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A Due Process Dilemma: Pretrial Detention in Juvenile Delinquincy Proceedings, 11 J. Marshall J. of Prac. & Proc. 513 (1978)

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COMMENTS

A DUE PROCESS DILEMMA: PRETRIAL DETENTION IN JUVENILE DELINQUENCY PROCEEDINGS

The due process clause of the fourteenth amendment requires fundamental fairness in criminal proceedings.[1] One element of fundamental fairness is the presumption of innocence until proven guilty.[2] This entails avoiding punishment of the accused prior to conviction and affording him an unhampered defense preparation. This is achieved by affording the defendant the pretrial right to bail.[3] Bail furnishes the accused pretrial release conditioned upon his yielding a certain sum of money, securing a bail bond, or promising his presence at trial.

In criminal proceedings, the only valid purpose of bail is to secure the accused's presence at trial.[4] Therefore, in criminal

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1. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 554 (1971) (Brennan, J., concurring in part and dissenting in part) ("The Due Process Clause commands, not a particular procedure, but only a result; in my Brother Blackmun's words, 'fundamental fairness . . . [in] factfinding.' ").

2. DeChamplain v. Lovelace, 510 F.2d 419, 424 (8th Cir. 1975) ("a fundamental component of due process is the presumption of innocence accorded the criminal defendant").

3. *See* note 113 and accompanying text *infra*. In Stack v. Boyle, 342 U.S. 1, 4 (1951), the Court stated:

> From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

But see Wansley v. Wilkerson, 263 F. Supp. 54, 57 (1967) (in reference to the retrial of a defendant convicted of rape, the court stated, "a trial judge must deny bail if he feels the release of the accused will endanger the safety of the community"); NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION 373 (1976) (without citing authority and contradicting its working papers, COMPARATIVE ANALYSIS, *supra* note 5, at 20, the author states that an exception to the right to bail, "concerns defendants who have demonstrated that their freedom would pose a personal threat to witnesses, or otherwise defeat the orderly process of trial.")

Unlike bail prior to trail, bail pending appeal is not mandatory. *See* Rehman v. State of Cal., 85 S. Ct. 8, 9 (Douglas, Circuit J., 1964) ("If . . . the safety of the community would be jeopardized, it would be irresponsible judicial action to grant bail.")

4. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose [assuring the presence of the accused at trial] is "excessive" under the Eighth Amendment. . . . Since the function of

proceedings, it is impermissible to set bail to prevent the accused from harming himself or others, and, except for capital offenses, he may be detained only if he is unable to secure the money, bail bond, or promise of return which condition his release.[5]

Unlike criminal proceedings, juvenile delinquency proceedings are civil in nature[6] and are conducted in a separate juvenile court system. Although the articulated purpose of the juvenile court system is to protect and rehabilitate the juvenile,[7] juveniles accused of delinquency are deprived of many procedural rights accorded adults in criminal proceedings. The right to bail is one such example.[8] Because juveniles are not provided a right to bail, they are detained prior to trial for reasons for which adults may not be detained, including the protection of the juvenile and the community.[9]

One of the many questions which emanate from this situation is whether due process under the eighth[10] and fourteenth

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bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.

Stack v. Boyle, 342 U.S. 1, 5 (1951).

5. *See* NATIONAL INSTITUTE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, 7 A COMPARATIVE ANALYSIS OF STANDARDS AND STATE PRACTICES (Working Papers) 20 (1976) [hereinafter cited as COMPARATIVE ANALYSIS]; P. WALD & D. FREED, BAIL IN THE UNITED STATES: 1964 4-8 (1964) [hereinafter cited as BAIL 1964]; Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 964 (1965) [hereinafter cited as Foote *I*]. *But see* United States v. Nebbia, 357 F.2d 303, 304 (1966) ("If the court lacks confidence in the surety's purpose or ability to secure the appearance of a bailed defendant, it may refuse its approval of a bond even though the financial standing of all bail is beyond question.")

6. *See* notes 11-19 and accompanying text *infra*.

7. *Id.*

8. In almost all jurisdictions juveniles are not afforded a right to bail. *But see, e.g.*, Trimble v. Stone, 187 F. Supp. 483, 488 (D.D.C. 1965) (juveniles have a right to bail under the eighth amendment of the U.S. Constitution); State v. Franklin, 202 La. 439, 12 So. 2d 211 (1943) (juveniles have a right to bail before trial under state constitution); ARK. STAT. ANN. § 45-421 (1977) ("within the discretion of the judge" juveniles are "entitled" to release on their recognizance, to release to the custody of some other party, or to give bond to assure their appearance at trial in the same manner as adults); MASS. GEN. LAWS ANN. ch. 119, § 67 (West Supp. 1977-1978) (juveniles shall be admitted to bail "in accordance with law"). *See generally* C. ANTIEU, MODERN CONSTITUTIONAL LAW § 6:10 (1969); Hill, *A Juvenile's Right to Bail*, 1 HASTINGS CONST. L.Q. 215 (1974); Smith, *Juvenile Right to Bail*, 11 J. FAM. L. 81 (1971); Comment, *Right to Bail for Juveniles*, 48 CHI-KENT L.R. 99 (1971); Comment, *A Juvenile's Right to Bail in Oregon*, 47 ORE. L. REV. 194 (1968); Comment, *The Right to Bail and the Pre-"Trial" Detention of Juveniles Accused of "Crime,"* 18 VAND. L. REV. 2096 (1965); 44 WASH. L. REV. 481 (1968).

9. *See* notes 32-35 and accompanying text *infra*.

10. "Excessive bail shall not be required. . . ." U.S. CONST. amend. VIII.

amendments affords juveniles a right to bail. This article concludes that juveniles do have such a right to bail. To reach this conclusion, it is necessary to observe the practice of juvenile pretrial detention, to discern the juvenile delinquency due process standards, and to apply these standards in the juvenile pretrial detention setting. In determining that juveniles accused of delinquency do have a constitutional right to bail, it is of critical importance and of constitutional significance that this right be fashioned so as to accommodate the unique postion of the juvenile in the juvenile justice system. The initial step of this due process analysis, therefore, is to examine the juvenile justice system.

THE JUVENILE JUSTICE SYSTEM

Traditionally, society has treated juveniles and adults differently. Whether the treatment afforded juveniles is seen as better or worse often will vary with the age of the one queried. Our courts have been no exception to the differing treatment accorded juveniles and adults, although the difference in treatment has fluctuated with time.

In the eighteenth and nineteenth centuries, the criminal courts treated juveniles and adults similarly. At this time, under common law, juveniles accused of crime were treated the same as adults, except they were accorded an irrebuttable presumption of criminal incapacity when less than seven years old and a rebuttable presumption between the ages of seven and fourteen years.[11] Otherwise, juveniles charged with crimes were entitled to the same procedural rights as adults, as well as subject to the same punishments.[12]

During the late nineteenth century, however, attempts were made by juvenile court reformers to separate convicted juveniles from adults and to rehabilitate them.[13] The theory that the courts have a duty to protect, care for, and reform delinquents, rather than to punish them like adults, took hold with the passage of the state juvenile court acts at the turn of the century.[14]

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11. *See* W. LAFAVE, CRIMINAL LAW 351 (1972); R. PERKINS, CRIMINAL LAW 839 (2d ed. 1969).

12. *See* Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909) [hereinafter cited as Mack]. *But see* S. FOX, MODERN JUVENILE JUSTICE 18 (1976) (found juveniles charged with minor offenses were not accorded all adult procedural rights).

13. *See* Mack, *supra* note 12, at 106-07.

14. *Id.* at 107-08.

Accompanying the shift in aim was a shift in method. Under the juvenile court acts, juvenile proceedings became more informal.[15] By relabeling juvenile proceedings as civil, the courts were able to dispense with the procedures formerly accorded juveniles in criminal proceedings.[16] This shift to a less rigid, more informal proceeding was expected to produce greater cooperation between court and juvenile, thereby promoting the recently formed objectives of protection, care, and rehabilitation.[17]

The power used to institute the more informal procedure in juvenile proceedings had its source in the traditional *parens patriae* power of the chancery courts. In the chancery courts, the state was viewed as the "higher or ultimate parent of all of the dependents within its border."[18] The chancery courts had originally invoked this power to protect the property and welfare of children and, if necessary, to remove neglected or abused children from their parents.[19] The *parens patriae* concept ar-

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15. *Id.* at 107-14.

16. Thus, in finding that due process does not require a jury right in a delinquency proceeding, the court in Wissenberg v. Bradley, 209 Iowa 813, 229 N.W. 205, 207 (1929), stated:

> The appellant in the instant case is not being tried in this proceeding for any crime. The action is, in a sense, a special proceeding provided by statute, wherein the state, by virtue of its authority as parens patriae, takes jurisdiction of the incorrigible child and commits it, not to jail for punishment, but to a reformatory for its care, education, and training.

17. Mack, *supra* note 12, at 106-09.

18. *Id.* at 104.

19. In Eyre v. Countess of Shaftesbury, 24 Eng. Rep. 659 (1722), the court held that a devise that gave guardianship of one's son to three persons and that omitted words of survivorship would be construed as a devise to the sole survivor. In reaching the holding, Lord Macclesfield stated:

> [T]he King is bound of common right, and by the laws to defend his subjects, their goods and chattels, lands and tenements, and by the law of this realm, every loyal subject is taken to be within the King's protection, for which reason it is, that idiots and lunatics, who are incapable to take care of themselves, are provided for by the King as *pater patriae*, and there is the same reason to extend this care to infants.

Id. at 664.

In Butler v. Freeman, 27 Eng. Rep. 204 (1756), the court relied upon the *parens patriae* [or *pater patriae*] concept in finding it contempt of court to marry a ward of the court without leave. Lord Hardwicke stated that "this Court [Chancery] . . . has a general right delegated by the Crown as *pater patriae*, [to] interfere in particular cases, for the benefit of such who are incapable [of protecting] themselves." *Id* at 204.

This rather nebulous and broad power of the chancellors was brought intact to the courts of equity in America. In affirming a judgment awarding the custody of two children to their mother/complainant, the court in Cowls v. Cowls, 8 Ill. (3 Gilm.) 435, 437 (1846), stated:

> The power of the court of Chancery to interfere with and control, not only the estates but the persons and custody of all minors within the limits of its jurisdiction, is of very ancient origin, and can not now be questioned. . . . It is a duty, then, which the country owes as well to

ticulated the duty and the justification for the state to intervene in the lives of children in need of help.

Despite assurances that these informal procedures would protect the juvenile at least to the extent of criminal due process standards, the informal procedures ultimately came under attack.[20] The attendant unfairness of these informal procedures, together with evidence indicating that juveniles were not receiving the care and treatment postulated by the juvenile court acts, resulted in Supreme Court action. Since 1966, the Court has repeatedly scrutinized the juvenile delinquency adjudicatory hearing to determine the constitutionality of failing to provide juveniles the same due process standards as adults in criminal proceedings. With the exception of the right to a jury trial, the Court has consistently held that the due process clause under

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itself, as to the infants, to see that he is not abused, defrauded or neglected, and the infant has a right to this protection.

20. *E.g.*, Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7; Lehman, *A Juvenile's Right to Counsel in a Delinquency Hearing*, 17 JUV. CT. JUDGES J. 53, 54 (1966) ("Unfortunately, loose procedures, high-handed methods and crowded court calendars, either singly or in combination, all too often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process."); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957); Comment, *Due Process in the Juvenile Courts*, 2 CATH. U. AM. L. REV. 90, 91 (1952) ("[I]t has become settled law in this country that the constitutional guarantees applicable to criminal procedure accorded to known criminals, acknowledged Communists, and enemy aliens before our courts, need not be considered in the sentencing to reformatories of our young citizens adjudged to be juvenile delinquents."); 41 CORN. L.Q. 147, 154 (1955) stating:

> In the search for proper judicial standards to govern juvenile court proceedings there remains a vital balance of interests yet to be struck between an informal approach emphasizing reformation and rehabilitation, on the one hand, and a more formal procedure designed to guard against punishment of the innocent, on the other.

