"[B]etween the Devil and the Deep Blue Sea:* A Look at the Fifth Amendment Implications of Probation Programs for Sex Offenders Requiring Mandatory Admissions of Guilt

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"[B]etween the Devil and the Deep Blue Sea:"* A Look at the Fifth Amendment Implications of Probation Programs for Sex Offenders Requiring Mandatory Admissions of Guilt

BY BRENDAN J. SHEVLIN**

INTRODUCTION

The Fifth Amendment states "No person shall be compelled in any criminal case to be a witness against himself." What these words mean has changed over time and is still the subject of much debate today. In the context of the probation of sex offenders, the degree of protection the Fifth Amendment requires is of particular importance. Mental health experts overwhelmingly agree that a sex offender must admit his guilt for treatment and rehabilitation to be successful. Sex offenders are generally very reluctant to fully admit their guilt, or even that they committed a crime at all. An admission of guilt requirement in sex offender treatment programs conflicts with the idea that a defendant should not be made a witness against himself. The Supreme Court has not ruled directly on this issue, and it has been the source of

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* Thomas v. United States, 368 F.2d 941, 945 (5th Cir. 1966).
** J.D. expected 2000, University of Kentucky.
1 U.S. CONST. amend. V
2 See 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, 702 (1994).

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much confusion in the lower courts. This Note argues that, unless use of such admissions in future prosecutions is prohibited, conditioning parole on an admission of guilt violates the Fifth Amendment privilege against self-incrimination. While the state interest in obtaining an admission of guilt is quite compelling, it can still be served with relatively moderate concessions to convicted sex offenders. Finally, this Note proposes that grants of immunity for statements made in sex offender programs would eliminate the fear of self-incrimination while preserving the state’s interest in compelling admissions of guilt in its effort to successfully treat sex offenders.

I. HISTORICAL BACKGROUND OF THE PRIVILEGE AGAINST SELF-INCrimINATION

The notion of a privilege against self-incrimination has a history that precedes the Constitution and the Bill of Rights. The idea emerged as a reaction to the oppressive procedures used during the Spanish Inquisition and the persecution of Puritans in England. Defendants were commanded to testify against themselves and often were tortured if their answers were not to the tribunal’s liking. The privilege was finally recognized in England in 1641, when Parliament reversed the heresy conviction of a man who had been convicted because he refused to testify against himself. This privilege became part of English law and was imported to the colonies with the rest of the common law. The privilege became particularly dear to the colonists because of the coercive tactics of British colonial officials. After the Revolutionary War, many of the former colonies drafted constitutions containing the right against self-incrimination. The privilege was incorporated into the original Bill of Rights in 1789.

A useful starting point is to examine the elements of the privilege against self-incrimination. “To receive Fifth Amendment protection, a person’s statement or act must (1) be compelled; (2) be testimonial; and (3) incriminate the person in a criminal proceeding.” However, the protection

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5 See id.
7 See id.
extends to any proceeding, as long as the responses could be used against the person in a later criminal case. This gives the protection a broad application, as it can be asserted any time a person fears the information sought might be used against him in a subsequent criminal proceeding. In addition, prosecutors and judges are not allowed to comment to the jury on a defendant’s silence, nor can there be any presumption of guilt inferred when a person exercises his or her Fifth Amendment privilege against self-incrimination. As one legal scholar articulated, “[a]t the core of the privilege is the notion that the state may not penalize individuals for refusing to answer potentially incriminating questions.” The broad application of the privilege is limited by the requirement that the testimony must be “self-incriminating,” meaning that the potential future incrimination must be a reasonable concern and not an imaginary threat. The reasonableness requirement is set out in Hoffman v. United States. Hoffman also stands for the idea that the protection not only extends to a reasonable fear that the answers sought could be used against the person in a criminal trial, “but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a... crime.” This shows the breadth of protection the Supreme Court has given through the Fifth Amendment: it extends to answers that could be used in discovering evidence against the person and protects the answers themselves from being used as evidence. In addition, the risk protected against is incrimination, not prosecution. Therefore, regardless of whether prosecution is unlikely, the protection remains if there exists a reasonable threat of incrimination. This is important because the threat of incrimination that defendants often assert is a fear of committing perjury, which is frequently not prosecuted. The Hoffman Court also stated that the protection against self-incrimination extends not only to actual incriminating statements, but also to statements that could possibly provide a link to incriminating evidence if a person chose to answer them.

