Miranda In Mental Health: Court Ordered Confessions And Therapeutic For Young Offenders

Jennifer A. Brobst*
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Abstract

There is a certain sadness accompanying the hopeful tone of the promotion of juvenile brain science to ameliorate harsh juvenile justice policies.

KEYWORDS: mental, health, young
MIRANDA IN MENTAL HEALTH: COURT ORDERED CONFESSIONS AND THERAPEUTIC INJUSTICE FOR YOUNG OFFENDERS

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Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The Constitution recognized the evils that lay behind these practices and prohibited them in this country.

* Jennifer A. Brobst, J.D., LL.M., is an Assistant Professor and Director of the Center for Health Law and Policy at Southern Illinois University (SIU) School of Law. Many thanks to the law student editors and staff at the Nova Law Review for their patience and editorial assistance and for the opportunity to participate in the timely and wide-ranging Symposium, Shutting Down the School to Prison Pipeline, sponsored by the Nova Law Review and Gwen S. Cherry Black Women Lawyers Association at Nova Southeastern University Shepard Broad College of Law on September 18, 2015. Thoughtful editorial perspectives were provided by valued faculty colleagues, particularly Dr. Jan Hill-Jordan, Research Instructor at the SIU School of Medicine, Department of Psychiatry, and Professor William A. Schroeder, SIU School of Law. Also, a special thanks is extended to my daughter, Scout, for providing an astute and willing sounding board for the ideas expressed herein regarding her constitutional rights as a minor and those of her peers.

I. Fisher v. State, 110 So. 361, 365 (Miss. 1926).

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I. INTRODUCTION

There is a certain sadness accompanying the hopeful tone of the promotion of juvenile brain science to ameliorate harsh juvenile justice policies. For some offenders, the courts improved understanding of why youth express themselves with impulsivity and violence at times makes little, if any, difference on the legal outcomes of these juvenile offenders, and may even exacerbate the harsh remedies accorded them in the criminal justice system. The appeal of therapeutic justice, embracing both scientific advancement and compassion for the young, may be dangerously deceptive, leading to higher sentences and longer confinement in a system ill-equipped to manage the mental health needs of either young or old.

Specifically, court-ordered therapy that seeks to elicit disclosures of additional criminal activity may place violent but vulnerable juvenile offenders at risk of additional charges. A small but emerging body of state and federal case law scrutinizes therapeutic justice practices that may coerce disclosures in the name of treatment, potentially violating the constitutional due process rights of offenders. While this emerging body of law addresses adult inmates, increasing reliance on therapeutic jurisprudence with regard to juvenile offenders warrants examination of its constitutional impact on juveniles offered mental health treatment in the juvenile justice system. As was said with respect to the authority of the early juvenile court system, “those who labor to shield the young from evil influences benefit humanity; but benevolent enterprises must be carried out in a constitutional manner.”

Too many convicted offenders have been both offenders and crime victims since youth, creating a substantial need for access to effective mental health services due to trauma, mental illness, and addiction. These are simultaneously some of the most dangerous, unstable, and vulnerable offenders in the system. To address this, the national conversation suggests that court-ordered mental health assessment and therapy should be increasingly relied on for the purpose of rehabilitation, protecting both society and offender from the risk of recidivism, while demonstrating a more

7. See People v. Rebullloza, 184 Cal. Rptr. 3d 548, 560–61 (Cal. 2015); Maroney, supra note 2, at 91–94; Marc McCulloch, Still Between a Rock and a Hard Place . . . Victim or Delinquent: Dual Status Minor in California — An Illusory Promise?, 28 J. JUV. L. U. LA VERNE C.L. 118, 118–21 (2007) (identifying the tension in California’s systemic efforts to serve the needs of youth who qualify as both dependents and delinquents).
I.

INTRODUCTION

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2. See, e.g., Graham v. Florida, 560 U.S. 48, 68, 73 (2010). “[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.” Id. at 68; see also Cheryl B. Preston & Brandon T. Crowther, Legal Amnesia: The Role of Brain Science in Protecting Adolescents, 43 Hofstra L. Rev. 447, 451 (2014) (asserting that MRI advances show that “teenagers may have the ability to reason like adults, but do so with vexing inconsistency”). Danna Pollard Sacks, Children’s Developmental Vulnerability and the Roberts Court’s Child-Protective Jurisprudence: An Emerging Trend?, 40 Stetson L. Rev. 777, 777 (2011) (advocating Supreme Court expansion of juvenile protection under the Eighth Amendment to child welfare and the First Amendment). But see Terry A. Maroney, The False Promise of Adolescent Brain Science in Juvenile Justice, 85 Notre Dame L. Rev. 89, 174 (2009) (“[A] disproportionate focus on the teen brain tends to support a false notion that teens’ propensity to offend is hard-wired, a view that not only makes societal reform seem pointless but, by implying the impossibility of deterrence, could support needless incapacitation of many youth until their brains grow up.”) (emphasis added).


5. Daicoff, supra note 4, at 11-12; Stanton Peele, Court-Ordered Treatment for Drug Offenders Is Much Better Than Prison Or Is It?, RECONSIDER Q., Winter 2000-01, at 20, 22-23.

6. See Peele, supra note 5, at 20. Note that the term therapy may generally include a variety of treatment forms, but for the purposes of this Article, it is used interchangeably with psychotherapy, a form that involves conversation between mental health clinician and client.

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10. See McClusco, supra note 7, at 118-19, 123.


In a study of over eighteen hundred juvenile inmates in Cook County, Illinois in 2002, nearly two-thirds of male and three-fourths of female inmates “met diagnostic criteria for one or more psychiatric disorders.” Linda A. Teplin et al., Psychiatric Disorders in Youth in Juvenile Detention, 59 Archives Gen. Psych 1133, 1133-34 (2002).

12. See Thomas Grasso, Adolescent Offenders with Mental Disorders, FUTURE CHILD., no. 2, Fall 2008, at 143, 145-46 (noting the common intersection of depression and anger among incarcerated juvenile offenders, which may manifest as aggression toward others or self-harm and suicidality).
empathetic approach to mentally ill and addicted youth. Yet, the availability of mental health treatment and care for juvenile offenders and the enforcement of due process rights for offenders with serious mental health needs remain lacking. For example, the availability of services and beds in state hospitals has not kept up with court demand, nor have they been made equally available for all mental health needs, in part due to selective legislative policies:

The situation is also worse than it appears because the majority of beds remaining in the state mental hospitals are not available for all the individuals with serious mental illness who need to be hospitalized. The reason these beds are not available is because they are occupied by long-stay forensic patients and sex offenders who have been sent to the state hospital by court order. Thus, the 356,000 mentally ill inmates in prisons and jails are there by court order, and the majority of patients in state mental hospitals are there by court order.

In Part II, Juvenile Offenders and the Modern Therapeutic State, this Article will discuss why court-ordered therapy in an increasingly therapist-focused juvenile justice system may present a legally impossible approach for rehabilitating the juvenile offenders most in need of such services. After identifying the legal and research history supporting court-ordered therapy, Part III, Constitutional Considerations for Juvenile Offenders in Therapy, will reveal why the unfortunate, but necessary, practical result is that certain advances in mental health research and adolescent neuroscience...
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II. JUVENILE OFFENDERS AND THE MODERN THERAPEUTIC STATE

Therapeutic modalities addressing violent recidivism may request or even require an offender's disclosure of additional crimes or victims. For example, evidence-based treatments for posttraumatic stress disorder (“PTSD”) may require the juvenile offender to produce a trauma narrative, fully disclosing the circumstances surrounding the traumatic event, which may involve the offender's previously undisclosed culpable acts. Sex offender treatment for juveniles and adults may require waivers of confidentiality or regular use of polygraphy to motivate truthful


14. See People v. Davis, 871 N.W.2d 392, 394 (Mich. Ct. App. 2015) (addressing the court's interest but lack of authority in dismissing unannounced robbery charge against a seventeen-year-old cognitively-impaired young man who although incompetent to stand trial, was held in jail for two months because no vacancies opened up at a psychiatric facility; Michael L. Perlin, 'Yonder Stands Your Orphan with His Gun': The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes, 46 TEX. TECH. L. REV. 301, 316–17 (2013) (addressing the continuing lack ofsafe and adequate mental health resources for juvenile offenders since the 1980s).


16. See infra Part II. Note that expungement of lesser offenses for minors may ameliorate the legal challenges discussed herein, but this approach is beyond the scope of this Article.

17. See infra Part III.

18. U.S. CONST. amend. V; In re Gauld, 387 U.S. 1, 49–50 (1967); see also McKune v. Lile, 536 U.S. 24, 48 (2002); infra Part III.

19. See infra Part IV.


21. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., TRAUMA-FOCUSED COGNITIVE BEHAVIORAL THERAPY FOR CHILDREN AFFECTED BY SEXUAL ABUSE OR TRAUMA 5 (2012), http://www.childwelfare.gov/pubPDF/trauma.pdf (including the trauma narrative as a required protocol for trauma-focused cognitive behavioral therapy, defined as “[g]radual exposure exercises, including verbal, written, or symbolic recounting of abusive events, and processing of inaccurate [or] unhelpful thoughts about the abuse”); Esther Deblinger et al., Trauma-Focused Cognitive Behavioral Therapy For Children: Impact of the Trauma Narrative and Treatment Length, 28 DEPRESSION & ANXIETY 67, 68 (2011) (“Exposure-based cognitive behavioral interventions are generally recommended for treating adults as well as youth with PTSD,” but noting parental and child hesitancy to fully disclose the details of the traumatic event).

