THE CONSTITUTIONAL CONTROVERSY OF A JUVENILE'S RIGHT TO BAIL IN JUVENILE PREADJUDICATION PROCEEDINGS

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During the past ten years the right to bail within the juvenile court system has become an increasingly controversial issue.[1] Underlying this controversy are complex issues and problems involving the original goals of the juvenile court system, and the constitutional questions over due process in juvenile proceedings and the right to bail itself. This note will consider whether in the light of these complexities the due process requirement of fundamental fairness demands the imposition of the right to bail in juvenile preadjudication procedures.

Issues concerning a detained juvenile's constitutional right to bail are inextricably tied to the general controversy of whether the Eighth Amendment grants the right to bail. Initially, the Eighth Amendment speaks not in terms of the right to bail, but rather that "excessive bail shall not be required." Since federal law has always provided for a right to bail,[2] the Supreme Court has never reached the constitutional question of whether the Eighth Amendment implicitly grants the right to bail.

Absent a Supreme Court decision, the ambiguous language of the excessive bail clause lends itself to at least three interpretations, and a number of controversies.[3] First, in a number of state criminal

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1. See cases cited notes 111-139 and accompanying text *infra,* and also Kinney v. Lenon, 447 F.2d 596 (9th Cir. 1971).

2. The first provision was in the Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91. It is presently contained in FED. R. CRIM. P. 46(a)(1).

3. Foote, *The Coming Constitutional Crisis in Bail I,* 113 U. PA. L. REV. 959, 969-70 (1965) [hereinafter cited as Foote I]; *See also* Foote, *The Coming Constitutional Crisis in Bail II,* 113 U. PA. L. REV. 1125 (1965) [hereinafter cited as Foote II]. Both articles present a thorough discussion on the constitutional problems involved with the subject of bail. Foote I discusses the historic background of the right to bail and the excessive bail clause. Foote II considers the due process and equal protection issues created by the monetary basis of the system and the indigent defendant.

cases, it has been held that "excessive bail" language, in itself, does not establish a right to bail.[4] A second group of cases, on the other hand, suggest that such a clause infers that bail cannot be excessive in amount in cases where the court sets bail.[5] However, if there are no statutory provisions or restrictions, the court has the discretion to deny bail altogether.[6] A third group holds or suggests that the excessive bail clause necessarily implies a constitutional right to bail.[7] A problem with this last approach, as pointed out by Professor Caleb Foote, is that the precise scope of the implied right is relatively undefined and this creates yet another issue.[8] Until these inconsistencies concerning the interpretations of the excessive bail clause are settled, the language of the Eighth Amendment lends little support for the argument that juveniles should be granted the right to bail.

Criminal Procedure Applied to Juvenile Adjudications

While a number of state constitutions explicitly grant the right to bail,[9] these provisions offer little support for the argument that this right should be extended to include juveniles. First, as will be discussed later, children may be treated differently from adults. The juvenile court at its inception was devised to treat children's misdeeds differently from adult crimes. As a result, the juvenile court system was permitted to maintain procedures distinct from criminal court.[10] Although the right to bail was granted in adult cases, prior to the *Gault* decision, bail was traditionally denied to juveniles based on this distinction.[11] Furthermore, the state has the power to deny the right to bail unless the denial is irrational, unreasonable, or arbitrary.[12] Because the Supreme Court has been reluctant to deal with the con-

4. *See, e.g.*, People v. Holder, 70 Misc. 2d 819, 335 N.Y.S.2d 157 (1972), People *ex rel.* Shapiro v. Keeper of City Prison, 290 N.Y. 393, 49 N.E.2d 498, 39 N.Y.S.2d 526 (1943) (excessive bail clause of N.Y. Const.); Vanderford v. Brand, 126 Ga. 67, 54 S.E. 822 (1906) (dictum) (excessive bail clause of Ga. Const.).

5. *See, e.g.*, Reddy v. Snepp, 357 F. Supp. 999 (D.N.C. 1973), *Ex parte* Voll, 41 Cal. 29 (1871) (excessive bail language does not imply post-conviction bail).

6. *Id.*

7. Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960) (a pre-*Gault* juvenile decision holding a general absolute right to bail in non-capital cases); *see* Mastrian v. Hedman, 326 F.2d 708 (8th Cir. 1964), *cert. denied,* 376 U.S. 965 (1964) (by implication).

8. Foote I, *supra* note 3, at 970.

9. COLUMBIA UNIVERSITY, LEGISLATIVE DRAFTING RESEARCH FUND, INDEX DIGEST OF STATE CONSTITUTIONS 26 (1959).

10. See text accompanying notes 16 and 17 *infra.*

11. *See, e.g., Ex parte* Cromwell, 232 Md. 305, 192 A.2d 775 (1963), Cinque v. Boyd, 99 Conn. 70, 121 A. 678 (1923).

12. Mastrian v. Hedman, 326 F.2d 708 (8th Cir. 1964), *cert. denied,* 376 U.S. 965 (1964).

stitutionality of a separate and distinct juvenile court,[13] and has also been hesitant to abet the demise of the juvenile court system,[14] there is little substance to an argument that there are no distinctions between adults and juveniles rendering the state's denial of bail arbitrary, unreasonable, or discriminatory.

