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Basing Juvenile Detention on Past Adjudication: "Fairness" at the Preadjudication Stage of the Juvenile Justice System

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BASING JUVENILE DETENTION ON PAST ADJUDICATION: "FAIRNESS" AT THE PREADJUDICATION STAGE OF THE JUVENILE JUSTICE SYSTEM

In 1975 the Florida Legislature amended section 39.03(3)(c)(3) of the Florida Statutes.[1] The amendment provides that a child taken into custody for an alleged felony must be detained until his first appearance before a judge if he has twice previously been adjudicated delinquent.[2]

Although this provision affects a relatively small number of juveniles, it marks a major change in Florida's legislative attitude toward juveniles. Florida's juvenile statutes are generally in conformity with national standards for juvenile justice systems.[3] Unfortunately, section 39.03(3)(c)(3) is not in line with these standards, which advocate

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1. FLA. STAT. § 39.03(3)(c) (1973), *as amended*, FLA. STAT. § 39.03(3)(c) (1975) provided:

(c) Unless ordered by the court pursuant to the provisions of this chapter, a child taken into custody shall not be placed or retained in detention care or shelter care prior to the court's disposition unless detention or shelter care is required:

1. To protect the person or property of others or of the child.

2. Because he has no parent, guardian, responsible adult relative, or other adult approved by the court able to provide supervision and care for him.

3. To secure his presence at the next hearing.

The criteria for placement in detention or shelter care given above shall govern the decision of all persons responsible for determining whether detention or shelter care is warranted prior to the court's disposition.

2. FLA. STAT. § 39.03(3)(c) (1975), *amending* FLA. STAT. § 39.03(3)(c) (1973) provides:

(c) Unless ordered by the court pursuant to the provisions of this chapter, a child taken into custody shall not be placed or retained in detention care or shelter care prior to the court's disposition unless detention or shelter care is required:

1. To protect the person or property of others or of the child.

2. Because he has no parent, guardian, responsible adult relative, or other adult approved by the court able to provide supervision and care for him.

3. To secure his presence at the next hearing. *If a child has been twice previously adjudicated a delinquent and has been charged with a third subsequent delinquency which would constitute a felony if the child were an adult, said child shall be detained under this subparagraph and shall have a detention hearing within 24 hours of initial detention, excluding Saturdays, Sundays, and legal holidays, to determine the need for continued detention. The circuit court, or the county court if previously designated by the chief judge of the circuit court, shall hold the detention hearing. When the county judge is not an attorney, the chief judge may designate members of the bar to hold the detention hearing.*

The criteria for placement in detention or shelter care given above shall govern the decision of all persons responsible for determining whether detention or shelter care is warranted prior to the court's disposition.

(Emphasis added).

3. *Compare* FLA. STAT. ch. 39 (1975) *with* UNIFORM JUVENILE COURT ACT *and* 18 U.S.C. §§ 5031–42 (Supp. IV, 1974).

pretrial release for the juvenile.[4] This provision denies a certain group of juveniles the possibility of predetention hearing release. This denial is predicated on the juvenile's past court record. Furthermore, the court that holds the detention hearing and decides whether to authorize detention prior to adjudication of the case on the merits is to consider the provisions of section 39.03(3)(c) in making its decision.[5] Thus, a juvenile may be detained for at least 2 weeks, and in many cases for as long as 6 weeks, because of his past record.[6]

The provision promises to have little or no beneficial effect upon Florida's juvenile law system. It establishes an arbitrary and mechanical policy for pretrial detention that is contrary to the due process standards of fairness which the general trend of law advocates for juveniles.

Prior to its amendment in 1975, section 39.03(3)(c) provided for three basic standards to govern the decisions of those responsible for determining whether detention or shelter care was warranted prior to the court's disposition. It provided that:

> [A] child taken into custody shall not be placed or retained in detention care or shelter care prior to the court's disposition unless detention or shelter care is required:
> 1. To protect the person or property of others or of the child.

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4. *See* UNIFORM JUVENILE COURT ACT § 14; 18 U.S.C. § 5034 (Supp. IV, 1974).

5. Note that FLA. R. JUV. P. 8.050 provides that the court is to make a finding that "the release of the child would be inimical to the welfare of the child or of the public . . . ." Therefore, the amended section appears to conflict with the rules of court, because it requires consideration of other than these two criteria.