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9 See id.
10 See WEINBERGER, supra note 4, at 48.
11 Shem, supra note 6, at 503.
12 See Solomon, supra note 8, at 1699-1700.
14 Hoffman, 341 U.S. at 486.
15 See Berg, supra note 2, at 706.
16 See Hoffman, 341 U.S. at 486.
Despite this traditionally broad interpretation, many courts have found little or no conflict between the Fifth Amendment and requiring convicted sex offenders to admit guilt in order to be eligible for parole. In Kentucky, the sex offender program requires such an admission, as demonstrated in the recent case of *Razor v. Commonwealth*. In *Razor*, the defendant was convicted of committing numerous sexual offenses involving three children over a number of years. Razor maintained his innocence throughout the trial and at sentencing. The Jefferson Circuit Court granted Razor probation on condition that he enroll in the Kentucky Corrections Cabinet Sexual Offender Treatment Program. The Sex Offender Program had the customary admission of guilt requirement, and Razor insisted on maintaining his innocence. Eighteen months after Razor was probated, the Commonwealth made a motion to revoke probation on the grounds that he had not fulfilled the requirements of the sex offender program. Because of Razor’s failure to successfully complete the sexual offender treatment program and admit his guilt, the Jefferson Circuit Court revoked the probation and Razor appealed to the Kentucky Court of Appeals. The court held, largely based on *Minnesota v. Murphy*, the seminal Supreme Court case in the area, that the requirement did not violate the Fifth Amendment because the admission could not be used in future criminal proceedings and therefore carried no threat of self-incrimination. The Court of Appeals said:

> [T]he Supreme Court clearly adopted the view that a sentence of probation may be revoked due to the probationer’s violation of an express condition of probation by refusing to answer incriminating questions, so long as any incriminating responses which are made are not then used against the probationer in a criminal proceeding.

The court reasoned that there was no threat of incrimination in Kentucky because information obtained by a parole officer is privileged by statute,

19 See id. at 473.
20 See id.
21 See id.
23 *Razor*, 960 S.W.2d at 474 (referring to *Minnesota*, 465 U.S. at 437).
thereby preventing it from being used as evidence in court.\textsuperscript{24} The statute states, "[a]ll information obtained in the discharge of an official duty by any probation or parole officer shall be privileged and shall not be received as evidence in any court."\textsuperscript{25} In addition, the Kentucky statute regarding the sex offender program states:

Communications made in the application for or in the course of a sexual offender's diagnosis and treatment in the program between a sexual offender or member of the offender's family and any employee of the department who is assigned to work in the program, shall be privileged from disclosure in any civil or criminal proceeding, unless the offender consents in writing to the disclosure or the communication is related to an ongoing criminal investigation.\textsuperscript{26}

The Court of Appeals held that because the required admissions could not be admitted into court, any fear of self-incrimination was removed.\textsuperscript{27} Required admissions of guilt in sexual offender programs are perfectly permissible if protections similar to the ones provided by Kentucky are extended to the sex offender. Privileging or granting use immunity to the admissions provides adequate protection against self-incrimination. While the sex offender is given no choice but to admit to his actions, the information obtained cannot be used in a criminal case, which is what the Fifth Amendment actually protects against.\textsuperscript{28}

The problem is that most prosecutors are unwilling to surrender the opportunity to obtain additional damning evidence against sex offenders, or convicted criminals in general, and rarely grant them any sort of immunity.\textsuperscript{29} This is understandable because it means foregoing the use of potentially incriminating evidence that could result in another conviction. However, because successful treatment programs all demand that participants admit their guilt, and because sex offenders who fail to admit their guilt are three times more likely to have unsuccessful treatment,\textsuperscript{30}

\begin{thebibliography}
\bibitem{24} See id.
\bibitem{25} K.R.S. § 439.510 (Michie 1996); \textit{Razor}, 960 S.W.2d at 474.
\bibitem{26} K.R.S. § 197 440; \textit{Razor}, 960 S.W.2d at 474.
\bibitem{27} See \textit{Razor}, 960 S.W.2d at 474.
\bibitem{30} See Solkoff, \textit{supra} note 28, at 1450.
\end{thebibliography}
prosecutors might be wise to not take such a hard stance against granting immunity. In fact, in an era of prison overcrowding, such a concession could prove vital to running a successful probationary program that would reduce some of the strain on the nation's correctional facilities.

