Mandatory Chemical Castration for Perpetrators of Sex Offenses Against Children: Following California's Lead

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Mandatory Chemical Castration for Perpetrators of Sex Offenses Against Children: Following California's Lead

I. INTRODUCTION

Imagine the innocence of a seven-year-old schoolgirl walking home after a day of classes. This picture is a peaceful reminder to many of childhood days characterized by carefree happiness and unlimited dreams. Next imagine, however, that our innocent, seven-year-old schoolgirl is abducted a mere one hundred yards from her home, thrown in the trunk of a car, driven to a field and sexually molested, battered against a tree until unconscious, and then dumped, naked, into a river where she is left to drown. Unfortunately, we need not imagine this scenario because it is the true story of Natalie Astner, whose tragic fate befall her at the hands of a convicted child molester.¹

According to the California Department of Justice, there are an estimated sixty-six thousand registered sex offenders in the state of California and approximately thirty-nine thousand of those offenders have been convicted of sexual assault on a child.² By the end of their first


year on parole, more than fifty percent of convicted sex offenders are back in prison with the number rising to almost eighty percent after two years on parole.\(^3\)

The recidivism rate among child molesters has led to strong public sentiment favoring harsher punishment of repeat child molesters.\(^4\) California has taken bold steps in the past two years in an effort to combat these heinous sex crimes against children.\(^5\) The culmination of California's efforts came in 1996 with Assembly Bill 3339, which provides for the mandatory chemical castration of repeat child molesters.\(^6\)

Proponents of chemical castration of repeat child molesters are riding a wave of public emotion that has been building over the past decade.\(^7\) For example, the victims of the "pillowcase rapist" organized to support the chemical castration legislation.\(^8\) Chemical castration proponents assert that it will lower recidivism and decrease the victimization of chil-

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5. In 1994, Governor Wilson signed a "One Strike" law which imposes a "25-year-to-life sentence on child molesters and the most vicious predatory rapists." Chemical Castration Fact Sheet, supra note 2, at 2. Also in 1994, Governor Wilson signed legislation instituting a state-wide telephone system for people to call to inquire whether a specific individual has a sex offense conviction on their record. See id. In 1995, the Governor signed Assembly Bill 888, which permits the state "to civilly commit violent repeat sex offenders who have a diagnosable mental disorder in secure mental institutions." Id. In 1996, Wilson signed legislation defining a sexually violent offender as "anyone who commits a sex offense against a child under the age of 14." Id. Additionally, this legislation "prohibits a sex offender from being exempted from registering as a sex offender simply by receiving a rehabilitation certificate." Id. 
7. See Michael A. Barmettler, Note, People v. Hicks: Sentencing Laws and Sex Offenses—A Disingenuous Approach by the California Supreme Court, 32 SAN DIEGO L. REV. 285, 286 (1995); see also Mary Lynne Vellinga, 'Castration' Law Under Fire, SACRAMENTO BEE, Feb. 4, 1997, at A1, (discussing the trend favoring tougher laws on child molesters following highly publicized sex crimes such as that of Polly Klaas). 
8. See Vincent J. Schodolski, California OKs 'Castration' Bill; Foes Doubt Legality of Punishment for Molesters, CHI. TRIB., Aug. 31, 1996, at 1. The Women's Coalition helped organize the victims of the pillowcase rapist, Reginald Muldrew, in order to push the chemical castration bill. See id.
dren in the future. In support of this assertion, proponents rely on the successful use of chemical castration in Europe and other countries.

Opponents of chemical castration, such as the American Civil Liberties Union (ACLU), argue that chemical castration amounts to cruel and unusual punishment. The California Attorneys for Criminal Justice joined the ACLU in opposing chemical castration on the ground that it is cruel and unusual punishment, as well as a possible violation of the offender's right to privacy.

This Comment discusses the controversy surrounding mandatory chemical castration and advocates the affirmation of California's mandatory chemical castration law as a significant step toward protecting our nation's children. Part II discusses the details of California’s mandatory chemical castration law. Part III explains the medical procedures and mechanisms of chemical castration. Part IV provides an analysis of the application and success of chemical castration outside of California. Part V sets forth a detailed review of the constitutional implications surrounding mandatory chemical castration with additional attention given to the historical development and related case law. Part VI addresses the issue of informed consent. Part VII discusses the public policy arguments surrounding California's mandatory chemical castration, and part VIII provides a brief conclusion.

9. See Douglas J. Besharov & Andrew Vachhs, Is Castration an Acceptable Punishment?, A.B.A. J., July 1992, at 42. Research has shown that recidivism rates are less than five percent when hormone therapy and counseling are used concurrently. See id.; see also Our Children, Our Freedom, St. Louis Post-Dispatch, Sept. 5, 1996, at 6B, available in 1996 WL 2789767 (stating that recidivism rates are as low as two percent in Europe where chemical castration is used).

10. See infra notes 71-101 and accompanying text (discussing the application of chemical castration in Europe and other countries).

11. See David Van Biema, A Cheap Shot at Pedophilia? California Mandates Chemical Castration for Repeat Child Molesters, Time, Sept. 9, 1996, at 60; see also infra notes 155-212 and accompanying text (discussing the allegations of cruel and unusual punishment).


13. See infra notes 20-43 and accompanying text.

14. See infra notes 44-70 and accompanying text.

15. See infra notes 71-150 and accompanying text.

16. See infra notes 151-274 and accompanying text.

17. See infra notes 275-301 and accompanying text.

18. See infra notes 302-43 and accompanying text.

19. See infra notes 344-46 and accompanying text.
California's Mandatory Chemical Castration Law

California bill AB 3339 passed in the State Assembly by a vote of forty-two to twenty-seven in May 1996 and by a vote of twenty-five to one in the State Senate in August 1996. On September 17, 1996, California Governor Pete Wilson signed the legislation making chemical castration mandatory. The law became effective on January 1, 1997.

A. AB 3339 Repeals and Replaces California Penal Code Section 645

AB 3339 repeals section 645 of the California Penal Code, which stated:

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.

AB 3339 rewrites section 645 of the California Penal Code to read, in pertinent part:

(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 other punishment prescribed for that offense or any other provision of law, at the discretion of the court.

(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.

B. Improvements in the Penal Code Provided by AB 3339 and the New Section 645

There are two noteworthy improvements provided by the new law.

22. See id.
25. The entire text of AB 3339 reads as follows:
SEC. 1. Section 645 of the Penal Code is repealed.
SEC. 2. Section 645 is added to the penal code to read:
645. (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 equiv-
First, although section 2(a) of AB 3339 allows a judge to order chemical castration upon a first conviction, just as in repealed Penal Code section 645, the new law raises the age limit of the victim from ten years of age to thirteen years of age.\(^5\) The second improvement, which is responsible for the entirety of the attention thrust upon the new law, calls for the mandatory chemical castration of any person found guilty of a second conviction of specified offenses.\(^7\)


\(^7\) See CAL. PENAL CODE § 645(a).

\(^{26}\) See id. § 645(b).
C. Explanation of Penal Code Section 645 as Amended by AB 3339

While section 1 of AB 3339 calls for the repeal of California Penal Code section 645, section 2 adds the amended section 645 to the Penal Code. Subdivision (a) of the amended section 645 closely parallels the repealed Penal Code section 645 in providing that "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 [chemical castration] treatment."29

Subdivision (b) of section 645 supplies the mandatory element of the law by providing that "[a]ny person guilty of a second conviction of any offense listed in subdivision (c), where the victim has not attained 13 years of age, shall, upon parole, undergo [chemical castration] treatment."30

Subdivision (c) of this section details the specific offenses referred to in both parts (a) and (b) above.31 The specific offenses listed in part (c) include acts of sodomy,2 oral or lascivious acts with a child under the age of fourteen,3 oral copulation,4 and penetration of genital or anal openings by foreign or unknown objects.5

Part (d) of this section requires the medroxyprogesterone acetate treatment one week before an offender's release from prison.6 Additionally, the convicted offender must "continue treatments until the Department of Corrections demonstrates to the Board of Prison Terms that [the] treatment is no longer necessary."7

Subdivision (e) provides an exemption from this section for those convicted of the specified offenses.8 This subdivision exempts those persons who voluntarily undergo permanent, surgical castration from the imposition of chemical castration treatment.9

28. See A.B. 3339.
29. CAL. PENAL CODE § 645(a). This subdivision also subjects the convicted to "any other punishment prescribed for that offense or any other provision of law, at the discretion of the court." Id.
30. Id. § 645(b). In addition to the mandatory chemical castration treatment, this subdivision also subjects the convicted sex offender to "any other punishment prescribed for that offense or any other provision of law." Id.
31. See id. § 645(c).
32. See CAL. PENAL CODE § 286(c), (d) (West Supp. 1997).
34. See CAL. PENAL CODE § 288a(b), (d) (West Supp. 1997).
36. See CAL. PENAL CODE § 645(d).
37. Id.
38. See id. § 645(e).
39. See id. Note that section 645 permits the discretionary use of chemical castra-
Subdivision (f) provides that the Department of Corrections is responsible for administering this section. Subdivision (f) also states that a physician or surgeon employed by the Department of Correction will not be required to participate in the chemical castration of a sex offender against his or her will. Subdivision (f) further requires that the convicted sex offender be informed of the effects of the chemical treatment as well any resulting side effects. Finally, subdivision (f) requires acknowledgment of the receipt of this information by the convicted sex offender.

