

**COMMON ENEMY AND POLITICAL
OPPORTUNITY LEAVE ARCHAICALLY
MODERN SENTENCING UNCHECKED: THE
UNCONSTITUTIONALITY OF LOUISIANA'S
CHEMICAL CASTRATION STATUTE**

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*The criminal's soul is not referred to in the trial merely to explain his crime . . . if it is brought before the court . . . it is because it too, as well as the crime itself, is to be judged and to share in the punishment.*¹

I. INTRODUCTION

“Rot in hell and suffer!” yelled Herbert Nicholson, Jr. at Judge Robin Pittman on November 3, 2010 at Nicholson’s sentencing hearing in the Criminal District Court in Orleans Parish.² A jury had found Nicholson guilty of two counts of aggravated kidnapping, as well as one count each of aggravated rape with a knife, attempted aggravated rape with a knife, aggravated oral sexual battery with a knife, and sexual battery.³

Perhaps Nicholson made his outburst because he knew a harsh sentence was imminent and he felt he had nothing to lose; one wonders, however, if he knew the full extent of what was at stake. Following Nicholson’s brash cry for Pittman’s damnation, Nicholson was sentenced to three life sentences, to be served consecutively, without the benefit of probation, parole, or suspension of sentence on the aggravated kidnapping and aggravated rape convictions.⁴ The State then made a verbal request that the defendant be subjected to chemical castration per Louisiana Revised Statute § 14:43.6(A).⁵ According to the

1. MICHEL FOUCAULT, *DISCIPLINE & PUNISHMENT: THE BIRTH OF THE PRISON* 18 (Alan Sheridan trans., 1977).

2. Gwen Filosa, *Serial Rapist Gets Three Life Sentences After Telling Judge to ‘Rot in Hell’*, *TIMES-PICAYUNE*, Nov. 3, 2010, http://www.nola.com/crime/index.ssf/2010/11/serial_rapist_gets_three_life.html.

3. Original Brief on Behalf of Defendant-Appellant at *1-3, *State v. Nicholson*, 2011 WL 6840878 (La. App. 4th Cir. 2011) (No. 2011-KA-0883) [hereinafter Original Brief on Behalf of Defendant-Appellant]. These charges arose from two incidents that occurred in 1991 and 1994, respectively.

4. *Id.* at *3. Nicholson was also sentenced to fifty years for attempted aggravated rape, twenty years for aggravated oral sexual battery, and ten years for sexual battery, with all of the sentences to be served consecutively. *Id.*

5. *Id.* The Louisiana Revised Statute is commonly referred to throughout the comment as La. R.S. § 14:43.6(A) (2008), or “the chemical castration statute.” Louisiana also has another sentencing statute in place, Louisiana Revised Statute § 15:538(C), requiring particular sex offenders to undergo treatment as a condition of their probation or parole. If a mental health professional with experience treating

District Attorney's office, this was the first time chemical castration under La. R.S. § 14:43.6 had been sought in Orleans Parish since the statute had come into effect in 2008.⁶ Had Nicholson known that La. R.S. § 14:43.6 gave the court almost absolute discretion to sentence certain sexual offenders to chemical or physical castration, he probably would have restrained himself from insulting the judge.⁷ Not surprisingly, the court ordered that chemical castration be administered despite the fact that Nicholson was fifty-eight years old at the time of sentencing and would surely be spending the remainder of his life in prison.⁸

Nicholson subsequently filed an appeal to the Fourth Circuit Court of Appeal of Louisiana, claiming that La. R.S. § 14:43.6 does not apply retroactively to crimes committed prior to the statute's enactment in 2008 because it violates the Ex Post Facto Clause of the United States Constitution and, alternatively, that castration is an excessive punishment that violates the Eighth Amendment's Cruel and Unusual Punishment Clause and the Fourteenth Amendment's Due Process and Equal Protection Clauses.⁹ In their response brief, the State conceded that the statute does not apply retroactively and, consequently, Nicholson's constitutional challenges were moot.¹⁰ Regardless of the State's concession, the Fourth Circuit Court of Appeal of Louisiana did not reverse the trial court's imposition of the chemical castration sentence, but, rather, pretermitted the issue entirely on the basis that Nicholson would not be eligible for parole, and, therefore, would not be subjected to the application of

sex offenders determines chemical castration should be included in the treatment plan, the offender must undergo chemical castration or else waive his eligibility for probation or diminution of sentence. LA. REV. STAT. ANN. § 15:538(C) (1997). This statute is commonly referred to throughout the comment as La. R.S. § 15:538(C), or "the probation statute."

6. Filosa, *supra* note 2.

7. Chemical castration is a mandatory sentence upon a second conviction of any of the enumerated sex offenses listed in the statute. If an individual resists chemical castration, he may be subject to physical castration, or, in the alternative, have an additional three years of incarceration added to the initial sentence for failure to comply with the castration sentence. LA. REV. STAT. ANN. § 14:43.6 (2008).

8. Filosa, *supra* note 2; Original Brief on Behalf of Defendant-Appellant, *supra* note 3, at *35.

9. Original Brief on Behalf of Defendant-Appellant, *supra* note 3, at *35-38.

10. Original Brief on Behalf of Appellee State of Louisiana at *23-24, 26 n.6, State v. Nicholson, 2012 WL 5963354 (La. App. 4th Cir. 2012) (No. 2011-KA-0883) [hereinafter Original Brief on Behalf of Appellee State of Louisiana].

the castration portion of his sentence.¹¹

Even if the court's prediction that Nicholson will not be chemically castrated turns out to be correct, the State's desire to put the statute into action garners *urgent* attention. The chemical castration statute will not promote public safety or deter sex-based offenses, because chemical castration is neither an effective, nor appropriate, treatment for all sex offenders. The only societal value to be derived from the statute is of a purely symbolic nature; namely, the public can feel an illusory sense of security and believe the state is taking action when hearing that harsh punishments are being exacted upon sex offenders. However, symbolism alone cannot justify the implicit acceptance of this statute when it is encroaching on civil liberties. The legislature should repeal the chemical castration statute as the State should not be spending any more money or judicial resources on this impractical and, likely, unconstitutional law.

Chemical castration is a term used to describe the treatment of injecting males with medroxyprogesterone acetate (MPA), better known as Depo-Provera.¹² Depo-Provera was approved by the Food and Drug Administration to be used as a female contraceptive and to treat endometriosis.¹³ Some physicians believe that the drug can lower a male's sex drive because the drug reduces the production of the hormone testosterone in the testes and the adrenal glands, and, thereby, reduces the level of testosterone circulating through the bloodstream.¹⁴

Administration of MPA has *only* been shown to be effective in lowering recidivist rates for sexual convictions under limited circumstances—when applied to certain sexual convicts, and combined with other methods of therapy.¹⁵ In other words, MPA

11. State v. Nicholson, Nos. 2011—KA—0883, 2011—K—0681, 2012 WL 6619019, at *14 (La. App. 4th Cir. Dec. 5, 2012).

12. *Id.* at *40.

13. *Drug Information*, PHYSICIANS DESK REFERENCE, <http://www.pdr.net/drug-summary/depo-provera-contraceptive-injection?druglabelid=1373&id=1124> (last visited Mar. 25, 2013); Matthew R. Kutcher, *The Chemical Castration of Recidivist Sex Offenders in Canada: A Matter of Faith*, 33 DALHOUSIE L.J. 193, 198 (2010).

14. Larry Helm Spalding, *Florida's 1997 Chemical Castration Law: A Return to the Dark Ages*, 25 FLA. ST. U. L. REV. 117, 122 (1998).

15. It is critical to note that MPA has not been shown to effectively treat sex offenders in general. It has only been proven to be an effective treatment in paraphilics, and, even then, only when administered under the following conditions: (1) the individual "volunteers for treatment"; (2) he "lacks an antisocial personality

is not a cure in and of itself.¹⁶ According to the Center for Sex Offender Management:

Sex offending isn't like an "illness" that will simply go away with a certain type of medication or treatment. This does not mean that sex offenders cannot control their behavior. Specialized treatment can help sex offenders to develop important skills that can help them manage their behavior over time, which can reduce their chances of sexually abusing in the future. But whether someone will be successful depends on the person, and whether or not they are motivated to change their behaviors.¹⁷

Therefore, Louisiana's new chemical castration statute, La. R.S. § 14:43.6, which allows, and sometimes even mandates, courts to sentence sexual convicts to undergo chemical castration based solely on the sexual nature of the offense, rather than on particular medical needs, will not be effective in lowering sexual crime recidivism rates because chemical castration only provides one element of a multi-stage treatment to be administered to certain sex offenders.

Understandably, Mr. Nicholson's story may not elicit much sympathy. After all, the only category of criminals that might draw more public scorn and incite more widespread panic and fear than sex offenders are murderers.¹⁸ Still, it is imperative to remember that the United States has recognized that prisoners, regardless of the nature of their crimes, are still entitled to certain constitutional rights—notably, the prohibition from being subjected to cruel and unusual punishment and the guarantee of

pathology"; (3) he "does not have a severe substance abuse problem"; (4) "the dosage is sufficient to suppress the testosterone production"; and (5) "a consenting, pair-bonded partner is available." Tanya Simpson, "If Your Hand Causes you to Sin . . .": *Florida's Chemical Castration Statute Misses the Mark*, 34 FLA. ST. U. L. REV. 1221, 1225 (2007). See discussion *infra* Part II.B.

16. Simpson, *supra* note 15, at 1225.

17. *Frequently Asked Questions*, THE CTR. FOR SEX OFFENDER MGMT., <http://www.csom.org/faq/index.html> (last visited Apr. 30, 2012).

18. "Message boards" on many online national newspaper sites reveal that most "commenters" (1) erroneously thought "chemical castration" and "physical castration" were synonymous to the archaic castration procedure involving dismemberment; and (2) that such dismemberment was not only warranted, but too light a punishment, considering the nature of the criminal charge. See generally Filosa, *supra* note 2 (noting that a poster named "nolahhhh" wrote on November 3, 2010, "Yes chemical castration IS the answer. While we are at it lets [sic] chop those hands off so there is no inappropriate touching").

minimum protections of due process of law. Considering these rights, the recent chemical castration statute not only violates prisoners' constitutional rights, but it may also pose a risk to public safety because it is purely retributive and is used for inappropriate purposes. Even though the statute explicitly states that castration shall not be used in lieu of sentencing or other punishment ordered by the court, prosecutors use the statute as a leveraging tool during plea bargaining negotiations and, as such, the statute indirectly results in reduced sentences.¹⁹

The new chemical castration statute is problematic for a variety of legal, ethical, and medical reasons that this comment will discuss.²⁰ No matter what lens is used to examine this statute, though, the heart of the problem is the same: a seemingly-possible therapeutic device is being manipulated into an egregious form of punishment based on its symbolic significance and blanket application to all offenders on the basis of the offense, rather than on medical need.²¹ In other words, it is a measure implemented to "take away [the] manhood" of sex offenders, but it is touted as a means of public safety.²² Consequently, it does not actually fix the targeted problem.

19. See *infra* Part II.D.

20. Another problem raised by this practice, which is not substantively addressed herein but deserves mention, is that those who are capable of paying for the procedure will be capable of bypassing incarceration and will only further promote the pervasive disparate treatment of differently situated socio-economic classes by the criminal justice system. See Rebecca Ruiz, *Eyes on the Prize: Our Moral and Ethical Duty to End Mass Incarceration*, THE AM. PROSPECT, Jan./Feb. 2011, at A3 (noting that "the poor and young encounter a legal system that is rarely transparent and often produces tragic outcomes for those who lack the resources to mount a just defense or the ability to expose abuse and corruption").

21. David Reutter, *Louisiana Sex Offender Agrees to Surgical Castration*, PRISON LEGAL NEWS, Oct. 2011, at 48

22. *Id.* (quoting Francis Phillip Tullier, a Louisiana sex offender who, at the time of his sentencing hearing, entered into a plea deal with the State providing he could undergo surgical castration in lieu of completing his twenty-seven year prison sentence). As the judge in Tullier's case saw the matter, when a sex offender allows the state to surgically remove his testicles, he is giving to "Caesar what Caesar is owed." *Id.* (referencing *Matthew 22:21* (King James)). However glib the comment was intended to be, the reference gives the impression that the judge believes physical punishment is analogous to the monetary tax addressed in *Matthew 22:21*. Such a comment is reminiscent of the exact type of archaic and barbaric, cruel punishments modern civilizations have been trying to abandon in exchange for a criminal justice system that, in theory, "must respect the human attributes even of those who have committed serious crimes." *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010).

Because physical and chemical castration are not effective deterrents to future sexual assaults, as will be discussed, allowing sex offenders to bypass incarceration in exchange for a symbolic token of their crime is not only counterproductive to the goal of reducing the occurrence of sexual offenses, but the practice also provides a false sense of accomplishment to the public. While people may cheer for the emotional and physical pain being imposed on sex offenders, society is being punished as a whole because we have collectively accepted this draconian practice in place of a practical, cost-effective solution that could be applied consistently by the courts, free up judicial resources by limiting appeals, and effectively reduce recidivism rates by providing specific rehabilitating mechanisms only to those certain sex offenders that are susceptible to being rehabilitated by those mechanisms.²³ In addition to the harm caused by the inefficiency of the statutes, society suffers further harm as a result of courts enforcing unconstitutional legislation. Appellate courts have actively avoided considering the merits of constitutional challenges to the statutes, and, instead, have consistently reversed or affirmed castration sentences based on procedural issues or extraneous justifications.²⁴

This comment proposes the abolishment of Louisiana's blanket chemical castration law. While legal scholars have been arguing that these chemical castration statutes are unconstitutional on many grounds—with most law review articles emphasizing that the statutes violate the Eighth Amendment's Cruel and Unusual Punishment Clause²⁵—Louisiana's newer chemical castration statute can be distinguished from other state

23. See *infra* Part II.B; see also Erin Peterson, *Chemical Castration: Experts Question if Hormonal Injections Prevent Repeat Sex Offenses or Just Distract From the Real Issues*, ETHOS MAG. (June 9, 2011), <http://ethosmagonline.com/archives/12525> (pointing to an individual who underwent a ten year probationary period of chemical castration in lieu of jail time and was subsequently convicted for two counts of sexual assault). Police suspected he had been responsible for a series of seventy-five sex-related crimes since 1987. *Id.*

24. See *People v. Foster*, 101 Cal. App. 4th 247 (2002) (refusing to consider the assertion that the castration statute violated the Cruel and Unusual Punishment Clause because appellate review was precluded by the negotiated plea agreement).

25. See generally John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, The Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559 (2006); Spalding, *supra* note 14; Simpson, *supra* note 15; Catherine Rylyk, *Lest We Regress To the Dark Ages: Holding Voluntary Surgical Castration Cruel and Unusual, Even for Child Molesters*, 16 WM. & MARY BILL RTS. J. 1305 (2008).

statutes on procedural grounds and the subsequent substantive consequences. These differences make the Louisiana statute particularly repugnant to the Fourteenth Amendment's Due Process Clause. In addition, Louisiana already has a chemical castration statute in effect that adequately protects the interests of the offender and the state by providing better medical safeguards and procedural protections that benefit the offenders and public alike. This older statute, La. R.S. § 15:538, is more consistent with domestic and international practices.²⁶ Chemical and surgical castration are by no means pervasive, accepted forms of punishment, either domestically or internationally; therefore, Louisiana's unsubstantiated departure from the minority of locales that authorize judicially-mandated chemical castration is indicative of the statute's shortfalls.

