Hastings Law Journal

Volume 19 | Issue 1 Article 9

1-1967

Waiver of Constitutional Rights by Minors: A Question of Law or Fact

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NOTES

WAIVER OF CONSTITUTIONAL RIGHTS BY MINORS: A QUESTION OF LAW OR FACT?

Juvenile law has grown up. *In re Gault*[1] has destroyed the childishness which had made a constitutional delinquent of that body of social experiment and legal exceptions applying to the juvenile court. A child may now look up at his accusers and demand notice of charges against him, counsel, confrontation and cross-examination of witnesses, and the privilege against self-incrimination.[2]

But with this maturity comes a host of problems having no counterparts in the law dealing with the adult offender. This note is to treat but one: the competence of a child to waive his constitutional rights, for the purposes of juvenile court as well as criminal court proceedings.

Waiver of Constitutional Rights

Little authority need be cited for the proposition that constitutional rights can be waived.[3] The Supreme Court of the United States, in *Escobedo v. Illinois*,[4] recognized that

> [t]he accused may, of course, intelligently and knowingly waive his privilege against self-incrimination and his right to counsel either at a pre-trial stage or at the trial.[5]

The traditional definition of waiver as a voluntary relinquishment of a known right is fully applicable to rights of constitutional genre.[6] To waive a constitutional right, one must have both knowledge of the existence of the right and the intention to abandon it.[7] In other words, an effective waiver assumes lack of ignorance, intimidation and fear. Necessarily, each case is peculiar in its consideration of an alleged waiver:

> The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.[8]

Waiver by a Minor: A Question of Fact

Waiver is therefore a question of fact. And in the cases we are considering, the fact is that the accused is a juvenile. Should this

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

2 *Id.* at 33, 41, 42-57.

3 *E.g.*, United States v. Drummond, 354 F.2d 132 (2d Cir. 1965); DeRose v. United States, 315 F.2d 482 (9th Cir. 1963).

4 378 U.S. 478 (1964).

5 *Id.* at 490 n.14.

6 Walker v. Peppersack, 316 F.2d 119 (4th Cir. 1963).

7 Cipres v. United States, 343 F.2d 95 (9th Cir. 1965); Commonwealth *ex rel.* Whiting v. Cavell, 244 F. Supp. 560 (M.D. Pa. 1965).

8 Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *See* People v. Chesser, 29 Cal. 2d 815, 178 P.2d 761 (1947).

fact alone preclude a valid waiver as a matter of law? In civil matters, a minor is certainly legally incompetent in a wide variety of situations. A child cannot be held on his personal contract;[9] he cannot alone convey his real property;[10] he cannot maintain a suit without a guardian *ad litem*.[11]

No one would contend that *every* minor lacks the cognizance and shrewdness requisite for the protection of his interests in these affairs, but common experience demands the recognition that exceptions are rare. The law adopts the general rule at the nominal expense of a few, thereby insuring the protection required by the majority.

An analogy to the issue of waiver is compelling. If a minor is incompetent in matters of simple contract, should he not be powerless to surrender his constitutional rights? If, as a matter of law, a minor is unable to waive the requirement that a civil action against him be brought through the appointment of a guardian,[12] there would appear to be no sound reason why a distinction should exist to accommodate a waiver of the right to counsel or the privilege against self-incrimination. Nonetheless, the distinction exists. The courts consistently treat age as simply another element in the total array of circumstances which must be considered in seeking an intelligent and competent waiver.[13] Statements such as this are common:

> Although minority itself would not prevent an intelligent waiver . . . it is an important circumstance to be observed in the consideration of the other factors of the case. . . .[14]

Consider the practical consequences of treating a child as incompetent to waive his rights. If a juvenile cannot as a matter of law waive his right to counsel, then it might be necessary for the police to insure the prompt acquisition of a lawyer, the child's parents or a

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[9] CAL. CIV. CODE §§ 34-36, 1556-57.

[10] CAL. CIV. CODE § 33.

[11] CAL. CIV. CODE § 42; CAL. CODE CIV. PROC. §§ 372-73.