III. THE CHEMICAL CASTRATION DRUG

California's new law calls for the use of medroxyprogesterone acetate (MPA) or its chemical equivalent. MPA is manufactured under the trade name Depo-Provera by the Upjohn Company. Although various hormonal treatments have shown some success in decreasing the libido, MPA remains the most commonly used hormone today.

A. Historical Development of MPA

Since its inception, MPA has been widely used internationally as a female contraceptive. More than ten million women in over eighty foreign countries used MPA as a contraceptive between 1969 and 1984.
Research on chemical castration first began in the United States in the 1960s by Johns Hopkins Professor John Money.\textsuperscript{49} It was not until 1992, however, that the United States Food and Drug Administration (FDA) approved its use as a female contraceptive in this country.\textsuperscript{50} Although the FDA has not given specific authorization for the use of MPA in the castration setting, the Food, Drug and Cosmetic Act does not limit the uses for which a doctor might prescribe a drug once it is on the market, thus making it available for use as a chemical castration drug.\textsuperscript{51}

**B. MPA Medical Mechanisms of Action**

Although the treatment is referred to as chemical castration, the actual treatment neither castrates nor sterilizes a person.\textsuperscript{52} The application of the drug involves weekly intramuscular injections in either the arm or the buttock of approximately 500 milligrams each.\textsuperscript{53} Weekly injections are necessary because individual doses of MPA become less effective over time.\textsuperscript{54} MPA functions by inhibiting “the release of the follicle-stimulating hormone and the lutenizing hormone from the anterior pituitary gland in the brain.”\textsuperscript{55} MPA causes a reduction of the androgen levels “in the blood stream to that of a prepubescent male.”\textsuperscript{56} The resulting effect is a decrease in the production of testosterone in the testicles.\textsuperscript{57} This decrease in testosterone levels causes a corresponding reduction in “erectile capability” and sexual interest.\textsuperscript{58} When administered in large enough doses, MPA can also decrease sexual desire in women.\textsuperscript{59}

\textsuperscript{49} See Rundle, supra note 45, at B1; Roan, supra note 47, at E5.
\textsuperscript{50} See Roan, supra note 47, at E5.
\textsuperscript{51} See Fitzgerald, supra note 45, at 6 n.24 (citing 12 FDA DRUG BULL. 2-3 (April 1982)).
\textsuperscript{52} People v. Gauntlett, 352 N.W.2d 310, 315 (Mich. Ct. App. 1984) (contrasting the chemical castration therapy and sanctions authorized by Michigan statute such as castration and sterilization).
\textsuperscript{53} See Fitzgerald, supra note 45, at 6; Rundle, supra note 45, at B1. An oral form of MPA is available, but it is not as effective as the injected form. See Fitzgerald, supra note 45, at 6 n.25; Icenogle, supra note 46, at 284 (citing Lehne, Treatment of Sex Offenders with Medroxyprogesterone Acetate, in 6 HANDBOOK OF SEXOLOGY: THE PHARMACOLOGY AND ENDOCRINOLOGY OF SEXUAL FUNCTION 516, 517 (1988)).
\textsuperscript{54} See Schodolski, supra note 8, at 1.
\textsuperscript{55} Fitzgerald, supra note 45, at 6.
\textsuperscript{56} Id.
\textsuperscript{57} See id.
\textsuperscript{59} See Schodolski, supra note 8, at 1.
The objective of MPA is to reduce the compulsive sexual imagery of the offender. If it works correctly, those undergoing MPA treatment will not experience spontaneous erections or ejaculations, but will experience no inhibition when prompted by a partner or researcher. While a decrease in sperm production is an additional physiological effect of MPA, dosages of the drug can be manipulated to avoid total impotence. Additionally, there are no feminizing effects as a result of exposure to MPA. Once the treatment ceases, erection, ejaculation, and sexual drive return within two weeks.

C. Known side effects of MPA

There are various reports of side effects associated with exposure to MPA. Some expected side effects include "weight gain, cold sweats, nightmares, muscle weakness, and fatigue." Additional studies show potential side effects, including irregular gallbladder functioning and diverticulitis when subjected to long term treatment, testicular atrophy, diabetes mellitus, phlebitis, headaches, insomnia, nausea, dyspnea, hyperglycemia, leg cramps, loss of body hair, and increased body temperature. Most reported side effects rarely occur, however, and they are all reversible after MPA treatment is terminated.

A major concern often raised about the use of MPA is the long-term risk of cancer. There is documentation of breast cancer in female dogs.
and uterine cancer in monkeys after being exposed to Depo-Provera. There is no evidence, however, that MPA may cause cancer in human beings.

IV. APPLICATION OF CHEMICAL CASTRATION OUTSIDE OF CALIFORNIA

The practice of mandatory physical castration dates back to the middle ages. In the United States, courts have dealt with various castration and sterilization issues since as early as the 1940s. The castration of sex offenders began in a number of European countries as early as 1906. Many of these nations are replacing surgical castration with chemical castration. Countries outside Europe are currently considering chemical castration sentencing measures similar to that of California. Additionally, several states in the United States have expressed an interest in the use of chemical castration.

A. Application of Chemical Castration in European Countries

Between 1935 and 1970, Denmark offered its criminal sex offenders a choice between imprisonment or undergoing surgical castration, but,

69. See Peters, supra note 62, at 311 (citing John T. Melella et al., supra note 62, at 225).

70. See Icenogle, supra note 46, at 285 (citing Lehne, supra note 53, at 522).

71. See Peters, supra note 62, at 308 (citing Nickolaus Heim & Carolyn J. Hursch, Castration for Sex Offenders: Treatment or Punishment? A Review and Critique of Recent European Literature, in 8 ARCHIVES OF SEXUAL BEHAVIOR 281 (1979)).


73. See Peters, supra note 62, at 309 (citing Heim & Hursch, supra note 71, at 282) (noting that Denmark first legalized castration and was soon followed by Germany, Norway, Finland, Estonia, Iceland, Latvia, and Sweden).


75. See infra notes 91-101 and accompanying text (discussing the presence of chemical castration measures in non-European countries).

76. See infra notes 102-50 and accompanying text (discussing chemical castration legislation pending in other U.S. states).
after 1973, chemical castration replaced the surgical castration option.\textsuperscript{77} The Chief Physician at Denmark’s only prison for sex offenders cited positive results arising from the implementation of the chemical castration option.\textsuperscript{78} A notable case study in Denmark concerned the chemical castration of twenty-six-year-old Arne Kjeldsen.\textsuperscript{79} Kjeldsen was convicted four times of sex crimes against pre-teen girls dating back to 1986.\textsuperscript{80} After receiving the treatment,\textsuperscript{81} Kjeldsen claimed that he felt a great deal better without his "sex fantasies."\textsuperscript{82} Since 1989, twenty-six prisoners in Denmark have elected the chemical injections and sixteen of these prisoners were released on probation.\textsuperscript{83} Only one of these sixteen committed another offense after the injections.\textsuperscript{84}

Recently, Germany moved to the forefront of the chemical castration wave due to the brutal murder of a young Bavarian girl.\textsuperscript{85} The suspect, a twenty-seven-year-old electrician, was released from prison eighteen


\textsuperscript{78} See \textit{Chemical Castration Seems to Be Working in Denmark}, \textsc{St. Louis Post-Dispatch}, Sept. 1, 1996, at 4D, available in 1996 WL 2789115 [hereinafter \textit{Working}]. The Chief Physician, Heidi Hansen, rebutted contentions that the treatment is "medieval and barbaric," asserting that it is "safe, reversible, and effective." \textit{Id.; see Jan M. Olsen, ‘Chemically Castrated’ Man Says He Is Cured and Happy}, \textsc{Associated Press}, Aug. 30, 1996, available in 1996 WL 4438079 (stating that the only castration program in Denmark is voluntary and administered in conjunction with psychotherapy).

