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BEYOND AN EYE FOR AN EYE: CASTRATION AS AN ALTERNATIVE SENTENCING MEASURE

Is castration an acceptable creative alternative to incarceration for sexual offenders?¹ The Honorable Michael T. McSpadden believes it is.² In 1991, McSpadden, a judge in Harris County, Texas, approved surgical castration as a condition of probation for Steven Butler, who was charged with sexually assaulting a thirteen

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¹ See Michael E. Smith, *Will the Real Alternatives Please Stand Up?*, 12 REV. L. & SOC. CHANGE 171 (1983-84). Creative alternative sentencing is a sound response to the question of how to alleviate prison overcrowding for certain classes of offenders. *Id.* at 204. Castration can be achieved through the use of antihormone drugs or by surgically removing the testicles to reduce sex drive. See Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 2, 6, 7 (1990). Castration has been used to abolish sexual activity for utilitarian, eugenic, and criminal purposes. William Green, *Depo-Provera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues*, 12 U. DAYTON L. REV. 1, 3 (1986). "The Surgical procedures for sterilizing the male are (1) severing and tying the cut ends of the tubes that carry sperm from the testicles to the urethra (vasectomy); or (2) removal of the testicles (castration)." *Id.* at 3 n.9. The legislation of punishment for violations of state law is "subject to constitutional scrutiny pursuant to the Eighth Amendment prohibition against cruel and unusual punishment." William L. Baker, Comment, *Castration of the Male Sex Offender: A Legally Impermissible Alternative*, 30 LOY. L. REV. 377, 390 (1984).

Although the United States Supreme Court has yet to decide whether castration is cruel and unusual punishment, historically the use of surgical castration has not been looked upon as a favorable alternative to incarceration. See *Skinner v. Oklahoma*, 316 U.S. 535, 545 (1942) (invalidating an Oklahoma statute providing for the sterilization of criminals as a violation of equal protection); *Mickle v. Henrichs*, 262 F. 687, 690-91 (D. Nev. 1918) (holding unconstitutional a Nevada statute authorizing vasectomies on rapists as cruel and unusual punishment); *Davis v. Berry*, 216 F. 413, 419 (S.D. Iowa 1914) (holding unconstitutional an Iowa statute authorizing vasectomies on criminals convicted of their second felony).

² *The Castration Option*, N.Y. TIMES, Mar. 10, 1992, at A24. "Judge McSpadden likes the castration option because, he says, the current punishments don't work." *Id.* McSpadden believes that the "procedure could provide a meaningful deterrent to violent crime." Julie Mason, *Castration Legality an Unresolved Issue*, HOUS. CHRON., Mar. 22, 1992, at C1.

year old girl.³ At this time, Butler was on probation for a 1989 conviction for fondling a seven year old girl.⁴ However, a physician could not be found who was willing to perform the procedure and Butler was ultimately sentenced to life in prison.⁵

This Note attempts to show that castration is an acceptable sentencing alternative for certain classes of sexual offenders. Section I examines the growing trend by judges and legislators towards favoring castration as a sentencing alternative and explains the reasons for this trend. This Section finds that this trend is a necessary response to a failing criminal justice system. Section II analyzes castration in light of the Eighth Amendment's prohibition of cruel and unusual punishment. Section III attempts to show how castration as a sentencing alternative can achieve the goals of the criminal justice system, which are retribution, deterrence, denunciation and rehabilitation. Moreover, this Section sets forth statistics reflecting the positive effects of castration on offenders. Section IV examines chemical castration, finding that it is a less intrusive alternative than surgical castration. For example, the use of Depo-Provera as a form of castration can successfully achieve the goals of the criminal justice system. Section V sets forth a basic framework of how chemical castration can be imposed as a probation condition. Section VI discusses an offender's ability to waive Eighth Amendment protection, posing the question that if castration is deemed a cruel and unusual punishment, can an offender volunteer for the castration alternative, and in effect, waive protection from such a punishment? Finally, Section VII draws conclusions about the castration alternative and emphasizes its necessary inclusion in the criminal justice system.

³ *The Castration Option*, *supra* note 2, at A24.

⁴ James C. Harrington, *Castration Case Highlights Larger Problem for Society*, *TEX. LAW.*, Apr. 6, 1992, at 13. "In exchange for Butler's voluntarily accepting castration, McSpadden intended to give him 10 years deferred adjudication and set him free, rather than the 35-year hard-time plea bargain offered by the district attorney's office, or possible life imprisonment if convicted at trial." *Id.*

⁵ *Man Who Chose Castration Gets Life Term in Sex Assault*, *N.Y. TIMES*, Aug. 9, 1992, § 1, at 29.

I. *The Trend Toward Acceptance of Castration*

Over the past ten years, there have been a number of cases where judges have attempted to use castration as an alternative sentencing measure.⁶ In *State v. Brown*,⁷ a South Carolina judge offered to suspend the sentences of three rapists if they agreed to be permanently sterilized.⁸ In *People v. Gauntlett*,⁹ a Michigan judge sentenced a sexual offender to five years of chemical castration.¹⁰ Women are not excluded from the alternative.¹¹ Recently, a woman in Tennessee who was convicted of molesting her sons agreed to be sterilized to avoid prison.¹² Similarly, a California judge offered to

⁶ "The proposal to use castration as a punishment for sex crimes re-emerged in the 1980s . . . but those offers were either withdrawn or overruled before any castration took place." Tamar Lewin, *Texas Court Agrees to Castration for Rapist of 13-Year-Old Girl*, N.Y. TIMES, Mar. 7, 1992, § 1, at 1.

⁷ 326 S.E.2d 410 (S.C. 1985).

⁸ *Id.* at 411; see Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 UCLA L. REV. 1, 6-7 n.19 (1992) (discussing several cases in which defendants agreed to permanent sterilization).

⁹ 352 N.W.2d 310 (Mich. Ct. App. 1984), *modified*, 353 N.W.2d 463 (Mich. 1984).

¹⁰ 352 N.W.2d at 313. In this case, chemical castration involved periodic injections of Depo-Provera medication. *Id.* at 314. "This treatment involves the administration of medroxyprogesterone acetate (MPA), a synthetic progesterone manufactured by the Upjohn Company under the trade name Depo-Provera." Fitzgerald, *supra* note 1, at 2. MPA works as follows:

MPA inhibits the release of the follicle-stimulating hormone and the luteinizing hormone from the anterior pituitary gland in the brain. This results in a decrease in testosterone production in the testicles. MPA interferes with the effects of the testosterone and accelerates the metabolism of testosterone in the body. MPA reduces the level of androgen in the blood stream to that of a prepubescent male. MPA, like all progestinic hormones, acts directly on the brain. MPA reduces the sexual imagery, thus providing the offender with relief from his compulsive fantasy.

Id. at 6-7.

¹¹ *Woman Who Molested Sons Agrees to Sterilization*, N.Y. TIMES, Jan. 31, 1993, § 1, at 29.

