St. John's Law Review

Volume 85
Number 4 *Volume 85, Fall 2011, Number 4*

Article 5

April 2014

Sex Offender Treatment in Prisons and the Self-Incrimination Privilege: How Should Courts Approach Obligatory, Un-Immunized Admissions of Guilt and the Risk of Longer Incarceration?

Daniel R. Strecker

NOTES

SEX OFFENDER TREATMENT IN PRISONS AND THE SELF-INCRIMINATION PRIVILEGE: HOW SHOULD COURTS APPROACH OBLIGATORY, UN-IMMUNIZED ADMISSIONS OF GUILT AND THE RISK OF LONGER INCARCERATION?

DANIEL R. STRECKER†

INTRODUCTION

> No person . . . shall be compelled in any criminal case to be a witness against himself.[1]

In early 2006, a prisoner in the New York State Department of Correctional Services ("DOCS") named Joseph Hirsch transferred to the Oneida Correctional Facility in Rome, New York.[2] In 2002, Joseph had been convicted on counts of sexual abuse in the first and second degrees and unlawful imprisonment; and, as his sentence neared its close, he was to participate in DOCS's Sex Offender Counseling Program

---

† Articles Editor, *St. John's Law Review* and *Journal of Catholic Legal Studies*; J.D. Candidate, 2012, St. John's University School of Law; B.A., 2007, Sarah Lawrence College. I wish to thank my mother and father, Carolyn and Raymond; sister, Gail; brother, Raymond; sister-in-law, Katherine; grandmother, Regina Donahue; my best friends Colin, Keegan, Lia, and Piper; and the remainder of my friends and family for their overwhelming, unconditional, and undeserved support throughout my three years in law school. I could not have made this journey without their gracious and freely given love. Likewise, I thank God for his gracious and freely given sacrifice, in the Person of Ἰησους Χριστός, for every day I awake living and breathing.

[1] U.S. CONST. amend. V.

[2] *See* Amended Complaint at 4, 35, Hirsch v. Desmond, No. 08-CV-2660 (JS)(AKT), 2010 WL 3937303 (E.D.N.Y. Sept. 30, 2010) [hereinafter Amended Complaint] (on file with author); *see also* N.Y. STATE DEP'T CORR. SERVS., Facility Listing, http://www.doccs.ny.gov/faclist.html (last visited Mar. 14, 2012).

("SOCP").[3] Upon admission to SOCP, Joseph signed a waiver that acknowledged, "I . . . understand that any crime of detail I disclose [that] . . . I have previously committed and not been prosecuted for . . . will be reported to the appropriate law enforcement agencies."[4]

In addition to signing this waiver, Joseph had to accept responsibility for his past misconduct by admitting to his offenses of conviction and other allegations contained in his probation report.[5] This report contained an allegation of penetration, for which Hirsch had been acquitted, and an allegation of stalking, for which he had never been charged.[6] Joseph feared, therefore, that in light of the waiver he had signed, admitting to the stalking conduct would expose him to further prosecution.[7] Moreover, he feared that admitting to the penetration allegation and his offenses of conviction might, in the event his convictions were overturned, be used against him in any re-trial the state might pursue.[8] In light of these fears, Joseph refused to make the required admissions and he became ineligible to participate in SOCP.[9] Despite Joseph's protests that the admission requirements violated his Fifth Amendment privilege against self-incrimination,[10] the Time Allowance Committee recommended that all of Joseph's good-time credit be withheld, leading to his spending an additional ten-and-a-half months behind bars—that is, completing his full sentence.[11] Situations similar to Joseph's have become increasingly common in America.

---

[3] *See* Amended Complaint, *supra* note 2; Hirsch v. Plescia, No. 03-CV-1617(DLI), 2005 WL 2038587, at *1 (E.D.N.Y. Aug. 23, 2005).

[4] *See* Amended Complaint, *supra* note 2, at 28.

[5] *See Hirsch*, 2010 WL 3937303, at *1.

[6] *See id.*; Amended Complaint, *supra* note 2, at 4–5.

[7] *See* Amended Complaint, *supra* note 2, at 4–5; *see also* N.Y. PENAL LAW §§ 120.45–60 (McKinney 2011) (defining the offense of stalking).

[8] *See* Amended Complaint, *supra* note 2, at 34–35.

[9] *See Hirsch*, 2010 WL 3937303, at *1.

[10] *See Id.*; Amended Complaint, *supra* note 2, at 4–5, 35.

[11] *See* Amended Complaint, *supra* note 2, at 5, 32. Ultimately, Hirsch brought an action in the Eastern District of New York for relief under 42 U.S.C. § 1983 on the basis that this alleged violation of his self-incrimination privilege resulted in his losing early release, his being adjudicated a higher level sex offender before release, and his facing greater post-release restrictions once he returned to society. *See Hirsch*, 2010 WL 3937303, at *1–2. The court dismissed his claims on grounds of qualified immunity. *Id.* at *6–7.

In part because of the unique and devastating impact that sexual crimes have on their victims, sex offenses and the individuals who commit them have, in recent years, been one of the American public's central criminological concerns.[12] This concern has led to widespread state and federal legislation aimed directly at sex offenders, including post-release registration, community-notification, and civil-commitment laws.[13] The Supreme Court has upheld the validity of this legislation on different constitutional grounds.[14] Nevertheless, the Supreme Court's pronouncements clearly indicate that the constitutionality of such measures is an open question.[15]

In addition to these measures, aimed at supervising or confining sex offenders following the completion of their sentences, states have created treatment programs for these offenders as a means of rehabilitating them and, thus, as a means of preventing recidivism.[16] Though sex offenders as a group do not necessarily recidivate at higher levels than other

---

[12] *See* CTR. FOR SEX OFFENDER MGMT., LEGISLATIVE TRENDS IN SEX OFFENDER MANAGEMENT 1 (2008), *available at* http://www.csom.org/pubs/legislative_trends.pdf. The Center for Sex Offender Management is a joint project of the United States Department of Justice, the National Institute of Corrections, the State Justice Institute, and the American Probation and Parole Association. *See id.*

[13] *See id.* at 3 ("[A]pproximately 20 states have specialized commitment laws, and over 4,500 sex offenders are placed in secure civil commitment facilities nationwide."); CTR. FOR SEX OFFENDER MGMT., AN OVERVIEW OF SEX OFFENDER MANAGEMENT 7–8 (2002), *available at* http://www.csom.org/pubs/csom_bro.pdf [hereinafter MANAGEMENT OVERVIEW] (noting that all fifty states have enacted sex-offender registration and community-notification laws).

[14] *See* United States v. Comstock, 130 S. Ct. 1949, 1954, 1965 (2010) (upholding, as within the Necessary and Proper Clause, a federal statute authorizing the post-sentence civil commitment of federal sex offenders deemed "sexually dangerous to others") (internal quotation marks omitted); Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003) (finding no procedural due process violation when state listed sex offenders in its registry without first providing them with a hearing); Smith v. Doe, 538 U.S. 84 (2003) (holding that retroactive application of sex offender registry and notification requirements does not violate the Ex Post Facto Clause); Kansas v. Hendricks, 521 U.S. 346, 360 (1997) (holding that a statute providing for civil commitment of sex offenders did not violate substantive due process because it made "mental abnormality" a condition of post-sentence confinement, an early iteration of the requirement laid out in *Comstock*).

[15] *See Comstock*, 130 S. Ct. at 1965 ("We do not reach or decide any claim that the [federal civil commitment] statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution. Respondents are free to pursue those claims on remand . . . .").

[16] *See* MANAGEMENT OVERVIEW, *supra* note 13, at 6–7.

categories of offender,[17] the belief that treatment and rehabilitation are crucial to reducing the possibility of further *sexual* offenses motivates these programs.[18] Additionally, clinical concensus that participants must take responsibility for their actions to render rehabilitation meaningful makes acknowledging offenses of conviction and, even, offenses that have gone un-prosecuted, an often unavoidable step in the treatment process.[19] Thus, refusing to admit responsibility may ultimately disqualify an inmate from treatment.[20]

For fairly obvious reasons, in numerous states treatment begins before the prisoner completes his sentence and returns to society, a fact that has led to constitutional debate. As an incentive to accepting treatment, many states make refusal a detriment to a prisoner's privileges during incarceration and, also, to when, if at all, the prisoner will attain early release;[21]

---

[17] *See* CTR. FOR SEX OFFENDER MGMT., MYTHS AND FACTS ABOUT SEX OFFENDERS 2–3 (2000) [hereinafter MYTHS AND FACTS], *available at* http://www.csom.org/pubs/mythsfacts.pdf (noting that, while recidivism rates vary widely among sex offenders according to a range of characteristics, "recidivism rates for sex offenders are lower than for the general criminal population").

[18] *See* CTR. FOR SEX OFFENDER MGMT., WHAT YOU NEED TO KNOW ABOUT SEX OFFENDERS 4 (2008), *available at* http://www.csom.org/pubs/needtoknow_fs.pdf.

[19] *See* McKune v. Lile, 536 U.S. 24, 33 (2002) ("Therapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism. . . . An important component of those rehabilitation programs requires participants to confront their past and accept responsibility for their misconduct. . . . Research indicates that offenders who deny all allegations of sexual abuse are three times more likely to fail in treatment than those who admit even partial complicity.") (citations omitted); Scott Michael Solkoff, Note, *Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs*, 17 NOVA L. REV. 1441, 1450 (1993).

[20] *See* Solkoff, *supra* note 19 ("[W]ith few exceptions, the [sex offender treatment] therapists interviewed said they would not accept anyone in their program who absolutely denied sexual [mis]conduct . . . . Most firmly believed that individuals who denied the abuse were not amenable to treatment.") (internal quotation marks omitted); *see, e.g.*, N.Y. STATE DEP'T OF CORR. SERVS., OFFICE OF GUIDANCE AND COUNSELING, SEX OFFENDER COUNSELING AND TREATMENT PROGRAM GUIDELINES 16–17 (2008), *available at* http://www.doccs.ny.gov/ProgramServices/SOCTP_Guidelines_Nov08.pdf [hereinafter N.Y.S. TREATMENT GUIDELINES] (correlating denial of responsibility with low amenability to sex offender counseling and making denial a factor in barring continued participation).