III. STATE V IMLAY

The leading case for the proposition that forcing convicted sex offenders to admit their guilt as a condition of probation violates the Fifth Amendment is State v. Imlay. The facts in that case were analogous to Razor v. Commonwealth. Imlay, a sex offender who refused to admit his guilt at trial, was offered probation as an alternative to incarceration. However, a condition of the probation was that the sex offender take part in a treatment program that required him or her to admit guilt. Imlay fulfilled all of the requirements of the treatment program except the admission of guilt condition. The head of the treatment program determined this made Imlay unsuitable for the treatment program, and a probation revocation proceeding was initiated in the same district court that granted him probation. Imlay's probation was revoked because of his failure to fulfill the admission of guilt requirement of the treatment program. He was sentenced to five years in the Montana State Prison. On appeal, the Supreme Court of Montana stated "it is clear that the defendant's incarceration at the Montana State Prison is directly related to his refusal to admit that he committed a crime." The court went on to say, "it is clear that in this case the defendant is being subjected to a penalty that he would not otherwise be subjected to if he would simply admit his guilt." The court held that such a penalty for maintaining one's right against self-incrimination was prohibited by the Fifth Amendment.

The court relied upon three points in making its holding. First, "the defendant still had the right to challenge his conviction." Any admission of guilt could be used against him in an appeal. Second, the reliability of any admission would be in doubt because of the compulsion surrounding

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32 See supra notes 18-27 and accompanying text.
33 See Imlay, 813 P.2d at 980-82.
34 Id. at 982-83.
35 Id. at 985.
36 See id.
37 Id.
it. Third, an admission of guilt would not only violate the protections of the Fifth Amendment, but it would also constitute committing or admitting to perjury. These are the grounds most commonly cited for upholding the Fifth Amendment protection against attempts at compelled admissions of guilt. One complication in such scenarios is that, especially in cases of sex offenders, it may be very difficult to obtain evidence for prosecution without the defendant’s testimony. However, this does not mean that the defendant’s Fifth Amendment rights should be revoked in order to aid in prosecution. This brings to light the two interests that hang in the balance in this controversy: The state has a compelling interest in rehabilitating sex offenders and preventing them from sexually assaulting others. Treatment, rather than punishment, serves the state’s interest in rehabilitation. In addition, there is great desirability in rehabilitating rather than imprisoning those who can be treated. Prisons suffer from overcrowding, so rehabilitation and outpatient programs offer attractive alternatives. Treatment programs are also less costly than prisons. In addition, the probationers can be given their liberty while packed court dockets are not further burdened and financial resources are not drained through lengthy proceedings. Probation has become “a necessary and integral part of our correctional system.”

These are significant considerations which should not be undermined by the sweeping privilege against self-incrimination. Rather, these considerations can be more than adequately served by privileging the sex offender’s discussions with his treatment supervisor or by granting his statements immunity from being introduced into evidence. Privileging the information does not affect the way states choose to run their sex offender programs.

38 See id.
39 Interestingly, the State of Montana alleged in its brief to the U.S. Supreme Court that, in Montana, “statements made in therapy cannot be used in a subsequent criminal prosecution.” If this was true, the Inlay case would have been the same scenario as in Razor v. Commonwealth, and under the Razor Court’s reasoning would not violate the Fifth Amendment. Brief for State of Montana at 16, 503 U.S. 905 (1992) (No. 91-682).
40 See Solkoff, supra note 28, at 1446.
41 See Berg, supra note 2, at 732.
44 Id.
programs. If the goal is rehabilitation, then that goal will be more fully served by encouraging sex offenders to make the admissions of guilt that states assert are vital to successful treatment. Unless the real goal is to get additional convictions using the statements made in treatment, the state is not asked to surrender much by granting immunity.

At the same time, there are very valid reasons for upholding the Fifth Amendment protection against potentially limiting interpretations. Historically, the Fifth Amendment has been viewed as a significant check on government power over individuals. Along those same lines, it exists to discourage the government from using coercive techniques which it likely would use or be tempted to use in the Fifth Amendment’s absence. It restricts the state’s authority and helps guarantee that the state meet its burden of proof in criminal cases (rather than compel individuals to convict themselves). The Fifth Amendment also represents the idea that a person should not be made to go through the psychological trauma of being forced to incriminate oneself or commit perjury. In addition, it reinforces the right to privacy that society values. The Supreme Court has said that “[t]he immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime.”

Considerations of both state and individual interests are significantly affected by the court’s decisions regarding compelled admissions of guilt as a requirement of probation.

