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# NIPPING THE PROBLEM IN THE BUD: THE CONSTITUTIONALITY OF CALIFORNIA'S CASTRATION LAW

*Karen J. Rebish*

## I. INTRODUCTION

On September 17, 1996, Governor Pete Wilson of California signed into law 1995 Cal. Stat 3339 (the "Castration Law"), a bill that mandates the "chemical castration" or "surgical castration" of twice-convicted child molesters.<sup>1</sup> Although similar legislation is being proposed in other states throughout the country,<sup>2</sup> the new law makes California the first state to impose such a controversial punishment.<sup>3</sup>

Although statistics show that there has been a decline in violent sex crimes countrywide,<sup>4</sup> the Castration Law, along with other sexual offender laws passed throughout the country,<sup>5</sup> is yet another example of

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<sup>1</sup> See Greg Lucas, *Wilson to Sign Castration Bill Today*, SAN FRANCISCO CHRON., Sept. 17, 1996, at A15. See also Cassandra Stern, *California Waging War On Sexual Predators; Chemical Castration Law Is State's Latest Weapon*, WASH. POST, Sept. 24, 1996, at A03 (stating that Governor Wilson signed the chemical castration law the previous week); Daniel C. Tsang, *'Cruel, Unusual' Border Crossed In Drive Against Sex Offenders*, CAPITAL TIMES (Wis.), Oct. 9, 1996, at 11A (stating that Governor Wilson signed the chemical castration law in September of 1996).

<sup>2</sup> See Lucas, *supra* note 1, at A15 (stating that "Texas, Massachusetts and Wisconsin are considering similar measures."); Susan Estrich, *Chemical Castration Sends Wrong Message*, USA TODAY, Sept. 5, 1996 (stating that Florida and Washington are considering castration laws similar to California's).

<sup>3</sup> See Daniel B. Wood, *States Are Rushing to Curb Sex Crimes*, CHRISTIAN SCI. MONITOR, Sept. 5, 1996, at 4.

<sup>4</sup> See *id.* (stating that statistics of rape and other violent sex crimes have declined over the past twenty years). See also *Rapes, Sexual Assaults Declined, Report Says*, OMAHA WORLD HERALD, Feb. 3, 1997, at 1 (stating that in 1995 the Bureau of Justice reported 97,000 rapes, the lowest rate per capita since 1985).

<sup>5</sup> See Wood, *supra* note 3, at 4 (citing to the example of "[t]he federal crime bill signed [in 1994] by Bill Clinton [that] mandated states to require sexual offenders released from prison to register with law-enforcement agencies"). See also *id.* (citing to the New Jersey legislation

"a wave of preventive and punitive laws [that are] sweeping the country to put the public at ease and [to put] sexual offenders in their place."<sup>6</sup>

The political message behind such laws is clear. According to the author of the California legislation, Republican Assemblyman William Hoge<sup>7</sup>, "[t]his legislation sends a clear message to child molesters -- you are not welcome in California, and if you commit these heinous crimes, you will be dealt with appropriately."<sup>8</sup>

Briefly, being "dealt with appropriately," according to the statute, is either choosing surgical castration or receiving mandatory injections of a drug called Depo-Provera.<sup>9</sup> Depo-Provera is a hormonal drug that has been used around the world as a female contraceptive.<sup>10</sup> But more recently, it has also been shown to curb sexual impulses in men, by causing their testicles to shrink, and thus, theoretically rendering them "castrated" and incapable of molesting any more children.<sup>11</sup>

Opponents of the Castration Law, including the American Civil Liberties Union, contend that it is not only barbaric but that it cannot withstand the constitutional and legal challenges that it will surely face.<sup>12</sup> Just a few potential legal barriers to the California law are a state's right to medicate without consent,<sup>13</sup> exposure to dangerous side effects,<sup>14</sup> cruel and

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enacted after seven-year-old Megan Kanka was murdered by a convicted child molester).

<sup>6</sup> *Id.*

<sup>7</sup> See Paul Hoversten, *Calif. Targets Child Molesters Bill Requires for Chemical Castration*, USA TODAY, Aug. 29, 1996, at 3A (stating that Assemblyman Bill Hoge of Pasadena sponsored the bill).

<sup>8</sup> Lucas, *supra* note 1, at A15.

<sup>9</sup> See Ellen Hale, *Value of Chemical Castration Doubted Experts Assess California Effort to Stop Sex Crimes*, COURIER-JOURNAL (N.Y.), Aug. 28, 1996, at 04A (stating that "[t]he drug the lawmakers have in mind is Depo-Provera.").

<sup>10</sup> *Id.*

<sup>11</sup> *See id.*

<sup>12</sup> See Tsang, *supra* note 1, at 11A ("California Gov. Pete Wilson . . . signed into law a bill more appropriate for the Dark Ages than the eve of the 21st century."). *See also id.* (stating that "[t]he American Civil Liberties Union is likely to challenge the California law as unconstitutional").

<sup>13</sup> See David Van Bienna, *A Cheap Shot at Pedophilia? California Mandates Chemical Castration For Repeat Child Offenders*, TIME, Sept. 9, 1996, at 60 (noting the legal arguments against chemical castration).

unusual punishment,<sup>15</sup> and the right to procreate.<sup>16</sup>

This note analyzes the potential constitutional debate over the California law. Part II sets out the specifics of the Castration Law, including both the ethical and political motivations behind the law's enactment.<sup>17</sup> Part III discusses the actual procedures of surgical and chemical castration.<sup>18</sup> It will focus on the effects of the chemical castration drug Depo-Provera.<sup>19</sup> In addition, Part III examines the appropriate candidates for the procedures, if any, and includes a discussion of the "typing" of sex offenders.<sup>20</sup> Part IV discusses the constitutional issues and case law surrounding the California law.<sup>21</sup> These issues include the Eighth Amendment's protection against cruel and unusual punishment,<sup>22</sup> and the Fourteenth Amendment's right to privacy.<sup>23</sup> Finally, Part V concludes that the California bill will not withstand the legal battles it will face.<sup>24</sup>

## II. THE CALIFORNIA LEGISLATION

The Castration Law was passed in the California State Assembly on August 23, 1996 by a vote of fifty-one to eight.<sup>25</sup> It was passed into

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See *infra* notes 25-59 and accompanying text.

<sup>18</sup> See *infra* notes 60-138 and accompanying text.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See *infra* notes 139-226 and accompanying text.

