THE RUSE OF REHABILITATION: THE SUPREME COURT'S MISCONCEPTION OF COERCION IN SEXUAL OFFENDER REHABILITATION PROGRAMS

by
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*It appears the Supreme Court could use a lesson in psychology. In 2002, the Court held that revoking a prisoner's privileges and moving him to a higher-security prison in response to his refusal to incriminate himself did not create the "coercion" required for a Fifth Amendment violation. Touting the state's interest in rehabilitation and effective prison administration, the Court refused to enforce the prisoner's right to remain silent. This Note takes issue with the Court's reasoning and offers an alternative approach to the issue, while still using the balancing test set forth by the Court. The author incorporates psychological research into all aspects of the balance and uses pre-*McKune *precedent to show that the facts of* McKune *did constitute coercion. The Note also discusses alternatives that would promote the state's interests without infringing on constitutional rights: immunity, voluntary treatment programs, and programs that do not require admission of crimes.*

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I. INTRODUCTION

Imagine you are in prison, convicted of a heinous sexual offense. You maintain your innocence despite your conviction and failed appeals. After six years of good behavior, you have slowly worked your way into a medium-security prison with an array of special privileges. The prison officials tell you that unless you enter a treatment program and admit responsibility for both the crime of which you have been convicted and any past crimes, you will be moved to a maximum-security prison and lose all of your privileges. You will be able to earn no more than sixty cents per day, when currently you can earn up to minimum wage. Your visitation rights will be curtailed so that only your family, attorney, and clergy may visit you. While now you can spend $140 per payroll period at the canteen, you will only be able to spend $20. Your recreational and organizational privileges will be severely limited, and you will be forced to live with three other inmates, instead of the one you share a cell with now. Do you feel compelled to enter the program and tell of your crimes?

This was the situation in the recent case of *McKune v. Lile*,[1] and the Supreme Court held that there was no compulsion to self-incriminate. With this decision, the Court chipped away yet again at our Fifth Amendment rights. As far back as 1897, the Court considered a confession coerced if the individual was "influenced by *any* threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner."[2] Although never explicitly overruled, the Court has distanced itself significantly from this simple proposition in the last 110 years, culminating with *McKune*.[3]

A plurality of the Court, led by Justice Kennedy, held that the state's interests in rehabilitation and effective prison administration outweighed the individual prisoner's right to silence. It reached this conclusion not only because of the seriousness of the state interests, but also because of

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

[2] Bram v. United States, 168 U.S. 532, 543 (1897) (emphasis added).

[3] *E.g.*, Arizona v. Fulminante, 499 U.S. 279, 285 (1991) (stating that the above cited passage "does not state the standard for determining the voluntariness of a confession"); Colorado v. Connelly, 479 U.S. 157, 166 (1986) (stating that to recognize a Fifth Amendment violation with a mentally ill defendant would require recognition of a "brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated").

the significant restraints already imposed on prisoners. The new test allows prison officials to penalize prisoners who exercise their constitutional right to silence, as long as the consequences do not constitute an "atypical and significant" hardship on the prisoners' lives.[4]

Until *McKune*, the Court regularly held that although the right to silence is not absolute, government officials also cannot make it too "costly." In a series of cases, known as the "penalty cases," the Court recognized that certain penalties, including job termination,[5] loss of government contracts,[6] and loss of public office[7] are unacceptable consequences for exercising one's right to silence. However, the Court also acknowledged that when the "penalty" is merely the heightened possibility of a negative consequence, there is no compulsion.[8]

This Note contends that the Court was on the right track with its decision in *Bram,* and the slow move away from its holding, culminating with *McKune*, has virtually eliminated the significance of the right altogether in the prison context. The holding in *McKune*, that the severe penalties imposed on prisoners for exercising their constitutional rights did not constitute coercion, simply cannot be squared with the statement that "[t]he privilege against self-incrimination does not terminate at the jailhouse door."[9]

A more appropriate use of the balancing test would take into account psychology, both in deciding whether the consequences in this case amounted to coercion and in considering the strength of the state's rehabilitation interest. The psychological literature reinforces *Bram*'s premise that any threat, however small, constitutes coercion. In fact, psychologists have identified the imposition of negative consequences as "coercion" in and of itself.[10] This means that individuals are more likely to act based on these negative consequences than of their own free will and so are coerced into confessing in the most basic sense.

This Note argues that the *McKune* Court reached the wrong result, misusing the balancing test by failing to take into consideration insights about coercion and rehabilitation gleaned from psychological research. The first Part gives a brief overview of the different opinions of *McKune v.*

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[4] *McKune*, 536 U.S. at 38 (plurality opinion).

[5] Garrity v. New Jersey, 385 U.S. 493, 497–498 (1967).

[6] Lefkowitz v. Turley, 414 U.S. 70, 82 (1973).

[7] Lefkowitz v. Cunningham, 431 U.S. 801, 807–808 (1977).

[8] Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 286–288 (1998); Baxter v. Palmigiano, 425 U.S. 308, 317–318 (1976). As discussed below, the *McKune* plurality interpreted these cases somewhat differently. It distinguished these cases from the "penalty cases" by noting that in *Baxter* and *Woodard* the defendants were imprisoned, whereas in the penalty cases the defendants were free citizens. *See infra* Part V.A.1.b.

[9] *McKune*, 536 U.S. at 36.

[10] *E.g.,* Andrew Day, Kylie Tucker & Kevin Howells, *Coerced Offender Rehabilitation—A Defensible Practice?*, 10 PSYCHOL. CRIME & L. 259, 259 (2004); Christine A. Pace & Ezekiel J. Emanuel, *The Ethics of Research in Developing Countries: Assessing Voluntariness*, 365 LANCET 11, 12 (2005).

Lile. The next Part explores the reasons the Court should consider psychology in determining whether government action is coercive. The following Part explains the basic framework for understanding coercion from a psychological perspective. Finally, the last Part illuminates an appropriate balancing test, taking both psychology and pre-*McKune* precedent into account.

II. THE OPINIONS OF *MCKUNE V. LILE*

Although the plurality and dissent reached drastically different conclusions, the essential legal reasoning is the same. Each used the all-too-familiar balancing test, with the state on one side of the scale and the individual prisoner on the other. Justice Kennedy's plurality opinion departed from the Court's history of refusing to acknowledge psychology[11] by spotlighting rehabilitation as a legitimate state interest.[12] It also focused on prison officials' need for wide latitude, and it analyzed the individual's interests in terms of these administrative concerns.[13] Ultimately, the plurality held that the best way to maintain the appropriate balance is by allowing consequences for refusing to self-incriminate, as long as they do not constitute "atypical and significant hardships" as compared to ordinary prison life.[14] The dissent struck the opposite balance, doubting the plurality's characterization of the state's interests and contending that the severity of the consequences for failing to self-incriminate seriously violated the individual prisoner's rights.[15] Justice O'Connor's concurrence fell somewhere in between. Justice O'Connor refused to adopt the "atypical and significant hardship" test, but determined the consequences in this case were not severe enough to constitute coercion.[16]

A. Justice Kennedy's Plurality Opinion

In finding Kansas's Sexual Abuse Treatment Program (SATP) constitutional, the plurality opinion strongly emphasized the state's

[11] *See* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155 (2002) (discussing conflict between the Supreme Court's treatment of consent to search and psychological research); Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 116–117 (2006) (arguing for a new rule for eyewitness identification procedures that would take psychological research into account). *See generally* Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271 (2005) (describing courts' reluctance to use social science research in areas such as eyewitness identification, false confessions, and child suggestibility).

[12] *McKune*, 536 U.S. at 32–35.

[13] *Id.* at 37–39.

[14] *Id.* at 38.

[15] *Id.* at 54–72 (Stevens, J., dissenting).