22. E.g., Ambrose v. Godinez, 510 F. App’x 470, 472 (7th Cir.), cert. denied, 134 S. Ct. 270 (2013) ("[i]n Illinois a threshold step for participating in sex-offender treatment—or even being evaluated for treatment—is signing what the parties call a "waiver"—more accurately, a release—authorizing a participant's therapist to disclose information obtained during treatment."); Doe v. Hell, 781 F. Supp. 2d 1134, 1143 (D. Colo. 2011) (denying the Fifth Amendment claim of an incarcerated prisoner whose demand for assurances of immunity for mandatory disclosures in sex offender treatment was refused); see also CTR. FOR SEX OFFENDER MGMT., UNDERSTANDING TREATMENT FOR ADULTS AND

https://nsuworks.nova.edu/nlr/vol40/iss3/3
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disclosures.23 As the Supreme Court of the United States stated in McKane v. Little,24 upholding the constitutionality of compelled disclosures in sex offender therapy: "Mental health professionals seem to agree that accepting responsibility for past sexual misconduct is often essential to successful treatment and that treatment programs can reduce the risk of recidivism by sex offenders."25

Juvenile offenders are more likely to have committed violent crimes against juvenile victims, as most juvenile violence involving physical assault relates to group fights among youth.26 Juvenile sex offenders tend to target young children as early adolescents and other teenage victims in later adolescence.27 Depending on the level of ongoing risk to others, disclosures in therapy may impose mandatory child abuse reporting or other duty to warn requirements upon the mental health clinician.28 Therefore, juvenile offenders engaged in court-ordered therapeutic interventions, possibly relying on promised privileges of confidentiality, should understand that mandatory reporting of a risk of child abuse29 or a duty to warn others of threats of harm30 may override their confidentiality.31 Juvenile offenders receiving treatment may also be concerned that their disclosures will result in criminal charges against parents or guardians.32 Many offenders refuse to accept treatment or fail to complete it after initially consenting to treatment.33 The ethical dilemmas for clinicians working with offenders include concerns that court-ordered treatment may be a trap for their clients, another form of punishment disguised as rehabilitation.34 For the young offender, mandatory reporting based on disclosures in court-ordered therapy may result in additional criminal investigations, charges, sentencing, forced medication, and the possibility of involuntary commitment.35 Even if the state-employed mental health clinician were to

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23. See Mary Ann Farkas & Gale Miller, Sex Offender Treatment: Reconciling Criminal Justice Priorities and Therapeutic Goals, 21 FED. SENT’G REP. 78, 78 (2008) (noting fourteen states use polygraphy as a regulatory standard or disciplinary component of sex offender treatment for assessment and periodic monitoring); see also Ashley J. Faust, Comment, Answer Me or Go to Jail: Why Court-Ordered Polygraph Testing to Treat Probationers Violates the Fifth Amendment, 21 AM. U. J. GENDER SOC. POL’Y & L. 455, 460–63 (2012); Maloney, supra note 20, at 911–12; e.g., Allison v. Snyder, 332 F.3d 1076, 1079 (7th Cir. 2003) ("It is not clearly established—indeed, it is not the law—that self-accusatory programs and polygraph machines are forbidden when treating sex offenders.").


25. Id. at 48, 68 (Stevens, J., dissenting).


29. See id.

30. People v. Kailey, 333 P.3d 89, 91 (Colo. 2014) (en banc) (holding that exercise of the statutory duty to warn removes the protections of the psychologist-patient privilege); Expose v. Thad Wilderson & Assocs., P.A., 863 N.W.2d 95, 105–06 (Minn. Ct. App. 2015) (defining the scope of the licensed psychologist’s immunity when exercising the duty to warn a potential victim of a threat of harm); see also Volk v. Demeereer, 337 P.3d 372, 395 (Wash. Ct. App. 2014); review granted, 352 P.3d 188 (Wash. 2015) (defining the common law duty of care owed by a therapist to third parties to protect against foreseeable dangers from mental health patients); Charles E. Cantu & Margaret H. Jones Hopson, Bite Medicine: A Critical Look at the Mental Health Care Provider’s Duty to Warn in Texas, 31 ST. MARY’S L.J. 359, 362–63, 365 (2000). “Tarasoff has been widely accepted by both legislatures and courts as the basis for imposing the duty of reasonable care upon mental health care professionals to provide a warning to likely victims of their dangerous patients.” Cantu & Hopson, supra note 30, at 362–65; see also Tarasoff v. Regents of the Univ. of Cal, 529 P.2d 553, 558 (Cal. 1974), vacated en banc, 551 P.2d 334 (Cal. 1976).

31. Kailey, 333 P.3d at 95.

32. See generally Jill Levenson, Incorporating Trauma-Informed Care into Evidence-Based Sex Offender Treatment, 20 J. SEXUAL AGGRESSION 9, 11 (2014) (noting that because many juvenile sex offenders are victims of abuse, trauma treatment should be added as a component of sex offender treatment).


34. Levenson, supra note 32, at 11 (addressing arguments that “sex offender treatment is simply punishment, citing the coercive and paternalistic nature of some programs” that may seemingly contradict ethical codes of mental health treatment while others suggest “a paradoxical double-bind for clients who wish to change but fear the consequences of disclosure”); see also David R. Katten, The Ethical Struggle of Unwilling Juvenile Client Autonomy by Raising Competency in Delinquency and Criminal Cases, 16 S. CAL. INTERDISC. L.J. 293, 293–94 (2007) (describing the tension between protective and autonomous policies for juvenile offenders).

35. See infra Section III.C.
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\textsuperscript{28} See Reena Kapoor & Howard Zonana, Forensic Evaluations and Mandated Reporting of Child Abuse, 38 J. AM. ACAD. PSYCHIATRY & L. 49, 50 (2010).

\textsuperscript{29} See id.
provide Miranda warnings\textsuperscript{36} to the young offender—respecting all of the constitutional rights attending the state supervised therapeutic session—juvenile defense attorneys must consider whether it is ethical to counsel mentally unstable youth against participating in therapy.\textsuperscript{37}

A. Evolution of the Modern Therapeutic State in Juvenile Justice

When reflecting on the balance of interests between violent juvenile offenders in rehabilitation and the state in public protection, consider that the modern therapeutic state has emerged from several intertwining threads of history.\textsuperscript{38} A traditionally rehabilitative juvenile justice system appears naturally primed to embrace the proliferation of specialized mental health and drug courts,\textsuperscript{39} as well as the new advances in evidence-based mental health treatments.\textsuperscript{40} And yet, the rise in judicial reliance on therapeutic interventions for juvenile offenders calls to mind criticism of the 1960s policies of court-ordered treatment and excessive institutionalization of the mentally ill.\textsuperscript{41}

Such criticism of undue reliance on mandatory mental health treatment as a form of social control brought about calls for deinstitutionalization and greater autonomy measures, including consent to


\textsuperscript{38} For example, the Supreme Court has recognized the importance of evidence-based mental health treatments, particularly in cases involving juveniles. See, e.g., National Child Traumatic Stress Network, Empirically Supported Treatments and Promising Practices, supra note 38, http://www.nctsn.org/resources/topics/treatments-that-work/promising-practices (last visited Feb. 23, 2016).

\textsuperscript{39} See, e.g., D’Emic, supra note 38, at 25, 28 (identifying more than 150 mental health courts in the United States); Hora & Stalcup, supra note 38, at 725 (identifying “1621 operational drug treatment courts in the United States” as of 2004 since the first adult treatment court in 1989).


\textsuperscript{41} See PAUL S. APPELBAUM, ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE 5 (1994); Mona Paré, Of Minors and the Mentally Ill: Repositioning Perspective on Consent to Health Care, 29 WINDSOR Y.B. ACCESS TO JUST., no. 1, 2001, at 107, 112–13. “Thus, in the late 1950s and early 1960s, they began to question whether there was anything more to mental illness than an arbitrary decision by those with power in society to classify as ill various persons who displayed annoying behaviors and thus, to facilitate their confinement and control.” APPELBAUM, supra at 5.
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...treatment, at a time when children’s autonomy needs were also beginning to gain traction.42 Today, the loss of mental health resources has led to increasing reliance on incarceration of the mentally ill, also calling into serious question whether certain categories of persons with mental illness are more likely to be incarcerated, specifically poor and homeless youth, and young men of color.43

Again, in the 1960s, the increasing focus on the rights of the mentally ill paralleled the expanding juvenile justice movement.44 In 1967, Justice Fortas in *In re Gault*45 outlined procedural rights for juvenile defendants, including the right to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and most importantly, for the purpose of this Article, the privilege against self-incrimination.46 By 1979, the Court upheld a juvenile’s right to contest involuntary commitment decisions in *Parham v. J.R.*,47 concluding: “[P]arents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized. They, of course, retain plenary authority to seek such care for their children, subject to a physician’s independent examination and medical judgment.

In the 1980s and 1990s, a temporary spike in youth violence40 led to more punitive state reform of juvenile justice policies, such that one critic argued “the juvenile [justice] system became indistinguishable from the adult one.”41 Dramatic advances in neuroscience since the 1990s revealed that the adolescent brain undergoes a phenomenal developmental transformation impacting impulsivity and emotional control while logical processes are near...
their height in functioning for adolescents.\textsuperscript{51} Research in PTSD gained traction at this time, resulting in significant federal funding under the Substance Abuse and Mental Health Service Administration and the creation of the National Child Traumatic Stress Network in 2001, which included a strong focus to educate the child welfare and juvenile justice systems on the connection between PTSD and delinquency.\textsuperscript{52} The legal system responded accordingly. In 2005, in Roper v. Simmons,\textsuperscript{53} the Supreme Court of the United States prohibited capital sentencing of juvenile offenders pursuant to the Eighth and Fourteenth Amendments.\textsuperscript{54} As stated by the Court, with a nod toward juvenile brain science and other mental health research, “[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.”\textsuperscript{55} Since Roper and its progeny, Graham v. Florida,\textsuperscript{56} and Miller v. Alabama,\textsuperscript{57} state policy makers interested in public safety have been hesitant to expand categorical consideration of minority status beyond the Eighth Amendment or to sentencing for lesser crimes.\textsuperscript{58} 

51. See Mark Hansen, What’s the Matter with Kids Today: A Revolution in Thinking About Children’s Minds Is Sparking Change in Juvenile Justice, A.B.A. J., July 2010, at 50, 52 (noting that there are “no studies contradicting all the neurological and behavioral research that shows the brain is still maturing during adolescence, and that the maturation process continues well into adulthood.”); Maroney, supra note 2, at 93, 98–99.