<sup>22</sup> U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

<sup>23</sup> U.S. CONST. amend. XIV, §1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .").

<sup>24</sup> See *infra* notes 227-235 and accompanying text.

<sup>25</sup> See Vincent J. Schodolski, *Castration Law Enacted in California; Repeat Offense of Child Molesting to Bring Surgical or Chemical Procedure*, AUSTIN AMERICAN-STATESMAN, Aug. 31, 1996, at A22.

law by Governor Pete Wilson on September 17, 1996.<sup>26</sup>

The Law, in its final form, repealed the old language of Section 645 of the California Penal Code and replaced it with new language, relating to crimes.<sup>27</sup> The old Section 645 stated that "whenever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years, the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person, for the prevention of procreation."<sup>28</sup> In other words, the old version authorized the court to impose physical castration on an offender in the specific circumstance when the victim is female and under the age of ten.<sup>29</sup>

The new version would repeal the above provision of Section 645 and add:<sup>30</sup>

(a) Any person guilty of a *first* conviction of any offense specified in subdivision (c), where the victim has not attained 13 years of age, *may*, upon parole, undergo medroxyprogesterone acetate treatment, or its chemical equivalent, in addition to any punishment prescribed by law.

(b) Any person guilty of a second conviction of any offense specified in subdivision (c), where the victim has not attained 13 years of age, *shall*, upon parole undergo medroxyprogesterone acetate treatment or its chemical equivalent, in addition to any other punishment prescribed for that offense or any other provision of law.<sup>31</sup>

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<sup>26</sup> See Lucas, *supra* note 1, at A15.

<sup>27</sup> 1995 Cal. Stat. 3339 (legislative synopsis), CAL. PENAL CODE § 645 (Deering 1996).

<sup>28</sup> CAL. PENAL CODE § 645 (Deering 1996).

<sup>29</sup> *California Committee Analysis on Senate Floor Bill No. AB 3339 Before the Senate Rules Committee*, 1995-96 Reg. Sess. (Cal. Aug. 15, 1996).

<sup>30</sup> *Id.*

<sup>31</sup> 1995 Cal. Stat. 3339 (emphasis added).

The sex offenses included for the punishment include: sodomy by force or fear of bodily injury;<sup>32</sup> sodomy in concert by force or violence;<sup>33</sup> lewd or lascivious acts committed by force, violence, etc.;<sup>34</sup> oral copulation;<sup>35</sup> oral copulation in concert by force or violence;<sup>36</sup> sexual penetration with a foreign object;<sup>37</sup> and sexual penetration with a foreign object.<sup>38</sup> The Castration Law further states:

(d) The parolee shall begin medroxyprogesterone acetate treatment one week prior to his or her release from confinement in the state prison or other institution and shall continue treatments until the Department of Corrections demonstrates to the Board of Prison Terms that this treatment is no longer necessary.

(e) If a person voluntarily undergoes a permanent, surgical alternative to hormonal chemical treatment for sex offenders, he or she will not be subject to this section.<sup>39</sup>

Finally, subdivision (f) requires that:

(f) The Department of Corrections shall administer this section and implement the protocols required by this section . . . These protocols shall include, but not be limited to, a requirement to inform the person about the effect of hormonal chemical treatment and any

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<sup>32</sup> *California Committee Analysis on Senate Floor Bill No. AB 3339 Before the Senate Rules Committee*, 1995-96 Reg. Sess. (Cal. Aug. 15, 1996).

<sup>33</sup> *Id.*

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

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

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

<sup>37</sup> *California Committee Analysis on Senate Floor Bill No. AB 3339 Before the Senate Rules Committee*, 1995-96 Reg. Sess. (Cal. Aug. 15, 1996).

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

<sup>39</sup> 1995 Cal. Stat. 3339.

side effects that may result from it. A person subject to this section shall acknowledge the receipt of this information."<sup>40</sup>

The author of the law is Republican Assemblyman William Hoge, from Pasadena, California.<sup>41</sup> In his backing of the legislation, Assemblyman Hoge stressed "prevention" rather than "punishment" when dealing with repeat sex offenders.<sup>42</sup>

Assemblyman Hoge was motivated to introduce the law by the request of convicted child molester Larry Don McQuay of Texas.<sup>43</sup> Mr. McQuay has admitted to molesting hundreds of children before he was imprisoned.<sup>44</sup> He also confessed that his attacks became more violent as he continued molesting.<sup>45</sup> Mr. McQuay "begged" the state of Texas to castrate him, claiming that he would continue to molest children when released from prison.<sup>46</sup> When McQuay's plea was denied, Assemblyman Hoge introduced the California bill.<sup>47</sup>

In authoring the bill, Assemblyman Hoge also cited to the recidivism rates of sex offenders in other countries using chemical castration:

Chemical castration has proved to be the most effective

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<sup>40</sup> *Id.*

<sup>41</sup> Hoversten, *supra* note 7, at 3A.

<sup>42</sup> Van Bienna, *supra* note 13, at 60.

<sup>43</sup> *Id.*

<sup>44</sup> See 20/20: *Stop Me Or Else - Sex Criminal Requests Castration* (ABC television broadcast, Nov. 18, 1994).

<sup>45</sup> *Id.*

<sup>46</sup> See Van Bienna, *supra* note 13, at 60. See also 20/20: *Stop Me Or Else - Sex Criminal Requests Castration* (ABC television broadcast, Nov. 18, 1994) In an interview with ABC television reporter John Stossel, McQuay states that "the solution is to castrate him." *Id.* John Stossel asked McQuay, "You want to be castrated?" *Id.* McQuay answered, "Yes. I want it to stop my compulsive urges to have sex." *Id.*

<sup>47</sup> See Van Bienna, *supra* note 13, at 60.

treatment available to treat sex offenders, a group that traditionally has a high recidivism rate. In European countries that have utilized castration, recidivism rates have dropped to as low as 2% from otherwise high 50%. In the United States, about half of all sex offenders are rearrested. The actual offense rate is probably higher since sex crimes are often unreported by victims.<sup>48</sup>

As of mid-August, 1996, the California Corrections Department has reported 687 individuals on parole for the sex crimes specified in the bill.<sup>49</sup> The cost of treatment for a paroled sex offender is approximately \$2,380 per year for each individual.<sup>50</sup> In addition to administrative costs, this adds up to approximately \$2 million dollars per year for the state of California.<sup>51</sup> Some critics of the California Law might view the money spent on any type of treatment to be too much of a "luxury" for child molesters.<sup>52</sup>

Some critics also argue that chemical castration is not a treatment at all, and that the law is an "overly invasive and shortsighted measure that focus[es] on punishment while ignoring the need for long-term counseling to help child molesters recover from their fixation."<sup>53</sup> In fact, Dr. Fred

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<sup>48</sup> *Assembly Committee Analysis on Assembly Floor Bill No. AB 3339*, Aug. 30, 1996.