¹² *Id.*

suspend a child abuser's sentence if she agreed to use Norplant, a long-term birth control device implanted under the skin.¹³

Additionally, numerous states are considering mandatory penalties of castration for sexual offenders. Florida State Senator Robert Wexler introduced legislation that was approved by the State Senate but ultimately died "when the regular session clock stopped without the House taking it up."¹⁴ Texas State Senator Teel Bivins recently proposed a bill allowing voluntary castration to treat sexual

¹³ *People v. Johnson*, No. F015316 (Cal. Ct. App. 5th Dist. 1991). "Judge Howard Broadman of Tulare County Superior Court . . . told Darlene Johnson, mother of five and a convicted child abuser, that she wouldn't have to go to prison if she agreed to use Norplant." Karen Southwick, "Use Norplant, Don't Go to Jail" *Judges, Social Workers, and Medical Professionals Debate the Ethic*, S.F. CHRON., Aug. 2, 1992, at 13; see Suzanne Fields, *Can Incentives Change Behavior?*, WASH. TIMES, Apr. 20, 1992, at E1. Additionally, a recent proposal in Kansas required women convicted of felony possession of narcotics to choose between Norplant and prison. Southwick, *supra* at 13. "Still other states—Ohio and Washington—have looked at making Norplant mandatory for a woman who has given birth to a cocaine-exposed infant." *Id.*; see Rori Sherman, *Split Rulings for Fetal Abuse Cases; Ky. Reversal*, NAT'L L.J., Feb. 24, 1992, at 3 (discussing an Ohio bill mandating Norplant for second offenders of prenatal neglect). "It is reasonable to say to someone, there's a way for you to avoid prison by doing something 200,000 women have already done: controlling your fertility In the Johnson case it looks as if she would benefit from taking a break (from child-bearing)." *Id.* (quoting Douglas Besharov, a resident scholar in domestic policy with the American Enterprise Institute in Washington, D.C.). "To date, the only court challenge to a sentence that included Norplant as part of the punishment was won. However, it was decided 'on very narrow grounds,' . . . and the battle promises to continue." Phyllis Orrick, *Skin Deep: Seldom Told Tales of Norplant*, NY PRESS, Mar. 31-Apr. 6, 1993, at 16.

Norplant works by suppressing ovulation, development and growth of the uterine endometrium by limiting progesterone secretion. *Requirements or Incentives by Government for the Use of Long-Acting Contraceptives*, 267 JAMA 1818-21 (1992). "Norplant is a highly effective contraceptive, with a failure rate of 0.3% to 0.6% in one year and 1.5% over five years." *Id.*

¹⁴ *Legislature '94: The Big Issues*, PALM BEACH POST, Apr. 17, 1994, at A11. The proposal "would have allowed judges to sentence two-time rapists to hormone-suppressing drugs and sentence three-time sex offenders to the electric chair." *Id.*; see Fla. S.B. 1984, 13th Leg., 2nd Reg. Sess. (1994). Twelve out of the forty state senators were co-sponsoring the bill. William Booth, *Florida Wants to be on Cutting Edge of Get Tough Crime Remedies*, WASH. POST, Feb. 17, 1994, at A3. Senator Wexler plans to return with another proposal next year. *Legislature '94: The Big Issues, supra*, at A11.

offenders.¹⁵ Senator Bivins's bill also provides for a long-term study of the recidivism rate of participating offenders.¹⁶ A California bill provides that, "upon the third conviction of a person for rape, or other specified sex offenses," the court may subject the defendant to chemical castration.¹⁷ A Hawaii bill proposed mandatory castration for people convicted of first degree sexual assault and for repeat offenders of sexual assault.¹⁸ In New Mexico, a bill provides for castration of "persons convicted of criminal sexual penetration."¹⁹ Moreover, Washington state legislators, in 1990, proposed two bills concerning castration.²⁰ One bill provided for mandatory castration of sex offenders,²¹ while another gave sex offenders a choice between castration and incarceration.²² Arguably, these cases and proposed

¹⁵ Tex. S.B. 322, 73rd Leg., 1st Reg. Sess. § 1 (1993); see Kevin Moran, *Contraceptive Effectively Treats Male Sex Offenders; Drug Found to Lessen Repeat-Behavior Risk*, HOUS. CHRON., Feb. 28, 1993, at C1. "The bill would make it legal for aggravated-sex offenders who are 21 or older to volunteer for surgical castration. They would have to get spousal consent and undergo psychiatric evaluation before being castrated. The legislation would not apply to plea bargains" *Id.*

¹⁶ Tex. S.B. 322, 73rd Leg., 1st Reg. Sess. § 1 (1993).

¹⁷ Cal. A.B. 189, Reg. Sess., (1993). The bill died in the assembly pursuant to California Constitution Article IV § 10(c). Cal. A.B. 189, Reg. Sess., (1993), available in LEXIS, Legis Library, CATRCK File. The constitution states that "[a]ny bill introduced during the first year of the biennium of the legislative session that has not been passed by . . . January 31 of the second calendar year of the biennium may no longer be acted on by the house." CAL. CONST. art. IV § 10(c). Another California bill provided in part:

[T]hat upon a first conviction for rape involving mayhem and upon a third conviction of forcible rape, as defined, a person is punishable by castration, in addition to any confinement. . . . [P]erson shall be advised of the option to be sentenced pursuant to other provisions of law if he voluntarily submits himself to surgical castration. This bill would provide that a defendant who exercises this option shall not be subject to a mandatory sentence of life without the possibility of parole pursuant to this provision.

Cal. A.B. 1499, Reg. Sess., (1991).

¹⁸ Haw. H.B. 3434, 16th Leg., Reg. Sess. (1992).

¹⁹ N.M. S.B. 46, 41st Leg., 1st Reg. Sess. (1993).

²⁰ Lewin, *supra* note 6, at 1.

²¹ *Id.*

²² *Id.* Washington State legislators deliberated, and finally rejected both bills. *Id.*

bills indicate society's mature attempt to find a meaningful and effective deterrent to violent crimes.²³

These judicial and legislative attempts at authorizing castration could not have come at a better time. The present system of treating and punishing sexual offenders is not working and "we simply cannot afford to ignore alternative forms of punishment."²⁴ The number of imprisoned sexual offenders is reaching epidemic proportions.²⁵ "The total prison population grew by twenty percent from 1988 to 1990, but the increase for sex offenders was forty-eight percent."²⁶ Additionally, incarceration is failing to rehabilitate sexual offenders, and there is no sign of a decrease in sexual offenses in the future.²⁷

²³ Pamela K. Hicks, Comment, *Castration of Sexual Offenders*, 14 J. LEGAL MED. 641, 642 (1993). The Supreme Court has recognized that cruel and unusual punishment is an evolving concept which must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Gregg v. Georgia*, 428 U.S. 153, 166 (1976); see Richard Lacayo, *Sentences Inscribed on Flesh*, TIME, Mar. 23, 1992, at 54 (quoting Judge McSpadden as follows: "'Nobody's going to call [castration] cruel and unusual punishment . . . [t]hey're going to call that effective punishment.'"). Castration has already been accepted as an alternative treatment in Europe. Baker, *supra* note 1, at 379. Denmark, Germany, Norway, Finland, Estonia, Iceland, Latvia, and Sweden have all passed legislation authorizing castration as a treatment for sexual offenders. *Id.*

²⁴ Smith, *supra* note 1, at 171. Judge McSpadden, a proponent of castration as a sentencing alternative, maintains that the criminal justice system is floundering and that society needs to think about alternative ways to control violent offenders. Lacayo, *supra* note 23, at 54; see Jorgen Ortmann, *The Treatment of Sexual Offenders*, 3 INT'L J. L. & PSYCHIATRY 443, 444 (1980) ("[C]urrent penal sanctions show no positive effect in preventing [sexual recidivism].").

²⁵ Daniel Goleman, *Therapies Offer Hope for Sex Offenders*, N.Y. TIMES, Apr. 14, 1992, at C1. "The simple fact is that federal, state, and local governments cannot jail all of the individuals convicted of a crime. The number of prison inmates in the United States has been growing steadily." Arthur, *supra* note 8, at 30.

²⁶ Goleman, *supra* note 25, at C1. "In 1990, there were 85,647 sex offenders in state and federal prisons, one in six of all prisoners . . ." *Id.*; see Roberto Suro, *Amid Controversy, Castration Plan in Texas Rape Case Collapses*, N.Y. TIMES, Mar. 17, 1992, at 16. "In the past several years, as the revolving door at the gates to our state prison has hardly paused for the sex offenders sent there, it must seem, to those victims that the criminal justice system has failed them entirely—and it has." *Id.* (quoting Judge McSpadden).

