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PRACTICING MEDICINE WITHOUT A LICENSE:¹ LEGISLATIVE ATTEMPTS TO MANDATE CHEMICAL CASTRATION FOR REPEAT SEX OFFENDERS

LISA KEESLING*

INTRODUCTION

On May 20, 1989, Helen Harlow gave her seven-year-old son permission to ride his bike if he promised to be back before dark.² When her son did not return, Ms. Harlow called the police.³ Later that evening, a neighbor found her son in the woods, naked and covered with mud.⁴ A man had grabbed the boy off his bike, twisted a rope around the boy's neck, strangled him, raped him and severed his penis.⁵ Miraculously, the boy survived to identify his attacker.⁶ The attacker was Earl Shriner.⁷

Shriner's twenty-four-year history of sexual violence began at the age of sixteen when he was accused of killing a schoolmate.⁸ Under the law at that time, the state could not charge Shriner with homicide because of his age.⁹ Instead, he was sent to a juvenile center.¹⁰ Once released, Shriner assaulted two teenage

1. David Van Biema & Jordan Bonfante, *A Cheap Shot at Pedophilia? California Mandates Chemical Castration for Repeat Child Molesters*, TIME, Sept. 9, 1996, at 60. In response to the enactment of California's mandatory chemical castration law, Dr. Fred Berlin, head of the Sexual Disorder Clinic at Johns Hopkins Hospital, stated, "There are many sex offenders for whom this is not going to be appropriate or useful. In effect, the legislators are practicing medicine without a license." *Id.*

* J.D. Candidate, June 1999.

2. Kate Shatzkin, *Sex-Assault Trial Begins: Mutilated Boy Was Confused, Says Witness*, SEATTLE TIMES, Jan. 30, 1990, at B1; Kate Shatzkin & Anh Do, *Shriner Guilty: Jury Convicts Him in Attack on Boy*, SEATTLE TIMES, Feb. 7, 1990, at A1.

3. Shatzkin, *supra* note 2, at B1.

4. *Id.*

5. Erik Lacitis, *An Option? Chemicals Might Have Helped Earl Shriner*, SEATTLE TIMES, June 1, 1989, at D1.

6. Gayle M.B. Hanson, *Perverts Who Prey on Kids*, WASH. TIMES, Oct. 16, 1995, at 8.

7. *Id.*

8. Shatzkin & Do, *supra* note 2, at A1.

9. *Id.*

10. *Id.*

girls.¹¹ While serving his ten-year prison sentence, physicians diagnosed Shriner as a sexual psychopath.¹² Although authorities considered him dangerous, they released Shriner from prison at the end of his sentence.¹³ Subsequent to Shriner's release, the police arrested him twice for misdemeanor assaults of young boys.¹⁴ Shriner's career of sexual violence ended on May 26, 1990, when Judge Thomas Sauriol sentenced him to 131 1/2 years in prison for sexually mutilating Helen Harlow's seven-year-old son.¹⁵

The high rate of recidivism¹⁶ for sex offenders like Earl Shriner¹⁷ poses a difficult problem for the criminal justice system

11. Jim Simon, *System Simply Had No Way to 'Digest' Shriner*, SEATTLE TIMES, June 1, 1989, at E1.

12. *Id.* Prior to his release, prison officials attempted to commit Shriner to a state mental institution as a sexual psychopath. *Id.* Officials, however, could not get him committed. *Id.* Similar attempts to admit him into a home for the developmentally disabled also failed. *Id.* Although mildly retarded, Shriner's IQ was too high to qualify him for the state's system. *Id.*

13. *Id.* During his incarceration, prison officials discovered a list on Shriner. Lacitis, *supra* note 5, at D1. The list contained items needed to injure and murder children. *Id.* Shriner also told a cell mate about his fantasy of rigging a van with cages for the same purpose. Hanson, *supra* note 6, at 8.

14. Simon, *supra* note 11, at E1. Prosecutors originally charged Shriner with statutory rape and unlawful imprisonment for the second attack. *Id.* For both attacks, Shriner spent a total of 133 days in jail. *Id.*

15. Kate Shatzkin, *Shriner Gets 131 Years*, SEATTLE TIMES, March 26, 1990, at A1. After six hours of deliberation, a jury found Shriner guilty of two counts of first-degree rape, one count of first-degree attempted murder and one count of first-degree assault. Shatzkin & Do, *supra* note 2, at A1.

16. Recidivism is the "re-offense rates of sex offenders measured by whether they are caught." Richard Whitmire & Ellen Hale Gannett, *Repeat Offenders*, DENVER POST, Dec. 21, 1995, at A25. Attorney General Janet Reno has stated that the recidivism rate for child molesters is approximately 75%. *California Considers Chemical Castration*, FLA. TODAY, Aug. 30, 1996, at A3. In one study, 561 sex offenders had victimized over 195,000 individuals. Peter Finn, *Do Sex Offender Treatment Programs Work?*, 78 JUDICATURE 250, 250 (1995). Additionally, although the total prison population from 1988 to 1990 increased by 20%, the number of individuals imprisoned for sex offenses increased by 48%. *Id.* However, other experts assert that these figures are too high and the actual rate of recidivism is between 7% and 15%. Hanson, *supra* note 6, at 8.

17. Jesse Timmendequas and Richard Allen Davis are two recidivist sex offenders whose crimes also received national attention. See Robert Teir & Kevin Coy, *Approaches to Sexual Predators: Community Notification and Civil Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 405, 408 (1997) (relating examples of sex abuse crimes and advocating the use of registration and civil commitment laws as solutions to the problem of recidivism). Jesse Timmendequas raped and murdered seven-year-old Megan Kanka. Tracy L. Silva, Comment, *Dial "1-900-Pervert" and Other Statutory Measures That Provide Public Notification of Sex Offenders*, 48 SMU L. REV. 1961, 1962 (1995). Later, the victim's family learned that Timmendequas had been convicted twice for child molestation and was living with two other released sex offenders. *Id.* Richard Allen Davis had been convicted eight times for

and leaves it searching for creative sentencing alternatives.¹⁸ Within the last decade, many states have passed a flurry of laws in an attempt to alleviate the growing problem of sexual abuse.¹⁹ "Three Strikes, You're Out" laws,²⁰ registration laws,²¹ public notification laws²² and sexual predator laws²³ are all legislative attempts to solve the problem.²⁴ In 1996, California took a new approach to the problem of recidivism by enacting a law that requires chemical castration²⁵ as a term of parole for certain types

sexual abuse of children before raping and murdering teenager Polly Klass. Teir & Coy, *supra* at 408.

18. See Brian McCormick, *Courts Opting to Treat, Rather Than Punish, Some Abusers*, 35 AM. MED. NEWS 30, 30 (1992) (outlining the new treatment programs courts are requiring offenders to attend).

19. See Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 311 (1997) (outlining the major legislation enacted over the past decade to address the problem of recidivist sex offenders).

20. First enacted in California in 1994, "Three Strikes, You're Out" laws require the imposition of a sentence of life without possibility of parole or probation for third time offenders. *Id.* at 311-12. These laws directly affect sex offenders, since most repeat their criminal sexual behavior unless treated. *Id.* at 311.

21. Registration laws require convicted sex offenders to register with the local authorities upon release from prison. Silva, *supra* note 17, at 1970. The Federal Crime Bill passed in 1994 requires all states to institute a registry or lose federal funding. Freeman-Longo, *supra* note 19, at 312.

22. Public notification laws were initiated in Washington as part of the Community Protection Act. Freeman-Longo, *supra* note 19, at 313. The laws gained popularity after the death of Megan Kanka and are now more commonly known as Megan's law. See Silva, *supra* note 17, at 1963 and accompanying text. Megan's law requires law enforcement agencies to notify the public when a registered sex offender moves into the community. *Id.* The extent of notification required depends on a determination of the offender's "risk level" or dangerousness. Freeman-Longo, *supra* note 19, at 313. A federal version of Megan's law was signed by President Clinton in 1996. *Id.*

23. Washington was the first state to enact a sexual predator law as a provision of the Community Protection Act of 1990. John Kip Cornwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293, 1298-99 (1996). These laws allow for the involuntary commitment of sexual offenders to mental institutions after completion of their criminal sentence. *Id.* at 1295. The Supreme Court upheld the constitutionality of an identical law enacted in Kansas. *Sex Predator Law Triumphs in Court*, NEWS TRIB., June 24, 1997, at A8. The Court held that the law comported with the requirements of due process and rejected arguments that it violated double jeopardy principles and ex post facto punishment. *Hendricks v. Kansas*, 117 S. Ct. 2072, 2086 (1997).

24. Freeman-Longo, *supra* note 19, at 311-16.

25. The term chemical castration is misleading. Surgical castration, or orchietomy, is a permanent sterilization procedure in which the testicles are removed. *Id.* Judge Michael T. McSpadden, *Time for Public Debate on Castrating Sex Offenders*, HOUSTON CHRON., June 16, 1997, at 21. Unlike surgical castration, chemical castration is not permanent. Lacitis, *supra* note 5, at D1. Its effects last only as long as the treatment continues. *Id.*

of repeat sex offenders.²⁶ The California statute requires paroled sex offenders to receive weekly injections of Depo-Provera,²⁷ a testosterone-reducing hormone.²⁸ This treatment rests on controversial medical evidence that indicates hormonal agents can successfully treat paraphiliacs²⁹ by reducing their proclivity towards deviant sexual behavior.³⁰ While the treatment of repeat sex offenders with this drug is not new,³¹ the idea that a state government can mandate it as a term of parole is unprecedented.³²

California's legislative attempt to force the administration of Depo-Provera on an unwilling parolee raises a number of constitutional issues.³³ The Fourteenth Amendment states, "nor

Additionally, chemical castration reduces male sex drive but does not prevent erections or ejaculations. Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 7 (1990).

