


12-15-1997

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Recommended Citation

Peter J. Gimino III *Mandatory Chemical Castration for Perpetrators of Sex Offenses Against Children: Following California's Lead*, 25 Pepp. L. Rev. 1 (1998)

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Mandatory Chemical Castration for Perpetrators of Sex Offenses Against Children: Following California's Lead

I. INTRODUCTION

Imagine the innocence of a seven-year-old schoolgirl walking home after a day of classes. This picture is a peaceful reminder to many of childhood days characterized by carefree happiness and unlimited dreams. Next imagine, however, that our innocent, seven-year-old schoolgirl is abducted a mere one hundred yards from her home, thrown in the trunk of a car, driven to a field and sexually molested, battered against a tree until unconscious, and then dumped, naked, into a river where she is left to drown. Unfortunately, we need not imagine this scenario because it is the true story of Natalie Astner, whose tragic fate befell her at the hands of a convicted child molester.¹

According to the California Department of Justice, there are an estimated sixty-six thousand registered sex offenders in the state of California and approximately thirty-nine thousand of those offenders have been convicted of sexual assault on a child.² By the end of their first

1. See Ian Traynor, *European News: Grieving Germany Buries Murdered Child*, GUARDIAN, Sept. 26, 1996, at 011, available in 1996 WL 4045782. The fact that the man suspected of this crime was previously convicted of child molestation spurred debate over the use of chemical castration in Germany. See *id.*; see also Terrence Petty, *Girl's Murder Provokes Debate on Sex Offenders*, ORANGE COUNTY REG., Sept. 26, 1996, at A14, available in 1996 WL 7050380 (providing details of the Astner tragedy and the corresponding public reaction). There are many similar crimes that occur in the United States. See, e.g., Midge Decter, *Megan's Law & the "New York Times,"* 98 COMMENTARY 61 (1994) (describing the rape and strangulation of seven-year-old Megan Kanka by a convicted sexual offender in New Jersey which led to the creation of Megan's Law requiring the publication of sex offenders' places of residence); Raquel Blacher, Comment, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 908-10 (1994) (describing three violent sexual crimes, including the kidnapping and sexual assault of a seven-year-old boy in Washington state by an offender with a criminal history); Shari P. Geller, *Zero Tolerance for Child Molesters*, L.A. TIMES, Dec. 16, 1996, at B5 (describing the deaths of an eleven-year-old girl and a seven-year-old girl at the hands of a repeat sex offender).

2. See *Chemical Castration Fact Sheet*, Office of Governor Pete Wilson, Sept. 17, 1996, at 1.

year on parole, more than fifty percent of convicted sex offenders are back in prison with the number rising to almost eighty percent after two years on parole.³

The recidivism rate among child molesters has led to strong public sentiment favoring harsher punishment of repeat child molesters.⁴ California has taken bold steps in the past two years in an effort to combat these heinous sex crimes against children.⁵ The culmination of California's efforts came in 1996 with Assembly Bill 3339, which provides for the mandatory chemical castration of repeat child molesters.⁶

Proponents of chemical castration of repeat child molesters are riding a wave of public emotion that has been building over the past decade.⁷ For example, the victims of the "pillowcase rapist" organized to support the chemical castration legislation.⁸ Chemical castration proponents assert that it will lower recidivism and decrease the victimization of chil-

3. See *id.* According to some statistics, "sex offenders report an average of 23 child victims." Geller, *supra* note 1, at B5.

4. The author of California's Chemical Castration bill, Assemblyman William Hoge, stated: "I am sending a message to child molesters of the world that you are not welcome in California Child molestation is a heinous crime and must be stopped." Greg Lucas, *Chemical Castration Bill Passes; Wilson Expected to Sign Child Molester Penalty*, S.F. CHRON., Aug. 31, 1996, at A1, available in 1996 WL 3226648.

5. In 1994, Governor Wilson signed a "One Strike" law which imposes a "25-year-to-life sentence on child molesters and the most vicious predatory rapists." *Chemical Castration Fact Sheet*, *supra* note 2, at 2. Also in 1994, Governor Wilson signed legislation instituting a state-wide telephone system for people to call to inquire whether a specific individual has a sex offense conviction on their record. See *id.* In 1995, the Governor signed Assembly Bill 888, which permits the state "to civilly commit violent repeat sex offenders who have a diagnosable mental disorder in secure mental institutions." *Id.* In 1996, Wilson signed legislation defining a sexually violent offender as "anyone who commits a sex offense against a child under the age of 14." *Id.* Additionally, this legislation "prohibits a sex offender from being exempted from registering as a sex offender simply by receiving a rehabilitation certificate." *Id.*

6. A.B. 3339, 1995-96 Reg. Sess. (Ca. 1996); see *infra* notes 20-43 and accompanying text (discussing the details of California's mandatory chemical castration law).

7. See Michael A. Barnettler, Note, *People v. Hicks: Sentencing Laws and Sex Offenses—A Disingenuous Approach by the California Supreme Court*, 32 SAN DIEGO L. REV. 285, 286 (1995); see also Mary Lynne Vellinga, 'Castration' Law Under Fire, SACRAMENTO BEE, Feb. 4, 1997, at A1, (discussing the trend favoring tougher laws on child molesters following highly publicized sex crimes such as that of Polly Klaas).

8. See Vincent J. Schodolski, *California OKs 'Castration' Bill; Foes Doubt Legality of Punishment for Molesters*, CHI. TRIB., Aug. 31, 1996, at 1. The Women's Coalition helped organize the victims of the pillowcase rapist, Reginald Muldrew, in order to push the chemical castration bill. See *id.*

dren in the future.⁹ In support of this assertion, proponents rely on the successful use of chemical castration in Europe and other countries.¹⁰

Opponents of chemical castration, such as the American Civil Liberties Union (ACLU), argue that chemical castration amounts to cruel and unusual punishment.¹¹ The California Attorneys for Criminal Justice joined the ACLU in opposing chemical castration on the ground that it is cruel and unusual punishment, as well as a possible violation of the offender's right to privacy.¹²

This Comment discusses the controversy surrounding mandatory chemical castration and advocates the affirmation of California's mandatory chemical castration law as a significant step toward protecting our nation's children. Part II discusses the details of California's mandatory chemical castration law.¹³ Part III explains the medical procedures and mechanisms of chemical castration.¹⁴ Part IV provides an analysis of the application and success of chemical castration outside of California.¹⁵ Part V sets forth a detailed review of the constitutional implications surrounding mandatory chemical castration with additional attention given to the historical development and related case law.¹⁶ Part VI addresses the issue of informed consent.¹⁷ Part VII discusses the public policy arguments surrounding California's mandatory chemical castration,¹⁸ and part VIII provides a brief conclusion.¹⁹

9. See Douglas J. Besharov & Andrew Vachhs, *Is Castration an Acceptable Punishment?*, A.B.A. J., July 1992, at 42. Research has shown that recidivism rates are less than five percent when hormone therapy and counseling are used concurrently. See *id.*; see also *Our Children, Our Freedom*, ST. LOUIS POST-DISPATCH, Sept. 5, 1996, at 6B, available in 1996 WL 2789767 (stating that recidivism rates are as low as two percent in Europe where chemical castration is used).

10. See *infra* notes 71-101 and accompanying text (discussing the application of chemical castration in Europe and other countries).

11. See David Van Biema, *A Cheap Shot at Pedophilia? California Mandates Chemical Castration for Repeat Child Molesters*, TIME, Sept. 9, 1996, at 60; see also *infra* notes 155-212 and accompanying text (discussing the allegations of cruel and unusual punishment).

12. See Lucas, *supra* note 4, at A1.

13. See *infra* notes 20-43 and accompanying text.

14. See *infra* notes 44-70 and accompanying text.

15. See *infra* notes 71-150 and accompanying text.

16. See *infra* notes 151-274 and accompanying text.

17. See *infra* notes 275-301 and accompanying text.

18. See *infra* notes 302-43 and accompanying text.

19. See *infra* notes 344-46 and accompanying text.

II. CALIFORNIA'S MANDATORY CHEMICAL CASTRATION LAW

California bill AB 3339 passed in the State Assembly by a vote of forty-two to twenty-seven in May 1996 and by a vote of twenty-five to one in the State Senate in August 1996.²⁰ On September 17, 1996, California Governor Pete Wilson signed the legislation making chemical castration mandatory.²¹ The law became effective on January 1, 1997.²²

A. AB 3339 Repeals and Replaces California Penal Code Section 645

AB 3339 repeals section 645 of the California Penal Code, which stated:

Whenever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years, the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person, for the prevention of procreation.²³

AB 3339 rewrites section 645 of the California Penal Code to read, in pertinent part:

(a) Any person guilty of a first conviction of any offense specified in subdivision (c), where the victim has not attained 13 years of age, may, upon parole, undergo medroxyprogesterone acetate treatment or its chemical equivalent, in addition to any other punishment prescribed for that offense or any other provision of law, at the discretion of the court.

(b) Any person guilty of a second conviction of any offense specified in subdivision (c), where the victim has not attained 13 years of age, shall, upon parole, undergo medroxyprogesterone acetate treatment or its chemical equivalent, in addition to any other punishment prescribed for that offense or any other provision of law.²⁴

B. Improvements in the Penal Code Provided by AB 3339 and the New Section 645

There are two noteworthy improvements provided by the new law.²⁵

20. See B. Drummond Ayres, Jr., *California Child Molesters Face "Chemical Castration,"* N.Y. TIMES, Aug. 27, 1996, at A1.

21. See David Leshner, *Molester Castration Measure Signed Law,* L.A. TIMES, Sept. 18, 1996, at A3.

22. See *id.*

23. CAL. PENAL CODE § 645 (West 1988) (repealed 1996).

24. CAL. PENAL CODE § 645 (West Supp. 1997) (emphasis added).

25. The entire text of AB 3339 reads as follows:

SECTION 1. Section 645 of the Penal Code is repealed.

SEC. 2. Section 645 is added to the penal code to read:

645. (a) Any person guilty of a first conviction of any offense specified in subdivision (c), where the victim has not attained 13 years of age, may, upon parole, undergo medroxyprogesterone acetate treatment or its chemical equiv-

First, although section 2(a) of AB 3339 allows a judge to order chemical castration upon a first conviction, just as in repealed Penal Code section 645, the new law raises the age limit of the victim from ten years of age to thirteen years of age.²⁶ The second improvement, which is responsible for the entirety of the attention thrust upon the new law, calls for the mandatory chemical castration of any person found guilty of a second conviction of specified offenses.²⁷

alent, in addition to any other punishment prescribed for that offense or any other provision of law, at the discretion of the court.

(b) Any person guilty of a second conviction of any offense specified in subdivision (c), where the victim has not attained 13 years of age, shall, upon parole, undergo medroxyprogesterone acetate treatment or its chemical equivalent, in addition to any other punishment prescribed for that offense or any other provision of law.

(c) This section shall apply to the following offenses:

- (1) Subdivision (c) or (d) of Section 286.
- (2) Paragraph (1) of subdivision (b) of Section 288.
- (3) Subdivision (b) or (d) of Section 288a.
- (4) Subdivision (a) or (j) of Section 289.

(d) The parolee shall begin medroxyprogesterone acetate treatment one week prior to his or her release from confinement in the state prison or other institution and shall continue treatments until the Department of Corrections demonstrates to the Board of Prison Terms that this treatment is no longer necessary.

(e) If a person voluntarily undergoes a permanent, surgical alternative to hormonal chemical treatment for sex offenders, he or she shall not be subject to this section.

(f) The Department of Corrections shall administer this section and implement the protocols required by this section. Nothing in the protocols shall require an employee of the Department of Corrections who is a physician and surgeon licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code or the Osteopathic Initiative Act to participate against his or her will in the administration of the provisions of this section. These protocols shall include, but not be limited to, a requirement to inform the person about the effect of hormonal chemical treatment and any side effects that may result from it. A person subject to this section shall acknowledge the receipt of this information.

