Detention Reform from a Judge’s Viewpoint

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Detention is a mainstay of the juvenile justice system, relied upon by judges as a site of safekeeping, a place where they can be sure a juvenile will not get into any more trouble and will not run away. Because of the security and reassurance offered by detention, judges are very defensive about preserving traditional detention as it has almost always been known in modern juvenile justice systems. Any suggested limitations or reforms of detention elicit howls of outrage and concern from most judges.

Juvenile Court judges are generally more proactive in community and social policy functions than other trial court judges. Indeed, Juvenile Court judges have always been urged by the Council of Juvenile and Family Court Judges and other organizations to be catalysts for change in their communities where children’s issues are concerned. However, in the area of detention, it seems judges are usually most active in taking leadership roles to resist change. The focus of this chapter is to encourage judges to be active participants in detention reform, to help them recognize that detention may be seriously harmful and that it acts to curtail or deprive the liberty of more juveniles around the country than any other part of the juvenile justice system.

Liberty v. Custody

Judges need to first acknowledge there is an inherent evil in detaining a child in a secure facility such as most detention centers. That evil is, at its essence, the serious deprivation of personal liberty which is
inherent in any order of detention. It is more than that, however. Young, early, or first offenders are often mixed with more seriously criminal offenders and are therefore exposed to the tutelage of more sophisticated juveniles. There is a significant loss of personal dignity involved in the mere booking of a child in most detention centers, with the loss of personal clothing, searches (often including strip searches), the wearing of institutional clothing, and the depersonalization that occurs within any correctional setting.

Although pretrial detention of juvenile offenders is routine in almost every state, and judges are given wide latitude by most statutes to impose pre-adjudication detention, judges should recognize that the decision to detain will have a profound effect on the life of a child and should be the exception rather than the rule in juvenile cases.

Since 1984, judges have taken solace from the United States Supreme Court decision in Schall v. Martin, 467 U.S. 253 (1984), in justifying traditional detention practices. In Schall, the Court upheld New York’s statutory scheme of preventive detention, which actually provides more time limits and procedural safeguards than many other states’ statutes but is otherwise reflective of traditional detention policies. The majority opinion in Schall, authored by Chief Justice Rehnquist, rationalizes the intrusion on liberty, which is acknowledged as substantial, with the theory that “juveniles, unlike adults, are always in some form of custody” (Schall, at 264). The Court seems to have little concern with significant differences between parental custody and secure detention, justifying detention as an appropriate parens patriae substitution for parental control.

In In re Gault in 1967, the Supreme Court discussed in detail the theory now espoused by the Court that juveniles have a right “not to liberty but to custody.” It noted the theory, now embraced by Justice Rehnquist, that because a child has a right only to custody, “[i]f his parents default in effectively performing their custodial function—that is, if the child is ‘delinquent’—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the ‘custody’ to which the child is entitled” (Gault, 387 U.S. 1, at 17). However, the Court rejected that theory emphatically, asserting that the parens patriae theory should not be used to rationalize exclusion of juveniles from the constitutional scheme. Although the present Court seems to have done an about-face on juveniles’ rights in Schall, Juvenile Court judges should be urged to remember pre-Gault
abuses of the juvenile justice system and refrain from taking the giant step backwards which might be suggested by the Schall decision.

Juvenile Court judges, who are believed to have a special concern for the best interests and welfare of children, should not ascribe to the theory that custody in secure detention is simply a substitute for parental custody when children are criminally misbehaving and that it is no more harmful than custody by parents. Surely any judge who has actually visited a detention center cannot compare the conditions of detention to those of a home under parental control. Even though almost all juvenile court statutes allow detention of a juvenile for his own protection, it cannot be said that confinement in a correctional institution such as a detention center is simply providing a safe place for a child to live while awaiting court action.

Though arguably endorsed by the Schall language, Juvenile Court judges should not accept the proposition that children have limited, if any, liberty rights. We should not regress from important strides made since Gault in recognizing and protecting the rights of juveniles in Juvenile Court proceedings. If anything, we should be more, not less, concerned about protecting juveniles' liberty interests, given the long-term serious harm that could result from even short-term stays in detention.