[12] Hess v. Gerhart, 19 Pa. D. & C. 253 (C.P. Lancaster Co. 1933).

[13] *See* Annot., 71 A.L.R.2d 1160, 1162 n.2 (1960).

[14] People v. Hardin, 207 Cal. App. 2d 336, 340-41, 24 Cal. Rptr. 563, 566 (1962).

In determining whether incriminating statements are voluntary, age of the person should be considered, but statements should not be ruled inadmissible merely because of the youth of the maker. People v. Magee, 217 Cal. App. 2d 443, 457, 31 Cal. Rptr. 658, 667 (1963). "The age of a defendant minor, his education and his lack of previous experience with the law are also important factors to be considered in determining the voluntariness of a confession." State v. White, 146 Mont. 226, 234, 405 P.2d 761, 765, *cert. denied*, 384 U.S. 1023 (1965). Where a waiver of right to counsel is relied on, the juvenile court "must affirmatively find as a fact that by reason of 'age, education, and information, and all other pertinent facts' the minor is able to and did make an intelligent waiver." McBride v. Jacobs, 247 F.2d 595, 596 (D.C. Cir. 1957). *See* Annot., 87 A.L.R.2d 624, 625 (1963).

It is important to recognize the waiver implications in a case which discusses the voluntariness of a minor's confession. A decision that a confession was involuntary is also a holding that the defendant made no voluntary waiver of his privilege against self-incrimination. That immaturity alone does not render a confession involuntary is equivalent to the rule that a minor is not incapable of making a voluntary relinquishment of his privilege against self-incrimination.

guardian *ad litem*. This is not too great a burden. However, if the child cannot waive his privilege against self-incrimination, then *no statement* made by him after being taken into custody—before, at least, adult assistance is by his side—could ever be used against him. It is therefore not surprising to hear a judge say that such a development would "unduly restrict law enforcement."[15]

Waiver remains a question of fact even though the defendant is a juvenile; age weighs heavily, but is by no means conclusive.[16] The general rule[17] that courts indulge every reasonable presumption against waiver of constitutional rights has particular significance in this context.[18]

Sources of Incompetence

The circumstances which occasionally prevent an effective waiver by an adult are conspicuous by their absence in the case of a juvenile. The obvious source of incompetence to be expected in a minor is simple inability to comprehend. Immaturity, illiteracy and inexperience are concomitants of youth. Words like "counsel" and "self-incrimination" will convey little assurance to a child so afflicted. For a waiver to fit its definition, it must be an abandonment of a *known* right. To know of the right to counsel is to know not only the nature of the right, but also its significance: the practical advantages of having a lawyer must be appreciated.[19] Such an understanding is beyond the grasp of most juvenile defendants. Thus, it has been held

[15] People v. Magee, 217 Cal. App. 2d 443, 457, 31 Cal. Rptr. 658, 667 (1963) (Bray, J.).

[16] A good number of decisions have squarely held the issue of waiver not to be one of law:

"There is nothing . . . that supports the defendants' contentions, except that they were seventeen and eighteen years of age. We are of the opinion that this fact standing alone is not sufficient to void a confession when the same is validly made under the law." Olivera v. State, 354 P.2d 792, 794 (Okla. Crim. 1960). In State v. Kelley, 253 Iowa 1314, 115 N.W.2d 184 (1962), this language was cited with approval.

"The competence of a seventeen-year-old criminal defendant to waive his right to counsel is a question of fact." Williams v. Huff, 142 F.2d 91, 92 (D.C. Cir. 1944).

"To find that it was inadmissible, we would have to hold that any confession made by a person who is not yet eighteen years old is involuntary unless one of his parents or his attorney is present. This is not the law." State v. Stewart, 176 Ohio St. 156, 159-60, 198 N.E.2d 439, 442, *cert. denied*, 379 U.S. 947 (1964).

"A statutory definition of minority, without more, does not in itself render inadmissible confessions or admissions of an infant." De Souza v. Barber, 263 F.2d 470, 476 (9th Cir.), *cert. denied*, 359 U.S. 989 (1959).

