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Family Law--Juvenile Courts--Preponderance of the Evidence Upheld as Applicable Standard of Proof in Juvenile Delinquency Adjudications (In re Samuel W., N.Y. 1969)

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surrounding an arbitrator's duty to disclose prior or contemporaneous relations with the parties? While the majority opinion purports to set forth an absolute rule requiring disclosure, the qualification annexed by the concurring opinion — that arbitrators need not disclose "trivial relationships" — will undoubtedly cause much confusion. In the absence of a clear majority[47] the concurring opinion carries considerable weight. As previously indicated, the concurring justices favored disclosure for practical purposes while permitting the arbitrator to decide whether his relationship with a party was substantial enough to require disclosure. What, then, is the "trivial relationship" which need not be disclosed? The arbitrator in *Commonwealth* was apparently a wealthy man, and the business he received from the party, twelve thousand dollars over a four or five year period, would seemingly be trivial. Yet, the award was vacated.

Thus, no clear answer has really been provided for the critical question of whether an arbitrator must disclose a prior or contemporaneous relationship with one of the parties to the arbitration proceeding; the confusion remains, though now centered about the interpretation of the term "trivial relationship." Only future litigation will determine whether the disclosure rule of *Commonwealth* will endure.

FAMILY LAW — JUVENILE COURTS — PREPONDERANCE OF THE EVIDENCE UPHELD AS APPLICABLE STANDARD OF PROOF IN JUVENILE DELINQUENCY ADJUDICATIONS. — *In re Samuel W.*, 24 N.Y.2d 196, 247 N.E.2d 253, 299 N.Y.S.2d 414 (1969).

Appellant was adjudicated a juvenile delinquent for stealing $112 from complainant's pocketbook. This finding was based upon a preponderance of the evidence as required by Section 744(b) of the New York Family Court Act. The Court of Appeals, in affirming, *held* that despite the recent expansion of criminal due process in juvenile hearings, the quantitative test of proof, as prescribed by the statute, was both correctly applied and constitutional.

Prior to the juvenile court movement in the United States,[1] a

[47] *Commonwealth* was decided on a 4-2-3 basis. Thus, a possibility exists that the Court would refuse to vacate an arbitration award involving non-disclosure of a "trivial" relationship.

[1] The first juvenile court act was passed in Illinois in 1899. Law of July 1, 1899, §§ 1-21, [1899] Ill. Laws 131-37. *See also* Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

child reaching the age of seven was tried, convicted, and sentenced in a criminal court as an adult.[2] However, the harsh sanctions resulting from these criminal convictions motivated the states to extend the doctrine of *parens patriae*[3] to their delinquency proceedings through a system of juvenile courts. Thus, impelled by a feeling of charity, or perhaps guilt, the state set aside the juvenile as an individual in need of help and guidance, free from the formalities of criminal procedures and sanctions. This humane concept spread rapidly, and today is employed by all the states and the District of Columbia.[4]

The State of New York officially adopted this approach in 1922, with the passage of the New York Children's Court Act;[5] but these concepts were not formally extended to New York City until the passage of the New York City Children's Court Act[6] in 1924. These early systems were informal in their approach, stressing guidance rather than retribution, and granting both the child and the court a wide variety of rehabilitative post-adjudication alternatives. However, while both acts ensured some basic procedural safeguards[7] and set forth the requirement of "competent" evidence,[8] neither explicitly delineated the quantum of evidence necessary for an adjudication of delinquency.

The first interpretation of "competent" evidence was provided by the New York Court of Appeals in *People v. Fitzgerald*,[9] wherein Judge Crane, writing for the majority, stated that "the evidence taken in this case was not *competent* or sufficient to convict an adult; therefore, it was insufficient to convict this boy,"[10] thereby indicating that the state's burden of proof should be equivalent to the quantum im-

2 Paulsen, *Kent v. United States: The Constitutional Context And Juvenile Cases*, 1966 SUP. CT. REV. 167, 169.

3 *Parens patriae* was the common law doctrine which made the sovereign the guardian of all the dependent children in the realm. *In re* Gault, 387 U.S. 1, 16-17 & nn.18-21 (1967); Mack, *supra* note 1.

4 387 U.S. at 14; Paulsen, *supra* note 2, at 169.

