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Note, Give Me Liberty or Give Me Silence: Taking a Stand on Fifth Amendment Implications For Court-Ordered Therapy Programs

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NOTES

GIVE ME LIBERTY OR GIVE ME SILENCE: TAKING A STAND ON FIFTH AMENDMENT IMPLICATIONS FOR COURT-ORDERED THERAPY PROGRAMS

INTRODUCTION

> [T]he Fifth Amendment privilege against compulsory self-incrimination . . . can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.[1]

Probation is frequently conditioned on the convicted criminal's satisfactory completion of a rehabilitative therapy program.[2] A primary purpose of the criminal justice system is to protect the public by discouraging recidivism in past offenders.[3] In theory, permanent incarceration best serves this purpose, because a person in jail cannot commit another crime.[4] In the last century, however, the prison pop-

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1 Kastigar v. United States, 406 U.S. 441, 444-45 (1972) (footnotes omitted).

2 *See* Ann A. Holmes, Note, *Alternative Sentencing in Alabama*, 16 LAW & PSYCHOL. REV. 217, 221-22 (1992). Many courts use "intensive supervised probation," which involves increased observation and may be coupled with psychological counseling. *See id.*; *see also* Gail Jones, *The Use and Effectiveness of the Probation Order with a Condition for Psychiatric Treatment in North Wales*, 20 CAMBRIAN L. REV. 63 (1989) (noting that most commentators are enthusiastic about the use of court-ordered therapy programs).

This Note assumes that such therapy programs successfully curb recidivism. *See* COMMITTEE ON GOV'T POLICY, GAP REPORT NO. 137, FORCED INTO TREATMENT: THE ROLE OF COERCION IN CLINICAL PRACTICE (1994) (noting the success of court-ordered therapy in a number of contexts, including for sex offenders); Amicus Brief of American Professional Society on the Abuse of Children Supporting Neither Party at 12, State v. Imlay, 813 P.2d 979 (Mont. 1991), *cert. granted*, 112 S. Ct. 1260, *cert. dismissed*, 113 S. Ct. 444 (1992) (No. 91-687) [hereinafter APSAC Brief] (noting the significant difference in recidivism rates for offenders who complete therapy versus those who do not participate); *see also* W.L. Marshall & H.E. Barbaree, *Outcome of Comprehensive Cognitive-Behavioral Treatment Programs*, *in* HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 363, 379 (W.L. Marshall et al. eds., 1990) [hereinafter HANDBOOK OF SEXUAL ASSAULT] ("Outpatient treatment of sex offenders by cognitive-behavioral procedures . . . seems to be effective."). *But see* Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 27 (1989) (noting the difficulty of drawing conclusions from current studies).

3 *See generally* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 10 (2d ed. 1986) (discussing criminal law's goal of preventing harm to society).

4 This reasoning ignores the prevalence of crime in prison. *See* Hudson v. Palmer, 468 U.S. 517, 526 (1984) (giving statistics on crime in prison).

ulation in the United States has increased dramatically.[5] Overcrowding in jails has forced law enforcement officials to seek alternatives to incarceration.[6] Suspended sentences and probation provide such alternatives, and are often used for nondangerous offenders.[7] Probation, however, does not provide the same certainty of nonrecidivism as incarceration does;[8] therefore, the increased use of probation has corresponded with an increase in court-ordered therapy.[9] In 1978, the Supreme Court recognized that "[a]pproximately a century ago, a reform movement assert[ed] that the purpose of incarceration, and therefore the guiding consideration in sentencing, should be rehabilitation of the offender."[10] This emphasis on rehabilitation[11] has had enormous implications for the mental health profession. The most important consequence has been the growth and diversification of therapy programs ranging from substance abuse counseling to family group therapy to sex offender treatment programs.[12]

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5 *See* Holmes, *supra* note 2, at 217 ("[S]tate and federal prison populations have more than tripled" in the past couple of decades.) *See generally* Benjamin Frank, *The American Prison: The End of an Era*, 43 FED. PROBATION 3 (1979) (arguing that due to the population increase, incarceration can no longer be the primary form of punishment).

6 *See* Holmes, *supra* note 2, at 221-28; *see also* STEVEN R. SMITH & ROBERT G. MEYER, LAW, BEHAVIOR, AND MENTAL HEALTH: POLICY AND PRACTICE 445-48 (1987) (listing alternatives to incarceration).

7 *See* Roberts v. United States, 320 U.S. 264, 272 (1943); ARTHUR W. CAMPBELL, LAW OF SENTENCING 52 (1978); Holmes, *supra* note 2, at 219.

8 *See* Holmes, *supra* note 2, at 221; *see also* Furby et al., *supra* note 2, at 3-4 (noting that in states which emphasize rehabilitation "the prevailing view is that simple incarceration is not a sufficient deterrent for sex offenders." However, because "the overwhelming majority of apprehended sex offenders are not incarcerated or institutionalized at all. . . . probation with mandated treatment . . . is the most common disposition.").

9 *See* Furby et al., *supra* note 2, at 4 ("In response to the increasing demand for sex offender treatment, there has been a proliferation of both public and private outpatient programs.").

10 United States v. Grayson, 438 U.S. 41, 46 (1978); *see* Carol A. Veneziano, *Prison Inmates and Consent to Treatment: Problems and Issues*, 10 LAW & PSYCHOL. REV. 129, 130 (1986). *See generally* LAFAVE & SCOTT, *supra* note 3, at 23-26 (discussing different justifications for punishment and the current emphasis on rehabilitation).

11 In very recent years there has been a decline in the push toward rehabilitation as the primary goal of the criminal justice system. This decline is due to the apparent lack of results from rehabilitative programs and the high cost of administering therapy programs. *See, e.g.*, SMITH & MEYER, *supra* note 6, at 424-25; Justin Brooks, *Addressing Recidivism: Legal Education in Correctional Settings*, 44 RUTGERS L. REV. 699, 702 n.6 (1992) (theorizing that this shift has been prompted by the increase in drug-related crimes); *see also* Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011 (1991) (criticizing the recent rejection of the rehabilitative model of punishment). This Note assumes that, regardless of this shift, rehabilitation still plays a significant role in sentencing.

12 *See generally* HAROLD J. VETTER & LEONARD TERRITO, CRIME AND JUSTICE IN AMERICA 475-81 (1984) (discussing addiction treatment and community correctional centers); Stanley L. Brodsky & Donald J. West, *Life-Skills Treatment of Sex Offenders*, 6 LAW & PSYCHOL. REV. 97 (1981) (comparing different forms of treatment for sexual offenders). The sex offender programs referred to in this Note do not treat violent sex crimes such as rape.

The expansion of these programs has resulted in a proliferation of new forms of treatment, often focusing less on a "cure" than on controlling symptoms. There is a growing

The dramatic expansion of therapeutic sentencing alternatives has disturbing implications for the Fifth Amendment rights of convicted offenders, because cooperation of the patient is a prerequisite to successful therapy.[13] Sex offenders, alcoholics, batterers and child abusers often deny both the commission of an offense and the inappropriateness of their actions.[14] The first step toward rehabilitation, however, is to admit that there is a problem. In criminal law, this translates into an admission of guilt, raising the question of whether the requirement of most therapy programs that a defendant accept responsibility for his actions[15] violates the Fifth Amendment protection against self-incrimination.[16]

To answer this question this Note first discusses a Montana case, *State v. Imlay*,[17] which highlights one of the conflicts that arises between the Fifth Amendment privilege against self-incrimination and the need of the criminal justice system for effective rehabilitation. Part II identifies the requirements of a basic Fifth Amendment claim. Part III examines two examples of Fifth Amendment balancing prior to conviction. Additionally, it discusses various alternatives to the balancing approach which have been taken in termination of parental rights cases by courts seeking to avoid the conflict between court-ordered therapy and the Fifth Amendment privilege against self-incrimination. Part IV explores the application of the Fifth Amendment in the post sentencing phase of a criminal proceeding. This note proposes that a state's legitimate interest in compelling testimony for reasons other than amassing evidence for a criminal prosecution should be balanced against the defendant's interest in asserting the Fifth Amendment privilege. After a verdict of guilty, this balancing may

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belief among mental health professionals that sexual dysfunction such as child molestation cannot be cured. Rather, the perpetrators can be taught to recognize signs of the problem and control their impulses. The present psychological approach uses cognitive behavioral therapy to prevent recidivism. *See* APSAC Brief, *supra* note 2, at 10-11; *see also* William D. Pithers, *Relapse Prevention with Sexual Aggressors*, *in* HANDBOOK OF SEXUAL ASSAULT, *supra* note 2, at 343, 346 (discussing self-management skills of sex offenders as an alternative goal of therapy); William D. Murphy, *Assessment and Modification of Cognitive Distortions in Sex Offenders*, *in* HANDBOOK OF SEXUAL ASSAULT, *supra* note 2, at 331 (describing self-modification training).

13 *See, e.g.*, Marshall & Barbaree, *supra* note 2, at 374 (noting that men who refused to participate in treatment because of a failure to admit guilt "recidivated at a rate that was, if anything, slightly higher than the untreated admitters").

14 *See* APSAC Brief, *supra* note 2, at 13; Jeffrey A. Klotz et al., *Cognitive Restructuring Through Law: A Therapeutic Jurisprudence Approach to Sex Offenders and the Plea Process*, 15 U. PUGET SOUND L. REV. 579, 581 nn.7-9 (1992).

15 This Note uses the phrase "acceptance of responsibility" interchangeably with "admission of guilt."

16 The Fifth Amendment states in relevant part: "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

17 813 P.2d 979 (Mont. 1991), *cert. granted*, 112 S. Ct. 1260, *cert. dismissed*, 113 S. Ct. 444 (1992).

come out in favor of lessening the extent of the constitutional protection with respect to particular inquiries. Finally, this Note analyzes the requirements of rehabilitation schemes in the context of two recent Supreme Court cases which show that the elements needed to trigger a Fifth Amendment claim may be present in cases where the protection is not allowed to operate.[18] In such situations the government's interest in imposing a requirement of therapy outweighs a defendant's interest in the Fifth Amendment protections.

