1971

Pre-Hearing Detention of Youthful Offenders: No Place to Go

Follow this and additional works at: http://digitalcommons.law.yale.edu/yrlsa

Part of the Law Commons

Recommended Citation
(1971) "Pre-Hearing Detention of Youthful Offenders: No Place to Go," Yale Review of Law and Social Action: Vol. 1: Iss. 4, Article 3. Available at: http://digitalcommons.law.yale.edu/yrlsa/vol1/iss4/3

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Review of Law and Social Action by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
"It is all very well for you to say that you came of unhealthy parents, and had a severe accident in your childhood which permanently undermined your constitution;... You may say that it is not your fault. The answer is ready enough at hand, and it amounts to this—that if you had been born of healthy and well-to-do parents, and had been well taken care of when you were a child, you would never have offended against the laws of your country, nor found yourself in your present disgraceful position. If you tell me you had no hand in your percentage and education, and that it is therefore unjust to lay these things to your charge I answer that whether your being in a consumption is your fault or not, it is a fault in you, and it is my duty to see that against such faults as this the commonwealth shall be protected. You may say that is your misfortune to be criminal; I answer that it is your crime to be unfortunate."

Pre-Hearing Detention of Youthful Offenders: No Place to Go*

by Paul B. Jones

Paul B. Jones is currently a third year student at the Yale Law School and Assistant Director of the Yale College Afro-American Studies Program.

*Supported in part by the Planning Commission on Criminal Administration for the State of Connecticut.

In reaction to the harsh dispositions and handling of youthful offenders by the criminal courts, the Illinois Legislature of 1899 initiated a system of juvenile justice which offered an alternative to the then current penal system. From its beginning, the juvenile court has been based upon the philosophy of "individualized justice"; that is, the individuality of the child, or the "whole child," is considered in the handling and disposition of his case. The decision of the juvenile court judge is not whether this boy or girl has committed a specific wrong, but "what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." Traditional juvenile court theory has not placed primary emphasis upon an adversarial determination of guilt for a particular, isolated act. Rather, it has adopted a remedial or rehabilitative role with the idea of correcting the potential, if not actual, development of a pattern of anti-social behavior.

Even though most authorities agree that the philosophy of individualized justice constitutes a major step forward in the handling of youthful offenders, there has been increasing controversy over the nature of juvenile court proceedings at both the hearing and pre-hearing stages. In recent years attacks have been sustained against the juvenile courts' practice of denying children certain legal protections guaranteed by the Constitution to persons accused of crime.

In most jurisdictions juvenile court proceedings are
considered to be civil rather than criminal in nature; consequently, the Bill of Rights and its counterparts in state constitutions have not applied.\textsuperscript{10} In justification of such practice, supporters of the traditional juvenile court have argued that the court is acting to help and to protect the child's interests, not to punish him.\textsuperscript{11}

The degree to which courts' practices measure up to their theory has of course recently been examined by the U.S. Supreme Court. In 1967, under \textit{U.S. v. Gault}\textsuperscript{11a} the Court ruled that several of the guarantees which derive from the Bill of Rights are applicable in juvenile delinquency proceedings even though delinquency proceedings are still considered to be civil rather than criminal. Those guarantees include the right to notice, the right to counsel, and the right against self-incrimination. Quoting from \textit{Kent v. the United States},\textsuperscript{12} the majority in \textit{Gault} based its decision in part upon "...[E]vidence ...that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded adults nor the solicitous care and regenerative treatment postulated for children."\textsuperscript{13} The \textit{Gault} decision not only undermined many of the assumptions which support the constitutionality of the juvenile court, but also recognized that the very nature of juvenile court proceedings requires adherence to guarantees of due process at the hearing stage.

The Court also stated, however, that it was not concerned with "the procedures or constitutional rights applicable to the pre-judicial stage of the juvenile process ..." (emphasis added)\textsuperscript{14} As a result, it is unclear whether the Court will require that the full range of pre-trial procedural safeguards be applied to juveniles accused of law violation.

Included among pre-hearing procedures are those governing custody of the child pending disposition. These procedures, like those applied at the hearing stage prior to \textit{Gault}, derive from the philosophy of "individualized justice" and Chancery's concept of \textit{parens patriae}.\textsuperscript{15} The court's concern for the lack of "solicitous care and regenerative treatment" in most juvenile court jurisdictions raises fundamental questions about the propriety of the current criteria for detention and of procedures intended to effect the detention or release of a child prior to adjudication.

The following is a report of the findings of an eight-month study of detention practices in New Haven, Connecticut, and considers the current practices of the New Haven Court with regard to (1) the traditional rationale for detaining youthful offenders prior to adjudication, and (2) the due process requirements of the \textit{Gault} decision.

In 1941, the Connecticut General Assembly revised the Juvenile Court Statute in order to establish its present statewide juvenile justice system.\textsuperscript{16} The revision divided the state into three districts and placed New Haven in the Second along with Middlesex and New London counties.\textsuperscript{17} The juvenile court judge travels on circuit throughout each district, holding hearings in many of the local communities.\textsuperscript{18} In each of the three
detention has been defined as "the temporary care of children who require secure custody for their own or the community's protection in physically restricting facilities pending court disposition."26 Explaining which children fall under this definition, the Juvenile Court Rules for the State of Connecticut specify that there must be (1) a strong probability that the child will run away prior to court disposition, or (2) a strong probability that the child will commit other offenses before court disposition, or (3) reasonable cause to believe that the child's continued residence at home pending disposition will not safeguard the best interests of the child and the community because of the serious and dangerous nature of the alleged delinquent act.27

There seems to be substantial variation in detention rates among different jurisdictions. For example, Freed and Wald report that "In some places, all children referred to juvenile court are detained. In others only two or three out of every hundred are held. A 50% ratio is not uncommon."28 While it may seem reasonable to suggest that the difference in detention rates among jurisdictions reflects a difference in numbers of serious offenses, the findings of this study corroborate the findings of comparative studies which report that this is not so.29

Rather, different communities and even different probation officers within the same probation staff, use different criteria or interpretations of criteria.30 It is this lack of uniformity – more than any other factor – which accounts for variations in the rates of detention.

Runaways

The National Council on Crime and Delinquency recommends that a child be detained only if it is "almost certain" that he will run away.31 In order to comply with this recommendation, the intake officer should have reasonable cause to believe that the child is a runaway at the time of detention or that he has a history of absenting himself from home without prior permission from his parent.32

As previously noted, the Connecticut Statute offers no explicit guidelines for intake officers. However, the Juvenile Court Rules do state that there must be a "strong probability"33 that the child will run away before he may be admitted to detention. Popular connotations which attach to the language of the Connecticut rule and to the N.C.C.D. rule tend to suggest that the N.C.C.D. rule may provide a stricter test; but, unfortunately, there is no Connecticut case law indicating what constitutes a "strong probability that the child will run away."

According to one member of the staff "the court gets a tremendous number of kids who've run away from home; but quite frankly, we don't like to keep them. In the overwhelming majority of cases we notify the parent..."
and try to get the kid back home as soon as possible.\textsuperscript{34} In any event, the detention records do show that of all the children referred to the court in 1969, the overwhelming majority were charged with running away. Among the 485 children detained, 113 (23%) were runaways. It is interesting to note, however, that only thirteen of those children were adjudicated; the remaining one hundred were detained less than forty-eight hours and were handled non-judicially.\textsuperscript{35}

Considering that all of the runaways were at large and referred to the detention facility initially by an arresting officer, it is clear that the New Haven intake officers were de facto in compliance with the N.C.C.D. recommendation which suggests that the child be a runaway at the time of detention.\textsuperscript{36} Because all of the runaway children handled non-judicially were released within forty-eight hours it is also apparent that the primary reason for admitting them to the detention facility was not to guarantee appearance at a delinquency hearing.\textsuperscript{37} Nor do we find the true reason for detention in the probation officers' need for time to review each child's case history (if there was one) before allowing him to be released.\textsuperscript{38} Rather, correlation between the runaway allegation and the child's social history suggest that the runaways who were detained less than forty-eight hours were held for one of two reasons: inability to locate the parent or the immediate threat of the child suffering physical abuse at the hand of an irate parent.\textsuperscript{39} In the case of the 13 runaways who were detained and adjudicated, the picture is somewhat but not significantly different. The average length of detention was 5 days, while the average time interval between referral and adjudication was 112 days. Once again it appears that the real purpose served by pre-hearing detention of runaways in New Haven was not to assure the appearance of the child at the delinquency hearing. Case histories of these children show that the term of incarceration resulted from the fact that there was no place else for the child to stay while the probation officer sought a temporary placement pending disposition as an alternative to returning the child to a badly deteriorated home situation.

