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Interim Detention of Juvenile Delinquents in Ohio: A Proposal for Controlling Judicial Discretion

LEROY PERNELL*

I. INTRODUCTION

The detention of juveniles prior to adjudication or disposition of their cases represents one of the most serious problems in the administration of juvenile justice. The problem is characterized by the very large number of juveniles incarcerated during this stage annually, the harsh conditions under which they are held, the high costs of such detention, and the harmful after-effects detention produces[1].

The extent of juvenile interim[2] detention and its social and economic costs are well documented.[3] National estimates of the number of children detained each year in an interim status range as high as 500,000.[4] In Ohio the number of juveniles retained prior to disposition rose from 10,405 in 1973 to 15,620 in 1975.[5] Unsuitable, often deplorable, conditions of detention contribute to the urgency of the problem.[6]

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1. INSTITUTE OF JUDICIAL ADMINISTRATION AND AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO INTERIM STATUS (Tent. Draft 1977) (footnotes omitted) [hereinafter cited as IJA-ABA STANDARDS, INTERIM STATUS].

2. In this article the term "interim detention" refers to periods of detention: (1) after arrest and before trial, (2) after trial and before final disposition, or (3) after the disposition hearing and before implementation of disposition. *See* IJA-ABA STANDARDS, INTERIM STATUS, *supra* note 1, at 4. "Interim period" is defined by the Institute of Judicial Administration—American Bar Association Joint Commission on Juvenile Justice Standards as "[t]he interval between the arrest or summons of an accused juvenile charged with a criminal offense and the implementation of a final judicial disposition. The term 'interim' is used as an adjective referring to this interval, *e.g.* 'interim status,' 'interim liberty,' and 'interim detention.' " *Id.* STANDARD 2.1.

3. *See generally* sources cited in IJA-ABA STANDARDS, INTERIM STATUS, *supra* note 1, at 1-2 nn.1-4. *See also* R. GOLDFARB, JAILS 286-344 (1975); Sarri, *The Detention of Youth in Jails and Juvenile Detention Facilities*, 24 JUV. JUST. 2 (1973).

4. R. SARRI, UNDER LOCK AND KEY: JUVENILES IN JAILS AND DETENTION 5 (1974).

5. BUREAU OF STATISTICS, OHIO DEPARTMENT OF MENTAL HEALTH AND RETARDATION, OHIO JUVENILE COURT STATISTICS (1973-1975).

6.

> Although a great many states have laws specifically forbidding the jailing of children with adult offenders, nearly 90% of all juvenile court jurisdictions, particularly those in non-metropolitan areas, are too small to warrant detention facilities for children. . . . As a result, children are detained in old-age homes, insane asylums, courthouses, or often in one or two cells of the local jail.
>
> . . . The so-called separate facilities in jail often turn out to be a bunk . . . within hearing if not sight of adult criminals.

D. FREED & P. WALD, BAIL IN THE UNITED STATES: 1964, at 105 (1964).

In 1974 only Arizona, California. Connecticut, Indiana and Maryland absolutely forbad juveniles to be detained in adult jails. M. LEONARD & R. SARRI, JUVENILE DELINQUENCY: A COMPARATIVE ANALYSIS OF LEGAL CODES IN THE UNITED STATES 32 (1974).

In Ohio.

> [a] child may be detained in jail or other facility [sic] for detention of adults only if [juvenile detention facilities are] not available and the detention is in a room separate and removed from those for adults. The court may order that a child over the age of fifteen years be

In 1976, Ohio Attorney General William J. Brown responded to the chaotic state[7] of Ohio's juvenile justice system by appointing a Citizens' Task Force to recommend corrective action. As a direct result of the efforts of the Task Force, House Bill 460 was introduced into the 112th Ohio General Assembly in 1977. The bill, which has been passed by the House in amended form[8] and which now awaits Senate action, would substantially revise juvenile procedures for the state. Some of the more costly and controversial provisions of the legislation address the nature and conditions of juvenile detention facilities.[9] Although passage of the bill would also affect interim detention procedures,[10] amendment or additional legislation would be required to relieve the unfairness and arbitrariness of Ohio's present system for deciding which juveniles need interim detention.

This article will assess traditional and contemporary views of criteria for imposing interim detention and will discuss the intimately related issue of juvenile bail. It will then propose an alternative new model to guide judicial imposition of interim detention in Ohio and elsewhere.

II. Criteria for the Decision to Detain

The history of juvenile law helps to explain the conflicting goals that beset our modern juvenile system. The American juvenile courts were

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> detained in a jail in a room separate and removed from adults if public safety and protection reasonably require such detention.
>
> The official in charge of a jail or other facility for the detention of adult offenders or persons charged with crime shall inform the court immediately when a child, who is or appears to be under the age of eighteen years, is received at the facility, and shall deliver him to the court upon request, or transfer him to a detention facility designated by the court.

Ohio Rev. Code Ann. § 2151.312(A) (Page 1976). The fact that 56 of Ohio's 88 counties lack separate juvenile detention facilities other than designated areas in adult jails undoubtedly contributes to the "blatant violations of juvenile rights in most counties and intentional or unintentional violations of the law regarding the separation of adults and children." [Ohio] Attorney General's Juvenile Justice Task Force, Justice for Our Children 50 (1976) [hereinafter cited as Ohio Task Force Report].

Exploitation, homosexual rape, and suicide are consequences of commingling adults and juveniles in detention. *See* Robinson, *What to Do If Your Child Is Arrested*, 103 Reader's Digest 167, 167-68 (1973). People v. Harmon, 53 Mich. App. 482, 220 N.W.2d 212 (1974), reversed the conviction of a teenager for escape from an adult prison. Testimony revealed that he had twice been beaten by adult gangs for refusal to engage in homosexual activity. At least one court has held that jailing children with adults violates due process. Cox v. Turley, 506 F.2d 1347 (6th Cir. 1974).

7. Ohio Task Force Report, *supra* note 6, at 12.

8. Sub. H.B. 460, 112th Ohio Gen. Ass. (1978).

9. In response to the intense criticism of the practice of commingling children with adults in detention facilities, discussed at note 6 *supra*, Sub. H.B. 460 would amend existing Ohio law to proscribe placement of juveniles in adult jails. Although the bill stops short of forbidding adults and juveniles to be housed under one roof, it imposes segregation sufficiently strict that

> it is impossible for the child to come into contact with or converse with the adults in the building, and the children who are detained in the building do not use hallways, sanitary, eating, or recreational facilities, or any other auxiliary facilities at the same time they are being used by the adults who are detained in the building.

Sub. H.B. 460, *supra* note 8, § 2151.15(C).

The bill also directs immediate transfer of a child mistakenly placed in an adult facility; absent transfer the charges must be dismissed, although the child may be recharged. *Id.* § 2151.13(B).

10. *See* text accompanying notes 53-57 *infra*.

founded at the turn of this century[11] as a response to social conditions of the Industrial Revolution[12] in the belief that courts, with their inherent equity powers, could and should have broad discretion to act in the best interests of the child.[13] The common-law concept of *parens patriae*[14] became the courts' guiding principle. As a natural outgrowth of this doctrine of "supreme guardianship," the courts came to view their power as extending to the physical custody of the child.[15] Tension has arisen in the system, however, because landmark decisions, notably *Kent v. United States*[16] and *In re Gault*,[17] have forced the states to afford constitutional due process and equal protection to juveniles in custody.

This author proceeds from the premise, shared by prominent critics of contemporary predisposition detention procedures, that "the danger of

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11. Illinois adopted the first Juvenile Court Act. Act of April 21, 1899, 1899 Ill. Laws 131.