The *Imlay* court looked to the so called “penalty cases” for precedent in determining that a required admission of guilt as a condition of probation violated the protections of the Fifth Amendment. These cases employ the same sort of balancing of interests discussed above. The two leading cases on the issue, both closely analyzed in *Imlay*, are *Thomas v. United States* and *Gollaher v. United States.*

**IV THOMAS V UNITED STATES**

In *Thomas*, the case upon which the Supreme Court of Montana relied most heavily in its decision in *State v. Imlay*, the defendant asserted his

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45 See Shem, *supra* note 6, at 509.
46 See id. at 509-11.
47 Hoffman v. United States, 341 U.S. 479, 490 (1951) (quoting United States v White, 322 U.S. 694, 698 (1944)).
48 Thomas v. United States, 368 F.2d 941 (5th Cir. 1966).
49 Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969).
innocence throughout trial but was eventually convicted for bank robbery. Still protesting his innocence at the sentencing hearing, the defendant came before the same judge who presided at trial. The judge, convinced of the defendant's guilt, extended the following proposition to the defendant:

If you will come clean and make a clean breast of this thing for once and for all, the Court will take that into account in the length of sentence to be imposed. If you persist, however, in your denial, as you did a moment ago, that you participated in this robbery, the Court also must take that into account. Now which will it be? 

Confronted with these two choices, the defendant still maintained his innocence. The trial judge then immediately imposed the maximum sentence allowed. The Thomas Court characterized the situation confronted by the defendant as follows:

The two “ifs” which the district court presented to Thomas placed him in a terrible dilemma. If he chose the first “if,” he would elect to forego all of the above-noted post-conviction remedies and to confess to the crime of perjury, however remote his prosecution for perjury might seem. Moreover, he would abandon the right guaranteed by the Fifth Amendment to choose not to be a witness against himself, not only as to the crime of which he had been convicted, but also as to the crime of perjury. His choice of the second “if” was made after the warning that the sentence to be imposed would be for a longer term than would be if he confessed. From the record, it is clear that an ultimatum of a type which we cannot ignore or approve confronted Thomas. Truly, the district court put Thomas “between the devil and the deep blue sea.”

The Court found this choice to be a violation of the Fifth Amendment, as the defendant was dealt a “judicially imposed penalty” for maintaining his right not to incriminate himself. The Thomas case is a classic example of a defendant being forced to make an unconstitutional choice. A majority of circuits follow the Thomas decision, stating that choices where the defendant is punished for not admitting his guilt are unconstitutional.

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51 See Thomas, 368 F.2d at 943-44.
52 Id. at 944.
53 See id.
54 Id. at 945.
55 Id. at 946.
56 See Berg, supra note 2, at 714.
V \textit{Gollaher v. United States}

\textit{Gollaher v. United States} takes the opposite position from \textit{Thomas} in “penalty” situations. \textit{Gollaher} was a case much like \textit{Thomas} in that a defendant was given a longer sentence for failing to admit his guilt at sentencing. The Ninth Circuit was very focused on the state’s rehabilitative goals in determining whether the increased sentence violated the protection against self-incrimination. The court said:

This case presents a dilemma which every trial judge faces at the time of sentence. It is almost axiomatic that the first step toward rehabilitation of an offender is the offender’s recognition that he was at fault. In the present state of the criminal law, there is no doubt that punishment is still a consideration in the imposition of sentence, especially where non-violent or economic crimes are involved. But to the extent that rehabilitation is the objective, no fault can be found of the judge who takes into consideration the extent of a defendant’s rehabilitation at the time of sentence.

The court then held that the imposition of a harsher sentence in the face of a defendant’s refusal to admit guilt was perfectly permissible, and moreover encouraged open judicial disclosure of the practice. \textit{Gollaher} therefore stands for the idea that the state’s interest in rehabilitating convicted criminals can override a person’s protection against self-incrimination. This is the case pointed to by states and prosecutors to justify requiring an admission of guilt under the threat of revocation of probation. By focusing on the state’s rehabilitative goals, the \textit{Gollaher} decision puts few limits on the discretion of judges to punish persistent claims of innocence by convicted criminals. However, it is just such exertions of state authority that the Fifth Amendment was created to protect against. To allow the state to strip the Fifth Amendment of any clout because the state claims it has a valid interest in compelling admissions of guilt goes against the broad protection the privilege against self-incrimination has traditionally provided.

