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THE PRIVILEGE AGAINST SELF-INCRIMINATION UNDER SIEGE: ASHERMAN *v.* MEACHUM*

INTRODUCTION

The Fifth Amendment privilege against self-incrimination is an essential safeguard of individual rights in the American legal system.¹ It was adopted in response to a long history of oppression of the individual by the state and today remains an important shield, protecting individuals against abuses of state authority.² At the core of the privilege is the notion that the state may not penalize individuals for refusing to answer potentially incriminating questions.³

The Second Circuit, sitting *en banc*,⁴ examined an alleged

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

¹ The Fifth Amendment provides in relevant part, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Fifth Amendment privilege against self-incrimination applies to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964); see also *infra* note 25.

² See, e.g., LEONARD LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 431 (1968) ("The framers understood that without fair and regularized procedures to protect the criminally accused there could be no liberty. They knew that from time immemorial the tyrant's first step was to use the criminal law to crush his opposition."); Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, Cleveland Bar Association, 25 *THE JOURNAL* 91, 97 (1954) ("[H]istory demonstrates that the fight for the privilege against self-incrimination was a part, and an important part, of the great struggle against the oppression of the individual by the church and state."). See also *Brown v. Walker*, 161 U.S. 591, 637 (1896) (Field, J., dissenting) (The privilege against self-incrimination is the "result of a long struggle between opposing forces of the spirit of individual liberty on the one hand and the state on the other."). For a discussion of the history behind the adoption of the Self-Incrimination Clause of the Fifth Amendment, see *infra* notes 8-23 and accompanying text.

³ See *Malloy*, 378 U.S. at 8 (The Fifth Amendment "guarantees . . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.").

⁴ There has been some disagreement over whether the term "in banc" or "en banc" is correct. See Jon O. Newman, *In Banc Practice in the Second Circuit. The Virtues of Restraint*, 50 *BROOK. L. REV.* 365, 365 n.1 (1984) [hereinafter *The Virtues of Restraint*]. Although Judge Newman uses the English version of the phrase, "in banc," this Comment will use the "equally correct" French term "*en*

penalty situation in *Asherman v. Meachum*.⁵ The court held that the privilege against self-incrimination yields in the face of a relevant government inquiry "under circumstances where answers might tend to incriminate but are also relevant to the proper exercise of state authority."⁶ Specifically, the court addressed the issue of whether the Commissioner of the Connecticut State Department of Corrections had violated the Self-Incrimination Clause of the Fifth Amendment by terminating the supervised home release of a sentenced prisoner, Steven M. Asherman, upon notice by his attorney that he would refuse at a scheduled psychiatric examination to answer questions about the crime for which he was charged because of the possibility that his answers might be used against him in a pending appeal.⁷

The *Asherman* court found that the revocation of Asherman's supervised home release status was not a violation of the Fifth Amendment because the Commissioner had terminated Asherman's supervised home release due to his refusal to answer a relevant governmental inquiry, not his invocation of the privilege against self-incrimination. The court determined that, under the Fifth Amendment, government agencies have the authority to take adverse administrative action against those who invoke their privilege against self-incrimination and refuse to respond to relevant governmental inquiries

banc." See Jon O. Newman, *In Banc Practice in the Second Circuit, 1984-1988*, 55 BROOK. L. REV. 355, 355 n.1 (1989) [hereinafter *Second Circuit 1984-1988*].

Rule 35(a) of the Federal Rules of Appellate Procedure states that an *en banc* review "is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." FED. R. APP. P. 35(a). Between 1984 and 1988 the Second Circuit sat *en banc* an average of only 1.4 times per year, while the other eleven circuits granted rehearings *en banc* an average of seven times per year. *Second Circuit 1984-1988, supra*, at 356.

⁵ *Asherman v. Meachum*, 957 F.2d 978 (2d Cir. 1992) (*en banc*).

⁶ *Asherman*, 957 F.2d at 980-81. For purposes of this Comment, the term "relevant governmental inquiry" refers to any formal or informal civil proceeding that is conducted by a government agency and is within the scope of that agency's authority.

⁷ *Id.* Supervised home release is a type of community release program whereby prison inmates are allowed to live and work in the community under the close supervision of corrections officials. Other types of community release programs include work and educational release, and transfers to half-way houses. See *infra* note 38 and accompanying text.

as long as the adverse action is taken for refusing to answer a relevant inquiry and not for invoking a constitutional right.

After examining the policies that underlie the Fifth Amendment and reviewing the *Asherman* decision, this Comment argues that the majority's interpretation of relevant case law is flawed and inconsistent with the historically broad judicial interpretation of the Fifth Amendment's Self-Incrimination Clause. In addition, this Comment argues that case law does not support the majority's conclusion that the state may take adverse action against an individual for refusing to answer questions that are part of a relevant governmental inquiry without ensuring that potentially incriminating answers will not be used against that individual in a subsequent criminal action. Further, this Comment suggests that the *en banc* majority's assertion that Asherman's supervised home release was terminated for his failure to answer a relevant inquiry and not for invoking his privilege against self-incrimination is untenable. As the dissent correctly pointed out, this distinction is without any real meaning because, ultimately, Asherman's refusal to answer a relevant government inquiry was the direct result of his invocation of the privilege against self-incrimination. Finally, this Comment examines the ramifications of the court's decision and concludes that the decision has the potential to restrict significantly the scope of protection that the self-incrimination privilege affords individuals in situations involving relevant governmental inquiries.

I. THE HISTORY AND POLICIES BEHIND THE PRIVILEGE AGAINST SELF-INCRIMINATION

Legal scholars trace the origins of the privilege against self-incrimination as far back as the twelfth century.⁸ The

⁸ ERWIN GRISWOLD, *THE FIFTH AMENDMENT TODAY* 2 (1955); O. JOHN ROGGE, *THE FIRST & THE FIFTH* 138 (1960); 8 JOHN H. WIGMORE, *WIGMORE ON EVIDENCE* § 2250, at 269-70 (McNaughton rev. ed. 1961). *But see* LEVY, *supra* note 2, at 433 (discussing how the privilege can be traced to ancient Judaic law). For a detailed discussion of the history of the self-incrimination privilege, see MARK BERGER, *TAKING THE FIFTH* 1-23 (1980); LEVY, *supra* note 2; Edmund M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949); R. Carter Pittman, Note, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).

Although history has often been used as a guide for interpreting constitutional

privilege grew out of opposition to the inquisitorial method of prosecution, which the ecclesiastical courts in England first introduced.⁹ Under the inquisitorial system, individuals were required to take the *ex officio*, oath which mandated truthful responses to all questions.¹⁰ Few procedural safeguards existed to protect individuals from unfair prosecution. A court could interrogate an individual on its own motion and then act as

amendments, its value as a guide for interpreting the Self-Incrimination Clause is not universally supported. See, e.g., BERGER, *supra*, at 224 ("In its fullest sense, the history behind the privilege against self-incrimination is too vast to meaningfully assimilate in the process of interpreting the Fifth Amendment."); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 678 (1968) ("Although [the] history is absorbing, I do not find it a *vade mecum*. The privilege has always been responsive to the needs and problems of the time."); Robert B. McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 194 ("History is scarcely more helpful in measuring the reach of the privilege Frequent attempts have been made to uncover absolute answers that by now we should realize are not to be provided even by the most painstaking research.").

One reason for questioning the interpretive value of the history behind the privilege against self-incrimination is the concern that the exclusive use of history as a guide to determine the current scope of the privilege provides for little, if any, flexibility in the interpretive process. See BERGER, *supra*, at 224. Such a static view of the privilege ignores "the absolute necessity of adapting constitutional provisions to new realities . . ." *Id.* These concerns or any others, however, should not render history meaningless in a discussion of Fifth Amendment issues. At the very least, the historical background of the privilege provides support for its continuation and puts the burden of proof on those who argue for its abolition. See John T. McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affection, Raison D'Etre and Miscellaneous Implications*, 51 J. CRIM. L.C. & P.S. 138, 144 n.31 (1960).

Thus, notwithstanding the differing views of the role history should play in interpreting the privilege against self-incrimination, a brief summary of the history behind the adoption of the Fifth Amendment's Self-Incrimination Clause does provide a useful framework for a discussion of the issues raised in *Asherman*. Unlike the majority, which ignored the history of the Self-Incrimination Clause, the dissent properly incorporated the history of the privilege in its opinion, noting that *Asherman* could not be reviewed in its proper context without such a discussion. *Asherman*, 957 F.2d at 989 (Cardamone, J., dissenting).

⁹ 8 WIGMORE, *supra* note 8, § 2250, at 269-84. Early resistance to the inquisitorial method of prosecution was not widespread because of its limited use. Opposition to the inquisitorial method was generally tied to the struggle between religious and civil authorities over jurisdictional power and the effort by the Crown to restrict the inquisitorial procedures employed by ecclesiastical judges. BERGER, *supra* note 8, at 8-9.

¹⁰ LEVY, *supra* note 2, at 46-47. One principle difference between the inquisitorial and the accusatorial method of prosecution is that under the accusatorial system, investigators rely on sources other than the accused to develop their case. See ROGGE, *supra* note 8, at 139-40.

accuser, prosecutor, judge and jury.¹¹ Often rumor or suspicion was sufficient grounds for an inquisitorial proceeding.¹²

While the inquisitorial method was initially employed by the ecclesiastical courts, its use soon spread to the common law courts.¹³ As a result, opposition to the oppressiveness of the method began to grow.¹⁴ Finally, in 1641 Parliament passed a bill prohibiting the use of the *ex officio* oath as an ecclesiastical procedure in any penal matter.¹⁵ The procedure was later barred in the common law courts as well.¹⁶ By the end of the seventeenth century, the privilege against self-incrimination was firmly established in England and had been imported to the American colonies.¹⁷

Throughout the colonies the general principle that individuals should not be compelled to give evidence against themselves emerged as a fundamental right.¹⁸ Puritans, finding

¹¹ BERGER, *supra* note 8, at 5-6. Berger describes what this meant for the accused:

The accused was not informed of the charges, his accusers, nor the evidence against him. He was condemned if he refused to take the oath, condemned if he supplied the sought-after admissions, and risked perjury if he failed to tell the truth. In the hands of a skillful interrogator, the inquisitorial proceeding and oath were extremely powerful tools and nearly foolproof in securing the conviction of those against whom they were directed.

Id. at 6.

¹² *Id.*

¹³ ROGGE, *supra* note 8, at 146; 8 WIGMORE, *supra* note 8, § 2250, at 285.

¹⁴ BERGER, *supra* note 8, at 5-6; ROGGE, *supra* note 8, at 147.

¹⁵ 8 WIGMORE, *supra* note 8, § 2250, at 283-84. At the same time, Parliament abolished the Court of Star Chamber and the Court of High Commission for Ecclesiastical Causes. *Id.* Parliament finally addressed the volatile issue of the *ex officio* oath largely as a result of the case of a man named "Freeborn John" Lilburn. In 1640, Lilburn was arrested and charged with printing or importing heretical and seditious books. He refused to take the *ex officio* oath and give evidence against himself. For his refusal, he was condemned to be whipped and pilloried. Lilburn took his case to Parliament. The House of Commons eventually vacated his sentence, labeling it "illegal and against the liberty of the subject." GRISWOLD, *supra* note 8, at 3.

¹⁶ 8 WIGMORE, *supra* note 8, § 2250, at 289.

¹⁷ Fortas, *supra* note 2, at 97. See also LEVY, *supra* note 2, at 368 (noting that "as [the Colonies'] political and economic systems matured, their legal systems most strikingly in the field of criminal procedure, began more and more to resemble that of England"); BERGER, *supra* note 8, at 20-21 ("Given that the American colonies were principally settled by British subjects, it should not be surprising to find that English legal traditions appeared quickly in the colonial experience.").

¹⁸ For a discussion of Colonial statutes and pre-revolutionary trials which adopted the notion that people should not be required to be witnesses against

that religious intolerance was as common as it had been in England, continued their struggle to establish an absolute right against self-incrimination in the New World.¹⁹ Other social conditions of colonial life also generated increased opposition to compulsory self-incrimination. For example, the Crown began using increasingly arbitrary means to administer justice in the Colonies, and would officials sometimes torture individuals to extract information during investigations.²⁰

After the Revolutionary War, colonial leaders drafted written constitutions to ensure the protection of fundamental rights, many of which included the privilege against self-incrimination.²¹ Later, during the process of ratifying the Federal Constitution, a bill of rights became necessary to allay concerns that the new federal government would become too powerful.²² One of the concerns expressed by colonial leaders was that, without a privilege against self-incrimination, they could not insure the protection of individuals from the "the evils that lurk[ed] in the shadows of a new and untried sovereignty."²³ Consequently, when the First Congress met in 1789 to draft the Bill of Rights, it included the right to remain silent.

In the two hundred years before *Asherman v. Meachum*, the Supreme Court expanded the protection that the privilege against self-incrimination afforded individuals beyond the limited circumstances from which it originally developed. Today the privilege appears in a variety of different contexts.²⁴ Courts and commentators have offered many policies to justify

themselves, see LEVY, *supra* note 2, at 332-404. *But see* BERGER, *supra* note 8, at 21-22, for a discussion of how the notion was ignored by judges during the Salem witch trials in 1692.

¹⁹ Pittman, *supra* note 8, at 775-83.

²⁰ *Id.*

²¹ Virginia, Pennsylvania, Maryland, North Carolina, Vermont, Massachusetts and New Hampshire included self-incrimination clauses in their state constitutions or bills of rights. ROGGE, *supra* note 8, at 184-85.