It is well settled that "[r]ules of practice and procedure adopted by [the Supreme] Court supercede any legislative enactment governing practice and procedure to the extent that statute and rule may be inconsistent." Bernhardt v. State, 288 So. 2d 490, 496 (Fla. 1974); *E.g., In re* Clarification of Florida Rules of Practice and Procedure (Florida Constitution, Article V, Section 2(a)), 281 So. 2d 204 (Fla. 1973); *In re* Florida Rules of Criminal Procedure, 272 So. 2d 65 (Fla. 1972); Jaworski v. City of Opa-Locka, 149 So. 2d 33 (Fla. 1963).

The courts of Florida realize that the juvenile statutes are in substantial conflict with the juvenile court rules. The Florida Conference of Circuit Judges has sent the following Resolution to the Florida Legislature: "Resolved, that the Conference recommend that when the proposed new Rules of Juvenile Procedure are adopted by the Supreme Court the Legislature revise Chapter 39, Florida Statutes, to remove therefrom all items in conflict with such rules which are procedural rather than substantive in nature." Fla. Conference of Circuit Judges, Recommendations to the Florida Legislature (1975 annual convention, copy on file at FLA. ST. U.L. REV. offices).

6. FLA. STAT. § 39.03(7)(b) (1975) authorizes, on special order, a 30-day extension of detention: "The court may extend the special order detaining a child an additional 30 days . . . when the grand jury fails to return an indictment within the 14-day period for that purpose, or when the State Attorney shall give the court the notice provided for in s. 39.02."

2. Because he has no parent, guardian, responsible adult relative, or other adult approved by the court able to provide supervision and care for him.
3. To secure his presence at the next hearing.[7]

Chapter 39 of the Florida Statutes established the procedures to be followed when a juvenile under suspicion of committing a crime was taken into custody by a police officer.[8] It provided that the above criteria were to be considered at three separate stages. The arresting officer made the initial decision concerning detention of the child.[9] If the officer, after considering the section 39.03(3)(c) criteria, determined that detention was not necessary, he released the child to his parents or to a responsible adult relative.[10] If, however, the officer determined that detention was necessary, he notified the child's parents of his decision and without unreasonable delay delivered the child to an intake officer.[11]

The intake officer reviewed the facts and determined whether detention was required under the three criteria listed in section 39.03(3)(c).[12] If he decided not to release the child, he authorized detention care.[13]

The detained child was to receive a detention hearing within 24 hours, excluding Sundays and legal holidays, of his original detention.[14] At this hearing, a judge considered the section 39.03(3)(c) criteria.[15] If the judge deemed detention to be necessary, he entered a special order directing detention,[16] stating therein the reasons which led to the belief that detention was necessary.[17]

No juvenile was to be detained under a special order for more than 14 days unless "an order of adjudication of the case" had been entered by the court.[18] At the adjudicatory hearing, the court determined whether the juvenile committed the offense that initially led to his arrest. After making this determination, the court entered

7. FLA. STAT. § 39.03(3)(c) (1973), *as amended*, FLA. STAT. § 39.03(3)(c) (1975).
8. FLA. STAT. §§ 39.03(1)–(3) (1975).
9. *Id.* § 39.03(3)(a).
10. *Id.* § 39.03(2).
11. *Id.* § 39.03(3)(a).
12. *Id.* § 39.03(3)(b).
13. FLA. STAT. § 39.03(3)(b) (1975).
14. *Id.* § 39.03(7)(a).
15. *Id.*
16. *Id.*
17. *Id.*
18. FLA. STAT. § 39.03(7)(b) (1975) provides in part as follows: "(b) No child shall be held in detention or shelter care under a special order for more than 14 days unless an order of adjudication for the case has been entered by the court."

an order either dismissing the case, withholding adjudication, or adjudicating the child delinquent.[19]

Finally, if the child was adjudicated delinquent, he received a dispositional hearing.[20] The court received and considered a predisposition study prepared by an agent of the Division of Youth Services.[21] The court then determined the action to be taken with the child.[22]

This procedure was criticized by those who feared that intake officers were releasing hard-core juvenile delinquents immediately after police took them into custody under suspicion of committing violent crimes; it was believed that violent juveniles were being set free to commit more crimes before their adjudicatory hearings. It was argued that a juvenile received positive reinforcement of criminal tendencies and lost respect for authority when not immediately penalized for alleged crimes. In addition, critics of the system feared the effects of police disillusionment upon seeing a recently arrested juvenile set free before a complete arrest report could be filed.[23]

The Florida Legislature responded to these criticisms with Senate Bill 165, which contained the 1975 amendment to section 39.03(3)(c)(3).[24] The germ of this provision first appeared in the committee substitute for Senate Bill 371.[25] Although this bill died on the Senate calendar, its provision pertaining to juvenile detention was incorporated into Senate Bill 165.[26] The passage of Senate Bill 165

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19. *Id.* § 39.10.