²⁷ Goleman, *supra* note 25, at C1. The majority of incarcerated sexual offenders "receive little or no treatment." *Id.* "By conservative estimate, more than 75% of jailed sex offenders get no help at all." *Id.* (quoting Fay Honey Knapp, director of the Safer Society Program in Orwell, Vt., a national referral service for sex offenders

California has more than 15,000 jailed sex offenders, yet "offers treatment in only one experimental program for forty-six rapists and child molesters."²⁸ New York has almost 4,000 jailed sex offenders, and has a treatment program in only one prison.²⁹ One cannot ignore the possibility that castrating sexual offenders constitutes a reasonable and necessary response to an inadequate criminal justice system.³⁰

II. *Cruel and Unusual Punishment*

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."³¹ Although the Supreme Court has not developed specific criteria for determining what penalties are cruel and unusual,³² Justice Brennan's concurring opinion in *Furman v. Georgia*,³³ set forth a test to determine whether a certain penalty violated the Eighth Amendment.³⁴ Justice Brennan stated:

The test, then, will ordinarily be a cumulative one:
If a punishment is unusually severe, if there is a
strong probability that it is inflicted arbitrarily, if it is
substantially rejected by contemporary society, and if

seeking therapy).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *But see Furman v. Georgia*, 408 U.S. 238, 281 (1972) (finding that severe punishments, condemned throughout history, are not constitutional merely because they are necessary).

³¹ U.S. CONST. amend. VIII.

³² Corey H. Marco & Joni M. Marco, *Antabuse: Medication in Exchange for a Limited Freedom—Is it Legal?*, 5 AM. J.L. & MED. 295, 326 (1981). Although legislation of punishment for violations of state law is also subject to other constitutional protections, including equal protection and due process, this Note will focus only on the Eighth Amendment implications of castration. For a discussion of equal protection and due process issues that arise in castration cases, see Denise E. Stich, *Alternative Sentencing or Reproduction Control: Should California Courts Use Norplant to Protect Future Children from Child Abuse and Fetal Abuse*, 33 SANTA CLARA L. REV. 1017 (1993).

³³ 408 U.S. 238, 257 (1972) (Brennan, J., concurring).

³⁴ *Id.* at 282.

there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.³⁵

This test can be applied to the castration alternative. If one considers castration a severe punishment that is arbitrarily inflicted, and that a less severe form of punishment is available,³⁶ then castration will probably be found to violate the Eighth Amendment.³⁷ Castration has side effects which include sweating, blushing, the loss of body hair and an increase in body weight.³⁸ Additionally, because castration would have an effect on an offender's ability to procreate, which is "fundamental to the very existence and survival" of the human race,³⁹ it is easy to see how opponents reject castration as a sentencing alternative.⁴⁰ However, a convicted sex offender no longer enjoys all rights that a law abiding citizen possesses,⁴¹ and

³⁵ *Id.*

³⁶ See Baker, *supra* note 1, at 393-94.

³⁷ See *id.* at 394. "Surgical castration not only prevents the sex offender from engaging in illegal sexual conduct, but furthermore, it obviates the possibility of that person ever engaging in a normal marital sexual relationship or any other sexual behavior permissible by law." *Id.* at 389. "Castrated sex offenders are subjected to similar needless suffering and disability." *Id.* Castration may "aggravate the depression and self-contempt" of an offender. Lacayo, *supra* note 23, at 54.

³⁸ Green, *supra* note 1, at 4.

³⁹ Skinner v. Oklahoma, 316 U.S. 535, 541 (1941).

⁴⁰ See Baker, *supra* note 1, at 389, 393 (arguing that castrated sex offenders are needlessly prevented from normal marital sexual relations and that castration amounts to mutilation of the human body). Critics of the castration alternative cite *Weems v. United States*, 217 U.S. 349, 377 (1910), as authority for considering castration a barbaric punishment. The Supreme Court in *Weems* also recognized hanging as a barbaric punishment. *Id.* However, this country continues to accept hanging as an acceptable sentencing alternative. See *Court OKs Hanging For Child Killer*, N.Y. NEWSDAY, Jan. 5, 1993, at 17. On January 5, 1994, in the State of Washington, "Allan Dodd was executed in America's first legal hanging in nearly three decades." *A Smooth Hanging*, N.Y. NEWSDAY, Jan. 6, 1993, at 14.

⁴¹ See *United States v. Tonry*, 605 F.2d 144, 150-51 (5th Cir. 1979) (limiting an offender's activities, which would otherwise be enjoyed by law-abiding citizens). "[I]f it is reasonably necessary to impinge even preferred rights in order to protect the public

occasional blushing or the loss of body hair does not compare with the trauma that victims endure at the hands of sexual offenders.⁴²

Moreover, the Supreme Court, in *Harmelin v. Michigan*,⁴³ recognized that severe penalties may be cruel, but are not necessarily unusual if they have been "employed in various forms throughout our Nation's history."⁴⁴ Not only has castration as a criminal punishment been used in twentieth century America several hundred times,⁴⁵ the procedure has been offered to offenders as a voluntary probation condition in the United States, and castration is presently being used as an alternative in several European countries.⁴⁶ Therefore, although castration of sexual offenders may be severe, it is not necessarily unusual.

Castration is no more cruel and unusual than the death penalty, which is authorized by law in thirty-six states.⁴⁷ The death penalty "destroys [a person's] very existence" and is no more than the "calculated killing of a human being by the State . . . [and] in comparison to all other punishments . . . is uniquely degrading to human dignity."⁴⁸ An "execution is a way of saying, '[y]ou are not fit for this world, take your chance elsewhere.'"⁴⁹ However, not only

and promote an offender's rehabilitation, the court may do so." Arthur, *supra* note 8, at 60. "[I]n the absence of any cruel and unusual treatment which would be banned by the Eighth Amendment, prisoners have no right to refuse mandatory treatment. . . . [T]he state has an interest in enforcing treatment which will bring about their rehabilitation and presumably reduce recidivism rates" Carol Bohmer, *Legal and Ethical Issues in Mandatory Treatment: The Patient's Rights Versus Society's Rights*, in *THE SEXUAL AGGRESSOR, CURRENT PERSPECTIVES ON TREATMENT* 3, 10 (Joanne G. Greer & Irving R. Stuart eds. 1983).

⁴² See *infra* part III; Lacayo, *supra* note 23.

⁴³ 501 U.S. 957 (1991).

⁴⁴ *Id.* at 994-95.

⁴⁵ Lori Rodriguez, *Castration Case Opens Wounds*, HOUS. CHRON., Mar. 21, 1992, at A25.

⁴⁶ See Baker, *supra* note 1, at 379; Green, *supra* note 1, at 5; Lewin, *supra* note 6, at 12. Chemical castration has been used as a treatment for sexual deviation disorders in the United States since 1966. *Id.*

⁴⁷ Francis X. Clines, *The Grim List of Those Put to Death*, N.Y. TIMES, Nov. 18, 1992, at A16.

⁴⁸ *Furman*, 408 U.S. at 290-91 (Brennan, J., concurring).

⁴⁹ *Id.* at 290 (quoting Stephen, *Capital Punishments*, 69 FRASER'S MAG. 753, 763 (1864)).

can the castrated offender continue to enjoy *rights*, he can participate in "socially acceptable activities,"⁵⁰ and avoid confinement.⁵¹ Furthermore, castration will not necessarily be inflicted arbitrarily. The castration of sexual offenders would follow as a result of state statutes authorizing castration as a response to specific sexual offenses.⁵²

Justice Brennan's final consideration of whether a punishment violates the Eighth Amendment depends on whether the punishment would be "substantially rejected by contemporary society."⁵³ Such a standard is not satisfied given the broad interpretation that the Eighth Amendment necessarily demands. The words of the Eighth Amendment "are not precise, and their scope is not static."⁵⁴ Nor is the Eighth Amendment a "ratchet . . . that fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changing social conditions."⁵⁵ Rather, the Amendment draws its meaning from the "evolving standards of decency that mark the progress of a maturing society."⁵⁶ Given the growing rate of sexual offenses in the United States and the fact that incarceration has failed both to rehabilitate offenders and meet retributive goals,⁵⁷ it is reasonable to conclude that American society would accept castration as a necessary sentencing alternative. Indeed, the fact that a number of state legislatures are presently considering mandatory castration as a sentencing alternative is a strong indication that contemporary society may not find castration to be cruel and unusual.⁵⁸ Arguably, castration may even be a more

⁵⁰ Lauren J. Abrams, *Sexual Offenders and the Use of Depo-Provera*, 22 SAN DIEGO L. REV. 565, 568 (1985).

