SUPREME COURT OF THE UNITED STATES

No. 00–1187

DAVID R. MCKUNE, WARDEN, ET AL., PETITIONERS
v. ROBERT G. LILE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[June 10, 2002]

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

No one could possibly disagree with the plurality's statement that "offering inmates minimal incentives to participate [in a rehabilitation program] does not amount to compelled self-incrimination prohibited by the Fifth Amendment." *Ante*, at 2. The question that this case presents, however, is whether the State may punish an inmate's assertion of his Fifth Amendment privilege with the same mandatory sanction that follows a disciplinary conviction for an offense such as theft, sodomy, riot, arson, or assault. Until today the Court has never characterized a threatened harm as "a minimal incentive." Nor have we ever held that a person who has made a valid assertion of the privilege may nevertheless be ordered to incriminate himself and sanctioned for disobeying such an order. This is truly a watershed case.

Based on an ad hoc appraisal of the benefits of obtaining confessions from sex offenders, balanced against the cost of honoring a bedrock constitutional right, the plurality holds that it is permissible to punish the assertion of the privilege with what it views as modest sanctions, provided that those sanctions are not given a "punitive" label. As I shall explain, 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. Despite the plurality's meandering attempt to justify its unprecedented departure from a rule of law that has been settled since the days of John Marshall, I respectfully dissent.

I

The text of the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." It is well settled that the prohibition "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.' " *Minnesota* v. *Murphy,* 465 U. S. 420, 426 (1984) (quoting *Lefkowitz* v. *Turley,* 414 U. S. 70, 77 (1973)). If a person is protected by the privilege, he may "refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." *Id.*, at 78 (citing *Kastigar* v. *United States,* 406 U. S. 441 (1972)). Prison inmates—including sex offenders—do not forfeit the privilege at the jailhouse gate. *Murphy*, 465 U. S., at 426.

It is undisputed that respondent's statements on the admission of responsibility and sexual history forms could incriminate him in a future prosecution for perjury or any other offense to which he is forced to confess.[1] It is also

[1]As a participant in the Sexual Abuse Treatment Program (SATP), respondent would be required to sign an "Admission of Responsibility" form setting forth the details of the offense for which he was convicted. Because he had testified at trial that his sexual intercourse with the victim before driving her back to her car was consensual, the District Court found that a written admission on this form would subject respondent to a possible charge of perjury. 24 F. Supp. 2d 1152, 1157 (Kan. 1998). In addition, the SATP requires participants to "generate a

clear that he invoked his Fifth Amendment right by refusing to participate in the SATP on the ground that he would be required to incriminate himself. Once he asserted that right, the State could have offered respondent immunity from the use of his statements in a subsequent prosecution. Instead, the Kansas Department of Corrections (Department) ordered respondent either to incriminate himself or to lose his medium-security status. In my opinion that order, coupled with the threatened revocation of respondent's Level III privileges, unquestionably violated his Fifth Amendment rights.

Putting to one side the plurality's evaluation of the policy judgments made by Kansas, its central submission is that the threatened withdrawal of respondent's Level III and medium-security status is not sufficiently harmful to qualify as unconstitutional compulsion. In support of this position, neither the plurality nor JUSTICE O'CONNOR cites a single Fifth Amendment case in which a person invoked the privilege and was nevertheless required to answer a potentially incriminating question.[2]

The privilege against self-incrimination may have been

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written sexual history which includes all prior sexual activities, regardless of whether such activities constitute uncharged criminal offenses." *Id.*, at 1155. The District Court found that the form "clearly seeks information that could incriminate the prisoner and subject him to further criminal charges." *Id.*, at 1157.

[2] Petitioners relied on two cases, *Fisher* v. *United States,* 425 U. S. 391 (1976), and *United States* v. *Washington,* 431 U. S. 181, 187–188 (1977). In *Fisher*, we held that the privilege does not permit the target of a criminal investigation to prevent his lawyer from answering a subpoena to produce incriminating documents. We reached that conclusion because the person asserting the privilege was not the one being compelled. In *Washington,* cited *ante*, at 8, a grand jury witness voluntarily answered questions after being advised of the privilege, though not of the fact that he was a potential defendant in danger of being indicted. In neither case did the witness assert the privilege against incriminating himself.

