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## A Shot in Arm: Can chemical castration statutes cure sex offenders legally and ethically?

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A SHOT IN THE ARM: CAN CHEMICAL  
CASTRATION STATUTES CURE SEX OFFENDERS  
LEGALLY AND ETHICALLY?

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The purpose of this article is to determine the appropriateness of administering medroxyprogesterone acetate (MPA) to those convicted of sex offenses against a child as a means of reducing the urge to reoffend as it currently stands in six states.<sup>1</sup> Part I will take a look at historical and international uses of castration implemented before the California statute in 1996.<sup>2</sup> In Part II, the effectiveness of chemical castration in its first fifteen plus years of use in the United States and examine the legal, ethical, and medical issues involved.<sup>3</sup> Currently six states have mandatory chemical castration statutes,<sup>4</sup> one state offers voluntary surgical castration,<sup>5</sup> and the remaining forty-three states employ various alternatives to castration. These alternative options including longer sentences and cognitive therapy will be examined in detail in Part III.<sup>6</sup>

## I. Historical and international uses of castration.

To understand the visceral reactions for and against castration today it is helpful to look at the history behind it. In the punitive sense, castration dates as far back as Hammurabi's Code,<sup>7</sup> the ancient dynasties of China,<sup>8</sup> and by the Normans during their conquest of the Roman Empire.<sup>9</sup> Aside from war and criminal punishment, castration has also been used to shame and easily identify slaves and

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<sup>1</sup> Fla. Stat. ch. 794.0235 (West 2012) (requiring the administration of MPA to sex offenders convicted of sexual battery against victims 12 and under).

<sup>2</sup> Cal. Penal Code § 645 (West 2012).

<sup>3</sup> See John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L. J. 559, 573 (2006).

<sup>4</sup> Cal. Penal Code § 645 (West 2012); Fla. Stat. ch. 794.0235 (West 2012); La. Rev. Stat. Ann. § 15:538 (West 2006); Iowa Code § 903B.10 (2006); Mont. Code Ann. § 45-5-512 (2006); Wis. Stat. § 304.06(1q) (a) (2006).

<sup>5</sup> Tex. Govt. Code Ann. § 501.061 (West 2006).

<sup>6</sup> Wash. Rev. Code Ann. § 9.94A.840 (West 2012) (proscribing the treatment program for inmates deemed sexually violent predators upon their release).

<sup>7</sup> *The Code of Hammurabi, in The Avalon Project* (Rev. Claude Hermann Walter Johns, ed., Yale Law School 2008).

<sup>8</sup> Ernst Faber, *Chronological handbook of the history of China: a manuscript left by the late Rev. Ernst Faber* 3 (Pastor P. Kranz ed., American Presbyterian Mission Press) (1902).

<sup>9</sup> Edward Gibbon, *The History of the Decline and Fall of the Roman Empire* 170 (David Widger ed., Project Gutenberg 1996) (1782).

eunuchs.<sup>10</sup> The methods varied from the use of a hot knife or sword to more gruesome means such as covering the genitals with feces and allowing dogs to attack.<sup>11</sup> Even today castration is still used to torture and humiliate as demonstrated in Darfur.<sup>12</sup>

Twentieth century Europe tried to implement castration as a curative and preventative measure of treating sex offenders, but those early efforts are often overshadowed by Nazi experimentation with castration and eugenics.<sup>13</sup> In addition to castrating all sexual offenders, the Nazis also used castration against targeted ethnic groups.<sup>14</sup> Beginning in 1933, the Nazi-regime castrated or sterilized between 200,000 and 350,000 people deemed unfit for reproduction.<sup>15</sup> However, before these deplorable uses of castration by Nazi Germany, Denmark actually enacted the first European castration law in 1929.<sup>16</sup>

#### A. Castration in Europe

The Denmark statute was enacted after public interest groups voiced concerns about sexual reoffenders.<sup>17</sup> Since that time, Sweden, Finland, Norway, the Czech Republic, Germany and other nations have enacted legislation

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<sup>10</sup> Shih-shan Henry Tsai, *The eunuchs in the Ming Dynasty* 11 (Harry J. Lamley ed., State University of New York Press) (1996).

<sup>11</sup> Peter McAllister, *Manthropology: the science of why the modern male is not the man he used to be* 280 (St. Martin's Press) (2009).

<sup>12</sup> Brian Steidle, *In Darfur, My Camera Was Not Nearly Enough*, *The Washington Post*, March 20, 2005, at B02 (Janjaweed militiamen have castrated the occupants of the villages they attack leaving them to bleed out).

<sup>13</sup> ROBERT J. LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* 269, 278-84 (1986).

<sup>14</sup> *Id.* at 274; see J. Michael Bailey & Aaron S. Greenburg, *The Science and Ethics of Castration: Lessons from the Morse Case*, 92 *Nw. U. L. REV.* 1225, 1232 (1998) (A follow-up study of the criminals castrated by the Nazis found the recidivism rate to be only 2.3%).

<sup>15</sup> Lifton, *supra* n. 13.

<sup>16</sup> GEORGE F. STURUP, *TREATMENT OF SEXUAL OFFENDERS IN HERSTEDVESTER DENMARK*, 61 (1968).

<sup>17</sup> *Id.* Women's rights organizations were at the forefront demanding legislation to protect women against recidivist rapists.

supporting castration.<sup>18</sup> The trend in Europe seems to be moving in favor of castration. By March of 2012, the small nation of Moldova passed a castration law<sup>19</sup> and the United Kingdom (UK) Ministry of Justice put its support behind chemical castration after twenty years of university trials.<sup>20</sup> The details and effectiveness of the European castration laws versus those in the U.S. will be discussed in Part II.

## B. The genesis of castration in the United States

Despite not being codified by a state until 1996,<sup>21</sup> the idea of utilizing castration as a punishment was actually introduced by Thomas Jefferson.<sup>22</sup> In an effort to proportion punishments to their crimes, Jefferson proposed a bill to the state of Virginia in 1778.<sup>23</sup> The bill sought to reduce the punishment of death for rape, polygamy, and sodomy to castration.<sup>24</sup> When he ran into opposition from other legislators like Edmund Pendleton, Jefferson explained that proportioning punishments was necessary to allow the 'mercies of the law' to be dispensed equally.<sup>25</sup>

The United States experimented with its own eugenics programs in the early parts of the twentieth century that called for the surgical castration or sterilization of certain members of society.<sup>26</sup> The introduction of Social Darwinism into education systems led to the belief that

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<sup>18</sup> Stacy Russell, *Castration of Repeat Sexual Offenders: An International Comparative Analysis*, 19 HOUS. J. INT'L. L. 425, 441 (1997).

<sup>19</sup> *Moldova introduces chemical castration for paedophiles*, March 6, 2012, <http://www.bbc.co.uk/news/world-Europe-17278225> (Passed as a reaction to public outcries that Moldova was becoming a tourist destination for foreign sex offenders).

<sup>20</sup> Polly Curtis, *Should sex offenders be chemically 'castrated'?*, March 14, 2012, <http://www.guardian.co.uk/politics/reality-check-with-polly-curtis/2012/mar/13/prisons-and-probation-criminal-justice#A>.

<sup>21</sup> Cal. Penal Code § 645.

<sup>22</sup> Thomas Jefferson, *A Bill for Proportioning Crimes and Punishment* in THE PAPERS OF THOMAS JEFFERSON Papers 2:492-504 (Julian P. Boyd et al ed., Princeton University Press 1950) (1778).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> THE PAPERS OF THOMAS JEFFERSON Papers 1:505 (1776).

<sup>26</sup> Kari A. Vanderzyl, *Castration as an alternative to incarceration: an impotent approach to the punishment of sex offenders*, 15 N. ILL. U. L. REV. 107, 109-10 (1994).

keeping individuals with undesirable traits from breeding would improve society.<sup>27</sup> In 1927, the United States Supreme Court upheld a Virginia statute mandating the compulsory sterilization of the mentally retarded in *Buck v. Bell*.<sup>28</sup> Justice Oliver Wendell Holmes stated in the Court's decision that, "It is better for all the world, if instead of waiting to execute degenerate offspring for crime...society can prevent those who are manifestly unfit from continuing their kind."<sup>29</sup>

Several states followed Virginia's lead until courts began to change their view on the use of sterilization and involuntary castration against convicted felons and the mentally ill.<sup>30</sup> The state's argued that the principle of *parens patriae* allowed the sterilizations in the best interest of the public.<sup>31</sup> However, courts began to uniformly reject these statutes as violative of equal protection and due process.<sup>32</sup> From this point, the use of castration went by the wayside until a doctor prescribed the MPA drug, a female contraceptive, for a patient experiences pedophilic urges in the late 1960's.<sup>33</sup> This marked the advent of chemical castration in the United States, as it is known today.<sup>34</sup>

## II. Chemical Castration

It is important to distinguish castration from sterilization. Sterilization has no effect on sex drive or behavior, but eliminates conception as a consequence of such activities.<sup>35</sup> Castration, on the other hand, involves the removal of the major source of sexual hormones

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<sup>27</sup> Marques P. Richeson, *Sex, Drugs, and... Race-to-Castrate: A Black Box Warning of Chemical Castration's Potential Racial Side Effects*, 25 HARV. BLACKLETTER L. J. 95, 99 (Spring 2009).

