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A Juvenile's Right Against Compelled Self-Incrimination at Predisposition Proceedings

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A JUVENILE'S RIGHT AGAINST COMPELLED SELF-INCRIMINATION AT PREDISPOSITION PROCEEDINGS

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Abstract: State courts have struggled to balance the tensions between the juvenile justice system and a juvenile's constitutional rights at post-adjudicatory predisposition proceedings. Washington courts do not provide a clear standard for protecting a juvenile's rights at these proceedings. This Comment examines the punitive nature of Washington's juvenile justice system and argues that the right against self-incrimination should attach at juvenile predisposition proceedings. It also argues that a grant of use and derivative use immunity at such proceedings provides optimal protection for juvenile rights because it safeguards a juvenile's rights while fostering the treatment component of the Juvenile Justice Act.

Jennifer[1] is fifteen. She pled guilty to a charge of residential burglary with a firearm.[2] Jennifer has a history of delinquency and is currently in detention. Prior to disposition,[3] the court requires Jennifer to submit to an interview with a probation officer and to a psychological examination.[4]

Jennifer has heard that probation officers and psychologists may pressure juveniles to divulge uncharged crimes. She fears that she could unwittingly reveal other crimes during the interview. Jennifer fears that the court may use such statements to impose a longer sentence. Additionally, Jennifer fears that her statements regarding uncharged criminal conduct may be used by the juvenile court to transfer her to the adult criminal system where she would be tried as an adult.[5]

Jennifer's story illustrates the complex issues surrounding a juvenile's right against compelled self-incrimination. For instance, does Jennifer have the right to counsel at a predisposition interview or psychological

1. Jennifer and the facts represented in this scenario are fictitious.

2. Residential burglary with a firearm qualifies as a serious offense under the Juvenile Justice Act. Wash. Rev. Code § 13.40.020(1)(c) (1993).

3. A juvenile disposition is analogous to adult criminal sentencing. Francis B. McCarthy and James G. Carr, *Juvenile Law and Its Processes* 525 (2d ed. 1989).

4. Wash. Rev. Code § 13.40.130(7) (1993) (allowing the court to request a predisposition study to aid the court at disposition).

5. The prosecutor or the court must file a motion requesting transfer of the juvenile for adult criminal prosecution if the juvenile is fifteen and the information alleges a class A felony or an attempt, solicitation, or conspiracy to commit a class A felony. *Id.* § 13.40.110. The juvenile court may decline jurisdiction if doing so would be in the best interests of the juvenile or the public. *Id.* Once the juvenile court declines jurisdiction, the juvenile remains under adult criminal jurisdiction in all future prosecutions. *Id.* § 13.40.020(10).

examination? If Jennifer asserts her right to remain silent, will the questioning cease? If she remains silent, will the court use her silence to impose a sentence beyond the standard range? If she cooperates, and reveals other criminal activity, will she receive rehabilitative services and will the court protect her from having her statements used in subsequent delinquency or adult criminal proceedings?

This Comment addresses these questions and analyzes a juvenile's right against compelled self-incrimination at predisposition interviews and predisposition psychological examinations. Part I examines the nature of Washington's juvenile system and the inadequacy of existing procedural protections for juveniles. Part II describes the constitutional framework that determines when state officials violate a defendant's right against self-incrimination. Part III argues that the same right against self-incrimination granted to adults should apply to juveniles at predisposition proceedings. It examines how current law fails to protect a juvenile's rights and undermines the Juvenile Justice Act of 1977. It also recommends that a judicial or statutory grant of use and derivative use immunity[6] would provide an optimal solution by resolving the tensions between a juvenile's right against compelled self-incrimination and the treatment component of the Juvenile Justice Act.[7]

I. WASHINGTON'S JUVENILE JUSTICE SYSTEM

In 1967, *In re Gault* sparked the transformation of the juvenile court from a social institution based on rehabilitation and the best interests of the child to a legal institution replete with an array of procedural protections, including the right against self-incrimination.[8] In *Gault,* the Supreme Court examined the reality of juvenile incarceration[9] and noted that the traditional rationales for denying juveniles procedural protections

6. There are three forms of immunity. Transactional immunity immunizes the defendant from criminal prosecution for any transaction, matter or thing about which a defendant is compelled to testify. Use and derivative use immunity immunizes the defendant from the use of the compelled testimony or any derivative evidence. Use immunity immunizes the defendant only from the use of the actual compelled statements. State v. Carroll, 83 Wash. 2d 109, 112, 515 P.2d 1299, 1301 (1973). A grant of transactional immunity is broader than the right against self-incrimination and a grant of use and derivative use immunity is co-extensive with the right. Kastigar v. United States, 406 U.S. 441, 453 (1972).

7. Wash. Rev. Code § 13.40 (1993).

8. 387 U.S. 1, 31–57 (1967) (requiring timely notice, the right to counsel, the right against self-incrimination and the right to confront and examine witnesses at juvenile adjudications).

9. *Id.* at 17–31. The Court argued that the rationale behind the diverse treatment of adults and juveniles required more than mere verbiage and unpersuasive cliché. *Id.* at 29–30.

included the belief that juvenile proceedings were neither criminal nor adversarial.[10] The Court rejected these rationales in light of the realities of recidivism, the failures of treatment, the stigma of delinquency, the breaches of confidentiality, and the arbitrariness of the juvenile court process.[11] The Court suggested that juvenile adjudicatory proceedings should be considered "criminal" for the purposes of the privilege against self-incrimination.[12] However, the Court limited its holding to the adjudicatory hearing and did not extend these protections to the post-adjudicatory context.[13] Consequently, state courts have struggled to balance the tensions between the juvenile justice system and a juvenile's constitutional rights at post-adjudicatory predisposition proceedings.

