

# The Proposed Ohio Juvenile Code of 1977-1978

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## I. HISTORY OF JUVENILE JUSTICE

Ohio was among the earliest of the American states to consider and enact juvenile court legislation.<sup>1</sup> Although Illinois enacted the first juvenile law in 1899,<sup>2</sup> the doctrine of *parens patriae* was used to justify commitment of children as early as 1839 in Pennsylvania<sup>3</sup> and 1869 in Ohio.<sup>4</sup> Earlier individualized treatment for young criminals dates back to 1825 when New York established a House of Refuge,<sup>5</sup> and to 1830 when probation was used as a substitute for institutionalization.<sup>6</sup>

*Parens patriae* may originally have been thought to extend state control only to orphaned children, dependent children and incompetent persons.<sup>7</sup> The class was easily extended by proponents of the juvenile court movement to incorrigibles and law breaking children. The extension was justified by the theory that the state was the ultimate guardian of children and could intervene in the interests of good citizenship.<sup>8</sup>

It is likely that chancery jurisdiction was originally restricted to cases involving the aristocracy to protect the feudal system rather than the

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1. 95 OHIO LAWS 785 (1902) (Act establishing the Cuyahoga County Juvenile Court). Legislation of 1906 extended the concept statewide. 98 OHIO LAWS 314 (1906). Columbus established a juvenile court in 1904 and Cincinnati established one in 1908. See A. PLATT, *THE CHILD SAVERS* 139 (1969); Harpst, *Practice in Cuyahoga County Juvenile Court*, 10 CLEV.-MAR. L. REV. 507 (1961); Young, *A Synopsis of Ohio Juvenile Court Law*, 31 U. CIN. L. REV. 131, 135 (1962).

2. 1899 ILL. LAWS 131. By 1917 46 states, the District of Columbia, England, Portugal, Belgium, France, Hungary, Germany, and Switzerland had followed. The Scandinavian countries substituted administrative boards to accomplish the same thing. See O. NYQUIST, *JUVENILE JUSTICE* 124 (1960); A. PLATT, *THE CHILD SAVERS* 9 (1969).

3. *Ex parte Crouse*, 4 Whart. 9 (Pa. 1839). In *Crouse*, the court described the House of Refuge as reform oriented and justified commitment of children by asking: "To this end may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community?" *Id.* at 11.

4. *Prescott v. State*, 19 Ohio St. 184 (1869). See *House of Refuge v. Ryan*, 37 Ohio St. 197, 204 (1881) (court described the authority of the state as *parens patriae* as unquestioned); Whitlatch, *The Juvenile Court—A Court of Law*, 18 CASE W. RES. L. REV. 1239, 1243 (1967).

5. See, H. LOU, *JUVENILE COURTS IN THE UNITED STATES* 16 (1927).

6. *Id.* at 17.

7. See C. FOOTE, R. LEVY AND F. SANDERS, *CASES AND MATERIALS ON FAMILY LAW* 394 n.13 (1966); BALLENTINE'S LAW DICTIONARY 811 (2d ed. 1969); Cogan, *Juvenile Law Before and After the Entrance of "Parens Patriae,"* 22 S. C. L. REV. 147 (1970); Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S. C. L. REV. 205 (1971).

8. See Mäck, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); Rendleman, *supra* note 7, at 219. Rendleman notes: "In 18th century Virginia the local officials could bind out as apprentices the children of parents who were poor, not providing 'good breeding,' neglecting their formal education, not teaching a trade, or were idle, dissolute, unchristian or 'uncapable.'" *Id.* at 212.

children, and that our original resort to the *parens patriae* doctrine was misplaced.<sup>9</sup> Nevertheless, it is fair to admit that poor laws were enacted by 1562, that a fully developed statutory scheme had been created that allowed the crown to take children of pauper parents and apprentice those children to others,<sup>10</sup> and that our first states had enacted similar laws as an integral part of the social order.<sup>11</sup> Thus, the doctrine of *parens patriae* was first used within chancery to justify state intervention to protect the feudal system; then outside chancery to justify poor laws and to give the state jurisdiction over misbehaving children. Finally, the doctrine was used to justify separate treatment for juvenile criminals and the extension of state jurisdiction over potential criminals or delinquents.

Because this theory of protective custody over children was thought benevolent,<sup>12</sup> the child savers<sup>13</sup> were prepared to offer it as a replacement for criminal trials, incarceration and punishment, and as an alternative for poorhouse commitment. Consequently, orphanages and reformatories accompanied this movement toward more benevolent juvenile court procedure.<sup>14</sup> No matter what the particular issue, courts referred to *parens patriae* to justify ultimate state control over children and to avoid procedural niceties that usually accompanied civil or criminal commitment proceedings.<sup>15</sup> The use of the doctrine to justify relaxed procedural rules has recently been litigated in the United States Supreme Court and found wanting.<sup>16</sup>

The Supreme Court decisions undoubtedly precipitated the Ohio Juvenile Code revisions that were enacted in 1969, but for the most part those revisions were limited to bringing Ohio into compliance with the

9. *Shelley v. Westbrook*, 37 Eng. Rep. 850 (Ch. 1817); *Wellesley v. the Duke of Beaufort*, 38 Eng. Rep. 236 (Ch. 1827); *Wellesley v. Wellesley*, 4 Eng. Rep. 1078 (H.L. 1828). These cases are cited in Rendleman, *supra* note 7, at 208. He points out that unlimited chancery jurisdiction was inconsistent with our concept of limited constitutional government. Moreover, it was never extended to the poor citizenry.

10. Statutes of Artificers, 5 Eliz. 4 (1562). The Poor Law Act of 1601, 43 Eliz. 2 (1601). See Rendleman, *supra* note 7, at 210.

11. See JERRIGAN, *THE LABORING AND DEPENDENT CLASSES IN COLONIAL AMERICA* (1960); Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CALIF. L. REV. 175 (1955).

12. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 479 (1928); (Brandeis, J., dissenting) (footnote omitted):

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

13. See A. PLATT, *supra* note 1; Platt, *The Rise of the Child Saving Movement: A Study in Social Policy and Correctional Reform*, 381 THE ANNALS 21 (1969).

14. A. PLATT, *supra* note 1 at 146: "The passage of the Illinois juvenile court act in 1899 prompted a flood of optimistic rhetoric . . . . The Act, however, did little to change the quality of institutional life . . . ."

15. See Rendleman, *supra* note 7, at 245-47.

16. See, e.g., *Breed v. Jones*, 421 U.S. 519 (1975); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

recently announced constitutional requirements.<sup>17</sup> The 1969 revisions failed to address treatment issues,<sup>18</sup> restrict jurisdiction over delinquent children<sup>19</sup> as had been recommended,<sup>20</sup> or eliminate commitment of status offenders to Ohio Youth Commission institutions.<sup>21</sup> After the 1969 Code revisions, the Ohio Supreme Court promulgated Rules of Juvenile Procedure, which became effective on July 1, 1972. These Rules brought Ohio into conformity with procedural concepts previously mandated by the Supreme Court of the United States.<sup>22</sup> Although the rules have been amended<sup>23</sup> they also do not address crucial issues relating to juvenile crime and treatment.<sup>24</sup>

## II. THE PROPOSED OHIO JUVENILE CODE OF 1977-1978

The purpose of this article is to assess the correctional potential of pending Ohio juvenile reform legislation by comparing it with federal legislation and various investigative studies. A factor in the equation of Ohio juvenile justice reform is the Juvenile Justice and Delinquency

17. See generally Willey, *Ohio's Post-Gault Juvenile Court Law*, 3 AKRON L. REV. 152 (1970).

18. See, e.g., OHIO REV. CODE ANN. § 2151.355(E) (Page 1976). This statute provided that a child might be committed to the Department of Rehabilitation and Correction. At the time this section was enacted the only institution that housed juveniles was the Ohio State Reformatory. Commitment to the Ohio State Reformatory had been rejected in *Cope v. Campbell*, 175 Ohio St. 475, 196 N.E.2d 457 (1964); *In re Agler*, 15 Ohio App. 2d 240, 240 N.E.2d 874 (Defiance County 1968), *rev'd*, 19 Ohio St. 2d 70 (1969). Despite these two cases, the 1969 Revisions continued the possibility that juveniles could be committed to maximum security penal institutions for adult criminal offenders.

19. OHIO REV. CODE ANN. § 2151.02 (Page 1976), as enacted in 1969, included Section A of § 2151.02. All the other sections of old § 2151.02 were included in a new section describing the unruly child and numbered § 2151.022. In addition, the new § 2151.02 enacted in 1969 included: "(B) Who violates any lawful order of the court made in this chapter."

20. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 23 (1967).

21. OHIO REV. CODE ANN. § 2151.354 (Page 1976) allows any disposition available for neglected children, OHIO REV. CODE ANN. § 2151.353 (Page 1976), probation, suspension of driving privileges, and, under certain circumstances, any disposition authorized for delinquent children. *Id.* § 2151.355. See 72 OHIO OP. ATTY. GEN. 71 (1972), which concluded that any construction of § 2151.354 that would allow commitment of an "unruly" child to the Ohio Youth Commission would be a violation of due process of law, and therefore an improper construction. Since many unruly children are chronic behavior problems and likely to violate one of the conditions of probation, it is also possible to proceed against them under § 2151.02(B) as delinquent, and justify their commitment as delinquent children rather than as unruly children. Section 2151.02(B) is currently used to justify commitment of status offenders.

22. As adopted, JUVENILE RULE 29(E)(4), required the "beyond a reasonable doubt" standard of proof for all juvenile traffic and delinquency proceedings. OHIO REV. CODE ANN. § 2151.35 (Page 1976) only required the "clear and convincing evidence" standard be used. *In re Winship*, 397 U.S. 358 (1970) had been decided during the interim and required the "beyond a reasonable doubt" standard. For a pre-*Winship* discussion of this burden of proof problem, see Willey, *supra* note 17 at 181-83.

23. Juv. R. 29(E)(4), as amended, requires a "beyond a reasonable doubt standard" in unruly cases as well.

24. OHIO ATTORNEY GENERAL'S JUVENILE JUSTICE TASK FORCE, JUSTICE FOR OUR CHILDREN iv (December 1976) [hereinafter cited as OHIO TASK FORCE REPORT]. The preface by Attorney General Brown, cited an 1834 report which blamed three-fourths of all crime on children and the decay of the family; an 1866 Massachusetts report condemning use of reformatories and recommending use of cheaper and better foster homes; and an 1875 report condemning use of jails for children. He pointed out that we had all those problems or were still doing all those things in Ohio in 1976. *Id.*

Prevention Act of 1974 [hereinafter called the Federal Act] which provides some federal funds for states that comply with its requirements.<sup>25</sup> The Federal Act becomes important because it emphasizes community-based programs for delinquency prevention and treatment,<sup>26</sup> diversion of juveniles from juvenile court,<sup>27</sup> and noncommitment of status offenders.<sup>28</sup> In addition, the Federal Act prohibits the continued use of adult jails for holding alleged or adjudicated delinquents.<sup>29</sup>

Under the Federal Act, each participating state is required to submit a plan substantiating the implementation of its provisions.<sup>30</sup> By December 1975, Ohio had done nothing to comply with this requirement. Attorney General William G. Brown independently constituted a Task Force On Juvenile Justice in January of 1976 to study juvenile crime in Ohio. The efforts of the Task Force culminated in a report [hereinafter called the Task Force Report] dated December 1976,<sup>31</sup> and House Bill No. 460. An amended form, Substitute House Bill 460 is presently under consideration in the Ohio General Assembly.<sup>32</sup> By January 1977, the Ohio Juvenile Justice Advisory Committee appointed by Governor James A. Rhodes published a Draft Proposal for Goals and Standards [hereinafter called OJJAC Standards] for juvenile justice as a first step toward Federal Act compliance.<sup>33</sup>

In addition, two national studies were completed in 1977. The National Advisory Committee on Criminal Justice Standards and Goals issued its report presenting Standards for Juvenile Justice [hereinafter called the LEAA Standards].<sup>34</sup> The Institute of Judicial Administration and the American Bar Association [hereinafter called the IJA-ABA Standards]<sup>35</sup> also published its conclusions.

Thus, the Federal Act, the Task Force Report, the OJJAC, LEAA,

25. Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5601 (Supp. 1975). See also OHIO TASK FORCE REPORT, *supra* note 24, at 56-57.

26. Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §§ 5634(a)(2) (Supp. 1975).

27. *Id.* § 5633(a)(10).

28. *Id.* § 5633(a)(12).

29. *Id.* § 5633(a)(13).

30. *Id.* § 5633.

31. See note 24 and accompanying text *supra*.

32. Sub. H.B. 460, as amended, was unanimously passed by the Ohio House Judiciary Committee on March 9, 1978, and by the Ohio House of Representatives on March 23, 1978.

33. OHIO JUVENILE JUSTICE ADVISORY COMMITTEE, DRAFT GOALS AND STANDARDS FOR JUVENILE JUSTICE IN OHIO (January 1977) [hereinafter cited as OJJAC STANDARDS].

34. NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION (1976) [hereinafter cited as LEAA STANDARDS]. The LEAA Standards are presented in one large volume of twenty-eight chapters, were dated December 1976 and became available to the public in 1977.

35. INSTITUTE OF JUDICIAL ADMINISTRATION—AMERICAN BAR ASSOCIATION JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, JUVENILE JUSTICE STANDARDS PROJECT (Tent. Draft 1977) [hereinafter cited as IJA-ABA STANDARDS]. The IJA-ABA Standards are presented in twenty-three volumes along with a separate summary and analysis.

and IJA-ABA Standards established juvenile justice reform requirements against which the pending Ohio legislation can be measured. Although this article addresses the correctional potential of the bill, it will not consider the Children's Bill of Rights<sup>36</sup> or deinstitutionalization of status offenders provisions.<sup>37</sup>

Preliminary to a section-by-section analysis of House Bill 460, a brief statement on the rationale, long-range goals and immediate priorities of the Task Force is appropriate. A basic rationale adopted by the Task Force was the protection of juvenile rights and dignity. The Task Force also recognized the necessity of providing children with vital services.<sup>38</sup> In view of the budgetary limits of the juvenile system, the Task Force realized that reform of the existing system would probably occur through more efficient use of currently allocated resources. Despite the budgetary considerations, the Attorney General requested study of reform alternatives, acknowledged some alternatives would be essential, and admitted additional resources might be needed to make the system less wasteful, more beneficial and less arbitrary.<sup>39</sup> Given the national political posture on crime and delinquency, however, most members of the Task Force concluded that to achieve needed juvenile justice reform, costly unproven new programs should not be suggested.<sup>40</sup>

The Task Force decided that a long range goal must be to consolidate children's services within a single agency.<sup>41</sup> During the Task Force investigation, evidence established that youth services are administered by many agencies. Because of this organization, some children who need services from more than one agency will not get services from any. The Task Force would insure that no child would be denied services because of a dispute between agencies concerning which agency would be ultimately responsible for payment of services ordered.

