Loyola of Los Angeles Law Review

Volume 3
Number 2 *Symposium: The Conglomerate Corporation*

Article 15

4-1-1970

A Boy's Day at the Zoo—The Kangaroo Court: In Re Dennis M

Steven Spector

A BOY'S DAY AT THE ZOO—THE KANGAROO COURT: *IN RE DENNIS M.*[1]

"Under our Constitution, the condition of being a boy does not justify a kangaroo court."

In re Gault[2]

"Due process of law" as guaranteed by the Fifth[3] and Fourteenth[4] Amendments compels the state in an adult criminal prosecution to adhere to that standard of proof[5] which requires that facts supporting a charge be proven "beyond a reasonable doubt".[6] It is also now established that an adult must waive his *Miranda* rights[7] before the results of an in-custody

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1 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969).

2 387 U.S. 1, 28 (1967).

3 U.S. CONST. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

4 U.S. CONST. amend. XIV, § 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

5 A good working definition of "standard of proof" is found in *Symposium—Standards of Proof and Admissibility in Juvenile Court Proceedings*, 54 MINN. L. REV. 362, 363-64 (1969):

> The degree or quantum of proof required for a decision is often spoken of as the burden of proof. It must be carefully distinguished from the more usual usages of 'burden of proof' which refer to the burden of producing evidence and the burden of persuasion. . . . The *degree of proof* . . . refers to the question of how much more likely one version of the facts is than the other.

6 *See* Speiser v. Randall, 357 U.S. 513, 525-26 (1958), and Leland v. Oregon, 343 U.S. 790, 802-03 (1952) (dissenting opinion). *See also* Holland v. United States, 348 U.S. 121, 126 (1954), and Brinegar v. United States, 338 U.S. 160, 174 (1949).

There do not appear to be any cases explicitly holding that the Due Process Clauses of the Fifth and Fourteenth Amendments require the standard of proof beyond a reasonable doubt. Nor is this standard enunciated in the Constitution. The issue has been discussed by the federal courts which have spoken of the burden of proof in the abstract, without explanation, holding that beyond a reasonable doubt is required. *See, e.g.*, United States v. Fleischman, 339 U.S. 349, 363 & n.10 (1950); Christoffel v. United States, 338 U.S. 84 (1949); Lilienthal's Tobacco v. United States, 97 U.S. 237 (1877).

The *Speiser* and *Leland* opinions were both on the state level and thus it may fairly be assumed that this standard is *implied* to the states as well as the federal government.

7 In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court held that a confession during police interrogation was not admissible in evidence unless the police bore the burden of proving that the accused voluntarily gave his statement *after* being informed of his constitutional guarantees. *Id.* at 476. These procedural guarantees were held applicable when the nature of the investigation changed from an investigatory to an accusatory stage. Before questioning, the police must inform the accused that he has a right to remain silent, that any statement he makes may be used against him, that he has the right to have counsel present and that if he cannot afford

interrogation may be admitted into evidence against him. In *In re Dennis M.*,[8] the California Supreme Court was confronted with the application of these protections to juvenile offenders.

Dennis, age fifteen and one-half, stole an automobile and before abandoning it, removed a revolver from the glove compartment. Ten days later, while visiting his girl friend and thinking he had completely unloaded the gun, he placed the barrel under her chin while hugging her and pulled the trigger twice. The gun discharged the second time, killing the girl.

Upon arriving at the victim's home, investigating officers advised Dennis of his constitutional rights by reading from a "pocket slip"[9] containing a listing of rights, which Dennis then signed. When asked if he wanted to talk about the incident, Dennis replied that he had accidentally shot his girl friend. He further admitted the theft of the gun and the car. Neither his attorney, his parents nor any other adviser was present.

Petitions were filed in the juvenile court to declare Dennis a ward of that court under Welfare and Institutions Code Section 725.[10] The basis for such a proceeding was provided in Welfare and Institutions Code Section 602,[11] which granted to the juvenile courts jurisdiction over "any person under the age of 21 . . . who violates any law of this State. . . ." The court held that as jurisdiction depended on whether a violation of the law had occurred, Welfare and Institutions Code Section 701[12] controlled. Section 701 directed that a preponderance of the evidence, rather than proof beyond a reasonable doubt, was sufficient to establish such a violation.[13]

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counsel the state will provide him with one. *Id.* at 444. Additionally, waiver of these rights is possible, but it must be made knowingly and intelligently and the burden is upon the police to show that a valid waiver was made. *Id.* at 475.

8 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969).

9 A "pocket slip" is a printed form succinctly containing the bare warnings that are required to be given to the suspect by Miranda v. Arizona, 384 U.S. 436 (1966).

10 CAL. WELF. & INST. CODE § 725 (West 1966) provides in relevant part:

> After receiving and considering the evidence on the proper disposition of the case, the court may enter judgment as follows:
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> . . .
>
> (b) If the court has found that the minor is a person described by [Section] . . . 602, it may order and adjudge the minor to be a ward of the court.

11 CAL. WELF. & INST. CODE § 602 (West 1966) provides:

> Any person under the age of 21 years who violates any law of this State . . . is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

12 CAL. WELF. & INST. CODE § 701 (West 1966) provides:

> At the hearing, the court shall first consider only the question whether the minor is a person described by [Section] . . . 602, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible . . . however, a preponderance of evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602. . . .

13 This decision, ultimately affirmed, may be a misconstruction of the code sections. Section 701 on its face requires only a preponderance of the evidence to show

The petitions charged Dennis with involuntary manslaughter, theft of a revolver and automobile theft.[14] At the hearing the court determined that Dennis had committed the three violations, was thus within the jurisdiction of the juvenile court and declared him to be a ward of the court.

The Court of Appeal[15] implicitly upheld the determination of the lower court that the preponderance of the evidence test was proper. The judgment of involuntary manslaughter, however, was reversed.[16] The court held that Dennis's extrajudicial statements were not legally admissible, as required by Section 701, in that they were obtained in violation of the standards set forth in *Miranda*.[17]

On appeal to the California Supreme Court,[18] Dennis contended that the prior finding of involuntary manslaughter, reversed in the Court of Appeal, "may have had significant weight in the [juvenile] court's subsequent ruling on disposition,"[19] and thus a new determination concerning wardship was necessary. The Supreme Court, considering anew the merits, rejected Dennis's arguments and, with one dissent, affirmed the judgment of the juvenile court.

