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Comments

Chemical Castration: An Alternative to Incarceration

In March, 1992, Steven Allen Butler, an accused rapist, asked a Texas District Judge to punish him via castration rather than imprisonment.¹ Judge Michael McSpadden initially agreed to his request, but later withdrew approval after amassed outcry from civil libertarians and legal experts. One physician, having agreed to perform the procedure, subsequently withdrew his agreement.² At the same time, Butler's family insisted that he was "brainwashed" into volunteering.

Eight years earlier, a Michigan judge sentenced Roger Gauntlett,³ a convicted rapist, to one year in prison plus five years of probation conditional on Gauntlett's receipt of regular injections of Depo-Provera,⁴ referred to in medical circles as "chemical castra-

1. Richard Lacayo, *Sentences Inscribed on Flesh*, Time 54 (March 23, 1992).

2. The American Medical Association strongly opposes the employment of medical procedures in conjunction with criminal sanctions. Dr. George Annas, a professor of health at Boston University Medical School states "Physicians have no business acting as agents of the state to punish people." Lacayo, Time at 59 (cited in note 1).

3. Ironically, Roger Gauntlett is the heir to the Upjohn Pharmaceutical Corporation fortune. Upjohn manufactured the drug Depo-Provera. John T. Melella, Sheldon Travin and Ken Cullen, *Legal and Ethical Issues in the Use of Antiandrogens in Treating Sex Offenders*, 17 Bull Am Acad Psychiatry Law 223, 228 (1989).

4. Depo-Provera is a psychotropic drug which controls sexual behavior via reduction of one's "sex drive" by reducing the level of the male hormone testosterone. The use of Depo-Provera results in a reduction of genital functioning, including reduction of spermatogenesis, erection and ejaculation; it does not, however, result in total impotence. See, Comment, *Sexual Offenders and the Use of Depo-Provera*, 22 San Diego L Rev 565, 567 (1985).

Depo-Provera has recently been approved by the Food and Drug Administration for use in the United States as a form of female birth control. Warren E. Leary, *U.S. Approves Injectable Drug as Birth Control*, The New York Times 1 (October 30, 1992).

tion."⁵ Not surprisingly, Mr. Gauntlett vehemently opposed the treatment and appealed the sentence.⁶

The response of the criminal justice system in dealing with sex offenders raises serious legal, medical and ethical questions. Not only are sex offenses traumatic for the victim and his or her family, but society as a whole has a substantial interest in the deterrence of such crimes as well. To a large extent, courts have thus far relied almost exclusively on incarceration, either in prisons or mental institutions, to curb such behavior. Such approaches, however, have been unsuccessful in reducing the number and recidivism of offenses.⁷

This comment will explore castration as an alternative to incarceration for convicted sex offenders. More specifically, emphasis will be given to the use of pharmacological treatments as a condition of probation and the plausibility of such treatment in light of the United States Constitution. Further, attention will be given to statutory questions, such as the reasonableness of court ordered probation conditioned upon the receipt of treatment. Finally, consideration will be given to the defendant and whether voluntary consent to such a condition can truly be given.

BACKGROUND

Compulsory physical castration has been widely practiced for thousands of years.⁸ In the Middle Ages, individuals were castrated as a punishment according to the *lex talionis*⁹, ie, "an eye for an eye, a tooth for a tooth."¹⁰ In Greece, slaves were castrated for commercial purposes and harem guards in the Middle East were

5. Order of Probation, *People v Gauntlett*, No D 824-00-076 FY (Mich Cir Ct, Kalamazoo County, Jan 30 1989); 134 Mich App 737, 352 NW2d 310, 313, modified, 419 Mich 909, 353 NW2d 463 (1984). (quoting trial court's probation order).

6. The Court of Appeals found that the trial judge had imposed an illegal probation condition. *Gauntlett*, 352 NW2d at 314-17. The Court first indicated that there was no statutory authority for treating a sex offender with the drug. *Id* at 314-15. Second, the Court noted that Depo-Provera had not gained acceptance in the medical community as safe and reliable and was still considered experimental. *Id* at 316. Finally, the Court noted a problem in complete lack of informed consent by the Defendant. *Id*.

7. See Comment, 22 San Diego L Rev at 565-66 (cited in note 4).

8. Nickolaus Heim and Carolyn J. Hursch, *Castration for Sex Offenders: Treatment or Punishment? A Review and Critique of Recent European Literature*, 8 Archives of Sexual Behavior 281 (1979).

9. *Lex talonis* is the law "which requires the infliction upon a wrongdoer of the same injury which he has caused to another." *Black's Law Dictionary* 913 (West, 6th ed 1990).

10. Heim and Hursch, 8 Archives of Sexual Behavior at 281-82 (cited in note 8).

castrated to prevent them from self-indulgence.¹¹ In fact, since 1906, castration has been used as a treatment for sex offenders in several European countries.¹² Indeed, until 1970, surgical castration of sex offenders was compulsory in post-war Germany.¹³

Today, the use of surgical castration as a treatment for sex offenders is statutorily regulated in European countries.¹⁴ In the United States, however, surgical castration of sex offenders has not met with a favorable reception. For instance, one court has held that a Nevada statute providing for physical castration of rapists by vasectomy was unconstitutional as cruel and unusual punishment.¹⁵ Another court has found unconstitutional an Iowa Statute requiring the sterilization of men convicted of a second felony.¹⁶

11. Tauber, *Effects of Castration Upon the Sexuality of the Adult Male*, 2 *Psychosomatic Med* 74 (1940).

12. Heim and Hirsch, 8 *Archives of Sexual Behavior* at 282 (cited in note 8). Denmark was the first country to legalize castration as a medical treatment in 1929. Other countries quickly followed suit: Germany (1933, 1935, 1969), Norway (1934), Finland (1935, amended 1950), Estonia (1937), Iceland (1938), Latvia (1938) and Sweden (1944). *Id.*

13. *Id.*

14. *Id.* Under the most recent German statute, for example, castration is permitted only in the following circumstances:

(1) if the treatment is indicated according to the knowledge of medical science to prevent, cure, or ease serious diseases, mental disorders, or complaints of the subject that result from his abnormal sexual drive, or (2) if, because of the subject's abnormal sexual drive, his character, and his previous manner of living, it may be assumed that he will commit further sexual offenses, again given that castration is indicated according to the knowledge of medical science to meet this risk, and that it is thus possible to help the person with regard to his future way of life. Whether the operation will be effected or not depends on the vote of an independent commission of experts. People who because of insanity are unable to understand the whole procedure and the meaning of the operation must be represented by a guardian.

