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The Juvenile Offender and Self-Incrimination

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COMMENT

THE JUVENILE OFFENDER AND SELF-INCRIMINATION

A juvenile offender whose case has been transferred from juvenile court to criminal court may be confronted with incriminating statements which he made during the course of the juvenile proceedings. The admissibility in a criminal prosecution of confessions and admissions made by a juvenile to police, probation officers, juvenile court judges, or other juvenile authorities involves important issues of public policy and constitutional law.

The problem typically arises when a youth of sixteen or seventeen commits an act which, were he an adult, would be characterized as a crime. The youth has a history of several juvenile offenses. He is arrested and quickly confesses.[1] Why not? The police "know" he did it; lying or refusing to answer questions will only aggravate the situation. If he cooperates, he may receive better treatment from the judge. He also cooperates with the juvenile probation officer who interrogates him, because he knows that the probation officer will make recommendations to the juvenile court judge regarding treatment. Despite the youth's cooperation with the authorities, the juvenile court judge decides to transfer the case to criminal court. The youth is then confronted by the prosecutor and is advised to plead guilty; conviction is a foregone conclusion, *because the prosecutor has the youth's own confession and admissions to use against him.* The youth is unaware that serious questions of constitutional law have arisen from this turn of events, but he probably is bitterly aware that the cooperative behavior required to win leniency in juvenile court has paradoxically damned him to almost certain conviction in criminal court.[2]

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[1] See generally, Long, *Headaches of a Judge—A Challenge to the Bar,* 27 WASH. L. REV. 130, 135 (1952). "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. They may start out with a lie, but... they can't stick with the lie very long, and so they usually 'shoot the works,' and 'sing.'"

[2] How many juveniles this has happened to is not known. There are no appellate decisions on this subject in Washington. The Seattle-King County Bar Association's manual, JUVENILE COURT PRACTICE IN KING COUNTY (1964) states, at 15, that "counsel may wish to advise a youth of 16 years or over who has a previous record... and on whom the juvenile court may waive jurisdiction for adult prosecution... to make no disclosure or admission except through counsel until the decision as to jurisdiction

Since the problem originates in the juvenile proceeding, an examination of an individual's rights in those proceedings is in order. Judicial recognition of an accused's rights in juvenile proceedings has been haphazard at best with many courts loath to give them more than lip service. The reason is that a juvenile proceeding is considered to be a special, non-criminal proceeding, designed to accomplish both the protection of young people and the prevention of criminal development rather than the administration of criminal punishment. This has led to a rather curious development—a juvenile offender suffers from greater disabilities than his adult counterpart. For instance, in Washington, good faith is a defense to false imprisonment of a juvenile because the restraint is imposed by the state as a parent for the protection and well being of the child.[3] Similarly, article I, section 22 of the Washington Constitution guarantees bail in all criminal proceedings, but a juvenile has no right to bail because a juvenile proceeding is not considered to be criminal.[4] Finally, since he is not being subjected to a criminal prosecution, a juvenile can be forced to incriminate himself, even though he faces a possible deprivation of liberty.[5]

However, some courts have had second thoughts about due process in juvenile proceedings. In California, where juvenile courts were once allowed to compel self-incrimination because the proceeding was "non-criminal,"[6] statutory characterization of the proceeding as non-criminal is now deemed to be "a legal fiction, presenting a challenge to credulity and doing violence to reason."[7] Detrimental effects upon the juvenile, *i.e.*, deprivation of liberty, employment difficulties, re-

has been made...." This appears to be a clear indication from experienced counsel that the prosecutor will use self-incriminatory statements made in the course of juvenile proceedings. The Children's Bureau Publication No. 346, STANDARDS FOR SPECIALIZED COURTS DEALING WITH CHILDREN (1954), suggests, at 38-39, that the use of evidence obtained in juvenile proceedings, including admissions made in preliminary investigations, be prohibited in subsequent criminal proceedings if jurisdiction is transferred. Wigmore lists thirty-eight states which expressly prevent the admission in criminal court of evidence obtained in the course of a juvenile proceeding. 1 WIGMORE, EVIDENCE § 196(c) n. 5 (3rd ed. 1940). Washington is not among them.

[3] Weber v. Doust, 84 Wash. 330, 146 Pac. 623 (1915).