²² LEVY, *supra* note 2, at 418-21.

²³ Pittman, *supra* note 8, at 789.

²⁴ Significantly, the Supreme Court has not found that every setting in which the privilege is invoked deserves the same level of self-incrimination protection. In cases like *Asherman*, however, which involve individuals who have suffered direct penalties external to the trial process for invoking the right to remain silent, the Court has provided individuals with substantial protection under the Self-Incrimination Clause of the Fifth Amendment. *See infra* notes 140-59 and accompanying text.

this expansion.²⁵ In fact, one reason the policies underlying the privilege against self-incrimination have received so much attention is that the modern privilege and the functions it serves have expanded beyond the privilege's limited historical scope.²⁶ Thus, some of the original justifications for the privilege are not as strong today as they once were.²⁷

One widely accepted policy behind the privilege against self-incrimination is to prevent individuals from being subjected to the "cruel trilemma of self-accusation, perjury or contempt."²⁸ This rationale recognizes that it is "inherently cruel to make a man an instrument in his own condemnation."²⁹ In

²⁵ A comprehensive survey and analysis of the policies underlying the privilege against self-incrimination are beyond the scope of this Comment. This Comment, therefore, addresses briefly only the most widely accepted justifications for the modern privilege. For more in-depth treatments of the policies behind the privilege against self-incrimination, see BERGER, *supra* note 8, at 25-44; 8 WIGMORE, *supra* note 8, § 2251, at 295-318; David M. O'Brien, *The Fifth Amendment: Fox Hunters, Old Women, Hermits and the Burger Court*, 54 NOTRE DAME L. REV. 26, 33-54 (1978). See also note 27 for authors who are particularly critical of the policies underlying the modern privilege.

²⁶ See *infra* notes 125-59 and accompanying text.

²⁷ Some commentators have questioned the continued validity of the privilege against self-incrimination and have argued that it should be abolished or its scope severely restricted. See, e.g., Friendly, *supra* note 8; LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT (1959); see also David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination*, 33 U.C.L.A. L. REV. 1063, 1147 (1986) (arguing that the privilege against self-incrimination "can be explained by specific historical developments, but cannot be justified either functionally or conceptually"). Given the continued broad interpretation of the Self-Incrimination Clause of the Fifth Amendment, however, it appears that courts have not embraced the critics' views.

²⁸ *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (reviewing the history and policies underlying the privilege against self-incrimination). The Supreme Court has recognized that individuals not facing legal compulsion, i.e., contempt charges, may face choices that "are analogous [to the "cruel trilemma"] and hence raise similar concerns." *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990) (footnote omitted); see also *Miranda v. Arizona*, 384 U.S. 436, 461 (1966) (finding that the privilege against self-incrimination not only protects individuals from legal compulsion but also from the "informal compulsion exerted by law enforcement officials during in-custody questioning). *Muniz* and *Miranda* suggest that it is not the means used to overcome an individual's will to remain silent that is central to the "cruel trilemma" rationale, but the element of compulsion.

²⁹ David Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts The Dilemma*, 53 CAL. L. REV. 89, 95 (1965); see also GRISWOLD, *supra* note 8, at 7 ("[W]e do not make even the hardened criminal sign his own death warrant, or dig his grave, or pull the lever that springs the trap on which he stands. We have through the course of history developed a considerable feeling of

addition, the privilege plays an important role in preserving the accusatorial nature of our criminal justice system.³⁰ Accusatorial procedures ensure that the state bears the burden of establishing guilt and help maintain a "fair state-individual balance."³¹ If the government could compel individuals to incriminate themselves and then use the information to obtain a conviction, there would be few mechanisms to limit the government's power over the administration of the criminal justice system.³²

Another policy underlying the privilege against self-incrimination is that it prevents physical and psychological abuse by government officials.³³ The argument in favor of this policy is that without the protection that the privilege affords individuals, the government would begin to use highly coercive techniques to gain information.³⁴ Finally, the privilege also reflects society's "respect for the inviolability of the human per-

the dignity and intrinsic importance of the individual man. Even the evil man is a human being."); *Brown v. Walker*, 161 U.S. 591, 637 (1896) (Field, J., dissenting) ("The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one and needs no illustration. It is plain to every person who gives the subject a moment's thought.").

³⁰ *Murphy*, 378 U.S. at 55; see also BERGER, *supra* note 8, at 37 ("The abolition of the privilege, or its narrow construction by the courts, might thus permit too much of a flavor of the inquisitorial tradition to engraft itself upon the accusatorial framework history has given us").

³¹ 8 WIGMORE, *supra* note 8, § 2251, at 317; *Murphy*, 378 U.S. at 55. The Constitution limits the power of the state where the potential for abuse of individual rights exists. By including the privilege against self-incrimination in the Bill of Rights, the framers acknowledged that the power to compel individuals to incriminate themselves created enough potential for abuse that it should be limited. The result of such a determination was that the state would be required to bear the burden of proving its case without the help of the defendant. See BERGER, *supra* note 8, at 226.

³² See BERGER, *supra* note 8, at 39-41 (arguing that "[w]ithout [the privilege against self-incrimination], and in light of the State's extensive investigatory power and vast array of criminal prohibitions, the result would be a grant of too much authority to control the individual and too little power to prevent excesses").

³³ *Murphy*, 378 U.S. at 55; see also LEVY, *supra* note 2, at 326-27 (acknowledging that the privilege against self-incrimination developed out of the struggle to eliminate torture as a government practice).

³⁴ See McNaughton, *supra* note 8, at 143-44. Some commentators assert that in the absence of a privilege against self-incrimination, the government would abuse its power by oppressing individuals who hold unpopular religious or political beliefs. See Friendly, *supra* note 8, at 696 (The privilege provides "a shelter against governmental snooping and oppression concerning religious and political beliefs"); Berger, *supra* note 8, at 35 ("Compelled self-incrimination, if tolerated, might well prove to be too tempting a tool for use against minority views.").

sonality and the right of each individual 'to a private enclave where he may lead a private life.'³⁵

It may be true that none of these policy rationales necessarily provides an independent basis for justifying the privilege against self-incrimination. The strength of any policy, however, varies depending on the context in which it is offered. Thus, the strongest justification for the privilege exists when more than one rationale for the privilege exists to support its application in a particular setting.

Both the history and policies underlying the privilege against self-incrimination are an integral part of a discussion of the issues raised in *Asherman*. Indeed, the Second Circuit's decision threatens the very foundation of the privilege against self-incrimination by disregarding the policies underlying the privilege, and viewing the privilege as an obstacle rather than an important personal right.

II. *ASHERMAN V. MEACHUM*

A. *Facts*

In 1980, Steven M. Asherman, a student at Columbia Medical School, was convicted of manslaughter in the first degree and sentenced to a prison term of seven to fourteen years.³⁶ The Connecticut Supreme Court later affirmed

³⁵ *Murphy*, 378 U.S. at 55 (quoting *United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)). As Mark Berger observes:

Our system of government represents an attempt at accommodating the often opposing interests of the citizen and the state. In a very general sense, it accords high regard to the individual and seeks to protect him from unwarranted state interference. Beyond that it protects the individual against methods of intrusion that may violate his individuality and integrity, even though the intrusion itself may be unwarranted. The Fifth Amendment very clearly promotes these goals and is justified by them.

BERGER, *supra* note 8, at 39. Immunity laws that require individuals to waive their privacy rights, however, undermine this argument. Friendly, *supra* note 8, at 689 (citing McKay, *supra* note 8, at 212).

³⁶ *State v. Asherman*, 478 A.2d 227 (Conn. 1984), *cert. denied*, 470 U.S. 1050 (1985). The nature of the crime was particularly brutal. Asherman stabbed the victim, a medical school classmate of his, over 100 times. *Id.* Asherman was originally charged with murder. The jury, however, convicted him of first degree manslaughter because of evidence that he committed the homicide under circumstances

Asherman's conviction and he began serving his sentence in March of 1985.³⁷ After Asherman served almost three years, Larry Meachum, the Commissioner of the Connecticut State Department of Corrections (the "Commissioner"), granted Asherman's application for supervised home release ("SHR").³⁸ Asherman was then released into a halfway house where he underwent required drug-abuse and mental health counseling.³⁹ Finally, in March of 1988, Asherman formally entered

showing extreme emotional disturbance. The evidence suggested that mind-altering drugs may have induced the emotional disturbance which led to the crime. For a detailed discussion of the facts surrounding the crime, see *id.*

³⁷ *Asherman*, 478 A.2d at 227. The Connecticut District Court later rejected Asherman's federal *habeas corpus* challenge to his conviction. *Asherman v. Meachum*, 739 F. Supp. 718 (D. Conn.), *aff'd*, 923 F.2d 845 (2d Cir. 1990).

³⁸ *Asherman v. Meachum*, 957 F.2d 978, 980 (2d Cir. 1992) (en banc); see *supra* note 7. Asherman's release into the SHR program was authorized by statute. The relevant provision provided:

If the commissioner of correction deems that the purposes of this section may thus be more effectively carried out, he may transfer any person from one correctional institution to another or to any public or private nonprofit halfway house, group home or mental health facility, or to an approved community residence with the concurrence of the warden, superintendent or person in charge of the facility to which said person is being transferred. Any inmate so transferred shall remain under the jurisdiction of said commissioner. Any inmate transferred to an approved community residence shall also be subject to specifically prescribed supervision by personnel of the department of corrections until his definite or indeterminate sentence is completed.

CONN. REV. STAT. ANN. § 18-100(e) (West 1988). After numerous problems with the SHR program developed, the legislature began limiting eligibility for the program with the intent to phase it out by June 30, 1993. See CONN. REV. STAT. ANN. §18-100b(a)-(e) (West Supp. 1992). For a discussion of the problems that led to the termination of the SHR program and proposals for modified conditional liberty programs, see Brant Houston & Lynne Tuohy, *Convicts Using Home Release as a Way to Freedom; Home Release is Back Door to Freedom for Convicts*, HARTFORD COURANT, Nov. 29, 1992, at A1; Lynne Tuohy, *After Home Release Ends, Prisons to Try Again*, THE HARTFORD COURANT, Jan. 12, 1993, at C1; Lynne Touhy, *Supervised Home Release Program Allowed to Die; Home Release Prison Program Allowed to Die*, HARTFORD COURANT, July 1, 1993, at B1.

As part of the SHR application process, Asherman signed a document entitled Community Residence Agreement and Notification which states in relevant part: "I understand and accept the Community Residence Program as a privilege and thereby may lose this privilege if and when the Commissioner of Corrections or his designee deems [sic] appropriate." Community Residence Agreement and Notification (July 6, 1987) (on file with author).

³⁹ *Asherman v. Meachum*, 932 F.2d 137, 139 (2d Cir. 1991). The Commissioner granted Asherman's application for SHR on the condition that he undergo drug-abuse and mental-health counseling in addition to the standard conditions for release under the program. Letter from Lawrence Meachum, Commissioner of

the SHR program, moved into an apartment with his wife and began working as a computer systems analyst.⁴⁰

Four months after Asherman entered the SHR program, the Connecticut Parole Board denied his request for parole.⁴¹ Based on this denial, the Commissioner ordered Asherman to undergo a psychiatric examination to determine whether the denial of parole adversely affected his mental state and made him an inappropriate participant in the SHR program.⁴² On August 22, 1988, Asherman's attorney wrote to the Commissioner in an effort to clarify the nature of the evaluation proceeding and to inform him that Asherman had a pending federal habeas corpus challenge to his conviction.⁴³ The letter also stated that Asherman would appear for the psychiatric evalua-

Corrections, to Steven Asherman (Dec. 7, 1987) (on file with author).

⁴⁰ *Asherman*, 932 F.2d at 137. To participate in the SHR program Asherman signed a document entitled Conditions of Community Residence which provided in relevant part:

1. I will report as directed and follow the instructions of my supervising officer.

. . . .
11. Your release on community residence is based upon the CONCLUSION of the Commissioner of Correction that there is a reasonable probability that you will live and remain at liberty without violating the law and that your release is not incompatible with the welfare of society. In the event that you engage in conduct in the future which renders this conclusion no longer valid, then your community residence will be revoked or modified accordingly.

Connecticut Department of Correction, Conditions of Community Residence (March 30, 1988) (on file with author).

⁴¹ *Asherman*, 957 F.2d at 980. In making its determination, the Parole Board cited the seriousness of Asherman's crime, the "reasonably probability" that he would break the law again, and the belief that his release would not be compatible with the interests of society. Letter from Henry A. Bissonnette, Jr., Assistant to the Chairman of Connecticut Board of Parole, to Stephen Asherman (July 28, 1988) (on file with author).

⁴² *Asherman*, 957 F.2d at 980.