The juvenile court is a phenomenon of the early twentieth century. Prior to the initiation of the various juvenile court acts, juveniles who had reached the age of culpability[15] and had been accused of criminal conduct, were entitled to the procedures of and subject to the same criminal court as adults.[16] With the advent of the juvenile court acts, children became subject to the exclusive jurisdiction of the juvenile court.[17] The goals of the juvenile court system were the welfare and best interests of the child rather than punishment per se.[18] Theoretically distinguishing the juvenile court from the criminal court, the reformers reasoned that the procedures of the criminal court were not necessary in the juvenile system.[19] Indeed, these protective procedures were viewed as obstacles to the achievement of the juvenile

13. Examples are the delicacy of the Court's tread in *In re* Gault, 387 U.S. 1, 13, 17 (1967) and Kent v. United States, 383 U.S. 541, 551-52 (1966).

14. See text accompanying note 52 *infra*.

15. "[T]here is a presumption of criminal incapacity on the part of an infant below the age of fourteen, which is conclusive prior to the age of seven and rebuttable thereafter. In other words, while it is otherwise in the case of one under the age of seven, the common law recognizes the possibility of criminal guilt by a person between the ages of seven and fourteen if the individual is shown to have sufficient maturity as a matter of fact despite the lack of years." R. PERKINS, CRIMINAL LAW 839 (2d ed. 1969).

16. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909) [hereinafter cited as Mack]. This work considers the juvenile system at the time of its inception.

17. *See*, Mack, *supra* note 16, at 109. Illinois' Act of 1898 was the first juvenile court law. Van Waters, *The Socialization of Juvenile Court Procedure*, 13 J. CRIM. L.C. & P.S. 61, 63 (1922) [hereinafter cited as Van Waters].

18. "In theory this court is parental, a court of guardianship, not a criminal or quasi-criminal court, but a court where the paramount issue is the welfare of the child." Van Waters, *supra* note 17, at 63. Another early expression: "To save children from life-long consequences of childish errors, to check their feet at the very entrance of the downward road and to set them upon the gently graded pathway leading to usefulness and happiness, to let them expiate a fault at their own homes under the surveillance of kindly probation officers, and to accomplish those ends without the publicity that tends to blast later attempts at well-doing, as well as to save young souls from the taint of contact with matured criminals, these were the purposes sought to be accomplished in establishment of the juvenile court of Buffalo." Murphy, *New York-History of the Juvenile Court of Buffalo*, in THE INTERNATIONAL PRISON COMMISSION, CHILDREN'S COURTS IN THE UNITED STATES 10 (1904). *But cf.* FOX, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970). The concern for the child's welfare was only one of many paradoxical elements motivating juvenile justice reform.

19. Mack, *supra* note 16, at 109-110, and Van Waters, *supra* note 17, at 64-65.

court goals.[20] As a result, it was believed that to approximate the goals of the system, informal, individualized, paternal, and solicitous procedures were the most appropriate.[21]

Unfortunately, informal procedures tended to be subject to abuse. When describing prejudicial dispositions in the juvenile court, the President's Commission of Law Enforcement and Administration of Justice[22] found that:

> Discretion too often is exercised haphazardly and episodically, without the salutary obligation to account and without a foundation in full and comprehensive information about the offender and about the availability and likelihood of alternative dispositions. Opportunities occur for illegal and even discriminatory results, for abuse of authority by the ill-intentioned, the prejudiced, the overzealous. Irrelevant, improper considerations—race, nonconformity, punitiveness, sentimentality, understaffing, overburdening loads —may govern officials in their largely personal exercise of discretion.[23]

The failure of informality to serve the best interest and welfare of the child was recognized by the Supreme Court in the late sixties. In three decisions, *Kent v. United States*,[24] *In re Gault*,[25] and *In re Winship*,[26] the Supreme Court noted that due to this failure and the resulting injustice to the juvenile, due process required procedural formalities in the juvenile court proceedings.

In the *Kent* decision, the Court dealt with the informal proceedings in which the juvenile court waived jurisdiction of a minor and transferred him to criminal court. The Court held that a hearing to consider waiver of juvenile court jurisdiction is required. This waiver hearing was necessary considering the significance of the juvenile court's order.[27] Justice Fortas, speaking for the majority, declared:

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20. *See* Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REVIEW 167, 171, 174 (1966) [hereinafter cited as Paulsen]. This article provides a full discussion of the juvenile system in retrospect prior to the *Gault* decision. For a complete description of the structure and assumptions of the juvenile court, see Pound, *The Juvenile Court and the Law* (1944) in 10 CRIME & DELINQUENCY 490 (1964).

21. Paulsen, *supra* note 20, at 169-72, and Mack, *supra* note 16 at 109-111.

22. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1968) [hereinafter cited as CHALLENGE]. The purpose of this commission was to report about crime in America, "about those who commit it, about those who are its victims, and about what can be done to reduce it." *Id.* at 37.

23. *Id.* at 222.

24. 383 U.S. 541 (1966).

25. 387 U.S. 1 (1967).

26. 397 U.S. 358 (1970).

27. In Kent's case, as a result of the waiver order, he was transferred to jail along

> [T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children . . . permitted this procedure. We hold that it does not.[28]

Thus the Court decided that informal procedures had, in practice, failed to reflect the special concerns of the reformers. As a result, the Court held that Kent was entitled to a hearing, including access by his counsel to the social records and probation reports, and a statement of reasons for the juvenile court's decision.[29] Furthermore, the Court stated that although the hearing may be informal,[30] it must "'measure up to the essentials of due process and fair treatment."[31] Because informal procedures had not reflected society's concerns for the child's welfare, procedural due process required such regularities as a waiver hearing. The informal proceedings of the hearing, in which there is a possibility of incarceration and loss of liberty, must satisfy the essentials of due process and fair treatment.

