# The Denial of a State Constitutional Right to Bail in Juvenile Proceedings: The Need for Reassessment in Washington State

*Kathleen A. Baldi**

## I. INTRODUCTION

Article I, section 20 of the Washington Constitution states that "[a]ll persons charged with crimes shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great."[1] Despite seemingly unequivocal language that this constitutional provision is applicable to "all persons," the Washington Supreme Court, in *Estes v. Hopp*,[2] declared that juveniles do not have a constitutional right to bail.[3] The *Estes* court engaged in little constitutional analysis, but instead, reasoned that juvenile proceedings are civil in nature and that article 1, section 20 applies only in criminal proceedings.[4]

Central to the *Estes* court's determination was the *parens patriae* system of juvenile justice[5] that existed in Washington State at the time of the decision. The *parens patriae* system emphasizes rehabilitation rather than punishment and gives judges broad discretion to act in the best interests of the child. Under this system, juveniles are protected and sheltered by the state, which theoretically molds them into responsible citizens.[6] When the *Estes* decision was handed down in

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* B.A. 1991, University of Washington; J.D. 1996, Seattle University School of Law. Research & Technical Editor, Seattle University Law Review. The author would like to thank The Honorable Justice Charles W. Johnson for his helpful comments and Gretchen Graham, Audrey Smith, Joel Kauth, and the other members of the Law Review for their help in preparing this Comment for publication. The author would also like to thank her husband, Ty Baldi, for his constant support and encouragement.

1. WASH. CONST. art. I, § 20.

2. 73 Wash. 2d 263, 438 P.2d 205 (1968).

3. *Id.* at 269, 438 P.2d at 208; *see also* State *ex rel.* Gray v. Webster, 122 Wash. 526, 530, 211 P. 274, 275 (1922).

4. 73 Wash. 2d at 269, 438 P.2d at 208.

5. *See infra* notes 16-19 and accompanying text.

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

1968, Washington, like every other state, had clearly embraced the *parens patriae* concept of juvenile justice.

However, in the twenty-seven years since *Estes*, Washington's juvenile justice system has undergone a radical transformation. In 1977, Washington adopted a system based primarily on punishment and accountability in contrast to the prior system based on rehabilitation.[7] This Comment argues that because Washington has essentially rejected the *parens patriae* approach to juvenile justice in favor of a punitive approach, juveniles should be given the same right to bail as their adult counterparts.

Section II of this Comment provides an overview of the historical development of juvenile justice in the United States. Section III examines the Washington Supreme Court's interpretation of article I, section 20 in *Estes v. Hopp* and examines cases from other states in which juveniles' constitutional right to bail has been assessed. This examination is followed in Section IV by a discussion of the transformation that has occurred in Washington since the *Estes* decision. Finally, Section V explains why, as Washington's juvenile justice system shifts its focus from rehabilitation toward punishment, juveniles should have the same right to bail as adult criminal defendants.

## II. THE HISTORY OF JUVENILE JUSTICE

### A. *The Development of the Juvenile Courts and the Institutionalization of the* Parens Patriae *Approach to Juvenile Justice*

In criminal proceedings at common law, no distinction was made between an adult and a child who had reached the age of criminal responsibility.[8] Punishment, not rehabilitation, was the underlying philosophy, as juveniles were often given harsh sentences and confined in adult institutions.[9] However, beginning in 1787, religious groups and private welfare organizations attempted to reform the appalling conditions faced by both juvenile and adult prisoners. These groups began to provide social services for the growing number of unsuper-

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7. *See infra* section IV.A.

8. IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES: RETHINKING THE BEST INTERESTS OF THE CHILD 150 (1989); *see, e.g.*, DEAN J. CHAMPION, THE JUVENILE JUSTICE SYSTEM: DELINQUENCY, PROCESSING, AND THE LAW 7-10 (1992). At common law, only children seven years of age or older were subject to the criminal courts because those under the age of seven were deemed incapable of possessing criminal intent. *Id.* at 15-17. Under most statutory schemes today, the juvenile courts have jurisdiction over all children under the age of eighteen. *Id.* In Washington, a juvenile is defined as "any individual who is under the chronological age of eighteen years . . . ." WASH. REV. CODE § 13.40.020(14) (1994).

9. SCHWARTZ, *supra* note 8, at 150.

vised and troubled youth flooding into industrialized, urban areas.[10] As the influence of these private welfare organizations grew, states began to regulate and control the privately funded programs and facilities, thereby bringing an increasing number of delinquent and dependent children under state influence and control.[11]

By the late nineteenth century, the social reform movement focused on the complete removal of children from adult jails and lock-ups.[12] Guiding these reform efforts was the belief that children are not responsible for their actions, and therefore, they should not receive the punitive treatment accorded adult prisoners.[13] Because the reformers believed that children were redeemable, they sought to insulate children from the brutalities of adult prison life and stem the tide of future criminal activity.[14]

These early reform efforts led to the creation of the first juvenile court in 1899[15] and the institutionalization of the *parens patriae*[16] doctrine as a justification for state control over delinquent youths.[17] The *parens patriae* approach to juvenile justice focuses on the welfare of the child by creating a benevolent and protective relationship between the state and the delinquent child.[18] *Parens patriae* juvenile courts reject the formal, adversarial processes of adult criminal proceedings in favor of informal and flexible processes in which judges have broad discretion to act in the "best interests of the child."[19] Rehabilitation, not punishment, is the primary goal. By 1917, all but three states had instituted a separate juvenile court.[20] Today, the separate system of juvenile justice is firmly entrenched in all fifty states and the District of Columbia.[21]

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10. CHAMPION, *supra* note 8, at 10-11.

11. *Id.* at 11.

12. ARTHUR D. LITTLE, INC., U.S. DEP'T OF JUSTICE, REMOVAL OF JUVENILES FROM ADULT JAILS AND LOCK-UPS: A REVIEW OF STATE APPROACHES AND POLICY IMPLICATIONS 3-4 (1981).

13. *Id.* at 4.

14. *Id.*

15. CHAMPION, *supra* note 8, at 13, 250.

16. *Parens patriae* is a concept derived from the twelfth century English monarchy that literally means "father of the country." *Id.* at 18. At English common law, a child over the age of seven who violated the law became accountable to the King. *Id.* On behalf of the King, the chancellor adjudicated juvenile matters and ultimately became responsible for safeguarding the welfare of children who came within the jurisdiction of the court. *Id.*

17. *See* SCHWARTZ, *supra* note 8, at 150-51.

18. CHAMPION, *supra* note 8, at 307.

19. SCHWARTZ, *supra* note 8, at 150.

20. *Id.*

21. Janet E. Ainsworth, *Re-imagining Childhood and Reconstructuring the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1083 (1991).

### *B. The Second Call for Juvenile Justice Reform: The Dawning of the Due Process Model*

Despite the benevolent philosophy underlying the creation of separate juvenile courts, by the 1960s many began to question whether the system was truly operating in the best interests of the child.[22] Parents of juvenile offenders and members of the public became increasingly concerned about the broad discretion given to judges under the *parens patriae* system.[23] The absence of consistent guidelines inherent in the case-by-case approach to juvenile adjudication resulted in "frequent and obvious abuses of judicial discretion."[24] In addition, because juvenile proceedings were deemed civil, not criminal, in nature, children were denied certain basic constitutional protections enjoyed by adult criminal defendants.[25]

In 1960, the Director of Detention Services for the National Probation and Parole Association noted that after sixty years of reform, "children are still held in jails or jail-like facilities."[26] According to the director, the traditional purpose of detention was to warehouse children in secure custody until the court had time to investigate and act.[27] Most of the jails and police lock-ups where children were detained failed to meet even the minimum standards required for adult institutions.[28] In 1966, the plight of the juvenile courts led the United States Supreme Court to declare that a child charged with a crime may be receiving the "worst of both worlds: . . . he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[29]

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22. *See* CHAMPION, *supra* note 8, at 306.

23. *Id.*

24. *Id.*; *see, e.g.*, *In re* Gault, 387 U.S. 1, 31-57 (1967). In *Gault*, a 15-year-old boy was sentenced to six years confinement in a state industrial school after a juvenile court judge concluded that he had made an obscene phone call. Although Gault's parents were notified that a delinquency hearing would be held, neither Gault nor his parents were advised of the specific charges against him or told that the boy could be represented by counsel. Gault was held in a detention facility for three to four days without explanation, despite the fact that both of Gault's parents were active participants in the court proceedings. At the hearing, Gault did not have an attorney and was found guilty based upon the testimony of his accuser, who was not present. In addition, the statements that Gault made during a police interrogation were used against him. *Id.* at 7-10.

25. Kent v. United States, 383 U.S. 541, 555 (1966).

26. SHERWOOD NORMAN, DETENTION PRACTICE: SIGNIFICANT DEVELOPMENTS IN THE DETENTION OF CHILDREN AND YOUTH 1 (1960).

27. *Id.*

28. *Id.*

29. *Kent*, 383 U.S. at 556.