⁴³ *Asherman*, 932 F.2d at 139-40; Letter from William L. Tracy, Jr., attorney for Stephen Asherman, to Lawrence Meachum, Commissioner of Corrections (August 22, 1988) [hereinafter *Tracy Letter*] (on file with author). Asherman sought federal habeas corpus relief on the grounds that: he was denied his right to cross-examine witnesses; the jury was given improper instructions; the trial was tainted by juror misconduct; and his federal due process rights were violated by the application of Connecticut's manslaughter statute to his case. *Asherman v. Meachum*, 739 F. Supp. 718, 720 (D. Conn.), *aff'd*, 923 F.2d 845 (2d Cir. 1990). After Asherman challenged the revocation of his SHR status, he amended his habeas corpus petition and pursued only the claim that his federal due process rights were violated. *Asherman*, 739 F. Supp. at 720.

tion, but would not "participate in any interrogation which [was] related to the crime for which he [was] charged."⁴⁴ Upon receiving the letter, the Commissioner canceled Asherman's psychiatric examination.⁴⁵ When Asherman appeared at the Department of Corrections on August 24th as ordered, he was reincarcerated.⁴⁶ That day he filed a petition for a writ of habeas corpus in Connecticut state court challenging his return to prison.⁴⁷

The Commissioner concluded that Asherman, through his attorney, had refused to submit to a psychiatric evaluation and that such an action was a violation of the conditions of the SHR program.⁴⁸ Consequently, he was charged in a disciplinary proceeding with violating the terms of his SHR.⁴⁹ Upon reviewing Asherman's case the disciplinary committee found that he had violated the conditions of his release and recommended that the classification committee review his status in the SHR program.⁵⁰ A short time later, the warden at Hart-

⁴⁴ *Asherman*, 957 F.2d at 980; *Tracy Letter*, *supra* note 43.

⁴⁵ *Asherman*, 932 F.2d at 146.

⁴⁶ *Asherman*, 957 F.2d at 980.

⁴⁷ *Asherman*, 932 F.2d at 140.

⁴⁸ *Asherman v. Meachum*, 566 A.2d 663, 665-66 (Conn. 1989) (footnote omitted).

According to the Community Residence Violation Report dated August 24, 1988, Asherman violated conditions 1 and 11 of the Conditions of Community Residence to which he had agreed in order to participate in the program. *See supra* note 40. The Report stated in pertinent part:

NATURE OF VIOLATION

Condition #1: By virtue of a letter received by Commissioner Meachum, signed by your lawyer, William L. Tracy, Jr., which indicated that Mr. Asherman will not participate in any interrogation which is related to the crime for which he was charged. This is a violation of Condition #1 which states in part, "You are to follow the instructions of his supervising officer."

Condition #11: Which states in part, "that your release is not incompatible with the welfare of society." Mr. Asherman's community release status was reviewed following the Connecticut Board of Parole's decision to deny parole. By virtue of Mr. Asherman's decision not to cooperate with a psychological examination, his parole denial, and its possible impact on him, it was determined that continued supervision in the community was incompatible with the welfare of society.

Community Residence Violation Report from Jack Tokarz, Parole Officer, Connecticut Department of Corrections (Aug. 24, 1988) [hereinafter *Report*] (on file with author).

⁴⁹ *Asherman*, 932 F.2d at 140.

⁵⁰ *Id.*

ford Correctional Center reversed the disciplinary committee's finding that Asherman had violated the conditions of his SHR, but upheld its recommendation that Asherman's classification status be reviewed.⁵¹ After reviewing Asherman's case, the classification committee recommended that he be removed from the SHR program and incarcerated in a medium or minimum security facility.⁵² On September 7, 1988, the Commissioner wrote Asherman to notify him officially of his removal from the SHR program. The Commissioner explained that, given the recent denial of Asherman's parole application, his refusal to answer questions compelled the Commissioner to conclude that Asherman was not suitable for the SHR program. He reasoned that Asherman's refusal to participate in the psychiatric examination denied him the opportunity to evaluate his continued suitability for the SHR program.⁵³

Two months later, the Connecticut Superior Court ruled in favor of Asherman on his habeas corpus challenge to the revocation of his SHR status.⁵⁴ The court rejected Asherman's assertion that he had a constitutionally protected liberty interest in his continued participation in the SHR program and was entitled to the protections that such a liberty interest entails under the Due Process Clause of the Federal Constitution.⁵⁵

⁵¹ *Id.* Unlike disciplinary hearings, which involve misconduct that may lead to sanctions such as loss of good time credits, reclassification proceedings may be triggered by changed circumstances that do not involve misconduct on the part of a person in the SHR program. *Asherman*, 566 A.2d at 666 n.4.

⁵² *Asherman*, 932 F.2d at 140.

⁵³ *Id.* The Commissioner's letter to Asherman states in relevant part:

Your refusal to fully participate in th[e] psychiatric evaluation precludes me from obtaining information necessary to determine whether the denial of parole in and of itself had such an impact on you that you no longer are suitable person for home release status.

. . . .

The absence of the information referred to . . . above constitutes sufficient ground for determining that you no longer are a suitable person for home release status. Your conduct in this regard has denied me the opportunity to obtain information which is essential to my continuing authority to review your suitability for the privilege of home release. I am compelled therefore to conclude that you are no longer suitable for this status and I herewith transfer you to confinement within a correctional facility

Letter from Lawrence Meachum, Commissioner of Corrections, to Steven Asherman (Sept. 7, 1988) [hereinafter *Meachum Letter*] (on file with author).

⁵⁴ Memorandum of Decision, *Asherman v. Meachum*, No. 349828 (Conn. Super. Ct. Nov. 10, 1988).

⁵⁵ *Id.* The court found that unlike the revocation of parole or probation, the

The court did, however, accept his narrower argument that the specific provisions of the Community Residence Agreement and Notification and the Conditions of Community Residence,⁵⁶ to which he agreed in order to participate in the SHR program, created a liberty interest under state law.⁵⁷ In reviewing the procedure used to revoke Asherman's SHR status, the court found that the state did not meet the requirements of due process because the Commissioner's reasons for revoking Asherman's SHR were inadequate.⁵⁸ The court then ordered that Asherman be reinstated into the SHR program or released from custody.⁵⁹

After the superior court had granted Asherman habeas corpus relief, the Commissioner ordered another hearing to determine whether Asherman should be reinstated into the SHR program and, if so, under what conditions.⁶⁰ The prison warden who conducted the hearing determined that Asherman should be reinstated into the SHR program under the original conditions of his release.⁶¹ On January 12, 1989, the day

revocation of SHR does not implicate a liberty interest under the Due Process Clause because a person on supervised home release does not enjoy the same level of freedom as a parolee or probationer. *Id.* at 11-15.

⁵⁶ See *supra* notes 38 and 40.

⁵⁷ The court found that the conditions of release created an expectation that SHR status would not be revoked unless one of the release conditions was specifically violated. *Asherman*, No. 349828, slip op. at 16-21.

⁵⁸ *Id.* at 27-32. Specifically, the court found that the Commissioner (1) relied upon a violation of condition #11 of the Conditions of Community Residence without adequate evidence of such a violation, (2) was influenced by public pressure to reincarcerate Asherman, and (3) this pressure improperly entered into the decision making process. *Id.* at 28-29. The court also advised that if the Commissioner ordered another psychiatric examination to determine Asherman's suitability for the SHR program, Asherman would be required to answer all questions put to him by an examining psychiatrist or psychologist. The court emphasized, however, that any disclosures should be considered privileged communications. *Id.* at 30-31.

⁵⁹ *Id.* at 32. The court also ordered that the Commissioner not conduct any subsequent hearing because his prior conclusion that Asherman should be returned to custody rendered him unable to conduct a fair hearing. *Id.* In the event that a hearing be held, an "unbiased, neutral and detached person" should conduct it. *Id.*

⁶⁰ Cross Appeal Brief of Appellee Before In Banc Court at 12, *Asherman v. Meachum*, 957 F.2d 978 (2d Cir. 1992) (en banc) (No. 90-2530). Before the hearing in November 1988, a Department of Corrections psychiatrist interviewed Asherman as part of the process to determine whether he should be reinstated into the SHR program. In that interview, Asherman's privilege against self-incrimination was not implicated. The doctor agreed not to question Asherman concerning the 1978 crime rather than give a promise of confidentiality as the judge in Asherman's state habeas corpus action had recommended. *Id.*; see *supra* note 58 and *infra* note 162.

⁶¹ Cross Appeal Brief of Appellee Before In Banc Court at 12, *Asherman* (No.

Asherman was scheduled to be released, Connecticut Governor William O'Neil ordered that Asherman remain in custody.⁶² Asherman then made a motion to terminate this stay of his release, which the Connecticut Superior Court granted. The Connecticut Supreme Court later affirmed the termination of the stay.⁶³ On May 7, 1989, Asherman was released into the SHR program. Six months later, however, the Connecticut Supreme Court reversed the prior decision of the superior court and found that Asherman had not been reimprisoned in violation of due process.⁶⁴ He returned to prison on December 19, 1989.⁶⁵

Asherman then renewed his challenge to the termination of his SHR by filing a federal writ of habeas corpus in the United States District Court for the District of Connecticut.⁶⁶ The court granted summary judgment in Asherman's favor, holding that although his due process, equal protection and First Amendment rights were not violated by the termination of his SHR status, his Fifth Amendment privilege against self-incrimination had been violated because his invocation of the Fifth Amendment had been given as the reason for his removal from the SHR program.⁶⁷ The Commissioner appealed the decision.

B. *The Second Circuit Panel Decision*

On appeal the Commissioner contended that it was permissible for him to have drawn an adverse inference based

90-2530).

⁶² *Asherman v. Meachum*, 932 F.2d 139, 140 (2d Cir. 1991).

⁶³ *Id.*

⁶⁴ *Asherman v. Meachum*, 566 A.2d. 663 (Conn. 1989). The court found that the letter from Asherman's attorney invoking the Fifth Amendment privilege, see *supra* notes 43-44 and accompanying text, was sufficient evidence of unsuitable conduct to support reinprisonment. *Id.* at 668.

⁶⁵ *Asherman*, 932 F.2d at 140.

⁶⁶ *Id.* The Commissioner moved to dismiss Asherman's habeas corpus petition on the ground that Asherman had failed to exhaust his state remedies. On June 22, 1990, the district court rejected the Commissioner's motion. Cross Appeal Brief of Appellee Before In Banc Court at XV, *Asherman* (No. 90-2530).

⁶⁷ Ruling on Petitioner's Motion for Summary Judgment at 16-17, 19, *Asherman v. Meachum*, No. H 90-007 (D. Conn. Oct. 24, 1990). Because Asherman's Fifth Amendment rights had been violated, the district court granted his writ of habeas corpus. *Id.* at 19.

upon the letter from Asherman's attorney, and that his decision to remove Asherman from the SHR program was not predicated solely on Asherman's invocation of the privilege against self-incrimination.⁶⁸ The court began its consideration of the case by reviewing the general scope of the Fifth Amendment.⁶⁹ First, the court noted that the Fifth Amendment privilege against self-incrimination is not limited to any particular type of proceeding, but can be invoked by individuals under circumstances where answers to official questions might incriminate them in future criminal proceedings.⁷⁰ Accordingly, unless the government offers immunity, an individual may not be compelled to testify under threat of some type of adverse action.⁷¹ The court also discussed the important policy reasons for granting immunity for compelled testimony, specifically noting that "[i]f there was no immunity to protect against giving such testimony, the government would be in a position to demand that a witness testify, and the witness would be at the mercy of what use the government might make of it."⁷²

⁶⁸ *Asherman*, 932 F.2d at 144. The Commissioner asserted that the decision to reimprison Asherman was also based on other factors including: "(1) an earlier 'shaky' psychiatric evaluation; (2) the disclosure of a drug and psychiatric history; and (3) a June 6, 1990 report indicating that [Asherman] require[d] long-term supportive psychotherapy." *Id.* at 146. The court found these arguments to be without merit because the Commissioner was aware of Asherman's "shaky" psychiatric evaluation when he decided to grant his SHR application in the first place, and because the Commissioner did not learn of Asherman's drug and psychiatric history or obtain the June 1990 report until after Asherman had been reimprisoned. *Id.* As a result, these facts could not have been the reason for the Commissioner's decision to revoke Asherman's SHR status. *Id.*

The Commissioner also argued that: (1) Asherman failed to exhaust his state court remedies with respect to his Fifth Amendment privilege; (2) Asherman waived his right to assert his constitutional argument; and (3) the court erred when it granted summary judgment in Asherman's favor because genuine issues of material fact were in dispute. *Id.* at 141. The court, however, rejected these arguments. *Id.* at 141.

⁶⁹ Judge Cardamone authored the panel decision. The other members of the panel were Chief Judge Oakes and Judge Lombard.

⁷⁰ *Asherman v. Meachum*, 957 F.2d 978, 981 (2d Cir. 1992) (en banc) (citing *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)). For a discussion of *Turley*, see *infra* note 152. See also *In re Gault*, 387 U.S. 1, 49 (1967) ("[T]he availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites").

⁷¹ *Asherman*, 932 F.2d at 145 (citing *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977)). For a discussion of *Cunningham*, see *infra* note 153.

⁷² *Asherman*, 932 F.2d at 145.

Further, the court rejected the Commissioner's assertion that it was permissible to draw an adverse inference from Asherman's refusal to answer questions concerning the crime with which he was charged.⁷³ The court noted that a state may require potentially incriminating testimony or may draw an adverse inference from a witness's refusal to testify in a civil proceeding where the state provides immunity from prosecution or where a witness's "silence in and of itself is insufficient to support an adverse decision [in the civil proceeding]."⁷⁴ The court found, however, that the facts surrounding the revocation of Asherman's SHR did not support a permissible adverse inference because Asherman had not been offered immunity and the sole reason Asherman lost his SHR status was his assertion of the privilege against self-incrimination.⁷⁵

After determining that the Commissioner could not draw an adverse inference from Asherman's refusal to answer questions, the court found that the Commissioner had in fact

⁷³ *Id.*

⁷⁴ *Id.* (citing *Baxter v. Palmigiano*, 425 U.S. 308, 316-17 (1976)). The *Asherman* court noted that under those circumstances, an individual does not have to choose between testifying and risking criminal prosecution, or not testifying and being penalized for asserting a constitutional privilege. *Id.* In *Baxter*, the Supreme Court found it permissible to draw an adverse inference from an inmate's refusal to testify at a disciplinary hearing because under state law disciplinary decisions had to be based on more than just the inmate's silence, the state did not require a waiver of the Fifth Amendment privilege and no criminal proceedings were pending against the inmate. 425 U.S. at 317-20.