One year later in the *Gault* case, the Court dealt with the question of whether the rights of notice, counsel, privilege against self-incrimination, and the right to confront and cross-examine witnesses were required by due process at the adjudication of delinquency. Justice Fortas, writing for the majority, reemphasized the Court's general dissatisfaction with the informal procedure of the juvenile courts:

> The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principles has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.[32]

After stating that the unique and beneficial aspects of the system would "not compel the States to abandon or displace any of the substantive benefits of the juvenile process,"[33] the Court declared that the adjudication proceeding must "measure up to the essentials of due

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with adults, and was exposed to the possibility of a death sentence instead of treatment for a maximum of five years and the protection of the Juvenile Court Act. 383 U.S. at 553-54 (1966).

28. *Id.* at 554.
29. *Id.* at 557.
30. *Id.* at 561.
31. *Id.* at 562.
32. 387 U.S. at 18-19.
33. *Id.* at 21.

process and fair treatment."[34] Following a discussion of the principles each right reflects, the Court imposed these four rights in the proceedings.[35] The Court was careful to add, however, that the imposition of these formalities did not imply that the requirements of a criminal trial or of an administrative hearing were necessary.[36]

In the *Winship* decision, the Court, operating upon the *Gault* rationale, imposed an additional formality in the adjudication proceedings. Due process, the Court declared, required the criminal standard of proof beyond a reasonable doubt at delinquency adjudications.[37] Justice Brennan, writing for the majority, noted that the reasonable doubt standard was a "prime instrument for reducing the risk of convictions resting on factual error."[38] Furthermore, the need for criminal safeguards in juvenile proceedings was not obviated by civil labels and good intentions;[39] such safeguards were necessary impositions when a child charged with violation of a criminal law could possibly be subjected to institutional confinement.[40] Justice Brennan, however, was careful to note that such an imposition would not risk any destruction to the beneficial aspects of the juvenile court.[41] The standard was necessary because a child's best interest was not promoted if he could be subjected to the stigma of "delinquent" for violating a criminal law and institutionally confined on proof insufficient to convict him were he an adult.[42]

Thus after recognizing the failure of the juvenile court to approximate the goals of the reformers and its failure to even satisfy the fundamentals of due process in certain proceedings, the Court imposed due process regularities on the once totally informal proceedings of the juvenile court system.

The decision of the Court in *McKeiver v. Pennsylvania*,[43] however, dispelled any beliefs that all procedural requirements of a criminal trial would be necessary in juvenile proceedings, when the Court denied juveniles the right to trial by jury. Justice Blackmun, writing for the Court, tersely stated that:

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34. *Id.* at 30.

35. *Id.* at 33 (timely notice), 36-41 (counsel), 45, 47-48 (self-incrimination), 50-56 (self-incrimination and confessions).

36. *Id.* at 30.

37. 397 U.S. at 367. The Court first discussed the principle and rationale of the requirement of proof beyond a reasonable doubt. *Id.* at 361-64.

38. *Id.* at 363.

39. *Id.* at 365-66.

40. *Id.* at 367.

41. *Id.* at 366.

42. *Id.* at 367.

43. 403 U.S. 528 (1971).

> [T]he applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness. As that standard was applied in those two cases, we have an emphasis on factfinding procedures. The requirements of notice, counsel, confrontation, cross-examination, and standard of proof naturally flowed from this emphasis. But one cannot say that in our legal system the jury is a necessary component of accurate factfinding.[44]

As such, the right to "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."[45]

There are two basic arguments given in the *McKeiver* decision supporting the fairness of the juvenile non-jury proceedings and which militate against the constitutional requirement that the right to jury trial be imposed in juvenile proceedings.[46] The weight of authority was against such a requirement.[47] But more importantly, the benefits of the juvenile court's ability to function in a unique manner outweighed the benefits contributed by the jury trial to the fact finding function of the juvenile proceedings.[48]

While the decision established that in the balancing process, the benefits of the juvenile system outweigh the benefits of the jury trial, the decision has been validly criticized for failing to mention the policies or values that the Court considered in finding the adjudication hearing fundamentally fair.[49] Furthermore, the Court failed to consider adequately the purpose of the jury trial beyond that of fact-finding.[50] Unlike *Gault* and *Winship*, the Court in *McKeiver* did not scrutinize the particular juvenile proceedings.[51] Rather, the emphasis of the decision lies in the assertion that the jury trial would possibly impede and inhibit any experimentation or flexibility within the system,[52] and would transform the system into an adversary proceed-

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44. *Id.* at 543.

45. *Id.* at 545.

46. Comment, *Constitutional Law—Due Process: No Constitutional Right to Trial by Jury for Juveniles in Delinquency Proceedings*, 56 MINN. L. REV. 249, 254-55 (1971) [hereinafter cited as MINN.].

47. The Court in *McKeiver*, 403 U.S. at 544-49, cited the Task Force Report, Uniform Juvenile Court Act, the Standard Juvenile Court Act, the Legislative Guide for Drafting Family and Juvenile Court Acts, and its own dictum from Duncan v. Louisiana, 391 U.S. 145 (1968).

48. 403 U.S. at 547.

49. Comment, *Juvenile Courts—Juveniles in Delinquency Proceedings Are Not Constitutionally Entitled to the Right to Trial by Jury—McKeiver v. Pennsylvania*, 70 MICH. L. REV. 171, 193 (1971) [hereinafter cited as MICH.]; MINN., *supra* note 46, at 257. *See also* Ketcham, *McKeiver v. Pennsylvania: The Last Word on Juvenile Court Adjudications?* 57 CORNELL L. REV. 561 (1972).