20. *Id.* § 39.09(3).

21. *Id.*

22. FLA. STAT. § 39.01(28) (1975). FLA. STAT. § 39.11 (1975) spells out the court's power with reference to a delinquent child. It may, for example, place the child on probation, § 39.11(2)(a); commit him to a licensed childcare institution, § 39.11(2)(b); or commit him to the Division of Youth Services, § 39.11(2)(c).

23. For these and other criticisms of the release procedure consult *Hearing Before the Fla. Senate Select Subcomm. on Youth Services* (April 10, 1975) (tapes on file with the Fla. Senate Comm. on Health and Rehabilitative Services).

24. Fla. S. 165 (1975); Fla. Laws 1975, ch. 75-48.

25. Fla. S. 371 (1975). Senate Bill 371 was introduced in the Senate on April 15, 1975. FLA. S. JOUR. 90 (1975). It provided in part as follows: "4) *Because the child has been twice previously adjudicated a delinquent and has been charged with a third subsequent delinquency which would constitute a felony if the child were an adult.*" This provision eventually became FLA. STAT. § 39.03(3)(c)(3) (1975). *See* notes 1, 2 *supra*. This bill was promptly referred to the Judiciary—Criminal Committee. FLA. S. JOUR. 90 (1975). The next day the bill was sub-referred to the Select Subcommittee on Legislation Relating to Juveniles. FLA. S. JOUR. 98 (1975). The Select Subcommittee presented its committee substitute for Senate Bill 371. FLA. S. JOUR. 320 (1975).

26. At about the same time that Senate Bill 371 was making its difficult way through the legislative process, Senate Bill 165 had begun an even more tortuous journey; on April 8, 1975, the bill was introduced in the Senate, referred to the Senate HRS Committee, and placed on the calendar. FLA. S. JOUR. 16, 32 (1975). The committee substitute was passed as amended and sent to the House. FLA. S. JOUR. 39 (1975). The House,

resulted in the amendment of section 39.03(3)(c)(3), which now calls for the preadjudication detention of juveniles who have twice previously been adjudicated delinquent.[27]

Both national and Florida crime statistics indicate that there is cause for concern about the effectiveness of the juvenile justice system.[28] These statistics, however, do not call for the strict measures of section 39.03(3)(c)(3). On the contrary, there are indications that much of the detention contemplated by the new provision will serve no societal need. First, the decrease in the crime rate brought about by extra detention will probably be negligible. The Division of Youth Services (hereinafter referred to as DYS) stated in an annual report that in 1974, of the 86,393 juveniles referred to it because of delinquency problems, only 10,781 were detained at some stage of the dispositional process.[29] The DYS report also showed that of the delinquent referrals released by DYS intake officers in 1974, only 6.7 percent fell into the "failure" category, *i.e.*, either committed a delinquent offense between release and disposition, ran away, or failed to show for subsequent court appearance.[30] Unfortunately, DYS does not list separately the various offenses which bring a child within its failure category;[31] it is therefore impossible to know how many of the "failures" actually committeed subsequent crimes. But it is reasonable

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however, amended the bill. FLA. H.R. JOUR. 294–305 (1975). After further amendment, the House passed the bill on April 25, 1975, and returned it to the Senate. FLA. H.R. JOUR. 318 (1975). The Senate declined to concur in the House amendments. FLA. S. JOUR. 180 (1975). The House refused to recede. FLA. H.R. JOUR. 346 (1975). A conference committee was appointed. FLA. H.R. JOUR. 346 (1975); FLA. S. JOUR. 187 (1975).

The conference committee inserted the present detention provision in Senate Bill 165, drawing upon Senate Bill 371. The committee substitute for Senate Bill 165 was passed in the Senate on May 26, 1975, FLA. S. JOUR. 380 (1975), and in the House on May 27, 1975, FLA. H.R. JOUR. 754 (1975).

27. *See* note 2 *supra.*

28. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 55 (1967), where it is stated: "Rough estimates . . . indicate that one in every nine youths—one in every six male youths—will be referred to juvenile court in connection with a delinquent act (excluding traffic offenses) before his 18th birthday."

In 1973, 50.8% of all persons arrested for crimes against property were under the age of 18. FBI, CRIME IN THE UNITED STATES 128 (1973).