Is It Broke?

A typical response from judges when concerns about detention practices are addressed to them is that no one has demonstrated that there actually is a problem that needs fixing. The "if it ain't broke . . ." philosophy is strong among judges, who feel that there is nothing wrong with detention as it currently operates and that reformers are arguing for "change for change's sake" rather than for change needed to correct a harmful circumstance.

Institutional reform in juvenile corrections has usually come, if it has come at all, as a result of a crisis, often in the form of major civil rights actions. (Recall, for example, Morales v. Turman, in Texas; Manning v. Matheson, in Utah; and In re Bobby M., in Florida.) Such a crisis response is certainly not the most desirable way to create change, but it will eventually become necessary if judges and juvenile justice officials do not take a proactive approach to detention reform before a crisis is created.

It probably isn't accurate to say that there is not a current crisis. One
merely needs to look. Physical conditions of detention are often abomi-
nable. Detention centers have been neglected in favor of other institu-
tional reforms necessitated by civil rights actions, riots, deaths, assaults,
and other problems previously found in post-adjudication institutions,
training schools, and the like. As a result, most physical facilities presen-
tly housing detention centers are outdated, overcrowded, and not
amenable to humane, rehabilitative treatment models.

In addition, as resources continue to shrink for other services, many
states seem to be increasing their use of detention. So more and more
children are being exposed to the generally harmful effects of secure
detention.

Further, only now are judges and others finding time to look at and
seriously consider the constitutional parameters of detention practices.
There are few, if any, restrictions on judicial discretion in detention
decisions. Few states require even a probable cause finding prior to
continuation of pre-trial detention. (In my district in Utah, probable
cause hearings are held, but only as the result of a lawsuit which
preceded the Supreme Court’s decision in Schall. No other districts in
Utah make formal probable cause determinations.) Counsel is most
often not assigned until the adjudicatory phase, if at all, so the juve-
nile has no assistance of counsel when the detention determination is
made. In most cases, no formal findings are required, even on the
vague standards usually set forth for holding a child in detention, i.e.,
risk of further criminal acts, risk of non-appearance at future hearings,
and protection of the juvenile. The judge need not set forth reasons for
her finding that detention is justified on the basis of one of these
factors, and the child has no opportunity to dispute or address the
findings. Few time limitations are set by statute for pre-adjudication
detention, although time standards are recommended by the ABA,
and there were time limitations set forth in the New York statute at
issue in Schall. What is presumably “short-term” pre-adjudication de-
tention may turn into weeks or even months of secure confinement
without benefit of almost any due process protections.

Therefore, even though there have been few major lawsuits creating
sufficient crises in the detention area, Juvenile Court judges and other
juvenile justice authorities should recognize that there is, indeed, a
crisis in detention that needs our attention. We should be willing to act
now, because it is the right thing to do, whether the Supreme Court,
other courts, or state legislatures require us to do it or not. To borrow a
phrase from Judge Orme of the Utah Court of Appeals, such a response is "an effort to move the standard of our performance from the floor toward the ceiling," or to go beyond "the permissible" to "the desirable." In other words, we should be willing to do what appears to be right, that which is to be desired, not just that which is required.

Standards for Detention

Most Juvenile Court statutes specify certain basic standards for detention of juveniles: (1) to compel appearance, (2) to protect the community by preventing further delinquent activity pending adjudication, and (3) to protect the juvenile. Using those standards as the foundation, judges should be encouraged, and should encourage their colleagues, to objectify those standards to the extent possible without unduly limiting necessary judicial discretion.

As is pointed out by the minority opinion in Schall, these basic standards, without further guidelines, can, and often do, result in unwarranted detention of many juveniles to their ultimate harm. There are no guidelines in most state statutes to assist a judge in determining on what basis he should decide when a juvenile is likely to miss future hearings, or commit further crimes in the foreseeable future, or seriously injure or hurt himself. Each of these standards bears more detailed consideration by judges and others in determining appropriate criteria for making detention decisions.

