Chemical Castration: Constitutional Issues of Due Process, Equal Protection, and Cruel and Unusual Punishment

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CHEMICAL CASTRATION:
CONSTITUTIONAL ISSUES OF DUE PROCESS, EQUAL PROTECTION, AND CRUEL AND UNUSUAL PUNISHMENT

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I. INTRODUCTION: CALIFORNIA'S CHEMICAL TREATMENT STATUTE

On September 17, 1996, California became the first state to statutorily require chemical treatment as a condition of parole for child molesters convicted of a second offense when the sexual crime is committed against a child under the age of thirteen.\(^1\) California judges retain discretion to order treatment with medroxyprogesterone acetate or its chemical equivalent for persons convicted of a first offense.\(^2\) The enumerated offenses include sodomy, lewd or lascivious acts, oral copulation, and penetration by foreign objects.\(^3\) Under the California statute, treatment begins one week before a prisoner's release from a state prison or other institution and continues until the parolee demonstrates to the satisfaction of the Board of Prison Terms that treatment is no longer necessary.\(^4\) An offender scheduled to undergo chemical treatment must demonstrate that he or she has been informed of the treatment and its side effects.\(^5\) There is no requirement that a parolee undergo any group or individual psychological counseling along with chemical treatment.

California is not alone in searching for a method of effectively treating and deterring sexual offenders. Georgia also has a statute, which grants its Board of Pardons and Paroles the discretion to require medroxyprogesterone acetate treatment or its chemical equivalent as a condition of parole for those offenders convicted of sexually molesting a child age 16 or younger.\(^6\) Unlike the California

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\(^1\) CAL. PENAL CODE § 645(b) (Deering 1983 & Supp. 1998). 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.

\(^2\) Id. § 645(a). Any person guilty of a first conviction of any offense specified in subdivision (c), where the victim has not attained 13 years of age, may, upon parole, undergo medroxyprogesterone acetate treatment or its chemical equivalent, in addition to any other punishment prescribed for that offense or any other provision of law, at the discretion of the court.

\(^3\) Id. § 645(c).

\(^4\) Id. §645(d).

\(^5\) Id. § 645(f).

\(^6\) GA. CODE ANN. § 42-9-44.2(a) (1997).
statute, Georgia requires a parolee’s written consent before treatment may begin, and a parolee must undergo and pay for concurrent outpatient counseling. Florida, Louisiana, and Montana are among other states which have enacted or are considering similar legislation.\(^7\)

States across the country are considering and implementing measures such as chemical castration in an attempt to combat sexual crime primarily because child molestation is such “a serious, pervasive problem.”\(^9\) In addition, the recidivism rate for this type of crime is one of the highest, ranging in some estimates from twenty-two to forty percent.\(^10\)


\(^7\) Id.


\(^11\) 494 U.S. 210 (1990) (holding involuntary chemical treatment of prisoner with psychotropic drugs is not a violation of substantive due process).

\(^12\) 504 U.S. 71 (1992) (holding that the continued confinement of an insanity acquittee solely on the basis of having an antisocial personality, with no evidence of mental illness, when the hospital review committee had recommended conditional discharge, violated due process).

\(^13\) 504 U.S. 127 (1992) (holding that the involuntary administration of antipsychotic drugs during trial constitutes a deprivation of liberty protected by due process).

discusses the right to reject a condition of parole. Part V argues that chemical castration is not cruel and unusual punishment. Part VI examines the question of giving a parolee the option of waiving Due Process and Eighth Amendment protection with regard to chemical treatment as a condition of parole. This Comment concludes that chemical castration may be a viable alternative psychiatric treatment option, but only in combination with group or individual counseling, for an extremely narrow subset of sexual offenders (paraphilics) who choose to undergo treatment. California’s statute is not narrowly confined to the group of offenders who might actually benefit from chemical treatment, fails an equal protection analysis, and impermissibly violates the fundamental right to procreate. Furthermore, it is questionable whether the criminal justice system has the capability or resources necessary to accurately diagnose paraphilia in large numbers of criminal sexual offender populations or appropriately prescribe medical treatment for large groups of repeat sexual offenders as a condition of parole.

II. MEDROXYPROGESTERONE ACETATE (MPA)

A. MPA’s Approved Use as a Female Contraceptive

MPA is currently manufactured by the Pharmacia & Upjohn Company under the trade name Depo-Provera. Depo-Provera’s only approved uses at this time are for the prevention of pregnancy and as “adjunctive and palliative treatment in advanced inoperable cases” of endometrial or renal carcinoma. Although MPA’s use as a treatment for sex offenders is not an approved or labeled use, physicians are permitted to prescribe MPA as a treatment under the Food and

15 See U.S. CONST. amend. VIII.
16 PHYSICIANS’ DESK REFERENCE 2259 (52d ed. 1998) [hereinafter PDR].
17 Id.
18 Id. at 2264.
Drug Administration Guidelines for the “use of approved drugs for unlabeled indications.”

As a female contraceptive, MPA is administered in 150 milligram (“mg.”) intramuscular (“IM”) doses every three months. As an adjunctive treatment of inoperable cancer, the dosage is initially 400 mg. every week. When MPA is used in treating sex offenders, the dosage is a weekly IM injection of 100 mg. to 800 mg. with the usual dose being about 500 mg. Injection is the route of choice because MPA in pill form is poorly absorbed by the body.

When used as a female contraceptive, MPA is “over 99% effective, making it one of the most reliable methods of birth control available.” Because MPA is a long acting method of birth control, women who stop taking the drug commonly experience a period of infertility that can last up to eighteen months after discontinuing MPA. The risks to women using MPA include, but are not limited to, irregular menstrual bleeding, increased risk of osteoporosis, slightly increased risk of developing breast cancer, and an increased risk of developing blood clots and stroke. Side effects include, but are not limited to, weight gain, amenorrhea, headache, nervousness, abdominal cramps, and decreased sexual desire. Most

20 Id.

21 Id. "Once a drug has been marketed, the Food, Drug and Cosmetic Act does not limit the manner in which a doctor may present the drug. Such 'unapproved' or 'unlabeled' uses are reported in the scientific journals and become part of accepted therapies.” 12 FDA DRUG BULL. 1, 2-3 (1992).

22 PDR, supra note 16, at 2261.

23 Id. at 2264.

24 Fitzgerald, supra note 19, at 6.


26 PDR, supra note 16, at 2261.

27 Id. at 2262. "Based on the results from a large study done in the United States, of those women who stop using Depo-Provera Contraceptive Injection in order to become pregnant, about half of those who become pregnant do so in about 10 months after their last injection; . . . about 93% of those who become pregnant do so in about in about 18 months after their last injection.” Id.

28 Id.

29 Id.
importantly, however, only one to five percent of over 3,900 women in a clinical trial using MPA reported experiencing decreased libido or anorgasmia.\(^{30}\)

**B. Experimental Use as a Treatment for Paraphilia**

MPA is currently utilized as a component of psychiatric treatment for a specific category of psychosexual disorders known as paraphilia.\(^{31}\) Paraphiliacs suffer from overwhelming sexual desires resulting in an impaired ability for socially acceptable means of sexual gratification.\(^{32}\) These offenders commit sexual crimes "in order to realize a specific and particularized sexual fantasy."\(^{33}\) The etiology of paraphilia differs greatly among individuals and is a complicated disorder with many different factors contributing to its formation.\(^{34}\) The disorder is extremely difficult to diagnose,\(^{35}\) requiring a comprehensive psychiatric evaluation of the offender's motivation to commit sexual crimes as well as the offender's emotional

\(^{30}\) PDR *supra* note 16, at 2261.


\(^{32}\) *The Merck Manual of Diagnosis and Therapy* 1498 (1987) [hereinafter Merck].

\(^{33}\) DSM IV, *supra* note 31, at 522-23. The essential features of a paraphilia are recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons, that occur over a period of at least 6 months (Criterion A). For some individuals, paraphiliac fantasies or stimuli are obligatory for erotic arousal and are always included in sexual activity. In other cases, the paraphiliac preferences occur only episodically (e.g., perhaps during periods of stress), whereas at other times the person is able to function sexually without paraphiliac fantasies or stimuli. The behavior, sexual urges, or fantasies cause clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criterion B).

*Id.*

\(^{34}\) Merck, *supra* note 32, at 1496 (explaining inherited or subtle constitutional factors probably contribute to the development of paraphilia).

\(^{35}\) See Fuller, *supra* note 9, at 603. "No specific diagnostic test for pedophilia or child molestation exists . . . diagnosis is made on the basis of the essential clinical features. The diagnosis is a challenging one to make. . . . The clinician should avoid relying solely on the self-report of the patient, which may have self-serving purposes." *Id.*
response to his actions. An offender’s cognitive state “demonstrates a persistent fantasy about sex.” His emotional state is “an erotic craving which can only be realized by enacting the particular fantasy.” And lastly, his behavioral state “reveal[s] a stereotypical sex act because his erotic pleasure is only maximized by the precise realization of the particular fantasy.” An offender typically suffers from more than one paraphilia at a time. There appears to be a gender majority of paraphilics.

Paraphilias are far more common among males than females, and this unequal distribution has been found in most cultures studied. Since reproductive competence in the female is of decisive importance for the species, and less so in the male, biologic reasons for this unequal distribution may exist.

California’s chemical treatment statute targets child molesters. A conviction for pedophilia, however, does not constitute a diagnosis of paraphilia. Deviant sexual behavior stems from various differing motivations. In the crime of rape, for example, the perpetrator may often be primarily motivated by a need for violence, or to humiliate the victim, rather than the overwhelming sexual urges of

36 See Fred S. Berlin & Carl F. Meinecke, Treatment of Sex Offenders with Antiandrogenic Medication: Conceptualization, Review of Treatment Modalities, and Preliminary Findings, 138 AM. J. PSYCHOLOGY 601, 601-03 (1981). “A diagnosis of paraphilia can be made by ... examining a person’s cognitive, emotional, and behavioral state.” Id. at 601.

37 Fitzgerald, supra note 19, at 5.

38 Id.

39 Id.

40 Id. “All of his paraphilias must be diagnosed so that relieving one paraphilia does not result in its replacement by another sexual fantasy.” Id. See DSM IV, supra note 31, at 523. “Not uncommonly, individuals have more than one Paraphilia.” Id.