50. MINN., *supra* note 46, at 257. *See* MICH., *supra* note 49, at 193.

51. *See* MICH, *supra* note 49, at 193.

52. 403 U.S. at 545-47, 550. *See* MICH, *supra* note 49, at 188.

ing.[53] Indicative of this emphasis is an early statement by the majority that "the Court has insisted that these successive decisions do not spell the doom of the juvenile court system or even deprive it of its informality, flexibility, or speed."[54]

The effect of these four decisions has been an accommodation of the goals and philosophy of the juvenile system within the framework of the due process standard.[55] The constitutional requirement of due process dictates the necessity of some criminal procedures at certain juvenile proceedings. However, fundamental fairness does not require that all of these procedures be applied.

The question emerges as to whether or not fundamental fairness includes a right to bail in juvenile preadjudication proceedings. In light of the Supreme Court proscriptions thus far issued, the constitutional requirement of due process and fundamental fairness does not seem to necessitate the imposition of the right to bail at juvenile preadjudication proceedings.

When considering the application of the right to bail, the balancing test of the *McKeiver* decision must be applied as the latest definitive statement by the Supreme Court on juvenile court proceedings. The *McKeiver* Court balanced the benefits of the juvenile court's ability to function against the benefits contributed by the jury trial to the factfinding function of the juvenile proceeding.[56] Such a balancing test, if applied to the bail issue, would in effect balance the benefits of the informal preadjudication proceedings against the benefits contributed from the right to bail to the factfinding function of the juvenile proceedings.

It is submitted, however, that the balancing process should also consider the realities of the juvenile proceedings,[57] and, in addition, should not be limited to the factfinding function of the right to jury trial. Justice Brennan, in his concurring opinion to the *McKeiver* decision, stated his belief that the juvenile proceedings should be reviewed and considered. He declared that the jury question could not be decided except in terms of the "adequacy of a particular state procedure to 'protect the [juvenile] from oppression by the government', and to protect him against 'the compliant, biased, or eccentric judge.' "[58]

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53. 403 U.S. at 545.

54. *Id.* at 534. The Court cited *In re* Winship, 397 U.S. at 366.

55. Nothing will be said in this article on the constitutional basis for the juvenile court system.

56. See text accompanying note 48 *supra.*

57. The Court had considered such realities of the juvenile proceedings in *In re* Winship, 397 U.S. 358, 366-67 (1970), *In re* Gault, 387 U.S. 1, 28-30 (1967), Kent v. United States, 383 U.S. 541, 552-54 (1966). *See* MICH, *supra* note 49, at 193.

58. 403 U.S. at 554 (Brennan, J., concurring).

Furthermore, the purpose of the particular juvenile proceedings and the purpose and practical application of the right to be imposed should also be considered.[59] Only after considering both the realities and the purposes can a balancing be made that will approximate the goals of the juvenile court and be consistent with the Court's emphasis that the procedure not lead to the demise of the system.[60]

Balancing the Juvenile System with the Right to Bail

In juvenile preadjudication proceedings, the child has initially been taken into custody and is awaiting a hearing or orders as to his conduct. In all states the child is brought before a juvenile court official who may decide if the child should be detained for his own good or released to the custody of his parents or guardians pending the disposition of his case.[61] The informality is deemed beneficial because it affords the judge the opportunity to consider the child's needs and welfare.[62]

Originally, detention of the juvenile and separation from his family was to be avoided as much as possible.[63] The early reformers deemed detention proper only when the child's welfare required custody, as in circumstances where no responsible adult was willing or able to take the child.[64] In practice, however, the discretionary power to detain has been used widely. The Task Force on Juvenile Delinquency and Youth Crime[65] found that "detention of children appears to be far too routinely and frequently used."[66] Nearly three-quarters of the delinquent juveniles referred to probation departments by law enforcement agencies were held in juvenile halls.[67] In some communities, however, the task force found that the ratio was even higher.

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59. See notes 35, 37 and accompanying text *supra*; MICH, *supra* note 49, at 183, 193; MINN, *supra* note 46, at 257, 259.

60. See text accompanying note 48 *supra*.

61. *See* Comment, *The Right to Bail and the Pre-"Trial" Detention of Juveniles Accused of "Crime"*, 18 VAND. L. REV. 2096, 2101-04 (1965) [hereinafter cited as *Right to Bail*]. This article gives a complete analysis of all the juvenile court acts on this procedure. *Id.* at 2098-99.

62. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE ON JUVENILE DELINQUENCY AND YOUTH CRIME 16 (1967) [hereinafter cited as TASK FORCE].

63. *See* Mack, *supra* note 16, at 116.

64. *Id.*

65. The purpose of the Task Force was to "inquire into the working of the existing system of juvenile justice and suggest methods of improving it." TASK FORCE, *supra* note 62, at XI.

66. *Id.* at 36.