Failure to Appear

If a child is being held in detention to assure his appearance at future court hearings, there must be some objective basis for fearing he will not appear if sent home. Guidelines are quite easily formulated which would help measure the risk of failure to appear. For example, it should be verified that a child has a history of running away. It is also important that the "failure to appear" standard is not used as a way to hold simple runaways in detention in violation of federal rules prohibiting such practice. If the main reason a child is being held in detention is that he or she runs away from home, then the issue is certainly not one that should be handled by imposing the criminal-like approach of detention. Alternatives must be developed to treat and handle home
runaways so that they do not end up in detention. The commission of a minor delinquent act, or even a status offense such as curfew violation or truancy, by a child with a history of running away from home should not qualify him to be held in detention. This would clearly be a "back door" approach to contravene the now generally accepted federal rules that runaways and status offenders should not be held in detention centers. A general rule should be that if the offense charged would not result in a detention order absent the history of running away from home, then the juvenile offender should not be held in detention simply because he is also a runaway.

A good guideline for avoiding failures to appear would be to determine whether the child has a history of missing court hearings after receiving legal notice—verifiable by a quick look at court records—or has a documented history of running away from court-ordered placements, i.e., probation, foster homes, correctional programs, etc. In other words, if the child has a history of following court-ordered restrictions, such as appearing at hearings, staying home while on probation, or maintaining in a community-based placement, there is little reason to doubt that he or she would appear in court after being ordered to do so.

There are certainly better alternatives possible to insure appearance than to hold a juvenile in secure confinement. Home detention, electronic monitoring, and restraints against parents are all good alternatives to detention for this purpose.

Objective guidelines are very appropriate for the failure-to-appear standard. It is one that is easily measurable by a juvenile's past history, either of missing hearings or of running from court-ordered placements. That history should be recent enough to be relevant to the current inquiry, i.e., within the last year. Such are the guidelines currently in use in my court as a result of a federal lawsuit and consent decree. This guideline is easily applied and rarely results in the release of a juvenile who subsequently fails to appear for an adjudication hearing.

Preventive Detention

It is preventive detention, or in other words, detention for the purpose of preventing further delinquent activity pending adjudication, which is the most problematic. Preventive detention of juveniles was
specifically upheld as constitutional by the Supreme Court in *Schall*. The Court apparently was not impressed by expert testimony which negated the probability or accuracy of predicting future behavior, or by testimony of judges who actually applied the New York statute, both of which clearly indicated that preventive detention was, in fact, used by judges as a sanction for the current charge, to teach a lesson, etc. Although the Supreme Court indicated pre-adjudication detention would *not* be constitutional if it was, in fact, punishment, it seemed to ignore the reality that many of the judges did perceive and use pre-adjudication detention specifically as a sanction.

If prevention of future criminal activity is a justifiable reason to detain juveniles prior to a finding of guilt (and the Supreme Court says it is), then we must have some standards or guidelines to help us predict that risk. Surely it is not appropriate to detain *every* juvenile who commits a criminal offense to prevent him from further offending. But if every juvenile is not going to be detained for preventive purposes, how are we to determine which youths are going to be so detained?

Risk prediction instruments have been developed in many jurisdictions around the country. Some are quite extensive and detailed, others are fairly simple. All take into account the severity of the current offense, the history of other offenses and their severity, and the recency and frequency of such earlier offenses. Other factors such as substance abuse are also considered. Applying such instruments enables the judge to make a determination of future risk based on something more than "gut" feeling. While risk prediction instruments are certainly not guaranteed, they do reduce the likelihood of many youths being detained who present little or no risk of re-offending in the near future, and they increase the likelihood that those who present the more serious risks will actually be detained. The Broward County experience is a very good demonstration of the use of risk assessment instruments. Similar guidelines are in place in the Third District Court in Utah and a few other jurisdictions. It is important to note, anecdotally, that there was not a rash of crime committed by juveniles released under these guidelines. The experience is that most juveniles charged with a delinquent act can either be released under the supervision of their parents or guardians, or under other court-ordered restrictions, without jeopardizing community safety.

Offense-based guidelines seem to be an anathema to most judges, who believe factors other than the offense charged are more important
in making detention decisions. However, if the concern really is prevention of further criminal behavior, what better measurement than current offense and offense history? If we cannot agree with that premise, we are really going to have a difficult time arguing that what we are doing is preventive detention rather than punishment.

