California's Chemical Castration Law:
A Model for Massachusetts?

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California's Chemical Castration Law: A Model for Massachusetts?

I. INTRODUCTION

Any legislation dealing with parole conditions should have two objectives. First, it should be effective in reducing recidivism rates and protecting society. Second, it must pass constitutional muster, for if it does not, its potential for benefitting society will be moot.

In September 1996, Governor Pete Wilson of California signed into law the country's first mandatory chemical castration law.¹ The measure mandates that anyone who has been twice convicted of molesting a child under the age of thirteen must undergo chemical castration as a condition of parole.² The law permits, but does not require, the State to condition parole upon such treatment after a first conviction for child molestation.³ Finally, under this law, the prisoner retains the option to refuse the treatment and remain in prison.⁴

This Note begins with a brief overview of chemical castration, including a discussion of the treatment itself, its effectiveness, and judi-

¹ See CAL. PENAL CODE § 645 (West 1998). This statute provides, in relevant part, that:
(a) Any person guilty of a first conviction . . . where the victim has not attained 13 years of age, may, upon parole, undergo medroxyprogesterone acetate treatment or its chemical equivalent . . .
(b) Any person guilty of a second conviction . . . shall, upon parole, undergo medroxyprogesterone acetate treatment or its chemical equivalent. . . .
(d) The parolee shall begin medroxyprogesterone acetate treatment one week prior to his or her release from confinement . . . and shall continue treatments until the Department of Corrections demonstrates . . . that this treatment is no longer necessary.

² See id. § 645(b).
³ See id. § 645(a).
⁴ See generally id. § 645.
cial analysis, given the limited legal history of this form of treatment.\(^5\) It then analyzes the legal challenges that the new California law will likely face, including claims that the law violates the Eighth Amendment's ban on cruel and unusual punishment, the right to engage in mental activity in the form of sexual fantasy, which is protected by the First Amendment, and the fundamental privacy rights implicit in the United States Constitution.\(^6\) Finally, this Note examines similar legislation proposed in Massachusetts, compares and contrasts the two measures in terms of effectiveness and constitutionality, and proposes ways to improve the Massachusetts bill to enable it to withstand constitutional scrutiny.\(^7\)

II. A BRIEF OVERVIEW OF CHEMICAL CASTRATION

A. What is Chemical Castration?

The term "chemical castration" describes a medical treatment that uses antihormonal drugs to block the release of hormones, resulting in significantly lower testosterone levels and sex drives in men.\(^8\) Unlike surgical castration, which requires the removal of the testes, chemical castration is not actually "castration" because there is no physical mutilation.\(^9\)

California's new law calls for the use of medroxyprogesterone acetate (MPA), or its chemical equivalent, to treat paraphiliac sex offenders.\(^10\) MPA is typically administered through weekly intramuscular injections.\(^12\) MPA, or Depo-Provera, as it is commonly known,\(^13\) "re-

\(^5\) See infra Part II.B.
\(^6\) See infra Parts III.A-C.
\(^7\) See infra Part V.
\(^9\) See Pamela K. Hicks, Castration of Sexual Offenders: Legal and Ethical Issues, 14 J. LEGAL MED. 641, 645 (1993).
\(^12\) See Howard M. Kravitz et al., Medroxyprogesterone Treatment for Paraphiliacs, 23 BULL. AM. ACAD. PSYCHIATRY L. 19, 21-22 (1995); see also Fitzgerald, supra note 8, at 6.
\(^13\) See Douglas J. Besharov, Yes: Consider Chemical Treatment, 78 A.B.A. J. 42,
duces the production and effects of testosterone,"\textsuperscript{14} which is produced in the testes and is the primary hormone affecting male sexual behavior.\textsuperscript{15} The theory behind California’s law is that by lowering the testosterone level in convicted child molesters, their deviant sexual urges and compulsive fantasies will be controlled, thereby reducing their risk to society.\textsuperscript{16}

In addition to lowering men’s testosterone levels, Depo-Provera treatment can cause certain side effects such as weight gain, hypertension, mild lethargy, cold sweats, nightmares, hot flashes, muscle aches, headaches, sleeplessness, gallstones, testicular atrophy, and the onset of diabetes in those who are prone to it.\textsuperscript{17} Further, since the treatment does not remove the testes, it does not physically prevent a man from procreating, but the treatment does cause testicular atrophy and a dramatic decrease in sperm count.\textsuperscript{18}

\begin{footnotes}
\item[14] Fitzgerald, \textit{supra} note 8, at 3.
\item[15] See Kafka et al., \textit{supra} note 10, at 13.
\item[16] See Fitzgerald, \textit{supra} note 8, at 2-3 (stating that “MPA . . . reduces the production and effects of testosterone, thus diminishing the compulsive sexual fantasy. . . . While undergoing MPA treatment, the offender will not pose any threat to the community.”) (footnote omitted); see also Kari A. Vanderzyl, Comment, \textit{Castration as an Alternative to Incarceration: An Impotent Approach to the Punishment of Sex Offenders}, 15 N. ILL. U. L. REV. 107, 117 (1994) (“Depo-Provera injections curbed deviant conduct resulting from sexual arousal by decreasing the production of testosterone. . . .”).
\item[17] See Fred S. Berlin & Edgar Krout, \textit{Pedophilia: Diagnostic Concepts Treatment, and Ethical Considerations}, 7 AM. J. OF FORENSIC PSYCHIATRY 13, 25 (1986); see also Kravitz et al., \textit{supra} note 12, at 26-27; Hicks, \textit{supra} note 9, at 646; Rundle, \textit{supra} note 8, at B1.
\item[18] See Fitzgerald, \textit{supra}, note 8, at 7 (citing PAUL A. WALKER ET AL., \textit{Antiandrogenic Treatment of the Paraphilias, in GUIDELINES FOR THE USE OF PSYCHOTROPIC DRUGS}, 436 (1984)). Studies show that MPA treatment causes a “dramatic decrease in sperm count” and “testicular atrophy.” \textit{Id.} “MPA does not cause impotence, but "erotic apathy,"
which eliminates spontaneous erections and ejaculations. \textit{Id.} (citations omitted). MPA patients are still able to have consensual sexual activity. \textit{See id.; see also} Kravitz et al., \textit{supra} note 12, at 27 (pointing out that one patient in Dr. Kravitz’s study fathered a healthy child while undergoing MPA treatment); Daniel L. Icenogle, \textit{Sentencing Male Sex Offenders to the Use of Biological Treatments}, 15 J. LEGAL MED. 279, 285 (1994). “[A]lthough men have fathered children while on MPA, lowered sperm counts and mobility, as well as deformed sperm, have been reported.” \textit{Id.} (citing Gregory K. Lehne, \textit{Treatment of Sex Offenders with Medroxyprogesterone Acetate, in} 6 HANDBOOK OF SEXOLOGY: THE PHARMACOLOGY & ENDOCRINOLOGY OF SEXUAL FUNCTION 522 (1988)).
\end{footnotes}
B. Effectiveness of the Treatment

Supporters of the new California measure claim the purpose of the law is twofold. First, they believe that it will help reduce recidivism rates of sex offenders. Second, and more importantly, they contend that by reducing recidivism rates the new law will protect children and adults from being victimized by repeat sex offenders. In contrast, critics of the statute argue not only that chemical castration is cruel and unusual punishment, but also that its effectiveness in reducing recidivism has not been proven.

Since the goal of California's chemical castration law is to protect children from child molesters by reducing recidivism, the effectiveness of the law should be judged by how well it reduces the rate of reoffense. It should be noted that recidivism rates among child molesters have been estimated at fifty to almost one hundred percent. United States Attorney General Janet Reno has estimated that the rate of reoffense for child molesters is as high as seventy-five percent. Regardless of the estimate used, recidivism rates of child molesters is a serious concern.