[16] *Id.* at 54 (O'Connor, J., concurring).

interests.[17] After a brief recitation of the facts, it immediately states: "[s]ex offenders are a serious threat in this Nation."[18] In this one statement, the plurality indicated the focal point of the rest of the opinion: the tremendous need for rehabilitation in the context of sex offenders. Justice Kennedy's opinion justified this assertion by noting the high incidence of sexual crimes, especially against juveniles, coupled with a high rate of recidivism for untreated offenders.[19] Because sex offenders will eventually return to society, the state has a valid public safety interest in treating them and thereby reducing sexual crimes. The opinion cited the United States Department of Justice for its proposition that current rehabilitation programs are successful in curbing recidivism.[20]

The opinion then elucidated the need for sex offenders to accept responsibility for treatment to work. In an interesting divergence from its history of disregarding social science research,[21] the plurality cited psychology articles indicating that denial is an impediment to successful treatment.[22] It also noted the lack of any indication that the SATP was a pretext for obtaining confessions for later prosecution and emphasized that rehabilitation is a valid penological interest served by the program.[23] In rebutting the dissent's solution of immunity, the plurality, this time keeping with the Court's pattern of ignoring the social sciences, claimed that lack of immunity was also necessary for offenders to recognize the seriousness of their actions, and thus for treatment to work.[24] With no citation to authority, the assertion appears to be an extension of the proposition offered by the government at oral argument that offenders must acknowledge that their actions "carry consequences."[25] Because immunity would prevent prosecution for these past acts, offenders would accordingly assume their offensive acts were inconsequential.

Next, the plurality recognized the additional state interest of efficient prison administration.[26] Stressing separation of powers as well as federalism issues, it announced that the Court should defer to state legislatures and allow them to conduct their rehabilitation programs as they see fit.[27] The opinion also rejected the dissent's solution—giving benefits for participation in the program instead of punishing the failure to participate—based on the state's interest in effective prison

[17] *Id.* at 32–41 (plurality opinion).
[18] *Id.* at 32.
[19] *Id.* at 32–33.
[20] *Id.* at 33.
[21] *See supra* note 11.
[22] *McKune*, 536 U.S. at 33.
[23] *Id.* at 38.
[24] *Id.* at 34–35.
[25] *Id.* at 34.
[26] *Id.* at 37.
[27] *Id.*

administration.[28] The plurality argued that the dissent's solution would result in prisons assigning all sex offenders to maximum-security prisons with no privileges upon arrival. Prison administrators would do so to preserve incentives for rehabilitation, which usually occurs near the end of an offender's sentence.[29] Additionally, prison officials would need to constantly take each prisoner's baseline into account before making any decisions regarding his privileges or housing.[30] Thus, the Court decided to defer to prison administrators whenever possible, upholding the state's valid interest in maintaining its prisons in accordance with its own standards and procedures.

While not expressly weighing it in the balance, the plurality noted another state interest in its opinion. In discarding the dissent's immunity solution, the plurality acknowledged the importance of deterrence.[31] It is unclear who is deterred, but the plurality appears to be arguing that maintaining the option to prosecute serves the broad purpose of general deterrence: using the defendant to serve as an example to others who may be considering committing crimes.

The other side of the balance, prisoners' interests, got somewhat of a short shrift by the plurality opinion. It downplayed their significance by noting the considerable strain already burdening prisoners by virtue of their incarceration.[32] Then it analyzed these interests in terms of the state interest of effective prison administration.[33] Due to the importance of deference to the states in prison administration, the plurality adopted the "atypical and significant hardship" test. As applied in this context, this means that any consequence imposed by the state on prisoners for failure to incriminate themselves is justified unless it creates an "atypical and significant hardship" in relation to normal prison life.[34] The plurality gave little guidance as to what might constitute such a hardship, but it suggested that an increased sentence or reduction in good-time credits might be enough to meet the burden.[35] Because the facts did not meet this high burden, the plurality held the SATP constitutional.[36]

B. Justice Stevens's Dissent

Not surprisingly, the dissent took the opposite approach to that of the plurality. It minimized and re-characterized the state's interests while

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[28] *Id.* at 46–47.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 35.

[32] *Id.* at 36.

[33] *Id.* at 38–39.

[34] *Id.* at 37–38.

[35] *Id.* at 38. In *Sandin v. Conner*, 515 U.S. 472, 485–486 (1995), the case from which the rule is taken, even solitary confinement was not considered an "atypical and significant" hardship.

[36] *McKune*, 536 U.S. at 48.

maximizing the interests of the individual.[37] Although recognizing rehabilitation as an important goal, the dissent noted that this goal exists in every criminal case.[38] Thus, if the Court justified infringement on the right to silence by reference to rehabilitation, the right would be in jeopardy in every situation.[39] Additionally, the dissent noted that the government provided no evidence that immunity somehow hinders rehabilitation. The dissent further argued that immunity would actually further the rehabilitative goal by encouraging open communication during therapy.[40]

Rather than minimizing the importance of prison administration, the dissent merely refused to accept the premise that the sanctions in this case were precipitated by administrative necessity.[41] First, the government presented no evidence that the move to a maximum-security unit was necessary.[42] Kansas did not have a special housing unit dedicated to its sexual rehabilitation program; Lile, in fact, lived in the medium-security facility before being ordered to participate in the program.[43] Furthermore, the state submitted no evidence that there was a lack of medium-security facilities in Kansas and gave no alternative explanation for why Lile had to be moved to a maximum-security prison instead of another medium-security unit.[44] The dissent asserted that instead of arising out of administrative necessity, the state intended to punish Lile's assertion of his constitutional right to silence.[45] The punitive intent is illuminated by the fact that the reduction in privilege level imposed against Lile is the same as the punishment prison officials give to prisoners who commit such serious crimes as arson and assault while in prison.[46]

Again in contrast to the plurality, the dissent analyzed the individual interest independent of the state's interest. The dissent maintained that the "bedrock constitutional right" against self-incrimination is just as strong when the individuals asserting it are imprisoned as when they are free citizens.[47] The dissent then analyzed the consequences imposed upon Lile for his failure to participate in the program to determine if they were severe enough to qualify as a penalty for refusing to self-incriminate.[48] Very important to the dissent was the fact that Lile was

[37] *Id.* at 54–72 (Stevens, J., dissenting).
[38] *Id.* at 69.
[39] *Id.*
[40] *Id.* at 69–70.
[41] *Id.* at 66–67.
[42] *Id.* at 67.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 64.
[46] *Id.* at 54.
[47] *Id.* at 54, 58.
[48] *Id.* at 62–64.

ordered to attend the program and received an automatic penalty for failing to attend.[49] Additionally, when aggregated, the results of the revocation of Lile's privileges were quite severe. Further, the move to a maximum-security prison added to the severity by forcing Lile into a more dangerous environment.[50]

Ultimately, the dissent maintained that the penalties imposed for failure to participate in the program created coercion to self-incriminate.[51] Furthermore, the state interests that the plurality found so influential were either non-existent or better served by respecting Lile's right to silence. The dissent also offered two alternatives that would not offend the Fifth Amendment: granting use immunity[52] and offering voluntary programs with incentives for participating, rather than punishment for failure to participate.[53] Immunity eliminates the "incrimination" aspect of the Fifth Amendment, whereas voluntary programs eradicate the coercive quality of the state's actions; thus, both preserve the prisoner's right not to self-incriminate.

C. Justice O'Connor's Concurrence

While Justice O'Connor's reasoning is not quite as fulfilling as that in the other opinions, it was the deciding vote. The concurrence argued that the consequences in this case were simply not severe enough to be seen as compelling. Justice O'Connor distinguished the present case from the "penalty" cases where the Court held that certain penalties, such as termination of employment, were so severe as to create compulsion.[54] After considering the privileges Lile lost, Justice O'Connor posited that the "changes in living conditions seem to me minor."[55] The concurrence refused to adopt the plurality's "atypical and significant hardship" test, but maintained that the standard for compulsion, whatever it is, was not met in this case.[56]

III. THE ARGUMENT FOR CONSIDERING PSYCHOLOGY IN THE BALANCING ANALYSIS

Psychological research is an essential tool in analyzing sex offender treatment and its implications for the Fifth Amendment. The treatment programs themselves are psychology-based; the requirement of confessions for efficacy is gleaned from psychology; and the coercive

[49] *Id.* at 60.
[50] *Id.* at 62–64.
[51] *Id.* at 71.
[52] *Id.* at 56.
[53] *Id.* at 64–65.
[54] *Id.* at 49–50 (O'Connor, J., concurring).
[55] *Id.* at 51.
[56] *Id.* at 54.

nature of the program may actually reduce efficacy. The necessity of psychology is illustrated by the fact that both the plurality[57] and the dissent[58] acknowledged it in their opinions. Citing psychology when it helps bolster a scientifically questionable conclusion and ignoring it the rest of the time is an unsound approach to legal reasoning. Further, the state should be required to prove that the infringement on prisoners' Fifth Amendment rights is reasonably related to its rehabilitative purpose, which requires a look at psychological research. In sum, the Court should consider psychology in all relevant aspects of the balance.