See Ketcham, *The Legal Renaissance in the Juvenile Court*, 60 NW. U.L. REV. 585, 587-90 (1965).

Several major organizations have promulgated standards for juvenile proceedings. *E.g.*, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, MODEL ACTS FOR FAMILY COURTS AND STATE-LOCAL CHILDREN'S PROGRAMS (1974); INSTITUTE OF JUDICIAL ADMINISTRATION/AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT (1975) [hereinafter cited as IJA/ABA JUVENILE JUSTICE STANDARDS PROJECT]; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS & CORRECTIONS (1973) [hereinafter cited as NAC COURTS & NAC CORRECTIONS]; NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM JUVENILE COURT ACT (1968) [hereinafter cited as UNIFORM JUVENILE COURT ACT (1968)]; NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD JUVENILE COURT ACT (1959); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967) [hereinafter cited as PRESIDENT'S TASK FORCE]. For a comparative analysis of the standards promulgated by these six organizations, see COMPARATIVE ANALYSIS, *supra* note 5.

the fourteenth amendment requires the incorporation of adult criminal due process standards in juvenile delinquency adjudicatory proceedings.[21] The Court, however, has not yet scrutinized the constitutionality of any of the preadjudicatory stages of the delinquency proceeding, such as the procedure for detaining juveniles prior to trial.

DETENTION

"Detention" has been defined as the temporary care of a child who requires custody in a physically restricting facility pending court disposition.[22] This is sometimes distinguished from "shelter care," which is the temporary care of a child in a physically unrestricting facility.[23]

Detention[24] decisions prior to the adjudication of a juvenile may be made by numerous people under various circumstances. Thus, the police officer may decide that an apparent juvenile lawbreaker must be brought to the police station. Once there, another detention decision will normally be made, often by a designated juvenile police officer, who will determine whether the juvenile should be released. If detained, the juvenile is taken to either the court or the detention facility designated by the

21. Breed v. Jones, 421 U.S. 519 (1975); *In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967). For a discussion of these cases see text accompanying notes 71-92 *infra*.

22. *See, e.g.*, NATIONAL COUNCIL ON CRIME & DELINQUENCY, STANDARD JUVENILE COURT ACT 10 (1959) ("detention" defined as "the temporary care of children who require secure custody for their own or the community's protection in physically restricting facilities pending court disposition"). Similar definitions of "detention" are explicitly incorporated in many state statutes. *E.g.*, ARIZ. REV. STAT. § 8-201(11) (1974); COLO. REV. STAT. § 19-1-103(11) (1973); ILL. REV. STAT. ch. 37, § 701-9 (1977); MD. CTS. & JUD. PROC. § 3-801(m) (Supp. 1977); S.D. CODIFIED LAWS § 26-8-1(7) (1976). Other state statutes, though using the word "detention," do not define its meaning. *E.g.*, CONN. GEN. STAT.; N.C. GEN. STAT.; WIS. STAT. ANN.

23. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 119 (1967) (shelter care defined as "[t]emporary care in a physically unrestricting facility pending the child's return to his home or placement for longer term care"). Most states which explicitly define "detention" by statute also define "shelter care." *E.g.*, COLO. REV. STAT. § 19-1-103(25) (1973); ILL. REV. STAT. ch. 37, § 701-17 (1977); MD. CTS. & JUD. PROC. § 3-801(r) (Supp. 1977); S.D. CODIFIED LAWS § 26-8-1(11) (1976). However, a particular state may explicitly define "detention" by statute but not define "shelter care." *E.g.*, ARIZ. REV. STAT. *See generally* Berns, *Juvenile Detention: An Eyewitness Account*, 4 COLUM. HUMAN RIGHTS L. REV. 303 (1972); Ferster & Courtless, *Juvenile Detention in an Affluent County*, 6 FAM. L.Q. 3 (1972); FERSTER, SNETHEN & COURTLESS, *Juvenile Detention: Protection, Prevention or Punishment?*, 38 FORDHAM L. REV. 161 (1969) [hereinafter cited as Ferster].

24. Except as otherwise stated, "detention" as used in this article includes preadjudicatory confinement in both detention and shelter care facilities prior to trial or prior to the determination that trial is unnecessary. Thus "detention" includes temporary custody in a police station.

court. At this stage, an authorized officer of the court will determine whether further detention is necessary. If further detained, the juvenile, in most jurisdictions, is entitled to a detention hearing before a judge.[25]

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25. In delinquency proceedings, state statutes provide that a police officer may take a juvenile into custody under the laws of arrest or pursuant to a court order. *E.g.*, IOWA CODE ANN. § 232.15 (West 1969); OHIO REV. CODE ANN. § 2151.31(A), (B) (Page 1976); TENN. CODE ANN. § 37-213(a)(1), (2) (1977).

As indicated in the text, state statutes normally provide for several possible levels of detention decisions after a juvenile is taken into custody. A standard procedure, proposed by the UNIFORM JUVENILE COURT ACT (1968), *supra* note 20, §§ 15, 17, and commonly incorporated by statute, is as follows: The person taking the child into custody must, within a reasonable time, release the child, bring the child before the court, or deliver him to a detention or shelter care facility designated by the court. If the child is brought before the court or delivered to a detention or shelter care facility, the intake or other authorized officer of the court must immediately make an investigation and thereafter release the child, unless detention is warranted. If he is not released, a detention hearing must be held to determine whether detention or shelter care is warranted. *E.g.*, GA. CODE ANN. §§ 24A-1402, -1404 (Supp. 1977); N.D. CENT. CODE §§ 27-20-15, -17 (1974); OHIO REV. CODE ANN. §§ 2151.31.1,-.4 (Page 1976); PA. STAT. ANN. tit. 11, §§ 50-310, -312 (Purdon Supp. 1977-1978); TENN. CODE ANN. §§ 37-215, -217 (1977).

However, many states' statutes do not require a detention hearing to determine whether continued detention is necessary. *See* notes 43-45 and accompanying text *infra*. These statutes are normally less clear than the above statutes on who makes the detention decisions, and how, when or where they are to be made. Often the statutes will provide that a child taken into custody, but not released, must be taken to a specified place of detention, or taken either to a place of detention or to the court. *See, e.g.*, IOWA CODE ANN. § 232.17 (West 1969); LA. REV. STAT. ANN. § 13:1577 (West Supp. 1978); MO. ANN. STAT. § 211.141 (Vernon 1959); OKLA. STAT. ANN. tit. 10, § 1107 (West Supp. 1977-1978); R.I. GEN. LAWS § 14-1-20 (1969). Thereafter, some of these statutes provide that detention beyond a certain time limit may be allowed only upon a court order. *E.g.*, IOWA CODE ANN. § 232.17 (West 1969); MO. ANN. STAT. § 211.141(2), (3) (Vernon 1959). Other statutes provide merely that the juvenile, at this stage, "may be released," without stating how and by whom. *E.g.*, LA. REV. STAT. ANN. § 13:1577(A) (West Supp. 1978); OKLA. STAT. ANN. tit. 10, § 1107(A) (West Supp. 1977-1978); R.I. GEN. LAWS § 14-1-21 (1969).

Still other state statutes provide even less or no guidance as to who is required to make detention decisions, and how, when or where they are to be made. *See, e.g.*, ARIZ. REV. STAT. (provides that "[an arrested juvenile] may be released from temporary custody only to the parents, guardian or custodian of such child or to the juvenile court," *id.* § 8-223(B) (Supp. 1977-1978), and that "[t]he board of supervisors shall maintain a detention center . . . where children alleged to be delinquent . . . shall, when necessary before or after hearing, be detained," *id.* § 8-226(A) (Supp. 1977-1978)); N.H. REV. STAT. ANN. § 169:7(III) (1977) ("delinquent child may be retained in the custody of the person having the child in charge, or in the custody of the probation officer, or may be kept in some suitable place at the expense of the town, county or state, as may be ordered by the court"); S.C. CODE § 43-17-70 (1976) ("[T]he arrest of [a juvenile] shall be reported to the court by the officer making the arrest as speedily as possible for investigation and action . . . . But if confinement be necessary before the case can be heard the child shall not be incarcerated in the same room with adult criminals . . . .").

In some jurisdictions, the permissible standards of detention vary with the detention decision-maker. For example, police officers are sometimes given broader standards of detention. Generally, however, a particular jurisdiction will require the same standards to be applied by all detention decision-makers, though permissible standards vary from jurisdiction to jurisdiction. Out of the fifty-one jurisdictions surveyed, there emerged five general standards for detaining juveniles. They are: to ensure the juvenile's presence at trial; to protect the juvenile; to protect the community; to hold the juvenile where the juvenile has no parent, guardian, or other person able to provide supervision and care for him and return him to the court when required; and to hold the juvenile where the juvenile's detention is necessary for reasons of expedience.

Twenty-six jurisdictions incorporate the first detention standard, providing for the detention of the juvenile to ensure his presence at trial.[26] Some of these jurisdictions provide detention to prevent the juvenile from failing to attend trial;[27] others provide detention to prevent the juvenile from fleeing or being removed from the court's jurisdiction.[28] In addition, one

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26. *See* notes 27-29 *infra.*

27. Some statutes of this type are directed at the *necessity* of detaining a juvenile to secure his presence at trial. D.C. CODE § 16-2310(a)(2) (1973) ("required . . . to secure the child's presence at the next court hearing"); FLA. STAT. ANN. § 39.03(c)(3) (West Supp. 1978) ("required . . . [to] secure his presence at the next hearing"); KY. REV. STAT. § 2.08.192(4)(b)(1977) ("necessary to assure . . . the appearance of the child in court"); ME. REV. STAT. tit. 15, § 3203(5)(C)(Supp. 1977-1978)("required to secure the juvenile's presence at the next hearing"); MISS. CODE ANN. § 43-23-11 (1972) ("necessary . . . to insure his attendance in court at such time as it shall be required"); N.J. STAT. ANN. § 2A:4-56(b)(1) (West Supp. 1977-1978) ("necessary to secure the presence of the juvenile at the next hearing").

Other statutes are directed at the *degree of certainty* that the juvenile will fail to appear at trial. KAN. STAT. § 38-815b(c)(2) (Supp. 1977) ("the child is not likely to appear at a hearing for adjudication"); LA. REV. STAT. ANN. § 13:1578.1 (West Supp. 1978) ("[t]here is a substantial probability that he will not appear in court on the return date"); MINN. STAT. ANN. § 260.172(1) (West Supp. 1978) ("reason to believe that the child would . . . not return for a court hearing"); N.M. STAT. ANN. § 13-14A-27 (Supp. 1976) ("child will run away or be taken away so as to be unavailable for proceedings of the court or its officers"); N.Y. JUD.-CT. ACTS FAM. CT. § 728(b)(iii) (McKinney 1975) ("substantial probability that he will not appear in court on the return date"); WASH. REV. CODE ANN. § 13.40.040 (2)(a)(i)(Supp. 1977)("will likely fail to appear for further proceedings").

One jurisdiction provides for detention where "there are not adequate assurances that the youth will appear for court when required." MONT. REV. CODES ANN. § 10-1212(1)(c) (Supp. 1977).

