
SEX OFFENDER PROBATIONERS AND THE FIFTH AMENDMENT:
RETHINKING COMPULSION AND EXPLORING PREVENTATIVE
MEASURES IN THE FACE OF REQUIRED TREATMENT PROGRAMS

by
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Sex offenders are often subject to mandatory probation conditions, including treatment programs designed to help offenders control their impulses. These programs frequently require offenders to divulge information about their sexual history and to admit to sexual offenses for which they may or may not have been convicted. This Comment considers how this aspect of conditional release may implicate the Fifth Amendment by violating the privilege against self-incrimination, as illustrated by the Ninth Circuit's decision in United States v. Antelope. It will also consider various alternatives available for achieving greater balance between the competing interests of protecting the Fifth Amendment right and promoting meaningful treatment programs. Ultimately, the author concludes that the legislature is best suited to resolve the issue.

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I. INTRODUCTION: *UNITED STATES V. ANTELOPE*—A SNARLED PROCEDURAL HISTORY

In October 2000, Lawrence Antelope joined an Internet site featuring child pornography.¹ Unbeknownst to Antelope, the site was set up by a law enforcement task force formed to address child sexual exploitation.² When Antelope purchased a pornographic video entitled “Doctor’s Appointment,” which was described to him by an undercover agent as featuring an eight-year-old girl, law enforcement officers delivered the tape and promptly arrested Antelope.³

Antelope ultimately pleaded guilty to possessing child pornography.⁴ He was sentenced to five years probation⁵ under terms that required him to participate in the Sexual Abuse Behavior Evaluation and Recovery program (“SABER”).⁶ SABER in turn required him to complete a questionnaire detailing his full sexual history, including sexual offenses for which he had not yet been convicted.⁷ It also required him to submit to mandatory polygraph tests to support the truthfulness of his responses.⁸ At sentencing, Antelope contested these probation terms, invoked his Fifth Amendment privilege against self-incrimination regarding SABER’s treatment conditions, and refused to undergo treatment without a grant of immunity.⁹ The district court overruled Antelope’s objections and told him that information revealed in his

¹ Brief of Appellee at 3, *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005) (No. 03-30334) [hereinafter Response Brief].

² *Id.* The site advertised “Preteen Nude Sex Pics.” *United States v. Antelope*, 395 F.3d 1128, 1131 (9th Cir. 2005).

³ Response Brief, *supra* note 1, at 3; *Antelope*, 395 F.3d at 1131.

⁴ *Antelope*, 395 F.3d at 1131.

⁵ Probation, parole, and supervised release are all forms of conditional release. While they differ in some important aspects, they are similar in that they can all be revoked for failure to comply with the conditions of release. *See United States v. Kincade*, 379 F.3d 813, 817 n.2 (9th Cir. 2004) (“Our cases have not distinguished between parolees, probationers, and supervised releasees for Fourth Amendment purposes”). For the sake of brevity and convenience this paper will refer to parolees, probationers, and supervised releasees collectively as “probationers.” For discussion regarding conditional release, *see infra* Part III.

⁶ *Id.* He received only five years probation pursuant to a downward sentencing departure. Opening Brief of Defendant-Appellant at 6, 11, *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005) (No. 03-30334) [hereinafter Opening Brief].

⁷ Opening Brief, *supra* note 6, at 12, 16–17.

⁸ *Antelope*, 395 F.3d at 1131.

⁹ Opening Brief, *supra* note 6, at 6–7. For discussion regarding immunity, *see infra* Part V.A.

history or polygraph test would likely be subject to counselor-patient privilege.¹⁰ Both parties appealed.¹¹

Pending appeal, the district court revoked Antelope's probation due to several violations, including failure to comply with SABER's sexual history questionnaire and polygraph requirements.¹² As it turned out, the district court erroneously assumed Antelope's confidences would be protected by the counselor-patient privilege. Before beginning treatment, SABER required Antelope to sign a contract in which he agreed to waive the counselor-patient privilege and acknowledge that the details of his treatment, including the autobiography, could be turned over to law enforcement if his counselor considered it legally or ethically necessary.¹³ Failure to waive the confidentiality of his treatment would result in termination of treatment and notification of his probation officer.¹⁴ Defense counsel presented the SABER contract to the district court at the revocation hearing, but the court was apparently unmoved by the contract's Fifth Amendment implications.¹⁵

Rather than revoke probation entirely, the court re-imposed probation, added six months of electronic monitoring, and renewed the contested probation terms.¹⁶ Antelope appealed again and filed a motion with the district court inquiring whether the recent order included use immunity from statements made in compliance with SABER's polygraph requirement. The district court dismissed it as moot.¹⁷

While the first and second appeals were pending, Antelope again violated the terms of his probation by refusing to submit to SABER's requirements on Fifth Amendment grounds.¹⁸ However, this time his fears were more acutely realized. A second revocation hearing was held.¹⁹ At the hearing, Antelope's counselor testified about circumstances under which he chose to forego counselor-patient confidentiality and provide law enforcement with patient information.²⁰ Although SABER counselors were only legally required to

¹⁰ *Antelope*, 395 F.3d at 1131.

¹¹ *Id.* The government appealed a downward sentencing departure and Antelope appealed the requirement that he undergo treatment without a grant of immunity. Opening Brief, *supra* note 6, at 6.

¹² *Antelope*, 395 F.3d at 1131.

¹³ Opening Brief, *supra* note 6, at 13–14 (citing in substantial part the first page of the SABER treatment contract). Montana law requires counselors to release pertinent information regarding victims who are under eighteen years old. *Id.* at 17; MONT. CODE ANN. § 41-3-201 (2005).

¹⁴ Opening Brief, *supra* note 6, at 13–14.

¹⁵ *Id.* at 12.

¹⁶ *Antelope*, 395 F.3d at 1131. Interestingly, the district court apparently ordered Antelope's counsel not to continue advising him to assert his Fifth Amendment privilege, and stated that Antelope's counsel was "trying to set a legal issue" that was not "in the interest of this client." Opening Brief, *supra* note 6, at 7 (citing excerpts of the district court record).

¹⁷ *Antelope*, 395 F.3d at 1131.

¹⁸ *Id.*; Opening Brief, *supra* note 6, at 8.

¹⁹ Opening Brief, *supra* note 6, at 8, 15.

²⁰ *Id.* at 17–18.

report instances in which the victim was currently under eighteen years old, Antelope's counselor testified that he had previously reported offenses involving victims who were over eighteen, and that doing so resulted in prosecution of the probationer.²¹ Antelope expressed an interest in undergoing treatment and again requested use immunity, but re-asserted his Fifth Amendment claim.²²

Perhaps realizing counselor-patient privilege would not protect Antelope's Fifth Amendment rights, the district court held that as a matter of law, probation nullifies any Fifth Amendment right a probationer has to decline to reveal incriminating information.²³ The court revoked Antelope's probation and sentenced him to thirty months in prison²⁴ followed by supervised release under the same terms to which he was previously subjected.²⁵ Antelope appealed for the third time.²⁶

All three of Antelope's appeals were consolidated, but the Ninth Circuit declined to address the Fifth Amendment claim.²⁷ It held that because the district court originally had erroneously granted Antelope too great a downward departure, the original sentence had to be vacated.²⁸ Thus, the court stated that it "need not reach any issues raised by the probation revocation."²⁹ On remand, the district court sentenced Antelope to twenty months incarceration and three years supervised release under the contested terms.³⁰ Antelope, of course, objected to these terms on Fifth Amendment grounds, but this time the district court held his claim was insufficiently ripe unless or until he was actually "prosecuted or subject to prosecution" for any crimes disclosed as a result of treatment.³¹ Antelope appealed for the fourth time.³²

Soon after re-sentencing, he finished his prison term and was released under supervision.³³ Once again, Antelope violated the terms of his supervised release agreement by refusing to submit to polygraph tests or to reveal his full sexual history.³⁴ At the release revocation hearing, he re-asserted his Fifth Amendment claim, and in response to Antelope's ongoing concerns, the district

²¹ *Id.* (citing revocation hearing testimony in which Antelope's counselor stated that although there was no legal requirement to turn over to law enforcement information regarding victims over eighteen years old, there were instances in which he had turned sexual histories over to law enforcement when he felt he had an ethical responsibility to do so).

²² *Antelope*, 395 F.3d at 1131.

²³ *Id.* at 1131-32.

²⁴ *Id.* at 1132.

²⁵ Opening Brief, *supra* note 6, at 19.

²⁶ *Id.*

²⁷ *United States v. Antelope*, 65 F. App'x 112, 113 (9th Cir. 2003).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Antelope*, 395 F.3d at 1132.

³¹ *Id.* (internal quotations omitted).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

court re-asserted its belief that the counselor-patient privilege under Montana law would likely protect him.³⁵ Ultimately, it held Antelope's claim was unripe and declined to review the possibility of use immunity protection, also on ripeness grounds.³⁶ The district court then suggested that Antelope should assert his privilege upon seeing his SABER counselor and that he should say, "I am doing this because I am ordered to do it. I am not doing it voluntarily, it's a court order, and I do it only because if I don't do it I'm going to end up in jail."³⁷ The district court then sentenced Antelope to ten months in prison and twenty-six months supervised release with the same polygraph and sexual history requirement condition.³⁸ Antelope appealed; his fourth and fifth appeals were consolidated and the Ninth Circuit finally ruled in Antelope's favor on his Fifth Amendment claim.³⁹

United States v. Antelope's snarled procedural history illustrates the disagreement and confusion about how the criminal justice system should reconcile court-ordered treatment programs and probationers' Fifth Amendment rights.⁴⁰ The District Court for the District of Montana looked to several preventative options to preserve Antelope's constitutional right against self-incrimination, none of which ultimately proved effective. Consider the district court's varied responses to Antelope's Fifth Amendment concerns. Twice, it informed him he would be protected by counselor-client privilege.⁴¹ Alternatively, it told him that as a probationer, he had no Fifth Amendment right at all to decline to reveal incriminating information.⁴² Then, perhaps in acknowledgement of *some* Fifth Amendment right, it told him his claim would be insufficiently ripe until he was actually subject to prosecution.⁴³ Throughout the entire process, it ignored the possibility of use immunity.⁴⁴ Absent clear guidance regarding the scope of impermissible compulsion and the measures for preventing such a violation, the district court was ill-equipped to respond to Antelope's Fifth Amendment claim.

Ultimately, the Ninth Circuit held that a probationer cannot be subjected to a longer term of incarceration for refusing to disclose his sexual history in the course of court-ordered treatment if a real risk of prosecution exists.⁴⁵ The court found Antelope's risk of incrimination was sufficiently real to warrant a valid fear of future incrimination because Antelope's SABER counselor

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* (internal quotations omitted).

³⁸ *Id.*

³⁹ *Id.* at 1138 ("[W]e hold that Antelope's privilege against self-incrimination was violated because Antelope was sentenced to a longer prison term for refusing to comply with SABER's disclosure requirements.").

⁴⁰ See *infra* Part IV; *United States v. Antelope*, 65 F. App'x 112 (9th Cir. 2003); *Antelope*, 395 F.3d 1128.

⁴¹ *Antelope*, 395 F.3d at 1131, 1132.

⁴² *Id.* at 1131-32.