[17] Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *Accord*, Emspak v. United States, 349 U.S. 190, 198 (1955); Glasser v. United States, 315 U.S. 60, 70 (1942).

[18] Juvenile courts have been especially admonished to demand intelligent and competent waivers of the rights which legislatures have seen fit to give minors. Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956).

[19] *See* Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 33.

in a recent New Jersey case[20] that notice by police of constitutional rights to two boys, ages 13 and 15, lacked significant weight in determining the voluntariness of their subsequent confessions made in the absence of parents or counsel.

In addition, the child is peculiarly susceptible to his environment. All but the most hardened, habitual offenders are likely to be overawed by the state's law enforcement machinery. In these intimidating surroundings, the juvenile is impressed with the desirability of full cooperation; to assume an antagonistic posture by asking for a lawyer or refusing to speak seems to the child a highly undesirable alternative.[21] Waiver must be a voluntary act, and the probable absence of free volition under these circumstances is plain.

The great majority of the cases which invalidate alleged waivers by juveniles are more concerned with the child's reaction to his environment than with his innate ignorance. In *Gallegos v. Colorado*,[22] a 14-year-old murder defendant was detained for 5 days without seeing his mother or a lawyer, after which he signed a confession. The conviction was reversed, the Supreme Court finding an abuse of due process. The Court based its decision on the "totality of circumstances":[23]

> The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend. . . .[24]

Similar analysis produced the same result in *Haley v. Ohio*,[25] where a 15-year-old boy charged with murder had been questioned by relays of police for 5 hours without advice from a friendly adult.[26]

But the facts in *Gallegos* and *Haley* are exaggerated as compared to the standard case; the claim of incompetent waiver usually involves little more than assertions of subtle intimidation, fright or bewilderment. Each decision is therefore a product of what Justice Frankfurter called "psychological judgment that reflects deep, even if inarticulate, feelings of our society."[27]

Gault and the Waiver Issue

It has been shown that uniform past practice has been treatment

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[20] *In re Carlo*, 48 N.J. 224, 225 A.2d 110 (1966).

[21] "Most kids, when confronted by the police, not only confess to the matter at issue, but will voluntarily involve themselves and others in offenses the officers had not even heard of. . . . [N]ot having the mature experience of us adults, . . . they usually 'shoot the works,' and 'sing.'" Long, *Headaches of a Judge—A Challenge to the Bar*, 27 WASH. L. REV. 130, 135 (1952).

[22] 370 U.S. 49 (1962).

[23] *Id.* at 55.

[24] *Id.*

[25] 332 U.S. 596 (1948).

[26] *Accord*, United States v. Morales, 233 F. Supp. 160 (D. Mont. 1964) (16-year-old held overnight and interrogated without a lawyer); People v. De Flumer, 16 N.Y.2d 20, 209 N.E.2d 93, 261 N.Y.S.2d 42, *cert. denied*, 384 U.S. 1018 (1965) (15-year-old defendant withheld from parents overnight and for 2 more days before he confessed and was assigned counsel).

[27] Haley v. Ohio, 332 U.S. 596, 603 (1948) (concurring opinion).

of waiver as a question of fact.[28] The *Gault*[29] decision heightens the importance of the issue. Indeed, Justice Fortas' opinion recognizes this dimension of the *Gault* command:

> We appreciate that special problems may arise with respect to waiver of the privilege (self-incrimination) by or on behalf of children, and that there may well be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents.[30]

It is clear enough that the Court does not intend to upset the settled law of waiver by a minor; additional language of the opinion makes more explicit the desire of the Court that the fact-finding process be tempered with caution for the protection of the child.[31] This is the "principle" of which the Court speaks.