A.B. 3339, 1995-96 Reg. Sess. (Ca. 1996).

26. See CAL. PENAL CODE § 645(a).

27. See *id.* § 645(b).

C. Explanation of Penal Code Section 645 as Amended by AB 3339

While section 1 of AB 3339 calls for the repeal of California Penal Code section 645, section 2 adds the amended section 645 to the Penal Code.²⁸ Subdivision (a) of the amended section 645 closely parallels the repealed Penal Code section 645 in providing that "any person guilty of a first conviction of any offense specified in subdivision (c), where the victim has not attained 13 years of age, may, upon parole, undergo [chemical castration] treatment."²⁹

Subdivision (b) of section 645 supplies the mandatory element of the law by providing that "[a]ny person guilty of a second conviction of any offense listed in subdivision (c), where the victim has not attained 13 years of age, shall, upon parole, undergo [chemical castration] treatment."³⁰

Subdivision (c) of this section details the specific offenses referred to in both parts (a) and (b) above.³¹ The specific offenses listed in part (c) include acts of sodomy,³² lewd or lascivious acts with a child under the age of fourteen,³³ oral copulation,³⁴ and penetration of genital or anal openings by foreign or unknown objects.³⁵

Part (d) of this section requires the medroxyprogesterone acetate treatment one week before an offender's release from prison.³⁶ Additionally, the convicted offender must "continue treatments until the Department of Corrections demonstrates to the Board of Prison Terms that [the] treatment is no longer necessary."³⁷

Subdivision (e) provides an exemption from this section for those convicted of the specified offenses.³⁸ This subdivision exempts those persons who voluntarily undergo permanent, surgical castration from the imposition of chemical castration treatment.³⁹

28. See A.B. 3339.

29. CAL. PENAL CODE § 645(a). This subdivision also subjects the convicted to "any other punishment prescribed for that offense or any other provision of law, at the discretion of the court." *Id.*

30. *Id.* § 645(b). In addition to the mandatory chemical castration treatment, this subdivision also subjects the convicted sex offender to "any other punishment prescribed for that offense or any other provision of law." *Id.*

31. See *id.* § 645(c).

32. See CAL. PENAL CODE § 236(c), (d) (West Supp. 1997).

33. See CAL. PENAL CODE § 238(b)(1) (West Supp. 1997).

34. See CAL. PENAL CODE § 238a(b), (d) (West Supp. 1997).

35. See CAL. PENAL CODE § 239 (West Supp. 1997).

36. See CAL. PENAL CODE § 645(d).

37. *Id.*

38. See *id.* § 645(e).

39. See *id.* Note that section 645 permits the discretionary use of chemical castra-

Subdivision (f) provides that the Department of Corrections is responsible for administering this section.⁴⁰ Subdivision (f) also states that a physician or surgeon employed by the Department of Correction will not be required to participate in the chemical castration of a sex offender against his or her will.⁴¹ Subdivision (f) further requires that the convicted sex offender be informed of the effects of the chemical treatment as well as any resulting side effects.⁴² Finally, subdivision (f) requires acknowledgment of the receipt of this information by the convicted sex offender.⁴³

III. THE CHEMICAL CASTRATION DRUG

California's new law calls for the use of medroxyprogesterone acetate (MPA) or its chemical equivalent.⁴⁴ MPA is manufactured under the trade name Depo-Provera by the Upjohn Company.⁴⁵ Although various hormonal treatments have shown some success in decreasing the libido, MPA remains the most commonly used hormone today.⁴⁶

A. Historical Development of MPA

Since its inception, MPA has been widely used internationally as a female contraceptive.⁴⁷ More than ten million women in over eighty foreign countries used MPA as a contraceptive between 1969 and 1984.⁴⁸

tion treatment after a first conviction as well as the mandatory use after a second conviction. *See id.*

40. *See id.* § 645(f).

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.* § 645(b).

45. *See* Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 2 (1990) (citing PHYSICIANS' DESK REFERENCE, 2123-24 (42d ed. 1988)). Pharmacia acquired the Upjohn Company in 1995. *See* Rhonda L. Rundle, *Will "Chemical Castration" Really Work?*, WALL ST. J., Sept. 19, 1996, at B7.

46. *See* Daniel L. Icenogle, *Sentencing Male Sex Offenders to the Use of Biological Treatments—A Constitutional Analysis*, 15 J. LEGAL MED. 279, 284 (1994); *see also* Schodolski, *supra* note 8, at 1 (noting that Depo-Provera is still the most commonly used drug as of August 1996).

47. *See* Shari Roan, *No Consensus on Chemical Castration*, L.A. TIMES, Sept. 26, 1996, at E5.

48. *See* Kari A. Vanderzyl, Comment, *Castration as an Alternative to Incarceration: An Impotent Approach to the Punishment of Sex Offenders*, 15 N. ILL. U. L.

Research on chemical castration first began in the United States in the 1960s by Johns Hopkins Professor John Money.⁴⁹ It was not until 1992, however, that the United States Food and Drug Administration (FDA) approved its use as a female contraceptive in this country.⁵⁰ Although the FDA has not given specific authorization for the use of MPA in the castration setting, the Food, Drug and Cosmetic Act does not limit the uses for which a doctor might prescribe a drug once it is on the market, thus making it available for use as a chemical castration drug.⁵¹

B. MPA Medical Mechanisms of Action

Although the treatment is referred to as chemical castration, the actual treatment neither castrates nor sterilizes a person.⁵² The application of the drug involves weekly intramuscular injections in either the arm or the buttock of approximately 500 milligrams each.⁵³ Weekly injections are necessary because individual doses of MPA become less effective over time.⁵⁴ MPA functions by inhibiting “the release of the follicle-stimulating hormone and the lutenizing hormone from the anterior pituitary gland in the brain.”⁵⁵ MPA causes a reduction of the androgen levels “in the blood stream to that of a prepubescent male.”⁵⁶ The resulting effect is a decrease in the production of testosterone in the testicles.⁵⁷ This decrease in testosterone levels causes a corresponding reduction in “erectile capability” and sexual interest.⁵⁸ When administered in large enough doses, MPA can also decrease sexual desire in women.⁵⁹

REV. 107, 116 n.65 (1994).

49. See Rundle, *supra* note 45, at B1; Roan, *supra* note 47, at E5.

50. See Roan, *supra* note 47, at E5.

51. See Fitzgerald, *supra* note 45, at 6 n.24 (citing 12 FDA DRUG BULL. 2-3 (April 1982)).

52. *People v. Gauntlett*, 352 N.W.2d 310, 315 (Mich. Ct. App. 1984) (contrasting the chemical castration therapy and sanctions authorized by Michigan statute such as castration and sterilization).

53. See Fitzgerald, *supra* note 45, at 6; Rundle, *supra* note 45, at B1. An oral form of MPA is available, but it is not as effective as the injected form. See Fitzgerald, *supra* note 45, at 6 n.25; Icenogle, *supra* note 46, at 284 (citing Lehne, *Treatment of Sex Offenders with Medroxyprogesterone Acetate*, in 6 HANDBOOK OF SEXOLOGY: THE PHARMACOLOGY AND ENDOCRINOLOGY OF SEXUAL FUNCTION 516, 517 (1988)).

54. See Schodolski, *supra* note 8, at 1.

55. Fitzgerald, *supra* note 45, at 6.

56. *Id.*

57. See *id.*

58. See Marsha Weissman & Richard Luciani, *Sentencing the Sex Offender: A Defense Perspective*, in CRIMINAL LAW AND URBAN PROBLEMS, at 259, 270 (PLI Litig. & Admin. Practice Course Handbook Series No. C4-4185, 1989).

59. See Schodolski, *supra* note 8, at 1.

The objective of MPA is to reduce the compulsive sexual imagery of the offender.⁶⁰ If it works correctly, those undergoing MPA treatment will not experience spontaneous erections or ejaculations, but will experience no inhibition when prompted by a partner or researcher.⁶¹ While a decrease in sperm production is an additional physiological effect of MPA, dosages of the drug can be manipulated to avoid total impotence.⁶² Additionally, there are no feminizing effects as a result of exposure to MPA.⁶³ Once the treatment ceases, erection, ejaculation, and sexual drive return within two weeks.⁶⁴

C. Known side effects of MPA

There are various reports of side effects associated with exposure to MPA. Some expected side effects include "weight gain, cold sweats, nightmares, muscle weakness, and fatigue."⁶⁵ Additional studies show potential side effects, including irregular gallbladder functioning and diverticulitis when subjected to long term treatment, testicular atrophy, diabetes mellitus, phlebitis, headaches, insomnia, nausea, dyspnea, hyperglycemia, leg cramps, loss of body hair, and increased body temperature.⁶⁶ Most reported side effects rarely occur, however, and they are all reversible after MPA treatment is terminated.⁶⁷

A major concern often raised about the use of MPA is the long-term risk of cancer.⁶⁸ There is documentation of breast cancer in female dogs

60. See Fitzgerald, *supra* note 45, at 6-7. MPA does not function by causing impotence, but rather by causing what has been termed "erotic apathy." See *id.* at 7 (quoting P. WALKER ET AL., *Antiandrogenic Treatment of the Paraphilias*, in GUIDELINES FOR THE USE OF PSYCHOTROPIC DRUGS 427, 435 (1984)).

61. See *id.* at 7.

62. See Kimberly A. Peters, Comment, *Chemical Castration: An Alternative to Incarceration*, 31 DUQ. L. REV. 307, 311 (citing John T. Melella et al., *Legal and Ethical Issues in the Use of Antiandrogens in Treating Sex Offenders*, 17 BULL. AM. ACAD. PSYCHIATRY L. 223, 225 (1989)).

63. See *id.*

64. See Fitzgerald, *supra* note 45, at 7 (citing Money, *Treatment Guidelines: Antiandrogen and Counseling Paraphilic Sex Offenders*, 13 J. OF SEX & MARITAL THERAPY 219, 220-21 (1987)).

65. Peters, *supra* note 62, at 311 (citing John T. Melella et al., *supra* note 62, at 225).

66. See Fitzgerald, *supra* note 45, at 7 (citing P. WALKER ET AL., *supra* note 60, at 436).

67. See Fitzgerald, *supra* note 45, at 7.

68. See Weissman & Luciani, *supra* note 58, at 270.

and uterine cancer in monkeys after being exposed to Depo-Provera.⁶⁹ There is no evidence, however, that MPA may cause cancer in human beings.⁷⁰

IV. APPLICATION OF CHEMICAL CASTRATION OUTSIDE OF CALIFORNIA

The practice of mandatory physical castration dates back to the middle ages.⁷¹ In the United States, courts have dealt with various castration and sterilization issues since as early as the 1940s.⁷² The castration of sex offenders began in a number of European countries as early as 1906.⁷³ Many of these nations are replacing surgical castration with chemical castration.⁷⁴ Countries outside Europe are currently considering chemical castration sentencing measures similar to that of California.⁷⁵ Additionally, several states in the United States have expressed an interest in the use of chemical castration.⁷⁶

A. *Application of Chemical Castration in European Countries*

Between 1935 and 1970, Denmark offered its criminal sex offenders a choice between imprisonment or undergoing surgical castration, but,

69. See Peters, *supra* note 62, at 311 (citing John T. Melella et al., *supra* note 62, at 225).

70. See Icenogle, *supra* note 46, at 285 (citing Lehne, *supra* note 53, at 522).

71. See Peters, *supra* note 62, at 308 (citing Nickolaus Heim & Carolyn J. Hursch, *Castration for Sex Offenders: Treatment or Punishment? A Review and Critique of Recent European Literature*, in 8 ARCHIVES OF SEXUAL BEHAVIOR 281 (1979)).

72. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding Oklahoma's Habitual Criminal Sterilization Act unconstitutional in violation of the Fourteenth Amendment). See, e.g., *Gauntlett v. Kelley*, 849 F.2d 213, 217 (6th Cir. 1988) (holding the sentencing of defendant to chemical castration during probation did not violate due process); *State v. Brown*, 326 S.E.2d 410, 410-11 (S.C. 1985) (finding the imposition of surgical castration to be cruel and unusual punishment in violation of the constitution). For a discussion of a trend favoring the use of castration as a punitive measure in this country, see Kenneth B. Fromson, Comment, *Beyond an Eye for an Eye: Castration as an Alternative Sentencing Measure*, 11 N.Y.L. SCH. J. HUM. RTS. 311, 313-17 (1994).

73. See Peters, *supra* note 62, at 309 (citing Heim & Hursch, *supra* note 71, at 282) (noting that Denmark first legalized castration and was soon followed by Germany, Norway, Finland, Estonia, Iceland, Latvia, and Sweden).

74. See *Restraining Sex Offenders*, THE HERALD (Rock Hill, S.C.), Sept. 5, 1996, at 11A, available in 1996 WL 8277397 (opining that chemical castration is a useful weapon against sex offenders).

75. See *infra* notes 91-101 and accompanying text (discussing the presence of chemical castration measures in non-European countries).

76. See *infra* notes 102-50 and accompanying text (discussing chemical castration legislation pending in other U.S. states).

after 1973, chemical castration replaced the surgical castration option.⁷⁷ The Chief Physician at Denmark's only prison for sex offenders cited positive results arising from the implementation of the chemical castration option.⁷⁸ A notable case study in Denmark concerned the chemical castration of twenty-six-year-old Arne Kjeldsen.⁷⁹ Kjeldsen was convicted four times of sex crimes against pre-teen girls dating back to 1986.⁸⁰ After receiving the treatment,⁸¹ Kjeldsen claimed that he felt a great deal better without his "sex fantasies."⁸² Since 1989, twenty-six prisoners in Denmark have elected the chemical injections and sixteen of these prisoners were released on probation.⁸³ Only one of these sixteen committed another offense after the injections.⁸⁴

Recently, Germany moved to the forefront of the chemical castration wave due to the brutal murder of a young Bavarian girl.⁸⁵ The suspect, a twenty-seven-year-old electrician, was released from prison eighteen

77. See Jan M. Olsen, *Dane Who Is Undergoing Chemical Castration Says He Is Cured*, ORANGE COUNTY REG., Aug. 31, 1996, at A23, available in 1996 WL 7045837.

78. See *Chemical Castration Seems to Be Working in Denmark*, ST. LOUIS POST-DISPATCH, Sept. 1, 1996, at 4D, available in 1996 WL 2789115 [hereinafter *Working*]. The Chief Physician, Heidi Hansen, rebutted contentions that the treatment is "medieval and barbaric," asserting that it is "safe, reversible, and effective." *Id.*; see Jan M. Olsen, *'Chemically Castrated' Man Says He Is Cured and Happy*, ASSOCIATED PRESS, Aug. 30, 1996, available in 1996 WL 4438079 (stating that the only castration program in Denmark is voluntary and administered in conjunction with psychotherapy).

79. See Olsen, *supra* note 78. Androcur, the drug first utilized in Denmark for chemical castration functioned by inhibiting testosterone production. See *id.* According to Denmark's Chief Physician at the Herstedvester Prison, the effects of this drug dissipate over time. See *id.* Accordingly, in 1989, doctors in Denmark began utilizing a combination of Androcur and Decapetyl. See *id.* This combination, used in Kjeldsen's case, more closely resembles Depo-Provera, the drug used in California. See *id.*

80. See *id.*

81. Kjeldsen's treatment consisted of injections twice a month. See *id.*

82. See *id.*

83. See *id.*

84. See *id.*; see also *Danish Deputies Favour Castration of Convicted Rapists*, AGENCE FRANCE-PRESSE, Oct. 22, 1996, available in 1996 WL 12163189 (explaining the introduction to parliament of a bill by Danish Justice Minister Bjoern Westh that called for the chemical castration of convicted rapists).

85. See Traynor, *supra* note 1, at 11. As described in the introduction of this Comment, seven-year-old Natalie Astner was kidnapped by a convicted child molester. See *id.* Natalie was abducted within 100 yards of her home, thrown in the trunk of a car, taken away, sexually abused, knocked unconscious, and dumped in a river where she drowned. See *id.*

months short of serving a full four and one-half year term for sexually molesting a nine-year-old and an eleven-year-old girl.⁸⁶ Consequently, Germany's Federal Minister for Families, the Elderly, Women, and Children has called for the chemical castration of repeat sex offenders.⁸⁷ In addition, the Bavarian Prime Minister endorsed consideration of chemical castration.⁸⁸

For decades, other European nations, such as Sweden, have provided the option of surgical castration for violent sex offenses.⁸⁹ According to the California governor's office, recidivism has been reduced to approximately 2.2% in these countries after employing chemical castration treatment.⁹⁰

B. Application of Chemical Castration in Other Countries

Although not mandated by law as in California, chemical castration has been used effectively in Canada.⁹¹ The head of the Sexual Behavior and Gender Identity Clinic at the University of Toronto's Clarke Institute of Psychiatry, Dr. Robert Dickey, asserted that the drugs used by Canadian therapists are more effective than Depo-Provera.⁹²

In Singapore, Chief Justice Yong Pung How stated in September 1996 that child molesters may be penalized with castration.⁹³ Citing California's mandatory chemical castration law, How declared that Singapore may consider implementing its own program.⁹⁴ This consideration of California's chemical castration law came on the heels of an appeal, which How ignored, by a Singaporean man "sentenced to twenty years and twenty-four strokes of the cane for molesting five schoolboys."⁹⁵

86. *See id.*

87. *See Petty, supra* note 1, at A14.

88. *See Traynor, supra* note 1, at 11.

89. *See Restraining Sex Offenders, supra* note 74, at 11A.

90. *See California Governor Signs Castration Legislation*, AGENCE FRANCE-PRESSE, Sept. 18, 1996, available in 1996 WL 12140962 [hereinafter *Governor*].

91. *See Max Vanzi, Assembly OKs Castration Drug for Molesters*, L.A. TIMES, Aug. 31, 1996, at A26.

92. *See id.* The drug used by Dr. Dickey acts directly on the brain in order to "shut down sexual desire" as opposed to acting as a hormone suppressant as in the case of Depo-Provera. *Id.* One concern raised by Dr. Dickey is the possible false sense of security resulting from the mandatory chemical castration in California because of the failure of Depo-Provera to reach 100% effectiveness. *See id.*

93. *See Singapore's Crime Rate Up First Time in Seven Years*, AGENCE FRANCE-PRESSE, Sept. 11, 1996, available in 1996 WL 12136162.

94. *See id.*

95. *Id.*

Peru's, attorney general proposed that rapists receive death or chemical castration.⁹⁶ The Peruvian government stated that it would study the use of a chemical castration punishment similar to that used in California.⁹⁷ This decision came after the discovery of four children's bodies, ages seven to thirteen, believed to have been victimized by a man possibly connected to additional sex crimes that had occurred over the past two years.⁹⁸ Peru's Congress President agreed to have the legislature consider a chemical castration proposal when submitted.⁹⁹

Recently, in Ecuador, President Abdala Bucaram proposed a bill to have rapists castrated.¹⁰⁰ The bill, which came after frustration stemming from the Catholic church's refusal to allow the execution of child rapists, calls for castration by surgical or chemical means.¹⁰¹

C. Proposed Application of Chemical Castration in Other States in This Country

Many states currently keep a close eye on California's new mandatory chemical castration law. New York has taken a wait-and-see approach to chemical castration programs such as that in California, seemingly to allow any of the kinks to be worked out of the program before possibly implementing its own.¹⁰²

In Texas, State Senator Teel Bivins proposed a bill allowing for the physical castration of repeat child molesters.¹⁰³ There is also support for an amendment to this bill to allow for the option of the chemical castration of repeat offenders.¹⁰⁴

96. See *Peru's Attorney General Proposes Castration or Death for Rapists*, ASSOCIATED PRESS POL. SERVICE, Sept. 4, 1996, available in 1996 WL 5404510.

97. See *id.*

98. See *id.*

99. See *id.*

100. See *Ecuador's Leader Wants to Castrate Child Rapists*, FIN. POST, Oct. 29, 1996, at 2, available in 1996 WL 5744225.

101. See *id.*

102. See *Let California Field-Test "Chemical Castration,"* NEWSDAY, Sept. 6, 1996, at A54, available in 1996 WL 2535414.

103. See Ben Wear, *Senate Committee Unanimously Passes Castration Proposal*, AUSTIN AM.-STATESMAN, Mar. 2, 1995, at B3, available in 1995 WL 6090163. This Bill was proposed in 1995 after failure to get a hearing in 1993. See *id.*

104. See *id.* A Texas criminal defense attorney cites a case of one of his clients "who was suspected of 350 rapes and had been convicted of two." *Id.* After being convicted of yet another sex crime, he was sentenced to some jail time, probation,

Several states have also either introduced or have chemical castration bills pending in their legislatures. Michigan's HB 4703, introduced during the 1995 legislative session, would allow the court to order the chemical castration of those persons convicted of criminal sexual conduct in the first degree after having been previously convicted in Michigan or any other state with similar sex offense laws.¹⁰⁵ The bill provides for the treatment to be imposed "during any portion of the sentence in which the person is not incarcerated."¹⁰⁶ A similar chemical castration measure also appeared during Michigan's 1996 legislative session in HB 6208.¹⁰⁷

In Massachusetts, HB 1744 established an "investigational study into the efficacy of . . . chemical castration."¹⁰⁸ The study calls for fact finding and reporting on the desirability of implementing a voluntary chemical castration program using the drug Depo-Provera as in California.¹⁰⁹

Wisconsin proposed AB 594, which provided a procedure for the Wisconsin courts to use to determine whether child sex offenders should be chemically castrated.¹¹⁰ Wisconsin's bill provides that a person "convicted of sexually assaulting a child who is younger than 12 years old" would be subject to a hearing to determine whether chemical castration should be imposed.¹¹¹

Alabama bill HB 92 aimed to amend current Alabama law which lacks a provision for the chemical castration of a male or the sterilization of a female convicted of sex crimes against children under the age of sixteen.¹¹² Alabama HB 92 would allow Alabama courts to order chemical castration or sterilization "upon a second conviction for certain sex crimes involving a child under the age of 16 years."¹¹³

and chemical castration. *See id.* According to the attorney, the offender had not committed any additional offenses after receiving chemical castration treatment. *See id.*

105. *See* H.B. 4703, 88th Leg., Reg. Sess. (Mich. 1995).

106. *Id.*

107. *See* H.B. 6208, 88th Leg., Reg. Sess. (Mich. 1996).

108. H.B. 1744, 179th Gen. Court., 1st Ann. Sess. (Mass. 1995) (internal quotations omitted).

109. *See id.*

110. *See* A.B. 594, 92d Leg. Sess., 1995-96 Reg. Sess. (Wis. 1995).

111. *Id.* The Wisconsin court would order chemical castration if it was found that the treatment would not hamper the person's ability to work, would not cause irreversible changes to the body, and would cause the person to stop sexually assaulting children. *See id.* Additionally, it must be determined at the hearing that without the treatment or incarceration, the offender is likely to repeat, that there is no less intrusive means of successful treatment, and that the offender understands the effects of the treatment and consents to it. *See id.*

112. *See* H.B. 92, Reg. Sess. (Ala. 1996).