\textsuperscript{79} See Olsen, supra note 78. Androcur, the drug first utilized in Denmark for chemical castration functioned by inhibiting testosterone production. \textit{See id.} According to Denmark’s Chief Physician at the Herstedvester Prison, the effects of this drug dissipate over time. \textit{See id.} Accordingly, in 1989, doctors in Denmark began utilizing a combination of Androcur and Decapteyl. \textit{See id.} This combination, used in Kjeldsen’s case, more closely resembles Depo-Provera, the drug used in California. \textit{See id.}

\textsuperscript{80} \textit{See id.}

\textsuperscript{81} Kjeldsen’s treatment consisted of injections twice a month. \textit{See id.}

\textsuperscript{82} \textit{See id.}

\textsuperscript{83} \textit{See id.}

\textsuperscript{84} \textit{See id.; see also Danish Deputies Favour Castration of Convicted Rapists, \textsc{Agence France-Presse}, Oct. 22, 1996, available in 1996 WL 12163189 (explaining the introduction to parliament of a bill by Danish Justice Minister Bjoern Westh that called for the chemical castration of convicted rapists).}

\textsuperscript{85} \textit{See Traynor, supra note 1, at 11. As described in the introduction of this Comment, seven-year-old Natalie Astner was kidnapped by a convicted child molester. \textit{See id.} Natalie was abducted within 100 yards of her home, thrown in the trunk of a car, taken away, sexually abused, knocked unconscious, and dumped in a river where she drowned. \textit{See id.}}
months short of serving a full four and one-half year term for sexually molesting a nine-year-old and an eleven-year-old girl. Consequently, Germany's Federal Minister for Families, the Elderly, Women, and Children has called for the chemical castration of repeat sex offenders. In addition, the Bavarian Prime Minister endorsed consideration of chemical castration.

For decades, other European nations, such as Sweden, have provided the option of surgical castration for violent sex offenses. According to the California governor's office, recidivism has been reduced to approximately 2.2% in these countries after employing chemical castration treatment.

B. Application of Chemical Castration in Other Countries

Although not mandated by law as in California, chemical castration has been used effectively in Canada. The head of the Sexual Behavior and Gender Identity Clinic at the University of Toronto's Clarke Institute of Psychiatry, Dr. Robert Dickey, asserted that the drugs used by Canadian therapists are more effective than Depo-Provera.

In Singapore, Chief Justice Yong Pung How stated in September 1996 that child molesters may be penalized with castration. Citing California's mandatory chemical castration law, How declared that Singapore may consider implementing its own program. This consideration of California's chemical castration law came on the heels of an appeal, which How ignored, by a Singaporean man "sentenced to twenty years and twenty-four strokes of the cane for molesting five schoolboys."

86. See id.
87. See Petty, supra note 1, at A14.
88. See Traynor, supra note 1, at 11.
89. See Restraining Sex Offenders, supra note 74, at 11A.
92. See id. The drug used by Dr. Dickey acts directly on the brain in order to "shut down sexual desire" as opposed to acting as a hormone suppressant as in the case of Depo-Provera. Id. One concern raised by Dr. Dickey is the possible false sense of security resulting from the mandatory chemical castration in California because of the failure of Depo-Provera to reach 100% effectiveness. See id.
94. See id.
95. Id.
Peru's attorney general proposed that rapists receive death or chemical castration.96 The Peruvian government stated that it would study the use of a chemical castration punishment similar to that used in California.97 This decision came after the discovery of four children's bodies, ages seven to thirteen, believed to have been victimized by a man possibly connected to additional sex crimes that had occurred over the past two years.98 Peru's Congress President agreed to have the legislature consider a chemical castration proposal when submitted.99

Recently, in Ecuador, President Abdala Bucaram proposed a bill to have rapists castrated.100 The bill, which came after frustration stemming from the Catholic church's refusal to allow the execution of child rapists, calls for castration by surgical or chemical means.101

C. Proposed Application of Chemical Castration in Other States in This Country

Many states currently keep a close eye on California's new mandatory chemical castration law. New York has taken a wait-and-see approach to chemical castration programs such as that in California, seemingly to allow any of the kinks to be worked out of the program before possibly implementing its own.102

In Texas, State Senator Teel Bivins proposed a bill allowing for the physical castration of repeat child molesters.103 There is also support for an amendment to this bill to allow for the option of the chemical castration of repeat offenders.104

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97. See id.
98. See id.
99. See id.
101. See id.
103. See Ben Wear, Senate Committee Unanimously Passes Castration Proposal, AUSTIN AM.-STATESMAN, Mar. 2, 1995, at B3, available in 1995 WL 6090163. This Bill was proposed in 1995 after failure to get a hearing in 1993. See id.
104. See id. A Texas criminal defense attorney cites a case of one of his clients "who was suspected of 350 rapes and had been convicted of two." Id. After being convicted of yet another sex crime, he was sentenced to some jail time, probation,
Several states have also either introduced or have chemical castration bills pending in their legislatures. Michigan's HB 4703, introduced during the 1995 legislative session, would allow the court to order the chemical castration of those persons convicted of criminal sexual conduct in the first degree after having been previously convicted in Michigan or any other state with similar sex offense laws.105 The bill provides for the treatment to be imposed "during any portion of the sentence in which the person is not incarcerated."106 A similar chemical castration measure also appeared during Michigan's 1996 legislative session in HB 6208.107

In Massachusetts, HB 1744 established an "investigational study into the efficacy of... chemical castration."108 The study calls for fact finding and reporting on the desirability of implementing a voluntary chemical castration program using the drug Depo-Provera as in California.109

Wisconsin proposed AB 594, which provided a procedure for the Wisconsin courts to use to determine whether child sex offenders should be chemically castrated.110 Wisconsin's bill provides that a person "convicted of sexually assaulting a child who is younger than 12 years old" would be subject to a hearing to determine whether chemical castration should be imposed.111

Alabama bill HB 92 aimed to amend current Alabama law which lacks a provision for the chemical castration of a male or the sterilization of a female convicted of sex crimes against children under the age of sixteen.112 Alabama HB 92 would allow Alabama courts to order chemical castration or sterilization "upon a second conviction for certain sex crimes involving a child under the age of 16 years."113

and chemical castration. See id. According to the attorney, the offender had not committed any additional offenses after receiving chemical castration treatment. See id.
106. Id.
109. See id.
111. Id. The Wisconsin court would order chemical castration if it was found that the treatment would not hamper the person's ability to work, would not cause irreversible changes to the body, and would cause the person to stop sexually assaulting children. See id. Additionally, it must be determined at the hearing that without the treatment or incarceration, the offender is likely to repeat, that there is no less intrusive means of successful treatment, and that the offender understands the effects of the treatment and consents to it. See id.
113. Id. This bill also provides a clause making it a felony for any person to refuse
Recently, in New Jersey, SB 1568 was introduced.\textsuperscript{114} New Jersey’s bill closely parallels California’s mandatory chemical castration law as it requires New Jersey courts to order offenders “convicted of a second or subsequent offense of aggravated sexual assault upon a child under the age of 13 . . . to undergo chemical castration.”\textsuperscript{115} As in California, this bill allows the New Jersey courts to exercise discretion in ordering chemical castration after a first offense.\textsuperscript{116} New Jersey cites the reduced recidivism from successful chemical castration programs in Europe as supporting authority for SB 1568.\textsuperscript{117}

In January 1997, Arizona joined the fight against child molestation when it introduced HB 2216.\textsuperscript{118} The Arizona measure closely parallels California’s law in allowing for the imposition of MPA treatment upon the discretion of the court for a first offense.\textsuperscript{119} Additionally, chemical castration is required upon the second conviction before the offender is released from prison.\textsuperscript{120} Finally, as in California, the Arizona proposal allows for an offender to avoid the chemical castration treatment by opting for the surgical castration.\textsuperscript{121}

Following this trend, a state senator in Jackson, Mississippi, filed a chemical castration bill for the 1997 legislative session which would require chemical castration upon an offender’s second rape conviction.\textsuperscript{122}

Louisiana HB 78 provides for the use of MPA for sex offenders as a condition of probation or parole.\textsuperscript{123} Under Louisiana’s proposed law, repeat sex offenders would not be eligible for parole unless they undergo chemical castration at their own expense.\textsuperscript{124} The ACLU of Louisiana claims that conditioning release from confinement on undergoing chemi-

to be chemically castrated or sterilized after it has been ordered by the court. See id.

115. Id. (internal quotations omitted).
116. See id.
117. See id.
119. See id.
120. See id.
121. See id.
cal castration is coercive. Representative Kay Isles, responsible for HB 78, stressed that chemical castration is not coercive, but rather voluntary because offenders can opt to remain incarcerated to avoid the treatment.