<sup>49</sup> Dan Bernstein, *Repeat Molesters May Get Shots To Tame Sex Drive*, SACRAMENTO BEE, Aug. 30, 1996, at A1.

<sup>50</sup> *Id.*

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

<sup>52</sup> *Cf.* Stern, *supra* note 1, at A3 (according to San Jose psychiatrist Stewart Nixon, "[c]urrently there is so much hostility and anger out there towards [pedophiles] for what they have done that the idea of treatment is seen as a luxury"). See also Kim Batt-Lincoln, *Idaho Must Consider Alternatives to Just Imprisoning Sex Offenders*, IDAHO STATESMAN, Feb. 23, 1997, at 14A (advocating that "[i]nvesting in offender rehabilitation need not minimize the criminals' responsibility for their crimes or imply society 'forgives' the offenders for their victimization of society.").

<sup>53</sup> Stern, *supra* note 1, at A3.



Berlin, founder of the Sexual Disorders Clinic at Johns Hopkins University and acclaimed researcher in the chemical treatment of sexual offenders,<sup>54</sup> opposes the California law because it will not be appropriate for many sex offenders.<sup>55</sup> According to Dr. Berlin, each sex offender must be assessed to see if they have a condition that would be responsive to chemical treatment.<sup>56</sup> For example, chemical treatment would not be effective for pedophiles in denial.<sup>57</sup>

Other critics claim the bill to be part of a political game or trend.<sup>58</sup> In fact, some critics say the Castration Law is "merely another case of [Governor] Wilson playing to the politics of the moment by using an emotionally charged issue to rekindle political support in the face of sagging approval ratings in public opinion polls."<sup>59</sup>

### III. SURGICAL AND CHEMICAL CASTRATION: THE PROCEDURES

The castration bill gives an offender a choice between the punishment of surgical castration or its chemical equivalent, medroxyprogesterone acetate treatment.<sup>60</sup>

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<sup>54</sup> See Bernstein, *supra* note 49, at A1.

<sup>55</sup> Van Biema, *supra* note 13, at 60.

<sup>56</sup> See Bernstein, *supra* note 49, at A1.

<sup>57</sup> *Id.* (according to Dr. Berlin, "[f]or pedophiles, there's a lot of denial. Many of them don't appreciate the harm they cause and the need for treatment. Overcoming that denial is crucial to making the treatment work . . .").

<sup>58</sup> *Cf.* Stern, *supra* note 1, at A3.

<sup>59</sup> *Id.* (stating "[t]he momentary politics of an issue plays well in California. Pete Wilson is a master of these things. Last year it was illegal immigrants who were scapegoats. Who knows what will be next year"). See also *Castration & Politicians; California Is On The Verge of Adopting a New Law "Fixing" Child Molesters Either by Chemical Means or Surgically*, SAN FRANCISCO EXAMINER, Aug. 28, 1996, at A16 (stating "[the Castration Law] is intended not as a criminal deterrent but as an election-year gambit for politicians interested in showing once again that they are "tough on crime").

<sup>60</sup> 1995 Cal. Stat. 3339.

## A. Surgical Castration

Surgical castration is a method of castration that is legally used in certain European countries to cease male sexual activity for criminal purposes.<sup>61</sup> Presently, Denmark, the Federal Republic of Germany, Norway, Sweden, and Switzerland permit surgical castration of sexual offenders.<sup>62</sup> For example, at the Herstedvester Institute for Abnormal Criminals in Denmark, candidacy for the voluntary surgical castration program is based on "a complete and well-analyzed life history and through psychiatric examination, surgery, and six months' aftercare period based on individualized integrating group therapy."<sup>63</sup>

Surgical castration is virtually irreversible,<sup>64</sup> and its primary effect is to diminish a person's physical and emotional ability to respond to sexual stimuli.<sup>65</sup> The procedure's physical side effects include excessive perspiration and blushing, loss of hair both on the body and face, increase in body weight, and softening of the skin.<sup>66</sup> Psychological side effects are not conclusive,<sup>67</sup> although "[i]t is common to see a relaxation resulting from the lack of pathological libido."<sup>68</sup> With regard to recidivism, studies have shown rates are "remarkably low" after surgical castration.<sup>69</sup>

<sup>61</sup> William Green, *Depo-Provera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues*, 12 U. DAYTON. L. REV. 1, 3 (1986).

<sup>62</sup> *Id.* (stating that Denmark, Germany, Norway, Sweden and Switzerland permit the legal, surgical castration of rapists).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 4. *But see id.* (stating that "castration does not always abolish the capacity for sexual intercourse or foreclose the possibility that the castrate may obtain synthetic testosterone to restore his sexual potency.").

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

<sup>66</sup> Green, *supra* note 61, at 3.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 3-4 (referring to a statement by a Dr. George Sturup, director of Denmark's Institute for Abnormal Criminals and a leading authority on castration, with regard to the recidivism of rapists after surgical castration). *But see id.* (stating that "castration does not always abolish the capacity for sexual intercourse or foreclose the possibility that the castrate may obtain synthetic testosterone to restore his sexual potency"). *See also* discussion *infra* Part C.

*B. Chemical Castration*

The alternative method of chemical castration is most commonly accomplished through medroxyprogesterone acetate treatment (MPA), a synthetic progesterone that is manufactured by the Upjohn Company under the trade name Depo-Provera.<sup>70</sup>

Depo-Provera is an injectable form of female hormones.<sup>71</sup> The drug was first used in 1959 to treat women's gynecological problems.<sup>72</sup> Subsequently, the drug was used as a female contraceptive.<sup>73</sup>

It was not until 1966 that Depo-Provera was first used in the treatment of persons with sexual deviation disorders or paraphiliacs.<sup>74</sup> Paraphiliacs have been defined as "persons compelled to commit sex crimes in order to realize a specific and particularized sexual fantasy,"<sup>75</sup> and they include persons with such disorders as fetishism, transvestism, zoophilia, pedophilia, exhibitionism, voyeurism, sexual masochism, and sexual sadism.<sup>76</sup>

Basically, Depo-Provera reduces the level of the male hormone testosterone,<sup>77</sup> which influences sexual behavior.<sup>78</sup> Depo-Provera controls sexually deviant behavior by diminishing a person's capability of erotic imagery and the functioning of genitalia.<sup>79</sup> As a result, a male will experience a reduction in spermatogenesis, erection, and ejaculation.<sup>80</sup> When used effectively, treatment with Depo-Provera, in addition to

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<sup>70</sup> Green, *supra*, note 61, at 4.