Id.

15. *Mickle v Henrichs*, 262 F 687 (D Nev 1918). The Court stated: "Vasectomy in itself is not cruel; it is no more cruel than branding, the amputation of a finger, the slitting of a tongue, or the cutting off of an ear; but, when resorted to as punishment, it is ignominious and degrading, and in that sense is cruel." *Mickle*, 262 F at 690.

16. *Davis v Berry*, 216 F 413 (S D Iowa 1914). The court noted that the Iowa statute was intended to apply to all second conviction's, regardless of the felony. *Davis*, 216 F at 417. In Iowa, this included not only murder, arson, rape, etc., but also crimes that had once been considered misdemeanors, such as wife abandonment, cutting electric light wires, or breaking an electric globe. *Id.* at 417-18. Thus, the court considered the statute inherently cruel and unusual. *Id.* at 417. In commenting on the statute under consideration, the Iowa court stated:

When Blackstone wrote his commentaries he did not mention castration as one of the cruel punishments, quite likely for the reason that with the advance of civilization the operation was looked upon as too cruel, and was no longer performed. But each operation is to destroy the power of procreation. It is, of course, to follow the man during the balance of his life. The physical suffering may not be so great, but that is not the only test of cruel punishment; the humiliation, the degradation, the mental suffering

This view was subsequently affirmed in *State v Brown*, wherein the Supreme Court of South Carolina held that castration is prohibited by the constitutional mandate against cruel and unusual punishment.¹⁷ Modern day opponents of castration argue that "castration of any kind is morally pernicious and pragmatically impotent."¹⁸

DEPO-PROVERA

While surgical castration is an unlikely alternative to prison on humanitarian and civil liberty grounds, another option exists. First tested in the 1960's, the use of hormone suppressors, ie, "chemical castration," has been very successful in the treatment of sex offenders.¹⁹ Today, the most common treatment involves the administration of medroxyprogesterone acetate (MPA), a synthetic progesterone, manufactured under the trade name Depo-Provera.²⁰

Depo-Provera is a long-acting injectable form of MPA which inhibits sexual drives and sexually dangerous behavior by reducing the production of testosterone.²¹ Essentially, Depo-Provera restricts the release of luteinizing hormones (LH)²² from the pituitary gland, which in turn decreases androgen levels, particularly testosterone, in the bloodstream.²³ Clinically, Depo-Provera dimin-

are always present and known by all the public, and will follow him wheresoever he may go. This belongs to the Dark Ages.

Id at 416.

17. 284 SC 407, 326 SE2d 410 (1985). In *Brown*, the trial judge sentenced three sex offenders to 30 years in prison, provided, however, that the sentence be suspended if the defendants agreed to surgical castration. The Supreme Court of South Carolina, while acknowledging that the trial judge has wide discretion in ordering suspension or probation, indicated that castration was a form of mutilation and thus prohibited as a violation of public policy. *Brown*, 326 SE2d at 411-12.

18. Douglas J. Besharov and Andrew Vachhs, *Is Castration an Acceptable Punishment?*, ABA Journal 43 (July 1992). In support of this view, the author cited a case from Germany wherein a man eluded life imprisonment by submitting to castration. The man began receipt of hormone injections, and proceeded to strangle a seven year old girl and bury her body. At trial, the defense claimed that the castration had removed any sexual feelings that the defendant may have had prior to receiving treatment. Thus, the defense attempted to use the defendant's castration as proof that the crime was not sexually motivated. Besharov and Vachhs, ABA Journal at 43.

19. See Generally, Fred S. Berlin, *The Paraphilias and Depo-Provera: Some Medical, Ethical and Legal Considerations*, 17 Bull Am Acad Psychiatry Law 233 (1989).

20. Physicians Desk Reference, 42nd Ed, 2123-24 (1988).

21. Melella, 17 Bull Am Acad Psychiatry Law at 225 (cited in note 3).

22. LH is the chemical messenger which activates the production of the male hormone, androgen, in the testicles. Hence, the use of Depo-Provera results in decreased androgen levels. Androgen is a sexual activator. Id.

23. Id.

ishes compulsive erotic fantasy and lowers male sex drive.²⁴ Without it, sex offenders report inability to control their sexually offensive behavior.²⁵

The physiological effects of Depo-Provera are temporary diminution of penile erections and ejaculations, and a decrease of sperm production.²⁶ Dosages can be titrated to obviate total impotence and the medication is not feminizing.²⁷ Various side effects have been reported, including weight gain, cold sweats, nightmares, muscle weakness and fatigue.²⁸ Studies on animals have also shown that Depo-Provera causes breast cancer in female dogs and uterine cancer in monkeys.²⁹ More importantly, however, is the fact that the few documented side-effects are believed to be fully reversible with cessation of treatment.³⁰ In fact, within seven to ten days, erectile and ejaculatory abilities are restored, as well as sex drive.³¹

DEPO PROVERA AS A TREATMENT FOR SEX OFFENDERS: APPROPRIATE CANDIDATES

Presently there are few effective treatment methods available that significantly reduce the incidence or recurrence of sexually offensive behavior. Thus, in view of the high rate of recidivism among sex offenders, the time has come for the legal system to be innovative and to accept the challenge of controlling deviant sexual behavior through the use of Depo-Provera.

