

**NOTE: DAMNED IF YOU DO, DAMNED IF YOU DON'T—
WHY MINNESOTA'S PRISON-BASED SEX OFFENDER
TREATMENT PROGRAM VIOLATES THE RIGHT
AGAINST SELF-INCRIMINATION**

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I. INTRODUCTION

The Fifth Amendment of the United States Constitution states “[n]o person . . . shall be compelled . . . to be a witness against himself.”¹ It expresses the belief that a society “based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, [is] more important than punishing the guilty.”² It makes central to our country’s system of justice “[t]he principle that a man is not obliged to furnish the State with ammunition to use against him.”³ The State has the right to punish lawbreakers, but it cannot compel self-incrimination.⁴ “A man may be punished, even put to death, by the State; but . . . he should not be made to prostrate himself before its majesty.”⁵

Many states—including Minnesota—require convicted sex

1. U.S. CONST. amend. V. The Fifth Amendment was incorporated into the Fourteenth Amendment and applied to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964).

2. LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 432 (1968).

3. Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 J. CLEV. B. ASS’N 91, 98 (1954).

4. *Id.* at 98-99.

5. *Id.* at 100.

offenders to admit to their crimes as part of their sentence. This creates a number of potential Fifth Amendment violations, the most obvious being when an admission of guilt would destroy the offender's appeal.⁶ An admission may also give rise to a perjury prosecution for an offender who testified at trial.⁷ Furthermore, an offender risks prosecution by disclosing past offenses for which he has not yet been prosecuted.⁸

So how does one balance an offender's Fifth Amendment right against self-incrimination with society's interest in rehabilitating sex offenders before releasing them from prison?⁹ Courts throughout the country have wrestled with this question,⁹ as have many authors and scholars.¹⁰ There is much uncertainty surrounding the issue, but one thing is sure: any means the State uses must comport with the Constitution, for "[t]here is no iron curtain drawn between the

6. See, e.g., *McComb v. State*, 94 P.3d 715, 721 (Kan. Ct. App. 2004), *rev. denied*, 2004 Kan. LEXIS 830 (Kan. Dec. 14, 2004); *State ex rel. Morrow v. LaFleur*, 590 N.W.2d 787, 790 (Minn. 1999).

7. *Morrow*, 590 N.W.2d at 791; see also *infra* Part VII.B.

8. A fourth problem, but one that is beyond the scope of this Note, is the issue of whether the State can deny a person the right to maintain their innocence. The classic Fifth Amendment situation is when the person fears that admissions may be used against them in a subsequent criminal proceeding. See *infra* Part III.B. However, there is an argument to be made that the Fifth Amendment recognizes the more fundamental right of a person to simply say, regardless of whether they will be subject to criminal prosecution or not, "I'm not guilty. I just didn't do it."

9. Compare *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966) (determining that forcing a defendant to admit guilt or receive maximum sentence violated Fifth Amendment because it imposed a judicial penalty on the defendant), and *Bankes v. Simmons*, 963 P.2d 412 (Kan. 1998) (finding refusal to issue good time credits due to prisoner's statements made in therapy violated his Fifth Amendment rights), and *State v. Imlay*, 813 P.2d 979 (Mont. 1991) (protecting convicted sex offender from making non-immunized self-incriminating statements), with *Gollaher v. United States*, 419 F.2d 520 (9th Cir. 1969) (permitting harsher sentence on an offender who would not admit his guilt because public's interest in rehabilitation outweighed the offender's rights), and *McComb*, 94 P.3d at 715 (finding no Fifth Amendment violation when State revokes offender's supervised release term for refusing to sign an acceptance of responsibility form required under post-release treatment program).

10. See, e.g., Jessica Wilen Berg, *Give Me Liberty or Give Me Silence: Taking a Stand on Fifth Amendment Implications for Court-Ordered Therapy Programs*, 79 CORNELL L. REV. 700 (1994); Jonathan Kaden, *Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination*, 89 J. CRIM. L. & CRIMINOLOGY 347 (1998); Brendan J. Shevlin, "Between the Devil and the Deep Blue Sea: A Look at the Fifth Amendment Implications of Probation Programs for Sex Offenders Requiring Mandatory Admissions of Guilt," 88 KY. L.J. 485 (2000); Jamie Tanabe, *Right Against Self-Incrimination v. Public Safety: Does Hawaii's Sex Offender Treatment Program Violate the Fifth Amendment?*, 23 U. HAW. L. REV. 825 (2001).

Constitution and the prisons of this country.”¹¹

This Note looks at the issue as applied to Minnesota’s prison-based sex offender treatment program (SOTP). Minnesota requires sex offenders to undergo treatment as part of their sentences.¹² A prerequisite of admission into a treatment program is admitting responsibility for the offense and similar past offenses.¹³ Convicted offenders who refuse to admit responsibility are denied entry into treatment, resulting in an extension of their supervised release date and more time spent in prison.¹⁴

The Minnesota Supreme Court justifies this by reasoning that supervised release is a benefit and prisoners have no liberty interest in a supervised release date.¹⁵ However, in a recent case not involving a sex offender, the court ruled that Minnesota’s sentencing statutes grant inmates a liberty interest in their supervised release dates.¹⁶ This Note argues that, because of the court’s new ruling, requiring sex offenders to admit their crimes violates their right against self-incrimination.

This Note first discusses Minnesota’s SOTP and the state’s sentencing statutes.¹⁷ Next, it provides a brief historical overview of the Fifth Amendment, followed by case law that lays out the modern right against self-incrimination.¹⁸ This Note then discusses the pertinent Supreme Court cases,¹⁹ followed by Minnesota case law relating to the sentencing of sex offenders.²⁰ This Note argues that Minnesota’s sentencing scheme—viewed in light of a recent Minnesota Supreme Court decision—violates sex offenders’ rights against self-incrimination when they are required to admit their crimes in order to participate in therapy.²¹ This Note concludes by proposing solutions to the problem that will properly balance society’s interests with those of the sex offenders.²²

11. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

12. *See infra* Part II.A.

13. *See infra* Part II.A.

14. *See infra* Part II.B.

15. *See infra* Part V.A.3.

16. *See infra* Part V.C.

17. *See infra* Part II.

18. *See infra* Part III.

19. *See infra* Part IV.

20. *See infra* Part V.

21. *See infra* Part VI.

22. *See infra* Part VII.

II. MINNESOTA LAWS AND PROGRAMS AFFECTING SEX OFFENDERS

A. *Minnesota's Sex Offender Treatment Program*

Research has shown that inmates who successfully complete a SOTP are less likely to reoffend than those who quit or are terminated from the program.²³ A study that tracked sex offenders over a nine-year period showed that only fourteen percent of the offenders who successfully completed the treatment program were rearrested for a new sex offense.²⁴ This is in comparison to a rate of twenty-one percent who received no treatment and thirty percent who did not complete treatment.²⁵ Sex offender recidivism rates are typically high,²⁶ but rates for offenders released from Minnesota prisons have dropped fifty percent between the years of 1992 and 1999.²⁷

Given these statistics, Minnesota understandably grants judges the power to mandate convicted sex offenders to undergo therapy while incarcerated.²⁸ The Legislature has mandated that the Commissioner of the Department of Corrections²⁹ (DOC) provide sex offender treatment for adults and juveniles committed to the custody of the Commissioner and adult offenders for whom

23. MINN. DEP'T OF CORR., PROGRAMS FOR SEX OFFENDERS 1 (2003), <http://www.doc.state.mn.us/publications/pdf/Sex%20Offender%20Programs.pdf>; see MARY ELLISON, MINN. DEP'T OF PUB. SAFETY, OJP FACT SHEET 2 (2004), http://www.ojp.state.mn.us/cj/publications/FS-2004-001_Sex_Offenders.pdf.

24. MINN. DEP'T OF CORR., *supra* note 23, at 1.

25. *Id.*

26. ELLISON, *supra* note 23, at 1-2.

27. MINN. DEP'T OF CORR., *supra* note 23, at 1.

28. Another method of treating sex offenders is through civil commitment under Minnesota's Sexually Psychopathic Personality Act, MINN. STAT. § 253B.02, subd. 18b (2004), or the Sexually Dangerous Persons Act, MINN. STAT. § 253B.02, subd. 18c. Although the topics are related, civil commitment implicates a host of different constitutional issues. This Note focuses on prison-based treatment programs and does not discuss civil commitment. A number of other articles provide an in-depth look at Minnesota's civil commitment scheme. See, e.g., Eric S. Janus, *Minnesota's Sex Offender Commitment Program: Would an Empirically-Based Prevention Policy Be More Effective?*, 29 WM. MITCHELL L. REV. 1083 (2003); Warren J. Maas, *Erosion of Constitutional Rights in Commitment of Sex Offenders*, 29 WM. MITCHELL L. REV. 1241 (2003); Anita Schlank & Rick Harry, *Examining Our Approaches to Sex Offenders and the Law: The Treatment of the Civilly Committed Sex Offender in Minnesota: A Review of the Past Ten Years*, 29 WM. MITCHELL L. REV. 1221 (2003).