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

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

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

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

<sup>75</sup> Green, *supra* note 61, at 2.

<sup>76</sup> *Id.* at 5 n.25 (citing to AMERICAN PSYCHIATRIC ASS'N. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 268-75 (3rd ed. 1980)).

<sup>77</sup> Lauren J. Abrams, *Sexual Offenders and the Use of Depo-Provera*, 22 SAN DIEGO L. REV. 565, 567 (1985).

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

<sup>79</sup> See Green, *supra* note 61, at 6.

<sup>80</sup> *Id.*

psychological counseling, appears to "strength[en] the threshold or barrier to sexual arousal. As a consequence, the individual is metaphorically on vacation from the demands of his sex drive and is so able to experience an erotic or psycho-sexual realignment in conjunction with counseling."<sup>81</sup> In other words, a male sex offender, when not taking Depo-Provera, will not have the willpower to control his deviant sexual behavior.<sup>82</sup> But, when a male sex offender is being treated with Depo-Provera, his actions are "under control."<sup>83</sup>

Depo-Provera is not without side effects, however. Most commonly, physical side effects experienced include fatigue, weight gain, hot flashes, cold sweats, hypertension, headaches, hypogonadism, and insomnia.<sup>84</sup> Other side effects include mild lethargy, nightmares, hyperglycemia, and leg cramps.<sup>85</sup> Also, although Depo-Provera does cause decreased sperm count, the remaining sperm is abnormal and could cause deformations in a fetus, if impregnation occurs.<sup>86</sup> Additionally, Depo-Provera has been shown to cause breast cancer in dogs and uterine cancer in monkeys.<sup>87</sup> Finally, because the drug is usually administered over a long period of time, any or all of these side effects may be long-term.<sup>88</sup> However, most reported side effects are extremely rare,<sup>89</sup> and all side effects cease once the administration of Depo-Provera stops.<sup>90</sup>

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<sup>81</sup> *Id.* at 5-6 (citing to studies by Dr. John Money of the Biosexual Psychological Clinic of Johns Hopkins Hospital).

<sup>82</sup> See Abrams, *supra* note 77, at 567.

<sup>83</sup> *Id.*

<sup>84</sup> Green, *supra* note 61, at 6.

<sup>85</sup> Abrams, *supra* note 77, at 568 (citing Bradford, *Hormonal Treatment of Sex Offenders*, 11 BULL. AM. ACAD. PSYCHIATRY L. 159, 166 (1983)).

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

<sup>87</sup> Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. LAW 1, 8 (1990) (stating that these statistics caused the Food and Drug Administration to ban its use in the U.S. as a female contraceptive in 1984. However, Depo-Provera is used as a contraceptive in over eighty countries).

<sup>88</sup> *Id.* at 9.

<sup>89</sup> *Id.* at 7.

<sup>90</sup> *Id.* (stating that after treatment ceases, "[e]rection and ejaculation return within 7-10 days, along with the subjective awareness of the sex drive").

Depo-Provera does not cause impotence during treatment;<sup>91</sup> an individual can still experience erections and ejaculations while taking the drug.<sup>92</sup> Although patients do not have spontaneous erections or ejaculations, they can sexually perform when prompted by another person.<sup>93</sup> Also, there has only been minimal diminution of consensual sexual activity.<sup>94</sup>

Although Depo-Provera does appear to be a very promising treatment for sexual offenders, there is still much research that needs to be done.<sup>95</sup> As of today, Depo-Provera has not been cleared by the Food and Drug Administration for the purpose of treating sexual deviants.<sup>96</sup> Issues such as long term effects of Depo-Provera,<sup>97</sup> questions on appropriate dosage levels,<sup>98</sup> and the lack of studies of the drug and its effect on recidivism rates indicate that there is still much to be learned about the drug.<sup>99</sup>

### C. Appropriate Candidates For The Procedure

Sexual offenders have been divided into four types.<sup>100</sup> An individual's type can play an important role in the effectiveness Depo-Provera may have.<sup>101</sup>

A Type I offender will often deny the commission of the crime or the criminal nature of the act.<sup>102</sup> A Type II offender will admit to the

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

<sup>92</sup> Fitzgerald, *supra* note 87, at 7.

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

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

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

<sup>96</sup> See Tsang, *supra* note 1, at 11A.

<sup>97</sup> See Fitzgerald, *supra* note 87, at 9.

<sup>98</sup> *Id.* at 10.

<sup>99</sup> *Id.* See also discussion *infra* Part C.

<sup>100</sup> See Fitzgerald, *supra* note 87, at 4.

<sup>101</sup> See e.g., Kimberly A. Peters, *Chemical Castration: An Alternative to Incarceration*, 31 DUQ. L. REV. 307, 312 (1993) (stating that "appropriate candidates for treatment need to be identified.").

<sup>102</sup> Fitzgerald, *supra* note 87, at 4.

commission of the crime but will blame the commission on nonsexual or nonpersonal forces, such as drugs, alcohol, or stress.<sup>103</sup> A Type III offender is a violent individual whose act is caused by non-sexual gain, such as power, violence, or anger.<sup>104</sup> Finally, the Type IV individual is a *paraphiliac* who "exhibits a pattern of sexual arousal, erection and ejaculation, which is characterized by a specific fantasy or its actualization."<sup>105</sup>

Depo-Provera or MPA treatment has been shown to be effective for the Type IV paraphiliac.<sup>106</sup> This is because the paraphiliac has the essential criterion to successful treatment -- the ability to acknowledge his behavior as intolerable and beyond his control.<sup>107</sup>

The other three types of sexual offenders will not be successful MPA treatment candidates because they lack the capacity to acknowledge their abnormal behavior.<sup>108</sup> A Type I offender is not likely to be responsive to MPA treatment because he denies responsibility for the offense.<sup>109</sup> Additionally, Type II sex offenders, would not respond well to treatment because they will place blame for the offense on other factors besides themselves.<sup>110</sup> Type III offenders, that include hostile rapists, are violent and angry and are not amenable to Depo-Provera.<sup>111</sup> Experts feel the only alternative for Types I, II, and III sex offenders is incarceration.<sup>112</sup>

But a Type IV offender, sometimes in the case of a pedophile, might feel remorse or guilt for his actions but is, unfortunately, unable to

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

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

<sup>105</sup> *Id.* (emphasis added).

