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Florida's Hormonal Control Statute: Arguments for Constitutionality under Florida's Right of Privacy

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I. INTRODUCTION

Florida's new law,¹ which proscribes the administration of medroxyprogesterone acetate ("MPA")² to sexual battery offenders, became effective in October of 1997. More than one hundred, out of one hundred and twenty members of the House of Representatives, voted for the law, with virtually no debate.³ The lawmakers' vote was bold because, although other states have similar statutes,⁴ none have been challenged.⁵ Therefore, the constitutionality of a law that mandates MPA treatment is still in question. As with any new and untraditional method of crime prevention or rehabilitation,⁶ constitutional challenges are expected. The list of challenges will probably include equal protection,⁷ cruel and unusual punishment,⁸

1. FLA. STAT. § 794.0235 (1997).

2. See discussion *infra* Part IV.

3. Jeremy Wallace, *Chemical Castration Bill Passes in House*, BRADENTON HERALD, Apr. 25, 1997, at L1 (stating that 108 of 120 House of Representatives members voted for the MPA statute).

4. CAL. PENAL CODE § 645 (West 1997); GA. CODE ANN. § 42-9-44.2 (1982); LA. REV. STAT. ANN. § 538 (West 1998); MONT. CODE ANN. § 45-5-512 (1997).

5. Bryan Keene, Note, *Chemical Castration: An Analysis of Florida's New "Cutting-Edge" Policy Towards Sex Criminals*, 49 FLA. L. REV. 803, 804 (1997) (discussing MPA legislation).

6. See generally Kenneth B. Fromson, Note, *Beyond an Eye for an Eye: Castration as an Alternative Sentencing Measure*, 11 N.Y.L. SCH. J. HUM. RTS. 311, 313-17 (1994) (discussing case and legislative history of castration in the United States).

7. Whether or not MPA statutes violate the Equal Protection Clause is an issue because, although a statute may be gender neutral, the drug affects men and women differently. Recent Legislation, *Constitutional Law—Due Process and Equal Protection—California Becomes First State to Require Chemical Castration of Certain Sex Offenders—Act of Sept. 17, 1996, ch. 596, 1996, Cal. Stat. 92 (to be Codified at Cal. Penal Code § 645)*, 110 HARV. L. REV. 799, 801-04 (1997) (arguing that California's hormonal control statute violates the Equal Protection Clause because MPA sterilizes women).

8. See Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 31 (1990) (explaining the history of the Eighth Amendment and why MPA treatments are not cruel and unusual punishment); Larry Helm Spalding, *Florida's 1997 Chemical Castration Law: A Return to the Dark Ages*, 25 FLA. ST. U. L. REV. 117, 130-31 (1998) (contending that hormonal control is cruel and unusual punishment); Jodi Berlin, Note, *Chemical Castration of Sex Offenders: "A Shot in the Arm" Towards Rehabilitation*, 19 WHITTIER L. REV. 169, 188-94, 212 (1997) (discussing the history and legal tests for cruel and unusual punishment and explaining that MPA treatment is not cruel and unusual punishment). MPA is not inherently cruel because the side effects are minimal and reversible. *Id.* at 212. It "is proportional to the offense because it is" sentenced for the same period of time as probation leaving "no arbitrary and excessive use" of MPA. *Id.* It is

double jeopardy,⁹ due process,¹⁰ First Amendment,¹¹ and the right to privacy.¹² Constitutional challenges were apparently anticipated, as evidenced by the inclusion of a clause that protects the statute if part of it is held invalid by providing that the parts that are not invalidated are still good law.¹³

the least restrictive means of accomplishing “deterrence and rehabilitation” because physical castration is more restrictive. *Id.*

9. Spalding, *supra* note 8, at 133–35 (arguing that the statute violates the Double Jeopardy Clause of the Fifth Amendment because a defendant’s withdrawal from treatment results in a violation of probation and a second-degree felony).

10. Due process requires that a condition of probation be reasonably related to the crime that the defendant was convicted of, the prevention of future criminality, or public safety. *Id.* at 131–32 (urging that MPA statute fails the reasonable relationship test required of all probation conditions). “[W]ith regard to non-paraphiliacs and involuntarily-treated paraphiliacs” MPA is not reasonably related to the goals of the statute because incarceration is a “more narrowly tailored means” of accomplishing the state interest of protecting its citizens. *Id.* at 132. The statute indiscriminately mandates MPA, and the statute does not “necessarily prevent future criminality” because it does not address violent tendencies unrelated to sexual drive. *Id.* at 132–33. This analysis is incomplete because it does not incorporate the “medically appropriate” requirement, which will presumably ensure that MPA sentenced defendants are likely to experience a decreased likelihood of re-offense when treated. *See* discussion *infra* Parts III.B, IV.B.

11. Mandatory MPA treatments implicate the issue of whether an individual’s First Amendment right to mental autonomy is violated because MPA decreases sexual fantasies in its recipients. Fitzgerald, *supra* note 8, at 26–31 (discussing the right to mental autonomy and its relation to statutes that proscribe administration of a drug that decreases sexual thoughts). Whether a statute interferes with the mental autonomy guaranteed by the First Amendment depends on the degree of the intrusion. *Id.* Administration of MPA is not so intrusive so as to violate the First Amendment. *Id.* at 28 (detailing an analysis of MPA treatment and the test for determining whether an intrusion violates the First Amendment right to mental autonomy). *See also* Berlin, *supra* note 8, at 186–88, 210–12 (concluding that First Amendment rights are not violated); G.L. Stelzer, Note, *Chemical Castration and the Right to Generate Ideas: Does the First Amendment Protect the Fantasies of Convicted Pedophiles?*, 81 MINN. L. REV. 1675, 1704–09 (1997) (proposing that a new test is needed to determine whether MPA statutes violate the First Amendment).

12. Spalding, *supra* note 8, at 128–30 (arguing that the statute violates the federal right to privacy); Keene, *supra*, note 5, at 813–17 (arguing that the statute violates the right to privacy in the *Florida Constitution*).