113. *Id.* This bill also provides a clause making it a felony for any person to refuse

Recently, in New Jersey, SB 1568 was introduced.¹¹⁴ New Jersey's bill closely parallels California's mandatory chemical castration law as it requires New Jersey courts to order offenders "convicted of a second or subsequent offense of aggravated sexual assault upon a child under the age of 13 . . . to undergo chemical castration."¹¹⁵ As in California, this bill allows the New Jersey courts to exercise discretion in ordering chemical castration after a first offense.¹¹⁶ New Jersey cites the reduced recidivism from successful chemical castration programs in Europe as supporting authority for SB 1568.¹¹⁷

In January 1997, Arizona joined the fight against child molestation when it introduced HB 2216.¹¹⁸ The Arizona measure closely parallels California's law in allowing for the imposition of MPA treatment upon the discretion of the court for a first offense.¹¹⁹ Additionally, chemical castration is required upon the second conviction before the offender is released from prison.¹²⁰ Finally, as in California, the Arizona proposal allows for an offender to avoid the chemical castration treatment by opting for the surgical castration.¹²¹

Following this trend, a state senator in Jackson, Mississippi, filed a chemical castration bill for the 1997 legislative session which would require chemical castration upon an offender's second rape conviction.¹²²

Louisiana HB 78 provides for the use of MPA for sex offenders as a condition of probation or parole.¹²³ Under Louisiana's proposed law, repeat sex offenders would not be eligible for parole unless they undergo chemical castration at their own expense.¹²⁴ The ACLU of Louisiana claims that conditioning release from confinement on undergoing chemi-

to be chemically castrated or sterilized after it has been ordered by the court. *See id.*

114. *See* S.B. 1568, 207th Leg., 1st Ann. Sess. (N.J. 1996).

115. *Id.* (internal quotations omitted).

116. *See id.*

117. *See id.*

118. *See* H.B. 2216, 43d Leg., 1st Reg. Sess. (Ariz. 1997).

119. *See id.*

120. *See id.*

121. *See id.*

122. *See* S.B. 2042, 1997 Reg. Sess. (Miss. 1997); *see also* *TBI Completes Influence Probe in Drowning Death*, THE COM. APPEAL, Oct. 13, 1996, at B2, available in 1996 WL 13661119.

123. *See* H.B. 78, 1997 Reg. Sess. (La. 1997).

124. *See* Doug Myers, *Bill Proposes Chemical Castration*, BATON ROUGE ADVOC., Jan. 7, 1997, at 1B, available in 1997 WL 7230502.

cal castration is coercive.¹²⁵ Representative Kay Isles, responsible for HB 78, stressed that chemical castration is not coercive, but rather voluntary because offenders can opt to remain incarcerated to avoid the treatment.¹²⁶

Colorado also has a bill under review which would allow chemical castration.¹²⁷ Under Colorado's proposed law, repeat child sex offenders would be required to undergo chemical castration as a condition of parole.¹²⁸ Use of chemical castration in Denmark, Sweden, and Germany was cited in support of Colorado's bill.¹²⁹

In Georgia, Representative George Grindley introduced HB 21 in January 1997.¹³⁰ Georgia's bill allows judges to impose chemical castration on first-time offenders for aggravated child molestation on a victim under the age of fifteen.¹³¹

Nevada also has followed California's lead with the introduction of their own chemical castration measure in January 1997.¹³² Nevada's bill, SB 101, would allow district attorneys to request the chemical castration of offenders before they are reintroduced into their communities.¹³³ Chemical castration would only be imposed upon a second or subsequent conviction of a serious sex offense.¹³⁴ Low recidivism rates in Denmark were cited in support of the bill.¹³⁵

Senate Bill 633 in Oklahoma allows for the chemical castration of first time sex offenders.¹³⁶ Parole after second and subsequent convictions

125. See Jack Wardlaw, *The Crucible, Louisiana-Style*, NEW ORLEANS TIMES-PICAYUNE, Jan. 15, 1997, at B7, available in 1997 WL 4199279.

126. See *id.*

127. See H.B. 1133, 61st Gen. Assembly, 1st Reg. Sess. (Colo. 1997); see also *Repeat Child Sex Offenders Deserve Chemical Castration*, DENVER POST, Dec. 11, 1996, at B10, available in 1996 WL 12638756 [hereinafter *Repeat*].

128. See *Repeat*, *supra* note 127, at B10.

129. See *id.* The sponsor of Colorado's bill, Rep. Doug Dean, expected to face considerable opposition from the ACLU, but the bill passed the House State Affairs Committee easily with no opposition at the hearing. See Dan Luzadder, *Chemical Castration Bill Advances; Nobody Shows Up to Oppose Plan Designed to Stop Pedophiles*, ROCKY MOUNTAIN NEWS, Jan. 31, 1997, at 10A, available in 1997 WL 6817663.

130. See Marlon Manuel, *County's Representatives on Appropriations Given Their Subcommittee Jobs*, ATLANTA J. & CONST., Jan. 30, 1997, at G5, available in 1997 WL 3952155.

131. See *id.*

132. See Ed Vogel, *Castration Measure Targets Sex Offenders*, LAS VEGAS REV.-J., Jan. 31, 1997, at 5B, available in 1997 WL 4536109.

133. See *id.*

134. See *id.*

135. See *id.*

136. See Chuck Ervin, *State Lawmakers Pen Castration Legislation*, TULSA WORLD,

of sex offenses may be conditioned upon chemical castration treatment under this measure.¹³⁷ Under the proposed law, chemical castration would be required for anyone convicted of a sex crime where the victim is under sixteen.¹³⁸

In January 1997, the State of Washington revived chemical castration legislation from its 1990 legislative session.¹³⁹ Under Washington's proposal, judges would be allowed to require chemical castration upon the recommendation of medical experts.¹⁴⁰ The Washington chemical castration law would apply to those offenders convicted of first or second degree rape of adults or first degree rape of children.¹⁴¹ As in California, Washington has employed Depo-Provera as its chemical castration drug.¹⁴² Washington's proposal would permit the chemical castration shots to continue for the life of the convicted offender.¹⁴³

Iowa's Governor Terry Branstad announced plans to call for a chemical castration law akin to California's.¹⁴⁴ As in California, the Iowa law would require chemical castration upon parole for those offenders convicted a second time for sex offenses against children.¹⁴⁵ Additionally, judges would have the option of ordering chemical castration upon a first conviction.¹⁴⁶

Tennessee also saw the introduction of its own chemical castration bill in January 1997.¹⁴⁷ Representative Tim Burchett is calling for the chemical castration of all first-time child sex offenders.¹⁴⁸ In response, the

Feb. 1, 1997, at A9, available in 1997 WL 3624227. SB 633 came on the heels of SB 629 which provides for surgical castration known as "asexualization" for criminal sex offenders. *Id.*

137. *See id.*

138. *See id.*

139. *See* Hal Spencer, *Chemical Castration of Sex Offenders Becomes Issue Again*, SEATTLE POST-INTELLIGENCER, Jan. 27, 1997, at B3, available in 1997 WL 3186119.

140. *See id.*

141. *See id.*

142. *See id.*

143. *See id.*

144. *See* Jonathan Roos, *Branstad Proposes Chemical Castration*, DES MOINES REG., Dec. 20, 1996, at 1, available in 1996 WL 15278573.

145. *See id.*

146. *See id.*

147. *See* Rebecca Ferrar, *Lawmaker Advocates Castrating Molesters*, KNOXVILLE NEWS-SENTINEL, Dec. 22, 1996, at B1, available in 1996 WL 14436447.

148. *See id.*

Tennessee director of the ACLU immediately mounted an opposition.¹⁴⁹ Burchett, claiming that his motivation is to protect children, stated that the bill "will send a clear message that child molestation will not be tolerated in the state of Tennessee."¹⁵⁰

V. CONSTITUTIONAL IMPLICATIONS

Not surprisingly, California's mandatory chemical castration law has spawned a great deal of debate over its relation to the United States Constitution.¹⁵¹ Vigorous opponents such as the ACLU have asserted that chemical castration amounts to cruel and unusual punishment.¹⁵² The effect of mandatory chemical castration on the right to privacy also has provided fertile ground for recent debate.¹⁵³ These privacy concerns include the effect of California's law on the right to procreate freely, the right to object to medical treatment, and the right to receive medical treatment.¹⁵⁴ This section will examine the impact of California's mandatory chemical castration law on these constitutional concerns.

A. *Cruel and Unusual Punishment*

Perhaps the most frequently cited objection to chemical castration is that it violates the Eighth Amendment protection against cruel and unusual punishment. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹⁵⁵ A relevant inquiry, initially, is whether chemical castration can be characterized as treatment so as to avoid the reach of the Eighth Amendment.¹⁵⁶ In *Rennie v. Klein*,¹⁵⁷ the Federal District

149. *See id.*

150. *Id.*

151. *See, e.g.,* Van Biema, *supra* note 11, at 60 (identifying claims of cruel and unusual punishment).

152. *See id.*

153. *See* Lucas, *supra* note 4, at A1.

154. *See* Fitzgerald, *supra* note 45, at 39-52; *see generally* Vanderzyl, *supra* note 48, at 134-37 (discussing informed consent issues relating to the use of castration).

155. U.S. CONST. amend. VIII.

156. *See* Vanderzyl, *supra* note 48, at 126 (citing William Green, *Depo-Provera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues*, 12 U. DAYTON L. REV. 1, 20 (1986) (discussing Eighth Amendment limitations on castration)).

157. 462 F. Supp. 1131 (D.N.J. 1978), *vacated*, 653 F.2d 836 (3d Cir. 1981) (concerning the depth of review granted by the court for a preliminary injunction sought by mental patients against the hospital staff), *vacated*, 458 U.S. 1119 (1982) (remanding for consideration under *Youngberg v. Romeo*, 457 U.S. 307 (1982)), *on remand to* 720 F.2d 266 (3d Cir. 1983) (upholding the district court finding that a right to antipsy-

Court of New Jersey articulated a four-pronged test to determine whether an action can be considered treatment or punishment.¹⁵⁸ The prongs of the *Rennie* test require the following inquiries: (1) whether the procedure has any therapeutic value; (2) whether the procedure is part of an accepted medical practice or is experimental in nature; (3) whether the adverse effects of the procedure seem unduly harsh; and (4) whether the procedure is "part of an ongoing psychotherapeutic program."¹⁵⁹

Arguably, chemical castration through the use of MPA satisfies all four prongs of the *Rennie* test and therefore avoids Eighth Amendment scrutiny.¹⁶⁰ First, MPA has the clear therapeutic value of reducing the levels of testosterone and decreasing the offender's sexual fantasy.¹⁶¹ Second, MPA can properly be characterized as an innovative, rather than experimental, therapy.¹⁶² Third, while some short-term adverse effects result from the use of MPA, these effects are reversible and long-term concerns about effects such as cancer have been discounted.¹⁶³ Accordingly, these effects should not be characterized as unduly harsh. Fourth, because MPA treatment occurs under medical supervision as part of an ongoing psychological treatment to control deviant sexual fantasies, it satisfies the fourth prong of the *Rennie* test.¹⁶⁴ Moreover, the purpose of MPA to control the offender's criminal psychological tendencies warrants regarding this treatment as part of a psychotherapeutic process.¹⁶⁵

chotic drugs exists). On remand, the court of appeals abandoned the least restrictive means analysis for determining whether to apply antipsychotic drugs in exchange for an approach where the drugs would be imposed on the patient in order to prevent harm to himself or others in the opinion of professional medical judgment. *See Rennie v. Klein*, 720 F.2d 266, 269 (1983).

158. *See id.* at 1143.

159. *Id.*; *see Vanderzyl*, *supra* note 48, at 126 (delineating the *Rennie* test).

160. *See Fitzgerald*, *supra* note 45, at 33; *Peters*, *supra* note 62, at 319-20 (arguing that chemical castration satisfies the *Rennie* test for characterization as a medical treatment).

161. *See Fitzgerald*, *supra* note 45, at 33.