28. Under this heading, some states address only the prospect of the juvenile voluntarily leaving or fleeing the court's jurisdiction. *E.g.*, CAL. WELF. & INST. CODE § 636 (West Supp. 1978) ("likely to flee to avoid the jurisdiction of the court"); ILL. REV. STAT. ch. 37, § 703-6(2) (1977) ("likely to flee the jurisdiction of the court"); MD. CTS. & JUD. PROC. CODE ANN. § 3-

jurisdiction allows detention to secure the juvenile's presence at trial only if there is a history of failure to appear for hearings before the court.[29] Unlike the other jurisdictions, this jurisdiction bases its detention decision, under this standard, upon determinations of past rather than future conduct or circumstances, thereby avoiding the inherent problems with basing judicial decisions upon mere "hunches."[30]

The second juvenile detention standard provides for detention to protect the juvenile. Thirty-nine jurisdictions incorporate some form of this detention standard.[31] Under this standard,

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815(b)(2) (Supp. 1977) ("likely to leave the jurisdiction of the court"); NEB. REV. STAT. § 43-205.03 (1974) ("likely to flee the jurisdiction of the court").

Other states allow detention both where the juvenile may voluntarily leave the jurisdiction and where another person may remove the child from the court's jurisdiction. Commonly, these states provide that the juvenile shall not be detained unless "the child *may* abscond or be removed from the jurisdiction of the court." (emphasis added); GA. CODE ANN. § 24A-1401 (1976); N.D. CENT. CODE § 27-20-14 (1974); OHIO REV. CODE § 2151.31 (Page 1976); PA. STAT. ANN. tit. 11, § 50-309 (Purdon Supp. 1977-1978); TENN. CODE ANN. § 37-214 (1977). *But see* TEX. FAM. CODE ANN. tit. 3, § 53.02(b)(1) (Vernon 1975) ("*likely* to abscond or be removed from the jurisdiction of the court") (emphasis added); WYO. STAT. § 14-8-107(a)(iii)(1977) ("required . . . [t]o prevent the child from absconding or being removed from the jurisdiction of the court").

29. ALA. CODE tit. 12, § 12-15-59(a)(4) (1975); *cf., e.g.*, WIS. STAT. ANN. § 48.28(1)(e)(West Supp. 1977-1978)(a juvenile may be detained "[w]hen it is reasonably believed that the child has run away from his parents, guardian or legal custodian or is a fugitive from justice").

30. Common sense dictates that it is easier to determine whether a certain event has already occurred, or is presently occurring, as opposed to predicting whether the event will occur in the future. Therefore, basing detention upon relevant past conduct, rather than upon a prediction of future conduct, will lead to more equitable results. *See* NAC CORRECTIONS, *supra* note 20, at 103 ("Standards and criteria for determinations of dangerousness are difficult formulations at best."); Foote *I*, *supra* note 5, at 963-64. ("In the best adjudicatory climate the determination of such vague predictive criteria as future dangerousness or possible flight is necessarily unreliable, and under the actual conditions by which the pretrial detention determination is made in this country the probability of maladministration is infinite.")

Nevertheless, many of the major juvenile-court standards-promulgating organizations would allow detention to prevent future flight. Some of these standards are as broad or broader than many of the state statutes. *E.g.*, PRESIDENT'S TASK FORCE, *supra* note 20, Standard 12.7 ("A juvenile should not be detained . . . prior to a delinquency adjudication unless detention is necessary . . . [t]o insure the presence of the juvenile at subsequent court proceedings . . . ."). *But see* NAC COURTS, *supra* note 20, at 297 ("detention should not be authorized unless the child is an escapee from either an institution for delinquent children or a penal institution").

31. ALA. CODE tit. 12, § 12-15-59(a)(3) (1975); CAL. WELF. & INST. CODE § 636 (West Supp. 1978); COLO. REV. STAT. § 19-2-103(3)(a) (1973); CONN. GEN. STAT. ANN. § 17-63 (West 1975); D.C. CODE § 16-2310(a)(1) (1973); FLA. STAT. ANN. § 39.03(3)(c)(1) (West Supp. 1978); GA. CODE ANN. § 24A-1401 (1976); HAW. REV. STAT. § 571-31 (1968); IDAHO CODE § 16-1811(1) (Supp. 1977); ILL. REV. STAT. ch. 37, §§ 703-4, -6(2) (1977); IND. CODE § 31-5-7-12(b) (1976); IOWA CODE ANN. § 232.16 (West 1969); KAN. STAT. § 38-815b(c)(1), (3) (Supp. 1977); KY. REV. STAT. § 208.192(4)(b)(1977); ME. REV. STAT. tit. 15, § 3203(4)(A)

statutes commonly provide for detention when necessary to protect the person or property of the juvenile. Some statutes, however, are less specific, commonly providing for detention to ensure the welfare of the juvenile.[32]

The third juvenile detention standard provides for detention to protect the community.[33] Specific interests within this stan-

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(Supp. 1977-1978); MD. CTS. & JUD. PROC. CODE ANN. § 3-815(b)(1) (Supp. 1977); MICH. COMP. LAWS ANN. § 712A.15(a) (Supp. 1977-1978); MINN. STAT. ANN. § 260.172(1) (West Supp. 1978); MISS. CODE ANN. § 43-23-11 (1972); MONT. REV. CODES ANN. § 10-1212(1)(a) (Supp. 1977); NEB. REV. STAT. § 43-205.03 (1974); NEV. REV. STAT. § 62.140(4) (1973); N.J. STAT. ANN. § 2A:4-56(a) (West Supp. 1977-1978); N.M. STAT. ANN. § 13-14A-27 (Supp. 1976); N.C. GEN. STAT. § 7A-284(a) (Supp. 1977); N.D. CENT. CODE § 27-20-14 (1974); OHIO REV. CODE ANN. § 2151.31 (Page Supp. 1976); ORE. REV. STAT. § 419.573(3)(b) (1975); PA. STAT. ANN. tit. 11, § 50-309 (Purdon Supp. 1977-1978); S.D. CODIFIED LAWS § 26-8-19.2 (1976); TENN. CODE ANN. § 37-214 (1977); TEX. FAM. CODE ANN. tit. 3, § 53.02(b)(2) (Vernon 1975); UTAH CODE ANN. § 78-3a-30(1) (1977); VT. STAT. ANN. tit. 33, § 643(a) (Supp. 1976); VA. CODE § 16.1-248(A)(3) (Supp. 1977); WASH. REV. CODE ANN § 13.40.040(2)(a)(ii)(Supp. 1977); W. VA. CODE §§ 49-5-8(a), -5A-2 (1977); WIS. STAT. ANN. § 48. 28(1)(em)(West Supp. 1977-1978); WYO. STAT. § 14-8-107(a)(i)(1977).

32. *Compare* N.D. CENT. CODE § 27-20-14 (1974) (juvenile shall not be detained "unless his detention or care is required to protect the person or property . . . of the child") *with* IOWA CODE ANN. § 232.16 (West 1969)(juvenile shall be released "except where the immediate welfare of the child . . . requires that the child be detained") *and* ORE. REV. STAT. § 419.573(3)(b)(1975) (juvenile shall be released unless "the welfare of the child . . . may be immediately endangered by [his] release").

Most statutes do not provide detention standards which distinguish between a neglect and delinquency proceeding in regard to juvenile protection. *But see, e.g.*, D.C. CODE § 16-2310(a), (b) (1973); N.J. STAT. ANN. § 2A:4-56 (West Supp. 1977-1978).

The positions of six major standards-promulgating organizations on preventive detention for the protection of the juvenile are found in COMPARATIVE ANALYSIS, *supra* note 5, at 16-19, which states:

> All [six organizations] would allow preventive detention to protect the youth's personal safety, but the IJA/ABA Juvenile Justice Standards Project would restrict this power to instances when the youth himself requests it. Only the National Advisory Commission and the Uniform Juvenile Court Act allow preventive detention to protect the youth's property. The H.E.W. Model Act, the National Advisory Commission, the Uniform Juvenile Court Act, and the N.C.C.D. Standard Act would all seem to permit it to protect the youth's moral/educational welfare.

Id. at 16.

33. Thirty-seven jurisdictions provide for some form of preventive detention for community protection: ALA. CODE tit. 12, § 12-15-59(a)(2) (1975); CAL. WELF. & INST. CODE § 636 (West Supp. 1978); COLO. REV. STAT. § 19-2-103(3)(a)(b) (1973); D.C. CODE § 16-2310(a)(1) (1973); FLA. STAT. ANN. § 39.03(3)(c)(1) (West Supp. 1978); GA. CODE ANN. § 24A-1401 (1976); HAW. REV. STAT. § 571-31 (1968); IDAHO CODE § 16-1811(1)(c) (Supp. 1977); ILL. REV. STAT. ch. 37, §§ 703-4, -6(2) (1977); IND. CODE. § 31-5-7-12(b) (1976); IOWA CODE ANN. § 232.16 (West 1969); KAN. STAT. § 38-815b(c)(1) (Supp. 1977); KY. REV. STAT. § 208.192(4)(b)(1977); LA. REV. STAT. ANN. § 13:1578.1 (West Supp. 1978); ME. REV. STAT. tit. 15, § 3203 (4)(A)(Supp. 1977-1978); MD. CTS. & JUD. PROC. CODE ANN. § 3-815(b)(1) (Supp. 1977); MICH. COMP. LAWS ANN. § 712A.15(c) (Supp. 1977-1978); MINN. STAT. ANN. § 260.172(1) (West Supp.

dard range from the very general, such as the welfare or protection of the community, to the more specific, such as the protection of the person or property of others.[34] A few jurisdictions specifically allow detention for community protection only if there is a serious risk that the juvenile is likely to commit a delinquent act.[35]

To ensure the presence of the juvenile at trial, to protect the juvenile, and to protect the community are the three major standards for juvenile detention. Detention for juvenile and community protection has been termed "preventive detention"

1978); MISS. CODE ANN. § 43-23-11 (1972); MONT. REV. CODES ANN. § 10-1212(1)(a) (Supp. 1977); NEB. REV. STAT. 43-205.03 (1974); NEV. REV. STAT. § 62.140(4) (1973); N.J. STAT. ANN. § 2A:4-56(b)(2) (West Supp. 1977-1978); N.M. STAT. ANN. § 13-14A-27 (Supp. 1976); N.Y. JUD.-CT. ACTS FAM. CT. § 728(b)(iii) (McKinney 1975); N.D. CENT. CODE § 27-20-14 (1974); OHIO REV. CODE ANN. 2151.31 (Page 1976); ORE. REV. STAT. § 419.573(3)(b) (1975); PA. STAT. ANN. tit. 11, § 50-309 (Purdon Supp. 1977-1978); S.D. CODIFIED LAWS § 26-8-19.2 (1976); TENN. CODE ANN. § 37-214 (1977); UTAH CODE ANN. § 78-3a-30(1) (1977); VT. STAT. ANN. tit. 33, § 643(a) (Supp. 1976); VA. CODE § 16.1-248(A)(2) (Supp. 1977); WASH. REV. CODE ANN. § 13.40.040 (2)(e)(Supp. 1977); W. VA. CODE § 49-5A-2 (1977); WYO. STAT. § 14-8-107 (a)(ii)(1977).

34. *Compare* IDAHO CODE § 16-1811(1)(c) (Supp. 1977) (juvenile shall be released unless "contrary to the *welfare of society*") (emphasis added) *and* IOWA CODE ANN. § 232.16 (West 1969) (juvenile shall be released unless "the immediate . . . *protection of the community* requires that the child shall be detained") (emphasis added) *with* WYO. STAT. § 14-8-107(a)(ii) (1977) (juvenile shall be released unless required to "*protect the person or property of others*") (emphasis added) *and* ILL. REV. STAT. ch. 37, § 703-6(2) (1977) (juvenile may be detained if "it is a matter of immediate and urgent necessity for the protection of the . . . person or property of *another*") (emphasis added).

