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## Chemical Castration for Child Predators: Practical, Effective, and Constitutional

*Elizabeth M. Tullio\**

If legislation and punishment alone cannot fully solve the problem, medicine and science need to be called into action. And if society can be made safer by such means, why not use them?<sup>1</sup>

### INTRODUCTION

Every year approximately 100,000 to 500,000 children are sexually molested in the United States.<sup>2</sup> This results in 10–25% of children being sexually abused by the age of eighteen—out of which 30–40% are females and 10–15% are males.<sup>3</sup> With such high rates, child sexual abuse can be classified as an epidemic across the country. Friends, family members, and strangers commit these crimes.<sup>4</sup> There are those who are attracted solely to children and others who are mainly attracted to adults, but occasionally attack children.<sup>5</sup> While a number of different punishments and treatments have been implemented, there is no cure for such a condition.<sup>6</sup> People are left wondering what to do, how to stop these offenders, and how they can keep their young children safe from such unspeakable horror.

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\* B.A., University of California, Irvine; J.D. expected May 2010, Chapman University School of Law. I would like to thank my family for their love and support throughout this process. I would also like to thank Professor Jennifer Robinson in the School of Social Ecology at the University of California, Irvine for all of her help and guidance in putting this article together. See also Peter Tullio, *Jurisdiction Obtained by Forcible Abduction: Reach Exceeds Due Process Grasp*, 67 J. CRIM. L. & CRIMINOLOGY 181 (1976) (the author of this article has been a source of motivation and inspiration in my life, without whom none of this would be possible).

<sup>1</sup> Karen Harrison, *The High-Risk Sex Offender Strategy in England and Wales: Is Chemical Castration an Option?*, 46 HOW. J. CRIM. JUST. 16, 28 (2007) (quoting F.S. Berlin).

<sup>2</sup> Bhagwan A. Bahroo, *Pedophilia: Psychiatric Insights*, 41 FAM. CT. REV 497, 497 (2003); Ariel Rosler & Eliezer Witztum, *Treatment of Men with Paraphilia with a Long-Acting Analogue of Gonadotropin-Releasing Hormone*, 338 NEW ENG. J. MED. 416, 416 (1998).

<sup>3</sup> Bahroo, *supra* note 2, at 497.

<sup>4</sup> *Id.* at 499.

<sup>5</sup> Richard I. Lanyon, *Theory and Treatment in Child Molestation*, 54 J. CONSULTING & CLINICAL PSYCHOL. 176, 177–78 (1986).

<sup>6</sup> John Cloud, *Pedophilia*, TIME, Apr. 29, 2002, at 44–45; Bahroo, *supra* note 2, at 503 (“Pedophilia tends to be a chronic condition, and recidivism rates are high.”).

Over the years, a number of treatments have been implemented including physical castration and invasive, almost cruel therapies.<sup>7</sup> The crime of raping a child is so abhorrent that many states adopted laws that called for the death penalty for the commission of such crimes.<sup>8</sup> However, sentencing these offenders to death is no longer constitutional,<sup>9</sup> and those who are released often reoffend and end up back in prison.<sup>10</sup> In reality, there has never been a widely used treatment that could be described as both effective and humane in treating pedophiles and child molesters.<sup>11</sup> However, a certain treatment has been used and experimented with since the mid twentieth century that is both humane and incredibly effective in treating these offenders.<sup>12</sup> This treatment is the next step in sex offender therapy and the best possible option for any child molester or pedophile. This treatment is chemical castration.

While chemical castration sounds almost barbaric, it is one of the more civilized forms of treatment that has been used on sexual predators.<sup>13</sup> It is merely a type of hormone therapy that takes away the offender's sexual desire.<sup>14</sup> There can be some unpleasant side effects, but they are mostly reversible, and, overall, there is little pain and suffering associated with the procedure.<sup>15</sup> Even the Catholic Church fully supports the procedure and set up the St. Luke Institute in the United States in 1985 where pedophilic priests undergo a combination of counseling and chemical castration for pedophilia.<sup>16</sup> In addition to the effectiveness of chemical castration, it is also exponentially less expensive than the cost of keeping these individuals in prisons and hospitals, making it an almost perfect solution.<sup>17</sup>

While a number of constitutional concerns arise with the use of such a procedure, this comment proposes that chemical castration does not violate the Constitution. For those states

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<sup>7</sup> See *infra* Part II.C.

<sup>8</sup> Joanna H. D'Avella, Note, *Death Row for Child Rape? Cruel and Unusual Punishment under the Roper-Atkins "Evolving Standards of Decency" Framework*, 92 CORNELL L. REV. 129, 131 n.7 (2006).

<sup>9</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650–51 (2008).

<sup>10</sup> Bahroo, *supra* note 2, at 503 ("Neither treatment nor incarceration seems to significantly affect recidivism.").

<sup>11</sup> See *infra* Part II.C.

<sup>12</sup> Charles L. Scott & Trent Holmberg, *Castration of Sex Offenders: Prisoners' Rights Versus Public Safety*, 31 J. AM. ACAD. PSYCHIATRY L. 502, 502 (2003).

<sup>13</sup> Harrison, *supra* note 1, at 21–28. A name change may be in order as the term "castration" will always "summon up images of pain and suffering." *Id.* Chemical castration is not as invasive or "barbaric" as surgical castration. *Id.*

<sup>14</sup> See *infra* Part III.A.

<sup>15</sup> Harrison, *supra* note 1, at 21.

<sup>16</sup> *Id.* at 23.

<sup>17</sup> See *infra* note 144 and *infra* Part III.C.

that require an offender to undergo such a procedure, the health and safety of the offender is taken into consideration and a number of procedural safeguards protect individuals from abuse.<sup>18</sup> Because of these procedural safeguards, it is difficult to think of the treatment as cruel and unusual in any way. Additionally, there is a fundamental right to procreate as well as a right to refuse treatment that must be taken into consideration.<sup>19</sup> However, chemical castration is not in violation of either right as it does not necessarily strip an individual of reproductive capabilities.<sup>20</sup> Furthermore, keeping children safe from sexual predators is the absolute definition of a compelling state interest. Therefore, requiring chemical castration as a condition of parole or probation for pedophiles and child molesters is practical, effective, and constitutional.

A number of issues will be addressed throughout the text of this comment. The next section explains the true makeup of a child molester and how he is a different breed of sex offender. It will also discuss how it is necessary to do more than imprison such offenders, as rates of recidivism are incredibly high. Section III will examine different legislation that has been passed and treatments that have been implemented in dealing with these offenders, and why they have not solved the problem. Section IV will discuss chemical castration and how it is an effective treatment that can succeed in treating these offenders where others have failed. Lastly, section V will look at the constitutionality of requiring such offenders to undergo treatment.

## I. THE PROBLEM

### A. Getting to Know Your Friendly Neighborhood Child Molester

Child molesters and pedophiles are different from other sex offenders. A child molester is an older person “whose conscious sexual desires and responses are directed, at least in part, toward dependent, developmentally immature children and adolescents who do not fully comprehend these actions and are unable to give informed consent.”<sup>21</sup> In fact, those who commit sexually deviant crimes against children, commonly referred to as pedophiles, are recognized as suffering from a disability.<sup>22</sup>

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<sup>18</sup> See *infra* notes 196, 197, 198 and accompanying text.

<sup>19</sup> See *infra* notes 218, 219, 220 and accompanying text.

<sup>20</sup> See *infra* notes 134, 135, 136, 137 and accompanying text.

<sup>21</sup> Lanyon, *supra* note 5, at 176.

<sup>22</sup> AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 571–72 (4th ed. 2000) (stating that the DSM-IV is a text commonly

The latest edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) characterizes a pedophile as one who has suffered from “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity” with prepubescent children.<sup>23</sup> The individual has either “acted on these sexual urges” or such urges and fantasies cause incredible difficulty or distress in their life.<sup>24</sup> Pedophilia is one of the most common paraphilias listed in the DSM-IV.<sup>25</sup> There are both male and female pedophiles, however, the rates of female pedophilia are so incredibly low and there is so little research on the subject that many doubt their existence.<sup>26</sup> It should be noted that not every pedophile actually acts on their urges, nor does every person who commits such deviant sexual acts qualify as a pedophile under the DSM-IV.<sup>27</sup>

There are two main groups of child sexual abusers.<sup>28</sup> Those sex offenders who are primarily sexually attracted to children are known as “fixated” or “preference” offenders and those who are normally attracted to adults, but who also attack children are known as “regressed” or “situational” offenders.<sup>29</sup> Situational offenders are more likely to blame their behavior toward children on drugs, alcohol, or other outside factors.<sup>30</sup> Their behavior is impulsive and each attack can usually be linked to significant life stressors.<sup>31</sup> These offenders will commit sexual acts with children as if the child is a surrogate for an adult companion.<sup>32</sup> There are also violent pedophiles that attack children due to anger, the need to feel power, violence, or just sadistic pleasure.<sup>33</sup>

Some of these regressed or situational offenders realize that what they are doing is not right and hate their sexual proclivities toward children.<sup>34</sup> However, many offenders cannot stop

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used in the United States by doctors, researchers, and even health insurance companies to diagnose, understand, and further study those inflicted with mental disorders).

<sup>23</sup> *Id.* at 572.

<sup>24</sup> *Id.*

<sup>25</sup> Ariel Rosler & Eliezer Witztum, *Pharmacotherapy of Paraphilias in the Next Millennium*, 18 BEHAV. SCI. & L. 43, 44 (2000) (stating that a paraphilia is a mental disorder where a person is aroused by abnormal sexual behaviors); Pedophilia, the sexual preoccupation with children, is a type of paraphilia. Bahroo, *supra* note 2, at 498.

<sup>26</sup> J. Paul Fedoroff et al., *A Case Series of Women Evaluated for Paraphiliac Sexual Disorders*, 8 CAN. J. HUM. SEXUALITY 127, 127–28 (1999).

<sup>27</sup> T. Howard Stone et al., *Sex Offenders, Sentencing Laws, and Pharmaceutical Treatment: A Prescription for Failure*, 18 BEHAV. SCI. & L. 83, 90–91 (2000).