41 MERCK, supra note 32, at 1496-97. “Except for Sexual Masochism, where the sex ratio is estimated to be 20 males for each female, the other Paraphilias are almost never diagnosed in females, although some cases have been reported.” DSM IV, supra note 31, at 524.

42 CAL. PENAL CODE § 645 (Deering 1983 & Supp. 1998). The statute focuses on crimes “where the victim has not attained 13 years of age . . . .” Id. § 645 (a) & (b).

43 See Daniel L. Icenogle, Sentencing Male Sex Offenders to the Use of Biological Treatments, 15 J. LEGAL MED. 279, 281-82 (1994).
a paraphilia. MPA is not an effective treatment for pedophiles or other sex offenders who do not suffer from paraphilia.

1. Reducing Sex Offender Recidivism

There is promising data on the effectiveness of MPA treatment in reducing recidivism among male paraphilics. Over 600 paraphilics treated in a study conducted by the John Hopkins Sexual Disorders Clinic reported a recidivism rate of less than ten percent. Subjects who complied with treatment reported a recidivism rate of under three percent. From 1976 to 1980, only one out of twenty-five patients committed an act of paraphilia while undergoing MPA treatment at the University of Texas Medical Branch at Galveston. Studies have been published on another promising medication, an antiandrogen, cyproterone acetate (CPA), also used in the treatment of paraphilia. Some of the studies tracked previously convicted recurrent sex offenders undergoing treatment with CPA and found no recidivism during a three-year follow-up.

MPA can be one useful psychiatric tool in treating the abnormal sexual compulsions of those sex offenders suffering from paraphilias. MPA is not a magic cure, but does provide the most effective treatment for rehabilitating some

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44 Id.
46 Id.
48 Id. at 286 n.67. However, “[n]either cyproterone or cyproterone acetate are currently available in the United States. Until October 1992, Berlex Pharmaceuticals had been making both available in the United States on a compassionate use protocol for the anorexia associated with AIDS and cancer, but that status has been discontinued.” Id.
49 Id. at 287. Treatment consisted of both CPA and psychotherapy.
50 Icenogle, supra note 43, at 280-87 (discussing case study results of the use of chemical treatment for paraphilic offenders).
51 Janet Heimlich, Robert Siegel & Ray Suarez, All Things Considered News (National Public Radio radio broadcast, May 12, 1997) available in 1997 WL 12832467 (interviewing Dr. Fred Berlin, founder of Johns Hopkins University Sexual Disorders Clinic, on the subject of MPA treatment without concurrent counseling). Dr. Fred Berlin stated that “[f]or people who are craving sex with children, we can at least reduce the intensity of those cravings [using MPA treatment], not as a cure
paraphilic offenders when used in combination with psychiatric counseling. While MPA shows significant promise in the treatment of paraphilia, it is not a blanket treatment appropriate for all sexual criminals, or even for all paraphilics. Requiring MPA treatment without requiring concurrent counseling is unlikely to achieve the desired effect on paraphilics. The most important consideration in the successful treatment of paraphilia is that an offender must be a willing participant or a guarantee, but as a means of helping them be more successful at not giving in to too-unacceptable temptations.” *Id.*

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52 Fitzgerald, *supra* note 19, at 9. There are many benefits from MPA treatment. The primary behavior effect, the cessation of deviant sexual behavior, is very rapid, especially compared to psychotherapy alone. There are also several clinical advantages: 1) Patients become optimistic and hopeful that indeed control of their paraphilia is possible. Many were previously extremely pessimistic and hopeless: they did not think anything could help. 2) Victims are not being harmed while therapy proceeds. 3) As a result, behaviors such as rape and pedophilia are treatable on an outpatient basis, which is less costly than inpatient treatment or incarceration. 4) Issues concerning a clinician’s duty to violate confidentiality becomes less problematical because the illegal behavior stops early. 5) Concurrent psychotherapies may proceed without the patient having to deal with the discouraging problem of weekly or even daily recidivism causing him to ignore the small gains of weekly psychotherapy. 6) Clinician’s are encouraged by the rapid and apparent success of treatment compared to more traditional therapies where effects are less certain. *Id.* at 9 n.49.

53 *Id.* at 9.

54 Icenogle, *supra* note 43, at 285. Clearly, though, not all paraphilics respond to MPA. In a study from Sherbrooke Hospital in Quebec, only 40 of 80 patients treated with MPA responded with decreased fantasies. This study included just over one year of treatment with MPA and three years of post-treatment follow up, with some patients remaining on MPA throughout the follow up and others being tapered off of it. Of those who initially responded to the MPA, none resumed their paraphilic behavior during the follow up. *Id.* at 285-86. *But see* Ethel S. Person, *Paraphilias and Gender Identity Disorders*, 1 PSYCHIATRY 46, at 11 (Lippincott-Raven rev. ed., 1994). [T]he primary method of treating the paraphilia itself is a psychoanalytically oriented therapy . . . . But even this kind of intensive intervention is no guarantee of success. Although there are case reports of good results, there are no long term follow-up studies. However, few therapists would claim a high percentage of positive results in patients with full-blown perverse syndromes. The patient’s overall adaptation may well improve, but permanent change in the perverse structure is more problematic. *Id.*
in order for treatment to be successful. Long term psychotherapy, the traditional treatment, is recommended, but has not proven to be particularly successful when used alone, especially when an offender is participating involuntarily. MPA therapy is also most effective when the offender voluntarily participates in chemical treatment concurrently with counseling.

55 Fitzgerald, supra note 19, at 9; MERCK, supra note 32, at 1498.

56 MERCK, supra note 32, at 1498; Patricia M. Harris, Ph.D., Prison-Based Sex Offender Treatment Programs in the Post Sexual Psychopath Era, 23 J. PSYCHIATRY AND LAW 555 (1995). Psychotherapy and other supportive measures can help the patient... adjust more effectively to the consequences of paraphilic activity. Psychotherapy is useful in the treatment of some child molesters but probably not all although the literature on individual psychotherapy for child molesters is sparse and preponderantly consists of case reports. ... Group psychotherapy has been evaluated poorly in general. Outcome studies are mixed and ambivalent.

Fuller, supra note 9, at 604.

57 MERCK, supra note 32, at 1498 ("Long-term psychotherapy usually is necessary but is not always successful. It is less useful when coercive, e.g., by court order."); See also Fitzgerald, supra note 19, at 8-9.

MPA has proven to be a successful treatment for the paraphilic offender when used under the following conditions. First, the offender volunteers for treatment. Second, the offender lacks an antisocial personality pathology. Third, the offender does not have a severe substance abuse problem. Fourth, the dosage is sufficient to suppress the testosterone production. Fifth, a consenting pair-bonded partner is available.

Id. See Heimlich, Siegel & Suarez, supra note 51 (interviewing Dr, Fred Berlin; founder of Johns Hopkins University Sexual Disorders Clinic, on the subject of MPA treatment without concurrent counseling). Dr. Berlin remarked, "If someone were to impose upon me castration, if I had no sense of how this was going to be helpful if this wasn’t combined with psychological and emotional support, I might simply become a very angry and disenfranchised person, and not necessarily a safer individual in the community." Id.
Hormonal treatment and anti-androgen therapy are treatments that have shown some success for certain subcategories of paraphilia including pedophiles. MPA is a progestin which decreases the production and effects of testosterone and "reduces erotic imagery," thus providing the offender with relief from his compulsive fantasy. Decreasing the testosterone level in the male decreases libido and diminishes a paraphilic's sexual compulsions. Ending the sexual compulsion brings uncontrollable sexual urges within the offender's control and enables the paraphilic to benefit from the traditional forms of psychotherapy such as counseling. MPA acts on the overall male sex drive, decreasing normal as well as abnormal sexual desires. Side effects in men are infrequent and end

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58 Icenogle, supra note 43, at 283-85.
Hormones ... have been used to reduce the sex drive. Each of the hormones used accomplishes this by lowering the testosterone level ... Currently, the most commonly used hormone is medroxyprogesterone acetate (MPA). Several studies have demonstrated its effectiveness in the treatment of sexual offenders. The mechanism by which MPA lowers libido is not completely understood. While it does lower the serum testosterone, both by increasing testosterone metabolism by the liver and decreasing the release of LH and FSH from the brain (which decreases the release of testosterone by the testes), the ability of MPA to decrease paraphilic behavior seems to go beyond this and also may be due to a tranquilizing effect on the brain.

Id. at 284. "Medications have been used to suppress paraphilic symptoms. Child molesters may benefit from the use of . . . medroxyprogesterone acetate . . . Medications should not be used alone; concomitant psychotherapy, behavior therapy, or psychosocial rehabilitation is indicated." Fuller, supra note 9, at 604. But see Person, supra note 54, at 10.

Aversion therapy and treatment with antiandrogenic medication have been attempted both with sex offenders and with patients with paraphilias. The studies have not been systematic nor are the results encouraging. Short-term control is easier to obtain than fundamental long-term change. The limitation to the therapy is often the patient's noncompliance in taking medication. The main limitation to antiandrogenic medication is, in fact, its mode of operation; it acts by reducing sexual desire, not by selectively inhibiting deviant impulses. Over several years, patients may be unwilling to give up sexual pleasure.

Id.

59 MERCK, supra note 32, at 1498.

60 Fitzgerald, supra note 19, at 6. See Berlin & Meinecke, supra note 36, at 603.

61 Icenogle, supra note 43, at 283.

62 Fitzgerald, supra note 19, at 8-9.

63 Icenogle, supra note 43, at 284.
when treatment with the drug is discontinued. The male’s full sex drive returns within a week to ten days. In addition, “MPA does not cause impotence.” Case studies have shown some males can still engage in sexual activity while undergoing treatment with MPA. Statutorily requiring MPA treatment as a condition of parole makes such treatment mandatory, if an offender is not allowed the option to reject parole and remain incarcerated. For MPA treatment to be effective, however, an offender must want to be rehabilitated, he must want treatment, not be forced into it by the state. Therefore, requiring offenders to undergo treatment as a condition of parole will not decrease offender recidivism by rehabilitation if the offender does not want to reform his behavior; MPA is not a magic cure for paraphilia in spite of the paraphilic.