<sup>28</sup> 274 U.S. 200.

<sup>29</sup> *Id.* at 207.

<sup>30</sup> *In re Henrickson*, 123 P.2d 322 (Wash. 1942) (invalidating statute on due process grounds); *Ruby v Massey*, 452 F. Supp. 361 (D. Conn. 1978) (invalidating statute on equal protection violation).

<sup>31</sup> See Sandra Coleman, *Involuntary Sterilization of the Mentally Retarded: Blessing or Burden?*, 25 S.D. L. REV. 55, 62 (1980).

<sup>32</sup> *Henrickson*, 123 P.2d 322; *Ruby*, 452 F. Supp. 361.

<sup>33</sup> Robert D. Miller, *Forced Administration of Sex Drive Reducing Medications to Sex Offenders: Treatment or Punishment?*, 4. PSYCHOL. PUB. POL'Y. & L. 175, 181 (1998).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 178.

effecting both drive and behavior.<sup>36</sup> This portion of the article will focus on the chemical use of castration.

In 1966, Dr. John Money treated his first patient with MPA in an effort to combat the patient's sexual attraction to children.<sup>37</sup> Money later reported that the treatment was effective in reducing erections, production of semen, orgasms, and the occurrence of sexual fantasies in eight similarly situated patients.<sup>38</sup> After Money's studies, MPA was carefully prescribed by psychiatrists to willing patients.<sup>39</sup> The relevant treatments and studies found the reoffending, or recidivism, rate of subjects after five years of the treatment to be as low as 3%.<sup>40</sup> It is crucially important, however, to recognize that these patients were completely voluntary and willing to undergo treatment as opposed to being court or state mandated.<sup>41</sup>

#### A. What is MPA?

As noted above, John Money began treating male patients with MPA in 1966, but that is a far cry from the FDA-approved use of the drug.<sup>42</sup> At that time and to this day, the FDA approves the use of MPA is exclusively in treating hormonally related diseases in women.<sup>43</sup> Today, the drug is more popularly marketed as female contraceptive under the trade name Depo-Provera.<sup>44</sup>

Depo-Provera is prescribed in pill form for the cessation of menstruation, abnormal bleeding of the uterus due to hormonal imbalance, and to prevent complications in post-menopausal women.<sup>45</sup> In the form of an injection, Depo-

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 181.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 182.

<sup>40</sup> John Money, *Use of an Androgen-Depleting Hormone in the Treatment of Male Sex Offenders*, 6 J. SEX RES. 165 (1970); Fred S. Berlin & H. Martin Malin, *Media Distortion of the Public's Perception of Recidivism and Psychiatric Rehabilitation*, 138 AM. J. PSYCHIATRY 1572 (1981) (reporting on the treatment of over 2,000 paraphilias over a ten year period).

<sup>41</sup> Miller, *supra* n. 33 at 182.

<sup>42</sup> *Id.*

<sup>43</sup> [http://www.fda.gov/medwatch/SAFETY/2004/DepoProvera\\_Label.pdf](http://www.fda.gov/medwatch/SAFETY/2004/DepoProvera_Label.pdf) (last visited May 1, 2012).

<sup>44</sup> *Id.*

<sup>45</sup> <http://www.medicinenet.com/medroxyprogesterone/article.htm> (last visited May 1, 2012).

Provera is prescribed only as a contraceptive and to treat renal cancer.<sup>46</sup> Doctors prescribe Depo-Provera in 5-10 mg doses daily as a pill and 150 mg every three months as an injected contraceptive.<sup>47</sup> None of these approved uses pertain to treatment in male patients. This is because there have been no long-term clinical trials and, therefore, no FDA-approval for any use of MPA in men.<sup>48</sup>

B. The side effects of MPA use in males.

When administered to men, MPA acts as an antiandrogen that reduces the effects and testosterone levels to those of a prepubescent boy.<sup>49</sup> The 150 mg dosage every ninety days as a female contraceptive is trumped when used to treat men believed to have uncontrollable sexual urges.<sup>50</sup> The drug is injected at up to 43.3 times those prescribed levels of dosage.<sup>51</sup> That number sheds some light on extreme side effects experienced by males who have been treated with MPA.<sup>52</sup> Two reasons lending themselves to why MPA has not been approved in men include evidence that paraphilias and pedophiles do not have abnormal levels of testosterone and that the cause of developing such a disorder is unknown.<sup>53</sup> Nonetheless, the belief is that the MPA will relieve the paraphilia of his compulsive fantasies and make him more amenable to psychotherapy, eventually reducing the risk of recidivism.<sup>54</sup>

Reports of the drugs effectiveness in males range widely, but the lists of side effects are more consistent.<sup>55</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Fabian M. Saleh & Fred S. Berlin, *Sex Hormones, Neurotransmitters, and Psychopharmacological Uses in Men with Paraphiliac Disorders*, 12 J. CHILD SEXUAL ABUSE 233, 240 (2003).

<sup>49</sup> Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 6 (1990).

<sup>50</sup> Stinneford, *supra* n. 3 at 559, 573.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 573-74; See Ariel Rosler & Eliezer Witztum, *Pharmacotherapy of Paraphilias in the Next Millennium*, 18 BEHAVIORAL SCI. L. 43, 45 (2000).

<sup>54</sup> Stinneford, *supra* n. 50 at 574.

<sup>55</sup> See John M.W. Bradford, *The Hormonal Treatment of Sex Offenders*, 11 BULL. AM. ACAD. PSYCHIATRY LAW 159 (1983). According to the Johns Hopkins Hospital Biosexual Hormonal Clinic: Fact Sheet, Undated, MPA also affects the recipient's brain directly,

That list includes weight gain, diabetes mellitus, pulmonary embolism, depression, drastic reduction in sperm count, irreversible loss of bone mass,<sup>56</sup> irregular functioning of the gall bladder, fatigue, lethargy, testicular atrophy, and even the development of cancer.<sup>57</sup> Pfizer, the manufacturer of Depo-Provera, added a "black box warning" to the drug label, explaining that prolonged exposure to the drug could result in a significant reduction in bone mineral density.<sup>58</sup> Although all of the side effects are reported to disappear when treatment is stopped, the same cannot be said when osteoporosis or cancer sets in.<sup>59</sup> Furthermore, the majority of chemical castration statutes result in a life sentence of MPA treatment.<sup>60</sup>

### C. The European schemes

The United States is often influenced by legal and public policy developments internationally. For present day examples, one need not look any further than the debates over nationalized health care<sup>61</sup> and personhood at conception.<sup>62</sup> Therefore, to understand the use and popularity of chemical castration in the United States, it is advantageous to look at the current European schemes and their effectiveness.

#### **1. Using long-term clinical trial and error before enacting and revising chemical castration laws.**

European nations have been using castration as a statutory means of rehabilitating sex offenders since the

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producing a tranquilizing effect, and reducing the intensity and frequency of intrusive sexual urges.

<sup>56</sup> Stinneford, *supra* n. 3 at 561.

<sup>57</sup> Miller, *supra* n. 33 at 182.

<sup>58</sup> [www.fda.gov/bbs/topics/ANSWERS/2004/ANS01325.htm](http://www.fda.gov/bbs/topics/ANSWERS/2004/ANS01325.htm) (last visited March 20, 2012).

<sup>59</sup> Miller, *supra* n. 33 at 182.

<sup>60</sup> Fla. Stat. § 749.0235(2)(a); Iowa Code § 903B.10(4); Mont. Code Ann. § 45-5-512(4); Cal. Penal Code § 645(a)-(c).

<sup>61</sup> Joe Neel, *Taking the Measure of Health Care in America*, NPR, July 2, 2008,

<http://www.npr.org/templates/story/story.php?storyId=92136549>.