I
THE CONFLICT IDENTIFIED

In *State v. Imlay*,[19] the District Court of Cascade County found the defendant guilty of sexually abusing a minor and sentenced him to five years in jail.[20] The judge imposed a suspended sentence, conditioning Imlay's probation on the satisfactory completion of a therapy program for sex offenders.[21] The therapy program required Imlay to accept responsibility for his actions. When Imlay asserted his innocence, as he had throughout the trial, the therapist refused to pursue treatment.[22] The state prosecutor's office then petitioned for revocation of the suspended sentence on the ground that Imlay had violated the terms of his probation.[23]

The district court revoked Imlay's probation and reinstated the original five year sentence.[24] During the hearing, the court gathered evidence from the directors of two sexual offender treatment programs.[25] It found that no outpatient therapy program would accept a person who refused to admit committing a sexual assault. Moreover, the Montana State Prison ran the only available inpatient program.[26] The court determined that a repeat offense was improbable, but felt constrained by the jury's guilty verdict and thus decided to revoke Imlay's probation.[27]

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18 This Note draws a distinction between the availability of the Fifth Amendment privilege against self-incrimination and its applicability. Thus, there are some situations that meet the requisite criteria for triggering the privilege, but, because the balance of interests comes out in the government's favor, the constitutional protection is limited.

19 813 P.2d 979 (Mont. 1991), *cert. granted*, 112 S. Ct. 1260, *cert. dismissed*, 113 S. Ct. 444 (1992).

20 *Id.* at 980.

21 *Id.* at 981.

22 *Id.*

23 Joint Appendix at 24, State v. Imlay, 813 P.2d 979 (Mont. 1991), *cert. granted*, 112 S. Ct. 1260, *cert. dismissed*, 113 S. Ct. 444 (1992) [hereinafter Joint Appendix].

24 *Id.* at 36.

25 *Id.* at 34-35.

26 *Id.* at 35.

27 *Id.* at 36.

The Montana Supreme Court vacated the sentence and remanded the case to the district court, holding that the Fifth Amendment prohibits increasing a defendant's sentence for his refusal to confess his guilt.[28] The State of Montana, joined by seventeen other states, petitioned the Supreme Court for certiorari on the ground that the Fifth Amendment was not applicable because there was no further threat of prosecution.[29] In response, Imlay claimed that he feared a criminal prosecution for perjury and that the district court had penalized him for exercising his Fifth Amendment right not to incriminate himself.[30] This Note argues that the decision of the Montana Supreme Court is erroneous. Although the court correctly held that Fifth Amendment protections are available in the probationary context, it erred in assessing the specific application of those protections.

II

REQUIREMENTS FOR A FIFTH AMENDMENT CLAIM

The Fifth Amendment has its origins in the English common law,[31] from which it was later incorporated into the American Bill of Rights. The framers, "[w]hile deeply committed to perpetuating a system that minimized the possibilities of convicting the innocent, . . . were not less concerned about the humanity that the fundamental law

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28 *Imlay*, 813 P.2d at 985. On remand, the district court resentenced Imlay to five years in prison, noting that, had it known of Imlay's unacceptability into a therapy program, it would not have allowed a suspended sentence in the first place. Joint Appendix, *supra* note 23, at 41.

29 *See* Amicus Brief Submitted by the State of Vermont on Behalf of the States of Alaska, Arizona, Delaware, Kansas, Kentucky, Louisiana, Michigan, Nevada, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Utah and Virginia in Support of Petitioner, *Imlay*, 813 P.2d 979 (Mont. 1991), *cert. granted*, 112 S. Ct. 1260, *cert. dismissed*, 113 S. Ct. 444 (1992) (No. 91-687) [hereinafter Brief of States in Support of Petitioner]. The American Professional Society on the Abuse of Children filed a brief supporting neither party. APSAC Brief, *supra* note 2. Additionally, the United States Department of Justice filed a brief on behalf of the petitioner.

30 Brief for Respondent, at 9-10 *Imlay*, 813 P.2d 979 (Mont. 1991), *cert. granted*, 112 S. Ct. 1260, *cert. dismissed*, 113 S. Ct. 444 (1992). The Supreme Court granted certiorari and heard oral arguments in the case. However, it later concluded that any opinion it would render would be merely advisory and that the petition should have been dismissed. Montana v. Imlay, 113 S. Ct. 444 (1992) (dismissal of certiorari because improvidently granted). Mr. Imlay would either be released on parole, or serve his complete sentence regardless of the decision of the United States Supreme Court; thus a ruling would not have a substantive impact on the rights of either party. *See id.* at 444-45 (Stevens, J., concurring). Justice White dissented from the decision, claiming that the importance of the issue, and the conflict among the lower courts, mandated a consideration of the case. *Id.* at 445 (White, J., dissenting).

31 *See generally* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 368 (1968); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE (2d ed. 1992). At English common law, there was an oath *ex officio* stating *"nemo teneture seipsum prodere"* (no man is bound to produce himself). When the Bill of Rights incorporated the maxim, it varied the language to cover any forced self-incrimination. *See id.* at § 8.14.

should show even to the offender."[32] Thus, the protections found in the Fifth Amendment are meant to apply to the guilty and the innocent.

Several concerns guide the application of the Fifth Amendment. The Supreme Court, in *Murphy v. Waterfront Commission*,[33] listed a number of these considerations:

> our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play . . . ; our respect for the inviolability of the human personality and of the right of each individual [to privacy] . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."[34]

This does not mean, however, that the Fifth Amendment is an absolute right. The courts have never interpreted the amendment to prevent the use of nontestimonial incriminating evidence or voluntary statements.[35] Once a court establishes that the Fifth Amendment is implicated in a particular situation, the court must still determine the extent of its protection. This Note proposes that such a determination should take into account the various policies behind the amendment and balance the individual's interest against the government's.[36] In some situations, such as the preconviction context, the balance will strongly favor applying the full protection afforded by the Fifth Amendment.[37] After a verdict of guilty, however, full protection may

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32 LEVY, *supra* note 31, at 432.

33 378 U.S. 52 (1964).

34 *Id.* at 55 (quoting Quinn v. United States, 349 U.S. 155, 162 (1955)) (footnotes omitted). The first concern observes the importance of not presenting a defendant with an impossible choice; the second reflects the type of system our society favors; the third recognizes the possible abuses of police power; the fourth concern notices that the unequal balance of power in favor of the government would lead many defendants to plead guilty in order to avoid harsh penalties (Plea bargaining, although it raises these same concerns, is now allowed in recognition of its usefulness in the settlement of cases without trial. Bordenkircher v. Hayes, 434 U.S. 357 (1978)); the fifth recognizes an individual's right to privacy; the sixth focuses on the fear of false guilty pleas; and the seventh is an acknowledgment that our society views "the determination of guilt or innocence by just procedures" to be "more important than punishing the guilty." LEVY, *supra* note 31, at 432.

35 *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 304-05 (1985).

36 *See* discussion *infra* part IV.

37 A court may be able to balance in the presentencing context; however, the individual's interest in most cases will be so strong as to override the government's interest. Although the analysis in this Note is applicable to the presentencing situation, there are different considerations at various stages in the trial process. Accordingly, this Note concentrates on the application of a balancing test to the postsentencing phase of a criminal trial.

not apply, and the court can weigh the scope of the Amendment against society's interest in a workable criminal justice system.[38]

A. Incrimination

The Fifth Amendment privilege against self-incrimination has two parts.[39] First, it guarantees every person the right to remain silent when faced with a reasonable fear of incrimination in a later criminal proceeding. Second, it protects against the use of statements that are the result of governmental coercion. This section focuses on the first part of the privilege against self-incrimination. The following section addresses the exclusion of coerced testimony.

1. *Real Fear of Incrimination*

For the privilege against self-incrimination to attach, the risk of future incrimination must not merely present " 'imaginary and insubstantial' hazards of incrimination," but "rather . . . 'real and appreciable' risks."[40] If the risk is too speculative, the Fifth Amendment's protections do not apply.[41] The requirement that the fear not be imaginary focuses on the risk of *incrimination*, not prosecution. Prosecution need only be possible; it does not actually have to happen, nor does it have to result in a conviction.[42] Furthermore, the amendment "does not distinguish degrees of incrimination."[43] Thus, if the fear of incrimination is real but minor, the amendment's protections apply.

Although the right against self-incrimination applies to defendants in all proceedings, the resulting incrimination must relate to a criminal charge. Because a probation revocation hearing is not a criminal proceeding, the Fifth Amendment does not protect against the use of coerced statements at such hearings, nor is a person privileged to remain silent when her only fear is revocation of probation.[44]

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38 *See* discussion *infra* part IV.

39 *See supra* note 16 and accompanying text.

40 Minor v. United States, 396 U.S. 87, 98 (1969) (deciding that the risk presented by the registration requirement for narcotics dealers was not substantial because it was unlikely that illegal sales would be recorded).

41 *Id.* at 98.

42 Minor's fear was unreasonable because the fear of incrimination was not realistic. *Minor*, 396 U.S. at 93. If the incriminating statements were likely to be recorded, the Fifth Amendment would apply whether or not the government tended to prosecute the offense. This distinction becomes important later in the context of *Imlay*—even though the government may not often bring prosecutions for perjury based upon evidence acquired during therapy, the fear of incrimination is still real and substantial. *See infra* part IV.B.2.

43 Miranda v. Arizona, 384 U.S. 436, 476 (1966).

44 *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973). In *Gagnon*, the defendant was arrested for burglary while on probation. His probation was revoked without a hearing. The Court held that, although Mr. Scarpelli was entitled to a hearing under the same conditions as required for the revocation of parole in Morrissey v. Brewer, 408 U.S. 471 (1972), such a hearing is not considered a criminal proceeding. The Court emphasized

A probationer, nevertheless, may fear further criminal prosecution for the activities resulting in the revocation of probation. Consequently, the Supreme Court has held that:

> [t]he Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.[45]

The following analysis focuses on the postsentencing context and addresses two concerns: the right to remain silent in the face of questions related to the original criminal charge, and questions related to a separate criminal charge.

a. *Fear of incrimination related to the original criminal prosecution*

Questions put to a postconviction, pre-appeal defendant about the crime for which she was convicted raise Fifth Amendment concerns. The Double Jeopardy Clause[46] prohibits a second trial for a single crime, so there is no fear of another, identical criminal prosecution.[47] The convicted defendant, however, may still seek postconviction relief and therefore fear incrimination after the conclusion of the initial trial.[48] In *United States v. DiFrancesco*[49] the Supreme Court noted that a jury verdict of *not guilty* is final, although the pronouncement of a *sentence* is not.[50] A *conviction* is final when the time for appeal has elapsed and a petition for certiorari either has been denied or no longer can be brought on the issue.[51] Therefore, when the questions relate to the original criminal prosecution, a criminal whose conviction is deemed final is not privileged to remain silent.[52]

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the "informal nature of the proceedings and the absence of technical rules of procedure or evidence." *Gagnon*, 411 U.S. at 786-87. Additionally, the hearing board is not in the role of a judge focusing on factfinding and punishment, but is concerned instead with the rehabilitative needs of the offender. *Id.* at 787-88.

45 Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

46 U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

47 *See, e.g.*, United States v. Halper, 490 U.S. 435, 447-48 (1989) (holding that a later *civil* proceeding can violate the clause if the judgment serves as a penalty rather than mere restitution).