1. Evidence Regarding the Effectiveness of the Treatment

During the last decade, while society has become more aware of the crime of child sexual molestation and the frequency with which molesters repeat their offense, an increasing number of medical and scientific studies have explored ways in which the recidivism rates for this

19. See A.B. 3339, Reg. Sess. (Cal. 1996). This Assembly Bill was introduced by Assembly Member Hoge on February 23, 1996. See id.

20. See id.

21. See id.

22. See id.

23. See id.

24. See id.

25. See Paul Hoversten, California Targets Child Molesters Bill Requires for Chemical Castration, USA TODAY, Aug. 29, 1996, at 3A (paraphrasing California Assemblyman Bill Hoge's claim that the recidivism "rate for repeat offender[s] would be 90% or more" without chemical castration); see also Chemical Castration Now California Option, CALGARY HERALD, Sept. 18, 1996, at A6 (stating that the recidivism rate in Europe was almost 100%); Michael T. McSpadden, Castration Will Work, HOUSTON CHRON., Feb. 23, 1993, at 13 (claiming that more than 80% of sex offenders will reoffend).

26. See Burt Herman, California Takes Lead in Chemical Castration; Governor Says He'll Sign Measure Requiring Injections for Repeat Child Molesters, ROCKY MOUNTAIN NEWS (Colorado), Sept. 1, 1996, at 3A.

27. See supra notes 25-26 and accompanying text.
crime might be reduced. Several studies testing Depo-Provera treatment on sex offenders have reported striking decreases in recidivism rates.

For instance, one leading study conducted by Dr. Fred Berlin at Johns Hopkins University, found a recidivism rate of less than ten percent among 600 men treated with the testosterone-reducing chemical. Other studies have produced similar results: one relapse in six months out of twenty-two treated paraphiliacs in a U.S. study, one reoffense in four years among twenty-six Danish prisoners, and an eighteen percent recidivism rate out of forty treated patients in Texas. These results contrast sharply with the nearly sixty percent recidivism rate out of twenty-one patients who received only counseling. The results of these chemical castration studies are comparable to older studies of surgical castration conducted in Europe.

Like the chemical castration studies, surgical castration studies found that the surgery dramatically reduced the rate of recidivism in men whose testes had been removed. Proponents of chemical treatment point to these surgical castration study results as additional support for their position that chemical castration can effectively reduce recidivism by reducing testosterone, since chemical castration has virtually the same effect on testosterone levels as surgical castration.

28. See generally e.g., Icenogle, supra note 18; Kravitz et al., supra note 12.
29. See e.g., Kravitz et al., supra note 12, at 26 ("[O]nly one subject, an exhibitionist, admitted to recidivistic behavior during the first six months of treatment. No subjects were rearrested for new offenses during this period.").
31. See Kravitz et al., supra note 12, at 26.
32. See Danes Favor Chemical Castration, TULSA WORLD, Sept. 1, 1996, at A9 [hereinafter Danes Favor Chemical Castration].
33. See Katherine Seligman, Chemical Castration: Will It Work?, S.F. EXAMINER, Sept. 15, 1996, at C-1. This study was undertaken by the Rosenberg Clinic in Galveston, Texas, where, for over 15 years, Depo-Provera has been used to treat nonviolent sex offenders. See id.
34. See id.
35. See Berlin & Krout, supra note 17, at 24.
36. See id. (stating that in Denmark, 900 castrated pedophiles exhibited less than 3% recidivism over a 30 year period; in Holland, 237 men exhibited a 1.3% recidivism rate; in Switzerland, test subjects had a 5.8% recidivism rate versus 52% for a noncastrated control group).
37. See generally id. at 23-24.
2. Problems with the Effectiveness of Treatment as it Relates to California's Law

Although the above-mentioned chemical castration studies have concluded that the treatment dramatically reduces recidivism rates, critics of California's new law contend that these studies do not necessarily provide support for the law as it is currently written. In the studies, most of the chemical castrations were administered in conjunction with some form of therapy or counseling, rather than administration of the chemical treatment alone. The first criticism of the law is that it only requires chemical treatment, and makes no provision for concurrent therapy. Many experts believe that concurrent therapy is crucial to ensuring the effectiveness of the chemical treatment.

The second criticism of the California law is that its effectiveness

38. See supra notes 28-36 and accompanying text.
40. See, e.g., Rundle, supra note 8, at B1 (referring to Dr. Fred Berlin's criticism of the lack of medical and psychiatric control in California's law); Boodman, supra note 10, at Z07 ("Most experts say that Depo Provera works best if it is administered in conjunction with other forms of therapy."); Icenogle, supra note 18, at 284-85 ("Generally, MPA is used in conjunction with some sort of talk therapy.") (citing Gregory K. Lehne, Treatment of Sex Offenders with Medroxyprogesterone Acetate, in 6 HANDBOOK OF SEXOLOGY: THE PHARMACOLOGY & ENDOCRINOLOGY OF SEXUAL FUNCTION 518 (1988)).
41. See Kravitz et al., supra note 12, at 21-23; see also Icenogle, supra note 18, at 284-85.
42. See Sex Offenses: Chemical Castration: Hearings on A.B. 3339 Before the Senate Comm. on Criminal Procedure, Reg. Sess. 8-9 (Cal. 1996) (citing Dr. Berlin's contention that chemical treatment is effective if in conjunction with psychological counseling); see also Odious Crime, Irrational Punishment, BOSTON GLOBE, Sept 7, 1996, at A10 [hereinafter Odious Crime].
43. See Seligman, supra note 33, at C-1 (citing expert Dr. Collier Cole of the Rosenberg Clinic in Galveston, Texas, who stated that the chemical treatment is not recommended without therapy); Danes Favor Chemical Castration, supra note 32, at A9 (quoting Dr. Heidi Hansen, chief physician at the Danish Herstedvester Penal Institute, who stated that chemicals are only a tool, not a cure, and "[p]atients need extensive psychotherapy"); Kravitz et al., supra note 12, at 20 (citing William L. Marshal, et al., Treatment Outcome with Sex Offenders, 11 CLINICAL PSYCHIATRY REV. 465, 465-85 (1991)). "[A] combination of hormonal treatment with behavioral techniques and counseling has been considered the treatment of choice." Id.; see also id. at 28 (stating that it is not clear from the data whether drugs, therapy, a combination of both, or certain other factors were responsible for improvement in patients in his study); Memorandum from the California Psychiatric Association (Aug. 15, 1996) (on file with author) (arguing that counseling is needed for an effective program).
will be diminished since it does not provide for screening of the potential participants to determine whether they are appropriate candidates for the chemical treatment. In those chemical castration studies which produced positive results, all of the participants were prescreened to ensure that they were medically and psychiatrically likely to benefit from the treatment.

Experts urge that prescreening is a necessary prerequisite to effective chemical castration treatment, since there are different types of sex offenders, and treatment is effective only on a certain "'subgroup of offenders,'" namely those who sexually crave children. For those sex offenders who commit crimes because they seek to exert power, control, or to commit violence, and not because they sexually crave children, chemical castration is generally not an effective treatment. Absent prescreening, California's law takes an overly broad approach in subjecting all second offenders to treatment regardless of their motivations for committing crimes. As a result, the treatment is likely to be less effective than it otherwise would be.