Subsequent to being convicted of a sex crime, the offender may be incarcerated, either in a mental institution or in a prison, or may be granted probation with various conditions. If incarcerated, chemical treatment becomes irrelevant; however, in the present social climate regarding such offenses, a strong pressure clearly exists not to imprison convictees and thus the option of chemical treatment is relevant. The complexity of the choice between incarceration and treatment often lies in the wide divergence of views of sexually deviant behavior.³² More specifically, the legal system views sexual deviation as a violation of the criminal law resulting

24. *Id.*

25. Comment, 22 *San Diego L Rev* at 567 (cited in note 4).

26. Melella, 17 *Bull Am Acad Psychiatry Law* at 225 (cited in note 3).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 224.

in punishment, deterrence, rehabilitation or a combination of the three.³³ In contrast, sexual deviation is also viewed as a medical problem for which punishment is not morally appropriate.³⁴ Consequently, punishment may not accomplish a continuing deterrent effect. Moreover, since states are obligated to protect society from harm, there may still be an ethical obligation to control deviant behavior by deterrence or rehabilitation. In any event, it seems obvious that both society and the offender would receive a greater benefit if the offender is rehabilitated and does not resume the unlawful behavior.³⁵ To do so, however, the appropriate candidates for treatment need to be identified.

Experts have classified the types of sex offenders into four groups. The Type I offender denies the perpetration of the crime.³⁶ Type II offenders admit to the perpetration of the offense, but blame their criminal behavior on non-sexual or non-personal forces (eg: drugs, alcohol or job stress).³⁷ Type III offenders are violent and appear to be prompted by non-sexual reasons (eg: anger, power or violence).³⁸ Type IV offenders are paraphiliacs³⁹ who demonstrate a pattern of sexual arousal, erection and ejaculation, which is accompanied by a distinctive fantasy or its achievement.⁴⁰ The pivotal criterion in calculating the treatability of a sex offender is his acknowledgement that his conduct is intolerable and beyond his control.⁴¹ Accordingly, therapists advocate that the only alternative for the first three types of sexual offenders is in-

33. Id.

34. Id.

35. See generally Lawrence Taylor and Katharina Dalton, *Premenstrual Syndrome: A New Criminal Defense?*, 19 Cal W L Rev 269, 284 (1983).

36. Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 Am J Crim L 1, 4 (1990).

37. Fitzgerald, 18 Am J Crim L at 4.

38. Id.

39. A paraphilia is a sexual deviation disorder; recognized paraphilias include voyeurism, exhibitionism, transvestism, fetishism, erotic sadism, sexual masochism and pedophilia (sexual attraction to children). Fred S. Berlin and Carl F. Meineke, *Treatment of Sex Offenders with Antiandrogenic Medication: Conceptualization, Review of Treatment Modalities, and Preliminary Findings*, 138 Am J Psychiatry 601 (1981).

40. Fitzgerald, 18 Am J Crim L at 4.

41. A diagnosis of paraphilia can be made by observing an individual's cognitive, emotional and behavioral state. Cognitive examination will disclose a pattern of perverted sexual fantasies. Emotional exam will identify erotic cravings which can be alleviated only by carrying out the fantasies. Ergo, these cravings are perceived as harmful when not carried out. Finally, behavioral examination shows general stereotyped sexual activity because "erotic pleasure is maximized only when deviant fantasies are carried out." Berlin and Meineke, 138 Am J Psychiatry at 601 (cited in note 39).

carceration.⁴² Because the Type I offender denies that his behavior is wrong, he can probably not be helped by Depo-Provera treatment. Likewise, as the Type II offender blames his behavior on "other" forces, the individual would probably not be responsive to treatment which focuses on sexual feelings rather than non-personal forces. Finally, the Type III compulsive sex offenders, hostile rapists and those who commit sex crimes motivated by power or anger are not amenable to treatment with Depo-Provera.⁴³ As these offenders are generally acting out of other criminal impulses, therapy which concentrates on the diminution of one's sex drive holds little promise for this group.

On the other hand, an individual who feels remorse or guilt, but who is unable to "control" his behavior is more likely to respond to Depo-Provera treatment and counseling than the individual with little regard for the damage he has done. As such, experts have found Type IV offenders excellent candidates for Depo-Provera, claiming that treatment is highly effective in controlling "unremitting fantasies and the cessation of unwanted sexual acting out."⁴⁴ It is therefore critical that the sex offender considered for treatment go through a painstaking process of screening and evaluation to ascertain his amenability to treatment. Once properly diagnosed, the offender, if he consents, can undergo treatment. If consent is not forthcoming, or if the offender is an inappropriate candidate, other alternatives must be considered.

PROBATION

According to the Supreme Court, 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 from burning at the time of the imposition of the sentence."⁴⁵ In other words, probation reflects the overriding concern with the rehabilitation of the offender.⁴⁶ A condition of probation is acceptable if it is rationally related to the rehabilitation of the offender, protects the public against subsequent offenses, deters future misconduct or condigns

42. Comment, 22 San Diego L Rev at 582 (cited in note 4).

43. Once properly diagnosed, the offender may be legally treated with Depo-Provera. Depo-Provera is not experimental and can be prescribed by any physician under the Food and Drug Administration Guidelines. Berlin, 17 Bull Am Acad Psychiatry Law at 235 (cited in note 19).

44. Comment, 22 San Diego L Rev at 582 (cited in note 4).

45. *US v Murray*, 275 US 347, 358 (1928).

46. *United States v Tonry*, 605 F2d 144, 148 (5th Cir 1979).

punishment.⁴⁷

Opponents to the use of Depo-Provera assert that requiring such treatment as a probation condition is unacceptable. First, critics profess that Depo-Provera treatment is unrelated to the accused's behavior to the extent that rape is a crime of hatred and anger.⁴⁸ Insofar as Depo-Provera only temporarily reduces the offender's sex drive, it is unrelated to the accused's future criminality.⁴⁹ Second, critics urge that probation requirements must be performable during the probation period; Depo-Provera, opponents claim, would have to be used for life to be effective.⁵⁰ Finally, opponents argue that the cost and lack of availability should preclude the use of Depo-Provera as a condition of probation.⁵¹

Conversely, advocates of Depo-Provera treatment argue that such treatment should be an acceptable condition of probation for several reasons. First, studies have shown that present rehabilitation approaches, including incarceration, are ineffective agents for deterring future crime.⁵² Nationally, convicted rapists serve an average of less than six years in jail, and incarceration tends to "mask" rehabilitation.⁵³ Incredibly, studies show that as many as 59 percent of individuals treated by incarceration alone repeat their crimes.⁵⁴ Second, as medical research has shown that Depo-Provera treatment is effective only in certain offenders (sex offenders driven by overwhelming sexual fantasies), violent sex offenders, acting vis-a-vis rage, anger and hatred are unacceptable candidates for treatment. Finally, judicial acceptance of Depo-Provera therapy as a probation condition should result in increased availability and treatment, which, in conjunction with counseling, would not have to be administered for life. Moreover, treatment with Depo-

47. *Tonry*, 605 F2d at 148.