⁷⁵ *Asherman*, 932 F.2d at 146. The court pointed out that Asherman's assertion of the privilege was given as the basis for charging him with violating the terms of his SHR. The disciplinary board then found him guilty of violating the terms of his SHR. Later the warden reversed that decision and called for a review of Asherman's classification status. *Id.* at 140; see *supra* notes 48-51 and accompanying text. In addition, the Commissioner's September 7, 1988, letter to Asherman explaining his decision to remove Asherman from the SHR program, see *supra* note 53 and accompanying text, stated that because of Asherman's refusal to "fully participate" in the psychiatric evaluation, he was unable to obtain the information necessary to determine whether Asherman could remain the SHR program. The court found that it was the "absence of this information that the commissioner focus[ed] on as a sufficient basis to reimprison Asherman." *Asherman*, 932 F.2d at 146. Thus, the court concluded that the sole reason Asherman had lost his SHR status was his invocation of his privilege against self-incrimination. The fact that the relationship between Asherman's assertion of the privilege against self-incrimination and his removal from the SHR program was not as direct as in cases where termination or removal was statutorily mandated did not change the fact that Asherman lost his SHR status because he invoked his privilege against self-incrimination. *Id.*

drawn such an adverse inference.⁷⁶ The court noted that Asherman was imprisoned when he arrived for the psychiatric examination because his refusal to answer questions was deemed a disciplinary violation and that he remained in prison because his silence was found to be a sufficient basis to reclassify his status.⁷⁷ Thus, the court found that Asherman was forced to choose between remaining silent and being reimprisoned, or answering questions that might incriminate him and risking that his testimony would be used against him to prevent the granting of habeas corpus relief or used against him if his writ of habeas corpus was granted and he was retried.⁷⁸ Finding that Asherman's exercise of the privilege against self-incrimination was the "sole basis of the revocation of [his] SHR status," the court held that Asherman's Fifth Amendment rights were violated.⁷⁹ Consequently, the court affirmed the order of the district court directing that Asherman be reinstated into the SHR program.⁸⁰ Subsequently, a rehearing *en banc* was ordered.⁸¹

C. *The Decision of the En Banc Court*

The Court of Appeals for the Second Circuit sitting *en banc* vacated the panel's opinion.⁸² The court held that the

⁷⁶ *Asherman*, 932 F.2d at 146.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 146-47.

⁸⁰ *Id.* In its decision, the court specifically noted that its holding did not open the door to inmates dictating the rules for undergoing legitimate psychiatric evaluations. Rather, the decision made it impermissible for the Commissioner to draw an adverse inference from an inmate's silence, unless the inmate had been granted immunity from future prosecution or the decision to reimprison the inmate was not based solely on the inmate's silence. *Id.* at 146. The court also pointed out that the decision did not prevent the Commissioner from evaluating Asherman's mental health so long as it is done within constitutional constraints, *i.e.*, without violating Asherman's Fifth Amendment rights. *Id.* at 147.

⁸¹ See generally *supra* note 4.

⁸² *Asherman v. Meachum*, 957 F.2d 979 (2d. Cir. 1992) (*en banc*). Two days before the *en banc* court issued its decision, the Attorney General of the State of Connecticut notified the court that Asherman had completed his sentence and was discharged from prison on February 11, 1992. *Id.* at 986 n.1. The fact that Asherman was released from custody before the court issued its decision arguably rendered the case moot. See *Lane v. Williams*, 455 U.S. 624 (1982) (where inmates' sentences expired before adjudication of their habeas corpus challenge to

revocation of Asherman's home release status for his refusal to answer questions which might tend to incriminate him did not violate the Self-Incrimination Clause of the Fifth Amendment.⁸³ The court found that states have the authority to ask questions relevant to the proper exercise of authority and to take adverse action against those whose refusal to answer interferes with the exercise of that authority.⁸⁴

1. The Majority Decision

The court prefaced its analysis by reiterating the fundamental principle that individuals cannot be compelled to incriminate themselves in any criminal or civil proceeding, whether it be formal or informal.⁸⁵ Thus, the court noted that it would have been impermissible compulsion for a court to order Asherman to answer questions concerning his crime and to threaten him with contempt if he refused, or to order him to

the constitutionality of parole revocation and reincarceration, the case was moot because the inmates "had obtained all the relief they sought," *Id.* at 633, and they would suffer no "collateral legal consequences." *Id.* at 632 (quoting *Sibron v. New York*, 392 U.S. 40, 57 (1968)); *Weinstein v. Bradford*, 423 U.S. 147, 147-49 (1975) (per curiam) (citation omitted) (where inmate was paroled after the Court of Appeals for the Fourth Circuit had upheld his claim against members of the North Carolina Board of Parole that he was constitutionally entitled to "certain procedural rights in connection with" his parole application, case was rendered moot because there was "no demonstrated probability" that the inmate would again be subjected to the jurisdiction of the parole system). Neither the majority nor the dissent, however, addressed the mootness issue. *See infra* note 183.

⁸³ *Id.* at 983. For the purpose of resolving the issues in the case, the court assumed without deciding that: (1) the answers to the questions Asherman had refused to answer created a risk of self-incrimination; (2) Asherman could bring a habeas corpus proceeding to challenge the revocation of his SHR status; and (3) the decision by the Connecticut Supreme Court rejecting Asherman's habeas corpus challenge to the termination of his SHR status had no *res judicata* effect on his pending federal habeas corpus challenge to his conviction. *Id.* at 981. *See infra* note 183.

⁸⁴ *Id.* After deciding the Fifth Amendment issue which gave rise to the *en banc* rehearing, the court addressed the question of whether all issues presented on appeal should be decided by the *en banc* court or whether it was proper to return any remaining issues to the panel. The court held that an *en banc* court could elect to limit issues which it would consider during the course of the *en banc* consideration and, thus, could return any remaining issues to the panel for resolution. *Id.* at 983-84.

⁸⁵ *Id.* at 981 (citing *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)). For a discussion of *Turley*, see *infra* note 152.

waive his self-incrimination privilege.⁸⁶ The court then examined a series of United States Supreme Court cases that addressed the issue of what adverse actions state officials may take in response to a person's invocation of the privilege against self-incrimination. The court acknowledged that the state may not take adverse action against an individual for invoking the Fifth Amendment if the state's inquiry is not "reasonably related to the valid exercise of state authority."⁸⁷ The court asserted, however, that under the Supreme Court's decisions in *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation*⁸⁸ and *Gardner v. Broderick*,⁸⁹ situations could arise where adverse action taken by the state in response to a person's refusal to answer a relevant governmental inquiry would not be a violation of the Fifth Amendment.⁹⁰

Finding *Uniformed Sanitation Men* and *Gardner* particularly pertinent to the resolution of the appeal, the court examined the two cases in detail. Both cases involved municipal employees who were asked to answer questions regarding corruption in their agencies.⁹¹ The court asserted that in each case the Supreme Court distinguished between permissible questioning and impermissible impairment of a constitutional right—that is, taking adverse action against an individual in response to the invocation of the self-incrimination privilege—and found a violation of the Fifth Amendment. The basis for the violation in both cases was that the government agency

⁸⁶ *Asherman*, 957 F.2d at 981.

⁸⁷ *Id.* (citing *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956)). In *Slochower*, an associate professor at Brooklyn College was discharged under a provision of the City Charter of New York when he refused to testify before a congressional committee investigating "subversive influence in the American Judicial System." 350 U.S. at 551. The relevant provision of the City Charter provided for the dismissal of city employees who invoked the privilege against self-incrimination to avoid answering questions about their official conduct. The Court found that because the questions asked of the professor were unrelated to his official functions, he could not be dismissed for invoking his right to remain silent. *Id.* at 558-59. The Court did not address the question of whether the City could have fired the professor if the questions were relevant to his official conduct but his answers were potentially incriminating.

⁸⁸ 392 U.S. 280 (1968). For a discussion of this case, see *infra* note 149 and accompanying text.

⁸⁹ 392 U.S. 273 (1968). For a discussion of this case, see *infra* note 148 accompanying text.

⁹⁰ *Asherman*, 957 F.2d at 981.

⁹¹ See *infra* notes 148-50 and accompanying text.

took adverse action not for a refusal to answer relevant questions, but rather for the employees' refusal to waive their privilege against self-incrimination or because they were explicitly told their answers would be used against them in any future criminal proceeding.⁹²

Based on these cases, the *en banc* majority found that the Self-Incrimination Clause of the Fifth Amendment provides both "a limit and a grant of power with respect to government inquiries."⁹³ Specifically, the court determined that public agencies may neither require a waiver of immunity, nor ask incriminating questions under a threat to use the answers in a future criminal proceeding, as was done in *Gardner and Uniform Sanitation Men*.⁹⁴ At the same time, however, public agencies may ask questions relevant to their public authority and take adverse action against individuals whose refusal to answer questions impedes the governmental process "as long as the consequence is imposed for failure to answer a relevant inquiry and not for refusal to give up a constitutional right."⁹⁵

With regard to Asherman, the court asserted that the Commissioner had not taken action to impair Asherman's constitutional right against self-incrimination.⁹⁶ Under the court's analysis, the psychiatric exam was relevant to the Commissioner's public responsibilities and Asherman's refusal to answer questions about his crime prevented the Commissioner from carrying out a relevant inquiry into Asherman's mental state.⁹⁷ Thus, the court found that the Commissioner revoked Asherman's SHR status not for his assertion of the self-incrimination privilege, but because he refused to discuss the crime for which he was convicted and this refusal interfered with the Commissioner's public responsibilities; that is, Asherman refused to respond to a relevant governmental inquiry.⁹⁸ Consequently, the court held that the Commissioner's

⁹² *Asherman*, 957 F.2d at 982.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ The court noted that the Commissioner did not seek a court order compelling Asherman to answer the questions, require him to waive immunity or indicate to Asherman that his answers could be used against him in future criminal proceedings. *Id.* at 983.

⁹⁷ *Id.* at 982-83.

⁹⁸ *Id.* The court found Asherman's refusal to answer questions an "attempt to

actions did not violate Asherman's Fifth Amendment rights.

2. The Dissent

The dissenting opinion, authored by Judge Cardamone, warned that the result of the majority's decision threatened the basic foundation of the Fifth Amendment privilege against self-incrimination.⁹⁹ In contrast to the majority, the dissent argued that the Fifth Amendment should not yield to a relevant governmental inquiry because the Self-Incrimination Clause is a "fundamental limitation on a governmental agency's ability to conduct such an inquiry."¹⁰⁰ Further, the dissent criticized the majority's analysis, remarking that "the majority greatly disserves judicial precedents construing the language of the Amendment broadly."¹⁰¹ Finally, the dissent asserted that the majority's result ignored "the long history of cruel punishments inflicted on recalcitrant witnesses that led to [the adoption of the privilege against self-incrimination] in our Bill of Rights."¹⁰²

Specifically, the dissent argued that, unless Asherman had been offered immunity, the Fifth Amendment prohibited him from being forced to choose between answering questions that could incriminate him or being penalized for asserting his self-incrimination privilege.¹⁰³ The Commissioner's letter to Asherman explaining the revocation of his SHR status¹⁰⁴ demonstrated that the sole reason Asherman lost his SHR status was his refusal to answer questions relating to his

foreclose all questions about his crime and prevent the commissioner from pursuing a relevant inquiry." *Id.* at 983.

⁹⁹ *Id.* at 985-86. Chief Judge Oakes joined in the dissent. Judge Lumbard filed an opinion in which he dissented from the majority's opinion to the extent that it vacated the opinion of the original Second Circuit panel, but agreed with the majority that the court sitting *en banc* did not have to resolve every question presented on appeal and could return any remaining issues to the panel. *Id.*

¹⁰⁰ *Id.* at 986. The dissent asserted that this notion is fundamental to construing the Constitution. *Id.* at 988.

¹⁰¹ *Id.* at 986.

¹⁰² *Id.* For a discussion of the history of the privilege against self-incrimination, see *supra* notes 8-25 and accompanying text.

¹⁰³ *Id.* (citing *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) and *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984)). For a discussion of these cases, see *infra* notes 152 & 156-58 and accompanying text.

¹⁰⁴ See *Meachum Letter*, *supra* note 53 and accompanying text.

crime, *i.e.*, his invocation of the privilege against self-incrimination.¹⁰⁵ According to the dissent, Asherman could be required to answer a relevant inquiry, but only if his answers did not involve a risk of self-incrimination. If the relevant inquiry required answers which created a risk of self-incrimination, the state would be required to provide adequate immunity to safeguard Asherman against this risk.¹⁰⁶ Then, if Asherman refused to answer questions after a specific grant of immunity had been provided or he responded to questions and his answers indicated that he was unsuitable for the SHR program, his SHR status could be revoked.¹⁰⁷ Because Asherman was not offered immunity and his SHR status was revoked because he asserted his privilege against self incrimination, however, the dissent found that the Commissioner's actions were improper and violated the Fifth Amendment.¹⁰⁸

Turning to the cases cited by the majority, the dissent argued that the holdings of *Uniform Sanitation Men* and *Gardner* did not support the majority's interpretation of the Self-Incrimination Clause.¹⁰⁹ The dissent noted that the Supreme Court has stated that these cases "make clear that a 'state may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right.'"¹¹⁰ The dissent accepted the majority's position that existing Fifth Amendment law preserved the power of public agencies to terminate an employee for refusing to answer a relevant governmental inquiry. It found, however, that such authority exists only when those inquiries "do not involve an attempt to coerce [individuals] to relinquish their constitutional rights,' *i.e.*, answer questions which might tend to incriminate them."¹¹¹ Thus, the di-

¹⁰⁵ *Asherman*, 957 F.2d at 986.