The second long-range goal of the Task Force was deemphasis of institutionalization and reallocation of resources to community treatment programs.<sup>42</sup> Evidence supports movement from state institutional

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36. H.B. 460, 112th Gen. Ass. § 2151.02 (1977-78) [hereafter cited as H.B. 460]. The Children's Bill of Rights was not included in Sub. H.B. 460.

37. H.B. 460, *supra* note 36, § 2151.40.

38. OHIO TASK FORCE REPORT, *supra* note 24, at 2.

39. *Id.*

40. See OHIO TASK FORCE REPORT, *supra* note 24, at iv. Attorney General Brown informed the Task Force that juvenile institutional costs has grown 1400% in 20 years and 500% over the last decade. The Attorney General also noted this was paralleled by a similar increase in crime.

41. OHIO TASK FORCE REPORT, *supra* note 24, at 3, 101. H.B. No. 460 does not include any provisions for such governmental reform.

42. OHIO TASK FORCE REPORT, *supra* note 24, at 3, 88. See H.B. 460, *supra* note 36, §§ 2152.01-.14, 5139.03(J), 5139.27. See also Sub. H.B. 460, 112th Gen. Ass. § 5139.03(B) (1977-78) [hereinafter cited as Sub. H.B. 460]. Sub. S.B. 460, § 5139.03(B) limits Ohio Youth Commission institutional population to 200; and establishes minimum standards for facilities, programs, personnel, operation and education. The substance covered in the original bill is adequately covered in the Sub. H.B. 460 provisions, except for the explicit direction of H.B. 460, § 5139.03(J) to Ohio Youth Commission to reallocate funds from Fairfield to community programs.

correction programs to smaller community oriented treatment centers.<sup>43</sup> Studies have consistently indicated that large state institutions do not reform, but increase the likelihood that one committed to them will violate the law in the future.<sup>44</sup> While some juveniles do present a danger to society, testimony was given in 1976 that only 414<sup>45</sup> children at Youth Commission institutions had committed a violent crime.<sup>46</sup> In addition, modern studies acknowledge that community programs achieve better results than state institutions.<sup>47</sup> Fiscal management also supports the movement toward community treatment programs: community treatment costs approximately 25% of the \$13,000 per child per year that Ohio currently spends at its least costly Ohio Youth Commission institution.<sup>48</sup>

The Task Force identified two short-range goals: closing Fairfield School for Boys and reforming the Ohio Juvenile Code. The Task Force conducted an extensive investigation of Fairfield,<sup>49</sup> and although this subject could easily accommodate a separate article, the results of that investigation must be summarized for this work. The Task Force investigation revealed Fairfield was horribly overcrowded and physically

43. OHIO TASK FORCE REPORT, *supra* note 24, at 18; IJA-AEA STANDARDS, CORRECTION ADMINISTRATION, *supra* note 25, at 109; LEAA STANDARDS, *supra* note 34, at 673, and OJJAC STANDARDS, *supra* note 33, at 60. The unanimous thrust of the recommendations is towards the least disruptive disposition for each juvenile. Hence, all agree the utilization of community facilities and programs should receive first priority. See also OHIO CITIZENS' TASK FORCE ON CORRECTIONS, FINAL REPORT OF THE OHIO CITIZENS' TASK FORCE A1-A29, A5 (1971). The report concludes that all phases of institutional corrections are inadequate and institutions can only be justified on a community protection basis. Since institutionalization has a negative effect on most inmates after a short period of incarceration, "wherever possible alternatives to incarceration must be found." The Ohio Citizens' Task Force recommends development of a system of community-based corrections.

44. OHIO TASK FORCE REPORT, *supra* note 24, at 9; Winter, Downs & Hall, JUVENILE CORRECTIONS IN THE STATES: RESIDENTIAL PROGRAMS AND DEINSTITUTIONALIZATION A PRELIMINARY REPORT, 1-80 (National Assessment of Juvenile Corrections, The University of Michigan, November 1975); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY ch. 6 (1967).

45. OHIO TASK FORCE REPORT, *supra* note 24, at 30 n.4. Total Youth Commission population ranges from 2257 (the number of beds available) to 3000.

<i>Institutions</i>	<i>Capacity</i>
Buckeye Youth Center (1)	200 (Boys: 144, Girls: 56)
Child Study Center (1)	100
Cuyahoga Hills Boys School (2)	200
Fairfield School for Boys	650
Indian River School (4)	192
Maymee Youth Camp (5)	120
Mohican Youth Camp (6)	120
Riverview School for Girls (7)	152
Scioto Village Girls School (7)	227
Training Center for Youth (1)	104
Training Institution, Central Ohio (1)	192

46. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 18 (1967).

47. See generally material cited note 43 *supra*.

48. See OHIO TASK FORCE REPORT, *supra* note 24, at 46. It was also estimated that 1977 cost per bed at Fairfield would approximate \$15,000, and that it would rise to as much as \$17,000 per bed by 1979.

49. OHIO TASK FORCE REPORT, *supra* note 24, at 65-79.

delapidated below humane standards.<sup>50</sup> The Fairfield staff, program and forms of punishment created an atmosphere of hostility;<sup>51</sup> consequently, security was maintained through a program of extreme regimentation.<sup>52</sup> The Task Force concluded Fairfield's architecture and physical condition were inconsistent with the potential for treatment.<sup>53</sup> In other words, commitment to Fairfield could not be defended upon any premise used to justify a separate juvenile court system.<sup>54</sup>

Although original House Bill 460 effectively closed Fairfield,<sup>55</sup> the amended bill merely limits the population of Youth Commission institutions.<sup>56</sup> If Fairfield were completely shut down, funds would be available to initiate a movement towards community treatment programs. Without the closure of Fairfield, changes designed to improve juvenile treatment through community programs would require additional legislative appropriations. Under present circumstances, it is doubtful the necessary funds would be appropriated.

#### A. *Statutory Provisions Addressing Specific Goals of the Task Force*

The second short-range goal of the Task Force was to reform the existing Ohio Juvenile Code. The proposed legislation reflects priorities identified by the Task Force that are crucial for achieving reform. During the drafting stages of this legislation, the Task Force also considered federal requirements to enable Ohio to receive federal funding. Bearing in mind the purpose of this article, the comparative analysis of the Ohio Bill, this author will now delve into the provisions of the 1977-1978 proposed Ohio Juvenile Code that address juvenile correction and treatment.

##### 1. *Prohibition on Commitment of Status Offenders*

Ohio currently needs to eliminate statutory provisions that allow

50. *Id.* at 65-68.

51. *Id.* at 69-71.

52. *Id.* at 75-77.

53. *Id.* at 68.

54. See also Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); OHIO TASK FORCE REPORT, *supra* note 24, at 65-79.

55. H.B. 460, *supra* note 36, § 5139.03:

(D) The Fairfield School for Boys shall within ninety days of the effective date of this section have an inmate population of not more than six hundred inmates. Within one hundred eighty days of the effective date of this section, the Fairfield School for Boys shall have a population of not more than than two hundred inmates.

(E) Within two years of the effective date of this section, the Fairfield School for Boys shall cease operation as a state facility for the residential treatment or custody of juveniles committed to the Youth Commission.

(F) Upon cessation of use as state juvenile correctional facility, all buildings designated as dormitories constructed prior to 1927 shall be razed.

56. Sub. H.B. 460, *supra* note 42, § 5139.03(B): "Any institution or facility that is subject to the control and management of the Youth Commission shall not have a ward population in excess of two hundred individuals at any one time."

commitment of status offenders to state correctional institutions and detention of juveniles in county jails.<sup>57</sup> Section 2151.02(B) of the Ohio Revised Code authorizes a juvenile court to adjudicate as delinquent an unruly child who violates an order of probation.<sup>58</sup> Section 2151.354 allows the juvenile court to treat some unruly children who do not violate any court order as if they were delinquent.<sup>59</sup> To eliminate commitment of status offenders to the Youth Commission, both of these statutes must be repealed. Neither section appears in House Bill 460 or the substitute bill, Substitute House Bill 460.<sup>60</sup>

The proposed legislation significantly limits placement of unruly children in nonsecure programs.<sup>61</sup> Except for children who violate probation or who fail to remain in a nonsecure treatment program, juveniles cannot be committed to a secure treatment program for more than thirty days.<sup>62</sup> However, the proposed section of House Bill 460 that

57. 42 U.S.C. § 5633(a)(2), (13) (Supp. 1974). See OHIO TASK FORCE REPORT, *supra* note 24, at 46. IJA-ABA STANDARDS, ARCHITECTURE OF FACILITIES, *supra* note 35, STANDARD 5.3 limits commitment to secure facilities of adjudicated delinquents; OJAC STANDARDS, *supra* note 33, STANDARD 13.2 provides: "[S]tatus offenders . . . should not be committed to the Ohio Youth Commission; and LEAA STANDARDS, *supra* note 34, at 311 abolish the traditional status offense, and subsume the topic under Chapter 10 that defines "Families with Service Needs."

58. OHIO REV. CODE ANN. § 2151.02(B) (Page 1976): "Who violates any lawful order of the court made under this chapter." See Willey, *supra* note 17, at 161; OHIO TASK FORCE REPORT, *supra* note 24, at 48. This section is the reason the Ohio Youth Commission shows few unruly child commitments, and yet is castigated for housing up to 20 percent status offenders.

59. OHIO REV. CODE ANN. § 2151.354 (Page 1976). The last paragraph reads as follows: "If after making such disposition the court finds, upon further hearing, that the child is not amenable to treatment or rehabilitation under such disposition, the court may make a disposition otherwise authorized under section 2151.355 of the Revised Code." See OHIO TASK FORCE REPORT, *supra* note 24, at 47; "Any construction of Section 3151.354, Ohio Revised Code, that would allow commitment of an 'unruly child to the legal custody of the Ohio Youth Commission would be a violation of due process of law, and therefore an improper construction." Willey, *supra* note 17, at 165-66; 72 OHIO OP. ATTY. GEN. 71 (1972).

60. Sub. H.B. 460, *supra* note 42, § 2151.24:

As used in Chapter 2151 of the Ohio Revised Code, "delinquent child" includes any child who commits a violation of any law of this state, any law of the United States, or any ordinance or regulation of a political subdivision of the state, which violation would be a crime if committed by an adult, except as provided in Division (B)(21) of Section 2151.02 of the Revised Code.

Sub. H.B. 460, *supra* note 42, § 2151.27(E):

(1) Place the child on probation under any terms that the court prescribes, including, but not limited to, the performance of community service work for health districts, park districts, counties, municipal corporations, townships and other subdivisions of state or local government that are reasonably near the location at which the unruly act was committed or the domicile of the child;

(2) Suspend or revoke the operator's license that was issued to the child, or suspend or revoke the registration of all motor vehicles that are registered in the child's name;

(3) Commit the child in a nonsecure treatment program operated by a public or private organization for a period not to exceed one year, which commitment cannot be renewed pursuant to Division (F) of this section;

(4) If the child violates probation or fails as a result of his intentional acts to remain in a program to which he is committed pursuant to Division (3) of this section, the court, after a hearing, may commit the child to a secure treatment program for up to thirty days.

61. Sub. H.B. 460, *supra* note 42, § 2151.26(e)(3).

62. *Id.*



prohibited commitment to a secure program more than once, even though the child continued his violations, does not appear in Substitute House Bill 460.<sup>63</sup>

## 2. *Minimum Age for Ohio Youth Commission Commitment*

Although there is no minimum age specified for adjudication of unruly or delinquent children, the proposed Ohio Code has finally established a minimum age of twelve years before a delinquent child can be committed to a secure treatment program, or to certain institutions such as those of the Ohio Youth Commission.<sup>64</sup> It is hoped that a minimum age will be included within the unruly child sections; at the present time, unruly children can be committed to secure facilities for thirty days and to nonsecure facilities for ninety days.<sup>65</sup>

Another problem with the existing Ohio Juvenile Code is that once a court assumes jurisdiction over a child, it may retain jurisdiction over that child until he is twenty-one. For example, a thirteen-year old was recently detained for assaulting a school teacher. It was proved the teacher had unjustly attacked him and that the minor had been acting in self-defense. The complaint was dismissed. The court discovered the youth had been adjudicated delinquent two years earlier. The court therefore claimed jurisdiction over the child, and ordered the child into a residential school in another city. House Bill 460 originally provided that jurisdiction over an unruly child ceases one year after the adjudication date.<sup>66</sup> Substitute

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63. H.B. 460, *supra* note 36, § 2151.47(E):

If a child is adjudged unruly as defined in Division (A) of Section 2151.40 [truant from home or school] of the Revised Code, the court may commit the child to a secure treatment facility within the county, or, if the county is a member of a treatment facility district as provided under sections 2151.01 to 2152.99 of the Revised Code to a secure treatment facility within the district for not more than thirty days, if there is probable cause to believe that the child would not remain in a nonsecure treatment program regardless of the existence of an order of disposition requiring him to do so. If a disposition pursuant to this division has previously been ordered in a case, no further disposition pursuant to this division shall be ordered.

64. OHIO TASK FORCE REPORT, *supra* note 24, at 5. See H.B. 460, *supra* note 36, § 2151.57(J) which imposes the minimum age limits on those delinquent children who might be committed under H.B. 460 § 2151.57(C) (D) or (E). Currently, Ohio Revised Code § 5139.05(A) (Page 1971) provides: "The juvenile court may commit any child to the Youth Commission . . . provided that any child so committed shall be at least twelve years of age. . . ." IJA-ABA STANDARDS, JUVENILE DELINQUENCY AND SANCTIONS, *supra* note 35, STANDARD 2.1 provides for a minimum age of ten before jurisdiction attaches.