5 Law of April 10, 1922, ch. 547, [1922] N.Y. Laws 145th Sess. 1259 (repealed 1962) (presently codified as N.Y. FAMILY CT. ACT of 1962).

6 Law of April 23, 1924, ch. 254, [1924] N.Y. Laws 147th Sess. 493 (repealed 1933) (replaced by Law of April 26, 1933, ch. 482, [1933] N.Y. Laws 156th Sess. 1038) (repealed 1962) (presently codified as N.Y. FAMILY CT. ACT of 1962).

7 Both the New York Children's Court Act and the New York City Children's Court Act provided for notice, a right to counsel at the discretion of the court, and appeal. Law of April 10, 1922, ch. 547, §§ 11-12, 22, 43, [1922] N.Y. Laws 145th Sess. 1265, 1267, 1273 (repealed 1962) (presently codified as N.Y. FAMILY CT. ACT of 1962); Law of April 23, 1924, ch. 254, §§ 13-14, 24, 60, [1924] N.Y. Laws 147th Sess. 500, 502-03, 512 (repealed 1933) (replaced by Law of April 26, 1933, ch. 482, [1933] N.Y. Laws 156th Sess. 1038) (repealed 1962) (presently codified as N.Y. FAMILY CT. ACT of 1962).

8 Law of April 10, 1922, ch. 547, § 22, [1922] N.Y. Laws 145th Sess. 1267; Law of April 23, 1924, ch. 254, § 24, [1924] N.Y. Laws 147th Sess. 502.

9 244 N.Y. 307, 155 N.E. 584 (1927).

10 *Id.* at 316, 155 N.E. at 587 (emphasis added).

posed in an adult criminal trial. Thus, in subsequent cases, where charges of a criminal nature were brought against a juvenile, the courts applied the "beyond a reasonable doubt" standard.[11]

However, the *Fitzgerald* rationale was soon repudiated by the Court of Appeals in *People v. Lewis*,[12] which held that the rehabilitative nature of juvenile hearings abrogated the necessity for criminal standards of proof; thus, the Court was free to apply the civil test of a fair preponderance of the evidence. The *Lewis* opinion stands as a classic implementation of *parens patriae* because of the Court's recognition of the primary purpose of the Children's Court Act — the elimination of the concept of crime and punishment as applied to juveniles. The Court believed that the state intended to provide for the care and well-being, custody and discipline of children who were to be treated only as people in need of aid, encouragement, and guidance, and not as adult criminal offenders:

> [T]he fundamental point is that the proceeding was not a criminal one. The State was not seeking to punish a malefactor. It was seeking to salvage a boy who was in danger of becoming one.[13]

The Court concluded that since the proceeding was not criminal, there was no right to, or necessity for, the application of criminal procedural safeguards.

Dissenting on the basis of his opinion in *Fitzgerald*, Judge Crane questioned the constitutionality of the majority's findings, and voiced a prophetic warning concerning the runaway application of the *parens patriae* doctrine: "Can a child be deprived of his liberty . . . by changing the name of the offense . . . to 'juvenile delinquency' . . . . At what age do the constitutional safeguards and protection begin?"[14] Nevertheless, the *Lewis* case remained the sole authority governing juvenile proceedings until the passage of the New York Family Court Act[15] (hereinafter Act) in 1962.

The Act provides detailed rules of procedure and attempts to correct the deficiencies of the former legislation[16] through the extension of the constitutional concept of due process to adjudications of ju-

11 *See, e.g., In re* Madik, 233 App. Div. 12, 251 N.Y.S. 765 (3d Dep't 1931).

12 260 N.Y. 171, 183 N.E. 353 (1932), *cert. denied*, 289 U.S. 709 (1933).

13 *Id.* at 177, 183 N.E. at 355.

14 *Id.* at 180, 183 N.E. at 356 (dissenting opinion).

15 N.Y. FAMILY CT. ACT § 111 *et seq.* (McKinney 1963). The passage of the Family Court Act in 1962 merged the New York Children's Court Act and the New York City Children's Court Act, thus establishing a uniform state-wide system of juvenile courts for New York State.