2. The Experimental Nature of MPA Treatment

MPA has never before been administered to such a large group of sex offenders within the criminal justice system. Statutorily mandated MPA treatment as a condition of parole, therefore, requires parolees to participate in an experimental medical treatment program.

Dosage levels reducing the sexual drive in male paraphiliacs to a level allowing offenders to control their criminal sexual behavior are still experimental. Treatment typically consists of weekly IM injections of 500 mg. of MPA, with dosage varying between 100 mg. to 800 mg. California’s statute requires treatment to begin only one week before an offender is released from prison. The lack of medical certainty concerning appropriate dosages for individual sexual offenders, combined with the initial administration of treatment only one week prior to release, raises the question of whether a dosage that is adequate to achieve the

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64 Fitzgerald, supra note 19, at 7.
65 Money, supra note 25, at 220.
66 Fitzgerald, supra note 19, at 7.
67 Id.
69 Money, supra note 25, at 219-21 (1987). The pill form of MPA “is not satisfactory for the treatment of paraphilia.” Id. at 221.
state's goal of safeguarding the public can be determined within one week. It is
doubtful whether an accurate dosage is determinable for each individual within such
a short time, considering that the treatment will be administered to a large diverse
population of offenders. Presumably an offender must attend weekly appointments
with a physician to verify cooperation with the treatment and dosage can then be
adjusted.

In addition, the long term effects of MPA are unknown because of the
relatively recent use of the drug as a prevalent psychiatric treatment for paraphilia.71
This is an especially troublesome point given California's statutory requirement that
MPA treatment continue until a parolee can demonstrate that treatment is no longer
necessary,72 making life-long treatment a distinct possibility. It is not known
whether MPA decreases paraphilic offender recidivism in large groups of the
criminal sexual offender population. The majority of studies to date have based
their conclusions on results gathered from individuals or small groups of
participants participating in psychiatric treatment programs.73 MPA as a condition
of parole is an experimental treatment because (1) long-term effects are unknown
due to a lack of long-term studies conducted with MPA, (2) appropriate dosage is
uncertain, and (3) because the drug has not been approved by the FDA for use in
people with paraphilias.74

III. CONSTITUTIONAL ISSUES RAISED BY A
MANDATORY CHEMICAL TREATMENT STATUTE

Requiring sex offenders convicted of a second offense to undergo chemical
treatment as a condition of parole implicates several constitutional issues: equal
protection, the due process clause, and the cruel and unusual punishment
prohibition.

A. Equal Protection Violation

California's chemical castration statute fails under a gender discrimination
equal protection argument because, although it is facially neutral,75 its effect is to

71 Fitzgerald, supra note 19, at 7-8.
73 Fuller, supra note 9, at 604.
74 See generally PDR, supra note 16, at 2080.
75 See CAL. PENAL CODE § 645(a), (b), & (d) (Deering 1983 & Supp. 1998).
impose state mandated chemical sterilization on women sex offenders while doing almost nothing to further the state’s interest in reducing recidivism in this group. In contrast, the state can cite medical studies demonstrating that MPA reduces recidivism in male patients, thereby achieving the overriding important result of public safety.

The Fourteenth Amendment prohibits states from “deny[ing] to any person within its jurisdiction the equal protection of the laws.”\(^76\) This right to equal protection does not prevent a state from creating different classifications or treating those persons within the different classifications unequally, but does forbid classifications based on criteria unrelated to a state’s asserted purpose.\(^77\) In *Skinner v. Oklahoma*,\(^78\) which held Oklahoma’s Habitual Criminal Sterilization Act unconstitutional under an equal protection analysis, the Supreme Court recognized a state’s right to exercise its police power to treat different classes of offenders differently.\(^79\) This holding was reiterated in *Craig v. Boren*,\(^80\) when the Court said a state has met its burden when it “indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as means allows.”\(^81\) California’s chemical treatment statute permissibly subdivides criminals into those who commit sexual offenses and those who don’t. The statute further permissibly differentiates between those sexual offenders who are repeat offenders and those who are not.\(^82\) The California statute applies to repeat male and female sexual offenders who commit an enumerated sexual crime against children younger than thirteen,\(^83\) and was apparently written specifically to survive an equal protection argument based on unequal treatment.

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76. U.S. CONST. amend. XIV, § 1.

77. See *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).


80. 429 U.S. 190 (1976) (invalidating state statutes prohibiting the sale of 3.2% beer to males under age 21 and females under age 18).

81. *Id.* at 197.


83. See CAL. PENAL CODE § 645(b) and (d) (Deering 1983 & Supp. 1998).
Two separate equal protection arguments are applicable to California’s chemical treatment statute as written: gender discrimination (based not on unequal treatment, but on unequal effect: the physiological gender-related effect of MPA on women), and an unconstitutional classification among male sex offenders (based on requiring sexual offenders to undergo chemical treatment without differentiating between those offenders who would benefit from treatment and those who would not).

1. California’s Chemical Treatment Statute Fails a Gender Discrimination Challenge

California’s chemical treatment statute is facially neutral, applying equally to both male and female repeat sexual offenders, but is unconstitutional under a gender discrimination equal protection analysis. To withstand an equal protection challenge based on gender discrimination, the statute generally must survive the Supreme Court’s intermediate level scrutiny by showing that the statute serves an important state purpose and is substantially related to achieving the asserted purpose. California’s societal protection purpose in enacting a chemical treatment statute is undeniably important: the state has an important interest in deterring recidivism in sexual offenders who prey on children by requiring twice-convicted child molesters to undergo chemical treatment as a condition of parole. The documented studies showing a decrease in recidivism among male paraphilic patients undergoing MPA treatment in conjunction with counseling support the inference that the statute is substantially related to achieving the stated purpose with regard to male sexual offenders. However, the state is unable to meet its burden of substantial relationship when the statute is applied to female sexual offenders because the treatment is virtually ineffective in decreasing the female libido. MPA’s positive effect of decreasing recidivism of sex offenders is thought to be directly related to the drug’s ability to decrease the sexual drive or libido of

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84 See CAL. PENAL CODE § 645(b) and (d) (Deering 1983 & Supp. 1998).
86 See generally Craig, 429 U.S. at 197.
88 See supra notes 45-57 and accompanying text.
89 PDR, supra note 16, at 2261.
paraphilias. MPA decreases the libido or sex drive in only a very small percentage of females. Requiring female sexual offenders to undergo chemical treatment with MPA as a condition of parole would effectively sentence all repeat female sexual offenders convicted of an enumerated offense to state imposed sterility while accomplishing the state's purpose of decreasing recidivism in only one to five percent. Therefore, the statute is unconstitutional as applied to women because the state cannot meet its burden of substantial relationship.

A hypothetical statute requiring only male repeat sexual offenders to undergo chemical treatment with MPA as a condition of parole might survive the intermediate level scrutiny required for discrimination based on gender because of MPA's actual differing physiological effects. In Michael M. v. Superior Court, a narrowly divided Supreme Court upheld a California statute punishing only men for the crime of statutory rape. In Michael M., the state's important purpose was the reduction of teenage pregnancy, and the Court held that punishing only males was substantially related to achieving that important goal. Justice Stewart, concurring, wrote that "the Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded .... The Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist." There is a demonstrable physiological difference between men and women in the effects of the currently

90 Icenogle, supra note 43, at 282.
91 PDR, supra note 16, at 2261.
92 See generally id. (describing Depo-Provera (MPA) as 99% effective in preventing pregnancy).
93 See generally id.
96 Id. at 470-73.
97 Id. at 472-73.
98 Id. at 481 (Stewart, J., concurring).
available drugs used in the treatment of sexual offenders;\textsuperscript{99} therefore, a state could permissibly require only males to undergo chemical treatment as a condition of parole. In addition, paraphilia is in large part a male disorder, adding strength to the state’s argument for differentiation based on physiology.\textsuperscript{100} States are not required, under the equal protection clause, to disqualify a valid treatment method simply because the sole available treatment is effective for only one gender.\textsuperscript{101} A statute requiring chemical treatment only for male repeat sex offenders is not an unconstitutional violation of equal protection, given that the reason for the distinction between men and women is based on demonstrable physiologic differences in the efficacy of the treatment and not on stereotypical misrepresentations of gender.\textsuperscript{102}

2. Permissible Classification, Impermissibly Over-inclusive

California’s chemical treatment statute unconstitutionally requires all repeat sex offenders convicted of a second specifically enumerated offense to undergo chemical treatment as a condition of parole regardless of whether the offender is diagnosed as suffering from paraphilia or some other psychiatric disorder.\textsuperscript{103} Failing to differentiate between those offenders who would benefit from chemical treatment (paraphilics) and those who do not makes California’s statute impermissibly over-inclusive and therefore unconstitutional.

A statute separating a narrow, medically identifiable subgroup of sex offenders from all other sex offenders and non-sex offenders for the purpose of requiring chemical treatment as a condition of parole is not an impermissible classification under the equal protection clause.\textsuperscript{104} Classification based on an

\textsuperscript{99} PDR, supra note 16, at 2081.

\textsuperscript{100} See MERCK, supra note 32, at 1496-97; DSM IV, supra note 31, at 534 (stating that “Paraphilias are almost never diagnosed in females although some cases have been reported”). The assumption that the treatment method is valid is made only for the sake of the equal protection argument.

\textsuperscript{101} See Michael M., 450 U.S. at 481 (Stewart, J., concurring).

\textsuperscript{102} See id.

\textsuperscript{103} See CAL. PENAL CODE § 645(b) & (c) (Deering 1983 & Supp. 1998).

\textsuperscript{104} See Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (upholding an Oklahoma law subjecting opticians but not sellers of ready wear glasses to a regulatory system: “Evils in the same field may be of different dimensions and proportions, requiring different remedies . . . [o]n the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute.”);
objective psychiatric evaluation, not on a suspect or semi-suspect classification such as race, gender, or illegitimacy, might survive an equal protection argument. Furthermore, a statute classifying repeat paraphilic sex offenders for the purpose of receiving parole conditioned on chemical treatment may merit only rational basis scrutiny by the Supreme Court. The state could pass this low level scrutiny by showing that requiring a narrow, medically identifiable subgroup of repeat male sex offenders to undergo chemical treatment with MPA as a condition of parole is rationally related to the legitimate state purpose of protecting its children from child molesters, based on numerous reputable scientific studies supporting the premise that chemical treatment with MPA is effective when used in conjunction with

Dandridge v. Williams, 397 U.S. 471, 486-87 (1970) (upholding a regulation placing a welfare limit of $250 per month per family regardless of family size or need: "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.").