The third criticism of California's law is that its effectiveness is further diminished since the patients, those convicted felons whose options are to either undergo the treatment and be paroled or refuse the treatment and stay in jail, may not be participating voluntarily, given their limited options. Experts agree that willing participation is an important factor toward the effectiveness of the treatment, since chemical castration is most effective on volunteers who truly want to change their behavior. In fact, even patients who have voluntarily taken the

44. See, e.g., Rundle, supra note 8, at B1.
45. See Kravitz, et al., supra note 12, at 21-22. Kravitz's study required all 29 patients to undergo an extensive screening which included, among other things, a psychiatric interview, psychological test, and medical and legal review. See id. at 21.
46. See Seligman, supra note 33, at C-1 (quoting Dr. Berlin). See also Memorandum from Sue North, Legislative Advocate, California Psychiatric Association to the Members of the California Senate (Aug. 15, 1996) (on file with author) (alerting the California Senate that "inmates . . . should under psychiatric evaluation to ascertain whether or not chemical castration would be helpful in changing their behavior").
47. See Herman, supra note 26, at 3A; see also Odious Crime, supra note 42. Denise Snyder, Executive Director of the District of Columbia Rape Crisis Center, asserts that rape is a crime of violence, and that castration does nothing to address the real problem. See Boodman, supra note 10, at Z07.
48. See Seligman, supra note 33, at C-1.
49. See id. (referring to Dr. Berlin's criticism of California's law that "[u]nfortunately, the state's new law won't discriminate. Those who want to commit crimes will find a way.").
50. See Rundle, supra note 8, at B1.
51. See id. (quoting Dr. Berlin, founder of the Johns Hopkins Sexual Disorders
drug and responded positively to treatment are doubtful that forced treatment would be helpful.\textsuperscript{52}

The fourth and final criticism of California's chemical castration law is that it relies on parolees to self-report for purposes of determining the treatment's effectiveness at reducing recidivism.\textsuperscript{53} The chemical castration studies upon which California's law is based also relied upon the subject offenders to truthfully report all of their sexual fantasies and activities.\textsuperscript{54} The results of the study would be skewed in favor of effectiveness to the extent that the patients failed to accurately report their sexual urges regarding children.\textsuperscript{55} While self-reporting is an acknowledged weakness of the castration studies, actual results in California may be even more skewed since the participants are prison parolees and may be less willing to report their sexual offenses or fantasies accurately out of fear of returning to prison.\textsuperscript{56}

C. The Limited Legal History of Chemical Castration

There is very little case law, in either federal or state courts, concerning chemical castration. A small number of cases have commented on chemical castration in dicta,\textsuperscript{57} but only one case has directly addressed the issue of a state's ability to impose chemical castration as a

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Clinic, who has treated more than 150 men with Depo-Provera, who stated that, "[y]ou can only help people to help themselves."'); see also Wayne Woodlief, Politics Inside Out: Sex Offender Bill Means Well but Needs a Rewrite, BOSTON HERALD, Apr. 26, 1995, at O29.

\textsuperscript{52} See Rundle, supra note 8, at B1. One anonymous sex offender patient, who has voluntarily taken Depo-Provera for seven years, expressed his doubts about mandatory treatment by stating:

[i]f somebody wants to fulfill their sexual fantasies they will do so whether they are on the drug or not. If you want to help yourself, [the drug] helps you stay out of trouble. If you want to go out and hurt people, [the drug] isn't strong enough to overrule those urges.

\textit{Id.}

\textsuperscript{53} See Kravitz et al., supra note 12, at 20.

\textsuperscript{54} See id.

\textsuperscript{55} See id. at 28. One study showed surprisingly favorable results in patients who received placebos. \textit{See id.}

\textsuperscript{56} See, e.g., Boodman, supra note 10, at Z07.

\textsuperscript{57} See e.g., Arizona v. Christopher, 652 P.2d 1031, 1033 (Ariz. 1982) (holding that the state had no duty to provide the defendant with an effective rehabilitation program); Idaho v. Estes, 821 P.2d 1008, 1010 (Idaho Ct. App. 1991) (determining that rehabilitation with Depo-Provera was secondary to protecting society); Dennis v. Maryland, 284 A.2d 256, 258 (Md. Ct. Spec. App. 1971) (holding that an expert witness' recommendation of chemical treatment instead of punishment was only a plea for leniency and not evidence toward an insanity defense).
punishment or as a parole condition. In 1984, the Michigan Court of Appeals in *People v. Gauntlett*, overturned defendant Gauntlett’s sentence for his conviction of criminal sexual conduct in the first degree. As part of his sentence, the trial judge ordered Gauntlett to undergo chemical castration treatment for the duration of his one-year jail term and four-year probation term. Gauntlett challenged his sentence as unconstitutional, claiming that the punishment constituted cruel and unusual punishment and violated his fundamental privacy rights.

The Michigan court did not reach the larger constitutional issues raised by Gauntlett, but instead held that the parole condition violated Michigan law. Specifically, the court found the probation conditions unlawful because: (1) the drug Depo-Provera had not been approved by the Food and Drug Administration (FDA) for this kind of experimental use; (2) the treatment was not generally accepted by the medical community; and (3) there was a lack of voluntariness or consent on the part of the defendant in submitting to the experimental treatment.

*Gauntlett* continues to be important to any discussion chemical castration because it remains, to date, the only published case addressing this issue. *Gauntlett*’s relevance to California’s new law may be limited, however, since fourteen years have elapsed since *Gauntlett* was decided.

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60. *See id. at 314. Gauntlett pled nolo contendere to one count of criminal sexual conduct in the first degree arising from two charges of sexual intercourse with his 14 year old stepdaughter and three charges of sexually fondling his 12 year old stepson. See id. at 311.*
61. See id. at 313.
62. See id. at 314.
63. See id. (referring to MICH. COMP. LAWS § 771.3(4) (1993) which states that the court may only impose lawful conditions of probation).
64. See id. at 317.
65. *See Gauntlett, 352 N.W.2d at 314-15. Depo-Provera is only licensed in the United States for treating certain types of cancer. See id. at 314. “[T]he drug is not approved by the FDA for suppressing the sex drive in the male, but its experimental use for that purpose is allowed.” Id. at 315.*
66. *See id. at 316. “Depo-Provera treatment . . . has not gained acceptance in the medical community as a safe and reliable medical procedure.” Id. “The drug produces an alphabet of adverse reactions from acne to cancer to weight gain.” Id. at 315 (citing PHYSICIAN’S DESK REFERENCE 1765-66 (34th ed. 1980)).
67. *See id. at 315. “[E]ven in the four studies undertaken to treat sex offenders with medroxyprogesterone acetate, participation was voluntary.” Id. at 315.*
68. *See id. at 316.*
and in that time significant studies have proven Depo-Provera's effectiveness.69 Given this research, courts today will likely view this treatment with less skepticism than did the Gauntlett court.

III. POTENTIAL LEGAL CHALLENGES TO THE CALIFORNIA STATUTE

Opponents of California's chemical castration law are likely to challenge the law as violative of the First and Eighth Amendments, and of the fundamental constitutional right to privacy implicit in the Constitution. The following section examines these potential challenges more closely.

A. Cruel and Unusual Punishment

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment.70 To date, the Supreme Court has not established a uniform test for what constitutes cruel and unusual punishment.71 Instead, the Court has articulated different standards at varying times in our country's history.72 Before analyzing whether chemical castration is "cruel and unusual," it must be determined whether chemical castration constitutes "punishment" for Eighth Amendment purposes, or whether it is simply a "treatment," and therefore, outside the purview of the Eighth Amendment.73

Although the Supreme Court has not addressed the issue of whether the administration of drugs constitutes "punishment" for Eighth Amendment purposes, the United States District Court for the District of New Jersey discussed the issue in 1978 in the often-cited case of Rennie v. Klein.74 In Rennie, the district court considered the issue of whether New Jersey had the authority to forcibly administer certain
drugs to involuntarily institutionalized mental patients in nonemergency situations.\textsuperscript{75}

After finding that the Eighth Amendment ban on cruel and unusual punishment applied to persons involuntarily held in mental institutions,\textsuperscript{76} the court in \textit{Rennie} set forth four factors to determine whether the state can administer certain drugs without violating the Eighth Amendment.\textsuperscript{77} Firstly, any treatment must have therapeutic value.\textsuperscript{78} It must be a medically accepted practice.\textsuperscript{79} It must not have unnecessarily harsh side effects as compared to its benefits.\textsuperscript{80} Finally, it must be part of an overall treatment program.\textsuperscript{81} Only if all four of these criteria are met can the administration of the drugs be deemed “treatment” and not punishment.\textsuperscript{82} If the drugs are administered following this four-prong analysis, it will not run afoul of the Eighth Amendment’s prohibition of cruel and unusual punishment.\textsuperscript{83}

California’s castration law is likely to face a similar treatment/punishment threshold test as that described in \textit{Rennie}. Applying the four-prong analysis, California’s law appears to pass the first prong of the test, since the treatment, at least when applied under proper conditions, does have therapeutic value.\textsuperscript{84} Whether the California treatment satisfies the second prong of the \textit{Rennie} test, requiring that the treatment be an acceptable medical practice,\textsuperscript{85} is more problematic.\textsuperscript{86} One court, the Michigan Court of Appeals in \textit{People v. Gauntlett},\textsuperscript{87}

\textsuperscript{75} \textit{Id.} at 1134.