16 N.Y. FAMILY CT. ACT §§ 728, 735-37, 741-42, 744(a) (McKinney 1963). *See generally* Donahoe, *N.Y. Family Court Act: Article 7 — Its Philosophy And Its Aims*, 15 SYRACUSE L. REV. 679 (1964).

venile delinquency.[17] Indeed, the application of due process to juvenile proceedings would seem to be mandated by the quasi-criminal nature of the adjudications, *i.e.*, the threat of confinement which confronts the youth involved.[18] However, the courts subsequently continued to follow the "preponderance of the evidence" rule advocated by *Lewis*,[19] since this quantum had been codified in section 744(b) of the Act.

However, a successful constitutional challenge to the juvenile process and its *parens patriae* approach was made in *In re Gault*,[20] thereby casting a fundamental doubt on the validity of all juvenile court proceedings which had relied upon *parens patriae* to justify the dearth of procedural due process. Gerald Gault had been adjudicated a juvenile delinquent pursuant to the Arizona Juvenile Code[21] for making a lewd telephone call. While a similar violation committed by an adult would have resulted in a maximum sentence of two months, or a minimum of a five dollar fine, Gault, sentenced to the State Industrial School for the period of his minority, was confronted with imprisonment for six years. Noting this "awesome prospect of incarceration,"[22] the *Gault* Court held four basic procedural rights to be applicable to juvenile court proceedings: the right to notice of charges; the right to counsel; the right of confrontation and cross-examination; and the privilege against self-incrimination.

Limiting itself to these four issues, the majority rejected extrapolation of all the elements of criminal due process to juvenile hearings, but declared that Gault could not constitutionally be denied

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17 N.Y. FAMILY CT. ACT § 711 (McKinney 1963). *See infra* note 50.

18 *In re* Gregory W., 19 N.Y.2d 55, 224 N.E.2d 102, 277 N.Y.S.2d 675 (1966). *Gregory W.* illustrates that the great bulk of *Lewis* was overruled by the 1962 Act. Twelve year old Gregory W. had confessed to an assault and robbery after being in custody for twenty-four hours. He was adjudicated a delinquent largely on the testimony of the detective who had procured his confession. The Court of Appeals reversed, *holding* that since Gregory's confession was involuntary, due process of law had not been observed. Judge Keating explained that juvenile court proceedings, while not criminal under the Act, retained at least a quasi-criminal character as a result of the threat of confinement confronting the youth involved.

19 *E.g.*, *In re* Gregory W., 19 N.Y.2d 55, 224 N.E.2d 102, 277 N.Y.S.2d 675 (1966); *In re* Young, 50 Misc. 2d 271, 270 N.Y.S.2d 250 (Fam. Ct. Westchester County 1966); *In re* Anonymous, 3 Misc. 2d 208, 154 N.Y.S.2d 409 (Sup. Ct. Oneida County 1956). *Contra*, People v. Anonymous, 53 Misc. 2d 690, 279 N.Y.S.2d 540 (Nassau County Ct. 1967) (refusing to find respondent delinquent because the state hadn't proven its case "beyond a reasonable doubt").

20 387 U.S. 1 (1967). This was the first case in the Supreme Court challenging the constitutionality of juvenile procedures, although a previous case, Kent v. United States, 383 U.S. 541 (1966), had involved a related issue and presaged the Court's holding in *Gault:* "There is evidence . . . that he [the juvenile] gets neither the protection accorded to adults nor the solicitous care . . . postulated for children." 383 U.S. at 556 (1966).

21 ARIZ. REV. STAT. ANN. § 8-201(6)(a)(d) (1956).

22 387 U.S. at 36.

was based upon a preponderance of the evidence. While admitting that the proof did not satisfy the "beyond a reasonable doubt" standard, the judge declared that his choice of law was predetermined by the statutory requirement.[39] The sole question certified on appeal was whether the quantum of evidence required by section 744(b) was constitutionally valid in light of *Gault*.