Another of the issues raised about preventive detention in the Schall case was that most of the juveniles held in pre-adjudication detention for purposes of preventing further criminal behavior were released after adjudication to non-secure placements, seemingly undermining the prevention argument. The Supreme Court found a legitimate state interest in preventing criminal activity, even for the short period during which a juvenile may be held (in New York) pending adjudication. The Court discounted clear evidence in the case that most juveniles went back to non-secure placements immediately following adjudication, so that “prevention” was very short-lived. The dissent strongly disagreed with the majority position on this point.

The Supreme Court notwithstanding, it is important for judges to ask themselves what their real purpose is in detaining a youth pending adjudication. If the offense charged is one which is unlikely to result in secure confinement or very strict supervision after adjudication, most judges who honestly inquire of themselves would have to admit that prevention of future criminal activity is not a very sound basis for detention. Certainly victims of recidivist acts after adjudication are no less harmed than those who may be victimized by one awaiting adjudication. Because it is doubtful that we, as a society, are willing to securely incarcerate, for the long term, every juvenile who commits a criminal offense of any kind, the incapacitation or prevention argument is not a very persuasive one.

Again, alternatives to secure detention could be just as effective at preventing further criminal activity without the harmful effects of secure confinement. Courts which have tried closely supervised home detention, day treatment programs in lieu of detention, and electronic monitoring have had good success in maintaining juveniles in the community without endangering public safety. (Examples are El Paso, Texas; most of Hawaii; Broward County, Florida; and several areas in Utah).

Judges must be willing to look at offense-based guidelines, with room for well-documented, clearly stated exceptions, to justify the use of pre-adjudication detention for preventive purposes. Otherwise, it
can be much more persuasively argued that such detention is, in fact, pre-adjudication punishment.

Protection of the Juvenile

It is actually protection of the juvenile himself which is the argument most often set forth by opponents to limitations on detention. Judges often fall back on the traditional *parens patriae* doctrine, and the benevolent purposes of the Juvenile Court, to justify holding a child in secure detention for her own good.

Protective detention usually falls into three categories: (1) preventing a possibly suicidal child from harming himself; (2) protecting the juvenile from the folly of his or her own decisions which he or she has only limited capacity to understand (i.e., preventing further penetration into criminal activity or further activities which may be immoral, and emotionally or physically harmful, such as prostitution); and (3) protecting a child from an abusive or neglectful home environment.

As judges consider these protective reasons for detaining children in secure facilities, it should become painfully clear that detention centers are not appropriate places to accomplish these purposes. Surely a suicidal child cannot be helped, treated, or otherwise appropriately cared for in a detention center housing seriously criminal juveniles. Communities must develop alternatives to detention for this category of children for whom detention is clearly inappropriate. Crisis beds in hospitals are a necessity for a truly disturbed or suicidal child. Secure detention under conditions necessarily existing in most detention centers can only exacerbate the child's problems.

Protecting a child from his or her own folly is the most commonly cited reason for protective detention. The fundamental doctrine of the juvenile law is the incapacity of juveniles to fully comprehend the consequences of their acts. So, it is argued, juveniles who persist in committing acts which result in their involvement in correctional or court systems, and particularly which are harmful to their own physical and emotional well-being, must be detained for their own good. If one follows that argument, however, these juveniles would have to be detained for the duration of their minority; otherwise, the protective detention is, in fact, punishment. The good intentions and benevolence of judges who have a hard time releasing juveniles to further “mess up” their lives are not in doubt, but unless Juvenile Court judges are actually going to
be deified, it is really not up to us to decide which juveniles we are going to detain in a correctional facility for their own good.

Further, if one applies commonly accepted mental health doctrines, the state is not constitutionally justified in curtailing liberty for protection of an individual against that individual’s own desires. There is really no reason, not even the lack-of-capacity argument (which would apply equally to mentally ill adults), that such constitutional limitations should not also apply to juveniles who choose harmful lifestyles or activities. While all good Juvenile Court judges who are genuinely concerned about children are tempted to use our better judgment to protect juveniles from their own detrimental behavior, we must confine ourselves to constitutional uses of our authority.