26. Freeman-Longo, *supra* note 19, at 314. Specifically the statute provides:

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.

CAL. PENAL CODE § 645(b) (West 1996).

27. Depo-Provera is the trade name for medroxyprogesterone acetate, a type of progesterone. Fitzgerald, *supra* note 25, at 2.

28. CAL. PENAL CODE § 645 (West 1996). Specifically, "[t]he parolee shall begin medroxyprogesterone acetate treatment one week prior to his or her release from confinement in the state prison or other institution and shall continue treatments until the Department of Corrections demonstrates to the Board of Prison Terms that this treatment is no longer necessary." *Id.* § 645(d).

29. Paraphiliacs are individuals who engage in deviant sexual behavior to fulfill a specific and highly developed sexual fantasy. See Fitzgerald, *supra* note 25, at 2 (reviewing the administration and effects of Depo-Provera in the treatment of paraphiliacs and promoting it as a probation alternative).

30. *Id.*

31. See John McD. W. Bradford, *The Hormonal Treatment of Sexual Offenders*, 11 BULL. OF THE AM. ACAD. OF PSYCHIATRY & THE L. 159, 161-63 (1983) (documenting the results of initial studies of Depo-Provera in the treatment of sex offenders). Research on the effectiveness of Depo-Provera began in the United States in the 1960s at Johns Hopkins Hospital. Rhonda L. Rundle, *Medicine: Will 'Chemical Castration' Really Work?*, WALL ST. J., Sept. 19, 1996, at B1. The drug is still being administered as part of the treatment program at the Johns Hopkins Sexual Disorders Clinic under the supervision of Dr. Fred Berlin. *Id.*

32. *Laws of Impotence*, ECONOMIST, Sept. 21, 1996, at 18.

33. Burt Herman, *California's Plan for Chemical Castration of Sex Offenders Stirs Up Protests*, STAR-LEDGER, Aug. 30, 1996, at 5. While California's statute has been challenged as violating the Eighth Amendment and the First Amendment, these constitutional arguments are outside the scope of this Comment. See Raymond A. Lombardo, Note, *California's Unconstitutional Punishment for Heinous Crimes: Chemical Castration of Sexual Offenders*, 65 FORDHAM L. REV. 2611, 2612 (1997) (arguing chemical castration violates the Eighth Amendment's Cruel and Unusual Punishment

shall any State deprive any person of life, liberty, or property, without due process of law."³⁴ The Supreme Court has interpreted the Due Process Clause to guarantee the fundamental right of privacy.³⁵ An individual's right to refuse medical treatment is encompassed by this privacy right.³⁶ A state cannot infringe upon a fundamental right unless it draws its regulation narrowly enough to further only a compelling state interest.³⁷

This Comment demonstrates that the California statute impermissibly infringes upon a sex offender's privacy right to refuse medical treatment. Part I discusses the administration of Depo-Provera in the treatment of paraphiliac sex offenders and its effectiveness in reducing recidivism. Part II addresses the judicial and legislative adoption of Depo-Provera as an alternative sentence for sex offenders. Part III examines the sex offender's privacy right to refuse unwanted medical treatment protected by the Fourteenth Amendment. Part III also analyzes the constitutional test of strict scrutiny to determine when the forced administration of medication may comport with due process. This Comment concludes by applying the strict scrutiny standard to California's chemical castration statute, and explains why the statute fails to pass constitutional muster. Finally, Part IV of this Comment proposes amendments to California's statute that not only address the current problem of recidivism, but also will withstand constitutional scrutiny.

I. CHEMICAL CASTRATION: DEPO-PROVERA AS TREATMENT FOR SEX OFFENDERS

Depo-Provera is the trade name for medroxyprogesterone acetate, a synthetic progesterone³⁸ originally developed and manufactured by the Upjohn Company as a female contraceptive device.³⁹ Although used widely around the world,⁴⁰ Depo-Provera's

Clause). *But see* Kenneth B. Fromson, Note, *Beyond an Eye for an Eye: Castration as an Alternative Sentencing Measure*, 11 N.Y.L. SCH. J. HUM. RTS. 311, 317-22 (1994) (asserting chemical castration is not cruel and unusual punishment); G. L. Stelzer, Note, *Chemical Castration and the Right to Generate Ideas: Does the First Amendment Protect the Fantasies of Convicted Pedophiles?*, 81 MINN. L. REV. 1675 (1997) (applying First Amendment analysis to the California statute and arguing that chemical castration does not violate freedom of speech).

34. U.S. CONST. amend. XIV, § 1.

35. *See* Griswold v. Connecticut, 381 U.S. 479, 494 (1965) (Goldberg, J., concurring) (agreeing with the Court that the right of privacy is a fundamental constitutional right).

36. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267 (1997).

37. *Id.* at 2268.

38. Progesterone is a steroid sex hormone that prepares the uterus for fertilization during the menstrual cycle. MILLER-KEANE ENCYCLOPEDIA & DICTIONARY OF MEDICINE, NURSING & ALLIED HEALTH 1220 (5th ed. 1992).

39. Fitzgerald, *supra* note 25, at 2.

possible side effects prevented its approval for use as a contraceptive for women in the United States until recently.⁴¹ When administered to men, Depo-Provera reduces the level of testosterone⁴² in two ways: it decreases the production of testosterone in the testes,⁴³ and it increases the metabolism of testosterone by the liver.⁴⁴ The physiological result is a lowered sex drive and a reduction in sexual fantasy and imagery.⁴⁵

Dr. John Money was the first researcher to use Depo-Provera in the treatment of sex offenders in the United States.⁴⁶ In 1966, Dr. Money administered the drug to a bisexual transvestite who was in therapy for engaging in incestuous activity with his six-year-old son.⁴⁷ Dr. Money's success led to subsequent studies which demonstrated that the administration of Depo-Provera could be an effective tool in the treatment of paraphiliacs.⁴⁸

Paraphiliacs are one type of sex offender driven by a compulsion to realize a specific sexual fantasy.⁴⁹ Because a number of causes may motivate sexually deviant behavior, the diagnosis of an individual as a paraphiliac cannot be made simply

40. *Id.* at 8. Depo-Provera is used in over 80 countries as a contraceptive device. *Id.*

41. *Laws of Impotence, supra* note 32, at 18. Initially, the FDA denied approval due to testing on beagles and monkeys that showed a link to cancer. Fitzgerald, *supra* note 25, at 8.

42. Testosterone is the principal hormone produced by cells in the testes. Bradford, *supra* note 31, at 159. Testosterone controls the production of sperm and the maturation of secondary sex characteristics. *Id.* Medical research supports a relationship between testosterone levels and sex drive. *Id.* at 161.

43. Fitzgerald, *supra* note 25, at 6. Depo-Provera decreases testosterone production by hindering the pituitary secretion of the lutenizing hormone (LH) and the follicle stimulating hormone (FSH) in the brain. *Id.* LH stimulates the production of testosterone; FSH stimulates the production of sperm. Bradford, *supra* note 31, at 159.

44. Daniel L. Icenogle, M.D., *Sentencing Male Sex Offenders to the Use of Biological Treatments*, 15 J. LEGAL MED. 279, 284 (1994).

45. Fitzgerald, *supra* note 25, at 6. Weekly injections of approximately 500 mg reduce the amount of hormones in men to a prepubescent level. *Id.*

46. Rundle, *supra* note 31, at B1. Dr. Money was a renowned professor at Johns Hopkins University. *Id.*

47. Bradford, *supra* note 31, at 162.

48. Fitzgerald, *supra* note 25, at 8-9. A study at the Johns Hopkins Sexual Disorders Clinic of 600 paraphiliacs showed a less than 10% rate of recidivism. Icenogle, *supra* note 44, at 285.

49. Fitzgerald, *supra* note 25, at 2. There are four classifications of sex offenders. *Id.* at 4. Type I denies that his act is criminal. *Id.* Type II admits the criminal act but blames it on nonsexual forces like drugs and alcohol. *Id.* Type III is the violent offender motivated by rage and aggression. *Id.* Type IV is the paraphiliac who demonstrates a pattern of sexual arousal beginning at puberty. *Id.* Types of paraphilia include pedophilia, exhibitionism, transvestitism, voyeurism, fetishism, sexual sadism and sexual masochism. *Id.* at 4-5.

by examining the individual's outward behavior.⁵⁰ Instead, diagnosis requires a comprehensive evaluation of the individual's cognitive, emotional and behavioral states.⁵¹ If an offender is a paraphiliac, an evaluation of his cognitive state will reveal a fantasy; an evaluation of his emotional state will uncover the sexual craving he fulfills by enacting that fantasy; and an evaluation of his behavioral state will show the precise method he uses to act out the fantasy.⁵² Depo-Provera reduces the sexual imagery experienced by a sex offender.⁵³ Thus, the motivation behind the deviant sexual behavior is diminished, thereby increasing the individual's amenability to treatment.⁵⁴ Proper diagnosis of the offender as a paraphiliac is critical because a decrease in sexual imagery will not affect those individuals motivated by other forces, such as rage or psychosis.⁵⁵

Physiologically, Depo-Provera causes the patient to experience fewer erections and ejaculations, and it reduces sperm count.⁵⁶ Unlike surgical castration, Depo-Provera does not produce complete impotency.⁵⁷ The offender can still engage in sexual activity and criminal sexual behavior while being treated with the drug.⁵⁸ Additionally, all effects of Depo-Provera are completely reversible upon the cessation of treatment.⁵⁹ Within seven to ten days after termination, testosterone production increases and the offender is again aware of an increased sex drive and sexual fantasies.⁶⁰ Depo-Provera alone will not effectively treat most sex offenders.⁶¹ Therefore, to maximize its effectiveness, Depo-Provera must be combined with individualized psychotherapy.⁶²

Depo-Provera treatment also requires close medical

50. *Id.* at 5. For example, rape may be motivated by rage or psychosis rather than a response to a sexual fantasy. Icenogle, *supra* note 44, at 281-82.