13. Ch. 97-184, § 2, 1997 Fla. Laws 3455, 3457 (codified at FLA. STAT. § 794.0235 (1997)). Section two of Chapter 97-184 of the *Laws of Florida* reads as follows:

If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

The department of corrections anticipates that no more than three persons will be eligible for the MPA treatment within the next year.¹⁴ This is probably because not all defendants are medically appropriate for the treatment.¹⁵ Additionally, prison officials do not anticipate the first treatments to begin for years.¹⁶ Defendants sentenced to MPA treatment are not eligible to receive it until approximately one week before the expiration of their prison sentences.¹⁷ It is possible that, by the time the Florida Statute is challenged, there will be a United States Supreme Court opinion addressing a similar statute on a federal right to privacy challenge.¹⁸ Florida courts could then use such an opinion as a guide. In the meantime, however, this is uncharted territory deserving of a constitutional debate.

This article analyzes the new hormonal control statute's validity under Article I, section 23 of the *Florida Constitution*, Florida's right to privacy, and offers non-frivolous arguments for the application and extension of existing law in advancing the proposition that the statute is constitutional. Part II explains why the treatment should not be referred to as chemical castration. Part III provides an overview of the statute. Part IV describes the MPA drug and explains how it decreases recidivism. Part V discusses the federal right to privacy, and Part VI explains Florida's constitutional right to privacy while proposing arguments for its constitutionality.

II. "CONTROL" NOT "CASTRATION"

The administration of medroxyprogesterone acetate is properly phrased "hormonal control" not "chemical castration." The word "castrate" suggests removal of all sexual function. It is of paramount importance to understand that MPA does not castrate, but rather controls and decreases the level of testosterone in the brain, thereby causing the recipient to experience a diminished sex drive.¹⁹

Id.

14. *Drug Castrations May be Years Away*, ORLANDO SENTINEL, June 2, 1997, at C6.

15. See discussion *infra* Parts III.B, IV.B.

16. *Castration Legal, but Not Practiced—Yet*, BRADENTON HERALD, June 2, 1997, at L3.

17. FLA. STAT. § 794.0235(2)(b) (1997) (stating that MPA injections "shall commence not later than one week prior to the defendant's release from prison or other institution.").

18. See Wallace, *supra* note 3.

19. See discussion *infra* Part IV.

A common myth of MPA treatment is that it causes impotence.²⁰ Although the frequency of spontaneous erections may decrease,²¹ MPA recipients are still able to achieve an erection,²² have sex,²³ and father children.²⁴ The phrase “chemical castration” encourages the myth that MPA prevents its recipients from committing a sexual offense by imposing impotence.

The word “castration” conjures up images of medieval ceremonies involving bloody torture tools.²⁵ A medication that controls hormone levels bears no relation to such torture. Yet, those torturous images cannot be separated from the word “castration.” Opponents of MPA, while cleverly using it to create emotional dishevel, correctly define “castration” as “to deprive of the testes,” but fail to establish how decreasing sexual fantasy by controlling levels of testosterone fits that definition.²⁶ The statute does not mention the phrase “chemical castration,” and that phrase should not be used in its description.²⁷ The use of the phrase is prejudicial because it causes emotional uncertainty, and is inaccurate because it does not properly describe MPA treatment. Further, the use of the phrase is unnecessary because the procedure can be called “hormonal control” in order to eliminate this prejudice.

Conceivably, either “hormonal control therapy” or “hormonal control” more accurately and less prejudicially describes the treatment. The role of MPA in treating or “controlling” sexual offenders is to lower sexual libido and the likelihood of a repeat offense by controlling the body’s ability to produce and process testosterone.²⁸ If physical sexual dysfunction, which does not occur in all recipients,²⁹ appears as a side effect, adjusting the

20. Fitzgerald, *supra* note 8, at 7.

21. *Id.* at 7.

22. *Id.*

23. *Id.*

24. Daniel L. Icenogle, *Sentencing Male Sex Offenders to the Use of Biological Treatments*, 15 J. LEGAL MED. 279, 285 (1994).

25. See *Weems v. United States*, 217 U.S. 349, 404 (1910) (explaining that the cruel and unusual punishment clause of the Eighth Amendment was “intended to prohibit the barbarities of . . . castration”).

26. Keene, *supra* note 5, at 803 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 349 (1993)).

27. See FLA. STAT. § 794.0235 (1997).

28. See discussion *infra* Part IV.

29. See discussion *infra* Part IV.

dosage can reverse it.³⁰ Clearly, “hormonal control” is the correct way to describe MPA treatment.

III. THE HORMONAL CONTROL STATUTE

A. *The MPA Sentence*

Section 794.0235 of the *Florida Statutes* alters sentencing guidelines for sexual battery defendants to include weekly injections of medroxyprogesterone acetate.³¹ The injections are in addition to, not instead of, any prison sentence incurred by the same offense.³² Depending on the particular defendant’s past criminal history, the judge “may” or “shall” sentence the defendant to undergo the treatment after release from prison.³³ For first-time sexual battery offenders, the judge has discretionary power to impose the injections.³⁴ If the offender, however, has a prior sexual battery conviction, MPA treatment is mandatory.³⁵ In either case, when the judge is determining the duration of the treatment, he or she can specify a specific number of years or has discretion to order the treatment to continue for the life of the defendant.³⁶

B. *The Medical Expert and Medically Appropriate Requirement*

Judges do not retain complete autonomy in sentencing offenders to hormonal control. The requirement that a medical expert must determine the defendant to be an appropriate candidate for the MPA treatment significantly reduces the judge’s power to impose the sentence.³⁷ Any defendant sentenced to MPA must be a medically appropriate candidate at the start of the treatment and throughout the course of the injections.³⁸ In other words, a defendant must be a medically appropriate candidate at all times to be eligible for MPA.³⁹ Unfortunately, the lawmakers did not define “medically

30. Berlin, *supra* note 8, at 181 (citing AMERICAN HOSPITAL FORMULARY SERVICE, 96 DRUG INFORMATION 2333, 2333 (Gerald K. McEvoy ed., 1996)).

31. FLA. STAT. § 794.0235 (1997).

32. *Id.* § 794.0235(1)(b).