A. Inconsistency

The most disconcerting aspect of the plurality's opinion is its use of psychology to legitimize the state interest of rehabilitation while utterly disregarding it in the rest of the balance. First, the plurality considered rehabilitation through programs like the SATP to be a vital state interest.[59] The plurality then cited studies showing that treatment can lower recidivism, furthering the interest of rehabilitation.[60] The plurality thus acknowledged psychologists' ability to treat offenders based on psychological research. Further, the plurality used psychological research to support the premise that denial impedes treatment, buttressing the view that admission of guilt is the only way to achieve rehabilitation.[61] Finally, in rejecting the dissent's solution of immunity, the plurality again used rehabilitation as its basis, although not actually citing any psychological studies.[62]

However, while acknowledging the important connection between psychology and successful treatment,[63] the plurality ignored other psychological factors that come into play in analyzing both rehabilitation efficacy and the prisoner's interests.[64] The plurality failed to consider research showing that simple admission through filling out a form might not actually further treatment goals at all.[65] It did not explore the numerous treatment alternatives touted by psychologists that would not require admission of past crimes.[66] Moreover, the plurality failed to mention that the coercive nature of the SATP could actually decrease the program's effectiveness, thus inhibiting the state's rehabilitative interest.[67]

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[57] *Id.* at 33–34 (plurality opinion).
[58] *Id.* at 68–69 (Stevens, J., dissenting).
[59] *Id.* at 33 (plurality opinion).
[60] *Id.*
[61] *Id.*
[62] *Id.* at 34.
[63] *Id.* at 33.
[64] *See infra* Part V.B.1.
[65] *See infra* Part V.B.1.a.
[66] *Id.*
[67] *See infra* Part V.B.1.b.

Offering no real explanation for the exclusion, the plurality simply acted as though the research did not exist.

To fashion the appropriate balance, the plurality should consider psychology consistently or not at all. The plurality reasoned that though Lile experienced adverse consequences for failing to incriminate himself, the state's interest in rehabilitation outweighed his interest in remaining silent.[68] To reach this conclusion the plurality must have accepted that the state proved: (1) it has an interest in rehabilitation and (2) that interest is furthered by the SATP. The first assertion is uncontested. However, to prove the second assertion, the state cited psychological research. By citing only the research that was helpful to its case, the state gave a skewed picture of reality. To fully understand whether the rehabilitative interest is furthered by the SATP, the state should have presented—and the plurality should have considered—all of the psychological research pertaining to that topic.

B. Reasonable Relation to the Rehabilitative Purpose

In substantive due process cases, the Supreme Court has held that "*[a]t the least*, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[69] To illustrate, in *Foucha v. Louisiana*,[70] the Court held that the state could not keep an individual in a mental institution by showing only that the individual was a danger to himself or others.[71] Instead, the Court required an additional showing that the individual was in fact mentally ill.[72] The Court reasoned that without such a showing the confinement itself was not reasonably related to the purpose of commitment generally: treating mental illness.[73] Similarly, in *Jackson v. Indiana*, the Court held that a state cannot detain someone based on incompetence to stand trial when the state has established that the individual will never be competent to stand trial.[74] Further, even if the individual might become competent, the detention must be in furtherance of the goal of obtaining competence.[75]

Though the present case does not contain a substantive due process element, the reasoning above can be transferred easily. Here, the state is claiming that the SATP is necessary so that sex offenders will not re-offend upon release; thus, the program protects society from the dangers that untreated offenders pose. As a consequence, the state argues, the

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[68] *McKune*, 536 U.S. at 36–38.

[69] Jackson v. Indiana, 406 U.S. 715, 738 (1972) (emphasis added).

[70] Foucha v. Louisiana, 504 U.S. 71 (1992).

[71] *Id.* at 75–76.

[72] *Id.*

[73] *Id.* at 79.

[74] *Jackson*, 406 U.S. at 738.

[75] *Id.*

program is justified even though it infringes on the individual prisoner's constitutional right against self-incrimination. This is quite similar to the situations in *Foucha* and *Jackson*, where the state was attempting to protect society from dangerous individuals at the expense of the individuals' constitutional liberty interests. In either case, the state should be required to prove, at the least, that the infringement is reasonably related to the purpose of the infringement.

In the substantive due process context, however, the Court has given quite a bit of deference to state officials in determining whether commitment bears a "reasonable relation" to the purposes of confinement. For example, in *Washington v. Harper*,[76] the Court held that the state's policy of treating specific prisoners with antipsychotic drugs was constitutional because the policy required a psychiatrist's approval before drugs would be administered.[77] The Court concluded that treatment was in the prisoners' medical interest; otherwise, the psychiatrist would not prescribe the drugs.[78] The present case is distinguishable, though, because here there is a blanket policy requiring that sex offenders enter the SATP. Psychologists do not individually evaluate each prisoner and determine that the program will be useful to the prisoner or further the state's rehabilitative goal.

The Court has held at least one such blanket policy constitutional.[79] In *Jacobson v. Massachusetts*, the Court upheld a state statute allowing the board of health of each city or town to require all residents to get vaccinations.[80] The defendant argued that because some medical research indicated that vaccinations might not be safe, the policy was unconstitutional.[81] The Court noted that though there were conflicting medical views, much evidence existed showing that vaccinations could help protect a community against smallpox.[82] It thus deferred to the decisions of the boards of health as reasonable.[83]

Again the present case is distinguishable. In *Jacobson*, the relation between vaccination and public safety was well established in the medical community. Thus, the Court did not need to consider at length medical research pertaining to the topic. In the present case, though, there is no general consensus in the psychological community that: (1) admission is needed for effective treatment, or (2) programs such as the SATP are effective. Thus, the state should have been required to produce, and the Court should have considered, psychological research pertaining to those questions.

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[76] Washington v. Harper, 494 U.S. 210 (1990).
[77] *Id.* at 222–23.
[78] *Id.* at 222.
[79] Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905).
[80] *Id.* at 12.
[81] *Id.* at 23–24.
[82] *Id.* at 30, 35.
[83] *Id.* at 27.

Following the above framework, the Court should have first considered whether admission of past crimes is "reasonably related" to the goal of rehabilitation. Admission of past crimes is equivalent to the "commitment" discussed in *Foucha* and *Jackson*. Those cases involved a liberty interest; thus, commitment was the infringement of the right at issue. Our case involves the right against self-incrimination, with the infringement of the right being the requirement of admission of past crimes.

Instead of accepting the state's assertion that admission is necessary for treatment, the Court should have considered psychological research to determine whether this is in fact true. If it had, it would have found that the reasoning behind requiring the hurdle of a confession is that offenders need to take responsibility for their actions and feel empowered to change them.[84] Many psychologists agree that admission of the crime alone is often not enough to combat denial.[85] Offenders may minimize the harm imposed or justify their behavior in other ways.[86] Thus, a program that requires offenders to sign a simple "admission of responsibility" form is unlikely to be any more effective than a program that does not require such an admission. An appropriate way to achieve lower rates of recidivism would be a program that actually works with denial in all its forms, rather than simply requiring an admission.[87]

Next, the Court should have considered whether the SATP as a whole is reasonably related to the goal of rehabilitation. Ultimately, the state's rehabilitative interest is to create long-term changes in the individual offender, decreasing recidivism.[88] Consequently, the Court should have considered the efficacy of treatment as a whole. In a coerced environment, such as the one created by the SATP, treatment is actually hindered, and so the goal of rehabilitation is not furthered.[89] If the Court is going to find state action constitutional based on the state's assertion of an interest in rehabilitation, it should make the state take account of all the practical aspects of actually decreasing recidivism, rather than giving prison officials free reign to "treat" prisoners, disregarding individuals' interests when convenient.

