parson was indeed young at heart when Lewis Carroll's fairy tale came true for him. On November 6, 1976, Parson, then fifteen years old, was arrested and charged with promoting gambling and pos-

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1. L. CARROLL, THROUGH THE LOOKING GLASS, AND WHAT ALICE FOUND THERE 52-53 (1983).

2. C. Leigh & J. Richards, Young at Heart (Sunbeam Music Corp. 1954).

session of a gambling device.[3] Parson allegedly had been trying to entice others into a game of chance known as "three-card monte."[4] Following his arrest, Parson was released pending an initial appearance in family court,[5] the court which, in New York State, has jurisdiction over juveniles charged with all but the most serious crimes.[6]

On December 1, 1976, Parson made his initial appearance in family court on the gambling charges.[7] That initial appearance (which certainly would have satisfied the Queen) consisted of the following colloquy:

> COURT OFFICER: Will you identify yourself.
> * * * * *
> TYRONE PARSON: Tyrone Parson, Age 15.
> * * * * *
> THE COURT: Miss Brown, how many times hasTyrone been known to the Court?
> MISS BROWN: Seven times.
> THE COURT: Remand the respondent.[8]

Parson was remanded to juvenile detention to await a probable cause hearing. After Parson was detained for five days, a probable cause hearing was held on December 6, 1976. At that hearing, the charges against him were dismissed because the offense alleged did not constitute a crime under the New York Penal Law.[9]

For Tyrone Parson, Carroll's fairy tale came true as the result of a New York statute, now section 320.5(3)(b) of the Family Court Act.[10] Section 320.5(3)(b), like its predecessor, provides that the family court may order the detention of an alleged juvenile

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3. United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 698 (S.D.N.Y. 1981), *aff'd*, 689 F.2d 365 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984).

4. Schall v. Martin, 104 S. Ct. 2403, 2426 n.21 (1984) (Marshall, J., dissenting).

5. *Martin*, 513 F. Supp. at 698.

6. The New York Family Court Act governs persons between 7 and 16 years of age alleged to have committed acts which, if committed by an adult, would constitute crimes. N.Y. FAM. CT. ACT § 301.2(1) (McKinney 1983). Children 13 or older accused of murder and those 14 and 15 accused of serious offenses including kidnapping, arson and rape are treated as "juvenile offenders" and may be prosecuted in criminal court as adults. N.Y. PENAL LAW §§ 10.00(18), 30.00(2) (McKinney Supp. 1984).

7. *Martin*, 513 F. Supp. at 698.

8. *Martin*, 104 S. Ct. at 2432.

9. *Martin*, 513 F. Supp. at 699.

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

delinquent, even prior to a finding of probable cause, if the court determines that "there is a serious risk that he may, before the return date commit an act which if committed by an adult would constitute a crime."[11]

In 1984, after more than six years of litigation regarding its constitutionality,[12] section 320.5(3)(b) was upheld by the United States Supreme Court. Writing for himself and five other justices in *Schall v. Martin*, Justice Rehnquist concluded that "preventive detention under the Family Court Act serves a legitimate state objective" and that "the procedural protections afforded pretrial detainees by the New York statute satisfy the requirements of [due process]."[13]

In reaching this judgment, the majority further concluded that "pretrial detention of juveniles properly promotes the interests both of society and the juvenile,"[14] "serves a legitimate regulatory purpose,"[15] and thus does not constitute "punishment."[16] Additionally, and perhaps most significantly, the majority specifically rejected the claim that detention under section 320.5(3)(b) violates due process because "it is virtually impossible to predict future criminal conduct with any degree of accuracy."[17]

In responding to this claim, Justice Rehnquist observed:

> Our cases indicate . . . that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions and we have specifically rejected the contention . . . "that it is impossible to predict future behavior and that the question is so vague as to be meaningless."[18]

In a narrow sense, this Article is about *Schall v. Martin*. The Supreme Court's reasoning on the due process issue will be examined in light of the available empirical data regarding predic-

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11. *Id.* The New York Family Court Act was amended, effective July 1, 1983. 1982 N.Y. LAWS 926. The predecessor statute, N.Y. FAM. CT. ACT § 739(a) (McKinney 1976), provided for the preventive detention of both alleged juvenile delinquents and persons alleged to be in need of supervision. Under the Act, as amended, § 320.5(3)(b) governs only alleged delinquents. Tyrone Parson was detained under § 739(a)(ii). *See Martin*, 513 F. Supp. at 693, 698.

12. *See infra* text accompanying notes 19-58.

13. *Martin*, 104 S. Ct. at 2406.

14. *Id.* at 2412.

15. *Id.*

16. *Id.* at 2414.

17. *Id.* at 2417.

18. *Id.* at 2417 (footnote omitted) (quoting Jurek v. Texas, 428 U.S. 262, 274 (1976)).

tions of future criminal conduct and "dangerousness." In a broader sense, however, this Article is about the use of predictions of dangerousness in the criminal and juvenile justice systems and the implications of *Martin* for the use of such predictions in future efforts to prevent crime. The Court's treatment of predictions of dangerousness in *Martin*, it will be argued, represents a new and significant chapter in the jurisprudence of such predictions, a chapter which portends not only Supreme Court approval of preventive detention for adult criminal defendants, but also a move toward expanding the population of juveniles against whom coercive efforts at crime prevention may be directed.

I. Judicial Analyses of the Predictions Required bythe New York Statute

In order to comprehend the implications of *Martin*, it is helpful first to understand how the issue of predicting future criminal behavior was treated by the various courts which considered the constitutionality of the New York statute.

Prior to its challenge in the federal courts, New York's juvenile preventive detention statute was scrutinized and upheld by the state's highest court in 1976.[19] In *People ex rel. Wayburn v. Schupf*, a state trial court held that the statute violates equal protection. This finding was based on the fact that the statute authorizes pretrial detention of juveniles, yet no comparable authority exists for the pretrial detention of adults charged with crimes.[20] Having so ruled, the court found it "not necessary to consider the relator's due process contention."[21] While the nature of this due process claim was not specified by the court, on appeal it became clear that this claim was based upon the purported inability of legal decision-makers to predict future criminal conduct.[22]

In 1976, the New York Court of Appeals rejected both the trial court's equal protection rationale and the relator's due pro-

19. People *ex rel.* Wayburn v. Schupf, 39 N.Y.2d 682, 350 N.E.2d 906, 385 N.Y.S.2d 518 (1976).

20. People *ex rel.* Wayburn v. Schupf, 80 Misc. 2d 730, 733, 365 N.Y.S.2d 110, 113-14 (Sup. Ct. 1974), *modified*, 47 A.D.2d 79, 365 N.Y.S.2d 235 (2d Dep't 1975), *rev'd*, 39 N.Y.2d 682, 350 N.E.2d 906, 385 N.Y.S.2d 518 (1976).

21. *Id.* at 735, 365 N.Y.S.2d at 115.

22. People *ex rel.* Wayburn v. Schupf, 39 N.Y.2d at 689-90, 350 N.E.2d at 910, 385 N.Y.S.2d at 521-22.

cess claim.[23] In denying the due process contention, the court directly confronted "the assertion . . . that because the degree of probability of repetition of criminal behavior cannot be predicated with scientific precision, there is ineluctably involved an unconstitutional element of vagueness or speculation."[24] This "element," said the court, is "necessarily present" in bail, sentencing and parole decisions and "any other procedure in which discretionary authority for differing criminal dispositions is vested in a court or an administrative body."[25]

Judge Fuchsberg, writing separately, agreed that the statute does not violate equal protection,[26] but found the statute violative of due process because it offers no criteria for determining which juveniles pose a "serious risk" of future crime.[27] This lack of criteria, he suggested, "is no accident" since "as commentators have pointed out and reputable studies have shown, we presently possess no legal or sociological crystal ball with which to make accurate predictions of future crimes."[28] As a result, Judge Fuchsberg concluded, "choices among juveniles as to who is at risk and who is not are thus essentially random and inexplicable."[29]

Nearly two years later, the New York statute was challenged for the first time in the federal courts.[30] In 1981, in *United States ex rel. Martin v. Strasburg*,[31] the United States District Court for the Southern District of New York held that while the statute does not violate equal protection,[32] it is, "both on its face and as applied," violative of due process.[33] The court's latter conclusion was based upon two considerations.First, the court found that because it lacked guidelines, the statute's application relied upon

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23. *Id.*

24. *Id.* at 689-90, 350 N.E.2d at 910, 385 N.Y.S.2d at 522.

25. *Id.* at 690, 350 N.E.2d at 910, 385 N.Y.S.2d at 522.

26. *Id.* at 690, 350 N.E.2d at 911, 385 N.Y.S.2d at 522-23 (Fuchsberg, J., concurring).

27. *Id.* at 691, 350 N.E.2d at 911, 385 N.Y.S.2d at 523.

28. *Id.*

29. *Id.* at 692, 350 N.E.2d at 911, 385 N.Y.S.2d at 523.

30. The case was certified as a class action in an unpublished opinion on April 3, 1978. *See* United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 693-94 (S.D.N.Y. 1981), *aff'd*, 689 F.2d 365 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984).

31. 513 F. Supp. 691 (S.D.N.Y. 1981), *aff'd*, 689 F.2d 365 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984).

32. *Id.* at 706.

33. *Id.* at 717.

"each judge's subjective views and biases."[34] As the court concluded: "The whole process is riddled with subjectivity and caprice and confers upon the judge 'a license for arbitrary procedure.' "[35]

Second, after reviewing the results of a number of empirical studies of the prediction of dangerousness, the court concluded:

> [N]ot only does it appear that one cannot predict dangerousness with an acceptable degree of accuracy, but, to the extent that dangerousness can be predicted at all, there is a substantial problem of overprediction, that is, to identify persons potentially dangerous who, if subsequently released, would engage in no further violent or even criminal behavior.[36]

In view of these considerations, the court found it "clear" that juveniles detained under the New York statute "have their freedom curtailed by judgments that are untrustworthy and uninformed and without the requisite rationality which due process mandates."[37]

In 1982, a three judge panel of the Court of Appeals for the Second Circuit affirmed the district court's decision on the ground that pretrial detention under the New York statute was utilized primarily "to impose punishment before adjudication of the alleged criminal acts," thus violating due process.[38] In reaching this judgment, the court attached significant weight to statistics proffered by the juvenile appellees showing that "the vast majority of juveniles detained under [the New York statute] either have their petitions dismissed before an adjudication . . . or are released after adjudication."[39] In view of these statistics, the court concluded that "[i]n practice . . . the vast majority of the pre-trial detentions involve either mistakes in judgment fostered by [the statute's] procedurally and substantively unlimited terms or the imposition of incarceration solely as punishment for unadjudicated crimes."[40]

In a concurring opinion, Judge Newman was "less certain than the majority that the record supports a conclusion of a significant number of instances where detention was imposed either

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34. *Id.* at 707.
35. *Id.* (quoting Kent v. United States, 383 U.S. 541, 553 (1966)).
36. *Id.* at 709.
37. *Id.* at 712.
38. Martin v. Strasburg, 689 F.2d 365, 366 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984).
39. *Id.* at 369.
40. *Id.* at 373.

mistakenly or for purposes of punishment."[41] Judge Newman concluded that "the statute denies due process . . . not because it has been shown to yield an unacceptable number of mistaken or impermissible results, but simply because it needlessly creates an unacceptable risk of such results."[42]

Pointing to the "present state of knowledge concerning predictions of criminal behavior," Judge Newman asserted that "only the foolhardy would deny that even with carefully circumscribed decision-making, a significant risk of erroneous prediction remains."[43] The New York statute's constitutional flaw, he concluded, was that it "does not include readily available limitations that would reduce the risk of error."[44] Specifically, Judge Newman referred to the failure of the statute to: (1) limit the crimes for which arrest would subject a juvenile to detention; (2) require a finding of probable cause or even any assessment of the probability that the juvenile to be detained committed the offense charged; (3) require an assessment of the juvenile's background; (4) place limits on the type of crime the judge must predict that the juvenile will commit if released; and (5) specify a standard of proof by which the evidence must convince the judge of a "serious risk" of future criminal behavior.[45]

In 1984, the United States Supreme Court reversed the judgment of the court of appeals and held that the New York juvenile preventive detention statute does not violate due process.[46] In addition to concluding that prediction of criminal conduct is legally possible[47] and that juvenile preventive detention does not constitute "punishment,"[48] the Court found that the New York statute serves two legitimate and compelling state interests: "protecting the community from crime"[49] and "protecting a juvenile from the consequences of his criminal activity."[50] These state interests, the Court further concluded, outweigh the liberty interests of

41. *Id.* at 375 (Newman, J., concurring).
42. *Id.*
43. *Id.* at 376.
44. *Id.* at 377.
45. *Id.*
46. Schall v. Martin, 104 S. Ct. 2403, 2419 (1984).
47. *Id.* at 2417.
48. *Id.* at 2414.
49. *Id.* at 2410.
50. *Id.* at 2411.

juveniles,[51] which "must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody."[52]

In dissent, Justice Marshall (joined by Justices Brennan and Stevens) took exception to the majority's treatment of predictions of dangerousness.[53] First, Justice Marshall noted the district court's conclusion that "no diagnostic tools have as yet been devised which enable even the most highly trained criminologists to predict reliably which juveniles will engage in violent crime."[54] Then, citing several reviews of empirical research regarding predictions of future crime and "dangerousness," he concluded that "[t]he evidence supportive of this finding is overwhelming."[55]

Yet, even "[i]f the record did not establish the impossibility . . . of reliably predicting whether a given juvenile would commit a crime before his trial," Justice Marshall indicated that the Court should "nevertheless still strike down § 320.5(3)(b) because of the absence of procedural safeguards" such as those suggested by Judge Newman.[56] Agreeing with Judge Newman that the absence of such safeguards allows for "the exercise of unfettered discretion as to an issue of considerable uncertainty—likelihood of future criminal behavior,"[57] Justice Marshall found that such discretion raises two constitutional issues which render the statute violative of due process: "First, it creates an excessive risk that juveniles will be detained 'erroneously'—*i.e.*, under circumstances in which no public interest would be served by their incarceration. Second, it fosters arbitrariness and inequality in a decision-making process that impinges upon fundamental rights."[58]

II. Dangerousness and Due Process: An Empirical Analysis

In *Martin*, the Supreme Court majority conceded that a juvenile's "interest in freedom from institutional restraint, even for the brief time involved here, is undoubtedly substantial . . . ."[59]

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51. *Id.* at 2410-12.
52. *Id.* at 2410.
53. *Id.* at 2425-26 (Marshall, J., dissenting).
54. *Id.* at 2425 (quoting *Martin*, 513 F. Supp. at 708).
55. *Id.* at 2425.
56. *Id.* at 2430.
57. *Id.* at 2430 (quoting *Martin*, 689 F.2d at 375 (Newman, J., concurring)).
58. *Id.* at 2430-31.
59. *Id.* at 2410.