51. Fitzgerald, *supra* note 25, at 5.

52. *Id.* All of the paraphiliac's fantasies must be analyzed to ensure that the offender does not simply replace one with another. *Id.*

53. Bradford, *supra* note 31, at 163.

54. Fitzgerald, *supra* note 25, at 2-3.

55. Icenogle, *supra* note 44, at 281-82. Studies indicate that Depo-Provera treatment is only effective for those who suffer a loss of self-control pertaining to the fulfillment of a sexual fantasy, not those motivated for other reasons to engage in criminal sexual behavior. *Id.* at 281.

56. Bradford, *supra* note 31, at 163; Icenogle, *supra* note 44, at 285.

57. Fitzgerald, *supra* note 25, at 7. Individuals receiving treatment experience only "erotic apathy" and do not have spontaneous erections. *Id.*

58. Freeman-Longo, *supra* note 19, at 314. As a result, Depo-Provera is combined with specialized therapy in a complete treatment plan. *Id.* at 314-15.

59. Bradford, *supra* note 31, at 163. Upon cessation of medication, follow up studies have shown a dramatic increase in deviant sexual conduct. *Id.*

60. Fitzgerald, *supra* note 25, at 7.

61. Freeman-Longo, *supra* note 19, at 314.

62. *Id.*

supervision as it may result in significant adverse side effects.⁶³ Major effects include weight gain, hot and cold flashes, nightmares, fatigue, leg cramps, nausea, headaches and depression.⁶⁴ Continued use can result in phlebitis,⁶⁵ hyperglycemia,⁶⁶ dyspnea,⁶⁷ hypogonadism,⁶⁸ and cerebrovascular⁶⁹ disorders.⁷⁰ Depo-Provera can also aggravate epilepsy, asthma, cardiac dysfunction and renal dysfunction.⁷¹ While no study has indicated the drug is carcinogenic to humans, studies do link Depo-Provera to breast cancer in beagles and uterine cancer in monkeys.⁷² Because of these possible complications, administration of Depo-Provera requires ongoing medical supervision.⁷³

Depo-Provera treatment of sex offenders is both hailed and condemned by the medical community.⁷⁴ Proponents of the drug argue that the treatment can significantly reduce the recurrence of criminal sexual behavior.⁷⁵ However, this evidence is the result of only small-scale or individual case studies.⁷⁶ In those studies, researchers chose participants after an evaluation of their

63. PHYSICIAN'S DESK REFERENCE 2080-82 (51st ed. 1997).

64. Bradford, *supra* note 31, at 163; Fitzgerald, *supra* note 25, at 7.

65. Phlebitis is the inflammation of a vein which interferes with normal blood flow. MILLER-KEANE ENCYCLOPEDIA & DICTIONARY OF MEDICINE, NURSING & ALLIED HEALTH 1148 (5th ed. 1992).

66. Hyperglycemia is an abnormal amount of glucose in the blood. *Id.* at 718.

67. Dyspnea is difficulty in breathing, usually associated with respiratory infections or pulmonary diseases. *Id.* at 460.

68. Hypogonadism is the retardation in development of the gonads or testes. *Id.* at 624, 732.

69. Cerebrovascular disorders are conditions impairing blood supply to the brain. *Id.* at 279.

70. Bradford, *supra* note 31, at 163; Fitzgerald, *supra* note 25, at 7.

71. Bradford, *supra* note 31, at 163. The drug can cause water retention which aggravates these conditions. *Id.*

72. Fitzgerald, *supra* note 25, at 8.

73. Freeman-Longo, *supra* note 19, at 315.

74. See Icenogle, *supra* note 44, at 285-86 (comparing the results of two studies involving chemical castration). Researchers at Johns Hopkins Hospital have used Depo-Provera to treat sex offenders since the treatment was initiated by Dr. Money in 1966. Rundle, *supra* note 31, at B1. However, Richard Seely, director of a Minnesota psychotherapeutic program, feels, "[a]s the next step up from the vindictive barbarism of castration, Depo-Provera leaves me with little hope." Michael S. Serrill, *Castration or Incarceration? Three Rapists Face What Critics Call a Cruel and Useless Punishment*, TIME, Dec. 12, 1983, at 70.

75. Lacitis, *supra* note 5, at D1. The recidivism rate for sex offenders released from incarceration without any treatment is as high as 85%. Serrill, *supra* note 74, at 70. For offenders undergoing Depo-Provera treatment, the recidivism rate is less than 15%. *Id.* This rate was the finding of a three and one-half year study conducted by Dr. Fred Berlin at the Johns Hopkins Sexual Disorder Clinic. *Id.*

76. Fitzgerald, *supra* note 25, at 9-10.

amenability to treatment and also required the participants to undergo psychotherapy to alter their behavior.⁷⁷ Any long-term side effects are unknown and there are no large-scale studies of the drug's effectiveness on recidivism.⁷⁸ Some experts still believe the only effective solution to the problem of recidivist sex offenders is confinement and intensive psychotherapy.⁷⁹ As a result, Depo-Provera should not be viewed as a cure-all.⁸⁰

II. LEGISLATIVE ADOPTION OF DEPO-PROVERA IN SENTENCING

Interest in Depo-Provera as a potential treatment for repeat sex offenders is not limited to the medical community. Recently, the legislative and judicial systems have also looked to Depo-Provera as an answer to the high rate of recidivism among sex offenders. This Part discusses the legislative and judicial attempts to use Depo-Provera treatment as an alternative sentencing device, focusing on California's chemical castration statute. Section A reviews judicial attempts to solve the problem of recidivism. Section B discusses California's statutory solution—the enactment of its chemical castration statute. Section C examines the medical and legal community's reaction to this California statute.

A. *The Search for Sentencing Alternatives*

Castration of prisoners is not a novel concept to the legislative or judicial systems.⁸¹ Involuntary castration was a statutorily authorized form of punishment⁸² in many states until the Supreme Court declared such statutes unconstitutional.⁸³ Responding to

77. Lacitis, *supra* note 5, at D1; Serrill, *supra* note 74, at 70.

78. Fitzgerald, *supra* note 25, at 9-10.

79. Serrill, *supra* note 74, at 70.

80. McCormick, *supra* note 18, at 30.

81. Stacy Russell, Comment, *Castration of Repeat Sexual Offenders: An International Comparative Analysis*, 19 HOUS. J. INT'L L. 425, 440 (1997). The states began castrating prisoners around 1899. *Id.*

82. One such statute was Oklahoma's Habitual Criminal Sterilization Act. OKLA. STAT. ANN. tit. 57, § 171 (West 1991). A habitual criminal was an individual convicted two or more times of a felony involving "moral turpitude." *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942). The statute provided for the attorney general to initiate a proceeding to obtain a judgment allowing for the sterilization of the criminal. *Id.* This sterilization was sought to prevent criminal tendencies from being transmitted to offspring. *Id.* at 537-38.

83. *Id.* at 538. In *Skinner*, the state's Habitual Criminal Sterilization Act was attacked on constitutional grounds. *Id.* at 537-38. Though the court recognized a protected liberty interest in the right to procreate, the Court instead rested its decision upon the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 541. Under the statute, larceny was considered a crime of moral turpitude while embezzlement was not. *Id.* at 538-39. The court determined that these offenses were similar and yet only one class of offenders was deprived of the right to procreate. *Id.* at 541. *See also* Mickle v. Henrichs,

reports that incarceration is ineffective in rehabilitating sex offenders,⁸⁴ courts have again turned to castration to control deviant sexual behavior, albeit on a voluntary basis.⁸⁵ Courts are utilizing both surgical and chemical castration procedures as alternative sentencing devices.⁸⁶

Judicial attempts to offer castration as either an alternative to incarceration, or as a condition of probation, have received national attention in recent years.⁸⁷ Texas Judge Michael McSpadden drew harsh criticism from the legal and medical communities when he offered convicted rapist Steven Allen Butler probation instead of prison if Butler voluntarily underwent surgical castration.⁸⁸ Unable to find a doctor willing to perform the surgery, the judge retracted the offer.⁸⁹ A Michigan judge

262 F. 687, 691 (D. Nev. 1918) (striking down as cruel and unusual punishment a statute requiring vasectomies for rapists).

84. The recidivism rate for sex offenders who are only incarcerated is as high as 85%. Serrill, *supra* note 74, at 70.

85. Fromson, *supra* note 33, at 313-14.

86. *Id.* See also Icenogle, *supra* note 44, at 288-93 (outlining cases that have discussed the use of Depo-Provera treatment for sex offenders).

