PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 6 | Issue 3 Article 4

5-15-1979

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James M. McGoldrick

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JAMES M. McGOLDRICK*
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John (age eighteen), Jim (age seventeen) and Bill (age eighteen) are all suspected of having committed together a number of burglaries. All have been questioned. Bill, in exchange for a grant of immunity, is willing to testify that he, John and Jim committed the burglaries. Aside from Bill's testimony, there is no other evidence. Jim can be convicted in a California Juvenile Court based upon the uncorroborated testimony of Bill. John cannot be convicted in a California Criminal Court based upon the uncorroborated testimony of Bill.[1]

* B.A., Pepperdine University, 1966; J.D., University of Chicago, 1969; Trial Attorney, United States Department of Justice, Antitrust Division, 1969-71; Staff Attorney, Tulare County Legal Services Association; Professor of Law, Pepperdine University School of Law, 1974 to date.

** This article would not have been possible without the diligent and conscientious efforts of my research assistant, 3rd. year Pepperdine law student, Marv Stern.

1. This hypothetical is a modified version of one suggested by Chief Justice Bird of the California Supreme Court in her dissenting opinion *In re* Mitchell P., 22 Cal. 3d 946, 960 n.12, 587 P.2d 1144, 1153-54 n.12, 151 Cal. Rptr. 330, 340 n.12 (1978) (Bird, C.J., dissenting).

Linda was born on February 25, 1950 at 6:32 p.m. On February 25, 1967 at 4:30 p.m., in St. Louis, Missouri, she assaulted a policeman with intent to kill. She was tried as an adult and sentenced to forty-five years. Missouri's juvenile courts had exclusive jurisdiction over minors less than seventeen, but the state courts applied a common law rule that counts one's age as of 12:01 a.m. of the day of birth. Had she been tried in juvenile court, her sentence would have been at most four years.[2]

Armando (age sixteen) was found guilty in juvenile court of misdemeanor assault. Because of a number of prior contacts with the authorities, he was sentenced to the California Youth Authority for up to five years. Had he been tried as an adult in criminal courts, his maximum sentence would have been six months.[3]

The above hypotheticals reveal several different aspects of the Equal Protection Clause and the juvenile justice system. In the first hypothetical, a difference of age allowed Jim to be found guilty in a juvenile court but prevented a guilty verdict against John in a criminal court. Though it seems clear that Jim is treated less favorably than John, it is difficult to generate much sympathy for Jim. California, along with about half of the other states, disallows convictions in criminal courts based solely upon an accomplice's uncorroborated testimony. Other states and the federal courts merely require that the jury be cautioned concerning the unreliability of such testimony. Does the Equal Protection Clause require that an extreme rule of evidence be applied in juvenile courts simply because it is applied in criminal courts?

In the second hypothetical, Linda, because of a quirk in the common law, was tried as an adult in the adult courts, as opposed to the generally more benevolent juvenile courts. She was sentenced to forty-five years as opposed to four. Can she, as a borderline adult, claim that the disparity of the two sentences is in violation of the Equal Protection Clause? If the classification between juvenile and adult defendants can be challenged by juveniles, why not by adults?

In the third situation, Armando was subject to a penalty many times greater than if he were tried as an adult. Though the juvenile system typically treats juveniles more benevolently than adult defendants are treated under the criminal courts, this is not universally true. Does the Equal Protection Clause entitle the juvenile to the "best of both worlds:" to the juvenile system when

2. This is a variation of the example of bad timing found in Brown v. Baldwin, 356 F. Supp. 831 (E.D. Mo. 1973).

3. The *Armando* facts are based on the unresolved issue in People v. Olivas, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976).

more benevolent or to some specific aspect of the adult system when it is more advantageous? On the other hand, if the purpose of a separate juvenile system is to provide a better chance for rehabilitation in a more benevolent court, how can classification leading to more harsh treatment be fairly related to the purpose?

Violation of the Equal Protection Clause, even from the beginning of the constitutionalization of the juvenile justice process, was not a very successful argument. Even in the famous *Gault* case,[4] where the Supreme Court began the process of domesticating the juvenile courts, the Equal Protection Clause was ignored.[5] In *In re Winship*,[6] which held that juveniles, like adults, had to be proven guilty beyond a reasonable doubt, the Supreme Court said simply that it had no occasion to discuss the Equal Protection Clause.[7]

Consistent with its early disregard in the *Gault* decision, the Equal Protection Clause has not been a significant force in the field of juvenile justice in the lower federal courts or in the various state courts.[8] Even in California, where the state Supreme

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

5. Only Justice Black, in a concurring opinion, felt that the Equal Protection Clause was relevant. Justice Black argued that the Due Process Clause of the Fourteenth Amendment required the incorporation of all the criminal procedure rights in the first eight amendments and that all those should be made applicable to both adults and juveniles charged with a crime. *Id.* at 61. He was objecting to the so-called selective incorporation doctrine followed by the Supreme Court, where the Court selected the most important provisions of the first eight amendments and made them applicable, through the Fourteenth Amendment, to adult criminal trials in state courts. Finally, admitting that the Supreme Court had adopted such a selective incorporation approach, Justice Black then stated that the Equal Protection Clause would require that whatever rights were given to adults would also have to be given to juveniles. *Id.*

6. 397 U.S. 358 (1970).

7. Note that even Justice Black was not consistent in his application of the Equal Protection Clause to juvenile rights. He dissented in *Winship*, stating that proof beyond a reasonable doubt was not a constitutional requirement and, thus, not applicable to juvenile trials. *Id.* at 385-86. He made no reference to the fact that the state court granted the right to proof beyond a reasonable doubt to adults and denied that right only to juveniles, thus raising the same kind of equal protection problem he had referred to in his *Gault* dissent. *See* note 5 *supra*.

8. *In the Matter of* S.J.C., 533 S.W.2d 746 (Tex. 1976), *cert. denied*, 429 U.S. 835 (1976) (different rule for use of uncorroborated testimony of accomplice not in violation of due process or equal protection); United States v. Ramirez, 556 F.2d 909 (9th cir. 1976) (longer sentence for juveniles than adults upheld); *In re* Blakes, 4 Ill. App. 3d 567, 281 N.E.2d 454 (1972) (same); J.K. v. State, 68 Wis.2d 246, 228 N.W.2d 713 (1975) (same); *In re* Welfare v. I.Q.S., 244 N.W.2d 30 (Minn. 1976) (same, but a particularly enlightening opinion); *In re* Mario, 65 Misc. 2d 708, 317 N.Y.S.2d 659 (1971) (non-criminal jurisdiction of the juvenile courts upheld); Com-

Court has been a leader in developing an independent and expansive view of equal protection demands, the equal protection arguments have not won the day in juvenile justice cases.[9]

Perhaps the insignificance of the Equal Protection Clause in the field of juvenile justice can most clearly be demonstrated by comparing two cases decided by the California Supreme Court in late 1978. On November 9, 1978 the California Supreme Court applied the strictest kind of scrutiny and ruled that a system whereby some criminal defendants were indicted by the grand jury and others were charged based upon information filed at their preliminary hearing was an unconstitutional denial of equal protection as guaranteed by article I, section 7[10] of the California Constitu-

