THE NEW INQUISITION: STATE COMPULSION OF THERAPEUTIC CONFESSIONS

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> Dressed in a white sheet and carrying a white rod, the offender had to confess before the whole congregation during service time on a Sunday or major holiday; and often the moral of the occasion was reinforced by the reading of an appropriate sermon or homily. More severe penances involved making such a confession on more than one occasion, sometimes in the market-place of the nearest town, or further personal humiliations such as appearing bare-legged.[1]

> One of the requirements in [the Vermont Treatment Program for Sexual Aggressors] is to participate in monthly group session conducted by John Bergman. Mr. Bergman and his assistant Saul put their hands on inmates in the group. People are afraid to object because if they are terminated they will have to max out their sentence. If anyone objects Bergman [tells] them "then get the hell out of here . . ., you're in denial!"[2]

INTRODUCTION

In a system historically wedded to the privilege against self-incrimination and an ideology of free thought and expression, the contention that American judges are imprisoning people for refusing to confess to criminal conduct has an improbable ring. The fact is that they do so

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1. MARTIN INGRAM, CHURCH COURTS, SEX AND MARRIAGE IN ENGLAND, 1570-1640, 54 (1987) (describing practices in the English ecclesiastical courts).

2. This allegation was contained in the sworn declaration of Dominic Magoon attached to the Memorandum in Support of Motion for Preliminary Injunction in Goldsmith v. Dean, Civ. No. 2:93-CV-383 (D. Vt. filed Aug. 22, 1995). This class action suit, currently pending in federal district court, was brought by inmates at the Vermont Northwest State Correctional Facility, challenging the constitutionality of coercive aspects of drama therapy for sex offenders. *Id.* Mr. Bergman has denied the allegations contained in this declaration. *See* Affidavit of John Bergman, *Goldsmith* (No. 2:93-CV-383). Specifically, Mr. Bergman states that "I do not recall ever screaming profanities at a [sic] inmate or telling an inmate to 'get out' or telling any inmate he was 'in denial' because he objected to some aspect of drama therapy." *Id.* at 28. Mr. Bergman also states that "I am unaware of any inmate being forced to serve his maximum sentence merely because he may have objected to drama therapy techniques." *Id.* at 27-28. *See also* Wilson Ring, *Prison Rape Simulations Challenged*, VALLEY NEWS, Aug. 26, 1995, at A1.

routinely and without serious constitutional qualms, and that most other actors in the criminal courts, prisons, probation and parole departments, and associated therapy programs see the practice as unproblematical and unremarkable. Compelled confessions and the imprisonment of defendants who refuse to confess have become normal functions of our criminal process.

These are not the confessions that suspects make at the beginning of the criminal process—in squad cars and police station interrogation rooms—the kind of confessions that the line of cases culminating in *Miranda v. Arizona* intended to shield from state coercion.[3] On the contrary, these confessions are solicited near the end of the process—during pre-sentence investigation interviews and court-mandated group therapy sessions—and their purpose is not principally evidentiary, but therapeutic and rehabilitative.

Proponents of court-mandated therapeutic confessions seem to represent a broad consensus of legal and professional opinion.[4] Simply as a matter of professional self-interest, prosecutors, defense lawyers, judges, therapists, and probation officers can see clear advantages in a system that offers to curtail or suspend prison sentences in exchange for confession and acceptance of responsibility. Although they would be bound to agree that this trade-off acts to compel self-incrimination, proponents of the practice argue that this is true only in a literal and simplistic sense, not in the sense intended by the constitutional privilege against self-incrimination.[5] These proponents stress the differences in timing and purpose between evidentiary and therapeutic confessions.[6]

At first blush these arguments appear persuasive. Therapeutic confessions, coming as they do near the end of the process, usually do not expose a defendant to criminal prosecution. In most situations where such confessions are solicited, the defendant has already been convicted and the

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

4. *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, 700-01 (1994).

5. *See, e.g.*, Brief Submitted by the State of Vermont on Behalf of the States of Alaska, Arizona, Delaware, Kansas, Kentucky, Louisiana, Michigan, Nevada, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Utah, and Virginia as Amici Curiae in Support of Petitioner at 10, Montana v. Imlay, 503 U.S. 905 (1992) (No. 91-687), *cert. dismissed*, 506 U.S. 5 (1992) ("Prohibited compulsion of speech should not focus on the theoretical implications of the responses.").

6. *See, e.g., id.* at 13 ("Given the essentially civil nature of probation and the strong rehabilitation purposes probation serves, the possible criminal implications of the respondent's admission does [sic] not implicate the Self-Incrimination Clause of the Fifth Amendment.").

confession will generally have no evidentiary purpose.[7] Unlike the typical recipient of *Miranda* warnings, defendants required to make therapeutic confessions face penal consequences only for refusing to confess, not for agreeing to confess.[8]

The practice may also be supported by an appeal to the utilitarian goals of the criminal justice system which transcend the interests of its individual participants. Although valuable ends do not justify unconstitutional means,[9] valuable ends may at least predispose judges to resolve ambiguities in favor of utility. The values promised by therapeutic confessions include the policy goals of rehabilitation and cost-effectiveness.

The view that rehabilitation is a central or necessary object of criminal sentencing may be falling out of fashion.[10] Nonetheless, the desirability of rehabilitating criminals remains uncontroversial.[11] When rehabilitation is attempted through psychotherapy, forensic psychologists maintain that acceptance of responsibility is an indispensable first step to any cure.[12] Traditional religion says the same: confession is not only good for the soul, it is indispensably good.[13] Many sentencing judges seem to hold a similar view: defendants who accept responsibility stand a chance of being rehabilitated; those who deny their guilt or who "minimize" their crimes

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7. Whatever evidence the confession contains may not be used in a criminal prosecution. Once the defendant has been convicted, the Double Jeopardy Clause bars a subsequent prosecution for the same offense. *See* U.S. CONST. amend. V.

8. A suspect's silence after receipt of *Miranda* warnings cannot be introduced against him at trial. Doyle v. Ohio, 426 U.S. 610, 617-18 (1976); Wainwright v. Greenfield, 474 U.S. 284, 295 (1986).

9. This statement applies with full force to the privilege against self-incrimination. *See* New Jersey v. Portash, 440 U.S. 450, 459 (1979) (concluding that when the state seeks directly to compel confessions a balancing of law enforcement interests against the values served by the privilege "is not simply unnecessary. It is impermissible."); Lefkowitz v. Turley, 414 U.S. 70, 78 (1973) (noting that "claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well"). *But see* Berg, *supra* note 4 (advocating a balancing approach).

10. *See* Justin Brooks, *Addressing Recidivism: Legal Education in Correctional Settings*, 44 RUTGERS L. REV. 699, 703 (1992); Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1012-13 (1991); STEVEN R. SMITH & ROBERT G. MEYER, LAW, BEHAVIOR, AND MENTAL HEALTH: POLICY AND PRACTICE 424-25 (1987).

11. *See* United States v. Grayson, 438 U.S. 41, 46 (1978); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 24 (2d ed. 1986); Berg, *supra* note 4, at 701.

12. *See* Scott Michael Solkoff, Note, *Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs*, 17 NOVA L. REV. 1441, 1450 (1993).

13. *See, e.g.*, THOMAS AQUINAS, THE SUMMA THEOLOGICA, pt. III (Supp.), q. VI, art. 1, at 134 (Fathers of the English Dominican Province trans., R & T Washbourne 1917) (discussing the connection between confession and salvation).

can be punished, incapacitated, or deterred from future criminality, but cannot be "cured."[14]

Furthermore, successful rehabilitation promises cost-savings. Prison populations and the public funds necessary to maintain them have grown dramatically in recent years.[15] To the extent that therapy offers an alternative to incarceration, in the form of probationary "out-patient" groups for offenders who accept responsibility for their crimes, its appeal to prison administrators and budget writers is clear.[16] "In house" programs, insofar as they permit early release of repentant prisoners who successfully complete mandated therapy, offer the same advantages.

Appellate courts have generally come down in favor of the permissibility of court-mandated therapeutic confessions. These courts generally view the elicitation of therapeutic confessions, not principally as a confession issue, but rather as a dispositional issue—a matter for the highly discretionary, almost non-existent law governing sentences, prison classification, parole-release decisions, and the fashioning and supervision of probation conditions.[17] In short, this is territory that appellate courts have traditionally left to the sound and informed discretion of trial judges and administrators.

The purpose of this Article is to examine these positions which, despite their logical and practical appeal, leave the nagging sense that something—something to do with our fundamental constitutional traditions—has gone awry. This Article argues that, given the uncertain effectiveness of therapeutic confessions and the historical underpinnings of the right against self-incrimination, court-mandated therapeutic confessions raise serious constitutional problems that the courts must address. Part I sets this argument in its proper context by offering four examples, culled from Vermont case law, of the use of court-mandated therapy as a probation condition.[18] Part II sets forth the standard Fifth Amendment analysis

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14. *See generally* W.L. Marshall, *Treatment Effects on Denial and Minimization in Incarcerated Sex Offenders*, 32 BEHAV. RES. THERAPY 559 (1994) (reporting success in weaning incarcerated sex offenders from denial and minimization).

15. *See* U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 210 (113th ed. 1993) (noting increase in prison populations between 1960 and 1991); Berg, *supra* note 4, at 700-01 (noting prison population increases during the past century).

16. This is particularly true in a political climate that stresses the ideals of crime prevention and fiscal conservatism.

17. *See, e.g.*, State v. Mace, 154 Vt. 430, 434-35, 578 A.2d 104, 107 (1990), *vacated sub nom.* Mace v. Amestoy, 765 F. Supp. 847 (D. Vt. 1991) (reasoning that because the court-mandated therapy was "reasonably related to the rehabilitation of defendant . . . [it] lies within the discretion of the [trial] court").

18. *See infra* Part I.

employed by most courts to determine the constitutionality of such probation conditions.[19]

Part III proposes an alternative Fifth Amendment analysis—focusing on the historical underpinnings of the privilege against self-incrimination.[20] First, the Article traces the use of therapeutic confessions from early continental inquisitional procedures through modern totalitarian regimes, focusing on both the English ecclesiastical courts and the use of therapeutic confessions in colonial America.[21] Next, Part III focuses on the analogies between these historical practices and modern court-ordered therapeutic confessions.[22]

In Part IV, this Article argues that, given the analogies between court-mandated therapy and the historic use of therapeutic confessions that gave rise to the privilege against self-incrimination, serious constitutional issues are implicated, making application of the traditional Fifth Amendment analysis inappropriate.[23] Part V examines the First Amendment interests raised by court-mandated therapeutic confessions.[24] This Article concludes that court-mandated therapeutic confessions raise serious constitutional questions which must be addressed in light of the historical underpinnings of the privilege against self-incrimination.

I. FOUR CASES

The cases summarized in this part are drawn from appealed convictions or probation revocation orders in Vermont. The Vermont examples could be multiplied manyfold simply from the reported decisions,[25] and the

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19. *See infra* Part II.

20. *See infra* Part III.

21. *See infra* Part III.A-D.

22. *See infra* Part III.E.

23. *See infra* Part IV.

24. *See infra* Part V.

25. The reported decisions since 1987 include at least the following: State v. Masse, No. 94-660 (Vt. Dec. 22, 1995); State v. Guilmette, 665 A.2d 891 (Vt. 1995) (mem.); State v. Rickert, 665 A.2d 887 (Vt. 1995); State v. Boisvine, 162 Vt. 644, 648 A.2d 664 (1994) (mem.); State v. Madden, 161 Vt. 645, 638 A.2d 1059 (1994) (mem.); State v. Coleman, 160 Vt. 638, 632 A.2d 21 (1993) (mem.); State v. Fitzgerald, 160 Vt. 654, 627 A.2d 861 (1993) (mem.); State v. Hamilton, 160 Vt. 652, 625 A.2d 790 (1993) (mem.); State v. Merchant, 159 Vt. 642, 623 A.2d 40 (1993) (mem.); State v. Kiefer, 159 Vt. 642, 619 A.2d 841 (1992) (mem.); State v. Bickford, 158 Vt. 660, 610 A.2d 1112 (1992) (mem.); State v. Ladue, 158 Vt. 659, 608 A.2d 665 (1992) (mem.); State v. Derouchie, 157 Vt. 573, 600 A.2d 1323 (1991); State v. Sims, 158 Vt. 173, 608 A.2d 1149 (1991); State v. Mace, 154 Vt. 430, 578 A.2d 104 (1990), *vacated sub nom.* Mace v. Amestoy, 765 F. Supp. 847 (D. Vt. 1991); State v. Gleason, 154 Vt. 205, 576 A.2d 1246 (1990); State v. Foster, 151 Vt. 442, 561 A.2d 107 (1989); State v. Peck, 149 Vt. 617, 547 A.2d 1329 (1988); State v. Schroeder, 149 Vt. 163, 540 A.2d 647 (1987). *See also* Mullin v. Phelps, 162 Vt. 250, 268, 647 A.2d 714, 724-25 (1994) (striking

reported cases represent only the tip of the iceberg. In the trial courts, the practice of seeking therapeutic confessions has become endemic to plea bargaining and sentencing in a wide spectrum of cases, from misdemeanor assaults to serious sexual felonies. This pattern is by no means unique to Vermont.[26] Indeed, when the United States Supreme Court granted certiorari in one such case, *Montana v. Imlay*,[27] sixteen states joined in an amicus brief submitted by the Vermont Attorney General arguing that the privilege against self-incrimination is inapplicable in the context of therapeutic confessions.[28]

The following four cases illustrate the variety of contexts in which the elicitation of therapeutic confessions has become an issue and demonstrate the routinization of the process by courts and advocates.