Section II of this comment provides the necessary foundation for a thorough analysis and discussion of the chemical castration laws in Louisiana. This section begins with a brief historical overview of the societal practice of castration and then turns to the medical basis for using chemical castration to treat sex offenders while explaining the medicinal and psychological inadequacies of judicially-mandated chemical castration sentencing schemes. Finally, the statutes of the few states that have adopted chemical castration laws are compared, and the subsequent legal and procedural issues that have arisen from passing such laws are discussed. Section III sets forth the relevant jurisprudence to attack the constitutionality of La. R.S. § 14:43.6. Section IV then asserts the unconstitutionality of the statute. Policy arguments throughout the comment highlight the inherent flaws in the Louisiana chemical castration statute that will prevent the law from having any practical functionality or social benefit. These flaws are primarily rooted in the statute's punitive nature and, secondarily, in the administrative and

26. However, Louisiana should consider amending the statute to provide that prosecutors may not use chemical or physical castration for plea-bargaining purposes. Allowing this use harms society and the sex offender. Medical decisions concerning surgical and/or hormonal alteration should be made by professional medical experts, and not by lawyers in an adversarial system. The focus, rather, should be on which offenders would benefit from such a procedure. Not only is this the logical approach to treating the individual offender, but this mode would also benefit society by decreasing the amount of recidivist sex offenders posing risks to public safety, lowering recidivism rates in general, and decreasing tax expenditures directed towards keeping sex offenders incarcerated. These aims are more likely to be achieved under the earlier statute, LA. REV. STAT. ANN. § 15:538 (2012).

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procedural application of the statute. Additionally, Section IV proposes that, even if the judicial branch does not find the statute unconstitutional, the state should legislatively redact the 2008 chemical castration statute on the substantive, procedural, and constitutional grounds presented.

II. CASTRATION: FROM ANCIENT PRACTICES TO MODERN LAW

This section traces the historical origins and development of castration and, subsequently, chemical castration, as both a punishment and a cure. Next, there is a brief explanation of what chemical castration is, how it works, when it works, and why the medical and psychiatric professions are resistant to the idea of judicially mandated castration sentences. This section then explains how castration statutes aimed at sex offenders came into existence in the United States and compares the various statutory models that different states have adopted. This discussion then leads into an exploration of Louisiana's statutes—the chemical castration statute and the probation statute—and how the 2008 chemical castration statute differs from both Louisiana's probation statute as well as all of the other castration statutes that various states have enacted.

A. HISTORICAL PERSPECTIVE OF CASTRATION

Chemical castration is a fairly new idea, but civilizations have been using physical castration as a means of rehabilitation and control for centuries.²⁷ Human castration followed the origination of slavery in the Middle Eastern and Eastern regions over 7,000 years ago.²⁸ Prior to the institution of slavery, these regions had started domesticating animals and observed that castrating animals made the animals less aggressive and more productive.²⁹ Slave owners thus presumed castration would make their slaves more compliant and reliable in carrying out their duties.³⁰ As slavery became more prevalent, so too did the occurrence of castration because castrated slaves were found to be

27. Castration has also been used for prevention of disease and crime, pleasure, profit, piety and spiritual purification. VICTOR T. CHENEY, A BRIEF HISTORY OF CASTRATION 1-5 (2d ed. 2006).

28. *Id.* at 1.

29. *Id.*

30. *Id.* at 2.

more profitable and trustworthy.³¹

Castration as a strict form of punishment first became a formalized law around 1955-1913 B.C., when the Babylonian King, Hammurabi, enforced the ancient retaliation law, *lex talionis*—better known as “eye for an eye, tooth for tooth.”³² Under Hammurabi’s code, a human was to be castrated if he had castrated another.³³ Over time, castration became a means of punishing moral crimes in general.³⁴ For example, Roman law ordered castration as punishment for committing acts of bestiality, and Egypt provided the same punishment for raping a free woman.³⁵ Castration was the punishment for rape well into the Middle Ages in England and Western Europe.³⁶ However, following Saint Bartholomew’s Massacre of August 24, 1572, laws calling for castration as punishment for moral crimes faded for hundreds of years until the early twentieth century.³⁷

The United States has given due consideration to the use of castration as a dual form of punishment and rehabilitation for sex offenders since its founding.³⁸ Thomas Jefferson believed criminal sentences were too extreme and that punishments should be proportionate to the crimes committed.³⁹ He reasoned that the ubiquity of capital punishment deprived citizens of the opportunity to be rehabilitated and, further, did not deter crime.⁴⁰ Consequently, he introduced a bill in Virginia in 1778 amending the sentence for rape, polygamy, and sodomy from capital punishment to castration for a man or, if a woman, “cutting thro’ (sic) the cartilage of her nose a hole of one half inch diameter at

31. CHENEY, *supra* note 27, at 2. Despite the procedure’s high mortality rate, the profitability of the castrated slave was enough incentive to make castration a regular feature of the slave trade until slavery was abolished in the twentieth century. *Id.*

32. *Id.* at 6.

33. *Id.*

34. *Id.*

35. *Id.*

36. CHENEY, *supra* note 27, at 7.

37. *Id.* The victorious French Catholics cut the genitals off of copious dead and wounded Protestants. Subsequently, castration became viewed as a sin. *Id.*

38. Thomas Jefferson, *A Bill for Proportioning Crimes and Punishments*, in 5 THE FOUNDERS’ CONSTITUTION 374, 375 (Julian P. Boyd et al. eds., The University of Chicago Press 1987) (1950).

39. *Id.*

40. *Id.* at 374.

least.”⁴¹ The bill was ultimately rejected, and the state retained the death penalty.⁴² Even though Virginia did not initially adopt Jefferson’s proposal, the United States was the first country to renew castration laws as a form of retributive punishment.⁴³ Although the majority of states did not adopt castration as a retributive punishment, it was not long before various states started to require castration of criminals for other reasons.⁴⁴

In the twentieth century, U.S. courts not only condoned castration, but supported it as part of the eugenic sterilization movement when applied to “mentally defective” individuals that could potentially pass their genetic disorders on to their children.⁴⁵ By 1970, approximately thirty states had eugenic-based castration statutes, which lead to the forced sterilization of over 60,000 Americans.⁴⁶ The courts have been less consistent when considering forced physical castration of individuals who are, for all intents and purposes, not mentally ill and where the only justification for the castration procedure is punitive.⁴⁷ The

41. Jefferson, *supra* note 38, at 375.

42. George Painter, *The Sensibilities of Our Forefathers: The History of Sodomy Laws in America*, GAY AND LESBIAN ARCHIVES OF THE PAC. NORTHWEST, <http://www.glapn.org/sodomylaws/sensibilities/virginia.htm#fn27>. (last visited June 15, 2013).

43. From 1909 to 1917, three states, Washington, Nevada, and Indiana, introduced castration as an alternative punishment. *Id.*

44. Robert D. Miller, *Forced Administration of Sex-Drive Reducing Medications to Sex Offenders: Treatment or Punishment?*, 4 PSYCHOL. PUB. POL’Y & L. 175, 178 (1998). “In the years after 1899, a Dr. Sharp in Indiana castrated 176 sex offenders, initially believing he was subduing their sexual urges, but eventually realizing the eugenic significance of his actions.” *Id.* at 178 n.12.

45. *Id.* at 178. In 1927, the U.S. Supreme Court upheld a statute allowing forced sterilization of “mentally defectives,” on the basis that it would be “better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.” *Buck v. Bell*, 274 U.S. 200, 207 (1927). An expert witness in *Buck*, Dr. Joseph DeJarnette, garnered support for the movement by comparing the United States’ dismal sterilization numbers to the mass sterilizations completed in Nazi Germany during his court testimony: “Germany in six years has sterilized about 80,000 of her unfit while the United States with approximately twice the population has *only* sterilized about 27,869 . . . in the past 20 years.” Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL’Y 1, 12 (1996) (emphasis added).

46. Michael G. Silver, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 862-63 (2004).

47. *See State v. Feilen*, 70 Wash. 65 (1912) (upholding a statute providing for

only clear instruction from the Supreme Court of the United States has been that forced sterilization must be applied in a manner consistent with the Equal Protection Clause of the Constitution.⁴⁸ Thirteen states still have eugenic sterilization laws, but they are rarely invoked.⁴⁹ Due to the irreversible nature of surgical castration, the fact that clinical evidence demonstrates it is not always effective in reducing inappropriate sexual behavior, and the availability of reversible medications, surgical castration fell out of popular favor for a few decades.⁵⁰ Surprisingly, the people who brought it back to the forefront of public debate were the offenders themselves who were seeking the procedure in lieu of incarceration.⁵¹ Larry Don McQuay's highly publicized case, as discussed in Subsection C, involved a request for castration by a sex offender being considered for parole, and his subsequent denial, and, is largely responsible for the legislative enactment of forced chemical castration statutes across the country.⁵²

Unfortunately, the states and countries that have adopted chemical castration laws have enacted them for political reasons arising out of individual incidences of particularly heinous sexual crimes that have been given extensive media coverage, as opposed to peer-reviewed empirical studies presenting evidence of the efficacy of the use of MPA to lower recidivism rates.⁵³ As a

sterilization of persons convicted of statutory rape based on scientific eugenic rationales, even though the defendant was sentenced to life imprisonment); *Davis v. Berry*, 216 F. 413 (S.D. Iowa 1914) (striking down a statute providing for sterilization of men convicted of any two felonies because it constituted cruel and unusual punishment); *Mickle v. Henrichs*, 262 F. 687 (D. Nev. 1918) (striking down a state statute requiring sterilization of certain sex criminals because sterilization used as a form of punishment, without any greater purpose, is cruel and unusual).

48. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (finding a forced sterilization statute unconstitutional where the sterilization procedure was applied to third time offenders whose third crime involved moral turpitude, because the statute did not treat similar offenders equally).

49. *Miller*, *supra* note 44, at 178.

50. *Id.* at 178-79. In addition, courts were unwilling to impose castration sentences because (1) state laws did not provide funding for elective surgical procedures; (2) surgeons were unwilling to perform the surgery; (3) the statutes inherently abdicate the convict's right to abstain from medical procedures without informed consent; and (4) the uncertainty of the effects of the procedure. *Id.* at 180.

51. *Id.* at 180.

52. *See Simpson*, *supra* note 15, at 1222.

53. One of the leading, well-respected proponents of treating certain paraphilics with MPA (voluntarily, not at the behest of the court), commented:

Clearly, much of the relevant legislation [regarding sex offenders] had been

result, the justifications for these chemical castration laws have been dependent upon generalizations about sex offenders that perpetuate two contradictory ideas.⁵⁴ The first justification is anchored in the idea that all sex offenders are evil people who may be deterred by the threat of harsh punishments. This means that if sex offenders can be deterred from committing the crime, then they are cognitively capable of making the choice to commit the sex offense. Because they are actively making such a despicable choice in the face of harsh punishments, they *deserve* to be castrated.

The second justification is that all sex offenders suffer from a compulsion, and they *need* treatment. Because sex offenders do not have the ability to defeat their urges, the state must quash these urges by way of imposing castration.⁵⁵ Thus, the political sphere has framed these statutes in such a way that they are seemingly protecting the public and “helping” sex offenders.

The following section will explain how chemical castration was developed, when it should be used, and why it should not be applied as a mandatory condition of sentencing for sex offenders. The outspoken resistance of the medical community will shape and inform the forthcoming discussions of the judicial and legislative inefficiencies in enforcing mandatory chemical castration statutes, as well as bolster the arguments asserting that the Louisiana Chemical Castration statute is unconstitutional.

based on the contention that, as a group, sex offenders pose an exceptionally high risk of recidivism. Yet, a recent publication by the Office of Justice Programs suggests that as a group, sex offenders actually have a lower recidivism rate than many comparison groups who have committed other serious crimes.

Fred S. Berlin, *Sex Offender Treatment and Legislation*, 31 J. AM. ACAD. PSYCHIATRY L. 510, 510-13 (2003) [hereinafter Berlin, *Sex Offender*].

54. Stinneford, *supra* note 25, at 577.

55. Such a dichotomy can be seen in the speech that Governor Pete Wilson of California gave upon passing the first chemical castration statute in the country. Initially, Wilson conjured the idea that sex offenders are creepy villains preying on America's children: “I have a message for those skulking in the shadows. You better stay in the shadows or leave this state, because we will not tolerate your conduct We are not going to concede one inch of any playground in any neighborhood to vicious predators.” *Id.* However, later that day, he explained, “Child molesters can't stop because they have a compulsion to do what they do . . . [a]nd as long as they have that urge, they'll keep victimizing children—unless we do something about it.” *Id.*

B. WOULD A PRIVATE PSYCHIATRIST PRESCRIBE MPA AS TREATMENT?

The switch from surgical to chemical castration came about during the rise of modern hormone therapy during the 1940s.⁵⁶ Chemical castration mimics surgical castration in that they are both forms of androgen deprivation therapy (ADT) that suppress the production or action of male hormones, primarily testosterone.⁵⁷

Surgical castration⁵⁸ is the irreversible removal of the testes.⁵⁹ Chemical castration is the administration of drugs—anti-androgens—that interfere with androgen production or effects.⁶⁰ There are three popular anti-androgen drugs used worldwide: cyproterone acetate (CPA), medroxyprogesterone acetate (MPA), and leutinizing hormone releasing hormone (LHRH).⁶¹ CPA is predominantly used throughout Canada and Europe.⁶² Of the eight statutes in the United States that provide for chemical castration, seven specifically identify MPA as a treatment option, while also authorizing the use of other pharmaceutical agents.⁶³ Louisiana singles out MPA as the sole agent to be administered to those sentenced to chemical castration under the castration statute; however, MPA is presented as just one option of treatment under the probation statute.⁶⁴

MPA is a synthetic form of progesterone that has FDA approval as a female birth control and as a treatment for endometriosis.⁶⁵ When administered to males, MPA “reduces the production of testosterone by the testes, and boosts the metabolic

56. Kutcher, *supra* note 13, at 200.

57. Marnie E. Rice & Grant T. Harris, *Is Androgen Deprivation Therapy Effective in the Treatment of Sex Offenders?*, 17 PSYCHOL. PUB. POL'Y & L. 315, 315 (2011).

58. Surgical castration is also known as orchiectomy. *Id.*

59. *Id.* at 317.

60. *Id.*

61. *Id.*

62. Charles L. Scott & Trent Holmberg, *Castration of Sex Offenders: Prisoners' Rights Versus Public Safety*, 31 J. AM. ACAD. PSYCHIATRY L. 502, 503 (2003).

63. *Id.* at 503-04.

64. LA. REV. STAT. ANN. § 14:43.6 (2012); LA. REV. STAT. ANN. § 15:538 (2012).

65. Rice & Harris, *supra* note 57, at 317.

clearance of testosterone by the liver, thereby reducing circulating levels.”⁶⁶ Testosterone is considered crucial to the “regulation of sexuality, aggression, cognition, emotion and personality,” and is “the major activator element of sexual desire, fantasies and behavior.”⁶⁷ In addition, testosterone “basically controls the frequency, duration, and magnitude of spontaneous erections.”⁶⁸

While few studies have been conducted on the relationship between testosterone levels and sexual aggression specifically, there is some evidence that the level of intrusiveness of sex offenses is related to offenders’ testosterone levels.⁶⁹ Notwithstanding, most sex offenders have normal levels of testosterone.⁷⁰ There is a consensus in the medical community that lowering sex offenders’ testosterone levels to a substantially below-normal level may lower the offender’s propensity to commit future sex crimes, but the majority of psychiatrists, physicians, psychologists, therapists, and researchers also seem to believe that, if lowering testosterone levels can decrease the likelihood of repeat offenses, it will only do so for certain offenders.⁷¹

66. Rice & Harris, *supra* note 57, at 317.

67. Ariel Rosler & Eliezer Witztum, *Pharmacotherapy of Paraphilias in the Next Millennium*, 18 BEHAV. SCI. & L. 43, 45 (2000).