35. *E.g.*, LA. REV. STAT. ANN. § 13:1578.1 (West Supp. 1978); N.Y. JUD.-CT. ACTS FAM. CT. § 728(b)(iii) (McKinney 1975).

The positions of the six standards-promulgating organizations on preventive detention for community protection are found in COMPARATIVE ANALYSIS, *supra* note 5, at 16-19, which states:

> Although all the groups approve detention to protect the personal safety of others, the IJA/ABA restricts such detention to cases where "serious bodily harm" is anticipated, and both HEW and NCCD similarly qualify the standard. The President's Task Force, the National Advisory Commission, the H.E.W. Model Act, and the Uniform Juvenile Court Act allow preventive detention to protect property of others—the IJA/ABA clearly would not. It is not clear whether any of the groups would permit detention to protect the community from "moral injury."

Id. at 16.

It is of interest to note that in NAC CORRECTIONS, *supra* note 20, the National Advisory Commission, apparently addressing the issue of preventive detention as applied to adults, stated that the Commission had not yet taken a direct position on the advisability of preventive detention, but that most of its standards were based on a right to pretrial release afforded by bail. NAC CORRECTIONS, *supra* note 20, at 103. This inconsistency between positions on adults and juveniles is hard to reconcile. This is especially true in the area of preventive detention to protect the community, since there is no apparent difference between juveniles and adults that justifies detaining juveniles for community protection, but not adults.

since it anticipates a harmful occurrence.[36] However, in so far as the detention standard to ensure the presence of the juvenile anticipates the fleeing or failure to attend trial of the juvenile, this standard is also a form of preventive detention and will be treated as such.

Besides such forms of preventive detention, another juvenile detention standard, the fourth of the five general detention standards, allows detention where the juvenile has no parent, guardian, or other person able to provide supervision and care for him and to return him to the court when required.[37] Unlike the preventive detention standards, which anticipate problems, this standard principally responds to a present problem, the absence of a responsible parent. It is aimed at providing immediate care, based principally upon a determination of present fact, rather than a prediction of future conduct or circumstances.[38]

The fifth detention standard, detention for expedience, is not so much a standard as a collection of several broad, undefined detention criteria, which give the court almost total discretion to detain a juvenile. Examples of such criteria include detention where release would be impracticable, undesirable, or

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36. *See generally* Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1966).

37. *E.g.*, OHIO REV. CODE ANN. § 2151.31 (Page 1976). The implicit purpose of this standard is to provide immediate care to the juvenile. This purpose is explicitly stated in the standard promulgated in PRESIDENT'S TASK FORCE, *supra* note 20, which antedated the states' passage of statutes incorporating this standard. The Task Force standard states that a "juvenile should not be detained . . . unless detention is necessary . . . to *provide physical care* for a juvenile who cannot return home because he has no parent or other suitable person able and willing to supervise and care for him adequately." *Id.* Standard 12.7 (emphasis added). Recognition of the purpose (to care for the juvenile, rather than to prevent harm to the juvenile or community) is necessary to the proper implementation of this standard.

38. This standard presents a common problem of statutory construction. It is not clear whether the qualifying words "able and willing to provide supervision and care for him and return him to the court when required" modify only the immediately preceding antecedent, "other suitable person," or all four preceding antecedents. Justice Brandeis confronted this problem in Porto Rico Co. v. Mor., 253 U.S. 345, 348 (1920), and stated: "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." Since the Juvenile Court Acts are aimed at providing care and protection to the juvenile in all circumstances—both at home and not—it would appear that the qualifying words are intended to modify parent, guardian, and third party alike.

Another problem with the fourth standard is that it does not clarify whether a juvenile with an "able parent" may be detained where the parent is not present at the police station, intake facility, or court. Presumably this standard allows detention until such parent comes to take the juvenile home.

inadvisable.[39] Only a minority of jurisdictions, however, allow detention for such reasons.

Many of the standards for detaining juveniles, as well as their lack of specificity, have engendered criticism.[40] One commentator has concluded that standards which allow detention to protect the juvenile or the community or where release would be inexpedient, impracticable, or undesirable make it possible to detain virtually any child.[41]

Besides the five present detention standards, there are other vulnerable aspects of the preadjudicatory detention determination procedure. Only twenty-six jurisdictions statutorily mandate a detention hearing for a detained juvenile.[42] Nine additional jurisdictions provide by statute that a juvenile has a right to a detention hearing, either implying that the right may be waived by failure to assert it,[43] or explicitly stating that the

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39. *E.g.*, MO. ANN. STAT. § 211.141(1) (Vernon 1959) (detained juvenile shall be released "unless it is impracticable [or] undesirable"); OKLA. STAT. tit. 10, § 1107(A) (West Supp. 1977-1978) (detained juvenile shall be released "unless it is impracticable or inadvisable"); R.I. GEN. LAWS § 14-1-20 (1969) (detained juvenile shall be released "unless it is impracticable"). None of the six major standards-promulgating organizations recommends allowing detention based on such broad and unspecified standards.

40. *E.g.*, BAIL 1964, *supra* note 5, at 94; Ferster, *supra* note 23, at 164-70; Hoffman & McCarthy, *Juvenile Detention Hearings: The Case for a Probable Cause Determination*, 15 SANTA CLARA LAW. 267, 272 (1975); Smith, *Juvenile Right to Bail*, 11 J. FAM. L. 81, 101 (1971). *But cf.* Comment, *The Right to Bail and the Pre-"Trial" Detention of Juveniles Accused of "Crime,"* 18 VAND. L. REV. 2096, 2108 (1965) (problem is not lack of criteria but finding someone to apply criteria).

41. Ferster, *supra* note 23, at 185.

42. ALA. CODE tit. 12, § 12-15-60(a) (1975); ALAS. STAT. § 47.10.140 (1975); CAL. WELF. & INST. CODE § 632 (West 1972); D.C. CODE § 16-2312(a)(1) (1973); FLA. STAT. ANN. § 39.03(7)(a) (West Supp. 1978); GA. CODE ANN. § 24A-1404 (Supp. 1977); ILL. REV. STAT. ch. 37, § 703-5(1) (1977); KAN. STAT. § 38-819(a) (Supp. 1977); KY. REV. STAT. § 208.192(2) (1977); ME. REV. STAT. tit. 15, § 3203(4), (5) (Supp. 1977-1978); MD. CTS. & JUD. PROC. CODE ANN. § 3-815(c) (Supp. 1977); MICH. COMP. LAWS ANN. § 712A.14 (1968); MINN. STAT. ANN. § 260.172(1) (West Supp. 1978); N.J. STAT. ANN. § 2A:4-58 (West Supp. 1977-1978); N.M. STAT. ANN. § 13-14A-28 (Supp. 1976); N.Y. JUD.-CT. ACTS FAM. CT. § 728(a) (McKinney 1975); N.D. CENT. CODE § 27-20-17(2) (1974); OHIO REV. CODE ANN. § 2151.31.4 (Page 1976); ORE. REV. STAT. § 419.577(3) (1975); PA. STAT. ANN. tit. 11, § 50-312(b) (Purdon Supp. 1977-1978); TEX. FAM. CODE ANN. tit. 3, § 54.01 (a) (Vernon Supp. 1976-1977); VT. STAT. ANN. tit. 33, § 643 (Supp. 1976); VA. CODE § 16.1-250 (Supp. 1977); WASH. REV. CODE ANN. § 13.40.050(1)(b)(Supp. 1977); W. VA. CODE §§ 49-5-8(a), -5A-2 (1977); WYO. STAT. § 14-8-110(a)(1977).

However, some states which do not require detention hearings for detained juveniles by statute do require hearings by court decision. *See, e.g.*, Baldwin v. Lewis, 300 F. Supp. 1220 (E.D. Wis. 1969), *rev'd on procedural grounds*, 442 F.2d 29 (7th Cir. 1971); *cf.* DeChamplain v. Lovelace, 510 F.2d 419, 426 (8th Cir. 1975) (due process affords serviceman a right to a pre-court-martial hearing to determine whether further detention is necessary).

43. COLO. REV. STAT. § 19-2-103(2) (1973); HAW. REV. STAT. § 571-32(a)

juvenile may receive a hearing only upon request.[44]

In those jurisdictions which do mandate a detention hearing, few require a finding of probable cause for continued detention.[45] In addition, the juvenile court judge may often detain a juvenile without making separate findings of fact which form the basis for detention.[46] Other procedural safeguards, as the right to confrontation and cross-examination of witnesses, are

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(1968); IDAHO CODE § 16-1811(5) (Supp. 1977); S.D. CODIFIED LAWS § 26-8-19.2 (1976); UTAH CODE ANN. § 78-3a-30 (1977).

44. IND. CODE § 31-5-7-12(b) (1976); MONT. REV. CODES ANN. § 10-1216(5) (Supp. 1977); NEB. REV. STAT. § 43-205.04 (Supp. 1977); NEV. REV. STAT. § 62.170(4) (1973).

A few states' statutes make reference to detention hearings but fail to specify any requirements of, or rights to, detention hearings. *See, e.g.*, ARK. STAT. ANN. § 45-418 (1977) (provides that if "neither information nor petition is filed, nor indictment returned, within 24 hours after a detention hearing or within 96 hours after arrest, whichever is sooner, the juvenile shall be discharged from detention" but does not provide whether a detention hearing is required); TENN. CODE ANN. § 37-217(b) (1977) ("An informal detention hearing *may* be held not later than three days after the child is placed in detention . . . . If an informal hearing is not held as provided, a hearing on the petition shall be held within seven days or detention shall be terminated *unless good cause is shown*") (emphasis added).

One state, Connecticut, makes an obscure reference to a detention hearing requirement. CONN. GEN. STAT. ANN. § 17-62(b)(West Supp. 1978)(where a juvenile is detained, he shall remain in custody "pending a hearing upon the [delinquency] petition which shall be held within ten days from the issuance of such [detention] order on the need for such temporary care and custody").

The positions of the six standards-promulgating organizations as to the requirement of a detention hearing are summarized in COMPARATIVE ANALYSIS, *supra* note 5, at 23:

> Of the six major standards-recommending groups surveyed, four, the H.E.W. Model Act, the President's Task Force on Juvenile Delinquency and Youth Crime, the Uniform Juvenile Court Act, and the IJA/ABA Juvenile Justice Standards Project (Draft Standards on Interim Status, 1974) would require a judicial hearing on whether or not to continue the detention of the juvenile. The National Advisory Commission, in its *Courts* volume, recommends giving the juvenile the "opportunity" for a "judicial determination of the propriety of the continued placement in the facility." The National Council on Crime and Delinquency Standard Act would require a court order and an opportunity for a hearing by a judge or a referee.

Most commentators support a mandatory detention hearing for the detained juvenile not otherwise released. *See* Ferster, *supra* note 23, at 180 n.139 and accompanying text.

45. *See* Hoffman & McCarthy, *Juvenile Detention Hearings: The Case for a Probable Cause Determination*, 15 SANTA CLARA LAW. 267, 273 (1975) (statutes of only four jurisdictions specifically require a probable cause determination at the detention hearing stage).