Judge Bergen, writing for the majority, noted that the purpose of juvenile law was to save, not to punish. He stressed that only limited circumstances required commitment, and that "[n]othing could be farther removed in temper and purpose than this [court is] from the criminal court for adults."[40] In addition, he predictably reiterated the stringent rationale of the *Lewis* decision: " 'Since the proceeding was not a criminal one, there was neither right to nor necessity for the procedural safeguards prescribed by constitution and statute in criminal cases.' "[41] Recognizing the appellant's contention that there was "some danger of erosion of constitutional rights in the informality and lack of 'legality' in the way juvenile court judges in practice deal with the children's cases,"[42] the Court emphasized the offsetting safeguards: the provision for confidentiality[43] and the assurance that the adjudication was not a conviction. [44]

While acknowledging that the loss of liberty was the strongest argument in favor of applying constitutional protections to juveniles, Judge Bergen lamented the "singular misfortune" of the family courts in being "impaled on the sharp points of a few hard constitutional cases."[45] He noted, however, that *Kent v. United States*,[46] *Gault*, and the "hard" New York precedent, *In re Gregory W.*,[47] were unique in their lack of elementary fairness and thus easily distinguishable from the instant case.

Significantly, in reviewing the question in the case at bar, the Court found only tenuous differences between the "beyond a reasonable doubt" standard (as a quantitative or qualitative test of proof) and the "fair preponderance" of the evidence criterion:

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39 N.Y. FAMILY CT. ACT § 744(b) (McKinney 1963).

40 24 N.Y.2d at 198, 247 N.E.2d at 254, 299 N.Y.S.2d at 416.

41 *Id.* at 198, 247 N.E.2d at 255, 299 N.Y.S.2d at 416.

42 *Id.* at 199, 247 N.E.2d at 255, 299 N.Y.S.2d at 417.

43 N.Y. FAMILY CT. ACT §§ 783-84 (McKinney 1963). *See also* N.Y. FAMILY CT. ACT § 782 (McKinney 1963), which provides that an adjudication of delinquency affects no right or privilege, including the right to hold public office or to obtain a license.

44 N.Y. FAMILY CT. ACT § 781 (McKinney 1963).

45 24 N.Y.2d at 200, 247 N.E.2d at 256, 299 N.Y.S.2d at 418.

46 383 U.S. 541 (1966). *See supra* note 20.

47 19 N.Y.2d 55, 224 N.E.2d 102, 277 N.Y.S.2d 675 (1966). For a discussion of this case, see *supra* note 18.

> It is enough to say that for a very long time one has been used in the criminal law and the other in civil law, and that the profession accepts the view that beyond a reasonable doubt is a "higher" standard.[48]

In conclusion, Judge Bergen noted that the quantum of proof necessary for an adjudication had been expressly provided for by a statute[49] which also encompassed a due process requirement.[50] Furthermore, since neither the delinquency status nor the proceedings leading to adjudication were criminal in nature, no substantial equal protection question was raised.

Chief Judge Fuld, in a dissent joined by Judges Burke and Keating, construed *Gault* as requiring a quantum of proof beyond a reasonable doubt in *all* cases in which "a child may be found to have committed a crime and [can be] incarcerated for an appreciable length of time."[51] The astute judge pointed to the contention in *Gault* that the juvenile proceeding was just as serious as a felony prosecution, and concluded that any finding of guilt not substantiated "beyond a reasonable doubt" would be ridiculous. This standard, according to Chief Judge Fuld, was "fundamental and universal" in our law, and essential to our scheme of judicial due process. He also emphasized that this interpretation was not unique,[52] noting that in *United States v. Costanzo*,[53] for example, the court stated that "[t]he Government's burden in a juvenile case . . . is to prove all elements of the offense 'beyond a reasonable doubt,' just as in a prosecution against an adult. . . . In practical importance to a person charged with crime the insistence upon a high degree of proof ranks as high as any other protection."[54] Finally, the dissent remarked that although the difference between the two standards may be tenuous, both due process and equal protection clearly demand proof beyond a reasonable doubt wherever personal liberty is jeopardized.[55]

Essentially, the instant case affirms the law as it stands in New

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48 24 N.Y.2d at 202, 247 N.E.2d at 257, 299 N.Y.S.2d at 420.

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50 N.Y. FAMILY CT. ACT § 711 (McKinney 1963). This section provides that "[t]he purpose of this article is to provide a due process of law (a) for considering a claim that a person is a juvenile delinquent or a person in need of supervision and (b) for devising an appropriate order of disposition for any person adjudged a juvenile delinquent or in need of supervision."

51 24 N.Y.2d at 203, 247 N.E.2d at 258, 299 N.Y.S.2d at 421 (dissenting opinion).

