

“IF YOUR HAND CAUSES YOU TO SIN . . .”:  
FLORIDA’S CHEMICAL CASTRATION STATUTE  
MISSES THE MARK

TANYA SIMPSON\*

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*And if your hand causes you to sin, cut it off: it is better for you to  
enter into life maimed, than having two hands to go into hell,  
into the fire that shall never be quenched.*

—Mark 9:43 (King James)

I. INTRODUCTION

On May 4, 2005, convicted Texas child molester Larry Don McQuay was released from prison. Again. McQuay, who had been a school bus driver in San Antonio, Texas, had been initially sentenced to eight years in prison for molesting a six-year-old boy in 1989.<sup>1</sup> McQuay begged the state of Texas to surgically castrate him so that he would not repeat his crimes, which he admitted included molesting over 200 children.<sup>2</sup> McQuay stated that when he looks at a child, “I see a sex object . . . I hate the things that I do. I’m just scared

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\* B.A., San José State University, 1992; M.B.A., University of San Diego, 1999; J.D., Florida State University, 2006. I am grateful to Judge James R. Wolf, First District Court of Appeal, and Professor Benjamin J. Priester, Florida State University College of Law, for their comments and encouragement and to Les Garringer, Senior Attorney, Office of the State Courts Administrator, Florida, for providing the inspiration and seeds of research for this Comment.

1. Sam Howe Verhovek, *Texas Frees Child Molester Who Warns of New Crimes*, N.Y. TIMES, Apr. 9, 1996, at A7.

2. David Van Biema & Jordan Bonfante, *A Cheap Shot at Pedophilia? California Mandates Chemical Castration for Repeat Child Molesters*, TIME, Sept. 9, 1996, at 60.

that it's going to happen. That's why I want to get the surgery.'"<sup>3</sup> His request was denied.<sup>4</sup> McQuay's letters from prison prompted the citizens' organization, Justice for All, to help him raise the funds to obtain the surgery privately.<sup>5</sup> Although the organization was successful in raising the funds, they could find no physician who was willing to perform the surgery.<sup>6</sup>

In 1996, after having served six years of an eight-year sentence, Larry Don McQuay was released from prison for "good conduct,"<sup>7</sup> even though he had stated that he would not only molest again, but kill his victims to prevent them from testifying against him.<sup>8</sup> Dismayed at the Texas court's denial of McQuay's request to be castrated prior to his release, California Assemblyman Bill Hoge introduced a bill in 1996 that was overwhelmingly passed by the California legislature requiring "chemical castration" of paroled, repeat child molesters.<sup>9</sup>

Florida wasted no time in getting its own chemical castration statute on the books. In October of 1997, the legislature enacted section 794.0235, *Florida Statutes*, which permits Florida's courts to order periodic administration of medroxyprogesterone acetate (MPA) injections for individuals convicted of sexual battery and mandates such a court order upon an individual's second conviction.<sup>10</sup> The controversial theory behind the statute is that forced administration of large doses of female hormones into male sex offenders who are placed on probation will significantly reduce the likelihood of recidivistic sexual offenses.<sup>11</sup>

On April 12, 2005, some seven years after Florida's statute was enacted, Susan Maher, Deputy General Counsel for Florida's Department of Corrections (DOC), briefed the Senate Justice Appropriations Committee on the status of the implementation of Florida's chemical castration statute.<sup>12</sup> Maher reported that from the time the

3. *Pedophile Who Sought Castration Is Released*, ABC NEWS, May 4, 2005, <http://abcnews.go.com/GMA/LegalCenter/story?id=726907> [hereinafter ABC NEWS].

4. See Christy Hoppe, *Molesters Seeking Castration: Texas Examining Laws on Sex Offenders*, DALLAS MORNING NEWS, Aug. 13, 1995, at 45A.

5. Stacy Russell, Comment, *Castration of Repeat Sexual Offenders: An International Comparative Analysis*, 19 HOUS. J. INT'L L. 425, 429 (1997).

6. *Id.*

7. Verhovek, *supra* note 1.

8. *Pedophile Warns He Will Strike Again*, CNN, Apr. 2, 1996, [http://www.cnn.com/US/9604/02/child\\_molester/index.html](http://www.cnn.com/US/9604/02/child_molester/index.html). For the rest of the story, see *infra* Part VI.

9. See Van Biema & Bonfante, *supra* note 2, at 60.

10. FLA. STAT. § 794.0235 (2006).

11. FLA. H.R. COMM. ON CRIME & PUNISHMENT, FINAL BILL RESEARCH AND ECONOMIC IMPACT STATEMENT, at 2-3 (1997) [hereinafter HOUSE STATEMENT].

12. Memorandum from Les Garringer, Office of the State Courts Administrator, Florida, to Lisa Goodner, State Courts Administrator, Florida, 1 (May 27, 2005) (on file with author) [hereinafter Garringer Memo].

statute was enacted in 1997 until the day of the briefing, circuit judges had failed to order chemical castration in 104 of the 107 cases in which such order had been statutorily mandated.<sup>13</sup> This briefing has reignited the controversy over Florida's chemical castration statute.<sup>14</sup>

This Comment will discuss the background of Florida's chemical castration statute, including why "chemical castration" is actually a misnomer, judicial attempts at ordering chemical castration prior to statutory authorization, the statutory evolution of chemical castration statutes in other states, and the characteristics of Florida's own statute. It will then identify key legal problems with Florida's statute, the most egregious of which are violations of the prohibition against cruel and unusual punishment, violations of both federal and state substantive due process interests, and violations of the doctrine of informed consent. It will then identify problems inherent in Florida's statute which make it difficult if not impossible to implement in its current form. Finally, this Comment will propose statutory changes to comport with the policy goals of probation, pass constitutional muster, and overcome the implementation hurdles inherent in the current statute.

## II. BACKGROUND OF FLORIDA'S CHEMICAL CASTRATION STATUTE

### A. "Chemical Castration": Medical Myth

From ancient times until relatively recently in our own nation's history, physical castration was considered an acceptable punishment for a variety of crimes.<sup>15</sup> Physical castration is a permanent deprivation of the male ability to produce testosterone, usually accomplished through surgical removal of the testes.<sup>16</sup> The procedure, while disfiguring, has fewer nonsexual side effects than drug treatment.<sup>17</sup> Following World War II, castration as punishment fell out of favor in the United States<sup>18</sup> and was ultimately declared unconstitu-

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13. *Id.*

14. After the office of Governor Jeb Bush was contacted by a concerned citizen recommending the castration of sex offenders, Governor Bush, who was aware of the report, requested the Office of the State Courts Administrator to ascertain why the state's courts have not been ordering the administration of MPA as provided by statute. *Id.* at 2.

15. See Kimberly A. Peters, Comment, *Chemical Castration: An Alternative to Incarceration*, 31 DUQ. L. REV. 307, 308-09 (1993), for a description of the historical uses of castration.

16. Surgically removing the testes eliminates "virtually all testosterone from the [male] system, and thus disabl[es] the sex drive." John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 574 (2006).