68. *Id.*

69. Rice & Harris, *supra* note 57, at 317. Although the effects of androgen deprivation therapy on sex offenders’ testosterone levels has not been meaningfully studied, medical researchers have concluded that testosterone tends to promote prostate cancer growth. Ravi A. Madan, *Featured Clinical Trials: Combining Vaccines and Antiandrogen Therapy for Prostate Cancer*, CANCER.GOV, (Sep. 21, 2010) <http://www.cancer.gov/clinicaltrials/featured/trials/NCI-07-C-0107>. In fact, men who still show signs of disease-progression after undergoing surgery or radiation treatments are given the option of undergoing androgen deprivation therapy, either by chemical castration or physical castration because depletion of androgens causes the prostate cancer cells to die. *Id.*; Natalia V. Narizhneva, et al., *Small Molecule Screening Reveals a Transcription-Independent Pro-Survival Function of Androgen Receptor in Castration-Resistant Prostate Cancer*, 8 CELL CYCLE 4155, 4155 (2009), available at <http://www.landesbioscience.com/journals/cc/article/10316/21NarizhnevaCC8-24.pdf>. However, many researchers continue to study androgen deprivation therapy as it relates to testosterone because ADT only temporarily subdues cancer growth, and the cancer becomes chemotherapy-resistant and androgen-independent. *Id.* at 4155-56. Because of the wealth of research, psychologists rely on the data compiled from the studies on ADT as a form of prostate cancer treatment to discuss the side effects and efficacy of treating sex offenders with ADT. *See generally*, Rice & Harris, *supra* note 57.

70. Rice & Harris, *supra* note 57, at 317.

71. *See generally* Rice & Harris, *supra* note 57.

There seems to exist in our society a ubiquitous belief that sex offenders are a highly heterogeneous group.⁷² This is not true, and, in fact, “[a]s a group, sex offenders cut across socioeconomic, educational, racial, and religious lines.”⁷³ To confound matters, sex offenders are classified differently—legally, etiologically, typologically, and clinically.⁷⁴ While copious factors must be considered in determining a therapeutic plan to administer to a sex offender, no one factor is as important as the determination of whether the offender is a paraphilic sex offender or a nonparaphilic sex offender.⁷⁵

Paraphilic offenders are a clinical subgroup of sexually offending individuals in whom a sexual deviation syndrome (or paraphilia) can be diagnosed.⁷⁶ “The paraphilias are characterized by recurrent, intense sexual urges, fantasies, or behaviors that involve unusual objects, activities, or situations and cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.”⁷⁷ The types of paraphilias include exhibitionism, fetishism, frotteurism, pedophilia, sexual masochism, sexual sadism, transvestic fetishism, voyeurism, and paraphilia not otherwise specified.⁷⁸ Paraphilic offenders comprise a slight minority of sex offenders.⁷⁹ Thus, for “nonparaphilic offenders, the sex offense is a crime of opportunity rather than an expression of an enduring preference for a deviant form of sexual conduct.”⁸⁰

72. Fabian M. Saleh & Laurie L. Guidry, *Psychosocial and Biological Treatment Considerations for the Paraphilic and Nonparaphilic Sex Offender*, 31 J. AM. ACAD. PSYCHIATRY L. 486, 486 (2003).

73. *Id.*

74. *Id.* Recent research has resulted in the classification of twenty-four different types of pedophiles and nine different types of rapists. *Id.* “In addition, more and more subpopulations of sex offenders, such as adolescent offenders, female offenders, and Latino and other culturally diverse offenders, are being recognized as relevant treatment groups with notable differences that have significant implications relative to intervention efficacy.” *Id.*

75. Berlin, *Sex Offender*, *supra* note 53, at 511.

76. Saleh & Guidry, *supra* note 72, at 487.

77. *Id.*

78. *Id.* (referencing AM. PSYCH ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed.) (2000)).

79. Stinneford, *supra* note 25, at 569. Stinneford highlights a recent study that revealed that out of 142 convicted child molesters in Arizona, only 8.5% were diagnosed with pedophilia. *Id.* at 570.

80. *Id.* at 571.

The diagnosis of the offender is of great significance when considering the efficacy of administering MPA because the presence of paraphilia is one of two factors that greatly increase the risk of sexual recidivism.⁸¹ MPA will only be helpful in lowering the recidivism rates of certain paraphilic offenders, because it will reduce the intensity of eroticized urges, fantasies, masturbation frequency, and erectile rigidity and duration.⁸² However, various studies have shown that androgen deprivation therapy does not eliminate the possibility of achieving penile erection, nor does it necessarily lead to a reduction in sexual activity.⁸³ There is a resounding consensus that MPA will not “assist the antisocial nonparaphilic sex offender who lacks a sense of conscience and moral responsibility by somehow instilling appropriate values.”⁸⁴

Because MPA does not entirely remove the possibility of experiencing sexual urges or engaging in sexual activity, determining whether or not the offender has a paraphilia is only the first inquiry to be undertaken when determining the appropriateness of treating an offender with MPA. MPA has only been shown to be effective in paraphilics when the following conditions are present: “(1) the individual ‘volunteers for treatment’; (2) he ‘lacks an antisocial personality pathology’; (3) he ‘does not have a severe substance abuse problem’; (4) ‘the dosage is sufficient to suppress the testosterone production’; and (5) ‘a consenting, pair-bonded partner is available.’”⁸⁵ Unfortunately, satisfying all of these factors is highly unlikely. As will be discussed, the nature of the chemical castration statutes makes the possibility that offenders will volunteer for the treatment remote at best. In addition, antisocial personality disorder, drug abuse, and alcoholism are as pervasive among sex offenders as they are among other types of criminal offenders; that is, very pervasive.⁸⁶

There is, however, a palpable demand for more reliable

81. Stinneford, *supra* note 25, at 571. The other risk factor is antisocial orientation.

82. Kutcher, *supra* note 13, at 201; Berlin, *Sex Offender*, *supra* note 53, at 511.

83. Kutcher, *supra* note 13, at 201.

84. Fred S. Berlin, *Risk/Benefit Ratio of Androgen Deprivation Treatment for Sex Offenders*, 37 J. AM. ACAD. PSYCHIATRY L. 59, 59 (2009).

85. See Simpson, *supra* note 15, at 1225.

86. Stinneford, *supra* note 25, at 569.

research to be completed on the long term effects of ADT on sexual behavior in general, and sexual recidivism in particular, before ADT is relied upon as a principle component of sex offender treatment.⁸⁷ Researchers explain:

First, castration, whether surgical or chemical, clearly reduces sexual desire in most, if not all, men. However, it is just as clear that it does not necessarily eliminate sexual behavior, nor render all men incapable of sexual intercourse. Just as clear is that surgical and chemical castration have many side effects that are extremely bothersome to many men, especially those who do not voluntarily choose it.⁸⁸

Unfortunately, all of the recidivism studies that have reported favorable results with ADT have compared volunteers to refusing parties.⁸⁹ Attempts to study recidivism with respect to MPA injections is further frustrated by the fact that the individuals who seem to show reduced fantasies and testosterone levels are the most likely to drop out of the studies and stop MPA treatment.⁹⁰

Another possible reason voluntary participants drop out is due to the associated side effects.⁹¹ One study reported that “[k]nown physical and mental health risks, for example, include increased risk of fractures and diabetes mellitus (by 40-50%) and a smaller increase (10-20%) in the risk of cardiovascular morbidity and depressive symptoms, as well as a number of other less serious well-documented risks.”⁹² Another study showed that the most common side effects were: “loss of libido (reported by [only] 66% of participants), hot flashes (63%), and genital shrinkage (55%), . . . weight gain (48%), body hair loss (48%), gynecomastia (46%), depression (35%), impaired short-term memory (22%), and osteoporosis (11%).”⁹³ With respect to sex

87. See Berlin, *Sex Offender*, *supra* note 53, at 513 (advocating the need to “establish a comprehensive and coherent forensic approach to issues surrounding sexual misconduct” in order to avoid court decisions that are based on preexisting internalized judicial biases rather than a rational body of knowledge); Saleh & Guidry, *supra* note 72, at 491; Rice & Harris, *supra* note 57, at 328.

88. Rice & Harris, *supra* note 57, at 322.

89. *Id.* at 324.

90. *Id.*

91. *Id.*

92. *Id.* at 325 (internal citations omitted).

93. *Id.* at 319.

offenders, the risk of these side effects is compounded by the fact that the men receiving these administered treatments are elderly, with a mean age over seventy in most studies.⁹⁴ Additionally, ADT therapy is usually combined with other medications, which have their own side effects.⁹⁵ Researchers astutely point out that even advocates of administering MPA to sex offenders acknowledge the lack of empirical evidence regarding long lasting recidivism rates and side effects, and enthusiastically await studies that might show more conclusively that MPA is helping at least one type of sex offender.

The final issue regarding the medical community's stance on chemical castration that warrants discussion here is of an ethical nature. The American Medical Association (AMA) has asserted that courts have the authority to identify criminal behavior but do not have the "ability to make a medical diagnosis or to determine the type of treatment that will be administered."⁹⁶ The AMA goes on to say that ethical practices within the medical community demand that physicians only treat patients on the basis of "sound medical diagnosis," and that this is especially true where the treatment involves in-patient therapy, surgical intervention, or pharmacological treatment. As such, the AMA implicitly disapproves of the forced chemical castration scheme. This pronouncement came after Louisiana's probation statute was passed, but before the 2008 castration statute was passed, which might explain why there has been a shift towards relying on "medical experts" in administration of the castration statute, as opposed to the "licensed physicians" with experience treating sex offenders that are relied upon under the probation statute.

In sum, there is a lack of empirical evidence showing a positive correlation between ADT treatments on sex offenders and decreased recidivism rates, and there is ample evidence of permanent and sometimes severe side effects, which has resulted in a resistance from the medical community to support court-ordered chemical castration. If this is the state of affairs, then why have state legislatures continued to create and promote these statutes? One may argue that deterring sexual crimes

94. Rice & Harris, *supra* note 57, at 320.

95. *Id.*

96. *Opinion 2.065 – Court-Initiated Medical Treatments in Criminal Cases*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion2065.page> (last visited Jan. 30, 2013).

justifies the punishment. However, regardless of whether the medication works in certain incidences for certain offenders, it is important to consider the fact that sex offenses represent under 1% of all arrests, even though it is estimated that “one in every five girls and one in every seven boys are sexually abused by the time they reach adulthood.”⁹⁷ Additionally, one in six adult women and one in thirty-three adult males experience an attempted or completed sexual assault.⁹⁸ From this we can infer that only a very small percentage of sexual offenders are actually arrested. With this information in mind, the reader should consider whether the chemical castration statute accomplishes any of the State’s legitimate interests in deterring crime, protecting public safety, lowering recidivism rates, or exacting a punishment that is proportionate to the crime committed.

The following subsection pinpoints the particular incident that gave rise to the chemical castration trend in the United States and delves into the various chemical castration statutes that states reactively enacted. This examination will help illuminate the ways in which chemical castration laws, in their dominant form, have had variously flawed procedural and ethical aspects since their inception, as well as lay the foundation for how these flaws have been magnified in Louisiana’s new chemical castration statute.

C. STATE LEGISLATURES ENACT CHEMICAL CASTRATION LAWS IN THE UNITED STATES

Larry Don McQuay was a school bus driver in San Antonio, Texas, who was initially sentenced to eight years in prison for molesting a six-year-old boy in 1989.⁹⁹ McQuay admitted that he had molested over 200 children and begged the state of Texas to surgically castrate him so that he would not continue to molest children upon being released from prison.¹⁰⁰ Texas denied his request.¹⁰¹ McQuay then set about raising funds to obtain the

97. *Fact Sheet: What You Need to Know About Sex Offenders*, CTR. FOR SEX OFFENDER MGMT., http://www.csom.org/oubs/needtoknow_fs.pdf (last visited May 2, 2012).

98. *Id.*

99. Simpson, *supra* note 15, at 1221.

100. *Id.*

101. *Id.* at 1222.

surgery privately; however, he could not find a willing physician to perform the surgery.¹⁰² McQuay only served six years of his sentence and was released from prison in 1996 for “good conduct,” despite his public statement that he would “not only molest again, but kill his victims to prevent them from testifying against him.”¹⁰³ Reacting to the Texas court’s denial of McQuay’s request to be castrated prior to his release, the California legislature passed a bill requiring chemical castration of paroled, repeat child molesters.¹⁰⁴

Since 1997, nine states have enacted laws allowing or imposing chemical or surgical castration of sex offenders. Those states are: Louisiana, California, Florida, Montana, Iowa, Texas, Wisconsin, Oregon, and Georgia.¹⁰⁵ Georgia and Oregon have since repealed their statutes for unspecified political reasons.¹⁰⁶ Despite the abandonment of these two states, a handful of states have continued to show interest in the procedure.¹⁰⁷ In addition, chemical castration is gaining popularity internationally. However, in contrast to most domestic state statutes, and certainly Louisiana’s statute, international practices have a greater focus on medical necessity for the treatment and almost uniformly require the offender’s informed consent.¹⁰⁸ The

102. Simpson, *supra* note 15, at 1222.

103. *Id.*

104. *Id.*

105. See LA. REV. STAT. ANN. § 15:538 (2012); LA. REV. STAT. ANN. § 14:43.6 (2011); CAL. PEN. CODE § 645 (West 2012); FLA. STAT. ANN. § 794.0235 (West 2012); MONT. CODE ANN. § 45-5-512 (2012); IOWA CODE ANN. § 903B.10 (West 2012); TEX. GOV’T CODE ANN. § 501.061 (West 2012); WIS. STAT. ANN. § 304.06 (1q)(b) (West 2012); OR. REV. STAT. ANN. § 144.625 (repealed 2011); GA. CODE ANN. § 42-9-44.2 (repealed 2006).

106. Stinneford, *supra* note 25, at 562 n. 14; S.B. 356, 76th Leg. Reg. Sess. (Or. 2011).

107. Chemical castration legislation has been proposed but not yet adopted in Pennsylvania (1997), Oklahoma (2002), Minnesota (2005), Vermont (2008), Alabama (2009), and Virginia (2011). Zachary Edmonds Oswald, “Off with His___”: *Analyzing the Sex Disparity in Chemical Castration Sentences*, 19 MICH. J. GENDER & L. 471, 483-84 (2013) (citations omitted).

