Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs

Scott Michael Solkoff*
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Abstract

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KEYWORDS: programs, compromise, violated
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TABLE OF CONTENTS

I. INTRODUCTION: MONTANA V. IMLAY .......................... 1441
II. THE HISTORY AND PURPOSE OF THE RIGHT AGAINST SELF-INCrimINATION ...................... 1444
III. THE UTILITY OF COURT-MANDATED THERAPY PROGRAMS ..................... 1448
IV. THE FIFTH AMENDMENT AND COURT-MANDATED THERAPY PROGRAMS ............ 1453
   A. Guidance from the Supreme Court .................. 1456
      1. Estelle v. United States and the Requirement for Miranda Warnings 1457
      2. Minnesota v. Murphy ...................... 1461
   B. The "Penalty" Cases ....................... 1463
   C. Application in the Lower Courts ................. 1471
      1. Fifth Amendment Not Violated ............... 1472
      2. Fifth Amendment Violated ............... 1478
      3. A Dubious Compromise .................. 1482
V. THE BEST OF BOTH WORLDS: JUDICIAL USE IMMUNITY ..................... 1485
   A. Why Opposition to Judicial Use Immunity is Unwarranted in Court-Mandated Therapy 1487
   B. Judicial Use Immunity is a Reasonable Accommodation .................. 1491
VI. CONCLUSION .................................... 1493

I. INTRODUCTION: MONTANA V. IMLAY

HIGHLIGHT: This note examines cases in which a criminal defendant is ordered to admit his or her guilt during therapy as a condition to probation. It suggests investing the probationers with immunity so that they may be compelled to accept responsibility for their crimes without courts running afoul of the Fifth Amendment privilege against self-incrimination.

In 1989, Donald Glenn Imlay was accused of sexually molesting a
nine-year-old girl in his Great Falls, Montana grocery store. In his fifty-six years, Imlay had never been accused of a crime and stood adamantly on his proclamation of innocence. Despite his protestations, Imlay was convicted by a jury of sexual assault on a minor. The judge sentenced him to a five-year suspended sentence conditioned upon gainful employment and successfully completing a sexual therapy program. After sentencing, Imlay moved in with his mother because he no longer had a business to go back to nor any income. Due to his degenerative joint disease and high blood pressure, he was denied employment but did begin vocational training in leather work which provided a small income to support his mother and himself. In addition, he also sought out the treatment mandated by the court’s sentencing order, but was greeted with difficulties of a constitutional dimension.

After attending six sessions of treatment, he was terminated from the program because of his refusal to incriminate himself. Imlay was distraught. He immediately contacted another program but was denied admission for the same reason. No program in the State of Montana would accept him if he continued to deny his guilt. In September of 1990, almost one year after his original sentence and despite his apparent good-faith efforts, the county court revoked the suspended sentence for Imlay’s failure to successfully complete a sexual therapy program. Mr. Imlay was remanded to the custody of the Montana State Prison to serve out a sentence of five years.

Mr. Imlay’s guilt is irrelevant at this point. What is relevant is whether Mr. Imlay was punishment for refusing to incriminate himself in derogation of the Fifth Amendment to the United States Constitution. Imlay was stranded between Scylla and Charybdis. He was forced to either waive his privilege against self-incrimination, thereby remaining free and amenable to treatment, or he could stand his constitutional ground but be sent to jail. The Montana Supreme Court found the dilemma to be unconstitutional. The court held that the Fifth Amendment "prohibits augmenting a defendant’s sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination." The United States Supreme Court, having never confronted the issue, granted review, but then dismissed the

grant of certiorari as improvidently granted. In dissent, Justice White stated:

We granted certiorari to consider whether the Fifth Amendment bars a State from conditioning probation upon the probationer’s successful completion of a therapy program in which he would be required to admit responsibility for his criminal acts. ... The constitutional question is an important one and the decision below places the Montana Supreme Court in conflict with other courts. I believe we should decide the question and resolve the conflict.

Although the opinion of the United States Supreme Court would have been concededly more authoritative, this note shall address the issue framed by Justice White. In so doing, it will be necessary to trace the history and purpose of the Fifth Amendment privilege against self-incrimination in order to determine its applicability to court-ordered therapy programs. Next, the note presents a brief examination for the rationale and utility of court-ordered treatment. Indeed, it is this consideration that courts often weigh against the Fifth Amendment. Third, the note discusses the often

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8. Id. at 445 (citations omitted).
9. This note is limited to the Fifth Amendment concerns inherent in court-ordered therapy programs which require an admission of guilt. It leaves to others the question of a psychotherapist-patient privilege which may also protect against using such statements in court. See, e.g., Alaska v. R.H., 686 F.2d 269 (Alaska Ct. App. 1984) (psychotherapist privilege prevents testimony from treating psychologist in child abuse case); Edwards v. Juan A., 261 Cal. Rptr. 68 (Cal. 1989) (psychotherapist privilege excepted in court-ordered psychological examinations but not in therapy); Thomas R. Malia, Annotation, Validity, Construction, and Application of Statutes Limiting Physician-Patient Privilege in Judicial Proceedings Relating to Child Abuse or Neglect, 44 A.L.R.4th 649 (1986). A number of states have enacted a "psychotherapist privilege" but have specifically abrogated that privilege when child abuse is suspected. E.g., F.L.A. STAT. § 90.50X(2) (Supp. 1992) (creating a psychotherapist privilege); F.LA. STAT. § 415.512 (1991) (denying the privilege in child abuse investigations); E.H. v. Department of Health & Rehabilitative Serv., 443 So. 2d 1083 (Fla. 3d Dist. Ct. App. 1984); Missouri v. Ward, 745 S.W.2d 666 (Mo. 1985).
10. In construing the effect of the Fifth Amendment to a particular set of facts, it is imperative to examine the history of that Amendment. Asherman v. Meachum, 957 F.2d 978, 989 (2d Cir. 1991). Here, it is particularly true that "a page of history is worth a volume of logic." New York Trust Co. v. Einner, 256 U.S. 345, 349 (1921) (Holmes, J.).
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divergent opinions of the state and federal courts which have touched upon the issue. Although the law surrounding the privilege against self-incrimination cannot be summed up in a discrete set of elements, there are, nonetheless, constant principles which can be distilled from the case law. This note then takes the position that a reasonable remedy exists which prevents court-mandated therapy programs from running afoul of the Fifth Amendment—the grant of immunity. Courts can grant use immunity to defendants who are ordered to undergo treatment. In this manner, the rehabilitative interests of the State are served while not impinging on the defendant's constitutional rights. The note concludes with the sober realization that if courts do not avail themselves to the reasonable accommodation of immunity, they must find a violation of the Fifth Amendment when one is ordered to confess during treatment.

II. THE HISTORY AND PURPOSE OF THE RIGHT AGAINST SELF-INCrimINATION

No matter how noble and revered the constitutional aspiration, some find it especially difficult to afford such protections to the child abuser or the sex offender. These crimes are viewed as particularly heinous and worthy of swift and severe punishment. Even those who should be better advised are led by moral impulse to deny such defendants their full panoply of constitutional rights. To be sure, it is all too easy to view the privilege against self-incrimination as a "shelter to the guilty" rather than a protection for the innocent. Yet such a view shows little deference for the history and rationale of the privilege.

While there are earlier references, the privilege against self-incrimination is most often traced to the English Court of Star Chamber. In that
court, individuals, who stood accused of crimes were given the choice of taking their legal oath or of being whipped and pilloried. In 1637, "Freeborn John" Lilburne was haled before the Star Chamber on a charge of sedition. When charged by the Council, he refused to take the oath officio and was condemned to torture. But Lilburne was a stubborn man and petitioned the newly convened Long Parliament for relief. In 1641, the House of Commons freed Lilburne and abolished the Council and Court of Star Chamber.

Thirty-six years after the House of Common's decree, the Virginia House of Burgesses declared that "noe law can compel a man to swear against himselfe in any matter wherein hee is lyable to corporall punishiment." Yet as the Salem witch trials of 1692 so sadly proclaimed, the privilege was far from ingrained in the colonial fabric. Mindful of the Star Chamber and of the incidents at Salem, by 1776, eight colonies had adopted the right to remain silent within their own constitutions. And when the Bill of Rights was ratified in 1791, it included James Madison's draft that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." In 1964, the privilege was incorporated to the states by way of the Fourteenth Amendment.

The constitutionalization of the privilege has been hailed as "one of the great landmarks in man's struggle to make himself civilized" and has been expanded well beyond its meager words. Indeed, the scope of the

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13. Id.
14. See discussion supra part IV.C.
16. By the early sixteenth century, the courts and Church of England had devised a Latin phrase, "Nemo tenetur prodere se ipsum," or, in English, No one should be required to accuse himself. The maxim, however, seemed little more than an idea. ERWIN N. GRIEWOLD, THE FIFTH AMENDMENT TODAY 7 (1955). Christ himself, in response to his accusers said, "Why ask me? Go to them that heard me." John 18:21-22.
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https://nsuworks.nova.edu/nlr/vol17/iss4/17
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privilege is "as broad as the mischief against which it seeks to guard."

And this "mischief" is not confined to the Star Chamber or to the witch's stake. The privilege addresses "many of our fundamental values and noble aspirations." The enactment of the right reflects "our unwillingness to subject those suspected of crime to the cruel trilemma of self-acquittal, perjury or contempt . . . .\" As illustration, had Donald Imlay, in order to remain free, waived his Fifth Amendment right and confessed his guilt during treatment, he would be subjecting himself to perjury and/or contempt charges for maintaining his innocence at trial.

The existence of the privilege is also required to maintain "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and requiring the government in its contest with the individual to shoulder the entire load.\" This rationale seems based on the large arsenal of information that the government has at its disposal and the fundamental unfairness that would result from the accused being added to that arsenal. It is true that, especially in sexual crimes or crimes of abuse, the defendant's testimony may be one of the only means of soliciting information. Yet this is no justification to disregard the Fifth Amendment. The argument failed when propounded by the Council of the Star Chamber and it should fall today. On the one hand is the government's need for information. On the other is the danger inherent in compelling adverse testimony from the lips of the accused. It is truly a balancing test, in which history has dictated the result.

That government may compel one to incriminate oneself not only offends the balance between the individual and the State, it also offends "our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life.\" For example, the privilege protects an alleged communist sympathizer from being forced to testify about his beliefs and activities where those statements may later be used against him in a criminal prosecution. In this way the Fifth Amendment operates to restrain government from the abuse of its own power - from having unfettered access to the minds of its subjects. To this end, the United States Supreme Court has found there to be an "intimate relationship" between the Fourth and Fifth Amendments in that they encompass "all invasions on the part of the government [directed towards] the sanctity of a man's home and the privacies of life.\" Justice Goldberg also provided as rationale for the privilege, "our distrust of self-deprecatory statements.\" This is best illustrated by way of example. In United States v. Wong, the criminal defendant was given a Fifth Amendment warning but claimed, due to a language barrier, that she understood the instruction to mean that she had to answer all questions. Under this assumption, she proceeded to give perjurious testimony. Wong clearly illustrates the fact that when forced to play a role in their own conviction, defendants are likely to be less than honest. Without the privilege, those who provide self-incriminating testimony will be hastening their own conviction. The incentive to lie is great since a perjury conviction will be likely less severe than conviction for the crime charged, assuming at all that one is found out. The distrust of self-deprecatory statements stems, then, "from an awareness that individuals are unlikely to incur freely the sanction of a criminal conviction.\" In the context of incriminating statements made during the course of

32. Id.
34. Waterfront Comm'n, 378 U.S. at 55 (quoting Wigmore, EVIDENCE 317 (McNaughton rev., 1961)).
35. Cf. Colombe v. Connecticut, 367 U.S. 568, 581-82 (1961) (privilege is based on "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips").
37. See Grieswold, supra note 16, at 3.
40. Boyd v. United States, 116 U.S. 616, 630 (1886). Despite longstanding precedent to the contrary, the present bench of the Court seems to be moving away from the privacy rationale for the Fifth Amendment as it seeks to limit the right to privacy in general. See Berger, supra note 18, at 41-44. As the preceding discussion has shown, privacy is but one reason for respecting the privilege. Therefore, even if the Court divorces privacy from the privilege, the privilege must stand in its entirety.
41. Waterfront Comm'n, 378 U.S. at 55.
43. Id. at 176.
44. Id.
45. See Byers, 740 F.2d at 1154 (Robinson, J., dissenting).
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The privilege is "as broad as the mischief against which it seeks to guard."28 And this "mischief" is not confined to the Star Chamber or to the witch's stake. The privilege addresses "many of our fundamental values and noble aspirations."29 The enactment of the right reflects "our unwillingness to subject those suspected of crime to the cruel trilemma of self-acquittal, perjury or contempt ... ."30 As illustration, had Donald Inlay, in order to remain free, waived his Fifth Amendment right and confessed his guilt during treatment, he would be subjecting himself to perjury and/or contempt charges for maintaining his innocence at trial.31

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37. See Greenwald, supra note 16, at 3.
therapy, there is also a sense that the "confessor" is merely cleansing her or his mind, and that the statements may or may not have a basis in reality.48 Discussions with one’s therapist are of a highly private nature and personal thoughts may easily be taken out of a context known only to the "confessor." The Fifth Amendment provides blanket protection against the unreliability of self-deprecatory statements.