48 Such relief may take the form of a direct appeal, a motion for a second trial based upon new evidence, or a petition for a writ of habeas corpus.

49 449 U.S. 117 (1980).

50 *Id.* at 132.

51 Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987) (citing United States v. Johnson, 457 U.S. 537, 542 n.8 (1982)).

52 If the questions would incriminate the defendant in another charge, then he would be privileged to remain silent. Alternatively, if the inquiries focus only on actions for which he has already been tried, there would be no possibility of further prosecution, and thus no fear of incrimination.

Even before the convicted criminal has exhausted all avenues of appeal, the state can impose a sentence.[53] At this point it is the defendant who must weigh the risks and benefits of remaining silent—the burden switches to him to show his innocence.[54] The Fifth Amendment allows a defendant to remain silent before a conviction is final, but it does not allow a person to escape a valid sentence. Thus, a convicted criminal may not avoid a particular sentence by maintaining his innocence and claiming that the protection afforded by the Fifth Amendment excuses his lack of proof.[55] This does not mean that a state can penalize a defendant for continued silence. It means that the state can impose an appropriate sentence for the crime. In those cases where the Fifth Amendment protects a defendant's silence, the state can still compel statements by granting immunity from their use.

b. *Fear of incrimination related to a separate criminal charge*

A more difficult Fifth Amendment problem is presented when a convicted criminal fears prosecution for a separate criminal charge. For example, in a probation revocation proceeding, a prosecutor might ask the defendant questions relating to a crime, such as burglary, which she was suspected of committing while on probation. Her answers to the questions may result not only in the revocation of probation, but also in a separate criminal prosecution for burglary. However, a convicted defendant retains some Fifth Amendment protection. For example, in *Minnesota v. Murphy*,[56] the Court stated:

> A defendant does not lose [the] protection [of the Fifth Amendment] by reason of his conviction of a crime; notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted.[57]

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53 Some sentences are stayed pending appeal, for example, death sentences. In other situations, however, the government's interest in protecting the public allows the state to incarcerate a defendant who is waiting to appeal.

54 *See, e.g.*, Delo v. Lashley, 113 S. Ct. 1222, 1226 (1993) ("Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears."). This is not to say that the government no longer has the burden to prove that the process was valid. Appeals which result in acquittal on a technicality are not proceedings to determine guilt or innocence. Although a defendant has to prove innocence after a verdict of guilty, the government still has the responsibility of showing that the verdict was obtained after a constitutionally valid trial.

55 *See* United States v. Rylander, 460 U.S. 752, 758 (1983) (observing that the Fifth Amendment "has never been thought to be in itself a substitute for evidence that would assist in meeting a burden of [proof]").

56 465 U.S. 420 (1984).

57 *Id.* at 426.

Because a convicted criminal does not lose all claims to the protections of the Fifth Amendment, if a state wishes to elicit answers relating to separate criminal activity, it must provide immunity from subsequent prosecution. This is the clearest application of the Fifth Amendment in the postconviction context.

In many cases, however, the inquiries are not this straightforward. For example, a court may impose general conditions of probation instead of requiring answers to specific questions that relate to guilt. The purpose of these conditions is not to amass evidence for a later criminal prosecution, but to facilitate rehabilitation. Although such conditions may lead to future incrimination, they are not impermissible.[58] Requirements that a convicted criminal reveal financial information,[59] answer his probation officer truthfully,[60] or successfully complete a therapy program[61] are examples of general probation conditions that the courts have upheld as constitutional even though such conditions might reveal incriminating evidence.[62]

2. *Fear of Prosecutions for Perjury: Beyond the Scope of Immunity Statutes*

Immunity statutes provide "a reconciliation of the well-recognized policies behind the privilege of self-incrimination . . . , and the need of the State, as well as the Federal Government, to obtain information 'to assure the effective functioning of government.' "[63] They allow the government to compel a person to speak, but prevent the use of the statements in future prosecutions. Courts construe the immunity broadly:[64] it should "in all respects commensurate with the protection guaranteed by the constitutional limitation."[65] In other words, statements which would have been excluded under the Fifth Amendment must also be excluded when elicited under a grant of immunity.

One potential problem in this area involves prosecutions for perjury. Immunity statutes do not apply to prosecutions for perjury, the

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58 *See* discussion *infra* part IV.

59 United States v. Pierce, 561 F.2d 735 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978).

60 Minnesota v. Murphy, 465 U.S. 420 (1984). *See* discussion *infra* part IV.B.1.

61 State v. Imlay, 813 P.2d 979 (Mont. 1991), *cert. granted*, 112 S. Ct. 1260, *cert. dismissed*, 113 S. Ct. 444 (1992). *See* discussion *infra* part IV.B.2.

62 This Note deals with these situations in more detail in part IV *infra*.

63 Lefkowitz v. Turley, 414 U.S. 70, 81 (1973) (footnotes omitted) (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 93 (1964) (White, J., concurring)).

64 *See, e.g.*, Reina v. United States, 364 U.S. 507 (1960); Ullmann v. United States, 350 U.S. 422 (1956), *overruled by* Kastigar v. United States, 406 U.S. 441 (1972).

65 Glickstein v. United States, 222 U.S. 139, 141 (1911). *See also* New Jersey v. Portash, 440 U.S. 450, 453 (1979) (holding that the immunity granted by state statutes "must be at least coextensive with the privilege afforded by the Fifth and Fourteenth Amendments").

rationale being that the courts have an inherent power to punish false testimony.[66] This does, in fact, comport with the Constitution because the Fifth Amendment does not entitle a defendant to lie, but merely protects him if he chooses to remain silent.[67] If a defendant chooses to speak, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination."[68] In *United States v. Apfelbaum*,[69] the Supreme Court noted that the federal immunity statute's express exception allowing prosecutions for perjury[70] did not violate the Fifth Amendment.[71] The Court interpreted the privilege as not protecting against proceedings to substantiate charges of perjury.[72] Moreover, the Court held that enhancing a sentence for willful perjury during trial does not violate the Fifth Amendment.[73] The Court has stated that "a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more threaten-

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66 *Glickstein*, 222 U.S. at 141.

67 *See* United States v. Knox, 396 U.S. 77 (1969). Knox was charged with making false statements on his wagering registration form. The Court held that despite the fact that the Fifth Amendment would bar the use of *truthful* statements in the registration in a later criminal prosecution, it would not protect falsehoods. *Id.* at 82.

68 Jenkins v. Anderson, 447 U.S. 231, 238 (1980) (quoting Brown v. United States, 356 U.S. 148, 156 (1958)).

69 445 U.S. 115 (1980).

70 18 U.S.C. § 6002 (1988).

71 *Apfelbaum*, 445 U.S. at 126.

72 *Id. See generally* 70 C.J.S. *Perjury* § 32 (1987) (discussing that there is no "right" to commit perjury).

73 United States v. Dunnigan, 113 S. Ct. 1111 (1993) (holding that the trial court may enhance sentence of a defendant convicted of a drug-related offense for willful perjury that occurred when the defendant testified in her own defense). The Supreme Court emphasized that the district court must make specific findings to support all elements of a perjury violation. *See id.* at 1118. No standard, however, was articulated to determine the sufficiency of the evidence. It appears to be possible for the trial court to simply rest on the same evidence which was used to convict the defendant on the original charge. In other words a defendant who claims innocence under oath can be convicted of perjury simply on the basis that the verdict was guilty. Previous cases had held that the privilege mandates that a sentence cannot be augmented because of an unsubstantiated belief that a defendant committed perjury. *See, e.g.*, Poteet v. Fauver, 517 F.2d 393 (3rd Cir. 1975); Scott v. United States, 419 F.2d 264, 269 (D.C. Cir. 1969).

This approach appears to place more weight on the need of the criminal system to prevent false testimony than the individual's right to testify on his or her own behalf. Because a defendant convicted of another offense may have his sentence enhanced based on a claim of perjury simply because the final verdict in the case is guilty, defendants may be less likely to testify on the their own behalf. This is an example of balancing the Fifth Amendment protections against society's interest in an effective criminal system. *See* discussion *infra* parts III & IV. Although this Note focuses on the government's interest in rehabilitation, *Dunnigan* seems to allow other objectives of the criminal system, such as the need for truthful testimony, to take precedence over the protections afforded by the Fifth Amendment.

ing to society and less deserving of leniency than a defendant who does not so defy the trial process."[74]

In summary, a defendant must establish the existence of a real fear of criminal incrimination for the first part of the Fifth Amendment privilege to apply. The adequacy of this fear may depend on whether the incrimination is related to the original criminal charge or to a different prosecution. When the government grants immunity, the fear is extinguished and the Fifth Amendment does not apply because statements made under the grant cannot be used against the person in a criminal prosecution. However, if a person previously has made statements under oath, subsequent inconsistent statements, even if made under a grant of immunity, can be used in a criminal prosecution for perjury.

B. Exclusion of Coerced Testimony

The second part of the privilege against self-incrimination prevents the use of statements acquired through governmental compulsion.[75] The amendment's protections are not applicable to voluntary statements and are generally not self-executing—they must be asserted.[76] There is no need for a knowing and intelligent waiver in most cases.[77] In some situations, however, the mere failure to claim the privilege does not constitute a waiver. In these cases, special circumstances lead the courts to assume that compulsion is present and to allow defendants automatic immunity from the use of the statements in later prosecutions. The following three sections discuss situations in which the Fifth Amendment protections are self-executing.

1. *Incrimination by Assertion of the Privilege*

When the claim of the privilege itself would result in incrimination, the courts treat the privilege as self-executing. In *Hoffman v. United States*,[78] the Supreme Court held that "[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."[79] This situation is most evident in the context of federal income and excise taxation of gamblers. The mere act of refusing to file a tax return and claiming the privilege

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74 *Dunnigan*, 113 S. Ct. at 1118.

75 *See* Garner v. United States, 424 U.S. 648, 653 (1976).

76 *See* United States v. Kordel, 397 U.S. 1, 7-10 (1970) (holding that a person can lose the privilege simply by failing to claim it).

77 *See id.*

78 341 U.S. 479 (1951).