<sup>106</sup> *Id.* at 5.

<sup>107</sup> Peters, *supra* note 101, at 312 (stating that "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").

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 313.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* (stating that "[a]s 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").

<sup>112</sup> Peters, *supra* note 101, at 312, 313.

control his behavior.<sup>113</sup> This type of offender is most likely to respond positively to a combination of treatment with Depo-Provera and counseling.<sup>114</sup>

As such, it is very important to properly diagnose a sex offender.<sup>115</sup> In diagnosing a Type IV offender, or a paraphiliac, the examination must be based not only on the offender's sexual behavior, but on other areas of his behavior as well.<sup>116</sup> The individual's "cognitive, emotional, and behavioral states must be examined" to receive a complete picture of the offender.<sup>117</sup> After such a psychological examination is performed, there also must be a complete medical examination to check for any medical complications that could be a contributing factor to the behavior.<sup>118</sup> Only after both of these steps are complete should an offender be eligible for MPA treatment.<sup>119</sup>

The typical dosage of Depo-Provera administered to an offender receiving treatment is between 100 milligrams and 800 milligrams, injected intramuscularly on a weekly basis.<sup>120</sup> The typical dosage is 500 milligrams.<sup>121</sup> Usually, the dosage does not need to be increased over time because the body does not build up a tolerance for Depo-Provera.<sup>122</sup>

Under the California Castration Law, Depo-Provera would be administered by injection to a parolee, throughout the parole period.<sup>123</sup> In California, the average parole period is three years.<sup>124</sup>

The injection of Depo-Provera acts on the body in the following manner:

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Fitzgerald, *supra* note 87, at 5.

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

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 5, 6.

<sup>119</sup> *Id.* at 6.

<sup>120</sup> Fitzgerald, *supra* note 87, at 6.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See Schodolski, *supra* note 25, at A22.

<sup>124</sup> *Id.*

MPA binds to the muscle and is gradually released . . . MPA inhibits the release of the follicle-stimulating hormone and the luteinizing hormone from the anterior pituitary gland in the brain. This results in a decrease in testosterone production in the testicles. MPA interferes with the effects of the testosterone and accelerates the metabolism of testosterone in the body. MPA reduces the level of androgen in the blood stream to that of a prepubescent male.<sup>125</sup>

Significantly, MPA treatment must be accompanied by counseling to help the offender readjust to a new lifestyle.<sup>126</sup> According to Dr. Berlin, founder of the Sexual Disorders Clinic at Johns Hopkins University,<sup>127</sup> "even though the medicine decreases the offender's sex drive, he still has to deal with his feelings of companionship, intimacy, affection, devotion, or love which may have previously been provided."<sup>128</sup>

According to experts, such as Dr. Berlin, the California law is not the answer to the sex offender problem.<sup>129</sup> In fact, Dr. Berlin, who is an advocate for voluntary chemical castration, opposes the California Castration Law.<sup>130</sup> He states that "[t]here are many sex offenders for who this is not going to be appropriate or useful . . . [i]n effect, the legislators are practicing medicine without a license."<sup>131</sup>

Additionally, it appears that the Castration Law fails to specifically assess each offender.<sup>132</sup> The California law specifically covers certain sex acts with minors without performing an examination and assessment to

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<sup>125</sup> Fitzgerald, *supra* note 87, at 5-6.

<sup>126</sup> *See id.* at 9.

<sup>127</sup> *See supra* text accompanying note 56.

<sup>128</sup> Fitzgerald, *supra* note 87, at 9 n.50.

<sup>129</sup> Van Biema, *supra* note 13, at 60.

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

<sup>131</sup> *Id.*

<sup>132</sup> *See supra* text accompanying note 56.



determine the potential effectiveness of the treatment<sup>133</sup> -- "[t]he law exempts hetero-sexuals who practice conventional sex acts with minors. It does not cover males convicted of having vaginal sex with females under 13; it covers only those convicted of sodomy, oral sex, insertion of foreign objects or lewd and lascivious conduct with such minors.<sup>134</sup>

In other words, according to Dr. Berlin, "a 'broadbrush' effort [such as the one attempted by the California legislature] to 'castrate the bastards' will have little therapeutic value."<sup>135</sup> In fact, according to Dr. Berlin, the pedophiles that the California law is trying to reach, are not always an appropriate group for treatment.<sup>136</sup> "For pedophiles, there's a lot of denial. Many of them don't appreciate the harm they cause and the need for treatment."<sup>137</sup> As discussed earlier, an essential element of successful treatment is for the pedophile to acknowledge the harm they have done.<sup>138</sup>

#### IV. CONSTITUTIONAL IMPLICATIONS

##### A. *Case Law*

Again, the California law gives the sexual offender the choice between surgical and chemical castration.<sup>139</sup> Both options have been addressed by various state and federal courts, but not in the state of

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<sup>133</sup> *See id.*

<sup>134</sup> Daniel C. Tsang, *Castration: 'Desperate Cures' Shame Society*, PHOENIX GAZETTE, Sept. 20, 1996, at B7 (noting the inefficiencies of chemical castration).

<sup>135</sup> Hale, *supra* note 9, at 04A (quoting Dr. Fred Berlin, "who uses drugs to treat sex offenders and who says they should be made available to offenders who could be helped by them").

<sup>136</sup> *See* Bernstein, *supra* note 49, at A1.

<sup>137</sup> *Id.*

<sup>138</sup> Peters, *supra* note 101, at 312.

<sup>139</sup> 1995 Cal Stat. 3339.