17. Pamela K. Hicks, Comment, *Castration of Sexual Offenders*, 14 J. LEGAL MED. 641, 646 (1993).

18. Larry Helm Spalding, *Florida's 1997 Chemical Castration Law: A Return to the Dark Ages*, 25 FLA. ST. U. L. REV. 117, 119 (1998).

tional as a violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>19</sup>

Late twentieth-century biotechnological developments now enable the repression of testosterone in males without the disfiguring and irreversible consequences of physical castration. By regularly injecting males with large doses of female hormones, production of testosterone can be significantly reduced.<sup>20</sup> This similarity to the effect of physical castration has led to the popular adoption of the term “chemical castration.”<sup>21</sup>

MPA, commercially known as Depo-Provera, was initially developed by Upjohn Pharmaceutical Company and is now widely prescribed as a female oral contraceptive.<sup>22</sup> When ingested by women in indicated doses, MPA is 99% effective in preventing pregnancy.<sup>23</sup> While some women experience undesirable side effects, these are generally minimal and affect a woman’s sex drive in only 1-5% of cases.<sup>24</sup>

Although MPA was developed and approved by the FDA specifically for use in women, some physicians have found it to be an effective element of a treatment program for paraphilia in men.<sup>25</sup> Paraphilia is an uncontrollable acting out of one’s specific sexual fantasies in a socially unacceptable, often criminal way.<sup>26</sup> Numerous studies have shown that administration of MPA in male paraphiliacs who have voluntarily participated in the treatment in conjunction with psychological counseling has been highly effective in preventing recidivistic incidents.<sup>27</sup>

19. *Skinner v. Oklahoma*, 316 U.S. 535, 536-38 (1942) (declaring unconstitutional, on equal protection grounds, the Oklahoma Habitual Criminal Sterilization Act, which required that certain repeat offenders be sentenced to a vasectomy).

20. Stinneford, *supra* note 16, at 572-74.

21. See Hicks, *supra* note 17, at 646. While popularly referred to as chemical castration, experts note that use of the drug does not actually amount to castration. Dr. Fred Berlin, Assistant Professor of Psychiatry at Johns Hopkins Medical School, points out that while the drug helps treated individuals control desire, “the therapy is neither castration nor sterilization.” *Id.* (quoting *People v. Gauntlett*, 352 N.W.2d 310, 315 (Mich. Ct. App. 1984)).

22. Lisa Keesling, Comment, *Practicing Medicine Without a License: Legislative Attempts to Mandate Chemical Castration for Repeat Sex Offenders*, 32 J. MARSHALL L. REV. 381, 385 (1999). It is also FDA-approved for use as a treatment for some types of cancer. See Linda Beckman, *Chemical Castration: Constitutional Issues of Due Process, Equal Protection, and Cruel and Unusual Punishment*, 100 W. VA. L. REV. 853, 856 (1998).

23. PHYSICIAN’S DESK REFERENCE 2717 (59th ed. 2005) (stating a typical failure rate of 0.1%) [hereinafter PDR].

24. *Id.* at 2718.

25. Stinneford, *supra* note 16, at 572-76.

26. See Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 2 (1990). “Recognized paraphilias include pedophilia, exhibitionism, transvestism, voyeurism, frotteurism, fetishism, sexual sadism, sexual masochism, and other psychosexual disorders including some forms of rape.” *Id.* at 4-5.

27. Beckman, *supra* note 22, at 860-61.

It is critical to note that MPA has not been shown to be an effective treatment of sex offenders in general. It has only been proven to be an effective treatment in paraphiliacs, and then only when administered under the following conditions: (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."<sup>28</sup>

Regular administration of MPA in men does produce one key similar effect to physical castration, that of reducing testosterone levels, but there are also many differences. Most notable is the reversible nature of that effect. Upon cessation of MPA treatment, testosterone levels typically revert to normal levels in seven to ten days.<sup>29</sup> MPA is a treatment but not a cure. It has no long term benefits.<sup>30</sup> When the treatment stops, the paraphiliac may revert to his former ways.<sup>31</sup>

While the benefits of MPA treatment are reversible, many of the serious health consequences are not. The dosage typically administered to paraphiliacs to eliminate the male sex drive ranges from 8.6 to 43.3 times that which is recommended for female contraception.<sup>32</sup> This discrepancy in dosage may have significant consequences in light of the drug's severe side effects.<sup>33</sup> Possible side effects of MPA include weight gain, decreased sperm count, hyperinsulinaemic response to an increased glucose load, irregular gallbladder functioning, diverticulitis, fatigue, lethargy, testicular atrophy, diabetes mellitus, "hot and cold flashes, phlebitis, headaches, insomnia, nausea, nightmares, dyspnea, hyperglycemia, leg cramps, loss of body hair, increased basal body temperature," malaise, pulmonary embolism, depression, cerebrovascular disorders, decreased bone mineral density, and aggravation of epilepsy, asthma, cardiac dysfunction, and renal dysfunction.<sup>34</sup> Among the most alarming of these is the irreversible depletion of bone mineral density, which leads to the long-term likelihood of "osteoporosis and multiple bone fractures as a result of [the] treatment."<sup>35</sup>

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28. Fitzgerald, *supra* note 26, at 8-9.

29. *See id.* at 7.

30. *Id.* at 34.

31. *Id.*

32. Stinneford, *supra* note 16, at 573.

33. *Id.*

34. John McD. W. Bradford, *The Hormonal Treatment of Sexual Offenders*, 11 BULL. AM. ACAD. OF PSYCHIATRY & L. 159, 163 (1983); Fitzgerald, *supra* note 26, at 7; Stinneford, *supra* note 16, at 658, 576.

35. Stinneford, *supra* note 16, at 568.

### B. Judicial Orders

Prior to the enactment of state chemical castration statutes, late-twentieth-century courts sparked national debate over their attempts to impose surgical or chemical castration as a condition of probation or other alternative to incarceration.<sup>36</sup> In Texas, Judge Michael McSpadden agreed to defendant Steven Allen Butler's request to allow the defendant to undergo surgical castration rather than stand trial for the sexual assault of a thirteen-year-old girl.<sup>37</sup> After news of the agreement set off protests, and no doctor could be found to perform the surgery, the offer was called off,<sup>38</sup> and Butler was convicted and sentenced to life in prison, the maximum sentence for his offense.<sup>39</sup>

In Michigan, Judge Robert L. Borsos ordered Roger A. Gauntlett,<sup>40</sup> who was convicted of criminal sexual intercourse with his fourteen-year-old stepdaughter,<sup>41</sup> to submit to chemical castration for the duration of his five-year probation sentence.<sup>42</sup> Gauntlett challenged the sentence as being both unconstitutional and unlawful.<sup>43</sup> The appellate court found it unnecessary to reach Gauntlett's constitutional arguments,<sup>44</sup> instead holding that the probation condition was unlawful based on lack of common law precedent,<sup>45</sup> lack of statutory authority,<sup>46</sup> and lack of "acceptance in the medical community as a safe and reliable medical procedure."<sup>47</sup>

### C. Chemical Castration Statutes

On September 17, 1996, the legal landscape of chemical castration changed dramatically when Governor Pete Wilson signed Assemblyman Bill Hoge's bill, thereby enacting the first state statute mandating chemical castration as a condition of release for sex offenders.<sup>48</sup>

36. See Keesling, *supra* note 22, at 390-91 for discussion of the national response to cases from recent years.

37. *Choosing Castration*, TIME, Mar. 16, 1992, at 33.

38. *Man Who Chose Castration Is Convicted of Sex Assault*, N.Y. TIMES, Aug. 7, 1992, at A10.

39. *See id.*

40. In an interesting coincidence, Gauntlett was an heir to Upjohn Corporation, the original makers of Depo-Provera. In his postsentencing remarks, Judge Borsos suggested that Gauntlett might want to make a contribution towards establishing a center for research and treatment of sex offenders. *People v. Gauntlett*, 352 N.W.2d 310, 313 (Mich. Ct. App. 1984).

41. *Id.* at 311. Gauntlett had also been charged with sexually fondling his twelve-year-old stepson, but that charge was dropped as part of his plea agreement. *Id.*

42. *Id.* at 313.

43. *Id.* at 314.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 316.

48. *See* CAL. PENAL CODE § 645 (Deering 1997).