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monwealth v. Brasher, 359 Mass. 550, 270 N.E. 389 (1971) (same); E.S.G. v. State, 447 S.W.2d 225 (Tex. Ct. App. 1969) (same, *but see* Justice Cadena's eloquent dissent); *In re* Moten, 242 So. 2d 849 (La. Ct. App. 1970) (different standard for arrest of juvenile upheld); Marschall v. City of Carson, 86 Nev. 107, 464 P.2d 494 (1970) (same); Baldwin v. Lewis, 300 F. Supp. 1220 (E.D. Wis. 1969) (no right to bail in juvenile proceedings); Mayne v. Turner, 24 Utah 2d 195, 468 P.2d 369 (1970) (prosecutorial discretion to try juvenile in criminal or juvenile court not in violation of due process or equal protection); People v. Schupf, 39 N.Y.2d 682, 350 N.E.2d 906 (1976) (different pretrial detention standard for juveniles upheld. The *Schupf* court went on to state that:

> For the same reasons that our society does not hold juveniles to an adult standard of responsibility for their conduct, our society may also conclude that there is a greater likelihood that a juvenile charged with delinquency, if released, will commit another criminal act than that an adult charged with crime will do so.

Id. at 684, 350 N.E.2d at 907. The case continues with an excellent policy discussion of why children should be treated differently than adults); Mason v. Henderson, 337 F. Supp. 35 (E.D. La. 1972) (exempting crime of rape but not other serious crimes from juvenile jurisdiction not in violation of equal protection); Smith v. State, 229 So. 2d 551 (Miss. 1969) (same); Coney v. State, 491 S.W.2d 501 (Mo. 1973) (lack of standards to guide judge in a fitness hearing not contrary to equal protection rights); Raines v. State, 55 Ala. App. 588, 317 So.2d 555 (1974) (no equal protection violation in requiring waiver of jury trial before given access to juvenile court); DeBacker v. Sigler, 185 Neb. 352, 175 N.W.2d 912 (1970) (same); *In re* State, 57 N.J. 143, 270 A.2d 273 (1970) (same); United States v. Alexander, 333 F. Supp. 1213 (D.D.C. 1971) (U.S. Attorney given discretion where to file certain enumerated serious felonies upheld). For two exceptions, both involving the right to appeal, *see In re* Brown, 439 F.2d 47 (3rd Cir. 1971), *and* Long v. Robinson, 316 F. Supp. 22 (D. Md. 1970), *aff'd*, 436 F.2d 1116 (4th Cir. 1971). For an excellent discussion of *Brown*, *see* Note, *Juvenile Law: Equal Protection in the Post-Adjudicative Process*, 9 SAN DIEGO L. REV. 345 (1972).

9. In interpreting its own state Equal Protection Clause, the California court has gone beyond the federal constitutional requirements. The most notible example of that was the California Supreme Court's decision in San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1 (1973), held that such a means of financing local schools was not in violation of the federal constitution's Equal Protection Clause. Then, in 1976, also in Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), the California court reaffirmed its earlier decision despite the clearly contra federal decision.

10. *See* note 51 *infra* and accompanying text.

tion.[11] On December 22, 1978 the California Supreme Court permissively reviewed a system whereby an adult could not be convicted based upon the uncorroborated testimony of an accomplice, but a juvenile could, and held that such classifications were not in violation of the Equal Protection Clause.[12] This paper will further examine these two cases as well as survey the general impact of the Equal Protection Clause on the juvenile justice system.

The first issue presented in any equal protection case involves the appropriate level of review to be applied. Or, as Presiding Justice Kaus of the California Court of Appeal has succinctly delineated the problem: "The first question is whether, in assessing petitioner's equal protection claim, we go first class or tourist—whether we apply the 'strict scrutiny' standard or the traditional 'rationality test.' "[13] Like travel on an airplane, in some cases the equal protection clause is gourmet food, free champagne, personalized service, fruit baskets, and room enough for both feet. In other cases, the same clause is mints from the airport lounge, $2.00 drinks, instructions on the use of the oxygen mask, air sickness bags, and sufficient room for a short one-legged man. At the risk of taking Justice Kaus' analogy a bit far, it seems that in recent years with the advent of pub pong, singing pilots, and, of all things, free competition, the line of demarcation between first class and tourist has begun to blur. Whether the blurring means a change in the treatment of those in tourist class (and perhaps also in first class), or the creation of a new class, luxury coach,[14] is a debatable point.

A similar blurring has developed in cases interpreting the Equal Protection Clause. Whether a new test has emerged or the old tests have changed is still very much an open question. Whatever the analogy, Clark Kent versus Superman, Dr. Jeckyll versus Mr. Hyde, or "The Three Faces of Eve," the resolution of each equal protection problem must begin by establishing which of the conflicting characteristics of the Equal Protection Clause is going to control. Unless one understands the basic schizophrenic (the analogies are endless) nature of the Equal Protection

11. Hawkins v. Superior Court, 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978).

12. *In re* Mitchell P., 22 Cal. 3d 946, 587 P.2d 1144, 151 Cal. Rptr. 330 (1978).

13. Alex T. v. Superior Court, 72 Cal. App. 3d 24, 28, 140 Cal. Rtpr. 17, 19(1977). *Alex T.* involved a juvenile's right to the same speedy trial guarantees as an adult.

14. *Compare* the recent airlines innovation of providing special services for businessmen or women, or so-called "full-fare" passengers.

Clause, it is impossible to either understand or analyze an equal protection issue.

The Equal Protection Clause is concerned with the accuracy of government classifications: persons similarly situated must be treated alike.[15] The accuracy of the classification must be judged in relationship to the purpose or the objective of the law. The rational basis test requires only minimal accuracy and has little concern for the law's actual purpose.[16] The compelling state interest test requires a high degree of accuracy and is very concerned with the importance of the state objectives or purposes.[17] Only suspect classifications (race or national origin)[18] or fundamental rights (right to vote, to travel, to privacy) call for strict scrutiny.[19] Suspect classifications or fundamental rights entitle one to first class treatment. Without one of those two, one must be satisfied with tourist. There is still, however, luxury coach to consider.

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15. There is, however, no real need to examine the accuracy of classifications used with the intent of promoting impermissible government ends, *e.g.*, race discrimination or abridgment of first amendment rights. Such classifications are *per se* invalid once the impermissible purpose is proven. Examples of provable impermissible purposes are rare. Again using the airplane analogy, it does not matter what class ticket one has purchased, society frowns on one's boarding a plane with a gun for the purpose of forcing the pilot to buzz Cleveland.