33. *Id.* § 794.0235(1)(a)(b).

34. *Id.* § 794.0235(1)(a).

35. *Id.* § 794.0235(1)(b).

36. FLA. STAT. § 794.0235(2)(a) (1997).

37. *Id.*

38. *Id.* § 794.0235(2)(a), (3).

39. *Id.* § 794.0235(3).

appropriate.”⁴⁰ The logical interpretation is that a defendant is a medically appropriate candidate if the medical expert determines that MPA will produce the desired effect if administered. The desired effect is a decrease in the recipient’s sexual libido.⁴¹ This interpretation would exclude women completely because MPA is a widely used female contraceptive and does not significantly affect a woman’s libido.⁴² ;

C. *The Alternatives*

The statute permits defendants to refuse the treatment by allowing two alternatives.⁴³ First, a defendant may submit a motion to the court for physical castration instead of hormonal control.⁴⁴ This motion gives the judge the power to levy a physical castration sentence in lieu of the MPA.⁴⁵ The second option is to simply refuse hormonal control and stay in jail.⁴⁶ Refusal by a sentenced offender to undergo treatment is a second-degree felony.⁴⁷ This option to refuse treatment remains available throughout the course of treatment, and the defendant may at any time choose to discontinue the hormone control therapy and return to prison.⁴⁸

The Department of Corrections provides the services needed to administer the treatment to the defendant.⁴⁹ The weekly injections begin one week prior to the defendant’s release from prison, and continue through the duration of the term specified by the sentencing judge.⁵⁰ It is estimated that the treatments will cost the Department of Corrections \$2000 per year for each defendant, plus any incidental costs of staffing and additional facilities.⁵¹

40. *Id.*

41. *See* discussion *infra* Part IV.

42. Recent Legislation, *supra* note 7, at 800.

43. FLA. STAT. § 794.0235(2)(a), (5) (1997).

44. *Id.* § 794.0235(1)(b).

45. *Id.*

46. *Id.* § 794.0235(5).

47. *Id.*

48. *See* FLA. STAT. § 794.0235 (1997).

49. *Id.* § 794.0235(3).

50. *Id.* § 794.0235(2)(a).

51. *Drug Castrations May Be Years Away*, *supra* note 14.

IV. MEDROXYPROGESTERONE ACETATE

A. MPA Therapy Generally

Proper analysis of the hormonal control statute requires an understanding of what MPA is, on whom it will work, how it works, and how it affects its recipient. When analyzing a statute calling for mandatory medical treatment, issues such as effectiveness and adverse side effects are important to determine whether the treatment is the least intrusive means of accomplishing the statute's goal.⁵² For example, if the drug does not accomplish the desired effects, it fails the least intrusive method requirement because the least intrusive means of achieving nothing is nothing. Accordingly, if a drug capable of achieving the desired results on certain individuals is mandated for individuals not within that class, the drug, in effect, does nothing, and is not the least intrusive means of producing that result. In essence, if the drug does not accomplish the purported goal of the law, it is not necessarily related to the state interest involved. Understanding possible and probable side effects is required to fully anticipate the degree to which administration of a drug will infringe on a person's private life and make a decision as to whether other methods are less invasive in accomplishing the government's goal.

MPA, more commonly known as Depo-Provera, a non experimental⁵³ synthetic hormone, is the most commonly used hormonal control drug.⁵⁴ When administered to males intravenously on a weekly basis, it decreases uncontrollable sexual libidos by controlling testosterone levels.⁵⁵ MPA alleviates the amount of testosterone in the body by increasing testosterone metabolism in the liver and reducing the amount of testosterone produced by the testes.⁵⁶ This induces a tranquilizing effect on the brain, relieving the recipient of his unmanageable sexual impulses by decreasing the frequency of sexual fantasies.⁵⁷

52. See discussion *infra* Parts VI.C.4, IV.D.4.

53. Fitzgerald, *supra* note 8, at 6.

54. Icenogle, *supra* note 24, at 284.

55. *Id.* at 284.

56. Stelzer, *supra* note 11, at 1683–84. See generally Icenogle, *supra* note 24, at 283–84 (explaining the “physiology of male sex hormones”).

57. Stelzer, *supra* note 11, at 1684.

B. *The Paraphiliac*

Research shows that MPA reduces recidivism for sexual offenders suffering from a paraphiliac disorder.⁵⁸ Paraphiliacs exhibit “a pattern of sexual arousal, erection and ejaculation,” commonly formalized by a “specific fantasy or its actualization.”⁵⁹ This means that the individual achieves sexual excitement from a particular fantasy or by acting out that fantasy in real life.⁶⁰ For example, a pedophile with a paraphiliac disorder would become sexually aroused by a fantasy involving sexual relations with a child or by actually having sexual relations with a child.⁶¹

When attempting to diagnose a paraphiliac disorder, a doctor typically relies on whether “persistent fantasies about some type of deviant sex” are present.⁶² If these fantasies are not satisfied, the individual experiences “intense cravings” which, if left unfulfilled, will cause the individual to suffer “negative feelings.”⁶³ In other words, paraphiliacs have a fantasy about some type of non conventional, possibly illegal, sexual act.⁶⁴ The fantasy is beyond the individual’s control, in so far as he cannot change it or prevent himself from having it.⁶⁵ If the individual fails to act out the fantasy in real life, he suffers some degree of mental anguish.⁶⁶ If the pedophile from the earlier example resisted the urge to have sexual relations with a child, as dictated by his fantasy, he would suffer “intense cravings” to fulfill the fantasy, which would ultimately cause him mental suffering.⁶⁷

The paraphiliac’s past probably includes “manifested stereotyped sexual activity because satisfaction of these cravings requires precise recreation of the fantasy.”⁶⁸ This means that, at some point, the individual has probably acted out his exact fantasy in real life because the cravings suffered as a result of the fantasies can only be satisfied if the fantasy is

58. Icenogle, *supra* note 24, at 285 (discussing research conducted by the Johns Hopkins Sexual Disorders Clinic).

59. Fitzgerald, *supra* note 8, at 4.

60. *Id.*

61. *See id.*

62. Icenogle, *supra* note 24, at 281 (citing Berlin & Meincke, *Treatment of Sex Offenders with Antiandrogenic Medication: Conceptualization, Review of Treatment Modalities and Preliminary Findings*, 138 AM. J. PSYCHIATRY 601, 601 (1981)).