Prompted by these concerns, in 1967 the Supreme Court formally recognized the constitutional rights of delinquent children in the landmark case of *In re Gault*.[30] In *Gault*, the Court concluded that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[31] Thus, in judicial proceedings, due process requires that juveniles be given the right to notification of charges, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.[32] Although the *Gault* Court did not address whether juveniles were entitled to bail, the Court recognized that the *parens patriae* juvenile court system had been used as a justification for the denial of this right.[33] But, despite the Court's skepticism of the constitutional and theoretical bases for the separate juvenile system,[34] it stopped short of holding the *parens patriae* approach unconstitutional.

Some advocates feared that constitutional protections for juveniles would frustrate *parens patriae* objectives by creating a formalistic and adversarial environment.[35] However, Justice Fortas noted that "the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process."[36] Thus, after *Gault*, a new era in juvenile justice seemed to be dawning under a "due process model," characterized by more formalized processes and concern for juveniles' rights at every stage of the proceedings.[37] During the 1970s, the Court extended constitutional protections by recognizing the right to proof "beyond a reasonable doubt" in delinquency adjudications[38] and granting double jeopardy protection to juveniles.[39]

Yet, despite the Supreme Court's dissatisfaction with the flexible *parens patriae* approach, the due process model has not been fully realized. Instead, the Court has continued to base decisions on what it characterizes as the unique, informal nature of the juvenile system. For example, in *McKeiver v. Pennsylvania*,[40] the Court denied the

30. 387 U.S. 1, 31-57 (1967).
31. *Id.* at 13.
32. *Id.*
33. *Id.* at 14.
34. *Id.* at 17-31.
35. *See id.* at 21-23.
36. *Id.* at 21.
37. CHAMPION, *supra* note 8, at 183-84, 307.
38. *In re* Winship, 397 U.S. 358, 368 (1969).
39. Breed v. Jones, 421 U.S. 519, 541 (1975).
40. 403 U.S. 528 (1971).

right to jury trial in juvenile adjudications.[41] The *McKeiver* Court declined to constitutionally mandate trial by jury in juvenile adjudications, in part, because jury trials would introduce "the traditional delay, the formality, and the clamor of the adversary system" into the already defective juvenile courts.[42] The result is that, while the United States Constitution is undoubtedly applicable in juvenile proceedings, "the Constitution does not mandate [the] elimination of all differences in the treatment of juveniles."[43] Although this statement refers to the United States Constitution, the same underlying assumption that juvenile offenders are fundamentally different from adult criminal defendants permeates the state courts' justifications for denying juveniles the constitutional right to bail.

## III. THE DENIAL OF THE CONSTITUTIONAL RIGHT TO BAIL IN JUVENILE PROCEEDINGS

The constitutional right to bail in juvenile proceedings has been considered in twelve states and the District of Columbia. In all but two instances, an absolute right to bail has been denied.[44] Thus, the denial of juveniles' constitutional right to bail in Washington is not without support.

### *A. The Denial of Bail in Washington State*

The Washington Supreme Court has considered whether juveniles have a right to bail on three separate occasions. The first case, *Packenham v. Reed*,[45] was decided in 1905 prior to the 1913 enactment of Washington's Juvenile Court Law.[46] The court's subsequent decisions, *State ex rel. Gray v. Webster*[47] and *Estes v. Hopp*,[48] were decided after the enactment of the Juvenile Court Law, when Washington clearly adopted a *parens patriae* approach to juvenile justice.[49] Thus, it is not surprising that the *Packenham* court held that juveniles charged with crimes have a right to bail pending appeal, while the *Gray* and *Estes* courts rejected this right.

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41. *Id.* at 545-51.

42. *Id.* at 545, 550.

43. Schall v. Martin, 467 U.S. 253, 263 (1984). In *Schall*, the United States Supreme Court resurrected the *parens patriae* doctrine to uphold the constitutionality of preventative detention based on a prediction of future dangerousness. *Id.* at 281.

44. *See infra* notes 68, 81 and accompanying text.

45. 37 Wash. 258, 79 P. 786 (1905).

46. *See infra* text accompanying notes 125-127.

47. 122 Wash. 526, 211 P. 274 (1922).

48. 73 Wash. 2d 263, 438 P.2d 205 (1968).

49. *See infra* text accompanying notes 124-129.

In *Packenham*, a ten-year-old boy was convicted of a crime under a 1903 law and was sentenced to the state reform school until he reached the age of eighteen.[50] The superior court denied bail pending his appeal on the ground that children were not entitled to bail.[51] The supreme court reversed, holding that "we have no doubt that an infant, convicted of crime and committed to the reform school, has a right of appeal . . . and, incidentally, a right to be admitted to bail pending the appeal."[52] However, the *Packenham* decision was not based on a constitutional right to bail but on an interpretation of a criminal statute that authorized bail pending appeal.[53] To support its holding, the court stated: "So far as the courts are concerned, there can be no distinction between the constitutional right to bail before conviction and the statutory right to bail pending an appeal from a judgment of conviction."[54] The court's dicta suggests that in 1905 juveniles had a constitutional right to bail pending adjudication.

Seventeen years later, in *Gray*, a juvenile again challenged the denial of bail pending the appeal of his commitment to a state training school.[55] The juvenile relied on the *Packenham* decision, but the court rejected his claim. According to the court, bail was proper in *Packenham* because the child in that case had been charged with an offense for which there was a statutory right of appeal.[56] In contrast, the juvenile in *Gray* had been adjudged delinquent under the new Juvenile Court Law, which provided that a finding of delinquency "shall in no case be deemed a conviction of crime."[57] Because the juvenile in *Gray* was not charged with a crime, he had no right of appeal under the criminal statutes or under article I, section 22 of the Washington Constitution.[58]

Forty-five years later, the Washington Supreme Court was once again called upon to consider a juvenile's right to bail. It was in 1968,

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50. 37 Wash. at 258-59, 79 P. at 768.

51. *See id.* at 259, 79 P. at 768.

52. *Id.* at 260, 79 P. at 787.

53. The statute provided:

> In all criminal actions, except capital cases in which the proof of guilt is clear or the presumption great, upon an appeal being taken from the judgement of conviction, the court in which the judgement was rendered, or a judge thereof, must . . . determine the amount of bail to be required of the appellant.

*Id.* at 259-60, 79 P. at 786.

54. *Id.* at 260, 79 P. at 787.

55. 122 Wash. at 527, 211 P. at 274.

56. *Id.* at 528, 211 P. at 274.

57. *Id.* at 529, 211 P. at 275.

58. *Id.* at 529-30, 211 P. at 275. WASH. CONST. art. I, § 22 provides in part that "[i]n criminal prosecutions the accused shall have . . . the right to appeal in all cases."

an era now firmly entrenched in the *parens patriae* concept of juvenile justice, that the Washington Supreme Court decided *Estes v. Hopp*.[59] Although the *Gault* decision, mandating application of the Fourteenth Amendment and the Bill of Rights to juvenile defendants, was decided less than one year earlier, the Washington Supreme Court viewed *Gault* as being limited to due process.[60] Therefore, when considering a juvenile's constitutional right to bail, the court stated that "[d]enying a minor bail pending his appeal from a juvenile court order in no way denies him the 'essentials of due process and fair treatment.'"[61]

The court further rejected the argument that juveniles have a constitutional right to bail under article I, section 20 even though the article states that "*[a]ll persons* charged with crimes shall be bailable by sufficient sureties."[62] Employing the standard *parens patriae* rationale, the court concluded that releasing a juvenile on bail "would in many, if not most, cases be adverse to the minor's best interest and welfare."[63] The court also noted,

> To allow a child judged delinquent or dependent to go free on bail, pending appeal, would merely be returning him to the environment which was the cause of his problems initially! Many times, in fact, the delinquents really have nowhere to go. Most have come from environments totally adverse to their best interests. There is no guidance and nothing to do but return to their previous delinquent behavior. By placing the child in a home or training school, he receives the care and training he would not otherwise receive, and contrary to the situation in some states, juveniles in Washington are not to be detained in jail or confined with adult convicts.[64]

Ultimately, the court's decision rested, as it did in *Gray*, on its conclusion that article I, section 20 applies only to criminal proceedings.[65] Because in 1968 the Juvenile Court Law provided that

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59. 73 Wash. 2d 263, 438 P.2d 205 (1968).

60. *Id.* at 269, 438 P.2d at 208-09.

61. *Id.* at 269, 438 P.2d at 209. Although this Comment addresses the issue of bail pending adjudication and the *Estes* decision dealt specifically with bail pending an appeal, the substantive distinction was not a factor in the *Estes* analysis.

62. WASH. CONST. art. I, § 20 (emphasis added).

63. *Estes*, 73 Wash. 2d at 269, 438 P.2d at 209.