Statistics gathered by the Florida Division of Youth Services after a 2-year study showed a 48% recidivism rate for juveniles sentenced to training schools and a 41% recidivism rate for juveniles sentenced to group treatment residential programs. Fla. Div. of Youth Services, A Summary View of Juvenile Crime and Corrections in Florida, at 7 (Sept. 1975) (unpublished report, copy on file at FLA. ST. U.L. REV. offices).

29. [1974] FLA. DIV. OF YOUTH SERVICES, ANNUAL COMPILATION OF QUARTERLY JNAS, at 2.

30. ANNUAL COMPILATION, *supra* note 29, at 3.

31. *Id.*

to assume that many of the 6.7 percent "failure" group released by DYS either ran away or failed to appear rather than committed crimes before their adjudicatory hearings.

Evidence suggests that removing crime-prone juveniles from society for a short period of time is not an efficient method of lowering the crime rate.[32] Therefore, the likelihood that enforcement of section 39.03(3)(c)(3) will lower the juvenile crime rate is small. There is, however, a possibility that the quality of justice for juveniles will be lowered.

One deleterious aspect of section 39.03(3)(c)(3) is that it cannot be consistently enforced at this time. There is no statewide information system in Florida;[33] the only way to determine whether a juvenile has twice previously been adjudicated delinquent is to call the court where the child was last adjudicated delinquent. Since most courthouses are open only from 8:00 a.m. to 5:00 p.m., the difficulty which intake officers will face is obvious. The intake officer's task is more difficult when the apprehended juvenile lives in a different county from the one in which his previous records are on file.[34]

Another shortcoming of section 39.03(3)(c)(3) is that it will increase the workload of the already overworked juvenile justice system. To compensate for this extra strain upon the judicial system, it provides for the appointment of county judges and members of the bar to hold detention hearings.[35] The decision rendered at the detention hearing is an important one since the juvenile may be detained for a period of 2 weeks, and, in some cases, this detention may be extended for an additional 30 days.[36] In light of the importance of the

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32. Clarke, *Getting 'Em Out of Circulation: Does Incarceration of Juvenile Offenders Reduce Crime?* 65 J. CRIM. L.C. & P.S. 528 (1974).

33. Letter from Chief Justice Adkins of the Florida Supreme Court to circuit judges who participate in juvenile court matters, June 26, 1975 (copy on file at FLA. ST. U.L. REV. offices). On page 3 the Chief Justice stated: "Until Florida has a statewide computerized information system, there will be no way to determine if a child has been twice previously adjudicated a delinquent."

34. Interview with Ted Tollett, Fla. Div. of Youth Services, at Tallahassee, Fla., July 1, 1975.

35. FLA. STAT. § 39.03(3)(c)(3) (1975); section 39.02(1) provides that "[t]he circuit court shall have exclusive original jurisdiction of proceedings in which a child is alleged to be dependent or delinquent." FLA. STAT. § 39.03(c)(3)(c) (1975) provides that "[t]he circuit court, *or the county court if previously designated by the chief judge of the circuit court,* shall hold the detention hearing. When the county judge is not an attorney, the chief judge may designate members of the bar to hold the detention hearing." (Emphasis added).

36. FLA. STAT. § 39.03(7)(b) (1975) provides:

> No child shall be held in detention or shelter care under a special order for more than 14 days unless an order of adjudication for the case has been entered by the court. The court may extend the special order detaining a child an

presumption of innocence and the right of pretrial release to our system of justice,[37] the appointment of judges who are inexperienced in juvenile law to consider this important decision seems especially unfair.

In summary, the enforcement of this provision may do more harm than good. At present, it cannot be consistently enforced, and it permits inexperienced persons to make decisions which may result in a prolonged separation of a juvenile from family, home, friends, and school work. Most importantly, it allows the detention of many juveniles who do not need to be detained.[38]

Since the beginnings of the separate juvenile court system in the early nineteenth-century, juvenile proceedings in this country have been classified primarily as civil rather than criminal; thus the criminal rights of due process were not deemed applicable to juveniles.[39] English common law recognized the power of *parens patriae*—a residual power in the crown to protect children.[40] That doctrine became the state's basis for treating the juvenile suspect differently from his adult counterpart.[41] Juvenile court systems envisaged a judge acting as a mature and well balanced parent—a judge who would do whatever was best for the child's care and rehabilitation while bypassing the procedure and formalities of the adult criminal system.[42]

By the middle of this century, however, it became clear that the informality of the juvenile courts resulted in arbitrariness rather than in justice.[43] Dissatisfaction with the effects of arbitrary incarceration of juveniles led to public concern about the entire juvenile justice sys-

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additional 30 days in the case of a child covered by paragraph 39.02(5)(c) when the grand jury fails to return an indictment within the 14-day period for that pupose, or when the State Attorney shall give the court the notice provided for in s. 39.02.