California's law, which became effective on January 1, 1997, requires all individuals twice convicted of certain sex crimes involving victims under thirteen years of age to undergo MPA treatment as a condition of parole and permits such sentences for first offenders as well.<sup>49</sup> The administration of MPA must continue until such time as the Department of Corrections demonstrates that the treatment is no longer necessary.<sup>50</sup> California's law provides that the parolee shall be informed of the effects of treatment but requires only that the parolee acknowledge receipt of the information and not that the parolee consent to the treatment.<sup>51</sup> A parolee may exempt himself from such a sentence only by voluntarily undergoing permanent surgical castration.<sup>52</sup>

Since California enacted its chemical castration law, six other states have followed suit. Florida, Iowa, Louisiana, Montana, Oregon, and Wisconsin have all enacted some form of chemical castration law.<sup>53</sup> Of these, all but Oregon and Wisconsin determine eligibility for a sentence of chemical castration based on the underlying offense of conviction.<sup>54</sup> All but Florida and Oregon define the triggering offense as one in which the victim is a child.<sup>55</sup>

Of the five states whose statutes determine eligibility based on the underlying offense, none of them requires that the offender be diagnosed with paraphilia or any sexual disorder at all prior to treatment. In fact, none of them so much as requires the involvement of a physician. Two states, Florida and Iowa, do not even require that the offender be informed of the effects of treatment.<sup>56</sup>

#### D. Florida's Chemical Castration Statute

In 1997, Florida enacted its version of a chemical castration statute.<sup>57</sup> Florida's statute authorizes judges to sentence any defendant

49. *Id.* § 645. On February 21, 2006, Senator Bill Morrow introduced a proposed amendment to this law which would mandate treatment for first offenders and expand the age group of victims that would qualify second offenders for treatment to include victims up to sixteen years of age. S.B. 1382, 2005-06 Leg., Reg. Sess. (Cal. 2006).

50. CAL. PENAL CODE § 645.

51. *Id.*

52. *Id.*

53. See FLA. STAT. § 794.0235 (2006); IOWA CODE § 903B.1 (2006); LA. REV. STAT. ANN. § 15:538(C) (2006); MONT. CODE ANN. § 45-5-512 (2006); OR. REV. STAT. §§ 144.625-.629 (2006); WIS. STAT. § 304.06(1q) (2006). "Georgia [had] also enacted a chemical castration law, but repealed [its law in 2006] for unspecified policy reasons." Stinneford, *supra* note 16, at 562 n.14. Texas law permits sex offenders to petition for surgical castration under certain circumstances. TEX. GOV'T CODE ANN. § 501.061 (Vernon 2006). In addition, Minnesota, Oklahoma, Pennsylvania, and Vermont have also considered proposals for chemical castration laws. Stinneford, *supra* note 16, at 585 n.172.

54. See Stinneford, *supra* note 16, at 580-81.

55. See *id.* at 579-81.

56. *Id.* at 579. For further comparison of the various state laws, see *id.* at 578-84.

57. See FLA. STAT. § 794.0235 (1997).

who is convicted of a first offense of sexual battery, whether upon a child or upon an adult, to be “treated” with MPA.<sup>58</sup> Furthermore, the statute mandates that Florida judges *must* sentence a defendant who has a prior sexual battery conviction and is subsequently convicted of sexual battery to MPA treatment.<sup>59</sup> The judge must specify a duration of years of treatment, which may extend up to the life of the defendant.<sup>60</sup>

Implementation of a sentence of MPA treatment is contingent upon a court-appointed “medical expert” making a determination, within sixty days of sentencing, “that the defendant is an appropriate candidate for [such] treatment.”<sup>61</sup> While the statute does not “require the . . . treatment when it is not medically appropriate,”<sup>62</sup> there is no requirement that the “medical expert” be a physician or that a physician be involved in any aspect of making such a determination.

If the defendant is sentenced to a period of incarceration preceding probation, Florida’s statute provides that the administration of MPA shall begin no later than one week prior to the defendant’s release.<sup>63</sup> However, there is no provision that any subsequent medical evaluation be conducted at that time, a time which could be years or even decades after the initial evaluation.

Similar to California’s statute, a defendant may exempt himself from this sentence only by voluntarily undergoing permanent surgical castration.<sup>64</sup> Furthermore, if a defendant fails or refuses to allow the administration of MPA or to appear for its administration, the defendant does not merely violate the terms of his probation but is also automatically guilty of a separate, second degree felony.<sup>65</sup>

Finally, the statute mandates that the DOC shall provide the services necessary to administer the treatment.<sup>66</sup> However, it does not provide any guidance as to how this is to be accomplished or how it is to be funded.

Since Florida’s chemical castration statute was enacted, only four cases have reached Florida’s district courts of appeal and no Florida case has turned on the constitutional validity of forcibly administering MPA to an unwilling probationer.<sup>67</sup> In *Houston v. State*, the Fifth

58. *Id.* § 794.0235(1)(a).

59. *Id.* § 794.0235(1)(b).

60. *Id.* § 794.0235(2)(a).

61. *Id.*

62. *Id.* § 794.0235(3).

63. *Id.* § 794.0235(2)(b).

64. *Id.* § 794.0235(1)(b).

65. *Id.* § 794.0235(5).

66. *Id.* § 794.0235(3).

67. In *Houston v. State*, 852 So. 2d 425 (Fla. 5th DCA 2003), the appellant did challenge the constitutionality of Florida’s chemical castration statute. *Id.* at 426, 428. However, the court overturned his sentence on technical, statutory grounds. *Id.* at 428.

District reversed the sentence of MPA treatment because the trial court failed to appoint a medical expert or specify a duration of years as required by the statute.<sup>68</sup> In *Jackson v. State*, the Fourth District reversed the sentence of MPA treatment because the trial court failed to comply with the sixty day requirement for determining whether the defendant was an appropriate candidate for the treatment and failed to specify a duration of years as required by the statute.<sup>69</sup> The Fourth District did note that it was “odd” that the statute required a medical evaluation to be made within sixty days while at the same time requiring that the treatment commence not later than one week before the defendant’s release from prison.<sup>70</sup> In *Department of Corrections v. Cosme*, the circuit court had ordered the DOC to pay for the medical expert because the court had no funds of its own to do so.<sup>71</sup> The Fifth District held that the statute does not require the DOC to pay for the medical expert,<sup>72</sup> leaving unanswered the question as to who is to pay for the expert. The Fifth District also echoed the Fourth District’s sentiment that the procedure mandated by the statute is “very odd.”<sup>73</sup> The court noted that by the time the MPA was to be administered, the medical evaluations would certainly be stale if not obsolete,<sup>74</sup> and it further observed that since both defendants in that case had “received life sentences without parole, . . . the treatments would only take place if the sentences were undone.”<sup>75</sup> Finally, in *Boone v. State* the First District reversed the sentence of MPA treatment because the trial court failed to comply with unspecified mandatory statutory procedures prior to ordering MPA treatment.<sup>76</sup>

### III. LEGAL PROBLEMS WITH THE STATUTE

There is a host of doctrines and constitutional provisions under which Florida’s statute could be challenged and would most likely fail, including equal protection, procedural due process, waiver, mental autonomy, vagueness, and double jeopardy.<sup>77</sup> This Comment will

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68. *Id.*

69. *Jackson v. State*, 907 So. 2d 696, 698-99 (Fla. 4th DCA 2005).

70. *Id.* at 698.

71. *Dep’t of Corr. v. Cosme*, 917 So. 2d 1049, 1050 (Fla. 5th DCA 2006).

72. *Id.* at 1051.

73. *Id.* at 1050.

74. *Id.* at 1051.

75. *Id.*

76. *Boone v. State*, 933 So. 2d 1252, 1254 (Fla. 1st DCA 2006) (citing *Jackson v. State*, 907 So. 2d 696, 697 (Fla. 4th DCA 2005); *Houston v. State*, 852 So. 2d 425, 428 (Fla. 5th DCA 2003)).

