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COMMENT

THERAPY FOR CONVICTED SEX OFFENDERS: PURSUING REHABILITATION WITHOUT INCRIMINATION

JONATHAN KADEN

*"Mea culpa belongs to a man and his God. It is a plea that cannot be exacted from free men by human authority."*¹

I. INTRODUCTION

The Fifth Amendment right against self-incrimination is a fundamental protection against government abuse of an individual's autonomy, privacy, and dignity.² Courts, however, have unevenly applied the right to convicted sex offenders who, as a condition of court-ordered therapy, must admit responsibility for their crime.³ In some cases, if an offender does not admit

¹ Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. B. ASS'N J. 91, 100 (1954). "Mea culpa" is a Latin expression meaning "a formal acknowledgment of personal fault." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1397 (1966).

² "No person shall . . . be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

³ Most therapy programs for sex offenders require that the offender admit personal responsibility for his offense. See generally MARC S. CARICH, SEX OFFENDER TREATMENT OVERVIEW: TRAINING FOR THE MENTAL HEALTH PROFESSIONAL, 89, 95, 107 (1997). Therapy for sex offenders also tends to vary considerably from traditional or general therapy: therapy for sex offenders is more confrontational and more authoritarian; the goals of the therapy are defined by societal mores, not the client; therapy is aimed at increasing, not decreasing the offender's emotional pain; and offenders may forgo confidentiality that is prevalent in general therapy. *Id.* However, some mental health professionals have criticized this model of therapy for sex offenders, and have suggested therapy programs that are less confrontational, and that do not focus di-

responsibility for a crime, therapists terminate him from therapy, and courts punish him with probation revocation and imprisonment.⁴ In other cases, courts have held that sentences which penalize a convicted offender for refusing to admit to a crime violate the offender's Fifth Amendment right against self-incrimination.⁵

Whether courts hold that the Fifth Amendment protects a convicted offender from having to admit his guilt turns largely on how the offender pled at trial. When a defendant pleads guilty, he waives certain constitutional rights, including the right against compulsory self-incrimination.⁶ Therefore, defendants who have pled guilty have been penalized for denying their offenses in therapy. If a defendant pleads not guilty, courts have recognized his right, absent a grant of immunity, to continue to maintain his innocence without being subjected to the concomitant penalties of probation revocation and imprisonment.⁷ However, a grant of immunity does not preclude prosecution for perjury,⁸ so even immunized offenders who pled not guilty and testified on their own behalf at trial are still at risk of unwilling self-incrimination if they are required to admit responsibility in therapy. In addition, when a defendant enters either a *nolo contendere*⁹ or *Alford* plea,¹⁰ neither of which requires the defen-

rectly on the offender's admission of guilt. See *infra* notes 126-63 and accompanying text.

⁴ See, e.g., *State v. Butler*, 900 P.2d 908 (Mont. 1995); *State v. Carrizales*, 528 N.W.2d 29 (Wis. 1995); *State v. Gleason*, 576 A.2d 1246 (Vt. 1990).

⁵ See, e.g., *Gilfillen v. State*, 582 N.E.2d 821 (Ind. 1991); *State v. Imlay*, 813 P.2d 979 (Mont. 1991).

⁶ *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

⁷ See *Imlay*, 813 P.2d at 985; *Gilfillen*, 582 N.E.2d at 824.

⁸ See *Glickstein v. United States*, 222 U.S. 139, 141 (1911); see also *United States v. Apfelbaum*, 445 U.S. 115, 126 (1980).

⁹ A plea of *nolo contendere* gives the defendant the option of not contesting the issue of guilt or innocence. A defendant does not have an automatic right to enter this plea; the court must consent to it. The plea waives the defendant's right to trial and waives all other claims not related to the plea itself. Following a *nolo* plea, the court enters a conviction. However, a *nolo* plea may not be introduced into evidence in a later civil or criminal action as proof that the defendant committed the offense underlying the conviction. The defendant has a right to deny the facts of the crime in a later proceeding. WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 932 (1992). See also *United States v. Mapco Gas Products*, 709 F. Supp. 895, 897 (E.D. Ark. 1989).

dant to admit commission of the crime, courts hold that the right against self-incrimination does not protect the offender from having to admit responsibility for the crime in treatment.¹¹ An offender who enters a *nolo* or *Alford* plea forgoes the same rights as an offender who pleads guilty, including the right against self-incrimination.¹² These outcomes present problems. Offenders who plead not guilty and testify in their own defense at trial face an unsavory choice between confessing guilt in therapy and risking that their admission will foreclose rights of appeal and lead to further incrimination for perjury or other crimes, or refusing to admit guilt and risking removal from therapy and revocation of probation. Offenders who plead not guilty and testify in their own defense, and then admit guilt in therapy risk further incrimination for two reasons: (1) if completion of sex offender therapy is predicated on an admission of guilt, and the offender completes therapy, his probation officer will know that he admitted guilt and committed perjury at trial, and (2) therapy for sex offenders is often characterized by more limited confidentiality than in traditional client-therapist relationships, so an offender's admission of guilt may, and in some cases must, be disclosed.¹³ Offenders who enter *nolo* or *Alford* pleas may refuse to admit responsibility for an offense in court, yet often must admit guilt in therapy. Though this presents no constitutional problems, offenders who have refused to admit guilt in court may not be inclined to admit guilt in therapy either; thus their participation in therapy may be terminated,

¹⁰ An *Alford* plea is entered formally as a guilty plea, but the offender refuses to admit responsibility for the crime. A defendant may "voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). A defendant who refuses to admit guilt may nevertheless enter an *Alford* plea as a strategic decision to avoid the cost or publicity of a trial, or to receive a less punitive sentence in exchange for the plea. See Alice J. Hinshaw, Comment, *State v. Cameron: Making the Alford Plea an Effective Tool in Sex Offense Cases*, 55 MONT. L. REV. 281 (1994). A defendant who enters an *Alford* plea is treated as waiving the same rights, including the right against self-incrimination, as a defendant who enters a regular guilty plea. See *State v. Butler*, 900 P.2d 908, 911 (Mont. 1995).

¹¹ See *Butler*, 900 P.2d at 911; *Gleason*, 576 A.2d at 1250; *Carrizales* 528 N.W.2d at 32.

¹² See *Butler*, 900 P.2d at 911; *Gleason*, 576 A.2d at 1250.

¹³ See *infra* notes 114-16, 243 and accompanying text.

leaving them untreated and more dangerous than if they had been meaningfully involved in therapies that did not require an admission of guilt.¹⁴

To preserve Fifth Amendment rights in the case of convicted sex offenders sentenced to therapy subject to such conditions, a state must offer offenders who pled not guilty and testified in their own defense immunity from future prosecution and protection against probation revocation. Furthermore, to facilitate the rehabilitation of more convicted offenders, courts, legislatures, and therapists ought to give greater consideration to therapy programs that successfully treat sex offenders who remain unwilling to admit responsibility for an offense. Such therapy programs are also essential for resolving the dilemma faced by offenders who have entered *nolo* or *Alford* pleas expressly to avoid a formal admission of guilt. Courts that require these offenders to admit responsibility as a condition of continued participation in therapy and probation demand inconsistent responses from the offenders regarding the offense underlying the conviction. When courts allow offenders to enter *nolo* or *Alford* pleas to avoid an admission in court, yet require them to accept responsibility in therapy, courts may set these offenders up to fail to adhere to the requirements of therapy. Offenders who avoided admitting guilt in court may be just as inclined to avoid admitting guilt in therapy. Though not constitutionally required, wider availability of therapy programs offering treatment to such offenders who refuse to admit guilt would allow more offenders who currently are removed from treatment to receive treatment.

This Comment proposes that the state must offer immunity from future prosecution, protection against probation revocation, and access to treatment that does not require an admission of responsibility in order to preserve the Fifth Amendment right against self-incrimination for convicted sex offenders in court-mandated therapy. While offenders who enter *nolo contendere* or *Alford* pleas waive their Fifth Amendment rights against self-

¹⁴ See Mack E. Winn, *The Strategic and Systematic Management of Denial in Cognitive/Behavioral Treatment of Sexual Offenders*, 8 *SEXUAL ABUSE: J. RES. & TREATMENT* 25, 26 (1996).

incrimination, they would nonetheless benefit if courts sentenced them to treatment programs that do not require admissions of guilt prior to entrance, or as a condition of continued participation in the program. More convicted offenders would receive treatment if courts and therapists cooperated to increase access to such therapy programs. This course of action would serve the values of autonomy, privacy, and dignity that are protected by the Fifth Amendment, facilitate the rehabilitation of convicted offenders using therapies previously ignored by the courts, and further the state interest in protecting its citizenry. Part II of this Comment explores the historical evolution of the Fifth Amendment right against self-incrimination. In the context of an inquisitorial judicial heritage, the framers of the Fifth Amendment intended to protect basic human dignity and autonomy against the potentially coercive powers of government.¹⁵ These values underscore the importance of tailoring sentencing and therapy for sex offenders so that they are least intrusive to the offender's rights. Part III explores traditional and alternative theories of treating sex offenders. Most courts accept without question the traditional notions that admission of responsibility is a precursor to treatment and some coercive pressure in treatment is effective at gaining such an admission.¹⁶ Other theorists posit that less confrontational treatment is more effective at overcoming denial, and some studies show evidence of effective treatment without focusing on responsibility for a crime.¹⁷ Part IV outlines courts' current treatment of the dilemma that convicted sex offenders face between the possibility

¹⁵ See *infra* notes 59-63 and accompanying text.

¹⁶ See *Gollaher v. United States*, 419 F.2d 520 (9th Cir. 1969). The court, upon imposing a stiffer sentence because of the defendant's refusal to admit guilt after his conviction, noted that "it is almost axiomatic that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault." *Id.* at 530-31.

¹⁷ See Jon J. Kear-Colwell, *Guest Editorial: A Personal Position on the Treatment of Individuals Who Commit Sexual Offenses*, 40 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 259, 261 (1996) (confrontation "makes little or no psychological sense and could be considered antitherapeutic, even damaging"); Anita M. Schlank & Theodore Shaw, *Treating Sexual Offenders Who Deny Their Guilt: A Pilot Study*, 8 SEXUAL ABUSE: J. RES. & TREATMENT 17, 21 (1996) ("safe environment and lack of pressure to admit" to offense facilitate treatment and modification of denial); Winn, *supra* note 14, at 26 (studies have explored various treatment interventions which can be effective in the presence of denial).

of future incrimination that accompanies an admission of responsibility and the termination of treatment and revocation of probation that follows a denial. Last, Part V examines the current case law and various modes of treating sex offenders in the context of the interests protected by the Fifth Amendment right against self-incrimination. This Part concludes that courts and therapists neither sufficiently preserve convicted sex offenders' Fifth Amendment rights, nor offer offenders adequate treatment options. When offenders have testified in their own defense at trial they should be afforded the right to deny that they committed a sex offense in therapy without fearing probation revocation or imprisonment. Modes of treatment previously given little attention by the courts offer effective therapy without focusing on an offender's admission of responsibility and allow more offenders to receive treatment.

II. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION

Most scholars agree that Justice Goldberg's statement in *Murphy v. Waterfront Commission*¹⁸ on the purposes and policies of the Fifth Amendment privilege against self-incrimination endures as an accurate modern assessment of the privilege.¹⁹ Justice Goldberg wrote:

[The privilege against self-incrimination] reflects many of our fundamental values and most noble aspirations: 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 which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the

¹⁸ 378 U.S. 52 (1964).

¹⁹ Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 OHIO ST. L.J. 497, 513 (1992) [hereinafter Herman, *Part II*]. Herman observed that "the settled view of scholarly literature" is that Goldberg's *Murphy* opinion "invests the constitutional privilege with all of the values and interests that underlay the common law privilege: the values of autonomy, dignity, privacy, and reliability, and the interests in bodily and mental integrity." *Id.*

individual to shoulder the entire load;" our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life; [and] our distrust of self-deprecatory statements"²⁰

The privilege protects the dignity of the individual by ascribing sanctity to his freedom to keep private information about himself.²¹ This essential conclusion grows out of a rich legal history that merits exploration. This Part examines the historical development of the privilege against self-incrimination in England and the United States, the elements necessary for its modern invocation, and its historical and enduring purposes.