[4] State *ex rel.* Gray v. Webster, 122 Wash. 526, 211 Pac. 274 (1922).

[5] *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954); cited with approval in *In re* Lewis, 51 Wn.2d 193, 316 P.2d 907 (1957). *Accord, In re* Dargo, 81 Cal. App. 2d 205, 183 P.2d 282 (1947); *In re* Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932). The extent of the impositions on civil liberties approved at one time or another for juvenile court proceedings exceeds the bounds of this comment, and these examples are recited here primarily to give the flavor of the topic. See Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORN. L. Q. 387 (1961).

[6] *In re* Dargo, *supra* note 5.

[7] *In re* Contreras, 109 Cal. App.2d 691, 241 P.2d 631, 633 (1952).

strictions on military service, and not the form of the proceeding, are considered controlling. In Washington, D. C., Judge Holtzoff stated:

> precious constitutional rights cannot be diminished or whittled away by the device of changing names of tribunals or modifying the nomenclature of legal proceedings. The test must be the nature and essence of the proceeding rather than its title. If the result may be the loss of personal liberty, the constitutional safeguards apply.[8]

In the state of Washington, applicability of constitutional safeguards to juvenile proceedings is confused. In *In re Lewis*,[9] where the right to a public trial was unsuccessfully asserted, the court indicated, in dictum, that a juvenile could be compelled to incriminate himself, because the proceeding was remedial and not penal. But in *In re Petrie*,[10] the court held that before the juvenile court could effect a permanent termination of the relationship between a natural parent and her child, due process required that the parent be afforded reasonable notice; an opportunity to be heard or defend; the assistance of counsel, if wanted; a reasonable time to prepare for trial; and an orderly proceeding. In *In re Lundy*,[11] in determining whether a seventeen-year-old could be prohibited from singing in a bar and grill, the court prefaced its decision by remarking that while the juvenile court act was to be interpreted liberally to effect its beneficent purposes, nevertheless it had to be "construed with all the strictness of a criminal law..." so that "no person, whether minor or adult, should ever be restrained of liberty without due process...."[12]

The problem in many states has been that due process requirements have not been evenly applied to juvenile proceedings. Their application has been limited to the forum's view of the safeguards necessary to its concept of special proceedings for juvenile offenders. *Weber v. Doust*[13] is a good example. In an action for false imprisonment brought by a juvenile who had been detained in violation of law, the court held that the officers were liable on the theory that, despite the special nature of the juvenile proceeding, not even a delinquent child could be deprived of his liberty without due process. However, on rehearing, the earlier decision was reversed. The court

[8] United States v. Dickerson, 168 F. Supp. 899, 902 (D.D.C. 1958), *rev'd on other grounds*, 271 F.2d 487 (D.C.Cir. 1959).
[9] 51 Wn.2d 193, 316 P.2d 907 (1957).
[10] 40 Wn.2d 809, 246 P.2d 465 (1952).
[11] 82 Wash. 148, 143 Pac. 885 (1914).
[12] *Id.* at 151, 143 Pac. at 886.
[13] Weber v. Doust, 81 Wash. 668, 143 Pac. 148 (1914), *rev'd on rehearing*, 84 Wash. 330, 146 Pac. 623 (1915).

reasoned that, because of the special nature of a juvenile proceeding, a good-faith arrest made for the protection and well-being of the child was not a denial of due process. Just how due process became an issue in a false imprisonment action is never revealed, and does not ever appear to be involved, since the holding is merely that good faith is a defense to a juvenile's suit for false imprisonment. This case illustrates the confusion and uncertainty in this area of the law.

Despite this confusion, the need for fundamental fairness and due process in juvenile proceedings, coupled with a series of recent decisions relating to self-incrimination and the right to counsel, leads to the conclusion that self-incriminatory statements made in the course of a juvenile proceeding (including out-of-court proceedings) will not generally be admissible in criminal proceedings where the juvenile court waives jurisdiction and transfers the case to criminal court.