64. *Id.* at 270, 438 P.2d at 209 (quoting respondent's brief). Given the Washington Supreme Court's adoption of this language, it is interesting to note that the "child" in this case was a 16-year-old girl who was arrested while in the company of her brother and her *husband*. *Id.* at 264, 438 P.2d at 205.

65. *Id.* at 269, 438 P.2d at 208.

juvenile proceedings were not criminal in nature,[66] there existed no constitutional right to bail in juvenile proceedings in Washington.

### B. The Denial of Bail in Other States

The Washington Supreme Court was not alone in its decision to deny juveniles the constitutional right to bail. In fact, of the twelve other jurisdictions that have considered whether juveniles have an absolute, constitutional right to bail,[67] only two have recognized that right.[68]

The first and only court to recognize a *state* constitutional right to bail was the Louisiana Supreme Court in *State v. Franklin*.[69] The *Franklin* court did so under Louisiana's Constitution of 1921, which has a bail provision remarkably similar to that of Washington: "All *persons* shall be bailable by sufficient sureties, except the following: 1. Persons charged with a capital offense, where the proof is evident or the presumption great."[70] Although Louisiana's juvenile court law created a discretionary right to bail for minors under the age of seventeen,[71] the Louisiana Supreme Court stated: "It is axiomatic that the Constitution must prevail over an act of the Legislature which conflicts with it."[72] Echoing the fundamental justification for bail, that a person is innocent until proven guilty,[73] the court further stated that "[a] finding of delinquency usually demonstrates the necessity for

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66. *See id.*; *see also* WASH. REV. CODE § 13.04.240 (1974).

67. A state constitutional right to bail has been considered by the following states: California, Colorado, Connecticut, Indiana, Kansas, Kentucky, Louisiana, Maryland, New Jersey, Ohio, and Texas. *See infra* notes 69 and 81. The District of Columbia has also considered juveniles' right to bail, but it did so under the United States Constitution. *See infra* notes 75-76.

68. Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960); State v. Franklin, 12 So. 2d 211 (La. 1943).

69. 12 So. 2d 211 (La. 1943). The *Franklin* court recognized juveniles' state constitutional right to bail pending adjudication. *Id.* at 212; *see also* State v. Aaron, 390 So. 2d 208 (La. 1980); State v. Hundley, 267 So. 2d 207 (La. 1972). But in Louisiana, juveniles' right to bail pending appeal has been twice denied. *See* State v. Banks, 402 So. 2d 690, 694 (La. 1981) (holding that the 1974 constitution delegated to the legislature the power to devise special juvenile procedures pending appeal); State v. Clark, 173 So. 137, 138 (La. 1937) (denying bail pending appeal because suspensive appeals were not available to juveniles under the constitution of 1921).

70. LA. CONST. of 1921 art. I, § 12 (emphasis added).

71. *Franklin*, 12 So. 2d at 212-13.

72. *Id.* at 213.

73. *See* Donald B. Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 329 (1982) (stating that "[b]ail . . . has for centuries been the answer of the Anglo-American system of criminal justice to a vexing question: what is to be done with the accused, whose guilt has not been proven, in the 'dubious interval,' often months long, between arrest and final adjudication") (footnotes omitted).

making a change in the custody of the child, but prior to such finding, he is entitled to his constitutional right to bail."[74]

In *Trimble v. Stone*,[75] the United States District Court for the District of Columbia also held that juveniles have a constitutional right to bail pending adjudication, but the court did so under the Eighth Amendment to the United States Constitution.[76] In an opinion that anticipated the tenor of the *Gault* decision,[77] the *Trimble* court expressly rejected the criminal-civil distinction that the *Estes* court used to deny juveniles the right to bail:

> The fact that [juvenile] proceedings are to be classified as civil instead of criminal, does not, however, necessarily lead to the conclusion that constitutional safeguards do not apply. It is often dangerous to carry any proposition to its logical extreme. These proceedings have many ramifications which cannot be disposed of by denominating the proceedings as civil. Basic human rights do not depend on nomenclature.[78]

In addition, the court rejected as unrealistic the characterization that commitment of a juvenile to a state reformatory is solely for treatment and not punishment. "All incarceration consequent on an infraction of the law [whether in a reform school or a penitentiary] combines deterrence, punishment, and treatment for rehabilitation in varying degrees."[79] Thus, the punitive-rehabilitative distinction between adult and juvenile proceedings "does not bear the aspect of reality."[80]

In spite of compelling arguments articulated by the *Trimble* and *Franklin* courts, the majority of state courts have denied juveniles the right to bail under their state constitutions.[81] As in *Estes*, the decision

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74. *Franklin*, 12 So. 2d at 213.

75. 187 F. Supp. 483 (D.D.C. 1960).

76. *Id.* at 484-86; *cf. Banks*, 402 So. 2d at 694-95 (holding that fundamental fairness under the Due Process Clause, as articulated in *Gault*, mandates bail for juveniles pending adjudication). *Contra* Pauley v. Gross, 574 P.2d 234, 237 (Kan. Ct. App. 1977) ("The eighth amendment to the federal constitution confers no right to bail on anyone, either adult or juvenile. It provides only that bail shall not be excessive."); State v. Cromwell, 192 A.2d 775, 778 (Md. 1963) (holding that "the failure to provide for bail in juvenile proceedings is not a violation of the Federal Constitution").

77. The *Trimble* court anticipated *Gault* by stating that the "Constitution contains no age limits." 187 F. Supp. at 486; *see supra* text accompanying note 31.

78. 187 F. Supp. at 485.

79. *Id.* at 486.

80. *Id.*

81. *In re* Magnuson, 242 P.2d 362, 364 (Cal. Dist. Ct. App. 1952) (denying bail pending appeal); L.O.W. v. County of Arapahoe, 623 P.2d 1253, 1255 (Colo. 1981) (denying bail pending adjudication); Cinque v. Boyd, 121 A. 678, 682-86 (Conn. 1923) (denying bail pending adjudication and on appeal); *In re* Ort, 407 N.E.2d 1162, 1164 (Ind. Ct. App. 1980) (denying bail

to reject the right to bail has been based on the *parens patriae* concept of juvenile justice and the underlying notion that juvenile offenders are not charged with crimes.

For example, in *Baker v. Smith*[82] and *State ex rel. Peaks v. Allaman*,[83] the courts held that juveniles did not fit within the plain language of their states' bail provisions and thus had no constitutional right to bail. In *Baker*, the Kentucky Supreme Court found that juveniles are not "prisoners" within the meaning of Kentucky's constitutional provision governing bail.[84] The Kentucky Constitution provides, in part, that "[a]ll prisoners shall be bailable by sufficient securities."[85] The *Baker* court reasoned that the use of the word "prisoners" in the bail provision reflects the historical understanding that bail is only applicable to persons charged with crimes.[86] Bail is granted to a person charged with a crime to "honor the presumption of innocence."[87]

However, because the juvenile court is concerned with the welfare of children and not with imposing punishment for criminal actions, the court reasoned that juveniles do not have the same right to bail afforded criminal defendants.[88] Although a child's detention may have the same practical effect upon his freedom as does the confinement of an adult, the child's confinement is for his own welfare.[89] In contrast, the pre-trial confinement of an adult criminal defendant is used solely to ensure his presence at trial.[90] Thus, in the juvenile context, the state is merely exercising substituted parental control, and the state's interest in the welfare of the child outweighs any curtailment

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pending appeal); *In re* Pisello, 293 N.E.2d 228, 230-31 (Ind. Ct. App. 1973) (denying bail pending appeal); *Pauley*, 574 P.2d at 240 (denying bail pending adjudication); Baker v. Smith, 477 S.W.2d 149, 151 (Ky. 1971) (denying bail pending adjudication); *Ex parte* Newkosky, 116 A. 716, 717 (N.J. 1920) (denying bail pending adjudication); State *ex rel.* Peaks v. Allaman, 115 N.E.2d 849, 850 (Ohio Ct. App. 1952) (denying bail pending adjudication); State v. Fullmer, 62 N.E.2d 268, 269 (Ohio Ct. App. 1945) (denying bail pending appeal); Espinosa v. Price, 188 S.W.2d 576, 576 (Tex. 1945) (denying bail pending appeal).

82. 477 S.W.2d 149 (Ky. 1971).

83. 115 N.E.2d 849 (Ohio Ct. App. 1952).

84. 477 S.W.2d at 151-52.

85. KY. CONST. § 16.

86. 477 S.W.2d at 150. To support its assertion that bail only applies in a criminal context, the court indicated that bail does not extend to persons who are quarantined or to those who are confined to mental institutions. *Id.* (citations omitted).

87. *Id.* at 151.

88. *See id.* at 150-51.

89. *Id.* at 150.