77. For a discussion of those provisions and arguments which are beyond the scope of this Comment, see Beckman, *supra* note 22, at 867-69 (discussing equal protection); *id.* at 882-85 (discussing procedural due process); *id.* at 893-94 (discussing waiver of constitutional protections); Fitzgerald, *supra* note 26, at 27-31 (discussing mental autonomy);

concern itself with the most egregious violations: the constitutional prohibition against cruel and unusual punishment, the constitutional protection of the substantive due process liberty and privacy interests in refusing unwanted medical treatment, and the doctrine of informed consent.

#### A. *Cruel and Unusual Punishment*

Punishment that is cruel and unusual is prohibited by the Eighth Amendment of the United States Constitution<sup>78</sup> as applied to the states by the Fourteenth Amendment<sup>79</sup> and is also specifically prohibited by Florida's Constitution.<sup>80</sup> The Florida Constitution provides that its own prohibition "shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution."<sup>81</sup>

Three tests have evolved in United States Supreme Court jurisprudence to determine whether a given punishment is cruel and unusual. The first is whether the punishment is inherently cruel,<sup>82</sup> that is, whether it is cruel in and of itself, without regard to the particular offender or the underlying offense. As the Court explained in *Gregg v. Georgia*, the eighth amendment meaning of cruel and unusual is not static, but rather " 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' "<sup>83</sup> The second test, first articulated by the Court in *Weems v. United States*, is whether the punishment is grossly out of proportion to the offense.<sup>84</sup> The third test is whether the punishment is excessive.<sup>85</sup> This term was defined by the Court in *Furman v. Georgia* when it stated, "A punishment is excessive . . . if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering."<sup>86</sup>

Whether Florida's chemical castration scheme violates the prohibition against cruel and unusual punishment also depends on whether the forced administration of MPA is considered a treatment or a punishment. The effective use of MPA as treatment for a physio-

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Spalding, *supra* note 18, at 123-25 (discussing vague statutory provisions); *id.* at 133-35 (discussing double jeopardy).

78. U.S. CONST. amend. VIII.

79. *See id.* amend. XIV.

80. FLA. CONST. art. I, § 17.

81. *Id.*

82. Fitzgerald, *supra* note 26, at 36.

83. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

84. *Id.* (citing *Weems v. United States*, 217 U.S. 349, 367 (1910)).

85. *Id.* (citing *Furman v. Georgia*, 408 U.S. 238, 392-93 (1972) (Burger, C.J., dissenting)).

86. *Furman*, 408 U.S. at 279 (Brennan, J., concurring).

logical and psychological condition can be beneficial both to the individual undergoing treatment and to society. However, when chemically induced biological alteration of an individual is forced upon him against his will by the state, such an imposition arguably ceases to be a treatment and becomes a punishment.

One federal district court applied a useful test for determining whether the administration of antipsychotic drugs should be classified as treatment or punishment: (1) whether the drug has any proven therapeutic value, (2) whether administration of the drug is recognized as an acceptable medical practice, (3) whether the adverse effects are unnecessarily harsh in relation to the long-term benefits, and (4) whether the drug treatment is part of an overall psychotherapeutic program.<sup>87</sup> MPA's therapeutic value is only proven as to paraphiliacs, and then only under certain conditions.<sup>88</sup> Its forced administration is not only not recognized as an acceptable medical practice, it is specifically denounced by the American Medical Association.<sup>89</sup> In addition, MPA's adverse effects are extremely harsh, especially when weighed against the total lack of benefit to nonparaphilic offenders and the questionable benefit to paraphiliacs absent the counseling and support elements of an overall treatment program. Thus, the forced administration of MPA into an unwilling individual and absent a comprehensive treatment program clearly amounts to a punishment.<sup>90</sup>

As a punishment, the forced administration of MPA violates the first test for being cruel and unusual as to all offenders and the third test as to nonparaphilic offenders. The biological alteration of an individual against his will violates the first test because it is inherently cruel, in light of our (supposedly) maturing society's evolving standards of decency,<sup>91</sup> and "shock[s] general conscience . . . [and is] intolerable in fundamental fairness."<sup>92</sup> One commentator has gone so far as to associate this punishment with the biological experiments conducted by Nazi Germany in World War II.<sup>93</sup>

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87. See *Rennie v. Klein*, 462 F. Supp. 1131, 1143 (D.N.J. 1978).

88. See *supra* note 28 and accompanying text.

89. See COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AM. MED. ASS'N, *Court-Initiated Medical Treatments in Criminal Cases* 1 (1998), available at [http://www.ama-assn.org/ama1/pub/upload/mm/369/ceja\\_4a98.pdf](http://www.ama-assn.org/ama1/pub/upload/mm/369/ceja_4a98.pdf).

90. Even assuming, arguendo, that such administration could be considered to be treatment, the nonconsensual aspect of it likely violates the individual's substantive due process liberty interest in refusing unwanted medical treatment. See discussion *infra* Part III.B.

91. See *supra* note 83 and accompanying text.

92. This language is borrowed from the Eighth Circuit, which, in 1965, defined cruel and unusual punishment as that "of such character or consequences as to shock general conscience or to be intolerable in fundamental fairness." *Lee v. Tahash*, 352 F.2d 970, 972 (8th Cir. 1965).

93. Beckman, *supra* note 22, at 890.

While MPA is technically not an experimental drug because it has been approved for use in women, the FDA has not approved the drug for any use in men because no clinical trials have determined MPA to be safe and effective for long-term use in men.<sup>94</sup> As one commentator astutely observes, “pumping massive doses of female hormones into a male body . . . subjects offenders to severe physical [side] effects, some of which appear quite likely to have painful, disabling, and possibly fatal long-term effects.”<sup>95</sup> Surely the infliction of this type of treatment on a fellow human being should shock the general conscience and be intolerable in light of society’s evolving standards of decency. In the words of Justice Jackson in his concurrence in *Skinner v. Oklahoma*, “[t]here are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes.”<sup>96</sup>

The forced administration of MPA also violates the third test as applied to nonparaphilic offenders: whether the punishment is excessive or unnecessary. Experts have identified four distinct types of sex offenders.<sup>97</sup> Type I denies that the act was a crime.<sup>98</sup> Type II acknowledges that he has committed a crime, but blames outside factors, such as alcohol, drugs, or stress.<sup>99</sup> “Type III is the violent offender who is driven by nonsexual motivation, such as anger, power, or violence.”<sup>100</sup> Type IV is the paraphiliac, whose crime is driven by sexual arousal characterized by a specific sexual fantasy.<sup>101</sup> Of these, only paraphiliacs have been shown to effectively benefit from MPA treatment.<sup>102</sup> The nonparaphilic offender is not helped, and consequentially, society is not protected by “treating” these individuals with MPA injections. Because there is no proven benefit to be derived from administering MPA to the first three types of offenders, the punishment is excessive as to these offenders in that it involves “unnecessary and wanton infliction of pain.”<sup>103</sup> In the words of a leading and oft-cited commentator,

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94. Stinneford, *supra* note 16, at 572. While the FDA has not approved MPA for use in men, once a drug is approved for one particular use, doctors may prescribe it for unapproved uses under the Food, Drug and Cosmetic Act. *Id.*

95. *Id.* at 568; *see also supra* notes 34-35 and accompanying text.

96. 316 U.S. 535, 546-47 (1942) (Jackson, J., concurring).

97. *See* Fitzgerald, *supra* note 26, at 4.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 5.

103. *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (“[P]unishment must not involve the unnecessary and wanton infliction of pain.” (citing Furman v. Georgia, 408 U.S. 238, 392-93 (1972) (Burger, C.J., dissenting))).