108. Canada, Argentina, South Korea, Russia, Poland, the Czech Republic, and Spain have all enacted various forms of chemical castration statutes within the past ten years. See Kutcher, *supra* note 13 (concluding that chemical castration of sex offenders is ethically problematic, in response to the Canadian Federal Court of Appeal’s upholding of the constitutionality of a National Parole Board requirement that recidivist sex offenders, if found to be long-term sex offenders, be chemically castrated as a condition of release); Guillermo Fontana, *Argentina Province Ok’s Chemical Castration For Rapists*, CNN, Mar. 19, 2010,

resounding international insistence to preserve harmony and concordance amongst the medical and legal fields in this matter, as well as the underwhelming support for forced chemical and surgical castration from the medical and psychiatric communities in the United States,¹⁰⁹ serve to make the domestic statutes all the more suspect.¹¹⁰ The discussion of domestic statutes in the

03-19/world/argentina.castration_1_chemical-castration-rapists-province?s=PM:WORLD (noting that the law of Mendoza, an Argentine province, authorizes rapists, not only child molesters, to volunteer to undergo chemical castration in return for reduced prison sentences); Jennie Ryan, *South Korea Enacts Chemical Castration Law*, JURIST (July 24, 2011), <http://jurist.org/paperchase/2011/07/south-korea-enacts-chemical-castration-law.php> (discussing South Korea becoming the first Asian country to pass a statute calling for chemical castration of individuals convicted of sexual offenses against children); *Russia Introduces Chemical Castration For Pedophiles*, RT (Oct. 4, 2011), <http://rt.com/news/pedophilia-russia-chemical-castration-059/> (reporting that the Russian parliament passed a law providing that all sex offenders who have committed sexual acts against victims under the age of fourteen will face chemical castration subject to a psychiatrist's "report," and that all sexual offenders, regardless of the age of the victim, may request chemical castration in an effort to qualify for parole); *Poland Castration Law Takes Effect*, BBC NEWS EUROPE, June 10, 2010, <http://www.bbc.co.uk/news/10269055> (following a string of high profile pedophile cases, Poland enacted legislation forcing sex offenders who have committed sexual acts against children or family members to undergo chemical castration, even if a psychiatric evaluation yields a finding that the particular offender is not an appropriate candidate for the procedure); Dan Bilefsky, *Europeans Debate Castration of Sex Offenders*, N.Y. TIMES, Mar. 10, 2009, <http://www.nytimes.com/2009/03/11/world/europe/11castrate.html?pagewanted=all> (providing that the law of the Czech Republic authorizes physical castration where the offender (1) was a repeat offender, (2) suffered a serious sexual disorder (3) gives informed consent; and (4) where the procedure is approved by an independent committee of psychiatric and legal experts); *Rapists Offered Chemical Castration as an Option by the Catalan Department of Justice*, BARCELONA REP. (Aug. 8, 2009), http://www.barcelonareporter.com/index.php?/news/comments/rapists_offered_chemical_castration_as_an_option_by_the_catalan_department/ (discussing the chemical castration and psycho-social rehabilitation offered to offenders who have volunteered for the treatment prior to being released and after finishing their sentences in their entirety).

109. See *supra* Part II.B.

110. Although this comment does not expound upon this matter in great detail, there is a fairly justifiable theoretical reason why other countries are better suited to endorse chemical castration as a treatment rather than a mandatory punishment: almost every single country that has some type of chemical castration mechanism has socialized healthcare, and there is a societal expectation that if a person has a medical deficiency, that person will get medical treatment at the government's expense. This may explain why the domestic states who have tried to set up holistic, medically ethical statutes have failed to fund those efforts, and the states with the mandatory, medically-unethical regimes are the only states enforcing the procedure—in other words, the combination of privatized health care and the social penal system have created an ideology in which it is acceptable to aggregate tax

next section highlight the struggle between satisfying the legislative objectives of: (1) punishing and curing certain sex offenders or, alternatively, all sex offenders; (2) enforcing the administration of a medical procedure that the state cannot legally force physicians to administer; (3) assigning judges various levels of discretion in sentencing offenders that they are not trained to psychologically diagnose; and (4) attempting to fund such an endeavor. The states have attempted three various models to address these concerns: The California-Based Model: Probation-Contingent-Upon-Castration for Certain Sex Offenders, The Recidivism Study Pilot Model, and Texas' Lone-State Model.¹¹¹ As will later be explored, Louisiana's most recent statute is a combination of all three models.

1. THE CALIFORNIA-BASED MODEL: PROBATION-CONTINGENT-UPON-CASTRATION FOR CERTAIN SEX OFFENDERS

California's chemical castration statute¹¹² served as the

income to fund punishment, but not acceptable to pay for an adequate, medically-oriented solution. This comment does not suggest that this is necessarily intentional, but rather, a possible effect of an inherited societal structure and the accompanying traditional values. No matter the intention, the end result is that our decisions reflect a society that values vindication above resolution. This hypothesis is completely consistent with the Louisiana legislative progression: the probation statute, which provided for the medical needs of the individual, is to be financed by the individual offender, but under the newer castration statute, there are fewer medical safeguards, and the costs are assigned to the state and, thereby, to the taxpayers.

111. I have named the models based off of identifying traits, and I give partial credit to John F. Stinneford. *See generally* Stinneford, *supra* note 25.

112. Section 645 of the California Penal Code provides:

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

(b) Any person guilty of a *second conviction* of any offense specified in subdivision (c), *where the victim has not attained 13 years of age, shall*, upon parole, undergo medroxyprogesterone acetate treatment or its chemical equivalent, in addition to any other punishment prescribed for that offense or any other provision of law.

...
(d) The parolee shall begin medroxyprogesterone acetate treatment one week prior to his or her release from confinement in the state prison or other institution and *shall continue treatments until* the Department of Corrections demonstrates to the Board of Prison Terms that this *treatment is no longer necessary*.

(e) *If a person voluntarily undergoes a permanent, surgical alternative to hormonal chemical treatment for sex offenders, he or she shall not be subject to this section.*

model for most of the chemical castration statutes that followed it, including Louisiana's first chemical castration statute, La. R.S. § 15:538.¹¹³ The California statute is limited to offenders who have committed one of several forms of statutory or forcible rape upon a victim who is twelve-years-old or younger.¹¹⁴ Upon first conviction of such an offense, the court has discretion to order chemical castration as a condition of parole, but castration becomes mandatory after a second conviction of one of the enumerated offenses.¹¹⁵

The California statute expressly provides for administration of MPA or its chemical equivalent.¹¹⁶ There is no requirement that the offender be diagnosed with a sexual disorder, nor is it required that a doctor find the administration of the treatment medically appropriate.¹¹⁷ Furthermore, the offender only needs to be notified of the effects of the treatment and acknowledge receipt of such notification; there is no informed consent requirement and there is no right to refuse the treatment.¹¹⁸

Under the Probation-Contingent-Upon-Castration model, offenders begin being treated with MPA one week prior to their release from prison and are required to continue such treatment until the Department of Corrections can show the Board of Prison Terms that the injections are no longer necessary.¹¹⁹ California

(f) The Department of Corrections shall administer this section and implement the protocols required by this section. *Nothing in the protocols shall require an employee of the Department of Corrections who is a physician and surgeon licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code or the Osteopathic Initiative Act to participate against his or her will in the administration of the provisions of this section.* These protocols shall include, but not be limited to, a requirement to inform the person about the effect of hormonal chemical treatment and any side effects that may result from it. A person subject to this section shall *acknowledge* the receipt of this information.

CAL. PEN. CODE § 645 (West 2012) (emphasis added).

113. Stinneford, *supra* note 25, at 578. Other states that have followed California's statute include Florida, Iowa, and Montana. *Id.*

114. CAL. PEN. CODE § 645 (West 2012).

115. *Id.*

116. *Id.*

117. Stinneford, *supra* note 25, at 578.

118. *Id.*

119. CAL. PEN. CODE § 645 (West 2012). Although, if MPA was administered to an appropriate sex offender upon probation, and the treatment worked—in so far as, the offender never commits another sexual offense while receiving the MPA injections—it is unlikely that the Board would determine that the injections were no longer necessary because the injections do not have any lasting curative effect.

acknowledged, when passing their bill, that offenders may be required to receive MPA injections for their lifetime.¹²⁰ However, the offender may escape undergoing chemical castration by opting to undergo physical castration.¹²¹ The Board of Corrections organizes and supplies such services without regard to the offender's ability to pay for them.¹²²

Florida, Iowa, Montana, and Louisiana all enacted chemical castration statutes modeled after the California statute.¹²³ Those statutes are similar insofar as they make chemical castration a condition of parole, but there are a few notable differences.¹²⁴ The first difference concerns the people who are affected by the statute. Like the California statute, Iowa's statute applies to offenders that have committed sexual crimes where the victim of the offense was twelve-years-old or younger.¹²⁵ However, the range of offenses is much broader than in the California statute; it applies to crimes ranging from indecent contact to sexual exploitation of a child.¹²⁶ On the other hand, the Florida statute limits the range of crimes that trigger chemical castration eligibility. Under Florida law, chemical castration may be applicable where the offender has committed sexual battery and shall be applicable upon a second conviction for sexual battery.¹²⁷ However, the age of the victim is not relevant in most cases.¹²⁸ Montana has taken the middle ground. Chemical castration may be ordered after a person has been convicted of either sexual assault or sexual intercourse without consent, where the victim is fifteen-years-old or younger, or of incest, regardless of the victim's age.¹²⁹

Testosterone levels and prior urges return shortly after an offender has stopped receiving injections. Stinneford, *supra* note 25, at 579-80.

120. OFFICE OF S. FLOOR ANALYSIS, A.B. 3339, REGULAR SESS., at 4 (Ca. 1996).

121. CAL. PEN. CODE § 645 (West 2012).

122. *Id.* § 645 (f).

123. See FLA. STAT. ANN. § 794.0235 (West 2012); IOWA CODE ANN. § 903B.10 (West 2012); MONT. CODE ANN. § 45-5-512 (West 2012); LA. REV. STAT. ANN. § 15:538 (2012).

124. See FLA. STAT. ANN. § 794.0235 (West 2012); IOWA CODE ANN. § 903B.10 (West 2012); MONT. CODE ANN. § 45-5-512 (West 2012); LA. REV. STAT. ANN. § 15:538 (2012).

125. IOWA CODE ANN. § 903B.10 (West 2012).

126. *Id.*

127. FLA. STAT. ANN. § 794.0235 (West 2012).

128. *Id.* §§ 794.011, 794.0235.

129. MONT. CODE ANN. § 45-5-512 (West 2012).

In contrast to California, certain states have also taken different approaches to post-adjudication or pre-adjudication medical review. Specifically, Iowa, Montana, and Florida require some form of minimal medical review before treatment is imposed.¹³⁰ Iowa, for example, explicitly emphasizes that chemical castration shall not be the sole form of treatment for sex offenders.¹³¹ Rather, MPA should be administered in conjunction with counseling and a comprehensive therapy plan, and the state further suggests that the offender undergo cognitive behavioral therapy to make treatment as effective as possible.¹³² Despite certain minimal medical protections, none of these states require that the offender be diagnosed with a sexual disorder before undergoing chemical castration.¹³³ Nor do any of the states, under this type of model, or any other model, require the offender's informed consent.¹³⁴

As far as duration of treatment is concerned, Iowa and Montana follow California's lead and provide that treatment should continue until the state determines that administration of MPA is no longer necessary.¹³⁵ Florida permits the court to determine the duration of treatment at the time of sentencing; the court may order treatment to continue until the defendant's death.¹³⁶

130. See FLA. STAT. ANN. § 794.0235 (West 2012) (stating that the administration of MPA is contingent upon a determination by a court appointed expert that the offender is an appropriate candidate for treatment); MONT. CODE ANN. § 45-5-512 (West 2012) (noting that the administration of MPA is only appropriate where it would be medically safe); IOWA CODE ANN. § 903B.10 (West 2012) (providing that it must be assessed that administering MPA would be effective).

131. *District Policies, Sotp Hormonal Intervention Therapy*, DEP'T OF CORRECTIONAL SERVS., FIFTH JUDICIAL DISTRICT, <http://fifthdcs.com/FifthPolicy/index.cfm?policy=SotpHormonalInterventionTherapy> (last visited Mar. 14, 2013).

132. *Id.* Iowa and Louisiana, under the probation statute, are the only states that require offenders to pay for the administration of the MPA injections. However, Iowa offenders are solely required to pay for the administration of MPA and are not fiscally responsible for the psychological evaluation, treatment plan, and MPA injections, whereas sex offenders in Louisiana are responsible for those costs. IOWA CODE ANN. § 903B.10 (West 2012); LA. REV. STAT. ANN. § 15:538 (2012).

133. *Sotp Hormonal Intervention Therapy*, *supra* note 131.

134. *Id.*

135. MONT. CODE ANN. § 45-5-512 (West 2012); IOWA CODE ANN. § 903B.10 (West 2012).

136. FLA. STAT. ANN. § 794.0235 (West 2012). This is significant because Louisiana adopted this durational policy in the new chemical castration statute. The FDA has recommended that Depo-provera only be taken for up to two years because

Florida and Iowa, like California, also permit offenders to avoid chemical castration by undergoing surgical castration.¹³⁷ Most states provide funding for treatment costs associated with administration of MPA; however, Iowa and Louisiana both require the offender to pay the associated costs.¹³⁸

Inspired by the California-type model, but possibly not as confident in enacting such far-reaching procedures, certain states have set up pilot programs to assess the effect, if any, that adopting mandatory chemical castration statutes would have on recidivism rates.

extended use results in loss of bone density and other severe side effects. *Safety: Depo-Provera (Medroxyprogesterone Acetate Injectable Suspension)*, FDA, <http://www.fda.gov/Safety/MedWatch/SafetyInformation/SafetyAlertsforHumanMedicalProducts/ucm154784.htm> (last visited Mar. 14, 2013). This warning is given with respect to the dosages given for birth control purposes, which are significantly smaller than the dosages prescribed for chemical castration. Stinneford, *supra* note 25, at 573. When passing their chemical castration bill, California acknowledged that Depo-Provera had caused multiple unwanted side effects and that there were alternative anti-androgen drugs to Depo-Provera available at the time that had limited negative side effects. OFFICE OF S. FLOOR ANALYSIS, A.B. 3339, *supra* note 120, at 3. However, the alternative would cost \$400-\$500 for each monthly injection, whereas Depo-Provera only costs the state \$40 per injection. *Id.*

137. FLA. STAT. ANN. § 794.011 (West 2012); IOWA CODE ANN. § 903B.10 (West 2012).

138. IOWA CODE ANN. § 903B.10 (West 2012); LA. REV. STAT. ANN. § 15:538 (2012). Requiring payment for the procedures will only frustrate any ability these statutes have to lower recidivism rates because failure to obtain treatment triggers, under Louisiana law, an additional felony, resulting in revocation of probation, incarceration, and fines. Furthermore, this perpetuates a justice system that targets low-income socioeconomic classes. Where a statute's alleged purpose is aimed at deterring crime and promoting rehabilitation, and the structure of the statute only encourages rehabilitation to those who can afford it and punishes those who cannot, the statute should be viewed as substantively unfair. People may demand an answer to the question of why citizens should have to pay for sex offender rehabilitation programs—they are, after all, sex offenders. However, *if* the state insists on treating them on the basis of their conviction, then why should the statute carry an inherent presumption that a wealthy sex offender poses less of a risk if set free on parole than an indigent sex offender? This is certainly not a logical conclusion, considering the fact that wealth did not prevent the offender from committing the crime in the first place. But the result is that where there is one wealthy offender on parole and one indigent offender on parole, the indigent offender is more likely to violate the statute and return to prison, not because he committed a sexual offense, but because he could not procedurally comply with the statute. Therefore, the statute encourages disparate treatment by encouraging release of wealthy sex offenders and discouraging release of poor sex offenders. Such a regime, while not facially unconstitutional, has certainly proven itself ineffective and self-defeating.