37. *See* Stack v. Boyle, 342 U.S. 1, 4 (1951).

38. Excess detention of juveniles has long been considered undesirable. The Task Force on Juvenile Delinquency found that "detention of children appears to be far too routinely and frequently used . . . . The notorious inadequacy and overcrowding of child detention centers and the not uncommon use of adult jails and lockups make the practice even less tolerable." THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 36 (1967) (hereinafter cited as TASK FORCE REPORT). The Task Force recommended that "detention pending a detention hearing should be restricted to cases where it is clearly necessary to protect the youth or the community." *Id.* at 37.

39. M. PAULSEN & C. WHITEBREAD, JUVENILE LAW AND PROCEDURE 5 (1974).

40. *Id.* at 4.

41. *Id.*

42. *Id.*

43. *See* Kent v. United States, 383 U.S. 541, 554–56 (1966).

tem.[44] This concern led to action on the part of the United States Supreme Court, which decided to impose due process standards upon any proceeding which might result in incarceration of a juvenile.

In three decisions, *Kent v. United States*,[45] *In re Gault*,[46] and *In re Winship*,[47] the Supreme Court noted that the informality of the juvenile system had failed to protect the best interests and welfare of the child. In *Kent*, the Court stated that a waiver hearing must "measure up to the essentials of due process and fair treatment."[48] *Gault* and *Winship*, however, made it clear that specific criminal due process rights would replace informality at any hearing which might result in a loss of the juvenile's freedom.

Recognizing the failure of the juvenile justice system to live up to the expectations of those who developed it, Justice Fortas pointed out in *Gault* that "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court."[49] He then went on to establish four criminal rights for juveniles facing adjudicatory hearings: (1) the right to counsel;[50] (2) notice of charges;[51] (3) the privilege against self-incrimination;[52] and (4) the rights to confrontation and cross-examination of witnesses.[53] *Winship* assured juveniles the same standard of proof (beyond a reasonable doubt) used in criminal trials of adults.[54]

Although the Supreme Court attempted to halt the practice of unnecessary commitment of juveniles to institutions by imposing due process guarantees at the adjudicatory level, it stopped short of guaranteeing due process rights at preadjudicatory levels.[55] Noting the lamentable amount of pretrial detention imposed upon juveniles, some

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44. This dissatisfaction with the effects of detention upon juveniles was voiced by THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 80 (1967):

> Official action may actually help to fix and perpetuate delinquency in the child through a process in which the individual begins to think of himself as delinquent and organizes his behavior accordingly. That process itself is further reinforced by the effect of the labelling upon the child's family, neighbors, teachers, and peers, whose reactions communicate to the child in subtle ways a kind of expectation of delinquent conduct. The undesirable consequences of official treatment are maximized in programs that rely on institutionalizing the child.

45. 383 U.S. 541 (1966).
46. 387 U.S. 1 (1967).
47. 397 U.S. 358 (1970).
48. 383 U.S. at 562.
49. 387 U.S. at 28.
50. *Id.* at 41.
51. *Id.* at 33–34.
52. *Id.* at 55.
53. *Id.* at 57.
54. 397 U.S. at 361–64.
55. *See In re* Gault, 387 U.S. 1 (1967).

lower courts moved to insure the above due process rights at pre-adjudicatory detention hearings. As early as 1969, in *Baldwin v. Lewis*,[56] a federal district court determined that due process rights were necessary to prevent abuses at the detention level. Baldwin had been detained on suspicion of committing arson, although examination of the record showed that there were no facts which provided a basis for his detention. The district court stated:

> A detention hearing . . . is, by its very nature, a proceeding which may result in the deprivation of a juvenile's liberty for an indeterminate period of time pending disposition of the accusations against him. It is the opinion of this Court that a logical interpretation of the Supreme Court's decision in In re Gault . . . requires that such a hearing satisfy all the requirements of due process under the Fourteenth Amendment.[57]

The Supreme Court of Alaska, in *Doe v. State*,[58] came to a similar conclusion. Doe, charged with selling LSD, was ordered detained pending his adjudicatory hearing on the basis of a hearsay statement that he had threatened one of the state's witnesses.[59] The court found reversible error in the trial court's refusal to guard Doe's due process rights. Although the court mentioned that *Gault* had intended to encompass only adjudicatory hearings, it stated that "[i]nitially it should be noted that due process standards must be observed at a detention inquiry since it may result in the deprivation of the child's liberty."[60]