54. Id. at 578; see also U.S. CONST. amend. VIII, XIV. Subsequent cases prohibited harsh sentencing of juvenile offenders for other serious crimes. See Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012); Graham v. Florida, 560 U.S. 48, 82 (2010).


57. See U.S. CONST. amend. VIII; Miller, 132 S. Ct. at 2471, 2475; Graham, 560 U.S. at 79, 82; Roper, 543 U.S. at 562, 572–73; e.g., State v. Riley, 110 A.3d 1205, 1214, 1218 (Conn. 2015) (noting the state split in authority with some but not all jurisdictions reforming sentencing procedures to require consideration of youth-related mitigation factors pursuant to Miller); Run v. State, 769 S.E.2d 381, 383 (Ga. 2015) (holding that sentencing a juvenile to a non-mandatory life sentence without the possibility of parole does not violate the Eighth and Fourteenth Amendments); People v. Banks, 36 N.E.3d 432, 436 (Ill. App. Ct. 2015) (holding that sentencing a juvenile to a non-mandatory life sentence without the possibility of parole does violate the Eighth and Fourteenth Amendments); People v. Banks, 36 N.E.3d 432, 436 (Ill. App. Ct. 2015) (holding that sentencing a juvenile to a non-mandatory life sentence without the possibility of parole does not violate the Eighth and Fourteenth Amendments); People v. Banks, 36 N.E.3d 432, 436 (Ill. App. Ct. 2015) (holding that sentencing a juvenile to a non-mandatory life sentence without the possibility of parole does not violate the Eighth and Fourteenth Amendments).

58. However, according to juvenile neuroscience experts, recent scientific advances in imaging have not produced a uniform or bright line between adolescence and adult maturity.\textsuperscript{59} Also, infantilizing adolescence worries some policy advocates that young offenders will not be given sufficient opportunity to learn to take responsibility for their actions.\textsuperscript{60} The traditional substituted authority paradigm for the consent of minors would be reinforced by finding youth less criminally responsible in light of their immaturity and brain development patterns.\textsuperscript{61} This paternalistic view would limit the choice of youth to either seek or reject mental health treatment in the juvenile justice system.\textsuperscript{62} From a dystopian perspective in the juvenile offender’s assumed best interests, the parent, guardian, or the state could more easily force treatment and medication despite the young offender’s protests, hearkening back to the social control policies of the 1950s and 1960s.

One reasonable suggestion is to add to the current dichotomous approaches to a minor’s autonomy or substituted adult authority, a model of supported authority.\textsuperscript{63} That is, a juvenile offender could make health and mental health decisions with substantial guidance from a trusted authority, ideally from as young an age as possible, teaching children to make increasingly responsible decisions for themselves as they mature.\textsuperscript{64} As benevolent an approach as this appears, serious chronic mental health conditions may always necessitate less autonomy.\textsuperscript{65} For example, although many clinicians would recommend that juvenile justice policies place a greater emphasis on community diversion for juvenile offenders needing mental health services, a few offenders would still require smaller psychiatric inpatient programs.\textsuperscript{66}

Returning full circle to the notion of mental health as a form of necessary social control, the Supreme Court of the United States’
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Returning full circle to the notion of mental health as a form of necessary social control, the Supreme Court of the United States’
acknowledgement of adolescent development—combined with the movement toward therapeutic justice and enhanced interest in mental health services for young offenders—poses a risk to juvenile autonomy. The compassionate call for a therapeutic approach to juvenile delinquency appears to take into account the hard fought constitutional protections for juvenile defendants but rarely focuses on a defendant’s autonomy—a defendant who may or may not want the mental health services offered by the justice system.

Few could argue with the fact that the interwoven history of state mental health and criminal justice systems has resulted in offenders of all ages desperate for access to quality mental health assessment and treatment. Today, the criminal justice system has become the number one provider of mental health services in the United States while law enforcement patrol officers with relatively little training are increasingly relied upon to serve as the primary first-responders in mental health crises. According to The Washington Post, from January to June 2015, more than a quarter of the 462 persons shot dead by law enforcement were in the “throes of mental or emotional crisis” at the time they were killed. Both sectors of the criminal justice system—pre- and post-conviction—are ill-equipped to manage the mental health needs of arrestees and inmates. Moreover, law enforcement and licensed qualified mental health professionals may not ameliorate this problem through broad collaboration without creating conflict of interest concerns.

B. Judicial Misuse of Adolescent Mental Health Services

In light of the legal risks accompanying court-ordered therapy, discussed in Part III below, it is imperative that when mental health services are ordered or initiated with consent, they have a reasonable promise of assisting the young offender and protecting the public. While mental health research—particularly with respect to juvenile brain development and child traumatic stress—has made tremendous strides, findings from the nascent research on mental health therapy for violent juvenile offenders are uneven. Too often, the juvenile justice system has been insufficiently discriminating when crafting treatment orders in sentencing or in funding new programs. For example, in a 2014 meta-analytical report on juvenile sex offender treatment programs by the U.S. Department of Justice, it was noted:

While there is growing interest in crime control strategies that are based on scientific evidence, determining what works is not an easy task. It is not uncommon for studies of the same phenomena to produce ambiguous or even conflicting results, and there are many examples of empirical evidence misleading crime control policy and practice because shortcomings in the quality of the research were overlooked.

More alarming is that many researchers had long warned of the immorality of a lack of research on treatment for juvenile sex offending,


74. See id. at 116–17; Lowery et al., supra note 72; infra Part III.


77. See Letourneau & Borduin, supra note 76, at 290–91.

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identifying the propagation of ineffective or even harmful treatments and their embrace by the courts:

Indeed, there has been an almost complete lack of rigorous research on effective interventions for juvenile sexual offenders. The research community’s failure—our failure—to subject the most widely used models of treatment to empirical investigation means that we have consigned vulnerable youth to untreated and possibly ineffective or even iatrogenic procedures.81

Other examples abound with respect to lack of efficacy in treatment programs for young offenders.82 The unknown impact of providing common evidence-based treatment, such as cognitive behavioral therapy, to patients with developmental delays is an ongoing and serious concern, as the evidence-based treatments in use were researched and developed for persons without these diagnoses.83 An average of studies places the number of juvenile offenders with mild to moderate mental retardation at 10%, which is deeply troubling when this population has some of the highest rates of child abuse victimization.84 Some argue that the new frontier in mental health treatment must redesign known treatment models to include criminogenic factors among offender populations because what is currently shown to be effective for persons outside of the system is not equally effective for those within the criminal justice system.85 Female juvenile offenders are offered very few substantially researched mental health programs for violent behavior, despite their high rates of physical aggression in the juvenile justice system.86 Among adult men in court-ordered batterer treatment programs, one study indicated that 42% met criteria for alcohol dependence,87 and yet the juvenile justice system notes high rates of addiction but rarely addresses teenage dating violence.88 What these research gaps among court-ordered treatment strategies reveal is that the judicial system needs to exhibit greater patience and care before forcing unknown, ineffective, and potentially harmful mental health treatment on young offenders.89

Looking for evidence-based treatments for the purpose of sentencing is not enough. Despite an increased popularity in use and adoption of the term evidence-based by the courts,90 few treatment programs would even meet the low standard of a qualifying evidence-based practice, according to the Office of Juvenile Justice and Delinquency Prevention.91 Indeed, clinical researchers acknowledge that research is still in its infancy in understanding what treatment practices are based on sufficient evidence to constitute an evidence-based practice, and which are not:

individuals’ criminal thinking and antisocial attitudes specifically, and likely criminogenic risk—e.g., associates—with treatment for their mental illness and substance abuse issues.

Id. at 599 (internal citations omitted).


88. See Zosky, supra note 77, at 365–67 (arguing that dating violence fell in the gap between rehabilitative juvenile justice and punitive adult justice systems with a need for “zero tolerance [and mandated] accountability” for juvenile dating violence, along with mandatory juvenile abuser treatment program participation).

89. See Gilchrist et al., supra note 86, at 125, 129–30; Goldstein et al., supra note 85, at 171; Zosky, supra note 77, at 367.

90. See Philip H. Pennypacker & Alyssa Thompson, Realignment: A View from the Trenches, 53 SANTA CLARA L. REV. 991, 1009, 1014 (2013) (“Evidence-based practices [in sentencing] are a new approach to gathering and analyzing this information, backed by research, with the promise of better results so that more fitting outcomes can be guaranteed.”); Wilson et al., supra note 84, at 592 (noting a purported lack of evidence-based mental health treatment providers in the criminal justice system).

91. Model Programs Guide, OFFICE OF JUVENILE JUSTICE & DELIQ. PREVENTION, http://www.ojjdp.gov/mpg (last visited Feb. 23, 2016) (categorizing only 22% of 252 youth offender and child welfare programs as evidence-based, 57% promising but unproven as effective, and 21% showing no effects or benefit).
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80. Letourneau & Borduin, supra note 76, at 287; see also CTR. FOR SEX OFFENDER MGMT., supra note 22, at 11 ("[T]he current research on [sex offender] treatment effectiveness remains somewhat equivocal . . .").
81. CTR. FOR SEX OFFENDER MGMT., supra note 22, at 10–11.
84. See Amy Blank Wilson et al., Criminal Thinking Styles Among People with Serious Mental Illness in Jail, 38 LAW & HUM. BEHAV. 592, 593 (2014) (noting higher rates of childhood conduct disorders and adolescent antisocial personality disorders among convicted offenders.