16. The accuracy of most classifications is tested using a rational basis test: do the classifications rationally relate to legitimate state ends? Since this test is fairly easily satisfied, the court's level of review or scrutiny is commonly called permissive. Because the court in applying the rational basis test generally defers to the legislative judgement, the level of scrutiny is sometimes called deferential. Under the rational basis or mere rationality test, there is little independent evaluation of the importance of the state objective. In fact, under the most deferential approach, the court will speculate as to possible purposes which might better support the classifications. From 1937 to 1971, the United States Supreme Court found only one case to fail the rational basis test. It was later reversed.

17. In cases involving suspect classifications or fundamental rights, the accuracy of classifications is tested using a compelling state interest test: The classifications must be necessary in order to achieve compelling state purpose or objectives. Since it is very difficult for the government to satisfy this test, the level of review or scrutiny is called strict. Under the compelling state interest test, the court examines quite closely the actual importance of the state objectives.

18. The United States Supreme Court has found only two unqualified suspect classifications; race and national origin. Classifications based upon the status of being an "alien" are, for the most part, treated as though just as suspect as race or national origin. Gender classifications are not yet officially recognized by the Court as suspect but, in actual practice, the level of review is close to strict scrutiny. Classifications based upon wealth or illegitimacy have had an inconsistent treatment but are not now suspect.

19. Only these three rights have been called fundamental though each has on occasion been given a far-reaching scope. The right to vote includes the right to participate more generally in the electoral process. The right to travel has little to do with travel, but has been used to strike down unreasonable durational residency requirements penalizing necessities of life. The right to privacy is the most broad but has had its major application in the field of birth control and abortion rights.

The United States Supreme Court has not been willing in recent years to expand the category of cases requiring the strictest scrutiny, but its application of the rational basis test has been, in many cases, something more than "a largely meaningless requirement of rationality."[20] The Supreme Court states that it is applying the rational basis equal protection test, but the actual application of the test seems to be more than the permissive scrutiny traditionally associated with the rational basis test.[21] The Court seems to focus more on the actual purposes of the law and to require the state to come forward with some justification for the classifications. Many of the sharper focus cases involve gender classifications, however, they are far from limited to only sex classifications. They range from classifications based upon legitimacy to classifications involving recipients of food stamps.[22] These cases and others have led many to conclude that the Supreme Court has, whether it admits it or not, adopted a middle

20. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1089 (1978) [hereinafter cited as TRIBE].

21. The United States Supreme Court has found the following, among others, to be in violation of the more sharply focused rational basis test: Trimble v. Gordon, 430 U.S. 762 (1977) (an Illinois distinction between legitimate and illegitimate children for purposes of intestate succession); Califano v. Goldfarb 430 U.S. 199 (1977) (gender based discrimination between widows and widowers as to Social Security Act survivors' benefits); Craig v. Boren, 429 U.S. 190 (1976) (Oklahoma statute prohibiting females under 18 and males under 21 from buying 3.2% beer); Stanton v. Stanton, 421 U.S. 7 (1975) (Utah law that males reach majority at 21 while females do so at 18); Jimenez v. Weinberger, 417 U.S. 628 (1974) (Social Security Act legitimacy distinction in order for children to qualify to obtain benefits from their parents' disability insurance); United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (amendment to Food Stamp Act which rendered ineligible any household containing an individual unrelated to any other member of the household); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (statute denying illegitimate children the benefits of a financial aid program for the working poor); Gomez v. Perez, 409 U.S. 535 (1973) (Texas statute denying rights of paternal support to illegitimate children only); Jackson v. Indiana, 406 U.S. 715 (1972) (incompetent criminal defendants subject to more lenient pretrial commitment standards and more stringent standards for release); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (Louisiana statute denying dependent, unacknowledged illegitimate children equal recovery under Workmen's Compensation laws); Lindsey v. Normet, 405 U.S. 56 (1972) (Oregon law requiring a double-bond requirement in order to appeal a Forcible Entry and Wrongful Detainer statute); Reed v. Reed, 404 U.S. 71 (1971) (mandatory provision of Iowa probate code giving preference to men over women in members of the same entitlement class in appointment of administrators).

22. Others include cases involving irrebuttable presumptions and cases involving commercial speech. Even the recent impairment of obligations of contract cases is significant. All of these cases indicate a higher level of review given to economic and other non-fundamental interests.

level of review between rational basis and the compelling state interest test. The most common statement of the "new test" is found in *Craig v. Boren*,[23] where the Court stated: "To withstand a constitutional challenge, [gender classifications] must serve important governmental objectives and must substantially relate to the achievement of those objectives."[24] It has been suggested that this new, middle level test ought to be applied when there are classifications close to suspect (*i.e.*, sex, illegitimacy) or interests close to fundamental (*i.e.*, education, necessities of life).[25]

It should also be noted that the Court may not be applying a new middle level test at all. It may just be more responsibly applying the old rational basis test. It is interesting that, other than the sharper focus in gender cases, the new middle level test looks surprisingly similar to the old, pre-1937, rational basis test.[26] In fact, the *Craig v. Boren* language had its origin in the first major sex classification case, *Reed v. Reed*[27] where that Court quoted the 1920 decision of *F.S. Royster Guano Co. v. Virginia*[28] stating that: "[Classifications] must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . ."[29]

The middle level test is actually more restrictive than the view that the rational basis test has changed. The middle level test would be applicable to only those equal protection issues where classifications close to suspect were used or interests close to fundamental were involved. A vigorous rational basis test would be applicable to any equal protection problem.

Classifications between adults and juveniles have had a long-standing legal as well as practical legitimacy. Distinctions range from driver's license requirements to voting rights, from military service eligibility to availability of 3.2% beer. Classifications between adult defendants and juvenile defendants have seemed even less subject to attack. Unlike the other distinctions, as to the

23. 429 U.S. 190 (1976).
24. *Id.* at 197.
25. TRIBE, note 20 *supra*, at 1082-89.
26. The pre-1937 rational basis test ought not to be confused with Lochnerism. Lochner v. New York, 198 U.S. 45 (1905). In *Lochner*, the Supreme Court artificially elevated certain business and economic interests and applied a very high level of scrutiny to test any state law affecting those economic interests. The high level of scrutiny makes Lochnerism much more comparable to the compelling state interest test. Before 1937, the rational basis test seemed to have been a meaningful though somewhat deferential level of review. Only as a reaction to the abuses of Lochnerism did the Court begin, in 1937, the extreme deferential approach that continued during the term of the Warren Court.
27. 404 U.S. 71 (1971).
28. 253 U.S. 412 (1920).
29. 404 U.S. at 76.

latter, juveniles were in the more favored class. Instead of being denied a driver's license, the juvenile acquired the right to a more benevolent system, bent on rehabilitation, not punishment. If, in order to achieve the benevolent goal of rehabilitation, it was necessary to treat juvenile defendants on occasion in a more harsh way than adult defendants, that anomalous result was an unfortunate, though necessary, cost in achieving what was recognized as a valid and important goal. Juveniles who willingly took the pluses seemed to be a terribly ungrateful lot in complaining about the few minuses.[30]

Furthermore, the notion of equality of rights between juvenile defendants and adult defendants has been viewed as a threat to the separate existence of the juvenile courts. The United States Supreme Court used that reasoning in rejecting jury trials in juvenile cases:

> If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.[31]

One author has compared the procedural domestication of the juvenile court with teaching a bird not to eat.[32] Success comes at fairly obvious costs. Would, for example, the non-criminal jurisdiction of the juvenile courts survive any kind of careful equal protection analysis?[33]

Most important of all in assessing the disregard of the Equal Protection Clause in juvenile cases is that the truly unfair aspects of the system have been largely cured through a careful procedural due process analysis. The time has long since passed when a court could claim that juveniles were subject to a kangaroo court, treated neither benevolently nor with basic fairness.[34] Juvenile defendants are still not automatically protected by the fourteenth amendment Due Process Clause incorporation of certain rights of criminal defendants found in the fourth, fifth, sixth and eighth amendments. Those rights are applicable only in criminal cases

30. *See In re* J.K., 68 Wis. 2d 426, 228 N.W.2d 713 (1975) for a typical application of this litany in a case involving equal punishment for juveniles.

31. McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971).

32. McGoldrick, *Breed v. Jones: The Domesticated Juvenile Court, A Pyrrhic Victory*, 1 J. JUV. L. 1 (1977).

33. *See* Justice Cadeno's dissent in E.S.G. v. State, 447 S.W.2d 225 (Tex. Ct. App. 1969) for a thoughtful presentation of the problems of such jurisdiction.

34. This indictment is found in Kent v. United States, 383 U.S. 541 (1966) which played the role of John the Baptist in preparing the way for the *Gault* decision.

and juvenile procedures are still technically "civil." Nonetheless, since *Gault*, juveniles are given a significant level of due process through an application of general procedural due process rules developed in civil and administrative law cases.

Whether a case is designated civil or criminal, the basic procedural due process rule of law is that liberty or property interests cannot be taken by the government without due process. In adult criminal cases, the constitution spells out with some specificity what is required. In juvenile cases, civil cases, and administrative hearings, the court has to determine on a case by case basis what is required by the procedural Due Process Clause. Two issues are customarily presented: first, has the government taken a liberty or property interest and, second, what process is due. As the liberty or property interest increases in importance, the demands of procedural due process grow stricter and stricter. Whereas, in situations involving an interest of relatively low value, procedural due process may require only an informal chance to state one's side of the controversy; as the taking threatens a more important interest, procedural due process may require everything from appointed counsel to a jury trial.

Whatever liberty or property might mean at their outer limits,[35] there is no dispute that liberty includes freedom from institutional confinement. Whenever a juvenile is threatened with confinement because of criminal activity, liberty interests are at stake and some degree of process is due.[36] Every United States Supreme Court case after *Gault* has dealt with the issue of how much process is due. The general test utilized balances individual liberty or property interests against state interest and concerns.[37] In performing this balancing in juvenile cases, the Court has concluded that the process due to juveniles charged with crime include the right to counsel, the right to notice, the right to confront and cross-examine witnesses, and the right to be free from self-incrimination. Process due also includes the right to

35. The meaning of the liberty and property clauses is the single most important developing area in the procedural due process field. *See, e.g.*, cases such as Paul v. Davis, 424 U.S. 693 (1976), Bishop v. Wood, 426 U.S. 341 (1976) and Board of Curators v. Horowitz, 435 U.S. 78 (1978).

36. It is assumed that confinement as a result of a finding of certain status offenses also requires procedural due process though the United States Supreme Court has not spoken explicity concerning this issue.

37. In some cases such as Goss v. Lopez, 419 U.S. 565 (1975), the balancing test requires a very low level of procedural due process. In *Goss* a student was suspended for ten days, which constituted of taking of both a liberty and a property interest. The Court found that these rather limited property and liberty interests could be protected adequately by informal notice from the principal to the student as to the charges against the student, notification to the parent, and an opportunity for the student to state his side of the case.

proof of guilt beyond a reasonable doubt and the right to be free from double jeopardy. However, process due to a juvenile does not include the right to a jury trial.

The Supreme Court's recognition of the juvenile system's failure to meet its lofty goals led it to place more and more procedural demands on the juvenile court system which resulted in a reduction in the differences between criminal courts and juvenile courts consequently, an equal protection attack on the whole juvenile system has grown less realistic. Any protection given juveniles by the Equal Protection Clause would be largely repetitive of the procedural due process guarantees already given. Also, if basic procedural fairness did not require that a juvenile defendant be accorded such rights as a jury trial,[38] why should the Equal Protection Clause?

Nonetheless, three reasons call for a separate equal protection analysis. First, the Equal Protection Clause has at least two levels of scrutiny and, perhaps, a third. The highest level of scrutiny, if required in juvenile cases, would be more protective of juvenile rights than the procedural due process approach, even in instances of overlap. Second, the Equal Protection Clause protects against governmental abuses not within the scope of procedural due process. Third, the procedural due process doctrine is a falling star. As a constitutional doctrine, it appears to be on the decline while equal protection, particularly in its lowest and perhaps middle level of scrutiny, appears to be on the ascendancy.

A juvenile could argue that a jury trial is required by procedural due process guarantees or that since jury trials are given to adult criminal defendants, the Equal Protection Clause requires that juries must also be accorded to juveniles. If the Equal Protection Clause requires only permissive scrutiny, in the form of the rational basis test, then the level of review for the equal protection issue would be less than the balancing test already used under the procedural due process approach required by *Gault*. If, however, strict scrutiny or the compelling state interest test were required for the equal protection issue, the Equal Protection Clause would demand a higher level of review than the procedural Due Process Clause. For example, while on balance the state's interest in maintaining a confidential, informal, juvenile hearing might justify the denial of the jury trial to juveniles, it is

38. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

unlikely that the state could show that such state interests are compelling in their importance or that there is a necessary relationship between the denial of the jury trial and the promotion of those interests.

It must also be remembered that not every equal protection issue is simply an overlap of procedural due process concerns. The length of the sentence given a juvenile for a particular crime does not raise procedural due process issues unless, indirectly, through the eighth amendment prohibition of cruel and unusual punishment. Even under the eighth amendment, penalties may vary widely from jurisdiction to jurisdiction. But, if different penalties are accorded different persons primarily because of age classification, then significant equal protection issues are presented. Although neither the Due Process Clause nor the eighth amendment would forbid a three year penalty for burglary, for example, the state judgment that persons over a certain age should spend only one year in commitment while persons under that age could spend many times more than that raises obvious equal protection issues. The California Supreme Court in *People v. Olivas*[39] ruled that such sentencing classifications as applied to persons tried in the adult court system could not withstand the required strict scrutiny level of review. In *Olivas* it is not at all apparent that such a classification could have withstood even a permissive level of review. Though *Olivas* did not involve the juvenile courts *per se*, it is an example of the Equal Protection Clause clearly demanding more and being more appropriate than the procedural due process approach generally used in juvenile cases.