162. *See id.* at 34 (citing Dale H. Cowan & Eva Bertsch, *Innovative Therapy: The Responsibility of Hospitals*, 5 J. LEGAL MED. 218, 220 (1984)). The innovative nature of MPA should not preclude its usage. *See id.* at 34-35. *But see People v. Gauntlett*, 352 N.W.2d 310, 316 (Mich. Ct. App.) (finding Depo-Provera treatment to fail as a probationary condition because it had not gained acceptance as a "safe and reliable" procedure in the medical community), *modified*, 353 N.W.2d 463 (Mich. 1984).

163. *See supra* notes 65-70 and accompanying text (discussing the known side effects of MPA).

164. *See Fitzgerald*, *supra* note 45, at 33.

165. *But see Vanderzyl*, *supra* note 48, at 126-28 (discussing the perspective that

Accordingly, MPA should escape Eighth Amendment scrutiny because it qualifies under the *Rennie* test as a treatment and not a punishment.¹⁶⁶

Alternatively, even if chemical castration is regarded as a punishment, it should still pass constitutional scrutiny under the Eighth Amendment. Courts have historically had difficulty in determining what constitutes cruel and unusual punishment.¹⁶⁷ In 1958, the United States Supreme Court in *Trop v. Dulles*¹⁶⁸ recognized that the Eighth Amendment's meaning of cruel and unusual punishment is derived from evolving societal standards that are the product of a maturing society.¹⁶⁹ This adherence to evolving societal standards has continually guided the Court in determining cruel and unusual punishment guidelines.¹⁷⁰ Accordingly, a number of inquiries have developed to determine whether a punishment is cruel and unusual under the Eighth Amendment.¹⁷¹

The first inquiry is whether the punishment is inherently cruel.¹⁷² Originally, it was believed a punishment that would have been invalid at the time of the Constitution's inception was inherently cruel.¹⁷³ Modernly, however, the Court has stated that "an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment."¹⁷⁴ Although the Court has not yet addressed whether chemical castration is inherently cruel, numerous courts have applied this test in cases dealing with the punishments of surgical castration and sterilization. In *Davis v. Berry*,¹⁷⁵ an Iowa statute required all persons twice convicted of felonies to undergo a vasectomy.¹⁷⁶ In finding that the statute violated the prohibition against

both surgical and chemical castration fail under the *Rennie* test).

166. See Peters, *supra* note 62, at 319-20.

167. See Pamela K. Hicks, *Castration of Sexual Offenders*, 14 J. LEGAL MED. 641, 658 (1993).

168. 356 U.S. 86 (1958).

169. See *id.* at 101.

170. See *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (noting that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society") (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)).

171. See Fitzgerald, *supra* note 45, at 36; Peters, *supra* note 62, at 320-21; Vanderzyl, *supra* note 48, at 128-29.

172. See *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Brennan, J., concurring); *Trop v. Dulles*, 356 U.S. 86, 101-02 (1958); *In re Kemmler*, 136 U.S. 436, 446-47 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 134-36 (1879).

173. See Fitzgerald, *supra* note 45, at 36 (citing Shari Nurkin Leinwand, Note, *Aversion Therapy: Punishment as Treatment and Treatment as Cruel and Unusual Punishment*, 49 S. CAL. L. REV. 880, 938-39 (1976)).

174. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

175. 216 F. 413 (S.D. Iowa 1914), *rev'd on other grounds*, 242 U.S. 468 (1917).

176. See *id.* at 417.

cruel and unusual punishment, the court emphasized the mental suffering, public degradation, and public humiliation inherent in this punishment.¹⁷⁷ In *Mickle v. Henrichs*,¹⁷⁸ a man was sentenced to prison and a vasectomy in order to prevent future procreation.¹⁷⁹ The Nevada court enjoined the enforcement of the vasectomy order stating that it was prohibited by the ban on cruel and unusual punishment.¹⁸⁰ The court asserted that the offender should not suffer the mutilation and brand of infamy that accompanies the operation once he has served his sentence and is introduced back into society.¹⁸¹ In *State v. Brown*,¹⁸² the Supreme Court of South Carolina found that surgical castration violated the state constitution's prohibition of cruel and unusual punishment.¹⁸³ By regarding castration as a form of mutilation, the court aligned itself with earlier decisions prohibiting punishment that degrades the offender.¹⁸⁴ In *Skinner v. Oklahoma*,¹⁸⁵ the Supreme Court found the punishment of sterilization unconstitutional on equal protection grounds.¹⁸⁶ As demonstrated by these decisions, there is strong support for the proposition that surgical castration and sterilization are inherently cruel.

The use of MPA, however, differs greatly from its surgical alternative and cannot be characterized as inherently cruel. First, the chemical castration treatment requires no incisions or probative surgery, but rather is administered to the offender through a simple injection with a hypodermic needle.¹⁸⁷ Second, the treatment does not result in any mutilation

177. See *id.* at 416. But see *State v. Feilen*, 126 P. 75 (Wash. 1912). The court ordered Feilen, who was convicted of statutory rape of a female under the age of 10, to serve a life sentence in the state penitentiary and undergo a vasectomy. See *id.* at 76. The court found that the vasectomy was not cruel and unusual punishment. See *id.*

178. 262 F. 687 (D. Nev. 1918).

179. See *id.* at 687.

180. See *id.* at 690-91.

181. See *id.* at 691.

182. 326 S.E.2d 410 (S.C. 1985).

183. See *id.* at 412.

184. See Vanderzyl, *supra* note 48, at 129-30.

185. 316 U.S. 535 (1942).

186. See *id.* at 538. The Court struck down the sterilization because of its failure to meet the requirements of the Fourteenth Amendment's equal protection clause. See *id.* Although the Court decided the case on equal protection grounds, it could easily have found a violation of the Eighth Amendment. See Fitzgerald, *supra* note 45, at 37.

187. See Fitzgerald, *supra* note 45, at 36.

of the body, as opposed to its surgical counterpart.¹⁸⁸ Third, the effects of chemical castration are reversible.¹⁸⁹ As a result, the humiliation, degradation, or “badge of infamy” that concerned previous courts enjoining surgical castration orders is not present with chemical castration.¹⁹⁰

A second inquiry for determining when a punishment is cruel and unusual is whether the punishment is disproportionate to the offense.¹⁹¹ The historical principle of proportionality between a punishment and crime is ardently grounded and repeated in common law jurisprudence.¹⁹² In *Harmelin v. Michigan*,¹⁹³ however, Justice Scalia, joined by Chief Justice Rehnquist, explicitly rejected the use of proportionality analysis by finding that “the Eighth Amendment contains no proportionality guarantee.”¹⁹⁴ Justice Kennedy filed a concurrence, joined by Justices O’Connor and Souter, which stated that “[t]he Eighth Amendment does not require strict proportionality . . . [r]ather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”¹⁹⁵ Although chemical castration would likely pass constitutional muster under the strict proportionality requirements applied prior to *Harmelin*,¹⁹⁶ it is clear that it easily passes the grossly disproportionate standard enunciated by Justice Kennedy’s *Harmelin* concurrence for two reasons. First, there is no excessive pain or discomfort involved in the ad-

188. See Hicks, *supra* note 167, at 659 (stating that chemical castration does not involve intrusive procedures or mutilation); Peters, *supra* note 62, at 320 (stating that Depo-Provera treatment does not mutilate the body).

189. See *supra* notes 65-70 and accompanying text (discussing the known side effects of MPA).

190. See Fitzgerald, *supra* note 45, at 37-38.

191. See *id.* at 38 (citing Leinwand, *supra* note 173, at 938-39); Hicks, *supra* note 167, at 658 (citing *Furman v. Georgia*, 408 U.S. 238, 257-306 (1972) (Brennan, J., concurring)); Peters, *supra* note 62, at 320 (citing *Weems v. United States*, 217 U.S. 349 (1910)); Vanderzyl, *supra* note 48, at 129 (citing *Weems*, 217 U.S. at 366-67 (1910)).

192. See *Solem v. Helm*, 463 U.S. 277, 284 (1983), *overruled by Harmelin v. Michigan*, 501 U.S. 957 (1991). In *Solem*, the Court determined that objective criteria should guide the proportionality analysis. *Solem*, 463 U.S. at 292. The objective criteria considered by the Court were “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.” *Id.*

193. 501 U.S. 957 (1991).

194. *Id.* at 965.

195. *Id.* at 1001 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem*, 463 U.S. at 288, 303); see *Weems*, 217 U.S. at 371 (discussing the idea that the punishment for the crime should be proportionate to the offense); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (finding the punishment of death for the rape of an adult woman to be grossly disproportionate and excessive for the offense).

196. See *Solem*, 463 U.S. at 292 (discussing the necessary elements for proportionality review).

ministration of the chemical castration treatment.¹⁹⁷ Instead, this treatment is an effort to prevent continued anti-social behavior once the offender is released.¹⁹⁸ In fact, some offenders welcome this treatment as a personal relief from their criminal sexual fantasies.¹⁹⁹ Second, and most importantly, chemical castration is not a grossly disproportionate punishment in relation to the seriousness of sex crimes against children.²⁰⁰ Child victims must bear the emotional scars from these attacks—if they survive them—and some children who have been sexually molested become “psychological time bombs” prone to numerous personality disorders affecting the rest of their lives.²⁰¹ On the other hand, the effects of chemical castration on the offender cease once its application is terminated.²⁰²

A third inquiry relevant to determining cruel and unusual punishment asks whether the punishment is excessive in relation to the achievement of legitimate state objectives.²⁰³ Additionally, the punishment must serve these objectives in the least restrictive manner possible.²⁰⁴ The state clearly has the legitimate objective of protecting its citizens, especially young children. Arguments can be made asserting that the use of physical castration or even incarceration is suspect under this inquiry because the lesser intrusive alternative of chemical castration exists. Subjection to chemical castration relieves the offender of his or her criminal sexual fantasies and thereby reduces the future threat to society.²⁰⁵

197. See Vanderzyl, *supra* note 48, at 130 (stating that chemical castration, unlike surgical castration, does “not entail severe physical pain”).

198. See Hicks, *supra* note 167, at 659.

199. See *Working*, *supra* note 78, at 4D. After four convictions for violent sex crimes committed against young girls, Arne Kjeldsen, the offender, welcomed chemical castration asserting that it removed the sex fantasies that made him a criminal. See *id.*

200. See Hicks, *supra* note 167, at 659 (stating that chemical castration is not “grossly” out of proportion compared to the severity of the crimes).

201. See Fitzgerald, *supra* note 45, at 38 (citing Prager, *Sexual Psychopathy and Child Molesters, The Experiment Fails*, 6 *Juv. L.* 49, 63 (1982)).

202. See *supra* note 67 and accompanying text (discussing the reversible nature of MPA side effects).

203. See *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Brennan, J., concurring).

204. See *id.*; see also Fitzgerald, *supra* note 45, at 39 (citing AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE § 18:2-3(b), at 57-70 (1980)).

205. See Fitzgerald, *supra* note 45, at 39.

A fourth inquiry addresses the concern of whether the punishment is being inflicted arbitrarily.²⁰⁶ This concern is easily dismissed because California's chemical castration law removes all arbitrariness from the picture. According to the language of the law, persons found guilty of second convictions of specified offenses against children under the age of thirteen must undergo chemical castration upon parole.²⁰⁷ Therefore, chemical castration will be prescribed without the discretion of the court upon the parole of every repeat sex offender who falls within the statute.

A fifth and final inquiry is whether the punishment is unacceptable to contemporary society.²⁰⁸ The most recognized standard for determining acceptability to society is whether people informed of the penalty find it shocking, unjust, and unacceptable.²⁰⁹ There is ample justification for not finding chemical castration unacceptable by today's societal standards. First, chemical castration can be considered equivalent to psychotropic drugs including antidepressants, antipsychotics, and tranquilizers which are routinely used to treat mental disorders.²¹⁰ Second, courts have upheld life sentences without parole for crimes other than murder and sex offenses.²¹¹ Third, because society accepts the state's ability to sentence an offender to death, the lesser included ability of the state to regulate the offender during the term of his sentence should also be accepted.²¹² Chemical castration is clearly a less painful and intrusive penalty than these accepted alternatives.