[T]here is a tendency to consider all sex offenders as being comparable, but there is a wide difference in behavior among sex offenders. This tendency to generalize will subject inappropriate offenders to MPA treatment. . . . MPA should only be prescribed for those offenders to whom it offers the promise of hope. Otherwise, MPA is an inappropriate or ineffective treatment, or *punishment, masquerading as treatment*, which violates the eighth amendment.<sup>104</sup>

## B. Substantive Due Process

### 1. The Federal Constitution

The Fourteenth Amendment of the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>105</sup> Among protected liberty interests is the right to refuse unwanted medical treatment. The United States Supreme Court first recognized this interest in *Washington v. Harper* when it held that prisoners possess “a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.”<sup>106</sup> This concept was affirmed just four months later in *Cruzan v. Director, Missouri Department of Health*, when the Court again recognized that competent persons may have a constitutionally protected liberty interest in refusing unwanted medical treatment.<sup>107</sup> The Court did note, however, that intruding on an individual’s recognized liberty interest does not per se violate the Constitution; the intrusion must be evaluated by balancing the individual’s liberty interest against the state’s relevant interests.<sup>108</sup>

In *Harper*, the Court, noting that “[t]he extent of a prisoner’s right under the [Due Process] Clause to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate’s confinement,”<sup>109</sup> applied the standard of review for prison regulations, which is whether a regulation is “‘reasonably related to

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104. Fitzgerald, *supra* note 26, at 59 (citations omitted and emphasis added).

105. U.S. CONST. amend. XIV, § 1.

106. 494 U.S. 210, 221-22 (1990).

107. 497 U.S. 261, 279 (1990). While some commentators have mistakenly characterized this decision as recognizing a privacy right, *see, e.g.*, Keesling, *supra* note 22, at 400-01, the Court specifically declined to so hold in that case. *Cruzan*, 497 U.S. at 279 n.7 (stating that “[a]lthough many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest.”); *see also infra* note 118.

108. *Cruzan*, 497 U.S. at 279 (citing *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)).

109. 494 U.S. at 222. The Court further emphasized that “[t]here are few cases in which the State’s interest in combating the danger posed by a person to both himself and others is greater than in a prison environment.” *Id.* at 225.

legitimate penological interests.’ ”<sup>110</sup> The Court held that Washington’s policy, under which the state would forcibly administer antipsychotic drugs to an incarcerated individual whose mental illness represented a significant danger to himself or others, was reasonably related to the state’s legitimate interests in protecting the individual himself, other prisoners, and prison staff from serious harm.<sup>111</sup> The court thus concluded that, considering the state’s legitimate penological interest, Washington’s regulation did not impermissibly infringe on a prisoner’s liberty interests when administration of the drugs was in the prisoner’s medical interest and was “for no purpose other than treatment, and only under the direction of a licensed psychiatrist.”<sup>112</sup>

In 1992, the United States Supreme Court addressed for the first time the forced administration of drugs to a pretrial detainee.<sup>113</sup> In *Riggins v. Nevada*, the Court recognized as a constitutionally protected liberty interest a defendant’s right to refuse unwanted medical treatment, observing that such an individual “ ‘retain[s] at least those constitutional rights that we have held are enjoyed by convicted prisoners.’ ”<sup>114</sup> The Court held that the state had deprived the defendant of his protected liberty interest when it administered antipsychotic drugs in order to make the defendant competent to stand trial.<sup>115</sup> The holding specifically requires states to consider “less intrusive alternatives” before administering medication against a defendant’s will.<sup>116</sup>

In weighing the defendant’s liberty interest against the state’s legitimate interests, while the Court acknowledged that the reasonableness test ordinarily applied to state infringements of “ ‘fundamental constitutional rights’ ” is more restrictive than that applied to prison regulations,<sup>117</sup> the Court specifically stopped short of applying a strict scrutiny standard.<sup>118</sup> However, the Court did shift the burden from the defendant to the state to establish the need for medical treatment once the defendant moves to terminate such treatment.<sup>119</sup>

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110. *Id.* at 223 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987), and citing *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987)).

111. *Id.* at 226-27.

112. *Id.*

113. *Riggins v. Nevada*, 504 U.S. 127, 135 (1992).

114. *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 545 (1979)).

115. *Id.* at 137-38.

116. *Id.* at 135.

117. *Id.* (quoting *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987)).

118. *Id.* at 136. Again, some commentators have misconstrued the Court’s standard, leading to a flawed analysis under strict scrutiny that, if relied upon, could lead unwary defendants perilously down the path of an ultimately doomed argument. *See, e.g.*, Keesling, *supra* note 22, at 396-406; *see also supra* note 107.

119. *Riggins*, 504 U.S. at 135.

It is thus clear from well-established case law that Florida's sex offenders do have a protected liberty interest under the United States Constitution in being free from the unwanted administration of MPA. The questions that must be addressed are whether Florida has a legitimate interest that outweighs this liberty interest and whether that interest can be served by a less intrusive alternative.

In the case of nonparaphilic offenders, or even paraphilic offenders who are unwilling to undergo MPA treatment and are therefore unlikely to benefit from it, the state's interests clearly do not outweigh the individual's liberty interest, since no legitimate state interest will be served by administering the drug. In the case of paraphilic offenders, particularly those who are willing to undergo the treatment and for whom it is most likely to be successful, the state does have a legitimate interest in protecting the safety of those members of society against whom the paraphiliac is likely to reoffend. While the side effects of the drug are potentially quite severe, no alternative has been shown to be effective in preventing recidivist paraphilic behavior, with the exception of a period of incarceration during which the individual is physically constrained from reoffending. Thus, for the narrowly defined group of paraphilic offenders who are willing to undergo the treatment, the "forced" administration of MPA should pass Fourteenth Amendment constitutional muster. However, as to these offenders, this argument is moot, because if an individual is willing to undergo the treatment, then the treatment is not unwanted, thus the right to refuse unwanted medical treatment is not invoked.

## 2. *The Florida Constitution*

Unlike individuals in most states, Floridians have another layer of constitutional protection against the forced administration of unwanted medical treatment. The right to privacy, which has been judicially read into the Fourteenth Amendment of the United States Constitution from the penumbra of the various amendments,<sup>120</sup> is specifically embodied in Florida's Constitution, which provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."<sup>121</sup> The Florida Supreme Court has held in *In re Guardianship of Browning* that this right to privacy encompasses the right of a competent person "to choose or refuse medical treatment, and that right extends to *all* relevant decisions concerning one's health."<sup>122</sup> The Court "reinforced the all encompassing nature

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120. See *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965).

121. FLA. CONST. art. I, § 23.

122. 568 So. 2d 4, 11 (Fla. 1990) (emphasis added).

of this right by stating “[w]e see no reason to qualify that right on the basis of the denomination of a medical procedure as major or minor, ordinary or extraordinary, life-prolonging, life-maintaining, life-sustaining, or otherwise.”<sup>123</sup>

In 1996, one year before Florida’s chemical castration statute was passed, the Florida Supreme Court considered a case in which a prisoner on a hunger strike was seeking an injunction against forced nutrition and medication.<sup>124</sup> In *Singletary v. Costello*, the Court held that the individual’s status as a prisoner did not vitiate his privacy right to refuse medical treatment.<sup>125</sup> The Court applied a strict scrutiny analysis, in which the prisoner’s privacy interest could only be overcome if there were a compelling state interest sufficient to override that right and if the means of implementing such a state interest were “narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual.”<sup>126</sup>

The Court looked to its earlier analysis in *Browning*, in which the Court had identified four state interests for consideration and balancing against an individual’s right to refuse unwanted medical treatment: “1. the preservation of life; 2. the protection of innocent third parties; 3. the prevention of suicide; and 4. the maintenance of the ethical integrity of the medical profession;”<sup>127</sup> with the first being the most significant and the last being the least significant.<sup>128</sup> Considering these four factors, the Court in *Singletary* held that even with the preservation of life being the most important state interest, that interest, in and of itself, was not sufficient to overcome the “fundamental nature” of even a prisoner’s privacy right.<sup>129</sup>

Applying this analysis to Florida’s chemical castration statute yields an even stronger result. Florida case law has clearly identified a protected privacy right under the Florida Constitution to refuse unwanted medical treatment.<sup>130</sup> The United States Supreme Court, in evaluating the level of privacy that can reasonably be expected by a probationer (as opposed to an ordinary citizen), recently reiterated that probation is “one point . . . on a continuum of possible punish-

123. *Singletary v. Costello*, 665 So. 2d 1099, 1104 (Fla. 4th DCA 1996) (quoting *Browning*, 568 So. 2d at 11 n.6).