When the findings of these studies are looked at collectively, it becomes clear that therapeutic programs for justice-involved persons with SMI [serious mental illness] must develop a multiprong treatment approach that integrates interventions for
Psychology, in its scientific base, relies on evidence, and the discipline is making progress in differentiating science from pseudoscience, [evidence-based practices] from discredited practices. We ardently hope that our Delphi poll sparks a broader, overdue discussion within the profession about discredited practices in working with some of our most vulnerable populations. The risk to patients and practitioners in using discredited procedures is real.92

This has not stopped the proliferation of mental health courts or the wide variety of juvenile offender rehabilitation programs.93

Yet, compulsory treatment programs are increasingly criticized within the mental health profession, not only for their lack of efficacy, but for the potential harm they cause to patients.94 Twelve-step programs, in particular, have faced recent scrutiny.95 Batterer treatment programs are regularly ordered as a term of sentencing for domestic violence offenders, despite the repeated lack of evidence that they can reasonably assure a reduction in recidivism.96 Although not specifically related to mental health treatment, Scarred Straight programs, briefly placing at-risk youth in jail or prison to frighten them from committing additional crimes, were well-supported by the criminal justice system without a requirement of proof of efficacy—proof which never emerged after decades of implementation.97

Without doubt, assessment and treatment for traumatic stress, mental illness, and addiction—conditions frequently found among both juvenile and adult offender populations—can be beneficial, and ongoing research into creating better evidence-based modalities should be a high priority among policy makers.98 For example, trauma-focused cognitive behavioral therapy for juveniles with PTSD has an increasingly strong research base,99 as does certain treatment and medication for chronic anxiety and depression.100 The problem is that insufficiently tested and other suspect therapeutic approaches tend to occur when the legal system itself financially supports and even generates programs, as shown above with batterer intervention, juvenile sex offender programs, and twelve-step programs.101

In general, court systems thus far have not had a good track record of understanding which treatments work best, and specifically whether they work in a criminal justice setting among young violent offenders most in need of rehabilitation.102 It is too early to know whether specialized mental health and drug courts can improve on this state, but the criminal justice system was never equipped nor was it meant to serve as the primary provider


94. See Peele, supra note 5, at 20 (criticizing twelve-step addiction programs led by non-clinicians). “We might need to run seminars with Americans whose lives have been ruined by coerced twelve-step treatment—just as we need to present to American people whose lives have been ruined by drug laws—to make clear the dangers of the therapeutic state.” Id. at 23. New York is the first state to require non-violent drug offenders to be offered drug treatment instead of jail time, regardless of their addiction status or diagnosis. Id. at 20.

95. See Flanagin, supra note 93; Peele, supra note 5, at 20.


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98. See CHILD WELFARE INFO. GATEWAY, supra note 21, at 2–3, 6–7; Penuypacker & Thompson, supra note 90, at 1014–15, 1018; Wilson et al., supra note 84, at 598–99; Treatments for Mental Disorders, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., http://www.samhsa.gov/treatment/mental-disorders (last updated Oct. 27, 2015).

99. CHILD WELFARE INFO. GATEWAY, supra note 21, at 2–3, 6–7 (“Based on systematic reviews of available research and evaluation studies, several groups of experts and Federal agencies have highlighted TF-CBT as a model program or promising treatment practice.”).

100. See Lynn E. O’Connor, The Myth of “Evidence-Based” Treatment of Depression: What’s Wrong with the Outcome Studies of Treatment of Depression?, PSYCHO. TODAY (July 20, 2013), https://www.psychologytoday.com/blog/our-empathic-nature/201307/the-myth-evidence-based-treatment-depression (criticizing existing research studies comparing medication and talking therapies for treatment of depression); Treatments for Mental Disorders, supra note 98 (approving cognitive behavioral therapy, mindfulness therapies, and exposure therapies, as well as medication to treat anxiety and depression).

101. See N.C. COUNCIL FOR WOMEN, NORTH CAROLINA BATTERER INTERVENTION PROGRAMS: A GUIDE TO ACHIEVING RECOMMENDED PRACTICES 3, 19 (2013), http://www.councilforwomen.nc.gov/documents/publications/battererinterventionhandbook.pdf (noting that batterer treatment programs are not considered mental health treatment and are therefore not covered by health insurance, resulting in removal of participants who cannot afford to pay the program fees); Rick Brundrett, Sex Offender Treatment Costs Skyrocket, Records Show, THE NERVE (Dec. 27, 2011, 6:00 AM), http://www.thenerve.org/sex-offender-treatment-costs-skyrocket-records-show (noting sharp increases in the number of confined sex offender treatment participants, paid for almost entirely by state funding).

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of mental health services in the United States.\textsuperscript{103} Another serious concern is that juvenile offenders subject to untested, ineffective, or even harmful therapeutic approaches are likely to be the most vulnerable of all—young men and women with complex histories of trauma, addiction, mental illness, poverty, displacement, and exposure to harsh structural racism.\textsuperscript{104} Court-ordered mental health treatment methods must be proven to be efficacious, for our most vulnerable youth in the juvenile justice system should not be the subjects of psycho-social experimentation.\textsuperscript{105} If our justice system cannot provide these assurances, then the legal risks of court-ordered therapy identified in Part III below cannot be justified in the interests of rehabilitating young offenders.\textsuperscript{106}

### III. CONSTITUTIONAL CONSIDERATIONS FOR JUVENILE OFFENDERS IN THERAPY

For youth in need of mental health and substance abuse treatment, child welfare and public education systems may initiate their first brush with state oversight, yet the most vulnerable may also find themselves placed in the school-to-prison pipeline.\textsuperscript{107} In effect, the juvenile justice system may provide offenders with their first experience of mental health care involving criminal justice enforcement.\textsuperscript{108} However, even in a well-meaning, therapeutic-focused justice system, state government is not constitutionally permitted to overreach under \textit{Gault}.\textsuperscript{109} That is, the provision of therapeutic

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\textsuperscript{103} See id.

\textsuperscript{104} See McCulloch, supra note 7, at 120–21, 123–24.

\textsuperscript{105} See id.; Wilson et al., supra note 84, at 599; Salerno v. Corzine, No. 06–3547, 2013 WL 5505741, at *8 (D.N.J. Oct. 1, 2013) (addressing claims by New Jersey civil committees who were denied privileges, including employment, when they refused to participate in sex offender treatment which showed little efficacy). Plaintiffs’ pro se claims in Salerno included assertions that the treatment program “is a sham and that its real objective is to detain indefinitely, and not to rehabilitate,” noting that from 1999 through 2011, less than 5% of residents had been released. \textit{Salerno}, 2013 WL 5505741, at *8. The District Court of New Jersey was unconvinced, relying on the state’s good intentions when stating: “The fact that successes in treatment sufficient for discharge are small in number does not mean that the goal is a sham nor that the treatment is unrelated to reaching for that goal.” \textit{Id}.

\textsuperscript{106} See McCulloch, supra note 7, at 120–21, 123–24; Wilson et al., supra note 84, at 599; infra Part III.

\textsuperscript{107} See Jonathan Arellano-Jackson, \textit{But What Can We Do? How Juvenile Defenders Can Disrupt the School-to-Prison Pipeline}, 13 \textit{SEATTLE J. FOR SOC. JUST.} 751, 753–54, 757 (2015) (reflecting on the school-to-prison pipeline as a significant cause of racial and economic inequality in the United States, with zero-tolerance school discipline and suspension policies, particularly for male students of color with unmet mental health treatment needs).

\textsuperscript{108} See id. at 788.

\textsuperscript{109} In \textit{re Gault}, 387 U.S. 1, 4, 30–31 (1967) (upholding the due process rights of juvenile defendants). Recall that the trial court originally adjudicated fifteen-year-old justice to young vulnerable offenders must not violate their due process rights, including violations of the privilege against self-incrimination.\textsuperscript{110} When treatment occurs in custodial settings, juvenile offenders may invoke constitutional protections against self-incrimination, including \textit{Miranda} warnings.

### A. A Juvenile Offender’s Fifth Amendment Due Process Right Against Self-Incrimination in Therapy

A distinct line of state and federal case law applies Fifth Amendment due process protections against self-incrimination to some, but not all, court-ordered, state-supervised therapy provided as a term of sentencing.\textsuperscript{111} Note that all involve cases with adult rather than juvenile offenders, taking into consideration that many states try youth under age eighteen as adults.\textsuperscript{112} Under the Fifth Amendment, no person “shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”\textsuperscript{113} The privilege against self-incrimination

\textit{Gerald Gault}, a delinquent, imposing incarceration for the remainder of his minority for the misdemeanor of making a single lewd telephone call, with an added sentence of delinquent status for habitual involvement in \textit{immoral matters}. \textit{Id} at 4, 7–9. Gault had a prior misdemeanor conviction for being found in the presence of a minor in possession of a stolen wallet and the sentencing judge had also happened to recall a prior accusation against Gault for having lied to the police about stealing a baseball glove from another boy. \textit{Id} at 4, 9.

\textsuperscript{110} See id.

\textsuperscript{111} \textit{See} U.S. CONST. amend. V; \textit{e.g.}, McKune v. Lile, 536 U.S. 24, 29–30, 33–35, 41, 48 (2002) (holding that sanctions imposed on an inmate who refuses to incriminate himself in court-ordered sex offender treatment is not subject to compulsion in violation of the Fifth Amendment); Estelle v. Smith, 451 U.S. 454, 456, 460, 472–73 (1981) (holding that court-ordered pretrial psychiatric evaluations are inadmissible under the Fifth Amendment to enhance sentencing); Russell v. State, 109 A.3d 1249, 1261–63 (Md. Ct. Spec. App. 2015) (following McKune, in holding that sanctions for refusal to answer questions in court-ordered polygraph examinations for a defendant on probation did not amount to compulsion in violation of the privilege against self-incrimination).