born of the rack and the Star Chamber, see L. Levy, Origins of the Fifth Amendment 42 (I. Dee ed. 1999); *Andresen* v. *Maryland,* 427 U. S. 463, 470 (1976), but the Framers had a broader view of compulsion in mind when they drafted the Fifth Amendment.[3] We know, for example, that the privilege was thought to protect defendants from the moral compulsion associated with any statement made under oath.[4] In addition, the language of the Amendment, which focuses on a courtroom setting in which a defendant or a witness in a criminal trial invokes the privilege, encompasses the compulsion inherent in any judicial order overruling an assertion of the privilege. As Chief Justice Marshall observed in *United States* v. *Burr*, 25 F. Cas. 38, 40 (No. 14,692e) (CC Va. 1807): "If, in such a case, he say upon his oath that his answer would incriminate himself, the court can demand no other testimony of the fact."

Our holding in *Malloy* v. *Hogan,* 378 U. S. 1 (1964), that the privilege applies to the States through the Fourteenth Amendment, determined that the right to remain silent is itself a liberty interest protected by that Amendment. We explained that "[t]he Fourteenth Amendment secures

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[3] The origins and evolution of the privilege have received significant scholarly attention and debate in recent years. See, *e.g.*, Hazlett, Nineteenth Century Origins of the Fifth Amendment Privilege Against Self-Incrimination, 42 Am. J. Legal Hist. 235 (1998); Amar & Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 Mich. L. Rev. 857 (1995). The historical account is complicated by the fact that before *Boyd* v. *United States*, 116 U. S. 616 (1886), the privilege was treated as a common-law evidentiary doctrine separate from the Fifth Amendment. During that time, the privilege was also subsumed within general discussions of the voluntariness of confessions.

[4] Alschuler, A Peculiar Privilege in Historical Perspective, in The Privilege Against Self-Incrimination 181, 192–193 (R. Helmholz et al. eds. 1997) (discussing historical sources which indicate that the "privilege prohibited (1) incriminating interrogation under oath, (2) torture, and (3) probably other forms of coercive interrogation such as threats of future punishment and promises of leniency" (footnotes omitted)).

against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak *in the unfettered exercise of his own will, and to suffer no penalty* . . . for such silence." *Id.,* at 8 (emphasis added). Since *Malloy*, we have construed the text to prohibit not only direct orders to testify, but also indirect compulsion effected by comments on a defendant's refusal to take the stand, *Griffin* v. *California,* 380 U. S. 609, 613–614 (1965), and we have recognized that compulsion can be presumed from the circumstances surrounding custodial interrogation, see *Dickerson* v. *United States,* 530 U. S. 428, 435 (2000) ("[T]he coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself'") (quoting *Miranda* v. *Arizona,* 384 U. S. 436, 439 (1966)). Without requiring the deprivation of any other liberty interest, we have found prohibited compulsion in the threatened loss of the right to participate in political associations, *Lefkowitz* v. *Cunningham,* 431 U. S. 801 (1977), forfeiture of government contracts, *Lefkowitz* v. *Turley,* 414 U. S., at 82, loss of employment, *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of City of New York,* 392 U. S. 280 (1968), and disbarment, *Spevack* v. *Klein,* 385 U. S. 511, 516 (1967). None of our opinions contains any suggestion that compulsion should have a different meaning in the prison context. Nor is there any support in our Fifth Amendment jurisprudence for the proposition that nothing short of losing one's livelihood is sufficient to constitute compulsion. Accord, *Turley*, 414 U. S., at 83.

The plurality's suggestion that our decision in *Meachum* v. *Fano,* 427 U. S. 215 (1976), supports a novel interpretation of the Fifth Amendment, see *ante*, at 11, is inconsistent with the central rationale of that case. In *Meachum*,

a group of prison inmates urged the Court to hold that the Due Process Clause entitled them to a hearing prior to their transfer to a substantially less favorable facility. Relying on the groundbreaking decisions in *Morrissey* v. *Brewer,* 408 U. S. 471 (1972), and *Wolff* v. *McDonnell,* 418 U. S. 539 (1974), which had rejected the once-prevailing view that a prison inmate had no more rights than a "slave of the State,"[5] the prisoners sought to extend those holdings to require judicial review of "any substantial deprivation imposed by prison authorities." The Court recognized that after *Wolff* and its progeny, convicted felons retain "a variety of important rights that the courts must be alert to protect." Although *Meachum* refused to expand the constitutional rights of inmates, we did not narrow the protection of any established right. Indeed, Justice White explicitly limited the holding to prison conditions that "do not otherwise violate the Constitution," 427 U. S., at 224.[6]