It is not at all clear, however, that an evaluation will be objective. See Person, supra note 54, at 9 ("Accurate diagnosis depends on eliciting the paraphilic fantasy and ritualized behavior. The achievement of sexual excitement must depend on either the mental elaboration or behavioral enactment of the deviant fantasy. . . . Differential diagnosis is usually relatively easy."") But see DSM IV, supra note 31, at 522-23 (discussing two categories of criteria the individual must fulfill in order to be diagnosed with paraphilia). Criterion A is that the fantasies are recurrent and sexually arousing, and occur over a period of at least six months. Id. Criterion B states that the "behavior, sexual urges, or fantasies cause clinically significant distress or impairment in social, occupational, or other important areas of functioning." Id. The diagnosis appears to depend upon deviant sexual behavior and mental states. Although it is objectively possible to determine if a sex offender, who is found guilty of deviant sexual behavior, commits such behavior, it is a subjective evaluation regarding an individual's mental state regarding recurrent, arousing sexual fantasies. Assessing mental state depends on an individual's subjective perception, and his honesty in relating his mental state. There is no objective test to determine if the individual is telling the truth about his feelings. See generally id. at 524 (discussing penile plethysmography, a mechanical technique of assessing an individual's sexual response to visual and auditory stimuli). "The reliability and validity of this procedure in clinical assessment have not been well established, and clinical experience suggests that subjects can simulate response by manipulating mental images." Id.

See Frontiero v. Richardson, 411 U.S. 677 (1973) (holding as unconstitutional under the Due Process Clause of the Fifth Amendment statutes giving spouses of male military personnel dependent status and military benefits, but not giving spouses of female military personnel dependent status unless they could prove they depended on wives for over one-half their support); Weinberger v. Wisenfeld, 420 U.S. 636 (1975) (striking down provision of Social Security Act awarding survivor's benefits to widows, but not widowers, responsible for dependent children); Orr v. Orr, 440 U.S. 268 (1979) (invalidating laws that require alimony payment only from men).

See Williamson, 348 U.S. at 103.

See Fitzgerald, supra note 19, at 8-9; PDR, supra note 16, at 1498; Icenogle, supra note 43, at 281-89.
psychotherapy in reducing male paraphilic recidivism. This classification is under-inclusive as it excludes some sex offenders from treatment and thereby from parole, but the Supreme Court has stated "[t]he state [is] not bound to deal alike with all . . . classes, or to strike at all evils at the same time or in the same way." Under-inclusion in this instance is permissible because sex offenders who are not paraphilic are not effectively helped by MPA treatment, and it is possible that all paraphilics might not be candidates for MPA treatment due to various individual medical contraindications or because they do not want to receive treatment. The Court recently stated, in Kansas v. Hendricks, that "when a legislature undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." California's chemical treatment statute is an attempt to deal with an area "fraught with medical . . . uncertain[y]," but is not drawn narrowly enough to survive even rational basis scrutiny. The statute does not separate paraphilic sex offenders from other types of sex offenders who molest children. Requiring all repeat sex offenders, regardless of their underlying motivation for committing sexual crimes against children, to undergo chemical treatment as a condition of parole means that many sex offenders whose sexual disorders are not affected by MPA will be released on parole and made to undergo chemical treatment with MPA. MPA is not effective in decreasing recidivism in the offender population that is not paraphilic; therefore, requiring treatment of such a population does nothing to further the state's interest in safeguarding the public. Furthermore, MPA treatment is not necessarily successful in every paraphilic. Before a state orders chemical treatment, the parolee should undergo an extensive psychiatric evaluation, be diagnosed as suffering from paraphilia by a competent psychiatrist, receive a medical determination that MPA is a treatment beneficial to him, and be willing to undergo MPA treatment along with concurrent counseling. Only then can a state and its

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109 Icenogle, supra note 32, at 281-89.


111 See, Fuller, supra note 9, at 604 ("Personalities, attitudes, deviant arousal, and clinical features of individuals who abuse children differ substantially. As a result of this variability the same treatment is unlikely to be equally suitable for all.").


113 Id. at 2081 n.3 (internal quotation marks and citations omitted) (adding that disagreement within the psychiatric profession on the proper definition of mental illness does not "tie the State's hands" in drafting "civil commitment laws").

114 Id.
citizens have any degree of confidence that the sex offenders receiving parole under a chemical treatment program are those offenders who might actually be helped by the treatment, producing the desired result of protecting society from paroled child molesters.

It is questionable whether a state can marshal and sustain the resources required to adequately conduct such detailed procedures for each repeat sex offender. States are currently unable to adequately meet the traditional psychiatric counseling needs of paraphilics in prison, which are less procedurally complicated and less expensive than administering a chemical treatment program with the necessary level of oversight.

Chemical treatment is a relatively new, alternative treatment for paraphilia that has shown some promise in reducing recidivism among a narrow, medically identifiable subgroup of sex offenders. Legislatures should be able to require treatment of the appropriate classification of sex offenders that medical science has identified would benefit from treatment, but only if a state is able to demonstrate it has the capability and resources required to accurately apply appropriate treatment to the identified group.

115 Patricia M. Harris, Prison-Based Sex Offender Treatment Programs in the Post Sexual Psychopath Era, 23 J. PSYCHIATRY & LAW 555 (1995).

The scope of prison sex offender treatment programs is much more narrow than their labels suggest. Contemporary sex offender treatment programs favor offenders who victimize children . . . . Offenders who victimize adults, usually referred to as rapists, either fail to meet stringent program selection criteria or are considered undesirable due to incompatibility with program methods . . . . Moreover, the very small number of treatment slots available in most programs can accommodate only a tiny percentage of persons identified as sex offenders. Most programs handle few offenders and require limited involvement from them, usually on a voluntary basis, for periods of as little as two hours per week. Even in the so-called residential programs, where subjects are housed together in the same living unit and are provided with more extensive treatment, very few offenders are treated. The Connecticut Correctional Institution at Somers, one of the largest residential programs, can treat only 80 offenders at a time although at least 3,000 known sex offenders are incarcerated in Connecticut prisons.

Id. at 561-70 (footnotes omitted).

116 See Fuller, supra note 9, at 604. "Most physicians are in no way equipped to treat perpetrators of child sexual abuse and should refer the patient to a psychiatrist or psychologist with a special interest in the treatment of sexual offenders." Id.

117 Icenogle, supra note 43, at 279.

118 See Kansas, 117 S. Ct. at 2081.
B. Substantive Due Process and Fundamental Rights

The Fourteenth Amendment\(^{119}\) prohibits a state from depriving its citizens of "life, liberty or property, without due process of law."\(^{120}\) Substantive due process "involves a definition of the protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it."\(^{121}\) Identified liberty interests include "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . ."\(^{122}\)

The Supreme Court, in *Washington v. Glucksberg*,\(^ {123}\) stated that the established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition. Second, we have required in substantive due process cases a careful description of the asserted fundamental liberty interest.\(^ {124}\)

The Court also noted that "the Fourteenth Amendment forbids the government to infringe . . . fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."\(^ {125}\) California's involuntary chemical treatment statute implicates at least two fundamental liberty issues: the right to procreate (because MPA is a female contraceptive), and the right to bodily integrity (because the

\(^{119}\) U.S. CONST. amend. XIV.

\(^{120}\) Id.


\(^{122}\) Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (cited with approval in Board of Regents v. Roth, 408 U.S. 564, 572 (1972)).

\(^{123}\) Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (establishing that assistance in committing suicide is not a fundamental liberty interest protected under the due process clause and outlining a substantive due process analysis).

\(^{124}\) Id. at 2268 (internal citations and quotations omitted).

\(^{125}\) Id. (internal citations and quotations omitted).
statute calls for involuntary drug treatment that alters biological functioning as a condition of parole).

1. An Impermissible Violation of a Female’s Fundamental Right of Procreation

It is undeniable that a woman’s fundamental right of procreation is impermissibly violated by California’s chemical treatment statute because the chemical treatment serves no compelling state interest. Justice Douglas, writing for the majority in *Skinner v. Oklahoma*, declared procreation to be one of the “basic civil rights of man,” which is “fundamental to the very existence and survival of the race.” MPA is over ninety-nine percent effective in preventing pregnancy and effectively renders female sex offenders undergoing mandatory MPA treatment sterile for the duration of treatment. Such treatment, however, is ineffective in accomplishing the state’s goals of rehabilitation, deterrence, and public safety because there is no evidence that MPA treatment decreases the female sex drive. Imposing state mandated sterilization without an accompanying state justification for this violation of a fundamental right fails even rational basis review.

As applied to women, California’s statute fails the substantive due process argument based on the women’s fundamental right to procreate. Therefore, this Section attempts to analyze California’s chemical treatment statute using a hypothetical drug which is effective in decreasing the libido of both women and men, but, similar to MPA, temporarily sterilizes women. A state’s chemical treatment statute might survive this substantive due process attack if the hypothetical drug treatment had the same contraceptive effect in women as does MPA, but, unlike MPA, significantly furthers the state’s purpose of reducing recidivism in women as well as in men. The analysis is undertaken on speculation that medical science may discover or create such a drug and that a result of sterilization, especially if temporary, may not be fatal to a treatment.

The impairment of the fundamental right to procreate struck down by the Court in *Skinner* is distinguishable in an important way from the impairment of


127 *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (stating that procreation is one of the “basic civil rights of man,” which is “fundamental to the very existence and survival of the race”).