87. Serrill, *supra* note 74, at 70. In South Carolina, Judge C. Victor Pyle imposed a 30 year prison sentence upon three defendants who pled guilty to a brutal six hour gang rape. *Id.* The judge sent shock waves through the court room, however, when he added an offer to suspend the sentence if the defendants would voluntarily submit to surgical castration. *Id.* The South Carolina Supreme Court reversed the sentence on appeal because it violated the state constitution's prohibition of cruel and unusual punishment. *South Carolina v. Brown*, 326 S.E.2d 410, 412 (S.C. 1985). Even as recently as September 1997, a charged child-sex offender requested surgical castration in exchange for a reduced sentence. Janan Hanna, *Judge Rejects Castration for Child-Sex Defendant*, CHI. TRIB., Sept. 5, 1997, at 1. Because the court is not authorized to enter into a plea agreement with a defendant under Illinois law, the judge rejected the offer. *Id.* The judge stated, "[t]he defendant is trying to play 'Let's Make a Deal' with the court. The bottom line is the court does not play 'Let's Make a Deal'." *Id.* Chemical castration received national focus when a jury sentenced Joseph Frank Smith for rape in Texas. Serrill, *supra* note 74, at 70. Known as the 'ski-mask rapist', Smith confessed to raping the same woman on two separate occasions. Paul Hoversten, *Calif. Targets Child Molesters: Bill Requires for Chemical Castration*, USA TODAY, Aug. 29, 1996, at 03A; *Chemically Castrated Rapist Lives Quiet Life*, SAN DIEGO UNION & TRIB., Dec. 8, 1983, at A43. After Smith volunteered to undergo a Depo-Provera treatment program at Johns Hopkins Hospital, the jury imposed 10 years probation rather than incarceration. Serrill, *supra* note 74, at 70.

88. Richard Lacayo, *Sentences Inscribed on Flesh (Castration for Sex Offenders)*, TIME, Mar. 23, 1992, at 54. While on probation for child molestation, Butler was charged with the rape of a 13 year-old girl. *Id.* Facing a trial and possible plea-bargained 35 year sentence, Butler accepted the offer to undergo castration. *Id.* Legal experts condemned the offer as "barbaric," fearing "the implications of allowing prisoners to barter body parts for their freedom." *Id.*; *Choosing Castration (Convicted Rapist Steven Allen Butler)*, TIME, Mar. 16, 1992, at 33.

89. *Man Who Sought Surgical Castration Gets Life Sentence for Raping Girl*, 13, DALLAS MORNING NEWS, Aug. 8, 1992, at 30A. Butler was convicted

sentenced Roger Gauntlett,⁹⁰ convicted for engaging in sexual intercourse with his fourteen-year-old stepdaughter, to five years probation conditioned upon Gauntlett being chemically castrated.⁹¹ Gauntlett challenged the Depo-Provera condition on constitutional grounds; however, the appellate court never reached that argument.⁹² Instead, the court determined the condition was unlawful since Depo-Provera had not gained acceptance in the medical community as a safe and reliable procedure.⁹³ In an Ohio rape case, a judge proposed Depo-Provera treatment during sentencing, but the defendant refused to consent to the program.⁹⁴ The appellate court upheld the trial judge's decision to consider this refusal as a lack of rehabilitative potential, justifying a harsher sentence.⁹⁵

B. California's Statutory Solution

Frustrated by these unsuccessful judicial attempts at alternative sentencing, assemblyman Bill Hoge introduced a bill in California requiring involuntary chemical castration upon parole for certain types of child molesters.⁹⁶ In support of the bill, Hoge

for aggravated sexual assault and sentenced to life in prison. *Id.*

90. Ironically, Gauntlett is the heir to the Upjohn Company which markets Depo-Provera. Rundle, *supra* note 31, at B1.

91. *People v. Gauntlett*, 352 N.W.2d 310, 311, 313 (Mich. Ct. App. 1984). Gauntlett was also charged with three counts of criminal sexual conduct for fondling his 12-year-old stepson. *Id.* at 311. These counts were dismissed in exchange for a plea of guilty. *Id.*

92. *Id.* at 314. Gauntlett argued the condition was "unconstitutional as cruel and unusual punishment, a violation of fundamental rights of liberty, privacy, bodily integrity, equal protection and procedural and substantive due process." *Id.*

93. *Id.* at 316. The court noted that the only studies of Depo-Provera involved volunteer participants who were also undergoing psychotherapy. *Id.* at 315. Furthermore, at least one of these studies was later criticized because 11 of the 20 participants dropped out of treatment or relapsed. *Id.*

94. *Ohio v. Thompson*, No. 1378, 1988 WL 88350, at *3 (Ohio Ct. App. Aug. 19, 1988). The defendant was indicted for raping a child under the age of 13 and for gross sexual imposition. *Id.* at *1. He pled guilty to attempted rape in exchange for a dismissal of the remaining counts against him and a sentencing recommendation of incarceration for no less than three years but not more than fifteen. *Id.*

95. *Id.* at *3. The judge sentenced the defendant to prison for a minimum of six years. *Id.* at *1.

96. Van Biema & Bonfante, *supra* note 1, at 60. Hoge introduced the bill out of frustration over the story of Larry Don McQuay. *Id.* McQuay was sentenced to an eight year prison term for child molestation. Christy Hoppe, *Molesters Seeking Castration: Texas Examining Laws on Sex Offenders*, DALLAS MORNING NEWS, Aug. 13, 1995, at 45A. While in prison, McQuay admitted to committing over 200 acts of child molestation and requested the Texas Department of Criminal Justice to pay for a surgical castration procedure. Russell, *supra* note 81, at 428. When his request was denied, McQuay began a letter campaign from prison to obtain the surgery. Hoppe,

cited studies from European countries reporting recidivism rates as low as two percent for treated offenders as opposed to the normal rate of fifty percent for untreated offenders.⁹⁷ "Child molestation is a heinous crime and must be stopped," argued Hoge.⁹⁸ "Where are the rights of those who have been molested? By God, this is a bill that's going to address that."⁹⁹

Under the terms of the California chemical castration statute, an individual convicted twice of a sexual crime involving a victim under thirteen years of age must undergo hormonal treatment upon parole.¹⁰⁰ It is within the court's discretion to impose the condition on a first-time offender.¹⁰¹ The treatment is to continue for the life of the offender or until a finding by the Board of Prison Terms that the injections are no longer necessary.¹⁰² A convicted offender is exempt from the provisions of the statute if he voluntarily undergoes surgical castration.¹⁰³

Governor Pete Wilson signed the bill on September 17, 1996, and it became effective January 1, 1997.¹⁰⁴ A spokesman for the governor asserted, "[i]f we can prevent just one child from being a victim of a molestation . . . then chemical castration has worked Chemical castration is a common-sense step toward eliminating the sick impulse among our most dangerous criminals."¹⁰⁵ The estimated annual cost of the treatment is \$2380 per parolee.¹⁰⁶

supra, at 45A. His letters prompted a citizen's group, Justice for All, to help him raise the needed funds. Russell, *supra* note 81, at 428-29. Although the group succeeded in obtaining funding, they were unable to find a physician willing to perform the surgery. *Id.* at 429.

97. WOMEN'S COALITION, SENATE RULES COMM., REPORT ON CAL. ASSEMBLY BILL NO. 3339, Reg. Sess. (1996).

98. *Will Chemical Castration Stop Sex Offenders?*, JET, Sept. 23, 1996, at 16, 16.

99. *Id.*

100. CAL. PENAL CODE § 645(b) (West 1996). The specific crimes are sodomy (§ 286(c) and (d)); committing a lewd act upon the body of a child by use of force with the intent of arousing that child (§ 288(a)); oral copulation (§ 288a(b) or (d)) and genital or anal penetration (§ 289(a) and (j)).

101. CAL. PENAL CODE § 645(a) (West 1996).

102. *Id.* § 645(d).

103. *Id.* § 645(e).

104. 1996 Cal. Legis. Serv. Ch. 596 (A.B. 3339) (West) (codified as CAL. PENAL CODE § 645); Mike Lewis, *The New Castration Civil Libertarians Prepare to Challenge Mandatory Hormone Treatments for Some Sex Offenders*, CAL. LAW., Jan. 1997, at 21. After meeting with almost unanimous approval in both houses, the bill passed the State Assembly by a 51-8 vote. Herman, *supra* note 33, at 5; Vincent J. Schodolski, *California OKs 'Castration' Bill: Foes Doubt Legality of Punishment for Molesters*, CHI. TRIB., Aug. 31, 1996, at 1.

105. Janan Hanna & Susan Kuczka, *Defendant Offers Castration as Sentence: Child-Sex Case Suspect Raises Many Questions*, CHI. TRIB., Aug. 31, 1996, at 1.

106. WOMEN'S COALITION, SENATE RULES COMM., REPORT ON CAL.

C. Reaction to California's Statute

Since its proposal, California's chemical castration statute has met resistance on medical, legal and practical grounds.¹⁰⁷ Significantly, not one law enforcement agency supports the statute.¹⁰⁸ These opponents question the effectiveness of chemical castration in sentencing.¹⁰⁹ They assert that previously cited studies fail to establish the drug's effects when administered on an involuntary basis.¹¹⁰ Furthermore, the statute fails to distinguish among the various types of sex offenders.¹¹¹ Administration of Depo-Provera or other hormonal agents is an ineffective treatment for offenders motivated by anger and aggression.¹¹² This emphasis on an offender's sex drive "misfocuses the issue and feeds into myths about rape. Sexual assault is a crime of violence and aggression . . . not the product of an uncontrollable sex drive."¹¹³

Even medical experts who promote the drug in treatment oppose its involuntary administration.¹¹⁴ The California Psychiatric Association argues that the state has usurped the judgment of doctors by forcing medication on sex offenders without a determination of its potential effectiveness or the individual's physical toleration for the drug.¹¹⁵ Depo-Provera can result in dangerous side effects and requires medical supervision.¹¹⁶ Other

ASSEMBLY BILL NO. 3339, Reg. Sess. (1996). Since this treatment could last for the lifetime of the parolee, the costs of the treatment would increase each year beyond the number of paroled individuals. *Id.*

107. *Laws of Impotence, supra* note 32, at 18.

