MCKUNE V. LILE: EVISCERATION OF THE RIGHT AGAINST SELF-INCRIMINATION THROUGH THE REVIVAL OF *BOYD V. UNITED STATES*

INTRODUCTION

In *Boyd v. United States*,[1] the Supreme Court observed the "intimate relation"[2] between the Reasonableness Clause of the Fourth Amendment[3] and the Incrimination Clause of the Fifth Amendment,[4] noting that "the Fourth and Fifth Amendments run almost into each other."[5] The Court reasoned that there was so much overlap between the two clauses that:

> [T]he 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment.[6]

As scholars have pointed out, this attempt "to fuse the Fourth and Fifth Amendments has not stood the test of time and has been plainly rejected by the modern Court."[7] This synthesis of the Reasonableness Clause and the Incrimination Clause has been unsuccessful largely because the text of the two clauses calls for different standards. Specifically, the Reasonableness Clause protects against only "unreasonable" searches, while the scope of Incrimination Clause's protection is not limited by the convenient principle of what is "reasonable."[8]

While severing the Reasonableness Clause from the Incrimination Clause analysis may be more true to the textual and policy reasons behind the Fifth Amendment, the separation has not clarified the Supreme Court's approach to determining unconstitutional compulsion.[9] Perhaps in an effort

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1 116 U.S. 616 (1886).

2 *Id.* at 633.

3 *See* U.S. CONST. amend. IV. The Reasonableness Clause protects people "against unreasonable searches and seizures." *Id.*

4 *See* U.S. CONST. amend. V. The Incrimination Clause states, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." *Id.*

5 116 U.S. at 630.

6 *Id.* at 633.

7 Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 790 (1994).

8 Robert B. McKay, *Self-incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 194.

9 *Compare* Garrity v. New Jersey, 385 U.S. 493 (1967) (holding choice of self-incrimination or losing one's job amounted to unconstitutional compulsion), *with* McGautha v. California, 402 U.S. 183

to bring some clarity to this inquiry a plurality of the Supreme Court attempted to borrow a standard, not from the Reasonableness Clause this time, but from the Due Process Clause when deciding whether there was unconstitutional compulsion in *McKune v. Lile*.[10] Using the due process standard created in *Sandin v. Connor*,[11] the *McKune* plurality held that a Kansas sexual offender treatment program did not compel prisoners to incriminate themselves in violation of the Fifth Amendment.[12] By borrowing from the *Sandin* standard, the plurality implicitly suggests that the Due Process Clause and the Incrimination Clause "run almost into each other." This Note will examine whether it is appropriate to borrow a due process test when looking at a self-incrimination claim by comparing and contrasting the two clauses, or whether the plurality in fact makes a *Boyd*-like error. If it is in fact erroneous to borrow a due process test, then the plurality may in fact be creating an implicit exception to the Fifth Amendment—a prisoner exception.

The failure of a majority opinion to emerge from *McKune* may generate more questions than answers regarding the relationship between sex offender treatment programs and the Incrimination Clause. One question is whether the plurality's willingness to borrow from another constitutional clause when entertaining Incrimination Clause questions suggests that the current Supreme Court is willing to revive the reasoning of *Boyd*. A recent case in the U.S. District Court for the District of Montana implicitly suggests that courts may be willing to revert to Boydian reasoning and provides a useful vehicle for analyzing this problem. In *United States v. Antelope*, the defendant was convicted of sex offenses after sending forty dollars to an undercover investigative unit for a child pornography video.[13] During the time period between his conviction and his sentencing, the defendant demonstrated exceptional post-offense rehabilitation and acceptance of responsibility[14] and for these reasons, the district court granted a downward departure from the 24-to-30 months sentencing guideline range and sentenced Antelope to five years probation.[15] As a condition of his probation, Antelope was required to participate in a sex offender treatment program.[16]

(1971) (holding choice of self-incrimination or drawing of potential negative inference at sentencing does not amount to unconstitutional compulsion).

10 536 U.S. 24 (2002).

11 515 U.S. 472, 483 (1995).

12 *McKune*, 536 U.S. at 28.

13 Excerpts of Record of Defendant-Cross-Appellant at 5, United States v. Antelope, No. 01-30187, 01-30188 (9th Cir. filed Oct. 24, 2001).

14 *Id.* at 72-78.

15 *Id.* at 80-82.

16 *Id.* at 90.

The program requires disclosure of all prior sexual misconduct and uses polygraph tests to verify the truthfulness of the offender's disclosures.[17] To protect his Fifth Amendment right against self-incrimination, Antelope sought immunity.[18] Both the district court and state government refused Antelope's request.[19] When Antelope exercised his Fifth Amendment right and refused to comply with treatment and polygraphing, the district court revoked his probation and sent him to prison after analyzing the case using the standard from *United States v. Knights*,[20] a Reasonableness Clause case,[21] suggesting either a direct return to the reasoning of *Boyd* or another exception to the Fifth Amendment, possibly a probationer exception.

This Note examines the *McKune* decision and its implication on sex offender rehabilitation programs in both prison and probation settings. Part I provides the background necessary for a discussion of sex offender rehabilitation programs and outlines the basic principles behind Fifth Amendment jurisprudence, as applicable to understanding *McKune*. Part II describes the background facts and the procedural history of the *McKune* case. Part III examines the three opinions that emerged from *McKune*. Part IV analyzes the *McKune* opinion as binding precedent and as a source for the prisoner exception to the right against self-incrimination, concluding that fusing the Due Process Clause to the Incrimination Clause is inappropriate and is analogous to the long since repudiated reasoning of *Boyd*. Part V considers *McKune*'s implications in the context of probation revocation and contemplates the merits of a probationer's exception to the right against self-incrimination. The district court's reasoning in *Antelope* is also examined and compared to the reasoning in *Boyd*. Lastly, Section VI examines the trend toward the creation of a sex offender exception to the right against self-incrimination and considers alternatives to such an exception that recognize both the unique policies behind the right against self-incrimination and also the dangers that sex offenders present to society.

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17 Excerpts of Record of Defendant-Appellant at 257, 260, United States v. Antelope, No. 01-300097 (9th Cir. filed June 27, 2002).

18 *Id.* at 113.

19 *Id.* at 160-61, 271-72.

20 534 U.S. 112 (2001).

21 Excerpts of Record of Defendant-Appellant at 113, 160-61, 243-44, United States v. Antelope, No. 01-300097 (9th Cir. filed June 27, 2002).

I. BACKGROUND

A. *Sex Offender Rehabilitation Programs*

To understand the role that the Fifth Amendment plays in sex offender rehabilitation programs, it is first necessary to know the background of the goals and limitations of such programs. In 1997, the Bureau of Justice Statistics reported that, on any given day, there are nearly a quarter of a million convicted sex offenders under the care, custody, or control of corrections agencies.[22] The high rate of recidivism[23] in sex offenders makes it especially difficult for the criminal justice system to effectively rehabilitate this large group of offenders.[24] Given this difficulty, there is strong state interest in assuring the availability of the most effective rehabilitation programs. While there is little doubt that effective rehabilitation programs are crucial, there is no consensus on the characteristics of such a program. Experts generally acknowledge, however, that successful rehabilitation requires an offender to accept responsibility for past transgressions.[25] Acknowledging a sexual problem is similar to the step that a recovering alcoholic takes in admitting they have a problem and acknowledging the people that they have harmed. Experts express different views on the value of coercing an offender to accept responsibility. One commentator has pointed out that courts generally assume that regardless of whether it is voluntary or coerced, acceptance of responsibility is necessary for treatment.[26] But there is also the view that "less confrontational treatment is more effective at overcoming denial" and that there is the potential for "effective treatment without focusing on responsibility for a crime."[27]

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22 LAWRENCE A. GREENFELD, U.S. DEPT. OF JUSTICE, SEX OFFENSES AND OFFENDERS 1 (1997).

23 *See* PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEPT. OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 10 (2002) (finding a rapist's odds of committing a new rape to be 3.2 times greater than a non-rapists odds). *But see* David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 572-73 (1994) (concluding "no study has demonstrated that sex offenders have a consistently higher or lower recidivism rate than other major offenders").

24 Sexual offenses traditionally include rape and other forms of sexual assault. *See* MODEL PENAL CODE Article 213 (Proposed Official Daft 1962). More recently, offenses such as possession of child pornography fall under the category of sexual offenses. *See, e.g.,* 18 U.S.C. §§ 2252, 2252A (2002).

25 *See, e.g.,* NAT'L INST. OF CORRECTIONS, U.S. DEPT. OF JUSTICE, A PRACTITIONER'S GUIDE TO TREATING THE INCARCERATED MALE SEX OFFENDER 73 (1988).

