

Ten Ways to Reduce Detention Population

BY JUDGE LINDSAY G. ARTHUR

ABSTRACT

The Temptation

"When in doubt, hold." It's easy. Somebody, a police officer, a probation officer, an intake worker, all professionals, has already made the decision to detain. Whoever it was thought it was right. It's easy for the court to agree. A detained child will not hurt anyone, he won't run away. And he won't get hurt himself—physically. Of course, he will be cut off from his own bed and his mother and his friends and his school, and he'll never quite recover his reputation. He'll lose some potential friends whose parents don't want them associating with a delinquent. Of course, he'll make new friends in detention, though they'll mostly be juvenile delinquents. If he's detained, he'll be safe. If he's released, it's easy to imagine all manner of bad things that may happen to others and to him. So, unless he can prove it's safe to release him, detain him. It won't be appealed since appeals cost so much and take much longer than the probable time in detention. It's easy to hold. The media doesn't complain if you

"Juvenile detention is regularly overlooked, maligned, and misunderstood. Its embattled condition is best described as severely abused and neglected. It is underfunded, understaffed, crowded and largely ignored."¹

"Detention caseloads increased 38 percent between 1987 and 1996. The increase in the number of delinquency cases handled by the courts has driven the growth in the number of juveniles in the detention system. In 1987, 1.2 million delinquency cases were disposed of in juvenile courts. By 1996, this number had risen 49 percent, to almost 1.8 million. This increase in the volume of juveniles in the justice system resulted in a 38 percent increase in the number of delinquency cases that involved the use of detention. The number of juvenile delinquency cases detained in 1996 was 89,000 more than in 1987. This has resulted in increased demand for juvenile detention bed space across the country."²

"Changes in statutes allowing more detainable offenses have significantly increased the number of youths admitted to regional detention centers."³

"Although minority youth constituted about 32 percent of the youth population in the country in 1995, they represented 68 percent of the juvenile population in secure detention..."⁴

detain but it may chew you out if you release. So detention fills up.

There are options

The law may provide options. It may even require options. One option is simply to read the statutes closely. Or the Constitution itself may require release. Or maybe others can be persuaded or required to find a place, especially if they have to pay for detention. There are many in the community operating facilities that can be used as alternatives, and they are often anxious for the place-

ments. Detention should be a last resort, not a first resort as it too often is.

1. Don't Hold Technical Violators

"Thirty-four percent of youth are detained for status offenses and technical violations. This category includes kids who have violated court orders or the rules of probation. While they may have angered an adult or broken a rule, they have not committed new offenses. Adults

Judge Lindsay G. Arthur has been a judge for 47 years, 18 of them as Chief Judge of the state juvenile court sitting in Minneapolis. He has been widely published and has been active with the National Council of Juvenile and Family Court Judges, serving as its president and the editor of its *Juvenile and Family Law Digest*. Judge Arthur currently serves as the Council's Senior Judicial Scholar. He has also served on juvenile and family related committees of the American Bar Association, the National Center for State Courts, the American Law Institute, and various local organizations. He has long been an advocate of individualized justice and of rehabilitation.

would rarely if ever face detention as a consequence for these behaviors.”⁵ Many of these probation violators can be punished by community service, electronic bracelets, weekend or daytime detention, etc. On the other hand, there are some few who must be detained because other options for controlling them have failed. There are those status offenders who persistently defy a “valid court order,” but if the court is actually ordering the detention of a status offender or misdemeanor, it should clearly state the reason that justifies the loss of liberty with all that that entails.