<sup>28</sup> Lanyon, *supra* note 5, at 177–78. *See also* Harrison, *supra* note 1, at 26.

<sup>29</sup> Lanyon, *supra* note 5, at 177.

<sup>30</sup> Harrison, *supra* note 1, at 26.

<sup>31</sup> Lanyon, *supra* note 5, at 177–78.

<sup>32</sup> *Id.* at 177.

<sup>33</sup> Harrison, *supra* note 1, at 26.

<sup>34</sup> *See* Cloud, *supra* note 6, at 44 (quoting Reverend Stephen Rosetti who runs St. Luke Institute, a psychiatric hospital, who stated, “People don’t grow up and say, ‘I want

themselves and it is as if they are addicted to these children.<sup>35</sup> Alternatively, a number of offenders see nothing wrong with what they are doing.<sup>36</sup> Some think that the child wanted the experience, enjoyed it, and that it was educational for the child.<sup>37</sup> Fixated offenders often view children as being seductive and teasing the offender.<sup>38</sup> There are many theories as to why one develops a sexual attraction towards children, but no one knows exactly why this happens.<sup>39</sup> It has been attributed to a number of factors which include, but are not limited to: difficulties in forming intimate relationships, brain abnormalities, being sexually abused as a child, and even having a brother.<sup>40</sup> In the end it does not matter what category of child predator the offender falls into or why, but that every single one of them is incredibly dangerous.<sup>41</sup>

#### B. Recidivism Rates

Merely imprisoning child predators will not stop the attacks on children.<sup>42</sup> The average prison sentence for a child sexual abuser is eleven years and, once released, there are incredibly high re-offense rates.<sup>43</sup> Prison is not much of a deterrent for sex offenders as many of these individuals “revert to earlier patterns of behavior” without further treatment.<sup>44</sup> Mere imprisonment may deter some offenders, but most are still going to offend regardless of what the penalty is.<sup>45</sup> Being that, in a number of cases, the abused child and the sexual predator are often the only ones that know of the offense, the risk of actually being caught is

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to be a pedophile. . . . All the people I’ve ever talked to hate it.”); Lanyon, *supra* note 5, at 178.

<sup>35</sup> Harrison, *supra* note 1, at 26 (describing the idea that the offender is addicted to the child is raised by Dr. Gillian Mezey who claims that preferential offenders are “constantly preoccupied with children and will look on children as sexual prey, so when they see a child they will be considering ways in which they can gain access to that child”).

<sup>36</sup> Lanyon, *supra* note 5, at 178.

<sup>37</sup> Bahroo, *supra* note 2, at 500.

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

<sup>39</sup> Cloud, *supra* note 6, at 45; Rosler & Witztum, *supra* note 2, at 416.

<sup>40</sup> Cloud, *supra* note 6. *See also* Lanyon, *supra* note 5, at 178–79.

<sup>41</sup> Keith F. Durkin & Allison L. Digianantonio, *Recidivism Among Child Molesters: A Brief Overview*, 45 J. OFFENDER REHAB. 249, 250 (2008) (reviewing a number of case studies which have collectively found that children who are sexually victimized suffer in a number of different ways from the experience including physical injuries, fear, anxiety, depression, low self esteem, poor academic performance, social maladjustment, aggressive behavior, and acting out sexually).

<sup>42</sup> *See* Bahroo, *supra* note 2, at 503.

<sup>43</sup> Cloud, *supra* note 6; Durkin & Digianantonio, *supra* note 41, at 252.

<sup>44</sup> Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 3 (1989).

<sup>45</sup> Bahroo, *supra* note 2, at 503, 506.

very low.<sup>46</sup> Therefore, while the punishment for such an offense is often quite severe, it does not stop the offender from sexually victimizing children: many are driven by their urges and do not view getting caught as a reality.<sup>47</sup>

Case studies conducted on released child sexual abusers have uncovered appalling results including that approximately 50–70% of those released eventually re-offend.<sup>48</sup> While some researchers argue that these rates are much lower, findings of low rates can be attributed to data collected from unreliable sources.<sup>49</sup> Being that the numbers in these studies are all based on self-reports and police or conviction records, a majority of attacks have gone unreported.<sup>50</sup> Studies have found that offenders commit two to five times more offenses than those for which they are arrested or convicted.<sup>51</sup> Often, before an offender is released, assessments are done to determine if he presents a substantial risk of reoffending. However, so many factors are linked to sexual recidivism that it is impossible to predict who really presents a substantial risk, making life imprisonment the only way to ensure that the offender will not reoffend.<sup>52</sup>

## II. INADEQUATE SOLUTIONS

### A. Sex Offender Registration

Since implementing a life sentence for every sex offender, or even just for every child molester and pedophile is unreasonable and unrealistic, states have taken steps to keep communities safe from released sex offenders. In 1947, California was the first state to have any kind of registry system for sex offenders, and it

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<sup>46</sup> *Id.* at 503.

<sup>47</sup> *Id.*

<sup>48</sup> Durkin & Digianantonio, *supra* note 41, at 252.

<sup>49</sup> Joseph J. Romero & Linda Meyer Williams, *Recidivism Among Convicted Sex Offenders: A 10-Year Followup Study*, 49 FED. PROBATION 58, 58 (1985).

<sup>50</sup> *Id.*; Durkin & Digianantonio, *supra* note 41, at 251–52.

<sup>51</sup> Durkin & Digianantonio, *supra* note 41, at 251 (declaring that most sex offenses are never reported and those arrested for such offenses reported committing at least twice as many offenses); Romero & Williams, *supra* note 49, at 58 (reporting that in one case study, it was found the incarcerated rapists and pedophiles had committed two to five times more offenses than they had been convicted for).

<sup>52</sup> Robert Prentky et al., *Risk Factors Associated with Recidivism Among Extrafamilial Child Molesters*, 65 J. CONSULTING & CLINICAL PSYCHOL. 141, 147 (1997) (citing studies assessing factors that could help predict sexual recidivism and finding that the degree of sexual preoccupation with children, having other paraphilias, and numerous prior sexual offenses all indicated the individual was likely to reoffend); Durkin & Digianantonio, *supra* note 41, at 253 (reviewing a number of case studies which found that sexual recidivism was more likely when certain factors were present such as a higher number of offenses, the offender not being related to the victim, offending at an early age, going after very young children, using physical force, personality disorders, impulsivity, lack of empathy toward the victim, alcohol abuse, low IQ, and learning disabilities).

now has more registered sex offenders than any other state.<sup>53</sup> Today, there are currently over 11,000 registered sex offenders residing in Los Angeles County alone.<sup>54</sup> Throughout the late Twentieth Century, the laws regarding sex offender registration have evolved, in large part, due to the numerous attacks on children.<sup>55</sup> It was not until the 1990's, after the brutal rape and murder of seven-year-old Megan Kanka in New Jersey, that a public outcry was heard for something more to be done to protect the nation's children.<sup>56</sup> Unbeknownst to Megan or her family, their new neighbor across the street was a recently released sex offender.<sup>57</sup> When Megan went over to her neighbor's house to see a puppy, she ended up being raped and strangled to death with a leather belt.<sup>58</sup> No one in the community had any idea that they lived near a sexual predator.<sup>59</sup>

After Megan's death, New Jersey passed an entirely new kind of sex offender registration law.<sup>60</sup> By the late 1990's, implementing sex offender registration laws was not anything new: over 25 states had already put such laws into action.<sup>61</sup> However, there was a big difference between the laws enacted in New Jersey after Megan's death and those throughout the rest of the nation.<sup>62</sup> New Jersey became the first state to require public notification in addition to the individual registering as a sex offender.<sup>63</sup> New Jersey's new law caught political attention as the Federal Omnibus Crime Bill was passing through Congress, which contained the Jacob Wetterling Crimes Against Children and Sex Offender Registration Act ("Jacob Wetterling Act").<sup>64</sup>

President Clinton amended the Jacob Wetterling Act by signing Megan's Law so that, in addition to requiring every state to compile a registry for sex offenders, the states were required to

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<sup>53</sup> Sex Offender Registration and Exclusion Information, <http://www.meganslaw.ca.gov/sexreg.aspx?lang=ENGLISH> (last visited Sept. 6, 2009).

<sup>54</sup> California Sex Offender Locator Map—Los Angeles, [http://www.meganslaw.ca.gov/search\\_main.aspx?searchBy=county&county=los%20angeles&lang=ENGLISH](http://www.meganslaw.ca.gov/search_main.aspx?searchBy=county&county=los%20angeles&lang=ENGLISH) (last visited Sept. 6, 2009).

<sup>55</sup> See Bahroo, *supra* note 2, and accompanying text.

<sup>56</sup> Maureen S. Hoppell, *Balancing the Protection of Children Against the Protection of Constitutional Rights: The Past, Present and Future of Megan's Law*, 42 DUQ. L. REV. 331, 336, 339 (2004).

<sup>57</sup> *Id.* at 332.

<sup>58</sup> *Id.* at 333; State v. Timmendequas, 737 A.2d 55, 68–69 (N.J. 1999).

<sup>59</sup> Hoppell, *supra* note 56, at 332.

<sup>60</sup> *Id.* at 336; N.J. STAT. ANN. § 2C:7–8 (West 2005).

<sup>61</sup> Hoppell, *supra* note 56, at 337.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*; N.J. STAT. ANN. § 2C:7–8 (West 2005).

<sup>64</sup> Hoppell, *supra* note 56, at 338 (reporting that years before Megan was murdered, Jacob Wetterling was kidnapped at gunpoint and neither he nor the man who abducted him were ever found). See generally 42 U.S.C. § 14071 (2006).



release relevant information to the public about such individuals residing in the state.<sup>65</sup> Compliance with the act was deemed so crucial that 10% of a state's federal funding was made contingent upon the timely passage of similar laws in each state.<sup>66</sup> Sex offenders required to register have challenged these laws as an invasion of privacy.<sup>67</sup> Given that the purpose of these laws is to protect the community and keep children safe from sexual predators, the states have held that such regulations are legitimate.<sup>68</sup> The U.S. Supreme Court even ruled that laws requiring sex offender registration and community notification are constitutional.<sup>69</sup> The Court held that the "mere injury to reputation" that these laws may cause, "even if defamatory, does not constitute the deprivation of a liberty interest."<sup>70</sup> While these laws are a step in the right direction, more needs to be done to ensure the safety of our children. Even with public notification systems in place, a child predator remains dangerous.