To encapsulate, the privilege against self-incrimination protects us from a recurrence of Star Chamber inquisition; from subjecting ourselves to a Hobson’s choice of perjury, contempt, or self-incrimination; from the excess of State power; from invasions upon our solitude and right to be let alone;50 and from an inherent distrust for inadverent self-deprecatory statements.51 Yet, again, in the words of Justice Blitchford, the privilege is "as broad as the mischief against which it seeks to guard."52

The question remains then, as to whether the privilege extends to bar a state from conditioning probation upon the probationers’ successful completion of a therapy program in which defendants would be required to admit responsibility for their criminal acts. Whether this is a "mischief" contemplated by the Fifth Amendment turns upon a number of factors. To understand the nuances of the issues involved, one must understand the methodology of modern treatment programs.

III. THE UTLILITY OF COURT-MANDATED THERAPY PROGRAMS

One of the reasons that sex offenders are more frequently the subject of court-mandated therapy programs53 is the prevalence of the disorder.54

48. Cf. id. at 1154.
49. Cf. id.
50. See Tehan v. United States ex rel. Shott, 382 U.S. 406, 416 (1966) (the privilege "reflects the concern of our society for the right of each individual to be let alone").
51. See Waterfront Comm’n, 378 U.S. at 55; United States v. Grunewald, 233 F.2d 556, 591 (2d Cir. 1956) ("to put an individual ... in a position where his natural instincts and personal interests dictate that he should lie ... and then punish him for lying is ... intolerable").
52. Counselman, 142 U.S. at 562.
53. It is beyond the scope of this note to compare the relative benefits of the rehabilitative theory of punishment with those of the utilitarian and retributivist schools. Suffice it to say that the rehabilitative model implicated by the treatment programs is not without its supporters nor its critics. Compare HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 53 (1968) (rehabilitation serves the goal of retooling the offender to comport with the dictates of law and "what we do to the offender in the name of reform

Research indicates "that as many as 10% to 15% of boys and 20% to 25% of girls experience at least one instance of sexual misuse prior to the age of 18...."55 Moreover, most prosecuted sex offenders have multiple victims.56

While not limited to sexual abuse,57 the long-term consequences of child abuse can be devastating.58 Some studies indicate that the percentage of psychiatric inpatients who were abused as children may be as high as eighty percent.59 Due to their sexual misuse, adult survivors are much more likely to develop depression, various anxiety disorders, substance abuse disorders, and sexual dysfunction.60 Given the impact of the malady, it is clear that society must be protected from those who sexually abuse children.

To this end, sexual abuse of children is a serious crime in all jurisdictions,61 and legislatures and courts often find that treatment is the best sentencing alternative.62 The constitutional issues underlying treatment become the more significant as psychological counseling becomes the

is being done for our sake, not for his") with CHARLES W. THOMAS & DONNA M. BISHOP, CRIMINAL LAW 85 (1987) (rehabilitation "is roughly as useful as is our inclination to place a free turkey on the table of an impoverished family on Thanksgiving or Christmas and to walk away from our well-motivated degradation of that family with the pious conviction that we just struck a major blow in the fight against poverty"). None of the courts which have concerned themselves with the privilege as it relates to treatment programs have ever questioned the utility of those programs. See discussion supra part IV.C.

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56. BENJAMIN SCHLESINGER, SEXUAL ABUSE OF CHILDREN 12-29 (1982).
62. SMITH, supra note 57, at 1.
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most often ordered offense-specific condition for child sexual abuse probationers. Unfortunately, the treatment alternative seems to be working.

One study found a four-year recidivism rate of twenty-five percent for treated offenders compared with sixty percent for non-treated offenders. Others have found recidivism rates below ten percent for properly treated individuals. What makes these programs so effective is the time-tested behavioral modification techniques developed by program therapists and researchers. And therein lies the rub.

One element which all successful programs share is the requirement that the patient admit that the abuse occurred. Cognitive behavioral principles require the patient to admit responsibility for his or her actions as a condition precedent to practical corrective therapy. In fact, failure to confess responsibility greatly reduces the chances for positive results. Research indicates that offenders who wholly deny allegations of sexual abuse are three times more likely to fail in treatment than those who admit even partial complicity. The United States Department of Justice has therefore indicated that the offender must openly acknowledge guilt as a "basic requirement for meaningful participation." In another study, the Criminal Justice Section of the American Bar Association found that "[w]ith few exceptions, the therapists interviewed said they would not accept anyone in their program who absolutely denied sexual conduct with children. Most firmly believed that individuals who denied the abuse were not amenable to treatment." Unfortunately, denial is a common phenomenon in sexual offender treatment. Although modern treatment programs utilize methods to overcome that denial, those who deny involvement altogether are summarily deemed unamenable for treatment. Some professionals argue that they are bound by their code of ethics to terminate treatment if the offender is unable or unwilling to confess his guilt. To be sure, if outpatient therapy is not being effective, then society is at much greater risk of the patient reoffending.

It appears then, that the nature of the treatment and the nature of the malady conflict. Effective treatment requires an admission of guilt, but sex offenders are especially prone to denial. Understandably, therapeutic professionals must take this opposition into consideration when designing a program of treatment.

The sexual offender treatment program of Ft. Lauderdale's Family Service Agency provides an excellent example of how professionals deal with denial in structuring a therapy program. In January of 1993, the program was treating twenty-five sex offenders which had been ordered into the program by the Broward County courts. Some of the offenders denied the abuse when they first entered the program. Others were immediately amenable to treatment. No matter their disposition at the outset, each offender has a ten-week probationary period in which they are encouraged to admit full responsibility for their crime. During this first ten weeks, treatment centers on overcoming denial by explaining to the probationers the way in which the mind might mask acceptance of responsibility. During the next stage, treatment centers on modifying behavior so as to prevent a recurrence of criminal conduct. If, however, the offender does not accept responsibility during the first ten-weeks, he or she is deemed unamenable to treatment. The counselor is then required to report such non-compliance.

63. Id. at 3.
66. See Smith et al., supra note 57.
67. See MALETZKY & MCGOVERN, supra note 54, at 253-55.
68. Id.
69. Id.
70. Id.
72. Smith et al., supra note 57, at 8.
73. MALETZKY & MCGOVERN, supra note 54, at 27; see Illinois v. Frusk, 558 N.E.2d 694, 697 (Ill. App. Ct. 1990) (testimony of program administrator that denial is "almost universal" amongst persons accused of sexual offenses).
74. MALETZKY & MCGOVERN, supra note 54, at 27.
75. Id.
76. See, e.g., AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS 6(c) (1990) ("Psychologists terminate a clinical or consulting relationship when it is reasonably clear that the consumer is not benefiting from it. They offer to help the consumer locate alternative sources of assistance").
77. See supra text accompanying notes 64-65.
78. MALETZKY & MCGOVERN, supra note 54.
79. Telephone interview with Dr. John Morin, Psychological Resident of the Family Service Agency located in Ft. Lauderdale, Florida (Jan. 6, 1993). During the discussion and as an "aside," Dr. Morin expressed his concern about the actual guilt of some of his patients. During treatment, a number of the probationers had expressed a feeling of coercion to plea bargain. They felt that their public defender was unable or unwilling to afford them a full defense. Indeed, Dr. Morin indicated that only one of his twenty-five patients had gone to trial. That innocence might be one reason for a failure to confess guilt cannot be lightly dismissed. Id.
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to the offender’s probation officer.

The case of Vermont v. Gleason provides an example of how such programs affect the individual offender. Myron Gleason pleaded no contest to a misdemeanor lewdness charge and was placed on probation with the requirement that he successfully complete a sex offender program. Gleason had difficulties accepting responsibility for his behavior and was dismissed from the treatment program. At his probation revocation hearing, the treating psychologist testified that Gleason had "not addressed the issue in any way with me in a meaningful way and this pattern of massive denial concerns me for his safety and for the community." The court accepted Gleason’s representations that, if given a second chance, he would cooperate fully with the treatment program. Five months later, however, Gleason’s probation officer again petitioned the court for a revocation of probation. At the violation hearing, the psychologist explained that Gleason was a pleasant subject who had faithfully kept his appointments. However, "when the agenda focused on any sexual matters or issues, there was a definite change in attitude and cooperation in terms of discussing that particular issue." Gleason had made improvements, however. He opened up about his childhood history, his sexual awareness, and his adolescent sexual experiences. Still, he refused to enter into any “meaningful dialogue” regarding his sexual offenses. The psychologist testified that because of this “wall of denial,” he discontinued Gleason’s therapy sessions in the belief that “additional counseling would not prove helpful.”

While Gleason typifies the difficulties denial brings to the treatment process, it also exemplifies the point of departure where treatment ends and the law begins. When Gleason’s psychologist recognized the futility of future treatment, he was compelled to report such findings to Gleason’s probation officer. In turn, Gleason was no longer at the mercy of therapy. His concerns could now only be addressed by the law.

81. Id. at 1248.
82. Id.
83. Id.
84. Id.
85. Gleason, 576 A.2d at 1248.
86. Id. at 1248.
87. Id.
88. Id.
89. Id.
90. Gleason, 576 A.2d at 1249.
91. See discussion supra pp. 1442-43.
92. The only variance which may be deemed material is that Innpay pleaded innocent and was convicted after trial while Gleason pleaded no contest. The Gleason court rendered the difference moot by holding that “when the court accepts a plea of no contest, it has the same effect in that case as a plea of guilty and ‘authorizes the court for the purposes of the case to treat defendant as though he were guilty.’” 576 A.2d at 1249 (citation omitted).
93. Many jurisdictions invest their courts with the authority to order parents into psychological counseling by statute. See, e.g., FLA. STAT. § 39.442(3)(a) (1991).
94. Gleason, 576 A.2d at 1250-51.
95. Id. at 1251.
96. See U.S. CONST. amend. V.
97. Gleason, 576 A.2d at 1250.
98. Id. at 1250-52.
99. Id. at 1251 (dicta).
100. Id.
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The case of Vermont v. Gleason,80 provides an example of how such programs affect the individual offender. Myron Gleason pleaded nolo contendere to a misdemeanor lewdness charge and was placed on probation with the requirement that he successfully complete a sex offender program.81 Gleason had difficulties accepting responsibility for his behavior and was dismissed from the treatment program.82 At his probation revocation hearing, the treating psychologist testified that Gleason had “not addressed the issue in any way with me in a meaningful way and this pattern of massive denial concerns me for his safety and for the community.”83 The court accepted Gleason’s representations that, if given a second chance, he would cooperate fully with the treatment program.84 Five months later, however, Gleason’s probation officer again petitioned the court for a revocation of probation.85 At the violation hearing, the psychologist explained that Gleason was a pleasant subject who had faithfully kept his appointments.86 However, “when the agenda focused on any sexual matters or issues, there was a definite change in attitude and cooperation in terms of discussing that particular issue.”87 Gleason had made improvements, however. He opened up about his childhood history, his sexual awareness, and his adolescent sexual experiences.88 Still, he refused to enter into any “meaningful dialogue” regarding his sexual offenses.89 The psychologist testified that because of this “wall of denial,” he discontinued Gleason’s therapy sessions in the belief that “additional counseling would not prove helpful.”90

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IV. The Fifth Amendment and Court-Mandated Therapy Programs

The Gleason and Imlay91 cases are factually similar,92 but the courts which decided them reached very different results with regard to the constitutional rights of the defendants. Both Gleason and Imlay were convicted of sex crimes. Both were ordered to undergo sexual treatment as a condition to their probation.93 Both men were also required to admit responsibility for their respective crimes during the course of that treatment. On appeal, both Gleason and Imlay contend that they were therefore being coerced to waive their Fifth Amendment privilege against self-incrimination.

The Vermont Supreme Court held that the Fifth Amendment did not prohibit the trial court from conditioning Gleason’s probation upon his admission of guilt during court-ordered therapy.94 The court noted that the condition of probation required Gleason only to admit to crimes for which he had already been convicted.95 Since Gleason cannot be twice placed in jeopardy for the same offense,96 the court reasoned, any statements he makes pursuant to the court order cannot be used against him.97 Moreover, since the Fifth Amendment only bars the compelling of incriminating statements, Gleason’s rights are not abridged.98 If, on the other hand, the condition of probation had required the admission of acts unrelated to Gleason’s convictions, then Gleason’s Fifth Amendment rights would have been violated.99 Here, however, effective treatment mandated disclosure only of previously convicted crimes.100 Furthermore, the court found that the trial judge had merely acted to advance the rehabilitative interests of the

91. See discussion supra pp. 1442-43.
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State. The trial court "did not take that extra, impermissible step of compelling defendant to choose between making inculminating statements and jeopardizing his conditional liberty by remaining silent. . . . [I]f merely found that] the public would be best protected if defendant could learn to control his sexual behavior." In sum, the Vermont court found the condition to comport with the Fifth Amendment.