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[84] *See* John S. Carroll, *Consent to Mental Health Treatment: A Theoretical Analysis of Coercion, Freedom, and Control*, 9 BEHAV. SCI. & L. 129, 139 (1991); Jon J. Kear-Colwell, *Guest Editorial: A Personal Position on the Treatment of Individuals Who Commit Sexual Offenses*, 40 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 259, 261 (1996).

[85] *See* ANNA C. SALTER, TREATING CHILD SEX OFFENDERS AND VICTIMS: A PRACTICAL GUIDE 97 (1988); Howard E. Barbaree, *Denial and Minimization Among Sex Offenders: Assessment and Treatment Outcome*, 3 F. ON CORRECTIONS RES. 30, 31 (1991).

[86] SALTER, *supra* note 85, at 96–109; Barbaree, *supra* note 85.

[87] Barbaree, *supra* note 85, at 32.

[88] *McKune*, 536 U.S. at 33 (plurality opinion).

[89] *See infra* Part V.B.1.b.

IV. PSYCHOLOGICAL UNDERSTANDING OF COERCION

Psychologists' definition of coercion is, on the most basic level, similar to the lay person's definition. Essentially, coercion entails getting someone else "to do something that the [person] otherwise would not do."[90] Throughout this Part, I will refer to the coercing party—here the prison administrators—as the "agent" and to the party being coerced—here the prisoner—as the "target."[91] An obvious example of coercion is the agent using physical force to compel the target into action.[92] However, psychologists,[93] as well as the Court,[94] also recognize a more subtle method: mental coercion.[95]

Mental coercion involves restricting a target's opportunity to choose a specific course of action.[96] A target starts out with the opportunity to make a choice among different courses of action.[97] In a coercive situation, though, an agent restricts the target's "freedom" to choose among the options.[98] This can be done by removing certain choices

[90] Carroll, *supra* note 84, at 130.

[91] *Id.*

[92] One author distinguishes between "compulsion," which requires physical force, and "coercion," which implies some choice, but still entails manipulation. *Id.* Another author prefers the term "coercion" when agents use physical compulsion and "pressure" when they restrict choice or impose negative consequences upon some choices. Day et al., *supra* note 10, at 260. Throughout the literature, though, psychologists tend to use "coercion" to describe both forms of pressure. *Id.*

[93] *E.g.*, Carroll, *supra* note 84, at 134–136.

[94] *E.g.*, Miranda v. Arizona, 384 U.S. 436, 448 (1966) (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)) ("[T]his Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition."); Leyra v. Denno, 347 U.S. 556, 558 (1954) ("The use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment."); Bram v. United States, 168 U.S. 532, 542–543 (1897).

[95] The psychological literature distinguishes between "objective" and "perceived" coercion. *See, e.g.*, Day et al., *supra* note 10, at 263. Objective coercion entails one person attempting to get another to do something, whereas perceived coercion refers to the target's subjective feelings. Carroll, *supra* note 84, at 130, 138. That is, someone can feel coerced to act without any discernable outside pressure, through, for example, internal guilt. Anne Rogers, *Coercion and "Voluntary" Admission: An Examination of Psychiatric Patient Views*, 11 BEHAV. SCI. & L. 259, 263 (1993). The two types of coercion are interrelated, in that perceived coercion is likely to follow when someone has been objectively coerced. Carroll, *supra* note 84, at 138. Though the distinction can be important in psychological research, it is irrelevant to the purposes of this Note.

[96] Carroll, *supra* note 84, at 134.

[97] *Id.*

[98] *Id.* at 134–136. Agents can also restrict choice through limiting "control." *Id.* at 136. Limiting control means lowering the target's *ability* to choose. *Id.* The agent can reduce ability to choose through confusion, distraction, or sedation of the target. *Id.* The government, at least in *McKune*, has not attempted to reduce prisoner control, and so freedom reduction is the focus of this Note.

altogether (through physical force, for example) or by reducing the appeal of some choices by imposing negative consequences.[99]

Following this framework, psychologists classify certain types of behavior as necessarily coercive, whereas others are necessarily *not* coercive. Establishing sanctions for one or more choices is coercive because it restricts the target's freedom by making those options less desirable.[100] For example, assume a target has two choices: confess to a crime or remain silent. If the agent imposes a sanction for remaining silent, such as prison time, then a decision by the target to confess is coerced, psychologically speaking. In fact, coercion is frequently defined simply as creating, or threatening to create, penalties for making a certain choice.[101]

Creating inducements for one or more choices is necessarily *not* coercive.[102] For instance, imagine again a target with two choices: confessing to a crime or remaining silent. If an agent offers a reward for confession, such as better housing (a move from a maximum-security to a medium-security unit in a prison, for example), then a target's confession is *not* coerced from a psychological perspective. Granted, the positive reinforcement may affect targets' behavior, making them more likely to choose the desirable alternative of confession. However, giving rewards actually increases the targets' options, thus enhancing their freedom. In effect, if coercion means reducing the amount or desirability of the target's choices, then increasing these choices is inherently *not* coercive.

More complicated is the act of taking away a benefit: this may or may not be coercive, depending on the circumstances.[103] If the target feels entitled to the benefit, then taking away that benefit is similar to creating a negative consequence and is coercive.[104] If the agent has already given the benefit, the target is likely to feel entitled to it, and thus the act is coercive. However, if the agent has not given the benefit and the target does not feel that the benefit has been promised, then the removal of the benefit has little effect on the target. Therefore, the act is most likely not coercive.[105]

Within this framework, psychologists have determined that some agent behaviors can create an even more coercive environment than the imposition of negative consequences alone. Psychologists have found that people often feel coerced to perform an action that they would otherwise be completely unwilling to do, merely because an authority figure orders

[99] *Id.* at 134.
[100] *Id.* at 135.
[101] *E.g.*, Day et al., *supra* note 10, at 259; Pace & Emanuel, *supra* note 10, at 12.
[102] Carroll, *supra* note 84, at 135.
[103] *Id.*
[104] *Id.*
[105] *Id.*

or urges them to do it.[106] This remains true even when participants are told their participation is completely voluntary.[107] Thus, the most coercive environment is created when agents order targets to choose one option, while they impose negative consequences for choosing any alternative.

V. A BETTER APPROACH TO THE BALANCE

Admittedly, the Court cannot weigh the state's interests against the individual's in a vacuum, considering each as though completely separate from the other. In *McKune*, the Court did consider the individual's interests in light of the state's. It noted that the state's interest in effectively running its prison necessarily restricts the individual prisoner's rights.[108] However, it should have also considered that curbing the individual's rights might affect the state interest of rehabilitation. Additionally, as noted above, the Court should have incorporated psychology in all relevant aspects of the balance, rather than using it only when convenient.

As an initial matter, the aggregate effect of the consequences imposed upon prisoners for failing to incriminate themselves creates coercion. That is, the automatic and permanent consequences mean that prisoners who admit their crimes are acting not of their own volition, but out of fear of negative consequences. Thus, to find the SATP constitutional, the Court would need to find a state interest that outweighs the individual's interest against self-incrimination. However, here the state's rehabilitative interest is not furthered by the state's coercive act. In fact, the coercion likely hinders treatment progress. Further, the state showed no administrative interest furthered by the program. Even if it had an administrative interest, the availability of easy alternatives that would not violate prisoners' constitutional rights means that the coercive practice is not necessary to further that interest. In sum, a proper use of the balancing test shows that the Court should have found the SATP unconstitutional.

A. Individual Analysis

1. Severity of the Consequences

First, prison officials ordered Lile to participate in the treatment program; given the content of the program, this was tantamount to ordering him to admit his crimes. At this point, the coercive nature of the transaction was set. Next, prison officials threatened Lile with revocation of a number of privileges and a move to a higher-security unit. These consequences for failure to self-incriminate were not only serious,

[106] Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371, 372 (1963).