#### B. Capital Child Rape Statutes & Their Unconstitutionality

A number of states have realized that a community's awareness of convicted child molesters will not, by itself, ensure the safety of its children. In fact, starting in 1993, a number of states went a little too far and enacted statutes that made it a capital crime to rape a child under the age of twelve.<sup>71</sup> Almost twenty years before these states began enacting capital child rape statutes, the U.S. Supreme Court held in *Coker v. Georgia* that issuing the death penalty for the rape of an adult woman is unconstitutional as it is a disproportionate punishment for a crime in which there is no loss of life.<sup>72</sup> In *Kennedy v. Louisiana*, in 2008, the U.S. Supreme Court applied similar logic in finding that implementing the death penalty in cases of child rape was a grossly excessive punishment which violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.<sup>73</sup> At the time the decision was handed down, Louisiana, South Carolina, Montana, Georgia, and Oklahoma all had laws which deemed the rape of a child to be a capital offense<sup>74</sup>

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<sup>65</sup> 42 U.S.C. § 14071 (2006).

<sup>66</sup> *Id.*; U.S. CONST. amend. VIII.

<sup>67</sup> Hopbell, *supra* note 56, at 342–43. *See also* Doe v. Poritz, 662 A.2d 367, 368, 372 (N.J. 1995).

<sup>68</sup> Hopbell, *supra* note 56, at 343.

<sup>69</sup> Conn. Dep't of Pub. Safety v. Doe, 123 S.Ct. 1160, 1162, 1164, (2003).

<sup>70</sup> *Id.* at 1164.

<sup>71</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2647–49 (2008).

<sup>72</sup> *Coker v. Georgia*, 433 U.S. 584, 584–85 (1977).

<sup>73</sup> *Kennedy*, 128 S. Ct. at 2649–51.

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

Arguably, these states found the rape of a child to be such a deplorable act that even though the offender had not taken a life, he deserved to have his life taken for the commission of such an act. In fact, the Governor of Louisiana, Bobby Jindal, stated in an interview that he found the Court's decision in *Kennedy* to be an "awful decision."<sup>75</sup> In reaction to the Court's decision, Governor Jindal stated: "That's ridiculous . . . We don't want anybody in Louisiana harming our children. We think these monsters need to be stopped . . . If there is any other crime other than taking human life . . . that screams out for the death penalty it's those criminals that harm our children."<sup>76</sup>

While the state requested a rehearing on the case due to certain factual errors, the Court denied the request in October 2008.<sup>77</sup> The Supreme Court's decision in *Kennedy v. Louisiana* still stands, so implementing the death penalty for the rape of a child constitutes cruel and unusual punishment in violation of the Eight Amendment.<sup>78</sup> Society's abhorrence to crimes of this nature is obvious. However, the dilemma as to what to do with those who commit sexual crimes against children remains. Imprisonment keeps pedophiles away from children. However, those released back into the community often end up reoffending. The death penalty is far too harsh a punishment, yet more needs to be done to protect our children. Punishing offenders simply is not enough; it is necessary to take all steps possible to rehabilitate them.<sup>79</sup>

### C. Treatment, Surgery & Disappointment

In reality, "active pedophiles who find their way into the few treatment programs around the country turn out to be less of a risk than those who are locked up for a while and released."<sup>80</sup> Scientists in the 1940's realized that "[p]unishment alone is a

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<sup>75</sup> *Your World With Neil Cavuto* (Fox News television broadcast June 26, 2008) (interview with the Governor of Louisiana, Bobby Jindal) available at <http://www.foxnews.com/search-results/m/20265419/dead-wrong.htm#q=jindal> (last visited Oct. 26, 2009).

<sup>76</sup> *Id.*

<sup>77</sup> Linda Greenhouse, *In Court Ruling On Executions, A Factual Flaw*, N.Y. TIMES, July 2, 2008, at A1 (reporting the Supreme Court did not take into account that in 2006 the Uniform Code of Military Justice had been revised to deem child rape as a capital offense under federal law); *U.S. Supreme Court Denies Rehearing in Kennedy v. Louisiana Opinion*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/us-supreme-court-denies-rehearing-kennedy-v-louisiana-opinion> (last visited Sept. 6, 2009); *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008), *rehearing denied* (Oct. 1, 2008) (denying based on the Uniform Code of Military Justice not conflicting with the Court's reasoning or decision).

<sup>78</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2641 (2008).

<sup>79</sup> Bahroo, *supra* note 2, at 506.

<sup>80</sup> Cloud, *supra* note 6.

wasteful and useless procedure” for a child sexual abuser.<sup>81</sup> Time spent in prison does nothing to treat the offender’s sexual proclivities toward children.<sup>82</sup> These offenders need serious help in controlling their urges and leaving children alone.<sup>83</sup>

A number of treatments have been used on pedophiles and child molesters, some of which are bizarre and even seem absurd. Aversion therapy, also known as covert association or covert sensitization, is a common cognitive behavioral treatment that has been used to treat child molesters.<sup>84</sup> Here, the deviant sexual behavior or fantasy is associated with unpleasant stimuli so that the offender will associate the deviant fantasies with the unpleasant stimuli and no longer find them arousing.<sup>85</sup> Even though aversion therapy is promising for some offenders, the effects are not long lasting.<sup>86</sup> The unpleasant associations “lose their pervasive effectiveness quite quickly” and need to be strengthened continuously, which is difficult to do.<sup>87</sup>

Other treatments include directed masturbation and satiation procedures.<sup>88</sup> Directed masturbation is where an individual masturbates to pictures of adults or to adult sexual fantasies in an attempt to associate the pleasure of having an orgasm with these fantasies and images.<sup>89</sup> The hope is to increase the offender’s ability to become sexually aroused by adults.<sup>90</sup> However, this treatment is useless against the situational offender who is already attracted to adults, but still goes after children. As for the satiation procedures, there are two different types: verbal and masturbatory. Verbal satiation is where the offender is directed to say deviant fantasies out loud until it becomes boring and tedious.<sup>91</sup> Masturbatory satiation is a procedure in which the offender is directed to masturbate to deviant sexual fantasies for prolonged periods of time without orgasm.<sup>92</sup> The idea is that the uncomfortable experience will be

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<sup>81</sup> Benjamin Apfelberg et al., *A Psychiatric Study of 250 Sex Offenders*, 100 AM. J. PSYCHIATRY 762, 762 (1944).

<sup>82</sup> Bahroo, *supra* note 2, at 506.

<sup>83</sup> *Id.* at 503 (“Neither treatment nor incarceration seems to significantly affect recidivism.”).

<sup>84</sup> *Id.* at 504; W.L. Marshall, *Covert Association: A Case Demonstration with a Child Molester*, 6 CLINICAL CASE STUD. 218, 218 (June 2007).

<sup>85</sup> Bahroo, *supra* note 2, at 504 (stating that the unpleasant stimuli can be anything such as noxious odors and electric shocks); Marshall, *supra* note 84, at 218.

<sup>86</sup> Marshall, *supra* note 84, at 219.

<sup>87</sup> *Id.*

<sup>88</sup> Bahroo, *supra* note 2, at 504; N. McConaghy, *Science and the Mismanagement of Rapists and Pedophiles*, 4 PSYCHIATRY, PSYCHOL. & L. 109, 114 (1997).

<sup>89</sup> McConaghy, *supra* note 88, at 114.

<sup>90</sup> *Id.*

<sup>91</sup> Bahroo, *supra* note 2, at 504.

<sup>92</sup> *Id.*; McConaghy, *supra* note 88, at 114.

associated with the “deviant sexual interest” thereby diminishing it.<sup>93</sup> While these procedures are undoubtedly unpleasant, they appear to do little to lessen the offender’s attraction to children.<sup>94</sup>

Other treatments including anger management, conflict resolution, social skills training, and victim empathy have also been implemented.<sup>95</sup> One case study even used music therapy and drum playing to treat a child molester.<sup>96</sup> The proponents of music therapy say that it allows the offender to express himself, develop listening skills, learn self control, and reduce the offender's resistance to therapy and level of denial.<sup>97</sup> However, while the case study showed that he became more open and learned to play the drums, nothing actually indicated that the offender was less likely to sexually victimize children.<sup>98</sup>

Unfortunately, psychological and behavioral treatments alone are not effective in treating *all* pedophiles and child predators.<sup>99</sup> First of all, a number of released pedophiles will not even seek out treatment unless their urges cause them great distress or a court has forced them to undergo treatment.<sup>100</sup> Others who want help may be afraid to talk to anyone about what they have done.<sup>101</sup> Pedophiles and sexual predators who have attacked large numbers of children usually have not disclosed all of their offenses.<sup>102</sup> They have been trained to deny their offenses, being that in the legal system, further disclosure of any unknown offenses will only lead to lengthier prison sentences.<sup>103</sup> With society’s abhorrence to sexual crimes against children, it is not uncommon for many such offenders to be afraid of telling anyone about their offenses, including therapists, for fear of incarceration.<sup>104</sup> Also, a number of those who do undergo such psycho-behavioral treatment do not actually receive any

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<sup>93</sup> McConaghy, *supra* note 88, at 114.

<sup>94</sup> *Id.* at 118.

<sup>95</sup> Bahroo, *supra* note 2, at 504.

<sup>96</sup> See generally Vaughn A. Kaser, *Music Therapy Treatment of Pedophilia Using the Drum Set*, 18 ARTS IN PSYCHOTHERAPY 7 (1991).