2. THE RECIDIVISM STUDY PILOT MODEL: NOT RECESSION PROOF

Following in California's wake, Oregon and Wisconsin initiated "pilot programs" aimed at determining the efficacy of MPA administration and its effect on lowering recidivism rates for repeat offenders.¹³⁹ In Oregon, for example, the Department of Corrections was supposed to select forty to fifty persons to undergo administration of MPA or its chemical equivalent as part of a pilot program started in 1999.¹⁴⁰ An initial study was published in 2002, and a follow up study was published in 2006.¹⁴¹ Although the first study is not particularly revealing because most offenders generally do not recidivate within the first three years of being released, the second study tended to show that offenders treated with MPA were less likely to recidivate or violate probation than those offenders who were supposed to be administered MPA, but due to various factors, such as cost, location, or lack of medical personnel, were never administered the drug.¹⁴²

Only those persons who were likely to benefit from the treatment and posed a high risk of recidivating were selected to participate.¹⁴³ However, Oregon repealed the program by way of Senate Bill 356, which stated that "[t]his 2011 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect on its passage."¹⁴⁴

139. Stinneford, *supra* note 25, at 580; OR. REV. STAT. ANN. § 144.625 (repealed 2011); WIS. ADMIN. CODE DOC § 330.02 (2012).

140. Stinneford, *supra* note 25, at 580; Barry M. Maletzky & Gary Field, *The Biological Treatment of Dangerous Sexual Offenders, A Review and Preliminary Report of the Oregon Pilot Depo-Provera Program*, 8 AGGRESSION & VIOLENT BEHAV. 391, 404 (2003).

141. Maletzky & Field, *supra* note 140; Barry M. Maletzky, Arthur Tolan & Bentson McFarland, *The Oregon Depo-Provera Program: A Five-Year Follow-Up*, 18 SEXUAL ABUSE 303 (July 2006).

142. See Maletzky & Field, *supra* note 140; Maletzky, Tolan, & Bentson, *supra* note 141.

143. Maletzky & Field, *supra* note 140.

144. S.B. 356, 76th Leg. Reg. Sess. (Or. 2011). No further information could be found about the declaration of an emergency by way of committee notes, reports in the media, or legislative documents. Nor was there any evidence that any other state statute had been simultaneously repealed, lifted, or limited by the state of emergency. However, it is interesting, though not necessarily indicative of any wrongdoing, that the head psychiatrist hired to administer the MPA injections,

Wisconsin also set up a pilot program promulgated through its chemical castration statute.¹⁴⁵ Wisconsin's statute only applies to "serious child sex offenders."¹⁴⁶ Serious sex offenders are persons who have sexually assaulted children under the age of thirteen.¹⁴⁷ While the statute makes chemical castration a condition of probation or parole, in practice the statute (in conjunction with Department of Corrections regulations) only applies to individuals who, after undergoing clinical and medical evaluations by a licensed physician, have been diagnosed with pedophilia or a similar diagnosis that would require pharmacological treatment in conjunction with cognitive behavioral therapy.¹⁴⁸ As of 2002, after 523 inmates had been evaluated, 217 were determined statutorily eligible, but, because of the voluntary nature of the program, it was unknown how many of the statutorily eligible inmates would decide to participate.¹⁴⁹ Furthermore, at the time of the report, only six offenders were being administered injections.¹⁵⁰ Due to the cost and delays in getting the program up and running, the Governor

organize the pilot program, and write the two aforementioned studies, actually had his medical license revoked on two separate occasions during the time of his employment. The first time was in 2000, when the State of New York revoked his license because he supplied false information about his level of education and the medical school he attended when applying for his license. Then, in 2004 his license was revoked by the State of Oregon. In 2007, a year after the second study was published, he applied to have the license reinstated, but Oregon denied the application. It is entirely plausible that such information does not yield the assumption that the findings of his study were not accurate. At the very least, however, it appears that the State employed a non-licensed physician with a history of sanctions to inject parolees with dangerously high dosages of progesterone. *Dr. Barry Maletzky, M.D.*, HEALTH GRADES, <http://www.healthgrades.com/physician/dr-barry-maletzky-ywxf/background-check> (last visited Mar. 14, 2013).

145. WIS. STAT. ANN. § 304.06 (1)(q) (West 2012). The statute grants the parole commission discretion to require chemical castration as a condition of parole for the offenses enumerated in WIS. ADMIN. CODE DOC § 330.04 (2012). *Id.* As a result, the legislature provided the DOC with funds to initiate a pilot program to determine the efficacy of administering MPA to sex offenders. PHARMACOLOGICAL TREATMENT OF CHILD SEX OFFENDERS (CORRECTIONS), JOINT COMM. ON FIN. (Feb. 28, 2002), available at <http://legis.wisconsin.gov/lfb/publications/budget/2001-03%20Budget-Adjustment/Documents/Papers/1142.pdf>.

146. WIS. STAT. ANN. § 304.06 (1)(q)(b) (West 2012).

147. *Id.* § 304.06 (1)(q)(a).

148. WIS. ADMIN. CODE DOC § 330.04 (2012).

149. PHARMACOLOGICAL TREATMENT OF CHILD SEX OFFENDERS, *supra* note 145.

150. *Id.*

recommended repealing the castration program.¹⁵¹ However, that recommendation was ignored, and, by 2005, thirty-two offenders had participated, or were participating, in the treatment, including eight offenders who had completed the program.¹⁵² Although the program is underfunded and under-resourced, the pilot program is currently active.¹⁵³ Its continued existence is promising insofar as the study may finally yield some meaningful findings on how to effectively reduce sex offender recidivism rates with anti-androgen therapy and possibly provide guidance on how the Department of Corrections can use such a treatment to reduce prolonged incarceration sentences and focus on cost-effective, rehabilitating probation schemes. The downside is that the program was enacted over fifteen years ago, and the study has hardly gathered any data, let alone results. It will probably take another thirty years of observance to determine what effect, if any, the treatment has on recidivism rates.

Both California's and Wisconsin's models demonstrate a few inherent problems in chemical castration statutes. One issue is that administering the treatment requires money. If the state tries to supply the service, it often seems to limit or eliminate the program for lack of funding. If the state requires the defendants to pay for the treatment, low-income offenders are unfairly and disparately treated. Another predicament is that, due to the lack of empirical evidence on the efficacy of anti-androgen treatment, states are trying to research the treatment at the same time they are trying to judicially enforce it.¹⁵⁴ If a state is going to give the department of corrections the authority to determine medically

151. PHARMACOLOGICAL TREATMENT OF CHILD SEX OFFENDERS, *supra* note 145.

152. PHARMACOLOGICAL TREATMENT OF CHILD SEX OFFENDERS (Corrections), JOINT COMM. ON FIN. (May. 26, 2005), *available at* <http://legis.wisconsin.gov/lfb/publications/budget/2005-07-Budget/Documents/Budget%20Papers/231.pdf>.

153. BUDGET CHANGE ITEMS 2013-2015, DEPT. OF CORRECTIONS, at 125 (2012), *available at* <http://legis.wisconsin.gov/lfb/publications/budget/2013-15%20budget/documents/governor/corrections.pdf> (showing intent to deduct \$50,000 from the program in 2013 and 2014).

154. This is something that California realized, and, in 2007, the state passed a law granting the department of corrections permission to begin a pilot program aimed at sex offenders based on the relapse prevention model. CAL. PENAL CODE § 3072 (West 2012). The purpose of the program is to rehabilitate those sex offenders who pose a particular violent risk to society but want to be rehabilitated and give their voluntary consent to treatment determined by medical protocols. *Id.* The department must monitor the medically clinical effect on the sex offenders, and also report on the cost-effectiveness of the program. *Id.*

appropriate candidates for parole contingent upon voluntary submission to MPA treatments and therapy, then why does there need to be a mandatory sentence of castration that will waste judicial resources by inviting a flood of appeals? As discussed in the next subsection, Texas takes an approach that addresses these problems, but, in turn, requires a much more intrusive procedure in exchange for little to no benefit to society or the offender.

3. TEXAS'S LONE-STATE MODEL

Texas has taken a drastically different approach from other states and has bypassed the chemical castration route entirely. Instead, under Texas law, certain sex offenders may volunteer to undergo surgical castration.¹⁵⁵ The option is part of the state's Rehabilitation and Reentry Program, and, therefore, is probably the only statute that is purely treatment-oriented, as opposed to retributive.¹⁵⁶ This view is further supported by the fact that Texas also enacted a statute requiring the state to study the rate of recidivism for at least ten years after an orchiectomy is performed under the castration statute.¹⁵⁷

An inmate is only eligible for the surgery if he meets the following criteria: (1) he has been convicted at least twice of continuous sexual abuse of a child, sexual assault of a child, or aggravated sexual assault of a child; (2) he is at least 21 years old; (3) he has requested the procedure in writing; (4) he has signed a statement admitting to committing the offense for which he has been convicted; (5) he has been evaluated and counseled by a psychiatrist and a psychologist who have experience treating sex offenders and have found, subsequent to the evaluation, that the offender is a suitable candidate for the procedure; (6) the inmate has given his informed, written consent to undergo the procedure; and (7) the inmate must not have made a prior request, and subsequent withdrawal of such request, for the procedure.¹⁵⁸

155. TEX. GOV'T CODE ANN. § 501.061 (West 2012).

156. TEX. DEPT OF CRIMINAL JUSTICE, OFFENDER ORIENTATION HANDBOOK 63 (Nov. 2004), *available at* [www.lb5.uscourts.gov/ArchivedURLs/Files/06-20443\(1\).pdf](http://www.lb5.uscourts.gov/ArchivedURLs/Files/06-20443(1).pdf).

157. TEX. GOV'T CODE ANN. § 501.062 (West 2012). Orchiectomy is synonymous with "surgical castration," and consists of surgical removal of the testes. TEX. DEPT OF CRIMINAL JUSTICE, *supra* note 156, at 63.

158. TEX. GOV'T CODE ANN. § 501.061 (West 2012).

If the requesting inmate meets the aforementioned criteria, he will be assigned a monitor to assist him in his decision to have an orchiectomy.¹⁵⁹ The monitor serves two functions. First, the monitor is meant to ensure that the inmate has been fully informed about the procedure by medical professionals, or to provide such information in the case he has not been fully informed.¹⁶⁰ Second, the monitor must determine that the inmate has consented to the procedure free from coercion, and to advise the inmate to withdraw his request for an orchiectomy if the monitor determines that the inmate is being coerced to undergo the procedure.¹⁶¹ Additionally, the inmate may choose to withdraw his request on his own volition any time prior to the surgery.¹⁶² Texas law further provides against potential abuse of the statute by prohibiting the Parole Panel from making orchiectomy a condition of parole or mandatory supervision.¹⁶³ The request or completion of the surgery will not carry any influence on parole decisions, favorable or otherwise.¹⁶⁴

The Texas statutory approach does a better job at respecting the rights of the prisoner—it is truly voluntary, requires informed consent, contains abundant medical safeguards, and makes castration available only to those who are deemed to benefit from the procedure. Additionally, the state limits costs by only allowing prisoners to apply for the procedure once and by making the procedure a one-time event, as opposed to an on-going treatment. The statute also does not disparately treat classes based on income because the state pays for the procedure regardless of socioeconomic class. However, Texas's approach is not without its shortcomings.

The relative medical and judicial efficacy of the Texas approach is undercut by the social costs. Not releasing sex offenders who receive the treatment and, ostensibly, no longer pose a threat to public safety, is a costly and unfair practice. Not only does undergoing the procedure not result in a shorter sentence, but it is also possible that the availability of the procedure may even prolong a prison sentence if a sex offender

159. TEX. GOV'T CODE ANN. § 501.061 (West 2012).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* § 508.226.

164. TEX. DEPT OF CRIMINAL JUSTICE, *supra* note 156, at 63-64.

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does not opt to undergo castration.¹⁶⁵ Then again, if the Texas statute allowed for prisoners to choose treatment in exchange for reduced prison sentences, the procedure would not seem truly voluntary. However, the parole board director has discretion to give time-served credits for extraordinary behavior, and it is possible that if the procedure leads to a significant change in the offender's behavior, it may inadvertently reduce a prison sentence based on an individual assessment.¹⁶⁶

**C. LOUISIANA RUNS WITH THE PACK THEN VEERS OFF-TRACK:
HOW THE PASSAGE OF THE 2008 CHEMICAL CASTRATION
STATUTE CAME TO OVERSHADOW THE PROBATIONARY STATUTE**

Now that most of the domestic law pertaining to chemical castration has been covered, Louisiana's chemical castration statutes can be examined in light of the historical and statutory precedents. Initially, Louisiana, like the majority of other states, enacted a chemical castration law that was a condition of parole, probation, or release.¹⁶⁷ This statute (the probation statute) is still valid law in Louisiana. The probation statute applies to offenders convicted of sex offenses against minors, and offenders

165. *Leach v. Owens*, No. A-09, CA-421-JN, 2010 WL 5266063, at *1 (W.D. Tex. Dec. 15, 2010).

166. TEX. DEPT OF CRIMINAL JUSTICE, *supra* note 156, at 54.

167. Section 15:538(c) of the Louisiana Revised Statutes provides:

(1)(a) No sexual offender, whose offense involved a minor child who is twelve years old or younger; or

(b) who is convicted two or more times of a violation of R.S. 14:42, R.S. 14:42.1, R.S. 14:43, R.S. 14:43.1, R.S. 14:43.2, R.S. 14:43.3, R.S. 14:43.4, R.S. 14:78, R.S. 14:78.1, or R.S. 14:89.1 shall be eligible for probation, parole, or suspension of sentence or diminution of sentence if imposed as a condition by the sentencing court pursuant to R.S. 15:537(A), unless, as a condition thereof, the offender undergoes a treatment plan based upon a mental health evaluation which plan shall effectively deter recidivist sexual offenses by the offender, thereby reducing risk of reincarceration of the offender and increasing safety of the public, and under which the offender may reenter society.

(2) ...

(b) The treatment plan may include:

(i) The utilization of medroxyprogesterone acetate treatment or its chemical equivalent as a preferred method of treatment.

(ii) A component of defined behavioral intervention if the evaluating qualified mental health professional determines that is appropriate for the offender.

....

(6)(b) Any physician or qualified mental health professional who acts in good faith in compliance with this Subsection in the administration of treatment shall be immune from civil or criminal liability for his actions in connection with such treatment.

LA. REV. STAT. ANN. § 15:538(C) (1997).

who had been convicted of two or more of the enumerated sexual offenses.¹⁶⁸ Noticeably, the statute does not strictly provide for chemical castration, but rather makes parole contingent upon the offender entering into “a treatment plan based upon a mental health evaluation which shall effectively deter recidivist sexual offenses by the offender, thereby reducing risk of reincarceration of the offender and increasing safety of the public, and under which the offender may reenter society.”¹⁶⁹ Louisiana’s statute was, and is, the only statute that expressly provided the legislature’s purpose within the statutory text.

The probation statute provides fairly practical medical safeguards. The treatment plan is determined by a qualified mental health professional with experience in treating sexual offenders and administered by a licensed medical expert.¹⁷⁰ Use of MPA is merely a recommended form of treatment.¹⁷¹ Subject to a mental health professional’s determination, the injections are administered in conjunction with a “component of defined behavioral intervention,” or else not at all if the medical professional determines that the offender is not a good candidate for the injections.¹⁷² Even if the offender is deemed to be a good candidate for the treatment, the offender must be informed of the uses and the side effects of the treatment and, thereafter, acknowledge, in writing, receipt of such information.¹⁷³ The offender is not required to give consent.¹⁷⁴ If the inmate does not wish to undergo MPA injections, he may opt for surgical castration upon giving written, informed consent.¹⁷⁵ Otherwise, an offender *must* undergo chemical castration, if ordered, until it is shown that it is no longer necessary, or have his probation or parole revoked.¹⁷⁶ The offender is responsible for all costs associated with the evaluation, treatment, and administration of MPA injections.¹⁷⁷

168. LA. REV. STAT. ANN. § 15:538(C) (1997).

169. *Id.*

170. *Id.* § 15:538(C)(2)(a); *Id.* § 15:538(C)(6)(a).