2. Use Bail

It was the original wisdom of the Juvenile Court that children should not be admitted to bail because they would not be deterred by the forfeiture of money that was usually not their own, or because they would value their liberty more than someone else’s money. The wisdom has never been adequately investigated. Additionally, juvenile proceedings were deemed to be civil rather than criminal, and therefore the constitutional provision requiring bail would not apply,⁶ though an early opposing opinion stated,

The fact that [juvenile] proceedings are to be classified as civil instead of criminal, does not... necessarily lead to the conclusion that constitutional safeguards do not apply. It is often dangerous to carry any proposition to its logical extreme. These proceedings have many ramifications which cannot be disposed of by denominating the proceedings as civil. Basic human rights do not depend on nomenclature.⁷

Some courts have simply fallen back on the *parens patriae* concept, that the court is better able than parents to take care of some delinquent children.

To allow a child judged delinquent or dependent to go free on bail, pending appeal, would be merely returning him to the environment which was the cause of his problems initially! Many times, in fact, the delinquents really have nowhere to go. Most have come from environments totally adverse to their best interests. There is no guidance and nothing to do but return to their previous delinquent behavior. By

placing the child in a home or training school, he receives the care and training he would not otherwise receive...⁸

The refusal to use bail was further explained by the theory that Juvenile Courts are concerned with rehabilitation which requires treating the causes of the child’s delinquency, and since detention is part of the treatment,⁹ to allow a child to be bailed out of detention would be to interrupt the treatment. Of late, however, Juvenile Courts have become more and more formalized under due process requirements.¹⁰ They have been less concerned with rehabilitation and treatment and more concerned with just punishing juveniles on the same basis as adults.¹¹ The proceedings are becoming more and more criminal, so logically juveniles should be admitted to bail on the same basis as adults.¹² This could substantially reduce the number of juveniles in detention, particularly if the bail amount were geared to the child’s level of values, such as by requiring his boom box to be deposited, or his CD collection, or the license plates to his car, or a favorite dress, doll, or bracelet.

3. Disallow Warrantless Arrests

On the ground that juvenile proceedings are not criminal and that their purpose is not punitive, (a statute may authorize a warrantless arrest as) a form of protective custody to which the general law of arrest does not apply and it is therefore unnecessary that the child be committing a misdemeanor in the officer’s presence, or that the officer have probable cause to believe that the child has been involved in the commission of a felony.¹³

The statutes have allowed detention for completely subjective reasons. But in the new approach—that juveniles should be punished like adults, not rehabilitated—the rationale for deviating from the adult law of arrest no longer applies. Therefore, arrest and detention should be limited by the same rules as for adults. Juveniles are either children or adults; they cannot have the worst of both worlds.

4. Don’t Hold Runaways Who Won’t Run

Though there is a strong administrative policy against it, status offenders are in fact being detained.

Status offense cases were much less likely to involve detention than were delinquency cases. In 6 percent of the formally processed status offense cases disposed by juvenile courts in 1997, the juvenile was held in a detention facility at some point between referral to court and case disposition. Juveniles were detained in 11 percent of runaway cases, 7 percent of ungovernability cases and status liquor law violations, and 2 percent of cases involving truancy charges. Of the estimated 9,400 petitioned status offense cases involving detention in 1997, liquor law violation cases and runaway cases made up the greatest proportions.¹⁴

Under most statutes, even status offenders can be detained if there is a violation of a "valid court order" or good probable cause to believe that they will not return for their next hearing.¹⁵ Mere failure to appear in court to answer a misdemeanor petition is not grounds for pre-trial detention.¹⁶ But it's too easy to say that a child will not return for his next hearing; it's too easy to opine that a stay in custody pending his trial or disposition hearing might have a salutary effect. Evidence should be required to prove probable cause, with opportunity for rebuttal.

5. The Threat of Danger to Others is Seldom Valid

Juveniles may be detained if they pose a threat to others. "Preventive detention involves a short-term prediction of dangerousness or the prediction of some future harm. — The development of definitions of danger has focused on two concerns: danger to the public generally posed by the defendant, and danger posed to potential victims or witnesses."¹⁷ The court must make a prediction of future danger, and the prediction must be based on evidence presented at a due process hearing. The court should also realize that when the child knows that the disposition is pending, he may be on his good behavior so as not to aggravate the disposition or to prove he can live in the community.