Neither source, however, offers a definition of acts which constitute a danger to the community or to the child. The two initial problems, then, are first, to determine what constitutes a serious or dangerous offense; and second, to determine what evidence is relevant to deciding whether there is a strong probability that the child will commit other offenses.

One study reports that for those juveniles accused of rape, arson, or an offense with a gun, detention was automatic.\textsuperscript{44} Another study confronted the problem of defining the serious offense and found that "if 'dangerous' is defined as including only offenses against persons, then in only two localities were more than 10\% of the juveniles detained because they were 'dangerous'.\textsuperscript{45} In New Haven, the more serious offenses that were committed in 1969 cover aggravated assault, rape, robbery, breaking and entering, and possession of a dangerous weapon.\textsuperscript{46} Children charged with those offenses constituted only 15.4\% of the population detained. More revealing, however, is the fact that those children only represent 40\% of all the youthful offenders charged with and adjudicated for the offenses listed above. The remaining 60\% were not detained at all prior to adjudication. When asked about the practice of releasing children who had allegedly committed a serious offense, one court officer responded:

"First of all, we don't have enough room. So many kids who don't have any place to stay come through here that we try to get as many of the other kids out as we possibly can — especially toward the weekends. So, naturally, if a parent is willing to accept a child and if we think the parent is fairly reliable, we let the kid go."

But then why detain for an average of five days 40\% of the children charged with serious offenses?\textsuperscript{47} If the court is not worried about the child appearing on the scheduled hearing date and if it also has reason to believe that the child will receive adequate custodial attention at home, then why is he detained at all?

The answer lies, in part, in the hypothetical local merchant, the next door neighbor, or the interested taxpayer, who, in the view of court staff, demands safer streets.

"Of course, we hold a few of the kids because we want a psychological evaluation, but we also have to keep in mind that the police officer who brings the child here usually does so only after he — or the kid's neighbors — have had all the nonsense they can take in light of that we don't feel that it's in our best interest, the kid's best interest, or the community's best interest to put him right back on the street."

Deciding who to detain is a problem of balancing the desirability of the individual's freedom prior to adjudication with legitimate community concern for law enforcement and the reduction of the damage or annoyance which may result from a child's misdemeanant or felonious behavior. Detention based upon the danger of the child "committing other offenses" implies that interest in reducing the possibility of additional offenses.
against person or property supersedes the interest in protecting the child’s right to freedom.

Assuming for the moment that detention for such preventive purposes is desirable, what evidence is used to determine whether there is a “strong probability” that the child will commit another offense? In New Haven, the statistics indicate that prior delinquent behavior is thought to be a strong determinant. For example, of the fifty children adjudicated for an offense against property, only two were detained. But of the twenty-seven children adjudicated for violation of probation by virtue of an offense against property, 73% were detained. This large increase in the percentage of children detained was characteristic of every category of offense where the offense resulted in violation of probation, but in no category was the increase greater than in that of auto theft. While 33% of the children charged with auto theft alone were detained, 100% of those charged with violation of probation by virtue of auto theft were incarcerated prior to adjudication.

Incorrigibility

The Advisory Council of Judges recommends that children with strained family relationships are likely to get into further trouble and, hence, should be detained. While there is yet no empirical data to validate this hypothesis, it is true that many of the children with strained family relationships are detained. In New Haven, 88% of all the children who were allegedly incorrigible and adjudicated in 1969 were also detained prior to adjudication. According to the supervisor of the New Haven probation staff, the primary reason for the high rate of detention among children charged with incorrigibility is not fear of the additional trouble they may get into, but that “There’s no place for these children to go.” Because the complaint alleging incorrigibility is filed by the parent, it provides evidence of explicit conflict between the parent and the child, and so it is hardly surprising that the overwhelming majority of these children do end up on the detention facility.

As a matter of policy, however, the New Haven staff discourages parents from seeking refuge from a troublesome child by refusing to assume custody. In a recent directive rehearsing regulations for admitting children to detention, the supervisor of detention and the supervisor of probation stated that

“Parent’s refusal to receive the child into his home shall not, in itself, be cause for placing the child in detention. Parents cannot shirk their responsibility toward their own children in this manner. Such parents should be advised to contact the juvenile court on the following workday.”

In spite of the directive, the record shows that among the children detained, the largest group still consisted of those who were charged with incorrigibility.

After Detention

Commitment

While it is true that 87% of the children committed had been detained prior to adjudication, this study shows that the 87% represents only 37% of the total population of children detained. The majority of juveniles adjudicated, then, are returned to the community whether they were detained or not. But a closer look at the cases involving children who were committed reveals that basically the criteria used by the court at the detention stage are also used to determine whether or not to commit a child—for an indeterminate period—to the commissioner of child welfare.

None of the children who were detained for having committed a serious offense were subsequently committed. 27% of the children detained on the basis of a complaint alleging incorrigibility were subsequently committed. But the record also shows that 100% of the children who violated probation by virtue of incorrigibility were committed — regardless of whether they were detained or not. Considering that one of the purposes of the traditional juvenile court is to perform a remedial function by correcting the development of a pattern of delinquency, this is perhaps not surprising. But note that children charged with incorrigibility or violation of probation by virtue of incorrigibility account for 40% of all the children committed by the New Haven Court in 1969.

Release: recidivism

The findings of the preceding section reveal that the New Haven juvenile court makes extensive use of the broad discretionary power vested in it by the Connecticut legislature to hold children who allegedly cause problems for their parents. As noted earlier, such practice places an extra burden on the intake officer who is at the pre-hearing detention stage with another set of children who have allegedly committed acts which would be crimes if they had been committed by adults. Space limitation within the detention facility often requires that the decision to release such law violators be based upon available bed space. When bed space is available for children other than parental nuisances intake officers next isolate those children who have violated probation—regardless of the offense.

Detention of probation violators may be premised on the belief that since this class of children is recidivist, it is dangerous. But while the average time interval between the initial referral and adjudication was 121 days, the average length of detention for the twenty-
nine children who were incarcerated was five days. Thus all of the children included in the study were free to commit other offenses before adjudication. The record shows that 12 (38%) of those detained committed other offenses before adjudication, while 9 (43%) of those not detained committed other offenses. One also finds that 18 of the 21 (87.7%) children who committed offenses before adjudication had previous records (Section 11-B of Table C). We conclude from these findings, then, that (1) short-term detention does little to correct the antisocial behavior of those children who have previous records, and (2) relative to children who have no previous record, there is a high probability that children who have previous records will commit other offenses. It would seem to follow that if the New Haven court were to authorize the long-term incarceration of 100% of the children who have a previous record, the rate of law violations occurring during the period of release would drop by 85.7%. But section 11-B of Table C also indicates that of all the children who had previous records, exactly 50% repeated while 50% did not. So incarceration of all those with previous records would result in the unnecessary detention of 50% of the children.

Detention Alternatives

Findings of the preceding section raise serious doubts about the capacity of the traditional juvenile court to deal with rising juvenile crime. The increase in the number of youth offenses has forced the juvenile court to perform functions essentially similar to those exercised by any court adjudicating cases of persons charged with dangerous and disturbing behavior. Yet, the procedures of the juvenile court— including those applied at the pre-hearing detention stage—tend to ignore that aspect of the judicial function which looks to the protection of society. The focus has been—and still is—directed toward the common interest of the state and of the child in protecting the welfare of the latter.

Judge Ketcham has described this view of juvenile court procedures in terms of a "mutual compact theory"—a relationship created between the state (acting through the juvenile court) on one hand, and the child charged with delinquency on the other. Under this theory, detention can be regarded as a bargain or agreement whereby the state is permitted to intervene constructively in the child's life, while the child, in return, must give up certain constitutional safeguards. Among other things, the compact authorizes the juvenile court to substitute state control for parental control; but "such an intrusion of governmental supervision rests on the assumption that the state will act in the best interests of the child and that its intervention will enhance the child's welfare."62

Shelter Care

Turning first to the case of those children detained on the strength of complaints alleging "runaway" and "incorrigibility," the court's own testimony would seem to indicate that physically restricting facilities in no way enhance the welfare of either the child or the community.

This study has demonstrated that it is not fear of the child's failure to appear for the delinquency adjudication or fear of the danger he poses to the community which results in pre-hearing detention, but rather that, apart from the detention facility, there is no place for runaway or incorrigible children to stay. Under these circumstances, fairness to the child does not necessarily militate against the court assuming temporary custody. But in such cases "shelter care," i.e. "temporary care in physically unrestricting facilities,"63 is recommended as a more appropriate means of enhancing the child's welfare.