¹⁰⁶ *Id.* at 989.

¹⁰⁷ *Id.* at 987. The dissent also noted that the Commissioner would be entitled to draw an adverse inference from Asherman's refusal to answer questions regarding his crime if his refusal occurred after a grant of immunity or if the decision to revoke Asherman's SHR status was not based solely on his refusal to answer questions. See *Baxter v. Palmigiano*, 425 U.S. 308, 317-18 (1976). For a discussion of *Baxter*, see *supra* note 74 and accompanying text.

¹⁰⁸ *Asherman*, 957 F.2d at 986-87.

¹⁰⁹ *Id.* at 987.

¹¹⁰ *Id.* (quoting *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984), in turn quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977)). For a discussion of *Murphy*, see *infra* notes 156-58 and accompanying text.

¹¹¹ *Id.* at 988 (quoting *Uniform Sanitation Men Ass'n, Inc. v. Commissioner of*

lemma that Asherman faced—answering questions or losing his SHR status—was an impermissible choice in violation of his privilege against self-incrimination.¹¹²

In addition, the dissent attacked the majority's assertion that the Commissioner did not revoke Asherman's SHR status because he invoked his self-incrimination privilege but rather because he refused to answer a relevant governmental inquiry, labeling it a "tortured attempt to disregard the result compelled by this Amendment."¹¹³ The dissent found this distinction to be meaningless given that Asherman's refusal to answer a relevant inquiry was the direct result of his invocation of his self-incrimination privilege.¹¹⁴ Further, the dissent argued that a construction of the Constitution that allows a relevant governmental inquiry to trump the privilege against self-incrimination was a reversal of what it termed the fundamental proposition that "to constitute a proper exercise of state authority a governmental inquiry must not violate the Constitution."¹¹⁵

Finally, the dissent examined the history behind the adoption of the Self-Incrimination Clause of the Fifth Amendment, reasoning that the case could "not be reviewed in proper context without considering in some detail the history leading to [its] adoption."¹¹⁶ After reviewing the events that led to the adoption of the Fifth Amendment's privilege against self-incrimination, the dissent concluded that the "majority opinion takes a step backwards in the continuing struggle to maintain this precious right."¹¹⁷

Sanitation, 392 U.S. 280, 285 (1968)). For a discussion of *Uniform Sanitation Men*, see *infra* note 149 and accompanying text.

¹¹² *Id.* at 987.

¹¹³ *Id.* at 988. The dissent found that case law clearly supported a determination that Asherman's Fifth Amendment privilege had been violated. Thus, it asserted that, to avoid the result required under existing Fifth Amendment law, the majority made the distinction between taking adverse action for failure to answer a relevant inquiry and for invoking the privilege against self-incrimination. *Id.*

¹¹⁴ *Id.* In criticizing the distinction created by the majority, the dissent argued that it was "a distinction without a difference where . . . the two are inextricably intertwined." *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 989.

¹¹⁷ *Id.* at 991.

III. ANALYSIS

Asherman held that under certain circumstances the Self-Incrimination Clause of the Fifth Amendment will not safeguard an individual's decision to refuse to answer potentially incriminating questions that are part of a relevant governmental inquiry.¹¹⁸ The court ruled that a state may take adverse administrative action against an individual who refuses to answer such questions, even if the questions might elicit incriminating answers that may later be used against that individual in a criminal proceeding. In other words, the Second Circuit, sitting *en banc*, refused to interpret the privilege against self-incrimination as a limit on the power of government agencies to make a relevant inquiry. Following *Asherman*, an individual may be required to answer questions as part of a relevant governmental inquiry or be penalized for refusing to do so as long as the government agency labels any adverse action taken against such an individual as resulting from a failure to answer a relevant inquiry and not from refusing to give up a constitutional right. The fact that an individual's refusal might be the direct result of his assertion of the self-incrimination privilege is now insufficient to invoke the protection of the Fifth Amendment and shield an individual from adverse administrative action.

A. *A Critique of the Asherman Decision*

The *en banc* majority based its analysis on the view that, under existing Fifth Amendment law, government agencies have the authority to make inquiries relevant to their public responsibilities, and to take adverse action against anyone whose refusal to answer questions interferes with the discharge of those responsibilities.¹¹⁹ The majority suggested that the only limit on the power of government agencies to conduct relevant inquiries is a prohibition against impairing the privilege against self-incrimination by requiring a waiver of immunity, asking questions while threatening to use the answers in later criminal proceedings or compelling testimony

¹¹⁸ See *supra* notes 85-98 and accompanying text.

¹¹⁹ *Asherman*, 957 F.2d at 982.

by court order.¹²⁰ From this premise, the majority concluded that the Self-Incrimination Clause of the Fifth Amendment does not bar adverse administrative action for failure to answer a relevant governmental inquiry as long as any adverse action is imposed for the failure to answer the inquiry and not for the refusal to give up a constitutional right.¹²¹

The majority's analysis, however, is fundamentally flawed. First, the majority's decision is a departure from the traditionally broad interpretation of the Fifth Amendment.¹²² The majority failed to address directly the fundamental question which, if answered in the affirmative, would give rise to a violation of the privilege against self-incrimination: whether Asherman was subject to compulsion within the meaning of the Fifth Amendment. Indeed, the circumstances surrounding the revocation of Asherman's SHR status compelled the conclusion that he was subject to compulsion in violation of his privilege against self-incrimination.

Second, case law does not support the majority's conclusion that the state may take adverse action against a person for failure to answer a relevant inquiry under circumstances where testimony may be incriminating without first providing immunity.¹²³ Third, the distinction the majority draws between taking adverse administrative action for failure to answer a relevant governmental inquiry and for invoking a constitutional right in order to support its holding is based on circular reasoning. Because the two situations are so interrelated, there exists no principled basis upon which to make such a distinction. Under circumstances where the risk of self-incrimination exists and immunity has not been offered, the failure to answer a relevant inquiry will always be the direct result of invoking the privilege.¹²⁴ The net result of creating such a distinction is effectively to eviscerate the protection of the Fifth Amendment in situations involving relevant governmental inquiries. Finally, the majority failed to engage in an examination of whether its decision undermined the policy

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See *infra* notes 125-59 and accompanying text.

¹²³ See *infra* notes 160-66 and accompanying text.

¹²⁴ *Asherman v. Meachum*, 957 F.2d 978, 988 (2d Cir. 1992) (en banc) (Cardamone, J., dissenting); see *infra* notes 167-70 and accompanying text.

objectives of the privilege against self-incrimination.

1. A Departure from the Traditionally Broad Interpretation of the Self-Incrimination Clause of the Fifth Amendment

Although the language of the Fifth Amendment's Self-Incrimination Clause provides only that a person cannot be compelled to be a witness against himself in any criminal case,¹²⁵ the Supreme Court has interpreted the language of the privilege broadly.¹²⁶ The privilege protects individuals from being compelled to give any evidence which is "personal."¹²⁷ In addition, its protection encompasses all "testimonial" evidence; *i.e.*, any communication that "explicitly or implicitly or impliedly relate[s] a factual assertion or disclose[s] information."¹²⁸ The privilege also applies to any evidence that

¹²⁵ See *supra* note 1 and accompanying text.

¹²⁶ See *In re Gault*, 387 U.S. 1, 50 (1967) (The privilege against self-incrimination "is to be broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom"); *Ullman v. United States*, 350 U.S. 422, 426 (1956) ("[The privilege against self-incrimination] must not be interpreted in a hostile or niggardly spirit."). Some commentators, however, have criticized the Court's broad interpretation of the privilege against self-incrimination. See *supra* note 27.

¹²⁷ Requiring that a disclosure be personal to be protected under the Self-Incrimination Clause is consistent with the view that it is the defendant's "private inner sanctum of individual feeling and thought" which the privilege is meant to protect. *Couch v. United States*, 409 U.S. 322, 327 (1973). Thus, in *Couch* the privilege against self-incrimination did not protect tax records in the hands of the petitioner's accountant. *Id.*; see *supra* note 35 and accompanying text; see also *United States v. Nobles*, 422 U.S. 225, 233-34 (1975) (holding that trial judge's order that the defense turn over a report by a defense investigator did not violate the defendant's Fifth Amendment rights because the information in the report came from persons other than the defendant).

¹²⁸ *Doe v. United States*, 487 U.S. 201, 210 (1988). The Fifth Amendment does not render all incriminating evidence inadmissible, but only that which is testimonial in nature. *Fisher v. United States*, 425 U.S. 391, 425 (1976). Thus, the privilege against self-incrimination would not prevent the state from compelling the disclosure of physical or other evidence that does not require the communication of a fact or belief. See, *e.g.*, *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (holding that the admission of portions of a video tape depicting a drunk driving suspect's compelled responses to police questions that were incriminating because of the slurred nature of the suspect's speech was not a violation of the Fifth Amendment because slurred speech is a physical characteristic and, therefore, not testimonial); *United States v. Dionisio*, 410 U.S. 1, 7 (1973) (holding that a suspect could be compelled to provide voice recording where it was not used for its "testimonial or communicative content"); *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) (holding that

is potentially incriminating. The Court in *Hoffman v. United States*¹²⁹ interpreted this requirement broadly, finding that a response need furnish only "a link in the chain of evidence needed to prosecute the claimant" for it to be deemed incriminating for purposes of invoking the privilege against self-incrimination.¹³⁰

In addition, the privilege not only prohibits the government from compelling individuals to testify at their own trial, but also "privileges [them] not to answer official questions put to [them] in any other proceeding, civil or criminal, formal or informal where the answer might incriminate [them] in future criminal proceedings."¹³¹ Further, its protection does not cease upon conviction of a crime.¹³² Only where the state supplies sufficient immunity can it compel individuals to give incriminating testimony and then penalize them if they refuse to testify.¹³³

Under these criteria, Asherman could not have been compelled to answer questions that might tend to incriminate him. Clearly any of Asherman's responses during the psychiatric exam would have been self-referential and therefore "personal."¹³⁴ His answers also would have been testimonial in na-

"[a] mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the] protection [of the Fifth Amendment]"; *United States v. Wade*, 388 U.S. 218, 222-23 (1967) (holding that required participation in a police line-up is not testimonial and subject to suppression on Fifth Amendment grounds because there is no compulsion to disclose information); *Schmerber v. California*, 384 U.S. 757, 765 (1966) (holding that blood sample was admissible because "[it] was neither petitioner's testimony nor evidence relating to some communicative act or writing by petitioner").

¹²⁹ 341 U.S. 479 (1951).

¹³⁰ *Id.* at 486.

¹³¹ *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). In the criminal context, the accused may invoke the privilege against self-incrimination from the time he or she is taken into custody through the trial process. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (accused retains privilege against self-incrimination during "custodial interrogation"); *Griffin v. California*, 380 U.S. 609, 615 (1965) (accused may refuse to testify and the prosecution cannot comment on a defendant's silence during trial).

¹³² *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984). For a discussion of this case, see *infra* notes 156-58 and accompanying text.

¹³³ *Turley*, 414 U.S. at 84-85. For a discussion of the scope of immunity required to supplant the privilege against self-incrimination, see *infra* note 187.

¹³⁴ See *supra* note 127 and accompanying text.

ture.¹³⁵ In addition, because Asherman was not offered immunity and had a pending federal habeas corpus petition challenging his conviction at the time of the psychiatric examination, any answers relating to the crime for which he had been convicted created a risk of self-incrimination.¹³⁶ The possibility existed that Asherman's testimony could be used against him to prevent the granting of habeas corpus relief or to secure a new conviction if a writ of habeas corpus were granted and a new trial ordered.¹³⁷ Finally, given that the privilege does not turn on the type of proceeding involved, Asherman had the right to invoke his privilege against self-incrimination in the context of a psychiatric examination.¹³⁸

Because the Fifth Amendment would have protected Asherman from being compelled to give testimony that was potentially incriminating, the question the majority should have focused on, but did not, was whether Asherman was subject to compulsion within the meaning of the Fifth Amendment.¹³⁹ Where the possibility exists that testimony given in

¹³⁵ See *supra* note 128 and accompanying text.

¹³⁶ See *supra* notes 129-30 and accompanying text. The *en banc* majority, however, did not decide this issue and instead assumed that Asherman had reasonably apprehended a risk of self-incrimination sufficient to warrant his assertion of the privilege. *Asherman v. Meachum*, 957 F.2d 978, 981 (2d Cir. 1992) (*en banc*).