A. THE HISTORICAL DEVELOPMENT OF THE PRIVILEGE

The origins of the privilege against self-incrimination in England pre-date the *Magna Carta*.²² In fact, some form of the privilege against self-incrimination has been dated to the *ius commune*—a combination of Roman and canon (ecclesiastic) laws²³—and to Talmudic law before that.²⁴ It is through the English history of the privilege, though, that its modern day values and objectives of "autonomy, privacy, and dignity" began to take shape.²⁵

²⁰ *Murphy*, 378 U.S. at 55 (citations omitted).

²¹ See *Couch v. United States*, 409 U.S. 322 (1973). Justice Powell wrote that the privilege "is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." *Id.* at 327.

²² LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: ITS ORIGINS AND DEVELOPMENT ix* (1968).

²³ RICHARD H. HELMHOLZ ET AL., *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 17* (1997). The privilege of the *ius commune* about which Helmholtz and his colleagues write was more narrow and less protective than our modern day conception of the privilege. Further, the authors suggest that this history and its understanding throughout the development of the privilege in England and colonial North America argue for a more limited modern day conception of the Fifth Amendment privilege. *Id.* at 46, 201-04. The privilege would require only a "showing of solidly grounded suspicion before interrogation" of a suspect could begin. *Id.* at 204. Once a proper showing of probable cause had been made, a suspect or defendant at trial could "reasonably be expected to respond," and silence could be considered to have a bearing on guilt. *Id.*

²⁴ LEVY, *supra* note 22, at 433.

²⁵ Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101,

Following the Norman Conquest of the late eleventh century, England developed a system of ecclesiastical courts, separate from secular courts, that held jurisdiction over all spiritual matters and cases involving the clergy.²⁶ Gradually, as the ecclesiastical court system expanded its jurisdiction over cases only marginally ecclesiastical, it encroached upon the jurisdiction of the secular courts.²⁷ The ecclesiastical courts had a substantial jurisdiction over criminal offenses against religion, and utilized an inquisitorial procedure, "summoning people to answer reckless or unsupported charges."²⁸ By the late twelfth century, secular courts more commonly followed accusatorial proceedings, meaning that "there were a definite charge, a known accuser, and open, rather than secret, proceedings."²⁹ The *Magna Carta*, signed in 1215, further attached importance to accusatorial procedures in the secular courts.³⁰

182-83 (1992) [hereinafter Herman, *Part I*]. The historical analysis in this Comment follows the traditional view that the privilege against self-incrimination as embodied in current American law has its origins in England. To be sure, as Helmholz et al. argue, the procedures of the English ecclesiastical courts mirrored the procedures and notions of the Roman Church courts. See HELMHOLZ ET AL., *supra* note 23, at 19; Herman, *Part I, supra*, at 106. However, modern day notions of an accusatorial rather than an inquisitorial system of justice grew out of the separate English lay courts. See *id.* The procedures of these secular courts were the basis for later protests against the very limited conception of a privilege against self-incrimination held by the Roman and English ecclesiastical courts. An expanded conception of the right against self-incrimination and other protections for the accused that resulted from these protests ultimately found their way into the United States Constitution. See LEVY, *supra* note 22, at 65-66, 416, 421-28.

²⁶ LEVY, *supra* note 22, at 43.

²⁷ *Id.*

²⁸ *Id.* at 45.

²⁹ Herman, *Part I, supra* note 25, at 106. Inquisitorial procedure allowed a trial based on suspicion alone, with neither a specific accuser nor charges. A defendant did not know the witnesses testifying against him, and there was little regard for evidentiary standards. Proceedings were shrouded in secrecy, allowing for tyranny or torture, and a defendant was presumed guilty. An accusatorial system, on the other hand, required a definite accuser and knowledge by the defendant of the charges against him. Witnesses were known to the defendant, and a "stringent" law of evidence existed. Moreover, the defendant was presumed innocent until proven otherwise before a jury trial open to the public. LEVY, *supra* note 22, at 39.

³⁰ Herman, *Part I, supra* note 25, at 106. The *Magna Carta* provided for easy acquisition of a writ which transferred a "case from a mode of private accusation . . . to a mode of public accusation (the precursor of the grand jury)." *Id.*

In 1236, the oath *de veritate dicenda* became part of the English ecclesiastical courts' parlance. An inquisitional oath, it was later and is presently known as the oath *ex officio*, "because the judge compelled it by virtue of his office."³¹ The oath was a sworn statement obligating a person to answer truthfully to all questions in ecclesiastical actions without knowledge of his accuser, without having been formally charged, and without knowledge of the evidence against him.³² The oath's requirement of truthful responses was designed to draw out a confession.³³ The ecclesiastical courts compelled confessions under oath because the confessions provided evidence against the defendant and rehabilitation for the defendant.³⁴ Over the objections of Parliament, the ecclesiastical courts retained the oath *ex officio*.³⁵

John Lambert, in 1532, made the first recorded objection that the oath was unlawful.³⁶ Lambert did not claim a right to remain silent; rather he claimed that he should not have to accuse himself by admitting to heresy without knowledge or notice of the formal charges against him.³⁷ Lambert objected to the use of the oath as a "fishing expedition," used in lieu of other evidence.³⁸ By the mid-sixteenth century, the "refusal on the part of suspected heretics to accuse themselves became com-

³¹ LEVY, *supra* note 22, at 46.

³² *Id.* at 46-47.

³³ *Id.* at 47.

³⁴ William A. Nelson, *The New Inquisition: State Compulsion of Therapeutic Confessions*, 20 Vt. L. REV. 951, 975 (1996). Nelson notes that the ecclesiastical courts claimed the power not only to punish criminally, but spiritually—with eternal damnation. A confession rehabilitated the defendant in that it spared him from damnation. The threat of spiritual doom engendered as much fear and compulsion as torture. *Id.* at 977-78. Nelson draws a loose analogy between the rehabilitative confessions of English ecclesiastical courts and the compelled rehabilitative confessions required of convicted sex offenders today. *Id.* at 970. He recognizes that though the "two systems share certain significant attributes," they are not "subject to the same moral objections." *Id.* at 974-75. The notion of coercing confessions for rehabilitative purposes, recounts Nelson, is not without a checkered history. *Id.* at 975-80.

³⁵ In the early fourteenth century, Parliament passed the *Prohibitio Formata de Statuto Articuli Cleri*, which objected to the use of the oath *ex officio*. The ecclesiastical courts and the King's Council ignored it. Herman, *Part I*, *supra* note 25, at 110.

³⁶ *Id.* at 112.

³⁷ *Id.* at 113.

³⁸ *Id.*

monplace.³⁹ Refusal was grounded more and more in an objection to the oath's incriminating effect; silence, however, was also seen as incriminating, and objectors were punished with imprisonment.⁴⁰

John Udall, a Puritan minister suspected of writing seditious material under a pseudonym, further advanced the notion that courts were limited in their ability to compel responses from defendants.⁴¹ Though Udall denied writing under the pseudonym, he refused to answer further questions regarding whether he had written other material considered heretical by the ecclesiastical courts.⁴² Even when apprised of the rehabilitative purposes of confession—mercy and salvation by the Queen—Udall refused.⁴³ Thus, Udall likely became the first person to claim a legal right of silence—a right against self-incrimination.⁴⁴ The judge advised the jury that Udall's silence was evidence of guilt, and he was convicted.⁴⁵

In the early seventeenth century, Puritans looked increasingly to the common law courts for relief from the perceived unfairness of the oath *ex officio*.⁴⁶ The common law courts, though they offered more procedural safeguards, were not sympathetic to a modern notion of a right against self-incrimination;⁴⁷ if possible, they would convict a person by his

³⁹ LEVY, *supra* note 22, at 79.

⁴⁰ Herman, *Part II*, *supra* note 19, at 538-39.

⁴¹ LEVY, *supra* note 22, at 164.

⁴² *Id.*

⁴³ Nelson, *supra* note 34, at 979-80.

⁴⁴ LEVY, *supra* note 22, at 168.

⁴⁵ Herman, *Part I*, *supra* note 25, at 120-21.

⁴⁶ LEVY, *supra* note 22, at 216. Puritans used the secular common law courts to challenge the ecclesiastical courts' jurisdiction and procedures. Common law courts had sparred with ecclesiastical courts since the twelfth century over jurisdiction—the common law courts resented the ecclesiastical courts' encroachment, and envisioned themselves as competent to try all matters. Common law courts could issue writs of prohibition which enjoined the ecclesiastical courts from hearing a case. Puritans' complaints regarding the oath *ex officio* provided an additional opportunity for the common law courts to assert their jurisdiction. *Id.* at 216-20.

⁴⁷ *Id.* at 215-16. In the common law courts, the accused knew his accuser, the charge, and the evidence against him. However, a defendant's silence could be used as evidence of his guilt. *Id.*

own confession.⁴⁸ In the common law courts, though, Puritans did find a nationalistic resistance to courts that compelled the taking of an oath, and to the Roman-based ecclesiastical law.⁴⁹

The trials of John Lilburne in the 1640s increased the discontent of those who objected to the oath *ex officio*. Lilburne refused to take an oath, and he refused to answer questions regarding his own activities.⁵⁰ Upon being held in contempt in a trial for sedition, Lilburne asserted that compulsory self-incrimination was against God's law and against the "self-protective law of nature."⁵¹ Following the trials of John Lilburne, Parliament abolished the oath *ex officio*.⁵² Common law courts assumed jurisdiction over cases that threatened "life, liberty, or property."⁵³

Emboldened by Lilburne's example, others protested for a right of silence separate from the compulsion of the oath *ex officio*.⁵⁴ A petition before the House of Commons protested against the right of any authority to compel a self-incriminating statement.⁵⁵ In the years following Lilburne's trials, the right against self-incrimination was solidified. Defendants and witnesses at trial were accorded a right against self-incrimination fairly uniformly by the beginning of the eighteenth century.⁵⁶ Professor Herman concludes that the privilege was broadly applied under the English common law; it protected witnesses and defendants and restricted not only courts, but "all of the agencies which then engaged in interrogation."⁵⁷ Further, the privilege began to offer witnesses and defendants the possibility of

⁴⁸ *Id.* at 215.

⁴⁹ *Id.* at 216. The common law courts were unique to England, and they viewed the ecclesiastical courts with some hostility. *Id.*

⁵⁰ Herman, *Part I*, *supra* note 25, at 136.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 137-38.

⁵⁵ LEVY, *supra* note 22, at 295-96.

⁵⁶ Herman, *Part I*, *supra* note 25, at 147. Although a defendant's right to refuse to answer a question seemed settled, defendants still represented themselves frequently, and though not compelled by force to answer questions, they rarely if ever objected to zealous questioning. *Id.* at 140-41.

⁵⁷ Herman, *Part II*, *supra* note 19, at 543.

avoiding the perilous choice between punishment for silence and punishment for coerced self-incrimination.

The English roots of the privilege and Lilburne's assertion that the right against self-incrimination was fundamental to the self-protective law of nature found fertile ground in the American colonies. Although in the seventeenth century, the assertion of the right "was honored as often in the breach as in the observance,"⁵⁸ the eighteenth century conception of the right changed, as is reflected in Benjamin Franklin's characterization of it as one of the "common Rights of Mankind."⁵⁹ Drawing on this belief, Virginia became the first state to include in its state constitution the fundamental right of a person to not "be compelled to give evidence against himself."⁶⁰ The Framers of the Fifth Amendment stated the right similarly: "No person . . . shall be compelled in any criminal case to be a witness against himself."⁶¹ By placing the right against self-incrimination within the Bill of Rights, the Framers warned against the "dangers of government oppression of the individual," and reiterated that the sovereignty of government is subordinate to the rights of man.⁶² The Framers drew upon their English heritage, and sought to prevent the coerced confessions and limited protections for defendants that were found in the English ecclesiastical courts.⁶³

⁵⁸ Herman, *Part I, supra* note 22, at 163.

