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Abuse It and Lose It: A Look at California's Mandatory Chemical Castration Law

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I would like to thank my fiancée, Jennifer, for her love and support, especially during the past two years while I attended law school. I also owe special thanks to my mother and father, for their continual support and encouragement in all my endeavors.

I. A RESPONSE TO OUTRAGE

> The vision of a seven-year old child being raped and murdered by a twice-convicted sex offender who lived across the street, unbeknownst to the child's family, is a haunting one. With that vision in mind, one could justify, on an emotional level, virtually any punishment and virtually any punishment could be characterized as a mere protective measure. Indeed, any balancing of the rights of children and others to be free from rape, murder, and sexual abuse against the rights of those convicted of committing those crimes will always result in a decisive tipping of the scales of justice in favor of the former.[1]

In July 1994, seven-year-old Megan Kanka was raped and murdered by her New Jersey neighbor, Jesse Timmendequas, a twice-convicted child molester.[2] Timmendequas, who had been released in 1988 from a prison for sex offenders, was living with two other sex offenders across the street from the Kanka home.[3] To pacify a frightened nation, President Clinton signed the Violent Crime Control and Law Enforcement Act,[4] commonly known as the Federal Crime Act or "Megan's Law."[5] Title XVII of the Federal Crime Act requires people who are convicted of criminal

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1. Doe v. Pataki, 940 F. Supp. 603, 605 (S.D.N.Y. 1996). In *Pataki*, the district court upheld the constitutionality of the New York State Sex Offender Registration Act under the Ex Post Facto Clause. *Id.* at 629-31. The Act's registration provisions require convicted sex offenders to register with law enforcement authorities after parole or release. N.Y. CORRECT. LAW §§ 168 to 168-v (McKinney Supp. 1997).

2. Daniel B. Wood, *States Are Rushing to Curb Sex Crimes*, CHRISTIAN SCI. MONITOR, Sept. 5, 1996, at 4.

3. Jim Hooker, *Megan's Law Has a Harsh Prototype*, RECORD (Thruston Co., Wash.), Oct. 4, 1994, at A1.

4. Pub. L. No. 103-322, 108 Stat. 2038 (1994).

5. *See* Wood, *supra* note 2, at 4 (stating that Megan's death caused a crackdown on crime legislation culminating in President Clinton's signature of the Federal Crime Act).

offenses against minors or other sexually violent offenses to register with state law enforcement agencies.[6]

Megan Kanka was not the first child to be murdered and raped by a repeat child molester. On October 1, 1993, Richard Allen Davis broke into Polly Klaas's room during her slumber party, tied up two of Polly's friends, and abducted Polly at knife-point.[7] Two months later Polly's strangled body was found dumped in a nearby ditch.[8] The anger and rage, which began in the peaceful rural town of Petaluma, California, quickly swept across the country when it became known that Davis had a long criminal history involving seventeen arrests, including convictions for sexual abuse and kidnaping.[9] With the rape and murder of twelve-year-old Polly Klaas providing the impetus, California became the first state to enact mandatory chemical castration for repeat child molesters.[10]

For many families, the implementation of Megan's Law in 1994 marked the first step in the right direction for stopping recidivism[11] and increasing the safety of citizens.[12] In 1996, California's mandatory castration law for repeat child molesters became the next step, sparking a deeper philosophical debate by enacting "what many legal experts consider the most punitive child-molestation measure ever adopted in the" United States.[13]

This Comment begins by examining the origins of compulsory sterilization,[14] especially in light of the Supreme Court's landmark decision in *Buck v. Bell.*[15] Next,

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6. 42 U.S.C.A. § 14071 (West 1995).

7. Daniel Franklin, *The Right Three Strikes*, WASH. MONTHLY, Sept. 1994, at 25.

8. *Id.*

9. *Id.*; *see* Dan Walters, *Suspect a Poster Boy for Crime*, L.A. DAILY J., Dec. 14, 1993, at 6 (reporting that Davis had previously been convicted of kidnaping twice and was paroled from prison the previous June). Before Polly's abduction and murder, Davis had been arrested 16 times, including two abductions, sexual assault, numerous burglaries, grand theft, breaking and entering, battery, drunk driving, and probation violations. *Richard Allen Davis' Life of Crime*, S.F. CHRON., Aug. 6, 1996, at A11.

10. *Molesters Face 'Castration,'* ORANGE COUNTY REG., Aug. 31, 1996, at A1; *see id.* (discussing California's mandatory chemical castration law). *See generally* David Boyers, *Review of Selected 1996 California Legislation*, 28 PAC. L.J. 740 (1997) (discussing California's chemical castration law).

11. *See* BLACK'S LAW DICTIONARY 1269 (6th ed. 1990) (defining a "recidivist" as a "habitual criminal").

12. Robert Gebeloff, *New Jersey Puts Parole Listings on the Web*, N.J. RECORD, Oct. 31, 1996, at A1.

13. Wood, *supra* note 2, at 4.

14. *See infra* Part II.A. (explaining the compulsory sterilization movement in the United States before the 1930s).

15. 274 U.S. 200 (1927); *see infra* Part II.B. (analyzing the United States Supreme Court decision in *Buck v. Bell*).

this Comment analyzes California's 1997 mandatory castration law,[16] as well as the chemical castration procedures of other states and countries.[17] This Comment explains the workings of chemical castration treatment,[18] the early studies of chemical castration,[19] and the potential moral and medical concerns about implementing compulsory sterilization.[20] This Comment also examines the possible due process[21] and cruel and unusual punishment[22] issues raised by chemical castration laws such as California's, and how these laws may pass constitutional muster. Finally, this Comment argues that mandatory castration should be a condition of sex offenders' parole because both utilitarian[23] and retributivist[24] viewpoints justify it.

II. HISTORY OF STERILIZATION

A. *From the Ancient Greeks to the 1930s*

The practice of selected breeding and compulsory sterilization has existed for thousands of years.[25] The origins of the eugenics movement[26] can be traced back to the time of Plato's *Republic*.[27] During that time, many "philosophers, scientists, and sociologists . . . advocated different programs of selective breeding which they believed would improve the human race."[28] Building on these selective breeding principles, the Spartans of ancient Greece made crude attempts to further the eugenics movement by permitting their sickly children to die and by slaughtering their more intelligent slaves to ensure the ruling elite's control.[29]

Aided by the perfection of safe and effective sterilization operations, along with a rising eugenics movement, compulsory sterilization gained widespread popularity

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16. *See infra* Part III (unraveling California's mandatory chemical castration law for repeat child molesters).

17. *See infra* Part IV (discussing the views of other states and countries about chemical castration).

18. *See infra* notes 105-21 and accompanying text (describing the chemical castration procedure and its potential side effects).

19. *See infra* Part V.A. (discussing previous studies of castration).

20. *See infra* Part V.B. (putting forth concerns of mandatory chemical castration).

21. *See infra* Part VI.A. (analyzing a convicted sex offender's Fourteenth Amendment right to procreate and to refuse medical treatment).

22. *See infra* Part VI.B. (examining a convicted sex offender's Eighth Amendment right against cruel and unusual punishment).

23. *See infra* Part VII.A. (analyzing mandatory chemical castration under a utilitarian model).

24. *See infra* Part VII.B. (arguing why chemical castration is needed from a retributivist viewpoint).

25. *See* Jeffrey F. Ghent, Annotation, *Validity of Statutes Authorizing Asexualization or Sterilization of Criminals or Mental Defectives*, 53 A.L.R. 3D 960, 963-65 (1973) (discussing the history of the compulsory sterilization movement).

26. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 428 (9th ed. 1985) (defining "eugenics" "as a science that deals with the improvement . . . of hereditary qualities of a race or breed") [hereinafter WEBSTER'S].

27. Ghent, *supra* note 25, at 963. Plato's *Republic* is a book detailing the provocative dialogues of Socrates, as interpreted by Plato, who followed Socrates as a young man. PLATO'S REPUBLIC 33 VII (G.M.A. Grube trans., 1974). Plato wrote the *Republic* probably around 380 B.C. *Id.* at IX.

28. Ghent, *supra* note 25, at 963.

29. *Id.*

in the United States during the 1890s.[30] "In the early part of the twentieth century, state legislatures embraced the [idea] that compulsory sterilization was an appropriate [method] to rid society of 'defective people.'"[31] On April 9, 1907, Indiana became the first state to enact legislation that allowed the compulsory sterilization of the feebleminded.[32] By the 1930s, more than thirty states had passed similar laws, expanding the list of persons subject to sterilization to include those with hereditary defects, such as alcoholism and drug addiction.[33] Although sterilization laws existed in several states, only Virginia and California applied them zealously.[34] By January 1935, the states had performed some 20,000 forced "eugenic" sterilizations; nearly half of these occurred in California.[35] Although the idea seems repulsive today, before the Second World War society viewed eugenic sterilization as progressive reform.[36]

B. Buck v. Bell*: "Three Generations of Imbeciles Are Enough"*

Before 1927, most lower courts invalidated compulsory sterilization laws as violative of equal protection or due process.[37] However, in its landmark decision in

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30. Stephen Jay Gould, *Carrie Buck's Daughter*, 2 CONST. COMM. 331, 332 (1985).

31. DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 404 (1993); *see* Haynes v. Lapeer, 166 N.W. 938, 939 (Mich. 1918) (describing the common characteristic of "defective people" as set forth in Act No. 34 of the Michigan Public Acts of 1913 as being "mentally defective persons who are maintained wholly or in part at public expense in public institutions in this state"); *In re* Hendrickson, 123 P.2d 322, 323 (Wash. 1942) (including in its sterilization statute, "all feeble-minded, insane, epileptic, habitual criminals, moral degenerates and sexual perverts who [have the] potential to produce[] offspring [and] who [will] probably become a [menace to society]").

32. STEPHEN TROMBLEY, THE RIGHT TO REPRODUCE: A HISTORY OF COERCIVE STERILIZATION 51 (1988); *see id.* (stating that the statute allowed for the procedure if no probability of the victim's mental improvement existed).

33. Gould, *supra* note 30, at 332.

34. *Id.*

35. *Id.*

36. FARBER ET AL., *supra* note 31, at 404; *see* Ghent, *supra* note 25, at 965 (suggesting that German eugenic abuses during World War II may have influenced courts to invalidate mandatory sterilization statutes).

37. *See* Haynes v. Lapeer, 166 N.W. 938, 940-41 (Mich. 1918) (holding that a compulsory sterilization law authorizing the sterilization of mentally defective persons in public institutions was invalid because it violated the Equal Protection Clause of the Constitution). The Michigan Supreme Court reasoned that the statute violated the Equal Protection Clause because it authorized castration for mentally defectives living in state reformatories, but did not authorize castration for mental defectives living elsewhere. *Id.* at 940; *see* Davis v. Berry, 216 F. 413, 418-19 (D.C. Iowa 1914) (concluding that a statute authorizing the sterilization of mental defective persons and criminals was invalid because it violated due process) *rev.*, 242 U.S. 468 (1917). In *Davis*, the court stated that the statute violated procedural due process because the prisoner, who was to have the surgery, did not receive appropriate notice of the proceedings against him, and prison officials denied him an administrative hearing guaranteed under the statute. *Davis*, 216 F. at 418. *But see* Smith v. Command, 204 N.W. 140, 143 (Mich. 1925) (upholding a sterilization act that applied to feeble-minded persons but did not include insane people). The Michigan Supreme Court stated that the feeble-minded are particularly and peculiarly fit subjects for sterilization, and that "good and substantial reasons" exist to sterilize the feeble-minded, but not the insane. *Smith*, 204 N.W. at 143.

Buck v. Bell,[38] the United States Supreme Court unexpectedly lent legitimacy to the sterilization practice.[39] In his opinion for the Court, Justice Holmes upheld a Virginia statute authorizing the sterilization of a sixteen-year-old girl who was believed to be mentally retarded because both her mother and grandmother had been mentally retarded.[40] Justice Holmes reasoned that it is "better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."[41] Justice Holmes then brashly asserted: "Three generations of imbeciles are enough."[42]

Justice Holmes's opinion upheld the Virginia statute that established a process for the sterilization of mentally retarded persons confined in state institutions.[43] The sterilization statute assumed that retardation was inheritable, that reproduction by retarded adults was against society's interests, and that, if sterilized, some retarded persons could be discharged from state institutions and freed from state supervision.[44] Justice Holmes's opinion has been criticized for its defective reasoning: Since a state "may call upon [its] best citizens [to give] their lives," such as a solider who is obliged to serve in the military, a state could also call for "lesser sacrifices," such as the reproductive organs of an institutionalized woman.[45]

Although the Court has never expressly overruled *Buck*, most scholars suggest that the Court would overturn the case if the issue presented itself to the United

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38. 274 U.S. 200 (1927).

39. Gould, *supra* note 30, at 333.

40. *Buck*, 274 U.S. at 205, 207-08; *see infra* note 42 (stating that although Carrie Buck appeared mentally-ill, she was ultimately found to have normal intelligence).

41. *Buck*, 274 U.S. at 207.

42. *Id.*

> Buried beneath the formal constitutional theory operating in *Buck v. Bell* are tragic facts that remained hidden for [nearly 50 years]. In 1980, a Virginia official found Carrie Buck still alive, living near Charlottesville with her sister Doris, who had also been sterilized ([after] she had been told the [surgery] was for [her] appendicitis). Carrie Buck was found to be a woman of normal intelligence. She had been [sent] off to the state institution by her foster parents when she became pregnant (apparently the result of rape by a relative of her foster parents). The only evidence [that she was mentally-ill] presented at her commitment hearing [to the state institution was testimony] from her foster parents. . . . During the trial on whether [the state could sterilize Carrie Buck], the only evidence put forward concerning the supposed retardation of her daughter—who at the time was only seven months old—came from a social worker who testified that "there is a look about [the baby] that is not quite normal, but just what it is I can't tell." The daughter later received adequate grades in elementary school before dying at age eight from illness.

FARBER ET AL., *supra* note 31, at 406 (last alteration in original).

43. FARBER ET AL., *supra* note 31, at 406.

44. *Id.*

45. *Buck*, 274 U.S. at 207; *see* Sheldon Gelman, *The Biological Alteration Cases*, 36 WM. & MARY L. REV. 1203, 1209 (1995) (criticizing Justice Holmes's opinion in *Buck*).

States Supreme Court again.[46] However, ten states still have statutes authorizing the compulsory sterilization of the mentally disabled.[47]

III. CALIFORNIA'S CASTRATION LAW

On January 1, 1996, California became the first state to impose mandatory chemical or surgical castration for repeat child molesters.[48] California's new law requires castration for any person guilty of a second conviction of any specified sex offense,[49] when the victim has not reached thirteen years of age.[50] California's new law also empowers a court to prescribe medroxyprogesterone acetate[51] (MPA) treatment or its chemical equivalent to any person found guilty of a first conviction of any specified sex offense, when the victim is under thirteen years of age.[52]

One week before a sex offender's release from state prison, California's castration law will require the parolee[53] to begin MPA treatment.[54] The parolee must

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46. Robert J. Cynkar, Buck v. Bell: *"Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1426 (1981).

47. *See* ARK. CODE. ANN. § 20-49-205 to -304 (Michie 1991); DEL. CODE ANN. tit. 16, §§ 5701-5716 (1985); GA. CODE ANN. § 31-20-3 (1982); IDAHO CODE §§ 39-3901 to -3909 (1971); MISS. CODE ANN. §§ 41-45-1 to -19 (1972); N.C. GEN. STAT. §§ 35-39 to -43 (1994); OR. REV. STAT. §§ 436.225-.295 (1993); UTAH CODE ANN. §§ 62A-6-101 to -6-116 (1988); VT. STAT. ANN. tit. 18, §§ 8705-8712 (1987); VA. CODE ANN. §§ 54.1-2975 to -2977 (Michie 1994).

48. Republican Assembly Member Bill Hoge of Pasadena sponsored California's castration bill, AB 3339. AB 3339 was introduced on February 23, 1996, passed the California Assembly (42-27) on May 31, 1996, and then breezed through the California Senate (26-1). ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 3339, at 1 (Aug. 30, 1996). AB 3339 was filed with the Secretary of State and enacted on September 18, 1996. 1996 Cal. Legis. Serv. ch. 596, at 2711.