<sup>97</sup> See *id.*

<sup>98</sup> *Id.* at 15. The author states in the conclusion that this method should be implemented to treat pedophilia and related personality disorders, but the offender’s changes in playing showed nothing more than an improvement in playing the drums, social skills, a possible change in mood swings, and possibly becoming more comfortable with the researcher or therapist in general. *Id.*

<sup>99</sup> Stone et al., *supra* note 27, at 94–95.

<sup>100</sup> Bahroo, *supra* note 2, at 503.

<sup>101</sup> Jon Kear-Colwell & Douglas P. Boer, *The Treatment of Pedophiles: Clinical Experience and the Implications of Recent Research*, 44 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 593, 594 (2000).

<sup>102</sup> *Id.*

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

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

benefit from it.<sup>105</sup> Research has revealed that while some offenders are effectively treated with just psychotherapy and behavioral reassessment therapies, this same treatment is completely ineffective on other sexual offenders.<sup>106</sup> These offenders need more than just a few therapy sessions to prevent them from reoffending.

On the more drastic side, physical castration and neurosurgery are two options that have also been considered for the treatment of child molesters.<sup>107</sup> Neurosurgery “involves removal of part of the hypothalamus to . . . decrease sexual arousal and impulsive behaviors.”<sup>108</sup> The procedure was more common in Europe than it ever was in the United States. However, it was rarely ever implemented and, in reality, has not been used in decades.<sup>109</sup> Additionally, “this procedure has a high failure rate and adverse [consequences].”<sup>110</sup> Plus, mandating that part of the offender’s brain be removed crosses ethical and moral lines.<sup>111</sup> Therefore, because brain surgery is ineffective, highly invasive, and unethical, it cannot be considered as a serious treatment for pedophiles and other child predators.

Physical castration is a drastic measure, although it is nowhere near as dangerous, ethically unsound, or constitutionally questionable as neurosurgery. Though physical castration has its advantages, a number of flaws remain. Physical castration, or orchiectomy, is a surgical procedure in which a man’s testes are removed.<sup>112</sup> This causes a dramatic drop in the levels of testosterone in the body which severely decreases a man’s sex drive.<sup>113</sup> Studies have shown that the offender will feel calmer, happier, more passive, and less likely to reoffend.<sup>114</sup> The offender is better able to suppress violent and aggressive urges making it easier for him to live in society.<sup>115</sup> Additionally, while the sexual recidivism rate for non-castrated

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<sup>105</sup> Stone et al., *supra* note 27, at 95.

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

<sup>107</sup> Bahroo, *supra* note 2, at 505.

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

<sup>109</sup> See Luk Gijs & Louis Gooren, *Hormonal and Psychopharmacological Interventions in the Treatment of Paraphilias: an Update*, 33 THE J. SEX RES. 273, 274 (Fall 1996) (going over history of and current trends of medical treatment for paraphilias).

<sup>110</sup> Bahroo, *supra* note 2, at 505.

<sup>111</sup> *Id.*

<sup>112</sup> Stone et al., *supra* note 27, at 92.

<sup>113</sup> *Id.* at 92–93. See also Robert A. Prentky, *Arousal Reduction in Sexual Offenders: A Review of Antiandrogen Interventions*, 9 SEXUAL ABUSE: J. RES. & TREATMENT 335, 335 (1997) (reporting that the testes produce 95% of testosterone in the body).

<sup>114</sup> Harrison, *supra* note 1, at 18.

<sup>115</sup> *Id.*

offenders is around 50%, the re-offense rate for a sex crime among castrated offenders is usually 1–5%.<sup>116</sup>

While physical castration proves to be highly effective, there are a number of ethical and constitutional concerns associated with it. There is no problem if a patient voluntarily undergoes such treatment completely out of their own free will, which some patients have done in order to stop their deviant sexual urges and live normal lives.<sup>117</sup> However, there are a number of problems when physical castration is statutorily mandated for those who commit such offenses. First, it is a permanent procedure.<sup>118</sup> While certain effects can be reversed by injections of testosterone, nothing can replace what was removed through this invasive surgical procedure. Physical castration is literally a life sentence.<sup>119</sup> Therefore, just like executing an innocent individual who was wrongly convicted, nothing can be done to remedy a wrongly convicted sex offender who was forced to undergo surgical castration. In addition, there are a number of adverse mental and physical side effects including metabolic changes, depression, and suicidal tendencies.<sup>120</sup> While certain states allow for sex offenders to voluntarily undergo physical

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<sup>116</sup> Prentky, *supra* note 113, at 336 (reporting results from a number of studies conducted in Europe throughout the 20th century which assessed groups of sex offenders and found sexual recidivism rates before castration were 50% in a group of 738 sex offenders and 1.4% after castration, group of 1,036 sex offenders with an 84% recidivism rate before castration and 2.3% after, 30 year follow up study of 900 people had a post castration rate of 1.1%, group of 127 offenders after 5 years who had an offense rate pre-castration of 76.8% and a post castration recidivism rate of 7.4%); Stone et al., *supra* note 27, at 93 (reporting that studies of recidivism rates for sexually castrated offenders found pre surgical and non castration rates of sexual recidivism were 46% and 58% and rates for those castrated were only 3% and 2.9%); Rosler & Witztum, *supra* note 25, at 44 (claiming that “post castration recidivism rates are among the lowest rates for all forms of treatment of paraphilias” and find that in 11 European case studies that 3,589 sex offenders who were castrated had a mean sexual recidivism rate of 2.2% with findings ranging from 0–7.4%); Harrison, *supra* note 1, at 18–19 (reporting on numerous case studies which found that from 1930–1969 over 400 castrated sex offenders had only a 3% rate of sexually reoffending, group of 224 in 1960 were castrated with a 3.5% sexual recidivism rate, in 1968 a study found that of 18 castrated sex offenders there was no recidivism, in 1989 a comparison study of 99 castrated and 35 non-castrated sex offenders found that 46% of non castrated offenders had sexually reoffended as opposed to only 3% of castrated offenders).

<sup>117</sup> See Harrison, *supra* note 1, at 19. (discussing a sex offender in England who wanted to be castrated to offset reoffending. The prison would not allow it, but after going on a 42 day hunger strike and trying to do the operation himself, he was allowed to get the operation which he paid for out of his own pocket. He claims that he now has no sexual urges and feels that the procedure has stopped him from sexually abusing at least four or five children).

<sup>118</sup> *Id.* at 19.

<sup>119</sup> *Id.*; see *infra* note 229.

<sup>120</sup> Stone et al., *supra* note 27, at 93 (pointing out that side effects include changes in metabolic processes, loss of protein, changed pituitary function, weight fluctuation, loss of calcium in bones, hot flashes and perspiration, loss of body hair, depression, suicidal tendencies, and indifference to life).

castration to avoid longer sentences or chemical castration, no state *requires* the offender to undergo physical castration.<sup>121</sup> Forcing someone to undergo a permanent and life altering surgical procedure challenges what is ethical and constitutional.<sup>122</sup>

### III. CHEMICAL CASTRATION: A NEW HOPE

An almost perfect solution to keep child molesters from reoffending would be a treatment with the effectiveness of surgical castration, but without the ethical dilemmas. This solution is chemical castration, which a number of states have already implemented.<sup>123</sup> Many people find any type of castration an unsettling punishment due to its improper uses throughout history.<sup>124</sup> However, chemical castration is one of the most effective and least restrictive ways to help treat child predators and keep children safe.

#### A. The Why & How of Chemical Castration

Chemical castration has been experimented with ever since the 1940's with the use of anti-androgens to lower the testosterone levels of sexually dangerous males.<sup>125</sup> About two decades later Dr. John Money became the first person in the United States to administer the anti-androgen drug Medroxyprogesterone Acetate (MPA) to sex offenders.<sup>126</sup> While other chemical agents have been administered to such offenders throughout the world, MPA is the most commonly administered drug in the U.S. for the purposes of chemical castration.<sup>127</sup> In fact, the MPA is administered through injections of the drug Depo Provera, which is used by many women as a hormonal

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<sup>121</sup> See *infra* notes 159, 160.

<sup>122</sup> U.S. CONST. amend. VIII.

<sup>123</sup> See *infra* Part IV.B.

<sup>124</sup> See *Buck v. Bell*, 274 U.S. 200 (1927) (upholding laws that allowed for the sterilization of those declared to be imbeciles and mentally defective as it was thought to promote the general welfare of society. The offspring of these individuals would only fall into lives of crime and so this law prevents the continuous breeding of imbeciles); Mary Ann Farkas & Amy Stichman, *Sex Offender Laws: Can Treatment, Punishment, Incapacitation, and Public Safety Be Reconciled?*, 27 CRIM. JUST. REV. 256, 267 (2002) (describing that in Colonial times, black slaves could be castrated for merely having sex with white women. Also, in the eugenics movement of the Nineteenth Century, castration and sterilization was permitted in America for criminals and the mentally ill).

<sup>125</sup> Scott & Holmberg, *supra* note 12, at 502.

<sup>126</sup> *Id.*

<sup>127</sup> Prentky, *supra* note 113, at 341–42, 338 (cyproterone is commonly is used in Great Britain and Canada, but MPA is the “agent of choice” in the United States. Serotonin re-uptake inhibitors, LHRH agonists, and gonadotropin releasing hormone is also used for chemical castration purposes). See also Gijs & Gooren, *supra* note 109, at 274.

contraceptive.<sup>128</sup> The reason it has such different effects on men that undergo such treatment is that women only receive 150 mg of the drug every 3 months.<sup>129</sup> Sex offenders receive the drug every week, usually in higher doses.<sup>130</sup>

MPA is able to reduce the occurrence of sexual imagery and lessen the offender's level of sexual desire.<sup>131</sup> MPA is administered through weekly intramuscular injections of 100 to 1,000 milligrams of the drug, depending on the needs of the offender.<sup>132</sup> The MPA inhibits the release of the follicle stimulating hormone and the lutenizing hormone from the brain's anterior pituitary gland.<sup>133</sup> Essentially, the drug causes the brain to believe the body has enough testosterone and so it does not allow the testicles to produce anymore.<sup>134</sup> The effect is a reduction in the levels of testosterone in the offender's blood down to that of a pre-pubescent male within one to two weeks; this low level of testosterone greatly lowers the offender's sex drive.<sup>135</sup> The offender is then temporarily impotent and, when the drug is in full effect, there is a reduction in orgasm, sperm production, sexual frustration, and the frequency and satisfaction of masturbation.<sup>136</sup> One of the most appealing aspects of chemical castration is that the offender is made calmer and more responsive to psycho-behavioral treatment.<sup>137</sup> The injections suppress the offender's sexual urge and desire as well as make it easier for the patient to concentrate on therapy, control his behavior, and prevent relapse.<sup>138</sup>

The drug has the incredible effect of keeping the pedophile or child molester from offending, but scientists disagree as to how long the drug needs to be administered.<sup>139</sup> Some researchers have stated that the hormone therapy should be for a few months, others for up to five years, and some researchers argue

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<sup>128</sup> *Depo-Provera*, DEPOPROVERA, [http://media.pfizer.com/files/products/uspi\\_depo\\_provera\\_contraceptive.pdf](http://media.pfizer.com/files/products/uspi_depo_provera_contraceptive.pdf) (last visited Nov. 7, 2009).