65. H.B. 460, *supra* note 36, § 2151.47(C), (E). IJA-ABA STANDARDS, DISPOSITIONS, *supra* note 35, STANDARD 3.3 (E): "(1) Nonsecure residence. No court should sentence a juvenile to reside in a nonsecure residence unless the juvenile is at least ten years old. . . . (2)(b) No court should sentence a juvenile to confinement in a secure facility unless the juvenile is at least twelve years old. . . ." Sub. H.B. 460, *supra* note 42, § 2151.51(B) provides financial assistance to certain local rehabilitation facilities for delinquent children only if they restrict treatment to those over twelve. Sub. H.B. 460, *supra* note 42, § 2151.52(B) provides financial assistance to detention facilities used for rehabilitation for delinquent males if they are over ten and delinquent females if they are over twelve. Since this distinction was deleted from § 2151.52(B), one must assume it was left here by error.

66. H.B. 460, *supra* note 36, § 2151.49: "The jurisdiction of the juvenile court over an adjudicated unruly child shall terminate one year from the date of adjudication." LEAA Standards, *supra* note 34, STANDARD 14.14 limits the jurisdiction of the court to 12 months for a class 1 delinquent act; 30 months

House Bill 460 contains no such provision; there is nothing to prevent cases such as the one described wherein a complaint is dismissed, but the child is nevertheless committed.

### 3. No Jailing of Juveniles

House Bill 460 directly prohibited detention in jails<sup>67</sup> for juveniles before or after adjudication. In addition, jail officials who suspected an inmate to be under eighteen were required to immediately inform the court.<sup>68</sup> The original bill also provided first-degree misdemeanor penalties<sup>69</sup> for any person who detained a child in a building in which adults charged with a criminal offense were held.<sup>70</sup> Substitute House Bill

for a class 2 delinquent act; 48 months or to age 21 whichever occurs first for a class 3 delinquent act; or until age 21 for a class 4 delinquent act. OJJAC STANDARD, INFORMAL INTERVENTION, *supra* note 33, STANDARD 4.5 provides: "The jurisdiction of the receiving agency is to be terminated at the time of the youth's disengagement from the program." One assumes the "least restrictive alternative" also limits the time span of juvenile court jurisdiction over the less serious cases.

67. H.B. 460, *supra* note 36, § 2151.20(C): "No child shall be placed in or committed to any prison, jail, or lockup. No child shall be brought into any police station, vehicle, or place where such child can come in contact or communicate with any adult convicted of crime or under arrest and charged with crime." This language is almost identical to the language contained in the present Ohio Juvenile Code, which has been ignored. See OHIO REV. CODE ANN. § 2151.34 (Page 1976). See OHIO REV. CODE ANN. § 2151.312(A)(4) (Page 1976): "A child may be detained in jail or other facility for detention of adults only if the facility in division (A)(3) of this section is not available and the detention is in a room separate and removed from those for adults." Section 2151.312(A)(3) describes a juvenile detention center. OJAAC STANDARD, FORMAL INTERVENTION, *supra* note 33, STANDARD 4.3 provides: "Juveniles placed in secure detention facilities should be separated from adult offenders at all times, subject to regulation of the Juvenile Delinquency Act of 1974 and the Ohio Revised Code." LEAA STANDARD, *supra* note 34, STANDARD 5.9 provides: "Under no circumstances should these juveniles be held in the same detention facilities with adults." IJA-ABA STANDARD, INTERIM STATUS, *supra* note 35, STANDARD 10.2: "The interim detention of accused juveniles in any facility or part thereof also used to detain adults is prohibited." See also IJA-ABA STANDARDS, POLICE HANDLING OF JUVENILE PROBLEMS, *supra* note 35, STANDARD 2.5(B).

68. H.B. 460, *supra* note 36, § 2151.20(D): "The official in charge of a jail . . . 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 . . ." IJA-ABA STANDARD, INTERIM STATUS, *supra* note 35, STANDARD 5.4 provides: "The holding of an arrested juvenile in any police detention facility prior to release or transportation to a juvenile facility should be prohibited." The history involved in attempts to keep juveniles out of adult jails is interesting and informative. OHIO REV. CODE ANN. § 2151.311 (Page 1976), as enacted in 1969 provided: "(A) A person taking a child into custody shall, with all reasonable speed and without taking the child elsewhere, either: (1) release . . . or (2) . . . deliver him to a place of detention." The words "and without taking the child elsewhere," were deleted by amendment in 1972. Juvenile Rule 7 is consistent with the 1972 enactment. This was done because police demand that they be authorized to arrest, book, and process juveniles in the same manner and place as adults.

69. OHIO REV. CODE ANN. § 2929.21 (Page 1975):

- (A) Whoever is convicted of or pleads guilty to a misdemeanor other than a minor misdemeanor shall be imprisoned for a definite term or fined, or both, which term of imprisonment and fine shall be fixed by the court as provided in this section.
- (B) Terms of imprisonment for misdemeanor shall be imposed as follows:
  - (1) For a misdemeanor of the first degree, not more than six months.
- (C) Fines for misdemeanors shall be imposed as follows:
  - (1) For a misdemeanor of the first degree, not more than one thousand dollars. . . .

70. H.B. 460, *supra* note 36, § 2151.99(B): "Whoever violates division (G) or (H) of section 2151.20 or section 2151.34 of the Revised Code is guilty of a misdemeanor of the first degree.

460 continues to allow detention in jails,<sup>71</sup> but provides that after January 1, 1981, a county without acceptable detention facilities shall receive no money from the Ohio Youth Commission.<sup>72</sup> The importance of this prohibition should not be overlooked. A survey of juvenile detention facilities, the Grandfield study,<sup>73</sup> reported fifty-six of the eighty-eight Ohio counties used areas within the county jail for detaining children charged merely with unruliness or delinquency.<sup>74</sup> The study revealed most counties did not obey the current Juvenile Code that requires separation of adults and children.<sup>75</sup> Continued use of jails is bad not only for the young people who are detained in them, but also obviates the need for local or regional detention and treatment facilities. In effect, the use of jails guarantees continued reliance on commitment to state institutions<sup>76</sup> for young people who would not be committed to them if these youngsters

71. Sub. H.B. 460, *supra* note 42, § 2151.15(C):

No child who is under the age of eighteen shall be placed in or committed to any adult prison, jail, or lockup, brought into any police station or other place in which he can come into contact with or communicate with any adult who has been convicted of or is under arrest for and charged with the commission of an offense, or detained in any jail or building in which adults charged with or convicted of an offense are kept, except as provided in this section.

A child may be detained in a hospital or similar institution in which adults convicted of or arrested for the commission of an offense are incidentally kept, if all reasonable efforts are made to ensure that no child has any contact with any adult who has been convicted or arrested for an offense and who is being detained in the institution. A child may be detained in a building in which adults are detained, if the child is kept on a separate floor or in a separate living unit that is within the exclusive control of the juvenile court and in which only children are kept, it is impossible for the child to come into contact or converse with adults being detained 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.

72. Sub H.B. 460, *supra* note 42, § 3:

After January 1, 1981, a county that has not established a county detention home or that does not belong to a detention home district organized pursuant to section 2151.49 of the Revised Code shall not receive any money from the Youth Commission pursuant to section 5139.27, 5139.271, 5139.28, or 5139.281 of the Revised Code, any Law Enforcement Assistance Administration money from the Department of Economic and Community Development, or any money from the Department of Public Welfare pursuant to Title XX of the Social Security Act, 49 Stat. 620 (1935), 42 U.S.C. § 301, as amended, unless the money will be used to construct a county or district detention home.

73. GRANDFIELD, COOPER, MILLIGAN, & PETREE, OHIO JUVENILE DETENTION SURVEY, THE OHIO STATE UNIVERSITY (1975) [hereinafter cited as GRANDFIELD]. At page 42 of the Grandfield study it is estimated that only forty counties will still be using jails as of the end of 1976.

74. OHIO TASK FORCE REPORT, *supra* note 24, at 50: "Clearly, status offenders, such as school truants or children running from conflicts within their homes, can now be locked in Ohio's county jails—in the majority of our counties."

75. OHIO REV. CODE ANN. § 2151.312(A) (Page 1976): "A child alleged to be delinquent, unruly, or a juvenile traffic offender may be detained only in the following places: (4) any suitable place designated by the court." The GRANDFIELD study, *supra* note 73, at 13 reported: "[U]pon visual inspection, project staff found that most did not meet the 'separate and removed' requirements. While visual contact between adults and juveniles was not possible in most of jails, verbal communication was."

76. OHIO TASK FORCE REPORT, *supra* note 24, at 59. Batchelder, in a concurring report asked: "How soon would monies be available to assist rural counties in developing more alternatives to county jails and state institutions?" See R. SARRI, UNDER LOCK AND KEY: JUVENILES IN JAILS AND DETENTION at 5, 13 (1974). Ms. Sarri estimates that as many as 500,000 juveniles are processed through local jails each year. She quotes Judge Young from *Jones v. Wittenberg*, 323 F. Supp. 93, 99 (N.D. Ohio 1971):

lived in a county with detention and treatment facilities or in one that had joined a facilities district.<sup>77</sup> As many as forty-six Ohio counties have access to detention and treatment facilities,<sup>78</sup> but it is essential that every county have such access in order to provide adequate services to children and to eliminate unnecessary juvenile incarceration.<sup>79</sup> In addition, it is essential that this legislation contain explicit provisions authorizing the Youth Commission to refuse commitments and to allocate openings among the respective counties.<sup>80</sup> The provisions that could have achieved this result were deleted from Substitute House Bill 460.

Regional or community detention and treatment facilities located to serve rural counties could offer many advantages to the child, the juvenile court system, and society. The staff of these facilities could exercise both an intake and a diversion function. Where community services are available, the staff could direct the child to them. Thus, contact with the formal juvenile justice system would be minimized. If services or programs were not available, the facility staff would represent a group interested in program creation and use. Because community programs generally cost less than institutionalization,<sup>81</sup> the taxpayer would benefit

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[W]hen the total picture of confinement in the Lucas County Jail is examined, what appears is confinement in cramped and overcrowded quarters, lightless, airless, damp, filthy with leaking water and human waste, slow starvation, deprivation of most human contacts, except with others in the same subhuman state, no exercise or recreation, little if any medical attention, no attempt at rehabilitation, and for those who in despair or frustration lash out at their surrounding, confinement, stripped of clothing and every last vestige of humanity, in a sort of oubliette.

The GRANDFIELD study, *supra* note 73, at 14 reports conditions for juveniles in some jails were no better than those described by Judge Young in *Wittenberg*.

77. OHIO REV. CODE ANN. § 2151.34 (Page 1976) authorizes each county to provide a detention home, or join in the formation of a multi-county district to establish a detention facility. H.B. 460, *supra* note 36, § 2152.01(C) continues this authorization and makes explicit the right of the facility to conduct care and treatment programs for adjudicated children. Sub. H.B. 460, *supra* note 42, §§ 2151.49-.50 continue these authorizations. H.B. 460, *supra* note 36, § 5139.27 authorizes the Youth Commission: (A) to promulgate regulations for the construction of such facilities; and (B) to establish minimum standards for operation, programs of education, training and rehabilitation, and qualifications of personnel employed by these facilities.

78. Allen, Ashland, Ashtabula, Butler, Clark, Cuyahoga, Erie, Franklin, Hamilton, Lake, Lorain, Lucas, Mahoning, Montgomery, Muskingum, Richland, Sandusky, Seneca, Summit, Trumbull, Warren and Wood Counties have independent county detention facilities. Morgan County contracts with Muskingum County for services. Portage, Geauga, Belmont, Harrison, Delaware, Union, Madison, Champaign, Logan, Fayette, Pickaway, Ross, Pike, Vinton, Jackson, Columbiana, Holmes, Stark, Tuscarawas, and Wayne have their own regional detention facilities. Carroll, Licking, and Guernsey contract for services from regional facilities.

79. Most Task Force members agreed that Ohio Youth Commission institutions should be reserved for the 414 children who are presently being confined for committing violent crimes. Youth Commission officials agreed that many children committed to institutions could be more appropriately treated in community treatment programs. Evidence for all this is the drastic reduction in Fairfield population from 1100 to under 500 because of the threat of a right to treatment suit.

80. The Task Force recommended the Youth Commission be given power to limit its population and to refuse commitments. See H.B. 460, *supra* note 36, § 5139.03(B), (C); the authority of the Youth Commission to refuse to allocate commitments is not found in Sub. H.B. 460, *supra* note 42.

81. Lemert, *Instead of Court, Diversion in Juvenile Justice*, PUBLIC HEALTH SERV. PUB. NO. 2127 (1971); Smith, *A Quiet Revolution, Probation Subsidy*, HEW No. (SRS) 72-26011. Between 1966 and 1972, Smith concluded California had saved over 126 million dollars, and the saving was

greatly. In addition to intake and diversion, the regional facility could coordinate local probation services and treatment programs. This would minimize the need for state institutionalization.<sup>82</sup> Under the proposed Code, the Ohio Youth Commission is empowered to promulgate regulations for the construction of these facilities and to establish minimum standards for operation, educational programs, training and rehabilitation, and personnel qualifications.<sup>83</sup>

Summarizing the immediate goals of the Task Force, one finds: (1) closing of Fairfield; (2) prohibiting Youth Commission commitment of status offenders; (3) establishing minimum ages for commitment of delinquents; and (4) prohibiting uses of jails for juveniles. In addition, the Task Force recommended legislation that would: (5) restrict juvenile court jurisdiction over unruly children; (6) extend juvenile court jurisdiction over "Parents Subject to Compulsory Child Rearing Assistance"; (7) extend the court's power to decree emancipation; and (8) establish a

growing each year. Probation subsidy programs have reduced commitments each year in California as follows:

1966-67	1398
1967-68	2416
1968-69	3319
1969-70	3557
1970-71	4495
1971-72	5266
1972-73	5449
1973-74	5027

Both adult and juvenile offenders were participants. See also OHIO TASK FORCE REPORT, *supra* note 24, at 18.