\textsuperscript{112} See McKune, 536 U.S. at 29 (holding that sanctions imposed on an inmate who refuses to incriminate himself in court-ordered sex offender treatment is not subject to compulsion in violation of the Fifth Amendment); Estelle, 451 U.S. at 456 (holding that under the Fifth Amendment court-ordered pretrial psychiatric evaluations are inadmissible for the purpose of enhancing sentencing); Russell, 109 A.3d at 1251 (following McKune in holding that sanctions against a probationer for refusal to answer questions in court-ordered polygraphy does not amount to compulsion in violation of the privilege against self-incrimination).

\textsuperscript{113} U.S. CONST. amend. V. The self-incrimination clause of the Fifth Amendment applies to the States through the Fourteenth Amendment. U.S. CONST. amend. V, XIV, Malley v. Hogan, 378 U.S. 1, 6 (1964).
of mental health services in the United States. Another serious concern is that juvenile offenders subject to untested, ineffective, or even harmful therapeutic approaches are likely to be the most vulnerable of all—young men and women with complex histories of trauma, addiction, mental illness, poverty, displacement, and exposure to harsh structural racism. Court-ordered mental health treatment methods must be proven to be efficacious, for our most vulnerable youth in the juvenile justice system should not be the subjects of psycho-social experimentation. If our justice system cannot provide these assurances, then the legal risks of court-ordered therapy identified in Part III below cannot be justified in the interests of rehabilitating young offenders.

III. CONSTITUTIONAL CONSIDERATIONS FOR JUVENILE OFFENDERS IN THERAPY

For youth in need of mental health and substance abuse treatment, child welfare and public education systems may initiate their first brush with state oversight, yet the most vulnerable may also find themselves placed in the school-to-prison pipeline. In effect, the juvenile justice system may provide offenders with their first experience of mental health care involving criminal justice enforcement. However, even in a well-meaning, therapeutic-focused justice system, state government is not constitutionally permitted to overreach under Gault. That is, the provision of therapeutic justice to young vulnerable offenders must not violate their due process rights, including violations of the privilege against self-incrimination.

When treatment occurs in custodial settings, juvenile offenders may invoke constitutional protections against self-incrimination, including Miranda warnings.

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not only permits a person to refuse to testify against himself at a
criminal trial in which he is a defendant, but also "privileges him
not to answer official questions put to him in any other proceeding,
civil or criminal, formal or informal, where the answers might
incriminate him in future criminal proceedings."114

The Supreme Court of the United States has held that the privilege
against self-incrimination is designed to protect the fairness of parties in an
accusatorial system and should be liberally construed.115 Therefore, any
coerced confession by the defendant in violation of the privilege against self-
incrimination may not be admitted against him or her in a court of law.116

For many years, the Supreme Court of the United States has
recognized that court-ordered mental health treatment in the criminal justice
system may be a coercive environment invoking Fifth Amendment
protections. Such protections are narrowly applied to the juvenile justice
system through Gault as a matter of procedural due process in the
adjudicatory phase of proceedings.117 For decades, the Due Process Clause
has been interpreted to require "that state action, whether through one
agency or another, shall be consistent with the fundamental principles of
liberty and justice which lie at the base of all our civil and political
institutions."118 Moreover, the burden to prove that statements may be
incriminating is relatively low: "To sustain the privilege, it need only be
evident from the implications of the question, in the setting in which it is
asked, that a responsive answer to the question or an explanation of why it
cannot be answered might be dangerous because injurious disclosure could
result."119 Whether the line of cases addressing the due process rights of
adult offenders in court-ordered therapy will apply equally or similarly to
juveniles, pursuant to Gault, Roper, and Graham, is far from clear.

Turley, 414 U.S. 70, 77 (1973)).

115. See Allen v. Illinois, 478 U.S. 364, 367, 375 (1986); Gault v. Goren,
385 U.S. 115, 151 (1967) ("[Constitutional provisions for the security of person and property
should be liberally construed."); see also U.S. CONST. amend. V.

116. Malloy, 378 U.S. at 6, 13 (1964) (holding that the accused should suffer
no penalty for affirming his or her right to remain silent); Brown v. Mississippi, 297 U.S. 278,
279, 281-82, 287 (1936) (addressing confessions obtained by torture, including whipping and
attempted lynching, "extorted by officers of the [state by brutality and violence"); see also
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117. See U.S. CONST. amend. V, XIV; e.g., In re Gault, 387 U.S. 1, 13 (1967);
PWG v. State, 682 So. 2d 1203, 1207 (Fla. 1st Dist. Cir. App. 1996) (interpreting In re Gault,
387 U.S. 1, 13, 31 (1967)).

118. Brown, 297 U.S. at 286 (emphasis added) (quoting Hebert v. Louisiana,
272 U.S. 312, 316 (1926) (interpreting the comparative authority of a state supreme court); see
also U.S. CONST. amend. V, XIV.


However, highlighting patterns among the adult cases may serve as a useful
start to predicting their impact on court-ordered treatment of juvenile
offenders.120

In 1972, the Supreme Court of the United States, in McNeil v.
Director, Patuxent Institution,121 held that an inmate who refused to
cooperate with a psychiatric examination could not be held longer than his
criminal sentence for assault in order to accomplish the examination.122 Note
that the examination been completed, it could have led to a possible
indeterminate stay in a state mental hospital.123 When attempting to
psychologically assess McNeil, he "was repeatedly interrogated not only
about the crime for which he was convicted but for many other alleged
antisocial incidents going back to his sophomore year in high school."124

Justice Douglas in his concurrence opinion asserted that the inmate
properly exercised his Fifth Amendment right to remain silent when avoiding
psychiatric examination, for "[t]he questioning of McNeil is in a setting and
has a goal present with both potential and immediate danger."125 Noting
that more than half of the state hospital residents were held beyond the time
of their original criminal sentences, Justice Douglas concluded:

Whatever the Patuxent procedures may be called—
whether civil or criminal—the result under the Self-Incrimination
Clause of the Fifth Amendment is the same. As we said in In re
Gault, there is the threat of self-incrimination whenever there is a
depredation of liberty; and there is such a depredation whatever the
name of the institution, if a person is held against his will.126

In McNeil, Justice Douglas would uphold a defendant’s exercise of
his right to remain silent in a psychiatric assessment.127 However, a mental
health assessment does not always need the defendant’s cooperation. For
example, in Esquivel v. Smith, the District Court of Ohio recently held that

120. See generally Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons,


122. Id. at 246.

123. Id.; see also Allison v. Snyder, 332 F.3d 1076, 1079 (7th Cir. 2003)
(holding that detention of civil committees in prison rather than a mental institution does not
violate the Illinois Sexually Dangerous Persons Act, for "they are pretrial detainees as well as
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125. Id.; see also U.S. CONST. amend. V.

126. McNeil, 407 U.S. at 257 (Douglas, J., concurring) (internal citation
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127. Id. at 254–55, 257 (Douglas, J., concurring).

https://nsuworks.nova.edu/nlr/vol40/iss3/3
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petitioner’s selective refusal to answer 300 questions on a psychosexual evaluation provided evidence of a refusal to cooperate and a “refusal to take responsibility for his acts.”

Timing is important. Where the in-custody pretrial detainee in Estelle v. Smith was ordered to undergo a psychiatric examination, the Supreme Court of the United States held he must be given a Miranda warning; but the federal District Court of Idaho argued that Estelle was limited by its facts and should not have been extended to prosecutorial commentary on the meaning of silence at sentencing, such as a psychosexual evaluation conducted post conviction.

Also, key to the Fifth Amendment analysis, for those criminal defendants who actually make incriminating disclosures in psychotherapy, a due process analysis must assess whether the disclosures were made under compulsion. The primary focus is on the defendant, not the interrogator, whether investigator, probation officer, warden, or court-employed psychologist:

[The constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was “free and voluntary. That is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence...”

The voluntariness test is objective and does not rely on the actual mindset of the suspect being questioned.

If the defendant changes his or her mind about cooperating with court-ordered treatment services once they have begun, a waiver of Fifth Amendment rights carries the potential for punitive sanctions. For example, in 2014, in Prieto v. Davis, the defendant was described by the state psychologist as difficult and testy when administered a sex offender psychological assessment. The defendant was made aware that under section 19.2-264.3:1(F)(2) of the Virginia Code, he had waived his Fifth Amendment privilege and that the court could sanction him by informing the jury of his refusal to cooperate with the assessment.

Overall, the Fifth Amendment privilege against self-incrimination remains arguably broad and relatively easy to invoke if one is aware of the right. As the Supreme Court of the United States stated in 1892, the privilege is “as broad as the mischief against which it seeks to guard.” A plea negotiation, for example, involving an agreement to obtain psychotherapy and probation in lieu of a heavier sentence and incarceration, may arguably constitute coercion and create a legitimate fear of self-incrimination. As the Court of Appeals of Alaska held in James v. State, a defendant’s Fifth Amendment right to remain silent was implicated when, if he refused to cooperate with court-ordered sex offender treatment he would face incarceration, but if he instead cooperated, he might lose his pending appeal. Moreover, the social worker in James who conducted the initial court-ordered psychological assessments of sex offenders admitted “he had testified against former interviewees using information that came out during the interviews.”

The privilege against self-incrimination may also protect against post-conviction use of statements made previously to a mental health provider.