A. State v. Rickert

William Rickert was charged with assaulting and harassing Susan O., a woman with whom he had a long and contentious relationship.[29] The most serious allegation—that Rickert threatened Susan with a gun—was a felony; all other allegations involved misdemeanor charges.[30] Rickert's

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order in custody case which conditioned right to visitation on admission of sexual abuse); *In re* M.C.P., 153 Vt. 275, 298, 571 A.2d 627, 639-40 (1989) (involving a similar practice in a "child in need of care or supervision" (CHINS) case).

26. *See, e.g.*, Asherman v. Meachum, 957 F.2d 978 (2d Cir. 1992) (en banc); Russell v. Eaves, 722 F. Supp. 558 (E.D. Mo. 1989); *In re* Jessica B., 254 Cal. Rptr. 883 (Ct. App. 1989); Archer v. State, 604 So. 2d 561 (Fla. Dist. Ct. App. 1992); Young v. State, 566 So. 2d 69 (Fla. Dist. Ct. App. 1990); Henderson v. State, 543 So. 2d 344 (Fla. Dist. Ct. App. 1989); People v. Prusak, 558 N.E.2d 696 (Ill. App. Ct. 1990); Gilfillen v. State, 582 N.E.2d 821 (Ind. 1991); *In re* H.R.K., 433 N.W.2d 46 (Iowa Ct. App. 1988); *In re* J.G.W., 433 N.W.2d 885 (Minn. 1989); *In re* J.W., 415 N.W.2d 879 (Minn. 1987); State v. Cameron, 830 P.2d 1284 (Mont. 1992); State v. Imlay, 813 P.2d 979 (Mont. 1991), *cert. granted*, 503 U.S. 905 (1992), *and cert. dismissed*, 506 U.S. 5 (1992); Dutchess County Dep't of Social Servs. *ex rel.* T.G. v. G., 534 N.Y.S.2d 64 (Fam. Ct. 1988), *aff'd sub nom. In re* Travis Lee G., 565 N.Y.S.2d 136 (App. Div. 1991). Similar issues come up routinely in federal courts under the Federal Sentencing Guidelines' provision for downward departures for defendants who accept responsibility for their offenses. *See* U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 3E1.1 (1994); Kinder v. United States, 504 U.S. 946, 951 (1992) (White, J., dissenting from denial of certiorari) (reviewing circuit court cases).

27. Montana v. Imlay, 503 U.S. 905 (1992), *cert. dismissed*, 506 U.S. 5 (1992).

28. *See* Brief Submitted by the State of Vermont on Behalf of the States of Alaska, Arizona, Delaware, Kansas, Kentucky, Louisiana, Michigan, Nevada, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Utah, and Virginia as Amici Curiae in Support of Petitioner, *Imlay* (No. 91-687).

29. State v. Rickert, 665 A.2d 887, 888 (Vt. 1995).

30. *Id.*; Printed Case of the Appellant at 1 (Docket Entries), 25 (Affidavit of Edward V. Meslin), *Rickert* (No. 94-187). Specifically, Rickert was charged with "aggravated domestic assault, domestic abuse, violation of an abuse prevention order, simple assault, and unlawful trespass." *Rickert*, 665 A.2d at 888.

attorney reached a plea agreement with the prosecution calling for nolo contendere pleas to all charges,[31] a sentence of twenty-one days to three years, of which all but twenty-one days were suspended, and an order of probation.[32] The order included a condition, as part of the standard probation order form, that Rickert undergo domestic abuse counselling to the satisfaction of his probation officer.[33]

At the plea hearing, Rickert's attorney told the court that his client had come to the conclusion that something was wrong with his relationship with Susan. His decision to plead had been motivated by that realization, although he did not admit to all charges:

> MR. ALBERT: We agree it was not a constructive relationship, Your Honor.
>
> THE COURT: You are a master of understatement, Mr. Albert.
>
> MR. ALBERT: Well, there's a lot more going on here, Your Honor.[34]

The judge addressed Rickert concerning the social problem of domestic abuse and the fact that the issue was receiving a great deal of media attention.[35] The judge noted particular concern about the allegation concerning the gun: "I have to admit that's my nightmare . . . that when a relationship breaks up and one party can't let go that violence may escalate to the point where it becomes serious or fatal."[36] He told Rickert that he hoped probation would help him stabilize his situation.[37] The judge said nothing about the specifics of the counselling program, except that Rickert was obligated to complete it.

Rickert's probation officer referred him to the Domestic Abuse Education Program (DAEP), a local counselling program on contract with the Department of Corrections, where he was interviewed by intake worker

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31. Nolo contendere pleas, although a sufficient basis for conviction and sentence, do not constitute factual admissions to the charges. *See* VT. R. CRIM. P. 11(b), 11(e)(5)(B).

32. *Rickert*, 665 A.2d at 888. Rickert had already served twenty-one days in pre-trial detention. Printed Case of the Appellant at 8 (Notice of Plea Agreement), *Rickert* (No. 94-187).

33. *Rickert*, 665 A.2d at 888; Printed Case of the Appellant at 9 (Probation Order), *Rickert* (No. 94-187).

34. Transcript of Plea Hearing at 11-12 (Sept. 13, 1994), *Rickert* (No. 94-187).

35. *Id.* at 12-13.

36. *Id.* at 13.

37. *Id.*

Ingrid Jonas.[38] Rickert arrived for his intake interview on time and paid the fee for the procedure.[39] He told Jonas that he did not think he had any reason to be enrolled in the program and "denied the majority of what he had been convicted of."[40] The only reason he was applying for admission to the DAEP was "because he took a plea bargain in Court and he didn't want to be in jail."[41] Rickert told Jonas that he wanted her to understand something about Susan so that Jonas could understand his perspective: Rickert asserted that Susan had taken a lot of drugs and was very moody, in part because she had had a hysterectomy.[42]

Jonas understood from court papers that Rickert had been convicted of six "domestic abuse related things" involving Susan.[43] When Jonas asked Rickert about the specifics of these charges, he denied that he made verbal threats to kill Susan and denied threatening her with a gun.[44] He admitted pushing Susan onto the couch and then breaking some of his own belongings.[45] He also told Jonas that on other occasions he had slapped Susan, physically restrained her, screamed and yelled at her frequently, and called her names.[46] Rickert also conceded that he sometimes "[w]ithheld some emotions as [a] power dynamic."[47]

Jonas declined to refer Rickert to the DAEP because of his denial and his "minimal" insight.[48] It did not occur to Jonas that the allegations in the police affidavits with which she had been provided might not be true.[49] She communicated her decision to Rickert's probation officer, who filed a formal probation violation complaint, alleging that "Mr. Rickert does *not* take responsibility for his behaviors associated with these convictions. Mr. Rickert was rejected from participating in the DAEP due to his denial issues."[50]

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38. Transcript of Violation of Probation Merits Hearing at 23 (Feb. 7, 1994), *Rickert* (No. 94-187). Jonas' qualifications for her job were an unspecified bachelor's degree and certification to train law enforcement officers "in terms of responding to domestic cases and sensitivity to victims of domestic cases." *Id.*

39. *Id.* at 26.

40. *Id.*

41. *Id.* at 27.

42. *Id.* at 27, 31-32.

43. *Id.* at 26.

44. *Id.* at 27.

45. *Id.*

46. *Id.* at 29-30.

47. *Id.* at 30.

48. *Id.* at 27-28, 32.

49. *Id.* at 30.

50. Brief of the Appellant at 3, *Rickert* (No. 94-187).

In opposition to revocation of probation, defense counsel argued that Rickert was being punished for failing to admit charges that he had consistently denied.[51] Rickert admitted to having a problem and to various incidents and patterns of domestic abuse.[52] Punishing him for not making further admissions, counsel argued, violated his privilege against self-incrimination and his right of free expression.[53]

The prosecutor argued that Rickert needed "inpatient treatment and counselling" in a "highly structured setting" because he had to "develop empathy for victims and understanding [and] insight into domestic violence."[54] Defense counsel countered that the State was essentially seeking to punish Rickert "for failing to say certain things" that were untrue and for his "lack of insight."[55] The judge imposed the underlying three year sentence and remanded Rickert to custody.[56]

B. State v. Boisvine

Brian Boisvine was tried on two misdemeanor charges that he assaulted his former girlfriend.[57] He took the stand in his own defense and categorically denied the accusation.[58] The court found him guilty, but he continued to insist on his innocence at the sentencing hearing.[59] The judge imposed a fully suspended six to twelve month sentence, with an order of probation.[60] The principal condition of Boisvine's probation was that he "attend and complete" the DAEP.[61] Defense counsel objected to this condition on the ground that Boisvine, given his refusal to confess guilt, was destined to be rejected from the program.[62]

This prediction proved accurate. On March 11, 1993, Boisvine's probation officer filed a probation violation complaint alleging:

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51. *See* Transcript of Violation of Probation Continued Disposition Hearing at 2 (Mar. 9, 1994), *Rickert* (No. 94-187).

52. *Id.*

53. *Id.*

54. *Id.* at 11-14.

55. *Id.* at 16.

56. *Rickert*, 665 A.2d at 888.

57. Transcript of Apr. 28, 1993 at 2, State v. Boisvine, 162 Vt. 644, 648 A.2d 664 (1994) (mem.) (No. 93-346).

58. *Id.*

59. *Id.* at 4.

60. Printed Case of the Appellant at 2, 5 (Docket Entries), *Boisvine* (No. 93-346).

61. *Id.* at 2, 11 (Probation Violation Complaint). This is the same program to which William Rickert was referred. *See supra* text accompanying note 38.

62. Transcript of Apr. 28, 1993 at 2, *Boisvine* (No. 93-346).

> On 1/14/93 Brian Boisvine attended an initial interview for Domestice [sic] Abuse Education Program. At the completion of the intake, Brian was not referred as he said he never hit her. At this time Brian is making himself unavailable for the program, as well as any other program, as he does not take responsibility for his actions.[63]

Despite the court's verdict, Boisvine's counsel argued that his client had a right to maintain his innocence.[64] Counsel added that an admission at this stage could subject his client to prosecution for perjury in light of his testimony at trial.[65] The prosecutor replied that she would not charge the defendant with perjury.[66] The judge, in an attempt to avoid the issue, continued the case for thirty days to provide Boisvine another chance to admit his guilt and be accepted into the program.[67]

This second chance, however, accomplished nothing. At the continuation of the hearing, defense counsel indicated that Boisvine had met a second time with a representative of the DAEP, had related the same version of events, and had again been refused admission.[68] Boisvine's attorney repeated his previous arguments, stressing that "you can't punish someone for maintaining [his] innocence," and pointing out that the court's verdict in the trial could have been factually wrong.[69]

While acknowledging that the defendant's denial of guilt could be sincere, the judge found that Boisvine had violated his probation. According to the court, Boisvine failed to complete the program "for reasons of principle or conscience or stubbornness, I don't know. We'll give him the benefit of the doubt and say it's on principle and conscience, but he has not completed the DAEP program . . . and we'll find a violation on that failure to comply."[70] The judge imposed upon Boisvine a sentence of zero to thirty days in prison.[71]

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63. Printed Case of the Appellant at 11, *Boisvine* (No. 93-346).
64. Transcript of Apr. 28, 1993 at 3, *Boisvine* (No. 93-346).
65. *Id.*
66. *Id.* at 5.
67. *Id.* at 10-11.
68. Transcript of June 9, 1993 at 2, *Boisvine* (No. 93-346).
69. *Id.*
70. *Id.* at 11.
71. Printed Case of the Appellant at 14 (Modified Probation Order), *Boisvine* (No. 93-346).

C. State v. Mace

In July 1987, Robert Mace was charged with having sexual intercourse with his fourteen-year-old stepdaughter.[72] The alleged sexual act was that Mace "did place his penis in contact with [the victim's] vulva and did intrude his penis into her vaginal opening."[73] Mace admitted that he sexually abused his stepdaughter but consistently denied that he committed the charged act of sexual intercourse.[74] Eight months after Mace was charged, the parties reached a plea agreement.[75] The prosecutor amended the charging document to allege that Mace "did place his penis in contact with [the victim's] leg" in violation of the less serious crime of lewd and lascivious conduct with a minor.[76] Mace pleaded guilty to the amended charge, and the prosecutor's statement of the factual basis made clear the limits of Mace's admission:

> He is pleading to a charge of lewd and lascivious conduct. The factual basis for that being that on or about December 31, 1985, he did rub his penis against the leg of a girl who was under the age of 16 years with the intent of appealing to his sexual desires. He denies that there was penetration, but agrees that his penis did come in contact with her leg.[77]

Mace agreed that by his plea he was admitting the same act.[78]

Mace received a sentence of one to five years, all suspended, with an order of probation and a counselling requirement: "You shall attend, participate, and complete the sexual therapy program at Orange County Mental Health in Randolph as directed by Mr. Sargent and by your probation officer."[79] Seven months later, Mace's probation officer, Harry Goodsell, swore out a probation violation complaint, alleging that "Mace was still in denial of the sexual intercourse in his case" and that he "denied the sexual intercourse and said that he would not admit this in the therapy now or in the future."[80]

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72. Printed Case of the Appellant at 3 (Information by State's Attorney), State v. Mace, 154 Vt. 430, 578 A.2d 104 (1990) (No. 89-166), *vacated sub nom.* Mace v. Amestoy, 765 F. Supp. 847 (D. Vt. 1991).

