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JUVENILE DETENTION HEARINGS: A PROPOSED MODEL PROVISION TO LIMIT DISCRETION DURING THE PREADJUDICATORY STAGE

I. Introduction

The current juvenile court system evolved from the efforts of reformers who sought to improve the treatment of minors who had committed or who were likely to commit offenses. Reformers attempted to make procedures within the system flexible and informal without the technicalities they concluded were present in the criminal law system. To advance these goals, broad discretionary power was conferred upon decision-makers working within the system. This broad discretionary power, still reflected in current juvenile codes, constitutes a flaw in the juvenile court system because it creates the risk that decisions will be arbitrary and will lack well-defined bases.

1. Statutes identifying those individuals who fall within the jurisdiction of state juvenile court systems employ the terms "juvenile," "minor" and "child." See, e.g., Me. Rev. Stat. Ann. tit. 15, § 3101(2)(A) (1980) (exclusive jurisdiction conferred upon juvenile court when juvenile is alleged to have committed juvenile crime); Nev. Rev. Stat. § 62.040(1)(c) (1983) (juvenile court has exclusive jurisdiction over proceedings pertaining to child who lives in or is found within county and who has acted in delinquent manner); N.H. Rev. Stat. Ann. § 169-B:6(I) (1981) (anyone may file written petition alleging that minor has behaved in delinquent manner). This Note uses these terms interchangeably.


3. See In re Gault, 387 U.S. 1, 15 (1967). For a comparison of the treatment of juveniles processed through the juvenile court system and adults processed through the adult criminal court system, see infra note 29.

4. See Hasenfeld & Sarri, The Juvenile Court Reexamined in Brought to Justice? Juveniles, The Courts, and The Law 207, 214 (R. Sarri & Y. Hasenfeld eds. 1976) (pursuant to doctrine of parens patriae, wide discretionary power was conferred upon juvenile court to enable it to deal with variety of juvenile problems) [hereinafter cited as Hasenfeld, The Juvenile Court Reexamined]. For a description of the doctrine of parens patriae, see infra note 21 and accompanying text.

5. See Law and Tactics, supra note 2, at 8.

6. See id. at 18; Inst. of Judicial Admin.—Am. Bar Ass'n Joint Comm'n on Juvenile Justice Standards [hereinafter referred to as IJA-ABA Joint Commission], Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition 1-4 (1976) [hereinafter cited as Interim Status]; Hasenfeld, The Juvenile Court Reexamined, supra note 4, at 215.
A critical stage of decision-making in the juvenile court system begins when a police officer encounters a juvenile. The officer has a number of options available to him: he may (1) question the juvenile, (2) search the juvenile, (3) send or return the juvenile home, or (4) take the juvenile into custody to question him further or to hold him pending an investigation. If the police officer decides to take the child into custody, another and equally important determination in the decision-making process must be made. This second decision, rendered by a probation officer or intake worker, reviews the necessity for the retention of custody over the child. If the child is detained, another determination regarding his continued custody pending future court proceedings must be made. This decision must be reviewed judicially and an independent determination rendered by the court before the detention of the child is continued. Procedures that place few limitations upon decision-makers during this stage of the juvenile court process increase the risk that the juvenile will be unnecessarily detained, to the detriment of both the youth and the community.


8. Rights of Juveniles, supra note 7, at 3-12 See also Nat'l Advisory Comm. on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention, Report of the Task Force on Juvenile Justice and Delinquency Prevention 190 (1976) (every state allows law enforcement officers to take child into custody for same reasons that adult can be subjected to arrest; furthermore, states often authorize such officials to take child into custody when he has run away from home, has been neglected, or is ill or injured and needs treatment) [hereinafter cited as Task Force Report].


10. Law and Tactics, supra note 2, at 181; Corrections, supra note 7, at 30. See also Rights of Juveniles, supra note 7, at 3-35 (often juveniles are taken into custody without warrant or summons; issue to be resolved is whether child is to be placed in care of his parents, held pending investigation or confined).

11. For a definition of detention, see infra text accompanying note 30.

12. See Rights of Juveniles, supra note 7, at 3-37; Corrections, supra note 7, at 30.

13. Besharov, supra note 2, at 229. The court determination concerning the continued detention of the juvenile is a critical decision in three respects. First, a court order which dictates that a child be detained has relevance regarding the final outcome of the case. Second, the decision to detain will affect how the court categorizes the particular juvenile in the future. Third, when the juvenile is placed into a detention facility, the defense counsel's tactical and strategical choices are limited because of a desire to have the adjudicatory stage begin as soon as possible. Id.

14. See Interim Status, supra note 6, at 3-4; Task Force Report, supra note 8, at 374.
To curb unnecessary pretrial detention, organizations that have drafted juvenile court standards suggest that a detention hearing automatically be held when a child is not released within a specified period of time. Most jurisdictions in the United States authorize the holding of a detention hearing to consider the matter of the continued detention of the child pending future court proceedings.


16. In New York, the detention hearing is called the “initial appearance.” See N.Y. Fam. Ct. Act § 320.4 (McKinney Pt. 2 1983). One jurisdiction refers to the detention hearing simply as a “hearing.” See, Colo. Rev. Stat. § 19-2-102(1) (1978). For purposes of clarity, this Note uses only the term “detention hearing.” Some detention hearing schemes apply to confinement in detention or secure facilities as well as to confinement in shelter care facilities. See, e.g., Ala. Code § 12-15-60(a) (1977) (if child is not released, petition shall be filed and hearing held to determine necessity for continued detention or shelter care); Colo. Rev. Stat. § 19-2-103(2) (1978) (when child is placed in detention or shelter care facility, child’s parent or legal guardian shall be notified of right to hearing to determine need for continued detention); Ind. Code Ann. § 31-6-4.6(b) (Burns Supp. 1983) (when child is alleged to be delinquent, he shall be held in secure facility, unless detention in shelter care facility is more appropriate); Iowa Code Ann. § 232.44(1) (West Supp. 1983-1984) (hearing to be held to determine whether child should be placed in detention or shelter care facility).

17. See infra notes 75-77 and accompanying text. During juvenile proceedings, no trial is held; rather, hearings are utilized to process the juvenile through the justice system. L. Wies, A Guide to Juvenile Court 5 (1977) [hereinafter cited as Guide to Juvenile Court]. In addition to the detention hearing, a hearing on the jurisdictional facts and a hearing regarding the disposition of the case are features of the juvenile court process. Id. at 21.

The detention hearing is the first hearing to be held and should be commenced within a reasonable time after the child has been taken into custody. Id. The detention hearing serves a purpose that is different from the function of the probable cause hearing. Rights of Juveniles, supra note 7, at 3-39. The detention hearing is a forum for the determination of whether the community interest or the welfare of the juvenile warrants detention prior to an adjudicatory hearing. Id. The probable cause hearing establishes whether the particular facts sufficiently indicate that the person committed the alleged offense. Id. For a list of those states that mandate that a detention hearing be held when a child is taken into custody, see infra note 75 and accompanying text.

The hearing on the jurisdictional facts constitutes the proceeding during which the court will review evidence to decide if the minor has in fact committed the offense as alleged. Guide to Juvenile Court, supra, at 22.

Once the juvenile’s involvement in the alleged offense has been established, the hearing pertaining to the disposition of the case is held. Id. at 23. Usually, this proceeding is not separate from the hearing on the jurisdictional facts. Id. The issue to be resolved when the court disposes of the case is whether the juvenile is to be released or placed in a restrictive environment. Id. at 24.
quirements underlying court detention procedures often differ, restricting the decision-maker’s discretionary power to varying degrees.\(^8\)

This Note addresses constitutional issues relevant to pretrial detention and identifies problematic aspects in the existing juvenile justice system. It examines state and model provisions regarding the detention of youths prior to trial and concentrates on the inclusion of the detention hearing as an element of detention schemes. This Note proposes a model state provision that utilizes the detention hearing to protect the preadjudicatory rights of juveniles and to reduce the risk that detention will be unnecessarily ordered.\(^9\)

**II. Constitutional Implications Regarding Detention and the Legal Rights of Juveniles**

The underpinnings of the current juvenile justice system in the United States evolved from nineteenth century reform movements that were directed at the improvement of the status of children who engaged in or who were likely to engage in deviant behavior.\(^20\) The reformers’ efforts resulted in the establishment of the first juvenile court in 1899.\(^21\) A predominant feature of the reformed system was

\(^{18}\) For example, New Jersey’s recently enacted provision dictates that certain factors be considered during a review of the merits of detention. Factors including the type and circumstances of the alleged offense and the past attendance record of the juvenile for court proceedings must be reviewed before a decision concerning the appropriateness of detention is reached. See N.J. Stat. Ann. § 2A:4A-34(e)(1)(5) (West Supp. 1983-1984). New Jersey’s previous governing section, 2A:4-56, did not require such factors to be taken into consideration. See also Del. Code Ann., Del. Fam. Ct. Rules, R. 60(a) (1981) (during detention hearing, court shall review any evidence pertinent to possible release of child including any record of child’s previous commission of delinquent acts, child’s present home environment, presence of adult to supervise child, type of offense alleged, protection of community and well-being of child); W. Va. Code § 49-5A-2 (1980) (circumstances of particular case are taken into consideration when determining whether to detain child). The relevant Pennsylvania provision, authorizing informal detention hearings, does not require that such factors be considered. See 42 Pa. Cons. Stat. Ann., § 6325 (at informal hearing, it shall be determined whether detention or shelter care is necessary for protection of person or property of others or of child, or because child may leave court’s jurisdiction, or because no one is available to supervise and care for him to ensure he returns to court on required date).

\(^{19}\) See infra notes 159-77 and accompanying text.

\(^{20}\) Law and Tactics, supra note 2, at 5. For a description of the change effectuated by reformers, see infra note 21 and accompanying text.

\(^{21}\) Id. See also In re Gault, 387 U.S. 1, 14 (1967). Pursuant to common law in the United States, if a child reached the age of criminal responsibility, which was seven in some states and ten in others, and was alleged to have committed a criminal
the broad discretionary power granted to decision-makers responsible for the processing of juvenile cases. This grant of power enabled the juvenile court process to function in the informal and flexible manner envisioned by the reformers. This progress, however, may have been made at the expense of the juvenile. Discretionary power that is unlimited by criteria and procedures poses a risk that juveniles will be unnecessarily detained. In recent years, the Supreme Court has
responded to flaws in the juvenile court system by applying constitutional due process guarantees to juvenile court proceedings. These decisions have reduced the procedural arbitrariness that accompanied the earlier reforms. Such determinations, as well as rulings pertinent to due process and adult detention, are instructive in ascertaining whether preadjudicatory detention practices are indeed protective of a juvenile's legal rights.