171. *Id.* § 15:538(C).

172. *Id.*

173. LA. REV. STAT. ANN. § 15:538(C) (1997).

174. *Id.*

175. *Id.* § 15:538(C)(8).

176. *Id.* § 15:538(C)(3)(d), (7).

177. *Id.* § 15:538(C)(5).

In 2008, Governor Bobby Jindal passed Senate Bill No. 145, enacting yet another chemical castration law (the castration statute) which broadened the class of offenders that can be treated with MPA by expanding the sexual offenses that warrant chemical castration and removing oversight from the medical community.¹⁷⁸ The chemical castration statute grants trial court judges the authority to sentence first-time offenders of the enumerated sexual acts (aggravated rape, forcible rape, second degree sexual battery, aggravated incest, molestation of a juvenile when the victim is under the age of thirteen, and aggravated crime against nature) to undergo chemical castration.¹⁷⁹ The court is *required* to sentence sexual offenders to chemical castration upon their second conviction of one of the enumerated offenses.¹⁸⁰ In contrast to the probation statute's requirement that a *mental health expert with experience treating sex offenders* determine whether the offender would benefit from administration of MPA, the castration statute provides that administration of MPA is contingent upon a *court appointed medical expert* determining that the defendant is an *appropriate candidate* for the treatment.¹⁸¹ In addition, like the Florida statute, the court determines the duration of treatment at the time of sentencing, as opposed to a licensed physician periodically assessing whether the offender is still benefitting from the treatment.¹⁸²

Unlike the probation statute, the castration statute shall not be used in lieu of, or reduce, any penalty prescribed by law.¹⁸³ The treatment is administered by the Department of Corrections, and the state pays for the costs of administering the treatment.¹⁸⁴ The offender does not have to consent to the administration of

178. LA. REV. STAT. ANN. § 14:43.6 (2008).

179. *Id.* § 14:43.6.A.

180. *Id.* § 14:43.6.B(1).

181. *Id.* § 14:43.6.C(1). It appears that an "appropriate" candidate is an offender who does not have any preexisting health conditions that would be worsened by taking MPA and is not taking any medications that would be contraindicated by taking MPA. Original Brief on Behalf of Defendant-Appellant, *supra* note 3, at *41.

182. LA. REV. STAT. ANN. § 14:43.6.C(1) (2008) ("An order of the court sentencing a defendant to medroxyprogesterone acetate (MPA) treatment shall specify the duration of treatment for a specific term of years, or in the discretion of the court, up to the life of the defendant").

183. *Id.* § 14:43.6.B(2).

184. *Id.* § 14:43.6.C(3).

MPA.¹⁸⁵ In fact, if the offender does not submit to the treatment, he will automatically be charged with a violation of the castration statute and sentenced to three to five years of imprisonment, with or without hard labor.¹⁸⁶ However, if the offender does not want to receive MPA treatments, he may opt to be physically castrated upon providing the court with a written motion stating that he is “intelligently and knowingly” giving his consent to be physically castrated as an alternative to the MPA treatment.¹⁸⁷

In direct contrast to the probation statute, and other states’ statutes that were likewise seemingly passed for the purpose of rehabilitating sex offenders, protecting the public, and decreasing high incarceration rates, the purpose of the castration statute is noticeably absent.¹⁸⁸ In statements made to the public, Jindal characterized the passing of the castration statute as an act that is strictly meant to punish sex offenders.¹⁸⁹ Jindal signed the bill

185. LA. REV. STAT. ANN. § 14:43.6 (2008).

186. *Id.* § 14:43.6.C(4).

187. *Id.* § 14:43.6.B(2).

188. *Id.* § 14:43.6.

189. *Governor Signs Chemical Castration Bill, Authorizing the Castration of Sex Offenders in Louisiana*, OFFICE OF THE GOVERNOR (June 25, 2008), <http://gov.louisiana.gov/index.cfm?md=newsroom&tmp=detail&articleID=270> (wherein Governor Jindal explicitly states that the passage of the bill was meant to punish “these monsters”—sex offenders—to the fullest extent). In contrast, the probation statute explicitly provides that its purpose is to rehabilitate sex offenders and prevent future convictions. LA. REV. STAT. ANN. § 15:538(c) (1997). Admittedly, Jindal’s motivation for signing the bill does not necessarily mean the legislature had the same intent in passing the law. However, some idea of the legislature’s intent can be gleaned from looking to the origins of the bill. The chemical castration bill was introduced by Senator N. Gautreaux who, in the same legislative session, introduced a bill—that also subsequently became law—that prohibits sex offenders from wearing masks or hoods during any celebration where such items are generally worn. LA. REV. STAT. ANN. § 14:313 (2008). In 2006, Senator Gautreaux introduced the “Mary Jean Thigpen” law, which did not change the law, but rather systematically increased the punishments for certain sexual offenses. TRACY SUDDUTH, LA. STATE S., 2006 REGULAR SESSION HIGHLIGHTS: CRIMES/CRIMINAL PROCEDURE 1 (2006), available at <http://senate.legis.state.la.us/sessioninfo/2006/rs/highlights/LinkShell.asp?s=Crimes>. Finally, in 2004, Senator Gautreaux introduced another bill that was passed, which prohibits any paroled sex offender from being or living within 1,000 feet of any facility where children congregate. LA. STATE S., SENATOR’S NEWS RELEASE: STATE SENATOR NICK GAUTREAUX CONTINUES FIGHT TO PROTECT CHILDREN AGAINST SEXUAL PREDATORS (2005), available at <http://www.senate.legis.state.la.us/senators/Archives/2005/GautreauxN/LinkShell.asp?type=rel060305>. Therefore, even though legislative intent is left to judicial interpretation where not explicitly stated, the fact that the senator who introduced the castration bill has a pattern of introducing increasingly punitive laws aimed at

into law on the day that the U.S. Supreme Court ruled it was unconstitutional for Louisiana to execute convicts who raped children under the age of twelve.¹⁹⁰ The governor admitted, “I am glad we have taken such strong measures in Louisiana to put a stop to these monsters’ brutal acts.”¹⁹¹ Jindal went on to say, “I am *especially* glad to sign [the castration statute] into Louisiana law . . . on the same day the Supreme Court has made an atrocious ruling against our state’s ability to sentence those who sexually assault our children to the fullest extent.”¹⁹² The legislation is meant to be a punishment that deters “heinous and disgusting crimes.”¹⁹³

D. ADMINISTERING CHEMICAL CASTRATION: EASIER SAID THAN SENTENCED?

Despite the media frenzy over the string of states enacting chemical castration statutes, most courts are not sentencing offenders to be chemically castrated and, consequently, the constitutionality of the statutes has not been thoroughly scrutinized under judicial review. Even where constitutional challenges have made it to appellate courts, the substantive grounds have not been examined because, more likely than not, the statute has been misapplied in a procedural manner. This is, in large part, a result of the statutes’ failure to elucidate clear procedural safeguards or of a lack of judicial resources to administer the forced castration process.

An example of this problem can be seen in a Florida castration statute that is a mixture of Louisiana’s statutes.¹⁹⁴ According to a report prepared by the Florida Department of Corrections, from the time of the enactment of the Florida statute in 1997 until the report was prepared in 2005, Florida courts had

sex offenders lends credence to the possibility that the statute was passed with the intent to punish sex offenders without serving a legitimate penal interest.

190. *Louisiana Gov. Jindal Authorizes Chemical Castration of Sex Offenders*, HUFFINGTON POST, July 4, 2008, http://www.huffingtonpost.com/2008/06/26/louisiana-gov-jindal-auth_n_109342.html.

191. *Id.*

192. *Id.* (emphasis added).

193. Douglas A. Berman, *Louisiana Judges Not Using Authority to Order Chemical Castration for Sex Offenders*, SENTENCING LAW & POLICY (Jan. 10, 2011), http://sentencing.typepad.com/sentencing_law_and_policy/2011/01/louisiana-judges-not-using-authority-to-order-chemical-castration-for-sex-offenders.html.

194. *See* FLA. STAT. ANN. § 794.0235 (West 2012).

failed to apply the statute in 104 out of the 107 cases in which its application was mandated.¹⁹⁵ The main reason cited for the oversight was that judges were not aware of the statute. When it was applied, the court has had difficulty in following the strict and confounding procedural guidelines, and thus, Florida's jurisprudence ruminates on the statute in a purely procedural way without ever reaching the substance of mandating chemical castration. One Florida court ordered the castration without appointing a medical expert or assigning the duration of treatment.¹⁹⁶ In another case, the court failed to determine whether the inmate was an appropriate candidate within sixty days of the sentencing hearing.¹⁹⁷ In a case where the chemical castration sentence was reversed, the court ordered the Department of Corrections to hire and pay for a medical expert to determine the appropriateness of the candidacy because the court did not have any funds to pay for the medical expert.¹⁹⁸

Louisiana appears to be experiencing similar problems getting to the merits of the castration statute.¹⁹⁹ As of January 10, 2011, the Louisiana Department of Public Safety and Corrections said that they could not find any inmates who had been sentenced to chemical castration for conviction of a sex crime under the new law.²⁰⁰ Since the public statement from the Department of Corrections, chemical castration has been ordered under the castration statute in a few cases, but it is not ordered in the majority of cases that fall under the mandatory sentence provision of the castration statute.²⁰¹ It is possible that, like Florida, the statute is not being applied because judges and prosecutors are unaware the statute exists. Another reason may be that prosecutors are reluctant to enforce the politically-charged legislation. As an Assistant District Attorney in East

195. Simpson, *supra* note 15, at 1223.

196. *Houston v. State*, 852 So. 2d 425 (Fla. 5th Dist. Ct. App. 2003).

197. *Jackson v. State*, 907 So. 2d 696 (Fla. 4th Dist. Ct. App. 2005).

198. *Dep't of Corrs. v. Cosme*, 917 So. 2d 1049 (Fla. 5th Dist. Ct. App. 2006).

199. *See, e.g., State v. R.K.*, 10-982 (La. App. 3d Cir. 5/11/11); 64 So. 3d 426 (holding that the Louisiana castration statute does not apply retroactively to acts committed prior to enactment of the statute); Original Brief on Behalf of Appellee State of Louisiana, *supra* note 10, at *23-24 (wherein the state conceded that the chemical castration statute did not apply retroactively to acts committed prior to enactment of the statute and, thus, did not argue for enforcement of the sentence upon appeal).

200. Berman, *supra* note 194.

201. *Id.*

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Baton Rouge Parish explained, “the legislation is ill-advised . . . it’s not that simple. It doesn’t cure it.”²⁰² However, other prosecutors have begun to utilize the chemical castration statute outside of court by using it as a bargaining chip in negotiating plea deals.²⁰³

Not only does this practice give prosecutors discretion to make uninformed medical decisions, but it also prevents any opportunity for meaningful judicial scrutiny of the statute.²⁰⁴

While the great bulk of existing case law on chemical castration concerns misapplication of the statutes, there have been a few constitutional challenges heard by the courts.²⁰⁵ The following section will discuss the posture of the courts on these issues.

III. CONSTITUTIONAL CHALLENGES TO CHEMICAL CASTRATION LAWS

The only successful constitutional attack on a chemical castration statute has been the ex-post facto challenge.²⁰⁶ In

202. Berman, *supra* note 194.

203. *Id.* In 1999, prior to the enactment of the 2008 chemical castration statute, Francis Phillip Tullier was sentenced to twenty-seven years in prison for molesting three young girls between the ages of six and twelve on several hundred occasions. Aliyah Shahid, *Convicted Louisiana Pedophile Francis Phillip Tullier Volunteers to Be Castrated to Get Out of Jail*, NY DAILY NEWS, Mar. 5, 2011, http://articles.nydailynews.com/2011-03-05/news/28677335_1_castrated-pedophile-caesar. As part of a plea agreement entered into at the time of sentencing, Tullier opted to undergo surgical (or “physical”) castration rather than complete the rest of his sentence. Tullier underwent the surgery on March 3, 2011, at the age of 78. David Reutter, *Louisiana Sex Offender Agrees to Surgical Castration*, PRISON LEGAL NEWS, Oct. 2011, at 48. Tullier was released from prison following the procedure, which he paid for, and now lives as a registered sex offender in Iberville Parish, Louisiana. *Id.*

204. *See also*, Prescott Carlson, *Child Molester Castrates Self to Gain Parole*, IMPERFECT PARENT (March 4, 2011), <http://www.imperfectparent.com/topics/2011/03/04/child-molester-castrates-self-to-gain-parole/>.

205. *See Savery v. Dep’t of Corrs.*, No. 6:09-cv-810-Orl-31DAB, 2010 WL 4683773, at *6 (M.D. Fla. 2010) (stating that no published Florida cases have discussed the constitutionality or legality of Florida’s chemical castration statute as of yet, and holding that it was improper for the defendant to raise the issue of constitutionality on a motion to the federal district court).

206. “No Bill of Attainder or ex post facto law shall be passed.” U.S. CONST. art. I, § 9, cl. 3. *See State v. Lathrop*, 781 N.W.2d 288 (Iowa 2010); *State v. R.K.*, 10-982 (La. App. 3d Cir. 5/11/11); 64 So. 3d 426.

other words, courts have applied chemical castration statutes as punishment for crimes committed prior to the enactment of the respective statutes, and those decisions have been reversed on appeal. Because almost all of the chemical castration sentences that have been heard by appellate courts have been reversed for violating the Ex-Post Facto Clause, courts have not directly considered the substantive constitutionality of the statutes.

Although the Supreme Court of the United States has not heard any cases regarding the constitutionality of the chemical castration statutes, many scholars have argued that forced chemical castration is a form of cruel and unusual punishment, a violation of substantive and procedural due process and equal protection under the Fourteenth Amendment, and a violation of the Double Jeopardy Clause.²⁰⁷ This comment argues that Louisiana's castration statute violates substantive due process and procedural due process under the Fourteenth Amendment and, accordingly, this section provides the pertinent background law on these constitutional claims.

Generally, courts examine procedural protections with regard to the substantive rights at stake.²⁰⁸ Substantive rights, on the other hand, remain a distinct analysis.²⁰⁹ The Supreme Court has explained that the "substantive issue involves a definition of the protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it."²¹⁰ The procedural issue, on the other hand, "concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance."²¹¹

A. SUBSTANTIVE DUE PROCESS

The Fourteenth Amendment prohibits a state from "depriv[ing] any person of life, liberty, or property, without due process of law."²¹² This protection has been viewed as having both a procedural and substantive component, which "forbids the

207. Spalding, *supra* note 14, at 125-26, 128-35; Simpson, *supra* note 15, at 1223, 1229-38; Stinneford, *supra* note 25, at 564-68, 585-99.

208. *Washington v. Harper*, 494 U.S. 210, 220 (1990).

209. *Id.*

210. *Id.* (citing *Mills v. Rogers*, 457 U.S. 291 (1982)) (internal citations omitted).

211. *Id.* (citing *Mills v. Rogers*, 457 U.S. 291 (1982)) (internal citations omitted).