67. *Id.*

> [V]irtually every juvenile referred by law enforcement officers to the probation department was detained, notwithstanding the fact that some minors were apprehended in error, many committed inconsequential offenses, and many others had responsible parents able to control the minor pending juvenile court appearance.[68]

Other researchers have found that the large breadth of discretion accorded to police results in varying rates of detention. Some districts have detained all children referred to juvenile court, while others have held only two or three out of every one hundred.[69]

> A 50% ratio is not uncommon, although the National Council on Crime and Delinquency estimates that only 10% of the children apprehended for delinquency are in need of official custody pending adjudication or disposition of their cases.[70]

Records also reveal that forty-three percent of the children detained overnight or longer are eventually released without ever being brought before a juvenile court judge;[71] half of all cases referred to juvenile courts are resolved at the intake stage before any judicial hearing.[72]

This unnecessary detention is even less tolerable in light of evidence that detention facilities are overcrowded and inadequate. In a study conducted in California counties, "the proportion of children detained daily in excess of designed capacity on the average ranged from approximately 10 percent to 100 percent."[73] Thirteen of the twenty largest counties studied in California had insufficient bed space, causing one of the major problems in their juvenile halls.[74] In Minnesota a detention center with a thirty-bed capacity transferred an excess of one thousand juveniles to jail each year.[75] Furthermore, while many states forbid the jailing of children with adults, nearly ninety percent of all juvenile court jurisdictions are too small to warrant separate facilities for the juveniles.[76] As a result "children are detained in old-age homes, insane asylums, courthouses, or often in one or two cells of the local jails set aside as 'detention quarters.' "[77] Such evidence supports the argument that release is imperative except in those limited circumstances in which there is no other alternative.

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68. *Id.*

69. D. FREED & P. WALD, BAIL IN THE UNITED STATES: (1964), at 97 [hereinafter cited as FREED & WALD].

70. *Id.*

71. *Id.* at 100.

72. *Id.*

73. THE GOVERNOR'S SPECIAL STUDY COMMISSION ON JUVENILE JUSTICE, PART II, A STUDY OF THE ADMINISTRATION OF JUVENILE JUSTICE IN CALIFORNIA 82 (1960).

74. *Id.*

75. FREED & WALD, *supra* note 69, at 107.

76. *Id.* at 105.

77. *Id.*

As a result of the unnecessary detention and the inadequate detention facilities, critics of the proceedings have advocated that the right to bail as a remedy for this abuse is constitutionally required by fundamental fairness.[78] Such a right, it is alleged, would remedy this improper detention.

Bail developed as a system for providing a means of releasing the accused while at the same time providing some assurance that he would appear at trial.[79] In its present day form of commercial bonding, involving the cash-bond and bail-bondsmen system, the bail system has been subjected to a number of criticisms concerning its practical application.[80] Not only has the monetary basis of the bail system been criticized, but the application of such a system has raised constitutional questions.[81]

The monetary basis of the bail system has permitted bail to be used to detain people for reasons other than to assure their presence at trial.[82] In 1963 the Judiciary Committee of the New York State

78. Prior to the *Gault* decision, two cases granted juveniles the right to bail based on the argument that the purpose of juvenile court acts is to provide additional benefits for the juvenile, and not to remove those rights which he had previously possessed. Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960); State v. Franklin, 202 La. 439, 12 So. 2d 211 (1943), *followed without comment in* State v. Hundley, 263 La. 94, 267 So. 2d 207 (1972). Following *Gault* three cases have granted the right to bail. Clark v. Noble (D.C. Miss. 1968), reported in 1 Pov. L. Rep. § 4130.501 (1972), based its decision on the argument that in a juvenile hearing a child was entitled to all the constitutional rights of an adult. Two Wisconsin lower court cases granted the right to bail based on the *Gault* decision. Wisconsin *ex rel.* Mayberry v. Administrator (Waukesha County Ct. 1967); Wisconsin *ex rel.* Wronski v. Frohmader, No. 349-590 (Milwaukee Cir. Ct. 1967) cited in Comment, *Right to Bail for Juveniles*, 48 Chi.-Kent L. Rev. 99, 101 n.20 (1971). *See also* Comment, *A Juvenile's Right to Bail In Oregon*, 47 Ore. L. Rev. 194 (1968); Comment, *Right to Bail for Juveniles*, 48 Chi.-Kent L. Rev. 99 (1971). Written prior to the *McKeiver* decision, these notes argue that juvenile proceedings function as criminal proceedings and therefore criminal safeguards should be imposed. *See generally* Mora, *Juvenile Detention: A Constitutional Problem Affecting Local Government*, 1 Urb. Law. 189 (1969); Dorsen & Rezneck, *In re Gault and the Future of Juvenile Law*, 1 Fam. L.Q. 1 (Dec. 1967); Comment, *Juvenile Justice and Pre-Adjudication Detention*, 1 U.C.L.A.-Alaska L. Rev. 154 (1972).

79. *See* Stack v. Boyle, 342 U.S. 1, 4 (1951). *See also* A. Goldfarb, Ransom (1965) [hereinafter cited as Goldfarb].

80. *See* Note, *An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation*, 9 Colum. J. Law & Soc. Prob. 394 (1973); Paulsen, *Pretrial Release in the United States*, 66 Colum. L. Rev. 109 (1966) [hereinafter cited as *Pretrial Release*]; Note, *Bail in the United States: A System in Need of Reform*, 20 Hastings L.J. 380 (1968). Comment, *Tinkering with the California Bail System*, 56 Calif. L. Rev. 1134 (1968). These authorities give a criticism of the bail system and offer possible alternatives.

81. *See* Foote I and Foote II, *supra* note 3.