⁵¹ See *infra* part V.

⁵² See *supra* notes 14-22 and accompanying text.

⁵³ *Furman*, 408 U.S. at 282 (Brennan, J., concurring).

⁵⁴ *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

⁵⁵ *Harmelin*, 501 U.S. at 990.

⁵⁶ *Id.* at 1015 (White, J., dissenting) (quoting *Trop*, 356 U.S. at 101).

⁵⁷ See *supra* notes 26-27 and accompanying text.

⁵⁸ See *supra* part I; see also *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (finding that attention must be given to public and legislative attitudes concerning methods of punishment). There is already evidence that society is beginning to accept mandatory sterilization punishments:

humane form of punishment than incarceration.⁵⁹ When castration is compared to a lengthy prison sentence which subjects a convicted offender to "daily life threatening violence and sexual abuse," one can no longer deny the possibility that castration is a reasonable alternative.⁶⁰

The castration alternative should not be deemed a punishment disproportionate to a crime involving sexual abuse. In the recent case of *Harmelin v. Michigan*,⁶¹ the Supreme Court held that a state may impose life imprisonment without the possibility of parole for possession of 650 grams of cocaine.⁶² As a result, the Court's previous opinion in *Solem v. Helm*,⁶³ "which expressly determined that the Eighth Amendment guaranteed proportionality in noncapital sentencing, while not overruled, was left 'eviscerated.'"⁶⁴ Nevertheless, applying a proportionality standard,⁶⁵ when one considers the seriousness of sexual abuse, and the suffering that victims are subjected to as a result of sexual abuse, castration should not be seen as a punishment disproportionate to the offense.⁶⁶

In a Los Angeles Times poll conducted last year, 46 percent of those who responded approved "strongly" of making Norplant mandatory for drug-abusing women. Fifteen percent approved "somewhat." Sixty percent of Glamour magazine readers who responded to another poll said it was OK to force female child abusers to use Norplant.

Southwick, *supra* note 13, at 13.

⁵⁹ See Lewin, *supra* note 6, at 1 (stating that castration maybe a better deal than life in prison).

⁶⁰ Baker, *supra* note 1, at 394.

⁶¹ 501 U.S. 957 (1991).

⁶² *Id.* at 995-96.

⁶³ 463 U.S. 277 (1983).

⁶⁴ Edward J. McGowan, *Eighth Amendment Proportionality in the Aftermath of Harmelin v. Michigan*, 10 N.Y.L. SCH. J. HUM. RTS. 185, 186 (1992) (quoting *Harmelin*, 501 U.S. at 986-87 (White, J., dissenting)).

⁶⁵ A proportionality standard in this context is used to determine Eighth Amendment violations. It balances the harshness of the penalty with the gravity of the crime and considers sentences imposed in other jurisdictions for similar crimes. See *Solem v. Helm*, 463 U.S. 277, 292 (1983) (holding that a life sentence without parole was unconstitutionally disproportionate to the crime committed).

⁶⁶ See *Harmelin*, 501 U.S. at 987 (stating "three factors that *Solem* found relevant to the proportionality determination: (1) the inherent gravity of the offense; (2) the sentences imposed for similarly grave offenses in the same jurisdiction; and (3) sentences

Castration should not be found to be disproportionate simply because it is not a typical sentence "imposed upon similarly situated defendants who have committed similar crimes."⁶⁷ Such analysis not only prevents the adoption of new alternatives, it fails to recognize a state's power to adapt its penal laws to social conditions and norms as it sees fit, a power considered to be primary by the Supreme Court.⁶⁸ A state has the power to criminalize an act that is perfectly legal in another state.⁶⁹ In fact, a state may "criminalize an act that other [s]tates choose to *reward*—punishing, for example, the killing of endangered wild animals for which other [s]tates are offering a bounty."⁷⁰

imposed for the same crime in other jurisdictions").

⁶⁷ *People v. Gauntlett*, 352 N.W.2d 310, 318 (Mich. 1984).

⁶⁸ *See Weems v. United States*, 217 U.S. 349, 379 (1910). "[T]here is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety." *Id.*

⁶⁹ *Harmelin*, 501 U.S. at 989.

⁷⁰ *Id.* at 989. In *Harmelin*, the Court described the differences in state sodomy statutes:

[J]udging by the statutes that Americans have enacted, there is enormous variation—even within a given age, not to mention across the many generations ruled by the Bill of Rights. The State of Massachusetts punishes sodomy more severely than assault and battery, compare Mass. Gen. Laws. § 272:34 (1988) ("not more than twenty years" in prison for sodomy) with § 265:13A ("not more than two and one half years" in prison for assault and battery); whereas in several States, sodomy is not unlawful *at all*. In Louisiana, one who assaults another with a dangerous weapon faces the same maximum prison term as one who removes a shopping basket "from the parking area or grounds of any store . . . without authorization." La. Rev. Stat. Ann. §§ 14:37; 14:68.1 (West 1986).

Id. at 987.

III. Achieving Goals of the Criminal Justice System

The goals of the criminal justice system include retribution, deterrence, denunciation and rehabilitation.⁷¹ Castrating sexual offenders would serve both the retributive and denunciation goals of the criminal justice system because, as a punishment, it serves as a "device for the expression of feelings of resentment, indignation, and vindication."⁷² Not only is imposing punishment as retribution of psychological value to the victim, it serves legitimate concerns of society.⁷³ Moreover, states have an interest in protecting innocent

⁷¹ See Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 6 (1987). Retribution is defined as revenge for the hurt which society suffers as a result of a criminal's behavior. WAYNE LAFAVE & AUSTIN SCOTT, CRIMINAL LAW § 1.5(a)(6) 25 (2d ed. 1986). The basic premise underlying retribution is that a wrongdoer deserves to be punished because he has committed a crime. *Id.* Deterrence, quite simply, is an attempt to discourage or prevent the defendant or others from engaging in future criminal conduct. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 5 (1987). Denunciation "takes the view that punishment is justified as a means of expressing society's condemnation of a crime." *Id.* at 8. Finally, rehabilitation is an attempt to "reduce crime by reforming the wrongdoer rather than by threatening him or others." *Id.* at 5.

⁷² Abrams, *supra* note 50, at 576. However, Abrams was careful to propose situations where retribution may not be an appropriate goal:

The fact that many sex offenders were once victims of sexual abuse themselves, and the fact that the compulsive sex offender may be driven by a hormonal imbalance, are mitigating circumstances to be considered when punishment is intended as retribution. The dilemma is whether retribution should be the motivation for punishment of an individual who is physiologically or psychologically influenced to commit an act. A growing body of medical research suggests recognition of criminal defenses based on psychological dysfunction resulting from physical conditions. Under these circumstances, the defense of diminished capacity, a variant of the insanity defense, is sometimes recognized for persons with impulsive, uncontrollable behavior.

Id. at 577.