26 Jonathan Kaden, Comment, *Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination*, 89 J. CRIM. L. & CRIMINOLOGY 347, 351 (1998).

27 *See id.* at 351, n.17 (listing studies).

While it is important to acknowledge these diverging opinions, it is not necessary to resolve these differences in this Note. This Note argues that the Fifth Amendment, as a constitutional privilege,[28] operates independently of these clinical opinions. To better understand the boundaries set by the Fifth Amendment, some basic principles must be outlined.

B. *The Fifth Amendment Right Against Self-incrimination*

While there is some disagreement about the characteristics of an effective sex-offender rehabilitation program, there is even more controversy surrounding discussions of the proper policies behind the right against self-incrimination.[29] The relevant portion of the Fifth Amendment provides that "no person shall . . . be compelled in any criminal case to be a witness against himself."[30] From these few words, two important principles have emerged. First, an individual has the right to remain silent in the face of official questioning where answers could result in self-incrimination.[31] Second, if an individual is compelled to give incriminating answers, the Amendment prevents those statements from being used in a future criminal proceeding.[32]

There is no doubt that the privilege against self-incrimination is well recognized, but the right is not self-executing. "[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself."[33] As normally is the case with general legal rules, there are exceptions. Where "some identifiable factor was held to deny the individual a 'free choice to admit, deny, or to refuse to answer'" [34] application of the general rule is inappropriate. For this reason, two exceptions to the requirement that a witness assert the privilege against self-incrimination have emerged.[35]

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28 The terms "privilege" and "right" are used interchangeably throughout this Note. However, as Professor Levy has pointed out, while the right against self-incrimination originated as a common-law privilege, the Fifth Amendment established it as a constitutional right. LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION vvii (1999).

29 *See, e.g.,* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986) (rejecting traditional theoretical justifications for the privilege against self-incrimination).

30 U.S. CONST. amend. V.

31 *See, e.g.,* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

32 *See, e.g., id.* at 78.

33 Garner v. United States, 424 U.S. 648, 654 (1976) (footnote omitted).

34 Minnesota v. Murphy, 465 U.S. 420, 429 (1984).

35 *See id.* at 429-34. This requirement of "free choice" goes to the heart of the "compulsion" element of a self-incrimination claim.

The first exception involves confessions obtained when a suspect is in police custody.[36] Because both prisoners and probationers are not "in custody" for the purposes of this Note, it is not necessary to further explore this type of situation.[37] The second exception arises in situations where assertion of the privilege is penalized so that the option to remain silent is foreclosed and the incriminating testimony is effectively compelled.[38] The "penalty" exception is central to an understanding of what follows and thus must be examined in further detail. Additionally, another line of cases, the "tough choice" cases, will also be examined in this section. In "tough choice" cases the Court refuses to recognize the right against self-incrimination when the government forces an individual to choose between giving incriminating evidence and another unpleasant option. What this Note refers to as a "tough choice" situation will often resemble and may sometimes be indistinguishable from a penalty situation, but, according to the Supreme Court, does not amount to unconstitutional compulsion.

1. The "Penalty Cases"

In 1968, the Supreme Court decided the seminal penalty case, *Garrity v. New Jersey*.[39] *Garrity* arose out of a New Jersey Attorney General investigation concerning the alleged fixing of traffic tickets.[40] In the course of the investigation, several police officers were questioned and warned that (1) anything said might be used against them; (2) they had the privilege to refuse to answer; but (3) those who refused to answer would lose their job.[41] The police officers did not exercise their right to remain silent and answered the questions.[42] The statements were used to secure subsequent convictions for conspiracy to obstruct the administration of traffic laws.[43] The Supreme Court held that the choice given to the police officers was impermissible because it was coerced; therefore, the statements could not be used in a subsequent criminal proceeding.[44]

Garrity has been applied in several other situations where individuals have been induced to forgo the Fifth Amendment privilege through some

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36 *Id.* at 429; *see also* Miranda v. Arizona, 384 U.S. 436 (1966).

37 *See Murphy*, 465 U.S. at 430 (holding probationer was not "in custody" because no formal arrest or restraint on freedom of movement).

38 *Id.* at 434-35.

39 385 U.S. 493 (1967).

40 *Id.* at 494.

41 *Id.* at 494.

42 *Id.* at 494-95.

43 *Id.*

44 *Id.* at 500.

type of threat or penalty.[45] In *Spevack v. Klein*, the Court held that individuals are protected from threats of disbarment.[46] The Supreme Court has also found threats of the loss of the right to participate in political associations,[47] ineligibility to receive government contracts,[48] and termination of employment to be inappropriate threats resulting in unconstitutional compulsion.[49] These decisions comport with early decisions, where the Court declared that an individual who refuses to answer questions that may incriminate him or herself must "suffer no penalty . . . for such silence"[50] and the exercise of the privilege must not be "costly."[51] Despite these decisions, there is not a bright line between impermissible threats and permissible "tough choice" cases.

2. Tough Choice Cases

In the penalty cases, the Supreme Court prohibited the government from using threats to induce waiver of the right against self-incrimination, but other cases appear to allow the government to force an individual to choose between giving incriminating evidence and a negative consequence for remaining silent. The Supreme Court has said:

> [The] criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow . . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.[52]

Thus, in *McGautha*, the Supreme Court upheld a requirement that the defendant choose between remaining silent about guilt with adverse affects on his sentence or testifying about his sentence at risk of being subjected to cross-examination on issues relating to guilt.[53]

Similarly, *Minnesota v. Murphy*[54] represents another case where the Court allowed the state to force an individual to choose between supplying incriminating evidence and another unattractive alternative. In *Murphy*, a

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45 *Murphy,* 465 U.S. at 434.

46 385 U.S. 511 (1967).

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

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

49 Uniformed Sanitation Men Ass'n v. Comm. of Sanitation, 392 U.S. 280 (1968).

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

51 Griffin v. California, 380 U.S. 609, 614 (1965).

52 McGautha v. California, 402 U.S. 183, 213 (1971) (citation omitted).

53 *Id.* at 218.

54 465 U.S. 420 (1984).

defendant's probation officer knew the defendant had committed a rape and murder unrelated to his probation. Because part of the defendant's probation required him to be honest in all matters with the probation officer, the defendant faced additional jail time if he refused to speak to his probation officer.[55] When the probation officer interviewed the defendant, he confessed.[56] The Supreme Court found no Fifth Amendment violation when information that a defendant provided was used against him even though there was the threat of facing additional jail time for a parole violation.[57]

The Supreme Court has also allowed a prisoner's silence to be used against him at a prison disciplinary hearing[58] and has allowed a death row inmate to choose between incriminating himself at his clemency interview and having adverse inferences drawn from his silence.[59] In these cases individuals are placed in situations where they must choose between self-incrimination and the risk of severe punishment. Along the same line, the Court repeatedly has held that plea-bargaining does not violate the Fifth Amendment, even though criminal defendants may feel considerable pressure to admit guilt in order to obtain more lenient treatment.[60] Given the prevalence of sex offender treatment programs and the Court's decision to narrow the right against self-incrimination, it is crucial to determine if sex offender rehabilitation cases are more like the impermissible penalty situation or the permissible tough choice situation.

3. The Immunity Option

At the outset it should also be noted that granting immunity[61] to an offender avoids the problem of self-incrimination because once immunity is granted, there is no longer the risk of the testimony being used to incriminate.[62] To avoid the difficultly in drawing the line between compulsion and

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55 *Id.* at 422.

56 *Id.* at 423.

57 *Id.* at 436.

58 Baxter v. Palmigiano, 425 U.S. 308, 317 (1976).

59 Ohio Adult Parole Auth. v. Woodward, 523 U.S. 272 (1998).

60 *See, e.g.*, Brady v. United States, 397 U.S. 742, 751 (1970) (finding no compulsion where defendant plead guilty because of fear of the death penalty).

61 Regarding, the issue of immunity, at least one commentator has argued that "[t]he key question [in Fifth Amendment cases] . . . is what sort of immunity the [self-incrimination] clause requires before a person may be made to tell all outside his own 'criminal case,' beyond the earshot of the petit jury." AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 46 (1997). *See also* Kastigar v. United States, 406 U.S. 441 (1972) (holding that immunity protects a person against compelled statements and their fruits from being used at a criminal trial).

62 Of course, this does not grant absolute immunity, it merely places the burden of producing evidence on the state. *See generally* Scott Michael Solkoff, Note, *Judicial Use Immunity and the Privi-*

a tough choice, several courts have required sex offenders to be granted immunity in rehabilitation programs that require admissions of past crimes.[63] There are, however, similar situations that do not involve sex offenders, where courts have not required immunity.[64] Thus, it is important to note that in *McKune*, when sex offender treatment was pitted against the Fifth Amendment in the prison context, the option of immunity was available to avoid constitutional problems.