49. *See* CAL. PENAL CODE § 667.71 (West Supp. 1997) (including in those offenses sodomy or oral copulation when the perpetrator commits it by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim or another person); *id.* (establishing that the state may punish a habitual child molester by imprisonment in the state prison for a term of 25-years-to-life); *see also id.* § 667.72 (West Supp. 1997) (defining a "habitual child molester" as a person who has served at least one prison term for a violation of California Penal Code § 286(c), § 288(b), § 288a(c), § 288(c); who for the purpose of committing the sexual offense, kidnaped the victim; who was under the age of 14 at the time of the offense; and who is convicted in the present proceeding of the same offense against at least two separate victims).

50. *Id.* § 645(b) (West Supp. 1997).

51. This Comment hereinafter refers to medroxyprogesterone acetate as "MPA" or "Depo-Provera" because MPA is a form of Depo-Provera. PHYSICIANS' DESK REFERENCE 2079 (51st ed. 1997). The drug is similar to the natural hormone progesterone, which the female human body produces naturally in ovaries during the second half of the menstrual cycle. *Id.* at 2081. In October 1992, the Food and Drug Administration (FDA) approved Depo-Provera for use as an injectable contraceptive. Kevin Moran, *Contraceptive Effectively Treats Male Sex Offenders: Drug Found to Lessen Repeat-Behavior Risk*, HOUS. CHRON., Feb. 28, 1993, at C1. However, while the FDA has not approved the drug for suppressing male sex drive, its experimental use for that purpose is allowed. People v. Gauntlett, 352 N.W.2d 310, 314 (Mich. Ct. App.), *modified*, 353 N.W.2d 463 (Mich. 1984).

52. CAL. PENAL CODE § 645(a) (West Supp. 1997).

53. Parole occurs when convicted offenders serve part of their sentence and then the prison releases them into the community under state supervision for the remainder of their sentence. Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Disorder*, 18 AM. J. CRIM. L. 1, 15 (1990); *see id.* (stating that since the acceptance of parole is contractual in nature, the offender can reject parole).

54. CAL. PENAL CODE § 645(d) (West Supp. 1997).

continue MPA treatment sessions until the Department of Corrections[55] demonstrates to the Board of Prison Terms[56] that the treatment is no longer necessary.[57] Before administering the chemical castration drugs, the law requires the Department of Corrections to inform the parolee of any side effects that may result from the chemical treatment.[58] The law also provides for administration by the Department, but allows individual medical practitioners the Department employs to opt out of administering any part of the statute.[59]

Although California's law mandates castration for a large group of repeat child molesters, the law does not cover all sex acts with minors. The new law's mandatory castration provisions covers those offenders convicted of oral copulation,[60] and penetration of genital or anal openings by foreign objects.[61] California's law also covers vaginal sex and sodomy with children under thirteen years of age if the perpetrator committed such crimes by force or violence.[62]

The cost of California's drug treatment is expected to be $2380 per year per parolee for the administration of MPA to the parolee by intramuscular injections.[63] Parolees will be administered injections of 500 milligrams of MPA into the arm or buttocks on a weekly basis.[64] The Department of Corrections estimates that the

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55. *See* CAL. CODE REGS. tit. 15, § 3901.9.4 (1996) (stating that the Department may establish and impose special conditions of parole); *id.* (authorizing the Department to impose any condition of parole deemed necessary due to unusual circumstances).

56. *See id.* § 2000 (1996) (describing the "Board of Prisons Terms" as an administrative board responsible for setting parole dates; establishing parole length and conditions; discharging sentences for certain parolees; granting, rescinding, suspending, postponing, or revoking parolees; conducting disparate sentence reviews; advising on clemency matters; and handling miscellaneous other statutory duties); *see also id.* (noting that persons under the Board's jurisdiction are adult felons committed by superior courts to the Director of Corrections).

57. CAL. PENAL CODE § 645(d) (West Supp. 1997).

58. *Id.* § 645(f) (West Supp. 1997).

59. *Id.*

60. *Id.* § 288a(b)(1) (West Supp. 1997) (referred from California Penal Code § 645(c)(3)). California Penal Code § 288a(d) states:

> Any person who, while voluntarily acting in concert with another person . . . commits an act of oral copulation (1) when the act is accomplished against the victim's will by means of force or fear of immediate and unlawful bodily injury . . . (2) where the act is accomplished against the victim's will by threatening to retaliate in the future . . . or (3) where the victim is at the time incapable, because of a mental disorder or developmental or physical disability, of giving legal consent . . . ."

Id. § 288a(d) (West Supp. 1997).

61. *Id.* § 289(j) (West Supp. 1997) (referred from California Penal Code § 645(c)(4)).

62. *See id.* § 261 (West Supp. 1997) (prohibiting rape) (referred from California Penal Code § 645(c)(2)); *id.* § 286(c), (d) (West Supp. 1997) (prohibiting sodomy) (referred from California Penal Code § 645(c)(1)).

63. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 3339, at 4 (Aug. 15, 1996) [hereinafter AB 3339 SENATE ANALYSIS]. *But see id.* at 5 (reporting that the A.C.L.U. estimates the retroactive cost of applying this treatment to offenders released in the last 10 years becomes $1,285,200 and the cost in the year 2000 accumulates to $2,118,200).

64. Rhonda L. Rundle, *Medicine: Will 'Chemical Castration' Really Work*, WALL ST. J., Sept. 19, 1996, at B1; *see* Shari Roan, *No Consensus on Chemical Castration Medicine*, L.A. TIMES, Sept. 26, 1996, at E1 (stating that women using Depo-Provera as a contraceptive receive an injection of 150 milligrams once every three months, whereas California's law requires sex offenders to have weekly injections of 500 milligrams); *see also* PHYSICIANS' DESK REFERENCE, *supra* note 51, at 2081 (noting that the injection of Depo-Provera should be vigorously shaken

annual cost of the program will be about $1.6 million.[65] Currently, there are 14,983 sex offenders in California's prisons,[66] with another 6000 sex offenders on parole.[67] In addition, there are about 66,000 registered sex offenders in California, about 38,000 of whom have been convicted of molesting a child.[68] Furthermore, California's Department of Corrections estimates that the state has on parole 687 sex offenders in California for the crimes specified in the castration law.[69] "An unknown number of these parolees are repeat offenders."[70] "Based on the figures from 1990 through 1995, the average number of specified offenders released per year is 215 persons."[71] Moreover, because the Board of Prison Terms determines the length of each chemical treatment, on a prisoner by prisoner basis,[72] "the costs of treatment would increase in future years beyond the . . . individuals on parole."[73] According to a study by the Department of Corrections, implementing chemical castration will cost an estimated $1 million, but the project is projected to save $3 million per year by reducing recidivism among sex offenders.[74] Department officials estimate that they will be telling approximately 300 inmates per year to drop their shorts for a shot of MPA.[75]

IV. THE MOVEMENT TOWARD CHEMICAL CASTRATION

A. Other States

Although California was the first state to codify mandatory chemical castration, it was not the first state to consider it. Several states have proposed legislation imposing mandatory castration penalties for sexual offenders.[76] In 1993, Texas Senator Teel Bivens proposed a bill that would have allowed convicted sex offenders to

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just before use to ensure that the dose being administered represents a uniform suspension).

65. *Depo-Provera Still Largely Untested*, Dow Jones News Service, Sept. 19, 1996, at *1, *available in* Westlaw, Allnewsplus Database [hereinafter *Depo-Provera Untested*].

66. Mary Lynne Vellinga, *'Castration' Law Under Fire: 'Cartoon Solution,'* SACRAMENTO BEE, Feb. 4, 1997, at A1.

67. Katherine Seligman, *Chemical Castration Costly, Won't Work, Experts Insist Drug Not Effective on All Who Take It, Therapists Say*, S.F. EXAMINER, Sept. 15, 1996, at C1.

68. Steven A. Capps, *Chemical Castration Bill Becomes Law*, S.F. EXAMINER, Sept. 17, 1996, at A2.

69. AB 3339 SENATE ANALYSIS, *supra* note 63, at 4.

70. *Id.*

71. *Id.* at 5.

72. *See id.* at 4 (claiming that MPA treatment could last up to a lifetime). *But see* Vellinga, *supra* note 66, at A1 (stating that the drug therapy would end when the parole is over, usually about three years).

73. AB 3339 SENATE ANALYSIS, *supra* note 63, at 4.

74. Seligman, *supra* note 67, at C1.

75. *Id.*

76. *See, e.g.*, HB 92 (Ala. 1996); SB 1568, 207th Leg., 1st Reg. Sess. (N.J. 1996); HB 1774 (Mass. 1995); HB 4703 (Mich. 1995); HB 6208 (Mich. 1995); AB 594 (Wis. 1995); SB 46, 41st Leg., Reg. Sess. (N.M. 1993); SB 322, 73d Leg., 1st Reg. Sess. (Tex. 1993); HB 3434, 16th Leg., Reg. Sess. (Haw. 1992).

undergo castration voluntarily.[77] Texas's bill also provided for a long-term study of the recidivism rate among the participating offenders.[78] In Hawaii, a proposed bill provided castration for repeat offenders of sexual assault and those convicted of first degree sexual assault.[79] A New Mexico bill provided castration for "persons convicted of criminal penetration."[80] In 1990, the state legislature in Washington proposed two bills concerning castration.[81] One bill provided for mandatory castration of sex offenders,[82] while the other bill gave sex offenders the choice between castration and incarceration.[83]

Other states such as Wisconsin and Florida have also considered and ultimately rejected chemical castration laws.[84] Wisconsin's bill failed passage because it did not contain a provision allowing doctors in the correctional department to determine which patients the drug could help.[85] In California such expertise is not needed because the state will apply the treatments without any medical evaluation.[86] In 1994, Florida State Senator Robert Wexler introduced a bill that would have imposed chemical castration on twice-convicted rapists and the death penalty on any man convicted of a third violent sexual assault.[87] The Florida Senate approved the bill by a vote of twenty-nine to ten,[88] but the bill eventually failed passage because bill supporters would not make chemical castration voluntary and refused to erase its death penalty provision for third time rapists.[89]

With the passage of California's law, many states plan to pass their own bills requiring mandatory chemical castration. One commentator suggests that Idaho

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77. SB 322, 73d Leg., 1st Reg. Sess. (Tex. 1993); *see* Moran, *supra* note 51, at C1 (stating that the bill would have made it legal for aggravated sex offenders who are 21 or older to volunteer for surgical castration); *id.* (commenting that those sex offenders would have had to get spousal consent and to undergo a psychiatric evaluation before being castrated and that the legislation would not have been applied to plea bargains); *see also* Kenneth B. Fromson, Note, *Beyond an Eye for an Eye: Castration as an Alternative Sentencing Measure*, 11 N.Y.L. SCH. J. HUM. RTS. 311, 314-17 (1994) (discussing the trend of several states toward accepting castration).

78. SB 322, 73d Leg., 1st Reg. Sess. (Tex. 1993).

79. HB 3434, 16th Leg., Reg. Sess. (Haw. 1992).

80. SB 46, 41st Leg., Reg. Sess. (N.M. 1993).

81. Fromson, *supra* note 77, at 315.

82. *Id.* at 315-16.

83. *Id.*

84. Rundle, *supra* note 64, at B1.

85. AB 594 (Wis. 1995); *see* Rundle, *supra* note 64, at B1 (reporting from an interview with Daniel L. Icenogle, a family physician and health-law consultant in Madison, Wisconsin).

86. Rundle, *supra* note 64, at B1.

87. SB 1984, 13th Leg., 2d Reg. Sess. (Fla. 1994).

88. *Florida Senate OKs Chemical Castration*, CHI. TRIB., Mar. 31, 1994, at 18.

89. Jim Ash, *Florida Senate Approves Chemical Castration Bill*, Gannett News Service, Mar. 31, 1994, *available in* 1994 WL 11257520 (copy on file with the *Pacific Law Journal*).

follow California's lead and pass a law requiring chemical castration for repeat child molesters.[90] There has also been initial talk in Tennessee's legislature about following California's lead in requiring castration for repeat child molesters as a condition of parole.[91] Some Tennessee representatives, such as Democrat Brenda Turner, suggest that California should expand its law to include those sex offenders who rape adults.[92]

Currently, state legislatures of the 1997 term in Arizona, Colorado, and Mississippi have also filed chemical castration bills modeled after California's.[93] Representatives in Louisiana prefiled a castration bill before its 1997 legislative session even began.[94] Experts also predict that California's new law will affect other states like Florida and Michigan, which have been considering similar bills and may now be persuaded to pass them.[95]

B. Chemical Castration Abroad

In several European countries, castration for rapists has been around for decades.[96] "Germany offers hormone-suppressing injections and clinical surgery to violent sex offenders, and Sweden makes chemical castration available to criminals who want it."[97] "From 1935 to 1970, Denmark gave sex[ual] offenders the choice of prison or surgical castration."[98] However, Denmark banned this practice in 1970 after

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90. *Editorial Roundup*, IDAHO STATESMAN, Sept. 28, 1996, at 7A.

91. Duren Cheek, *Castration Bill May Include Adult Rapes*, TENNESSEAN, Sept. 28, 1996, at 1B.

92. *Id.*

93. *See* HB 2216, 43d Leg., 1st Reg. Sess. (Ariz. 1997) (mandating chemical castration as a condition of parole for repeat sexual offenders convicted of molestation, continuous sexual abuse, or sexual assault of a child under 13 years of age, continuing until the Board of Executive Clemency determines that treatment is no longer necessary); HB 1133, 61st Leg., 1st Reg. Sess. (Colo. 1997) (declaring MPA treatment as a condition of parole for any person convicted of a second sexual offense against children younger than 15 years of age, to continue until: (1) The State Board of Parole determines it is no longer necessary, (2) the person is released from parole, or (3) the person serves the entire length of the person's sentence); SB 2465 (Miss. 1997) (implementing MPA treatment for persons convicted of a second sexual offense against a person under 18 years old, in addition to any other punishment prescribed for that offense or any other provision of law, for the term of that person's natural life absent a finding by the Department of Corrections that treatment is no longer necessary).

94. HB 78 (La. 1996).

95. Ellen Hale, *Experts Doubt Effectiveness of Forced Chemical Castration*, Gannett News Service, Aug. 27, 1996, at S11, *available in* 1996 WL 4385176 (copy on file with the *Pacific Law Journal*).

96. Jan M. Olsen, *Chemical Castration Option for Habitual Sex Offenders*, PORTLAND OREGONIAN, Sept. 1, 1996, at A3.

97. *Id.*

98. *Molester Is Happy with Castration*, DES MOINES REG., Sept. 1, 1996, at 16.

a swell of criticism arose denouncing the castration practice as "inhumane and irreversible."[99] After a brief three-year ban, however, the castration practice resurfaced, employing chemical treatment instead of the surgical procedure.[100]

In Singapore, "known for its strict laws and harsh punishment of criminals,"[101] the island's chief justice argued that the city-state should adopt a law requiring child molesters to take drugs reducing their testosterone[102] potency or have their testicles surgically removed.[103] However, a survey taken in response to the chief justice's remarks showed that most Singapore lawyers opposed his proposal to castrate repeat sex offenders.[104]

V. CHEMICAL CASTRATION

"The newest form of male sterilization, chemical castration, does not require surgery, but rather, involves treatment with" drugs that suppress hormones.[105] "Chemical castration is a term coined to describe the use of libido inhibiting drugs, such as Depo-Provera."[106] These drugs operate to lower testosterone levels in patients, which results in the patients experiencing a reduced sex drive and a decrease in the frequency of erotic imagery.[107] MPA treatment usually renders patients temporarily impotent.[108] "Chemical castration is accomplished through weekly injections with [these] drugs that inhibit [a patient's] testosterone production."[109]

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99. *Id.*

100. *Id.* "When Denmark began chemically castrating sex offenders, it [picked] the drug Androcur, which suppresses the production of testosterone." *Id.* However, the effect sometimes wore off while patients continued to take their shots, so "[i]n 1989, doctors switched to a combination of Androcur and Decapetyl." *Id.* Decapetyl hinders the effect of remaining hormones. *Id.* Both Androcur and Decapetyl have side effects including obesity and mood swings. *Id.*

101. *Singapore Lawyers: 'No' to Castration*, UPI, Sept. 10, 1996, *available in* LEXIS, Nexis Library, UPI File. Largely crime-free, Singapore's tough laws make it one of the world's safest cities. *Singapore May Consider Castration of Child Molesters*, AGENCE FRANCE-PRESSE, Sept. 6, 1996, *available in* 1996 WL 12131892 (copy on file with the *Pacific Law Journal*). Death by hanging is mandatory in Singapore for murder and drug trafficking, while the city-state imposes caning for certain crimes. *Id.* Singapore's notoriously harsh laws struck America's attention when 18-year-old American teenager Michael Fay received four strokes on his backside with a rattan cane for committing vandalism in 1994. Nigel Holloway, *Spare the Rod: States Drop Measures to Emulate Singapore*, FAR E. ECON. REV., Feb. 29, 1996, at 20.