Where such an interest is to be subordinated to the interest of the state—as is the case under the New York statute—traditional due process analysis requires consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[60]

This Section will address, by review of the empirical data regarding predictions of dangerousness, the two questions raised by the second of these factors: (1) How great is the risk of erroneous deprivation of a juvenile's liberty interest under the New York statute? and (2) To what extent, if any, can this risk be reduced by the imposition of procedural safeguards?

The New York statute clearly requires a prediction of dangerousness, i.e., a finding that "there is a serious risk that [the juvenile] may before the return date commit an act which if committed by an adult would constitute a crime."[61] Predictions of future criminal behavior generally proceed along one of two lines, either clinical or statistical. The differences between the clinical and statistical approaches have been summarized succinctly as follows:

> Clinical prediction is a judgment or opinion based upon information gathered during a personal interview or examination of the subject and formulated through the relatively unstructured process of clinical evaluation. . . . Actuarial prediction, on the other hand, uses statistically generated data to assign probable results based on relatively objective characteristics of the subject.[62]

Empirical research has examined the accuracy of both kinds of predictions.

A. *Empirical Research Regarding Clinical Predictions*

The accuracy of clinical predictions of future criminal conduct has been the subject of a number of empirical studies in the past dozen years or so.

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60. *Id.* at 2431 (Marshall, J., dissenting) (quoting Matthews v. Eldridge, 424 U.S. 319, 335 (1976)).

61. N.Y. JUD. LAW § 320.5(3)(b) (McKinney 1983).

62. Dix, *Clinical Evaluation of the "Dangerousness" of Normal Criminal Defendants*, 66 VA. L. REV. 523, 529 (1980).

In 1972, Kozol and his colleagues at the Massachusetts Center for the Diagnosis and Treatment of Dangerous Persons reported on 592 male offenders examined at the Center over a ten year period.[63] Each offender was examined by at least two psychologists, two psychiatrists and a social worker, and was given a battery of psychological tests.[64] Moreover, in each case, a detailed life history was elicited from "multiple sources," including the offender, his family, friends, neighbors, teachers, employers, and legal and mental health records.[65]

Overall, 435 of these 592 offenders were released from the Center. Of this number 386 were diagnosed as not dangerous while forty-nine were diagnosed as dangerous and released by the courts against staff advice.[66] Dangerousness was defined as the "potential for inflicting serious bodily harm on another."[67]

Over a post-release follow-up period of nearly five years, Kozol found that only seventeen of the forty-nine offenders predicted to be dangerous (34.7 percent) did, in fact, commit a dangerous act.[68] Thus the rate of "false positives"—those erroneously labeled dangerous—was over 65 percent.

In 1973, the State of Maryland issued a report describing the first ten years of operation of its Patuxent Institution,[69] a mental health/corrections facility similar to the Center for the Diagnosis and Treatment of Dangerous Persons in Massachusetts.[70] Included in the report were data regarding some 421 offenders, each of whom was treated at Patuxent for at least three years. In 286 of these cases, release was ordered by the courts despite opposition from psychiatric staff members who felt that these offenders

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63. Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQ. 371 (1972).

64. *Id.* at 383, 386.

65. *Id.* at 383.

66. *Id.* at 389.

67. *Id.* at 372.

68. *Id.* at 390.

69. Patuxent Inst., Md. Dep't of Pub. Safety & Correctional Servs., Maryland's Defective Delinquency Statute: A Progress Report 2-3 (January 9, 1973) (available in the Charles B. Sears Law Library at the State University of New York at Buffalo); *see also* Steadman, *A New Look at Recidivism Among Patuxent Inmates*, 5 BULL. AM. ACAD. PSYCHIATRY & L. 200 (1977); Carney, *The Indeterminate Sentence at Patuxent*, 20 CRIME & DELINQ. 135, 141-42 (1974).

70. J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 44-45 (1981).

were dangerous.[71]

Investigators used FBI records to determine how many of these "dangerous" offenders committed any new offense in the three years following release. Among the 100 offenders who were granted a conditional release, the recidivism rate was 39 percent. The recidivism rate among those 186 offenders released unconditionally was 46 percent.[72] Thus, the rate of "false positives" was 61 percent for the former group and 54 percent for the latter.

More recently, the Patuxent data have been reanalyzed. In this reanalysis, Steadman found that among offenders predicted to be dangerous, but released unconditionally, only 41.3 percent were arrested for *violent* crimes during the three year follow-up.[73] Thus, assuming that the staff predictions were predictions of violent criminal behavior, the "false positive" rate for this group of offenders was close to 59 percent.

Another opportunity to examine the accuracy of clinical predictions of dangerousness arose in New York State as a result of the United States Supreme Court's 1966 decision in *Baxstrom v. Herold*.[74] In *Baxstrom*, the Court held that persons committed to institutions for the criminally insane were denied due process if they were retained in such institutions beyond the length of the sentence that would have been imposed for their offenses. In the wake of *Baxstrom*, nearly 1000 of "the most dangerous mental patients in the state" were transferred from hospitals for the criminally insane to ordinary state mental hospitals.[75]

Steadman and his colleagues monitored the subsequent activities of these "dangerous" offenders, both in the hospitals to which they were transferred and the communities into which they were released.[76] During the four year period following transfer, only 20 percent of these offenders were assaultive in the hospital or community.[77] During the same period, only 3 percent were considered

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71. Patuxent Inst., *supra* note 69, at 3.

72. *Id.*

73. Steadman, *supra* note 69, at 205.

74. 383 U.S. 107 (1966).

75. Steadman, *The Psychiatrist as a Conservative Agent of Social Control*, SOC. PROBS., Fall 1972, at 263, 265.

76. Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970*, 129 AM. J. PSYCHIATRY 304 (1972); *see also* Hunt & Wiley, *Operation Baxstrom After One Year*, 124 AM. J. PSYCHIATRY 974 (1968).

77. Steadman & Keveles, *supra* note 76, at 304.

sufficiently dangerous to be transferred back to hospitals for the criminally insane.[78]

The Steadman group also focused on 121 of the *Baxstrom* inmates who were released into the community. During an average post-release follow-up of two and a half years only nine of these "dangerous" offenders (fewer than 8 percent) were convicted of *any* crime. Furthermore, only one of these convictions was for a crime of violence.[79]

In 1971, another federal court ruling led to the release of a similar group of purportedly dangerous "mentally disabled offenders" in Pennsylvania.[80] A four year post-release follow-up of these 438 offenders, reported by Thornberry and Jacoby, found that only 14 percent were discovered to have committed acts harmful to others.[81]

In yet another study of clinical predictions of dangerousness, Steadman and Cocozza reported on 257 indicted felony defendants found incompetent to stand trial.[82] Each defendant had been examined by psychiatrists who made specific clinical predictions of dangerousness. The psychiatrists predicted that 60 percent of these defendants were dangerous.[83] During a three year follow-up, including time in the hospital and the community, only 14.46 percent of these "dangerous" defendants were rearrested for violent crimes.[84]

In addition to these studies of clinical predictions regarding adult offenders, two studies have examined the accuracy of such predictions made regarding juvenile offenders. One of these studies provides a direct assessment of the accuracy of clinical predictions of dangerousness, while the other offers only an indirect assessment.

The direct assessment study, comparable to those done with adult offender predictions, was reported by Wenk and Emrich.[85]

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78. *Id.*

79. *Id.*

80. Dixon v. Pennsylvania, 325 F. Supp. 966 (M.D. Pa. 1971).

81. T. THORNBERRY & J. JACOBY, THE CRIMINALLY INSANE: A COMMUNITY FOLLOWUP OF MENTALLY ILL OFFENDERS 197 (1979).

82. Steadman & Cocozza, *Psychiatry, Dangerousness and the Repetitively Violent Offender*, 69 J. AM. INST. CRIM. L. & CRIMINOLOGY 226, 227 (1978).

83. *Id.*

84. *See id.* at 229, Table 2.

85. F. WENK & R. EMRICH, ASSAULTIVE YOUTH: AN EXPLORATORY STUDY OF THE AS-

This study examined the accuracy of psychiatric consultants' assessments of the potential for violence of 511 wards of the California Youth Authority. Of the 118 youths in this group clinically evaluated as posing a moderate or high potential for violence, only nine (7.6 percent) recidivated by committing a violent offense during a fifteen month post-release follow-up period.[86] Thus, the "false positive" rate for these clinical predictions was more than 92 percent.

The indirect assessment of clinical predictions of juvenile dangerousness was conducted in New York by Schlesinger.[87] Schlesinger combed the clinical and research literature regarding violent behavior among juveniles. Based on this review, he isolated thirty different factors posited to be predictive of violent behavior among children and adolescents. Schlesinger also surveyed the staff of a juvenile court psychiatric clinic. This survey yielded an additional sixteen factors said by clinicians to be predictive of violent behavior in juveniles.[88]

Schlesinger then examined the court and clinic records of 122 juveniles referred for psychiatric evaluations before disposition of their cases. In this review, he had access to "all information about the juvenile available to the clinic staff and the judges."[89] Using court files and probation department records, Schlesinger was able to follow the activities of these youths for a one year period. During this period, only seven of the 122 juveniles were found to have committed a violent offense. Moreover, among this sample, there was no statistically significant relationship between the commission of violent offenses and *any* of the predictor variables.[90]

While the percentage of "false positives" varies among these studies (and, in some instances, within studies as a function of the behavioral criterion used), it seems fair to conclude that, in general, no more than one out of three clinical predictions of danger-

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SAULTIVE EXPERIENCE AND ASSAULTIVE POTENTIAL OF CALIFORNIA YOUTH AUTHORITY WARDS (Report distributed by National Technical Information Services, U.S. Department of Commerce, April 1972).

86. *Id.* at 125-26.

87. Schlesinger, *The Prediction of Dangerousness in Juveniles: A Replication*, 24 CRIME & DELINQ. 40 (1978).

88. *Id.* at 41-43.

89. *Id.* at 44.

90. *Id.* at 46.

ousness proves to be accurate.[91] In other words, for every three individuals predicted to commit crimes of violence, only one is likely to fulfill that prophesy. From the Wenk and Emrich results, it appears that clinical predictions regarding the dangerousness of *juveniles* are likely to be even less accurate.[92]

None of these studies of clinical prediction is free of methodological flaws.[93] Indeed, one major criticism common to all of them is that they may have underestimated the extent to which those predicted to be dangerous actually engage in subsequent criminally dangerous behavior.[94] Obviously, not all such behavior can be detected in any population.

Yet after years of carefully examining these studies in light of other criminological research, Monahan has concluded that these studies "provide *reasonably accurate estimates* of the validity of clinical predictions of violence."[95] Monahan's conclusion in this regard is based in large measure upon other criminological data which "support the argument that the one-third of the individuals who are predicted as violent and are arrested for a violent crime are in fact the same people who commit most of the unreported and unsolved violent acts."[96] As Monahan puts it: "It is not that the false positives are really true positives in disguise but rather that the true positives are 'truer' (i.e., more violent) than we imagined."[97]

B. *Empirical Research Regarding Statistical Predictions*

Since at least 1923, researchers have sought to develop accurate statistical techniques for the prediction of criminal behavior.[98] One line of this research has dealt with the prediction of

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91. This is the conclusion reached in J. MONAHAN, *supra* note 70, at 47. Other commentators have suggested that clinical predictions of dangerousness are inaccurate 95 percent of the time. *See, e.g.*, B. ENNIS & R. EMERY, THE RIGHTS OF MENTAL PATIENTS 20 (1978). In view of the empirical research, such an estimate seems clearly exaggerated.

92. *See supra* notes 85-86 and accompanying text.

93. The methodological criticisms of several of these studies have been reviewed in J. MONAHAN, *supra* note 70, at 50-56.

94. Monahan, *The Prediction of Violent Behavior: Developments in Psychology and Law*, in PSYCHOLOGY AND THE LAW 147 (C. Scheirer & B. Hammonds eds. 1983).

95. *Id.* at 159 (emphasis in original).

96. *Id.*

97. *Id.*

98. *See, e.g.*, Hart, *Predicting Parole Success*, 14 J. AM. INST. CRIM. L. & CRIMINOLOGY 405 (1923).

criminal behavior in samples of non-offenders (i.e., individuals who have yet to be identified as criminals or delinquents). Another line of studies has examined the prediction of recidivism among already convicted criminals. Finally, a third line of research has focused upon prediction of *violent* criminal behavior.