A. Washington's Juvenile Justice System Is Predominantly Punitive

In response to the procedural requisites articulated in *Gault* and social pressure for legislative reform due to heightened concern over public safety and arbitrary punishments,[14] the Washington Legislature enacted the Juvenile Justice Act of 1977. The Act represented a philosophical change in the treatment of juvenile offenders. The legislature rejected the "best interests" or "welfare based" model of criminal justice[15] and the idea that the state provided substitute parental care, discipline, and custody.[16] It approved reforms based upon the "justice model" of crime control which emphasized punishment, retribution, and accountability.[17]

Additionally, the legislature increased the Act's emphasis on punishment and retribution when it applied a presumptive sentencing

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10. Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court,* 69 Minn. L. Rev. 141, 152 (1984).

11. *Id.* at 153.

12. *Gault,* 387 U.S. at 49–50. The Court reasoned that despite their "civil" label delinquency proceedings deny juveniles liberty. *Id.*

13. *Id.* at 31 n.48. The Court noted that these procedural protections do not necessarily apply at disposition because many dispositional concerns are unique to the juvenile process. *Id.*

14. Mary K. Becker, *Washington State's New Juvenile Code: An Introduction,* 14 Gonz. L. Rev. 289, 294 (1979).

15. Martin L. Forst and Martha-Elin Blomquist, *Punishment, Accountability, and the New Juvenile Court System,* 43 Juv. & Fam. Ct. Jrnl. No. 1, 2–3 (1992). *See also* Becker, *supra* note 14, at 307–09.

16. Juvenile Court Law, ch. 160, § 1, 1913 Wash. Laws 520 (repealed 1977).

17. The ten stated purposes of the Act are: protecting the citizenry, determining guilt, making the juvenile accountable, providing for punishment, providing due process, providing treatment, supervision and custody, handling juvenile offenders, providing for restitution, and developing clear standards, goals, and policies to effectuate these goals. Wash. Rev. Code § 4.40.010(2)(a–j) (1993). Only two out of the ten purposes address treatment.

scheme to juveniles.[18] The legislature adopted a general matrix approach which established standard ranges for confinement and/or community supervision based on a juvenile's age, present offense, and history and seriousness of prior offenses.[19] The judge must consider mitigating and aggravating circumstances to determine where within the prescribed range the juvenile should be sentenced.[20] Moreover, the judge retains discretion to find a "manifest injustice" and to sentence a juvenile outside the range if a standard sentence would either impose an excessive penalty on the juvenile or would pose a serious threat to society.[21]

The Act also authorizes the court to order a study to assist at disposition.[22] Subsequent cases note that the predisposition study may consist of an interview by a probation officer[23] and/or a psychological examination.[24] The purpose of the predisposition study is to evaluate the juvenile's potential dangerousness and to determine whether the juvenile is amenable to treatment.[25] Thus, the predisposition study aids the court in determining the appropriate sentence within the standard range and may provide critical information for finding a manifest injustice and sentencing the juvenile outside the range.

In addition to the retributive structure of the Act, the actual functioning of juvenile detention demonstrates the predominantly punitive nature of the juvenile system.[26] In 1984, Washington admitted more juveniles to detention centers per 100,000 juveniles than any other state.[27] The high numbers of juveniles in detention strained the financial

18. *Id.* § 13.40.0357.

19. *Id.* § 13.40.030. Criminal history is limited to convictions by a juvenile court or guilty pleas. State v. Adcock, 36 Wash. App. 699, 703, 676 P.2d 1040, 1042 (1984). Moreover, the Washington State Juvenile Dispositions Standards Commission provides that "[s]anctions should not be based upon the youth's race, sex, economic status, or treatment needs." Washington State Juvenile Disposition Standards Commission, *Washington State Juvenile Disposition Standards Philosophy and Guide* 10 (July 1984). *See also* Wash. Rev. Code § 13.40.150(4)(a-e) (1993).

20. Wash. Rev. Code § 13.40.150(3) (1993).

21. *Id.* § 13.40.020(12).

22. *Id.* § 13.40.130(7).

23. State v. P.B.T., 67 Wash. App. 292, 294, 834 P.2d 1051, 1052, *review denied,* 120 Wash. 2d 1021, 849 P.2d 1017 (1992).

24. State v. Decker, 68 Wash. App. 246, 247, 842 P.2d 500, 501 (1992), *review denied,* 121 Wash. 2d 1016, 854 P.2d 500 (1993).

25. State v. Escoto, 108 Wash. 2d 1, 3, 10, 735 P.2d 1310, 1311, 1314 (1987).

26. For a critical review of Washington's juvenile justice system, see Jeffery K. Day, Comment, *Juvenile Justice in Washington: A Punitive System in Need of Rehabilitation,* 16 U. Puget Sound L. Rev. 399 (1992).

27. Ira M. Schwartz, *(In)Justice for Juveniles* 40–47 (1989) (citing U.S. Census Bureau, *Children in Custody* (1985)). Washington State had 5,076 commitments to detention centers at a rate of 985.6

and physical capabilities of the juvenile system. A 1987 State of the State Report found that the current juvenile system provided few services beyond custodial care.[28] Finally, in 1990, a class action lawsuit was filed, claiming that the King County detention center was overcrowded, unsanitary, and lacked supervision adequate to protect juveniles from violence.[29]

Despite the intent of the Act,[30] the presumptive sentencing scheme, and mounting evidence of the predominantly punitive nature of juvenile detention, the Washington Supreme Court has continued to maintain that rehabilitation and punishment are dual purposes of the Act.[31] In 1982, the court suggested that the Act "attempts to tread an equatorial line somewhere midway between the poles of rehabilitation and retribution."[32] In 1987, the court maintained that despite recent changes in the juvenile system, juvenile proceedings remained rehabilitative and were distinguishable from adult criminal prosecutions in terms of procedure and result.[33] The court appeared to rely on the social compact theory to deny juveniles additional procedural protections.[34] This theory suggests that juveniles give up some procedural formalities in exchange for the benefits of rehabilitation.[35] Accordingly, the court denied