79 *Id.* at 486-87.

incriminates the taxpayer. Consequently, the Court has held that merely failing to file triggers Fifth Amendment protections.[80]

The privilege does not apply, however, when the government has a legitimate regulatory interest, unrelated to a criminal prosecution, in compelling information. For example, in *California v. Byers*[81] the Supreme Court determined that a California statute requiring all automobile drivers involved in an accident to stop and provide basic identifying information does not violate the Fifth Amendment.[82] The Court found that divulging one's name and address is not sufficiently incriminating to invoke the Fifth Amendment's protection.[83] The Court also noted that the statute was regulatory, not criminal, in nature and thus did not implicate the constitutional protection.[84] The Court stated that "tension between the State's demand for disclosures and the protection of the right against self-incrimination . . . must be resolved in terms of balancing the public need . . . and the individual claim."[85]

2. *Custodial Interrogation*

The Fifth Amendment protections are also self-executing in certain cases of "custodial interrogation." For example, *Miranda v. Arizona*[86] established procedural safeguards for defendants who are questioned while in police custody.[87] The Supreme Court concluded that under the psychological pressures of interrogation during custody, suspects may provide statements they would otherwise have refused to furnish.[88] Therefore, in such contexts, suspects must be told of their constitutional rights. Statements made in the absence of such

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80 *See* Mackey v. United States, 401 U.S. 667 (1971); Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968). *See generally* Joseph N. Laplante, Note, *Self Incrimination on Income Tax Returns: A Compelling Dilemma*, 43 TAX LAW. 225 (1989) (identifying difficulties with the current system).

81 402 U.S. 424 (1971).

82 *See id.*

83 *Id.* at 431.

84 *Id.* at 430. This is an example of pre-indictment balancing. *See* discussion *infra* part III.

85 *Id.* at 427.

86 384 U.S. 436 (1966). A full analysis of *Miranda*, and the jurisprudence surrounding it, is beyond the scope of this Note.

87 Prior to *Miranda*, the courts inquired as to whether a statement was voluntary or involuntary. *See* Yale Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the "Old" Voluntariness Test*, 65 MICH. L. REV. 59 (1966) (asserting the ineffectiveness and unworkability of the old voluntariness test). *See generally* 2 LAFAVE & ISRAEL, *supra* note 31, at § 6.2 (1992) (discussing the test for voluntariness).

The Supreme Court set out the standard for voluntariness in Procunier v. Atchley, 400 U.S. 446, 453 (1971). Although *Miranda* now covers many Fifth Amendment situations, the voluntariness standard is still applicable outside the custodial context. *See, e.g.*, Withrow v. Williams 113 S. Ct. 1745 (1993); Colorado v. Connelly, 479 U.S. 157 (1986).

88 *Miranda*, 384 U.S. at 448-49.

warnings may not be used in a subsequent criminal prosecution.[89] Investigators must provide such warnings whenever a person's "freedom of action is curtailed in any significant way."[90] Once outside the police setting, however, the parameters of the exception are unclear. Later cases have narrowed the holding in *Miranda*,[91] and the Supreme Court has been reluctant to expand its scope into the probationary context.[92]

3. *The Penalty Situations*

The final situation in which a court will presume compulsion occurs when a person is given a choice between either exercising the Fifth Amendment privilege and being penalized, or waiving the privilege and incriminating himself. Not all sanctions are considered penalties for Fifth Amendment purposes. The Supreme Court in *Garrity v. New Jersey*[93] held that civil sanctions are enough to trigger Fifth Amendment protection—the question is simply whether the defendant has been deprived of his free choice to admit, deny or refuse to answer.[94] In *Lefkowitz v. Turley*[95] the Court stated that a "waiver secured under threat of substantial economic sanction cannot be termed voluntary."[96] The Supreme Court has also found the threat of loss of employment to be a penalty.[97]

In *Thomas v. United States*,[98] the Fifth Circuit held that increasing a defendant's sentence because he would not plead guilty is a penalty and violates the Constitution.[99] After pronouncing a guilty verdict, the sentencing judge gave the defendant an ultimatum: he could confess to the crime and possibly face a reduced sentence, or he could maintain his innocence and face the maximum sentence for bank robbery.[100] Thomas refused to confess and the court imposed the maxi-

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89 *See id.*

90 *Id.* at 467.

91 *See, e.g.*, New York v. Quarles, 467 U.S. 649, 651 (1984) (establishing the "public safety exception" to *Miranda* and noting that "overriding considerations of public safety [can] justify [an] officer's failure to provide *Miranda* warnings"); Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) (defining interrogation as "express questioning or its functional equivalent"); Michigan v. Tucker, 417 U.S. 433 (1974) (allowing a defendant to waive his constitutional rights after only a partial warning).

92 *See* discussion *infra* part IV.B.1.

93 385 U.S. 493 (1967).

94 *See id.* (finding application of Fifth Amendment rights in case in which police officers convicted of conspiracy were given the choice either to incriminate themselves or to forfeit their jobs).

95 414 U.S. 70 (1973).

96 *Id.* at 82-83.

97 *See* Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280 (1968).

98 368 F.2d 941 (5th Cir. 1966).

99 *Id.* at 946.

100 *Id.* at 942.

mum sentence.[101] In holding the district court's actions unconstitutional, the Fifth Circuit pointed out that "Thomas had not been finally and irrevocably adjudged guilty."[102] Thus, if he confessed, he would have been hurting his chances of success on appeal. The choice between either maintaining his innocence or receiving a lighter sentence violated the defendant's Fifth Amendment rights. Ten years later, in *United States v. Wright*,[103] the same court reaffirmed this idea, stating that "[a] defendant does not lose his right to appeal or to continue to assert his innocence simply because the verdict of the jury is guilty."[104]

The majority of other circuits follow the *Thomas* court's reasoning, holding that a threat to increase a defendant's sentence if he will not admit his guilt is unconstitutional.[105] The Ninth Circuit in *Gollaher v. United States*,[106] however, declined to follow the rationale of *Thomas* and applied a balancing test,[107] emphasizing the importance of rehabilitation over the defendant's right to maintain his innocence after conviction.[108] The court reasoned that when a criminal is unwilling to take the first step toward rehabilitation—acceptance of responsibility—the judge may impose a stricter sentence.[109]

Almost twenty years later, in *United States v. Mourning*,[110] the Fifth Circuit upheld the constitutionality of the *Federal Sentencing Guideline*'s two point reduction for "acceptance of responsibility."[111] For each

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101 *Id.*

102 *Id.* at 945.

103 533 F.2d 214 (5th Cir. 1976).

104 *Id.* at 216.

105 *See, e.g.*, United States v. Kovic, 830 F.2d 680, 691 (7th Cir. 1987), *cert. denied*, 484 U.S. 1044 (1988); United States v. Espinosa, 771 F.2d 1382, 1404 (10th Cir.), *cert. denied*, 474 U.S. 1023 (1985); United States v. Roe, 670 F.2d 956, 973 (11th Cir. 1982), *cert. denied*, 459 U.S. 856 (1982); United States v. DiRusso, 535 F.2d 673, 674 (1st Cir. 1976); United States v. Coke, 404 F.2d 836, 847 (2d Cir. 1968).

106 419 F.2d 520 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969).

107 *See* discussion *infra* part IV for a more detailed analysis of the application of a balancing test after conviction.

108 *See Gollaher*, 419 F.2d at 530.

109 *Id.* A defendant who admits guilt is a better candidate for rehabilitation than one who refuses to accept responsibility for his actions. *See supra* note 13 and accompanying text.

110 914 F.2d 699 (5th Cir. 1990).

111 *Id.* at 705-07 (discussing U.S. SENTENCING COMM'N GUIDELINES MANUAL § 3E1.1 (1989) [hereinafter U.S.S.G.]. Although the circuits agree about the constitutionality of § 3E1.1, they do not agree as to its application. The First, Second and Ninth Circuits hold that a defendant need only accept responsibility as to the offenses charged. However, the Fourth, Fifth and Eleventh Circuits hold that the sentencing court has discretion to take into account all of the circumstances in determining the defendant's acceptance of responsibility. *See* Kinder v. United States, 112 S. Ct. 2290 (1992) (White, J. dissenting from denial of certiorari) (identifying the conflict between the circuits); United States v. Frierson, 945 F.2d 650 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1515 (1992); United States v. O'Neil, 936 F.2d 599 (1st Cir. 1991); United States v. Oliveras, 905 F.2d 623 (2d Cir. 1990); United States v. Gordon 895 F.2d 932 (4th Cir.), *cert. denied*, 498 U.S. 846 (1990); United States v.

crime, the guidelines provide for the calculation of a base offense level.[112] A court may then consider aggravating and mitigating factors and adjust the offense level accordingly.[113] In practice there is no substantive difference between penalizing a defendant for maintaining his innocence by refusing to reduce his sentence and rewarding a defendant who accepts responsibility by indirectly decreasing his prison term.[114] When trying to make a distinction, courts often focus on the purpose of sentencing, noting the difference between actions engaged in for deterrent or rehabilitative purposes and those used as punitive measures.[115] If the purpose of sentencing is exclusively retributive, there is no reason to lighten a criminal's sentence for accepting responsibility.[116] If the purpose of sentencing is at least partially rehabilitative, however, courts should consider the criminal's acceptance of responsibility in determining the sentence.[117]

The emphasis in the postsentencing context should not be on the penalty-leniency distinction. The availability of the Fifth Amendment in a particular circumstance should depend instead upon the purpose of the action or inquiry that raised constitutional concerns. This should diminish the number of inconsistencies generated by the penalty-leniency line and clarify the application of the privilege. When a court imposes an increased sentence as a punitive measure it is likely to violate the Fifth Amendment. In contrast, when the court's reasons for varying the length of incarceration are related to rehabilitative or other legitimate goals of the criminal system besides punishment, the

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Mourning, 914 F.2d 699 (5th Cir. 1990); United States v. Gonzalez, 897 F.2d 1018 (9th Cir. 1990); United States v. Rogers, 921 F.2d 975 (10th Cir.), *cert. denied*, 498 U.S. 839 (1990); *See also* United States v. Henry, 883 F.2d 1010 (11th Cir. 1989).

112 *See* U.S.S.G. § 3E1.1.

113 *See id.*

114 *See* John C. Coffee, Jr., *"Twisting Slowly in the Wind": A Search for Constitutional Limits on Coercion of the Criminal Defendant*, 1980 SUP. CT. REV. 211, 218 (questioning whether leniency can be distinguished from a penalty in the Fifth Amendment context).

115 *See* United States v. Halper, 490 U.S. 435, 448-49 (1989) (holding that a subsequent civil prosecution can violate the Double Jeopardy Clause when the proceedings are not designed to be remedial but seek to impose punitive sanctions instead); Allen v. Illinois, 478 U.S. 364 (1986) (distinguishing between information gathered for therapeutic purposes and that used for a criminal prosecution); Agustin v. Quern, 611 F.2d 206, 211 (7th Cir. 1979) (holding that the constitutional prohibition against ex post facto laws only applies to the imposition of punishment, and because laws designed to protect the public are not punitive, they are not barred). The Fifth Amendment itself draws a distinction between civil and criminal prosecutions, the former being primarily restitutionary and the latter involving punitive measures.