82. See OHIO TASK FORCE REPORT, *supra* note 24, at 88-96.

More than local programs or facilities are needed to curb juvenile commitments to the Ohio Youth Commission. Cuyahoga County has long committed, based on population, three times as many juveniles to the Ohio Youth Commission as Summit County. Cuyahoga County will continue to overcommit to state institutions until it becomes less costly for the Cuyahoga County treasury to place these juveniles in community programs. This seems directly contrary to the needs of the juvenile; and it is directly contrary to the best interests of the Ohio taxpayer when a juvenile is placed in a very costly state program that does not do as much for him as a much less costly local program. For statistics on annual permanent commitment to the Ohio Youth Commission from each county, see the Annual Report of the Ohio Youth Commission.

83. H.B. 460, *supra* note 36, § 5139.27; OHIO REV. CODE ANN. §§ 5139.27, 5139.271, 5138.28, 5139.281 (Supp. 1977); IJA-ABA STANDARDS, CORRECTIONS ADMINISTRATION, *supra* note 35, STANDARD § 2.1; IJA-ABA STANDARDS, ARCHITECTURE OF FACILITIES, *supra* note 35, STANDARD 1.14. The IJA-ABA STANDARDS recommend that corrections be placed under a single state agency rather than "a proliferation of agencies at both the state and local level." IJA-ABA STANDARDS, CORRECTION ADMINISTRATION, *supra* note 35, STANDARD 2.1. The authority given to the Youth Commission, however, seems to satisfy recommendations on quality control of facilities and programs. It is possible the proposed Juvenile Code may have incorporated the best state agency standards with the best community control and leadership. OJJAC Standards, *supra* note 33, at §§ 11.1, 11.2, 11.3 recommend alternatives to state institutionalization, the licensing and regulation of residential alternatives, and the establishment of minimum standards for these programs. LEAA STANDARDS, *supra* note 34, at ch. 22, recommends a single state agency, but admits centralization will not cure existing problems. It prohibits use of jails, but gives the centralized state agency no more power than the proposed Code awards to the Youth Commission for setting standards for facilities, programs, training and staff. In LEAA STANDARD, *supra* note 34, STANDARD 2.1, it is said: "Localities should be responsible for the operation of direct service programs for delinquency prevention. This responsibility should include identifying local needs and resources, developing programs to resolve the needs and delivering the services needed."

maximum ceiling time length for juvenile commitment at a state institution.<sup>84</sup>

#### 4. Jurisdiction Over Unruly Children

The Task Force unanimously concluded that the vague language defining the unruly child was intolerable and contributed to the arbitrariness of the system.<sup>85</sup> Some of the Task Force members argued that court jurisdiction over juvenile noncriminal behavior should be terminated.<sup>86</sup> These members also felt that if juvenile courts did not waste so much time and resources on less significant misbehavior patterns, the courts would have adequate time and resources to achieve better results with delinquents. The Task Force finally decided to eliminate only the more arbitrary provisions of the existing Code.<sup>87</sup> The House Judiciary

84. OHIO TASK FORCE REPORT, *supra* note 24, at 4-5.

85. OHIO REV. CODE ANN. § 2151.022 (Page 1976):

As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "Unruly child" includes any child:

(A) Who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient;

(B) Who is an habitual truant from home or school;

(C) Who so deports himself as to injure or endanger the health or morals of himself or others;

(D) Who attempts to enter the marriage relation in any state without the consent of his parents, custodian, legal guardian, or other legal authority;

(E) Who is found in a disreputable place, visits, or patronizes a place prohibited by law, or associates with vagrant, vicious, criminal, notorious, or immoral persons;

(F) Who engages in an occupation prohibited by law, or is in a situation dangerous to life or limb or injurious to the health or morals of himself or others;

(G) Who has violated a law applicable only to a child.

OHIO TASK FORCE REPORT, *supra* note 24, at 37. See also Willey, *supra* note 17, at 159-62 (1970).

86. IJA-ABA STANDARDS, NONCRIMINAL MISBEHAVIOR, *supra* note 35, at 2:

These standards take the position that the present jurisdiction of the juvenile court over noncriminal misbehavior—the status offense jurisdiction—should be cut short and a system of voluntary referral to services provided outside the juvenile justice system adopted in its stead. . . . However, because of . . . youth who run away, who are in circumstance of immediate jeopardy, who are in need of alternative living arrangements when they and their parents cannot agree, and who evidence a need for emergency medical services—some carefully limited official intervention is preserved. . . ."

The LEAA Standards eliminated the traditional status offense, but gave the court jurisdiction over the "family with service needs" in cases involving: (1) school truancy; (2) repeated disregard for or misuse of lawful parental authority; (3) repeated running away from home; (4) repeated use of intoxicating beverages; and (5) delinquent acts committed by a juvenile younger than ten years of age. LEAA STANDARDS, *supra* note 34, at 312. It is contemplated that the court will have power to order parents, as well as agencies, to modify their behavior in these cases. The OJJAC STANDARDS, *supra* note 35, STANDARDS 13.1-13.5 recommend the deinstitutionalization of status offenders, but continues court jurisdiction over them with emphasis on voluntary programs. Within the limits of least restrictive alternative, coercive court action is contemplated.

87. OHIO TASK FORCE REPORT, *supra* note 24, at 37. Sub H.B. 460, *supra* note 42, § 2151.13<sup>1</sup> [As used in Chapter 2151 of the Revised Code] "unruly child" includes any child: (A)

Who does not subject himself to a reasonable control of his parents, teachers, guardian, or custodian, by reason of being habitually disobedient; (B) Who is an habitual truant from home or school; (C) Who engages in sexual conduct, as defined in section 2907.01 of the Revised Code, with another child; (D) Who attempts to enter the marriage relation in any state without the consent of his parents, custodian, legal guardian, or other legal authority; (E) Who is found in or patronizes a place prohibited by law; (F) Who engages in an occupation prohibited by law; (G) Who has violated a law applicable only to a child.

The original H.B. 460 did not include (A) or (C).

Committee, however, added a provision on disobedience that seems to reopen the juvenile system to the charge of arbitrariness. This author hopes for the elimination of this provision prior to the final passage of the bill.<sup>88</sup>

The Task Force recommended the elimination of sections allowing institutionalization of status offenders.<sup>89</sup> The Task Force also understood some juvenile court intervention and use of "leverage" might be essential with a youth or family member who refuses to participate in community treatment programs.<sup>90</sup>

### 5. *Parents Subject to Compulsory Child Rearing Assistance*

The Task Force heard considerable testimony that family failure is a very important contributor to juvenile misbehavior and that juvenile courts fail or lack power to order appropriate family participation in treatment programs.<sup>91</sup> Consequently, the Task Force recommended an addition to the jurisdiction of the juvenile court: jurisdiction over "Parents Subject to Compulsory Child Rearing Assistance."<sup>92</sup> The Ohio Juvenile Court Judges Association asserted these sections were patently unconstitutional<sup>93</sup> and unnecessary since the court presently has jurisdiction over

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88. See Willey, *supra* note 17, at 159-162 (1970).

89. OHIO TASK FORCE REPORT, *supra* note 24, at 46.

90. OHIO TASK FORCE REPORT, *supra* note 24, at 6-64. Two members of the Cleveland Heights-University Heights Youth Service Bureau argued that ultimate court intervention was essential in some habitual misbehavior cases, and that a street-wise youth might play the counseling game to the hilt. They argued the possibility and threat of early court intervention is essential to the counseling process with this type of youth, and also, with any recalcitrant family member.

91. OHIO TASK FORCE REPORT, *supra* note 24, at 38; OHIO REV. CODE ANN. § 2151.359 (Page 1976): "[The court shall have power to:] make an order restraining or otherwise controlling the conduct of any parent . . ." if such an order is necessary to "(A) Control any conduct or relationship that will be detrimental or harmful to the child; (B) Where such conduct or relationship will tend to defeat the execution of the order of disposition made or to be made." It is generally agreed that a court can enjoin a parent's harmful act and has contempt powers that might apply to parents, but it was also agreed the current practice is to order the parents into counseling and then coercing the parent by threatening to commit his child if the parent does not cooperate. Since many cases are initiated by the parent against the child, many parents refuse to obey the court in order to further punish the child. The purpose of these sections is to give the court power to coerce the parent by some other method than commitment or punishment of the child. Some juvenile court judges cited this section as evidence that they already had the power; others argued the proposed sections would be an unconstitutional extension of court power into family matters.

92. All references to parents subject to compulsory child rearing assistance were deleted from Sub. H.B. 460. Sub. H.B. 460, *supra* note 42, § 2151.35(B) does not extend the court's jurisdiction as did H.B. 460, *supra* note 36, § 2151.60(A) which provides: "[such a 'Parent' is one] who does not provide proper parental care, as defined in section 2151.61 of the Revised Code, by the reason of the harmful behavior of the parent . . ." "Harmful behavior: means an act or failure (1) Within the discretion of a parent . . . (2) has directly contributed to the delinquency unruliness, or dependency of the child." LEAA STANDARDS, *supra* note 86, OJJAC STANDARDS, *supra* note 33, recommended the strengthening of community facilities and services to make available the basic needs of the family; counseling, employment, food and health care, housing, day care and education. IJA-ABA STANDARDS. *Noncriminal Misbehavior*, *supra* note 35, STANDARD 4.2 rests on the premise that "services should be offered on a voluntary basis, and the juvenile and the family should not be required to receive such services in cases involving the juvenile's unruly behavior which does not contravene the criminal law."

93. OHIO JUVENILE JUDGES ASSOCIATION, THE ANALYSIS, JUVENILE JUSTICE REFORM BILL 5 (1977) notes:

parents under Juvenile Rule 34(D).<sup>94</sup> Juvenile Rule 34 (D), however, only authorizes the court to restrain those who interfere with dispositional orders; the Rule has never been interpreted to empower the court to order parents into counseling.

The court's current practice is to assume jurisdiction over a child because of the child's repeated disregard for parental authority, even though the child's refusal to obey may arise from the parent's conduct. The juvenile court then threatens parents with the child's commitment if the parents do not change their unreasonable ways or seek counseling. This seems more than a bit unjust as far as the child is concerned. Insofar as the parents often have filed the complaint, commitment of the child is exactly what the parents are seeking. The proposed sections give the court jurisdiction over a parent who does not provide a child with proper parental care because of the parents' harmful behavior.<sup>95</sup> The court will also have the power to punish parental failure with contempt.<sup>96</sup> Additionally, the key phrases "proper parental care"<sup>97</sup> and "harmful behavior" are defined.<sup>98</sup>

The bill attempts to establish jurisdiction in personam over parents by a new classification "Parents Subject to Compulsory Child Rearing Assistance." A careful study of H.B. section 2151.60 indicates this provision is patently unconstitutional, being vague and indefinite, and furthermore it is unnecessary as the court has authority over conduct of parents pursuant to Juv. R. 34(D). Proposed Section 2151.60 has clear definitional limits; while Juv. R. 34(D) and Ohio Rev. Code Ann. § 2151.359 (Page 1976) have no statutory limits at all. If the juvenile rule is constitutional, the proposed section is also.

94. Juv. R. 34(D): "In any proceeding where a child is made a ward of the court, the court may grant a restraining order controlling the conduct of any party if the court finds that such order is necessary to control any conduct or relationship which may be detrimental or harmful to the child and tend to defeat the execution of a dispositional order."

95. H.B. 460, *supra* note 92, § 2151.60(A).

96. H.B. 460, *supra* note 36, § 2151.67 allowed the court to:

(A) Enjoin the person from continuing to do any act upon which the adjudication was based. [This gives the court approximately the same powers as Juv. R. (D), but the following section seems to extend it.]

(B) Require the person to obtain counseling or treatment, provided by the court or any public or private agency provided such counseling or treatment does not conflict in time with the person's employment, and providing such counseling or treatment is rationally related to the act upon which the adjudication is based or to the causes of that act.

(C) Failure to comply with an order entered pursuant to this section may be adjudged contempt of court and punished accordingly.

97. H.B. 460, *supra* note 36, § 2151.61 defines proper parental care:

A child whose home is filthy and unsanitary; whose parents, stepparents, guardian, or custodian permit him to become dependent, unruly, or delinquent, whose parents, stepparents, guardian, or custodian refuse or neglect to provide him with necessary care, support, medical attention, and educational facilities; or whose parents, stepparents, guardian or custodian fail to subject such child to necessary discipline is without proper parental care or guardianship.

This author would like to see the elimination of words "whose home is filthy and unsanitary; whose parents, stepparents, guardian, or custodian permit him to become dependent, unruly or delinquent," but realizes that they are limited by H.B. 460, *supra* note 36, § 2151.60(B) to specific: (1) "acts or failures," (2) within the discretion of the parent, and (3) which has directly contributed to the delinquency, unruliness or dependency of the child. Given these specific and detailed limitations, these words are less vague than the present statute. See OHIO REV. CODE ANN § 2151.05 (Page 1976).

98. H.B. 460, *supra* note 36, § 2151.60(B): "[A]s used in this section, 'harmful behavior' means an



That parents are subject to compulsory child rearing assistance is not a new idea. Ohio has a similar concept incorporated in the present Code<sup>99</sup> and Rules.<sup>100</sup> The concept has been adequately studied and presented in the Standards.<sup>101</sup> Furthermore, it is recognized in many cases that the problem lies with a parent or other family member rather than with the child; the juvenile court has no power to compel a parent to seek treatment or counseling, and it is unfair to stigmatize the child with an unruliness adjudication when his parents are at fault. The proposed sections allow the court to direct appropriate orders to the offending parents. The court would not be required to hold the child hostage as an adjudicated offender and commit him if his parents did not correct their behavior.<sup>102</sup> This additional juvenile court jurisdiction over offending family members may have been the most important reform in the proposed legislation. It could have contributed to strengthening the family and ultimately reducing delinquency. The House Judiciary Committee, however, eliminated these sections from Substitute House Bill 460. Since these proposed sections represent less of an intrusion into family matters than Ohio's present sections that define neglect<sup>103</sup> and contributing,<sup>104</sup> this author hopes they will be replaced before final passage of the Bill.