29. The Department of Corrections is under the control and supervision of the Commissioner of Corrections. MINN. STAT. § 241.01, subd. 1.

treatment is ordered as a condition of probation.³⁰ The Commissioner is required to provide a range of sex offender programs, including programs within the state adult correctional facility system.³¹ The Commissioner is empowered to establish rules and regulations for the treatment programs, and participation in the program is subject to those rules.³² The Commissioner is not required “to accept or retain an offender in a program if the offender . . . refuses or fails to comply with the program’s requirements.”³³ Offenders do not have a statutory right to treatment.³⁴

Sex offenders entering one of the DOC facilities are immediately assessed to determine their programming needs.³⁵ The DOC’s largest prison-based treatment facility, located in MCF–Lino Lakes, houses 225 adult males and services approximately 400 offenders per year.³⁶ The offenders are assessed for thirty days before being assigned to a therapeutic track.³⁷ The goal of the program is “to help the offender reduce his risk of reoffending through acceptance of responsibility for his problems; acquisition of new information, cognitive and behavioral change; and development of a reoffense prevention plan and a community re-entry plan.”³⁸

Most treatment providers agree that acceptance of responsibility is necessary for successful treatment and failure to do so is a serious obstacle to rehabilitation.³⁹ Offenders are required to disclose all past offenses because development of an effective

30. *Id.* § 241.67, subd. 3-4.

31. *Id.* § 241.67, subd. 3(a).

32. *Id.*

33. *Id.*

34. *Id.*

35. MINN. DEP’T OF CORR., *supra* note 23, at 1. The programs available include group therapy, chemical dependency programming, alternative programming for lower functioning inmates, transitional programming to prepare inmates for re-entry into society, aftercare programming for offenders continuing to serve their sentence, and post-release programming for offenders on supervised release. *Id.*

36. *Id.* The other facilities offering treatment are MCF–Willow River/Moose Lake for the highest risk male offenders (capacity 50), MCF–Shakopee for adult women (capacity 12), and MCF–Red Wing for juveniles (capacity 25). *Id.* at 1-2.

37. *Id.* at 1.

38. *Id.*

39. Schlank & Harry, *supra* note 28, at 1224; *see also* ASS’N OF STATE CORR. ADMINISTRATORS’ PUBL’N, CORRECTIONAL BEST PRACTICES: DIRECTORS’ PERSPECTIVES (2000), <http://www.drc.state.oh.us/web/Articles/article61.htm> (discussing Ohio’s sex offender treatment program).

relapse prevention plan involves “a careful analysis of the thoughts, feelings and decisions which preceded past offenses.”⁴⁰ From a clinical perspective, there is a benefit to encourage or push offenders to admit to their past offenses despite the offenders’ reluctance to do so, while at the same time giving them psychological support for overcoming their reluctance.⁴¹

Consequently, an offender who refuses to admit or accept responsibility for past offenses is declared unamenable to treatment and is not accepted into the treatment program.⁴² While admitting past offenses may make sense from a treatment perspective,⁴³ it may violate the offender’s Fifth Amendment right against self-incrimination.⁴⁴

B. Minnesota’s Sentencing Statutes and the Commissioner’s Power to Extend an Inmate’s Supervised Release Date for Disciplinary Infractions

The Minnesota Sentencing Guidelines⁴⁵ were promulgated in 1980 with the goal of establishing uniformity and proportionality in criminal sentencing.⁴⁶ The Guidelines set a presumptive criminal

40. Schlank & Harry, *supra* note 28, at 1224 (citing *McKune v. Lile*, 536 U.S. 24 (2002)).

41. Telephone Interview with Robin Goldman, MCF–Lino Lakes Sex Offender Treatment Program Director (Oct. 28, 2005). Ms. Goldman likens this to teaching someone to jump off a high dive. *Id.* You push them from the top, but are there at the bottom to offer support and encouragement. *Id.*

42. *See, e.g.*, *State ex rel. Morrow v. LaFleur*, 590 N.W.2d 787, 791 (Minn. 1999). *Morrow* is discussed in detail in Part V.A.

43. *See* Schlank & Harry, *supra* note 28, at 1224.

44. *See infra* Part V.

45. The Guidelines were created and are reviewed annually by the Minnesota Sentencing Guidelines Commission, an on-going policy-making body created by the Minnesota Legislature in 1978. *See* Act of April 15, 1978, ch. 723, 1978 Minn. Laws 761 (codified as amended at MINN. STAT. ch. 244 (2004)); *see also* Minnesota Sentencing Guidelines Commission, What is the Sentencing Guidelines Commission?, http://www.msgc.state.mn.us/Text%20Only/what_are_the_guidelines.htm#q2 (last visited Feb. 21, 2006).

46. *See* MINN. SENTENCING GUIDELINES pt. I, at 1 (2005). The stated purpose of the Guidelines is to “establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender’s criminal history.” *Id.* In order to meet this goal, felons convicted of committing a crime in the typical fashion must receive the same sentence, and felons convicted of committing a crime in an atypical fashion must receive a different sentence. *Id.* Under the previous indeterminate sentencing scheme, the Legislature set the maximum sentence an inmate could serve based on his crime. The sentencing judge then had discretion to impose a sentence ranging from probation to the maximum allowed by the Legislature. Parole boards also had

sentence based on the type of offense and the convicted felon's criminal history score.⁴⁷

The offender is rarely incarcerated for the duration of the sentence. Instead, the sentence consists of (1) a term of imprisonment that is equal to two-thirds of the executed sentence, and (2) a supervised release term that is equal to one-third of the sentence.⁴⁸ The supervised release term is a transitional phase that allows the offender to re-enter society under the supervision of state or county corrections agents.⁴⁹ Supervised release may also be used as an incentive for the offender to behave while incarcerated, and the Commissioner may impose a "disciplinary confinement period"⁵⁰ (also known as "disciplinary confinement time added" or DCTA) for violation of "any disciplinary rule adopted by the Commissioner."⁵¹

When an offender is sentenced, the judge is required to inform the offender of "(1) the total length of the executed sentence; (2) the amount of time the defendant will serve in prison; and (3) the amount of time the defendant will serve on supervised release, assuming the defendant commits no disciplinary offense in prison that results in the imposition of a [DCTA]."⁵² The judge must also explain that the Commissioner may extend the defendant's incarceration time for the commission of disciplinary offenses which could result in the defendant being incarcerated for the entire sentence.⁵³

The Legislature has declared that refusal to participate in sex offender therapy is grounds for DCTA.⁵⁴ This means that a sex

discretion to release the inmate if he was deemed rehabilitated. See Richard S. Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQ. 1, 7 (1993). The Guidelines removed this discretion in favor of a more uniform sentencing approach. *Id.*

47. See MINN. SENTENCING GUIDELINES pts. II, IV (2005); see also Frase, *supra* note 46, at 4.

48. MINN. STAT. § 244.101, subd. 1.

49. See GOVERNOR'S COMM'N ON SEX OFFENDER POLICY, FINAL REPORT 9 (2005), <http://www.doc.state.mn.us/commissionsexoffenderpolicy/commissionfinalreport.pdf> [hereinafter FINAL REPORT].

50. MINN. STAT. § 244.05, subd. 1b.

51. *Id.*

52. *Id.* § 244.101, subd. 2.

53. *Id.*

54. *Id.* § 241.67, subd. 3(a) ("Participation in [the SOTP program] is subject to the rules and regulations of the Department of Corrections," i.e., the DOC may impose DCTA for failure to comply with the program); see also State *ex rel.* Morrow v. LaFleur, 590 N.W.2d 787, 790 (Minn. 1999).

offender may be forced to choose between undergoing therapy—which requires admitting the crime as the first step—or facing DCTA, resulting in a longer period of incarceration.⁵⁵ It is this “Hobson’s choice” that gives rise to a potential violation of the Fifth Amendment right against self-incrimination.⁵⁶

III. THE FIFTH AMENDMENT

A. *Brief History of the Right Against Self-Incrimination*⁵⁷

Although evidence supporting recognition of the right against self-incrimination can be found as far back as Talmudic law, the modern-day right has its roots in English history.⁵⁸ Following the Norman conquest of England, separate ecclesiastical courts were established to hear all cases of an ecclesiastical nature.⁵⁹ The courts were inquisitorial, meaning the judge would summon the accused for secret examination.⁶⁰

The oath *de veritate dicenda* was first introduced to England in 1236.⁶¹ It later became known as the oath *ex officio* because the judge was empowered to compel the oath by virtue of his office.⁶² The ecclesiastical court would force the accused to take the oath, while he was ignorant of its meaning and before any formal charges were made, in order to uncover charges that could be leveled

55. See MINN. STAT. §§ 241.67, subd. 3(a), 244.05, subd. 1b(a).

56. The term “Hobson’s choice” means the choice of taking what is offered or nothing at all. Webster’s New Universal Unabridged Dictionary 864 (Jean L. McKechnie ed., 2d ed. 1983).

57. For a much more detailed historical analysis of the right against self-incrimination, see LEVY, *supra* note 2 and Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101 (1992).

58. LEVY, *supra* note 2, at 433-35. Levy writes that there was no such thing as a plea of guilty in Talmudic law. *Id.* at 435. No one would be permitted to confess to a crime or witness against himself, and any incriminating admission would simply be excluded. *Id.*

59. *Id.* at 43. The courts had criminal jurisdiction over offenses against religion such as blasphemy, sacrilege, and witchcraft. They also had jurisdiction over issues less related to religion, such as sexual conduct, marriage, and wills. *Id.* at 43-44.

60. *Id.* at 45.