4. General Policies and Relationship (or Lack Thereof) to Other Amendments

Additionally, it is important to note that the Fifth Amendment's protection from self-incrimination has a unique history and policies that set it apart from other protections in the Constitution.[65] Despite these differences, in the late nineteenth century, the Supreme Court, in *Boyd v. United States*,[66] found that the Fourth and Fifth Amendments had similar policies. The Court held that seizing or compelling production of a defendant's private papers to be used in evidence against him was equivalent to compelling him to be a witness against himself. Additionally, the Court noted "[i]n this regard the Fourth and Fifth Amendments run almost into each other" and share an "intimate relation" and "throw great light on each other."[67] Thus, in holding that the statute that allowed the government to gain documentary evidence in custom violation cases violated both the Fourth Amendment and the self-incrimination privilege of the Fifth Amendment,

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lege Against Self-Incrimination in Court Mandated Therapy Programs, 17 NOVA L. REV. 1441, 1485-93 (1993).

63 *See* Mace v. Amestoy, 765 F. Supp. 847, 851-52 (D. Vt. 1991) ("If the state wishes to carry out rehabilitative goals in probation by compelling offenders to disclose their criminal conduct, it must grant them immunity from criminal prosecution."); State v. Cate, 683 A.2d 1010, 1019 (Vt. 1996) ("[W]ithout protection from the use of his statements in future prosecutions, defendant is entitled to invoke his Fifth Amendment privilege."); State v. Imlay, 813 P.2d 979 (Mont. 1991) ("Under these circumstances, and absent any grant of immunity, we believe that the better reasoned decision are those decisions which protect the defendant's constitutional rights against self-incrimination, and which prohibit augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination.").

64 *See* Gollaher v. United States, 419 F.2d 520, 530 (9th Cir. 1969) (holding that Fifth Amendment rights are not violated when given longer sentence for refusal to take the first step toward rehabilitation).

65 *See infra* Parts IV.B., V.B. *See generally* Katharine B. Hazlett, *The Nineteenth Century Origins of the Fifth Amendment Privilege Against Self-Incrimination*, 42 AM. J. LEGAL HIST. 235 (1998).

66 116 U.S. 616 (1886).

67 *Id.* at 630, 633.

the *Boyd* Court essentially linked the Fifth Amendment to Fourth Amendment. Linking the two Amendments together allowed a more "liberal" construction of those guarantees than would have been possible had the two provisions been read separately.[68]

Today, *Boyd* is of little precedential value, except as a starting point to understand what has superceded it.[69] Specifically, Professor Akhil Reed Amar has pointed out that "*Boyd*'s effort to fuse the Fourth and Fifth Amendments has not stood the test of time and has been plainly rejected by the modern Court" and that "*Boyd*'s mistake was to misread both the Reasonableness Clause and the Incrimination Clause by trying to fuse them together [because] [a]t heart, the two provisions are motivated by very different ideas; they do not 'run almost into each other' as a general matter."[70] For example, in *Schmerber v. California*,[71] the Supreme Court examined whether compelled extraction of a blood sample from an accused and subsequent admission of that sample as incriminatory evidence at his trial was a violation of either the Reasonableness Clause or the Incrimination Clause. In finding that there was not a constitutional violation, the Court analyzed each amendment separately and did not mention the fusion of the two Amendments.[72] Thus, while there may be some remnants of *Boyd* alive in the Court's modern Fifth Amendment jurisprudence,[73] it is clear that the Fifth Amendment is not to be read with the Fourth Amendment. The two Amendments serve different policies and have unique histories.

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68 WAYNE R. LAFAVE ET. AL., 3 CRIMINAL PROCEDURE §§ 2.8(b), 8.12(a) (2d ed. 1999).

69 *See, e.g.*, Fisher v. United States, 425 U.S. 391 (1976) (rejecting the notion the Fifth Amendment protects the privacy of papers); Warden v. Hayden, 387 U.S. 294 (1967) (overturning "mere evidence" rule, a remnant of *Boyd*, and holding that the Fourth Amendment does not limit the type of evidence that may be seized); Schmerber v. California, 384 U.S. 757 (1966) (limiting *Boyd* by holding that the self-incrimination clause does not protect real or physical, only communications and testimony). *See generally* RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE, ch. 4 (2001) (devoting an entire chapter to "The Rise" and more importantly the "Fall of *Boyd v. United States*"); LAFAVE ET. AL., *supra* note 68, at §§ 2.8(b), 8.7(a), 8.12(a).

70 Amar, *supra* note 7, at 790.

71 384 U.S. 757 (1966).

72 *Compare id.* at 760-65 *with id.* at 766-72. Neither part looked at *Boyd* in any detail.

73 *See* LAFAVE ET. AL., *supra* note 68, at § 8.12(g) (noting that a minority of lower courts have found that *Boyd* protects private documents, such as diaries).

II. THE BACKGROUND TO *MCKUNE V. LILE*

A. *Underlying Facts to* Mckune

Robert Lile was convicted in Kansas state court of aggravated kidnapping, rape, and aggravated sodomy in 1983.[74] Despite pleading not guilty, denying all charges, and testifying that the sexual intercourse with the victim was consensual, Lile was convicted.[75] In 1994, when Lile was a prisoner at Lansing Correctional Facility, the Kansas Department of Corrections recommended that he participate in the Sexual Abuse Treatment Program (SATP).[76] To be admitted into the SATP, the offender must complete and sign an "Admission of Responsibility" form.[77] The form requires complete disclosure of sexual history, including crime of conviction and any uncharged sexual offenses.[78] To ensure that the form is completed accurately, a polygraph examination is used to verify the sexual history information.[79] Because Lile was not given any assurances that the information disclosed in the SATP would not be used in future criminal proceedings, he refused to participate in the program on that ground that it violated his Fifth Amendment right against self-incrimination.[80]

Lile's refusal to participate in the SATP resulted in the lowering of his prison privileges from Level III to Level I. The most significant consequence of the Level I status was that Lile would be transferred to a maximum-security prison that put him in a more dangerous environment.[81] Other consequences of this lower status were reductions in visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, and access to personal television.[82] Seeking an injunction to prevent these changes from taking effect, Lile filed a § 1983[83] action against the warden and the secretary of the Department of Corrections.[84]

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74 McKune v. Lile, 536 U.S. 24, 29-30 (2002).

75 *Id.* at 30. The conviction was in fact affirmed on appeal. State v. Lile, 699 P.2d 456 (Kan. 1985).

76 *McKune*, 536 U.S. at 30.

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.* at 31.

81 *Id.*

82 *McKune*, 536 U.S. at 30-31.

83 42 U.S.C. § 1983 (2002).

84 *McKune*, 536 U.S. at 30.

B. Lile v. Mckune *in The Lower Courts*

The U.S. District Court for the District of Kansas granted Lile summary judgment and found that the program violated his Fifth Amendment right.[85] The State appealed the district court's grant of summary judgment and the Tenth Circuit affirmed the district court's judgment.[86] The court rejected the State's assertion that there could be no compulsion unless the consequences imposed on Lile constituted "atypical and significant hardships on the inmate in relation to the ordinary incident of prison life,"[87] explicitly refusing to use the "Sandin Analysis"[88] that the Supreme Court had used in evaluating procedural due process claims in the prison context.[89] The changes in Lile's environment were enough to find the required "substantial and potent penalties"[90] compelling self-incrimination. The fact that the consequences Lile faced were more like "penalties" than "sanctions"[91] and that the consequences took affect automatically also weighed in favor of compulsion.[92]

Even though the Tenth Circuit determined that there has been a violation of a constitutional right, it did not end its analysis there; the court noted, "Because of the institutional context of this case and the great deference that is owed to the management decisions and policies of prison officials, we believe it is appropriate to balance the prison's penological interests against the prisoner's constitutional right."[93] The court found two interests particularly important: promoting rehabilitation and increasing public safety. It weighed these interests against Lile's right not to self-incriminate, but found that the State's interest did not outweigh Lile's constitutional right.[94] The State appealed, and the Supreme Court granted certiorari to review the constitutionality of the Kansas prison regulations.[95]

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85 Lile v. McKune, 24 F.Supp. 2d 1152 (D. Kan. 1998).

86 Lile v. McKune, 224 F.3d 1175 (10th Cir. 2000).

87 *Id.* at 1183 (quoting Sandin v. Conner, 515 U.S. 472, 484 (1995)).

88 *Sandin* held that a prisoner only has a due process liberty interest if the restraint "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U.S. at 484.