⁵⁹ LEVY, *supra* note 22, at 383 (citing BENJAMIN FRANKLIN, SOME OBSERVATIONS ON THE PROCEEDINGS AGAINST THE REV. MR. HEMPHILL (1735), reprinted in PAPERS OF BENJAMIN FRANKLIN, Vol. 2, at 37, 44-45, 47, 49 (Leonard W. Labaree et al. eds., 1959)).

⁶⁰ *Id.* at 405. The language of the Fifth Amendment had its American roots in Section 8 of the Virginia Declaration of Rights, which was drafted by George Mason. *Id.* at 405-06, 409.

⁶¹ U.S. CONST. amend. V. The text of the Fifth Amendment, as written by James Madison, originally read, "no person . . . shall be compelled to be a witness against himself." LEVY, *supra* note 22, at 423. John Laurence, a Federalist lawyer from New York, added the phrase "in any criminal case." See generally *id.* at 424-25.

⁶² LEVY, *supra* note 22, at 430.

⁶³ See *id.* The American colonies adopted much of the English secular courts' common law "most strikingly in the field of criminal procedure The consequence was a greater familiarity with and respect for the right against self-incrimination." *Id.* at 368. The adoption of an accusatorial rather an inquisitorial system of justice reflected a choice on the part of the framers to protect individual rights and preserve procedural safeguards for all, sometimes at the expense of punishing the guilty. See Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 939, 1049 n.618

B. DEVELOPMENT OF THE MODERN CONTOURS AND ELEMENTS OF THE PRIVILEGE

The Fifth Amendment set forth the right against self-incrimination ambiguously, leaving it open to interpretation and expansion.⁶⁴ The Supreme Court, largely during this century, has interpreted the right broadly. The modern characteristics of the right against self-incrimination take their shape from two interrelated protections of the right. First, the right prevents the use of compelled or coerced confessions.⁶⁵ Second, the right allows a person to remain silent in the face of questioning if he has a real fear of incriminating himself—the government may not obtain an incriminating statement by compulsion.⁶⁶

Compulsion is a necessary element for the right against self-incrimination.⁶⁷ The privilege “does not preclude a witness from testifying voluntarily in matters which may incriminate him.”⁶⁸ Consequently, if a person desires the protection of the

(1991) (citing *Smith v. Murray*, 477 U.S. 527, 544-45 (1986) (Stevens, J., dissenting) and *Stone v. Powell*, 428 U.S. 465, 523-34 (1975) (Brennan, J., dissenting)).

⁶⁴ LEVY, *supra* note 22, at 430. The framers may have purposely drafted the right against self-incrimination clause with ambiguity to engender debate about its “intent, meaning, and purpose.” *Id.* The framers did not envision themselves as “framers of detailed codes.” *Id.*

⁶⁵ *Haynes v. Washington*, 373 U.S. 503 (1963) (written confession of defendant inadmissible as evidence because it was given involuntarily).

⁶⁶ *Brown v. Walker*, 161 U.S. 591, 598-600 (1896) (witness may only refuse to respond to questioning if he truly fears incrimination, but not if he only fears shame or indignity).

⁶⁷ *Hoffa v. United States*, 385 U.S. 293, 304 (1966) (petitioner’s incriminating statements not protected by the right against self-incrimination in the absence of any evidence of compulsion). Compulsion occurs when “a person has been ordered to testify by a state actor who has the power to sanction the refusal to testify.” RONALD J. ALLEN ET AL., *CONSTITUTIONAL CRIMINAL PROCEDURE* 1062 (3d ed. 1995). The right protects only against compelled testimonial evidence, not physical evidence such as handwriting or blood samples. *Id.* at 479, 1154.

⁶⁸ *United States v. Monia*, 317 U.S. 424, 427 (1943) (holding that witnesses who voluntarily gave self-incriminating testimony under oath are only protected from prosecution because of statutory grant of immunity). Any consistent or reliable notion of “voluntariness” is hard to find. The term is subject to wide-ranging interpretation and abuse. *See generally* *Colorado v. Connelly*, 479 U.S. 157 (1986) (confession given by mentally ill respondent who was following the orders of voices in his head regarded as voluntary, and not protected by the right against self-incrimination); *Payne v. Arkansas*, 356 U.S. 560 (1958) (confession of a man with a fifth-grade education excluded after he had been subject to psychological intimidation); *Brown v. Mis-*

privilege, he must affirmatively invoke it.⁶⁹ If a person asserts the privilege, then he has a right to refuse to answer a question, and any demand that he answer will be indicative of compulsion.⁷⁰ There are situations in which compulsion is assumed, and the privilege is self-executing. For example, an affirmative invocation of the privilege is required neither when an individual is interrogated in custody⁷¹ nor in a "classic penalty situation."⁷² In a custodial situation, the pressures on a subject are considered so strong that the state must advise him of his Fifth Amendment right to remain silent and avoid incriminating himself.⁷³ In a penalty situation, a witness is faced with an impermissible choice between exercising his right against self-incrimination and accepting a penalty for doing so, or waiving his right and risking incrimination.⁷⁴ Compulsion is assumed to be present because a witness cannot affirmatively invoke the privilege against self-incrimination (as is normally required) to trigger compulsion without incurring a penalty. It is important to distinguish between a penalty and ineligibility for a privilege. If a criminal who has been granted probation is threatened with probation revocation, that is a penalty—the probationer would be deprived of a liberty he has.⁷⁵ However, when an incarcer-

issippi, 297 U.S. 278 (1936) (suspects who confessed after being beaten did so involuntarily).

⁶⁹ *Monia*, 317 U.S. at 427.

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

⁷¹ *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that the inherently compelling pressures of in-custody interrogation demand that the accused be informed of his right against self-incrimination).

⁷² *Minnesota v. Murphy*, 465 U.S. 420 (1984). The paradigmatic example of a penalty situation in which compulsion is assumed is a witness who must choose between: (1) giving testimony that would incriminate himself, or (2) claiming a right not to testify and being held in contempt. ALLEN ET AL., *supra* note 67, at 1062. See also *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966) (defendant impermissibly forced to choose between admitting guilt or denying guilt and suffering maximum sentence); *State v. Fuller*, 915 P.2d 809, 815 (Mont. 1996) (issuance of a credible threat of a penalty by lower court sufficient to create penalty situation for defendant, even if court could not have carried out its threat).

⁷³ *Miranda*, 384 U.S. at 467.

⁷⁴ Jessica Wilen Berg, Note, *Give Me Liberty Or Give Me Silence: Taking a Stand on Fifth Amendment Implications for Court-Ordered Therapy Programs*, 79 CORNELL L. REV. 700, 713 (1994).

⁷⁵ This is a penalty even if the probation was expressly contingent on fulfillment of a condition.

ated criminal is denied eligibility for probation for failure to satisfy a necessary precondition, he has been denied a privilege—a conditional liberty he desires, not assigned a penalty.⁷⁶

For a person to claim the right against incrimination, the law requires that he must also show a real fear of incrimination.⁷⁷ A “merely remote and naked possibility . . . such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice.”⁷⁸ Furthermore, fear of infamy or disgrace is insufficient to claim the privilege.⁷⁹ A person is not exempted from the duty of disclosure only because “testimony may tend to degrade [him] in public estimation The design of the constitutional privilege is not to aid [a person] in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge.”⁸⁰ A person may cite a real fear of incrimination after his own conviction because the fear extends to possible incrimination in the future as well as to current criminal proceedings.⁸¹

The government may counterbalance any real fear of incrimination by offering immunity from prosecution in exchange for testimony. In this situation, the government may compel testimony, under threat of contempt. Such a use of immunity recognizes “the need of the State, as well as the Federal Government, to obtain information ‘to assure the effective functioning of government.’”⁸² The individual giving incriminating testimony is protected against the use of the testimony in a prosecution against him, and further protected against the derivative use of the testimony to unearth other evidence tending

⁷⁶ *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 9 (1979).

⁷⁷ *Brown v. Walker*, 161 U.S. 591, 599-600 (1896).

⁷⁸ *Id.* at 600.

⁷⁹ Fear of shame, alone, is an insufficient ground for claiming the right against self-incrimination because, as Justice Brown explained, “[t]he safety and welfare of an entire community” should not be undermined by an individual’s desire to protect his reputation. *Id.* at 605.

⁸⁰ *Id.* at 605-06.

⁸¹ See *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984); see also *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

⁸² *Lefkowitz*, 414 U.S. at 81 (citing *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 93 (1964) (White, J., concurring)).

to incriminate him.⁸³ Grants of immunity, however, do not prevent a later prosecution for perjury. An exception for perjury is allowed because of courts' inherent power to punish false testimony.⁸⁴

The right against self-incrimination serves to restrict the states as well as the federal government,⁸⁵ and it may be invoked in a state proceeding to protect against incrimination in a federal forum, and vice versa.⁸⁶ Further, the right is available outside traditional courtroom and interrogation room settings—its availability “does not turn upon the type of proceeding in which its protection is invoked,” but on the potential exposure to incrimination that a compelled statement may invite.⁸⁷

C. THE PURPOSES AND OBJECTIVES OF THE PRIVILEGE: THE NATURE OF THE RIGHT PROTECTED

Underlying the evolution of the privilege's history in the United States are certain basic objectives and values. The Framers of the Constitution believed that people were entitled to some very basic rights, and wished to protect against the sort of encroachment upon these rights that had occurred in England. The privilege against self-incrimination manifested the Framers' belief in the paramount importance of individual rights.⁸⁸ Though Levy finds little evidence in historical accounts of a specific theory or underlying policy of the right,⁸⁹ Professor Herman accounts for a right to silence and a prohibition of

⁸³ *Kastigar v. United States*, 406 U.S. 441, 453 (1972). The extent to which derivative use of immunized incriminating testimony is prohibited is beyond the scope of this Comment. See generally JEROLD ISRAEL & WAYNE LAFAVE, *CRIMINAL PROCEDURE IN A NUTSHELL* 282-83 (1988).

⁸⁴ *Glickstein v. United States*, 222 U.S. 139, 141 (1911).

⁸⁵ *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (holding that the Fifth Amendment privilege is incorporated into the Fourteenth Amendment's restrictions against the states).

⁸⁶ *Id.* at 10-11.

⁸⁷ *Estelle v. Smith*, 451 U.S. 454, 462 (1981) (quoting *In re Gault*, 387 U.S. 1, 49 (1967) (right applicable to statements made during psychiatric examination)).

⁸⁸ See *supra* notes 59-63 and accompanying text.

⁸⁹ See LEVY, *supra* note 22, at 430-31. Levy does assert more generally that the Constitution as a whole reflected the framers' view that “the citizen is the master of his government, not its subject.” *Id.* at 431.

compulsion by pointing to three values that sustain the privilege against self-incrimination: autonomy, privacy, and dignity.⁹⁰

The privilege protects the autonomy of an individual and the privacy of one's own thoughts.⁹¹ Lambert's objection to the oath *ex officio* as a "fishing expedition" (when he was questioned about heresy charges) exemplifies this value.⁹² Without knowledge of the charges or evidence against him, Lambert did not know to what he should confess under oath. Without a specific charge, an obligation to answer generally to criminal allegations invades the sanctity of an individual's mind and compromises the extent to which the individual can control information about himself.⁹³ Lambert ran the risk of confessing to more than the court suspected, or in the case of extreme coercion, confessing falsely to put an end to his ordeal.