212. U.S. CONST. amend. XIV, § 1.

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government to infringe certain ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”²¹³ Substantive due process protects those fundamental rights and liberties that are deeply rooted in this nation’s history and tradition.²¹⁴ The Supreme Court requires a “careful description” of the asserted fundamental interest.²¹⁵

The jurisprudence reflects a general liberty interest in refusing medical treatment.²¹⁶ In the leading decision, *Washington v. Harper*, the Supreme Court specifically recognized that prisoners have a liberty interest in “avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.”²¹⁷ The Court clarified that the liberty interest is implicated when *any* medication is forcibly injected into a non-consenting person’s body.²¹⁸

Harper concerned a schizophrenic inmate serving a sentence for robbery.²¹⁹ Harper spent the first portion of his incarceration in the mental health unit of Washington State Penitentiary, where he consented to the administration of antipsychotic drugs.²²⁰ Harper was granted parole on the condition that he participate in psychiatric treatment.²²¹ He received treatment at a hospital’s psychiatric treatment ward and was later committed pursuant to a civil commitment order.²²² However, after assaulting two nurses, he was sent back to prison and placed in the Special Offender Center, a ward designated “to diagnose and treat convicted felons with serious mental disorders.”²²³ At first, Harper consented to the administration of antipsychotics, but later objected to taking the drugs.²²⁴

213. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal citations omitted); *Reno v. Flores*, 507 U.S. 292, 302 (1993).

214. *Glucksberg*, 521 U.S. at 703.

215. *Id.*

216. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 304 (1990).

217. *Washington v. Harper*, 494 U.S. 210, 221-22 (1990).

218. *Id.* at 229.

219. *Id.* at 213-14.

220. *Id.*

221. *Id.* at 214.

222. *Id.*

223. *Harper*, 494 U.S. at 214.

224. *Id.*

The treating physician medicated Harper, despite his objections, pursuant to a state statute authorizing licensed psychiatrists to medicate any non-consenting inmate if he: “(1) suffers from a ‘mental disorder’ and (2) is ‘gravely disabled’ or poses a ‘likelihood of serious harm’ to himself, others, or their property.”²²⁵ Harper, as a non-consenting inmate, was entitled to a hearing by a committee composed of mental health professionals,²²⁶ not involved with his treatment, who could either grant or deny the treating physician the power to administer the medication upon finding that Harper met both of the aforementioned conditions.²²⁷ Harper was entitled to various procedural protections before, during, and after the hearing.²²⁸ In addition, the involuntary medication could only be continued with periodic review.²²⁹ The committee approved medication for Harper, and Harper subsequently filed a § 1983 action, alleging that the state statute violated his procedural and substantive due process rights because it failed to provide for a judicial hearing before the involuntary administration of antipsychotic drugs.²³⁰

The Supreme Court found that Harper possessed “a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the due process clause.”²³¹ However, the Court also found that the context of an inmate’s confinement determines the extent of the inmate’s right to avoid the unwanted administration of antipsychotic

225. *Washington v. Harper*, 494 U.S. 210, 215 (1990).

226. The committee is composed of a psychiatrist, a psychologist, and the Superintendent of the Special Offender Center for prisoners with mental illnesses. *Id.* at 229.

227. *Id.* at 215-16.

228. *Id.* at 216. “The comprehensive procedural protections consist of the following:

He must be given at least twenty-four hours notice of the Center’s intent to convene an involuntary medication hearing, during which time he may not be medicated. In addition, he must receive notice of the tentative diagnosis, the factual basis for the diagnosis, and why the staff believes medication is necessary. At the hearing, the inmate has the right to attend; to present evidence, including witnesses; to cross-examine staff witnesses; and to have the assistance of a lay adviser who has not been involved in his case and who understands the psychiatric issues involved. Minutes of the hearing must be kept, and a copy provided to the inmate. The inmate has the right to appeal the committee’s decision to the Superintendent of the Center within 24 hours, and the Superintendent must decide the appeal within 24 hours after its receipt.

229. *Id.* at 216.

230. *Id.* at 217.

231. *Harper*, 494 U.S. at 221.

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medication.²³² The Court applied a reasonableness standard, explaining that in all cases in which the needs of prison administration implicate constitutional rights, the proper standard when “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.’”²³³

In applying the tailored reasonableness standard, the Court found that three factors were pertinent:

First, there must be a valid, rational connection between the prison regulation and the legitimate government interest put forward to justify it. Second, a court must consider the impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. Third, the absence of ready alternatives is evidence of the reasonableness of the prison regulation, but this does not mean that prison officials have to set up and then shoot down every conceivable alternative method of accommodating that claimant’s constitutional complaint.²³⁴

Applying the first and second factors, the Court concluded that the prison has a legitimate interest in protecting the safety of prison staff and other inmates, and that the state statute allowing physicians to administer antipsychotics to non-consenting inmates was rationally related to this interest.²³⁵ The Court acknowledged that the prison also had a duty to take reasonable measures to protect the safety of the inmate to be treated.²³⁶ However, the Court decided that “[w]here an inmate’s mental disability is the root cause of the threat he poses to the inmate population, the State’s interest in decreasing the danger to others necessarily encompasses an interest in providing him

232. *Washington v. Harper*, 494 U.S. 210, 222 (1990).

233. *Id.* at 223 (citing *Turner v. Safley*, 482 U.S. 78 (1987)).

234. *Id.* at 224-25 (quoting *Turner*, 482 U.S. at 89-91) (internal citations and quotations omitted).

235. *Id.* at 225-26. The Court gave added weight to the prison’s interest in safety because a prison “is made up of persons with ‘a demonstrated proclivity for antisocial criminal, and often violent, conduct.’” *Id.* at 225 (quoting *Hudson v. Palmer*, 468 U.S. 517 (internal citations omitted)).

236. *Id.* at 225.

with medical treatment for his illness.”²³⁷ Therefore, administering antipsychotics to persons who are gravely disabled as a result of a mental illness and who also pose a threat of substantial danger to themselves or others furthers the legitimate objective of preventing dangerous incidences.²³⁸ While the Court conceded that there is considerable dispute over the potential side effects of antipsychotics, it was significant that the overwhelming majority of the psychiatric profession agreed that the “proper use of drugs is one of the most effective means of treating and controlling a mental illness likely to cause violent behavior.”²³⁹

The Court gave little attention to the third factor, finding that the proposed alternative mechanisms that Harper offered—being found incompetent, or being physically restrained or secluded—did not further the prison’s legitimate objectives because they were not an adequate substitute for medication.²⁴⁰ Consequently, the Court found the state statute comported with substantive due process.²⁴¹

B. PROCEDURAL DUE PROCESS

The United States Ninth Circuit Court of Appeals did not directly consider the constitutionality of chemical castration under the Due Process Clause of the Fourteenth Amendment; however, in *United States v. Cope*, it did offer some insight, in dicta, as to how a sex offender could frame such a challenge.²⁴² Cope, a convicted sex offender, challenged a condition to his sentence requiring him to take chemical castration medication. Cope claimed that this was overbroad and, as such, a violation of his due process rights. The Ninth Circuit explained that district courts are not ordinarily required to articulate a reason for ordering each condition of a sentence.²⁴³ However, additional process is required when a forced medication condition implicates

237. *Washington v. Harper*, 494 U.S. 210, 221-22 (1990).

238. *Id.* at 226.

239. *Id.*

240. *Id.* at 227. The proposed alternatives lacked merit because Harper failed to show their medical effectiveness or the toll the alternatives would take on the prison’s resources. *Id.*

241. *Id.*

242. *United States v. Cope*, 527 F.3d 944, 955 (9th Cir. 2008).

243. *Id.* at 956.

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a significant liberty interest.²⁴⁴ The court then stated that forced sentencing of chemical castration does “implicate a particularly significant liberty interest.”²⁴⁵

The court came to this conclusion after analogizing the chemical castration procedure to the forced sentencing of antipsychotic drugs. Antipsychotic drugs are the only other type of medication that warrants additional process.²⁴⁶ The additional process is justified because such medication alters the mind and behavior of the offender, and because the side effects make it dangerous. The court then stated that chemical castration is as intrusive as forced administration of antipsychotic drugs because it clearly alters the mind and behavior by manipulating hormone levels to achieve impotence, and because the medication leads to cancer and depression.²⁴⁷ “In fact, chemical castration may be found at the extreme end of the spectrum of intrusive medications and procedures”²⁴⁸

Given the Ninth Circuit’s due process analysis of chemical castration, it is likely that sex offenders sentenced under the castration statutes are entitled to additional process. In the Ninth Circuit, the additional process consists of the government bearing the burden of showing that, based on the on-the-record medically-grounded findings: (1) the condition the government seeks to impose is necessary to accomplish one or more factors listed in the statutory sentencing guidelines,²⁴⁹ and (2) that “the condition ‘involves no greater deprivation of liberty than is reasonably necessary.’”²⁵⁰ The particular sentencing guideline factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant,²⁵¹ and (2) the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from repeat offenses, and to provide the particular defendant with needed

244. *United States v. Cope*, 527 F.3d 944, 956 (9th Cir. 2008).

245. *Id.* at 955.

246. *Id.* (citing *United States v. Williams*, 356 F.3d 1045, 1053-54 (9th Cir. 2004) (holding that forced administration of antipsychotic drugs implicates severe liberty interests because the drugs interfere with a person’s “self-autonomy,” and have serious side effects)).

247. *Id.* at 955 n.5.

248. *Id.*

249. 18 U.S.C. § 3583 (d)(1) (2012).

250. *Cope*, 527 F.3d at 955 (citing *Williams*, 356 F.3d at 1057).

251. 18 U.S.C. § 3553 (a)(1) (2012).

medical care in the most effective manner.²⁵²

Significantly, the court intentionally excluded from consideration the concept of whether a liberty-implicating sentence is justified by the government's legitimate interest in imposing sentences that reflect the seriousness of the offense and provide just punishment.²⁵³ Instead, the additional process protects the defendant by weighing the needs of the particular defendant and the interests of public safety. Therefore, where a significant liberty interest is implicated, the state is not attributed the ordinary level of deference to punish a crime according to the local societal consensus of the seriousness of the crime. Such a conclusion would tend to show that Louisiana's castration statute would not pass muster under this due process analysis because Louisiana's statutory scheme inherently administers the castration procedure solely on the basis of the offense, not on the medical needs of the individual defendant nor on the possibility of preventing repeat offenses.

The *Harper* Court also discussed procedural due process claims brought by inmates objecting to the administration of medication, and this precedent would be applicable in a challenge to the constitutionality of Louisiana's chemical castration statute. Harper argued that the Due Process Clause requires a judicial decision-maker to determine whether the forced administration of medication is warranted, not, as was the case, a committee composed of a psychiatrist, a psychologist, and the Superintendent of the Special Offender Center for prisoners with mental illnesses.²⁵⁴

As with substantive due process, the procedural due process analysis begins with establishing the existence of a fundamental right, or a protected liberty or property interest.²⁵⁵ As stated earlier, prisoners have a protected liberty interest in their right to refuse unwanted administration of medication.²⁵⁶ Next, the

252. 18 U.S.C. § 3553(a)(2)(B)-(D) (2012).

253. *Id.* § 3553 (a)(2)(A).

254. *Washington v. Harper*, 494 U.S. 210, 228-29 (1990).

255. *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976) (stating that the existence of a liberty interest is necessary to bring a procedural due process claim because procedural due process "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment").

256. *Harper*, 494 U.S. at 220; *see supra* text accompanying notes 275-76.

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rights and interests at stake in a particular case are referenced to determine what procedural protections are required under the Clause.²⁵⁷ This is accomplished by considering: (1) the private interest at stake, (2) the governmental interest at stake, and (3) the value of the procedural requirements.²⁵⁸

Notwithstanding its finding that the inmate's interest in warding off unwanted administration of medication "was not insubstantial," and that antipsychotics carry a minimal-to-high risk of being adversely affected by any one of a number of potential side effects, the *Harper* Court concluded that not only were the inmate's interests adequately protected but, perhaps, better served, by allowing medical professionals rather than a trial judge, to make the determination to medicate or not.²⁵⁹ The Court determined that the judicial hearing setting is inherently ill-suited for making decisions that require years of medical training, knowledge of side effects, and continuous and ongoing observation of, and interaction with, the inmate.²⁶⁰ Consequently, the Court held that the Due Process Clause requires no more than an administrative hearing, so long as the state can show that a judicial hearing would not be as effective, as continuous, and as probative as the administrative hearing, and good reason was used to reach such a conclusion.²⁶¹ Thus, absent evidence of bias or infringement on the inmate's right to have an opportunity to be heard in a meaningful time and manner, an administrative hearing satisfies the procedural due process requirement.²⁶²

257. *Washington v. Harper*, 494 U.S. 210, 229 (1990).

258. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

259. *Harper*, 494 U.S. at 231 (citing *Parham v. J.R.*, 442 U.S. 584, 607-09 (1979)).

260. *Id.* at 232. The Court noted that "[c]ommon human experience and scholarly opinions suggest that the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of mental and emotional illness may well be more illusory than real." *Id.*

261. *Id.* at 233.

262. *Id.* at 235. In addressing Harper's claim that the statute had deficient procedural protections because he was not provided counsel at the administrative hearing, the Court, somewhat brashly, responded, "[I]t is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment." *Id.* at 236.

IV. LOUISIANA'S CHEMICAL CASTRATION STATUTE VIOLATES SUBSTANTIVE & PROCEDURAL DUE PROCESS

Louisiana's chemical castration statute violates the procedural and substantive due process requirements of the Fourteenth Amendment. Following in the steps of *Harper*, the substantive due process issue is addressed first.

A. SUBSTANTIVE DUE PROCESS

A substantive due process analysis first requires the protected constitutional interest to be defined.²⁶³ Subsequently, the conditions under which competing state interests might outweigh that constitutional interest must be identified.²⁶⁴ The state's interest in compelling chemical castration of certain sex offenders does not outweigh the liberty interest of prisoners to avoid the unwanted, and arbitrary, administration of medication.

Substantive due process protects those fundamental rights and liberties that are deeply rooted in this nation's history and tradition.²⁶⁵ The *Harper* Court held that prisoners have a significant liberty interest in avoiding the unwanted administration of forcibly injected medication.²⁶⁶ It is highly likely that Louisiana's chemical castration statute implicates the identical liberty interest in *Harper* because the statute provides for the injection of MPA into non-consenting individuals.²⁶⁷ Therefore, the first part of the substantive due process analysis is satisfied, and the context of the inmate's confinement will determine the extent of the inmate's right to avoid the unwanted administration of MPA.²⁶⁸

In order for the statute to be upheld against a challenge

263. *Washington v. Harper*, 494 U.S. 210, 220 (1990).

264. *Id.*

265. *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997).

266. *Harper*, 494 U.S. at 221.

267. LA. REV. STAT. ANN. § 14:43.6 (2012). Even if the court found that prisoners sentenced to chemical castration did not have a liberty interest in avoiding unwanted medication, *Skinner* sets precedent for finding that the chemical castration statute infringes on the right to procreate. This interest is not as strong in the chemical castration context because chemical castration is usually reversible, and not every male subjected to chemical castration loses the ability to procreate while being administered MPA.

268. *Harper*, 494 U.S. at 222.

based on substantive due process, it must be shown that chemical castration is reasonably related to the legitimate penological interests.²⁶⁹ This test requires: (1) finding a valid, rational connection between chemical castration and the legitimate government interest put forward to justify it; (2) consideration of the impact on guards, other inmates, and the allocation of prison resources if chemical castration is not imposed on sex offenders; and (3) whether there are other alternatives that would accommodate the legislature's purpose in passing the chemical castration statute.²⁷⁰

To satisfy the first factor, Louisiana must have (1) a legitimate interest in chemically castrating sex offenders, and (2) that interest must have a valid, rational connection to sentencing certain offenders to chemical castration.