Appellant's prime contention was that the facts supporting the charge were not established beyond a reasonable doubt, which he asserted was required by the United States Supreme Court decision in *In re Gault*.[20]

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that a minor *is or is not within the meaning of section 602.* Section 602, which alone addresses itself to "violations of the law", makes *no* statement concerning the standard of proof and thus leaves that test open. Therefore these sections may require a preponderance of the evidence to show that the defendant falls within the purview of Section 602, and yet the jurisdictional violation must be shown beyond a reasonable doubt.

[14] *In re* Dennis M., 70 Cal. 2d 444, 449, 450 P.2d 296, 298, 75 Cal. Rptr. 1, 3 (1969).

[15] *In re* Medina, 63 Cal. Rptr. 512 (1967), *vacated*, 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969).

[16] *Id.* at 518.

[17] *Id.* at 517-18.

[18] When a case is appealed to the California Supreme Court, the opinion of the Court of Appeal is vacated. *See* Knouse v. Nimocks, 8 Cal. 2d 482, 66 P.2d 438 (1937), and Estate of Kent, 6 Cal. 2d 154, 57 P.2d 901 (1936). Thus, an appeal is considered to be from the trial court. As such, the contentions regarding the standard of proof and the admissibility of the confession were to be renewed in the Supreme Court.

[19] *In re* Dennis M., 70 Cal. 2d 444, 450, 450 P.2d 296, 299, 75 Cal. Rptr. 1, 4 (1969). CAL. WELF. & INST. CODE § 702 (West 1966) provides:

> After hearing such evidence, the court shall make a finding . . . whether or not the minor is a person described by [Section] . . . 602 . . . . If the court finds that the minor is such a person, it shall make and enter its findings and order accordingly and shall then proceed to hear evidence on the . . . proper disposition . . . of the minor.

As a result, Dennis contended that if the holding of involuntary manslaughter was invalid, error resulted in the trial court's reliance on this "conviction" in its determination as to wardship.

[20] 387 U.S. 1 (1967).

Thus it was argued that as proof of the violation was not so established, the minor could not be held to have "violate[d] any law of this State. . . ."[21] To hold otherwise, Dennis urged, would constitute a deprivation of due process of law. The pivotal issue therefore was whether, under *Gault*, due process required an application of the "beyond a reasonable doubt" standard to establish charges in a juvenile proceeding adjudicating guilt.

Using a three-fold approach, the California Supreme Court held that beyond a reasonable doubt was *not* required, on the basis of the language in *Gault*, upon the inference that the United States Supreme Court had left the decision to the states, and upon the legislatively-enacted preponderance of the evidence test.

The California Supreme Court in examining *Gault* reiterated that this decision "inaugurated a sweeping constitutional reform of the rights of juveniles"[22] within the judicial forum. But the court also was careful to note that *Gault* was intended to affect not "the totality of the relationship of the juvenile and the state," but only certain aspects, particularly the "*adjudicatory stage* of juvenile proceedings, and then only when the outcome may be commitment to a state institution."[23] (emphasis added.)

The court then held that the Constitution did not require that the full range of criminal rights afforded adults be given also to juveniles,[24] and that *Gault* merely adopted the test of *Kent v. United States*,[25] which stated that the "hearing must measure up to the essentials of due process and fair treatment."[26] *Gault* was read to hold *solely* that certain essentials of due process in juvenile proceedings consisted of: 1) adequate notice of charges, 2) assistance of counsel, 3) opportunity for confrontation and cross-examination of witnesses, and 4) the privilege against self-incrimination.[27] The court thus concluded that as the criminal standard of proof was not expressly mentioned, *Gault implicitly* did not require the test of beyond a reasonable doubt.[28]

The *rationale* of *Gault*, however, may be at variance with this decision. *Gault* indicates that the essentials of due process suggest "the appearance as well as the actuality of fairness, impartiality and orderliness" for the juvenile, and the "procedural regularity and the exercise of care implied

21 CAL WELF. & INST. CODE § 602 (West 1966).

22 *In re* Dennis M., 70 Cal. 2d 444, 450, 450 P.2d 296, 299, 75 Cal. Rptr. 1, 4 (1969).

23 *Id.*

24 *Id.* at 450-51, 450 P.2d at 299, 75 Cal. Rptr. at 4.

25 383 U.S. 541 (1966).

26 *Id.* at 562.

27 70 Cal. 2d at 451, 450 P.2d at 299, 75 Cal. Rptr. at 4, *citing In re* Gault, 387 U.S. 1, 31-57 (1967). The Court clarified this pronouncement by stating: "We emphasize that we indicate no opinion as to whether the decision of [the Arizona] court with respect to such other issues does or does not conflict with the requirements of Federal Constitution." 387 U.S. at 10-11.

28 70 Cal. 2d at 451, 450 P.2d at 299, 75 Cal. Rptr. at 4.

in the phrase 'due process.' "[29] While these terms are far from definitionally precise, under *Gault*, it is clear that a juvenile need not be afforded *all* the procedural protections provided an adult in a criminal prosecution.[30] The rationale is that where essential differences exist between the two proceedings, the underlying purpose or justification of a specific protection embodied in due process or other clause may be absent. Thus the Sixth Amendment[31] right to a jury trial may not be requisite in a juvenile hearing which, contrary to adult proceedings, emphasizes the desirability of the judge's ability to meet the highly varied needs of each individual juvenile. A judge, more freely than a jury, can exercise discretion uncouched in technical legalities.[32]

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[29] 387 U.S. at 27-28.

[30] *See also* the separate opinions of Justices Black and Harlan. Justice Black takes the position that the juvenile is entitled to *all* of the guarantees in the Bill of Rights made applicable to the states:

> Undoubtedly this would be true of an adult defendant, and it would be a plain denial of equal protection of the laws—an invidious discrimination—to hold that others subject to heavier punishments could, because they are children, be denied these same constitutional safeguards. *Id.* at 61.

Thus Justice Black would have little difficulty in applying the beyond a reasonable doubt test in the instant case.

Justice Harlan's position, however, is that due process allows the Supreme Court to determine the procedural protections that are necessary to guarantee the fundamental fairness of juvenile proceedings "in a fashion consistent with the 'traditions and conscience of our people.'" *Id.* at 67. For Justice Harlan, the question becomes the *method* by which the procedural requirements of due process should be measured. These should be considered in light of the problems which confront the state and the character of the procedural system which the state has created. *Id.* at 68. He suggests three criteria: 1) no more restrictions should be imposed than are imperative to assure fundamental fairness, 2) the restrictions which are imposed should preserve as far as possible the state's purpose, and 3) restrictions should be chosen which will permit the orderly selection of any additional protections necessary. *Id.* at 72.