1. *Prediction of Criminal Behavior Among Non-Offenders.* Perhaps the best known studies of the first type are those that were conducted by, or based upon the work of, the late Sheldon and Eleanor Glueck of Harvard Law School.[99] Holding constant factors such as age, intelligence, and neighborhood of residence, the Gluecks found statistically significant relationships between juvenile delinquency and a number of other variables: paternal discipline, maternal supervision, parental affection and family cohesiveness.[100] The Gluecks then used these variables to develop an actuarial table for predicting the probability that a given child would become a juvenile delinquent.[101]

Two sorts of efforts were made to validate (*i.e.*, test the accuracy of) the Gluecks' predictive table. The first type of validation studies were retrospective, applying the Glueck table to youngsters already identified as delinquent.[102] According to Sheldon Glueck, "The typical outcome of these checkups is that in some nine-tenths of the cases (very occasionally a somewhat lower proportion) the Glueck table would have correctly identified the boys at a very early age as potential persistent delinquents . . . ."[103]

The second type of validation studies of the Glueck table were *prospective*—i.e., they involved attempts to *predict* which youngsters would become delinquent. Since that was the stated purpose for the Glueck table,[104] these studies come closest to true validations of the table. Sheldon Glueck described two such studies.

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99. The Gluecks studied juvenile delinquents and young adult criminals for some 40 years. A chronological bibliography of their 258 publications is provided in E. GLUECK & S. GLUECK, VENTURES IN CRIMINOLOGY 347-64 (1964). Among their publications dealing with prediction are: S. GLUECK & E. GLUECK, PREDICTING DELINQUENCY AND CRIME (1960) [hereinafter cited as PREDICTING DELINQUENCY]; S. GLUECK & E. GLUECK, UNRAVELING JUVENILE DELINQUENCY (1950); and S. GLUECK & E. GLUECK, OF DELINQUENCY AND CRIME (1974) [hereinafter cited as DELIQUENCY & CRIME].

100. PREDICTING DELINQUENCY, *supra* note 99, at 23-31.

101. *Id.* at 118-26.

102. *Id.* at 127-32.

103. DELINQUENCY & CRIME, *supra* note 99, at 311.

104. PREDICTING DELINQUENCY, *supra* note 99, at 123.

The first was a seven year longitudinal study of New York City boys entering the first grade. Of 235 boys involved, 186 were predicted at school entrance to be "non-delinquents" while thirty-seven were predicted to become "delinquents." At the end of seven years, 176 (or 94.6 percent) of those predicted to be "non-delinquents" were "still . . . in fact non-delinquent—a remarkable confirmation . . .."[105] On the other hand, at the end of this same period, "[o]f thirty-seven boys predicted as *delinquents*, thirteen are already adjudicated delinquents and four more are 'unofficial' offenders, making a total of 46 percent—again a remarkable confirmation of a forecast."[106]

The other prospective validation study reported by Glueck involved 179 District of Columbia school children with various classroom problems. According to the Glueck table, 158 of these children were likely to become delinquent. During a four year follow-up period, it was found that "58 of these children had already been to court or police for delinquent acts."[107]

While Glueck never directly acknowledged that these studies found "false positive" rates of 54 percent and 63.3 percent , respectively, he did observe:

> The "false positives" aspect of the problem is not a scientific one but an issue in social ethics and social policy. In this connection, it is very important to point out that mistakes in *not* spotting future *delinquents* can be very costly to society, while mistakes in assuming a few persons to be potential delinquents . . . who nevertheless ultimately turn out *not* to be delinquents can do little harm and might even do considerable good.[108]

In a more recent British study, West and Farrington followed a group of 411 eight and nine year old boys until each had reached age twenty-five.[109] Before the boys turned ten years old, the researchers rated them on "as many factors as possible" including the extent to which they were "troublesome" in school.[110]

Looking at the boys' juvenile delinquency records at age sev-

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105. DELINQUENCY & CRIME, *supra* note 99, at 312.

106. *Id.* at 312-13.

107. *Id.* at 313. These 58 children were 36.7 percent of the group predicted likely to become deliquent.

108. *Id.* at 316 (emphasis in original).

109. *Early Identification and Classification of Juvenile Delinquents: Hearing Before the Subcommittee on Juvenile Justice of the Senate Committee on the Constitution*, 97th Cong., 1st Sess. 35-37 (1981) (prepared statement of Dr. David P. Farrington).

110. *Id.* at 41.

enteen the researchers found that "troublesomeness" in school as rated by teachers and peers before age ten proved to be the best single predictor of delinquency. Based on this variable alone, the researchers found that they could have made accurate predictions of delinquency in 44.6 percent of the cases. When "troublesomeness" was combined with five other factors (family socio-economic status, family size, parental criminal convictions, parental behavior toward the boy, and intelligence[111]), the researchers found that they could have made accurate predictions of delinquency in about 50 percent of the cases.[112] As they concluded, "the limit of predictability with these data was reached in identifying a vulnerable group of whom half became delinquents.[113]

The West and Farrington study also examined the ability of a number of variables to predict future violent behavior in their cohort. They found that teachers' ratings of aggressiveness made before the boys turned ten years old were the best predictors of violent behavior. Of the quarter of the cohort rated most aggressive, "14 percent became violent delinquents."[114] As the researchers readily admitted, "[t]his prediction had a very high false positive rate of 86 percent."[115] When West and Farrington relied upon self-reports of violence rather than convictions for violent offenses, the "false positive" rate fell to 60 percent (i.e., 40 percent of those in the top quarter in terms of aggressiveness ratings reported "involvement in fights, starting fights, carrying weapons, and using weapons in fights").[116]

In 1983, Loeber and Dishion reported the results of an extensive review of the empirical literature regarding predictions of delinquency based upon objective predictors.[117] They included in their review every study they could locate which contained data making it possible to specify both the type and percentage of predictive errors.[118] The studies they reviewed are pertinent here because their data provide a means of specifying the percentage of

111. *Id.*
112. *Id.* at 41-42.
113. *Id.* at 42.
114. *Id.* at 46.
115. *Id.* at 46-47.
116. *Id.* at 47.
117. Loeber & Dishion, *Early Predictors of Male Delinquency: A Review*, 94 PSYCHOLOGICAL BULL. 68 (1983).
118. *Id.* at 73.

"false positives" (i.e., those predicted to become delinquents who did not) yielded by a variety of predictors. The results of these studies are aggregated in Table One below.

TABLE ONE

Predictor(s) Utilized	No. of Studies	No. Predicted to become Delinquent	No. Who did not become Delinquent	Percent False Positives[119]
Behavior[120]	24	4355	2824	64.8
Educational Factors[121]	6	2938	1754	59.7
Family Size[122]	2	1444	1169	80.9
Separation from Parents/Parental Conflict[123]	5	762	575	75.5
Delinquency Among Family Members[124]	6	1153	793	68.8
Parenting[125]	2	259	180	69.5
Prior Delinquency Record[126]	5	586	306	52.1
Parents Socio-Record[127]	5	6197	3966	59.7
Composite of Predictors[128]	7	1214	804	66.2
TOTAL		18,908	12,104	64.0

As this Table illustrates, regardless of which predictors are utilized, attempts to predict delinquency among non-offenders have resulted in overall "false positive" rates well over 50 percent.

2. *Prediction of Recidivism Among Convicted Offenders.* Most of the studies examining statistical predictions of recidivism among

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119. The percentage of "false positives" in this table for each predictive category (i.e., behavior, educational factors, family size, etc.) is derived from the following formula:

$$\text{Percent False Positive} = \frac{\text{(Number predicted to become delinquent who did not become delinquent) x (100)}}{\text{(Number predicted to become delinquent)}}$$

This is the standard formula used by researchers and reviewers to calculate the percentage of "false positives," i.e., the percentage of those individuals predicted to commit crimes who do not, in fact, commit crimes. *See* C. BARTOL, PSYCHOLOGY AND AMERICAN LAW 104 (1983). This is also the formula relied upon at other points in this Article.

already convicted offenders have been attempts to validate actuarial devices developed to predict parole success or failure.[129] Overall, these studies have demonstrated that "a few familiar items—such as the offender's criminal history, age, employment and drug history—could be combined to identify subgroups of offenders having a higher probability of returning to crime than convicted offenders generally."[130] Yet they have also "produced an embarassingly large number of false positives."[131] Indeed, as one recent review has concluded, "For the past 50 years, high false positive rates have consistently bedevilled every effort to predict recidivism. False positive rates of 50 to 60 percent have been the rule."[132]

The "false positive" problem in predictions of recidivism is well illustrated by validation studies of the "salient factor score," the instrument used by the United States Parole Commission to predict parole success.[133] This device relies upon an additive com-

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For each predictive category in the table, this formula was applied to the raw data (i.e., the *number* of positive predictions and the *number* of "false positives") provided by Loeber and Dishion in their review. It should be noted, however, that in their own analyses, Loeber and Dishion employed a different and potentially misleading formula:

$$\text{Percent False Positive} = \frac{\text{(Number predicted to become delinquent who did not become delinquent) x (100)}}{\text{(Number predicted to become delinquent) + (number predicted not to become delinquent)}}$$

Loeber & Dishion, *supra* note 117, at 70. This latter measure will produce a lower false positive rate in all cases where the number predicted *not* to become delinquent is greater than zero.

120. Loeber & Dishion, *supra* note 117, at 74-76.

121. *Id.* at 83.

122. *Id.* at 85.

123. *Id.* at 87.

124. *Id.* at 88.

125. *Id.* at 90.

126. *Id.* at 80.

127. *Id.* at 84.

128. *Id.* at 92.

129. *See* von Hirsch & Gottfredson, *Selective Incapacitation: Some Queries About Research Design and Equity*, 12 N.Y.U. REV. L. & SOC. CHANGE 11, 13-14 (1983-1984).

130. *Id.* at 14.

131. *Id.* at 15.

132. Blackmore & Welsh, *Selective Incapacitation: Sentencing According to Risk*, 29 CRIME & DELINQ. 504, 516 (1983).

133. Hoffman & Beck, *Revalidating the Salient Factor Score: A Research Note*, 8 J. CRIM. JUST. 185, 186 (1980).

bination of weighted scores on seven factors: number of prior convictions, number of prior incarcerations, age at first commitment, current commitment offense, history of parole violation, history of drug dependence, and record of employment. Total scores range from 11 to 0 and are used to classify parole applications into four risk groups: very good risk (11-9), good risk (8-6), fair risk (5-4) and poor risk (3-0).[134]

Researchers with the Parole Commission have reported three separate validation studies of the "salient factor score," conducted in 1970, 1971 and 1976.[135] The 1976 study utilized a post-release follow-up of one year and defined a "favorable outcome" as "no new arrest and no parole violation warrant issued."[136] A "similar follow-up period/outcome criterion" was utilized in both the 1970 and 1971 studies.[137] The results of these studies are summarized in Table Two below.

TABLE TWO[138]

Percent of Parolees With Favorable Outcomes

	Poor Risk (0-3)	Fair Risk (4-5)	Good Risk (6-8)	Very Good Risk (9-11)
1970	51%	64%	76%	91%
1971	51%	60%	78%	91%
1976	56%	63%	73%	92%

As can be seen from this Table, the percentage of "favorable outcomes" among parolees predicted to be "poor risks" ranged from 51 percent in 1970 and 1971 to 56 percent in 1976. In other words, application of the "salient factor score" predictive device results in "false positive" rates consistently higher than 50 percent.

In their review of the delinquency literature described above, Loeber and Dishion also reviewed a number of studies which assessed the accuracy of predictions of recidivism among juvenile

134. *Id.* at 187.
135. *Id.* at 186-87.
136. *Id.* at 186.
137. *Id.* at 186-87.
138. Adapted from Hoffman & Beck, *supra* note 133, at 186.

delinquents.[139] The results of the studies they reviewed are aggregated in Table Three below.

TABLE THREE

Predictor(s) Utilized	No. of Studies	No. Predicted to Recidivate	No. Who Did not Recidivate	Percent False Positives[140]
Behavior[141]	6	713	274	38.4
Parent Socio-Economic Status[142]	2	2085	808	38.7
Family Size[143]	1	47	32	68.1
Delinquency Among Family Members[144]	2	130	43	33.1
Composite of Predictors[145]	3	1263	870	68.9
TOTAL		4238	2027	47.8

As can be seen from this Table, predictions of recidivism among juvenile delinquents have proven somewhat more accurate than those of adult offenders. Yet, overall, the "false positive" rate yielded by these predictions has been close to 50 percent.

3. *Prediction of Violent Criminal Behavior.* In addition to studies emphasizing recidivism in general, there is also a body of empirical research evaluating statistical predictions of violent behavior. Three such studies, carried out by California corrections authorities in the 1960s, were reported by Wenk and his colleagues in 1972.[146]In the first of these studies, parole officials developed a "violence prediction scale."[147] This statistically derived scale included as predictor variables: the number of previous offenses, length of incarceration, drug abuse, and current commitment offense. Using these factors, the officials isolated a group of parolees three times more likely than other offenders to commit

139. *See* Loeber & Dishion, *supra* note 117.
140. *See supra* note 119.
141. *See* Loeber & Dishion, *supra* note 117, at 77.
142. *Id.* at 84.
143. *Id.* at 85.
144. *Id.* at 88-89.
145. *See id.* at 93.
146. *See* Wenk, Robinson & Smith, *Can Violence Be Predicted?*, 18 CRIME & DELINQ. 393 (1972).
147. *Id.* at 395.

acts of violence. Still, 86 percent of the offenders in this high risk group were not found to have committed an act of violence while on parole.[148]

In the second California study, researchers were given access to offender histories and psychiatric reports on 7,712 parolees. Based on these data, they assigned each of the parolees to one of six distinct categories of risk for violent behavior. 21 percent were assigned to the high risk, "potentially aggressive" category.[149] In a one year follow-up of parolees in this group, the researchers found that only five of the 1,630 parolees so classified were convicted of crimes of violence.[150]

The final study reported by Wenk dealt with 4,146 wards of the California Youth Authority, who were monitored for fifteen months following their release from juvenile institutions. On the basis of data gathered regarding this sample, the researchers concluded that predictions of violent recidivism based solely upon a youth's history of actual violence would result in a "false positive" rate of 95 percent.[151] Moreover, even after analyzing data on 100 variables and utilizing sophisticated multivariate statistical techniques, the researchers were never able to attain better than an 88 percent rate of "false positives."[152]

More recently, a Michigan study has also examined the accuracy of statistical predictions of violent recidivism.[153] The Michigan Corrections Department collected data on 350 variables for 2,200 male parolees. Statistical analyses of data derived from half of this sample were used to create an actuarial table for predicting violent crime during parole. This table utilized the following predictor variables: nature of the parolee's commitment offense, juvenile felony record, age at first arrest, record of institutional misconduct, and marriage.[154]

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148. *Id.*

149. *Id.* at 395-96.

