1-1-1975

Juvenile Detention Hearings: The Case For a Probable Cause Determination

Nancy Hoffman

Kristine Mackin McCarthy

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation

Available at: http://digitalcommons.law.scu.edu/lawreview/vol15/iss2/1

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
INTRODUCTION

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

The backward world depicted by Lewis Carroll no longer exists in the adult criminal process, but in the juvenile court system, vestiges of illogic remain. In California, a supposedly enlightened jurisdiction, a juvenile accused of a crime may find himself detained in juvenile hall for as long as twenty-one days or more before there is any determination that he has committed the crime with which he is charged. Under the guise of parens patriae, the juvenile court has taken short cuts that unnecessarily undermine due process. Recent decisions by the United States Supreme Court have mandated that certain constitutional rights apply in the adjudicatory stage of a juvenile court proceeding.

1. *A. B., 1955, University of California, Berkeley; J.D., summa cum laude, 1974, University of Santa Clara School of Law; member, California Bar; Deputy Public Defender, Santa Clara County.

2. **B.A., 1971, Loretto Heights College, Denver, Colo.; J.D. Candidate, University of Santa Clara School of Law.

The authors wish to thank Aidan R. Gough, Professor of Law, University of Santa Clara School of Law, whose ideas, counsel, and guidance made this article possible.


2. A juvenile may be kept in custody for forty-eight hours before a petition to declare him a ward or dependent child is filed. Since nonjudicial days are not included within this forty-eight hour period it is conceivable that a juvenile could be detained another three days if he is picked up before a three day weekend. After the detention hearing he may be detained fifteen judicial days before the jurisdictional hearing is held to determine his guilt or innocence. Of course this fifteen day period does not include week-ends or other holidays. See Cal. Welf. & Inst'n Code §§ 631 (West Supp. 1974), 632, 636 (West 1972).

However, it is still unclear what constitutional guarantees apply to the decision to detain a juvenile prior to his adjudication as a juvenile offender.4

This article focuses on the detention hearing as a critical stage in the proceeding against a juvenile. The present state of the law is analyzed with particular attention devoted to the four jurisdictions that require, by statute, a probable cause finding at the detention hearing;5 in addition, the article examines the juvenile detention process in California.

Recent trends in statutory enactments and case law since In re Gault6 provide the basis for our contention that a probable cause hearing is necessary prior to the detention of a juvenile accused of a crime.7 This article suggests that the preliminary hearing in the adult criminal process should serve as a model to be followed in juvenile court proceedings. In addition, the problems that may arise by requiring a probable cause hearing are reviewed and possible solutions are suggested.

WHAT IS DETENTION?

A place of "detention" means different things to different people. To a poorly informed public it is "[w]here the bad kids are."8 To most law enforcement officers it is "[w]here you take minors who have broken the law."9 To the minor in detention it frequently is "where they lock you up."10 To many juvenile

4. Some cases have decreed that juveniles are to be accorded constitutional safeguards in the detention process. See, e.g., Kinney v. Lenon, 425 F.2d 209 (9th Cir. 1970) (right to a fair trial); Richard M. v. Superior Court, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971) (protection against double jeopardy); In re Donna G., 6 Cal. App. 3d 890, 86 Cal. Rptr. 421 (1970) (dictum) (protection from statutory vagueness); In re Macidon, 240 Cal. App. 2d 600, 49 Cal. Rptr. 861 (1966) (detention orders must be supported by evidence).
5. These jurisdictions are the District of Columbia, Illinois, New York, and Alaska.
7. Recognizing that minor revisions in the law are more readily accepted than sweeping changes, we have proposed a probable cause determination at detention hearings only for those juveniles accused of crimes. Aside from this practical consideration, we have limited our discussion to this particular category of juveniles partially because of our feeling that the entire process for handling dependent, "out-of-control" and neglected juveniles needs to be revised, not simply handled with greater procedural due process. Moreover, the case law supporting a probable cause finding has derived from fact situations involving criminal charges. Nevertheless, it should be noted that the arguments for providing a probable cause determination at detention hearings of juveniles charged with crimes may be equally persuasive for proceedings relating to other juveniles who stand to lose their liberty.
9. Id.
10. Id.
court judges it is a convenient repository for juveniles for whom there is no other facility immediately available to effect a proper disposition—a storehouse for future dispositions.\textsuperscript{11} One commentator has defined detention as the "[t]emporary care, of [a] child who require[s] secure custody, in [a] physically restricting [facility] pending court disposition."\textsuperscript{12} Detention is to be carefully distinguished from shelter care which is, "[t]emporary care in a physically unrestricting facility pending the child's return to his own home or placement for longer term care."\textsuperscript{13} Shelter care generally is used for dependent and neglected children who are placed in boarding homes, group homes, and temporary care institutions.\textsuperscript{14} Children apprehended for delinquency whose homes are not fit for their return but who, with proper handling, are not likely to run away may also be placed in shelter care.\textsuperscript{15} If detention is used properly, only those children who have committed delinquent acts and who are in need of secure custody for their own protection or the protection of society will be "detained."\textsuperscript{16} Moreover, if the differentiation between detention and shelter care is faithfully adhered to there will be no dependent, neglected, or mentally deficient children held in detention homes, and the alternative methods of caring for these children in foster homes, group homes, and through homemaker services will be more fully developed.\textsuperscript{17}

Detention or shelter care of a child involves a temporary infringement on the rights of the parent and the child. However, in both instances, the real burden of adjustment falls upon the child, who must learn to cope with a new living arrangement and separation from his family at a time when he is likely to be upset and apprehensive at the prospect of court action.\textsuperscript{18} Since deten-

\textsuperscript{11} Id.
\textsuperscript{12} W. Sheridan, Standards for Juvenile and Family Courts 23 (1966). Similar definitions are found in National Council on Crime & Delinquency, Model Rules for Juvenile Courts 5 (1966), which states that "'Detention' means the temporary care of a child who requires secure custody in any facility pending court disposition or execution of a court order for commitment." In National Council on Crime & Delinquency, Standard Juvenile Court Act 10 (1959), "detention" is defined as:
\begin{itemize}
  \item the temporary care of children who require secure custody for their own or the community's protection in physically restricting facilities pending court disposition.
\end{itemize}
\textsuperscript{13} The President's Commission on Law Enforcement & Administration of Justice, Task Force Report: Corrections 119 (1967).
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{17} Id.
\textsuperscript{18} W. Sheridan, Standards for Juvenile and Family Courts 60 (1966).
tion is extremely disruptive to a child’s emotional security, it should be used only when drastic action is needed.\textsuperscript{19} Unfortunately, the courts resort to juvenile detention far too frequently and routinely.\textsuperscript{20} To remedy this overuse of detention, it has been suggested that legislation be enacted to restrict both the authority to detain and the circumstances under which detention would be permitted.\textsuperscript{21} This restrictive legislation would provide for detention only when it is clearly necessary to protect the youth or community or to keep the juvenile within the jurisdiction of the juvenile court.\textsuperscript{22}

Pre-adjudicatory detention of a child generally is authorized for two reasons: (1) to prevent him from running away before his appearance in court,\textsuperscript{23} or (2) to prevent him from committing an offense dangerous to himself or the community before disposition of his case.\textsuperscript{24} The National Council on Crime and Delinquency (NCCD) has suggested criteria for detention that are aimed at strengthening the role of the probation officer in helping the child and the family in the community pending court disposition.\textsuperscript{25} The NCCD makes it clear that detention should not be used unless failure to do so would be likely to place the child or the community in danger;\textsuperscript{26} that no child should be detained unless he or she is almost certain to run away or commit other offenses; and that detention should not be used as a substitute for shelter care, as a convenient way to hold a child for an interview, or as a corrective or punitive measure.\textsuperscript{27}

Despite the “shalt nots” in the NCCD standards, an examination of juvenile detention practices reveals that in fact juveniles \textit{are} detained for reasons other than those recommended by the NCCD.\textsuperscript{28} This is true primarily because statutory standards for

\textsuperscript{20} The President’s Commission on Law Enforcement & Administration of Justice, Task Force Report: Juvenile Delinquency & Youth Crime 36 (1967).
\textsuperscript{21} Id. at 37.
\textsuperscript{22} Id. The Task Force Report suggests that children, for whom detention is necessary only because of the unavailability of parental supervision, should be placed in low security community residential centers. Id.
\textsuperscript{23} Included in this category are those children being held for transfer to other counties or states.
\textsuperscript{24} Feister & Courtless, Juvenile Detention in an Affluent County, 6 Fam. L.Q. 3, 5 (1972).
\textsuperscript{25} National Council on Crime & Delinquency, Standards & Guides for the Detention of Children & Youth 15-17 (2d ed. 1961).
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} See id. at 11, where it is stated:

The most common reason . . . for misuse and overuse [of juvenile detention] is that it is allowed to function as a substitute for probation and other community services and facilities.
determining when the conditions for detention have been met are vague.29

THE PRESENT STATE OF THE LAW

Statutory Overview

Twenty-four states in the United States and the District of Columbia specifically provide for detention of a juvenile to avoid danger to the community.30 The “danger” referred to in this con-

29. See generally Ferster, Snethen & Courtless, Juvenile Detention: Protection, Prevention or Punishment?, 38 FORDHAM L. REV. 161, 164 (1969). The authors note that although authorities state that a juvenile should be detained if necessary to assure his presence in court, they differ on how to determine whether a particular child might run away. Statutes authorizing detention to assure presence in court do not use “almost certain” (suggested by the NCCD) that he will run away as a standard, but use looser terminology instead.