73. *Id.*

74. Transcript of Violation of Probation Hearing at 22-23 (Jan. 16, 1989), *Mace* (No. 89-166).

75. *See* Mace v. Amestoy, 765 F. Supp. 847, 848 (D. Vt. 1991).

76. *Id.*

77. Transcript of Change of Plea Hearing at 5-6 (Apr. 12, 1988), *Mace* (No. 89-166).

78. *Id.* at 8.

79. *Mace*, 765 F. Supp. at 848.

80. Printed Case of the Appellant at 6 (Probation Violation Complaint), *Mace* (No. 89-166).

At a hearing on the Violation of Probation Complaint, Goodsell testified that Mace's therapist, Tim Sargent, had informed him "[t]hat Mr. Mace was not completely being very open on all the issues, especially the sexual assault—sexual intercourse issue."[81]

> [Sargent] said that [Mace] maintained that there was no sexual intercourse. That the warrant should not have read "Amended from sexual intercourse." He did not do it. Therefore, he was not going to admit to something he didn't do at that time or in the future. And I just told him that the probation case would never come to any appropriate conclusion, so I handed him a citation for the 12th of December.[82]

Although Mace admitted other sexual misconduct in the course of his therapy, "he would not admit that he had put his penis into the victim's vagina" and this was the basis of the alleged violation.[83]

Sargent testified that his educational training was "fifty-five credits beyond the bachelor's level."[84] He had worked in the local sex offender treatment program for the past three and one half years.[85] Sargent's understanding of the facts of the case stemmed from reading affidavits and conversations with Goodsell.[86] Based on these sources Sargent disbelieved Mace's denials.[87] Yet, Sargent had never spoken to Mace's stepdaughter.[88] Sargent acknowledged that, except for his denial of sexual intercourse, Mace had been a good participant in the group.[89] Sargent also agreed that, if Mace had not had intercourse with his stepdaughter, there would be no basis to hold him in violation of probation.[90]

Despite Mace's denial of intercourse, Sargent recalled one occasion when Mace tacitly admitted the charge. According to Sargent, Mace told the group that, when confronted by his wife, he told her that he had sexual intercourse with his stepdaughter.[91] Mace denied that he made this admission.[92] He believed Sargent had misconstrued a statement he had

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81. Transcript of Violation of Probation Hearing at 4, *Mace* (No. 89-166).
82. *Id.*
83. *Id.* at 7-8.
84. *Id.* at 8.
85. *Id.*
86. *Id.* at 9.
87. *Id.* at 10-11.
88. *Id.* at 14.
89. *Id.*
90. *Id.* at 15.
91. *Id.* at 10.
92. *Id.* at 22.

made in the therapy group.[93] Recounting the therapy session, Mace testified that:

> When [my stepdaughter] told her mother that we had had sexual intercourse, her mother didn't want to hear my side of it. And I said, "What difference does it make? What I did was bad enough." And this woman believed that I did have sexual intercourse up until the point that I finally got her to go to see Dr. Glower. And Dr. Glower told her that [her daughter] was fully virginal. And Tim Sargent, I told him the same thing . . . . Because Tim told me that the reason I wouldn't admit to sexual intercourse through counseling was because my wife would leave me. And I said that she had assumed that and hadn't left me up until this point, and that was not the reason.[94]

Mace's wife testified that she had a number of conversations with her husband about his sexual abuse of her daughter.[95] According to his wife, Mace never told her that he had engaged in sexual intercourse with the victim, and had, in fact, always denied it.[96] Finally, Mace's stepdaughter, age seventeen at the time of the hearing, testified that she was now convinced that her stepfather's sexual abuse three years previously had not involved sexual intercourse.[97]

After the victim's testimony, the judge asked Sargent if he wanted to revise his opinion of the case.[98] Sargent replied, "I have to say I think the defendant is still in denial. I've been through this with other victims and perpetrators before."[99] Notwithstanding this testimony, Sargent believed that he could still "work with him."[100]

The judge initially doubted the State's case of a probation violation:

> You can't, on one hand, amend the charge from a sexual assault to [lewd and lascivious conduct], which doesn't allege sexual intercourse; have someone plead to that. And then say to him during therapy, "You have to admit that there was sexual intercourse." You know, it's not fitting. And you could read these [probation] conditions forever to the

93. *Id.*
94. *Id.*
95. *Id.* at 19-20.
96. *Id.*
97. *Id.* at 27.
98. *Id.* at 29.
99. *Id.*
100. *Id.* at 29-30.

> defendant, and he still wouldn't be on notice that he would have to admit to sexual intercourse just by reading the conditions of probation.[101]

The judge had changed her mind by the conclusion of the hearing:

> Based on the evidence presented, and I'm changing my mind mainly because Tim Sargent said that the defendant admitted to him that he had told his wife that he did in fact have sexual intercourse with his [step]daughter, which, to me, presents a whole different situation. Because, at that point, one would commonly say that you're not going to make an admission like that unless it actually happened, and to one's wife. And I think it changes the entire complexion of the case from before where the only evidence might have been the victim's statement. Now, essentially, you have an admission by the defendant. And then, we have a contradiction. At one point, he might have admitted to his wife that he had had sexual intercourse. Yet, during therapy, he's not being as forthright. And evidently, according to Mr. Sargent, there's a limit to what therapy can do in the face of denial on the defendant's part. And there was a condition of probation . . . "requiring attendance, participation and complet[ion of] the sexual therapy program at Orange County Mental Health, as directed by Mr. Sargent, approved by your probation officer." And it appears that, based on this denial, that that in fact is not happening. So I'll find that there is a violation.[102]

The judge did not believe Mace, his wife, or his stepdaughter.[103] At the sentencing hearing, Sargent represented to the court that, except for his refusal to admit intercourse, Mace had done well in therapy and was still amenable to treatment.[104] The judge ordered Mace to serve sixty days of the suspended one- to five-year sentence, after which he would be returned to the same program.[105]

D. State v. Stearns

After a plea to sexual assault, David Stearns was placed on probation on the condition that he "actively participate in a mandatory, outpatient

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101. *Id.* at 6-7.

102. *Id.* at 30-31.

103. *Id.* at 31 ("I don't believe the defendant. I don't believe the defendant's wife. And I don't believe the victim.").

104. Transcript of Violation of Probation—Sentencing at 3, 5-6 (Feb. 27, 1989), *Mace* (No. 89-166).

105. Printed Case of the Appellant at 4 (Docket & Disposition Rpt.), *Mace* (No. 89-166).

sexual offender treatment program, and . . . abide by the program's treatment contract as designated by your [probation officer]."[106]

Stearns did not deny his offense, but his participation in the treatment program was unsatisfactory in other respects. According to William Fink, the treatment group leader, Stearns "was not really taking responsibility for investigating the [precursors] to his sex offending so that we could work with him to reduce his risk."[107]

> [H]e was not giving us anything to work with. It is my function both to work with the client and to let the probation officer know what progress they are making, what their current level of risk might be, and Mr. Stearns was not giving us any of the information that we need to work with, which is sexual fantasy, [masturbation] practices, history of deviant sexual arousal, etc., etc.[108]

Fink's therapy program worked on a relapse prevention model: "[B]asically what we do is we work with the offender on the [precursors] of their offense; the thinking, the fantasies, the moods, the cycles . . . to help them formulate a strategy to reduce their risk."[109]

Stearns testified that the therapy group was trying to make him admit to fantasies that he did not have.

> Q [D]id anyone in the group or did the group as a whole ask you about deviant sexual fantasies, violent sexual fantasies?
>
> A Yes, they did, and I tried to explain to them that I wasn't having those type of thoughts of raping people and doing things with kids—that I just couldn't agree with. It was really hard for me.
>
> Q Well, when you told them that you didn't have these violent sexual fantasies, what was the group's response?
>
> A They were calling me a liar.[110]

They told him that he was in denial.

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106. Printed Case of the Appellant at 5 (Probation Violation Complaint), State v. Stearns (No. 91-214).

107. Transcript of Violation of Probation Hearing at 22 (Apr. 1, 1991), *Stearns* (No. 91-214).

108. *Id.* at 23.

109. Transcript of Sentencing Hearing at 6 (Apr. 29, 1991), *Stearns* (No. 91-214).

110. Transcript of Continued Sentencing Hearing at 25 (May 8, 1991), *Stearns* (No. 91-214).

The judge found a probation violation on the basis of Stearns' generally slack performance in group therapy, including his refusal "to investigate the [precursors] to sex offending so that he would be able to reduce his risk of reoffending while in the community."[111]

II. THE STANDARD FIFTH AMENDMENT ANALYSIS

The Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[112] Courts analyze post-conviction self-incrimination issues with reference to the United States Supreme Court's "penalty" cases—cases where the state conditions a benefit, typically continued state employment, upon a waiver of self-incrimination rights.[113] The Supreme Court has held that, when the target of an investigation refuses to confess, the state may not make good on its threat of dismissal. "[A] State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself."[114] When the threat is successful and the target responds to incriminatory questioning, the confession may not be used in a later criminal prosecution.[115]

Application of these holdings in the context of therapeutic confessions is invited, if not absolutely compelled,[116] by the Supreme Court's decision in *Minnesota v. Murphy*.[117] Murphy, charged in 1980 with criminal sexual conduct, pleaded guilty to a reduced charge and was placed on probation with a requirement that he participate in a treatment program for sexual offenders.[118] In the course of the treatment program he admitted to a 1974 rape and murder.[119] A treatment counselor relayed this admission to Murphy's probation officer, who questioned Murphy about the uncharged crimes, telling him that they indicated a need for further treatment.[120]

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111. Transcript of Violation of Probation Hearing at 36, *Stearns* (No. 91-214).

112. U.S. CONST. amend. V.

113. *See* Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967).

114. *Lefkowitz*, 431 U.S. at 805. *See also* Minnesota v. Murphy, 465 U.S. 420, 434-35 (1984).

115. *Garrity*, 385 U.S. at 500; *Murphy*, 465 U.S. at 434-35.

116. *Cf.* Asherman v. Meachum, 957 F.2d 978 (2d Cir. 1992) (en banc) (approving, without reference to *Murphy*, revocation of supervised home release status in response to an assertion of the privilege).

117. *Murphy*, 465 U.S. at 420.

118. *Id.* at 422.

119. *Id.* at 423.

120. *Id.* at 425.

Murphy protested the disclosure of what he thought were confidential communications, but admitted to the rape and murder, and his confession was introduced against him in a subsequent prosecution.[121]

In the Supreme Court, Murphy argued that his confession was inadmissible under the holdings of the penalty cases, because the state law obligation to give truthful answers to his probation officer's questions compelled him to admit the 1974 crimes or face revocation of probation.[122] A majority of the Court saw this argument as "not without force," but rejected it on the ground that Minnesota, although it conditioned probation on the giving of truthful answers, had not "attempt[ed] to take the extra, impermissible step" of conditioning probation on a waiver of privileged silence.[123] Although a state may, without offending the privilege, require a probationer to answer questions relevant to probation conditions,

> [t]he result may be different if the questions put to the probationer, however relevant to his probationary status, call for *answers that would incriminate him in a pending or later criminal prosecution*. 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 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.[124]

The Court concluded that, because the Minnesota Supreme Court had not held "that a refusal to furnish incriminating information would have justified revocation of probation," and because there was no evidence that Murphy "feared that his probation would be revoked if he remained silent," he was not "deterred from claiming the privilege by a reasonably perceived threat of revocation."[125]

In therapeutic confession cases, *Murphy* forces a focus on criminal liability. The question becomes whether a probationer's confession, or "acceptance of responsibility," could "incriminate him in a pending or later criminal prosecution."[126] The strongest self-incrimination claims of this sort

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121. *Id.* at 424-25.

122. *Id.* at 434.

123. *Id.* at 434, 436.

124. *Id.* at 435 (emphasis added).

125. *Id.* at 436, 437, 439. Three dissenting Justices thought that the requirement to be truthful in all matters reasonably implied a duty to answer questions, and that the majority's contrary conclusion was "simply incredible." *Id.* at 447 (Marshall, J., dissenting).

126. *Id.* at 435.

arise in cases, like *Murphy*, where the state insists on confessions to crimes of which the probationer has not been convicted. One such case is *State v. Mace*, where the defendant admitted sexual misconduct with his stepdaughter but denied sexual intercourse.[127] Unlike *Murphy*, the State in *Mace* took the step of revoking probation in response to the defendant's refusal to confess to criminal misconduct.[128]

Mace challenged the revocation of probation on the basis of *Murphy* and the penalty cases.[129] The Vermont Supreme Court was not persuaded by this argument. Acknowledging that the solicited confession exposed Mace to criminal liability in theory, the court saw the State's therapeutic purpose as a distinguishing factor:

> The [trial] court imposed probation conditions aimed at treating defendant for aberrant sexual behavior toward his stepdaughter. In furtherance of that goal, defendant was compelled to divulge and discuss his sexual conduct with his stepdaughter. The record makes it clear that the mental health clinic's goal of full disclosure of this conduct is aimed at rehabilitation and treatment, not later prosecution.[130]

The federal district court vacated this holding on Mace's subsequent habeas corpus petition, holding that prosecutorial good intentions are irrelevant.[131] "The privilege 'protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.'"[132] Once such a potential is shown, "the person need not show an intention on the part of the government to commence a criminal prosecution."[133]

Cases where the defendant's "denial" relates strictly to the crime of conviction may also have valid claims under *Murphy*, although the threat of criminal prosecution is usually more attenuated. The Double Jeopardy Clause of the Fifth Amendment protects defendants from a second criminal prosecution for the "same offense."[134] This term is narrowly construed to bar prosecutions only if the two offenses are technically identical or if the

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127. State v. Mace, 154 Vt. 430, 578 A.2d 104 (1990), *vacated sub nom.* Mace v. Amestoy, 765 F. Supp. 847 (D. Vt. 1991). *See supra* Part I.C (discussing *State v. Mace*).