The progressive sweep of the *Gault* decision has therefore left the law of juvenile waiver exactly where it was. This has been recognized in California in two significant developments. The California Legislature, while enacting *Gault*-inspired amendments to the juvenile court laws in the summer of 1967, made it quite clear that it did not intend to prohibit competent waivers by juveniles.[32] Secondly, in *People v. Gomez*,[33] decided on August 24, 1967, it was decided—with full appreciation of *Gault*—that a minor does not have "the right, ipso facto, to disaffirm a waiver merely by asserting his non-age at the trial."[34]

Alternative Approaches to Waiver

The existing rule that it is possible for a minor to waive his rights has not gone without criticism, however. In *In re Castro*,[35] a juvenile court case, the 16-year-old accused confessed before he was told of his right to counsel. The appellate court held the confession admissible,[36] but the court availed itself of the opportunity to speculate

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[28] *See* text at notes 9-18 *supra*.

[29] *In re* Gault, 387 U.S. 1 (1967).

[30] *Id.* at 55.

[31] "If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it has not been coerced or suggested, but also that it is not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Id.*

[32] The amended relevant part of CAL. CODE CIV. PROC. § 372 reads as follows: "Nothing in this section or in any other provision . . . is intended by the Legislature to prohibit a minor from exercising an intelligent and knowing waiver of his constitutional rights in any proceeding under the Juvenile Court Law . . . ."

Other new provisions require the allowance or appointment of counsel at various stages of procedure *unless there is an intelligent waiver*. *See* CAL. WELF. & INST'NS CODE §§ 625, 627.5, 634, 700.

[33] 60 Cal. Rptr. 881 (1967).

[34] *Id.* at 885.

[35] 243 Cal. App. 2d 402, 52 Cal. Rptr. 469 (1966).

[36] CAL. WELF. & INST'NS CODE § 701 provides that the juvenile court judge may *support his findings* with only such evidence as would be admissible in a criminal case, although admission of evidence in the juvenile court proceeding is governed only by the rules of materiality and relevance.

Thus, under pre-*Gault* California law, any relevant confession would be admissible in the juvenile court proceeding, but the judge would be precluded

on the problem of waiver—anticipating the day when *Miranda v. Arizona*[37] might apply to children. After reviewing the many civil disabilities of minors, it is asked: "How then can he be expected knowingly and effectively to waive his constitutional rights?"[38]

In *Williams v. Huff*,[39] it was decided that the competence of a boy 17-years-old to waive his right to counsel in a criminal case was a question of fact. Justice Edgerton wrote the opinion, but noted his dissatisfaction:

> It seems to me . . . as a matter of law that a boy of seventeen cannot competently waive his right to counsel in a criminal case. In saying this I do not speak for the court.[40]

Only one case has been found which cites this language with approval,[41] and one Ninth Circuit opinion has expressly repudiated it.[42]

In *Urbasek v. People*,[43] arising in the juvenile court, the Appellate Court of Illinois considered the propriety of allowing an 11-year-old boy to waive his privileges against search and seizure and self-incrimination, which the court assumed would be applicable by force of the Federal Constitution:

> [W]e are not persuaded that the State may assert a claim of waiver against respondent. The protection . . . is a fundamental right, and its loss by waiver by a minor would be contrary to the "laudable purposes of Juvenile Courts" . . . .[44]

There is even a contribution at this point from the highest court in the land. In *Gallegos*[45] it was said:

> [A] fourteen-year old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police . . . and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.[46]

But it has already been explained that the *Gallegos* decision turned on the "totality of circumstances,"[47] and not on any rule of law that a minor, "no matter how sophisticated," is incapable of making a competent waiver.

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from using the confession to support his findings unless it could be shown preliminarily that the minor had been warned of his rights and had then made a competent waiver. In the *Castro* case, it had not been shown that the minor had been warned of his right to counsel; although the confession was admissible, it was held, nevertheless, that it could not be *considered*.

[37] 384 U.S. 436 (1966). *Miranda* requires that a person in custody must, prior to questioning, be told of his right to remain silent, that what he says may be used against him, that he may consult with counsel, and that, if he is indigent, a lawyer will be afforded him. *Id.* at 478-79.

[38] *In re* Castro, 243 Cal. App. 2d 402, 409, 52 Cal. Rptr. 469, 473 (1966).