82. "The bail system is currently used indirectly to detain certain defendants be-

Assembly cited five areas of abuse.[83] First, the committee criticized the limitation of the bail hearing to facts relating to the alleged offense or the defendant's criminal record without considering personal factors of the defendant that would make him a good risk.[84] Second, the committee cited judges who, presuming guilt, use bail to give defendants a "taste for jail" by arbitrarily setting bail beyond the defendant's financial means, resulting in the accused's detention.[85] The committee also found that judges at times used the power to coerce the defendants in some aspect of the case.[86] Fourth, it criticized judicial reliance on recommendations of the district attorney who had no more information than the judge. Such a practice, in effect, results in the abdication of judicial responsibility.[87] Lastly, the committee cited the failure of defense counsel to participate in the bail setting process and to function as a competent legal representative by appealing to the arraigning judge for bail leniency.[88]

A Philadelphia bail study revealed that in two-thirds of the cases before a particular magistrate, he set bail after considering the defendant's name and the nature of the offense alone.[89] Some magistrates candidly admitted that they set high bail to break crime waves, keep the defendant in jail, protect women, or "make an example" of a recalcitrant defendant.[90] Thus, detention is often the result of the bail system "employed to achieve other aims than the safe production of accused at the time of trial . . . ."[91]

Most important, however, are the constitutional questions of the system's relationship to indigents. Indigents often cannot afford even the minimal standard bail set for the offense, resulting in their continued incarceration.[92] "Compared with other due process problems which have arisen in recent years, bail presents differences in the treatment of the poor which are more pervasive and pernicious."[93] As-

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fore trial. Judges manipulate the bail system, which on its face does not so provide, to meet the needs for preventive detention." GOLDFARB, *supra* note 79, at 12. *See also Pretrial Release, supra*, note 80, FREED & WALD, *supra* note 69, Foote II, *supra* note 3.

83. FREED & WALD, *supra*, note 69, at 13-15, n.6, citing New York Leg. Doc. No. 37 (1963).

84. FREED & WALD, *supra* note 69, at 13.

85. *Id.* at 14.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1038 (1953) [hereinafter cited as *Philadelphia Bail Study*].

90. *Id.* at 1039-40.

91. *Pretrial Release, supra* note 80, at 114.

92. *Philadelphia Bail Study, supra* note 89, at 1032-33.

93. Foote I, *supra* note 3, at 963.

suming that the excessive bail clause implies the right to bail, the constitutional problems result from a conflict "between an historically derived discrimination and a growing thrust towards equal protection."[94] The constitutional issues inherent in the confrontation of the indigent defendant with the bail system have been enumerated by Professor Foote.[95] He asserts that the indigent defendant is being denied the fundamental fairness guaranteed by due process of law when, alleging his own innocence, he is punished by imprisonment before trial.[96] His detention denies him procedural due process: incarceration may effectively prevent adequate preparation of his case and thereby deprive him of a fair trial.[97] Denied pretrial liberty solely on account of his poverty, he is being denied equal protection of the law.[98] The indigent's apparent right to bail under the eighth and fourteenth amendments is violated when the proscription against "excessive" bail is construed in such a way as to automatically foreclose his fundamental right to freedom pending trial.[99] These complex and unsettled constitutional issues which exist in the relationship between the monetary bail system and the indigent will also be faced by indigent juveniles if they have a right to bail.

When considering the application of bail to the juvenile system, the problems become more pervasive. First, an absolute right to bail is in theory at odds with the traditional philosophy of the juvenile court; the welfare and protection of the child is at issue rather than his guilt or innocence. As the task force stated in 1967, "Release as of right plainly may interfere with the protection or care required in some cases."[100] When describing the juvenile court procedure, even reformers considered that detention of the child might at times be necessary if the home was totally unfit for the child.[101]

Another problem created by the bail system for the juvenile lies in the incapacity of the minor to enter into a contract with a bail bondsman. The juvenile is under no enforceable duty if the agreement is executory on both sides.[102] Therefore, the ability of the child to avoid his contracts by pleading his infancy as a defense[103] will discourage bondsmen to enter into a contract with him. As a result, his

94. Foote II, *supra* note 3, at 1126.
95. *Id.* at 1135.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. TASK FORCE, *supra* note 62, at 36.
101. Mack, *supra* note 16, at 117.
102. 1 A. CORBIN, CORBIN ON CONTRACTS § 6 (1963).
103. *Id.*

right to bail will be contingent on his parent's willingness or ability to enter into a contract with the bondsman. The Alaska Supreme Court noted this problem when considering the question of bail and juvenile proceedings. In the case of *Doe v. State*, the court asserted that:

> [T]he present adult bail system would be practically unsuitable as a device for securing the child's future appearance before the court, and would not necessarily result in the child's release. Because contracts entered into by minors have been held to be voidable, bail bondsmen surely would be unwilling to deal directly with a child in providing a bail bond. Unless the child's parents are willing and financially able to secure the bond, the child's right to bail will not result in release.[104]

As an additional consideration, statistical data reveal that delinquents are concentrated disproportionately in the large inner cities and tend to come from families with lower than average income.[105] Thus, a considerable number of juveniles taken into custody will possibly be confronted with the identical due process and equal protection complications faced by the adult indigent accused.

The bail system is beset with a number of practical and theoretical problems for juveniles as well as adults. Theoretically the excessive bail clause of the Eighth Amendment does not clearly provide for a right to bail in all cases.[106] In addition, not only does the system in practice set bail at exorbitant levels and subject it to abusive use, but the bail system creates a number of constitutional issues involving indigent defendants and bail's monetary basis.[107] Evidence shows that abuse and detention are prominent in the adult bail system.[108] As such, although the imposition of the right to bail may allow pre-trial release of the child, the practical application and functioning of the system does not remedy the excessive detention practices of the informal juvenile proceeding. The imposition of the right, in its prominent form of commercial bonding, would visit all the problems associated with bail in the criminal courts and with indigent defendants upon the juvenile; in addition, the voidability of a juvenile's contract could foreclose bail as a means of release.