Considerations of Public Policy. The purpose of special proceedings for juveniles is not to punish or restrain an individual but rather to inquire into his welfare and prevent the development of a criminal.[14] It is not surprising that some courts have found that a child "questioned in the same manner and spirit as a parent might have questioned his child was not 'compelled' to give a self-incriminating answer to a question."[15] It is, after all, essential that the juvenile court know precisely what the child has done, and the circumstances of his life generally, if it is to make a proper diagnosis of the child's problem and arrive at a feasible plan for his protection, guidance, or rehabilitation.[16] Thus, despite obvious unfairness in forcing a juvenile to incriminate himself when he faces detention (a probable violation of due process), it can be assumed that, because of the special nature of the juvenile proceeding, courts will continue to permit this compelled self-incrimination.

On the other hand, if the juvenile's case is transferred to a criminal court, the rationale of obtaining self-incriminating statements is no longer relevant. In the criminal setting there is little inquiry into the child's welfare. No longer is society interested in preventing the making of a criminal; one allegedly exists. Society is going to restrain and punish the offender, *not* protect, guide, or rehabilitate him. Having gently questioned the child "in the same manner and spirit as a

[14] *In re* Lewis, 51 Wn.2d 193, 316 P.2d 907 (1957); *accord,* Weber v. Doust, *supra* note 13; *In re* Lundy, 82 Wash. 148, 143 Pac. 885 (1914). Juvenile offenders and readers of the press are probably of the opinion that the juvenile court often punishes.

parent might have questioned his child," society now drops the parental mask and turns him over to the prosecutor, with an iron-clad case built on the juvenile's own confession and admissions.

Juvenile codes generally prescribe that juvenile proceedings shall not be open to the public and that the probation officer's investigation record shall be withheld from public inspection.[17] These laws are intended to protect a juvenile offender from public calumny and also to encourage a complete, uninhibited disclosure of the juvenile's past. Their purpose and effect is vitiated when self-incriminatory statements are allowed to be made public after a transfer of a juvenile case to criminal court.[18] It would appear to be more consistent with the purpose of juvenile court acts if incriminatory statements made by a juvenile prior to transfer to criminal court were considered privileged. The rationale for compelling such statements rests on the remedial nature of a juvenile proceeding. If the prosecutor is allowed to use these statements against the juvenile in a subsequent criminal prosecution, the remedial juvenile proceeding is converted into a preliminary proceeding in the criminal process.[19]

Considerations of Due Process. The scope of due process in the context of juvenile proceedings has been uncertain; it has varied according to time, forum, and the particular safeguard being asserted. For instance, no case holds that a juvenile cannot insist upon a fair hearing; jurisdictions vary as to whether he has a privilege against self-incrimination,[20] and no case has been found in which the juvenile could insist upon a public trial. But in recent years, a series of decisions has led to a minority rule, which one court stated as follows:

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[15] *In re* Holmes, 379 Pa. 599, 109 A.2d 523, 526 (1954).

[16] The same information should be available to the criminal courts for precisely the same reason. It does not necessarily follow that the defendants should be compelled to testify against themselves.

[17] See, *e.g.*, WASH. REV. CODE §§ 13.04.091 and 13.04.230.

[18] This is not to imply that the Washington statutes necessarily preclude the use of such evidence in a criminal trial. Their language, while perhaps indicating a privilege, State v. Bixby, 27 Wn.2d 144, 177 P.2d 689 (1947), does not approximate that of the statutes in other states which have been interpreted as proscribing the use of such admissions in criminal court. 1 WIGMORE, *op. cit. supra* note 2.

[19] While there is no Washington precedent, there are cases concerning the trial of juveniles in criminal court, none of which reveals the slightest judicial misgivings about the possible use of statements made in the course of juvenile proceedings. State v. Ring, 54 Wn.2d 250, 339 P.2d 461 (1959) (tried in criminal court after defendant turned eighteen years of age); State v. Melvin, 144 Wash. 687, 258 Pac. 859 (1927); State *ex. rel.* Sowders v. Superior Court, 105 Wash. 684, 179 Pac. 79 (1919).

[20] Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944) (privilege exists); *In re* Sadlier, 97 Utah 17, 85 P.2d 810, *aff'd on rehearing*, 97 Utah 313, 94 P.2d 161 (1939); *In re* Tahbel, 46 Cal. App. 755, 189 Pac. 804 (1920); See cases cited note 5, *supra* (privilege does not exist).