89 *Lile*, 224 F.3d at 1184-85.

90 *Id.* at 1185-86.

91 *Id.* at 1188-89.

92 *Id.* at 1189.

93 *Id.* at 1190.

94 *Id.* at 1190-92.

95 McKune v. Lile, 532 U.S. 1018 (2001).

III. *MCKUNE V. LILE*: UNANSWERED QUESTIONS

On June 10, 2002, more than six months after oral arguments and almost four years after Lile filed his § 1983 action, the Supreme Court issued an opinion.[96] A majority of the Court held that the adverse consequences Lile faced as a result of not complying with the SATP were not enough to compel unconstitutional self-incrimination.[97] However, because of the differences in the reasoning of the plurality and concurring opinions, no clear standard emerged from the decision.

A. *Justice Kennedy's Plurality Opinion*

Justice Kennedy wrote for the plurality[98] and put forth a three-part test for finding a prison rehabilitation program to be constitutional.[99] First, the program must "bear a rational relation to legitimate penological objective."[100] Second, any "adverse consequences an inmate faces for not participating [must be] related to the program objectives."[101] Third, the adverse consequences must "not constitute atypical and significant hardships in relation to the ordinary incidents of prison life."[102]

The plurality had no trouble finding that the SATP satisfied the first requirement of serving a legitimate penological objective. In fact, two such interests were noted: rehabilitation and deterrence. Rehabilitation is furthered because the "potential for additional punishment reinforces the gravity of the participants' offenses and thereby aids in rehabilitation."[103] Additionally, the plurality noted that the state's interest in deterrence would also be furthered by the SATP because the information obtained in the program could be used to prosecute dangerous offenders.[104]

Likewise, the plurality did not have difficulty in finding that the SATP met the second requirement because the consequences of non-compliance were related to program objectives. There was no indication that Lile was being transferred to a maximum-security prison as punishment for exercising his Fifth Amendment right.[105] Lile was transferred from the prison that

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96 McKune v. Lile, 536 U.S. 24 (2002).

97 *Id.*

98 Chief Justice Rehnquist, Justice Scalia, and Justice Thomas joined the plurality opinion.

99 *McKune*, 536 U.S. at 37.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.* at 34.

104 *Id.*

105 *McKune*, 536 U.S. at 38.

offered SATP simply to make room for other inmates who might participate in the SATP.[106] Given that it is well within the discretion of prison administrators to make these types of housing decisions,[107] the plurality had little trouble finding that the consequences Lile would face were related to legitimate penological interests and were not subterfuge for punishment.

In establishing the third requirement, the plurality relied heavily on the fact that Lile was seeking to exercise his constitutional rights not as a free man, but as a prisoner. Because of the prison setting, the plurality was persuaded to borrow the "atypical and significant hardship" requirement from due process jurisprudence.[108] That particular language comes from *Sandin v. Conner*,[109] where the Court held that prison regulations could not violate the Due Process Clause unless those regulations impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[110] Justice Kennedy acknowledged that the due process analogy did "not provide a precise parallel . . . but it does provide useful instruction."[111] The analogy allowed the "compulsion inquiry [to] consider the significant restraints already inherent in the prison life and the State's own vital interest in rehabilitation goals and procedures within the prison system."[112]

To find "atypical and significant hardship" the plurality would first require the threatened consequences to be sufficiently severe. But given that Lile was in a prison setting, the plurality found that there was no compulsion because the consequences were not great enough. His decision not to participate in SATP "did not extend his term of incarceration" and it did not affect "his eligibility for good-time credits or parole."[113] Rather, according to the plurality, all that was at stake was a de minimis loss along the lines of television privileges.[114] In cases involving inmates, the plurality would require the loss to be more significant.

Furthermore, despite the fact that there were no Fifth Amendment Supreme Court cases supporting the proposition, the plurality would require a liberty interest to be at issue,[115] again borrowing from due process case

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106 *Id.*

107 *See* Meachum v. Fano, 427 U.S. 215, 225 (1976) (holding due process does not entitle prisoner to a hearing when transferred to a prison with substantially less favorable conditions).

108 *McKune*, 536 U.S. at 36.

109 515 U.S. 472 (1995).

110 *Id.* at 484.

111 *McKune*, 536 U.S. at 37.

112 *Id*.

113 *Id.* at 38.

114 *Id.* at 39-41.

115 *Id.* at 39.

law.[116] Once the plurality established the requirement of a liberty interest, the penalty cases were easily distinguishable. None of the penalty cases involved a liberty interest; they all involved free citizens. Lile, on the other hand, was a prisoner and he did not possess many of the rights that were at issue in those cases.

The plurality, however, found that the "critical distinction" between Lile's situation and those in the penalty cases was that Lile was "asked to discuss other past crimes as part of a legitimate rehabilitative program conducted within prison walls."[117] Because Lile was in prison, the plurality also examined the State's interest in the program. As Justice Kennedy stated, "It would be bitter medicine to treat as irrelevant the State's legitimate interests and to invalidate the SATP on the ground that it incidentally burdens an inmate's right to remain silent."[118]

Because the consequences for Lile were not severe enough to warrant constitutional concern, the fact that they were imposed automatically was unimportant to the plurality.[119] The plurality also rejected the distinction between rewards and penalties. It noted that such a distinction would give States "perverse incentives to assign all inmates convicted of sex offenses to maximum security prisons" so that the option to enter the SATP would be based on a reward instead of a penalty.

B. *Justice O'Connor's Concurrence*

Justice O'Connor concurred with the plurality that the consequences of Lile not participating in the SATP did not rise to the level of compulsion necessary to invoke protection from self-incrimination.[120] However, Justice O'Connor did not agree with the plurality's reasoning. For O'Connor, the "Fifth Amendment compulsion standard is broader than the 'atypical and significant hardship' standard" that the plurality put forth.[121] O'Connor found the penalty cases to be relevant, but believed that the penalties that Lile faced were not "serious enough to compel him to be a witness against himself."[122]

O'Connor noted that some of the "tough choice" cases certainly had a liberty interest at stake and distinguished those cases because they imposed

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116 *See id.* at 38 (citing due process cases).

117 *McKune*, 536 U.S. at 40-41.

118 *Id.* at 41.

119 *Id.* at 44.

120 *Id.* at 48 (O'Connor, J., concurring).

121 *Id.*

122 *Id.* at 50 (O'Connor, J., concurring).

punishment "through a fair criminal process."[123] O'Connor also disagreed with the *Sandin* standard that the plurality applied to Fifth Amendment cases, as the standard for compulsion was not the same as the standard used in due process claims.[124] For O'Connor, "the Fifth Amendment compulsion standard is broader than the 'atypical and significant hardship' standard [used] for evaluating due process claims in prisons."[125]

Beyond these disagreements, O'Connor did not put forth significant guidance. She found "the plurality's failure to set forth a comprehensive theory of the Fifth Amendment privilege against self-incrimination troubling."[126] Given the circumstances of this case, O'Connor noted that because "the penalties assessed against [Lile] in response to his failure to incriminate himself are [not] compulsive on any reasonable test, I need not resolve this dilemma to make my judgment in this case."[127] Thus, O'Connor rejects the plurality's approach, but still finds no constitutional violation.

C. *Justice Steven's Dissent*

Writing for the dissenters,[128] Justice Stevens disagreed with both the plurality and the concurrence's finding that the consequences of not participating in the SATP were not severe enough to qualify as compulsion.[129] According to the dissent, any one individual penalty might not be enough to find compulsion, but the "aggregate effect of those penalties" created compulsion.[130]

For the dissent, "the right to remain silent is itself a liberty interest."[131] The penalty cases clearly established that deprivation of a liberty interest is not required by any Fifth Amendment case and nothing suggested "compulsion should have a different meaning in the prison context."[132] The principal distinction between the penalty cases and the tough choice cases was that in penalty cases there was a sanction for disobeying a direct order and in the tough choices cases there was the mere risk of adverse conse-

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123 *McKune*, 536 U.S. at 52-53 (acknowledging that this theory does not explain all of the Courts precedent).

124 *Id.*

125 *Id.* at 50.

126 *Id.* at 53.

127 *Id.* at 54.

128 Justices Souter, Ginsburg, and Breyer joined the dissent.

129 *McKune*, 536 U.S. at 54-57 (Stevens, J., dissenting).

130 *Id.* at 67 (Stevens, J., dissenting).

131 *Id.* at 57.