### 6. *Emancipation*

Despite juvenile justice reform, cases will remain in which the parent-child conflict cannot be resolved; the individuals are good citizens and obey the law, but the child justifiably wants to control his life. The existing emancipation doctrine appears to be based on parental consent; however, in a nonuniform way, it has been extended to rest on child behavior. Consequently, one author concludes it is impossible to predict what will happen in the future by studying existing cases.<sup>105</sup> Yet many

act or failure to act which is (1) within the discretion of a parent, stepparent, guardian, or custodian of a child; (2) has directly contributed to the delinquency, unruliness, or dependency of the child."

99. OHIO REV. CODE ANN. § 2151.05 (Page 1976).

100. JUV. R. 34(D).

101. LEAA STANDARDS, *supra* note 34, at 311-32, & Appendix 4, at 796. See also PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, JUVENILE DELINQUENCY AND YOUTH CRIME (1967).

102. See IJA-ABA STANDARDS, ABUSE AND NEGLECT, *supra* note 35, STANDARD 2.1 for a clear articulation of the hostage principle: "Courts should be authorized to assume jurisdiction in order to condition continued parental custody upon the parents' accepting supervision . . ." It is difficult to argue this jurisdiction is in the best interest of the child or consistent with the least restrictive alternative.

103. OHIO REV. CODE ANN. §§ 3113.01-99 (Page 1972).

104. OHIO REV. CODE ANN. § 2151.41 (Page 1976). See Comment, *Contributing to Delinquency: An Exercise in Judicial Speculation*, 9 AKRON L. REV. 566 (1976).

105. C. MEIER, OHIO FAMILY LAW 267 (1963). See also *id.* § 32.12, at 275: "Emancipation" means the freeing of a minor child from parental control . . . may be implied as well as express, and may take a variety of forms or be inferred under any diversity of circumstances which recognize the child as person sui juris. Thus sending him forth to shift for himself, or compelling him to support himself shows emancipation.

cases have protected the minor's interest while maintaining parental obligations. Areas in which these cases have arisen include: (1) right-to-wage cases; (2) intra-family tort cases; and (3) diversity jurisdiction cases.<sup>106</sup> The common law has allowed emancipation in cases concerning: (1) marriage of the child, (2) induction into the armed services; (3) establishment of a domicile different from that of the parents; and (4) establishment of economic independence.<sup>107</sup> In addition, many states presently have emancipation statutes.

The proposed sections attempt to bring order to this very confusing area of the law. They are based on a concept fully articulated in the Standards.<sup>108</sup> The two major studies, IJA-ABA and LEAA, differ only on whether the courts should be able to enter a decree of emancipation.<sup>109</sup> Despite the divergence on this point, these studies agree on the proof that should be required before a court can enter a finding of emancipation. Under the sections on emancipation, the child has the burden of establishing the facts necessary to support the petition.<sup>110</sup> The sections are

106. IJA-ABA STANDARDS, RIGHTS OF MINORS, *supra* note 35, STANDARD 2.1: "A new approach to emancipation":

A. The legal issues traditionally resolved by reference to the emancipation doctrine should be resolved legislatively as aspects of the substantive doctrines which govern legal relationships between child and parent, between parent and parent, between child and nonmembers of the family, and between parents and nonmembers of the family.

B. Legislatively created, narrowly drawn doctrines which obviate the need for relying upon the vague criteria of the traditional emancipation doctrine should include the following principles:

1. a parent should not be permitted to recover from the child's employer wages due or paid by the employer to the child;
2. a child should be permitted to sue his or her parent and the parent should be permitted to sue the child for damages arising from intentional or negligent tortious behavior so long as the behavior is not related to the exercise of family functions. . . .

107. IJA-ABA STANDARDS, RIGHTS OF MINORS, *supra* note 35, at 21-30.

108. LEAA STANDARDS, *supra* note 34, at STANDARD 14.24:

The Family court should have the power to enter an order of responsible self-sufficiency in favor of any juvenile. Before making such an order, the court must determine: (1) That the juvenile wishes to be free from parental control; (2) That he or she understands the consequences of being free from parental control; and (3) That he or she has an acceptable plan for independent living and self-support and the apparent ability and maturity to implement such a plan. The legal effect of an order of responsible self-sufficiency is the complete emancipation of the minor child."

109. Compare IJA-ABA STANDARDS, RIGHTS OF MINORS, *supra* note 35, STANDARD 2.1 with LEAA STANDARD, *supra* note 34, STANDARD 14.24:

(C) Because legal disputes concerning the activities and needs of children will inevitably arise between the child and parent, between parent and parent, between child and nonmembers of the family, and between parents and nonmembers of the family and the disputes will arise in contexts and present legal issues which cannot be forecast legislatively, the legislature should also enact an emancipation doctrine of general applicability.

1. The doctrine should not permit emancipation by judicial decree.
2. The doctrine should be explicitly limited to issues not addressed by other standards of this volume and should authorize a finding of emancipation when a child, prior to the age of majority, has established a residence separate from that of his or her family, whether or not with parental consent or consent of a person responsible for his or her care, and is managing his or her own financial affairs."

110. H.B. 460, *supra* note 36, §§ 2151.70-.74. The child must be over 16; his petition must show the cessation of mutual duties between parent and child will be in the best interests of the child and that

designed to protect the mature and responsible juvenile who is in serious conflict with his parents. Thus, the sections apply only to juveniles over sixteen who have plans for their physical needs, education, and support. The proposed legislation makes the child responsible for his actions as if he were eighteen, however, the court retains jurisdiction to modify the emancipation order.

During the House Judiciary Committee's final review, the emancipation sections were eliminated. This writer feels the proposed sections would be a positive improvement over the presently confused state of the law. The sections are consistent with the substantive recommendations of the two most recent studies of juvenile law.<sup>111</sup> In short, these sections would provide mature and responsible juveniles a badly needed remedy and this author hopes they will be reinserted before the Bill's final adoption.

### 7. *Time Limit on Institutional Commitments*

The final priority item listed by the Task Force was the establishment of a maximum time length for institutional juvenile commitment.<sup>112</sup> The Task Force decided to limit commitments to insure no child would be institutionalized longer than the maximum adult prison term for the same act. In comparison to the recommendation of the Standards, this is an exceedingly harsh position; however, it is no worse than the present Juvenile Code.<sup>113</sup> Nevertheless, the House Judiciary Committee amended

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he has plans for his physical needs, further education and financial well-being. A full hearing, after service on all necessary people is mandated, and the court can impose limitations and conditions in the decree.

111. The two major studies are cited in notes 108 & 109 *supra*. The STANDARDS require the child to have an acceptable plan for independent living and self-support. The child must also be managing his or her own affairs. The LEAA STANDARDS recommend a judicial decree to establish this; while the IJA-ABA STANDARDS are to the contrary. But the IJA-ABA provision requires a finding as to the critical facts. There is no way to arrive at "findings" without a judicial hearing with accompanying decree. Hence, both studies require judicial intervention and a judicial decree of emancipation. See also IJA-ABA STANDARDS, NONCRIMINAL BEHAVIOR, *supra* note 35, STANDARD 5.1. This Standard provides, relative to the noncriminal child, that the juvenile court can decree an alternative residential placement over the objection of the parent.

112. H.B. 460, *supra* note 36, § 2151.59(C): "No order of commitment shall continue for a period longer than the maximum term for which an adult convicted of the same act as the child could be imprisoned." IJA-ABA STANDARDS, JUVENILE DELINQUENCY AND SANCTIONS, *supra* note 35, STANDARD 5.2 classifies all criminal acts within five classes of juvenile offenses. Juvenile offense Class 1 includes crimes that carry a sentence of death or life imprisonment; Class 2 includes crimes that carry sentences between 5 and 20 years; Class 3 includes crimes that carry sentences between 1 and 5 years; Class 4 includes crimes that carry sentences between 6 months and 1 year; and Class 5 includes crimes that carry sentences of less than 6 months. STANDARD 6.2 provides the length of the juvenile sanction, which in all cases is a lesser time than the minimum adult sentence; whether the confinement should be in a secure facility; or whether the penalty should be a conditional freedom (probation). LEAA STANDARDS, *supra* note 34, STANDARDS 14.13, 14.14 present a similar scheme, though potential confinement for the juvenile is longer than provided by the IJA-ABA STANDARDS. OJJAC STANDARD, *supra* note 33, STANDARD 7.4 provides for the least restrictive alternative.

113. OHIO TASK FORCE REPORT, *supra* note 4, at 5, 25; OHIO REV. CODE § 2151.23 (Page 1976). The jurisdiction of the court attaches in accordance with this section and continues until the juvenile reaches age 21. See *Slawski v. Slawski*, 49 Ohio App. 100, 195 N.E.258 (Ct. App. Lucas County 1934); *In re Davis*, 22 Ohio Op. 108, 179 N.E.2d 198 (Juv. Ct. Marion County 1971).

the section to allow harsher treatment for juveniles than adults who commit the same misdemeanor. With respect to felonies, however, the House Judiciary Committee restricted maximum commitment of juveniles to the minimum adult term.<sup>114</sup> Because institutionalization has so many adverse effects on the juvenile, it is wrong to allow a child to be committed for a longer term than an adult even for misdemeanors.<sup>115</sup> The proposed legislation, however, does include time limits for the commitment of delinquent and unruly children.<sup>116</sup>

## B. *Additional Juvenile Code Reform Sections*

The legislative changes discussed up to this point have related to specific goals or priorities designated by the Task Force in its report. Many other changes were considered, recommended, and incorporated in House Bill 460. In one form or another, some of these changes are incorporated in Substitute House Bill 460.

### 1. *Intake*

One of the most important changes recommended by the Task Force was the addition of a single paragraph to the purpose section of the existing Juvenile Code.<sup>117</sup> The section provides a legislative basis for court intake powers and indicates a preference for noninvolvement by the court.<sup>118</sup>

114. Sub H.B. 460, *supra* note 42, § 2151.30(B):

No order of commitment for a delinquent child shall continue for a period of time that is longer than: (1) one hundred twenty days, if the act for which the child was adjudicated delinquent would be a misdemeanor of the second, third, or fourth degree if committed by an adult; (2) the maximum term for which an adult convicted of the same act could be sentenced, if the act for which the child was adjudicated delinquent would be a misdemeanor of the first degree if committed by an adult; (3) the longest minimum term for which an adult convicted of the same act could be sentenced under section 2929.11 of the Revised Code, if the act for which the child was adjudicated delinquent would be a felony if committed by an adult.

115. See IJA-ABA STANDARD, DISPOSITIONS, *supra* note 35, STANDARD 3.3(B). This Standard suggests a presumption against coercively removing a juvenile from his or her home.

116. H.B. 460, *supra* note 35, § 2151.47:

(C) Place the child in a nonsecure treatment program . . . for a period not to exceed ninety days; and

(E) . . . may commit the child to a secure treatment facility . . . for not more than thirty days . . . If a disposition pursuant to this division has previously been ordered in a case, no further disposition pursuant to this division shall be ordered."

Sub. H.B. 460, *supra* note 42, § 2151.27(E)(3) extends disposition of unrulies in nonsecure programs to one year. It allows use of secure programs for up to thirty days for unrulies who violate probation or who refuse to remain in nonsecure programs. This conflicts with current provisions of the Federal Act, *supra* note 27.

117. Sub. H.B. 460, *supra* note 42, § 2151.01(E): "To achieve the forgoing purposes in appropriate cases without official court action."

118. IJA-ABA STANDARDS, JUVENILE DELINQUENCY AND SANCTIONS, *supra* note 35, STANDARD 1.3 provides for discretionary dismissal in appropriate cases. IJA-ABA STANDARDS, NONCRIMINAL MISBEHAVIOR, *supra* note 35, STANDARD 1.1 provides that a juvenile's acts of misbehavior, ungovernability, or unruliness should not constitute a ground for juvenile court jurisdiction. LEAA STANDARD, *supra* note 34, STANDARD 14.16 requires (1) an adjudication of delinquency and (2) a finding that the juvenile is in need of supervision, care or treatment; otherwise, STANDARD 14.4 requires the least restrictive alternative. OJJAC STANDARDS, *supra* note 33, at 29 emphasize prevention measures even before informal intervention and services to preclude the least restrictive alternative.

The 1969 Ohio Juvenile Code does not contain provisions for intake,<sup>119</sup> although the 1972 Juvenile Rules provide that court action should be avoided.<sup>120</sup> The Rules also allow informal screening by the court before the filing of a complaint.<sup>121</sup> The Rules, however, cannot override specific language of the Juvenile Code that allows any person to file a complaint.<sup>122</sup> Some police departments believed courts could not refuse to accept or act upon police complaints.<sup>123</sup> The additional purpose clause is reinforced by a proposed section that empowers the court to establish an intake department.<sup>124</sup> In addition, the court is specifically authorized to make informal adjustments without a hearing.<sup>125</sup>

119. See Willey, *supra* note 17, at 170-71: "The Ohio act does not provide for intake screening, and the sections listing the contents of the complaint do not require an allegation that the child is 'in need of treatment and rehabilitation.' . . . Such a requirement would support the fundamental concept of juvenile justice, and should surely be included as a legislative standard." (footnotes omitted).

120. Juv. R. 9:

- (A) Court action to be avoided. In all appropriate cases formal action should be avoided and other community resources utilized to ameliorate situations brought to the attention of the court.

121. *Id.*:

- (B) Screening; referral. Information that a child is within the court's jurisdiction may be informally screened prior to the filing of a complaint to determine whether the filing of a complaint is in the best interests of the child and the public.

122. *Id.* OHIO REVISED CODE § 2151.27 (Page 1976): "Any person . . . may, with respect to such child file a sworn complaint in the juvenile court . . ." Sub. H.B. 460, *supra* note 42, § 2151.25 no longer gives anyone the right to file a complaint. It allows one to file an affidavit alleging certain facts, which is then screened before a complaint is filed. See Sub. H.B. 460, *supra* note 42, § 2151.21.