[21] *See* N.Y.S. TREATMENT GUIDELINES, *supra* note 20, at 17 ("[R]efusing sex offender counseling . . . may have [an impact on participants'] eligibility for certain privileges such as transfers closer to home, earned eligibility, time allowance and family reunion."); *see, e.g.*, Wirsching v. Colorado, 360 F.3d 1191, 1203 (10th Cir.

and yet, like the program that disqualified Hirsch, the programs might not offer use immunity for statements made in counseling.[22] It has been disputed whether requiring incarcerated sex offenders to admit responsibility for past misconduct—without an offer of immunity and at the risk of losing privileges or early release—violates the Fifth Amendment privilege against compelled self-incrimination.[23]

While in *McKune v. Lile* a plurality of the Supreme Court ruled that withholding privileges for refusing to make such admissions does not violate the Self-Incrimination Clause, the Court has never considered whether increasing an offender's term of confinement does.[24] Lower courts—federal and state—have addressed the issue, reaching divergent outcomes through different analyses, and courts are in need of a uniform solution to adjudicating these self-incrimination claims.[25] The analysis employed by the *McKune* plurality provides that solution. Part I of this Note discusses the historical background of the Fifth Amendment privilege against self-incrimination and its contemporary meaning in American case law. Part II examines different approaches to the question of whether the sex offender treatment programs discussed here violate that privilege. Finally, Part III advances theories for determining the constitutionality of these programs, evaluates their merits, and ultimately argues that the *McKune* plurality's use of the "atypical and significant hardship" standard is the most functional and durable approach that any court has offered to resolve this troubling, muddled, and constitutionally multi-faceted question.[26]

2004) (Colorado); Ainsworth v. Stanley, 317 F.3d 1, 2–3 (1st Cir. 2002) (New Hampshire); Searcy v. Simmons, 299 F.3d 1220, 1223 (10th Cir. 2002) (Kansas) (cases documenting consequences similar to those described in the *Sex Offender Counseling and Treatment Program Guidelines*). This Note will use terms such as "parole," "early release," and "good time" interchangeably.

[22] *See* Hirsch v. Desmond, No. 08-CV-2660 (JS)(AKT), 2010 WL 3937303, at *1 (E.D.N.Y. Sept. 30, 2010).

[23] *See infra* Part II.

[24] *See McKune*, 536 U.S. at 29–31; *infra* Part II.A.

[25] *See infra* Part II.B.

[26] *McKune*, 536 U.S. at 37–38 (internal quotation marks omitted).

I. THE HISTORICAL DEVELOPMENT OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

A. The Privilege in the Constitution

In the period following independence, most states included some version of the privilege in their constitutions.[27] The first state to do so was Virginia, whose Declaration of Rights asserted that, in criminal prosecutions, no person could "be compelled to give evidence against himself."[28] Between 1776 and 1784, the eight states that also annexed bills of rights to their constitutions included similar provisions.[29] When the privilege was proposed for inclusion in the United States Constitution, it was adopted without opposition.[30] These provisions likely reflected an aversion to practices of the British crown, which had used inquisitorial procedures such as the oath *ex officio* to torture and persecute Protestant dissidents, including Puritans.[31]

Thus, though those at the adopting conventions only infrequently referred to the privilege, it appears that they had torture and inquisitorial procedures in mind.[32] As written, the clause reads simply, "No person . . . shall be compelled in any criminal case to be a witness against himself"—note that the phrase "self-incrimination" does not appear anywhere in the

---

[27] *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 405 (1968).

[28] *See id.* at 405–06.

[29] *See id.* at 407–08.

[30] *See* MILTON MELTZER, THE RIGHT TO REMAIN SILENT 87 (1972).

[31] The most infamous example of this practice occurred in the Royal Court of Star Chamber. *See* R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 771 (1935). The oath *ex officio* obliged the accused both to answer all questions posed by the tribunal and to do so truthfully. *See* ALAN M. DERSHOWITZ, IS THERE A RIGHT TO REMAIN SILENT? 66 (2008). This oath placed its subjects in what the Supreme Court has described in other contexts as a "cruel trilemma": They risked conviction by giving true testimony, conviction for contempt for violating the oath by refusing to testify, or conviction for perjury by lying. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); ALFREDO GARCIA, THE FIFTH AMENDMENT: A COMPREHENSIVE APPROACH 9 (2002); *see also* Pittman, *supra*, at 771–72 (observing that Puritan dissidents, as a precondition to sailing from England, were in some instances obliged to take oaths of allegiance and recite Anglican prayers even as they waited aboard ship to escape).

[32] *See* GARCIA, *supra* note 31, at 16; Pittman, *supra* note 31, at 788.

text.[33] Yet interpreted according to the narrow import of its terms, the privilege would have had no content; for by the time of the Bill of Rights, there was little need to protect accused persons from testamentary compulsion at trial because common law forbade criminal defendants from testifying in any capacity—either for or against themselves.[34] This rule suggests that the clause was intended to do more than prevent testamentary compulsion; rather, it was likely intended also to prohibit coercing confessions through torture, safeguard against excesses like the oath *ex officio*, and protect those who refused to answer potentially incriminating questions under oath from contempt proceedings.[35]

B. The Privilege in Twentieth-Century Case Law

Three lines of self-incrimination case law have developed over the last century that are important to understanding the privilege in the context of prison sex-offender counseling. The first, which indicates the expansive protection of the privilege, includes cases in which the Court has invalidated measures to penalize the privilege's invocation. The second line, which begins to delineate the privilege's limitations, encompasses cases in which the Court has found the actual likelihood of incrimination too remote to warrant protecting persons invoking the privilege from penalty. Finally, further delineating the privilege's limits, the Court has considered the privilege in circumstances in which persons, both at trial and in the penological context, were forced to choose between remaining silent or risking adverse consequences.

---

[33] *See* Ralph Rossum, *"Self Incrimination": The Original Intent*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 273 (Eugene W. Hickok, Jr., ed., Univ. Press of Va. 1991).

[34] *See id.* at 276 ("Permitting a defendant to testify in his own behalf was a nineteenth-century reform which began in the state courts in Maine in 1864 and in the federal courts by an act of Congress in 1878.").

[35] *See* MARK BERGER, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION 25 (1980). *But see* GARCIA, *supra* note 31, at 8 (noting that historians have diverged as to the historical origin of the privilege in America).

1. The "Penalty" Cases

The "penalty cases" comprise the first line of law relevant to this discussion—cases in which the Supreme Court has ruled government may not attempt to compel testimony by penalizing the privilege's invocation, nor use testimony attained by the threat of such a penalty. Thus, in *Malloy v. Hogan*, the Court overturned a Connecticut ruling finding the petitioner in contempt for refusing to answer questions in an official inquiry.[36] While the Court analogized its decision to a line of cases rejecting torture to obtain confessions, it went further, opining that the privilege even protected against "inducing a person to confess through sympathy falsely aroused, or other like inducement far short of compulsion by torture . . . ."[37] In sweeping terms, the Court framed the privilege as "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."[38]

In the ensuing years, the Court invalidated other iterations of compelled testimony. In *Garrity v. New Jersey*, police officers were told that, if they invoked their privilege against self-incrimination and refused to answer questions in a state attorney general investigation, they would lose their jobs.[39] The officers relented and testified, and their answers were used against them in a subsequent criminal prosecution.[40] Saying, "Subtle pressures may be as telling as coarse and vulgar ones,"[41] the Court held that the privilege against self-incrimination "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office" and voided the officers' convictions.[42] Similarly, in *Lefkowitz v. Turley*, the Court held that a state also cannot threaten losing state contracts to secure

---

[36] 378 U.S. 1, 3 (1964). The petitioner had also been ordered jailed until he was willing to cooperate. *See id.*

[37] *Id.* at 6–8 (citation omitted) (internal quotation marks omitted).

[38] *Id.* at 8.

[39] *See* 385 U.S. 493, 494 (1967).

[40] *See id.* at 495.

[41] *Id.* at 496 (citations omitted).

[42] *See id.* at 500. In a companion case, *Spevack v. Klein*, 385 U.S. 511 (1967), the Court, re-affirming its position that government may not impose "any sanction which makes assertion of the Fifth Amendment privilege costly," held that an attorney could not be disbarred for refusing to testify without immunity. *Id.* at 515 (internal quotation marks omitted).

the privilege's waiver.[43] In so holding, the Court used now famous language: "The [Fifth] Amendment not only protects . . . against being involuntarily called as a witness against [oneself] in a criminal prosecution but also . . . answer[ing] official questions . . . in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate [one] in future criminal proceedings."[44]

Finally, in *Griffin v. California*, the Court held that the Self-Incrimination Clause forbids prosecutorial comment or instructions by the court that an accused's silence during a criminal trial can be used as evidence of guilt.[45] The Court reasoned that, to do so, would make invoking the privilege costly; and such a cost, said the Court, was an impermissible remnant of the "inquisitorial system of criminal justice."[46]

2. The Incrimination Requirement

Despite this broad protection against government intrusion, federal courts have limited the privilege to circumstances in which the testimony sought to be compelled can reasonably be expected to incriminate the witness.[47] In *Lefkowitz*, the Court reasoned that, once the government has granted a witness immunity, because the government may no longer use incriminating statements against her, it may compel testimony through economic penalties, or even "by use of civil contempt and coerced imprisonment."[48] Furthermore, even when a state has not granted a witness immunity, but when there is only a remote risk of incrimination, the Self-Incrimination Clause does not protect an individual from being compelled to testify:

---

[43] *See* 414 U.S. 70, 82 (1973) ("A waiver [of the privilege] secured under threat of substantial economic sanction cannot be termed voluntary.").

[44] *Id.* at 77; *see also* Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977) ("[T]he touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids.").

[45] 380 U.S. 609, 615 (1965).

[46] *Id.* at 614 (quoting Murphy v. Waterfront Comm., 378 U.S. 52, 55 (1964)) (internal quotation marks omitted); *see supra* text accompanying notes 31–35.

[47] *See* Michael J. Zydney Mannheimer, *Ripeness of Self-Incrimination Clause Disputes*, 95 J. CRIM. L. & CRIMINOLOGY 1261, 1273 (2005) (describing this incrimination requirement as a "rationale to limit the reach of the Clause").

[48] *Lefkowitz*, 414 U.S. at 84.

> A claim of . . . privilege must establish reasonable ground to apprehend danger to the witness from his being compelled . . . . The danger . . . must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things,—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency . . . .[49]

Thus, to warrant the privilege's protection, a witness must establish some "real and appreciable fear" that the requested information will be used to incriminate her, or that it will "furnish a link in the chain of evidence needed" to prosecute her.[50]

With respect to crimes for which an individual has already been convicted or acquitted, the protections of the Double Jeopardy clause may also nullify the necessity for, and thus the right to, the privilege's protection.[51] The Court has stated, "[W]here there can be no further incrimination, there is no basis for the assertion of the privilege."[52] The availability of avenues for collaterally attacking convictions makes the precise point at which there is no longer a possibility of incrimination imperfectly discernable, though there is consensus that the appreciable risk ceases once a defendant's appeals—direct and discretionary—terminate.[53]

---

[49] Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 190 (2004) (quoting Brown v. Walker, 161 U.S. 591, 599–600 (1896)) (alterations in original omitted) (citations omitted) (internal quotation marks omitted); *see also* Zicarelli v. N.J. State Comm'n of Investigation, 406 U.S. 472, 478 (1972) ("It is well established that the privilege [against self-incrimination] protects against real dangers, not remote and speculative possibilities.").