46. *But see* Baldwin v. Lewis, 300 F. Supp. 1220 (E.D. Wis. 1969), *rev'd on procedural grounds*, 442 F.2d 29 (7th Cir. 1971) (court found due process required an adequate record containing the facts supporting the court's decision).

typically omitted.[47]

In addition, appellate review of the decision to detain is almost nonexistent. First, issues presented for review may become moot by a finding of delinquency.[48] Second, the denial of preadjudicatory release may be deemed an interlocutory and nonappealable order.[49] As a result, judicial accountability is lacking at the detention decision-making stage.[50]

The actual practice of juvenile detention appears to support many of the fears and criticisms levied by commentators.[51] Although detention studies and statistics are scarce,[52] the available statistics support the suspicion that the court may detain virtually any child, for any or no reason. The President's Task Force on Juvenile Detention and Youth Crime noted a study that found that nearly three-fourths of the juveniles referred to probation departments by law enforcement agencies were held in detention centers.[53] Besides the often large number of juveniles detained, there is a large variation in detention rates. Some districts detained all the juveniles referred to the juvenile court while others detained only two or three out of every hundred.[54] A study in California showed that detention rates among the counties surveyed ranged from 19% to 66%.[55] Additionally, studies have found that variations in detention rates are not necessarily due to any difference in the number of serious offenses.[56]

Statistics on length of detention are also rare. A study by the National Council on Crime and Delinquency (the NCCD

47. *See, e.g.*, OHIO REV. CODE ANN. § 2151.31.4 (Page 1976) (provides for "an informal detention hearing"). *See* Ferster, *supra* note 23, at 185.

48. *Cf., e.g., In re* Orr, 38 Ill. 2d 417, 231 N.E.2d 424 (1967) *cert. denied*, 391 U.S. 924 (1968) (question of trial court's denial of request for bail pending appeal deemed moot).

49. *See, e.g.*, Mendoza v. Baker, 319 S.W.2d 147, 150 (Tex. Civ. App. 1958); ILL. REV. STAT. ch. 37, § 701-20(3) (1977).

50. *See* text accompanying notes 107-10 *infra*.

51. *See* authorities cited in note 40 *supra*.

52. Thus in 1969, Ferster, *supra* note 23, at 162-63 stated:

> Unfortunately, detention statistics, like statistics on arrests of juveniles, are difficult to obtain and difficult to interpret. Twenty-two jurisdictions do not keep any detention statistics at all. Of the twenty-nine that do, most of the statistics are so incomplete that it is almost impossible to assemble comparable statistical information on such items as rate of detention, length of detention, and disposition of juveniles after detention.

53. PRESIDENT'S TASK FORCE, *supra* note 20, at 36.

54. *See* BAIL 1964, *supra* note 5, at 97.

55. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, LOCKING THEM UP: A STUDY OF INITIAL JUVENILE DETENTION DECISIONS IN SELECTED CALIFORNIA COUNTIES 118 (1968).

56. *E.g., id.*

Study) found that the length of detention of juveniles in jails and detention centers ranged from one to sixty-eight days. The median length of detention was sixteen days.[57]

Some of the most disquieting detention statistics are those comparing the number of juveniles detained to the number ultimately released after adjudication. The NCCD Study found that approximately 167,000 of 409,218 juveniles detained were neither committed to an institution nor placed on probation.[58]

Beyond the problems reflected by the statistics, a direct view of the juvenile detention experience is alarming in itself.[59] Detention obstructs the juvenile's schooling and disrupts other constructive daily patterns. Detention encourages the juvenile to view himself as a criminal.[60] In addition, detention introduces the juvenile to the attitudes and experiences of more sophisticated offenders, whether other juveniles or adults. Inevitably some juveniles are detained in jails alongside hardened criminals,[61] where resulting jail atrocities are not uncommon.[62]

Detention not only directly harms the juvenile during the preadjudicatory stage, but also indirectly prejudices his ultimate adjudication and disposition. Courts and commentators alike have acknowledged that detention hampers one's defense.[63] Specifically, detention impedes the securing of witnesses,[64] impairs constructive contact between the defendant and his attorney,[65] and promotes prejudicial insinuations that

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57. National Council on Crime and Delinquency, *Juvenile Detention*, 13 CRIME & DELINQ. 11, 34 (1967) [hereinafter cited as NCCD Study].

58. *Id.* at 36.

59. Ferster, *supra* note 23, at 188.

60. BAIL 1964, *supra* note 5, at 95.

61. *See id.* at 105 ("over 100,000 children are detained each year in ordinary jails or jail-like structures").

62. Washington Post, Mar. 7, 1969, § AA, at 11, col. 1. "A witness before a Senate Judiciary Subcommittee reported that in the Cook County jail juveniles 14 years old or older were sexually molested, tortured, beaten, and murdered by other prisoners."

63. *See, e.g.*, Stack v. Boyle, 342 U.S. 1, 4 (1951); authorities cited in notes 64-67 *infra*.

64. In some cases the accused is the only one able to locate an important witness.

> Student directors of the Yale Law School Public Defender Association report that Negroes are most reluctant to talk to white people regarding any criminal matter. They have found it impossible to locate Negro witnesses that the accused could probably find within a short period of time if permitted to search for them.

Note, 70 YALE L.J. 966, 969-70 n.27 (1961).

65. Foote, *The Coming Constitutional Crisis In Bail: II*, 113 U. PA. L. REV. 1125, 1147 (1965) [hereinafter cited as Foote *II*] ("The quality of representation which a jail defendant obtains is adversely affected by pretrial detention because, instead of the defendant coming to his office, counsel

the detained defendant is guilty.[66] It is, therefore, hardly surprising that empirical studies have found that detention results in a higher percentage of guilty adjudications and longer sentences.[67]

From the preceding analysis of preadjudicatory juvenile detention, it is apparent that detention touches the due process interest of an accused juvenile at two distinct levels. First, detention directly affects the juvenile prior to trial. Second, by prejudicing the outcome of the juvenile's trial, detention indirectly affects the juvenile's freedom after trial. Whether these restraints on the juvenile's liberty interests are justified under a due process analysis depends on the balance struck between the competing interests under the due process standards unique to the juvenile delinquency setting.

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must go to the jail to see the defendant, often under conditions unfavorable to privacy and mutual dignity.")

66. *See* NAC CORRECTIONS, *supra* note 20, at 101.

67. *See, e.g.*, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, JUNIOR BAR SECTION, THE BAIL SYSTEM OF THE DISTRICT OF COLUMBIA, REPORT OF THE COMMITTEE ON THE ADMINISTRATION OF BAIL, WASHINGTON (1963) (of 258 defendants convicted, 83 had been admitted to bail before trial and 175 were detained prior to trial); Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 38 N.Y.U.L. REV. 67, 85 (1963) (detention before trial affects both conviction rates and sentence durations).

It is very possible that factors other than pretrial detention result in more convictions and more severe sentencing. More recent studies, however, have controlled various variables associated with detention that may affect the disposition of a case. In one study, several such factors were controlled, including previous criminal records and whether the defendant was represented by private or court-assigned counsel. Findings included:

> Among those with no record, fifty-nine per cent of the jail[ed] defendants received prison sentences, compared to ten per cent of the bail[ed] defendants. Among those with prior records, eighty-one per cent of the jail[ed] defendants were sentenced to prison, compared to thirty-six per cent of the bail[ed] defendants. Thus, jail[ed] defendants were forty-nine and forty-five per cent more likely to be sentenced to prison. These percentages are no smaller than the original difference of forty-seven per cent, which existed before the factor of previous record was held constant.

Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641, 647-48 (1964). After the isolation of other factors, the author concluded, "[t]hese findings provide strong support for the notion that a causal relationship exists between detention and unfavorable disposition." *Id.* at 655.

For a thorough discussion of detention and the various kinds of "infection which can sap the vitality of the trial," see Foote *II*, *supra* note 65, at 1137-48.

APPLYING THE DUE PROCESS FAIRNESS STANDARD IN LIGHT OF PARENS PATRIAE JUVENILE COURT PHILOSOPHY

The Due Process Standard

As earlier described, the informal procedures and attendant unfairness in juvenile delinquency proceedings after the passage of the juvenile court acts ultimately led to Supreme Court action. In *Kent v. United States*,[68] the Court examined a proceeding in which a District of Columbia juvenile court had waived its exclusive jurisdiction over a juvenile and authorized the criminal prosecution of him as an adult. The Supreme Court held that before the juvenile court could waive its jurisdiction, the juvenile was entitled to a hearing, to access by his counsel to the social records and probation reports presumably considered by the court, and to a statement of reasons for the decision of the juvenile court.[69] The Court felt that such a result was required by the District of Columbia statute read in the context of constitutional principles of due process.[70] Although admitting that the state was "*parens patriae*," the Court noted that the state's role as parent did not justify procedural arbitrariness.[71] The Court also cited evidence questioning whether the juvenile court system was in fact serving its theoretical purposes of solicitous care and regenerative treatment so as to justify the juvenile court's continued immunity from adult constitutional guarantees.[72] *Kent* left undecided the question of whether, independent of a state or federal statute, constitutional guarantees applicable to adults must be applied in juvenile delinquency proceedings.

This question was squarely answered by the Court in *In re Gault*.[73] In *Gault* the Court examined a proceeding in which a fifteen year old boy was adjudicated delinquent for making an obscene telephone call and was subsequently ordered to the Arizona State Industrial School for the period of his minority, unless discharged sooner. Finding a denial of due process, the Court held that the adjudicatory hearing must measure up to the essentials of due process and fair treatment, which include notice of charges, notification of the right to counsel, the privilege against self-incrimination, and the rights of confrontation

68. 383 U.S. 541 (1966).
69. *Id.* at 557.
70. *Id.*
71. *Id.* at 554-55.
72. The Court stated that "[t]here is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *Id.* at 556.
73. 387 U.S. 1 (1967).

and cross-examination.[74] However, the Court specifically refused to examine the procedures or constitutional rights applicable to the pre-judicial or post-adjudicatory stages of the juvenile delinquency process.[75]

In reaching its holding, the Court in *Gault* stressed that intelligent application of due process standards in juvenile proceedings would not require the states to abandon or displace any of the substantive benefits of the juvenile court process. Four benefits that the Court specifically confronted were the separate processing from adults, avoiding classifying juveniles as "criminals," the confidentiality of police and court contacts, and the concept of the kindly juvenile judge.[76] The Court did note that, contrary to the most effective administration of the juvenile court, due process requirements will sometimes increase order and regularity in proceedings, as well as introduce elements of the adversary system.[77] These considerations, however, were not sufficient to justify the failure to provide the accused juvenile the adult due process standards that the *Gault* Court considered.

Three years later, in *In re Winship*,[78] the Court extended juvenile due process rights in holding that the essentials of due process and fair treatment require that the standard for determining whether a juvenile has committed a delinquent act be raised to proof beyond a reasonable doubt.[79] In reaching its holding, the Court first noted that it had never explicitly held that the due process clause requires proof beyond a reasonable doubt for adult conviction. The Court affirmed that the virtually unanimous adherence to the reasonable doubt standard in common law jurisdictions presumptively established it as a requirement of due process.[80] This factor, together with the prior implicit Court recognition that the reasonable doubt standard was constitutionally guaranteed, led the Court to hold explicitly that proof beyond a reasonable doubt was required under the due process clause in adult criminal proceedings.[81]

In determining the applicability of the reasonable doubt standard to juveniles, the Court, as in *Gault*, considered the impairment that the adult procedure might have on the benefits accorded the juvenile under the juvenile court system. The

74. *Id.* at 33-34, 41, 55, 57.
75. *Id.* at 13.
76. *Id.* at 22-27.
77. *Id.* at 27.
78. 397 U.S. 358 (1970).
79. *Id.* at 367.
80. *Id.* at 361.
81. *Id.* at 364.