<sup>129</sup> *Id.*; Carol Levine, *Depo-Provera and Contraceptive Risk: A Case Study of Values in Conflict*, 9 HASTINGS CENTER REP. 8, 9 (1979).

<sup>130</sup> Gijs & Gooren, *supra* note 109, at 275.

<sup>131</sup> Peter J. Gimino, III, *Mandatory Chemical Castration for Perpetrators of Sex Offenses Against Children: Following California's Lead*, 25 PEPP. L. REV. 67, 74-75 (1997).

<sup>132</sup> Gijs & Gooren, *supra* note 109, at 275 (stating that the dosage varies with the most common dosage being between 300 and 500 milligrams). *See also* Rosler & Witztum, *supra* note 25, at 47.

<sup>133</sup> Gimino, *supra* note 131, at 74.

<sup>134</sup> Harrison, *supra* note 1, at 20; Gimino, *supra* note 131, at 74.

<sup>135</sup> Harrison, *supra* note 1, at 20; Rosler & Witztum, *supra* note 25, at 47; Gimino, *supra* note 131, at 74.

<sup>136</sup> Harrison, *supra* note 1, at 20.

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

<sup>138</sup> *Id.*

<sup>139</sup> Gijs & Gooren, *supra* note 109, at 275.



that the taking of these medications should never stop.<sup>140</sup> The main argument for continuing the treatment is the fact that the effects of the drugs, especially MPA, are reversible once weekly injections stop.<sup>141</sup> It is said that in order to properly treat the offender, they must undergo behavioral therapy *as well as* the hormonal treatments in order to treat the problem as a whole.<sup>142</sup> The idea is that proper treatment will treat the person and not just try to get rid of the offending behavior.<sup>143</sup> Either way, there is no doubt that the administration of these drugs is effective and has kept numerous offenders from sexually victimizing children.<sup>144</sup> As stated by one released offender undergoing hormone therapy treatments, “I realised [sic] that I could walk down the street, see boys I found sexually attractive, and not be possessed by thoughts about having sex with them . . . It took that edge off.”<sup>145</sup>

#### B. Recent Legislation

Recognizing the overall societal benefit, a number of states have already enacted chemical castration statutes for certain sex offenders. California was the first state to implement a chemical castration statute in 1996 when it made the procedure a condition of probation for certain offenders.<sup>146</sup> Today, a number of states have followed California’s example including

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<sup>140</sup> *Id.*

<sup>141</sup> Harrison, *supra* note 1, at 21 (explaining that the depo provera will remain in the bloodstream for up to eight weeks, but the effects will “significantly fall within days”); Rosler & Witztum, *supra* note 25, at 46 (The effects are “dose dependant”); Farkas & Stichman, *supra* note 124, at 267 (stating that studies have shown that the effect occurred as long as the offender continued with the injections).

<sup>142</sup> Harrison, *supra* note 1, at 20; Kear-Colwell & Boer, *supra* note 101, at 603.

<sup>143</sup> Kear-Colwell & Boer, *supra* note 101, at 603.

<sup>144</sup> Cloud, *supra* note 6 (citing a 1991 study of 400 people who underwent physical castration showed that only 1.2% had reoffended. In a study done by the St. Luke Institute following 121 pedophilic priests who underwent the treatment, only 3 relapsed); Stone et al., *supra* note 27, at 96–97 (stating that the treatment affects “both deviant and non deviant sexual behavior” as there is a general suppression of sexual drive, urges, and fantasies. There are statistically significant reductions in the frequency of paraphilic behaviors with the use of MPA with later studies confirming these benefits); Rosler & Witztum, *supra* note 25, at 45, 47 (reporting that chemical castration is a highly effective treatment for sex offenders since “MPA is effective in controlling [psycho sexual disorders], particularly pedophilia”); Prentky, *supra* note 113, at 338 (arguing that even in the very early studies of MPA used to treat sex offenders done in the 1960’s, MPA reduced a number of criminal sexual behaviors. The drug was found to have a strong effect on sexual behavior, sexual desire, and helped the offenders control their behavior, especially when implemented with therapy); Harrison, *supra* note 1, at 24. (citing that in a 1994 study, in a group of 629 men who underwent chemical castration there was only an 8% recidivism rate after 5 years. Research in the area of chemical castration is incredibly optimistic and some feel that the treatment will work for most sex offenders, especially when the individual taking the drug is also going through behavioral therapy).

<sup>145</sup> Harrison, *supra* note 1, at 25.

<sup>146</sup> CAL. PENAL CODE § 645 (Deering 2008); Gimino, *supra* note 131, at 70, 79.

Montana,<sup>147</sup> Iowa,<sup>148</sup> Wisconsin,<sup>149</sup> Louisiana,<sup>150</sup> Oregon,<sup>151</sup> and Florida.<sup>152</sup> In fact a number of states have gone even further than California in their adoption of such statutes. California requires offenders to undergo chemical castration if they are convicted of multiple offenses against a victim under the age of thirteen.<sup>153</sup> Louisiana, Wisconsin and Iowa also require that the offenses must be against a child for MPA injections to be implemented,<sup>154</sup> but Florida,<sup>155</sup> Oregon,<sup>156</sup> and Montana have no age requirement for the victim.<sup>157</sup> While some states leave it up to the court's discretion, California, Iowa, and Florida all make MPA injections a mandatory condition of release for those with multiple convictions.<sup>158</sup> In addition, Iowa, Louisiana, California, and Florida allow offenders to avoid MPA treatments if the offender voluntarily undergoes physical castration.<sup>159</sup> Plus, Texas *only* gives the offender the decision to undergo voluntary surgical castration as a condition of release and does not offer chemical castration as an option.<sup>160</sup> These states have all realized that more than just imprisonment is necessary to keep a sex offender from re-offending, and most of them realize that chemical castration is the most proper means to achieve that end.

### C. Chemical Castration vs. Incarceration

Another reason why chemical castration is so appealing is that it allows the offender to be out of prison and comes at a cost that is exponentially lower than incarceration. In 1985, state governments spent \$9 billion on corrections.<sup>161</sup> In 1993, state, local, and federal governments combined spent almost \$100 billion on the justice system and, in 1996, states spent about \$27

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<sup>147</sup> MONT. CODE ANN. § 45-5-512 (2007).

<sup>148</sup> IOWA CODE ANN. § 903B.1 (West 2003).

<sup>149</sup> WIS. STAT. ANN. § 302.11 (West 2005).

<sup>150</sup> LA. REV. STAT. ANN. § 15:538 (West 2005).

<sup>151</sup> OR. REV. STAT. ANN. § 144.625 (West 2005).

<sup>152</sup> FLA. STAT. ANN. § 794.0235 (West 2007).

<sup>153</sup> CAL. PENAL CODE § 645 (Deering 2008).

<sup>154</sup> LA. REV. STAT. ANN. § 15:538 (2008) (offenses against a "minor" under 12 years of age); WIS. STAT. ANN. § 302.11 (West 2005) (required for "serious child sex offenders"); IOWA CODE ANN. § 903B.10 (West 2008).

<sup>155</sup> FLA. STAT. ANN. §§ 794.0235, 794.011 (West 2007).

<sup>156</sup> OR. REV. STAT. ANN. § 144.625 (West 2008).

<sup>157</sup> MONT. CODE ANN. § 45-5-512 (2007); MONT. CODE ANN. § 45-5-502 (2007); MONT. CODE ANN. § 45-5-503 (2007); MONT. CODE ANN. § 45-5-507 (2007).

<sup>158</sup> CAL. PENAL CODE § 645 (Deering 2008); FLA. STAT. ANN. § 794.0235 (West 2007); IOWA CODE ANN. § 903B.10 (West 2003).

<sup>159</sup> CAL. PENAL CODE § 645 (Deering 2008); LA. REV. STAT. ANN. § 15:538 (West 2005); FLA. STAT. ANN. § 794.0235 (West 2007); IOWA CODE ANN. § 903B.10 (West 2003).

<sup>160</sup> TEX. GOV'T CODE ANN. § 501.061 (Vernon 2004).

<sup>161</sup> *Developments in the Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1892 (1998).

billion on corrections.<sup>162</sup> The average cost of housing and caring for an inmate is approximately \$20,000 per inmate per year.<sup>163</sup> Furthermore, the actual amount spent on incarceration is much higher being that costs for projects such as building new prisons are not included into agency budgets.<sup>164</sup> With these costs, keep in mind that between 1980 and 1994 alone, the population of imprisoned sex offenders grew approximately 330%.<sup>165</sup> Of these offenders, two-thirds sexually victimized minors and more than half of that population went after children under twelve years of age.<sup>166</sup>

Even when such offenders are released from prison, many of them are involuntarily committed to hospitals and continue to cost the state money.<sup>167</sup> Ever since the 1930's there have been laws pertaining to "sexual psychopaths" or "sexually violent predators" that require that such offenders are institutionalized after they have served their time in prison or after being found not competent to stand trial.<sup>168</sup> Today, when an offender is placed in one of these institutions they can regularly petition for release.<sup>169</sup> Nevertheless, the offender is usually held until both a psychologist and the court agree that the individual's "personality disorder" or "brain abnormality" has "changed" so that he is "deemed safe" for release.<sup>170</sup> There are currently seventeen states that fund the involuntary commitment of such individuals.<sup>171</sup> The cost of the programs varies between the states and the yearly cost ranges from \$500,000–\$45 million.<sup>172</sup>

As of 2002, weekly injections of MPA cost \$160 per month.<sup>173</sup> While this is the cost of the drug alone and does not include additional costs involved with probation or further therapy, the difference in cost remains phenomenal as the average cost of one inmate's incarceration is over \$1,660 per month.<sup>174</sup> This difference is magnified when coupled with the fact that incarceration can be fifteen times more expensive per prisoner

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 1893.