The objective of protecting the autonomy of the individual is also reflected by a desire to allow suspects to remain silent, as Udall did before the High Commission, without risking punishment. Under oath to testify truthfully, Udall faced either incriminating himself, or incrimination by implication through

⁹⁰ Herman, *Part I*, *supra* note 25, at 182-86. Herman notes that modern commentators assert that autonomy, privacy and dignity are the values that currently underlie the protections of the right against self-incrimination and protect against the type of abuses that were found in English history. *Id.* Commentators give these values interrelated, if not overlapping definitions. Autonomy takes on meaning implying a freedom from government overreaching. For example, Louis Henkin suggests that autonomy includes both a freedom from regulation and from official intrusion. See Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1424-25 (1974). The government intrusion exemplified by compelling a defendant to incriminate himself violates both the defendant's autonomy and privacy because it compromises the individual's ability to maintain control over information about himself. Herman, *Part I*, *supra* note 25, at 183 n.436 (citing Charles Fried, *Privacy*, 77 YALE L.J. 475, 488 (1968)). The individual's control over the information he releases about himself becomes weakened because the "browbeating" and threat of jail that accompany compulsion create stress and fear that facilitate a willingness to make incriminating statements. *Id.* at 182-84. See also MARK BERGER, *TAKING THE FIFTH* 43 (1980) (stating that the "core element" of privacy is control over personal integrity, including "the ability to withhold information about ourselves."). Lastly, the value of dignity, as protected by the right against self-incrimination, reflects a freedom from a violation of bodily integrity and the unreliable confessions that may result. Herman, *Part I*, *supra* note 25, at 184.

⁹¹ See Herman, *Part I*, *supra* note 25, at 183 n.436.

⁹² See *id.*

⁹³ *Id.*

his silence.⁹⁴ The value of autonomy requires that the prosecution be required to provide its own proof, and that the knowledge and conscience of the accused remain solely in his dominion.

The purpose of protecting the individual's dignity grew out of a distaste for courts—even the accusatory common law courts—which exercised considerable pressure upon defendants to incriminate themselves.⁹⁵ The dignity of an individual is compromised by coercion, whether verbal or physical.⁹⁶ A ban on torture and a provision for the security of the criminally accused are among the most important functions of the right against self-incrimination.⁹⁷

Lilburne's insistence that a right against self-incrimination was an inherent right, and America's constitutional Framers' belief in rights of men that eclipse government sovereignty, point to the evolution of a right that protects the sanctity of individual thought and the "inviolability of the human personality."⁹⁸ The overlapping values of autonomy, privacy, and dignity manifest themselves in the objectives of the right against self-incrimination. In its contemporary conception, "the privilege is an intimate and personal one."⁹⁹ Derived from an "abhorrence of governmental assault against the single individual accused . . . and the temptation [of the government] to resort to the expedient of compelling incriminating evidence from" the mouth of the accused, the privilege respects a private inner sanctum of individual feeling and thought.¹⁰⁰

⁹⁴ See Herman, *Part I, supra* note 25, at 120-21.

⁹⁵ See LEVY, *supra* note 22, at 215-16.

⁹⁶ Coercion engendered by torture or the mere threat of torture compromises the individual's dignity by creating fear and stress sufficient to persuade the individual to reveal information about himself that ordinarily he would not. The individual is placed in the unsavory position of trading information for protection of his bodily integrity. Or, the individual's impulse for self-preservation may lead him to provide information that is not true just to avoid further torture. Herman, *Part I, supra* note 25, at 182-84.

⁹⁷ LEVY, *supra* note 22, at 430.

⁹⁸ *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). See also LEVY, *supra* note 22, at 430; Herman, *Part I, supra* note 25, at 136.

⁹⁹ *Couch v. United States*, 409 U.S. 322, 327 (1973).

¹⁰⁰ *Id.*

III. TREATMENT OF SEXUAL OFFENDERS

As prison beds become increasingly scarce, and the cost of incarceration rises, courts continue to develop alternatives to imprisonment.¹⁰¹ In cases involving convicted sex offenders, courts increasingly suspend imprisonment, and sentence offenders to probation conditioned upon successful participation in specialized treatment programs.¹⁰² Specialized treatment can be an effective means of reducing sex offenders' tendency to reoffend.¹⁰³ These treatment programs almost universally require the offender to admit responsibility for the offense underlying the conviction as a condition of entry and continued participation in the program.¹⁰⁴ This is a difficult hurdle for sex offenders, who are particularly likely to deny their offenses.¹⁰⁵ However, amenability to treatment and successful rehabilitation are widely regarded to hinge upon eliminating denial and replacing it with an admission of responsibility for past sexual de-

¹⁰¹ See Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 CRIME & JUST. 99, 100 (1996) (reporting that in 1993, federal prisons were operating at 136% capacity, 39 state systems were operating above rated capacity, and that in 1994 corrections budgets were the fastest rising component of state spending). See also Leonore H. Tavill, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty is Today's Probation Condition*, 36 CLEV. ST. L. REV. 613 (1988). Tavill observes that the "judicial system has turned to alternative sentencing as a solution" to prison overcrowding and costs. *Id.* at 614. "[T]he most common alternative form of sentencing has become probation accompanied by certain restrictive conditions." *Id.*

¹⁰² Scott Michael Solkoff, Note, *Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs*, 17 NOVA L. REV. 1441, 1449-50 (1993) (citing Barbara E. Smith et al., *The Probation Response to Child Sexual Abuse Offenders: How is it Working?*, A.B.A. CRIM. JUST. SEC. 1-14 (1990)).

¹⁰³ Robert J. McGrath, *Sex Offender Risk Assessment and Disposition Planning: A Review of Empirical and Clinical Findings*, 35 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 328, 329 (1991); William L. Marshall & Howard Barbaree, *The Long-Term Evaluation of a Behavioral Treatment Program for Child Molesters*, 26 BEHAV. RES. & THERAPY 499, 505 (1988). Recidivism among sex offenders tends to be high; untreated offenders reoffend up to 60% of the time. See McGrath, *supra*. Specialized treatment can reduce this recidivism rate significantly. See *id.*; WILLIAM L. MARSHALL ET AL., HANDBOOK OF SEXUAL ASSAULT 285 (1990) (citing study of 100 clients in which only eight reoffended). One study reports that if only one offender in fifty is treated successfully the cost of treatment is still cost beneficial. *Id.* at 7. In this discussion, "offender" and "client" will be used interchangeably.

¹⁰⁴ Schlank & Shaw, *supra* note 17, at 18; Winn, *supra* note 14, at 26-27.

¹⁰⁵ See Schlank & Shaw, *supra* note 17, at 18. See also Carich, *supra* note 3, at 20.

viancy.¹⁰⁶ If an offender refuses to admit responsibility for the offense, he is typically terminated from his treatment program, and subject to probation revocation and imprisonment.¹⁰⁷ The reality that offenders are sentenced to treatment programs involuntarily, the tendency of sex offenders to be especially prone to denial,¹⁰⁸ and offenders' fears regarding the incriminating consequences of disclosing their offenses all challenge an offender's capacity to participate successfully in treatment programs.

Denial is a significant component "of an offender's response to disclosure" of his sexual offense.¹⁰⁹ Disclosure often occurs when an offender is convicted and sentenced to treatment for an offense. Therapists describe a dilemma between preferring clients who are mandated by a court's sentence to attend treatment,¹¹⁰ and clients who will willingly admit responsibility for a sexual offense.¹¹¹ Clients who attend therapy on a voluntary basis, without a court order, tend to evade real treatment by convincing themselves that they are quickly "cured" and that they no longer need to follow procedures of the treatment program.¹¹² This option is not available to an offender who is in therapy as an involuntary condition of his probation because the therapist wields the threat of imprisonment as a consequence of non-compliance with established procedures of the treatment program. Thus, from the perspective of the therapist, resources are best spent on clients who are mandated to be there and more likely to complete treatment.¹¹³ Yet involuntary placement in a treatment program, though it prevents resort to claims of a "quick-fix," may not be particularly conducive to an offender's admission of responsibility for his behavior.

¹⁰⁶ Winn, *supra* note 14, at 26-27.

¹⁰⁷ See *State v. Gleason*, 576 A.2d 1246, 1249 (Vt. 1990).

¹⁰⁸ Solkoff, *supra* note 102, at 1451 (citing BARRY M. MALETZKY, *TREATING THE SEXUAL OFFENDER* 12-34 (1991)).

¹⁰⁹ ANNA C. SALTER, *TREATING CHILD SEX OFFENDERS AND VICTIMS: A PRACTICAL GUIDE* 96 (1988).

¹¹⁰ *Id.* at 86.

¹¹¹ *Id.* at 67.

¹¹² *Id.* at 86.

¹¹³ *Id.* at 86-87.

Further complicating the therapist-client relationship is the fact that treatment of sex offenders is also frequently characterized by more limited confidentiality than a traditional therapist-client relationship.¹¹⁴ Limited confidentiality is imposed by statute in all states with respect to abuse of children: therapists are required to report an admission of such abuse, whether or not it is related to the offense for which the offender is in therapy.¹¹⁵ In practice, not all therapists report abuse even though they legally have no discretion.¹¹⁶ However, therapists are bound by an ethical duty to the client to acknowledge that their communications may not be entirely privileged.¹¹⁷ Therapists' hesitance to report or to tell clients that all such statements are subject to disclosure is due, in part, to the recognition that limits on confidentiality may limit or alter client disclosures.¹¹⁸

The conventional view of treatment professionals is that denial must be overcome for therapeutic work to proceed effectively.¹¹⁹ Therapists identify several types or components of denial that occur along a spectrum: denial of acts or facts, denial of responsibility, denial of awareness, denial of fantasy and planning, denial of inappropriate feelings, and denial of the serious impact of behavior.¹²⁰ When an offender frequently expresses denial of facts—a refusal to admit that the sexual offense ever happened—therapists will often deem an offender untreatable and unsuitable for their therapy program.¹²¹ Intolerance for denial of facts may stem from a conception of the different types of denial as static, having little movement within or among

¹¹⁴ *Id.* at 89.

¹¹⁵ Murray Levine & Eric Doherty, *The Fifth Amendment and Therapeutic Requirements to Admit Abuse*, 18 CRIM. J. & BEHAV. 98, 100 (1991).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 109.

¹¹⁸ *Id.*

¹¹⁹ Edith Fein & Gerrie V. Bishop, *Child Sexual Abuse: Treatment for the Offender*, SOC. CASEWORK: J. CONTEMP. SOC. WORK, Feb. 1987, at 122, 123.

¹²⁰ These components represent the overlapping conceptions of denial asserted by more than one author. See SALTER, *supra* note 109, at 97; Nathan L. Pollock & Judith M. Hashmall, *The Excuses of Child Molesters*, 9 BEHAV. SCI & L. 53, 57 (1991); Winn, *supra* note 14, at 27-28.

¹²¹ Winn, *supra* note 14, at 27. See *State v. Imlay*, 813 P.2d 979, 981-82 (Mont. 1991).

the types.¹²² If a therapist sees little sign of progress in a client that denies facts, and does not expect that the nature of the client's denial will change, he is apt to dismiss the client from the program.

Given the tendency of offenders to initially deny or minimize the impact of their offense and the fact that they are frequently in treatment against their will, some therapists advocate a confrontational approach to therapy.¹²³ Confrontation need not be equated with hostility, but under this approach, the therapist takes explicit value stances, indicates that he does not trust the offender, and consistently redirects dialogue so that the offender comes to terms with his behavior.¹²⁴ Many therapists view group therapy as useful because other offenders are usually adept at confronting a new group member's denial or resistance to treatment.¹²⁵

Other therapists suggest that a confrontational approach may not be the most effective approach. Support exists in the treatment community for therapy programs that attempt to produce change in offenders' behavior with a motivational approach rather than a confrontational approach.¹²⁶ While the confrontational approach may confirm "in the offender[] the feeling that [he has] no control over [his] behavior and that controls have to be imposed," the motivational approach attempts to engender a desire within the offender to change—to do something for himself.¹²⁷ Professor Jon Kear-Colwell suggests that the confrontational approach makes little psychological sense and may be damaging to a sexual offender because it reinforces the offender's view that his locus of control is outside himself.¹²⁸ It strips the offender of a sense of autonomy and self-

¹²² Bruce Lafien & William R. Sturm, Jr., *Understanding and Working With Denial in Sexual Offenders*, 3 J. CHILD SEXUAL ABUSE 19, 21 (1994).