Because California's mandatory chemical castration satisfies the relevant inquiries under the Eighth Amendment, the prohibition of cruel and unusual punishment should not bar the operation of this law.

206. See *Furman*, 408 U.S. at 282 (Brennan, J., concurring).

207. See CAL. PENAL CODE § 645(b) (West Supp. 1997); *supra* note 30 and accompanying text (discussing California's mandatory chemical castration law).

208. See *Furman*, 408 U.S. at 282 (Brennan, J., concurring).

209. See Hicks, *supra* note 167, at 659 (citing *Furman*, 408 U.S. at 361 (Brennan, J., concurring)).

210. See Besharov & Vachhs, *supra* note 9, at 42; see also Fromson *supra* note 72, at 328 (citing Green, *supra* note 156, at 25-26).

211. For example, in *Harmelin*, the Court upheld the sentence of life in prison without the possibility of parole for a man who was convicted of possessing six hundred and fifty grams of cocaine. See *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991).

212. In Seattle, Washington, it was ruled that the hanging of a child killer in 1993 was not barred by the Constitution as cruel and unusual punishment. Paul Leavitt, *Washington Judge: Hanging not Cruel*, USA TODAY, June 2, 1993, at 3A.

B. Constitutional Right to Privacy Concerns

While the United States Constitution does not grant an explicit right to privacy, an implicit right to privacy does exist.²¹³ In the 1965 landmark case *Griswold v. Connecticut*,²¹⁴ the Court recognized that the First, Third, Fourth, Fifth, and Ninth Amendments of the Constitution combine to create "zones of privacy."²¹⁵ The *Griswold* Court held that the right to privacy is a fundamental right which cannot be curtailed without a compelling governmental interest.²¹⁶ The courts have found that inherent in this privacy right are the right to procreative freedom, the right to refuse medical treatment, and a possible right to receive medical treatment.²¹⁷

It is important to note that prisoners do not enjoy the same constitutional protections as law abiding citizens.²¹⁸ Additionally, individuals on probation "are still convicted criminals and as such are subject to certain limitations on their liberty."²¹⁹ Limitations in the probation context may be subject to "special scrutiny" in order to ensure that the limitations "serve the dual objectives of rehabilitation and public safety."²²⁰ With these restrictions on individual liberty under consideration, this section

213. See Vanderzyl, *supra* note 48, at 118.

214. 381 U.S. 479 (1965).

215. See *id.* at 484.

216. See Vanderzyl, *supra* note 48, at 119 (citing *Griswold*, 381 U.S. at 484-86). The Court in *Griswold* adhered to the principle "that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" *Griswold*, 381 U.S. at 485 (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)).

217. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (asserting the constitutionally protected right of procreation); *Rennie v. Klein*, 720 F.2d 266 (1983) (finding that mental patients have a constitutional right to refuse treatment of antipsychotic drugs); *Wyatt v. Stickney*, 325 F.Supp. 781 (M.D. Ala. 1971) (introducing the idea of a constitutional right to treatment).

218. See Janet F. Ginzberg, Note, *Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant*, 58 BROOK. L. REV. 979, 1004 (1992). The Supreme Court has recognized that prisoners do not lose all of their constitutional rights upon entering prison. See *id.* at 1005 (citing *Bell v. Wolfish*, 441 U.S. 520 (1979); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974)).

219. *Id.* at 1009 (citing *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (noting that the "[s]tate properly subjects probationer to many restrictions not applicable to other citizens.")).

220. *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975).

will address California's mandatory chemical castration in relation to the right to procreative freedom, the right to refuse medical treatment, and the potential right to receive medical treatment.

1. Right to Procreative Freedom

In *Skinner v. Oklahoma*,²²¹ the Court struck down the Oklahoma Habitual Criminal Sterilization Act requiring the sterilization of habitual criminals.²²² The Court "recognized that the right to procreate is 'one of the basic civil rights of man.'²²³ The right to procreate is also deeply rooted in Supreme Court decisions dealing with contraceptive devices.²²⁴

Punishments historically considered by the Court—like sterilization, vasectomy, and surgical castration—violate the right to procreate because they effectively eliminate the offender's capacity to procreate.²²⁵ MPA treatment, however, does not violate this right.²²⁶ Although MPA treatment prevents spontaneous erections or ejaculations, those undergoing the treatment can engage in sexual activity when prompted by a partner.²²⁷ While some critics argue that chemical castration causes a reduction in sexual capacity due to a decreased sex drive, as opposed to physiological effects, dosages of MPA can be manipulated to avoid total impotence.²²⁸

221. 316 U.S. 535 (1942).

222. See *id.* at 536. The Act defined a habitual criminal as a person "convicted two, or more times for crimes amounting to felonies involving moral turpitude." *Id.* (internal quotations omitted). The offender in *Skinner* was convicted once of stealing chickens and twice of robbery with firearms. See *id.* at 537.

223. Peters, *supra* note 62, at 322 (quoting *Skinner*, 316 U.S. at 541).

224. See *Carey v. Population Services*, 431 U.S. 678, 687-88 (1997) (finding that restrictions on the distribution of contraceptives burdened the freedom of decision relating to childbearing); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (striking down a Massachusetts provision prohibiting the distribution of contraceptives to single persons); *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (holding that a Connecticut law prohibiting the use of contraceptives placed an unconstitutional burden on the right of marital privacy); Erika T. Blum, Note, *When Terminating Parental Rights is Not Enough: A New Look at Compulsory Sterilization*, 28 GA. L. REV. 977, 985-87 (1994) (discussing the development of the right to procreate).

225. See Vanderzyl, *supra* note 48, at 122.

226. See Fitzgerald, *supra* note 45, at 44 (stating that MPA treatment does not run afoul of the right to procreate).

227. See *supra* note 61 and accompanying text (discussing the MPA medical mechanisms of action).

228. See *supra* note 62 and accompanying text (noting the medical mechanisms of action of MPA). See also Fitzgerald, *supra* note 45, at 44 ("A paraphiliac undergoing MPA treatment is not impotent, but 'erotically apathetic.'") (citing P. WALKER, ET AL., *supra* note 60, at 427-43); *id.* (stating that diminished sex drive can be restored

Fundamental rights, like the right to procreate, are only subject to state regulations if there is a compelling governmental interest.²²⁹ Under this standard, a state must demonstrate a compelling objective and show that the regulation achieves the objective through the least restrictive means available.²³⁰ The use of chemical castration does not unconstitutionally interfere with the right to procreate for several reasons. First, the state has a legitimate interest in promoting the safety of its child citizens from sex crimes.²³¹ By removing the sexual fantasies which motivate the offender to commit these criminal acts, the state is taking great strides towards preventing the commission of future offenses. MPA treatment is "clearly effective during active treatment" in reducing sex crimes.²³² Second, because the offender can still engage in sexual activity, his or her probation while undergoing MPA treatment is "less intrusive on [the offender's] procreative liberty than either commitment or incarceration."²³³ Limitations on conjugal visits would pose a more severe barrier on procreative freedom than the effects of chemical castration. Additionally, chemical castration is arguably a more effective and less intrusive alternative to other therapies currently in use.²³⁴ Because it achieves a compelling governmental interest through the least restrictive means available, the limited intrusion of chemical castration on the right to procreate is justified.

2. Right to Object to Medical Treatment

Included in the liberties protected by the due process clause of the Fourteenth Amendment is the right to refuse medical treatment.²³⁵ The

through an adjustment of the drug dosage) (citing F. BERLIN, *Sex Offenders: A Biomedical Perspective and a Status Report on Biomedical Treatment*, in J. GREER & I. STUART, *THE SEXUAL AGGRESSOR* 83-123 (1983)).

229. See Vanderzyl, *supra* note 48, at 122 (citing *Roe v. Wade*, 410 U.S. 113, 155 (1973)).

230. See *id.* (citing *Shelton v. Tucker*, 364 U.S. 479, 488-89 (1960)).

231. See *id.* at 123 (citing *Runnels v. Rosendale*, 499 F.2d 733, 735 (9th Cir. 1974) (suggesting safety concerns may justify mandatory treatment)).

232. Fitzgerald, *supra* note 45, at 44 (quoting Grossman, *Research Directions in the Evaluation and Treatment of Sex Offenders: An Analysis*, 3 BEHAV. SCI. & LAW 421, 428 (1985)).

233. See *id.*

234. See Fromson, *supra* note 72, at 329. For example, in Oregon, convicted rapists are subjected to electric shock therapy. See *id.*

235. See *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) (stating that

right to refuse unwanted medical treatment is limited, however.²³⁶ The liberty interest of the individual must be weighed against the state's interest in requiring the treatment.²³⁷ Historically, certain state interests have been held to outweigh an individual's liberty interest in refusing medical treatment.²³⁸ Those state interests include: "(1) the protection of life; (2) the prevention of suicide; (3) the protection of innocent third parties; and (4) the protection of the medical profession."²³⁹ The interest of protecting innocent third parties, namely children, justifies the imposition of chemical castration upon parole or probation.²⁴⁰ Incarceration of offenders only protects innocent children while the offender is confined.²⁴¹ Chemical castration, which chemically depresses an offender's sexual desires, allows the offender to adapt to a non-criminal lifestyle once reintroduced into society while continuing to protect children from future sex crimes.²⁴²

The Court has also upheld mandatory sterilization laws in the context of mental patients. In *Buck v. Bell*,²⁴³ the Court found that a Virginia state law authorizing the sterilization of mental patients was not void under the Fourteenth Amendment.²⁴⁴ Following this precedent, the Court, in *Washington v. Harper*,²⁴⁵ upheld the involuntary administration of antipsychotic drugs in situations where the offender posed a danger to himself or to others.²⁴⁶ While the Court in *Washington* was concerned with the protection of others in a prison context, the argument for protecting others is equally, if not more, compelling when considered

a competent person has a constitutional right to refuse medical treatment); *Rennie v. Klein*, 720 F.2d 266, 269 (3d Cir. 1983) (holding that an involuntarily committed mental patient has a constitutional right to refuse antipsychotic drugs); Fitzgerald, *supra* note 45, at 44.

236. See *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905) (stating that an individual's "supremacy of his own will" may be subject to restraint for the safety of the general public); Fitzgerald, *supra* note 45, at 44.

237. See Peters, *supra* note 62, at 323.

238. See *id.*

239. *Id.* (citing *Harper v. State*, 759 P.2d 358, 364 (Wash. 1988)); see *United States v. Tony*, 605 F.2d 144, 147 (5th Cir. 1979) (stating that conditions may be imposed on probation if they are "reasonably related to the rehabilitation of the probationer and protection of the public"); see also *Cruzan*, 497 U.S. at 281 (allowing Missouri to impose heightened evidentiary standards to protect the state interest in life versus an individual's desire to be removed from life support).

240. See Peters, *supra* note 62, at 323.

241. See *id.*

242. See *id.*

243. 274 U.S. 200 (1927).

244. See *id.*

245. 494 U.S. 210 (1990).