<sup>164</sup> *Id.* at 1893–94.

<sup>165</sup> Stone et al., *supra* note 27, at 87.

<sup>166</sup> *Id.*

<sup>167</sup> See Farkas & Stichman, *supra* note 124, at 258–59.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 259.

<sup>170</sup> *Id.* at 259–60.

<sup>171</sup> WASH. ST. INST. FOR PUB. POL'Y, INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: COMPARING STATE LAWS, Doc. No. 05-03-1101, at 1 (2005).

<sup>172</sup> *Id.* at 2, 6.

<sup>173</sup> Harrison, *supra* note 1, at 20.

<sup>174</sup> *Id.*; see *supra* notes 163, 173 and accompanying text.

than for those on parole or probation.<sup>175</sup> In addition, Iowa and Louisiana require the offender to pay for his own treatment once released to lower costs even further.<sup>176</sup> Implementing chemical castration as a condition of release could allow prisoners to get out of prison sooner, help them control their urges, get jobs, and reduce prison crowding and spending. In fact, it has even been stated that “0.5 to 0.7% of gross domestic product is lost by incarcerating felons rather than placing them in jobs.”<sup>177</sup> Even the American Bar Association endorses probation over imprisonment, as cited in *State v. Christopher*, finding it to be:

a desirable disposition . . . [as it] maximizes the liberty of the individual while vindicating the authority of the court; it eases the reintegration of the offender into the community; it minimizes the hidden costs that imprisonment places on the family of the offender; and is it the most economic form of correctional supervision.<sup>178</sup>

The *Christopher* court agreed that a good reason for granting probation was to “alleviate the overcrowding in our prisons by not incarcerating those people with whom the state can adequately deal in other ways.”<sup>179</sup> Requiring chemical castration for released child molesters and pedophiles is the most logical choice in to drive down costs and recidivism rates as well as help get some of these people out of prison to become fully functioning members of society.

#### IV. THE CONSTITUTION & WHY CHEMICAL CASTRATION IS PERFECTLY ACCEPTABLE

The United States Supreme Court has never directly assessed the constitutionality of chemical castration. While some find the administration of MPA to sex offenders to be a questionable procedure, chemical castration is not harsh enough to be classified as cruel and unusual punishment. Because it is so effective, the effects are reversible, and it deals with the safety of children—an unquestionably compelling state interest—this procedure is not in violation of the Constitution.<sup>180</sup>

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<sup>175</sup> *Developments in the Law, supra* note 161, at 1893.

<sup>176</sup> IOWA CODE ANN. § 903B.10(6) (West 2003); LA. REV. STAT. ANN. § 15:538(C)(5) (West 2005).

<sup>177</sup> *Developments in the Law, supra* note 161, at 1894.

<sup>178</sup> *State v. Christopher*, 652 P.2d 1031, 1033 (Ariz. 1982) (citing the ABA’s Standards for Criminal Justice).

<sup>179</sup> *Id.*

<sup>180</sup> *See supra* notes 2, 3.

## A. Chemical Castration Is Not Cruel &amp; Unusual Punishment

According to the Eighth Amendment of the United States Constitution, the federal government prohibits any punishment that can be categorized as “cruel and unusual”.<sup>181</sup> In 1972, in *Furman v. Georgia*, the U.S. Supreme Court held that excessive punishments which are “greatly disproportioned to the offenses charged” constitute cruel and unusual punishment in violation of the Eighth Amendment.<sup>182</sup> Therefore, any punishment that is grossly excessive to the crime charged is prohibited.<sup>183</sup>

The only court in history that found chemical castration to be a disproportionate sentence was the Michigan Supreme Court in *People v. Gauntlett* in 1984.<sup>184</sup> In *Gauntlett*, MPA was going to be administered by injections of Depo-Provera to a man who was convicted of raping his fourteen-year old stepdaughter and molesting his twelve year old stepson.<sup>185</sup> The court believed that administering these injections was an “unlawful condition of probation.”<sup>186</sup> This is because the Food and Drug Administration (FDA) had not approved the drug when the decision was handed down in 1984.<sup>187</sup> At that time it “had not [yet] gained acceptance in the medical community as a safe and reliable medical procedure.”<sup>188</sup> Today, however, this argument has no merit because the drug was deemed safe and approved by the FDA in October of 1992.<sup>189</sup>

Even though the drug is safe, there are still some unpleasant side effects of chemical castration.<sup>190</sup> These include, but are not limited to, loss in bone density, weight gain, loss of body hair, depression, and fatigue.<sup>191</sup> The majority of these side effects are reversible and the most severe ones are rarely experienced.<sup>192</sup>

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<sup>181</sup> U.S. CONST. amend. VIII.

<sup>182</sup> *Furman v. Georgia*, 408 U.S. 238, 279–80 (1972) (Douglas, J., concurring).

<sup>183</sup> *See id.*

<sup>184</sup> *People v. Gauntlett*, 352 N.W.2d 310, 318 (Mich. Ct. App. 1984).

<sup>185</sup> *Id.* at 311, 313.

<sup>186</sup> *Id.* at 316–17.

<sup>187</sup> *Id.* at 315.

<sup>188</sup> *Id.* at 316.

<sup>189</sup> *U.S. Food and Drug Administration: All Approvals October 1992*, Fda.Gov, <http://www.accessdata.fda.gov/scripts/cder/drugsatfda/index.cfm?fuseaction=Reports.MonthlyApprovalsAll> (last visited September 14, 2009).

<sup>190</sup> Rosler & Witztum, *supra* note 25, at 47 (declaring that side effects include “weight gain, malaise, nightmares, headaches, muscular cramps, dyspepsia, gallstones, diabetes mellitus,” and a decrease in mineral bone density); Harrison, *supra* note 1, at 21 (reporting that side effects also include depression, a decrease in body hair, hypoglycemia, insomnia, and difficulty breathing).

<sup>191</sup> *Id.*

<sup>192</sup> Harrison, *supra*, note 1, at 21; Gijs & Gooren, *supra* note 109, at 276 (explaining that when the treatment was stopped, “the adverse side effects with the exception of diabetes, disappeared”).

This is one of the reasons that the dosage of MPA given to the offender is often kept as low as possible.<sup>193</sup> While it is necessary to put an end to deviant sexual behavior, the offender's safety is not disregarded.<sup>194</sup> Even though some offenders may receive the injections for the rest of their lives, the dosage may be lowered over time if deemed necessary or if the offender shows improvement.<sup>195</sup> Courts take these side effects into account in ordering individuals to undergo such chemical therapy.<sup>196</sup> If the courts simply forced individuals to undergo or continue treatment that would result in serious harm, then the procedure could be seen as cruel and unusual punishment.<sup>197</sup>

In addition to protecting the individual's health, states with mandatory chemical castration statutes have procedural safeguards in place to protect the offenders from abuse.<sup>198</sup> Florida, for example, does not allow the mandatory administration of MPA injections to be carried out unless the procedural requirements of the state's chemical castration statute have been followed exactly.<sup>199</sup> If the procedure has not been strictly followed, even slightly, the court will not uphold that portion of the offender's sentence.<sup>200</sup> The courts realize that chemical castration is a serious matter and do not nonchalantly impose such treatment on individuals.

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<sup>193</sup> Gijs & Gooren, *supra* note 109, at 275.

<sup>194</sup> *Id.* at 275 (noting that doses are kept as low as possible to keep the side effects to a minimum).

<sup>195</sup> *Id.*

<sup>196</sup> *People v. Wheeler*, No. F051518, 2008 WL 2502521 at \*9 (Cal. App. 5 Dist. June 24, 2008) (describing that Wheeler was taken off of MPA injections by his doctor because the drugs cause bone density loss which would have been dangerous for him as he already suffered from HIV); Florida only allows the MPA treatments to be administered to those who are determined to be appropriate candidates for the procedure by a medical expert. FLA. STAT. ANN. § 794.0235(2)(a) (West 2007); Oregon requires that screenings are done to determine that the individual is suited for such therapy upon release. OR. REV. STAT. ANN. § 144.625(2) (West 2003); Montana allows that the treatment only *may* be required. MONT. CODE ANN. § 45-5-512(1)-(2) (West 2007).

<sup>197</sup> See *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008); *Furman v. Georgia*, 408 U.S. 238, 280 (1972). An individual who is sentenced to MPA injections where the injections would actually cause him serious injury or death would be analogous to sentencing him to a slow death sentence which is already and therefore excessive for the crime of raping or molesting a child without taking the child's life. *Id.*

<sup>198</sup> WIS. STAT. ANN. § 302.11 (West 2005) (undergoing the procedure is a voluntary choice of the individual, but they will not be released on time if they refuse the treatment); Oregon only allows those who are most likely to benefit from it to undergo the procedure. OR. REV. STAT. ANN. § 144.625 (West 2003); Florida requires that the determination of whether the individual can receive the injections must be done within sixty days of imposing the sentence and a court order shall specify the duration of treatment. FLA. STAT. ANN. § 794.0235 (West 2007).

<sup>199</sup> FLA. STAT. ANN. § 794.0235 (West 2007); *Boone v. State*, 933 So.2d 1252, 1254 (Fla. Dist. Ct. App. 2006); *Houston v. State*, 852 So.2d 425, 428 (Fla. Dist. Ct. App. 2003).