128. *Mace*, 154 Vt. at 432, 578 A.2d at 106.

129. *Id.* at 436, 578 A.2d at 108.

130. *Id.*

131. *Mace*, 765 F. Supp. at 852.

132. *Id.* at 851 (quoting Kastigar v. United States, 406 U.S. 441, 445 (1972)).

133. *Id.*

134. U.S. CONST. amend. V. This guarantee is applicable to the states via the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969).

elements of one are entirely included within the elements of the other.[135] When the solicited admission focuses narrowly on the crime of which the defendant was convicted, the Double Jeopardy Clause removes the threat of a second prosecution or additional punishment for that crime.

Even so, there are two situations in which a defendant can assert substantial Fifth Amendment claims notwithstanding that the solicited confession has been restricted to a crime for which a conviction has been obtained. First, a convicted defendant like Brian Boisvine,[136] who has previously denied the charged offense under oath, may face a separate perjury prosecution, an increase in his sentence on account of perjured testimony, or a criminal contempt proceeding if he subsequently changes his position and accepts responsibility in a therapy group. Second, a defendant who appeals a conviction will face a risk of incrimination if he confesses to the crime in therapy before his appeal is decided. If the conviction is reversed and a new trial is granted, the prosecution may use the confession in the second trial.[137]

It is unclear whether these claims of residual liability will prevail. In *State v. Imlay*, the Montana Supreme Court, holding that a probationer's sentence could not be augmented because he refused to waive the privilege against self-incrimination, noted that a defendant who is required to waive the privilege faced the risk of perjury prosecution, the possible detrimental effects on any future collateral proceedings, and the possible detrimental effects on future challenges based on newly discovered evidence.[138] The United States Supreme Court initially granted the State's petition for certiorari[139] and then dismissed the writ as improvidently granted, over a dissent by Justice White.[140] The question thus remains open.

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135. United States v. Dixon, 113 S. Ct. 2849, 2856 (1993). *Dixon* overruled the somewhat broader test of Grady v. Corbin, 495 U.S. 508 (1990). *Dixon*, 113 S. Ct. at 2860. The *Grady* test barred a second prosecution when the state, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, 495 U.S. at 521.

136. See *supra* Part I.B.

137. The privilege against self-incrimination would typically be available in a new trial resulting from a reversal on appeal. *In re* Justice Hill, 149 Vt. 431, 435, 545 A.2d 1019, 1022 (1988) (noting that, despite a jury verdict, "the Fifth Amendment privilege is available until the case is fully concluded, including any appeals"). *But see* State v. Gleason, 154 Vt. 205, 211-12, 576 A.2d 1246, 1250 (1990) (noting that "the imposition of sentence extinguishes the privilege against self-incrimination with respect to the crime of which the accused is convicted"). Nonetheless, if the defendant admits to conduct in court-mandated therapy while the appeal is pending, such an admission would be admissible in the new trial.

138. State v. Imlay, 813 P.2d 979, 985 (Mont. 1991), *cert. granted*, 503 U.S. 905 (1992), *and cert. dismissed*, 506 U.S. 5 (1992).

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

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

Whatever may be the fate of claims of residual liability, such as those raised in *Imlay*, they are essentially technical and formal arguments, without much practical appeal. The Vermont Supreme Court correctly observed in *Mace* that the "goal of full disclosure . . . is aimed at rehabilitation and treatment, not later prosecution."[141] If the prosecutor is particularly zealous or the confession, as in *Murphy*,[142] relates to another serious crime, the confession may result in a new prosecution. New prosecution, however, is unusual.

III. AN ALTERNATIVE FIFTH AMENDMENT APPROACH

The technical and formal nature of the residual criminal liability cases tends to trivialize the self-incrimination issues raised by court-mandated therapeutic confessions. A closer analysis reveals that there is far more at stake here than legally justified but practically insubstantial claims of criminal liability.[143] The privilege against self-incrimination, understood in terms of its historical genesis, is more centrally and vitally involved in the coercion of therapeutic confessions than the case law acknowledges. Although the case law on "acceptance of responsibility" as a probation condition goes back only about fifteen years, the outlines of current practices can be discerned much farther back, to the continental, English, and colonial inquisitorial systems that gave rise to the privilege against self-incrimination.

An historical analytical approach to the privilege against self-incrimination has respectable sanction. Justice Frankfurter, quoting Justice Holmes' famous aphorism, wrote that, "[t]he privilege against self-incrimination is a specific provision of which it is particularly true that 'a page of history is worth a volume of logic.'"[144] Another of Justice Holmes' dicta also speaks to the historical underpinnings of the privilege:

> [T]he provisions of the Constitution . . . are organic living institutions transplanted from English soil. Their significance is vital not formal; it

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141. *Mace*, 154 Vt. at 436, 578 A.2d at 108.

142. *See supra* text accompanying note 119.

143. If residual criminal liability were the only issue, a quick fix would be across-the-board grants of use immunity or the "health professional" privilege. *See* Mace v. Amestoy, 765 F. Supp. 847, 851-52 (D. Vt. 1991). *See generally* Solkoff, *supra* note 12, at 1485-93 (discussing judicial-use immunity in the context of court-mandated therapy).

144. Ullmann v. United States, 350 U.S. 422, 438 (1956) (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)). This Article disagrees somewhat with Justice Frankfurter's reading of the history.

> is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.[145]

In *Counselman v. Hitchock*, the Court wrote that the privilege against self-incrimination is "as broad as the mischief against which it seeks to guard."[146] The phrase has been quoted routinely ever since.[147] The mischief which gave rise to the privilege against self-incrimination, and against which it seeks to guard, includes precisely the kind of state action that has been coming to the courts in the new therapeutic confession cases.

A. Therapeutic Confession Under the Continental System

The English privilege against self-incrimination came about as a reaction to the inquisitional procedures of the ecclesiastical courts and the "prerogative courts" that had supervision over them—the Court of High Commission and the Court of the Star Chamber.[148] These procedures, which relied heavily on the accused's confession, were continental imports, and operated in marked contrast with the accusatorial practices of the common-law courts.[149]

Confessions served two central purposes in these continental systems. First, confessions were used to obtain evidence against the condemned prisoner.[150] The confession established the prisoner's guilt and therefore "almost discharged the prosecution of the obligation to provide further evidence."[151] But it served an equally important function unrelated to the objective determination of guilt. As might be expected given the importance the Catholic Church attributes to redemptive confessions,

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145. Gompers v. United States, 233 U.S. 604, 610 (1914).

146. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

147. *E.g.*, Estelle v. Smith, 451 U.S. 454, 467 (1981); Fisher v. United States, 425 U.S. 391, 418 n.3 (1976) (Brennan, J., concurring in judgment) (quoting Schmerber v. California, 384 U.S. 757, 764 (1966)); United States v. Mandujano, 425 U.S. 564, 574 (1976); United States v. Mara, 410 U.S. 19, 33 (1973) (Marshall, J., dissenting); California v. Byers, 402 U.S. 424, 449 (1971) (Harlan, J., concurring in judgment); Miranda v. Arizona, 384 U.S. 436, 459-60 (1966).

148. *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 330-32 (1968) (summarizing the origins of the right against self-incrimination in England).

149. *See generally id.* at 3-42 (discussing English criminal procedure).

150. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 37-38 (Alan Sheridan, trans., Vintage Books 1979) (1975). Foucault was a 20th century French social historian and intellectual.

151. *Id.* at 38.

confessions served rehabilitative purposes—to save the prisoner from eternal damnation for his unconfessed sins.[152]

> [T]he only way that this procedure might use all its unequivocal authority, and become a real victory over the accused, the only way in which the truth might exert all its power, was for the criminal to accept responsibility for his own crime and himself sign what had been skilfully and obscurely constructed by the preliminary investigation. "It is not enough," as Ayrault, who did not care for these secret procedures, remarked, "that wrong-doers be justly punished. They must if possible judge and condemn themselves."[153]

The confession therefore

> transcended all other evidence; an element in the calculation of the truth, it was also the act by which the accused accepted the charge and recognized its truth; it transformed an investigation carried out without him into a voluntary affirmation. Through the confession, the accused himself took part in the ritual of producing penal truth.[154]

By his confession "the accused committed himself to the procedure; he signed the truth of the preliminary investigation."[155]

Indeed, the evidentiary function of coerced confessions was often secondary. A judge could proceed *per inquisitionem* only if the defendant's guilt was already sufficiently indicated by "ill fame."[156] In certain cases the inquisition could not go forward if the accused objected, *except* when his guilt was certain and a confession would serve no important evidentiary purpose:

> The [inquisitorial] procedure could be used without the consent of the accused if he was caught red handed; and it came to be thought that, if the guilt of the accused was so obvious that many witnesses were prepared to swear to it, it could also be applied, because the notoriety was equivalent to capture in the act. The judge, being thus "apprised" of the facts, could proceed by inquest . . . .[157]

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152. *Id.* at 38.

153. *Id.* (citation omitted).

154. *Id.*

155. *Id.* at 39.

156. 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 171 (3d ed. 2d prtg. 1966).

157. *Id.* at 172 (footnote omitted).

The two roles of the confession in the inquisitorial courts—the pre-conviction truth-determining function and the post-conviction rehabilitative function—were not as distinct as they may seem in retrospect. Canon law did not recognize any presumption of innocence, and indeed it functioned on an assumption that every accused person was guilty to some degree.[158] "Each piece of evidence aroused a particular degree of abomination. . . . The suspect, as such, always deserved a certain punishment . . . ."[159]

The double function of evidence gathering and penance continued after sentence had been passed. "It was the task of the guilty man to bear openly his condemnation and the truth of the crime that he had committed."[160] By his compelled confession the accused proclaimed his own guilt and "attest[ed] to the truth of what he had been charged with."[161] The process, known as the *amende honorable*, consisted of a solemn acknowledgement of guilt at the doors of churches.[162] Foucault describes the process: "'Barefoot, wearing a shirt, carrying a torch, kneeling, to say and to declare that wickedly, horribly, treacherously, he has committed the most detestable crime' . . . ."[163]

This process was applied with full vigor to those who persisted in their claims of innocence even after being sentenced. Foucault gives the following account of a man condemned for armed robbery:

> He stared impudently at the scaffold and said that it had certainly not been set up for him, since he was innocent; he first asked to return to the chamber, where he beat about the bush for half an hour, still trying to justify himself; then, when he was sent back to execution, he ascended the scaffold with a purposeful air, but, when he saw himself undressed and tied to the cross before being stretched, he asked to go back to the chamber a second time and there made a full confession of his crimes and even declared that he was guilty of another murder.[164]

Such "gallows speeches" were central to the rehabilitative function of the inquisitorial system:

> The rite of execution was so arranged that the condemned man would himself proclaim his guilt by the *amende honorable* that he spoke, by the

158. FOUCAULT, *supra* note 150, at 42.
159. *Id.*
160. *Id.* at 43.
161. *Id.*
162. *Id.*
163. *Id.* (citation omitted).
164. *Id.* at 43-44 (citation omitted).

> placard that he displayed and also by the statements that he was no doubt forced to make. Furthermore, at the moment of the execution, it seems that he was given another opportunity to speak, not to proclaim his innocence, but to acknowledge his crime and the justice of his conviction. The chronicles relate a good many speeches of this kind.[165]

For example, one Jean-Dominique Laglade, condemned for three murders proclaimed: "Listen to my horrible, infamous and lamentable deed, committed in the city of Avignon, where the memory of me is execrable, for having inhumanly violated the sacred rites of friendship."[166] Occasionally, and quite regrettably from the standpoint of law enforcement, the prisoner remained recalcitrant and his "indomitability" was lauded as "an alternative claim to greatness: by not giving in under torture, he gave proof of a strength that no power had succeeded in bending."[167]

The rehabilitative purpose of confessions under the continental system is not the only point of correspondence with current therapeutic practice. The confessions of the inquisitorial courts were elicited by clerics, in their capacity as "doctors" of the prisoner's soul.[168] Torture, like psychology, was a kind of science, calling for punctilious precision in such matters as the length of ropes, the duration of pain, and the heaviness of weights.[169] And the condemned defendant was uniformly referred to as the "patient."[170]

This Article is not arguing, even remotely, that modern psychotherapy as practiced in the penal arena is *equivalent* to the inquisitorial practices described by Foucault, or subject to the same moral objections. The distinction cannot rest, however, on any notion that twentieth century psychology has a stronger claim than the church of the *ancien regime* to truth and efficacy. The soul doctors who coerced the *amendes honorables* were at least as convinced of the validity of their methods as are modern psychologists. The continental system successfully justified itself by arguments of efficacy: it was generally supported by the people, who saw in it "a better assurance than any other law for the repression of crime."[171]

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165. *Id.* at 65.

166. *Id.* at 66 (citation omitted).

167. *Id.* at 67.

168. *See* LEVY, *supra* note 148, at 26 (noting that the judicial inquisitor "sought to extract from [the accused] a confession of his guilt so that his soul might be saved despite his wanton or ignorant errors of conscience which could only lead to eternal damnation").

169. FOUCAULT, *supra* note 150, at 40 ("[Torture] was a regulated practice, obeying a well-defined procedure; the various stages, their duration, the instruments used, the length of ropes and the heaviness of the weights used, the number of interventions made by the interrogating magistrate, all this was, according to the different local practices, carefully codified.").