Protective detention seems to be utilized more often for girls than for boys in the juvenile system, reflecting the paternalistic traditions of juvenile justice. Most juvenile court judges, including women, are unwilling to let girls be used, abused, and subjected to numerous indignities on the streets. While I share those concerns, and I personally abhor ingrained attitudes and traditional roles of our society which subject women in general to such atrocities, I cannot justify subjecting girls to yet another loss of personal control and liberty by placing them in secure correctional facilities to protect them from their own choices. Again, alternatives must be developed to assist courts in releasing such girls to placements outside secure correctional settings. We are stretching the bounds of constitutional acceptance by using detention as a holding facility for promiscuous, prostituting, street-walking juvenile girls.

The third category of protective detention is detention of youths who come from abusive or neglectful homes. Indeed, some youths prefer life in a detention center to life in their own homes. However, such children are clearly more appropriate for the child welfare system than for the delinquency/detention system. Detention should never be used for children who are within the jurisdiction of the Juvenile Court solely because they are victims of abusive or neglectful parents. To subject them to the harmful effects of detention, not just physically but also emotionally, is to further abuse them.

Guidelines

Relatively objective guidelines are recommended for both of the first two general purposes of pre-adjudication detention, to compel
appearance and to prevent further criminal activity. (The third purpose, protection of the child, is an inappropriate use of detention altogether, and alternatives should be utilized.)

Judges nearly always have strong, negative reactions to the mere suggestion of guidelines, either for sentencing or detention. The only reason for such reaction seems to be the perception that guidelines severely limit judicial discretion. ("What do we need judges for if a computer can make these decisions?") Judicial authority and discretion are sacred cows, and there is no question that qualified, well-trained judges can be trusted to exercise discretion in a responsible manner.

It is baffling, however, that judges so strenuously resist the idea of tools that can help them exercise their discretion in more rational, explainable ways. As a judge who has used guidelines in one form or another from the beginning of my judicial experience, I can attest that the guidelines soon become ingrained as measures easily applied in individual cases, so that the judge soon forgets the guidelines themselves because the criteria seem so reasonable. Guidelines need not be severe restrictions on judicial authority; rather, they give the judges bases for making decisions they might otherwise want to make but cannot justify under more traditional, broad detention standards. For example, judges are often faced with parents who do not want to take their child home and then bring him or her back to court for an adjudicatory hearing. They want their child to stay in detention and learn a lesson. Often, the parents outright refuse to take a child home. Guidelines, either statutory or voluntary, give the judge a firm basis for insisting that parents take responsibility for their own children, relieving the court and overcrowded detention facilities from having to do the parents' job.

Guidelines limiting use of detention also tend to force development of alternatives. It was not until admissions guidelines limited use of pre-adjudication detention in my jurisdiction that alternatives such as home detention, crisis hospital beds, a group holding facility for child-welfare children (chins, pins, status offenders, and neglect and dependency victims), and diversion programs were developed. All are now currently in place because we simply refuse to admit those children to detention under our guidelines. Almost all judges would prefer to use non-secure, less intrusive alternatives to detention for many youths who are otherwise confined if such alternatives were available. Imple-
mentation of admissions guidelines can be of great assistance in for-
ing development of such alternatives.

Post-Adjudication Detention

Use of detention as a sanction, either for contempt of court or as a legislatively allowed dispositional alternative, is increasing, and it is now one of the most common causes of juvenile detention. For exam-
ple, although admissions guidelines in my jurisdiction resulted in sig-
ificant population reductions in the detention center five years ago, use of detention as a penalty for contempt of court, along with use of short-term detention as a disposition, which was authorized by legis-
lation in 1988, have resulted in at- or over-capacity populations in our detention center on a daily basis.

Use of detention as a post-adjudication sanction cannot simply be dismissed by reformers as inappropriate and receive no more attention
than that. Enforcement of court orders through imposition of deten-
tion time for contempt is a traditional use of detention and is seen as
an inherent power of the court. It is really the ultimate use of judicial
authority, and it cannot lightly be restricted or removed. Even federal
restrictions on detention of status or other non-criminal offenders al-
low the use of detention to enforce "valid court orders." The "valid
court order" exception is commonly used, either explicitly or through
contempt proceedings.