[107] *Id.*

[108] McKune v. Lile, 536 U.S. 24, 37 (2002).

but automatic and permanent. Taken together, the consequences amount to state coercion, in both a psychological and legal sense, and therefore constitute a violation of Lile's Fifth Amendment rights.

a. Direct Order

Initially, prison officials directly ordered Lile to participate in the program, thus directly ordering him to incriminate himself. As the dissent aptly noted, "an order from the State to participate in the SATP is inherently coercive."[109] Furthermore, psychological research supports this premise. Stanley Milgram's famous study showed that an order alone can create perceived coercion and make people do what they otherwise would not.[110] In Milgram's study, an experimenter ordered participants to administer what they believed were severe shocks to another person, supposedly as part of a study on learning.[111] Almost all of the participants continued to administer the shocks even though the recipient begged the participants to stop and eventually stopped responding.[112] Milgram gleaned from this experiment that "the individual who is commanded by a legitimate authority ordinarily obeys," regardless of the individual's desires.[113]

b. Consequences Themselves

Although downplayed by the Court,[114] the move from a medium- to a maximum-security prison is quite severe. As an initial matter, individual freedom is more harshly curtailed as the security level rises.[115] More importantly, though, maximum-security prison creates an increased safety risk for the prisoner.[116] Transferring an inmate to a prison with a higher security level is effectively a threat of harm because of that increased risk. Thus, offering prisoners the chance to avoid transfer in exchange for self-incrimination is tantamount to a promise of increased safety. As the Court held in *Arizona v. Fulminante*[117] and *Payne v. Arkansas*,[118] a confession offered in return for a promise of safety is compelled. In *Fulminante*, an

[109] *Id.* at 60 (Stevens, J., dissenting). The plurality dealt with this aspect of the punishment by apparently claiming that the prison officials merely "asked" Lile to participate in the program. *Id.* at 44 ("Whether the inmates are being asked or ordered to participate depends entirely on the consequences of their decision not to do so.").

[110] Milgram, *supra* note 106, at 376.

[111] *Id.* at 373–374.

[112] *Id.* at 375.

[113] *Id.* at 372.

[114] *McKune*, 536 U.S. at 38 (plurality opinion).

[115] For example, in a maximum-security unit, Lile's movement would be more restricted and he would live in a four-person (rather than a two-person) cell. *Id.* at 31.

[116] JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 1995, 2 (1997), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/csfc95ex.pdf.

[117] 499 U.S. 279 (1991).

[118] 356 U.S. 560 (1958).

alleged child murderer was offered protection from other prison inmates in return for a confession.[119] In *Payne*, the police chief warned the defendant that a mob was growing outside the police station, but was told that if he confessed the chief would "probably keep them from coming in."[120] Although the threat in the present case is not as direct as in *Fulminante* and *Payne*, it is just as real. The district court found that the maximum-security unit was, in fact, the most dangerous place to house a prisoner.[121] Studies by the Federal Bureau of Statistics support this finding.[122] The Bureau's research reveals that more assaults occur in maximum-security prisons than medium- or minimum-security prisons.[123]

Lower courts and state courts have struggled to determine when a threat is "credible" or direct enough to warrant a holding of coercion. In *Boyd v. State,* for example, the Supreme Court of Arkansas held that when the police told an African-American suspect that a "large group of white people" was looking for him, his confession was coerced.[124] In contrast, the Fourth Circuit held that a confession was not coerced when police told a suspect "things would go easier" if he confessed.[125] The court considered all of the circumstances, including the fact that the suspect had voluntarily agreed to talk with the police and was continually told he could leave at any time.[126] While there is no clear line as to when a threat is direct enough, the running theme throughout the case law is that courts must look at the totality of the circumstances in making this determination.[127] While the safety risk in the present case is substantial, it is only one among a number of consequences for failing to self-incriminate. When taken together with all the other penalties, the increased risk of safety creates coercion.

The plurality and concurrence take each privilege individually, and throw each out as insignificant.[128] However, when taken as a whole, the privilege reduction is considerable. In a series of cases, called the

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[119] *Fulminante*, 499 U.S. at 286.

[120] *Payne*, 356 U.S. at 564.

[121] McKune v. Lile, 536 U.S. 24, 64 (2002) (Stevens, J., dissenting).

[122] STEPHAN, *supra* note 116.

[123] *Id.*

[124] Boyd v. State, 328 S.W.2d 122, 125 (Ark. 1959). However, the court also held that once the suspect was in a safe place, away from the supposed "group of white people," the coercion disappeared. *Id.*

[125] Rose v. Lee, 252 F.3d 676, 686 (4th Cir. 2001).

[126] *Id.*

[127] *See, e.g.*, State v. Carroll, 645 A.2d 82, 86 (N.H. 1994) (holding that where police told suspect "[w]e can't take care of protecting something we don't understand," taken with the totality of the circumstances, did not constitute coercion); State v. Sanders, 13 P.3d 460, 463–464 (N.M. 2000) (holding that where FBI agent warned suspect of a threat on his life and offered protection, the confession was not coerced based on the totality of the circumstances).

[128] McKune v. Lile, 536 U.S. 24, 37 (plurality opinion) (referring to the penalties as concerning "the minutiae of prison life"); *id.* at 51 (O'Connor, J., concurring) ("These changes in living conditions seem to me minor.").

"penalty" cases, the Court held that threatening the loss of one's livelihood for failing to self-incriminate constitutes compulsion.[129] Similarly, here Lile lost his right to earn money and send it to his family. The concurrence attempted to distinguish these cases by noting that a prisoner will always have the basic necessities of life, and so the loss of a job is not as compelling.[130] This distinction is unsatisfying and inaccurate. In the penalty cases, the defendants did not lose every chance to earn a living; they lost a specific job. In fact, in *Lefkowitz v. Turley*, the defendants lost only their opportunity to obtain government contracts.[131] They maintained the ability to continue building for private companies, yet the Court held this penalty created coercion.[132]

Similar to the defendants in the penalty cases, who would be forced to take a lower-paying and less fulfilling job if they chose not to incriminate themselves, Lile was denied the small luxuries allowable in prison. The amount he could spend at the canteen was seven times lower than it had been (from $140 to $20), and the amount he could earn was reduced from minimum wage ($2.65 per hour in 2007[133]) to sixty cents per day.[134] Granted, Lile would have food and shelter regardless of what he made, but the attorney in *Spevack*[135] would likely not have gone hungry if disbarred.

Furthermore, Lile's limited access to prison organizations and recreation and his reduced visitation rights[136] extend the consequences beyond those in the penalty cases. Considering the restrictions already inherent in prison life, limiting Lile's activities and contact with the outside world even further is a drastic consequence. Perhaps on its own, a reduction in visitation rights coupled with restrictions on recreation would not seem so harsh. However, when taken together with the economic losses and move to a more dangerous prison, the result is compelling consequences.

Finally, the privilege reduction imposed for refusing to join the program is the same as that imposed for committing serious crimes. Consequently, the imposition creates a stigma in the eyes of the prison guards. That a stigma was created influenced the Court in *Lefkowitz v. Cunningham*, where the Court held that loss of a political position for

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[129] *E.g.*, Gardner v. Broderick, 392 U.S. 273, 278–279 (1968) (finding a constitutional violation when the state fired a police officer for refusing to incriminate himself); Spevack v. Klein, 385 U.S. 511, 516 (1967) (finding a constitutional violation when an attorney was threatened with disbarment for failing to incriminate himself).

[130] *McKune*, 536 U.S. at 51 (O'Connor, J., concurring).

[131] Lefkowitz v. Turley, 414 U.S. 70, 83 (1973).

[132] *Id.*

[133] U.S. DEP'T OF LABOR, MINIMUM WAGE LAWS IN THE STATES (2007), http://www.dol.gov/esa/minwage/america.htm#content.

[134] *McKune*, 536 U.S. at 63 (Stevens, J., dissenting).

[135] *Spevack*, 385 U.S. at 511.