132 *Id.* at 58.

quences.[133] Further, the dissent did not view this distinction as new and instead posited that it is well established in Supreme Court precedent.[134] The dissent also disagreed with the plurality and Justice O'Connor's characterization of the consequences that Lile faced for not complying with SATP as merely a loss of benefit and viewed the distinction between rewards and penalties as crucial to finding Fifth Amendment compulsion.[135]

However, what the dissent found most disturbing was what Stevens described as the "ad hoc appraisal of the benefits of obtaining confessions from sex offenders, balanced against the cost of honoring a bedrock constitutional right."[136] According to the dissent, "the sanctions are in fact severe, but even if that were not so, the plurality's policy judgment does not justify the evisceration of a constitutional right."[137] The dissent conceded that the SATP served a legitimate State interest in seeking to rehabilitate sex offenders.[138] But Stevens pointed out that:

> The program's laudable goals, however, do not justify reduced constitutional protection for those ordered to participate . . . . The State's interests in law enforcement and rehabilitation are present in every criminal case. If those interests were sufficient to justify impinging on prisoners' Fifth Amendment right, inmates would soon have no privilege left to invoke.[139]

According to the dissent, the right against self-incrimination is absolute. Once compulsion is established, it is unnecessary to determine whether or not there is a State interest at issue. Even if there is an important State interest at issue, it is unacceptable to balance such an interest against a Constitutional right, because the right is a liberty interest in and of itself.

IV. *MCKUNE V. LILE*: EVISCERATION OF A BEDROCK CONSTITUTIONAL RIGHT

The *McKune* plurality did not rely on self-incrimination case law in its opinion when it sought to add the atypical and significant hardship requirement. Determining the ramifications of this departure may be of little practical significance, however, because the *McKune* plurality opinion is not binding precedent. The extent to which *McKune* is binding is examined first. Regardless of its precedential value, the plurality opinion is of signifi-

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133 *Id.* at 60-62.
134 *Id.* at 61-62.
135 *McKune*, 536 U.S. 61-63.
136 *Id.* at 54.
137 *Id.* (Stevens, J., dissenting).
138 *Id.* at 68.
139 *Id.* at 68-69.

cant theoretical interest because it seems to create a prisoner exception to the right against self-incrimination and thus, the soundness of this approach is also examined.

A. Mckune *as Precedent*

The *McKune* case was remanded to the Tenth Circuit, which issued a brief opinion. The Tenth Circuit vacated their prior opinion and remanded the case to the district court with an order to dismiss Lile's complaint.[140] In an interesting twist, the Tenth Circuit noted that Justice O'Connor's opinion set the relevant standard for Fifth Amendment compulsion claims.[141]

To reach this result the Tenth Circuit cited *Marks v. United States*.[142] *Marks* offers a framework that sometimes allows for finding a holding in decisions where there is no majority opinion. What has become known as a "*Marks* analysis," is possible when five Justices cannot agree on a rationale, and instructs, "[t]he holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[143]

Justice O'Connor's concurrence in *McKune* is clearly narrower than the plurality's opinion. O'Connor did not seek to change Fifth Amendment jurisprudence, but instead decided *McKune* by simply finding that a transfer to maximum security prison and the other lost privileges did not rise to the level of compulsion.[144] The plurality agreed with Justice O'Connor on this point, but would have raised the hurdle necessary to find compulsion. For the plurality, in order to find compulsion it was necessary for the adverse consequences to constitute "atypical and significant hardship."[145] The plurality raises the hurdle even higher, requiring a balancing of the state's interest against the inmate's Fifth Amendment right.[146]

Given the plurality's expansion of the State's ability to compel incrimination, Justice O'Connor's opinion can be considered a subset of the

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140 Lile v. McKune, 299 F.3d 1229, 1230 (10th Cir. 2002).

141 *Id.*

142 430 U.S. 188 (1977).

143 *Marks*, 430 U.S. at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). In *Marks*, the Court relied on an earlier plurality opinion that stated that the First Amendment sometimes protects obscene materials. *Marks*, 430 U.S. at 193-94. The Court was able to declare a plurality opinion the holding because there was also a concurrence that found obscene material to always be protected by the First Amendment. *Id.* Essential to the *Marks* decision was that one plurality rationale included a distinct subset of another plurality; that subset became the holding under the *Marks* analysis.

144 *McKune*, 536 U.S. at 48-49.

145 *Id.* at 38-39.

146 *Id.* at 39-41.

plurality decision. The Tenth Circuit has followed the O'Connor concurrence in several other cases as well.[147] While there is little doubt that Justice O'Connor's opinion was the narrowest that concurred with the judgment, even Justice O'Connor realized the limitations of her opinion. Justice O'Connor acknowledged as much by stating that:

> [T]he plurality's failure to set forth a comprehensive theory of the Fifth Amendment privilege against self-incrimination [is] troubling. But because this case indisputably involves burdens rather than benefits, and because I do not believe the penalties assessed against respondent in response to his failure to incriminate himself are compulsive on any reasonable test, I need not resolve this dilemma to make my judgment in this case.[148]

If Justice O'Connor refused to detail complete principles, what help is her decision? O'Connor did state that, "the proper theory should recognize that it 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*."[149] The problem with applying this theory is that it begs the question, "What is a fair criminal process?" Without a meaningful explanation of what is meant by a "fair criminal process," we are left with the unhelpful conclusion that a fair criminal process is one in which the Supreme Court says that a defendant is not compelled to incriminate himself, and an unfair criminal process is one where the Court says that a defendant is compelled to incriminate himself. Given the circularity of this reasoning and the difficulty in applying such a vague test, any Fifth Amendment theory must have more substance.

In her defense, O'Connor did not claim to be putting forth a comprehensive theory and also recognized "this explanation of the privilege is incomplete, as it does not fully account for all of the Court's precedents in this area."[150] It is probably undesirable to develop a theory that comports with all of the Supreme Court's Fifth Amendment cases. Given that the Court's views of the Fifth Amendment have changed considerably since its inception, especially over the past fifty years, such a task is probably also

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147 *See* Reed v. McKune, 298 F.3d 946, 952 (10th Cir. 2002) ("Justice O'Connor's narrower position in her concurrence represents the holding of the plurality decision"); Searcy v. Simmons, 299 F.3d 1220, 1225 (10th Cir. 2002) ("Because Justice O'Connor based her conclusion on the narrower ground that the KDOC's policy was not compulsion under the Fifth Amendment, we view her concurrence as the holding of the Court in McKune"); *see also* Dzul v. Nevada, 56 P.3d 875, 884-86 (Nev. 2002) (finding that the adverse consequences for failure to participate in sex offender program did not violate the right against self-incrimination under any of three *McKune* opinions).

148 *McKune*, 536 U.S. 53-54 (2002).

149 *Id.* at 53 (emphasis added).

150 *Id.* (comparing Griffin v. California, 380 U.S. 609 (1965) (holding that prosecutor cannot comment on defendant's failure to testify); with Ohio Adult Parole Auth. v. Woodward, 523 U.S. 272 (1998) (holding that there is no right to silence at a clemency interview)).

impossible. Instead, it is wiser to examine the theoretical background behind the Fifth Amendment. Given Justice O'Connor's view of the *McKune* case, it was unnecessary and in fact appropriate for her to stop short of putting forth such a theory.

B. McKune*: The Prisoner Exception to the Fifth Amendment*

McKune illustrates an interesting approach to the Fifth Amendment right against self-incrimination. The plurality adds an "atypical and significant hardship" requirement, but, nowhere in prior Supreme Court precedent is there a suggestion that this approach is mandated when one seeks to exercise the Fifth Amendment in a prison environment. Instead, the Supreme Court looked to Fourteenth Amendment Due Process jurisprudence for guidance in analyzing claims within the prison walls. Both Justice O'Connor and the dissent suggest that the plurality's view of the Fifth Amendment does not fit within a comprehensive theory for the right against self-incrimination. It thus becomes necessary to examine this criticism of the plurality opinion. If faults in this reasoning prove fatal and it cannot fit squarely within Fifth Amendment jurisprudence, then the plurality is essentially suggesting an exception to the right against self-incrimination.

Two issues must be examined in order to determine the appropriateness of the plurality applying a Fourteenth Amendment constitutional test to a Fifth Amendment self-incrimination situation. First, the borrowed principle of an "atypical and significant hardship" must be constitutionally sound. Second, there must be similarities between the two amendments in order to assure a coherent test.

1. The (Un)Soundness of the "Atypical and Significant Hardship" Standard

In *Sandin v. Connor*,[151] a prisoner brought a civil rights claim seeking to challenge imposition of disciplinary segregation for misconduct.[152] The Supreme Court held that formal procedures were not necessary because the punishment did not increase the prisoner's sentence and did not impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[153] However, four of the *Sandin* Justices dissented from this approach[154] and found this standard to be vague and overly sub-

151 515 U.S. 472 (1995).

152 *Id.* at 476.