102. *See* WEBSTER'S, *supra* note 26, at 1219 (defining "testosterone" as a male hormone that the testes produces, which can be made synthetically, and is responsible for inducing and maintaining male secondary characters).

103. *Singapore Lawyers: 'No' to Castration*, *supra* note 101.

104. *Id.*

105. Kari A. Vanderzyl, Comment, *Castration as an Alternative to Incarceration: An Impotent Approach to the Punishment of Sex Offenders*, 15 N. ILL. U. L. REV. 107, 116 (1994).

106. Pamela K. Hicks, Comment, *Castration of Sexual Offenders and Ethical Issues*, 14 J. LEGAL MED. 641, 646 (1993); *see* Fitzgerald, *supra* note 53, at 2 (describing MPA as a synthetic progesterone manufactured by the Upjohn Company under the trade name Depo-Provera).

107. Hicks, *supra* note 106, at 646.

108. *Id.*

109. Vanderzyl, *supra* note 105, at 116.

MPA injections have a wide array of possible side effects including weight gain, hypertension,[110] mild lethargy, and irregular gallbladder function.[111] In some patients, Depo-Provera has also caused high blood pressure, nightmares, cold sweats, and lethargy.[112] An alternative drug reportedly has limited side effects, but many patients as well the California Legislature have refused it because it costs $400 to $500 for each monthly injection as compared to $40 for weekly injections of Depo-Provera.[113]

In 1992, the United States Food and Drug Administration (FDA) approved MPA's use in the United States for female birth control.[114] MPA is also marketed as a female contraceptive in over eighty countries.[115] However, the FDA has not approved MPA's use on males as a hormone suppressor.[116]

One advantage to chemical castration as opposed to surgical castration is that its effects are reversible, and studies indicate that within seven to ten days after the termination of the treatment, subjects regain full erective and ejaculatory abilities.[117] While undergoing MPA treatment, the patient may have erections, and some chemically castrated patients have been able to reproduce.[118] Although MPA prevents most patients from having spontaneous erections or ejaculations, erections are possible if prompted by a partner.[119] "Arousal time may take ten or twenty minutes, but many men will still be able to have sex" while undergoing MPA treatment.[120] Patients under MPA treatment have also reported a minimal diminution of consensual sexual activity.[121]

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110. *See* WEBSTER'S, *supra* note 26, at 593 (defining "hypertension" as "abnormally high blood pressure").

111. Rundle, *supra* note 64, at B1.

112. *Combining Group Therapy and Drugs Helps Sex Offenders Deal with Compulsions*, 6 CQ RESEARCHER 33 (1996) [hereinafter *Therapy and Drugs*].

113. *Id.*

114. Roan, *supra* note 64, at E1; *see* Fitzgerald, *supra* note 53, at 8 (stating that before 1992, the FDA banned the use of MPA in the United States because it was known to cause breast cancer in beagles and uterine cancer in monkeys).

115. Malcolm Potts & John M. Paxman, *Depo-Provera—Ethical Issues in Its Testing and Distribution*, 10 J. MED. ETHICS 9, 9-10 (1984); *see* Fitzgerald, *supra* note 53, at 8 (claiming that the World Health Organization, the U.S. Agency for International Development, and the International Planned Parenthood Federation have advocated MPA's use for female birth control); *see also id.* (asserting that recent test results indicate MPA is not carcinogenic to humans).

116. Daniel C. Tsang, *Castration: 'Desparate Cures' Shame Society*, PHOENIX GAZETTE, Sept. 20, 1996.

117. John T. Mella et al., *Legal and Ethical Issues in the Use of Antiandrogens in Treating Sex Offenders*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 223, 225 (1989).

118. *See* Douglas J. Besharov & Andrew Vachhs, *Is Castration an Acceptable Punishment?*, 78 A.B.A. J. 42 (1992) (asserting that chemical castration and surgical castration patients "can still have erections, and many [have] successfully impregnate[d] their wives").

119. Fitzgerald, *supra* note 53, at 7.

120. Seligman, *supra* note 67, at C1.

121. *Id.*

A. Studies of Castration

In European studies, reducing the testosterone levels of sex offenders reduced Europe's number of sexual offenses dramatically.[122] Backers say European countries using the procedure have seen their repeat offender rates fall from almost 100% to 2%.[123] Chemical castration's hormonal treatment aims to accomplish the same testosterone-lowering goal as surgical castration.[124] "In studies, castration appears to be the most effective treatment in reducing repeat crimes among sex offenders."[125]

In a Danish study of 900 surgically castrated sex offenders, the recidivism rate was only 2.2% over a thirty-year period.[126] In yet another Danish study, a 4.3% recidivism rate was reported over a period of up to eighteen years among 117 surgically castrated sex offenders.[127] Noncastrated offenders, however, were ten times more likely to re-offend than those who were castrated.[128] According to a Switzerland study, a 7.4% recidivism rate was reported among 121 castrated sex offenders over a five-year period compared to a 52% rate at the ten year follow-up among men not undergoing the procedure.[129] Fifty sex offender clinics in this country now use chemical therapy, and Europe uses it even more widely.[130] Moreover, many repeat sex offenders who have undergone MPA treatment openly praise the drug's ability to eliminate their once uncontrollable urge to commit violent sex crimes.[131]

B. Concerns About Chemical Castration

Many experts are wary of using Depo-Provera to castrate sex offenders chemically and involuntarily because virtually no studies of people who have been chemically castrated against their will exist.[132] Dr. Fred Berlin, who is the nation's

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122. John Bacon, *California: Chemical Castration for Repeat Molesters*, USA TODAY, Sept. 18, 1996, at 3A.

123. *Id.*

124. *Therapy and Drugs*, *supra* note 112, at 33.

125. *Id.*

126. Joanne Jacobs, *'Chemical Castration' Law Is Flawed*, DENVER POST, Sept. 5, 1996, at B11.

127. Fred S. Berlin, *The Case for Castration*, WASH. MONTHLY, May 1994, at 28.

128. *Id.*

129. *Id.*

130. Besharov & Vachhs, *supra* note 118, at 42. Researchers have conducted numerous studies on Depo-Provera's effect on sex offenders. According to a 1991 study of 626 patients conducted at the National Institute for Study, Prevention and Treatment of Sexual Trauma in Baltimore, Maryland, Dr. Berlin reported that five years after they were "treated through chemical castration fewer than 10 percent . . . committed sexual offenses again." AB 3339 SENATE ANALYSIS, *supra* note 63, at 4-5. "Of the most compliant patients, fewer than five percent committed new sexual acts." *Id.* at 4.

131. Jan M. Olsen, *Chemically Castrated Sex Offender Says He's Happy to Be Cured*, SUN-SENTINEL FT. LAUDERDALE, Sept. 1, 1996, at 18A. Without the treatment, many sex offenders report an inability to control sexually offensive behavior, such as Arne Kjeldsen. *Id.* "After his fourth conviction for violent sex crimes against preteen girls," Kjeldsen agreed to a chemical castration. *Id.* "Twice a month, the 26-year-old gets injections that suppres[s] his sex drive." *Id.* In a recent phone interview, from a Copenhagen prison cell, Kjeldsen said, "[w]atching a pornographic movie is like watching the evening news," and that he's cured and finally happy. *Id.*

132. *Depo-Provera Untested*, *supra* note 65.

leading expert on Depo-Provera treatment for pedophiles[133] and who directs a sex offender clinic at Johns Hopkins University in Baltimore, is one of the experts concerned about the California law's compulsory nature.[134] One of Dr. Berlin's main concerns is that the few studies conducted among child molesters all involved the voluntary use of MPA as part of a larger therapeutic program. He believes these studies may not accurately reflect the results of a mandatory program.[135] Although Dr. Berlin "agrees that the drug can be effective," he believes "that a willing participant is required for the drug to work."[136] The doctor calls the new California law "misdirected" because it treats all criminals the same. Instead, he suggests that society focus on a more comprehensive plan dealing with what he said "is a mental health and social problem."[137]

John P. Wincz, a psychologist at Brown University who works with sex offenders, also shares Dr. Berlin's concerns.[138] He said Depo-Provera is "ninety percent effective for those who are motivated to change . . . . [B]ut if a person is not motivated, he is not going to change."[139] Similarly, Collier Cole, a psychologist at the Rosenberg Clinic in Galveston, Texas, who has treated nonviolent sex offenders with the drug for more than fifteen years, doubts that MPA treatments will eliminate a pedophile's ability to assault a child sexually.[140] Mr. Collier states that "[i]f [the criminal's] motivation isn't sex, if it's a bad-ass criminal like Mr. (Richard Allen) Davis, giving him Depo-Provera won't solve the problem. This drug won't give [people] a conscience."[141] Furthermore, new research indicates that a molester can defeat the effects of chemical castration by taking injections of steroids, which may counteract the effects of Depo-Provera.[142]

Some medical experts are also skeptical of California's mandatory chemical castration law because it makes no provision for therapy.[143] "The difference between California's . . . law and those in Europe is the requirement or availability of therapy" in Europe.[144] These critics argue that Depo-Provera will work only on some sexual

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133. *See* WEBSTER'S, *supra* note 26, at 867 (defining "pedophilia" as "sexual perversion in which children are the preferred sex object[s]").

134. Roan, *supra* note 64, at E1.

135. *Id.*

136. *Our Children, Our Freedom*, ST. LOUIS POST-DISPATCH, Sept. 5, 1996, at 6B.

137. Seligman, *supra* note 67, at C1.

138. Joyce Price, *Therapists Say Chemical Castration of Little Value in Curbing Pedophiles*, WASH. TIMES, Sept. 3, 1996, at A5.

139. *Id.*

140. Seligman, *supra* note 67, at C1.

141. *Id.*

142. *Castration Law Misses the Point*, WIS. ST. J., Sept. 13, 1996, at 13A; *see* State v. Estes, 821 P.2d 1008, 1009-10 (Idaho Ct. App. 1991) (rejecting Depo-Provera treatment for the defendant because the treatment could be counteracted with other drugs).

143. Donna Alvarado, *Mandatory Chemical Castration Criticized*, SEATTLE TIMES, Sept. 18, 1996, at A3.

144. Seligman, *supra* note 67, at C1.

offenders, but not others because no drug works on everybody.[145] Dr. Marc Graff, of the Southern California Psychiatric Society, believes California's new law is "a one-size-fits-all remedy," and that "[t]here are definitely people who won't respond to it."[146]

Additionally, some opponents of Depo-Provera are concerned that chemically castrating sex offenders sends the wrong message to society. Advocates of this view claim that the underlying biological argument behind chemical castration undermines the criminality of the offense.[147] They argue that chemical castration "misfocuses the issue and feeds into the myths about rape."[148] These opponents point out that people still believe the myth that sexual crimes are the product of uncontrollable sex drive only, when in fact sexual assaults are crimes of violence and aggression.[149] Additionally, "[s]ome experts suggest hormonal drugs may help individuals oppressed by persistent sexual fantasies but not those with primarily sadistic motivations."[150]

VI. CONSTITUTIONAL ISSUES

This Comment now explores some constitutional challenges possibly raised by chemically castrating sexual offenders. It examines the potential constitutional issues raised by the Fourteenth Amendment's Due Process Clause and the Eighth Amendment's protection against cruel and unusual punishment.[151] Specifically, this Comment centers on whether mandatory castration offends a sex offender's Fourteenth Amendment substantive due process right to procreate, as well as the sex offender's right to refuse medical treatment. This Comment then analyzes whether chemical castration violates the Eighth Amendment's protection against cruel and unusual punishment.

A. Fourteenth Amendment: Fundamental Rights

This Comment's Fourteenth Amendment due process analysis is narrowly confined to a convicted sex offender's right to procreate and the offender's right to refuse medical treatment. The specific issues discussed are: (1) Whether mandatory

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145. Alvarado, *supra* note 143, at A3; *see id.* (quoting Dr. Mark Daigle, Chief of Psychiatry at Atascadero State Hospital, as saying that "[n]o drug works on everybody").

146. *Id.*

147. Sandra G. Boodman, *Does Castration Stop Sex Crimes?*, WASH. POST, March 17, 1992, at Z7; *see id.* (reporting from an interview with Denise Snyder, Executive Director of the D.C. Rape Crisis Center).

148. *Id.*

149. *Id.*

150. *Therapy and Drugs*, *supra* note 112, at 33.

151. This Comment does not address any equal protection claims or procedural due process issues potentially raised by chemical castration. *See generally* Recent Legislation, *Constitutional Law: Due Process and Equal Protection—California Becomes First State to Require Chemical Castration of Certain Sex Offenders*, 110 HARV. L. REV. 799 (1997) (discussing equal protection issues raised by California's chemical castration law).

chemical castration violates an individual's procreative freedom,[152] and (2) whether administering involuntary injections of Depo-Provera violates an individual's right to refuse intrusive medical treatment.[153]

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees that "[n]o state [shall] deprive any person of life, liberty, or property, without due process of law."[154] The Supreme Court has concluded that inherent in this right to privacy is the protection of bodily autonomy,[155] which includes procreative freedom and the right to refuse intrusive medical treatment.[156]

The first step in a Fourteenth Amendment due process analysis of sentencing sex offenders to mandatory castration requires a determination of whether a *fundamental right* or *liberty interest* is at risk.[157] When the Court speaks in terms of fundamental rights, it focuses on whether the infringed or restricted right is a personal right that is fundamental.[158] When the Supreme Court speaks in terms of liberty interests, it has not explicitly stated that it is using the doctrine of substantive rights. Generally, government actions that infringe upon fundamental rights receive strict scrutiny,[159] whereas those that affect liberty interests receive a less heightened level of scrutiny.[160] If the right involved is not fundamental nor a liberty interest, then the

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152. *See infra* Part VI.A.1.

153. *See infra* Part VI.A.2.

154. U.S. CONST. amend. XIV, § 1.

155. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

156. Kimberly A. Peters, Comment, *Chemical Castration: An Alternative to Incarceration*, 31 DUQ. L. REV. 307, 322 (1993).

157. Daniel L. Icenogle, *Sentencing Male Sex Offenders to the Use of Biological Treatments*, 15 J. LEGAL MED. 279, 294 (1994).

158. Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring); *see* Planned Parenthood v. Casey, 505 U.S. 833, 833-51 (1992) (stating that areas of personal choice protected by the right to privacy under the Due Process Clause are "matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment"); *id.* at 847 (declaring that the Constitution promises a realm of personal liberty in which the government may not enter).

159. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (applying strict scrutiny in a case involving the fundamental right to marry); *Griswold*, 381 U.S. at 485 (applying strict scrutiny to a statute that restricted the fundamental right to use contraception); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (applying strict scrutiny to a state's infringement upon the fundamental rights involved in family relationships); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (applying strict scrutiny in the area concerning the fundamental right of child rearing and education).

160. *See, e.g., Planned Parenthood*, 505 U.S. at 876 (applying an undue burden standard to a state statutory scheme that restricted the liberty interest in having an abortion); Cruzan v. Director, Mo. Dep't of Pub. Health, 497 U.S. 261, 270 (1990) (applying a balancing test to interpret the liberty interest in exercising the right to refuse medical treatment).

state's regulation will pass constitutional review if it meets a mere rationality test.[161] A mere rational standard of review requires only that the state direct its classification at a legitimate governmental purpose, and that the statute in question rationally further that purpose.[162] Thus, to determine which standard of review to apply to chemical castration, the first step is to determine whether chemical castration violates an individual's fundamental right or liberty interest.

One approach used by the Supreme Court to decide if a particular right is fundamental is whether that right is "explicitly or implicitly guaranteed by the Constitution."[163] Under the Fourteenth Amendment Due Process Clause, the Supreme Court has found many fundamental rights that are not specifically enumerated in the Bill of Rights,[164] including an individual's fundamental right to marriage,[165] child rearing and education,[166] family relationships,[167] contraception,[168] and procreation.[169] In the

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161. *See, e.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949) (applying rational basis test to a New York City regulation outlawing certain types of business advertising on delivery vehicles).

162. *See infra* Part VI.A.1.d. (discussing the rational basis test).

163. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

164. *See, e.g.*, U.S. CONST. amend. I (enumerating the right to religion, freedom of speech, or press, and the right to assemble); *id.* amend. IV (guaranteeing people "the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"); *id.* amend. VI (declaring "[i]n all criminal prosecutions [that] the accused [has] the right to a speedy and public trial, . . . and [the right] to [a]ssistance of [c]ounsel). The Bill of Rights, which was ratified on September 25, 1789, consists of the first ten amendments to the United States Constitution.

165. *Loving*, 388 U.S. at 12. In *Loving*, the District of Columbia, pursuant to its laws, married two residents of Virginia, an African-American woman and a Caucasian male. *Id.* at 2. Upon returning to Virginia, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. *Id.* at 2-3. The Supreme Court invalidated Virginia's miscegenation statute because it violated due process by denying the couple the fundamental freedom of marriage. *Id.* at 12.

166. *Pierce*, 268 U.S. at 534-35. In *Pierce*, an Oregon act required every parent, guardian, or other person having control of a child between 8 and 16 years old to send the child to a public school. *Id.* at 530. The Supreme Court invalidated the Oregon act because it violated due process by denying individuals the fundamental liberty in choosing education. *Id.* at 534.

167. *Prince*, 321 U.S. at 166. In *Prince*, a Massachusetts act prohibited boys under the age of 12 and girls under the age of 18 from selling articles of merchandise in any street or public place. *Id.* at 161. Although the Supreme Court stated that the state must respect and may not enter the private realm of family life, the Court ultimately upheld the act because the appellant failed to prove an equal protection claim. *Id.* at 166. The Court deemed the equal protection claim inadequate because the act excluded all parents from allowing their children to hand out literature on public highways. *Id.* at 171.

168. *Griswold*, 381 U.S. at 485. In *Griswold*, the Court held that married individuals have a constitutionally protected right to privacy that protects their decisions pertaining to contraception. *Id.* 484-86. The seven to two majority struck down a Connecticut state statute that forbade the use of contraceptives by finding several different rationales for the origin of the right to privacy. *Id.* at 485-86 (Douglas, J.); *id.* at 486-96 (Goldberg, J., concurring); *id.* at 500-02 (Harlan, J., concurring); *id.* at 502-05 (White, J., concurring). In applying a strict scrutiny analysis, the Court concluded that Connecticut's justification for the law, the suppression of illicit sex, was not sufficiently compelling to justify allowing a state regulation to invade this area of protected freedoms. *Id.* at 485. The plurality held that the various guarantees of the Bill of Rights created a penumbra of rights zones of privacy. *Id.* at 484 (Douglas, J.). Another view urged that the right to privacy comes from the Ninth Amendment since it "protects rights that are not expressly enumerated in the first eight amendments" and because the "list of rights enumerated there [should] not be deemed exhaustive." *Id.* at 492 (Goldberg, J., concurring). In Justice Harlan's concurring opinion, he found a right to privacy inherent in the Fourteenth Amendment's "concept of ordered liberty." *Id.* at

years from 1965 to 1986, the Supreme Court continued to expand the doctrine of fundamental rights within the right to privacy area, due in large part to its review of privacy interests under a strict standard analysis.[170] As a result of applying this high standard of review, the Court has recognized and protected a considerably wide array of privacy interests.[171] However, in *Bowers v. Hardwick*,[172] the Supreme Court abandoned its expansionist view of fundamental rights in the privacy area by concluding that homosexual sodomy by two consenting adults is not a fundamental right.[173] As a result of the *Bowers* decision, much uncertainty exists in the right to privacy area.[174] This confusion also became somewhat compounded when the Supreme Court recently ruled that the right to abortion is a due process liberty interest, and no longer a fundamental right.[175]

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500. (Harlan, J., concurring).

In *Eisenstadt v. Baird*, the Court invalidated a statute that authorized the selling of contraceptives by registered physicians and pharmacists only to married persons because it discriminated against the unmarried. Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972). In the majority opinion, Justice Brennan exclaimed that "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453.

In *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), the Supreme Court continued to expand fundamental rights when it struck down a New York statute on due process grounds because it prohibited the sale and distribution of contraceptives to minors. *Id.* at 696. The Court declared: "The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices." *Id.* at 685.

169. *See infra* Part VI.A.1. (discussing the fundamental right to procreate).

170. *See infra* Part VI.A.1.b. (applying a strict scrutiny standard to mandatory chemical castration).

171. Mark J. Kappelhoff, Note, Bowers v. Hardwick*: Is There a Right to Privacy?*, 37 AM. U. L. REV. 487, 500 (1988).

172. 478 U.S. 186 (1986). In *Bowers*, Georgia charged the respondent with violating its statute criminalizing sodomy after he committed the act with another male in the bedroom of his home. *Bowers*, 478 U.S. at 187-88. In reaching its decision that consensual sodomy by homosexuals is not a fundamental right, the Court focused on society's historically negative view of homosexuality. *Id.* at 192-94.

173. *Id.* at 195-96.

174. Kappelhoff, *supra* note 171, at 501.

175. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court began by stating broadly that it was affirming the essential holding of *Roe v. Wade*, 410 U.S. 113 (1973), by re-affirming: (1) A woman's right to an abortion before fetal viability without undue interference from the state; (2) the state's power to restrict abortion after viability, if the law contains exceptions for pregnancies endangering a woman's life or health; and (3) the principle that the state has a legitimate interest from the outset of pregnancy in both the mother's life and the fetus's health. *Planned Parenthood*, 505 U.S. at 833-34. Although the plurality in *Planned Parenthood* did not overrule *Wade* explicitly, it partially overturned *Wade* to the extent it gave abortion status as a fundamental right. *Id.* at 839. As a result of *Planned Parenthood*, the states may restrict abortion so long as they do not place an undue burden on a woman's right to choose. *Id.* at 874. The *Planned Parenthood* opinion did not discuss fundamental rights or the strict scrutiny issue, but by applying the undue burden test to the Pennsylvania statute, the Court can no longer treat abortion as a fundamental right. Consequently, the Court will test restrictions on abortion by the undue burden standard, not the strict scrutiny standard.

1. Right to Procreate

Although the Supreme Court has never explicitly found a liberty interest or fundamental right in having a sex drive, or in being rendered temporarily unable to reproduce, the Supreme Court recognized procreative rights in 1942 when it decided *Skinner v. Oklahoma.*[176] In *Skinner*, the United States Supreme Court struck down Oklahoma's Habitual Criminal Sterilization Act.[177] The Act defined a "habitual criminal" as a person who had been convicted for two or more felonies involving moral turpitude.[178] The statute stated that if the court determined that the defendant was a "habitual criminal" and could be rendered sexually sterile without detriment to general health, then the operation of a vasectomy in the case of a male, or a salpingectomy in the case of a female, should sterilize the defendant.[179] In *Skinner*, the defendant, a three-time convicted felon,[180] was serving a sentence for robbery with a firearm when the state legislature passed the statute.[181] In the ensuing trial, the court instructed the jury about the defendant's past crimes involving moral turpitude, and then told the jury that the sole question for them was whether a vasectomy could be performed on the defendant without detriment to his health.[182] The jury found that it could be, and the court entered judgment ordering the defendant's vasectomy.[183]

In overruling the Oklahoma Supreme Court's ruling that upheld the statute on equal protection grounds, the United States Supreme Court refused to comment on the defendant's arguments that the statute violated the Fourteenth Amendment's Due Process Clause and the Eighth Amendment's protection against cruel and unusual punishment.[184] Even though the Court arguably decided *Skinner* purely on equal protection grounds, Justice Douglas, writing for the majority, inferred that procreation is a fundamental right by saying: "[W]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects."[185] Justice Douglas further went on to state the Court's unequivocal view that a "strict scrutiny" analysis must

176. 316 U.S. 535 (1942).

177. OKLA. STAT. ANN. tit. 57, §§ 171-207 (West 1935). *Skinner* invalidated this statute because the Court found it unconstitutional. *Skinner*, 316 U.S. at 539-40.

178. *Skinner*, 316 U.S. at 536.

179. *Id.* at 537.

180. Skinner's two prior felony convictions were for stealing chickens and robbery with a firearm. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 538.

185. *Id.* at 541.

be employed whenever a state's classification authorizes sterilization, because such a classification affects a fundamental right.[186]

a. Setting Up the Standard of Review for Chemical Castration

Since the Supreme Court has seemingly classified procreation as a fundamental right[187] and mandatory chemical castration laws substantially affect a person's procreative freedom, a substantial likelihood exists that mandatory castration laws will be subject to strict scrutiny if challenged by a sex offender. Although the effects of chemical castration are reversible, the patient undergoing the treatment is virtually denied the right to reproduce during the course of treatment.[188] Moreover, critics of California's new law might also argue that castration by surgery or injections represents a more intrusive procedure than the vasectomy at issue in *Skinner* because chemical castration results in suppression of the offender's sex drive.[189] Finally, critics might argue that California's law as drafted indicates that chemical castration, for at least some parolees, could last a lifetime.[190] By leaving the treatment's ending date to the discretion of the Board of Prison Terms with no maximum length for MPA treatment,[191] California's new law has the potential of permanently depriving sex offenders of the right to procreate.

On the other side of the coin, a good argument exists that a court reviewing California's law might not apply a strict scrutiny analysis. First, proponents of chemical castration should argue that today's modern form of chemical castration is quite different than the sterilization used in *Skinner* because, unlike the surgical procedure, chemical castration is not permanent and the offender's sex drive and ability to reproduce will likely return shortly after the treatment ends.[192] Moreover, some

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186. *Id.; see id.* at 539-40 (holding that the statute violated the Equal Protection Clause because crimes such as grand larceny qualified for sterilization, whereas intrinsically similar crimes, such as embezzlement, were not classified as a felony, resulting in two similarly-situated crimes having unequal punishments).

187. *See supra* Part VI.A.1. (discussing *Skinner* and the fundamental right to procreate).

188. *See supra* note 108 and accompanying text (stating that usually the chemical injections prevent the patient from reproducing). *But see supra* notes 118-21 and accompanying text (discussing how some patients can reproduce successfully during MPA treatment).

189. *See supra* notes 105-09, 131 and accompanying text.

190. *See* CAL. PENAL CODE § 645(d) (West Supp. 1997) (stating that the parolee shall continue MPA treatments until the Department of Corrections demonstrates to the Board of Prison Terms that the treatment is no longer necessary).

191. *See supra* note 72 and accompanying text.

192. In *Skinner*, surgical castration rendered the defendant sexually sterilized by the operation of a salpingectomy or vasectomy. *Skinner*, 316 U.S. at 537. MPA treatment, on the other hand, is reversible, temporary, and does not require surgery. *See supra* notes 105-21 and accompanying text (describing how chemical castration works).

evidence exists that chemical castration does not result in a total deprivation of a patient's sex drive during the treatment because some men have reported an ability to perform sexually and even reproduce while undergoing MPA treatment.[193] Therefore, by classifying chemical castration as a temporary restriction on procreative ability, instead of a total deprivation, a court could apply a lower level of scrutiny.

Secondly, courts may distinguish chemical castration from the other Supreme Court right to privacy cases by using an argument similar to the one used in *Bowers*. Although the Supreme Court usually applies strict scrutiny to due process cases when a state infringes upon fundamental rights,[194] the Court has not applied strict scrutiny to all infringements of those rights.[195] Traditionally, the High Court has applied strict scrutiny to rights involving sex, marriage, and childbearing.[196] However, as evidenced by the *Bowers* decision, the Court has been less willing to accept so-called fringe values, such as consensual sodomy by homosexuals.[197] Thus, a court could side-step using strict scrutiny by classifying a child molester's right to procreate, after he has committed two sexual crimes against children, as a fringe value, rather than a traditional value.[198] Although chemical castration infringes upon the child molester's ability to procreate, a court should not apply strict scrutiny to California's law because the molester's inability to procreate lasts only during the probationary period and the law's purpose is to eliminate unconventional behavior.[199]

Finally, courts may get around applying a strict scrutiny analysis by asserting that chemical castration is part of the continuing rehabilitative process of the convicted felon, since the treatment lasts only while he is on probation. In *Griffin v. Wisconsin*,[200] the Supreme Court stated: "[P]robationers . . . do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditioned liberty properly dependent on observance of special [probation] restrictions.'"[201] However, the Supreme Court has pronounced that these restrictions are only "meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large."[202] Therefore, proponents of mandatory castration could argue that a strict scrutiny analysis should not apply to mandatory castration as part of a convicted felon's parole because the state uses chemical injections both as rehabilitation for the rapist and as protection of society at large from sexual predators.

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193. *See supra* notes 118-21 and accompanying text.
194. Icenogle, *supra* note 157, at 299.
195. *See supra* notes 172-74 and accompanying text (discussing the Supreme Court's decision in *Bowers*).
196. *See supra* notes 165-69 and accompanying text.
197. Icenogle, *supra* note 157, at 299.
198. *Id.*
199. *Id.*
200. 483 U.S. 868 (1987).
201. *Griffin*, 483 U.S. at 874 (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).
202. *Id.* at 875 (citing State v. Tarrell, 247 N.W.2d 696, 700 (Wis. 1976)).

b. Applying Strict Scrutiny

If a court does apply a strict scrutiny standard, the statute's classification must further "compelling"[203] governmental interests and must be "narrowly tailored"[204] to further the state's objective.[205] Thus, under a strict scrutiny standard of review, the state not only must show a compelling objective, but also must employ the least restrictive means.[206] Historically, satisfying the compelling interest prong of a strict scrutiny analysis has been a difficult task for a state.[207] However, the Court has found some governmental interests compelling.[208]

The state's interest in chemically castrating repeat sex offenders is protecting the safety and well-being of the community. Proponents of chemical castration will likely argue that the state's interest in ensuring public safety significantly outweighs any restrictions on the probationer's rights.[209] In *Jacobson v. Massachusetts*,[210] the Supreme Court sustained a criminal sentence imposed on the defendant for refusing to take a vaccination against small pox to secure the general comfort, health, and prosperity of the state.[211] Justice Harlan, writing for the majority stated: "Even liberty itself, the greatest of all rights, is not [an] unrestricted license to act according to

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203. *See* Virginia v. United States, 116 S. Ct. 2264, 2287 (1995) (stating that, at the least, the state must show that the classification serves important governmental objectives).

204. The Supreme Court uses the terms "narrowly tailored" and "necessary" interchangeably. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1984) (defining "narrowly tailored" as the "less drastic means" for effectuating the state's objectives).

205. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2114 (1995).

206. Shelton v. Tucker, 364 U.S. 479, 488-89 (1960).

207. *See* Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (concluding that the state's justification of administrative convenience does not withstand strict scrutiny). In *Frontiero*, a statute allowed spouses of male members of the uniformed services to be considered 'dependent' for purposes of obtaining benefits, without regard to whether the spouse was in fact dependent on the member for support. *Id.* at 678. A servicewoman, on the other hand, could not claim her husband as a 'dependent' under these programs unless he was in fact dependent on her for one-half of his support. *Id.; see* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (stating that a state's statutory classification that denied welfare assistance to individuals who had not resided in the state for one year violated the citizen's right to interstate travel). In *Shapiro*, appellee, a 19-year-old unwed mother of one child who was pregnant with her second, moved to Connecticut where the state denied assistance on the sole ground that the mother had not lived in the state for one year. *Id.* at 623. The Supreme Court concluded that the state's justification of discouraging those who enter the state solely to obtain larger benefits fails the narrowly tailored prong of strict scrutiny. *Id.* at 631.

208. *See* Korematsu v. United States, 323 U.S. 214, 217-18 (1944) (upholding an exclusion order prohibiting all people of Japanese ancestry from remaining in the Pacific Coast area during World War II). In *Korematsu*, the Supreme Court held the order constitutional by finding a compelling interest in national security. *Id.* at 217.

209. *See* Jacobson v. Massachusetts, 197 U.S. 11, 16 (1905) (balancing an individual's inherent right to care for his or her own body against the state's interest in protecting the general comfort, health, and prosperity of the community).

210. 197 U.S. 11 (1905).

211. *Jacobson*, 197 U.S. at 26.

one's will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others."[212] Although the compulsory vaccination in *Jacobson* would have altered the defendant's biological functions, the Court upheld it under a strict scrutiny analysis because of the state's compelling interest in protecting public health.[213] Proponents of chemical castration probably will find California's castration law analogous to the vaccination order imposed in *Jacobson.* They will argue that the state's paramount interest in protecting the public from those offenders who repeatedly perform predatory and sexually violent acts will outweigh any restrictions on the child molester's rights.