108. WOMEN'S COALITION, SENATE RULES COMM., REPORT ON CAL. ASSEMBLY BILL NO. 3339, Reg. Sess. (1996). This argument was presented by the American Civil Liberties Union (ACLU) in committee hearings on the bill. *Id.* The ACLU stated it would support the bill if amended to permit only voluntary injections combined with counseling. *Id.*

109. Hanna & Kuczka, *supra* note 105, at 1. "This bill has huge holes in it," stated an ACLU advocate. "There's no evidence that forcibly chemically castrating someone will actually work, especially for someone who is not motivated by sexual urges." *Id.*

110. Craig Turk, *Kinder Cut*, NEW REPUBLIC, Aug. 25, 1997, at 12.

111. *Id.*

112. *Id.*

113. WOMEN'S COALITION, SENATE RULES COMM., REPORT ON CAL. ASSEMBLY BILL NO. 3339, Reg. Sess. (1996) (quoting Denise Snyder, executive director of the D.C. Rape Crisis Center).

114. WOMEN'S COALITION, SENATE COMM. ON CRIMINAL PROCEDURE, REPORT ON CAL. ASSEMBLY BILL NO. 3339, Reg. Sess. (1996). Dr. Fred Berlin advocates the use of Depo-Provera in treating sex offenders. *Id.* Berlin, however, opposes the "imposition of Depo-Provera treatment upon an unwilling individual . . . in the absence of medical testimony that such treatment was appropriate, and in the absence of prior agreement from the prospective patient that he was interested in receiving it." *Id.*

115. WOMEN'S COALITION, SENATE RULES COMM., REPORT ON CAL. ASSEMBLY BILL NO. 3339, Reg. Sess. (1996).

116. *Id.*

medical experts contend that the evidence of the drug's effectiveness in reducing the rate of recidivism and increasing safety to the community is insufficient to justify forced administration.¹¹⁷ "Just as one should not attempt to force antipsychotic medications upon a nonpsychotic individual, physicians should never attempt to force Depo-Provera treatment upon an unwilling person."¹¹⁸

Involuntary medical treatment imposed by statute requires doctors to serve as agents of the state, raising ethical considerations.¹¹⁹ Physicians may not be willing to prescribe a "highly questionable drug with numerous side effects to an involuntary patient."¹²⁰ This objection leads to practical considerations such as, who would administer the injections if doctors refuse?¹²¹ Also, what is the probability that an unwilling individual will show up for these weekly injections over an indefinite period of time?¹²²

The American Civil Liberties Union (ACLU) asserts that treatment with Depo-Provera can result in dangerous side effects.¹²³ The state is exposing sex offenders to these risks without any evidence that chemical castration is effective on unwilling individuals.¹²⁴ By indiscriminately forcing medical treatment on parolees, the statute infringes on fundamental constitutional rights.¹²⁵ The statute is a "knee-jerk reaction" based on strong emotions rather than proof of the drug's effectiveness.¹²⁶

Surprisingly, challenges to California's chemical castration

117. WOMEN'S COALITION, SENATE COMM. ON CRIMINAL PROCEDURE, REPORT ON CAL. ASSEMBLY BILL NO. 3339, Reg. Sess. (1996).

118. *Id.* (citing Dr. Fred Berlin).

119. Diane M. Gianelli, *Castration for Sex Offenders: Questions Arise Over Effectiveness, Appropriateness, Ethics*, AM. MED. NEWS, April 13, 1992, at 2, 2.

120. Mary Lynne Vellinga, 'Castration' Law Under Fire 'Cartoon Solution', SACRAMENTO BEE, Feb. 4, 1997, at A1. Barbara Schwartz, who runs the sexual offender program for the Department of Corrections in Massachusetts, expressed this concern. *Id.*

121. WOMEN'S COALITION, SENATE COMM. ON CRIMINAL PROCEDURE, REPORT ON CAL. ASSEMBLY BILL NO. 3339, Reg. Sess. (1996).

122. *Id.*

123. Van Biema & Bonfante, *supra* note 1, at 60. The ACLU also contends that the effects of Depo-Provera could be reversed by the offender consuming other drugs. *Id.*

124. Hanna & Kuczka, *supra* note 105, at 1; WOMEN'S COALITION, SENATE RULES COMM., REPORT ON CAL. ASSEMBLY BILL NO. 3339, Reg. Sess. (1996).

125. WOMEN'S COALITION, SENATE RULES COMM., REPORT ON CAL. ASSEMBLY BILL NO. 3339, Reg. Sess. (1996). The ACLU has attacked the statute as violating the right to privacy, the right to procreate and the right to bodily integrity and as constituting cruel and unusual punishment. Van Biema & Bonfante, *supra* note 1, at 60; Herman, *supra* note 33, at 5.

126. Vellinga, *supra* note 120, at A1; *Editorial: Castration or Incarceration?*, NEW SCIENTIST, Sept. 21, 1996, at 3, [hereinafter *Castration or Incarceration?*].

statute have been limited to medical and legal experts.¹²⁷ Some victim's rights groups support the bill and plan to lobby for its expansion to include all rapists.¹²⁸ The American public also appears to support this involuntary medication.¹²⁹ This popular support has encouraged Florida, Louisiana and Georgia to enact legislation patterned after California's statute.¹³⁰ A dozen other states have introduced similar bills.¹³¹ Unless the courts strike down such legislation, this trend will likely continue.¹³²

127. *Castration or Incarceration?*, *supra* note 126, at 3.

128. Herman, *supra* note 33, at 5. The bill was drafted and supported by the California chapter of the Women's Coalition. *Id.* Frustrated by the early release of 'pillow case rapist' Reginald Muldrew, the Coalition consulted his victims to ask what they wanted to see happen to Muldrew. Schodolski, *supra* note 104, at 1. The victims wanted to have him castrated so the Coalition began lobbying for such measures. *Id.* The group eventually wants a broader bill which will apply to all rapists. Herman, *supra* note 33, at 5. A spokesperson for the Coalition asserted, "[i]f this doesn't pass, we'll bring it back again and again and again. We're not talking about cutting off their testicles. Maybe someday, but not now." *Id.*

129. *Castration or Incarceration?*, *supra* note 126, at 3. In a survey of American voters conducted by Princeton Survey Research, 59% of those polled supported surgical or chemical castration for repeat sex offenders. *Many Approve Caning, Castration*, CAMPAIGNS & ELECTIONS, June, 1994.

130. Florida's and Louisiana's statutes require involuntary treatment upon a second offense subject to a determination by a physician that the drug is medically appropriate. Act of May 30, 1997, ch. 97, § 184, 1997 Fla. Sess. Law Serv. (West) (to be codified at FLA. STAT. § 794.0235); Act of July 10, 1997, ch. 746, 1997 La. Sess. Law Serv. 746 (West) (to be codified at LA. REV. STAT. ch. 15, § 538). Montana's statute does not require a medical evaluation but leaves it within the discretion of the judge whether to impose treatment upon a first or second offense. Act of April 19, 1997, ch. 334, 1997 Mont. Sess. Law Serv. (West) (to be codified at MONT. LAWS ch. 45-5). Georgia has enacted a statute allowing chemical castration as a term of parole only upon the consent of the offender. GA. CODE ANN. 16-6-4 (1997). Texas recently enacted a law allowing recidivist child molesters to submit to voluntary surgical castration. Associated Press, *Bush Signs Child Molester Castration Bill*, FORT WORTH STAR-TELEGRAM, May 21, 1997, at 6. The law requires offenders to submit to a mental health examination and to consent in writing. *Id.*

131. Alabama, Arizona, Hawaii, Iowa, Mississippi, Missouri, New York, Oklahoma, South Carolina and Washington have bills pending which are identical to California's statute. S. 116, 1st Spec. Sess. (Ala. 1997); H. 2216, 43rd Leg., 1st Reg. Sess. (Ariz. 1997); S. 215, 19th Leg. (Haw. 1997); S. 503, 77th Gen. Assembly, 1st Sess. (Iowa 1997); S. 2465, Reg. Sess. (Miss. 1997); H. 753, 89th Gen. Assembly, 1st Reg. Sess. (Mo. 1997); S. 4925, 220 Leg. Sess. (N.Y. 1997); S. 633, 46th Leg., 1st Sess. (Okla. 1997); H. 3090, 112th Gen. Assembly (S.C. 1997); S. 5352, 55th Leg., 1st Reg. Sess. (Wash. 1997). Colorado and Oregon have bills pending requiring involuntary treatment subject to a medical evaluation. H. 1133, 61st Gen. Assembly, 1st Reg. Sess. (Col. 1997); H. 3672, 69th Leg., Reg. Sess. (Or. 1997). Nevada's and Vermont's bills provide only for voluntary participation in Depo-Provera treatment programs. H. 206, 69th Leg. Reg. Sess. (Nev. 1997); H. 212, 64th Leg., Biennial Sess. (Vt. 1997).

132. Hoversten, *supra* note 87, at 03A. According to the National Conference of State Legislatures, "[i]f one state does it and is able to do it successfully and

III. PRIVACY INTERESTS: THE RIGHT TO REFUSE UNWANTED MEDICAL TREATMENT

The framers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.¹³³

The Due Process Clause of the Fourteenth Amendment states that no state shall “deprive any person of life, liberty, or property, without due process of law.”¹³⁴ This clause secures more than fair procedural process, however.¹³⁵ Due process also contains a substantive guarantee against state interference with an individual's fundamental rights.¹³⁶ The clause recognizes that there is a “realm of personal liberty which the government may not enter.”¹³⁷ The “full scope of liberty” is not limited to those interests already guaranteed in explicit terms by the Bill of Rights or elsewhere in the Constitution.¹³⁸ Instead, liberty is a “rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.”¹³⁹

Although the term “right of privacy” does not appear in the text of the Constitution, Supreme Court decisions have recognized that the Constitution guarantees certain zones of personal privacy.¹⁴⁰ In *Roe v. Wade*, the Court found the unwritten constitutional right of privacy to be rooted in “the personal liberty and restrictions upon state action” of the Fourteenth Amendment.¹⁴¹ However, the Court also recognized that past

prevail in the courts, then that's a track record that other states might look at.” *Id.*

133. *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965).