<sup>62</sup> Amanda Marcotte, *Personhood Laws in Mexico Preview Mississippi's Future*, SLATE, Oct. 28, 2011, [http://www.slate.com/blogs/xx\\_factor/2011/10/28/what\\_does\\_personhood\\_for\\_fertilized\\_eggs\\_look\\_like\\_in\\_practice\\_.html](http://www.slate.com/blogs/xx_factor/2011/10/28/what_does_personhood_for_fertilized_eggs_look_like_in_practice_.html).

1920's.<sup>63</sup> During this time, the respective governments were able to see what works and what does not. A prime example is the fact that most European countries that once mandated castration for sex offenders now use the treatment on a purely voluntary basis.<sup>64</sup> The UK, Germany, and the Scandinavian nations have remained on the forefront of the studies and research that have contributed to the current systems.<sup>65</sup>

MPA is considered more of a portion of the treatment program than a part of the sex offender's punishment.<sup>66</sup> Cognitive therapy is the primary component of the rehabilitation and is only supplemented by the Depo-Provera or other prescribed medications.<sup>67</sup> In France for example, a recent medical study has resulted in shift in treatment.<sup>68</sup> The use of Depo-Provera to compliment psychotherapy has been replaced by anti-depressants.<sup>69</sup> The research found that the replacement drugs are still effective at suppressing the sexual fantasies without the crippling side effects.<sup>70</sup>

Many of these studies have led to steady decreases in the dosage of chemical castration drugs to levels as low as 10 mg per week.<sup>71</sup> The United Kingdom Ministry of Justice has recently decided to implement a similar program after twenty years of clinical testing.<sup>72</sup> The treatment program consists of cognitive therapy combined with low doses of antidepressants.<sup>73</sup> The medication has proven to dampen the sexual fantasies of the offender without the long-term bodily effects of MPA injections.<sup>74</sup> The Ministry of Justice explicitly stated that they follow the biological treatment

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<sup>63</sup> Sturup, *supra* n. 16.

<sup>64</sup> Curtis, *supra* n. 20.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Dr. Karen Harrison, *The Castration Cure?*, PRISON SVCS. J., Issue 175 (2008).

<sup>68</sup> A. Baratta, MD., *The role of antidepressants in treating sex offenders*, Dec. 26, 2001, <http://dx.doi.org/10.1016/j.bbr.2011.03.031>.

<sup>69</sup> *Id.*

<sup>70</sup> Curtis, *supra* n. 20.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

of paraphilias guidelines set forth by The World Federation of Societies of Biological Psychiatry.<sup>75</sup>

The results of the European research studies indicate that the voluntary programs centered on psychotherapy and only supplemented with medications are becoming increasingly effective.<sup>76</sup> A study in Denmark, on the other hand, treated seventeen sex offenders from 1989 to 1997.<sup>77</sup> In those nine years, not a single one of them reoffended.<sup>78</sup> The main ingredient of this treatment program was, in fact, MPA.<sup>79</sup> Germany's voluntary chemical castration system has also found success with recidivism rates.<sup>80</sup> One hundred and four sex offenders were treated with MPA from 1970 to 1980 and only 3% reoffended in that time.<sup>81</sup> Those who refused the option of participating in the program had a 50% recidivism rate.<sup>82</sup> The success of each study, despite their contrasts, is the result of decades long research and careful development of their treatment programs while avoiding passing quick, reactionary laws like other European nations have.

## **2. Impulsive castration laws as a reaction.**

Even without research to support its implementation, countries like the small nation of Moldova have passed mandatory castration laws.<sup>83</sup> The stark contrast from the trending voluntary treatment is the product of an issue unique to the small country.<sup>84</sup> Moldova has experienced an influx of foreign sex offenders.<sup>85</sup> There have been fifteen recent cases of sexually violent predators reoffending, with nine of those being foreign to Moldova. The new law, which goes into effect July 1, 2012, gives the judge the option of requiring chemical castration treatment for

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<sup>75</sup> *Id.*

<sup>76</sup> Heidi Hanson & Lise Lykke-Olesen, *Treatment of dangerous sexual offenders in Denmark*, THE JOURNAL OF FORENSIC PSYCHIATRY, Vol. 8, Issue 1 (1997).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Curtis, *supra* n. 20.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Moldova introduces chemical castration for paedophiles*, March 6, 2012, <http://www.bbc.co.uk/news/world-Europe-17278225>

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

anyone convicted of violently abusing a child under the age of fifteen.<sup>86</sup>

Within the past three years, Poland and Russia have enacted similar mandatory chemical castration laws due to the same issues.<sup>87</sup> It appears that the evidence gathered from the various studies in the UK, France, Denmark, and Germany versus the recent passage of mandatory castration in Moldova, Poland, and Russia illustrates the difference between careful, long-term development of programs and laws passed as a reaction. In the United States, problems like prison overpopulation, and without the benefit of such longstanding law or consistent and reliable medical studies, judges were forced to create their own alternative sentencing for repeat sex offenders.<sup>88</sup>

D. Pre-statutory cases ordering chemical castration in the U.S.

Even before the existence of statutory law approving it, judges across the country began implementing chemical castration into sex offender sentences.<sup>89</sup> *People v. Gauntlett*, a Michigan state court case, stands as the first such attempted sentence in 1985.<sup>90</sup> The defendant, Roger Gauntlett, was convicted of first-degree criminal sexual conduct.<sup>91</sup> The specifics of the charge arose from the act of sexual intercourse with his fourteen year old stepson and the fondling of his twelve year old stepson.<sup>92</sup> Judge Robert Borsos originally sentenced Gauntlett to five years probation, the first to be served in jail and submission to experimental Depo-Provera treatment as a condition of his probation.<sup>93</sup> On appeal, the appellate authority held that such a condition was invalid without support for common law

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (All three countries have experienced opposition from groups like Amnesty International, as well as within their own governing bodies).

<sup>88</sup> Debra Todd, *Sentencing of Adults Sex Offenders in Cases Involving Sexual Abuse of Children: Too Little, Too Late? A View from the Pennsylvania Bench*, 109 PENN. ST. L. REV. 487, 500 (2004).

<sup>89</sup> Jeff Sirmons, *The Availability of Chemical Castration to Control Sex Drive*, 33 CHAMPION 26 (December 2009) (Reporting on the availability of chemical castration for the National Association of Criminal Defense Lawyers).

<sup>90</sup> 352 N.W.2d 310.

<sup>91</sup> *Id.* at 311.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

or a statute.<sup>94</sup> In fact, the appellate court went so far as to remove Judge Borsos on remand of the case and vacate the probation as disproportionately lenient in favor of a longer prison sentence.<sup>95</sup> This case set the tone for resisting chemical castration as a sentencing condition without a statute or guidelines.

Twelve years later in Chicago, Jeffrey Morse attempted to lure a nine-year-old girl into his car with a toy gun so that she would touch his penis.<sup>96</sup> The young girl escaped and Morse confessed to the events when he was apprehended just a few hours later.<sup>97</sup> After pleading guilty, but prior to sentencing, Morse discussed the possibility of surgical castration with his attorney and went through with the procedure in hopes of receiving a lesser sentence.<sup>98</sup> At sentencing, experts testified to the effectiveness of surgical castration in decreasing the likelihood of a subsequent offense.<sup>99</sup> Nonetheless, Morse was sentenced to 26 years in prison, which is actually one more than the last plea offer he received.<sup>100</sup> While the castration in this case was surgical not chemical, and voluntary not mandated, the sentence is proof of yet another court unwilling to use or acknowledge castration without supporting law.

An example of what could happen if judges could order castration without supporting law nearly occurred in Pennsylvania in 2000.<sup>101</sup> In the case known as *In re R.B.*, a juvenile defendant charged with assault and a terroristic threat.<sup>102</sup> The trial judge ordered the juvenile to be evaluated at Johns Hopkins University for the possibility of Depo-Provera treatment.<sup>103</sup> Despite neither offense being sexual in nature, R.B. admitted to being sexually attracted to younger females in his psychological evaluation.<sup>104</sup> The Superior Court examined chemical castration in detail on

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<sup>94</sup> *Id.* at 315.

<sup>95</sup> *Id.* at 321.

<sup>96</sup> Bailey, *supra* n. 14.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1226.

<sup>99</sup> *Id.* at 1225.

<sup>100</sup> *Id.* at 1226.

<sup>101</sup> *In re R.B.*, 765 A.2d 396 (Pa. Super. 2000).

<sup>102</sup> *Id.* at 396-97.