\textsuperscript{76} See \textit{id.} at 1143. Rennie was involuntarily committed to the Ancora Psychiatric State Hospital for the Mentally Ill for manic depressive illness. See \textit{id.} at 1136. Rennie was previously diagnosed as a paranoid schizophrenic, with behavior varying from suicidal to delusional to violent. See \textit{id.} at 1135-36. Rennie was treated with a variety of antipsychotic drugs including Thorazine, Prolixin, Etrafon, Haldol, Elavil, and Lithium. See \textit{id.} at 1136.

\textsuperscript{77} See \textit{id.} at 1143.

\textsuperscript{78} See \textit{id.}

\textsuperscript{79} See \textit{id.}

\textsuperscript{80} See \textit{Rennie}, 462 F. Supp. at 1143.

\textsuperscript{81} See \textit{id.}

\textsuperscript{82} See Vanderzyl, supra note 16, at 126.

\textsuperscript{83} See Rennie, 462 F. Supp. at 1143.


\textsuperscript{85} See \textit{Rennie}, 462 F. Supp. at 1143.

\textsuperscript{86} See supra notes 38-56 and accompanying text.

specifically held that chemical castration is not widely accepted in the medical community.88 Gauntlett was decided fourteen years ago and was only the opinion of a Michigan state court. As such, its precedential value in states other than Michigan, and its application to the analysis of California’s castration law will be limited.89 Also, since 1984, it has become more commonplace for doctors to use chemical treatment procedures on sex offenders,90 It is conceivable, therefore, that chemical treatment would no longer be viewed as experimental as it was when Gauntlett was decided. Gauntlett’s relevance to this issue today, is questionable and unlikely.

The third prong of the Rennie test requires that the side effects of the treatment must not be unnecessarily harsh in relation to the treatment’s benefits.91 While studies on chemical castration treatment have concluded that the treatment does cause some side effects,92 these side effects generally have not appeared to be particularly serious or persistent.93 Furthermore, if the treatment results in lower recidivism rates, it is arguable that the side effects are outweighed by the treatment’s benefits.

The final prong of the Rennie test requires that the procedure be part of an “ongoing psychotherapeutic [treatment] program.”94 California’s law, in its current form, does not meet this prong of the test since it does not provide for ongoing concurrent treatment in conjunction with the injection of chemicals.95 Particularly, it does not provide for, or require, any concurrent counseling, which many experts believe is crucial to this form of treatment’s success.96

88. See id. at 316.
89. Like Gauntlett, the New Jersey federal district court case of Rennie v. Klein, discussed previously, would not be controlling in California per se. Nonetheless, it is generally considered throughout the legal community as authoritative with regard to the treatment versus punishment test, and for this reason it will likely be followed by California courts. See Fitzgerald, supra note 8, at 32-33; Peters, supra note 71, at 318-19; Green, supra note 71, at 19-20; Vanderzyl, supra note 16, at 126.
90. See Berlin, supra note 84, at 235. Depo-Provera “has now been used in conjunction with the treatment of paraphilic disorders for over 20 years, and a great deal is known about its mechanisms of action.” Id.
92. See supra note 17 and accompanying text.
93. See Kravitz et al., supra note 12, at 26-27. The most common side effects noted have been muscle cramps, weight gain, headaches, fatigue, lethargy, drowsiness, and sleeplessness. See id.
95. See generally CAL. PENAL CODE § 645 (West 1998).
96. See supra notes 39-43 and accompanying text.
Since California's law does not meet the fourth prong of the *Remnie*
test, it is not likely to escape Eighth Amendment review under the
 guise of "treatment." Rather, it is likely to be considered "punishment,"
and therefore, subject to the tests put forth by the United States Su-
 preme Court for determining whether the punishment is cruel and un-
usual. 97

The Supreme Court's standards regarding cruel and unusual punish-
ment have their foundation in *Weems v. United States*, 98 where the
Court, in 1910, held that "it is a precept of justice that punishment for
crime should be graduated and proportioned to [the] offense." 99

*Weems' concept of "proportionality" was reaffirmed in the 1958 case of
*Trop v. Dulles*, 100 in which the Court decided that "[t]he basic concept
underlying the Eighth Amendment is nothing less than the dignity of
man," 101 and therefore, "[t]he Amendment must draw its meaning
from the evolving standards of decency that mark the progress of a
maturing society." 102

The concept of proportionality, requiring that punishment be propor-
tional to the crime committed, has come under criticism by some Su-
 preme Court justices in recent years. 103 Nonetheless, the proportionali-
ty doctrine still survives in some form. 104 Two Eighth Amendment

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97. See infra Part III.A.
98. 217 U.S. 349 (1910). Weems was sentenced to 15 years of hard labor for
falsifying an official document while serving as a Coast Guard employee in the Phil-
ippine Islands. See id. at 357-58. The Supreme Court, in reviewing Weems' sentence,
reasoned that 15 years in chains at hard and painful labor, in addition to restrictions
on his freedom, was punishment far out of proportion to the crime committed, and
therefore, in violation of the Eighth Amendment. See id. at 366-67.
99. Id. at 367.
100. 356 U.S. 86 (1958). While serving in the Army in 1944, Trop was
courtmartialed for desertion. See id. at 87-88. As part of his punishment and dishon-
orable discharge, Trop's citizenship was revoked. See id. The Supreme Court held
that the military did not have the power to withhold citizenship, and that denational-
ization was barred by the Eighth Amendment. See id. at 91-93, 101.
101. Id. at 100.
102. Id. at 101.
103. See *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (plurality) (Scalia, J.,
joined by Rehnquist, C.J.) (arguing that the Eighth Amendment does not guarantee
proportionality).
104. See id. at 1001, 1023. Four Justices voted to keep a limited form of propor-
tionality, which bans sentences that are grossly out of proportion to the crime, while
the three dissenting justices voted that the "punishment[s] must be tailored to a
defendant's personal responsibility and moral guilt." Id. at 1023 (White, J., dissent-
ing). The remaining two justices voted to abandon the requirement of proportionality
altogether. See id. at 965.
cases, Furman v. Georgia\textsuperscript{105} and Gregg v. Georgia,\textsuperscript{106} adopt the proportionality concept in differing degrees.\textsuperscript{107}

In 1972, the Supreme Court in Furman v. Georgia, addressed whether punishment is unconstitutional if it exceeds what is necessary to achieve legitimate state aims.\textsuperscript{108} Thus, Furman requires a state to use the “least restrictive” alternatives to achieve its goals.\textsuperscript{109}

In applying the Furman standard to California’s castration law, the relative restrictiveness of chemical castration must be weighed against the possible alternatives.\textsuperscript{110} Opponents of California’s law argue that chemical castration is not the state’s least intrusive alternative because the treatment affects an offender’s bodily integrity and sexual freedom.\textsuperscript{111} In support of their position, opponents argue that incarceration is a less intrusive alternative, which does not violate an offender’s bodily autonomy, and is also more effective in preventing further offenses.\textsuperscript{112} Conversely, supporters of California’s law argue that incarceration is, in fact, more intrusive than chemical castration, since an offender will enjoy far more freedom if released from prison and receiving treatment than if he did not receive treatment and remained in prison.\textsuperscript{113}

The Supreme Court articulated another cruel and unusual punishment test in the 1976 case of Gregg v. Georgia.\textsuperscript{114} In Gregg, the Court ad-

\textsuperscript{105} 408 U.S. 238 (1972). In Furman, three petitioners—one convicted of murder and two convicted of rape—were sentenced to death. See id. at 239.