Thus it would appear that for Justice Harlan the reasonable doubt test affords fundamental fairness. Without it, the present lack of uniformity among the standards of proof in use allows convictions more or less depending upon the state where prosecution occurs. Secondly, the purposes of the juvenile system will not be eroded by the application of the reasonable doubt test. This standard affects only the adjudicatory stage of the proceeding, not the other stages where the benefits would remain. *See id.* at 21-22. Finally, reasonable doubt will not interfere with any other restrictions that the Court may be constrained to impose. It goes only to the quantum of proof that must be adduced to establish guilt.

[31] U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

[32] Commonwealth v. Johnson, 211 Pa. Super. 62, 234 A.2d 9 (1967) (jury trial not required). *But see* Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968); Peyton v. Nord, 73 N.M. 717, 437 P.2d 716 (1968); Santana v. State, 431 S.W.2d 558 (Tex. Civ. App. 1968), *rev'd on other grounds*, 444 S.W.2d 614 (1969). In *Johnson*, the court emphasized the need to be able to deal in a highly individualized manner with each case and that it was able to do so with a judge alone and unable to do so with a jury. The court stated:

> The institution of [a] jury trial in [a] juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's

The essential question, however, is which prophylactic rights are provided under due process. The basic rationale underlying *Gault* is that, *in certain respects*, a juvenile proceeding is sufficiently analogous to an adult criminal prosecution because the due process clause requires that juveniles, as well as adults, in certain areas, be afforded the same procedural protections. The problem in the instant case is whether the beyond a reasonable doubt standard of proof is one of these procedural protections provided adults which should be extended to minors.

Gault at the outset declared that "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."[33] But loss of liberty alone is not the sole similarity between criminal and juvenile proceedings. In addition to incarceration and subsequent loss of liberty, the result of a juvenile hearing may be no different from that of criminal prosecutions as: 1) the length of incarceration may equal or exceed that of a criminal conviction,[34] 2) the stigma that attaches to

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ability to function in this unique manner, and would result in a sterile procedure which could not vary to meet the needs of delinquent children. 211 Pa. Super. at 78, 234 A.2d at 17.

It is possible that individuality need not be sacrificed were the court to consist of both judge *and* jury, but this, in effect, would make the jury a useless formality, where the judge in order to retain these benefits could freely vacate the decision of the jury and insert his own. The California Supreme Court listed other differences. If these differences did actually exist, the problem of *Gault* may never have arisen. The *Gault* Court noted in fact that:

> There is evidence . . . that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children. 387 U.S. 1, 18 n.23, *quoting* Kent v. United States, 383 U.S. 541, 556 (1965).

Realistically, these attempts to aid the minor were more honored in the breach than in the practice. However, for the curious, the differences the California court felt existing were: 1) the processing and treatment of juveniles is separate from adults, 2) judges take into account the demeanor, conduct, emotional and psychological attitude of the juvenile, and determine on a case by case basis the appropriate action to be taken, 3) the proceeding is conducted in a non-criminal atmosphere for the benefit and protection of the youth, 4) the juvenile is not classified as a criminal, but as a delinquent and the stigma of being labeled a criminal is not present, and 5) the need is for speedy and individualized rehabilitative services because the offender may only exhibit behavioral or personality disorders. Thus beyond a reasonable doubt is not as critical as in an adult proceeding. *In re* Dennis M., 70 Cal. 2d 444, 454-55 n.8, 456, 450 P.2d 296, 302 n.8, 303, 75 Cal. Rptr. 1, 7 n.8, 8 (1969).

[33] 387 U.S. at 36.

[34] One may be committed to the California Youth Authority until age 25. CAL. WELF. & INST. CODE § 1771 (West 1966). In this case, commitment would thus have been for a period of approximately 10 years. Under the Penal Code, the maximum sentence for involuntary manslaughter is 15 years. CAL. PEN. CODE §§ 192, 193 (West 1957). It is also possible that a juvenile and an adult offender may be sentenced for equal periods of time. If the charge, for example, had been assault with a deadly weapon, a maximum 10 year period of detention may have resulted. CAL. PEN. CODE § 245 (West 1957). *Gault* is an example of a situation where the juvenile

both reflects upon the character and reputation of the individual,[35] 3) commitment is to a state institution where liberty is restrained, even though it is called an industrial school,[36] and 4) there is a strong possibility that juveniles will be placed in the same facilities as adult criminals.[37]

These many similarities may be indicative that *all* adult criminal rights should be afforded juveniles. While this in fact may be the ultimate evolution of *Gault*, only one court has so stated.[38] However, it is clear that the criminal standard of proof at least merits special consideration.

The use of the reasonable doubt test is as traditional as the presumption of innocence until proof of guilt.[39] And, in addition to the "compelling similarity" between this right and the specific rights held applicable in *Gault*, "in practical importance . . . the insistence upon a high degree of proof ranks as high as any other protection. . . ."[40] Moreover, as

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period of commitment far *exceeded* the adult period. Gault was placed in an industrial school for the period of his minority, approximately six years. The same crime applied to an adult would have resulted in a fine of from $5 to $50 or imprisonment for not more than two months. 387 U.S. at 29.

35 The United States Supreme Court stated in *Gault*:

> . . . we are told that one of the important benefits of the special juvenile court procedures is that they avoid classifying the juvenile as a 'criminal.' The juvenile offender is now classed as a 'delinquent.' . . . *It is disconcerting, however, that this term has come to involve only slightly less stigma than the term 'criminal' applied to adults.* 387 U.S. at 23-24 (emphasis added.)

The Court also noted that, "[T]he word 'delinquent' has today developed such invidious connotations that the terminology is in the process of being altered; the new descriptive phrase is 'persons in need of supervision'. . . ." 387 U.S. at 24 n.31, *citing* Note, 79 HARV. L. REV. 775, 799 n.140 (1966).

36 *Gault* also indicated that:

> A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence —and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is [still] an institution of confinement in which the child is incarcerated. . . . *Id.* at 27.

37 In discussing the equivalence of commitment as a juvenile delinquent and imprisonment as an adult offender, the Court in *Gault* noted that:

> in over half of the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult 'criminals.' *Id.* at 50.