<sup>103</sup> *Id.* at 397.

<sup>104</sup> *Id.* at 396.

appeal.<sup>105</sup> That court found Depo-Provera treatment to be in its early stages and far from full validation.<sup>106</sup> Furthermore, described subjecting a juvenile never before charged with a sexual crime as "radical".<sup>107</sup> These cases and controversies resulted in chemical castration advocates achieving the passage of the first chemical castration statute in 1996.<sup>108</sup>

E. The chemical castration statutes in the U.S.

At its peak, eight states had chemical castration statutes in place: California, Florida, Iowa, Wisconsin, Montana, Louisiana, Georgia, and Oregon.<sup>109</sup> Two of those states, Georgia and Oregon, already repealed those statutes.<sup>110</sup> Being the first of its kind, the California statute has served as the template for the other five states and we will examine it detail.<sup>111</sup> This will make the differences in the other five approaches more apparent in discussing the legal, ethical, and medical objections that have been voiced.

### **1. Provisions and specifics of castration statutes.**

Governor Pete Wilson signed the California bill into law in 1996 after public outcries for the control of repeat sex offenders.<sup>112</sup> Under section 645 of the California Penal Code, one becomes eligible for chemical castration after committing one of several forms of forced or statutory rape upon a victim twelve-years-old or younger.<sup>113</sup> The judge has the discretion to order chemical castration after the first offense as a condition of parole and the treatment becomes mandatory after a second conviction.<sup>114</sup>

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<sup>105</sup> *Id.* at 397-400.

<sup>106</sup> *Id.* at 400.

<sup>107</sup> *In re R.B.*, 765 A.2d at 400.

<sup>108</sup> Cal. Penal Code § 645.

<sup>109</sup> Cal. Penal Code § 645; Fla. Stat.749.0235(2) (a); Iowa Code § 903B.10(4); Wis. Stat. § 304.06(1q) (a); Mont. Code Ann. § 45-5-512(4); La. Rev. Stat. Ann. § 15:538(C) (3) (d).

<sup>110</sup> Ga. Code Ann. § 16-6-4 (repealed in 2006); Or. Rev. Stat. Ann. § 144.625(1) (2006) (repealed by Law 2011, c. 419 § 1, eff. June 17, 2011).

<sup>111</sup> Stinneford, *supra* n. 3 at 578.

<sup>112</sup><http://web.archive.org/web/20061020071518/http://www.cnn.com/US/9608/29/castration/> (last visited March 26, 2012).

<sup>113</sup> § 645(a)-(c).

<sup>114</sup> *Id.* at § 645(b).

The time period for the treatment, as per the statute, is from one month prior to release until the Department of Corrections deems it to be no longer necessary. The statute is devoid of any requirement that a doctor determines the treatment to be medically necessary, or even safe.<sup>115</sup> As far as informed consent on the part of the offender, he does have a right to be informed of the effects but has no right to refuse.<sup>116</sup> The only way to avoid chemical castration treatment once mandated is to consent to surgical castration.<sup>117</sup>

Florida, Iowa, Montana, and Louisiana modeled their statutes after California, but still include some individual differences.<sup>118</sup> To start with, the crimes that make an offender eligible for chemical castration differ greatly. In Iowa, castration is mandated for anything from indecent contact to sexual exploitation of a child.<sup>119</sup> Florida, on the other hand, restricts eligibility to sexual battery convictions.<sup>120</sup> As for the age of the victim, Iowa and Louisiana follow California's requirement of twelve-years-old or younger.<sup>121</sup> In Montana, the victim must be fifteen or younger and Florida has no such age requirement.<sup>122</sup> Interestingly enough, Montana and Louisiana require chemical castration after a second offense regardless of the victim's age.<sup>123</sup> As we will see, this runs in the face of the alleged purpose of the statutes to reduce pedophilic urges.

Like California, these four states also leave out any involvement of a physician or a diagnosis of the offender with a sexual disorder.<sup>124</sup> Of these four, only Montana and Louisiana require that the offender be informed of the effects without the right to refuse treatment.<sup>125</sup> Only Louisiana limits the treatment timetable to during the incarceration and subsequent parole, or earlier if

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<sup>115</sup> *Id.* at § 645(f).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at § 645(e).

<sup>118</sup> Stinneford, *supra* n. 3 at 578-79.

<sup>119</sup> Iowa Code § 903B.10(1), (3).

<sup>120</sup> Fla. Stat. § 794.0235(1)(a).

<sup>121</sup> Iowa Code § 903B.10(3); La. Rev. Stat. Ann. § 15:538(C)(1)(a).

<sup>122</sup> Mont. Code Ann. § 45-5-15(1).

<sup>123</sup> *Id.* at § 45-5-15(2); La. Rev. Stat. Ann. § 15:538(C)(1)(b).

<sup>124</sup> Stinneford, *supra* n. 3 at 579.

<sup>125</sup> Mont. Code Ann. § 45-5-15(5); La. Rev. Stat. Ann. § 15:538(C)(4).

treatment is deemed no longer necessary.<sup>126</sup> Like their model statute, Iowa, Louisiana, and Florida permit the offender to avoid chemical castration only by submission to physical castration.<sup>127</sup>

## **2. Impulsive passage of castration law.**

The implementation of Louisiana's castration statute is especially intriguing in that it came about under similar circumstances to Moldova's recent law.<sup>128</sup> Governor Bobby Jindal signed the bill as a direct reaction to the United States Supreme Court overturning a death sentence for a convicted Louisiana child rapist.<sup>129</sup> After the high court's ruling in *Kennedy v. Louisiana*, Jindal called the decision "dead wrong" and an affront to the people of Louisiana and the jury's unanimous decision.<sup>130</sup> The victim was Kennedy's eight-year-old stepdaughter whose injuries required emergency surgery.<sup>131</sup> Later that same day, Governor Jindal signed the bill allowing courts to require sex offenders to undergo chemical castration treatment.<sup>132</sup> Needless to say, the careful research and consideration employed to develop the European schemes was not a part of the Louisiana legislation. This helps to explain why the law so closely mirrors California's.

## **3. Mixing criminal and civil commitment to castrate.**

The remaining chemical castration state, Wisconsin, is considered the broadest and lacking consistent standards.<sup>133</sup> Only "serious child sex offenders" are considered eligible for chemical castration.<sup>134</sup> That term is defined as anyone convicted of sexual assault of a child under the age of

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<sup>126</sup> La. Rev. Stat. Ann. § 15:538(C) (3) (d).

<sup>127</sup> Iowa Code Ann. § 903B.10(1); La. Rev. Stat. Ann. § 15:538(C) (10); Fla. Stat. § 794.0235(1) (b).

<sup>128</sup> Vincent Rossmeier, *Jindal approves castration for sex offenders*, SALON, June 26, 2008 (available at [http://www.salon.com/2008/06/26/jindal\\_castration/](http://www.salon.com/2008/06/26/jindal_castration/)).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Linda Greenhouse, *Supreme Court Rejects Death Penalty for Child Rape*, THE NEW YORK TIMES, June 26, 2008 (available at [http://www.nytimes.com/2008/06/26/washington/26scotuscnd.html?\\_r=1&partner=rssuserland&emc=rss&pagewanted=all&oref=slogin](http://www.nytimes.com/2008/06/26/washington/26scotuscnd.html?_r=1&partner=rssuserland&emc=rss&pagewanted=all&oref=slogin)).

<sup>132</sup> Rossmeier, *supra* n. 128.

<sup>133</sup> Stinneford, *supra* n. 3 at 581.

<sup>134</sup> Wis. Stat. § 304.06(1q) (b).

thirteen.<sup>135</sup> The Department of Corrections and the Parole Commission then have the authority to require chemical castration treatment as a condition of probation or parole.<sup>136</sup>

Wisconsin allows the chemical castration of civilly committed sexually violent predators as a condition of release.<sup>137</sup> More specifically, before being released from civil commitment, a court must order the Department of Corrections to construct a treatment program addressing the offender's need for chemical castration. Without such an order, those deemed sexually violent predators cannot be released from civil commitment.<sup>138</sup>

#### **4. General legal concerns.**

Despite now having statutes on the books, the chemical castration states, namely California and Florida, found it difficult to gain state wide judicial support of the programs.<sup>139</sup> Many judges had issues with the lack of medical involvement and made certain that what few medical requirements existed were followed.<sup>140</sup> In *Jackson v. Florida*, the appellate court invalidated a chemical castration order because a medical expert did not review the order within 60 days of sentencing.<sup>141</sup> While violation of that provision may appear minuscule, it is the only way a judge can protect the offender's medical well being in a statute lacking diagnosis or realistic informed consent requirements.