52 *See, e.g.*, United States v. Costanzo, 395 F.2d 441 (4th Cir. 1968); *In re* Urbasek, 38 Ill. 2d 535, 232 N.E.2d 716 (1967).

53 395 F.2d 441 (4th Cir. 1968).

54 24 N.Y.2d at 205, 247 N.E.2d at 259, 299 N.Y.S.2d at 422 (dissenting opinion), *quoting* United States v. Costanzo, 395 F.2d 441, 444-45 (4th Cir. 1968).

55 24 N.Y.2d at 206, 247 N.E.2d at 259-60, 299 N.Y.S.2d at 423-24 (dissenting opinion).

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York. Unfortunately, the Court considered the practical and constitutional aspects of the problem in a somewhat cursory manner. Hence, the end result is an affirmation of an anachronism which exists in the juvenile courts of New York.

An adult who committed Samuel W.'s offense would have been charged with one of the following crimes: robbery in the third degree;[56] grand larceny in the third degree;[57] or petit larceny.[58] The adult offender, convicted and sentenced by proof beyond a reasonable doubt,[59] could conceivably be released after less than one year imprisonment.[60] A teenager entitled to "youthful offender" treatment (ages 16 to 19)[61] would enjoy all the protections and guarantees available to the adult, including conviction only upon proof beyond a reasonable doubt and early release.[62] Yet, because Samuel W. was only twelve years old, he was confronted with a period of incarceration ranging up to nine years. Thus, a child subject to the benevolence and safe keeping of the family court, where culpability is assessed by a "fair preponderance of the evidence", is actually burdened with a longer sentence than is the "hardened criminal". At the very least, such a disposition is illogical.

Notwithstanding the practical aspects of the problem, the partial failure of the juvenile court system prior to *Gault* must also be considered.[63] Recidivism among juveniles has not declined; if anything, it has become more frequent.[64] Of even greater import is the fact that

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56 N.Y. PENAL LAW § 160.05 (McKinney 1967) (a class D felony). § 70 provides for a maximum sentence of seven years for a class D felony.

57 N.Y. PENAL LAW § 155.30(4) (McKinney 1967) (a class E felony). § 70 provides for a maximum sentence of four years for a class E felony.

58 N.Y. PENAL LAW § 155.25 (McKinney 1967) (a class A misdemeanor). § 70.15 provides for a maximum sentence not to exceed one year imprisonment for a class A misdemeanor.

59 N.Y. CODE CRIM. PROC. § 389 (McKinney 1958). *Accord*, People v. Sanabria, 42 Misc. 2d 464, 249 N.Y.S.2d 66 (Sup. Ct. N.Y. County 1964) (although proof beyond a reasonable doubt is not explicitly mandated by the New York Constitution).

60 For a class A misdemeanor the maximum sentence shall not exceed 1 year, N.Y. PENAL LAW § 70.15 (McKinney 1967). There also exists for the class D or E felon the possibility of a sentence under one year if the court so wishes, in light of the person's history and character and the nature and circumstances underlying the crime. N.Y. PENAL LAW § 70.05 (McKinney 1967).

61 N.Y. CODE CRIM. PROC. § 913(e) (McKinney 1958). There is, however, this proviso: the crime he commits must not be punishable by death or life imprisonment. Also, a previous felony conviction will preclude "youthful offender" treatment.

62 N.Y. CODE CRIM. PROC. § 913(q) (McKinney 1958).

63 *See generally* Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281 (1967); Note, *Juvenile Delinquents: The Police, State Courts, And Individual Justice*, 79 HARV. L. REV. 775 (1966).

64 *See* REPORT OF THE PRESIDENTIAL COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 55, 78 (1967).