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per 100,000. California was second with 7,560 commitments at a rate of 259.6 per 100,000. Combining commitments to training centers and detention centers, Washington still ranked first with 6,239 admissions or 1,211 admissions per 100,000. *Id.*

28. Charles J. Kehoe & Joseph R. Rowen, *Juvenile Detention in Washington State: State of the State Report* 2–3 (1987).

29. T.I. v. Delia, No. 90-2-16125-1 (King County Superior Court filed Aug. 10, 1990).

30. Two recent changes in the Act illustrate a slightly renewed emphasis on treatment. In 1989, the legislature created a drug rehabilitation program, administered locally as funding permits. Omnibus Alcohol and Controlled Substance Act, ch. 271, § 115, 1989 Wash. Laws 1266, 1284. Then, in 1992, the legislature added a provision which states that purposes of the Act should be treated equally. Juvenile Justice Act of 1977, ch. 205, § 101, 1992 Wash. Laws 886, 886-87. Changes in the laws, however, do not necessarily reflect changes in the actual functioning of the juvenile system.

31. State v. Schaaf, 109 Wash. 2d 1, 743 P.2d 240 (1987); State v. Rice, 98 Wash. 2d 384, 655 P.2d 1145 (1982); *cf.* State v. Lawley, 91 Wash. 2d 654, 662, 591 P.2d 772, 775 (1979) (Rosellini, J., dissenting).

32. *Rice,* 98 Wash. 2d at 393, 655 P.2d at 1150-51; *see also* State v. Escoto, 108 Wash. 2d 1, 10, 735 P.2d 1310, 1314 (1987) (Durham, J., concurring).

33. *Schaaf,* 109 Wash. 2d at 16, 743 P.2d at 247.

34. *See, e.g., Escoto,* 108 Wash. 2d at 10–11, 735 P.2d at 1315 (Durham, J., concurring) (arguing that a less stringent application of the privilege is warranted in light of the rehabilitative purpose of the Act). *But see In re* Gault, 387 U.S. 1, 21 (1967) (questioning whether the benefits of the juvenile system outweigh the harm from the denial of procedural protections).

35. Barbara D. Flicker, *Standards for Juvenile Justice: A Summary and Analysis* 33 (1977).

juveniles the right to a jury trial[36] and limited the statutory right against self-incrimination[37] to adjudicatory proceedings.[38] Subsequent Washington decisions, however, have assumed that juveniles have a right against self-incrimination at predisposition proceedings.

B. Inadequacy of Existing Procedural Protections

Three Washington cases have examined a juvenile's right against compelled self-incrimination at predisposition proceedings. First, in *State v. Escoto,*[39] the supreme court held that a trial court did not violate the constitution when it used a juvenile's demeanor and statements from a predisposition interview to justify a sentence outside the standard range.[40] The trial court had limited the predisposition interview to adjudicated matters and had permitted counsel to attend, even though counsel chose not to attend.[41] The supreme court held that, considering the totality of the circumstances, Escoto, a twelve year old boy, had impliedly waived his right to remain silent by failing to assert the right at the interview[42] and by responding to the examiner's questions.[43]

In *State v. P.B.T.*[44] and *State v. Decker*[45] the court of appeals examined whether juveniles have the right to counsel at predisposition interviews and psychological examinations. *P.B.T.* limited the scope of the predisposition interview to "adjudicated matters"[46] and held that counsel may be present during an interview when the juvenile has a charge, similar to the charge at issue in the interview, pending in another proceeding.[47] In contrast, the *Decker* court denied the juvenile's request for counsel at a predisposition psychological examination and granted

36. *Schaaf,* 109 Wash. 2d at 4, 743 P.2d at 242.

37. Wash. Rev. Code § 13.40.140(8) (1993).

38. *Escoto,* 108 Wash. 2d at 7, 735 P.2d at 1313.

39. *Id.*

40. *Id.* at 3, 735 P.2d at 1311.

41. *Id.*

42. *Id.* at 6, 735 P.2d at 1312.

43. *Id.* In a concurring opinion, Justice Durham argued that the right against self-incrimination was not implicated and thus the court should not have reached the waiver question. *Id.* at 11, 735 P.2d at 1315.

44. 67 Wash. App. 292, 834 P.2d 1051 (1992).

45. 68 Wash. App. 246, 842 P.2d 500 (1992).

46. "Adjudicated matters" refers to convictions and guilty pleas. *See supra* note 19 and accompanying text.

47. *P.B.T.,* 67 Wash. App. at 300, 834 P.2d at 1055.

use immunity[48] to the juvenile for incriminating statements made in the interview.[49]

While these cases suggest that juveniles have a Fifth Amendment right against compelled self-incrimination at predisposition proceedings, they provide inconsistent safeguards for such rights. First, the *Escoto* court did not specifically hold that the right against self-incrimination attaches at predisposition proceedings. Rather, it suggested that if the right attaches, Escoto waived that right.[50] Moreover, even if the right against self-incrimination attaches, it is unclear from the opinion whether Escoto's rights were protected because the interview was limited to adjudicated matters, because counsel was allowed to attend, or because of a combination of the two.