\footnote{Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969).}
\footnote{See id. at 530.}
\footnote{Id.}
\footnote{See id.}
\footnote{Id.}
\footnote{Shem, supra note 6, at 508.}
VI. PUNITIVE OR NOT

Clearly, the trial court in Thomas placed a heavy price on the defendant for asserting his right not to incriminate himself. The trial court imposed the maximum sentence strictly because he refused to admit his guilt. By conditioning a lesser sentence on an admission of guilt, the court effectively punished the defendant for asserting his Fifth Amendment rights. Importantly, this is the very situation that a defendant is confronted with when a required condition of probation is an admission of guilt. Such was the situation in Imlay, where the judge made the defendant choose between admitting the crime and being free as long as he fulfilled his probation obligations, or maintaining his innocence and going to prison. Judicial proponents of conditioning sentencing on admission of guilt have commonly stated that defendants are not really punished in cases where probation is revoked; the result is only to reinstate rather than enhance the original sentence and, moreover, probation is only a discretionary privilege given to those who aid in the fulfillment of the state’s interest. The courts that have ruled on this issue have likewise drawn “a distinction between enhancing a sentence and lowering one.” Courts that emphasize this distinction often use it as a way of getting around the Thomas rule. They focus on the fact the person denied a reduced sentence or probation is not getting a longer sentence as a result of his silence; rather, he is simply not getting the privilege of a reduction or probation resulting from complying with the state’s desires. The State of Montana made this very argument in its brief to the Supreme Court in the Imlay case. The State claimed that “revocation of probation is not a penalty that triggers Fifth Amendment protections.” Specifically, the State argued that the probation was an attempt at leniency by the trial court. Thus, when Imlay did not adhere to the specific requirements of the sex offender program, but asserted his Fifth Amendment privilege instead, revoking his probation did not result in a penalty.

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65 Solkoff, supra note 28, at 1469.
66 See id.
68 See id. at 11.
This choice did not place Imlay in a coercive situation where Fifth Amendment concerns might be controlling because Imlay did not have to choose between making incriminating statements or suffering a potentially impermissible penalty. The suspended sentence given to Imlay on the condition that he undergo sex offender therapy was a lenient sentence, designed to provide him with the benefit of treatment in a community-based program.\(^6\)

Arguably the choice presented to Imlay represents a penalty situation. The fact that Imlay received leniency with the initial offer of probation does not put him in any less of a penalty situation when he must choose to forego his right against self-incrimination or else lose the benefit of probation and go to jail. This choice put Imlay between the proverbial "rock and a hard place." As one commentator has observed, "[p]lainly, a defendant who is told that his or her sentence will be lessened is under equal compulsion to waive the privilege as is the defendant who is told that his or her sentence will be increased. The practical result is the same regardless of whether one uses a negative or positive linguistic spin."\(^7\) This characterization seems right on point. The effect on the defendant of having probation revoked is the same whether it is classified as a penalty or the denial of a benefit that only those who comply with the state receive. The constitutional rights of defendants should not be evaluated on the basis of such a spurious distinction. Clearly, there is a tremendous difference between being incarcerated and being free only to adhere to probationary restrictions. The defendant in Imlay was penalized with a jail sentence for seeking the protection of the Fifth Amendment to the same extent that the defendant in Thomas was penalized with a longer sentence for asserting this same right. Inequality in treatment based on the assertion of the privilege not to reveal incriminating evidence against oneself should be classified as falling into the "penalty" cases such as Thomas, and the same logic should be applied.

A similar criticism has been raised where expressing remorse during the sentencing stage is rewarded with a reduction in a defendant’s sentence. Such a choice puts the defendant in a similar penalty position.\(^7\) The government interest in rehabilitating criminals remains the same. However, the defendant is faced with the choice between maintaining his innocence at the cost of staying in jail for a longer period, or giving up his constitu-

\(^6\) Id. at 13.
\(^7\) Solkoff, supra note 28, at 1469.
\(^7\) See Orenstein, supra note 64, at 792.
tional right not to incriminate himself in return for a reduced sentence.\textsuperscript{72} The threat of incrimination remains for the defendant, despite the conviction, given that admissions could be used against him or her on appeal.\textsuperscript{73} As in the probation scenario, there is a significant risk that the admissions of guilt are insincere.\textsuperscript{74} In effect, the defendant is being bribed to make an admission, with little downside other than the surrender of a constitutionally protected right. As in the probation situation, there are solutions other than tossing out the privilege against self-incrimination.\textsuperscript{75}