[50] *Hiibel*, 542 U.S. at 190 (finding an insufficient possibility of incrimination when the defendant had never explained how the disclosure of his name could have been used to prosecute him).

[51] *See, e.g.*, Neal v. Shimoda, 131 F.3d 818, 833 (9th Cir. 1997).

[52] Mitchell v. United States, 526 U.S. 314, 326 (1999).

[53] *See id.* (there can be no further incrimination when "the sentence has been fixed and the judgment of conviction has become final"); *see also* United States v. Kennedy, 372 F.3d 686, 691–92 (4th Cir. 2004) ("[A] defendant's right to invoke the Fifth Amendment as to events for which he has been convicted extends to the period during which the conviction is pending appeal. Because any post-conviction evidence could be used against a defendant if his conviction were to be overturned, the risk of coerced self-incrimination remains until the conviction has been affirmed on appeal."); United States v. Duchi, 944 F.2d 391, 394 (8th Cir. 1991) ("[T]he Fifth Amendment right not to testify concerning transactions for which one has been convicted continues until the time for appeal has expired or until the conviction has been affirmed on appeal."). *But see Neal*, 131 F.3d at 833 (finding only a remote

3. The "Tough Choice" Cases

The outer limits of the self-incrimination privilege are particularly apparent in the so-called "tough choice" cases, in which persons navigating the criminal justice system have to choose between invoking the privilege or risking sometimes grave consequences.[54] For example, the Court rejects the notion that pressuring defendants to plead out—essentially, to incriminate themselves—by offering lesser sentences, unconstitutionally burdens the privilege.[55] The Court has stated:

> [N]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive [it], is invalid. Specifically, there is no *per se* rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return . . . .[56]

And in the penological context, self-incrimination rights are even more subject to compromise. Because "[d]isciplinary proceedings in state prisons . . . involve the correctional process and important state interests other than conviction for crime," the Court has declined to extend *Griffin* to prison disciplinary hearings where punitive segregation is at stake, ruling that inmates' rights are not violated by having to choose between risking self-incrimination through testifying or hurting their case by having their silence imputed against them.[57]

II. THE PRIVILEGE AND SEX OFFENDER TREATMENT

In recent years, a new challenge has emerged in the landscape of self-incrimination law. Inmates have challenged sex offender treatment regimes like the one that expelled Joseph Hirsch, wherein incarcerated sex offenders are required to make

---

possibility of incrimination after an inmate's opportunity to appeal had expired *and* where the inmate expressed no desire to collaterally attack his conviction, thus suggesting that availability of collateral attack *also* bears on the question).

[54] *See* Jonathan M. Rund, Note, McKune v. Lile*: Evisceration of the Right Against Self-Incrimination Through the Revival of* Boyd v. United States, 12 GEO. MASON L. REV. 409, 414–15 (2003) (distinguishing the "penalty cases" from the "tough choice cases").

[55] *See* Corbitt v. New Jersey, 439 U.S. 212, 218 (1978).

[56] *Id.* at 218–19.

[57] *See* Baxter v. Palmigiano, 425 U.S. 308, 319–20 (1976). For a discussion of *Griffin*, see *supra* text accompanying notes 45–46. For further discussion of the reasoning in *Baxter*, see *infra* text accompanying notes 113–114.

potentially self-incriminating admissions or risk losing early release. The Supreme Court has addressed whether a state may constitutionally withhold privileges from an inmate refusing to make such admissions, but has never addressed whether a state may also withhold early release. In the Supreme Court's wake, lower courts have diverged when ruling on challenges to programs that pointedly refuse to offer participants use immunity for statements made in counseling, yet make expulsion from treatment and, potentially, longer incarceration the consequence for refusing to make such statements. Section A of this Part will examine the Supreme Court decision holding that states may constitutionally withhold *privileges* for refusing to make potentially incriminating statements in sex-offender counseling. Section B will examine the divergent analyses and outcomes of lower courts that have addressed the question of whether states may also *increase* inmates' *period of incarceration* for such refusal.

A. McKune v. Lile

The Supreme Court's plurality decision in *McKune v. Lile* governs this issue.[58] There, a sex offender treatment program, without offering participants immunity, required them to admit to their offenses of conviction and to complete a sexual history form, regardless of whether that sexual history included unprosecuted crimes.[59] The respondent, a sex offender, refused to participate in the program on the grounds that the required admissions violated his self-incrimination privilege.[60] As a result of his refusal, the prisoner's privilege status was downgraded, resulting in a variety of consequences—the most severe of which was his transfer from a medium- to a maximum-security unit.[61]

Finding the due process analysis of *Sandin v. Conner* pertinent to analyzing self-incrimination challenges in the prison context,[62] a four-justice plurality reasoned that losing privileges

---

[58] 536 U.S. 24 (2002).

[59] *See id.* at 30.

[60] *See id.* at 31.

[61] *Id.* at 38. The downgrade in the prisoner's privilege status also curtailed his visitation rights, work opportunities, wage potential, ability to send money to family, canteen expenditure, and television access. *See id.* at 30–31.

[62] 515 U.S. 472 (1995). In *Sandin*, the Court considered a due process challenge by a prisoner confined to thirty-days' administrative segregation after a hearing

for refusing to undergo sex-offender counseling, in light of Lile's being incarcerated and the legitimate penological objective of rehabilitating sex offenders, was compulsion in violation of the Fifth Amendment only if it constituted an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life."[63] The plurality reasoned that for the consequences of an inmate's choice to remain silent to be such a hardship, they must be "closer to the physical torture against which the [privilege] clearly protects" rather than "the *de minimis* harms against which it does not."[64] By this reasoning, the plurality determined that the loss of privileges at issue was not such a hardship.[65] The plurality left unanswered the question of whether the state would have violated the Constitution had the prisoner's decision "extend[ed] his term of incarceration . . . [or] affect[ed] his eligibility for good-time credits or parole."[66]

Justice O'Connor concurred in the judgment but objected to the application of the "atypical and significant hardship" standard on the basis that it was narrower than the compulsion standard previously applied by the Court.[67] Nevertheless, in comparison to the kinds of economic punishments found to be compulsion in cases like *Lefkowitz v. Turley*,[68] O'Connor wrote, "I

---

where he could not present witnesses. *See id.* at 475–76. The Court noted the problematic nature of federal judicial oversight of day-to-day management of state prisons, and announced the principle, "[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Id.* at 482. In light of these principles, the Court reasoned that prisoners' protected liberty interests are "limited to freedom from restraint[s]" that do not exceed "the sentence in such an unexpected manner" as to "impose[ ] atypical and significant hardship[s] . . . in relation to the ordinary incidents of prison life." *Id.* at 484. Under this test, the Court held that, in light of the sanction imposed, the Due Process Clause did not entitle the prisoner to have the opportunity to call witnesses in his defense at the disciplinary hearing, even though the Sixth and Fourteenth Amendments would guarantee such a right at trial. *See id.* at 487.

[63] *McKune*, 536 U.S. at 37–38 (quoting Sandin v. Conner, 515 U.S. 472, 484 (1995)) (internal quotation marks omitted).

[64] *Id.* at 41.

[65] *See id.* at 35.

[66] *Id.* at 38 (on the facts discussed above, the question was not before the Court).

[67] *See id.* at 48 (O'Connor, J., concurring) (stating that the atypical and significant hardship standard is *broader* than the ordinary self-incrimination standard).

[68] 414 U.S. 70 (1973). O'Connor characterized the penalties at issue in those cases: "[They] involved the potential loss of one's livelihood . . . . To support oneself in one's chosen profession is one of the most important abilities a person can have. A choice between incriminating oneself and being deprived of one's livelihood is the

do not believe the penalties assessed against respondent in response to his failure to incriminate himself are compulsive [under] any reasonable test . . . ."[69]

B. Divergent Analyses and Outcomes After McKune

Other courts have now applied *McKune* to circumstances in which the refusal to make statements in counseling that might be self-incriminating has extended a prisoner's term of incarceration or affected his eligibility for parole.[70] The circuits have concurred in declining to apply the *Sandin* atypical and significant hardship standard, instead applying the less definite compulsion standard advocated by Justice O'Connor; doing so, even though they have not expressly split,[71] they have reached divergent outcomes on whether such treatment regimes are constitutional. In addition, one state court, applying the *Sandin* due process standard, has held that such regimes *do* violate the privilege against self-incrimination.

1. *McKune* in the Circuits: Different Analyses, Same Outcome

In *Searcy v. Simmons*, the Tenth Circuit considered the constitutionality of an inmate's losing the ability to earn additional good-time credits for refusing to participate in a Kansas counseling program requiring sex offenders to divulge past, un-prosecuted offenses without immunity.[72] Noting that *McKune* was a plurality decision, the court characterized the inquiry according to O'Connor's concurrence: Whether the consequences of the plaintiff's refusal were "so great as to constitute compulsion for the purposes of the Fifth Amendment privilege against self-incrimination."[73] In determining that the

---

very sort of choice that is likely to compel someone to be a witness against himself." *McKune*, 536 U.S. at 50.

[69] *McKune*, 536 U.S. at 54.

[70] *See id.* at 35 (plurality opinion).

[71] *But see* Hirsch v. Desmond, No. 08-CV-2660(JS)(AKT), 2010 WL 3937303, at *6 (E.D.N.Y. Sept. 30, 2010) (noting the "circuit split" on the issue).

[72] 299 F.3d 1220, 1222–23 (10th Cir. 2002).