P.B.T. also fails to create a clear standard. *P.B.T.* suggested that a juvenile may become confused when discussing similar offenses and may disclose incriminating information.[51] However, self-incrimination may actually be more likely when charges are dissimilar, when more serious charges are pending in another proceeding or when a juvenile has committed undisclosed crimes. In these situations a juvenile may run an even greater risk of disclosing additional offenses which may lead to prosecution. By providing greater procedural protections to juveniles who arguably need them less, *P.B.T.* conflicts with Fifth Amendment jurisprudence, which increases procedural protections in relation to the severity of the punishment and likelihood of the incriminating response.[52]

In contrast to *P.B.T.*, the *Decker* court refused to allow counsel's presence at a predisposition interview.[53] The court reasoned that counsel's presence would interrupt the proceedings and undermine the evaluation.[54] The *Decker* decision fails to adequately protect a juvenile's rights because it does not clarify whether Decker's immunity was use and derivative use immunity or merely use immunity.[55] A grant of use

48. *See supra* note 6 and accompanying text. It is unclear from the opinion whether the court granted Decker use and derivative use immunity or merely use immunity. *Decker*, 68 Wash. App. at 252, 842 P.2d at 503.

49. *Decker*, 68 Wash. App. at 252, 842 P.2d at 503. *Decker* suggests that predisposition interviews and psychological examinations should be treated the same. *Id.* at 251, 842 P.2d at 503.

50. State v. Escoto, 108 Wash. 2d 1, 6, 735 P.2d 1310, 1312 (1987).

51. *P.B.T.*, 67 Wash. App. at 299, 834 P.2d at 1055.

52. *See In re* Gault, 387 U.S. 1, 49 (1967).

53. *Decker*, 68 Wash. App. at 251, 842 P.2d at 502–03.

54. *Id.* at 251, 842 P.2d at 503.

55. *Id.* at 248, 842 P.2d at 501. Whereas the trial court granted the juvenile "use immunity," the court of appeals appeared to also immunize derivative evidence. *Id.* at 252–53, 842 P.2d at 503.

immunity is not co-extensive with the right against self-incrimination and would not adequately protect a juvenile's rights.[56] Moreover, *Decker* does not clarify whether immunity applies to the pending disposition or merely to future juvenile or criminal proceedings.

Escoto, P.B.T., and *Decker* do not create a clear framework for safeguarding a juvenile's right against compelled self-incrimination. The courts have not clarified whether juvenile predisposition proceedings are custodial interrogations, whether juveniles have a right to remain silent at these proceedings,[57] or whether juveniles require enhanced protections due to their immaturity and vulnerability to adult coercion.

II. FIFTH AMENDMENT JURISPRUDENCE GOVERNS THE RIGHT AGAINST COMPELLED SELF-INCRIMINATION

In order to define the parameters of a juvenile's rights at predisposition proceedings and to provide a uniform workable standard, the courts should utilize Fifth Amendment jurisprudence to protect a juvenile's rights. The Fifth Amendment of the U.S. Constitution provides that no person shall be compelled in a criminal case to be a witness against him or herself.[58] The degree of protection for the right against self-incrimination turns upon the nature of the proceeding and the exposure which it invites.[59] The U.S. Supreme Court distinguishes between custodial interrogations, non-custodial settings, and other types of proceedings.

A. The Right Against Self-Incrimination During Interrogations

In *Miranda v. Arizona,*[60] the Supreme Court created a prophylactic rule governing custodial interrogations.[61] *Miranda* required that, prior to custodial interrogations, law enforcement officials must warn suspects or

56. *See supra* note 6 and accompanying text.

57. The Supreme Court distinguishes between custodial and non-custodial interrogations. Miranda v. Arizona, 384 U.S. 436, 467–73 (1966).

58. The Court applied the Fifth Amendment right against compelled self-incrimination to the states in 1964. Malloy v. Hogan, 378 U.S. 1 (1964). The Washington constitution also includes a right against self-incrimination. Wash. Const. art. 1, § 9. Washington's right is no broader than the federal right. State v. Mecca Twin Theatre and Film Exch., Inc., 82 Wash. 2d 87, 91, 507 P.2d 1165, 1167–68 (1973).

59. *In re* Gault, 387 U.S. 1, 49 (1967).

60. 384 U.S. 436 (1966).

61. *Id.* Prior to *Miranda,* the Court relied directly on the Due Process Clause to exclude involuntary confessions. *See, e.g.,* Fikes v. Alabama, 352 U.S. 191 (1957).

defendants that they have the right to remain silent, that any statement may be used against them in future criminal proceedings, and that they have the right to counsel.[62] The Court created a presumption against the admissibility of a defendant's statements absent these warnings.[63]

Miranda defined custodial interrogation as questioning initiated by law enforcement officers after a person has been taken into custody or deprived of freedom of action in any significant way.[64] Subsequent decisions held that a person is in custody when the person's movements are so restricted as to effectively restrain freedom of movement at the time of questioning.[65] Furthermore, interrogation may be any actions or questions which are reasonably likely to induce a defendant to make an incriminating response.[66]

A defendant's rights during custodial questioning must be rigorously observed. *Miranda* held that once a person invoked the right to remain silent either prior to or during custodial interrogation, questioning must cease.[67] This does not mean that law enforcement officers may never resume questioning. In assessing the admissibility of a statement made after invoking the right to remain silent, the Court examined the length of time between interrogations, the change in parties and subject matter of the questioning, and whether or not the questioner provided a new set of *Miranda* warnings.[68] In contrast to invoking the right to remain silent, if the defendant invokes the right to counsel during a custodial interrogation, the police must stop questioning and may not resume

62. *Miranda,* 384 U.S. at 467-73.

63. *Id.; see also* State v. Sargent, 111 Wash. 2d 641, 647–48, 762 P.2d 1127, 1130 (1988).

64. *Miranda,* 384 U.S. at 444; *see also Sargent,* 111 Wash. 2d at 650–52, 762 P.2d at 1131–32.

65. Oregon v. Mathiason, 429 U.S. 492 (1977) (holding that a defendant who voluntarily went to a police station to talk to a police officer was not in custody).