[136] *McKune*, 536 U.S. at 63.

failure to self-incriminate constituted compulsion.[137] The Court noted that revocation of the position would tarnish the political figure's "general reputation" and was thus a compelling consequence.[138] In the prison world, a severe reduction in privilege level generally means the prisoner has committed a serious crime, such as sodomy, riot, or assault. Thus, the privilege revocation is likely to lower Lile's general reputation among the guards.[139] Again, standing alone, this stigma might not be compelling, but taken together with all the other consequences it helps to push the officials' actions into compulsion.

c. Automatic and Permanent Penalty

The automatic nature of the penalty reinforces the prisoner's lack of choice, again creating coercion from a psychological point of view.[140] The individual is not merely weighing the possible consequences of refusing or agreeing to self-incriminate, but instead knows negative consequences will result from a refusal. Thus, the prisoner feels even more compelled to self-incriminate than if this barrage of penalties was merely a possible consequence of his refusal.

As the dissent points out,[141] the automatic penalty distinguishes the present case from those in which the Court refused to find compulsion. Contrary to the plurality's assertion,[142] the Court in *Baxter v. Palmigiano* and *Ohio Adult Parole Authority v. Woodard* did not hold that the consequences of death or longer imprisonment were not severe enough to constitute compulsion. *Woodard* involved clemency procedures that consisted of "a voluntary interview" during which the defendant might have been required to incriminate himself. The defendant argued that these procedures constituted compulsion.[143] By refusing to participate, the defendant ran the risk that the Governor would consider the defendant's silence when deciding whether to grant clemency.[144] However, because the defendant's silence was merely one consideration in the clemency decision, the Court held that there was no coercion.[145] Similarly, in *Baxter*, the prison board was allowed to consider the defendant's silence during a disciplinary proceeding;[146] however, as the Court specifically noted, the defendant "[wa]s not in consequence of his silence *automatically* found guilty of the infraction with which he ha[d] been charged."[147] Thus, while a non-automatic penalty may not constitute

[137] Lefkowitz v. Cunningham, 431 U.S. 801, 807 (1977).
[138] *McKune*, 536 U.S. at 63.
[139] *Id.* at 62.
[140] *See* Carroll, *supra* note 84, at 134–135.
[141] *McKune*, 536 U.S. at 60–61.
[142] *Id.* at 44–45 (plurality opinion).
[143] Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 276–277 (1998).
[144] *Id.* at 287–288.
[145] *Id.* at 288.
[146] Baxter v. Palmigiano, 425 U.S. 308, 312 (1976).
[147] *Id.* at 317 (emphasis added).

compulsion (legally or psychologically), an automatic penalty creates a different dynamic.[148]

In addition to imposing an automatic penalty, the *McKune* situation adds to the coercive effect by making the penalty permanent. Lile has no possibility of earning back his privileges unless he submits to the SATP.[149] He is relegated to a maximum-security unit under the most restrictive privilege level for the remainder of his prison sentence. His *only* option, if he wants his old status back, is to enter the program and admit his crimes.

2. A Psychologically Coercive System

Psychology also supports the premise that the SATP is coercive.[150] The imposition of negative consequences for refusing to participate in the SATP is a classic case of "coercion" as defined in psychology.[151] At the outset, prisoners had two choices: entering the SATP and admitting their crimes or refusing to enter and staying silent. On the surface, the presentation of these choices might appear non-coercive. However, prison officials created a number of negative consequences for the second choice: failing to self-incriminate. Non-participants faced economic consequences, including a reduction in pay and in the amount of money they were allowed to send home. Additionally, refusal to participate resulted in restrictions to visitation rights as well as recreational opportunities. Thus, the officials restricted the prisoners' freedom to choose, and any choice to admit their crimes would be coerced in psychological terms.[152]

There is a counter-argument. Because prisoners are not entitled to the privileges that are taken away for failure to participate, the withdrawal of the privileges is not a negative consequence, but instead is just the removal of a benefit. However, remember that Lile had to earn these privileges over a period of years. Thus, even when the situation comes under the rubric of removal of a benefit, it still constitutes objective coercion. Lile had already attained a high-privilege status and maintained it for years. Once a benefit has been given, the individual feels entitled to it and taking it away is functionally identical to creating a sanction.[153] Even when characterized as the revocation of a benefit, the prison officials' actions were objectively coercive. In sum, from a psychological viewpoint, the system inherently involves coercive actions.

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[148] *See* Carroll, *supra* note 84, at 134–135.

[149] McKune v. Lile, 536 U.S. 24, 64 (Stevens, J., dissenting).

[150] The psychological understanding of this point is important, based on coercion's effect on rehabilitation. *See supra* Part III; *infra* Part V.B.1.b.

[151] *See supra* Part IV.

[152] Carroll, *supra* note 84, at 134.

[153] *Id.* at 135.

B. State Analysis

The state undoubtedly has an interest in convincing prisoners to participate in rehabilitation programs. However, the Court "ha[s] already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need."[154] Indeed, the government *always* has an interest in obtaining confessions from suspected criminals. Consequently, the government must show that in this particular situation, its interest is so compelling that the interest outweighs the individual's right to silence. The state has not achieved this feat here.

1. Rehabilitation

As a preliminary matter, the plurality's characterization of the importance of rehabilitation for sex offenders[155] is accurate.[156] Sexual offenses are undeniably heinous crimes, and they are rampant throughout our society.[157] Most offenders eventually return to society, and so the state has an interest in assuring, to the greatest degree possible, that they do not reoffend. Furthermore, recidivism is likely without any sort of rehabilitation.[158]

That said, rehabilitation programs only promote the state's interest when they work. Consequently, if the SATP does not work, the state cannot claim a rehabilitative interest, and its side of the balance becomes lighter. However, the Court's view of the state's rehabilitative interest is too shallow to account for whether the program is effective. The Court's reasoning is: rehabilitation is a priority; Kansas' SATP is a rehabilitative program; thus, convincing prisoners to enter this program is a state priority.[159] Instead, before applauding its great rehabilitative effect, the Court should look to the psychology behind the program and its self-incrimination requirement. Then it should assess whether the SATP is a workable way to further the goal of rehabilitation.[160]

a. The Relationship Between Admissions and Successful Rehabilitation

The plurality mischaracterized psychology by stating that admission of past crimes is necessary for recovery. In fact, the import of admitting one's crime comes from the acceptance of responsibility that should

[154] Lefkowitz v. Cunningham, 431 U.S. 801, 808 (1977).

[155] *McKune*, 536 U.S. at 32–33 (plurality opinion).

[156] SHANNAN M. CATALANO, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2004, 3, 7 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cv04.pdf.

[157] *Id.*

[158] PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, 13 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf.

[159] *McKune*, 536 U.S. at 33–34.

[160] *See supra* Part III.A.

accompany the confession.[161] Coerced admissions create the opposite effect: prisoners will confess to avoid negative consequences, but they will not actually take any ownership over what happened.[162] Not only does this type of confession fail to further the rehabilitative purpose, but it can even hinder it.[163]

Though the state has an undeniable interest in offender rehabilitation, coercing prisoners to incriminate themselves does not further this interest. Overcoming denial is important even for those prisoners who agree to sign the Admission of Responsibility form, because such a surface admission does not eliminate the possibility for other types of denial.[164] In fact, one study found that very few offenders actually accept responsibility in a way that furthers treatment, even when they admit to commission of their crimes.[165] Denial is not, as the plurality assumes,[166] an easily-identifiable problem that is cured with a written statement acknowledging the crime. Thus, by requiring prisoners to sign the Admission of Responsibility form, the state is *unnecessarily* infringing on prisoners' constitutional rights. No state interest is being furthered by the infringement.

Furthermore, psychology has multiple ways of dealing with the problem of failure to admit one's crimes that are more effective than simply punishing those who refuse to submit. Psychologists have created strategies to help people work toward admitting their responsibility, even though at first, offenders may be adamant in maintaining their innocence.[167] Additionally, denial may not inhibit rehabilitation as much as the plurality contends.[168] Less confrontational strategies that do not require a confession have been shown to work.[169] Unfortunately, these programs are not seen as "tough on crime" and so are often discarded by state officials.[170] States should have some choice as to what type of rehabilitation program to use. However, the Court should not blindly accept the SATP as furthering rehabilitation when many other strategies that do not infringe on constitutional rights have proven effective, and forced admissions generally thwart the rehabilitative result.