48. William Green, *Depo-Provera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues*, 12 U Dayton L Rev 1, 13 (1986).

49. Green, 12 U Dayton L Rev at 13.

50. *Id.* at 14. Green argues that since treatments do not permanently eradicate or diminish sexual potency and that since the offender may obtain testosterone illegally to restore sex drive, an offer of probation would have to be conditioned on lifetime treatment. *Id.* But see contra, Fitzgerald, 18 Am J Crim L at 17 (the offender cannot counteract the effect of Depo-Provera by taking testosterone supplements).

51. *Id.*

52. See Laurence French, *A Practitioner's Notes on Treating Sexual Deviance*, 68 Psychological Reports 1195, 1196 (1991).

53. Besharov and Vachhs, *ABA Journal* at 42 (cited in note 18).

54. S. Steven Yang, *Treatability of the Sex Offender: Considerations of Etiology, Pathology and Treatment in Repealing Sexually Dangerous Offender Statutes*, 8 Med Law 319, 323 (1989).

Provera can easily be administered and monitored.⁵⁵

INVOLUNTARY TREATMENT AND INFORMED CONSENT

The context in which Depo-Provera treatment is given is critical to both its legality in treating sex offenders and to its ethical usage. With this in mind, it is unlikely that a state can force an offender to accept Depo-Provera treatment without violating the offender's rights. This is especially true given that probation cannot be imposed unless the offender knowingly and voluntarily accepts it.⁵⁶

In *Canterbury v Spence*,⁵⁷ the court stated that "the root premise [of the doctrine of informed consent] is the concept, fundamental in American Jurisprudence, that 'every human being of adult years and sound mind has a right to determine what shall be done with his own body. . .'"⁵⁸ In making an informed decision regarding treatment, the offender must be given an opportunity to intelligently weigh the options available and the risks associated on each.⁵⁹ Thus, the doctrine of informed consent requires that the defendant be told all relevant information regarding treatment, including any material risks to his well-being.⁶⁰

If a judge offers a convicted sex offender Depo-Provera treatment as a condition of probation, the standards established in *Canterbury* provide definitive instruction for fully informing the offender. For instance, the offender should be told the short-term physiological side effects and benefits of treatment. Additionally, the offender is presumably entitled to know certain statistical factors, such as recidivism rates. For example, if Depo-Provera is provided to the offender, he will not only be spared the debilitating effects of incarceration, but also is more likely to be rehabilitated and less likely to repeat the crime. Ergo, the offender can return to the community where he can readjust to society and can maintain social and family ties. Without treatment, however, the offender

55. One author suggests that the offender be responsible to arrange for treatments with a physician. If the offender fails to receive treatment, the probation department would be notified and probation revoked. Fitzgerald, 18 Am J Crim L at 16-17 (cited in note 36).

56. Green, 12 U Dayton L Rev at 15 (cited in note 48).

57. 464 F2d 772, 780 (DC Cir 1972), cert denied, 409 US 1064 (1972).

58. *Canterbury*, 464 F2d at 780, citing *Schloendorff v Society of New York Hospital*, 211 NY 125, 105 NE 92, 93 (1914).

59. *Canterbury*, 464 F2d at 780.

60. *Id.* A risk is material when "a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy." *Id.* at 787.

must face incarceration. If incarcerated, the offender may not be rehabilitated and the potential for recidivism cannot be eliminated.⁶¹ In fact, the offender may very well continue to pose a threat to society as a whole.⁶²

A second hurdle also exists with respect to informed consent, i.e., that consent must be made freely and voluntarily. Specifically, it has been questioned whether an individual facing incarceration can provide voluntary consent to accept treatment knowing that refusal will lead to imprisonment.⁶³ Admittedly, such a decision can be difficult, and in fact, some courts have recognized the possibility of inherent coercion with respect to the ability of an involuntarily committed individual to give consent. An individual does not necessarily lose his/her capacity to choose, however, just because a decision is difficult.⁶⁴

In general, courts have concluded that the less invasive the treatment, the more inclined the court will be to find that consent is voluntary.⁶⁵ In *Kaimowitz v Michigan Dept. of Mental Health*,⁶⁶ the court held that an involuntarily committed mental patient could not consent to experimental psychosurgery when the offender's release might depend on his consent. The court identified three factors to determine if consent was informed: competence, knowledge and voluntariness.⁶⁷ Based on these factors, the court concluded that (1) since the offender had been incarcerated for fifteen years, his decision-making ability had eroded; (2) that there was not enough information pertaining to "experimental psychosurgery"; and (3) that the inequality of bargaining power between the parties in an inherently coercive institutional environment made the offender unable to give consent.⁶⁸

While it is true that a convicted sex offender is faced with only two options, either incarceration or treatment, it does not necessarily follow that the offender is unable to give consent. In *Kaimowitz*, the risks of experimental surgery clearly outweighed

61. See French, 68 Psychological Reports 1195 (cited in note 52).

62. *Id.*

63. Besharov and Vachhs, ABA Journal at 43 (Cited in note 18).

64. For example, cancer patients are often faced with a choice between accepting unpleasant chemical agents or dying.

65. Fitzgerald, 18 Am J Crim L at 22 (cited in note 36).

66. Civil No 73-19434-AW (Cir Ct, Wayne County, Mich, July 10, 1973), summarized in 42 USLW 2063 (July 31, 1973); Note, *Kaimowitz v Department of Mental Health: A Right to be Free from Experimental Surgery*, 54 BU L Rev 301 (1974).

67. Note, 54 BU L Rev at 314-18.

68. *Id.*

the benefits. With regard to Depo-Provera, however, there is no reason to believe that the offender cannot make an informed choice. First, if treatment is offered immediately, then the possibility that the defendant's decision-making ability will diminish via long-term imprisonment is avoided.