<sup>200</sup> *Boone*, 933 So.2d at 1254; *Houston*, 852 So.2d at 428.

Those against the treatment may argue that it is not wholly effective.<sup>201</sup> While findings so far have been impressive, there has not been any study with results showing that 100% of those who underwent the procedure did not re-offend.<sup>202</sup> Therefore, *some* people who receive these injections will not be affected by them.<sup>203</sup> However, the drug is so effective that a vast majority of people who do receive the injections will benefit from them.<sup>204</sup> As one offender stated, “the only way the streets will ever be safe is to put me on a course of injections where I can be controlled and I can be switched off.”<sup>205</sup> Therefore, even if certain offenders do not respond positively to the treatment, it is still a treatment that works for a majority of offenders and will save many children from the horror of sexual molestation.<sup>206</sup>

In addition, a majority of jurisdictions that use MPA injections require offenders to receive the drug until it is deemed unnecessary.<sup>207</sup> So if a person is wrongly convicted of an offense, it is unlikely that he will have to take the drugs for the rest of his life. A wrongly convicted individual who must undergo MPA injections as part of his parole or probation is taken out of prison: he might receive the injections for a while, but will be taken off the drug once it is realized that he does not need it. His sexual functioning will return to normal and any other side effects will reverse themselves over time.<sup>208</sup> This is in direct opposition to a wrongly convicted individual who receives a life sentence or the death penalty. In most jurisdictions that administer MPA injections, the wrongly convicted child molester gets out of prison and undergoes injections that he will be taken off of eventually.

Chemical castration is not a disproportionate punishment for the crime of raping or molesting a child. This treatment is nowhere near as harsh as putting a person to death for the rape of a child or even requiring a person to undergo physical castration.<sup>209</sup> In fact, administering weekly injections that reduce a person’s sex drive is more humane than a number of other treatments that have been utilized.<sup>210</sup> Additionally, one of

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<sup>201</sup> See Farkas & Stichman, *supra* note 124, at 270 (“Not all sex offenders are suitable candidates.”).

<sup>202</sup> See *supra* note 144 and accompanying text.

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

<sup>204</sup> *Id.*

<sup>205</sup> Harrison, *supra* note 1, at 26.

<sup>206</sup> See *supra* note 144 and accompanying text.

<sup>207</sup> See *supra* notes 151–153, 155 and accompanying text.

<sup>208</sup> See *supra* notes 141, 194.

<sup>209</sup> See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (see, e.g., Louisiana, South Carolina, Montana, Georgia and Oklahoma). See also *supra* notes 112, 118, 119 and accompanying text.

<sup>210</sup> See *supra* Part III.C. See also *supra* note 85 and accompanying text.

the main reasons the Supreme Court held that the death penalty was an excessive punishment for the rape of a child was because the crime did not involve the taking of a life.<sup>211</sup> The only thing chemical castration takes from the offender is his sexual desire.<sup>212</sup> Therefore, it is a perfectly proportionate penalty as it is this overwhelming desire that causes the offender to sexually attack innocent children.<sup>213</sup> Chemical castration is a serious penalty, but not a disproportionate one.

Chemical castration is the answer to the question of what to do with child molesters and pedophiles. It is unconstitutional to execute such individuals and it is incredibly expensive to keep them imprisoned or involuntarily committed for the rest of their lives.<sup>214</sup> There is a very high risk that such an offender will end up back in prison, and many treatments that have already been attempted do not have high enough success rates.<sup>215</sup> In *Trop v. Dulles*, the Supreme Court declared that the law must “draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>216</sup> In today’s maturing society, legislation and failed treatments have led us to chemical castration. Therefore, chemical castration is, in fact, the answer. This treatment is what the “standards of decency,” from which the law is to draw its meaning, have evolved into regarding the treatment of child molesters and pedophiles. These crimes are reprehensible, but in today’s society it is necessary to turn to such treatment in order to actually solve the problem rather than simply dispose of the offenders.<sup>217</sup>

#### B. The Fourteenth Amendment’s Right to Privacy

The Due Process Clause of the Fourteenth Amendment guarantees that no state shall “deprive any person of life, liberty or property without due process of law.”<sup>218</sup> In addition, the Supreme Court has interpreted the Fourteenth Amendment’s

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<sup>211</sup> *Kennedy*, 128 S. Ct. at 2649–50.

<sup>212</sup> See *supra* note 131 and accompanying text.

<sup>213</sup> See *supra* note 35–38 and accompanying text.

<sup>214</sup> *Kennedy*, 128 S. Ct. 2641. See *supra* Part IV.C.

<sup>215</sup> See *supra* Parts II.B. & III.C.

<sup>216</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>217</sup> *Kear-Colwell & Boer, supra* note 101, at 603 (“The aim of treatment is to address the pedophile’s problems in a more holistic manner, as opposed to simply treating the offending behavior as the only issue and ignoring the person who generates the behavior.”); *Cloud, supra* note 6 (stating that most people want to just lock up pedophiles, but most offenders are “tortured by these temptations and relieved we can do something for them”).

<sup>218</sup> U.S. CONST. amend. XIV § 1.



liberty interests to include an individual's right to privacy.<sup>219</sup> This makes it slightly problematic to sentence individuals to undergo chemical castration. The procedure infringes on their fundamental right to have a child, as well as the right to refuse medical treatment, both of which are protected under the Fourteenth Amendment's right to privacy.<sup>220</sup> However, making chemical castration a mandatory condition of probation or parole does not unconstitutionally burden the rights of the offender. The state has a legitimate interest in the safety of its children and chemical castration is the least restrictive way to advance such an interest. Therefore, while a convicted child molester's constitutional rights are slightly burdened in sentencing him to undergo the procedure, they are not violated.

### 1. The Right to Refuse Medical Treatment

The Fourteenth Amendment's right to privacy includes the right of a competent person to refuse treatment as a liberty interest protected under the Due Process Clause.<sup>221</sup> In assessing whether a regulation unconstitutionally infringes upon this right, it is necessary to balance the individual's liberty interest against the interest of the state.<sup>222</sup> For example, "if a patient cannot be confined without endangering other[s] . . . and yet he refuses medication that would curb his dangerous tendencies, this would be one factor to weigh in overriding his decision to refuse."<sup>223</sup>

In *Washington v. Harper*, the Supreme Court officially declared that the right to refuse medical treatment is a liberty interest protected under the right to privacy through the Due Process Clause of the Fourteenth Amendment.<sup>224</sup> While it is not a fundamental right that can only be burdened by a compelling state interest, the Court held in *Harper* that a higher standard than rational basis review should be implemented.<sup>225</sup> The

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<sup>219</sup> *Roe v. Wade*, 410 U.S. 113, 152 (1973) ("The Constitution does not explicitly mention any right of privacy . . . [but] the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.").

<sup>220</sup> Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 39-52 (1990); Jason O. Runckel, *Abuse it and Lose it, a Look at California's Mandatory Chemical Castration Law*, 28 PAC. L.J. 547, 562-67 (1997); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (stating that the right to refuse medical treatment is constitutionally protected); *Griswold v. Conn.*, 381 U.S. 479 (1965).

<sup>221</sup> *Cruzan v. Dir., Miss. Dep't of Mental Health*, 497 U.S. 261, 278 (1990).

<sup>222</sup> *Id.* at 279.

<sup>223</sup> *Rennie v. Klein*, 462 F. Supp. 1131, 1145 (D. N.J. 1978).

<sup>224</sup> *Harper*, 494 U.S. at 221-22.

<sup>225</sup> *See id.* at 223; Fitzgerald, *supra* note 220, at 48; Runckel, *supra* note 220, at 576.

Supreme Court declared here that in determining if an incarcerated individual could be forcibly medicated, it is necessary that such regulations be “reasonably related to the penological interests.”<sup>226</sup> If the offender is fully competent, then the Fourteenth Amendment gives the offender the right to refuse the MPA injections.<sup>227</sup> Incidentally, while incarcerated, a child molester does not pose a threat to those around him or himself.<sup>228</sup> It is only once he is back in society and living in the community that he represents a threat to others.<sup>229</sup> It is upon the offender’s release that he poses a very serious threat to the community.<sup>230</sup> In this case, the State’s interest in protecting children from sexual attacks justifies the mandatory imposition of the treatment for these offenders and there is no doubt that such a treatment is rationally related to the “penological interest.”<sup>231</sup>

## 2. The Right to Have a Child

In *Skinner v. Oklahoma*, the Supreme Court first recognized that everyone has the right to have children.<sup>232</sup> The court stated that procreation is “one of the most basic civil rights of man” which is “fundamental to the very existence and survival of the race.”<sup>233</sup> Years later in *Griswold v. Connecticut*, the Court declared that there is a right to privacy for married individuals that is protected under the Fourteenth Amendment.<sup>234</sup> This decision invalidated a state law that illegalized contraceptives as it overly invaded the privacy rights of married couples and infringed upon their fundamental right to decide whether or not to have a child.<sup>235</sup> This right to privacy was extended to all individuals in *Eisenstadt v. Baird*.<sup>236</sup> In *Eisenstadt*, the Court ruled that a state law which allowed the distribution of contraceptives to married couples to prevent pregnancy, but not to unmarried individuals for the same reason, violated the Equal Protection Clause of the Fourteenth Amendment.<sup>237</sup> The Court stated that a married couple is not an entity on its own, but is merely “an association of two individuals.”<sup>238</sup> The Court went on

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<sup>226</sup> *Harper*, 494 U.S. at 223.

<sup>227</sup> *Id.* at 221.

<sup>228</sup> Fitzgerald, *supra* note 220, at 49.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 50.

<sup>232</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

<sup>233</sup> *Id.* at 541.

<sup>234</sup> *Griswold v. Conn.*, 381 U.S. 479 (1965).