[73] *Id.* at 1225 (quoting *McKune*, 536 U.S. at 49) (O'Connor, J., concurring). The *Searcy* court based this conclusion on the narrowest grounds doctrine. *See id.*; Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotation marks

threatened loss of early release did not amount to such compulsion, the Tenth Circuit found four factors controlling. First, the court noted that Kansas regulations left the award of good-time credits to the discretion of penal authorities and made no guarantee of award for satisfactory behavior.[74] Thus, the court reasoned, the consequence of the plaintiff's refusal was "not a new penalty, but only the withholding of a benefit that . . . [Kansas was] under no obligation to give."[75] Second, the court noted that the program was voluntary, insofar as the plaintiff could choose to take advantage of a benefit, or else to avoid making self-incriminating statements.[76] Third, the court observed that the admissions sought were clinically and penologically central to rehabilitating sex offenders.[77] Finally, the court stated that the plaintiff's loss of good-time credits was "not the result of his refusal to incriminate himself, but [was, rather] a consequence of his inability to complete rehabilitation" determined to be in his and society's best interest.[78]

In *Ainsworth v. Stanley*, the First Circuit considered largely similar factors in determining that denial of parole for failure to participate in sex-offender counseling was not unconstitutional compulsion.[79] Noting that *McKune* was a plurality decision, the court reasoned that Justice O'Connor's stance, that the loss of privileges was not compulsion under any reasonable test, was "arguably more narrow than the plurality's and therefore constitute[d] the holding of the Court."[80] The court observed that (1) the consequence of the plaintiffs' refusal to participate in a counseling program was not "a new or additional penalty," but

omitted); *see also* Ainsworth v. Stanley, 317 F.3d 1, 4 (1st Cir. 2002) (reasoning on the same basis that Justice O'Connor's stance in *McKune* was more narrow than the plurality's and therefore constituted the holding of the Court).

[74] *See Searcy*, 299 F.3d at 1226.

[75] *Id.*

[76] *See id.*

[77] *See id.* at 1227.

[78] *Id.* (in this sense, the refusal to incriminate himself did not directly cause the loss of good time; rather, the refusal to participate in treatment was the basis for the loss of good time). The Tenth Circuit has again considered this issue in the context of a similar treatment program in Colorado. *See* Wirsching v. Colorado, 360 F.3d 1191, 1193 (10th Cir. 2004) (no unconstitutional compulsion where refusal to participate in sex offender counseling resulted in loss of opportunity to earn good-time credits at a higher rate).

[79] 317 F.3d 1, 3 (1st Cir. 2002).

[80] *Id.* at 4 (quoting Lurie v. Wittner, 228 F.3d 113, 130 (2d Cir. 2000)).

merely the withholding of a discretionary benefit that the government was entitled to condition on completion of the program; (2) even though refusing to participate came with certain consequences, the program was ultimately voluntary; (3) the admission of crimes is widely believed to be necessary for the successful treatment of sex offenders, and so the government has a valid interest in establishing a treatment program that requires sex offenders to admit to past conduct as a condition of participation; and, finally, (4) the denial of parole for failing to participate was not automatic, even though "the vast majority of parolees had completed the [program] prior to release."[81]

2. *McKune* in the Circuits: Same Analysis, Different Outcome

In *United States v. Antelope*, however, the Ninth Circuit ruled that similar circumstances *did* amount to unconstitutional compulsion.[82] There, the appellant was sentenced in district court to five-years' probation for sex offenses and was required, as part of his sentence, to complete counseling.[83] His repeated refusal to make potentially incriminating disclosures in counseling led the district court to impose a variety of penalties, including revoking his probation and sentencing him to additional periods of incarceration and supervised release.[84] On review, the Ninth Circuit noted that, despite the government's legitimate interest in requiring sex offenders to admit to past misconduct, the "irreconcilable constitutional problem . . . is that . . . the disclosures . . . may be starkly incriminating, and there is no disputing that the government may seek to use such

[81] *Id.* at 5. For another circuit's use of very similar factors, see Defoy v. McCullough, 301 F. App'x 177, 181–82, 181 n.7, 182 n.9 (3d Cir. 2008) (holding no unconstitutional compulsion where (1) inmate was merely required to serve the rest of his sentence; (2) loss of parole was the result of his voluntary choice not to participate in a valid treatment program; (3) state had a legitimate penological interest in eliciting potentially incriminating statements for the purposes of rehabilitation, and (4) loss of parole for failure to participate was not completely automatic).

[82] 395 F.3d 1128, 1139 (2005).

[83] *See id.* at 1131.

[84] *See id.* at 1131–32. Specifically, the court imposed six months of additional monitoring; revoked appellant's probation and sentenced him to twenty months of prison and three-years of supervised release; and, finally, following release from that period of incarceration, sentenced him to an additional ten months of prison and another twenty-six months of supervised release. *Id.*

disclosures for prosecutorial purposes."[85] As in *Searcy* and *Ainsworth*, the court treated Justice O'Connor's opinion as controlling.[86] Because O'Connor stated that "she would not have found a penalty of 'longer incarceration' such as that here to be constitutionally permissible," the Ninth Circuit held that revoking appellant's conditional liberty for refusing to make the potentially self-incriminating statements in sex offender treatment violated his Fifth Amendment rights.[87]

3. Minnesota: *McKune*'s Analysis, Different Outcome

In *Johnson v. Fabian*,[88] the Supreme Court of Minnesota arrived at the same conclusion as the Ninth Circuit, but did so by a route not taken since *McKune v. Lile*. The court considered the petitions of two incarcerated sex offenders.[89] The first, whose appeals were pending, was ordered to participate in a sex-offender counseling program in which he was expected to admit to his offenses of conviction.[90] He refused to participate to avoid jeopardizing his appeals and so incurred a sanction that pushed back his eligibility for parole by forty-five days.[91] The second inmate had testified at his trial that he was innocent and, when ordered to undergo counseling, refused to do so because admitting to his offenses of conviction might subject him to prosecution for perjury; as a result, he incurred the same forty-five day extension.[92]

---

[85] *Id.* at 1137–38.

[86] *See id.* at 1133 n.1.

[87] *Id.* at 1138 (quoting McKune v. Lile, 536 U.S. 24, 52 (2002)) (O'Connor, J., concurring). The Second Circuit has, implicitly, dealt with the issue in the same way as the Ninth Circuit: In *Donhauser v. Goord*, 181 Fed. App'x 11 (2d Cir. 2006), the court considered a district decision finding that threatening a loss of early release for failing to make self-incriminating statements in sex offender counseling was unconstitutional compulsion. *See id.* at 12; Donhauser v. Goord, 314 F. Supp. 2d 119, 123, 129 n.8 (N.D.N.Y. 2004). The Court reversed and remanded for procedural reasons but impliedly accepted the district court's holding by recommending the defendants consider immunizing disclosures made in counseling. *Donhauser*, 181 Fed. App'x at 12; *see also* Edwards v. Laidlair, No. 9:07-cv-00059-JKS, 2008 WL 3156214, at *5 n.7 (noting that in *Donhauser* the Second Circuit agreed *sub silentio* that the denial of good time credits at issue gave rise to a viable Fifth Amendment claim).

[88] 735 N.W.2d 295, 311–12 (Minn. 2007).

[89] *See id.* at 297.

[90] *See id.* at 298.

[91] *See id.*

[92] *See id.*

In ruling that both inmates' self-incrimination privilege had been violated, the court followed an approach—for which this Note advocates[93]—rejected by every federal court of appeals to consider the issue. While citing—like the First, Tenth and Ninth Circuits had—the narrowest grounds doctrine, the court contradicted those circuits by determining the *McKune plurality's* rationale was narrower, and thus more controlling, than O'Connor's concurrence[94]; so finding, Minnesota applied the atypical and significant hardship standard.[95]

Even still, the court did not reach the same outcome as the *McKune* plurality, concluding that, because Minnesota's statute mandated early release—rather than leaving it to the discretion of an administrative body—inmates there had a protected liberty interest in parole that rendered extended incarceration an atypical and significant hardship.[96] Therefore, the court held

---

[93] *See infra* Part III.D–E.

[94] " '[W]hen a fragmented Court decides a case and no single rationale . . . enjoys the assent of the five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred . . . on the narrowest grounds.' " *Johnson*, 735 N.W.2d at 304 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)) (internal quotation marks omitted). Note that it was on this same basis that the courts in *Searcy*, *Ainsworth*, and *Antelope* determined that, in fact, O'Connor's concurrence was controlling. The Minnesota court's determination rested, in large part, on O'Connor's explicitly stating that the Court's prior self-incrimination analysis was "*broader*" than the atypical and significant hardship standard. *See* McKune v. Lile, 536 U.S. 24, 48 (2002) (O'Connor, J., concurring) (emphasis added). For more discussion, see *infra*, note 96.

[95] *See Johnson*, 735 N.W.2d at 304. Explaining this conclusion, the court stated, "Justice O'Connor . . . disagreed with the application of the *Sandin* test because she considered [it] too narrow for identifying compulsion under the Fifth Amendment. In other words, Justice O'Connor agreed with the plurality's rationale that a consequence that satisfies the *Sandin* 'atypical and significant hardship' test would constitute compulsion for Fifth Amendment purposes. Her disagreement with the plurality was that she believed the test for compulsion should be *broader*, meaning that some consequences that do not satisfy the *Sandin* test may nevertheless constitute compulsion." *Id.* (citations omitted); *see McKune*, 536 U.S. at 48 (O'Connor, J., concurring) ("I agree with [the dissent] that the Fifth Amendment compulsion standard is *broader* than the 'atypical and significant hardship' standard we have adopted for evaluating due process claims in prisons.") (emphasis added).

[96] *Johnson*, 735 N.W.2d at 302, 308–09. In Minnesota, a prisoner's sentence comprised two parts: a term of imprisonment constituting two thirds of the total sentence, and a term of supervised release, constituting the remaining third of the total sentence. *See id.* at 299. While the total sentence could not be extended by disciplinary infractions, they could extend the imprisonment period up to the length of the total sentence. *See id.* A presumption, however, existed that the prisoner

that penalizing the two inmates' refusal to make statements in counseling that might incriminate them—by jeopardizing one's appeal and subjecting the other to prosecution for perjury—violated the privilege against self-incrimination.[97]

III. RESOLUTION: TIDYING THE LANDSCAPE

The fact that cases such as Joseph Hirsch's continue to arise suggests that the untidy landscape of self-incrimination jurisprudence that has emerged from *McKune* requires resolution.[98] In proposing a resolution to this problem, this Part will first consider two approaches that would categorically forbid withholding privileges, as well as extending confinement, for an inmate's refusal to make un-immunized admissions in counseling. The first approach challenges the analytical basis for treating the Self-Incrimination Clause as flexible—able to bend to make room for competing state interests. It fails because it does not realistically assess self-incrimination case law and, ultimately, does little to protect prisoners' interests. The second approach challenges the clinical legitimacy of these programs. It fails because, while there may be scientific disagreement about properly structuring sex offender rehabilitation programs, courts cannot adequately gauge constitutionality on the basis of clinical and scientific arguments about which reasonable practitioners may disagree.

Next, this Part will explore three frameworks within which courts can analyze prisoners' self-incrimination claims, using the case of Joseph Hirsch as a paradigm for their application. The first considers whether statements in sex-offender counseling, even if un-immunized, are actually incriminating. This practical and efficient inquiry disposes of a substantial number of potential claims by revealing that, in fact, there is frequently no

---

would be released after the two-thirds period unless he incurred disciplinary infractions, thus creating a liberty interest in early release. *See id.* at 302.