63. *Id.*

64. *Id.*

65. *See id.*

66. *See id.*

67. *See* Icenogle, *supra* note 24, at 281.

68. *Id.*

precisely recreated.⁶⁹ In terms of the pedophile example, only a child partner can fulfill the urges imposed by the fantasy of having sexual relations with a child.⁷⁰ An adult partner would prevent precise recreation of the fantasy and would not temper the unmanageable “intense cravings.”⁷¹ The fantasies and the corresponding behavior remain for an indefinite period and tend to stay the same over time.⁷² In terms of paraphiliacs experiencing an illegal fantasy, this is bad news because it makes them extremely likely to commit the crime in the same manner yet again.⁷³

In the case of a paraphiliac, his fantasy is his enemy because his fantasy is the catalyst that causes him to engage in the fantasized sexual activity, which might be illegal.⁷⁴ Denied of his fantasy, he would have “intense cravings,” requiring real life actualization of the sexual acts depicted in the fantasy and his future would be less likely to include “manifested stereotyped sexual activity.”⁷⁵ MPA denies the fantasy.⁷⁶ By decreasing the amount of testosterone in the body, MPA sedates the brain and interrupts sexual fantasies, including those perpetuating the cravings for illegal sex, causing the sex drive and accompanying cravings to decrease.⁷⁷ This increases the offenders ability to control otherwise uncontrollable sexual impulses.⁷⁸

Because not all sexual offenders are paraphiliacs,⁷⁹ the hormonal control statute accounts for this discrepancy in effectiveness by allowing administration of the drug to only those defendants deemed medically appropriate for treatment by a medical expert.⁸⁰ The inclusion of such a requirement ensures that defendants are not indiscriminately sentenced to MPA treatment.⁸¹

69. *Id.*

70. *See id.*

71. *See id.*

72. Icenogle, *supra* note 24, at 281.

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.*; *see also* Stelzer, *supra* note 11, at 1684.

77. Stelzer, *supra* note 11, at 1684.

78. *Id.*

79. Fitzgerald, *supra* note 8, at 4-5 (discussing the types of sexual offenders).

80. FLA. STAT. § 794.0235(2)(a) (1997). *See* discussion *supra* Part III.B. (proposing that “medically appropriate” requires that the defendant be the type of person that would be less likely to commit the crime again if administered MPA).

81. *See* discussion *supra* Part III.B.

C. *Side Effects*

Some recipients report side effects including “weight gain, mild lethargy, cold sweats, hot flashes, nightmares, hypertension, elevated blood sugar, shortness of breath, and lessened testis size.”⁸² Recipients rarely suffer anything but minimal side effects.⁸³ The list of side effects may seem extensive, but it is important to note that whenever a drug is used for a new or different objective, all of its potential side effects, no matter how remote, must be documented and registered.⁸⁴

MPA does not cause an inability to achieve erection or ejaculation.⁸⁵ Although the body’s ability to experience spontaneous erections and ejaculations does decrease, recipients of the treatment do retain the physical and mental ability necessary to engage in sexual activity when stimulated by a partner.⁸⁶ In fact, MPA recipients concede that the treatment minimally affects consensual sexual activity.⁸⁷ Furthermore, men have fathered children while undergoing MPA treatment.⁸⁸ Hypothetically, adverse effects on one’s sex drive can be adjusted by changing the MPA dosage.⁸⁹ In any case, effects of the drug cease upon discontinuation of treatment.⁹⁰

V. FEDERAL RIGHT TO PRIVACY

A. *The Implied Right to Privacy*

Although the “Constitution does not explicitly mention any right of privacy,”⁹¹ the right to privacy implicit in the Fourteenth Amendment of the United States Constitution has been interpreted by the United States Supreme Court to protect areas such as contraception⁹² and abortion.⁹³ The

82. Icenogle, *supra* note 24, at 285. *See generally* Fitzgerald, *supra* note 8, at 7 (discussing additional “possible” side effects).

83. Fitzgerald, *supra* note 8, at 7.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Icenogle, *supra* note 24, at 285.

89. Fitzgerald, *supra* note 8, at 7.

90. Icenogle, *supra* note 24, at 285.

91. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (discussing the history of the implied right to privacy).

92. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (invalidating a statute that forbade contraceptive use because it infringed upon the right of marital privacy).

Supreme Court has never held that hormonal control of sexual offenders is unconstitutional.⁹⁴ However, the right to privacy granted by the United States Constitution is not at issue here. The right to privacy contained in Florida's Constitution is broader and provides more comprehensive protection against governmental intrusion than its federal counterpart.⁹⁵

B *Supreme Court Treatment of Biological Alteration*

It is important to examine how the United States Supreme Court has treated biological alteration in the past, so that a foundation can be laid for litigation in the future.⁹⁶ In *Jacobson v. Massachusetts*,⁹⁷ the Court upheld a criminal sentence imposed for refusing to submit to a smallpox vaccination.⁹⁸ The Court, in *Buck v. Bell*,⁹⁹ upheld a law as constitutional which called for involuntary sterilization of mental defectives for the welfare of society.¹⁰⁰ In *Skinner v. Oklahoma*,¹⁰¹ the Court invalidated a law mandating sterilization of defendants convicted of two felonies without addressing the biological alteration issue on the grounds that the law violated the Equal Protection Clause by not including white collar crimes.¹⁰² The *Washington v. Harper*¹⁰³ decision upheld forcible administration of antipsychotic drugs that alter the chemistry of the brain.¹⁰⁴

It is clear that, under certain circumstances, what might be unconstitutional if applied to the general public may be constitutional with respect to certain groups of individuals when their special circumstances call for special treatment. The Court in *Buck* articulated this thought by providing that its ruling was "confined to the small number who are in the

93. *Roe*, 410 U.S. at 152–53 (invalidating a state law permitting abortion only to save a mother's life).