> [W]here the charge in the Juvenile Court is one of crime which, because of charitable considerations for the welfare of the child, is called "juvenile delinquency," then it must be surrounded by the guarantees and limitations of the federal constitution.[21]

The reason is that whether the proceeding be called "civil," "equitable," or "criminal,"

> the constitutional limitations are applicable if the final action of the court may result in depriving a person of his liberty. Whether the enforced incarceration may be in jail, penitentiary, reformatory, training school, or other institution, is immaterial. What matters is the potential loss of liberty.[22]

The most recent case adopting the view that constitutional safeguards apply to juvenile proceedings is *United States v. Morales*.[23] The court in this case concluded that the variation in rulings concerning the applicability of constitutional safeguards is attributable to the variation in the proceedings; *ie.*, some are social and do not affect the juvenile's liberty, while others are directed toward depriving the juvenile of his liberty. In the latter proceedings, basic constitutional safeguards must be observed. The cases, however, do not divide along these lines. For instance, in *In re Holmes*,[24] a juvenile faced a deprivation of liberty, nevertheless, he was forced to incriminate himself. However, the conclusion of the court in *Morales* that this variation in juvenile proceedings is the only proper ground for the denial of constitutional safeguards in any juvenile proceeding appears to be sound. It is probable, therefore, that more and more courts will adopt the rule that where a juvenile faces a possible deprivation of liberty, due process requirements apply.

An established theory holds that because the proceedings in juvenile court do not constitute "criminal" proceedings, the juvenile may, therefore, be compelled by that court to testify.[25] The fifth amendment protection against self-incrimination applies only to protect

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[21] *In re* Poff, 135 F. Supp. 224, 227 (D.D.C. 1955).

[22] United States v. Dickerson, 168 F. Supp. 899, 901 (D.D.C. 1958). The Washington court in *In re* Lundy, 82 Wash. 148, 143 Pac. 885 (1914), also rested the right to due process on the existence of a threat to liberty. Each of the following cases held that regardless of the special, non-criminal nature of a juvenile proceeding, due process applies if liberty is in peril: Shioutkan v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956); United States v. Morales, 233 F. Supp. 160 (D. Mont. 1964); Application of Johnson, 178 F. Supp. 155 (D.N.J. 1957); *In re* Contreras, 109 Cal. App.2d 691, 241 P.2d 631 (1952).

[23] 233 F. Supp. 160 (D. Mont. 1964).

[24] 379 Pa. 599, 109 A.2d 523 (1954).

[25] 379 Pa. 599, 109 A.2d 523 (1954).

against criminal prosecution, and a juvenile proceeding is not a criminal prosecution. This argument, however, is valid only where no danger of criminal prosecution exists when the juvenile is being compelled to testify in juvenile court. There can be no question that such a danger does exist.[26] In *In re Holmes*,[27] the Pennsylvania court held that the juvenile court's compelling a juvenile to testify was not a constitutionally proscribed compulsion of self-incrimination. The basis for the court's decision was its view that the proceeding was non-criminal, designed not to punish but rather to protect. However, noting that a juvenile could be transferred to criminal court for trial, the court stated that such a transfer "could not be made after the Juvenile Court had made an adjudication of delinquency nor, perhaps, after any self-incriminatory examination of the child."[28]

In *Harling v. United States*,[29] a unanimous court held that oral admissions made by a juvenile while in police custody prior to the juvenile court's waiving jurisdiction are inadmissible in subsequent criminal proceedings.[30] The court reasoned that compelled self-incrimination was possible in the juvenile court only because the juvenile was immune from criminal prosecution.[31] If the action were criminal, the constitutional prohibition would necessarily apply. To use admissions obtained in juvenile court to prosecute in criminal court after a waiver of jurisdiction would violate "fundamental notions of fairness," and turn the juvenile proceeding into "an adjunct to and part of the adult criminal process."[32] By resorting to the concept of fundamental fairness, the court avoided the self-incrimination question.[33]

Until recently, federal constitutional standards did not apply to state proceedings because the privilege against self-incrimination was not considered a part of due process. Each state was free to apply

[26] WASH. REV. CODE § 13.04.120 (juvenile may be transferred to criminal court for prosecution); State v. Melvin, 144 Wash. 687, 258 Pac. 859 (1927); State *ex rel.* Sowders v. Superior Court, 105 Wash. 684, 179 Pac. 79 (1919).

[27] 379 Pa. 599, 109 A.2d 523 (1954).