170. *Id.*

171. 5 HOLDSWORTH, *supra* note 156, at 176 (citation omitted).

This Article does argue that the two systems share certain significant attributes; that these similarities are not merely coincidental; and that they are important to any understanding of the privilege against self-incrimination.[172]

B. Therapeutic Confession in the English Ecclesiastical Courts

The English ecclesiastical courts were established by the Normans as a system, separate from the pre-Conquest common-law courts, with jurisdiction over church-related offenses like sacrilege and witchcraft, and also over certain sins of the flesh, such as bastardy and fornication.[173] By the sixteenth century they had adopted the continental inquisitorial procedures, with the notable exception of torture.[174]

Like their continental sources, the English ecclesiastical courts relied heavily on confessions for the double purpose of evidence and rehabilitation. The common-law courts could punish crimes by execution or imprisonment.[175] The ecclesiastical courts, by contrast, were strictly limited to three penalties: excommunication, penance, and admonition or reproof.[176] Penance, the intermediate option, "was in theory supposed to work for the health of the culprit's soul, to deter others and to give satisfaction to the congregation for the affront of public sin. Malefactors generally had to confess their fault openly in church and to ask God for forgiveness."[177] Its forms varied, but a penitential confession was invariably required.

> The precise details of the penances awarded by the courts varied greatly from case to case, as did their severity. . . . Dressed in a white sheet and carrying a white rod, the offender had to confess before the whole congregation during service time on a Sunday or major holiday; and often the moral of the occasion was reinforced by the reading of an appropriate sermon or homily. More severe penances involved making such a confession on more than one occasion, sometimes in the market-place of the nearest town, or further personal humiliations such as appearing bare-legged.[178]

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172. *See infra* Part III.E.

173. LEVY, *supra* note 148, at 43-44.

174. *Id.* at 35, 45.

175. 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 457 (1883).

176. INGRAM, *supra* note 1, at 52.

177. *Id.* at 53-54.

178. *Id.* at 54.

For example, a man who admitted to "keeping a harlot in his house"

> was enjoined to do his public penance in Brentwood market on Thursday for an hour, "and there shall confess his fault penitently, having his coat off and his doublet and his hose, a sheet about him and a white rod in his hand, and in like manner he shall do on Sunday next in the parish church of Horndon in service time for one hour."[179]

Milder penances "merely involved confessing the offense before the minister and selected representatives of the congregation (usually the churchwardens) at a time when large numbers of people were unlikely to be present in church."[180] A man who had "begotten with child his late servant" was ordered to appear before selected officials and "half a dozen of some of the best of the parish communicants . . . confessing his fault how that he ungodly behaved himself in committing such an evil act, promising amendment of life and not to do the like again."[181]

Excommunication, the severest punishment of the ecclesiastical courts, could be avoided or remitted by a willingness to confess and do penance. "The culprit had first to take an oath to obey the judge and the mandates of the church. The sentence was then lifted, either absolutely or subject to certain conditions such as the performance of penance."[182] Conversely, refusal to perform penance could be punished by excommunication, or even by fine or imprisonment.[183]

This system led to a sort of sparring between the defendant and judge that mirrors the standoff between the defendant and the DAEP intake worker in *State v. Boisvine*.[184] For example, in 1595 a man named Henry Enewe was charged with three offenses, but claimed he was innocent of two of them:

> He admitted only the third part of the presentment. But penance being ordered, "he said he would never do penance as long as he lived, although he were quartered." At the next session, however, he alleged that "he had acknowledged his fault before Mr. Newman, minister . . . . He was discharged."[185]

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179. F.G. EMMISON, ELIZABETHAN LIFE: MORALS & THE CHURCH COURTS 286 (1973).

180. INGRAM, *supra* note 1, at 54.

181. EMMISON, *supra* note 179, at 288.

182. INGRAM, *supra* note 1, at 53.

183. EMMISON, *supra* note 179, at 301-04. Fines and imprisonment could, however, be imposed only by resort to a court having authority to impose such sanctions. *Id.* at 302-04.

184. *See supra* Part I.B.

185. EMMISON, *supra* note 179, at 285.

Generally, the threat of excommunication, or a "taste" of it, was enough to produce the desired confession. "To many laymen the penalties and disabilities which went with excommunication were not to be disregarded, and sooner or later many sought reconciliation with the Church."[186]

As with the French practices, the English ecclesiastical courts encouraged confessions for evidentiary purposes as well as for penance.[187] In many cases, guilt was obvious.

> Charges of antenuptial fornication, for example, were usually admitted because the woman was manifestly pregnant at marriage; likewise bastard-bearers could hardly deny that they had committed fornication, and usually had little to gain by concealing the circumstances in which they had offended or hiding the name of their partner.[188]

As with the continental procedure, the English courts did not demark the pre- and post-conviction stages as clearly as we do today, and the two functions were often merged.

In the sixteenth and early seventeenth centuries, the infamous Court of the High Commission, "an ecclesiastical arm of the Privy Council and Star Chamber," brought these inquisitorial practices to bear against religious dissidents.[189] The body that ultimately became the Court of High Commission was established in 1557 by Queen Mary.[190] In this time of Catholic restoration in England, the Court's procedures were used as a means of persecuting Protestants.[191] Under Elizabeth I and James I, the religious orthodoxy in England had changed and the same practices were targeted against Catholics and Puritans respectively.[192]

Staffed mainly by clerics, the High Commission procedures "naturally . . . tended to follow the model of the civil rather than the common law."[193] Torture was used more sparingly than on the continent, although it was not unknown.[194] The principal means of compelling

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186. *Id.* at 306.

187. *See* INGRAM, *supra* note 1, at 329 (noting that inquisitorial practices were used to establish the truth of the charges against the accused).

188. *Id.* at 330.

189. LEVY, *supra* note 148, at 76.

190. *Id.*

191. *Id.* at 75, 76 ("The commission under Mary was empowered to inquire into all heresies and seditious words, all offenses committed in church and against church property, and all refusals to attend church and to conform.").

192. *Id.* at 124, 213.

193. 1 HOLDSWORTH, *supra* note 156, at 607.

194. *See generally* JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 73-139 (1976) (discussing torture in England between 1540 and 1640).

confessions was the oath ex officio, by which the defendant was required to answer the court's questions on pain of eternal damnation.[195] This oath became the focus of Puritan opposition to the repressive policies of the state.

> The ex-officio oath, as employed in the ecclesiastical courts, which regulated the most intimate details of men's daily life, and more particularly by the Court of High Commission, was possibly the most hated instrument employed to create the unhappy plight of these Puritans and Separatists.[196]

To the Puritans, the oath was as fearsome and as morally reprehensible as torture, because it threatened the pains of damnation.[197] The oath "put the conscience uppon the racke."[198] Opponents of the oath relied in part on *nemo tenetur prodere seipsum,*[199] a canon law maxim of ancient origin.[200] Defenders of the oath countered that the *nemo tenetur* rule applied only to crimes that were previously unknown, not those that had been established by strong suspicion or "fame."[201] Nor did it apply, defenders of the oath maintained, "when the purpose of the inquiry was not to punish but to reform the party spiritually 'for his soules health.'"[202]

Like the confessional procedures of the continental courts and the inferior ecclesiastical courts, the ex officio practices of the High Commission served the confused double purpose of evidence gathering and reform of the defendant. The defendants, particularly Puritans, would attempt to avoid the oath if they could:

> [I]n the event that they must swear, they should mislead their inquisitors if they could. . . . They would report some facts, no doubt undamaging

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195. *See* LEVY, *supra* note 148, at 24, 128-29.

196. R. Carter Pittman, *The Colonial and Constitutional History of the Privilege against Self-Incrimination in America*, 21 VA. L. REV. 763, 770 (1935). *See also* 1 HOLDSWORTH, *supra* note 156, at 609 (noting that the oath ex officio came under attack "because that oath was the most efficient means of extracting information as to the policy of the opponents of the Established Church").

197. LEVY, *supra* note 148, at 177.

198. *Id.* (citation omitted). *See also* Pittman, *supra* note 196, at 779 (noting that "the Puritan mind placed the ecclesiastical oath in the category of 'tortures' just as it did the rack, the boot and the thumbscrew").

199. "No one is bound to betray himself." BLACK'S LAW DICTIONARY 1039 (6th ed. 1990).

200. *See* LEVY, *supra* note 148, at 70 (discussing Thomas More's refusal to take the oath); *id.* at 100-02 (discussing Thomas Tresham's invocation of the maxim). *See generally* R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European IUS Commune*, 65 N.Y.U. L. REV. 962 (1990) (discussing the origins of the maxim).

201. LEVY, *supra* note 148, at 161, 178-79.

202. *Id.* at 130-31 (citation omitted).

> ones, and deny the rest or conveniently suffer a lapse of memory, ever ready, however, to fall back on conscience as a mainstay for refusing [to] answer.[203]

The recalcitrant or impenitent defendant was imprisoned either for contempt or *pro confesso*—"as if he had confessed."[204] These scenarios were played out in a series of famous trials of religious and political dissidents under the regimes of Archbishops Whitgift and Laud in the late sixteenth and early seventeenth centuries.[205]

The accounts of these cases make clear the rehabilitative aspects of the High Commission and Star Chamber ex officio procedures. One example will suffice. John Udall, a minister and Hebrew scholar, was prosecuted in the High Commission for publishing seditious literature.[206] His authorship of the offensive books was clear, but when asked to confess he refused.[207] The High Commission "urged Udall either to take the oath or confess, promising him, in return, the queen's mercy, yet threatening harsh treatment if he remained obstinate."[208]

The exchange between the defendant and the Bishop of Rochester, after repeated urgings and refusals, has a strangely familiar ring:

> BISHOP OF ROCHESTER: The day is past, and we must make an end: will you take the oath?
>
> UDALL: I dare not take it.
>
> ROCHESTER: Then you must go to prison, and it will go hard with you, for you must remain there until you be glad to take it.
>
> UDALL: God's will be done! I had rather go to prison with a good conscience, than to be at liberty with an ill one.[209]

After a stint in prison, Udall was prosecuted in a common-law court for seditious libel and was convicted by a jury.[210] Throughout the trial, he maintained his refusal to accuse himself, and he was probably the first

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203. *Id.* at 142.
204. *Id.* at 74, 132.
205. *See generally id.* at 109-265 (discussing inquisitional practices under Whitgift and Laud).
206. *Id.* at 164.
207. *Id.*
208. *Id.* at 166.
209. *Id.* (citation omitted).
210. *Id.* at 168.

defendant in a common-law trial to assert the right against self-incrimination.[211] Even after conviction, however, the prosecution and the court continued to press Udall for a confession:

> The government did not . . . want a martyr on its hands. What it wanted was the confession, humiliation, and submission of one of the foremost Puritan spokesmen. Notwithstanding the verdict, the judges did not promptly pronounce sentence upon him. When they brought him back the next day, they asked him to admit his guilt, express remorse, fall on his knees, and crave her Majesty's mercy.[212]

Udall again refused.[213] After further wrangling, he was sentenced to hang.[214] Udall was ultimately promised a pardon if he agreed to leave England and never return, but died of illness in prison before the pardon could be granted.[215]

Udall's case is perhaps the clearest example of coercion designed to produce a therapeutic confession—a confession not to show evidence of guilt, but rather evidence of repentance or, in the modern phrase, amenability to treatment. The other notorious trials of the period, those of Henry Barrow, Thomas Cartwright, and John Lilburn, show the same basic pattern: refusal to take the oath, followed by imprisonment with the promise of release if the defendant confessed.[216] In Barrow's case a number of defendants refused the High Commission's oath, were tried and convicted in a common-law court, and were promised a pardon if they would only confess and recant.[217] At the place of execution they were given a final chance to confess, but continued to assert their innocence and were ultimately hanged.[218]

C. Therapeutic Confession in Colonial America

Cases like these led to the abolition of the High Commission and the other prerogative courts in 1640 and the recognition of a privilege against

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211. *Id.*
212. *Id.* at 168-69.
213. *Id.* at 169.
214. *Id.*
215. *Id.* at 169-70.
216. *See id.* at 154-56, 174-88, 273-78.
217. *Id.* at 192.
218. *Id.*

self-incrimination in the common-law courts.[219] Such cases also led to the establishment of the privilege in colonial America, to which many of the victims of the English ecclesiastical proceedings fled.[220]

The colonial history can be seen as a recapitulation of the earlier English struggles. On the one hand, many of the settlers were the same Puritans who had been the targets of the English inquisitorial procedures. The same dissidents who were being prosecuted by the ecclesiastical courts "were making up the ship lists to New England"[221] and many of the colonial charters they adopted embodied the privilege against self-incrimination in one form or another.[222] On the other hand, the Puritans could be at least as bigoted in matters of religion as their English persecutors. In the colonies, as in England, "[t]here were also established churches, laws against sedition and heresy, and a system of censorship. There was, additionally, a considerable degree of persecution of obstreperous or overly conscientious Nonconformists."[223] Colonial governments conducted inquisitional proceedings similar to the continental and English ecclesiastical proceedings.[224] As in England, the inquisitors' purpose was often rehabilitative rather than evidentiary.

In Pennsylvania, in 1693, a printer named Bradford was prosecuted for publishing material without a license.[225] The court had no doubt about his guilt because he was "the only printer south of Boston."[226] Nevertheless, Governor Penn wanted a formal confession:

> GOVERNOUR: I desire to know from you, whether you did print the Charter or not, and who set you to work.
>
> BRADFORD: Governour, it surely is an impracticable thing for any man to accuse himself, thou knows it very well.