137. Id. at *35 (“Prieto was uncooperative in discussing the crimes—particularly in areas where he might appear in an unfavorable light—and that he was ‘vague from time to time,’ ‘testy’, and evasive.”).
138. Id.; see also U.S. CONST. amend. V; VA. CODE ANN. § 19.2-264.3:1(F)(2) (2014). This statutory section provides: “If the court finds, after hearing evidence presented by the parties, out of the presence of the jury, that the defendant has refused to cooperate with an evaluation requested by the Commonwealth, the court may admit evidence of such refusal or, in the discretion of the court, bar the defendant from presenting his expert evidence.” VA. CODE ANN. § 19.2-264.3:1(F)(2).
139. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892); see U.S. CONST. amend. V.
140. Counselman, 142 U.S. at 562.
143. Id. at 1068, 1072; see also U.S. CONST. amend. V.
144. James, 75 P.3d at 1068-69.
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The privilege against self-incrimination may also protect against post-conviction use of statements made previously to a mental health professional.
For example, the Court of Appeals for the Ninth Circuit has held that disclosures of other crimes made in a sexual psychopath treatment program under assurances of confidentiality, but admitted in evidence to enhance sentencing, would violate a defendant’s Fifth Amendment privilege against self-incrimination.\(^{146}\) Also, in a probation revocation proceeding, a defendant agreeing to terms of probation thereby waived any privilege against self-incrimination relating to practical disclosure of basic information necessary for monitoring the duration of his probation.\(^{147}\) However, any information likely to incriminate the accused in a subsequent criminal prosecution would be subject to due process protections against self-incrimination.\(^{148}\)

More recently, state statutory schemes that mandate sex offender treatment, including compelled disclosures of criminal activity, have been met with mixed responses by the courts.\(^{149}\) For example, in *People v. Rebulloza*,\(^{150}\) the Supreme Court of California granted review to consider whether a sentence of probation requiring completion of a sex offender treatment program may lawfully include a waiver of the Fifth Amendment privilege against self-incrimination.\(^{151}\) The lower court, in 2015, held that mandatory categorical waiver of a criminal defendant’s privilege against self-incrimination violated the Fifth Amendment.\(^{152}\)

In this case, Rebulloza pled no contest to a single count of indecent exposure and was ordered to first “waive any privilege against self-incrimination and participate in polygraph examinations which shall be part of the sex offender management program,” and second, to “waive any

145. *Pens v. Bail*, 902 F.2d 1464, 1464–65 (9th Cir. 1990); see also U.S. CONST. amend. V.


147. *State v. Cass*, 635 N.E.2d 225, 228 (Ind. Ct. App. 1994); see also U.S. CONST. amend. V.


150. 184 Cal. Rptr. 3d 548 (Cal. App.), review granted, 349 P.3d 1066 (Cal. 2015).

151. *Id.* at 551; see also U.S. CONST. amend. V.


153. *Rebulloza*, 184 Cal. Rptr. 3d at 550–51 (ordering the defendant subject to section 1203.067(b)(3) and (b)(4) of the California Penal Code respectively); see also Cal. PENAL CODE § 1203.067(b)(3) (West 2004 & Supp. 2014), declared unconstitutional by People v. Rebulloza, 184 Cal. Rptr. 3d 548, 551 (Cal. App. 2015); PENAL § 1203.067(b)(4).

154. *Reinhardt*, 66 F. Supp. 3d at 1356–57 (noting that the penalties of loss of an appeal were greater than those in *McKune* which only involved enhanced monitoring and restrictions); see also U.S. CONST. amend. V; *McKune*, 536 U.S. at 30.


156. *McKune*, 536 U.S. at 35–36; see also *Reinhardt*, 66 F. Supp. 3d at 1357.


158. *See U.S. CONST. amend. V; Substance Abuse Treatment Evidence-Based Practices (EBP)*, supra note 40.

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Therefore, statements made by a convicted offender to a therapist under court-ordered conditions may be subject to the privilege against self-incrimination if the offender claims the privilege and is compelled to incriminate him or herself in the session. Clearly, the most recent statutory efforts to require compelled therapeutic disclosure from convicted offenders have focused on sex offenses, a legislative policy which has failed to consider the reality of the current lack of evidence-based sex offender treatments. If evidence-based mental health practices continue to justify mandatory treatment for additional offenses, the current judicial trend, eroding Fifth Amendment protections in favor of mandatory mental health treatment will already have a framework in therapeutic justice. If the therapeutic setting is made to fit within the bounds of a custodial setting presumed to be coercive, then more therapists providing court-ordered treatment to offenders may be required to provide the added protection of Miranda warnings before mandating disclosures.

153. Rebulloza, 184 Cal. Rptr. 3d at 550–51 (ordering the defendant subject to section 1203.067(b)(3) and (b)(4) of the California Penal Code respectively); see also CAL. PENAL CODE § 1203.067(b)(3) (West 2004 & Supp. 2014), declared unconstitutional by People v. Rebulloza, 184 Cal. Rptr. 3d 548, 551 (Cl. App. 2013); PENAL § 1203.067(b)(4).
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155. Reinhardt, 66 F. Supp. 3d at 1356; see also U.S. CONST. amend. V; McKune, 536 U.S. at 41.
156. McKune, 536 U.S. at 35–36; see also Reinhardt, 66 F. Supp. 3d at 1357.
157. See James v. State, 75 P.3d 1065, 1066 (Alaska Ct. App. 2003); Finkelhor et al., supra note 27, at 1; Przybylski, supra note 79.
158. See U.S. CONST. amend. V; Substance Abuse Treatment Evidence-Based Practices (EBP), supra note 40.
B. Miranda in Custodial Mental Health Settings

A court-ordered therapeutic setting may require the added protections of Miranda warnings to ensure the defendant-patient's understanding of the privilege against self-incrimination if statements made are later admitted against the defendant at trial. This requires an assessment of whether the setting fits within the scope of a custodial interrogation. Recall that Miranda and its progeny require that a suspect in custody “must be warned that he has a right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” If a suspect does make a statement during custodial interrogation, the Government bears the burden of showing, prior to admitting the statement, that the suspect voluntarily, knowingly, and intelligently waived his or her Miranda rights.

The test is objective when determining whether a suspect is in custody, sufficient to trigger the need for Miranda warnings prior to interrogation. The court must determine whether there was “a formal arrest or restraint on freedom of movement of the degree associated with formal arrest,” by examining two inquiries: “[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave.”

Custodial settings, whether questioning is conducted by civil or criminal investigators, may require Miranda warnings for statements made to be admissible. For example, in 2014, in Jackson v. Conway, the Second Circuit Court of Appeals held that a child protective services caseworker violated defendant’s Fifth Amendment and Miranda rights when she interrogated the defendant while he was in police custody accused of child sexual abuse. Although he had invoked his right to remain silent during police interrogation, he was willing to speak to the caseworker with respect to her parallel civil investigation. However, the statements defendant made to her were ultimately used against him, resulting in multiple charges in a grand jury indictment, testimony by the caseworker at trial, and extensive use of his disclosures during the State's closing argument. On appeal, Jackson argued that the caseworker, in eliciting his incriminating statements, “acted either as a law enforcement officer or as the functional equivalent of a police officer when she interviewed him without first providing the required Miranda warnings, and that his statements to her were thus inadmissible.”

The State in Jackson conceded that the defendant was in custody for the purpose of Fifth Amendment analysis. However, the court of appeals disagreed with the State’s limited definition of interrogation. According to the Second Circuit, “the Supreme Court of the United States has not strictly limited its holdings in this regard to law enforcement personnel conducting criminal investigations.” The Second Circuit quoted Estelle, noting that when the psychiatrist:

“went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of [the defendant’s] future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting.”

Note that Estelle had relied on Miranda, which clearly supported application of the privilege against self-incrimination beyond criminal proceedings “and it serves to protect persons in all settings in which their

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160. See id. at 445; D’Emic, supra note 38, at 25.
161. Miranda, 384 U.S. at 439, 444.
162. Id. at 444.
163. Id. at 444, 475.
165. Id. (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)).
168. Id. at 122, 140, 155; see also U.S. Const. amend. V.
169. Jackson, 763 F.3d at 122.
170. Id. at 123.
171. Id. at 127.
172. Id. at 128.
173. Id. at 129-30.
174. Jackson, 763 F.3d at 137; see also U.S. Const. amend. V.
175. Jackson, 763 F.3d at 137-38 (noting that Supreme Court of the United States precedent clearly had included non-law enforcement agents when determining that an interrogation had occurred, such as tax investigators and psychiatrists).
176. Id. at 138 (alteration in original) (quoting Estelle v. Smith, 451 U.S. 454, 467 (1981)).
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169 Jackson, 763 F.3d at 122.
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freedom of action is curtailed in any significant way from being compelled to incriminate themselves.\textsuperscript{177}

In contrast, the Third Circuit Court of Appeals held in 2010 that a child protective services worker who visited a murder defendant in jail in order to discuss his children’s welfare, but who also happened to conversationally discuss the events of the murder, did not interrogate the defendant and therefore did not violate his \textit{Miranda} rights by failing to issue a warning against self-incrimination.\textsuperscript{178} Whereas the voluntariness of a confession may focus objectively on the defendant under a \textit{Fifth Amendment analysis},\textsuperscript{179} according to the Third Circuit Court of Appeals, the motivation of the interrogator is relevant in determining whether an interrogation has taken place under \textit{Miranda}.\textsuperscript{180} This may be key when assessing whether court-ordered therapy in the juvenile justice system requires administration of \textit{Miranda} warnings before proceeding with questioning during treatment.\textsuperscript{181} As already discussed, many forms of therapeutic interventions deliberately rely on the juvenile offender providing truthful disclosures of details of potentially culpable events.\textsuperscript{182}

With proper supervision and guidance, juvenile offenders may consent to treatment or interrogation by waiving their \textit{Miranda} rights.\textsuperscript{183} In cases where the offender has specifically requested the mental health assessment or examination, as opposed to one imposed by court order or by the state, a clear \textit{Miranda} waiver is more likely to have occurred.\textsuperscript{184} In essence, precedent since \textit{Estelle} has attached \textit{Fifth Amendment} protections in the mental health context only when the mental health provider is deemed an \textit{agent of the state}.\textsuperscript{185} Juvenile offenders would be particularly reliant on the

\textsuperscript{177} \textit{Estelle}, 451 U.S. at 466 (quoting \textit{Miranda} v. Arizona, 384 U.S. 436, 467 (1966)); see also U.S. CONST. amend. V.

\textsuperscript{178} \textit{See Saranchak v. Beard}, 616 F.3d 292, 303–04 (3d Cir. 2010).