⁴³ *Id.* at 1132.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1138.

testified that he had previously reported other patients' sexual histories to law enforcement, and that doing so resulted in those patients' prosecution.⁴⁶

Relying almost entirely on Justice O'Connor's concurrence in *McKune v. Lile*,⁴⁷ the Ninth Circuit used a purpose-based analysis to determine whether Antelope suffered constitutionally impermissible compulsion.⁴⁸ Stating that "[c]ountervailing government interests, such as criminal rehabilitation" do not supersede the right to silence, regardless of their ostensibly rehabilitative purpose,⁴⁹ the court found that further incarceration for failure to comply with the sexual history requirement was impermissibly compulsive.⁵⁰ While the court did not expressly direct the government to grant Antelope immunity, it noted that Antelope was correct to remain silent absent a grant of immunity and that the scope of immunity should be consistent with the protection afforded by the Fifth Amendment.⁵¹ Thus, under *Antelope*, if the government provides an offender with immunity so that he may undergo treatment, it may not circumscribe the scope of the immunity afforded based on the individual's status as a sex offender.⁵²

As a result of the Ninth Circuit's decision, the government effectively must provide sex offenders with use and derivative use immunity if they are required to undergo court-ordered treatment that requires an acceptance of responsibility, and a risk of prosecution exists. At the same time, the decision deprives the government of its ability to use the threat of incarceration as leverage to encourage offenders to co-operate with treatment efforts and to obey probation conditions. This result effectively hobbles the ability of the criminal justice system to pursue its rehabilitative goals because a sex offender

⁴⁶ *Id.* at 1135. Given the terms of the treatment contract, "[t]he treatment condition placed Antelope at a crossroads—comply and incriminate himself or invoke his right against self-incrimination and be sent to prison. . . . [Therefore] Antelope's successful participation in SABER triggered a real danger of self-incrimination[.]"

⁴⁷ 536 U.S. 24, 48–54 (2002) (O'Connor, J., concurring).

⁴⁸ In contrast to Justice O'Connor's approach, the *McKune* plurality, which held that Lile's transfer from a medium security prison to a maximum security prison because he was unwilling to comply with the disclosure requirements of a sex offender treatment program, reached its decision due to the premise that "lawful conviction and incarceration necessarily place limitations on the exercise of a defendant's privilege against self-incrimination." *McKune*, 536 U.S. at 38 (Kennedy, J., plurality opinion).

⁴⁹ *Antelope*, 395 F.3d at 1134.

⁵⁰ *Id.* at 1139. Compare *United States v. Dotson*, 324 F.3d 256, 261 (4th Cir. 2003) (holding a polygraph requirement for a sex offender permissible because the purpose of the polygraph was for treatment and not prosecution). The Ninth Circuit also noted that the plurality suggested that extended incarceration or reduced eligibility for good time or parole would be impermissibly compulsive. *Antelope*, 395 F.3d at 1138 n.3 (citing *McKune*, 536 U.S. at 38 (Kennedy, J., plurality opinion)).

⁵¹ *Id.* at 1141. It stated: "The scope of the immunity should be consistent with the Supreme Court's opinion in *Kastigar*" [406 U.S. 441, 453 (1972)]. . . . (holding that 'immunity from use and derivative use . . . is coextensive with the scope of the privilege against self-incrimination.') *Kastigar*, of course, does not insulate Antelope from prosecution altogether, just from the 'use and derivative use' of compelled admissions in trial against him." *Id.* at 1141 n.5.

⁵² *Id.*

in the Ninth Circuit may essentially forego court-ordered treatment without consequences by invoking his Fifth Amendment right against self-incrimination when a real risk of prosecution exists.⁵³

The conflict is further confounded by disagreement in the Supreme Court's Fifth Amendment jurisprudence. The Ninth Circuit's resolution of the issue rests precariously on Justice O'Connor's concurrence in *McKune v. Lile*, a 4-1-4 decision.⁵⁴ *McKune* involved a prisoner who risked losing various prison privileges because he failed to disclose his sexual history in a sex offender program in which he was ordered to participate prior to his release.⁵⁵ As *McKune* addressed the Fifth Amendment in a prison context, the full scope of probationers' Fifth Amendment rights vis-à-vis mandatory sex offender treatment is unclear. The *McKune* plurality, concurrence, and dissent each merit consideration. Given recent changes in the court, it is unclear which of the three views will ultimately prevail.

With these considerations in mind, this Comment will consider how the criminal justice system can best facilitate treatment and public safety, without running afoul of the Fifth Amendment. Part I of this paper introduced the conflict between mandatory rehabilitation and the Fifth Amendment, as illustrated by *United States v. Antelope*. Part II explains the scope of the sex offender problem and the constitutional ramifications of compulsory treatment programs. Part III explores the intersection between established Fifth Amendment case law and case law regarding probationers. Because the threshold question for determining whether a constitutional violation exists is whether the threat of probation revocation truly constitutes impermissible compulsion, Part IV considers *McKune v. Lile*, which illustrates the alternative means for evaluating compulsion for the purposes of the Fifth Amendment privilege of probationers who are subject to court-ordered treatment requirements. It also will examine the relative constitutional viability of alternative options available to the criminal justice system for protecting the Fifth Amendment privilege of probationers subject to treatment requirements. Part V offers substantive suggestions on how to reconcile the tension between court-ordered sex offender treatment and sex offender probationers' Fifth Amendment privilege. This Comment concludes with the assertion that the legislature is best situated to balance the competing interests at issue. Until that occurs, the government should take a variety of measures to guarantee the full protection of the Fifth Amendment.

II. CONFLICTING INTERESTS: THE SCOPE OF THE SEX OFFENDER PROBLEM AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

Sex crimes are a serious problem in the United States. Although some researchers are concerned that statistical methods used to determine sex

⁵³ See *id.* at 1138, 1141.

⁵⁴ *Id.* at 1136-39.

⁵⁵ *McKune*, 536 U.S. at 31 (Kennedy, J., plurality opinion). For discussion regarding *McKune*, see *infra* Part IV.

offender recidivism do not accurately capture the full breadth of the problem,⁵⁶ even the “best case” scenarios are troubling. For example, according to the Center for Sex Offender Management (CSOM),⁵⁷ approximately 78 women eighteen years of age and older are forcibly raped each hour in the United States.⁵⁸ Further, “1 of 6 U.S. women and 1 of 33 U.S. men have experienced an attempted or completed rape as a child and/or adult.”⁵⁹ Another study found that “[a]pproximately two-thirds of state prisoners convicted of rape or sexual assault offended against children.”⁶⁰

Despite the gravity of these offenses and contrary to public sentiment,⁶¹ convicted sex offenders do not typically face life imprisonment for their crimes.

⁵⁶ Judith V. Becker, *Offenders: Characteristics and Treatment*, FUTURE OF CHILD., Summer–Fall 1994, at 176, 183, available at http://www.futureofchildren.org/usr_doc/vol14no2ART10.pdf (discussing “serious limitations on official crime statistics”); see also CTR. FOR SEX OFFENDER MGMT., AN OVERVIEW OF SEX OFFENDER MANAGEMENT 1, 2 (2002), available at http://www.csom.org/pubs/csom_bro.pdf [hereinafter OVERVIEW OF SEX OFFENDER MANAGEMENT]. Because recidivism is most often calculated using re-arrest or conviction statistics, studies tend to reflect results involving sex offenders who got caught, or who got caught again, as opposed to those who have successfully evaded detection or arrest. *Id.* Furthermore, researchers believe sex offenses are significantly underreported due to a variety of complex factors including, among other things, fear of retribution, shame, victims’ desire to put the experience behind them, and victims’ fear of reporting the offense when it could result in arrest and incarceration of someone who is a friend or family member. CTR. FOR SEX OFFENDER MGMT., RECIDIVISM OF SEX OFFENDERS 1, 3 (2001), available at <http://www.csom.org/pubs/recidsexof.html> [hereinafter RECIDIVISM OF SEX OFFENDERS] (citing the results of several Bureau of Justice Statistics surveys that indicate only one out of three “sexual assaults against persons 12 or older are reported to law enforcement.”).

⁵⁷ The Center for Sex Offender Management was established in 1997 as a project of the Office of Justice Programs, U.S. Department of Justice. RECIDIVISM OF SEX OFFENDERS, *supra* note 56, at 1.

⁵⁸ OVERVIEW OF SEX OFFENDER MANAGEMENT, *supra* note 56, at 1 (citing PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (1998)).

⁵⁹ *Id.*

⁶⁰ *Id.* (citing LAWRENCE A. GREENFELD, U.S. DEP’T OF JUSTICE, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT (1997)).

⁶¹ I refer here to the weight of public sentiment as evidenced by recent legislation and court decisions involving sex offender registration, notification, civil commitment, and increased penalties for sex offenses involving children. Independently or pursuant to federal mandate, all fifty states have enacted sex offender registration and community notification laws. OVERVIEW OF SEX OFFENDER MANAGEMENT, *supra* note 56, at 7–8. Thus far, both registration and community notification laws have passed constitutional muster. See, e.g., *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1 (2003) (upholding Connecticut’s sex offender registration laws when challenged on due process grounds); *Smith v. Doe*, 538 U.S. 84 (2003) (holding Alaska’s sex offender registration and notification laws do not constitute punishment and therefore do not violate the Ex Post Facto Clause when retroactively applied to convicted sex offenders). Additionally, at least sixteen states have enacted civil commitment statutes, which enable state authorities to subject a convicted sex offender to civil commitment following incarceration if a court finds the offender is too dangerous to be released. OVERVIEW OF SEX OFFENDER MANAGEMENT, *supra* note 56, at 8. When and if the offender no longer poses a significant risk to the community, he may be released. *Id.* Courts also have upheld the constitutionality of civil commitment programs. *Id.*

Rather, convicted sex offenders who are subject to community supervision are a reality of the system.⁶² In fact, more than half of all sex offenders subject to the supervision of the American correctional system are under some form of conditional supervision in the community.⁶³ Thus, although new federal legislation provides for life imprisonment and civil commitment of sex offenders who commit certain offenses,⁶⁴ most offenders probably will be subject to community supervision instead of incarceration. Because of this reality, and because of the overwhelming interest in protecting the public safety, the government possesses a legitimate interest in preventing recidivism among sex offenders who remain in or return to society.

Researchers remain optimistic that treatment can reduce sex offender recidivism.⁶⁵ Some studies regarding the efficacy of different treatment programs have yielded inconsistent results,⁶⁶ but researchers generally have found that sex offenders who receive specialized treatment have “a significantly lower rearrest rate than offenders who did not participate in treatment.”⁶⁷ Thus, treatment arguably plays a valuable role in ameliorating the risk of recidivism posed by sex offenders under community supervision. Given the impact these crimes have on their victims,⁶⁸ the government has a valid interest in fostering sex offender treatment programs.

⁶² RECIDIVISM OF SEX OFFENDERS, *supra* note 56, at 1. (“While the likelihood and length of incarceration for sex offenders has increased in recent years, the majority are released at some point on probation or parole . . .”). See also PATRICK A. LANGAN ET AL., U.S. DEP’T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, 9 (2003) (“[O]nly rarely do life sentences in the United States literally mean imprisonment for the remainder of a person’s life. Most felons receiving a life sentence are eventually paroled. On average, a sex offender released from prison in 1994 had an 8-year term and served 3½ years of that sentence (45%) before being released . . . Half of the released sex offenders [in the study] . . . served no more than a third of their sentence before being released.”).

⁶³ RECIDIVISM OF SEX OFFENDERS, *supra* note 56, at 1.

⁶⁴ See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §§ 206, 302, 120 Stat. 587, 613–15, 619–22 [hereinafter Adam Walsh Act]. Section 302 of the Adam Walsh Act provides for civil commitment of some “sexually dangerous persons.” Section 206 increases penalties for certain sexual offenses against children.

⁶⁵ CTR. FOR SEX OFFENDER MGMT., MYTHS AND FACTS ABOUT SEX OFFENDERS 1, 6 (2000), available at <http://www.csom.org.pubs/pubs.html> [hereinafter MYTHS AND FACTS].

⁶⁶ RECIDIVISM OF SEX OFFENDERS, *supra* note 56, at 12–14 (indicating that studies evaluating the results of sex offender treatment have had mixed results, largely because of inconsistencies in treatment methodology, type of sex offender, and location of treatment program); *id.* at 7 (“Mixing an antisocial rapist with a socially skilled fixated pedophile with a developmentally disabled exhibitionist may indeed produce a hodgepodge of results”) (citing B.K. Schwartz & H.R. Cellini, *Sex Offender Recidivism and Risk Factors in the Involuntary Commitment Process*, in 3 THE SEX OFFENDER ch. 8, 8–6 (1997)).