And then there is Inlay, in which the Montana Supreme Court found nearly identical facts to violate the privilege. The court considered how Inlay had done nearly everything in his power to comply with the conditions of his probation. When denied gainful employment elsewhere, Inlay had applied and been accepted for state-funded training. When denied treatment from one therapy program, he looked elsewhere. Like Gleason, the only thing, Inlay had failed to do was to admit that he committed the crime of which he had been convicted. The court found if clear

that in this case the defendant is being subjected to a penalty that he would not otherwise be subjected to if he would simply admit his guilt. That penalty is that he serve time in the Montana State Prison. Even though the defendant has already been convicted of the crime that he denies, our system still provides . . . for opportunities to challenge that conviction . . . . These are important rights guaranteed to every defendant under our criminal justice system, but would be rendered meaningless if the defendant could be compelled to admit guilt as a condition to his continued freedom . . . . In addition, by admitting guilt in this case, the defendant would have to abandon his right guaranteed by the Fifth Amendment, not only to the crime for which he has been convicted, but also to the crime of perjury. . . . Under these circumstances . . . . we believe that the better reasoned decisions are those decisions which protect the defendant's constitutional right against self-incrimination, and which prohibit augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against

101. Id. at 1248-52.
103. Id.
104. 813 P.2d at 979.
105. Id. at 983.
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110. Compare Gleason, 576 A.2d at 1250-52 with Inlay, 813 P. 2d at 985.
111. Inlay, 813 P.2d at 985.
112. Id. at 980-81.
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119. Id.
120. See id.
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And then there is Imlay, in which the Montana Supreme Court found nearly identical facts to violate the privilege. The court considered how Imlay had done nearly everything in his power to comply with the conditions of his probation. When denied gainful employment elsewhere, Imlay had applied and been accepted for state-funded training. When denied treatment from one therapy program, he looked elsewhere. Like Gleason, the only thing, Imlay had failed to do was to admit that he committed the crime of which he had been convicted. The court found it clear that in this case the defendant is being subjected to a penalty that he would not otherwise be subjected to if he would simply admit his guilt. That penalty is that he serve time in the Montana State Prison. Even though the defendant has already been convicted of the crime that he denies, our system still provides ... for opportunities to challenge that conviction. These are important rights guaranteed to every defendant under our criminal justice system, but would be rendered meaningless if the defendant could be compelled to admit guilt as a condition to his continued freedom. In addition, by admitting guilt in this case, the defendant would have to abandon his right guaranteed by the Fifth Amendment, not only to the crime for which he has been convicted, but also to the crime of perjury. Under these circumstances ... we believe that the better reasoned decisions are those decisions which protect the defendant's constitutional right against self-incrimination, and which prohibit augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination.

In so holding, the Montana Supreme Court raised several issues of import. As in Gleason, the Imlay court found the privilege to apply only to incriminating statements. Unlike Gleason, however, the court appears to have found the privilege abridged on at least three levels; the threat of imprisonment being the first level of Fifth Amendment violation, the threat of future convictions being the second; and the hinderance of the appellate process, being the third.

Mr. Imlay was forced to choose between waiving his privilege against self-incrimination, thereby retaining his freedom, or of asserting his constitutional right and being sent to prison for five years. In short, Imlay received a harsher punishment due to his failure to confess guilt. That choice, as far as the Montana Supreme Court is concerned, is one the Fifth Amendment will not condone.

Furthermore, by requiring Imlay to speak, the probation condition threatened him with future convictions as well. Imlay testified in his own defense during trial. If, during therapy, he were to admit guilt of his crime, he might well be subject to a charge of perjury. In this regard, Imlay's court-ordered confession would not only impair his freedom on the present charge, but it would subject him to criminal liability for another.

What is more, found the court, is that the probation condition would deny Imlay his fair chance of challenging his conviction. For example, the girl whom Imlay was convicted of assaulting may later recant her testimony. If Imlay is compelled to admit guilt to retain his freedom, such an admission would make the prospects of a new trial extremely unlikely. Again, in the view of the Imlay court, this penalty should not be

101. Id. at 1248-52.
103. Id.
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119. Id.
120. See id.
exact from a choice contrary to the Fifth Amendment. The Inlay and Gleason decisions differ then, in this one respect - the Inlay court goes farther. It recognizes the purpose of the privilege and cites three ways in which it is violated. One should not assume that this represents a mere oversight on behalf of the Vermont Supreme Court. On the contrary, the different opinions represent different conceptions about the breadth and potency of the Fifth Amendment and epitomize the conflict which has been brewing in the lower courts for years.

It is important to consider both views in reaching the right decision. And there is a "right decision." Indeed, though it may often appear otherwise, the law can only tolerate one of two conflicting principles at a time. The United States Supreme Court has never been directly faced with the issue of whether court-ordered therapy programs that require an admission of guilt violative the privilege against self-incrimination. Nevertheless, the Court has not shied away from the Fifth Amendment. This note will examine the pertinent Fifth Amendment holdings of the Supreme Court and will then move to the application of those holdings in the lower courts.

A. Guidance from the Supreme Court

Although the United States Supreme Court has never decided whether the Fifth Amendment prevents a state from conditioning parole upon successful completion of court-mandated therapy programs that require an admission of guilt, the Court's holdings on related Fifth Amendment issues are instructive. First of all, the Court has made clear that the privilege survives conviction and may therefore apply to prisoners and probationers. Second, the Court has found the privilege to apply only to those

121. Id.
122. Id.
123. The United States Supreme Court declined to resolve this manifest conflict when it dismissed its original grant of certiorari in the Inlay case. See 113 S. Ct. 444, 445 (1992) (White, J., dissenting). Elizabeth Griffling, counsel of record for the State of Montana, speculates (not without foundation) that Justice Stevens and Blackmun were responsible for the pretext of not hearing the case on procedural grounds. She believes that they feared a reversal of the Montana Supreme Court decision and interposed the remedy of dismissing the writ as improvidently granted. Telephone Interview with Elizabeth L. Griffling, Montana Assistant Attorney General (Dec. 30, 1992).
124. See supra part IV.A.
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In re Lay court goes farther. It recognizes the purpose of the privilege and cites
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on the pre-trial evaluation and stated in substance that Smith would be a future danger to society. After deliberation, the jury sentenced Smith to death. The Court ruled that admission of the doctor's testimony violated Smith's privilege against self-incrimination. Barrering a scenario where the defendant places his or her own sanity in issue, statements made during court-ordered competency interviews cannot be used, absent an express waiver of the privilege against self-incrimination. The Court found that if the State wanted to use statements Smith made during the examination, it would have had to instruct Smith prior to the interview that anything he said to the psychiatrist could be used against him. The Court held that to allow otherwise would compel Smith to incriminate himself in violation of the Fifth Amendment.

It must be noted that to reach the issue at all, the Court had to first decide that the Fifth Amendment applies to both the guilt and penalty phases of the trial. So holding, the Court reaffirmed the language from In re Gault, that "the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." In Estelle, the exposure invited by Smith's statements was an aggravation of his sentence, specifically from life imprisonment to death by electrocution. In an oft-cited passage, Chief Justice Burger wrote, that "[i]f the Fifth Amendment prevents a criminal defendant from being made the 'deliberate instrument of his own conviction,' it protects him as well from being made the 'deliberated instrument' of his own execution." Although a pre-trial psychiatric examination is not the same as court-ordered therapy, there are fair implications to be drawn. First, Estelle entitles the Court's position that Fifth Amendment applicability is not determined on the type of proceeding, but upon the exposure invited by elicited statements. Where Smith's statements were used against him to increase the penalty for his crime, so too are statements taken from court-ordered therapy programs which are used to revoke probation. In both cases, the defendants become the 'deliberated instruments' of their own heightened penalties. Thus both scenarios violate the Fifth Amendment absent the use of procedural safeguards.

The Court's decision in Miranda set forth those procedural safeguards as requiring a warning that the defendant has a "right to remain silent" and that "anything said can and will be used against the individual in court." The Miranda Court required such warnings when a defendant or suspect is in an especially coercive atmosphere, such as that arising out of a custodial interrogation in a police station. The concept of custodial interrogation is not limited, however, to the station house, nor does questioning at a police station necessarily constitute a custodial interrogation. The test for custody is whether a defendant's "freedom of action is curtailed in any significant way . . . ."

In Estelle, the psychiatric interview took place in jail, arguably a more coercive environment than an out-patient treatment facility. Still, the

150. Id. at 462 (quoting 2 HAWKINS, PLEAS OF THE CROWN 595 (6th ed. 1824)) (citations omitted.
151. Estelle, 451 U.S. at 435; see In re Gault, 387 U.S. at 69.
152. Compare Estelle, 451 U.S. at 462 with cases discussed supra part IV.C.
153. Id.
154. 384 U.S. at 466-69, see Estelle, 451 U.S. at 466-69.
155. Estelle, 384 U.S. at 444.
158. Miranda, 384 U.S. at 467; see Estelle, 451 U.S. at 466.
159. Estelle, 451 U.S. at 467.
160. The fact that the interview happened to occur while the defendant was in jail seems of little consequence. The Estelle Court was much more concerned with the non-substantial nature of the court-ordered competency examination would lead a reasonable person to assume that he or she was free to speak without fear of criminal reprisals. 451 U.S. at 467. Lower courts have expressed a similar concern regardless of whether the court-ordered psychiatric examination took place in a custodial setting. See, e.g., Gibson v. Zahnbusch, 581 F.2d 75, 79 (4th Cir.), cert. denied, 439 U.S. 906 (1978); United

https://nsuworks.nova.edu/nlr/vol17/iss4/17
on the pre-trial evaluation and stated in substance that Smith would be a future danger to society.\textsuperscript{139} After deliberation, the jury sentenced Smith to death.\textsuperscript{140}

The Court ruled that admission of the doctor’s testimony violated Smith’s privilege against self-incrimination.\textsuperscript{141} Barring a scenario where the defendant places his or her own sanity in issue,\textsuperscript{142} statements made during court-ordered competency interviews cannot be used, absent an express waiver of the privilege against self-incrimination.\textsuperscript{143} The Court found that if the State wanted to use statements Smith made during the examination, it would have had to instruct Smith prior to the interview that anything he said to the psychiatrist could be used against him.\textsuperscript{144} The Court held that to allow otherwise would compel Smith to incriminate himself in violation of the Fifth Amendment.\textsuperscript{145}

It must be noted that to reach the issue at all, the Court had to first decide that the Fifth Amendment applies to both the guilt and penalty phases of the trial.\textsuperscript{146} In so holding, the Court reaffirmed the language from \textit{In re Gautz},\textsuperscript{147} that "the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites."\textsuperscript{148} In \textit{Estelle}, the exposure invited by Smith’s statements was an aggravation of his sentence, specifically from life imprisonment to death by electrocution.\textsuperscript{149} In an oft cited passage, Chief Justice Burger wrote, that "[j]ust as the Fifth Amendment prevents a criminal defendant from being made the
deluded instrument of his own conviction, it protects him as well from being made the ‘deluded instrument’ of his own execution."\textsuperscript{150}

Although a pre-trial psychiatric examination is not the same as court-ordered therapy, there are fair implications to be drawn. First, \textit{Estelle} restates the Court’s position that Fifth Amendment applicability is not determined on the type of proceeding, but upon the exposure invited by elicited statements.\textsuperscript{151} Where Smith’s statements were used against him to increase the penalty for his crime, so too are statements taken from court-ordered therapy programs which are used to revoke probation.\textsuperscript{152} In both cases, the defendants become the "deluded instruments" of their own heightened penalties.\textsuperscript{153} Thus both scenarios violate the Fifth Amendment absent the use of procedural safeguards.

The Court’s decision in \textit{Miranda} set forth those procedural safeguards as requiring a warning that the defendant has a "right to remain silent" and that "anything said can and will be used against the individual in court."\textsuperscript{154} The \textit{Miranda} Court required such warnings when a defendant or suspect is in an especially coercive atmosphere, such as that arising out of a custodial interrogation in a police station.\textsuperscript{155} The concept of custodial interrogation is not limited, however, to the station house,\textsuperscript{156} nor does questioning at a police station necessarily constitute a custodial interrogation.\textsuperscript{157} The test for custody is whether a defendant’s "freedom of action is curtailed in any significant way..."\textsuperscript{158}

In \textit{Estelle}, the psychiatric interview took place in jail,\textsuperscript{159} arguably a more coercive environment than an out-patient treatment facility.\textsuperscript{160} Still,
the patient undergoing therapy does have his freedom of action curtailed in a very significant way. A therapy patient is not free to leave the treatment facility on penalty of probation revocation.165 Moreover, the very nature of psychological treatment may, in itself, be "coercive."

The treating physicians are armed not with weapons and badges, but with the tools of their trade—the means of eliciting information from those not otherwise willing to open up their thoughts.162 If therapists, rather than limiting their function to the rehabilitation of offenders, disclose statements made during the course of therapy, the patients are, to borrow a phrase from Miranda and Estelle, "faced with a phase of the adversary system" and are "not in the presence of [a person] acting solely in [their] interest."163 Accordingly, if statements are to be used from a treatment program, the defendant should have the opportunity to make a knowing and intelligent waiver of his or her right against self-incrimination.164

Following this reasoning, the Estelle Court found the Fifth Amendment to be implicated when statements are elicited from a proceeding intended for a different purpose.165 The pre-trial interview was intended to gauge Smith's competency for trial, not to elicit incriminating statements.166 When Smith was ordered to undergo the examination, he did not know that his statements would be used for anything other than determining his competence to stand trial.167 The state crossed the boundaries of the Fifth Amendment, however, when it used Smith's statements to increase the penalty for his crime.168 In fact, if the testimony of the psychiatrist had been confined to his function as evaluator, no Fifth Amendment issue would have arisen.169 Since Smith was reasonably under the impression that the examination was being used only to determine his competence, the State, in

order to use his communications for more, needed to give Smith due warning that any thing he said could be used against him.170

Accordingly, when offenders subject themselves to court-ordered therapy, there is also no expectation that statements made during the course of that therapy can be used against them.171 To the contrary. It seems reasonable to assume that statements are being made in confidence with one's therapist.172 Since effective treatment can only be had with candor,173 it is not reasonable to expect that the courts would violate that candor by exacting penalties for one's admissions. For this reason, probationers like Imlay and Gleason should arguably be warned of such a practice just as Smith must be warned.