See, e.g., MICH. COMP. LAWS ANN. § 712A.15(c) (Supp. 1974) (detention pending hearing is allowed if “offenses are so serious that release would endanger public safety”); MINN. STAT. ANN. § 260.171(1) (1971) (child shall be released except where immediate welfare of the child or protection of the community requires the child be detained); TEX. FAM. CODE ANN. § 53.02(b)(1) (1973) (child may be detained prior to a hearing if he is likely to abscond or be removed from the jurisdiction).

A problem related to vague standards for detention is that the grounds for initially taking a juvenile into custody are also ambiguous and overly broad in many jurisdictions. See, e.g., N.H. REV. STAT. ANN. § 169:2 (Supp. 1973) (any child who is wayward); VA. CODE ANN. § 16.1-194(2) (1960) (the child has violated a law and the officer believes custody is necessary to protect the public interest). See also Ferster & Courtless, The Beginning of Juvenile Justice, Police Practices and the Juvenile Offender, 22 VAND. L. REV. 567, 583-84 (1969). The authors point out that most juvenile codes use the phrase “taking into custody” instead of “arrest.” Almost half of the laws in these jurisdictions specifically say that the process does not constitute an arrest.


Three states permit detention when it is a matter of immediate and urgent necessity for the protection of the minor or the person or property of another. Three states permit detention when it is "required to protect the person and property of others." Other statutes set forth this standard in rather vague terms, some looking to the nature of the offense with which the juvenile is charged, others attempting to define the probability that the child will commit a new offense, and the rest simply expressing a general desire for the protection of the community.

Eighteen states and the District of Columbia have statutory provisions designed to assure the child's presence in court at the next hearing. These statutes provide for detention of a juvenile

2. See note 30 supra for citations to statutes of California, Illinois, and Nebraska.
5. New Mexico requires a showing of probable cause that if the child is not detained he will commit injury to the persons or property of another. N.M. Stat. Ann. § 13-14-22(1) (Supp. 1974). New York requires a serious risk that the minor will do an act that would be a crime if committed by an adult. N.Y. Family Court Act § 739(b) (McKinney 1963).
where, for example, the child "may abscond" or where he or she is "likely to flee the jurisdiction." A New York statute requires that there be a "substantial probability" that the child will not appear in court; New Mexico requires that there be "probable cause" to believe the child will run away or be taken from the jurisdiction of the court; and Michigan requires proof that the child already has run away from home. Assuring the child's presence in court is the rationale most often used to justify the detention of runaways.

Twenty-four states and the District of Columbia require a detention hearing of some sort. Only four jurisdictions, however, specifically call for a probable cause determination at that hearing. The provisions in the District of Columbia statute require a detention hearing within one day (excluding Sundays) after the child has been taken into custody. At this hearing the judge first determines whether detention is required under the statute. If the judge finds that detention is required he must hear evidence to determine whether there is probable cause to believe the allegations in the delinquency petition are true. Where probable cause exists he may order the child detained, setting forth the reasons for his decision. When there is a finding of no probable cause, the child must be released. This is a strangely reversed

40. N.Y. FAMILY COURT ACT § 739(a) (McKinney 1963).
46. D.C. CODE ANN. § 16-2312(a)(1) (1973). The statutory criteria are found in section 16-2310.
47. Id. § 16-2312(e).
48. Id. § 16-2312(f).
procedure. If the probable cause determination as to whether the allegations of the petition are true were made initially and no probable cause found, no further determination would be necessary. A determination that probable cause is lacking would be essentially a determination that the court has no basis for assuming jurisdiction over the child. Under the District of Columbia Code, as it is now written, however, a judge determines whether detention is necessary even before deciding whether the court has probable jurisdiction to effect such a determination.

In Illinois, a minor taken into temporary custody must be brought before a judicial officer for a detention hearing within thirty-six hours, exclusive of Sundays and legal holidays. At the hearing, if the judge finds there is no probable cause to believe the minor is a delinquent child, he must be released. If the court concludes that there is probable cause to believe that the minor falls within the statutory description of “delinquent,” and further that the statutory criteria for detention are met, then the court may order detention or shelter care in an appropriate place. There are no provisions protecting the minor’s right to examine or confront witnesses. Only the court has the right to examine witnesses in relation to any allegations connected with the petition.

The New York Family Court Act provides for a finding similar to a probable cause determination if the child who has been taken into custody is brought before the court prior to the filing of a petition. In such an instance the judge must make a preliminary finding as to whether the court appears to have jurisdiction over the child. The child has the right to remain silent and the right to be represented by counsel at the hearing. If it appears the court does not have jurisdiction over the child, or if he appears to be a child in need of supervision rather than a

---

50. Id. § 702-1 provides in pertinent part:
   Proceedings may be instituted under the provision of this Act concerning boys and girls who are delinquent, otherwise in need of supervision, neglected or dependent . . .
51. Id. § 703-6(2) (Supp. 1974). Detention is authorized if it is a matter of immediate and urgent necessity for the protection of the minor or the persons or property of another, or if the minor is likely to flee the jurisdiction. Id.
52. Id. § 703-6.
53. N.Y. FAMILY COURT ACT § 728 (McKinney 1963).
54. N.Y. FAMILY COURT ACT § 712(b) (McKinney Supp. 1974). A “person in need of supervision” is defined as
   a male less than sixteen years of age and a female less than eighteen years of age who does not attend school . . . or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority.

Id.
juvenile delinquent,\textsuperscript{55} then the court must order his release. If the child appears to be a delinquent, he must still be released unless there is a substantial probability that he will not appear in court on the return date, or there is a serious risk that before the return date he may commit a criminal act.\textsuperscript{56}

After the filing of a petition, the court, in its discretion, may either release the child or direct his detention. There is no requirement for a probable cause determination as to whether the allegations in the petition are true.\textsuperscript{57}

Under the Alaska statute a policeman may take into custody a minor who violates a law or ordinance in his presence, who has been lawfully arrested by a citizen or whom he believes to be a fugitive from justice.\textsuperscript{58} Such detention may be continued in a juvenile detention facility if the officer believes it necessary to protect the minor or the community.\textsuperscript{59} Within forty-eight hours of the initial detention the court must hold a hearing to determine that probable cause exists to believe the minor is delinquent. At this hearing the minor is entitled to be informed of the grounds upon which the probable cause determination and the decision to detain will be made. He is entitled to counsel and has the right to confront the witnesses used against him.\textsuperscript{60} If the court finds that probable cause exists to believe the minor is delinquent, it may either release him to the custody of a suitable person or order him detained. If it finds no probable cause the minor must be released and the case dismissed.\textsuperscript{61} The Alaska statute provides the judge with no criteria to guide him in making his decision whether or not to detain the minor after probable cause has been established. In \textit{John Doe v. State},\textsuperscript{62} however, the Alaska Supreme Court interpreted the statute and set forth general guidelines to be followed by the courts. In that case the court held that a child is entitled to remain free pending a determination by a juvenile court that he is delinquent, dependent, or in need of supervision, so long as the court has reasonable assurances that

\begin{itemize}
  \item \textsuperscript{55} A "juvenile delinquent" is defined as a "person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime." \textit{Id.} § 712(a).
  \item \textsuperscript{56} \textit{N.Y. FAMILY COURT ACT} § 728(b)(iii) (McKinney 1963).
  \item \textsuperscript{57} \textit{Id.} § 739. \textit{But see} \textit{People v. Mucci}, 32 \textit{N.Y.2d} 307, 298 N.E.2d 109 (1973), which held that if a full fact-finding hearing is not held within three days as mandated by the Family Court Act, there must be a showing of facts to indicate probable cause to hold the juvenile. In dictum, the court stated that it may be desirable to view the earlier detention hearing as an appropriate time to conduct an inquiry into probable cause. \textit{Id.} at 310, 298 N.E.2d at 112.
  \item \textsuperscript{58} \textit{ALAS. STAT.} § 47.10.140(a) (1971).
  \item \textsuperscript{59} \textit{Id.}
  \item \textsuperscript{60} \textit{Id.} § 47.10.140(c).
  \item \textsuperscript{61} \textit{Id.} § 47.10.140(d).
\end{itemize}
the child will appear at future proceedings. The court noted that this freedom from detention would be required even though the facts upon which a petition is based involve an act which, if committed by an adult, would be a crime. The court further held that when a child cannot return home, every effort must be made to place him in an environment where his freedom will not be curtailed, and he should be detained only if there is clearly no alternative available.63

Of the four statutory schemes requiring a probable cause determination, only that of Alaska, as interpreted by its courts,64 fully protects the juvenile against unreasonable detention. The District of Columbia's inappropriately reversed procedure, the failure of the Illinois statute to grant the juvenile the right to cross-examine and confront witnesses, and the vague New York requirement that the court “appear” to have jurisdiction, all fall far short of providing adequate assurance that a juvenile will be detained only upon a finding of probable cause that he has committed the crime with which he is charged.