The Supreme Court has said, "There is nothing inherently unattainable about prediction of future criminal conduct."¹⁸ The problem comes in the criteria to be used to determine danger. The decision has to come

early in the case, within a day or two after the person has been detained at the direction of the police or detention staff, before there is time to accumulate the detail of a full investigation. Because a mistake may deprive an American of his liberty, due process requires a defined set of standards, prescribed in advance to limit any arbitrariness or bias of the judge.

The usual standards for preventive detention prescribed by various state statutes are the violent nature of the offense, the prior record, probation or parole status, recent threats to witnesses, and any "risk assessment" prepared by staff. But such criteria speak mainly to the defendant's past rather than to future probabilities.¹⁹ Other elements that are sometimes used are the defendant's demeanor, dress, and grooming as he appears in court and, from the evidence and their appearances in court, the judge's perception of the quality of parental supervision. Definitive psychological evaluations are seldom available so early in the proceedings. Sometimes the court subconsciously bases the detention decision on the defendant's membership in a group, such as his race, his neighborhood, his economic status, or his school record. Because the judge perceives that these are the groups to which most criminals belong, there is the syllogism that those who belong to such groups are criminals.

There is too often little concern with detention's impact on the defendant and his family by the loss of a job and employability, by the loss of schooling, or by denigration of community reputation. Of great importance, detention may be a determinant in the subsequent trial²⁰ and disposition. A detained child is more likely to be committed to an institution, understandable in most cases, but because a majority of detainees may be committable does not justify the easy assumption that all of them are.

A possibly definitive study was made of a uniquely appropriate situation. A federal court in New York ruled that the state statute allowing preventive detention was unconstitutional and enjoined the State Commissioner of Juvenile Justice from detaining defendants who were detained only preventatively. However, the New York Court of Appeals had held the same statute constitutional. As state courts ordered juveniles detained, those committed to the State Commissioner were released under the federal ruling, and those put in placements

without the State Commissioner were held under the state ruling. Two groups were thus created: both groups had been found by a court to require detention because of danger, but one group was released and the other detained. The study made an extensive comparison of the behavior of both groups during the pretrial period. It recommended against preventive detention.

There are reasonable and constitutional arguments to incapacitate a presumptively innocent individual when we are certain he or she is dangerous. But whenever a significant number of persons are presumptively detained, many individuals will be deprived of their liberty even though they would not have endangered the community. In light of the great cost to defendants in terms of case outcomes and sanctions, and the marginal gains to society in crimes averted, preventive detention appears to be unjustified.²¹

6. Few Juveniles are Themselves in Danger

If released, a very few juveniles may commit suicide or maim themselves in the attempt because they consider themselves to be losers, think the future is hopeless, or are convinced that they have disgraced their families. Juveniles may be at risk of injury from victims or victims' friends, or from the juvenile's gang if it believes that the juvenile has betrayed them or "dissed" them, disgracing or disrespecting them. But deeming or assuming that such a danger exists is too easy. The court should insist upon admissible evidence of *actual* danger to or by this child.

7. Therapeutic Detention May Be Obsolete

While preventive detention may stop or disrupt certain behaviors or actions, the nature of therapeutic detention is to start or cause certain events to take place. Therefore, therapeutic detention could also be called "educative detention," "helpful detention," or "proactive detention." This function examines those things that detention can do to help the juvenile achieve the preventive detention goals of protecting the

offender, family, community, and to prevent re-offending.

While the ultimate goal of therapeutic detention is not the complete rehabilitation of the juvenile offender, detention should be seen as the place where the process begins...