134. U.S. CONST. amend. XIV, § 1.

135. *See Washington v. Glucksberg*, 117 S. Ct. 2258, 2267 (1997) (finding that the right to physician assisted suicide is not a fundamental right protected by the Fourteenth Amendment).

136. *Id.*

137. *See Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 847 (1992) (reaffirming the holding of *Roe v. Wade* and ruling on provisions of the Pennsylvania Abortion Control Act).

138. *Id.* at 847-48. Additionally, the fundamental rights encompassed in the Fourteenth Amendment are not limited to only those interests protected by other rules at the time the Amendment was adopted. *Id.*

139. *Id.* at 848-49 (citing *Poe v. Ullman*, 367 U.S. 497, 543 (Harlan, J., dissenting)).

140. *See Roe v. Wade*, 410 U.S. 113, 153 (1973) (finding the right of privacy encompasses a woman's right to choose whether or not to have an abortion).

141. *Id.* at 152-53.

decisions pointed to the First Amendment,¹⁴² Fourth Amendment,¹⁴³ Fifth Amendment,¹⁴⁴ Ninth Amendment¹⁴⁵ and the penumbras of the Bill of Rights¹⁴⁶ as the source of the right of privacy.¹⁴⁷ Regardless of its origin, the right of privacy is fundamental and therefore can only include other personal rights deemed fundamental.¹⁴⁸ This privacy right encompasses the right to marry, to have children, to use contraception, to bodily integrity, to choose to have an abortion and to refuse unwanted lifesaving medical treatment.¹⁴⁹

However, the right to privacy is not absolute. A state is permitted to infringe upon this fundamental right only if its regulation withstands "strict constitutional scrutiny."¹⁵⁰ This test

142. Under the First Amendment, "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

143. The Fourth Amendment provides that:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

144. Under the Fifth Amendment:

[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

145. The Ninth Amendment states, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The Supreme Court has interpreted the Ninth Amendment to show that additional fundamental rights exist which are protected from governmental interference, although not specifically enumerated in the first eight amendments. *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965).

146. See *Griswold*, 381 U.S. at 483-84 (suggesting that the enumerated guarantees in the Bill of Rights have penumbras or peripheral rights without which the specific rights would be less meaningful and less protected). The right of association and freedom to teach are both penumbras of the First Amendment. *Id.* at 482.

147. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

148. *Id.* Once a right is labeled fundamental the Fourteenth Amendment forbids governmental infringement "at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997).

149. *Roe*, 410 U.S. at 152-53; *Glucksberg*, 117 S. Ct. at 2267.

150. *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 829 (1992)

requires more than a rational relationship between a regulation and a legitimate state purpose.¹⁵¹ Strict scrutiny first requires a state to demonstrate a compelling, subordinating interest.¹⁵² Then, the state must establish that the regulation is both narrowly drawn and necessary to further this interest.¹⁵³ If a less restrictive or “less drastic means for achieving the same basic purpose” is available, then courts must strike the regulation down as unconstitutional.¹⁵⁴

California’s chemical castration statute infringes on a sex offender’s right to refuse unwanted medical treatment. The constitutionality of the statute turns on the balance struck between this privacy right and any compelling state interests. This Part explores this balance to determine if the statute is a permissible or an unjustified infringement of a sex offender’s constitutional rights. Section A discusses the historical origins of the privacy interest in refusing unwanted medical treatment. Section B reviews the elements of the strict constitutional scrutiny standard and the Supreme Court’s application of this test. Section C subjects California’s statute to strict constitutional scrutiny and concludes that it does not meet due process guidelines.

A. *The Interests at Stake*

The right of privacy encompasses only fundamental rights.¹⁵⁵ A right is fundamental when it is so rooted in the “traditions and conscience” of the Nation that it “cannot be denied without violating those fundamental principles of liberty and justice.”¹⁵⁶ To determine if an individual’s interest in avoiding unwanted medical treatment meets this standard, a court reviews the Nation’s history and legal practices.¹⁵⁷

An individual’s privacy interest in refusing unwanted medical treatment has its origins in the common law.¹⁵⁸ “No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of

(Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *Roe*, 410 U.S. at 154. Court decisions recognize that some state legislation in the constitutionally protected zones of privacy is appropriate. *Id.*

151. *Griswold*, 381 U.S. at 497.

152. *Id.*

153. *Id.* at 498; *Roe*, 410 U.S. at 155.

154. *Griswold*, 381 U.S. at 504 (White, J., concurring).

155. *Roe*, 410 U.S. at 152.

156. *Griswold*, 381 U.S. at 493.

157. *Glucksberg*, 117 S. Ct. at 2268.

158. See *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 269-79 (1990) (outlining the history of the doctrine of informed consent and a constitutionally protected interest in the right to refuse medical treatment).

others”¹⁵⁹ In recognition of this right, courts expanded the tort action of assault and battery to include the touching of an individual without consent or legal justification.¹⁶⁰ In the early 1900s, courts began to apply assault and battery law to medical procedures performed on an individual without his consent.¹⁶¹ These early cases recognized that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault, for which he is liable in damages.”¹⁶²

It was not until the 1950’s that court decisions expanded the notion of patient autonomy to include the requirement of informed consent.¹⁶³ The courts developed this doctrine to address cases in which a patient consents to a treatment without being informed of its material risks.¹⁶⁴ A necessary corollary to the doctrine of informed consent is that a patient possesses the right to withhold consent or to refuse medical treatment.¹⁶⁵ Initial cases addressing such refusal rested on a First Amendment right to refuse treatment prohibited by the individual’s religious beliefs.¹⁶⁶ The first case to address a refusal apart from religious issues was *In re Quinlan*.¹⁶⁷

Karen Quinlan fell into a coma and remained in a vegetative

159. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

160. *Cruzan*, 497 U.S. at 269; ARTHUR S. BERGER, *WHEN LIFE ENDS: LEGAL OVERVIEWS, MEDICOLEGAL FORMS, AND HOSPITAL POLICIES* 13 (1995).

161. See Elizabeth Sudbury Langston, Note, *Torts—Changes in the Arkansas Law of Informed Consent: What’s Up Doc?*, 19 U. ARK. LITTLE ROCK L.J. 263, 269-70 (1997) (discussing the development of the doctrine of informed consent and its application in early Arkansas court decisions). For example, in *Rolater v. Strain*, a patient consented to a foot operation provided it would not require the removal of any bone. *Id.* at 270. During the operation, the physician believed removing the bone was necessary and did so. *Id.* The court found this action to constitute a battery since the doctor had operated outside the parameters of the patient’s consent. *Id.*

162. *Cruzan*, 497 U.S. at 269 (quoting Cardozo’s opinion in *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914)).

163. See Lori B. Andrews, *Informed Consent and the Decisionmaking Process*, 5 J. LEGAL MED. 163, 175 (1984) (discussing the history of the doctrine of informed consent and evaluating its assistance in patient decision making).

164. *Id.* Now recognized as a negligence action, the doctrine requires a physician to disclose all information material to a patient’s decision to undergo the proposed procedure. *Id.* at 171.

165. *Cruzan*, 497 U.S. at 270; BERGER, *supra* note 160, at 16.

166. *Cruzan*, 497 U.S. at 270. These cases involved patients refusing blood transfusions due to their religious beliefs. BERGER, *supra* note 160, at 18. The judiciary will usually not interfere in such cases unless the practice of the religious belief threatens the “morals, welfare, or health” of the community or if minor children are involved. *Id.*

167. 355 A.2d 647 (N.J. 1976).

state with no hope for improvement.¹⁶⁸ Quinlan's father sought judicial approval to disconnect his daughter's life-support equipment.¹⁶⁹ The New Jersey Supreme Court granted the request based on the constitutional right to privacy.¹⁷⁰ Noting this right was broad enough to include a woman's choice to terminate pregnancy, the court concluded that privacy issues also encompassed the right to refuse medical treatment—even if it was life-sustaining.¹⁷¹ However, Quinlan's right was not absolute; it had to be balanced against the state's compelling interests in protecting life and preserving a physician's right to prescribe a course of treatment.¹⁷² Given the degree of bodily invasion and the hopeless prognosis, the court concluded that Quinlan's privacy right to refuse treatment was paramount.¹⁷³ Subsequent cases continued to base the right to refuse unwanted medical treatment on either a constitutional privacy right or the common law doctrine of informed consent.¹⁷⁴

The United States Supreme Court has also recognized a privacy right to refuse unwanted life-sustaining medical treatment in *Cruzan v. Director, Missouri Department of Health*.¹⁷⁵ Nancy Cruzan was in a vegetative state, so her parents sought judicial leave to withdraw all artificial nutrition and hydration.¹⁷⁶ The Missouri Supreme Court denied the request, stating that Cruzan's parents failed to show by clear and convincing evidence that the termination of the medical procedures comported with the incompetent patient's wishes.¹⁷⁷ Upon review, the Court

168. *Quinlan*, 355 A.2d at 655. Quinlan was rushed to the hospital when she stopped breathing for 15 minutes. *Id.* at 653-54. The lack of oxygen to the blood during that interval caused severe brain damage and Quinlan slipped into a coma. *Id.* at 654. The doctors were unable to ascertain what led to this condition. *Id.* Quinlan lost all cognitive brain functions and could not survive off of a respirator. *Id.* at 654-55.