> The Illinois Juvenile Court Act [included] most of the features that have since come to distinguish the juvenile court. The original act and the amendments to it that shortly followed brought together under one jurisdiction cases of dependency, neglect and delinquency—the last comprehending incorrigibles and children threatened by immoral associations as well as criminal lawbreakers. Hearings were to be informal and nonpublic, records confidential, children detained apart from adults, and a probation staff appointed. In short, children were not to be treated as criminals nor dealt with by the processes used for criminals.

THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT, JUVENILE DELINQUENCY AND YOUTH CRIME 3 (1967) [hereinafter cited PRESIDENT'S TASK FORCE REPORT].

12.

> Both industrialization and immigration were bringing people into cities by the thousands, with resulting overcrowding, disruption of family life, increase in vice and crime, and all the other destructive factors characteristic of rapid urbanization. Truancy and delinquency rose rapidly, and civic-minded men and women worried about the exposure of children to tobacco, alcohol, pornography, and strict life in general. . . . [T]hroughout the 19th century there was a rising concern about official treatment of children—the growth of what has been called the spirit of social justice. The social sciences . . . seemed to provide the ideal tool for implementing the dual goals of treating wayward children and offsetting their deleterious surroundings.

Id. at 2-3.

13. Although European and American children were often treated as harshly as adults well into the nineteenth century, special treatment for children had its origins in the early English equity courts. Under the doctrine of *inquisitio post mortem*, the Crown assumed the parental role in administering deceased children's estates. H. LOU, JUVENILE COURTS IN THE UNITED STATES 3, 13-14 (1927). After the abolition of the Court of Wards in 1600, the Court of Chancery assumed the duty of protection of all infants. 3 W. BLACKSTONE, COMMENTARIES *426-28. This early jurisdiction extended only to matters traditionally civil in nature; at common law a child of seven was presumed incompetent to commit a crime. Jurisdiction to act in the best interest of children accused of acts that would constitute adult crime seems to stem from a marriage of equity and criminal law principles. The fact that courts of criminal jurisdiction were unable to deal effectively with young children undoubtedly contributed to the attractiveness of separate children's courts.

14. *Parens patriae* literally means "father of his country" or "parent of the country." BLACK'S LAW DICTIONARY 1269 (14th ed. 1968). The doctrine was set forth in Eyre v. Shaftsbury, 2 Peere Williams 103 (1772):

> The care of all infants is lodged in the king as parens patriae, and by the king this care is delegated to his Court of Chancery. . . . Idiots and lunatics, who are incapable to take care of themselves, are provided for by the king as parens patriae; and there is some reason to extend this care to infants.

15. H. LOU, *supra* note 13, at 8.

16. 383 U.S. 541 (1966).

17. 387 U.S. 1 (1967).

too much detention before trial or disposition currently outweighs the danger—both for juveniles and society—of too much release."[18] The numbers and characteristics of juveniles detained are determined by police and juvenile court criteria for deciding which children are to be held. Fairness, both as a matter of constitutional due process and social policy, would seem to demand that the criteria be specific and consistently applied. Nevertheless, in 1976, sixteen states[19] had no meaningful standards for detention but left the determination entirely to the unguided discretion of the juvenile judge.[20] More commonly, state statutes, including Ohio's,[21] list one or more very general classes of juveniles for whom interim detention may be required:[22] (1) children who present a risk of harm to themselves or others; (2) children who present a risk of absconding from the jurisdiction; and (3) children who lack parental supervision.

There is general agreement that children who threaten to abscond or who lack parental supervision may appropriately be detained,[23] although

18. IJA-ABA STANDARDS, INTERIM STATUS, *supra* note 1, at 3. *See also* D. FREED & P. WALD, *supra* note 6, at 93-109, 111.

19. Alabama, Alaska, Arkansas, Connecticut, Idaho, Louisiana, Maine, Mississippi, Missouri, Nevada, North Carolina, Rhode Island, Virginia, West Virginia, Wisconsin and Washington. McDiarmid, *Juvenile Pre-Trial Detention*, 34 NAT'L LEGAL AID AND DEFENDERS' ASS'N BRIEFCASE 77, 78 (1976).

20.

> If the criteria [that the judge uses to make his detention determination] are loose enough to permit him to interpose subjective judgments about the child's best interests, or his own predictions about possible danger to the community, the results are bound to vary with the judge's philosophic disposition and will be unpredictable on a jurisdiction-wide basis.

Wald, *Pretrial Detention for Juveniles*, in PURSUING JUSTICE FOR THE CHILD 121, 121-22 (M. Rosenheim ed. 1976).

21. The Ohio statute provides, in part, that

> [a] child taken into custody shall not be detained or placed in shelter care prior to hearing or complaint unless his detention or care is required to protect the person and property of others or those of the child, or because the child may abscond or be removed from the jurisdiction of the court, or because he has no parent or guardian or custodian or other persons able to provide supervision and care for him and return him to the court when required or because an order for his detention or shelter care has been made by the court pursuant to this chapter.

OHIO REV. CODE ANN. § 2151.31(D) (Page 1976). This section was enacted in 1969 at the urging of Ohio juvenile authorities such as Judge Whitlatch, who has written that Ohio's previous informal policy of interim release if the child was not likely to abscond or endanger "was subject to the interpretation of so many individuals that it was never intelligently implemented. In practice, children were admitted to the detention home upon the request of social workers, intake personnel, probation officers, police officers, school officials and parents without any well-defined criteria for admissions." Whitlatch, *Practical Aspects of Reducing Detention Home Population*, 24 JUV. JUST. 17, 21 (1973).

Juvenile Rule 7(A), adopted by the Ohio Supreme Court in 1972 without disapproval by the Ohio General Assembly, is worded identically to Ohio Revised Code § 2151.31(D) except that the Rule omits the concluding phrase of the statute: "because an order for his detention or shelter care has been made by the court pursuant to this chapter." The Ohio Constitution provides that "[a]ll laws in conflict with [the juvenile] rules shall be of no further force or effect after such rules have taken effect." OHIO CONST. art IV, § 5(B). It is therefore arguable that detention cannot be imposed by the Ohio juvenile courts for any reason not explicitly stated in Juvenile Rule 7(A).

22. Ohio and several other states allow detention of a child otherwise undetainable under the statutory criteria, if there is no parent, guardian, or relative able to assure custody. McDiarmid, *supra* note 19, at 78.

23. Ferster, Snethen & Courtless, *Juvenile Detention: Protection, Prevention or Punishment?* 38 FORDHAM L. REV. 161, 164 (1969).

most jurisdictions do not provide suitably specific guidelines to indicate the conditions under which a court is to order detention on either or both of these two grounds.[24] The widespread practice of detaining children who allegedly present a risk of harm is, however, open to serious question.

A. *Preventive Detention: Practical Objections*

The risk that a child charged with a delinquent act poses to himself, the community, or both, has been accepted as a justifiable basis for interim detention.[25] There is, nevertheless, a shocking lack of data to support the belief that the judicial system can adequately identify those children who pose a real threat of danger and still avoid incarcerating those who do not.[26]

Given the detrimental effects of detention, it would be unconscionable to set an overinclusive standard. The emotional consequences of detention include insecurity, assumption of the psychological role of prisoner,[27] and suicidal inclination.[28] Detained children are subject to physical and sexual abuse by their peers.[29] Trial and subsequent disposition are often seriously prejudiced by interim detention.[30]

There have been few attempts at identifying specific dangerous acts

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24. *See* Wald, *supra* note 20, at 123.