Detention constitutes an involuntary deprivation of a person's liberty. The fifth and fourteenth amendments prohibit the federal government and the states from depriving a person of his "life, liberty or property without due process of law." In essence, procedural

also Besharov, supra note 2, at 6 (as juvenile court procedure developed, it was not subjected to legal restrictions; rather, unlimited judicial discretion operated in a "legal vacuum," creating procedural deprivations).

26. See Breed v. Jones, 421 U.S. 519, 528-29 (1975) (in recent decisions Supreme Court has recognized that realities of juvenile court system do not completely conform to system's ideals; thus Court has held that those constitutional guarantees applied during criminal prosecutions should also be applied during juvenile proceedings). See infra notes 45-52 and accompanying text for a discussion of rights accorded to juveniles processed through the adjudicatory stage of the juvenile court process.

27. See Rights of Juveniles, supra note 7, at 1-4. It has been suggested that the application of constitutional due process guarantees at juvenile court proceedings may severely restrict the juvenile court system, which was intended to operate in an informal and in a flexible manner. See In re Winship, 397 U.S. 358, 375-76 (1970) (Burger, J., dissenting). If juvenile court proceedings are formalized, the juvenile system may be unable to carry out its beneficent objectives. See id. at 376. Conversely, it has been urged that the juvenile process has been able to achieve its ameliorative goals in spite of the effectuation of procedural reforms. See Rights of Juveniles, supra note 7, at 1-4. To fully ensure that the system functions in the benevolent and fair manner envisioned by the reformers, the juvenile court process must provide the child with procedural protections. Id.

28. See infra notes 44-51 and accompanying text.

29. See infra notes 30-38 and accompanying text. Adults processed through the criminal court system are viewed differently than are juveniles processed through the juvenile justice system. While the adult offender is considered to be "an enemy of society," the juvenile offender is treated as a child. Whereas the adult must partake in an adversarial criminal proceeding, the child receives understanding, guidance and protection. See generally, Hoffman & McCarthy, Juvenile Detention Hearings: The Case for A Probable Cause Determination, 15 Santa Clara Law. 267, 279-80 (1975) [hereinafter cited as Hoffman & McCarthy]. See also In re Gault, 387 U.S. at 14 (difference between procedural rights granted to adults and procedural protections accorded to juveniles has existed since inception of juvenile court system).


safeguards must accompany such deprivations. Procedural due process mandates that when the government impinges upon the life, liberty or property interests of an individual, it must give such person notice and an opportunity to be heard.

Traditionally, the determination of what process must be accorded individuals before they are deprived of their liberty or property interests involves consideration of three factors: (1) the private interest to be affected by the governmental decision; (2) the possibility that the governmental action, as a result of present procedures, will effect an erroneous deprivation of the private interest and the value of alternate or additional safeguards; and (3) the governmental interest to be affected, including the administrative and fiscal consequences created through the imposition of the alternate or substitute procedural requirements. This three-factor analysis has been applied in juvenile detention proceedings.

of fifth and fourteenth amendments). See also Goss v. Lopez, 419 U.S. 565, 574 (1975) (fourteenth amendment's due process clause prohibits "arbitrary deprivations of liberty").

32. See L. Tribe, American Constitutional Law 502-03 (1978) [hereinafter cited as Tribe]. Procedural due process guarantees reduce the risk that governmental action will be erroneously or arbitrarily taken. See id. at 539.

33. Tribe, supra note 32, at 512.

34. See Mathews v. Eldridge, 424 U.S. 319, 332, 335 (1976). In Mathews, the Court, after applying its three-factor analysis, rejected the respondent Eldridge's claim that the termination of Social Security disability benefit payments could not be effected without affording the recipient an evidentiary hearing. Id. at 349. See Tribe, supra note 32, at 540 (Mathews v. Eldridge test may be viewed as general formula for ascertaining what process is due when government impinges upon a private interest).

35. In Martin v. Strasburg, 689 F.2d 365 (2d Cir. 1982), aff'd 513 F. Supp. 691 (S.D.N.Y. 1981), cert. granted sub nom., Schall v. Martin, 103 S. Ct. 1765 (1983) part of New York's provision for court-ordered detention was held to be unconstitutional. Utilizing the Mathews v. Eldridge approach, Judge Newman, in his concurrence, noted that two interests are at stake when New York's detention criterion, authorizing detention when a serious risk exists that the juvenile will commit a criminal act, is applied: the private interest of personal liberty and the government interest in the prevention of crime. Id. at 375-76 (Newman, J., concurring). Under this three-factor analysis, a significant risk of an erroneous deprivation of liberty exists when detention decisions are based upon predictions about future criminal activities. Id. at 376. This danger arises because of the uncertainty inherent in a prediction of future behavior. Restrictions that would reduce the risk of a wrongful deprivation when the challenged provision is applied are not readily available in the statutory scheme. Id. at 376-77. For example, the statute does not specify the types of crimes for which a detainee has been taken into custody that warrant continued detention. Id. at 377. Furthermore, no probable cause finding regarding the commission of the underlying crime need be made by the judge who issues the detention order. Id. In addition, before a judge issues a detention order, he is not required to consider any aspects of a juvenile's background and is not limited to specific types of crimes when he predicts the juvenile will commit an offense if released. Id. Judge
Due process also mandates that sanctions with a punitive rather than a regulatory purpose cannot be imposed upon an individual without affording him certain procedural safeguards. In the context of pretrial detention, a detainee may not be punished before he has been found guilty in compliance with due process requisites. Detention does not, however, constitute punishment merely because the particular detainee is not free to live as comfortably as he desires while he is confined.

In Gerstein v. Pugh, the Supreme Court determined that, in the context of the criminal justice system, the fourth amendment is relevant to the determination of what process is due when suspects are detained pending trial. According to the Court, the fourth amendment requires that state detention procedures afford a pretrial detainee, following his arrest, a judicial determination of probable cause prior to the imposition of a significant restraint upon his liberty.

Newman also cited the statute's failure to mandate that a particular standard of proof be met during the detention determination as a ground for his conclusion that the provision permits a judge unlimited discretion to detain a youth. See id.

36. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165-66, 186 (1963). If punishment is imposed, the features of a criminal prosecution, including “indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses,” must be accorded the person subjected to the punitive measure. Id. at 167.

The Court in Mendoza-Martinez addressed the question whether automatic forfeiture-of-citizenship portions of immigration laws constituted punishment or a regulatory restraint. Id. at 163-84. Factors deemed important by the Court in this inquiry included whether the particular sanction has been traditionally viewed as punitive and whether its “operation will promote the traditional aims of punishment—retribution and deterrence.” Id. at 168 (footnote omitted).

37. Bell v. Wolfish, 441 U.S. 520, 535 (1979). Thus, to determine whether conditions and restrictions imposed upon pretrial detainees impermissibly infringe upon the detainees' liberty interest, it must be asked whether such conditions amount to punishment. See id. In Bell, the Court concluded that not all of the conditions and restrictions to which a detainee is subjected constitute punishment “in the constitutional sense.” Id. at 537. If the government has legally detained a person, disabilities may be imposed that are designed to effectuate the detention of this person. Id.

38. Id. at 537. A loss of freedom of choice and privacy is incidental to placement in a detention facility. Id. In addition, the presumption of innocence accorded to an individual prior to trial has no significance in determining what rights must be accorded to a detainee during his confinement prior to trial. Id. at 533.


40. See id. at 125-26 n.27. The Court noted that the probable cause determination is the first stage of the criminal justice process set into motion when a person has been accused of criminal conduct. Id.

The fourth amendment establishes the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” and dictates that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S Const. amend. IV.
pend pending trial.\footnote{41} The \textit{Gerstein} decision has had significant implications regarding limitations placed upon juvenile detention practices.\footnote{42} Lower courts have utilized the decision to delineate the scope of due process protection that juvenile detainees are entitled to prior to trial.\footnote{43}

Although the juvenile system functions in a nonadversarial manner and represents the state in its role as \textit{parens patriae}, its procedures may not be implemented in an arbitrary manner.\footnote{44} When a child is alleged to be delinquent and his case proceeds to the adjudicatory stage, he must be afforded a proceeding that conforms to the requirements of the due process clause of the fourteenth amendment.\footnote{45}

\begin{itemize}
  \item \textit{See} 420 U.S. at 124-25. According to the Court, the Constitution does not dictate that adversarial safeguards be provided during the probable cause determination. \textit{Id}. at 123. In effect, whether the probable cause determination is an adversarial proceeding is a matter to be considered by the individual states. \textit{Id}.
  \item \textit{See} infra notes 96 & 98 and accompanying text.
  \item \textit{See} infra note 98 and accompanying text.
  \item \textit{See} Kent v. United States, 383 U.S. 541, 554-55 (1966). The Court in \textit{Kent} held that a waiver of jurisdiction by a juvenile court pursuant to the District of Columbia Juvenile Court Act, transferring the juvenile case to an adult court, must be accompanied by a hearing, access by the juvenile's counsel to the social records and probation reports considered by the court, and a statement of reasons underlying the decision to waive jurisdiction. \textit{Id}. at 560-62. The Court explained that the waiver hearing need not meet all of the requirements of a criminal trial or an administrative hearing, but must "measure up to the essentials of due process and fair treatment." \textit{Id}. at 562.
  \item \textit{In re} Gault, 387 U.S. 1, 30-31 (1967). In \textit{Gault}, the Court reiterated the view expressed in \textit{Kent} that delinquency proceedings must comport with "the essentials of due process and fair treatment." \textit{Id}. at 30 (quoting \textit{Kent}, 383 U.S. at 562). Justice Harlan, concurring and dissenting in part, formulated the term "fundamental fairness," which has been used by the Court in subsequent decisions as a standard by which to measure the rights of minors in the context of the juvenile court system. \textit{Id}. at 72 (Harlan, J., concurring in part, dissenting in part). See McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971) and Breed v. Jones, 421 U.S. 519, 531 (1975), for examples of the Court's application of the "fundamental fairness" standard in the context of the juvenile court system.
  \item The Court in \textit{Gault} cautioned that its findings did not necessarily apply to preadjudicatory or postjudicatory hearings. 387 U.S. at 13, 31 n.48. State courts, however, have found that the specific due process guarantees set forth in \textit{Gault} apply to juvenile detention hearings. \textit{See}, e.g., Doe v. State, 487 P.2d 47 (Alaska 1971). In \textit{Doe}, the court held that at the detention hearing, a court must adhere to due process standards because, at such a proceeding, the possibility arises that the child may lose his liberty. \textit{Id}. at 53. According to the court, due process requires that the decision to detain be founded upon "competent, sworn testimony, that the child have the right to be represented by counsel at the detention inquiry, and that the detention order state with particularity the facts supporting it." \textit{Id}. (footnotes omitted). \textit{See also} T.K. v. State of Georgia, 126 Ga. App. 269, 274, 190 S.E.2d 588, 592 (Ga. Ct. App. 1972) (under Georgia Juvenile Court Code, it was intended that procedural requirements set forth in \textit{In re Gault}, 387 U.S. 1 (1967) be applied at detention hearing).
\end{itemize}
Within the context of such a proceeding, he is entitled to the right to counsel,\textsuperscript{46} the right to notice,\textsuperscript{47} the privilege against self-incrimination,\textsuperscript{48} and the right to confront and cross-examine witnesses.\textsuperscript{49} Furthermore, the constitutional standard of proof beyond a reasonable doubt must be applied during the adjudicatory stage of juvenile proceedings.\textsuperscript{50} Notwithstanding the Supreme Court's extension of due process protections to juveniles at the adjudicatory stage,\textsuperscript{51} the Court has not found that all of the guarantees of the criminal process should be applied during juvenile court proceedings.\textsuperscript{52}