The basis for the therapeutic detention rationale is the emphasis on diagnosis and observation. The court needs information regarding the juvenile, the home environment, and peers in order to make an informed decision about the future of the juvenile. Short-term detention has been used as an opportunity to accomplish this task. The diagnosis and observation themes are so common that most juvenile codes include them as a rationale for detention. It is this concept that has created much of the conflict in the definition of detention goals.²²

If therapy is to be the basis for detention, it should be acknowledged, with *actual* therapy being provided at the detention center, therapy that addresses the child's individual needs, not just saying that a dose of detention will be good for him. And if the child is held for observation, there must be observation by professionals, not merely the staff shift notes. The concept of therapy is that the child can be rehabilitated. Nowadays, however, under the "new" approach, rehabilitation is discarded to protect the juveniles from judicial bias and to ensure equality. All similar offenses are to have similar punishments regardless of the juvenile or his home environment or his peers. There's no need for observation or diagnosis. Therapeutic detention is obsolete because punishment, not therapy, is the order of the day.

8. Courtesy Holds are Improper

A courtesy hold occurs when the detention facility holds a child who is dependent but not delinquent or incorrigible simply because the Child Protective Services, the parents, or relatives all refuse to take her. The practice is improper. Such children cannot be held.²³ With findings explaining the need for placement, a trial court may order the state to accept a juvenile even though the quota for the state facility is full, it being the state's obligation to either raise its quota or

find alternative placements for residents.²⁴ In the ultimate case, this may require the court either to hold the commissioner in contempt if he does not find room for the child or to order the sheriff to deliver the child to the commissioner personally or to an appropriate institution. Judge Lincoln of Detroit once accompanied the sheriff on such a delivery. The children were accepted.

9. Use Home Detention

Even where the Court lacks authority to order detention in a secure facility because the statutory criteria are not met, it still may order home detention if it provides a hearing within 20 days.²⁵ Home detention can be supported by random phone calls or electronic bracelets, or possibly holding the parent in contempt if the child leaves home.

10. Use Options

Instead of considering detention to be only in a maximum security building, a Juvenile Court may develop resources involving lesser and cheaper degrees of security as the needs of the juvenile may allow. These may range from simple mentoring or informal probation programs to community programs such as drug rehabilitation, day treatment, intensive probation, and electronic monitoring, to various levels of group homes, such as foster parent homes, staff monitored homes, and staff-secure homes, to periodic detention, such as weekend or daytime detention. A more complete and definitive description of continuum of care programs is set forth by Dunlap and Roush.²⁶

Consider also that if parents or the state must pay for detention, they may find options. Both will strongly resist paying, pleading lack of authority, poverty, illogic. But there is authority for requiring such payment²⁷ and when payment is required, those ordered to pay often do a vigorous search for some other place or means of detention.

Require Parents to Pay — court may order the parents to pay the costs of detention without inquiring as to their ability to pay. The court is not required to detain the child in a facility covered by the parents' insurance.²⁸

Require the State to Pay — "Because at least one purpose of the detention was to facilitate juvenile's placement in a treatment facility, the detention consti-

tuted treatment of the juvenile. Therefore the state was financially responsible for the costs of court-ordered detention not paid by the juvenile's mother."²⁹ "Temporary detention is treatment for which the state Department of Social Services must pay."³⁰ But the state is not required to pay detention costs incurred prior to adjudication,³¹ presumably because treatment doesn't start until after adjudication, though see *Therapeutic Detention*, supra. A contra opinion is that temporary detention is treatment for which the state Department of Social Services must pay.³²

A Hearing is Always Necessary

A child is entitled to a hearing, constitutionally, and more specifically, by statute. The hearing must usually be within 72 hours of the beginning of detention, though some statutes provide for a shorter period. Saturdays, Sundays, and holidays are usually, but not always, exempted. A hearing is not required, however, when a child is returned from an escape.³³ If the hearing is not held within the required time, the child must be released regardless of his condition or danger. Detention could not be extended for five days to permit the state to locate a witness without proof of probable cause to believe that the allegations in the petition were true.³⁴ High-risk juveniles may be detained longer than the 15-day statutory limitation if necessary for finding a placement.³⁵ The United States Supreme Court has held that an Immigration and Naturalization Service regulation that required that detained juvenile aliens could be released only to parents, close relatives, or guardians except in unusual circumstances does not violate due process.³⁶