Critics of the mandatory chemical castration law should argue that, although the state has an interest in protecting society against sex crimes, its interest is not compelling because it does not satisfy the intrusiveness of taking away the parolee's ability to procreate.[214] Moreover, critics could argue that MPA injections are still a speculative treatment because researchers have not conclusively proven that MPA injections are more effective than other treatments.[215] Thus, opponents of the chemical castration law might argue that a court would not likely hold that speculative gains of MPA treatments "manifestly outweigh" the impairment of a paraphiliac's right to procreate.[216]

To satisfy the second constitutional prong, the state must argue that its MPA treatments are "narrowly tailored" to meet the goal of reducing recidivism among sex offenders. The state could claim that MPA treatment is the "less intrusive means" for decreasing repetitive sex crimes because it is the only effective treatment in preventing paraphiliacs from continuing to rape. As shown by the country's high recidivism rates,[217] the other common forms of treatment, incarceration and counseling, do not seem effective,[218] whereas Depo-Provera has shown substantial success in early studies.[219] Moreover, the offender has already undergone the more traditional forms of rehabilitation after his first sexual conviction, and these were not effective. Thus, after the felon's second sex crime conviction, MPA treatment is not only the least intrusive means for rehabilitation, but perhaps the only effective means of rehabilitation.

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212. *Id.* at 26-27.

213. *Id.* at 36-37.

214. Fitzgerald, *supra* note 53, at 44.

215. *Id.*

216. *See, e.g.*, People v. Beach, 147 Cal. App. 3d 612, 620, 195 Cal. Rptr. 381, 385 (1983) (rejecting a condition of probation requiring the defendant to move out of her neighborhood because the desired gains of such a condition were merely speculative).

217. *See infra* note 375 (reporting recidivism rates as high as 75% among pedophiles in the United States).

218. *See infra* notes 385-86 and accompanying text (arguing that traditional forms of punishment do not prevent future crime).

219. *See supra* note 130 (noting the early studies of Depo-Provera).

Secondly, the state will claim that biweekly injections of Depo-Provera are minimally intrusive on the patient because, unlike surgical castration, the effects are not permanent: the treatments last only while the patient is on probation and the health risks associated with the treatment are not too severe.[220] In addition, the state could also argue that incarceration is far more intrusive than chemical castration. A person who undergoes castration surrenders a single fundamental right, the right to procreate; however, incarceration strips inmates of constitutional rights and privileges that would otherwise be theirs but for their confinement.[221] Incarceration forces many inmates to give up their right to travel,[222] and severely limits their First Amendment right to assemble, as well as their Fourteenth Amendment rights to privacy and due process.[223] In addition, by restricting these rights, incarceration also severely curtails an inmate's right to procreate, especially if that inmate is not permitted conjugal visits.

Finally, the state could argue that the right to accept MPA treatment is a voluntary decision made by the child molester. Since parole is not a constitutional right, the parolee is not constitutionally entitled to parole, thus the sex offender is presented with the option; to either accept a grant of parole and undergo MPA treatment, or deny it and remain incarcerated.[224] Some critics of chemical castration may denounce the choice as inherently coercive, and maybe it is. But as one commentator put it, "the real question is this: When faced with the certainty of incarceration, wouldn't we all want to be able to make such a choice? To ask the question is to answer it."[225]

Opponents may argue that the chemical castration law is not narrowly tailored because it is not the least restrictive means available to deter sex crimes. Critics will probably assert that incarceration is a less intrusive form of punishment than chemical castration because being incarcerated does not take away an individual's fundamental right to bodily privacy. Although incarceration limits a prisoner's rights,

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220. *See supra* notes 110-12 and accompanying text (describing the risks associated with MPA treatment).

221. *See, e.g.*, Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 125 (1977) (declaring that confinement as well as needs of the penal institution impose limitations on prisoners' constitutional rights, including those derived from the First Amendment, which are implicit in incarceration).

222. *See Shapiro*, 394 U.S. at 626 (stating that the Court long ago recognized that the nature of the federal union and the constitutional concept of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of the land, uninhibited by statutes, rules, or regulations that unreasonably burden or restrict this movement).

223. Icenogle, *supra* note 157, at 299.

224. Fitzgerald, *supra* note 53, at 14-15.

225. Douglas J. Besharov, *At Issue: Is "Chemical Castration" an Acceptable Way to Treat Sex Offenders?*, 6 CQ RESEARCHER 41 (1996). The question of whether or not chemical castration violates the doctrine of unconstitutional conditions is beyond the scope of this Comment. *See generally* Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988) (suggesting that the government should not be able to use its bargaining position to deprive individuals of their entitlements).

it does not invade that person's bodily rights, physical ability to procreate, or biological ability chemically to produce a sex drive. Moreover, incarceration can be considered less intrusive than chemical castration because incarceration does not expose the individual to the variety of health risks that chemical castration does.[226]

Critics can also argue that mandatory chemical castration for all repeat sex offenders is extremely "over-inclusive."[227] For instance, suppose that a person could be prevented from committing further acts of child abuse merely by being required to submit to counseling and parenting classes, together with close monitoring of children and of family relationships by a doctor or social worker.[228] In such cases, chemically castrating that individual would seemingly be an unnecessary form of punishment. From a safety standpoint, incarceration also arguably protects the community better than castration because incarceration removes the individual from society, whereas during MPA treatment, the sex offender integrates himself with the rest of society.[229] Finally, for California's mandatory chemical castration law to be narrowly tailored to the state's interest in reducing sex crimes, the state has to rely on the unproven assumption that the rapist's uncontrollable sex drive, not anger, causes crimes of a sexual nature.[230]

c. Looking at Undue Burden

Under *Roe v. Wade*,[231] a woman's right to an abortion was viewed as a fundamental privacy right, requiring state legislatures to have a compelling state interest before regulating abortions.[232] But nineteen years later, the Supreme Court in *Planned Parenthood v. Casey*[233] stated that a woman's choice to have an abortion is

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226. *See supra* notes 110-12 and accompanying text (discussing the health risks associated with MPA treatments).

227. *See* Massachusetts v. Murgia, 427 U.S. 307, 325-26 (1976) (Marshall, J., dissenting) (arguing that the Court should declare Massachusetts's statute setting a mandatory retirement for uniformed police officers at age 50 unconstitutional because it is extremely over-inclusive). In *Murgia*, the Supreme Court upheld the mandatory retirement age because it rationally furthered the state's interest in assuring that its police officers are physically fit. *Id.* at 310-11. However, in his dissent, Justice Marshall argued that the statute is over-inclusive because it mandates all police officers over 50 years old retire, including those officers who are physically fit. *Id.* at 325-26 (Marshall, J., dissenting).

228. Connie S. Rosati, *A Study of Internal Punishment*, 1994 WIS. L. REV. 123, 134.

229. Vanderzyl, *supra* note 105, at 123.

230. *See supra* notes 141, 147-50 and accompanying text (arguing that sexual crimes are acts of violence).

231. 410 U.S. 113 (1973).

232. *Roe*, 410 U.S. at 152-56.

233. 505 U.S. 833 (1992).

a liberty interest and no longer a fundamental right.[234] Although the joint opinion purported to reaffirm *Wade*'s central holding, the Court described a woman's right to have an abortion as a liberty interest,[235] and the Court reviewed a woman's right to have an abortion under an "undue burden" test[236] instead of the strict scrutiny test applied in *Wade*.[237] The plurality in *Planned Parenthood* stated that "[o]nly where state regulation imposes an *undue burden* on a woman's ability to make this decision does the power of the State reach into the heart of the *liberty* protected by the Due Process Clause."[238] The plurality decision in *Planned Parenthood* reduced the scope of a woman's right to have an abortion by permitting "incidental" restrictions on abortions that do not amount to an undue burden.[239] After *Planned Parenthood*, a woman still has a right to terminate her pregnancy before viability, but a state is not "prohibited from taking steps to ensure that this choice is thoughtful and informed."[240]

In the wake of *Planned Parenthood*, a court may possibly review mandatory chemical castration under an undue burden standard. However, even though procreation, like abortion, involves the right to procreate, the Supreme Court will unlikely expand the undue burden test to include Fourteenth Amendment cases outside of abortion.[241] However, if a court does apply an undue burden test to California's law, the court would probably find MPA treatment an *incidental burden* instead of an *undue burden*. The sexual offender has a choice to undergo MPA treatment,[242]

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234. *Planned Parenthood*, 505 U.S. at 852-53.

235. *Id.* at 833-34.

236. *Id.* at 877 (describing an "undue burden" as the effect of a state regulation that places a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus). Although the Supreme Court used an undue burden standard in a number of cases before *Planned Parenthood*, the plurality opinion in *Planned Parenthood* recognized the standard's inconsistent prior use by saying: "The concept of an undue burden has been utilized by the Court, as well as individual Members of the Court, including two of us, in ways that could be considered inconsistent." *Id.* at 876.

237. *Id.*

238. *Id.* at 874 (emphasis added).

239. *Id.*; *see id.* at 887, 899-901 (concluding that informed consent requirements, 24-hour waiting period, parental consent provision, and reporting and record keeping requirements of the Pennsylvania statute did not impose an undue burden, but the spousal notification provision imposed an undue burden and was invalid).

240. *Id.* at 872.

241. *See Planned Parenthood*, 505 U.S. at 964 (Scalia, J., dissenting) (stating that the Court created the undue burden standard largely "out of whole cloth" by the authors of the joint opinion and "does not command the support of the majority of this Court"); *see also* Compassion in Dying v. Washington, 49 F.3d 586, 596 n.6 (9th Cir. 1995) (Wright, J., dissenting) (proclaiming that *Planned Parenthood* did not discard the traditional strict scrutiny test in fundamental rights cases not involving abortion); William J. Tarnow, *Recognizing a Fundamental Liberty Interest Protecting the Right to Die: An Analysis of Statutes Which Criminalize or Legalize Physician-Assisted Suicide*, 4 ELDER L.J. 407, 457 n.187 (1996) (stating that *Planned Parenthood* does not reject the strict standard of review in nonabortion cases).

242. *See supra* note 53 (stating that parole is contractual in nature and thus the offender can reject it).

patients can reproduce while receiving the injections,[243] and the treatment is only temporary.[244]

d. Applying Rational Basis

If the court determines that chemical castration involves a privacy right that is less than "fundamental," it will likely analyze the issues using a rationality test.[245] In the early 1890s, the Supreme Court declared a classification rational as long as it is "based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."[246] Today, this "rational basis" test is a very easy test for the government to pass.[247] However, that is not to say the rational basis test is necessarily a slam dunk in favor of the state;[248] the rights involved still receive moderate constitutional protection.[249] However, when reviewing under a rational basis standard there is a presumption that the statute being challenged is constitutional, and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."[250] In applying a rational basis test two questions are asked: First, is the classification directed at the achievement of a legitimate governmental purpose; and, second, does the statute in question rationally further that purpose.[251]

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243. *See supra* notes 118-21 and accompanying text.

244. *See supra* note 117 and accompanying text.

245. *See* Zablocki v. Redhail, 434 U.S. 374, 400, 402 (1978) (Powell, J., concurring) (applying a rational relationship test to a statute affecting the right to marry). Although this section examines the rational basis standard, the so-called "rational basis with teeth" review is outside the scope of this Comment. *See generally* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448-50 (1985) (employing a stronger form of rational review to invalidate a city ordinance requiring a special use permit for a proposed group home for mentally retarded persons). Although the Court in *Cleburne Living Center* did not explicitly state it was reviewing the ordinance under a stronger form of rational basis, the Court did not apply a standard rational basis test because it placed the burden on the government by inquiring into the record for support of the government's justifications. *Id. But see* Heller v. Doe, 509 U.S. 312, 318-19 (1993) (applying a rational basis review to a Kentucky civil commitment statute for the mentally ill and mentally retarded). In *Heller*, the 5-4 majority upheld the Kentucky statute, and implicitly rejected the rational basis with teeth standard by stating "legislative choice is not subject to a courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Heller*, 509 U.S. at 320. In Justice Souter's dissent, he states that even though the majority did not apply the *Cleburne* standard of review, he would follow *Cleburne* because the majority "cites *Cleburne* once, and does not purport to overrule it." *Id.* at 337 (Souter, J., dissenting).

246. Gulf, Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150, 151 (1897).

247. FARBER ET AL., *supra* note 31, at 287.

248. *See* Romer v. Evans, 116 S. Ct. 1620, 1629 (1996) (striking down an amendment to the Colorado Constitution which prohibited any state or local governmental branch from enacting regulations designed to protect homosexual persons from discrimination). Although the Court in *Romer* appeared to review the amendment under a rational basis standard, the amendment was found to be unconstitutional because it furthered no legitimate governmental purpose except to "make [homosexual persons] unequal to everyone else." *Id.*

249. Kappelhoff, *supra* note 171, at 500.

250. *Heller*, 509 U.S. at 320 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

251. Steffan v. Perry, 41 F.3d 677, 685 (D.C. Cir. 1994) (en banc).

Opponents of castration might argue that mandatory chemical castration does not rationally further the state's interest in protecting the health and well-being of the community because no Depo-Provera studies on unwilling patients exist.[252] Moreover, chemical castration will not eliminate a pedophile's ability to assault a child sexually, and chemical castration does not deter sex offenders who are not motivated by their sex drive.[253]

Although California's mandatory chemical castration law raises some legitimate concerns, it would probably withstand a rational basis review. Proponents of the drug would likely satisfy the first prong by showing that the state directs chemical castration at the legitimate goal of lowering the number of sex crimes.[254] In order to pass the second question, MPA treatments must rationally further the goal of lowering sex crimes "*or are likely to do so.*"[255] This prong may also be satisfied because it is conceivable to believe that MPA treatments will *likely deter some individuals* from committing illegal sex acts, especially since MPA treatments have helped some recidivists control their sexual behavior.[256] Therefore, if a court applies a mere rational basis test to California's mandatory chemical castration statute, the statute may well pass constitutional muster.

2. *Right to Refuse Medical Treatment*

The common law considered even the touching of one person by another without consent or legal justification a battery.[257] The law has embodied this notion of bodily integrity in the requirement that informed consent is generally necessary for any medical treatment.[258] The logical corollary of the doctrine of informed consent[259] is that the patient generally possesses the right to refuse consent, that is, the right to prohibit treatment.[260] Up until twenty years ago, only a few cases involving informed consent existed, and most of those cases involved religious beliefs that implicated the

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252. *See supra* notes 132-37 and accompanying text (acknowledging Dr. Berlin's concern that studies have tested Depo-Provera only on voluntary patients as part of a larger therapeutic program, and those studies may not accurately reflect the results of a mandatory program).

253. *See supra* notes 147-50 and accompanying text.

254. *See supra* notes 130-31 and accompanying text (illustrating MPA's success in lowering recidivism rates among sexual offenders).

255. *Perry*, 41 F.3d at 685 (emphasis added).

256. *See supra* note 131 (describing how Depo-Provera helped sexual recidivist Arne Kjeldsen control his sexual behavior).

257. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 9, at 39-42 (5th ed. 1984).

258. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 269 (1990).

259. The informed consent doctrine is based on principles of self-autonomy, and specifically on the premise that all individuals have the right to determine what should be done to their own bodies. KEETON ET AL., *supra* note 257, § 32, at 190.

260. *Cruzan*, 497 U.S. at 270.

First Amendment.[261] However, a New Jersey Supreme Court decision in 1976, *In re Quinlan*,[262] renewed the discussion regarding the scope of informed consent and the right to refuse medical treatment.[263]

The liberty that the Fourteenth Amendment's Due Process Clause protects allows an individual to refuse medical treatment, even if such treatment is beneficial.[264] However, this right is not absolute. To determine if a due process violation exists regarding medical treatment, courts must apply a balancing test under which the court weighs the individual's liberty interests[265] against the relevant state interests.[266] In *Cruzan v. Director, Missouri Department of Health*,[267] Chief Justice Rehnquist, writing for the majority, said that "[a]lthough many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right to privacy, we have never so held."[268] Emphasizing the correct way to view an individual's right to refuse medical treatment, the Chief Justice added "this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest."[269]

Further, the Supreme Court's decision in *Washington v. Harper*[270] recognized that prisoners possess a significant liberty interest in avoiding the forceful administration of antipsychotic[271] drugs, under the Due Process Clause of the Fourteenth Amendment.[272] After asserting that the prisoners had a liberty interest, the Court characterized its standard of review as a reasonableness test.[273] Although the Court employed a higher standard of review than a mere rationality standard, it refused to apply strict scrutiny.[274] The Court held that there must be a reasonable, not merely

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261. *Id. See generally* Kristine C. Karnezis, *Patient's Right to Refuse Treatment Allegedly Necessary to Sustain Life*, 93 A.L.R. 3D 67, 75-77 (1979) (discussing cases in which courts have upheld a patient's right to refuse lifesaving medical treatment).