<sup>235</sup> *Id.*

<sup>236</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 453.

to state that “if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>239</sup>

This right to privacy was again extended in 1973 in *Roe v. Wade*.<sup>240</sup> In *Roe*, the Court ruled that the fundamental right to privacy was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>241</sup> While a woman’s fundamental right to privacy included the right to choose, the state could constrain this right as long as it had a compelling state interest allowing the constraint to survive a strict scrutiny standard of review.<sup>242</sup> The Court held that a woman was not entitled to terminate her pregnancy at any time or for whatever reason she wished.<sup>243</sup> At some point the state’s interest in the protection of fetal life may “become dominant.”<sup>244</sup> The state’s interest reaches a compelling level when it is protecting the unborn child at the stage of viability where the fetus is capable of surviving outside of the mother’s womb.<sup>245</sup> Here the Court gave the states a way to try to implement regulations on a woman’s constitutionally protected right to an abortion.<sup>246</sup>

Decades later, the Court used the same reasoning in *Gonzales v. Carhart* in upholding Congress’ 2003 ban on partial birth abortion as constitutional.<sup>247</sup> This decision effectively banned women from having abortions in the third trimester of their pregnancy.<sup>248</sup> In ruling on *Carhart*, the Court heavily considered the health and life of the unborn child.<sup>249</sup> In

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<sup>239</sup> *Id.*

<sup>240</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>241</sup> *Id.* at 153.

<sup>242</sup> *Id.* at 155.

<sup>243</sup> *Id.* at 153.

<sup>244</sup> *Id.* at 155.

<sup>245</sup> *Id.* at 163.

<sup>246</sup> *Id.* at 153–55.

<sup>247</sup> *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007). *See generally* 18 U.S.C. § 1531 (2006) (banning abortions done at the end of the second and into the third trimester where the fetus has reached the age of viability. The abortion is performed delivering most of the fetus and then performing an overt act to kill the fetus).

<sup>248</sup> A woman cannot undergo partial birth abortion at any time unless her life is in danger. 18 U.S.C. § 1531; Telephone Interview with Hotline Operator, Birth Choice Health Clinics (Jan. 10, 2009) (arguing that a partial birth abortion is the only way to perform an abortion once a woman is in her third trimester due to the size of the fetus and the necessary dilation of the woman’s cervix. Today it is only permitted when the life of the mother is in danger. However, in these situations it is more common to induce labor).

<sup>249</sup> *Carhart*, 127 S. Ct. at 1626 (keeping intact the decision in *Roe v. Wade* that a woman has the right to an abortion within the first two trimesters as there are other available abortion procedures).

implementing the ban, Congress found partial birth abortion to be a “gruesome and inhumane procedure that is never medically necessary and should be prohibited.”<sup>250</sup> The Court found that this type of a procedure had the “power to devalue human life” and requires specific regulations due to the moral and ethical concerns that justify such additional provisions.<sup>251</sup> The Court supported Congress’ creation of a bright line rule to distinguish abortion from infanticide as it found the two become very similar as the pregnancy goes farther along.<sup>252</sup> So while a woman still has a constitutionally protected right to an abortion, her rights are sometimes outweighed by the life of the unborn child.<sup>253</sup> In dealing with such late term abortions, this decision was not about the individual bodily autonomy of the mother or her right to decide whether or not to bear children.<sup>254</sup> This decision was, in large part, about the life of the unborn child.<sup>255</sup>

The rationale in *Carhart* is analogous to the justification for administering MPA injections to convicted child molesters and pedophiles. In dealing with the treatment of child sexual predators, we are not so concerned with the rights or bodily autonomy of the offender.<sup>256</sup> While the offender’s rights and needs must be considered, the main point of treating these offenders is to end the sexual victimization of children.<sup>257</sup> Therefore, the administration of the treatment is very much for the child’s safety.<sup>258</sup> A woman has the right to have an abortion in the earlier stages of her pregnancy.<sup>259</sup> Once she enters into the last few months of her pregnancy, the state has stripped her of her right to choose whether or not to have a child.<sup>260</sup> It is at that moment when the child’s life becomes dominant over her right to choose.<sup>261</sup> Similarly, the child predator has the right to fantasize and entertain thoughts about children. It is not until he has actually acted on his thoughts and desires and attacks a child that he would be made to undergo treatment. It is at that moment of conviction when he has crossed the line and the state

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<sup>250</sup> *Id.* at 1624.

<sup>251</sup> *Id.* at 1633.

<sup>252</sup> *Id.* at 1633–34, 1622 (stating that, at this point, the fetus is so developed that, while it is partially outside the womb before it is terminated, the fetus can move its legs, kick its feet, and open and close its hands).

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> Harrison, *supra* note 1, at 26.

<sup>257</sup> Kear-Colwell & Boer, *supra* note 101, at 601.

<sup>258</sup> *Id.*

<sup>259</sup> *Carhart*, 127 S. Ct. 1610.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

may alter his rights because the life, sexual safety, and bodily autonomy of a child dominate over his right to privacy.

One might argue that administering MPA injections to these offenders would have to meet a higher standard than any restrictions imposed on a woman's right to choose. In *Planned Parenthood v. Casey* the Supreme Court ruled that a woman's right to an abortion is a liberty interest, but not a fundamental right.<sup>262</sup> Therefore, instead of a compelling state interest as required when a fundamental right is in jeopardy,<sup>263</sup> the regulation must simply be rationally related to a legitimate state interest and refrain from placing obstacles in a woman's path to obtaining an abortion.<sup>264</sup> In contrast, laws requiring convicted sex offenders to undergo chemical castration would have to pass the higher standard of strict scrutiny review.<sup>265</sup> In order for a regulation to pass strict scrutiny standards, it must be supported by a compelling state interest and it must be the least restrictive measure possible to achieve this goal.<sup>266</sup> Children who go through the horror of molestation often suffer later in life because of for the difficulties in coping with such a traumatic experience.<sup>267</sup> Keeping children safe from sexual predators is an unquestionably high priority, as evidenced by legislation within the last several decades.<sup>268</sup> There is no question that protecting children from sexual predators is a compelling state interest.

In addition, there is almost no question that administering injections of MPA is the least restrictive measure available to advance the states' interest of protecting children. MPA does not necessarily strip an individual of his right to decide whether or not to have a child.<sup>269</sup> It simply diminishes the offender's sexual desire.<sup>270</sup> If it is determined that the offender can cease treatment, then his testosterone levels will return and the physical effects will reverse.<sup>271</sup> In addition, while it is more difficult, it is still possible for a person undergoing MPA treatments to have erections and even ejaculate with the help of a partner.<sup>272</sup> It is also possible to adjust the dosage, if necessary,

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<sup>262</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 839–40 (1992).

<sup>263</sup> *Id.* at 840.

<sup>264</sup> *Id.*

<sup>265</sup> Runckel, *supra* note 220, at 563.

<sup>266</sup> *Id.* at 569.

<sup>267</sup> *See supra* note 41 and accompanying text.

<sup>268</sup> *See* statutes cited *supra* notes 146–152 and accompanying text. *See also supra* Part III.B.

<sup>269</sup> *See supra* note 141 and accompanying text.

<sup>270</sup> *See supra* note 135, 136 and accompanying text.

<sup>271</sup> *See supra* note 141 and accompanying text.

<sup>272</sup> Gimino, *supra* note 131, at 92.

to avoid total impotence and combat unpleasant side effects.<sup>273</sup> Even if the offender is unable to do these things, he can have sperm samples frozen so that he may still have a child. Just because offenders undergoing MPA treatments experience low testosterone levels and a sense of “erotic apathy” does not mean that they no longer have the ability or option to bear children.<sup>274</sup>

Additionally, MPA injections actually allow offenders to be released from incarceration and even become fully functioning members of society.<sup>275</sup> One offender undergoing MPA injections stated that he no longer had “that major sex urge within” him.<sup>276</sup> He is now trying to take part in more things because he has “more hope” that he is not going to “get into . . . trouble.”<sup>277</sup> When comparing MPA injections to all other implemented or experimented treatments used on offenders,<sup>278</sup> chemical castration is clearly the least restrictive means to achieve the compelling state interest of protecting children from sexual attack. Therefore, regulations which require convicted child molesters and pedophiles to undergo chemical castration do not violate the Fourteenth Amendment.

#### CONCLUSION

In sum, chemical castration is the nation’s next step in dealing with pedophilia and child molestation through punitive and rehabilitative measures. The procedure is, no doubt, a deterrent for some and an immensely therapeutic process for others in learning to control and cope with their deviant sexual desires. Recent legislation evidences the nation’s fear of sexual predators, especially those who pursue children.<sup>279</sup> Incarceration and other forms of treatment have done little to actually solve the problem. Those that were most effective went too far, whereas other therapies were often ineffective and borderline barbaric. Chemical castration, on the other hand, is effective, safe, and humane.<sup>280</sup>

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<sup>273</sup> *Id.*

<sup>274</sup> Farkas & Stichman, *supra* note 124, at 268 (citation omitted).

<sup>275</sup> See statutes cited *supra* notes 146–152 (mandating the use of chemical castration as a condition of release, probation, or parole); *People v. Collins*, 1 Cal. Rptr. 3d. 641, 646–47 (Cal. App. 4 Dist. 2003) (reporting that in states like California, a sexual predator can be released from involuntary commitment when they are no longer present danger of reoffending. This can be done with MPA injections).

<sup>276</sup> Harrison, *supra* note 1, at 26.

<sup>277</sup> *Id.*

<sup>278</sup> See *supra* Part II B. & C.

<sup>279</sup> See statutes cited *supra* notes 146–152 and accompanying text. See also *supra* Part III.B.

<sup>280</sup> See *supra* note 144, 189 and accompanying text.

Chemical castration is also incredibly cost effective. The cost of the treatment is miniscule when compared to the expense of incarceration or involuntarily commitment in a state hospital. Lastly, and most important, chemical castration *is* constitutional. It is not an overly excessive punishment for the offense charged, especially in comparison with other punishments and treatments that have been utilized for such offenders. It does not violate the right to have a child or the right to refuse treatment due to the compelling interests of the state and the nature of the drug. Chemical castration is the treatment to which we have been led after decades of recidivism and failed treatment for child molesters and pedophiles. This drug can give offenders a second chance at life, and give children less to be afraid of in the world.