California.<sup>140</sup>

Surgical castration of sexual offenders has not been well received in American courts.<sup>141</sup> In *State v. Brown*,<sup>142</sup> a South Carolina trial court sentenced members in a brutal gang rape to thirty-years imprisonment.<sup>143</sup> However, if any of the members agreed to be surgically castrated, their sentence would be suspended and they would be placed on probation for five years.<sup>144</sup> On appeal, the South Carolina Supreme Court held that the condition of imposing castration was an abuse of the judge's discretion because it was in violation of public policy and the South Carolina state constitution's prohibition against cruel and unusual punishment.<sup>145</sup>

Prior cases have also held surgical castration of sexual offenders unconstitutional, particularly with regards to rapists.<sup>146</sup> In *Mickle v. Henrichs*,<sup>147</sup> the federal district court held that a Nevada statute mandating vasectomies on rapists violated the United States Constitution.<sup>148</sup> Similarly, in *Davis v. Berry*,<sup>149</sup> the Federal District Court for the Southern District of Iowa held an Iowa statute unconstitutional for requiring sterilization of men convicted of their second felony.<sup>150</sup>

With regards to chemical castration with the use of Depo-Provera, the Michigan Court of Appeals addressed the issue in *Michigan v. Gauntlett*.<sup>151</sup> In *Gauntlett*,<sup>152</sup> Roger Gauntlett, ironically an heir of the

<sup>140</sup> See *State v. Brown*, 326 S.E.2d 410 (S.C. 1985); See also *People v. Gauntlett*, 352 N.W.2d 310, *modified*, 353 N.W.2d 463 (Mich. 1984).

<sup>141</sup> See Green, *supra* note 61, at 9.

<sup>142</sup> 326 S.E.2d 410 (S.C. 1985).

<sup>143</sup> See *id.* at 410-11.

<sup>144</sup> See *id.*

<sup>145</sup> See *id.* at 412.

<sup>146</sup> See Green, *supra* note 61, at 9.

<sup>147</sup> 262 F. 687 (D.Nev. 1918).

<sup>148</sup> See *id.* at 691 (holding that mandatory vasectomies were cruel and unusual punishment).

<sup>149</sup> 216 F. 413 (S.D. Iowa 1914).

<sup>150</sup> *Id.* at 417 (holding the statute to be in violation of the 8th Amendment's prohibition against cruel and unusual punishment).

<sup>151</sup> *Gauntlett*, 352 N.W.2d 310, *modified* 353 N.W.2d 463 (Mich. 1984).

<sup>152</sup> 352 N.W.2d 310, *modified*, 353 N.W.2d 463 (Mich. 1984).

Upjohn fortune,<sup>153</sup> was charged with two counts of criminal sexual conduct in the first degree arising from Gauntlett's acts of sexual intercourse with his fourteen year-old stepdaughter.<sup>154</sup> Mr. Gauntlett was also charged with three counts of sexual misconduct in the second degree arising from defendant's sexual fondling of his twelve year-old stepson.<sup>155</sup> In accordance with an agreement between the parties, Mr. Gauntlett pled no contest to one count of sexual conduct in the first degree with the stepdaughter.<sup>156</sup> The other counts were to be dismissed at sentencing.<sup>157</sup> The trial court sentenced the defendant to five years probation, with the first year to be spent in the county jail.<sup>158</sup> As a condition to probation, Mr. Gauntlett would have to receive chemical castration "by means patterned after the research and treatment of the Johns Hopkins Hospital in Baltimore, Maryland."<sup>159</sup>

The Michigan Court of Appeals overruled the lower court's decision and held that the trial judge imposed an illegal probation condition on the defendant.<sup>160</sup> The court first reasoned that there was no statutory authorization for treating sex offenders with Depo-Provera.<sup>161</sup> Second, the court found Depo-Provera had not "gained acceptance in the medical community as a safe and reliable medical procedure."<sup>162</sup> Third, the court noted Depo-Provera's experimental status, the limited professional literature on its use, the limited availability of the drug, and the fact that the trial judge's order made it impossible for the defendant to

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<sup>153</sup> Green, *supra* note 61, at 9. See also *Upjohn Heir to Leave Jail After Serving 4 Years*, CHI. TRIB., Oct. 23, 1990, at 3 [hereinafter, *Upjohn Heir*] (stating that Roger Gauntlett is the great-grandson of Upjohn founder W.E. Upjohn).

<sup>154</sup> *Gauntlett*, 352 N.W.2d at 311.

<sup>155</sup> *Id.*

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

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 313.

<sup>159</sup> *Gauntlett*, 352 N.W.2d at 313.

<sup>160</sup> *Id.* at 314-21.

<sup>161</sup> *Id.* at 314-15.

<sup>162</sup> *Id.* at 316 (citing to the drug's "alphabet adverse reactions from acne to cancer to weight gain").

perform the probation condition.<sup>163</sup> Finally, the court noted a problem with regard to a lack of informed consent by Gauntlett, noting that "[e]ven mentally incompetent persons, committed under court process, enjoy a greater degree of protection from extraordinary medical procedures."<sup>164</sup>

On appeal to the Supreme Court of Michigan, the court upheld the Appeals Court's decision that the use of Depo-Provera was an unlawful probation condition, but modified the issue regarding the trial judge abusing his sentencing discretion.<sup>165</sup> The case was remanded for resentencing.<sup>166</sup>

### B. Constitutional Issues

The California Castration Law has the potential to be challenged on a number of constitutional grounds including the First Amendment's freedom of expression,<sup>167</sup> the Eighth Amendment's guarantee against cruel and unusual punishment,<sup>168</sup> and the Fourteenth Amendment's due process guarantee of liberty.<sup>169</sup>

The First Amendment "allows individuals to express and receive ideas which enable them to make choices to realize their life goals."<sup>170</sup> As held in *Griswold v. Connecticut*,<sup>171</sup> the First Amendment also includes a

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

<sup>164</sup> *Id.*

<sup>165</sup> *People v. Gauntlett*, 353 N.W.2d 463, 464 (Mich. 1984) (noting that the decision that the trial judge abused his sentencing discretion was premature).

<sup>166</sup> *Id.* See also *Upjohn Heir*, *supra* note 153, at 3 (stating that after the state appeals court remanded the case for resentencing, Roger Gauntlett was sentenced to five to fifteen years in prison).

<sup>167</sup> U.S. CONST. amend. I ("Congress shall make no law respecting . . . or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

<sup>168</sup> U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

<sup>169</sup> U.S. CONST. amend. XIV, § 1 ("[n]or shall any State deprive any person of life, liberty, or property, without due process of law"). See generally *Green*, *supra* note 61, at 17-26.

<sup>170</sup> *Fitzgerald*, *supra* note 87, at 26.