Court found that the reasonable doubt standard would not impair any of the beneficial aspects of the juvenile court. Besides citing those beneficial aspects described in *Gault*,[82] the Court found there would be neither any effect on the informality, flexibility, or speed of the adjudicatory hearing, nor any impairment of the wide-ranging review of the juvenile's social history at the post-adudicatory dispositional hearing, nor any impairment of the juvenile's subsequent individualized treatment.[83]

In 1971, the Court in *McKeiver v. Pennsylvania*[84] dispelled the notion that due process requires that all adult constitutional procedures be incorporated in juvenile delinquency proceedings. The Court held that the due process clause of the fourteenth amendment does not require the right to trial by jury in juvenile delinquency adjudications.[85] The Court advanced a two-fold justification for its decision. First, the jury right would not significantly strengthen the fact-finding function in juvenile delinquency proceedings.[86] Second, the jury right would impair the juvenile court's ability to function in a unique manner. The result, the Court stated, would be the "traditional delay, the formality, and the clamor of the adversary system."[87] The Court added that introduction of the jury right would end the prospect of an intimate, informal protective proceeding as well as impede state experimentation in seeking to accomplish the rehabilitative goals of the juvenile court system.[88] Although acknowledging the serious failings of the juvenile court, the Court felt that the existing abuses related to the lack of resources and dedication rather than inherent unfairness, and therefore were not constitutional.[89] In his separate opinion, concurring in part and dissenting in part, Justice Brennan asserted that the due process question can only be decided in terms of the adequacy of a particular state procedure to protect the juvenile from oppression by the government.[90]

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82. *Id.* at 366. The Court also stated that requiring proof beyond a reasonable doubt would not affect the proceedings prior to the adjudicatory hearing. *Id.* at 366-67.

83. *Id.*

84. 403 U.S. 528 (1971).

85. *Id.* at 545.

86. *Id.* at 547. For a criticism of the Court's failure to consider adequately the purpose of the jury trial beyond that of fact-finding, see Comment, *Constitutional Law—Due Process: No Constitutional Right to Trial by Jury for Juveniles in Delinquency Proceedings*, 56 MINN. L. REV. 249, 257 (1971).

87. 403 U.S. at 550.

88. *Id.* at 545-47.

89. *Id.* at 547-48.

90. *Id.* at 554. In *McKeiver*, the Court reviewed the denial of jury trial in two sets of cases. The first set of cases had been consolidated and in-

The most recent Supreme Court decision concerning procedural due process in delinquency proceedings is *Breed v. Jones*.[91] In *Breed*, the Court further articulated its concern with accommodating the interests of due process with those of the *parens patriae* philosophy embedded in the juvenile court. In *Breed*, a juvenile was first adjudicated a delinquent and then found unfit for treatment as a juvenile. Subsequently, it was ordered that he be prosecuted as an adult. The Court held that prosecution of a juvenile as an adult after the adjudicatory proceeding in juvenile court violated the double jeopardy clause.[92] As a result, any transfer hearing to determine whether a particular juvenile should be prosecuted as an adult in a criminal proceeding must be held prior to the commencement of any juvenile delinquency adjudicatory hearing.

In reaching its decision, the Court first analyzed whether imposing the double jeopardy prohibition would have any negative effects—either by diminishing benefits or by imposing burdens—on the juvenile court system.[93] Recognizing that the double jeopardy prohibition, as well as all due process standards, diminish the flexibility and informality of juvenile proceedings,[94] the Court found, however, that applying this prohibition would not "diminish flexibility and informality to the extent that those qualities relate uniquely to the goals of the juvenile-court system."[95] The Court noted that applying the double jeopardy prohibition would impose certain burdens on delinquency proceedings. Thus, duplicative proceedings will occur where an adjudicatory hearing becomes necessary after transfer is rejected in the transfer hearing. Also, to avoid prejudice, the transfer hearing judge may have to disqualify

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volved crimes of physical force under Pennsylvania law. There was no indication of any statutory ban upon the admission of the public to juvenile trials. In addition the record was bare of any indication that the court excluded any person whom the appellants sought to have admitted to the courtroom. The second set of cases the Court reviewed arose out of a series of civil rights demonstrations in North Carolina. North Carolina law permitted or required the exclusion of the general public from juvenile trials. Under this law the trial judge had ordered the general public excluded from the hearing.

Noting that trial by jury allows an accused to protect himself against possible oppression by what in effect is "an appeal to the community conscience," Justice Brennan stated that similar protection is afforded a juvenile through a public trial in delinquency proceedings. Therefore, Justice Brennan dissented as to the North Carolina cases and concurred in the judgment as to the Pennsylvania cases.

91. 421 U.S. 519 (1975).

92. *Id.* at 541.

93. *Id.* at 535-39.

94. *Id.* at 535-36 n.15.

95. *Id.* at 535.

himself from presiding at the adjudicatory hearing. The Court concluded, however, that these burdens are not sufficient to justify a departure from the double jeopardy prohibition.

After considering the possible negative effects of incorporating the double jeopardy prohibition into juvenile proceedings, the Court considered the positive effects that it would have in promoting the objectives of the juvenile court system.[96] The Court noted that the juvenile's knowledge of his possible transfer to a criminal court after the adjudicatory hearing could only undermine the effort of achieving informality, nonadversariness, and cooperation, since the cooperative juvenile would run the risk of prejudicing his chances in adult proceedings if ultimately transferred there. Thus, to date, the double jeopardy issue in *Breed* has provided the Court with perhaps the best opportunity to articulate and evaluate the paradox that a due process standard may promote formality and adversariness at one level while encouraging informality and cooperation at another.

In viewing the juvenile court history and the recent Supreme Court decisions, it would appear that, since the enactment of the juvenile court acts at the turn of the century under the *parens patriae* concept, the goals of the juvenile court have been to protect, care for, and rehabilitate the juvenile delinquent. These goals are largely intact.[97] It is the *parens patriae* associated methods of informal procedure controlled by judicial discretion, together with evidence indicating that juveniles are not receiving the care intended by the court reformers,[98] which have increasingly come under attack.[99]

The standard that the Court uses in determining whether an adult procedural right must be incorporated into delinquency proceedings is whether the "essentials of due process and fair treatment" demand it. This requires accommodating and balancing the interests of the adult due process standards with the goals and methods of the juvenile court system. Specifically, the Court employs a two-pronged analysis: First, the Court determines whether the particular state procedure protects the juvenile from inherent unfairness and governmental oppression. Second, the Court determines the effect that application of the adult procedural guarantee would have on the juvenile court's ability to function in its uniquely beneficial manner; that is, its effect on promoting or inhibiting both the juvenile court's imme-

96. *Id.* at 540.
97. *See* Kent v. United States, 383 U.S. 541, 555-56 (1966).
98. *Id.* at 555-56; *see* note 72 *supra.*
99. *See* note 20 *supra.*

diate objectives of informality, nonadversariness, and cooperation and, most importantly, the ultimate goals of protection, care, and rehabilitation.

Inherent Unfairness of Detention Practices

Applying the two-pronged analysis to the issue of whether juveniles have a right to bail in delinquency proceedings, the first question is whether detention practices are inherently unfair and oppressive. For a procedure to be inherently unfair and oppressive, it must be harmful and without justification by its nature. As detailed above, the detention of juveniles results in two types of harm. The first is the direct physical, emotional, and psychological damage that results from involuntary confinement with others.[100] The second type of harm is the adverse effect that detention has on the juvenile's case.[101] To determine whether the harm done to detained juveniles is justified, it is necessary to analyze the functioning of the five general detention standards previously discussed.

The standard most susceptible to abuse is the standard which allows detention for reasons of expedience, as where release of the juvenile is felt to be impracticable, undesirable, or inadvisable. Often detention is imposed for reasons of expedience merely to promote courtroom convenience. In such cases, expedience is clearly an insufficient reason to justify the resulting harm to the juvenile, since courts are not meant to exist for their own convenience. In so far as imposing detention for reasons of expedience seeks to promote other interests, such as the protection of the juvenile or the community, it is likewise unjustified, since those interests are too broad and ill-defined to guide a juvenile court judge and to ensure that such interests are promoted.

Whether the three preventive detention standards—detention to protect the juvenile, to protect the community, and to ensure the juvenile's presence at trial—are justified depends both on the nature of the interests in question and on how effectively the interests are being promoted. Clearly, the protection and welfare of the juvenile and community, and the presence of the juvenile at trial are significant interests to be served by preventive detention. Yet, the present practice of preventive detention does not effectively promote these interests. One indication of this is the large number of detained juveniles ultimately released after trial.[102] This reflects not only the inef-

100. *See* notes 59-62 and accompanying text *supra.*
101. *See* notes 64-67 and accompanying text *supra.*
102. *See* NCCD Study, *supra* note 57, at 36; W. SHERIDAN, STANDARDS

fectiveness of short-term detention in protecting the juvenile and the community, but also the inability of a judge at the preadjudicatory stage to predict future behavior or circumstances. The available fact-finding mechanisms, even with a preadjudicatory detention hearing, are incapable of providing the sophistication required to predict effectively such an intangible as future behavior.[103]

In light of these factors, it is difficult to justify detention's damaging effect on the juvenile. This is especially true in view of the general acceptance in this country of the proposition that preventive detention is not proper for adults.[104] The wisdom of this intolerance for preventive detention in adult criminal proceedings is amplified in analyzing the illogic underlying preventive detention of juveniles: in effect, the detained juvenile is being "punished" prior to a trial for something he might do in the future.[105]

FOR JUVENILE AND FAMILY COURTS 62 (1966) ("[n]umerous studies show that a high percentage of children are released after such [detention] hearings. This result proves what experience has shown—that most of these children did not need to be detained in the first place.").

103. In Foote *I*, *supra* note 5, the author, in referring to preventive detention, states:

> In the best adjudicative climate the determination of such vague predictive criteria as future dangerousness or possible flight is necessarily unreliable, and under the actual conditions by which the pretrial detention determination is made in this country the probability of maladministration is infinite. . . . [O]ne would expect that the vagueness of the concepts applied would produce unevenness of administration in any event. If a criterion such as future dangerousness were applied in [criminal courts in] America, it is predictable that the magistrates and lower judiciary who today deliberately set high bail for indigents to prevent their release would have an equal opportunity to obtain the detention of the poor, the friendless, and the Negro by labelling them "dangerous."

Foote *I*, *supra* note 5, at 963-64.

104. Justice Jackson, as Circuit Justice in Williamson v. United States, 184 F.2d 280, 282-83 (2d Cir. 1950), stated that "[i]mprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loathe to resort to it." *But see* NAC CORRECTIONS, *supra* note 20, which states:

> The Commission has not taken a direct position on whether preventive detention . . . should be implemented. . . . [T]he present system of money bail is essentially a preventive detention system, with judges setting bond inordinately high to insure detention prior to trial. This form of hypocrisy runs counter to the need for the criminal justice system to breed respect rather than hostility for law.

105. "For instance, now," [the Queen] . . . went on . . . "there's the King's Messenger. He's in prison now being punished: And the trial doesn't even begin till next Wednesday: and of course the crime comes last of all." "Suppose he never commits the crime?" said Alice. "That would be all the better, wouldn't it?" the Queen said . . . .

L. CARROLL, THROUGH THE LOOKING GLASS 226-27 (Modern Library ed.), *quoted in* Hoffman & McCarthy, *Juvenile Detention Hearings: The Case for a*

In addition to the preventive detention standards already mentioned, there is the standard providing for detention where there is no parent, guardian, or other person able to provide supervision and care for the juvenile and return him to the court when required. Of the five detention standards, this standard is least subject to abuse. It affords some direction to a juvenile court judge to provide the juvenile care and supervision when confronted with a concrete problem. Therefore, insofar as this standard is used to provide necessary care based upon a determination of a present problem, rather than a prediction of a future problem, it will avoid the inherent abuses of preventive detention, and may be justified. Since this standard principally responds to a present problem of an absence of any responsible parent or guardian, it is justified under such circumstances.[106] However, the second part of this standard provides for detention where the parent, guardian, or third person is unable to care for, supervise, or return the juvenile to the court. Although the concept of parental inability, in the abstract, addresses a question of "present capacity," in practice, it may be applied to address or anticipate future problems, such as acts of violence or the fleeing of the jurisdiction by the juvenile. Therefore, a standard incorporating the concept of parental inability is susceptible to a preventive detention construction. Such a construction would subject the juvenile to the same unfairness and oppression as the preventive detention standards now do. It is reasonable to conclude that if the three preventive detention standards were deleted from state statutes, courts would, in an attempt to fill the void, use this remaining standard for preventive detention.