25. *See, e.g.*, H. LOU, *supra* note 13, at 106; McDiarmid, *supra* note 19. For a history of the origin of the concept of preventive detention, see R. GOLDFARB, RANSOM 127-49 (1965).

26.

> There is no responsible evidence to indicate that we know how to predict dangerous or violent behavior in a juvenile any more than we do in an adult. Yet juvenile courts have operated on the premise that they are authorized to detain for possible future criminal behavior. Typically, the kind of illegal behavior that warrants detention is not even specified; it could be any offense, from murder to marijuana. What few statistics we have show that only a small majority of juveniles in detention are charged with serious crimes involving violence to the person of others.

Wald, *supra* note 20, at 124.

27. Komisaruk, *Psychiatric Issues in the Incarceration of Juveniles*, 21 JUV. COURT JUDGES J. 117, 118 (1971).

28. *See* R. GOLDFARB, *supra* note 25, at 301.

29. *See* Note, *Detention Procedures in the Juvenile Court Process*, 54 MINN. L. REV. 409, 416 (1969).

30.

> From his experience in court, a California public defender has determined that the minor who comes to court in custody receives harsher treatment at disposition (the sentencing stage) than does the minor who remains out of custody. Judges are less likely to order great changes in family structure when the minor comes to court with his family. The presence of the family is an indication that a community-oriented placement is presently working and should be continued. The likelihood of separation from the family is increased when the minor is in custody and has, therefore, been away from his family for some time. After all, he is used to being confined, and the family expectations are lower.

Edwards, *The Rights of Children*, 37 FED. PROB. 34 (1973).

The case of Kinney v. Lenon, 425 F.2d 209 (9th Cir. 1970) illustrates another important aspect of this problem. A seventeen-year old black youth was held following a fight at school. Defendant's white attorney required his client's assistance to locate crucial witnesses and to assure their cooperation. The district court denied the youth's request for release. The Ninth Circuit reversed, holding that under the specific circumstances due process demanded that the accused be released to participate in the preparation of his own defense.

that constitute a threat to the child or the community.[31] The most serious problem created by the use of the "dangerousness" standard is that it is virtually impossible, as an evidentiary matter, to prove a child's future potential for engaging in harmful conduct. The child's attitude is too subjective a criterion.[32] Nor does the criterion of the child's past conduct provide a reliable measure of future behavior.[33] The "past conduct" criterion is often invoked, however, despite the lack of empirical studies to support it.[34]

Courts usually allow the seriousness of the offense to determine or strongly influence whether a child should be detained pending final disposition,[35] although it has long been observed that those who are charged with the most serious offenses may not pose a future threat to the community.[36] A major study by the American Bar Foundation of the effectiveness of adult pretrial preventive detention concluded that although the seriousness of the offense does to some degree identify subsequent recidivism, "the accuracy is not substantial."[37] Apparently no similar study has been made of juvenile interim detainees. There is, however, no reason to believe that the future conduct of juveniles can be predicted with greater certainty than the future conduct of adults.[38]

B. *Preventive Detention: The Equal Protection Problem*

Future harm is not only an unreliable criterion for interim detention of juveniles; it is constitutionally questionable when there is no corresponding basis for detention of adults. In *People ex rel. Wayburn v. Schupf*[39] the alleged delinquent, accused of acts which if committed by an adult would have constituted murder in the second degree and manslaughter in the first degree, was held without bail. New York, like

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31. *See* Ferster, Snethen & Courtless, *supra* note 23, at 166.

32. *Id.*

33. *Id.* at 167.

34. *See* Wenk, Robison & Smith, *Can Violence be Predicted?*, 18 CRIME AND DELINQUENCY 393, 398 (1972).

35.

> The imposition of arbitrary detention rules results in the unnecessary detention of many children. These rules are generally based on the seriousness of the alleged offense; such offenses commonly are homicide, aggravated assault, armed robbery, rape and possession of guns. Superficially, this appears to be a sound basis for detention. Therefore, detention of children held under such a rule frequently goes unchallenged by parents and counsel, and the screening process by staff ceases with the information concerning the nature of the charge. The obvious invalidity of such a rule is that it takes into consideration only one aspect of the screening process, albeit, an important one.

Whitlatch, *supra* note 21, at 27. *See also* Ferster, Snethen & Courtless, *supra* note 23, at 167.

36. F. WARNER, JUVENILE DETENTION IN THE UNITED STATES 153 (1933).

37. American Bar Foundation, *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. REV. 289, 323-24 (1971).

38. Wenk, Robison & Smith, *supra* note 34.

39. 80 Misc. 2d 730, 365 N.Y.S.2d 110 (Sup. Ct. Kings County 1974).

Ohio,[40] allows detention of juveniles when it is substantially probable that they will not appear before the court for future hearings, or when there is a serious risk that another offense may be committed.[41] The family court judge in *Wayburn* specifically found that the juvenile, although likely to return to court for future hearings, presented a serious risk to the community because of the seriousness of the charge.[42]

The alleged delinquent, Schupf, filed a petition for habeas corpus alleging that the New York juvenile detention statute violated the equal protection clause of the United States Constitution because there existed no similar authority to preventively detain a similarly-charged adult.[43] The New York Supreme Court sustained the petition, emphasizing that "[t]he right at issue in this case is the most fundamental of all our rights—the right to liberty."[44] The court observed that when legislation that affects a fundamental right is challenged on equal protection grounds, the enactment will be subjected to strict scrutiny; for the legislation to be upheld, the state must show a compelling interest in maintaining the classification.[45] The court concluded that because the effect and purpose of preventive detention is the same for adults as it is for juveniles,[46] "[t]here can be no compelling State interest in prohibiting preventive detention for adults while allowing it for juveniles."[47] The Court of Appeals reversed, agreeing with the lower court's application of strict scrutiny but finding a compelling state interest.[48] In an opinion concurring in result only Judge Fuchsberg asserted that juvenile preventive detention fails to pass constitutional muster because of the absence of any tools sufficient to make accurate predictions of future conduct.[49]

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40. For the text of the Ohio Statute, see note 21 *supra*.

41.

> (a) [T]he court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained:
> (i) there is a substantial probability that he will not appear in court on the return date; or
> (ii) there is a serious risk that he may before the return date do an act which if committed by an adult would constitute a crime.

FAM. CT. ACT (29A) § 739 (McKinney 1975 & Supp. 1977-78).

42. 80 Misc. 2d at 732, 365 N.Y.S.2d at 112.

43. New York law forbids preventive detention of adults. N.Y. CRIM. PROC. LAW § 510.30 (McKinney 1971 & Supp. 1977-78)).

44. 80 Misc. 2d at 733, 365 N.Y.S.2d at 113.

45. *Id.* at 732, 365 N.Y.S.2d at 112.

46.

> The effect of permitting pre-trial detention of juveniles is that they are incarcerated and deprived of their liberty. The effect is identical on juveniles and adults. As Mr. Justice Black has written:
> "Imprisonment awaiting determination of whether that imprisonment is justifiable has precisely the same evil consequences to an individual whatever legalistic label is used to describe his plight." (Carlson v. Landon, 342 U.S. 524, 557 . . . [dissent] [1952]).

Id. at 733, 365 N.Y.S.2d at 113.

47. *Id.*

48. People *ex rel.* Wayburn v. Schupf, 39 N.Y.2d 682, 689, 350 N.E.2d 906, 909-10, 385 N.Y.S. 2d 518, 520 (1976).

49. *Id.* at 691-94, 350 N.E.2d at 911-13, 385 N.Y.S.2d at 522-24 (Fuchsberg, J., dissenting).