III. State and Model Statutory Provisions Relating to Juvenile Detention

Significant numbers of juveniles are detained each year in both juvenile facilities\textsuperscript{53} and in adult jails.\textsuperscript{54} The preadjudicatory system of

\textsuperscript{46} Id. at 41. If the child's parents are indigent and cannot afford an attorney, counsel shall be appointed. Id.
\textsuperscript{47} Id. at 33-34.
\textsuperscript{48} Id. at 55.
\textsuperscript{49} See id. at 57.
\textsuperscript{50} In re Winship, 397 U.S. 358, 368 (1970). According to the Court, the due process clause of the fourteenth amendment mandates that when a person is charged with a criminal act, "every fact necessary to constitute the crime with which he is charged" must be proved beyond a reasonable doubt. Id. at 364. The Court limited its holding to the adjudicatory stage of the juvenile court process. Id. at 366-67. See supra note 31 for text of the due process clause of fourteenth amendment.
\textsuperscript{51} See supra notes 45-50 and accompanying text.
\textsuperscript{52} See McKeiver v. Pennsylvania, 403 U.S. 528 (1971). In McKeiver, the Court declined to give the juvenile who reaches the adjudicatory stage of juvenile court proceedings the right to a jury trial. See id. at 545. The Court noted that states should be allowed to experiment with their juvenile court systems, imposing the requirement of a jury trial only if desirable. Id at 547.
\textsuperscript{53} In October 1977, the United States Department of Justice reported that 46,980 juveniles were held in public juvenile detention and correctional facilities in the United States during the year 1975. Law Enforcement Assistance Admin., Children in Custody: Advance Report on the Juvenile Justice Detention and Facility Census of 1975 27, Table 8 [hereinafter cited as Children in Custody]. Of the 46,980 juveniles admitted to detention, 7,011 were "held pending court disposition." Id. at 28-29, Table 9. The Advance Report defines juveniles "held pending court disposition" as juveniles who have "not had any hearing" or who only have had "a preliminary screening, detention, or similar hearing and [are] awaiting further court action." Id. at 12. Juveniles detained in private detention and correctional facilities numbered 27,290. Id. at 31, Table 11. Five hundred and twenty-nine of the youths detained in private facilities were "held pending court disposition or awaiting transfer to another jurisdiction." Id. at 33, Table 11. A juvenile who is "awaiting transfer to another jurisdiction," in the context of the Advance Report, is a detained "juvenile who allegedly has committed a crime in or run away from another jurisdiction and is being held pending return to that jurisdiction," including juveniles who have run away from other correctional facilities, but excluding adjudicated delinquents who are waiting to be placed in a correctional facility. Id. at 11.
juvenile detention in the United States has been the subject of criticism. Problems within the system include the financial burden placed upon communities that must fund detention centers, substandard living conditions in facilities where juveniles are held, and the negative impact that the detention experience has upon the juve-

In 1967, it was reported that statistical findings for the year 1965 resulted in the conclusion that two-thirds of apprehended youths were placed in detention facilities for an average stay of twelve days. President's Comm'n on Law Enforcement and Admin. of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 37 (Washington, D.C., U.S. Gov't. Printing Offc., 1967) [hereinafter cited as Delinquency Task Force Report].

54. According to statistical findings for the year 1970, approximately 7,798 juveniles are held in jail on a daily basis in the United States. See R. Sarri, Under Lock and Key: Juveniles in Jails and Detention 25, Table 2.5 (1974) [hereinafter cited as Under Lock and Key]. Figures regarding juvenile detention in jail facilities during 1970 and data pertaining to juvenile detention in detention facilities during 1971 indicate that approximately 15,000 juveniles are held in American jails and detention facilities on any given day. Id. Juvenile Justice Standards, supra note 15, at 294.

55. See Interim Status, supra note 6, at 1; Wald, Pretrial Detention for Juveniles, in Pursuing Justice for the Child 119, 119-20 (M. Rosenheim ed. 1976) [hereinafter cited as Wald]. Critics have noted that the frequency with which detention is effected is one of several problems that plagues the juvenile court process. Id. See generally L. Cohen, Prejudicatory Detention in Three Juvenile Courts: An Empirical Analysis of the Factors Related to Detention Outcomes 11 (1975) (a great deal of criticism has been directed at excessive detention practices). See also Bailey, Prejudicatory Detention in a Large Metropolitan Juvenile Court, 5 Law & Human Behavior 19, 21 (1981) (growing consensus exists that “far too many children are detained by the court, and largely for wrong reasons”); Corrections, supra note 7, at 35-36 (practice of detention is misused; judges use detention to delay action, to punish, to protect, and to find placement for youths when other facilities are not available); Under Lock and Key, supra note 54, at 65 (practice of placing youths who may be subject to juvenile court proceedings in secure custody is overused).

56. Interim Status, supra note 6, at 1. For data regarding annual expenditures of public juvenile detention and correctional facilities, see Children in Custody, supra note 53, at 36-37, Table 14; Delinquency Task Force Report, supra note 53, at 37 (juveniles held in detention facilities for average of twelve days at total cost of more than fifty-three thousand dollars).

57. Interim Status, supra note 6, at 1. For an example of substandard conditions in juvenile facilities, see Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1366 (D.R.I. 1972) (court held that while boys confined in “bug-out” rooms in juvenile training school were theoretically being confined for rehabilitative purposes, in actuality they were being subjected to punishment). See also Under Lock and Key, supra note 54, at 53-63 (discussion of lack of professionals, services and programs in detention facilities); See Sarri, Service Technologies: Diversion, Probation, and Detention in Brought to Justice? Juveniles, the Courts and the Law 151, 168-71 (R. Sarri & Y. Hasenfeld eds. 1976) (review of type and extent of services available to juveniles during detention) [hereinafter cited as Sarri, Service Technologies].
nile who is detained. Criticism has also been directed at state practices that place juveniles in adult facilities.

58. *INTERIM STATUS* supra note 6, at 1. Pretrial detention may have a detrimental effect upon the detained child both during and after the detention period. See *In re William M.*, 3 Cal. 3d 16, 30-31, 473 P.2d 737, 747-48, 89 Cal. Rptr. 33, 43-44 (1970). The following description illustrates the harmful side of temporary confinement:

“It is difficult for an adult who has not been through the experience to realize the terror that engulfs a youngster the first time he loses his liberty and has to spend the night or several days or weeks in a cold, impersonal cell or room away from home or family . . . . The experience tells the youngster that he is ‘no good’ and that society has rejected him. So he responds to society’s expectation, sees himself as a delinquent, and acts like one.”

*Id.* at 31 n.25, 473 P.2d at 747-48 n.25, 89 Cal. Rptr. at 43-44 n.25 (quoting an amicus’s description of detention experience). See also Sarri, *Service Technologies*, supra note 57, at 174 (physical environment of most detention facilities tends to increase negative effects of detention on juveniles); *LEGISLATIVE COMM. OF NEW YORK, FAM. CT. ACT LEG. RPT.* at 3438 (McKinney 1962) (detrimental effect of detention on child who is needlessly detained may prove to be permanent).

59. See *UNDER LOCK AND KEY*, supra note 54, at 1-3. Only two states prohibit such placement under any circumstance. See *CONN. GEN. STAT.* § 46b-131 (1983) (placement of minor in adult facility is prohibited “except in the case of a mother nursing her infant”); *42 PA. CONS. STAT. ANN.* § 6327(c) (Purdon 1982) (persons in charge of or employed in jail are prohibited from knowingly receiving for detention or detaining person when reason to believe exists that such person is a child). See also *id.* § 6352(b) (once child is found to be delinquent, such child is not to be committed or transferred to adult penal institution or other facility where adults, convicted of crimes, serve sentences).

Three jurisdictions make the prohibition absolute when the child being detained is an alleged delinquent or when a child is detained pending a hearing on the petition alleging delinquency. See *ANUZ. REV. STAT. ANN.* § 8-226(B) (West Supp. 1974-1983); *MD.CTS. & JUD PROC. CODE ANN.* § 3-815(d) (1980 & Supp. 1983); *RI. GEN. LAWS* § 114-1-26 (1981).