Section 3E1.1's purpose is to recognize "the increased potential for rehabilitation among those who feel and show true remorse." United States v. Belgard, 694 F. Supp. 1488, 1497 (D. Or. 1988), *aff'd sub nom.*, United States v. Summers, 895 F.2d 615 (9th Cir.), *cert. denied*, 498 U.S. 959 (1990).

116 *See generally* LAFAVE & SCOTT, *supra* note 3, at 25-27 (discussing theory of retribution).

117 *See supra* note 13 and accompanying text.

defendant's constitutional protections should be balanced against the government's interest. This model concedes that the sentencing differences which result from a defendant's acceptance or denial of responsibility create coercive pressures. Yet such compulsion cannot be thought to always violate the Fifth Amendment, because a workable criminal system must be able to take into account a defendant's suitability for rehabilitation.

III

BALANCING THE FIFTH AMENDMENT IN THE PRECONVICTION CONTEXT

This Part analyzes preconviction situations in which Fifth Amendment concerns are implicated, but the courts have held that there is no violation of the privilege. By examining preconviction situations in which the courts have engaged in implicit balancing, this Note shows that the application of the Fifth Amendment is not absolute. This Note also argues that the courts should apply a balancing test which takes into account both society's interest in maintaining effective law enforcement and the individual's interest in applying the Fifth Amendment privilege.

Although it did not list specific factors to be considered, the Supreme Court explicitly referred to the use of a balancing test in two Fifth Amendment cases. In *Lefkowitz v. Turley*[118] the Court recognized the state's strong interest in questioning its employees, but noted that "claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well."[119] Five years later in *New Jersey v. Portash*,[120] the Court held that balancing was impermissible in cases in which testimony was given in response to a guarantee of immunity.[121] Despite these comments, the Court has not completely refuted the application of a balancing test. This Note argues that although the courts have not explicitly used a balancing test in conjunction with the Fifth Amendment privilege against self-incrimination, they have done so implicitly.[122] This section identifies cases in which courts have weighed the relevant concerns and allowed Fifth Amendment protections to yield to societal interests in effective law enforcement.

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118 414 U.S. 70 (1973).

119 *Id.* at 78.

120 440 U.S. 450 (1979).

121 *Id.* at 459. The Court held that because the situation involved "the constitutional privilege against compulsory self-incrimination in its most pristine form," it was inappropriate to consider the government's interest in using the compelled testimony. *Id.*

122 *See infra* part III.B.4.

There are two situations where courts have balanced Fifth Amendment concerns in the presentencing, and even preconviction, context: in permitting the use of guilty pleas, and in determining the constitutionality of court-ordered therapy programs in cases involving the termination of parental rights. These situations demonstrate that the privilege against self-incrimination is not absolute. Even in the preconviction context, in which the defendant has a strong interest in avoiding self-incrimination, courts have been willing to balance the individual's interest against the public interest in maintaining an effective criminal justice system. The courts' willingness to balance in preconviction cases lends strong support for balancing in postconviction cases.

A. Guilty Pleas and Plea Bargaining

In *Brady v. United States*,[123] the Supreme Court upheld the constitutionality of guilty pleas. Justice White, writing for the majority, stated, "[w]e decline to hold . . . that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty."[124] The Court reasoned that a defendant who chooses to go to trial does not face a greater sentence merely because he refused to plead guilty—he simply faces the punishment legally imposed for the crime of which he is found guilty. It is not unconstitutional for the state to extend a benefit to a defendant who in turn extends a substantial benefit to the government and who demonstrates by his plea that he is willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for successful rehabilitation in a shorter period than might otherwise be necessary.[125]

In coming to this conclusion, the Supreme Court, although it did not explicitly refer to the use of a balancing test, determined that certain interests outweighed the Fifth Amendment privilege prior to conviction. For example, the state's interest in facilitating rehabilitation and avoiding the expense of a full trial are sufficient to justify encouraging a guilty plea, despite the potential for unfair pressure on the defendant. Balancing such as this in the preconviction stage provides strong support for the use of a balancing test in the postconviction setting when a defendant has already been found guilty.

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123 397 U.S. 742 (1970).
124 *Id.* at 751.
125 *Id.* at 753.

B. Therapy as a Condition of Family Reunification

Unlike defendants in the plea bargaining context, parents whose children are removed from their custody by the state usually have not been indicted on criminal charges. In many child abuse and neglect actions, courts order the parents to complete therapy programs. Regaining custody of the children is predicated upon successful completion of the program, during which the parents must accept responsibility for their actions.[126] Because these civil custody cases may lead to future criminal prosecution, parents may fear the use in a criminal child abuse trial of statements they made during therapy. The state courts which have addressed this issue have reacted in different ways.

1. *The California Approach: Privileging Therapist-Patient Communications*

The first alternative, followed by the California Court of Appeals in *In Re Eduardo A.*,[127] is to hold that therapist-patient communications are privileged and cannot be revealed in court. The court emphasized that psychological counseling is important to the determination of parental fitness. Consequently, the parents must feel free to speak honestly. Often the exact nature of the disclosures is unnecessary to the proper determination of custody. If this is the case, then the doctor need testify only to the overall fitness of the parents and need not relate specific facts revealed during counseling. Because the doctor does not relate any of the parents' statements to the court in such cases, there is no fear of incrimination and thus, the Fifth Amendment protections are unnecessary.

Treating the therapist-patient relationship as privileged, however, does not necessarily avoid Fifth Amendment problems.[128] The exact scope of the privilege is often unclear, because there may be many exceptions which operate in different circumstances.[129] Furthermore, the privilege only prevents the therapist from taking the stand and

126 *See generally* William W. Patton, Note, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473, 510-23 (1990).

127 261 Cal. Rptr. 68 (Cal. Ct. App. 1989). This privilege is not thought to apply to communications with a therapist during a court-ordered psychiatric evaluation. The court in *Eduardo* distinguished between the two situations, citing the therapeutic purpose of the counseling programs as opposed to the inquisitive purpose of the psychiatric evaluations. *Id.* at 69-70.

128 It is beyond the scope of this Note to analyze the application of privilege in the therapy context.

129 *See, e.g.*, People v. Cabral, 15 Cal. Rptr. 2d 866 (Cal. Ct. App. 1993) (holding that when the defendant attempts to establish the existence of a therapeutic relationship, the scope of the privilege will be interpreted narrowly). *See also* State v. Rupp, 614 So.2d 1323 (La. Ct. App. 1993) (concluding that the therapist-patient privilege does not apply in child abuse prosecutions).

testifying about the specific nature of the communications with the patient. As evidenced by the holding in *Tarasoff v. Regents of California*,[130] a therapist may be required to reveal information gathered during counseling if the patient's statements indicate that he is likely to seriously injure a third party.[131] Privileging the therapist-client relationship does not necessarily prevent the recipient of the therapist's information from testifying. Finally, if therapy is openly conditioned upon the patient's admission of guilt, the therapist's certification of the defendant's successful completion of the program may provide grounds for a perjury charge.[132] Although this might not be enough in all situations to *convict* on a perjury charge, it could give rise to a reasonable fear of *incrimination* and thus trigger the protection of the Fifth Amendment. The chances of the government charging a defendant with perjury might not be overwhelmingly high, but the opportunity for such a prosecution exists, and must be taken into account in determining the availability of the Fifth Amendment protections.

2. *The Minnesota Approach: No Coercion*

The Minnesota Court of Appeals, in *In re S.A.V.*,[133] acknowledged the possibility of a subsequent criminal prosecution based on disclosures made in court-ordered therapy programs, but held that requiring a parent to cooperate with a psychological evaluation did not violate the Fifth Amendment because there was no compulsion. The court stated that "[t]ermination [of parental rights] in such a situation is not, however, a sanction for exercise of a constitutional right, but simply the necessary result of failure to rectify parental deficiencies."[134] The court emphasized that the state had an interest in protecting the children and that the termination of parental rights is

130 551 P.2d 334 (Cal. 1976).

131 *Id.* It is it not unheard of for probation to be revoked as a result of incriminating information acquired during therapy. *See, e.g.*, Minnesota v. Murphy, 465 U.S. 420, *reh'g denied*, 466 U.S. 945 (1984); *see* discussion *infra* part IV.B.1. In a recent Arizona case, a probationer invited his probation officer to join him during his weekly sex-offender therapy group. During the meeting he admitted to breaking into the homes of three women and stealing their underwear. The probation officer, acting on the new information, instigated successful proceedings to revoke probation. *News of the Weird*, WASH. CITY PAPER, Oct. 10, 1993, at 16.

132 Although the exact nature of the communications would be privileged, the successful completion of a therapy program which required the defendant to admit guilt would provide grounds for a perjury prosecution. The therapist could certify that the defendant completed the program, and that the completion was premised on the defendant's admission of guilt.

133 392 N.W.2d 260 (Minn. Ct. App. 1986).

134 *Id.* at 264. This is analogous to the *Rylander* Court's statement about the burden of proof. *Rylander*, 460 U.S. 752. The Fifth Amendment silence cannot be used as a substitute for proving parental fitness. *See supra* note 55 and accompanying text.

merely a result of the parents' unsuitability.[135] In a later case, *In re J.W.*,[136] the Minnesota Supreme Court refused to force parents to reveal specific evidence which could implicate them in a separate criminal proceeding.[137] The court noted that the state could, however, compel the relevant testimony if it granted immunity.[138] This narrow holding did not overrule the lower court case, but simply restricted the court's ability to compel particular facts or explanations from the parents in such situations.

Minnesota's approach, however, fails to evaluate appropriately the extent of the Fifth Amendment's protections. First, the threat of termination of parental rights is undoubtedly coercive. Furthermore, even if the court cannot compel the parents to answer a specific inquiry, the risk of incrimination still exists—successful therapy would require the parents to admit guilt and such evidence could be used to bring criminal charges of child abuse.[139] In such a circumstance, both the real fear of incrimination and the presence of governmental coercion implicate the Fifth Amendment. The better approach is to weigh the interests of the parents in avoiding incrimination against the state's interest in protecting children. This is the approach that the Vermont courts take to solve the problems which stem from the use of therapy as a condition of family reunification.

3. *The Vermont Approach: Balancing*

In *State v. Mace*,[140] the Vermont Supreme Court found that the requirement that a defendant participate in therapy, as directed by his therapist, was a condition "reasonably related to the rehabilitation of [the] defendant and thus lies within the discretion of the court."[141] The court acknowledged that the situation implicated Fifth Amendment but balanced the interests involved and found that the protections did not apply in this case. Because the defendant pled guilty, the court concluded that there was no fear of forcing an innocent

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135 *In re* S.A.V., 392 N.W.2d at 264.

136 415 N.W.2d 879 (Minn. 1987).