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219. *See generally id.* at 266-300 (discussing the abolition of the oath ex officio in the common-law courts).

220. *See generally id.* at 333-67 (discussing the privilege in colonial America).

221. Pittman, *supra* note 196, at 770.

222. *See id.* at 775-76 (discussing the Body of Liberties); LEVY, *supra* note 148, at 333-67 (discussing the privilege against self-incrimination in colonial America).

223. LEVY, *supra* note 148, at 339.

224. *See id.*

225. *Id.* at 360.

226. *Id.*

> GOVERNOUR: Well, I shall not much press you to it, but if you were so ingenuous as to confess, it should go the better with you.
>
> BRADFORD: Governour, I desire to know my accusers, I think it very hard to be put upon accusing myself.
>
> GOVERNOUR: Can you deny that you printed it: I know you did print it and by whose direction, and will prove it, and make you smart for it too since you are so stubborn.[227]

The most famous of the colonial trials, the Salem Witch Trials, make the same point. The trials were essentially inquisitional in method, involving lengthy interrogations and the occasional use of torture. "Some women maintained their declarations of innocency for eighteen hours, 'after most violent, distracting, and draggoning methods had been used with them, to make them confesse.'"[228] Confession invariably mitigated the punishment. Remarkably, "[o]f the nineteen who were hanged, all on the basis of spectral evidence, none confessed; not one of the fifty or so who confessed to being witches were executed."[229] Experiences such as these formed the immediate background to the state and federal constitutional rights against self-incrimination.[230]

D. Therapeutic Confession Under Twentieth Century Regimes

Although not historically related to the adoption of the constitutional right against self-incrimination, the history of twentieth century totalitarianism also informs society's sense of the wrongness of state-compelled therapeutic confessions. China, under Mao Tse Tung, proceeded against its criminals in much the same manner as England under Archbishop Whitgift. An American observer condemns "[t]he Maoist practice of 'criticism and self-criticism'" as "the mindless repetition of standardized

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227. *Id.* at 360-61.

228. *Id.* at 363 (citation omitted).

229. *Id.*

230. *See* Pittman, *supra* note 196, at 783 (noting that the privilege against self-incrimination "may possibly be traced to the proceedings of the prerogative courts of Governor and Council, which constituted the Supreme colonial courts, and the proceedings instituted to enforce the laws of trade in the colonies"). The American constitutions, to bring the story full-circle, ultimately led to an abolition of the French inquisitorial practices described by Foucault. "French editions of these American constitutions were published in Paris as fast as they came from the separate State conventions. [Franklin writes (May 1777) 'They (the French) read the translations of our separate colony constitutions with rapture.']" 8 John H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2250, at 294 (McNaughton rev. 1961) (quoting Pittman, *supra* note 196, at 764-65) (alteration in original).

'confessions' of class crimes."[231] A target of the practice portrays the process as follows: "Confess, confess your crimes and the People's government will treat you leniently. If you hide anything, the punishment will be very severe. . . . Confess! It is for your own good. Think about your future. Confess!"[232] The purpose of these coerced confessions was essentially rehabilitative. It "derive[d] from a Confucian emphasis on educating and transforming the wrong-doer rather than simply punishing him."[233] Terzani writes that "[s]elf-criticism probably is for a Chinese what the confession is for a Catholic: the only way to redemption."[234] But the English ecclesiastical practices provide an even closer analogy. With minor changes, this quoted speech could have been delivered by a judge of the High Commission to a recalcitrant Puritan.

Until now, the closest brush modern American courts have had with this sort of practice came during the anticommunist "witch-hunts" of the 1950s. Typically the suspect was asked if he or she was or had been a member of the Communist Party.[235] Many refused to answer, invoking the protections of the Fifth and First Amendments and risking criminal contempt.[236] Those who confessed to past party membership, by contrast, faced no criminal liability. Like the contrite state criminal of the People's Republic, the repentant dissenter before the High Commission, and other defendants who demonstrate an "acceptance of responsibility," cooperative witnesses were rewarded for having seen the light. "Witnesses who in fact told the Committee about their past membership in the Communist Party or front groups, far from being charged with anything, were fulsomely thanked and commended for their patriotism."[237]

Contemporary fiction also reflects society's aversion to state-compelled therapeutic confessions. George Orwell's nightmare vision of totalitarianism, *1984*, gives the final evolution of a system designed to coerce contrition.[238] Winston Smith, the protagonist, has been captured and brought to an interrogation room in the Ministry of Love. His interrogator, O'Brien, wants him to understand the process:

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231. William Ewald, *Unger's Philosophy: A Critical Legal Study*, 97 YALE L.J. 665, 742 (1988).

232. TIZIANO TERZANI, BEHIND THE FORBIDDEN DOOR 248 (1985) (alteration in original).

233. LOWELL DITTMER, LIU SHAO-CH'I AND THE CHINESE CULTURAL REVOLUTION 338 (1974).

234. TERZANI, *supra* note 232, at 259.

235. *See generally* WALTER GOODMAN, THE COMMITTEE 272-398 (1968) (discussing the House Committee on Un-American Activities during the 1950s).

236. *See, e.g.*, Ullmann v. United States, 350 U.S. 422 (1956).

237. GOODMAN, *supra* note 235, at 353.

238. GEORGE ORWELL, 1984 (1st ed. 1949).

> "[W]hy do you imagine that we bring people to this place?"
>
> "To make them confess."
>
> "No, that is not the reason. Try again."
>
> "To punish them."
>
> "No!" exclaimed O'Brien. His voice had changed extraordinarily, and his face had suddenly become both stern and animated. "No! Not merely to extract your confession, nor to punish you. Shall I tell you why we have brought you here? To cure you! To make you sane! Will you understand, Winston, that no one whom we bring to this place ever leaves our hands uncured? We are not interested in those stupid crimes that you have committed. The Party is not interested in the overt act; the thought is all we care about. We do not merely destroy our enemies; we change them."[239]

Although O'Brien later boasts that this system represents a vast improvement over the inquisition, which killed its enemies "while they were unrepentant," and the similar systems of Nazi Germany and Stalinist Russia,[240] the idea of "curing" criminals by a process of therapeutic confession is, as we have seen, not merely the product of a great fiction writer's mind.

E. Analogies Between Historical and Contemporary Therapeutic Confessions

How relevant are these scenarios to current practices? The question can be broken into two parts. First, are these analogies factually accurate? Are the similarities superficial or substantive? Can modern penal psychotherapy claim distinguishing characteristics which prevent a true identification with discredited precedents? Second, are the analogies plausible in terms of current constitutional law? Is there room in Fifth Amendment case law for a rule that can prevent or regulate post-adjudication inquisitorial practices; or is the history of the privilege against self-incrimination, despite Holmes' dictum that "a page of history is worth a volume of logic,"[241] only a matter of academic interest?

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239. *Id.* at 256.

240. *Id.* at 257.

241. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

This subpart argues that the analogies are essentially true—that the historical precedents cannot be distinguished on the basis of the type of coercion, the nature of confession sought, the crimes involved, or the efficacy of the "cure." Part IV continues this discussion, arguing that constitutional limitations in this field are plausible in terms of current Fifth Amendment case law.[242]

1. The Type of Coercion

In terms of methods, the analogy between court-mandated therapy and French inquisitional torture is, of course, overblown. This is not to say that psychotherapy in a penal context exerts exclusively moral as opposed to corporal pressures. Recalcitrant patients risk physical incarceration, sometimes for many years, for refusing to confess. Nonetheless, the bloodlust and brutality of the continental system find no counterparts in current practices—a difference in kind, not merely degree. Physical torture is not, however, an essential feature of all inquisitorial justice.[243] The English and colonial inquisitorial systems also generally abjured torture and relied for coercive effect on moral persuasion, with an ultimate threat of greater sanctions, which the defendant could freely "choose" to avoid by confessing.[244] If the oath ex officio of the English courts put the conscience on the rack, it did so in a purely metaphorical sense.

The probationer "in denial" faces the same pairing of moral and punitive incentives to confess. W.L. Marshall, who reports success in treating minimization and denial in a Canadian prison therapy group, describes the process as follows:

> Each offender discloses to the group the nature of his offense(s) in detail, including not only the assaults, but also the surrounding preceding circumstances . . . . Each member of the group, in turn, then questions the veracity of this account in a challenging but supportive manner. The therapist then reads a summary of the victim's account and the official version of the offense, and this is followed by further group challenges, where there are inconsistencies with the offender's account.
>
> . . . .
>
> Each member of the group is encouraged for making supportive but firm challenges. If any member of the group simply supports rather than questions the offender's stated position, particularly if that position is

242. *See infra* Part IV.

243. *Cf.* Blackburn v. Alabama, 361 U.S. 199, 206 (1960) ("[T]he blood of the accused is not the only hallmark of an unconstitutional inquisition.").

244. *See supra* Parts III.B-C.

> clearly self-serving, then they are challenged and their motivation questioned, again in a supportive but firm manner. . . .
>
> The therapist's task is to help clarify what the offender's disclosure reveals, to assure him that dissimulation is expected but not valuable to him, to make clear to the offender the disadvantages of not being honest and the advantages of telling the truth (earlier release from prison, a sense of personal relief, a chance to put his life together and overcome his problems etc.), to point to the self-serving nature of the offender's account, and to offer alternative, more realistic views of the offense . . . .[245]

These are standard inquisitional methods, essentially no different from the church inquisitions of the eighteenth century or the party inquisitions of the twentieth.

2. The Type of Confession

The therapies of the inquisitorial courts of France and England, like their twentieth century counterparts, insisted on something in addition to factual confessions. They sought evidence of spiritual and moral changes such as submission to beneficent authority (secular or divine), acknowledgment of moral fault, and acceptance of responsibility.[246] Current psychotherapy asks the same.[247] Although psychotherapeutic confessions generally lack a religious component,[248] the penal psychologist seeks essentially the same product—a radical and permanent spiritual change—as the penal priest. A workbook explains to sex offenders the benefits of acceptance of responsibility as follows:

> Denying, minimizing, rationalizing, and intellectualizing your problems are all defense mechanisms and are blocks against treatment . . . . When you become defensive, you are unable to recognize your problems or the severity of them. As a result, you have a harder time accepting that you need help. When you don't accept that you need help, treatment cannot occur. If you are defensive and enter treatment, it is like paying for a new car and then refusing to drive it. When you don't accept your need for treatment, your involvement will

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245. Marshall, *supra* note 14, at 561-62.

246. *See supra* notes 153-55, 177, 233-34 and accompanying text.

247. *See, e.g.*, Marshall, *supra* note 14, at 559 (reporting the efficacy of "procedures for overcoming denial and reducing or eliminating minimization" and noting that it is a therapist's "responsibility to facilitate . . . full admissions").

248. *But see* Warner v. Orange County Dep't of Probation, 827 F. Supp. 261, 266-67 (S.D.N.Y. 1993) (discussing the religious nature of Alcoholics Anonymous).

be superficial and you also will be scared of being inadequate and will not trust anyone.

Once you have accepted that you have problems, understand that you need help, and begin to work through your defenses, healthy change is much more likely to occur. When you accept your problems and acknowledge that you want help, then you won't spend time fighting, but growing. At this point you will be actively involved in treatment. You will be able to change old patterns of thinking and behavior. So, a successful client doesn't react to treatment by being defensive, but rather interacts with treatment. He takes an active stance, realizes that he has choices, and that he can chose [sic] to change and become a better person if he WANTS to. He will practice engaging in new behaviors and develop strategies to change. This is the type of person who has learned to say and believe, "I can." He sets goals, develops a treatment plan, and works toward self-improvement.

. . . You will come to realize that your problems are all a part of your self . . . . Each problem is very much related to all of the other problems. Each problem is like a piece of a jigsaw puzzle. It is an essential part of your "whole" picture . . . . As you solve one problem, you influence all your problems. After you work on many problems you will begin to have power and control over your own life. Then, instead of spending time and energy trying to overpower and control others, you can use your energy to succeed in productive activities.[249]

3. The Nature of the Crimes

An argument can be made that the modern practice of seeking therapeutic confessions is distinguishable from traditional practices on the basis of the types of crimes the defendants have committed. If the prisoners before the High Commission and Star Chamber were tried today, many of them—such as the sect leaders and the book and pamphlet publishers—would likely have strong First Amendment defenses. The same can be said of other inquisitorial systems, such as the Chinese self-criticism movement.[250] The crimes with which current therapies deal, the argument runs, are universally acknowledged to be serious crimes. Unlike heresy or treason, the criminality of rape does not depend on the politics or religion of a particular prosecutorial regime. Forcible rape is universally condemned.

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249. ROBERT FREEMAN-LONGO & LAREN BAYS, WHO AM I AND WHY AM I IN TREATMENT? 28 (1988).

250. *See supra* Part III.D.