Juvenile Detention in California

The purpose of the Juvenile Court Law in California is declared in part to be

to secure for each minor under the jurisdiction of the juvenile court such care and guidance preferably in his own home, as will serve the spiritual, emotional, mental, and physical welfare of the minor and the best interests of the State; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety and protection of the public cannot be adequately safeguarded without removal . . . .65

The decision to remove a child from the custody of his parents is governed by this general standard.

The specific provisions dealing with pre-adjudicatory detention of a minor in California provide that any person under eighteen years of age may be taken into custody if a police officer believes the juvenile comes under the jurisdiction of the court,66 is a ward of the court, has violated a court order, or has escaped from com-

63. Id. at 52-53.
66. Id. §§ 600, 601 (West 1972) and 602 (West Supp. 1974) describe the persons subject to the jurisdiction of the juvenile court. Section 600 describes dependent children, section 601 describes those minors who are habitually disobedient, truant, or in danger of leading an idle, immoral life, and section 602 describes those who have violated a law or court order.
A juvenile also may be taken into temporary custody and detained if he is found in a public place and is suffering from sickness or injury which requires medical care or hospitalization. Additionally, a minor may be taken into custody when an officer has reasonable cause to believe the minor has committed a public offense in his presence, when the officer has reasonable cause to believe the minor has committed a felony, or when the minor is involved in a traffic accident and the officer has reasonable cause to believe he was driving under the influence of intoxicating liquor or drugs.

The initial decision whether or not to detain the minor is made by the peace officer who takes him into custody. The officer is authorized to release the minor outright, release him upon the written promise of the minor, his parent, guardian or responsible relative that either or both will appear at a designated time and place, or deliver custody of the minor to a probation officer of the county. The statutory guidelines directing the officer's choice require him to choose the alternative which is least restrictive of the minor's freedom, and still serves the best interests of the minor and the community.

If the juvenile is brought before a probation officer, a second decision whether or not to detain him is made at this time. The probation officer must release the minor to the custody of his parents, guardian, or responsible relative after an investigation unless: (1) the minor is in need of effective parental care and he has no parent, guardian, or relative willing or able to provide such care; (2) he is destitute or is not provided with the necessities of life or a home or suitable place of abode; (3) his home is unfit by reason of neglect, cruelty, or depravity of the person having custody of the minor; (4) continued detention is a matter of immediate or urgent necessity for the protection of the minor or of the person or property of another; (5) the minor is likely to flee the jurisdiction; (6) he has violated an order of the court; or (7) he is physically dangerous to the public because of a men-

67. Id. § 625 (West 1972).
68. Id. This section further provides that any minor taken into custody upon reasonable cause to believe (1) he is a person described in section 601 or 602, or (2) upon reasonable cause to believe that he has violated an order of the juvenile court or (3) escaped a commitment of the juvenile court must be advised of his constitutional rights, including his rights to remain silent and to have counsel present during interrogation.
69. Id. § 625.1.
70. Id. § 626.
71. Id. § 629. This section allows the probation officer to require, as a condition of release, a written promise to appear at a designated place and time signed by the minor, his parent, guardian or responsible relative, or both.
tal or physical deficiency, disorder, or abnormality.\textsuperscript{72} If under these standards the probation officer determines that the child must be detained, a petition must be filed immediately\textsuperscript{73} and a detention hearing held on the next judicial day.\textsuperscript{74} The minor must be served with a copy of the petition and he and his parents or guardians must be notified of the time and place of the detention hearing.\textsuperscript{75} The hearing may be continued if there has not been proper notice.\textsuperscript{76} Unless a petition has been filed or a criminal complaint issued against a minor in custody, he must be released within forty-eight hours from the time he is initially detained by the peace officer.\textsuperscript{77}

At the detention hearing, which is held before a judge or referee, the minor and his parents or guardian must first be informed of the reasons why the minor was taken into custody, the nature of the juvenile court proceedings, and the right of both the minor and his parents to be represented by counsel in all stages of the proceedings.\textsuperscript{78} After examining the minor and his parents, and hearing all relevant evidence they wish to present, the court must make an order releasing the minor from custody unless he has violated an order of the juvenile court; he has escaped from a commitment of the juvenile court; it is a matter of urgent necessity for the protection of the person or property of another that the minor be detained; or the minor is likely to flee the jurisdiction.\textsuperscript{79} If it appears that one of these four conditions exists, the juvenile may, in the discretion of the judge or referee, be ordered detained until the jurisdictional hearing which must be held within fifteen judicial days.\textsuperscript{80}

The major shortcoming of California’s detention statute is its failure to provide precise guidelines for determining when a court can order a juvenile detained. Criteria in the statute such as “urgent and immediate necessity” and “likely to flee the jurisdiction” are vague and allow broad discretion on the part of the court. The loss of one’s liberty, even temporarily, is too consequential to be decided by such imprecise standards. One commentator has noted that locking up children charged with or suspected of offenses, prior to adjudication, puts a child through a negative ex-

\footnotesize{
\textsuperscript{72} Id. § 628.  
\textsuperscript{73} Id. § 630(a) (West Supp. 1974).  
\textsuperscript{74} Id. § 632 (West 1972).  
\textsuperscript{75} Id. § 630(a) (West Supp. 1974).  
\textsuperscript{76} Id. §§ 637, 638 (West 1972).  
\textsuperscript{77} Id. § 631(a) (West Supp. 1974).  
\textsuperscript{78} Id. § 633 (West 1972).  
\textsuperscript{79} Id. § 635.  
\textsuperscript{80} Id. § 636.  
}
perience likely to contribute to future delinquent or criminal conduct.\textsuperscript{81}

Furthermore, for the juvenile, the problem is compounded since pre-adjudication detention has the potential of altering the final disposition of his case. A juvenile who has been released is more readily available to discuss the case with his attorney\textsuperscript{82} and, more importantly, may be able to make a showing of satisfactory home adjustment at the adjudicatory hearing, thus directly affecting the disposition of his case. It is also noteworthy that when the juvenile is detained, he must pay the cost of his stay in juvenile hall and run the risk of being labeled "delinquent" by his peers.\textsuperscript{83}

The authors of this article propose that not only should a detention hearing be required whenever a juvenile is accused of committing a crime, but there should be a probable cause determination of whether or not the juvenile has committed the alleged offense before he can be detained pending further proceedings. A number of decisions in various jurisdictions explicitly support this proposition.\textsuperscript{84} Several cases in California can be interpreted as calling for a probable cause determination at the detention hearing,\textsuperscript{85} but juvenile courts throughout the state have been slow to require such a determination. To understand the rationales operating to enforce the status quo in the juvenile court process, it is helpful to consider the case law development since the United States Supreme Court decided \textit{In re Gault}\textsuperscript{86} in 1967.

**DEVELOPING CASE LAW: GAULT AND BEYOND**

The classification of the juvenile court under the aegis of the present \textit{parens patriae} doctrine and the impact this classification has had on the theoretical and historical development of the juvenile court process have made application of traditional legal concepts difficult. As a result, society deals with child offenders

\textsuperscript{81} Aubrey, supra note 29, at 164.
\textsuperscript{82} See Kinney v. Lenon, 425 F.2d 209 (9th Cir. 1970) holding that under the circumstances of the case the failure to release the juvenile for the purpose of aiding in the preparation of his defense unconstitutionally interfered with his due process right to a fair trial.
\textsuperscript{83} California Juvenile Court Practice 58 (C.E.B. 1968) [hereinafter cited as Juvenile Court Practice].
\textsuperscript{86} 387 U.S. 1 (1967).
in a manner much different from that in which it deals with adult offenders. The adult offender is considered an enemy of society. Generally, he is forced to undergo a criminal proceeding, adversary in nature, at which he will be accused, given a chance to defend himself, and be judged guilty or not guilty. If found guilty, punishment will be meted out by society according to the seriousness of the crime. The juvenile offender, on the other hand, is treated not as society's enemy but as its child. The state is interested in helping him, rather than in punishing him. It purports to do what is believed to be in the child's best interest. The issues in adult court are criminal responsibility and punishment. The issue in the juvenile court is how best to treat a juvenile offender through understanding, guidance, and protection.

The development of the juvenile court was the culmination of increased concern for the need to protect children from the harshness and emotional degradation of adult criminal courts and penal institutions. Thus, the theory of the juvenile court was that

[the child who must be brought into court should, of course, be made to know that he is face to face with the powers of the state, but he should at the same time and more emphatically, be made to feel he is the object of its care and solicitude . . . ]

In place of the austere sentencing judge of the criminal court, the juvenile court judge was to be

[s]eated at a desk with the child at his side, where he can on occasion put his arm around his shoulders and draw the lad to him . . . and thereby gain immensely in the effectiveness of his work.

Carried to what may be considered an extreme, the concept of parens patriae had to a large extent removed the juvenile court from the mainstream of the American judicial system and rendered it something akin to a social agency. The emphasis on the social aspect of the juvenile court's function had in many respects been at the expense of accepted legal procedures and rights. Recent Supreme Court cases dealing with the juvenile court system can be seen as an attempt to rectify this over-emphasis.