246. See *id.* at 217.

in a societal context. The similarity between the rationale for the involuntary medical treatment of mental patients and the rationale for the involuntary medical treatment of child molesters is compelling evidence for sustaining the constitutional validity of chemical castration.²⁴⁷

Moreover, if the judicially recognized liberty interest providing the right to refuse treatment is seen as paramount,²⁴⁸ it must be recognized that the offender has a choice.²⁴⁹ On one hand, if the offender is reluctant to undergo the chemical castration treatment because of a fear of potential side effects, he or she can always opt for the surgical alternative.²⁵⁰ Also, because chemical castration is imposed during parole, the offender can refuse the treatment and remain in prison.²⁵¹ In this sense, the chemical castration program affords a convicted sex offender greater liberty in refusing treatment than mentally ill patients are given.²⁵²

3. Right to Receive Medical Treatment

Three decisions establish a constitutional right to treatment for incarcerated individuals. The right to treatment was first discussed in *Wyatt v. Stickney*,²⁵³ concerning treatment for mental patients.²⁵⁴ Second, in *Donaldson v. O'Connor*,²⁵⁵ the Fifth Circuit Court of Appeals found the right to treatment applicable to an involuntarily committed individual under the "parens patriae" rationale.²⁵⁶ Third, in *Estelle v. Gamble*,²⁵⁷ the Supreme Court recognized a duty on the part of the government to provide treatment for incarcerated individuals.²⁵⁸ The right to treatment in these decisions arose from the notion that because "involuntary commitment represents a decrease in individual liberty, such confinement can be justified only if the state provides rehabilitative treatment."²⁵⁹

247. See Fitzgerald, *supra* note 45, at 49 (stating that MPA treatment is warranted by the state interest in protecting the public from future sex crimes).

248. See *id.*

249. See *id.*

250. See *Chemical Castration Fact Sheet*, *supra* note 2, at 1.

251. See Fitzgerald, *supra* note 45, at 49.

252. Compare *id.* with *supra* notes 243-47 and accompanying text (discussing the application of sterilization laws to mental patients).

253. 325 F. Supp. 781 (M.D. Ala. 1971).

254. See Peters, *supra* note 62, at 324 (citing *Wyatt*, 325 F. Supp. at 785).

255. 493 F.2d 507 (5th Cir. 1974).

256. Fitzgerald, *supra* note 45, at 50 (citing *Donaldson*, 493 F.2d at 521).

257. 429 U.S. 97 (1976).

258. See *id.* at 103.

259. Peters, *supra* note 62, at 324 (citing *O'Connor v. Donaldson*, 422 U.S. 563,

The Supreme Court, however, hesitated in accepting a constitutional right to treatment.²⁶⁰ In *Youngberg v. Romeo*,²⁶¹ the Court noted that "the State concedes a duty to provide adequate food, shelter, clothing, and medical care."²⁶² The Court in *Youngberg* dealt with a mentally retarded youth and required rehabilitation in the form of "minimally adequate or reasonable training."²⁶³ It has been argued that, applying the minimally adequate standard, MPA treatment could be required for sex offenders.²⁶⁴ However, if essential medical care is only required for incarcerated offenders, then MPA treatment is not likely to be required for non-incarcerated individuals.²⁶⁵

In *State v. Christopher*,²⁶⁶ a case directly on point, Christopher was given probation for child molestation.²⁶⁷ Christopher's probation was later revoked when he committed additional acts of child molestation.²⁶⁸ The court rejected Christopher's claim that he had the right to be rehabilitated with chemical castration while on probation.²⁶⁹ The court in *Christopher* recognized that while rehabilitation is one of the goals of criminal penalties, other goals such as retribution and restraint must also be considered.²⁷⁰ The court went on to state that "no society should be forced to guarantee effective rehabilitation to all offenders," but, rather, rehabilitation must be balanced and considered along with the other goals of punishment.²⁷¹ Accordingly, the court affirmed Christopher's probation revocation.²⁷²

States are not required to provide convicted sex offenders with MPA treatment.²⁷³ Additionally, the right to treatment granted to mental patients is not analogous to criminal offenders because "involuntarily committed [mental] patients are entitled to a higher level of treatment" than convicted criminals.²⁷⁴

573-76 (1975)); see Fitzgerald, *supra* note 45, at 50.

260. See Fitzgerald, *supra* note 45, at 50.

261. 457 U.S. 307 (1982).

262. *Id.* at 324.

263. *Id.* at 319.

264. See Peters, *supra* note 62, at 325.

265. See *id.*

266. 652 P.2d 1031 (Ariz. 1982).

267. See *id.* at 1032.

268. See *id.*

269. See *id.*

270. See *id.* at 1033.

271. *Id.*

272. See *id.* at 1035.

273. See Fitzgerald, *supra* note 45, at 51.

274. *Christopher*, 652 P.2d at 1034 (citing *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982)). The court further stated that neither the Fourteenth Amendment nor the

It is often in the best interest of society to impose chemical castration on child molesters in order to protect society. The offender, however, is not entitled to demand probation with chemical castration treatment. The offender should also not assume a right to parole with the chemical castration treatment.

VI. INFORMED CONSENT TO MEDICAL TREATMENT

Under the doctrine of informed consent, a doctor must disclose all relevant information to a patient.²⁷⁵ In *Canterbury v. Spence*,²⁷⁶ the court stated that the "root premise" of the doctrine of informed consent is that every adult of sound mind has the right to decide what will be done with his or her own body.²⁷⁷ According to *Canterbury*, a risk is material "when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy."²⁷⁸ The *Canterbury* court identified a four-pronged analysis regarding what information should be divulged to a patient as follows: the risks, the anticipated benefits, the consequences without treatment, and the alternatives.²⁷⁹ Applying these factors to chemical castration, the doctrine of informed consent would require that the offender be told of all possible side effects and the risks from the use of the treatment.²⁸⁰ The benefits of chemical castration are the elimination of the offender's criminal sexual fantasies resulting in increased amenability to psychotherapy.²⁸¹ Additionally, chemical castration increases the possibility of reintroducing the offender into society with minimal potential risk to the public.²⁸² The consequences without the treatment are clear. The offender will either remain incarcerated or institutionalized and will continue to pose a threat to society once re-

Eighth Amendment require states to provide rehabilitation programs to prisoners. *See id.* at 1034.

275. *See* Fromson, *supra* note 72, at 332 (citing *Canterbury v. Spence*, 464 F.2d 772, 779-83 (D.C. Cir. 1972)).

276. 464 F.2d 772 (D.C. Cir. 1972).

277. *Id.* at 780.

278. *Id.* at 787 (quoting Jon R. Waltz & Thomas W. Scheuneman, *Informed Consent Therapy*, 64 Nw. U. L. REV. 628, 640 (1970)).

279. *See id.* at 787-89.

280. *See* Vanderzyl, *supra* note 48, at 135.

281. *See* Fitzgerald, *supra* note 45, at 19.

282. *See id.*

leased.²⁸³ Thus, the goal of reducing recidivism will be seriously hampered.²⁸⁴ Finally, no alternative forms of therapy have proven effective in dealing with these types of offenses.²⁸⁵

California's mandatory chemical castration law specifically addresses the issue of informed consent. Section 2(f) of amended California Penal Code section 645, states that "[t]he Department of Corrections shall administer this section and implement the protocols required by this section" including "a requirement to inform the person about the effect of hormonal chemical treatment and any side effects that may result from it. A person subject to this section shall acknowledge the receipt of this information."²⁸⁶

Some critics assert that informed consent cannot be truly given due to the uncertainty surrounding some long term effects of chemical castration.²⁸⁷ This argument fails, however, because the doctrine of informed consent only requires the disclosure of all known information at the time of the treatment.²⁸⁸ Critics also assert that an offender cannot consent freely and voluntarily when the offender knows that the alternative is incarceration.²⁸⁹ An individual does not lose the ability to choose just because a decision is difficult to make.²⁹⁰ Although the decision to accept chemical castration or remain in prison could be viewed as inherently coercive because many prisoners will accept any condition to get out of prison, offering this treatment to an offender does not rise to the level of duress necessary to vitiate consent.²⁹¹ Prisoners are often given the opportunity to participate in medical experiments to relieve boredom, make money, improve living conditions, and, sometimes, to gain early release.²⁹² In spite of this, poor volunteer rates in these types of pro-

283. See *id.* (citing Van Moffaert, *Social Reintegration of Sexual Delinquents by a Combination of Psychotherapy and Anti-Androgen Treatment*, 53 ACTA PSYCHIATRICA SCANDEANAVIA 29 (1976)).

284. See Peters, *supra* note 62, at 316 (citing Laurence French, *A Practitioner's Notes on Treating Sexual Deviance*, 68 PSYCHOL. REP. 1195, 1196 (1991)).

285. See Fitzgerald, *supra* note 45, at 19.

286. CAL. PENAL CODE § 645(f) (West Supp. 1997); see *supra* notes 20-43 and accompanying text (discussing the details of California's mandatory chemical castration law).

287. See Fitzgerald, *supra* note 45, at 20 (citing Green, *supra* note 156, at 15).

288. See *id.* (citing John R. Mason, *Kaimowitz v. Department of Mental Health: A Right to be Free from Experimental Psychosurgery*, 54 B.U. L. REV. 301, 316-19 (1974)).

289. See Peters, *supra* note 62, at 316 (citing Besharov & Vachhs, *supra* note 9, at 43).

290. See *id.* Peters draws the analogy of a cancer patient choosing between unpleasant chemical treatment or death. See *id.* at 316 n.64.

291. See Fitzgerald, *supra* note 45, at 21.

292. See *id.* (citing *Bailey v. Lally*, 481 F. Supp. 203, 215 (D. Md. 1979)).

grams provide evidence that prisoners do not feel compelled to consent.²⁹³ Additionally, studies have shown that prisoners who have consented to these experimental procedures do not feel their consent was coerced.²⁹⁴

The court in *Kaimowitz v. Michigan Department of Mental Health*²⁹⁵ identified three factors to determine whether an involuntarily committed mental patient could give informed consent to experimental brain surgery.²⁹⁶ The factors considered were competence, knowledge, and voluntariness.²⁹⁷ These factors are sufficiently satisfied in the context of chemical castration. First, it can be assumed that the offender is competent to make decisions pertaining to treatment because the erosion of decision-making capacity which concerned the *Kaimowitz* court is not present.²⁹⁸ Second, the knowledge factor is satisfied because there is a great deal of scientific information available regarding chemical castration via the use of MPA.²⁹⁹ Thus, chemical castration is unlike the experimental psychosurgery considered in *Kaimowitz* because chemical castration is neither dangerous, uncertain, nor irreversible.³⁰⁰ Third, the voluntary factor is satisfied because the offender has the right to refuse chemical castration.³⁰¹ The offender can opt for the surgical alternative or remain incarcerated.

Accordingly, the doctrine of informed consent should not be a bar to the application of mandatory chemical castration.

293. *See id.* (citing *Bailey*, 481 F. Supp. at 220).

294. *See id.* at 21-22 (citing Kathleen J. Woody, *Legal and Ethical Concepts Involved in Informed Consent to Human Research*, 18 CAL. W. L. REV. 50, 61-63 (1981)).

295. *See id.* at 23 (citing *Kaimowitz v. Michigan Dep't of Mental Health*, No. 73-194-AW (Cir. Ct., Wayne County, Mich., July 10, 1973), 1 MENTAL DISABILITY L. REP. 147, 150 (1976)).

296. *See id.*

297. *See id.* (citing *Kaimowitz*, 1 MENTAL DISABILITY L. REP. at 149).

298. *See id.* at 24. In *Kaimowitz*, the offender had been confined for fifteen years before given the choice of experimental psychosurgery. *See Peters, supra* note 62, at 316.

299. *See Fitzgerald, supra* note 45, at 24.

300. *See id.*; *Peters, supra* note 62, at 317 (stating that more research is available on treatment with Depo-Provera than "experimental psychosurgery").

301. *See Peters, supra* note 62, at 317.

VII. PUBLIC POLICY ARGUMENTS

In addition to the constitutional implications, mandatory chemical castration raises a number of significant public policy considerations.