90. *Id.*

of his freedom.[91] The court also found it notable that the jurisdiction of the Kentucky juvenile courts is not limited to those children charged with committing public offenses, but also includes children who are neglected, needy, or abandoned.[92] According to the court, under Kentucky law there is no distinction between the types of "treatment" that these two groups of children receive.[93] Therefore, juveniles charged with public offenses are not "prisoners" and are not constitutionally entitled to bail.[94]

Similarly, the *Allaman* court interpreted Ohio's constitution to limit the scope of its bail provision to adults.[95] Article I, section 9 of the Ohio Constitution provides: "Bailable offenses: of bail, fine, and punishment. All persons shall be bailable, by sufficient sureties . . . ."[96] The Ohio Court of Appeals focused on the definition of the word "offenses" to limit bail to adults.[97] Because offenses are synonymous with crimes and because juveniles in Ohio are not charged with crimes, the court concluded that juveniles do not have a constitutional right to bail.[98] The court relied on a previous interpretation of Ohio's Juvenile Court Act to demonstrate that juveniles are not charged with crimes:

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91. *See id.* at 150-51. The notion of "substituted parental control" is a common theme of the *parens patriae* theory of juvenile justice. The idea that confinement of a juvenile to a state institution is equal to or better than returning the juvenile to his home has been frequently articulated. For example, in *Schall v. Martin* the United States Supreme Court stated,

> The juvenile's . . . interest in freedom from institutional restraints . . . must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.

467 U.S. 253, 265 (1984); *see, e.g., In re* Magnuson, 242 P.2d at 364; *Pauley*, 574 P.2d at 240.

92. *Baker*, 477 S.W.2d at 150.

93. *Id.*

94. *Id.* at 151-52.

95. 115 N.E.2d at 851.

96. OHIO CONST. art. I, § 9.

97. *Allaman*, 115 N.E.2d at 850.

98. *Id.* at 850-51. In *Espinosa*, the Texas Supreme Court reached the same conclusion. 188 S.W.2d at 577. The Texas Constitution states that "[a]ll prisoners shall be bailable by sufficient surieties, unless for capital offenses, when the proof is evident." TEX. CONST. art. I, § 11. The *Espinosa* court interpreted its bail provision as follows:

> It will be readily observed that the language employed in the Constitution has reference to criminal offenses and was not designed to apply in civil matters. Since relators have been adjudged delinquent children and ordered restrained in a civil and not a criminal proceeding, we are obliged here to apply rules of civil procedure rather than rules governing the conduct of criminal cases. Accordingly, the quoted provision of the State Constitution is not offended . . . .

188 S.W.2d at 577; *see In re* Magnuson, 242 P.2d at 364; *Ex parte* Newkosky, 116 A. at 717.

> The purpose of the statute is to save minors under the age of 17 years from prosecution and conviction on charges of misdemeanors and crimes, and to relieve them from the consequent stigma attaching thereto; to guard and protect them against themselves and evil-minded persons surrounding them; to protect them and train them physically, mentally and morally. . . . The statute is neither criminal nor penal in its nature, but an administrative police regulation.[99]

Unlike the *Baker* and *Allaman* courts, many states have avoided a textual analysis of their constitutions' bail provisions and have simply relied on the *parens patriae* concept of juvenile justice to deny bail. Nevertheless, the themes expressed in these decisions are familiar: (1) that bail only applies in criminal proceedings and that juveniles are not charged with or convicted of crimes,[100] (2) that juveniles are not punished by detention under the substituted parental control of the juvenile courts,[101] and (3) that bail would corrupt the informal character of juvenile proceedings.[102]

The most common theme expressed is that juveniles are not charged with crimes. For example, in *Cinque v. Boyd*,[103] the court looked to Connecticut's juvenile court act, which stated that "[n]o child shall be prosecuted for an offense before a juvenile court, nor shall the adjudication of such court that a child is delinquent . . . be deemed a conviction of crime."[104] In a thoughtful analysis, the *Cinque* court recognized that "an act does not become one solely of a civil nature simply because it is called so, but it's [sic] true nature is to be determined by the scope and nature of the provisions."[105] Yet, the court denied the complaining juvenile's constitutional right to bail based on the technical distinction between being charged with a "violation," as opposed to the "offense" of petty theft.[106] Bail was

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99. *Allaman*, 115 N.E.2d at 851 (quoting *Ex parte* Januszewski, 196 F. 123, 126 (S.D. Ohio 1911)).

100. *E.g.*, *In re* Magnuson, 242 P.2d at 364; *Cinque*, 121 A. at 682-83; *In re* Ort, 407 N.E.2d at 1164; *In re* Pisello, 293 N.E.2d at 230; *Pauley*, 574 P.2d at 240; *Baker*, 477 S.W.2d at 151; *Ex parte* Newkosky, 116 A. at 717; *Allaman*, 115 N.E.2d at 850-51; *Espinosa*, 188 S.W.2d at 577.

101. *E.g.*, *In re* Magnuson, 242 P.2d at 364; *Cinque*, 121 A. at 681-82; *In re* Ort, 407 N.E.2d at 1164; *In re* Pisello, 293 N.E.2d at 230; *Pauley*, 574 P.2d at 238; *Baker*, 477 S.W.2d at 150; *Ex parte* Newkosky, 116 A. at 716.

102. *L.O.W.*, 623 P.2d at 1258.

103. 121 A. 678 (Conn. 1923).

104. *Id.* at 681.

105. *Id.* at 683.

106. *See id.* at 684-85.

denied because, if the juvenile was found to have committed the violation, he would merely be declared "delinquent" and presumably would not suffer the stigma of being convicted of a criminal offense.[107]

Similarly, in *Pauley v. Gross*,[108] the Kansas Court of Appeals relied on the expressed legislative purpose behind the state's juvenile code to deny juveniles the right to bail:

> This act (juvenile code) shall be liberally construed, to the end that each child coming within its provisions shall receive such care, custody, guidance, control and discipline, preferably in the child's own home, as will best serve the child's welfare and the best interests of the state. In no case shall any order, judgment or decree . . . be deemed or held to import a criminal act on the part of any child. . . .[109]

Based on the civil-criminal distinction expressed in the code and the fact that detention is employed only as a last resort, the court concluded that "[d]etention in a juvenile proceeding . . . cannot really be said to be the equivalent of denial of bail for an adult."[110]

In *In re Magnuson*[111] and *Ex parte Newkosky*,[112] the courts focused on the nonpunitive character of juvenile detention. The *Magnuson* court stated that "[t]he result of a declaration of wardship, far from being a conviction of crime, is more in the nature of a guardianship."[113] To equate such guardianship with imprisonment is "to ignore the beneficent purposes of the law."[114] Similarly, the *Newkosky* court held that its juvenile court act was "intended to save young persons from the ordinary punishment for crime [and] from the consequences of criminal conduct."[115] Because the juvenile court act merely substitutes public control for parental control, the constitutional right to bail does not apply to juveniles.[116]

In *L.O.W. v. County of Arapahoe*,[117] the Colorado Supreme Court denied an absolute right to bail because it feared that the institution of formal bail proceedings would corrupt the unique

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107. *See id.* at 684.
108. 574 P.2d 234 (Kan. Ct. App. 1977).
109. *Id.* at 238.
110. *Id.* at 240.
111. 242 P.2d 362 (Cal. Dist. Ct. App. 1952).
112. 116 A. 716 (N.J. 1920).
113. 242 P.2d at 364.
114. *Id.*
115. 116 A. at 716.
116. *See id.* at 716-17.
117. 623 P.2d 1253 (Colo. 1981).

character of juvenile proceedings.[118] According to the court, the informal nature of the juvenile detention hearing gives juvenile court judges the opportunity to consider a child's needs and welfare.[119] Although Colorado's bail provision grants an absolute right to bail in all but capital cases,[120] the court noted that many rights afforded adult criminal defendants are not extended to juveniles: "[T]he protective purposes of juvenile proceedings preponderate over their punitive function."[121] The court also felt comfortable rejecting juveniles' absolute right to bail because juvenile detention in Colorado is limited to two narrowly defined circumstances: (1) protecting the child from imminent harm, and (2) protecting the public from serious bodily harm that the child is likely to inflict.[122]

Whether engaging in a structured textual analysis or simply relying on policy, each state court that has rejected the right to bail has done so based on the *parens patriae* concept of juvenile justice. But as was recognized in *Kent*, *Gault*, and *Trimble*, the benevolent *parens patriae* approach may not always reflect the realities of juvenile justice.[123] Thus, while the civil-criminal and rehabilitative-punitive distinctions may have been applicable in Kentucky, Ohio, Kansas, California, Maryland, and Colorado, they are not applicable in Washington in 1996. To understand why, it is necessary to examine the transformation that has taken place in juvenile justice in Washington since the *Estes* decision.