\textsuperscript{106} 428 U.S. 153 (1976) (plurality).

\textsuperscript{107} See Furman, 408 U.S. at 279 (Brennan, J., concurring); Gregg, 428 U.S. at 173.

\textsuperscript{108} See Furman, 408 U.S. at 279 (Brennan, J., concurring).

\textsuperscript{109} Fitzgerald, supra note 8, at 39 (citing AMERICAN BAR ASSOCIATION, STANDARDS OF CRIMINAL JUSTICE, § 18:2-3(b) (1980)).

\textsuperscript{110} See generally Fitzgerald, supra note 8, at 39 (“The third test . . . is whether the punishment is excessive in relation to the achievement of legitimate state goals.”); Green, supra note 71, at 22 (“Under the third test, applied in Furman v. Georgia, the question is whether the punishment exceeds what is necessary to accomplish the state’s legitimate aims.”). This Note assumes that California has a legitimate state interest in trying to reduce sexual molestation of children.

\textsuperscript{111} See Green, supra note 71, at 22-23; see also Vanderzyl, supra note 16, at 131.

\textsuperscript{112} See Green, supra note 71, at 22-23.

\textsuperscript{113} See Fitzgerald, supra note 8, at 39.

\textsuperscript{114} 428 U.S. 153 (1976) (plurality opinion). Petitioner Gregg was found guilty of armed robbery and murder, and was sentenced to death. See id. at 158. The Court held that criminal penalties, at the very least, cannot be “excessive,” which means that they cannot involve unnecessary and wanton infliction of pain and they cannot be
dressed the issue of whether the death penalty was "excessive." The plurality opinion in *Gregg* held that a punishment is not within "the dignity of man" if it is "excessive." The Court defined excessive punishment as that which involves the "unnecessary and wanton infliction of pain," and which is "grossly out of proportion to the severity of the crime." *Gregg* also required an examination of the "objective indicia that reflect the public attitude toward a given sanction" to determine whether a given punishment is acceptable to our society.

California's parole condition of chemical castration is certainly different in magnitude than the punishment of death addressed in *Gregg*. Analyzing the California measure under the *Gregg* test, the law appears to pass constitutional muster. First, chemical castration treatment does not appear to be "excessive," as defined by *Gregg*. Weekly intramuscular injections, despite possibly causing temporary discomfort during the injection, generally do not amount to "unnecessary," "unusual," or "wanton" infliction of pain.

Second, chemical castration treatment does not appear to be "grossly out of proportion" to the crime committed. California's law mandates treatment only for those who have been convicted twice of molesting children. Since chemical castration is only mandated for those convicted twice, and because the treatment effectively eliminates the motivation leading to the crime in the first place, the punishment is grossly out of proportion to the crime committed. *Id.* at 158.
directly proportional to the crime.\textsuperscript{125}

Finally, chemical castration is not out of step with public attitudes. In recent years, society has consistently supported various "get tough on crime" measures.\textsuperscript{126} Sex offenders, and child molesters particularly, garner little public sympathy.\textsuperscript{127} It seems reasonable, therefore, that a majority of citizens would support such a measure. Recently, in fact, one proponent of the California law stated that over eighty percent of Californians supported the use of chemical castration for child molesters.\textsuperscript{128}

Ultimately, the issue of cruel and unusual punishment is dependent on which of the abovementioned standards—excessiveness or proportionality—is applied to the California law. Given today's climate, it is unlikely that \textit{Furman}'s pro-criminal-defendant "least restrictive alternative" test\textsuperscript{129} would be applied if the Supreme Court addresses the issue of the constitutionality of California's law.\textsuperscript{130} Rather, the Court is likely to show deference to the California legislature, allowing it to determine how to treat and punish criminals in California.\textsuperscript{131}

\textsuperscript{125} See Fitzgerald, \textit{supra} note 8, at 38 ("Treatment with MPA complies with proportionality review."); see also Icenogle, \textit{supra} note 18, at 303 ("[T]he sentence proposed here is more proportional to the crime than incarceration. It is a direct physiologic response to a criminal behavior, eliminating that behavior. To address the crime by focusing on the particular behavior seems eminently proportional.").


\textsuperscript{127} See generally McSpadden, \textit{supra} note 25, at 13; \textit{Odious Crime}, \textit{supra} note 42, at A10 ("Child molesters endure an opprobrium even more intense than that encountered by some murderers.").

\textsuperscript{128} See Telephone interview with Susan Carpenter McMillan, Executive Director of The Woman's Coalition in Pasadena, Cal. (Sept. 20, 1996).

\textsuperscript{129} The \textit{Furman} least restrictive alternative test clearly favors criminal defendants since it requires states not to inflict punishment beyond that which is necessary to achieve its legitimate objective, rather than the alternative proportionality standard which prohibits only grossly disproportionate punishments. See \textit{Furman v. Georgia}, 408 U.S. 238, 279 (1976) (plurality) (Brennan, J., concurring).

\textsuperscript{130} See, e.g., Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (plurality) (Scalia, J.) (casting doubt on the future use of proportionality in noncapital cases); Icenogle, \textit{supra} note 18, at 303 (detailing the \textit{Harmelin} Court's criticisms of proportionality).

\textsuperscript{131} See, e.g., \textit{Gregg v. Georgia}, 428 U.S. 153, 175 (1976) (plurality) (stating that where a democratically elected legislature promulgates a statute, the Court will presume its validity).
B. First Amendment Rights

California's chemical castration law also implicates the First Amendment's protection of "mental autonomy." In Stanley v. Georgia, the Supreme Court recognized a person's right to read and observe in his or her own home that which he or she pleases, regardless of its value. The ability to receive, think about, and communicate ideas is called "mentation," and under Stanley, is protected by the First Amendment. Chemical castration affects mentation because it interferes with the offender's thought processes by inhibiting his sexual fantasies.

The Court in Stanley clearly held that a state may not attempt to control a person's thoughts. This prohibition, however, is not absolute. For instance, in Rennie v. Klein, the United States District Court for the District of New Jersey held that the First Amendment does not automatically prohibit a state from forcibly administering mind-affecting drugs to involuntarily committed mental patients. Rather, the court held that the First Amendment requires an examination of the length and persistence of the drugs' effect on the patient's ability to think and speak.