¹²³ SALTER, *supra* note 109, at 93.

¹²⁴ *Id.* at 88-95.

¹²⁵ Fein & Bishop, *supra* note 119, at 123.

¹²⁶ Kear-Colwell, *supra* note 17, at 261. See also Winn, *supra* note 14, at 30 (noting that especially those who are vulnerable and dependent on their defenses may not respond well to confrontation).

¹²⁷ Kear-Colwell, *supra* note 17, at 261.

¹²⁸ *Id.*

control. On the other hand, the motivational approach keeps the locus of control within the offender and allows him to feel like he has the power to make decisions and be responsible for his own behavior.¹²⁹ The motivational approach is grounded in negotiation, rather than imposition and control by the therapist.¹³⁰ Kear-Colwell laments that the motivational approach is seen as soft on offenders and "almost as colluding with them," but he asserts that the therapist's first responsibility is to his client, not to a community at large that perceives such treatment as coddling criminals.¹³¹

Sentencing courts tend to accept the aforementioned conventional views about the treatment of sexual offenders.¹³² The need for an offender to admit responsibility for his sexual offense, the role of confrontation and the threat of imprisonment in ensuring compliance with the terms of a treatment program are accepted as given.¹³³ Courts tend to ignore other modes of treatment that require neither a threshold willingness to admit responsibility for a sexual offense, nor a confrontational approach to offender denial. These other treatment philosophies provide alternatives for dealing with the inherent tension between rehabilitation and offenders' fears of shame and future incrimination. They recognize that neither denial nor amenability to treatment are static variables, and that therapeutic envi-

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 259. Kear-Colwell acknowledges the tension between "the rights of the offender" and "the greater good of society." *Id.* This tension, he concludes, is part of his profession, and he owes a duty first to the offenders he treats. *Id.*

¹³² See, e.g., *Gollaher v. United States*, 419 F.2d 520, 530 (9th Cir. 1969) (affirming trial court's decision to impose a harsher sentence because of defendant's refusal to admit guilt after he was convicted). The Ninth Circuit maintains that it is "almost axiomatic that the first step toward rehabilitation is the offender's recognition that he was at fault." *Id.*

¹³³ As of the publication date I found only one case acknowledging a sex offender treatment program that did not require admission of sex crimes. See *In re E.H.* III, 578 N.W.2d 243, 250 (Iowa 1998). I found no other mention in court opinions of the sort of alternative treatments described below, *infra* notes 135-63 and accompanying text. These treatments put less emphasis on immediate acceptance of responsibility, and suggest that confrontation may be counterproductive to rehabilitation.

ronments less focused on confrontation may be more conducive to facilitating rehabilitation.¹³⁴

One mode of therapy, known as metaconfrontation, recognizes the protective function that denial serves for offenders, and aims to induce eventual acceptance of responsibility by expressing empathy for the offender's initial need to deny.¹³⁵ Metaconfrontation, proposed by therapist Mack E. Winn, is directed toward offenders who do not respond well to direct confrontation and who might otherwise have been deemed untreatable because of the perceived intransigence of their denial.¹³⁶ A therapist poses a series of hypothetical questions designed to get the client to think about the negative emotional and social consequences of admitting responsibility for sexual deviancy.¹³⁷ By continuing to focus on such hypotheticals over a series of sessions the therapist produces a "climate of empathic intensity," in which the client may begin to feel comfortable ascribing the characteristics and consequences of denial to himself.¹³⁸ Once the emotional and functional bases for denial are exposed, the therapist then works to challenge the offender to accept responsibility for his sexual deviance.¹³⁹ The therapist works to achieve this goal without a direct and unsolicited confrontation which could engender counterproductive defensiveness in the offender.¹⁴⁰ This approach recognizes that confrontation may not be effective with clients who are "most vulnerable and dependent on their defenses."¹⁴¹ Instead of a direct confrontation, the therapist asks for explicit permission to challenge the offender's denial, and in doing so, gains the offender's compliance to examine himself.¹⁴² Further, the therapist, by creating an empathetic environment, aligns himself with the offender's strengths and encourages the offender to use his

¹³⁴ See Schlank & Shaw, *supra* note 17, at 21; Winn, *supra* note 14, at 30.

¹³⁵ Winn, *supra* note 14, at 30.

¹³⁶ *Id.* at 26, 30.

¹³⁷ *Id.* at 29.

¹³⁸ *Id.*

¹³⁹ *Id.* at 31.

¹⁴⁰ *Id.* at 31-32.

¹⁴¹ *Id.* at 30.

¹⁴² *Id.* at 31.

strengths to confront his own weaknesses, those parts of him that want to protect and deny.¹⁴³ These procedures are aimed at preserving the client's autonomy, encouraging responsibility, and avoiding a reversion to defensive posturing.¹⁴⁴

Another treatment study, done by Anita Schlank and Theodore Shaw, emphasizes the importance of trying to treat those offenders in absolute denial who are frequently dismissed from therapy programs as untreatable.¹⁴⁵ Left untreated, such offenders are more prone to commit more crimes once released into the community than those who have admitted responsibility for their sexual offense.¹⁴⁶ In the Schlank and Shaw treatment program, offenders who profess absolute denial of their offense participate in exercises designed to explain the protective function of denial and elicit empathy for victims.¹⁴⁷ Therapists then introduce clients to concepts of relapse prevention and ask them to apply these concepts to a behavior they are willing to change, such as smoking marijuana.¹⁴⁸ The clients then are asked to imagine applying "the model to someone who might be guilty of the offense for which [they have] been accused."¹⁴⁹ Modification of denial is facilitated by a "safe environment and lack of pressure to admit [the] offense."¹⁵⁰ This treatment procedure is conceived as an intermediary step for offenders who are removed from traditional treatment programs

¹⁴³ *Id.* at 32-33.

¹⁴⁴ *Id.* at 31, 33. Winn notes that an offender in denial who is "meaningfully invested in cognitive or behavioral therapies," which teach him to recognize and diminish deviant sexual arousal, "may be less of a risk than [an offender] who admits his offense but never completes treatment or one who is rejected from treatment due to his unwillingness to own his offense." *Id.* at 26. Winn acknowledges that those offenders who do accept responsibility for their offense are less likely to re-offend than those who do not. *Id.* However, he contends that too many offenders are denied treatment and deemed untreatable because they initially refuse to admit responsibility for their offense. *Id.* at 27. Thus, Winn advocates his treatment program as a way of treating more offenders, especially those who continue to deny their offense. *Id.*

¹⁴⁵ Schlank & Shaw, *supra* note 17, at 18.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 20.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 21.

¹⁵⁰ *Id.*

for absolute refusal to admit responsibility for their behavior.¹⁵¹ Following this therapy, offenders are better prepared to continue with further treatment which may or may not focus on ownership of the offense underlying the client's crime.¹⁵² Schlank and Shaw administered their therapy program to ten offenders who had been denied acceptance to other treatment programs because they refused to accept responsibility for their offense.¹⁵³ Of the ten, five responded to motivational treatment and admitted their offenses.¹⁵⁴

Some studies have investigated the possibility of treating a sexual offender "without a direct focus on the offender's ownership of the offense of which he was convicted."¹⁵⁵ These studies suggest that cognitive and behavioral therapies can effectively reduce the risk offenders pose to a community, though the offender is not directly held accountable for his offense as part of therapy.¹⁵⁶ One study by Borduin et al. focuses on improving the offender's functioning within the multiple systems (e.g., family, peer, school) that contributed to his criminal behavior.¹⁵⁷ The therapist facilitates goal-setting and intervention in systems that may best support a change in the offender's anti-social behavior.¹⁵⁸ People who comprise the various systems are involved in the client's therapy by working to alter the system to provide support to the client. For example, family therapy may promote communication about issues of sexuality.¹⁵⁹ Though this sort of treatment attempts to reduce denial and other problematic offender characteristics, there is no explicit emphasis on accepting responsibility for an offense. Clients of multisystemic treatments demonstrated lower recidivism rates than those in

¹⁵¹ *Id.* at 19.

¹⁵² *Id.* at 22.

¹⁵³ *Id.* at 19.

¹⁵⁴ *Id.* at 21.

¹⁵⁵ Winn, *supra* note 14, at 26.

¹⁵⁶ See Charles M. Borduin et al., *Multisystemic Treatment of Adolescent Sexual Offenders*, 34 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 105, 111 (1990); Marshall & Barbaree, *supra* note 103.

¹⁵⁷ Borduin, *supra* note 156, at 106.

¹⁵⁸ *Id.* at 111.

¹⁵⁹ *Id.* at 110.

individual therapy.¹⁶⁰ Over a period of twenty-one to forty-nine months, clients of multisystemic treatments exhibited a recidivism rate of 12.5% for sexual offenses.¹⁶¹ This is a significant improvement over a 60% recidivism rate for untreated offenders.¹⁶² Other behavior and cognitive therapies take differing approaches to changing the offender's behavior. Another study that did not focus on offenders' ownership of their offenses utilized behavioral treatments designed to condition offenders to associate criminal sexual impulses with negative sensations.¹⁶³

IV. THE FIFTH AMENDMENT RIGHTS OF CONVICTED SEXUAL OFFENDERS: RECENT CASE LAW

The Fifth Amendment¹⁶⁴ right against self-incrimination is a fundamental protection against government abuse of individual autonomy, privacy and dignity. Courts, however, have unevenly applied the right to convicted sex offenders who, as a condition of their court-ordered therapy, must admit responsibility for their crime. Offenders frequently must choose between admitting responsibility and risking that their admission will foreclose rights of appeal and lead to further incrimination, or refusing to admit guilt and risking removal from therapy and revocation of probation. Whether this choice violates the principles of the right against self-incrimination remains disputed, and often turns on what plea the offender enters at trial. Though it is settled that "a defendant waives certain constitutional rights [by pleading guilty,] including . . . his privilege against compulsory self-incrimination,"¹⁶⁵ the law is less clear for defendants who have been convicted, but did not plead guilty. Courts have pre-

¹⁶⁰ *Id.* at 110-11.

¹⁶¹ *Id.* at 110.

¹⁶² See McGrath, *supra* note 103, at 329. McGrath cited a U.S. Department of Justice study that suggested that the recidivism rate for untreated sexual offenders is about 60% within a three year period following their release from incarceration. *Id.*

¹⁶³ Marshall & Barbaree, *supra* note 103, at 499-500. This study, though it did not focus on ownership of offenses, did not include any subjects who denied their offenses.

¹⁶⁴ See U.S. CONST. amend. V.

¹⁶⁵ *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (quoting *McCarthy v. United States*, 394 U.S. 459 (1969)).

served the right better, though not fully, for offenders who plead not guilty at trial, but have said that it does not apply to offenders who enter *nolo contendere* or *Alford* pleas.¹⁶⁶ An examination of the relevant recent case law proves instructive in an effort to reconcile the courts' positions.