150. *Id.* at 396.

151. *Id.* at 399-400.

152. *Id.* at 397-401. For a more detailed analysis of the variables considered in the study, see Wenk & Emrich, *Assaultive Youth: An Exploratory Study of the Assaultive Experience and Assaultive Potential of California Youth Authority Wards*, 9 J. RESEARCH CRIME & DELINQ. 171 (1972).

153. Program Bureau, Mich. Dep't. of Corrections, The Parole Risk Study (June 29, 1978) (available in the Charles Sears Law Library at the State University of New York at Buffalo).

154. *Id.* at 11.

Using this table, corrections officials classified the other half of the parolee sample according to risk of assaultive behavior: very high, high, middle, low or very low risk. Among parolees designated as being at "very high risk" (4.7 percent of the sample), the rate of violent recidivism during a fourteen month follow-up was only 40 percent. Moreover, the violent recidivism rates for the "high risk" and "middle risk" parolees were only 20.7 percent and 11.8 percent respectively.[155]

Another major study of statistical prediction was reported in 1971 by a group of researchers at Harvard Law School.[156] The Harvard study examined the predictive mechanism of the District of Columbia's "preventive detention" law,[157] which provides that "any defendant charged with a dangerous crime, with obstructing justice, or with a violent crime if certain conditions are met may be held for a pre-trial detention hearing, at which a judicial officer is to determine whether any form of release can satisfactorily protect the community."[158]

If the judicial officer does not so conclude, the defendant may be detained for up to sixty days.[159]

In making this determination, judicial officers are directed by the law to

> take into account such matters as the nature and circumstances of the offense charged, the weight of the evidence against such person, his family ties, employment, financial resources, character and mental conditions, past conduct, length of residence in the community, record of convictions, and any record of appearances at court proceedings, flight to avoid prosecution, or failure to appear at court proceedings.[160]

The law does not specify any relative importance to be attributed to these criteria.

The Harvard researchers used these criteria (except for weight of the evidence) to develop two predictive scales, which were then applied in a six month follow-up of a sample of 657 adult criminal defendants in Massachusetts, all of whom were

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155. *Id.*

156. *See* Note, *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. REV. 300 (1971).

157. *See* D.C. CODE ANN. § 23-1322(a)(1), (b)-(e) (1981).

158. Note, *supra* note 156, at 303-04 (footnotes omitted) (citing D.C. CODE ANN. § 23-1322(a)(1), (b)-(e) (1981)).

159. *See* D.C. CODE ANN. § 23-1322(d)(2)(A) (1981).

160. *Id.* § 23-1321(b).

charged with crimes defined in the District of Columbia statute as "dangerous" but were freed pending trial.[161]

One scale (DS-1) assigned weights to each of the District of Columbia criteria based on a subjective assessment of their importance. The other scale (DS-2) was derived by statistically readjusting each criterion's weight on the basis of its actual correlation to recidivism in the Massachusetts sample.[162] Application of either scale involved selecting a cut-off score, above which a defendant would be detained as dangerous.[163]

On neither scale was there a cut-off point at which more recidivists than non-recidivists would be detained.[164] In order to detain all recidivists, cut-off scores would have to have been set so low as to produce "false positive" rates of 88.5 percent (DS-1) and 84.6 percent (DS-2).[165] Even the most promising cut-off scores[166] would have yielded "false positive" rates of 74.3 percent (DS-1) and 58.7 percent (DS-2).[167] All of these studies of statistical prediction are, of course, subject to many of the same methodological criticisms that have been leveled against the clinical prediction studies reviewed earlier.[168] Yet, despite such criticisms, it seems fair to conclude that these studies provide a reasonably accurate assessment of the state of the art. To summarize that assessment, it appears that statistical predictions of criminal behavior in general, and violent criminal behavior in particular, are much more likely to be wrong than right.

C. *Empirical Analysis of the Due Process Questions*

These studies of clinical and statistical prediction provide an empirical basis for responding to the two questions posed at the outset in this Section: (1) How great is the risk of erroneous deprivation of a juvenile's liberty interests under the New York statute?

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161. *See* Note, *supra* note 156, at 309-10.

162. *Id.* at 310 & 315 n.86. *See also generally* Q. MCNEMAR, PSYCHOLOGICAL STATISTICS 188-213 (4th ed. 1969) (the mathematical technique of "statistical readjustment" is herein described as "multiple correlation").

163. *Id.* at 314-16.

164. *Id.* at 316.

165. *See id.* at 314, 316. *See also supra* note 119.

166. A "promising" cut-off score is one with a relatively low false positive (non-recidivist-to-recidivist) rate. *Id.* at 315.

167. *See id.* at 314-16. *See also supra* note 119.

168. *See supra* notes 93-94 and accompanying text.

(2) To what extent, if any, might this risk be reduced by procedural safeguards?

1. *The Magnitude of the Risk.* The first of these two questions may be rephrased as follows: What is the likely "false positive" rate for predictions made by family court judges under the New York statute? Any answer to this question requires consideration of a number of preliminary questions: (1) What is being predicted? (2) About whom are these predictions being made? (3) On what basis are these predictions made?

The New York statute requires the judge to determine whether there is a "serious risk" that the juvenile will commit a criminal act before the next court appearance.[169] Thus, all the judge is required to predict is that the juvenile will commit *any* act, however minor, for which the state has established a criminal penalty. The statute speaks of "serious risk," but that term applies to the likelihood rather than the nature of the predicted offense.

The New York Family Court Act governs individuals between the ages of seven and sixteen years alleged to have committed acts which, if committed by adults, would constitute crimes.[170] The New York Penal Law, however, exempts from family court jurisdiction children thirteen or older accused of murder, and children fourteen or older accused of kidnapping, arson, rape and several other of the most serious crimes. These youngsters are designated "juvenile offenders" and may be tried in adult criminal courts.[171] Ironically, juveniles in this group of alleged serious offenders are *not* subject to preventive detention under the New York statute or any other provision of New York law.[172] As a result, predictions made by judges under the New York juvenile preventive detention statute generally are limited to juveniles charged with less serious offenses.

The basis for the judge's prediction is not specified by the New York statute. As the dissenting justices pointed out in *Martin*, "[t]he information on which the judge makes his determination is

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

170. *See* N.Y. FAM. CT. ACT § 301.2(1) (McKinney 1983).

171. *See* N.Y. PENAL LAW § 10.00(18), 30.00(2) (McKinney Supp. 1984).

172. The New York Criminal Procedure laws makes no provision for refusal to order bail or release on recognizance based on predictions of future criminal conduct. *See* N.Y. CRIM. PROC. LAW § 510.30(2) (McKinney 1984).

very limited."[173] The decision is made during a brief hearing resembling an arraignment in an adult case.[174] If a juvenile has been taken into custody upon arrest, this hearing must be held the next court day or within seventy-two hours, whichever comes first.[175] Thus, it is no surprise that only a limited amount of data regarding the juvenile can be gathered. Before the judge are the petition alleging delinquency, one or more affidavits specifying the juvenile's involvement in the offense alleged, and a written report prepared by a probation officer based upon a brief interview with the juvenile, the arresting officer and, in some cases, the juvenile's parent or guardian.[176] Rarely do either the probation officer or the complainant appear at the hearing.[177]

Typically, counsel is appointed at the time the case is called, "only moments before convincing reasons must be presented to the court for not ordering pretrial detention."[178] Generally the judge does not interview the juvenile or inquire into the truth of the allegations.[179] The average hearing lasts from five to fifteen minutes and the judge's decision regarding detention is rendered immediately.[180]

As the district court observed in *Martin*, the judge's prediction "bears a superficial resemblance" to both clinical and statistical predictions but "lacks the refinements of each."[181] In the words of the court:

> The judge's assessment could not properly be called a clinical prediction, unless it could be supposed that the judge's experience on the bench substitutes for a clinician's training; his confrontation with the accused juvenile substitutes for a diagnostic interview and examination; and the juvenile's arrest record substitutes for a patient's history. Nor is the evaluation by the judge in any way comparable to a rigorous statistical prediction. In comparison to the large number of variables used in the studies of statistical prediction, apparently very little data is available to the judge.[182]

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173. Schall v. Martin, 104 S. Ct. 2403, 2420 (1984) (Marshall, J., dissenting).
174. *Id.*
175. *See* N.Y. FAM. CT. ACT § 307.3(4) (McKinney 1983).
176. *Martin*, 104 S. Ct. at 2420-21.
177. *Id.* at 2421.
178. United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 708 (S.D.N.Y. 1981), *aff'd*, 689 F.2d 365 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984).
179. *Martin*, 104 S. Ct. at 2421.
180. *Id.*
181. *Martin*, 513 F. Supp. at 712.
182. *Id.*

In sum, the New York statute provides for preventive detention of juveniles charged with less serious crimes based upon largely intuitive predictions of any sort of criminal behavior. With that conclusion in mind, the empirical research reviewed earlier may be used to assess the likely risk of error (i.e., the "false positive" rate) in detentions ordered under the statute.

The studies of *clinical* prediction reviewed earlier establish "false positive" rates ranging from 54 to 92 percent, with an average rate of 76 percent.[183] Studies of *statistical* prediction have established remarkably similar "false positive" rates. Statistical predictions of criminal behavior have been found to result in "false positive" rates ranging from about 50 percent to over 99 percent.[184]

Many of the predictions reviewed in both sets of studies, however, were predictions of *violent* criminal behavior. Such behavior is statistically rare, certainly much rarer—and thus more difficult to predict—than crime in general.[185] In this sense, the results of these studies may not generalize to the predictions made by judges under the New York statute. Since New York judges are predicting criminal behavior of any sort, their predictions might be thought to prove more accurate than many of those examined in the empirical research.

On the other hand, there is a good reason to believe that the predictions assessed by this research are *more* rather than less accurate than those made by the judges. First, in contrast to the largely intuitive and generally poorly informed predictions made by the judges, most of the predictions studied were either clinical predictions made by mental health professionals using standard and generally accepted assessment techniques or statistical predictions based upon sophisticated multivariate analyses. Second, unlike many, if not most, of the predictions made by the judges, the bulk of the studied predictions were made regarding offenders with already well-established histories of criminal behavior and/or violent criminal behavior. This difference is particularly important, since by far the single most potent predictor of future crime

183. *See supra* notes 63-84 and accompanying text.

184. *See supra* notes 98-128 and accompanying text.

185. von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717, 733, 735-36 (1972).

is past crime, particularly violent crime.[186]

These considerations, coupled with the overall manner in which such judicial predictions are made, suggest that the "false positive" rate for predictions of criminal conduct made under the New York statute is certainly no less than 50 percent and probably a great deal higher. Thus to answer the question originally posed: *The risk of erroneous deprivation of a juvenile's liberty interests under the statute is considerable, to say the least.*

2. *The Likely Impact of Procedural Safeguards.* In his concurring opinion in *Martin*, Judge Newman suggested that the constitutional flaw in the New York statute is that it "does not include readily available limitations which would reduce the risk of error."[187] Judge Newman specified five such limitations, the probable efficacy of which may be assessed in light of the empirical research reviewed above.[188]

a. *Limiting the crimes for which arrest would subject a juvenile to detention.* As Judge Newman stated, "[e]ven the most ardent advocates of preventive detention do not claim that the commission of any crime, no matter how minor, provides an adequate basis for predicting commission of a future crime."[189] Apparently Judge Newman would have application of the New York statute limited to those juveniles charged with serious crimes.[190]

The empirical research, however, does not support the notion that such a limitation would reduce the rate of "false positives." Many of the studies reviewed dealt with predictions made regarding offenders charged with or convicted of *serious* crimes. For example, in the Harvard study, which found "false positive" rates of 74 and 88.5 percent, every one of the 657 defendants had been charged with "violent or dangerous" crimes.[191] Wenk's study of juvenile statistical predictions found a "false positive" rate of 88.8 percent (an eight-to-one ratio of "false positives" to "true positives").[192] Yet every one of the 4,146 subjects in this study had

186. *See* J. MONAHAN, *supra* note 70, at 104.

187. Martin v. Strasburg, 689 F.2d 365, 377 (2d Cir. 1982) (Newman, J., concurring).

188. *Id.*

189. *Id.*

190. The New York preventive detention statute does not apply to juveniles charged with serious crimes and tried in criminal court as adults. *See supra* notes 172-74 and accompanying text.

191. *See* Note, *supra* note 156, at 307.