⁶⁷ OVERVIEW OF SEX OFFENDER MANAGEMENT, *supra* note 56, at 2. See also MYTHS AND FACTS, *supra* note 65, at 6 (indicating that “effective sex offender specific treatment interventions can reduce sexual offense recidivism by 8%” and noting that given the “tremendous impact of these offenses on their victims, any reduction in the re-offense rates of sex offenders is significant.”)

⁶⁸ MYTHS AND FACTS, *supra* note 65, at 6. See also Scott Michael Solkoff, *Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs*, 17 NOVA L. REV. 1441, 1449 (1993) (“Due to their sexual misuse, adult survivors

However, compulsory sex offender rehabilitation programs implicate the Fifth Amendment.⁶⁹ Sex offenders who are subject to some form of conditional release—parole, probation, or supervised release—are also subject to certain terms as conditions of that release.⁷⁰ Courts often require sex offenders to undergo treatment. Failure to comply with the terms of one's probation agreement may result in probation revocation.⁷¹

Sex offender treatment programs typically require participants to admit responsibility for the crime of conviction, and any as yet uncharged sex offenses, because it fosters treatment.⁷² To facilitate accountability, these programs require participants to complete full sexual history questionnaires and to take polygraph tests to verify the truth of their answers.⁷³ Most programs will not allow an offender to continue treatment absent an admission of guilt responsibility for at least the crime of conviction.⁷⁴ Because completion of a sexual history questionnaire effectively constitutes acceptance of responsibility, failure to provide one's sexual history often forecloses treatment.

Testimony compelled through court mandated treatment programs implicates the Fifth Amendment in two ways. First, a convicted offender who testifies at trial on his own behalf and asserted his innocence, but who

[of childhood sexual assault] are much more likely to develop depression, various anxiety disorders, substance abuse disorders, and sexual dysfunction”).

⁶⁹ See generally *Minnesota v. Murphy*, 465 U.S. 420 (1984) (un-Mirandized statements made to probation officer regarding admission made during treatment held admissible at trial for rape and murder); *Montana v. Imlay*, 506 U.S. 5 (1992) (certiorari dismissed as improvidently granted); *McKune v. Lile*, 536 U.S. 24 (2002) (prisoner brought section 1983 claim alleging revocation of prison privileges and transfer to maximum security unit for failure to participate in sex offender treatment violated the Fifth Amendment); *United States v. Lee*, 315 F.3d 206 (3d Cir. 2003) (supervised releasee challenged polygraph requirement because it allegedly violated the Fifth Amendment); *Ainsworth v. Stanley*, 317 F.3d 1 (1st Cir. 2002) (prisoners brought section 1983 claim alleging sex offender treatment program violated the Fifth Amendment); *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005).

⁷⁰ See 18 U.S.C. § 3563(b) (2000) (setting forth mandatory and discretionary probation conditions).

⁷¹ *Id.*

⁷² Solkoff, *supra* note 68, at 1450–51. This exercise enables offenders to fully face and to take complete responsibility for the breadth and depth of their problem. It also enables counselors to tailor treatment to the behaviors and situations that specifically constitute a problem for each particular offender. See also *McKune*, 536 U.S. at 33–34 (Kennedy, J., plurality opinion) (“The critical first step in the Kansas SATP [Sexual Abuse Treatment Program] . . . is acceptance of responsibility for past offenses”); Brief of 18 States as Amicus Curiae in Support of Petitioners at 2, *McKune*, 536 U.S. 24 (No. 00-1187) (“[T]he information that offenders ‘self-report’ is crucial in helping state officials understand the full scope of each offender’s past and current problems as those offenders enter treatment . . .”); see also Becker, *supra* note 56, at 187 (“A sex offender can be considered amenable to treatment only if he acknowledges that he has committed a sexual offense, he considers his sexual offending a problem behavior that he wants to stop, and he is willing to participate fully in treatment”).

⁷³ *McKune v. Lile* and *United States v. Antelope* both involved challenges to programs that required acceptance of responsibility and full disclosure of prior sexual conduct. *McKune*, 536 U.S. at 34 (Kennedy, J., plurality opinion); *Antelope*, 395 F.3d at 1131.

⁷⁴ Solkoff, *supra* note 68, at 1450–51.

subsequently admits guilt for the crime of conviction during treatment potentially exposes himself to perjury charges.⁷⁵ Second, in programs that mandate full disclosure of all past sexual misconduct, the requirement that sex offenders admit responsibility for as yet uncharged sexual offenses potentially subjects offenders to a real risk of self-incrimination.⁷⁶ In either case, a probationer might feel forced to incriminate himself rather than face probation revocation, but in incriminating himself, he would likely face incarceration anyway if he reveals details regarding as yet uncharged offenses. This puts the probationer in an obvious Catch-22—the classic penalty situation prohibited by the Fifth Amendment.⁷⁷

Primarily, sex offender rehabilitation programs help to ensure public safety by providing offenders with tools that will enable them to control their impulses.⁷⁸ But treatment professionals have indicated that the threat of future prosecution secondarily helps to underscore the gravity of sex offenses and why society disdains them, which many offenders have difficulty understanding.⁷⁹ Therefore, the government has both a rehabilitative and a retributive purpose in reserving the right to prosecute particularly heinous offenses. In doing so, it removes egregious offenders from society who would otherwise be a threat and fosters treatment by maintaining the threat of retribution.⁸⁰ But, as long as the possibility of prosecution derived from testimony elicited during sex offender treatment has not been completely foreclosed, the Ninth Circuit's decision in *Antelope* subjects court-ordered treatment programs to constitutional challenge and risks undermining their purpose and effect. In the sex offender treatment context, prohibiting prosecutorial purpose thwarts not only prosecution, but rehabilitation as well.⁸¹

⁷⁵ *McKune*, 536 U.S. at 55 (Stevens, J., dissenting).

⁷⁶ *Antelope*, 395 F.3d at 1135. Offenders convicted pursuant to state law may be partially protected from prosecution by the running of statutes of limitations regarding uncharged offenses. However, the Adam Walsh Act provides that an indictment or information for federal sex offense charges may be filed “at any time without limitation” for prosecution of felony sex offenses. Adam Walsh Act, Pub. L. No. 109-248, § 211, 120 Stat. 587, 611 (2006).

⁷⁷ *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984).

⁷⁸ Becker, *supra* note 56, at 116 (“Successful treatment is most frequently defined as a lack of recidivism”). Thus, treatment focuses on impulse management, rather than a “cure.” *See also id.* at 188 (regarding the widespread use of cognitive behavioral therapy, which focuses on behavioral management).

⁷⁹ *McKune*, 536 U.S. at 34–35 (Kennedy, J., plurality opinion). Sex offenders often deny that the crime occurred, that their conduct constituted a crime, or that it has any negative impact on their victims. They sometimes rationalize their conduct by reasoning that the victim invited the attention, needed the attention, or that it was “educational.” JOHN E.B. MEYERS, 1 MEYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES § 6.33 (3d ed. 2005).

⁸⁰ *McKune*, 536 U.S. at 30 (Kennedy, J., plurality opinion) (noting that “Kansas leaves open the possibility that new evidence [derived from information shared during treatment] might be used against sex offenders in future criminal proceedings.”) Like Montana, where *Antelope* was convicted, Kansas legally requires counselors to report uncharged sex offenses involving minors. *Id.*

⁸¹ *Id.* at 35.

Various factors ameliorate this tension and limit the scope of the problem. For example, a conflict exists only in cases where the government uses a probationer's compelled statements against him for prosecutorial purposes.⁸² Therefore, when the government's purpose is strictly rehabilitative and there exists no risk of prosecution pursuant to the compelled testimony, the probationer must comply with the treatment terms or risk probation revocation, just as he would for any other probation violation.⁸³ Additionally, some treatment programs only require admission to the crime of conviction, rather than to all as yet uncharged offenses. In instances where an offender pleads guilty to the crime of conviction, double jeopardy prevents testimony compelled under these circumstances from becoming constitutionally problematic.⁸⁴ Voluntary treatment programs also fail to implicate the Fifth Amendment because they lack the element of compulsion.

However, a sentencing court risks violating a sex offender probationer's constitutional rights if it revokes the probationer's conditional release and subjects him to a longer sentence when he refuses to incriminate himself during court-ordered treatment.⁸⁵ Ordinarily, failure to comply with one's probation terms may legitimately result in probation revocation and incarceration.⁸⁶ However, in the context of sex offender treatment, failure to comply with one's probation terms followed by probation revocation and incarceration raises Fifth Amendment issues. Thus a constitutional problem arises in the conflict between the government's interest in treating sex offenders, the government's interest in prosecuting sex offenders, and the offender's right to remain silent during the course of government mandated treatment.

⁸² *Murphy*, 465 U.S. at 436 n.7 (holding that a state can require a probationer to answer incriminating questions "and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination."); *United States v. Dotson*, 324 F.3d 256, 261 (4th Cir. 2003) (holding a polygraph requirement for a sex offender permissible because the polygraph was for treatment purposes rather than for prosecution).

⁸³ *Murphy*, 465 U.S. at 435.

⁸⁴ *McKune*, 536 U.S. at 55 (Stevens, J., dissenting); *United States v. Antelope*, 395 F.3d 1128, 1134 (9th Cir. 2005) (citing *Neal v. Shimoda*, 131 F.3d 818, 833 (9th Cir. 1997) (holding that double jeopardy foreclosed the government from prosecuting prisoners who had to admit guilt during the course of a mandatory treatment program)). While prisoners' Fifth Amendment rights are not the topic of this paper, it's worth noting that prisoners who are subject to treatment requirements during incarceration also balk at the notion of taking responsibility for even the crime of conviction because they worry that doing so will jeopardize their appeals. See *Rice v. Mich. Parole Bd.*, No. 1:05-CV-549, 2005 WL 2297463, at *4 (W.D. Mich. Sept. 21, 2005); *Ainsworth v. Risley*, 244 F.3d 209 (1st Cir. 2001), *vacated*, 536 U.S. 953 (2002).

⁸⁵ See *Antelope*, 395 F.3d at 1138.

⁸⁶ For further discussion on conditional release, see *infra* Part III.

III. THE INTERSECTION BETWEEN THE FIFTH AMENDMENT AND CONDITIONAL RELEASE

Before delving further into the problem at hand, it is worthwhile to consider some of the established jurisprudence regarding the intersection between conditional release and constitutional rights. Parole,⁸⁷ probation,⁸⁸ and supervised release⁸⁹ are all forms of conditional release. While they differ in some respects, they are identical in that they all may be revoked if the offender violates the conditions of release. Except for a few select instances, probation revocation is not necessarily automatic.⁹⁰ Rather, a court will likely consider the probationer's case history, behavior, and risk to society before revoking any form of conditional release.⁹¹

The Supreme Court has yet to define the full scope of conditional releasees' constitutional rights. The Court has noted, however, that they are not entitled to the absolute liberty afforded ordinary citizens.⁹² As the rationale goes, persons subject to conditional release have already demonstrated by their criminal conduct "a capacity and willingness to commit crimes serious enough to deprive them of liberty."⁹³ Therefore, they are not entitled to a presumption

⁸⁷ Parole shortens a term of imprisonment. *United States v. Kincade*, 379 F.3d 813, 817 n.2 (9th Cir. 2004). Parole has technically been abolished in the federal system and replaced by "supervised release," but Congress has repeatedly extended the federal parole system. *Id.* Depending on the wording of the state statute, a prisoner may be eligible for or entitled to parole if certain criteria are met. Typically, parole will be revoked only if a parolee violates his parole conditions. However, like probation and supervised release, parole revocation requires a hearing before the sentencing court. *See* 18 U.S.C. § 3565(a) (2000); FED. R. CRIM. P. 32.1.