169. *Id.* at 651.

170. *Id.* at 663, 672. Upon a determination by the attending physicians and hospital ethics committee that Quinlan would remain in a vegetative state and agreement by the family, Quinlan could be removed from life support. *Id.*

171. *Id.* at 663. The court noted that, although not specifically enumerated in the Constitution, the Supreme Court recognized a constitutionally protected right of privacy. *Id.* This privacy right was the underlying basis for the Court's decision in *Roe v. Wade*. *Id.*

172. *Id.* at 663-64.

173. *Id.* at 664. The court distinguished that case from those involving blood transfusions to save a life. *Id.* Those procedures required minimal invasion and a maximum chance of recovery. *Id.*

174. *Cruzan*, 497 U.S. at 271.

175. 497 U.S. 261, 279 (1990). Nancy Cruzan sustained severe injuries in a car accident that resulted in permanent brain damage. *Id.* at 266. She slipped into a vegetative state and required artificial hydration and nutrition. *Id.*

176. *Id.* at 265.

177. *Id.* at 268-69. Cruzan's parents' claim was based on statements made

recognized a constitutionally protected right to refuse unwanted medical treatment.¹⁷⁸ The right is not absolute, but must be balanced against asserted state interests before determining if the state has violated an individual's privacy right.¹⁷⁹ The Court concluded that Missouri's requirement of a clear and convincing burden of proof withstood strict constitutional scrutiny.¹⁸⁰

The Court has recognized a right to refuse medical treatment in another context as well. In *Washington v. Harper*, the Court determined that a prisoner possessed "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs, under the Due Process Clause of the Fourteenth Amendment."¹⁸¹ The Court affirmed this decision in *Riggins v. Nevada*.¹⁸² The Court determined that, "absent a finding of overriding justification and a determination of medical appropriateness," the Due Process Clause guarantees a person in criminal custody the right to be free from antipsychotic drugs.¹⁸³ The Court determined that states must honor a prisoner's constitutional right to refuse unwanted medication.¹⁸⁴

These decisions demonstrate that a convicted sex offender has a constitutionally protected interest in avoiding unwanted medical treatment. Determining that a fundamental right exists only begins the inquiry. A court must then determine if the state regulation withstands strict constitutional scrutiny.

B. Defining the Constitutional Test

To survive constitutional attack, California's regulation must

to her roommate concerning her desire to die under such circumstances. *Id.* at 268. Although the court recognized a common law right to refuse medical treatment based on informed consent, it found these statements insufficient to allow the petitioners to exercise their substituted judgment on Cruzan's behalf. *Id.*

178. *Id.* at 279. Earlier Court decisions impliedly recognized a constitutional right to avoid unwanted medical treatment. See, e.g., *Mills v. Rogers*, 457 U.S. 291, 300 (1982) (refraining from deciding whether an involuntarily committed mental patient has a constitutional right to refuse antipsychotic medication).

179. *Cruzan*, 497 U.S. at 279.

180. *Id.* at 282.

181. 494 U.S. 210, 237 (1990). After the defendant's parole was revoked for assault, he was sent to a correctional institute established to treat inmates with serious mental disorders. *Id.* at 214. His treating physician sought to administer antipsychotic medication to the defendant without his consent. *Id.* Washington had established a procedure for involuntary treatment upon a finding by a neutral committee that the inmate was suffering from a mental illness and was dangerous to himself or others. *Id.* at 215. The defendant argued that this procedure violated the Due Process Clause. *Id.* at 217.

182. 504 U.S. 127, 138 (1992).

183. *Id.* at 135. The Court relied on its discussion in *Harper* to guide its decision since detainees would be afforded at least as much protection as inmates under the Fourteenth Amendment. *Id.*

184. *Id.* at 155 (Thomas, J., dissenting).

satisfy the substantive standard of strict scrutiny. The first part of this test requires a state to demonstrate a compelling interest that the regulation seeks to further. *Felce v. Fielder* illustrates possible compelling state interests that California seeks to advance by its chemical castration statute.¹⁸⁵

In *Felce*, a parolee appealed a determination that mandatory release parole could include a condition of forced injections of antipsychotic drugs absent a determination of medical necessity.¹⁸⁶ When considering this issue, the *Felce* court recognized the state had an interest in using such drugs to protect the public from the parolee's potentially violent behavior, to reduce crime and to help the parolee reassimilate into the community.¹⁸⁷ The *Harper* court also recognized a governmental interest in imposing appropriate medical treatment on a prisoner to reduce the danger he poses to himself, other inmates and prison personnel.¹⁸⁸ Neither court, however, determined if these interests were compelling.

Assuming *arguendo* the above state interests are compelling, the statute must still satisfy the second prong of the strict scrutiny test. California must also demonstrate that its statute is both narrowly drawn and necessary to further these interests.¹⁸⁹ If less intrusive alternatives exist, then California's infringement upon a sex offender's right to avoid involuntary chemical castration is impermissible.¹⁹⁰ The Supreme Court's decisions in *Riggins* and *Harper* illustrate where this line should be drawn.

In *Riggins*, a pretrial detainee moved to suspend his treatment with an antipsychotic drug until after trial based on his Fourteenth Amendment rights.¹⁹¹ The state asserted the continued medication was necessary to protect the state's interest in bringing an accused to trial and obtaining an adjudication.¹⁹² On review, the Court did not make a final determination of the substantive standards for determining when the forced administration of drugs before trial satisfies due process.¹⁹³ The Court did, however, postulate that the state would have satisfied

185. 974 F.2d 1484 (1992).

186. *Id.* at 1488.

187. *Id.* at 1495. Nevertheless, the court found the parole procedures insufficient to guard against an erroneous decision that the parolee was an appropriate subject for treatment. *Id.* at 1498. At no time was the medical data subject to evaluation by a neutral decision maker. *Id.* at 1499. Instead, the persons who made the decision to condition mandatory release parole on drug treatment were involved in the parolee's diagnosis. *Id.*

188. *Washington v. Harper*, 494 U.S. 210, 225 (1990).

189. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

190. *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965).

191. 504 U.S. 127, 130 (1992). Prior to this motion, *Riggins* was found competent to stand trial. *Id.*

192. *Id.* at 130, 135-36.

193. *Id.* at 135.

due process if the treatment was medically appropriate and, considering the absence of less intrusive alternatives, essential for the safety of the detainee or the safety of others.¹⁹⁴

In *Harper*, a prisoner contested a state regulation allowing for the involuntary administration of antipsychotic drugs on inmates.¹⁹⁵ The Court acknowledged that the Due Process Clause protects a prisoner's fundamental right to refuse unwanted medical treatment.¹⁹⁶ However, this clause does not confer a greater right than state law, so the Court focused its analysis upon the state-created liberty interest.¹⁹⁷ Nevertheless, the *Harper* decision illustrates under what conditions due process allows a state to involuntarily treat an inmate with antipsychotic drugs. The Court emphasized that substantive due process guarantees prohibit the forced administration of such drugs on all inmates, except those who are mentally ill and whose medical needs are furthered by such treatment.¹⁹⁸ The state's regulation satisfied these due process requirements.¹⁹⁹

C. *Strict Scrutiny Applied to California's Statute*

Application of the strict scrutiny test to California's statute first requires a court to decide if California has a compelling state interest. California can argue that its chemical castration statute seeks to further its interests in protecting the public, reducing crime and reintegrating the parolee into society. Assuming the court finds these interests to be compelling, the court then would determine if there is a less intrusive means of furthering these interests. Using the guidelines established by the aforementioned cases, this Section demonstrates why California's statute clearly fails this second requirement. Subsection 1 discusses why California has not used the least restrictive means available to further its state interests. Subsection 2 explains why no substantial connection exists between the California statute and

194. *Id.* The lower court did not make any findings about the necessity of this course of action or the availability of reasonable alternatives. *Id.* at 136. In fact, the lower court did not acknowledge the defendant's liberty interest in freedom from unwanted antipsychotic drugs at all. *Id.*

195. 494 U.S. 210, 217 (1990). The defendant argued that involuntary medication was impermissible unless he was adjudicated incompetent. *Id.* at 222.

196. *Id.* at 221-22.

197. *Id.* at 222.

198. *Id.* at 222-23, 243.

199. *Id.* at 236. Under the provisions of the state law, a psychiatrist had to determine that the inmate was mentally ill and dangerous and that the medication was appropriate. *Id.* at 215. This decision then had to be reviewed by a committee of independent medical decision makers. *Id.* at 215-16. The regulation also provided for notice, the right to be present at an advisory hearing, and the right to present and cross-examine witnesses. *Id.* at 216.

the compelling state interests.

1. California's Statute is Overbroad

The *Riggins* and *Harper* Courts recognized that the forcible injection of medication into a nonconsenting person's body represents a material interference with that person's privacy.²⁰⁰ "The invasion is particularly intrusive if it creates a substantial risk of permanent injury"²⁰¹ The action is especially debasing when it usurps a competent person's choice to refuse medical treatment.²⁰² When the design of the forced medication is "to alter the will and the mind of the subject, it constitutes a deprivation of liberty in the most literal and fundamental sense."²⁰³ Thus, a sex offender's interest in avoiding the administration of chemically altering drugs originates in our Nation's most fundamental values.²⁰⁴

California's statute impermissibly encroaches upon this interest. The statute arbitrarily forces chemical castration on parolees without a medical determination of the drug's potential effectiveness or of the individual's physical toleration for the drug.²⁰⁵ Under the terms of the statute, all twice-convicted sex offenders *must* undergo hormonal injections upon parole.²⁰⁶ The California legislature imposes this chemical treatment without any evidence of its effectiveness. First, studies show Depo-Provera to be effective only for one type of sex offender, paraphiliacs.²⁰⁷ This statute mandates chemical castration for all offenders, regardless of type.²⁰⁸ Second, no study establishes the drug's effects when administered on an involuntary basis.²⁰⁹ To date, participation in Depo-Provera treatment programs has been on a voluntary basis, with researchers choosing participants only after a finding of amenability to treatment.²¹⁰ Third, the drug has only been effective when combined with individualized psychotherapy.²¹¹ Even then, no large-scale studies exist of the

200. *Riggins*, 504 U.S. at 133-34; *Harper*, 494 U.S. at 221-22.