VII. DIRECTION FROM THE SUPREME COURT

The seminal Supreme Court case dealing with the probation of sex offenders is \textit{Minnesota v. Murphy}.\textsuperscript{76} There, a defendant in a sex offender treatment program admitted to raping and killing a woman on an occasion prior to the one for which he was convicted.\textsuperscript{77} Under the terms of his probation the defendant was required to “be truthful” with his probation officer.\textsuperscript{78} The defendant raised the defense that he did not think his responses could be used against him, and argued that the fact he was required to be truthful with his probation officer put him in the classic penalty situation.\textsuperscript{79}

The Supreme Court held that the Fifth Amendment generally has to be asserted by the defendant for it to be applied, and that in this case, the facts were not such as to allow the privilege to be self-executing (as in the penalty situations). The Court further said that in the “penalty cases,” the states did something to try to make the defendant forego the protections of the privilege, whereas here the defendant simply chose not to assert it.\textsuperscript{80} However, the Court, in dictum, made some interesting observations about what would constitute a penalty situation. The Court said:

There is thus a substantial basis in our cases for concluding that if the State, either expressly or by implication, asserts that invocation of the

\textsuperscript{72} See id.
\textsuperscript{73} See id.
\textsuperscript{74} See id. at 793.
\textsuperscript{75} See id. at 792.
\textsuperscript{76} Minnesota v. Murphy, 465 U.S. 420 (1984).
\textsuperscript{77} See id. at 423-25.
\textsuperscript{78} See id. at 422.
\textsuperscript{79} See id. at 434.
\textsuperscript{80} See id.
privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer’s answers would be deemed compelled and inadmissible in a criminal prosecution.\textsuperscript{81}

In addition, the Court ruled, “a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself.”\textsuperscript{82} Importantly, it noted “a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, \textit{as long as} it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination.”\textsuperscript{83}

Although the \textit{Murphy} decision went against the sex offender, and the Supreme Court has never directly ruled on the issue of conditioning probation on a requirement of an admission of guilt, the Court’s statements can be interpreted to mean that such a condition of probation would fall into the “penalty cases” and be impermissible. The Court’s comments about eliminating the possibility that responses could be submitted against a defendant in a criminal court, thereby removing the threat of incrimination, are accurate. That is, once a defendant’s fear of an admission being used against him or her in a criminal case is alleviated by privileging communications between treatment counselors and sex offenders, or by immunizing admissions of guilt, treatment programs would be free to require these admissions of guilt. This would seem to protect the primary interest asserted by states—rehabilitation—and allow for compelled admissions without infringing upon the right not to incriminate oneself.

\section*{VIII. BALANCING APPROACH}

Some commentators have been very focused on the state’s interest in determining whether a penalty situation exists.\textsuperscript{84} Illustrative is Jessica Wilen Berg, who asserts that when courts are strictly interested in punishing a defendant, a defendant’s willingness to admit guilt should not be a consideration. However, when a court’s aim is at least partially rehabilitative, Berg argues that the fact that a defendant has taken

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\textsuperscript{81} \textit{Id.} at 435.
\textsuperscript{82} \textit{Id.} at 434 (quoting Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977)).
\textsuperscript{83} \textit{Id.} at 435-36 (emphasis added).
\textsuperscript{84} See generally Berg, supra note 2.
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responsibility should be a consideration in determining his fate. In this respect, Berg contends that when a rehabilitative interest is asserted by the state, the Fifth Amendment privilege should be "balanced" against this interest. Despite the inequalities and potential for coercion, Berg suggests that the damage to the Fifth Amendment is outweighed by the benefits of a more workable criminal system. More specifically, Berg proposes a balancing test in which the first step is determining whether the Fifth Amendment applies, and then, if it does apply, the court determines whether ignoring its effect violates the Constitution. When determining whether there is a violation, the state's rehabilitative goals are to be considered. In addition, under this balancing test, the state's interest in rehabilitation should be considered predominant over the threat of coercing a confession. Finally, as Berg observes, the strength of the Fifth Amendment claim is contingent upon the likelihood of prosecution based on the self-incriminating statements.