Detention often has serious ramifications for the juvenile regardless of where he is detained.\textsuperscript{60} The experience of pretrial detention raises even greater concern when it is effected without sufficient evidence to indicate the involvement of the accused in the alleged crime.\textsuperscript{61} To curtail excessive detention practices, new provisions for detention should limit the discretionary power of decision-makers.\textsuperscript{62} Existing state detention procedures and recommendations made by organizations that promulgate standards for juvenile court proceedings serve as guidelines in the formulation of these new provisions. An effort directed at the promulgation of an efficient and fair detention procedure for juveniles should review the following aspects of such provisions: the availability of a detention hearing;\textsuperscript{63} the requirement of a probable cause determination\textsuperscript{64} and, if mandated, the stage at which it is to be made;\textsuperscript{65} the narrowness of criteria for detention;\textsuperscript{66} and the inclusion of features of accountability.\textsuperscript{67}

A. The Detention Hearing

The detention of youths during the period between the time at which they are taken into custody and the time at which the merits of their cases are ultimately adjudicated is a major cause of overcrowding in detention facilities.\textsuperscript{68} The implementation of a statutory man-

\textsuperscript{60} See \textit{Under Lock and Key}, supra note 54, at 14. In People \textit{ex rel.} Guggenheim v. Mucci, the New York Supreme Court observed that pretrial custody has the same consequence for adults and juveniles: a deprivation of liberty. 77 Misc. 2d 41, 44, 352 N.Y.S.2d 561, 564 (Sup. Ct. Kings County 1974), \textit{aff'd}, 46 A.D.2d 683, 360 N.Y.S.2d 71 (2d Dep't 1974). The court reasoned that, because a loss of liberty is experienced by juveniles as well as by adults when they are detained prior to trial, juveniles cannot justifiably be deprived of the rights given to adults at a preliminary proceeding. \textit{Id.} at 44-45, 352 N.Y.S.2d at 564-65.

\textsuperscript{61} \textit{Moss v. Weaver}, 525 F.2d 1258, 1260 (5th Cir. 1976), \textit{aff'g in part, rev'g in part} 383 F. Supp. 130 (S.D. Fla. 1974).

\textsuperscript{62} See \textit{Interim Status}, supra note 6, at 3; \textit{Law and Tactics}, supra note 2, at 18.

\textsuperscript{63} See \textit{Law and Tactics}, supra note 2, at 184.

\textsuperscript{64} See id. at 188.

\textsuperscript{65} See \textit{infra} note 115 and accompanying text.

\textsuperscript{66} See \textit{Interim Status}, supra note 6, at 4.

\textsuperscript{67} See id.

\textsuperscript{68} \textit{Wald}, supra note 55, at 120. See also \textit{Delinquency Task Force Report}, supra note 53, at 36 (detention of youths seems "to be far too routinely and frequently used," both prior to court appearance and while juvenile is awaiting placement in institution after adjudication).

The IJA-ABA Joint Commission developed standards specifically aimed at the problem of excessive detention practices. These guidelines substantially limit the discretion of decision-makers during the detention process. According to the Commission, the danger of over-detention prior to trial or disposition should cause greater
date which requires that a detention hearing be held whenever a juvenile is not released within a specified period of time is one alternative to rectify excessive detention practices. 69

This practice may ensure that detention decisions made by police and intake workers at early stages in the juvenile justice process will be judicially reviewed. 70 Such a procedure will encourage these decision-makers to consider alternatives for dealing with an alleged juvenile delinquent other than automatic detention. 71 Thus, the unnecessary detention of youths would be avoided at the onset of the juvenile justice process. 72 When a jurisdiction gives detained juveniles a statutory right to a detention hearing, a juvenile who is denied a prompt detention hearing has a basis upon which to challenge his continued detention. 73

Detention hearings are authorized by statute or court rules in most jurisdictions. 74 Thirty-six states and the District of Columbia require alarm than the risk that juveniles will be erroneously released. Interim Status, supra note 6, at 3.

In 1967, the President’s Commission on Law Enforcement and Administration of Justice addressed the problem of over-detention and recommended that limitations be placed upon those individuals vested with the authority to order the detention of a youth. The Commission also suggested that alternatives be made available to police officers and workers who, when confronted with runaways or allegedly delinquent juveniles during the night, have no choice other than to detain the youths until a proper inquiry can be made. Delinquency Task Force Report, supra note 53, at 37.

69. See Delinquency Task Force Report, supra note 53, at 37; Task Force Report, supra note 8, at 401-02. But cf. Wald, supra note 55, at 121 (concrete evidence indicating that detention hearing significantly reduces over-detention is virtually non-existent).

70. See Task Force Report, supra note 8, at 401-02. It has been held that when a juvenile is statutorily entitled to a detention hearing, he must be accorded such a proceeding. See In re Colar, 9 Cal. App. 3d 613, 617, 88 Cal. Rptr. 651, 653 (Ct. App. 1970). The juvenile’s right to a jurisdictional hearing at a future date does not relieve the court of its responsibility to give the juvenile the more immediate detention hearing. Id. See also T.K. v. State, 126 Ga. App. 269, 273, 190 S.E.2d 588, 591-92 (Ga. Ct. App. 1972) (court determined detention hearing has purpose that parallels function of commitment hearing in criminal system; committing court determines if adequate grounds exist to support guilt of accused individual and “to require him to appear and answer before the court competent to try him . . . ”).

71. See Task Force Report, supra note 8, at 401-02.

72. See id. By screening decisions to detain at detention hearings, excessive detention practices are eliminated because pretrial detention becomes the exception rather than the rule. See In re William M., 3 Cal. 3d 16, 25-26, 473 P.2d 737, 743-44, 89 Cal. Rptr. 33, 39-40 (1970).

73. Law and Tactics, supra note 2, at 184.

74. See infra notes 75-78 and accompanying text. Drafters of model juvenile provisions advocate a prompt judicial review of the merits of the continued detention of juveniles. As early as 1958, the National Conference of Commissioners recommended a provision which mandated that an informal detention hearing be held within seventy-two hours of the placement of a child in detention if he has not
that a hearing be held on the matter of detention if a child is not released within a specified period.\textsuperscript{75} North Carolina requires that a hearing to determine the need for continued detention or a hearing on the merits be held within five days of the taking of the child into custody.\textsuperscript{76} Some of the jurisdictions that require such a hearing be held authorize informal proceedings.\textsuperscript{77} Other states may be categorized as jurisdictions that give a statutory right to a detention hearing. They establish this right by either implying that it may be waived or by

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\textsuperscript{77} See, e.g., N.D. Cent. Code § 27-20-17(2)(1974) (if child is not released, petition shall be filed and informal detention hearing shall be held promptly); Ohio
specifying that the juvenile is entitled to a hearing only upon request.78

The inclusion of a time period within which the detention hearing must be held reduces the number of delays that characterize the juvenile court system.79 Delays are problematic for both the juvenile and the community.80 Current provisions that require a detention hearing81 vary regarding the time period within which the hearing must be held.82 Eleven jurisdictions require that the matter of a youth’s continued detention be reviewed within seventy-two hours of the juvenile’s admittance to detention.83 Nine states mandate that the

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78. See Note, A Due Process Dilemma: Pretrial Detention in Juvenile Delinquency Proceedings, 11 J. Mar. J. Pract. & Proc. 513, 525 (1978) [hereinafter cited as Note, Due Process Dilemma]. See, e.g., Kan. Stat. Ann. § 38-815b(a), (e) (1981) (child who is detained is entitled to detention hearing unless right to such hearing is waived); Neb. Rev. Stat. § 43-205.04 (1978) (probable cause hearing may be requested after detention order is entered; however, court may at its option hold adjudicatory hearing as soon as possible); Nev. Rev Stat. § 62.170(4) (1983) (child who is taken into custody, upon application, must be given detention hearing); S.D. Codified Laws Ann. § 26-8-19.2 (Supp. 1983) (child placed in detention or shelter care has right to prompt hearing to determine if he is to be detained further).

New Hampshire neither mandates that a detention hearing be held nor establishes a right to such a procedure upon request. Instead, its relevant provision requires that the court order detention until the child is arraigned. Such an arraignment must be held within twenty-four hours of the child’s having been taken into custody. See N.H. Rev. Stat. Ann. § 169-B:13 (Supp. 1983). Similarly, Rhode Island has no provision for a detention hearing, but requires that the child be granted a probable cause hearing within ten days of the filing of the petition. See R.I. Gen. Laws § 14-1-11 (1982).

79. Interim Status, supra note 6, at 14.

80. Id. at 11. For example, the juvenile may fail to appear before the court or may engage in antisocial conduct when released. Id. To reduce delays in the pretrial stage, states that have detention hearing provisions have limited the time period between the initial custodial taking of the child and the detention hearing. Id.

81. See supra note 75 and accompanying text for a list of those jurisdictions that require a detention hearing be held within a certain period of time after a child is taken into custody.

82. See supra notes 83-87 and accompanying text for categorizations of the various provisions.

detention hearing be held within forty-eight hours of the time that the juvenile was initially taken into custody.\textsuperscript{84} Seven states and the District of Columbia either require that the detention hearing be held within twenty-four hours of the onset of detention or specify that the detention hearing must begin on the next judicial day.\textsuperscript{85} Three states with mandatory detention hearing provisions establish time limitations that begin running when a petition for delinquency is filed.\textsuperscript{86} The relevant New Jersey provision contains features that conceivably


The applicability of the alternate provisions included in New York’s Family Court Act depends upon whether the child was taken into custody before or after the filing
reduce delays more effectively than any other provision that mandates a detention hearing be held. 87

Most of the provisions setting forth time constraints exclude weekends and legal holidays from the calculation of the time period. 88 Two states expressly include weekends and holidays in the limited time frame. 89

Two types of interests should be considered by drafters of a detention hearing provision that imposes a time restriction. First, the family court prosecutor must be given an adequate period of time to organize evidence and to interview witnesses in preparation for the detention hearing. Second, the impact that the detention experience will have upon the youth must be considered, particularly because the detention of the child may be unnecessary. 90 A twenty-four hour mandate that includes holidays and weekends is burdensome to court personnel such as the prosecutor, but is preferable to longer time allowances. It protects the child from the negative effects of detention and eliminates delays in the juvenile court system, reducing both the over-detention that characterizes juvenile judicial processes and the cost to taxpayers that is incurred when youths are detained. 91 Neither the juvenile nor his parents should have to request that the child be granted a detention hearing; rather, the judicial review concerning the question of the continued detention of a child should be automatic. 92 Furthermore, this mandatory review of an initial decision to detain a youth should be conducted in the presence of the juvenile’s counsel. 93


87. First, the New Jersey provision mandates that the detention hearing be held no later than the morning after the juvenile has been admitted into detention. See N.J. Stat. Ann. § 2A:4A-38(e) (West Supp. 1983-1984). Second, the length of any period of unnecessary detention is reduced through the inclusion of weekends and holidays in the calculation of the time period allotted for the detention hearing. See id.

88. See supra notes 83-87.


91. Id. at 304. See also Interim Status, supra note 6, at 11 (delay in juvenile court system “increases the risks of nonappearance and antisocial conduct” on part of juvenile if he is released).