66. Rhode Island v. Innis, 446 U.S. 291, 301 (1980). The Washington Court of Appeals suggested that the likelihood of incrimination should be examined from the defendant's perspective. State v. Willis, 64 Wash. App. 634, 637–38, 825 P.2d 357, 359 (1992) (holding that *Miranda* warnings are required during a corrections officer's questioning of a jailed defendant).

67. *Miranda,* 384 U.S. at 444–45; *see also* Michigan v. Mosley, 423 U.S. 96, 104 (1975). A mere refusal to answer questions is not enough to invoke the right because the right against compelled self-incrimination is not self-executing. *See* Garner v. United States, 424 U.S. 648, 654 n.9 (1976); *see also* State v. Sargent, 111 Wash. 2d 641, 648, 762 P.2d 1127, 1131 (1988).

68. *Moseley,* 423 U.S. at 104.

unless counsel is present,[69] or unless the defendant initiates questioning,[70] or gives a valid waiver of the right to counsel.[71]

The Court does not require *Miranda* warnings at proceedings which are either non-custodial or not interrogations. However, the privilege against self-incrimination may be asserted at any proceeding, whether civil, criminal, or administrative, at which the government might compel self-incrimination for use in a future criminal prosecution.[72] A defendant or witness may invoke the privilege and remain silent with respect to individual questions in non-custodial settings, but may not invoke the right to remain completely silent.[73]

These Fifth Amendment protections are unavailable in grand jury investigations and civil commitment proceedings. Grand jury proceedings provide additional procedural protections, such as a judge, jury, and the availability of immunity.[74] In contrast, civil commitment proceedings lack criminal sanctions.[75]

B. *The Right Against Self-Incrimination Applies at Adult Presentencing Proceedings*

Several courts have examined an adult defendant's right against compelled self-incrimination at presentencing interviews and psychological examinations. First, in *Estelle v. Smith,* the U.S. Supreme Court held that the sentencing court violated a defendant's Fifth Amendment right when it used the results of a psychiatric exam at the sentencing phase of a defendant's capital murder trial.[76] The defendant

69. Edwards v. Arizona, 451 U.S. 477 (1981).

70. Oregon v. Bradshaw, 462 U.S. 1039 (1983) (holding that when a suspect asked what was going to happen to him, the police could resume questioning).

71. Solem v. Stumes, 465 U.S. 638 (1984).

72. *In re* Gault, 387 U.S. 1, 47–48 (1967) (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 94 (1964)).

73. *See, e.g.,* Eastham v. Arndt, 28 Wash. App. 524, 532, 624 P.2d 1159, 1165 (1981). Courts may draw negative inferences from a defendant's silence in the absence of state action, such as *Miranda* warnings. Fletcher v. Weir, 455 U.S. 603, 606–07 (1982). However, Washington courts interpret the state Due Process Clause to protect the right to remain silent more strenuously than the U.S. Constitution. State v. Davis, 38 Wash. App. 600, 686 P.2d 1143 (1984) (protecting a juvenile's post-arrest silence even though no *Miranda* warnings were given).

74. United States v. Mandujano, 425 U.S. 564 (1976).

75. Allen v. Illinois, 478 U.S. 364 (1986); *cf.* Robert H. Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?,* 26 Stan. L. Rev. 55, 87 (1973) (suggesting that when a system incarcerates based upon dangerousness and provides minimal treatment, the privilege should apply).

76. 451 U.S. 454, 473 (1981).

had not been warned that his statements could be used to determine future dangerousness, which is a prerequisite for imposition of the death penalty. However, the Court narrowed its holding by suggesting that Fifth Amendment concerns are not present at all types of interviews and psychological examinations that might be relied on at sentencing.[77]

Subsequent courts have attempted to apply and clarify the *Estelle* holding. In *Jones v. Cardwell,* the Ninth Circuit Court of Appeals held that the right against self-incrimination applies in the non-capital context.[78] The Ninth Circuit held that a confession of crimes during a presentencing interview violated the defendant's right against self-incrimination when the confession was used to enhance the defendant's sentence.[79] The probation officer in *Jones* instructed the defendant that he had no choice but to answer questions. The probation officer's actions denied the defendant's right to remain silent and to refuse to answer incriminating questions.[80]

One month later, in *Baumann v. United States,*[81] the Ninth Circuit held that the sentencing court did not violate a defendant's rights by using the defendant's denial of culpability at a routine presentencing interview to enhance the sentence.[82] The court distinguished *Baumann* from *Jones* because the defendant in *Baumann* did not disclose additional uncharged crimes.[83] In 1990, in *United States v. Herrera-Figueroa,*[84] the Ninth Circuit held that when a defendant affirmatively requests the presence of counsel at a presentencing interview under the Federal Sentencing Guidelines, the request should be honored as a matter of fundamental fairness.[85] The *Herrera-Figueroa* court noted that a defendant may remain silent at a presentencing proceeding in response to specific questions. However, the court suggested that a defendant's

77. *Id.* at 469 n.13.

78. 686 F.2d 754 (9th Cir. 1982).

79. *Id.* at 757.

80. *Id.*

81. 692 F.2d 565 (9th Cir. 1982)

82. *Id.* at 577. However, the court did not determine whether a custodial interrogation had occurred because it was unclear from the record whether Baumann was released on his own recognizance. *Id.* at 576 n.4. Courts generally hold that routine presentencing interviews limited to adjudicated matters are not interrogations. *Id.* at 576.

83 Id. at 577.

84. 918 F.2d 1430 (9th Cir. 1990).