The *Jackson* case is not an isolated incident, which indicates a lack of uniformity in executing the chemical castration statute.<sup>142</sup> Florida's Fifth District Court of Appeals overturned an order for chemical castration because the trial court failed to appoint a medical expert.<sup>143</sup> In that case, Anthony Houston was a habitual sex offender convicted of two counts of sexual battery.<sup>144</sup>

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<sup>135</sup> *Id.* at § 304.06(1q)(a).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at § 980.08(5).

<sup>138</sup> *Id.*

<sup>139</sup> Stinneford, *supra* n. 3 at 582-83.

<sup>140</sup> 907 So.2d 696 (Fla. 4th Dist. App. 2005).

<sup>141</sup> *Id.*

<sup>142</sup> Houston v. Florida, 852 So.2d 425 (Fla. 5th Dist. App. 2003).

<sup>143</sup> *Id.* at 428.

<sup>144</sup> *Id.* at 426.

Not only did the trial court not appoint a medical expert, but it also violated the "duration of treatment" requirement. This part is especially interesting because the statute only mandates that a court specify the duration in a term of years, or in the discretion of the court, up to the life of the defendant.<sup>145</sup> So, not only did the judge happen to not appoint a medical expert, but also happened to leave the duration of treatment blank.<sup>146</sup> Whether this was intentional or just paperwork lost in the shuffle, one could argue that judges who disagree with the chemical castration statute may choose to ignore it. The remainder of Houston's sentence that did not involve chemical castration was affirmed.<sup>147</sup>

Having even fewer medical requirements than Florida, a number of convicted sex offenders in California have tried to challenge its statute. Existing case law shows this effort to be easier said than done. Steven Foster was charged with 32 counts of forcible lewd acts upon a child for sexually abusing the daughter of his girlfriend.<sup>148</sup> Foster agreed to a plea deal that stipulated a 30-year sentence and the dismissal of the counts that carried possible life sentences.<sup>149</sup> Foster acknowledged that he understood the details of his plea, which included "Possible/Mandatory hormone suppression treatment".<sup>150</sup>

By signing his plea, he also initialed a waiver of his appeal rights.<sup>151</sup> The ensuing appeal was unfruitful since Foster made it clear he was only challenging the sentence and not the validity of the plea. Having already waived his right to appeal the sentence, Foster's chemical castration sentence was affirmed.<sup>152</sup>

Though neither party brought it up, a dissenting judge highlighted the fact that nothing in section 645 allows a trial court to impose chemical castration as a condition of parole.<sup>153</sup> The Board of Prison Terms has the sole authority

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<sup>145</sup> Fla. Stat. § 749.0235.

<sup>146</sup> *Houston*, 852 So.2d at 428.

<sup>147</sup> *Id.*

<sup>148</sup> *People v. Foster*, 101 Cal. App. 4th 247, 249 (2000).

<sup>149</sup> *Id.* at 249-50.

<sup>150</sup> *Id.* at 249.

<sup>151</sup> *Id.* at 250.

<sup>152</sup> *Id.*

<sup>153</sup> 101 Cal. App. 4th at 252-53.

to establish conditions of parole.<sup>154</sup> The judge made clear his concerns that section 645 has effectively blurred the line between a condition of parole and a part of a sentence.<sup>155</sup> Although the plain language of the statute states an eligible offender may, upon parole, under go MPA treatment, the parties in this case extended that power to trial courts.<sup>156</sup>

In 2004, Rudolph Steele appealed his own conviction on the issue of who has the power to mandate chemical castration as a condition of parole in California.<sup>157</sup> Steele challenged both the court's authorization of chemical castration treatment and the constitutionality of section 645.<sup>158</sup> The court agreed with the majority in *Foster* that the hormone treatment is a part of the sentence and, therefore, under the trial court's authority.<sup>159</sup> As to the constitutional issue, the court managed to procedurally get out of settling the issue. Since Mr. Steele failed to raise the constitutional contention at trial, the issue was not preserved for appeal.<sup>160</sup> While the constitutionality of castration has been discussed widely in law review articles, case law on the topic is scarce.

## **5. State constitutional challenges to castration.**

To date, the United States Supreme Court has not had the opportunity to hear a case concerning state mandated castration. In fact, the two leading cases that have made it to state's highest courts came from states without castration statutes. In 1985, the South Carolina Supreme Court heard an appeal from three defendants convicted of first-degree criminal sexual conduct for the gang rape of a young female and criminal conspiracy in *State v. Brown*.<sup>161</sup> The General Sessions Court sentenced all three men to thirty years with a provision suspending the sentence and five years probation if each agreed to be surgically castrated.<sup>162</sup>

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<sup>154</sup> Cal. Penal Code § 645(a).

<sup>155</sup> 101 Cal. App. 4th at 256.

<sup>156</sup> *Id.* at 259.

<sup>157</sup> *People v. Steele*, 2004 WL 2897955 (Cal. App. 3d. 2004).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> 326 S.E.2d 410 (S.C. 1985).

<sup>162</sup> *Id.*

After petition of writ to the high court but before the case was heard, all three defendants were denied dismissal of their appeals so that they could go through with the castration.<sup>163</sup> Upon hearing the case, the court found castration to be a form of maiming prohibited by the public policy provision against cruel and unusual punishments in the state constitution.<sup>164</sup> This marked the first outright ban of castration in any state.

A similar challenge was attempted in Arkansas in 1999. James Ray Stanley pled guilty to rape and sexual solicitation of two fourteen year old boys on November 9, 1998.<sup>165</sup> The plea carried a sentence of 36 years with ten years suspended upon submission to physical castration and sex offender counseling.<sup>166</sup> The American Civil Liberties Union (ACLU) motioned for leave to intervene on in Stanley's case to set aside the condition of castration as unconstitutional and illegal.<sup>167</sup> Again, procedural loopholes allowed the court to skate the constitutionality question by ruling the ACLU lacked standing.<sup>168</sup>

Unlike the majority, Justice Robert L. Brown addressed the castration issue in his dissent.<sup>169</sup> Justice Brown was disappointed that the court would allow a punishment as severe and permanent as castration by silence.<sup>170</sup> A persuasive section of the dissent illustrates the fact that two states that at that time had chemical castration statutes did not authorize surgical castration as an alternative.<sup>171</sup> It is understandable, and then, that Justice Brown was confused as to how Arkansas could allow castration as a condition of parole without any legislation on the topic.

These two cases give us a piecemeal idea of how supreme courts feel towards surgical castration.<sup>172</sup> Since

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<sup>163</sup> *Id.* at 411.

<sup>164</sup> *Id.*; *State v. Gilliam*, 262 S.E.2d 923 (S.C. 1980) (finding banishment as a condition of probation to be void against public policy as cruel and unusual).

<sup>165</sup> *ACLU v. State*, 5 S.W.3d 418, 419 (Ark. 1999).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 421.

<sup>169</sup> *Id.* at 421-23.

<sup>170</sup> 5 S.W.3d at 421.

<sup>171</sup> *Id.* at 422.

<sup>172</sup> *Id.*; *Brown*, 326 So.2d 410.

there is exists no such cases on chemical castration, it makes sense to look at the major similarities and differences between the two treatments before the Eighth Amendment analysis.

Surgical castration, medically known as orchiectomy, is the permanent removal of the testicles.<sup>173</sup> The procedure is considered hormone therapy because its purpose is to stop testosterone production.<sup>174</sup> According to the University of Pittsburgh Medical Center (UPMC), surgical castration is utilized in the treatment of patients with testicular or prostate cancer.<sup>175</sup> The list of risks and complications is very brief and includes only bleeding and infection in rare occurrences.<sup>176</sup> The side effects of surgical castration, however, make a slightly longer list. Ninety percent of males who undergo the procedure have experienced diminished sexual desire and the inability of achieving an erection.<sup>177</sup> Other effects like weight gain, mood swings, and hot flashes are similar to those experienced by women in menopause.<sup>178</sup>

Chemical castration, as we have seen, lasts only as long as the treatment.<sup>179</sup> For that reason, MPA treatment is sometimes considered safer because it is not permanent and can be stopped at any time.<sup>180</sup> Unfortunately, courts and parole boards are turning MPA exposure into lifelong treatment in many cases.<sup>181</sup> The side effects already discussed ranging from weight gain to osteoporosis and cancer are the direct result of this long-term exposure.<sup>182</sup> With those in mind, it has become a major concern that no chemical castration state requires the treated offender to be diagnosed as a sex offender.<sup>183</sup> These will help us

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<sup>173</sup><http://www.upmccancercenters.com/cancer/prostate/hormoneorchtherapy.html> (last visited March 27, 2012).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See Cal. Penal Code § 645.