A. NOT GUILTY PLEAS

In *State v. Imlay*,¹⁶⁷ Donald Imlay was convicted of sexual assault following a jury trial at which he pled not guilty and testified on his own behalf.¹⁶⁸ The trial court sentenced him to five years in prison, but suspended the sentence, choosing to place Imlay on probation under the condition that he enroll in and complete a sexual therapy program.¹⁶⁹ Though Imlay attended all appointments with his sexual therapy counselor over the course of six months, he was advised that he could not continue with the treatment program because he would not admit responsibility for the crime for which he was convicted.¹⁷⁰ His therapist testified that Imlay was not amenable to treatment because he would not admit that he had committed a sex offense.¹⁷¹ The court found Imlay in violation of his probation for failing to complete a therapy program; his probation was revoked and he was ordered to serve five years of prison time.¹⁷²

Imlay appealed the decision to revoke his probation.¹⁷³ The Montana Supreme Court vacated this decision, holding that Imlay's Fifth Amendment right against self-incrimination had been

¹⁶⁶ Compare *State v. Imlay*, 813 P.2d 979 (Mont. 1991), and *State v. Fuller*, 915 P.2d 809 (Mont. 1996) (both holding that a convicted sex offender who pled not guilty at trial could not be forced to admit responsibility for his offense in therapy under penalty of probation revocation and imprisonment), with *State v. Gleason*, 576 A.2d 1246, 1269 (Vt. 1990) (holding that a convicted sex offender who entered a *nolo contendere* plea waived his right against self-incrimination following his conviction), and *State v. Butler*, 900 P.2d 908 (Mont. 1995) (holding that a convicted sex offender who entered an *Alford* plea waived his right against self-incrimination).

¹⁶⁷ 813 P.2d 979 (Mont. 1991).

¹⁶⁸ *Id.* at 980.

¹⁶⁹ *Id.* at 981.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 982.

¹⁷² *Id.*

¹⁷³ *Id.* at 980.

violated.¹⁷⁴ The court observed that Imlay was faced with a “terrible” choice: he could admit to the crime in accordance with the requirements of the therapy program and incriminate himself for perjury, or he could maintain his innocence and be penalized with imprisonment.¹⁷⁵ The court noted further that Imlay retained his Fifth Amendment rights even after his conviction. Even after conviction by a trial court, a defendant is not irrevocably adjudged guilty because he still has available to him the “right to challenge his conviction, based on newly discovered evidence.”¹⁷⁶ So not only would an admission of guilt incriminate Imlay for perjury, it would all but foreclose his opportunity to exercise his rights of appeal.¹⁷⁷ Imlay faced a classic penalty situation in which the Fifth Amendment is self-executing—he had to choose between incriminating himself or accepting a penalty for refusing to do so; under the Fifth Amendment’s application, Imlay was faced with coercion and a real fear of incrimination, so he could not be punished for asserting his own innocence.¹⁷⁸

The Montana Supreme Court vacated the order which had revoked the suspended sentence on the grounds that it was a violation of Imlay’s right against self-incrimination, absent a grant of immunity, to penalize him for refusing to confess to a

¹⁷⁴ *Id.* at 985.

¹⁷⁵ *Id.* at 983.

¹⁷⁶ *Id.* at 985. See also *Thomas v. United States*, 368 F.2d 941, 945 (5th Cir. 1966) (holding that a convicted offender’s sentence may not be augmented if he refuses to confess to his crime because this would foreclose his rights to exercise the “processes of motion for new trial (including the opportunity to discover new evidence), appeal . . . and collateral attack”).

¹⁷⁷ *Imlay*, 813 P.2d at 985. The court stated that Imlay’s right to challenge his conviction based on new evidence “would be rendered meaningless if [he] could be compelled to admit guilt as a condition to his continued freedom . . . [and] the reliability of an admission of guilt under such circumstances would be highly suspect.” *Id.* At a new trial, the prosecution would have to introduce evidence anew; if Imlay had admitted guilt to his therapist, his probation officer presumably would know either because of limited therapist-client confidentiality, or by implication of Imlay’s completion of the treatment. This evidence of an admission would not only foreclose appeal, but the State could introduce it to prosecute for perjury.

¹⁷⁸ See generally *Hoffa v. United States*, 385 U.S. 293, 304 (1966) (compulsion required to activate the right against self-incrimination); *Brown v. Walker*, 161 U.S. 591, 599-600 (1896) (may refuse to testify only if truly fear incrimination).

crime in therapy.¹⁷⁹ The Montana Supreme Court then remanded the case to the trial court, which resentenced Imlay to five years in prison.¹⁸⁰ The Montana Supreme Court upheld the lower court's second sentence, and the United States Supreme Court granted certiorari to review the case,¹⁸¹ but then dismissed the writ of certiorari as improvidently granted.¹⁸² The Court concluded that there existed no real case or controversy because no matter how they decided the case, Imlay's imprisonment would be the same.¹⁸³ If the State won, sentencing courts would retain the right to punish the probationer with five years imprisonment if he refused to admit guilt in therapy, while if Imlay won, the sentence on remand of five years in prison would apply.¹⁸⁴

While the Montana Supreme Court decision in *Imlay* stands for the proposition that a convicted sex offender who is sentenced to therapy may remain silent, absent a grant of immunity, when asked to confess to his crime as part of treatment,¹⁸⁵

¹⁷⁹ *Imlay*, 813 P.2d at 985.

¹⁸⁰ See *Montana v. Imlay*, 506 U.S. 5, 6 (1992). By resentencing Imlay to a prison term instead of probation conditioned upon successful completion of a sex offender therapy program, the lower court did not put Imlay in a position in which his freedom from prison was dependent upon an admission of guilt.

¹⁸¹ *Montana v. Imlay*, 503 U.S. 905 (1992).

¹⁸² *Montana v. Imlay*, 506 U.S. 5 (1992).

¹⁸³ *Id.* at 6.

¹⁸⁴ Imlay would not be entitled to probation with treatment if he won because the case initially accepted for review by the Supreme Court was the Montana Supreme Court's decision to uphold the lower court's second sentence of five years in prison. The Supreme Court ultimately dismissed the writ of certiorari precisely because Imlay's sentence would be the same no matter which side prevailed; the Court refused to issue an advisory opinion in a matter that it believed did not qualify as a case or controversy. See *id.* at 6 (Stevens, J., concurring).

¹⁸⁵ It may not seem like *Imlay* protects convicted offenders' rights against self incrimination because Donald Imlay ultimately ended up serving a five year prison term as a consequence of his refusal to admit guilt. However, when the lower court sentenced him again, it was essentially considering the case *de novo* in light of the Montana Supreme Court's holding; it was not reacting to Imlay's refusal to admit guilt in therapy. In future cases, trial courts will face a choice between sending the convicted offender to prison, as the lower court ultimately did in *Imlay*, or sentencing the offender to probation and sex offender therapy with a grant of immunity. Though the Montana courts' resolution of this issue better preserves offenders' rights, I argue that admissions made in therapy still raise Fifth Amendment right against self-incrimination problems because the state may not immunize against a prosecution for perjury. Such a prosecution is still a risk because completion of a therapy pro-

*State v. Fuller*¹⁸⁶ requires that when confessions are extracted in such a situation, they may not be used to convict the offender for another sex offense. After a trial at which he pled not guilty, Matthew Fuller was convicted of attempted sexual assault. However, the trial court suspended his prison sentence, requiring instead that he complete a sex offender treatment program.¹⁸⁷ The program required patients to disclose their offense history for admission to the program, and it terminated from treatment those patients who denied their offense during the program.¹⁸⁸ The trial court had advised Fuller that, for him, termination from the program would result in imprisonment.¹⁸⁹ While in treatment, Fuller admitted to three prior sex offenses.¹⁹⁰ In accordance with its statutory duty, the treatment program informed the Montana Probation and Parole Department which in turn informed the local Police Department of Fuller's prior offenses.¹⁹¹ Fuller's suspended sentence was revoked for unrelated violations of probation, he was imprisoned, and later he was charged with the three additional sex offenses that he had disclosed in treatment.¹⁹² Fuller moved to dismiss the charges, alleging that the State had violated his right against compelled self-incrimination.¹⁹³ The trial court denied the motion, and ultimately convicted Fuller of the charges. Fuller then appealed the denial of his motion.¹⁹⁴

The Montana Supreme Court, upon reviewing the latter conviction, reversed the trial court's denial of Fuller's motion.¹⁹⁵ The court concluded that Fuller's Fifth Amendment right against compelled self-incrimination was violated because he

gram would imply an admission of the sex offense and that the offender who testified in his own defense at trial committed perjury. See *infra* notes 241-43 and accompanying text.

¹⁸⁶ 915 P.2d 809 (Mont. 1996).

¹⁸⁷ *Id.* at 811.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 814.

¹⁹⁰ *Id.* at 811.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 810.

was placed in the equivalent of a classic penalty situation, forced to choose between incrimination and a penalty for maintaining his silence.¹⁹⁶ The court observed that the sentence of the trial court in the original case likely was invalid under *Imlay*, and that it likely could not have revoked Fuller's probation had he refused to disclose his prior offense history.¹⁹⁷ However, the court wrote that the issuance of a credible threat to revoke Fuller's probation if he did not admit his guilt was sufficient to place Fuller in an untenable position.¹⁹⁸ Fuller was required to reveal his past offense history or risk his conditional liberty, which made the right against self-incrimination self-executing.¹⁹⁹ Because the right is self-executing in such a circumstance, the Fifth Amendment protected the confessions that Fuller made, and they could not be used against him in later sex offense prosecutions.²⁰⁰

One additional detail of *Fuller* merits mentioning. After Fuller's acceptance into the treatment program, but before his second trial, Fuller's original conviction was reversed by the Montana Supreme Court for lack of evidence, and the court acquitted Fuller of the original charges.²⁰¹ It can be inferred from the court's opinions that Fuller never admitted to the first offense in treatment.²⁰² Had the treatment program forced him to do so, an admission of the first offense may not have been admissible into evidence on appeal. However, had the court not granted an acquittal on appeal, but granted a new trial, an admission of guilt made in therapy surely would have undermined Fuller's case in a new trial.²⁰³

¹⁹⁶ *Id.* at 816.

¹⁹⁷ *Id.* at 815.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 816.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 811 (citing *State v. Fuller*, 880 P.2d 1340 (1994)).

²⁰² *See id.* (noting that Fuller disclosed several past offenses, including the three ultimately prosecuted; there is no mention of an admission to the crime for which Fuller was initially convicted and sentenced to treatment).

²⁰³ *See State v. Imlay*, 813 P.2d 979, 985 (Mont. 1991) (observing that an offender's right to challenge his conviction based on new evidence in a new trial would be "rendered meaningless" if he had admitted responsibility for the offense during therapy).

B. THE *NOLO CONTENDERE* AND *ALFORD* PLEA CASES

There is precedent standing in tension with the principles articulated in *Imlay* and *Fuller*. These cases involve defendants who either entered a plea of *nolo contendere*, or entered an *Alford* Plea. Under a *nolo* plea, the defendant does not contest the charges against him, and although it "authorizes the court for purposes of the case to treat defendant as though he were guilty," the defendant does not expressly admit the offense in court.²⁰⁴ Under an *Alford* plea, the "defendant pleads guilty, while either maintaining his innocence or not admitting to having committed the crime."²⁰⁵ In these situations, courts rarely recognize an offender's right against self-incrimination.²⁰⁶

In *State v. Gleason*, Myron Gleason was charged with lewdness; he entered a plea of *nolo contendere*, and the court placed him on probation, conditioned upon his participation in a treatment program for sex offenders.²⁰⁷ When Gleason repeatedly refused to discuss the offense for which he was convicted, his therapist discontinued treatment.²⁰⁸ The therapist stated that additional treatment would not be helpful as long as Gleason denied his offenses.²⁰⁹ Consequently, the trial court revoked Gleason's probation.²¹⁰ Gleason appealed, claiming that his Fifth Amendment right against self-incrimination was violated

²⁰⁴ *State v. Gleason*, 576 A.2d 1246, 1249 (Vt. 1990).

²⁰⁵ *State ex rel. Warren v. Schwarz*, 566 N.W.2d 173, 176 (Wis. Ct. App. 1997), *aff'd*, 579 N.W.2d 698 (Wis. 1998).