Confusion associated with the constitutionality of preventive detention of juveniles has been further compounded by the recent case of *Warren v. Wilson.*[50] In *Wilson* the family court of Onandaga, New York, ruled that the *Wayburn* lower court finding that there was no compelling state interest is still valid for juveniles over the age of sixteen.

Ohio's juvenile detention criteria pose the same constitutional problems as those of New York. The parallel extends to the exposure of juveniles over the age of fifteen to preventive detention[51] when they would have an absolute right to bail if they had been charged as adults.[52]

C. *Effect of Substitute House Bill 460 on Interim Detention*

Although Substitute House Bill 460 would affect interim detention primarily through restrictions it would impose on the use of particular types of facilities,[53] the bill would change existing detention criteria[54] in one significant respect. Proposed section 2151.16(a)(5) would allow

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Judge Fuchsberg concurred in the result only, on the ground of mootness. During the pendency of the appeal the juvenile had been adjudicated a delinquent and committed to a youth facility. The majority recognized that the issue was moot for Schupf, but chose nevertheless to resolve the question. *Id.* at 670, 350 N.E.2d at 910, 385 N.Y.S.2d at 519.

50. 89 Misc. 2d 1046, 393 N.Y.S.2d 275 (Fam. Ct. Onandaga Cty. 1977).

51. OHIO REV. CODE ANN. § 2151.26 (Page 1976).

52. OHIO CONST. art, I, § 9; OHIO R. CRIM. P. 46.

53. *See* note 9 *supra.*

54. In its present form the Ohio statute directs that "[a] child taken into custody shall not be *detained* or placed in *shelter care* prior to hearing or complaint unless his detention or care is required to protect the person or property of *others* or those of the *child* . . . ." OHIO REV. CODE ANN. § 2151.31(D) (Page 1976) (emphasis added). H.B. 460 as originally drafted appeared to disallow juvenile placement in detention facilities in order to protect the person or property either of the child himself or of others. H.B. 460, 112th Gen. Ass. §§ 2151.55(B)-(C), 2151.22(A)(1). Such children could, under the original draft, be placed in shelter care, defined as a physically unrestricted (nonsecure) facility. *Id.* § 2151.22(A)(1). The version of the bill debated in the House distinguished *detention*, permissible only to protect the person or property of *others*, from shelter care, an available option to protect the child's own person or property. It is problematic whether either version would have improved on current law. Neither proposed specific standards to measure risk to a child's person or property. Moreover, the degree of security at the holding facility is irrelevant to the fact that a child has been removed involuntarily from his or her home to a potentially detrimental environment. *See* notes 27-30 and accompanying text *supra.*

Prior to passage by the House, however, Sub. H.B. 460 was amended to restore essentially the present statutory language:

> (*A*) A child taken into custody shall be released immediately to his parents, guardian, or other custodian unless:
>
> (1) Shelter care or detention is necessary to protect the person or property of the child or other persons;
>
> (2) There are reasonable grounds to believe that the child may abscond or be removed from the jurisdiction of the court;
>
> (3) An order for shelter care or detention has been made pursuant to this chapter;
>
> (4) The child has no parent, guardian, custodian, or other person able to provide supervision and care for him and return him to court when required;
>
> (5) The child's parents, guardians, custodians, or other persons who are supervising him refuse to execute a written promise to bring the child before the court when requested by the court;
>
> (6) The report required by division (C) of this section indicates that shelter care is warranted for an alleged dependent child.

Sub. H.B. 460, 112th Ohio Gen. Ass. § 2151.16 (1978).

predisposition detention of children whose parents or guardians refuse to promise in writing to produce the child at future court hearings.[55] This would codify and strengthen the present informal juvenile court practice of conditioning release on oral agreement of parents to guarantee a juvenile's future appearance.

The effect of this new provision would be to make the child's release dependent on the whims of the parent rather than on an actual determination of the likelihood that the child will pose a danger to himself or others, or that he will fail to appear at future court dates. The parent is often the last person to want the child released. When the parents themselves have filed the delinquency charges, they cannot simultaneously serve as prosecutor and protector. Even parents who have not brought charges may feel that they can no longer cope with the child's behavior and may view detention as relief from the pressures of parental responsibility. Those harried parents may be reluctant to agree in writing to return the child to the court, if by that agreement they lose what they see as their only chance of a respite. That parental attitude is understandable, but hardly consistent with the generally accepted philosophy of detention.

Moreover, parents often view overnight or weekend stays in detention as a good "dose" of discipline, in lieu of personally-imposed parental punishment. The parent hopes that the shock of a temporary lock-up will teach the child a lesson he will never forget. Unfortunately, it may also be a lesson from which he will not easily recover. The child, especially if he is a "first offender," may fall victim to older, bigger, and more experienced juvenile offenders.[56]

Because the foregoing motives are common, proposed Substitute House Bill 460 would increase the likelihood that the court will not release the child. It would be more consistent with the purposes and realities of detention not to let parents refuse to agree to care for their child. It is illogical to punish the child with continued confinement in a detention setting merely because the parents refuse to accept their responsibilities. If the proposed provision to detain children for parental refusal to guarantee return is retained, the bill should be amended to provide that a child detained for parental refusal must be treated as a dependent child

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55. *Id.*

56. *See* notes 27-30 and accompanying text *supra*. Asked in an interview whether a child could be taught a lesson by a few nights in jail, Milton G. Rector, President of the National Council on Crime and Delinquency, replied:

> No child deserves that kind of lesson. Being in jail is a traumatizing experience for youngsters. Some are brutalized. Some hurt themselves. All are further alienated from their parents. Just recently, a case came across my desk of a 17-year old college freshman, who was arrested because police found marijuana in his dormitory room. The boy's father let the police keep him in jail overnight. When he got there in the morning, the boy's nose was broken and both his eyes blackened—the result of a fight begun when older, tougher prisoners tried to gang-rape the younger boys.

Robinson, *supra* note 6, at 167-68.

(one who lacks proper parental supervision) and held in a less restrictive shelter care facility or foster home setting.[57]

Substitute House Bill 460 offers no solution to the problems of preventive detention. The bill would continue current practices and expand detention to include children whose parents decline to vouch for their child's future return to court. Adoption of this provision seems certain to increase the number of juveniles detained and worsen the already unsatisfactory, overcrowded, conditions of confinement.

D. *Interim Status Standards Proposed by the Institute of Judicial Administration-American Bar Association Joint Commission*

The Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards [IJA-ABA Commission] has proposed interim status standards to govern the actions of arresting officers, intake officers, and juvenile court judges.[58] The standards divide

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57. *See* text accompanying notes 96-100 *supra.*

58. IJA-ABA STANDARDS, INTERIM STATUS, STANDARDS 5.6 (police), 6.6 (juvenile facility intake officials), 7.7 (juvenile court). The other standards are keyed to the standard for intake officers:

6.6 Guidelines for status decision.

A. Mandatory release. The intake official should release the accused juvenile unless the juvenile;

1. is charged with a crime of violence which in the case of an adult would be punishable by a sentence of one year or more, and which if proven is likely to result in commitment to a security institution, *and* one or more of the following additional factors is present:

a. the crime charged is one of first or second degree murder;

b. the juvenile is currently in an interim status under the jurisdiction of the court in a criminal case, or is on probation or parole under a prior adjudication, so that detention by revocation of interim release, probation, or parole may be appropriate;

c. the juvenile is an escapee from an institution or other placement facility to which he or she was sentenced under a previous adjudication of criminal conduct;

d. the juvenile has a demonstrable recent record of willful failure to appear at juvenile proceedings, on the basis of which the official finds that no measure short of detention can be imposed to reasonably ensure appearance; or

2. has been verified to be a fugitive from another jurisdiction, an official of which has formally requested that the juvenile be placed in detention.