In fiscal 1966 approximately 66 percent of the 16 and 17 year-old juveniles referred to the court by the Youth Aid Division had been before the court previously. In 1965,

institutional confinement is not necessarily in the best interests of the child. Abstracting even a short length of time from the juvenile's growing years may inflict upon him an indelible mark;[65] hence, any pretense that the juvenile's confinement is not punitive is self-deceiving.[66]

It should be re-emphasized that the instant decision was based on the quantum of proof prescribed by Section 744(b) of the Act which constitutes the basic rationale behind the Court's opinion. However, regardless of the statutory authority, it seems that proof beyond a reasonable doubt should be the quantum necessary to satisfy the requirements of due process. While the Supreme Court has never specificially endorsed such a standard, there have been intimations to this effect.[67] Viewing these implications in light of Section 389 of the New York Code of Criminal Procedure, which requires proof beyond a reasonable doubt in a criminal action, the due process rationale of *Gault* becomes significant. Due process was extended to juvenile adjudications by the *Gault* Court because the infant, upon conviction, is branded a delinquent and may be committed to a state institution.[68] Essentially, due process requires that the procedural regularity and fair play which is implicit in our concept of liberty and justice, and which is incorporated into our criminal system, will be extended to and observed in our juvenile proceedings.[69] Thus, the critical question can be posed as follows: Does proof beyond a reasonable doubt constitute a part of this procedural regularity and fair play? The answer lies in the dis-

56 percent of those in the Receiving Home were repeaters. The SRI [Stanford Research Institute] study revealed that 61 percent of the sample Juvenile Court referrals in 1965 had been previously referred at least once and that 42 percent had been referred at last twice before.

In re Gault 387 U.S. at 22, *quoting* REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA (1966).

65 *See* Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946).

The judgment against a youth that he is delinquent is a serious reflection upon his character and habits. The stain against him is not removed merely because the statute says no judgment in this particular proceeding shall be deemed a conviction for crime or so considered. The stigma of conviction will reflect upon him for life. It hurts his self-respect. It may, at some inopportune, unfortunate moment, rear its ugly head to destroy his opportunity for advancement, and blast his ambition to build up a character and reputation. . . . Guilt should be proven by evidence which leaves no reasonable doubt.

Id. at 341, 38 S.E.2d at 447.

66 *See* Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7; Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387 (1961).

67 *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Coffin v. United States, 156 U.S. 432, 453-54 (1895).

68 387 U.S. at 13. The *Gault* Court also quoted from its decision in Haley v. Ohio, 332 U.S. 596, 601 (1948): "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."

69 387 U.S. at 27-28.

crimination which is manifest in the structure of our juvenile court system. It seems clear that every criminal in New York, as long as he is over sixteen, is entitled to have his guilt proven beyond a reasonable doubt. But if he is of a lesser age, the quantum becomes a fair preponderance. Such a policy is contrary to the fundamental fairness which is basic to due process. Moreover, this quantum issue is not merely tangential, but rather is essential to a fair adjudication when liberty is at stake.[70] Regardless of terminology, juvenile court proceedings and criminal convictions result in an identical loss of freedom.

The juvenile offenders of New York deserve a better status than that of "paper citizens" — they are entitled to the same protection and rights as their elder brothers and sisters. And this protection must include the right to be adjudged innocent until proven guilty beyond a reasonable doubt. The *Samuel W.* decision marks a hiatus in New York's juvenile law; for the Court of Appeals has apparently repudiated the state's formerly progressive attitude in the juvenile area. Clearly, the value of other constitutional guarantees is minimized when an individual can be convicted on a mere preponderance of the evidence. Thus, the only viable solution consonant with the rationale of *Gault* is to extend the thrust of that opinion to the quantum of evidence required in a juvenile proceeding. Only through such an extension can the juvenile be assured the constitutional guarantee of due process which *Gault* envisioned.

TORTS — DEFAMATION — EXECUTIVE PRIVILEGE TO DEFAME EXTENDED TO UNDERCOVER AGENT ACTING PURSUANT TO ORDERS. — *Heine v. Raus*, 399 F.2d 785 (4th Cir. 1968).

Appellee, an undercover agent for the Central Intelligence Agency (hereinafter CIA), informed members of an anti-Communist league of which he was a member that appellant was a Soviet agent. Appellant brought an action for slander in a federal district court which resulted in summary judgment for the appellee. The Court of Appeals for the Fourth Circuit, in vacating the judgment and remanding for further proceedings, *held* that the absolute governmental immunity from tort liability for defamation was available to an agent who acted pursuant to instructions issued with the approval of the Director of the CIA or

[70] Kent v. United States, 383 U.S. 541 (1966).
> We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial . . . but we do hold that the hearing must measure up to the essentials of due process and fair treatment. *Id.* at 562.