



DO YOU KNOW WHERE THE CHILDREN ARE?

A Report on Massachusetts Youth Unlawfully Held Without Bail



by Barbara Fedders and Barbara Kaban

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EXECUTIVE SUMMARY

In 2004, over four thousand Massachusetts children and youth between the ages of seven and seventeen spent time behind bars -- in some cases up to four days -- after their arrest and prior to their first court appearance. While the law requires that young people must be at least fourteen years old to be detained, more than five hundred children under fourteen were so held that year.

Massachusetts law also provides that a party empowered by the judicial branch -- a judge, magistrate, or bail commissioner -- should review detention decisions about arrested youths, but many children and adolescents are unlawfully deprived of this opportunity. Routinely, decisions to detain young people are based solely on juvenile probation officers' recommendations, which are made pursuant to a cursory consideration of facts, and without benefit of written procedures or guidelines -- all in violation of due process principles. Probation officers frequently recommend detention for youths accused of minor offenses, rather than reserving it for the most serious and dangerous offenders.

The impact of these practices is detrimental to the welfare of individuals in the juvenile justice system and communities at large. National studies have shown that arrested youths who are detained are more likely to re-offend than similarly situated youths who are not detained. Detention prior to the first court appearance is disproportionately ordered for youth of color, and the detained young people are held in facilities with poor conditions, often deprived of exercise and denied necessary medications. These practices undermine the mission of the Massachusetts juvenile court, which is to treat those who come before it not as criminals, but as children in need of aid and guidance.

Fortunately, this problem can be addressed relatively quickly and easily, without litigation. The Office of the Commissioner of Probation must establish explicit guidelines for the probation officers assigned responsibility for detention determinations. Police, sheriffs' departments and detention facility staff must ensure that youths have access to bail commissioners. These individuals must also cease the practice of detaining children under fourteen. Making these changes is essential to the integrity of the juvenile justice system. Nothing less than the well-being of our children is at stake.

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INTRODUCTION

On a Friday afternoon on their way home from school, fourteen-year-old Cassie¹ and a classmate had an argument that ended when Cassie angrily grabbed the girl's cell phone. As the two girls argued, police officers arrived. The other girl had not been hurt, and Cassie had not left the area with the cell phone, but Cassie was nevertheless arrested. The police took out a delinquency charge for robbery against her in juvenile court. Following standard police practice, they contacted the local juvenile probation officer to find out whether she should be released or detained. Cassie had no prior delinquency or criminal record. She had a good school attendance record and a supportive family. Nevertheless, the probation officer contacted by the police recommended that she be detained, presumably based solely on the seemingly serious nature of the charges.

Cassie spent the weekend prior to her court appearance in a locked facility run by the sheriff's department because of the probation officer's recommendation. Her family members, miles away, were unable to visit and were denied the opportunity to post a cash bail to secure her release. Cassie was not permitted to exercise or go outside for the entire weekend, instead remaining in a tiny, bare, locked room 23 hours a day. On

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¹ A pseudonym. This account is based on a case handled by the Criminal Justice Institute of Harvard Law School.

Monday, guards shackled Cassie's hands and feet, and the sheriff's department transported her in a van to the juvenile court. Her anxious family members burst into tears when they saw her shuffle into the courtroom, escorted by a court officer. At her hearing, the judge simply ordered her to stay away from the girl with whom she had argued and released her to the care and custody of her mother. Cassie eventually received a disposition of probation.

Cassie's detention arose from a series of cursory and ill-informed decisions that have sadly become commonplace in the juvenile court system. The probation officer's opinion was formed solely from the brief telephone conversation with the police officer about the nature of the charges and a check to see if Cassie had a prior record. The probation officer did no independent investigation, did not examine Cassie's school attendance record, did not consult her family, and had no personal experience with her. The probation officer did not have the benefit of any promulgated rules or practice guidelines in making the detention recommendation. No bail commissioner reviewed the recommendation and made an independent assessment of whether a cash bail would secure Cassie's appearance in court, as the law provides for children and adults in these circumstances. The judge's decision to release Cassie immediately, which would likely not have been made if Cassie truly posed a risk of flight, casts serious doubt on the wisdom of the initial decision to detain her.