¹³⁷ *Asherman v. Meachum*, 932 F.2d 137, 146 (2d Cir. 1991); *Asherman*, 957 F.2d at 986 (Cardamone, J., dissenting). As Mr. Asherman's counsel noted:

The interrogation was to be conducted under the stressful conditions where disapproval of demeanor or statement could result in immediate imprisonment. Discrepancies between statements now and those reported by police twelve years [earlier] could be used against him. Moreover, any admission that could be construed as evidence of a shortcoming or problem prior to the offense pending habeas corpus review might be used against Mr. Asherman as evidence of extreme emotional disturbance at a new trial (citation omitted). Unlike a court proceeding where a court reporter is present, Mr. Asherman's statements would not be transcribed. He would have no protection against inaccurate or incomplete versions of his statements.

Cross Appeal Brief of Petitioner-Appellee at 37, *Asherman*, 932 F.2d at 137 (No. 90-2530).

¹³⁸ *Asherman*, 957 F.2d at 986; see *supra* note 131 and accompanying text; see also *Estelle v. Smith*, 451 U.S. 454 (1981) (where defendant was required to submit to a psychiatric examination to determine his competency to stand trial, use of his statements to the psychiatrist at a later sentencing hearing violated the Fifth Amendment).

¹³⁹ The majority did not address the compulsion issue directly. Instead its analysis centered on permissible questioning by government agencies and impermissible impairment of the privilege against self-incrimination. Implicit in this distinction,

one proceeding may be used to prejudice a person in a subsequent criminal proceeding, and choosing to remain silent would result in some type of direct or indirect sanction, the Supreme Court has found compulsion in three situations: (1) when a person testifies at an initial proceeding as a result of impermissible pressure by the state;¹⁴⁰ (2) when a person asserts the privilege against self-incrimination and refuses to testify because the testimony could be used adversely in a later criminal proceeding and, as a result, suffers a penalty external to the trial process;¹⁴¹ and (3) when a state practice indirectly

however, is that compulsion would be present only in those situations where the court concluded that an action by a government agency impermissibly impaired the privilege against self-incrimination. The court suggested that only where a court compelled incriminating answers by court order or where a government agency required a waiver of immunity or specifically threatened to use answers in a criminal proceeding would the impairment of the privilege be sufficient to give rise to a violation of the Fifth Amendment. Although the Supreme Court has found compulsion in these situations, it has never specifically limited violations of the Fifth Amendment to these situations. As the dissent correctly argued, "It cannot be seriously contended that [these] actions . . . are necessary for the finding of a Fifth Amendment violation." *Asherman*, 957 F.2d at 987. In support of this conclusion the dissent cited *Minnesota v. Murphy*, 465 U.S. 420 (1984), for the proposition that all that is required to find a violation of the Fifth Amendment is that the government agency "sought to induce [an individual] to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.'" *Murphy*, 465 U.S. at 434 (citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977)).

¹⁴⁰ *Garrity v. New Jersey*, 385 U.S. 493 (1967), illustrates this type of situation. In *Garrity* police officers testified at an investigatory hearing after being told that refusal to answer questions would result in their discharge and loss of pension rights, and that any incriminating statement made at the hearing would be used against them in any subsequent criminal prosecution. The Court held that the statements were coerced and not voluntary and, therefore, improperly admitted into evidence at a subsequent trial. The *Garrity* court emphasized that the petitioner's "option to lose [his] means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent." *Id.* at 497. Consequently, had the petitioner in *Garrity* remained silent and then brought an action after facing adverse consequence for invoking his privilege against self-incrimination, the Court would likely have reached the same result. The element that gave rise to the constitutional impairment in *Garrity* was that the police officers had to face the choice between incriminating themselves or suffering a penalty for remaining silent, and not which choice the police officers actually made. Thus, *Garrity* supports the broader notion that the Self-Incrimination Clause of the Fifth Amendment prohibits the state from putting individuals in the cruel dilemma of becoming a witnesses against themselves or suffering a penalty for remaining silent.

¹⁴¹ See *infra* notes 143-159 and accompanying text. One way to view the penalty situation within the framework of a compulsion analysis is to view a "penalty"

penalizes a defendant for exercising his right to remain silent through the normal trial process, and the result is an impermissible burden on the exercise of the Fifth Amendment.¹⁴²

Asherman falls into the second category. Steven Asherman invoked his right to refuse to answer questions which might tend to incriminate him. Upon receiving notice of this refusal, the Commissioner canceled Asherman's scheduled psychiatric examination. When Asherman arrived at the appointed time, he was reincarcerated. His refusal to answer questions led to his initial reincarceration and formed the basis for charges that he had violated the conditions of the SHR program. Later the classification committee viewed his silence as a sufficient basis to remove him officially from the SHR program. When the Commissioner wrote to Asherman to explain his removal from the SHR program, he remarked that it was Asherman's "refusal to fully participate" in the psychiatric evaluation that

for invoking the Fifth Amendment as "the kind of illicit pressure on a defendant to become a witness against himself which, if it is effective would 'compel' him to take the witness stand over his objection." Peter Weston, *Order of Proof: An Accused's Right to Control the Time and Sequence of Evidence in His Defense*, 66 CAL. L. REV. 935, 942 (1978).

¹⁴² The Supreme Court has distinguished between direct and indirect penalties. Defendants may face indirect penalties involving a choice that impairs their Fifth Amendment rights during the trial process without the impairment rising to the level of a violation of the Fifth Amendment. In cases where a state practice indirectly penalizes a defendant through the trial process, a violation of the Fifth Amendment is not automatic. The Court usually balances the state's interest in the practice and the threat to the policies underlying the privilege against self-incrimination. *See, e.g., Jenkins v. Anderson*, 447 U.S. 231 (1980) (upholding the prosecution's impeachment of a defendant with his pre-arrest silence because the danger of discouraging the exercise of the right to remain silent was outweighed by the state's interest in justice and truth); *Brooks v. Tennessee*, 406 U.S. 605 (1972) (holding state statute which required a defendant to choose between testifying before introducing any other evidence on his behalf or not testifying at all impermissibly burdened the exercise of the Fifth Amendment); *McGautha v. California*, 402 U.S. 183 (1971) (holding that procedure requiring defendants in capital cases to waive their right to address the court on the issue of punishment in order to exercise the privilege against self-incrimination at trial did not place an impermissible burden on the privilege because the pressure the defendants faced was analogous to the pressure defendants face when choosing whether or not to testify at trial). *But see Simmons v. United States*, 390 U.S. 377 (1968) (where the Court did not employ a balancing test and found a state practice, which forced a defendant to choose between forfeiting his right to testify in support of an illegal search and seizure claim and waiving his privilege against self-incrimination at trial, unconstitutional). For a detailed discussion of the Court's balancing process in these types of cases, see Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1569, 1592-1602 (1986).

precluded him from obtaining the information necessary to determine Asherman's continued suitability for the SHR program, and that the absence of this information was sufficient to conclude that he was no longer suitable for the program.¹⁴³ Thus, ultimately, it was Asherman's refusal to answer questions which might tend to incriminate him that led to his removal from the SHR program. In other words, Asherman was directly penalized for asserting his privilege against self-incrimination.

The Supreme Court addressed a similar penalty situation in *Spevack v. Klein*.¹⁴⁴ In *Spevack* an attorney was disbarred for invoking his privilege against self-incrimination and refusing to produce financial documents during a disciplinary proceeding. The Court held that the disbarment violated the attorney's Fifth Amendment rights.¹⁴⁵ Specifically, the Court found that "the Fifth Amendment guarantees . . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."¹⁴⁶ In elaborating on what constitutes an impermissible penalty, the Court broadly defined one as the "[i]mposition of any sanction which makes the assertion of the Fifth Amendment 'costly.'"¹⁴⁷ Like the attorney in *Spevack*, Asherman's assertion of the privilege against self-incrimination was very "costly." He lost his SHR status and was reincarcerated.

The Supreme Court further developed its analysis of penalty situations in *Gardner v. Broderick*¹⁴⁸ and *Uniform Sani-*

¹⁴³ For a discussion of the *Asherman* facts, see *supra* notes 36-67. The Commissioner's assertion that it was a lack of information that compelled his conclusion that Asherman was unsuitable for the SHR program does not alter the fact that the reason the Commissioner did not obtain the information in the first place was because Asherman invoked his right to remain silent. The *en banc* majority, however, failed to address this argument.

¹⁴⁴ 385 U.S. 511 (1967).

¹⁴⁵ *Id.* at 515-16.

¹⁴⁶ *Id.* at 514 (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)). Justice Douglas, writing for the plurality, found that the threat of disbarment, damage to professional reputation and loss of income were "powerful forms of compulsion." *Id.* at 516. Justice Harlan strongly dissented, arguing that the Court should balance the risk to the privilege against self-incrimination with the importance of the state interest that the procedure was intended to protect. *Id.* at 519-20.

¹⁴⁷ *Id.* at 515 (quoting *Griffin v. California*, 380 U.S. 609, 614 (1965)).

¹⁴⁸ 392 U.S. 273 (1968). In *Gardner*, a New York City patrolman refused to sign

*tation Men Association, Inc. v. Commissioner of Sanitation.*¹⁴⁹ In each case municipal employees summoned to be witnesses at investigatory proceedings were fired and, thus, subjected to substantial economic penalties after invoking their right to remain silent. And in each case, the Court held that dismissal was an impermissible penalty for asserting the privilege against self-incrimination.¹⁵⁰ Importantly, the Court inferred the compulsion necessary to find a violation of the Fifth Amendment from the imposition or threat of a penalty for exercising the right to remain silent.

Although *Gardner* and *Uniform Sanitation Men* do not involve a conditional liberty program like SHR, they do involve the authority of government agencies to make relevant inquiries under the Fifth Amendment. Like the municipal employees in *Gardner* and *Uniform Sanitation Men*, Asherman was summoned to answer questions as part of a relevant governmental inquiry and subjected to a substantial penalty for invoking his right to remain silent. If the Court found the compulsion necessary for a violation of the Fifth Amendment in those cases, consistency and logic required the *en banc* majority to find the element of compulsion in Asherman's case as the penalty involved more than an economic sanction. Indeed, where a person faces the loss of liberty for remaining silent, courts should be even more sensitive to possible violations of the self-incrimination privilege.¹⁵¹

a waiver of immunity before a grand jury investigating corruption. After an administrative hearing, he was fired solely because he refused to waive his self-incrimination privilege.

¹⁴⁹ 392 U.S. 280 (1968). In *Uniform Sanitation Men*, the New York City Commissioner of Investigation summoned 15 sanitation workers to appear and answer questions as part of an investigation into corruption. Each worker was told that if he invoked his privilege against self-incrimination, he would be fired. Twelve men refused to give testimony and were fired. The other three testified but refused to sign waivers of their privilege against self-incrimination; they, too, were fired.

¹⁵⁰ Both cases involved a statute which required the dismissal of public employees who refused to answer questions about their official conduct on self-incrimination grounds or who refused to waive immunity from future prosecution. See *supra* notes 148-49 and accompanying text.

¹⁵¹ See *Uniform Sanitation Men Assoc., Inc. v. Commissioner of Sanitation*, 426 F.2d 619, 626 (2d Cir. 1970) (noting that "there would be sufficient reasons to support a less stringent requirement with respect to immunity where the issue is not whether a witness should be put in jail until he answers but whether a public employee should be dismissed for refusing to give an account of his official conduct"). In *Fowler v. Vincent*, 366 F. Supp. 1224, 1228 (S.D.N.Y. 1973), the court

Two later cases, *Lefkowitz v. Turley*¹⁵² and *Lefkowitz v. Cunningham*,¹⁵³ also compel the conclusion that Asherman's Fifth Amendment rights were violated. In both cases the Court found a violation of the privilege against self-incrimination even though the penalties were of a lesser economic magnitude than those imposed in *Gardner* and *Uniform Sanitation Men*.¹⁵⁴ The Court did not find the greater magnitude of the economic consequences in the earlier cases to be a distinguishing factor militating against finding a violation of the Fifth Amendment. Instead, in holding that it was impermissible to impose direct penalties for asserting the privilege against self-incrimination, the Court adopted a broad view of the privilege against self-incrimination, stating that "the touchstone of the Fifth Amendment is compulsion and direct economic sanctions and imprisonment [for refusal to testify after a court order] are not the only penalties capable of forcing the self-incrimination which the [Fifth] Amendment forbids."¹⁵⁵ This is significant because it suggests that revocation of one's status as a participant in a conditional liberty program such as SHR would be a penalty sufficient to constitute a violation of the privilege against self-incrimination.

Indeed, in *Minnesota v. Murphy*,¹⁵⁶ a case which dealt with the privilege against self-incrimination in a conditional liberty setting, the Court suggested that it would be an imper-

interpreted the language in *Uniform Sanitation Men* to suggest that "the loss of liberty presents even stronger compulsion than loss of employment."

¹⁵² 414 U.S. 70 (1973). In *Turley*, licensed architects challenged a New York statute that required state contracts to provide that if a contractor refused to waive immunity or answer questions when called to testify concerning his state contracts, any existing contracts with the state could be cancelled and future contracts prohibited for five years. The Court held that the statute was unconstitutional, arguing that the five year penalty was "a substantial economic sanction." *Id.* at 82.

¹⁵³ 431 U.S. 801 (1977). In *Cunningham*, under a New York statute, an attorney was removed from his position as an unpaid political party officer and barred from holding any party or public office for five years because he refused to waive his privilege against self-incrimination before a special grand jury. The Court emphasized that such positions carry "prestige and political influence" and depriving the attorney of his office would "impinge on his right to participate in private political associations." *Id.* at 808-09.

¹⁵⁴ The penalties in those cases were the loss of government employment and, thus, a person's means of support. See *supra* notes 148-49 and accompanying text.