From the evidence available, a means of remedying the unnecessary detention practices of the juvenile courts is warranted. However, in light of the problems present in the bail system, the application of the right to bail does not seem to offer the appropriate procedural remedy to render the preadjudication proceedings fundamentally fair. Rather, the juvenile court system itself provides a possible remedy for

104. 487 P.2d 47, 52 (Alas. 1971).
105. CHALLENGE, *supra* note 22, at 173.
106. See note 3 and accompanying text *supra*.
107. *Id.*
108. *Id.*

unnecessary detention. As noted earlier,[109] release is usually available at the discretion of a juvenile court official. The flexibility of the juvenile court system permits improvisation, with the present procedures providing a more satisfactory means of release than offered by the bail system. As such, the right to bail should not be constitutionally required. A number of lower courts[110] have realized the problems of the bail system and have utilized the existing procedure to correct unnecessary detention. Furthermore, in some cases the courts have imposed additional requirements to insure that detention is not a routine practice and is employed only when absolutely necessary.

Courts Consider Bail for Juveniles

In one of the first cases dealing with the right to bail following the *Gault* decision, *Fulwood v. Stone*,[111] the Court of Appeals for the District of Columbia declined to consider the constitutional right to bail of juveniles. Fulwood had been confined in the District of Columbia Receiving Home for Children pending trial on charges of robbery and assault.[112] From this situation, Fulwood's counsel had requested the minor's release on bail. The trial judge, John Sirica, denied the request, asking "Who is going to put it up?"[113] The Court of Appeals, in declining to face the issue, stated that if the provisions of the Juvenile Court Act of the District of Columbia[114] were faithfully observed, there would be a more than adequate substitute for bail.[115] This statute provided that after an officer took a child into custody, he could release the child to his parents unless otherwise ordered by the court. Thereafter, if the juvenile court had assumed custody of the child, it could still release the child to a guardian or parents pending final disposition of the case. The *Fulwood* court concluded that "appropriate inquiry" concerning pretrial custody was a requirement of the juvenile court.[116] Such an inquiry was necessary to comply with the stated statutory intent of Congress that the child and his family ties be conserved and strengthened, and the child receive the guidance and care, preferably in his own home, that would serve his best interests.[117] The case was then remanded for further inquiry.

109. See note 61 and accompanying text *supra*.
110. See notes 111-39 *infra*.
111. 394 F.2d 939 (D.C. Cir. 1967).
112. *Id.* at 941.
113. *Id.*
114. D.C. CODE §§ 16-2306, 16-2316 (1966) set out in the opinion, 394 F.2d at 943.
115. 394 F.2d at 943.
116. *Id.* at 944.
117. D.C. CODE § 16-2316 (1966).

In the recent case of *Baker v. Smith*,[118] the Kentucky Court of Appeals found that the juvenile was not entitled to the right to bail. Smith had been charged with malicious mischief for throwing a brick through the windshield of a parked automobile.[119] The court, without elaboration, declared that he was not entitled to bail because there was "ample authority in the juvenile court to release a child from detention."[120]

In *Baldwin v. Lewis*,[121] the court of appeals, as in *Fulwood*, did not find it necessary to deal with the constitutional right to bail in juvenile proceedings. In this case Baldwin had been confined on suspicion of arson, although no reasons for detention had initially been stated by the police.[122] The next day, the social worker determined that detention was necessary. However, he failed to indicate the facts that were the basis for his conclusion that the child was "almost certain to commit an offense dangerous to himself or the community before the court disposition . . . ."[123] Two days later, the children's court on rehearing affirmed the detention although the record was barren of facts to provide a basis for this conclusion. None of the witnesses' statements were in the record, nor were exhibits offered or received in evidence, and no testimony was taken.[124]

The *Baldwin* court's findings that bail was not constitutionally necessary was premised upon the belief that the Wisconsin Children's Code,[125] if faithfully observed, would provide an adequate substitute for bail.[126] Under this statute, the juvenile court was required to release the juvenile to the custody of his parents unless there is a finding that they are incapable of caring for him. The court, however, did not simply leave the faithful observance of the code to the discretion of the trial court when it must determine the detention or release of a child. In such a detention inquiry, to comply with fundamental fairness, the court required a judicial determination of probable cause; facts or documents upon which the decision for detention was based had to be identified, made part of the record, or made available to counsel for inspection.[127] Furthermore, an adequate record

118. 477 S.W.2d 149 (Ky. 1972).
119. *Id.* at 150.
120. *Id.* at 152.
121. 300 F. Supp. 1220 (E.D. Wis. 1969) *rev'd on procedural grounds*, 442 F.2d 29 (7th Cir. 1971).
122. *Id.* at 1224.
123. *Id.*
124. *Id.* at 1226.
125. WIS. STAT. ANN. § 48.29 (1967).
126. 300 F. Supp. at 1233.
127. *Id.* at 1232.

containing the facts supporting the court's decision was required by due process.[128]

The tendency of courts, faced with the issue of bail, to avoid the question and to modify the release procedures of the juvenile court was also followed by the California Supreme Court in *In re M.*[129] The minor, William M., was taken into custody for selling marijuana to a police officer. The juvenile court judge conducting the detention hearing declared that "anybody who sells marijuana or LSD is detained here until his regular hearing, for the safety of others."[130] Although the juvenile's counsel presented evidence to prove that the minor would not present an imminent danger to himself or others, this evidence was rejected by the court.[131] An additional suggestion that the child be released to the responsibility of his counsel acting as a probation officer was also rejected.[132] After refusing to accept proof that detention could possibly be deleterious to the boy and refusing to permit the boy or his parents to testify, the court stated that it detained "as a matter of 'philosophy' or 'policy' every child who was charged with the offense involved in the present case."[133]