124. *Id.* at 1101.

125. *Id.* at 1105.

126. *Id.* (citing *Browning*, 568 So. 2d at 14).

127. *Id.*

128. *Id.* Regarding the fourth consideration, the Court stated, “[r]ecognition of the right to refuse necessary treatment in appropriate circumstances is consistent with existing medical mores; such a doctrine does not threaten either the integrity of the medical profession, the proper role of hospitals in caring for such patients or the State’s interest in protecting the same.” *Id.* (quoting *Satz v. Perlmutter*, 362 So. 2d 160, 163 (Fla. 4th DCA 1978)).

129. *Id.* at 1110.

130. *Id.* at 1102.

ments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.”<sup>131</sup> Applying the Court’s continuum analysis, a probationer can reasonably expect some greater level of privacy than that afforded to prisoners.

While a probationer clearly has a privacy interest in refusing unwanted medical treatment, this interest must still be balanced against Florida’s state interest in administering MPA to sex offenders. Unlike the state in *Singletary*, Florida’s interest under its chemical castration statute is in the second category: the protection of innocent third parties. If the first and “most significant” category, the preservation of life, is not sufficient to overcome the privacy interest of a prisoner, surely the second, lesser category is not sufficient to overcome the privacy interest of a nonincarcerated probationer. Thus Florida’s chemical castration statute fails the state interest prong of strict scrutiny analysis.

Even if Florida’s statute were to somehow survive the state interest prong of strict scrutiny analysis, it would fail the narrow tailoring prong. As previously discussed,<sup>132</sup> a significant percentage of individuals to whom MPA would be forcibly administered under Florida’s statute are those for whom it would have no benefit. Because Florida’s statute is not narrowly tailored, even if it were to potentially pass a federal constitutional challenge under rational basis scrutiny *as applied* to a narrow class of individuals—those paraphiliacs who are willing to undergo the treatment and are thus likely to benefit from it—the statute would fail a *facial* state constitutional challenge under strict scrutiny as being impermissibly overbroad.

### C. Informed Consent

The notion of administering MPA only to those paraphiliacs who are willing to undergo the treatment (and could therefore potentially benefit from it) begs further analysis under the doctrine of informed consent. Indeed, the United States Supreme Court has itself acknowledged that the right to refuse medical treatment is itself a “logical corollary” of the doctrine of informed consent.<sup>133</sup>

In *Canterbury v. Spence*, the D.C. Circuit Court of Appeals defined “[t]he root premise” of the doctrine of informed consent as “the concept, fundamental in American jurisprudence, that [e]very human being of adult years and sound mind has a right to determine what

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131. See *Sampson v. California*, 126 S. Ct. 2193, 2197 (2006).

132. See discussion *supra* Part II.A.

133. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 270 (1990).

shall be done with his own body . . . .’”<sup>134</sup> As succinctly summarized by Professor Fitzgerald,

[t]he doctrine of informed consent requires the physician to provide the individual with all the information relevant to his treatment. The individual must then choose, in accordance with his values and judgment, whether to undergo the treatment. The individual’s decision should be controlling throughout the treatment, and the individual may reject the treatment or withdraw from the treatment at any time, even if the treatment is judged to be beneficial.<sup>135</sup>

The Florida Supreme Court expressly adopted the informed consent doctrine in *State v. Presidential Women’s Center*,<sup>136</sup> stating that “a physician has an obligation to advise his or her patient of the material risks of undergoing a medical procedure”<sup>137</sup> and adding that “[u]nless a person knows the risks and dangers of . . . a procedure, ‘a “consent” does not represent a choice and is ineffectual.’”<sup>138</sup> This concept was perhaps best articulated by Florida’s Fifth District Court of Appeal in *Buckner v. Allergan Pharmaceuticals*:

A doctor’s duty is to “inform his patient what a reasonable prudent medical specialist would tell a person of ordinary understanding of the serious risks and the possibility of serious harm which may occur from a supposed course of therapy so that the patient’s choice will be an intelligent one, based upon sufficient knowledge to enable him to balance the possible risks against the possible benefits.”<sup>139</sup>

Florida’s chemical castration statute does not require that an individual upon whom a sentence of MPA treatment is imposed be so informed, nor does it permit him to consent. Were the statute to require that the treatment be prescribed and administered by a physician, it is likely that the subject individual would, at a minimum, be informed even absent a statutory requirement because of physicians’ legal, ethical, and professional obligation to provide such information and their liability for not doing so as codified in the Florida Statutes.<sup>140</sup> However, because Florida’s chemical castration statute does not require the involvement of a physician at any point, the probability that the individual will be informed is one that can not be assumed.

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134. 464 F.2d 772, 780 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972) (quoting *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (1914)).

135. Fitzgerald, *supra* note 26, at 18.

136. 937 So. 2d 114 (Fla. 2006).

137. *Id.* at 116 (citing *Thomas v. Berrios*, 348 So. 2d 905, 907 (Fla. 2d DCA 1977)).

138. *Id.* (quoting *Bowers v. Talmage*, 159 So. 2d 888, 889 (Fla. 3d DCA 1963)).

139. 400 So. 2d 820, 823 (Fla. 5th DCA 1981) (quoting *Zebarth v. Swedish Hosp. Med. Ctr.*, 499 P.2d 1, 11 (1972)).

140. *See* FLA. STAT. § 766.103 (2006).

Furthermore, even if the individual is informed, Florida's chemical castration statute and its probationary scheme expressly deny him the right to consent (or not) to the treatment. While the United States Supreme Court has never ruled on the right of a convicted defendant to refuse probation,<sup>141</sup> Florida's Fifth District has specifically held that Florida defendants have no such right.<sup>142</sup> Worse, if a defendant refuses to "consent" to a probationary condition of MPA treatment, he is not only subject to the penalties associated with violating his probation, he is automatically guilty of a separate, second degree felony as well.<sup>143</sup> The only choice that an individual who is sentenced to receive MPA treatment is offered is the choice to be surgically castrated instead.<sup>144</sup> This is arguably not a real choice.

#### IV. IMPLEMENTATION PROBLEMS WITH THE STATUTE

According to a memo generated in response to the DOC's April 12, 2005 report,<sup>145</sup> the primary reason that Florida's judges have not been sentencing eligible sex offenders to MPA treatment as mandated by statute seems to be that both prosecutors and judges were largely unaware of the statute or of the defendants' triggering qualifications.<sup>146</sup> With the attention that the statute is now receiving,<sup>147</sup> this is likely to change.<sup>148</sup> As sentencing to MPA treatment begins to be imposed with greater frequency, the flaws in the statute will become apparent. This will become evident not only in challenges on appeal as to the legality and constitutionality of the statute but also in difficulties in implementing the statute as written.<sup>149</sup>

One of the most obvious "oddities" in the statute has already been noted by both the Fourth and Fifth Districts.<sup>150</sup> The statute requires that a determination be made within sixty days of an offender's sen-

141. See Beckman, *supra* note 22, at 885.

142. Evans v. State, 544 So. 2d 1160, 1161 (Fla. 5th DCA 1989).

143. FLA. STAT. § 794.0235(5) (2006).

144. *Id.* § 794.0235(1)(b).