38 *See In re* Rindell, R.I. Family Court (Jan. 10, 1968), *discussed in* 36 U.S.L.W. 2468 (1968).

39 *In re* Dennis M., 70 Cal. 2d 444, 453-54, 450 P.2d 296, 301, 75 Cal. Rptr. 1, 6 (1969). *See also* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 321 (1954); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1153 (1960).

40 United States v. Costanzo, 395 F.2d 441, 444 (4th Cir.), *cert. denied*, 393 U.S. 883 (1968). In extending the criminal standard of beyond a reasonable doubt to apply to the Federal Juvenile Act the court stated:

> We see a *compelling similarity* between the enumerated safeguards due a juvenile in as full measure as an adult and the requirement of proof beyond a reasonable doubt. In *practical importance* to a person charged with crime the insistence upon a high degree of proof *ranks as high as any other protection*; and if young and old are entitled to equal treatment in the one respect, we can think of no

with the rights enumerated in *Gault*, ". . . the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication."[41] This becomes clearer when *Gault* is considered as affecting only the adjudicatory procedure and does not prevent the state from utilizing whatever means, consonant with the Constitution, during the subsequent rehabilatory stage.

Perhaps a more important consideration concerns the use of the criminal test as a *substantive*, rather than *procedural*, tool. Each of the *Gault* requirements, as here, affects the outcome of the proceeding.[42] Other rights which arguably are not required are procedural, as they do not directly affect the result, but instead are means imposed by society to ensure that this same result will be determined by a process which is free of prejudice or bias. Thus whether a judge or a jury is the finder of fact has no bearing, in theory, on the result. The same cannot be said, however, for the standard of proof test.

Finally, beyond a reasonable doubt is not only a means to ensure the effective application of the *Gault* rights, but is also within the spirit, if not the letter, of that decision. Upon this basis, the Illinois Supreme Court extended the requirement of beyond a reasonable doubt to juveniles in *In re Urbasek*.[43] Referring to *Gault*, the opinion declared:

> [T]he language of that opinion *exhibits a spirit that transcends the specific issues there involved*, and that, in view thereof, it would not be consonant with due process or equal protection to grant allegedly delinquent juveniles the same procedural rights that protect adults charged with crimes, *while depriving these rights of their full efficacy* by allowing a finding of delinquency upon a lesser standard of proof than that required to sustain a criminal conviction.[44] (emphasis added.)

Thus it may fairly be concluded that due process of law, under the rationale of *Gault*, requires that the beyond a reasonable doubt test, inherent in criminal actions, be made applicable to juvenile adjudications. In holding to the contrary, however, California relied on other considerations.

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reason for tolerating an inequality in the other. (emphasis added.) *Id.*

[41] *In re* Gault, 387 U.S. 1, 22 (1967). *See also Symposium—Basic Rights for Juveniles in Juvenile Proceedings Under the Minnesota Juvenile Court Rules: A Response to Gault*, 54 MINN. L. REV. 335, 360-61 (1969).

[42] It is evident that the four areas constitutionally guaranteed to juveniles by *Gault* all have significant effect on the outcome of the proceeding. Notice of charges "must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded." 387 U.S. at 33. The right to counsel is necessary to allow the juvenile "to cope with the problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceeding" and to ascertain whether there is a defense and prepare and present it. *Id.* at 36. The privilege against self-incrimination is outcome determinative where a person can be compelled to be a witness against himself when he is threatened with a deprivation of liberty. *Id.* at 50. The right of confrontation and cross-examination ensures that the adjudication will not be made by inappropriate considerations or incompetent evidence. *Id.* at 57 n.98.

[43] 38 Ill. 2d 535, 232 N.E.2d 716 (1967).

[44] *Id.* at 541-42, 232 N.E.2d at 719.

California further based its decision on inferences drawn from *Gault's* express refusal to rule on the standard of proof requirement.[45] The United States Supreme Court, declining to rule on the merits, stated: "We emphasize that we indicate no opinion as to whether the decision of [the Arizona] court with respect to such other issues does or does not conflict with requirements of the Federal Constitution."[46] Thus California considered itself and other states free to determine this issue in light of the absence of a controlling United States Supreme Court opinion.

California was not greatly swayed in its examination of the conflicting decisions by other state and lower federal courts and deemed the result to be highly inconclusive. This view can be justified, however, only if both pre-and post-*Gault* decisions were considered at the time of the California ruling.

The overwhelming majority of pre-*Gault* cases were in accord in holding that the criminal standard was not constitutionally required.[47] It is questionable, however, whether this body of case law should have been consulted on the present issue. The concern here is for the effect *Gault* has had on the question whether the requirements of due process demand the reasonable doubt test. Therefore the decisions prior to *Gault*, while significant, are not relevant to the issue, as *Gault* concededly has changed the constitutional basis of the underlying policy, typified by the *parens patriae* juvenile proceeding. However, the California Supreme Court seemed to place great emphasis on the fact that pre-*Gault* weight of authority clearly favored the preponderance of the evidence test.[48]

Prior to *Dennis* at least six jurisdictions had considered the issue of

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[45] While this is undoubtedly a proper interpretation of *Gault*, the court also relied in part on *In re* Whittington, 391 U.S. 341 (1968), stating: ". . . and one year later the Court again refrained from the [standard of proof] issue." 70 Cal. 2d at 451, 450 P.2d at 299, 75 Cal. Rptr. at 5. It remains to be seen whether California gave this case its proper construction.

In *Whittington*, the United States Supreme Court granted certiorari to the Ohio court affirming a judgment based on the preponderance of the evidence test. The Court heard oral argument on the appropriate standard of proof, but did not reach the merits of the case. Rather the Court vacated the judgment and remanded the case to the Ohio appellate courts for consideration in light of *Gault*, which had been decided in the interim between the granting of certiorari and the remand order. 391 U.S. 341 (1968).

What the California court fails to note is *why* the case was remanded. The United States Supreme Court did not pass on the merits because of an intervening order from the Ohio court binding the juvenile over for trial as an adult. Thus there was no final state ruling in the case and on remand, the Ohio majority avoided the issue, leaving to the dissent the privilege of pointing out how the question was begged. *In re* Whittington, 17 Ohio App. 2d 164, 245 N.E.2d 364 (1969).

[46] *In re* Gault, 387 U.S. 1, 10-11 (1967).

[47] *See* cases collected at Annot., 43 A.L.R.2d 1128, 1138-41 (1955).