Public statements indicate that the government would assert the chemical castration statute was passed in furtherance of the state's legitimate interest in deterring future sexual offenses from occurring.²⁷¹ States certainly have a legitimate interest in keeping crime down and protecting the safety of their citizens.²⁷² Even though the statute does not actually further the interest, a court will likely find that the government interest and the statute are rationally related because the standard for this factor imposes such a minimal level of scrutiny so the court almost always finds the government's law is rationally related to a legitimate interest. However, the court may still find the statute to be unreasonable.

Next, if the court were to accommodate the prisoner's constitutional right, the court would look to the impact on prison resources generally. The holding in *Harper* hinged on the state's interest in preventing a real threat of danger or violence from being perpetrated upon the prison staff or other inmates. The Court emphasized that the prisoner's constitutional right to bodily integrity was, in turn, threatening the staff's and inmates'

269. *Washington v. Harper*, 494 U.S. 210, 223 (1990).

270. *Id.* at 224-25.

271. "Jindal said in a statement that he wanted to create a deterrent to 'heinous and disgusting crimes. We think it's critical to give the judicial system and our law enforcement officials every tool possible to punish these monsters and keep them away from our children,' the governor said." Berman, *supra* note 193.

272. *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (explaining that prisons both deter crimes—by threatening potential offenders with the punishment of being removed and isolated from society—and rehabilitate offenders for their return to society).

right to bodily integrity. Furthermore, the means used to prevent that danger—administration of antipsychotics—were empirically supported by the psychiatric community, and the statute was construed to apply only to those persons who had been diagnosed with a mental illness and posed a threat of danger.

Unlike the state statute in *Harper*, the Louisiana chemical castration statute is not meant to further a prison's otherwise legitimate interest in the safety of other inmates and staff, or otherwise promote efficient distribution of prison resources.²⁷³ Sex offenders in prison tend to be targets of violent or sexual acts by other inmates. There is no reason to believe that sex offenders pose a threat of violence to the staff or inmates based on the commission of a certain crime. However, even if there was some evidence in support of this, the danger posed to others in the prison would not be remedied by ensuring, as the statute aims to do, that sex offenders are castrated at some undetermined time towards the end of their sentences rather than at the onset of incarceration.

Of course, the most persuasive argument for finding the statute to be unreasonable is that a cursory glimpse into MPA research shows that the drug does not work on all sex offenders, but rather, is a tool that licensed psychologists can use in treating

273. *Pell v. Procunier*, 417 U.S. 817, 822 (1974).; LA. REV. STAT. ANN. § 14:43.6 (2012); OFFICE OF THE GOVERNOR, *supra* note 189 (wherein Governor Jindal announces the purpose of the chemical castration statute is to punish sex offenders to the fullest extent). Even if it was the interest the Louisiana legislature intended to protect, the statute would not be rationally related to justify the means. While there is a very high occurrence of rape and sexual assault in prison that endanger inmates and staff alike, there is little evidence to suggest that inmates serving sentences for sexual offenses are the primary perpetrators. The 2007 Bureau of Justice Statistics revealed that 4.5% of the prison population reported being sexually abused within the previous twelve month span, which translates into roughly 70,000 prisoners a year being the victims of sexual abuse. *US: Federal Statistics Show Widespread Prison Rape*, HUMAN RIGHTS WATCH (Dec. 15, 2007), <http://www.hrw.org/news/2007/12/15/us-federal-statistics-show-widespread-prison-rape>. The perpetrators of sexual abuse run the gambit of prisoners and are hard to classify or predict. However, patterns show that the offenders are usually young, heterosexual, have been incarcerated multiple times, and are "street-smart" or gang-affiliated. NO ESCAPE: MALE RAPE IN US PRISONS, HUMAN RIGHTS WATCH, at § IV (2001), available at http://www.hrw.org/reports/2001/prison/report4.html#_1_23. In turn, many factors increase the risk of becoming a victim of prison sexual abuse such as age, introverted and amiable demeanor, and feminine qualities. The only criminal offense that increases the risk of becoming a victim of sexual abuse in prison is being convicted of a sexual offense against a minor. *Id.*

certain sex offenders who consent to the treatment and take the medication in conjunction with therapy.²⁷⁴ In other words, unlike antipsychotics, which can seriously curb the threat of danger or violence that a mentally unstable person might pose, the administration of MPA alone will not prevent a person from committing a sexual offense. Furthermore, because Louisiana's castration statute does not provide for a licensed physician to evaluate the offender prior to the sentencing of castration, there is no way for the Department of Corrections to know whether they will be treating any offenders who will benefit from administration of the drug.

The statute further limits any possible benefit it could have by not requiring that offenders be made aware of the effects, and side effects, of the treatment and, thereby, ensuring the offender's ultimate consent. Not only does the lack of consent pose due process concerns, it also has a physically debilitating effect on the offenders who are administered the drug against their will.²⁷⁵

Also, in contrast to the dispute over the side effects of antipsychotics in *Harper*, the side effects of MPA may be the only thing on which the MPA studies all agree.²⁷⁶ In fact, one of the reasons it has been difficult to measure MPA's effect on recidivism rates is that MPA treatment programs have a high drop-out rate due to severe side effects.²⁷⁷ The side effects are of

274. Even this treatment's effectiveness is highly disputed because the medication can reduce testosterone and sexual fantasies, but even the greatest proponents admit that MPA does not change sexual performance abilities (i.e., "frequency of masturbation, frequency of orgasm, level of erection"). Rice & Harris, *supra* note 57, at 324.

275. Studies performed on men who have had to undergo ADT as a form of prostate cancer treatment have shown that the litany of side effects caused by the treatment can be worse in instances where a person is forced to undergo the treatment, as opposed to volunteering. Rice & Harris, *supra* note 57, at 322.

276. See Saleh & Guidry, *supra* note 72, at 489-90; Berlin, *Sex Offender*, *supra* note 53, at 59-60; Rice & Harris, *supra* note 57, at 325 (noting that MPA increases the risk of bone loss density and diabetes mellitus by 40-50%); Fabian M. Saleh & Fred S. Berlin, *Sex Hormones, Neurotransmitters, and Psychopharmacological Treatments in Men with Paraphilic Disorders*, 12 J. CHILD SEXUAL ABUSE 233, 241 (2003) (stating that:

MPA can cause a number of potentially serious and less serious adverse effects, including depressive symptoms, breast tenderness and galactorrhea . . . weight gain—apparently secondarily to increased fat deposition . . . nausea, abdominal pain, nightmares, hot flashes, acne, alopecia [hair loss], hirsutism, hyperglycemia, diabetes mellitus, gallstones . . . hypogonadism, hypospermatogenesis, and hypertension).

277. Stinneford, *supra* note 25, at 575.

particular concern here because the Department of Corrections will be administering the medication for whatever duration the court determines is appropriate at the initial hearing.²⁷⁸ Because the sexual urges, fantasies, and erections are fully restored upon stopping the medication, the object of deterring crime would only be reached by sentencing offenders to a lifetime of injections.²⁷⁹ This is vastly different from the periodic reviews mandated by the statute at issue in *Harper*, which ensured that the involuntary treatment was consistently and continuously medically necessary. Consequently, the lack of medical oversight in the administration of MPA visibly weakens the reasonable link connecting the state's interest in deterring crime to the chemical castration statute. While chemical castration may punish the offenders mentally and physically, it does little to nothing to prevent them from committing future crimes. Society's gradual acceptance of pharmaceutical culture should not dissuade courts from recognizing the continued importance of the right to refuse medication.

Finally, the unreasonable nature of the statute is supported by the availability of two reasonable alternative solutions that would promote the legislature's purpose in passing the statute. The first alternative would be to repeal the chemical castration statute and rely solely on the probation statute. Even though the probation statute is still problematic, it has a greater likelihood of actually deterring crime because the probation statute provides medical safeguards to ensure that sex offenders who will benefit from the treatment are selected for administration of MPA.²⁸⁰ The probation statute also protects the interests of inmates because it requires that they consent to the procedure and undergo therapy in conjunction with the administration of MPA.²⁸¹ Furthermore, the probation statute requires a licensed physician, with a history of working with sex offenders, to determine whether MPA is appropriate for the inmate's treatment, and a licensed medical expert to administer the medication. Periodic oversight from the medical community will

278. Stinneford, *supra* note 25, at 576. The FDA recommended dose is much lower than the dose administered for ADT.

279. However, the drug has a "black box warning" due to a side effect that causes bone loss density, and, as a result, the drug should not be taken for longer than two years at its FDA recommended dose. *Id.*

280. LA. REV. STAT. ANN. § 15:538 (2012).

281. *Id.*

help ensure that MPA continues to be a preferred method of treatment specific to the offender and that major risks from side effects will be avoided. This course of action would make more prison resources available, adequately protect sex offenders' right to bodily integrity by providing more medical safeguards, and promote public safety by focusing on rehabilitation of sex offenders rather than punishment.²⁸²

The second alternative is to remove both the probation and the castration statutes and enact a voluntary-participation-based pilot program, like Iowa and California, to determine an efficient way to treat sex offenders that would reduce sentencing costs and promote public safety. The states that have pilot programs in place could even work together to compound their efforts by sharing data. This would create a larger pool of participants and would enable researchers to draw more reliable conclusions from the study than they would be able to from small participant pools. Even though this alternative does not provide a quick fix to lowering recidivism rates of sex offenders, it lays the foundation to fix the problem at hand. Arguably, the foundation for a solution is more valuable than what the statutes offer now—namely, a costly, symbolic solution to a problem.²⁸³ The statutes require additional hearings; the hearings will generate more appeals and, thereby, greater court costs. Harsher criminal penalties do not deter crime or slow incarceration rates.²⁸⁴ Prior to the enactment of the 2008 chemical castration statute, the death penalty was a sentence for committing sex offenses against

282. Other state legislatures have shown that the average cost of the injection is anywhere from \$21-30 per week. It costs, on average, \$3.42 per day to keep a prisoner on probation and \$7.47 per day to keep a prisoner on parole. On average, it costs about \$78.95 per day to keep a prisoner incarcerated. If a single sex offender consented to the treatment, and was receptive to the treatment, giving him parole plus the injection would save the state approximately \$25,000 per year. *How Much Does it Cost to Keep Criminal in Prison?*, CREDIT LOAN, <http://www.creditloan.com/infographics/how-much-does-it-cost-to-keep-a-criminal/> (last visited Feb. 6, 2013).

283. In addition to the myriad of factors that must converge for MPA to be helpful, administration of MPA is recommended for persons under the age of thirty-five. Of the 4,900 sex offenders in Louisiana custody, as of December 2011, 3,407 are 35 years old and older.

284. Louisiana has the highest incarcerated population in the United States, and the United States has the highest incarceration rate in the world. *Louisiana Has Highest Incarceration Rate in the World; ACLU Seeks Changes*, ACLU (Dec. 11, 2008), <http://www.aclu.org/racial-justice/louisiana-has-highest-incarceration-rate-world-aclu-seeks-changes>.

minors. There is no greater deterrent than death as a punishment, but the rate of forcible sexual offenses has remained around 5% for years, despite the availability of the death penalty. Furthermore, sexual offenses are notoriously under-reported, and therefore, holding out the handful of people subjected to chemical castration will not be an effective deterrent on the masses that are getting away with these types of crimes.

In conclusion, the Louisiana castration statute violates substantive due process because the state's legitimate interest in deterring crime is not reasonably related to the chemical castration statute. Nullifying the statute would not result in any consequential harm to other inmates or prison staff, and reasonable alternatives to the statute exist and would better serve the government's interest.

B. PROCEDURAL DUE PROCESS

Even though the substantive due process analysis is a separate task from procedural due process, procedural due process is analyzed with the substantive right in mind. As with substantive due process, the procedural due process analysis begins with establishing the existence of a fundamental right or protected liberty interest.²⁸⁵ As stated previously, prisoners have a protected liberty interest in their right to refuse unwanted administration of medication.²⁸⁶ Next, the rights and interests at stake in a particular case are referenced to determine what procedural protections are required by procedural due process.²⁸⁷ This is accomplished by considering: (1) the private interest at stake, (2) the governmental interest at stake, and (3) the value of the procedural requirements.²⁸⁸

Inmates have a litany of private interests at stake with regard to the Louisiana castration statute. First and foremost, they have an interest in receiving proper medical care, not punishment under the guise of arbitrary medical care. Where such wanton and reckless treatment is required by the state, the defendant should at least have the benefit of having a licensed psychologist approve of the procedure. The government has an

285. *Washington v. Harper*, 494 U.S. 210, 220 (1990).

286. *Id.*

287. *Id.* at 229.

288. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

interest in protecting the prisoners in their custody, protecting the safety of the public, and providing proper deterrents to the commission of future crimes. Finally, the procedural requirements offer little to no value to the individual or the state because the legislature has given the judiciary the power to make medical decisions. The judge determines the duration of the treatment before any meaningful medical evaluation of the offender has occurred. Even though the statute does not require offenders to continue treatment when not “medically appropriate,” this cannot offer any protective benefit in a statute that is, in and of itself, medically inappropriate insofar as it requires a medical treatment based on the type of crime committed rather than the medical need of the individual.²⁸⁹

The *Harper* Court stated that the interests of an inmate are better protected when a panel of medical professionals, rather than a judicial panel, makes decisions regarding the special medical needs of inmates. That rule of the Court should carry particular weight in finding that the Louisiana chemical castration statute contravenes the Due Process Clause. Not only would this case present the basic situation of infringing an inmate’s right to refuse medication, but a *competent* inmate’s right to refuse medical treatment. The competency of the inmate is of particular importance to the issue because psychologists have agreed that the medications will not successfully affect an offender if he does not want to be rehabilitated. Therefore, to act in direct conflict with the offender’s wishes in this case would only prove to be an expensive way of violating the inmate’s constitutional rights.²⁹⁰ The castration statute provides that a judge will determine whether to sentence first time offenders to chemical castration and that second time offenders must be sentenced to castration. The sentence is contingent upon finding that the offender is an “appropriate candidate.” However, the definition of “appropriate” is unclear.²⁹¹ Is it appropriate for the

289. LA. REV. STAT. § 14:43.6(C)(3).

290. This is especially true when considering that the defendant has to either be physically castrated or else add three to five years onto his prison sentence if he resists the injections.

291. In *State v. Nicholson*, the Department of Corrections found that Nicholson was an appropriate candidate because he did not have any contraindicated medications or medical conditions. However, the Department failed to take into consideration the fact that Nicholson was fifty-eight-years-old, had not been diagnosed with any of the paraphelias, and would never be released from prison.

court? Appropriate for the medical community? Appropriate to punish the offender? The expertise of the medical community is needed in applying this sentence, if it is going to be used at all, and if the inmate's interests are going to be protected.

V. CONCLUSION

Sexual crimes are a huge problem in the United States and internationally, and this problem deserves attention and meaningful solutions. Such solutions should not be fixed by the courts but rather by health care professionals. The legislature should not reasonably expect to see any results from sending convicted sex offenders to judges for what are essentially medical treatments. While it seems like there is a likely possibility that Louisiana's chemical castration statute could be found to violate the Due Process Clause, it is uncertain when, if ever, the substance of the statutes will ever come before a reviewing court. For this reason, this comment urges the Louisiana legislature to redact the castration statute based on the legal, ethical, and medical policy arguments that have been presented.

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