153 *Id.* at 483.

154 *Id*. at 488 (Ginsburg, J., dissenting) (joined by Justice Stevens); *id.* at 491 (Breyer, J., dissent-

jective. In commenting on the vagueness, Justice Ginsburg asked, "What design lies beneath these words? The Court ventures no examples, leaving consumers of the Court's work at sea, unable to fathom what would constitute an 'atypical, significant deprivation,' and yet not trigger protection under Due Process Clause directly."[155] Also, in noting that the standard was subjective and what constituted a due process violation would vary from prison to prison, Ginsburg noted that "the process due by reason of the Constitution . . . should not depend on particularities of the local prison's code."[156] Thus, the fact that *Sandin* itself may lie on shaky footing is reason enough to question its extension into Fifth Amendment jurisprudence.[157]

2. The Fifth and Fourteenth Amendments: New *Boyd*ian Reasoning

If the differences between the Fifth and Fourteenth Amendments are too great, then using *Sandin's* atypical and significant hardship requirement in self-incrimination cases is unreasonable. "When law fails to satisfy that simple test of rationality, sooner or later the law will be revised to accord with another principle that better meets the felt needs of the time."[158] This principle is illustrated by the Court's decision in *Boyd v. United States*,[159] where the Court merged the Reasonableness Clause of the Fourth Amendment with the Incrimination Clause of the Fifth Amendment.[160] Differences in the policies behind the two clauses, however, caused the Court to re-

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ing) (joined by Justice Souter). These are the same four Justices that dissent in *McKune*.

155 *Id.* at 490 n.2.

156 *McKune*, 122 S. Ct. at 490.

157 *See* Philip W. Sbaratta, Note, Sandin v. Conner*: The Supreme Court's Narrowing of Prisoners' Due Process and the Missed Opportunity to Discover True Liberty*, 81 CORNELL L. REV. 744, 773 (1996) (arguing *Sandin* "reduces prisoners' due process rights to an unacceptable level . . . [and] renders prisoners susceptible to virtually unlimited prison official discretion over substantial interests that should invoke the Due Process Clause on their own weight"); Quan Luong, Casenote, Sandin v. Conner*: Prisoners' Rights and State-Created Liberty Interests- Has the Court Come Full Circle?*, 7 GEO. MASON U. CIV. RTS. L.J. 25, 41 (1997) (stating that "the *Sandin* decision appears to represent an uneasy attempt to limit prisoners rights specifically, while continuing to recognize positivist liberty interests generally"); Mark Adam Merolli, Note and Comment, Sandin v. Conner's *"Atypical and Significant Hardship" Signals the Demise of State-Created Liberty Interests for Prisoners*, 15 ST. LOUIS U. PUB. L. REV. 93, 122 (1995) (finding that *Sandin* "has functionally eliminated the concept of state-created liberty interests for prisoners"); Michelle C. Ciszak, Note, Sandin v. Conner*: Locking Out Prisoners' Due Process Claims*, 45 CATH. U. L. REV. 1101, 1144-45 (1996) ("the Sandin Court created a thirty-year setback in prisoners' rights law and signaled to prisoners that their constitutional claims may be forever 'locked out' from judicial review").

158 McKay, *supra* note 8, at 197.

159 116 U.S. 616 (1886).

160 *Id.* at 630 (noting that the two Amendments "almost run into each other").

evaluate the usefulness of this fusion.[161] Similarly, if the differences between the Due Process Clause and Incrimination Clause are too great, it is improper to borrow the *Sandin* test in *McKune*, as *Boyd*'s flawed reasoning would be repeated in a different context.

Much of the discussion revolving around self-incrimination jurisprudence suggests that the secret to understanding the clause involves looking to both the history and the policies of the Fifth Amendment.[162] To determine whether it is rational to apply the atypical and significant hardship requirement in self-incrimination cases, however, only the policies will be examined in detail. The notion that the history of the Fifth Amendment is important probably comes from Justice Frankfurter's description of the privilege as "a specific provision of which it is particularly true that 'a page of history is worth a volume of logic.'"[163] It has been pointed out, however, that Frankfurter made this claim when looking at "a self-incrimination issue on which the historical practice was quite clear."[164] In most situations, including this one, changed circumstances make the history of the Fifth Amendment largely irrelevant.[165] For this reason, the Supreme Court has recently noted that the Fifth Amendment provides "no helpful legislative history."[166] Additionally, even when history provides insight, it is not always followed.[167] Commentators have noted:

> When the common law appears to accept a practice as consistent with the original understanding of the privilege, that does not always end the matter. Where the historical confines of the privilege seem not to fit its general lessons of history, the Court has not hesitated to note . . . that "a noble principle often transcends its origins."[168]

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161 *See supra* Part I.B.4.

162 LAFAVE ET. AL., *supra* note 68, at § 8.14(c) ("two common threads that run through the Supreme Court opinions dealing with self-incrimination issues [are] the frequent reference to the history of the privilege and . . . the basic policies that underlie the privilege").

163 Ullmann v. United States, 350 U.S. 422, 438 (1956) (citation omitted).

164 LAFAVE ET. AL., *supra* note 68, at § 8.14(b). Frankfurter found that a grant of immunity displaces the witness' right to claim the privilege. *Ullmann*, 350 U.S. at 434.

165 *See* LAFAVE ET. AL., *supra* note 68, at § 8.14(b) ("changed circumstances make rare such a square fit").

166 United States v. Balsys, 524 U.S. 666, 674 (1998). The history of self-incrimination "sheds no light whatever on the subject, unless indeed that which is adverse, resulting from the contrast between the dilemma of which petitioner complains and the historical excesses which gave rise to the privilege." McGautha v. California, 402 U.S. 183, 213 (1971).

167 In *Marchetti v. United States*, 390 U.S. 39, 53 (1968), the Court noted that while "[h]istory . . . offers no ready illustrations of the privilege's application to prospective acts, but the occasions on which such claims might appropriately have been made must necessarily have been very infrequent." "We are, in any event, bid to view the constitutional commands as 'organic living institutions,' whose significance is 'vital not formal.'" *Id.*

168 LAFAVE ET. AL., *supra* note 68, at § 8.14(b) (quoting Miranda v. Arizona, 384 U.S. 436, 460

And as Judge Friendly pointed out, "[a]lthough this history is absorbing," it is not "a *vade mecum*."[169] "The privilege has always been responsive to the particular needs and problems of the time."[170] For these reasons, this Note will focus on the policies of the Fifth Amendment rather than its history.[171]

There have been numerous policy justifications suggested to explain the privilege against self-incrimination.[172] In fact, so many policies have been put forth that one commentator has pointed out the "[m]any discussions by judges and scholars have obscured the privilege behind clouds of eulogy."[173] While it must be conceded that no one policy can explain all of the facets of self-incrimination doctrine,[174] the importance of examining policy cannot be understated. "Reexamination of the policies of the privilege . . . is indispensable to any reconsideration of the proper scope of the fifth amendment and peculiarly necessary because of the extent to which eloquent phrases have been accepted as a substitute for thorough thought."[175]

Two related policies are particularly important. The first fits into the broad category of systemic rationales that justify the privilege as "an instrumentalist guarantee designed to further procedural objectives that exist independent of the privilege,"[176] while the second is a dignity rationale that views the "privilege as an end in itself, serving to recognize human dignity and individuality."[177]

The first policy relates to the idea that the State must "bear the full responsibility for establishing guilt."[178] Under this view the privilege against

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(1966)).

169 Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 678 (1968). A v*ade mecum* is a useful reference, such as a handbook. OXFORD AMERICAN DICTIONARY 1027 (1980).

170 Friendly, *supra* note 169, at 678. "Just as it is 'revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV,' it would be ludicrous to attempt to fix the proper scope of the privilege in light of what was appropriate under the Stuarts of Cromwell. 'The history of the privilege does not settle the policy of the privilege' . . . ." *Id.* at 679.

171 *See* LAFAVE ET. AL., *supra* note 68, at § 8.14(c). "Where the history is entangled and the current context substantially changed, a broader, functional analysis is commonly seen as the more appropriate source for determining the modern day scope of a constitutional right." *Id.*

172 *See, e.g.,* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) (listing no less than seven potential policies).

173 AMAR, *supra* note 61, at 65.

174 At least none that this author is capable of comprehending.

175 Friendly, *supra* note 169, at 679.

176 LAFAVE ET. AL., *supra* note 68, at § 8.14(d).

177 *Id.* at § 8.14(e).