[48] *See In re* Dennis M., 70 Cal. 2d 444, 451, 450 P.2d 296, 299-300, 75 Cal. Rptr. 1, 5 (1969).

the standard of proof in a post-*Gault* setting. Illinois[49] and Texas[50] had held that the beyond a reasonable doubt standard was required, as did the Court of Appeal for the Fourth Circuit,[51] a majority in Nebraska[52] and a lower Rhode Island court.[53]

The sole post-*Gault* decision previous to *Dennis* permitting the use of a lesser standard of proof was *In re Wylie.*[54] The court there adopted its own pre-*Gault* holding of a preponderance of the evidence test almost without comment. However, the prior holding,[55] while consonant with pre-*Gault* rationale, does not appear to be responsive to the changes initiated by *Gault.* The District of Columbia opinion rested on the reasoning that "[b]ecause the child is exempt from the criminal law and from criminal penalties, safeguards of the criminal law generally have no application in juvenile proceedings."[56] It is evident that *Gault,* even under a narrow construction, shows the misdirection of this line of reasoning.

The California Supreme Court then considered the status of the preponderance of the evidence test specifically embodied in Welfare and Institutions Code Section 701. This section had earlier been challenged as being violative of either due process or equal protection in *In re Johnson.*[57] There the validity of this statute was upheld, where the court stated: "The rationale of all of the decisions on the subject in this state is that because a proceeding before the juvenile court is not a criminal proceeding the constitutional and statutory rights given to persons charged with crime are not applicable to such proceedings."[58]

Johnson, in turn however, rested upon the court's earlier decision *People ex rel. Weber v. Fifield,*[59] which dealt with the somewhat related problem

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49 *In re* Urbasek, 38 Ill. 2d 535, 232 N.E.2d 716 (1967).

50 Santana v. State, 431 S.W.2d 558 (Tex. Civ. App. 1968). Subsequent to *Dennis,* the Texas Supreme Court reversed in a 4-3 decision. 444 S.W.2d 614 (1969). Thus this is no longer good authority.

51 United States v. Costanzo, 395 F.2d 441 (4th Cir.), *cert. denied,* 393 U.S. 883 (1968).

52 DeBacker v. Brainard, 183 Neb. 461, 161 N.W.2d 508 (1968), *appeal dismissed,* 396 U.S. 28 (1969). A majority of four justices of the Nebraska court thought the beyond a reasonable doubt test was required, but the statutory preponderance of the evidence test had to be upheld because Nebraska law requires the concurrence of five judges to hold a legislative act unconstitutional. *Id.* at 462, 161 N.W.2d at 509.

53 *In re* Rindell, R.I. Family Court (Jan. 10, 1968), *discussed in* 36 U.S.L.W. 2468 (1968). That court stated that *all* of the guarantees of the Bill of Rights should be applicable in juvenile proceedings.

54 231 A.2d 81 (D.C. Ct. App. 1967).

55 *In re* Bigesby, 202 A.2d 785 (D.C. Ct. App. 1964).

56 *Id.*

57 227 Cal. App. 2d 37, 38 Cal. Rptr. 405 (1964).

58 *Id.* at 39-40, 38 Cal. Rptr. at 406. It would appear that the same criticism leveled at *In re* Wylie, 231 A.2d 81 (D.C. Ct. App. 1967), is also applicable here.

59 136 Cal. App. 2d 741, 289 P.2d 303 (1955).

of right to counsel in a juvenile proceeding. No mention of due process was made in that decision denying counsel and thus this predecessor to *Dennis* is directly contrary to the United States Supreme Court's *Gault* decision.[60] Some doubt thus exists as to the validity of this line of reasoning.

Nevertheless, the California Supreme Court held that unless the differences between criminal prosecutions and juvenile proceedings were *obliterated* by *Gault*, *Johnson* would remain the law in California. It is curious that the court felt obliteration was necessary before *Johnson* would be disapproved. As previously noted, perhaps a more logical stance is that criminal rights are constitutionally required where they have sufficient nexus and fall within that area of similarity between criminal and juvenile proceedings. Thus if the distinctions were merely modified or changed rather than eradicated, an opposite result should obtain in that area of change. Mere change would therefore necessitate compliance in part to the fundamental fairness inherent in due process.

The California court, however, expressly disapproving any blending of criminal and juvenile actions, quoted *Kent v. United States*[61] stating under the Constitution, the juvenile courts need not "conform with all the requirements of a criminal trial or even of the usual administrative hearing."[62] Thus *Johnson* remained controlling, notwithstanding the doubtful conclusions reached by earlier decisions from which *Johnson* stemmed.[63]

Accordingly, California adopted the position that due process did not require the criminal standard of proof in juvenile proceedings. Aside from the questionable constitutionality of this stance, it is doubtful whether the social policy of California is in any way advanced. The California Legislature recently considered three bills advancing either a beyond a reasonable doubt or a clear and convincing evidence test.[64] The latter was ultimately

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[60] *Fifield* declared that juvenile proceedings were not criminal in nature—a rationale never tested in California against the requirements of due process and repugnant to the letter and spirit of *Gault*. *Accord, Ex parte* Daedler, 194 Cal. 320, 228 P. 467 (1924).

[61] 383 U.S. 541 (1966).

[62] *In re* Dennis M., 70 Cal. 2d 444, 454, 450 P.2d 296, 301, 75 Cal. Rptr. 1, 7 (1969).

[63] The California Supreme Court gave summary treatment to the constitutionality of the statute apart from *Johnson*. After citing to cases upholding a presumption of constitutionality of legislative acts, the court concluded:

> [W]e cannot say that the Legislature plainly exceeded constitutional limits in finding that the benefits of the reasonable doubt standard would be outweighed by the adverse effects of imposing that doctrine of adult criminal law on the essentially remedial proceedings of the juvenile court. 70 Cal. 2d at 457, 450 P.2d at 303, 75 Cal. Rptr. at 9.

This, however, essentially begs the question whether the statute meets the requirements of due process.

[64] A.B. 655, A.B. 1660 and A.B. 2332 of the 1969 Regular Session of the Legislature all proposed to change the standard of proof in juvenile hearings to beyond a reasonable doubt. A.B. 655 was substantially changed by amendment before passage, then was

adopted, but was in turn vetoed by Governor Reagan. Since the legislature has explicitly expressed dissatisfaction with the present standard, renewed attacks may be expected in both the legislative and judicial arenas.[65]

Further ground for appeal was Dennis's contention that extrajudicial oral statements made by him to investigating officers could not be used by the state to support the finding of involuntary manslaughter.