Opponents of chemical castration argue that administration of the drugs violate an offender's First Amendment rights because they interfere with protected mental activity by inhibiting a person's ability to

132. U.S. CONST. amend. I. "Congress shall make no law . . . abridging the freedom of speech . . ." Id.
133. Green, supra note 71, at 18.
134. 394 U.S. 557 (1969). In Stanley, law enforcement agents seized three obscene films from Stanley's bedroom. See id. at 558. The Supreme Court held that the Constitution protects the "right to receive information and ideas, regardless of their social worth" and that the state cannot "control the moral content of a person's thoughts." Id. at 564-65.
135. See id. at 565 (holding that an individual has a right to possess and view pornography in his own home).
136. See Fitzgerald, supra note 8, at 26.
137. See Stanley, 394 U.S. at 565.
139. Stanley, 394 U.S. at 565.
140. See Green, supra note 71, at 19.
142. See id. at 1144.
143. See id.
generate sexual fantasies.\textsuperscript{144} They also contend that the drugs interfere substantially with an offender’s mental autonomy since the drugs must be used continuously in order to be effective.\textsuperscript{145} Consequently, the offender’s right to engage in sexual fantasizing would be inhibited for as long as the treatment continued.\textsuperscript{146}

Alternatively, proponents of chemical castration argue that the treatment does not violate a defendant’s First Amendment rights since it is reversible and the adverse effects end when the treatment ends.\textsuperscript{147} Further, the drugs may actually help an offender expand and clarify his ability to express himself because the treatment will free him from his engaging in and acting upon his intense and compulsive sexual fantasies.\textsuperscript{148} Finally, proponents point out that MPA is not “mind controlling” or meant to affect a person’s politics or personal beliefs, and that compulsive sexual fantasy, while protected, is not the kind of expression at the heart of the First Amendment.\textsuperscript{149}

C. The Fundamental Right to Privacy

California’s law is also likely to be challenged as a violation of the constitutional fundamental right to privacy.\textsuperscript{150} In \textit{Griswold v. Connecticut},\textsuperscript{151} the Supreme Court recognized the right of privacy as being wi-

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\textsuperscript{144} See Melella et al., supra note 138, at 227.
\textsuperscript{145} See Melella et al., supra note 138, at 227.
\textsuperscript{146} See Green, supra note 71, at 20.
\textsuperscript{147} See Fitzgerald, supra note 8, at 29.
\textsuperscript{148} See Peters, supra note 71, at 326.
\textsuperscript{149} See id. “Depo-Provera does not alter the physiological functioning of the mind, but rather only affects one’s intensity and preoccupation with compulsive sexual fantasy and restores thoughts to the boundaries of normalcy.” Id.
\textsuperscript{150} MPA deprives the paraphiliac of his sexual fantasy, but it restores his thoughts to the parameters of normalcy. . . . MPA actually increases the paraphiliac’s ability to generate thoughts. Freed from his compulsive fantasy, the offender can make choices to realize his life ambitions and participate in the social and political activities of the society.
\textsuperscript{151} See Fitzgerald, supra note 8, at 29.
\textsuperscript{152} See Melella et al., supra note 138, at 227. “[A]ntiandrogens are not given to control attitudes and behaviors which impact on political beliefs or personal affiliations, presuming this is the type of first amendment right the Constitution was designed to protect.” Id. (citing Fred S. Berlin, Ethical Use of Antiandrogenic Medication, 138 AM. J. PSYCHIATRY 1515, 1516 (1981)).
CHEMICAL CASTRATION
thin the "penumbra" of rights implicit in the Constitution,\textsuperscript{152} and as a right "created by several fundamental constitutional guarantees."\textsuperscript{153} In Eisenstadt \textit{v.} Baird,\textsuperscript{154} the Court expanded the privacy right to include the right of an individual "to be free from unwarranted governmental intrusion" in personal matters such as procreation.\textsuperscript{155}

Following the Supreme Court's "fundamental rights" precedents, a state may interfere with or restrict a fundamental right, such as privacy, only if it has "a 'compelling state interest,' and [the] legislative enactments . . . [are] narrowly drawn [to meet that interest]."\textsuperscript{156} This test is known as the "strict scrutiny" test.\textsuperscript{157}

The most obvious privacy right threatened by chemical castration is the right to procreate, since chemical castration inhibits one's ability to have children.\textsuperscript{158} In \textit{Skinner v. Oklahoma},\textsuperscript{159} the Supreme Court invalidated a state statute requiring certain criminal offenders to be sterilized by the performing of a vasectomy.\textsuperscript{160} Marking the beginning of the Supreme Court's gradual recognition of the fundamental rights of privacy and procreation, the Court held that procreation is a "basic civil right[] of man . . . [that] is fundamental to the very existence and survival of the race."\textsuperscript{161} The Court emphasized that any state legislation inter-
fering with the fundamental right of procreation must pass the constitutional standard of strict scrutiny test, and be narrowly tailored to achieve a state's compelling interest. 162

Following the mandate of the Court in Skinner, California’s chemical castration law must be examined under the strict scrutiny standard since the law interferes with the offender’s ability to procreate. California must first have a compelling interest in administering chemical castration to convicted child molesters. Supporters offer at least two compelling interests in connection with this law. 163 The first is the state's interest in protecting its children from sexual assault by parolees. 164 The second is the state’s interest in rehabilitating its sexual offenders into productive citizens. 165

Opponents of California’s law are likely to accept these interests as legitimate and compelling, but will focus instead on the second prong of the strict scrutiny test, which requires that chemical castration be the least intrusive or most narrowly drawn alternative for achieving the state’s interests. 166 Opponents argue that the law is overly broad since chemical castration does not effectively curb sexual assaults motivated by violence, and that the law does not prescreen potential participants to rule out this treatment for these types of offenders. 167 Without a prescreening provision, it could successfully be argued that incarceration is a more effective method for protecting society from sex offender recidivism. 168 Further, California’s law does not provide for counseling concurrent with the treatment. 169 Since the desired reduction in recidivism is more likely to occur when concurrent counseling and rehabilitation alternatives are available, 170 such as comprehensive training and

162. See id.


164. See id. “[C]hemical castration will help reduce the recidivism rate among sex offenders. More importantly, it may prevent future children and adults from becoming a victim of a sex offense.” Id.

165. See id.; see also Icenogle, supra note 18, at 299-300.

166. See Shelton v. Tucker, 364 U.S. 479, 488 (1960) (holding that a state must use narrowly drawn statutes or the least drastic means to achieve its purpose).

167. See supra notes 44-49 and accompanying text.


170. See supra notes 39-43 and accompanying text.
treatment programs, California's law may not meet the strict scrutiny test.\textsuperscript{171}

Opponents of California's law will further argue that incarceration may be less intrusive than chemical treatment because the drugs intrude on an offender's mental and physical well-being by subjecting him to harmful side effects\textsuperscript{172} and limiting his ability to procreate.\textsuperscript{173} In fact, the treatment might be considered even more intrusive than the sterilization via vasectomy proscribed in \textit{Skinner},\textsuperscript{174} since chemical castration severely limits the sex drive itself, in addition to impairing the ability to procreate.\textsuperscript{175} Most men who undergo a vasectomy are sexually normal and retain normal sex drives, except that they cannot procreate.\textsuperscript{176} Men who undergo chemical castrations, however, suffer both impaired procreative ability and limited sex drive.\textsuperscript{177}

Whether California's law will be considered narrowly drawn and less intrusive than incarceration depends on whether chemical castration is determined to be a treatment that directly addresses the root cause of the crime.\textsuperscript{178} If it is concluded that the treatment is effective, and that a chemically castrated man enjoys more freedom than one who is incarcerated, the law is likely to withstand strict scrutiny, despite the intrusiveness of the treatment.\textsuperscript{179}

Chemical castration may be considered far less intrusive than the sterilization required in \textit{Skinner}\textsuperscript{180} because chemical castration is reversible.\textsuperscript{181} Furthermore, men who undergo the chemical treatment are, to some degree, still able to procreate while being treated, whereas men

\begin{footnotes}
\item[172.] See supra note 17 and accompanying text.
\item[173.] See supra note 18 and accompanying text.
\item[175.] See Green, supra note 71, at 24.
\item[176.] See Fitzgerald, supra note 8, at 44; see also Icenogle, supra note 18, at 298.
\item[177.] See Green, supra note 71, at 24 (citing Georg K. Sturup, \textit{Castration: The Total Treatment, in SEXUAL BEHAVIORS: SOCIAL, CLINICAL, AND LEGAL ASPECTS} 361, 361 (H.L.P. Resnik & Marvin E. Wolfgang eds., 1972)). "The use of Depo-Provera also intrudes upon the personal right to procreate because its effect on testosterone levels leaves men sexually impotent." \textit{Id.} See also Fitzgerald, supra note 8, at 58-59.
\item[178.] See Icenogle, supra note 18, at 300 (stating that MPA treatment directly counters the criminal behavior of sex offenders). See also supra Part III.A.
\item[179.] See, e.g., Icenogle, supra note 18, at 300 (determining that giving up the ability to procreate is preferable to incarceration where almost all rights are surrendered).
\item[180.] Skinner v. Oklahoma, 316 U.S. 535, 541-43 (1942).
\item[181.] See Peters, supra note 71, at 326; see also Icenogle, supra note 18, at 298.
\end{footnotes}
who undergo a vasectomy are subject to virtually permanent and total sterilization.\textsuperscript{182} Finally, the possibility of future side effects from chemical castration\textsuperscript{183} pales in comparison to the very real dangers of prison, especially for sex offenders.