One federal court has displayed its general dissatisfaction with pre-detention protection of due process rights. In *Conover v. Montemuro*,[61] the plaintiff contended that the intake interview (as it was conducted by the probation department) violated his fourteenth amendment rights. The district court found that "the threshold inquiry must focus on the extent to which [*In re Gault*] . . . requires that juveniles be accorded the same Fourteenth Amendment rights as adults."[62] The court found that *Gault* left unresolved the types of procedures which would provide protection of constitutional rights at the preadjudicatory stage.[63]

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56. 300 F. Supp. 1220 (E.D. Wis. 1969), *reversed for failure to exhaust state remedies*, 442 F.2d 29 (7th Cir. 1971).
57. *Id.* at 1232.
58. 487 P.2d 47 (Alas. 1971).
59. *Id.* at 49.
60. *Id.* at 53.
61. 304 F. Supp. 259 (E.D. Pa. 1969).
62. *Id.* at 263.
63. *Id.*

One of the most important preadjudicatory rights for adults is the right to release on bail. Although pretrial release on bail is generally considered to be a due process right,[64] the Supreme Court has not found that this right should extend to juveniles. *Gault*, which dealt only with constitutional rights at the adjudicatory level, left the issue unresolved[65] because bail relates to a preadjudicatory stage of the judicial process. Even those courts which have found that juveniles should have adult due process rights at the preadjudicatory level have generally not found that pretrial release on bail is one of those rights.[66] Most have found that a system of juvenile detention, if scrupulously enforced, provides an adequate substitute for the due process right of bail, without the hindrance of money bail.[67] In *Fulwood v. Stone*,[68] the plaintiff's attorney requested that the plaintiff be released on bail pending his adjudicatory hearing. The trial court denied this request without accepting any testimony regarding the appropriateness of release. The court of appeals refused to reach the question of whether a "constitutional right to bail"[69] existed in juvenile proceedings; it stated that the Juvenile Court Act provided an adequate substitute for bail.[70] The court remanded for "appropriate inquiry"[71] concerning pretrial custody and noted that "[i]f there were neither a right to bail nor faithful adherence to the philosophy of the Juvenile Court Act, the juvenile would receive the 'worst of all possible worlds.' "[72]

The *Doe* court, though upholding the right to due process at the detention inquiry,[73] noted that a juvenile faces special problems which make "a blanket application of the right to pre-adjudication release"

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64. *See* U.S. CONST. art. VIII. One author has stated that "[s]ince federal law has always provided for a right to bail, the Supreme Court has never reached the constitutional question of whether the Eighth Amendment implicitly grants the right to bail." A. Hill, *The Constitutional Controversy of a Juvenile's Right to Bail in Juvenile Preadjudication Proceedings*, 1 HASTINGS CONSTITUTIONAL L.Q. 215 (1974).

However, at least one lower court has decided that such an implication is warranted. Trimble v. Stone, 187 F. Supp. 483 (D.C.C. 1960).

It is well settled in Florida that a denial of bail to one who is otherwise entitled thereto is a deprivation of constitutional rights and due process of law. *Ex parte* McDaniel, 97 So. 317 (Fla. 1923); Nix v. McCallister, 202 So. 2d 1 (Fla. 1st Dist. Ct. App. 1967).

65. 387 U.S. at 13.

66. *See* A. Hill, *supra* note 64, at 233.

67. *See, e.g.*, text accompanying notes 68, 73 *infra*.

68. 394 F.2d 939 (D.C.C. 1967).

69. *Id.* at 943.

70. *Id.*

71. *Id.* at 944.

72. *Id.* at 943, n.14, *quoting* Kent v. United States, 383 U.S. 541, 556 (1966) ("worst of both worlds" in original).