B. Mandatory detention. A juvenile who is excluded from mandatory release under subsection A. is not, *pro tanto*, to be automatically detained. No category of alleged conduct or background in and of itself may justify a failure to exercise discretion to release.

C. Discretionary situations.

1. Release vs. detention. In every situation in which the release of an arrested juvenile is not mandatory, the intake official should first consider and determine whether the juvenile qualifies for an available diversion program, or whether any form of control short of detention is available to reasonably reduce the risk of flight or misconduct. If no such measure will suffice, the official should explicitly state in writing the reasons for rejecting each of these forms of release.

2. Unconditional vs. conditional or supervised release. In order to minimize the imposition of release conditions on persons who would appear in court without them, and present no substantial risk in the interim, each jurisdiction should develop guidelines for the use of various forms of release based upon the resources and programs available, and analysis of the effectiveness of each form of release.

3. Secure vs. nonsecure detention. Whenever an intake official determines that

children accused of delinquency into two groups: (1) those whose release is mandatory, absent special circumstances, because the charged offense would, for an adult, be punishable by a sentence of less than one year; and (2) those whose release is discretionary because the charged offense would, for an adult, be punishable by a year or more in a secured facility.

The proposed standards supply laudably strict and definite criteria for the exercise of discretion to detain, and thus represent a significant improvement over both existing Ohio law and pending legislation. The classification of juvenile detainees by the nature of the offense charged is, however, vulnerable to criticism. The legislative distinction between crimes punishable by less than one year in prison (ordinarily misdemeanors)[59] and crimes punishable by one year or more (ordinarily felonies)[60] is often arbitrary and not reflective of the social significance of the offense. In Ohio, for example, such serious offenses as assault, negligent homicide, arson and sexual imposition are all chargeable as misdemeanors.[61] To codify the felony-misdemeanor distinction would seem no more desirable than to continue to allow subjective judicial discretion based upon essentially the same distinction. Moreover, because many juveniles would fall within the standards' allowance of discretionary detention, their adoption would reduce but not eliminate the problems traditionally associated with interim detention.

The recommendations are a compromise, completely satisfactory neither to those who would abolish predisposition detention nor to those who support completely discretionary detention powers for courts. The IJA-ABA Commission saw its standard as "a reasonable middle ground, characterized by a distinct preference for release, a permissible but minimal category of detainees, and a requirement of *candor* in identifying those who may be detained."[62]

III. BAIL: PANDORA'S BOX OR PANACEA?

One possible solution to the problem of arbitrary predisposition detention of children is to provide juveniles with a right to bail. Release would routinely be guaranteed as long as the terms and conditions of the

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> detention is the appropriate interim status, secure detention may be selected only if clear and convincing evidence indicates the probability of serious physical injury to others, or serious probability of flight to avoid appearance in court. Absent such evidence, the accused should be placed in an appropriate form of nonsecure detention, with a foster home to be preferred over other alternatives.

Id. STANDARD 6.6.

59. *See, e.g.*, OHIO REV. CODE ANN. § 2901.02(F) (Page 1975).

60. *See, e.g.*, *id.* § 2901.02(E).

61. *Id.* §§ 2903.13 (assault), 2903.05 (B) (negligent homicide), 2902.03 (arson), 2907.06 (sexual imposition).

62. IJA-ABA STANDARDS, INTERIM STATUS, *supra* note 1, at 79.

bail were met. However, money bail, which has often proved unworkable for adults,[63] presents even greater problems for juveniles.[64]

For present purposes the subject of juvenile bail will be approached as though its availability were within legislative discretion, circumscribed only by general principles of due process and equal protection. The constitutional question whether the right to bail is guaranteed by the eighth amendment to every adult accused of a criminal offense remains unanswered by the Supreme Court;[65] the derivative question, whether juveniles enjoy a federal constitutional right to bail, is beyond the scope of this discussion.[66]

The theory of bail in the adult criminal system is that "the forfeiture of one's goods will [serve as] an effective deterrent of the temptation to break the conditions of one's release."[67] Bail is properly employed only "to release the accused with assurance that he will return at trial";[68] it may not be denied merely because the accused is likely to flee,[69] nor set excessively high to achieve prophylactic or preventive detention.[70] In practice, the bail system is seriously flawed:

> Accused persons . . . are forced to spend the interval between arrest and trial in jail . . . because they cannot pay the bondsman's premium, or put up . . . collateral. They lose their jobs. . . . Their chances for acquittal are lowered. . . .

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63. *See, e.g.*, D. FREED & P. WALD, *supra* note 6, at 9-21.

64. *See* authorities cited in IJA-ABA STANDARDS, INTERIM STATUS, *supra* note 1, at 64.

65. *See* Stack v. Boyle, 342 U.S. 1 (1951).

66. In Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960), a federal district court recognized an eighth amendment right to bail and declared that this federal constitutional right could not be withheld from a juvenile merely because delinquent behavior is technically noncriminal. The court stated: "The ultimate test is not whether the proceedings are denominated criminal or civil, but what the outcome may be. If as a result of an infraction of law, the proceedings may result in depriving a person of his liberty, the protection of the bill of rights is applicable." *Id.* at 486.
As one commentator has pointed out,

> the ambiguous language of the excessive bail clause lends itself to at least three interpretations, and a number of controversies. First, in a number of state criminal cases, it has been held that "excessive bail" language, in itself, does not establish a right to bail. A second group of cases, on the other hand, suggest that such a clause infers that bail cannot be excessive in amount in cases where the court sets bail. However, if there are no statutory provisions or restrictions, the court has the discretion to deny bail altogether. A third group holds or suggests that the excessive bail clause necessarily implies a constitutional right to bail. A problem with this last approach, as pointed out by Professor Caleb Foote, is that the precise scope of the implied right is relatively undefined and this creates yet another issue. Until these inconsistencies concerning the interpretations of the excessive bail clause are settled, the language of the Eighth Amendment lends little support for the argument that juveniles should be granted the right to bail.

Hill, *The Constitutional Controversy of a Juvenile's Right to Bail in Juvenile Preadjudication Proceedings*, 1 HASTINGS CONST. L.Q. 215, 215-16 (1974) (footnotes omitted). *See also* Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959 (1965); Note, *Right to Bail for Juveniles*, 48 CHI.-KENT L. REV. 99 (1971); Note, *The Right to Bail and the Pre-"Trial"; Detention of Juveniles Accused of "Crime"*, 18 VAND. L. REV. 2096 (1965).