90. Id.
91. Juvenile Court, supra note 88, at 5.
The Supreme Court Looks at Juvenile Justice

The Supreme Court took its first close look at the juvenile court in *Kent v. United States*. This case dealt specifically with the requirements for a valid waiver of the juvenile court's jurisdiction and transfer for trial to the adult court. The Supreme Court stated that, in addition to raising problems concerning the construction of the District of Columbia Juvenile Court Act, the case also poses a question of the justifiability of according a juvenile less protection than adults suspected of criminal offenses. The Court noted that in this instance there was an absence of any indication that the denial of rights available to adults was offset or mitigated by a *parens patriae* approach or the special solicitude for juveniles commanded by the Juvenile Court Act. Justice Fortas, for the majority, further emphasized that studies and critiques of juvenile courts in recent years have raised various questions as to whether their actual success with juveniles measures well enough against their theoretical purpose to justify immunizing the juvenile court from the reach of constitutional guarantees applicable to adults. Though the Court expressed concern about the lack of constitutional guarantees for juveniles, the case ultimately was decided on statutory grounds, thus avoiding a decision on the vital constitutional issues. The Court held that when there is to be a waiver of jurisdiction under the District of Columbia statute, there must be accorded to the defendant a hearing, effective assistance of counsel, and a statement of reasons for the waiver. Moreover, the Court emphasized that the hearing must measure up to the basic requirements of due process.

One year later, in *In re Gault*, the United States Supreme Court faced head-on the constitutional issues it had avoided in *Kent*. Although the Court limited its role in *Gault* to ascertaining the precise impact of the due process clause of the fifth and fourteenth amendments upon the adjudicatory phase of a juvenile

---

93. 383 U.S. at 546. The code then in force in the District of Columbia provided:

If a child 16 years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction . . . .

94. 383 U.S. at 551.
95. Id. at 555-56.
96. Id. at 555.
97. Id. at 561.
98. Id. at 562.
court proceeding, the decision was of great consequence. It guaranteed to juveniles the right to counsel, notice of charges, the right against self-incrimination and the right to confront and examine witnesses. However, *Gault* did not hold that all procedural guarantees afforded adults charged with a crime apply to juveniles. The *Gault* decision therefore left undecided a number of constitutional issues relating to hearsay testimony, burden of proof, right to a transcript, right to trial by jury, right to bail, right to a public proceeding and the right against unreasonable search and seizure.¹⁰⁰

Following *Gault*, the range of constitutional guarantees afforded a juvenile was further expanded in *In re Winship*.¹⁰¹ *Winship* presented a narrow question—whether proof beyond a reasonable doubt in the adjudicatory stage is required by due process when a juvenile is charged with an act which would constitute a crime if committed by an adult.¹⁰² The Court held that in addition to the constitutional safeguards prescribed by *Gault*, due process requires that there be a showing of proof beyond a reasonable doubt during the adjudicatory phase of a delinquency proceeding.¹⁰³

Finally, in *McKeiver v. Pennsylvania*,¹⁰⁴ the Court considered whether the due process clause of the fourteenth amendment assures the right to trial by jury in the adjudicatory phase of a state juvenile delinquency proceeding. In a plurality decision, the Court concluded that trial by jury in the adjudicatory stage is not a constitutional requirement.¹⁰⁵

Has *McKeiver v. Pennsylvania* marked the end of a trend

---

¹⁰² Id. at 359. Prior to this decision there were two views on how *Gault* would affect the standard of proof in juvenile proceedings. One view held that the spirit of *Gault* transcended the specific issues raised and the rights granted by that decision would be meaningless without the “beyond a reasonable doubt” standard of proof. The other view distinguished *Gault* on the ground that the *Gault* Court had specifically refused to rule on the issue of standard of proof. Thus, constitutional rights could be granted to juveniles only by specific holding rather than as part of a trend. Note, *Standard of Proof Required in a Delinquency Adjudication*, 39 Fordham L. Rev. 121, 123-24 (1970).
¹⁰³ 397 U.S. at 368.
¹⁰⁴ 403 U.S. 528 (1971).
¹⁰⁵ Id. at 545. Justice Blackman announced the Court's judgment in an opinion in which Chief Justice Burger and Justices Stewart and White joined. Justices Brennan and White filed separate concurring opinions. Justice Brennan concluded that jury trials are not required in juvenile proceedings so long as some other aspect of the process (such as a public trial) protects the interests jury trials are intended to serve. Id. at 553-56. Justice Harlan took the position that criminal jury trials are not constitutionally required. Id. at 557. Justices Douglas, Black and Marshall dissented.
to grant juveniles all the rights guaranteed to adults in criminal proceedings? Although the decision may not signify that the trend begun by Gault has ended, it certainly illustrates one of two polarized viewpoints as to what constitutional protections are appropriate in the juvenile court. The McKeiver view is to apply Kent, Gault, and Winship strictly within the confines of the Supreme Court language and to continue to accept the basic tenets of parens patriae and the concept that juvenile matters are basically civil rather than criminal. The logical extension of this view is that the constitutional guarantees of an adult criminal trial need not apply to juvenile court proceedings. A view contrary to that of the McKeiver Court is to accept—decisions of Kent, Gault, and Winship as indicative of Supreme Court discomfort with the lack of due process in the juvenile courts. The corollary of such a view would be the broadening of the constitutional requirements of due process in various phases of a juvenile court proceeding.

Due Process at the Detention Hearing

The courts in three jurisdictions—the District of Columbia, Wisconsin, and California—have accepted the latter view and determined what due process requires at the detention hearing of a juvenile accused of a crime. Baldwin v. Lewis was decided by the United States District Court in Wisconsin prior to the McKeiver decision. Richard Baldwin, seventeen years old, was detained on suspicion of arson. In his application for a writ of habeas corpus he sought discharge on the grounds that his right to bail under the eighth amendment had been violated and that he had been denied his right to a probable cause determination that he had committed the crime of which he was accused. He argued that he could not be held in custody without such a probable cause finding. After holding that Baldwin’s initial detention was not in violation of his fourth amendment rights, the court went on to consider the procedure at the subsequent detention hearing. The court first noted that a detention hearing held pursuant to the Wisconsin statutory scheme could result in the deprivation of a juvenile’s liberty for an indeterminate period. The court emphasized that any person who is deprived of his

107. 300 F. Supp. 1220 (E.D. Wis. 1969), rev’d for failure to exhaust state remedies, 442 F.2d 29 (7th Cir. 1971).
108. U.S. CONST. amend. VIII provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”
109. 300 F. Supp. at 1223.
110. Id. at 1224-26.
liberty because he is suspected of committing a crime, must be accorded the due process rights guaranteed by the fourteenth amendment. Thus, the court found that the detention hearing must satisfy due process demands.\textsuperscript{111}

The \textit{Baldwin} court held that a detention hearing must include a determination as to whether there is probable cause to believe that an act has been committed which, if committed by an adult, would be a crime, and that the juvenile in custody has in fact committed such an act.\textsuperscript{112}

In 1969, the year of the \textit{Baldwin} decision, the United States Court of Appeals for the District of Columbia considered the case of \textit{Cooley v. Stone}.\textsuperscript{113} Ronald Cooley, sixteen years old, was taken into custody in connection with a burglary and detained at the Receiving Home for Children. A detention hearing was held, but there was no judicial inquiry into probable cause. The only matter considered by the juvenile court was whether to release Cooley to the custody of his mother. In granting Cooley's writ of habeas corpus the district court held that no person could lawfully be held in penal custody by the state without a prompt judicial determination of probable cause.\textsuperscript{114} The district court predicated its holding on \textit{Gault} and \textit{Kent}, finding that the protections of the fourth amendment apply to juveniles as well as adults.\textsuperscript{115} The United States Court of Appeals for the District of Columbia affirmed this ruling and further stated that the result would be compelled on fifth, as well as fourth, amendment grounds.\textsuperscript{116} Two years later the District of Columbia Circuit expanded the decision in \textit{Cooley}, holding in \textit{Brown v. Fauntleroy}\textsuperscript{117} that even a juvenile who is \textit{not} detained has the right to a probable cause determination at a preliminary hearing.

In \textit{M.A.P. v. Ryan},\textsuperscript{118} however, the newly established District

\textsuperscript{111} \textit{Id.} at 1232.  
\textsuperscript{112} \textit{Id.} On the question of bail the court held that an appropriate standard for detention, applied in a manner consistent with due process, is an adequate substitute for bail. The court approved of the standard in the Wisconsin Children's Code which required that a juvenile \textit{shall} be released unless, there is a finding that because of the circumstances, including the gravity of the alleged crime, the nature of the juvenile's home life, and the juvenile's previous contacts with the court, the parents or guardian of the juvenile are incapable under the circumstances to care for him. \textit{Id.} at 1232.  
\textsuperscript{113} 414 F.2d 1213 (D.C. Cir. 1969).  
\textsuperscript{114} \textit{Id.}  
\textsuperscript{115} \textit{Id.}  
\textsuperscript{116} \textit{Id.} at 1214. The fifth amendment provides in part that no person shall be deprived of "liberty . . . without due process of law . . . ." U.S. Const. amend. V.  
\textsuperscript{117} 442 F.2d 838 (D.C. Cir. 1971).  
of Columbia Court of Appeals\textsuperscript{119} declined to follow the Brown decision when a juvenile who had not been detained moved for a probable cause hearing.\textsuperscript{120} The court found there was no constitutional right to a probable cause hearing, and rejected any implication in Brown that any arrested person has a right to a determination as to the validity of his arrest.\textsuperscript{121} Furthermore, the court noted that the extensive inquiry that must be made into the facts and law before a delinquency petition is filed, protects the juvenile against the filing of an unfounded petition.\textsuperscript{122} The court found that the standard to be met in juvenile proceedings is fundamental fairness,\textsuperscript{123} and that there was nothing about the District of Columbia procedure which violated this standard.\textsuperscript{124}