85. *Id.* at 1434 (relying on its supervisory power over the orderly administration of justice to confer the right to counsel).

refusal to speak with the probation officer may be used by the court to deny the defendant a sentence reduction.[86]

In 1992, the Washington Supreme Court examined *Estelle* and held that a defendant has a right against self-incrimination when a probation officer or a psychological examiner questions the defendant at a presentencing interview.[87] The court reasoned that defendants may make incriminating statements even after their conviction which may affect the severity of their sentence or which disclose additional uncharged offenses.[88] The supreme court noted that constitutional protections are no less important at sentencing proceedings than at the investigative or trial phases.[89]

The Ninth Circuit and Washington courts hold that the privilege against self-incrimination and the right to refuse to answer incriminating questions does not terminate upon a finding of guilt. An adult defendant has a right against compelled self-incrimination at presentencing proceedings, although it remains unclear whether a routine presentencing interview could ever amount to a custodial interrogation. Consequently, Fifth Amendment jurisprudence does not provide an entirely clear analytical framework to apply in the juvenile context. However, the cases do suggest that the nature of the proceeding and the potential for criminal prosecution dictate the extent of the constitutionally required procedural protections.

III. THE RIGHT AGAINST SELF-INCRIMINATION SHOULD APPLY AT JUVENILE PREDISPOSITION PROCEEDINGS

When courts consider what is necessary to protect a juvenile's right against self-incrimination, it is essential that they make their decisions in light of the reality of the juvenile justice system and not merely the stated legislative purpose[90] or courts' interpretations of relevant statutes.[91] The right against self-incrimination should attach at juvenile predisposition

86. *Id.* at 1433. The court may deny the defendant a sentence reduction for acceptance of responsibility when the defendant remains silent. *Id.* Denial of a sentence reduction does not constitute a penalty on the right against self-incrimination. *Id.* (citing United States v. Skillman, 913 F.2d 1477, 1485 (9th Cir. 1990)).

87. State v. Post, 118 Wash. 2d 596, 604–05, 826 P.2d 172, 177 (1992).

88. State v. McCullough, 49 Wash. App. 546, 744 P.2d 641 (1987).

89. *Post*, 118 Wash. 2d at 605, 826 P.2d at 177.

90. *See supra* note 17.

91. *See supra* notes 31–38 and accompanying text; *see also, e.g., In re* Gault, 387 U.S. 1, 17–31 (1967) (examining the reality of juvenile adjudications).

proceedings because these proceedings create a potential for criminal prosecution, are reasonably likely to elicit an incriminating response and are more like adult criminal proceedings that require *Miranda* warnings than the *Miranda* exceptions.

A. Juveniles Are Likely To Incriminate Themselves at Predisposition Proceedings

Washington's juvenile system is predominantly punitive, and incriminating statements made at predisposition proceedings may lead to enhanced sentences or criminal prosecutions in either the juvenile or adult corrections systems.[92] At a predisposition interview, a juvenile's immaturity, the scope of permissible questioning, and pressure from parents and interviewers to confess create formidable psychological pressures.

1. Juveniles Are Immature and Vulnerable

The basic premise of juvenile courts is that children are immature and must be treated differently from adults.[93] The very existence of the juvenile court system is testimony to the unique needs of juveniles.[94] The U.S. Supreme Court, Washington courts, and current psychological data recognize these differences. The U.S. Supreme Court suggested that juveniles are in earlier stages of emotional, intellectual, and moral development than adults[95] and that juveniles have special needs due to their immaturity.[96] The Washington Supreme Court noted that juveniles should be given special protections[97] and that a juvenile's constitutional rights are not equal to those of an adult because children are vulnerable and unable to make critical decisions in a logical and informed manner.[98]

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92. *See supra* notes 5, 18–22 and accompanying text.

93. *See* Flicker, *supra* note 35, at 38.

94. *Id.*

95. Schall v. Martin, 467 U.S. 253 (1984). The Court observed that society recognizes that juveniles are in "the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified or firmly adopted." *Id.* at 265 n.15 (quoting People *ex rel.* Wayburn v. Schupf, 350 N.E.2d 906, 908 (1976)).

96. *See, e.g.*, Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (noting that juveniles cannot be compared to adults in full possession of their faculties).

97. State v. Schaaf, 109 Wash. 2d 1, 15, 743 P.2d 240, 247 (1987).

98. *Id.* at 20, 743 P.2d at 249. The court appears to equate special protections with diminished constitutional rights.

In *P.B.T.*, the Washington Court of Appeals held that by denying counsel's presence at a predisposition interview, the trial court removed the means by which the juvenile could distinguish those questions which would be incriminating from those which would not.[99] Finally, a psychological survey suggests that juveniles do not adequately discern the scope and impact of waiving their constitutional rights.[100] Juveniles are less likely to invoke their rights and more likely to waive them than are adults.[101] When courts place juvenile offenders on the same procedural footing as adult criminal defendants, the courts ignore juveniles' relative immaturity, inexperience, and vulnerability to adult coercion.[102]

2. *The Nature of the Interview Compounds Juvenile Vulnerability*

The broad scope of inquiry at juvenile predisposition proceedings increases the likelihood that juveniles may make incriminating statements.[103] The court may consider any relevant evidence when sentencing the juvenile within the standard range. Thus, the scope of the predisposition interview extends to any arguably relevant information which might aid the court.[104] Moreover, predisposition interviews and psychological examinations are critical tools in determining whether to impose a sentence beyond the standard range.[105]

Furthermore, parole officers and psychological examiners are expert questioners and information gatherers. This expertise exacerbates the inherent power imbalance between child and interviewer, and

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99. State v. P.B.T., 67 Wash. App. 292, 299, 834 P.2d 1051, 1055, *review denied*, 120 Wash. 2d 1021, 849 P.2d 1017 (1992).

100. Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134 (1980).

101. *Id.* at 1134; Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. Crim. L. & Criminology 1185, 1203 (1989).

102. Feld, *supra* note 10, at 141–42.

103. This is particularly true of psychological evaluations which may last for several hours at a time over four to five days. Interview with Robert Smith, Supervisor of the Sex Offender and Diagnostic Unit, in Seattle, Washington (March 22, 1993).