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

[162] Barbaree, *supra* note 85, at 31.

[163] *See* Rogers, *supra* note 95, at 267.

[164] SALTER, *supra* note 85, at 96–109.

[165] Barbaree, *supra* note 85, at 31.

[166] McKune v. Lile, 536 U.S. 24, 33–34 (2002) (plurality opinion).

[167] Barbaree, *supra* note 85, at 32; Winn, *supra* note 161.

[168] Jonathan Kaden, Comment, *Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination*, 89 J. CRIM. L. & CRIMINOLOGY 347, 370–372 (1999).

[169] *Id.*; Kear-Colwell, *supra* note 84, at 261–262.

[170] Kear-Colwell, *supra* note 84, at 259.

b. Coercion's Effect on Rehabilitation

The severe consequences that the officials impose, coupled with the objectively coercive method of implementation, are likely to create psychological coercion, thus reducing the efficacy of the rehabilitation program as a whole. That is, prisoners who do enter the program based on fear of the consequences of refusal are much more likely to fail than those who would enter of their own free will.

At a minimum, the state should be required to prove that its program, including the coercion involved, is reasonably likely to fulfill its purpose: rehabilitation.[171] In fact, psychological research points in the opposite direction. In psychology, "empowerment" is seen as the best way to create long-lasting changes in people.[172] Empowerment means the individual is able to choose between a "moderate number of options that are of similar desirability, [and] have positive consequences."[173] Creating rewards for entering treatment programs would enhance empowerment and improve efficacy. In contrast, the current system of punishing for failure to participate inhibits empowerment and, as a consequence, long-lasting change. Again, the state's method of forcing participation not only fails to further the rehabilitative goal, but actually impedes it.

2. Administration

The plurality invoked[174] the deference set forth in *Turner v. Safley*,[175] but that case does not apply here. The purpose behind the *Turner* standard is deferring to prison administrators regarding the numerous decisions they must make that may affect the everyday lives of prisoners.[176] However, this does not mean that the standard applies merely because the victims of constitutional infringement are imprisoned, as the plurality suggests.[177] Initially, there must be some administrative policy for the Court to defer to the state's discretion.[178] Further, the right infringed upon must be one that is inconsistent with effective prison administration.[179] Because neither prerequisite is met here, *Turner* does not apply.

Even if the Court applies *Turner*, however, the SATP is an unreasonable response to prison concerns. Thus, it should be held

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[171] *See supra* Part III.B.

[172] Carroll, *supra* note 84, at 139.

[173] *Id.* (emphasis removed).

[174] McKune v. Lile, 536 U.S. 24, 37 (2002).

[175] Turner v. Safley, 482 U.S. 78, 87–91 (1987).

[176] *Id.* at 84–85.

[177] *McKune*, 536 U.S. at 37.

[178] *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 132–133 (2003) (regulations affecting visitation rights); Lewis v. Casey, 518 U.S. 343, 346–347 (1996) (regulations restricting "lock down" prisoners' access to law libraries); O'Lone v. Estate of Shabazz, 482 U.S. 342, 346–347 (1987) (regulations pertaining to work duties); *Turner*, 482 U.S. at 91 (regulation restricting correspondence).

[179] Johnson v. California, 543 U.S. 499, 510 (2005).

unconstitutional even under the deferential *Turner* standard. There is no alternative way for participants to exercise their right to silence; accommodating the right would not create a heavy burden on the state; and there are ready alternatives available. Consequently, the Court should require the state to accommodate prisoners' rights and hold the program unconstitutional.

a. Turner *does not apply*

The Court need not invoke the deferential standard illuminated in *Turner* in the present case simply because there is no legitimate administrative decision to defer to the state. The *Turner* test has been used in cases where legitimate prison regulations affecting prisoners' everyday lives incidentally burden constitutional rights.[180] For example, in *Turner*, for security reasons, prison officials enacted regulations restricting correspondence between inmates.[181] The Court refused to require officials to sort through each piece of mail to determine whether it presented a security risk, because of the excessive administrative costs and the heightened possibility of security breaches.[182] Instead, the Court deferred to the prison's policy, because it was a reasonable response, rather than an "exaggerated" one, to the security issue. Thus, the Court allowed the policy to continue even though it burdened the prisoners' freedom of speech.[183]

Similarly, in *O'Lone v. Estate of Shabazz*, for security reasons, prisoners on work detail were not allowed to return to the prison in the middle of the day.[184] Unfortunately, this meant Muslim prisoners missed an important religious service that occurred on Friday afternoons.[185] However, the Court refused to force the prison to accommodate these prisoners by allowing them to return to the prison on Fridays.[186] Accommodation would have meant more work for supervising guards, who would have needed to evaluate each prisoner's reason for returning to the prison.[187] The Court instead held that administrative decisions, such as when and where prisoners work, would be left to the state unless an "unreasonable" burden on constitutional rights ensued.[188]

The present case is wholly unlike *Turner* and *O'Lone*, because here there is no administrative reason for the prison's actions. The move from a medium- to a maximum-security unit was not part of some bigger

[180] *See, e.g., Overton*, 539 U.S. at 131 (freedom of association); *Lewis*, 528 U.S. at 346 (access to the courts); *O'Lone*, 482 U.S. at 345 (freedom of religion); *Turner*, 482 U.S. at 81–82 (freedom of speech).

[181] *Turner*, 482 U.S. at 91.

[182] *Id.* at 93.

[183] *Id.*

[184] *O'Lone*, 482 U.S. at 346.

[185] *Id.* at 347.

[186] *Id.* at 353.

[187] *Id.* at 351.

[188] *Id.* at 349.

regulatory scheme enacted by the prison. The medium-security unit in which Lile was previously housed was not reserved solely for program participants.[189] Even if it had been, the state gave no reason that Lile could not have been transferred to another medium-security facility.[190] The purpose of the move (not to mention the privilege reduction) was solely punitive. Unlike in *Turner*, where the prison enacted security regulations that happened to infringe prisoners' rights,[191] here the state created a rehabilitation program and punished prisoners for refusing to enroll.

Furthermore, *Turner* applies only to those rights that are inconsistent with effective prison administration;[192] the right against self-incrimination is not such a right. Unlike First Amendment rights, which necessarily will be limited when one's liberty is taken away, Fifth Amendment rights are equally as easy to apply to prisoners as to free citizens. First Amendment rights require respecting an individual's affirmative actions, and prison administration necessarily entails restricting individual prisoners' actions. Consequently, prison administrators need greater leeway when regulations infringe on First Amendment rights. The right against self-incrimination can be more easily analogized to Equal Protection and the Eighth Amendment right against cruel and unusual punishment, both of which the Court has held cannot be analyzed under *Turner*.[193] These rights restrict affirmative *government* acts against the individual.

Because the present case does not involve an administrative regulation that incidentally infringes prisoners' constitutional rights, the *Turner* standard does not apply. In fact, there are no administrative concerns raised by the state at all. Thus, the Court should simply weigh the rehabilitation interest against the prisoners' interests, without considering administrative interests at all.

b. Analysis under Turner

Even if analyzed under the deferential standard in *Turner*, the SATP does not pass the "reasonableness" test elucidated in *Turner*. The Court's test requires, as a threshold, that there be a "logical connection" between the penological interest and the intrusive practice.[194] After the state meets that threshold, other factors to consider in deciding reasonableness include: 1) alternative means, if any, for exercising the right that is being infringed upon; 2) the difficulty of accommodating the right, meaning the effect on guards, other prisoners, and resource allocation; and 3) the absence (or presence) of "ready alternatives."[195]

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[189] McKune v. Lile, 536 U.S. 24, 67 (Stevens, J., dissenting).

[190] *Id.*

[191] Turner v. Safley, 482 U.S. 78, 91 (1987).

[192] Johnson v. California, 543 U.S. 499, 510 (2005).

[193] *Id.* (Equal Protection); Hope v. Pelzer, 536 U.S. 730, 737–738 (2002) (Eighth Amendment).