Another factor making the Equal Protection Clause important in juvenile cases is the apparent decline of the procedural due process clause in the United States Supreme Court, which may eventually have an impact on the procedural due process rights of juveniles. The high point for procedural due process came in *Goss v. Lopez*.[40] However, since that time, the Court has decided three cases giving the state a greater role in defining and limiting liberty and property interests that call for any procedural due process.[41] This descendancy of the procedural Due Process Clause occurs at a time when the Equal Protection Clause appears to be ascending. The California courts have been particularly active in finding new fundamental rights calling for the strict scrutiny test and even the United States Supreme Court has ex-

39. People v. Olivas, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976).
40. 419 U.S. 565 (1975).
41. *See* note 35 *supra* and accompanying text.

panded the quality of permissive review. That the equal protection test is ascending holds out promise, in at least some instances, for a more meaningful consideration of the true balance of interest between the state and the juvenile than does the procedural Due Process Clause, particularly in its current descent.

The United States Supreme Court's handling of the equal protection issue in juvenile cases is consistent with its handling of equal protection issues in adult criminal cases. The Court has provided a high level of protection to criminal defendants through the Due Process Clause of the Fifth and Fourteenth amendments and through the most important aspects of the Fourth, Fifth, Sixth and Eighth amendments, but not through the Equal Protection Clause. Its technical application of the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures and the judge-created exclusionary rule has often appeared to go beyond any realistic concern for fundamental or even important rights of criminal defendants and perhaps reflects an insensitivity to competing police and societal interests. Nonetheless, classifications affecting, in a practical sense, the most important kinds of interest, but not ones directly involving rights protected by the Fourth, Fifth, Sixth, or Eighth amendments, have been given the most minimum level of review. Strict scrutiny is reserved for suspect classifications (race) and fundamental interests (right to privacy, right to vote, and the right to travel). Though imprisonment has fairly obvious impact on all of the fundamental interests, the Court has always applied the permissive scrutiny test. *Marshall v. United States*,[42] a 1974 decision, is fairly typical. A defendant with three prior felony convictions sought commitment under the federal Narcotic Addict Rehabilitation Act as a narcotic addict, but Congress had limited eligibility to those with no more than two priors. The majority, with no consideration of the underlying factual reality, concluded that Congress could rationally assume that an addict with a multiple-felony record would be less likely to benefit from rehabilitative treatment.[43] In a dissenting opinion, Justice Marshall, joined by Justices Douglas and Brennan, admitted that the case did not fit into any "neat 'fundamental interest' or 'suspect classification' mold."[44] Still, he argued for a higher

42. 414 U.S. 417 (1974).
43. *Id.* at 428-30.
44. *Id.* at 432.

level of review than mere rationality:

> I find it hard to understand why a statute which sends a man to prison and deprives him of the opportunity even to be considered for treatment for his disease of narcotics addiction, while providing treatment and suspension of prison sentence to others similarly situated, should be tested under the same minimal standards of rationality that we apply to statutes regulating who can sell eyeglasses or who can own pharmacies.[45]

He concluded that the deferential scrutiny used by the Court was "total deference and no scrutiny."[46]

A case the year before, *McGinnis v. Royster*,[47] had given some hope for a higher level of review. The majority rejected an equal protection challenge to a New York scheme under which a prisoner received "good time" credit for time served in state prison after sentencing, but not for time spent in county jail before sentencing.[48] Nonetheless, Justice Powell's opinion seemed to require more than that shown in *Marshall*. He insisted that the classification must be rationally related to some "legitimate," "articulated" and "non-illusory" state purpose.[49] In *Marshall*, the Court seemed to accept the government's claimed purposes without any showing that such a purpose had more than an imaginary basis.

Two 1972 cases[50] had also given hope that the Court was adopting something comparable to "middle" level of review for equal protection challenges to classifications, such as the above, affecting liberty interests in such an obvious way. The 1973 case of *McGinnis* furthered that hope, but *Marshall* signaled a return to the most permissive scrutiny. Though the United States Supreme Court "middle" level test of review continues to have its moments, few of those have effected the rights of criminal defendants.

In view of the Equal Protection Clause's almost total failure at the federal level as a challenge to criminal law classifications, the success of the Equal Protection Clause in the California Supreme Court has been nothing short of startling. Of course, California has now asserted its independence in interpreting equal protec-

44. *Id.* at 432.
45. *Id.* at 432-33.
46. *Id.* at 433.
47. 410 U.S. 263 (1973).
48. *Id.* at 277.
49. *Id.* at 276.
50. For examples of the rational basis test being atypically successful in criminal cases, *see* Jackson v. Indiana, 406 U.S. 715 (1972) (invalidating pretrial commitment procedures for incompetent criminal defendants more harsh than those for non-defendant incompetents) and Humphrey v. Cady, 405 U.S. 504 (1972) (remanding for further evidence an equal protection challenge to commitment procedures for disorderly sex offenders.) *See generally*, Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther].

tion rights given by the California Constitution.[51]

It is difficult to put an exact date on the beginning of California's aggressiveness in establishing its independent interpretation of equal protection doctrines. State courts have always been more willing to find legislative classifications lacking in rationality than the United States Supreme Court, however, the California courts have gone far beyond this well recognized tendency. The rational basis test has been enforced with a vengeance. Even more significiantly, the California Supreme Court has quite willingly found new classifications and interests calling for strict scrutiny. It has also liberally applied those fundamental interests already recognized by the United States Supreme Court.

As early as 1969, the state court found that the right to pursue a lawful occupation was a fundamental right.[52] There is no comparable federal decision. In 1970, the state court ruled that wealth classification in criminal cases was suspect.[53] In 1971, sex was held to be a suspect classification.[54] The United States Supreme Court is still talking rational basis in these areas, though now with sharper focus. *Serrano v. Priest*,[55] also decided in 1971, held that education is a fundamental right and that wealth, in non-criminal cases, is a suspect classification. Another 1971 decision, *In re Gary W.*,[56] would seem to have particular significance to juveniles. In that case, the court found that "[T]he right to a jury trial in an action which may lead to the involuntary confinement of the defendant, even if such confinement is for the purpose of treatment, is . . . fundamental."[57]

Though each of the above cases went beyond federal precedent, all at the time were thought to be based on solid federal principles and, thus, not really declarations of independence from the

51. CAL. CONST., art. I, § 7 provides that:
(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.
(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges and immunities granted by the Legislature may be altered or revoked.
Formerly CAL. CONST., art. I, §§ 11, 25.

52. Purdy & Fitzpatrick v. California, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

53. *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

54. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

55. *See* note 9 *supra* and accompanying text.

56. 5 Cal. 3d 296, 486 P.2d 1201, 96 Cal. Rptr. 1 (1971).