Colorado also has a bill under review which would allow chemical castration. Under Colorado’s proposed law, repeat child sex offenders would be required to undergo chemical castration as a condition of parole. Use of chemical castration in Denmark, Sweden, and Germany was cited in support of Colorado’s bill.

In Georgia, Representative George Grindley introduced HB 21 in January 1997. Georgia’s bill allows judges to impose chemical castration on first-time offenders for aggravated child molestation on a victim under the age of fifteen.

Nevada also has followed California’s lead with the introduction of their own chemical castration measure in January 1997. Nevada’s bill, SB 101, would allow district attorneys to request the chemical castration of offenders before they are reintroduced into their communities. Chemical castration would only be imposed upon a second or subsequent conviction of a serious sex offense. Low recidivism rates in Denmark were cited in support of the bill.

Senate Bill 633 in Oklahoma allows for the chemical castration of first time sex offenders. Parole after second and subsequent convictions


126. See id.


128. See Repeat, supra note 127, at B10.

129. See id. The sponsor of Colorado’s bill, Rep. Doug Dean, expected to face considerable opposition from the ACLU, but the bill passed the House State Affairs Committee easily with no opposition at the hearing. See Dan Luzadder, Chemical Castration Bill Advances; Nobody Shows Up to Oppose Plan Designed to Stop Pedophiles, ROCKY MOUNTAIN NEWS, Jan. 31, 1997, at 10A, available in 1997 WL 6817663.


131. See id.


133. See id.

134. See id.

135. See id.

136. See Chuck Ervin, State Lawmakers Pen Castration Legislation, TULSA WORLD,
of sex offenses may be conditioned upon chemical castration treatment under this measure.\textsuperscript{137} Under the proposed law, chemical castration would be required for anyone convicted of a sex crime where the victim is under sixteen.\textsuperscript{138}

In January 1997, the State of Washington revived chemical castration legislation from its 1990 legislative session.\textsuperscript{139} Under Washington's proposal, judges would be allowed to require chemical castration upon the recommendation of medical experts.\textsuperscript{140} The Washington chemical castration law would apply to those offenders convicted of first or second degree rape of adults or first degree rape of children.\textsuperscript{141} As in California, Washington has employed Depo-Provera as its chemical castration drug.\textsuperscript{142} Washington's proposal would permit the chemical castration shots to continue for the life of the convicted offender.\textsuperscript{143}

Iowa's Governor Terry Branstad announced plans to call for a chemical castration law akin to California's.\textsuperscript{144} As in California, the Iowa law would require chemical castration upon parole for those offenders convicted a second time for sex offenses against children.\textsuperscript{145} Additionally, judges would have the option of ordering chemical castration upon a first conviction.\textsuperscript{146}

Tennessee also saw the introduction of its own chemical castration bill in January 1997.\textsuperscript{147} Representative Tim Burchett is calling for the chemical castration of all first-time child sex offenders.\textsuperscript{148} In response, the
Tennessee director of the ACLU immediately mounted an opposition. Burchett, claiming that his motivation is to protect children, stated that the bill "will send a clear message that child molestation will not be tolerated in the state of Tennessee."  

V. CONSTITUTIONAL IMPLICATIONS  

Not surprisingly, California's mandatory chemical castration law has spawned a great deal of debate over its relation to the United States Constitution. Vigorous opponents such as the ACLU have asserted that chemical castration amounts to cruel and unusual punishment. The effect of mandatory chemical castration on the right to privacy also has provided fertile ground for recent debate. These privacy concerns include the effect of California's law on the right to procreate freely, the right to object to medical treatment, and the right to receive medical treatment. This section will examine the impact of California's mandatory chemical castration law on these constitutional concerns.  

A. Cruel and Unusual Punishment  

Perhaps the most frequently cited objection to chemical castration is that it violates the Eighth Amendment protection against cruel and unusual punishment. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." A relevant inquiry, initially, is whether chemical castration can be characterized as treatment so as to avoid the reach of the Eighth Amendment. In Rennie v. Klein, the Federal District  

149. See id.  
150. Id.  
151. See, e.g., Van Biema, supra note 11, at 60 (identifying claims of cruel and unusual punishment).  
152. See id.  
154. See Fitzgerald, supra note 45, at 39-52; see generally Vanderzyl, supra note 48, at 134-37 (discussing informed consent issues relating to the use of castration).  
155. U.S. CONST. amend. VIII.  
156. See Vanderzyl, supra note 48, at 126 (citing William Green, Depo-Provera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues, 12 U. DAYTON L. REV. 1, 20 (1986) (discussing Eighth Amendment limitations on castration)).  
Court of New Jersey articulated a four-pronged test to determine whether an action can be considered treatment or punishment. The prongs of the *Rennie* test require the following inquiries: (1) whether the procedure has any therapeutic value; (2) whether the procedure is part of an accepted medical practice or is experimental in nature; (3) whether the adverse effects of the procedure seem unduly harsh; and (4) whether the procedure is "part of an ongoing psychotherapeutic program." Arguably, chemical castration through the use of MPA satisfies all four prongs of the *Rennie* test and therefore avoids Eighth Amendment scrutiny. First, MPA has the clear therapeutic value of reducing the levels of testosterone and decreasing the offender’s sexual fantasy. Second, MPA can properly be characterized as an innovative, rather than experimental, therapy. Third, while some short-term adverse effects result from the use of MPA, these effects are reversible and long-term concerns about effects such as cancer have been discounted. Accordingly, these effects should not be characterized as unduly harsh. Fourth, because MPA treatment occurs under medical supervision as part of an ongoing psychological treatment to control deviant sexual fantasies, it satisfies the fourth prong of the *Rennie* test. Moreover, the purpose of MPA to control the offender’s criminal psychological tendencies warrants regarding this treatment as part of a psychotherapeutic process.

chotic drugs exists). On remand, the court of appeals abandoned the least restrictive means analysis for determining whether to apply antipsychotic drugs in exchange for an approach where the drugs would be imposed on the patient in order to prevent harm to himself or others in the opinion of professional medical judgment. See *Rennie v. Klein*, 720 F.2d 266, 269 (1983).

158. See id. at 1143.
159. *Id.*; see *Vanderzyl*, supra note 48, at 126 (delineating the *Rennie* test).
160. See *Fitzgerald*, supra note 45, at 33; *Peters*, supra note 62, at 319-20 (arguing that chemical castration satisfies the *Rennie* test for characterization as a medical treatment).
161. See *Fitzgerald*, supra note 45, at 33.
163. See *supra* notes 65-70 and accompanying text (discussing the known side effects of MPA).
164. See *Fitzgerald*, supra note 45, at 33.
165. *But see Vanderzyl*, supra note 48, at 126-28 (discussing the perspective that
Accordingly, MPA should escape Eighth Amendment scrutiny because it qualifies under the Rennie test as a treatment and not a punishment.166 Alternatively, even if chemical castration is regarded as a punishment, it should still pass constitutional scrutiny under the Eighth Amendment. Courts have historically had difficulty in determining what constitutes cruel and unusual punishment.167 In 1958, the United States Supreme Court in Trop v. Dulles168 recognized that the Eighth Amendment's meaning of cruel and unusual punishment is derived from evolving societal standards that are the product of a maturing society.169 This adherence to evolving societal standards has continually guided the Court in determining cruel and unusual punishment guidelines.170 Accordingly, a number of inquiries have developed to determine whether a punishment is cruel and unusual under the Eighth Amendment.171

The first inquiry is whether the punishment is inherently cruel.172 Originally, it was believed a punishment that would have been invalid at the time of the Constitution's inception was inherently cruel.173 Modernly, however, the Court has stated that "an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment."174 Although the Court has not yet addressed whether chemical castration is inherently cruel, numerous courts have applied this test in cases dealing with the punishments of surgical castration and sterilization. In Davis v. Berry,175 an Iowa statute required all persons twice convicted of felonies to undergo a vasectomy.176 In finding that the statute violated the prohibition against

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166. See Peters, supra note 62, at 319-20.
169. See id. at 101.
170. See Hudson v. McMillian, 503 U.S. 1, 8 (1992) (noting that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society") (quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1981)).
171. See Fitzgerald, supra note 45, at 36; Peters, supra note 62, at 320-21; Vanderzyl, supra note 49, at 128-29.
173. See Fitzgerald, supra note 45, at 36 (citing Shari Nurkin Leinwand, Note, Aversion Therapy: Punishment as Treatment and Treatment as Cruel and Unusual Punishment, 49 S. CAL. L. REV. 880, 938-39 (1976)).
175. 216 F. 413 (S.D. Iowa 1914), rev'd on other grounds, 242 U.S. 468 (1917).
176. See id. at 417.
cruel and unusual punishment, the court emphasized the mental suffer-
ing, public degradation, and public humiliation inherent in this punish-
ment.177 In Mickle v. Henrichs,178 a man was sentenced to prison and
a vasectomy in order to prevent future procreation.179 The Nevada court
enjoined the enforcement of the vasectomy order stating that it was
prohibited by the ban on cruel and unusual punishment.180 The court
asserted that the offender should not suffer the mutilation and brand of
infamy that accompanies the operation once he has served his sentence
and is introduced back into society.181 In State v. Brown,182 the Su-
preme Court of South Carolina found that surgical castration violated the
state constitution’s prohibition of cruel and unusual punishment.183 By
regarding castration as a form of mutilation, the court aligned itself with
earlier decisions prohibiting punishment that degrades the offender.184
In Skinner v. Oklahoma,185 the Supreme Court found the punishment of
sterilization unconstitutional on equal protection grounds.186 As demo-
strated by these decisions, there is strong support for the proposition
that surgical castration and sterilization are inherently cruel.