[39] 142 F.2d 91 (D.C. Cir. 1944).

[40] *Id.* at 92.

[41] *In re* Poff, 135 F. Supp. 224, 228 (D.D.C. 1955); it was cited to support dicta that a boy of 16 is incapable of deciding whether he should demand a jury trial.

[42] De Souza v. Barber, 263 F.2d 470 (9th Cir.), *cert. denied*, 359 U.S. 989 (1959).

[43] 76 Ill. App. 2d 375, 222 N.E.2d 233 (1966).

[44] *Id.* at 385, 222 N.E.2d at 238.

[45] Gallegos v. Colorado, 370 U.S. 49 (1962).

[46] *Id.* at 54.

[47] Notes 22-24 *supra* and accompanying text.

Until now, no attempt has been made in this note to distinguish the practices in juvenile courts and criminal courts. Since the *Gault* decision has made constitutional rights equally applicable in the juvenile courts, it would at first seem that no differences should exist, but the District of Columbia Circuit recognizes a special circumstance in which a juvenile cannot be deemed to have waived his privilege against self-incrimination: when the youth has made damaging admissions while in police custody before the juvenile court has waived its jurisdiction of the case and transferred it to the criminal court. In *Harling v. United States*,[48] Judge Bazelon stated that to admit such statements in the criminal court

> would be tantamount to a breach of faith with the child, since he cannot be charged with knowledge of either his privilege against self-incrimination or the Juvenile Court's power to waive its jurisdiction and subject him to criminal penalties.[49]

The court applied this rule as a *matter of law*.[50]

The *Harling* opinion specifically avoided the question of spontaneous statements—utterances not in the course of official interrogation. Since the due process argument of the opinion rested upon the element of breach of faith with the child, it is difficult to see how a valid distinction might be made with respect to spontaneous statements. The expectancy of the child would be the same in any case; the obligation to speak is there, whether or not an "official interrogation" has commenced. It is therefore not at all askew of the *Harling* doctrine to conclude that *all* statements made by a minor prior to waiver of jurisdiction to the criminal court should be inadmissible against the child in the criminal proceeding. This should apply as a matter of course—irrespective of alleged waivers by the minor—since the *Harling* rule precludes consideration of any possibility that the child fully understood that he could be transferred to the criminal court.

It must be concluded that the supposed undercurrent of judicial displeasure with the question-of-fact approach to the problem of waiver (suggested by some writers)[51] has an insubstantial foundation of case rhetoric for its support. With the exception of the dictum in *Huff*,[52] and possibly that in *Castro*,[53] the statements which might

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[48] 295 F.2d 161 (D.C. Cir. 1961).

[49] *Id.* at 163.

[50] Judge Bazelon said this in so many words: "Moreover, we do not believe that the question of admissibility of the child's statements as evidence against him in the District Court should vary from case to case depending on criteria which could at best only partially indicate the child's capacity to waive his right." *Id.* at 164 n.12.

One writer has suggested that a wedding of the *Harling* and *Gallegos* doctrines should require the exclusion of all pretransfer admissions, even if the juvenile had the active assistance of counsel. *See* Note, *Due Process Reasons for Excluding Juvenile Court Confessions From Criminal Trials*, 50 CALIF. L. REV. 902, 907 (1962).

[51] *See* Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 572 (1957); Note, *Due Process Reasons for Excluding Juvenile Court Confessions From Criminal Trials*, 50 CALIF. L. REV. 902, 905 (1962); Comment, *The Juvenile Offender and Self-Incrimination*, 40 WASH. L. REV. 189, 200 (1965).

[52] Williams v. Huff, 142 F.2d 91 (D.C. Cir. 1944).

[53] *In re* Castro, 243 Cal. App. 2d 402, 409, 52 Cal. Rptr. 469, 473 (1966).

be interpreted to favor placing a shroud of incompetence over every minor are little more than products of make-weight tendency and loose verbiage. When it is confronted with the compulsion to choose between the two alternatives, we must conclude that no court is likely to break with tradition.