57. *Id.* at 306, 486 P.2d at 1209, 96 Cal. Rptr. at 9.

federal views. Only in the 1973 case of *Brown v. Merlo*[58] does one begin to see the state consciously going beyond federal guidelines. The court, applying the rational basis test, rejected the California guest statute as being without any "realistic" state purpose. It realized that various "conceivable" purposes for the guest statute might satisfy the federal rational basis test but in a very significant footnote called the federal approach an "excessively artificial analysis."[59] The state court continued in the footnote to argue that the United States Supreme Court was beginning to draw back from "an absolutely deferential position" and cited seven 1971 and 1972 Supreme Court opinions to justify that conclusion.[60] The court then cited Professor Gunther's influential 1972 article with his suggestion that such cases could well "herald a 'newer equal protection' providing a 'new bite' for the traditional 'rational basis' test."[61] However, the California court made clear that even if Professor Gunther turned out to be a bad prophet, the state supreme court and its house, planned to strike out on their own, rejecting "totally unrealistic 'conceivable' purposes" as contrary to state equal protection standards.[62]

Three California strict scrutiny cases seem of particular importance in resolving equal protection issues in the handling of juvenile defendants. The first, *In re Gary W.*,[63] involved the right to a jury trial in a juvenile court related civil commitment procedure. The second, *People v. Olivas*,[64] held longer sentences for youthful offenders tried in adult courts than for adult defendants in violation of the Equal Protection Clause. The third, *Hawkins v. Superior Court*,[65] found indictment by grand jury for some defendants and charge by information after a preliminary hearing for other defendants to be in violation of equal protection principles.

At the time of the *Gary W.* case[66] California Welfare and Institutions Code § 1769 allowed the terms of wards of the Youth Au-

58. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

59. *Id.* at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr at 395 n.7.

60. *Id.* James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); and Reed v. Reed, 404 U.S. 71 (1971).

61. *See* Gunther note 50 *supra* at 20-24.

62. *See also* Ramirez v. Brown, 9 Cal. 3d 199, 507 P.2d 1345, 107 Cal. Rptr. 137 (1973). Mandamus brought by three ex-felons to compel officials to register them as voters. California forbids those convicted of infamous crimes the absolute right to vote. Court applied compelling state interest test and while it found such an interest, the California law did not achieve the interest in the least burdensome manner.

63. 5 Cal. 3d 296, 486 P.2d 1201, 96 Cal. Rptr. 1 (1971).

64. 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976).

65. 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978).

66. *Supra* note 63.

thority to be extended by court order for additional two year increments upon a showing of dangerousness to the community because of some mental disorder. Gary W. argued that before his confinement could be extended he ought to be entitled to at least the same procedural rights as mentally disordered sex offenders, narcotics addicts and nonconfined imminently dangerous persons. In so far as the right to some type of jury trial was concerned, the California Supreme Court agreed. The court found that a right to a jury trial was a fundamental right "in any action which may lead to the involuntary confinement of the defendant."[67] California provided for jury trials in most other civil commitment proceedings. The Equal Protection Clause required it in § 1769 hearings unless an exclusion could be justified by a compelling state interest. Not even a reasonable interest could be shown.

The court's handling of the equal protection issue is noteworthy in at least three respects. First, the right to a jury trial in a civil commitment procedure would seem to be primarily a procedural due process issue. The right ought not to depend on California's giving it to some and thus being required by the Equal Protection Clause to give it to all (or, if strictly an equal protection problem, by denying it to all). If a jury trial is a fundamental right, it is only because procedural due process makes it so. Second, the court unnecessarily found a jury trial to be a fundamental right for purposes of an equal protection analysis, necessitating strict scrutiny when the state could not even have shown a rational distinction. By too easily finding fundamental rights, the court makes it almost impossible for the state to justify reasonable distinctions and simply invites frivolous litigation. Third, the court found the unequal classifications by looking at all civil commitment procedures without considering the various reasons for the different procedures or the jury's ability to make the required widely divergent determination. On the other hand, the court has not been willing, for purposes of an equal protection analysis, to compare juvenile delinquency proceedings with adult criminal proceedings much closer in overall function than the numerous civil commitment procedures so casually lumped together in *Gary W.*

People v. Olivas[68] was potentially the single most important

67. 5 Cal. 3d at 306, 486 P.2d at 1209, 96 Cal. Rptr. at 9.
68. *Supra* note 64.

California equal protection case in recent years. In addition to providing a separate court system for juveniles, California provides a separate correctional system, the California Youth Authority, for young adult criminal defendants between the ages of 16 and 21. Juveniles 16 and 17 years old can be tried in either juvenile court or criminal court and juveniles convicted in either one can be sentenced to the California Youth Authority. For young adults, such a commitment was considered preferable to state prison because of the less mature Youth Authority population, a greater number of privileges, more lenient parole, and, for persons convicted in criminal court of felonies, maximum sentences of five years or until age 25, whichever was longer. For misdemeanants, the maximum period of confinement was two years or until age 23, whichever was longer. Olivas, at the time of his conviction for misdemeanor assault, faced more than three years at the Youth Authority for an offense normally calling for a penalty of only six months.

The *Olivas* court found that liberty, as defined to include freedom from confinement and parole restrictions, was a fundamental right. Even assuming that the state's interest in rehabilitating young offenders was a compelling state interest, the disparate sentencing of young misdemeanants could not be shown to be sufficiently related to that interest. The *Olivas* court specifically refused to address the issue as to whether juveniles could be sentenced for longer periods than adults, but shortly after *Olivas* the California law was amended to provide that juveniles could not be sentenced for longer than the adult maximum.[69]

The *Olivas* decision has been the source of much litigation in California, involving everything from prison hair codes[70] to sex offenses against children.[71] The court's labeling, as fundamental, a broadly defined liberty interest has surely invited that litigation. Once the court defines fundamental rights broadly, two things be-

69. The 2nd District California Court of Appeal has applied *Olivas* to require that adults sentenced to the Youth Authority have the same pre-sentence credit time, People v. Sandoval, 70 Cal. App. 3d 73, 138 Cal. Rptr. 609 (1977); for a contra ruling *see In re* Leonard R., 76 Cal. App. 3d 100, 142 Cal. Rptr. 632 (1977). The Court of Appeal also ruled, over a vigorous dissent by Justice Jefferson, that allowing warrantless misdemeanor arrests for juveniles but not adults was not in violation of the Equal Protection Clause, *In re* Thierry S., 61 Cal. App. 3d 344, 132 Cal. Rptr. 194 (1976), *reversed on statutory grounds*, 19 Cal. 3d 727, 139 Cal. Rptr. 708 (1977). Two Court of Appeal cases in late 1978 held that *Olivas* alone required that juveniles be sentenced in the same manner, *In re* Eric Craig J., 86 Cal. App. 3d 513, 150 Cal. Rptr. 299 (1978), and for the same length as adults, *In re* Dennis C., 86 Cal. App. 3d 603, 150 Cal. Rptr. 356 (1978). No case has yet addressed the different probation rules for juvenile court wards. *Mitchell P.* cast a shadow over many of the lower court cases which apply *Olivas* in a strict fashion; *see* text at note 68.

70. *In re* Gatts, 79 Cal. App. 3d 1023, 145 Cal. Rptr. 419 (1978).