Second, unlike "experimental psychosurgery," there is a substantial amount of research data and complete medical studies with regard to Depo-Provera treatment. Thus, it is clear that Depo-Provera treatment works and, in fact, has resulted in recidivism rates of less than 5 percent.⁶⁹ Moreover, the uncertainties posed by experimental surgery are eliminated. Nor does Depo-Provera have the same magnitude of dangerousness, intrusiveness or irreversibility of benefit to the patient and to society as does experimental surgery. It can also be argued that administering therapeutic medication to a willing convict is very different than using him to study the effects of a drug or medical procedure unrelated to his potential benefit.⁷⁰

Third, the offender does have the option to refuse treatment. Consequently, in cases where the offender chooses to undergo treatment, the defendant's choice is controlling throughout the process. In fact, the defendant has the option to withdraw from treatment at any time even if treatment is considered beneficial.⁷¹

Finally, inequality of bargaining power always exists with respect to the relationship between an offender and the state. Thus, if the accused's consent is negated as being a condition of probation, then all probation conditions should be negated for similar reasons.⁷²

CONSTITUTIONAL CONSIDERATIONS

Sentencing an offender to probation as an alternative to incarceration must occur in a manner consistent with his constitutional rights. These rights implicated by the offer of Depo-Provera treatment generally have a common concern; they involve the common theme of individual freedom. The first, known as freedom of integ-

69. Besharov and Vachhs, ABA Journal at 42 (cited in note 18).

70. See *Bailey v Lally*, 481 F Supp 203 (D Md 1979), wherein prisoners participated in "non-therapeutic" experiments involving the testing of live viruses. The Supreme Court held that conditions of incarceration were not so despotic as to make participation involuntary. *Bailey*, 481 F Supp at 221. Thus, imprisonment alone was not enough to make consent involuntary.

71. *Canterbury*, 464 F2d at 779-83.

72. Fitzgerald, 18 Am J Crim L at 24 (cited in note 36).

erty, involves the individual's right to be free from both mental and physical government interference.⁷³ Mental integrity is the right to be free from state imposed thought control and is protected by the First Amendment and the right to privacy.⁷⁴ Bodily integrity, which is protected by the Eighth Amendment, mandates that an individual be free from cruel and unusual punishment.⁷⁵

The second freedom, known as the freedom of autonomy, involves an individual's right to engage in certain activities. Further divided into its mental and physical elements, mental autonomy involves the right to receive and generate one's own thoughts and is protected by the First Amendment.⁷⁶ Bodily autonomy involves "the freedom to generate behaviors" and is protected by the privacy components of the Fourteenth Amendment.⁷⁷

Eighth Amendment

Although states have broad discretion to punish offenders who violate state laws, this power is, nonetheless, subject to the Eighth Amendment limitation on cruel and unusual punishment. Consequently, whether a state can intrude upon a sex offender's body via treatment with Depo-Provera as a condition of probation depends on the extent that such treatment contravenes the cruel and unusual clause. The answer to that question depends on two factors: (1) whether Depo-Provera, used as a condition of probation, is a treatment or punishment, and (2) whether such condition is cruel and unusual.

In *Rennie v Klein*,⁷⁸ the district court for New Jersey held that a defendant being forced to take medication did not infringe upon his eighth amendment rights because the drug was proven effective and was an integral part of an overall treatment program.⁷⁹ In so holding, the court established a four-prong test to determine whether therapy constitutes treatment or punishment: (1) does the drug have therapeutic value?; (2) is the drug recognized as ac-

73. Comment, *Madness and Medicine: The Forcible Administration of Psychotropic Drugs*, 1980 Wis L Rev 497, 502-3 (1980).

74. Comment, 1980 Wis L Rev at 508.

75. Id at 520.

76. Id at 508.

77. Id.

78. 462 F Supp 1131 (D NJ 1978).

79. *Rennie*, 462 F Supp at 1143. In *Rennie*, the plaintiff, an involuntary patient at Acora Psychiatric Hospital, sought to enjoin defendant psychiatrist from forcibly administering drugs to him in a non-emergency situation. The plaintiff objected to the drug Prolixin, a psychotropic drug, the effects of which last approximately two weeks. Id at 1136.

cepted medical practice?; (3) is the drug a part of an ongoing therapeutic program?; and (4) even though it may have long-term benefits, are the drug's adverse effects unreasonably harsh?⁸⁰

Applying the four part *Rennie* test to Depo-Provera, the drug is arguably a legitimate medical treatment for sex offenders. First, Depo-Provera offers a great therapeutic value; it reduces the level of testosterone, thus relieving the defendant from an urge that was formerly "insistent, commanding and not subject to voluntary control."⁸¹ Second, Depo-Provera is not considered experimental and is only administered with medical supervision.⁸² Moreover, Depo-Provera has become increasingly accepted. In fact, one author noted that there has been a "growing willingness of judges to condition probation or reduce sentences based upon the offender's participation in such treatment."⁸³ Third, Depo-Provera is administered as part of an ongoing therapeutic process. The treatment eradicates the offender's compulsive sexual drive and makes him more amenable to therapy which in turn allows the offender to continue alignment of his life. Finally, the benefits of Depo-Provera treatment far outweigh any adverse side-effects. For, while the offender may experience some short term effects, there apparently are no long term side effects.⁸⁴ Moreover, the sexually inhibiting functions and suppression of the sex drive are only temporary. Thus, unlike physical castration or vasectomy, the effects are reversible; full sexual drive, fantasy, and function return to the offender within 7-10 days following cessation of treatment.⁸⁵

Given that Depo-Provera has been reported to be "the most effective form of clinical management for the sexual offender on probation,"⁸⁶ and is no longer an experimental procedure, certainly the use of Depo-Provera as a condition of probation can be classified as treatment rather than punishment. Federal court decisions, however, have virtually eliminated any distinguishment between treatment and punishment for the purpose of Eighth Amendment

80. *Rennie*, 462 F Supp at 1143.