61. *Id.* at 46. It was brought to England by Cardinal Otho, legate of Pope Gregory IX, as part of procedural reforms to be followed by ecclesiastical courts. *Id.*

62. *Id.*

against him.⁶³ It obligated the accused to give true answers to whatever questions were asked.⁶⁴ Its purpose was to extract a confession,⁶⁵ and a refusal to take the oath was regarded as evidence against the accused.⁶⁶ Both the King and Parliament objected to the oath, but the ecclesiastical courts used it nevertheless.⁶⁷

Parliament abolished the oath in the seventeenth century and common law courts assumed jurisdiction from ecclesiastical courts over matters in which “life, liberty or property” were at stake.⁶⁸ In the years that followed, an affirmative right to remain silent developed.⁶⁹ Eventually, English common law recognized the right against self-incrimination both in court and when interrogated by an agency of the State.⁷⁰

The American colonies adopted England’s right against self-incrimination.⁷¹ Then, following the Declaration of Independence in 1776, several states drafted state constitutions containing a right against self-incrimination.⁷² Section 8 of the Virginia Declaration of

63. *Id.* at 46-47.

64. *Id.*

65. *Id.* at 47. Obtaining a confession was important because it was often the only way to comply with the canon law’s requirement of “perfect or complete” proof. Herman, *supra* note 57, at 109.

66. Herman, *supra* note 57, at 112.

67. *See id.* at 110. In 1246, King Henry III forbade the use of the oath under most circumstances because he believed it was “contrary to ‘ancient Customs . . . [and] peoples Liberties.’” *Id.* In 1285 and again in 1316, Parliament ordered the courts to desist administering the oath. *Id.*

68. *Id.* at 135-36. This action was prompted by the trials of John Lilburne. Accused of sedition, Lilburne was willing to answer questions about the actual charges against him, but would not answer questions that he believed raised new matters. *Id.* at 135. Lilburne was held in contempt for refusing to take the oath and was put in the stocks, whipped, fined, and jailed. *Id.* at 136. He argued that the oath and self-accusation were against God’s law and the law of nature, and that he was being imprisoned for refusing to incriminate himself. *Id.* He gained popular support, eventually prevailed and was released from jail. *Id.*

69. *See id.* at 137-38.

70. Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Self-Incrimination and the Involuntary Confession Rule (Part 2)*, 53 OHIO ST. L.J. 497, 543 (1992).

71. LEVY, *supra* note 2, at 336. Virginia, the first American colony, stated in its 1606 charter that its citizens and their descendents would enjoy the same rights as those born in England. *Id.* These rights included trial by jury and any criminal procedural protections that existed in England. *Id.* Subsequent charters of other colonies included a similar guarantee. *Id.*

72. *Id.* at 409. The states included Virginia, Pennsylvania, Delaware, Vermont, Maryland, Massachusetts, New Hampshire, and North Carolina. *Id.* at 409-10.

Rights stated that “in all capital or criminal prosecutions a man . . . [cannot] be compelled to give evidence against himself.”⁷³ This became a model for the Fifth Amendment.⁷⁴

B. The Modern-Day Right Under the Fifth Amendment

The Fifth Amendment states that “no [person] shall be compelled in any criminal case to be a witness against himself.”⁷⁵ The right is a bedrock of our society. The right against self-incrimination

reflects . . . our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; . . . our sense of fair play which dictates “a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load”; . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.⁷⁶

1. When the Right Against Self-Incrimination Attaches

In line with the policies listed above, the Fifth Amendment “privileges [an individual] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”⁷⁷ It applies to any situation where the one asserting the privilege has a rational fear that his statement could lead to prosecution.⁷⁸

The State may compel a witness to answer if it first grants

73. *Id.* at 405-06.

74. *Id.* at 409.

75. U.S. CONST. amend. V.

76. *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (citations omitted).

77. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

78. *See id.*; *see also* *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (“The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.”).

immunity against use of the answers and evidence derived from them in any subsequent criminal case.⁷⁹ If immunity was not granted, any compelled answers are not admissible in a later criminal proceeding.⁸⁰

2. *The General Requirement that the Right Must Be Affirmatively Asserted*

As a general rule, a person must assert the right against self-incrimination in order to claim it.⁸¹ The Fifth Amendment is intended to protect a witness from government compulsion and therefore “does not preclude a witness from testifying voluntarily in matters which may incriminate him.”⁸² A witness who fails to claim the right at the time of questioning will not be allowed to claim compulsion at a later date.⁸³

3. *When the Right Is Self-Executing: Custodial Interrogations and Penalty Situations*

There are, however, certain situations in which the right becomes self-executing and the witness’ failure to assert the privilege is excused.⁸⁴ These situations involve circumstances where “the individual [was denied] a ‘free choice to admit, to deny, or to refuse to answer.’”⁸⁵ An example is found in custodial

79. *Lefkowitz*, 414 U.S. at 78 (citing *Kastigar v. United States*, 406 U.S. 441 (1972)).

80. *Id.*

81. *United States v. Monia*, 317 U.S. 424, 427 (1943); *see also Garner v. United States*, 424 U.S. 648, 654 (1976) (“[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not ‘compelled’ him to incriminate himself.”)

82. *Minnesota v. Murphy*, 465 U.S. 420, 427 (1984).

83. *See, e.g., Rogers v. United States*, 340 U.S. 367, 371 (1951); *see also United States v. Kordel*, 397 U.S. 1 (1970). In *Kordel*, a corporate officer who had been notified of contemplated criminal action against him nevertheless proceeded to provide incriminating answers to interrogatories posed in a civil case. 397 U.S. at 3-6. The Court concluded that “his failure . . . to assert the constitutional privilege leaves him in no position to complain now that he was compelled to give testimony against himself.” *Id.* at 10.

84. *Murphy*, 465 U.S. at 429-30.

85. *Garner*, 424 U.S. at 657 (quoting *Lisenba v. California*, 314 U.S. 219, 241 (1941)). The policy behind the self-incrimination clause being triggered when a witness fears his answers may lead to criminal charges is that “[t]he natural concern which underlies [these] decisions is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage.” *United States v. Patane*, 542 U.S. 630, 638 (2004) (alteration in original) (quoting *Michigan v. Tucker*, 417 U.S. 433, 440-41 (1974)). The same policy applies to non-

interrogations.⁸⁶ Coercion is assumed in custodial interrogation settings because they contain “inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”⁸⁷

A penalty situation occurs when a person is forced to decide between facing a penalty for asserting his Fifth Amendment right against self-incrimination or avoiding the penalty by incriminating himself.⁸⁸ The Supreme Court has stated in a line of cases that a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right to not give incriminating testimony about himself.⁸⁹ Examples of impermissible penalties that were substantial enough to trigger the right against self-incrimination include loss of employment;⁹⁰ loss of the license to practice law;⁹¹ ineligibility to receive government contracts, resulting in a reduced ability to earn a living;⁹² and loss of ability to hold public office and to participate in political groups.⁹³ In all of these cases, the penalties faced by the defendants for refusing to incriminate themselves were so severe that it caused the defendants to succumb to the pressure, coercion was assumed, and the right against self-incrimination was self-executing.⁹⁴

criminal proceedings.

86. *See, e.g., Murphy*, 465 U.S. at 429-34.

87. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). *Miranda* was the first case to extend Fifth Amendment rights to in-custody interrogation situations. *Id.* *Miranda* recognized inherent compulsion to speak exists when an individual is interrogated in police custody. *Id.* Therefore, any statements are presumed to have been compelled in violation of the Fifth Amendment unless the State can prove that the individual made the statement freely and with full awareness of his rights. *See id.* at 478.

88. *Murphy*, 465 U.S. at 434. Failure to assert the right against self-incrimination is also excused “where the assertion of the privilege is penalized so as to ‘foreclos[e] a free choice to remain silent, and . . . compe[l] . . . incriminating testimony.’” *Id.* (citing *Garner v. United States*, 424 U.S. 648, 661 (1976)).

89. *See infra* notes 90-93.

90. *Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation*, 392 U.S. 280 (1968).

91. *Spevack v. Klein*, 385 U.S. 511 (1967).

92. *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

93. *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).

94. *See Garrity v. New Jersey*, 385 U.S. 493 (1967).

IV. UNITED STATES SUPREME COURT DECISIONS RELATING TO SEX
OFFENDER TREATMENT PROGRAMS

A. Minnesota v. Murphy

In 1980, Donald Murphy was charged with criminal sexual conduct but was sentenced to three years probation when he pleaded guilty to the lesser charge of false imprisonment.⁹⁵ One of the terms of his probation required participation in sexual offender treatment offered by Alpha House.⁹⁶ After Murphy abandoned his treatment program, the treatment counselor informed his probation officer that Murphy admitted raping and murdering a teenage girl in 1974.⁹⁷ Upon meeting with his probation officer, Murphy admitted to the rape and murder.⁹⁸ He was arrested and indicted for first-degree murder.⁹⁹

Murphy argued that the use of his confession at trial would violate his Fifth Amendment rights.¹⁰⁰ The Minnesota Supreme Court agreed, and the Supreme Court granted certiorari on the issue of “whether a statement made by a probationer to his probation officer without prior warnings is admissible in a subsequent criminal proceeding.”¹⁰¹

The Court ruled that Murphy’s privilege against self-incrimination was not violated because, under the circumstances, he was not compelled to incriminate himself.¹⁰² However, the Court stated two principles that have direct bearing on the issue of sex offenders. First, a defendant does not lose his Fifth Amendment rights by virtue of conviction of a crime.¹⁰³ Second, the State threatening to revoke an individual’s probation for

95. Minnesota v. Murphy, 465 U.S. 420, 422 (1984). He was sentenced to a term of sixteen months, but the sentence was suspended subject to his probation. *Id.*

96. *Id.*

97. *Id.* at 423. Murphy had been questioned about the incident twice before in 1974, but never charged. *Id.* at 422.