The use of MPA, however, differs greatly from its surgical alternative
and cannot be characterized as inherently cruel. First, the chemical ca-
stration treatment requires no incisions or probative surgery, but rather is
administered to the offender through a simple injection with a hypoder-
nic needle.187 Second, the treatment does not result in any mutilation

177. See id. at 416. But see State v. Feilen, 126 P. 75 (Wash. 1912). The court or-
dered Feilen, who was convicted of statutory rape of a female under the age of 10,
to serve a life sentence in the state penitentiary and undergo a vasectomy. See id. at
76. The court found that the vasectomy was not cruel and unusual punishment. See
id.
178. 262 F. 687 (D. Nev. 1918).
179. See id. at 687.
180. See id. at 690-91.
181. See id. at 691.
183. See id. at 412.
184. See Vanderzyl, supra note 48, at 129-30.
186. See id. at 538. The Court struck down the sterilization because of its failure to
meet the requirements of the Fourteenth Amendment’s equal protection clause. See
id. Although the Court decided the case on equal protection grounds, it could easily
have found a violation of the Eighth Amendment. See Fitzgerald, supra note 45, at 37.
187. See Fitzgerald, supra note 45, at 36.
of the body, as opposed to its surgical counterpart. Third, the effects of chemical castration are reversible. As a result, the humiliation, degradation, or "badge of infamy" that concerned previous courts enjoining surgical castration orders is not present with chemical castration.

A second inquiry for determining when a punishment is cruel and unusual is whether the punishment is disproportionate to the offense. The historical principle of proportionality between a punishment and crime is ardently grounded and repeated in common law jurisprudence. In *Harmelin v. Michigan*, however, Justice Scalia, joined by Chief Justice Rehnquist, explicitly rejected the use of proportionality analysis by finding that "the Eighth Amendment contains no proportionality guarantee." Justice Kennedy filed a concurrence, joined by Justices O'Connor and Souter, which stated that "[t]he Eighth Amendment does not require strict proportionality... rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Although chemical castration would likely pass constitutional muster under the strict proportionality requirements applied prior to *Harmelin*, it is clear that it easily passes the grossly disproportionate standard enunciated by Justice Kennedy's *Harmelin* concurrence for two reasons. First, there is no excessive pain or discomfort involved in the ad-

188. See Hicks, *supra* note 167, at 659 (stating that chemical castration does not involve intrusive procedures or mutilation); Peters, *supra* note 62, at 320 (stating that Depo-Provera treatment does not mutilate the body).
189. See *supra* notes 65-70 and accompanying text (discussing the known side effects of MPA).
192. See Solem v. Helm, 463 U.S. 277, 284 (1983), overruled by *Harmelin v. Michigan*, 501 U.S. 957 (1991). In *Solem*, the Court determined that objective criteria should guide the proportionality analysis. *Solem*, 463 U.S. at 292. The objective criteria considered by the Court were "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Id.
194. Id. at 965.
195. Id. at 1001 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem*, 463 U.S. at 288, 303); see *Weems*, 217 U.S. at 371 (discussing the idea that the punishment for the crime should be proportionate to the offense); Coker v. Georgia, 433 U.S. 584, 592 (1977) (finding the punishment of death for the rape of an adult woman to be grossly disproportionate and excessive for the offense).
196. See *Solem*, 463 U.S. at 292 (discussing the necessary elements for proportionality review).
ministration of the chemical castration treatment. Instead, this treatment is an effort to prevent continued anti-social behavior once the offender is released. In fact, some offenders welcome this treatment as a personal relief from their criminal sexual fantasies. Second, and most importantly, chemical castration is not a grossly disproportionate punishment in relation to the seriousness of sex crimes against children. Child victims must bear the emotional scars from these attacks—if they survive them—and some children who have been sexually molested become "psychological time bombs" prone to numerous personality disorders affecting the rest of their lives. On the other hand, the effects of chemical castration on the offender cease once its application is terminated.

A third inquiry relevant to determining cruel and unusual punishment asks whether the punishment is excessive in relation to the achievement of legitimate state objectives. Additionally, the punishment must serve these objectives in the least restrictive manner possible. The state clearly has the legitimate objective of protecting its citizens, especially young children. Arguments can be made asserting that the use of physical castration or even incarceration is suspect under this inquiry because the lesser intrusive alternative of chemical castration exists. Subjecting to chemical castration relieves the offender of his or her criminal sexual fantasies and thereby reduces the future threat to society.

197. See Vanderzyl, supra note 48, at 130 (stating that chemical castration, unlike surgical castration, does "not entail severe physical pain").
198. See Hicks, supra note 167, at 659.
199. See Working, supra note 78, at 4D. After four convictions for violent sex crimes committed against young girls, Arne Kjeldsen, the offender, welcomed chemical castration asserting that it removed the sex fantasies that made him a criminal. See id.
200. See Hicks, supra note 167, at 659 (stating that chemical castration is not "grossly" out of proportion compared to the severity of the crimes).
201. See Fitzgerald, supra note 45, at 38 (citing Prager, Sexual Psychopathy and Child Molesters, The Experiment Fails, 6 Juv. L. 49, 63 (1982)).
202. See supra note 67 and accompanying text (discussing the reversible nature of MPA side effects).
204. See id.; see also Fitzgerald, supra note 45, at 39 (citing AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE § 18:2-3(b), at 57-70 (1980)).
205. See Fitzgerald, supra note 45, at 39.
A fourth inquiry addresses the concern of whether the punishment is being inflicted arbitrarily.206 This concern is easily dismissed because California’s chemical castration law removes all arbitrariness from the picture. According to the language of the law, persons found guilty of second convictions of specified offenses against children under the age of thirteen must undergo chemical castration upon parole.207 Therefore, chemical castration will be prescribed without the discretion of the court upon the parole of every repeat sex offender who falls within the statute.

A fifth and final inquiry is whether the punishment is unacceptable to contemporary society.208 The most recognized standard for determining acceptability to society is whether people informed of the penalty find it shocking, unjust, and unacceptable.209 There is ample justification for not finding chemical castration unacceptable by today’s societal standards. First, chemical castration can be considered equivalent to psychotropic drugs including antidepressants, antipsychotics, and tranquilizers which are routinely used to treat mental disorders.210 Second, courts have upheld life sentences without parole for crimes other than murder and sex offenses.211 Third, because society accepts the state’s ability to sentence an offender to death, the lesser included ability of the state to regulate the offender during the term of his sentence should also be accepted.212 Chemical castration is clearly a less painful and intrusive penalty than these accepted alternatives.

Because California’s mandatory chemical castration satisfies the relevant inquiries under the Eighth Amendment, the prohibition of cruel and unusual punishment should not bar the operation of this law.

206. See Furman, 408 U.S. at 282 (Brennan, J., concurring).
207. See Cal. Penal Code § 645(b) (West Supp. 1997); supra note 30 and accompanying text (discussing California’s mandatory chemical castration law).
208. See Furman, 408 U.S. at 282 (Brennan, J., concurring).
209. See Hicks, supra note 167, at 659 (citing Furman, 408 U.S. at 361 (Brennan, J., concurring)).
210. See Besharov & Vachhs, supra note 9, at 42; see also Fromson supra note 72, at 328 (citing Green, supra note 156, at 25-26).
211. For example, in Harmelin, the Court upheld the sentence of life in prison without the possibility of parole for a man who was convicted of possessing six hundred and fifty grams of cocaine. See Harmelin v. Michigan, 501 U.S. 967, 996 (1991).
212. In Seattle, Washington, it was ruled that the hanging of a child killer in 1993 was not barred by the Constitution as cruel and unusual punishment. Paul Leavitt, Washington Judge: Hanging not Cruel, USA Today, June 2, 1993, at 3A.
B. Constitutional Right to Privacy Concerns

While the United States Constitution does not grant an explicit right to privacy, an implicit right to privacy does exist. In the 1965 landmark case *Griswold v. Connecticut*, the Court recognized that the First, Third, Fourth, Fifth, and Ninth Amendments of the Constitution combine to create "zones of privacy." The *Griswold* Court held that the right to privacy is a fundamental right which cannot be curtailed without a compelling governmental interest. The courts have found that inherent in this privacy right are the right to procreative freedom, the right to refuse medical treatment, and a possible right to receive medical treatment.