⁸⁸ Probation is a sentence in and of itself, in lieu of incarceration, rather than a suspension of a sentence. *See United States v. Bahe*, 201 F.3d 1124, 1130 (9th Cir. 2000) (probation is sentence alternative to incarceration). It is available in both the federal and state systems for specified lesser crimes. Like parolees, probationers are subject to conditions of release, and probation may be revoked. 18 U.S.C. §§ 3563, 3565 (2000).

⁸⁹ Supervised release follows a term of imprisonment for certain felony and misdemeanor offenses. 18 U.S.C. § 3583(a) (2000) (inclusion of a term of supervised release following imprisonment). Courts have discretion to impose supervised release following incarceration for lesser offenses. It also is available in the federal and some state systems.

⁹⁰ The now discretionary United States Sentencing Guidelines suggest that revocation should be mandatory for possession of controlled substances, firearms, and failed drug tests. 18 U.S.C. § 3565(b). *See also United States v. Booker*, 543 U.S. 220, 265–66 (2005) (rendering the Sentencing Guidelines advisory).

⁹¹ *See* 18 U.S.C. § 3553(a) (2000).

⁹² *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (noting that conditional releasees are subject to "conditional liberty properly dependent on observance of special [probation] restrictions" (citing *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972))).

⁹³ *United States v. Crawford*, 372 F.3d 1048, 1071 (9th Cir. 2004) (Trott, J., concurring). *See also Griffin*, 483 U.S. at 873–74 ("A State's operation of a probation system . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.") Further, the Court has also held that "[t]hese restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large." *Id.* at 875.

of innocence because they have not yet finished serving their sentences.⁹⁴ Thus, constitutional limitations placed on individuals subject to conditional release are typically predicated on a status-based analysis. Two notable limitations include those placed on probationers' Second and Fourth Amendment rights. For example, as conditions of probation, probationers are forbidden to possess firearms⁹⁵ and are subject to search and seizure based on circumstances constituting less than probable cause.⁹⁶

It bears repeating, however, that the Court has held that probationers' constitutional rights are limited, rather than nonexistent.⁹⁷ Some members of the Court have opined that restrictions on liberty associated with a valid conviction are "essential to the Fifth Amendment analysis."⁹⁸ As with the Second and Fourth Amendment, this reflects a traditional status-based analysis. Under a broader reading of the Fifth Amendment, probation status would not foreclose the possibility of full Fifth Amendment protection.

Vastly simplified, the Fifth Amendment consists of a single idea: opposition to methods by which a witness can be forced to incriminate himself.⁹⁹ The Fifth Amendment provides that "[n]o person . . . shall be

⁹⁴ *Crawford*, 372 F.3d at 1071 (further noting that releasees' "collective behavior while on [conditional release] demonstrates the truth of the axiom that past behavior is the best predictor of future behavior.").

⁹⁵ 18 U.S.C. § 3563(b) (2000) (setting forth mandatory and discretionary conditions of probation); 18 U.S.C. § 3565(b) (suggesting that probation revocation is mandatory if a probationer possesses a firearm).

⁹⁶ See Adam Walsh Act, Pub. L. No. 109-248, § 210, 120 Stat. 587, 615-16 (2006) (requiring sex offenders to submit to search based on reasonable suspicion as condition of release). See also OR. REV. STAT. § 137.540(1) (2005), which sets forth the general conditions governing probation, and which are applicable to all state probationers unless explicitly excluded by the court. Specifically, section 137.540(1)(i) requires the probationer to "consent to the search of [his] person, vehicle, or premises upon the request of a representative of the supervising officer if the supervising officer has *reasonable grounds* to believe that evidence of a violation will be found . . ." (emphasis added). Although these conditions circumscribe a probationer's constitutional rights, they also reflect a minimum standard by which the terms must be effected: "reasonable grounds." Compare CAL. CODE REGS. tit. 15, § 2511(a) (2005), which currently offers probationers no Fourth Amendment protection.

⁹⁷ In the context of Fourth Amendment search and seizure rights, the Court has noted that although "the State properly subjects [parolees] to many restrictions not applicable to other citizens, [their] condition is very different from that of confinement in a prison." *Morrissey*, 408 U.S. at 482. Furthermore, the Ninth Circuit, which decided *United States v. Antelope*, also adheres to the view that probationers and parolees are entitled to rights above and beyond those afforded to prisoners. See *Latta v. Fitzharris*, 521 F.2d 246, 248-49 (9th Cir. 1975); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992). This reflects a "right" approach to the contested liberty interest, as opposed to a "privilege" approach, which would more closely circumscribe probationers' liberty interests. See *Morrissey*, 408 U.S. at 482.

⁹⁸ Compare *McKune v. Lile*, 536 U.S. 24, 36 (2002) (Kennedy, J., plurality opinion) (finding that restrictions on liberty associated with a valid conviction are "essential to the Fifth Amendment analysis").

⁹⁹ See *McKune*, 536 U.S. at 56-57 (Stevens, J., dissenting); Solkoff, *supra* note 68, at 1444-47.

compelled in any criminal case to be a witness against himself;¹⁰⁰ it applies to the states by virtue of the Fourteenth Amendment.¹⁰¹ Practically speaking, the Fifth Amendment prevents the government from compelling an individual to make incriminating statements and then using them against him in a subsequent criminal proceeding.

To establish a Fifth Amendment claim, a criminal defendant must prove that (1) the desired testimony carried a legitimate threat of incrimination, and (2) the penalty suffered for failure to make the incriminating statement amounted to impermissible compulsion.¹⁰² “The touchstone of the Fifth Amendment is compulsion.”¹⁰³ Impermissible compulsion occurs when the government imposes “substantial penalties” imposed as a result of a witness’ exercise of his Fifth Amendment right to remain silent.¹⁰⁴ Not every penalty may be characterized as “substantial.” For example, losing one’s professional license, job, or right to hold public office are considered substantial penalties,¹⁰⁵ but being transferred from a medium to a maximum-security prison unit is not.¹⁰⁶

While the core protection of the Fifth Amendment is arguably only a trial right,¹⁰⁷ it also offers protection in various contexts. A defendant who successfully invokes the protection of the Fifth Amendment may not only refuse to answer questions at trial, but also may refrain from answering questions at “any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future proceedings.”¹⁰⁸ Moreover, it offers protection from the threat of future prosecution derived from both direct evidence and evidence that constitutes “a link in the chain” of evidence that may lead to prosecution.¹⁰⁹ Self-incrimination need not occur before an

¹⁰⁰ U.S. CONST. amend. V.

¹⁰¹ *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

¹⁰² *Antelope*, 395 F.3d at 1134 (citing *Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984) and *Lile v. McKune*, 224 F.3d 1175, 1179 (10th Cir. 2000) (“The privilege has two components: incrimination and compulsion.”), *rev’d*, 536 U.S. 24 (2002) (holding the state-imposed repercussions in *Lile* insufficiently coercive to amount to compulsion)).

¹⁰³ *Antelope*, 395 F.3d at 1134 (citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977)).

¹⁰⁴ *Cunningham*, 431 U.S. at 805.

¹⁰⁵ *Antelope*, 395 F.3d at 1136.

¹⁰⁶ *McKune v. Lile*, 536 U.S. 24, 52 (2002) (O’Connor, J., concurring).

¹⁰⁷ *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (Thomas, J., plurality opinion) (“The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial” (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990))).

¹⁰⁸ *Minnesota v. Murphy*, 465 U.S. 420, 426 (citing *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)).

¹⁰⁹ *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (“The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.”)

individual has the right to invoke the Fifth Amendment privilege. In the event a question poses an apparent risk, an individual may properly refuse to answer.¹¹⁰

There are limits, however, on the scope of Fifth Amendment protection. The privilege is not self-executing.¹¹¹ An individual seeking its protection must actively invoke the privilege when faced with an incriminating question.¹¹² The government is not completely foreclosed from compelling testimony from a witness or defendant.¹¹³ The Fifth Amendment may not be invoked as a shield against answering any and all questions—it only protects one from questions that pose a “real and appreciable danger of self-incrimination.”¹¹⁴ Furthermore, silence may only be invoked in the face of a “particular and apparent” threat of future prosecution.¹¹⁵ Thus, a defendant may not invoke the Fifth regarding a crime for which the statute of limitations has run or for which he has already been convicted.¹¹⁶

A valid conviction, however, does not foreclose an individual from invoking Fifth Amendment protection.¹¹⁷ Probationers and prisoners may also invoke the Fifth Amendment.¹¹⁸ In *Minnesota v. Murphy*, Marshall Murphy, a sex offender probationer participating in a court-ordered treatment program, admitted to a rape and murder that occurred before the crime to which Murphy pleaded guilty.¹¹⁹ Rather than approaching the police, Murphy’s counselor reported this to Murphy’s probation officer.¹²⁰ In a later meeting with Murphy, the probation officer confronted Murphy about the murder and he again admitted responsibility for it.¹²¹ The statements he made to his probation officer were then used against him in the subsequent rape and murder prosecution.¹²²

¹¹⁰ *Antelope*, 395 F.3d at 1134 (citing *McCoy v. Comm’r*, 696 F.2d 1234, 1236 (9th Cir. 1983)).

¹¹¹ *Murphy*, 465 U.S. at 428.

¹¹² *Id.*

¹¹³ *Id.* at 435 n.7.

¹¹⁴ *Antelope*, 395 F.3d at 1134 (citing *McCoy*, 696 F.2d at 1236); see *Estelle v. Smith*, 451 U.S. 454, 462 (1981) (holding that Fifth Amendment may be invoked during a competency examination because statements might further incriminate the defendant for sentencing purposes).

¹¹⁵ *Antelope*, 395 F.3d at 1134 (citing *Brown v. Walker*, 161 U.S. 591, 598 (1896)); see also *Marchetti v. United States*, 390 U.S. 39, 53 (1968) (holding the risk of criminal prosecution must “not merely [be] trifling or imaginary hazards.”).

¹¹⁶ *Antelope*, 395 F.3d at 1134 (citing *Brown*, 161 U.S. at 598, and *Neal v. Shimoda*, 131 F.3d 818, 833 (9th Cir. 1997)). Section 211 of the Adam Walsh Act will have grave ramifications for the treatment of federal sex offenders who combine kidnapping and sex offenses. It removes the statute of limitations for any offense under 18 U.S.C. § 1201 (2000). Adam Walsh Act, Pub. L. No. 109-248, § 211, 120 Stat. 587, 616 (2006).

¹¹⁷ *Murphy*, 465 U.S. at 426; *McKune v. Lile*, 536 U.S. 24, 48–54 (2002) (O’Connor, J., concurring).

¹¹⁸ *Murphy*, 465 U.S. at 426; *Estelle*, 451 U.S. at 462–63.

¹¹⁹ *Murphy*, 465 U.S. at 423.

¹²⁰ *Id.*

¹²¹ *Id.* at 423–24.

¹²² *Id.* at 424–25.

The Court did not address the constitutionality of the fact that Murphy's probation officer obtained the incriminating information from Murphy's treatment counselor.¹²³ Instead, it reached its decision by finding that a routine meeting with a probation officer does not constitute a custodial situation and, therefore, the officer is not required to issue Miranda warnings before questioning the probationer about his conduct.¹²⁴ Thus, it is incumbent on the probationer to invoke the Fifth Amendment independently when his answers could incriminate him in a future prosecution.¹²⁵ The Court ultimately held that Murphy's statements to his probation officer were admissible in the subsequent criminal trial because Murphy failed to invoke the Fifth Amendment.¹²⁶

The Court explained that when a probationer is asked questions related to his probationary status, and the answers to those questions "would incriminate him in a pending or later prosecution," he may properly invoke his right to remain silent.¹²⁷ In comparison, when a probationer is asked questions related to his probation status he may not invoke the privilege simply because his answers may result in probation revocation.¹²⁸ Hence, "a State may validly insist on answers to even incriminating questions [and thereby] sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination."¹²⁹ One would think these distinctions would have settled the matter, but the Court's subsequent decision in *McKune v. Lile* suggests otherwise.