## IV. THE TRANSFORMATION OF JUVENILE JUSTICE IN WASHINGTON STATE

### A. *The Historical Development*

Washington's separate system of juvenile justice began much like the systems in the rest of the nation. In 1905 and 1909, the state enacted legislation that created "Juvenile Court session[s]" within the superior courts.[124] In 1913, the legislature enacted the Juvenile Court Law,[125] which authorized courts to intervene on behalf of all

118. *Id.* at 1256.
119. *Id.* at 1257.
120. *Id.* at 1256.
121. *Id.*
122. *Id.*
123. *See supra* text accompanying notes 29, 30-34, and 79-80.
124. 1905 Wash. Laws ch. 18, § 3, at 35 (repealed 1909); 1909 Wash. Laws ch. 190, §§ 1, 3, at 668-69 (repealed 1913).
125. 1913 Wash. Laws ch. 160, § 1, at 520 (substantially repealed by WASH. REV. CODE § 13.04 (1977)).

dependent and delinquent children[126] under the age of eighteen. Firmly adopting a *parens patriae* approach, the legislature defined the law's primary purpose as providing care, custody, and discipline for delinquent and dependent children in a manner approximating that which may or should be given by a parent.[127]

Under the sweeping reforms of the 1913 Juvenile Court Law, no child under the age of sixteen could be detained in an adult jail, common lock-up, or police station.[128] Counties with more than fifty thousand inhabitants were required to maintain separate juvenile detention facilities "wherein all children within the provisions of [the] act shall, when necessary, be sheltered."[129]

The Juvenile Court Law remained substantially unchanged for nearly sixty-four years.[130] However, by the mid-1970s, growing concerns about the increase in juvenile crime and the perception that the juvenile court system was insensitive to public safety led critics of the rehabilitative model to call for legislative reform.[131] A study designed to assess these concerns concluded that the conflicting roles

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126. *Id.* (defining delinquent and dependent children).

127. *Id.* § 14, at 530.

128. *Id.* § 11, at 529.

> No court or magistrate shall commit a child under sixteen years of age to a jail, common lock-up, or police station; but if such child is unable to give bail, it may be committed to the care of the sheriff, police officer, or probation officer, who shall keep such child in some suitable place or house or school of detention provided by the city or county, outside the enclosure of any jail or police station, or in the care of any association willing to receive it and having as one of its objects the care of delinquent, dependent or neglected children.

*Id.*

129. *Id.* § 13, at 530.

130. The detention statute did experience significant modifications in 1961 and 1973. The 1961 amendment required that the child's parent or guardian be immediately notified whenever a child was taken into custody. 1961 Wash. Laws ch. 302, § 2, at 2476. In addition, no child could be held in a detention facility or shelter longer than 72 hours, excluding Sundays and holidays, unless the prosecutor filed a petition. *Id.* Even if a petition was filed, the child had to be released within 72 hours from the time of filing, unless a court order was issued authorizing continued detention. *Id.* The maximum court-ordered detention was 30 days, although an extension could be granted upon order from the juvenile court judge. *Id.* At each stage of continued detention the court was required to enter findings upon which continued detention was based. *Id.*

The 1973 amendment announced that "[a] child in need of detention either by reason of assaultive conduct or because of probable failure to appear for further proceedings, shall . . . be the responsibility of and provided for by the juvenile court." 1973 Wash. Laws 1st Ex. Sess. ch. 101, § 1, at 710. This amendment appears to further place the juvenile court in a parental role by removing children in detention from police custody or the supervision of a community shelter not operated by the juvenile court.

131. Mary Kay Becker, *Washington State's New Juvenile Code: An Introduction*, 14 GONZ. L. REV. 289, 293-95 (1979).

of rehabilitation and punishment frustrated efforts to combat juvenile crime.[132] The increase in juvenile crime was documented by the number of admissions to juvenile institutions, which rose from 873 in 1960 to 1,539 in 1967.[133] The juvenile court's perceived lack of concern for public safety was evidenced by case studies submitted to the legislature. In one such example, a seventeen-year-old who was found guilty of second degree murder was ordered to give fifty dollars to charity and to perform one hundred hours of community service.[134] In response to the public's concerns, the legislature passed the Juvenile Justice Act of 1977 (JJA),[135] which has been described as "the most substantial reform of a state juvenile code that has occurred anywhere in the United States."[136]

Under the JJA, the court is seen primarily as an "instrument of justice rather than . . . a provider of services."[137] First, status offenders—traditionally runaways and behaviorally disturbed, noncriminal adolescents—were removed from the court system and assigned to the Department of Social and Health Services for counseling and treatment.[138] Under this new division of responsibilities, prosecutors and probation counselors became responsible for the intake and screening of juveniles entering the court system. Second, determinative sentencing guidelines were imposed to hold juveniles accountable for their crimes.[139] Determinative sentencing removed juvenile court judges' discretion by imposing statutory guidelines that do not allow for consideration of a juvenile's social background or his need for treatment. Instead, the sentencing scheme provides mandatory punishment commensurate with the juvenile's age, crime, and criminal history.[140] Third, the JJA's primary focus on accountability is evidenced by its replacement of the term "delinquent" with the term "juvenile offender."[141] Finally, juvenile hearings were opened to the public, a practice previously thought to be injurious to youthful offenders.[142]

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132. *Id.* at 299.
133. *Id.* at 293.
134. *Id.* at 294.
135. The JJA is currently codified at WASH. REV. CODE § 13.40 (1994).
136. Ainsworth, *supra* note 21, at 1106 (citation omitted).
137. Becker, *supra* note 131, at 308.
138. *Id.*
139. *Id.*; WASH. REV. CODE § 13.40.0357 (1994).
140. WASH. REV. CODE § 13.40.010(2)(d) (1994).
141. Becker, *supra* note 131, at 308.
142. Richard G. Patrick & Timothy T.A. Jensen, *Changes in Rights and Procedures in Juvenile Offense Proceedings*, 14 GONZ. L. REV. 313, 315-16 (1979); WASH. REV. CODE

Although the new juvenile code created a system based on punishment, restitution, and accountability,[143] the legislature has been careful to indicate that the state retains a primary responsibility for "being accountable for, and responding to the needs of youthful offenders."[144] As the following section illustrates, Washington courts have generally deferred to the legislature's expressed purposes of rehabilitation and punishment, while critical commentary has been consistently less deferential.

### *B. Judicial and Critical Reaction to the JJA*

The Washington Supreme Court has repeatedly characterized the JJA as promoting the twin purposes of rehabilitation and punishment,[145] while commentators have vigorously argued that the Act is predominately punitive.[146] *State v. Lawley*[147] is indicative of the court's characterization. Two years after Washington adopted the JJA, a sixteen-year-old defendant who was denied the right to a jury trial challenged the statute as violative of his due process rights.[148] The juvenile argued that he was entitled to the same constitutional protection given adult criminal defendants because the JJA's punitive approach effectively transformed juvenile proceedings into criminal prosecutions.[149] While recognizing that the legislature had "substantially restructured" the juvenile system by mandating punishment, the court denied the right to jury trial, concluding that "the legislature did

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§ 13.40.140(6) (1994).

143. Becker, *supra* note 131, at 308.

144. WASH. REV. CODE § 13.40.010(2) (1994). The declared co-equal purposes of the JJA are: (a) to protect the citizenry from criminal behavior; (b) to determine whether accused juveniles have committed offenses; (c) to make the juvenile offender accountable for criminal behavior; (d) to provide for punishment commensurate with the juvenile's age, crime, and criminal history; (e) to provide due process for juveniles alleged to have committed an offense; (f) to provide necessary treatment, supervision, and custody for juvenile offenders; (g) to provide for the handling of juvenile offenders by communities whenever consistent with public safety; (h) to provide restitution to victims of crime; (i) to develop effective standards and goals for the operation, funding, and evaluation of all components of the juvenile justice system; (j) to provide for a clear policy to determine what types of offenders shall receive punishment, treatment, or both. *Id.*

145. *E.g.*, State v. Schaaf, 109 Wash. 2d 1, 9-10, 743 P.2d 240, 244 (1987); State v. Lawley, 91 Wash. 2d 654, 656-58, 591 P.2d. 772, 773 (1979).

146. *E.g.*, Ainsworth, *supra* note 21, at 1106-09; Jeffrey K. Day, Comment, *Juvenile Justice in Washington: A Punitive System in Need of Rehabilitation*, 16 U. PUGET SOUND L. REV. 399, 416-27 (1992); Renee M. Willette, Comment, *A Juvenile's Right Against Compelled Self-Incrimination at Predisposition Proceedings*, 69 WASH. L. REV. 305, 307-10 (1994). *See generally* Becker, *supra* note 131, at 308.

147. 91 Wash. 2d 654, 591 P.2d 772 (1979).

148. *Id.* at 656, 591 P.2d at 772.