129 *Id.*

130 *Skinner*, 316 U.S. at 535.
this same right under a chemical treatment statute. Although female sex offenders would still be subject to state mandated sterilization, the sterilization by chemical treatment is temporary. Women who stop using a contraceptive are no longer sterile. In *Skinner*, the state of Oklahoma sentenced persons convicted of two or more particular felonies to surgical castration. Although female sex offenders would still be subject to state mandated sterilization, the sterilization by chemical treatment is temporary. Women who stop using a contraceptive are no longer sterile. In *Skinner*, the state of Oklahoma sentenced persons convicted of two or more particular felonies to surgical castration. Male sexual offenders undergoing chemical treatment may not even experience actual impairment of the right to procreate. Males undergoing treatment with MPA experience “erotic apathy,” but are still able to achieve an erection and ejaculation. Some male patients undergoing treatment with MPA have reported only a minimal decrease in consensual sexual activity. The male sex drive generally returns within seven to ten days of discontinuing treatment with MPA and the side effects wear off as the drug is cleared from the body.

Justice Douglas, delivering the opinion in *Skinner*, stated that Oklahoma’s Habitual Criminal Sterilization Act “deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.” However, the Court also said that legislatures “may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience.”

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131 *Id.* at 536-37.


133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*


139 *Skinner v. Oklahoma*, 316 U.S. 535, 535 (1942). Oklahoma’s statute fails under the equal protection clause because the statute punishes one criminal but not another for the same type of crime.

140 *Id.* at 540 (“Nor is [the legislature] prevented by the equal protection clause from confining its restrictions to those classes of cases where the need is deemed to be the clearest.”) (citing *Miller v. Wilson*, 236 U.S. 373, 384 (1915)).
The Court distinguished the sterilization upheld in *Buck v. Bell*,\(^{141}\) from the sterilization struck down in *Skinner*,\(^{142}\) explaining that when sterilization of the confined mentally ill is done in order that they might be released from institutionalization, the procedure is done for the purpose of more nearly achieving a form of equality by allowing institutionalized mentally ill people to be released and returned to the community.\(^{143}\)

Chemical treatment sterilizes female sexual offenders only temporarily and is unlikely to sterilize males at all.\(^{144}\) Chemical treatment would allow a repeat paraphilic sexual offender to be released from confinement in a prison or an institution, and is preferable to releasing repeat sex offenders with no attempt at treatment. Under the California statute, treatment is discontinued when the parolee can demonstrate to the Board of Prison Terms that chemical treatment is no longer necessary.\(^{145}\) The ability to discontinue distinguishes chemical treatment from the permanence of surgical castration. A statute requiring MPA chemical treatment along with concurrent psychotherapy as a condition of parole may pass even strict scrutiny by the Supreme Court, providing that the statute is narrowly tailored to achieve a compelling state interest and the state is able to show there are no less restrictive alternatives. A state has a compelling interest in the safety of its children and in deterring and rehabilitating repeat sex offenders in order to return them to society as productive, nondangerous members of the community. Chemical treatment with counseling, narrowly tailored to affect only those offenders who would benefit from the treatment, is an acceptable requirement of parole. There is no lasting impairment in females, and possibly no impairment in males, of the fundamental right to procreate,\(^{146}\) and similar to the state's compelling interest for sterilization given in *Buck*,\(^{147}\) the sexual offender gains release from confinement.

\(^{141}\) 274 U.S. 200 (1927) (upholding a Virginia statute authorizing the surgical sterilization of institutionalized persons deemed to be mentally ill).

\(^{142}\) *Skinner*, 316 U.S. at 538.

\(^{143}\) *Id.* at 542.


\(^{146}\) Fitzgerald, *supra* note 19, at 7.

\(^{147}\) *Buck*, 274 U.S. at 205-06. Justice Holmes delivered the opinion of the Court upholding surgical sterilization of institutionalized mentally ill patients and set forth the state's compelling interest: "many defective persons who if now discharged would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and
Therefore, if a state were to use a chemical that, unlike MPA, actually achieves the state’s purpose in both men and women and were narrowly tailored to apply only to offenders who benefitted from this treatment, such a statute might withstand even strict scrutiny under a substantive due process analysis of a violation of the fundamental right to procreate.

2. Chemical Treatment May Not Be an Impermissible Violation of Bodily Integrity

Requiring a specifically defined group of repeat sex offenders to undergo chemical treatment as a condition of parole, although a substantial interference, may not constitute a constitutionally impermissible deprivation of a convicted sex offender’s identified liberty interest in bodily integrity. The Supreme Court, in Washington v. Harper,148 upheld the principle of bodily integrity as a liberty interest saying, “[t]he forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty.”149 The Court went on to say that a prisoner’s liberty interest in bodily integrity may be overridden in cases where the prisoner presents a danger to himself or others and the treatment is in the prisoner’s medical interests, providing the procedures under which such treatment is administered satisfy due process requirements.150

Kansas v. Hendricks151 recently examined the impairment of a paraphilic prisoner’s liberty interest in freedom from physical restraint by involuntary civil commitment under Kansas’s Sexually Violent Predator Act.152 The Court upheld the Kansas civil commitment statute, stating that “[a]lthough freedom from physical restraint ‘has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,’ that liberty interest is not absolute.”153 The Court acknowledged that “[t]here are manifold restraints to which every person


Id. at 229.

Id. at 210.


KAN. STAT. ANN. § 59-29a01 (1994).

Kansas, 117 S. Ct. at 2079 (citing Fouca v. Louisiana, 504 U.S. 71, 80 (1992)).
is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.\textsuperscript{154}

In Kansas,\textsuperscript{155} the Court ruled that a paraphilic could be subjected to involuntary physical restraint only under narrowly defined conditions.\textsuperscript{156} In a case of an internal physical restraint, such as mandatory chemical treatment, the liberty interest is at least equal in importance to the liberty interest in freedom from involuntary commitment as an external physical restraint. The Court said as much in Washington v. Harper,\textsuperscript{157} deciding that a "respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment."\textsuperscript{158}

The Court in Vitek v. Jones,\textsuperscript{159} in Riggins v. Nevada,\textsuperscript{160} and again in Washington,\textsuperscript{161} made clear that involuntary administration of medication could be upheld against a prisoner's liberty interest under narrow circumstances where the state can (1) establish an overriding justification for involuntary administration of medication and (2) show that the treatment is in the medical interest of the inmate.\textsuperscript{162} The Court reiterated these requirements in Kansas: \textsuperscript{163} "A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment."\textsuperscript{164} An additional reason such as "mental illness" or "mental abnormality" is required to justify the substantial interference

\textsuperscript{154} Id. (citing Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (upholding governmental compulsory vaccination)) (validating compulsory vaccination against religious objection).

\textsuperscript{155} Kansas, 117 S. Ct. at 2079.

\textsuperscript{156} Id.


\textsuperscript{159} 445 U.S. 480 (1980).

\textsuperscript{160} 504 U.S. 127, 135 (1992).

\textsuperscript{161} Washington, 494 U.S. at 210.

\textsuperscript{162} Id. at 220-24; See also Riggins, 504 U.S. at 135.

\textsuperscript{163} Kansas, 117 S. Ct. 2072.

\textsuperscript{164} Id. at 2080.
with a person’s right to liberty.\textsuperscript{165} In Kansas, the Court grappled with the uncertainty and disagreement among psychiatric professionals in defining the terms of mental illness and mental abnormality and concluded that a diagnosis of paraphilia is sufficient for a legal finding of mental illness or mental abnormality (distinguished from a medical finding),\textsuperscript{166} cautioning courts to give legislatures broad latitude when acting in areas of “medical and scientific uncertainties.”\textsuperscript{167} The Court clearly reiterated the standard of review for prison regulations set forth in Washington,\textsuperscript{168} Turner v. Safley,\textsuperscript{169} and O’Lone v. Estate of Shabazz,\textsuperscript{170} stating that “[t]he proper standard for determining the validity of a prison regulation claimed to infringe on an inmate’s constitutional rights is to ask whether the regulation is ‘reasonably related to legitimate penological interests.’”\textsuperscript{171}

Involuntary civil commitment of a paraphilic has been upheld when a state is able to show an overriding justification and can present evidence that treatment is in the inmate’s medical interests.\textsuperscript{172} Involuntary chemical treatment as a condition of parole for paraphilics might likewise be upheld because of the state’s overriding justification in the safety of its children and the deterrence and rehabilitation of its repeat sex offenders when the state can present evidence that treatment is in the medical interest of the offender (the treatment actually decreases an individual’s propensity to engage in deviant sexual behavior).

Diagnosis of paraphilia is held to be sufficient for a legal finding of mental illness or mental abnormality.\textsuperscript{173} The California statute mandates chemical

\begin{footnotesize}
\begin{enumerate}
\item[165] \textit{Id.}
\item[166] \textit{Id.} at 2072.
\item[167] \textit{Id.} at 2081 n.3.
\item[168] \textit{Washington}, 494 U.S. at 224. “To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a ‘reasonableness’ test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights.” \textit{Id.} (internal quotations and citations omitted).
\item[169] 482 U.S. 78 (1987) (upholding restriction on the ability of prisoners to send mail to other inmates stating the regulation was reasonably related to prison safety and security).
\item[170] 482 U.S. 342 (1987) (upholding prison work regulation even though the regulation kept some prisoners from practicing their religion).
\item[171] \textit{Washington}, 494 U.S. at 223.
\item[172] \textit{Id.} at 222-23.
\item[173] \textit{Kansas}, 117 S. Ct. at 2081.
\end{enumerate}
\end{footnotesize}
treatment with MPA for those sex offenders convicted of a second offense of child molestation; the second conviction provides evidence of past criminal sexual behavior and evidence that the offender is likely to commit future similar sexual crimes if not rehabilitated or deterred before being released on parole. Chemical treatment with MPA can be determined by a medical professional to be in the inmate’s medical interest depending on a variety of factors such as gender, accurate diagnosis of paraphilia by an appropriate medical professional, and appropriate administration.

Chemical treatment enables a repeat sexual offender to be paroled, releasing him from incarceration. The Supreme Court has ruled that involuntary institutionalization for treatment may be in the medical interest of a convicted paraphilic and may likewise hold that chemical treatment with MPA, under specific circumstances, would be medically appropriate, given its relatively few side effects versus its benefits to the parolee and to society. Requiring MPA treatment realizes the state’s objective in a less externally restrictive manner than the available alternatives of incarceration or institutionalization, but only when applied to an appropriately narrow subgroup of sex offenders who voluntarily chose to undergo treatment in conjunction with counseling.