⁷³ See *id.* at 576. "It is a way to penalize the wrongdoer for the injury he has caused, even if the punishment results in no benefit to himself or others." *Id.*

people from violent crimes.⁷⁴ Once a sex crime has been committed:

The very real tragedy that sex offenses pose for victims and their families cannot be ignored. An adult rape victim is often severely traumatized by the 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.⁷⁵

The castration alternative's success cannot be easily denied; statistics demonstrate that castrated sexual offenders have extremely low recidivism rates⁷⁶ due to the reduced sexual drive that results from the surgical procedure.⁷⁷ Thus, while a state's compelling interest in protecting the public can be served by castrating sexual offenders,⁷⁸ these offenders are also being deterred from committing future criminal acts.⁷⁹

The deterrent effect of castration is shown by the work of Nikolaus Heim and Carolyn J. Hursch, who analyzed studies on surgical castration in four European countries: Langeluddeke's study

⁷⁴ *Id.*; see Judge Michael T. McSpadden, *Judge Speaks on Controversial Castration Case*, HOUS. CHRON., Mar. 18, 1992, at 21. "Until we can live in something other than a constant state of fear, it seems that it would be altogether appropriate to attempt to render sexual offenders less capable of repeating their crimes." *Id.*

⁷⁵ Abrams, *supra* note 50, at 576.

⁷⁶ Douglas J. Besharov, *Yes: Consider Chemical Treatment*, 78 A.B.A. J. 42, 42 (1992).

⁷⁷ Ortmann, *supra* note 24, at 449. The removal of the sex glands results in both a reduction of sexual hormones in the body and a reduction in sexual drive. *Id.* Moreover, recent surveys of medical and psychological literature reveal that most castrated men are left "completely unable to engage in sexual activity." Baker, *supra* note 1, at 388. *But see* Raymond E. Anderson, *Castration Is Not the Panacea That It's Supposed to be*, L.A. DAILY J., Dec. 1, 1983, at 4. ("Castration as a method of controlling sexual offense has, in the scientific sense, been strictly a sideshow. There are relatively few studies of the effects on behavior of castration, and most of these are narrow in scope or of poor quality.")

⁷⁸ See *supra* note 71 and accompanying text.

⁷⁹ See DRESSLER, *supra* note 71, at 6.

in Germany; Cornu's study in Switzerland, Bremer's study in Norway, and Sturup's study in Denmark.⁸⁰ Heim and Hursch determined that castrated sexual offenders had a far lower recidivism rate than offenders who did not undergo castration.⁸¹ Similarly, Jorgen Ortmann, a Senior Psychiatrist at the Herstedrester Treatment Centre, in Albertslund, Denmark, analyzed a study of castrated offenders in Denmark encompassing a thirty year period between 1929 and 1959.⁸² Out of 738 castrated offenders, "only ten . . . castrated men relapsed into sexual criminality, a relapse rate of 1.4% after castration."⁸³ Ortmann maintained that castration had reduced expected relapse rates of up to 50% "to a minimum of 1-2%."⁸⁴ From a criminological point of view, the above statistics show that castration can prevent future sexual offenses by former sexual offenders. Therefore, the state's interest in protecting the public can be served by castrating sexual offenders.⁸⁵

⁸⁰ Nikolaus Heim & Carolyn J. Hursch, *Castration for Sex Offenders: Treatment or Punishment? A Review and Critique of Recent European Literature*, 8 ARCHIVES SEXUAL BEHAV. 281, 283 (May 1979).

⁸¹ *Id.* at 283-89. Langeluddeke's German study involved 1036 sex offenders who were castrated between 1934 and 1944. *Id.* These offenders were compared to 685 sex offenders who were never castrated before their prison release. *Id.* Castrated sexual offenders had a 2.3% recidivism rate, while sex offenders who did not undergo castration had a 39.1% recidivism rate. *Id.* at 284-85. Cornu's study of 127 sex offenders yielded similarly favorable results. Cornu found that 50 offenders who did not undergo castration had a recidivism rate of 52%, while castrated sexual offenders had a recidivism rate of only 7.44%. *Id.* at 289. Additionally, Bremer's Norwegian study indicated a 2.9% recidivism rate. *Id.* at 294. Sturup's Danish study showed that only 2.2% of 900 castrated offenders had recidivated. *Id.* at 296.

⁸² Ortmann, *supra* note 24, at 445.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Arthur, *supra* note 8, at 37. "The hallmark of a valid probation condition . . . is its ability . . . to make future crime less likely. When a condition successfully thwarts future crime, the multiple purposes of rehabilitation, public protection, and facilitation of law enforcement are served." *Id.*

IV. Chemical Castration—A Less Intrusive Alternative

Even if surgical castration is found to violate the Eighth Amendment, a similar alternative sentencing measure is available that is less severe and can serve penal purposes.⁸⁶ Chemical castration through the use of Depo-Provera medication⁸⁷ is an effective alternative to surgical castration.⁸⁸ Depo-Provera injections reduce a male's testosterone level, which is one of the variables "influencing sexual behavior."⁸⁹ Like surgical castration, the goal of chemical castration is to reduce sex hormones in the body in order to reduce an offender's sex drive.⁹⁰ Thus, surgical castration, like chemical

⁸⁶ Besharov, *supra* note 76, at 42.

⁸⁷ See Fitzgerald, *supra* note 1, at 2. "MPA is not considered an experimental drug and can be prescribed by any physician under the Food and Drug Administration Guidelines relating to the 'use of approved drugs for unlabeled indications.'" *Id.* at 6. Depo-Provera would be given through "weekly intramuscular injection[s] of a solution containing between 100 mg and 800 mg of MPA, with the typical dosage being 500 mg. MPA binds to the muscle and is gradually released. An additional dosage is not generally needed because the body does not build up a tolerance for the drug." *Id.*

⁸⁸ Abrams, *supra* note 50, at 569. When compared to other methods of treatment, Depo-Provera "has been more specific and enduring in the elimination of sexually dangerous behavior." *Id.* at 568. "Only surgical castration has comparable results in reducing recidivism, but this technique is subject to serious moral and ethical criticism." *Id.*

⁸⁹ *Id.* at 567. Chemical castration has been used as a treatment for paraphiliacs "who exhibit a pattern of sexual arousal, erection and ejaculation, which is characterized by a specific fantasy or its actualization." Fitzgerald, *supra* note 1, at 4. Chemical castration can prevent those sexual offenses that are influenced by sexual impulses. Besharov, *supra* note 76, at 42. Thus, rape offenders are not necessarily appropriate candidates for castration. See Green, *supra* note 1, at 8. "Popular and professional opinion suggests . . . that rape is the sexual manifestation of violence." *Id.* at 8 n.39. "Research shows that rape expresses . . . the need to control, dominate or hurt. So even if you reduce the felon's sexual drive . . . he will simply find other ways to exercise his deviance upon the community." *Id.* at 8 (quoting Dr. Asher Pacht, *The Rapist in Treatment: Professional Myths and Psychological Realities*, in *SEXUAL ASSAULT* 90 (M. Walker & S. Broadsky eds., 1976)). However, "[r]ecognizing the sexual side of some rapes in no way seeks to blame the victim, or denies the violent, hateful aspect of rape. Promoting an apparently effective therapy does not condone the behavior, but it does protect future victims." Besharov, *supra* note 76, at 42.

⁹⁰ Baker, *supra* note 1, at 394-95. "[Antihormone drugs] reduce the hormone produced in the testicles and adrenal glands, in addition to inhibiting the effect sex hormones have on areas in the brain that influence sexual urge." *Id.* By reducing the production and effects of testosterone, chemical castration diminishes the compulsive

castration, can serve preventive goals by protecting the public and can serve retributive goals by punishing an offender.⁹¹

Similar to surgical castration, studies of chemically castrated offenders have yielded positive results.⁹² Ortmann has reviewed and critiqued an extensive amount of literature on chemical castration and has determined that antihormone treatment resulted in recidivist rates of nearly zero in some of the largest target populations studied.⁹³ Recently, researchers at the Rosenberg Clinic in Galveston, Texas, treated sex offenders with Depo-Provera and had favorable results.⁹⁴ Dr. Collier Cole, a psychologist at the Rosenberg Clinic, found that only eighteen percent of chemically castrated offenders had committed additional sexual offenses.⁹⁵

Additionally, chemical castration would serve rehabilitative goals.⁹⁶ The offender treated with Depo-Provera would experience relief from what was once an uncontrollable urge to commit violent

sexual fantasy, causing "erotic apathy." Besharov, *supra* note 76, at 42. What were once insistent and commanding urges can be voluntarily controlled by the administration of antihormone drugs. *Id.* "Fifty sex offender clinics in this country now use chemical therapy, and it is even more widely used in Europe." *Id.*

⁹¹ See *supra* part III.