²⁰⁶ After sentencing, an offender who has entered a *nolo* or *Alford* plea is treated much like an offender who pled guilty. He waives claims unrelated to the plea, including his right against self-incrimination. See *Gleason*, 576 A.2d at 1250 (acknowledging that an offender who plead *nolo contendere* retains his right against self-incrimination prior to sentencing, but holding that the right is extinguished following sentencing); see also *United States v. Mapco Gas Products*, 709 F. Supp. 895 (E.D. Ark. 1989); *People v. Gentapanan*, Nos. 84-00074A, 84-00004A, 1986 WL 68907 (D. Guam App. Div. July 7, 1986); *State v. Butler*, 900 P.2d 908, 909 (Mont. 1995); *Warren*, 566 N.W.2d at 176. Courts only allow defendants to enter *nolo* and *Alford* pleas once they are satisfied that the offenders are entering the pleas voluntarily and with knowledge of the claims they waive, and the other pleading choices that they forgo. See *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); LAFAYE & ISRAEL, *supra* note 9, at 933-38.

²⁰⁷ *Gleason*, 576 A.2d at 1248.

²⁰⁸ *Id.* at 1249.

²⁰⁹ *Id.*

²¹⁰ *Id.*

by his probation condition.²¹¹ Gleason asserted that by virtue of his *nolo* plea, he had never admitted the offense for which he was sentenced, and that it was improper to compel him to do so in treatment without a grant of immunity.²¹²

The Vermont Supreme Court held that the probation condition did not violate Gleason's Fifth Amendment right.²¹³ It stated that a *nolo* plea waives the defendant's right against self-incrimination for the offense at issue, and authorizes the court to "treat the defendant as though he were guilty."²¹⁴ The court conceded that a defendant who has pled *nolo contendere* may invoke his Fifth Amendment right at sentencing to avoid a harsher sentence.²¹⁵ Following imposition of a sentence, however, the right against self-incrimination is extinguished with respect to the crime for which the defendant was convicted, and "because of the protection against double jeopardy, [the] defendant faces no threat of subsequent prosecution for the offense."²¹⁶ A sex offender who has entered a *nolo* plea is expected to admit responsibility for his offense in therapy even though he avoided the issue of guilt in court.

In *State v. Butler*,²¹⁷ Bruce Butler was charged with sexual assault. Butler initially pled not guilty, but then chose to enter an *Alford* plea.²¹⁸ Butler indicated before the court the dilemma involved in his decision: "[I]f it goes to a jury trial, I'm going to end up in prison for something I didn't do. And if I plead guilty and go to this doctor and don't admit it to him, I still end

²¹¹ *Id.* Specifically, the probation condition was a modified probation condition which required Gleason to "discuss issues surrounding sexual behavior and offenses" with his therapist. *Id.* at 1248.

²¹² *Id.* at 1249.

²¹³ *Id.* at 1251. The court concluded that the probation condition did not force Gleason to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent. *Id.* Gleason did not face incrimination because he only needed to discuss offenses for which he had already been convicted, and he had not testified as to his own innocence, so perjury was not at issue.

²¹⁴ *Id.* at 1249.

²¹⁵ *Id.* at 1250.

²¹⁶ *Id.*

²¹⁷ *State v. Butler*, 900 P.2d 908, 909 (Mont. 1995).

²¹⁸ *Id.*

up in prison."²¹⁹ The court sentenced Butler to ten years in prison, but suspended the sentence in favor of probation, conditioned upon therapy.²²⁰ In the face of damning evidence, the *Alford* plea allowed Butler to enter a guilty plea for more lenient sentencing, while allowing him to maintain that he did not commit the crime. When Butler refused to admit his offense in therapy, and violated other probation conditions, the court revoked his probation and ordered him to serve the ten year prison sentence for sexual assault.²²¹

The Montana Supreme Court acknowledged that Butler entered the *Alford* plea to obtain favorable sentencing, but stated that he waived his right against compulsory self-incrimination by doing so.²²² Butler entered his plea knowing that sex offender treatment was not a condition of probation that the State would forgo.²²³ He voluntarily placed himself in a position to be sentenced to treatment that required an admission of guilt.²²⁴ Thus, the court held that the treatment requirement did not violate Butler's right against self-incrimination, and that the trial court was justified in revoking his probation.²²⁵

V. ANALYSIS

This analysis proposes sentencing for convicted sex offenders that maximizes the interests protected by the Fifth Amendment right against self-incrimination,²²⁶ while preserving the state's interests in rehabilitating its offenders and protecting its citizens. First, while *Imlay* holds that the state may only compel an admission under a grant of immunity,²²⁷ it does not adequately protect against the penalty situation because even an immunized offender who testified in his own defense at trial

²¹⁹ *Id.* at 910-11.

²²⁰ *Id.* at 909.

²²¹ *Id.* at 909-10. The court sentenced Butler to ten years in prison without parole eligibility until he finished a treatment program. *Id.* at 910.

²²² *Id.* at 911.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 912.

²²⁶ See U.S. CONST. amend. V.

²²⁷ *State v. Imlay*, 813 P.2d 979, 985 (Mont. 1991).

risks incriminating himself for perjury. Courts should provide immunity and prohibit a penalty—probation revocation—for refusing to admit guilt in order to remove this risk. Second, combining a limit on the state's power to penalize a convicted offender who declines to admit guilt with a grant of immunity opens the possibility that therapists may release patients without exposing them to penalty, and then refer them temporarily to alternative treatment programs that either: (1) accept offenders in denial and pursue less coercive strategies to encourage responsibility and rehabilitation, or (2) treat offenders who continue to assert their innocence throughout therapy. Lastly, although offenders extinguish their privilege against self-incrimination by entering *nolo contendere* or *Alford* pleas at trial, courts ought to reconsider the sentences given to such offenders. When courts sentence these offenders to therapy programs in which they must admit responsibility for their crime, the courts set the offenders up to fail to meet the requirements of therapy. The offenders have not admitted committing a crime to the court, and demanding without exception that they take a contrary position with a therapist in order to participate in treatment will lead to fewer offenders receiving treatment.

The interests at stake in the adjudication of sex offenders are naturally opposed to each other. On one hand, the Fifth Amendment protects the offender's interest in dignity, autonomy, and privacy.²²⁸ Honoring these interests limits the circumstances under which the state may demand that the offender admit his guilt. If the offender fears that an admission would risk further incrimination he may maintain his silence, and unless the state can immunize him, it may not compel incriminating statements.²²⁹ On the other hand, the state has strong dual interests in rehabilitating the offender and protecting its citizens.²³⁰ In the case of sex offenders, though, rehabilitation is often synonymous with an admission of guilt.²³¹ Adding to the tension between the interests at stake, sex offenders are particu-

²²⁸ Herman, *Part I, supra* note 25, at 182-86.

²²⁹ *Imlay*, 813 P.2d at 985.

²³⁰ State *ex rel. Warren v. Schwarz*, 566 N.W.2d 173, 177 (Wis. 1997).

²³¹ See Winn, *supra* note 14, at 26-27.

larly disposed to deny their offense and their problem generally.²³² How then, can courts respect the rights of offenders to refuse to incriminate themselves, and simultaneously demand that therapists rehabilitate offenders by helping them to admit responsibility for their crimes? The problem is complicated when limited therapist-patient confidentiality for sex-offenders (particularly when the victims are children) is added to the mix.²³³ The admissions that offenders make to their therapists may be reported to probation officers, and the police in many states,²³⁴ so the offender who testified on his own behalf at trial risks prosecution for perjury if he ultimately admits committing the crime for which he was sentenced. Refusal to admit responsibility is simultaneously a protected right and symptom of a dangerous condition; admission, while a sign of rehabilitation, may impermissibly lead the offender to be an accomplice to his own conviction, or to give a confession of questionable validity.

A. THE NEED FOR IMMUNITY AND PROTECTION FROM PROBATION REVOCATION FOR CONVICTED OFFENDERS WHO PLEAD NOT GUILTY

In *Imlay*, the Montana Supreme Court honored the Framers' conviction that the power of government is held subordinate to the rights of individuals.²³⁵ The founders, wishing to avoid the inquisitorial procedures of the old English ecclesiastical courts, sought to protect the right to avoid self-incrimination under the coercion of the state.²³⁶ The elements of the modern application of the Fifth Amendment reflect this objective. In order for the right against self-incrimination to protect an individual, he must be subject to compulsion, and he must have an actual fear of self-incrimination.²³⁷ Thus, *Imlay* rightly recognized that an offender who pled not guilty and testified on his

²³² Solkoff, *supra* note 102, at 1451.

²³³ See Levine & Doherty, *supra* note 115, at 100.

²³⁴ See *State v. Fuller*, 915 P.2d 809, 811 (Mont. 1996) (noting that therapist was under statutory duty to report additional sex offenses to the Department of Probation and Parole).

²³⁵ See LEVY, *supra* note 22, at 430.

²³⁶ See *id.* at 405, 430; Herman, *Part I*, *supra* note 25, at 163.

²³⁷ See *Hoffa v. United States*, 385 U.S. 293, 304 (1966); *Brown v. Walker*, 161 U.S. 591, 599-600 (1896).

own behalf at trial and later refused to admit responsibility for an offense in therapy under threat of imprisonment satisfied both requirements.²³⁸ Compulsion is presumed in such a circumstance because it is a classic penalty situation, so the right is self-executing. If Donald Imlay had been required to admit criminal responsibility under these circumstances, his interest in protecting himself from state intrusion would have been severely frustrated. Placed in a no-win situation, facing the penalty of imprisonment for maintaining his innocence, or the risk of incrimination for acquiescing to the demands of treatment, Imlay's autonomy and his control over his inner thoughts were compromised. With the threat of punishment lurking for both silence and admission, Imlay's situation is analogous to that of John Udall centuries earlier.²³⁹ The Montana Supreme Court, however, refused to penalize Imlay for his silence. Imlay, the court said, could not be compelled to admit responsibility for his crime or any past offenses absent a grant of immunity.²⁴⁰

Though immunity removes the threat of incrimination for additional sex offenses, when the client-therapist relationship is not privileged, it cannot fully assure an offender that he should feel safe accepting responsibility for a crime. A grant of immunity does not protect against prosecution for perjury, because of the inherent value and necessity of truthful testimony.²⁴¹ So, though the *Imlay* court properly held that under the presented circumstances the offender could not be penalized for maintaining his silence, it failed to recognize that a grant of immunity alone does not remove the offender from a risk of self-

²³⁸ *But see* Berg, *supra* note 74, at 733 (arguing that *Imlay* incorrectly balanced the offender's rights over the state's interests in rehabilitating the offenders and protecting its citizens).

²³⁹ *See* LEVY, *supra* note 22, at 164, 168; Herman, *Part I, supra* note 25, at 120-21. While Udall was at trial without knowledge of his accuser or the evidence against him, and Imlay had already been sentenced after a trial in which he had representation and knew the accuser and the evidence against him, both men faced a penalty situation. Furthermore, in each case, though an admission would have been incriminating, the government extolled its rehabilitative values. *See* Nelson, *supra* note 34, at 979.

²⁴⁰ *State v. Imlay*, 813 P.2d 979, 985 (Mont. 1991).

²⁴¹ *See* Glickstein v. United States, 222 U.S. 139, 141 (1911); *see also* United States v. Apfelbaum, 445 U.S. 115, 126 (1980).

incrimination and a classic penalty situation. Immunity would be of limited benefit if an offender who testified on his own behalf can still be compelled to admit responsibility, under threat of probation revocation and imprisonment. Even if the State had granted Imlay immunity, an admission of guilt would subject him to possible prosecution for perjury.²⁴² Further, even if Imlay's conversations with his therapist were privileged, completion of a course of treatment that is openly conditioned upon an admission of guilt would give rise to knowledge that Imlay had lied under oath at trial. Without divulging the specifics of privileged conversations between them, the therapist need only testify that Imlay completed therapy, for the state to have grounds for a perjury charge.²⁴³ In order to effectively remove the offender from the classic penalty situation, the State must grant immunity from future prosecution, *and* forbid probation revocation and imprisonment if the offender still insists on maintaining his innocence.