81. See, Melella, 17 Bull Am Acad Psychiatry Law at 225. (cited in note 3).

82. See note 43 and accompanying text.

83. Yang, 8 Med Law at 322 (1989) (cited in note 54).

84. The fact that long-term side effects are unknown could pose a potential drawback in cases wherein the argument is raised that prisoners are being subject to experimentation. However, in light of the voluminous literature and case studies of the effect of Depo-Provera, and considering that treatment is suggested only where consent is given, the success of the "being subject to an experiment" argument is minimal at best.

85. See notes 19-31 and accompanying text.

86. Fitzgerald, 18 Am J Crim Law at 17 (cited in note 36).

analysis. For example, in *Knecht v Gillman*, the Court of Appeals for the Eighth Circuit held that it was cruel and unusual punishment when a behavioral modification program at a medical facility for criminally insane used a drug which induced vomiting.⁸⁷ The court found that because vomiting was a painful and debilitating experience, the drug had no therapeutic value.⁸⁸

Similarly, in *Mackey v Proconier*, the Ninth Circuit court ruled that injecting inmates with Succinylcholine, a paralysis inducing drug, was cruel and unusual punishment.⁸⁹ The court indicated that since Succinylcholine was not recommended for fully conscious patients, the staff could potentially employ psychiatry experimentation without the patients' consent.⁹⁰ Consequently, Depo-Provera treatment must also be analyzed as a form of punishment.

The Supreme Court has enunciated three separate tests which address whether punishment is cruel and unusual under the Eighth Amendment. The first test, whether the punishment is inherently cruel,⁹¹ must be judged by the standards of modern society and the effects on the offender.⁹² While surgical castration arguably is "inherently cruel," Depo-Provera treatment is not. First, the treatment does not permanently mutilate the body and involves only a simple injection. Second, there are no known long-term effects which affect the offender's future and physiological changes are reversible with cessation of treatment. Finally, the drug is not experimental and does not have to be administered for the life of the offender to be effective.⁹³

The second test employed by the Court asks whether the punishment is commensurate to the offense for which it is imposed.⁹⁴ This test, which views the seriousness of the punishment in relation to the gravity of the offense, would again pass Eighth Amendment muster. First, insofar as the offense is viewed as the result of a sexual illness and not an act of violence, Depo-Provera therapy provides a more logical approach to "curing" the offender than does incarceration. If the offender accepts Depo-Provera treat-

87. 488 F2d 1136 (8th Cir 1973).

88. *Knecht*, 488 F2d at 1139-1140.

89. 477 F2d 877 (9th Cir 1973).

90. *Mackey*, 477 F2d at 878.

91. This test was first applied in *Trop v Dulles*, 356 US 86 (1958).

92. *Gregg v Georgia*, 428 US 153, 173 (1976).

93. See contra, Green, 12 U Dayton L Rev at 22 (cited in note 48).

94. This test was first applied in *Weems v United States*, 217 US 349 (1910).

ment, he can reenter society with state supervision, and he will receive the needed attention to control his behavior. Second, the treatment is not excessive because it can be discontinued at the end of the probation period. Furthermore, the drugs' effects are fully reversible. Consequently, at least one court has held that probation with treatments is too lenient and disproportional to sentences for similar offenses.⁹⁵

Under the third test,⁹⁶ the Court must determine whether the punishment is excessive in relation to the accomplishment of the states' legitimate aims. As the offender is relieved of his former sexual urges with Depo-Provera, clearly there is no threat to society. Additionally, the practical value in accomplishing the states' goal of reducing the incidence of rape cannot be accomplished by less intrusive methods. Depo-Provera treatment, coupled with therapy, is more likely to lead to rehabilitation than incarceration alone, which in turn provides greater long-term safety for society.

Privacy Interests

In 1965, the Supreme Court formally announced the right to privacy in *Griswold v Connecticut*.⁹⁷ Through the Due Process Clause

95. *People v Gauntlett*, 134 Mich App 737, 755, 352 NW2d 310, 318 (1984). In *Gauntlett* (see note 5), the court indicated that the trial judge abused his discretion because the defendant's sentence was "so significantly disproportionate to the [harsher] sentences generally imposed on similarly situated defendants." *Id.*

96. This test was first applied in *Furman v Georgia*, 408 US 238 (1972). Justice Brennan stated the test as follows:

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 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.

Furman, 408 US at 282.

97. 381 US 479 (1965). The Court offered a number of rationales for the right of privacy. One view indicated that various guarantees in the Bill of Rights created zones of privacy. The 1st Amendment protects the right of association with the related privacy, the 3rd Amendment protects privacy of the home. The 4th and 5th Amendments protect other facets of privacy including the sanctity of the home. The 9th Amendment protects rights retained by the people. *Griswold*, 381 US at 484, Douglas J. plurality). Another view found that the 9th Amendment expressly recognized fundamental personal rights not specifically mentioned in the Constitution. To determine which rights are fundamental, judges must look to traditions and the collective conscious of people. *Id.* at 493 (Goldberg, Brennan and Warren, concurring). Another view found the right to privacy inherent in the 14th Amendment's "concept of ordered liberty" which protects fundamental rights. *Id.* at 500 (Harlan, concurring).

of the Fourteenth Amendment, the right to privacy also applies to state action.⁹⁸ Inherent in this right of privacy is the protection of bodily autonomy, which includes a prima facie right to procreative freedom, the right to refuse intrusive medical treatment, and possibly the right to treatment.

1. *The Right to Procreative Freedom*

The Supreme Court has recognized that the right to procreate is "one of the basic civil rights of man."⁹⁹ Procreation has also been termed to be "fundamental to the very existence and survival of the race."¹⁰⁰ This sexual privacy right can be traced to *Skinner v Oklahoma*,¹⁰¹ wherein the Court held that forced sterilization of habitual criminals invaded an individual's right to privacy in marriage and procreation.