The hearing must meet the requirements of due process such as:³⁷

Notice to the Child — Timely notice must be given to the child of the purpose of the hearing;

The Child has a right to appear — The child must be permitted to attend the hearing;

Provide the Child with Attorney — The child must be advised of his right to an attorney, at public expense if necessary. There is a difference of opinion among the states as to whether the child's attorney must [a] advocate the wishes of the child or [b] advocate the attorney's

own concept of the child's best interests.³⁸

Notify Parent — At least one custodial parent or guardian must be notified of the hearing and its purpose. Most statutes require that a parent or guardian be present and there is some opinion that the right to appear belongs to the parent so that the child cannot waive his parent's presence.³⁹ Certainly the chances of preventing further delinquency are greatly improved if a parent is present.

Require Admissible Evidence — The petitioner must prove its case by evidence admissible under the Rules of Evidence. Since human liberty is at stake in a criminal-type matter, proof is probably necessary beyond a reasonable doubt.

Court must make Findings — The court must make at least oral findings on the record of its reasons for ordering or not ordering detention.

Conclusion

The number of detained children is increasing too rapidly. It is straining facilities and the staff that is trying to help and manage the inmates. Instead of building more and more cells for juveniles, courts should examine the standards they use to determine detention. It's easy to detain, too easy. Law enforcement prefers it. The media prefers it. Probation officers may even like to keep the kids where they can find them. To release may be to swim against the stream. But that's often part of being a Juvenile Court Judge. The standard tests for detention: danger to self or others or proclivity to run, are often interpreted much too loosely, without valid evidence. And there are options available. Some of them are actually required by statute or by the Constitution. Community facilities are often ready, willing, and able to provide options. Others become apparent if real evidence is required to prove the need for detention. Detention should be a last resort.

AUTHOR'S ADDRESS:

Judge Lindsay G. Arthur
1201 Yale Place, #205
Minneapolis, MN 55403

END NOTES

- ¹ David M. Roush, "Public-Private Venture to HELP Youth in *Juvenile Detention*," *Juvenile and Family Court Journal*, Vol. 50, No. 2, Summer 1999, pp 57. The author describes a successful program conducted by a detention center to reduce delinquency among violent juveniles.
- ² Lynn Ryan MacKenzie, *Detention in Delinquency Cases*, 1987-1996, August 1999. Office of Juvenile Justice and Delinquency Prevention "Court Summaries, 11/16/00."
- ³ *Juvenile Justice Detention Programs, Ten Year Longitudinal Analysis, Bureau of data and Research*, "Research Digent Issue #26, 9/98, pp.1.
- ⁴ *Disproportionate Minority Confinement: 1997 Update*, Juvenile Justice Bulletin, OJJDP, September 1998.
- ⁵ *Juvenile Detention Alternatives Initiative*, The Annie E. Casey Foundation, April 2000.
- ⁶ 47 Am. Jur.2d Sec. 62, pp. 1105 *Juvenile Courts, etc.*
- ⁷ *Trimble v. Stone*, 187 F. Supp.483, 486 [D.D.C. 1960], as quoted in "The Denial of a State Constitutional Right to Bail in Juvenile Proceedings: The Need for Reassessment in Washington State." Kathleen A. Baldi, 19 *Seattle University Law Review* 573, 582.
- ⁸ *Estes v. Hopp*, 438 P.2d 205 [Wash. 1968] as quoted in "The Denial of a State Constitutional Right to Bail in Juvenile Proceedings: The Need for Reassessment in Washington State." Kathleen A. Baldi, 19 *Seattle University Law Review* 573, 580.
- ⁹ *Baker v. Smith*, 477 S.W. 2d 149 [Ky. 1971].
- ¹⁰ *In re Gault*, 387 U.S. 1 (1967).
- ¹¹ Lindsay G.Arthur, "Punishment Doesn't Work," *Juvenile and Family Court Journal*, Vol. 51, No. 3, (2000) pp. 37.
- ¹² "The Denial of a State Constitutional Right to Bail in Juvenile Proceedings: The Need for Reassessment in Washington State." Kathleen A. Baldi, 19 *Seattle University Law Review*, 573.
- ¹³ 47 Am. Jur.2d Sec. 62, pg 1103 *Juvenile Courts, etc.*
- ¹⁴ Puzzanchera, C., et al., *Juvenile Court Statistics 1997* (Report) Department of Justice, OJJDP, June 2000, per Internet 11/16/00.
- ¹⁵ See, for example, Minn. Stats., 260B.178 .
- ¹⁶ *J.L. v. McCormick*, 671 So. 2d 202 (Fla., 1996).
- ¹⁷ Jeffrey Fagan and Martin Guggenheim, "Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles:A Natural Experiment," 86 [Part 1] *The Journal of Criminal Law & Criminology*, 415, 419 (1986).
- ¹⁸ *Schall v. Martin*, 467 U.S. 253, 278 (1984).
- ¹⁹ Fagan and Guggenheim, op. cit. 420.
- ²⁰ "A first offender detainee is more likely to be convicted and severely sentenced than a recidivist with more than ten prior arrests who was released before trial." *The Presumption of Innocence: the Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 Jeff Thaler, Wis. L.R. 441, 446.
- ²¹ Fagan and Guggenheim, op. cit. 448.
- ²² Earl L. Dunlap and David W. Roush, "Juvenile Detention as Process and Place," *Juvenile and Family Court Journal*, Vol. 46, No. 2, Spring 1995, pp. 6.
- ²³ *JV502820 v. Superior Court of Maricopa Count*, 889 P.2d 36 (Ariz. 1995).
- ²⁴ *State v. Stephens*, S.E.2d (W.Va., 1996).
- ²⁵ *State v. Marion County Superior Court, Juvenile Division*, 704 N.E.2d 477 (Ind. 1998).
- ²⁶ Dunlap and Roush, op. cit., pp. 11.
- ²⁷ *In the Interest of N.D.S., a child, and concerning L.S. and E.S.*, 5 P.3rd 382 (Colo. 2000).
- ²⁸ *J.W. v. Hendricks County Office of Family and Children*, N.E.2d (Ind. 1998).
- ²⁹ *Scotts Bluff County v. Department of Social Services*, N.W.2d (Neb. 1996).
- ³⁰ *Keith County v. Department of Social Services*, 540 N.W.2d 109 (Neb. 1995).
- ³¹ *State in Interest of J.B.*, 708 So. 2d 1300 (La. 1998).
- ³² *Keith County v. Department of Social Services*, 540 N.W.2d 109 (Neb. 1995).
- ³³ *In the Interest of J.L.P.*, S.E.2d (Ga 1997).
- ³⁴ *In re S.J.*, 686 A.2d 1024 (D.C., 1996).

END NOTES

³⁵ *Red v. Gnat*, 681 So.2d 847 (Fla., 1996).

³⁶ *Reno v. Flores et al.*, 113 S. Ct. 1439 (Cal., 1993).

³⁷ For a full description of a juvenile's rights at a due process hearing, see Lindsay G. Arthur, "Participant's Rights and Duties in Juvenile Court Hearings," *Juvenile & Family Court Journal*, Vol. 50, No. 3, Summer 1999, pp. 41.

³⁸ Lindsay G. Arthur, "Participant's Rights and Duties in Juvenile Court Hearings," *Juvenile & Family Court Journal*, Vol. 50, No. 3, Summer 1999, pp. 41, 43.

³⁹ *Re Roman*, 527 N.Y.S.2d 488, N.Y.App. Div. [1988]