\textsuperscript{180} \textit{Saranchak}, 616 F.3d at 303–04 (“When Saranchak ‘freely admitted to killing [Edmund]’ and ‘also admitted to killing [Stella],’ Garber’s follow-up question was not an interrogation eliciting incriminating information.”) (citation omitted); see also \textit{Miranda}, 384 U.S. at 444.


\textsuperscript{182} \textit{See McKune}, 536 U.S. at 33–34; \textit{Farkas & Miller}, supra note 23, at 78–79.

\textsuperscript{183} \textit{See Smith v. Wainwright}, 741 F.2d 1248, 1258–59 (11th Cir. 1984).

\textsuperscript{184} \textit{See Estelle v. Smith}, 451 U.S. 454, 467–68 (1981); \textit{Smith}, 741 F.2d at 1258–59 (noting that no \textit{Miranda} warnings are required by a clinician who examines the defendant at the defendant’s request).

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\textsuperscript{187} \textit{See J.D.B.}, 131 S. Ct. at 2402–03. Note that the ability to understand \textit{Miranda} warnings based on IQ and cognitive ability has been relevant to the weight and credibility of a defendant’s disclosures for some time. \textit{See State v. Sanchez}, 400 S.E.2d 421, 423–24 (N.C. 1991).


\textsuperscript{189} \textit{J.D.B.}, 131 S. Ct. at 2402–03.

\textsuperscript{190} \textit{N.C. Gen. Stat. § 7B-2101(a) (2007)}.

\textsuperscript{191} \textit{J.D.B.}, 131 S. Ct. at 2399.
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With the two police officers and the two administrators present, J.D.B. was questioned for the next [thirty to] [forty-five] minutes. Prior to the commencement of questioning, J.D.B. was given neither Miranda warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave the room.\textsuperscript{192}

In deciding that J.D.B. was subject to a custodial interrogation warranting Miranda warnings, the Supreme Court of the United States set out factors that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis [was] consistent with the objective nature of that test."\textsuperscript{193}

Note that as with J.D.B.'s experience in the school administrative setting, a juvenile offender participating in court-ordered psychotherapy, whether incarcerated or on probation, will likely meet with the clinician in a closed office without a parent or guardian present.\textsuperscript{194} Both settings are arguably less punitive than incarceration in the criminal justice system, but the lines are hastily drawn.\textsuperscript{195} Both the educational setting and mental health setting now increasingly overlap with criminal justice efforts as seen in the proliferation of law enforcement on school grounds and court-ordered mental health treatment.\textsuperscript{196} In the juvenile justice system, all of these elements coexist to an extent, merging rehabilitative, educational, and punitive elements.\textsuperscript{198}

Finally, if the court deems the disclosure setting noncustodial, then an offender must assert the privilege against self-incrimination; otherwise,

\textsuperscript{192} Id. at 2406.

\textsuperscript{193} Compare S.G. v. State, 956 N.E.2d 668, 678 (Ind. Ct. App. 2011) (holding that a juvenile was not subject to custodial interrogation, nor were his Miranda rights violated, when he was questioned about a theft by the school principal), with State v. Antonio T., 352 P.3d 1172, 1174, 1178 (N.M. 2015) (finding a violation of a high school student's privilege against self-incrimination for statements made to a vice principal in the presence of a deputy sheriff, requiring Miranda warnings before questioning).

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\textsuperscript{196} Id. at 42; Peele, supra note 5, at 20; Zosky, supra note 77, at 360-61, 367.

\textsuperscript{198} Zosky, supra note 77, at 360-61.

\textsuperscript{199} See Salinas v. Texas, 133 S. Ct. 2174, 2180, 2184 (2013) (holding that prosecutorial use of defendant’s noncustodial silence did not violate the Fifth Amendment privilege against self-incrimination); Minnesota v. Murphy, 465 U.S. 420, 429, 440 (1984) (holding that a witness who does not claim the privilege against self-incrimination may lose the benefit of the privilege without making a knowing and intelligent waiver); Rogers v. STATE, 340 U.S. 367 (1951) (holding that the privilege against self-incrimination is deemed waived unless invoked); James v. State, 75 P.3d 1065, 1066–68 (Alaska Ct. App. 2003) (finding that an inmate verbally asserted his right to remain silent to correctional officers during sex offender treatment while his appeal was pending).

\textsuperscript{200} See Jones, 75 P.3d at 1067–68; Farkas & Miller, supra note 23, at 78-79; Holland, supra note 196, at 79.

\textsuperscript{201} See Buchanan v. Kentucky, 483 U.S. 402, 424–25 (1987) (denying defendant’s Sixth Amendment claim of ineffective assistance of counsel for failure to warn defendant of the risk that his psychiatric examination results would be introduced into evidence against him at trial); State v. Huff, 381 S.E.2d 635, 661 (N.C. 1989), vacated, 497 U.S. 1021 (1990) (determining whether defendant’s Sixth Amendment right to effective assistance of counsel was violated due to defense counsel’s opening the door to rebuttal testimony by the State’s psychiatric expert who evaluated defendant pre-trial subject to court order); State v. McClary, 577 S.E.2d 690, 692–93 (N.C. Ct. App. 2003) (addressing whether defense counsel properly objected to admission of defendant’s pre-trial psychiatric evaluation and mental health treatment history); Kinports, supra note 186, at 139 n.105 (discussing Smith v. Murray, 477 U.S. 527, 530–31 (1986) (addressing defense counsel’s unwillingness to object to the State’s admission of defendant’s statements to his own psychiatric expert in the sentencing phase of a capital trial)).

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Finally, if the court deems the disclosure setting noncustodial, then an offender must assert the privilege against self-incrimination; otherwise, the offender's silence in the face of interrogation may, in fact, be held against him.198 One must question how easily a juvenile offender would be able to navigate and assert a right to remain silent in the face of intimidating questions in therapy. Courts apply a variable, albeit objective, standard to determine if a therapeutic setting is custodial or inherently coercive, a determination no juvenile could reasonably forecast.200 Defense counsel will certainly bear some of the burden in their duty to advise unsuspecting juvenile defendants of the legal risks of accepting plea agreements or diversion involving psychotherapy.201

C. Involuntary Commitment: Expanding the Due Process Divide Between Civil and Criminal Proceedings

Even if the privilege against self-incrimination and Miranda rights attach to court-ordered psychotherapy in the juvenile justice system, the privilege may not attach to court-ordered mental health services deemed outside the scope of the justice system.202 Despite the early 1970s broad application of a right to remain silent in settings involving a deprivation of

192. Id.
193. Id. at 2406.
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liberty, whether criminal or civil, today a sharper division is emerging between the two. By 1979, in Parham, if a juvenile offender made disclosures in court-ordered therapy that resulted in civil involuntary commitment, the constitutional due process rights that might attend the therapeutic setting in the criminal justice system would not be equally available in the involuntary commitment proceeding. In 1986, with respect to proceedings of civil involuntary commitment of sexual predators, the Supreme Court of the United States in Allen v. Illinois asserted that “involuntary commitment does not itself trigger the entire range of criminal procedural protections,” including the privilege against self-incrimination. Mandating psychiatric care and treatment, according to the majority in Allen, is not punitive, but justified civil state action under the parens patriae doctrine when the person subject to commitment is confined “to an institution expressly designed to provide psychiatric care and treatment.

In a more limited interpretation, the Wisconsin Court of Appeals, in 2003, addressed a criminal defendant who made incriminating disclosures of past crimes to a psychologist in a court-ordered assessment interview for sexually violent civil commitment. The court held that the State could not suppress statements made by the defendant on the basis that Miranda warnings had not been given:

The purpose of the examiner’s interview was to evaluate Lombard for the purpose of a potential ‘civil commitment proceeding, not a criminal proceeding,’ and the examiner was not required to comply with Miranda’s dictates. Had the examiner, inadvertently or otherwise, elicited statements from Lombard, which could subject him to future criminal prosecution, those statements might well be suppressible in a future prosecution under Estelle.

This evolving integration of civil commitment and criminal justice policies would be especially persuasive with regard to mental health treatment of young offenders because they may be subject to the State’s protective interest under parens patriae based on both mental health and minority age status. The specialized juvenile court system has long been defined by the doctrine of parens patriae:

It is to save, not to punish; it is to rescue, not to imprison; it is to subject to wise care, treatment and control rather than to incarcerate in penitentiaries and jails; it is to strengthen the better instincts and to check the tendencies which are evil; it aims, in the absence of proper parental care, or guardianship, to throw around a child, just starting in an evil course, the strong arm of the parens patriae.

A protective, rehabilitative approach to juvenile delinquency purportedly continues today, over a hundred years later, but with ready embrace of a more authoritative tone:

Given the different goals of the juvenile delinquency and the adult criminal systems, and the former’s emphasis on rehabilitation as the principal means by which to achieve the goal of preventing delinquent children from becoming adult offenders, we believe that it is constitutionally permissible for the trial court to impose whatever treatment plan it concludes is most likely to be effective for a particular child, as long as that plan does not pose a significant threat to the health or well-being of the child. In such a

203. See In re Gaul, 387 U.S. 1, 47–48 (1967); Miranda v. Arizona, 384 U.S. 436, 478–79 (1966). 204. See J.D.B. v. North Carolina, 131 S. Ct. 2394, 2402 (2011); M.W. v. Davis, 756 So. 2d 90, 109 (Fla. 2000). 205. Parham v. J.R., 442 U.S. 584, 600–01, 620 (1979) (upholding the substantial liberty interests of juveniles under the Fourteenth Amendment to avoid being unnecessarily confined for the purpose of medical treatment); M.W., 756 So. 2d at 99, 109 (upholding a court order to commit a minor without an evidentiary hearing subject to Parham and state statutory provisions); see also U.S. CONST. amend. XIV. Applying a classically nebulous parens patriae best interests standard in a dependency hearing, the court merely considered the minor’s procedural rights, as well as “whether a child believes that he or she is being listened to and that his or her opinion is respected and counts.” M.W., 756 So. 2d at 108.