94. Recent Legislation, *supra* note 7, at 799.

95. See, e.g., *Winfield v. Division of Pari-Mutuel Wagering*, Dep't of Bus. Regulation, 477 So. 2d 544, 548 (Fla. 1985).

96. See generally Sheldon Gelman, *The Biological Alteration Cases*, 36 WM. & MARY L. REV. 1203, 1204–15 (1995) (analyzing Supreme Court decisions regarding biological alteration).

97. 197 U.S. 11 (1905).

98. *Id.* at 31.

99. 274 U.S. 200 (1927).

100. *Id.* at 207.

101. 316 U.S. 535 (1942).

102. *Id.* at 538.

103. 494 U.S. 210 (1990).

104. *Id.* at 227.

institutions named” and did not apply “to the multitudes outside.”¹⁰⁵ The Supreme Court’s treatment of cases involving the invasion of bodily autonomy reveal that a state’s compelling interest in mandating a particular procedure can override an individual’s right to maintain complete control over his or her body.

VI. FLORIDA’S RIGHT OF PRIVACY

A. *Article I, Section 23 of the Florida Constitution*

In 1980, Florida amended its constitution to include a statute providing an explicit right to privacy ensuring that “[e]very natural person has the right to be let alone and free from governmental intrusion into his private life.”¹⁰⁶ Section 23 of the *Florida Constitution* is broader and encompasses protection of a greater number of privacy interests than the implied right to privacy in the United States Constitution.¹⁰⁷

B. *Statutory Construction of the Right to Privacy*

The Supreme Court of Florida, in *Traylor v. State*,¹⁰⁸ held that Florida courts should look first to the text of the *Florida Constitution* to determine the nature and scope of personal rights of Florida residents.¹⁰⁹ The lawmakers struck the words “unwarranted” and “unreasonable” from the preceding phrase “governmental intrusion” in order to make the *Florida Constitution* sweep more broadly.¹¹⁰ The “phrase ‘right to be let alone’ from government intrusion” was intentionally chosen to distinguish “Florida’s broad privacy right from the limited federal right.”¹¹¹ This is clear evidence that the lawmakers and the citizens who voted for the statute intended it to

105. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

106. FLA. CONST. art. I, § 23.

107. *See, e.g., Winfield v. Division of Pari-Mutuel Wagering, Dep’t of Bus. Regulation*, 477 So. 2d 544, 548 (Fla. 1985).

108. 596 So. 2d 957 (Fla. 1992).

109. *Id.* at 962.

110. *See, e.g., Winfield*, 477 So. 2d at 548.

111. *Mozo v. State*, 632 So. 2d 623, 632 (Fla. 4th Dist. Ct. App. 1994). The federal right to privacy was significantly narrowed by the Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967), when the Court announced that “protection of a person’s *general* right to privacy . . . is . . . left largely to the law of the individual States.” *Id.* at 350–51. (refusing to allow federal right to privacy protection for government’s listing and recording an individual’s telephone conversation at a public pay phone).

provide more comprehensive protection from government interference than that which the national constitution provides.¹¹²

C. *The Right to Privacy Test*

Florida's privacy amendment does not explicitly provide a standard for reviewing a governmental intrusion into an individual's private life.¹¹³ In *Winfield v. Division of Pari-Mutuel Wagering, Department of Business Regulation*,¹¹⁴ the Supreme Court of Florida articulated the accepted test for Florida's right to privacy challenges.¹¹⁵ The test can be broken down into four simple parts.¹¹⁶ First, the challenger must have had a legitimate expectation of privacy.¹¹⁷ Second, if a legitimate expectation of privacy exists, the individual is found to have a fundamental right.¹¹⁸ Third, since a fundamental right is at issue, the state must show that it has a compelling interest to warrant the abridgement of the individual's privacy.¹¹⁹ Last, the state must prove that it is utilizing the least intrusive method available to accomplish its goal.¹²⁰ Florida's right to privacy provides comprehensive protection from governmental intrusion, but it does not act as an unwavering warrant against all intrusion into an individual's private life.¹²¹

Defendants may claim protection under Article I, section 23 of the *Florida Constitution* because, although some constitutional rights of prisoners are abridged or alienated completely during incarceration, the right to privacy guaranteed by the *Florida Constitution* remains intact.¹²² Since the right to privacy protects those to whom the hormonal control statute applies, the statute must pass muster under the *Florida Constitution*.

112. See e.g., *Mozo*, 632 So. 2d at 633.

113. *Id.*

114. 477 So. 2d 544 (Fla. 1985).

115. *Id.* at 547. See also, Jon Mills, *Sex, Lies, and Genetic Testing: What Are Your Rights to Privacy in Florida?* 48 FLA. L. REV. 813, 823-24 (1996) (discussing the "legal test" for Florida's right to privacy).

116. Mills, *supra* note 115, at 823-24.

117. *Id.* at 823.

118. *Id.* at 824.

119. *Id.*

120. *Id.*

121. *North Miami v. Kurtz*, 653 So. 2d 1025, 1027 (Fla. 1995).

122. *Singletary v. Costello*, 665 So. 2d. 1099, 1105 (Fla. 4th Dist. Ct. App. 1996).

1. Legitimate Expectation of Privacy

Florida courts use a “legitimate” expectation of privacy test to determine the interests protected by Florida’s constitutional right to privacy.¹²³ The courts have held that the words “unreasonable” and “unwarranted” are reminiscent of the narrower federal expectation of privacy test.¹²⁴ The federal test provides protection of an individual’s expectation of privacy only if society recognizes it as reasonable to do so.¹²⁵ Florida’s right to privacy deliberately omitted the words “unreasonable” and “unwarranted.”¹²⁶ This omission “makes it clear that the Florida right of privacy was intended to protect an individual’s expectation of privacy regardless of whether society recognizes that expectation as reasonable.”¹²⁷ This is consistent with the fact that the lawmakers intended Florida’s right to privacy to provide broader protection against governmental intrusion than its federal counterpart.¹²⁸

The test for determining whether an individual has an expectation of privacy is easily broken down into three parts: 1) the individual must have a subjective expectation of privacy;¹²⁹ 2) the expectation must not be spurious or false;¹³⁰ and 3) the expectation must not conflict with society’s values.¹³¹ First, the existence and scope of an individual’s subjective expectation of privacy as determined by consideration of all of the circumstances must be established by placing emphasis on the “objective manifestations of that

123. *Mozo v. State*, 632 So. 2d 623, 633 (Fla. 4th Dist. Ct. App. 1994) (providing an excellent description and explanation for the legitimate expectation of privacy test).