IV. CONSENT AND WAIVER OF CONSTITUTIONAL RIGHTS

If a court finds that the California statute violates an offender's fundamental rights, the next question the court must answer is whether the offender, given his incarceration, has the capability to consent to the chemical treatment, thereby waiving his privacy rights.\textsuperscript{184} In \textit{Brady v. United States},\textsuperscript{185} the Supreme Court held that a criminal defendant could consent to waive his right to a jury trial and his right against self-incrimination.\textsuperscript{186} The Court cautioned, however, that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."\textsuperscript{187} By analogy, California's chemical castration law could implicate a fundamental privacy right if an offender could knowingly and voluntarily consent to waive his privacy right and undergo the treatment.\textsuperscript{188}

The doctrine of "informed consent" requires that consent to be voluntary, knowing and intelligent.\textsuperscript{189} This doctrine usually applies in a medical setting,\textsuperscript{190} and requires that a patient be informed by a physician of any and all risks associated with a potential course of medical treatment, and of all other available options, prior to the patient making

\begin{itemize}
  \item \textsuperscript{182} See Icenogle, supra note 18, at 298; see also Fitzgerald, supra note 8, at 44.
  \item \textsuperscript{183} See supra note 17 and accompanying text.
  \item \textsuperscript{184} See Icenogle, supra note 18, at 294; see also Fitzgerald, supra note 8, at 17.
  \item \textsuperscript{185} 397 U.S. 742 (1970).
  \item \textsuperscript{186} See id. at 748; see also U.S. CONST. amend. V ("No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall be compelled . . . to be a witness against himself. . . .").
  \item \textsuperscript{187} \textit{Brady}, 397 U.S. at 748. The defendant in \textit{Brady} changed his pleas to guilty after his codefendant pleaded guilty to kidnapping, and after twice being questioned by the trial judge as to voluntariness. See id. at 743. On appeal, the petitioner then claimed his plea was not voluntary. See id. at 744.
  \item \textsuperscript{188} See, e.g., Fitzgerald, supra note 8, at 17-18, 22, 57.
  \item \textsuperscript{189} See Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972); see also \textit{Brady}, 397 U.S. at 784.
  \item \textsuperscript{190} See Icenogle, supra note 18, at 294 ("Informed consent . . . would be obtained in accordance with the standards required for other medical treatments in the state."); see also Fitzgerald, supra note 8, at 18 ("The doctrine of informed consent requires the physicians to provide the individual with all the information relevant to his treatment.").
\end{itemize}
a decision regarding his treatment. The leading case dealing with informed consent is *Canterbury v. Spence*.

In *Canterbury*, the United States Court of Appeals for the District of Columbia held that it is a patient's right to decide for himself whether to undergo treatment. In order for the patient to make an informed decision, however, the physician must explain all information to the patient that is material to his decision. A risk is considered "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 court further explained that physicians must communicate to the patient all information about potential risks of the treatment, possible alternative treatments, and the likely consequences attendant to refusing treatment.

The California statute requires an analogous level of informed consent. It requires physicians to inform the offender of the treatment's direct results and known side effects. It does not, however, require that the state specifically inform the offender that there may be unknown long-term side effects. Additionally, the law has no explicit requirements that the physician inform the offender about the alternatives and consequences of refusing or discontinuing treatment. Most likely, however, this information will routinely be provided, because accepting and continuing treatment is, by definition, a condition of parole. Since a prisoner's parole is conditional upon his accepting

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191. See *Canterbury*, 464 F.2d at 786.
193. See id. at 781. In this case, the defendant had agreed to a back operation without being properly informed of the risk of paralysis. Id. at 776.
194. See id. at 786.
196. See id. at 787-88.
197. See CAL. PENAL CODE § 645(f) (West 1998). "These protocols shall include, but not be limited to, 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." Id.
198. See id.
199. See generally id.
200. See generally id.
201. See Fitzgerald, supra note 8, at 19. The law further does not require an explanation that if an offender chooses to stay in prison, an additional consequence of his decision would be that his condition would remain untreated, thus, he would still be a threat to society upon release. See id.
the treatment, it can safely be assumed that he will understand that the only alternative or consequence to refusing the treatment is a denial of parole, and therefore, to remain in prison.

Opponents of California’s legislation contend that this kind of consent can never be voluntary due to its “inherently coercive nature.” They argue that voluntary consent means free choice, which is not possible when the only alternative to treatment is the total deprivation of liberty. Opponents cite the 1973 case of Kaimowitz v. Department of Mental Health, in which a Michigan Circuit Court held that an involuntarily committed mental patient could not legitimately consent to experimental brain surgery. “To be legally adequate, a subject’s informed consent must be competent, knowing and voluntary.” The court determined that the patient’s consent was not voluntary because of the inherently coercive atmosphere and unequal bargaining power between the institution and the patient. The court reasoned that the mental capacity of a patient who had been institutionalized for seventeen years had diminished to a point where it was impossible for the patient to give informed consent. Finally, the court found the patient could not possibly give knowledgeable consent to psychosurgery given the profound uncertainty of the procedure. Similar concerns about consent arise regarding the California statute. First, if a convicted sex offender is mentally incompetent due to his incarceration, or if he was extremely dysfunctional prior to incarceration, the analysis in Kaimowitz would lead one to the conclusion that the offender cannot give informed consent to chemical castration.

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203. See Green, supra note 71, at 16.
204. See id.
206. See id. at 150-51.
207. Id. at 150.
208. See id. at 151.
209. See id. at 147.
210. See id. at 150.
211. See Kaimowitz, 1 MENTAL DISABILITY LAW REP. at 150-51.
212. See, e.g., ACLU Press Release, supra note 150.
213. See Jules Crittenden, ‘Chemical Castration’ Proposed for Pedophiles, BOSTON HERALD, Mar. 27, 1995, at 8. For example, Jill Brotman of the American Friends Service Committee, a group which advocates for prisoners’ rights, argues that “most pedophiles have a disease that needs to be addressed and are in no condition to decide whether to be chemically castrated. . . . [They] have disabilities in virtually every area of their lives.” Id.
The prisoner's ability to make a knowing decision may also be compromised by the medical community's lack of information concerning the risks and benefits of chemical castration. As noted, the decision in People v. Gauntlett classified treatment by this chemical as "experimental." Finally, courts may conclude that potential parolees, like mental patients, are unable to consent due to the unequal bargaining power between the individual and the state, given the inherently coercive, institutional prison environment. It is important to note that there is always unequal bargaining power present between the state and the individual in any parole bargain. If unequal bargaining power negates consent to chemical treatment as a parole condition, then arguably all parole conditions must be unlawful on the same grounds.