71. People v. Gonzales, 81 Cal. App. 3d 274, 146 Cal. Rptr. 417 (1978).

gin to happen. First, it must become easier for the state to satisfy the compelling state interest test and, second, the court must constantly redefine various interests, working out fine distinctions between those interests that are fundamental and those that are not. Because of those distinctions, *Olivas* has been in large part a disappointment in juvenile cases, as demonstrated by the *Mitchell P.* case.[72]

In addition to *Gary W.* and *Olivas*, the *Hawkins* case[73] must be considered. In *Hawkins*, the California Supreme Court found that the denial of a preliminary hearing to one who had already been indicted by the grand jury was in violation of the California Equal Protection Clause.

The actual impact of the *Hawkins* case on the criminal justice system is probably minor—fewer than five percent of all prosecutions were begun by grand jury indictment, even under the old dual system.[74] The *Hawkins* case left standing the grand jury indictment process; it just held that an indicted defendant also had a right to a preliminary hearing. The *Hawkins* case is, however, a potentially far-reaching decision in its use of the California Equal Protection Clause. Adding further interest to the case is a Justice Mosk concurring opinion to his own majority opinion in which he aggressively lobbied for an expanded three-tier equal protection system with a middle level of review joining the more traditional rational basis and the relatively modern compelling state interest test.

Three things are worth noting about the majority opinion in *Hawkins*. First, the court obviously preferred making the decision concerning a procedural issue on equal protection grounds as opposed to the Due Process Clause though the Court itself recognized that the case presented "a serious due process issue." Second, the California Supreme Court in no way felt inhibited by more narrow federal equal protection precedent in interpreting the state Equal Protection Clause. Third, the most obvious difference between the federal courts' and the California Supreme Court's interpretation of the Equal Protection Clause continues to be the latter's greater willingness to find necessary the strict scrutiny level of review, but there does appear to be a retreat from *Olivas*.

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72. *See* note 77 *infra*.
73. *Supra* note 65.
74. 22 Cal. 3d 584, 605-06, 586 P.2d 916, 930, 150 Cal. Rptr. 435, 449 (1978).

The court's reason for avoiding the due process issue is fairly obvious. The California constitution authorizes grand jury indictment and the federal constitution mandates it, and no court has ever held that a preliminary hearing is constitutionally required.

Despite the fact that the grand jury was not in violation of the Due Process Clause and there was no due process requirement that a criminal defendant be granted a preliminary hearing, the dual system could nonetheless present equal protection problems. The fact that 95% of felons received a preliminary hearing, and 5% of the felons received a grand jury indictment but no preliminary hearing, creates classifications which treat persons similarly situated in a different fashion. Though a system which provided only grand jury indictment and no preliminary hearings at all would have probably been constitutional, that does not necessarily mean that a dual system is constitutional. For example, there is no constitutional requirement that the government provide welfare payments to indigent citizens, but once the government decides to make those payments it must do so without arbitrary and unreasonable classification. The difficulty with the California Supreme Court's handling of the Equal Protection Clause is its failure to even consider federal precedent in determining the appropriate level of review. In matters of criminal justice, the United States Supreme Court has almost consistently applied a rational basis test. In cases involving calculation of time off for good behavior as well as cases involving eligibility for drug rehabilitation programs, the United States Supreme Court has applied the lowest level of scrutiny. However, the California Supreme Court found that the denial of a preliminary hearing to persons indicted by the grand jury was the deprivation of fundamental rights, thus calling for the compelling state interest test. The rights listed as fundamental were rights to counsel, confrontation of the witnesses, the right to personally appear and the right to a hearing before an impartial judicial officer, all procedural due process rights. Once the court determined to apply a compelling state interest test, the attorney general had no chance at all to justify the dual system.[75]

75. One of the most fascinating aspects of the court's opinion in the *Hawkins* case was its avoidance of the California constitutional provisions authorizing the grand jury. Article 1, sections 14 and 23 of the California constitution explicitly sanctioned the use of the grand jury for indictment of felons. Article 1, section 14 provides "Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information." It would appear that section 14 not only authorizes explicitly the use of grand jury but also authorizes the dual system whereby some persons are indicted by grand jury and others charged by information. If the California constitution specifically authorized the dual system, then it would be impossible for the California Supreme

The California Supreme Court's willingness to discover new fundamental rights is the most dramatic difference between its approach to the Equal Protection Clause and the United States Supreme Court's approach to similar cases. The United States Supreme Court has recognized only three fundamental rights calling for the higher level of review, the right to travel interstate, the right to vote and the right of privacy. It is hard to argue with the California Supreme Court's conclusion that such things as right to counsel are fundamental rights. The difficulty is accepting the fact that any state classification which involves the right calls for a compelling state interest equal protection test. Protecting rights of counsel as fundamental under the sixth amendment is not the same thing as requiring the highest level of judicial scrutiny for any classification affecting right to counsel. State courts have long been willing to apply a stricter rational basis test than the United States Supreme Court, but California's willingness to require a compelling state interest test in a great number of cases does far more harm to legitimate governmental interest. California does not require the government to show some rational reason for classifications, rather the California courts are requiring that the state government show that these classifications are absolutely necessary. Nonetheless, the description of the fundamental rights in *Hawkins*, though lengthy, must be considered a retreat from the broad language of *Olivas* where the possibility of confinement seemed sufficient to command strict scrutiny.[76]

In view of the court's apparent ease in finding the equal protection violation in the *Hawkins* case, it was particularly startling that the court gave such a superficial attention to a similar equal protection problem in the *In re Mitchell P.* case.[77] In a juvenile petition, Mitchell P. was charged with committing acts which would have constituted burglary, grand theft and receiving stolen

Court to hold that such a system was in violation of the federal constitution, but as already discussed the California Supreme Court did not follow federal equal protection guidelines in striking down the grand jury information dichotomy. The majority opinion attempts to skirt what seems to be an obvious approval of the dual system by reference to the phrase "by law" in section 14. Justice Mosk states that the phrase "by law" encompasses both judicial decisions as well as legislative enactments and that thus the constitution authorizes the courts to make sure that any use of the grand jury is consistent with other state constitutional provisions such as the state equal protection clause.

76. *See* text at note 68 *supra.*

77. *Supra* note 1.

property if he had been an adult. At the adjudication hearing one of the juveniles who had entered a jewelry store with Mitchell P. was granted immunity from prosecution and testified that Mitchell P. was involved in the burglary. The only evidence concerning the violation was the testimony of the accomplice. The equal protection problem presented in *Mitchell P.* involves the use of the uncorroborated testimony of an accomplice. Penal Code Section 1111 provides that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by other such evidence sufficient to connect the defendant with the crime. In an opinion by Justice Clark, the California Supreme Court ruled that Penal Code Section 1111 had no application to juvenile court proceedings and that the failure to have such a provision for juveniles was not in violation of any constitutional rights. Neither the majority opinion nor the dissenting opinion of Chief Justice Bird mentioned the earlier *Hawkins* case. Because of the statutory and common law origins of the accomplices' requirement, the court did not consider the Due Process Clause to require that the rule be adopted in either criminal or juvenile proceedings. The court considered the more difficult constitutional issue to be the equal protection requirement. The case which seemed to trouble the California Supreme Court was the 1970 case of *In re Winship*.[78] That case had required that the "proof beyond reasonable doubt" standard had to apply to juvenile proceedings as well as to adult proceedings. The court there said that a minor could not be subjected to "institutional confinement on proof insufficient to convict him were he an adult."[79] The California court, however, viewed *Winship* as strictly a due process case.