<sup>180</sup> Henry T. Greely, *Neuroscience and Criminal Justice: Not Responsibility but Treatment*, 56 U. KAN. L. REV. 1103, 1105-06 (2008).

<sup>181</sup> Cal. Penal Code § 645(a)-(c).

<sup>182</sup> Stinneford, *supra* n. 3 at 573.

<sup>183</sup> Vanderzyl, *supra* n. 26 at 132-34.

briefly shed some light on the unanswered Eighth Amendment question.

## 6. Bill of Rights application.

The purpose of this article is not to determine specifically the constitutionality of chemical castration. However, taking a look at the Eighth and Fourteenth Amendment concerns is a good way of concluding the analysis of its legal appropriateness. For starters, it has been over fifty years since the U.S. Supreme Court found a non-capital punishment to be cruel and unusual.<sup>184</sup> Second, once the Supreme Court deems a given punishment unconstitutional under the Eighth Amendment it is irreversible without a constitutional amendment.<sup>185</sup> With that in mind, what makes a punishment cruel and unusual?

The Supreme Court has admitted the difficulty of determining what exactly amounts to a "cruel and unusual" punishment.<sup>186</sup> Through applicable case law, the Court defined the main purpose as preventing government punishments that deny or violate human dignity.<sup>187</sup> The next obvious question, then, is how to define human dignity.

The answer appears to be something like it is different than it was ten years ago, which is different than it was one hundred years ago. This is because whether a punishment denies or violates human dignity relies upon always evolving standards of decency.<sup>188</sup> Justice McKenna made this standard clear in the 1910 decision in *Weems v. U.S.*<sup>189</sup>

In *Weems*, the Court found a fifteen-year sentence for false identifying to be cruel and unusual.<sup>190</sup> In explaining the Court's decision, Justice McKenna stressed the idea of evolving standards of decency by making the point that larceny was punishable by hanging when the U.S.

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<sup>184</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>185</sup> *Rhodes v. Chapman*, 452 U.S. 337 (1981).

<sup>186</sup> *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878).

<sup>187</sup> *Trop*, 356 U.S. at 100; See also *Roper v. Simmons*, 543 U.S. 551 (2005) (making clear that human dignity protections are still afforded to those convicted of heinous crimes).

<sup>188</sup> *Wilkerson*, 99 U.S. at 135; *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

<sup>189</sup> 217 U.S. 349, 404.

<sup>190</sup> *Id.*

Constitution was adopted.<sup>191</sup> Also within that opinion, the Court used language from an 1872 Georgia Supreme Court case that stated, "[T]he cruel and unusual punishment clause was, doubtless, intended to prohibit the barbarities of quartering, hanging in chains, and *castration*".<sup>192</sup> Though peripheral, this appears to be the only mention of castration by the Supreme Court in the Eighth Amendment context.

It is crucial to recognize that the human dignity standard remains intact even for those convicted of heinous crimes.<sup>193</sup> This is especially important in analyzing a punishment (chemical castration) of child sex offenders. The court has called the protection of inmate rights and dignity central to the overall preservation of a free society.<sup>194</sup> Even punishments found not to be inherently cruel have struck down as grossly disproportionate to the crime.<sup>195</sup> The idea is to prohibit state initiated assault on the offender's personhood and the infliction of harm only for harm's sake.<sup>196</sup> The Court has established three factors to determine if a punishment is so disproportionate to the crime and, therefore, violative of the Eighth Amendment: 1) the gravity of the offense and the harshness of the penalty; 2) the sentences imposed on like criminals in the same jurisdiction, and 3) the sentences imposed in other jurisdictions.<sup>197</sup>

## **7. Ethical purpose of the Eighth Amendment**

Taking into account both Eighth Amendment tests, examples of prisoner punishments the courts have deemed cruel and unusual include shooting a prisoner in the leg

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 403.

<sup>193</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>194</sup> *Hudson v. Palmer*, 468 U.S. 517, 523-24 (1984).

<sup>195</sup> *Cf. Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (recognizing the ways the Eighth Amendment is intended to limit the reach of the criminal process); *Weems*, 217 U.S. at 366 (including conditions that so severe and degrading that they amaze the court as cruel and unusual).

<sup>196</sup> *Stinneford*, *supra* n. 3 at 588.

<sup>197</sup> *Ewing v. California*, 538 U.S. 11, 22 (2003) (acknowledging the continuing validity of these three factors in determining a punishment's constitutional validity).

during a riot,<sup>198</sup> a sentence of death for rape,<sup>199</sup> and handcuffing an inmate to a hitching post.<sup>200</sup> Justice Scalia's dissent in the 2002 decision of *Atkins v. Virginia* has come closest to addressing the end result of castration.<sup>201</sup> The majority in *Atkins* held the execution of mentally retarded persons to be cruel and unusual.<sup>202</sup> Scalia's dissent, joined by Chief Justice Roberts and Justice Clarence Thomas, made clear the belief that punishments involving torture or maiming are inherently cruel and impermissible always.<sup>203</sup>

These restrictions fall in line with the Utilitarian outlook on punishment, as well as with the constraints associated with a liberal theory on punishment. Utilitarian punishment schemes, such as in the United States, make the ultimate goal of any given punishment to deter, incapacitate, and rehabilitate.<sup>204</sup> However, without restrictions one goal may be pursued more than the other two and the prisoners rights are likely to be violated.<sup>205</sup> For this reason, the utilitarian theory forces punishments to be proportionate insofar as the positive consequences outweigh the negative.<sup>206</sup> Therefore, if a sex offender not diagnosed as a paraphilia is sentenced to chemical castration until deemed necessary, he is incapacitated as a continuously worsening degree without proper regard to deterrence or rehabilitation.

The current makeup of the rights afforded to prisoners call for the proportioning of these goals, and in doing so, a number of constraints on punishments.<sup>207</sup> Under the liberal theory, a punishment may not be so severe so as to be inhumane; it may not be imposed in ways that violate the

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<sup>198</sup> *Whitley v. Albers*, 475 U.S. 312, 327 (1986).

<sup>199</sup> *Kennedy*, 554 U.S. 407, 447 (2008).

<sup>200</sup> *Hope v. Pelzer*, 536 U.S. 730, 748 (2002).

<sup>201</sup> 536 U.S. 304, 349 (2002).

<sup>202</sup> *Id.* at 306.

<sup>203</sup> *Id.* at 349.

<sup>204</sup> Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy as a Limit on Punishment*, 97 CORNELL L. REV. 45, 76 (November, 2011).

<sup>205</sup> Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1435-38 (2001) (illustrating the influence of utilitarian reasoning throughout the criminal justice system).

<sup>206</sup> *Id.*

<sup>207</sup> Hugo Adam Bedau & Erin Kelly, *Punishment*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Edward N. Zalta ed., Spring 2010 Edition, <http://plato.stanford.edu/archives/spr2010/entries/punishments/>.

maintained rights of the accused and convicted; the punitive severity must accord with the severity of the crime; and the less severe of two relatively equal punishments should always be chosen.<sup>208</sup> These constraints should sound familiar as the reasons behind many of the Supreme Courts previous rulings that punishments were cruel and unusual.<sup>209</sup> These theories have no doubt lent themselves to the identification of certain basic needs that prisoners have, in theory, become entitled to over the years, as well.

Prisoners' rights to be free from cruel and unusual punishment have been extended to protect certain identifiable human needs.<sup>210</sup> Some of those guaranteed needs include personal safety,<sup>211</sup> sanitation,<sup>212</sup> nutrition,<sup>213</sup> and medical care.<sup>214</sup> With those in mind, it would appear that injections of MPA without a diagnosis of the inmate as having a sexual disorder and with the known debilitating effects go directly in the face of at least three of those guarantees.

The Eighth and Fourteenth Amendment work together to prevent states from imposing criminal punishment and civil commitment based solely on the person's undesirable characteristics.<sup>215</sup> Though never challenged, this seems to speak directly to Wisconsin's dual criminal and civil commitment of sex offenders without any diagnosis requirement.<sup>216</sup> Specifically pertaining to the involuntary medication of inmates, the Supreme Court has developed a

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<sup>208</sup> *Id.*

<sup>209</sup> See *Whitley*, 477 U.S. at 327; *Kennedy*, 554 U.S. at 447; *Hope*, 536, U.S. at 748.