[97] *See id.* at 308–09.

[98] In yet another recent case, a plaintiff asked the Western District of New York for relief under 42 U.S.C. § 1983 on substantially the same grounds as Joseph Hirsch. *See* Sayles v. Fischer, No. 08-CV-0747, 2011 WL 1199834, at *1–2 (W.D.N.Y. Mar. 29, 2011). The court, because of the lack of consensus among the circuits, resolved the case in favor of the defendants on qualified immunity grounds, just like the court in *Hirsch*. *See Sayles*, 2011 WL 1199834, at *9; Hirsch v. Desmond, No. 08-CV-2660 (JS)(AKT), 2010 WL 3937303, at *6–7 (E.D.N.Y. Sept. 30, 2010).

realistic chance of a prisoner's actually incriminating herself in such a program. Unfortunately, this approach will not dispose of all potential claims.[99] A second approach arises out of the post-*McKune* jurisprudence—specifically the circuits'—and balances states' and prisoners' interests by considering a variety of factors. While this approach harmonizes some of the apparent divergence in post-*McKune* jurisprudence, it involves distinctions and questions that ultimately make it unsatisfactory. Finally, this Part will propose adopting the third approach—the *McKune* plurality's—under which a consequence can only constitute compulsion for self-incrimination purposes if it constitutes an atypical and significant hardship in relation to the ordinary incidents of prison life. This approach is the most functional because it appreciates the reality of self-incrimination jurisprudence, does not require inquiries ill suited to the judicial capacity, and balances both states' legitimate interests and prisoners' constitutional rights.

A. *Responding to Criticism of* McKune

1. The Analytical Argument

One argument against the programs discussed above challenges the *McKune* court's self-incrimination analysis itself. The *McKune* plurality analyzed the self-incrimination question within a borrowed due process framework.[100] Within such a framework, whether a particular hardship is unconstitutionally compelling depends on the context in which that hardship is threatened or imposed.[101] Thus, while prisoners' self-incrimination privileges do not "terminate at the jailhouse door," in light of the inherent—and constitutional—restrictions of prison life, consequences that violate the privilege in free society do not necessarily do so when imposed on prisoners.[102] So, while

---

[99] Part of the attractiveness of this approach is its status as a longstanding and well-settled self-incrimination principle. *See* Mannheimer, *supra* note 47, at 1273, 1273 n.56 (tracing this rationale as far back as 1861).

[100] *See McKune*, 536 U.S. at 37–38. This is the *Sandin* atypical and significant hardship standard. *Id.* at 37.

[101] *See id.* at 36 ("The fact that these consequences are imposed on prisoners, rather than ordinary citizens, . . . is important in weighing respondent's constitutional claim.").

[102] *Id.*

the "penalty" cases make unconstitutional even the comparably trivial threat of ineligibility to receive state contracts, it would be a mistake to transport their reasoning wholesale into the prison context.[103]

But this framework for analyzing self-incrimination challenges has been criticized as being at odds with the nature of the Self-Incrimination Clause itself. For example, a provision like the Due Process Clause does not mandate any particular process; rather, what process is due depends on a variety of circumstances.[104] In a similar vein, the Fourth Amendment forbids searches and seizures that are "unreasonable," and what searches are reasonable will vary by scenario.[105] The Self-Incrimination Clause, however, confers a substantive protection not limited to what is reasonable, or what is due, under the circumstances; and—so it has been claimed—it is intellectually inconsistent to apply it differently depending on such circumstances as who claims its protections.[106] In light of this reasoning, it would be a mistake to transport a due process standard, by which a state's competing penological interest can outweigh, for example, a prisoner's right to call witnesses in his defense at a prison administrative hearing, into the realm of the inviolable self-incrimination privilege.[107]

While this argument has logical appeal, it is simply at odds with the Court's self-incrimination jurisprudence. Certainly, the penalty cases demonstrate the privilege's resilience and the expansiveness of its protections.[108] Nevertheless, the "tough choice" cases expose the fact that these protections have an outer limit.[109] They demonstrate that the privilege has never been interpreted to be absolutely inviolable, regardless of the

---

[103] *Id.* at 40–41; *See also supra* Part I.B.1.

[104] *See* Rund, *supra* note 54, at 432–33; *see also* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.") (alterations in original omitted) (internal quotation marks omitted).

[105] U.S. CONST. amend. IV; *see* Rund, *supra* note 54, at 409.

[106] *See* Rund, supra note 54, at 409, 433; *see also* Andrew E. Taslitz, *Confessing in the Human Voice: A Defense of the Privilege Against Self-Incrimination*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 121, 127–28 (2008).

[107] *See supra* note 62; *see also* Taslitz, *supra* note 106; Rund, *supra* note 54, at 409, 433.

[108] *See supra* Part I.B.1.

[109] *See supra* Part I.B.3.

circumstances under which it is invoked; rather, they show that the privilege, like many constitutional rights, may be burdened to accommodate competing governmental interests.[110]

Moreover, the Court has explicitly sanctioned burdening the privilege in the prison context when important state penological interests are in play. Justice Kennedy, writing for the plurality in *McKune*, explained the outcomes in the tough choice cases: "[T]his Court has recognized that lawful conviction and incarceration necessarily place limitations on the exercise of a defendant's privilege against self-incrimination."[111] Thus, in *Baxter v. Palmigiano*, while the Court recognized that *Griffin*[112] prevents the factfinder from treating a criminal defendant's silence as evidence of guilt at trial, it was constitutional to impute an inmate's silence in a disciplinary proceeding in state prison against him because such proceedings "involve the correctional process and important state interests other than conviction for crime."[113] Understood in light of Justice Kennedy's explanation, therefore, it is not logically inconsistent, nor unprecedented, to apply the Self-Incrimination Clause in the context of prison sex-offender counseling—where the important state interest of rehabilitating sex offenders is involved—differently than with non-convicted and presumed innocent persons.[114]

There is a further flaw in this approach: It could actually harm prisoners' interests by leading to longer sentences. As one writer who opposes the *McKune* decision has suggested, to allow sex offenders to make admissions in counseling without the prospect of prosecution, or to allow them to avoid counseling consequence free, would be to risk excessive leniency toward a particularly troublesome category of offender.[115] To avoid this leniency, and to ensure that society responds appropriately to

---

[110] *See* Corbitt v. New Jersey, 439 U.S. 212, 216, 222–23 (1978) (discussing the constitutionality of burdening a defendant's self-incrimination privilege in light of the substantial benefits to the state of maintaining a plea-bargaining scheme).

[111] McKune v. Lile, 536 U.S. 24, 38 (2002).

[112] *See generally* 380 U.S. 609 (1965).

[113] Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) (citing Griffin v. California, 380 U.S. 609 (1965)). Baxter is one of the tough choice cases. *See supra* Part I.B.3.

[114] *See McKune*, 536 U.S. at 40 (not to do so would be to treat the fact of respondent's incarceration "as if it were irrelevant").

[115] *See* Rund, *supra* note 54, at 438.

these offenses, he recommends coupling immunity in counseling with an increase in the length of sex offenders' sentences.[116] But such an approach, offered for the sake of intellectual consistency, is plainly harmful to the human interests of the prisoners whose self-incrimination privilege it supposedly protects: Despite virulent public sentiment against sex offenders, most sex offenders do not spend their lives in prison.[117] States are under no obligation to rehabilitate sex offenders, and state legislatures could simply foreclose the possibility of parole for sex offenders altogether.[118] Thus, while these programs may give rise to constitutional quandaries, one alternative—simply to treat sex offenders as too dangerous to warrant rehabilitation, and to eliminate programs that make society amenable to their release—would undoubtedly be worse for inmates.[119]

2. Lack of Psychological Efficacy

Another approach attacks the psychological and therapeutic validity of these programs to prove their unconstitutionality. As an initial matter, courts, commentators, and health practitioners agree that rehabilitation is central to reducing recidivism among sex offenders.[120] In addition, there is also agreement that

---

[116] *See id.*

[117] Merrill A. Maiano, Comment, *Sex Offender Probationers and the Fifth Amendment: Rethinking Compulsion and Exploring Preventative Measures in the Face of Required Treatment Programs*, 10 LEWIS & CLARK L. REV. 989, 996 (2006).

[118] *See* Greenholtz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1, 7 (1979) (holding no constitutional right to early release from a validly imposed sentence).

[119] Speaking of the respondent's transfer from a medium- to a maximum-security unit, the *McKune* plurality wrote, "Respondent's reasoning would provide States with perverse incentives to assign all inmates convicted of sex offenses to maximum security prisons . . . . The rule would work to the detriment of the entire class of sex offenders who might not otherwise be placed in maximum-security facilities." *McKune*, 536 U.S. at 46. Likewise, states could simply cease rehabilitating sex offenders in preparation for early release and stop releasing them early altogether. Presumably, states could even legislate life sentences for sex offenses and abandon any efforts at rehabilitation.

[120] *See id.* at 33 (noting that rehabilitation programs enable offenders to manage their impulses and avoid re-offending); United States v. Antelope, 395 F.3d 1128, 1137–38 (9th Cir. 2005) ("Often sex offenders repeat their past offenses, and informed counseling can only help protect them, their potential victims, and society.") (citations omitted); MANAGEMENT OVERVIEW, *supra* note 13, at 8 (noting that treatment of sex offenders has the greatest chance of reducing recidivism); Jon J. Kear-Colwell, *A Personal Position on the Treatment of Individuals who Commit Sexual Offenses*, 40 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 259, 260

admitting responsibility is important to successful offender rehabilitation, and thus that it is a valid obligatory step in any treatment plan.[121]

The divergence in opinion as to the psychological efficacy of these programs comes at the point where admissions in counseling are not immunized, and where non-participation comes with certain consequences, including longer confinement. Opponents argue that backing up the admission requirement with potentially negative consequences is actually detrimental to offender rehabilitation,[122] and that there is no clinical support for the view that requiring admissions to be un-immunized has rehabilitative value.[123] If these programs, then, actually hinder the state's legitimate penological objective of rehabilitating sex

---

(1996) ("With adequate treatment programs, it has been shown that the risk of reoffending can be significantly reduced . . . . Treatment . . . will prevent some future victims from being assaulted."); Maiano, *supra* note 117, at 997 ("Researchers remain optimistic that treatment can reduce sex offender recidivism.").