Cassie's experience is similar to that of thousands of youngsters who, every year, are arrested and held in locked facilities prior to any judicial fact-finding and without a system for protection against mistaken or unnecessary deprivations of liberty. Over a long weekend, a juvenile can be detained for up to four days while she waits for court to

come back in session. Jurisdictions throughout the Commonwealth detain children under fourteen years old, in direct violation of state law. The detainees – Cassie among them – are disproportionately youth of color. Thus several different aspects of the practice of holding young people without bail prior to arraignment combine to make it unhelpful, unlawful, and unfair.

The authors of this report are attorneys who have represented hundreds of youths in the Massachusetts juvenile courts. Our interest in the issue stems from our experiences meeting children and adolescents at their first court appearances, after many have been detained as Cassie was. They are typically shell-shocked and sometimes appear traumatized, unhappy proof of a problematic and unlawful system. Because the detention decisions are made prior to our appointment as their attorneys, we have been unable to mount court challenges to pre-arraignment detention decisions. Alarmed at the repeated infringement of our clients’ rights, we have decided to document the problem in the hope that practices will change.

LEGAL BACKDROP

Circumstances of Youth Arrests

In Massachusetts, children and adolescents who violate the criminal laws of the Commonwealth are subject to prosecution in the juvenile delinquency courts if they have reached the age of seven.² A child may lawfully be arrested if accused of committing any felony or one of a specified class of misdemeanor,³ provided the arresting officer has

² M.G.L.A. ch. 119 §52 defines “delinquent child” as “a child between seven and seventeen who violates any city ordinance or town by-law or who commits any offence against a law of the Commonwealth.”

³ M.G.L.A. ch. 274 §1 defines a felony as “a crime punishable by . . . imprisonment in the state prison.” The statutes states that “all other crimes are misdemeanors.” Police officers may arrest a youth if they obtain a warrant, and, in some cases, are empowered to arrest youth without obtaining a warrant. Police powers to arrest youth are circumscribed by statutes (M.G.L. ch. 276 §22 (describing process for obtaining an arrest warrant for individuals suspected of committing crimes); M.G.L. ch. 276 §28 (outlining multiple

probable cause to believe that an offense has been or is being committed.⁴ Typical misdemeanors for which young people are arrested include trespassing, disorderly conduct and shoplifting.⁵ Typical felonies for which young people are arrested include robbery, larceny of property valued in excess of \$250 and assault and battery with a dangerous weapon.⁶ In Massachusetts, a “dangerous weapon” is defined broadly enough to include common objects used in a threatening way: if one child kicks another while wearing sneakers, for example, the sneakers may be considered a “dangerous weapon” and elevate the charge to a felony.⁷

Legal Protections for Adults and Youths Who Are Arrested

Massachusetts laws are written to maximize the opportunity of arrested adults and youths to be released and return to court on their own, instead of being held in state custody. They are designed to guard against arbitrary or mistaken decisions to deprive arrested individuals of their liberty pending resolution of the case. An adult who is arrested is brought that same day to court if a court is in session, and if not, at its very next session.⁸ Adults who are arrested when courts are not in session are granted access to bail commissioners, who hold hearings at police stations and county jails to assess the

circumstances in which an officer may arrest without a warrant); M.G.L. ch. 119 §67 (noting that youth between the ages of seven and seventeen may be arrested)); court rules (Mass.R.Crim. P 6 (limiting the issuance of arrest warrants to youth who are at least twelve years of age)); and case law (see, e.g., *Commonwealth v. Howe*, 405 Mass. 332, 334 (1989) (noting that, in the absence of statutory authority, a police officer may not make a warrantless arrest for a misdemeanor unless the misdemeanor occurs in the officer’s presence and involves a breach of the peace)).