145. Garringer Memo, *supra* note 12, and accompanying text.

146. *Id.* at 6-7. There is no indication that judges have not been complying because they have misgivings about the statute itself. See *id.*

147. See *supra* notes 14, 70, 73-75 and accompanying text. In addition, Mr. Garringer reminded trial court judges of the requirements of the statute in a presentation he gave at a 2006 conference. Les Garringer, Address at the 2006 Annual Education Program of the Florida Conference of Circuit Judges in Orlando, Florida (Dec. 4, 2006).

148. For example, on December 7, 2006, three days after attending the judges' conference, see *supra* note 147, Judge Fred Hardt in Collier County, Florida, handed down that county's first chemical castration sentence. *Convicted Rapist Gets Castration Sentence*, BONITA DAILY NEWS (Bonita Springs, Fla.), Dec. 7, 2006, [http://www.bonitanews.com/news/2006/dec/07/convicted\\_rapist\\_gets\\_castration\\_sentence](http://www.bonitanews.com/news/2006/dec/07/convicted_rapist_gets_castration_sentence).

149. As early as *Gauntlett*, the Michigan Court of Appeals foreshadowed many of these issues when questioning the trial court's order of MPA treatment. See *People v. Gauntlett*, 352 N.W.2d 310, 313-17 (Mich. Ct. App. 1984).

150. See *supra* notes 70, 73-75 and accompanying text.

tencing as to whether he is an “appropriate candidate” for treatment.<sup>151</sup> However, treatment may not commence for years or even decades in the likely event that the individual is incarcerated prior to being released on probation.<sup>152</sup> The Fourth District opined that “it would seem more appropriate to make the medical determination closer in time to the release date. It could very well be that with the passage of time the medical determination that the defendant is an appropriate candidate for MPA will have changed.”<sup>153</sup>

If the offender does not receive an evaluation contemporaneously with his release, he will have an obvious due process challenge. If such an evaluation is conducted, the statute provides no guidance as to what such an evaluation would require. As Mr. Garringer observed, “this entire process has one fatal flaw. When the prisoner is scheduled for release, the Department of Corrections must begin the process [of medically evaluating the individual] *de novo*.”<sup>154</sup> This necessitates finding another medical expert, paying for another evaluation, and possibly conducting additional hearings if the evaluation is challenged. In the words of Mr. Garringer, “[c]ertainly the [DOC], or any physician, would not rely on an evaluation that occurred years earlier in administering the treatment. They would certainly recognize that a person’s tolerance to the substance could be affected after years of incarceration, and improper administration of MPA could create serious side effects.”<sup>155</sup> One would hope so.

A second issue is the determination of who is an “appropriate candidate.” The statute provides no guidance as to the interpretation of that term. This leaves open a range of discretion on the part of the DOC, the medical expert, and the judiciary that is not only likely to be constitutionally overbroad but will also create a wide disparity from circuit to circuit as to who is eligible for—or subjected to—the treatment. Certainly women would be excluded, but beyond that, an appropriate candidate could range from anyone who can tolerate the risks and side effects without grave danger to those willing paraphiliacs who might actually be helped by the treatment. In addition, the statute makes no provision for periodic evaluation and ongoing monitoring of how the individual is tolerating the treatment. It is quite possible that someone who is an “appropriate candidate” at the time of sentencing, and even at the time of commencement of treatment, will no longer be so after a number of years.

A third issue is the qualification and retention of the “medical expert.” Nothing in the statute expressly requires that the medical ex-

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151. FLA. STAT. § 794.0235(2)(a) (2006).

152. *See id.* § 794.0235(2)(b).

153. *Jackson v. State*, 907 So. 2d 696, 698 (Fla. 4th DCA 2005).

154. Garringer Memo, *supra* note 12, at 8.

155. *Id.* at 4.

pert be a physician. Even if that were to be inferred, there is no requirement that the physician be a psychiatrist with training and experience in diagnosing paraphilia or that he have any knowledge of or experience with the effects of large doses of MPA in men. The training and specialization of the medical expert thus has the potential to greatly influence who is identified as an appropriate candidate.

A fourth issue, raised in part by the Fifth District,<sup>156</sup> is the funding of the program. The House Committee on Crime and Punishment (House Committee) stated that the bill would have “no fiscal impact.”<sup>157</sup> The Senate Criminal Justice Committee (Senate Committee), however, came to quite a different conclusion, determining that the cost of treating only those individuals for whom MPA treatment is statutorily mandated would exceed \$50 million over twenty years, assuming the treatment continued only for the average probation term of six years.<sup>158</sup> Each individual for whom a discretionary sentence of MPA was ordered would add over \$70 thousand to that cost over twenty years.<sup>159</sup>

Neither of these fiscal impact analyses takes into account the payment of the medical expert, and the statute makes no provision for such payment.<sup>160</sup> Furthermore, as noted by Mr. Garringer, the costs of paying the medical expert will likely not be limited to the medical evaluation.<sup>161</sup> Defense counsel also likely will want to depose the expert to determine whether to challenge the order of administration of MPA.<sup>162</sup>

A fifth issue is liability.<sup>163</sup> The statute provides no immunity from liability to either the DOC, the medical expert making the evaluation, or any third party contractor who might be involved in administering the treatment. Because the statute effectively precludes informed consent, the likelihood of tort claims for the negative consequences of the treatment is high. With no informed consent and no

156. See *supra* note 72 and accompanying text.

157. HOUSE STATEMENT, *supra* note 11, at 1. In its Fiscal Research & Economic Impact Statement, the committee classified most of the fiscal effects as “indeterminate,” and in its comments, the committee found that “[t]he fiscal impact of [the] bill would consist primarily of the cost of continued weekly injections (presently the cost is \$40 per injection) given to each offender” and again reiterated that the bill has “no fiscal impact.” *Id.* at 6-8.

158. CRIMINAL JUSTICE COMM. ET AL., SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT 7-9 (1997) [hereinafter SENATE STATEMENT].

159. *Id.*

160. In *Cosme*, the Fifth District specifically invited the Florida Justice Administration Commission to file a response to help the court determine who is to fund the medical evaluations. *Dep't of Corr. v. Cosme*, 917 So. 2d 1049, 1051 (Fla. 5th DCA 2006). The Commission, however, declined, leaving the court “know[ing] little or nothing about the funding or lack of funding of these evaluations by the legislature.” *Id.*

161. Garringer Memo, *supra* note 12, at 8.

162. *Id.*

163. For further discussion, see *id.*; see also SENATE STATEMENT, *supra* note 1598, at 9.

immunity from liability, the task of recruiting physicians or other medical experts to participate in the program will be challenging at best.

A sixth issue is how MPA treatment is to be logistically administered. As noted by the House Committee, the DOC “does not have the infrastructure necessary to administer these treatments.”<sup>164</sup> The Senate Committee further observed that “[i]t is not feasible to expect this group [of probationers] (particularly indigent ones with transportation issues) to receive monthly treatments outside of the communities in which they live. However, neither community correctional centers or [sic] probation and parole offices possess the infrastructure necessary to administer treatment.”<sup>165</sup> The Senate Committee noted that this lack of sufficient infrastructure would necessitate contracting with community health providers to administer the drug.<sup>166</sup> The involvement of third party contractors would add another layer of complication to the already challenging task of tracking probationers’ compliance with the program.