[121] *See McKune*, 536 U.S. at 33 (noting the importance of sex offenders' confronting their past and accepting responsibility); *Antelope*, 395 F.3d at 1137 ("We do not doubt that [the] policy of requiring convicted sex offenders to give a sexual history, admitting responsibility for past misconduct to . . . counselors, serves an important rehabilitative purpose."); Judith V. Becker, *Offenders: Characteristics and Treatment*, FUTURE OF CHILD., Summer/Fall 1994, at 176, 187 ("A sex offender can be considered amenable to treatment only if he acknowledges that he has committed a sexual offense . . . ."); Anita M. Schlank & Theodore Shaw, *Treating Sexual Offenders Who Deny Their Guilt: A Pilot Study*, 8 SEXUAL ABUSE: J. RES. & TREATMENT 17, 18 (1996) ("Most therapists agree . . . that the first goal of treatment is to assist the perpetrator in acknowledging that he has a problem involving sexual behavior. . . . [O]ffenders [who deny responsibility] are more likely to reoffend following their release than those who have admitted their guilt . . . .").

[122] Rebecca Johansen, Note, *The Ruse of Rehabilitation: The Supreme Court's Misconception of Coercion in Sexual Offender Rehabilitation Programs*, 12 LEWIS & CLARK L. REV. 763, 784 (2008) ("[P]risoners will confess to avoid negative consequences, but they will not actually take any ownership over what happened. Not only does this type of confession fail to further the rehabilitative purpose, but it can even hinder it."); Abigail E. Robinson, Comment, *Treating the Sex Offender at Any Cost: Fifth Amendment Privilege Against Compelled Self-Incrimination in the Prison Context*, 42 WASHBURN L.J. 725, 749 (2003) ("[D]enying immunity actually . . . damages therapeutic success.").

[123] *See* Johansen, *supra* note 122, at 771 (claiming that, while the *McKune* plurality used rehabilitation as its basis for rejecting an immunity requirement, it cited no psychological evidence for this conclusion); *see also McKune*, 536 U.S. at 69 (Stevens, J., dissenting) (deriding the lack of evidence that the program's aims could not be served equally well by granting use immunity).

offenders, they do not justify burdening prisoners' right to be free from compelled self-incrimination; in fact, the inefficacy of the programs makes them not only unreasonable, but arbitrary.[124]

There is, however, at least some clinical support for the view that limiting patient freedom to choose not to participate in therapy may at times be in both the patient's and society's best interest—particularly when the patient poses a significant and demonstrable risk to others as convicted sex offenders have been provent to do.[125] While such limits are, from a variety of perspectives, not ideal, they reflect a balancing of interests and attention to the particular settings and purposes of treatment.[126]

Moreover, incentivizing participation in sex-offender counseling, and refusing to immunize admissions made there, may have a valid rehabilitative purpose and, at the very least, may not hinder rehabilitation. In a recent long-term study of the Minnesota sex offender rehabilitation program—the same program addressed in *Johnson v. Fabian*[127]—researchers found that, despite a lack of immunity, participation in prison sex-offender counseling reduced the risk of sexually re-offending behavior by twenty-seven percent.[128] The researchers recognized that inmates could refuse to participate, but risked lengthening their confinement if they did; but rather than reducing the efficacy of the program, they concluded that this system may actually have motivated prisoners to participate who otherwise would not not have been treated.[129]

Ultimately, the objective of offering this contrary evidence is not to resolve a debate that is essentially a matter of clinical decision-making about the most appropriate means of

---

[124] Johansen, *supra* note 122, at 791; Robinson, *supra* note 122, at 748.

[125] *See* John S. Carroll, *Consent to Mental Health Treatment: A Theoretical Analysis of Coercion, Freedom, and Control*, 9 BEHAV. SCI. & L. 129, 129 (1991).

[126] *See id.* at 139–40. For example, "the alternative of encouraging personal responsibility . . . until the [prospective patient] commits a crime . . . seems to abdicate our collective responsibility and creates substantial risks." *Id.* at 140.

[127] 735 N.W.2d 295 (Minn. 2007). *See supra* Part II.B.3.

[128] Grant Duwe & Robin A. Goldman, *The Impact of Prison-Based Treatment on Sex Offender Recidivism: Evidence from Minnesota*, 21 SEXUAL ABUSE: J. RES. & TREATMENT 279, 296 (2009). The study evaluated recidivism among 2,040 sex offenders released from Minnesota prisons between 1990 and 2003, before the decision in *Johnson*. *See id.* at 279.

[129] *See id.* at 283 (reasoning that this approach "likely motivated many offenders to enter treatment programming who might have otherwise opted not to do so if the choice were entirely voluntary").

rehabilitating sex offenders; rather, it shows the limits of attempting to resolve the issue in a judicial setting. Such choices are better left to the professionals charged by law-making and administrative bodies with administering rehabilitation programs whose ultimate end is the protection of society from recidivist sex offenders.[130] It is for this reason that courts—who, despite their clinical and scientific incompetence, must nevertheless rule on the constitutionality of such programs—should not resort to clinical arguments in making that determination when there is reasonable disagreement in the psychological community.

B. Applying the Incrimination Requirement

Applying the incrimination requirement to these counseling regimes, it becomes clear that, for a substantial number of participants, there is no possibility that their privilege against self-incrimination can be violated. Joseph Hirsch's case provides an example of how this requirement operates. Hirsch feared that admitting to the penetration allegation in his probation report would subject him to prosecution for rape.[131] However, because Hirsch was acquitted of this charge,[132] the Double Jeopardy Clause would in all likelihood have prevented him from being re-prosecuted.[133] Hirsch also feared that admitting to his offenses of

---

[130] For example, the plurality in *McKune* stated as its first justification for the validity of not offering immunity to program participants, "[T]he professionals who design and conduct the program have concluded that for SATP participants to accept full responsibility for their past actions, they must accept the proposition that those actions carry consequences. . . . [T]he potential for additional punishment reinforces the gravity of the participants' offenses and thereby aids in their rehabilitation." McKune v. Lile, 536 U.S. 24, 34 (2002).

[131] *See* Amended Complaint, *supra* note 2, at 4–5.

[132] *See* Hirsch v. Desmond, No. 08-CV-2660 (JS)(AKT), 2010 WL 3937303, at *1 (E.D.N.Y. Sept. 30, 2010).

[133] *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (holding that a directed verdict of acquittal is not reviewable, even if entered on an "egregiously erroneous foundation"). That an acquitted offense appeared in Hirsch's probation report is not inconsistent with established law. *See* United States v. Watts, 519 U.S. 148, 154 (1997) (holding that a court may consider acquitted charges for sentencing purposes); Vega v. Lantz, 596 F.3d 77, 80, 83 (2d Cir. 2010) (finding no constitutional violation where department of corrections officially labeled an inmate a sex offender on the basis of an acquitted charge); Billiteri v. U.S. Bd. of Parole, 541 F.2d 938, 944–45 (2d Cir. 1976) (suggesting that parole boards can take into account acquitted offenses in making

conviction might incriminate him because his case was on appeal.[134] But by the time that Hirsch was asked to admit to the conduct in the probation report, he had exhausted his direct appeals and his federal habeas petition had been denied.[135] In these circumstances, the near impossibility of his conviction's being overturned and a new trial being ordered suggest that Hirsch could not reasonably have feared further incrimination with respect to his offenses of conviction.[136] Finally, Hirsch feared prosecution for the stalking allegations.[137] In New York, a prosecutor must commence a misdemeanor stalking prosecution within two years of the offense.[138] Hirsch was convicted on January 3, 2002, and the alleged stalking occurred between his initial arrest and conviction.[139] Thus, in 2006 when Hirsch entered SOCP he could not have been prosecuted for misdemeanor stalking and, so, incriminating himself with respect to these allegations would have been extremely unlikely—an extraordinary and nearly impossible contingency.

---

their decisions). This paper does not address the therapeutic validity of requiring an offender to admit to acquitted offenses in counseling. *Cf. Hirsch*, 2010 WL 3937303, at *8 ("[N]o clearly established law require[s] the State to, for therapeutic purposes, ignore evidence of Hirsch's conduct, simply because that evidence was insufficient to convict him beyond a reasonable doubt.").

[134] *See* Amended Complaint, *supra* note 2, at 35.

[135] *See* People v. Hirsch, 299 A.D.2d 559, 750 N.Y.S.2d 512 (2d Dep't 2002) (affirming conviction); People v. Hirsch, 99 N.Y.2d 629, 790 N.E.2d 284, 760 N.Y.S.2d 110 (2003) (denying review); Hirsch v. Plescia, No. 03-CV-1617(DLI), 2005 WL 2038587, at *7 (E.D.N.Y. Aug. 23, 2005) (denying petition for writ of habeas corpus); *see also supra* note 53 (discussing cases supporting the proposition that there can be no incrimination once a conviction has been affirmed on appeal).

[136] *See, e.g.*, Neal v. Shimoda, 131 F.3d 818, 833 (9th Cir. 1997) (finding possibility of prosecution related to statements made during sex offender counseling insufficiently real where double jeopardy precluded further prosecution for offenses of conviction and where plaintiff expressed no intention to collaterally attack his conviction); Zaire v. West, No. 04-CV-6217L, 2008 WL 4852677, at *11 (W.D.N.Y. Nov. 6, 2008) (dismissing self-incrimination claims as "remote and speculative" because "[plaintiff's] direct appeal had concluded years before . . . [the] decision to remove his 10 years of good time credits for failure to complete the sex offender counseling program[,] . . . [and plaintiff's] federal collateral challenges to his state conviction were completed . . . .").

[137] *See* Amended Complaint, *supra* note 2, at 4.

[138] *See* N.Y. CRIM. PROC. LAW § 30.10(2)(c) (McKinney 2011) (defining limitations period for misdemeanors in New York); N.Y. PENAL LAW §§ 120.45–50 (defining misdemeanor stalking).

[139] *See* Hirsch v. Desmond, No. 08-CV-2660 (JS)(AKT), 2010 WL 3937303, at *1 (E.D.N.Y. Sept. 30, 2010); Amended Complaint, *supra* note 2, at 13.

The incrimination prong, however, may not have completely disposed of Hirsch's potential self-incrimination claim. In the event that the stalking in question rose to the level of a felony, the limitations period would have been five years.[140] So, depending on exactly when the stalking occurred, the limitations period may not have expired by the time Hirsch entered SOCP. Moreover, Hirsch may have testified in his own defense.[141] Courts have treated exposure to prosecution for perjury as sufficiently hazardous to violate the Self-Incrimination Clause.[142] In the event that Hirsch testified to his innocence at trial, an admission of guilt in SOCP could have exposed him to prosecution for lying on the stand.[143] Finally, many sex offender treatment programs require inmates to admit their entire sexual history, even if such history contains un-prosecuted offenses; in such a case, there would be no double jeopardy protection.[144] So, though the incrimination inquiry exposes the fact that, because of double jeopardy protections, the finality of judgments, and

---

[140] *See* N.Y. CRIM. PROC. LAW § 30.10(2)(b) (McKinney 2011) (defining limitations period for felonies in New York); N.Y. PENAL LAW §§ 120.55–60 (McKinney 2011) (defining felony stalking).