2. Minnesota v. Murphy

In Minnesota v. Murphy, the Court decided that a statement made by a probationer to his probation officer, without prior warnings, is admissible in a subsequent criminal proceeding.174 In 1974, Murphy was a suspect in the rape and murder of a teenage girl. No charges were then brought. Six years later, Murphy was charged with criminal sexual conduct in an unrelated incident. He pleaded guilty to a reduced charge of false imprisonment and was sentenced to probation. Among other things, Murphy was required to participate in a sexual treatment program and be truthful with his probation officer "in all matters." Murphy was told that if he failed to comply with any of the conditions of his probation, he may be subject to imprisonment. In September of 1981, the probation officer was informed by Murphy's therapist that during the course of his therapy Murphy had admitted to the 1974 rape and murder. Although the probation officer did not immediately call the police, she did contact Murphy to set up a meeting at which she planned to elicit incriminating statements. At the meeting, Murphy admitted to the probation officer that he had committed the 1974 crimes. This confession was used in Murphy's subsequent trial in which he

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160. Id. at 466-67 (construing Miranda, 384 U.S. at 436). These are not, however, comprehensive "Miranda" warnings. Although the Estelle Court requires notice to defendants that statements made during the examinations may be used against them, the Court did not require instruction as to the right to have counsel present. Id. at 466-67.
161. Cf. id. at 465.
162. See Smith et al., supra note 57, at 8.
163. See supra part II.
165. Id. at 422.
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161. See cases discussed supra part IV.C.
163. Estelle, 451 U.S. at 467 (quoting Miranda, 384 U.S. at 469) (first alteration in original).
164. Id. at 467 (purpose of warnings are to afford the subject an intelligent decision).
165. Id.
166. Id.
167. Id. at 465.
169. Id. at 465.
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The Court held that Murphy's admissions to his probation officer were properly admitted against him in his subsequent trial for rape and murder.\textsuperscript{177} However, the Court considered the case in the context of statements made to a probation officer, practically ignoring the issue that the statements were first discovered during the course of therapy.\textsuperscript{178} The Court held that the Fifth Amendment permitted Murphy to refuse any discussion of the crimes with his probation officer.\textsuperscript{179} However, Murphy failed to assert his privilege against self-incrimination in a timely manner,\textsuperscript{180} opting instead to reveal incriminating information to his probation officer.\textsuperscript{181} This incriminating information, the Court held, was therefore properly admitted against Murphy in his subsequent rape and murder trial.\textsuperscript{182} The Court reasoned that all Murphy had to do was decline to answer the probation officer's questions.\textsuperscript{183}

Murphy contended that it was not so easy.\textsuperscript{184} Murphy feared that had he done so—had he asserted his privilege against self incrimination—his probation would have been revoked in response.\textsuperscript{185} To the Court, this fear was "unreasonable" in light of its previous decisions that held it unconstitutional for a state to penalize a defendant for asserting his right to remain silent.\textsuperscript{186}

\textsuperscript{176} Id. at 425.
\textsuperscript{177} Id. at 440.
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\textsuperscript{179} Id. at 426-34.
\textsuperscript{180} As soon as the probation officer told Murphy of her discovery, Murphy did say that he "felt like calling a lawyer." \textit{Id.} at 424. However, the Court did not treat with the issue of Murphy having requested counsel at the meeting, thus invoking his Fifth Amendment privilege. \textit{Id.} at 424 n.3; see \textit{Fare v. Michael C.}, 442 U.S. 707, 709 (1979) (request for lawyer is an automatic invocation of the privilege).
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\textsuperscript{182} \textit{Id.}
\textsuperscript{183} \textit{Id.} at 437.
\textsuperscript{184} \textit{Id.} at 434-35.
\textsuperscript{185} \textit{Id.}
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Unfortunately, Murphy was not a lawyer and was not schooled in Supreme Court opinions. He was guided only by what the Judge had told him in the conditions of his probation; namely, that he was to "report to his probation officer periodically as directed, and be truthful with the officer in all matters."\textsuperscript{187} From this, the dissent submitted, Murphy could well have believed he was under compulsion to answer.\textsuperscript{188}

The dissent's rationale follows the general rule that one need not claim the privilege where the assertion of the Fifth Amendment right is itself penalized.\textsuperscript{189} A government may simply not impose penalties "capable of forcing the self-incrimination which the Amendment forbids."\textsuperscript{190} In this way, the Amendment privileges not only the right to remain silent, but also the freedom from influence that would have one waive that right.\textsuperscript{191}

\textbf{B. The "Penalty" Cases}

The "penalty" cases reflect the understanding that "the blood of the accused is not the only hallmark of an unconstitutional inquisition."\textsuperscript{192} An early illustration is the case of \textit{Boyd v. United States},\textsuperscript{193} involving a civil forfeiture action against property. A statute offered the owner an election between producing a self-incriminating document or forfeiting the goods.\textsuperscript{194} The Court held the statute to be violative of the Fifth Amendment in that it constituted a penalty for the exercise of the privilege.\textsuperscript{195}

It was therefore clear, early in the Court's Fifth Amendment jurisprudence, that the government could not exact a penalty for asserting one's privilege against self-incrimination. It was not until much later, however, that the Court fleshed out the parameters of this "penalty" rule.\textsuperscript{196}

\textsuperscript{187} \textit{Murphy}, 465 U.S. at 420.
\textsuperscript{188} Id. at 445-46.
\textsuperscript{189} See id.; see, e.g., \textit{Garrett v. New Jersey}, 385 U.S. 495, 500 (1967) (privilege against self-incrimination is among those inviolable rights "whose exercise a State may not condition by the exaction of a price").

\textsuperscript{192} \textit{Blackburn v. Alabama}, 361 U.S. 199, 206 (1960).
\textsuperscript{193} 116 U.S. 616 (1886).
\textsuperscript{194} \textit{Id.} at 617.
\textsuperscript{195} \textit{Id.} at 633-35.
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First in *Garrett v. New Jersey*197 and then in *Gardner v. Broderick*,198 the Court found that self-incriminating testimony may not be elicited from police officers by the threat of employment termination.199 The cases were very similar. Both dealt with criminal investigations of police officers, and in both cases the police were threatened with termination if they refused to testify.200 The only distinction is that in *Garrett*, the police officers succumbed to the threat and testified.201 In *Gardner*, the officers stood their constitutional ground but lost their jobs in the process.202 The Court found a violation of the Fifth Amendment in both instances.203 Accordingly, self-incriminating testimony must be suppressed if it was elicited by threatening job loss.204 Similarly, those who assert the privilege and suffer the loss of their jobs in response, must be reinstated to their previous positions.205 In this manner, the Fifth Amendment draws no distinction between those who cave into the threats and those who suffer because they did not.

These "penalty" rules have broad impact on cases involving court-ordered therapy. In all such cases, a government has threatened to revoke probation or a suspended sentence if the defendant takes the Fifth.206 Unfortunately, while the Supreme Court has often held employment termination to be an impermissible penalty,207 it has yet to tip its hand on whether the imposition of a stiffer sentence may violate the Fifth Amendment. However, the Circuit Courts of Appeals have taken up the issue, and have, for the most part, decided the issue in the affirmative.

In *Colman v. Lashove*,208 the defendant desired transfer to another prison. The defendant had a favorable record and the prison Superintendent lent his approval to the transfer. Nevertheless, because Colman refused to admit the crime of which he was convicted, the review board denied his transfer. The First Circuit Court of Appeals held:

> Though not unqualified, it is generally recognized that even after conviction, a defendant who shows a "real and appreciable risk" of subsequent incrimination may be entitled to assert the privilege against self-incrimination with regard to the crime... And requiring a prisoner to choose between his Fifth Amendment privilege and favorable post-conviction treatment may create a "classic penalty situation" in which the prisoner's answers would be deemed compelled and inadmissible in the criminal prosecution.209

Accordingly, the court found Colman's Fifth Amendment privilege to be abridged in not allowing his transfer.

The First Circuit holding has obvious implications in the area of court-ordered therapy. The court found that Colman had shown a "real and appreciable risk" of subsequent incrimination in that any statements he made could be used against him in a subsequent appeal.210 Defendants who are placed in therapy programs may likewise have their statements used against them while they appeal their case or seek habeas corpus relief.211 Moreover, the *Colman* case clearly holds that a defendant is placed in an unconstitutional penalty situation when the defendant is denied favorable post-conviction treatment for asserting his or her Fifth Amendment privilege.212 In court-mandated therapy cases, the defendants are often

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204. *Garrett*, 385 U.S. at 495.
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201. Garry, 385 U.S. at 495.
204. Garry, 385 U.S. at 495.
205. Gardner, 392 U.S. at 274-75.
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208. 976 F.2d 724 (1st Cir. 1992) (per curiam) (table case), reported in full 1992 U.S. App. LEXIS 23235.
210. Id. at *7.
211. The threat of perjury charges may be another "real and appreciable risk." See Inman, 813 P.2d at 985.
taken off probation and placed in jail for asserting their privilege during treatment. 213 If it is unconstitutional to deny a defendant's prison transfer based on that prisoner's assertion of his Fifth Amendment rights, then it could be argued that going from conditional freedom to jail is at least as egregious. 214

Prior to Colman, a number of appellate courts had considered the analogous issue of whether judges may increase defendants' sentences for their failure to accept responsibility for the crime of which they were convicted. 215 The Imlay 216 decision of the Montana Supreme Court relied heavily upon the case of Thomas v. United States. 217 In the sentencing phase of Thomas' trial, the following exchange took place:

MR. WILSON [U.S. Attorney]: If the court please, the defendant was convicted in this Court on June 14 for bank robbery and he is here for sentence.

THE COURT: Do you want to say anything on behalf of yourself?

THE DEFENDANT: I will repeat again that I am innocent. That's all.

THE COURT: I am going to tell you something and I want you to think carefully before you answer. You have been proven guilty beyond a reasonable doubt by overwhelming evidence... If you will come clean and make a clean breast of this thing for once and for all, the Court will take that into account in the length of the sentence to be imposed. If you persist, however, in your denial, as you did a moment ago, that you participated in this robbery, the Court also must take that into account. Now which will it be?

213. See, e.g., Imlay, 813 P.2d at 980.
214. The Colman case was decided on September 24, 1992 and therefore has not appeared in any court-mandated therapy cases.
215. See United States v. Heubel, 864 F.2d 1104 (2d Cir. 1989); United States v. Garcia, 544 F.2d 681 (3d Cir. 1976); United States v. Wright, 533 F.2d 214 (5th Cir. 1976); Potetz v. Fauver, 517 F.2d 393 (3d Cir. 1975); United States v. Laca, 499 F.2d 922 (5th Cir. 1974); Scott v. United States, 419 F.2d 520 (D.C. Cir. 1969); Thomas v. United States, 368 F.2d 941 (5th Cir. 1966). But see Gollacher v. United States, 419 F.2d 520, 530-31 (9th Cir.), cert. denied, 396 U.S. 960 (1969) (Fifth Amendment not violated when defendant faces harsher sentence for failing to confess).
216. 813 P.2d at 979; see discussion supra pp. 1442-43.

THE COURT: I am asking you to speak for yourself.

THE DEFENDANT: I am speaking for myself that I am innocent.

THE COURT: You persist in that?

THE DEFENDANT: Yes, sir.

THE COURT: The sentence of the Court is that you be sentenced to the maximum term permitted by law, twenty-five years. 218

That sentence was vacated by the Fifth Circuit Court of Appeals which found that the alternatives presented to the defendant violated his Fifth Amendment privilege against self-incrimination. 219

The two "ifs" which the district court presented to Thomas placed him in a terrible dilemma. If he chose the first "if," he would elect to forego all post-conviction remedies and to confess to the crime of perjury, however remote his prosecution for perjury might seem. Moreover, he would abandon the right guaranteed by the Fifth Amendment. . . . His choice of the second "if" was made after the warning that the sentence to be imposed would be for a longer term than would be imposed if he confessed. . . . [A]n ultimatum of a type which we cannot ignore or approve confronted Thomas. Truly, the district court put Thomas "between the devil and the deep blue sea." 220

Just as Thomas was faced with a constitutionally impermissible dilemma, so too was Imlay when he was told to confess during treatment or to serve out his sentence in jail. 221 The applicability of the Thomas rule

218. Thomas, 368 F.2d at 943-44. Such dialogue is not unique. More startling than Thomas is the following question from a federal district court judge to a man who had just been convicted of bank robbery:

THE COURT: I'm asking you. Not interested in indictments. I'm less interested in the Fifth Amendment. I'm interested in you were guilty of this crime (sic). Your buddy; he says he wasn't. What do you say? I'm the man to impose the sentence. Not your buddy. You tell me. Were you there?

Potetz, 517 F.2d at 394; see also Heubel, 864 F.2d at 1109-10.