149. *Id.*

not intend to accuse, treat and sentence juveniles the same as adult offenders."[150]

Yet two years later, the same court held that the state's failure to credit juveniles with time served in pre-adjudicatory detention was an unconstitutional violation of due process.[151] Analogizing a juvenile's time spent in detention to that of an adult criminal defendant, the court saw no reason to deny juveniles the same constitutional protection accorded their adult counterparts.[152] In reaching this conclusion, the court uncharacteristically noted that under Washington law a juvenile disposition order is punishment and "[t]he restrictions on a person's liberties suffered by pretrial detention is [sic] no less 'punishment' than that imposed by the disposition order."[153]

Critics of Washington's juvenile scheme have uniformly characterized it as punitive.[154] For example, Professor Janet Ainsworth used Washington's "just desserts"[155] model to support her conclusion that the separate juvenile court system should be abolished.[156] Relying on social constructivist theory,[157] Professor Ainsworth identified Washington's approach to juvenile justice as consistent with the "re-imagining" of childhood and adolescence that has occurred in the later half of the twentieth century.[158] According to Professor Ainsworth, the modern conception of childhood views adolescence as a brief stage in a continuum of fragmented life-stages.[159] Consequently, the

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150. *Id.* at 656, 591 P.2d at 773.

151. *In re* Trambitas, 96 Wash. 2d 329, 332-34, 635 P.2d 122, 123-24 (1981); *cf.* State v. Cook, 37 Wash. App. 269, 271, 679 P.2d 413, 414 (1984) (holding that pretrial detention must be credited toward community service hours imposed by disposition order).

152. *In re* Trambitas, 96 Wash. 2d at 332-34, 635 P.2d at 123-24.

153. *Id.* at 333, 635 P.2d at 124.

154. *See* sources cited *supra* note 146.

155. The "just desserts" model of juvenile justice is premised on "offender accountability" and "punishment commensurate with the seriousness of the offense." CHAMPION, *supra* note 8, at 26.

156. *See* Ainsworth, *supra* note 21, at 1106-07, 1118.

157. Social constructivist theory cannot be succinctly defined within the scope of this Comment. For a description of Professor Ainsworth's interpretation of the theory, see *id.* at 1085-90. For a more general discussion, see PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1966).

158. *See* Ainsworth, *supra* note 21, at 1101-07.

159. Professor Ainsworth argues that the distinctions made between life-stages such as childhood, adolescence, young-adulthood, adulthood, middle-life, and old-age are less tied to biological reality than to cultural, historical, and situational social construction:

> The number of stages into which an individual's life is divided and the essential qualities deemed characteristic of each stage in the life-cycle have varied over time and across cultures. Indeed, the very concept that human lives pass through life-stages with distinct characteristics has not always held the social and legal significance that it does in the contemporary West.

theory of a sharp dichotomy between childhood and adulthood used by early reformers to justify a separate, rehabilitative juvenile court has been superseded by a societal construction that blurs the distinction between children and adults.[160] Through the use of determinative sentences to hold juveniles accountable for their crimes, Washington's punitive approach to juvenile justice reflects this modern construction of childhood, a construction that assumes adolescent children possess the cognitive and reasoning abilities that make them substantially equivalent to adult criminal defendants.[161]

Washington's juvenile system "exemplifies a rejection of both the philosophy and practice of the traditional *parens patriae* juvenile court."[162] While Washington's rejection of the *parens patriae* philosophy is most clearly evidenced by its adoption of a determinative sentencing scheme, Washington has also adopted most of the procedural formality of adult criminal proceedings. For example, juveniles, like adults, are charged by prosecutorial information; they are governed by the same court rules during arraignment proceedings and the rules of evidence at trial; they are entitled to notification of charges, discovery, and the opportunity to be heard; they are allowed to cross-examine witnesses; they have the right to counsel; and they are subject to the same rules of joinder and severance.[163] "Washington replaced the intimate, informal proceeding in which the judge might 'put his arm around [a boy's] shoulder and draw the lad to him' with procedures that, with [the exception of jury trial], precisely mirror those of the adult criminal trial."[164] Washington's adoption of this punitive and formalistic approach to juvenile justice calls for the reassessment of a juvenile detainee's right to bail.

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> The definition of childhood—who is classified as a child, and what emotional, intellectual, and moral properties children are assumed to possess—has changed over time in response to changes in other facets of society.

*Id.* at 1092-93 (citations omitted).

160. *Id.* at 1101-03. Just as the early reformers justified the separate juvenile court system based on their reconstruction of adolescence as a subcategory of childhood, today's juvenile justice reformers have once again reconfigured childhood. *Id.* at 1101-02. "From [today's] vantage point, adolescence [does] not seem to have any intrinsic and invariant characteristics. Nor [do] the young appear to be as inherently and essentially different from adults as formerly [has] been assumed." *Id.* at 1102-03 (citation omitted).

161. *See id.* at 1103.

162. *Id.* at 1106.

163. *Id.* at 1108.

164. *Id.* (citations omitted).

## V. WHY JUVENILES SHOULD HAVE A CONSTITUTIONAL RIGHT TO BAIL

### A. *The Realities of Juvenile Detention*

The Washington Legislature has stated that "[i]t is the policy of this state that all county juvenile detention facilities provide a humane, safe, and rehabilitative environment and that unadjudicated youth remain in the community whenever possible, [so long as release is] consistent with public safety . . . ."[165] Under Wash. Rev. Code § 13.40.040, the court may detain a pre-adjudicated juvenile whenever there is probable cause to believe that he has committed an offense *and* he meets one of the following criteria: (1) he will likely fail to appear for further proceedings; (2) he may be a danger to himself; (3) he is a threat to community safety; (4) he will intimidate witnesses or otherwise unlawfully interfere with the administration of justice; or (5) he committed a crime while another case was pending.[166] In the juvenile context, an offense can be anything from homicide to disorderly conduct.[167]

Adult criminal defendants are also subject to detention under similar conditions.[168] However, under both article I, section 20 and the criminal court rules, adults have an affirmative right to bail in noncapital cases. An adult defendant who is detained in jail "must be taken or required to appear before the superior court as soon as practicable after the detention is commenced, . . . but in any event before the close of business on the next judicial day."[169] The adult criminal defendant "*shall* at the preliminary appearance . . . be ordered released on [his] personal recognizance pending trial unless" he is a flight risk or presents a danger to society.[170]

In contrast, a juvenile can be detained for as long as six to twelve days before his preliminary appearance,[171] and his right to bail is

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165. WASH. REV. CODE § 13.40.038 (1994).

166. *See* WASH. REV. CODE § 13.40.040(2)(a)(i)-(v) (1994). A juvenile may also be held in detention if he is a fugitive, if his parole has been modified or suspended, or if he is a material witness. *Id.* § 13.40.040(2)(b)-(d).

167. An offense is an "act designated a violation or a crime if committed by an adult under the law of this state. . . ." WASH. REV. CODE § 13.40.020(19) (1994).

168. *See* WASH. SUPER. CT. CRIM. R. 3.2.

169. WASH. SUPER. CT. CRIM. R. 3.2B(a)(1).

170. WASH. SUPER. CT. CRIM. R. 3.2(a) (emphasis added).

171. The juvenile detention hearing is the equivalent of the preliminary appearance in an adult criminal proceeding. When a juvenile is taken into custody after a warrantless arrest, he must be released within three days, excluding Saturdays, Sundays, and holidays, unless an

discretionary. Wash. Rev. Code § 13.40.040(4) states that "[a] juvenile . . . *may* be released upon posting a probation bond set by the court."[172] Thus, the affirmative right to bail evidenced by the use of the word "shall" in both article 1, section 20 and the criminal court rules has been modified by the discretionary word "may" in the juvenile context. The Washington State Judges' Benchbook on Juvenile Procedures indicates the discretionary nature of bail in juvenile proceedings: "An unresolved question is whether a juvenile may be held in continued detention without the opportunity for release upon the posting of a bond."[173]

A common assumption may be that the right to bail is unnecessary in juvenile proceedings because the duration of detention is limited. This assumption is inaccurate. In Washington, a juvenile may be lawfully detained for up to fifty days without an adjudication of guilt.[174] But a study commissioned by the Governor's Juvenile Justice Advisory Committee indicated that actual periods of detention may be even longer. The Detention Study found that the average length of time that a juvenile was held after a detention hearing varied widely from county to county.[175] For those counties reporting,[176]

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information is filed. WASH. REV. CODE § 13.40.050(1)(a) (1994); WASH. JUV. CT. R. 7.3(c). A detention hearing must be held within three days from the date of filing of the information, excluding weekends and holidays, or from the time that the juvenile is taken into custody if a warrant was issued prior to arrest. WASH. REV. CODE § 13.40.050(1)(b) (1994); WASH. JUV. CT. R. 7.3 (c)-(d). Although Washington's juvenile court rules suggest every reasonable effort should be made to conduct a detention hearing within 24 hours after the juvenile is taken into custody or an information is filed, the statutory language allows for considerably more flexibility and delay: A juvenile who is taken into custody based on a warrant must be given a detention hearing within three to six days, whereas a juvenile taken into custody without a warrant may be held for as long as six to twelve days before a detention hearing must be held. *See* WASH. REV. CODE § 13.40.050(1)(a)-(b) (1994).