92. See Task Force Report, supra note 8, at 401-02.

93. Wald, supra note 55, at 121. See also Task Force Report, supra note 8, at 402 (“[t]he informed participation of counsel is essential to a full and fair hearing”; a juvenile should be accorded due process protections at detention hearing, including right to counsel).
B. The Probable Cause Standard

The unnecessary detention of juveniles can be avoided through the institution of a probable cause standard of review at the detention hearing. An inquiry that asks whether probable cause exists to believe that the juvenile has committed the act for which he has been detained adds specificity to the decisional process and reduces the number of detention orders.

In Gerstein v. Pugh, the Supreme Court concluded that a judicial determination of probable cause must precede an "extended restraint of liberty following arrest." The Court has not directly defined the role of a probable cause inquiry in the context of pretrial juvenile detention. Lower courts, however, have utilized the Gerstein holding to support the view that the fourth amendment's probable cause standard is applicable when a juvenile is taken into custody. The Eighth Circuit recently held that juveniles who are accused of com-


95. See TASK FORCE REPORT, supra note 8, at 402 (this inquiry constitutes judicial screening of sufficiency of allegations directed at particular juvenile).

96. 420 U.S. 103, 114 (1975). Although the Court concluded that the probable cause determination must be made either before or immediately after the arrest of an individual, id. at 125, it declined to identify the exact pretrial stage during which probable cause must be established. Id. at 123-24 (specific procedures surrounding probable cause determination should be formulated by the particular states).

97. LAW AND TACTICS, supra note 2, at 187.


The Fifth Circuit in Moss v. Weaver held that in view of the conclusions reached in Gerstein v. Pugh, 420 U.S. 103 (1975), Florida's pretrial detention practices failed to pass constitutional muster because of the lack of a probable cause requirement. 525 F.2d at 1260. The court rejected an attempt to distinguish Gerstein on the ground that the more flexible standard of fundamental fairness is applicable in the juvenile court system. The court reasoned that the fourth amendment's probable cause requirement must not be set aside on the ground that a juvenile "pre-detention hearing" is not a formal stage in the criminal justice system. Id. In fact, it has aspects similar to features of the criminal process. Id. The court limited its holding, in accordance with Gerstein, concluding that a probable cause determination has a low
mitting criminal acts, as well as juveniles who have been detained for committing "status offenses," must be afforded prompt probable cause hearings to the same extent as juveniles who are accused of committing criminal offenses. In Brown v. Fauntleroy, the United States Court of Appeals for the District of Columbia Circuit held that a probable cause inquiry must be made even when detention has not been ordered; the court struck down a lower court's denial of a request for a probable cause hearing in the case of a juvenile who was arrested for the unauthorized use of a vehicle, but who was not detained.

Unlike the court in Brown, the District of Columbia Court of Appeals rejected the proposition that a constitutional right to a probable cause hearing exists even when a minor is not held in detention.

The traditional parens patriae philosophy underlying the juvenile court system was also rejected by an Arizona state court as a ground for denying a juvenile a hearing. See Bell v. Superior Court, County of Pima, 117 Ariz. 551, 554, 574 P.2d 39, 42 (Ct. App. 1977). Although the court in Bell found that the fourth amendment does not dictate that adversary safeguards be provided, it concluded that before a juvenile may be detained, pending an adjudicatory hearing, it must be judicially determined that probable cause to believe that the juvenile has acted in a delinquent manner exists. Id. In reaching this conclusion, the court reasoned that a hearing is not required in every case. Id. For a description of the parens patriae doctrine, see supra note 21 and accompanying text.

A status offense is an act that is deemed to be illegal only when a minor engages in such behavior. If an adult commits a status offense, no court sanction is imposed. Rubin, supra note 30, at 34. Examples of status offenses include acts such as truancy and a child's running away from home. Such conduct does not pose an imminent threat to society. R.W.T. v. Dalton, 712 F.2d 1225, 1231 (8th Cir.), cert. denied, 104 S. Ct. 527 (1983).

See 712 F.2d at 1231. The court of appeals in Dalton concluded that a requirement which provides that probable cause hearings be granted to detained juveniles does not preclude juvenile courts from fulfilling their special function in the juvenile justice system. Id. at 1230. The right to a probable cause determination is a basic due process right, according to the court. Id. at 1230-31.

See Brown v. Fauntleroy, 442 F.2d 838 (D.C. Cir. 1971). In Brown, the court reasoned that a juvenile who is taken into custody is entitled to the protection of the fourth amendment's probable cause requirement. Id. at 841-42.

See M.A.P. v. Ryan, 285 A.2d 310, 313 (D.C. Ct. App. 1981). The court in M.A.P. concluded that, pursuant to the District of Columbia Court Reform and Criminal Procedure Act of 1970, it was no longer required to follow the decisions of the United States Court of Appeals for the District of Columbia Circuit rendered after the Act's effective date. Id. at 312. This enactment established the District of Columbia Court of Appeals as the highest court in the District's judicial system and eliminated the authority of the United States Court of Appeals for the District of Columbia Circuit to review the decisions of the former court. Id. Because of the legislators' inclusion of other precautionary features in the District of Columbia's juvenile procedural provision, which preclude the institution of meritless claims
The court determined that when a juvenile is not detained prior to trial, the failure to provide him with a probable cause hearing is not violative of the standard of fundamental fairness. Similarly, relying on the doctrine of parens patriae, a Rhode Island court held that a child who is at risk of being detained prior to trial is not entitled to a probable cause hearing.

Those courts which have determined that juvenile justice procedures must be supplemented by a judicial finding of probable cause regarding the commission of an alleged offense generally do not specifically mandate that probable cause be established at the detention hearing. To discourage the effectuation of baseless detention decisions at an early stage in the juvenile court process, such a screening should be made at the detention hearing.

Among those jurisdictions that require the holding of a detention hearing for a detained juvenile, twelve states and the District of Columbia require that probable cause regarding the alleged offense be established at the hearing in addition to showing that criteria such as a risk of harm to the community or to the juvenile apply. The provi-
Some provisions implicitly require that a nexus between an allegation of misconduct and a finding of probable cause be established. Sometimes the particular statute sets forth the probable cause requirement in terms of a mandatory provision for release. Some states do not require that a probable cause determination be made at the mandatory detention hearing, but give the detained youth the right to a probable cause finding within a specified time period.

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109. See, e.g., D.C. CODE ANN. § 16-2312(f) (1981) ("[w]hen a judge finds there is probable cause to believe the allegations in the petition are true, he shall order the child to be placed or continued in detention or shelter care . . ."); 42 PA. CONS. STAT. ANN. § 6332(a) (Purdon 1982) (if child is alleged to be delinquent, court or master will determine if probable cause exists); Wis. STAT. ANN. § 48.208(1) (West 1979 & Supp. 1983-1984) (child may be held in secure detention facility if intake worker determines that probable cause exists to believe child has committed delinquent act). Section 48.21 of the Wisconsin statute requires that a judge or court commissioner make the above finding at a hearing for continued custody.

110. For example, Iowa's provision requires a showing of probable cause that the child is within the court's jurisdiction prior to the making of a decision to detain. See IOWA CODE ANN. § 232.44(5)(a) (West Supp. 1983-1984) ("[t]he court at the detention hearing] shall find release to be proper . . . [i]f the court finds that there is not probable cause to believe that the child is a child within the jurisdiction of the court . . ."). Thus in Iowa, when a child is alleged to have committed a delinquent act, he necessarily is within the court's jurisdiction and probable cause of the commission of such act must be ascertained. See also, Or. Rev. Stat. § 419.577(3) (1981) (finding of probable cause as to court's jurisdiction is required).

111. See, e.g., Ark. STAT. ANN. § 45-421(e)(1) (Supp. 1983) The subsection provides in part: ":[t]he court shall find release to be proper under the following circumstances:

1. That there is no probable cause to believe that the juvenile is within the jurisdiction of the court.

112. See, e.g., N.J. STAT. ANN. § 2A:4A-38(i) (West Supp. 1983-1984) ("[t]here shall be a probable cause determination where a juvenile has been charged with delinquency and has been placed in detention, within 2 court days after the initial [detention] hearing"); N.Y. FAM. CT. ACT § 325.1(1) (McKinney Pt. 2 1983) (at initial appearance, if respondent denies charge contained in petition and court determines that he shall be detained for more than three days pending fact-finding hearing, court shall schedule probable cause hearing).

In United States ex rel. Martin v. Strasburg, 513 F. Supp. 691 (S.D.N.Y. 1981), aff'd, 689 F.2d 365 (2d Cir. 1982), cert. granted sub nom. Schall v. Martin, 103 S. Ct. 1765 (1983), the district court deemed New York's preventive detention provision for juveniles to be unconstitutional on the ground that the provision authorized detention without a showing of probable cause. The provision, section 739(a)(ii) of the New York Family Court Act, has been recodified as section 320.5(3)(b). The Court of Appeals for the Second Circuit affirmed the district court's holding on the
Three organizations that have promulgated juvenile justice standards have suggested that an evidentiary standard of probable cause be incorporated into pretrial detention procedures. Moreover, these organizations suggest that the probable cause determination be made at the detention hearing itself. The probable cause determination should be made when the detention hearing begins. Through such a procedure, prejudice to the juvenile can be significantly reduced because the court will review the sufficiency of evidence supporting allegations against the juvenile prior to a consideration of his past record.

C. Detention Criteria and Accountability Safeguards

Through an application of specific criteria setting forth grounds for detaining youths, unnecessary occurrences of detention can be avoided. Over-detention in the juvenile court system can also be curtailed if accountability within the system is increased. By hold-
ing the juvenile court judge accountable for a decision to detain, responsible decision-making is more likely to occur.\textsuperscript{119} The requirement that a written statement of facts and reasons supporting such a decision be made both increases accountability and reduces the possibility of discretionary abuses during the decision-making process.\textsuperscript{120}

The broad discretion originally vested in juvenile courts enabled them to further goals of the state in its role as \textit{parens patriae}.\textsuperscript{121} The unnecessary use of detention is a product of this broad power. Through the incorporation of restrictive detention criteria in detention provisions, better-informed and more accountable systems of pretrial detention can be established.\textsuperscript{122} Criteria for detention should be specific and delineate particular circumstances that warrant the detention of a child.\textsuperscript{123} Open-ended standards should be avoided because they enable a judge to use subjective judgments in reaching a decision to detain.\textsuperscript{124}

\begin{footnotes}
\item[119.] \textit{Under Lock and Key}, supra note 54, at 68.
\item[120.] See \textit{Interim Status}, supra note 6, at 14. See \textit{supra} notes 21-24 and accompanying text regarding the risk, arising from the nonadversary character of the juvenile justice system, that decision-makers will act with unlimited discretion.