At the present time, the Uniform Act,64 the Model Rules,65 and no less than nine states have provisions for shelter care.66 According to these provisions, however, such facilities are intended for neglected and dependent children only.67 Is this reasonable? Is there really such a sharp distinction between a child charged with a status offense and a neglected child? The court rules which authorize the detention of "delinquent youth" and simultaneously forbid the detention of neglected youth assume that there are some rather important differences. But consider the Matter of A. M., a non-judicial case handled by the New Haven court in 1970.

The complaint, filed by the respondent's mother, alleged that A. M. was delinquent by virtue of difficult behavior at home and by virtue of having absented himself from home without prior parental permission. A. M. was placed in detention, but when the probation officer read the complaint and learned that the child was only nine years old, immediate steps were taken to notify the parent and to secure the child's release. However, when the mother was reached and informed of the court's decision to release A. M., she responded that under no circumstances would she take the child, and that if he was returned to the home "there would be real trouble."

A conversation with A. M. revealed that the complaint arose from a series of disputes between himself and his mother over A. M.'s possession of several "Jehovah's Witness" publications. According to A. M., "Mother don't like 'em cause her boyfriend laughs at her when he sees 'em." The mother confiscated the magazines along with other reading materials provided for the child by a Sunday school. But when she did, A. M. walked out, only to be apprehended one hour later on a nearby playground, and placed in the detention facility by the New Haven police.

By remanding A. M. to the detention facility, the court exercised the only option available. But to argue that under these circumstances A. M.'s welfare was enhanced by the consequent deprivation of liberty is to beg the issue. It is precisely because of those circumstances surrounding the matter of A. M. that the question remains: is it wise or fair to distinguish between children alleged to be delinquent and those who are allegedly neglected on the basis of the type of complaint filed? While it is true that A. M. was technically a runaway and therefore a delinquent, the circumstances of the
case indicate that the tension at home caused the runaway, and incarceration of the youth does not treat in any socially useful manner the causal factors which created the tension.

In at least one respect, however, the discussion of which children should be placed in shelter care is academic. The State of Connecticut provides no such facilities. In recommending that they be authorized and established, we suggest that an initial presumption in favor of release to the parents is desirable. But if such a presumption should fail, that there be a presumption in favor of maintaining custody of neglected children as well as status offenders in shelter-care units rather than in detention facilities pending their release or disposition. Further, such children should not be transferred from the shelter-care unit to the detention facility until they demonstrate by actual disruptive behavior that continued care in the physically unrestricting facility is no longer feasible.

Even though shelter-care facilities as well as the suggested presumptions may be in keeping with the spirit of the juvenile court legislation, it must be remembered that there are many problems associated with both the operation of such facilities and with the criteria for admission and release—problems which have not yet been articulated or thoroughly examined. For example, should all status offenders be admitted to shelter care until their disruptive behavior demonstrates that such care is no longer feasible? Should children charged with more serious offenses also be eligible for shelter care? If so, under what circumstances? Should the state bear the cost of maintaining the child in a shelter care facility? What criteria should determine when the condition which brought the child to the facility no longer exists?

**Preventive Detention**

The children charged with law violation present a different type of problem. Some critics of the juvenile court suggest that even these children should be eligible for shelter-care rather than detention. But most authorities agree that, barring the presence of home problems, law violators should, depending upon the nature of the offense and the history of previous court contacts, either be released or held in physically restricting facilities pending disposition. The most common reason given for this preference is that co-mingling law violators with neglected or dependent children exposes the latter to the unwholesome influence of the more experienced juvenile offender.

Again, however, the incarceration of law-violators in detention facilities which do not provide “the solicitous care and regenerative treatment postulated for children” places the juvenile court in the position of subordinating the interest of the child to the welfare of the community. This practice is tantamount to preventive detention and should be recognized as such, in spite of protests asserting that the child benefits from the brief respite or from the psychological evaluations obtained by the court during the period of incarceration. In fact, psychological testing has been rejected as a proper function of pre-hearing detention.

“Some probation departments and law enforcement agencies defend their detention practices on the grounds that detention is of therapeutic value to the child. Others frankly admit that children are detained because of the convenience in conducting investigations and administering psychological examinations. While detention may have a therapeutic effect in selected cases, in the Commission’s view, it is neither the function of law enforcement agencies nor probation departments to use it for this purpose. In our opinion, this is clearly and unmistakably a judicial responsibility which must be arrived at after juvenile court jurisdiction has been established.”

If the juvenile court can no longer claim that youthful law violators are detained prior to adjudication for the purpose of facilitating the court’s physical or psychological evaluations, it must concede that those law violators detained are either being punished before jurisdiction has been established or that they are being held for preventive purposes. By recognizing that it is detaining children for preventive purposes the court would be contending that it is justifiably responding to community pressure for safer streets. But the court must also recognize that there are as yet no sound predictive criteria for determining which children actually pose a threat to the community.

Without such criteria the most reasonable approach to combining “fairness to the child” with protection of the community is careful adherence to standards of due process at the pre-hearing stage.

**Detention Procedures: Current Practice**

In order to understand what “careful adherence to due process standards” means in the context of the juvenile court, we must first review the current procedures.

The decision to detain a child is made at four different levels by individuals with different professional skills. The first among the decision makers is the arresting officer. Although this study does not include an examination of police practice, it should be noted that when the arresting officer decides to refer a child to the detention facility, he is choosing one of a number of alternatives available to him. Among his options, those most commonly used are: (1) release; (2) release accompanied by an official report; (3) release and referral to the juvenile court without detention; and (4) referral to the juvenile court with detention. Of the juveniles referred to the New Haven court in 1969, 20.8% were detained, and well over 90% of those children were taken to the detention facility by the police. Theoretically, the police jurisdiction and influence ends at court intake, yet it is difficult to determine where the actual influence of the arresting officer ceases to have effect.

When the juvenile is referred to detention, he meets
an “intake officer.” In New Haven, that officer happens to be the supervisor of the detention staff. “Intake,” it should be noted, is a term which is by no means limited in application to the detention function; it refers, in the more general sense, to a screening process to determine whether the court should take action in a given case and, if so, what action. It is not a legal term, and except in the cases of juvenile and family courts the term is foreign to the judicial process. In the criminal court, at the post-arrest stage, decisions to screen out are functions of the grand jury, the judge, or the prosecutor. There, screening is an end in itself. In the juvenile court, however, “The function of intake is likely to be more ambitious than its criminal law counterpart.” This is largely because “intake” is inherited from the social work tradition and also because its officers, administrative rather than judicial personnel, are neither legally trained nor significantly restricted in the exercise of their discretionary authority by the procedural requirements which are a part of the criminal law.

When the intake officer, or, in the case of New Haven, the supervisor of detention, first encounters the child, he determines whether the parents have been notified of the child’s whereabouts. He then asks whether the arresting officer has apprised the child of his right to counsel and his right to remain silent. If the child has not been so advised the supervisor himself performs that duty. But beyond that, the only other duties he performs at that point are administrative. They consist of (1) completing the “detention record,” a standardized form reciting information sufficient to locate and identify the child and stating the reason for detention; (2) notifying the appropriate probation officer of the child’s presence in the detention facility; and (3) encouraging the probation officer to detain or release the child, depending upon the youth’s attitude, the nature of his offense, and his previous record.

If the probation officer intends to continue the detention of the child, he must file a delinquency petition within 24 hours and a detention order within 48 hours of the initial referral. However, since the Gault decision, probation officers in the New Haven jurisdiction have had difficulty complying with this rule. One probation officer observed that, “Since Gault requires that we notify both the parent and the child of the right to counsel, we don’t interview the child at all until he’s in the company of his parent. But, under those circumstances, efficiency is out of the question. Getting the mother or the father to show up sometimes presents a serious problem.”

Of course, an informative interview with the child himself is essential to determining whether he should be detained or released, but the question is how and under what conditions the information should be gathered. Current procedures require the probation officer to conduct the interview before the delinquency adjudication if the child admits that he is responsible for the acts alleged, or before the dispositional hearing if he denies the allegation.

In cases involving detention, however, it is most common for him that the probation officer has performed this duty within the 48-hour period prescribed for execution of the “detention order.”

In keeping with the social work heritage of the intake function, the interview itself is intended to facilitate a social investigation. According to the Connecticut juvenile court legislation and Cinque v Boy the first major Connecticut case to uphold the constitutionality of that legislation, the investigation must include the following information:

“Investigation prior to the hearing is provided for... the facts in the case, consisting of an examination of the parentage and surroundings of the child, his age, habits and history, home conditions, and the character of his parents or guardians. In case of alleged delinquency, the investigation is to be made by the probation officer.”