⁹² Ortmann, *supra* note 24, at 447. The target populations that Ortmann studied ranged from 6 to 33 people, a total of 97. *Id.* "Carefully conducted research indicates that hormone therapy works Recidivism rates are under 5%." Besharov, *supra* note 76, at 42.

⁹³ Ortmann, *supra* note 24, at 447. "On antihormone treatment, the relapse rate is very low, even falling to zero when those who relapse while on insufficient antihormone treatment are not included." *Id.*

⁹⁴ Moran, *supra* note 15, at C1. The clinic found that sex offenders "who remained on the therapy had a very small risk of reoffending." *Id.*

⁹⁵ *Id.* This study involved 61 sex offenders, 40 of whom took Depo-Provera and 21 who refused, but agreed to participate in the same psychological counseling program. *Id.* Only 7 out of the 40 study participants who took the drug reoffended. *Id.* Those who reoffended committed less serious crimes; a rapist, for example, exposed himself in public. *Id.* The study found that 35% of the participants reoffended after stopping the Depo-Provera therapy. *Id.* In contrast, 58% of the participants who never received the drug reoffended. *Id.*

⁹⁶ Abrams, *supra* note 50, at 580. "The use of Depo-Provera and psychotherapy for the compulsive sex offender as a condition of probation or parole satisfies the demand for punishment and the need for rehabilitation, while attempting to break the cycle of recidivism." *Id.*

crimes.⁹⁷ During this period of "sexual calm," the offender would no longer be a threat to society, and could, therefore, avoid confinement.⁹⁸ The offender would be able to rebuild family ties, pursue employment opportunities, and participate in "socially acceptable activities."⁹⁹ Moreover, although antihormone treatments take immediate effect,¹⁰⁰ these effects are reversible.¹⁰¹ Opponents who believe surgical castration is nothing more than useless mutilation may take heart in knowing that the chemically castrated offender maintains bodily integrity.¹⁰² Critics who oppose chemical castration by maintaining there is still an invasion of bodily integrity fail to recognize chemical castration as equivalent to therapies using psychotropic drugs,¹⁰³ including antidepressants, antipsychotics and tranquilizers, which are now widely used to treat mental disorders.¹⁰⁴

⁹⁷ *Id.* at 567-68.

⁹⁸ *Id.* at 568.

⁹⁹ *Id.*

¹⁰⁰ Baker, *supra* note 1, at 395. Baker also notes that antihormone therapy is "easily administered and closely monitored, and is a relatively inexpensive form of treatment." *Id.*

¹⁰¹ See Abrams, *supra* note 50, at 569. "The apparent absence of irreversible side effects and the high percentage of patients who improve within a short period of time indicate that Depo-Provera, along with psychotherapy, may be the preferred treatment for patients with long-standing histories of compulsive sexual deviancy." *Id.* Possible side effects of chemical castration include weight gain, a reduced sperm count, irregular gallbladder functioning, and diverticulitis while on prolonged therapy, testicular atrophy, diabetes mellitus, hot and cold flashes, phlebitis, headaches, insomnia, nausea, nightmares, dyspnea, hyperglycemia, leg cramps, loss of body hair, and increased basal body temperature. Fitzgerald, *supra* note 1, at 7. "[M]ost of the reported side effects are extremely rare. All of the side effects are reversible once the treatment ceases. Erection and ejaculation return within seven to ten days, along with the subjective awareness of the sex drive." *Id.*

¹⁰² See generally Besharov, *supra* note 76, at 42 (stating that, although some people might believe that surgical castration amounts to an invasion of bodily integrity, the use of hormone suppressors should be seen as equivalent to psychotropic drugs, which are now routinely used). But see Baker, *supra* note 1, at 393 (maintaining that castration amounts to mutilation of the human body). "Mutilating punishments are barbaric inasmuch as such forms of punishment 'violate the body's integrity which is a value we have come to respect in our civilization, and because they seem like a throwback to our cannibalistic past.'" *Id.* (quoting G. NEWMAN, JUST AND PAINFUL, A CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS 29 (1983)).

¹⁰³ See Besharov, *supra* note 76, at 42; Green, *supra* note 1, at 25-26.

¹⁰⁴ Besharov, *supra* note 76, at 42.

Chemical castration is arguably a better alternative to other recent innovative therapies for sexual offenders. For example, a comprehensive program for adult sex offenders in Oregon subjects convicted rapists to electric shock in an attempt to "create a phobic response to rape."¹⁰⁵ Chemical castration does not involve such torturous activities because the offender is merely subject to a chemical therapy, which is a less intrusive alternative because the offender maintains bodily integrity and the effects of the treatment are reversible. Another advantage of chemical castration is that its effect is not eliminated by the use of male sex hormones.¹⁰⁶ Offenders are prevented from purposely diminishing the effects of the antihormone injection, which in turn, could lead to recidivism.¹⁰⁷

V. Castration as a Probation Condition

Chemical castration should be offered to sexual offenders as a probationary requirement.¹⁰⁸ The Supreme Court has held that probation "is the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked

¹⁰⁵ Don Riesenber, *Motivations Studied and Treatments Devised in Attempt to Change Rapists' Behavior*, 257 JAMA 899-900 (1987).

¹⁰⁶ Ortmann, *supra* note 24, at 451.

¹⁰⁷ *Id.*

¹⁰⁸ Connie S. Rosati, *A Study of Internal Punishment*, 1994 WIS. L. REV. 123, 125 (1994). Although surgical castration is an acceptable probationary requirement, the procedure is subject to serious ethical considerations involving the mutilation of the human body. See Abrams, *supra* note 50, at 568. However, chemical castration is a less intrusive alternative that achieves favorable results, and, therefore, may be more readily acceptable to the public. See Besharov, *supra* note 76, at 42. A probation condition will not be found invalid merely because a convicted individual's fundamental rights are involved. See *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 n.14 (9th Cir. 1975). Judges may have the power to suspend sentences upon conditions they deem fit and proper, but a judge is not given unlimited discretion and "cannot impose conditions which are illegal and void as against public policy." *State v. Brown*, 326 S.E.2d 410, 411 (S.C. 1985) (finding that castration was cruel and unusual punishment). "Felony probation exists, but convicted felons, including rapists, are generally ineligible for probation because statutes prohibit parole for persons with prior felony convictions, those convicted of violent felonies, and those who will serve lengthy prison terms if not probated." Green, *supra* note 1, at 11; see Baker, *supra* note 1, at 390.

from burning at the time of the imposition of the sentence."¹⁰⁹ Probation is a sound substitute for incarceration because probation conditions are designed to meet the problems of offenders.¹¹⁰ Probation maximizes the probationer's liberty, while allowing a court to retain control over the probationer, and allowing the offender to continue as a member of the community.¹¹¹ Additionally, probation is less expensive than incarceration.¹¹²

A probationary condition is acceptable if it is reasonably related to the rehabilitation of the probationer, deters future criminal acts by the probationer or generally deters others, protects the public, serves as a form of punishment, or satisfies a combination of the above.¹¹³ Chemical castration is reasonably related to the rehabilitation of the sexual offender because Depo-Provera injections will prevent the offender from being controlled by deviant sexual

¹⁰⁹ *United States v. Murray*, 275 U.S. 347, 358 (1928).

¹¹⁰ *See United States v. Tonry*, 605 F.2d 144, 148 (9th Cir. 1979). Judges should "view probation as a substitute for imprisonment and formulate conditions calculated to ensure that the probation furthers the purposes of the criminal law." *Id.*

¹¹¹ Fitzgerald, *supra* note 1, at 15. A court retains the authority to condition an offender's freedom on his agreement to abide by particular requirements and to revoke that freedom should any condition be violated. HARRY E. ALLEN ET AL., *PROBATION AND PAROLE IN AMERICA* 36 (1985).