<sup>171</sup> 381 U.S. 479 (1965).

guarantee of mental autonomy, and within its penumbra, the right to privacy.<sup>172</sup> The Supreme Court has recognized this "right to privacy" in *Stanley v. Georgia*,<sup>173</sup> when it upheld an individual's right to receive and process pornographic materials in one's own home.<sup>174</sup> The Court went on to say that a state government could not control an individual's thoughts, even if they were loathsome, noxious, or immoral.<sup>175</sup>

In effect, the use of Depo-Provera or surgical castration controls an individual's thoughts about sex.<sup>176</sup> Depo-Provera "interfere[s] with a paraphiliac's mentation by decreasing his compulsive sexual fantasy."<sup>177</sup>

However, the "key element in deciding whether an individual's First Amendment rights have been violated is the degree of the intrusion caused by the treatment."<sup>178</sup> In *Rennie v. Klein*,<sup>179</sup> a federal court faced the issue of the forced administration of drugs on mental patients and held that the "length and persistence of the effects of psychotropic drugs on the patient's ability to think and speak determines whether the drug intrudes upon their freedom to think or their right to privacy."<sup>180</sup>

With regard to the California Castration law and the constitutionality of the options of surgical and chemical castration, it would appear that surgical castration is in violation of the First Amendment:

Measured by the *Rennie* effects test, surgical castration arguably violates the convicted [sex offender's] First Amendment rights because the effect on his freedom of

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<sup>172</sup> *Id.*

<sup>173</sup> 394 U.S. 557 (1969).

<sup>174</sup> *Id.* at 564.

<sup>175</sup> *Id.* at 565.

<sup>176</sup> Green, *supra* note 61, at 19 (stating, "the main effect of castration on men . . . is that their capacity to respond to sexual stimuli is diminished, as is their sexual fantasy life and their sexual interests in general").

<sup>177</sup> Fitzgerald, *supra* note 87, at 28.

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

<sup>179</sup> 462 F. Supp 1131 (D. N.J. 1978).

<sup>180</sup> *Rennie*, 462 F. Supp. at 1143-44.

thought and privacy in those thoughts is long-term and irreversible. The use of Depo-Provera would also violate the convicted [sex offender's] First Amendment rights.<sup>181</sup>

Chemical castration arguably is not as intrusive because the effects of MPA treatment are reversible and are in existence only through the duration of the treatment.<sup>182</sup> But the fallacy and downfall of this argument, according to the *Rennie* test, is the uncertainty of the duration of treatment: "[i]ts effects are said to be temporary and reversible but the efficacy of the treatment requires its continued use."<sup>183</sup>

The Eighth Amendment to the United States Constitution prohibits punishment that is deemed cruel and unusual.<sup>184</sup> What is cruel and unusual is "an evolving concept"<sup>185</sup> that must "draw its meaning from the evolving standards of decency that mark the progress of maturing society."<sup>186</sup>

Two steps are involved in determining whether both surgical and chemical castration are cruel and unusual punishments.<sup>187</sup> First, are they in fact, punishments as opposed to treatments; and second, if they are punishments, are they cruel and unusual?<sup>188</sup>

In determining the question of punishment versus treatment, the *Rennie* court established the following four-part test<sup>189</sup>: (1) does it have any therapeutic value, (2) is its use recognized as accepted medical practice, (3) is it part of an ongoing psychotherapeutic program, and (4) even though it may have long-term benefits, are its adverse effects

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<sup>181</sup> Green, *supra* note 61, at 19-20.

<sup>182</sup> Peters, *supra* note 101, at 326.

<sup>183</sup> Green, *supra* note 61, at 19-20.

<sup>184</sup> U.S. CONST. amend. VIII.

<sup>185</sup> Trop v. Dulles, 356 U.S. 86, 101 (1958).

<sup>186</sup> *Id.* (discussing the meaning of the Eighth Amendment in the context of the death penalty).

<sup>187</sup> See Green, *supra* note 61, at 20.

<sup>188</sup> *Id.*

<sup>189</sup> Rennie v. Klein, 462 F. Supp. 1131, 1143 (D. N.J. 1978).

unreasonably harsh?<sup>190</sup>

Although, both surgical and chemical castration may arguably have therapeutic value,<sup>191</sup> they fail other prongs of the test.<sup>192</sup> First, surgical castration fails the second prong of the test because it is not a medically acceptable treatment for criminals in the United States.<sup>193</sup> Depo-Provera also fails the second prong of the *Rennie* test due to the fact that it is merely "an experimental procedure for criminals [and it] is a suspected carcinogen."<sup>194</sup> It fails despite the argument that Depo-Provera has been reported to be "the most effective form of clinical management for the sexual offender on probation,"<sup>195</sup> and the argument that the use of MPA treatment is just that, a "treatment."<sup>196</sup> However, under the *Rennie* test, both surgical or chemical castration would be considered punishments because they fail to meet all four parts of the test<sup>197</sup>

The second question now must be answered. That is, are the punishments of surgical or chemical castration cruel and unusual punishment under the Eighth Amendment?<sup>198</sup> The Supreme Court has, at different times, come up with three separate tests in determining whether punishments are cruel and unusual.<sup>199</sup>

In *Trop v. Dulles*,<sup>200</sup> the Supreme Court determined that

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

<sup>191</sup> Green, *supra* note 61, at 20 (stating that "[u]sed in conjunction with psychotherapy since 1966, Depo-Provera is reported to be the most effective form of clinical management for the sexual offender on probation").

<sup>192</sup> *Id.* at 21.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Peters, *supra* note 101, at 319.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Green, *supra* note 61, at 21.

<sup>199</sup> See *Trop v. Dulles*, 356 U.S. 86 (1958) (establishing one test for cruel and unusual punishment); *Weems v. United States*, 217 U.S. 349 (1909) (establishing another test for cruel and unusual punishment); and *Furman v. Georgia*, 408 U.S. 238 (1972) (establishing a third test for cruel and unusual punishment).

<sup>200</sup> 356 U.S. 86 (1958).

punishments are cruel and unusual if they are inherently cruel.<sup>201</sup> With regards to surgical castration, "the [ ] operation always involves an injury owing to the mutilation itself, to changes of endocrine origin -- sexual, somatic, and psychic -- and to the unfortunate emotional reaction."<sup>202</sup> With regards to Depo-Provera, the fact remains that the drug is experimental and it must be administered over a long period of time.<sup>203</sup> Accordingly, "[u]nder the *Trop* test, a court would be likely to find that the use of surgical castration or Depo-Provera would shock the conscience, because it permanently mutilates the body."<sup>204</sup>

In *Weems v. United States*,<sup>205</sup> the Supreme Court established a second test for determining whether punishment is cruel and unusual.<sup>206</sup>

The test turns on "whether the punishment is greatly disproportionate to the offense for which it is imposed."<sup>207</sup> Under this test, a court would also likely find both surgical and chemical castration in violation of the Constitution.<sup>208</sup> "[c]astration is an irreversible procedure and Depo-Provera is an experimental drug whose required use would have adverse side effects, whereas incarceration for [a sexual offense] in some jurisdictions may result in a minimum one-year sentence."<sup>209</sup>

Finally, under the third test, as set out in *Furman v. Georgia*,<sup>210</sup> "the question is whether the punishment exceeds what is necessary to accomplish the state's legitimate aims."<sup>211</sup> Again, both surgical and chemical castration would fail under this test.<sup>212</sup>

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<sup>201</sup> Green, *supra* note 61, at 22.