IV. MCKUNE V. LILE—A FRACTURED DECISION

A. *McKune v. Lile: Impermissible Compulsion in the Prison Context*

Antelope's long procedural journey reflects not only the obvious confusion and disagreement about probationers' Fifth Amendment rights when they are subject to court-ordered treatment requirements, but also illustrates the lack of a clearly articulated standard or remedy for addressing the problem. Although the Ninth Circuit's decision in *Antelope* may have temporarily resolved the status of probationers' Fifth Amendment rights in the Ninth Circuit, the jurisprudence on which that decision was based is anything but certain. This part will explore

¹²³ *Id.* at 423 n.1 (assuming without deciding that "the counselor could not have provided the information to the police," nor could the probation officer have made the counselor's information available for use in a criminal prosecution).

¹²⁴ *Id.* at 430.

¹²⁵ *Id.* at 431 (finding that Murphy failed to claim the privilege in a "timely manner").

¹²⁶ *Id.* at 429.

¹²⁷ *Id.* at 435.

¹²⁸ *Id.* A probation revocation hearing is not a criminal proceeding. *Id.* So, when a probationer violates his probation conditions, and he receives a hearing to determine whether revocation is appropriate, he may not refuse to answer questions solely because his answers may lead to probation revocation. *Id.*

¹²⁹ *Id.*

McKune v. Lile, which constituted the legal basis for the Ninth Circuit's decision in *United States v. Antelope*.¹³⁰ In *McKune*, decided in 2002, the plurality, concurrence, and dissent were unable to agree on a satisfactory analysis for determining compulsion for the purposes of the Fifth Amendment rights of prisoners. Given recent changes in the Supreme Court's membership, it is reasonable to once again consider the competing analyses offered in *McKune*, as they again may be considered if the Court accepts a compulsory treatment case involving a probationer.

In *McKune v. Lile*, a prisoner named Robert Lile, who was in the custody of the Kansas Department of Corrections, and who had been incarcerated for raping a woman at gunpoint, was ordered to participate in a treatment program similar to the one at issue in *Antelope*.¹³¹ A few years before his release, Department of Corrections officials decided that Lile should participate in a Sexual Abuse Treatment Program ("SATP") in order to minimize the likelihood that he would rape again upon release.¹³² The SATP required participants to complete an "Admission of Responsibility" form, to provide a full sexual history, and to undergo a supporting polygraph test.¹³³ The "Admission of Responsibility" form constituted the crux of the conflict in *McKune*.

At trial, Lile testified that his intercourse with the victim was consensual.¹³⁴ Thus, if he acknowledged responsibility for the rape on the "Admission of Guilt" form, he would be vulnerable to a perjury charge.¹³⁵ However, admission of responsibility for the crime of conviction, as well as for other past sex offenses, is considered a vital step in sex offender treatment.¹³⁶

¹³⁰ *United States v. Antelope*, 395 F.3d 1128, 1136–38 (9th Cir. 2005). The Ninth Circuit explained the "concurrence controls" principle as follows: "Abiding by the rule that when 'no single rationale explaining the results enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]'" *Id.* at 1133 n.1 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). The Ninth Circuit further cited two other circuits in which O'Connor's concurrence was viewed as the Court's holding in *McKune*. *Id.*; see *Ainsworth v. Stanley*, 317 F.3d 1, 4 (1st Cir. 2002); *Searcy v. Simmons*, 299 F.3d 1220, 1225 (10th Cir. 2002).

¹³¹ *McKune v. Lile*, 536 U.S. 24, 29–30 (2002) (Kennedy, J., plurality opinion).

¹³² *Id.* at 30.

¹³³ *Id.*

¹³⁴ *Id.* at 31.

¹³⁵ *Id.* Although this would potentially subject him to a perjury charge, double jeopardy would foreclose the possibility that admission to his crime of conviction would result in further incarceration. There is no indication of it in the case, but I imagine he feared prosecution for other uncharged offenses that could be revealed in the course of treatment.

¹³⁶ *Id.* at 33–34. Not only are offenders who deny responsibility for their crimes less likely to succeed in treatment, but treatment professionals have found that "for SATP participants to accept full responsibility for their past actions, they must accept the proposition that those actions carry consequences . . . the potential for additional punishment reinforces the gravity of the participants' offenses and thereby aids in their rehabilitation. If inmates know society will not punish them for their past offenses, they may be left with the false impression that society does not consider those crimes to be serious ones. The practical effect of guaranteed immunity . . . would be to absolve many sex offenders of any and all cost

Therefore, he was faced with the choice of subjecting himself to a perjury charge or refusing to participate in treatment. A perjury conviction could result in more jail time. Failure to participate in treatment would certainly result in losing many of his prison privileges and a transfer to a maximum-security unit.¹³⁷

Similar to participants in the treatment program in *Antelope*, Kansas SATP participants were offered minimal confidentiality regarding information disclosed during treatment, and they also were not offered immunity from prosecution.¹³⁸ Like Montana, Kansas left open the possibility that it could prosecute sex offenders for crimes disclosed in the course of treatment.¹³⁹ And like Montana, Kansas has a law *requiring* counselors to report uncharged sex offenses involving minors.¹⁴⁰ However, unlike Montana, no evidence existed to indicate Kansas had ever prosecuted a sex offender for crimes disclosed during treatment.¹⁴¹

Lile refused to participate in treatment on grounds that it would violate his Fifth Amendment right against self-incrimination.¹⁴² In response, Kansas Department of Corrections officials told him that if he refused to participate in the SATP, his privilege status would be reduced.¹⁴³ This reduction would result in limited visitation rights and access to the canteen, revocation of a right to a personal television, curtailed work and earnings opportunities, and transfer from a two to a four-bed cell; it also would involve a transfer from the medium-security unit where the SATP was offered, to a maximum-security unit, which was more dangerous.¹⁴⁴

Lile brought suit against the warden under 42 U.S.C. § 1983, seeking an injunction to prevent the prison from withdrawing his privileges and moving him to the maximum security unit.¹⁴⁵ The District Court for the District of Kansas found that these penalties constituted impermissible compulsion under the Fifth Amendment.¹⁴⁶ The Tenth Circuit affirmed, but acknowledged Kansas' interest in treating sex offenders, and suggested that "those interests could be served without violating the Constitution, either by treating the

for their earlier crimes. This is the precise opposite of the rehabilitative objective." *Id.* at 34–35.

¹³⁷ *Id.* at 30–31.

¹³⁸ *Id.* at 34.

¹³⁹ *Id.* at 35. The Court also noted that neither the Federal Bureau of Prisons nor several other states offer immunity to participants in sex offender treatment programs. *Id.*

¹⁴⁰ *Id.* at 30.

¹⁴¹ *Id.*

¹⁴² *Id.* at 31.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 31.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 32 (citing *McKune v. Lile*, 24 F. Supp. 2d 1152, 1157 (1998), *aff'd*, 224 F.2d 1175 (10th Cir. 2000), *rev'd*, 536 U.S. 24 (2002)).

admissions of inmates as privileged communications or by granting inmates use immunity.”¹⁴⁷

The Supreme Court granted certiorari because the Tenth Circuit held that “an important Kansas prison regulation violate[d] the Federal Constitution.”¹⁴⁸ However, the Court’s decision did little to settle questions about the scope of probationers’ Fifth Amendment rights. Although it ultimately held Kansas’ regulation did not violate the Fifth Amendment, *McKune* was a 4–1–4 decision with Justice O’Connor concurring.

After a detailed description of the Kansas SATP and its rehabilitative goals, the plurality held that the SATP did not impermissibly “compel prisoners to incriminate themselves in violation of the Constitution.”¹⁴⁹ It reasoned that a transfer from a medium to a maximum-security prison unit, and the associated loss of privileges, did not constitute a substantial penalty for the purposes of the Fifth Amendment.¹⁵⁰ It also found that Lile’s status as a prisoner was a deciding factor in determining whether the state had engaged in impermissible compulsion.¹⁵¹ Distinguishing between ordinary citizens and prisoners, it concluded that a prisoner’s liberty is necessarily diminished as a result of incarceration; thus, prisoners are not entitled to full Fifth Amendment protection.¹⁵² Because of this distinction, the plurality rejected Lile’s argument that the “so-called penalty cases” applied to his situation.¹⁵³

Instead, the plurality applied the “atypical and significant hardship” test elucidated in *Sandin v. Conner* for the purposes of determining whether a due process violation existed. It found that the SATP did not violate Lile’s Fifth Amendment privilege because the program bore a “rational relation to a legitimate penological objective,” and “consequences an inmate faces for not

¹⁴⁷ *Id.* at 32 (quoting *McKune v. Lile*, 224 F.3d 1175, 1192 (10th Cir. 2000), *rev’d*, 536 U.S. 24 (2002)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 35.

¹⁵⁰ *Id.* at 37–38.

¹⁵¹ *Id.* at 36 (“The privilege against self-incrimination does not terminate at the jailhouse door, but the fact of a valid conviction and the ensuing restrictions on liberty are essential to the Fifth Amendment analysis.” (relying on *Sandin v. Conner*, 515 U.S. 472, 485 (1995) (“[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”))).

¹⁵² *Id.* at 38 (“[T]his Court has recognized that lawful conviction and incarceration necessarily place limitations on the exercise of a defendant’s privilege against self-incrimination.” (relying on *Baxter v. Palmigiano*, 425 U.S. 308, 319–20 (1976), which declined to extend the rule of *Griffin v. California*, 380 U.S. 609 (1965) that the prosecution may not comment on a defendant’s silence at trial, to prison disciplinary hearings)).

¹⁵³ *Id.* at 40 (scoffing that “respondent treats the fact of his incarceration as if it were irrelevant” and rejecting Lile’s argument that *Garrity v. New Jersey*, 385 U.S. 493 (1967) and *Spevak v. Klein*, 385 U.S. 511 (1967), which involved “free citizens given the choice between invoking the Fifth Amendment privilege and sustaining their economic livelihood,” applied in the prison context). Other “penalty cases” include *Uniformed Sanitation Men Ass’n, Inc. v. Comm’r of Sanitation*, 392 U.S. 280 (1968); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).

participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life.”¹⁵⁴

In her concurrence, Justice O’Connor declined to analyze the case on those grounds.¹⁵⁵ Instead, she agreed with Justice Stevens¹⁵⁶ that the Fifth Amendment standard for evaluating compulsion is broader than the “atypical and significant hardship” standard applied for the purposes of due process claims.¹⁵⁷ And, unlike the plurality, she did not deny the applicability of the “penalty cases” to cases arising in a prison setting.¹⁵⁸ Rather, under the full-blown Fifth Amendment analysis applied in the penalty cases, she concluded that transfer from a medium to a maximum-security prison unit, and loss of privileges associated with re-assignment, did not constitute impermissible compulsion when compared to the loss of one’s livelihood.¹⁵⁹ In comparison, she noted that “longer incarceration and execution . . . [imposed] as a penalty for refusing to incriminate oneself would surely implicate a ‘liberty interest.’”¹⁶⁰

Additionally, she expressed concern with the plurality’s failure to set forth a comprehensive Fifth Amendment analysis.¹⁶¹ Although she acknowledged that it too was an incomplete explanation of the scope of the Fifth Amendment privilege, she proposed the following theory:

[I]t is generally acceptable to impose the risk of punishment, however great, so long as the actual imposition of such punishment is accomplished through a fair criminal process . . . *Forcing defendants to accept such consequences seems to me very different from imposing penalties for the refusal to incriminate oneself that go beyond the criminal process and appear, starkly, as government attempts to compel testimony*; in the latter context, any penalty that is capable of compelling a person to be a witness against himself is illegitimate.¹⁶²

Thus, according to Justice O’Connor’s concurrence, the compulsion question should turn on the purpose for which the penalty was imposed, rather than the legal status of the person from whom the government seeks testimony.¹⁶³ If the purpose of imposing the penalty is to compel testimony that will animate future prosecution, it is constitutionally unacceptable.¹⁶⁴ Whereas,

¹⁵⁴ *McKune*, 536 U.S. at 37–38 (Kennedy, J., plurality opinion).