Immediately after the shooting, Dennis described a phantom assailant to the girl's father and engaged in a "melodramatic hot pursuit" of the villain. He later repeated this fantasy to a deputy sheriff. The investigating officers, arriving at the scene, found the revolver in the flower-bed and were not satisfied with Dennis's explanation. They asked Dennis to step out from the victim's home and confronted him with the gun. The officers then advised Dennis of his constitutional rights by reading from a "pocket slip" and immediately asked him if he wished to talk about the episode. Dennis then acknowledged shooting the girl. He was placed under arrest and further explained that the incident was accidental. He also admitted theft of the gun and car.

Taken to the sheriff's station and readvised of his constitutional rights, Dennis stated to a deputy district attorney that he understood those rights. He then elaborated on his previous admissions. Neither Dennis's parents nor attorney were present at any stage of the proceedings, although it appeared from the record that an attempt to reach his parents would have been successful.[66]

Dennis's statements were admitted into evidence in the juvenile proceeding over objection predicated on non-waiver.[67] This objection was made under

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vetoed by the Governor. The standard was deleted by amendment in A.B. 1660. A.B. 2332 died in committee.

[65] It was noted in DeBacker v. Brainard, 396 U.S. 28, 31 n.5 (1969), that the United States Supreme Court would probably consider the question of standard of proof in *In re* Winship, *probable jurisdiction noted*, 396 U.S. 885 (1969).

[66] *In re* Medina, 63 Cal. Rptr. 512, 515 (1967), *vacated*, 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969).

[67] The Court of Appeal noted that the trial record did not explain why the pocket slip was not introduced into evidence to indicate a full and complete advisement of rights. *Id.* at 515. In addition, the investigating officer who testified to this advisement failed to state that Dennis had been warned that anything he said might be used against him, as required by *Miranda v. Arizona*. *In re* Dennis M., 70 Cal. 2d 444, 462, 450 P.2d 296, 306, 75 Cal. Rptr. 1, 11 (1969). Relying in part on this evidence, the Court of Appeal held there was no proof of waiver and reversed the trial court judgment as to involuntary manslaughter. *In re* Medina, 63 Cal. Rptr. 512, 517-18 (1967), *vacated*, 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969). It should be noted that Dennis judicially admitted the theft of both the gun and the car and therefore his appeal attacked only the involuntary manslaughter finding. The California Supreme Court, in effect reversing the Court of Appeal, affirmed the judgment of the trial court in its entirety. The court agreed that the testimony of the investigating officer was deficient to discharge the *Miranda* burden, but determined that because trial counsel did

Welfare and Institutions Code Section 701, which specifically provides that "a preponderance of the evidence, *legally admissible* in the trial of criminal cases, must be adduced to support a finding that the minor is a person [who has violated the law]."[68] (emphasis added.)

While the trial court ruled that Dennis's statements were legally admissible under *Miranda* and its progeny, the Court of Appeal reversed, stating:

> We think it clear there is no proof of waiver. This boy was fifteen years of age, . . . was without the aid of his parents and stood alone. He must have been without knowledge that he was facing adversaries preparing for an adversary proceeding. He had been a ward of the court for several years, had dealt with officers, including probation officers and their staffs, under proceedings statutorily designed to gain his confidence and to establish complete and friendly rapport. The deputy taking his statement, although complying with the requirements of *Miranda* so far as is concerned with the warnings to be given laid no stress upon the question of whether or not he should waive. Having given the warnings, he proceeded immediately to ask for appellant's story, which appellant gave him.[69]

From this evidence the court determined that the appellant was not shown to have appreciated the import of his constitutional rights and had no reasonable opportunity to consider the effects of waiver. As this did not constitute a "knowing, intelligent and considered waiver", the decision of the juvenile court was not permitted to stand.

The California Supreme Court, vacated the Court of Appeal decision, and affirmed the trial court, rejecting the contention that a minor is *per se* incapable of a valid waiver, and finding under the "totality of the circumstances" test that Dennis had in fact made a legally sufficient waiver.[70]

Miranda requires that before the results of a custodial interrogation may be admitted into evidence, the defendant must be informed of certain constitutional rights.[71] He must be warned that he has the right to remain silent, that any statement he makes may be used against him, that he has the right to have counsel present, and that if he cannot afford counsel, the state will provide him with one. Any of these rights may be waived, but in order to further protect the defendant, such waiver must be shown to have been made knowingly and intelligently and a *heavy burden* is imposed upon the prosecution to make an affirmative showing of this before such waiver will be accepted.[72] *Miranda*, however, was concerned with an

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not make an appropriate objection, the objection must be deemed waived. *In re* Dennis M., 70 Cal. 2d 444, 462, 450 P.2d 296, 307, 75 Cal. Rptr. 1, 12 (1969).

[68] CAL. WELF. & INST. CODE § 701 (West 1966).

[69] *In re* Medina, 63 Cal. Rptr. 512, 517 (1967), *vacated*, 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969).

[70] *In re* Dennis M., 70 Cal. 2d 444, 463-65, 450 P.2d 296, 307-09, 75 Cal. Rptr. 1, 12-14 (1969).

[71] 384 U.S. 436, 444-45 (1966).

[72] In Johnson v. Zerbst, 304 U.S. 458, 464 (1938), the United States Supreme Court stated that a "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

adult defendant, and thus does not directly control the issue whether a minor should be held capable of waiver.

The federal courts, recognizing the special problems of statements by minors, evolved a rule whereby the government is barred from using, in a prosecution under the criminal law, any incriminating statement taken from a minor during the time he was in "juvenile" custody.[73] The rationale is that a contrary rule "would be tantamount to a breach of faith with the child . . . [and] would destroy the Juvenile Court's *parens patriae* relation to the child. . . ."[74]

State courts have not chosen this direction, finding that the needs of law enforcement and public policy considerations of the criminal law require that juveniles, albeit under special protections, be deemed capable of waiver. Thus California has stated:

> [We find] no reason . . . for making such statements [made to police officers] inadmissible. In determining the character of their statements, that is, whether they are free and voluntary, the age of the person should be considered, but to rule out all statements merely because of the youth of the maker, would unduly restrict law enforcement.[75]

Differentiating between the provisions of the law which govern acts of wrongdoing by a minor where society's interest in self-preservation is paramount, and the blanket presumption of incapacity in a contractual situation,

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[73] *See* Edwards v. United States, 330 F.2d 849 (D.C. Cir. 1964), and Harling v. United States, 295 F.2d 161 (D.C. Cir. 1961).