98. *Id.* at 424.

99. *Id.* at 424-25.

100. *Id.* at 425.

101. *Id.*

102. *Id.* at 440. Although Murphy was required by the terms of his probation to answer the probation officer truthfully, that did not preclude him from refusing to make self-incriminating statements. Therefore, it would have been unreasonable for Murphy to believe that invoking his Fifth Amendment rights would have resulted in his probation being revoked. *Id.* at 438.

103. *Id.* at 426; *see also* Baxter v. Palmigiano, 425 U.S. 308, 316 (1976).

refusing to incriminate himself would create the classic penalty situation, and his statements would not be admissible against him at trial.¹⁰⁴

B. McKune v. Lile

1. *Facts in McKune*

In *McKune v. Lile*,¹⁰⁵ the Supreme Court considered the constitutionality of a Kansas law requiring convicted sex offenders to complete a treatment program.¹⁰⁶ Robert Lile was accused of sexually assaulting a high school student on her way home from school.¹⁰⁷ Although he claimed the act was consensual, he was convicted and sentenced to prison.¹⁰⁸

Prison officials ordered Lile to participate in a Sexual Abuse Treatment Program (SATP) a few years before his scheduled release date.¹⁰⁹ The two requirements of the program were that he (1) admit to and accept responsibility for the crime for which he was convicted and (2) complete a sexual history form detailing all past charged and uncharged criminal offenses.¹¹⁰ Although the information was used primarily to aid rehabilitation, it was not privileged, and Kansas left open the possibility that the statements would be used in subsequent criminal proceedings.¹¹¹

Prison officials informed Lile that his privilege status would be reduced from Level III to Level I if he refused to participate in the program.¹¹² Some of the benefits a Level III inmate enjoyed included enhanced visitation rights, the ability to earn up to minimum wage, the ability to send money home to family, and a

104. *Murphy*, 465 U.S. at 435. “There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer’s answers would be deemed compelled and inadmissible in a criminal prosecution.” *Id.*

105. 536 U.S. 24 (2002).

106. *Id.* at 29.

107. *Id.* at 29-30.

108. *Id.* at 30. Lile was convicted of rape, aggravated sodomy, and aggravated kidnapping. *Id.* The opinion does not state the length of his prison term. *See id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

cell shared with one other inmate rather than four.¹¹³

Lile argued that being forced to choose between admitting to sexual assault and having his status reduced to Level I imposed impermissible penalties upon him and thus violated his Fifth Amendment right against self-incrimination.¹¹⁴ The United States District Court for the District of Kansas entered summary judgment in his favor¹¹⁵ and the Court of Appeals for the Tenth Circuit affirmed.¹¹⁶

2. *The Plurality and Dissenting Opinions*

A plurality¹¹⁷ of the Court ruled that the reduction in status was not a penalty, and therefore Lile's rights were not violated.¹¹⁸ The plurality based its opinion on the premise that prison officials were free to move prisoners to other facilities for any reason.¹¹⁹ The Court previously ruled that "challenged prison conditions cannot give rise to a due process violation unless those conditions constitute 'atypical and significant hardship[s] on [inmates] in relation to the ordinary incidents of prison life.'"¹²⁰ Therefore, because the Commissioner could move Lile to another prison unit at will, the Court reasoned that the loss of benefits that accompanied the move was not a penalty for purposes of self-incrimination.¹²¹

113. *Id.* at 63-64 (Stevens, J., dissenting). Justice Stevens also pointed to the fact that reduction from Level III to Level I is typically reserved for serious disciplinary infractions, such as committing a felony, theft, sodomy, arson, and assault. *Id.* at 63 n.8.

114. *Id.* at 31.

115. *Lile v. McKune*, 24 F. Supp. 2d 1152, 1164 (D. Kan. 1998). The court reasoned that he would subject himself to perjury since he testified at trial that the act was consensual. *Id.* at 1157 n.8.

116. *Lile v. McKune*, 224 F.3d 1175, 1192 (10th Cir. 2000). The court of appeals ruled that reduction in prison privileges and housing accommodations was a penalty. *Id.* at 1189.

117. Justice Kennedy wrote the opinion, in which Justices Scalia and Thomas, and Chief Justice Rehnquist joined. *McKune*, 536 U.S. 24 at 29. Justice O'Connor concurred in the result. *Id.* at 48-54 (O'Connor, J., concurring).

118. *Id.* at 45-46.

119. *Id.* at 44. Prison administrators are free to transfer inmates to a different prison even if "life in one prison is much more disagreeable than in another." *Meachum v. Fano*, 427 U.S. 215, 225 (1976) (discussing Fourteenth Amendment Due Process Clause).

120. *McKune*, 536 U.S. at 37 (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). Although *Sandin* involves due process violations, the Court stated that *Sandin's* reasoning is analogous to a self-incrimination claim. *Id.*

121. *Id.* at 44. Although the defendant, Lile, "would prefer not to choose

After ruling that there was no constitutional violation, the plurality was free to balance Kansas's legitimate interests in rehabilitating sex offenders with incidental "burdens [on] an inmate's right to remain silent."¹²² The plurality also reasoned that the State's interest in rehabilitation must be "weighed against the exercise of an inmate's liberty"¹²³ and an inmate who accepts responsibility for the crime is more likely to be rehabilitated.¹²⁴ Finally, the plurality was concerned that a ruling in favor of Lile would call the U.S. Sentencing Guidelines into question, because they allow for downward adjustment of a sentence when the offender accepts responsibility for the crime.¹²⁵ However, while these are valid concerns, they are subordinate to the Constitution and would not survive if Kansas's SATP program had been found unconstitutional.

The dissent argued vigorously that the SATP program was not taking away benefits, but was instead penalizing inmates for refusing to incriminate themselves.¹²⁶ The dissent also pointed out that even if the change in Lile's status could be characterized as a loss of benefits to which he had no entitlement, the question is not whether he was entitled to them in the first place, but whether taking them away now constitutes a penalty for asserting his Fifth Amendment rights.¹²⁷

3. Justice O'Connor's Concurrence

Justice O'Connor's concurrence is the most important part of the opinion because although she agreed with the plurality's outcome, she did not agree with its analysis. She was troubled by its

between losing prison privileges and accepting responsibility for his past crimes," it is a choice "that does not amount to compulsion, and therefore one Kansas may require [Lile] to make." *Id.* at 45.

122. *Id.* at 41.

123. *Id.* at 36.

124. *Id.* at 36-37. "Acceptance of responsibility . . . demonstrates that an offender 'is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.'" *Id.* (citing *Brady v. United States*, 397 U.S. 742, 753 (1970)).

125. *Id.* at 47 (citing section 3E1.1 of the U.S. Sentencing Commission Guidelines Manual).

126. *Id.* at 64 (Stevens, J., dissenting).

127. *Id.* at 66. The dissent pointed out that it took Lile several years to acquire the living status he enjoyed at the time he was ordered to participate in the SATP program. *Id.* at 62.

“failure to set forth a comprehensive theory of the Fifth Amendment privilege against self-incrimination.”¹²⁸ More specifically, Justice O’Connor did not agree that the “atypical and significant hardship” standard is broad enough to evaluate whether a prisoner has been compelled to incriminate himself.¹²⁹ Instead, she believes the test should be “whether the pressure imposed . . . rises to a level where it is likely to ‘compel’ a person ‘to be a witness against himself.’”¹³⁰

Unlike the plurality, Justice O’Connor would apply the “penalty case” analysis to this situation, which would require determining whether the consequence faced by the individual refusing to incriminate himself was an impermissible penalty.¹³¹ O’Connor felt the changes in living conditions Lile faced were too minor to “compel his testimony.”¹³² However, she did state that longer incarceration is a penalty far greater than those already found unconstitutional in the penalty cases, and its “imposition . . . for refusing to incriminate oneself would surely implicate a ‘liberty interest.’”¹³³

The Court in *McKune* did not establish a self-incrimination test to apply in the prison context because it could not agree that the change in Lile’s living conditions were severe enough penalties to trigger the right against self-incrimination. However, if Lile had faced extended incarceration for refusing to incriminate himself, it appears that Justice O’Connor would have joined the dissent and created a majority that would have found it to be an impermissible penalty.¹³⁴ In fact, even the plurality opinion suggested that an extension of Lile’s incarceration term or ineligibility for good time credits would have affected the analysis.¹³⁵ This is important to keep in mind when considering Minnesota’s law.

128. *Id.* at 53 (O’Connor, J., concurring).

129. *Id.* at 48-49.

130. *Id.* at 49.

131. *See id.* at 49-50.

132. *Id.* at 51-52.

133. *Id.* at 52.

134. *Id.*

135. *See id.* at 43.