219. Thomas, 368 F.2d at 945-46; accord United States v. Wright, 533 F.2d 214 (5th Cir. 1976) (maximum sentence need not be imposed to run afoul of Fifth Amendment).

220. Thomas, 368 F.2d at 945; see also Imlay, 813 P.2d at 983.
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216. 813 P.2d at 979; see discussion supra pp. 1442-43.
to court-mandated therapy programs has great utility in light of its uniform acceptance.222 It appears that only one court has rejected Thomas' holding.223

In Gollaher v. United States,224 a criminal defendant was penalized with a stiffer sentence because of his refusal to admit guilt of the crime for which he was convicted.225 The Ninth Circuit recognized the wisdom of the Thomas decision but chose not to follow it, opting instead to place great weight on the state's interest in rehabilitating offenders.226 The court found it "axiomatic" that in order to affect proper rehabilitation, the defendant must admit his or her guilt.227 In essence, the court balanced the state's interest in rehabilitation against the defendant's continued right to deny his guilt.228 Rehabilitation won out.229

Similarly, courts which have addressed the Federal Sentencing Guidelines and its provision for a two-point downward departure for acceptance of responsibility230 have upheld that provision.231 Essentially, section 3E1.1 of the Guidelines permits a judge to be more lenient if the defendant admits responsibility for his or her criminal acts.232 On its face, section 3E1.1 seems to run contrary to the other penalty cases233 and

certainly to the rule set forth in Thomas.234 Yet the courts have ruled the downward departure to be generally consistent with the Fifth Amendment.235 Sine qua non, a defendant is rewarded for waiving his or her privilege.236 Interestingly, these decisions draw a distinction between enhancing a sentence and lowering one.237 The courts do not apply the Thomas rule since section 3E1.1 confers a privilege, not a punishment.238

Upholding the section seems to fly in the face of the Colman decision. In that case, the prison transfer would appear to be the conferment of a privilege just as the courts have held the downward departure to be.239 It takes some semantic liberty to reconcile the Guidelines decisions with the well-established rules of the penalty cases. Plainly, a defendant who is told that his or her sentence will be lessened is under equal compulsion to waive the privilege as is the defendant who is told that his or her sentence will be increased. The practical result is the same regardless of whether one uses a negative or positive linguistic spin. It appears that the courts which have ruled on the Guidelines have sought to viti ate the rehabilitative interests of the state over the rights of the accused, just as did the minority decision in Gollaher.

Rejecting the approach of those courts which would subjugate the Fifth Amendment in favor of other policy considerations, the Third Circuit spoke in words which go to the very core of the therapy/privilege controversy:

Defendant's claim revolves around the conflict between two principles of American criminal law. The first is the Fifth Amendment. The second is the principle that a court may consider all available information in formulating a sentence and may properly grant leniency to those who . . . show contrition for their crimes and take steps toward rehabilitation and re-establishment as good and responsible members of society. . . . We today reaffirm the principle we set out in Garcia: where a defendant invokes his or her Fifth Amendment privilege against self-incrimination in a timely manner, a sentencing court may not use his or her failure to waive that right as negative evidence to penalize

See Thomas, 368 F.2d at 945.
235. See, e.g., Gonzales, 897 F.2d at 1021; Henry, 883 F.2d at 1011. But see United States v. Want, 910 F.2d 587, 591 (9th Cir. 1990); United States v. Oliveira, 905 F.2d 623 (2d Cir. 1990) (judge precluded from basing acceptance of responsibility reduction on Fifth Amendment claim).
236. See id.
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222. See Heubel, 864 F.2d at 1104; Wright, 533 F.2d at 214; Scott, 419 F.2d at 264. But see Gollaher, 419 F.2d at 520. 
223. See Gollaher, 419 F.2d at 520. 
224. Id. 
225. Id. at 521. 
226. Id. at 530. 
227. Id.; see discussion supra part III. 
228. Gollaher, 419 F.2d at 530-31. 
229. Id. 
231. See, e.g., United States v. Gonzales, 897 F.2d 1018 (9th Cir. 1990); United States v. Henry, 883 F.2d 1010 (11th Cir. 1989). Section 3E1.1 provides: 
(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels. 
(b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial. 
(c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right. 
232. Henry, 883 F.2d at 1011. 
233. See discussion supra part IV.B. 
234. See Thomas, 368 F.2d at 945. 
235. See, e.g., Gonzales, 897 F.2d at 1021; Henry, 883 F.2d at 1011. But see United States v. Watt, 910 F.2d 587, 591 (9th Cir. 1990); United States v. Oliveras, 905 F.2d 623 (2d Cir. 1990) (judge precluded from basing acceptance of responsibility reduction on Fifth Amendment claim). 
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him or her in deciding upon the appropriate sentence.\textsuperscript{240}

The court was not without sympathy for the concerns enunciated in \textit{Gollaher}.

We also recognize that in many instances in which a defendant displays a lack of contrition and willingness to make amends for his or her crime, the sentencing court will not be able to consider it. However, when faced with a conflict between two principles of law, one of which is embodied in statute and tradition, and the other of which is embodied in the Constitution, that which is in the Constitution must hold sway.\textsuperscript{241}

The penalty cases may have been overcome by semantics, but nevertheless they are useful in applying to cases involving court-ordered therapy. The rule is still clear. Neither a government, nor a court, may exact a penalty for an assertion of the privilege against self-incrimination.\textsuperscript{242} Forbidden penalties run the gambit from loss of jobs to an increase in one’s sentence.\textsuperscript{243} Moreover, a state may not withhold a benefit (such as a prison transfer) from a defendant who invokes the privilege against self-incrimination.\textsuperscript{244}

In extending the "penalty" cases to the realm of court-ordered therapy, many courts have held that the threat of probation revocation infects a free and voluntary waiver of the privilege.\textsuperscript{245} Yet, as Justice White pointed out in his dissent to the denial of certiorari in \textit{Imlay}, the courts are far from reaching a consensus on the issue.\textsuperscript{246} There are a number of courts which find no constitutional dilemma in allowing a state to condition probation upon the admission of guilt in a therapy program.\textsuperscript{247}

C. Application in the Lower Courts\textsuperscript{248}

When the cases are confronted with the Fifth Amendment implications of court-mandated therapy programs, they weigh all of the factors discussed thus far; the history and purpose of the privilege, the utility and means of therapy, and of course, the law. Although the \textit{Imlay} and \textit{Gleason} cases\textsuperscript{249} are representative of the conflict operative in the courts today, the opinions can be divided into three categories. The first category is represented by the \textit{Gleason} case.\textsuperscript{250} Those which do not find a Fifth Amendment violation

240. \textit{Heublein,} 864 F.2d at 1109-11. In \textit{United States v. Garcia,} the court ruled it unconstitutional to impose a harsher sentence upon a drug dealer who refused toattle on his cohort. 544 F.2d 681, 685 (3d Cir. 1976). The court there found, that "a price tag was thus placed on appellants' expectation of maximum consideration at the bar of justice; they had to waive the protection afforded them by the Fifth Amendment," and "[t]his price was too high." Id.

241. \textit{Heublein,} 864 F.2d at 1111. The United States Supreme Court has historically shown little tolerance for balancing other interests, no matter how compelling, against the Fifth Amendment. \textit{Turley,} 414 U.S. at 78 (state interest in "maintaining the integrity of its civil service and of its transactions with independent contractors" insufficient to defeat privilege); \textit{McCarthy v. Amland,} 266 U.S. 34, 40 (1924) (state interest in executing bankruptcy laws insufficient to override privilege); \textit{Hale v. Henkil,} 201 U.S. 43, 66 (1906) (state interest in Antitrust regulations insufficient when balanced against Fifth Amendment).

242. E.g., \textit{Garrity v. New Jersey,} 385 U.S. 493 (1967). This appears to be true so long as that benefit is not mandated by Congress as a Federal Sentencing Guideline. See \textit{Gonzalez,} 897 F.2d at 1018; \textit{Henry,} 883 F.2d at 1010.

243. See cases cited supra notes 196, 207; \textit{Thomas,} 368 F.2d at 941.


246. 113 S. Ct. at 445.


248. Practitioner's Note: The following cases have found a violation of the Fifth Amendment when courts order probationers to undergo therapy wherein they are required to admit responsibility for their criminal acts: \textit{Mace,} 765 F. Supp. at 847; Jessica B. v. Ginger B., 254 Cal. Rptr. at 883; \textit{Pruskas,} 558 N.E.2d at 696; \textit{Gillfillen,} 582 N.E.2d at 821; \textit{In re Welfare of J.W.,} 415 N.W.2d at 879; \textit{In re Welfare of J.W.,} 429 N.W.2d 284 (Minn. Ct. App. 1988), aff'd, 433 N.W.2d 885 (Minn. 1989); \textit{Imlay,} 813 P.2d at 979.

The following cases have found the Fifth Amendment not to be violated when a court orders probationers to undergo therapy wherein they must admit responsibility for their criminal acts: Russell v. Eaves, 722 F. Supp. 558 (E.D. Mo. 1989); Archer v. Florida, 604 So. 2d 561 (Fla. 1st Dist. Ct. App. 1992) (by inference); Young, 566 So. 2d at 69 (by inference); \textit{Henderson,} 543 So. 2d at 344; Carson v. Jackson, 466 So. 2d 1188 (Fla. 4th Dist. Ct. App. 1985); \textit{In re H.K.,} 433 N.W.2d at 46; Duchess County Dept. of Social Serv. v. G., 534 N.Y.S.2d 64 (Fam. Ct. 1988), aff'd sub nom. \textit{In re Travis Lee G.,} 565 N.Y.S.2d 136 (App. Div. 1991); \textit{Gleason,} 576 A.2d at 1246.


250. 576 A.2d at 1246 (Vt. 1990); see supra pp. 1453-55.
The court was not without sympathy for the concerns enunciated in Golibier. We also recognize that in many instances in which a defendant displays a lack of contrition and willingness to make amends for his or her crime, the sentencing court will not be able to consider it. However, when faced with a conflict between two principles of law, one of which is embodied in statute and tradition, and the other of which is embodied in the Constitution, that which is in the Constitution must hold sway.

The penalty cases may have been overcome by semantics, but nevertheless they are useful in applying to cases involving court-ordered therapy. The rule is still clear. Neither a government, nor a court, may exact a penalty for an assertion of the privilege against self-incrimination. Forbidden penalties run the gambit from loss of jobs to an increase in one's sentence. Moreover, a state may not withhold a benefit (such as a prison transfer) from a defendant who invokes the privilege against self-incrimination. In extending the "penalty" cases to the realm of court-ordered therapy, many courts have held that the threat of probation revocation infects a free will.

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and voluntary waiver of the privilege. Yet, as Justice White pointed out in his dissent to the denial of certiorari in Inlay, the courts are far from reaching a consensus on the issue. There are a number of courts which find no constitutional dilemma in allowing a state to condition probation upon the admission of guilt in a therapy program.

C. Application in the Lower Courts

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ground their reasoning in the rehabilitative interests of the State and a perceived lack of harm to the offender.251 The second category is represented by the In re H.R.K. case.252 These cases, which find a Fifth Amendment violation, largely base their holdings on the "penalty" cases and the uncompromising virility of the Fifth Amendment.253 A third category involves child custody or visitation disputes in which a parent convicted of a sex crime is ordered to undergo therapy requiring an admission of guilt.254 In these cases, the defendants' Fifth Amendment rights are said to be violated, but it is also noted that, with or without an admission of guilt, the parent has the burden of persuading the court that he or she has reformed.255 In this third category, the courts defer to the Fifth Amendment while still honoring the goals and methodology of effective therapy.256

1. Fifth Amendment Not Violated

Therapists have put it in rather clear terms. Without an acceptance of responsibility for one's crime, a defendant's chances for rehabilitation are nil.257 It is not without reason, then, that some courts find it constitutionally permissible to require an admission of guilt during court-ordered therapy.258

In In re H.R.K.,259 the court affirmed a termination of parental rights where the parents failed to admit abuse during therapy.260 The parents argued that it violated due process to require them to balance two constitutionally guaranteed rights; the right to maintain the integrity of the family unit, and the right against self-incrimination.261 In dismissing the parents' claim, the court held:

251. See supra note 248.
252. 813 P.2d 979 (Mont. 1991); see supra pp. 1442-43, 1455-57.
253. See cases cited supra note 248.
254. See In re Welfare of J.W., 415 N.W.2d at 879; In re Welfare of J.G.W., 429 N.W.2d at 284; In re M.C.P., 571 A.2d 627 (Vt. 1989).
255. See cases cited supra note 248.
256. Id.
257. See, e.g., MALETZKY, supra note 54, at 253-55; see supra part III.
258. See Gleason, 576 A.2d at 1251-52; cf. Gollaber, 419 F.2d at 531 ("no fault can be found of the judge who takes into consideration the extent of a defendant's rehabilitation at the time of sentence").
259. 433 N.W.2d 46 (Iowa Ct. App. 1989).
260. Id. at 50.
261. Id.
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\begin{quote}
Termination [of parental rights] in such a situation is not . . . a sanction for exercise of a constitutional right, but simply the necessary result of failure to rectify parental deficiencies. Although the state cannot require [the parents] to waive [their] constitutional right, that does not mean it must relinquish its right and obligation to protect these children.\textsuperscript{262}
\end{quote}

In so holding, the court honored its role as parens patriae by disallowing family reunification until the parents admitted their guilt.\textsuperscript{263} Underlying this point was the recognition that effective therapy cannot be had without an acceptance of responsibility.\textsuperscript{264}

However noble the result of the case—the \textit{In re H.R.K.} court was able to keep the children safe—it is clear that the court had to knock the air out of the Fifth Amendment privilege in order to arrive at that result. It is significant, for example, that nowhere in the opinion was there a mention of the "penalty" cases which would, at the very least, have drawn the holding into question.\textsuperscript{265} After all, while the court maintained that it could not require the parents to waive their rights, it could keep their children from them if they refused.\textsuperscript{266} In this, the Iowa court was not alone.