Traditional inquisitorial procedures, however, were not limited to, or even mainly concerned with, conduct which would now be protected under the First Amendment. Although the high-profile High Commission cases were trials of religious dissidents and other "thought criminals," the day-to-day work of the ecclesiastical courts of the same period principally concerned sex offenses.[251]

> One important category of cases [over which the ecclesiastical courts had jurisdiction] consisted of offenses against religion, including heresy, atheism, blasphemy, sacrilege, witchcraft, perjury, profanity, schism, failure to attend church, and violation of the sabbath. Another significant category covered sins of the flesh, such as fornication, adultery, incest, procuring and bigamy. Finally, the criminal jurisdiction of the ecclesiastical courts stretched to a miscellany of offenses—usury, defamation, drunkeness [sic], disorderly conduct, and certain breaches of contract—that related vaguely to immorality of a different kind.[252]

Likewise, in inquisitorial France, common criminals were no less subject to coerced confession than heretics and political subversives.[253] The criminality that these courts punished and "treated" by their confessional cures was certainly not seen as trivial at the time. Indeed, the inquisition found broad support among ordinary people who believed it offered them "a better assurance than any other law for the repression of crime."[254]

4. The Efficacy of the Treatment

A distinction between traditional and modern uses of therapeutic confessions also cannot rest on any notion that twentieth century psychology has a stronger claim to practical efficacy than did seventeenth and eighteenth century religious practices. The efficacy argument is, in one sense, irrelevant to the constitutional question. Practices that offend constitutional rights cannot be sanctioned solely on utilitarian grounds.[255] Although, flogging and torture might be shown to reduce recidivism rates, such practices cannot, in the face of constitutional prohibition, lay claim to legitimacy on the basis of efficacy. Furthermore, widespread *perceptions*

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251. LEVY, *supra* note 148, at 44.

252. *Id.*

253. *See* FOUCAULT, *supra* note 150, at 43-44 (describing the coerced confession of a man charged with armed assault).

254. 5 HOLDSWORTH, *supra* note 156, at 176 (citation omitted).

255. *See supra* note 9 and accompanying text.

that sex offender treatment effectively reduces recidivism rates[256] certainly do not distinguish court-mandated therapy from the historical precedents. The soul doctors who coerced the *amendes honorables*, the English officials who administered the oath ex officio, and the courts and societies they served, must have been at least as convinced of the efficacy of their methods as we are of ours.

In another sense, however, the efficacy argument is pivotal. If therapists can establish that their techniques, and the confessions that they require, do in fact rehabilitate criminals and reduce recidivism rates, they will assure themselves of a permanent and privileged place in American criminal justice as a practical matter. If, as Justice Holmes suggested, history trumps logic,[257] practicality can be expected to trump history.

Claims that therapeutic confessions reduce recidivism rates, however, are far from confirmed. A 1989 review of sexual offender recidivism studies by Furby, Weinrott, and Blackshaw at the University of Oregon found enormous variation in methods and definitions, a generally confusing picture, and no solid evidence that treatment reduces recidivism. "[W]e can at least say with confidence that there is no evidence that treatment effectively reduces sex offense recidivism. Treatment models have been evolving constantly, and . . . there is always hope that more current treatment programs are more effective. That remains an empirical question."[258] A study by Rice, Harris, and Quinsey came to the same conclusion. "Our data suggest that, although it is politically unpopular to say so, we are, in fact, a long way from being able to argue that treatment is effective at all, let alone that it saves either money or human suffering."[259]

Authors reacting to the Furby review, many of whom are therapists in treatment programs and thus have a stake in the enterprise,[260] argue that evaluators should not demand too much in the way of methodological rigor "in a field so immature as that under consideration here,"[261] and that many

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256. *See* Berg, *supra* note 4, at 732; Solkoff, *supra* note 12, at 1450.

257. *Eisner*, 256 U.S. at 349.

258. Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 25 (1989) (footnote omitted).

259. Marnie E. Rice et al., *Evaluating Treatment Programs for Child Molesters*, *in* EVALUATING JUSTICE 189, 201 (Joe Hudson & Julian V. Roberts eds., 1993).

260. *See* Vernon L. Quinsey et al., *Assessing Treatment Efficacy in Outcome Studies of Sex Offenders*, 8 J. INTERPERSONAL VIOLENCE 512, 521 (1993).

261. W.L. Marshall et al., *Treatment Outcome with Sex Offenders*, 11 CRIM. PSYCHOL. REV. 465, 466 (1994). *See also* W.L. Marshall & W.D. Pithers, *A Reconsideration of Treatment Outcome with Sex Offenders*, 21 CRIM. JUST. & BEHAV. 10, 23-24 (1994) (discussing difficulties with random design of sex offender recidivism studies). A number of writers argue that there are inherent *ethical* barriers to methodological precision. The Furby review called for random assignment of subjects to

of the therapy programs included in the Furby review were primitive efforts that were later discontinued.[262] With regard to the Rice study, these critics contend that the study's negative results were attributable to poor program design.[263] Proponents of therapeutic techniques claim "good grounds for optimism" for newer kinds of therapy without, however, reporting statistically significant findings.[264]

The efficacy of therapeutic confessions on recidivism rates of sex offenders is a complex and hotly debated issue, and more evidence must be obtained. Although some researchers see hopeful indications for particular therapies,[265] in particular settings, for particular subjects, no current

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treatment and non-treatment groups, with assessment of recidivism rates for each. Furby et al., *supra* note 258, at 7. Marshall and Pithers protest that this would entail release of untreated offenders and "we cannot see how any ethically concerned researcher would suggest a random design treatment outcome study for sex offenders." Marshall & Pithers, *supra*, at 24. *See also* Judith V. Becker & John A. Hunter, Jr., *Evaluation of Treatment Outcome for Adult Perpetrators of Child Sexual Abuse*, 19 CRIM. JUST. & BEHAV. 74, 89 (1992) ("Although ethically the clinical researcher cannot randomly assign an admitted sex offender to a no-treatment control group, different forms of therapeutic intervention can be evaluated."). The ethical problem arises, however, only on the assumption that therapy significantly reduces recidivism rates, a result that remains to be demonstrated. Quinsey et al., *supra* note 260, at 513 ("If the treatment has not yet been shown to be effective or if the comparison/control treatment was the intervention most sex offenders would receive anyway, psychologists have an ethical obligation to reduce the present ambiguity about the effects of sex offender treatment.") (citation omitted).

262. Marshall & Pithers, *supra* note 261, at 12.

263. *Id.* at 16-19.

264. *Id.* at 21. For other post-Furby recidivism studies, see Janice Marques et al., *The Relationship Between Treatment Goals and Recidivism Among Child Molesters*, 32 BEHAV. RES. THERAPY 577, 581 (1994) (reporting a 1994 California study of 155 convicted child molesters randomly assigned to treatment and untreated control groups and finding a "clear tendency" for treatment groups to be less likely to be arrested for new sex offenses although the results were not statistically significant); Becker & Hunter, *supra* note 261 (reviewing a variety of approaches and finding clearly positive results for some); Michael P. Hagan et al., *The Efficacy of a Serious Sex Offenders Treatment Program for Adolescent Rapists*, 38 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 141 (1994) (reporting a study of 50 adolescent rapists and reporting a 10% recidivism rate over two years). Studies report statistically significant correlations between treatment and test performance of various sorts. *See, e.g.*, Robin J. Watson & Lana E. Stermac, *Cognitive Group Counselling for Sexual Offenders*, 38 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 259 (1994) (reporting significant effect on beliefs and attitudes about sexual offending); Marshall, *supra* note 14 (reporting success in weaning incarcerated sex offenders from denial and minimization); Judith V. Becker et al., *The Relationship of Abuse History, Denial and Erectile Response Profiles of Adolescent Sexual Perpetrators*, 23 BEHAV. THERAPY 87 (1992) (reporting a connection between history of victimization and denial and erectile response profiles).

265. A wide variety of therapies has been attempted, including physical therapies (psychosurgery, castration, and pharmacologic interventions using estrogens, neuroleptics, medroxyprogesterone acetate, cyproterone acetate) and psychological therapies (including "cognitive/behavioral" techniques such as electric and olfactory aversive therapies, biofeedback, assertiveness training and relapse prevention methods) which are sometimes employed in combination with antiandrogen therapy. *See generally* Marshall et al., *supra* note 261, at 257 (concluding that comprehensive cognitive behavioral programs are apt to be effective, and noting the value of the

evidence justifies across-the-board assumptions about the impact of prison and probationary sex offender treatment programs on recidivism rates.

IV. PROBATION AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

As briefly noted in Part II, the Fifth Amendment privilege against self-incrimination has been limited to confessions that carry the potential of "incriminating" the confessant in the sense of exposing him or her to criminal liability.[266] In *Brown v. Walker*, the Supreme Court clearly, if narrowly, rejected a broader reading of the privilege as protecting against compelled disclosures that could incur social disgrace or other non-penal consequences.[267] The Court held, by a five to four vote, that a witness could be compelled to testify to personal criminal conduct so long as the government granted transactional immunity for any criminal acts exposed by the testimony.[268] Justice Field stated the dissenting argument:

> The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one [sic], and needs no illustration. It is plain to every person who gives the subject a moment's thought.
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> A sense of personal degradation in being compelled to incriminate one's self must create a feeling of abhorrence in the community at its attempted enforcement.[269]

The Court reiterated its rejection of a broad reading of the privilege in the McCarthy-era case of *Ullmann v. United States*.[270] The Court held, over a similar dissent by Justice Douglas, that, despite the social and economic sanctions such an admission would incur, a suspected communist could be compelled to admit party affiliation to a state investigatory committee inasmuch as party membership was not per se a prosecutable offense.[271] It is therefore a given that the Fifth Amendment does not protect

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adjunctive use of antiandrogens); Becker & Hunter, *supra* note 261, at 76-88 (reviewing various treatments and therapies for child molesters). A form of "drama therapy" which requires participants to act out sexual encounters is being challenged as an Eighth Amendment violation in a class action suit currently pending in federal court in Vermont. *See* Memorandum in Support of Motion for Preliminary Injunction, Goldsmith v. Dean, Civ. No. 2:93-CV-383 (D. Vt. filed Aug. 22, 1995).

266. *See supra* note 126 and accompanying text.

267. Brown v. Walker, 161 U.S. 591 (1896).

268. *Id.* at 610.

269. *Id.* at 637 (Field, J., dissenting).

270. Ullmann v. United States, 350 U.S. 422 (1956).

271. *Id.* at 424-25, 438-39.

against compelled disclosures that give rise only to non-criminal consequences.[272]

It is also established law that probation revocation proceedings are not criminal proceedings in the sense that they do not require the full array of constitutionally mandated procedural safeguards observed in criminal trials.[273] Noting the non-criminal character of revocation proceedings, the Court in *Minnesota v. Murphy* drew a distinction between use of a probationer's admissions in a criminal prosecution and in a proceeding to revoke probation.[274] Although incriminating answers made under threat of revocation would, by analogy to the penalty cases,[275] most likely be deemed "compelled and inadmissible in a criminal prosecution,"[276] the Court wrote, "[t]he situation would be different if the questions put to a probationer were relevant to his probationary status and posed no realistic threat of incrimination in a separate criminal proceeding."[277] For example, a probationer has no valid grounds to fear criminal prosecution for violating a probationary residential restriction; violation of such a condition would not be a criminal act and the potential use of compelled answers in non-criminal probation proceedings would not violate the privilege. "Just as there is no right to a jury trial before probation may be revoked, neither is the privilege against compelled self-incrimination available to a probationer."[278] The same logic applies to probation violations that constitute crimes, so long as the probationer has been granted immunity from prosecution.

> Our cases indicate, moreover, that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination.[279]

Murphy's dictum that the privilege against self-incrimination is not "available to a probationer" can be read as a veto of the argument that, as with evidentiary confessions, the privilege against self-incrimination was

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272. *See generally* 8 WIGMORE, *supra* note 230, § 2255, at 332-24 (discussing the repudiation of the privilege against disclosing facts involving infamy or disgrace).

273. Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

274. Minnesota v. Murphy, 465 U.S. 420, 435 (1984).

275. *See supra* note 113 and accompanying text (discussing the Court's penalty cases).

276. *Murphy*, 465 U.S. at 435.

277. *Id.* at 435 n.7.

278. *Id.*

279. *Id.* at 436 n.7.

intended to bar state compulsion of post-conviction therapeutic confessions. This is, however, an overreading of the *Murphy* dictum. Although the status of probation necessarily entails major inroads into the privilege against self-incrimination, the privilege cannot be ousted entirely from this arena simply because revocation proceedings are deemed "civil" in nature.

The Court has been clear that labels such as civil and criminal do not control in this area. In *In re Gault*, the Court noted that juvenile delinquency proceedings also carry the "civil" label.[280] Nonetheless, if the end-product is indistinguishable from adult incarceration, the Court reasoned, the juvenile cannot be compelled to provide evidence of his or her own delinquency because "our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty."[281] The Court has retreated from this generalization of the privilege,[282] but *Gault*'s basic proposition that the applicability of the privilege depends on substance, not labels, has not been questioned.[283]

Two years after *Murphy*, in *Allen v. Illinois*, the Court considered a challenge to a state procedure by which persons adjudicated as "sexually dangerous" could be committed to a treatment center.[284] The evidence of sexual dangerousness included statements that the petitioner claimed had been elicited by two examining psychiatrists in violation of the privilege against self-incrimination.[285] The Illinois Supreme Court rejected the claim on the ground that "the privilege against self-incrimination was not available in sexually-dangerous-person proceedings because they are 'essentially civil in nature,' the aim of the statute being to provide 'treatment, not punishment.'"[286]

The United States Supreme Court affirmed in a five to four opinion, not on the ground that the proceedings were labeled "civil" and "therapeutic" rather than "criminal" and "punitive," but because the petitioner had not shown that the labels were deceptive:

> Petitioner has not demonstrated, and the record does not suggest, that "sexually dangerous persons" in Illinois are confined under conditions

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280. *In re* Gault, 387 U.S. 1, 50 (1967).

281. *Id.*

282. *See* Allen v. Illinois, 478 U.S. 364, 372 (1986).

283. *Cf.* United States v. Halper, 490 U.S. 435 (1989) (holding that the Fifth Amendment's double jeopardy bar against multiple punishments applies to punitive sanctions imposed in civil proceedings); Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994) (same).