192. *See* Wenk, Robinson & Smith, *supra* note 146, at 400-01.

been committed to the California Youth Authority.[193] As Wenk points out: "In California, the *most serious* juvenile offenders are committed to the Department of the Youth Authority."[194] Furthermore, all of the 511 subjects involved in the study of clinical predictions reported by Wenk and Emrich were among this class of most serious offenders. This study found a "false positive" rate of 92 percent.[195]

b. *Requiring a finding of probable cause, or at least an assessment of the probability that the juvenile committed the crime charged.* The New York statute authorizes pretrial detention without a finding of probable cause.[196] Requiring a finding of probable cause might well reduce the number of candidates for detention under the statute. But would it substantially reduce the likelihood of erroneous predictions regarding those juveniles—probably the vast majority—for whom probable cause would likely be found? The answer provided by the empirical research dealing with predictions regarding *convicted* adult offenders and *adjudicated* juvenile offenders is clearly "no." Those studies which have examined predictions of recidivism among convicted or adjudicated offenders have found "false positive" rates in roughly the 50 to 60 percent range.[197] These results represent some, but not much, improvement over predictions of crime made regarding non-offenders.[198]

c. *Requiring an assessment of the juvenile's background.* This limitation has considerable intuitive appeal. Presumably, the more a judge knows about the juvenile's background, the more likely it is that he or she will accurately predict the risk that the juvenile will engage in future criminal conduct. The empirical research belies this presumption however. The bulk of the studies reviewed involved predictions of future criminal behavior made on the basis

193. *Id.* at 397.

194. *Id.* at 396 (emphasis added).

195. E. Wenk & R. Emrich, *supra* note 85, at 125-26.

196. However, should a juvenile be detained under N.Y. FAM. CT. ACT § 320.5(3)(b) (McKinney 1983), the court will set a date for a probable cause hearing on the charged offense(s), *id.* § 320.4(2)(a), (c). Such a hearing must "be held within three days following the initial appearance or within four days following the filing of a petition, whichever occurs sooner," *id.* § 325.1(2), except that the court may for cause "adjourn the hearing for no more than an additional three court days," *id.* § 325.1(3). Without a finding of probable cause at that hearing, the juvenile must be released from detention. *See id.* § 325.3(4).

197. *See supra* notes 129-45 and accompanying text.

198. *See supra* notes 99-128 and accompanying text.

of extensive data regarding the subjects' backgrounds. Kozol's study of clinical predictions,[199] for example, is perhaps the clearest evidence that assessment of a subject's background does not guarantee accuracy of prediction. Subjects in this study were all examined by at least two psychologists, two psychiatrists, and a social worker.[200] Moreover, these extensive clinical examinations were supplemented by a full battery of psychological tests and "a meticulous reconstruction of the [subject's] life history elicited from multiple sources."[201] Yet predictions based upon these "background" assessments yielded a "false positive" rate of 65 percent.[202]

In the Wenk study of statistical predictions regarding juvenile wards of the California Youth Authority, "[e]xtensive background information available on each subject"[203] included elaborate case histories, current measures of mental and emotional functioning and prognostic judgments (counselors' ratings of academic and vocational potential plus their recommendations for type of training). Yet the most accurate predictions possible, utilizing this "extensive background information," resulted in a "false positive" rate of more than 88 percent.[204] Other studies of predictions based upon composites of various background data have found "false positive" rates in excess of 65 percent.[205]

d. *Limiting predictions to certain types of crimes.* The New York statute allows a juvenile to be detained on the basis of a prediction that he or she will commit *any* crime before the return date.[206] Would a requirement limiting predictions to *violent* or *serious* crime reduce the rate of "false positives" and thus the risk of erroneous detention? Both simple logic and the empirical research indicate that it would not.

Serious crimes (especially violent crimes) are statistically rare, certainly much rarer than less serious or minor crimes.[207] The rarer an event, the more difficult it is to accurately predict its oc-

199. *See* Kozol, Boucher & Garofalo, *supra* note 63.
200. *Id.* at 383.
201. *Id.*
202. *Id.* at 390-91.
203. Wenk, Robinson & Smith, *supra* note 146, at 397.
204. *Id.* at 401.
205. *See supra* notes 119, 140 and accompanying text.
206. N.Y. FAM. CT. ACT § 320.5(3)(b) (McKinney 1983).
207. *See* von Hirsch, *supra* note 185, at 733.

currence.[208] Logically, a judge's predictions of serious or violent crimes are more likely to prove erroneous than those of less serious or minor crimes.

The reality of this logic is demonstrated by the empirical research. Studies of recidivism in general have found "false positive" rates in the 50 to 60 percent range.[209] On the other hand, studies of predictions of serious or violent criminal conduct have found "false positive" rates ranging from 65 to over 99 percent.[210]

e. *Setting a standard of proof by which the judge must be convinced that the juvenile poses a "serious risk" of future criminal behavior.* New York's juvenile preventive detention statute does not specify any standard of proof by which the judge must be convinced that the juvenile to be detained poses a future risk to society. Similar statutes in several other jurisdictions require proof by "clear and convincing evidence."[211]

In the American legal system, there are basically three standards of proof: preponderance of the evidence, clear and convincing evidence, and evidence beyond a reasonable doubt.[212] While these standards have not been (and perhaps cannot be) quantified,[213] some commentators have suggested that "evidence beyond a reasonable doubt" roughly corresponds to at least 90 percent certainty, "clear and convincing evidence" to 75 percent certainty, and "preponderance of the evidence" to better than 50 percent certainty.[214]

From the empirical research, it appears that at best, predictions of dangerousness or future criminal conduct are more often wrong than right. In speaking of clinical predictions, Steadman and Cocozza have observed that "any attempt to commit an individual solely on the basis of dangerousness would be futile if

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208. *Id.*

209. *See supra* note 129 and accompanying text.

210. *See supra* notes 146-67 and accompanying text.

211. *See* ARK. STAT. ANN. § 45-421(d) (Supp. 1983); N.H. REV. STAT. ANN. § 169-B: 14(e)(1) (Cum. Supp. 1983); 42 PA. CONS. STAT. ANN. § 6335(a)(2) (Purdon 1982).

212. C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 793 (2d ed. 1972).

213. *See generally* Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

214. *See*, A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 33 (1975); Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1094-1101 (1976).

[these predictions] were subjected to any of these three standards of proof."[215] And, as Stone has concluded, "[e]ven if actuarial devices reduce the amount of predictive error none can claim to meet even the lowest of these legal standards."[216]

Following this logic, the setting of a standard of proof even as low as "a preponderance of the evidence," would theoretically preclude any application of the New York preventive detention statute. For it seems clear that judges could rarely, if ever, be even close to 50 percent certainty in their predictions of juvenile crime. As Brooks has asked: "How can you prove by a standard requiring well over 50 percent of accuracy that which research tells you cannot be proved by 50 percent of accuracy?"[217]

Despite this theoretical barrier, in reality courts do make frequent predictions of dangerousness, even where a standard of proof as high as "clear and convincing evidence" is imposed—as, for example, in the civil commitment of adults to mental hospitals.[218] Presumably, imposing such a standard in juvenile detention decisions like those made under the New York statute would reduce the percentage of "false positives."[219] But the question remains: By how much?

The research reported by Wenk and his collegues[220] helps provide an answer to this question. In their study of predictions regarding juveniles committed to the California Youth Authority, the Wenk group found an overall recidivism rate of 38.9 percent and a violent recidivism rate of 2.4 percent.[221] As noted earlier, even after examining 100 variables and utilizing sophisticated multivariate statistical techniques, these researchers were never able to attain predictions with better than an 88 percent rate of "false positives" (i.e., an eight-to-one ratio of false to true positives).[222]

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215. Cocozza & Steadman, *supra* note 214, at 1101.

216. A. STONE, *supra* note 214, at 33.

217. A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 128 (Supp. 1980).

218. *See* Addington v. Texas, 441 U.S. 418 (1979) (due process requires clear and convincing evidence of civil commitment criteria, including mental illness and dangerousness).

219. "Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered." *Id.* at 427.

220. Wenk, Robinson & Smith, *supra* note 146.

221. *Id.* at 399.

222. *Id.* at 401.

One method which has been suggested for avoiding the "false positive" problem in behavioral prediction is the limitation of such prediction to narrowly defined subgroups manifesting inordinately high base rates of the behavior to be predicted.[223] Using this sort of approach—comparable to demanding a higher standard of proof—Wenk and his colleagues isolated several groups of juveniles with violent recidivism rates substantially higher than those of others in the California Youth Authority population.[224] These groups included juveniles with records of aggressive crime but no violence, juveniles with documented histories of violent behavior, and juveniles with four or more commitments to the Youth Authority. Based on a post-release follow-up of fifteen months, researchers found that juveniles in these high risk groups had overall recidivism rates of 34.7%, 38.8%, and 53.5%, and violent recidivism rates of 1.3%, 5.2%, and 4.8%, respectively.[225]

The significance of these findings is that the factors identifying these groups (i.e., aggressive crimes, histories of violence, and multiple adjudications and commitments) seem likely to be most prominent among the factors that would lead a judge to predict future criminal behavior, even under a stringent standard of proof. Yet clearly, predictions of further criminality based upon any of these factors will entail a substantial percentage of "false positives." Utilizing the best of these predictors—i.e., four or more commitments—would reduce the "false positive" rate but would still result in predictions of criminal conduct which prove incorrect almost 50 percent of the time.

The persistence of high "false positive" rates, even among predictions based upon the most convincing evidence, is no surprise given the rather low base rates of the behavior being predicted. Criminal behavior, particularly violent criminal behavior, is relatively rare, even among juveniles and adults who have previously engaged in such behavior.[226] It is generally agreed that any predictions of rare (i.e., low base rate) behavior are bound to include a substantial percentage of "false positives."[227] Livermore

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223. von Hirsch, *supra* note 185, at 735.

224. Wenk, Robinson & Smith, *supra* note 146, at 398-99.

225. *Id.*

226. J. MONAHAN, *supra* note 70, at 24; Cocozza & Steadman, *supra* note 214, at 1089; von Hirsch, *supra* note 185, at 735.

227. *See, e.g.*, Cocozza & Steadman, *supra* note 214, at 1089; von Hirsch, *supra* note

provides a graphic illustration of the problem:

> Assume that one person out of a thousand will kill. Assume also that an exceptionally accurate test is created which differentiates with 95 percent effectiveness those who will kill from those who will not. If 100,000 people were tested, out of the 100 who would kill 95 would be isolated. Unfortunately, out of the 99,900 who would not kill, 4,995 people would also be isolated as potential killers.[228]

The question posed at the outset was: To what extent, if any, can the risk of erroneous deprivation of liberty interests under the New York preventive detention statute be reduced by procedural safeguards? In view of the foregoing analysis, the answer seems clear: *Very little.* The statute requires predictions which have been demonstrated empirically to be much more frequently wrong than right. Even applying the significant limitations suggested by Judge Newman,[229] it appears that predictions of criminality would still be plagued by "false positive" rates not substantially lower than those which obtain in the absence of such safeguards.

III. The Implications of *Martin*

Despite the district court's conclusion that there exists no reliable method of predicting future criminal conduct or dangerousness[230]—a factual conclusion more than amply supported by the evidence at trial and the Court's own review of the empirical literature[231]—the Supreme Court flatly rejected the juvenile appellees' contention that the New York statute violates due process because "it is virtually impossible to predict future criminal conduct with any degree of accuracy."[232] Writing for the majority in *Martin*, Justice Rehnquist concluded that "from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct."[233]

This final Section will examine some of the major implica-

185, at 733; von Hirsch & Gottfredson, *supra* note 129, at 15.

228. Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. Pa. L. Rev. 75, 84 (1968) (footnote omitted).

229. *See* Martin v. Strasburg, 689 F.2d 365, 377 (2d Cir. 1982) (Newman, J., concurring), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984).

230. United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 712 (S.D.N.Y.), *aff'd*, 689 F.2d (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984).

231. *Id.*, at 708-12; *Martin*, 104 S. Ct. at 2425; *supra* text accompanying notes 39-40.

232. *Martin*, 104 S. Ct. at 2417.

233. *Id.*

tions of *Martin* for the future use of predictions of dangerousness in the criminal and juvenile justice systems. First, however, it is necessary to consider the meaning of the Court's conclusion that predictions of future criminal conduct are legally attainable and the reasoning by which the majority reached that conclusion.

Justice Rehnquist offered two justifications for his conclusion that criminal conduct is predictable. The first was precedent. Citing *Jurek v. Texas*,[234] Justice Rehnquist said, "[W]e 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.' "[235] Justice Rehnquist's second rationale appeared to rely upon practice or tradition. As he stated, without further elaboration, the prediction of criminal conduct "forms an important element in many decisions" such as capital sentencing, parole-release determinations, parole revocations, and the sentencing of "dangerous special offenders."[236]

It seems clear, however, that neither of these rationales justifies Justice Rehnquist's conclusion. Rather, it appears that his conclusion regarding the predictability of criminal conduct can only be understood as a pragmatic policy judgment, transcending the limited question of juvenile detention based upon predictions of dangerousness.

The unelaborated rationale of practice or tradition is entirely unpersuasive in the *Martin* context. Justice Rehnquist is certainly correct in his observation that predictions of criminal conduct form the basis for many legal decisions.[237] But in every instance he cited (capital sentencing, parole release and revocation, and sentencing "dangerous special offenders"), such predictions are applied only to individuals *already convicted of criminal acts*. More-

234. 428 U.S. 262 (1976).

235. *Martin*, 104 S. Ct. at 2417-18.