⁴ The evidentiary standard governing arrests is the same for adults as for youth and is spelled out in the case law. See, e.g., *Commonwealth v. Santaliz*, 413 Mass. 238, 241 (1992).

⁵ See M.G.L.A. ch. 266 §120 (trespass); M.G.L.A. ch. 272 §53 (disorderly person); M.G.L.A. ch. 266 §. 30A (shoplifting).

⁶ See M.G.L.A. ch. 265 §19 (robbery); M.G.L.A. ch. 266 §30 (larceny); M.G.L.A. ch. 265 § 15A (assault and battery by means of a dangerous weapon).

⁷ See *Commonwealth v. Sexton*, 425 Mass. 146 (1997) (object may qualify as a dangerous weapon either because it is dangerous *per se* or because it is used in a dangerous fashion); *Commonwealth v. Marrero*, 19 Mass. App. Ct. 921, 922 (1984) (footwear, when used to kick, can be a dangerous weapon).

likelihood of the arrestee's voluntary arrival in court.⁹ They order the person released, set a cash bail or order the person held without bail.¹⁰ Those able to post the cash bail are immediately released and can come to court on their own. If the person is held without bail or cannot post bail, s/he remains in custody and arrives in court shackled and handcuffed. At the first court appearance, known as the arraignment, the arrestee is formally charged with a crime. The judge or magistrate before whom the arrestee appears conducts a hearing to determine whether a cash bail is necessary to ensure the person's return to court.¹¹ The law mandates that, absent a specific reason to believe that an arrested individual will not appear in court, the judge or magistrate shall release him or her without bail.¹²

The statutes governing arrested juveniles clearly indicate that, as with adults, pre-arraignment detention should be an option of last resort. A police officer who arrests a youth must contact the youth's parent or guardian and the probation office.¹³ The police must release the youth to the parent, guardian, "or any other reputable person" who agrees in writing to produce the youth in court at the appointed time, or to the custody of

⁸ Mass. R. Crim. P. 7.

⁹ This process is governed by M.G.L.A. ch. 276 §57, which authorizes the appointment of bail commissioners; M.G.L.A. ch. 276 §§42 and 58, which provide for the right of arrestees to be considered for admission to bail, with a presumption in favor of release on personal recognizance; and case law (see, e.g., *Commonwealth v. Christolini*, 422 Mass. 854, 856 (1996); *Commonwealth v. Hampe*, 419 Mass. 514 (1995)). The factors for consideration of whether to impose a cash bail are outlined in M.G.L.A. ch. 276 §58 and include consideration of the nature and circumstances of the offenses charged, the potential penalty, the person's family ties, the person's record of convictions, if any, and drug dependency or prior use of an alias.

¹⁰ M.G.L.A. ch. 276 §57 The statute mandates that arrestees accused of an enumerated set of offenses -- such as violation of a lawfully issued restraining order -- be held without bail

¹¹ This cash bail may be in addition to a bail that is set at the police station or county jail.

¹² M.G.L.A. ch. 276 §58. See Ireland, Massachusetts Practice: Juvenile Law §13, 113 (1993) (the question whether bail should be imposed in juvenile cases is determined in accordance with the same statute). The factors to be considered by a judge are those described in note 9.

¹³ M.G.L.A. c. 119 §67.

a juvenile probation officer upon that officer's request.¹⁴ Pre-arraignment detention is prohibited for children under fourteen, and is an option for older youths only in very limited circumstances.¹⁵ Even in the circumstances allowing for detention, the statute clearly provides that the youths should have the opportunity -- just as adults do -- to appear before a bail commissioner and request that a bail be set, so that they may have the opportunity for pre-arraignment release.¹⁶

Violations of Law in the Treatment of Arrested Youths

Unfortunately, in jurisdictions across the Commonwealth, probation and police officers routinely ignore the law when dealing with arrested youths. The law provides for pre-arraignment detention only for youth fourteen and over.¹⁷ Nevertheless, in 2004, authorities detained 520 children under the age of fourteen.¹⁸ As in Cassie's case, probation officers often recommend detention after only a cursory consideration, without examining all the factors relevant to whether the child is likely to come to court if released.