In California four cases have to some extent resolved the issues of what findings, procedure and evidence are required at the detention hearing.\textsuperscript{125} The seminal case dealing directly with detention hearings under the provisions of the California Juvenile Court Law is In re Macidon.\textsuperscript{126} This case involved a petition for a writ of habeas corpus seeking the minor's release from the detention which had been ordered pending the adjudicatory hearing. The petition filed against Macidon alleged he had committed a public offense.\textsuperscript{127} Macidon had been released by

\begin{itemize}
  \item \textsuperscript{119} The District of Columbia Court of Appeals felt free to examine the holding in Brown and accept or reject it for two reasons. The District of Columbia Court Reform and Criminal Procedure Act of 1970 provides that effective February 1, 1971, the District of Columbia Court of Appeals is the highest court in the District of Columbia, and is no longer subject to review by the United States Court of Appeals. Therefore the District of Columbia Court of Appeals is not bound by decisions of the United States Court of Appeals rendered after that date. Brown was decided February 26, 1971, and thus, although entitled to great respect, is not binding on the District Court of Appeals.
  \item \textsuperscript{120} Id. at 313.
  \item \textsuperscript{121} Id. at 315.
  \item \textsuperscript{122} D.C. CODE ANN. § 16-2305 (1973).
  \item \textsuperscript{123} 285 A.2d 310, 316 (D.C. Ct. App. 1971).
  \item \textsuperscript{124} Id. at 317.
  \item \textsuperscript{125} In re William M., 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970); In re Dennis H., 19 Cal. App. 3d 350, 96 Cal. Rptr. 791 (1971); In re Larry W., 16 Cal. App. 3d 290, 94 Cal. Rptr. 31 (1971); In re Macidon, 240 Cal. App. 2d 600, 49 Cal. Rptr. 861 (1966).
  \item \textsuperscript{126} 240 Cal. App. 2d 600, 49 Cal. Rptr. 861 (1966).
  \item \textsuperscript{127} Section 602 of the California Welfare and Institutions Code brings within the jurisdiction of the juvenile court any person under 18 years of age who violates any state or United States law or city or county ordinance. CAL. WELF. & INST'NS CODE § 602 (West 1972). Macidon was alleged to be one of five suspects who grabbed a twelve year old girl as she was walking home from school, used vulgar language around her, and stole her purse.
\end{itemize}
the police to the custody of his mother on written promise to ap-
pear before the probation officer. When he appeared before the
probation officer he again was released to the custody of his
mother. Several weeks later a detention hearing was held and
Macidon was ordered detained\textsuperscript{128} on the basis that his detention
was a matter of immediate and urgent necessity and should be
continued for the protection of the community.

The Court of Appeal for the First District held that the de-
tention order was without support in the record and ordered Maci-
don's release.\textsuperscript{129} It was clear to the court that there was no evi-
dence to place Macidon within any of the categories outlined in
the statute as possible bases for detention. Furthermore, he had
denied any involvement in the offense, and there was no evidence
to contradict this denial. The court concluded that under the
terms of the statute it was questionable whether commission of
the offense, if established, would in itself be sufficient evidence
to furnish a ground for detention.\textsuperscript{130} Thus, the case may be inter-
preted as requiring a prima facie showing of the minor's guilt be-
fore he can be detained, whenever the offense is denied by the
minor. Such a finding necessarily would precede any considera-
tion of the statutory criteria for detention.

The Macidon holding is not completely clear, however, be-
cause the juvenile court initially had found that no statutory
grounds for detention existed.\textsuperscript{131} Therefore it can be argued that
if statutory criteria for detention are met, the issue of probable
cause will not be reached. Such an interpretation of Macidon is
entirely too restrictive.

In the course of its opinion, the Macidon court relied on the
case of \textit{In re Contreras}.\textsuperscript{132} The court in Contreras held that
nothing in the juvenile court law should be interpreted as allowing
the imposition of unlawful restraints upon personal liberty.\textsuperscript{133}
Furthermore, the court determined that when the juvenile denies
his alleged delinquency, his liberty should not be taken from him
until his guilt is established by legal evidence.\textsuperscript{134} Although the

\textsuperscript{128} 240 Cal. App. 2d at 604, 49 Cal. Rptr. at 864. The court declined to
decide whether detention could be ordered in any matter where the minor is not
first detained pursuant to the California Welfare and Institutions Code sections
626 through 630, which provide for the peace officer and the probation officer
to exercise their discretion as to whether or not the child should be released from
custody.

\textsuperscript{129} 240 Cal. App. 2d at 610, 49 Cal. Rptr. at 868.

\textsuperscript{130} \textit{Id.} at 608, 49 Cal. Rptr. at 866.

\textsuperscript{131} H. THOMPSON, CALIFORNIA JUVENILE COURT DESKBOOK 45 (1972) [hereinafter cited as THOMPSON].


\textsuperscript{133} \textit{Id.} at 790-91, 241 P.2d at 633-34.

\textsuperscript{134} \textit{Id.}
Contreras case dealt directly with the jurisdictional phase of the proceedings, the court in Macidon stated that the Contreras holding would have equal application to detention proceedings. This reasoning by the Macidon court lends support to the position that a minor charged with an act denounced by law should not have fewer constitutional rights or guarantees than an adult under similar circumstances.

Thus, a logical interpretation of the Macidon decision would seem to be that in all cases where a juvenile is to be deprived of his liberty (detained) prior to an adjudicatory hearing, his guilt must be established by legal evidence, at least to the extent of a probable cause determination that he committed the offense charged. Indeed some judges have so interpreted Macidon and require a probable cause showing in every case where the minor denies the offense.

Subsequent to Macidon an amendment to the Juvenile Court Act granted the juvenile the right to remain silent, the right to confront witnesses, and the right to cross-examine persons examined by the court in the detention hearing. Following this amendment the California Supreme Court considered juvenile detention in the case of In re William M. In In re William M. the court interpreted the amendment as expressing the intention of the legislature that the probation officer be required to present facts which will support the minor's detention—that is, present a prima facie case that the minor committed the alleged offense. The court noted that if no such showing is made, the juvenile court will lack the "immediate and urgent necessity" to detain a youth charged with committing an offense.

In William M. the juvenile court had found that, on the basis of the police report, a prima facie case was established. Although William M. had denied the offense he had not challenged any of the facts in the report insofar as they established the case against him. Under these circumstances, the supreme court held the juvenile court properly relied on the police report in the finding of a prima facie case.

137. THOMPSON, supra note 131, at 45.
138. CAL. WELF. & INST'NS CODE § 630(b) (West Supp. 1974). The 1967 amendment added subdivision (b) to section 630. The statute was again amended in 1968 to grant the right to confrontation only of those persons examined by the court at the hearing. Prior to 1967, there were no provisions in the statutes protecting the right against self-incrimination and the right to confrontation of witnesses at the detention hearing.
139. 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970).
140. 3 Cal. 3d at 28, 473 P.2d at 745-46, 89 Cal. Rptr. at 41-42.
141. ld. at 29 n.21, 473 P.2d at 746 n.21, 89 Cal. Rptr. at 42 n.21.
The Court of Appeal for the Second District, in *In re Larry W.*, 142 considered the juvenile's right to confront witnesses and rejected the contention that no valid detention order can be made unless live witnesses, subject to cross-examination, appear. The court in that case perceived no requirement in the statute or in the *William M.* decision that would make a police or probation officer's report inadmissible at the detention hearing. Nevertheless, the court recognized that the minor may wish to examine the persons who have submitted written reports. Accordingly, the court found that a minor should be entitled to a reasonable continuance to secure the presence of such persons in court if need be. This procedure preserves the minor's right to a full hearing including the right to confront and cross-examine witnesses.143

An important adjunct to the *Larry W.* holding is found in *In re Dennis H.* 144 In that case the minor's counsel made a request to cross-examine the makers of written police reports and other documents submitted by the probation officer. A continuance was granted to secure the presence of these witnesses. However, at the continued hearing, the probation officer rested on the written evidence, having made no attempt to secure the writers of these reports as witnesses. The court held that once a minor has exercised his right to demand confrontation and cross-examination of witnesses, "it becomes the duty of the court to see that those persons are present at the continued hearing or lose the right to rely on the written declarations and affidavits." 145

Although the United States Supreme Court has declined to rule directly on the issue of whether a probable cause finding should be required in detention hearings, the decisions by the Wisconsin and California courts and by the United States Court of Appeals for the District of Columbia are encouraging signs. 146 The courts in *Cooley* and *Baldwin* promote the view that *Gault* and *Kent* have initiated a movement toward granting the full range of constitutional safeguards to the juvenile offender. To some commentators this trend marks the doom of the juvenile court because they believe it will create "an adversary, criminal court for children with full homage paid to legal technicalities but

142. 16 Cal. App. 3d 290, 94 Cal. Rptr. 31 (1971).
143. *Id.* at 293-94, 94 Cal. Rptr. at 32.
145. *Id.* at 355, 96 Cal. Rptr at 794 (emphasis added).
146. See also *In re* Black Bonnet v. State, 257 F. Supp. 889 (D.S.D. 1973); People v. Mucci, 32 N.Y.2d 307, 298 N.E.2d 109 (1973). Both cases deal with detention after a petition has been filed and hold that there must be a prompt probable cause finding to justify detention beyond a few days. See additional discussion of *Mucci* in note 57 supra.
perhaps little or no attention to the special needs of the child." It is questionable whether these fears are justified.