123. OHIO CONST. art. IV, § 5(b) provides: "The Supreme Court shall prescribe rules governing practice and procedure in all courts of the State, which rules shall not abridge, enlarge, or modify any substantive right . . ." The rules can never take precedence over statutes which create substantive rights, and no rule is valid if it would abridge, enlarge or modify the substantive right in question. While there is no precise definition of "substantive" or "procedural," substantive rules of law create, define, and regulate rights and obligations while procedural rules pertain to methods of enforcement. The changes in the proposed Juvenile Code define, extend or limit substantive rights; or to put it another way, define, extend or limit subject matter jurisdiction. This is a legislative and statutory prerogative, not a judicial rule making one. Those sections that mandate speedy trial or hearing rights are designed to protect constitutional rights and improve justice, clearly within the scope of legislative action. The legislative reform that requires a verbatim record is designed to improve the monitoring of juvenile courts by the appellate courts in order to protect the child and the juvenile process. These rights were being protected by prior practice or rules. Requiring a written opinion is designed to accomplish a similar goal: increased accountability of juvenile court judges. See J. Patrick Browne's forthcoming treatise on Ohio Civil Procedure which will be published by West Publishing Co. under the title, *Ohio Methods of Procedure*; and an article extracted from it entitled, *Civil Rule One and the Principle of Primacy—A Guide to the Resolution of Conflict Between Statutes and the Civil Rules*, which will appear in 5 OHIO N. L. REV. —(1978).

124. Sub. H.B. 460, *supra* note 42, § 2151.21(A) gives the court authority: to establish an intake department; adopt by journal entry uniform standards and procedures recommended by the Juvenile Judges of the Ohio Judicial Conference; screen all allegations prior to the filing of a complaint; engage in diversion; establish rules and procedures therefor; and use alternative community services. Section 2151.21(C) requires prosecutorial comment on the proposed intake rules, but gives the prosecutors no power to modify the rules. The original H.B. 460, *supra* note 36, § 2151.29 gave the prosecutor an important voice in establishing intake standards.

125. Sub. H.B. 460, *supra* note 42, § 2151.21(B) gives the court or an official designated by the court the power to make a preliminary inquiry and such informal adjustment as is practicable before the complaint is filed. The prosecutor is given no real power relative to the screening process or procedures. See also OHIO TASK FORCE REPORT, *supra* note 24, at 135.

The proposed section of original House Bill 460 concerning intake provided for involvement of the prosecutor during the organization of the intake department, the creation of standards for its governance, and the decision on informal adjustments.<sup>126</sup> The Task Force thought this compromise was better than vesting all intake power in the court or in the prosecutor.<sup>127</sup> Although the Task Force proposals were not new ideas<sup>128</sup> and were consistent with LEAA and IJA-ABA Standards,<sup>129</sup> Substitute House Bill 460 allows prosecutorial involvement whenever requested by the juvenile court, but preserves intake and diversion power to the court.

The possible unconstitutionality of judicial administration of intake services supports prosecutorial involvement during intake decisions.<sup>130</sup> It has often been argued the judiciary cannot decide whom to prosecute and also perform impartial judicial functions during trial. For instance, even though the court may not actually participate in the decision to prosecute a juvenile, the court has participated in the intake staff selection and training and has confidence in its judgment.<sup>131</sup> Furthermore, even if judicial involvement and control of intake is constitutional, serious doubt remains regarding its propriety.<sup>132</sup> Consequently, the Standards recommend

126. See H.B. 460, *supra* note 36, § 2151.29(A); OHIO TASK FORCE REPORT, *supra* note 24, at 135-37. An intake officer or department is essential, but to avoid the abuse common in "unofficial" cases, it is essential that definite intake criteria be established and published. An intake department will reject some complaints because of insignificance or other reasons and will also be responsible for diversion programs. Given the coercive potential involved in an offer of diversion, published standards are essential. Since diversion programs impinge on the freedom of the child, with the advice of counsel he should be able to refuse unofficial treatment or diversion and demand a full adjudicatory hearing.

127. See IJA-ABA STANDARDS, PROSECUTION, *supra* note 35, at 50 advances the position that an intake officer should make the initial decision on intake. If the intake officer declines to file the petition, the complainant can seek review by the prosecutor; it is clear the prosecutor has the final decision. The commentary to § 4.1 at 54 points out the decision to prosecute is discretionary, has been lodged within the prosecutorial office, and prosecutors enjoy immunity for duties performed within this role. IJA-ABA STANDARDS, COURT ORGANIZATION AND ADMINISTRATION, *supra* note 35, at 14. STANDARD 1.2 recommends that intake, detention and probation services be removed from the judicial branch and placed within the executive branch where these services can be independent of the court and develop the social service expertise not usually found in law trained judges. It is argued that due process might require juvenile courts to rid themselves of prosecutorial or intake decision making powers. IJA-ABA STANDARDS, JUVENILE PROBATION FUNCTION, *supra* note 35, STANDARD 4.1 acknowledges this office is charged with intake, investigative and probationary functions, but that they are inconsistent. It emphasizes the need to use specialists for each of these functions. The three IJA-ABA groups cited above acknowledge that if the services are combined within one agency, some needless duplication of effort can be avoided. LEAA STANDARDS, *supra* note 34, STANDARD 21.1 recommend that intake be handled by a state agency to insure uniformity throughout the state. It argues the court should be restricted to a judicial function. The Standard suggests that an intake agency screen complaints, satisfy the investigative function relative to dispositions, and act as an intake agency for state institutions or programs. LEAA STANDARD, *supra* note 34, STANDARD 15.13 very clearly gives the prosecutor final decision on whether a complaint should ultimately be filed. OJJAC STANDARDS, *supra* note 33, STANDARDS 5.1-5.6 are very brief, recommend intake services, and give the intake staff authority to dismiss complaints. All the above groups utilize the intake office to achieve diversion whenever possible.

128. FLA. STAT. § 39.04 (Supp. 1973).

129. See *supra* note 127.

130. See IJA-ABA STANDARDS, JUVENILE PROBATION FUNCTION, *supra* note 35, at 128 (1977).

131. *Id.*

132. *Id.* at 129.

executive branch administration of intake services rather than court administration.<sup>133</sup> This recommendation is well supported by constitutional and common-law concepts of prosecutorial functions.<sup>134</sup> It has always been the prosecutor who has decided whether to prosecute.<sup>135</sup> The judiciary has not had a similar power and it seems inconsistent with our basic governmental principle to give one branch of government both decisions.

Despite the preference for vesting intake control with the prosecutor, control of the intake department will remain in the juvenile court structure.<sup>136</sup> The Task Force recommendations that the prosecutor should have discretionary power to proceed against charged individuals<sup>137</sup> and to submit standards for the operation of the intake department also were eliminated from Substitute House Bill 460. Even though the prosecutor protects public interest and safety by insuring that all are prosecuted who should be, a separate intake department within the executive department would operate more effectively. Given the present low level of public confidence in criminal and juvenile courts, increased public scrutiny through control of intake by an executive agency is warranted and may prove to be beneficial.

## 2. *Least Restrictive Alternative*

The proposed addition to the purpose section was followed in original House Bill 460 by what is usually called the "Children's Bill of Rights."<sup>138</sup> The history and purpose of this section will not be discussed here, but three of its provisions relate to the problem of certain youths receiving overly harsh dispositional treatment. Subsection G required treatment by the "least restrictive method" for all unruly juveniles or delinquents. Although the Children's Bill of Rights was eliminated from Substitute House Bill 460, this particular right was retained.<sup>139</sup> The least restrictive alternative approach has been used in first amendment cases,<sup>140</sup> civil commitment cases,<sup>141</sup> and criminal cases alleging excessive punishment.<sup>142</sup>

133. *Id.* at 126.

134. IJA-ABA STANDARDS, PROSECUTION, *supra* note 35, at 55.

135. See ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION § 1.1 (Approved Draft 1971).

136. Sub. H.B. 460, *supra* note 42, § 2151.21.

137. H.B. 460, *supra* note 36, § 2151.29(A): "If no such informal adjustment is possible, the prosecuting attorney may file an information . . ."

138. See H.B. 460, *supra* note 36, § 2151.02.

139. H.B. 460, *supra* note 36, § 2151.02(G): "Treatment by the least restrictive method in cases in which he is adjudicated delinquent or unruly." Sub. H.B. 460, *supra* note 42, § 2151.27(L).

140. See *Shelton v. Tucker*, 364 U.S. 479 (1960); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

141. *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966), *cert. denied*, 382 U.S. 863 (1966).

142. See *Furman v. Georgia*, 408 U.S. 238 (1972); *In re Foss*, 10 Cal. 3d 910, 112 Cal. Rptr. 649, 519 P.2d 1073 (1974); *In re Lynch*, 8 Cal. 3d 410, 105 Cal. Rptr. 217, 503 P.2d 921 (1972).

The most compelling argument for the doctrine is stated in *Beyond the Best Interests of the Child*.<sup>143</sup> The Standards recommend the least restrictive alternative approach be included in the juvenile codes. The Standards also recommend that judges provide a written opinion that includes the facts relied upon in support of the given disposition, and the reason for rejecting less restrictive alternatives.<sup>144</sup> Substitute House Bill 460 requires a written opinion<sup>145</sup> and verbatim records of oral proceedings.<sup>146</sup>

### 3. Sex Discrimination

Subsection H<sup>147</sup> was included in House Bill 460 to eliminate discrimination that resulted in higher institutional commitment rates for unruly females.<sup>148</sup> This section also was aimed at reducing the commitment of unmarried pregnant girls who are too poor to exploit the community alternatives open to the affluent.<sup>149</sup> In short, Subsection H was designed to eliminate commitment discrimination on the basis of sex or wealth. Unfortunately, this subsection does not appear in Substitute House Bill 460. In addition, neither the original Bill nor the amended version address crucial problems such as venereal disease, contraception and pregnancy.<sup>150</sup> Many children are unwilling or unable to acknowledge to their parents that they are sexually active.<sup>151</sup> Consequently, these children are unable to obtain sex education, counseling or medical treatment because they cannot secure parental consent.<sup>152</sup> The Standards address this issue and

143. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 53 (1973).

144. See IJA-ABA STANDARDS, DISPOSITIONS, *supra* note 35, STANDARD 21.1: "The imposition of a particular disposition should be accompanied by a statement of the facts relied on in support of the disposition and the reasons for selecting the disposition and rejecting less restrictive alternatives." LEAA STANDARD *supra* note 34, STANDARD 14.4: "[T]hese provisions are designed to facilitate the appellate review of dispositions (written findings of facts and reasons for particular disposition chosen); and OJJAC STANDARD, FORMAL INTERVENTION, *supra* note 33, STANDARD 7.4.

145. Sub. H.B. 460, *supra* note 42, § 2151.17(D) provides either party can request a written opinion setting forth reasons why less restrictive alternatives were not imposed.

146. Sub. H.B. 460, *supra* note 42, § 2151.14(D).

147. H.B. 460, *supra* note 36, § 2151.02(H): "Equal treatment under the law without regard to race, religion, sex, or social status."

148. OHIO TASK FORCE REPORT, *supra* note 24, at 48 cites the Report of the Ohio Task Force for the Implementation of the Equal Rights Amendment (1975) which showed that 60% of the females in state juvenile institutions were status offenders.

149. OHIO TASK FORCE REPORT, *supra* note 24, at 48 presents figures showing that 15% of the females in one state institution were pregnant and had been committed as unruly children. There is little doubt but that those who can afford private care and counseling avoid juvenile court involvement, and only the poor are forced to rely on it for aid. Nothing could be more costly, stigmatizing and futile than a commitment of these pregnant girls; and much less costly local services are available to handle pregnancy.

150. The proposed sections relating to emancipation, H.B. 460, *supra* note 36, §§ 2151.70-74 are not usually thought to address this issue. In any event they were all deleted from Sub. H.B. 460 before it was sent to the floor by the House Judiciary Committee. See IJA-ABA STANDARDS, RIGHTS OF MINORS, *supra* note 35, STANDARD 2.1(C)(2). The Standard explicitly limits the emancipation doctrine to issues not addressed by other Standards within the volume.

151. See KONOPKA, *THE ADOLESCENT GIRL IN CONFLICT* (1966).

152. OHIO REV. CODE ANN. § 3709.241 (Page Supp. 1977). This section permits the minor to



conclude that withholding these services from minors has not and will not deter sexual activity by the young. In effect, withholding these services contributes to epidemic rates for venereal disease and teenage pregnancies. Consequently, the Standards recommend shifting decision-making power from parent to minor in these sexual problem areas.<sup>153</sup> A number of states have enacted legislation allowing physicians to provide birth control information and devices to minors without parental consent,<sup>154</sup> but Ohio has not gone beyond a statute authorizing venereal disease treatment without parental knowledge or consent.<sup>155</sup>

In addition to Subsection H,<sup>156</sup> another provision of House Bill 460 eliminated the institutionalized preference for appointing female referees to hear cases involving female children.<sup>157</sup> Unfortunately, the Substitute Bill is quite unclear on this point.<sup>158</sup>

#### 4. *Renewed Emphasis on the Family*

Subsection I guarantees to each child "a healthful and supportive home and the assistance of the state in effectuating this right."<sup>159</sup> This provision implements the Code's express purpose of maintaining children in a family environment and separating a child from his parents only when

consent to venereal disease tests and treatment, but absolves the parents of liability to pay for them. The statute does not require the physician to notify the parent.

153. See IJA-ABA STANDARDS, RIGHTS OF MINORS, *supra* note 35, at 70-71. STANDARD 4.8(A) provides that any minor may consent to medical services for venereal disease, contraception and pregnancy; 4.8(B) permits the physician to forego notification unless failure to inform would seriously jeopardize the health of the minor. Current cases deny the validity of state statutes that give spousal or parental veto powers over the abortion decision, but statutes which require written consent in some cases may be valid. See *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976). The LEAA Standards do not address the issues at all. LEAA STANDARDS *supra* note 34, STANDARDS 11.14, 11.10, 11.11. LEAA STANDARD 11.1 calls for respect for parental autonomy; STANDARD 11.4 mandates consideration of parental cultural values. The LEAA STANDARDS consider health, education, housing and recreation programs, but they do not address sexual problems unless one draws huge conclusions from a statement that appears in the commentary to STANDARD 3.1 on health services. "Local programs should develop guidelines regarding those medical problems that can be diagnosed and treated while maintaining a confidential relationship between doctor and youngster." LEAA STANDARDS, *supra* note 34, STANDARD 3.1.