In the Imlay case, the Attorney General for Montana argued that the Fifth Amendment did not apply because the state was concerned with rehabilitation rather than punishing defendants. Comparing the threat of incrimination to the state interest involved, the Montana Attorney General said "such an unrealistic threat carries little weight when considered with the otherwise overriding concerns of the state in supervising its probationers and administering appropriate treatment programs that foster rehabilitation." The rhetoric of the Attorney General for Montana parallels the balancing approach discussed by Berg because it reasons that where there is a strong governmental interest in rehabilitation, there is far less of a problem regarding self-incrimination. However, such an approach makes short work of the privilege against self-incrimination. In effect, it says that the privilege should disappear as a constitutional right when it conflicts with the well-intentioned rehabilitative policy of the state. Importantly, the Supreme Court has said that a person is entitled to the protection of the Fifth Amendment based on whether answers would be

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85 See id. at 715-16.
86 See id.
87 See id. at 723.
88 See id. at 727-28.
90 Id. (emphasis added).
91 See id. at 22.
incriminating, not on whether a strong likelihood of prosecution exists. \textsuperscript{92} Such an approach cannot be said to protect the traditional idea that the Fifth Amendment is a check against the power of the state over the individual. \textsuperscript{93} The balancing proposals do harm to the traditional application and breadth of the protection against self-incrimination. As the Supreme Court held when addressing the surrender of the right of self-incrimination:

This guarantee against testimonial compulsion, like other provisions of the Bill of Rights, “was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed.” \textsuperscript{94}

The Attorney General of Montana appears willing to do just what the Supreme Court was concerned about: sacrifice the fundamental protections of the Fifth Amendment for the state’s interests in the safety of its citizens and in rehabilitating criminals. \textsuperscript{95} The Attorney General’s brief further states that “[b]ecause the probation system involves the overwhelming interest of the state in supervising its probationers and protecting the public, the threat of revocation and revocation itself are constitutionally valid exercises of the state’s authority to protect the public and determine the appropriate treatment for convicted defendants.” \textsuperscript{96} The protections against self-incrimination became incompatible with Montana’s desired statutory scheme, and so it tried to assert that its interests trumped the interests of the individual. This sort of state action is exactly what the Fifth Amendment is designed to protect against. An attack on the Fifth Amendment has implications beyond the protection against self-incrimination, because ignoring provisions of the Constitution when convenient to do so is a slippery slope.

This being said, the goals of the above-mentioned “balancing” proponents could just as easily be achieved by implementing rules insuring the confidentiality of statements made during treatment, or by immunizing a defendant’s statements from being used against him or her in a criminal proceeding. Once the potential for criminal consequences stemming from

\textsuperscript{92} See Berg, supra note 2, at 706.
\textsuperscript{93} See Shem, supra note 6, at 510.
\textsuperscript{94} Hoffman v. United States, 341 U.S. 479, 486 (1951) (quoting Feldman v United States, 322 U.S. 487, 489 (1944)).
\textsuperscript{95} Brief for State of Montana at 22, Imlay (No. 91-682).
\textsuperscript{96} Id. at 30.
a defendant's admissions is eliminated, the Fifth Amendment is no longer a shield against self-incrimination. There is no constitutional right to remain silent once the possibility of using the responses in a criminal case is foreclosed. The threat of incrimination being removed, the courts would be free to demand whatever kind of statement they wanted as a condition of probation. Indeed, the Supreme Court acknowledged this in Hoffman: "If Congress should hereafter conclude that a full disclosure by the witnesses is of greater importance than the possibility of punishing them for some crime in the past, it can, as in other cases, confer the power of unrestricted examination by providing complete immunity". In such cases, the defendant will not have the Fifth Amendment to hide behind, and the goal of more effective rehabilitation by requiring an admission of guilt can be fulfilled.

IX. MACE v. AMESTOY: ONE COURT'S SOLUTION

Mace v. Amestoy is a case wherein the court came to a sensible solution that accorded with the protections of the Fifth Amendment. In Mace, a writ of habeus corpus was sought by a sex offender after the Vermont Supreme Court held that revocation of his probation was proper for his failure to admit to the crimes for which he was convicted. The defendant admitted committing sexual assault on his stepdaughter and pled guilty, but vehemently denied that he had sexual intercourse with her, as was accused. The defendant pled guilty to a sex crime carrying a lesser penalty than the crime for sexual intercourse. He was put on probation, a condition of which was his participation in a sex offender treatment program. He continued to deny the allegations of sexual intercourse for the six months he was in the treatment program. Despite evidence and testimony to corroborate his claims, his treatment counselor insisted that he was lying and that this was a "stumbling block" to treatment. The trial

97 See Solkoff, supra note 28, at 1492.
98 See id.
99 Hoffman v. United States, 341 U.S. 479, 490 (1951) (quoting McCarthy v. Arndstein, 266 U.S. 34, 42 (1924)).
102 See Mace, 765 F Supp. at 848.
103 See id.
court revoked the defendant’s probation, the Vermont Supreme Court affirmed the revocation, and a writ of habeas corpus was sought.