[74] Harling v. United States, 295 F.2d 161, 163-64 (D.C. Cir. 1961). Although this rule has been rationalized as supervisory, the question arises as to the effect of the Omnibus Crime Control Act, 18 U.S.C. § 3501 (1969). The sections provide in pertinent part:

> (a) In any criminal prosecution . . . a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall . . . determine any issue as to voluntariness. . . .
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> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsed between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant has been advised prior to questioning of his right to assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

[75] People v. Magee, 217 Cal. App. 2d 443, 456-57, 31 Cal. Rptr. 658, 667 (1963). *See also* cases collected at Annot., 87 A.L.R.2d 624 (1963), for other state courts reaching the same conclusion. Thus, in Haley v. Ohio, 332 U.S. 596, 603 (1948), Justice Frankfurter, concurring, stated:

> If a state, consistently with the Fourteenth Amendment, may try a boy of fifteen charged with murder by the ordinary criminal procedure, I cannot say that such a youth is never capable of that free choice of action which, in the eyes of the law, makes a confession 'voluntary'.

the court concluded that a minor's chronological maturity was but one factor to the considered.

Thus as *Miranda* applies to children, requiring a knowing and intelligent waiver, and as the states had determined that a minor should be held able to waive, the question became by what test should the validity of a purported waiver be judged. The United States Supreme Court, in *Haley v. Ohio*[76] and *Gallegos v. Colorado*,[77] held that such a waiver required special caution and thus "a totality of the circumstances" standard was utilized.

This test was later adopted in California, in *People v. Lara*,[78] where the court held that the validity of a waiver by a minor did not depend on the age factor alone, but that a combination of other circumstances such as intelligence, experience, education and ability to comprehend the meaning and effect of his statement were to be considered. Thus waiver became an issue of fact to be decided on the totality of the circumstances of each case. This test does not appear to offend *Miranda* as it neither deviates from the requirement of an affirmative waiver nor provides for a lowering of the standards upon which a waiver will be based. The question thus becomes whether, under the totality of the circumstances, Dennis in fact made a knowing and intelligent waiver.

The Supreme Court considered various factors as bearing on this question, finding that there was no showing that Dennis had less than average intelligence or an inadequate understanding of the situation facing him. It was also noted that Dennis was aware of the gravity of his act in that he divested himself of the revolver and had the presence of mind to make up a superficially plausible story of a phantom assailant. The court further stated that Dennis was very contained, unconcerned, not depressed or upset and had no apparent difficulty in understanding his constitutional rights. Additionally the court found that Dennis had previously been arrested on four occasions, thereby gaining experience with law enforcement procedures, and that the trial judge correctly appraised Dennis's attitude as being far from

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However, Justice Frankfurter offers no explanation why state criminal laws concerning *prosecution* are related to or should control the constitutional requirements of due process in regard to *waiver*. Perhaps a better statement is found in the Oregon decision State v. Gullings, 244 Ore. 173, 178-80, 416 P.2d 311, 313-14 (1966), where the court stated that if the Fifth and Sixth Amendment rights are preserved,

> we believe that an absolute prohibition is not required so long as it is made clear to the juvenile that criminal responsibility can result and that the questioning authorities are not operating as his friends but as his adversaries. . . .
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> . . .
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> . . . So long as information is available which meets constitutional criminal due process standards . . . the safety and security of the law-abiding public requires its use. . . .

[76] 332 U.S. 596 (1948).

[77] 370 U.S. 49 (1962).

[78] 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967), *cert. denied*, 392 U.S. 945 (1968).

naive about the incident.[79]

It is clear that a "heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[80] It remains to be seen, however, whether in the instant case, the state met this burden of proof or whether mere lip service was given to the totality of the circumstances test, when *all* factors, including those illustrated by the Court of Appeal, are considered.

The California Supreme Court emphasized factors which, in its opinion, were determinative as to whether Dennis in fact had the knowledge and intelligence, in short—the capacity, to waive. However, on the facts of the case, past decisions have imposed an even greater burden on the state than that imposed above by *Miranda.*

The California Supreme Court felt that Dennis neither had an inadequate understanding of the situation facing him nor difficulty in comprehending his constitutional rights. That a heavier burden rests upon the state in demonstrating these facts is illustrated by the United States Supreme Court decision in *Haley v. Ohio.*[81] *Haley* emphasized that waiver by minors constituted an area of special caution. To provide full protection the Court stated:

> We are told that this boy was advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed. That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. *We cannot indulge those assumptions.*[82] (emphasis added.)

From this case and the case of *Gallegos v. Colorado*[83] which held that "[The child] cannot be compared with an adult in full possession of his senses

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[79] *In re* Dennis M., 70 Cal. 2d 444, 464 n.14, 465, 450 P.2d 296, 308 n.14, 309, 75 Cal. Rptr. 1, 13 n.14, 14 (1969).

[80] Miranda v. Arizona, 384 U.S. 436, 475 (1966). The Court continued, stating: Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders. *Id.*

[81] 332 U.S. 596 (1948).

[82] *Id.* at 601. Analogous to many of the facts of the instant case, *Haley* further stated:

> What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crises of adolescence produces. . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. *Id.* at 599-600.

[83] 370 U.S. 49 (1962).

and knowledgeable of the consequences of his admissions,"[84] it can readily be inferred that there is a presumption against capacity, at least where, here, as in *Haley*, the confession is that of a fifteen year old youth.

An added factor bearing on capacity is the absence of any parent, adult adviser or attorney. It is clear from the record that an effort to contact Dennis's parents, if made, would have been successful. The California Supreme Court failed to consider this factor; other courts, however, place great emphasis on it. In *In re Williams*,[85] a New York court held: "The failure of the police to notify this child's parents that he had been taken into custody, if not alone sufficient to render his confession inadmissible, is germane on the issue of its voluntary character. . . ."[86]

Other courts have considered this factor more than merely germane. In *Gallegos*, the United States Supreme Court stated:

> He [a minor] would have no way of knowing what the consequences of his confession were without advice as to his rights . . . *and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given . . . the protection which his own immaturity could not.*[87] (emphasis added.)

Thus again it would appear that an added burden is upon the state. In light of the *Miranda* burden, the *Haley* burden regarding minors and the *Gallegos* burden concerning lack of parent or adult adviser, the question becomes whether the state's obligation as to proof has been met.