Another way to promote accountability within the juvenile court system is to require that weekly reports listing juvenile detainees and the length and basis for their detention be prepared and submitted to the court for review. Such reports, without the names of the detainees, should also be publicly issued. \textit{Interim Status}, \textit{supra} note 6, at 14.

\item[121.] See \textit{supra} note 21 and accompanying text for a discussion regarding the significance of the \textit{parens patriae} doctrine.

\item[122.] \textit{Interim Status}, \textit{supra} note 6, at 5. The IJA-ABA Joint Commission noted in its introductory comments that the Commission's detention standards differ from the criteria of previous model codes which conferred broad powers of discretion upon decision-makers. \textit{Id.} at 5. See \textit{also} \textit{Wald}, \textit{supra} note 55, at 121 (detention criteria are critical features of any detention hearing).

\item[123.] See generally, \textit{Interim Status}, \textit{supra} note 6, at 5-11. Authorities arrive at virtually the same categories when they categorize those juveniles who should be detained prior to trial and agree that juveniles may be detained prior to trial when they fall within one of the following three groups: (1) juveniles "who may abscond before a court hearing"; (2) juveniles "who are almost certain to commit a dangerous offense before court disposition"; and (3) juveniles "who must be held for another jurisdiction." \textit{Under Lock and Key}, \textit{supra} note 54, at 37. The placement of a juvenile in a detention unit on the ground that the juvenile must be protected from himself has been described as "inappropriate" in light of the conditions that often exist in such facilities. A child who is "self-destructive" should not be placed in a detention facility, but rather, should be referred to a hospital or an emergency clinic. \textit{Id.}

One organization that has promulgated juvenile justice standards has advised that a court should not detain a juvenile solely on the ground that the child may commit a property offense. \textit{See} \textit{Task Force Report}, \textit{supra} note 8, at 391. For a list of those jurisdictions in the United States that include the possible commission of a property offense as a basis for detention, see \textit{infra} note 138 and accompanying text.

\item[124.] \textit{See} \textit{Wald}, \textit{supra} note 55, at 121-22.
\end{footnotes}
Statutory criteria adopted by state legislatures are rarely more specific than the standards set forth in model codes. The predominant criteria appearing in provisions for court-ordered detention include the necessity to protect the person and property of others, the need to protect the child's welfare, the risk that the child will not appear at future court proceedings, and the lack of a parent or guardian to care for the child.

125. Interim Status, supra note 6, at 7.
126. See infra notes 127-139 and accompanying text for a discussion of these types of criteria. This Note deals primarily with preventive types of criteria applied to ensure appearance at court proceedings and to protect the child and general public from bodily harm.

Recommendations pertaining to detention criteria may be found in the following standards drafted by standards-recommending organizations: Task Force Report, supra note 8, Standard 12.7, at 390; Juvenile Justice Standards, supra note 15, Standard 3.152, at 297; Interim Status, supra note 6, Standard 6.6, at 78. Standard 12.11 of the Task Force Report provides that, at the detention hearing, the prosecution must establish that, after an application of appropriate detention criteria, the need for detention of the juvenile is evident. Thus, the criteria included in Standard 12.7 are to be employed at the detention hearing. Standard 3.152 of the Juvenile Justice Standards includes a consideration of factors in the juvenile's past such as a "demonstrable recent record of violent conduct resulting in physical injury to others." The commentary supplementary to this standard explains that the term "demonstrable record" would not necessitate the submission of a certified copy of a prior adjudication order. See Juvenile Justice Standards, supra note 15, at 297. Mere allegations regarding the past behavior of the juvenile, however, should not be sufficient to support a detention decision. See id. The IJA-ABA Joint Commission does not specifically suggest in its detention hearing provision that the court follow the guidelines of Standard 6.6. See Interim Status, supra note 6, Standard 7.6, at 85. The commentary to Standard 7.7 states, however, that the court should not apply less strict guidelines than the standards that police and intake officials employ at initial stages of the juvenile court process. See id. at 88.

In its report regarding courts, the National Advisory Commission on Criminal Justice Standards and Goals has set forth some restrictive guidelines in a commentary that supplements one of its standards. See Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Courts 297-98 (1973). As a general rule, detention should be utilized only in cases when the safety of the community is at stake. Id. at 297. Specifically, the Commission recommended that the detention of youths prior to trial be effected only in the following three circumstances: (1) when the child has escaped from a penal institution or facility for delinquent children; (2) when the child is alleged to be delinquent because he committed an offense against an individual, causing such person serious medical injuries; or (3) when the child has been found to be delinquent "three or more times within the last year or at least five times within the past two years." Id. The Commission advised that one of the following three purposes should underlie detention: (1) the protection of the person or property of others or of the juvenile; (2) the supervision and care of the juvenile when no other means to supervise the child or provide care for him exists; (3) the need to ensure that the child will be present at future court proceedings. Id. at 297-98.

Narrow criteria for the detention of juveniles in delinquency cases were recommended in the 1976 Task Force Report. See Task Force Report, supra note 8, Standard 12.7, at 390. One standard sets forth the risk of a child's nonappearance at
Thirty-eight jurisdictions have codified the risk of non-appearance at subsequent court proceedings as an appropriate basis for court-ordered detention. This particular criterion appears in different forms in various provisions. An important point of variation is the degree to which judicial discretion will be limited when a decision to detain on the ground of nonappearance is made. Some jurisdictions subsequent court hearings as well as the need to protect others from the infliction of injuries by the juvenile as reasons for preadjudicatory detention. *Id.* In addition, the standard includes the protection of the juvenile from bodily harm and the prevention of witness intimidation by the juvenile as appropriate bases for detention. *Id.* The standard contains a restrictive postscript: when a juvenile is detained, he or she should be placed in a residential environment that imposes as few restraints upon the child as possible while achieving the purposes of detention. See *id.*


129. See infra note 130 and accompanying text.

130. New Mexico’s relevant provision minimizes the risk that a judge will have unfettered discretion when he implements the nonappearance criterion. It requires that a probable cause finding be made in conjunction with the use of this criterion as a basis for detention. See *N.M. Stat. Ann.* § 32-1-24(A)(3) (1981). The New York Family Court Act authorizes the making of a detention decision at the initial appearance on the ground that there is a “substantial probability that . . . [the juvenile] will not appear in court on the return date . . . .” See *N.Y. Fam. Ct. Act* § 320.5(3)(a) (McKinney Pt. 2 1983). In Minnesota, a juvenile may be detained if “there is reason to believe” that he will fail to appear for a court hearing. See *Minn. Stat. Ann.* § 260.172(1) (West 1982). Similarly, a Texas provision authorizes the detention of a
do not explicitly set forth the risk of nonappearance as a criterion for court-ordered detention, but utilize the standard in bail provisions.131

Other criteria for the detention of juveniles have engendered criticism because they lack a sufficient degree of specificity.132 Broad detention criteria are exemplified by those statutes and court rules that authorize detention when necessary to protect both the juvenile and the community.133 Thirty-three states have provisions that autho-

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juvenile when he is "likely to abscond or be removed from the jurisdiction of the court." See Tex. Fam. Code Ann. § 54.01(e) (Vernon 1975 & Supp. 1982-1983).


The President's Commission on Law Enforcement and the Administration of Justice has advised that bail should not be an alternative within the juvenile court system. See Delinquency Task Force Report, supra note 53, at 36. In its Report, the Commission also questioned the merits of using bail as a means of release in the criminal justice system. Id. Within the specific context of the juvenile system, bail should not be used to free a juvenile because it may conflict with necessary protection or care. Furthermore, the release of the child should not be made contingent upon the availability of economic resources of the child or of his family. Id.

132. See, e.g., Hoffman & McCarthy, supra note 29, at 272; Interim Status, supra note 6, at 5-7. See also Task Force Report, supra note 8, at 374 (precise, narrow criteria regarding preadjudicatory custody, detention and shelter care of children should be established by law in each jurisdiction).

133. See, e.g., S.D. Codified Laws Ann. § 26-8-19.2 (1976 & Supp. 1983) (child shall be released unless his life, safety or welfare, or protection of community warrants such detention); Vt. Stat. Ann. tit. 33, § 643(a) (1981) (court shall order detention if it determines at detention hearing that such detention would further child's interest or that public safety and protection necessitate such detention).

The detention of a youth to preclude him from continuing to act in a delinquent or harmful manner is called "preventive detention." See Task Force Report, supra note 8, at 390. See also Wald, supra note 55, at 124-25 (authority to detain juvenile when possibility exists he will commit criminal offense has constituted one basis for juvenile court action). Within the context of the federal bail system, preventive detention has been criticized on the ground that the dangerousness of a particular individual cannot be accurately predicted. See The Task Force on the Administration of Justice/The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 39-40 (1978) (reprint of 1967 ed. published by U.S. Gov't Printing Ofc., Wash., D.C.). Yet, the prediction of future criminal activities is a basic element of the judicial system. See Hruska, Preventive Detention: The Constitution and Congress, 3 Creighton L. Rev. 36, 53 (1969). Although preventive detention poses a risk that an individual will be deprived of his liberty without due process of law, this risk can be reduced if a judicial system ensures that persons who face the possibility of detention will be given a full judicial hearing and that such persons will be detained only if they seriously endanger the community. Id. at 52, 54. A distinction between detention that is instituted to prevent the evasion of prosecution and detention that is instituted to preclude the commission of a criminal offense may be made. See Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 371, 376-77 (1970) ("detention to insure
rize pretrial court-ordered detention when it is effected in the best interests of the particular juvenile or is necessary to protect him.\textsuperscript{134}

The District of Columbia preventive detention scheme for adults was upheld in United States v. Edwards, 430 A.2d 1321 (D.C. Ct. App. 1981) (en banc), cert. denied, 455 U.S. 1022 (1982). In Edwards, the appellant, a rape suspect, was detained pursuant to a District of Columbia statute authorizing detention when no other means exist to reasonably protect the safety of any other person or of the community. \textit{Id.} at 1342. The appellant challenged the statute on the ground that criminal conduct cannot be accurately predicted. \textit{Id.} The court rejected this argument, noting, "prediction of the likelihood of certain conduct necessarily involves a margin of error, but is an established component of our pretrial release system. Trial judges have . . . predicted the likelihood of recidivism for capital offenses since the Judiciary Act of 1789." \textit{Id.} at 1342. The court determined that detention ordered under the provision "seeks to curtail reasonably predictable conduct, not to punish for prior acts." \textit{Id.} at 1332. \textit{See also D.C. Code Ann. }§ 23-1322(a)(1) (1981).