¹⁵⁵ *Id.* at 48 (O’Connor, J., concurring).

¹⁵⁶ *Id.* at 54 (Stevens, J., dissenting).

¹⁵⁷ *Id.* at 48 (O’Connor, J., concurring). Although she rejected the “atypical and significant hardship standard,” it could still be argued that her final decision rested on the petitioner’s prisoner status.

¹⁵⁸ *Id.* at 49–50.

¹⁵⁹ *Id.* Justice O’Connor noted that while the limitations placed on Lile “may make his prison experience more unpleasant . . . [they are] very unlikely to actually compel him to incriminate himself.” *Id.* at 51.

¹⁶⁰ *Id.* at 52.

¹⁶¹ *Id.* at 53.

¹⁶² *Id.* (emphasis added).

¹⁶³ *United States v. Antelope*, 395 F.3d 1128, 1137 (9th Cir. 2005).

¹⁶⁴ *Id.*

if the purpose of imposing the penalty is merely to protect the public by rehabilitating sex offenders, presumably that will not amount to impermissible compulsion.

In dissent, Justice Stevens asserted that no Supreme Court opinion supported the notion that prisoners are subject to a different standard for compulsion for the purposes of the Fifth Amendment.¹⁶⁵ Like Justice O'Connor, he would have applied the full-blown Fifth Amendment analysis as set forth in the "penalty cases," but he disagreed with the proposition that "nothing short of losing one's livelihood is sufficient to constitute compulsion."¹⁶⁶ Rather, Justice Stevens argued that revocation of privileges and transfer from a medium to a maximum-security prison unit for failure to incriminate oneself constituted impermissible compulsion under the Fifth Amendment.¹⁶⁷ Additionally, he found the automatic nature of the penalty for failure to participate in the SATP was inherently coercive.¹⁶⁸ Inasmuch as Justice Stevens would have found that the full-blown Fifth Amendment Analysis applied even in the prison context, and that threatened loss of livelihood was not the minimal threshold for compulsion, his interpretation constituted the broadest reading of the Fifth Amendment in *McKune*.

B. *Three Ways to Determine Impermissible Compulsion*

In *McKune*'s wake, at least three alternative approaches exist for analyzing the Fifth Amendment's compulsion prong. Depending on whether one subscribes to *McKune*'s plurality, concurrence, or dissent, impermissible compulsion regarding prisoners may turn on status (prisoner or law-abiding citizen), the purpose for which the government seeks the compelled testimony, or the nature of the penalty as exemplified in the "penalty cases." Because probationers, like prisoners, also enjoy only a limited liberty interest, it makes sense to extend *McKune* to a conditional release context. While the traditional two-step analysis for Fifth Amendment violations is sound, the "impermissible compulsion" prong remains to be satisfactorily clarified. This part will explore each option and weigh their relative merits.

1. *Status as a Means for Determining Fifth Amendment Compulsion*

The *McKune* plurality opined that the threshold for impermissible compulsion is predicated on the status of the testifying party. Under this approach, there are two Fifth Amendment standards for impermissible compulsion. Ordinary citizens enjoy the application of the compulsion standard set forth in the "penalty cases," while prisoners are subject to the "atypical and significant hardship" standard. As a result, prisoners must endure more before government compulsion triggers the Fifth Amendment. On its face, status

¹⁶⁵ *McKune*, 536 U.S. at 58–59 (Stevens, J., dissenting). "Not a word in our discussion of the privilege in *Ohio Adult Parole Auth. v. Woodward* . . . requires a heightened showing of compulsion in the prison context to establish a Fifth Amendment violation." *Id.* at 59.

¹⁶⁶ *Id.* at 58.

¹⁶⁷ *Id.* at 56.

¹⁶⁸ *Id.* at 60.

provides a bright line rule, but it does so only to the extent that law-abiding citizens are distinguishable from prisoners. Either standard is subjective, as a “penalty” or an “atypical hardship” is arguably in the eye of the beholder. After the initial categorization, the inquiry shifts and the following question remains: what is the appropriate test for evaluating compulsion for *probationers* subject to compulsory treatment programs?¹⁶⁹

Some precedent exists for predicating probationers’ Fifth Amendment rights on status. For example, Fourth Amendment search and seizure law potentially offers a status-based paradigm for defining probationers’ Fifth Amendment rights. Probationers are entitled to the “protection of the Fourth Amendment,”¹⁷⁰ but they may also be subject to various court-imposed restrictions on their liberty as a condition of probation.¹⁷¹ In *United States v. Knights*, the Supreme Court held that the government needs “no more than reasonable suspicion” to search a probationer’s home.¹⁷² Noting that “[i]nherent in the very nature of probation is that probationers ‘do not enjoy the absolute liberty to which every citizen is entitled,’” the Court found that Knights’s status as a probationer necessarily informed its analysis of Knights’s Fourth Amendment right.¹⁷³

Congress recently enacted the Adam Walsh Child Protection and Safety Act of 2006. Likely tracking *Knights*, section 210 of the Act dictates that as a condition of probation or supervised release, a sex offender must submit to searches of his person and property “at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion” concerning a release violation or unlawful conduct by the offender.¹⁷⁴ Thus, while sex offenders subject to community supervision are not afforded complete Fourth Amendment protection, the scope of their existing protection is at least more clearly delineated. Given this existing paradigm, it seems reasonable to extend this approach to the Fifth Amendment.

However, unlike the probable cause/reasonable suspicion distinction available under the Fourth Amendment, no clear benchmark exists for determining impermissible compulsion in a community supervision context. The “atypical and significant hardship” standard applied in *McKune* does not

¹⁶⁹ This is a difficult question, which might explain why the Supreme Court has declined to address it. *See Montana v. Imlay*, 506 U.S. 5, 5–6 (1992) (White, J., dissenting) (dismissing writ of certiorari as improvidently granted after previously granting cert “to consider whether the Fifth Amendment bars a State from conditioning probation upon the probationer’s successful completion of a therapy program in which he would be required to admit responsibility for his criminal acts”).

¹⁷⁰ *Moreno v. Baca*, 400 F.3d 1152, 1161 (9th Cir. 2005).

¹⁷¹ *United States v. Knights*, 534 U.S. 112, 119 (2001). In Oregon, for example, a probation officer may conduct a search based merely on reasonable suspicion, rather than full blown probable cause. *See supra* note 96 comparing OR. REV. STAT. § 137.540(1)(i) (2005), which requires “reasonable grounds” before executing a probation search and CAL. CODE REGS. tit. 15, § 2511(a) (2005), which currently offers probationers no Fourth Amendment protection at all.

¹⁷² *Knights*, 534 U.S. at 121.

¹⁷³ *Id.* at 119.

¹⁷⁴ Adam Walsh Act, Pub. L. No. 109-248, § 210, 120 Stat. 587, 615–16 (2006).

extend naturally to conditional releases because probation revocation would almost undoubtedly constitute an “atypical and significant hardship” for someone who has already been released to the community. Finally, the Court has already indicated that probation revocation for a probationer’s failure to incriminate himself would be constitutionally impermissible.¹⁷⁵

Because the Fifth Amendment lacks a starting point similar to the probable cause required in Fourth Amendment cases, it is difficult to delineate the boundaries of a more circumscribed right based on status. Absent clear boundaries, a status-based approach risks eviscerating the Fifth Amendment. Although some search and seizure laws are predicated on the diminished rights associated with a valid conviction,¹⁷⁶ status is an inappropriate guidepost in Fifth Amendment context.

2. *A Purpose Based Approach*

Alternatively, Justice O’Connor suggested that compulsion should be determined in light of the purpose for which the government seeks the compelled testimony. Justice O’Connor’s purpose test and the plain language of the Fifth Amendment are functionally equivalent. An individual’s compelled statements may not be used against him in a criminal case, or in other words, for prosecutorial purposes. Here, a real risk of prosecution and invocation of the privilege implicates the Fifth Amendment regardless of the individual’s status. Thus, compulsory sex offender treatment programs that use a sex offender’s statements strictly for rehabilitative purposes will survive Fifth Amendment scrutiny as long as no real risk of prosecution exists. Conversely, treatment schemes that foster government attempts to compel testimony for prosecutorial purposes would not pass constitutional muster.

A single standard for impermissible compulsion simplifies Fifth Amendment jurisprudence and preserves the integrity of the constitutional protection it affords. The purpose test is also consistent with existing Court precedent regarding probationers as set forth in *Minnesota v. Murphy*.¹⁷⁷ Because a purpose test renders constitutionally sound results and preserves the integrity of the core Fifth Amendment protection, it should be applied instead of a status-based approach.

¹⁷⁵ *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984) (“[I]f 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”).

¹⁷⁶ *Knights*, 534 U.S. at 119 (noting that a probationer may be subject to various court-imposed restrictions on his liberty as a condition of his probation). For example, state laws frequently limit the Second and Fourth Amendment rights of probationers. See OR. REV. STAT. § 137.540(1)(l) (forbidding probationers to possess weapons or firearms); OR. REV. STAT. § 137.540(1)(i) (requiring that probationers “consent to the search of person, vehicle, or premises upon the request of . . . the supervising officer if the supervising officer has reasonable grounds to believe that evidence of a violation will be found”); OR. REV. STAT. § 137.540(2) (permitting the court to impose additional special conditions of probation “that are reasonably related to the crime of conviction or the needs of the probationer for the protection of the public or reformation of the probationer, or both”).

¹⁷⁷ *Murphy*, 465 U.S. at 440.

3. *The “Penalty Case” Approach*

Finally, Justice Stevens articulated that he would apply the full-blown Fifth Amendment analysis, using the standard for compulsion set forth in the “penalty cases.” This analysis requires an exploration of the relevant circumstances on a case-by-case basis. As with the purpose test, the status of the invoking party is irrelevant. Circumstances comparable to the threatened harm under the “penalty cases” would constitute impermissible compulsion, regardless of whether the injured party is a probationer or prisoner. Although this approach protects the integrity of the Fifth Amendment, its case-by-case approach is arbitrary and risks eviscerating the Fifth Amendment’s protection. It too should be discarded in favor of a purpose test.

V. PROPHYLACTIC MEASURES FOR PREVENTING FIFTH AMENDMENT VIOLATIONS

Antelope reflects a fundamental disagreement, and even confusion, about how the criminal justice system should address actual and potential Fifth Amendment violations in a probation context when mandatory treatment conditions are at issue.

Preventative measures designed to prevent Fifth Amendment violations are appropriate only in limited circumstances. Every treatment program does not necessarily implicate probationers’ Fifth Amendment rights. For example, voluntary programs do not implicate the Fifth Amendment because by their nature they are not compulsive.¹⁷⁸ In addition, where evidence fails to indicate that any prisoner or probationer in that jurisdiction has ever been prosecuted for offenses disclosed during treatment, the Fifth Amendment may not be implicated because the threat of prosecution is not “particular and apparent.”¹⁷⁹ However, as long as a treatment program is a condition of release and there exists a real risk of prosecution, a prophylactic measure will likely be necessary to avoid running afoul of the Fifth Amendment.

Several alternatives exist to enable the criminal justice system to address the tension between effectuating compulsory treatment and protecting sex offender probationers’ Fifth Amendment rights. First, the Court could apply a status-based test for impermissible compulsion and thereby increase the threshold for impermissible compulsion as it applies to probationers.¹⁸⁰ This would obviate a Fifth Amendment claim because the public’s interest in

¹⁷⁸ See *McKune v. Lile*, 536 U.S. 24, 70 (2002) (Stevens, J., dissenting) (noting that the state could permissibly pursue its rehabilitative goals without compromising inmates’ Fifth Amendment rights by offering a voluntary program.) The Federal Bureau of Prisons offers a sex offender treatment program that is entirely voluntary. *Id.*

¹⁷⁹ *United States v. Antelope*, 395 F.3d 1128, 1134 (9th Cir. 2005) (citing *McCoy v. Comm’r*, 696 F.2d 1234, 1236 (9th Cir. 1983)); see *Estelle v. Smith*, 451 U.S. 454, 462 (1981) (holding that Fifth Amendment may be invoked during a competency examination because statements might further incriminate the defendant for sentencing purposes).