As a preliminary measure, however, the juvenile court rules provide for:

“A conference between the investigating officer and [the] child and his parents, as called for by the notice to appear, wherein the child, in the parent’s presence, is informed of his rights, told of the allegations of the complaint, and requested to make his answer thereto in order to insure that all further court proceedings are legally compatible with the stated position of the child and his parents.”

Even though the probation officer also has the authority to remove the child from the custody of the parent at that initial interview, it appears that such practice is not common among the New Haven probation staff. However, if the child is already in detention at the time of the interview, the probation officer informs the child of his right to a detention hearing. That information is of critical importance to the child because (1) in spite of the probation officer’s recommendation, release is subject to the discretion of the judge, and (2) the child’s right to bail exists “only under exceptional circumstances.”

In view of the fact that the informing of rights is an important function of the initial interview, there are at least three points in this process at which the child’s freedom is jeopardized: (1) the informal interview, (2) the detention hearing, and (3) the application of bail.

Areas for Reform

The Initial Interview: Exercise of Waiver

While it is the duty of the probation officer conducting the interview to inform the child of his right to counsel and his right to remain silent, it is not uncom-
mon to see a child, in the company of his parent, waive his rights. If a child does elect to exercise those rights, the interview is stopped and the matter is scheduled for a "contested," or adversarial, hearing on the merits. 99 However, if the child is in detention at the time of the interview and if he also elects to exercise his right to a detention hearing, the court must grant the request and hold the hearing "not later than 24 hours after the filing of the delinquent petition." 100

Before the Gault decision, waiver of the right to counsel and waiver of the right to remain silent presented no legal problems for the probation officer because, prior to that decision, the juvenile had neither a constitutional right to counsel nor a constitutional right against self-incrimination. Noting, however, that the Supreme Court has extended those rights, particularly the right to counsel, to juveniles who may be committed, lower courts following Gault have explained that

"Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act parens patriae, it has the inescapable duty to vouchsafe due process, and this necessarily includes a duty to see that a subject of an involuntary commitment proceeding is afforded the opportunity to guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf." 101

Thus the New Haven jurisdiction, and most others, have held that the right to counsel as well as the right to remain silent attach whenever a child is subject to "in custody interrogation." 102 Put simply, Gault held that these rights attach whenever the outcome is essentially criminal (i.e., whenever there is a danger of commitment). The Connecticut practice may appear to provide more protection than those mandated by the Supreme Court; however, when one considers that each of a child's encounters with the juvenile court is treated cumulatively rather than separately, it becomes apparent that each encounter — regardless of the outcome — may become evidence at a hearing which results in commitment. Furthermore, the juvenile court's practice of considering the nature of the offense as only a part of the evidence for commitment, makes it difficult to predict at the outset whether the proceeding will result in commitment.

In light of these circumstances, it seems appropriate to treat each juvenile court encounter as if it could result in commitment of the child. But while the courts may reasonably extend due process safeguards early in the proceedings, there remains the problem of determining when and under what conditions a child may exercise waiver. The Gault decision did discuss the waiver of the right to counsel and the right to remain silent, but it did not fully analyze the problems which stem from the improper implementation of waiver. In regard to the waiver of the right to counsel the court ruled that:

"They (Gerald and Mrs. Gault) had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right." 103

Then, in discussing whether the right to counsel applied to delinquency proceedings which may result in commitment, the court noted that, in light of Miranda v. Arizona, 104 it must also consider whether the right against self-incrimination "can effectively be waived unless counsel is present or the right to counsel has been waived." 105 However, in providing an answer to this question the court only ruled that

"We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique — but not in principle — depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, juvenile courts and appellate tribunals in administering the privilege. If counsel is not present for some permissible reason when an admission is obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it has not been coerced or suggested, but also that it is not the product of ignorance of rights or of adolescent fantasy, fright or despair." 106

The majority opinion here did not go far in explaining what conditions are most conducive to "an intentional relinquishment or abandonment of a known right or privilege," 107 and it is doubtful whether the Court will ever hold that there is a single constitutionally acceptable way in which a juvenile can waive a right. However, the court's warning against the admission into evidence of any inculpatory statements which might be the product of coercion articulates the undeniable importance of guaranteeing that neither the right to counsel nor the right against self-incrimination are frivolously or fearfully waived. Of equal importance in this regard is the protection against any waiver of the right to a detention hearing which may be prompted by coercive tactics or administrative zeal. In New Haven, such a waiver results in the child's immediate loss of freedom for a period up to, but not exceeding, 10 days. 108

The consequences of waiving the above-mentioned rights and the undesirability of such waivers resulting from various forms of coercion raise considerable doubt about the propriety of perpetuating New Haven's current plea-taking and investigatory procedures. As previously noted, those steps are completed at an informal conference between the probation officer, the child, and the child's parent. Of course, the child as well as the parent has the right to have counsel present. If either the child or the parent is without legal counsel at the interview but wishes to have such counsel, the interview will be halted in order to allow the child and/or the parent to retain counsel (or have counsel appointed by the court) prior to the delinquency adjudication. Of course, the adequacy of these procedures depends in large measure upon the absence of conflict between parent and child. Without the support of his parent, it is doubtful whether the child will understand or feel confident that he can have counsel, that he can remain silent, and that he can contest the probation officer's decision to continue his incarceration.

In answer to arguments asserting that, under circumstances of family conflict, it is the probation officer's
duty to protect the child’s interest, consider the Supreme Court’s description of the probation officer’s role at the hearing stage.

“The probation officer cannot act as counsel for the child. His role in the adjudicatory hearing, by statute and in fact, is as arresting officer and witness against the child.”

If this description is any less applicable at the interview or “plea-taking” stage, the fact remains that, given conflict between the parent and the child, the probation officer is placed under the considerable burden of extracting a statement of responsibility or a written waiver of the right to a detention hearing and simultaneously insuring that the circumstances permit an uncoerced, intelligent and competent waiver by the accused. The comment of one probation officer at a recent staff meeting indicates that this may not be possible. “Just last week I was in that situation. They (the parents and the child) formed their lines. If I leaned toward helping the child, I would have completely lost the parents. But if I leaned toward the parents, I would have lost all contact with the child.”

Previous sections of this article indicate not only that conflict between the parent and the child is common but that an allegation of incorrigibility imposes additional hardship upon the child. 88% of all the children alleged to be incorrigible were detained prior to adjudication and 40% of all the children committed by the New Haven court in 1969 were delinquent by virtue of incorrigibility. It would appear that the high percentage of cases characterized by explicit conflict between parent and child would prompt the court to recognize that the greatest care must be taken to assure that any waiver by the child is executed without coercion.

To illustrate the danger of coercion which is inherent in the interview setting, consider the matter of M. S., a case characterized by a serious violation of the law as well as parental conflict.

M. S. is a black fourteen-year-old who allegedly set fire to her own home while both parents were away. Upon receipt of the complaint, the intake officer placed M. S. in detention and the probation officer continued her detention until the interview preceding a possible detention hearing. At the interview M. S. and her mother were advised of the right to counsel but the mother was opposed to retaining counsel, probably because of the onerous financial burden already incurred as a result of the fire’s damage to the house. M. S., who remained rather sullen and non-communicative throughout most of her stay in the detention facility, was indifferent to acquiring retained or appointed counsel but insisted, after being asked to sign a statement of responsibility, that she did not set the fire. However, she did admit to setting two smaller fires in the home on previous occasions. Further inquiry revealed that M. S. believed that her sister, the complainant in this case, had set the fire with the express intention of incriminating her (M. S.), in order to retaliate for a number of past disputes.

When the matter of a detention hearing was raised, the probation officer informed both the parent and the child that the recommendation to the judge would be for continued detention unless Mrs. S. could assure the probation officer that M. S. would have suitable lodging and custodial attention until the hearing. Because Mrs. S. would give no such assurance, the probation officer quite candidly urged the child to waive her right to a hearing because, under the circumstances, it was almost certain that the judge would remand her to the detention facility.

Although the allegations themselves suggest a great strain in the parent-child relationship, the court certainly should have been warned of conflicting interests when the parent expressed no desire to retain counsel for the child or to provide suitable lodging until the delinquency adjudication. Under the circumstances, it appears that the better course would have been to bring the interview to a halt and test the waiver against the Miranda standards before proceeding. Those standards are intended to inform a defendant of the exact nature of his rights and to “overcome the inherent pressures of the interrogation atmosphere”; yet clearly in this case neither the parent nor the probation officer helped to overcome that pressure.