It is important to note that prisoners do not enjoy the same constitutional protections as law abiding citizens. Additionally, individuals on probation "are still convicted criminals and as such are subject to certain limitations on their liberty." Limitations in the probation context may be subject to "special scrutiny" in order to ensure that the limitations "serve the dual objectives of rehabilitation and public safety." With these restrictions on individual liberty under consideration, this section

213. See Vanderzyl, supra note 48, at 118.
214. 381 U.S. 479 (1965).
215. See id. at 484.
216. See Vanderzyl, supra note 48, at 119 (citing *Griswold*, 381 U.S. at 484-85). The Court in *Griswold* adhered to the principle "that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" *Griswold*, 381 U.S. at 485 (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)).
219. Id. at 1009 (citing *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (noting that the "[s]tate properly subjects probationer to many restrictions not applicable to other citizens.").
220. United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975).
will address California's mandatory chemical castration in relation to the right to procreative freedom, the right to refuse medical treatment, and the potential right to receive medical treatment.

1. Right to Procreative Freedom

In *Skinner v. Oklahoma,*\(^{221}\) the Court struck down the Oklahoma Habitual Criminal Sterilization Act requiring the sterilization of habitual criminals.\(^{222}\) The Court "recognized that the right to procreate is 'one of the basic civil rights of man.'"\(^{223}\) The right to procreate is also deeply rooted in Supreme Court decisions dealing with contraceptive devices.\(^{224}\)

Punishments historically considered by the Court—like sterilization, vasectomy, and surgical castration—violate the right to procreate because they effectively eliminate the offender's capacity to procreate.\(^{225}\) MPA treatment, however, does not violate this right.\(^{226}\) Although MPA treatment prevents spontaneous erections or ejaculations, those undergoing the treatment can engage in sexual activity when prompted by a partner.\(^{227}\) While some critics argue that chemical castration causes a reduction in sexual capacity due to a decreased sex drive, as opposed to physiological effects, dosages of MPA can be manipulated to avoid total impotence.\(^{228}\)

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221. 316 U.S. 535 (1942).
222. See id. at 536. The Act defined a habitual criminal as a person "convicted two, or more times for crimes amounting to felonies involving moral turpitude." Id. (internal quotations omitted). The offender in *Skinner* was convicted once of stealing chickens and twice of robbery with firearms. See id. at 537.
225. See Vanderzyl, supra note 48, at 122.
226. See Fitzgerald, supra note 45, at 44 (stating that MPA treatment does not run afoul of the right to procreate).
227. See supra note 61 and accompanying text (discussing the MPA medical mechanisms of action).
228. See supra note 62 and accompanying text (noting the medical mechanisms of action of MPA). See also Fitzgerald, supra note 45, at 44 ("A paraphiliac undergoing MPA treatment is not impotent, but 'erotically apathetic.'") (citing P. WALKER, ET AL., supra note 60, at 427-43); id. (stating that diminished sex drive can be restored
Fundamental rights, like the right to procreate, are only subject to state regulations if there is a compelling governmental interest. Under this standard, a state must demonstrate a compelling objective and show that the regulation achieves the objective through the least restrictive means available. The use of chemical castration does not unconstitutionally interfere with the right to procreate for several reasons. First, the state has a legitimate interest in promoting the safety of its child citizens from sex crimes. By removing the sexual fantasies which motivate the offender to commit these criminal acts, the state is taking great strides towards preventing the commission of future offenses. MPA treatment is "clearly effective during active treatment" in reducing sex crimes. Second, because the offender can still engage in sexual activity, his or her probation while undergoing MPA treatment is "less intrusive on [the offender's] procreative liberty than either commitment or incarceration." Limitations on conjugal visits would pose a more severe barrier on procreative freedom than the effects of chemical castration. Additionally, chemical castration is arguably a more effective and less intrusive alternative to other therapies currently in use. Because it achieves a compelling governmental interest through the least restrictive means available, the limited intrusion of chemical castration on the right to procreate is justified.

2. Right to Object to Medical Treatment

Included in the liberties protected by the due process clause of the Fourteenth Amendment is the right to refuse medical treatment. The

through an adjustment of the drug dosage) (citing F. BERLIN, Sex Offenders: A Biomedical Perspective and a Status Report on Biomedical Treatment, in J. GREER & I. STUART, THE SEXUAL AGGRESSOR 83-123 (1983)).
229. See Vanderzyl, supra note 48, at 122 (citing Roe v. Wade, 410 U.S. 113, 155 (1973)).
230. See id. (citing Shelton v. Tucker, 364 U.S. 479, 488-89 (1960)).
231. See id. at 123 (citing Runnels v. Rosendale, 499 F.2d 733, 735 (9th Cir. 1974) (suggesting safety concerns may justify mandatory treatment)).
232. Fitzgerald, supra note 45, at 44 (quoting Grossman, Research Directions in the Evaluation and Treatment of Sex Offenders: An Analysis, 3 BEHAV. SCI. & LAW 421, 428 (1985)).
233. See id.
234. See Fromson, supra note 72, at 329. For example, in Oregon, convicted rapists are subjected to electric shock therapy. See id.
235. See Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 278 (1990) (stating that
right to refuse unwanted medical treatment is limited, however.235 The liberty interest of the individual must be weighed against the state’s interest in requiring the treatment.237 Historically, certain state interests have been held to outweigh an individual’s liberty interest in refusing medical treatment.238 Those state interests include: “(1) the protection of life; (2) the prevention of suicide; (3) the protection of innocent third parties; and (4) the protection of the medical profession.”239 The interest of protecting innocent third parties, namely children, justifies the imposition of chemical castration upon parole or probation.240 Incarceration of offenders only protects innocent children while the offender is confined.241 Chemical castration, which chemically depresses an offender’s sexual desires, allows the offender to adapt to a non-criminal lifestyle once reintroduced into society while continuing to protect children from future sex crimes.242

The Court has also upheld mandatory sterilization laws in the context of mental patients. In Buck v. Bell,243 the Court found that a Virginia state law authorizing the sterilization of mental patients was not void under the Fourteenth Amendment.244 Following this precedent, the Court, in Washington v. Harper,245 upheld the involuntary administration of antipsychotic drugs in situations where the offender posed a danger to himself or to others.246 While the Court in Washington was concerned with the protection of others in a prison context, the argument for protecting others is equally, if not more, compelling when considered

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235. See Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (stating that an individual’s “supremacy of his own will” may be subject to restraint for the safety of the general public); Fitzgerald, supra note 45, at 44.
236. See Peters, supra note 62, at 323.
237. See id.
238. See id.
239. Id. (citing Harper v. State, 759 P.2d 358, 364 (Wash. 1988)); see United States v. Tonry, 605 F.2d 144, 147 (5th Cir. 1979) (stating that conditions may be imposed on probation if they are “reasonably related to the rehabilitation of the probationer and protection of the public”); see also Cruzan, 497 U.S. at 281 (allowing Missouri to impose heightened evidentiary standards to protect the state interest in life versus an individual’s desire to be removed from life support).
240. See Peters, supra note 62, at 323.
241. See id.
242. See id.
244. See id.
246. See id. at 217.
in a societal context. The similarity between the rationale for the involuntary medical treatment of mental patients and the rationale for the involuntary medical treatment of child molesters is compelling evidence for sustaining the constitutional validity of chemical castration.

Moreover, if the judicially recognized liberty interest providing the right to refuse treatment is seen as paramount, it must be recognized that the offender has a choice. On one hand, if the offender is reluctant to undergo the chemical castration treatment because of a fear of potential side effects, he or she can always opt for the surgical alternative. Also, because chemical castration is imposed during parole, the offender can refuse the treatment and remain in prison. In this sense, the chemical castration program affords a convicted sex offender greater liberty in refusing treatment than mentally ill patients are given.