V. MINNESOTA CASE LAW RELATING TO SEX OFFENDERS

A. State *ex rel.* Morrow v. LaFleur1. *Facts of the Case*

State ex rel. Morrow v. LaFleur is Minnesota's leading case on the issue of requiring admission of a crime in prison-based therapy. Randy Morrow was convicted in 1996 of fourth-degree criminal sexual conduct against a thirteen-year-old boy.¹³⁶ Morrow had employed the boy, and other boys, to assist him with his paper route.¹³⁷ The children spent much time at his house and often spent the night.¹³⁸ Morrow testified at trial that he showed his affection to the boys by hugging and kissing them and giving them backrubs.¹³⁹ The complainant, N.F., testified that on two occasions Morrow touched N.F.'s buttocks, which Morrow denied.¹⁴⁰ The jury found Morrow guilty and he was sentenced to thirty-six months of imprisonment and ten years of supervised release.¹⁴¹

Morrow was committed to the Commissioner of Corrections and underwent sex offender assessment at the Minnesota Correctional Facility at Stillwater.¹⁴² The prison psychologist informed Morrow that the purpose of the interview was to determine the most appropriate SOTP and that failure to complete the program could result in additional incarceration time.¹⁴³ Morrow cooperated in the interview by discussing and admitting some parts of the offense.¹⁴⁴ However, he denied touching N.F.'s buttocks, the element of sexual contact.¹⁴⁵ He also denied

136. *Morrow*, 590 N.W.2d at 789. Minnesota Statutes section 609.345, subdivision 1(b) (1998) states that a person is guilty of criminal sexual conduct in the fourth degree if they engage in sexual conduct with someone between the ages of thirteen and sixteen, and are more than forty-eight months older than the person. Consent is not a defense. *Id.* Mistake must be proven by a preponderance of the evidence. *Id.*

137. *Morrow*, 590 N.W.2d at 789.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 790.

145. *Id.*

responsibility for the offense and was unremorseful.¹⁴⁶ Morrow was transferred to Lino Lakes to begin long-term intensive sex offender treatment.¹⁴⁷

Morrow was assessed once again at Lino Lakes, where he admitted to all actions of his offense except for touching N.F.'s buttocks.¹⁴⁸ Morrow gave three reasons for his denials. First, he denied that his actions were inappropriate, harmful, or criminal.¹⁴⁹ Second, he refused to admit to the offense because he was in the process of appealing his conviction and feared that an admission would damage his appeal.¹⁵⁰ Third, Morrow had testified in his defense at trial and feared prosecution for perjury if he admitted to the offense.¹⁵¹

The treatment staff determined that Morrow would not benefit from treatment and discharged him from the program.¹⁵² As a result, Morrow was assessed ninety days DCTA, and his release date was extended from January 22, 1998, to April 22, 1998.¹⁵³

2. *The Minnesota Court of Appeals Decision*

The district court denied Morrow's habeas corpus petition, and he appealed.¹⁵⁴ The court of appeals found significant the fact that Morrow had not exhausted his right to appeal.¹⁵⁵ The court stated that "the 'better rule' is that the Fifth Amendment privilege against compelled self-incrimination 'continues until . . . the conviction has been affirmed on appeal.'"¹⁵⁶ The court also ruled that requiring an admission of guilt *before* being allowed to enter the treatment program was too restrictive.¹⁵⁷

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 790-91. Morrow's conviction was subsequently affirmed on appeal. *State v. Morrow*, No. C4-96-1702, 1997 WL 309453, at *3 (Minn. Ct. App. June 10, 1997). That fact, however, as the court of appeals noted in deciding that Morrow's right against self-incrimination was violated, is irrelevant because the appeal was pending at the time Morrow was being assessed for treatment. *See State ex rel. Morrow v. LaFleur*, 577 N.W.2d 226, 228 n.1 (Minn. Ct. App. 1998).

151. *Morrow*, 590 N.W.2d at 791.

152. *Id.*

153. *Id.*

154. *See Morrow*, 577 N.W.2d at 227.

155. *Id.* at 228.

156. *Id.* at 227 (quoting *United States v. Duchi*, 944 F.2d 391, 394 (8th Cir. 1991)).

157. *Id.* at 228. The court distinguished Morrow's case from *Taylor v. Lieffort*,

The court of appeals stated that Morrow's termination from the treatment program made treatment "a punishment for an exercise of [Morrow's] rights rather than an opportunity for rehabilitation."¹⁵⁸ The court also held that imposing DCTA because Morrow refused to admit guilt before entering the treatment program resulted in him "being punished immediately and directly for his failure to (fully) admit guilt" rather than making failure one factor in the ultimate decision of whether he successfully completed treatment.¹⁵⁹ The court of appeals ruled that Morrow's Fifth Amendment rights were violated and ruled that he must be released on his original release date.¹⁶⁰

3. *The Minnesota Supreme Court Decision*

The Minnesota Supreme Court accepted review on the issue of "whether the Fifth Amendment privilege against self-incrimination prohibits the Department of Corrections from making a finding of unamenability to treatment when that finding is based . . . on the inmate's assertion that truthful cooperation with treatment could subject him to criminal liability."¹⁶¹ The court reversed the court of appeals, holding that Morrow's rights were not violated.¹⁶²

The court's analysis focused on whether the Commissioner's power to impose disciplinary time on Morrow was a sufficient compulsion to trigger Morrow's Fifth Amendment right against self-incrimination.¹⁶³ In doing so, the court focused on the nature of the compulsion: the choice between participating in mandated sex offender treatment—which includes admission of the convicted offense—or having his sentence extended as discipline for failure

568 N.W.2d 456 (Minn. Ct. App. 1997), which involved a similar set of circumstances. There, the court held that a requirement of admission of guilt before Taylor, an inmate, could be admitted to sex offender treatment did not violate his Fifth Amendment rights. *See Taylor*, 568 N.W.2d at 458-59. The court of appeals, in *Morrow*, distinguished *Taylor* on two grounds. First, Taylor had already exhausted his appeals. *Morrow*, 577 N.W.2d at 228. Second, Taylor refused to participate in treatment, but Morrow only refused to make certain admissions. *Id.*

158. *Morrow*, 577 N.W.2d at 228.

159. *Id.* The court cited *In re Welfare of J.G.W.*, 433 N.W.2d 885, 886 (Minn. 1989), for the proposition that while the court could not require someone to incriminate themselves, it could require treatment for which acceptance of guilt is necessary for successful completion of therapy. *See Morrow*, 577 N.W.2d at 228.

160. *Morrow*, 577 N.W.2d at 228.

161. *State ex rel. Morrow v. LaFleur*, 590 N.W.2d 787, 792 (Minn. 1999).

162. *Id.* at 796.

163. *Id.* at 792.

to complete treatment.¹⁶⁴ The court reasoned that this did not rise to the level of compulsion found in the penalty cases and determined that Morrow's rights were not violated.¹⁶⁵

Key to the decision was the court's distinction between being released from prison before the end of one's sentence and "losing one's freedom when . . . not serving a sentence."¹⁶⁶ The court interpreted Minnesota's sentencing statutes as not guaranteeing a "specific, minimum length of a supervised release term,"¹⁶⁷ but that a supervised release date is conditional upon participation in a SOTP.¹⁶⁸ The court wrote:

In the plainest of terms, when Morrow received a 36-month sentence, those 36 months belonged presumptively to the state. Reducing the part of the 36-month sentence that is to be spent on supervised release is not a penalty of such magnitude that it is comparable to those detailed in the Supreme Court's so-called "penalty" cases.¹⁶⁹

Once the court determined that Morrow did not have a fundamental right to supervised release, it reasoned that society's interest in releasing sex offenders in a treated state outweighed Morrow's interests in refusing to incriminate himself.¹⁷⁰

In his dissent, Justice Page (joined by Justice Paul Anderson) argued that Morrow's Fifth Amendment rights were violated because he was penalized as a direct result of his refusal to incriminate himself while his appeal was pending.¹⁷¹ "The simple solution to this problem," he stated, "is for the [S]tate to grant Morrow immunity for any incriminating statements" that would affect his appeal.¹⁷²

164. *Id.*

165. *See id.* at 794-96 & n.13.

166. *Id.* at 793; *see also* State v. Kaquatosh, 600 N.W.2d 153, 157 (Minn. Ct. App. 1999).

167. *Morrow*, 590 N.W.2d at 793 (quoting MINN. STAT. § 244.101, subd. 3 (1998)).

168. *Id.* (citing MINN. STAT. § 244.101, subd. 1 (1998)).

169. *Id.*

170. *Id.* at 795-96. The court also distinguished between invoking one's Fifth Amendment right and the State's ability to require answers to official questions. *Id.* at 795.

171. *Id.* at 796-97 (Page, J., dissenting).

172. *Id.* at 798. This argument is not new. *See* Lefkowitz v. Turley, 414 U.S. 70, 78 (1973); *see also supra* Part III.B.1.