In Gallegos v. Colorado, the Court discussed a similar situation and held that “[the child]...would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing those rights — and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself...” Later, in the same opinion, the Court reversed a conviction based upon the confession obtained from the uncounseled child and warned that “There is no guide to the decision of cases such as this, except the totality of circumstances” (emphasis added).

In New Haven, as previously noted, the “totality of the circumstances” of the interview setting is often characterized by parent-child conflict and an absence of legal counsel. The probation officer must choose one of two courses. He may proceed with the interview after advising the child of his right to counsel and right to remain silent (as he did in the matter of M. S.). But if he elects this course, he faces the dilemma of having to secure a statement of responsibility or a waiver of the right to a detention hearing, while simultaneously having to protect the child’s rights. In addition there is the danger of the child’s case being prejudiced at the delinquency hearing. That danger results from the probation officer’s authority to prepare and admit his social investigation as testimony before adjudication. When the probation officer exercises that authority, the judge has the opportunity to read the report at the delinquency adjudication — before ascertaining whether the child still maintains that he is responsible for the acts alleged.

The social investigation thus acquires testimonial character and, consequently, raises the potential issue of self-incrimination.

If the probation officer elects to follow the second course and refuses to conduct the interview until the child is in company of counsel, there is a greater probability that the child’s rights will be protected — but there is also the marked disadvantage of additional delay. The average time interval between initial referral and adjudication is 121 days and a policy requiring counsel to
Recommendation for Change

A proper solution would seem to require the elimination of the pre-hearing interview. In its place, the court should substitute an arraignment hearing for every matter serious enough to require a judicial determination of delinquency. That hearing should be presided over by the judge or a court-appointed referee and should be held no later than 15 days after referral in cases involving no detention, and no later than 48 hours after the filing of a delinquency petition in cases which do involve pre-hearing detention. Not only should retained counsel or a public defender always be present, but the judge or referee should be required to appoint a guardian ad litem where practicable. This would facilitate the separation of judicial roles, a problem which now plagues the attorney practicing in the juvenile court.

"[The Lawyer] must stand as the ardent defender of his client's constitutional and legal rights. . .[with] the concepts of "guardianship" . . .[seeming] to require that not only the legal rights but the general welfare of the minor be thrown on the scale in the weighing by counsel of his course of action. . .[The guardian further] must assume the duty of interpreting the court and its objective to both child and parent. . ."120

The function of the hearing should be limited to advising the child of his rights in accordance with the Gault and Gallegos requirements, reciting the allegations, and taking a plea. But if the child should deny the allegations, it would also seem necessary to enter a finding of probable cause.121

The advantages of such a model include (1) greater protection of the child's rights and the consequent reduction of unwarranted investigations before jurisdiction has been established; (2) a more expeditious determination of the state's burden of proof and the sufficiency of its evidence; (3) a greater opportunity to challenge allegations of incorrigibility and to amend the complaint to neglect; and (4) a reduced burden upon the probation officer and a greater opportunity for him to devote his time to casework. The disadvantages include (1) greater formality at the preadjudication level, (2) an increase of judicial personnel, (3) the necessity of formulating more efficient mechanisms for retaining assistance of court appointed counsel, and (4) an increase in cost.

Obviously, there are many other advantages and disadvantages associated with the proposed model, and this article does not pretend to list them all. Nevertheless, it should be apparent that the problems created by the current procedures are serious enough to warrant further examination and consideration of the proposed model.

The Detention Hearing: Nature of the Proceedings

In describing the nature of the detention hearing, the juvenile court rules provide that "The court may admit into evidence any testimony that is material and relevant to the issue of detention."122 But even though the rules require that the probation officer have "reasonable cause to believe that the child is responsible for the acts alleged," there is no requirement for a finding of "probable cause" at the detention hearing.123 The judge may remand the child to detention for a period not to exceed 15 days unless, at the end of that period, a second judicial hearing finds that the condition which first resulted in the detention of the child still persists.124

The proposed model would also require several changes in the detention hearing itself. Under current New Haven procedures, that hearing is initiated only in response to a written or oral request by the child. In 1969, the court held detention hearings for only 31 out of the one hundred forty-nine juveniles who were detained beyond 48 hours prior to adjudication. The remaining children waived the right to the hearing.

Criticizing high rates of detention, the President's Task Force on Youth Crime asserts that "the law should require (and judges should compel) that a detention hearing be held within no more than 48 hours of initial detention."125 One might question whether the Task Force agrees with the policy of applying waiver concepts where the right to a detention hearing may be forfeited;126 in any event, the waiver practices which were discussed earlier clearly demonstrate the danger of coercion when an un counselled child is told by an officer of the court, "You have the right to a hearing if you want it, but I doubt that it will get you out of here."127 Addressing itself to that very situation, the Crime Commission reports that in order to assure "procedural justice for the child," it is necessary that "counsel. . .be appointed as a matter of course whenever coercive action is a possibility, without requiring any affirmative choice by child or parent."128 In that context, it becomes apparent that procedural justice requires the presence of counsel whenever the possibility of waiver exists and whenever a detention hearing is held.

The extent to which detention hearings will limit unwarranted incarceration depends not only upon the presence of counsel but also upon the criteria for detention, the nature of admissible evidence, and the scope of the hearing. As previously noted, the Court Rules governing the nature of the detention hearing provide that "The Court may admit into evidence any testimony that is material and relevant to the issue of detention."129 Such evidence includes "the bases for detention" which were examined earlier in this article (i.e., strong probability of runaway, strong probability of committing other offenses and seriousness of offense).130 Yet in spite of the reference to serious offenses or "danger to the community," there is no provision for a judicial determination of probable cause.

Of course, there are other areas of the law in which that practice is sanctioned. For example, prediction of future dangerous conduct forms the basis for confine-
ment in proceedings for commitment of the mentally
ill, sexual psychopaths, and defective delinquents.131
Those commitment statutes are designed to protect
society by confining for an indeterminate period those
offenders who have demonstrated habitual deviant
behavior, and to provide medical treatment for their
cure.132 In examining those procedures, the Harvard
Law Review raised an interesting proposition:

“If a case arose in which medical testimony indicated
that a patient could not be helped by treatment (either
because no treatment was known for his illness or be-
cause the available hospital had inadequate facilities) but
he was nonetheless committed as dangerous, the court
might well hold that the state was punishing the patient
for an illness and thus inflicting cruel and unusual
punishment.”133 (Emphasis added)

In this light, consider the case of a juvenile charged with
a serious offense or a child thought to represent a danger
to the community. Under current procedures such children are confined with the sanction of the court, not
because they are being punished but because such detention is intended to offer "solicitous care and regenera-
tive treatment." But it is precisely the inadequacy of such care and treatment which prompted this comment.
Under present procedure one might argue that pre-
hearing detention without a finding of probable cause amounts to a denial of due process.

In a recent federal case, Cooley v. Stone,135 a
sixteen-year-old boy charged with burglary was de-
tained in a District of Columbia receiving home. At the
detention hearing, counsel for the child was denied a
request for judicial inquiry into probable cause. In
refusing to enter such a finding, the court limited its
inquiry to a determination of the advisability of releasing
the boy to his mother and subsequently remanded the
child to a detention facility.

The defense counsel sought and obtained a writ of
habeas corpus in the United States District Court for the
District of Columbia:

“No person can be lawfully held in penal custody of the
state without a prompt judicial determination of
probable cause. The Fourth Amendment so provides and
this constitutional mandate applies to juveniles as well as
adults.”136

The United States Court of Appeals affirmed the ruling
of the District Court, asserting that both the fourth and
fifth amendments require a judicial determination of
probable cause.137

Recommendations

It would seem that the right to counsel as well as the
right to a judicial determination of probable cause are
necessary to minimize unwarranted governmental intrusion
into the life of a child accused of delinquent
behavior.

Another factor which argues for requiring a finding of
probable cause is that in personal liberty and due process
indicators of the danger a child poses to the community.

As procedures are now structured, a judicial hearing
which denies the child an opportunity to contest the
factual base of a police report (the only evidence
presently admitted as testimony which is relevant to the
issue of the court’s jurisdiction) has little to recommend
it to those who are concerned about procedural justice
for the child.

We recommend, therefore, that a detention hearing
which includes judicial inquiry into probable cause be
incorporated into the proposed arraignment or prelimi-
nary hearing procedures. The hearing should be held not
later than 48 hours after the filing of a delinquency
petition and should follow the warning of rights, the
recital of the allegation, and the plea-taking procedures
of the proposed arraignment proceedings. The intake
officer should continue to advise the child of his right to
counsel and his right to remain silent when the child is
first admitted to detention, but he should accept the
additional responsibility of guaranteeing that the child
has an opportunity to consult with counsel as well as
with his guardian ad litem before the arraignment and
detention hearing.