Not a word in our discussion of the privilege in *Ohio Adult Parole Authority* v. *Woodard,* 523 U. S. 272 (1998), *ante*, at 16, requires a heightened showing of compulsion in the prison context to establish a Fifth Amendment violation. That case is wholly unlike this one because Woodard was not ordered to incriminate himself and was not punished for refusing to do so. He challenged Ohio's clemency procedures, arguing, *inter alia*, that an interview with members of the clemency board offered to inmates one week before their clemency hearing presented him

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[5] See *Meachum* v. *Fano,* 427 U. S. 215, 231 (1976) (STEVENS, J., dissenting).

[6] In his opinion for the Court in the companion case, *Montanye* v. *Haymes,* 427 U. S. 236, 242 (1976), Justice White reiterated this point: "As long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him and [are] not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight."

with a Hobson's choice that violated the privilege against self-incrimination. He could either take advantage of the interview and risk incriminating himself, or decline the interview, in which case the clemency board might draw adverse inferences from his decision not to testify. We concluded that the prisoner who was offered "a voluntary interview" is in the same position as any defendant faced with the option of either testifying or accepting the risk that adverse inferences may be drawn from his silence. 523 U. S., at 286.

Respondent was directly ordered by prison authorities to participate in a program that requires incriminating disclosures, whereas no one ordered Woodard to do anything. Like a direct judicial order to answer questions in the courtroom, an order from the State to participate in the SATP is inherently coercive. Cf. *Turley*, 414 U. S., at 82 ("The waiver sought by the State, under threat of loss of contracts, would have been no less compelled than a direct request for the testimony without resort to the waiver"). Moreover, the penalty for refusing to participate in the SATP is automatic. Instead of conjecture and speculation about the indirect consequences that may flow from a decision to remain silent, we can be sure that defiance of a direct order carries with it the stigma of being a lawbreaker or a problem inmate, as well as other specified penalties. The penalty involved in this case is a mandated official response to the assertion of the privilege.

In *Baxter* v. *Palmigiano,* 425 U. S. 308 (1976), *ante*, at 15, we held that a prison disciplinary proceeding did not violate the privilege, in part, because the State had not "insisted nor asked that Palmigiano waive his Fifth Amendment privilege," and it was "undisputed that an inmate's silence in and of itself [was] insufficient to support an adverse decision by the Disciplinary Board." 425 U. S., at 317–318. We distinguished the "penalty cases," *Garrity* v. *New Jersey,* 385 U. S. 493 (1967), and *Turley*,

not because they involved civilians as opposed to prisoners, as the plurality assumes, *ante*, at 12–13, but because in those cases the "refusal to submit to interrogation and to waive the Fifth Amendment privilege, *standing alone and without regard to other evidence*, resulted in loss of employment or opportunity to contract with the State," whereas Palmigiano's silence "was given no more evidentiary value than was warranted by the facts surrounding his case." 425 U. S., at 318 (emphasis added). And, in a subsequent "penalty" case, we distinguished *Baxter* on the ground that refusing to incriminate oneself "was only one of a number of factors to be considered by the finder of fact in assessing a penalty, and was given no more probative value than the facts of the case warranted," while in *Cunningham* "refusal to waive the Fifth Amendment privilege [led] automatically and without more to imposition of sanctions." 431 U. S., at 808, n. 5.

Similarly, in *Minnesota* v. *Murphy*, 465 U. S., at 438–439, while "the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege," because revocation was not automatic under the Minnesota statute, we concluded that "Murphy could not reasonably have feared that the assertion of the privilege would have led to revocation."[7]

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[7] The plurality is quite wrong to rely on *Murphy* for the proposition that an individual is not compelled to incriminate himself when faced with the threat of return to prison. *Ante*, at 15. In *Murphy*, we did not have occasion to decide whether such a threat constituted compulsion because we held that "since Murphy revealed incriminating information instead of timely asserting his Fifth Amendment privilege, his disclosures were not compelled incriminations." 465 U. S., at 440. As we explained, "a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the privilege rather than answer if he desires not to incriminate himself. . . . But if he chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege and would