B. State v. Kaquatosh

State v. Kaquatosh,¹⁷³ decided by the Minnesota Court of Appeals shortly after *Morrow*, ruled that the threatened loss of probation is a sufficient liberty interest to trigger one's Fifth Amendment right against self-incrimination.¹⁷⁴ Mike Kaquatosh was found guilty of second-degree criminal sexual conduct.¹⁷⁵ As part of the pre-sentence investigation, the trial judge ordered Kaquatosh to submit to an assessment to determine his need for sex-offender treatment.¹⁷⁶ Kaquatosh went to the assessment, but denied all of the allegations in the complaint and was deemed unamenable to treatment.¹⁷⁷

The judge stayed Kaquatosh's twenty-one year prison sentence and instead put him on probation for ten years.¹⁷⁸ One condition of his probation was that he successfully complete a treatment program and "denial of [the] offenses [was] not acceptable as reasons why [Kaquatosh was] not accepted into a treatment program."¹⁷⁹

Kaquatosh initiated an appeal of his conviction.¹⁸⁰ His defense attorney recommended that he cooperate with the treatment but assert his Fifth Amendment right when questioned about the facts underlying the conviction.¹⁸¹ Kaquatosh followed these recommendations and agreed to participate in treatment but refused to admit to the crime.¹⁸² He was again deemed inappropriate for treatment and was arrested for violating his parole.¹⁸³ At the parole hearing, Kaquatosh argued that his Fifth

173. 600 N.W.2d 153 (Minn. Ct. App. 1999).

174. *Id.* at 158. *Kaquatosh* was decided by the court of appeals and therefore its value as precedent is much lower than *Morrow*. Nevertheless, it does illustrate how Minnesota courts interpret *Morrow* and *Murphy*, as well as the uncertainty surrounding this issue.

175. *Id.* at 154.

176. *Id.* at 154-55. The trial court must order convicted sex offenders to undergo assessment as part of a pre-sentence investigation unless the sentencing guidelines provide a presumptive prison sentence or an adequate assessment was conducted prior to the conviction. MINN. STAT. § 609.3457, subd. 1 (2004).

177. *Kaquatosh*, 600 N.W.2d at 155.

178. *Id.*

179. *Id.*

180. *Id.* at 154.

181. *Id.* at 155.

182. *Id.*

183. *Id.* The treatment provider recommended that he wait until after his appeal to participate in the program. *Id.*

Amendment rights were being violated.¹⁸⁴ The judge rejected the argument and executed the prison sentence.¹⁸⁵

The court of appeals, relying heavily upon *Morrow* and *Murphy*, reversed the decision.¹⁸⁶ Although the *Morrow* court ruled that a delay in Morrow's supervised release date did not rise to the level of compulsion necessary to trigger his right against self-incrimination, the court did state that revocation of probation would be sufficient.¹⁸⁷ Likewise, the Supreme Court in *Murphy* stated that the threatened loss of parole would create "the classic penalty situation."¹⁸⁸ The court of appeals ruled that revoking Kaquatosh's probation impermissibly penalized him for asserting his Fifth Amendment rights.¹⁸⁹ Therefore, the State could not compel Kaquatosh to incriminate himself as part of the treatment program, and revocation of his probation was unconstitutional.¹⁹⁰

C. Carrillo v. Fabian

The Minnesota Supreme Court's interpretation of Minnesota's sentencing statutes in *Carrillo v. Fabian*¹⁹¹ turns *Morrow* on its head by coming to an exactly opposite conclusion regarding an inmate's liberty interest in his supervised release date. Richard Carrillo, an inmate at the Faribault prison serving a 114-month sentence for a drive-by shooting, was accused of disorderly conduct and assault of an inmate because a prison guard claimed she saw him shove another inmate to the ground.¹⁹² The prison guard was the only witness to testify against Carrillo at his disciplinary hearing, and although she could not see his face when the altercation occurred, she testified that it was him.¹⁹³ Carrillo and two other inmates

184. *Id.* at 156. Kaquatosh was willing to participate in treatment but his defense attorney advised him not to do so. *Id.* at 155. His predicament is illustrated in his statement: "So what do I do, jeopardize my Fifth Amendment in doing this when [the defense attorney] advises me not to? Which road do I take?" *Id.* at 156.

185. *Id.* at 157-58.

186. *Id.*

187. *Id.* at 157 (citing *State ex rel Morrow v. LaFleur*, 590 N.W.2d 787, 792-93 (Minn. 1999)).

188. *Id.* (citing *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984)).

189. *Id.* at 158.

190. *Id.*

191. 701 N.W.2d 763 (Minn. 2005).

192. *Id.* at 766-67.

193. *Id.* at 767.

testified that he did not commit the offense.¹⁹⁴ Nevertheless, the hearing officer, relying on the “some evidence” standard of proof applied in prison disciplinary hearings, ruled that Carrillo committed the offense.¹⁹⁵ As a result, Carrillo served twenty-three days in segregation, and his supervised release date was delayed by seven days.¹⁹⁶ Carrillo’s writ of *habeas corpus* was denied by the district court and court of appeals.¹⁹⁷ The Minnesota Supreme Court, however, ruled that extending Carrillo’s incarceration violated his right to due process.¹⁹⁸

The first issue the court decided, and the key issue with respect to the self-incrimination analysis, was whether Minnesota’s sentencing scheme creates a liberty interest in an inmate’s supervised release date.¹⁹⁹ This was essentially the same issue the court addressed in *Morrow*, but this time the court came to the opposite conclusion.²⁰⁰ Rather than ruling that an inmate’s entire sentence presumptively belongs to the State, the court ruled that an inmate has a statutory right to his supervised release date unless he commits an offense while in prison.²⁰¹

In *Sandin v. Connor*,²⁰² the Supreme Court established the “nature of the deprivation” test, which looks not at strict statutory language but “the nature of the deprivation and the extent to which that deprivation departs from the basic conditions of [the inmate’s] sentence.”²⁰³ With this test in mind, the court considered Carrillo’s claim with regard to Minnesota’s sentencing system.

The court noted that when Carrillo was sentenced, he was told, pursuant to Minnesota Statutes section 244.101, that he would serve two-thirds of his sentence in prison and the remaining time

194. *Id.*

195. *Id.* Minnesota Department of Corrections Policy 303.010, H, requires only “some evidence in the record to support the charged violation of the offender disciplinary regulations.” *Id.*

196. *Id.* at 768.

197. *Id.*

198. *See id.* at 777.

199. *Id.* at 768.

200. *See supra* Part V.A.3. Compare *Carillo*, 701 N.W.2d at 777, with *State ex rel Morrow v. LaFleur*, 590 N.W.2d 787, 793 (Minn. 1999).

201. *Carrillo*, 701 N.W.2d at 773.

202. 515 U.S. 472 (1995).

203. *Carrillo*, 701 N.W.2d at 771. *Sandin* dealt with disciplinary segregation. The Court ruled that segregation involved only the conditions under which the inmate served time while in prison and, because it did not “inevitably affect” the duration of the inmate’s sentence, it was not a departure from the basic conditions of the sentence. *Sandin*, 515 U.S. at 475-76, 487.

on supervised release, but that prison time could be extended if he committed a disciplinary offense.²⁰⁴ The court reasoned that under this sentencing scheme, an extension of incarceration is a departure from the basic conditions of the inmate's sentence. It stated:

[I]t is precisely because Minnesota's statutory scheme sets up an ordered, standardized, clearly delineated system—under which an inmate *will be released* from prison on the date that he was informed by the judge at sentencing that he would be released *unless he commits a disciplinary offense*—that the extension of Carrillo's supervised release date represents a departure from the basic conditions of his sentence.²⁰⁵

The court recognized that Minnesota's sentencing scheme also contains a provision that declares “[n]otwithstanding the court's explanation of the potential length of a defendant's supervised release term, the court's explanation creates no right . . . to any specific, minimum length of a supervised release term.”²⁰⁶ The court reasoned that a literal interpretation of this provision would allow the Commissioner to extend an inmate's supervised release date for any reason whatsoever, thus rendering the previous provisions useless.²⁰⁷ To harmonize the provisions, the court concluded that there is a difference between a “liberty interest” and a “right” to supervised release.²⁰⁸ This interpretation would allow the Commissioner to extend the supervised release date if the inmate commits a violation, but would guard the inmate against unjustified extensions by granting him the right to protect his liberty interest in his release date.²⁰⁹

The court reversed the appellate court's decision and Carrillo's original supervised release date was reinstated.²¹⁰ The important rule is that “any extension of an inmate's period of imprisonment represents a significant departure from the basic conditions of the inmate's sentence.”²¹¹ Therefore, under

204. *Carrillo*, 701 N.W.2d at 771 (citing MINN. STAT. § 244.101, subds. 1-2).

205. *Id.* at 772 n.6.

206. *Id.* at 773 (alteration in original) (quoting MINN. STAT. § 244.101, subd. 3 (2004)).

207. *Id.* at 773 n.7.

208. *Id.* at 773.

209. *See id.*

210. *Id.* at 777.

211. *Id.* at 773.

Minnesota's sentencing scheme, any disciplinary sanction that "as an *immediate consequence*" extends an inmate's supervised release date triggers a liberty interest under the Due Process Clause of the U.S. Constitution.²¹²

VI. UNCERTAINTY BREWING IN MINNESOTA'S SEX OFFENDER TREATMENT PROGRAM

Morrow was based on the "important distinction . . . between being released from prison earlier than the time ordered in one's sentence and losing one's freedom when one is not serving a sentence."²¹³ Because *Morrow*'s time "belonged presumptively to the state," an extension of his supervised release date could not possibly have been a penalty for purposes of self-incrimination.²¹⁴ But this distinction is contradicted by *Carrillo*'s recognition of a prisoner's liberty interest in his supervised release date.²¹⁵ Accordingly, *Carrillo* leaves Minnesota's SOTP in violation of the Fifth Amendment.