[194] *Turner*, 482 U.S. at 89–90.

[195] *Id.* at 90–91.

As noted above, the test is difficult to apply, because there is no prison regulation to test. The plurality noted the importance of deferring to prison officials in making administrative decisions.[196] However, as the dissent pointed out, the state gave no administrative reason for the consequences imposed on Lile for failing to incriminate himself.[197] The state did not argue that it was reserving medium-security units for prisoners engaged in rehabilitation because of a shortage of beds, or express a security concern in allowing un-rehabilitated prisoners to stay in a medium-security facility.[198] Instead, it was attempting to convince prisoners to consent to rehabilitation programs by creating undesirable consequences for refusal. Thus, there is no administrative reason for the state's action, and the test should not apply.

However, if the state could drum up some administrative interest, the low threshold may be met. If the state could find some administrative necessity for transferring non-participants to a maximum-security unit, it could argue that the state should be given deference in determining whether to transfer prisoners. Because the SATP as a whole supports the penological goal of rehabilitation, the state could argue that the Court should leave decisions about the program to prison administrators. At the outset, there is a logical connection between maintaining the rehabilitation program and the goal of rehabilitation.

Although the state may win on the first factor, every other factor in *Turner's* test falls in the prisoner's favor. First, the Fifth Amendment right not to self-incriminate is an all-or-nothing right: it disappears once prisoners are required to confess their crimes. Thus, there are no "alternative means of exercising" the right.[199] Unlike the right to freely exercise one's religion[200] and the right to free speech,[201] the right to silence can only be exercised in one way: silence. Arguably, then, the Court cannot fairly apply this factor in the context of the Fifth Amendment and so it should be disregarded altogether. If this is the case, though, then *Turner* should not be applied at all. However, if the *Turner* test is applied fully, the Court should be wary of allowing the states to impinge this right, because it cannot lessen the blow by allowing its exercise in other ways.

The next *Turner* factor is the difficulty of accommodating the right at issue. The state must lose here as well, because accommodation of Lile's Fifth Amendment right would have little to no effect on the guards, other prisoners, or resource allocation within the prison. The easiest way to accommodate prisoners' rights while maintaining the program would be to simply eliminate the requirement that participants admit their past

[196] McKune v. Lile, 536 U.S. 24, 37 (plurality opinion).
[197] *Id.* at 67 (Stevens, J., dissenting).
[198] *Id.*
[199] *Turner*, 482 U.S. at 90.
[200] O'Lone v. Estate of Shabazz, 482 U.S. 342, 351–352 (1987).
[201] *Turner*, 482 U.S. at 92.

crimes. Many psychologists maintain that offenders can be effectively rehabilitated without ever confessing their crimes, or at least without confessing at the outset of therapy.[202] The state's interest in rehabilitation would be fulfilled, but prisoners' rights would not be violated.

Immunity, suggested by the dissent,[203] would also have minimal impact. The plurality blindly adopted the argument that immunity might affect rehabilitation or deterrence; its basis, as far as one can tell from its opinion, being solely the government's assertion at oral argument that prisoners who gain immunity take their crimes less seriously.[204] However, a search of the psychological literature reveals no basis for the claim that immunity affects rehabilitation or deterrence. Moreover, even if the premise were true, the impact on guards and other prisoners would remain nonexistent. Arguably, officials might need to reallocate resources to make up for the loss in deterrence, but this is extremely unlikely.

However, even if immunity is rejected, there is another easy way to accommodate the Fifth Amendment right: creating benefits for participation rather than sanctions for refusal.[205] The plurality exaggerated the negative impact of this alternative by stating that prison officials would have "to identify each inmate's so-called baseline and determine whether an adverse effect, however marginal, will result" with each routine housing decision.[206] In reality, prison officials would only need to make this determination if the move was the result of a prisoner exercising a constitutional right. Further, the "so-called baseline" is not difficult to decipher. The security level and privilege status of each prisoner is not a secret, and the adjustment downwards (in Lile's case from a medium-security unit to a maximum-security unit, and from Level 3 down to Level 1) is intentional.[207] It would be nearly impossible for a prison administrator to accidentally sanction a prisoner for exercising a constitutional right, as the plurality suggests.

Granted, this solution could disrupt prison administration inasmuch as officials might be wary of putting prisoners in minimum-security units and raising privilege levels. Officials would not want to create a situation where there were no more rewards to dole out because a prisoner was already at the highest privilege level and in the lowest security level. However, at least with regard to sex offender programs, this is likely to be a rare occurrence. Sex offenders are not regularly placed in minimum-

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[202] *See supra*, Part V.B.1.a.

[203] *McKune*, 536 U.S. at 69 (Stevens, J., dissenting).

[204] *Id.* at 34–35 (plurality opinion).

[205] The dissent also recognizes this alternative. *McKune*, 536 U.S. at 70–71.

[206] *Id.* at 46–47 (plurality opinion).

[207] As noted, it is the same punishment imposed for serious felonies. *Id.* at 54 (Stevens, J., dissenting).

security units when they arrive in prison.[208] Lile, for example, was in a medium-security unit,[209] and so could have been rewarded for participation.

The final factor is the "absence of ready alternatives." The *Turner* Court was unclear as to how this factor differs from the second factor, difficulty of accommodation. It did note that "obvious, easy alternatives" support the assertion that the regulation at issue is an "exaggerated" or unreasonable response to prison concerns. Further, a look to other prisons' policies can help the Court in determining whether ready alternatives exist. This factor also falls in favor of prisoners' rights in this case. At least one other state grants immunity for program participants,[210] and the Federal system has a voluntary rehabilitation program.[211] Because there are a number of easy alternatives that would not violate prisoners' rights, Kansas's policy of punishing prisoners for failing to participate is an exaggerated response to its rehabilitative goal.

Even if the state can overcome the low threshold from *Turner*, consideration of every other factor shows that ultimately its practice of punishing prisoners is an unreasonable way to meet its rehabilitation goal. Thus, the Court should have held the SATP unconstitutional and required the state to adopt one of the numerous alternatives at its disposal.

VI. CONCLUSION

With its decision in *McKune*, the Supreme Court dealt yet another blow to the already limited Fifth Amendment right against self-incrimination. Although the state's rehabilitation interest is valid, the Court's decision eviscerates the prisoner's right to silence when ready alternatives exist. A better approach would consider psychology in all relevant aspects of the balance and appreciate the severity not only of the state's interests, but of the individual's as well.

First, the consequences imposed are extreme; transfer to a maximum-security unit coupled with severe curtailment of privileges are some of the most severe penalties that can be imposed on a prisoner. Additionally, the penalties are automatic once an inmate refuses to incriminate himself and last throughout his prison term. Finally, the state's actions are coercive from a psychological perspective and so are likely to negatively affect rehabilitation.

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[208] *See id.* at 62 ("*Because of the nature of his convictions*, in 1983 the Department initially placed [Lile] in a maximum-security classification.") (emphasis added).

[209] *Id.* at 67.

[210] KY. REV. STAT. ANN. § 197.440 (West 2006) (making communications made during sexual rehabilitation treatment by sexual offenders and their families privileged).

[211] FED. BUREAU OF PRISONS, LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 34 (2004), *available at* http://www.bop.gov//news/PDFs/legal_guide.pdf.

The state's valid rehabilitation interest deserves great weight as well, but must be considered in terms of efficacy. Because the penological interest is not merely getting prisoners into rehabilitation programs, but rehabilitation itself, the Court should consider psychological research in the decision-making process. Coerced confessions are unlikely to further the rehabilitative goal, and, in fact, probably hinder it. Viewed in this context, the state's rehabilitative interest is actually furthered by honoring the prisoner's right to silence.

Though the Court has been quite deferential in allowing prison officials free reign to run prisons as they see fit, this case is an appropriate place to illuminate some limits. Accommodation of the individual's Fifth Amendment right places little to no burden on prison officials, with the readily available alternatives of immunity and voluntary programs. The Court should often give great deference to state prison officials. However, when, as here, officials are unnecessarily infringing on a bedrock constitutional right, the Court should draw the line.