For criticism directed at a preventive detention statutory scheme within the juvenile court system, see Martin v. Strasburg, 689 F.2d 365, 372-74 (2d Cir. 1982).

Detention standards that illustrate an overall lack of specificity include those provisions that do not mandate that the court adhere to specific criteria when deciding whether to detain a child. \textit{See}, e.g., \textit{Alaska Stat. }§ 47.10.140(d) (1979) (if court finds that probable cause exists to believe minor is delinquent, it shall decide whether continued detention is warranted); \textit{Mass. Ann. Laws }ch. 119, § 67 (Law. Co-op. 1975 & Supp. 1983) (child shall be detained if officer who arrests child makes written request that a child between fourteen and seventeen years of age be held in detention and probation officer or court, authorizing arrest of such child, directs that he be detained pending his court appearance); \textit{Mont. Code Ann. }§ 41-5-305(1)(d) (1983) (when custody of youth has been assumed, he is not to be detained before hearing on petition unless court orders such detention); \textit{R.I. Gen. Laws }§ 14-1-21 (1981) (if child who has been taken into custody is not released, he shall be held in detention pending hearing of case); \textit{Wyo. Stat. }§ 14-6-209(d) (1978) (determination of whether child is to be placed in detention or shelter care pending additional proceedings shall be made by court).

The vagueness that characterizes some jurisdictions' provisions is corrected to some extent through the inclusion of another type of requirement. Although these provisions do not mandate that the juvenile court premise the detention order upon specific criteria, they do require that certain factors be assessed when deciding whether to detain a youth. \textit{See Ark. Stat. Ann. }§ 45-421(f)(10) (Supp. 1983) (at detention hearing, inquiry regarding necessity for continued detention shall constitute a review of factors that are pertinent to decision to detain, such as "any facts indicating the possibility of violations of law if the juvenile is released without restriction"); \textit{Del. Code Ann., Del. Fam. Ct. Rules, }R. 60(a) (1981) (during course of detention hearing, court must consider all evidence that is relevant to decision to release the child, "including the child's prior delinquency record, if any, . . . the availability of adult supervision pending a trial, the nature of the alleged misconduct, the protection of the public interests and the general welfare of the child"). \textit{See N.J. Stat. Ann. }§§ 2A:4A-34(e)(1-5), 2A:4A-38(a) (West Supp. 1983-1984) regarding factors that must be considered by New Jersey courts when determining whether the continued detention of a child is necessary.

Nineteen states include a standard specifically directed at the protection of the community or the general public.\(^{135}\) Five states provide that a child may be detained if the court believes that he may commit a crime or an offense.\(^ {136}\)


\(^{136}\) See Ariz. Rev. Stat. ANN., JUV. CT. RULES OF PROC., R. 3(b)(2) (West 1973 & Supp. 1983-1984) (child may be detained if probable cause exists to believe he committed acts as alleged and that he is likely to commit an offense injurious to himself or others’); Conn. Gen. Stat. § 46b-131 (West Supp. 1983-1984) (child may be held in detention when there is "a strong probability that the child will commit or attempt to commit other offenses . . ."); Ky. Rev. Stat. ANN. § 208.192(4)(c) (Bobbs-Merrill 1982) (issue to be considered at detention hearing is possibility that child will commit offense if not held in detention); La. Stat. ANN., Code Juv. Proc. art. 40(1) (West Spec. Pamphlet 1984) (court may order that child remain in custody prior to adjudication if serious risk exists, based upon child’s previous conduct, that release will result in child’s committing an offense); N.Y. Fam. Ct. ACT § 320.5(3)(b) (McKinney Pt. 2 1983) (court shall not order detention of respondent “unless . . . (b) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime”).
Some jurisdictions have detention schemes that include the restrictive types of detention criteria that the drafters of recommended provisions advocate. Examples of specific criteria include standards that authorize pretrial detention when it is necessary to protect the person or property of others or of the juvenile. Criteria that permit detention to protect the juvenile or others from bodily harm are particularly restrictive.

137. For example, in Oregon, court-ordered detention is proper "if probable cause exists to believe the child has committed an act involving serious physical injury to another person, the use of forcible compulsion, the use or threatened immediate use of a deadly or dangerous weapon or arson in the first degree." Or. Rev. Stat. § 419.577(6)(b) (1981). According to Wisconsin law, a judge or juvenile court commissioner who conducts a hearing on the matter of continued detention may detain a child in a secure facility if "[p]robable cause exists to believe that the child has committed a delinquent act and either presents a substantial risk of physical harm to another person or a substantial risk of running away as evidenced by a previous act or attempt so as to be unavailable for a court hearing...." Wis. Stat. Ann. §§ 48.208(1), 48.21(1)(a) (West 1979 & Supp. 1983-1984). For examples of the criteria suggested by standards-recommending organizations, see supra note 126 and accompanying text.


139. See Task Force Report, supra note 8, at 374 (detention enacted to protect public should be used only when release of youth will pose threat of bodily harm to others).

The implementation of accountability measures during the pretrial detention stage may reduce unnecessary detention.\textsuperscript{40} A requirement that a decision to detain be supported by facts and reasons in the court record ensures that a ground for appellate review of a detention order exists.\textsuperscript{141} Three organizations that have recommended standards for juvenile proceedings suggest that a written record supportive of a decision to detain a youth always be made.\textsuperscript{142} Twelve jurisdictions

ordered following arraignment when prosecution establishes by clear and convincing evidence that it is necessary to protect person or property of other individuals "from the probability of serious bodily or other harm"); N.J. STAT. ANN. § 2A:4A-34(c)(2) (West Supp. 1983-1984) (juvenile may be placed or continued in detention when physical safety of community would be at risk if juvenile were not detained and "juvenile is charged with an offense, which if committed by an adult . . . would constitute a crime . . . or . . . a high misdemeanor . . ."); id. § 2A:4A-38(a) (criteria of latter section to be applied by court at detention hearing); OR. REV. STAT. § 419.577(5)(c) (1981) ("prior to an adjudication of the merits, the court may order that the child be held or placed in detention . . . [if] the court makes a written finding that the behavior of the child immediately endangers the physical welfare of the child or of another"); TENN. CODE ANN. § 37-214(c)(7) (Supp. 1983) (to hold child in secure facility or secure portion of facility, there must be "no less restrictive alternative that will reduce the risk . . . of serious physical harm to the child or to others . . ."). Alaska merely requires that the court "inform" the juvenile of the reasons that support its probable cause finding as well as the reasons supportive of the detention decision.\textsuperscript{140} See INTERIM STATUS, supra note 4, at 14. A federal district court has held that to comport with due process, a decision to detain a youth must be supported by the factual record of the court.\textsuperscript{141} See Baldwin v. Lewis, 300 F. Supp. 1220 (E.D. Wis. 1969), rev'd on other grounds, 442 F.2d 29 (7th Cir. 1971). The court in Baldwin found that the failure of both the state children's court and circuit court to establish in the record reasons supporting detention constituted one ground for the conclusion that the due process clause of the fourteenth amendment had been violated.\textsuperscript{Id. at 1232. See also Morris v. D'Amario, 416 A.2d 137, 141 (R.I. Sup. Ct. 1980) (in context of pre-hearing placement procedure, minimum due process safeguards should be accorded to juvenile; if court decides detention is necessary, written facts and reasons must support its determination).}

See INTERIM STATUS, supra note 4, at 14. A federal district court has held that to comport with due process, a decision to detain a youth must be supported by the factual record of the court. See Baldwin v. Lewis, 300 F. Supp. 1220 (E.D. Wis. 1969), rev'd on other grounds, 442 F.2d 29 (7th Cir. 1971). The court in Baldwin found that the failure of both the state children's court and circuit court to establish in the record reasons supporting detention constituted one ground for the conclusion that the due process clause of the fourteenth amendment had been violated.\textsuperscript{Id. at 1232. See also Morris v. D'Amario, 416 A.2d 137, 141 (R.I. Sup. Ct. 1980) (in context of pre-hearing placement procedure, minimum due process safeguards should be accorded to juvenile; if court decides detention is necessary, written facts and reasons must support its determination).}

See TASK FORCE REPORT, supra note 8, at 402. See also INTERIM STATUS, supra note 6, at 60, commentary (requirement that statement of reasons be made when pretrial liberty is denied ensures that officials will remain accountable for such decisions). One commentator has warned that the effectiveness of this safeguard is limited. He reasons that because detention decisions are not often subjected to appellate review, when an appellate court does consider the detention judge's order, it will rely heavily on his determination. The appellate court will defer to the latter decision-maker's ability to assess the existence of danger and, unless the lower court judge has blatantly abused his discretion, the decision will be upheld. Note, Preventive Detention Before Trial, 79 HARV. L. REV. 1489, 1507 (1966).

See TASK FORCE REPORT, supra note 8, Standard 12.11, at 401 (written record of facts and reasons should be required to support court order continuing detention of juvenile); INTERIM STATUS, supra note 6, Standard 7.7(D), at 87 ("[a] written statement of the findings of facts and reasons" should constitute part of judicial order to detain); JUVENILE JUSTICE STANDARDS, supra note 15, Standard 3.155, at 303 (family court judge who orders continued detention of juvenile "should explain, on the
expressly require that an order for detention be supported by facts or reasons. The most stringent provisions require a showing of both facts and reasons to support a decision to detain. Some provisions require the judge to set forth his reasons for issuing the detention order. Others expressly mandate that the reasons and/or facts underlying his decision be in writing. By requiring a written record of the facts and reasons that precipitated a decision to detain, a jurisdiction lays the groundwork for responsible decision-making during the pretrial juvenile detention stage.

IV. Proposal for Court-Ordered Detention

When a juvenile is taken into custody for committing an offense, a detention hearing will, in theory, significantly protect his liberty interest. The detention hearing gives the juvenile an opportunity to have the need for his continued detention judicially reviewed. The


144. See, e.g., N.J. STAT. ANN. § 2A:4A-38(g) (West Supp. 1983-1984) (when court determines that detention is necessary, "the court order continuing the juvenile's detention shall be supported by reasons and findings of fact on the record"); N.Y. FAM. CT. ACT § 320.5(3) (McKinney Pt. 2 1983) (court shall not order that respondent be detained "unless it finds and states the facts and reasons for so finding...").