137 *Id.* The trial court ordered the parents to explain the prior death of their nephew. In reversing, the Minnesota Supreme Court held that the parents were threatened with the loss of their children and were penalized for exercising the privilege against self-incrimination. *See also In re* J.G.W, 433 N.W.2d 885, 886 (Minn. 1989) ("[I]t is a violation of the parent's fifth amendment privilege to directly require the parent to admit guilt as a part of a court-ordered treatment plan . . . . [However,] the privilege does not protect the parent from the consequences of any failure to succeed in a court-ordered treatment plan.").

138 *In re* J.W., 415 N.W.2d at 884.

139 In this situation, the California approach might work. If the communications were privileged, they could not be offered in court; only the therapist's general determination of parental fitness would be admissible. The general certification would not be likely to provide grounds for a prosecution for child abuse.

140 578 A.2d 104 (Vt. 1990).

141 *Id.* at 107.

person to lie. Moreover, the program was designed to rehabilitate the defendant through recognition of his abusive behavior, rather than to subject him to further prosecution. Finally, the court reasoned that the defendant's fears of a separate sexual abuse charge arising out of acts discovered through therapy was not a realistic concern and thus did not justify Fifth Amendment protection.[142]

The *Mace* court's analysis is flawed in one respect: although it may be unlikely that the state will use the evidence discovered in therapy to institute separate criminal proceedings, this does not dissipate the fear of incrimination. Whether the state chooses not to initiate further criminal charges speaks to the possibility of prosecution and not to the possibility of incrimination. A parent's fear of incrimination is real and substantial, and therefore triggers the Fifth Amendment protections. The government cannot override the privilege simply by later deciding not to prosecute after it has all the evidence.

4. *Interests of the Parties*

In custody cases and in the plea bargaining context, courts have applied a balancing test to determine the scope of the application of the Fifth Amendment privilege in a particular situation. The government has a strong interest in protecting children. This interest, like the independent regulatory interest in gathering evidence in civil proceedings, is unrelated to procuring a criminal conviction.[143] In *Baltimore City Department of Social Services v. Bouknight*[144] the Supreme Court noted that:

> When a person assumes control over items that are the legitimate object of the government's noncriminal regulatory powers, the ability to invoke the [Fifth Amendment] privilege is reduced . . . Once [a child is] adjudicated . . . in need of assistance, his care and safety [become] the particular object of the State's regulatory interests.[145]

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142 *Id.* at 108. Additionally, in State v. Gleason, 576 A.2d 1246 (Vt. 1990), the Vermont Supreme Court held that conditioning probation on participation in counseling was not an abuse of discretion because the condition was reasonably related to the rehabilitation of the defendant.

143 *See* discussion *supra* part II.B.1.

144 493 U.S. 549 (1990). For commentaries on the case, see Irene M. Rosenberg, Bouknight: *Of Abused Children and the Parental Privilege Against Self-Incrimination*, 76 IOWA L. REV. 535 (1991) (asserting that when there is a hybrid (civil and criminal) purpose behind the production order, a court should balance the interests involved) and H. Bruce Dorsey, Note, Baltimore City Department of Social Services v. Bouknight: *The Required Records Doctrine—Logic and Beyond*, 50 MD. L. REV. 446 (1991) (advocating the use of a balancing test).

145 *Bouknight*, 493 U.S. at 558-59. The court held the defendant in contempt for failure to produce her child. It decided that the Fifth Amendment was not implicated because the state requested production of the child for reasons related to his well-being and not to gain information to be used in a criminal prosecution against the defendant.

Questioning parents about the abuse of their own children is relevant to determining whether they are fit parents. The inquiry serves rehabilitative purposes, not punitive ones. Although information obtained during questioning may result in termination of custody, or criminal prosecution, this is simply a logical consequence of the admission rather than an intended penalty. The applicability of the Fifth Amendment protection turns on the primary purpose for the proceeding. If the underlying purpose is to provide treatment or protection, rather than to impose punishment, then the Fifth Amendment privilege is limited.[146] This reasoning is similar to that used in the "independent regulatory scheme" exception discussed earlier.[147] If the court phrases the condition in such a way that the requirement is merely that the parents show their fitness or successfully complete therapy, it should be considered constitutional.[148] If parents are specifically required to incriminate themselves, such a requirement should violate the Fifth Amendment. When incrimination is merely a by-product of the requirement of showing fitness, the state's interest in protecting children may override the Fifth Amendment's protection against coercive pressures. These cases indicate a trend towards recognizing the importance of therapy as a tool for rehabilitation and the state's interest in promoting it.

The conflict between the state's interest and the Fifth Amendment in any of these cases can be avoided by granting immunity to the parents from the use of their incriminating statements.[149] The defendant in *Bouknight* was held in contempt for failure to produce her child in response to a court order.[150] If the state had simply granted immunity, the defendant could have produced the child with no fear of incrimination. The holding is evidence of the Court's willingness to override Fifth Amendment protections, even when there are alternatives available. It also may be evidence of the weight that the Court accords to the government's interest in gathering evidence for child abuse prosecutions.

In both the guilty plea and parental right termination cases, courts have imposed some limitations on the scope of the Fifth

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146 When the state's goal is rehabilitation, and not punishment, less weight should be placed on procedural safeguards. *See* Allen v. Illinois, 478 U.S. 364 (1986). *Allen* dealt with the issue of whether proceedings to declare a defendant a "sexually dangerous person" were criminal within the meaning of the Fifth Amendment. *Id.* at 365. Noting the rehabilitative purpose behind the proceedings, *id.* at 370, the Court held that such proceedings were essentially civil actions and that the process did not require application of the Fifth Amendment safeguards. *Id.* at 374-75. In so deciding, the Court weighed governmental and individual interests. *See id.* at 372-75.

147 *See* discussion *supra* part II.B.1.

148 *See* discussion *supra* part III.B.2.

149 The immunity statutes would reach these situations.

150 *Bouknight*, 493 U.S. at 549.

Amendment by balancing the constitutional protections against the needs of the criminal justice system. Although these two preconviction situations may be unique, both are evidence that the privilege is not absolute. These situations also demonstrate the appropriateness of using a balancing test to determine the extent of the Fifth Amendment protection against self-incrimination in the postconviction context when the government's interest in rehabilitation is more pronounced.

IV
BALANCING THE FIFTH AMENDMENT IN THE POSTSENTENCING CONTEXT

The Fifth Amendment is not absolute; the courts have weakened its prohibition on compelling a defendant to inculpate himself. For example, the absence of immunity for prosecutions for perjury shows that a state's interest in promoting truthfulness outweighs the Fifth Amendment privilege. Additionally, the legitimate regulatory interest exception allows the government to compel information when it has a strong public need.[151] The custodial interrogation exception has been limited to the police context.[152] Furthermore, the acceptability of guilty pleas recognizes that the need for official leniency when a defendant imparts a substantial benefit to the state outweighs an individual's interest in avoiding coercive pressures.

The Fifth Amendment privilege is not absolute prior to conviction, and it should not be considered absolute after conviction. This Note proposes a two step analysis for Fifth Amendment questions, one which is similar to the two part due process test articulated by the Supreme Court in *Matthews v. Eldridge*.[153] First, a court should determine whether the Fifth Amendment is triggered, for example, whether there is a real fear of incrimination and governmental compulsion. Second, if so, the court should determine whether a constitutional violation occurred. In order to answer the second question in the postsentencing context, courts should apply a balancing test as the Supreme Court did in *Matthews*.[154]

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151 *See supra* note 80 and accompanying text.

152 *See* discussion *supra* part II.B.2.

153 424 U.S. 319 (1976).

154 *Id.* It is important to acknowledge that the text of the Fifth Amendment does not explicitly support this two step analysis. Unlike the Fourth Amendment, which has a built-in reasonableness inquiry in that a court first determines whether there was a warrantless search or seizure and then applies a reasonableness test to determine whether the Amendment has been violated, the Fifth Amendment privilege against self-incrimination is absolute on its face. As noted above, however, application of the amendment's protections by the courts has not been absolute. As with the Fourth Amendment, a court must first decide whether the Fifth Amendment protections apply. Second, the court should apply a

The balancing test proposed here recognizes the need for procedural protections, yet it does not undermine the efficacy of rehabilitative programs. This Note does not set out the exact weight to accord each consideration but merely defines the parameters that the courts should consider in interpreting a universal test. The following section first provides a background on probationary conditions and then discusses two cases which identify important factors to be considered in balancing. It then identifies the factors that should be balanced to determine the application of the Fifth Amendment in the post-sentencing context. Finally, this section applies the test to two recent Supreme Court cases.

A. Balancing Relevant Conditions of Probation and Fifth Amendment Protections

The criminal justice system assumes that a verdict is correct and it does not provide a sentencing alternative for those who are wrongly convicted beyond the regular avenues of direct appeal and habeas corpus. Probation is not a means for wrongly convicted defendant's to escape jail, but is instead a form of punishment which is less severe than incarceration. It allows a state to avoid imprisoning defendants who do not present a threat to society. A person placed on probation, therefore, is presumed guilty. Although she retains certain constitutional rights, her rights must be balanced against the requirements of an effective criminal justice system.

1. *The Federal Probation Act and the 1984 Sentencing Reform Act*

The Federal Probation Act authorizes courts to impose probation or suspend a defendant's sentence for crimes committed before November 1, 1987.[155] Conditions of probation must not be more stringent than necessary for effective rehabilitation and protection of the public.[156] Probation may be revoked at any time for the violation of a condition of probation, or for events which occurred before the probationary period started.[157] Thus, a perjury conviction resulting from false testimony given before the probation was effective would be

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balancing test to determine the extent of the constitutional protection—whether the individual's interest outweighs the government's interest.

155 18 U.S.C. § 3651 (1982) (repealed 1984, but effective for crimes committed before November 1, 1987). *See generally* Beth M. Elfrey, Project, *Probation, Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1989-90*, 79 GEO. L.J. 1149 (1991) (discussing both the provisions and judicial treatment of the Act).

156 Elfrey, *supra* note 155, at 1161.

157 *Id.* at 1162.

grounds for terminating the probation and reinstating the sentence.[158]

The 1984 Sentencing Reform Act replaced the Federal Probation Act and is in effect for all crimes committed after November 1, 1987.[159] The 1984 act differs from the Federal Probation Act in several respects. First, the new act provides clear guidelines for imposing probation.[160] Second, the act allows courts to impose conditions of probation "reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the goals of sentencing."[161] Additionally, a court may modify the conditions at any time during probation following a hearing.[162] Like the Federal Probation Act, the Sentencing Reform Act allows a court to revoke probation for any violation during the probationary period, and permits the court to reinstate the original sentence, impose a new sentence or provide additional conditions of probation.[163] Although the act substantially clarifies the guidelines for imposing probationary conditions, it does not end the Fifth Amendment inquiry. The constitutionality of certain conditions of probation and the permissibility of specific inquiries remain at issue. The next subsection sets out a test which analyzes the relationship between conditions of probation and the protections of the Fifth Amendment.