73. Doe v. State, 487 P.2d 47 (Alas. 1971).

undesirable.[74] The right to bail could, for instance, result in sending the child back into the hands of parents who are abusive or who are unwilling to accept the responsibility of their child's delinquency.[75] The court further stated that, since a child would be dependent upon parental financial assistance to obtain release, a child's right to bail would not necessarily result in release.[76] It stated that the juvenile court rules dealing with pretrial release could be "construed and applied" to provide juveniles with an adequate substitute for bail.[77]

But in one recent New York Supreme Court case, the court found that even strict adherence to juvenile detention standards was insufficient to substitute for the due process right of bail when the standards imposed upon juveniles for detention differed from those imposed upon adults. In *People ex rel. Wayburn v. Schupf*,[78] the court found unconstitutional a section of the New York Family Court Act which provided that a juvenile defendant could be detained if there was a substantial risk that he would commit a crime before his hearing. The court pointed out that

> [i]t is irrational to conclude that persons under the age of sixteen—who are found to have a propensity to commit crime—need to be kept from society while persons over sixteen who are found to have an equal (or greater) propensity to commit crime may not, by virtue of that fact alone, be confined. Preventive detention is irrational when applied if it is imposed because of age and not the danger to society.[79]

Not only did the *Wayburn* court recognize the due process right of pretrial release for juveniles, but it also insisted that the factors taken into consideration in effecting that release be the same as those considered in the pretrial release of adults. The *Wayburn* court, however, tried to preserve the benefits of the juvenile system: it did not insist that a juvenile post bail in order to secure release.[80]

Clearly these cases demonstrate a trend in current juvenile court decisions; they seek to guarantee fair treatment of the juvenile by im-

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74. *Id.* at 52.
75. *Id.*
76. *Id.*
77. *Id.*
78. 365 N.Y.S.2d 110 (Sup. Ct. 1974).
79. *Id.* at 113–14.
80. The court in People *ex rel* Wayburn v. Schupf, 365 N.Y.S.2d 235 (Sup. Ct. 1975) held that the New York Family Court Act did not confer upon a judge the power to fix bail for juvenile respondents (this case deals with a different juvenile from the one involved in People *ex rel* Wayburn v. Schupf, 365 N.Y.S.2d 110 (Sup. Ct. 1974)).

plementing his due process rights whenever necessary to correct unfair juvenile justice practices. Although some lower courts have found that fairness should be measured by adult due process standards at preadjudicatory levels,[81] the Supreme Court has not done so.[82] Among those courts which have recognized a due process right of pretrial release for the juvenile, most have recommended a substitute system for release on bail.[83] Those courts have found that this substitute must be in accord with due process notions of fairness.[84]

Exactly which standards of pretrial release are fair is unclear. The Uniform Juvenile Court Act enumerates three model criteria for establishing a fair pretrial release system;[85] these criteria were formerly embodied in section 39.03(3)(c) of the Florida Statutes.[86] The juvenile delinquency chapter of the United States Code[87] contains similar standards; it provides that the juvenile shall be released unless "the detention of such juvenile is required to secure his timely appearance before the appropriate court or to insure his safety or that of others."[88]

The addition of a criterion which calls for the detention of juveniles based on their past records constitutes a mechanical standard for preadjudicatory detention. Courts have long abhorred arbitrary or mechanical standards for pretrial release no matter what their statutory basis. In *In re M*,[89] a California trial court had stated that any juvenile who sold marijuana was to be detained for the safety of others. But the California Supreme Court found "that the juvenile court cannot establish mechanical 'policies' for automatic detention";[90] it stated that "each juvenile [should] be treated as an individual."[91] In

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81. *See, e.g.*, Moss v. Weaver, 383 F. Supp. 130 (S.D. Fla. 1974), *modified*, 525 F.2d 1258 (5th Cir. 1976); Baldwin v. Lewis, 300 F. Supp. 1220 (E.D. Wis. 1969), *rev'd for failure to exhaust local remedies*, 442 F.2d 29 (7th Cir. 1971).; Doe v. State, 487 P.2d 47 (Alas. 1971); People *ex rel* Wayburn v. Schupf, 365 N.Y.S.2d 110 (Sup. Ct. 1974).

82. *In re* Gault, 387 U.S. 1 (1967).

83. *E.g.*, Fulwood v. Stone, 394 F.2d 939 (D.C.C. 1967); Doe v. State, 487 P.2d 47 (Alas. 1971). However, according to LEVIN & SARRI, JUVENILE DELINQUENCY: A COMPARATIVE ANALYSIS OF LEGAL CODES IN THE UNITED STATES 29 (1974), 20 states permit juveniles to post bail: Arkansas, Colorado, Connecticut, Delaware, Georgia, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Oklahoma, South Carolina, South Dakota, Vermont, Virginia, Washington, West Virginia.

84. *See, e.g.*, Doe v. State, 487 P.2d 47 (Alas. 1971).

85. *See* UNIFORM JUVENILE COURT ACT § 14.