67. Bandy v. United States, 81 S. Ct. 197 (1960).

68. D. FREED & P. WALD, *supra* note 6, at 8.

69. Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

70. *Id.*

> Courts set bail for most defendants on the basis of their alleged crimes and their records. Almost totally ignored are those ties to the community that determine the likelihood of appearing at trial.
>
> . . . [B]y relying on money [the present system of bail] jails too many of the poor; it also protects too little against the dangerous.[71]

Although attempts have been made to remedy some of these problems with legislative reform and new court rules[72] the most critical defect of the bail system persists: A money-oriented system of pretrial release is unfair to the poor. As Professor Foote has noted, "Compared with other due process problems which have arisen in recent years, bail presents differences in the treatment of the poor which are more pervasive and pernicious."[73]

Within this decade the Supreme Court has struck down, as violative of the fourteenth amendment's guarantee of equal protection, state sentencing procedures that effectively imposed incarceration on indigent individuals because of their financial inability to pay the alternative fine.[74] In 1977, in *Pugh v. Rainwater*,[75] the Fifth Circuit found that Florida's pretrial release system operated to deny equal protection to indigents because it failed to incorporate a presumption against money bail. Very recently the court en banc vacated the panel's earlier decision, five to four, holding that a presumption against a money bond is not constitutionally mandated.[76]

Despite serious practical, and perhaps constitutional, defects of bail in the adult criminal justice system, debate continues over whether juveniles already possess, or should be given, a right to bail.[77] The traditional view is that because allegations of delinquency are not allegations of criminal conduct, any existing constitutional or statutory right to bail for criminal offenses does not extend to delinquent juveniles.[78]

In *State ex rel. Peaks v. Allaman*,[79] an Ohio trial court determined that reference by the Ohio Constitution to "bailable offenses" applied only to conduct forbidden by the criminal code. Because the code then in effect provided that children were not to be classified as criminal by reason of conviction for delinquent acts, the *Allaman* court reasoned that allegedly

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71. D. FREED & P. WALD, *supra* note 6, at 110.

72. *E.g.*, Bail Reform Act § 3(a), (*codified at* 18 U.S.C. § 3146 (1966)); FLA. R. CRIM. P. 3.130; OHIO R. CRIM. 46.

73. Foote, *supra* note 66, at 963.

74. Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

75. 557 F.2d 1189 (5th Cir. 1977).

76. Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978).

77. *See* authorities cited at note 65 *supra*; authorities cited in IJA-ABA STANDARDS, INTERIM STATUS, *supra* note 1, at 64-65.

78. *See, e.g.*, A.N.E. v. State, 156 So. 2d 525 (Fla. Dist. Ct. App. 1963); State *ex. rel.* Peaks v. Allaman, 51 Ohio Op. 321, 115 N.E.2d 849 (Montgomery County 1952); R. v. Whitner, 30 Utah 206, 515 P.2d 617 (1973).

79. 51 Ohio Op. 321, 115 N.E.2d 849 (Montgomery County 1952).

delinquent children were not entitled to bail under the Ohio Constitution.[80] In *State v. Franklin*,[81] however, the Louisiana Supreme Court construed language in the Louisiana Constitution[82] that was virtually identical to that of the Ohio Constitution to give bail rights to all persons, juvenile as well as adult. The *Franklin* court rejected the criminal-noncriminal distinction *sub silentio* and ruled that juvenile courts "were established with the view of showing more consideration to the juvenile and were not designed to deprive him of his constitutional rights."[83]

Several courts, skirting the constitutional issue, have found that statutory provisions for release of juveniles pending final disposition satisfactorily perform the functions of adult bail.[84] In *Fulwood v. Stone*[85] the District of Columbia Circuit Court of Appeals vacated a writ of habeas corpus granted by the district court to a sixteen-year old youth detained without bail on charges of robbery and assault. The appellate court held that the District of Columbia juvenile detention statutes,[86] if faithfully observed in practice are "an adequate substitute for bail."[87] The *Fulwood* rationale merely reopens inquiry into interim detention criteria;[88] it fails to

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80. *Id.* at 323, 115 N.E.2d at 851.

81. 202 La. 439, 12 So. 2d 211 (1943).

82.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. All persons shall be bailable by sufficient sureties, except the folowing: First, persons charged with capital offense where the proof is evident or the presumption great; second, persons convicted of felonies, provided that where a minimum sentence of less than three years at hard labor is actually imposed, bail shall be allowed pending appeal and until final judgment.

LA. CONST. art. I, § 12.

83. 202 La. 439, 443, 12 So. 2d 211, 213 (1943).

84. United States *ex rel.* Burton v. Coughlin, 463 F.2d 530 (7th Cir. 1972); Fulwood v. Stone, 394 F.2d 939 (D.C. Cir. 1967); Baldwin v. Lewis, 300 F. Supp. 1220 (E.D. Wis. 1969), *rev'd on other grounds*, 442 F.2d 29 (7th Cir. 1971); Doe v. State, 487 P.2d 47 (Alaska 1971); *In re* Castro, 243 Cal. App. 2d 402, 52 Cal. Rptr. 469 (1966).

85. 394 F.2d 939 (D.C. Cir. 1967).

86.

> (a) When an officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the court, accept the written promise of the parent, guardian, or custodian to bring the child to the court at time fixed. Thereupon, the child may be released in the custody of a parent, guardian, or custodian. If not so released, the child shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to a place of detention provided by the Board of Commissioners of the District of Columbia or its authorized representative, and the officer taking him shall immediately notify the court and shall file a petition when directed to do so by the court.
>
> (b) A child whose custody has been assumed by the court may, pending final disposition of the case, be released by the court in the custody of a parent, guardian, or custodian, or of a probation officer or other person appointed by the court, to be brought before the court at the time designated. When not released as herein provided, the child, pending the hearing of the case, shall be detained in a place of detention provided by the Board of Commissioners of the District of Columbia, or its authorized representative, subject to further order of the court.

77 Stat. 588 (1963) (current version at D.C. CODE § 16-2311 (1973)).

87. 394 F.2d at 943.

88. *See* text accompanying notes 18-62 *supra*.

answer the criticism that such statutes allow arbitrary and unbridled discretion to detain juveniles.

Proponents of juvenile bail argue that, for all its defects, bail would sharply curtail the arbitrary exercise of judicial discretion and guarantee every juvenile the right to predisposition release. Opponents point to the special obstacles that bail would encounter in the juvenile context.

Because juveniles ordinarily do not support themselves, a money bail system would necessarily rely on the financial means of parents or guardians.[89] This dependency might present serious problems of unfairness for poor families, or lead to conflicts of interest when the parent or guardian has filed the charges or acquiesced in the filing.[90] As an alternative, it has been suggested that under a juvenile money bail system the juvenile be allowed to post his or her own funds from personal savings.[91] This approach would serve to assure the future appearance of the child, who would then have a personal stake in showing up for hearings, and would avoid financial dependence on others. One problem is that juveniles who come into contact with the law tend to lack resources. Another is that because contracts entered into by minors are generally voidable,[92] bail bonds posted by juveniles would not be binding. Common-law voidability could, however, be altered by statute.[93]

More fundamentally, the use of juvenile bail is arguably contrary to the purposes of the juvenile justice system. The aspect of bail that most appeals to reformers of the juvenile justice system, the absolute right to release, is a major point of controversy. Critics of juvenile bail point out that the goal of the juvenile justice system is to act in the best interest of the child. In their view that goal would be thwarted if the courts were required to grant absolute release even to those children who might be returned to an environment that threatens immediate harm to their safety. Professor Paulsen has argued that:

> [B]ail ought not be a *matter of right* in a juvenile case, not because the proceedings are civil rather than criminal in character but, more importantly, because a child in trouble may need care immediately and that care is not provided by a simple release from custody. Discharge to parents will not be wise in every case because the parents may be the source of a child's difficulty.[94]

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89. *See* Fulwood v. Stone, 394 F.2d 939 (D.C. Cir. 1967).

90. *See* text accompanying notes 55-57 *supra*.

91. Wald, *supra* note 20, at 132.

92. A. CORBIN, CORBIN ON CONTRACTS § 6 (1963). The Alaska Supreme Court rejected money bail for juveniles, assuring that

> the present system would be practically unsuitable as a device for securing the child's future appearance before a court, and would not necessarily result in the child's release. Because contracts entered into by minors have been held to be voidable, bail bondsmen surely would be unwilling to deal directly with the child providing a bail bond.