¹¹² ALLEN, *supra* note 111, at 45. Judges know that an increase "in the number of criminals sent to prison may be prohibitively expensive. On average, the cost to supervise an adult placed on probation is one-fourteenth the amount needed to support her in custody . . . [probation] is an indispensable correctional alternative to incarceration in every criminal court." Arthur, *supra* note 8, at 31. *But see* Sally T. Hillsman & Judith A. Greene, *Tailoring Criminal Fines to the Financial Means of the Offender*, 72 *JUDICATURE* 38, 40 (June/July, 1988) ("Newer sentencing options which have emerged in recent years under the banner of 'alternatives'—restitution, community service, enhanced probation and electronic monitoring—are often difficult and/or expensive for courts to supervise. Moreover, to ensure program success, they often target narrow groups of offenders."). Enhanced probation schemes, like electronic monitoring, are often left in the hands of privately owned companies, whose main objective is pecuniary gain and not to serve penal goals. Martin Berg, *D.A. Criticizes Electronic House Arrest*, L.A. *DAILY J.*, July 15, 1988, at 5.

¹¹³ *Tonry*, 605 F.2d at 148. Critics maintain that probation conditions must be capable of being performed within the term of probation. Green, *supra* note 1, at 12. Such analysis attempts to render surgical castration an unreasonable probation condition because it is irreversible and would prevent an offender from engaging in future legal sexual acts. *Id.* at 12-13.

impulses and an uncontrollable sexual drive.¹¹⁴ Consequently, chemical castration can help prevent future criminal acts by the probationer, and, therefore, helps to insure the public's safety.¹¹⁵ Another advantage of chemical castration is that it is easy to monitor.¹¹⁶ If an offender fails to meet with his assigned doctor to receive his Depo-Provera injection, the probation department can simply be contacted by the doctor and the offender's probation status will be revoked.¹¹⁷ Moreover, chemical castration via probation is relatively inexpensive when compared to the high costs of incarcerating offenders in this country.¹¹⁸

¹¹⁴ Fitzgerald, *supra* note 1, at 16. Chemical castration "frees the offender from his compulsive sex drive, the inconvenience of spontaneous erections, and the fear of relapse." *Id.* "When a condition successfully thwarts future crime, the multiple purposes of rehabilitation, public protection, and facilitation of law enforcement are served." Arthur, *supra* note 8, at 37.

¹¹⁵ Depo-Provera should be administered on a long-term basis and not as a cure for sex offenders. Abrams, *supra* note 50, at 569. "No long-term benefit of Depo-Provera alone has been shown after it is discontinued." *Id.* There is legal precedent requiring individuals to take medication in order to insure the public's safety. The Supreme Court has held the state's police power sufficient to justify a compulsory vaccination law. *Jacobson v. Massachusetts*, 197 U.S. 11, 25-26 (1905). By analogy, requiring an individual to take Depo-Provera medication so that others can be safe from attack should not be considered cruel and unusual punishment. Abrams, *supra* note 50, at 571. Abrams states that:

One of the principle interests supporting intervention by the state is the protection of innocent third parties, a strong consideration in mandatory treatment programs. Courts have resolved issues of mandatory treatment by balancing the individual's right to refuse treatment and the state's interest in compelling it. In this balancing process, the right of self-determination is defined as the right of an individual to freely choose his actions as long as these actions do not adversely affect the rights of others.

Id. at 570. "After all the sensationalism, the use of hormone-suppressing drugs, in certain cases, holds great promise for reducing the level of sexual violence against women and children. As a voluntary alternative, it is in both the defendant's and society's interest." Besharov, *supra* note 76, at 42.

¹¹⁶ Fitzgerald, *supra* note 1, at 16.

¹¹⁷ *Id.* at 16-17.

¹¹⁸ Baker, *supra* note 1, at 395. Elizabeth D. Chicknavorian, *House Arrest: A Viable Alternative to the Current Prison System*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 53, 55 (1990). The United States needs to be relieved of the "pressure of constructing new prison facilities. The costs of constructing such facilities run at about \$50,000 per bed." *Id.*

Whatever the probation requirements may be, whether by surgical or chemical castration, a defendant must give his informed consent to probation conditions.¹¹⁹ The doctrine of informed consent requires a physician to provide an individual with all information relevant to a proposed procedure.¹²⁰ This information includes the risks, benefits, consequences and alternatives involved in the procedure.¹²¹ Therefore, an offender given the castration option would be informed of the side effects, the benefits that allow the sexual offender to control sexual impulses, and the alternative—incarceration.

Critics assert there can be no voluntary consent to castration because the only other choice for the offender is incarceration.¹²² Indeed, offenders are not left with many choices and might choose to accept probation requirements to avoid lengthy prison sentences. However, common sense dictates that convicted offenders should have some limitations on their choices. If the offender believes he is making the best choice, a third party should not be able to take that choice away.¹²³ Moreover, the Supreme Court has upheld decisions that allowed defendants to enter guilty pleas that would not have been

¹¹⁹ G. KILLINGER ET AL., PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM 54 (1976). "Probation cannot be imposed unless the defendant accepts it." *Id.*

¹²⁰ *Canterbury v. Spence*, 464 F.2d 772, 779-83 (D.C. Cir. 1972).

¹²¹ *Id.* at 787-89.

¹²² *See United States v. Pierce*, 561 F.2d 735, 739 (9th Cir. 1977) (holding that true voluntary waivers would be acceptable, but recognizing that a "defendant's consent to a probation condition is likely to be nominal where consent is given only to avoid imprisonment"). "Critics contend that since a convicted offender will go to great lengths to retain his freedom—including bartering his body—voluntary consent to [castration] is precluded." Fitzgerald, *supra* note 1, at 21. One such critic contends:

The state's coercive power to impose incarceration eliminates the detainee's power to bargain, making it more likely that she will assent to illegal intrusions upon otherwise constitutionally protected liberties One commentator observes that although the doctrine appears to expand individual choices by allowing a person to forego a given right in exchange for some benefit, waiver of rights often occurs in situations where the individual has, in fact, no real choice at all.

Jeffrey N. Hurwitz, *House Arrest: A Critical Analysis of an Intermediate-Level Penal Sanction*, 135 U. PA. L. REV. 771, 794-95 (1987).

¹²³ *See Fitzgerald, supra* note 1, at 22. "Just because the alternatives of [one's] choices might be unpleasant, this does not make [those] choices unacceptable." *Id.*

entered but for the individual's desire to avoid a specific sentence.¹²⁴ In *North Carolina v. Alford*,¹²⁵ a defendant, who disclaimed any guilt, pleaded guilty in order to avoid the death penalty, which might have followed a jury verdict.¹²⁶ The Supreme Court held that such a plea was still the "product of a free and rational choice" when supported by competent counsel.¹²⁷ Additionally, in *Bordenkircher v. Hayes*,¹²⁸ the Supreme Court recognized that pleas involve difficult choices, but are "inevitable and permissible."¹²⁹ Consequently, one should presume that sexual offenders who undergo castration in order to avoid incarceration have not been subjected to illegal tactics by the state.¹³⁰ Judicial response to such bargains should be favorable as long as defendants are protected by procedural safeguards¹³¹ and are represented by competent counsel.¹³²

VI. Waiving Eighth Amendment Rights

Sexual offenders may volunteer for castration without even having the option offered to them, as Steven Butler did, in an attempt

¹²⁴ *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ 434 U.S. 357 (1978) (holding that threatening the accused to plead guilty or be subjected to reindictment on more serious charges did not violate the Due Process Clause).

¹²⁹ *Id.* at 364.