Those cases which have expanded the constitutional rights afforded to juveniles have done so in the procedural realm. These expansions need not be accompanied by changes in the *parens patriae* approach of the juvenile court. As the Supreme Court cogently expressed in *In re Gault*,

> [t]he 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.

In fact, the Court observed that procedural regularity with its fairness and impartiality may be more impressive and therapeutic as far as the juvenile is concerned than a procedure without such attributes. *In re Winship* reiterates the view that procedural safeguards will not destroy the beneficial aspects of the juvenile court, since the opportunity to review the child's social history during the dispositional hearing and to consider his individualized treatment will remain unimpaired. This strongly suggests that perhaps the only phase in the proceeding in which the uniqueness of the juvenile court should be retained is the dispositional phase, when the special needs of the child are considered. Whatever "treatment" results from the *parens patriae* approach prior to actual disposition will not be jeopardized merely because due process is required. The guaranteeing of a juvenile's constitutional rights may do more to engender respect for the law than a well-intentioned, but less than fundamentally fair proceeding. Thus, in a sense, greater adherence to due process standards may set the stage for the juvenile's increased receptiveness to treatment.

Furthermore, granting a juvenile the right to a probable cause determination before he can be detained does not interfere with the major philosophy of the juvenile court. It would be unrealistic to think that detention is an integral part of the treatment process which is designed to meet the special needs of children. The detention serves only to assure that the juvenile will appear...
in court and that he will not commit another act dangerous to himself or society. The hearing at which the decision whether or not to detain is made must satisfy due process of law in order that the juvenile not be subjected to arbitrary confinement.

**What Finding Should Be Required at a Detention Hearing?**

The entire judicial handling of the juvenile is designed and intended to be non-criminal. However, a consideration of the statutory and constitutional requirements in California for the arrest of adults charged with crimes and their subsequent release or detention provides helpful guidelines for determining the means by which the rights of juveniles can best be protected.

**The Standard for Detention of Adults**

*Arrest.* An adult in California is protected, by statute and constitutional requirements, from unreasonable or arbitrary arrest. Arrest of adults may be made with or without a warrant. An officer may arrest for misdemeanors only if he has reasonable cause to believe the person has committed an offense in his presence, but he may arrest for felonies not committed in his presence, if he has probable cause to believe the person arrested committed the felony. If the arrest is without a warrant, and the person arrested is not released, a complaint stating the charge must be placed before the magistrate. In the case of a misdemeanor, the complaint serves as the basis for an arrest warrant. In the case of a felony, a preliminary examination will be held which will result either in dismissal of the case or in the filing of an information which charges the crime or crimes alleged. If the officer arrests a person under a warrant, the warrant will have been issued on the basis of a magistrate’s finding that the offense has been committed and that there is reasonable ground to believe the defendant committed it.

---

155. CAL. PEN. CODE § 836 (West 1972).
156. Id. For certain misdemeanor vehicle offenses, the officer may often issue a citation in lieu of making the arrest. See id. § 818.
157. Id. § 849 (West Supp. 1974).
158. B. WITKIN, CALIF. CRIM. PROC. 98 (1963) [hereinafter cited as WITKIN].
159. CAL. PEN. CODE § 859b (West Supp. 1974).
160. Id. § 813 (West 1970).
Bail and release on own recognizance. After arrest, the rights of the arrestee are further protected. For Vehicle Code misdemeanors, if the person arrested is not taken before the magistrate, he is released upon a written promise to appear.\textsuperscript{161} For other offenses the defendant may be released on bail or on his own recognizance (OR).

Although bail is not always mandated, the defendant may be admitted to bail before conviction as a matter of right\textsuperscript{162} except in capital offenses.\textsuperscript{163} The suspect may be released on bail before the preliminary examination, before trial after being held to answer, or before trial after an indictment.\textsuperscript{164} The trend toward eliminating money bail has resulted, in recent years, in an increase of OR release programs allowing persons to be released upon a promise to appear without the requirement of posting bail.\textsuperscript{165}

According to the American Bar Association standards, the decision to release a defendant before trial should be based on whether there is a substantial risk of non-appearance by the defendant, and not on a so-called preventive detention basis.\textsuperscript{166}

One author has concluded that,

\begin{quote}
[i]n addition to the constitutional issues, that is, whether the eighth amendment precludes preventive detention, and whether such detention violates due process in controverting the presumption of innocence and inhibiting a defendant's ability to prepare his case . . . [s]erious questions also arise with respect to the actual need for preventive detention, and whether it will have any real effect on the crime problem.\textsuperscript{167}
\end{quote}

It should be noted that many adults do remain in custody prior to determination of their guilt; yet the provisions in the law for bail and OR release prescribe release in most cases.

\textit{Preliminary examination.} If the defendant is charged with a felony he must be brought before the magistrate without unnecessary delay,\textsuperscript{168} and in any event within two days after his arrest.\textsuperscript{169}

\begin{flushright}
163. \textit{Id.} § 1270.
164. \textit{Id.} § 1273.
165. \textit{See Portman, "To Detain or Not to Detain?"—A Review of the Background, Current Proposals, and Debate on Preventive Detention, 10 Santa Clara Law. 224, 229 (1970).} [hereinafter cited as Portman]. The author discusses innovations and efforts to improve the bail system. The experience of the Santa Clara County pretrial release program has been that there is no significant difference in failure to appear rates for those released on OR and those qualified for OR but released on bail. \textit{Report to Law Enforcement Assistance Administration, Santa Clara County Pretrial Release Program 13} (1973).
167. \textit{Portman, supra note 165, at 256.}
The California Constitution authorizes prosecution by information "after examination and commitment by a magistrate." Before the information is filed, there must be a preliminary examination of the case and an order holding the defendant to answer. The purpose of the preliminary examination is to determine whether there is probable cause to hold the defendant to answer. If at this stage there is a finding of no probable cause, then the prosecution cannot go forward and the defendant cannot be detained.

It is not clear that there is a constitutional right to a preliminary examination in all cases. In California, the Penal Code mandates that there be a preliminary examination before an information is filed. No preliminary examination is required, however, when a grand jury brings an indictment, the charge is only a misdemeanor, or the defendant waives the preliminary examination. A preliminary examination is not required when there is an indictment because the grand jury presumably performs the same weeding out function as the preliminary examination. In the case of a misdemeanor, the necessity of a screening procedure is not considered to be so critical; therefore, the prosecution can proceed by complaint.

Since felonies may be prosecuted by either indictment or information, California courts have held that a defendant is not denied due process or equal protection if proceeded against by an indictment, which does not require a preliminary examination. However, the preliminary examination has been recog-
nized by the United States Supreme Court as a "critical stage" of a state's criminal process, and several recent federal cases have accorded the right to a preliminary hearing constitutional status when the defendant is incarcerated and there has been no prior determination of judicial probable cause. In *Pugh v. Rainwater*, the Fifth Circuit Court of Appeals held that a preliminary hearing for probable cause is necessary for persons arrested pursuant to an information filed by the state attorney and for persons charged with a misdemeanor, unless they will not be incarcerated before trial. The court emphasized that its concern was not with how the trial would be affected by the absence of a preliminary hearing but with the validity of *pretrial detention* without a judicial probable cause finding.

Other cases not directly dealing with preliminary hearings lend support to the *Pugh* decision by holding that a probable cause finding by a judicial officer is mandated, by due process, before an individual can be deprived of his liberty. The United States Supreme Court has held that a parolee, after arrest, can be returned to custody for violation of parole conditions only after a probable cause determination. In *Shadwick v. City of Tampa* the high Court noted that arrest warrants cannot issue without a probable cause determination by a neutral and detached magistrate.

In sum, although the Supreme Court has not held that failure to hold a preliminary hearing violates the due process clause in every case, a number of cases in the federal courts evidence a pattern of requiring a probable cause finding whenever detention before trial is involved.

181. Pugh v. Rainwater, 483 F.2d 778 (5th Cir. 1973), cert. denied, 414 U.S. 1077 (1973); Brown v. Fauntleroy, 442 F.2d 838 (D.C. Cir. 1971); Cooley v. Stone, 414 F.2d 1213 (D.C. Cir. 1969). In *Pugh* the procedure excluding misdemeanants faced with potential imprisonment from preliminary hearings was held to be violative of the fourth amendment and the due process and equal protection clauses of the fourteenth amendment.
183. *Id.* at 786-87.
187. In addition, the Fifth Circuit Court of Appeals, in *Pugh v. Rainwater*, noted that even temporary deprivation of *property* without a hearing has been held impermissible. 483 F.2d 778 (5th Cir. 1973). See also Fuentes v. Shevin, 407 U.S. 67 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).
Which Safeguards Present in Adult Proceedings Should Apply to Juvenile Detention Hearings?

The adult alleged to have committed a crime is protected by statute and constitutional requirements against unreasonable arrest, detention, and prosecution. In contrast, a juvenile is given substantially fewer protections. A comparison of the safeguards made available to adults in California with those provided to juveniles during the intake process from arrest to trial, illustrates significant differences. These differences make it apparent that at some point prior to the actual guilt/innocence phase of the process (adjudication), the rights of the juvenile against unreasonable detention need to be safeguarded by a probable cause finding that he has committed the crime of which he stands accused.