172. WASH. REV. CODE § 13.40.040(4) (1994) (emphasis added).

173. JUDGES' BENCHBOOK COMMITTEE, WASHINGTON STATE JUDGES' BENCHBOOK JUVENILE PROCEDURE § 21.7, at V-22 (2d ed. 1988).

174. When a juvenile is held in detention, an adjudicatory hearing must be held within 30 days of his arraignment in juvenile court. WASH. JUV. CT. R. 7.8(b). The arraignment must be held within 14 days after the filing of the information. WASH. JUV. CT. R. 7.6(a). When a juvenile is detained after a warrantless arrest, an information need not be filed for 72 hours, excluding Saturdays, Sundays, and holidays, from the time that the juvenile is taken into custody. *See* WASH. JUV. CT. R. 7.3(c). Thus, a juvenile could be taken into custody on a Wednesday and held over a three day weekend before the prosecutor is required to file an information. Fourteen more days may pass before his arraignment must be held. Because his adjudicatory hearing need not be held until 30 days after the arraignment, the juvenile could be held in detention for up to 50 days.

175. COLUMBIA INFORMATION SYSTEMS, WASHINGTON STATE JUVENILE DETENTION STUDY 50-51 (1985) [hereinafter DETENTION STUDY].

176. Although there are 18 detention facilities in Washington, only 10 are represented in the study due to either statistical incompatibility or lack of available data. *Id.* at 11.

the average number of days that a juvenile was held in pre-adjudicatory detention was 37.[177] The lowest average was 16 days in Walla Walla and Yakima Counties; the highest was 124 days in Mason County.[178] King and Pierce Counties, the most populous and due process-oriented counties in the state, both reported a 45 day pre-adjudicatory detention average.[179]

Another assumption may be that juveniles do not need bail because they are not held in adult lock-ups or jails.[180] While Washington has been successful in removing juveniles from adult jails,[181] the conditions of confinement in juvenile facilities are as frightening and dangerous as confinement in an adult jail. Washington's use of determinative sentencing has created overcrowded facilities where pre-adjudicated juveniles are frequently housed with convicted offenders.[182] In fact, the state defines a detention facility as "a county facility . . . for the . . . confinement of a juvenile alleged to have committed an offense or an *adjudicated offender*. . . ."[183] Reports confirm that convicted offenders are regularly housed in the King County Detention Center: In 1988, 1989, and 1990, 23 percent of the total population consisted of adjudicated offenders.[184] In addition, 12 of the 18 county detention facilities contract with the state to house

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177. *Id.* at 50-51.

178. *Id.*

179. *Id.*

180. *See supra* text accompanying notes 128-129.

181. Although the removal of children from adult jails and lock-ups was mandated by the 1913 Juvenile Court Law, children in Washington continued to be confined in these facilities, particularly in rural areas that lacked detention facilities. *See* GOVERNOR'S JUVENILE JUSTICE ADVISORY COMMITTEE, JUVENILE JUSTICE REPORT 189 (1994). But this practice has been significantly reduced in recent years, due primarily to the Federal Juvenile Justice and Delinquency Prevention Act. *See id.* The Act, which ties state funding to compliance with its provisions, requires the removal of juveniles from adult jails with a few limited exceptions: A juvenile may not be detained in an adult facility for more than 24 hours unless a detention facility is not immediately available, and only if the juvenile is separated by sight and sound from adults prisoners. Washington codified the federal provisions in 1985, *see* WASH. REV. CODE § 13.04.116 (1994), and has subsequently achieved considerable success in maintaining compliance. On-site inspections in 1993 revealed that only 14 juveniles in the state were held in adult jails, compared to the 200 juveniles who were so detained in 1983. *Compare* GOVERNOR'S JUVENILE JUSTICE ADVISORY COMMITTEE, JUVENILE JUSTICE REPORT 189 (1994) *with* GOVERNOR'S JUVENILE JUSTICE ADVISORY COMMITTEE, JUVENILE JUSTICE REPORT 58 (1984).

182. *See* GOVERNOR'S JUVENILE JUSTICE ADVISORY COMMITTEE, JUVENILES JUSTICE REPORT 160 (1994); KING COUNTY DEPARTMENT OF YOUTH SERVICES, 1991 ANNUAL REPORT 14 (1992); *see also infra* text accompanying notes 184-203.

183. WASH. REV. CODE § 13.40.020(11) (1994) (emphasis added).

184. KING COUNTY DEPARTMENT OF YOUTH SERVICES, 1991 ANNUAL REPORT 14 (1992).

convicted offenders when the state's correctional facilities are overcrowded.[185]

In 1990, the King County Detention Center became so crowded that a class-action lawsuit was filed on behalf of juveniles in that facility. The juveniles alleged that they were subjected to physical and psychological harm due to overcrowding[186] and that the size of the detention staff was inadequate to handle the population.[187] At trial, several detainees testified that they had been physically and sexually assaulted.[188] The facility, originally designed to house 71,[189] had an average daily population of 120 juveniles.[190] Many of the assaults occurred in six-person dormitories, where "one kid [would watch] the door, so two others [could] hold down another boy."[191] Based on this evidence, the judge limited the center's population to 112 juveniles by imposing a two-youth-per-room limit.[192] Despite the logistical problems of instituting his order, the judge stated that "the need for detention does not override the rights of children to be safe and secure."[193]

Overcrowding caused similar problems at the Spokane County Juvenile Detention Center where two detainees tried to commit suicide.[194] Within weeks of each other, the two boys—a fifteen-year-old and a sixteen-year-old—were found unconscious after they tried to hang themselves with bedsheets. The director of the county's juvenile court system declared an "immediate crisis" due to the overcrowding.[195] During the week of the second suicide attempt, 61 juveniles were detained in the facility, even though the American Correctional Association standards suggested a maximum of 42.[196]

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185. *See* DETENTION STUDY, *supra* note 175, at 76-127. The counties that contract with the state are Benton, Chelan (diagnostic only), Clark, Grant, Grays Harbor, Pierce, Skagit, Snohomish, Spokane, Thurston, Whatcom, and Yakima. Clallam, Cowlitz, King, Kitsap, Lewis, and Okanogan Counties did not provide these services.

186. *See* Day, *supra* note 146, at 424.

187. *Id.*

188. Don Carter, *County Ordered to Cut Crowding at Youth Center*, SEATTLE POST-INTELLIGENCER, Aug. 17, 1991, at A1.

189. Day, *supra* note 146, at 425.

190. Carter, *supra* note 188, at A4.

191. *Id.* at A1 (quoting ACLU attorney John Phillips).

192. *Id.*

193. Bob Lane & Richard Seven, *Judge Sets Limit at Two Youths Per Cell*, SEATTLE TIMES, Aug. 16. 1991, at E1.

194. *Boy in Detention Tries to Hang Himself*, SEATTLE TIMES, Jan. 11, 1992, at A7.

195. *Id.*

196. *Id.*

Most recently, seven juveniles, four of them adjudicated offenders, were transferred out of the King County Detention Center after a staff member was injured during a gang fight.[197] All seven had been waived to adult court based upon the serious nature of their alleged crimes;[198] nevertheless, they were housed in the King County facility during trial or while awaiting sentencing.[199] Each of the juveniles had a history of threatening staff members with bodily harm, participating in gang activity, and engaging in aggressive behavior within the institution.[200] Although juveniles who are prosecuted as adults account for fewer than one-tenth of the 160 juveniles held at the detention center,[201] they create serious problems for the detention staff. In a facility that is not designed to handle long-term detainees, these violent juveniles stay months longer than any other detainee and, ultimately, "have nothing to lose."[202] In the most glaring example, one of the juveniles had already been sentenced to fifty-two years in prison for a fatal gang-related shooting; yet, he remained in the juvenile facility while the state determined where he would serve his sentence.[203]

The realities of juvenile detention in Washington—lengthy incarceration, overcrowding, attempted suicides, and violence—suggest that the *Estes* vision of the *parens patriae* juvenile court, applied today, is at best naive and at worst disingenuous. In the twenty-seven years since the *Estes* decision, our society has adopted a different conception of childhood and children's culpability. Today, we hold children accountable for their crimes, focusing on punishment rather than rehabilitation. Given this shift in focus, the juvenile system is more

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197. Diedtra Henderson, *Juvenile Criminals Now Held with Adults; Near-Riot at Detention Center Injures Staff Member, Causes Judge to Approve Relocation*, SEATTLE TIMES, Jan. 16, 1995, at A1.

198. *Id.* The four adjudicated offenders included: Brian Ronquillo, a 17-year-old who shot and killed a girl in front of her high school; Sanfey Feui "Fish" Saephan, a 16-year-old who stabbed a rival gang member in the head with a screwdriver; Chan Poo "Shampoo" Saetern, a 17-year-old who kicked and beat two victims; and Jeremy Santiago, a 17-year-old who pleaded guilty to robbery. *Id.* Ronquillo had already been sentenced to 52 years in prison, while the other three adjudicated offenders were awaiting sentencing. The remaining three juveniles who were held pending trial were: Royce "Little Scrappy" Hendrix, a 15-year-old accused of killing a young girl in a drive-by shooting; Tony "T.C." Combs, a 15-year-old who allegedly drove the vehicle in the drive-by shooting of the young girl; and Robert Veneagas Mena, a 17-year-old accused of severely abusing his 7-week-old son. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* This is the case of Ronquillo. *See supra* note 198.

akin to the adult system, and juveniles should, therefore, receive the same constitutional right to bail afforded their adult counterparts.