A. *Distinguishing Between Due Process and Fifth Amendment Violation Analyses*

Morrow and *Carrillo* were decided on different constitutional doctrines: *Morrow*'s under the Fifth Amendment and *Carrillo*'s under Due Process. But this does not change *Carrillo*'s effect on Minnesota's treatment program for two reasons. First, the difference between governmental actions giving rise to Due Process violations and government-created penalties triggering the right against self-incrimination is hazy and, if anything, the Fifth Amendment standard is easier to meet.²¹⁶ According to Justice

212. *Id.* It is interesting to note that *Carrillo* was written by Justice Paul H. Anderson, who had joined Justice Page's *Morrow* dissent. Chief Justice Blatz, who was in the *Morrow* majority and authored the *Carrillo* dissent, was the only other justice to have served on the court during the *Morrow* decision. Chronological List of Justices and Judges of the Minnesota Appellate Courts, <http://www.lawlibrary.state.mn.us/judges.html> (last visited Feb. 25, 2006). It is likely that the change in the court's make-up played a role in the different interpretation of Minnesota's sentencing statutes.

213. State *ex rel.* *Morrow v. LaFleur*, 590 N.W.2d 787, 793 (Minn. 1999).

214. *Id.* (citing MINN. STAT. § 244.101, subd. 3 (1998)); see also *supra* Part V.A.3.

215. See *supra* Part V.C.

216. For example, the *McKune* plurality found *Sandin*'s due process analysis "a useful instruction" in dealing with the self-incrimination issue. *McKune v. Lile*, 536 U.S. 24, 25 (2002) (citing *Sandin v. Connor* 515 U.S. 472, 484 (1995)).

O'Connor, the self-incrimination standard is even easier to establish because "the Fifth Amendment compulsion standard is broader than the 'atypical and significant hardship' standard we have adopted for evaluating due process claims in prisons."²¹⁷ And the *Morrow* majority agreed with Justice Page's statement that "[t]he absence of a substantive due process claim does not necessarily mean that the sanction imposed is not compulsion in violation of the Fifth Amendment."²¹⁸ Therefore, because Minnesota's sentencing scheme created a due process right for Carrillo, it was surely capable of creating a coercive penalty situation for Morrow.

Second, both *Morrow* and *Carrillo* hinged on the court's interpretation of Minnesota's sentencing scheme, not on different constitutional claims. In other words, the first hurdle both Morrow and Carrillo needed to overcome—irrespective of their underlying constitutional claim—was that Minnesota's sentencing scheme granted them an interest in their scheduled supervised release date.

For example, the court in *Morrow* focused first on Minnesota's sentencing statutes in determining that Morrow did not have an interest in his supervised release date, thus paving the way for its decision that Morrow was not being penalized for asserting his Fifth Amendment rights.²¹⁹ Likewise, in *Carrillo* the court stated that the first step in a due process analysis was to determine whether the State was interfering with an individual's liberty interest.²²⁰ This also meant determining whether Carrillo had a liberty interest in his supervised release date, which was the same basic question as in *Morrow*.²²¹ Therefore, the fact that the two cases were decided on different constitutional doctrines does not change *Carrillo*'s effect on a sex offender's right against self-incrimination.

B. *Applying McKune and Murphy Through the Carrillo Lens*

The constitutional implications of the *Carrillo* decision on

"[*Sandin*] may not provide a precise parallel for determining whether there is compelled self-incrimination, but it does provide useful instruction for answering the latter inquiry." *Id.* at 25.

217. *Id.* at 48 (O'Connor, J., concurring) (citing *Sandin*, 515 U.S. at 484).

218. *Morrow*, 590 N.W.2d at 793 n.10, 798 (Page, J., dissenting).

219. *See id.* at 793.

220. *Carrillo v. Fabian*, 701 N.W.2d 763, 768 (Minn. 2005).

221. *Id.*

Minnesota's SOTP are undeniable. With the court's recognition of a liberty interest in an offender's supervised release date, the State can no longer rely on *Morrow* when determining that offenders are unamenable to treatment simply because they refuse to make incriminating statements.

As already discussed above, had the court recognized the liberty interest at the time of *Morrow*, the decision would almost certainly have gone the other way; once the court established that *Morrow* had no right to a supervised release date, it logically followed that he was not being impermissibly penalized for his refusal to incriminate himself.²²² If, however, *Morrow* had a liberty interest in his supervised release date (as recognized in *Carrillo*²²³) and his full sentence did not "belong[] presumptively to the State,"²²⁴ then extending his supervised release date would have been a "substantial penalty for purposes of the Fifth Amendment."²²⁵

United States Supreme Court precedent compels the same conclusion. Although the Court in *McKune* did not find a Fifth Amendment violation under the facts of that case, Justice O'Connor's concurrence,²²⁶ the dissent,²²⁷ and even the plurality opinion²²⁸ all state that an extension of incarceration time would be a penalty sufficient to trigger the right against self-incrimination. *Morrow* faced longer incarceration in the form of DCTA for refusing to incriminate himself.²²⁹ It is quite plausible that under the *McKune* reasoning the Supreme Court would have found this to be an impermissible penalty by itself. However, it is even more likely that the Supreme Court would find an impermissible penalty

222. *Morrow*, 590 N.W.2d at 793; see also *supra* Part V.A.3.

223. See *supra* Part V.C.

224. *Morrow*, 590 N.W.2d at 793.

225. *Id.*

226. The penalty of "longer incarceration . . . [is] far greater than those we have already held to constitute unconstitutional compulsion in the penalty cases. Indeed, the imposition of such [an] outcome[] as a penalty for refusing to incriminate oneself would surely implicate a 'liberty interest.'" *McKune v. Lile*, 536 U.S. 24, 52 (2002) (O'Connor, J., concurring).

227. The dissent argued that Lile's loss of benefits while in prison implicated a liberty interest. See *id.* at 54 (Stevens, J., dissenting). Undoubtedly, the dissent would have agreed that longer incarceration would also implicate a liberty interest.

228. "In the present case, [Lile's] decision not to participate in the Kansas SATP did not extend his term of incarceration. Nor did his decision affect his eligibility for good-time credits or parole." *Id.* at 38.

229. *Morrow*, 590 N.W.2d at 791.

when the State threatens to take away a recognized liberty interest.

The Supreme Court's rule in *Murphy* (and the court of appeals' decision in *Kaquatosh* as persuasive authority) supports the idea that requiring a sex offender to admit his crime violates the Fifth Amendment. The Supreme Court stated in *Murphy* that threatened loss of parole is a sufficiently severe penalty to invoke the right against self-incrimination.²³⁰ Parole is different from a future supervised release date because the parolee has liberty now, while the inmate has an interest in future liberty. However, *Carrillo* blurs the distinction between the two by recognizing an actual liberty interest in supervised release. Extending an offender's release date prolongs incarceration and is in essence a denial of his future liberty.²³¹

Carrillo's interpretation of Minnesota's sentencing scheme has placed Minnesota's SOTP in violation of the Fifth Amendment. Incarcerated offenders, just like parolees, now have a recognized liberty interest in their supervised release date.²³² The State violates the Fifth Amendment when it threatens to interfere with either interest simply because the offender invokes his right against self-incrimination.

VII. RECOMMENDATIONS

Society has an undeniable interest in rehabilitating sex offenders before they are released from prison.²³³ Constitutional challenges to Minnesota's SOTP can be minimized and even eliminated by structuring the program to avoid penalty situations. Potential solutions include (1) utilizing treatment programs that do not require admission of the offense, (2) beginning treatment after all appeals have been exhausted, (3) granting immunity to statements made in therapy, and (4) changing sentencing laws by legislative action.

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

231. The *Carrillo* court recognized that "seven days of additional incarceration time may not appear long relative to two-thirds of a 114-month sentence," however, "any extension of an inmate's period of imprisonment represents a significant departure from the basic conditions of the inmate's sentence" and is worthy of the Constitution's protections. *Carillo v. Fabian*, 701 N.W.2d 763, 773 (Minn. 2005).

232. *See id.*; *see also Murphy*, 465 U.S. at 435.

233. *See supra* Part II.

A. *Utilize Treatment Programs Not Requiring an Admission of Guilt*

The conventional view of most therapists is that the offender's denial of the crime must be overcome in order for the treatment to be effective,²³⁴ and most courts believe that acceptance of responsibility is necessary for rehabilitation.²³⁵ There are, however, alternatives that would allow an offender to participate without first admitting to the crime.

In one such method, known as "metaconfrontation," the therapist "aims to induce eventual acceptance of responsibility by expressing empathy for the offender's initial need to deny [the offense]."²³⁶ The program is designed for offenders who are "most vulnerable and dependent on their defenses"²³⁷ and "encourages the offender to use his strengths to confront his own weaknesses, those parts of him that want to protect and deny."²³⁸

A second option, the "Schlank and Shaw method," was created "as an intermediary step for offenders who are removed from traditional treatment programs for absolute refusal to admit responsibility for their behavior."²³⁹ The program is designed to teach offenders about the "protective function of denial and elicit empathy for victims."²⁴⁰ The offenders are asked to apply what they learn about denial to someone who is guilty of the same offense.²⁴¹ By doing this, the offender confronts the effects of denial without being required to admit the offense.²⁴² This method was proven to be fairly successful when it was used on ten offenders and resulted in five of them admitting to their offense.²⁴³

Treatment professionals are best equipped to decide what therapy methods to use. However, given that Minnesota's SOTP is open to constitutional attack, it may be worth considering other solutions other than what is being done today. Providing alternative treatment programs for offenders who are unwilling to

234. Kaden, *supra* note 10, at 367; *see also supra* notes 39-41 and accompanying text.

235. Kaden, *supra* note 10, at 369.

236. *Id.* at 370.