154. CAL. WELF. & INST. CODE § 10053.2 (West 1972); MD. CODE ANN. § 135 (1971). See IJA-ABA STANDARDS, RIGHTS OF MINORS, *supra* note 35, at 74, 75.

155. See note 153 *supra*.

156. H.B. 460, *supra* note 36, § 2151.15 provides: "cases shall be submitted to referees without regard to the sex or race of the child."

157. OHIO REV. CODE ANN. 2151.16 (Page 1976) specifically provides: "In appointing a referee for the trial of females, a female referee shall be appointed where possible." H.B. 460, *supra* note 36, § 2151.15 provides: "All referees appointed after June 1, 1977 shall be attorneys appointed to practice in this state." IJA-ABA STANDARDS, COURT ORGANIZATION AND ADMINISTRATION, *supra* note 35, at 22 argues that use of referees demonstrates the lowered status of the courts. The National Advisory Commission agrees, but the use of referees is approved and supported by the ABA STANDARDS OF JUDICIAL ADMINISTRATION, COURT ORGANIZATION § 125 (Approved Draft 1974); OHIO TASK FORCE REPORT, *supra* note 24, at 129 (approval of Attorney referees).

158. Sub H.B. 460, *supra* note 42, § 2151.06(B) does provide that a judge "shall not appoint a referee in any cases solely upon the basis of sex."

159. H.B. 460, *supra* note 36, § 2151.02(1).

necessary for his welfare or to protect the public safety.<sup>160</sup> Subsection I is also consistent with provisions in House Bill 460 that preclude Youth Commission commitment for status offenders,<sup>161</sup> emphasize nonsecure treatment programs, and impose severe limitations on the use of secure treatment facilities for unruly children.<sup>162</sup> Subsection I is supported by the ban on the use of jails for detaining children,<sup>163</sup> and the preference for pre-adjudication release to parents.<sup>164</sup> Couple these changes with a restricted Ohio Youth Commission population,<sup>165</sup> Youth Commission authority to limit commitments,<sup>166</sup> reallocation of funds from Fairfield to community treatment programs,<sup>167</sup> and increased reliance on foster and group homes,<sup>168</sup> it becomes apparent why the Task Force placed renewed emphasis on the home and on the assistance needed to strengthen the home.<sup>169</sup>

Many experts who testified explained that neither a change in the Juvenile Code nor in institutional policy would reduce juvenile criminality. Most experts agreed that restricting juvenile court jurisdiction and reducing Youth Commission commitments might diminish the adverse impact these institutions have on the minor offender, but they reaffirmed the idea of community support to strengthen the family as the best way to decrease juvenile delinquency.<sup>170</sup>

### 5. Court Monitoring of Treatment Facilities

The Task Force sought not only to reduce unwarranted commitments

160. OHIO REV. CODE ANN. § 2151.01 (Page 1976): "(C) To achieve the foregoing purposes, whenever possible, in a family environment, separating the child from its parents only when necessary for his welfare or in the interests of public safety."

161. See notes 57-63 and accompanying text *supra*.

162. H.B. 460, *supra* note 36, §§ 2151.47(C), (E). Sub. H.B. 460, *supra* note 42, § 2151.27(E).

163. H.B. 460, *supra* note 36, §§ 2151.20(C), (G); Sub. H.B. 460, *supra* note 42, §§ 2151.13, 2151.15(C); OHIO REV. CODE ANN. § 2151.312(A)(4) (Page 1976).

164. H.B. 460, *supra* note 36, § 2151.22(A); Sub. H.B. 460, *supra* note 42, §§ 2151.16(A), (D)(1).

165. H.B. 460, *supra* note 36, § 5139.03(B); Sub. H.B. 460, *supra* note 42, § 5139.03(B).

166. H.B. 460, *supra* note 36, § 5139.03(C); no such section appears in Sub. H.B. 460.

167. H.B. 460, *supra* note 36, § 5139.03(J): "Upon the closing of Fairfield, the Youth Commission shall make available to local and regional youth services throughout the state funds previously designated for the operation of Fairfield and shall devise a plan to assist in the employment of persons previously employed at Fairfield." See also H.B. 460, *supra* note 36, § 2152.02 which mandates a "family home" atmosphere. No similar sections appear in Sub. H.B. 460.

168. In 1975, § 5139.06(B) of the Ohio Revised Code was repealed. It mandated minimum institutional commitments of five months and was repealed to make possible direct placement of committed children to foster homes. OHIO REV. CODE ANN. § 5139.06(B) (Page 1970) (repealed 1975). Since 1975 the Ohio Youth Commission has certified approximately 300 foster homes as well as 24 groups homes. See Sub. H.B. 460, *supra* note 42, § 2151.26 for an example of increased reliance on foster homes.

169. LEAA STANDARDS, *supra* note 34, ch. 1, 2 & 3 relate to delinquency prevention. Family is emphasized, as well as those services necessary to strengthen it. OJJAC STANDARDS, *supra* note 33, relating to prevention start off with § 1 entitled "Family." IJA-ABA STANDARDS, NONCRIMINAL MISBEHAVIOR, *supra* note 35, at STANDARD 4.1 recommends a spectrum of services for families in conflict.

170. See testimony of Mr. Jack McCormick, Superintendent of the Bureau of Criminal

of children to Ohio Youth Commission institutions, but also to insure that all commitments were based on an understanding of the nature of the institution and its program of rehabilitation.<sup>171</sup> Only a small percentage of juvenile judges interviewed by the Task Force had ever visited any Ohio Youth Commission institution or a private institution. Ohio Youth Commission officials confirmed the Task Force sampling that few judges were familiar with the institutions into which they regularly committed children. Because the Task Force could not conceive of any justification for a commitment to the very old, delapidated, Fairfield School for Boys other than lack of knowledge of its condition,<sup>172</sup> the Task Force concluded that it was essential to require all Ohio juvenile court judges to maintain familiarity with the institutions to which they commit adjudicated children.<sup>173</sup> Consequently, the proposed legislation specifically provides each judge: (1) shall be familiar with the program and physical condition of any institution; (2) shall visit every public care and treatment facility within his county or district once each year; (3) shall visit every Youth Commission institution every three years; and (4) shall file a written report citing specific facts indicating an understanding of the facility's education, vocational training, housing conditions, medical, dental, psychological and psychiatric health care programs, and any other matter that might appear significant to the judge. In addition, the report is to include recommendations for improvements.<sup>174</sup> Proposed § 2151.11(B) also requires this report be filed with the Clerk of Courts and be made available to the public.<sup>175</sup>

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Identification and Investigation, Office of the Attorney General. See OHIO TASK FORCE REPORT, *supra* note 24, at 38.

171. See OHIO REV. CODE ANN. § 2151.01(B) (Page 1976). This section appears in both versions of H.B. 460, and articulates the basic premise of a separate system for juveniles: to substitute for punishment a program of supervision, care, and rehabilitation.

172. The individual juvenile judges to whom I have talked and the Ohio Association of Juvenile Court Judges take the position that the Ohio Youth Commission has been established to provide treatment facilities and programs for all wards committed to it by the courts. They argue the state agency may be underfunded or inadequately managed, but whether it treats children or not is the problem of the state agency and of no concern to them. In view of the purpose clause, and the treatment premise, this seems rather unconvincing. At page ten of their analysis appears their philosophy: "As a state agency, the responsibility lies with the Ohio Youth Commission to provide adequate treatment facilities for all wards committed to it by the courts." See also IJA-ABA STANDARDS, INTERIM STATUS, *supra* note 35, STANDARD 3.6; LEAA STANDARDS, *supra* note 34, STANDARD 14.3.

173. Sub. H.B. 460, *supra* note 42, § 2151.11 § 2151.3; OHIO TASK FORCE REPORT, *supra* note 24, at 27.

174. IJA-ABA STANDARDS, MONITORING, *supra* note 35, STANDARD 1.6(B)(1): "Method of information gathering and documentation should include, but not necessarily be limited to: (b) on-site visits, inspections, and observations, including the use of film or video-tape to record and document conditions and activities . . ." LEAA STANDARDS, *supra* note 35, STANDARD 27.3 mandates a monitoring program, but does not detail the responsibilities thereunder; it does say: "Establishing the monitoring program recommended [here] would be a major achievement for the juvenile justice system." OJJAC STANDARD, FORMAL INTERVENTION, *supra* note 33, STANDARD 6.7 mandates institutional visitation.

175. Sub. H.B. 460, *supra* note 42, § 2151.11(B). See also IJA-ABA STANDARDS, DISPOSITION, *supra* note 35, STANDARD 1.2(G), which prohibits any coercive disposition, "unless the resources necessary to carry out this disposition are shown to exist," and requires if the resources are not

Once again, this reform is not a new idea. The Standards mandate juvenile court monitoring of facilities to which judges assign children in order to insure that proper care and treatment is provided.<sup>176</sup> The Standards require judges to file reports to effect necessary changes.<sup>177</sup> These reports would substantiate the monitoring functions to be fulfilled by juvenile court judges. To help the court fulfill its responsibility to monitor the institutions and facilities to which they commit juveniles, the legislation also provides that the court may demand reports from these institutions.<sup>178</sup>

## 6. *Appellate Monitoring of Juvenile Courts: Stay of Court Orders*

The proposed requirement that courts maintain verbatim records of their proceedings<sup>179</sup> and other judicial reporting requirements relative to case disposition will aid in the process of allowing the appellate process to monitor juvenile courts.<sup>180</sup> This author feels the proposed Code might have more carefully addressed the reviewability issue even though the

available, "an alternative disposition no more severe . . ."; STANDARD 4.1(D) requires the correctional agency or allows any interested party to inform the sentencing court of any deficiency, and requires the court to go so far as to discharge the youth if needed services are not made available to him. LEAA STANDARDS, *supra* note 34, STANDARD 14.20 protects the adjudicated juvenile's right to all publicly funded services to which nonadjudicated juveniles have access and this section mandates modification of any dispositional order when it appears that access to required services are not being provided.

176. IJA-ABA STANDARDS, INTERIM STATUS, *supra* note 35, STANDARD 3.6:

The attainment of a fair and effective system of juvenile justice requires that every jurisdiction should, by legislation, court decision, appropriations, and methods of administration, provide services and facilities adequate to carry out the principles underlying these standards. Accordingly, the absence of funds cannot be a justification for resources or procedures that fall below the standards or unnecessarily infringe on individual liberty. Accused juveniles should be released or placed under less restrictive control whenever a form of detention or control otherwise appropriate is unavailable to the decision maker.

*Accord* LEAA STANDARD, *supra* note 34, STANDARD 14.3.

177. IJA-ABA STANDARDS, MONITORING, *supra* note 35, STANDARD 9.1 articulates court responsibility for the monitoring of matters affecting juvenile justice. STANDARD 9.2 speaks of the court's traditional rule making power relative to its orders and further provides:

B. Juvenile court judges should further continuously monitor the facilities to which they assign juveniles, including making periodic on-site inspections, to determine that proper care and treatment is being provided. Judges should not only keep informed of the condition in the facilities but also should make reports to effect change when needed.

178. Sub. H.B. 460, *supra* note 42, § 2151.08(B).

179. Sub. H.B. 460, *supra* note 42, § 2151.14(D) would seem to permit continued use of recording devices. H.B. 460, *supra* note 36, § 2151.14(B) provides: "The juvenile court shall keep verbatim records of all proceedings as in courts of common pleas." See IJA-ABA STANDARDS, ADJUDICATIONS, *supra* note 35, STANDARD 2.1(A), LEAA STANDARD, *supra* note 34, STANDARD 11.7 (Encouraging accountability); OJJAC STANDARDS, FORMAL INTERVENTION, *supra* note 33, STANDARD 6.2. JUV. R. 37 provides: "[A] complete record of all testimony, or other oral proceedings shall be taken in shorthand, stenotype or by any other adequate mechanical or electronic recording device." It is common practice, in Cuyahoga County, to deny motions requesting a shorthand reporter even though there is no recorded instances of the correct and adequate operation of their recording devices.

180. IJA-ABA STANDARDS, MONITORING, *supra* note 35, STANDARD 9.3; IJA-ABA STANDARDS, APPEALS AND COLLATERAL REVIEW, *supra* note 35, STANDARD 2.1; STANDARD 2.1 provides: "It is the intent of these standards that review of right may be had of the merits of the dispositional order." OJJAC STANDARDS, PLANNING, *supra* note 33, at 4. LEAA STANDARD, *supra* note 34, STANDARD

pending legislation is no worse than existing law.<sup>181</sup> The current law and practice of most juvenile and appellate courts is to refuse to stay execution of the juvenile court order on appeal. This presents a serious impediment to appeal not only in this state, but also across the nation. Although the Standards might be correct in questioning the wisdom of an automatic stay, the Standards are certainly correct in stating that a stay should ordinarily be favored and a denial supported by specific reasons entered upon the record.<sup>182</sup>

### 7. *Time Limits on Hearings*

The proposed Code continues the present preference for immediate return of arrested juveniles to their parents wherever possible.<sup>183</sup> The Code seems to eliminate the possibility that a dependent child will either be housed or confined with unruly or delinquent children.<sup>184</sup> In addition, whenever a child is taken into custody and detention is recommended, it is important to hold a detention hearing as soon as possible. Present rules require a hearing on the next court day, or within seventy-two hours.<sup>185</sup> While the original Bill required only that the hearing be within seventy-two hours,<sup>186</sup> the Substitute Bill corrected this deficiency.<sup>187</sup>

13.8 emphasizes the fundamental nature of appeal to correct trial court errors in individual cases and to facilitate consistent interpretations and uniform application of law throughout the jurisdiction. LEAA STANDARDS, *supra* note 34, STANDARD 12.3 guarantees: "8. The right to the keeping of a verbatim record of the proceedings." It concludes however, with a qualified approval of electronic recording systems.

181. *See In re Becker*, 39 Ohio St. 2d 84, 314 N.E.2d 158 (1974).