In \textit{Dutchess County Department of Social Services v. G.},\textsuperscript{267} a New York Family Court terminated Mr. and Mrs. G's rights to their child based upon a finding of permanent neglect.\textsuperscript{268} The rights were terminated solely due to the parents' "adamant, long-standing, and repeated refusal to admit" to any wrongdoing during rehabilitative counseling.\textsuperscript{269} Without this admission, reasoned the court, effective therapy could not be assured, and

\begin{quote}
251. See supra note 248.
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257. See, e.g., \textit{Maletzky}, supra note 54, at 253-55; see supra part III.
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259. 433 N.W.2d 46 (Iowa Ct. App. 1989).
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261. Id.
262. Id. at 50 (emphasis added). The emphasized language was first employed in the case of \textit{In re Welfare of S.A.V.} in reaching a similar result. 392 N.W.2d at 260. \textit{In re Welfare of J.W.} that rationale was specifically rejected. 415 N.W.2d at 882.
263. \textit{In re H.R.K.}, 433 N.W.2d at 50.
264. Id.
265. See discussion supra part IV.B. In terming the parents' claim "novel," the court was apparently also unaware of any other cases which applied Fifth Amendment jurisprudence to the instance of court-ordered therapy. \textit{In re H.R.K.}, 433 N.W.2d at 50. This inability to gain from the experience of other courts is not unique to the Iowa Court of Appeals. \textit{Imlay} did not cite to one other case involving court mandated therapy and the Fifth Amendment privilege. This may be due to the death of research on the issue. Prior to this comment, there had been no effort to compile these cases.
266. Id. at 50.
268. Id. at 71.
269. Id. at 65.

\end{quote}
therefore neither could the safety of their child.270

The State of Florida has taken especially potent steps toward protecting children from child abuse and sex offenses.271 Although recently repealed, the State had even codified the requirement that offenders admit guilt in order to undergo therapy.272 Florida Administrative rule 33-19.001(3) provided:

An offender shall be considered amenable for treatment if he or she is an individual with a psycho sexual disorder who is motivated to participate in treatment for this disorder and has an intellectual capacity for logical reasoning and insight. The offender must be able to feel some remorse for his or her behavior and to eventually accept responsibility for his behavior and for changing it . . . .273

Pursuant to the rule, where a special condition of probation requires a defendant to undergo therapy, a proper psychiatric evaluation is a condition precedent to any obligation of the defendant to participate in a program.274 The examination must establish that the defendant is amenable to treatment within the meaning of rule 33-19.001(3).275 If the defendant is deemed amenable for treatment, it is not violative of the Fifth Amendment to require the defendant to "eventually accept responsibility for his behavior and for changing it."276

In upholding the constitutionality of the rule, Florida's First District Court of Appeal held that the Fifth Amendment was not violated "in that any admission of the commission of the offense occurs after the defendant's conviction, and Fifth Amendment protections apply prior to conviction."277 This reasoning is plain wrong.278 The United States Supreme Court has clearly found the privilege to outlaw the conviction.279 Perhaps aware of the deficiencies in its rationale, the court went on to say that "[e]ven if the requirement of admission of guilt under the rule impinged on Fifth Amendment rights, the inmate is not compelled to incriminate himself because the inmate may choose not to participate in the program."280 In this way, the court reached a result similar to that reached in In re H.R.K. by the Iowa Court of Appeals.281 Recognizing that it may not be able to compel defendants to enter programs and admit their guilt, it may, nonetheless, disallow therapy and probation in favor of prison time if they do not.282 Like, In re H.R.K., the Henderson opinion neglected any discussion of the "penalty" cases.283

In the related decision of Carson v. Jackson,284 Florida's Fourth District Court of Appeal did consider the "penalty" cases and still found no Fifth Amendment violation.285 Linda Carson was ordered to undergo treatment for abusing a child for whom she babysat.286 In a subsequent and unrelated civil suit for child abuse, the plaintiff's attorney attempted to discover communications between Carson and her psychologist.287 While discovery in the civil suit was being conducted, Carson also had a criminal charge pending that arose out of the same conduct.288 Carson maintained that any communications the psychologist might disclose would constitute compelled self-incrimination that may be used against her at the criminal proceeding.289 As Carson's counsel put it, "She was initially compelled in a prior judicial proceeding to confer with this court-appointed psychologist or face possible sanctions for non-cooperation. Is it then fair to use such compelled discussion, it is fair to suggest that perhaps the court gave no reasoned consideration.

279. See Minnesota v. Murphy, 465 U.S. 420, 426 (1984) ("A defendant does not lose this protection by reason of his conviction of a crime"). See also Asherman v. Meachum, 932 F.2d 137, 145 (2d Cir. 1991) ("The privilege continues even after a person has been convicted of a crime").

280. Henderson, 543 So. 2d at 346.

281. See In re H.R.K., 433 N.W.2d at 50; supra pp. 1474-75.

282. See Henderson, 543 So. 2d at 345; see also Archer v. Florida, 604 So. 2d 561 (Fla. 1st Dist. Ct. App. 1992) (did not reach Fifth Amendment issue due to procedural reasons but allowed revocation of probation due to failure to successfully complete therapy program, to stand).

283. See supra note 278; discussion supra part IV.B.

284. 466 So. 2d 1188 (Fla. 4th Dist. Ct. App. 1985).

285. Id. at 1191.

286. Id. at 1189-90.

287. Id. at 1190.

288. Id. at 1189.

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Pursuant to the rule, where a special condition of probation requires a defendant to undergo therapy, a proper psychiatric evaluation is a condition precedent to any obligation of the defendant to participate in a program.274 The examination must establish that the defendant is amenable to treatment within the meaning of rule 33-19.001(3).275 If the defendant is deemed amenable for treatment, it is not violative of the Fifth Amendment to require the defendant to "eventually accept responsibility for his behavior and for changing it."276

In upholding the constitutionality of the rule, Florida's First District Court of Appeal held that the Fifth Amendment was not violated "in that any admission of the commission of the offense occurs after the defendant's conviction, and Fifth Amendment protections apply prior to conviction."277 This reasoning is plain wrong.278 The United States Supreme Court has clearly found the privilege to outlive the conviction.279 Perhaps aware of the deficiencies in its rationale, the court went on to say that "[e]ven if the requirement of admission of guilt under the rule impinged on Fifth Amendment rights, the inmate is not compelled to incriminate himself because the inmate may choose not to participate in the program."280 In this way, the court reached a result similar to that reached in In re H.R.K. by the Iowa Court of Appeals.281 Recognizing that it may not be able to compel defendants to enter programs and admit their guilt, it may, nonetheless, disallow therapy and probation in favor of prison time if they do not.282 Like, In re H.R.K., the Henderson opinion neglected any discussion of the "penalty" cases.283

In the related decision of Carson v. Jackson,284 Florida's Fourth District Court of Appeal did consider the "penalty" cases and still found no Fifth Amendment violation.285 Linda Carson was ordered to undergo treatment for abusing a child for whom she babysat.286 In a subsequent and unrelated civil suit for child abuse, the plaintiffs attempted to discover communications between Carson and her psychologist.287 While discovery in the civil suit was being conducted, Carson also had a criminal charge pending that arose out of the same conduct.288 Carson maintained that any communications the psychologist might disclose would constitute compelled self-incrimination that may be used against her at the criminal proceeding.289 As Carson's counsel put it, "She was initially compelled in a prior judicial proceeding to confer with this court-appointed psychologist or face possible sanctions for non-cooperation. Is it then fair to use such compelled discussion, it is fair to suggest that perhaps the court gave no reasoned consideration.

279. See Minnesota v. Murphy, 465 U.S. 420, 426 (1984) ("A defendant does not lose this protection by reason of his conviction of a crime."); see also Asherman v. Mescal, 932 F.2d 137, 145 (2d Cir. 1991) ("The privilege continues even after a person has been convicted of a crime").
280. Henderson, 543 So. 2d at 346.
281. See In re H.R.K., 433 N.W.2d at 50, supra pp. 1474-75.
282. See Henderson, 543 So. 2d at 345; see also Archer v. Florida, 604 So. 2d 561 (Fla. 1st Dist. Ct. App. 1992) (did not reach Fifth Amendment issue due to procedural reasons but allowed revocation of probation, due to failure to successfully complete therapy program, to stand).
283. See supra note 278; discussion supra part IV.B.
284. 466 So. 2d at 1188 (Fla. 4th Dist. Ct. App. 1985).
285. Id. at 1191.
286. Id. at 1189-90.
287. Id. at 1190.
288. Id. at 1189.
289. Carson, 466 So. 2d at 1191.

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The court held that it was fair to allow discovery because it did not violate Carson's Fifth Amendment rights. The court first recognized that, in the ordinary case, if a witness desires the protection of the Fifth Amendment privilege, he or she must assert it in a timely fashion. In this case, Carson did not claim the privilege at the time of the disclosure. The court also recognized the exception to this general rule as carved out by the "penalty" cases. Therefore, the question left to the court was whether Carson was forced to incriminate herself upon the threat of judicial sanctions, thus excusing her failure to assert her rights before. The court found the "penalty" cases to be inapplicable to Carson's situation. Carson had agreed to undergo the therapy knowing full well that the trial court would not allow her to babysit again until the psychologist assured the judge that she had been rehabilitated. For this reason, the court found, Carson had advance knowledge that her communications would be conveyed to others. With this forewarning, the court held that Carson could not now complain of an infringement of her Fifth Amendment privilege. In essence, the court holds that one may fairly be placed in an otherwise unconstitutional "penalty" situation, so long as there is advance knowledge.

291. Id., 466 So. 2d at 1192.
292. Id.; see also Murphy, 465 U.S. at 434.
293. Id.; see also Murphy, 465 U.S. at 434; supra part IV.B.
294. Carson, 466 So. 2d at 1191-92.
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300. Id. Florida's Third District Court of Appeal seems to uphold this practice as well. In one case, the court revoked probation for failure of the defendant to successfully complete a sex offender program and sentenced him to sixty years imprisonment. Brown v. Florida, 400 So. 2d 812 (Fla. 3d Dist. Ct. App. 1981). The court did not reach the Fifth Amendment issue. Id. Florida's Second District Court of Appeal has also upheld the practice, albeit less enthusiastically. Young v. Florida, 566 So. 2d 69 (Fla. 2d Dist. Ct. App. 1990). In Young, that court held that it was an abuse of discretion to revoke defendant's probation merely because he refused to admit guilt during treatment. Id. at 69-70. The court's decision was guided by the fact that the defendant was now willing to

And then there is Russell v. Eaves, in which a prisoner challenged the practice of the Missouri Sexual Offender Program (MOSOP) requiring prisoners to "accept responsibility" for their crimes. MOSOP is an inpatient rehabilitative program operated by prison employees in which sex offenders are required to participate in order to qualify for parole. Like the program in Fort Lauderdale, MOSOP has two phases. The first is a preliminary phase in which patients are encouraged to get in touch with their feelings about their crime(s). The second phase involves straight therapy. Patients cannot complete the second phase until they accept responsibility for their crimes.

The court set forth three independent reasons for ruling Russell's Fifth Amendment claim "legally frivolous.

First, MOSOP is not a criminal proceeding, but a clinical rehabilitative program. Second, plaintiff's "testimony" is not compelled. He can refuse to participate in MOSOP. Finally, plaintiff has already been convicted of the crime for which MOSOP requires him to accept responsibility. While it is true that any future prosecution for that same crime could potentially violate the fifth amendment's double jeopardy clause . . . such a scenario is purely speculative at this point and, so, not properly before this Court.

It is not clear why the court looked to the character of the treatment program. It is not particularly relevant that the program itself is not a criminal proceeding. What matters is whether statements made therein try again. Id. at 70. In this way the court appeared to give its tacit approval to the practice, while not ruling upon the Fifth Amendment issue. Id.; cf. Davidson v. Florida, 419 So. 2d 728 (Fla. 2d Dist. Ct. App. 1982) (abuse of discretion to revoke probation for failure to complete therapy program where defendant left program at behest of therapist and probation officer).

302. Id. at 559.
303. Id.
304. See discussion supra part III.
306. Id.; see discussion supra part III.
308. Id.
309. Id. at 560-61.
310. Id.
311. See id.
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can be used in a criminal proceeding.\textsuperscript{313} Next, in holding that the testimony is not compelled because Russell could elect not to enter the program, the court seems to take a view akin to that of the \textit{In re H.R.K.} and \textit{Henderson} courts.\textsuperscript{314} If the defendants waive their privilege, they can get out of jail.\textsuperscript{315} If they refuse to incriminate themselves, they must remain incarcerated.\textsuperscript{316} As in \textit{H.R.K.} and \textit{Henderson}, the Russell court neglected to mention the "penalty" cases. The court's final contention, that incrimination is "speculative" and thus not "properly before this Court," is highly dubious.\textsuperscript{317} The privilege against self-incrimination protects a witness "where the answers might incriminate him in future criminal proceedings."\textsuperscript{318} The privilege does not require a court to wait until the harm has already been done.\textsuperscript{319}

As then Circuit Judge Scalia once stated in a similar context: "All of these theories are easy game, but it is not sporting to hunt them. . . . [These theories] are devices—no more fictional than many others to be found—for weaving a result demanded on policy grounds unsubtrosively into the fabric of law."\textsuperscript{320} It being highly desirable to protect the citizenry from repeat offenders, the courts therefore combat logic to bring the therapy programs within constitutional bounds. Other courts have been unable to do so.