Bail

Assuming that there is a finding of probable cause at
the detention hearing, the question of securing the
child’s release becomes more difficult. Under current
procedures the child has no absolute right to bail; the
issue of release constitutes a discretionary matter to be
decided by the juvenile court judge.138 The criteria he
applies are those examined earlier.139

Before juvenile court legislation was instituted,
children charged with crimes were presumably entitled
to the same right to bail as adult offenders; for the child
was held legally responsible (subject to certain presump-
tions based upon his age) for his criminal conduct and
could be subjected to the same punishment inflicted
upon adults convicted of the same offense.140

The United States Constitution, however, does not
expressly grant a right to bail for juvenile or adult
offenders,141 and the Supreme Court has held that the
denial of bail in some statutorily prescribed instances
does not constitute a violation of due process of law.
The “no excessive bail” clause was “never... thought
to accord a right to bail in all cases, but merely to pro-
vide that bail shall not be excessive in those cases where
it is proper to grant bail.”142 In a more recent case, the
Court also held that:

“[T]he fact that a liberty cannot be inhibited without
due process of law does not mean that it can under no
circumstances be inhibited. The requirements of due
process are a function not only of the extent of the
governmental restriction imposed, but also of the extent
of the necessity for the restriction.”143

In light of those holdings, it appears that the juvenile
court’s bail practice, a creation of the state legislature,
may not constitute a violation of due process standards prescribed by the Federal Constitution. With regard to the holdings of the Connecticut courts, the picture is basically the same; the present constitutional law is that "no person shall be arrested, detained or punished, except in cases clearly warranted by law." Pre-hearing or preventive detention of juveniles and the discretionary application of bail are so warranted.

Recommendations

There are some practical considerations which militate against extending an absolute right to bail in delinquency proceedings. First, money should not be a determinant when the detention or release of a child is at issue. Recent bail reform legislation emphasizes that admission to bail does not necessarily imply that a money bond must be posted. Secondly, juvenile court legislation makes it clear that the detention of a child prior to adjudication must turn upon a determination of how the welfare of the child will best be served. The question, then, is whether the parent or legal guardian is both willing and able to provide adequate custodial supervision of the child pending adjudication or disposition. The determination of that question is in keeping with the philosophy which was intended to characterize the juvenile court. Hence the extension of an absolute right to bail may cause unnecessary problems if the parent is not willing to care for the child prior to adjudication. For example, in the matter of A.M. the child's mother filed a complaint with the court and refused to take custody of the child after being informed of the court's intention to release him. Should an absolute right to bail extend to the child and the community which demands the careful consideration of each individual's rights; and no phase of juvenile justice procedures requires more careful consideration than that of detention of youthful offenders.

Conclusion

This article began with an examination of the current detention practices in the New Haven juvenile court and continued with a reappraisal of the criteria and procedures for detention in light of the due process issues raised by the Gault decision. The recommendations which follow from that reappraisal include: (1) the elimination of the initial interview in judicial cases; (2) the replacement of that interview with an arraignment hearing, to be held not more than 15 days after referral in cases involving no detention, and not more than 48 hours after the filing of a delinquency petition in cases that do; (3) the guarantee of counsel as well as of a guardian ad litem at the arraignment hearing (with sufficient notice of such guarantees before the hearings); (4) provision for waiver of the right to counsel, and the right to remain silent subsequent to the appraisal of those rights and the recital of allegations during the subsequent to appraisal of rights, recital of allegations hearing with a judicial determination of probable cause subsequent to appraisal of rights, recital of allegations and entering the plea at arraignment.

Though these recommendations are addressed primarily to more extensive formalities at the pre-adjudication stage, we cannot over-emphasize that the greatest care should be exercised by the court at every phase of the delinquency process. To emphasize the necessity of procedural regularity, however, is not to denigrate the court's ideal of caring for the child. Speaking to this point, the Task Force observed that

"Willingness to understand and treat people who threaten public safety and security should be nurtured, not turned aside as hopeless sentimentality, both because it is civilized and because social protection itself demands constant search for alternatives to the crude and limited expedient of condemnation and punishment. But neither should it be allowed to outrun reality. The juvenile court is a court of law, charged like other agencies of criminal justice with protecting the community against threatening conduct... What should distinguish the juvenile from the criminal courts is greater emphasis on rehabilitation, not exclusive pre-occupation with it."

It is the juvenile court's dual role of protecting both the child and the community which demands the careful consideration of each individual's rights; and no phase of juvenile justice procedures requires more careful consideration than that of detention of youthful offenders.

2. For general background of juvenile court legislation and handling of juvenile offenders prior to such legislation, see Platt, The Child Saver, The Emergence of the Juvenile Court in Chicago, 1969.
3. The first juvenile court legislation was enacted by the Illinois legislature in 1899. "It did not create a new court; it did include most of the features that have since come to distinguish the juvenile court. The original act and the amendments that shortly followed brought together under one jurisdiction cases of dependency, neglect and delinquency—the last category comprehending incorrigibles and children threatened by immoral associations as well as criminal law breakers." Task Force Report, Juvenile Delinquency and Youth Crime, p. 3. (1967)
5. The adoption of this philosophy is attributed to a reaction against the treatment of children in adult criminal courts. As to the inadequacy of such a judgment in the absence of other measures, see Paulsen, Kent v. United States: The Constitutional Context of Juvenile Cases, 1966 Sup. Ct. Rev. 167.
## Table A

Children Detained: Categorized by Offense

<table>
<thead>
<tr>
<th>Offense</th>
<th>Number Detained</th>
<th>Percentage of All Children Detained</th>
</tr>
</thead>
<tbody>
<tr>
<td>Serious Offense*</td>
<td>23</td>
<td>15.4</td>
</tr>
<tr>
<td>Against Property</td>
<td>2</td>
<td>1.3</td>
</tr>
<tr>
<td>Auto Theft</td>
<td>5</td>
<td>3.3</td>
</tr>
<tr>
<td>Incorrigibility</td>
<td>36</td>
<td>24.1</td>
</tr>
<tr>
<td>Runaway</td>
<td>10</td>
<td>6.6</td>
</tr>
<tr>
<td>Incorrigibility plus Serious Offense</td>
<td>8</td>
<td>5.3</td>
</tr>
<tr>
<td><strong>Violation of Probation by virtue of:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Serious Offense</td>
<td>8</td>
<td>5.3</td>
</tr>
<tr>
<td>Auto Theft</td>
<td>6</td>
<td>4.0</td>
</tr>
<tr>
<td>Offense against Property</td>
<td>27</td>
<td>18.1</td>
</tr>
<tr>
<td>Incorrigibility</td>
<td>13</td>
<td>9.3</td>
</tr>
<tr>
<td>Incorrigibility plus Serious Offense</td>
<td>8</td>
<td>5.3</td>
</tr>
<tr>
<td>Runaway</td>
<td>3</td>
<td>2.0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>149</td>
<td>100%</td>
</tr>
</tbody>
</table>

*The offense defined as serious and actually committed include: aggravated assault, rape, robbery, breaking and entering, and Possession of a dangerous weapon.