[28] *Id.* at 526; *accord,* Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944), and *In re* Sadlier, 97 Utah 17, 85 P.2d 810, *aff'd on rehearing,* 97 Utah 313, 94 P.2d 161 (1939).

[29] 295 F.2d 161 (D.C. Cir. 1961).

[30] The court specifically did not rest its decision on the *McNabb-Mallory* rule which provides that statements made by an accused after detention, with an unreasonable delay obtaining before the accused is brought before a magistrate, are not admissible.

[31] 295 F. 2d at 163.

[32] *Id.* at 164.

[33] The court was not called upon to determine whether due process considerations would bar the use of the juvenile's admissions in juvenile court. Presumably there was no objection to their use in that forum.

its own standards in determining whether its own privilege against self-incrimination precluded the use of testimony compelled in a juvenile proceeding in a subsequent criminal prosecution. Two landmark decisions handed down in 1964 by the United States Supreme Court have changed this situation completely.

In *Malloy v. Hogan*,[34] the Court held that the privilege against self-incrimination is a part of due process under the fourteenth amendment and applies to the states in the same manner and to the same extent as it applies to the federal government. In the companion case of *Murphy v. Waterfront Comm'n of New York Harbor*,[35] the Court, overruling prior contrary decisions, held that where a state compels self-incrimination through the use of a grant of immunity, the federal government is prohibited from making use of the testimony to convict the person who was compelled to testify. The Court rejected any notion that the rule rested on its control over the federal judiciary, basing its decision squarely on constitutional grounds. In view of the rule announced in *Malloy*, there can be no question that the *Murphy* rule will also apply to the states.[36]

In regard to juvenile offenders, the conclusive effect of *Malloy* and *Murphy* is obvious. Prior to *Malloy*, the privilege against self-incrimination was not a part of due process. Each state applied the privilege, by its own, not federal, standards. Now, however, federal standards apply. Prior to *Murphy*, there was no federal constitutional standard which prevented "whipsawing" a suspect by compelling his testimony in one jurisdiction under a grant of immunity and then trying him in another jurisdiction, using the compelled testimony against him. The use of testimony in juvenile court secured in violation of due process standards is justified, if ever, only because the juvenile is deemed to be immune from criminal prosecution. On the strength of the rule announced in *Murphy*, it would seem that self-incriminatory testimony, which is compelled in juvenile court, would not be available in a criminal prosecution, since this would constitute the proscribed practice. Indeed, under the *Murphy* rule, any evidence obtained as a result of such juvenile court testimony must likewise be excluded in criminal court.[37]

While the combination of the *Malloy* and *Murphy* rules precludes the prosecutor's use of a juvenile's compelled testimony, the problem

[34] 378 U.S. 1 (1964).
[35] 378 U.S. 52 (1964).
[36] *Id.* at 57 n.6.
[37] *Id.* at 79 n.18.

is not completely resolved. Often the juvenile's testimony is not compelled by the court. It is volunteered in hope of obtaining leniency. Counsel may protect the juvenile by answering for him or by forcing the juvenile court to compel the testimony. But juveniles are often unrepresented by counsel, and the *Murphy* and *Malloy* rules do little to assist a naive, unrepresented juvenile who is anxious to please the authorities.

Involuntary Confessions and Admissions. The involuntariness of a confession or admission is an unusual ground for an appeal of an adjudication of juvenile delinquency, since it is unusual for any confession or admission by a juvenile made to police or juvenile officers to be "involuntary." The nature of juvenile proceedings and the nature of youth both operate to result in "voluntary" admissions of the juvenile's misconduct. Through his knowledge of the juvenile court system and his experience with parents, friends, and teachers, the juvenile *knows* that his hope for leniency lies in being painfully honest and properly contrite. Failing to realize that the authorities can be certain of his guilt and still be unable to punish him because of insufficient admissible evidence in a criminal proceeding (or, for that matter, in a juvenile proceeding), the juvenile ordinarily "sings" without much encouragement.[38]

Because the juvenile or his counsel will usually admit the misconduct before the juvenile court, there is little likelihood of a challenge to a confession or admission in the juvenile proceeding. But if the case is transferred to criminal court, there is no reason why a challenge cannot then be made. If the confession or admission is challenged as being involuntary, the state has the burden of proving the contrary. Considering the impressionable nature of youngsters and the compulsive nature of the juvenile proceeding from arrest through final disposition, this could be a very difficult burden.[39] Indeed, if a confession "obtained by any direct or implied promises"[40] or "extracted by any sort of threats"[41] is inadmissible, it may well be that no admission or confession obtained in the course of a juvenile proceeding is admissible in a subsequent criminal proceeding. Implicit in the juvenile

[38] A cogent argument can be made that the very nature of this situation amounts to coercion and inducement and that all admissions and confessions so obtained are involuntary.