B. FACILITATING REHABILITATION

If courts grant convicted sex offenders immunity from future prosecution *and* prohibit a penalty for refusing to admit responsibility to a crime in therapy, the courts will preserve offenders' Fifth Amendment rights and facilitate their rehabilitation. Preserving the offender's rights under the Fifth Amendment and promoting rehabilitation requires the cooperation of the courts and therapists who treat sex offenders.²⁴⁴

²⁴² A prosecution for perjury may not be likely, or even an efficient use of prosecutorial resources. However, this does not affect the application of the right against self-incrimination. In order for the right to apply, the offender need only reasonably fear incrimination, not prosecution. See *Hoffman v. United States*, 341 U.S. 479, 486 (1951); Berg, *supra* note 74, at 706 (citing *Minor v. United States*, 396 U.S. 87, 93 (1969)).

²⁴³ Berg, *supra* note 74, at 719.

²⁴⁴ This analysis requires that courts become involved in prescribing a certain mode of therapy to some classes of sex offenders. To some extent courts are currently involved; they recognize that they are sentencing an offender to a program in which he will have to admit his guilt. I argue that when an offender's Fifth Amendment rights are at risk, the court must mandate therapy that facilitates rehabilitation without violating his right against self-incrimination. Courts are uniquely situated so that they may protect offenders' fundamental legal rights, while also prescribing therapy best suited to rehabilitate certain offenders. Therapeutic jurisprudence, the study of law

Once the threat of probation revocation is removed from the offender who persists in his denial, the therapist need not inform the probation officer that the offender has refused to admit the offense of which he was convicted. This information will have no legal implications. At this point, however, instead of discharging the offender as unamenable to treatment, the therapist ought to pursue alternative methods of treatment that either (1) work to break through denial in a motivational rather than confrontational style, or (2) offer therapy for sex offenders without focusing on the offender's ownership of a crime.²⁴⁵ Essentially, the therapist ought provide alternatives to termination from treatment for those offenders who cannot overcome denial. Offenders who refuse to admit responsibility yet remain invested in their treatment present less of a danger to the community than either offenders who admit their offense yet do not finish treatment, or offenders who are rejected from treatment for maintaining denial.²⁴⁶

The importance of therapists continuing to treat offenders who are in denial cannot be emphasized enough. It removes the possibility that an officer of the court could presume that an offender who completed treatment admitted responsibility for the offense of which he was convicted. For offenders who testi-

as a therapeutic agent, offers an example of how law can "profit from some of the insights that behavioral sciences provide." David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 280 (1993). Combining knowledge of law with behavioral science may lead legal actors such as judges and prosecutors to re-examine their rules and procedures to forge a more therapeutic criminal justice system. *Id.* at 280, 284-85.

²⁴⁵ See Borduin et al., *supra* note 156; Kear-Colwell, *supra* note 17, at 261; Marshall & Barbaree, *supra* note 103; Schlank & Shaw, *supra* note 17; Winn, *supra* note 14, at 26. There is evidence that these therapy programs can be effective in reducing recidivism among those offenders who refuse to admit responsibility, and in eliciting an admission of responsibility through a motivational, not confrontational approach to therapy. Borduin's multisystemic therapy, which does not focus explicitly on the offender's admission of responsibility, reduced recidivism rates to 12.5% for sexual offenses. Borduin et al., *supra* note 156, at 110. This is a significant improvement over a 60% recidivism rate for untreated offenders. McGrath, *supra* note 103, at 329. Schlank and Shaw administered their therapy to ten offenders who had been denied acceptance to other treatment programs because they refused to accept responsibility for their offense. Schlank & Shaw, *supra* note 17, at 19. Of the ten, five responded to motivational treatment and admitted their offenses. *Id.* at 21.

²⁴⁶ Winn, *supra* note 14, at 26.

fied on their own behalf at trial, this removes the threat of a perjury prosecution, and may help motivate them to challenge their own denial. Though offenders would no longer be required to admit responsibility for the offense underlying their conviction, and they may receive effective treatment in the absence of an admission, therapy is more effective when offenders do admit responsibility.²⁴⁷

A therapist who normally would refuse to treat an offender in denial could refer the offender to a treatment program such as those proposed by Winn,²⁴⁸ Schlank and Shaw,²⁴⁹ or Kear-Colwell,²⁵⁰ which deviate from the traditional confrontational mode of approaching denial. These alternative treatment programs, while facilitating admission of responsibility in offenders who previously had obstinately maintained their denial, also may serve the values protected by the Fifth Amendment better than traditional treatment. For example, a course of treatment proposed by therapist Mack Winn requires that the treatment therapist gain the offender's compliance prior to asking the offender to examine his denial.²⁵¹ Thus, this procedure preserves the offender's sense of autonomy better than confrontational treatment in which the therapist imposes control and change from the outside.²⁵² A client whose claim of innocence is continually challenged by an individual therapist or a group of other clients faces an inhospitable situation. An authority that refuses to accept denial until an admission is forthcoming strips the individual of control over information about himself and poses a threat to his dignity.²⁵³ Such a requirement recalls the distaste for old English ecclesiastical courts that exercised considerable coercive pressures upon defendants to admit their crime even after repeated denials.²⁵⁴ Though the early courts

²⁴⁷ *Id.*

²⁴⁸ See Winn, *supra* note 14.

²⁴⁹ See Schlank & Shaw, *supra* note 17.

²⁵⁰ See Kear-Colwell, *supra* note 17.

²⁵¹ Winn, *supra* note 14, at 31.

²⁵² Kear-Colwell, *supra* note 17, at 261.

²⁵³ See LEVY, *supra* note 22, at 164-68.

²⁵⁴ *Id.* Of course, the ecclesiastical courts compelled admissions of guilt from defendants in order to secure their convictions, while admissions compelled in therapy

used physical as well as verbal coercion, the dignity of the individual offender is compromised by any compulsion to admit guilt even if just by a credible verbal threat to imprison for maintaining silence. Furthermore, the compulsion present in this circumstance highlights the rationale for "our distrust of self-deprecatory statements."²⁵⁵ An offender who expressly refused to admit guilt in court, but then accepted responsibility for an offense when placed in a penalty situation, may have made a false confession under the pressure of having to choose between two undesirable options.

For those offenders who persist in denial even after referral to a "motivational" treatment, therapists have the option of behavioral or cognitive treatment that does not require the offender to focus on ownership of the offense of which he was convicted. For example, Borduin et al.'s multisystemic approach to treating sex offenders focuses on changing the multiple environments in which offenders move.²⁵⁶ By involving the other people from these settings, the therapist can work with them to create supportive environments that are less likely to engender anti-social behavior while teaching the offender cognitive techniques for keeping his deviant impulses under control.²⁵⁷

This treatment scheme allows those who are able to overcome denial with alternative treatments to do so and then resume treatment in traditional treatment programs that have been trusted to rehabilitate offenders and reduce recidivism.²⁵⁸ Moreover, this scheme allows offenders who continue to believe in their own innocence, even after motivational treatment aimed at ameliorating denial, to do so without punishment

come from offenders who have already been convicted. However, in each case, there is a substantial risk that coercion will beget an unreliable confession. See Peter Brooks, *Storytelling Without Fear? Confession in Law and Literature*, 8 YALE J.L. & HUMAN. 1, 17 (1996). Brooks notes that "there is something inherently unstable and unreliable about the speech act of confession." *Id.* One may confess to the wrong crime if he is unsure what is asked of him or if he feels compelled to give the questioners some response. *Id.*

²⁵⁵ *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

²⁵⁶ See Borduin et al., *supra* note 156, at 106.

²⁵⁷ See *id.* at 106, 111.

²⁵⁸ See Schlank & Shaw, *supra* note 17, at 22.

while continuing to receive therapy aimed at reducing recidivism. The offender is protected from probation revocation and perjury, and the state interest in rehabilitation is served.

C. REHABILITATION FOR OFFENDERS WHO ENTER *NOLO* AND *ALFORD* PLEAS

The Fifth Amendment does not mandate that courts offer immunity or protection from probation revocation for offenders who entered *nolo* or *Alford* pleas; these offenders consent to have their right against self-incrimination extinguished following sentencing.²⁵⁹ Moreover, such offenders do not need alternative treatment programs that do not require admission of guilt for entrance or completion to save them from the presumption of perjury that accrues to offenders who testify in their own defense yet fail to complete treatment. These offenders face no prospect of incrimination, and thus no penalty situation. Though not constitutionally required, treatment programs for sex offenders such as the one detailed by Borduin would provide offenders who had entered *nolo* or *Alford* pleas with a better chance at rehabilitation than programs which require an admission for entrance. When courts sentence offenders who enter *nolo* or *Alford* pleas like those in *Gleason* and *Butler* to conventional therapy programs in which they are required to admit guilt as a condition of entrance into the program, the courts set them up to fail. A defendant may choose to enter a *nolo* plea precisely because it allows him to deny the facts of the charge in a future proceeding.²⁶⁰ A defendant chooses to enter an *Alford* plea precisely because he insists on continuing to maintain his innocence.²⁶¹ How can courts expect that such defendants will be inclined to make an explicit admission of guilt that is required for entrance into a sex offender therapy program? These convicted offenders will be denied admission into conventional therapy programs, leaving them untreated and more dangerous than if they had been meaningfully involved in

²⁵⁹ See *State v. Gleason*, 576 A.2d 1246, 1269 (Vt. 1990); *State v. Butler*, 900 P.2d 908, 911 (Mont. 1995); discussion *supra* Part IV.B.

²⁶⁰ See *Gleason*, 576 A.2d at 1250.

²⁶¹ See *Butler*, 900 P.2d at 911.

cognitive or behavioral therapies that do not require an admission of guilt.²⁶² If courts are going to continue to allow sex offenders to enter *nolo* and *Alford* pleas, they ought to sentence them to the alternative treatment programs that continue to offer rehabilitative therapy to offenders who deny responsibility for an offense.²⁶³ While this is not constitutionally required because these offenders have waived their Fifth Amendment right against self-incrimination, alternative therapies that keep the offender's locus of control within himself and avoid repeated demands for a confession will better serve the values of dignity and autonomy that underlie the Fifth Amendment. This course of action will also allow more convicted sex offenders to receive treatment and reduce the likelihood of recidivism.²⁶⁴

VI. CONCLUSION

The Fifth Amendment right against self-incrimination provides us with some of our most treasured protections—preservation of our autonomy, privacy, and dignity against the threat of state coercion. Court-ordered therapy programs that require convicted sex offenders to admit responsibility for the offense of which they were convicted under threat of probation revocation and imprisonment violate these protections. Sentences and approaches to treatment can be modified, though, to preserve the interests protected by the Fifth Amendment while also satisfying the state interest in rehabilitating offenders. Courts and therapists may promote these interests by: (1) insulating offenders in therapy who testified in their own defense at trial with immunity and a protection against penalizing a refusal to admit guilt, and

²⁶² See Winn, *supra* note 14, at 26.

²⁶³ As long as offenders are given an opportunity to receive therapy in which they are not compelled to admit their offense, *nolo* and *Alford* pleas should be allowed for sex offenders. Some have raised the possibility that these pleas should not be available to sex offenders because of the conflict that arises between offenders' refusal to admit guilt in court, and the common requirement that they do so as a condition of their sentence. See Hinshaw, *supra* note 10, at 282, 297. However, to eliminate these pleas would eliminate substantial benefits. Both the *nolo* and *Alford* pleas spare the courts additional costly and lengthy trials, and offer the defendant some security that his sentence will be predictable. See LAFAVE & ISRAEL, *supra* note 9, at 932; Hinshaw, *supra* note 10, at 281.

²⁶⁴ See Winn, *supra* note 14, at 26.

(2) utilizing alternative treatment methods that are less confrontational and less concerned with an initial acceptance of responsibility.