These decisions recognized that there is an appreciable difference between an official sanction for disobeying a direct order and a mere risk of adverse consequences stemming from a voluntary choice. The distinction is not a novel one, nor is it simply offered to "justify departing from this Court's precedents," *ante*, at 16. Rather it is a distinction that we have drawn throughout our cases; therefore, it is the plurality's disregard for both factors that represents an unjustified departure. Unlike *Woodard*, *Murphy*, and *Baxter*, respondent cannot invoke his Fifth Amendment rights and then gamble on whether the Department will revoke his Level III status; the punishment is mandatory. The fact that this case involves a prison inmate, as did *Woodard* and *Baxter*, is not enough to render those decisions controlling authority. Since we have already said inmates do not forfeit their Fifth Amendment rights at the jailhouse gate, *Murphy*, 465 U. S., at 426, the plurality must point to something beyond respondent's status as a prisoner to justify its departure from our precedent.

II

The plurality and JUSTICE O'CONNOR hold that the consequences stemming from respondent's invocation of the privilege are not serious enough to constitute compulsion. The threat of transfer to Level I and a maximum-security unit is not sufficiently coercive in their view—either because the consequence is not really a penalty, just the loss of a benefit, or because it is a penalty, but an insignificant one. I strongly disagree.

It took respondent several years to acquire the status that he occupied in 1994 when he was ordered to partici-

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suffer no penalty as the result of his decision to do so." *Id.*, at 429. In contrast to Murphy, respondent has consistently asserted his Fifth Amendment privilege.

pate in the SATP. Because of the nature of his convictions, in 1983 the Department initially placed him in a maximum-security classification. Not until 1989 did the Department change his "security classification to 'medium by exception' because of his good behavior." *Lile* v. *Simmons*, 23 Kan. App. 2d 1, 2, 929 P. 2d 171, 172 (1996). Thus, the sanction at issue threatens to deprive respondent of a status in the prison community that it took him six years to earn and which he had successfully maintained for five more years when he was ordered to incriminate himself. Moreover, abruptly "busting" his custody back to Level I, App. 94, would impose the same stigma on him as would a disciplinary conviction for any of the most serious offenses described in petitioners' formal statement of Internal Management Policy and Procedure (IMPP). As the District Court found, the sanctions imposed on respondent "mirror the consequences imposed for serious disciplinary infractions." 24 F. Supp. 2d 1152, 1155 (Kan. 1998). This same loss of privileges is considered serious enough by prison authorities that it is used as punishment for theft, drug abuse, assault, and possession of dangerous contraband.[8]

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[8] IMPP 11–101 provides that an inmate "shall be automatically reduced to Level I for any of the following: (1) Termination from a work or program assignment for cause; (2) Refusal to participate in recommended programs at the time of placement; (3) Offenses committed in which a felony charge is filed with the district or county prosecutor; (4) Disciplinary convictions for: (a) Theft; (b) Being in a condition of drunkenness, intoxication, or a state of altered consciousness; (c) Use of stimulants, sedatives, unauthorized drugs, or narcotics, or the misuse, or hoarding of authorized or prescribed medication; (d) Sodomy, aggravated sodomy, or aggravated sexual act; (e) Riot or incitement to riot; (f) Arson; (g) Assault; (h) Battery; (i) Inmate Activity (limitations); (j) Sexual Activity; (k) Interference with Restraints; (l) Relationships with Staff; (m) Work Performance; or (n) Dangerous Contraband." App. 19–20 (citations omitted).

The punitive consequences of the discipline include not only the dignitary and reputational harms flowing from the transfer, but a serious loss of tangible privileges as well. Because he refused to participate in the SATP, respondent's visitation rights will be restricted. He will be able to earn only $0.60 per day, as compared to Level III inmates, who can potentially earn minimum wage. His access to prison organizations and activities will be limited. He will no longer be able to send his family more than $30 per pay period. He will be prohibited from spending more than $20 per payroll period at the canteen, rather than the $140 he could spend at Level III, and he will be restricted in what property he can keep in his cell. App. 27–28. In addition, because he will be transferred to a maximum-security unit, respondent will be forced to share a cell with three other inmates rather than one, and his movement outside the cell will be substantially curtailed. *Id.*, at 73, 83. The District Court found that the maximum-security unit is "a more dangerous environment occupied by more serious offenders." 24 F. Supp. 2d, at 1155.[9] Perhaps most importantly, respondent will no longer be able to earn his way back up to Level III status through good behavior during the remainder of his sentence. App. 17 ("To complete Level I, an inmate must . . . demonstrate a willingness to participate in recommended