¹⁴ *Id.*

¹⁵ The statute delineates the circumstances in which a youth may be detained: "[when] the arresting officer requests in writing that [the child] be detained and ... the court issuing a warrant for the arrest of a child ... directs in that warrant that such child shall [be detained]; or ... [when] the probation officer shall so direct." This procedure is applicable to children between fourteen and seventeen years of age. *Id.* See also Ireland, Massachusetts Practice: Juvenile Law §13, 112 (1993) ("The general provision in section 67 requiring release if certain requirements are met is subject to a proviso, whereby a child between fourteen and seventeen may be detained pending a court appearance in certain circumstances").

¹⁶ The statute governing the treatment of arrested youth provides: "Nothing contained in this section shall prevent the admitting of such child to bail in accordance with law." *Id.*

¹⁷ See note 15.

¹⁸ The numbers referenced in this article reflect 2004 post-arrest/pre-arraignment detention data obtained from six detention facilities: Boston, Westfield, Pittsfield, Worcester, Lawrence and New Bedford. The Boston facility is run by the Boston Police Department. The remaining facilities typically are run by the local Sheriff's departments under the supervision of the Executive Office of Public Safety. When a child is arrested and detained, each facility records the child's age, race, ethnicity, gender, the primary charge and the location of the alleged offense. All facilities except the one in Boston also record the number of days each child is confined.

In many cases, probation officers make these recommendations without the benefit of any written procedural rules or practice guidelines,¹⁹ in violation of the principles of due process guaranteed under the federal and state constitutions.²⁰ According to arrested juveniles and their attorneys, police officers typically defer to these recommendations without arranging hearings before the bail commissioners who could provide an objective assessment of the youth's likelihood of returning to court. Such unilateral exercises of power clearly contravene Massachusetts statutes.

DETAINED YOUTH: WHAT THE DATA TELL US

Detained Youth

In 2004, 4201 arrested juveniles between the ages of seven and seventeen were detained before their arraignments.²¹ Most were boys, and most were children of color.²² Although 17% of Massachusetts children are Black or Latino,²³ these youth made up 66% of those detained pre-arraignment.²⁴ Such racial disparities are consistent with studies from other states and nationwide, which show that pre-trial detention practices disproportionately affect youth of color.²⁵

¹⁹ Probation officers interviewed for this report stated that they do not have written policies or procedures to guide detention recommendations.

²⁰ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (describing three-part test for determining what procedural protections are required for a deprivation of liberty or property interests); *In re Kenney*, 399 Mass. 431, 435 (“The fundamental requisite of due process is an opportunity to be heard at a meaningful time and in a meaningful manner”).

²¹ See note 18.

²² *Id.*

²³ U.S. Census 2000, Population by Race and Hispanic or Latino Origin, for All Ages and for 18 Years and Over, for Massachusetts: 2000 available at <http://www.census.gov/Press-Release/www/2001/tables/ma tab 1.xls>.

²⁴ See note 18.

²⁵ Eleanor Hinton Hoytt, et. al., Reducing Racial Disparities in Juvenile Detention, Annie E. Casey Foundation, 2002 (available at <http://www.aecf.org/publications/pdfs/pathways8.pdf#search=%22eleanor%20hinton%20hoytt%22>

The detained juveniles are not those accused of committing

	White	Black	Asian	Latino
MA Youth Population [2000 census]	79%	6.5%	4%	10.5%
Detained Youth Population [2004 – ALP data]	31%	45%	3%	21%

the most serious offenses: according to police records, 45% of detained children were charged with misdemeanors.²⁶ The practice of detaining children for minor offenses is even more pronounced among girls, three-quarters of whom are charged with misdemeanors.²⁷