Arrest and temporary detention. A law enforcement officer may, without a warrant, take into temporary custody any minor under eighteen if the officer has reasonable cause to believe that the minor is a dependent,\textsuperscript{188} beyond control,\textsuperscript{189} or has violated a law.\textsuperscript{190} Included within the category of juveniles who have violated a law are those who have disobeyed a juvenile court order after coming within the jurisdiction of the court by virtue of the vaguely defined offense of “leading an immoral life.”\textsuperscript{191} In contrast, the arrest of an adult for a violation of the law cannot be

\textsuperscript{188} See Cal. Welf. \\
\& Inst’ns Code §§ 600, 625 (West 1972). The dependent child is one who is not receiving proper and effective parental care; who is destitute and not provided with the necessities of life or a suitable home; who is dangerous because of a mental or physical deficiency, disorder or abnormality; or whose home is unfit because of neglect, cruelty, depravity or physical abuse by either of his parents. Id. § 600.

\textsuperscript{189} See id. §§ 601, 625. A beyond control child is one who habitually refuses to obey the reasonable and proper orders of parents and school authorities, who is habitually truant from school; or who is in danger of leading an immoral life. Id. § 601.

\textsuperscript{190} See id. §§ 602 (West Supp. 1974), 625.1 (West 1972).

\textsuperscript{191} In California a juvenile falls within the jurisdiction of the juvenile court if he fails to obey a lawful order of that court after having been found to be a person described by section 601. Id. § 602. Section 601 includes within its ambit such broad categories of offenses as “in danger of leading an idle, dissolute, lewd or immoral life.” A three-judge federal district court held that this portion of section 601 is void because of vagueness, and a permanent injunction was granted against its use in San Francisco County. Gonzalez v. Maillard, No. 50424 (N.D. Cal. 1971), vacated and remanded, 416 U.S. 918 (1974). The remand on the ground of mootness was based on Stefie v. Thompson, 415 U.S. 452 (1974), and Zwicker v. Koota, 389 U.S. 241 (1967) (The Court will avoid reaching the constitutional question if state court construction of the statute will sufficiently narrow it). It is interesting to note that Gonzalez was the second-oldest case on the United States Supreme Court docket. The fact that vague statutes similar to the one at issue in Gonzalez exist in most jurisdictions may account for the reluctance of the Supreme Court to reach a decision and declare the statute unconstitutionally vague. See, e.g., Mich. Comp. Laws Ann. § 712A.2 (Supp. 1974); Minn. Stat. Ann. § 260.015 (1974).
sustained when that law proscribes such imprecisely defined behavioral activity.\textsuperscript{192}

After taking a juvenile into temporary custody, the officer has several options. He can release the minor without condition, release him pursuant to a written promise to appear before the probation officer,\textsuperscript{193} or take him before the probation officer whose alternatives are basically the same as those of the police officer.\textsuperscript{194} The minor may be detained for a period not to exceed forty-eight hours (excepting non-judicial days) from the time of arrest. As a practical matter, a juvenile detained on Friday evening remains in detention until Monday when the probation officer begins his investigation.\textsuperscript{195} Moreover, the probation officer can detain the minor for an additional forty-eight hours before filing the petition which triggers the requirement that a detention hearing be held the following day.\textsuperscript{196} Since non-judicial days are not included within the forty-eight hour period, in many cases there is no effective means under the present system to insure release of the minor within the first seventy-two hours after arrest.

In many California counties, on every Monday, a large number of children who have been detained over the weekend are released without a petition being filed or a detention order being sought.\textsuperscript{197} Similar unwarranted detention is avoided in the adult system because the defendant often is released on bail or his own recognizance. In contrast, a juvenile charged with a crime may be detained at the discretion of the probation officer.\textsuperscript{198} Therefore, even before the juvenile reaches the detention hearing phase of the juvenile court process he may have been held in custody for a considerable period of time, whereas an adult would have been released while awaiting trial or a preliminary examination.

\textsuperscript{192} Vague sections of the California Penal Code typically have met with more direct action than the Court was willing to take in Gonzalez. See, e.g., In re Davis, 242 Cal. App. 2d 645, 51 Cal. Rptr. 702 (1966) (declaring unconstitutionally vague section 650 1/2 of the Penal Code which made it a misdemeanor willfully and wrongfully to commit any act openly outraging public decency).

\textsuperscript{193} \textsc{Cal. Welf. \\ & Inst'ns Code} § 626 (West 1972).

\textsuperscript{194} Id. § 629.

\textsuperscript{195} Boches, \textit{Juvenile Justice in California: A Re-Evaluation}, 19 \textsc{Hast. L.J.} 47, 73 (1967) [hereinafter cited as Boches].

\textsuperscript{196} \textsc{Cal. Welf. \\ & Inst'ns Code} § 631 (West Supp. 1974).

\textsuperscript{197} Boches, \textit{supra} note 195, at 77 n.167. There is no provision for appeal from an order of detention. The proper remedy is habeas corpus. \textit{Juvenile Court Practice, supra} note 83, at 65, \textit{citing In re Macidon}, 240 Cal. App. 2d 600, 49 Cal. Rptr. 861 (1966). In a petition for writ of habeas corpus counsel should point out that in all fairness the juvenile should be entitled to the presumption of innocence, and the court should avoid the anomalous result of detaining someone presumed to be innocent only to release him after he is found to have committed the offense. 14 \textsc{Am. Jur. Trials, Juvenile Court Proceedings} § 48, at 663 (1968).

\textsuperscript{198} \textsc{Cal. Welf. \\ & Inst'ns Code} § 628 (West 1972).
Bail. Constitutional and statutory provisions regarding bail generally have been held to have no application in juvenile court proceedings on the ground that such proceedings are civil and not criminal. In addition, one commentator has urged that bail should not be a matter of right in a juvenile case because a child in trouble may need care immediately and such care is not provided by a simple release from custody. This commentator also has contended that habeas corpus can effectively accomplish the release of a juvenile who has been arbitrarily kept in custody prior to adjudication.

The California Supreme Court, while declining to consider whether juveniles are constitutionally entitled to bail, has concluded that California's Juvenile Court Law, when properly administered, provides an adequate system for prehearing release of juveniles without bail.

A few cases in other jurisdictions have held that the constitutional right to release on bail pending trial is applicable in juvenile court proceedings. The foundation for this minority view rests upon two assumptions. First, it is reasoned that the juvenile courts were not established to deprive the juvenile of his constitutional rights. Second, it has been found that any proceeding that may result in the deprivation of liberty requires the application of constitutional guarantees whether the proceeding is civil or criminal.

A discussion of all the arguments for and against utilizing the bail concept in the juvenile system is not within the scope of this article. It should be noted, however, that it seems unwise to consider the application of the right to bail in the juvenile context when such persuasive arguments have been made for its abolition in the adult system.

A probable cause finding for detention. Among those jurisdictions requiring that there be a detention hearing once the initial temporary detention period has lapsed, only four prescribe that there be a probable cause determination at that hearing, and
only three mandate such a finding prior to deciding whether or not to detain the juvenile. The detention hearing serves approximately the same function in juvenile proceedings as the preliminary hearing does in adult criminal proceedings—that is, it is a means of determining whether the individual shall be detained and proceedings against him continued. Because there is no right to release on bail or on OR for juveniles accused of a crime, it is imperative that in the detention hearing the court make a finding commensurate with the seriousness of further depriving a juvenile of his liberty. The evidentiary standard which would be appropriate in the detention hearing is a finding of probable cause to believe that an offense has been committed and that the juvenile is the person who committed it. The issue presently confronted at juvenile detention hearings is merely whether it is necessary to detain the minor for his protection, the protection of others, or because it is deemed likely he will flee the jurisdiction. In California, case law has determined that there must be a finding of probable cause at the detention hearing when the allegations in the petition are denied by the juvenile. This requirement should be applicable even in those cases where the allegations in the petition are not denied, because of the frequency with which juveniles admit the petitions though there may be a legal basis upon which to predicate a denial. Only in this way will the right of juveniles to be free from unreasonable detention be safeguarded.

---


209. A preliminary hearing in the adult system also serves to weed out prosecutions on groundless charges. In this sense the preliminary hearing is similar to the motion for summary judgment and the demurrer in civil cases.


212. Interview by authors with Professor Aidan R. Gough, Alternate Referee, Juvenile Court, Santa Clara County, Mar. 20, 1974. Waiver of the right to a probable cause finding should be made only with the assistance of counsel unless the child has validly waived counsel.

213. The majority of cases discussing the need for a judicial determination of probable cause when a juvenile is not detained have held that such a juvenile has no right to a probable cause hearing. In the Interests of D.M.D., 54 Wis. 2d 313, 195 N.W.2d 594 (1972); M.A.P v. Ryan, 285 A.2d 310, 313 (D.C. Ct. App. 1971). Only one court has held that a non-detained juvenile has the right to a probable cause determination at a preliminary hearing. See Brown v. Fauntleroy, 442 F.2d 838 (D.C. Cir. 1971).
WHAT DOES DUE PROCESS REQUIRE AT A JUVENILE PROBABLE CAUSE DETENTION HEARING?