3. MPA Treatment is Arguably the Least Intrusive Alternative

Chemical treatment with MPA must also satisfy the requirement of no less intrusive or restrictive alternatives before it can successfully survive a substantive due process attack after Riggins. Treatment of paraphilia traditionally primarily consisted of psychotherapy, which has not proven all that effective, as evidenced

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174 Id. at 2082.
175 Id.
176 PDR, supra note 16, at 2081.
177 Berlin & Meinecke, supra note 36, at 602.
178 Id.
179 Riggins, 504 U.S. at 127. The involuntary administration of antipsychotic drugs during trial in order to make defendant competent to stand trial constitutes a deprivation of the liberty protected by due process. Where the trial court had not attempted to make any findings that the medication was medically appropriate for the defendant, nor had the court considered any "less intrusive alternatives" that could be used to protect the defendant's and the state's interests, the defendant's right to due process was impermissibly violated because of the possibility his defense was impaired. Id.
by the relatively high rate of recidivism among sexual offenders. Current penal sanctions do not fare any better. Studies of paraphilics voluntarily undergoing chemical treatment used in conjunction with group or individual counseling for paraphilia have shown the greatest reduction in recidivism, indicating that chemical treatment combined with counseling is the most effective therapy currently available for paraphilia. Aversion therapies such as electric shock treatment, or other therapies consisting of surgical castration and stereotaxic neurosurgery (surgically destroying portions of the brain believed responsible for sexual response), are more externally physically intrusive than chemical treatment with MPA and have the added feature of being permanently disabling in some way. Although weekly IM injections are undeniably intrusive, the injections are less of an intrusion than the existing alternatives with the exception of psychiatric counseling that, used alone, is not as effective as using MPA with counseling. MPA treatment is not as visibly obvious an alteration of a person’s body as is surgical castration or stereotaxic neurosurgery. The chemical treatment is intrusive, however, in a subtle, internal way. MPA alters an individual’s basic biological

180 Fuller, supra note 9, at 604. “Psychotherapy is useful in the treatment of some child molesters but probably not all although the literature on individual psychotherapy for child molesters is sparse and preponderantly consists of case reports.” Id.


182 See supra notes 57-67 and accompanying text.


184 Don Riesenber, Motivations Studied and Treatments Devised in Attempt to Change Rapists’ Behavior, 257 JAMA 899-900 (1987) (discussing the receipt of an electric shock whenever a subject exhibits the deviant behavior). See also Icenogle, supra note 43, at 283.

185 See Icenogle, supra note 43, at 282-85. Surgical castration involves the surgical removal of the testes as a treatment for male sex offenders and has “been discarded due to its permanence, invasiveness, and mutilating characteristics.” Id. at 281.

186 Id. at 280-83. Stereotaxic neurosurgery involves the identification of the areas of the brain that accumulate large amounts of sexual hormones and, when destroyed, produce changes in sexual behavior . . . . In 1976, a government task force on the issue of psychosurgery concluded that stereotaxic neurosurgery held promise, but warned that its use should be restricted to designated research centers to assure the proper safeguards are taken. Id. (footnotes omitted).
functioning in a way that is not fully understood. While there may be no outward physical mutilation or alteration, there is an internal alteration that is at least as, if not more, intrusive by virtue of unknown biological manipulation, than surgical or aversion therapies. The "less intrusive" argument must therefore rest primarily on the transient effects of the drug. MPA's effects supposedly last only as long as the patient is undergoing treatment, arguably making MPA the least intrusive alternative.

C. Procedural Due Process Concerns Are Not Insurmountable

The procedures surrounding the administration of MPA chemical treatment must be sufficient to protect the offender's interests as against the state. "The procedural due process issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance."

Reviewing the Supreme Court's procedural due process analysis in Washington, Riggins, Foucha, and Kansas yields the required procedural protections for medical treatment of an inmate. First, there must be a medical finding of mental illness or mental abnormality. Second, a medical treatment must be in an inmate's medical interests. Third, the medical treatment ordered

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187 Id. at 284. "The mechanism by which MPA lowers libido is not completely understood . . . [T]he ability of MPA to decrease paraphilic behavior . . . may be due to a tranquilizing effect on the brain. It is unclear whether MPA has any specific effect on the sexual centers of the brain." Id. (footnotes omitted).

188 See supra notes 64-67 and accompanying text.


191 494 U.S. at 210.


193 504 U.S. 71.


195 See id. at 2080.

196 See Riggins, 504 U.S. at 134-35; see also Washington, 494 U.S. at 227.
must be essential for the inmate's safety or for the safety of others. Fourth, there must be no less intrusive alternatives to the medical treatment ordered. Chemical treatment of paraphilia as a condition of parole will likely be upheld under a procedural due process analysis if the state is able to show the inmate's interests are adequately protected in meeting all four procedural protections.

A psychiatrist or mental health professional must examine and evaluate the sexual offender and reach a medical finding or diagnosis of mental illness or mental abnormality. The Court has paved the way for acceptance of paraphilia as a mental abnormality in Kansas, finding paraphilia is sufficient for a legal diagnosis while recognizing psychiatric professional disagreement as to whether paraphilia constitutes a mental illness.

Once a diagnosis of paraphilia is made, treatment may be allowed, providing the state can show chemical treatment with MPA or its chemical equivalent is in the inmate's medical interest. MPA treatment is a part of a comprehensive therapy program shown to be effective in decreasing the overriding sexual demands of some paraphilics, medically benefitting such an inmate by allowing him to better order his life and return to society as a potentially contributing, nondangerous member of the community. The Supreme Court examined the issue of having an independent decision maker for cases of mental abnormality in Washington, and upheld a procedure where the decision maker, although not independent, was not involved in the current treatment or diagnosis of the inmate, and the medical treatment was "at all times consistent with the degree of care, skill, and learning expected of a reasonably prudent psychiatrist acting in

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197 See Riggins, 504 U.S. at 134-35; see also Washington, 494 U.S. at 227.
198 Riggins, 504 U.S. at 135; see also Washington, 494 U.S. at 225-26.
199 See Kansas, 117 S. Ct. at 2080-81.
200 See generally Kansas, 117 S. Ct. 2072 (discussing psychiatric evaluation and the definition of mental illness or mental abnormality).
201 See Kansas, 117 S. Ct. at 2081 n.3.
202 See Riggins, 504 U.S. at 134-35.
203 See Fitzgerald, supra note 19, at 16.
the same or similar circumstances.\footnote{Washington v. Harper, 494 U.S. 210, 227 n.11, 233-34 (1990) (internal citations and quotations omitted).} The fact that the decision-maker was employed within the system seeking to confine the inmate did not automatically disqualify him or her without proof of bias in favor of state ordered chemical treatment.\footnote{See Washington, 494 U.S. at 228-36.} A state psychiatrist can diagnose paraphilia after a comprehensive psychiatric evaluation of an individual offender absent a showing of bias toward diagnosing paraphilia in repeat sex offenders.

The state fulfills the third procedural requirement by showing that chemical treatment as a condition of parole is essential for the paraphilic offender’s safety and for the safety of a state’s citizens.\footnote{See Riggins, 504 U.S. at 134-35; see also supra notes 16-74 and accompanying text.} The state is also able to present evidence fulfilling the last procedural requirement: there is no less intrusive alternative to chemical treatment.\footnote{See Riggins, 504 U.S. at 135; see also Washington, 494 U.S. at 222.} Currently there are no less permanent, intrusive alternative treatments for achieving the state’s overriding purpose of reducing recidivism in this narrow classification of sexual offenders.\footnote{See supra notes 179-189 and accompanying text.}

A state, by carefully providing all the procedural protections required by the Constitution, can draft a statute requiring chemical treatment for paraphilic sexual offenders as a condition of parole that can withstand a procedural due process attack, but it remains to be seen whether a state will be able to provide all the necessary requisites of the procedural protections such as correct diagnosis and appropriate treatment for the narrow group of offenders for which such treatment is warranted.

Under the Kansas Sexually Violent Predator Act\footnote{KAN. STAT. ANN., § 59-29a01 (1994).} upholding involuntary civil commitment of a paraphilic,\footnote{Kansas v. Hendricks, 117 S. Ct. 2072 (1997).} the committed defendant is permitted three separate avenues of review when requesting release from institutionalization: (1) an annual review determining whether, beyond a reasonable doubt, continued detention was appropriate under the initial confinement standards; (2) the opportunity to receive specified authorization at any time to petition for release; and
(3) the right to petition for release at any time without specified authorization.\textsuperscript{212} It is unclear if the Supreme Court would require this same extent of review for a parolee undergoing chemical treatment. Two Supreme Court cases, although relevant, do not address the necessary procedural protection afforded a parolee living outside of a state facility. \textit{Kansas} concerns civil commitment based on a jury finding that a paraphilic defendant is a sexually violent predator.\textsuperscript{213} \textit{Washington} deals with the constitutionality of a prison policy authorizing involuntary treatment with antipsychotic drugs.\textsuperscript{214} Both cases deal only with an individual under the control and care of the state, within a state facility, as opposed to an individual released into the community.

\textbf{D. An Offender Must Have the Right to Reject Parole}

A convicted repeat sexual offender must be allowed the option of accepting the conditions of parole or staying incarcerated when the conditions of parole are offensive or burdensome.\textsuperscript{215} Repeat sex offenders must be given the right to reject chemical treatment as a condition of parole and to elect to finish out their sentence. Many offenders may find the condition too invasive or may simply not want therapy, in which case the therapy would be of uncertain value. The Supreme Court has not ruled on a convicted defendant’s right to refuse probation, and the state and federal courts are divided on the issue: some courts hold that a defendant may choose to refuse probation and serve the suspended sentence or demand that the court impose a sentence; other courts hold that a defendant does not have an unqualified right to refuse parole because of society’s interest in having offenders

\begin{footnotesize}
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\item[212] \textit{Id.} at 2078.
\item[213] \textit{Id.} at 2072.
\item[215] See Jay M. Zitter, \textit{Right Of Convicted Defendant To Refuse Probation}, 28 A.L.R.4TH, 736 (1981). For example, the court in \textit{State v. Randolph}, 316 N.W.2d 508 (Minn. 1982) held that a convicted criminal defendant who is placed on probation pursuant to sentencing guidelines has a right to refuse the probation and to demand the execution of his sentence if the conditions of probation make probation more onerous than a prison sentence, and if it could not be demonstrated that society’s interests would suffer by vacating the probation sentence.
\end{footnotesize}

\textit{Id.}
paroled for rehabilitative reasons. The concept of a chemical treatment parole condition is new, the treatment is experimental, and this condition of parole fundamentally alters an individual’s physiological functioning. Many may find the imposition of the treatment more burdensome than serving out the sentence for the offense. Because the condition of parole is experimental and profoundly impacts the parolee’s physiological functioning in ways that currently are not fully understood, an inmate must be afforded the opportunity to refuse MPA treatment and remain incarcerated

1. Meaningful Voluntary Choice or Coercion in Accepting the Condition

A primary concern when affording a convicted sex offender a choice between chemical treatment as a condition of parole and serving the sentence is whether the offender is capable of making a truly voluntary as opposed to a coerced choice. The situation is analogous to the possibility of “inherent coercion regarding the consent of involuntarily committed individuals to treatment,” in that there may be no actual voluntary choice given when an individual is forced to choose between two evils.