Instead, there are at least two alternatives which may be used to deal with the waiver problems which *Gault* intensifies. Some jurisdictions have taken steps toward the tightening of waiver requirements. In Oklahoma, the trend is indicated by the structure of the rule which has developed: a minor is presumed to be incapable of waiving constitutional and statutory rights *unless* it clearly appears that the minor fully understood the consequences.[54] In Alabama, it was provided by statute[55] that a confession by a child under 16 years of age was inadmissible against the child.[56] A 1923 amendment diminished the scope of the statute so as to allow the admission of such a confession in juvenile court and bar its admission against the child "in any civil, criminal, or other cause or proceeding whatever . . . ."[57]

The second and more feasible route is the modification of practices of law enforcement officers and juvenile courts to the end of eliminating the need for assessing a youth's competency to waive his rights. The Committee on Criminal Law and Procedure of the California Bar has proposed that "no statement taken from a juvenile under eighteen . . . be utilized in any subsequent criminal proceeding unless made in the presence of his attorney."[58] This is appropriate enough when the child desires counsel, but if he has waived that right—if he is so permitted—are his statements inadmissible nevertheless? Such a proposal must be predicated upon the assumption that a minor is incompetent to waive his right to counsel—at least for the purpose of determining the admissibility of statements made in the absence of an attorney—else the benefits of the reform might be denied to those most in need of its protection.

Moreover, the presence of an attorney should certainly not be the sole criterion; a parent or guardian can speak for the child just as effectively.[59] Sight must not be lost of the fact that what is required for a competent waiver is only maturity of judgment. California has chosen to rely ultimately on the judgment of the parent or guardian in juvenile court proceedings. Notice of constitutional rights, including the right to counsel, is required to be given to the minor *and* his

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[54] Olivera v. State, 354 P.2d 792 (Okla. Crim. 1960); Clark v. State, 95 Okla. Crim. 375, 246 P.2d 422 (1952); Fields v. State, 77 Okla. Crim. 1, 138 P.2d 124 (1943).

[55] Ala. Code 1907 § 6464.

[56] This statute was not given an expansive interpretation. Where a 16-year-old made statements to the police in the presence of his father, the statute was deemed inapplicable. Corbin v. State, 19 Ala. App. 439, 98 So. 132, *cert. denied, Ex parte* Corbin, 210 Ala. 369, 98 So. 134 (1923).

[57] ALA. CODE, tit. 13, § 377 (1958).

[58] 41 CAL. S.B.J. 798, 803 (1966).

[59] "Where the court finds for any reason the minor is not capable of a waiver [of right to counsel] the parent may so waive provided the court also finds there is no conflict of interest between them, and of course the waiver by the parent must be an intelligent, knowing act." McBride v. Jacobs, 247 F.2d 595, 596 (D.C. Cir. 1957).

parent or guardian during at least one of three stages: when the child is initially brought before the probation officer,[60] at the detention hearing[61] and at the juvenile court hearing.[62] Counsel is to be appointed if either the minor *or* his parent or guardian so requests.[63] The right to counsel cannot, therefore, be waived solely by the child; there must be concurrence in this decision by his parent or guardian, whose consideration is actively solicited.

Conclusion

A minor may waive his constitutional rights, providing the circumstances permit a knowing, intelligent relinquishment. California has enacted safeguards in the Juvenile Court Law which should prevent the injustices which might otherwise result from allowing a child to waive his right to counsel. However, the legislature has stated explicitly that it does not intend to disapprove of the recognition of competent waiver by children. This would not necessarily foreclose the development of an exclusionary rule by the courts. Such a rule could not have as its foundation a construction of legislative purpose, but could very well be based upon the judicial conclusion that a rule of law nullifying all juvenile waivers is essential to the preservation of minors' constitutional rights.

*Gary G. Strieker**

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[60] CAL. WELF. & INST'NS CODE § 627.5.
[61] CAL. WELF. & INST'NS CODE § 634.
[62] CAL. WELF. & INST'NS CODE § 700.
[63] CAL. WELF. & INST'NS CODE §§ 627.5, 634, 700.
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