262. 355 A.2d 647 (N.J. 1976). In the *Quinlan* case, Karen Quinlan fell into a vegetative state as a result of brain damage, and her father sought judicial approval to remove her from the respirator. *In re Quinlan*, 355 A.2d at 651. The New Jersey Supreme Court held that the father could remove the respirator because Karen had a right to privacy in terminating her life. *Id.* at 664.

263. *Id.* at 647.

264. *See In re* Quackenbush, 383 A.2d 785, 789-90 (N.J. 1978) (upholding a patient's refusal to consent to an operation to amputate his gangrenous legs).

265. *See Cruzan*, 497 U.S. at 275-76 (referring to the "liberty interest" as the right to refuse medical treatment, but mentioning that many state courts have treated it as within the constitutional right to privacy).

266. *Id.* at 279.

267. 497 U.S. 261 (1990).

268. *Cruzan*, 497 U.S. at 279 n.7.

269. *Id.*

270. 494 U.S. 210 (1990). *Harper* involved a state prisoner's assertion of a right to refuse antipsychotic medication that the state claimed was necessary to protect the prisoner's own safety and that of other inmates and staff in a correctional facility. *Harper*, 494 U.S. at 217. The Court held that minimal due process protections were constitutionally sufficient in the case of a convicted prisoner. *Id.* at 225-29.

271. *See* WEBSTER'S, *supra* note 26, at 92 (defining "antipsychotic" as "tending to alleviate psychosis or psychotic states").

272. *Harper*, 494 U.S. at 221-22; *see id.* at 229 (stating that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty").

273. *Id.* at 224.

274. *Id.* at 223-24.

rational, relationship to a legitimate state purpose.[275] Thus, in *Harper*, the Washington statute passed a reasonable basis test because its antipsychotic medication drug treatment program was reasonably related to its goal of internal prison security.[276]

Those desiring to administer Depo-Provera on child molesters would argue that chemical castration reasonably furthers the state's interest in protecting the young victims of these crimes. First, MPA treatments are needed upon a sex offender's release from prison because incarceration alone often serves to intensify that offender's desire to commit more such crimes.[277] Secondly, once the prison releases the offender, MPA treatment acts as a defense shield between society and the repeat molester now reentering the community.

The rationales for advocating a sex offender's right to refuse mandatory injections of Depo-Provera are two-fold. First, the government must allow the patient to refuse the potentially serious harms that might result from the administration of these drugs.[278] Second, the courts should intervene to prevent the state-sanctioned abuse of these drugs.[279]

Critics could claim that the courts should prevent the states from authorizing MPA treatment because mandatory chemical castration crosses the fine line between treating an offender's mental illness while in prison and using chemicals to control behavior beyond the prison walls.[280] Critics would argue that authorizing chemical castration would be inconsistent with *Harper* because the Supreme Court rendered that holding specifically in the prison context.[281] In *Harper*, the Court stated that "[t]he extent of a prisoner's right under the [Due Process] Clause to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate's confinement."[282] By narrowly applying *Harper*'s reasonable standard to a prison setting, a court will likely review a parolee's right to refuse MPA treatment under a more stringent test.

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275. *Id.* at 223.

276. *Id.* at 225. The Court looked to three factors to determine the reasonableness of Washington's prison regulation. *Id.* at 224-25. First, the Court examined if a valid, rational connection existed between the prison regulation and the governmental interest put forward to justify it. *Id.* at 224. Next, the Court analyzed the potential impact of the asserted constitutional right on guards, other inmates, and prison resources. *Id.* at 225. Finally, the Court considered the absence of ready alternatives evidence of the reasonableness of a prison regulation. *Id.*

277. Peters, *supra* note 156, at 322.

278. *See supra* notes 110-12 and accompanying text (discussing the possible future harmful effects of Depo-Provera).

279. *See* Nelson v. Heyne, 491 F.2d 352, 357 (7th Cir. 1974) (finding constitutional ramifications of medical policy within judicial competence).

280. *See* Jami Floyd, Comment, *The Administration of Psychotropic Drugs to Prisoners: State of the Law and Beyond*, 78 CAL. L. REV. 1243, 1253 (1990) (discussing the need to offer psychotropic drugs in an atmosphere of treatment and consent, especially in the prison setting).

281. Michael L. Perlin & Deborah A. Dorfman, *Is It More than "Dodging Lions and Wastin' Time?": Adequacy of Counsel, Questions of Competence, and the Judicial Process in Individual Right to Refuse Treatment Cases*, 2 PSYCHOL. PUB. POL'Y & L. 114, 123 (1996).

282. *Harper*, 494 U.S. at 222.

To prove this assertion, opponents of castration will rely on the recent Supreme Court decision in *Riggins v. Nevada*.[283] In *Riggins*, the Court held that Nevada violated due process when the state forced the defendant to stand trial under a heavy dose of antipsychotic drugs.[284] Although the Court's holding was narrow, Justice O'Connor, writing for the majority, suggested the Court would construe the right to refuse treatment much more broadly in contexts outside prison.[285] Therefore, if the Court limits the *Harper* reasonableness approach to "unique circumstances of penal confinement,"[286] then the Court might apply the strict scrutiny standard[287] of *Riggins* in other right-to-refuse-medical-treatment areas.[288] As a result, critics of castration could claim that *Riggins* suggests a strict scrutiny standard will apply to an offender's right to refuse MPA treatments, forcing the state, once again, to overcome the onerous task of proving that MPA treatment is the "less intrusive alternative."[289]

B. Eighth Amendment Analysis

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[290] The Eighth Amendment's prohibition of cruel and unusual punishment has traditionally guided sentencing practices by preventing all forms of excessive punishment.[291] Punishment is excessive if it is "grossly disproportionate" to the crime[292] or runs counter to the American legal system's accepted penological goals.[293]

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283. 504 U.S. 127 (1992).

284. *Riggins*, 504 U.S. at 136-38.

285. Bruce J. Winick, *New Directions in the Right to Refuse Mental Health Treatment: The Implications of* Riggins v. Nevada, 2 WM. & MARY BILL RTS. J. 205, 233 (1993).

286. *Riggins*, 504 U.S. at 134.

287. In the majority opinion, Justice O'Connor asserts that the Court is not adopting a strict scrutiny standard. *Id.* at 136. However, the dissent and other commentators have interpreted the majority's standard as strict scrutiny. *See id.* at 156 (Thomas, J., dissenting) (stating that the Court appears to adopt a standard of strict scrutiny); *see also* Winick, *supra* note 285, at 227 (referring to the majority's standard of review as strict scrutiny).

288. Winick, *supra* note 285, at 227.

289. *See supra* notes 217-30 and accompanying text (examining MPA treatment as a least intrusive alternative).

290. U.S. CONST. amend. VIII.

291. Solem v. Helm, 463 U.S. 277, 286 (1983); *see id.* at 288-90 (asserting that the Eighth Amendment applies to all punishments).

292. *See* Rhodes v. Chapman, 452 U.S. 337, 345 (1981) (stating that the Eighth Amendment prohibits punishments that involve the unnecessary and wanton infliction of pain, or are grossly disproportionate to the crime, even though the punishments may not be physically barbaric). *But see* Harmelin v. Michigan, 501 U.S. 957, 994 (1991) (suggesting that the proportionality of the crime to the punishment, outside of capital crimes, does not require "strict proportionality").

293. *See* Fromson, *supra* note 77, at 323 (listing the goals of the criminal justice system as retribution, deterrence, denunciation and rehabilitation); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 7-17 (2d ed. 1995) (discussing the principles of criminal punishment).

For California's chemical castration law to violate the Eighth Amendment, the law must fail two tests. First, the court must determine that chemical castration is punishment rather than treatment. Second, the court must find that chemical castration is a punishment that is cruel and unusual.

1. Treatment or Punishment?

In determining whether a given procedure is justified as treatment or classified as punishment, courts employ a four-part test.[294] Applying its four-prong test, the court in *Rennie v. Klein*[295] concluded that the forced administration of psychotropic drugs to patients was treatment rather than punishment, and thus outside the scope of the Eighth Amendment.[296] In reaching its conclusion, the *Rennie* court examined: (1) The procedure's therapeutic value, (2) its acceptance in medical practice, (3) its part in the ongoing psychotherapeutic program, and (4) the drug's effects in light of its benefits.[297]

The main issue regarding California's castration law is whether administering MPA to sex offenders for sterilization purposes is a treatment or a form of punishment. Critics will likely argue that chemical castration fails the first prong in the *Rennie* test because MPA treatment has low therapeutic value. They would probably argue that chemical castration has low therapeutic value because it does not remove the anger and hostility motivating the offender's acts of violence, especially if the treatment is not accompanied by any form of psychological counseling. The strongest argument that chemical castration is a punishment will likely be under the second factor, which requires MPA be an accepted medical practice. Here, critics can argue that MPA is an "experimental" drug not commonly accepted in medical circles for compulsory use[298] or male sterilization.[299] Finally, opponents could also argue that Depo-Provera's harmful effects outweigh its benefits to the offender. Studies have shown Depo-Provera might cause immediate adverse physical effects,[300] as well as serious long-term health effects.[301] Moreover, since chemical castration is a tem-

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294. Rennie v. Klein, 462 F. Supp. 1131 (D.N.J. 1978). In *Rennie*, the plaintiff was a highly intelligent, 38-year-old man. *Id.* at 1135. "Before his psychiatric difficulties began, he worked as a pilot and a flight instructor." *Id.* His first symptoms of mental illness began in 1971, and by 1976, after several admissions to mental hospitals, his behavior had become abusive, assaultive, and erratic. *Id.* In 1978, the plaintiff, an involuntary patient at Ancora Psychiatric Hospital, a state institution, sought to enjoin the psychiatrists and officials at Ancora from forcibly administering psychotropic drugs to him in nonemergency situations. *Id.* at 1135-36.

295. 462 F. Supp. 1131 (D.N.J. 1978).

296. *Id.* at 1143.

297. *Id.* at 1136-38.

298. *See supra* note 132 and accompanying text (acknowledging that studies have not tested MPA on involuntary patients).

299. *See supra* note 116 and accompanying text (noting that the FDA has not approved MPA for suppressing the sex drive in males).

300. *See supra* note 108 and accompanying text.

301. *See supra* notes 110-12 and accompanying text.

porary procedure, it does not provide any long-term benefits to the offender.[302] Once the injections cease, the offender may revert to his former conduct.[303]

Proponents might argue that MPA treatment has therapeutic value because MPA treatment lowers sex offenders' testosterone levels and may eliminate many paraphiliacs' uncontrollable sex drives.[304] Moreover, Depo-Provera's extensive use in other countries,[305] as well as its use in this country,[306] provide evidence that the medical community accepts the drug. Finally, proponents of chemical castration will likely argue that the drug's benefits outweigh its harmful effects. Chemical castration has an immediate and future positive impact on the offender. While receiving treatment, the offender's lowered testosterone is a benefit because it helps him safely readjust to society.[307] Furthermore, the temporary treatment can also have a permanent positive effect on paraphiliacs even after the treatment stops. Once the offender knows he can act in conformity with society while on Depo-Provera, making the transition into society once the treatments stop might be easier for him.

To predict whether courts will find chemical castration a form of punishment or a justified treatment is difficult. Thus far, at least one court has concluded that chemical castration is a form of punishment by ruling that chemical castration has not gained acceptance in the medical community as a safe and reliable procedure.[308] The court stated:

> Some sex offenders in other states have been given the *voluntary* option of participating in a Depo-Provera program as a condition of probation in very limited instances. However, our research reveals that no appellate court in the United States, either state or federal, has ever passed upon or approved voluntary or mandatory treatment of sex offenders with medroxyprogesterone acetate or Depo-Provera.[309]

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302. *See supra* note 117 and accompanying text.

303. Vanderzyl, *supra* note 105, at 128.

304. *See supra* notes 105-09, 131 and accompanying text.

305. *See supra* notes 126-30 and accompanying text (discussing Depo-Provera's use in other countries).

306. *See* Rundle, *supra* note 64, at B1 (reporting that as many as 1000 sex offenders have been treated with Depo-Provera to date in the United States).

307. *See infra* note 375 (stating that until patients experience relief from their sex drive, they will not be able to prevent themselves from committing sexual acts).

308. People v. Gauntlett, 352 N.W.2d 310, 315 (Mich. Ct. App. 1984). In *Gauntlett*, a Michigan appellate court wrestled with the issue of imposing chemical castration upon sex offenders as a lawful condition of probation. *Id.* at 314-17. The defendant pleaded nolo contendere to first-degree criminal sexual conduct with his stepdaughter. *Id.* at 311. The judge sentenced the defendant to five years probation, including one year of residence in a county jail, a payment of $25,000 in court fees, and submission to Depo-Provera treatment for the five-year probationary period. *Id.* at 313. The Michigan Court of Appeal invalidated the sentence on the ground that Depo-Provera treatment was an illegal condition of probation without the appropriate statutory authorization. *Id.* at 315-17.

309. *Id.* at 315 (emphasis added).

However, after thirteen more years of treating sex offenders with MPA and the enactment of California's new law, whether future courts will continue to view chemical castration as a mere experimental procedure remains to be seen.

2. Is Chemical Castration Cruel and Unusual Punishment?

Over the years, the interpretation of what constitutes cruel and unusual punishment has gradually evolved. Recognizing that the scope of the Eighth Amendment is not static, the Supreme Court stated that the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[310] Since the Supreme Court has never addressed the use of chemical castration as a condition of parole, and because notions of what constitutes cruel and unusual punishment change over time, predicting the exact test the Supreme Court will employ when it confronts this issue is difficult. Justice Marshall articulated the evolution of cruel and unusual punishment in his concurrence in *Furman v. Georgia*,[311] stating as follows:

> [A] penalty that was permissible at one time in our Nation's history is not necessarily permissible today . . . and that the very nature of the Eighth Amendment would dictate that unless a very recent decision existed, stare decisis would bow to changing values, and the question of the constitutionality of [a particular] punishment at a given moment in history would remain open.[312]

Initially, the United States Supreme Court interpreted the Eighth Amendment as prohibiting only barbaric or torturous forms of punishment.[313] In *Weems v. United States*,[314] the Court broadened its interpretation of cruel and unusual punishment to include punishments that are disproportionate to the crime committed.[315] The Court found Weems's punishment disproportionate to his crime because of the extreme

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310. Trop v. Dulles, 356 U.S. 86, 101 (1958).

311. 408 U.S. 238 (1972).

312. Furman v. Georgia, 408 U.S. 238, 329-30 (1972) (Marshall, J., concurring).

313. *See, e.g., In re* Kemmler, 136 U.S. 436, 447 (1890) (asserting that punishments are cruel when they involve "torture or a lingering death"); Wilkerson v. Utah, 99 U.S. 130, 136 (1879) (holding that the Eighth Amendment forbids "punishments of torture . . . and all others in the same line of unnecessary cruelty").

314. 217 U.S. 349 (1910). In *Weems*, a Philippine court convicted the defendant, an acting officer of the United States Coast Guard stationed at the Philippine Islands, of falsifying an official document. *Weems*, 217 U.S. at 357-58.

315. *Id.* at 380. Weems received a 15-year prison sentence with hard labor at Cadena Temporal, a Philippine prison, and a fine of 4000 pesetas (Philippine currency). *Id.* at 358. The Supreme Court held Weems's punishment for falsifying official documents disproportionate to his crime of falsifying documents by stating that "[t]here are degrees of homicide that are not punished so severely." *Id.* at 380.

mental and physical suffering inherent in the sentence.[316] In *Trop v. Dulles*,[317] the Court explicitly expanded the Eighth Amendment's scope to protect against severe mental pain, even though "[t]here may be involved no physical mistreatment, [and] no primitive torture."[318] In 1972, the Supreme Court in *Furman* identified four interrelated principles for determining an Eighth Amendment violation.[319] The Court focused on the punishment's degradation to human dignity, its arbitrariness, its acceptability to society, and its necessity.[320]

Using these traditional interpretations of cruel and unusual punishment as a historical backdrop, modern courts have formulated a three-part test in determining an Eighth Amendment violation. The test asks: (1) Whether the punishment is proportional to the crime,[321] (2) whether it involves unnecessary and wanton infliction of pain,[322] and (3) whether the punishment is contrary to evolving standards of decency.[323]

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316. Justice McKenna, writing for the majority, vividly described Weems's punishment: "[T]hose sentenced to cadena temporal shall labor for the benefit of the State; shall always carry a chain at the ankle, hanging from the wrist; shall be employed at hard painful labor; [and] shall receive no assistance whatsoever from without the penal institutions." *Id.* at 381. The Court further stated that:

> His prison bars and chains are removed, it's true after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate.... [H]e is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty.