[141] At Hirsch's sentencing hearing, his attorney objected to several portions of the probation report, including the portion pertaining to the stalking allegations. In his remarks, he suggested that, if the allegations had any credibility, the district attorney would have cross-examined his client about them, thus implying that Hirsch did, in fact, testify in his defense. *See* Amended Complaint, *supra* note 2, at 13–14.

[142] *See* Johnson v. Fabian, 735 N.W.2d 295, 311 (Minn. 2007) (concluding that exposure to perjury prosecution arising out of conflict between trial testimony and statements in counseling presented a "real and appreciable risk of incrimination" sufficient to violate the Constitution).

[143] *See* N.Y. CRIM. PROC. LAW § 30.10(2)(b) (McKinney 2011) (defining limitations period for felonies in New York); N.Y. PENAL LAW § 210.15 (McKinney 2011) (defining given false testimony as a felony).

[144] *See* McKune v. Lile, 536 U.S. 24, 30 (2002) ("Participating inmates also are required to complete a sexual history form, which details all prior sexual activities, regardless of whether such activities constitute uncharged criminal offenses."); Searcy v. Simmons, 299 F.3d 1220, 1222 (10th Cir. 2002) ("In completing the sexual history form, [participants] must list sexual activities where they were the perpetrator and a victim was involved, regardless of whether criminal charges were brought in response to the activity in question."); Ainsworth v. Stanley, 317 F.3d 1, 2 (1st Cir. 2002) ("New Hampshire's [sex offender counseling program] . . . require[s] participants to accept responsibility for . . . any other sexual offenses they may have committed."). In New York, if such un-prosecuted offenses constituted rape, aggravated sexual abuse in the first degree, or engaging in a course of sexual conduct with a child in the first degree, there would be no limitations period. *See* N.Y. CRIM. PROC. LAW § 30.10(2)(a) (McKinney 2011).

statutes of limitations, a substantial quantity of inmates simply cannot incriminate themselves in counseling, it ultimately does not address the full scope of the incrimination-in-counseling problem.

C. *The Four-Factor Inquiry*

1. Overview

Jurisprudence in the wake of *McKune* presents another avenue for disposing of inmate self-incrimination claims, one that balances a state's penological interests with an inmate's constitutional rights. The courts in *Searcy v. Simmons* and *Ainsworth v. Stanley* determined that the applicable holding of *McKune* was not the atypical and significant hardship standard advocated by the plurality, but was, rather, contained in Justice O'Connor's somewhat formless statement, "I do not believe the penalties assessed against respondent in response to his failure to incriminate himself are compulsive on any reasonable test . . . ."[145] Both courts then sought to determine whether the consequences of the inmates' refusals were "so great as to constitute compulsion for the purposes of the" Self-Incrimination Clause without reference to the atypical and significant hardship standard.[146]

From both courts' analyses, a four-factor test emerges that can guide courts in measuring the constitutionality of sex-offender counseling programs. First, the courts gauged the inmates' liberty interest in attaining early release. Second, the courts asked whether the programs were mandated by order or voluntary. Third, the courts noted the centrality of the required admissions to effective rehabilitation of sex offenders—that is, the courts weighed the states' interest in conditioning treatment and early release on potentially incriminating admissions. And, finally, the courts measured the connection between the refusal to make the admissions and the denial of early release, asking

---

[145] *McKune*, 536 U.S. at 54 (O'Connor, J., concurring); *see Searcy*, 299 F.3d at 1225; *Ainsworth*, 317 F.3d at 4.

[146] *See Searcy*, 299 F.3d at 1225. The *Ainsworth* court described O'Connor's opinion as offering "no clear guideposts," and described its own approach to whether the plaintiff had been unconstitutionally compelled as "resort[ing] to our own sound judgment, so long as it does not conflict with existing precedent." *Ainsworth*, 317 F.3d at 4.

whether the denial was an automatic consequence of the inmate's refusal to make the admissions and subsequent disqualification from therapy, or whether such refusal and disqualification were merely considered among other relevant factors.[147] This Note will apply the four-factor test to Joseph Hirsch's case to demonstrate how it would dispose of the issue. At the outset, however, this Note recognizes that courts are always likely to find the third factor weighty, regardless of the other factors, which are likely to vary from state to state and program to program.

a. State's Interest in Rehabilitation

A state's interest in rehabilitation is almost always likely to be given heavy weight in the four-factor inquiry. Released sex offenders are more likely than any other type of offender to be re-arrested for a new rape or sexual assault.[148] Though some studies suggest sex offenders are less likely than other categories of offender to commit another crime—that is, a sex crime or otherwise—following their release, the extreme seriousness of sex offenses makes reducing sexual reoffending a priority.[149] Moreover, because most sex offenders do not receive life sentences, they will eventually return to the community, making their successful rehabilitation a priority.[150] And, as has been discussed, sex offender treatment programs are essential to rehabilitating sex offenders and reducing their rates of recidivism.[151] Admission of responsibility is central to the success of such treatment, and states should not be obligated to make an admission consequence free by offering immunity: Such a position would undermine the state's penological and therapeutic message to offenders about the seriousness of their crimes.[152] Moreover, states should be entitled to provide disincentives, such as the loss of early release, to encourage successful and

---

[147] *See infra* Part III.C.1.c.

[148] *See McKune*, 536 U.S. at 33; U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1983 6 (1997).

[149] *See* Maiano, *supra* note 117, at 996–97; *see also* MYTHS AND FACTS, *supra* note 17.

[150] *See* Maiano, *supra* note 117, at 997.

[151] *See* Duwe & Goldman, *supra* note 128; *supra* Part III.A.2.

[152] *See McKune*, 536 U.S. at 34–35.

meaningful participation in their treatment programs.[153] Finally, while there is sentiment to the contrary, because there is a reasonable basis to conclude that these incentives may be useful components of a treatment plan, courts should not attempt to resolve a clinical and penological debate that is beyond their competence.[154]

b. Prisoner's Interest in Early Release

A court would be unlikely to find Hirsch's liberty interest in early release to be weighty: "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence[,]" for, "the conviction, with all its procedural safeguards," has constitutionally extinguished the right to freedom.[155] Rather, for an inmate to have a protected liberty interest in release prior to completing his constitutionally imposed sentence, "he must have a legitimate expectancy of release that is grounded in the state's statutory scheme."[156] For example, because of the contours of its sentencing system, which creates a presumption that with good behavior inmates will be released after serving two-thirds of their sentence, the Supreme Court of Minnesota has determined that Minnesota inmates have a liberty interest in parole.[157]

In New York, on the other hand, the parole board determines prisoners' fates according to guidelines established by the parole board itself, guidelines that delegate wide latitude to the board's case-by-case discretion.[158] As a result, inmates in New York have been held to "have no liberty interest in parole . . . ."[159] Under such a system, losing parole is not a penalty, but merely the

---

[153] *See id.* at 47–48; Duwe & Goldman, *supra* note 128.

[154] *See McKune*, 536 U.S. at 34–35; *supra* Part III.A.2.

[155] *See* Greenholtz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1, 7 (1979).

[156] Barna v. Travis, 239 F.3d 169, 170 (2d Cir. 2001).

[157] *See* Johnson v. Fabian, 735 N.W.2d 295, 302, 308–09 (Minn. 2007).

[158] *See Barna*, 239 F.3d at 171 (detailing the procedures for making parole determinations in New York).

[159] *Id.* This is probably an overstatement. *See* Boddie v. N.Y. Div. of Parole, 288 F. Supp. 2d 431, 440 (S.D.N.Y. 2003) (prisoner's liberty interest in discretionary release is limited to having his case considered according to statutorily mandated criteria, and not being denied parole for arbitrary or impermissible reasons—for example, race).

state's withholding a benefit that it is under no obligation to give.[160] Thus, a court would not be likely to give Hirsch's liberty interest in retaining his good-time much weight.

c. Voluntariness and Directness

The state's interest in rehabilitation and community protection and Hirsch's liberty interest in early release, balanced with the other two factors—voluntariness and directness—would likely result in a determination that Hirsch's constitutional rights were not violated when he lost good-time credits as the eventual consequence of not making the required admissions in SOCP. Hirsch's participation was not ordered by any court or executive body; rather, SOCP was a voluntary program that he was at liberty to refuse without directly incurring sanctions for violating a court order. And the denial of good time credits was not automatic in the manner contemplated by decisions like *Ainsworth*.[161] In fact, only after reviewing Hirsch's entire record and giving him the opportunity to be heard did the Committee determine that he had "not earn[ed] his good time."[162]

2. Harmonizing the Split

In addition to providing some guidance to lower courts determining the constitutionality of sex offender treatment programs in the wake of *McKune*, this four-factor approach brings the added benefit of reconciling the seemingly divergent outcomes discussed in Part II above. Under this analysis, it may be that the liberty interests implicated in the various cases were actually distinguishable. In *Searcy* and *Ainsworth*, for example, each court noted that its state's statutory scheme did not create a liberty interest in parole.[163] On the contrary, in *Johnson v.*

---

[160] *See* Searcy v. Simmons, 299 F.3d 1220, 1226 (10th Cir. 2002).

[161] *See* Ainsworth v. Stanley, 317 F.3d 1, 5 (1st Cir. 2002) ("[T]he denial of parole was not entirely automatic. While the vast majority of parolees had completed the [program] prior to release, a few inmates are paroled each year despite having not completed [it]."); Defoy v. McCullough, 301 F. App'x 177, 182 n.9 (3d Cir. 2008) ("In *McKune*, the defendant was denied his privileges as a direct result of his choice; here, [plaintiff] was at least considered for reparole.").

[162] Amended Complaint, *supra* note 2, at 32.