Opponents of Depo-Provera treatment urge that, like forced sterilization in *Skinner*, the effect of Depo-Provera intrudes upon one's procreative freedom by its effect on the male sex drive.¹⁰² While agreeing that the state has a fundamental interest in protecting society from sex offenders, critics maintain that such protection must be accomplished by the least restrictive means.¹⁰³ Moreover, the means employed must be rationally related to the end sought. On both grounds, critics contend Depo-Provera treatment fails.¹⁰⁴ Specifically, critics argue that (1) imprisonment would be a less restrictive alternative to Depo-Provera treatment and (2) Depo-Provera treatment as a probation condition would not pass constitutional scrutiny.¹⁰⁵ Noting that government action must advance a legitimate state interest achieved by a means reasonably related to that goal, opponents urge that Depo-Provera cannot rationally achieve the goal in the absence of proof of diminished frequency of rape.¹⁰⁶

While surgical castration, like a vasectomy, clearly eliminates the ability to procreate, proponents of Depo-Provera urge that treatment with Depo-Provera does not intrude upon the offender's

98. *Bowers v Hardwick*, 478 US 186, 190 (1986).

99. *Skinner v Oklahoma*, 316 US 535, 541 (1942).

100. *Skinner*, 316 US at 541.

101. 316 US 535, 541-2 (1942).

102. Green, 12 U Dayton L Rev at 24-5 (cited in note 48).

103. *Id.*

104. *Id.*

105. *Id.* at 25.

106. *Id.*

rights insofar as consent is given.¹⁰⁷ In the first instance, Depo-Provera treatment does not eliminate the capacity for intercourse.¹⁰⁸ Furthermore, the effects of Depo-Provera treatment are only temporary and any reduced ability to procreate would return to normal upon discontinuing treatment. Moreover, if the offender was incarcerated, he would be deprived of any conjugal rights anyway. Additionally, advocates have indicated that Depo-Provera treatment does reduce sex crimes because it is "clearly effective during active treatment."¹⁰⁹

2. *The Right to Refuse Medical Treatment*

An individual's privacy interest encompasses a right to bodily autonomy that includes a prima facie right to refuse intrusive medical treatment.¹¹⁰ This right, however, is not absolute; the individual's liberty interest must be balanced against the state's interest in compelling medication. Those state interests considered to outweigh the individual's liberty interest include: (1) the protection of life; (2) the prevention of suicide; (3) the protection of innocent third parties; and (4) the protection of the medical profession.¹¹¹

Those desiring to administer Depo-Provera to offenders as a condition of probation could invoke the third interest, that of protecting innocent third parties. Evidence indicates that incarceration alone does not "cure" the offender and ironically, often serves to intensify the offender's desires to commit such crimes.¹¹² Thus, incarceration alone only serves to protect innocent third parties during the period in which the offender is incarcerated. Upon release, the offender may pose an even greater threat to innocent third parties than he did before being incarcerated.

In contrast, Depo-Provera treatment quells those sexual desires which give rise to the offenses. Rather than imprisoning an offender in an environment which accentuates his dysfunction, the administration of Depo-Provera, while on probation, enables an offender to learn to function in society in a more acceptable manner and ultimately proves less harmful to innocent third parties. Essentially, if

107. Fitzgerald, 18 Am J Crim Law at 44 (cited in note 36).

108. Melella, 17 Bull Am Acad Psychiatry Law at 225 (cited in note 3).

109. Fitzgerald, 18 Am J Crim L at 44 (cited in note 36).

110. See *Rennie v Klein*, 720 F2d 266 (1983); *Rogers v Okin*, 478 F Supp 1342 (D Mass 1979).

111. *Harper v State*, 110 Wash 2d 873, 759 P2d 358, 364 (1988).

112. See generally Besharov and Vachhs, ABA Journal (cited in note 18); French, 68 Psychological Reports 1195 (cited in note 52).

the state's interest is truly to protect the public from future sex crimes, then "rehabilitation" cannot be achieved by less intrusive means. Clearly, confinement is far more intrusive on the offender's liberty than Depo-Provera treatment.

3. *The Right to Treatment*

The Courts first acknowledged a constitutional right to treatment in *Wyatt v Stickney*.¹¹³ In *Wyatt*, a federal district court, considering treatment for mental patients, indicated that "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process."¹¹⁴ Essentially, since involuntary commitment represents a decrease in individual liberty, such confinement can be justified only if the state provides rehabilitative treatment.¹¹⁵

In *Arizona v Christopher*, a repeat child-molester argued that being placed on probation constitutionally entitled him to be effectively treated and rehabilitated.¹¹⁶ The Arizona Supreme Court denied the defendant any right to effective treatment, holding that being placed on probation does not constitutionally entitle a sex offender to be effectively treated and rehabilitated with Depo-Provera.¹¹⁷ The court indicated that while rehabilitation is one goal of penal sanctions, other goals of punishment must not be ignored.¹¹⁸ Thus, to preserve order, society should consider other factors such as retribution, restraint of the offender to prevent future criminal acts, and deterrence of the general population from engaging in crime.¹¹⁹

In fact, in light of the Supreme Court decision in *Youngberg v Romeo*, the Supreme Court has been somewhat more reluctant to posit a constitutional right to treatment.¹²⁰ Thus, whether an indi-

113. 325 F Supp 781 (MD Ala 1971).

114. *Wyatt*, 325 F Supp at 785.

115. *O'Connor v Donaldson*, 422 US 563, 573-76 (1975).

116. 133 Ariz 508, 652 P2d 1031 (Az 1982). In *Christopher*, the defendant was put on probation for child molestation. His probation was revoked after defendant violated the conditions thereof by committing more child molestations. Defendant plead guilty to six of the violations committed while on probation and was sentenced to 25 years to life. Defendant argued that the state of Arizona had denied him his right to medical treatment when it did not require him to undergo chemical castration and behavior modification. This, the defendant contended, precluded the imposition of such a long prison sentence.

117. *Christopher*, 652 P2d at 1034-35.

118. *Id* at 1033.

119. *Id*.