¹⁵⁵ *Cunningham*, 431 U.S. at 806.

¹⁵⁶ 465 U.S. 420 (1984).

missible penalty to revoke a convicted defendant's probation because he invoked the privilege. The Court asserted that "[t]here is . . . 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 the revocation of probation it would have created a classic penalty situation."¹⁵⁷ In *Murphy*, however, the Court held that the state of Minnesota had not violated the Fifth Amendment because "there [was] no reasonable basis for concluding that Minnesota attempted to attach an impermissible penalty to the exercise of the privilege against self-incrimination."¹⁵⁸

Given the Supreme Court's broad view of the types of penalties that give rise to a violation of the Fifth Amendment, the *Asherman* majority's interpretation of the Fifth Amendment is unsupportable. Like the defendants in *Spevack*, *Gardner*, *Uniform Sanitation Men*, *Turley* and *Cunningham*, *Asherman* asserted the privilege against self-incrimination and was subjected to a substantial penalty—the loss of his SHR status.¹⁵⁹ Thus, *Asherman* faced almost the same choice as had the defendants in the Supreme Court's penalty cases: he could become a witness against himself or suffer a penalty for remaining silent. In addition, unlike the probationer in *Murphy*, *Asherman* clearly faced the choice of waiving his privilege against self-incrimination or losing his SHR status when he arrived at the scheduled psychiatric examination, and found that his refusal to answer questions meant his reincarceration. Given the direct sanction imposed on *Asherman* for invoking his right to remain silent, the element of compulsion necessary

¹⁵⁷ *Id.* at 435.

¹⁵⁸ *Id.* at 437. Specifically, the Court found that a probation condition that required a probationer to answer truthfully questions asked by his probation officer or risk the possible revocation of his probation did not imply that probation would be revoked if the probationer invoked his privilege against self-incrimination. *Id.* at 436. Consequently, the probationer did not have to choose between making incriminating statements and jeopardizing his probation status by remaining silent. *Id.* Accordingly, the court refused to suppress on Fifth Amendment grounds incriminatory statements made by the probationer to his probation officer. *Id.* at 440.

¹⁵⁹ Arguably, the penalty imposed on *Asherman* was not as direct as in *Uniform Sanitation Men*, *Gardner*, *Turley* and *Cunningham*, in which the adverse action taken for invoking the privilege against self-incrimination was statutorily mandated. Nevertheless, he was directly penalized for invoking his right to remain silent and the end result was the same. *Asherman* was penalized for invoking his right to remain silent.

to find a violation of Asherman's Fifth Amendment rights was present.

2. A Misinterpretation of Precedent

The *en banc* majority avoided the conclusion that Asherman's Fifth Amendment rights were violated by misinterpreting relevant Fifth Amendment precedent.¹⁶⁰ The majority asserted that, under the Fifth Amendment, government agencies have the authority to take adverse administrative action against a person who fails to answer a relevant inquiry as long as the sanction is imposed for failure to answer a relevant inquiry and not for refusal to give up a constitutional right. This view ignores the result compelled under the previously discussed penalty analysis. It also reflects a fundamental misunderstanding of the power conferred on government authorities to make inquiries and, thereby, undermines the protection granted by the Self-Incrimination Clause of the Fifth Amendment.¹⁶¹

Although the Court in *Gardner* and *Uniform Sanitation Men* specifically preserved the right of government agencies to take adverse action for refusal to answer a relevant inquiry, it did so within constitutional limits.¹⁶² As the Court stated in

¹⁶⁰ The dissent also criticized the *en banc* majority's interpretation of relevant case law. *Asherman v. Meachum*, 957 F.2d 978, 986-91 (2d Cir. 1992) (*en banc*); see *supra* notes 109-11 and accompanying text.

¹⁶¹ See *supra* notes 125-58 and accompanying text.

¹⁶² In *Gardner* the Court stated:

If appellant, a policeman, had refused to answer questions specifically, directly and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, the privilege against self incrimination would not have been a bar to his dismissal.

392 U.S. at 278 (footnote and citation omitted). This statement supports an interpretation of the Self-Incrimination Clause that permits adverse action against individuals who invoke the right to remain silent only when they have been given the benefit of immunity and still refuse to respond to a relevant governmental inquiry.

Nevertheless even if a court or government agency is not required to offer immunity in return for compelled testimony when answers are "directly and narrowly" related to a relevant governmental inquiry, the Commissioner's actions were still improper. Questioning Asherman regarding a 1978 crime in 1988 was not necessary to conduct Asherman's mental examination. Indeed, when Asherman

Uniform Sanitation Men:

Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination. At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, *after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.*¹⁶³

Contrary to the majority's position, this statement does not suggest that people can be forced to choose between testifying without immunity and losing their jobs.

It would be contrary to the basic tenets of the privilege against self-incrimination if people could be subject to direct sanctions for refusing to answer questions that could incriminate them. Indeed, the *Turley* Court asserted that only when employees have been given adequate immunity may the state "plainly insist that [they] answer questions under oath about the performance of their job or suffer the loss of employment."¹⁶⁴ This suggests that adverse action for failure to answer a relevant inquiry would be proper only when there was no threat of self-incrimination or when immunity had been granted. This view is supported by the Supreme Court's interpretation of its holdings in *Gardner* and *Uniform Sanitation Men:*

[T]he State must recognize what our cases hold: that answers elicited upon the threat of the loss of employment are compelled and inadmissible in evidence. Hence, if answers are to be required in such circumstances States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity.¹⁶⁵

finally submitted to a mental examination to determine his suitability for the SHR program in November of 1988, a psychiatrist conducted the examination without questioning him concerning the 1978 offense. *See supra* note 60. If questioning Asherman concerning the offense was not necessary to evaluate his mental state and, thus, his suitability for the SHR program, the case could have been decided in favor of Asherman on that ground alone. The Supreme Court has held that a government agency may not penalize individuals for invoking their privilege against self-incrimination in response to questions that are not reasonably related to the valid exercise of state authority. *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956). For a discussion of this case, see *supra* note 87.

¹⁶³ 392 U.S. at 284-85 (emphasis added).

¹⁶⁴ 414 U.S. at 84-85.

¹⁶⁵ *Id.* at 85.

Thus, the majority's assertion that an individual who has not been offered immunity nevertheless may be penalized for invoking his constitutional right to remain silent is not supported by case law.¹⁶⁶

3. A Faulty Distinction

In addition to misinterpreting the relevant case law, the *en banc* majority's analysis is flawed in still another way. The dissent correctly noted that the distinction the majority drew between taking adverse action for failure to answer a relevant inquiry and invoking a constitutional right is a "distinction without a difference."¹⁶⁷ The import of this analytical flaw cannot be overstated. Because Asherman's refusal to answer a relevant governmental inquiry was the direct result of invoking his right to remain silent, there is no principled basis upon which to determine whether Asherman's SHR status was revoked for his failure to answer a relevant governmental inquiry or for his invocation of the privilege against self-incrimination. This is true in every situation where a risk of self-incrimination exists and immunity has not been offered.

The majority implicitly argues that there is a distinction between taking adverse action for failure to answer a relevant inquiry and for invoking a constitutional right by asserting that only where the government compels testimony by court order, requires a waiver of immunity or insists that answers may be used in later criminal proceedings, would the privilege against self-incrimination be violated.¹⁶⁸ As the dissent correctly pointed out, however, those actions are not a prerequisite for finding a violation of the Fifth Amendment.¹⁶⁹ The Fifth Amendment bars a government agency from seeking to compel testimony under a threat of any type of sanction which

¹⁶⁶ Indeed, in the context of prison disciplinary hearings, the Supreme Court held that "if inmates are compelled in those proceedings to furnish testimonial evidence that might incriminate them in later proceedings, they must be offered 'whatever immunity is required to supplant the privilege' and may not be required to 'waive such immunity.'" *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 85 (1973)).

¹⁶⁷ *Asherman*, 957 F.2d at 988 (Cardamone, J., dissenting).

¹⁶⁸ *Id.* at 982.

¹⁶⁹ *Id.* at 987 (Cardamone, J., dissenting).

could force a person to give incriminating testimony.¹⁷⁰

Further complicating matters and rendering the *en banc* majority's distinction even more untenable is the fact that Asherman's refusal was limited to questions that related to the 1978 offense for which he was eventually convicted. He did not refuse to answer all questions, but only those which could elicit potentially incriminating responses.¹⁷¹ Thus, Asherman did not completely refuse to answer a relevant governmental inquiry, but only those questions that would create a risk of self-incrimination.¹⁷² In any event, however, it is impossible to separate Asherman's refusal to respond to a relevant governmental inquiry from his invocation of his privilege against self-incrimination.

4. The Policy Objectives Undermined

The policy objectives that underlie the privilege against self-incrimination are compromised by the majority's view that the Fifth Amendment yields in the face of a relevant governmental inquiry.¹⁷³ Since the *en banc* majority did not specifically limit its discussion to conditional liberty programs and public safety issues, arguably *Asherman* could support adverse action against an individual in any situation involving the failure to answer a relevant inquiry by a government agency. Consequently, in the future more individuals could face the functional equivalent of the "cruel trilemma," i.e., incriminate oneself, lie or suffer a penalty for remaining silent.¹⁷⁴

In addition, requiring individuals to choose between participating in establishing their own guilt and being penalized for remaining silent is inconsistent with the fundamental notion that even guilty individuals deserve not to be treated in a way

¹⁷⁰ *Id.* at 987 (citations omitted).

¹⁷¹ *See id.* at 988.

¹⁷² In addition, it appears that questioning Asherman regarding the 1978 offense was not relevant to an inquiry into Asherman's suitability for the SHR program. *See supra* notes 60 and 162.

¹⁷³ The *en banc* majority did not adequately address policy issues in its decision, and the dissent gave only cursory treatment to how the decision undermines the policies underlying the self-incrimination privilege. For a discussion of the policy objectives of the privilege against self-incrimination, see *supra* notes 25-35 and accompanying text. *See also supra* note 27.

¹⁷⁴ *See supra* note 28 and accompanying text.

which violates their human dignity.¹⁷⁵ Requiring that a person give incriminating evidence also would not be in keeping with our society's preference for an accusatorial rather than an inquisitorial system of justice.¹⁷⁶ Wherever possible the state should have to rely on sources other than the accused to develop its case. This helps to limit the potential for the state to abuse its power in extracting information helpful to its case.¹⁷⁷ Finally, the Fifth Amendment was intended to create a fair balance between individuals and the government. The majority's view would afford the government an unfair advantage in gathering evidence in criminal prosecutions.¹⁷⁸ Thus, *Asherman* is a case that lies at the heart of the privilege against self-incrimination. By failing to examine its underlying policies, the *Asherman* court ignored an important part of any Fifth Amendment analysis.

B. *Ramifications of Asherman*

The *en banc* majority's decision went beyond a discussion of the conditional liberty programs and public safety issues that would have been necessary to decide the case. The majority's analysis focused on the power of government agencies to conduct inquiries "where the answers might tend to incriminate but are also relevant to the proper exercise of state authority."¹⁷⁹ Thus, *Asherman* could have consequences far beyond correctional systems.

The majority found that the Supreme Court preserved the authority of public agencies to take adverse action against an individual for refusing to answer a relevant government inquiry even if the answers might be incriminating.¹⁸⁰ According to the majority, the only limit to this power is that a government agency cannot take adverse action for invoking the privilege against self-incrimination. On its face this limit would seem to provide broad Fifth Amendment protection. The *en banc* majority, however, by creating a constitutionally signifi-

¹⁷⁵ See *supra* note 29 and accompanying text.

¹⁷⁶ See *supra* note 30 and accompanying text.

¹⁷⁷ See *supra* notes 33-34 and accompanying text.

¹⁷⁸ See *supra* notes 31-32 and accompanying text.

¹⁷⁹ *Asherman v. Meachum*, 957 F.2d 978, 980-81 (2d Cir. 1992) (*en banc*).

¹⁸⁰ *Id.* at 982-83.

cant distinction between taking adverse action for refusal to answer a relevant inquiry and taking adverse action for invoking a constitutional right, substantially limited the protection of the self-incrimination privilege.

After *Asherman*, any government agency making an inquiry that is relevant to its public responsibilities could argue that it took adverse action for the refusal to answer a relevant inquiry and not for invoking the self-incrimination privilege. All local, state and federal government agencies that regularly engage in fact finding investigations which raise the specter of future criminal charges could use *Asherman* as a shield for adverse administrative action against those individuals who refuse to incriminate themselves. Unless the penalty that a person suffered was as direct and automatic as those in *Gardner*, *Uniform Sanitation Men*, *Turley* and *Cunningham*, it would be difficult to establish a violation of the Fifth Amendment—even if a person's refusal to answer a relevant government inquiry was the direct result of his or her invocation of the Fifth Amendment.

This is not the only impact that the *Asherman* decision will likely have. Incriminating testimony given during an inquiry which is also relevant to the legitimate exercise of government power will now be admissible in a subsequent criminal proceeding unless a person can establish that the government compelled the testimony.¹⁸¹ Proving compulsion after *Asherman*, however, will be quite difficult. The court seemed to suggest that only where a government agency seeks a court order compelling answers, requires a waiver of the privilege or insists that answers can be used in a future criminal proceeding will the impairment of the Fifth Amendment be sufficient to find a violation.¹⁸² Such flagrant violations of the Fifth Amendment, however, will rarely be the case. This is significant because individuals will not be able to suppress testimony successfully if they would not have been protected by the Fifth Amendment had they chosen to remain silent. Also, once a person testifies, there is a risk that the state will argue that the person waived the self-incrimination privilege. If the state can prove that the statements were voluntary, the testimony

¹⁸¹ See *Garrity v. New Jersey*, 385 U.S. 493 (1967); *supra* note 140.