The unfairness of the present juvenile detention standards is compounded by the inherent nature of the unfairness. This is caused not only by the inability to predict future behavior under the present preadjudicatory detention proceeding conditions, and the vagueness of most of the detention standards employed, but also from the lack of any accountability on the part of the courts. This lack of accountability is due to the ill-defined nature of the detention standards themselves,[107] the failure to make specific findings of fact justifying detention,[108] the seclusion of

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Probable Cause Determination, 15 SANTA CLARA LAW. 267, 267 (1975) *and* Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1489 n.1 (1966).

106. *See generally* note 37 *supra*.

107. An ill-defined standard affords an appellate court little or no reference point to determine whether the trial court abused its discretion in applying the standard. Therefore, the trial court rarely will have to account for its decision.

108. Because it is not required to provide the appellate court with the

juvenile proceedings from public scrutiny,[109] and the impracticability (and sometimes impossibility) of appellate review.[110]

Incorporation of Adult Due Process Standards

After determining that the state preadjudicatory release procedures do not protect the juvenile from inherent unfairness, the second step in the Supreme Court's two-pronged analysis is to determine the effect that incorporation of the relevant adult due process guarantee would have on the juvenile court's ability to function in its uniquely beneficial manner. Before determining that effect, it is necessary to ascertain precisely the adult due process pretrial release standard.

The critical question is whether adults accused of crime have a due process right to bail. In referring to bail, the Supreme Court has stated:

> This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[111]

However, it is not clear whether such right to bail is afforded by our Constitution or merely by statute. The eighth amendment of the United States Constitution does not explicitly guarantee a right to bail; it merely states that "excessive bail shall not be required." Yet from the adoption of the Judiciary Act of 1789 through the present Federal Rules of Criminal Procedure, the federal courts have held that a person accused of a crime other than a capital offense has an absolute right to bail.[112] In addition, substantially the same right to bail has been given the criminally accused in state proceedings via state constitutions and statutes.[113] As a result, the Supreme Court has not been required to determine whether the eighth amendment implicitly grants the right to bail, whether the right applies to the states

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basis for its decision in the form of findings of fact, the trial court is further insulated from appellate review.

109. The seclusion from public scrutiny takes on due process significance in light of Justice Brennan's opinion in McKeiver v. Pennsylvania, 403 U.S. 528, 554 (1971) (Brennan, J., concurring in part and dissenting in part); *see* note 90 *supra*.

110. *See* notes 48-49 and accompanying text *supra*.

111. Stack v. Boyle, 342 U.S. 1, 4 (1951) (citation omitted).

112. The first right-to-bail provision was in the Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91. The current bail provision is FED. R. CRIM. P. 46(a)(1).

113. *See* BAIL 1964, *supra* note 5, at 2 n.8 (39 states guarantee a right to bail before conviction in noncapital crimes; 4 states limit the power to deny bail to treason and murder cases; 3 states grant an absolute right to bail only in misdemeanor cases; and 4 states allow judges almost complete discretion to set bail).

through the due process clause of the fourteenth amendment, or the scope of any such right.[114] There is a dearth of court decisions confronting any of these three questions.[115]

It would appear that a provision that prohibits excessive bail necessarily implies that there is a right to bail. However, it is possible that such a provision creates no right to bail in itself but merely demands that bail not be excessive in cases made bailable by other provisions of law. Yet such an interpretation would be completely at odds with the paramount concern of the framers of the Bill of Rights: to protect against congressional abuse.[116] To hold that the eighth amendment grants no right to bail would be to transform a constitutional mandate into a triviality. It would be a constitutional guarantee with no guarantee, allowing court or legislature to abolish completely any right to bail.[117] The most reasonable interpretation of the eighth amendment, therefore, is one which imports a right to bail.

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114. *See generally* Foote *I* and Foote *II*, *supra* notes 5 & 65, respectively.

115. For cases holding that the eighth amendment grants a bail right, see Trimble v. Stone, 187 F. Supp. 483, 484 (D.D.C. 1965); State v. Franklin, 202 La. 439, 12 So. 2d 211 (1943). For cases holding that the eighth amendment does not grant a right to bail, see Mastrian v. Hedman, 326 F.2d 708, 710 (8th Cir. 1964) (charge of first degree murder); Wagner v. United States, 250 F.2d 804, 805 (9th Cir. 1957) (bail denied pending appeal); Wansley v. Wilderson, 263 F. Supp. 54, 57 (W.D. Va. 1967) (bail denied pending new trial).

As to whether the eighth amendment bail provision applies to states via the fourteenth amendment, the Eighth Circuit finds that it does. Pilkinton v. Circuit Court of Howell County, Missouri, 324 F.2d 45, 46 (8th Cir. 1963). *See also* Mastrian v. Hedman, 326 F.2d 708, 711 (8th Cir. 1964).

Few courts have attempted to define the scope of the right to bail under the eighth amendment. Paradoxically, some that do, find it constitutionally permissible for a state to afford to the trial court discretion to grant or deny bail. *E.g.*, Wansley v. Wilderson, 263 F. Supp. 54, 57 (W.D. Va. 1967).

116. In considering the possibility of interpreting the eighth amendment so as to allow legislative determination of what cases should be bailable, Professor Foote stated:

> Such legislative power is consistent with the English theory of civil liberties, in which Parliament itself constitutes the ultimate authority from which there is no other protection, but would constitute an anomaly in the American Bill of Rights whose central concern was protection against abuse by Congress; . . . .

Foote *I*, *supra* note 5, at 969.

117. Professor Foote further stated:

> By making the clause say to the bail-setting court that it may not do indirectly what it is, however, permitted to do directly—deny release—the clause is reduced to the stature of little more than a pious platitude. . . . Men such as George Mason and James Madison, who were primarily responsible for the draftsmanship of the eighth amendment, felt with intensity the importance of what they were doing. It is difficult to believe that as to bail they intended nothing more than to play games with words.

Id. at 970.

It would also appear that this right to bail guaranteed by the eighth amendment must apply to state proceedings through the due process clause of the fourteenth amendment. The basic test of incorporation is whether a particular procedure is fundamental to the Anglo-American concept of justice.[118] The Supreme Court has specifically acknowledged bail as a "traditional right to freedom."[119] In light of this, and since the Court has already declared the historically related eighth amendment ban on cruel and unusual punishment applicable to the states,[120] there is little reason not to believe that the right to bail should also apply to the states.

The question remains whether the right to pretrial release that bail entails would hamper the uniquely beneficial functioning of the juvenile delinquency proceeding. A right to preadjudiciatory release would remove judicial discretion, creating, perhaps, a greater degree of structure and formality, qualities thought less conducive to the unique functioning of the juvenile court.[121] Yet, as the Court in *Breed v. Jones* stated, all due process standards impede the flexibility and informality of juvenile proceedings in some way or another.[122] Therefore, this impairment, in itself, is insufficient to preclude application of the bail right to juvenile proceedings.

A right to preadjudicatory release would not affect any of the four benefits accorded juveniles discussed by the Court in *Gault*: separate processing from adults, avoiding classifying juveniles as "criminals," the confidentiality of police and court contacts, and the concept of the kindly juvenile judge.[123] Neither would a right to preadjudicatory release affect the dispositional hearing benefits[124] and subsequent individualized treatment cited in *Winship*.[125] Nor would it lengthen the delinquency proceeding, an objection the Court in *McKeiver*[126] had against extending the jury right to juveniles.[127] In fact, by eliminating the

118. *E.g.*, Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968).

119. Stack v. Boyle, 342 U.S. 1, 4 (1951). *See* note 3 *supra*.

120. Robinson v. California, 370 U.S. 660 (1962).

121. *E.g.*, *In re* Winship, 397 U.S. 358, 367 (1970).

122. Breed v. Jones, 421 U.S. 519, 535 n.15 (1975).

123. *In re* Gault, 387 U.S. 1, 22-27 (1967).

124. Most juvenile "trials" are divided into an adjudicatory hearing and dispositional hearing. It is only a juvenile who has been adjudicated delinquent, neglected, or in need of supervision who is subject to the benefits of the dispositional hearing. Such benefits include a close inspection of the needs and social background of the individual juvenile.

125. *In re* Winship, 397 U.S. 358, 367 (1970).

126. McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971).

127. Apart from the length of a specific delinquency proceeding, it is, of course, possible that more juveniles would fail to return to the court at the

considerations necessary to implement the present detention standards, the preadjudicatory detention proceeding would likely be shortened. Furthermore, there is no reason to believe that a right to preadjudiciatory release would hinder any feelings of cooperation now enjoyed between judge and juvenile, or increase the adversariness of the proceeding, two other factors the Court has considered important.[128] On the contrary, since it would no longer be necessary to argue whether the present detention criteria had been met, a preadjudicatory right to release would probably decrease the present degree of adversariness.[129]

A right to preadjudicatory release provided by bail would, therefore, neither seriously impair present juvenile procedures nor diminish any of the substantive benefits accorded juveniles already cited by the Court. A controlling issue, however, remains: whether the elimination of the detention standards brought about by the incorporation of the right to bail would prevent the court from adequately protecting and caring for the juvenile prior to trial.

Incorporation of a right to bail would eliminate detention for reasons of expedience. Such ill-defined criteria are not truly designed to protect or care for the juvenile and offer little guidance to the judge interested in promoting these interests. Therefore, elimination of this standard would not be detrimental.

A bail right would also eliminate detention to ensure the juvenile's presence at trial. Although this is an important interest to secure, there is no reason why the traditional right to bail accorded adults cannot equally secure the presence of the juvenile at trial.[130]

The right to bail would also eliminate the detention standard providing for detention to protect the community. The interest of community protection, although vitally important, is distinct from and often contrary to the interest of the accused juvenile. Therefore, eliminating detention for community protection would not lessen juvenile protection or care, but would

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proper time due to the fact that more juveniles would be released prior to trial.

128. Breed v. Jones, 421 U.S. 519, 540 (1975).

129. The necessity of determining what, if any, conditions are to be imposed upon the juvenile's release might, however, entail some new adversariness.

130. In Stack v. Boyle, 342 U.S. 1, 5 (1951), the Court affirmed that this is the function of bail, stating that "like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused."

further it by protecting the juvenile from the harm resulting from detention.[131] Again, there is no reason why the traditional right to bail, which forbids detention of adults for community protection,[132] would not function adequately to secure the interest of the community.[133]

The right to bail would also eliminate the detention standard providing for detention to protect the accused juvenile. Since the purpose of this standard is to protect the juvenile, this is the only form of preventive detention which affords a tenable argument that incorporation of the adult due process right of bail into delinquency proceedings would impair the juvenile court's ability to protect or care for the juvenile—integral interests in the uniquely beneficial functioning of the juvenile court.

There are several factors, however, which prevent the effective achievement of juvenile protection and care under this standard. The first factor is that involuntary detention exposes the impressionable juvenile to criminal influences, prevents him from fully aiding in preparing his case, and prejudices all parties involved, thus adversely affecting his case.[134] Therefore, two or three measures of damage result from one measure of attempted protection.

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131. *See* Mack, *supra* note 12, at 117 (author omits "community protection" as a reason for juvenile detention: "unless the danger of escape is great, or the offense very serious, or the home totally unfit for the child, detention before hearing is unnecessary").