The Federal District Court for Vermont agreed with the defendant that commanding him to make an admission while in treatment violated his right against self-incrimination, as he could still be prosecuted for that crime as a result of pleading to a lesser one at trial. It held this put the defendant in the classic penalty situation in that the defendant could have his probation revoked for refusing to make incriminating statements. The Court then went on to say: “[c]ontrary to the state’s position, the state has the burden of eliminating the threat of incrimination. If the state wishes to carry out rehabilitative goals in probation by compelling offenders to disclose their criminal conduct, it must grant them immunity from criminal prosecution.”

This middle-ground approach compromises without abandoning the constitutional freedom from compelled self-incrimination. Both sides get what they want; the state keeps its desired condition of an admission of guilt in its treatment program because, with immunity, the statements cannot be used against the defendant in a criminal case. In addition, proponents of the Fifth Amendment are assured its broad protection where it is applicable to protect the rights of the individual against state intrusion.

In addition, the court in *Mace v. Amestoy* went on to attack the “balancing” position referred to earlier:

> [T]he Vermont Supreme Court’s focus on the state’s rehabilitative purpose in compelling the petitioner to admit that he had sexual intercourse with his stepdaughter is misplaced, because what is at issue is the disclosure, not the purpose of the disclosure. Certainly the state has a legitimate rehabilitative purpose in demanding full disclosure, but that does not make the disclosure any less incriminating.

This analysis could not be any more on point. No one disputes that the state has a legitimate and compelling interest to rehabilitate sex offenders, and should be given all reasonable means to pursue that interest. However, when that interest conflicts with a constitutional right, the constitutional right must be given its full application. It cannot be merely sidestepped by courts because it is inconvenient when applied to rehabilitating sex offenders.

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104 See *id.* at 851.
105 See *id.*
106 *Id.* at 851-52.
107 *Id.* at 852.
offenders. The conflict must be acknowledged, and suitable treatment options that do not violate the privilege against self-incrimination must be instituted. As has been mentioned throughout this Note, a grant of immunity or the privileging of communications between the sex offender and his or her treatment counselor would give the state the right to demand whatever kind of admission it wanted, as there would be no chance of incrimination. This relatively minor concession would allow the states to implement the type of treatment programs they are so eager to implement.

This raises the question of why immunity is not granted frequently in order to deal with this problem. There are two considerations in administering a policy of immunity. As mentioned earlier in this Note, prosecutors are loath to extend this olive branch to defendants unless it some way expedites further prosecution. Second, courts feel they would be overstepping their authority in striking down the probation policies of the executive branch, which traditionally give prosecutors broad discretion, and thus hesitate to grant immunity. In addition, the concerns usually expressed regarding grants of immunity to defendants do not apply to immunizing the statements of sex offenders in treatment programs. In the case of someone on probation, his or her guilt has already been determined. Moreover, immunizing the statements of a probated sex offender does not immunize the sex offender from a subsequent prosecution for another crime. It simply prevents the sex offender’s own statements from his court-ordered treatment program to be introduced against him in a future criminal proceeding. The state remains free to prosecute sex offenders for other sex crimes; it is merely prevented from using statements made during the treatment program as evidence against him. This eliminates the fear that these sex offenders can evade the law the moment their admissions are immunized from use in criminal cases.

CONCLUSION

The privilege against self-incrimination has been broadly interpreted by the Supreme Court and cannot be set aside when inconvenient. The Fifth Amendment is a valuable restraint upon the state’s authority over individuals. While the successful treatment of sex offenders is a legitimate and important aim, procedures exist to achieve this goal apart from sidestepping such an important protection of individual rights. Courts must be consciously aware that they exist to serve the interests of justice, not to

109 See id. at 1490.
overlook the rights of the individual in order to facilitate a state’s rehabilitation programs. The Fifth Amendment is a last line of defense against potential abuses of state power and should not be discarded when a state asserts the Amendment is too protective or cumbersome. If a state wants to require admissions of guilt it can do so, but only by granting immunity to statements made by sex offenders while in treatment.