Conditions of Confinement

The conditions in the facilities that detain children -- euphemistically titled “Alternative Lock-up Programs” (ALPs) -- are often poor. According to youth interviewed by the authors and our own first-hand observations, ALPs in some cases lack features one would expect of facilities responsible for the care and custody of children. During their time in pre-arraignment detention, children are typically held in round-the-clock confinement, sometimes without access to prescription medication. Girls may be guarded by an all-male correctional staff. Youths sometimes have no access to clean clothes and are denied books, magazines, radio and television. The National Juvenile Detention Association estimates that the average national cost to taxpayers of operating one detention bed is \$205 per night.²⁸ Using what may be a low approximation for the cost of a detention bed per night in Massachusetts, we estimate that well over one million

²⁶ See note 18. The police departments typically record the most serious offense for each detained child. In some instances the police entries were not specific enough to allow the authors to classify the offense as either a misdemeanor or felony (e.g. “motor vehicle offense”; “possession of drugs”). Ambiguous entries were excluded from the calculations.

²⁷ See note 18.

²⁸ Coalition for Juvenile Justice, *Unlocking the Future: Detention Reform in the Juvenile Justice System*, Report Overview (2003) available at www.juvjustice.org/publications/OverviewofAR03.pdf.

dollars was spent in the Commonwealth in 2004 to confine children prior to their court appearances.

Impact of Confinement

The mission of the Massachusetts juvenile justice system is to treat children “not as criminals, but as children in need of aid, encouragement and guidance.”²⁹ Detaining children without necessity undermines that mission. For many of the youngsters held in Massachusetts facilities, detention after an arrest is their first experience of confinement. For others, detention represents their first time away from their parents. For most of them, this experience is difficult, even traumatic.

By unnecessarily separating children from their families and depriving them of basic living comforts, detention degrades and frightens children. While no comprehensive Massachusetts study has yet been conducted, findings from studies across the country suggest that detention does not reduce the likelihood of re-offending, and may in fact have the opposite effect. A study of one Texas county found that detaining youth in secure confinement increased long-term rates of re-offending; a San Francisco study of a program focusing on 1,500 high-risk juveniles that offered alternatives to secure detention to those juveniles participants were 26% less likely to be re-arrested than those held in secure detention facilities.³⁰

²⁹ M.G.L.A. ch. 119 §53.

³⁰ See note 28.

RECOMMENDATIONS FOR CHANGE

Despite its obvious illegality, the statewide practice of detaining children and adolescents prior to arraignment without bail or meaningful review has not been challenged in court. This failure to mount a legal challenge is attributable to the fact that the overwhelming majority of young people processed in the juvenile justice system cannot afford to hire their own counsel, and court-appointed attorneys are not appointed until the child is brought to court for the arraignment. By that time, the damage has already been done. This problem, however, can be fixed relatively easily and quickly, without litigation. It is imperative for juvenile court administrators, probation officers, lawyers, police, and judges to examine the current practices and implement changes.

The many instances of children unlawfully held without bail are not simply isolated examples of kids "slipping through the cracks;" there are far too many for that to be the case. This is a widespread systemic failure. Significant changes on every level must be instated. Probation officials should promulgate uniform standards for the juvenile probation officers charged with assessing an arrested child's likelihood of returning to court. They must also consider alternatives for juveniles who pose a risk of flight, such as supervised release, home detention, and electronic monitoring. Along with police officers, sheriffs, and detention facility staff, they should work to ensure that all youth detained pre-arraignment are provided access to a bail commissioner, as is the rule for adults; children should have more -- not fewer -- legal protections than adults. The practice of detaining youth under the age of fourteen must cease. Pre-arraignment detention facilities must ensure that the conditions at their facilities keep young people housed there clean and safe. Finally, juvenile court officials should commission a

comprehensive study on the effects of pre-arraignment detention on outcomes for detained youth, with a particular emphasis on the disproportionate confinement of youth of color.

Laws are in place to ensure that pre-arraignment detention is reserved for those few offenders who are truly unlikely to appear in court of their own accord. Decision-makers must commit to following them, and probation departments must agree on clear guidelines to govern decisions regarding detention. Continued arbitrariness undermines the belief of children and their families in the fundamental fairness of the system. We owe it to them to do better.

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