As for the equal protection issue, the court recognized that the State of California had created a less favorable classification for juveniles than for adults charged with the same crime. The court stated the issue as being "whether the state can require a lesser *quality of evidence* in juvenile proceedings."[80] It was at pains to point out that this did not mean that a juvenile could be convicted by a lesser degree of proof. The *Winship* case had established that the degree of proof had to be the same. Assuming the testimony of a particular accomplice did satisfy the reasonable doubt requirement, why would such testimony be sufficient in a juvenile proceeding but insufficient in a criminal proceeding? The court simply stated that "disparities among classes are constitutionally permissible when reasonably related to proper purpose." The ex-

78. 397 U.S. 358.

79. *Id.* at 367.

80. *In re* Mitchell, 22 Cal. 3d 946, 950, 587 P.2d 1144, 1147, 151 Cal. Rptr. 330, 334 (1978).

planation for the application of the rational relationship test as opposed to stricter scrutiny is found in a footnote. The court said that it was not making a classification "directly affecting a fundamental interest."[81] *Olivas* is thus distinguished. The court stated that the classification was not based upon a deprivation of liberty or any other fundamental right but was simply a question as to what kind of otherwise proper evidence might be used to support a finding of misconduct. Since the evidence, of whatever variety, had to satisfy proof beyond a reasonable doubt grounds the court concluded that no fundamental rights were affected. Once having decided that the rational basis test was the appropriate level of review, the court cited two main authorities for holding that distinctions made between juvenile justice and a criminal case were reasonable. In the 1971 case of *T. N. G. v. Superior Court*,[82] the California Supreme Court upheld sealing procedures which permitted the trial court to refuse to seal certain juvenile court records, whereas adults in exactly the same situation would have had the right to have had the records immediately sealed. The court held that the special rehabilitative functions of the juvenile court justified the different sealing provisions. In particular, the court felt that a probation officer might later need to view a juvenile's arrest records, whereas there was no comparable person who would ever have an interest in viewing an adult's arrest record. A second case giving the majority support was the United States Supreme Court decision in *McKeiver v. Pennsylvania*,[83] where the Supreme Court rejected the claim that a juvenile had the constitutional right to a jury trial.

The *Mitchell* court gave primarily two reasons why the classification as to an accomplice's testimony between adults and juveniles was justified. First, in a juvenile case, since the juvenile is not entitled to a jury trial, the judge is the trier of fact. The court stated that it is not unreasonable to assume that the judge would be more critical of accomplice's testimony and thus more likely to accord it the appropriate weight. No mention was made of the fact that the accomplice's testimony rule applies to adult cases in both jury and judge only trials. The second reason given was that juveniles are not generally subject to the same incarceration as adults. The *Mitchell P.* case itself would seem to be some

81. *Id.* at 950 n.3, 587 P.2d at 1147 n.3, 151 Cal. Rptr. at 334 n.3.
82. 4 Cal. 3rd 767, 484 P.2d 981, 94 Cal. Rptr. 813 (1971).
83. 403 U.S. 528.

support for that proposition, in that Mitchell P. was returned to his parents without any period of confinement. However, one might also note that the accomplice's testimony rule applies to both adult felony and misdemeanor cases even in instances when there is very little likelihood that the adult is going to serve any kind of prison sentence. Also, perhaps worthy of mention, there is the fact that most adult criminal defendants get probation for burglary.

Unlike the *T.N.G.* case, where the court at least found that a probation officer might later need a juvenile arrest record, or the *McKeiver* case where the United States Supreme Court claimed that a jury trial might upset the need for confidentiality and informality in the juvenile system, the California Supreme Court suggested no justification at all for the different use of the accomplice's testimony. The court cited in a footnote that the purpose of the Juvenile Court sytem is "guidance and treatment for the juvenile,"[84] but there was not the slightest indication why a conviction through use of an accomplice's testimony was in some way related to the rehabilitating of an impressionable minor.[85] Chief Justice Bird, in dissent, argued that juveniles were not the "recipient of specialized treatment" but "specialized punishment." The *Mitchell P.* case has significance far beyond its actual holding. Denying a juvenile the benefit of an extreme rule of evidence seems to be of marginal importance, but there is good reason to believe that the California Supreme Court intended *Mitchell P.* to have a much wider impact. The court's easy dismissal of *Olivas* and its reliance on cases like *T.N.G.* and *McKeiver* does not give hope for equal protection arguments in juvenile cases. *Olivas'* broad definition of liberty interest qualifying for the strictest scrutiny had led many lower California courts to conclude that strict scrutiny was required in analyzing juvenile court equal protection issues. *Mitchell* is a clear rejection of the strict scrutiny approach. The rehabilitative goal of the juvenile system, despite its lack of realism, appears to be a prima facie justification of any distinction between juvenile and adult defendants. Perhaps the most disappointing aspect of the *Mitchell* case was its to-

84. 22 Cal. 3d at 952 n.5, 587 P.2d at 1151 n.5, 151 Cal. Rptr. at 335 n.5.

85. An earlier California Court of Appeal opinion, though also rejecting the application of the accomplice's rule in juvenile cases, at least admitted that there was no indication that accomplice's testimony is more trustworthy or less likely to be given in hope of leniency simply because a person charged with an offense is a juvenile. (*In re* R.C., 39 Cal. App. 3d 894, 896, 114 Cal. Rptr. 734, 741 (1974)). It also recognized that the distinction between judge and jury cases was not well taken. The approach of the Appellate Court was basically that the Equal Protection Clause did not strike down differences in treatment of juveniles and adults, provided juveniles were given basic due process standards.

tal disregard of the middle level approach to equal protection problems.

Neither *Olivas*' broad first class nor *Mitchell's* limiting tourist class seem the best approach for juvenile cases. The *Olivas* approach has two opposite and harmful effects. It threatens interests that deserve first class protection by expanding the exclusive category to such a degree as to dilute the protection of all in that class. It is impractical to give all liberty interests the strictest kind of scrutiny. On the other hand, the *Olivas* approach makes it very difficult to justify even reasonable state interest. Because of the high level of procedural due process protection given juveniles, *Mitchell's de minimus* equal protection analysis would probably work little harm but for its perpetuation of the rehabilitation myth. That myth has had conflicting results, in some cases justifying unnecessarily harsh treatment of juveniles, and in others leading to unreasonably lenient dispositions with inadequate protection of the public. An approach somewhere in between is required. That luxury coach compromise would neither carelessly denigrate legitimate state concerns, nor perpetuate unproven assumptions harmful to both juveniles and society.