2. Fifth Amendment Violated

Like Donald Imlay, the defendant in \textit{Gilfillen v. Indiana},\textsuperscript{321} maintained his innocence even after his conviction for child molestation.\textsuperscript{322} After serving time, Gilfillen was placed on probation with the condition that he receive corrective therapy, but was terminated from the program because he refused to admit his guilt.\textsuperscript{323} Like Imlay, Gilfillen persisted and contacted another program but was denied admission due to the strength of his denial.\textsuperscript{324} The trial court, thereafter, revoked Gilfillen's probation.\textsuperscript{325} The Supreme Court of Indiana reversed, holding that a trial court may not insist on an admission of guilt as a condition of probation where the defendant has maintained his innocence from the outset.\textsuperscript{326} "Under these circumstances, requiring Gilfillen to admit that he has a problem with child molesting . . . is tantamount to requiring that he admit that he is guilty of the crimes charged. Clearly, this is unacceptable."\textsuperscript{327} Gilfillen did not plead guilty and could not now be compelled to do so.\textsuperscript{328}

\textit{Illinois v. Prusak}\textsuperscript{329} represents the more typical case where a defendant does plead guilty.\textsuperscript{330} Prusak pleaded guilty to "knowingly fondling his daughter's breasts."\textsuperscript{331} A condition to his three-year probation was that he undergo sexual therapy.\textsuperscript{332} When Prusak maintained his innocence during therapy, the trial court revoked his probation and sent him to jail for five years.\textsuperscript{333}

The court did not find it necessary to raise the Fifth Amendment issue, instead holding that the trial court abused its discretion in revoking Prusak's probation based upon his refusal to admit to any wrongdoing.\textsuperscript{334} As in \textit{Imlay} and \textit{Gilfillen}, the court considered how Prusak had made a good-faith

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\item 322. Id. at 823. Gilfillen was charged with two counts of child molestation and one count of incest. Id. at 822.
\item 323. Id. at 822-23.
\item 324. Id. at 823.
\item 325. \textit{Gilfillen}, 582 N.E.2d at 823.
\item 326. Id. at 824.
\item 327. Id.
\item 328. Id.
\item 330. Sex crime or child abuse defendants often plead guilty to the crime charged or to a lesser crime pursuant to a negotiated plea agreement with the prosecutor. It is speculated that, in this area of the law, more than in any other, the danger is great that an innocent person will be convicted due to the incentives to "plea out." Telephone Interview with Reverend Bill Wendler, New York State President, Victims of Child Abuse Laws (V.O.C.A.L.) (Jan. 16, 1993).
\item 331. \textit{Prusak}, 558 N.E.2d at 697.
\item 332. Id.
\item 333. Id. at 698.
\item 334. Id. at 699.
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effort to comply with his probation conditions. 335 Prusak had attended each and every counseling session for the approximately five months until his probation was revoked. 336

The only thing that Prusak did not do was accept responsibility for his sexual misconduct. However, Riley [the therapist], stated that denial is "almost universal" among sex offenders. It appears that Prusak was simply exhibiting a common behavior of persons convicted of sexual misconduct. It seems paradoxical to classify an individual as a sex offender and sentence him to probation and then revoke his probation because he exhibits behavior commonly displayed by sex offenders. 337

To be sure, the court's concern is adequately documented by therapy professionals. 338 Sex-offenders are inherently offense-deniers. 339 To punish a sex offender for his denial of guilt is akin to punishing a diabetic for having high blood-sugar. And, although the Prusak court found it unnecessary to reach the issue, others continue to find it violative of the Fifth Amendment.

Robert Mace was charged in Vermont state court with sexually assaulting his fourteen-year-old stepdaughter. 340 The affidavit in support of the complaint stated that the victim reported having sexual intercourse with Mace since she was eleven years-old. 341 Instead, Mace pleaded guilty to an amended information alleging that he had touched his penis to the victim's leg in order to satisfy his prurient interests. 342 Mace was sentenced to probation with the special condition that he successfully complete a sexual therapy program. 343 The therapist required that Mace admit to having sexual intercourse with the victim but Mace continued to maintain that he never had sex with his stepdaughter, although he did admit to other acts. 344 At a subsequent probation revocation hearing, both Mr. and Mrs. Mace gave testimony inconsistent with a finding that sexual intercourse had occurred. 345 Mace also submitted evidence from the victim's doctor that stated she was still a virgin. 346 More to the point, the victim herself testified that no sexual intercourse had taken place. 347 In the face of all this evidence, the trial judge chose to rely upon the opinion of the treating therapist that intercourse had in fact occurred. 348 It therefore revoked Mace's probation for not coming forth with that admission himself. 349 Soon after deciding the Gleason case, the Vermont Supreme Court affirmed 350 and Mace raised a Fifth Amendment claim in this federal habeas corpus action. 351

The district court vacated the probation revocation 352 and held that Mace's Fifth Amendment privilege against self-incrimination was violated by requiring him to admit to having sexual intercourse with his stepdaughter. 353 The court first set its seal to the longstanding rule that the Fifth Amendment survives conviction. 354 It then noted that a defendant must usually make an affirmative assertion of the privilege, barring that "well defined exception" where a defendant is deprived of his "free choice to admit, to deny, or to refuse to answer." 355 In such "penalty" cases, the court recognized that the privilege becomes "self-executing." 356 In Mace's case, the trial court had attempted to exact an admission of sexual intercourse—a crime for which he could be prosecuted. 357 He was threatened with, and later subjected to, revocation of his probation for failing to make such an admission. 358 "He was therefore placed in the 'classic penalty' situation and the privilege became self-executing." 359 The Vermont Supreme Court, reminiscent of Gleason, 360 held that this penalty situation was not a real fear since the fact that additional charges could be

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336. Prusak, 558 N.E.2d at 697-98.
337. Id. at 698.
338. See supra part III.
339. Id.
341. Id. at 848.
342. Id.
343. Id.
344. Id.
346. Id.
347. Id.
348. Id.
349. Id.
350. Mace, 765 F. Supp. at 849; see also Gleason, 576 A.2d at 1246.
352. Id. at 852.
353. Id. at 850.
354. Id.
355. Id. (quoting Lisenba v. California, 314 U.S. 219, 241 (1941)).
357. Id. at 851.
358. Id.
359. Id.
360. 576 A.2d at 1246; see supra pp. 1453-55.
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The court also took issue with a recurring theme coming from the courts which find no Fifth Amendment violation—that the state’s rehabilitative interest outweighs a defendant’s constitutional privilege against self-incrimination.

[What is at issue is the disclosure, not the purpose of the disclosure. Certainly the state has a legitimate rehabilitative purpose in demanding full disclosure, but that does not make the disclosure any less incriminating. *Citizens may not be forced to incriminate themselves merely because it serves a governmental need.*]

3. A Dubious Compromise

And so again the conflict arises. The main contention between the two alternative views—those finding a Fifth Amendment violation and those which do not—seems to be balancing the goal of rehabilitating the offender against the offender’s right to remain silent. The third category of cases finds a Fifth Amendment violation in requiring an offender to admit to his or her acts but limits the result of that holding based upon the rehabilitative interest of the State.

In *In re Welfare of J.W.*, non-custodial parents were ordered into a treatment program which required them to explain the circumstances surrounding their nephews death. Successful completion of the program was mandated as a condition precedent to the parents’ regaining custody of their own children. When questioned about the nephew’s death in pretrial depositions, the parents invoked their Fifth Amendment privilege against self-incrimination. They continued to assert the privilege throughout the court-mandated therapy program. The question before the Minnesota Supreme Court was whether it violated the parents’ Fifth Amendment rights when the court ordered them to explain the death during therapy.

The court observed that if the parents complied with the court order, they may be incriminating themselves and be liable to criminal prosecution. On the other hand, noted the court, if the parents continued to assert the privilege, they would lose their children. Following the "penalty" cases, the court found that such "potent sanctions" clearly violated the parents’ Fifth Amendment rights. But the inquiry did not stop there. "The critical issue," stated the court, "is not whether a privilege exists but how far the mantle of its protection extends."

The court recognized the two conflicting principles of ensuring the safety of the children and protecting the integrity of the Fifth Amendment. The court held that, to the extent the probation requirement requires self-incrimination, it is unenforceable. " Assertion of a constitutional right does not make a person a less fit parent, any more than it makes a person a less fit citizen. . . . But this is as far as the privilege extends protection." Courts may attempt to fulfill their parents patriae by continuing to mandate treatment, so long as revocation of probation is never based upon a failure to confess during that treatment.

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But, recognized the court, the parents are still confronted with quite a
dilemma. In order to regain their children, the parents must still prove to the court that a "meaningful change" has occurred. In light of overwhelming evidence that an admission of guilt is necessary for meaningful change to occur, the court realized that this would be a difficult task where one refuses to accept responsibility. Nevertheless, found the court, it is a dilemma which the Fifth Amendment does not address.

The Minnesota Supreme Court's approach is an interesting compromise. It recognizes that a revocation of probation for failure to admit guilt during therapy falls within the "classic penalty situation" forbidden by the Fifth Amendment. However, the court does not cower from its responsibility to the child victims of abusive parenting. The court still places the burden squarely on the shoulders of the offenders to prove they can now be good parents. For example, the parents may attempt to disprove the assumption that meaningful change can occur only with an admission of guilt. In adopting this view in the limited context of child custody cases, the Vermont Supreme Court summarized the issue best: "While the court may not specify that the only route to reunification is an abandonment of the self-incrimination right, the parents must expect that the court and [State Rehabilitative Services] will act based on the findings of extreme parental abuse. If the parents can find a way to show that they have become good parents, without admitting to any misconduct, and that a restoration of custody of the juvenile to them is in the best interest of the child and is safe, the court may not foreclose the option."

This category of cases stands for a dual proposition—that concern for the children does not permit a trampling of Fifth Amendment protection, but that Fifth Amendment protections do not extend so far as to prevent a court from demanding proof of reform before returning children to their parents.

384. Id. at 884.
385. Id.
386. See supra notes 67-74 and accompanying text; In re Welfare of J.W., 415 N.W.2d at 883.
388. Id.
389. See id. at 882.
390. See id. at 883-84.
391. Id. at 883.
393. In re M.C.P., 571 A.2d at 641.
394. See supra notes 67-74 and accompanying text.
395. See discussion supra part IV.C.
396. See supra p. 1486.
397. Compare supra part II with supra part III.
398. See discussion supra part IV.C.
399. See, e.g., In re M.C.P., 571 A.2d at 640-41.

This seems to be a more reasonable and socially utilitarian rule of law than do those decisions that find no Fifth Amendment violation or those decisions that do find a violation, but take the added risk of placing the public in harm's way. Unfortunately, this position shows little deference to the numerous therapy professionals which have found acceptance of responsibility not to be a preference, but to be required in order for meaningful change to occur.

It would seem then, that all three conceptions of the Fifth Amendment represent something of a Procrustean fit to the arena of court-mandated therapy programs. To hold, in the first instance, that the Fifth Amendment is violated, does much to uphold the sanctity of the privilege, but does little to protect society from repeat offenders. To hold, in the second category, that the privilege is not violated, may ensure a safer world, but shows little regard for the Amendment. And the third position is merely a pretense in judicial diplomacy. Despite prevailing professional theory, these cases hold that the parents may put on proof other than an admission to show effective change. Fortunately, there is another way.

V. THE BEST OF BOTH WORLDS: JUDICIAL USE IMMUNITY

This note has canvassed a broad variety of cases which speak to the Fifth Amendment implications of court ordered therapy. From the three different views that have emerged, one is left with the sober realization that none of the approaches adequately reconciles the conflicting interests. On one hand is the desire to make rehabilitation an effective option, on the other, is the compelling need to uphold the potency of the Fifth Amendment. At its core, this problem surrounds the desire to compel an individual to accept responsibility for his crimes without compromising the privilege against self-incrimination. It would be the best of all worlds then, to disallow the use of any incriminating statements made during therapy so that the rehabilitative process can be most effective. After all, the offender has already been convicted and sentenced for the underlying crime and the State has already made a decision to rehabilitate...
In order to regain their children, the parents must still prove to the court that a "meaningful change" has occurred. In light of overwhelming evidence that an admission of guilt is necessary for meaningful change to occur, the court realized that this would be a difficult task where one refuses to accept responsibility. Nevertheless, found the court, it is a dilemma which the Fifth Amendment does not address.

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rather than incarcerate. Having made this choice, it would be defeatist to disallow the full realization of that goal when a reasonable remedy exists.

Courts can grant "use" immunity to defendant's who are ordered to undergo therapy. In this way, the defendant's Fifth Amendment rights cannot be abridged by compelling an admission of guilt. Moreover, the State's interest in rehabilitation is served because offenders and therapists would then be unfettered in pursuing effective treatment.