Id. at 366.

317. 356 U.S. 86 (1958). In *Trop*, a court-martial convicted a native-born citizen of the United States of desertion during wartime. *Trop*, 356 U.S. at 87-88. When the petitioner deserted, he was serving as a private in the United States Army in French Morocco. *Id.* at 87. The court-martial sentenced the petitioner to "three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge." *Id.* at 88. In 1952, the petitioner applied for a passport but the State Department denied him one under section 401(g) of the Nationality Act of 1940 because he had lost his citizenship by treason. *Id.* The Supreme Court eventually held section 401(g) unconstitutional. *Id.* at 104.

318. *Id.* at 101.

319. *Furman*, 408 U.S. at 281-82 (Brennan, J., concurring). In *Furman*, the Court examined three cases in which a state imposed the death penalty, one of them for murder, and two of them for rape. *Id.* at 240. The five Justice majority held that imposing and carrying out the death penalty in these cases constituted cruel and unusual punishment in violation of the Eighth Amendment. *Id.* Each one of the five Justices in the majority, Justices Douglas, Brennan, Stewart, White, and Marshall, filed a separate opinion. *Id.* at 238. Among the five Justices writing for the majority, the opinions of Justice Marshall and Justice Brennan provided the most expansive interpretation of the Eighth Amendment. *See id.* at 257-306 (Brennan, J., concurring); *id.* at 314-74 (Marshall, J., concurring).

320. *Id.* at 286 (Brennan, J., concurring).

321. Solem v. Helm, 463 U.S. 277, 290 (1983).

322. *See* Wilkerson v. Utah, 99 U.S. 130, 136 (1879) (holding that the Eighth Amendment forbids punishments of torture and all other instances of unnecessary cruelty).

323. *Trop*, 356 U.S. at 101.

a. Proportionality Analysis

In *Solem v. Helm*,[324] the Supreme Court declared "as a matter of principle . . .[,] a criminal sentence must be proportional to the crime for which the defendant [is] convicted."[325] Justice Powell, writing for the majority, stated that a court's proportionality analysis should include: (1) "[T]he gravity of the offense and the harshness of the penalty," (2) "sentences imposed on other criminals in the same jurisdiction," and (3) "sentences imposed for the commission of the same crime in other jurisdictions."[326] However, in *Harmelin v. Michigan*,[327] the latest United States Supreme Court case considering the issue of proportionality, the Justices differed on the constitutionality of a proportionality standard in the Eighth Amendment.[328] Justice Scalia, joined by Chief Justice Rehnquist, rejected the proportionality doctrine as an inherent component of the Eighth Amendment by saying: "We conclude from this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."[329] Although the remaining seven Justices found a proportionality standard implicit in the Eighth Amendment,[330] these Justices could not reach a consensus on how the Court should apply this principle.

Justice Kennedy's concurrence, in which Justices O'Connor and Souter joined, concluded that the proportionality principle applies to both capital and noncapital cases.[331] However, under Justice Kennedy's view, an Eighth Amendment proportionality analysis does not require a strict proportionality between the crime and

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324. 462 U.S. 277 (1983).

325. *Solem*, 463 U.S. at 290. In *Solem*, the Court convicted the defendant, a previous six-time felon, of uttering a "no account" check for $100. *Id.* at 279-81. Justice Powell, writing for the Court, noted that the defendant's prior felonies were all nonviolent in nature, not against a person, and involved alcohol. *Id.* at 279-80. Ordinarily the maximum penalty for uttering a "no account" check would have been five years imprisonment and a fine of $5000, but under South Dakota's recidivist statute, the defendant's principal felony became a "Class 1" felony carrying a maximum penalty of life imprisonment without the possibility of parole and a $25,000 fine. *Id.* at 281. Ultimately, the Court invalidated the defendant's sentence because it was "grossly disproportionate" to the nature of his offense. *Id.* at 284.

326. *Id.* at 292.

327. 501 U.S. 957 (1991). In *Harmelin*, the Court convicted the petitioner of possessing 672 grams of cocaine, and sentenced the petitioner to life imprisonment without the possibility of parole according to a Michigan statute. *Harmelin*, 501 U.S. at 961. The Court eventually upheld the life sentence on the ground that it was not cruel and unusual. *Id.* at 996.

328. *Id.* at 957-61.

329. *Id.* at 965.

330. Seven of the nine Justices agreed that the Eighth Amendment included a proportionality guarantee for noncapital crimes. *See id.* at 996 (Kennedy, J., concurring) (stating that stare decisis dictates adherence to the narrow proportionality principle); *see also id.* at 1014 (White, J., dissenting) (stating that the Eighth Amendment requires a general proportionality requirement); *id.* at 1027-28 (Marshall, J., dissenting) (same); *id.* at 1028-29 (Stevens, J., dissenting) (same).

331. *Id.* at 997 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S. at 288).

sentence, rather "it forbids only extreme sentences that are 'grossly disproportionate' to the crime."[332]

In his dissent, Justice White, joined by Justices Stevens and Blackmun, applied *Solem*'s three-part disproportionality test to Michigan's statute.[333] Ultimately, the dissenters found the statute's penalty unconstitutionally disproportionate to the crime committed.[334] In a separate dissent, Justice Marshall agreed with Justice White's central conclusion that the Eighth Amendment imposed a general proportionality requirement, and if properly applied in *Harmelin*, it would have invalidated the Michigan statute.[335]

Although the Justices splintered on the application of the disproportionality standard, the Court did agree that sentencing in noncapital cases need not take into account potential individualized "mitigating factors."[336] In addition, the Court also agreed that although a severe mandatory penalty may be cruel, the penalty is not *unusual* simply because it is mandatory.[337]

In light of *Harmelin*, the United States Supreme Court has not yet clearly rendered its final decision on disproportionality.[338] Several circuits have concluded that whether *Solem*'s three-part proportionality test remains relevant in noncapital cases is unclear from *Harmelin*.[339] However, most courts adhere to the *Solem* test since the *Harmelin* majority did not expressly overrule or approve *Solem*.[340] Additionally, no other circuit has implemented an alternative to the proportionality principle set forth in *Solem*.[341]

The first step in *Solem*'s Eighth Amendment analysis is an examination of the gravity of the offense and the harshness of the penalty.[342] One way in which a punishment is excessive is if it is disproportionate to the offender's crime.[343] A punishment is also excessive or unnecessary if there exists a significantly less severe punishment which adequately achieves the inflicted punishment's purpose.[344]

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332. *Id.* at 1001 (Kennedy, J., concurring); *see id.* at 1004-05 (Kennedy, J., concurring) (rejecting the intrajudicial and interjudicial parts of *Solem*'s proportionality test).

333. *Id.* at 1021-27 (White, J., dissenting).

334. *Id.* at 1027 (White, J., dissenting).

335. *Id.* at 1028 (Marshall, J., dissenting).

336. *Id.* at 995; *see id.* at 995-96 (stating that an individualized determination of whether a sentence is appropriate applies only to capital sentencing because the "penalty of death differs from all other forms of criminal punishment, not in degree but in kind") (quoting Furman v. Georgia, 408 U.S. 238, 306 (1973)) (Stewart, J., concurring).

337. *Id.* at 995 (emphasis added).

338. Kathi A. Drew & R.K. Weaver, *Disproportionate or Excessive Punishments: Is There a Method for Successful Constitutional Challenges?*, 2 TEX. WESLEYAN L. REV. 1, 19 (1995).

339. *See, e.g.*, United States v. Kratsas, 45 F.3d 63, 67 (4th Cir. 1995); United States v. Bucuvalas, 970 F.2d 937, 946 n.15 (1st Cir. 1992).

340. Drew & Weaver, *supra* note 338, at 20.

341. *Id.*

342. *Solem*, 463 U.S. at 290-91, 292.

343. *Id.* at 284.

344. Furman v. Georgia, 408 U.S. 238, 279 (1973) (Brennan, J., concurring).

Mandating chemical castration as a condition of parole is probably not a disproportionate penalty for sex crimes. Since sexual offenses such as rape and child molestation cause a tremendous amount of social harm, chemical castration is not "grossly" out of proportion to the severity of those crimes.[345] Moreover, granting the paraphiliac offender release from confinement with MPA treatment is far less intrusive on the offender's liberty than continued incarceration.[346]

The second factor of the *Solem* test examines the sentences imposed on other criminals in the same jurisdiction.[347] Although opponents of California's law can argue that chemical castration is a harsher sentence than punishments for other severe crimes such as murder, a stronger argument may be that the new law arbitrarily mandates chemical castration for some sex offenders but not for others. For example, California's law requires chemical castration for repeat sex offenders who forcibly commit sodomy or oral copulation on children under thirteen,[348] but the law does not cover males convicted of having vaginal sex with children over thirteen.[349] By excluding from mandatory chemical castration males having vaginal sex with children over thirteen, opponents could argue that California's law disproportionately punishes some child molesters but not others.

Even though California's law may draw an arbitrary line between child molesters, it will still likely pass this intrajurisdiction analysis because MPA treatment is mandatory for all repeat child molesters whose crimes fall under the law's provisions. Since California's law allows no judge discretion for twice-convicted child molesters, all repeat child molesters who choose parole must receive MPA treatment. In addition, the *Solem* court noted that appellate courts should "grant substantial deference" to legislative and trial court judgment to determine the types and limits of punishments.[350] Therefore, since MPA treatment is not "grossly disproportionate" to the crime of child molesting,[351] it seems unlikely that a court will strike down California's statutorily-authorized chemical castration law.

Finally, the *Solem* test requires an examination of sentences imposed for the commission of the same crime in other jurisdictions.[352] Although California is the first state to implement mandatory chemical castration, the law mandates MPA treatment only upon the offender's parole. Therefore, offenders who do not want MPA treatment can reject parole and finish the remainder of their sentences through the traditional punishment of incarceration.

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345. Hicks, *supra* note 106, at 659.

346. *See supra* notes 217-30 and accompanying text (discussing chemical castration as a least intrusive sentence).

347. *Solem*, 463 U.S. at 292.

348. *See supra* notes 49, 60-62 and accompanying text (listing some of the offenses that qualify for mandatory chemical castration).

349. *See supra* note 50 and accompanying text.

350. *Solem*, 463 U.S. at 290.

351. *See supra* note 345 and accompanying text.

352. *Solem*, 463 U.S. at 292.

b. *Unnecessary and Wanton Infliction of Pain*

In addition to a disproportionality analysis, recent courts have also considered the punishment's mode of intrusion.[353] Specifically, courts have focused on whether the punishment involves the unnecessary and wanton infliction of pain.[354] This unnecessary and wanton infliction of pain component flows from the traditional forms of barbaric and torturous punishment that the Eighth Amendment's Cruel and Unusual Punishment Clause has always prohibited.[355] Recently, the Ninth Circuit has employed the unnecessary and wanton infliction of pain standard to methods of execution.[356] In *Campbell v. Wood*,[357] the court held that execution methods are constitutionally acceptable so long as unconsciousness is "likely to be immediate or within a matter of seconds."[358] Moreover, the *Campbell* court found that Washington's "long-drop"[359] method of hanging did not inflict unnecessary or wanton pain on the condemned because the hanging resulted in "rapid unconsciousness and death."[360]

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353. *See* Campbell v. Wood, 18 F.3d 662, 688 (9th Cir. 1994) (upholding the constitutionality of hanging as a means of execution). In *Campbell*, a Washington court convicted the defendant of three counts of first degree murder and sentenced him to death. *Id.* at 667. Under Washington's death penalty statute, the defendant could choose to be hung by the neck unless he chose to be executed by lethal injection. WASH. REV. CODE ANN. § 10.95.180(1) (West 1990). Although Campbell refused to exercise his choice to have a lethal injection, he argued that hanging violated the Eighth Amendment because hanging involves the unnecessary infliction of pain. *Campbell*, 18 F.3d at 683. Campbell did not argue that the punishment of death was disproportional to the crimes he committed. *Id.* The court ruled that hanging did not violate the Eighth Amendment because the defendant failed to prove that the potential risk of pain caused by decapitation or asphyxiation rendered judicial hanging unconstitutionally cruel. *Id.* at 687. The court also concluded that "Campbell is not entitled to a painless execution, but only one free of purposeful cruelty." *Id.*

In *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996), the Ninth Circuit became the first appellate court to invalidate a particular method of execution. Claire Cooper, *Executions in State's Gas Chamber Ruled Unconstitutional*, SACRAMENTO BEE, Feb. 22, 1996, at A3. In *Fierro*, California death-row inmates David Fierro, Robert Alton Harris, and Alejandro Gilber Ruiz brought an action on behalf of themselves and others similarly situated to challenge the constitutionality of California's method of execution by lethal gas. *Fierro*, 77 F.3d at 302. The court concluded that the extreme pain, the length of time the pain lasts, and the substantial risk that other inmates will suffer this extreme pain "require the conclusion that execution by lethal gas is cruel and unusual." *Id.* at 309.

354. *Campbell*, 18 F.3d at 683.

355. Trop v. Dulles, 356 U.S. 86, 100 (1958).

356. *See Fierro*, 77 F.3d at 307-09 (analyzing California's method of execution by lethal gas under an unnecessary and wanton infliction of pain standard); *Campbell*, 18 F.3d at 683-85 (reviewing the constitutionality of Washington's method of execution by hanging under an unnecessary and wanton infliction of pain test).

357. 18 F.2d 662 (9th Cir. 1994).

358. *Campbell*, 18 F.3d at 687.

359. *Id.* at 683 (describing "long-drop" hanging as dropping the condemned a particular distance based on the prisoner's weight).

360. *Id. See generally* Pamela S. Nagy, *Hang by the Neck Until Dead: The Resurgence of Cruel and Unusual Punishment in the 1990s*, 26 PAC. L.J. 85 (1994) (asserting that the Ninth Circuit based its decision in *Campbell* on flawed reasoning, and arguing that execution by hanging is unconstitutional as cruel and unusual punishment under the Eighth Amendment in that hanging disproportionately inflicts physical and psychological pain, impairs the dignity of the prisoner and society, and violates contemporary norms of society).

Although most modern cruel and unusual punishment claims arise in the death penalty context, one court has invalidated surgical castration on cruel and unusual grounds.[361] In *State v. Brown*,[362] the South Carolina Supreme Court invalidated a suspended sentence conditioned on the defendant consenting to surgical castration because the court found castration a physical "mutilation."[363] The court found that the sentence violated South Carolina's constitutional prohibition against the infliction of cruel and unusual punishment using the traditional interpretation regarding degrading punishment.[364] The *Brown* decision was not decided upon the defendants' ability to choose between castration and incarceration; what the court found cruel and unusual was the act of castrating criminals, not the allowance of the choice.[365]

Although the *Brown* case found surgical castration torturous or barbaric punishment for sex offenders, that a court would find Depo-Provera treatment an unnecessary and wanton infliction of pain seems highly unlikely. Unlike surgical castration, chemical castration does not involve any form of mutilation, and its intrusive behavior is limited to the injection. Furthermore, a lot less pain seems involved in receiving an injection of Depo-Provera than in being the lucky recipient of Washington's long-drop.

c. Evolving Standards of Decency

In *Trop*, the Supreme Court clearly stated that the touchstone of the Eighth Amendment in all types of cases is, beyond any doubt, whether a punishment conforms to society's contemporary standards of decency.[366] To determine society's contemporary standards, a court must review the history of a challenged punishment and examine society's present practices.[367] In explaining the criteria of unacceptableness to society, Justice Marshall stated, "[W]hether or not a punishment is cruel and unusual depends . . . on whether people who are fully informed as to the pur-

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361. State v. Brown, 326 S.E.2d 410 (S.C. 1985). In the *Brown* case, Brown and two defendants pleaded guilty to first degree criminal sexual conduct for their involvement in a brutal sexual assault. *Id.* at 411. At sentencing, the trial judge ordered that each defendant be incarcerated for the maximum sentence of 30 years under South Carolina law. *Id.* The trial judge, however, went on to state the conditions of probation he would accept: "provided however, that upon each of you voluntarily agreeing to be castrated and upon successful completion of that procedure, the balance of your sentence will be suspended and you will be placed on probation for five years." *Id.* Eventually, each defendant dispelled an earlier appeal of that sentence, and Brown sought a writ of mandamus to compel the execution of the suspended sentence. *Id.*

362. 326 S.E.2d 410 (S.C. 1985).