Further, my experience has been that with the advent of short-term
detention as a dispositional alternative, the use of suspended or stayed
detention orders can effectively circumvent admissions guidelines. A
juvenile who is arrested for an offense which would not qualify for
admission to detention may be admitted if he has a stayed or sus-
pended order of detention as a disposition. It has become fairly routine
to issue such orders in my court, and so admissions guidelines have
become almost a nullity, except for first-time offenders who are not
under the continuing jurisdiction of the court in any capacity.

It is easy for those who have never sat behind a bench to say judges
should not impose detention for contempt. However, when a youth
repeatedly ignores, defies, and refuses to obey reasonable orders of the
court, it is not so easy to restrain oneself from punishing such defiance
by ordering detention. This is especially true because there are simply
no available alternatives to detention as a sanction for contempt. Or-
dering additional fines to a juvenile who fails to pay fines and restitution is laughable, at least to the juvenile. Ordering house arrest to a probationer who is regularly violating all the other rules of probation simply gives him one more rule to ignore. So, judges routinely order time in detention.

It is an important challenge for those who seek to reduce detention populations, and who particularly disagree with the use of detention as a sanction, to develop creative alternatives which would be available to judges as sanctions, either for contempt or for delinquent acts. Until such alternatives are available, the use of detention as a sanction will continue to increase, perhaps becoming the category of greatest use of detention by judges.

In addition to the need for corrections systems to develop alternatives to detention as a sanction, judges should use as much restraint as possible in utilizing this option. When looked at realistically, ordering a youth to spend time in detention rarely accomplishes much in terms of greater compliance with court orders; it seldom results in more prompt payment of financial obligations, more strict compliance with terms of probation, less substance abuse, or more respectful behavior in the courtroom. What it does accomplish is satisfaction of the court’s need to exact vengeance, which has little place in juvenile justice.

Community Involvement

If detention reform is to be successful, the onus should not rest primarily on the shoulders of judges, who often bear all of the political consequences for limitations or restrictions on “get tough” use of detention. With juvenile crime, and especially gang activity, on the rise in many areas, and communities and neighborhoods up in arms about uncontrolled juvenile delinquency, courts will be hard-pressed to justify limiting the use of detention. Therefore, reformers, including judges, need to involve other parts of the community in detention reform efforts. Police departments need to participate in setting guidelines and policies. Drop-off facilities need to be developed to allow police to take a non-detainable child to a designated point where someone else will take the burden of locating a responsible adult to whom the child can be released, so police officers can do their jobs on the streets. Legislators need to be educated on the harms inherent in secure detention of juveniles and encouraged to fund alternatives and set policies
against the wholesale use of detention. Public hearings and media briefings should be held so that judges don’t have to be seen as having sole responsibility for detention reform. Limitations on the use of detention will be less popular with the general public than with those who are educated and knowledgeable about juvenile justice. The symbol of juvenile justice is the judge, and, for good or bad, judges are credited with whatever the public sees happening in their community. Efforts should be made to minimize the political risks to judges from detention reform.

Conclusion

Detention has long been an integral part of the Juvenile Court and youth corrections systems. As stated elsewhere in this book, the inherent harms of secure detention, even on a short-term basis, are seldom recognized. Thus, there have been few reform efforts directed at detention. As a result, judges generally do not feel that the detention system is in need of reform or limitation. However, as judges are asked to evaluate honestly their traditional uses of detention, many will realize that many juveniles are being inappropriately detained and that even short-term detention carries with it the potential for serious harm, as well as for violations of liberty rights.

Judges should take a proactive role in limiting their own uses of detention and in encouraging the development of alternatives to traditional secure detention. Juvenile Court judges should be willing to participate in these reforms, even though not required by the Supreme Court, because it is the “right” thing to do, and because it will result in better, more humane, and more constitutional treatment of juvenile offenders in most communities.

Legal Cases

Schall at 264.
In re Gault, 387 U.S. 1 (1967), at 17.
Morales v. Turman, in Texas.
Manning v. Matheson, in Utah.
In re Bobby M., in Florida.