¹⁸⁰ As already explained, the status test should be rejected because limiting constitutional rights based on the balancing test inherent in the status approach can be applied to weigh too heavily in favor of the government.

treating and punishing sex offenders would necessarily win over probationers' inferior interests. Second, probationers may be offered immunity,¹⁸¹ which neutralizes the risk of incrimination inherent in compulsory treatment. Third, prosecutors and courts can refuse to offer immunity, and instead rely on the evidentiary protection provided by the counselor-patient privilege. Finally, the legislature may enact laws that clearly define the scope of a sex offender probationer's rights when he is ordered to undergo treatment.

Each of these remedies addresses the problem at a different juncture in the legal process. Legislative action and immunity provide protection in advance of prosecution, while the counselor-patient privilege and the Fifth Amendment operate at trial. Despite this range of alternatives, each carries the risk of complications that diminish its utility.

A. *Immunity—An Unrealistic and Impractical Means of Protecting the Fifth Amendment Privilege*

Under 18 U.S.C. §§ 6002–6003, the federal government may compel testimony from a witness who has invoked his privilege against compelled self-incrimination, but only if the government grants the witness immunity from the use of the compelled testimony.¹⁸² A witness may properly refuse to make incriminating statements absent an immunity agreement.¹⁸³ But, because the Supreme Court has characterized immunity as a preventative, rather than a constitutional remedy, immunity is not necessarily constitutionally required in all cases where the Fifth Amendment is implicated.

A constitutionally adequate grant of immunity must meet several requirements. First, it must be co-extensive with the Fifth Amendment privilege against self-incrimination. Or, in other words, it must protect the witness from future prosecution derived from the direct and indirect use of evidence obtained as a result of the compelled testimony.¹⁸⁴ Second, a grant of immunity must be inter-jurisdictional.¹⁸⁵ Thus, federal immunity must protect the witness from

¹⁸¹ *McKune*, 536 U.S. at 69–70 (Stevens, J., dissenting); Solkoff, *supra* note 68, at 1486–91.

¹⁸² See *Antelope*, 395 F.3d at 1141. 18 U.S.C. § 6002 (2000), which outlines what “[i]mmunity generally,” provides:

Whenever a witness refuses, on the basis of his privilege against self-incrimination to testify, . . . [and he is ordered to testify], the witness may not refuse to comply with the order on the basis of his privilege against self incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony . . .) may be used against the witness in any criminal case, except a prosecution for perjury, giving false statement, or otherwise failing to comply with the order.

All fifty states also have some form of immunity statute. *Kastigar v. United States*, 406 U.S. 441, 447 (1972).

¹⁸³ *Antelope*, 395 F.3d at 1140 (citing *Chavez v. Martinez*, 538 U.S. 760, 771 (2003) (Thomas, J., plurality opinion)).

¹⁸⁴ *Pillsbury Co. v. Conboy*, 459 U.S. 248, 256 (1983); *Kastigar*, 406 U.S. at 442.

¹⁸⁵ *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 77–78 (1964).

state prosecutions and vice versa.¹⁸⁶ Finally, it has been suggested that immunity may be constitutionally inadequate if it is “limited to certain time periods, offenses, or is otherwise conditional.”¹⁸⁷ Immunity is limited to the extent that it only protects a witness from the risk of future criminal prosecution for offenses that have already been committed at the time the privilege is invoked or immunity is granted.¹⁸⁸ However, once immunity has been granted, a prosecutor may be required to prove that an indictment following a grant of immunity is based on evidence derived from a source independent of the immunized testimony.¹⁸⁹

Ultimately, the Ninth Circuit held that Antelope properly refused to complete SABER’s sexual history questionnaire absent an immunity agreement and that the proper scope of the immunity should be co-extensive with the protection afforded by the Fifth Amendment.¹⁹⁰ Immunity would have obviated Antelope’s Fifth Amendment concerns, but following his first sentencing hearing, the government rejected his request for immunity.¹⁹¹

Several considerations militate against granting sex offenders immunity for rehabilitative purposes. Although use and derivative use immunity may foster successful sex offender treatment, they hinder law enforcement’s ability to investigate and prosecute sex crimes.¹⁹² Recent legislation reflects that the prosecution of sex crimes is a waxing rather than a waning concern.¹⁹³ An across-the-board grant of immunity for all sex offenders in treatment is an

¹⁸⁶ *Id.* It also appears that a grant of immunity in one state must carry over to other states. Robert Stauffer et al., *The Privilege Against Self-Incrimination*, in 1 TESTIMONIAL PRIVILEGES ch. 4, § 4:55 (David M. Greenwald et al. eds., 3d ed. 2005).

¹⁸⁷ Stauffer et al., *supra* note 186, § 4:55.

¹⁸⁸ *Katz v. United States*, 389 U.S. 347, 349 (1967).

¹⁸⁹ Stauffer et al., *supra* note 186, § 4:54. *See, e.g.*, *United States v. Zielezinski*, 740 F.2d 727 (9th Cir. 1984) (an evidentiary hearing may be necessary to determine whether an indictment rests upon immunized testimony).

¹⁹⁰ *United States v. Antelope*, 395 F.3d 1128, 1141 (9th Cir. 2005). *Kastigar* held that the immunity from the use and derivative use of compelled testimony provided for in 18 U.S.C. § 6002 is “coextensive with the scope of the privilege against self-incrimination.” *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

¹⁹¹ Opening Brief, *supra* note 6, at 12.

¹⁹² Solkoff, *supra* note 68, at 1487. Also, some providers assert that the risk of prosecution fosters treatment. *See supra* note 79; *McKune v. Lile*, 536 U.S. 24, 35 (2002) (Kennedy, J., plurality opinion). Kansas indicated that although no offender had ever been prosecuted as a result of information disclosed during mandatory treatment, it refrained from offering immunity and retained the right to prosecute “particularly dangerous sex offender[s].” *McKune*, 536 U.S. at 35. Further, the plurality noted that the federal government and other states also decline to offer immunity to participants in compulsory sex offender treatment programs. *Id.*

¹⁹³ Adam Walsh Act, Pub. L. No. 109-248, § 122, 120 Stat. 587, 597–98 (2006) (increasing penalty for failure to register as a sex offender from a misdemeanor to a felony offense); *id.* § 205 (increasing penalty for sexual abuse from imprisonment for not more than 20 years to “any term of years or for life”); *id.* § 214 (ordering the Committee on Rules, Practice, Procedure, and Evidence of the Judicial Conference of the United States to consider amending the Federal Rules of Evidence to provide that the spousal privilege will not apply in cases where a spouse is charged with a crime against a child of either spouse).

inappropriate measure because it is not consistent with current public policy and legislation that limits sex offenders' liberty interests and creates harsher penalties for sex offenses. Since some treatment providers assert the risk of prosecution is necessary to underscore the gravity of sex offenses to offenders, immunity would, on some level, suggest that society finds sex offense conduct acceptable.¹⁹⁴ Additionally, because immunity insulates an offender from prosecution regardless of the jurisdiction in which immunity is granted, an immunity agreement in one jurisdiction could foreclose prosecution in other jurisdictions. This result also is inconsistent with the intent and breadth of recent legislation.¹⁹⁵

Also, since any protection afforded by immunity must be co-extensive with the scope of the Fifth Amendment, the government may not offer some form of conditional immunity to sex offenders in treatment programs. For example, it would be impermissible to grant immunity for treatment purposes, but to exempt from immunity instances in which the patient's disclosures involve homicide, because that protection would not be co-extensive with the protection of the Fifth Amendment. Once an individual has invoked the privilege, or has been afforded immunity, his incriminating statements cannot be used against him—period—regardless of whether immunity is characterized as constitutional or prophylactic.

Immunity arguably does not jeopardize the states' or the government's interest in prosecuting sex offenders because it does not entirely foreclose prosecution.¹⁹⁶ Use and derivative use immunity only foreclose prosecution based on the compelled testimony and evidence derived from it.¹⁹⁷ Therefore, the option to prosecute remains open as long as the government derives its evidence from sources independent of the compelled testimony.¹⁹⁸ However, because an offender's admission of responsibility may be the only means of identifying that a crime has occurred, prosecutors may be less inclined to lose an opportunity to obtain what may be their only evidence. Arguably, current DNA-sample requirements for identification and cataloguing purposes, combined with recently enacted comprehensive reporting, registration, and notification systems, will improve law enforcement's ability to investigate and prosecute sex crimes using evidence wholly independent of a sex offender's testimony. Despite these advancements, however, the public may be reluctant to sanction programs that interfere with punishing sex crimes.

Thus, although immunity is theoretically the most constitutionally sound remedy in the face of compelled self-incrimination in a treatment setting, it is impractical and unrealistic given the current legislative and social landscape.

¹⁹⁴ *McKune*, 536 U.S. at 35 (Kennedy, J., plurality opinion). See *supra* note 79.

¹⁹⁵ For example, section 155 of the Adam Walsh Act amends 42 U.S.C. § 14135a(a)(1)(A) to allow the Attorney General to collect DNA samples not only from individuals who have been arrested for sex offenses, but also from individuals who are facing charges or are convicted of federal sex offenses. Adam Walsh Act § 155.

¹⁹⁶ *McKune*, 536 U.S. at 70 (Stevens, J., dissenting).

¹⁹⁷ *Id.*

¹⁹⁸ Solkoff, *supra* note 68, at 1486.

For all of these reasons, regardless of its ability to facilitate rehabilitation, immunity should continue to be granted only on a limited, case-by-case basis.¹⁹⁹

B. Counselor-Patient Privilege—A Trojan Horse

The counselor-patient privilege fails to provide constitutionally adequate Fifth Amendment protection in the sex offender treatment context. The psychotherapist-patient privilege is an evidentiary rule that protects the confidentiality of communications between a patient and his therapist during the course of treatment.²⁰⁰ The privilege applies to communications between a patient and his psychiatrist, psychologist, or social worker.²⁰¹ Because “confidentiality is a *sine qua non* for successful psychiatric treatment,”²⁰² all fifty states and the Supreme Court have acknowledged some form of psychotherapist-patient privilege, although psychotherapist-patient privilege statutes vary in the nature and extent of the protection they afford.²⁰³

All privilege statutes basically operate in the same fashion. The patient possesses the privilege, but either the patient or the patient’s therapist may invoke it on the patient’s behalf.²⁰⁴ Invoking the privilege enables the patient to prevent his therapist from testifying about confidential matters learned in the course of treatment, including statements made by the patient during treatment.²⁰⁵ Because the privilege belongs to the patient, only the patient may waive it.²⁰⁶ However, the party seeking the protection of the privilege bears the

¹⁹⁹ For example, in limited cases immunity will probably continue to operate as a means of facilitating family reunification where the offender is the victim’s parent or guardian. When the victim is related to or subject to the guardianship of the offender, some argue that the family unit should not be broken up, and thus the offender *should* be granted immunity. See Solkoff, *supra* note 68, at 1482–84. Compare Adam Walsh Act § 214 (directing the Rules Committee to consider limiting the availability of the marital privilege in cases where a spouse has been charged with a sex offense against his or her own child or the child of his or her spouse).

²⁰⁰ Edward F. Malone & David J. Reyes, *Physician-Patient, Psychotherapist-Patient, and Related Privileges*, in 1 TESTIMONIAL PRIVILEGES ch. 7, § 7:1 (David M. Greenwald et al. eds., 3d ed. 2005).

²⁰¹ The Supreme Court has recognized a psychotherapist-patient privilege, which it also has held applies with equal force to psychologists and social workers. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996). The Court reasoned that treatment would be seriously undermined absent a privilege because successful treatment depends largely on a patient’s trust in his treatment provider. Thus, the Court held that society’s interest in treating individuals outweighed society’s need for evidence.