[39] See Haynes v. Washington, 373 U.S. 503 (1963).

[40] Bram v. United States, 168 U.S. 532, 543 (1897), cited with approval in, Malloy v. Hogan, 378 U.S. 1, 7 (1964).

[41] Bram v. United States, *supra* note 40, at 542.

proceeding is an implied promise of leniency for cooperation and an implied threat of stern punishment for refusing to cooperate.

Advice as to Constitutional Rights. Over the years, an increasing number of rights have been accorded to accused persons as a part of due process under the fourteenth amendment, as the individual's position in society has been steadily elevated. For example, a brutal beating was required to exclude a confession in 1936,[42] "so mild a whip as the refusal . . . to allow a suspect to call his wife until he confessed,"[43] sufficed to exclude an admission of guilt in 1963. Certain of these rights, *i.e.* the right to counsel and the right to remain silent, are effective only if the accused knows of their existence and knows that he may exercise them.

When the Court held, in *Gideon v. Wainwright,*[44] that the right to counsel in all criminal proceedings was a part of due process, the question when the right to counsel attached was left unanswered. However, it was clear that it attached whenever a "critical stage" was reached.[45] Then, in *Escobedo v. Illinois,*[46] the Court ruled (1) that a suspect has a right to counsel when suspicion has focused upon him and he is being interrogated; (2) that statements obtained from such an interrogation where counsel has been denied are not admissible, and (3) that he has a right to remain silent which is derived from the privilege against self-incrimination. Naturally, these rights may be waived. In *Escobedo,* because the suspect specifically asked to see his lawyer, there was no question of waiver. But what of the suspect who fails to ask for a lawyer? This was precisely the case in two recent state court decisions.[47]

In *People v. Dorado,*[48] the accused freely and voluntarily admitted a killing and signed a written statement. Relying upon *Escobedo,* the California court held that the confession was inadmissible because the interrogating officer had not advised the accused of his right to remain silent and of his right to counsel after the investigation focused on him. The court said that:

> the constitutional right to counsel precludes the use of incriminating

[42] Brown v. Mississippi, 297 U.S. 278 (1936).
[43] Malloy v. Hogan, 378 U.S. 1, 7 (1964).
[44] 372 U.S. 335 (1963).
[45] White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U. S. 52 (1961).
[46] 378 U.S. 478 (1964).
[47] People v. Dorado, 40 Cal. Rptr. 264, 394 P.2d 952 (1964); State v. Neely, 395 P.2d 557 (Ore. 1964).
[48] People v. Dorado *supra* note 47.

> statements elicited by the police during an accusatory investigation unless that right is intelligently waived; that no waiver can be presumed if the investigating officers do not inform the suspect of his right to counsel or his right to remain silent.[49]

The court found that the cases could not be distinguished merely because counsel had not been requested. The test, it felt, was substantive—whether or not the stage at which guidance and protection of counsel became necessary had been reached. At such time, the state must inform the suspect (1) of his right to counsel, and (2) of his right to remain silent. By requiring that the suspect know of these rights, assert them, and know when the critical stage has been reached, too heavy a burden would be placed upon the very person for whom the protections are intended. This reasoning finds strong support in the *Escobedo* dissent by Mr. Justice White, where the majority opinion is interpreted as establishing precisely the rule adopted in *Dorado*.[50] The attempt in *Escobedo* to distinguish some earlier, contrary decisions—where advice as to the accused's right to counsel and right to remain silent was given, also was given support in *Dorado*.[51]