124. *Id.* The federal expectation of privacy test was articulated by the Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967) to determine whether an individual qualified for Fourth Amendment protection against having his telephone conversations at a public phone booth listened to and recorded. *Id.* at 361. That case developed a two-prong test for determining an individual’s expectation of privacy. *Id.* at 361. The person must have an “actual (subjective) expectation of privacy,” and the expectation must be such that society is willing to accept it as being reasonable. *Id.* (internal quotations omitted). The test turns on “whether the defendant was reasonable in his belief of privacy,” while the legitimate expectation of privacy test recognizes an individual’s expectation of privacy even if it is not reasonable. *Mozo*, 632 So. 2d at 633–34.

125. *Katz*, 389 U.S. at 361; *see also Mozo*, 632 So. 2d at 633–34 (distinguishing the federal and Florida expectation of privacy tests).

126. *See, e.g., Mozo*, 632 So. 2d at 634.

127. *Id.* at 633–34.

128. *See, e.g., In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989).

129. *See infra* note 132 and accompanying text.

130. *See infra* note 133 and accompanying text.

131. *See infra* note 137 and accompanying text.

expectation.”¹³² Defendants do not manifest an expectation that future sexual fantasies will be within the protected zone of privacy because they implicitly invited the state to intrude into such activity by committing sexual battery. Knowledge that the commission of a crime gives rise to a governmental duty to punish and prevent the crime involved should be imputed. The state needs to intrude into a defendant’s sex life to prevent an offense from occurring again, because sex is the offender’s weapon of choice. Defendants constructively forfeit an expectation of privacy with respect to sexual activity when they commit a sexual battery, knowing that criminal activity mandates governmental intrusion to the extent that it is necessary to punish and prevent future offenses.

Next, the expectation of privacy must not be “spurious” or “false.”¹³³ A sexual battery offender’s claim of an expectation of privacy for sexual fantasies is “spurious” and “false” because, while perpetrating a sexual offense, sexual offenders are aware of the government’s duty to prevent him from doing it again.¹³⁴ In addition, he is cognizant of the fact that this duty necessitates an intrusion by the government into an offender’s sexual fantasy, a component of an individual’s private life, when that component is prompting the illegal activity.¹³⁵ The government is seeking to intrude upon the sexual fantasies of offenders whose fantasies cause them to commit sexual offenses. The offenders’ awareness that the government’s duty reasonably warrants such an intrusion negates the truth of subsequent claims of privacy over the sexual fantasies that prompted him to perpetrate the sexual battery, making any such claims “spurious” and “false.”¹³⁶

Finally, these expectations must then be placed “in the context of a society and the values that the society seeks to foster” because each person is not an “island of self-determination.”¹³⁷ Society seeks to discourage sexual offenders from committing sexual batteries. Society does not support

132. *North Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995) (citing *Stall v. State*, 570 So. 2d 257, 260 (Fla. 1990) (holding that a legitimate expectation of privacy does not exist for visiting retail establishments selling obscene materials)) (finding that job applicant did not have legitimate expectation of privacy against the City’s requiring her to reveal whether or not she smoked, because smokers disclose whether they smoke on a regular basis).

133. *Shaktman v. State*, 553 So. 2d 148, 153 (Fla. 1989) (Ehrlich, J., concurring specially).

134. *Id.*

135. *Id.*

136. *See id.*

137. *State v. Conforti*, 688 So. 2d 350, 359 (Fla. 4th Dist. Ct. App. 1997) (finding that erotic dancers did not have a legitimate expectation of privacy while performing lewd acts in front of a paying customer at a publicly patronized location).

releasing a paraphilic sexual offender from prison without additional safeguards because it is probable that he will commit another sexual battery upon an innocent person. A sexual offender's expectation of privacy for sexual activity and fantasies after incarceration is not legitimate with respect to the values that society seeks to support. If the court finds that a legitimate expectation does exist, that interest is presumptively protected from governmental intrusion,¹³⁸ and the right to privacy is invoked.¹³⁹

The privacy issue is best stated as whether an offender retains a legitimate expectation of privacy for sexual fantasies after being released from prison, not whether the defendant enjoys an expectation of privacy for future sexual batteries. The latter is not at issue because it has been held that there is no legitimate expectation of privacy while committing a sex crime.¹⁴⁰

A sexual battery defendant's subjective expectation of privacy towards his future sexual activity is limited. Whenever the state attempts to punish or rehabilitate, a defendant impliedly loses some of the privacy he or she enjoys.

In *Fosman v. State*,¹⁴¹ the Fourth District Court of Appeal limited a defendant's expectation of privacy by allowing the state's invasion into a situation derived from his alleged sexual battery.¹⁴² The court held that a defendant did not have a reasonable expectation of privacy interest in refusing to take a blood test in order to inform the victim of the defendant's HIV status.¹⁴³ This case demonstrated that a criminal act might forfeit the legitimacy of the expectation of privacy not only during the criminal act but also in subsequent circumstances stemming from the criminal act.¹⁴⁴ The defendant's HIV status had no relevance to his guilt or innocence.¹⁴⁵ His act

138. *Mozo v. State*, 632 So. 2d 623, 634 (Fla. 4th Dist. Ct. App. 1994) (holding that private conversations over a cordless telephone are "presumptively protected" from government intrusion because it is not "spurious or false" for a person to expect that the government will not, "without cause or suspicion," listen and record telephone conversations).

139. *See, e.g., Winfield v. Division of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So. 2d 544, 547 (Fla. 1985).

140. *Shapiro v. State*, 696 So. 2d 1321, 1326 (Fla. 4th Dist. Ct. App. 1997) (finding no legitimate expectation of privacy for a therapist's unlawful sexual activity with a patient).