178 *See id.* at § 8.14(d).

self-incrimination is justified to preserve the accusatorial nature of the criminal justice process.[179] The system is fairer and more effective when the government is forced to establish its case through its own independent labors rather than on the testimony of the accused.[180] Of course, this policy cannot explain every facet of the doctrine,[181] but nonetheless it is clear that the privilege adds some substance to criminal procedure.[182]

Because systemic rationales alone cannot justify the privilege against self-incrimination, the second policy has to do with "our respect for the inviolability of the human personality."[183] This view justifies the privilege against self-incrimination based upon individual privacy concerns. It is feared that "[c]ompelling a person to condemn himself out of his own mouth—and thereby to acknowledge his guilt—is said to deprive that person of his moral autonomy."[184]

Because these two policies have no corollaries in due process jurisprudence, it was incorrect to extend *Sandin*'s principles into *McKune*. First, procedural due process does not mandate any particular procedures. Rather, some fair process is required when the State seeks to deprive someone of life, liberty, or property.[185] In contrast, the privilege against self-incrimination forbids the use of inquisitorial procedures, even if one might consider these procedures to be effective. Thus, because the privilege against self-incrimination excludes a class of procedural options that might past muster under due process standards, it is inappropriate to use a due process standard to evaluate a self-incrimination claim. Similarly, by its very nature, due process is procedural, not substantive. Thus, while a pro-

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179 *See, e.g.,* Rogers v. Richmond, 365 U.S. 534, 540 (1961) (noting "ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."); Malloy v. Hogan, 378 U.S. 1, 7 (1964) (relying on *Rogers* and noting that "the American system of criminal prosecution is accusatorial, not inquisitorial, and the Fifth Amendment privilege is its mainstay . . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth.").

180 *See, e.g.,* Schmerber v. California, 384 U.S. 757, 762 (1966) (observing "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors.").

181 For example, "[i]t fails to explain . . . the availability of the privilege in contexts in which the government is not seeking evidence, such as civil suits brought by private parties." LAFAVE ET. AL., *supra* note 68, at § 8.14(d).

182 *Cf.* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.4(c), at 562 (6th ed. 2000) (noting the liberty to engage in fundamental constitutional rights is protected by procedural due process).

183 LAFAVE ET. AL., *supra* note 68, at § 8.14(e).

184 *Id.*

185 *See* NOWAK & ROTUNDA, *supra* note 182, at § 13.4(c), at 552.

cedure that requires self-incrimination might be in place, it would violate the second policy in that it would directly violate individual privacy and the unconscionable situation of incriminating oneself.

While the best approach to attacking *McKune* may be a direct attack on *Sandin*,[186] *McKune* can also be criticized for borrowing a due process test for application in a self-incrimination setting when it is inappropriate to do so, thus engaging in a new form of "Boydian reasoning" that is just as problematic as the old. *Boyd*'s merging of two different constitutional clauses allowed for a more "liberal" construction of the Incrimination Clause than would be possible if read separately from the Reasonableness Clause.[187] *McKune*'s merging of two different constitutional clauses, on the other hand, allows for a more "conservative" construction of the Incrimination Clause than is possible if read apart from the Due Process Clause. Once the policy differences behind the Incrimination Clause and the Due Process Clause are acknowledged, the flaws in the *McKune* plurality's reasoning become clear. Thus, as a matter of theoretical consistency the "atypical and significant hardship" standard has no place in Incrimination Clause jurisprudence.

With no theoretical basis left to explain why a due process standard appears in a self-incrimination case, we are stuck with law that "fails to satisfy the simple test of rationality."[188] Prior Supreme Court precedent has never put much weight on the status of the person claiming the privilege, but the plurality essentially decides the case based on the fact that Lile is a prisoner. Without any theoretical justification for linking the Due Process Clause to the Incrimination Clause, the plurality, by ipse dixit, comes to conclusion that prisoner's have fewer Fifth Amendment rights, apparently creating an exception to the right against self-incrimination when the claimant is a prisoner.

V. IMPLICATIONS IN PROBATION REVOCATION

Despite the erroneous reasoning used by the plurality, *McKune* may prove to be influential for no other reason than it appears in a Supreme Court plurality opinion. For this reason, the atypical and significant hardship analysis is considered in the context of Antelope's probation revocation. Additionally, the soundness of borrowing a search and seizure test for the probation context is contemplated.

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186 *See supra* note 157.

187 *See* LAFAVE ET. AL., *supra* note 68, at §§ 2.8(b), 8.12(a).

188 *See* McKay, *supra* note 8, at 197.

A. United States v. Antelope*: The Probationer Exception*

Under the dissent's approach, there is little doubt that a probationer cannot suffer probation revocation for invoking his right against self-incrimination. Likewise, Justice O'Connor's concurrence seems to indicate that it is impermissible to send a probationer to prison for exercising his Fifth Amendment right. The plurality opinion, however, may have implicitly and perhaps deliberately indicated that it is proper to revoke a probation sentence for failing to comply with a sex offender rehabilitation program even without a grant of offer immunity. Analysis of each of these three approaches in greater detail follows.

Antelope's situation would clearly meet the dissent's requirements for finding Fifth Amendment compulsion. The penalty that Antelope faced for not complying with the sex offender treatment program was much greater than the consequences that Lile faced. Lile suffered a transfer from a medium security prison to a maximum-security prison. Antelope, on the other hand, went from his home to a federal prison. Even given the restrictions placed on probationers, it is difficult to imagine a more drastic penalty. This penalty for not providing potentially incriminating information would rise to the level of compulsion necessary for the dissent to find a violation of the Fifth Amendment.

In *McKune*, Justice O'Connor disagreed with the dissent, in that she did not view the penalties facing Lile as coercive enough to compel self-incrimination. Despite this difference of opinion in *McKune*, it is difficult to see how O'Connor's opinion could be construed to support the Montana district court's decision to revoke Antelope's probationary status and send him to prison. Justice O'Connor indicated that invoking a penalty that involved "longer incarceration . . . [is] far greater than those we have already held to constitute unconstitutional compulsion in the penalty cases . . . [and] imposition of such outcomes as a penalty for refusing to incriminate oneself would surely implicate 'liberty interest.'"[189] It does not take a great leap to presume that if a liberty interest is involved when a longer sentence is imposed, then a liberty interest must be involved when a prison sentence is imposed on a probationer. Therefore, O'Connor's concurrence should be construed as finding that the consequences facing Antelope were serious enough to amount to unconstitutional compulsion.

The plurality might apply the "atypical and significant hardship" requirement because Antelope, as a probationer, is not a completely free citizen. The issue would be whether the penalty Antelope suffers for not participating in a rehabilitation program constitutes an atypical and significant

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189 McKune v. Lile, 536 U.S. 24, 52 (2002).

hardship in relation to the ordinary incidents of probationer life. Being sent to prison would appear to fall within this category, as the revocation of parole is the ultimate price for a probationer. While there is no due process hearing right when a prisoner is transferred to another prison,[190] there is a due process hearing right when probation is revoked and the probationer is sent to prison.[191] Thus, because revocation of probation involves a liberty interest, it seems clear that under the "atypical and significant hardship" standard, a court should decide in Antelope's favor. The district judge in *Antelope*, however, did not stop after conducting the *Sandin* analysis.

B. *Fourth and Fifth Amendments: A Return to Old* Boyd*ian Reasoning*

At Antelope's probation revocation hearing, the district judge drew an analogy between Antelope's situation and a recent Fourth Amendment search and seizure case that involved a probationer.[192] In *United States v. Knights*, the Supreme Court held that a warrantless search of a probationer's apartment was reasonable within the meaning of the Fourth Amendment because it was supported by reasonable suspicion.[193] If a probationer is subject to fewer search and seizure protections under the Fourth Amendment, the district judge reasoned, then Antelope is subject to fewer self-incrimination protections under the Fifth Amendment.[194]

Before the soundness of extending *Knights*' principles into Incrimination Clause case law is examined and compared to *Boyd v. United States*, it should be noted that *Knights* appears to be a more sound decision than *Sandin*. The *Knights* decision is based on a sound textual interpretation of the Fourth Amendment,[195] while the *Sandin* test was a new creation and thus made it hard for lower courts to apply.[196] Furthermore, *Knights* was a

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190 *See, e.g.,* Meachum v. Fano, 427 U.S. 215 (1976) (holding due process does not entitle prisoner to a hearing when transferred to a prison with substantially less favorable conditions).

191 *See, e.g.,* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (holding that when probationer is not afforded either a preliminary revocation hearing or a final hearing, revocation of probation does not meet standards of due process).

192 Excerpts of Record of Defendant-Appellant at 235-237, United States v. Antelope, No. 01-300097 (9th Cir. filed June 27, 2002).

193 534 U.S. 112 (2001).

194 Excerpts of Record of Defendant-Appellant at 235-237, United States v. Antelope, No. 01-300097 (9th Cir. filed June 27, 2002).