<sup>210</sup> *Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

<sup>211</sup> *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) ("If it is cruel and unusual to hold prisoners in unsafe conditions, it must be unconstitutional to confine the involuntarily committed...in unsafe conditions").

<sup>212</sup> *Hutto v. Finney*, 437 U.S. 678, 686 (1978).

<sup>213</sup> *Id.*

<sup>214</sup> *Estelle v. Gamble*, 429 U.S. 97, 105 (1976).

<sup>215</sup> See *Robinson v. California*, 370 U.S. 660 (1962) (finding a conviction based on defendant's status as a drug addict violative of the Eighth and Fourteenth Amendments); *Kansas v. Crane*, 534 U.S. 407 (2002) (Ruling it unconstitutional to civilly commit any person without a finding of a mental illness).

<sup>216</sup> *Wis. Stat. § 304.06(1q)(a)*; *Id.* at § 980.08(5).

two-part test to preserve the due process rights of the prisoner guaranteed by the Fourteenth Amendment.<sup>217</sup>

*Vitek v. Jones* is one of the cases used in developing that test.<sup>218</sup> The *Vitek* Court held that an inmate loses his right to freedom for the duration of their sentence, but a state may not classify him as mentally ill subjecting him to psychiatric treatment without additional proceedings.<sup>219</sup> In order to medicate an inmate involuntarily, the treatment (1) must be medically appropriate and (2) must further a state interest that cannot be achieved through less intrusive means.<sup>220</sup> Sex offender treatments less intrusive than chemical castration are plentiful and will be discussed in Part III.

The necessary case law appears to be in place for a castration case at the nation's highest court, if and when a challenge to one of the statutes is brought. This may occur sooner rather than later with more states like Alabama proposing castration laws in the state legislature.<sup>221</sup>

## **8. Ethical and Medical objections to chemical castration.**

In 1998, the American Medical Association went as far as to call chemical castration a form of maiming and oppose the treatment when imposed by a judge rather than prescribed by a physician.<sup>222</sup> Further medical arguments against court ordered chemical castration cite the lack of professional medical involvement and that treatment can only truly be successful when submitted to voluntarily.<sup>223</sup> The evidence that does exist in favor of chemical

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<sup>217</sup> See *Vitek v. Jones*, 445 U.S. 480, 494 (1980); *Riggins v. Nev.*, 504 U.S. 127 (1992); *Wash. v. Harper*, 494 U.S. 210 (1990).

<sup>218</sup> 445 U.S. 480.

<sup>219</sup> *Id.* at 493-94.

<sup>220</sup> See *infra* nn. 210-12.

<sup>221</sup> Stephanie Taylor, *Bill calls for castrating sex offenders*, TUSCALOOSA NEWS, Feb. 8, 2009,

<http://www.tuscaloosaneews.com/article/20090208/NEWS/902070238>.

<sup>222</sup> Am. Med. Assn., *COUNCIL ON ETHICAL & JUD. AFFAIRS, Court-Initiated Medical Treatments in Criminal Cases*, Rpt. 4-A-98 (1998).

<sup>223</sup> Jodi Berlin, *Chemical Castration of Sex Offenders: A Shot in the Arm Towards Rehabilitation*, 19 WHITTIER L. REV. 169, 204-06 (1997); Ryan C.W. Hall & Richard C.W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 MAYO CLIN. PROC. 457, 466 (2007).

castration indicates that it is only effective in treating individuals sexually attracted to children (paraphilias and pedophiles).<sup>224</sup> Therefore, convicted sex offenders who may be sociopaths or antisocial personalities are subjected to the crippling effects of MPA exposure without any medical benefit.<sup>225</sup> This is especially disturbing following an Arizona study in 2000 that found only 8.5% of 142 child molesters actually diagnosed as pedophiles.<sup>226</sup>

Dr. Fred Berlin of Johns Hopkins University is the founder of the hospital's sexual disorders clinic and considered the leading American researcher in the field.<sup>227</sup> After conducting a number of studies, Dr. Berlin supports Depo-Provera treatment only under physician-prescribed circumstances.<sup>228</sup> He adds that legislators and judges acting as doctors defeat the purpose of the treatment.<sup>229</sup> "To think we are going to legislate this problem away is false and such laws can give a false sense of security to the general public," Dr. Berlin said.<sup>230</sup> He stresses the need for the diagnosis as a sexual disorder and admits the treatment is ineffective in sex offenders motivated by anger, power, a desire to break rules, or a substance addiction.<sup>231</sup>

A study by Dr. Berlin before any state enacted a chemical castration statute found only 8% of 629 male volunteers to testosterone-reducing treatment reoffended within five years.<sup>232</sup> Even after numerous studies of his own, Dr. Berlin still cites the lack of long-term clinical trials—such as in Europe—as the main reason the FDA has not approved any use of MPA in men.<sup>233</sup> The wide ranges of

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<sup>224</sup> Jim Hanna, *Chemical castration becomes issue*, CINCINNATI INQUIRER, Feb. 18, 2002, [http://www.enquirer.com/editions/2002/02/18/loc\\_chemical\\_castration.html](http://www.enquirer.com/editions/2002/02/18/loc_chemical_castration.html) (highlighting research on chemical castration by Dr. Fred Berlin and the Boston-based Center for Sex Offender Management).

<sup>225</sup> Am. Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders* 701 (4th ed., Am. Psychiatric Assn. 2000).

<sup>226</sup> Leonard M.J. Simon, *An Examination of the Assumption of Specialization, Mental Disorder, and Dangerousness in Sex Offenders*, 18 BEHAVIORAL SCI. L. 275, 294 (2000).

<sup>227</sup> *In re R.B.*, 765 A.2d at 396.

<sup>228</sup> Hanna, *supra* n. 217.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Saleh & Berlin, *supra* n. 48.

<sup>233</sup> *Id.*

recidivism rates in other brief studies support Dr. Berlin's observation. In a cumulative study of hormone suppression programs, Drs. Barry Maletzky and Gary Field found a recidivism rate range from zero to 83%.<sup>234</sup> The doctors blame small sample sizes, lack of control, short follow-up periods, and the likelihood of reoffenses going unreported for the drastic inconsistencies.<sup>235</sup>

Even state and prison run trial programs have been abandoned upon finding a lack of consistent and reliable results. In July 2011, Oregon repealed their pilot chemical castration statute with an emergency bill for the "immediate preservation of the public peace, health, and safety," based on the inability to find medical professionals willing to provide the services needed to continue the program.<sup>236</sup> Before it was repealed, the program was designed to treat forty to fifty inmates convicted of sex crimes who were "most likely to benefit" from chemical castration.<sup>237</sup> Any candidates who qualified were then required to undergo treatment after being informed of the side effects.<sup>238</sup>

Like the aforementioned chemical castration statutes, the candidates did not have the right to withhold consent and the treatment was to last during all portions of "post-prison supervision" at the offender's expense.<sup>239</sup> The lack of physicians willing to participate, and the subsequent repeal, only reinforces the findings of Dr. Berlin's research and analysis. In a way, the Oregon experiment introduced the successes of Europe's trial and error strategy to the United States for any state to consider in the future before passing a castration law.

Despite the voluminous medical opposition to mandatory chemical castration, politicians continue to advocate for its imposition in states like Kentucky, Ohio and

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<sup>234</sup> Barry M. Maletzky & Gary Field, *The Biological Treatment of Dangerous Sexual Offenders: A Preliminary Review and Preliminary Report of the Oregon Pilot Depo-Provera Program*, 8 *AGGRESSION & VIOLENT BEHAVIOR* 391, 392 (2003).

<sup>235</sup> *Id.*

<sup>236</sup> Laws 2011, ch. 419, § 1, eff. June 17, 2011.

<sup>237</sup> Or. Rev. Stat. Ann § 144.625 (West 2006).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at § 144.625(3).