Doe v. State, 487 P.2d 47, 52 (Alaska 1971).

93. *See* IJA-ABA STANDARDS, INTERIM STATUS, *supra* note 1, at 65.

94. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 552 (1957) (emphasis in original) (footnotes omitted). *See also* IJA-ABA STANDARDS, INTERIM STATUS, *supra* note 1, at 64.

The President's Commission on Law Enforcement and Administration of Justice asserted in 1967 that "[r]elease as of right plainly may interfere with the protection and care required in some cases."[95]

This criticism of juvenile bail can be remedied. The power of the juvenile court over children extends beyond adjudication and disposition of delinquents. In Ohio the courts can act to protect the interests of children who are homeless, destitute, or lacking proper care and support.[96] The court can also act to protect children who are threatened with neglect or abuse,[97] by ordering temporary placement in facilities that serve the child's best interest.[98] Substitute House Bill 460 would merge the classes of abused and neglected children into the category of dependent children,[99] eliminating the present distinction between children suffering willful neglect and children lacking care and support without fault of parents or guardians. Under the substitute bill a child who is allegedly dependent "shall be held only in a shelter care program or a foster home"[100] pending final disposition. Dependency procedures could be made compatible with release as of right under a juvenile bail system if the dependency standards were sufficiently specific to preclude abuse through arbitrariness. It should prove easier to define dependency standards narrowly than to establish specific detention standards, because behavior prediction, a primary concern for detention, is not normally at issue in dependency actions.

The IJA-ABA Commission adopted a standard that expressly rejects money bail for juveniles: "The use of bail bonds in any form as an alternative interim status should be prohibited."[101] The Commission concluded that

> despite the advantages of alternative forms of money bail, all systems based on posting collateral or promising to pay money as a condition of release should be prohibited in the juvenile system. Bail inherently discriminates against persons without sufficient funds. It may exacerbate family problems when parents are forced to post their funds in order to gain release of a child. Its availability might reduce the pressure for more meaningful reform, and might . . . be used as a substitute for other forms of release.[102]

The original draft of House Bill 460 provided for pretrial release of juveniles on money bail.[103] The provision was deleted from the substitute bill.

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95. PRESIDENT'S TASK FORCE REPORT, *supra* note 6, at 36.
96. OHIO REV. CODE ANN. §§ 2151.04, 2151.23 (Page 1976).
97. *Id.* §§ 2151.03-.031.
98. *Id.* § 2151.312.
99. Sub. H.B. 460, 112th Gen. Ass. § 2151.22 (1978).
100. *Id.* § 2151.26(A).
101. IJA-ABA STANDARDS, INTERIM STATUS, *supra* note 1, STANDARD 4.7.
102. *Id.* at 66.
103. H.B. 460, 112th Gen. Ass. § 2151.55(C) (1977).

Despite its drawbacks, a system of guaranteed release could be a workable alternative to current juvenile detention practices if it incorporated nonmonetary conditions, as contemplated in the Bail Reform Act of 1966[104] and the Ohio Rules of Criminal Procedure.[105] The Bail Reform Act directs that the accused "shall . . . be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond . . . unless the [judicial] officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required."[106] In that case the judge "*shall*, either in lieu of or in addition to the above methods of release; impose the *first* of the following conditions of release which will reasonably assure the appearance of the person for trial . . . ."[107] Of the alternative forms of release that follow, money bond is ranked third, after "place[ment] in the custody of a designated person . . . agreeing to supervise"[108] the accused and "restrictions on the travel association, or place of abode . . . during the period of release. . . ."[109] The Ohio rule,[110] like the Florida rule sustained on rehearing in *Rainwater*,[111] was patterned on the Act but omits the Act's presumption against money bond and its order of priority.

Although the general presumption of the Bail Reform Act against money bail appears not to be required by the fourteenth amendment,[112] it is desirable as a matter of social policy in the adult and juvenile justice systems alike. The Act's articulation and ranking of alternative conditions upon which release may be granted is equally salutory and should be used to guide the search for improved juvenile interim detention procedures.

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104. Bail Reform Act of 1966 § 3(a), (codified at 18 U.S.C. § 3146 (1966)).

105. OHIO R. CRIM. P. 46.

106. Bail Reform Act of 1966 § 3(a), (codified at 18 U.S.C. § 3146(a) (1966)).

107. *Id.* (emphasis added).

108. *Id.* § 3146(a)(1).

109. *Id.* § 3146(a)(2).

110. OHIO R. CRIM. P. 46.

111. FLA. R. CRIM. P. 3.130 (set forth in Pugh v. Rainwater, 557 F.2d 1198, 1193 n.11 (5th Cir. 1977)).

112. The question still persists, however, whether money bail may constitutionally be required as a condition of release for indigents. The first *Rainwater* court had held "not that money bail may never be imposed on an indigent defendant [but] that equal protection standards require a presumption against money bail and in favor of those forms of release which do not condition pretrial freedom on an ability to pay." Pugh v. Rainwater, 557 F.2d 1189, 1202 (5th Cir. 1977). On rehearing, the majority stated that

> imprisonment solely because of indigent status is invidious discrimination and is not constitutionally permissible. But we view the deprivation of liberty of one who is accused but not convicted of crime as presenting a question with broader effects and constitutional implications than would appear from a rule stated solely for the protection of indigents.

572 F.2d 1053, 1055 (5th Cir. 1978). Two judges observed that "[t]he majority's position necessarily leads to the conclusion that monetary bail for indigents is unconstitutional." *Id.* at 2230 (Clark and Tjoflat, JJ., concurring specially).

IV. A Model for Interim Status Decisions

This writer proposes to modify and integrate existing rules and suggested standards for interim release to fashion a model that provides more specific detention guidelines for the juvenile court system without sacrificing essential flexibility. The first element of the model consists of categorizing alleged delinquent offenders into those for whom detention is permissible and those for whom it is not. The second element then superimposes methods of conditional release for detainable juveniles and methods of court supervision and control for children not subject to detention. The model draws upon the structural scheme of the IJA-ABA Commission's proposed standards for interim status,[113] but employs criteria for mandatory release that are less mechanical than the misdemeanor-felony distinction, and expressly accords supervisory discretion to the juvenile court even when the court would lack discretion to detain. The proposed conditions for release and supervision are familiar; they have long been available to the juvenile justice system and are frequently used. The model would, however, specifically require the courts and other juvenile authorities to grant release if, on the facts of a given case, they could not justify its denial.

A. *Criteria for Identification of Juveniles Subject to Detention*

The model contemplates that no juvenile could be detained unless he:

(1) has failed to appear at a previous hearing before a court, without reasonable cause; or
(2) poses a substantial risk of physical harm to himself or others, as manifested by recent violent behavior or threats of violence.[114]

The first criterion is narrower and more specific than the "risk of absconding" criterion that has traditionally been invoked to justify detention.[115] It requires that the juvenile, to be detained, must actually have failed to present himself in court in the past, without a reasonable

113. IJA-ABA Standards, Interim Status, *supra* note 1, Standards 5.6, 6.6, & 7.7.

114. This criterion is analogous to the Ohio civil commitment standard:

"Mentally ill person subject to hospitalization by Court order" means a mentally ill person who, because of his illness:

(1) Represents a substantial risk of physical harm to himself as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm;

(2) Represents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior or evidence of recent threats that place another in reasonable fear of violent behavior and serious harm.