195 *See* Jonathan T. Skrmetti, *The Keys to the Castle: A New Standard for Warrantless Home Searches in United States v. Knights*, 25 HARV. J.L. & PUB. POL'Y 1201, 1201, 1213 (2002) (stating "[w]ith *Knights*, the Court has offered a streamlined Fourth Amendment jurisprudence with a straightforward test to determine whether a search is constitutional [and that] it seems likely that the jurisprudence of *Knights* will prevail").

196 *See, e.g.,* Scott F. Weisman, Note, Sandin v. Conner*: Lowering the Boom on the Procedural*

unanimous decision, which featured only one short concurrence,[197] while four of the justices dissented in *Sandin*.[198] Aside from these strengths, the benefits of borrowing from *Knights* for analysis of a self-incrimination claim stop there.

When a district court seeks to borrow the *Knights* standard for reasonableness regarding probationer searches and apply it to a self-incrimination claim, the court is making the same mistake that the Supreme Court made more than one hundred years ago in *Boyd*. For it to be proper to transpose the *Knights* Fourth Amendment reasonableness standard into the compulsion standard in a Fifth Amendment claim, the two clauses must be similar enough to make such a jump logical. As became clear in the years following *Boyd*, differences in Fourth and Fifth Amendments make it improper to borrow search and seizure analysis for the self-incrimination analysis. "Unlike the . . . Fourth Amendment, which at least confines the dispute to the factual aspects of what is 'reasonable,' the privilege against self-incrimination yields to no convenient formula."[199] The "reasonableness" standard makes it is easier to adjust search and seizure analysis to a variety of situations. These differences suggest that the mere fact that a search of a probationer's home is reasonable under the Fourth Amendment is completely irrelevant to whether the threat of probation revocation amounts to unconstitutional compulsion.

In self-incrimination cases, courts often turn to the policies behind the privilege of self-incrimination when confronted with a novel situation. The Fifth Amendment requires that the government "bear the full responsibility for establishing guilt" seems to be contradicted by search and seizure case law. In a typical search and seizure, the accused may be compelled to allow the State to take evidence from the accused. But the Fourth Amendment does not prevent the defendant from being used as a source of evidence in this situation. There is something about testimonial compulsion that is qualitatively different than other forms of compelled evidence.[200] Thus, this unique characteristic of the privilege against self-incrimination sets the Fifth Amendment apart from the Fourth Amendment. Indeed this distinction is well recognized. "The Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise

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Rights of Prisoners, 46 AM. U. L. REV. 897, 913-19 (1997) (arguing *Sandin* takes a new approach for state-created liberty interests that will prove difficult for lower courts to apply).

197 *See* United States v. Knights, 534 U.S. 112, 122 (Souter, J., concurring).

198 *See* Sandin v. Conner, 515 U.S. 472, 488 (1995) (Ginsburg, J., dissenting) (joined by Stevens, J.); *id.* at 491 (Breyer, J., dissenting) (joined by Souter, J.).

199 McKay, *supra* note 8, at 194.

200 LAFAVE ET. AL., *supra* note 68, at § 8.14(c).

proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort."[201] This distinction is based on the fact that "[c]ompelling a person to condemn himself out of his own mouth—and thereby to acknowledge his guilt—is said to deprive that person of his moral autonomy to come to grips with his conscience on his own terms."[202] It is for this unique reason that the Fifth Amendment right against self-incrimination exists. By applying a ruling that was created without this policy in mind, the *Antelope* decision improperly extended the Fourth Amendment principle of 'reasonableness' that is not part of self-incrimination, thus reviving the same faulty reasoning that was used in *Boyd*.

C. *A Sex Offender Exception to the Fifth Amendment*

The Ninth Circuit has yet to rule on the merits of Antelope's self-incrimination claim. The question thus remains, if decisions such as *Antelope* and *McKune* continue, what is left of the right against self-incrimination? It is hypothesized that if *McKune* and *Antelope* and other developments regarding sex offenders, are viewed together, courts may in fact be creating a sex offender exception to the right against self-incrimination. This approach will first be criticized as lacking a theoretical foundation and secondly for judicial dishonesty. Next, feasible alternatives to eviscerating a constitutional right will be considered to help deal with the often imminent threat that sex offenders present to society.

The Ninth Circuit has yet to decide the merits of Antelope's Fifth Amendment argument. Additionally, there is some indication that *McKune* will have only limited precedential value.[203] There is, however, the danger that exceptions for prisoners and probationers will be construed broadly as an exception to the privilege against self-incrimination that applies to more run of the mill criminals. Yet, it would be erroneous to extend the reasoning in these two cases too far. That these two cases involve sex offenders is more than just a coincidence. In fact, what courts may implicitly be creating is a "sex offender" exception to the privilege against self-incrimination. This would not be the first time that courts and legislatures have tested the limits of the law on sex offenders.[204] Given the unique policies behind the

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201 *Id.*

202 *Id.*

203 *See supra* Part IV.A.

204 *See, e.g.,* FED. R. EVID. 413-415 (creating sex offender exceptions to the traditional rule that prohibits the use of character evidence against a defendant); N.J. STAT. ANN. § 2C:7-2 (West 2002) (requiring convicted sex offenders to register with law enforcement when released into the community and known as Megan's law); CAL. PENAL CODE § 645 (West 2002) (requiring chemical castration as a

privilege against self-incrimination, however, it is often improper to borrow standards from other areas of constitutional law and thus, there are great constitutional concerns in creating a sex offender exception to the privilege against self-incrimination.

Supporters of special treatment for sex offenders often justify their position with claims that sex offenders exhibit higher rates of recidivism than other criminals.[205] The problem with using recidivism rates as a justification is that it is subject to empirical attacks. For example, some have argued that sex offenders present no greater risk for recidivism than many other classes of offenders.[206] If this were indeed true, there are at least two possible paths that the law could take. First, the law could be changed so that all offenders with high rates of recidivism would be subjected to the exceptions that are created for sex offenders. The legal arguments against applying exceptions to sex offenders would maintain the same force when applied to other types of offenders. But, because the dismay that the public exhibits towards sex offenders does not transfer to other classes of offenders, it seems unlikely that such a movement would have much success.

There is, however, a second possibility. The special legal exceptions for sex offenders could be removed. This course also presents some dangers. The thrust behind much of the movement for harsher treatment of sex offenders has been because of a realization of the devastating harm that such criminals cause to their victims. There is the danger that any move to ease the treatment of sex offenders would result in punishments that are too lenient. This could be avoided by increasing the use and length of traditional punishments, such as longer sentencing and rehabilitation facilitated by grants of immunity. This course maintains true to the realization that sex offenders present a serious danger to society while acknowledging the State's interest in rehabilitation. However, this alternative avoids the constitutional manipulation necessary to create exceptions to the privilege against self-incrimination.

CONCLUSION

The plurality in *McKune* attempts to create an exception to the right against self-incrimination. Such a creation has serious implications, not the

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condition of parole for certain second time sex offenders).

205 *See, e.g.,* McKune v. Lile, 536 U.S. 24, 32-33 (2002).

206 *See, e.g.,* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 897 (1995) (arguing "it is simply not true that sex offenders have unusually high recidivism rates").

least of which is that the Supreme Court is tacitly opening the door to other exceptions that may further eviscerate the right against self-incrimination. *Antelope* can be viewed as a logical extension of this movement by creating a probationer exception, as well.

It is more likely, however, that *McKune* implicitly sent a signal to courts throughout the country, that the right against self-incrimination should not stand in the way of rehabilitating sex offenders. The creation of this sex offender exception may result in a transformation in self-incrimination jurisprudence, as it undermines two of the essential policies behind the privilege. The State no longer would have to bear the full responsibility for establishing guilt when a sex offender is made to provide information about past offenses as a condition of rehabilitation. Of equal concern is that self-incrimination damages the part of human personality that the specifically Fifth Amendment seeks to protect.

In dealing with sex offenders, one commentator advised, "Whoever fights monsters should see to it that in the process he does not become a monster."[207] Few can argue that sex offenders are not among the worst monsters that come through the criminal justice system. But it should be remembered that how a society treats its worst reflects on the moral strength of that society.

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207 Joelle Anne Moreno, *Whoever Fights Monsters Should See to it That in the Process He Does Not Become a Monster: Hunting the Sexual Predator With Silver Bullets—Federal Rules of Evidence 413-415—and a Stake Through the Heart*—Kansas v. Hendricks, 49 FLA. L. REV. 505, 505 (1997) (quoting FRIEDRICH W. NIETZSCHE, BEYOND GOOD AND EVIL 89 (Walter Kaufmann trans., 1989)).

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