²⁰² PAUL F. ROTHSTEIN & SUSAN W. CRUMP, FEDERAL TESTIMONIAL PRIVILEGES: EVIDENTIARY PRIVILEGES RELATING TO WITNESSES & DOCUMENTS IN FEDERAL LAW CASES § 3.2 (2d ed. 2005) (citing Supreme Court Draft Rule 504 on Psychotherapist-Patient Privilege, which was proposed but not enacted as part of the Federal Rules of Evidence, and the Advisory Committee Notes to that rule).

²⁰³ ROTHSTEIN & CRUMP, *supra* note 202, § 3.2. See, e.g., OR. R. EVID. 504, 504.1.

²⁰⁴ Malone & Reyes, *supra* note 200, § 7:20.

²⁰⁵ *Id.* § 7:1.

²⁰⁶ *Id.* § 7:20.

burden of proving it applies by showing that the communications between the therapist and the patient were made in confidence and in the course of diagnosis or treatment.²⁰⁷ When a therapist is subpoenaed to testify by opposing counsel, the therapist should refuse to discuss privileged information absent a clear waiver from his patient.²⁰⁸ In the context of court proceedings, an attorney must raise a timely objection to questions regarding privileged information.²⁰⁹

Once the party has established the privilege applies, the privilege is not subject to a balancing test.²¹⁰ In *Jaffee v. Redmond*, the Supreme Court held that balancing the necessity for evidence against a patient's privacy interest would eviscerate the privilege's effectiveness and make it difficult or impossible for treatment providers and patients to predict what statements, if any, would be protected.²¹¹

Absent a balancing test that can be applied on a case-to-case basis, some states have legislated clear exceptions to the counselor-patient privilege. While the privilege carries little weight in some jurisdictions,²¹² in others it may afford a criminal defendant significant protection.²¹³ Almost all states have statutory reporting requirements for certain matters, regardless of whether the information is revealed during therapy.²¹⁴ Other state laws expressly foreclose the use of the privilege in specific kinds of proceedings that are likely to involve statutory reporting requirements, such as homicide and child abuse cases.²¹⁵

In *Antelope*, the district court twice suggested that any testimony Antelope might provide regarding his sexual history would be protected by counselor-patient privilege.²¹⁶ Although this assertion is theoretically sound, in practice it affords sex offenders little protection from statements compelled as a result of court-ordered treatment. While the scope and nature of the privilege varies by state, treatment providers in all fifty states are statutorily required to report

²⁰⁷ *Id.*

²⁰⁸ *Id.* § 7:30.

²⁰⁹ *Id.*

²¹⁰ *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996).

²¹¹ *Id.* However, the Court noted in dicta that situations would likely arise in which "the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." *Id.* at 18 n.19.

²¹² See, e.g., CAL. EVID. CODE §§ 1006, 1026 (1995) (generally excluding from protection of the privilege "information that the psychotherapist or the patient is required to report to a public employee").

²¹³ See *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998) (extending *Jaffee* to a criminal case where confidential communications between the defendant and his psychotherapist constituted the sole grounds for the defendant's conviction for threatening the President's life).

²¹⁴ *Malone & Reyes*, *supra* note 200, § 7:27.

²¹⁵ See e.g., WIS. STAT. ANN. § 905.04(4)(d) (West 2005) (no privilege in trials for homicide when the disclosure relates directly to the facts or immediate circumstances of the homicide) and WIS. STAT. ANN. § 905.04(4)(3) (West 2005) (no privilege in cases of suspected child abuse).

²¹⁶ *Antelope*, 395 F.3d at 1131, 1132.

child abuse.²¹⁷ Thus, the counselor-patient privilege offers limited protection because even though an offender may invoke the privilege at trial and prevent his counselor from testifying, the proverbial cat has essentially been let out of the bag. Furthermore, even when treatment providers are not required by law to report sex offenses, they may be ethically required to do so by their professions' ethical codes.²¹⁸ Without a grant of immunity, sex offenders who have victimized children and who are in court-ordered treatment programs may have their compelled statements used against them in a criminal proceeding, in violation of the Fifth Amendment.

As a result, reporting requirements may effectively eviscerate any protection afforded by the counselor-patient privilege in the sex offender context.²¹⁹ Although this may be good news from a law enforcement perspective, the lack of protection caused by reporting requirements arguably hinders the treatment process because it undermines the trust necessary to foster treatment.²²⁰ At least one state statutorily protects the counselor-patient privilege as it applies to sex offenders,²²¹ but few states have followed suit. Considering these challenges, the counselor-patient privilege does not offer meaningful Fifth Amendment protection to sex offenders subject to mandatory treatment programs.

C. A Legislative Approach

Probationers' Fifth Amendment rights are most sensibly delineated by the legislature, as they have been for Fourth Amendment rights.²²² Simply stated, the legislature is better positioned than the judiciary to determine where the line between rehabilitation and prosecution should be drawn. Further, legislation clarifying the scope of probationers' rights will mitigate much of the confusion surrounding treatment requirements. For example, Wisconsin has addressed the compulsion issue by making polygraph tests voluntary for the purpose of sex

²¹⁷ See Brief of 18 States as Amicus Curiae in Support of Petitioners, *supra* note 72, at 1, app. A.

²¹⁸ For example, Antelope's counselor testified that he had previously reported information to law enforcement because he felt ethically responsible to do so. Opening Brief, *supra* note 6, at 13–14 (citing in substantial part the first page of the SABER treatment contract). Counselors are required to disclose to patients the "relevant limits on confidentiality and . . . the foreseeable uses of the information generated through their psychological activities." See ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT std. 4.02(a) (Am. Psychological Ass'n 2002). See also NASW CODE OF ETHICS § 1.07 (Nat'l Ass'n of Social Workers 1999); ACA CODE OF ETHICS § B.1.c–d (Am. Counseling Ass'n 2005).

²¹⁹ *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996).

²²⁰ *Id.*

²²¹ See KY. REV. STAT. ANN. § 197.440 (LexisNexis Supp. 2005). It is unclear how this protection coincides with Kentucky's child abuse report statute. Compare KY. REV. STAT. ANN. § 620.030 (LexisNexis Supp. 2005).

²²² See, e.g., OR. REV. STAT. § 137.540(1)(I), 137.540(1)(i) (2005); Adam Walsh Act, Pub. L. No. 109-248, § 210, 120 Stat. 587, 615–16 (2006).

offender treatment.²²³ There, the Department of Corrections may require, as a condition of community release, that a sex offender probationer submit to polygraph tests for treatment purposes, but the legislature has provided that the offender may refuse to take the test and that doing so does not constitute refusal of treatment.²²⁴ Further, if the offender submits to polygraph testing, the results may only be disclosed to those involved in the treatment process, the offender's attorney, and a state attorney for the purposes of a civil commitment proceeding.²²⁵

Wisconsin's legislation successfully addresses several of the factors that implicate the Fifth Amendment in compulsory treatment programs. It renders the polygraph voluntary, thus removing the element of compulsion, and additionally declines to construe failure to comply with the polygraph as refusal of treatment, thereby fostering rehabilitation. It also limits disclosure of the results to those involved in the treatment process, which will help to limit the use of an offender's statements in a future criminal prosecution.²²⁶ At the same time, it allows the state to further its goal of protecting the public safety by making statements made during the course of treatment available for use in a civil commitment proceeding. Thus, the state can present evidence revealed during treatment to advocate for civil commitment in cases where offenders pose an overwhelming risk to society. This procedure also furthers the state's goal of protecting the public by creating a meaningful treatment opportunity. This approach balances both the state's and sex offenders' individual interests. Clear legislation of this kind will enable treatment providers and law enforcement personnel to perform their duties without violating the Fifth Amendment. It also will remove much of the confusion regarding the Fifth Amendment rights of sex offender probationers.

VI. CONCLUSION—A WORKABLE COMPROMISE

Under *United States v. Antelope*, a sex offender probationer may not be subjected to a longer term of incarceration if he has a well-founded fear that accepting responsibility for his sex crimes during the course of compulsory sex offender treatment will result in prosecution. This holding potentially undermines the government's interest in protecting the public safety by removing the government's leverage for motivating sex offenders to participate in treatment. That being said, such compulsion jeopardizes the integrity of the Fifth Amendment by eviscerating its protection. Thus, there exists a profound tension between public policy, rehabilitation, and the Fifth Amendment.

Despite the Ninth Circuit's reliance on it, *McKune* reveals the perspectives of a fractured court. However, because a purpose test for compulsion would be

²²³ WIS. STAT. ANN. § 51.375(2)(b) (West 2005).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ It is unclear how this statute would interact with statutory reporting requirements regarding homicide or child abuse. However, it may be that such disclosures could not be used in a criminal prosecution.

easier to apply in the context of court-ordered treatment programs, render constitutionally sound results, and preserve the integrity of the core Fifth Amendment protection, it should be applied instead of a status analysis. The judiciary will continue to grapple with the scope of and proper analysis for the Fifth Amendment privilege. Given recent changes in the Supreme Court and a growing emphasis on the prosecution of sex crimes, we can expect the Court to revisit the issue in the near future.

In the meantime, the criminal justice community must enforce the law and rehabilitate offenders while honoring the Constitution's protections. Because most sex offenders are subject to some form of community release, it is incumbent on the criminal justice system to ensure that sex offenders receive the treatment necessary to manage their impulses. Simply stated, public safety requires that sex offenders on community release receive treatment.

Under *McKune*, statements made by a sex offender during the course of court-ordered treatment cannot be used against him for prosecutorial purposes. Some circumstances obviate preventative measures. For example, the government may avoid Fifth Amendment issues by simply refraining from using statements made during court-ordered treatment for prosecutorial purposes. As long as the government's purpose is strictly rehabilitative and no risk of prosecution exists, the probationer must comply with the treatment terms or risk probation revocation, just as he would for any other probation violation.²²⁷ Treatment programs may also require admission to only the crime of conviction, rather than to all as yet uncharged offenses. At least in cases involving a guilty plea, double jeopardy prevents testimony compelled under these circumstances from becoming constitutionally problematic. Voluntary treatment programs also fail to implicate the Fifth Amendment because they lack the element of compulsion. Absent a real risk of prosecution, a sex offender probationer cannot forego treatment on Fifth Amendment grounds.

Removing the risk of prosecution will ostensibly stymie some investigations because testimonial evidence is often all that remains in sex offense cases due to the short-lived nature of the evidence and victims' reticence to report the crime. While some treatment providers are concerned that removing the risk of prosecution will somehow render sex offenses unworthy of punishment in the minds of offenders, alternative means of developing evidence, stringent registration requirements, and harsher penalties for sex offenses should help to dispel any sense that sex crimes are acceptable.

A pragmatic approach to the Fifth Amendment issues raised by sex offender treatment will require a multi-faceted approach. Ideally, the legislature will address issues raised by mandatory sex offender treatment programs. The best legislation will adhere to the guarantees of the Fifth Amendment, but provide for civil commitment when appropriate. It also will clearly address the proper place of statutory reporting requirements in the sex offender treatment context.

²²⁷ *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984).

Finally, probation agreements and treatment contracts should also include an express provision indicating that probationers, like ordinary citizens, are entitled to invoke the Fifth Amendment privilege when faced with answering a potentially incriminating question in the course of treatment. However, they should also state that like ordinary citizens, probationers are not entitled to refuse to answer all questions. Although such a warning is not mandated by *Miranda v. Arizona* because probation is not considered "custody," this precaution will further safeguard the government from committing a constitutional violation.

Until the legislature evaluates the situation and clearly enumerates procedures for balancing the Fifth Amendment and the public safety, all individuals should be afforded the full protection of the Fifth Amendment. In the meantime, these few measures will provide a more clearly delineated right to probationers who are subject to compulsory treatment and will also permit the government to pursue its responsibilities as well.