---

15. Note, The Parens Patriae Theory and its Effect on the Constitutional Limits of Juvenile Court Powers, 27 Pitt. L. Rev. 887, 909 (1966) remarking: "Generally, the courts have treated the problem of the child's right to liberty in terms of the parent's right to custody of the child... The proposition that the child may not assert his right against the state acting as parens patriae follows from the analogy to the parent-child relationship. [T]he child is not entitled, either by the laws of nature or of the state, to absolute freedom, but is subjected to the restraint and custody of a natural or legally constituted guardian to whom he owes obedience and subjectation."
19. Id., at 219 but accuracy demands that we acknowledge the existence of a second temporary receiving center in the second district.
20. By maintaining quarters for members of the detention staff, the court makes it possible for an intake officer to be on duty at all times. The primary benefit of such an arrangement is that there is always an officer to authorize the detention or release of a child—even after 5:00 p.m., the end of the normal working day for other court officials.
22. From an interview with a member of the New Haven staff, April 4, 1970.
23. Conn. Gen. Stat. Sec. 17-46; but also see sec. 17-64 providing: "When accommodations for the temporary detention of children in state operated detention homes are unavailable, the judge of each district of the juvenile court shall arrange with some agency or person within such jurisdiction for the use of suitable accommodations to serve as a temporary detention place as may be required. . ."
24. While it may not be as surprising to note that treatment programs and facilities are not available to adult offenders incarcerated pending trial, other studies have indicated that the same situation is common among most adult penal institutions. e.g., Brockett, W.A., Pre-Trial Detention: "The Most Critical Period". Unpublished thesis, Yale Law School 1970.
25. Conn. Gen. Stat. at sec. 17-56 the statute provides that judges shall meet annually to "make orders and rules to carry into effect the provisions of this part, including suitable forms of procedure thereunder. . ."
27. The actual Rule reads as follows: "Rule 7-Basis For Detention—(1) no child shall be placed in detention or
<table>
<thead>
<tr>
<th>Offense</th>
<th>Number Detained</th>
<th>Number not Detained</th>
<th>Total</th>
<th>% Detained</th>
</tr>
</thead>
<tbody>
<tr>
<td>Serious Offense</td>
<td>23</td>
<td>35</td>
<td>58</td>
<td>40%</td>
</tr>
<tr>
<td>Against Property</td>
<td>2</td>
<td>48</td>
<td>50</td>
<td>4%</td>
</tr>
<tr>
<td>Auto Theft</td>
<td>5</td>
<td>10</td>
<td>15</td>
<td>33%</td>
</tr>
<tr>
<td>Incorrigibility</td>
<td>36</td>
<td>5</td>
<td>41</td>
<td>88%</td>
</tr>
<tr>
<td>Runaway</td>
<td>10</td>
<td>4</td>
<td>14</td>
<td>71%</td>
</tr>
<tr>
<td>Incorrigibility plus Serious Offense</td>
<td>8</td>
<td>0</td>
<td>8</td>
<td>100%</td>
</tr>
<tr>
<td>Violation of Probation by virtue of:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Serious Offense</td>
<td>8</td>
<td>2</td>
<td>10</td>
<td>80%</td>
</tr>
<tr>
<td>Auto Theft</td>
<td>6</td>
<td>0</td>
<td>6</td>
<td>100%</td>
</tr>
<tr>
<td>Offense against Property</td>
<td>27</td>
<td>10</td>
<td>37</td>
<td>73%</td>
</tr>
<tr>
<td>Incorrigibility</td>
<td>13</td>
<td>2</td>
<td>15</td>
<td>87%</td>
</tr>
<tr>
<td>Incorrigibility plus Serious Offense</td>
<td>8</td>
<td>2</td>
<td>10</td>
<td>80%</td>
</tr>
<tr>
<td>Runaway</td>
<td>3</td>
<td>0</td>
<td>3</td>
<td>100%</td>
</tr>
<tr>
<td>Total</td>
<td>149</td>
<td>118</td>
<td>267</td>
<td>56%</td>
</tr>
</tbody>
</table>
Table B1

Children Adjudicated Who Were Subsequently Committed

1) Detained and subsequently committed: 37%
2) Not detained but subsequently committed: 7%
3) Adjudicated and subsequently committed: 24%

| Number Committed | Children Committed-by Offense | Number Detained and Committed | Number not Detained but Committed | Children Detained-by Offense %*
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Serious offense</td>
<td>2</td>
<td>3.3</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Incorrigibility</td>
<td>10</td>
<td>15.9</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>Runaway</td>
<td>2</td>
<td>3.3</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Incorrigibility plus Serious Offense</td>
<td>5</td>
<td>7.9</td>
<td>5</td>
<td>0</td>
</tr>
</tbody>
</table>

Table B2

Violation of Probation by virtue of:

<table>
<thead>
<tr>
<th></th>
<th>Number Committed</th>
<th>Children Committed-by Offense</th>
<th>Number Detained and Committed</th>
<th>Number not Detained but Committed</th>
<th>Children Detained-by Offense %*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Serious offense</td>
<td>8</td>
<td>12.6</td>
<td>6</td>
<td>2</td>
<td>75%</td>
</tr>
<tr>
<td>Against property</td>
<td>8</td>
<td>12.6</td>
<td>7</td>
<td>1</td>
<td>26%</td>
</tr>
<tr>
<td>Auto theft</td>
<td>4</td>
<td>6.3</td>
<td>4</td>
<td>0</td>
<td>66%</td>
</tr>
<tr>
<td>Incorrigibility</td>
<td>15</td>
<td>23.9</td>
<td>13</td>
<td>2</td>
<td>100%</td>
</tr>
<tr>
<td>Incorrigibility plus Serious Offense</td>
<td>9</td>
<td>14.2</td>
<td>8</td>
<td>1</td>
<td>100%</td>
</tr>
<tr>
<td>Total</td>
<td>63</td>
<td>100%</td>
<td>55</td>
<td>8</td>
<td>37%</td>
</tr>
</tbody>
</table>

*This column represents the ratio of “Number Detained and Committed” in Table B to the “Number Detained” in Table A. For example, under incorrigibility in Table A, note that 36 children were detained, while under incorrigibility in Table B, 10 out of the 36 (27.7%) were subsequently committed.

27 days. However, the average time interval between initial referral and adjudication was 121 days. Consequently, it appears that fear of the child not appearing on the scheduled hearing date is not an actual reason for detention under the current New Haven practice.

38. Conn. Gen. Stat. sec. 17-66 authorizes such investigations but the probation officer seldom has the time or the opportunity to conduct an inquiry into the child’s case history when such child is held less than 48 hours.

39. The tables correlating the runaway allegation with data from the child’s social history is not included herein but “inability to locate the parent” and “immediate threat of physical abuse” accounted for the detention of over 85% of all those children charged with “runaway” but who were also released within 48 hours from detention.

40. Court Rules, supra at note 27.


42. Detention Standards, supra note 31 at 15.
Table C

Offenses Committed Between Initial Referral and Adjudication

I. Average time interval between initial referral and hearing
   A. In cases characterized by detention upon initial complaint: 112 days
   B. In cases characterized by no detention upon initial complaint: 130 days

II. Repeaters: 42% repeated (21/50)
   A. Number of children:
      | Detained | Not detained | Total |
      |----------|--------------|-------|
      | Repeater | 12           | 9     | 21    |
      | Non-repeater | 17   | 12    | 29    |
      | Total     | 29           | 21    | 50    |

   B. Number of children: Previous Record
      | Previous Record | No Previous Record | Total |
      | Detained | Not Detained | Total | Detained | Not Detained | Total |
      | Repeater | 10           | 8     | 18     | 36%       | 2      | 1     | 3     | 6%     |
      | Non-repeater | 15   | 3     | 18    | 2      | 9     | 11    |
      | Total     | 36           | 72%   | 14    | 28%     |

III. Number of Offenses Committed:
   Against person | 5 | Incorrigibility | 6
   Against property | 40 | Runaway | 14
   Auto theft | 9 | Total Number of Offenses | 74

43. *Court Rules, supra* at note 27.
45. *Id.* at 167.
46. See Table A.
47. *Id.*
48. *Id.*
50. See testimony of Judge Harold H. Green and Professor Alan Dershowitz, *Hearings on Amendment to the Bail Reform Act of 1966* before the Subcomm. on Constitutional Rights of the Sen. Comm. on the Judiciary, 91st Cong., 1st sess., 29, 172(1969) speaking about predictive indicators in regard to adult offender. No studies on juvenile offenders are yet available.
51. See Table A
52. Taken from a recent but undated inter-office memorandum entitled *Detention Admission Regulations* – applicable to New Haven practice.
53. See Table A.
54. See Table B.
55. Corrections, supra Note 32, at 36 reports that of 409, 218 detained, about 167,000 were neither committed or placed on probation.

56. Conn. Gen. Stat. sec. 17-69 provides that "commitments by the juvenile court shall be for an indeterminate time but shall terminate when the child reaches the age of twenty-one except in the case of mental deficiencies or defective delinquents. . . ."

57. See Table B.

58. 121 days represents the average of "A" and "B" under Roman number I in Table C.

59. The statistics recorded under the heading "recidivism" are the product of a sample study including 50 cases selected at random. With regard to these statistics, therefore, it is important to note that their actual statistical relevance has not yet been determined. All other statistics, however, reflect a pattern among the entire judicially handled population.

60. Compare, Wheeler and Cottrell, Juvenile Delinquency, Its Prevention and Control (1966) at 3, remarking: "... as of now, there are no demonstrable and proven methods for reducing the incidence of serious delinquent acts through preventive or rehabilitative proceedings."

61. Ketchum, Unfulfilled Promise of the Juvenile Court, in Justice For the Child, 27 (Rosenheim ed. 1962).


63. See Detention Standards, supra note 31, at 2, 8.


67. But see, Detention Standards, supra note 31 at 2; and Freedand Wald, supra note 25, at 109 discussing the use of shelter care for some delinquents.