120. 457 US 307 (1982). In *Youngberg*, Respondent was a mentally retarded individual

vidual has the right to treatment with Depo-Provera as an extension of due process remains unanswered. In *Youngberg*, Justice Powell, writing for a unanimous Supreme Court, indicated that ". . . the State concedes a duty to provide adequate food, shelter, clothing, and medical care. These are the essentials of the care that the State must provide."¹²¹

Although *Youngberg* involved the right to rehabilitation of a civilly committed mentally retarded individual, it can be applied by analogy to the sex offender. In *Youngberg*, the court indicated that the state was required to rehabilitate the individual with "minimally adequate or reasonable training."¹²² Thus, to the extent that Depo-Provera causes cessation of sexually offensive acts, vis-a-vis reduction in testosterone production, as some have suggested, then, arguably, Depo-Provera treatment is a minimally adequate treatment which could prevent the offender from having to be imprisoned. In fact, at least two courts have ruled that the state could not refuse to allow an inmate, convicted of rape, to receive Depo-Provera treatment which had been deemed medically appropriate.¹²³

However, if the state is required to provide only "essential medical care" for incarcerated individuals, it is doubtful that the state would be required to offer Depo-Provera to non-incarcerated persons. In fact, unless Depo-Provera can be categorized as "essential medical care," it is unlikely that such treatment would be required.¹²⁴

First Amendment

Conditional probation is also subject to First Amendment scru-

committed to Pennhurst State Hospital. Respondent's mother filed an action on behalf of Respondent, alleging that Respondent had a constitutional right to safe conditions of confinement, freedom from bodily restraint and training or "habilitation". Respondent further argued that the institutions failure to take preventive procedures after learning of his injury constituted a violation of the Eighth and Fourteenth Amendments. The Supreme Court held that the Respondent had a constitutionally protected liberty interest under the Fourteenth Amendment Due Process Clause to reasonably safe conditions of confinement, free from unreasonable bodily restraint and minimally adequate training. *Youngberg*, 457 US at 307.

121. *Id* at 324.

122. *Id* at 319.

123. See *Paoli v Galley*, Kaufman, J. Civil #K-74-476 (D Md, May 1975); *McDonald v Warden, State Prison (Connecticut)*, #32654, Judicial Dist of Hartford, New Britain (1983). Cited in Berlin, 17 Bull Am Acad Psych Law at 237 (cited in note 19).

124. Conversely, Depo-Provera treatment solely on a voluntary basis is still a viable alternative to incarceration.

tiny. The First Amendment right to freedom includes a guarantee of mental autonomy as well as expression, and, within its penumbra, a right to privacy.¹²⁵ The Supreme Court in *Stanley v Georgia*¹²⁶ recognized that free speech includes the "right to receive information and ideas, regardless of their social worth."¹²⁷ Specifically, the court stated that:

Our whole constitutional heritage rebels at the thought of [giving] government the powers to control men's minds . . . whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.¹²⁸

Subsequently, in *Kaimowitz v Department of Mental Health*,¹²⁹ the Court acknowledged that the First Amendment protects the free flow of ideas from unwarranted intrusions with individual mental processes.¹³⁰ Although treatment with Depo-Provera interferes with mentation by decreasing sexual fantasy, the First Amendment does not prohibit all intrusion on mental autonomy. In *Rennie v Klein*, a case involving forced administration of psychotropic drugs to mental patients, a federal district court ruled that the determination of whether a drug intrudes upon an individual's freedom to think or upon his right of privacy is dependent upon the length and persistence of the drugs' effect on the individual's ability to think and speak.¹³⁰

Measured by the *Rennie* effects test, Depo-Provera treatment arguably is not so intrusive as to violate the offender's First Amendment rights. In the first instance, the effects of Depo-Provera are reversible and are effective only during administration; the effects of the drug cease with termination of treatment. Furthermore, Depo-Provera does not alter the physiological functioning of the mind, but rather only affects one's intensity and preoccupation with compulsive sexual fantasy and restores thoughts to the boundaries of normalcy. In fact, Depo-Provera actually expands the offender's capacity to generate thoughts, because it frees him from compulsive fantasy. However, the offender can still think about and engage in sex while undergoing treatment. Finally,

125. *Griswold v Connecticut*, 381 US 479 (1965).

126. 394 US 557 (1969).

127. *Stanley*, 394 US at 564.

128. *Id* at 565-566.

129. 299 F Supp 117 (SD NY), (1969).

130. Note, 54 BU L Rev at 303, 328-31 (cited in note 66).

130. 462 F Supp 1131, 1143-44 (D NJ 1978).

Depo-Provera cannot be administered without the conscious cooperation to the offender.

CONCLUSION

In today's society, it is abundantly clear that incarceration alone is an insufficient deterrent for the sex offender. The occurrence of sexually deviant crimes continues to rise as more and more offenders are leaving the prison milieu with little or no treatment. Thus, with the criminal justice system floundering, the state needs to consider new ways to control sexual offenders.

Depo-Provera is presently the only treatment which has demonstrated itself to be an effective and highly successful tool in diminishing sexual paraphilia. Not only does the drug allow the offender to experience relief from obsessive sexual urges, but it also permits the offender to become more amenable to therapy. This in turn will make the offender safer to society and himself and less likely to repeat his crimes.

With the increase of judicial acceptance, it is clear that Depo-Provera has and will become an important adjunct to the treatment of certain sex offenders. When given to fully informed individuals on a voluntary basis, Depo-Provera poses relatively few legal and ethical issues. The offender arguably has the capacity to decide whether or not to undergo treatment, and the administration of Depo-Provera does not violate any of the offender's constitutional rights. Autonomy and integrity remain intact, as the treatment is not so intrusive as to infringe on one's thoughts or ideas. Nor does treatment violate the Eighth Amendment when used for a legitimate medical purpose. Further, given that the offender is presented with a choice, the offender's right to privacy remains sacred.

Based on the foregoing, the state should not deny a convicted sex offender the right to receive treatment when the state's objectives can be achieved safely through this alternative to incarceration. In trying to rehabilitate the offender, the protection of potential victims must be considered. With Depo-Provera treatment, society, as well as the offender, will benefit if the offender can be successfully treated rather than being incarcerated and released unchanged.

As one author suggests:

It must be recognized that the incarceration of paraphiliacs is a futile exercise. Science has provided a treatment which increases the liberty of the offender, deters future crime, provides public safety, facilitates the rehabili-

tation of the offender, and strengthens the legitimacy of the criminal law.¹³¹

In the absence of a proven method of providing long-term protection and security for the community from sexual offenders, the notion of Depo-Provera should be pursued. Depo-Provera is not the modern day "get-out-of-jail-free" card; it is an effective alternative to the traditional methods of the legal system.

Kimberly A. Peters

131. Fitzgerald, 18 Am J Crim L at 60 (cited in note 36).