3. Right to Receive Medical Treatment

Three decisions establish a constitutional right to treatment for incarcerated individuals. The right to treatment was first discussed in Wyatt v. Stickney concerning treatment for mental patients. Second, in Donaldson v. O’Connor, the Fifth Circuit Court of Appeals found the right to treatment applicable to an involuntarily committed individual under the “parens patriae” rationale. Third, in Estelle v. Gamble, the Supreme Court recognized a duty on the part of the government to provide treatment for incarcerated individuals.

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The Supreme Court, however, hesitated in accepting a constitutional right to treatment. In *Youngberg v. Romeo*, the Court noted that "the State concedes a duty to provide adequate food, shelter, clothing, and medical care." The Court in *Youngberg* dealt with a mentally retarded youth and required rehabilitation in the form of "minimally adequate or reasonable training." It has been argued that, applying the minimally adequate standard, MPA treatment could be required for sex offenders. However, if essential medical care is only required for incarcerated offenders, then MPA treatment is not likely to be required for non-incarcerated individuals.

In *State v. Christopher*, a case directly on point, Christopher was given probation for child molestation. Christopher’s probation was later revoked when he committed additional acts of child molestation. The court rejected Christopher’s claim that he had the right to be rehabilitated with chemical castration while on probation. The court in *Christopher* recognized that while rehabilitation is one of the goals of criminal penalties, other goals such as retribution and restraint must also be considered. The court went on to state that “no society should be forced to guarantee effective rehabilitation to all offenders,” but, rather, rehabilitation must be balanced and considered along with the other goals of punishment. Accordingly, the court affirmed Christopher’s probation revocation.

States are not required to provide convicted sex offenders with MPA treatment. Additionally, the right to treatment granted to mental patients is not analogous to criminal offenders because “involuntarily committed [mental] patients are entitled to a higher level of treatment” than convicted criminals.

573-76 (1975)); see Fitzgerald, supra note 45, at 50.
260. See Fitzgerald, supra note 45, at 50.
262. Id. at 324.
263. Id. at 319.
264. See Peters, supra note 62, at 325.
265. See id.
266. 652 P.2d 1031 (Ariz. 1982).
267. See id. at 1032.
268. See id.
269. See id.
270. See id. at 1033.
271. Id.
272. See id. at 1035.
273. See Fitzgerald, supra note 45, at 51.
274. *Christopher*, 652 P.2d at 1034 (citing *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982)). The court further stated that neither the Fourteenth Amendment nor the
It is often in the best interest of society to impose chemical castration on child molesters in order to protect society. The offender, however, is not entitled to demand probation with chemical castration treatment. The offender should also not assume a right to parole with the chemical castration treatment.

VI. INFORMED CONSENT TO MEDICAL TREATMENT

Under the doctrine of informed consent, a doctor must disclose all relevant information to a patient. In *Canterbury v. Spence*, the court stated that the “root premise” of the doctrine of informed consent is that every adult of sound mind has the right to decide what will be done with his or her own body. According to *Canterbury*, a risk is material “when a reasonable person, in what the physician knows or should know to be the patient’s position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy.” The *Canterbury* court identified a four-pronged analysis regarding what information should be divulged to a patient as follows: the risks, the anticipated benefits, the consequences without treatment, and the alternatives. Applying these factors to chemical castration, the doctrine of informed consent would require that the offender be told of all possible side effects and the risks from the use of the treatment. The benefits of chemical castration are the elimination of the offender’s criminal sexual fantasies resulting in increased amenability to psychotherapy. Additionally, chemical castration increases the possibility of reintroducing the offender into society with minimal potential risk to the public. The consequences without the treatment are clear. The offender will either remain incarcerated or institutionalized and will continue to pose a threat to society once re-

Eighth Amendment require states to provide rehabilitation programs to prisoners. See id. at 1034.

275. See Fromson, supra note 72, at 332 (citing Canterbury v. Spence, 464 F.2d 772, 779-83 (D.C. Cir. 1972)).
277. Id. at 780.
278. Id. at 787 (quoting Jon R. Waltz & Thomas W. Scheuneman, *Informed Consent Therapy*, 64 Nw. U. L Rev. 628, 640 (1970)).
279. See id. at 787-89.
280. See Vanderzyl, supra note 48, at 135.
281. See Fitzgerald, supra note 45, at 19.
282. See id.
leased. Thus, the goal of reducing recidivism will be seriously hampered. Finally, no alternative forms of therapy have proven effective in dealing with these types of offenses.

California's mandatory chemical castration law specifically addresses the issue of informed consent. Section 2(f) of amended California Penal Code section 645, states that "[t]he Department of Corrections shall administer this section and implement the protocols required by this section" including "a requirement to inform the person about the effect of hormonal chemical treatment and any side effects that may result from it. A person subject to this section shall acknowledge the receipt of this information.

Some critics assert that informed consent cannot be truly given due to the uncertainty surrounding some long term effects of chemical castration. This argument fails, however, because the doctrine of informed consent only requires the disclosure of all known information at the time of the treatment. Critics also assert that an offender cannot consent freely and voluntarily when the offender knows that the alternative is incarceration. An individual does not lose the ability to choose just because a decision is difficult to make. Although the decision to accept chemical castration or remain in prison could be viewed as inherently coercive because many prisoners will accept any condition to get out of prison, offering this treatment to an offender does not rise to the level of duress necessary to vitiate consent. Prisoners are often given the opportunity to participate in medical experiments to relieve boredom, make money, improve living conditions, and, sometimes, to gain early release. In spite of this, poor volunteer rates in these types of pro-

283. See id. (citing Van Moffaert, Social Reintegration of Sexual Delinquents by a Combination of Psychotherapy and Anti-Androgen Treatment, 53 ACTA PSYCHIATRICA SCANDINAVIA 29 (1976)).
284. See Peters, supra note 62, at 316 (citing Laurence French, A Practitioner's Notes on Treating Sexual Deviance, 68 PSYCHOL REP. 1195, 1196 (1991)).
285. See Fitzgerald, supra note 45, at 19.
286. CAL PENAL CODE § 645(f) (West Supp. 1997); see supra notes 20-43 and accompanying text (discussing the details of California's mandatory chemical castration law).
287. See Fitzgerald, supra note 45, at 20 (citing Green, supra note 156, at 15).
288. See id. (citing John R. Mason, Kaimowitz v. Department of Mental Health: A Right to be Free from Experimental Psychosurgery, 54 B.U. L. REV. 301, 316-19 (1974)).
289. See Peters, supra note 62, at 316 (citing Besharow & Vachhs, supra note 9, at 43).
290. See id. Peters draws the analogy of a cancer patient choosing between unpleasant chemical treatment or death. See id. at 316 n.64.
291. See Fitzgerald, supra note 45, at 21.
292. See id. (citing Bailey v. Lally, 481 F. Supp. 203, 215 (D. Md. 1979)).
grams provide evidence that prisoners do not feel compelled to consent. Additionally, studies have shown that prisoners who have consented to these experimental procedures do not feel their consent was coerced.

The court in *Kaimowitz v. Michigan Department of Mental Health* identified three factors to determine whether an involuntarily committed mental patient could give informed consent to experimental brain surgery. The factors considered were competence, knowledge, and voluntariness. These factors are sufficiently satisfied in the context of chemical castration. First, it can be assumed that the offender is competent to make decisions pertaining to treatment because the erosion of decision-making capacity which concerned the *Kaimowitz* court is not present. Second, the knowledge factor is satisfied because there is a great deal of scientific information available regarding chemical castration via the use of MPA. Thus, chemical castration is unlike the experimental psychosurgery considered in *Kaimowitz* because chemical castration is neither dangerous, uncertain, nor irreversible. Third, the voluntary factor is satisfied because the offender has the right to refuse chemical castration. The offender can opt for the surgical alternative or remain incarcerated.

Accordingly, the doctrine of informed consent should not be a bar to the application of mandatory chemical castration.

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293. See id. (citing Bailey, 481 F. Supp. at 220).
294. See id. at 21-22 (citing Kathleen J. Woody, Legal and Ethical Concepts Involved in Informed Consent to Human Research, 18 CAL. W. L. REV. 50, 61-63 (1981)).
295. See id. at 23 (citing Kaimowitz v. Michigan Dep't of Mental Health, No. 73-194-AW (Cir. Ct., Wayne County, Mich., July 10, 1973), 1 MENTAL DISABILITY L REP. 147, 150 (1976)).
296. See id.
297. See id. (citing *Kaimowitz*, 1 MENTAL DISABILITY L REP. at 149).
298. See id. at 24. In *Kaimowitz*, the offender had been confined for fifteen years before given the choice of experimental psychosurgery. See Peters, supra note 62, at 316.
299. See Fitzgerald, supra note 45, at 24.
300. See id.; Peters, supra note 62, at 317 (stating that more research is available on treatment with Depo-Provera than "experimental psychosurgery").
301. See Peters, supra note 62, at 317.
VII. PUBLIC POLICY ARGUMENTS

In addition to the constitutional implications, mandatory chemical castration raises a number of significant public policy considerations.