236. *Id.*

237. *See* Shah, *Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology*, 33 AM. PSYCHOLOGIST 224, 225 (1978) (predictions of criminal conduct or dangerousness are routinely used in decisions regarding bail or release on recognizance, waiver or transfer of juveniles for trial in criminal court, sentencing, work-release and furlough of penal inmates, parole, commitment of "sexually dangerous" offenders, transfers between prisons and special facilities for disruptive inmates, commitment of drug addicts, commitment and release of mental patients including those acquitted by reason of insanity, transfers between ordinary and secure mental hospitals, sentencing of "habitual" and "dangerous" offenders, and imposition of the death sentence).

over, in the death penalty context, where the Court has specifically upheld the use of predictions of dangerousness as a sentencing criterion, the importance of the extensive information available to the decision-maker as well as the ability of the "adversary process" to distinguish opinion and unreliable evidence from reliable evidence of the convicted defendant's dangerousness has repeatedly been emphasized.[238]

In *Martin*, however, the Court was confronted with a context in which predictions of criminal conduct provided the basis for abridging the liberty interests of individuals merely alleged to have committed criminal acts. Furthermore, it was readily apparent to the Court that in the *Martin* context both the amount of information available to the decision-maker and the potential corrective impact of the adversary process were extremely limited.[239]

Justice Rehnquist also cited *Jurek v. Texas* as support for his conclusion that "there is nothing inherently unattainable about a prediction of future criminal conduct."[240] As he correctly observed, the Supreme Court in *Jurek* rejected the contention that it is "impossible to predict future behavior."[241] The problem with Justice Rehnquist's reasoning is that the juvenile appellees in *Martin* never claimed that it is "impossible to predict future behavior." Their contention, as Justice Rehnquist specifically noted, was "that it is virtually impossible to predict future criminal conduct *with any degree of accuracy*."[242]

In *Jurek*, the petitioner made it clear that he was *not* challeng-

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238. *See, e.g.*, Jurek v. Texas, 428 U.S. 262, 276 (1976) ("What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas [capital sentencing] law clearly assures that all such evidence will be adduced."). *See also* Estelle v. Smith, 451 U.S. 454, 472 (1981) (citations omitted):

> In *Jurek v. Texas*, we held that the Texas capital sentencing statute is not unconstitutional on its face. As to the jury question on future dangerousness, the joint opinion announcing the judgment emphasized that a defendant is free to present whatever mitigating factors he may be able to show, *e.g.*, the range and severity of his past criminal conduct, his age, and the circumstances surrounding the crime for which he is being sentenced.

Finally, see Barefoot v. Estelle, 463 U.S. 880, 901 (1983) ("We are unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case.").

239. *See supra* notes 173-80 and accompanying text.

240. *Martin*, 104 S. Ct. at 2417.

241. *Id.* at 2417-18.

242. *Id.* at 2417 (emphasis added).

ing the *accuracy* of predictions of criminal conduct.[243] As a result, in *Jurek*, the Court simply reasoned that since predictions of criminal conduct are constantly made throughout the criminal justice system, there is no reason to believe that they cannot be made. Clearly avoiding any consideration of the *accuracy* of predictions of criminal conduct, and without any further elaboration, the Court simply stated:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities.[244]

Clearly the Court's response in *Jurek* does not answer the contention of the appellees in *Martin*. The fact that predictions of criminal conduct are relied upon throughout the criminal justice system says nothing about the accuracy of such predictions or whether that accuracy is sufficient to meet the demands of due process.

In *Barefoot v. Estelle*,[245] decided just a year before *Martin*, the Supreme Court was confronted with a due process challenge based upon the *accuracy* of predictions of criminal conduct. In upholding the challenged statute, the same statute earlier upheld in *Jurek*, the Court frankly stated the concern which apparently lies behind the cryptic rationale of practice or tradition relied upon in both *Jurek* and *Martin*: "Acceptance of petitioner's position that expert testimony about future dangerousness is far too unreliable to be admissible would immediately call into question those other

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243. Brief for Petitioner at 53-54, Jurek v. Texas, 428 U.S. 262 (1976):

> [W]e may put aside for now the issue whether predictions of individual human behavior in the indeterminate future can be made in any meaningful way. . . . We may put aside even the narrower issue whether such predictions can be made with the degree of precision appropriate when the purpose of the inquiry is to label a human creature fit or unfit to continue to exist. . . . That question need not be reached here because the predictive judgment demanded by the statute is wholly unintelligible even as a speculation.

244. *Jurek*, 428 U.S. at 274-75 (footnotes omitted).

245. 463 U.S. 880 (1983).

contexts in which predictions of future behavior are constantly made."[246]

Viewed in light of this concern, Justice Rehnquist's casual dismissal of the district court's conclusion regarding predictions of criminal conduct is more readily understood. The logical implications of the empirical data relied upon by the district court were inescapable and formed the basis for the appellees' contention that future criminal conduct cannot be predicted with any degree of accuracy. Any forthright appraisal of those data—such as that undertaken by the district court and the dissenting justices in *Martin*[247]—would have made it almost impossible to reject that contention. But, to paraphrase the Court in *Barefoot*, acceptance of the appellees' contention would immediately have called into question the many legal contexts in which predictions of future criminal conduct are made and relied upon. As a strictly pragmatic matter of policy, given the extent to which the American legal system relies upon predictions of criminal conduct,[248] such a result appears almost unthinkable.

This logic explains why—to use the words of the dissenters—Justice Rehnquist "brushes aside the District Court's findings" of fact.[249] To Justice Rehnquist, the appellees' contention raised a question which was legal or normative rather than factual or empirical. Hence, he regarded the district court's factual finding (and the empirical data upon which it rested) as irrelevant. As he concluded: "*from a legal point of view* there is nothing inherently unattainable about a prediction of future criminal conduct."[250]

In view of this analysis, *Martin* must be regarded as a new and significant chapter in the jurisprudence of predictions of dangerousness. Not only did the Court hold that predictions of criminal conduct (even those made on the basis of scant information in a relatively non-adversary context) may be used as the basis for incarcerating individuals who have merely been charged with

246. *Id.* at 898.

247. *See* United States *ex rel.* Martin v. Strasburg, 513 F. Supp. 691, 708-12 (S.D.N.Y. 1981), *aff'd*, 689 F.2d 365 (2d Cir. 1982), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984); Schall v. Martin 104 S. Ct. at 2425-26.

248. *See* Shah, *supra* note 237.

249. *Martin*, 104 S. Ct. at 2426 n.20.

250. *Id.* at 2417 (emphasis added).

crimes, but it did so in a way which signals that the use of such predictions in legal decision-making is now beyond empirical challenge. As a result, *Martin* appears to have important implications reaching beyond the limited issue of pretrial detention of juveniles charged with criminal acts. The remainder of this Section will be devoted to an examination of some of the potential implications of *Martin* for both the juvenile and criminal justice systems.

A. *Implications for the Criminal Justice System*

Every United States jurisdiction allows for the pretrial detention of juveniles charged with criminal conduct.[251] Indeed, the ubiquitousness of juvenile preventive detention statutes was one rationale cited by the Supreme Court in upholding the New York statute in *Martin*.[252] As the Court concluded,

> In 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.[253]

State provisions allowing pretrial detention of adult criminal defendants on the basis of predictions of dangerousness are not as common. Yet in twenty-six of the fifty-one American jurisdictions, there are either statutory or constitutional provisions which make dangerousness a criterion to be considered in bail and other pretrial release decisions.[254] In twenty jurisdictions, a criminal defendant may be denied release on recognizance if found by the court

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251. *Martin*, 104 S. Ct. at 2411 n.16.

252. *Id.* at 2411-12.

253. *Id.* at 2412.

254. ARIZ. CONST. art. II, § 22 (1910, amended 1982); CAL. CONST. art. I, § 12 (1974, amended 1982); MICH. CONST. art. I, § 15(c); ALASKA STAT. § 12.30.020(a) (1984); DEL. CODE ANN. tit. 11, § 2105 (1979); D.C. CODE ANN. §§ 23-1321, -1322 (1981); FLA. STAT. ANN. § 903.046 (West Supp. 1984); GA. CODE ANN. § 17-6-1 (Supp. 1984); HAWAII REV. STAT. § 804-7.1 (Supp. 1983); Act of Sept. 2, 1981, § 1, ILL. ANN. STAT. ch. 38, 110-10(b) (Smith-Hurd Supp. 1985); IOWA CODE ANN. § 811.2 (West Supp. 1984-1985); N.H. REV. STAT. ANN. § 597: 6-a (1974); N.C. GEN. STAT. § 15A-534(b) (1983); OR. REV. STAT. §§ 135.230, .245 (1983); S.C. CODE ANN. § 17-15-10 (Law. Co-op. 1977); S.D. CODIFIED LAWS § 23A-43-2 (Supp. 1983); VT. STAT. ANN. tit. 13, § 7554 (1974); VA. CODE § 19.2-120 (1983); WIS. STAT. ANN. § 969.01 (West 1985); COL. R. CRIM. P. 46; LA. CODE CRIM. PROC. ANN. art. 317 (West Supp. 1984); MINN. R. CRIM. P. 6.02 (West Supp. 1984); OHIO R. CRIM. P. 46; PA. R. CRIM. P. 4003; WASH. SUPER. CT. CRIM. R. 3.2.

to be dangerous.[255] In nineteen jurisdictions, courts may impose additional conditions when releasing on bail a defendant found to be dangerous.[256] In nine jurisdictions, courts have statutory authority to consider dangerousness in fixing the amount of cash bail a defendant must post to be released.[257] And, most significantly, in nine jurisdictions, a defendant may be denied pretrial release, even on bail, if found by the court to pose a danger to the community.[258]

In California, for example, a 1982 amendment to the state constitution—passed in a popular referendum on the so-called "Victim's Bill of Rights"[259]—provides that any defendant charged with a felony involving personal violence may be denied bail if: (1) proof of guilt is evident or the presumption thereof great; and (2) the court finds, upon clear and convincing evidence, that there is a substantial likelihood that release would result in great bodily harm to others.[260]

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255. CAL. CONST. art. I, § 12 (1974, amended 1982); FLA. CONST. art. I, § 14 (1885, amended 1982); ALASKA STAT. § 12.30.020(a) (1984); ARIZ. REV. STAT. ANN. § 13-3961(B) (Supp. 1984); DEL. CODE ANN. tit. 11, § 2105 (1979); D.C. CODE ANN. § 23-1321 (1981); GA. CODE ANN. § 17-6-1 (Supp. 1984); N.H. REV. STAT. ANN. § 597: 6-a (1981); OR. REV. STAT. §§ 135.230, .245 (1983); S.C. CODE ANN. § 17-15-10 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. § 23A-43-2 (Supp. 1984); VA. CODE § 19.2-120 (1983); WIS. STAT. ANN. § 969.035 (West 1985); OHIO R. CRIM. P. 46.

256. FLA. CONST. art. I, § 14 (1885, amended 1982); ALASKA STAT. § 12.30.020(b) (1984); ARIZ. REV. STAT. ANN. § 13-3967 (Supp. 1984); COL. REV. STAT. § 16-4-103(2) (Supp. 1984); D.C. CODE ANN. § 23-1321(a) (1981); HAWAII REV. STAT. § 804-7.1 (Supp. 1983); Act of Sept. 2, 1981, § 1, ILL. ANN. STAT. ch. 38, § 110-10(b) (Smith-Hurd Supp. 1985); IOWA CODE ANN. § 811.2 (West Supp. 1984-1985); N.C. GEN. STAT. § 15A-534(b) (1983); OR. REV. STAT. §§ 135.230, .245, .260 (1983); S.C. CODE ANN. § 17-15-10 (Law. Co-op. 1977); S.D. CODIFIED LAWS § 23A-43-3, -4 (1979 & Supp. 1984); VT. STAT. ANN. tit. 13, § 7554 (1974); WIS. STAT. ANN. §§ 969.01, .03 (West 1985); ARK. R. CRIM. P. 9.3; COL. R. CRIM. P. 46; MINN. R. CRIM. P. 6.02; OHIO R. CRIM. P. 46; WASH. SUPER. CT. CRIM. R. 3.2.

257. ALASKA STAT. § 12.30.020(b) (1984); COL. REV. STAT. § 16-4-105 (1978); DEL. CODE ANN. tit. 11, § 2107 (1979); FLA. STAT. ANN. § 903.046 (West Supp. 1984); LA. CODE CRIM. PROC. ANN. art. 317 (West Supp. 1984); S.C. CODE ANN. § 17-15-10 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. §§ 23A-43-3, -4 (1979 & Supp. 1984); VT. STAT. ANN. tit. 13, § 7554 (1974); MINN. R. CRIM. P. 6.02.

258. ARIZ. CONST. art. II, § 22 (1910, amended 1982); CAL. CONST. art. I, § 12 (1974, amended 1982); FLA. CONST. art. I, § 14 (1885, amended 1982); MICH. CONST. art. I, § 15(c); ARIZ. REV. STAT. ANN. § 13-3961(B) (Supp. 1984); D.C. CODE ANN. § 23-1322 (1981); GA. CODE ANN. § 17-6-1 (Supp. 1984); HAWAII REV. STAT. § 804-7.1 (Supp. 1983); VA. CODE § 19.2-120 (1983); WIS. STAT. ANN. § 969.035 (West 1985).

259. Note, *The Problems Facing California's New Bail Standard*, 5 GLENDALE L. REV. 203, 205 (1983).

260. CAL. CONST. art. I, § 12 (1974, amended 1982).

In Wisconsin, a 1981 popular referendum resulted in an amendment to the state constitution which provides that the legislature may authorize, but not require, state courts to deny pretrial release for ten days prior to a hearing if the defendant is charged with murder, sexual assault or the commission or attempted commission of any felony involving personal harm to another and has a prior conviction for committing or attempting to commit such a felony.[261] The amendment further provides for *additional* pretrial detention of up to sixty days if, following a hearing, the court finds by clear and convincing evidence that: (1) the accused committed the felony charged; and (2) no available condition of release would adequately protect the community from serious bodily harm.[262] In 1982, the state legislature acted in accordance with this amendment, implementing preventive detention by statute.[263]

Another preventive detention statute worth mentioning as an example is that of the District of Columbia.[264] This law, which provided the basis for the Harvard empirical study described earlier,[265] represents the first legislative effort in this country to implement a program of adult pretrial detention based on predictions of dangerousness.[266] The District of Columbia statute permits the pretrial detention of a defendant charged with a "dangerous crime" for up to sixty days if the court finds, by clear and convincing evidence, that: (1) there is a substantial probability that the defendant committed the offense charged; and (2) no conditions of release would reasonably assure the safety of the community.[267] The term "dangerous crime" includes the commission or attempted commission of robbery, burglary of a dwelling or place of business, or arson of a dwelling or place of business; forcible rape or assault with intent to commit forcible rape; and sale or distribution of controlled drugs punishable by more than one year in prison.[268]

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261. WIS. CONST. art. I, § 8 (1981).