104. State v. Ratliffe, 58 Wash. App. 717, 721, 794 P.2d 869, 870 (1990).

105. A 1982 study of factors influencing the decision to find a manifest injustice found that the mere presence of a predisposition report was a dominant factor. Comment, *The Court-Ordered Predisposition Evaluation Under Washington's Juvenile Justice Act: Self-Incrimination*, 10 U. Puget Sound L. Rev. 105, 137 (1986) (citing Doyon, *Factors Related to the use of the Manifest Injustice in Juvenile Court Sentencing*, Dep't of Social and Health Services, State of Washington (1982)).

undermines the juvenile's ability to differentiate between potentially incriminating and non-incriminating questions and to remain silent. Because juveniles in Washington do not have a right to counsel at predisposition proceedings, except when there is a similar charge pending in another proceeding,[106] juveniles must face parole officers or psychological examiners without the assistance of a knowledgeable adult. Moreover, parents who attend predisposition proceedings often encourage juveniles to confess to additional crimes in hopes of obtaining leniency.[107]

Predisposition proceedings are reasonably likely to elicit an incriminating response which may be used in a criminal prosecution. The juvenile's incriminating statements may provide the basis for sentencing the juvenile at the top of the standard range, for finding a manifest injustice, for filing additional charges in juvenile court, or perhaps for waiving juvenile court jurisdiction and trying the juvenile as an adult.[108]

3. *Predisposition Proceedings Are Distinguishable from Fifth Amendment Exceptions*

Predisposition proceedings are distinguishable from the exceptions to the requirement of *Miranda* warnings. Predisposition proceedings are more similar to police interrogations than to grand jury investigations, civil commitment proceedings, or routine presentence interviews. A witness at a grand jury proceeding may confer with counsel outside the grand jury room and the judge may immediately grant the witness use and derivative use immunity if the witness invokes the privilege.[109] These safeguards are not present at predisposition proceedings.[110] Juvenile predisposition proceedings are also distinguishable from civil commitment proceedings. While civil commitment proceedings are supposedly non-punitive and treatment oriented,[111] juvenile adjudications

106. State v. P.B.T., 67 Wash. App. 292, 834 P.2d 1051, *review denied,* 120 Wash. 2d 1021, 849 P.2d 1017 (1992).

107. Feld, *supra* note 10, at 181–82.

108. *See supra* note 5 and accompanying text.

109. United States v. Mandujano, 425 U.S. 564 (1976); *see also supra* text accompanying note 75.

110. At a minimum, courts should grant juveniles the same procedural protections granted adults at grand jury proceedings.

111. Allen v. Illinois, 478 U.S. 364 (1986); *see also supra* text accompanying note 75.

and dispositions attempt to punish juveniles for criminal offenses and provide little rehabilitation.[112]

Juvenile predisposition proceedings are also distinguishable from routine adult presentencing evaluations. Routine adult presentencing evaluations merely clarify the facts surrounding the crime of conviction or prior convictions and are not considered interrogations by the courts.[113] In contrast, the scope of juvenile predisposition interviews and psychological examinations may extend beyond convicted offenses to any matter relevant to a sentencing or treatment decision.[114] Juveniles' vulnerability to adult coercion and inability to make decisions in an informed manner combine to increase the likelihood that juveniles will make incriminating statements. Thus, predisposition proceedings resemble the coercive environments for which *Miranda* warnings were designed and should be considered interrogations in applying Fifth Amendment protections.

B. Applying Constitutional Protections to Juveniles

Adult constitutional procedural protections provide a mere starting point for protecting a juvenile's rights. The courts should protect a juvenile's right against self-incrimination by applying Fifth Amendment protections to juveniles at predisposition proceedings and then enhancing these protections in light of a juvenile's immaturity and vulnerability.

When courts examine the application of adult protections to juveniles, they should hold the following. When a juvenile is in detention or a secured residential facility, the courts should hold that a court ordered predisposition interview or examination is a custodial interrogation.[115] In such settings, a juvenile's freedom of movement is limited and the questions are reasonably likely to elicit an incriminating response.[116] When a predisposition proceeding is a custodial interrogation, a juvenile should be given *Miranda* warnings. If the juvenile invokes the right to counsel, questioning must cease and may not resume without counsel's

112. *See supra* notes 14–29 and accompanying text.

113. *See, e.g.*, Baumann v. United States, 692 F.2d 565 (9th Cir. 1982).

114. *See supra* notes 103–04 and accompanying text.

115. However, if a juvenile or the juvenile's counsel requests a predisposition interview or examination in order to prove a mitigating factor, the juvenile may waive the right against compelled self-incrimination. This comports with the Washington Supreme Court's analysis of insanity and incompetency evaluation requests. *See, e.g.*, State v. Jones, 111 Wash. 2d 239, 759 P.2d 1183 (1988); State v. Nuss, 52 Wash. App. 735, 763 P.2d 1249 (1988).

116. *See supra* notes 92–114 and accompanying text.

presence or a valid waiver of the right to counsel.[117] If the juvenile asserts the right to remain silent, questioning may resume only after a given time and on a topic other than the topic which prompted the juvenile to assert the right to remain silent.[118]

In a non-custodial setting, courts should hold that juveniles may refuse to respond to specific questions which may lead to incriminating evidence. The juvenile must specifically assert the right with respect to a particular question.[119] The examiner may continue to question the juvenile regarding other issues and the juvenile may continue to assert the right to remain silent in response to specific potentially incriminating questions.

The direct application of adult procedural protections to juveniles illustrates the incongruities in protecting juveniles and adults in the same manner. Whereas adults can protect themselves against self-incrimination by differentiating between benign and potentially incriminating questions, juveniles are less able to determine when it is in their interest to remain silent and are more likely to succumb to pressures to divulge additional information. Thus, juveniles need enhanced procedural protections to safeguard the same constitutional rights.