A. Arguments in Support of Mandatory Chemical Castration

Perhaps the most compelling argument in support of mandatory chemical castration is the prevention of the future victimization of children. The incidence of child molestation is shocking, with between one hundred thousand and five hundred thousand children molested each year in the United States alone.³⁰² According to the California Department of Justice, approximately forty thousand of the sixty-six thousand registered sex offenders in California sexually assaulted children.³⁰³ According to the Department of Corrections, over half of all paroled sex offenders commit new sex offenses within a year of being released from prison and approximately three out of four will return to prison within two years.³⁰⁴ This recidivism is most concerning. Studies show that chemical castration is an effective weapon in combating recidivism. In a 1991 study by Johns Hopkins University, "fewer than [ten percent] of 626 'chemically castrated' patients had committed sexual offenses five years after treatment."³⁰⁵ Dr. Fred Berlin, Director of the Sexual Disorders Clinic at Johns Hopkins University, noted that sex offenders may have a recidivism rate of nearly sixty-five percent in the United States.³⁰⁶ Dr. Berlin cited domestic and European studies in which the recidivism rate fell below fifteen percent after chemical castration.³⁰⁷

Chemical castration has been used in Europe for many years. Among the European countries utilizing chemical castration, recidivism rates have "dropped from almost 100 percent to just 2 percent."³⁰⁸ According to the office of California Governor Pete Wilson, recidivism has decreased to 2.2% in Sweden, Denmark, and Germany.³⁰⁹

302. See Hicks, *supra* note 167, at 644.

303. See *Chemical Castration Fact Sheet*, *supra* note 2, at 1.

304. See *id.*; see also Vanderzyl, *supra* note 48, at 137 (citing Sandra G. Boodman, *Does Castration Stop Sex Crimes?: An Old Punishment Gains New Attention*, WASH. POST, Mar. 17, 1992, at Z07) (stating that current research estimates that "approximately forty percent of rapists and pedophiles will repeat their crimes").

305. Rundle, *supra* note 45, at B1.

306. See Van Biema, *supra* note 11, at 60.

307. See *id.*

308. *Will Chemical Castration Stop Sex Offenders?*, JET, Sept. 23, 1996, at 17 [hereinafter *Sex Offenders*].

309. See *Governor*, *supra* note 90.

Another compelling argument in support of mandatory chemical castration, closely related to the recidivism concern, is preventing the future victimization of children. It is a sad but true fact that our nation's prisons are becoming overcrowded.³¹⁰ As a result, discretionary release programs are becoming an option in some states,³¹¹ which means numerous offenders will hit the streets before serving complete sentences with nothing to stop them from assaulting more children. Some, especially the families of the victims, would ask: If these offenders are so dangerous, why do we let them out of prison at all?³¹² Chemical castration provides a necessary safeguard for those offenders sent back into society when the state has no other way of dealing with them.

Another compelling factor in support of chemical castration is the cost. It costs approximately twenty-five thousand dollars to support one prisoner for a year.³¹³ The cost of chemical castration is estimated at only two thousand four hundred dollars per year per parolee.³¹⁴ This considerable cost savings is compelling evidence for releasing state taxpayers from the substantial burden of prison costs while still protecting society from these offenders through chemical castration.

A final policy argument in support of chemical castration is that it is beneficial to the offender.³¹⁵ While this argument is likely the least favored by the families of the victims, it is worth addressing. Chemical castration relieves the offenders of their criminal sexual fantasies.³¹⁶ In fact, some offenders request and welcome the treatment as a release from the thoughts that make them criminals.³¹⁷ In the end, it is society

310. See Hicks, *supra* note 167, at 644.

311. See *id.* at 643 (citing Jonathan D. Casper, *Determinate Sentencing and Prison Crowding in Illinois*, 1984 U. ILL. L. REV. 231, 250 (1984)).

312. See Susan Estrich, *Chemical Castration Sends Wrong Message*, USA TODAY, Sept. 5, 1996, at 13A.

313. See Vanderzyl, *supra* note 48, at 138 n.219 (citing *Federal Judges Oppose Mandatory Minimum Sentences*, 24 CORRECTIONS DIG. 6, 7 (1993)).

314. See *Chemical Castration Fact Sheet*, *supra* note 2, at 2. According to the California Department of Corrections, it would have cost an estimated \$1.6 million to chemically castrate the 687 sex offenders paroled between 1993 and 1995 in California. See Rundle, *supra* note 45, at B1.

315. See *supra* notes 281-82 and accompanying text (discussing the benefits to the offender through chemical castration treatment).

316. See *supra* notes 52-64 and accompanying text (discussing the MPA medical mechanisms of action).

317. See Olsen, *supra* note 77, at A23.

that receives the long term benefit if these offenders are cured because of the reduced threat that they pose.

B. Arguments in Opposition of Mandatory Chemical Castration

Groups such as the ACLU have been at the forefront of the opposition to California's mandatory chemical castration law.³¹⁸ Initial attacks have been made on constitutional grounds.³¹⁹ Leading these attacks is the claim that chemical castration violates the Eighth Amendment prohibition of cruel and unusual punishment.³²⁰ Violations of the offender's right to privacy also have been implicated.³²¹ Of paramount concern by these critics is the necessary duty not to interfere with the "bodily integrity" of the individual.³²²

Opponents of mandatory chemical castration also attack the statistics reported on recidivism, claiming that the recidivism rate used by supporters of chemical castration is "a gross exaggeration."³²³ The opponents assert that the voluntary nature of many European chemical castration programs is responsible for the lower recidivism.³²⁴ In addition, the lack of a psychotherapy provision is cited as one of the California law's shortcomings.³²⁵ Opponents also claim that the lack of long-term studies on chemical castration's effectiveness creates scientific skepticism regarding the value of the treatment.³²⁶ Opponents are also uncertain because mandatory chemical castration programs have not been implemented in the past.³²⁷

Another concern among the opposition is that forcing chemical castration on offenders is reminiscent of practices conducted by Third Reich doctors in Nazi Germany.³²⁸ Additionally, some have analogized manda-

318. Other groups mounting opposition to California's mandatory chemical castration are the California Attorneys for Criminal Justice, the California Medical Association, and the California Psychiatric Association. See Mike Lewis, 'Castration' Law Set for Challenges, DAILY J., Sept. 18, 1996, at 4.

319. See *supra* notes 151-274 and accompanying text (discussing the constitutional implications of mandatory chemical castration).

320. See Lucas, *supra* note 4, at A1.

321. See *id.*

322. See Van Biema, *supra* note 11, at 60.

323. Gina Kolata, *Sex Offenders: Facts and Myths*, MONTREAL GAZETTE, Sept. 4, 1996, at B1.

324. See Vellinga, *supra* note 7, at A1.

325. See *id.*

326. See Kolata, *supra* note 323, at B1.

327. See *id.*; see also Robin McKie, *Mind & Body: Skeptics Corner: Maiming and Taming Sex Offenders*, THE OBSERVER (London), Sept. 29, 1996, at 54 (stating that chemical and surgical castration have an unproven track record).

328. See Daniel C. Tsang, 'Castration' Won't Stop Rape, Child Abuse, TIMES UNION

tory chemical castration to the eugenics period.³²⁹ Although the term chemical castration is a misnomer because no physical castration actually occurs,³³⁰ some opponents perceive the treatment as physical mutilation.³³¹

Others question the effectiveness of the law itself. In California, the law does not cover those convicted of vaginal intercourse with females under the age of thirteen.³³² Moreover, offenders will not be subject to mandatory chemical castration if they are not granted parole.³³³

Finally, opponents object to the blanket application of the treatment. Dr. Fred S. Berlin, founder and director of the Sexual Disorders Clinic at Johns Hopkins University, disapproves of using chemical castration without prior medical or psychological evaluation.³³⁴ This objection is based on the concern that the psychological underpinnings of pedophilia remain untreated.³³⁵ Many critics argue that the chemical treatment inadequately addresses the anger and behavioral motivations behind some of these crimes.³³⁶ In fact, the California Psychiatric Association criticized the measure for postponing treatment until the week before the offender's release when substantial treatment could be provided during incarceration.³³⁷ Perhaps only time can provide the answers necessary to address the aforementioned concerns. Until then, mandatory chemical castration is likely to cause a great deal of debate wherever it is applied.

C. Current Public Opinion

Current public opinion overwhelmingly favors mandatory chemical castration. In a recent poll asking whether people favored the chemical castration of repeat child molesters, ninety-six percent responded in the

(Albany, N.Y.), Sept. 23, 1996, at A7.

329. See Lewis, *supra* note 318, at 1.

330. See Ayres, *supra* note 20, at A11.

331. See Lucas, *supra* note 4, at A1. Assemblywoman Carole Migden (D-San Francisco) stated, "In the name of humanity, it is wrong for the government to mutilate the bodies of our citizens." *Id.*

332. See Tsang, *supra* note 328, at A7.

333. See *id.*

334. See Rundle, *supra* note 45, at B1.

335. See Van Biema, *supra* note 11, at 60.

336. See Ed Bond, *Should Repeat Sex Offenders be Castrated?*, L.A. TIMES, Sept. 24, 1996, at B3.

337. See Schodolski, *supra* note 8, at 1.

affirmative.³³⁸ Only four percent of the responses opposed it.³³⁹ In California, the Women's Coalition in Pasadena supported the mandatory chemical castration law.³⁴⁰ Additionally, Patricia O'Donnell Brummet, a professor of sociology at California State University, Northridge, voiced a view common to many supporters when she stated, "I think we need to put our children and victims first and be concerned with their right to live a life free of sexual abuse."³⁴¹ In fact, some evidence indicates that many people consider chemical castration too lenient and would condone stiffer punishments.³⁴² Additionally, some assert that imprisonment is the only real safeguard for children.³⁴³ It is evident that most people are unwilling to consider leniency for crimes involving a commodity as precious as children.

VIII. CONCLUSION

California's mandatory chemical castration law is yet another step toward getting tough on crime. As with any innovative punishment or treatment, controversy and debate are necessary components of its development. Current debate on chemical castration is centered on constitutional, medical, and political issues. While mandatory chemical castration cannot be touted as a complete solution, its effect on recidivism is definitely a step in the right direction. With all of the controversy surrounding the legal implications of mandatory chemical castration, it is possible to overlook the question posed by Assemblyman William Hoge, the author of California's law: "Where are the rights of those who have been molested?"³⁴⁴ In urging the application of mandatory chemical castration programs nationwide, Assemblyman Hoge declared, "We have now set the stage for America—and we hope you are listening America."³⁴⁵ America should be listening not to political argument, but to the

338. See *Chemical Castration Punishment Favored*, INTELLIGENCER J. (Lancaster, Pa.), Sept. 21, 1996, at A10.

339. See *id.*

340. See Bond, *supra* note 336, at B3. The Women's Coalition recently lobbied for a new law that would require repeat child molesters to wear one handcuff for life. See Michelle DeArmond, *Some Molesters Could be Forced to Wear Handcuff*, ORANGE COUNTY REG., Dec. 31, 1996, at B7.

341. Bond, *supra* note 336, at B3.

342. A Washington state poll, conducted in response to the hanging of a child killer in Tacoma, Washington, asked whether the state should allow hanging. See *Backtalk: Hanging an Appropriate Means of Execution, Most Callers Say*, MORNING NEWS TRIB. (Tacoma, Wash.), Jan. 9, 1993, at B1. The poll received an overwhelming response in favor of the hanging. See *id.*

343. See Geller, *supra* note 1, at B5.

344. *Sex Offenders*, *supra* note 308, at 16.

345. Leshner, *supra* note 21, at A3.

cries of this nation's children who are subjected to these horrible crimes. Regardless of whether one supports or opposes mandatory chemical castration, it must be agreed that any measure that helps to protect the innocent lives of children has some merit. One thing is certain: The innocence of young children should be portrayed through their carefree and playful laughter, not, as in the case of young Natalie Astner, through the white coffin that lays them to rest.³⁴⁶

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346. See *supra* note 1 and accompanying text (discussing the tragic victimization of Natalie Astner in Germany).