¹⁸² *Asherman*, 957 F.2d at 983.

would certainly be admissible. Thus, not only does the *Asherman* decision limit the scope of Fifth Amendment protection to any situation involving a relevant inquiry by a government agency, but it does so quite significantly.¹⁸³

C. *A Better Approach*

The dissent's broad interpretation of the Self-Incrimination Clause of the Fifth Amendment provides a better framework for viewing possible Fifth Amendment violations. Basic to the notion that individuals should not be compelled to be witnesses against themselves is that individuals should not face a penalty external to the trial process for invoking their privilege against self-incrimination.¹⁸⁴ The dissent's view would prohibit any direct sanction for invoking the right to remain silent.

Under the dissent's interpretation of relevant case law, a government agency could exact a penalty on someone for refusing to answer a relevant inquiry in a situation where no risk of self-incrimination existed. Adverse action could also be taken when an individual who exchanges his privilege for a grant of adequate immunity refuses to answer a relevant governmental inquiry. However, where a person's refusal to answer questions is based on the legitimate invocation of the privilege against self-incrimination and the government does not confer proper immunity, adverse action would be impermissible.¹⁸⁵ This interpretation of the Fifth Amendment would not foreclose government agencies from making relevant inquiries.¹⁸⁶ If the risk of self-incrimination bars individuals from providing important information, the state can remove the impediment by a grant of immunity.¹⁸⁷

¹⁸³ Another particularly disturbing aspect of *Asherman* is the *en banc* majority's apparent eagerness to render a decision hostile to the Fifth Amendment. The *en banc* majority issued its decision after *Asherman* had finished serving his sentence and, thus, the Fifth Amendment issue was arguably moot. See *supra* note 82. In addition, in order to render its decision the *en banc* majority assumed without deciding several significant issues. See *supra* note 83.

¹⁸⁴ See *supra* notes 140-59 and accompanying text.

¹⁸⁵ *Asherman*, 957 F.2d at 936-37 (Cardamone, J., dissenting).

¹⁸⁶ See *supra* note 80.

¹⁸⁷ The Supreme Court has held that "use immunity" is sufficient to supplant the privilege against self-incrimination. "Use immunity" prevents the admission in

Although the result reached by the dissent is preferable to that of the majority because it minimizes infringement on Fifth Amendment rights, it does raise several arguments which must be addressed in order to defend successfully a broad view of the Fifth Amendment in cases involving relevant governmental inquiries. With regard to cases involving conditional liberty programs such as SHR, a rule that the Fifth Amendment limits the ability of government agencies to conduct relevant inquiries could delay or prevent corrections officials from obtaining information critical to determining an inmate's suitability for SHR or other related programs. As a result, inmates might remain in programs for which they are not suitable and pose a danger to society.

This argument, however, is not persuasive. First, most cases do not reach the trial stage. Therefore most prisoners have pleaded guilty and, thus, have no Fifth Amendment privilege.¹⁸⁸ Other prisoners will not have pursued appeals. Still

a criminal trial of any testimony which a person was compelled to give in a prior proceeding. This type of immunity prevents the admission of evidence derived from compelled testimony. *Kastigar v. United States*, 406 U.S. 441 (1972). States, however, retain the right to require a broader form of immunity under state constitutional law. Currently five states have declined to follow *Kastigar*, finding that the privilege against self-incrimination in their state constitution requires "transactional immunity," which accords witnesses complete immunity from prosecution for the offense related to the compelled testimony. See *State v. Gonzalez*, 825 P.2d 920, 934, *aff'd*, 853 P.2d 526 (Alaska 1993) (noting that use and derivative use immunity are impractical and problematic); *State v. Miyasaki*, 614 P.2d 915, 923 (Haw. 1980) (noting that use and derivative use immunity fail to place a witness in the same position as if never testifying); *Attorney General v. Colleton*, 444 N.E.2d 915, 921 (Mass. 1982) (stating that only transaction immunity sufficiently protects an individual from self-incrimination); *Wright v. McAdory*, 536 So. 2d 897, 903 (Miss. 1988) (expressing concern that use and derivative use immunity allow information gained from the immunized testimony); *State v. Soriano*, 684 P.2d. 1220, 1223, *aff'd*, 693 P.2d 26 (Or. 1984) (stating that use and derivative use immunity fail to prohibit-non-evidentiary use of testimony). In these states or states which have statutory provisions which provide for "transactional immunity" under certain circumstances, this "transactional immunity" would not affect the pending appeals of individuals and would require dismissal of charges only if the case was reversed on appeal. See *Katz v. United States*, 389 U.S. 347, 349 (1967) (finding that transactional immunity was meant to afford adequate protection from future prosecution not to immunize individuals from punishment pursuant to prior prosecutions); *Reina v. United States*, 364 U.S. 507, 512-14 (1960) (finding that immunity statutes need not do more than protect a witness from future prosecutions).

¹⁸⁸ Cross Appeal Brief of Appellee Before In Banc Court at 47, *Asherman v. Meachum*, 957 F.2d 978 (2d Cir. 1992) (en banc) (No. 90-2530). This is true only for those whose conduct while in prison or under the supervision of corrections

others will have voluntarily admitted guilt. Consequently, only a small percentage of prisoners will be afforded protection under the Fifth Amendment.¹⁸⁹ Moreover, in those rare situations in which an inmate-defendant could legitimately invoke the privilege against self-incrimination, an assurance by prison officials that any statements made will not be used in a subsequent criminal proceeding if a new trial is granted would be sufficient.¹⁹⁰

Under these circumstances, a grant of immunity would encourage inmates to participate freely in the examination. In the end, this would benefit society and the participants in SHR and other related programs. Corrections officials would be able to obtain the information necessary to determine whether certain individuals are a threat to society if they remain in conditional liberty programs. Participants in SHR and other related programs would not face self-incrimination pressures and could receive necessary treatment and counseling.

A rule requiring that corrections officials confer immunity on individuals whose statements could be used against them in subsequent criminal proceedings would not create an undue burden on the state. Indeed, no special procedural mechanism for granting immunity would have to be created.¹⁹¹ This un-

officers has been without incident. Situations in which an inmate, parolee or probationer's conduct has led to revocation or disciplinary proceedings and the possibility exists that criminal charges will be filed in the future give rise to new Fifth Amendment issues. See, e.g., Joseph Doyle, *The Due Process Need for Postponement on Use Immunity in Probation Revocation Hearing Based on Criminal Charges*, 68 MINN. L. REV. 1077 (1984); William R. Stein, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings*, 76 COLUM. L. REV. 674 (1976); Note, *Revocation of Conditional Liberty for the Commission of a Crime: Double Jeopardy and Self-Incrimination*, 74 MICH. L. REV. 525 (1976).

¹⁸⁹ *Id.*; Cross Appeal Brief for Appellee Before In Banc Court at 47, *Asherman* (No. 90-2530).

¹⁹⁰ See *id.* at 48. It is important to note that the Supreme Court has stated that a prisoner "may rightfully refuse to answer questions unless and until he is protected against the use of his compelled answers and the evidence derived therefrom . . ." *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)).

¹⁹¹ The Fifth Amendment requires immunity when testimony is compelled. See *Garrity v. New Jersey*, 71 U.S. 493 (1967); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 79 (1964). Thus, immunity can be conferred even in the absence of a statute. The Second Circuit in *Uniform Sanitation Men* adopted this view, stating "we see no reason why there must be a statute conferring [use immunity]." *Uniform Sanitation Men Assoc., Inc. v. Commissioner of Sanitation*, 426

dermines the argument that government inquiries might be delayed in situations in which immunity is required.¹⁹² In addition, a grant of immunity would not preclude prosecuting a person who gave immunized testimony. "Use immunity" would only prevent the state from any direct or indirect reliance on immunized testimony.¹⁹³ The state would be required to prove an independent basis for all its evidence in any subsequent proceeding.¹⁹⁴ This does nothing more than put the state in the same position in which it would have been had the person not testified.¹⁹⁵

Of course, if testimony is highly probative, exclusion of such evidence in a later proceeding may threaten the fact finding process. Where evidence sufficiently threatens a constitutional right, however, courts will exclude it in order to preserve constitutional protections. For example, when evidence is obtained through an illegal search and seizure in violation of the

F.2d 619, 626 (2d Cir. 1970).

One could argue that a specific grant of immunity is not necessary because compelled statements would not be admissible in a subsequent criminal proceeding. *Garrity*, 385 U.S. 493. This argument, however, is unavailing. First, if such an argument had any credence, there would be no need for government officials to confer immunity upon individuals under statute or otherwise. Second, it would be patently unfair to require individuals to risk self-incrimination based on the possibility that these statements would be inadmissible at a later criminal proceeding. As the Second Circuit panel correctly noted, "[t]he witness' future would be left to mere chance—like hazarding everything on a throw of the dice—a risk so totally unacceptable as to account for the existence of the salutary immunity rule for compelled testimony." *Asherman v. Meachum*, 932 F.2d 137, 145 (2d Cir. 1991), *opinion vacated*, 957 F.2d 978 (2d Cir. 1992) (en banc).

¹⁹² See *Fowler v. Vincent*, 366 F. Supp. 1224, 1228 (S.D.N.Y. 1973) (noting that requiring prisoners who face intramural disciplinary hearings and possible criminal prosecution be informed by corrections officials that they have use immunity "fully protects the prisoner's right against self-incrimination and yet permits the prison disciplinary system to retain a speed and flexibility which should not be encumbered by excessive procedural formality").

¹⁹³ See *supra* note 187.

¹⁹⁴ *Kastigar v. United States*, 406 U.S. 441, 460 (1972); see also *United States v. North*, 920 F.2d 940, 942 (D.C. Cir. 1990) (en banc) (holding that *Kastigar* is violated "whenever the prosecution puts on a witness when testimony is shaped, directly or indirectly, by compelled testimony, regardless of how or by whom he was exposed to that compelled testimony"), *cert. denied*, 111 S. Ct. 2235 (1991).

¹⁹⁵ One argument against "use immunity" concerns situations in which a person confesses and then is acquitted in a subsequent proceeding because the prosecution lacks independent evidence and is not able to introduce prior statements. This argument, however, is not applicable in situations like *Asherman's* where the prosecution already had sufficient evidence for a conviction at an earlier trial.

Fourth Amendment, it is inadmissible at trial.¹⁹⁶ Also while in police custody, the confessions and incriminating admissions of individuals are not admissible in evidence unless given voluntarily¹⁹⁷ and obtained after notification of the right to counsel and the right to remain silent.¹⁹⁸ In these situations, the preservation of constitutional protections outweigh the state's interest in convicting the guilty. In addition, the fact that the state has a legitimate interest in conducting an inquiry is not sufficient, in and of itself, to override the protection that the privilege against self-incrimination affords. In direct penalty cases, the Court has "rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need."¹⁹⁹

A rule requiring immunity would also reduce court costs. Given immunity, individuals would be free to respond to a relevant governmental inquiry without concern that their testimony could be used against them in a later criminal proceeding. Consequently, there would be no need to bring separate Fifth Amendment claims to suppress evidence at a subsequent trial. Where a government agency offered immunity, there would be no legal justification for remaining silent and thus fewer situations in which a government agency could impose a penalty for remaining silent.

CONCLUSION

The Fifth Amendment does not prevent a defendant from having to make difficult choices involving the privilege against self-incrimination during the trial process. In cases like *Asherman*, however, where the invocation of the privilege

¹⁹⁶ See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that where a suspect is arrested and shows at a suppression hearing that the evidence was obtained through a search that violated the Fourth Amendment, such evidence will not be admissible at trial in either state or federal court).

¹⁹⁷ *Davis v. North Carolina*, 384 U.S. 737 (1966) (holding that confession obtained by police was the end product of coercive influences and, therefore, constitutionally inadmissible as evidence).

¹⁹⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁹⁹ *Leftkowitz v. Cunningham*, 431 U.S. 801, 808 (1977)s see also *Leftkowitz v. Turley*, 419 U.S. 70, 78-79 (1973) (noting that "claims of overriding [state] interests are not unusual in Fifth Amendment litigation and they have not fared well").

against self-incrimination takes place outside the trial process, the penalties individuals may face for invoking the privilege are of a very different nature than the indirect penalties a defendant may face during trial. The right to remain silent of those who face direct penalties is not only impaired by *Asherman*, it is all but eviscerated because they face an end result that will always be adverse to their interests.

The result in *Asherman* is not supported by judicial precedent, which has construed the language of the Fifth Amendment broadly. Furthermore, the majority's distinction between taking adverse action for failure to answer a relevant governmental inquiry and for invoking a constitutional right is untenable. The effect of *Asherman* is to restrict significantly the privilege against self-incrimination in situations involving not only inquiries by corrections officials, but potentially and by logical extension, all government agencies. This will force more people to face the exact dilemma that the Fifth Amendment is intended to prevent—providing the government with incriminating testimony that can be used in a later criminal proceeding or being sanctioned for remaining silent. To avoid this result, some form of immunity should be provided in situations in which answers to a relevant governmental inquiry may tend to incriminate but are also relevant to the valid exercise of government authority. The privilege against self-incrimination must be preserved even in the face of a relevant governmental inquiry.

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