284. *Allen*, 478 U.S. at 365.

285. *Id.* at 366.

286. *Id.* at 367 (quoting People v. Allen, 481 N.E.2d 690, 694-95 (Ill. 1985)).

> incompatible with the State's asserted interest in treatment. *Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case.* . . . We therefore cannot say that the conditions of petitioner's confinement themselves amount to "punishment" and thus render "criminal" the proceedings which led to confinement.[287]

Probation is the "different case." When probation is revoked, the probationer is invariably incarcerated in the same institutions and under the same conditions as other convicted criminals. If the sanction is indistinguishable from normal penal incarceration, the privilege against self-incrimination cannot be deemed inapplicable solely on account of the civil label.

This is not to argue that the privilege fully applies in the probation context. Nor is it to disagree with the proposition "that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system,"[288] if it affords appropriate protection against criminal prosecution. Probation is a status of diminished and conditional liberty.[289] As with other rights,[290] probation necessarily entails drastic limitations on the privilege against self-incrimination. It is the nature of probation that the probationer report to an officer charged with monitoring his behavior.[291] By this rationale, a probation officer can ask whether her charge has smoked marijuana recently,[292] or inquire about the status of an ongoing criminal prosecution,[293] notwithstanding that these questions may produce incriminating responses.

The confessions called for in probationary therapy programs do not fit this mold. These confessions typically concern pre-probation conduct, not the current or contemplated behavior that probation officers are charged with monitoring, and without which the state could not sensibly administer

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287. *Id.* at 373-74 (emphasis added).

288. *Murphy*, 465 U.S. at 436 n.7.

289. *See Scarpelli*, 411 U.S. at 782 n.3.

290. *See, e.g.*, State v. Moses, 159 Vt. 294, 303-05, 618 A.2d 478, 484 (1992) (upholding limitation on probationer's right against search and seizure).

291. Modern probation systems are seen as an evolution of the doctrine of recognizance. Joseph S. McLean, Coerced Expression of Belief and the First Amendment Implications of Court Ordered Therapy Programs 1-2 (1994) (unpublished paper, on file with author) (citing Bruce D. Greenberg, *Probation Conditions and the First Amendment: When Reasonableness is Not Enough*, 17 COLUM. J.L. & SOC. PROBS. 45, 47-48 (1981)).

292. State v. Steinhour, 158 Vt. 299, 300, 607 A.2d 888, 889 (1992).

293. State v. Brown, 153 Vt. 263, 267, 571 A.2d 643, 645-46 (1989).

its probation system.[294] The state can justify its need for such confessions only by the general state interest in rehabilitation, weak as the linkage may be,[295] and not by any particular needs of the probation system. But even assuming a strong and established need for therapeutic confessions, the arguments against "balancing" in this context are strong. If, as this Article argues, current practices closely resemble the inquisitorial practices which were also justified by state and social interests in rehabilitation, and which the privilege was intended to outlaw, complaints that the privilege impedes important law enforcement goals need not and should not be permitted to carry the day.[296]

V. THERAPEUTIC CONFESSIONS AND THE FIRST AMENDMENT

In addition to the self-incrimination issues implicated by therapeutic confessions, therapeutic confessions also involve significant First Amendment interests. A distinguishing feature of most psychotherapeutic confession cases, a feature shared with the inquisitional procedures discussed in Part III, is that the defendant is being punished not because he refuses to answer questions, but because he refuses to give a particular answer. In the typical case the defendant does not stand mute—the Fifth Amendment posture—but rather speaks vehemently and unambiguously, denying guilt.[297] The fault that the probation-revoking court finds with a probationer "in denial" is not failure to answer at all, but failure to confess or to expose inner thoughts and feelings.[298] If the probationer admits to factual guilt, it may be done in a way that "minimizes" responsibility, or places undue emphasis on adverse circumstances.[299] Similarly, a probationer's view of the case may be marred by "cognitive distortions" concerning the role of the therapist, the probation officer, or other actors in the judicial process which have brought the probationer into therapy.[300]

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294. *Cf.* Griffin v. Wisconsin, 483 U.S. 868, 874-75 (1987) (concluding that a state's need to supervise probationers is a "special need" justifying relaxation of presumptive Fourth Amendment requirements).

295. *See supra* Part III.E.4.

296. *See supra* note 9.

297. *State v. Rickert*, *State v. Boisvine*, and *State v. Mace* are all examples of cases where the defendant vigorously denied guilt. *See supra* Parts I.A-C.

298. For a discussion of one such case, *State v. Stearns*, see *supra* Part I.D.

299. *See* State v. Masse, No. 94-660, slip op. at 2 (Vt. Dec. 22, 1995) (noting that the defendant "shifted responsibility for his crime, attributing his offense to his drinking, an argument with the victim's mother, and the seductiveness of the five-year-old victim").

300. *See id.* (noting that the defendant "portrayed himself as a victim of the state agencies responsible for supervising his probation and protecting the victim").

Connecting release from prison to the content of the probationer's speech implicates one of the policies behind the Fifth Amendment privilege: "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.'"[301] In this capacity the Fifth Amendment erects "an intimate and personal [privilege]. It respects a private inner sanctum of individual feeling and thought . . . ."[302] In promoting these objectives of dignity and autonomy the Court recognizes that the privilege "mark[s] the line between the kind of inquisition conducted by the Star Chamber and what we proudly describe as our accusatorial system of justice."[303] Although *any* compulsion that requires a person to relate facts or state an opinion, including the contempt sanction for an immunized but recalcitrant witness, necessarily invades this inner sphere to some extent,[304] state action that seeks to compel a *particular assertion* and that inflicts punishment for answers that are not to the state's liking, would seem to implicate these autonomy values more strongly. However, Fifth Amendment case law is virtually silent on this subject.[305]

The cases that most clearly recognize the distinction between compelling an answer and compelling a particular answer have been decided under the First Amendment, not the Fifth Amendment.[306] "If there is any

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301. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)).

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

303. Doe v. United States, 487 U.S. 201, 220 (1988) (Stevens, J., dissenting).

304. The dissenting opinions in *Ullmann v. United States* and *Brown v. Walker* stress these autonomy values in the immunity context. The privilege was meant to be "a safeguard of conscience and human dignity and freedom of expression," Ullmann v. United States, 350 U.S. 422, 445 (1956) (Douglas, J., dissenting), springing "from that sentiment of *personal self-respect, liberty, independence and dignity* which has inhabited the breasts of English speaking peoples for centuries, and to save which they have always been ready to sacrifice many governmental facilities and conveniences." Brown v. Walker, 161 U.S. 591, 632 (1896) (Field, J., dissenting).

305. *Cf.* United States v. Apfelbaum, 445 U.S. 115 (1980) (holding that immunized grand jury witness who testifies *falsely* can be prosecuted for perjury without violating the privilege).

306. For an argument that the First Amendment places limits on the state's power to compel beliefs in mandated therapy programs, see McLean, *supra* note 291. For a discussion of the First Amendment implications of probationary conditions which require defendants to accept a particular viewpoint or ideology, see Jaimy M. Levine, Comment, *"Join the Sierra Club!": Imposition of Ideology as a Condition of Probation*, 142 U. PA. L. REV. 1841 (1994). First Amendment claims are nevertheless much less frequently litigated than self-incrimination claims in the therapeutic confession cases. In *State v. Mace* the defendant argued that forcing him to confess to crimes which he denied committing violated his First Amendment right against the compelled expression of belief. The Vermont court rejected the claim as not preserved by a proper objection, adding that "[p]robation conditions may impact upon a probationer's First Amendment rights so long as the conditions have a reasonable nexus with rehabilitation of the defendant and protection of the public." State v. Mace, 154 Vt. 430, 436, 578 A.2d. 104, 108 (1990), *vacated sub nom.* Mace v. Amestoy, 465 F. Supp. 847 (D. Vt. 1991). Similarly, in *State v. Hamlin*, the court rejected an unpreserved claim that the

fixed star in our constitutional constellation," the Supreme Court wrote in *West Virginia State Board of Education v. Barnette*, "it is that no official, high or petty, can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein."[307] *Barnette* and its progeny[308] protect a First Amendment zone of personal autonomy which seems hardly different at all from the Fifth Amendment's "inner sanctum of individual feeling and thought."[309] "For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[310] Under the First Amendment, therefore, the state may not "control the moral content of a person's thoughts,"[311] and "[t]he fantasies of a drug addict are his own and beyond the reach of government."[312]

The Court's recent opinion in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, affirming the right of St. Patrick's Day parade sponsors to exclude Irish-American gay and lesbian groups, turned on this principle—the sponsors' First Amendment right to *refuse* to speak.[313]

> "Since *all* speech inherently involves choices of what to say and what to leave unsaid," one important manifestation of the principle of free speech is that one who chooses to speak may also decide "what not to say." Although the State may at times "prescribe what shall be orthodox in commercial advertising" by requiring the dissemination of "purely factual and uncontroversial information," outside that context it may not compel affirmance of a belief with which the speaker disagrees. Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, subject, perhaps, to the permissive law of defamation. Nor is the rule's benefit

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requirements of a prison sex therapy program violated the defendant's religious principles. State v. Hamlin, 148 Vt. 232, 531 A.2d. 598 (1987).

307. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

308. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977) (holding that a state may not compel its drivers to display "Live Free or Die" motto on license plates). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-4 (2d ed. 1988) (discussing *Barnette* and its progeny).

309. *Couch*, 409 U.S. at 322.

310. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977).

311. Stanley v. Georgia, 394 U.S. 557, 565 (1969).

312. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973). Compare this statement with *State v. Stearns*, where the defendant's principal failing in group therapy was his denial of "precursor" sexual fantasies. *See supra* Part I.D.

313. Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 115 S. Ct. 2338, 2347-48 (1995).

> restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.[314]

It is no coincidence that First Amendment law intersects with the Fifth Amendment at this point. The High Commission cases in which the privilege against self-incrimination was fought for and won were prosecutions of religious dissenters and tract-writers,[315] proceedings that, if brought today, would violate the First Amendment as well as the Fifth Amendment. It is therefore not surprising to find related Fifth and First Amendment arguments in litigation challenging the anticommunist investigations of the 1950s.[316] Moreover, the courts must ensure that the state does not, in its attempt to "cure" criminals, cross boundaries that protect the religious dissenter and drug addict alike.[317]

CONCLUSION

None of this is to argue that post-conviction confessions should not play a role, among other factors, in the sentencing decision. Judges have always taken into consideration the quality that these confessions demonstrate—whether called penance, contrition, or acceptance of responsibility. It would be absurd to argue that judges should ignore sincere contrition. Any system that rewards confession, however, necessarily encourages self-incrimination. These pressures are in no sense

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314. *Id.* (citations omitted).

315. *See supra* notes 206-18 and accompanying text.

316. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957).

317. Insisting that a defendant give a particular answer, and inflicting punishment for failure to do so, also raises a procedural due process problem. As illustrated in Part I, therapy group leaders and intake workers routinely accept as true the allegations contained in documents supplied by a defendant's probation officer. To the extent that the defendant disagrees with particular allegations, he is judged to be "in denial" or suffering from cognitive distortions. In *Mace*, for example, the therapist assumed that the defendant had intercourse with his stepdaughter despite the fact that Mace consistently denied that allegation and pleaded guilty to a lesser offense. *See supra* notes 86-88 and accompanying text. If the First and Fifth Amendments do not absolutely prevent state-compulsion of particular assertions of fact or opinion for therapeutic purposes, the state should at least be required to establish the *truth* of the withheld statement by adequate procedures. This issue, which is beyond the scope of this Article, has been argued before the Vermont Supreme Court, but has not been decided. *See* State v. Rickert, 665 A.2d 887 (Vt. 1995) (holding that the due process claim was not preserved for review). The standard test for determining what process is due is set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

the invention or monopoly of forensic therapists; they would not be eliminated even if therapists were entirely banished from the field.[318]

The fault with current practices is not that they value confession, but that, like the inquisitorial systems that have been discussed, they *fetishize* confession. If the therapeutic confession correlates at all with low recidivism rates, it is by no means the only, or even the most important, predictor.[319] The policy and value conflicts between rehabilitation and the zone of individual autonomy will come to a head when and if therapists demonstrate a clear causal connection between coerced confessions and successful treatment outcomes. At that point, it will become necessary to make a difficult political choice: Should our historic aversion to inquisitorial methods yield to claims of social utility? Until then, the Constitution protects the "private inner sanctum of individual feeling and thought,"[320] "the inviolability of the human personality"[321] of sex offenders and puritan pamphleteers alike, and the courts must draw lines that the state may not cross in its ambition to cure criminals of the disease of crime.

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318. *Compare* Thomas v. United States, 368 F.2d 941, 946 (5th Cir. 1966) (holding that a judge's imposition of a harsh sentence against a defendant who failed to confess his guilt was a judicially imposed penalty for exercising a guaranteed right) *with* United States v. Parker, 903 F.2d 91, 105 (2d Cir. 1990) (upholding § 3E1.1 of the Federal Sentencing Guidelines, authorizing a two point downward departure when the defendant "clearly accepts personal responsibility for his acts").

319. The Furby review cited age, employment, and marital status as factors which "appear to reflect actual offense rate differences" among sex offenders. Furby et al., *supra* note 258, at 5. Likewise, age at first offense and the number of prior arrests "are good predictors of rearrest." *Id.* The authors of the review speculated that "[r]ecidivism is likely to be lower when there exists an extensive social service network that includes postrelease support groups, job placement, and chemical dependency services." *Id.* at 6.

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

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