The Supreme Court has held that a defendant’s choice to enter a guilty plea and accept sentencing (all the while maintaining his innocence) is a voluntary choice although acknowledging that such an individual may be primarily motivated by the fear of receiving a harsher sentence in taking his chances with the imposition of a verdict and sentencing after a trial. The Court, in Bordenkircher v. Hayes, acknowledged that some pleas may involve difficult choices but such pleas are nonetheless “inevitable and permissible,” falling within the definition of a voluntary choice. The choice between undergoing chemical treatment to obtain

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216 See Zitter, supra note 215, at 736; see also United States v. Thomas, 934 F.2d 840 (7th Cir. 1991) (holding that a criminal defendant does not have an unqualified right to reject probation using a balancing test between a convicted defendant’s interest in rejecting onerous conditions of parole and society’s interest in requiring conditions of parole as a means to rehabilitate a convicted tax evader).

217 Fitzgerald, supra note 19, at 17.

218 See Brady v. United States, 397 U.S. 742 (1970); see also North Carolina v. Alford, 400 U.S. 25, 31 (1970) (referring to Brady and noting that a defendant who chooses to plead guilty to lesser charge to avoid the possibility of a death sentence is making a “free and rational choice”).


220 Id. at 364.
release by parole or to remain in prison necessarily contains an "inherent degree of coercion," possibly motivated by a fear of incarceration; nevertheless an individual should be permitted to make such a choice. Convicted sex offenders may be motivated to accept the condition of chemical treatment from a fear of imprisonment or a desire for release, but the choice is theoretically no different in risk of coercion than any other parole condition. Thus, the choice should be permissible after an offender has been diagnosed as an individual who would benefit from treatment, and fully informed of the nature and possible side effects of the treatment, including the existing alternatives to treatment. An offender must first be diagnosed as suffering from paraphilia before being given the option of chemical treatment because many offenders might choose treatment as merely a means of reducing their sentences, regardless of whether they actually suffer from paraphilia. Without allowing the option of chemical treatment, a qualifying offender is left incarcerated, institutionalized, or, in the case of ineffective traditional treatment methods, imprisoned by his own aberrant sexual urges.

2. MPA Treatment Furthers the Purpose of Parole

Requiring MPA treatment of male paraphilic sexual offenders convicted of a second offense arguably furthers the purposes of parole by allowing the rehabilitation and release of offenders. California's chemical treatment statute states, "Any person guilty of a second offense . . . 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." Parole is created by state statute to serve the state's purposes of rehabilitation and deterrence, and parole boards are often given broad discretionary power in furthering these purposes. However, an inmate has no constitutional right to parole.

The Supreme Court has stated that the method of deciding whether to grant parole is at best a primarily subjective appraisal depending in large part on "informed predictions as to what would best serve [correctional purposes] or the

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221 Fitzgerald, supra note 19, at 17.


224 Greenholtz, 442 U.S. at 7.
safety and welfare of the inmate. 225 "Probation is the attempted saving of a man who has taken one wrong step, and whom the judge thinks to be a brand who can be plucked from the burning." 226 The safety and welfare of the inmate is best served by release from incarceration and by receiving treatment that affords a substantial chance to lead a productive life free from the overwhelming sexual desires that cause the offender to commit sexual crimes. 227 The safety of the public is best served by means that reduce or stop sexual offender recidivism. As long as MPA actually is effective in reducing a particular paraphilic offender's recidivism, it accomplishes the purposes of parole. But the individual effectiveness determination seems difficult to make within the short period of time between when MPA treatment would start and when the offender receives parole.

There can be little question that states are looking for a method that will allow them to safely parole sex offenders. In addition to the humanitarian aspect of granting parole, the economic reality of increasing incarceration costs leads to the undeniable need to find viable alternatives to imprisonment or institutionalization of repeat sexual offenders. The nation's federal and state prison population grew by 55,876 inmates during 1996. 228 Counting both prison and jail inmates, there were over 1.6 million adults behind bars as of June 30, 1996. 229 The estimated cost of incarcerating 1.6 million inmates is over $26.8 billion annually. 230 Forecasts indicate that by the year 2000 the total prison population will be in the neighborhood of 2.25 million inmates. 231 Costs in areas such as health care are increasing rapidly, due in part to an aging prison population. 232 The size of the elderly population is doubling every four years as a result of longer sentences and

225 *Id.* at 9-10.


227 See MERCK, supra note 32, at 1498.


229 See id.


231 See id.

232 See id.
restrictions on parole, and it costs $69,000 a year to house an inmate over sixty years of age.\textsuperscript{233}

Granting a repeat paraphilic sexual offender parole on the condition that he undergo MPA chemical treatment and counseling represents a viable alternative to incarceration\textsuperscript{234} or to parole with no requirement of treatment. Given the complexity of the evaluation required and the procedures necessary for accurate administration, requiring chemical treatment may be more expensive than incarceration. One consideration in favor of chemical treatment is that parole would enable a paraphilic sexual offender to return to society and to the workforce where he would then have the opportunity to earn the money to support himself and possibly help alleviate the state's cost of his treatment\textsuperscript{235} which would be a more effective utilization of the state's resources than simply warehousing inmates and paying for their support.

E. \textit{MPA Treatment Is Not Cruel and Unusual Punishment for Male Paraphilics}

Cruel and unusual punishment is prohibited by the Eighth Amendment.\textsuperscript{236} A statute requiring chemical treatment as a condition of parole can survive an Eighth Amendment challenge if the treatment is applied to those offenders who benefit from it. For the purposes of this Comment, chemical treatment as a condition of parole will be characterized as a punishment. If such treatment is held not to be punishment, then the Eighth Amendment may not apply.

The Supreme Court, in \textit{Gregg v. Georgia},\textsuperscript{237} explained that the definition of "cruel and unusual" is not a static one, but changes with "the evolving standards of decency that mark the progress of a maturing society."\textsuperscript{238} In \textit{Lee v. Tahash},\textsuperscript{239} the court elaborated on the definition of "cruel and unusual" as punishment "of such

\begin{itemize}
\item \textit{See id.}
\item \textit{See Fitzgerald, supra} note 19, at 16-17.
\item \textit{See id.}
\item \textit{See U.S. CONST. amend. VIII.}
\item \textit{Id.}
\item 352 F.2d 970 (8th Cir. 1965).
\end{itemize}
character or consequences as to shock general conscience or to be intolerable in fundamental fairness."\(^{240}\)

One perspective of the character of mandatory MPA treatment as a condition of parole is simply as a medically appropriate chemical treatment administered by weekly injections\(^{241}\) until an offender demonstrates that treatment is no longer necessary.\(^{242}\) On a deeper, more disturbing level, MPA treatment is an involuntary, and possibly indefinite, chemical alteration of a person’s mental and biological functioning in order to further a state’s interests.\(^{243}\) Under the first characterization, MPA treatment is not very shocking. A weekly injection is less frequent than the injections self-administered by insulin dependent diabetics.\(^{244}\) Society and the offender both gain some benefit from requiring MPA treatment as a condition of parole.\(^{245}\) The offender is afforded a better quality of life by being able to live and work outside of prison, and society is protected from the danger of a repeat sexual offender.\(^{246}\)

The second characterization of chemical treatment as state-imposed mental and biological alteration is initially and appropriately shocking to the general conscience, recalling the biological alteration experiments committed by the Nazis, and appears intolerable by current standards of decency.\(^{247}\) "Some judges find state biological alteration – in the form of drugs, other psychiatric interventions, or sterilization – a profoundly threatening, political and social phenomenon."\(^{248}\) Requiring chemical treatment as a condition of parole may not be so shocking or

\(^{240}\) Id. at 972.

\(^{241}\) See Fitzgerald, supra note 19, at 6.


\(^{244}\) See MERCK, supra note 32, at 1077 (stating that most diabetics can be controlled with a single daily injection).

\(^{245}\) See Fitzgerald, supra note 19, at 3.

\(^{246}\) See id.

\(^{247}\) See Gelman, supra note 243, at 1300-01 (examining the constitutional issues of biological alteration and determining that it “undermines premises of biological equality and human dignity that provide the foundation for our rights. It destroys our Constitution.”).

\(^{248}\) Id. at 1300.
unfair as to be cruel and unusual punishment, however, in light of a previous
Supreme Court decision.\textsuperscript{249} Involuntary treatment with drugs is not without
precedent in the United States. The Supreme Court, in \textit{Washington},\textsuperscript{250} has upheld
involuntary treatment with antipsychotic drugs when an inmate poses a danger to
himself or others, and MPA’s side effects on the male paraphilic\textsuperscript{251} are relatively
mild compared with antipsychotic drug side effects.\textsuperscript{252} If involuntary administration
of a drug having greater debilitating side effects than MPA is not intolerable to
concepts of fundamental fairness\textsuperscript{253} when administered to mentally ill or dangerous
prison inmates for safety reasons,\textsuperscript{254} then requiring treatment as a condition of
parole using a drug with less debilitating side effects should not necessarily shock
the conscience or be found intolerable to the concept of fundamental fairness when
administered to protect the public safety and welfare. Furthermore, MPA’s side
effects end when treatment is discontinued.\textsuperscript{255} The transient nature of the effects
appears to make the treatment less threatening to the conscience because the
offender can be returned to his original state once the drug is discontinued.