Virginia.<sup>240</sup> Dr. Berlin best summarizes this competing tension between the medical experts and politicians in a comment for the *Journal of the American Academy of Psychiatry Law*:

Much of the relevant sex offender legislation, including that pertaining to testosterone-lowering treatments, has been enacted in response to intense public passion. When it comes to the issue of sex offenders, there is a pressing need to develop a coherent body of evidence-based forensic concepts and knowledge that can rationally inform both clinical practice and future public policy. That may require a closer collaboration between both the criminal justice and legislative sectors, and the scientific-medical communities.<sup>241</sup>

III. Alternative treatments for sex offenders.

A. The Texas Way; voluntary surgical castration.

Texas is the only state that offers surgical castration on a strictly voluntary basis and has, so far, been implemented without a legal challenge.<sup>242</sup> Under no circumstances is chemical castration an option for a convicted sex offender.<sup>243</sup> Besides being voluntary, the statute employs two stringent sets of eligibility and monitoring requirements.<sup>244</sup>

A candidate for the procedure must first meet a seven-part eligibility requirement.<sup>245</sup> He must: (1) Have been convicted at least twice of indecency with a child, sexual assault of a child, or aggravated sexual assault; (2) be at least 21 years old; (3) he must request the procedure in writing; (4) admit to his last crime in writing; (5) receive an evaluation and counseling from both a

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<sup>240</sup> Hanna, *supra* n. 217; *Renewed push for castration in Va.*, THE WASHINGTON POST, Jan. 26, 2011, <http://voices.washingtonpost.com/crime-scene/virginia/renewed-push-for-castration-in.html>.

<sup>241</sup> Fred S. Berlin, M.D., Ph.D., *Sex Offender Treatment and Legislation*, J. AM. ACAD. PSYCHIATRY L. 31:510-13 (2003).

<sup>242</sup> Tex Govt. Code Ann. § 501.061 (West 2011).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at § 501.061(a)-(f).

<sup>245</sup> *Id.* at § 501.061(a)(1)-(8).

psychiatrist and a psychologist to determine if the candidate is suitable for the procedure, both of whom must have experience dealing with sex offenders; (6) he must give written, informed consent to the procedure; and (7) must not have previously requested the procedure and later withdrawn.<sup>246</sup> Opting out deems the candidate permanently ineligible.<sup>247</sup> The statute also deflates any issue of coercion because the inmate may not under any circumstances receive time off of his sentence in exchange for submission to castration.<sup>248</sup>

Even if all seven criteria are met, Texas requires the candidate to meet with an independent monitor appointed by the Texas State Medical Board with expertise in mental health, law, and ethics.<sup>249</sup> The monitor also has two responsibilities that must be fulfilled before the candidate can actually go through with the procedure. He must ensure that the inmate (1) received adequate information about the procedure and (2) determine if the inmate has been coerced into requesting the procedure.<sup>250</sup> If the monitor determines that the inmate has been coerced, the monitor must advise him to withdraw from consideration.<sup>251</sup>

A final distinction, and constitutional safeguard, in the Texas statute is the prohibition of judges and parole panels from requiring surgical castration as a condition of any type of parole.<sup>252</sup> The legal, ethical, and medical precautions taken by the Texas legislature guarantees both that an inmate may only be castrated under his own free will and without any coercive benefit.<sup>253</sup> All of these safeguards allow the statute to serve its intended purpose: permit a convicted sex offender diagnosed as a paraphilia to voluntarily undergo surgical castration to reduce his sexual desires without the crippling side effects and questionable results of chemical castration.

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at § 501.061(b).

<sup>248</sup> § 501.061(f)(4).

<sup>249</sup> § 501.061(f).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> Tex. Crim. Pro. Ann. Art. 42.12 § 11(f) (West 2006).

<sup>253</sup> § 501.061.

B. Cognitive therapy-based treatment.

Dr. Maletzky's study of the failed Oregon castration experiment found no difference in recidivism rates between those who underwent chemical treatment and those who did not.<sup>254</sup> If nothing else, this alarming conclusion confirms that they are less invasive treatments for sex offenders widely available. Several studies indicate that cognitive-behavioral therapy is at least just as effective as chemical castration in preventing recidivism.<sup>255</sup> States like Washington have been using Sex Offender Treatment Programs (SOTP) since 1988 whereas the behavioral and psychotherapy received by the sex offender while incarcerated can continue upon his release.<sup>256</sup> Washington requires that the prosecuting attorney involved in the offender's case review and approve the decision to release and continue therapy.<sup>257</sup>

Most offenders enter the program within 18 months of their expected release and treatment is based solely on cognitive-behavioral and relapse prevention principles.<sup>258</sup> Upon release, the offender is expected to continue to see an SOTP therapist for up to a year at no cost.<sup>259</sup> However, depending upon the results of the prosecutor's review, continued participation in the program may be court-ordered.<sup>260</sup> If the offender refuses to be treated or fails, which around 15% do, they will be ordered to seek private certified treatment at their own cost to avoid returning to prison.<sup>261</sup> The system is not perfect, as none are, but the program has been successful in helping those who want to be helped without imposing unwanted, unproven drugs like Depo-Provera.

The Washington scheme is an example of the implementation of long developed medical and psychological

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<sup>254</sup> Maletzky & Field, *supra* n. 227.

<sup>255</sup> Gordon C. Nagayama Hall, *Sexual Offender Recidivism Revisited: A Meta-Analysis of Recent Treatment Studies*, 63 J. CONSULTING & CLINICAL PSYCHOL. 802, 807 (1995) (noting that both treatments achieved a recidivism rate around 30% in this study).

<sup>256</sup> Rev. Code of Wash. Ann. § 9.04.840 (West 2012).

<sup>257</sup> *Id.*

<sup>258</sup> [http://www.watsa.org/Treatment\\_Options.html](http://www.watsa.org/Treatment_Options.html) (last visited April 30, 2012).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

research. The Adam Walsh Child Protection and Safety Act passed in 2006 made the availability of these psychotherapy programs a mandatory compliance requirement for the Bureau of Prisons.<sup>262</sup> To date, there are six such federal facilities across the country ranging in security levels, but the program is catered to low to moderate security risk inmates.<sup>263</sup> This program, known as The Sex Offender Management Program (SOMP), is mandatory for inmates who are assigned and continues at least until their release.<sup>264</sup> While SOMP can be considered more of a monitoring program than voluntary treatment, the Walsh Act established two alternative voluntary programs.<sup>265</sup> Sex offenders have the option between a more relaxed nine to twelve month SOTP program and the more intensive Sex Offender Treatment Program-Resident (SOTP-R).<sup>266</sup>

SOTP-R requires a 36-month commitment from the inmate before he will be admitted and offers treatment opportunities including psychological testing, therapeutic groups, treatment community meetings, treatment team meetings, and individual counseling.<sup>267</sup> This program emphasizes cognitive-behavioral therapy, correcting distortions in thinking, victim empathy, acceptance of responsibility, and management of deviant thoughts and urges.<sup>268</sup> This is all accomplished without the use of involuntary medical treatment that may leave the offender crippled even after medication is stopped. The point to be taken from these programs is that a well-developed and well-executed scheme can achieve successful treatment of sex offenders in an unthreatening non-invasive manner.

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<sup>262</sup> The Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C. § 3621(f)(2) (amending the treatment statute by mandating the Bureau of Prisons compliance which was previously not required).

<sup>263</sup> Ian Friedman, *Sexual Offenders: How to Create a More Deliberate Sentencing Process*, 33-DEC. CHAMPION 12 (2009) (citing recent shows like "To Catch a Predator" for over the top sentencing and treatment of sex offenders).

<sup>264</sup> Federal Bureau of Prisons, *Sex Offender Management Program Inmate Handbook* 4 (Feb. 12, 2007).

<sup>265</sup> Friedman, *supra* n. 256 at 16-7.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*; Department of Justice Information Brochure on FMC Devens.

#### IV. Conclusions.

The absence of two vital features in the six chemical castration laws leads to the conclusion that their existence is premature: 1) voluntary assent to the program and 2) diagnosis by a physician that the inmate suffers from a sexual disorder. The painful, debilitating, and life threatening side effects of Depo-Provera treatment cannot be rationalized without such a diagnosis. Findings that cognitive therapy is just as, if not more effective, satisfy the Supreme Court's requirement that less invasive alternatives to involuntary medication must be used. It would seem to be impossible to continue this form of mandatory chemical castration while still respecting the utilitarian rationale and the liberal constraints on punishments that the Supreme Court has in the past.

Therefore, if states find it politically necessary to have a castration statute, the Texas surgical approach that contains the above vital features should be seen as the appropriate model. Examination of the physician and legal opposition to involuntary chemical castration treatment bring this article to the following conclusion. Mandatory chemical castration treatment in its current statutory form is a medical oxymoron that undermines the rehabilitative purpose of a treatment program. As such, the statutes in California, Florida, Louisiana, Montana, Iowa, and Wisconsin are wholly inappropriate as an effective, sound prevention of repeat sex offenses.