363. *Id.* at 412.

364. *Id.; see* S.C. CONST. art. I, § 15 (proclaiming that "[e]xcessive bail shall not be required; nor shall excessive fines be imposed; nor shall cruel, nor corporal, nor unusual punishment be inflicted; nor shall witnesses be unreasonably detained").

365. Hicks, *supra* note 106, at 653.

366. Trop v. Dulles, 356 U.S. 86, 100 (1958).

367. Furman v. Georgia, 408 U.S. 238, 278-79 (1972) (Brennan, J., concurring); *see id.* at 277-78 (Brennan, J., concurring) (insisting that a court must determine judicial interpretation of society's present practices as objectively as possible).

poses of the penalty and its liabilities would find the penalty shocking, unjust and unacceptable."[368]

Chemically castrating sex offenders, especially repeat child molesters, for their brutal crimes will likely be an acceptable punishment by society's standards. Moreover, California's castration law has passed both houses of the California Legislature with overwhelming support,[369] and some public surveys have revealed society's support for chemical or surgical castration for repeat rapists.[370]

VII. SOCIETAL, MORAL, AND PHILOSOPHICAL JUSTIFICATIONS FOR CHEMICAL CASTRATION

Assuming chemical castration passes constitutional scrutiny, the question still remains whether society should accept chemical castration as a mandatory condition of parole for sex offenders. This Comment argues that mandatory castration should be a condition of parole for all twice-convicted sex offenders because MPA treatment conforms to both types of moral reasoning underlying criminal punishment: utilitarianism[371] and retributivism.[372]

A. *Utilitarianism*

Simply put, utilitarians believe that the sole purpose of the law is to increase the total happiness of society and to diminish its pain.[373] According to this view, prior crime merits future punishment only to the extent that such punishment merits future good.[374] Therefore, a utilitarian would endorse chemical castration if its societal benefits outweigh its costs to society.

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368. *Id.* at 361 (Marshall, J., concurring).

369. *See supra* note 48 (reporting the votes in both the California Assembly and the California Senate).

370. In a 1994 poll, the Princeton Survey Research Association reported that 59% of the public supports chemical or surgical castration for repeat rapists, while only 34% oppose it. *Disapproval of Caning for Vandalism*, HOTLINE, Apr. 12, 1994, at 23. In a 1996 poll taken of 255 people, 244 people, or 96%, voted in favor of chemically castrating repeat child molesters. *Chemical Castration Punishment Favored*, INTELLIGENCER J., Sept. 21, 1996, at A10. In a poll in Pennsylvania, researchers surveyed 134 people about chemically castrating the worst child molesters, and 130 people responded "yes." *You Called It!*, ALLENTOWN MORNING CALL, Sept. 6, 1996, at A2.

371. *See* DRESSLER, *supra* note 293, at 9-10 (discussing the basic principles and forms of utilitarianism). *See generally* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J. Bowring ed., 1948) (discussing morality and its relationship to legislation); JOHN STUART MILL, UTILITARIANISM (S. Gorovitz ed., 1971) (describing the concepts behind utilitarian principles); Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011 (1991) (arguing that society should reconsider rehabilitation in determining how long society should punish a reformed person).

372. *See* DRESSLER, *supra* note 293, at 11-14 (discussing the basic principles and forms of retributivism). *See generally* IMMANUEL KENT, THE PHILOSOPHY OF LAW (W. Hastie trans., 1887) (discussing retributivism as a form of punishment in the law); Roger Wertheimer, *Understanding Retribution*, CRIM. JUST. ETHICS, Summer-Fall 1983, at 19 (explaining the philosophical principles underlying retributivism).

373. Joshua Dressler, *Substantive Criminal Law Through the Looking Glass of* Rummel v. Estelle*: Proportionality and Justice as Endangered Doctrines*, 34 SW. L.J. 1063, 1075 (1981).

374. *Id.*

Chemically castrating sexual offenders provides several significant benefits for society. Most importantly, chemically castrating sex offenders would increase public safety by lowering the country's high recidivism rates among sex offenders.[375] Studies have shown that the average adolescent sex offender, over his lifetime, may be expected to commit up to 380 sex crimes.[376] Based on Depo-Provera's success in previous studies, commentators argue that treating sex offenders with Depo-Provera holds great promise for reducing the level of sexual violence against women and children.[377] Therefore, if chemical castration prevents many sex offenders from committing future sexual crimes, society will gain an enormous benefit.

Chemical castration also benefits society because it allows sex offenders to re-enter society safely on parole, instead of the more costly alternative of keeping sex offenders in jail.[378] Although Depo-Provera treatment is not cheap, it is considerably less expensive than the high cost associated with incarceration.[379] In addition, once a prison releases the sex offender from confinement, another criminal can occupy the sex offender's prison cell. Paroling sex offenders on Depo-Provera could in effect help decrease the nation's overcrowded jails.[380] Even though California has the largest prison system in the country,[381] "the current California prison population

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375. *Let California Field-Test 'Chemical Castration,'* NEWSDAY, Sept. 6, 1996, at A54 (quoting U.S. Attorney General Janet Reno as reporting that recidivism rates among pedophiles in the United States have been as high as 75%). *See generally* Roan, *supra* note 64, at E1 (quoting California Governor Pete Wilson as saying "[c]hild molesters can't stop committing sexual crimes because they have a compulsion to do what they do, and as long as they have that urge, they'll keep on victimizing children unless we do something about it").

376. Don Reisenberg, *Motivations Studied and Treatments Devised in Attempt to Change Rapists' Behavior*, 257 JAMA 899, 900 (1987); *see id.* (describing that the 380 sex crimes include severe sexual crimes such as rapes, as well as lesser offenses, such as exhibitionism).

377. Besharov & Vachhs, *supra* note 118, at 42.

378. *See* Lauren A. Lundin, *Sentencing Trends in Environmental Law: An "Informed" Public Response*, 5 FORDHAM ENVTL. L.J. 43, 68 (1993) (estimating that the "annual cost of prison construction to accommodate future inmates is $340 million to $420 million, [not including] $170 million, which represents the current annual cost of operating prisons, [breaking down] to $22 thousand per inmate"); Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L. REV. 443, 497 (1993) (stating that prisons cost approximately $60 per day per inmate to operate and $60,000 to $75,000 per bed to build).

379. *See supra* notes 63-75 and accompanying text (reporting the projected costs of treating sex offenders with Depo-Provera).

380. *See* David Holmstrom, *Using Older Convicts as Safety Valve*, CHRISTIAN SCI. MONITOR, May 11, 1992, at 1 (declaring that by May 1992, 42 states were under court order to relieve overcrowding); Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 CRIME & JUST. 99, 100 (1996) (noting that at the conclusion of 1993, the federal prisons were operating at 136% capacity and 39 state systems were operating above rated capacity); David N. Wecht, Note, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 815-16 (1987) (declaring that the nation's inmate population is almost 1.4 million); *id.* at 816 (reporting that the United States' incarceration rate has risen to 455 per 100,000 citizens); *see also* Michael Gottesman & Lewis J. Hecker, Note, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U. L. REV. 702, 706-07 (1963) (stating that with the increase in crime, a state no longer enjoys the option of incarcerating every prisoner for his or her maximum term).

381. *California Tops the Nation in Rate of Parolees Rejailed*, SAN DIEGO UNION-TRIB., Sept. 19, 1991, at A1.

[extends] well beyond its intended capacity."[382] California prisons are jammed with more than 135,000 inmates, of which 14,000 are sex offenders.[383] Larry Doom, a Department of Corrections parole agent who supervises sex offender cases, argues that treating sex offenders comes down to a matter of resources: "You can't build more prisons, and everything is overcrowded."[384]

Chemical castration may also increase society's overall good because it may be the only successful means to reduce the number of repeat sex crimes. For many offenders, the sexual abuse and violence in prisons "merely heightens" their propensity to commit further crimes.[385] Moreover, one of the most extensive reviews of sex offender treatment research, published in 1989, concluded after looking at forty-two studies that no evidence exists that clinical treatment reduces rates of sex offenses.[386] If sexual offenders cannot truly control their testosterone levels, then chemical castration is probably the only way that society can achieve its goal of safety. Thus, a utilitarian would not endorse other forms of punishment, such as incarceration or even counseling programs, because those punishments would not benefit society by increasing public safety.

Commentators who believe that crime is neither an expression of free will, nor the product of environment, but instead is a manifestation of inherited physiological disorders that predispose persons to criminal behavior, support this view.[387] Under this view, mandatory castration may be society's last line of defense against the rising number of sex crimes because current rehabilitation forms of guilt and punishment are ineffective in preventing further sexual crimes.[388]

As it stands today, serious sex offenders normally serve very short sentences.[389] Nationally, the average time served by convicted rapists is less than six years, and that average does not include all those who plead guilty to a lesser offense.[390] There-

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382. Mike A. Cable, *Review of Selected 1996 California Legislation*, 28 PAC. L.J. 778, 785 (1997); *see* DATA ANALYSIS UNIT, CAL. DEP'T OF CORRECTIONS, CALIFORNIA PRISONERS & PAROLEES 1922, at 1-1 (1995) (reporting that California's prison population in 1992 was 186% of the designed capacity); Mark Ragan, *Prison Chief Links Tough Crime Laws, Overcrowded Cells*, SAN DIEGO UNION-TRIB., Jan. 14, 1986, at B3 (stating that three state prisons operate at 200% over capacity).

383. Seligman, *supra* note 67, at C1.

384. *Id.*

385. Besharov & Vachhs, *supra* note 118, at 42.

386. *Punishing Sex Offenders*, 6 CQ RESEARCHER 34 (1996).

387. *See* Matthew W. Frank, *Born to Crime: The Genetic Causes of Criminal Behavior*, 83 MICH. L. REV. 1218, 1218 (1985) (book review) (expounding on Lawrence Taylor's theories of crime and punishment). Lawrence Taylor, a criminal defense lawyer in private practice, was formerly an associate professor of law at Gonzaga University. He has served as a deputy district attorney for Los Angeles County and as a special prosecutor for the Attorney General of Montana. Taylor has written nine books, including EYEWITNESS IDENTIFICATION (1982) and WITNESS IMMUNITY (1983).

388. *See* Frank, *supra* note 387, at 1218 (advocating Taylor's position that the current concept of guilt and punishment, that humans are creatures of completely free will and their behavior can be modified by environmental influences, may be futile and that antisocial behavior may be the result of genetic influences).

389. Besharov & Vachhs, *supra* note 118, at 42.

390. *Id.*

fore, if society does not implement chemical castration as a safety net, non-rehabilitated sex offenders, who have served very limited sentences, will continue to threaten society's general safety.

Finally, many utilitarians may argue that California's castration law for repeat child molesters is too narrow, and that the state should expand it to include all adult rapists as well.[391] Extending chemical castration to all rapists would further utilitarian goals because extending chemical castration will act as a deterrent to all potential rapists, thereby protecting adults as well as children from becoming a victim of a sex offense.[392] Susan Carpenter-McMillan, Executive Director of the Pasadena-based Woman's Coalition, was not satisfied with California's measure but eventually supported it because she viewed it as a first step.[393] Therefore, increasing the scope of the law will increase the overall public good because chemical castration might become a deterrent to all sex offenders.

Chemical castration also furthers a nonclassical variety of utilitarianism known as rehabilitation.[394] Although the goal of rehabilitationists is the same, to reduce future crime, their main focus is to reform the perpetrator.[395] Chemical castration furthers the goals of rehabilitation because Depo-Provera treatment promises to reform a sex offender better than incarceration alone.[396] The offender successfully treated with Depo-Provera would experience relief from what was once an uncontrollable urge to commit violent sex crimes.[397] During this period of "sexual calm," the offender would be less of a threat to society, and could, therefore, avoid other external forms of punishment.[398] Once freed from prison, the offender can rebuild family ties, pursue employment opportunities, and participate in socially beneficial activities.[399]

Society's cost or pain caused by chemical castration would be the state's temporary intrusion on an offender's rights to self-autonomy and procreation.[400] Although self-autonomy and procreation are important rights, the societal pain associated with them is low because chemical castration is only temporary, and the convicted sex offender is the only injured party. From a utilitarian standpoint, the

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391. *'Chemical Castration' Law Enacted*, SAN DIEGO UNION-TRIB., Sept. 18, 1996, at A1; *see Forget About Castration*, TENNESSEAN, Oct. 2, 1996, at 8A (stating that Brenda Turner, a Democrat from Chattanooga, Tennessee, suggests that legislators should broaden a castration bill to apply to sex offenders that attack adults as well as those who attack children).

392. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 3339, at 4 (Aug. 22, 1996).

393. *'Chemical Castration' Law Enacted*, *supra* note 391, at A1.

394. *See* DRESSLER, *supra* note 293, at 10.

395. *Id.*

396. *See supra* notes 385-86 and accompanying text (discussing incarceration's negative effect on sex offenders).

397. Fromson, *supra* note 77, at 327-28.

398. *Id.* at 328.

399. *Id.*

400. *See supra* Part VI.A. (discussing the Fourteenth Amendment due process rights of sex offenders).

state should implement chemical castration for all sex offenders because its substantial societal benefits outweigh its low societal burden.

B. Retributivism

Chemical castration also looks attractive to many retributivists.[401] To a retributivist, the wrongdoing itself justifies punishment, regardless of the punishment's future efficacy.[402] According to this view, a criminal's voluntary decision to commit an antisocial act gives society the right to punish that offender.[403] Chemically castrating sex offenders is consistent with the form of retribution known as assaultive retribution.[404] Although an uncompromising assaultive retributivist would probably favor surgical castration for repeat rapists because of its stronger punishment, chemical castration's deprivation of the offender's sex drive and ability to reproduce may be sufficient punishment to vindicate a victim's anger of sexual violation. Moreover, chemically castrating repeat sex offenders may also look attractive to this type of retributivist because chemical castration punishes the offender by intruding on his bodily autonomy, similar to how his crimes deprived the victims of their personal rights.

VIII. CONCLUSION

Since California's mandatory castration law is morally justifiable and probably does not violate a sex offender's substantive due process rights or Eighth Amendment protections, the legislature should expand the mandatory castration law to include adult rape and all sex crimes committed against children. Due to the serious nature of sex crimes and the amount of social damage caused by them, society's first and foremost concern must be the community's safety, especially the well-being of the most common victims of sex crimes: women and children. Once an offender has committed a sex crime,

> [t]he very tragedy that sex offenders pose for victims and their families cannot be ignored. An adult rape victim is often severely traumatized by the

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401. *See* Courtney G. Persons, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525, 1538 (1996) (stating that a retributive punishment exacts an eye for an eye, inflicting pain in return for the pain the offender imposed on the community).

402. Dressler, *supra* note 373, at 1075.

403. *Id.*

404. Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1169 (1980). Professor Radin uses this term, but other scholars have named this form of retribution public vengeance or societal retaliation. *See* 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (1883) (stating that this form of retributivist believes hating criminals is morally right); *see also* DRESSLER, *supra* note 293, at 12 (stating that according to this view, hurting the criminal is morally right for society because the criminal has harmed society).

> event. It is common for the resulting psychological scars to affect the victim throughout his or her life. Children who are victimized are likely to suffer severe and long-lasting effects from sexual abuse. Molested children often become 'psychological time bombs' suffering from a multitude of disorders.[405]

If society's goal is stopping pedophiliacs before they rape again, then the country's current form of punishment and rehabilitation is failing. With a recidivism rate as high as seventy-five percent, sex crimes have reached an epidemic proportion. As recidivism rates among sex offenders continue to increase and repeat molesters continue to rape children, society can no longer afford to turn its back to such a potentially promising drug as Depo-Provera. Since society has not dedicated itself to locking these criminals up forever, at the very least, the state has an obligation to release these offenders back into communities as safely as possible. With no other effective procedure on the horizon, chemical castration should be utilized.

405. Lauren J. Abrams, Comment, *Sexual Offenders and the Use of Depo-Provera*, 22 SAN DIEGO L. REV. 565, 576 (1985).