237. *Id.*

238. *Id.* at 370-71.

239. *Id.* at 371-72. The program is named after its creators, Anita Schlank and Theodore Shaw. *Id.* at 371.

240. *Id.* at 371.

241. *Id.*

242. *Id.*

243. *Id.* at 372.

admit responsibility for the crime would be the best way to avoid a penalty situation. The Fifth Amendment violation would be eliminated. Furthermore, offenders who are traditionally considered unamenable to treatment would receive a form of therapy that they are able to handle. This modification would most likely result in a larger number of offenders receiving some form of treatment because in virtually all of the cases discussed above the offender refused to admit guilt, but did not refuse to participate in treatment altogether.

B. Begin Treatment After All Appeals Have Been Exhausted

Another solution would be to begin treatment after all avenues of appeal have been exhausted. Minnesota prison therapists follow this practice today.²⁴⁴ This practice avoids some Fifth Amendment violations because the offender would no longer have a reasonable fear that his statements would be used against him in a future criminal proceeding related to the convicted offense.²⁴⁵

However, an offender who testified in his own defense could still face charges of perjury as well as charges for previous crimes that have never been charged.²⁴⁶ This alone would be enough to prevent an offender from freely discussing his crimes in therapy, thus forcing him to decide once more between participating in therapy and extending his supervised release date.

Furthermore, the appeals process can be lengthy, and there have been instances in which an offender was forced to choose between pursuing his appeal and participating in therapy.²⁴⁷ The offender would also have to forego any post-conviction remedies that may be available to him beyond the first appeal.²⁴⁸ For these reasons, simply waiting until the time to appeal has passed is not a desirable alternative.

244. Goldman, *supra* note 41.

245. *See supra* Part III.B.1.

246. This was the argument made by Lile and Imlay. *See* McKune v. Lile, 536 U.S. 24, 55 (2002) (Stevens, J., dissenting); State v. Imlay, 813 P.2d 979, 983 (Mont. 1991).

247. Goldman, *supra* note 41.

248. *See Imlay*, 813 P.2d at 983 (noting that a defendant has the post-conviction remedies of "motion for new trial (including the opportunity to discover new evidence), appeal, petition for certiorari, and collateral attack").

C. *Grant Immunity to Statements Made in Therapy*

A grant of immunity promising that incriminating statements made in therapy will not be used against an offender in a future criminal proceeding could help eliminate potential Fifth Amendment issues that exist with the current system of treatment.²⁴⁹ But the grant of immunity must be specific and official to be effective. The *Morrow* court found no coercion because the Commissioner did not require a waiver of immunity from Morrow or insist that Morrow's statements would be used against him in the future.²⁵⁰ This type of "gentleman's agreement" between the State and the offender is not enough because it is not a guarantee that the statements will not be used in the future.²⁵¹

Prosecutors are hesitant to grant immunity because their primary goal is to convict sex offenders of their crimes and courts do not want to tread on the probation rights of the executive branch.²⁵² But immunity would not harm the State's interests if it does not plan to use the statements in the future. Immunity would also encourage the offender to accept responsibility and complete the therapy process.²⁵³

Offering immunity will also further the goal of developing a successful relapse prevention plan.²⁵⁴ As discussed above, it is essential that the offender disclose all past offenses in order to create a plan based on "the thoughts, feelings and decisions which preceded [the] past offenses."²⁵⁵ An offender would be much more willing to talk openly if there was no fear that his statements would be used against him in a criminal prosecution.

Immunity, however, would not solve all of the problems. First, the mere fact of the offender's participation in the SOTP, even without his incriminating statements, shows that he admitted to the crime. Second, immunity would not keep the offender's statements from being used against him in a civil commitment hearing.²⁵⁶ The right against self-incrimination only applies to

249. See *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973); see also *supra* Part III.B.1.

250. State *ex rel. Morrow v. LaFleur*, 590 N.W.2d 787, 790 (Minn. 1999).

251. See Tanabe, *supra* note 10, at 851-52.

252. Shevlin, *supra* note 10, at 503.

253. See Schlank & Harry, *supra* note 28, at 1224.

254. See *id.*

255. *Id.*

256. See *id.* at 1223-24. "If [the offenders] do not seek treatment in prison, the government can use this fact against them in a subsequent Sexually Violent Person (SVP) commitment. If they do seek treatment, the government may use

future criminal proceedings, and a civil commitment hearing is, by definition, a civil proceeding. Therefore, although immunity removes most of the Fifth Amendment violations, it is not ideal because it would not encourage an offender who feared civil commitment to cooperate with therapy.²⁵⁷

D. Legislative Changes to Sex Offender Sentencing Laws

Legislative changes to sex offenders' sentences are not new. Guideline sentences for sex offenders have been enhanced a number of times since the Guidelines were promulgated.²⁵⁸ In 1989, sentences were doubled and long term supervision was required for offenders deemed to be "patterned predatory offender[s]."²⁵⁹ In 1992, life imprisonment was established for sex offenders convicted of first-degree sexual assault under certain circumstances.²⁶⁰ And in 2000, first-degree criminal sexual conduct offenders were subjected to a presumptive prison sentence of 144 months.²⁶¹

The Legislature has the power to create a sentencing scheme for sex offenders that would remove any potential Fifth Amendment issues. One option would be to eliminate the supervised release term for sex offenders. This would avoid the constitutional issue and would serve society's interest in keeping the offender off the streets for a longer duration of time.²⁶² This method, however, would cost society more money to imprison the offender and would remove incentives for the offender to behave while in prison.²⁶³ The supervised release period is valuable because it allows the State to monitor the sex offender's reentry into society.²⁶⁴ Furthermore, abandoning the sentencing guidelines

information obtained from treatment against the offender in a subsequent SVP commitment." *Id.* (quoting John Q. LaFond, *Sexually Violent Predator Laws and Registration and Community Notification Laws: Policy Analysis: The Costs of Enacting a Sexual Predator Law*, 4 PSYCHOL. PUB. POL'Y & L. 468, 496 (1998)); *see also* Lile v. McKune, 24 F. Supp. 2d 1152, 1157 n.6 (D. Kan. 1998) (recognizing that Lile's statements would not be protected in civil commitment proceedings).

257. Schlank & Harry, *supra* note 28, at 1223.

258. ELLISON, *supra* note 23, at 2.

259. *Id.*

260. *Id.*

261. *Id.*

262. Of course, all changes made by the Legislature would have to comport with constitutional requirements.

263. ELLISON, *supra* note 23, at 2.

264. FINAL REPORT, *supra* note 49, at 15.

for an entire class of criminals is an extreme step that could create more problems than it would solve.

There are more preferable options the Legislature can pursue. For example, in 2004 Governor Pawlenty formed the Governor's Commission on Sex Offender Policy to review existing policies and laws and to recommend changes.²⁶⁵ The Commission recommended a number of changes to Minnesota's sentencing practices.²⁶⁶ One recommendation is the "[d]evelopment of a blended determinate-indeterminate sentencing system for sex offenders," involving doubling statutory maximum sentences and "vigorous . . . reviews of the offender's response to treatment while in custody."²⁶⁷ If the implementation of this recommendation resulted in the offender no longer being guaranteed a supervised release date, then the constitutional violation would be removed.²⁶⁸

These are just some of the possible solutions. The best alternative would be to utilize treatment methods that would not require offenders to admit the offense because the Fifth Amendment violation would be eliminated and more offenders would receive treatment. However, if that is not possible, then one of the other solutions, or perhaps a mix of the solutions, would be preferable over what is in place today.

VIII. CONCLUSION

Society has a strong interest in rehabilitating sex offenders before their release from prison. However, as this Note has shown, Minnesota's current SOTP likely violates the Fifth Amendment of the U.S. Constitution. Bringing it in conformity with the requirements of the Constitution would benefit society greatly by avoiding constitutional challenges in the future. Furthermore, a program that complies with the Constitution will allow treatment providers to focus their efforts on rehabilitation without fear of

265. *Id.* at 7.

266. *Id.* at 1-2.

267. *Id.*

268. Other recommendations from the Final Report include the creation of a sex offender release board that would have the authority to determine when sex offenders should be released from prison and their conditions for supervised release and increasing the maximum sentence to life for sex offenders with a prior history of criminal sexual conduct. *Id.* The recommendation to create a sex offender release board would most likely not avoid the constitutional problems highlighted in *Murphy* and *Kaquotosh* if refusal to incriminate oneself resulted in revocation of parole. See discussion *supra* Parts IV.A, V.B.

violating the Fifth Amendment.²⁶⁹

But most importantly, a system that encourages people to incriminate themselves and penalizes them for refusing to do so should not be allowed to survive. As Justice Stevens wrote in his *McKune* dissent, “we ought to ask ourselves—what if this is one of those rare cases in which the jury made a mistake and he is actually innocent?”²⁷⁰

269. This Note does not discount the importance of rehabilitation and the work done by therapists. Rather, its goal is to point out the inherent problems with the system with the goal of finding a solution that will avoid the self-incrimination problem and allow the therapists to focus on rehabilitating offenders.

270. 536 U.S. 24, 71-72 (Stevens, J., dissenting).