182. IJA-ABA STANDARDS, APPEALS AND COLLATERAL REVIEW, *supra* note 35, STANDARDS 5.1, 5.2, 5.3. LEAA STANDARD, *supra* note 34, STANDARD 14.8 suggests that the record is essential and that appellate review should be facilitated. STANDARD 20.6 protects review of disciplinary orders but no thought was given to the adverse impact the current nonstay policy has when coupled with long appellate court delay. Most juveniles represented by me believed an appeal would lengthen their time of commitment, and many were unwilling to risk appeal for that reason alone. OJJAC recognized the desirability of monitoring, but did not consider the impact the appellate process might have. Sub. H.B. 460, *supra* note 42, § 2505.17 continues the existing preference for nonstay, and prohibits stay unless it is approved by the juvenile court—the court that has just found it necessary.

183. Sub. H.B. 460, *supra* note 42, § 2151.16. Present OHIO REV. CODE ANN. § 2151.311(A) (Page 1976) provides: "[a] person taking a child into custody shall, with all reasonable speed . . . (1) release the child to his parents . . ." The original section enacted in 1969 also included the words "and without first taking the child elsewhere." These words were included to prevent the police practice of taking the juvenile to the police station for the usual four hour "booking" process with all its intimidating effect. They were eliminated in 1972; and for no good reason. IJA-ABA STANDARDS, INTERIM STATUS, *supra* note 35, STANDARD 5.4 provides: "The holding of an arrested juvenile in any police detention facility prior to release or transportation to a juvenile facility should be prohibited."

184. OHIO REV. CODE ANN. § 2151.312(B) (Page 1976) permits confinement of neglected or dependent children with delinquents upon order of the court. *See* Sub. H.B. 460, *supra* note 42, § 2151.26 that specifically prohibits commingling as to dependent children but allows commingling of unruly and delinquent children. IJA-ABA STANDARDS, NONCRIMINAL MISBEHAVIOR, *supra* note 35, STANDARD 5.2 specifically prohibits commingling. OJJAC STANDARDS, FORMAL INTERVENTION, *supra* note 33, STANDARD 4.1 limits use of detention to delinquents. *But see* STANDARD 4.13 that contemplates their use for status offenders but labels it the least desirable placement alternative.

185. JUV. R. 7(F)(1): "[N]ot later than seventy-two hours after a child is placed in detention or shelter care, or the next court day, whichever is earlier . . ."

186. H.B. 460, *supra* note 36, § 2151.23(A). *But see* H.B. 460, *supra* note 36, § 2151.35, 3151.45, which specify next day hearings.

187. Sub. H.B. 460, § 2151.16(F).

Along with prosecutorial involvement, the original Bill remains consistent with the Standards<sup>188</sup> by providing that alleged delinquent children must be arraigned within seventy-two hours; the Substitute Bill requires a similar hearing.<sup>189</sup> The function of this arrangement is to inform the juvenile of the charge against him and to make sure he knows and understands his basic rights. The proposed Ohio Code requires the adjudicatory hearing be held within ten days.<sup>190</sup> The Standards, however, would require a probable cause hearing in cases where the adjudicatory hearing for a detained juvenile is not held within five days.<sup>191</sup> Ohio currently requires the adjudicatory hearing be held within ten days and no provision provides<sup>192</sup> for a probable cause hearing.

### 8. *Open Juvenile Court Hearings*

One of the most important changes within House Bill 460 is the rejection of the closed juvenile court concept and the acceptance of the idea of open court justice, whether it is a juvenile or adult court.<sup>193</sup> This notion

188. LEAA STANDARDS, *supra* note 34, STANDARD 12.4 require: an arraignment promptly after a delinquency petition is filed. For juveniles in custody, this should be at the detention hearing. STANDARD 12.11 requires that detention hearings be held no later than 48 hours after the juvenile has been taken into custody. For juveniles who are not detained, the arraignment should be held within 72 hours. IJA-ABA STANDARDS, PRETRIAL COURT PROCEEDINGS, *supra* note 35, STANDARD 2.2, requires the initial appearance as promptly as possible and in no case later than five days after the petition is filed. IJA-ABA STANDARDS, INTERIM STATUS, *supra* note 35, at 13 suggests time limits: (1) STANDARD 5.3, release within two hours of arrest or transportation to a juvenile detention facility; (2) STANDARD 6.5, release or petition for detention within 24 hours; (3) STANDARD 7.6, detention hearing within 24 hours after petition is filed; and (4) STANDARD 7.10, adjudication within 15 days of arrest in cases where the juvenile is detained for over 24 hours following a court order of detention.

189. H.B. 460, *supra* note 36, § 2151.23(C); Sub. H.B. 460, *supra* note 42, § 2151.17(B).

190. H.B. 460, *supra* note 36, § 2151.23(B). Sub. H.B. 460, *supra* note 42, § 2151.17(A) requires adjudicatory hearing no later than ten days after the filing of the complaint, but allows the court to continue it for an additional ten days.

191. IJA-ABA STANDARDS, PRETRIAL COURT PROCEEDINGS, *supra* note 35, STANDARD 4.1:

A. In all delinquency proceedings the respondent should have the right to a judicial determination of probable cause, unless the adjudicatory hearing is [sic] held within [five] days after the filing of the petition if the juvenile is detained, and within [fifteen] days if the juvenile is not detained. Unless it appears from the evidence that there is probable cause to believe that an offense has been committed and that the respondent committed it, the petition should be dismissed. B. Unless there has been a prior judicial determination of probable cause, detention and transfer hearings should commence with consideration of that issue.

hearing shall be held not later than ten days after the filing of the complaint; upon a showing of good cause the adjudicatory hearing may be continued and detention or shelter care extended." LEAA STANDARD, *supra* note 34, STANDARD 12.1 requires, for juveniles in detention, "a. From admission to detention or shelter care to filing of petition, arraignment, detention, or shelter care hearing and probable cause hearing: 48 hours. b. From arraignment hearing to adjudicatory hearing: 20 calendar days." Even a very busy county like Cuyahoga has had no trouble scheduling adjudicatory hearings within ten days. No longer time should be allowed.

193. OHIO TASK FORCE REPORT, *supra* note 24, at 28, 124: JUV. R. 27 presently gives the judge the option of opening the court, and the Task Force heard evidence that some Ohio Juvenile courts had been open for years without any bad effects on the juvenile. Consequently, a move to open courts can do nothing but expose judicial impropriety. IJA-ABA STANDARDS, ADJUDICATIONS, *supra* note 35, STANDARD 6.1. Confidentiality is one of the many promises of the juvenile court that has not been kept, and on retrospect, was never as important as the benefits derivable from public trials. *See In re*

of an open juvenile court has been described as a "clear betrayal of the juvenile court philosophy."<sup>194</sup> To those who have studied juvenile law and practiced in juvenile courts, the change is only for the good.<sup>195</sup> None of the adverse effects often mentioned occur in courts that are presently open,<sup>196</sup> and the possibility of eliminating abusive judicial practices makes the move worthwhile. One must remember that Justice Brennan said in *McKeiver* that openness protects the accused from possible oppression by exposing improper judicial behavior.<sup>197</sup>

Despite its advantages, the proposed section mandating open proceedings is less complete than provisions recommended by the Standards. The Standards restrict the open or closed court decision to the juvenile, while the present Ohio Code allows juveniles to waive an open hearing, but also allows the prosecutor and the court to exclude the public.<sup>198</sup> This author advocates the incorporation of the restrictive position of the Standards into the Ohio legislation before its enactment.

### 9. *Bail in Juvenile Courts*

The proposed Bill retains existing rules and procedures relative to detention or release.<sup>199</sup> The original House Bill added the possibility of bail.<sup>200</sup> The Standards prohibit the use of money bail because it would incorporate bail abuses of the criminal court system into juvenile court; this appeared incompatible with the noncriminal, nonpunitive philosophy of the juvenile court.<sup>201</sup> Although release policies have been regarded as

Oliver, 333 U.S. 257 (1948). LEAA STANDARDS, *supra* note 34, STANDARD 12.3: "Court procedures in delinquency cases prior to adjudication should conform to due process requirements. Except for the right to bail, grand jury indictment, and trial by jury, the juvenile should have all the procedural rights given a criminal defendant." Specifically, mentioned: "Upon request by the juvenile, a proceeding open to the public, or with the court's permission, to specified members of the public." OJJAC STANDARD, *supra* note 33, STANDARD 6.2: "[A]t the adjudicatory hearing, the juvenile shall be afforded all the rights given a defendant in an adult criminal prosecution including trial by jury." STANDARD 6.2(d) qualifies this: "The juvenile court should encourage openness in the official court hearings but shall exclude those whom the judge fears may threaten the child's right to confidentiality."

194. Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281, 286 (1967).

195. IJA-ABA STANDARDS, ADJUDICATIONS, *supra* note 35, STANDARD 6.1.

196. Franklin County Courts have been open to the press for approximately five years.

197. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). See IJA-ABA STANDARDS, ADJUDICATION, *supra* note 35, at 72.

198. Sub. H.B. 460, *supra* note 42, § 2151.14:

The juvenile court may conduct its hearings in an informal manner and may adjourn its hearings in accordance with the time provisions set forth in division (F) of section 2151.16 and section 2151.17 of the Revised Code. All hearings in the court shall be open to the general public, except that the court may, upon the motion of either party or upon its own motion, exclude the general public and restrict admission to only persons who have a direct interest in the case if the interests of the child would be best served by a closed hearing. The court shall enter upon the record its reasons for restricting the general public from any hearing."

199. H.B. 460, *supra* note 36, § 2151.55(B).

200. Sub. H.B. *supra* note 42, § 2151.16; H.B. 460, *supra* note 36, § 2151.55(C).

201. IJA-ABA STANDARDS, INTERIM STATUS, *supra* note 35, STANDARD 4.7. LEAA STANDARDS, *supra* note 34, STANDARD 12.12.

an adequate substitute for bail, several cases and commentators have concluded that bail cannot be denied to juveniles accused of criminal acts.<sup>202</sup> The drafting committee of the Task Force viewed bail as an additional way to avoid unwarranted detention and, hence, justifiable.<sup>203</sup> It is entirely possible, however, that bail could be used as a substitute for customary release procedures. Since juvenile adjudicatory hearings must ordinarily be held within ten days, it is this author's position that present juvenile court release standards and procedures are adequate to satisfy constitutional needs. Bail is extremely susceptible to abuse and therefore should not be included in the proposed legislation. Bail, fortunately, does not appear in the Substitute Bill.

### 10. *Juvenile Record in Sentencing After Waiver*

The proposed relinquishment section<sup>204</sup> that allows waiver to criminal courts is similar to the present Juvenile Code section<sup>205</sup> and juvenile Rule.<sup>206</sup> The pending legislation does include directions to the criminal court, however, to consider the child's juvenile record for sentencing.<sup>207</sup> This provision resulted from testimony that many criminal court trial judges apply first-offender standards, even though the youth may have an extensive and violent juvenile record.

### III. SUMMARY

In large measure, the changes incorporated within House Bill 460 eliminate present inadequacies of the juvenile justice system. The current trend is to restrict juvenile court jurisdiction in order to mitigate the adverse impact that institutionally oriented systems have on misbehaving juveniles. House Bill 460 eliminated Ohio Youth Commission institutionalization of status offenders, mandated creation of a Youth Commission staff training program, established ceilings on institutional size, provided for the closure of Fairfield, and established maximum terms for commitment. The proposed legislation limits the length of time a court can retain jurisdiction on the basis of an individual offense and established minimum age levels for commitment. It eliminated use of jails for detention and treatment, restricted jurisdiction over status offenders, extended juvenile court jurisdiction over parents and families needing social services,

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202. IJA-ABA STANDARDS, INTERIM STATUS, *supra* note 35, at 63-66. The commentary marshals over two pages of cases, articles and arguments in favor of and opposed to the use of bail in juvenile courts.

203. *Id.* at 63. See also M. ROSENHEIM, "DETENTION FACILITIES AND TEMPORARY SHELTERS," CHILD CARING: SOCIAL POLICY FOR THE INSTITUTION 280 (Pappenfort, ed. 1973); Boches, *Juvenile Justice in California: A Re-evaluation*, 19 HASTINGS L.J. 47 (1967).

204. H.B. 460, *supra* note 36, § 2151.56; Sub. H.B. 460, *supra* note 42, § 2151.29.

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

206. JUV. R. 30.

207. Sub. H.B. 460, *supra* note 42, § 2151.29(F)(2).



allowed early emancipation of mature and self-sufficient juveniles, called for increased use of community facilities and programs, gave the Youth Commission authority to promulgate minimum standards, and provided the Youth Commission with the authority to allocate resources away from state institutional programs and to community treatment programs.

House Bill 460 contained Ohio's first statutory basis for intake and diversion and mandated prosecutorial involvement in these decisions. It articulated the least restrictive alternative premise and implemented this by requiring written judicial opinions explaining dispositional decisions. It mandated an end to discrimination in the commitment of unruly females, but did not address the harder issues of medical care, information and decision making relative to contraception and pregnancy services. The proposed Bill provided for monitoring treatment institutions and facilities by juvenile court judges, allowed the public to monitor the juvenile court's fulfillment of this function, and called for increased monitoring of juvenile courts by appellate courts.

The Bill prevented commingling of noncriminal offenders with those who have committed more serious offenses, involved the prosecutor in juvenile justice to a greater degree by requiring information and arraignment, provided for bail in certain situations and mandated juvenile records in waiver cases. It opened up juvenile court hearings and process to public scrutiny; nothing could be more conducive to improved juvenile justice.

Although the House Judiciary Committee modified many sections, the result, Amended Substitute House Bill No. 460, is a measurable improvement over present law. It is this author's opinion that the original provisions awarding juvenile court jurisdiction over parents subject to compulsory child rearing assistance and the provisions giving the court jurisdiction to decree emancipation for mature and responsible juveniles should be reconsidered. It must be remembered, however, that these issues can be considered on another day. The proposed legislation should not be jeopardized by attempting to reinstate these two proposals.

The Substitute Bill does not increase the prosecutor's role in the intake and diversion functions as did the original Bill, but it allows improved monitoring by the public of courts and treatment institutions. This increased monitoring may be its most important contribution to improved juvenile justice. This author hopes, however, the legislation will be changed to clarify whether juveniles alone are to decide if the juvenile court is to be open to the public.