Despite these difficulties, a prisoner in California may be able to give informed consent to chemical castration treatment if it is found that the treatment is not unduly intrusive. Since the treatment is reversible and not life threatening, and unlike the experimental brain surgery in Kaimowitz, the benefits far outweigh the risks, courts may view the treatment favorably. Supporters of the California law will also argue that sexual offenders are presumed competent to make their own decisions, that there is substantial scientific data supporting the beneficial effects of chemical castration, and that informed consent

214. See, e.g., Melella et al., supra note 138, at 228; Fitzgerald supra note 8, at 57.
216. See id. at 315. See also supra note 55.
217. See Green, supra note 71, at 16-17.
218. See Fitzgerald, supra note 8, at 24. "[T]here is always an inequality of bargaining power between the state and the convicted offender regarding probation. If the paraphiliac's consent is negated because it is given as a condition of release, all probation conditions should be negated because of the similar absence of consent." Id. (citing John R. Mason, Comment, Kaimowitz v. Department of Mental Health: A Right to Be Free from Experimental Psychosurgery, 54 B.U. L. REV. 301, 321-22 (1974)).
219. See id.
220. See id. at 22. "Courts have generally decided that the less invasive the treatment, the more likely the voluntariness of the consent; while the more invasive the treatment, the less likely the voluntariness of the consent." Id. at 22 (citing Corey H. Marco & Joni Michel Marco, Antabuse: Medication in Exchange for a Limited Freedom—Is It Legal?, 5 AM. J. LEGAL MED. 295, 315 (1980)).
221. See id. at 23-24.
222. See id. at 24.
223. See id.
only requires that all known information be disclosed.\textsuperscript{224}

Some experts believe that consenting to chemical treatment is a perfectly rational choice because it maximizes an individual’s freedom.\textsuperscript{225} Although the choice between treatment and prison may be coercive, the choice is still voluntary.\textsuperscript{226} People often make difficult decisions under duress, but these decisions, nonetheless, are still voluntary.\textsuperscript{227} A particularly noteworthy example of this is when a person with a serious disease must choose between facing possible death or submitting to a painful treatment with potentially serious side effects.\textsuperscript{228} This person makes the choice under duress, but does so in an informed and voluntary manner as long as he or she receives and understands information regarding other options.\textsuperscript{229} By analogy, convicted child molesters should also be able to make an informed decision as to whether to undergo chemical castration or remain incarcerated. The choice may be characterized as coercive, but “[w]hen faced with the certainty of incarceration, wouldn’t we all want to be able to make such a choice? To ask the question is to answer it.”\textsuperscript{230}

V. THE MASSACHUSETTS’ PROPOSAL

A. Status of Proposal to Date

Massachusetts State Representative John Locke has proposed that Massachusetts enact a chemical castration law.\textsuperscript{231} In 1996, the Massachusetts House of Representatives passed an “investigational study into the efficacy of therapeutic chemical intervention of persons convicted of rape, indecent assault or battery, or others diagnosed with paraphilic disorders who are to be released from confinement.”\textsuperscript{232} Although the House approved the study, the measure did not pass the Massachusetts Senate, and therefore, did not become law.\textsuperscript{233} Had it passed, the study would have reviewed all medical research on chemical castration, deter-

\textsuperscript{224} See Fitzgerald, \textit{supra} note 8, at 20.


\textsuperscript{226} See \textit{id.} at 160-61.

\textsuperscript{227} See \textit{id.} at 161.

\textsuperscript{228} See \textit{id.}

\textsuperscript{229} See \textit{id.}

\textsuperscript{230} Besharov, \textit{supra} note 13, at 42.


mined the number of Massachusetts offenders with paraphilia disorders, estimated their recidivism rates, and made recommendations on the feasibility of implementing such a program. 234

B. Recommendations for the Adoption of an Effective Chemical Castration Program in Massachusetts

Before enacting a chemical castration law, Massachusetts should consider the weaknesses of the California law. California’s law is flawed in terms of its effectiveness and constitutionality. 235 Massachusetts should design a law that more specifically targets the problem of recidivism among child molesters. In so doing, Massachusetts will create a law more effective than California’s, and avoid many of the constitutional pitfalls likely to plague California. 236

First, to improve upon the California law, Massachusetts should not automatically provide the option of chemical castration as a parole condition for all sex offenders. 237 Rather, Massachusetts should explicitly require the prescreening of all potential sex offender parolees, with the option of parole being offered only to those offenders who are identified by the state as good candidates for chemical castration. 238 Unlike the California statute, this provision would help to ensure that only suitable offenders are released into the community.

Second, Massachusetts should provide ongoing counseling in conjunction with the chemical treatment. Experts in the field agree that a combination of the two is the optimal form of treatment. 239 In addition, these mandatory counselors would be in the best position to observe the parolees and monitor whether the treatment is working. 240 From a public safety standpoint, this provision is preferable to merely administering injections and relying on parolees to self-monitor the treatment’s effectiveness. 241

By incorporating prescreening and ongoing counseling into its law, Massachusetts can avoid the two primary complaints about the effective-

234. See id. at 2-3.
235. See supra Parts II.B.2. & III.
236. See supra Part III.
238. See supra notes 44-49 and accompanying text.
239. See supra notes 40-43.
240. See generally supra notes 53-56 and accompanying text.
241. See Kravitz et al., supra note 12, at 20.
ness of California's law.\textsuperscript{242} If Massachusetts decides to allow chemical castration as a parole condition, it should follow the medical experts' advice regarding the appropriate use of this treatment.\textsuperscript{243} Since prescreening and concurrent counseling are universally recommended by the medical experts,\textsuperscript{244} Massachusetts should incorporate such provisions into its law, and thereby avoid the effectiveness problems raised with regard to California's law.

Massachusetts can also circumvent the constitutional concerns raised by the California law by providing concurrent counseling. With such treatment, Massachusetts' law will likely be classified as "treatment" under the \textit{Rennie}\textsuperscript{245} test, rather than as "punishment" for Eighth Amendment purposes.\textsuperscript{246} \textit{Rennie} required that a state program be medically accepted, have therapeutic value, have no unnecessarily harsh side effects in relation to its benefits, and be a part of an overall treatment program.\textsuperscript{247} By providing counseling, Massachusetts, unlike California, will satisfy all four parts of the \textit{Rennie} test, and avoid the problems associated with California's law which does not provide for chemical castration as part of an "overall treatment program."\textsuperscript{248}

In addition, even if Massachusetts' law were subject to an Eighth Amendment "punishment" analysis, provisions requiring voluntary consent, selective prescreening, and ongoing counseling would enable Massachusetts to pass even the rigorous "least restrictive" test set forth in \textit{Furman}.\textsuperscript{249}

Massachusetts must also craft its law in such a way as to ensure that it does not violate the fundamental right to privacy.\textsuperscript{250} To accomplish this goal, the Massachusetts' law must pass the "strict scrutiny" test, which requires the state to have a compelling interest in the enactment of the law and be narrowly drawn to meet that interest.\textsuperscript{251}

Massachusetts should clearly identify its compelling interest in enacting a chemical castration law as protecting children from molestation by

\textsuperscript{242} See discussion supra Part II.B.2.
\textsuperscript{243} See supra notes 40-56.
\textsuperscript{244} See supra notes 40-49 and accompanying text.
\textsuperscript{246} See id.
\textsuperscript{247} Id.
\textsuperscript{248} See supra Part II.B.2.
\textsuperscript{249} Furman v. Georgia, 408 U.S. 238, 279 (1972). As discussed earlier, the \textit{Furman} test sets out that to be constitutional, punishment must not exceed what is necessary to achieve legitimate state interest. See id.
\textsuperscript{250} See discussion supra Part III.C.
reoffenders and rehabilitating convicted child molesters into productive citizens. In addition, provisions requiring voluntary consent, prescreening, and ongoing counseling would increase the likelihood that a court would find the law sufficiently narrow in scope to meet the compelling state interests, thereby satisfying the strict scrutiny test. It would be more difficult for opponents of chemical castration to argue successfully that a Massachusetts’ law with such safeguards and an emphasis on treatment is overly broad to achieve the state’s interests.

In conclusion, by constructing a statute with provisions for prescreening, ongoing treatment, and informed consent, Massachusetts would provide a more narrowly tailored law than California. Incorporating these suggestions may not result in a fool-proof parole system for child molesters, but, by using the more targeted approach proposed here, Massachusetts would achieve better overall results and avoid many potential legal challenges by not releasing those more dangerous prisoners who are not amenable to treatment.

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