As noted before, Dennis was advised of his rights when read to from a pocket slip by the officers. The court held that this constituted sufficient compliance with *Miranda*. It is questionable, however, whether this formalized procedure was adequate to enable Dennis to meet the strict standards for waiver. The court perhaps recognized that to avoid future conflicts the "police be prepared to give their compulsory *Miranda* warnings *in terms that reflect the language and experience of today's juveniles.*"[88] (emphasis added.) To be sure, the court did not heed the United States Supreme Court warning in *Haley* that "weight [cannot be given] to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them."[89]

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[84] *Id.* at 54.

[85] 49 Misc. 2d 154, 267 N.Y.S.2d 91 (1966).

[86] *Id.* at 165, 267 N.Y.S.2d at 106. To insure protection of the minor, New York has enacted a statute providing that the police *must* attempt to communicate with the juvenile's parents before questioning him and that a confession may not be obtained from a child prior to notifying his parents or relatives. N.Y. FAMILY COURT ACT § 724(a) (McKinney 1962).

[87] 370 U.S. at 54.

[88] *In re* Dennis M., 70 Cal. 2d 444, 464 n.13, 450 P.2d 296, 308 n.13, 75 Cal. Rptr. 1, 13 n.13 (1969).

[89] 332 U.S. 596, 601 (1948).

Additionally, the trial record indicates that no emphasis was placed on the question of waiver, nor was Dennis given an opportunity to reflect upon the significance of his rights and a waiver thereof. Having given the warning, the investigating officer immediately asked Dennis if he wished to talk about the incident, whereupon Dennis made incriminating admissions.

A combination of these factors might not be sufficient to constitute a waiver by an adult. Indeed, *Miranda* stated, considering but *one* of these factors, that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."[90] If this can be said concerning an adult defendant, surely on the basis of all factors previously mentioned, it would appear questionable to hold that Dennis in fact had made a knowing and intelligent waiver.

The California Supreme Court also mentioned certain events which it found to be in support of its findings of waiver. The court stated that Dennis was well aware of the gravity of his act and yet had the presence of mind to originate a fantasy which appeared superficially plausible. In addition, Dennis seemed very contained and unconcerned. It may well be that this lends credence to the court's position. However, the court did not explain the psychological relationship between the two, nor did it offer any psychological data tending to prove that the former is a product of the latter. It seems clear that an opposite interpretation may prove more credible, because a mind predisposed to fantasy in this situation may be unable to comprehend the realities of his plight.[91] As *Gault* stated:

> If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of *adolescent fantasy, fright or despair.*[92] (emphasis added.)

As further support, the court noted that the defendant had previous experience with law enforcement officers in that he had been arrested on four separate occasions. On this basis the court thought that Dennis was amply experienced in police procedure and thus impliedly familiar with the rights accorded him. However, the Court of Appeal noted, but the California Supreme Court did not discuss, that all of the prior juvenile proceedings were statutorily designed to gain his confidence and to establish a friendly

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[90] 384 U.S. 436, 475 (1966).

[91] It is to be noted, however, that after his arrest, Dennis recanted from his previous story, perhaps indicating that he then became aware of and understood the gravity of his act. At this time Dennis maintained that he did not mean to shoot the girl, that it had been an accident, that he had just been playing with the gun when it went off, and finally, in speaking to the victim's sister, that he was sorry. *In re* Medina, 63 Cal. Rptr. 512, 515 (1967), *vacated*, 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969).

[92] 387 U.S. at 55.

rapport.[93] Thus even though Dennis was experienced, it is doubtful whether that experience in fact adequately equipped him with sufficient information to make a valid waiver.

The court also considered the personal appraisal of the trial judge to be significant. Aside from possible questions as to the emotional involvement of the trial judge,[94] the Court of Appeal gave little weight to this factor and it appears questionable whether the Supreme Court of California, one step further removed in the appellate process, is either a more accurate judge or should give greater emphasis to this sole factor.

The aspect of *Miranda* presented here is ultimately a factual one: did the defendant make a valid waiver? The effect of this decision, however, transcends the particular facts involved. *In re Dennis M.*, in its consideration of the various factors, intimates a withdrawal from a strict observance of *Miranda* rights. Were this trend to continue, the protection of waiver afforded a defendant would be undermined as the burden of proof on the state would be lessened and courts could emphasize any of many existing circumstances under the *totality* test to uphold police action.

An examination of the decision in *Dennis* on both issues—the standard of proof and the *Miranda* waiver—indicates that while *Gault's* pronouncement that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"[95] judicial concern for the benefits derived from a separate juvenile system, and all that this entails, may still paradoxically result in judicial hostility toward an *effective implementation* of the rights as applied to minors.

Steven Spector

POSTSCRIPT

After the completion of this Note, the United States Supreme Court in *In the Matter of Winship*, 397 U.S. 358 (Mar. 31, 1970), *ante* n.65, held that, contrary to *In re Dennis M.*, the beyond a reasonable doubt test, which is the standard of proof in adult criminal prosecutions was also,

[93] *In re* Medina, 63 Cal. Rptr. 512, 517 (1967), *vacated*, 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969).

[94] The trial judge's personal appraisal of Dennis's maturity is shown where, in ruling on the culpability of Dennis's conduct, he stated:

> That naive little young man had a — within seconds after an act, a terrible act causing the death of a young fifteen-year-old girl, had the unmitigated gall to make up a story and identify some person — his outward appearance was that of calmness, not of excitement. It doesn't strike me as the naive little fifteen-year-old. Instead of being shocked, complete hysteria, sick at heart at this moment, what does he do? He makes up a story and goes chasing off [after] an alleged person that shot the girl, and then throws the bullet and the gun into a vacant lot. 70 Cal. 2d at 465, 450 P.2d at 309, 75 Cal. Rptr. at 14.

Query whether this illustrates the cool discretion and objective appraisal required of the juvenile court judges?

[95] 387 U.S. at 13.

under the Due Process Clause, required in juvenile proceedings. Justice Brennan, writing for a 5-3 majority, declared that beyond a reasonable doubt was of constitutional stature, and further noted that: 1) a juvenile proceeding is criminal, rather than civil, in nature, 2) a change from the previous preponderance of the evidence test would not impair the beneficial aspects of the juvenile system, and 3) there exists the possibility of institutional confinement and criminal stigma for the juvenile defendant. The Court then stated that no valid basis existed for denying the adult standard to juvenile defendants.