147. See LAW AND TACTICS, supra note 2, at 185 (due process is violated if pretrial detention is effected without hearing). See generally JUVENILE JUSTICE STANDARDS, supra note 15, commentary to Standard 3.155, at 303; BESHAROV, supra note 2, at 229-30.

148. See LAW AND TACTICS, supra note 2, at 184. See supra note 17 and accompanying text for a description of the detention hearing.

The importance of an independent judicial inquiry when a liberty interest is at stake is well-documented. See, e.g., Giordenello v. United States, 357 U.S. 480, 486 (1958) (magistrate must determine whether facts relied on by complaining officer support finding of probable cause; "[h]e should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime"); Johnson v. United States, 333 U.S. 10, 14 (1948) (fourth amendment requires that inferences drawn from evidence "be drawn by a neutral and detached
number of jurisdictions that authorize the holding of a detention hearing when a juvenile is detained for a specified period has increased during the past two decades.149 Notwithstanding the value of this type of proceeding to the juvenile and to the community, many states do not mandate that it be held.150

The scope of any detention hearing's protection of the due process rights of a juvenile rests on the inclusion or exclusion of certain features in the detention hearing scheme. Factors indicative of the degree of protection afforded by a particular detention hearing provision include whether the right to a detention hearing is absolute151 and the time period within which it is to be held.152 The prejudicial effect created by a review of a juvenile's prior record, whether it pertains to past nonappearances at court proceedings or to previous offenses, is reduced by a probable cause determination at the onset of the detention hearing.153

The application of restrictive detention criteria at the detention hearing ensures that the detention decision will not be entirely subjective, but rather will represent an independent and objective determination.154 An automatic assessment of factors regarding the background and previous conduct of the juvenile at the detention hearing reduces the risk that a juvenile will be unnecessarily detained.155 In addition, a requirement that court-ordered detention be supported by

magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime”). See also Ferster, Snethen & Courtless, Juvenile Detention: Protection, Prevention or Punishment?, 38 FORDHAM L. REV. 161, 180 (1969) [hereinafter cited as Ferster] (most commentators believe detention practices can be effectively regulated only if judicial review of initial detention decision is mandatory).

149. See supra note 75 and accompanying text (thirty-seven jurisdictions presently require that detention hearing be held if child is not released within certain period of time after having been taken into custody). The increase is apparent if the conclusions of this Note are compared with earlier findings pertaining to the number of jurisdictions that mandate a detention hearing be held. See Ferster, supra note 148, at 180 n.140 (article published in 1969 reported that twelve jurisdictions require detention hearing be held); Hoffman & McCarthy, supra note 29, at 273 n.44 (article published in 1975 reported that twenty-four jurisdictions require detention hearing of some sort); Note, Due Process Dilemma, supra note 78, at 525-26 nn.42-44 (article published in 1978 reported that twenty-six jurisdictions mandate by statute that detained juvenile be given detention hearing).

150. See supra note 75 and accompanying text.
151. See supra note 70 and accompanying text.
152. See supra notes 79-85 and accompanying text.
153. See supra note 115 and accompanying text.
154. See supra notes 122-24 and accompanying text.
155. See supra note 133 and accompanying text for examples of jurisdictions that require such a review.
facts and reasons stated in the court record provides a basis for the review of the decision to detain and it ensures that a specific person remains responsible for a particular detention order. A periodic review of court detention practices constitutes an additional way to promote integrity within the judicial process.

The placement of a juvenile in an adult facility magnifies the ramifications effected by the detention experience, regardless of the maintenance of separate quarters for adults and minors. A provision that absolutely prohibits such placement shields the juvenile from the possibility that he will be exposed to unnecessary and destructive experiences while being detained.

**MODEL STATE PROVISION FOR COURT-ORDERED DETENTION OF JUVENILES ALLEGED TO BE DELINQUENT**

The underlying objective of the following proposal is the reduction of the number of unwarranted orders for the continued detention of juveniles prior to trial. Such a reduction would serve the interests of both the community that funds detention programs and the juvenile who faces the possibility of detention. The mechanism used to achieve this end is the detention hearing.

**A. Definitions**

1. “Juvenile” refers to a person who is over seven and less than sixteen years of age.
2. “Delinquent” refers to a juvenile who has committed an act which would constitute a criminal offense if committed by an adult.
3. “Detention” for the purposes of this provision refers to the placement of a juvenile alleged to be delinquent in a secure facility as opposed to a nonsecure or shelter care unit.

156. See *supra* note 140 and accompanying text.
158. See *supra* notes 58-60 and accompanying text.
159. This proposal incorporates procedures included in current state detention schemes and suggestions advanced by individual authorities in the area of juvenile justice as well as by organizations responsible for the promulgation of model provisions for juvenile court procedures.
161. A nonsecure facility theoretically is a detention facility that, as evidenced by its design and nature, is intended to enable the accused juvenile to partake of community life outside of the facility. The underlying purpose of such a facility is to
4. A "secure facility" is a unit that prevents the juvenile from leaving the premises of the facility as a result of physical restraints stemming from the structure of the facility as well as from the implementation of regulatory procedures.\textsuperscript{162}

B. The Detention Hearing

1. Once a juvenile has been taken into custody pursuant to an order or warrant issued by a court or pursuant to the laws of arrest, he or she shall be given a detention hearing before the juvenile court to determine if his or her continued detention is necessary. Such a hearing is mandatory unless the juvenile is released within twenty-four hours of his initial detention, including Saturdays, Sundays and legal holidays.\textsuperscript{163} This right to a detention hearing may not be waived unless a waiver statement is signed by the juvenile and his or her counsel.\textsuperscript{164}

2. A juvenile shall be informed of his or her right to have counsel present at the detention hearing. If the juvenile is not represented by counsel, the court shall appoint an attorney as his or her legal representative.\textsuperscript{165}

C. The Probable Cause Requirement

1. At the detention hearing, the court must determine that probable cause to believe that the alleged offense was committed exists and that the juvenile alleged to be delinquent committed the offense before detention is justified.\textsuperscript{166}

2. If probable cause has been established, the court shall review the evidence in the case, including factors set forth in subsection "E."

\textsuperscript{162} Interim Status, supra note 6, Standard 2.11, at 46. Temporary boarding homes constitute nonsecure facilities. Id.

\textsuperscript{163} See supra notes 85 & 87 and accompanying text.

\textsuperscript{164} See Interim Status, supra note 6, Standard 7.6, at 85; Task Force Report, supra note 8, Standard 12.11, at 401-02, commentary (neither juvenile nor his family should be required to request detention hearing).

\textsuperscript{165} Model provisions require that the juvenile's counsel be present at the detention hearing. See Uniform Juvenile Court Act, supra note 74, § 17(b) at 259; Juvenile Justice Standards, supra note 15, Standard 3.155, at 303; Interim Status, supra note 6, Standard 7.6(c), at 85; Task Force Report, supra note 8, Standard 12.11, at 402.

\textsuperscript{166} See supra note 107 and accompanying text regarding the importance of making a probable cause inquiry at the detention hearing.
to determine if the continued detention of the juvenile is warranted pursuant to the criteria in subsection "D."  

D. Criteria for Detention

Note: The criteria of this section may be applied to detain an alleged juvenile delinquent only after relevant factors in subsection "E" have been considered.

A juvenile may not be detained after a detention hearing has been held unless, during the detention hearing, the court finds:

1. if the juvenile is released, it is substantially probable that he or she will fail to appear at his or her next court appearance, thwarting the prosecutorial role of the government, or
2. a substantial probability exists that the juvenile will inflict bodily harm upon others if not detained.

E. Factors to Be Considered Prior to the Issuance of a Detention Order

The court shall consider the following factors prior to its issuance of a detention order:

1. whether the juvenile has a demonstrable record of a failure to appear at court proceedings;
2. whether the juvenile has a demonstrable record of committing acts that resulted in bodily injury to others;
3. whether the juvenile previously has been adjudicated as delinquent;
4. whether the juvenile is alleged to have committed a violent offense in the present case.

167. See supra note 115 and accompanying text for the significance of establishing probable cause prior to a consideration of factors in the juvenile's background.
169. See TASK FORCE REPORT, supra note 8, at 391 (possibility that juvenile will commit property offense if not detained should not serve as basis for court-ordered detention).
171. See id., Standard 3.152(d)(iii), at 297.
173. See id. § 2A:4A-34(e)(1); Juvenile Justice Standards, supra note 15, Standard 3.152(d), at 297.
F. Monitoring Measures

1. Any court order dictating that a juvenile be detained must be supported by a written record of reasons and findings of fact.\textsuperscript{174}

2. Detention practices, as well as other activities of the juvenile court, are subject to a bi-monthly review, implemented by appropriate state regulatory agencies.\textsuperscript{175}

G. The Site of Detention

1. When a juvenile alleged to be delinquent is to be detained in a secure facility, such facility must be:
   a. operated by a licensed child welfare agency or must be a unit that has received court approval, or
   b. operated under the supervision of the juvenile court or other public authority or private agency and approved by the State's public welfare department.\textsuperscript{176}

2. Detention in a jail or other adult facility is absolutely prohibited under any circumstances.\textsuperscript{177}

V. Conclusion

The detention hearing constitutes a means to prevent the groundless detention of juveniles. Its effectiveness is minimal, however, unless restrictions are placed upon the discretionary power of the decision-maker who exercises his authority during the hearing. A requirement that a detention hearing automatically be held when a juvenile taken into custody is not released within twenty-four hours discourages discretionary abuses at the initiation of the juvenile court process. To prevent an arbitrary exercise of discretionary authority at the detention hearing itself, the detention hearing scheme must include a probable cause inquiry, an application of narrow criteria and a consideration of factors pertaining to the individual juvenile. Any decision to detain should be supported by facts and reasons stated explicitly in the court record.

To circumscribe the authority of juvenile court decision-makers during the detention hearing and to prevent an unnecessary continua-
tion of detention, the hearing must conform to specific procedures each time it is held. Although the juvenile court system will lose some of its flexibility and informality to accommodate these requirements, this loss is necessary in view of the high cost of unwarranted detention decisions to both the juvenile and the community.

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