Ohio Rev. Code Ann. § 5122.01(B)(1)-(2) (Page 1977). Ohio amended its civil commitment procedures as a response to the mandate of *In re* Gault, 387 U.S. 1 (1967), a juvenile case whose broad due process implications affected all persons outside the category of competent adults. Thus, it is ironically appropriate that the law of mental disability should in turn contribute to greater fairness in the juvenile justice system.

115. *See* text accompanying notes 21-23 *supra*.

excuse. Present threats of flight, or past history as a runaway or truant would not justify detention, although the model anticipates that such past behavior would trigger close supervision by the court.

The second criterion is also more determinate than its traditional counterpart, the vague and often abused "risk of harm" standard for preventive detention.[116] Under the model, the court is not driven to unsupportable conjecture. Detention is an option only when the child has acted violently or expressly threatened violence in the recent[117] past.

B. *Presumption in Favor of Unconditional Release*

Under the model, when an alleged delinquent offender is brought by the arresting officer to the detention facility, the intake officials have the duty to release the child if he is not subject to detention under the foregoing criteria.[118] Even if the child is subject to detention, the intake officer, in deciding whether to detain the child until the court can hold a preliminary hearing,[119] would act under a presumption in favor of unconditional release. Because the prehearing detention period is usually relatively short, the terms of the model do not provide for discretion of the intake officials to grant conditional release, but restrict the officials' options to detention or unconditional release.

If the intake official's decision is to detain, when the child comes before the court the model once again establishes a presumption in favor of unconditional release. If the court concludes on the evidence that unconditional release is inappropriate, it may not detain the child without further considering whether release might be made under one or some combination of six specified conditions.

C. *Conditions of Release and Supervision*

The model prescribes six conditions that the court may impose upon the release of a detained juvenile. The release conditions are not ranked in mandatory order[120] but they are exhaustive and must all be considered. The conditions may be employed singly or in combination, subject to the requirement that the chosen method constitute the least restrictive alternative[121] possible to assure the child's appearance at a subsequent adjudication hearing.

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116. *Id.*

117. Although 'recent' is imprecise, it would seem preferable to allow judicial flexibility over the relevant time period to be used in evaluating the nature of the threat posed by the juvenile.

118. This feature of the model parallels STANDARD 7.7(B), IJA-ABA STANDARDS, INTERIM STATUS, *supra* note 1.

119. Proposed § 2151.17(B) of Sub. H.B. 460 formalizes the "informal detention hearing [to be] held not later than 72 hours after [placement] in detention" now required by Ohio law. OHIO REV. CODE ANN. § 2151.314 (Page 1976).

120. *E.g.*, Bail Reform Act of 1966 § 3(a), (*codified at* 18 U.S.C. § 3146 (1966)). *See* note 107 and accompanying text *supra*.

121. H.B. 460 required use of the least restrictive method of treatment for juveniles adjudicated

The conditions[122] are:

(1) release into custody of a parent or other supervising adult or agency;
(2) release into custody of a supervising individual or agency with the further restriction that the supervisor or representative must accompany the child when he leaves the supervisor's premises except to work or attend school (other exceptions in the court's discretion);
(3) individualized hours of curfew set by the court;
(4) regular attendance at specified programs of academic, health or recreational instruction;
(5) periodic reporting to a designated agent of the court;
(6) restricted association with specified persons or visitation to specified places.

The model requires the judge to consider the foregoing conditions in any case in which he does not grant unconditional release. If the judge then determines that the characteristics of the child and his environment are incompatible with even a heavily-conditioned release, he may impose interim detention.[123]

The same six conditions are available to the court in support of its supervisory discretion to assure the appearance of allegedly delinquent offenders who are not subject to detention. In practice, the court's supervisory control of a juvenile not subject to detention may often prove indistinguishable from its control of a juvenile, who, although subject to detention, is granted a conditional release. Moreover, the model would allow courts to place juveniles who are simultaneously delinquent and dependent, but not subject to detention, into an appropriate shelter care or foster home setting.[124]

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delinquent or unruly; the substitute bill imposes that requirement on adjudications of dependency, delinquency, and unruliness. H.B. 460, 112th Ohio Gen. Ass. § 2151.02(G) (1977); Sub. H.B. 460, 112th Ohio Gen. Ass. § 2151.27(L) (1978). The Ohio legislators are thus already aware of the issue as it relates to disposition and may be willing to extend the least restrictive method requirement to interim procedures as well.

Consideration of the least restrictive alternative doctrine had arisen in the context of physical conditions and administrative restrictions of jails and prisons. Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971). The issue has also been raised with respect to excessive security for mental patients:

> [T]he principle of the least restrictive alternative consistent with the legitimate purposes of a commitment inheres in the very nature of civil commitment, which entails an extraordinary deprivation of liberty . . . . A statute sanctioning such a drastic curtailment of the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivation without due process of law.

Covington v. Harris, 419 F.2d 617, 623-24 (D.C. Cir. 1969). *See also* Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966), *cert. denied*, 382 U.S. 863 (1966).

The foregoing has led one commentator to generalize that "all restrictions on detainees must be reasonably related to the state purpose of holding them until trial; the means used must be no more restrictive than is required to accomplish that limited purpose." Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L.J. 941, 950 (1970).

122. The conditions are either embedded in the existing formal procedures and informal practices of the juvenile and adult justice systems or, in the case of specially set curfews, seem intuitively to fall within the broad powers of the juvenile courts acting as *parens patriae*.

123. As noted at text accompanying note 114 *supra*, only those juveniles who have failed to appear at a previous hearing or who pose a substantial risk of physical harm to themselves or others are subject to detention.

124. *See* text accompanying notes 96-100 *supra*.

D. *Informational Needs of the Model*

The ultimate success of the proposed model depends on adequate information at two levels. First, and most importantly, a rational judicial decision concerning detention requires rapid access to the history and characteristics of the individual child in the context of his family, school, and community.[125] Second, data should be gathered and analyzed to assess the effectiveness of the model and to suggest appropriate modifications. The economic costs of an effective information system are significant but should be balanced against the benefits, both social and economic, of holding only the small number of juveniles for whom interim detention is truly necessary.

V. CONCLUSION

Children who enter the juvenile justice system should not be subjected to arbitrary decisions under vague standards for interim release. Nor should they suffer oppressive and unfair conditions of money bail. Release of juveniles awaiting final disposition should be governed by a system that is not oriented to the posting of financial security and that invokes the least restrictive alternative required to assure the appearance of the individual child at subsequent adjudication proceedings.

The proposed model forbids detention of children who do not demonstrably threaten the physical safety of themselves or others and are not known to have been inexcusably absent from prior court hearings. The model directs that even the relatively restricted category of allegedly delinquent juveniles subject to detention may not be held unless the court has considered and rejected the alternatives of unconditional release and release under six specified conditions. The model further provides that the court may attempt to assure the future appearance of juveniles not subject to detention by imposing the least onerous alternative selected from among the same six conditions of supervision. In sum, the model is sufficiently specific to avoid unjustifiable detention, yet sufficiently flexible to preserve the power and discretion that the juvenile courts require to protect the individual child, the family, and the larger society.

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125. *See, e.g.*, Note, *The Right to Bail and the Pre-"Trial" Detention of Juveniles Accused of "Crime"*, 18 VAND. L. REV. 2096, 2107-09 (1965) (proposing a screening program). In Ohio, the problem of information gathering for adult criminal pretrial release purposes has been attacked primarily through the use of "pretrial release" or "bail" programs and projects. *See* Howard & Pettigrew, *ROR Program in a University City*, 58 A.B.A.J. 363 (1972).