C. Existing Protections Undermine Treatment

Existing procedural protections in juvenile predisposition proceedings, which include the presence of counsel, limiting the scope of the interview to adjudicated matters, and use immunity under *Decker,*[120] undermine the treatment component of the Juvenile Justice Act. Counsel's presence may lead to ongoing objections which will undermine rapport between the interviewer and the juvenile.[121] The interview will likely become more adversarial, which stifles cooperation and further exacerbates the already punitive nature of the juvenile system.

Strictly limiting the scope of questions to adjudicated matters, as is done in an adult's routine presentencing interview, may protect a

117. *See supra* notes 67–69 and accompanying text.

118. *See supra* notes 65–67 and accompanying text.

119. *See supra* note 67 and accompanying text. This may be an unrealistic prospect because juveniles do not adequately comprehend their rights. *See* Grisso, *supra* note 100 and accompanying text.

120. 68 Wash. App. 246, 842 P.2d 500 (1992), *review denied,* 121 Wash. 2d 1010, 854 P.2d 500 (1993).

121. *Id.* at 251, 842 P.2d at 503.

juvenile's right against self-incrimination[122] but robs the court of guidance as to the juvenile's treatment needs.[123] Moreover, distinguishing between questions concerning adjudicated matters and questions concerning general criminal activity is a matter of degree and semantics. Considering an examiner's expertise and a juvenile's vulnerability, the questions may still elicit incriminating responses. If a court uses these confessions to enhance the juvenile's sentence, the juvenile is likely to feel betrayed and become angry and hostile, emotions which are inimical to rehabilitation.[124] Finally, the threat of sentence enhancement and future prosecution for inadvertent disclosures may increase the number of juveniles who remain silent in hopes of obtaining immunity under *Decker*.[125]

Balancing a juvenile's right against self-incrimination with the desire for full disclosure to facilitate treatment creates a tension which strains existing procedural protections. If Washington's juvenile system were truly equally rehabilitative and punitive, then arguably a juvenile's best choice would be to confess and obtain individualized treatment. In reality, the juvenile system is predominantly punitive. In a system so similar to the adult criminal system, courts should grant juveniles the same procedural rights as adults and safeguard such rights with additional procedural protections. Furthermore, courts should create procedural solutions which foster treatment because the punitive nature of the juvenile system conflicts with the courts' ongoing interpretations of the Act.[126]

D. An Optimal Solution

This Comment opened with Jennifer's concerns. In order to address those concerns, Washington courts should grant juveniles use and derivative use immunity at predisposition proceedings. Immunity would protect a juvenile's right against self-incrimination, further the treatment component of the Act, capitalize on a juvenile's predisposition to

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122. *See supra* note 82.

123. It also robs the juvenile court of the names of other victims who may need protection and social services.

124. *See In re* Gault, 387 U.S. 1, 51–52 (1967); State v. Escoto, 108 Wash. 2d 1, 14, 735 P.2d 1310, 1316 (1987) (Dore, J., dissenting) (citing Comment, *Juvenile Court: The Legal Process as a Rehabilitative Tool*, 51 Wash. L. Rev. 697, 701 (1976)).

125. 68 Wash. App. at 251, 842 P.2d at 503.

126. State v. Adcock, 36 Wash. App. 699, 702, 676 P.2d 1041, 1042 (1984) (suggesting that courts should ensure that their decisions effectuate both purposes of the Act).

cooperate prior to sentencing,[127] and maintain the integrity of the judicial process.

Use and derivative use immunity should apply at sentencing and at any future juvenile or criminal proceedings. After granting immunity, courts could not penalize juveniles for disclosures by finding a manifest injustice, although the court may be able to deny the benefit of a mitigating factor.[128] If the predisposition examiner or interviewer can reassure a juvenile at the onset of the interview that any statements made regarding prior unadjudicated or pending crimes cannot be used directly or indirectly in a subsequent proceeding, a juvenile will likely be more disposed to be open and honest. This openness and honesty should facilitate rehabilitation.

If courts will not acknowledge a juvenile's immaturity and provide adequate safeguards for a juvenile's right against self-incrimination, the legislature should grant use and derivative use immunity to juveniles at predisposition proceedings. The statute could be similar to the immunity statute for parents and guardians in proceedings concerning the abuse or neglect of a child.[129] The statute could state that without an express waiver of the right against self-incrimination made with the assistance of counsel,[130] no information given by a juvenile at predisposition interviews and examinations concerning additional uncharged or pending offenses may be used against the juvenile in any subsequent sentencing, delinquency, or criminal proceeding.

IV. CONCLUSION

Procedural protections define the parameters of fair play in a society. Placing a lone juvenile behind closed doors with an expert interviewer

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127. Juveniles are often more cooperative prior to sentencing when a large sentence may be imposed or when a manifest injustice may be sought because they perceive that they can influence the sentence. Interview with Robert Smith, Supervisor of the Sex and Diagnostic Unit, in Seattle, Washington (March 22, 1993).

128. *See supra* note 85 and accompanying text.

129. Wash. Rev. Code § 26.44.053(2) (1993) (stating that "no information given at any such [examination] of the parent, or any other person having the custody of the child may be used against such a person in any subsequent criminal proceedings against such person or custodian concerning the abuse or neglect of the child").

130. The statute should require an express waiver, as opposed to an implied waiver. An implied waiver would undermine the provision because waiver could be implied from the fact that a juvenile responds. This is particularly necessary because the Act requires only that children under age twelve have an adult or counsel present to waive a constitutional right. Wash. Rev Code § 13.40.140(10) (1993).

defies fair play. The courts or the legislature should grant juveniles use and derivative use immunity at predisposition interviews and psychological examinations. Immunity protects a juvenile's Fifth Amendment right against compelled self-incrimination while fostering the treatment component of the Juvenile Justice Act.