[163] *See Searcy*, 299 F.3d at 1226 (noting that state regulations left the award of good-time credits entirely to the discretion of penal authorities and made no guarantee of reward for satisfactory behavior); *Ainsworth*, 317 F.3d at 5 (observing that not earning parole as a consequence of plaintiff's non-participation in

Fabian, the court specifically noted, "The discretionary reward systems at issue in *Ainsworth* and *Searcy* were significantly different than the mandatory Minnesota system on which we base[ ] our conclusion . . . ."[164] In such a circumstance, delaying early release amounts to an "extension of the inmates' incarceration time,"[165] not merely the withholding of a discretionary benefit.[166] Likewise, in *Antelope*, the Ninth Circuit characterized the cascading series of punishments imposed as a result of the defendant's refusal to make potentially self-incriminating admissions in treatment as his being "sentenced to *a longer prison term*."[167] Where an offender's sentence becomes longer as a result of his refusal to make self-incriminating statements, as opposed to merely becoming *not shorter*, a weightier liberty interest is implicated. Moreover, the Defendant in *Antelope* was initially sentenced to probation that was then revoked,[168] and courts have noted that revocation of probation implicates weightier liberty interests than mere denial of parole.[169]

The other two factors of voluntariness and directness of consequences—from *Johnson* and *Antelope*—also weigh more heavily against the state's interest in the prevention of recidivism than they do in *Searcy* and *Ainsworth*. For example, in *Johnson*, the treatment program was not voluntary because the petitioners were actually ordered to participate in it.[170] Likewise, in *Antelope*, the treatment was included in the probation terms mandated by the trial court.[171] Moreover, in neither case was the refusal to make self-incriminating admissions and subsequent disqualification from treatment

---

counseling was not "a new or additional penalty" but merely the withholding of a discretionary benefit that the state was entitled to condition on participation in therapy).

[164] 735 N.W.2d 295, 308 (Minn. 2007); *see supra* note 96.

[165] *Johnson*, 735 N.W.2d at 309.

[166] *See supra* text accompanying note 96.

[167] United States v. Antelope, 395 F.3d 1128, 1138 (9th Cir. 2005) (emphasis added).

[168] *See id.* at 1131–32.

[169] *See* Greenholtz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1, 10 (1979) (describing revocation of probation and the denial of parole as "losing what one has" versus "not getting what one wants," and noting the "human difference" between the two).

[170] *See Johnson*, 735 N.W.2d at 298.

[171] *See Antelope*, 395 F.3d at 1131.

merely one factor considered among others in determining whether to grant early release or not to revoke probation; rather, in *Johnson* the delay of early release was imposed as a direct sanction for refusing treatment,[172] and in *Antelope* the trial court revoked defendant's probation solely because he was not complying with his court-ordered treatment.[173]

D. The Atypical and Significant Hardship Test: A More Honest Approach

Thus, under the four-factor approach implied in *Searcy* and *Ainsworth*, the divergent outcomes reached by the various courts to consider this issue can actually be distinguished and harmonized under a coherent legal standard. Nevertheless, this approach is flawed. First, in determining the extent to which a state's statutory scheme grants a protected liberty interest in early release, the test relies on undesirable searching of statutory language for evidence of discretion or mandate—for example, use of the word "shall."[174] This process leads to torturing statutory language,[175] and actually creates an incentive for states, rather than creating rigid, objective guidelines for granting or denying parole, to leave the widest discretion to parole authorities to make decisions on an *ad hoc* basis, a system with obvious potential to do greater harm to prisoners' interests than a system with a pre-determined set of decisive, reviewable factors.[176]

Second, the approach relies on specious distinctions between penalizing inmates and withholding a benefit from them. It may be true that, based on a bare schematic of sentencing and parole mechanisms, Minnesota's system creates a more legitimate

---

[172] *See* 735 N.W.2d at 298.

[173] *See* 395 F.3d at 1131.

[174] *See* Sandin v. Conner, 515 U.S. 472, 480–81 (1995) (criticizing the method of "wrestl[ing] with the language of intricate, often rather routine prison guidelines to determine whether mandatory language and substantive predicates created an enforceable expectation that the State would produce a particular outcome with respect to the prisoner's . . . confinement").

[175] *See id.* at 481 ("By shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation, the Court encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges.").

[176] *See id.* at 482.

expectancy of release than, say, New Hampshire's.[177] But it is difficult to imagine that the prospect of losing parole would not be equally disturbing to an inmate in either state; and it is likewise unlikely that inmates in Minnesota fear a postponement of parole by forty-five days more than Joseph Hirsch feared postponement of his by ten-and-a-half months.[178] While these distinctions may be helpful in certain contexts, in the self-incrimination sphere the question is whether the consequences for remaining silent are sufficient to overcome the prisoner's will not to speak.[179] The emotional impact of an impending loss of early release should certainly play into that determination.

Third, the four-factor approach relies on similarly specious distinctions between voluntariness and involuntariness and directness and indirectness. The essential question in the penalty cases is whether the alleged compulsion was enough to overcome the witness's free will not to speak.[180] So, because the compulsion inquiry seeks to determine whether statements were rendered involuntary by the imposition of a threat or penalty, simply to say that participation in a program was voluntary because it was not ordered by an administrator or court is to sidestep the inquiry into the penalty altogether.[181] Furthermore, courts' determinations of what is a direct or indirect consequence seem frequently to split hairs. For example, in *Ainsworth*, the court determined that prisoners' loss of parole was not direct because, even though ninety-seven percent of parolees had completed the treatment program, it was at least possible to be paroled without completing treatment.[182] But it is hard to credit this determination when such an overwhelming majority of sex

---

[177] *See* Ainsworth v. Stanley, 317 F.3d 1, 5 (1st Cir. 2002); *Johnson*, 735 N.W.2d at 302, 308–09; *supra* note 96.

[178] *See Johnson*, 735 N.W.2d at 298–99; Amended Complaint, *supra* note 2, at 5. New York's early release system has been deemed discretionary, not mandatory. *See* Barna v. Travis, 239 F.3d 169, 171 (2d Cir. 2001).

[179] *See* McKune v. Lile, 536 U.S. 24, 48–49 (2002) (O'Connor, J., concurring).

[180] *See* Malloy v. Hogan, 378 U.S. 1, 6–7 (1964).

[181] *See supra* text accompanying notes 161–162.

[182] *See Ainsworth*, 317 F.3d at 3 ("While the vast majority of parolees had completed the SOP prior to release, a few inmates are paroled each year despite having not completed the SOP.").

offenders who received parole had completed treatment while merely three percent had not.[183] Such a consequence is only indirect in the most technical sense.

E. The Atypical and Significant Hardship Test: In Practice

The atypical and significant hardship standard avoids these problems. In applying it, the correct approach is not the Minnesota Supreme Court's, but the *McKune* plurality's. The court in *Johnson v. Fabian* determined that the inmates' loss of early release was an atypical and significant hardship because Minnesota's sentencing scheme made early release mandatory rather than discretionary.[184] As discussed above, this approach, especially for federal courts considering the constitutionality of a state's prison regulation, is inappropriate.[185] A more appropriate and manageable approach is that of the plurality in *McKune*, which reasoned that for "the consequences of an inmate's choice to remain silent" to be such an atypical and significant hardship, they must be "closer to the physical torture against which the [self-incrimination privilege] clearly protects" rather than "the *de minimis* harms against which it does not."[186]

Few—or none—of these programs come close to such torture. For example, the *McKune* plurality noted that not only had Kansas never prosecuted an inmate on the basis of admissions in counseling, but the program at issue had never even disclosed information gathered during counseling to authorities.[187] In fact, in this author's research, he uncovered no instance of any state's having prosecuted an individual on the basis of information obtained during sex-offender counseling. Thus, there is no indication that these programs are elaborate information-gathering operations; rather, they are therapeutic, designed for the benefit of the community and—because states could simply opt not to rehabilitate offenders but instead imprison them for ever-longer terms—ultimately inure to the benefit of the offender by increasing society's amenability to his release.[188] These

---

[183] *See id.* at 3.

[184] *See* Johnson v. Fabian, 735 N.W.2d 295, 302, 308–09 (Minn. 2007).

[185] *See supra* text accompanying notes 179–181.

[186] McKune v. Lile, 536 U.S. 24, 41 (2002).

[187] *Id.* at 30, 35.

[188] *See id.* at 47–48.

attributes are a far cry from the kinds of penalties against which the privilege was originally developed. Physical torture, forcing a defendant to take an oath and subjecting her to an inquisition regarding charges of which she is unaware, jailing an otherwise free witness for contempt to compel him to testify: These are examples of "imposing penalties for the refusal to incriminate oneself that go beyond the criminal process and appear, starkly, as government attempts to compel testimony . . . ."[189]

In this light, it is unlikely that the consequences Hirsch faced were atypical and significant hardships in relation to the ordinary incidents of prison life. Hirsch's sentence was not extended like the offender's in *Antelope*.[190] Rather, Hirsch merely served out the remainder of his legitimately imposed sentence. Furthermore, there is no evidence that DOCS, despite maintaining the possibility of punishment, actively cooperated with prosecutors to pass on information obtained in counseling.[191] Furthermore, Hirsch could not have been surprised by losing early release because of his unwillingness to admit responsibility for his offenses of conviction because it is established practice to mitigate sentences on the basis of remorse, or to tie parole determinations to accepting responsibility for one's actions.[192] The Time Allowance Committee determined that Hirsch lacked remorse on the basis of his expulsion from treatment; that it should have done so on this basis rather than on the basis of statements made in a parole hearing seems immaterial.[193] These circumstances combine to render Hirsch's loss of early release not an atypical and significant hardship in relation to the ordinary incidents of prison life.

CONCLUSION

In recent years, courts have grappled with sex-offender counseling programs that offer incentives to participate, require participants to admit responsibility for their misconduct, and do not immunize such admissions. While *McKune* addressed the

---

[189] *Id.* at 53 (O'Connor, J., concurring).

[190] *See* United States v. Antelope, 395 F.3d 1128, 1138 (9th Cir. 2005).

[191] That is, there is no evidence that SOCP was a ruse for illegitimately obtaining evidence for criminal prosecutions. *See McKune*, 536 U.S. at 48.

[192] *See id.* at 47.

[193] *See* Amended Complaint, *supra* note 2, at 32.

loss of privileges, many of these programs go farther—and inmates who refuse to participate can find themselves incarcerated for longer periods. While the *McKune* plurality ruled that a mere loss of privileges was not compulsion in violation of the Fifth Amendment privilege against self-incrimination, the Court has never ruled on whether states may actually confine an inmate longer as a consequence of not making admissions in counseling. Blanket arguments against these programs, which attack their constitutional analysis or psychological validity, are unsatisfactory. An efficient and practical approach to these programs considers whether participants are actually being asked to incriminate themselves; but this approach does not dispose of every constitutional violation that could arise from such counseling. Courts that have considered these programs have measured largely the same factors and, while they have reached different outcomes, when analyzed in light of these factors, their outcomes can be harmonized. Ultimately, however, consideration of these four factors is flawed. The best approach, which can dispose of every case of longer confinement as a result of non-participation in counseling—unlike the incrimination test—and which avoids unseemly judicial meddling—as occurs under the four-factor inquiry—is that recommended by the *McKune* plurality: A consequence of non-participation is compulsion in violation of the privilege against self-incrimination if it constitutes an atypical and significant hardship in relation to the ordinary incidents of prison life.