68. Status offenses are those classified as delinquencies only if committed by juveniles, and include truancy, running away, and incorrigibility. "The distinction [between the status offender and the neglected child] is theoretically questionable and distorted in practice. . . ." Breckenridge and Abbott, The Delinquent Child and the Home, 11-12 (1912).

69. E.g., Eaton, Detention Facilities in Non-Metropolitan Counties, 17 Juv. Ct. Judges J. 9, 11-12 (1966). The question of physically restricting custody is not determined "solely on the basis of the gravity of the misconduct charged. A self-confident runaway who sees no reason why he should not keep going may be more of a security risk than the juvenile barglar who, when apprehended, reverts to the status of a frightened and homesick small boy."

70. See notes 43 through 47 as well as accompanying text. But for opposite view, see N.C.C.D., Guides for Juvenile Court Judges, supra note 49, at 47-48, noting that some communities have successfully operated a variety of shelter care facilities for law violators.

71. E.g., Warner, Juvenile Detention in the United States 152 (1933). There, she notes that "The effect of detention on any child may be far more far reaching than is evident on the surface. Subjecting a child to a period of congregate detention is a risk. Association with children of all degrees of delinquency exposes the child to a contagion as real as that of infectious disease and stimulates delinquent interest if nothing more."


73. See notes 58 through 60 and accompanying text.


75. This rate represents the percentages of those detained out of all children referred in 1969.

76. The correlation table showing the relationship between police referral and total referral is not included herein but the breakdown indicated that 94% of the children detained were brought in by police, 3% by the parents, and 3% by schools and other agencies. Compare this to 98.4% of all juvenile court cases handled in Chicago being referred by police during 1964. Citizens Committee on the Family Court, Bulletin 4 (April 1965).


78. It is conceded by various members of the probation staff that the decision "to detain a child for a day or two is sometimes the result of an arresting officer's heated recommendation."

79. The Intake Officer is most often a probation officer vested with the responsibility of making an initial determination of whether the allegations against the child are sufficient to invoke the statutory jurisdiction of the juvenile court. For general discussion of the intake function, see Palmier, Juvenile Court Intake: Form and Function, 5 Williamette L. Journal 121 (1968); Sheridan, Juvenile Court Intake, 2 Journ. Fam. Law 139 (1962).

80. Id., Juvenile Court Intake, at 146.

81. Id., at 144.


83. Id., at 14.

84. Juvenile Court Intake, supra note 79, at 144.


86. Court Rules, supra note 27, art. V, rule 8 (1).

87. Id., Art. VIII, rule 20 (1).

88. Id., art. V, rule 7 (2).

89. Id., art. V, rule 7 (3).


91. The New Haven practice includes procedures for waiver of the right to a detention hearing. In most cases involving detention beyond 48 hours, the probation officer invokes those procedures in order to speak with the child about his case — if the child has waived the right to counsel and the right to remain silent — but his primary objective is to secure the child's waiver of the right to a detention hearing.
46 123. Published by Yale Law School Legal Scholarship Repository, 1971

112. See text

114. 343

108.

103. 117.

116.

111. From probation staff meeting, Aug. 26, 1970.

119. See Paulsen,


97. 94.

93. 99 Conn.


93. 99 Conn. 70, at 78, 121 Atl. 678, at 681 (1923).

94. Id.

95. Court Rules, supra note 27, at Art I.


97. Court Rules, supra note 27, at Art V., rule 8 (3).

98. Id. at art VIII, rule 23.

99. If the case becomes a contested matter, the prosecutor, or "court advocate" as he is called, and counsel for the child conduct an adversarial hearing with the judge presiding. Witnesses are sworn and rules of evidence are recognized.

100. Court Rules, supra note 27, at Art V, Rule 9 (1).


102. Court Rules, supra note 27, at Art V, rule 7 (1).

103. In Re Gault, supra note 10, at 41 and 55.


105. In Re Gault, supra note 10, at 44.

106. Id., at 55.


108. Court Rules, supra note 27, at art. V, rule 7 (5).


110. See, Williams v. Huff 142 F. 2d 91 (D.C. Cir. 1944). The second opinion in this case, again reversing the District Court is at 146 F. 2d 867 (D.C. Cir. 1945) In which the District of Columbia Circuit reversed the discharge of the habeas petition of a seventeen-year-old convicted of assault without the assistance of counsel. The court found the validity of an alleged waiver to be a question of fact and remanded to determine "whether, in light of his age, education and information, and all other pertinent facts, [the defendant] . . .has sustained the burden of proving that his waiver was not competent and intelligent." 142 F.2d at 92.

111. From probation staff meeting, Aug. 26, 1970.

112. See text supra, accompanying notes 51-55.

113. See Table A and B.

114. Miranda v. Arizona, supra note 102, at 468.


116. Id., at 54.

117. Id., at 55.

118. See Vt. Stat. Ann. tit. 33, sec. 678 (Supp. 1967): "Whenever a minor is charged with a crime in any court and is not represented by counsel the court shall forthwith appoint a guardian and attorney to defend the interest of the minor. Whenever a minor is charged with a felony in any court, he shall be represented by counsel."

119. See Paulsen, The Constitutional Domestication of the Juvenile Court, 1967 sup. Ct. Rev. 233, 261-65 (P. Kurland ed.) Professor Paulsen delineates the difficulties of having counsel perform more than the role of advocate, noting the conflict of interests which may result from concern with obtaining rehabilitation for the child. He also quite rightly raises question about the qualifications of most lawyers to make such decisions.


121. In requiring the judicial officer to enter a finding on the basis of the information presented, there is a substantial probability that the child committed the offense with which he is charged, the test to apply should be comparable to the civil test for the issuance of a preliminary injunction; i.e. "likelihood of eventual success on the merits." W.E. Bassett Co. v. Revlon, Inc. 354 F.2d 868, 872 (2d Cir. 1966).

122. Court Rules, supra note 27, at Art V, Rule 9 (1).

123. Id., at Art V, rule 7 (1).

124. In unusually complicated situations, the judge will inquire into the facts of the case—not to enter a finding of probable cause but to understand what the allegations actually entail. However, because there are only 2 judges serving the New Haven Juvenile Court, it is likely that the judge presiding at the detention hearing will also preside at the adjudicatory hearing. In order to prevent this and thereby minimize the possibility of prejudicing the child's case, the judge presiding over the detention hearing will disqualify himself from the adjudicatory phase if he feels that he has heard too much.

125. Task Force Report, supra note 3, at 37.

126. Id., at 37 the Report does recommend that the authorization of detention be limited to probation officers but the object of the recommendation is to "develop and enforce a uniform detention policy". It is the contention of this commentary that the Task Force recommendation falls short of enabling the juvenile court to realize a uniform detention policy if that recommendation is meant to imply that individual probation officers within a given probation staff may continue to authorize detention by securing waivers; such practice would only perpetuate the current New Haven condition. There are as many different detention policies as there are different probation officers.

127. From an interview with a member of the New Haven Intake Staff (Feb. 10, 1970).


129. Court Rules, supra note 27, at Art V, rule 9 (2).

130. See text accompanying supra notes 22 through 30.

131. See generally Note, Civil Commitment of Narcotic Addicts, 76 Yale L. Jour. 1160 (1967); Note, Civil Commitment 79 Harv. L. Rev. 1288.

132. 79 Harv. L. Rev. 1288, 1291.

133. Id.


135. 414 F. 2d. 1213 (D.C. Cir. 1969).

136. Id. (quoting District Court Decision).

137. Id., at 1214.

139. See note 136 supra.


141. See Mitchell, *Bail Reform and The Constitutionality of Pretrial Detention*, 55 Va. L. Rev. 1223, 1224 (1969) remarking: "[The Eighth Amendment] which does not expressly grant or deny a right to bail, is susceptible of two interpretations. First, because the amendment does not provide for denial of bail, it can be construed to require the setting of bail in all cases with the proviso that it never be excessive. Second, because the amendment does not specifically grant the right to bail, it can be construed to mean only that bail shall not be excessive in those cases in which it is proper and that the setting of no bail in certain cases is not excessive." The analysis in the accompanying texts of this commentary proceeds from the second interpretation.


146. See *Task Force Report*, supra note 3, at 36.


149. *Task Force Report*, supra Note 3, at 36 remarking: "...[Bail] is one of those attributes of the criminal process that it is wise for the juvenile court system to be free of. Release as of right plainly may interfere with the protection or care required in some cases..."