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

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

<sup>204</sup> Green, *supra* note 61, at 22.

<sup>205</sup> 217 U.S. 349 (1910).

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

<sup>207</sup> Green, *supra* note 61, at 22.

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

<sup>209</sup> *Id.*

<sup>210</sup> 408 U.S. 238 (1972).

<sup>211</sup> Green, *supra* note 61, at 22.

<sup>212</sup> *Id.*



Surgical castration would fail the *Furman* test for cruel and unusual punishment because the less intrusive alternatives of imprisonment or psychotherapy are available. Depo-Provera would fail the *Furman* test because its practical value in accomplishing the state's aim of reducing [sexual offenses] is not more clearly demonstrated than less intrusive methods as imprisonment of psychotherapy.<sup>213</sup>

Inherent in the Fourteenth Amendment's right to privacy, is the protection of bodily autonomy, which includes procreative freedom and the right to refuse intrusive medical treatment.<sup>214</sup>

The Supreme Court has addressed the right to sexual privacy in the case of *Skinner v. Oklahoma*.<sup>215</sup> In this case, the Court held that a government enforced sterilization intruded upon a person's right to privacy in marriage and procreation.<sup>216</sup> It would seem that the option of surgical castration would be viewed in a similar light to *Skinner*. "Castration, like a vasectomy, destroys the ability to procreate, but castration is more severe because it results in the cessation of the sexual drive."<sup>217</sup> The treatment with Depo-Provera does "involve the state in the regulation of the enjoyment of the marriage relationship and of family life."<sup>218</sup> Because marriage and procreation are fundamental to the very existence of the race,<sup>219</sup> the government may not intrude on such a fundamental right unless they have a compelling interest and there are not less restrictive means to achieving that interest.<sup>220</sup> Again, it can be argued that both imprisonment and psychotherapy are less restrictive on one's right to

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

<sup>214</sup> See Fitzgerald, *supra* note 87, at 44.

<sup>215</sup> 316 U.S. 535 (1942).

<sup>216</sup> *Id.* at 541-42.

<sup>217</sup> Green, *supra* note 61, at 24.

<sup>218</sup> *Id.*

<sup>219</sup> *Roe v. Wade*, 410 U.S. 113, 155 (1973).

<sup>220</sup> *Shelton v. Tucker*, 364 U.S. 479, 488-89 (1960).

privacy than both surgical or chemical castration.<sup>221</sup>

An individual's right to privacy also includes a right to bodily autonomy that includes a right to refuse intrusive medical treatment.<sup>222</sup> In *Rennie*, inmates at a psychiatric hospital in New Jersey brought suit against the forced administration of antipsychotic medication.<sup>223</sup> The Third Circuit Court held that involuntarily committed patients retain a residuum of liberty which prohibits any unjustified intrusions on personal security.<sup>224</sup> It can be argued the Supreme Court "has clearly stated that individuals have a protected liberty interest under the Fourteenth Amendment which allows them to refuse unwanted medical treatment. This permits the convicted paraphiliac to refuse MPA treatment."<sup>225</sup> What is not so clear is, if once released from confinement, "the state's interest in protecting the public from future sex crimes warrants the imposition of MPA treatment."<sup>226</sup>

#### V. CONCLUSION

The California Castration Law addresses the very serious problem of pedophilia in the state of California. It also serves as a very attractive role model for other states dealing with their same problems. A possible reason for the Law's appeal is its method of ending child molestation by "nipping the problem in the bud" and rendering a potential offender unable to perform the criminal act.<sup>227</sup>

Unfortunately, the proposed solution of surgical and chemical castration have repercussions on the offender that trigger Constitutional rights.<sup>228</sup> In determining its Constitutional validity, these repercussions

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<sup>221</sup> Green, *supra* note 61, at 25.

<sup>222</sup> See Fitzgerald, *supra* note 87, at 44.

<sup>223</sup> *Rennie v. Klein*, 462 F.Supp 1131 (D. N.J. 1978).

<sup>224</sup> *Id.* at 1142.

<sup>225</sup> Fitzgerald, *supra* note 87, at 49.

<sup>226</sup> *Id.*

<sup>227</sup> See Green, *supra* note 61, at 4.

<sup>228</sup> See Tsang, *supra* note 1, at 11A.

contribute to the law failing to pass Constitutional muster.

First, the actual procedures of surgical and chemical castration are both radical and not without side effects.<sup>229</sup> Second, prior state and federal case law have been unreceptive to both surgical and chemical castration for constitutional reasons.<sup>230</sup> Third, both surgical and chemical castration violate an offender's First Amendment Right to express and receive ideas by impairing his freedom of thought.<sup>231</sup> Fourth, an offender's Eight Amendment Right is violated by both procedures because under prevailing law, both procedures are cruel and unusual punishment.<sup>232</sup> Finally, both chemical and surgical castration violate an offender's Fourteenth Amendment right to privacy.<sup>233</sup> This is done through the violation of one's right to bodily autonomy and procreative freedom.<sup>234</sup>

Although arguments for the use of castration, especially the non-permanent option of chemical castration, seem both rational and valid,<sup>235</sup> for California and other states dealing with their serious sex offender problems, castration is not a constitutional solution.

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<sup>229</sup> See *supra* notes 60-99 and accompanying text.

<sup>230</sup> See *supra* notes 139-166 and accompanying text.

<sup>231</sup> Green, *supra* note 61, at 19-20. See also *supra* notes 170-183 and accompanying text.

<sup>232</sup> See *supra* notes 184-213 and accompanying text.

<sup>233</sup> See *supra* notes 214-226 and accompanying text.

<sup>234</sup> *Id.*

<sup>235</sup> See, e.g., *supra* text accompanying notes 182, 191, 195, and 226.