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[9] Respondent attested to the fact that in his experience maximum security "is a very hostile, intimidating environment because most of the inmates in maximum tend to have longer sentences and are convicted of more serious crimes, and, as a consequence, care less how they act or treat others." *Id.,* at 41–42. He explained that in the maximum-security unit "there is far more gang activity," "reported and unreported rapes and assaults of inmates are far more prevalent," and "sex offenders . . . are seen as targets for rape and physical and mental assault[s]," whereas in medium security, "because the inmates want to maintain their medium security status, they are less prone to breaking prison rules or acting violently." *Id.*, at 42–43.

programs and/or work assignments for a full review cycle").

The plurality's glib attempt to characterize these consequences as a loss of potential benefits rather than a penalty is wholly unpersuasive. The threatened transfer to Level I and to a maximum-security unit represents a significant, adverse change from the status quo. Respondent achieved his medium-security status after six years of good behavior and maintained that status during five more years. During that time, an inmate unquestionably develops settled expectations regarding the conditions of his confinement. These conditions then form the baseline against which any change must be measured, and rescinding them now surely constitutes punishment.

Paying attention to the baseline is not just "superficially appealing," *ante*, at 18. We have recognized that the government can extend a benefit in exchange for incriminating statements, see *Woodard*, 523 U. S., at 288 ("[T]his pressure to speak in the hope of improving [one's] chance of being granted clemency does not make the interview compelled"), but cannot threaten to take away privileges as the cost of invoking Fifth Amendment rights, see *e.g.*, *Turley*, 414 U. S., at 82; *Spevack*, 385 U. S., at 516. Based on this distinction, nothing that I say in this dissent calls into question the constitutionality of *downward* adjustments for acceptance of responsibility under the United States Sentencing Guidelines, *ante*, at 19–20. Although such a reduction in sentence creates a powerful incentive for defendants to confess, it completely avoids the constitutional issue that would be presented if the Guidelines operated like the scheme here and authorized an *upward* adjustment whenever a defendant refused to accept responsibility. Similarly, taking into account an attorney's acceptance of responsibility or contrition in deciding whether to reinstate his membership to the bar of this Court, see *ante*, at 13, is obviously different from disbar-

ring an attorney for invoking his privilege. By obscuring the distinction between penalties and incentives, it is the plurality that calls into question both the Guidelines and plea bargaining. See *Corbitt* v. *New Jersey,* 439 U. S. 212, 223–224 (1978) ("Nor does this record indicate that he was being punished for exercising a constitutional right. . . . [H]omicide defendants who are willing to plead *non vult* may be treated more leniently than those who go to trial, but withholding the possibility of leniency from the latter cannot be equated with impermissible punishment as long as our cases sustaining plea bargaining remain undisturbed").[10]

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[10] The plurality quotes a footnote in *Roberts* v. *United States,* 445 U. S. 552 (1980), for the proposition that a principled distinction cannot be drawn between enhancing punishment and denying leniency, *ante*, at 19. This quote is misleading because, as in *Minnesota* v. *Murphy*, 465 U. S. 420 (1984), see n. 7, *supra*, Roberts failed to assert his privilege against self-incrimination, and we reiterated that the privilege is not self-executing, 445 U. S., at 559. Furthermore, the passage quoted by the plurality, *id,* at 557, n. 4, was in reference to Roberts' claim that the sentencing judge could not consider his refusal to incriminate *a co-conspirator* in deciding whether to impose his sentences consecutively. In that context, the privilege is not implicated and compulsion is not constitutionally significant. While it is true that in some cases the line between enhancing punishment and refusing leniency may be difficult to draw, that does not mean the distinction is irrelevant for Fifth Amendment purposes.