Use immunity is co-extensive with the privilege against self-incrimination. It is employed when the need to compel testimony outweighs the need to prosecute further. Use immunity prevents the prosecution from using any testimony, either directly or derivatively, against the witness in a subsequent prosecution. Significantly, however, a grant of use immunity does not foreclose a witness from prosecution for crimes about which testimony is given. It only provides that in any further proceeding against the witness, the government must come up with its case without benefitting from that testimony. To this end, the government has the burden of proving that any evidence used was not derived from the immunized testimony. Moreover, once a grant of use immunity, a witness cannot refuse to testify.

Since the Fifth Amendment extends only to statements that may incriminate the witness, if a witness is under immunity, he or she may be compelled to testify without running afoot of the privilege. In fact, use immunity agreements are likened to a contract between the government and the witness. If the witness refuses to testify, thus not living up to his or her end of the bargain, the witness can be greeted with a criminal contempt charge.

In the context of court-ordered therapy, it would then be constitutionally permissible to order defendants to accept responsibility for their crimes. They may still wish not to admit their guilt, but they can no longer fall back on the Fifth Amendment to protect them. In other words, they are forced to undergo the most effective therapy possible.

A. Why Opposition to Judicial Use Immunity is Unwarranted in Court-Mandated Therapy

The solution sounds so attractive, so amenable to the realm of court-ordered therapy, that the question must arise as to why all of the cases previously canvassed could not have required it. The answer is twofold. First, prosecutors are unlikely to extend immunity unless it serves a prosecutorial function. While society has an interest in effective rehabilitation, the prosecutor is naturally reluctant to extend immunity unless there is a reciprocal prosecutorial pay-off. Second, most courts seem to feel that they lack the inherent authority to override the executive branch and grant immunity sua sponte. These courts view judicial use immunity as an unnecessary encroachment on prosecutorial discretion.

in Interstate Commerce Commission probes so that they are therefore compelled to testify without any breach of Fifth Amendment); Lach, 874 F.2d at 1547 (witness found in criminal contempt for refusing to testify after grant of use immunity).

412. United States v. Fulbright, 904 F.2d 847, 852 (5th Cir. 1986) ("Immunity agreements are in the nature of contracts and are to be construed accordingly").

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415. Id. at 640.

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While there is a conflict among the courts, those permitting judicial use immunity are clearly in the minority, 424 and the United States Supreme Court has yet to tip its hand. 425 Still, those courts which advocate the

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limited use of judicially imposed immunity are not without support. At least one state has statutorily authorized its courts to grant use immunity, 426 and legal academia has generated much debate, nearly all of it urging some adoption of judicial use immunity. 427

Furthermore, the concerns typically enunciated by the opponents of judicial use immunity are not at all implicated in court-ordered therapy. For example, there are those who argue that use immunity would disallow the prosecution of otherwise addressable crimes. 428 This issue is often raised when an exculpatory defense witness is immunized. 429 The defense feels that the testimony is crucial to its case, but the prosecutor is wary of letting another potential criminal go free. 430 By the time a defendant is ordered into therapy, however, his or her guilt for the underlying crime has already

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428. See Stone, supra note 428, at 153 n.96.
429. See Winograde, supra note 427, at 758.
430. See Stone, supra note 427, at 152-53.
been adjudicated.\textsuperscript{431} Therefore, society’s interest in prosecuting crimes is not hindered by a grant of use immunity concurrent to the therapy order.\textsuperscript{432} Furthermore, even if the breadth of the immunity were to reach to crimes other than the defendant has already been convicted for but for which he or she confessed during court-ordered therapy, use immunity does not bar the government from prosecuting the defendant for those crimes.\textsuperscript{433} The State may still prosecute, so long as it establishes its case independent of the immune disclosures.\textsuperscript{434}

Moreover, judicial use immunity, when applied to court-ordered therapy does little to hamper prosecutorial discretion.\textsuperscript{435} Ordinarily, this concern is raised in the context of the government not being able to control its own trial strategy.\textsuperscript{436} Again, the court-ordered therapy cases are very different from those in which a witness is granted immunity to testify for either side.\textsuperscript{437} Here, the defendant him or herself is being granted immunity and only after conviction.\textsuperscript{438} Accordingly, a grant of judicial use immunity to a defendant already tried, does little to hamper prosecutorial discretion.\textsuperscript{439}

Indeed, it has been properly submitted that the judiciary is sometimes in a better position than the executive branch to decide upon a grant of immunity.\textsuperscript{440} The court has the benefit of hearing from both sides—from the prosecution and the defense—as to whether immunity is proper in each case.\textsuperscript{441} Whereas the prosecutor has a vested interest in the decision, the court is ideally the neutral arbiter.\textsuperscript{442} Moreover, the court is the player ultimately responsible for the integrity of the legal system.\textsuperscript{443} When applied to the court-ordered therapy cases, judicial use immunity registers as the only accommodation capable of protecting the parent’s privilege against self-incrimination while advancing the compelling state goals of rehabilitating the offender.

\begin{itemize}
\item \textsuperscript{431} See discussion supra part IV.C.
\item \textsuperscript{432} See cases discussed supra part IV.C.
\item \textsuperscript{433} Counselman, 142 U.S. at 585-86.
\item \textsuperscript{434} Kastigar, 406 U.S. at 453.
\item \textsuperscript{435} See Patton, supra note 427, at 502.
\item \textsuperscript{436} See Stone, supra note 427, at 154.
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\item \textsuperscript{441} Id.
\item \textsuperscript{442} Id.
\item \textsuperscript{443} Id.
\item \textsuperscript{444} See discussion supra part V.A.
\item \textsuperscript{445} See supra notes 413-19 and accompanying text.
\item \textsuperscript{446} Interview with Georgeann Stanley, United States Probation Officer, Southern District of Florida (Jan. 21, 1993).
\item \textsuperscript{447} 254 Cal. Rptr. at 883.
\item \textsuperscript{448} Id. at 884-85.
\item \textsuperscript{449} Id. at 885-86.
\item \textsuperscript{450} Id.
\item \textsuperscript{451} Id. at 893.
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been adjudicated.431 Therefore, society's interest in prosecuting crimes is not hindered by a grant of use immunity concurrent to the therapy order.432 Furthermore, even if the breadth of the immunity were to reach to crimes other than the defendant has already been convicted for but for which he or she confessed during court-ordered therapy, use immunity does not bar the government from prosecuting the defendant for those crimes.433 The State may still prosecute, so long as it establishes its case independent of the immune disclosures.434

Moreover, judicial use immunity, when applied to court-ordered therapy does little to hamper prosecutorial discretion.435 Ordinarily, this concern is raised in the context of the government not being able to control its own trial strategy.436 Again, the court-ordered therapy cases are very different from those in which a witness is granted immunity to testify for either side.437 Here, the defendant him or herself is being granted immunity and only after conviction.438 Accordingly, a grant of judicial use immunity to a defendant already tried, does little to hamper prosecutorial discretion.439

Indeed, it has been properly submitted that the judiciary is sometimes in a better position than the executive branch to decide upon a grant of immunity.440 The court has the benefit of hearing from both sides—from the prosecution and the defense—as to whether immunity is proper in each case.441 Whereas the prosecutor has a vested interest in the decision, the court is ideally the neutral arbiter.442 Moreover, the court is the player ultimately responsible for the integrity of the legal system.443 When applied to the court-ordered therapy cases, judicial use immunity registers as the only accommodation capable of protecting the parent's privilege against self-incrimination while advancing the compelling state goals of rehabilitating the offender.

431. See discussion supra part IV.C.
432. See cases discussed supra part IV.C.
433. Counselman, 142 U.S. at 585-86.
436. See Stone, supra note 427, at 154.
437. See, e.g., Sawyer, 799 F.2d at 1506-07; Karas, 624 F.2d at 505.
438. See cases discussed supra part IV.C.
439. See discussion supra part IV.C.
440. See Patton, supra, note 427, at 504.
441. Id.
442. Id.
443. Id.

B. Judicial Use Immunity is a Reasonable Accommodation

Certainly, the ideal remedy would be for the prosecutor's office itself to grant immunity. This would obviate any discussion on separation of powers and the ability of courts to intercede.444 Unfortunately, such an accommodation is not in the cards. The forces operative in the prosecutor's office work against granting immunity to defendants who have nothing to offer in the way of future prosecutions.445 Given their adversarial role, prosecutors "would never grant immunity to a sex offender."446 In order, then, to safeguard the Fifth Amendment, courts must exercise their own supervisory powers.

In re Jessica B.,447 a daughter was removed from her abusive parents subject to periodic review.448 The dependency court stated that, when it reviews the custody of Jessica, one of the things it will require is an admission of the father's guilt during his court-ordered therapy.449 Shortly after the dependency action, the parents had criminal charges brought against them for having had abused Jessica.450 The father, fearing that anything he said during therapy would be used against him in his criminal trial, refused to accept responsibility for the abuse.451 Upon dependency review, the parents were therefore denied any modification of the court's previous order.452

On appeal, the California Court of Appeals held that the father must be given use immunity for any statements he makes during his court-ordered therapy.453 Indeed, it would be a fine thing to first order a person to undergo therapy and to admit his or her guilt, and to then punish the person for doing so.454 The court found that, on these facts, the grant of use "immunity is essential to the constitutional privilege against self-incrimination and facilitates the goal of protecting the best interest of the minor and..."
achieving the reunification of the family at the earliest possible date.\textsuperscript{455} In \textit{Mace v. Amestoy},\textsuperscript{456} the United States District Court for the District of Vermont had found a Fifth Amendment violation in requiring a defendant to admit guilt during court-ordered therapy.\textsuperscript{457} The federal court found that the whole dilemma could have been avoided had the State granted use immunity to the defendant.\textsuperscript{458}

If the state wishes to carry out rehabilitative goals in prosecution by compelling offenders to disclose their criminal conduct, it must grant them immunity from criminal prosecution.

A State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminate the threat of incrimination.\textsuperscript{459}

As the court noted, if a probationer, having been granted immunity, refused to accept responsibility during treatment, it would then be constitutionally permissible to revoke probation.\textsuperscript{460} On the surface, it appears that such defendants are still being penalized for remaining silent. Indeed they are. Yet the Fifth Amendment does not grant an absolute right to keep quiet.\textsuperscript{461} The privilege covers only those statements that may tend to incriminate a witness.\textsuperscript{462} Since these defendants would have been immunized from further prosecution, they no longer bear a constitutional right to remain silent.\textsuperscript{463} "In all such proceedings, 'a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant.'\textsuperscript{464}

\textsuperscript{455} Id. at 893-94; see also Gonzales v. Superior Court, 178 Cal. Rptr. 358, 364 (Cal. 1980) (judicial use immunity relieves "an alleged wrongdoer of the threat of criminal prosecution in exchange for incriminating information which the legislature has deemed to serve some socially desirable policy").

\textsuperscript{456} 765 F. Supp. at 847; see supra pp. 1482-84.

\textsuperscript{457} Mace, 765 F. Supp. at 852.

\textsuperscript{458} Id. at 851-52.

\textsuperscript{459} Id. at 852-53 (notes omitted).

\textsuperscript{460} Id. (dicta).

\textsuperscript{461} Cunningham, 431 U.S. 801, 805 (1977).

\textsuperscript{462} Id.

\textsuperscript{463} See Counselman, 142 U.S. at 560.

\textsuperscript{464} Murphy, 465 U.S. at 426 (quoting Turley, 414 U.S. at 78).
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VI. CONCLUSION

From the courts which have addressed the Fifth Amendment implications of court-ordered therapy, three views have surfaced; first, that the privilege against self-incrimination is not violated when a court requires a confession during court ordered therapy; second, that the privilege is violated in that defendants are faced with a "penalty" for asserting their constitutional rights; and third, that the privilege is violated but that parents in a dependency action must still overcome the assumption that change can only occur with an acceptance of responsibility.

As has been shown, none of these theories pass muster. In order to reach the first result, courts must all but ignore the rule that a defendant cannot be penalized for asserting his or her constitutional rights. To subscribe to the first rule is to neglect the rationale and history of the privilege against self-incrimination. The second approach shows much more respect for the Constitution but may deter sound rehabilitation. Still, in the absence of a reasonable accommodation, the second view must stand. It is the only approach that gives the Fifth Amendment its due. The third line of cases still tramples on the privilege, albeit in a less direct manner. These cases still require defendants to make a choice of borderline constitutionality—either admit to your guilt or prove that you don't need to. This too should not be tolerated if a reasonable accommodation exists.

And it does. By granting use immunity to probationers who must admit their guilt during treatment, courts overcome the constitutional infirmities addressed in the foregoing examples. The author does not suggest that judicial use immunity should be employed whenever it seems

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462. Id.

463. See Counselman, 142 U.S. at 560.


465. See supra part III.

466. In re Welfare of J.W., 415 N.W.2d at 884.
fair or just, but here, it is all but necessary to uphold the sanctity of the Fifth Amendment. If society and the courts have decided to rehabilitate offenders, let them then do so. A grant of judicial use immunity would force probationers to accept responsibility for their crimes, thus placing them on the road to meaningful change. In this context, judicial use immunity may be the only friend the Fifth Amendment can rely upon.

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*Scott Michael Solkoff*
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