141. 664 So. 2d 1163 (Fla. 4th Dist. Ct. App. 1995).

142. *Id.* at 1166.

143. *Id.* (reasoning that "where there is probable cause to believe that a person has committed sexual battery and transmitted bodily fluids to the victim" the defendant does not have a privacy interest in refusing a HIV test when the results of the test will be "disclosed only to the victim and to public health authorities" because he does not have a legitimate expectation of privacy).

144. *See id.*

145. *See id.*

of sexual battery warranted special circumstances rendering him incapable of maintaining the required expectation of privacy.¹⁴⁶

Thus, by committing a sexual battery, a defendant implicitly extends an invitation to the state to prevent future sexual batteries by intruding on his sexual fantasies when those fantasies prompt the illegal sexual activity. That invitation precludes defendants from having a legitimate expectation of privacy with respect to sexual fantasies. If the defendant does not have a legitimate expectation of privacy with respect to his sexual fantasies, then the right to privacy does not apply to the hormonal control statute.

2. Fundamental Right

If a court finds that an individual's legitimate expectation of privacy exists, a fundamental right to protect that privacy interest also exists.¹⁴⁷ A fundamental right qualifies for strict scrutiny, requiring the state to prove that the law is necessarily related to a compelling state interest.¹⁴⁸ Assuming that the defendant has a legitimate expectation of privacy in sexual fantasies, a fundamental right to protect that interest exists. This right can only be infringed upon by the least intrusive method to achieve a compelling state interest.¹⁴⁹

3. Compelling Interest

Florida courts have approached the compelling interest issue differently depending on whether the government was intruding on private information or private decisions.¹⁵⁰ When the state seeks to discover private information, the courts have balanced the individual's right to privacy against the state's compelling interest.¹⁵¹ However, when a private decision is being infringed

146. See *Fosman*, 664 So. 2d at 1166.

147. *Winfield v. Division of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So. 2d 544, 547 (Fla. 1985).

148. *Id.* at 547.

149. *Id.* The test employed "shifts the burden of proof to the state to justify an intrusion on privacy." *Id.* The burden is met when the state establishes that "the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *Id.*

150. *Mills*, *supra* note 115, at 825.

151. *Id.* (citing *Florida v. Rolling*, 22 Media L. Rep. (BNA) 2264, 5 (Fla. 8th Cir. Ct., July 27, 1994) (holding the public's "right to information" is paramount to an individual's interest in preventing the release of crime scene photos after balancing the public's right against the victim's families right to privacy)).

upon, the court applies the traditional strict scrutiny test, which requires the state to demonstrate that the law is necessarily related to a compelling state interest.¹⁵² Administration of MPA deals with a private decision, not private information, because the state is not seeking to compel disclosure of anything from the defendant.¹⁵³ Since the statute infringes on a private decision, the traditional strict scrutiny analysis, as opposed to the balancing test, is appropriate. Although Florida courts have developed a different way of articulating this test by stating that the state must demonstrate that the law “serves a compelling state interest and accomplishes its goal through the use of the least intrusive means,”¹⁵⁴ this test is the same as traditional strict scrutiny, requiring that the law be necessarily related to a compelling government interest.¹⁵⁵

The state has a compelling interest in protecting its citizens.¹⁵⁶ The legislators who wrote and passed the law intended it to be both a deterrent and a rehabilitative tool.¹⁵⁷ Thus, the purpose of the law is to protect innocent third parties from being the victims of sexual batteries.

4. Least Intrusive Method

After the state establishes that the statute serves a compelling interest in protecting innocent third parties, it must establish that chemical castration is the least intrusive method for accomplishing that goal.¹⁵⁸ The hormonal control statute seeks to prevent sexual crimes against its citizens. It purports to accomplish this through hormonal control. Although hormonal control may not be an effective treatment for all defendants because the law does not

152. *Id.* (citing *Beagle v. Beagle*, 678 So. 2d 1271, 1273 (Fla. 1996) (deciding whether grandparent visitation could be granted over a parent’s objections)).

153. *Id.*

154. *Winfield v. Division of Pari-Mutuel Wagering*, Dep’t of Bus. Regulation, 477 So. 2d 544, 547 (Fla. 1985).

155. *See id.* at 547 (citing *Roe v. Wade*, 410 U.S. 113, 155 (1973) (fundamental rights may only be limited by a regulation that is narrowly drawn to accomplish a compelling state interest)).

156. *In re Guardianship of Browning*, 568 So. 2d 4, 14 (Fla. 1990).

157. Mark Silva, *Chemical Castration Approved*, MIAMI HERALD, May 3, 1997, at 6B (quoting Senator Al Gutman, Senate Criminal Justice Committee Chairman, as saying that MPA treatment “will assist those who can not assist themselves because of high testosterone”); Jeremy Wallace, *Chemical Castration Bill Becomes Law on Oct. 1*, BRADENTON HERALD, May 31, 1997, at L1 (stating that Representative Mark Ogles, co-author of the law, said “the new law will be a deterrent for many would-be sex offenders”).

158. *Winfield v. Division of Pari-Mutuel Wagering*, Dep’t of Bus. Regulation, 477 So. 2d 544, 547 (Fla. 1985).

apply to all defendants.¹⁵⁹ The law only applies to defendants when a medical expert determines them to be medically appropriate for MPA treatment.¹⁶⁰ Medically appropriate is taken to mean that MPA treatment will produce the desired effect of decrease in sexual libido,¹⁶¹ which will by implication lower the probability that the defendant will commit another sexual battery.

Hormonal control is the least intrusive method of preventing medically appropriate defendants from committing future sexual batteries against innocent third parties. Those deemed medically appropriate will experience a decrease in libido resulting in a decreased chance of recidivism by the defendant, which will ultimately cause a decrease in sexual crime against citizens of the state. No other treatment prevents future sexual batteries and allows the defendant all the other liberties of living a free life. The only other alternative is incarceration, which is more intrusive than MPA because it involves a forfeiture of physical liberty.