132. Stack v. Boyle, 342 U.S. 1 (1951).

133. For a discussion of bail and the balance it strikes between the interests of the community and those of the accused, see Foote *I*, *supra* note 5, at 963-64. It should be noted that the equal protection clause of the fourteenth amendment is another possible ground for attacking the refusal to grant juveniles the right to preadjudiciatory release, or indeed any other procedural rights now accorded adults. The Supreme Court has steadfastly avoided this equal protection question. *E.g.*, *In re* Winship, 397 U.S. 358, 359 n.1 (1970); *In re* Gault, 387 U.S. 13, 17 (1967); Kent v. United States, 383 U.S. 541, 551-52 (1966). Some commentators have stated that the equal protection argument is not valid since the distinct juvenile court system is justified by the state's paramount concern for the welfare of the juvenile; others have stated that there are clear distinctions between adults and juveniles which justify the differing treatment. *E.g.*, Hill, *The Constitutional Controversy of a Juvenile's Right to Bail in Juvenile Preadjudication Proceedings*, 1 HASTINGS CONST. L.Q. 215 (1974). Such arguments remain valid only insofar as the "unique treatment" is rationally based upon the juvenile's uniqueness or provides equal or further protection for the juvenile. Thus, the use of preventive detention for the protection of the community would appear defenseless against an equal protection analysis. There is no peculiar characteristic possessed by a juvenile which should allow him rather than an adult to be detained for the community's protection. Furthermore, detention of the juvenile for the protection of the community *and not of the juvenile* is not a practice whereby the juvenile is accorded equal or further protection.

134. *See* notes 63-67 and accompanying text *supra*.

Second, a detention standard providing for detention to protect the juvenile is too broad to consistently effect specific protective results. Detention for the "protection" or "welfare" of a juvenile can be broadly interpreted to mean anything from giving him a "taste of confinement" to providing treatment for a heroin addict.

Even in the event that more defined standards of preventive detention for juvenile protection are developed, the court's inability to predict future conduct and circumstances with any degree of accuracy is reason enough to eliminate this detention standard in delinquency proceedings. This is especially true in light of the insulation of the detention decision from judicial and public accountability.

One detention standard which the incorporation of bail would not necessarily eliminate is detention where the juvenile has no parent or third person able to provide care for him and return him to the court. Bail, being a conditional right, could conceivably incorporate this as a condition to preadjudicatory release. The court's interest in providing necessary care to the juvenile in this situation could therefore be maintained.

Since the detention standards that would be eliminated by the incorporation of a right to bail actually do little to benefit the juvenile, there are no reasons remaining why the traditional right to pretrial release provided by bail should not be afforded juveniles. There are, in fact, many reasons to afford such a right. The right to preadjudicatory release would avoid preadjudicative punishment and exposure to criminal influences. It would avoid adjudicative and dispositional prejudice and facilitate preadjudicatory preparation. In addition, it would strengthen family ties by returning more juveniles to their parents, an express objective of the juvenile court acts.[135]

Bail in the Juvenile Court

The right to release before trial is a conditional, not an absolute right.[136] Conditioning the release of adults accused of crime on monetary bail has been criticized as discrimination against

135. *E.g.*, ILL. REV. STAT. ch. 37, § 701-2 (1977) ("The purpose of this [Juvenile Court] Act is . . . to preserve and strengthen the minor's family ties whenever possible . . . .") When any authority removes a juvenile from the supervision of his parents upon the premise that such act is necessary and proper, the effect upon the family is inevitable. The message conveyed by the act of detention is clear: "this family unit is ineffective." The result, especially when family ties are not strong, is often the weakening of family unity.

136. Stack v. Boyle, 342 U.S. 1, 4-5 (1951).

the poor who cannot afford bail.[137] In recent years there has been a reaction to such criticism in the form of greater use of nonmonetary conditions of release.[138]

Criticism of release upon financial conditions is especially applicable to juveniles, who are inherently poor. Under such a system, a juvenile's freedom would inevitably depend upon another's ability to put up financial security. The result of imposing monetary bail on juvenile proceedings would be oppressive and against the aims of equal protection, due process, and the *parens patriae* philosophy of the juvenile court system.

As to the purposes of the release conditions, in adult criminal proceedings, the function of bail is limited by the eighth amendment to assuring the presence of the accused at trial.[139] A strict application of this principle to a juvenile delinquency setting would require that conditions placed upon a juvenile's right to release function only to assure his presence at trial. The unique dependence of a juvenile on his parent or guardian for their care precludes a blanket application of this principle to the juvenile accused of delinquency.[140]

Therefore, the juvenile's right to release must be conditioned upon nonmonetary factors which both adequately ensure the presence of the juvenile at trial and provide care for the juvenile when he is not receiving care at home. To ensure these interests, a court may, within the strictures of fundamental fairness, condition release upon any or all of the following conditions:

(1) the juvenile's promise to return to the court when required;[141]

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137. *See* Bandy v. United States, 82 S. Ct. 11, 13 (1961) (Douglas, Circuit Justice, 1960); Foote *I* & Foote *II*, *supra* notes 5 & 65, respectively; Note, *Bail in the United States: A System in Need of Reform*, 20 HASTINGS L.Q. 380, 403 (1968).

138. *E.g.*, Oakland (California) Police Citation Program (police officers authorized to issue citations in lieu of arrests for misdemeanor crimes where basic criteria are met); the Manhattan Summons Project (station house release program where defendant can be booked and then released with a citation to appear for trial); Manhattan Bail Project (release on own recognizance program); Philadelphia Common Pleas and Municipal Court ROR Program (provides for release on a promise to appear at trial of selected arrested persons whose ties to the community suggest that it is reasonable to expect them to appear when directed. NAC CORRECTIONS, *supra* note 20, at 108-09.

139. Stack v. Boyle, 342 U.S. 1, 5 (1951).

140. *See* Doe v. State, 487 P.2d 47, 49 (Alas. 1971) ("Certain problems peculiar to children are encountered in children's proceedings, however, which make a blanket application of the right to pre-adjudication release upon adequate assurance of future court appearance unworkable and undesirable from the child's viewpoint.").

141. Many states now allow conditional release of a juvenile upon his promise to return to court when required. *See, e.g.*, DEL. CODE tit. 10, § 936(1) (1974).

(2) supervision by a probation officer or other responsible party;[142]
(3) reasonable limitations on travel or association;[143]
(4) that care for the juvenile is being provided by a parent, guardian, or other person.[144]

Condition (1) is aimed at ensuring the juvenile's presence at trial. Conditions (2), (3), and (4) are aimed at ensuring the juvenile's presence at trial and ensuring his care. Condition (4) especially recognizes the unique dependence of the juvenile on his parent or guardian. Unlike preventive detention, which anticipates problems by making predictions of future conduct or circumstances, condition (4) reacts to a present problem based upon demonstrable factual determinations. Therefore, Condition (4) avoids the inherent unfairness of preventive detention, yet functions to provide the juvenile care when demonstrably necessary.

Specifically, Condition (4) would allow detention where a juvenile accused of delinquency is neglected or dependent.[145] These, however, are the only situations where detention becomes necessary to ensure his care, or presence at trial. If a juvenile is detained under any of these circumstances, he should be placed in a shelter care facility, where his physical restraint is not necessary.[146] Furthermore, the state should be required

142. Many states allow the release of a juvenile conditioned upon supervision by another person or organization. *See, e.g.*, ALA. CODE tit. 12, § 12-15-62(a)(1) (1975).

143. Several states allow conditions of travel or association to be placed upon the juvenile's release. *E.g.*, ALA. CODE tit. 12, § 12-15-62(a)(2) (1975); VA. CODE § 16.1-250(D)(2) (Supp. 1977).

144. Except as to the concepts of juvenile "supervision" and "protection," Condition (4) closely reflects § 53.02(b)(2) of title 3 of the Texas Family Code, which allows detention if "suitable supervision, care, or protection for [the juvenile] is not being provided by a parent, guardian, custodian, or other person." Condition (4) bears some similarity to the fourth general standard of detention discussed earlier (*see* text accompanying notes 37-38 *supra*); yet it differs from this standard in that it is not subject to a preventive detention construction since it is based *entirely* on past and present conduct and circumstances, rather than future.

145. Juveniles who are neglected, or dependent range from the physically abused and abandoned juveniles to those juveniles whose parents or guardians are no longer physically or mentally able to care for them.

146. In Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972), the court stated:

> Incursions on the rights of a pretrial detainee, other than those arising from the need for custody (instead of bail) to insure his presence at trial, are unconstitutional. Except for the right to come and go as he pleases, a pretrial detainee retains all of the rights of the bailee, and his rights may not be ignored because it is expedient or economical to do so.

In addition, juveniles should normally be provided shelter care when they request it. In this situation, Condition (4), allowing detention where no one is providing care for the juvenile, is presumptively not being met. *See*

either to institute a neglect, or dependency proceeding, or to release him. This would help prevent the state from abusively securing the detention of juveniles accused of delinquency by asserting, without basis, that the juvenile is neglected, or dependent.

An alleged violation of any of the conditions would be cause for a hearing to determine whether the condition has been violated. The necessary factual determinations would concern events of the past and present, rather than what might occur in the future. Such determinations would therefore be less subject to abuse than the current practices of predictive preventive detention. A finding of noncompliance would allow a judge in his discretion to detain a juvenile. In addition, to further assure appearance at the adjudicatory hearing, the intentional failure to appear at the adjudicatory hearing could be made a substantive crime.[147]

To adequately assure that the conditional right of release is properly granted, two steps should be taken: first, require that the judge separately set out in the record the findings of fact which form the basis of his decision; second, promote appellate review by allowing expedited appeals from detention hearing decisions.

CONCLUSION

From a policy standpoint, the desirability of maintaining many of the present standards of detention, which promote interests other than those of the juvenile at his expense, is open to dispute. The dispute focuses on how much procedural rigor will best assure a proper balance between the rights of the juvenile and those of the community.

A significant part of this question is answered by the eighth amendment, as incorporated in the due process clause of the fourteenth amendment. The only reasonable interpretation of the excessive bail clause is that it affords a right to bail to adults accused of crime. Upon close analysis, there remains no reason

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TEX. FAM. CODE. ANN. tit. 3, § 54.01(k) (Vernon 1975) ("child may sign a request for shelter without the concurrence of an adult"); WASH. REV. CODE ANN § 13.40.050(3)(Supp. 1977) ("Upon a finding that members of the community have threatened the health of a youth taken into custody, at the youth's request the court may order continued detention pending further order of the court."); IJA/ABA JUVENILE JUSTICE STANDARDS PROJECT, *supra* note 20, (restricts power to detain for juvenile protection to situations in which the juvenile requests detention).

147. *See* Note, *Bail In The United States: A System in Need of Reform*, 20 HASTINGS L.Q. 380 (1968). Several states provide that failure to appear at court when required, without reasonable cause, will subject the juvenile to contempt of court. *E.g.*, IDAHO CODE § 16-1810 (Supp. 1977).

to deny juveniles accused of delinquency a right to bail under the eighth and fourteenth amendments. In the absence of this due process right of preadjudicatory release, detention becomes oppressive and contrary to the best interests of the juvenile. With the inclusion of such a right, the juvenile is protected from preadjudicatory punishment, prejudice, and insufficient trial preparation; and the community is protected under the traditional due process bail mechanism whereby certain conditions attach to the right of release.

However, this conditional right of release must adapt to the singular state of the juvenile and the unique functioning of the juvenile court. It is at this level that the right guaranteed by the due process clause must be molded by the peculiar responsibilities of the juvenile court. Therefore, in preadjudicatory delinquency proceedings, fundamental fairness requires that any conditions placed on a juvenile's right to release be tailored to the limited purposes of providing immediate care to the juvenile when necessary or ensuring the juvenile's presence at the adjudicatory hearing. And the determination of the necessity of placing conditions upon release must be based on present problems rather than predictions of future ones.

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