A seventh issue concerns the supervision of the individual if the ordered term of years of treatment exceeds the term of probation. Senate staff raised this very issue, noting that once an individual’s probation term ends, the person is no longer under DOC supervision and the DOC would no longer be able to file a warrant for the individual’s arrest if he fails to report for MPA treatment.<sup>167</sup> The report candidly notes that this issue raises questions about what is to become of a defendant whose sentence to MPA administration exceeds the maximum period of confinement, questions which “staff cannot answer.”<sup>168</sup>

Senate staff summed up the consequences of the vagueness of the statute on how it is to be implemented: “[I]f there are significant problems in determining how to implement this legislation, . . . [i]f ‘men of common intelligence must guess’ at the meaning of a government restriction, the restriction is void . . . .”<sup>169</sup>

## V. RECOMMENDATIONS AND CONCLUSION

The United States Supreme Court has identified “the two primary goals of probation—rehabilitation and protecting society from future violations.”<sup>170</sup> Florida can and should redraft its chemical castration statute to comport with these policy goals, pass constitutional mus-

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164. HOUSE STATEMENT, *supra* note 11, at 3-4.

165. SENATE STATEMENT, *supra* note 158, at 4-5.

166. *Id.* at 5.

167. *Id.*

168. *Id.* at 4.

169. *Id.* at 6 (quoting *State v. Muller*, 681 So. 2d 725, 727 (Fla. 2d DCA 1996)).

170. *United States v. Knights*, 534 U.S. 112, 119 (2001).

ter, and overcome implementation hurdles. In order to draft an effective statute, however, the legislature must acknowledge, as it has in the reports of both chambers,<sup>171</sup> that treatment with MPA has only been shown to be an effective therapy for paraphiliacs when those paraphiliacs volunteer for the treatment, when the treatment is administered in conjunction with psychotherapy, and when certain other criteria are met.<sup>172</sup>

First, to avoid constitutional overbreadth, Florida's statute should reduce the scope of mandatory triggering offenses to those which are of the type likely to be committed by a paraphiliac, such as sexual battery on a child. The statute may make other offenses, such as sexual battery on an adult, a permissive trigger at the discretion of the court. Once the statute is triggered, the court should require a preliminary evaluation by a qualified psychiatrist to determine if the individual does indeed suffer from paraphilia. The statute should require such evaluation to be made after a first offense—there is no need to subject Florida's communities to a second paraphilic crime before protecting it from such individuals.

For those offenders who are determined by preliminary evaluation to suffer from paraphilia, the option should be made available to them to volunteer for consideration for a treatment program as a condition of probation. Identifying those offenders who are paraphiliacs and then giving them the option to volunteer for the program, rather than forcibly subjecting them to it, has several benefits. First, those paraphiliacs who volunteer for treatment are, by their action, self-identifying as individuals who are likely to benefit from the treatment. Second, the issues of cruel and unusual punishment and the right to refuse unwanted medical treatment go away, because the treatment is neither a punishment nor unwanted.

Following the preliminary evaluation, the individuals would still serve a period of incarceration determined by the judge under the sentencing guidelines of the underlying statute. While one leading commentator notes that "the incarceration of paraphiliacs is a futile exercise" as to the paraphiliac,<sup>173</sup> incarceration still serves a deterrent function for sex offenses in general and should not be abandoned. However, a paraphiliac's willingness to undergo the treatment could be judicially considered as a factor in determining the length and nature of the offender's sentence within the statutory guidelines for the underlying offense. If the legislature truly believes that the administration of MPA is an effective treatment and not a

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171. See HOUSE STATEMENT, *supra* note 11, at 10; SENATE STATEMENT, *supra* note 158, at 2.

172. See Fitzgerald, *supra* note 26, at 9.

173. *Id.* at 60.

punishment, it should not object to releasing a treated individual back into the community once it has been determined that the individual is no longer a danger and can become a contributing member of society.

For those individuals who were determined, during the preliminary evaluation following sentencing, to suffer from paraphilia and therefore to be potential candidates for the treatment, a full medical and psychological evaluation should be made sufficiently close to the individual's scheduled release to provide a meaningful prognosis for treatment. The treatment itself should begin sufficiently prior to the individual's release to make the necessary adjustments to the medication to achieve the appropriate dosage for the paraphiliac to manage his condition. Before submitting to treatment, the individual should be fully informed as to the risks and possible side effects of the drug, including the risk that the drug might not work for him, and should be required to sign a waiver of liability. This subsequent and complete evaluation would eliminate procedural due process challenges arising from untimely evaluations and would comport with the common law doctrine of informed consent. It would also provide the greatest assurance that the individual can be safely integrated back into society.

The state's interest in protecting society and the probationer's liberty interest can be effectively balanced with a well-drafted statutory program. Probationary supervision, under this unique circumstance, should extend for the duration of the treatment program, although the level of supervision may be limited after a specified period of years to require only ongoing participation in the treatment program. The treatment program should be both mandated and funded by the state for as long as is necessary, up to the life of the individual, and should not include MPA injections alone, but should also include periodic medical assessment and ongoing psychological counseling. MPA alone will not successfully treat most offenders without individualized psychotherapy.<sup>174</sup>

In the interest of public safety, should the individual indicate his wish to terminate the therapy or any portion thereof, either expressly or by not showing up for his treatments, or should ongoing medical and psychological evaluation lead to the conclusion that the therapy is either no longer necessary or is not proceeding successfully, an additional psychiatric evaluation should be made to determine whether the individual is a danger to the community. If the individual is determined to be a danger, the court should have the dis-

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174. See Keesling, *supra* note 22, at 387 (citing Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 314 (1997)).

cretion to modify the sentence as appropriate, with options ranging from terminating the therapy and sending the individual on his way to incarceration up to the maximum amount permitted by the underlying statute. Should an individual who is undergoing treatment reoffend, courts should be given broad discretion in determining whether to continue to make treatment available to the individual or whether to incarcerate him for the protection of society.

By limiting the treatment only to those who are likely to benefit from it, two costs are reduced. The financial cost of administering an unnecessary drug is eliminated as to those individuals who will not benefit. Furthermore, the social cost of releasing nonbenefiting individuals back into the community, believing we are safe from them when in fact we are not, is also greatly reduced. As observed by Larry Helm Spalding, “[h]ow can Floridians be safe and secure if the court-ordered drug treatment is administered to those whose motivation is not sex, but rather violence, hatred, and control, on the mistaken belief that it is likely to have a measurable impact on the root causes of the defendant’s criminal behavior?”<sup>175</sup> Granted, the proposed treatment program is much more comprehensive than the one mandated by the current statute, and the costs of administration, even considering the reduced subgroup of those to whom the revised statute would apply, will likely be quite high. Nonetheless, the cost to society of not properly treating paraphilic sex offenders is not measured in dollars, but in the lives of victims who are unnecessarily exposed to these individuals for so long as we fail to provide comprehensive, effective treatment. The people of the state of Florida can no longer afford the cost of a band-aid statute that gratifies the popular desire to cut off the offending parts of sex offenders. We need a statute that cuts off the offense.

## VI. EPILOGUE

In 1996, Larry Don McQuay was again sentenced to prison, this time for twenty years, after having confessed to the 1989 molestation of a nine-year-old girl.<sup>176</sup> In 1997, Texas passed a law allowing inmates to elect to be surgically castrated.<sup>177</sup> According to McQuay’s lawyer, McQuay underwent the procedure.<sup>178</sup> On May 4, 2005, McQuay was released from prison for “good behavior” after having

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175. Spalding, *supra* note 18, at 138.

176. Renee C. Lee & Robert Crowe, *Convict Who Sought Castration Released: Molester Whose Requests Led to State Legalization of the Procedure Will Be Monitored*, HOUSTON CHRON., May 4, 2005, at B1.

177. TEX. GOV’T. CODE ANN. § 501.061 (Vernon 2006); *see also id.* § 508.226 (parole panel may not mandate castration).

178. ABC NEWS, *supra* note 3.

served less than half of his twenty-year sentence.<sup>179</sup> He will be electronically monitored via an ankle bracelet until 2016.<sup>180</sup>

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179. *See* Lee & Crowe, *supra* note 176.

180. *See* ABC NEWS, *supra* note 3.