D. *Florida's Right to Refuse Medical Treatment*

Unlike the federal constitutional right to refuse medical treatment, which is in the Due Process Clause,¹⁶² the Supreme Court of Florida found the right to refuse medical treatment guaranteed by Florida's Constitution.¹⁶³ A defendant retains this right during and after incarceration.¹⁶⁴ The right to refuse medical treatment is not dependent on a determination of a "medical procedure as major or minor, ordinary or extraordinary, life-prolonging, life-maintaining, life-sustaining, or otherwise."¹⁶⁵ Thus, under this definition, the administration of MPA falls within this right regardless of the fact that it is a minor and safe therapy.

159. *See supra* Part III.B.

160. FLA. STAT. § 794.0235(2)(a) (1997). The hormonal control statute only applies to those defendants that are "appropriate candidate[s] for treatment." *Id.*

161. *See supra* Part III.B.

162. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 262 (1990).

163. *In re Guardianship of Browning*, 568 So. 2d 4, 10 (Fla. 1990).

164. *Singletary v. Costello*, 665 So. 2d 1099, 1105 (Fla. 1996) (finding that a prisoner had the right to refuse food and water while incarcerated).

165. *Id.* at 1104 (quoting *In re Guardianship of Browning*, 568 So. 2d 4, 12 (Fla. 1990)).

1. Consent

A defendant “may not forcibly [be] given medical treatment without express or implied consent.”¹⁶⁶ Under the hormonal control statute, a defendant is never forcibly injected with MPA without consent.¹⁶⁷ The defendant may expressly consent to the treatment, but it is more probable that the defendant will protest its administration. However, by accepting probation, when hormonal control is a condition of probation, he will impliedly consent to the treatment.¹⁶⁸ Consent is also implied when defendants appear for and submit to weekly MPA injections. Any protest to administration should be irrelevant so long as the defendant’s outward manifestations of agreeing to the probation and appearing for the injections are present. All defendants retain the right, at all times, to refuse this medical treatment and opt for incarceration or physical castration.¹⁶⁹ Any defendant may refuse MPA treatment, at any time.

2. “Voluntary” Consent

Opponents of the statute argue that consent can not be voluntary because refusal to consent results in a second-degree felony.¹⁷⁰ There is no reason to think that any defendant will be forced or coerced to accept probation. Moreover, it is unlikely that the department of corrections is going to hold defendants down and forcibly administer the weekly injections. The defendant will voluntarily accept probation and the conditions of probation and voluntarily submit to weekly injections. Again, a defendant at all times reserves the right to refuse treatments and return to jail or be physically castrated.¹⁷¹

166. *Id.* (quoting *Metropolitan Dade County v. P.L. Dodge Foundations, Inc.*, 509 So.2d 1170, 1172 (Fla. 3d Dist. Ct. App. 1987) (stating prisoner’s rights in dicta)).

167. FLA. STAT. § 794.0235(2)(a), (5) (1997); *see supra* Part III.C.

168. FLA. STAT. § 794.0235(2)(a), (5) (1997).

169. *Id.* § 794.0235(1)(b), (5). *See* discussion *infra* Part III.C.

170. Spalding, *supra* note 8, at 128 (arguing that refusing treatment “is no option at all” because the “choice cannot be held to be made freely, knowingly, or voluntarily” due to the fact that refusal results in incarceration).

171. *See supra* note 43 and accompanying text.

3. Compelling Interest

Even if a court finds voluntary and informed consent is lacking, the statute does not violate a defendant's right to refuse medical treatment because the state is utilizing the least intrusive method available to accomplish a compelling state interest. The Supreme Court of Florida has articulated four compelling state interests that should be weighed against an individual's right to refuse medical treatment.¹⁷² They are the preservation of life, the protection of innocent third parties, the prevention of suicide, and the maintenance of the ethical integrity of the medical profession.¹⁷³ The court in *Singletary v. Costello*¹⁷⁴ added that where the individual happens to be a prisoner, the "state interest in . . . the rehabilitation of prisoners is implicated."¹⁷⁵

Of the interests identified, the protection of innocent parties and the rehabilitation of defendants serve as compelling state interests for the hormonal control statute.¹⁷⁶ The protection of innocent persons interest "arises when the refusal of medical treatment endangers public health."¹⁷⁷ MPA refusal endangers the public because it increases the chances that a member of the public will be a victim of a sexual battery, an inherently violent crime. Hormonal control decreases the chances that the defendant will commit a sexual battery.¹⁷⁸ The statute protects the public by seeking to rehabilitate defendants by providing them with the medication they need to control their sexual impulses and resist the urge to commit sexual batteries.¹⁷⁹

4. Least Intrusive Method

MPA treatment is the least intrusive method of protecting the public against the sexual offenses perpetrated by paraphiliacs.¹⁸⁰ The only other

172. *Browning*, 568 So. 2d at 14 (holding that the state interest should be "balanced . . . against an individual's right to refuse medical treatment").

173. *Id.*

174. 665 So. 2d 1099 (Fla. 1996).

175. *Id.* at 1105 (quoting *Commissioner of Corrections v. Myers*, 399 N.E. 2d 452, 457 (Mass. 1979)).

176. *See supra* note 157.

177. *Singletary*, 665 So. 2d at 1105.

178. *See discussion supra* Part IV.A-B.

179. *See supra* Part IV.A-B. and note 157.

180. *See discussion supra* Part VI.C.4.

method, incarceration, is more intrusive into the private lives of offenders because it calls for deprivation of the liberty of freedom.¹⁸¹

VII. CONCLUSION

The lawmakers carefully drafted Florida's new hormonal control statute to ensure constitutionality. The law's opponents challenge its constitutionality with bald conclusions. Although medical technology restricts the statutes' effectiveness by only allowing its success within certain people, the lawmakers narrowly tailored the statute to apply to that group, the paraphiliac. Upon careful analysis, however, it is clear that the law does not violate Florida's Right to Privacy Amendment. The statute is the first step towards a modern, more humane criminal justice system that seeks public protection and actual rehabilitation rather than the illusory rehabilitative benefits provided by the present prison system.

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181. See discussion *supra* Part VI.C.4.