It is curious that the plurality asserts the impracticality of drawing such a distinction, given that in this case a majority of the Court agrees that it is perfectly clear the consequences facing respondent represent a burden, rather than the denial of a benefit. *Ante*, at 6 (O'CONNOR, J., concurring in judgment). Our cases reveal that it is not only possible, but necessary to draw the distinction. For even *Bordenkircher* v. *Hayes,* 434 U. S. 357 (1978), conditioned its entire analysis of plea bargaining on the assumption that the defendant had been charged with the greater offense prior to plea bargaining and, therefore, faced the denial of leniency rather than an enhanced penalty. *Id.,* at 360–361 ("While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly

Even if the change in respondent's status could properly be characterized as a loss of benefits to which he had no entitlement, the question at hand is not whether the Department could have refused to extend those benefits in the first place, but rather whether revoking them at this point constitutes a penalty for asserting the Fifth Amendment privilege. See *Perry* v. *Sindermann,* 408 U. S. 593, 597 (1972). The plurality contends that the transfer from medium to maximum security and the associated loss of Level III status is not intended to punish prisoners for asserting their Fifth Amendment rights, but rather is merely incidental to the prison's legitimate interest in making room for participants in the program. *Ante*, at 11. Of course, the Department could still house participants together without moving those who refuse to participate to more restrictive conditions of confinement and taking away their privileges. Moreover, petitioners have not alleged that respondent is taking up a bed in a unit devoted to the SATP; therefore, all the Department would have to do is allow respondent to stay in his current medium-security cell. If need be, the Department could always transfer respondent to another medium-security unit. Given the absence of evidence in the record that the Department has a shortage of medium-security beds, or even that there is a separate unit devoted to participants in the SATP, the only plausible explanation for the transfer to maximum security and loss of Level III status is

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expressed at the outset of plea negotiations. . . . This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty. As a practical matter, in short, this case would be no different if the grand jury had indicted [the defendant] as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain").

that it serves as punishment for refusing to participate in the program.

JUSTICE O'CONNOR recognizes that the transfer is a penalty, but finds insufficient coercion because the "changes in [respondent's] living conditions seem to [her] minor." *Ante*, at 3 (opinion concurring in judgment). The coerciveness of the penalty in this case must be measured not by comparing the quality of life in a prison environment with that in a free society, but rather by the contrast between the favored and disfavored classes of prisoners. It is obviously impossible to measure precisely the significance of the difference between being housed in a four-person, maximum-security cell in the most dangerous area of the prison, on the one hand, and having a key to one's own room, the right to take a shower, and the ability to move freely within adjacent areas during certain hours, on the other—or to fully appreciate the importance of visitation privileges, being able to send more than $30 per pay period to family, having access to the yard for exercise, and the opportunity to participate in group activities. What is perfectly clear, however, is that it is the aggregate effect of those penalties that creates compulsion. Nor is it coincidental that petitioners have selected this same group of sanctions as the punishment to be imposed for the most serious violations of prison rules. Considering these consequences as a whole and comparing the Department's treatment of respondent to the rest of the prison population, it is perfectly clear that the penalty imposed is "constitutionally indistinguishable from the coercive provisions we struck down in *Gardner*, *Sanitation Men*, and *Turley*." *Cunningham*, 431 U. S., at 807.[11]

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[11] JUSTICE O'CONNOR would distinguish these cases because the penalty involved the loss of one's livelihood, whereas here respondent will be housed, clothed, and fed regardless of whether he is in maximum or medium security. We rejected a similar argument in *Turley*, when we

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The SATP clearly serves legitimate therapeutic purposes. The goal of the program is to rehabilitate sex offenders, and the requirement that participants complete admission of responsibility and sexual history forms may well be an important component of that process. Mental health professionals seem to agree that accepting responsibility for past sexual misconduct is often essential to successful treatment, and that treatment programs can reduce the risk of recidivism by sex offenders. See Winn, Strategic and Systematic Management of Denial in Cognitive/Behavioral Treatment of Sexual Offenders, 8 Sexual Abuse: J. Research and Treatment 25, 26–27 (1996).

The program's laudable goals, however, do not justify reduced constitutional protection for those ordered to participate. "We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need." *Cunningham*, 431 U. S., at 808. The benefits of obtaining confessions from sex offenders may be substantial, but "claims of overriding interests are not unusual in Fifth Amendment litigation," and until today at least "they have not fared well." *Turley*, 414 U. S., at 78. 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.

The plurality's willingness to sacrifice prisoners' Fifth

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refused to distinguish *Garder* v. *Broderick,* 392 U. S. 273 (1968), and *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of City of New York,* 392 U. S. 280 (1968), based on the difference between losing one's job and losing the ability to obtain government contracts. 414 U. S., at 83. We concluded that there was no "difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor." *Ibid*.