201. *Harper*, 494 U.S. at 237 (Stevens, J., concurring in part and dissenting in part) (concluding involuntary medication of an inmate is improper absent a judicial determination of incompetence).

202. *Id.*

203. *Id.* at 237-38.

204. *Id.* at 238.

205. CAL. PENAL CODE § 645 (West 1997); WOMEN'S COALITION, SENATE RULES COMM., REPORT ON CAL. ASSEMBLY BILL NO. 3339, Reg. Sess. (1996).

206. CAL. PENAL CODE § 645 (West 1997).

207. Turk, *supra* note 110, at 12; *see* discussion *supra* pp. 393-94.

208. Turk, *supra* note 110, at 12; CAL. PENAL CODE § 645 (West 1997).

209. Hanna & Kuczka, *supra* note 105, at 1; Turk, *supra* note 110, at 12.

210. Lactitis, *supra* note 5, at D1; *see* discussion *supra* pp. 388-89.

211. Fitzgerald, *supra* note 25, at 9.

drug's effectiveness on recidivism.²¹² Finally, Depo-Provera may result in dangerous and unknown side effects.²¹³ The state is indiscriminately exposing sex offenders to these risks without any finding that chemical castration is medically appropriate and potentially effective.²¹⁴ For these reasons, the breadth of California's statute impermissibly infringes on substantive due process guarantees.

California's failure to use the least restrictive means available to further its state interests violates procedural due process as well. The statute requires chemical castration for all twice-convicted child molesters without any finding of amenability to treatment.²¹⁵ The decision to medicate a parolee against his will is arbitrary; no procedural safeguards are provided to ensure it is not erroneous. Under *Harper*, procedural due process requires at least a determination of overriding justification and medical appropriateness before a state can involuntarily medicate an individual.²¹⁶

2. California's Statute Fails to Address any Compelling State Interest

The California statute fails strict constitutional scrutiny on a second ground as well. The statute seeks to further the state interests of protecting the public, reducing crime and reassimilating the parolee into the community.²¹⁷ However, even assuming these interests are compelling, the statute fails to address all three interests. Depo-Provera can be effective only in the treatment of paraphiliacs, yet the statute fails to distinguish among the various classes of sex offenders.²¹⁸ As a result, the recidivism of non-paraphiliacs remains unaffected. The mandatory parole condition deprives offenders of alternative treatments that might prove more effective in reassimilating them into society. More significantly, the public works under the false assumption that these chemically castrated offenders are no longer dangerous. The release of a sex offender into the community without effective treatment jeopardizes public safety. The release of a sex offender under the false pretense that he is cured fosters a false sense of public security, thereby increasing

212. *Id.*

213. *Id.*; *Laws of Impotence*, *supra* note 32, at 18.

214. WOMEN'S COALITION, SENATE RULES COMM., REPORT ON CAL. ASSEMBLY BILL NO. 3339, Reg. Sess. (1996); *Castration or Incarceration?*, *supra* note 126, at 3.

215. CAL. PENAL CODE § 645 (West 1997); *see* discussion *supra* pp. 396-99.

216. *See Riggins*, 504 U.S. at 134-35 (reviewing the Court's holding in *Harper*).

217. *See* discussion *supra* pp. 403-04.

218. Turk, *supra* note 110, at 12; WOMEN'S COALITION, SENATE RULES COMM., REPORT ON CAL. ASSEMBLY BILL NO. 3339, Reg. Sess. (1996).

public risk.

Even among paraphiliac sex offenders, the statute fails. Studies showing the drug reduces recidivism have been short-term, voluntary and accompanied by individualized psychotherapy.²¹⁹ California's statute takes none of these findings into account. The statute imposes Depo-Provera treatment on an involuntary basis; however, not one study exists showing the effectiveness of chemical castration when administered without therapy and on an unwilling individual.²²⁰ The forcible injection of medication into a nonconsenting person's body is highly invasive.²²¹ The right to control one's own mind and body is sacred.²²² No right is more valued than the right to be let alone from the government interfering in zones of personal privacy.²²³ California's indiscriminate infringement upon this fundamental right is impermissible and unconstitutional.²²⁴

IV. TAILORING THE STATUTE FOR A CONSTITUTIONAL FIT

Although a solution is needed for the high rate of recidivism among sex offenders, California's statute as written does not provide a constitutionally permissible answer. The public has increased its pressure on state legislatures to address the growing

219. See discussion *supra* pp. 386-87 and *supra* notes 75-80.

220. *Castration or Incarceration?*, *supra* note 126, at 3.

221. *Washington v. Harper*, 494 U.S. 210, 237-38 (1990).

222. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

223. *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965).

224. California's statute also may violate the Equal Protection Clause. The Fourteenth Amendment does not deny the state, "the power to treat different classes of persons in different ways." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). Instead, the Equal Protection Clause denies the state the power to "legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Id.* A court applies the same strict scrutiny test used in due process analysis—the different treatment must be both necessary and the least restrictive means available to achieve a compelling state interest. *Id.* Under the statute, California denies parole to a sex offender who refuses the forced medical injections of Depo-Provera. CAL. PENAL CODE § 645 (West 1997). Even assuming California's interests in protecting the public and reintegrating the parolee into society are compelling, the denial of parole is not necessary to further those interests. Studies indicate that Depo-Provera is effective for only one type of sex offender. California does not further a compelling state interest by forcing a sex offender to comply with ineffective medical treatment. Conversely, an offender who refuses ineffective treatment does not impede a state interest. The public will receive the same level of protection and the parolee will receive the same level of rehabilitative assistance whether the offender refuses or accepts the injections. Ineffective treatment is the equivalent of no treatment at all. The imposition of Depo-Provera is arbitrary, has no relation to the purpose of the statute and is not the least restrictive means available to achieve a compelling state interest.

problem of sexual abuse in our nation.²²⁵ Encouraged by studies indicating that Depo-Provera could be effective in treating paraphiliac sex offenders, California responded to this pressure and enacted its chemical castration statute.²²⁶ Proponents of the bill argue this treatment is necessary to protect the public and solve the problem of recidivist sex offenders.²²⁷ Even if these state interests are compelling, California's indiscriminate and involuntary requirement of chemical castration for paroled offenders is unconstitutionally broad.

California and other states do not have to abandon Depo-Provera programs altogether. Chemical castration can be a useful rehabilitative tool.²²⁸ To impose this treatment in sentencing, however, state regulation must meet three requirements. First, each candidate must undergo a medical evaluation to determine if that offender is amenable to treatment. Additionally, a physician should screen the candidate for pre-existing medical conditions that might result in dangerous side effects. Second, the hormonal treatment should be only one component of a comprehensive psychological treatment program. Third, the offender should voluntarily consent to the treatment after being informed of any material risks. Under these limited conditions, chemical castration could prove an effective rehabilitation device and recidivism solution. Therefore, this Comment proposes that California amend its chemical castration statute. Upon its failure to do so, the courts should strike the statute down as unconstitutional.

CONCLUSION

Sexual abuse is "a heinous crime" that "must be stopped," but California's statute falls short of addressing that need.²²⁹ No study shows that Depo-Provera, administered alone, treats any type of sex offender. Instead, studies show that Depo-Provera makes one type of sex offender, paraphiliacs, more amenable to treatment. California's statute neither requires a medical determination of whether the sex offender is a paraphiliac, nor requires any broader psychological treatment plan. As written, California's statute will not prevent any type of sex offender from engaging in criminal sexual behavior.

A sex offender's right to refuse medical treatment is a

225. See discussion *supra* pp. 382-83 and notes 17-22 and accompanying text.

226. WOMEN'S COALITION, SENATE RULES COMM., REPORT ON CAL. ASSEMBLY BILL NO. 3339, Reg. Sess. (1996).

227. *Will Chemical Castration Stop Sex Offenders?*, *supra* note 98, at 16; see discussion *supra* pp. 395-97.

228. See discussion *supra* pp. 388-89.

229. *Will Chemical Castration Stop Sex Offenders?*, *supra* note 98, at 16.

fundamental privacy right protected by the Fourteenth Amendment. A state cannot infringe upon this right unless its regulation is the least intrusive means available to further a compelling state interest. Forcible injection into a nonconsenting person's body represents a material interference with that person's privacy and constitutes a fundamental deprivation of liberty. California's decision to forcibly medicate a parolee is purely arbitrary. The state is indiscriminately exposing sex offenders to dangerous side effects without any finding that Depo-Provera is medically appropriate.

Sex crimes involving children are a growing problem in America and call for legislative action. However, California proposes an ineffective solution at the expense of an individual's constitutional rights. No right is more sacred than the right to control one's own mind and body free from governmental interference. California's statute impermissibly infringes upon this right by mandating forced hormonal injections for paroled sex offenders without regard for its effectiveness. The statute fails to pass strict constitutional scrutiny and the courts should strike it down.