86. FLA. STAT. § 39.03(3)(c) (1973), *as amended*, FLA. STAT. § 39.03(3)(c) (1975).

87. 18 U.S.C. §§ 5031–42 (Supp. IV, 1975).

88. 18 U.S.C. § 5034 (Supp. IV, 1975).

89. 473 P.2d 737 (Cal. 1970).

90. *Id.* at 747–48.

91. *Id.* at 748.

Baldwin v. Lewis,[92] the children's court found at the detention hearing that it would be in the best interests of the juvenile and the community for the boy to be detained.[93] The sole basis for this finding appeared to be the seriousness of the crime charged.[94] The district court found that the child was denied due process of law.[95]

In *In re G.M.B.*,[96] the Supreme Court of Alaska found that a mere recitation of the juvenile's previous history was not sufficient to show detention was "necessary" for the protection of the juvenile or others. And in *People ex rel. Wayburn v. Schupf*,[97] the court found that the criteria for depriving a juvenile of his liberty before trial should be identical to those for determining whether an adult should be free before trial. The court ruled that pretrial detention was authorized only when there was a substantial probability that the defendant would not appear for his adjudicatory hearing.[98]

Although the trend toward granting due process rights at preadjudicatory stages of the dispositional process has not been followed in Florida's state courts, it has been demonstrated in at least one federal court in Florida. In *Moss v. Weaver*,[99] the plaintiffs sought declaratory and injunctive relief against the practice of imposing pretrial detention upon accused delinquents without a probable cause hearing. The district court stated that "the classical principles of procedural due process of law mandate that the state may not impose a deprivation of life, liberty, or property without an appropriate due process hearing."[100] The court, however, limited its ruling to a declaratory judgment granting a probable cause hearing to juveniles who were denied relief under existing procedures.[101]

Florida Rule of Juvenile Procedure 8.110(a) states that it acts in lieu of Florida Rule of Criminal Procedure 3.130, which is Florida's adult bail rule.[102] It is clear that Florida's pretrial release system for juveniles is meant to substitute for the adult's constitutional right of

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92. 300 F. Supp. 1220 (E.D. Wis. 1969), *reversed for failure to exhaust local remedies*, 442 F.2d 29 (7th Cir. 1971).

93. *Id.* at 1225.

94. *Id.*

95. *Id.* at 1233.

96. 483 P.2d 1006 (Alas. 1971).

97. 365 N.Y.S.2d 110 (Sup. Ct. 1974).

98. *Id.* at 114.

99. 383 F. Supp. 130 (S.D. Fla. 1974).

100. *Id.* at 134.

101. *Id.* at 135. Granting probable cause hearings to such juveniles appears now to be standard practice in Florida.

102. FLA. R. CRIM. P. 3.130; FLA. STAT. §§ 903.02–.36 (1975) contain Florida's statutory provision for release on bail.

pretrial release on bail.[103] Florida Rule of Juvenile Procedure 8.050 states that, if a court decides to detain a juvenile, it must make a specific finding that the juvenile's release would be inimical to himself or to society.[104] Thus the rule which sets judicial standards of fairness for the pretrial release of juveniles is in substantial accordance with the prior version of section 39.03(3)(c) of the Florida Statutes. Both the rule and the previous statute imply that fairness demands that a child remain free before his adjudicatory hearing, unless his freedom is not in the best interests of himself or society.

It is clear that as amended, section 39.03(3) (c) establishes a standard for pretrial release which is not in line with the notions of fairness established by the Supreme Court's decision in *Gault* and the cases following it. It establishes precisely the kind of mechanical policy for detention struck down by the California Supreme Court in *In re M.* Further, it establishes a standard for pretrial release which neither the United States Code nor the Uniform Juvenile Court Act incorporates. The provision is unrelated to the standards established by the Florida Rules of Juvenile Procedure or to prior Florida statutory law, which are both substantially the same as national codifications. Not only is the new provision unrelated to the effectuation of the goals of these systems, but it is also a direct contradiction of their clear purpose: to make juvenile detention the exception rather than the rule.

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103. Adults in Florida have a right to pretrial release on bail. *See* FLA. CONST. art. I, § 14; Gray v. State, 54 So. 2d 436 (Fla. 1951) (the Florida Supreme Court discussed the right to bail where the charge is a capital offense). *See also* A.N.E. v. State, 156 So. 2d 525, 527 (Fla. 1st Dist. Ct. App. 1963) (for the proposition that pretrial bail is not appropriate for juveniles in Florida).

104. FLA. R. JUV. P. 8.050.