207. Id. at 372, 375 (holding that proceedings under the Illinois Sexually Dangerous Persons Act were civil, not criminal proceedings within the scope of the Fifth Amendment right against compulsory self-incrimination); In re Heckl, 886 N.Y.S.2d 295, 297–98 (App. Div. 2009) (upholding the trial court’s right to compel the testimony of an incompetent adult in a civil guardianship proceeding without violating her due process privilege against self-incrimination).

208. Allen, 478 U.S. at 373. But see Allison v. Snyder, 332 F.3d 1076, 1079 (7th Cir. 2003) (“If pretrial detaineles may be subjected to the ordinary conditions of confinement, . . . then may persons detained before trial as sexually dangerous persons?”).


212. Id. (emphasis added).
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A protective, rehabilitative approach to juvenile delinquency purportedly continues today, over a hundred years later, but with ready embrace of a more authoritative tone:

Given the different goals of the juvenile delinquency and the adult criminal systems, and the former’s emphasis on rehabilitation as the principal means by which to achieve the goal of preventing delinquent children from becoming adult offenders, we believe that it is constitutionally permissible for the trial court to impose whatever treatment plan it concludes is most likely to be effective for a particular child, as long as that plan does not pose a significant threat to the health or well-being of the child. In such a

205. Parham v. J.R., 442 U.S. 584, 600–01, 620 (1979) (upholding the substantial liberty interests of juveniles under the Fourteenth Amendment to avoid being unnecessarily confined for the purpose of medical treatment); M.W., 756 So. 2d at 99, 109 (upholding a court order to commit a minor without an evidentiary hearing subject to Parham and state statutory provisions); see also U.S. CONST. amend. XIV. Applying a classically nebulous parens patriae best interests standard in a dependency hearing, the court merely considered the minor’s procedural rights, as well as “whether a child believes that he or she is being listened to and that his or her opinion is respected and counts.” M.W., 756 So. 2d at 108.
207. Id. at 372, 375 (holding that proceedings under the Illinois Sexually Dangerous Persons Act were civil, not criminal proceedings within the scope of the Fifth Amendment right against compulsory self-incrimination); In re Heckl, 886 N.Y.S.2d 295, 297–98 (App. Div. 2009) (upholding the trial court’s right to compel the testimony of an incompetent adult in a civil guardianship proceeding without violating her due process privilege against self-incrimination).
208. Allen, 478 U.S. at 373. But see Allison v. Snyder, 332 F.3d 1076, 1079 (7th Cir. 2003) ("If pretrial detainees may be subjected to the ordinary conditions of confinement, . . . then so may persons detained before trial as sexually dangerous persons.").
leading to additional charges or involuntary commitment. As recently asserted by the California Court of Appeals in People v. Rebulloza:

Under this broad [Fifth Amendment] waiver, a probationer who poses little or even no risk to the community could be compelled to confess to a crime committed long ago having no relevance to his or her current status as a sex offender. Any such confession could be given to police or prosecutors, who could then use it against the probationer to initiate an independent prosecution. The past offense could itself be a crime having little or no impact on public safety, and given the passage of time, prosecution of it may no longer serve the public safety purposes it may have served in the past.

Defense attorneys bound to protect their clients’ legal interests cannot readily advocate waiving confidentiality in therapy when the treatment mandates disclosure of other crimes or risks a therapist’s mandatory duty to disclose a danger to others. The risk of waiver is even more unjustified considering the substantial lack of research supporting the efficacy of numerous therapeutic interventions commonly ordered in the juvenile justice system. As stated by Justice Stevens in his dissenting opinion in McKune: “The State’s interests in law enforcement and rehabilitation are present in every criminal case. If those interests were sufficient to justify impinging on prisoners’ Fifth Amendment right, inmates would soon have no privilege left to invoke.”

No one benefits from the denial of mental health services to juvenile offenders who need them, but the therapeutic purpose is significantly undermined if the offender’s disclosure of new offenses results in additional charges or sanctions. Efforts to maintain the confidentiality of an offender’s disclosures in therapy, such as creating exceptions to mandatory child abuse reporting, would undermine the important interests in protecting

case, the state is doing nothing more than exercising its traditional role as paren’s patriae.213

Because they have been deemed a hybrid of criminal and civil approaches, juvenile proceedings may offer a more complex interpretation of the privilege against self-incrimination and custodial interrogation. As stated in McKeiver v. Pennsylvania,215 “[t]he [Supreme Court of the United States] has refused to simplistically categorize juvenile proceedings as either criminal or civil, avoiding thereby a wooden approach.”216 If Allen’s application of the Fifth Amendment in the context of civil commitment requires a sufficient nexus to a criminal proceeding, then it follows that juvenile courts with greater discretion to invoke hybrid criminal and civil remedies may seek to chip away at the due process rights of juvenile offenders in a therapeutic justice system.217 Nevertheless, the dissent in Allen strongly disagreed that civil involuntary commitment is treatment-based and non-punitive, noting specifically that the Illinois statute at issue provided for involuntary commitment of sexual predators only upon the filing of criminal charges.218 Following this view, when mental health treatment is mandated by the criminal justice system, provided in confinement, or inherently attached to a criminal proceeding, then the privilege against self-incrimination should survive.219

IV. CONCLUSION

The sad truth is that for many young offenders in need of mental health and substance abuse services, the opportunity for rehabilitation is out of reach. In cases involving violent crime and a risk of recidivism, court-ordered mental health treatment may in fact invite coerced confessions

216. State v. Boatman, 329 So. 2d 309, 312 (Fla. 1976) (citing McKeiver, 403 U.S. at 541); see also P.W.G., 682 So. 2d at 1207.
219. A goal of treatment is not sufficient, in and of itself, to render inapplicable the Fifth Amendment, or to prevent a characterization of proceedings as criminal. With respect to a conventional criminal statute, if a [state] declared that its goal was treatment and rehabilitation, it is obvious that the Fifth Amendment would still apply.
220. Id. at 380; see also U.S. CONST. amend. V.
221. See U.S. CONST. amend. V; Allen, 478 U.S. at 377, 380 (Stevens, J., dissenting).
222. Id. at 380.
223. See MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2015);
Kapoor & Zonana, supra note 28, at 50–53; supra text accompanying notes 26–31.
224. See CTR. FOR SEX OFFENDER MGMT., supra note 22, at 10–11; supra Section II.B.
225. McKune v. Lile, 536 U.S. 24, 69 (2002) (Stevens, J., dissenting); see also U.S. CONST. amend. V.
226. See Rebulloza, 184 Cal. Rptr. 3d at 554; Kapoor & Zonana, supra note 28, at 52.
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\section{IV. CONCLUSION}

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other minors and the public at large from victimization.\textsuperscript{227} Realistically, for youth most in need of rehabilitation, those with serious behavioral concerns and recidivist tendencies, therapeutic justice may never be therapeutic or beneficial.\textsuperscript{228} For those who pose less of a danger to society, it may not be legally possible to adequately protect the juvenile offender’s interest in rehabilitation through court-ordered mental health treatment as long as therapy requires full and honest disclosure of other crimes.\textsuperscript{229} Finally, for those most vulnerable offenders—young persons with histories of trauma, poverty, displacement, addiction, mental illness, and longstanding structural racism in the school-to-prison pipeline—due process violations in the guise of therapy constitute yet another societal betrayal.\textsuperscript{230}

Even with better practices in providing \textit{Miranda} warnings to youth in court-ordered custodial mental health services,\textsuperscript{231} juvenile defendants may be bound to advise young clients to wait until their sentences are complete before proceeding with needed therapeutic interventions.\textsuperscript{232} Therefore, while therapeutic justice may appear to reinvigorate the traditional focus on rehabilitation in the juvenile justice system, making use of advances in mental health and research on the juvenile brain, the truth is that the justice system was never meant to be a primary provider of mental health services for any age.\textsuperscript{233} To avoid further entrenchment of criminal justice into mental health, with its risk of compromising the Fifth Amendment rights of vulnerable defendants, the obvious course is to redirect funding to expand access to well supported evidence-based mental health services to youth in need of them before they enter the juvenile justice system and before they have a significant criminal history to disclose.


\textsuperscript{228} See Kapoor & Zonana, supra note 28, at 52; Soler et al., supra note 13, at 513–14.

\textsuperscript{229} See McKune, 536 U.S. at 59–60 (Stevens, J., dissenting) (distinguishing capital cases which presented an option of voluntary disclosure of incriminating statements, as opposed to those in which defendant was “directly ordered by prison authorities to participate in a program that requires incriminating disclosures”); supra Section III.B.

\textsuperscript{230} Compare Soler et al., supra note 13, at 513–14, with Mandy Locke, Army Combat Veteran’s Call for Help Lands Him in Jail, NEWS & OBSERVER (May 30, 2015, 5:30 PM), http://www.newsobserver.com/news/local/crime/article22658754.html (reporting on an Army veteran with PTSD who called a Veterans Affairs hotline and was criminally charged with communicating threats to the hotline worker who angered him). The veteran, who was jailed for over four months while awaiting trial, stated “[I]t is wrong to offer confidential help with one hand and throttle those who accept the offer with the other hand.” Locke, supra note 230.


\textsuperscript{232} See Miranda, 384 U.S. at 445, 478–79; \textit{Model Rules of Prof’l Conduct} c. 2.1 (AM. BAR ASS’N 2015); supra note 201 and accompanying text.

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\textsuperscript{234} Calls for a greater emphasis on mental health treatment services in juvenile justice, however, may not be the best answer. Increasing such services in juvenile justice could simply mean that youth would need to be arrested in order to get mental health services. Moreover, many of the most effective treatment methods work best when applied in the community, while youth are with their families rather than removed from them.

Id. at 143.