262. *Id.*

263. WIS. STAT. ANN. § 969.035 (West 1985).

264. D.C. CODE ANN. §§ 23-1231-1332 (1981).

265. *See supra* notes 156-67 and accompanying text.

266. The D.C. preventive detention law was enacted as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 642 (1970) (codified at D.C. CODE ANN. §§ 23-1321, -1322 (1981)).

267. D.C. CODE ANN. § 23-1322 (1981).

268. *Id.* § 23-1331.

In 1981, the District of Columbia Court of Appeals found this statute constitutional. In *United States v. Edwards*, the court held that the eighth amendment "excessive bail" clause does not grant a right to bail in criminal cases.[269] The court further held that detention under the statute is regulatory rather than penal and may be imposed without the full panoply of procedural safeguards guaranteed in a criminal trial.[270] Moreover, the court held the statute neither vague nor overbroad.[271]

In reaching these conclusions, the court conceded that characterization of detention under the statute "is a particularly close question."[272] Yet it concluded that such detention is not punishment since it is designed "to curtail *reasonably predictable conduct*, not to punish for prior acts."[273] Moreover, in rejecting the appellant's overbreadth argument based on "statistical studies concluding that criminal conduct generally cannot be predicted," the court concluded that:

> Prediction of the likelihood of certain conduct necessarily involves a margin of error, but is an established component of our pretrial release system. . . . Appellant's argument relies on the assumptions, which we do not share, that the judicial prediction of dangerousness, as distinguished from the prediction of likelihood of flight, is both a denial of a fundamental right and the imposition of punishment. Accordingly, we decline to find the statute unconstitutionally overbroad.[274]

In dissent, Judge Mack took strong exception to the majority's underlying presumption "that the state can predict those persons who are dangerous":

> I have reviewed defense counsel's exhaustive treatment of this presumption and I am convinced by the authorities relied upon that the presumption is not a valid one. Moreover, I am likewise convinced that the utilization of this presumption for the asserted purpose will result in pretrial detention of persons who pose no threat to the community. In my view, therefore, this classification of "dangerousness" is arbitrary and invalid under due process and equal protection principles.[275]

At the time *Martin* was decided by the Supreme Court, the

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269. 430 A.2d 1321, 1331 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).
270. 430 A.2d at 1333.
271. *Id.* at 1342-43.
272. *Id.* at 1332.
273. *Id.* (emphasis added).
274. *Id.* at 1342-43.
275. *Id.* at 1369 (Mack, J., dissenting).

District of Columbia bail statute was the only federal law providing for the pretrial detention of criminal defendants on the basis of predictions of dangerousness. In federal courts outside the District of Columbia, a judicial officer's concern in setting bail or other pretrial release conditions was limited by statute to assuring that the defendant appeared for trial.[276] In October 1984, however, just four months after the Supreme Court announced its decision in *Martin*, Congress passed, and the President signed into law, the Bail Reform Act of 1984.[277]

Under the Bail Reform Act of 1984, federal judicial officers must consider not only whether a criminal defendant will appear for trial, but also whether pretrial release of the defendant would pose a danger to "any other person" or to the "community."[278] If the judicial officer determines by clear and convincing evidence that pretrial release would pose such a danger, a defendant may be ordered detained prior to trial.[279] The Act specifies no limit to the duration of such pretrial detention.

The Supreme Court has yet to rule on the constitutionality of any state or federal law providing for the pretrial detention of adult criminal defendants based on predictions of future criminal conduct. In 1982, the Court denied *certiorari* in *Edwards*.[280] That same year, the Court failed to reach the merits in *Murphy v. Hunt*,[281] a constitutional challenge to Nebraska's preventive detention law which allows courts to deny bail or other pretrial release to defendants charged with certain crimes of violence, including "sexual offenses involving penetration by force or against the will of the victim."[282] In *Hunt*,[283] the Court of Appeals for the Eighth Circuit had held that exclusion of alleged violent sexual offenders from bail before trial violates the "excessive bail" clause of the eighth amendment.[284] Concluding that the appellant's "constitu-

276. *See* Act of June 25, 1948, ch. 645, § 3143, 62 Stat. 683, 821 (1948) (provision for "additional bail"), *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (to be codified at 18 U.S.C. §§ 3141-3150).

277. *See* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837.

278. *Id.*

279. *Id.*

280. 455 U.S. 1022 (1982).

281. 455 U.S. 478 (1982).

282. NEB. CONST. art. I, § 9 (1875, amended 1978).

283. 648 F.2d 1148 (8th Cir. 1981), *vacated sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982).

284. *Id.* at 1164-65.

tional claim to pretrial bail became moot following his conviction in state court,"[285] the Supreme Court vacated the judgment of the eighth circuit.[286]

It is important to note however, that in rejecting Hunt's claim as moot, the Supreme Court provided a clear blueprint for overcoming the mootness barrier in future challenges to preventive detention laws. The mootness problem could be avoided, the Court suggested, if either a suit for damages, or a class action suit by a class of pretrial detainees were instituted.[287] This was the very tactic used by the juvenile petitioners in *Martin*, where the Court reached the merits despite the fact that "the pretrial detention of the class representatives [had] long since ended."[288]Given the availability of the class action tactic as a means of overcoming the mootness problem which would plague most, if not all, Supreme Court challenges to adult preventive detention statutes, it seems likely that before long the Court will be forced to rule on the constitutionality of such laws. *Martin* leaves little doubt as to how the Supreme Court will rule when that day comes.

Naturally, those challenging an adult preventive detention statute will make every effort to distinguish their case from *Martin*. The obvious distinction is that *Martin* dealt with juveniles, a class of individuals who "unlike adults, are always in some form of custody,"[289] and whose liberty interests "may, in appropriate circumstances, be subordinated to the State's '*parens patriae* interest in preserving and promoting the welfare of the child.' "[290]

It is true that in *Martin* the Court leaned upon the argument that juvenile preventive detention laws serve the "combined interest of protecting both the community and the juvenile himself."[291] Yet it is equally true that the Court relied upon a number of other arguments, each of which is relevant to both juvenile and adult preventive detention.

First, the Court emphasized that "[t]he 'legitimate and compelling state interest' in protecting the community from crime

285. *Id.* at 481.
286. *Id.* at 481, 484.
287. *Id.* at 481-82.
288. Schall v. Martin, 104 S. Ct. 2403, 2405 n.3 (1984).
289. *Id.* at 2410.
290. *Id.* (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)).
291. *Id.* at 2410.

cannot be doubted."[292] Moreover, the Court observed that "[t]he harm suffered by the victim of a crime is not dependent upon the age of the perpetrator."[293]

Second, the Court concluded that pretrial detention of juveniles is regulatory and not punitive,[294] the same conclusion reached by the District of Columbia Court of Appeals in *Edwards* regarding pretrial detention of adult defendants.[295] In reaching this conclusion, the Supreme Court relied on the fact that "[t]here is no indication in the statute itself that preventive detention is used or intended as a punishment."[296] The same, of course, may be said of every one of the current statutes which allows adult defendants to be detained prior to trial on the basis of predictions of criminal conduct.[297] As the court of appeals concluded in *Edwards*, the clear purpose of such laws is "to curtail reasonably predictable conduct, not to punish for prior acts."[298]

Third, in *Martin*, the Court found that the procedural safeguards employed under the New York statute—limited though they may be—"provide sufficient protection against erroneous and unnecessary deprivations of liberty."[299] Virtually all of the procedural safeguards absent from the New York statute are present in most adult preventive detention statutes. For example, the California, Wisconsin and District of Columbia statutes described earlier all (1) limit the crimes for which arrest may subject a defendant to detention;[300] (2) require a finding that the defendant probably committed the crime charged;[301] (3) require assessment

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292. *Id.*

293. *Id.*

294. *Id.* at 2415.

295. 430 A.2d at 1332.

296. *Martin*, 104 S. Ct. at 2413.

297. *See supra* note 258.

298. 430 A.2d at 1332.

299. 104 S. Ct. at 2415-17.

300. CAL. CONST. art. I, § 12 (1974, amended 1982) ("Felony offenses involving acts of violence on another person . . . ."); D.C. CODE ANN. § 23-1322(a)(1) (1981) ("dangerous crime"); WIS. STAT. ANN. § 969.035 (West 1985) ("violent crime"). *See also* MICH. CONST. art. I, § 15 ("violent felony," murder, treason, first-degree criminal sexual conduct, armed robbery, and kidnapping with intent to extort money or valuables); ARIZ. REV. STAT. ANN. § 13-3961(B) (Supp. 1984) (murder, rape, armed robbery, kidnapping, arson, burglary, aircraft hijacking, manufacture or sale of controlled substances, and aggravated assault).

301. CAL. CONST. art. I, § 12 (1974, amended 1982); D.C. CODE ANN. § 23-1322(b)(2)(C) (1981); WIS. STAT. ANN. 969.035(6)(a) (West 1985).

of specific factors in the defendant's background;[302] (4) place limits on the type of crime the court must predict if the defendant is to be detained;[303] and (5) specify a standard of proof by which the court must be persuaded of the likelihood of future serious criminal behavior.[304]

Finally, and perhaps most significantly, the *Martin* Court concluded that the prediction of criminal conduct or dangerousness is legally attainable,[305] even for juveniles, who are generally regarded as *less* predictable than adults.[306] Given the apparent meaning of that conclusion, any challenge to adult preventive detention based upon proof of the inaccuracy of predictions of dangerousness seems destined to fail.

"It is, of course, not easy to predict future behavior."[307] Nevertheless, given the above described line of reasoning in *Martin* and the fact that the Supreme Court has never ruled that there is a constitutional right to bail,[308] it seems safe to predict that when faced squarely with the issue, the Court will uphold the preventive

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302. CAL. CONST. art. I, § 12 ("the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing in the case"); D.C. CODE ANN. § 23-1321(b) (1981); WIS. STAT. ANN. § 969.035(2)(b) (West 1985) ("previous conviction for committing or attempting to commit a violent crime"). *See also supra* text accompanying note 160.

303. CAL. CONST. art. I, § 12 (1974, amended 1982) (substantial likelihood of great bodily harm to others); D.C. CODE ANN. § 23-1322(b) (1981) ("no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community"); WIS. STAT. ANN. § 969.035(3)(c) (West 1985) ("serious bodily harm").

304. CAL. CONST. art. I, § 12 (1974, amended 1982) ("clear and convincing evidence"); D.C. CODE ANN. § 23-1322(b)(2)(A) (1981) ("clear and convincing evidence"); WIS. STAT. ANN. 969.035(6)(b) (West 1985) ("clear and convincing evidence").

305. 104 S. Ct. at 2417.

306. *See generally* G. MOHR & M. DESPRES, THE STORMY DECADE: ADOLESCENCE (1958); Fountain, *Adolescent into Adult: An Inquiry*, in THE PSYCHOLOGY OF ADOLESCENCE 196 (A. Esman ed. 1975); W. EVERAERD, C. HINDLEY, A. BOT & J. TEN BOSCH, DEVELOPMENT IN ADOLESCENCE: PSYCHOLOGICAL SOCIAL AND BIOLOGICAL ASPECTS (1983); and Capes, *Adolescence and Change*, in ADOLESCENCE: THE CRISIS OF ADJUSTMENT 41 (S. Meyerson, ed. 1983).

307. Jurek v. Texas, 428 U.S. 262, 274 (1976).

308. In Carlson v. Landon, 342 U.S. 524 (1952), the Court noted that "the very language of the [Eighth] Amendment fails to say all arrests must be bailable." *Id.* at 546. In Stack v. Boyle, 342 U.S. 1 (1951), however, the Court recognized the "traditional right to freedom before conviction [which] permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." *Id.* at 4. Lower courts have relied upon the Court's dicta in these two cases either to find or deny a constitutional right to bail. *See* Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1498-1500 (1966); Comment, *Preventive Detention and* United States v. Edwards: *Burdening the Innocent*, 32 AM. U.L. REV. 191, 196-99 (1982).

pretrial detention of adults based upon predictions of dangerousness. In so doing, the Court will be placing the constitutional stamp of approval on a process which will, in all likelihood, result in the erroneous and needless incarceration of the majority of the defendants to whom it is applied.

B. *Implications for the Juvenile Justice System*

By analogy to public health models, efforts to prevent juvenile crime may be characterized as primary, secondary, or tertiary prevention.[309]

Primary prevention efforts are directed at "institutions, organizations, social structures and cultural systems."[310] Their aim is to "reduce aggregate rates of delinquency"[311] by "modifying conditions in the physical and social environment that lead to crime."[312] Such efforts do not involve individual prediction or the labelling of specific juveniles as "predelinquents" or "at risk."[313]

Secondary prevention efforts are aimed at youngsters designated "predelinquents" or otherwise predicted to be "at risk of becoming involved in delinquency."[314] The basic thrust of secondary prevention is "early identification and intervention in the lives of individuals."[315] Secondary prevention efforts require individual predictions of future conduct.[316]

Tertiary prevention efforts are directed toward individuals already "officially identified" or "adjudicated" as "delinquents."[317] The aim of such efforts is "the prevention of recidivism."[318] The standard means of tertiary prevention are correction and

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309. *See generally* PREVENTION OF MENTAL DISORDERS IN CHILDREN 4-19 (G. Caplan ed. 1961); OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, JUVENILE DELINQUENCY PREVENTION: A COMPENDIUM OF 36 PROGRAM MODELS 1 (1981) [hereinafter cited as 36 PROGRAM MODELS].