Amendment rights is also unwarranted because available alternatives would allow the State to achieve the same objectives without impinging on inmates' privilege. *Turner* v. *Safley,* 482 U. S. 78, 93 (1987). The most obvious alternative is to grant participants use immunity. See *Murphy*, 465 U. S., at 436, n. 7 ("[A] State may validly insist on answers to even incriminating questions . . . as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination"); *Baxter*, 425 U. S., at 318 ("Had the State desired Palmigiano's testimony over his Fifth Amendment objection, we can but assume that it would have extended whatever use immunity is required by the Federal Constitution"). Petitioners have not provided any evidence that the program's therapeutic aims could not be served equally well by granting use immunity. Participants would still obtain all the therapeutic benefits of accepting responsibility and admitting past misconduct; they simply would not incriminate themselves in the process. At least one State already offers such protection, see Ky. Rev. Stat. Ann. §197.440 (2001) ("Communications made in the application for or in the course of a sexual offender's diagnosis and treatment . . . shall be privileged from disclosure in any civil or criminal proceeding"), and there is no indication that its choice is incompatible with rehabilitation. In fact, the program's rehabilitative goals would likely be furthered by ensuring free and open discussion without the threat of prosecution looming over participants' therapy sessions.

The plurality contends that requiring immunity will undermine the therapeutic goals of the program because once "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." *Ante*, at 7. See also Brief for 18 States as *Amici Curiae* 11 ("By subjecting offenders to prosecution for

newly revealed offenses, and by adhering to its chosen policy of mandatory reporting for cases of suspected child sexual abuse, Kansas reinforces the sensible notion that wrongdoing carries consequences"). The idea that an inmate who is confined to prison for almost 20 years for an offense could be left with the impression that his crimes are not serious or that wrongdoing does not carry consequences is absurd. Moreover, the argument starts from a false premise. Granting use immunity does not preclude prosecution; it merely prevents the State from using an inmate's own words, and the fruits thereof, against him in a subsequent prosecution. *New Jersey* v. *Portash,* 440 U. S. 450, 457–458 (1979). The plurality's concern might be justified if the State were required to grant *transactional* immunity, but we have made clear since *Kastigar* that use immunity is sufficient to alleviate a potential Fifth Amendment violation, 406 U. S., at 453. Nor is a State *required* to grant use immunity in order to have a sex offender treatment program that involves admission of responsibility.

Alternatively, the State could continue to pursue its rehabilitative goals without violating participants' Fifth Amendment rights by offering inmates a voluntary program. The United States points out that an inmate's participation in the sexual offender treatment program operated by the Federal Bureau of Prisons is entirely voluntary. "No loss of institutional privileges flows from an inmate's decision not to participate in the program."[12]

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[12] Brief for United States as *Amicus Curiae* 27. Because of this material difference between the Kansas and federal programs, recognizing the compulsion in this case would not cast any doubt on the validity of voluntary programs. The plurality asserts that "the federal program is different from Kansas' SATP only in that it does not require inmates to sacrifice privileges *besides housing* as a consequence of nonparticipation." *Ante*, at 18 (emphasis added). This statement is inaccurate because, as the quote

If an inmate chooses to participate in the federal program, he will be transferred from his "parent facility" to a "more desirable" prison, but if he refuses to participate in the first place, as respondent attempted to do, he suffers no negative consequences. Tr. of Oral Arg. 21–22. Although the inmates in the federal program are not granted use immunity, they are not compelled to participate. Indeed, there is reason to believe successful rehabilitation is more likely for voluntary participants than for those who are compelled to accept treatment. See Abel, Mittelman, Becker, Rathner & Rouleau, Predicting Child Molesters' Response to Treatment, 528 Annals N. Y. Acad. of Sciences 223 (1988) (finding that greater perceived pressure to participate in treatment is strongly correlated with the dropout rate).

Through its treatment program, Kansas seeks to achieve the admirable goal of reducing recidivism among sex offenders. In the process, however, the State demands an impermissible and unwarranted sacrifice from the participants. No matter what the goal, inmates should not be compelled to forfeit the privilege against self-incrimination simply because the ends are legitimate or because they have been convicted of sex offenses. Particularly in a case like this one, in which respondent has protested his innocence all along and is being compelled to confess to a crime that he still insists he did not commit, we ought to ask ourselves—what if this is one of those rare cases in which the jury made a mistake and he is actually innocent? And in answering that question, we should consider that even members of the Star Chamber thought they were pursuing righteous ends.

I respectfully dissent.

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in the text reveals, *no* loss of privileges follows from the decision not to participate in the federal program.