2. *Balancing Considerations: Legitimate Goals and Relevant Inquiries*

In *United States v. Pierce*,[164] the Ninth Circuit held that a condition of probation requiring a defendant to reveal financial information does not violate the Fifth Amendment.[165] In determining that the condition promoted the rehabilitative goals of the Federal Probation Act, the court relied on a test articulated in *United States v. Consuelo-Gonzalez*.[166] In *Consuelo-Gonzalez* the Ninth Circuit held that a probationer is not considered to have voluntarily waived his Fifth Amendment privilege with regard to specific probation conditions merely

158 *See, e.g.*, United States v. Stehl, 665 F.2d 58 (4th Cir. 1981) (probation revocation proceeding followed perjury conviction).

159 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3674, 28 U.S.C. §§ 991-998 (1988). *See generally* Elfrey, *supra* note 155, at 1149-59 (discussing both the provisions and judicial treatment of the 1984 act); Wendy R. Willis, Project, *Probation, Twenty-second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals*, GEO. L.J. 1491, 1496 (1993).

160 Elfrey, *supra* note 155, at 1149.

161 Willis, *supra* note 159, at 1493.

162 *Id.* at 1494.

163 *Id.* at 1495-96. Probation revocation proceedings are governed by rules of criminal procedure. FED. R. CRIM. P. 32.1.

164 561 F.2d 735 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978).

165 *Id.*

166 521 F.2d 259 (9th Cir. 1975) (en banc).

because he failed either to assert the right, or to object at the sentencing.[167] The *Pierce* court noted that "[a]s a practical matter, a defendant's consent to a probation condition is likely to be nominal where consent is given only to avoid imprisonment."[168] However, this does not end the inquiry. Although Fifth Amendment claims may not be extinguished with regard to a specific probationary condition, this does not mean that the privilege applies to all situations. The *Pierce* court applied the *Consuelo-Gonzalez* balancing test to establish whether the condition was justified by the needs of rehabilitation.[169]

The *Consuelo-Gonzalez* test examines three elements in determining whether a condition is reasonably related to the purposes of probation:

> (1) the purposes sought to be served by probation;
> (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers;
> (3) the legitimate needs of law enforcement.[170]

These factors balance the rehabilitative interest of imposing probation and the constitutional protection of the Fifth Amendment. This approach has had considerable influence. Several courts have adopted this balancing approach,[171] and the Sentencing Reform Act codified its elements, thereby permitting courts to balance the relevant interests when setting conditions of probation.[172]

In *Asherman v. Meachum*[173] the Second Circuit used a balancing analysis to determine that the revocation of a prisoner's home release status for failure to answer relevant questions did not violate the Fifth Amendment. The court noted that "public agencies retain the authority to ask questions relevant to their public responsibilities and to take adverse action against those whose refusal to answer impedes the discharge of those responsibilities."[174] The Second Circuit also noted

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167 *Id.* at 265.

168 *Pierce*, 561 F.2d at 739 (citing *Consuelo-Gonzalez*, 521 F.2d at 274 (Wright, J., dissenting)).

169 *Id.*, at 739-40.

170 *Consuelo-Gonzalez*, 521 F.2d at 262.

171 *See, e.g.*, United States v. Stine, 646 F.2d 839, 842-43 (3d Cir. 1981) (upholding the revocation of probation for a defendant who violated a condition requiring psychological treatment and implicitly accepting the *Consuelo-Gonzalez* balancing test); United States v. Tonry, 605 F.2d 144, 147-48 (5th Cir. 1979) (citing *Consuelo-Gonzalez* and holding that a condition of probation must be "reasonably related to rehabilitation of the probationer, protection of the pubic against other offenses during its term, deterrence of future misconduct by the probationer or general deterrence of others, condign punishment, or some combination of these objectives"); *cf.* Porth v. Templar, 453 F.2d 330, 333 (10th Cir. 1971) (holding in a case predating *Consuelo-Gonzalez* that conditions of probation must have "a reasonable relationship to the treatment of the accused and the protection of the public").

172 *See supra* notes 159-63 and accompanying notes.

173 957 F.2d 978 (2d Cir. 1992) (en banc).

174 *Id.* at 982.

that Asherman was penalized not for the exercise of his constitutional rights, but for "failure to answer a relevant inquiry."[175] Asherman's parole was revoked due to his failure to abide by the condition requiring a psychiatric examination, not simply due to his silence. Because the state needed to conduct a psychiatric examination to establish the defendant's fitness for parole, Asherman's failure to respond to questions resulted in the need to employ alternative options. Because parole was not a viable alternative, the state had no other option than to revoke Asherman's home release and to incarcerate him.

The distinction between the consequences that follow the failure to answer a relevant inquiry and punishment for the assertion of Fifth Amendment rights forces courts to balance the needs of the criminal justice system against the constitutional protections. It is impermissible for a court to increase a criminal's sentence or to revoke probation merely because the defendant invokes the Fifth Amendment.[176] If, however, the criminal refuses to answer a relevant inquiry[177] that is rationally related to the goals of incarceration or probation, then the defendant's interest in remaining silent should be balanced against the interests of the state and the requirements of the criminal system. When the balance tilts in favor of the government, making the defendant choose (between waiving the privilege and thus receiving certain benefits, such as probation instead of incarceration, or asserting the privilege and facing the consequences he would have had to face had probation not been available in the first place) is not unconstitutional.[178] In such cases, the failure to assert the privilege should be deemed a voluntary waiver.

In any case a court should first determine whether the Fifth Amendment applies at all. The court may then determine the extent of the Fifth Amendment protection. In the postconviction context, a court should consider the following: the legitimacy of the government's purpose, with effectuating rehabilitation being a more legiti-

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175 *Id.* at 983. The court emphasized that the questioner did not express interest in using the statements in a later criminal proceeding. *Id.* The court appeared to draw a distinction based on the *focus* of the proceeding. Here, the commissioner was not trying to amass evidence for a later criminal proceeding; instead he was attempting to ascertain the appropriateness of Asherman's home release status.

176 Gardner v. Broderick, 392 U.S. 273, 278 (1968).

177 The protections of the Fifth Amendment do not fail before every relevant inquiry. For example, when a police officer asks a suspect specific questions about a crime, that inquiry is relevant to the government's interest in maintaining law and order. The Fifth Amendment, however, applies in full force. A court must consider the purpose behind the inquiry. Gathering evidence for a criminal trial is not a legitimate goal permitting compulsion under the Fifth Amendment. *See supra* part II.A. Alternatively, compelling answers to facilitate rehabilitation is a legitimate goal. *Id.* Even so, the court must balance the interests involved and the defendant must be allowed the choice of whether to answer or not.

178 *See* McGautha v. California, 402 U.S. 183, 213 (1971) ("[T]he Constitution does not . . . always forbid requiring [a defendant] to choose.").

mate goal than coercing a confession; the relevance of the condition to a legitimate goal of the state; and the individual's interest in the protection, which depends on the probability that the government will bring a subsequent prosecution based on the incriminating statements. None of these considerations is determinative; each situation should be evaluated on its own facts. Nor should this list be considered exhaustive. Additional considerations may include whether there are viable alternatives to the particular rehabilitation program or whether the state can grant immunity. This flexible approach should avoid the need for narrow exceptions to the Fifth Amendment privilege against self-incrimination. Instead, courts should decide cases on an individual basis, taking into account many different factors, not least of which is the importance of rehabilitative programs.

B. Application of the Balancing Test

The following subsections apply the proposed balancing test to two recent Supreme Court cases. In each case, the lower court had imposed a general condition of probation that conflicted with the Fifth Amendment protection against self-incrimination. Because in both cases the conditions were relevant to the rehabilitation of the convicted criminal and were necessary to achieve goals of the criminal justice system, the interests of both the state and the defendants should be weighed. Consequently, in both cases this Note concludes that interests of the state outweigh those of the defendants.

1. *Condition of Truth*—Minnesota v. Murphy

In *Minnesota v. Murphy*,[179] the defendant claimed that a condition of probation requiring him to speak truthfully to his probation officer violated the Fifth Amendment. After pleading guilty to a sex offense, Murphy was given a suspended sentence and placed on probation.[180] During the course of court-ordered therapy, the probationer told his therapist about a previous rape and murder he had committed. The therapist contacted Murphy's probation officer, who arranged a meeting with Murphy and questioned him about the incident.[181] Murphy voluntarily admitted the crime. The probation officer related the in-

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179 465 U.S. 420 (1984). *See generally* Shelby Webb, Jr., Note, *Constitutional Law—Warning to Probationers: Admissions Made to Your Probation Officer Without Prior Warning Can Be Used Against You in a Subsequent Criminal Proceeding*—Minnesota v. Murphy, 28 How. L.J. 355 (1985) (arguing that *Murphy* substantially clarifies the contours of a probationer's constitutional rights).

180 *Murphy*, 465 U.S. at 422.

181 *Id.* at 423 n.1. This is a good example of a situation in which privileging the communications between the therapist and the client did not work. Although the therapist could not testify in court about his knowledge, he was not barred from informing the probation officer. *See* discussion *supra* part III.B.1.

criminating information to the police, who issued a warrant for Murphy's arrest.[182] As mentioned earlier,[183] a probation revocation proceeding is not considered a criminal prosecution; thus, any statements made by a probationer can be used to demonstrate a violation of a condition of probation.[184] The state used Murphy's statements, however, not only to revoke his probation, but also to prosecute him subsequent to the revocation proceeding.[185]

The Court found that Murphy had voluntarily waived his Fifth Amendment protection and that he had been under no compulsion to speak.[186] Additionally, the Court failed to find any of the exceptions which grant automatic immunity: Murphy would not have incriminated himself by simply claiming the right;[187] a conversation with a probation officer under these circumstances is not considered a custodial interrogation;[188] and he had not been threatened with a penalty for remaining silent.[189] The Court emphasized, however, that "if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of the probation, it would have created the classic penalty situation."[190]

The majority dismissed Murphy's claim that the confidence inspired by the probation officer and that Murphy's possible fear of revocation of his probation led him to volunteer information he would not have offered had he been apprised of his rights.[191] Dissenting, Justice Marshall argued that the state presented Murphy with the "Hobson's choice, of incriminating himself or suffering a penalty."[192] Because the threat to revoke probation was coercive and no *Miranda* warnings were given, Justice Marshall would have automatically immunized Murphy's statements from use in a future prosecution.[193]

The application of a balancing test would avoid this conflict between the majority and dissent by acknowledging that the Fifth Amendment protections are triggered but weighing their application

182 *Murphy*, 465 U.S. at 423-24.