### *B. Refuting the* Parens Patriae *Justification For Denying Bail*

Given the overwhelming precedent against granting a constitutional right to bail in juvenile proceedings, a plain language argument based on the language, "all persons charged with crime shall be bailable by sufficient sureties" would obviously fail. However, a plain language argument coupled with an understanding of the transformation that has occurred in juvenile justice in Washington strongly supports the conclusion that the constitutional right to bail should be granted.

The predominant theme in state court decisions denying the constitutional right to bail is the civil-criminal distinction that juveniles are not charged with crimes and, therefore, are not equivalent to adult criminal defendants.[204] The court in *State ex rel. Peaks v. Allaman* relied on the word "offense" in the Ohio Constitution to deny juveniles the right to bail.[205] Similarly, the *Baker v. Smith* court excluded juveniles from the right to bail because they are not "prisoners" within the meaning of the Kentucky Constitution.[206] And, in *Pauley v. Gross*, the Kansas court relied on the purpose of the state's juvenile code to establish that juvenile offenders are not charged with crimes.[207]

In Washington, these arguments are without merit. First, article I, section 20 of the Washington Constitution provides that bail applies only to "persons charged with crime."[208] Yet, in Washington, a juvenile can be detained whenever he has committed an "offense."[209] And, an offense is defined as "an act designated a violation or a *crime* if committed by an adult under the laws of this state."[210]

Second, the framers of the Washington Constitution rejected a motion to limit the bail provision to "prisoners" and, instead, included the language "all persons."[211] Therefore, the framers of Washing-

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204. *See supra* text accompanying notes 100-110.
205. 115 N.E.2d 849, 850 (Ohio Ct. App. 1952).
206. 477 S.W.2d 149, 151-52 (Ky. 1991).
207. 574 P.2d 234, 240 (Kan. Ct. App. 1977).
208. *See* WASH. CONST. art. I, § 20.
209. *See supra* text accompanying note 166.
210. WASH. REV. CODE § 13.40.020(19) (1994) (emphasis added).
211. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 509 (Beverly P. Rosenow ed., 1962).

ton's Constitution can be said to have included *all* citizens, including juveniles, within the scope of the bail provision.

Finally, unlike the Kansas code, the Washington code cites among its many purposes that it is designed: (1) to protect citizens from *criminal* behavior; (2) to make the juvenile offender accountable for his *criminal* behavior; (3) to provide for punishment commensurate with the age, *crime,* and *criminal* history of the juvenile offender; and (4) to provide for restitution to victims of *crime.*[212] Based on the above language, when the Washington Legislature revised the juvenile code in 1977, it clearly intended to charge juveniles with crimes. Thus, in Washington there is little basis for the argument that a juvenile is not a "person charged with crime" within the plain language of article I, section 20.

In *In re Magnuson* and *Ex parte Newkosky,* the courts used the punitive-rehabilitative distinction to deny juveniles the constitutional right to bail.[213] The rationale of these courts is that the state is exercising substituted parental control and that to equate juvenile detention with punishment fails to take into account the "beneficent purposes of the [juvenile court] law."[214] This argument is also without merit in Washington because Washington has clearly adopted a "just desserts" model of juvenile justice.[215] This model does not reject rehabilitation and treatment but places its primary emphasis on accountability and punishment.[216] Washington's adoption of this model is most clearly reflected in its implementation of determinative sentencing. Because determinative sentencing provides mandatory punishment commensurate with the juvenile's age, crime, and criminal history, the *parens patriae* notion of a beneficent juvenile court judge no longer exists. Determinative sentencing takes away the juvenile court judge's traditional flexibility to act in the best interest and welfare of the child.

Washington's emphasis on punishment is also reflected in the removal of status offenders from the juvenile court system.[217] While the training schools in 1968 may have been places where runaways and other non-criminal adolescents "receive the care and training [they]

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212. WASH. REV. CODE § 13.40.010(2) (1994).

213. *In re* Magnuson, 242 P.2d 362, 364 (D. Cal. 1952); *Ex parte* Newkosky,116 A. 716, 716 (N.J. 1920).

214. *See In re* Magnuson, 242 P.2d at 364.

215. *See supra* text accompanying notes 137-142, 155-162.

216. CHAMPION, *supra* note 8, at 26.

217. *See supra* text accompanying note 138.

would not otherwise receive" at home,[218] today's juvenile detention facilities house only juvenile offenders. Thus, juveniles charged with crimes are housed in environments that are increasingly more dangerous and that hardly substitute for the safety of juveniles' own homes.[219] This is not to say that juvenile offenders do not receive treatment within Washington's detention facilities, but, as was recognized in *Trimble v. Stone*, all incarceration, whether in a detention center or a penitentiary, combines varying degrees of punishment, treatment, and rehabilitation.[220] Because the Washington Legislature has chosen to emphasize punishment, juveniles should not be denied the absolute right to bail.

The *L.O.W. v. County of Arapahoe* court expressed fear that the imposition of a constitutional right to bail in juvenile proceedings would frustrate the unique character of the juvenile courts.[221] As Professor Ainsworth indicates, this type of reasoning is faulty. The procedural formality that the *L.O.W.* court feared is already present in Washington's formalistic approach to juvenile justice.[222] Juveniles have been afforded all of the constitutional protections characteristic of adult criminal proceedings, except the right to jury trial. Why should the right to bail be any different? Juveniles are subject to formalized procedures at every stage of the proceedings, yet the discretionary right to bail remains one of the last vestiges of the *parens patriae* juvenile court.

Finally, there is an historical basis for granting juveniles the right to bail. Washington's constitution was enacted in 1889, yet the separate juvenile court system was not fully implemented in Washington until 1913.[223] Prior to the 1913 enactment of the Juvenile Court Law, the *parens patriae* system of juvenile justice did not exist in Washington. Thus, when article I, section 20 of the state's constitution was enacted, juveniles were subject to the same criminal laws and sanctions as were adults. Juveniles were likely given the same right to bail as their adult counterparts. This conclusion is reflected in the *Packenham v. Reed*[224] and *State ex rel. Gray v. Webster*[225] decisions. In *Packenham*, a juvenile was granted the same statutory right to bail

218. Estes v. Hopp, 73 Wash. 2d 263, 270, 438 P.2d 205, 209 (1968).
219. *See supra* section V.A.
220. 187 F. Supp. 483, 486 (D.D.C. 1960).
221. 623 P.2d 1253, 1256 (Colo. 1981).
222. *See supra* note 163 and accompanying text.
223. *See supra* notes 124-125 and accompanying text.
224. 37 Wash. 258, 79 P. 786 (1905).
225. 122 Wash. 526, 211 P. 274 (1922).

that adults received, but *Packenham* was decided prior to the enactment of the Juvenile Court Law. After Washington adopted the *parens patriae* approach to juvenile justice, the *Gray* court denied juveniles the same statutory right to bail because they no longer had a constitutional right to appeal an adjudication of delinquency.[226]

A constitution is not a static document, but should change over time to be constitutive of the people it represents. As Washington's system of juvenile justice moves away from *parens patriae* principles and back toward its constitutional origins, juveniles should be returned to their former status as "persons charged with crime," and the right to bail should once again be extended to juveniles, as citizens of Washington.

## VI. CONCLUSION

As our system of juvenile justice moves away from rehabilitation and demands accountability and retribution from our children, we are "re-imagining" our conception of childhood. This re-imagining reflects the common law conception of children as being capable of acting responsibly and accepting responsibility for their actions. Washington State has clearly adopted such a conception.[227] As a result, the Washington Supreme Court's depiction of juvenile justice in *Estes v. Hopp*[228] neither reflects nor defines the realities of juvenile justice in Washington State in 1996. Yet, the legacy of the *Estes* decision lingers in the denial of juveniles' state constitutional right to bail in Washington's otherwise formal and punitive system of juvenile justice. Washington juveniles do not have an absolute right to bail, a procedural safeguard that is designed to "honor the presumption of innocence,"[229] because they are perceived not to be charged with crimes or punished by the juvenile court. Yet, they are incarcerated for long periods of time in a system that mirrors the realities of adult prison life.[230]

As we move back to a common law conception of childhood, the *parens patriae* justification for denying bail no longer exists. Therefore, the Washington Supreme Court should reconsider its denial of bail by reviewing the language of article I, section 20 in light of the realities of juvenile justice in 1996.

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226. *See supra* text accompanying notes 55-58.
227. *See supra* text accompanying notes 137-142, 155-164.
228. 73 Wash. 2d 263, 438 P.2d 205 (1968).
229. *See supra* text accompanying note 87.
230. *See supra* section V.A.