310. OFFICE OF JUVENILE JUSTICE LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE AND DELINQUENCY PREVENTION, THE PREVENTION OF SERIOUS DELINQUENCY: WHAT TO DO? 12 (1981) [hereinafter cited as WHAT TO DO?].

311. *Id.*

312. 36 PROGRAM MODELS, *supra* note 309, at 1.

313. *See* WHAT TO DO?, *supra* note 310, at 11-12.

314. *Id.* at 13 (emphasis removed).

315. 36 PROGRAM MODELS, *supra* note 309, at 1.

316. WHAT TO DO?, *supra* note 310, at 13-14.

317. *Id.* at 14.

318. 36 PROGRAM MODELS, *supra* note 309, at 1.

rehabilitation.[319]

The type of juvenile crime prevention approved by the Supreme Court in *Martin* is basically tertiary. Preventive detention of juveniles charged with crimes is clearly designed to prevent recidivism. Juvenile preventive detention, however, also resembles secondary prevention in that it may be applied to youngsters who have not yet been adjudicated delinquent but have merely been identified as being at risk for future criminal conduct. While the Court's decision in *Martin* is limited to juveniles who have at least been formally accused of criminal conduct, the Court's reasoning suggests that *Martin* may have significant implications for secondary prevention efforts aimed at a much broader class of juveniles.

The juvenile justice system has traditionally relied primarily upon tertiary prevention.[320] The system has "responded to crimes by juveniles with a wide range of services focused on control and/or rehabilitation of youthful offenders."[321] In recent years, however, "a new approach has emerged: the prevention of crime before youths engage in delinquent acts."[322] Since at least 1967, this "new approach" has been emphasized by governmental commissions and in various acts of Congress.[323]

Implementation of this "new approach" to delinquency prevention has spawned dozens, if not hundreds, of delinquency prevention programs throughout the country, the bulk of which have been federally funded.[324] To date, most such programs have been aimed either at youngsters in general or at selected *populations* of youngsters thought to be at particularly high risk for delinquency.[325] As such, these programs may be characterized as primary prevention.

Efforts at *individualized* prevention—i.e., secondary prevention—have been limited by two factors: (1) concern over the ability of experts or statistical tables to accurately identify "predelinquents";[326] and (2) reservations about the propriety if not the legality of labelling and intervening in the lives of youngsters who

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319. WHAT TO DO?, *supra* note 310, at 5.
320. *Id.* at 15.
321. 36 PROGRAM MODELS, *supra* note 309, at 1.
322. *Id.*
323. *Id.*
324. *Id.* at 2-3.
325. *Id.* at 7-16.
326. *See* WHAT TO DO?, *supra* note 310, at 13.

have not yet been accused of criminal conduct.[327] Such efforts, however, have not been without proponents.

For example, in looking back over four decades of research aimed at identifying "predelinquents," Sheldon Glueck wrote:

> If the argument of those who oppose the use of identification techniques to disclose which children are vulnerable were sound, we should logically . . . sit back complacently (as, unfortunately, we too often do today) until the child has developed into a true delinquent or gang member and then haul him into court with the usual far from satisfactory result.[328]

As Glueck saw it, "The choice presented to a community is whether its citizens prefer to let potentially delinquent children ripen into persistent offenders or to intervene, prophylactically, at a stage which gives the greatest promise of changing their dangerous attitudes and behavior. . . ."[329]

Glueck felt that the necessary "prophylactic" intervention could be "voluntary" rather than "compulsory" and that those "entrusted with the job" could "be expected to be more perceptive and tactful than to 'stigmatize' a child as a predelinquent."[330] "[I]t cannot be supposed," Glueck wrote, "that trained social workers would typically force themselves into a home and dramatically announce, 'Your child has been predicted as a delinquent!' "[331]

The voluntary approach envisioned by Glueck has been widely implemented. Today all sorts of intervention programs are available to parents who wish to volunteer themselves or their children for special treatment. The federally funded community mental health center is perhaps the clearest example.[332]

The main impediment to success of this voluntary approach is that it is indeed voluntary. Parents of children predicted to be at risk for delinquency are free to accept or reject intervention. And, unfortunately, those parents whose children most need in-

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327. *See* Monahan, *Childhood Predictors of Adult Criminal Behavior*, in EARLY CHILDHOOD INTERVENTION AND JUVENILE DELINQUENCY 19 (F. Dutile, C. Foust, & D. Webster eds. 1982).

328. Glueck, *supra* note 99, at 318.

329. *Id.*

330. *Id.*

331. *Id.* at 317.

332. Hopson, *Commentary*, in EARLY CHILDHOOD INTERVENTION AND JUVENILE DELINQUENCY 125 (F. Dutile, C. Foust, & D. Webster eds. 1982). *See also* Community Mental Health Centers Act, 42 U.S.C. §§ 2681-2689(m) (1982); 36 PROGRAM MODELS, *supra* note 309, at 20-143 (descriptions of 36 voluntary intervention programs).

tervention are often the most resistant to it.[333] Moreover, even when parents are willing to "volunteer" their children for intervention, the children themselves may resist.[334]

In view of these limitations to the voluntary prevention approach, some commentators have suggested *compulsory* intervention in the lives of youngsters predicted to be at risk for becoming delinquents. In the case of adjudicated delinquents or status offenders, there is already a statutory basis for such compulsory intervention.[335] To date, however, the juvenile justice system has been given no legal authority to mandate intervention where a child is merely predicted to become a delinquent. Thus, any effort at compulsory intervention in such cases would require legislative initiatives.

One suggested form for such legislation is the expansion of existing status offender laws to include predelinquents.[336] This approach would expand the reach of such laws to encompass not only so-called persons or children in need of supervision (PINS and CHINS)—i.e., runaways, truants and children who refuse to comply with parental commands—but also youngsters merely predicted to become delinquent.[337] Such an expansion of the juvenile courts' jurisdiction would provide the needed authority for state intervention regardless of parental consent.[338]

The other form of legislation which has been suggested involves authorization of compulsory intervention without any judicial finding that a child is delinquent or in need of supervision. Such a statute would authorize compulsory intervention in the lives of "potentially delinquent" children "along the lines of compulsory vaccination, compulsory quarantine for kids with measles, mandatory automobile child restraints, requirements that certain children have certain kinds of medicine put in their eyes at birth,

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333. *Early Identification and Classification of Juvenile Delinquents: Hearing Before the Subcommittee on Juvenile Justice of the Senate Committee on the Constitution*, 97th Cong., 1st Sess. 34 (1981) (prepared statement of Dr. David P. Farrington).

334. *See* Monahan, *supra* note 327, at 21 n.23 ("The true test of voluntariness is whether the child can say 'no' and walk out the door."). *See also* Parham v. J.R., 442 U.S. 584 (1979) (adversary hearing not required when parents seek to have minor child committed to mental institution).

335. *See generally* J. MURRAY, STATUS OFFENDERS: A SOURCEBOOK (1983). *See also* Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 503-04 n.1 (1984).

336. Hopson, *supra* note 332, at 127.

337. *Id.*

338. *Id.*

compulsory-educational tracking statutes, and the more general compulsory education statute."[339] Such a statute, it has been urged, would be justified not by "the *parens patriae* concept of the juvenile court" but rather by "the general concept of the state's police power."[340]

Thus far, commentators have not specified the precise parameters of a compulsory intervention statute of this sort. However, at least two authorities have hinted at what those parameters might be. In 1970, for example, President Nixon asked the Department of Health, Education and Welfare to consider the proposals of Dr. Arnold Hutschnecker.[341] Hutschnecker, who served as psychiatric consultant to the National Commission on the Causes and Prevention of Violence, had suggested the mandatory mass screening of every child between the ages of six and eight in the United States to determine their potential for criminal behavior.[342] Hutschnecker further suggested immediate "[c]orrective treatment . . . for all those tested who show delinquent tendencies."[343] For younger children identified as predelinquent, he recommended mandatory after-school counseling. Older youngsters with established criminal propensities, he said, should be sent to special camps for massive psychological and psychiatric treatment including "Pavlovian methods which I have seen used effectively in the Soviet Union."[344]

More recently, another psychiatric commentator has suggested that "psychiatric examination of children at school entrance time should be required like vaccination."[345] Children found to be disturbed; he suggested, should be denied entrance to school unless their parents agree to psychiatric treatment for the child—or for themselves. Those found to be "dangerously disturbed," he said, should be subjected to "enforced treatment" which "might prevent many future [Lee Harvey] Oswalds."[346]

To date, no statutes of this sort have been enacted. Yet there

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339. *Id.* at 126.
340. *Id.*
341. L.A. Times, Apr. 5, 1970, at 9, col. 4.
342. *Id.*
343. *Physician Heal Thyself*, TIME, April 20, 1970, at 8.
344. *Id.*
345. Bellak, *The Need for Public Health Laws for Psychiatric Illness*, 61 AM. J. PUB. HEALTH 119, 120 (1971).
346. *Id.*

are clear indications that compulsory intervention in the name of delinquency prevention is very much on the minds of legislators. For example, in 1981, the Senate Subcommittee on Juvenile Justice held a hearing on the "early identification and classification of juvenile delinquents."[347] In opening the hearing, subcommittee chairperson, Senator Arlen Specter, stated the agenda:

> There is an evolving pattern which I personally have observed and has been noted by many others where the juvenile is a truant at the age of 8 or 9, a vandal at 10 or 11, and guilty of minor petty larceny at 12 or 13, burglary of a vacant building at 13 or 14, perhaps robbery at 15 and robbery-murder at 17. The question is whether we can identify in this crime cycle the critical spot where we might direct some greater attention, such as family counseling or perhaps psychological or psychiatric care or a variety of potential corrective actions which might take the juvenile out of the crime cycle.[348]

Later in the proceedings, Senator Specter made clear the point of the hearing: "The issue is, At what point do we intervene on a *nonvoluntary* basis?"[349]

Authorization of nonvoluntary or compulsory intervention in the lives of children not yet formally identified as delinquents but merely predicted to be at risk for delinquent behavior is a drastic step which, to date, no governmental body, state or federal, has been willing to take. Statutory proposals such as those described above have been decried as fraught with constitutional objections.[350] In *Martin*, however, the Supreme Court appears to have obviated such objections.

Recall, for example, that in *Martin* the Court concluded that: (1) as a legal matter it is possible to predict future criminal conduct;[351] (2) even intervention as oppressive as incarceration does not constitute "punishment" when applied to juveniles predicted to commit crimes[352] but rather protects "both the community and the juvenile himself";[353] (3) the state has a "legitimate and com-

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347. *Early Identification and Classification of Juvenile Delinquents: Hearing Before the Subcommittee on Juvenile Justice of the Senate Committee on the Constitution*, 97th Cong., 1st Sess. (1981).

348. *Id.* at 1 (statement of Sen. Arlen Specter).

349. *Id.* at 12 (emphasis added).

350. *See* Hopson, *supra* note 332, at 126-27.

351. Schall v. Martin, 104 S. Ct. 2403, 2417-18 (1984).

352. *See id.* at 2412-15.

353. *Id.* at 2412.

pelling interest" in preventing crime;[354] and (4) this interest outweighs the liberty interests of juveniles, who are "always in some form of custody" anyway.[355]

While *Martin* pertained to juveniles at least formally *accused* of crimes, the conclusions reached by the Court in sustaining the New York detention statute have clearly foreclosed many, if not all, of the major constitutional objections which might be raised against statutes authorizing compulsory intervention in the lives of children merely *predicted* to be at risk for future criminal conduct. How legislators will respond in light of *Martin* remains to be seen. It might be hoped that state lawmakers will see the obvious lesson in the empirical research reviewed in this Article. There is good reason, however, to believe that they may instead begin to act upon the kinds of statutory proposals described earlier—proposals which would authorize coercive state intervention premised solely upon individual predictions of dangerousness. As Professor Tribe has observed, "The inevitable consequence [of preventive detention] is a continuing pressure to broaden the system in order to reach ever more potential detainees. Indeed, this pressure will be generated by the same fears that made preventive detention seem attractive in the first place."[356]

CONCLUSION

In *Schall v. Martin*, the Supreme Court held that, in the interest of crime prevention, juveniles merely accused of crimes may be incarcerated before trial, indeed even before a finding of probable cause, simply on the basis of judicial predictions of criminal conduct. Empirical research indicates that such predictions are more likely to prove wrong than right and suggests that this likelihood of error cannot be reduced appreciably by the imposition of procedural safeguards. In light of this research, it seems clear that many if not most juveniles detained on the basis of predictions of criminal behavior will be erroneously identified as potential criminals or recidivists and be needlessly incarcerated.

Viewed most narrowly, *Martin* affirmatively sanctions a pro-

354. *Id.* at 2410.

355. *Id.*

356. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 375 (1970).

cess which unreasonably interferes with the liberty interests of juveniles alleged to have committed crimes. The Court's reasoning in *Martin*, however, also appears to portend Supreme Court approval of preventive detention for adult criminal defendants, a practice the constitutionality of which seems bound to be determined by the Court in the near future. Furthermore, the Court's reasoning in *Martin* may well be read by legislators and policymakers as condoning, if not encouraging, state-mandated intervention in the lives of juveniles not yet charged with wrongful acts but merely predicted to become delinquent.

While *Martin* has already been hailed as "a major victory for the preservation of the juvenile-justice system,"[357] the present analysis suggests that it might more properly be regarded as "the first step of a profound shift in our system of criminal justice—a system that, at least until now, has operated on the premise that crime should . . . be prevented by the threat of subsequent punishment rather than the imposition of prior imprisonment."[358]

357. N.Y. Times, June 5, 1984 at B-5, col. 1 (quoting Leroy S. Zimmerman, Attorney General of Pennsylvania, "one of 23 state attorneys general who signed a 'friend of the court' brief on behalf of the New York statute").

358. Tribe, *supra* note 356, at 375.