183 *See supra* note 45 and accompanying text.

184 Gagnon v. Scarpelli, 411 U.S. 778 (1973).

185 *Murphy*, 465 U.S. at 425.

186 *Id.* at 429.

187 *Id.* at 439-40.

188 *Id.* at 431.

189 *Id.* at 439.

190 *Id.* at 435. In a footnote clarifying this statement, the Court noted that the Fifth Amendment would not apply if compliance with the condition would not pose a realistic threat of incrimination—if, for example, the condition were merely a residential restriction, or a limitation on travel. Furthermore, in dicta, the Court noted that a state could compel a probationer to answer even incriminating questions as long as it provided immunity from future criminal prosecution. *Id.* at 437 n.7.

191 *Id.* at 431-33.

192 *Id.* at 443 (Marshall, J., dissenting).

193 *Id.* (Marshall, J., dissenting).

against the state's interest in effective probation. The threat of probation revocation may influence a defendant's willingness to offer information. However, because the requirement of truthfulness was a legitimate condition of Murphy's probation and was not designed to present him with an unconstitutional choice, Murphy was not entitled to automatic immunity.

Both the majority and dissent emphasized the distinction between questions pertaining to the original prosecution and questions about a different crime.[194] As to the former, the Fifth Amendment right to remain silent is extinguished after a final conviction.[195] The protections remain available, however, in the latter inquiries.[196] The condition involved here was a general one which merely required Murphy to be truthful to his probation officer; it did not require him to disclose specific incriminating incidents. Such conditions are relevant to the government's interest in promoting successful probation and rehabilitation. The probationary relationship, like the therapeutic relationship, is premised on trust. In order for the probation officer to be as effective as possible, the defendant must be truthful. This does not mean that the defendant cannot remain silent; but if he speaks he must not lie. Murphy, for example, could have remained silent without violating his probation. Ultimately, the state's interest in promoting truthfulness outweighed the defendant's interest in avoiding coercive pressures.[197] Therefore, Murphy's failure to assert the privilege was appropriately considered a voluntary waiver.

2. *Condition of Successful Completion of Therapy*—State v. Imlay[198]

Imlay, like Murphy, stood trial and was found guilty. Unlike Murphy, however, Imlay asserted the Fifth Amendment privilege during therapy and claimed that he was penalized for his silence. During the trial he voluntarily testified and maintained his innocence.[199] Therefore, the requirement that Imlay admit guilt as part of a therapy program presented a real fear that he might face criminal prosecution for perjury. As noted earlier, there is no protection for perjured state-

194 *Id.* at 426, 441 (Marshall, J., dissenting).

195 *See* discussion *supra* part II.A.1.

196 *See* discussion *supra* part II.A.1.

197 This is consistent with the failure of the immunity statutes to cover prosecutions for perjury. The constitutional protection is not interpreted to allow false testimony. *See* discussion *supra* part II.A.

198 813 P.2d 979 (Mont. 1991), *cert. granted*, 112 S. Ct. 1260, *cert. dismissed*, 113 S. Ct. 444 (1992).

199 *Id.* at 985.

ments.[200] Therefore, in contrast to the parental reunification cases,[201] the state could not have immunized Imlay's statements in order to compel answers.[202] Because there is no protection for false statements, if Imlay were forced to admit guilt he could be charged with perjuring himself in the earlier proceeding.

Even when there is a real fear of incrimination, the Fifth Amendment is not available absent governmental compulsion.[203] Here, as in the plea bargaining situation, the defendant faces a choice. The Constitution "does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.' "[204] Montana did not force Imlay to admit his guilt; it merely provided him with a means of rehabilitation which he could have chosen not to accept.[205] As one state court noted, "[e]ven if the requirement of admission of guilt . . . impinged on Fifth Amendment rights, the inmate is not compelled to incriminate himself because the inmate may choose not to participate in the program."[206] Additionally, in *Bordenkircher v. Hayes*[207] the Supreme Court, examining plea bargains, stated that "there is no such element of punishment or retaliation so long as the accused is free to accept or reject [an offer of a different sentence]."[208] The state's goal is not to force those innocent of the crimes for which they have been convicted to perjure themselves during therapy. Instead, the intention of the state is to help guilty criminals accept responsibility for their actions and also to prevent recidivism. The choice between probation and incarceration involves governmental compulsion; few would choose confinement in

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200 *See* discussion *supra* part II.A. *But cf.* Scott M. Solkoff, Note, *Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs*, 17 NOVA L. REV. 1441 (1993) (advocating the application of judicial use immunity in the *Imlay* context).

201 *See* discussion *supra* part III.B.

202 Immunity is only effective if the defendant is protected from all later criminal prosecutions stemming from the compelled testimony.

203 *See* discussion *supra* part II.B.

204 Jenkins v. Anderson, 447 U.S. 231, 236 (1980) (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973)). *Jenkins* recognized the importance of considering the legitimacy of the challenged governmental practice in determining whether a constitutional right has been impermissibly burdened. *Id.* at 238.

205 The goal in this situation is to help the defendant, rather than to amass evidence for another criminal prosecution. In Allen v. Illinois, 478 U.S. 364 (1986), the Court distinguished between statutes that aim to provide treatment and those that aim to define criminal activities. The former are civil in nature and thus do not invoke the protections of the Fifth Amendment. *Id.* at 375. In such a situation, the purpose of eliciting the defendant's admission of guilt is to provide treatment, not to label him a criminal or to prosecute him for perjury.

206 Henderson v. State, 543 So.2d 344, 346 (Fla. Dist. Ct. App. 1989) (holding that conditioning the early release of a sex offender upon his satisfactory participation in a therapy program did not violate the Fifth Amendment).

207 434 U.S. 357 (1978).

208 *Id.* at 363.

a cell over the relative freedom offered by probation. Such compulsion, however, does not always rise to the level of constitutional infirmity. Rather than asserting that the Fifth Amendment is not triggered in these situations, it is more accurate to admit the presence of the evils against which the constitutional privilege seeks to protect. The analysis should not end there, however. Once a court establishes that the Fifth Amendment is triggered, it should then ask whether it is appropriate to apply its protections. The court should do this by balancing the interests of the criminal against those of the state.

The state has a strong interest in rehabilitating criminals through therapy and probation. First, the purpose of therapy is to provide treatment, not to punish; its use stems from society's interest in rehabilitation. The therapist is not a law enforcement officer and has no power to detain a patient who is unwilling to participate. Therapists strive to create a supportive environment in which people can feel comfortable talking about their problems. Under no circumstances would a competent therapist threaten a patient. Second, acceptance of responsibility is a necessary condition of therapy.[209] Third, rehabilitation is a legitimate goal of law enforcement[210] and this goal requires effective therapy programs. As the American Professional Society on the Abuse of Children noted in its amicus brief in *Imlay*:

> Effective treatment depends on cooperation between treatment professionals and the criminal justice system, particularly courts and probation and parole officials. The courts play a critical role by mandating participation in treatment as a condition of probation or parole. Court-ordered treatment provides an important external motivator for offenders to enter and remain in treatment.[211]

Finally, it is unlikely that the government will prosecute the probationer for perjury based on incriminating statements made during therapy.[212]

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209 *See supra* note 16 and accompanying text.

210 United States v. Grayson, 438 U.S. 41, 46 (1978). Although this Note focuses on the rehabilitative goals of the criminal justice system, there are other interests that may conflict with the Fifth Amendment's protections. This Note does not intend to suggest that all such considerations should trump the privilege. It is important, however, to recognize some of the cases which have focused on other goals. *See, e.g., McGuatha,* 402 U.S. at 217 (per curiam) (holding that the privilege was not violated by the state requirement that a jury determine guilt and punishment in the same proceeding and stating that the policies behind the amendment were "not offended when a defendant in a capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt"); United States v. Dunnigan, 113 S. Ct. 1111 (1993) (holding that the government's interest in appropriate punishment permits a court to increase a defendant's sentence when he or she commits willful perjury during the trial).

211 APSAC Brief, *supra* note 2, at 8-9.

212 Perjury charges are generally difficult to prove, and thus the government does not often choose to expend its limited resources on such prosecutions. In the therapy context,

The state's interests in fostering individual responsibility and rehabilitation outweigh Imlay's interest in avoiding self-incrimination. The requirement of therapy programs that a person accept responsibility is indispensable to their rehabilitative goal. Additionally, a person in Imlay's situation may still choose whether or not to comply with the condition of probation. Although he may still appeal his verdict, he may not use the Fifth Amendment to shield him from the punishment legally imposed for his crime. He may, in effect, choose his punishment, whether it be probation and therapy or incarceration. Because a probationer's Fifth Amendment privilege against self-incrimination is not violated even if his probation is revoked, the balance favors allowing the condition.

CONCLUSION

There is no consensus on the application of the Fifth Amendment protections in postsentencing situations. *Montana v. Imlay* provided the Supreme Court with an opportunity to clarify the operation of the privilege in this context. For procedural reasons, the Court chose not to take advantage of the opportunity.[213] The implications of the Montana Supreme Court opinion, holding that the court-ordered sex-offender program violated the Fifth Amendment, may be profound. If therapy programs are no longer used for fear of impinging on criminals' Fifth Amendment rights, the use of rehabilitative sentencing alternatives, such as probation, will likely decline.

As prison populations increase, we need realistic and appropriate alternatives to incarceration. Rehabilitation through probation and therapy offers a sound alternative. Therapy programs are a traditional form of psychological treatment and generally are not unusually intrusive. Furthermore, concerns that therapy is ineffective in the correctional setting because of the inherently coercive atmosphere[214] are less forceful in the probationary context. It therefore becomes important to retain such programs as part of the probation scheme, lest rehabilitative operations disappear entirely from the criminal system. Therapy is an ideal rehabilitation-focused alternative. If courts cannot impose reasonable conditions to ensure compliance with therapy programs, however, this alternative may well disappear.

The procedural safeguards of the Fifth Amendment recognize the criminal system's fallibility. Although the emphasis on perfecting the means of separating the guilty from the innocent is justifiable, it should not undermine procedures used to achieve other goals of the

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the state is likely to be more concerned with rehabilitating the offender than with obtaining another conviction.

213 *See supra* note 30 and accompanying text.

214 *See, e.g.*, Veneziano, *supra* note 10, at 141.

system such as punishment and rehabilitation. The protections must be balanced against the overall objective of the criminal legal system—to insure the safety of our society by providing a means for both punishment and rehabilitation. Therapy programs, which force an offender to accept responsibility for his actions and work toward avoiding recidivism, provide one of the best means to effectuate this latter goal.

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