In the watershed decision of In re Gault,214 the Supreme Court placed juveniles within the protection of the basic guarantees of the due process clause of the fifth and fourteenth amendments. Although the decision related to the adjudicatory phase of the proceedings, we submit that the same due process considerations should be given at the detention hearing, since it is a critical stage of the juvenile court proceedings215 and, in California, may result in more than two weeks of involuntary detention.216 Because of the critical nature of the detention hearing, the juvenile should be entitled to the constitutional protection of adequate notice of the hearings, disclosure of the offense with which he has been charged,217 the right to counsel at the hearing,218 the right to have counsel appointed if he appears without counsel,219 and the privilege against compulsory self-incrimination.220 Further, it is implicit that due process requires the presence of the juvenile at this critical hearing. In addition, the same rules governing the admissibility of evidence at an adult criminal trial or preliminary examination should be required at a juvenile detention hearing.

Evidentiary Rules

The dichotomy between due process and parens patriae that Gault and its progeny have sought to eliminate still exists in the rules governing admissibility of evidence in juvenile court proceedings. In California it is not clear whether the Evidence Code is applicable to all proceedings in the juvenile court. Section 300 of the Evidence Code provides that the Code applies in every court except as otherwise provided by statute.221 The comment to that section of the Code points out that section 300 does not affect any other statute that relaxes rules of evidence for specified purposes.222 To the extent, then, that the evidentiary standards

215. The Supreme Court has held that, as to adult criminal procedure, the sixth amendment requires counsel at the preliminary hearing since it is a critical stage. Coleman v. Alabama, 399 U.S. 1, 9-10 (1970).
218. Id. at 41; CAL. WELF. & INST'NS CODE § 633 (West 1972).
219. CAL. WELF. & INST'NS CODE § 634 (West 1972). This section provides that counsel must be appointed in sections 601 and 602 cases if the minor is without counsel, even if he is able to afford representation.
221. CAL. EVID. CODE § 300 (West Supp. 1974).
for juvenile court proceedings set forth in the Welfare and Institutions Code relax general evidentiary standards, they take precedence over the Evidence Code. The relevant Welfare and Institutions Code sections provide that at the detention hearing, the court shall hear all “relevant evidence,” at the jurisdictional hearing, “any matter or information relevant and material to the circumstances or acts which are alleged” may be heard, and proof beyond a reasonable doubt supported by legally admissible evidence to support a finding that a minor has committed a crime is necessary, and, at the dispositional hearing, evidence shall include the social study of the minor made by the probation officer as well as any other relevant and material evidence.

A general summary of admissibility of evidence in California shows that evidence initially must be material, in addition to being relevant. Evidence which is technically incompetent, such as hearsay, may be excluded by a timely objection but is not inadmissible per se. In contrast, the Welfare and Institutions Code section delineating the evidence admissible at the detention hearing does not provide that the evidence be material, nor does it exclude technically incompetent or highly prejudicial evidence.

It has been held that the police or probation officer's report is admissible at the detention hearing. The juvenile's rights are protected to some degree, however, because if the report is introduced at the detention hearing, the minor is entitled to a continuance so that the presence of those persons who prepared the reports may be secured for cross-examination. It is the responsibility of the probation officer to produce the necessary witnesses for the court in such a case. The rights of the juvenile

---

223. The relevant sections are CAL. WELF. & INST’NS CODE §§ 635, 701, 706 (West 1972).
224. Id. § 635.
225. Id. § 701. Under what is called the “revolving-door” theory of evidence, all relevant evidence comes in, but in determining jurisdiction the court considers only evidence admissible in a criminal or civil case, depending on whether the case is brought under section 600, 601 or 602. THOMPSON, supra note 131, at 50.
228. Id. § 330.
229. Id. § 140, Comment—Law Revision Commission. See Mogilner, Admissibility of Evidence in Juvenile Court, 46 CALIF. ST. B.J. 310 (1971). The author states that since section 701 of the Welfare and Institutions Code provides that any relevant and material evidence is admissible, it may be that technically incompetent evidence is admissible at the court's discretion. Under section 706 technically incompetent evidence clearly is admissible so long as it is relevant and material. Id. at 312-13.
231. Id.
are additionally protected by the California Supreme Court decision of *In re Gladys R.* In that case, the court held that the judge presiding at the jurisdictional hearing is prohibited from reading the social study report prior to the hearing, since the report may contain information that is inadmissible and prejudicial.

The "protections" afforded the California juvenile in the detention hearing by the evidentiary sections of the Welfare and Institutions Code may be sufficient for the determination of whether it is urgent and necessary that the juvenile be detained. This is true, however, only if such a finding is preceded by a probable cause determination, during which the general rules of evidence that protect the adult at all phases of a criminal prosecution are available to the juvenile.

**Procedure**

The procedure at the detention hearing should be similar to that followed at an adult preliminary hearing. We suggest California's procedure as a model. The finding of probable cause should be based on relevant and competent evidence. As in a trial, witnesses should be called and evidence introduced. The witnesses for the prosecution should be examined in the presence of the accused and should be subject to cross-examination. Further, the defense should be able to call its own witnesses and these witnesses also should be subject to cross-examination. The public should be excluded from the hearing at the request of the accused, and all witnesses should be excluded and kept

---

234. *Id.* at 861, 464 P.2d at 132, 83 Cal. Rptr. at 676.
235. For a view that guilt or innocence of a particular offense may not be so critical in a juvenile case see *In re Dennis M.*, 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969). Justice Mosk, for the majority, commented that since a youth's alleged crime may often be only the latest symptom of an underlying behavioral or personality disorder, a determination of whether he committed the particular misdeed may not be critical to the proper disposition of many juvenile cases as it is in an adult criminal prosecution. *Id.* at 456-57, 450 P.2d at 303, 75 Cal. Rptr. at 8.
236. We recognize that each jurisdiction would follow a procedure modeled after its own adult criminal procedure.
238. *Id.* § 866. Adverse witnesses may also be called by the defense but this practice usually is tactically unwise. For a discussion of tactical considerations see *California Criminal Law Practice* 242-44 (C.E.B. 1964) [hereinafter cited as *Criminal Law Practice*].
separate during the hearing at the request of the defense or prosecution.\textsuperscript{240} Physical evidence should be entered as evidence if admissible under the rules of evidence applicable at the trial.\textsuperscript{241} The witnesses need be examined only to the extent of establishing a prima facie case against the accused. As in the adult hearing, not all evidence available need be presented.

Some Difficulties and Possible Solutions

Arguments can be made that the requirement of a probable cause hearing will burden the courts by consuming a significant amount of judicial time, that it will burden the officers and other witnesses called to testify, and that it will make it impossible to proceed with the speedy adjudication that has been considered necessary in the juvenile court system. Efficiency of administration has never been deemed to be of sufficient importance to take precedence over constitutional rights.\textsuperscript{242} Once the premise is accepted that the detention hearing is a critical stage of the juvenile court proceedings that requires due process protections, the problem of overburdening the courts falls into proper perspective. Nevertheless, in recognition of the practical conclusion that clogged courts ultimately make it more difficult to provide due process by preventing adjudication and disposition with necessary dispatch, we emphasize that a probable cause determination hearing should be provided only for juveniles accused of a crime. We also suggest that a probable cause determination may be made upon the basis of the probation department report if stipulated to by the juvenile upon advice of counsel.

In courts where one judge hears all juvenile matters, the requirement of a probable cause hearing will present another problem. In those courts, a means of preserving the juvenile's right to an adjudication before an impartial judge must be found. A possible solution might be to have local attorneys act as referees at the detention hearings. Another arrangement that may solve the problem would be to have the hearings conducted by a judge from a neighboring county in a reciprocal arrangement.

No doubt the same arguments that can be made against a probable cause hearing in the juvenile court can be, and have been, made with respect to the procedure in the adult court. It


\textsuperscript{241} \textit{Criminal Law Practice}, \textit{supra} note 238, at 242.

bears repeating that the primary consideration in deciding which procedures are necessary should be the due process requirements that a state must satisfy before it can deprive a citizen of his liberty.\textsuperscript{243}

**Conclusion**

Statutes in jurisdictions throughout the United States do not, as a whole, provide adequate constitutional protection to juveniles accused of committing crimes. The United States Supreme Court's mandate that due process requires the guarantee of many constitutional rights to juveniles at the adjudicatory phase of the proceedings, has led to an increasing awareness in some courts that these same rights must be accorded to juveniles at the detention hearing as well.

By proposing that there be a probable cause determination of whether or not the juvenile has committed a crime before he can be detained, we do not recommend that the entire approach of the juvenile court be changed. We do not believe that the requirement of due process protections at the detention and adjudicatory stages would conflict with a treatment-oriented, \textit{parens patriae} approach during disposition. The insistence that the juvenile court proceeding is not criminal but civil, and therefore that the due process requisites of criminal proceedings are inappropriate, is no longer a valid argument. As the problem of juvenile delinquency continues to trouble our society, we must be flexible in considering alternative approaches. Even the strongest advocates of the juvenile court system admit to its imperfection and lack of total success. This article suggests that greater due process in the juvenile courts will enhance rather than detract from their rehabilitative efforts. To that end, requiring a probable cause determination at detention hearings for juveniles accused of a crime is a much needed procedural reform.

\textsuperscript{243} \textit{See In re Gault}, 387 U.S. 1, 18-19 (1967) wherein the Court states: The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.