A. Arguments in Support of Mandatory Chemical Castration

Perhaps the most compelling argument in support of mandatory chemical castration is the prevention of the future victimization of children. The incidence of child molestation is shocking, with between one hundred thousand and five hundred thousand children molested each year in the United States alone. According to the California Department of Justice, approximately forty thousand of the sixty-six thousand registered sex offenders in California sexually assaulted children. According to the Department of Corrections, over half of all paroled sex offenders commit new sex offenses within a year of being released from prison and approximately three out of four will return to prison within two years. This recidivism is most concerning. Studies show that chemical castration is an effective weapon in combating recidivism. In a 1991 study by Johns Hopkins University, fewer than [ten percent] of 626 'chemically castrated' patients had committed sexual offenses five years after treatment. Dr. Fred Berlin, Director of the Sexual Disorders Clinic at Johns Hopkins University, noted that sex offenders may have a recidivism rate of nearly sixty-five percent in the United States. Dr. Berlin cited domestic and European studies in which the recidivism rate fell below fifteen percent after chemical castration.

Chemical castration has been used in Europe for many years. Among the European countries utilizing chemical castration, recidivism rates have "dropped from almost 100 percent to just 2 percent." According to the office of California Governor Pete Wilson, recidivism has decreased to 2.2% in Sweden, Denmark, and Germany.

302. See Hicks, supra note 167, at 644.
303. See Chemical Castration Fact Sheet, supra note 2, at 1.
304. See id.; see also Vanderzyl, supra note 48, at 137 (citing Sandra G. Boodman, Does Castration Stop Sex Crimes?: An Old Punishment Gains New Attention, WASH. POST, Mar. 17, 1992, at Z07) (stating that current research estimates that "approximately forty percent of rapists and pedophiles will repeat their crimes").
305. Rundle, supra note 45, at B1.
306. See Van Biema, supra note 11, at 60.
307. See id.
308. Will Chemical Castration Stop Sex Offenders?, JET, Sept. 23, 1996, at 17 [hereinafter Sex Offenders].
309. See Governor, supra note 90.
Another compelling argument in support of mandatory chemical castration, closely related to the recidivism concern, is preventing the future victimization of children. It is a sad but true fact that our nation's prisons are becoming overcrowded. As a result, discretionary release programs are becoming an option in some states, which means numerous offenders will hit the streets before serving complete sentences with nothing to stop them from assaulting more children. Some, especially the families of the victims, would ask: If these offenders are so dangerous, why do we let them out of prison at all? Chemical castration provides a necessary safeguard for those offenders sent back into society when the state has no other way of dealing with them.

Another compelling factor in support of chemical castration is the cost. It costs approximately twenty-five thousand dollars to support one prisoner for a year. The cost of chemical castration is estimated at only two thousand four hundred dollars per year per parolee. This considerable cost savings is compelling evidence for releasing state taxpayers from the substantial burden of prison costs while still protecting society from these offenders through chemical castration.

A final policy argument in support of chemical castration is that it is beneficial to the offender. While this argument is likely the least favored by the families of the victims, it is worth addressing. Chemical castration relieves the offenders of their criminal sexual fantasies. In fact, some offenders request and welcome the treatment as a release from the thoughts that make them criminals. In the end, it is society
that receives the long term benefit if these offenders are cured because of the reduced threat that they pose.

B. Arguments in Opposition of Mandatory Chemical Castration

Groups such as the ACLU have been at the forefront of the opposition to California's mandatory chemical castration law. Initial attacks have been made on constitutional grounds. Leading these attacks is the claim that chemical castration violates the Eighth Amendment prohibition of cruel and unusual punishment. Violations of the offender's right to privacy also have been implicated. Of paramount concern by these critics is the necessary duty not to interfere with the "bodily integrity" of the individual.

Opponents of mandatory chemical castration also attack the statistics reported on recidivism, claiming that the recidivism rate used by supporters of chemical castration is "a gross exaggeration." The opponents assert that the voluntary nature of many European chemical castration programs is responsible for the lower recidivism. In addition, the lack of a psychotherapy provision is cited as one of the California law's shortcomings. Opponents also claim that the lack of long-term studies on chemical castration's effectiveness creates scientific skepticism regarding the value of the treatment. Opponents are also uncertain because mandatory chemical castration programs have not been implemented in the past.

Another concern among the opposition is that forcing chemical castration on offenders is reminiscent of practices conducted by Third Reich doctors in Nazi Germany. Additionally, some have analogized manda-
tory chemical castration to the eugenics period.\textsuperscript{329} Although the term chemical castration is a misnomer because no physical castration actually occurs,\textsuperscript{330} some opponents perceive the treatment as physical mutilation.\textsuperscript{331}

Others question the effectiveness of the law itself. In California, the law does not cover those convicted of vaginal intercourse with females under the age of thirteen.\textsuperscript{332} Moreover, offenders will not be subject to mandatory chemical castration if they are not granted parole.\textsuperscript{333}

Finally, opponents object to the blanket application of the treatment. Dr. Fred S. Berlin, founder and director of the Sexual Disorders Clinic at Johns Hopkins University, disapproves of using chemical castration without prior medical or psychological evaluation.\textsuperscript{334} This objection is based on the concern that the psychological underpinnings of pedophilia remain untreated.\textsuperscript{335} Many critics argue that the chemical treatment inadequately addresses the anger and behavioral motivations behind some of these crimes.\textsuperscript{336} In fact, the California Psychiatric Association criticized the measure for postponing treatment until the week before the offender's release when substantial treatment could be provided during incarceration.\textsuperscript{337} Perhaps only time can provide the answers necessary to address the aforementioned concerns. Until then, mandatory chemical castration is likely to cause a great deal of debate wherever it is applied.

\textbf{C. Current Public Opinion}

Current public opinion overwhelmingly favors mandatory chemical castration. In a recent poll asking whether people favored the chemical castration of repeat child molesters, ninety-six percent responded in the

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329. See Lewis, supra note 318, at 1.
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330. See Ayres, supra note 29, at A11.
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331. See Lucas, supra note 4, at A1. Assemblywoman Carole Migden (D-San Francisco) stated, "In the name of humanity, it is wrong for the government to mutilate the bodies of our citizens." Id.
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332. See Tsang, supra note 328, at A7.
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333. See \textit{id}.
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334. See Rundle, supra note 45, at B1.
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335. See Van Biema, supra note 11, at 60.
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337. See Schodolski, supra note 8, at 1.
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affirmative. Only four percent of the responses opposed it. In California, the Women's Coalition in Pasadena supported the mandatory chemical castration law. Additionally, Patricia O'Donnell Brummet, a professor of sociology at California State University, Northridge, voiced a view common to many supporters when she stated, "I think we need to put our children and victims first and be concerned with their right to live a life free of sexual abuse." In fact, some evidence indicates that many people consider chemical castration too lenient and would condone stiffer punishments. Additionally, some assert that imprisonment is the only real safeguard for children. It is evident that most people are unwilling to consider leniency for crimes involving a commodity as precious as children.

VIII. CONCLUSION

California's mandatory chemical castration law is yet another step toward getting tough on crime. As with any innovative punishment or treatment, controversy and debate are necessary components of its development. Current debate on chemical castration is centered on constitutional, medical, and political issues. While mandatory chemical castration cannot be touted as a complete solution, its effect on recidivism is definitely a step in the right direction. With all of the controversy surrounding the legal implications of mandatory chemical castration, it is possible to overlook the question posed by Assemblyman William Hoge, the author of California's law: "Where are the rights of those who have been molested?" In urging the application of mandatory chemical castration programs nationwide, Assemblyman Hoge declared, "We have now set the stage for America—and we hope you are listening America." America should be listening not to political argument, but to the

339. See id.
341. Bond, supra note 336, at B3.
343. See Geller, supra note 1, at B5.
344. Sex Offenders, supra note 308, at 16.
345. Lesher, supra note 21, at A3.
cries of this nation's children who are subjected to these horrible crimes. Regardless of whether one supports or opposes mandatory chemical castration, it must be agreed that any measure that helps to protect the innocent lives of children has some merit. One thing is certain: The innocence of young children should be portrayed through their carefree and playful laughter, not, as in the case of young Natalie Astner, through the white coffin that lays them to rest.346

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346. See supra note 1 and accompanying text (discussing the tragic victimization of Natalie Astner in Germany).