¹³⁰ See *Arthur*, *supra* note 8, at 60-61. In fact:

Since the earliest grants of probation and continuing to the present, criminal defendants in state and federal courts routinely have accepted probation in lieu of a prison sentence on the condition that they forego fundamental constitutional rights to which they otherwise would be entitled. State and federal courts of appeal across the country have approved conditions that curtail probationers' freedom of speech, association, and travel, as well as their protection against government and seizures, and their privilege against self-incrimination.

Id.

¹³¹ *Bordenkircher*, 434 U.S. at 362.

¹³² *Alford*, 400 U.S. at 31.

to avoid incarceration.¹³³ But if castration violates the Eighth Amendment's prohibition against cruel and unusual punishment, can a defendant request castration and, in effect, waive his constitutional right to be protected from such a punishment?

The Supreme Court, in *Brady v. United States*,¹³⁴ held that constitutional rights may be waived, but such waivers must be voluntary, knowing, "intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."¹³⁵ Thus, as long as a reasonable decision is made, there does not seem to be any limitations on what rights can be waived.¹³⁶ The Supreme Court has recognized in numerous cases that defendants can waive fundamental rights. In *Gannett Co. v. DePasquale*,¹³⁷ the Court recognized the ability to waive the right to counsel.¹³⁸ Additionally, in *Adams v. United States ex rel. McCann*,¹³⁹ the Supreme Court held that "one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judgment of the

¹³³ See *supra* notes 2-5 and accompanying text. "Mr. Butler approached his lawyer about the possibility of castration after reading that Judge McSpadden was an advocate of the procedure for sex offenders." Lewin, *supra* note 6, at 1. In January 1993, Harvey Dale Angel, a convicted sexual offender in Texas, requested to be castrated so that "he would no longer have the urge to commit sex crimes." Ruth Piller & Eric Hanson, *Sex Offender Asking for Castration, Delay in Transfer to Prison*, HOUS. CHRON., Jan. 21, 1993, at 30.

¹³⁴ 397 U.S. 742 (1970).

¹³⁵ *Id.* at 748.

¹³⁶ But see Richard J. Bonnie, *Dignity of the Condemned*, 74 VA. L. REV. 1363, 1371 (1988). A person can not waive all rights:

[I]t is clear that [one] may not waive [a] constitutional ban and thus empower the state to impose a punishment that is otherwise forbidden to inflict. Similarly, although it is easy to understand why a rational prisoner might prefer castration to a lengthy penitentiary sentence, it is unlikely that the state would be permitted to offer such a choice.

Id.

¹³⁷ 443 U.S. 368 (1979).

¹³⁸ *Id.* at 417; see *Faretta v. California*, 422 U.S. 806 (1975) (allowing waiver of right to counsel and granting the right to self-representation).

¹³⁹ 317 U.S. 269 (1942).

trial court."¹⁴⁰ In *Singer v. United States*,¹⁴¹ the Court recognized the right to waive both public trials and the right to be tried in the locality where the crime was committed.¹⁴² Consequently, if a court finds a defendant's request for castration to be reasonable, it could grant the constitutional waiver of the right to be protected from cruel and unusual punishment.¹⁴³ In fact, if the judge, prosecutor, and the defendant agree to such a sentencing alternative, "no other party would have the legal standing to challenge the agreement."¹⁴⁴

The Supreme Court's recognition of voluntary waivers does not imply a defendant's right to compel a court to act in a manner consistent with the waiver.¹⁴⁵ "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."¹⁴⁶ However, in *Faretta v. California*,¹⁴⁷ the

¹⁴⁰ *Id.* at 277-78.

¹⁴¹ 380 U.S. 24 (1965).

¹⁴² *Id.* at 35.

¹⁴³ See Green, *supra* note 1, at 1. But see *People ex rel. Battista v. Christian*, 164 N.E. 111, 112 (N.Y. 1928). The *Battista* court recognized that certain fundamental rights could not be disregarded and found that "[t]he public policy of the state as expressed in the Constitution takes precedence over [one's] personal wish or convenience." *Id.*

¹⁴⁴ Lewin, *supra* note 6, at 1 (paraphrasing Laurence H. Tribe, a noted professor of constitutional law at Harvard Law School). With regard to Steven Butler's case in Texas, "[l]awyers who investigated possible strategies to appeal [the castration approval] agreed that publicity was the only available option. The American Civil Liberties Union, the predominantly black Houston Lawyers Association and the National Association for the Advancement of Colored People had searched in vain for a legal solution." Mark Ballard, *Castration Foes Play the Race Card; Frustrated Legally, They Defeat Judge With Publicity*, TEX. LAW., Mar. 23, 1992, at 8. "Because Butler had volunteered and his common-law wife, Terra Cook, had agreed, opponents lacked standing to appeal" *Id.*

¹⁴⁵ *Singer v. United States*, 380 U.S. 24, 34 (1965). A defendant can not compel a court to do something that is unconstitutional:

For example, although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, . . . although he can waive his right to be tried in the State and district where the crime was committed, he cannot in all cases compel transfer of the case to another district

Id. at 35.

¹⁴⁶ *Id.* at 33-34.

¹⁴⁷ 422 U.S. 806 (1975).

Supreme Court allowed such a demand.¹⁴⁸ The *Faretta* Court found that Sixth Amendment guarantees should not be used as "an organ of the state" imposed upon an unwilling defendant.¹⁴⁹ The Court inferred from the character, language, and spirit of the Sixth Amendment that it granted a defendant the right to demand self-representation.¹⁵⁰ The Court held that thrusting "counsel upon the accused, against his considered wish, . . . violate[d] the logic of the Amendment."¹⁵¹ However, unlike the Sixth Amendment, the Eighth Amendment's prohibition of cruel and unusual punishment does not share the same character or spirit which can be easily traced back to the Framers of the Constitution.¹⁵² Therefore, a defendant could not demand to be castrated, but nothing stops the individual from *requesting* the alternative and a responsible court from granting the request.

VII. Conclusion

Castration is a creative sentencing alternative that is necessary to alleviate the growing sexual offense rate in this country. Castration prevents offenders driven by sexual impulses from

¹⁴⁸ *Id.* (holding that a defendant may demand self-representation).

¹⁴⁹ *Id.* at 820. The Sixth Amendment states in relevant part:

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have transfer of the case to another district

U.S. CONST. amend. VI.

¹⁵⁰ *Faretta*, 422 U.S. at 820.

¹⁵¹ *Id.* The *Faretta* Court held that imposing counsel upon an unwilling defendant would amount to counsel being a master, rather than an assistant, "and the right to make a defense [would be] stripped of the personal character upon which the Amendment insists." *Id.*

¹⁵² Little evidence exists recounting the debates on the adoption of the Eighth Amendment. McGowan, *supra* note 64, at 190. Analysis of the Sixth Amendment shows that the Framers were careful to avoid having counsel forced upon the accused. See *Faretta*, 422 U.S. at 826-32. "The Eighth Amendment received virtually no attention during the House debates on the Bill of Rights." McGowan, *supra* note 64, at 191.

committing sexual offenses. In addition, castration is not only a treatment, but is a punishment for sexual offenders. Punishment is a valuable goal of the criminal justice system, which is advanced by castration. Moreover, critics should not narrowly interpret the Eighth Amendment to prohibit castration as a cruel and unusual punishment. Such interpretation fails to recognize that Eighth Amendment analysis must adapt to changes in social conditions.

Even if mandatory castration is found to be cruel and unusual punishment, affording sexual offenders the option to choose between incarceration and castration should be offered as a probationary requirement. Sexual offenders will accept castration through probationary schemes and waive their rights to be protected from cruel and unusual punishment. Thus, whether mandatory castration is deemed constitutionally impermissible, optional castration as a condition of probation should not be found to run afoul of the Eighth Amendment. Given the amount of violent crimes in the United States, pending mandatory castration laws, and the public safety interest, one can no longer ignore the possibility that castration will be an accepted alternative in the near future.

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