A punishment will also be found cruel and unusual if it is greatly
disproportionate to the offense for which it is imposed.\textsuperscript{256} Under California’s
statute,\textsuperscript{257} MPA treatment is mandatory when a sexual offender is convicted for the


\textsuperscript{250} \textit{See id.}

\textsuperscript{251} Fitzgerald, \textit{supra} note 19, at 7 (noting that possible side effect include weight gain,
dramatically decreased sperm count, and testicular atrophy). “Most of the reported side effects are
extremely rare.” \textit{Id.}

\textsuperscript{252} \textit{See Gelman, supra} note 243, at 1206 (noting that antipsychotic drug side effects include “an
irreversible neurological disorder . . . in 10% to 25% of recipients . . . Other side effects include
mental distress, tremors, symptoms of Parkinson’s disease, and in rare cases, death.”).

\textsuperscript{253} \textit{See Lee}, 352 F.2d 970.

\textsuperscript{254} \textit{See Gelman, supra} note 243, at 1205.

\textsuperscript{255} \textit{See Fitzgerald, supra} note 19, at 7.

\textsuperscript{256} \textit{See Robinson v. California}, 370 U.S. 660, 667 (1962) (holding that a state law making the
“status” of narcotic addiction a criminal offense inflicts a cruel and unusual punishment); \textit{see also}
\textit{Weems v. United States}, 217 U.S. 349, 381-82 (1910) (holding that the inhibition against cruel
and unusual punishment is directed not only against torture, but against all punishments which, by their
excessive length or severity, are greatly disproportionate to the offenses charged).

\textsuperscript{257} \textit{CAL. PENAL CODE} § 645(b) & (c) (Deering 1983 & Supp. 1998).
second time of the following offenses: sodomy, lewd or lascivious acts, oral copulation, and penetration by foreign object against a victim less than thirteen years old. Requiring a repeat paraphilic sex offender to undergo chemical treatment while on parole is not an imposition of a disproportionate sentence considering the devastating effects of sexual molestation on children, effects that continue for years or for a lifetime. Allowing states to require, as a condition of parole, treatment that directly eliminates a paraphilic’s drive to commit sexual crimes recognizes “the wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist, and punish the crimes of men according to their forms and frequency.”

Justice Brennan, concurring in *Furman v. Georgia*, stated a third consideration under the Eighth Amendment

A punishment is excessive if it is unnecessary: the infliction of a severe punishment by the State cannot comport with human dignity where it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive.

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258 See id. § 645(c).

259 See id. § 645(b).

260 See Harmelin v. Michigan, 501 U.S. 957, 986-87 (1991) (providing three relevant factors in the proportionality determination: (1) the inherent gravity of the offense, (2) the sentences imposed for similarly grave offenses in the same jurisdiction, and (3) sentences imposed for the same crime in other jurisdictions).

261 See Lauren J. Abrams, *Sexual Offenders and the Use of Depo-Provera*, 22 SAN DIEGO L. REV. 565, 568 (1985); see also Fuller, supra note 9, at 603 (noting that posttraumatic stress disorder may develop in victims immediately after the sexual abuse; however, symptoms commonly develop or redevelop in the victim months or years after the molestation). The victim’s impairment may be mild or it may severely affect nearly all aspects of his life. Fuller, supra note 9, at 603.

262 *Weems*, 217 U.S. at 379.

263 408 U.S. 238, 279 (1972) (Brennan, J., concurring).

264 *Id.* (internal citations omitted).
The only effective therapy for paraphilia at this time is treatment with MPA or its chemical equivalent used in conjunction with counseling; there are no less severe alternatives that offer the hope of an effective treatment for paraphilia.

Requiring treatment with MPA as a condition of parole is excessive however, if applied to offenders who will not benefit from such treatment. MPA treatment does constitute cruel and unusual punishment for female sexual offenders because the treatment is not effective and therefore is unnecessary.\(^{265}\) MPA does nothing to reduce the propensity to commit sexual crimes in at least ninety-five percent of female paraphilic sexual offenders;\(^{266}\) therefore, the treatment “is nothing more than the pointless infliction” of sterility by chemical contraception,\(^{267}\) which is cruel and unusual punishment. MPA treatment is also cruel and unusual punishment for those male sex offenders who do not suffer from paraphilia because the treatment does not affect their propensity for deviant sexual behavior.

IV. OFFENDERS SHOULD HAVE THE OPPORTUNITY TO WAIVE CONSTITUTIONAL PROTECTIONS

If the Supreme Court determines that mandatory chemical treatment as a condition of parole violates due process and Eighth Amendment protections, a convicted paraphilic, after a medical determination that such treatment is in the offender’s medical interests, should be allowed to waive constitutional protections and receive treatment.\(^{268}\)

In *Brady v. United States*,\(^ {269}\) the Supreme Court set forth the standard for a valid waiver of constitutional rights.\(^ {270}\) Waiver in a criminal proceeding must be done voluntarily and “must be knowing, intelligent [and] done with sufficient awareness of the relevant circumstances and likely consequences.”\(^ {271}\)

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\(^{265}\) See PDR, *supra* note 16, at 2081.

\(^{266}\) See id.

\(^{267}\) *Furman*, 408 U.S. at 279 (Brennan, J., concurring).


\(^{269}\) 397 U.S. 742, 748 (1970).

\(^{270}\) See id.

Voluntary waiver is given when there is no physical or mental coercion to do so.²⁷² A defendant motivated by the possibility of a reduced sentence is still capable of voluntarily waiving fundamental protections.²⁷³ Even though a twice convicted sexual offender may be influenced to waive his constitutional protections by his desire for release, such waiver is still capable of being voluntary.²⁷⁴

Intelligent waiver is made when (1) a defendant has competent counsel to advise him, (2) the defendant understands the charges against him, and (3) the defendant is deemed competent.²⁷⁵ The Supreme Court has stated that waiver of certain fundamental rights should be allowed only in open court to protect the defendant.²⁷⁶ This protection is particularly important in chemical treatment cases because of the experimental nature of the condition. The court is then in the position to fully explain the consequences of waiving fundamental protections to a defendant, and can ascertain whether waiver is truly being made within the standard set forth in Brady.²⁷⁷ Twice convicted sexual offenders should not be required to waive due process and Eighth Amendment protections guaranteed them under the Constitution to receive effective treatment for a mental illness but, if necessary, should be permitted to do so.

V. CONCLUSION

California's chemical treatment statute fails constitutional scrutiny under several provisions: equal protection, substantive due process, and cruel and unusual punishment. The statute is impermissibly over-inclusive, including in its purview sexual offenders for whom MPA treatment has not been shown by medical literature to be effective. However, MPA treatment of male paraphilic sexual offenders is arguably the least restrictive alternative to achieving the state's purpose of rehabilitation, specific deterrence, and protection of the health and welfare of its citizens. MPA treatment coupled with psychiatric counseling has reduced the

²⁷² See Brady, 397 U.S. at 750.
²⁷³ See id. at 751.
²⁷⁴ See id.
²⁷⁵ Id. at 756.
²⁷⁶ Id. at 748 (stating that the waiver of the right to trial by entering a guilty plea, and waiver of the right to counsel should be done only in open court).
²⁷⁷ Id.
overwhelming sexual urges of male paraphilics in case studies\textsuperscript{278} and side effects are temporary.\textsuperscript{279} A twice convicted sexual offender must be given a voluntary choice between undergoing treatment and receiving parole, or refusing treatment and remaining incarcerated, both because of the experimental nature of MPA treatment and because the treatment is not effective in achieving the desired deterrence unless an offender wants to change his deviant behavior.

This Comment does not contend that a statute requiring chemical treatment as a condition of parole cannot be drafted to withstand Constitutional attack. Such a statute must be narrowly drawn to apply only to those offenders medically determined to benefit from the treatment because there exists a huge potential for inaccurate administration of MPA to offenders who will not benefit from treatment, but will receive parole by undergoing treatment, misleading the public into believing that these offenders have been rehabilitated. It remains to be seen whether the criminal justice system is capable of such a novel and expensive undertaking. The treatment must involve a diagnosis of a psychiatric illness or abnormality, evaluation of alternative treatment options, prescription of, and adjustment of, medication, along with a follow up of administration and effects on each patient/parolee. These elements have traditionally been the province of the medical profession, not the criminal justice system. Pertinent questions, although beyond the scope of this Comment, are whether the criminal justice system should, or would want to, legislate the administration of medication to criminals.

Alternative chemical treatments as a condition of parole for psychiatric illnesses that cause criminal behavior will continue to be an issue affecting the criminal justice system as medical science discovers new chemical therapies for such illnesses. But the mentally ill criminal defendant must not be statutorily forced to participate in a continual biological state experiment to further society’s interest in rehabilitation, deterrence, and cost control. State-imposed chemical treatment is a concept that affects all of its citizens in profound ways, subtly shifting our perceptions of punishment and bodily integrity. Lying in the shadows of such a treatment scheme is the specter of ever-increasing state control over the most private and protected areas of self. Chemical treatment of specific populations demands stringent procedural protections to guard against the possibility of invidious discrimination\textsuperscript{280} and should never be applied for the purpose of effecting a quick, seemingly easy fix at the expense of the constitutional rights of citizens, convicted criminals or not.

\textsuperscript{278} See supra notes 45-67 and accompanying text.

\textsuperscript{279} See Fitzgerald, supra note 19, at 7.

\textsuperscript{280} United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).
In summation, Laurence Tribe appropriately warns:

Those charged with the responsibility of choice must avoid too myopic an adherence to the matter at hand, recognizing that the ultimate results of incremental change might be wholly alien, and perhaps profoundly objectionable, to those who acquiesce step by step. And yet they must be equally sensitive not to misuse the power which comes with the authority to identify some governmental impositions, but not others, as harbingers of disastrous change; they must be scrupulous to distinguish the slip which leads inexorably down the slope from the one which does not.\(^{281}\)

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\(^{281}\) Tribe, supra note 85, at 1307 (citing Kahn, The Tyranny of Small Decisions, KYKLOS: Int’l. Rev. for Soc. Sci. 19, 23 (1966)).