In *State v. Neely*,[52] the accused was taken into custody and questioned for several hours without being informed of his right to remain silent or of his right to counsel until after he had confessed. The Oregon court noted that one of the critical facts of *Escobedo* was missing—the accused in *Neely* had not asked for counsel, but decided that it did not need to rule on the right to counsel because of another element, *i.e.* the failure of the interrogator to advise the suspect of his right to remain silent. The court pointed out that all the opinions (majority and dissenting) in *Escobedo* assumed that the right to remain silent at a police interrogation was a constitutional right, stemming from the self-incrimination clause of the fifth amendment.[53] Since the accused cannot be deemed to have waived his right unless he knew it existed, the state assumes the responsibility to see that a suspect is effectively warned of his right to remain silent. "[I]f this is not affirmatively shown by the state, a confession obtained without such warning is inadmissible."[54]

The language of *Escobedo* leaves little doubt that the two state

[49] 40 Cal. Rptr. 264, 268, 394 P.2d 952, 956 (1964).
[50] 378 U.S. at 495.
[51] *Id.* at 491-92.
[52] 395 P.2d 557 (Ore. 1964).
[53] See Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 57 n.6 (1964).
[54] 395 P.2d at 561.

courts are correct. Speaking for the majority, Mr. Justice Goldberg stated:

> [E]very person accused of a crime ... is entitled to a lawyer at trial. The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the "right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination."
>
> It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly.... This argument, of course, cut two ways. The fact that many confessions are obtained during the period points up its critical nature as a "stage when legal aid and advice" are surely needed.... There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice.[55]

The importance of the *Escobedo* rule to the subject of juvenile confessions is manifest. Although it might be that the special nature of the juvenile proceeding will prevent the operation of the rule in that context, any attempt to use admissions or confessions obtained in those proceedings in a subsequent criminal prosecution should evoke the rule and result in their exclusion. Indeed, the less the rule is observed in juvenile proceedings, the more it will affect any subsequent criminal proceedings.

As both *Dorado* and *Neeley* point out, the burden is on the state not only to show that the necessary advice has been given the suspect but also that a competent and intelligent waiver has been made. In regard to juveniles, it may be that such a waiver is impossible as a matter of law. A minor is considered legally incompetent to bind himself in a vast array of legal relationships, and the force behind this policy of legal incompetence would certainly seem to be applicable in a criminal proceeding. A minor cannot, for instance, appear in a civil action without a guardian *ad litem* because he is deemed, as a matter of law, to be incapable of protecting his legal interests. It seems odd, indeed, that he should be considered incompetent to prejudice his rights in a civil action but competent to do so in a criminal prosecution. However, in *Williams v. Huff*,[56] this view was rejected and a finding required whether, as a matter of fact, a competent waiver had been made. In

[55] 378 U.S. at 487-88 (citations omitted).
[56] 142 F.2d 91 (D.C. Cir. 1944).

Washington, a different result might be expected. In *In re Lundy*,[57] in discussing the purpose of the juvenile court act, the court specifically noted that "in passing it, the legislature indulged the usual presumptions arising from human experience that there is ordinarily a lack of mature discretion, discriminating judgment, and stability of character in children under the age of eighteen years . . . ."[58] But even if waiver by a juvenile is made a question of fact, it would appear to be a rare case where such a waiver will be found.[59]

CONCLUSION

It seems safe to conclude that alert counsel will be able to prevent the admission in evidence at a criminal trial of most self-incriminatory statements made by a juvenile in the course of a juvenile proceeding. It will be a most unusual case where a juvenile's constitutional rights will not be violated by the use of such evidence. The upshot will be either a marked decrease in cases transferred from juvenile to criminal court or a marked increase in the observance of constitutional safeguards by police and juvenile authorities in handling juveniles. The latter alternative might come about through the present trend toward observing due process requirements in juvenile proceedings, where there is a possibility that the juvenile faces a deprivation of liberty.

The problem can be avoided entirely by observing due process in juvenile court proceedings. The beneficient purpose behind juvenile court acts is small reason for denying juveniles the minimum standards of fairness which are called due process. It seems reasonable to propose that before society imposes its aid upon a juvenile it first prove that he needs such aid. And it also seems reasonable to suggest that in doing so, society extend to the juvenile the same constitutional safeguards that it extends to adults.

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[57] 82 Wash. 148, 143 Pac. 885 (1914).

[58] *Id.* at 152, 143 Pac. at 887.

[59] See note 1, *supra* and accompanying text and note 38, *supra*, and accompanying text. The youth of the accused, his fear of harsh treatment for failure to cooperate, and the implied promise of leniency for cooperation combine to make a competent waiver all but impossible.