When considering the bail issue presented in this case, the California Supreme Court noted that the bail system could provide "unexplored difficulties for most juveniles, particularly those who are indigent."[134] As a result, the court declined to deal with the constitutional question and recognized that the California Juvenile Court Law[135] provided an adequate substitute for bail if properly administered.[136] After noting that a juvenile has been granted the right to remain silent and the right to confrontation by statute, the court concluded that these sections clearly indicated the legislative intent that to maintain a detention order, a *prima facie* case that the minor committed the offense must be presented.[137] Furthermore, the court held that when considering detention, the nature of the offense charged could not be the sole rationale for detention, and "policies" for automatic detention could not be established.[138]

128. *Id.* at 1233.
129. 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970).
130. *Id.* at 20, 473 P.2d at 739, 89 Cal. Rptr. at 35.
131. *Id.*
132. *Id.*
133. *Id.* at 21, 473 P.2d at 740, 89 Cal. Rptr. at 36.
134. *Id.* at 26, n.17, 473 P.2d at 744, 89 Cal. Rptr. at 40. The court cited Foote II, *supra* note 3.
135. CAL. WELF. & INST. CODE §§ 500-966 (West 1961).
136. 3 Cal. 3d at 26, n.17, 473 P.2d at 744, 89 Cal. Rptr. at 40.
137. *Id.* at 28, 473 P.2d at 745-46, 89 Cal. Rptr. at 41-42.
138. *Id.* at 31, 473 P.2d at 747, 89 Cal. Rptr. at 43.

The Alaska Supreme Court in *Doe v. State*[139] considered the practical problems of the contractual incapacity of the minor. The Alaskan high court, like its California counterpart, recognized the criticisms of the bail system and modified the existing means of release offered by the juvenile court. In the *Doe* case, a petition for a declaration of delinquency was filed against the minor for selling lysergic acid diethylamide (LSD). At the detention hearing, the court prepared to adjudicate the case on the merits; as a result, a continuance for preparation of the case was granted to the minor's attorney. Because the hearing was on a Friday, to be continued on the following Monday, the court inquired into the question of whether the child should be detained over the weekend. The district attorney stated that the defendant had threatened one of the witnesses and for this reason requested that the minor be detained.[140] Doe's attorney objected to this hearsay statement and declared that the minor had never previously appeared before the court, and that there had been no showing under the rule that detention was necessary. Nevertheless, the order for detention was issued.[141]

Doe's attorney appealed therefrom for a declaration that children have a constitutional right to bail. The Alaska Supreme Court, after recognizing the problems of the adult bail system and the additional contractual problems of the minor,[142] declined to impose these problems on the minor. Such an imposition could only be detrimental to the interests of the child. Instead, the court held that the child had the right to remain free prior to adjudication when facts supporting the juvenile petition would constitute a crime if committed by an adult, and when the juvenile's appearance was reasonably assured.[143] Due process standards, the court declared, are required at detention hearings because the child may lose his liberty. Such being the case, due process required that the child have the right to counsel at the detention inquiry,[144] that only competent, sworn testimony be admitted,[145] and that facts supporting detention must be specifically stated.[146]

The additional due process requirements espoused by these lower courts maintained the informality and flexibility of the traditional

139. 487 P.2d 47, 49 (Alas. 1971).

140. *Id.*

141. *Id.*

142. *Id.* at 52.

143. *Id.* at 52-53.

144. *Id.* at 53. The court cited *In re* Gault, 387 U.S. 1 (1967), and Baldwin v. Lewis, 300 F. Supp. 1220 (E.D. Wis. 1969).

145. 487 P.2d at 53.

146. *Id.* The court cited *In re* G.M.B., 483 P.2d 1006 (Alas. 1971), and Baldwin v. Lewis, 300 F. Supp. 1220 (E.D. Wis. 1969).

juvenile court proceedings. The judges continued to have the discretion to grant release of the child or retain custody of the juvenile, whichever was in the best interests of the individual. Due process safeguards, however, were imposed by these courts at the detention inquiry to avoid the arbitrary imposition of detention. Thus, these court decisions resulted in an accommodation of the preadjudication within the due process framework without imposing the problems and additional complications of the criminal bail system, while continuing to maintain the concerns and flexibility of the juvenile court.

Conclusion

In light of the Supreme Court's mandate in *McKeiver* that the beneficial aspects of the juvenile process be maintained, and that no real benefits and only additional complications are contributed by the right to bail, this right should not be imposed on the proceedings. The informal preadjudication stage may be subject to abuse; evidence supports the fact that the proceedings result in unnecessary detention of juveniles and therefore do not satisfy fundamental fairness. The right to bail, however, is not the appropriate means for obtaining the child's release and remedying the abusive detention practices; fundamental fairness of the juvenile proceedings will not be satisfied by the imposition of the right to bail. Therefore, this right is not constitutionally required in preadjudication proceedings. The benefits of the informal juvenile proceeding outweigh the questionable advantages offered by the right to bail, and more closely effectuate the goals of the juvenile court system. These beneficial aspects have been recognized by lower courts. The actions of these courts bring the proceedings within the due process framework by modifying the available means of release offered by the juvenile court so that fundamental fairness is satisfied. These decisions have imposed procedural and evidentiary due process safeguards to insure release when at all possible while permitting custody of the child only when consistent with his welfare. In this manner the juvenile is not subject to the practical deficiencies of the bail system, but rather, his best interests and the goals of the juvenile system are more effectively served.