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## Florida's 1997 Chemical Castration Law: A Return to the Dark Ages

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# FLORIDA'S 1997 CHEMICAL CASTRATION LAW: A RETURN TO THE DARK AGES

LARRY HELM SPALDING\*

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## I. INTRODUCTION

Throughout history, castration has been used to punish sex offenders.<sup>1</sup> By the late 1900s, most castration sentences were disallowed on appeal, and a relieved public lauded itself for living in more enlightened times.<sup>2</sup> However, in Florida, the definition of "enlightenment" changed when, in 1997, the Florida Legislature overwhelmingly enacted chapter 97-184, Florida Laws,<sup>3</sup> opening the door

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1. See, e.g., Kimberly A. Peters, Comment, *Chemical Castration: An Alternative to Incarceration*, 31 DUQ. L. REV. 307, 308-09 (1993) (describing the historical uses of castration).

2. See generally *id.*; Karl A. Vanderzyl, Comment, *Castration as an Alternative to Incarceration: An Impotent Approach to the Punishment of Sex Offenders*, 15 N. ILL. U. L. REV. 107, 109-13 (1994) (describing the eugenics movement of the early twentieth century in the United States); Sheldon Gelman, *The Biological Alternative Cases*, 36 WM. & MARY L. REV. 1203, 1203-15 (1995) (chronicling the Supreme Court's treatment of four types of biological alteration controversies); Connie S. Rosati, *A Study of Internal Punishment*, 1994 WIS. L. REV. 123, 165-66 (1994) (presenting a philosophical discussion of the effort to move from voluntary choice to involuntary imposition of drug therapy); Stacy Russell, Comment, *Castration of Repeat Sexual Offenders: An International Comparative Analysis*, 19 HOUS. J. INT'L L. 425, 438-40 (1997) (discussing the international history and debate over the use of chemical castration).

3. Act effective Oct. 1, 1997, ch. 97-184, § 1, 1997 Fla. Laws 3455 (codified at FLA. STAT. § 794.0235 (1997)).

for "chemical castration"<sup>4</sup> of sex offenders. The new statute mandates court-ordered weekly injections of a sex-drive-reducing hormone<sup>5</sup> to qualified repeat sex offenders upon release from prison.<sup>6</sup> It may also be administered to first-time sex offenders.<sup>7</sup>

Child molesters, rapists, and other sex offenders are perceived as among the most vile members of society. It is not surprising, therefore, that the Legislature revived an ancient method of turning these condemned men into eunuchs. This time, however, the lawmakers advocated the use of drugs, not the surgeon's scalpel, to accomplish their objective.<sup>8</sup> While medical advances have made chemical suppression of the sex drive possible as a treatment for some sex offenders, the procedure is not free from criticism by medical, psychological, and psychiatric professionals.<sup>9</sup> Moreover, some, like the American Civil Liberties Union (ACLU), believe that court-ordered, mandatory chemical castration is unconstitutional.<sup>10</sup>

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4. The term "chemical castration" was first used in reference to a punitive measure for sex offenders in 1982 by the Arizona Supreme Court. See *State v. Christopher*, 652 P.2d 1031, 1031 (Ariz. 1982) (explaining a probationary treatment alternative recommended by a psychiatrist, but not ordered by the trial court). The media also described the court-imposed administration of medroxyprogesterone acetate (MPA) to sex offenders as "chemical castration." See Margaret Talev, *Reaction Mixed on Chemical Castration*, TAMPA TRIB., June 1, 1997, § 2, at 1.

5. Medroxyprogesterone acetate (MPA) is a synthetic progesterone more commonly known as the female contraceptive Depo-Provera, the brand name used by the manufacturer, the Upjohn Company. See PHYSICIANS' DESK REFERENCE 2083 (51st ed., 1997).

6. See FLA. STAT. § 794.0235 (1997). The statute provides that the court "[s]hall sentence a defendant to be treated with medroxyprogesterone acetate (MPA), according to a schedule of administration monitored by the Department of Corrections, if the defendant is convicted of sexual battery as described in s. 794.011, Florida Statutes." *Id.* § 794.0235(1)(b). Notably, the statute holds that "in lieu of treatment with . . . (MPA), the court may order the defendant to undergo physical castration upon written motion by the defendant providing the defendant's intelligent, knowing, and voluntary consent to physical castration as an alternative penalty." *Id.*

7. See *id.* § 794.0235(1)(a).

8. See T. Christian Miller, *Chemical Castration for Rapists Gets Committee Okay*, ST. PETE. TIMES, Mar. 26, 1997, at B7; Gordon Russell, *Bills Would Allow Chemical Castration*, SARASOTA HERALD TRIB., Apr. 2, 1997, at A1; see also Kenneth B. Fromson, Comment, *Beyond an Eye for an Eye: Castration as an Alternative Sentencing Measure*, 11 N.Y.L. SCH. J. HUM. RTS. 311, 331 (1994) (arguing that castration is a creative sentencing alternative that is necessary to alleviate the growing sexual offense rate in the United States). Representative Mark Ogles (Repub., Bradenton), who introduced House Bill 83, and Senator Anna Cowin (Repub., Leesburg), who sponsored Senate Bill 774, believe that the new law will greatly decrease the number of repeat sex offenses in Florida. See Miller, *supra*; Russell, *supra*.

9. See Sandra G. Boodman, *Does Castration Stop Sex Crimes?: An Old Punishment Gains New Attention, but Experts Doubt Its Value*, WASH. POST, Mar. 17, 1992, Weekly Journal of Medicine, Health, Science and Society, at 7.

10. See ACLU OF FLA., ACLU POSITION STATEMENT ON CHEMICAL CASTRATION (on file with the ACLU of Florida, Tallahassee, Fla.) [hereinafter ACLU POSITION STATEMENT]; Dana Peck, *Chemical Castration Advances: Senate Panel OKs Rape Punishment*, FLA. TIMES-UNION, Mar. 26, 1997, at B3.

This Article explores whether mandatory chemical castration is a medically acceptable and constitutionally permissible alternative to incarceration for sex offenders in Florida. Part II discusses the history of chemical castration in the United States. Part III addresses the medical, legal, and ethical issues the new statute raises and discusses the physical effectiveness of chemical castration on sex offenders. Part IV examines whether the new statute violates several constitutional rights of the sentenced sex offender, namely the right to refuse non-consensual medical treatment, the right to privacy, the prohibition against cruel and unusual punishment, the right to due process and equal protection, and the protection against double jeopardy. Parts V and VI establish that civil libertarians will accept a probation program that provides voluntary drug treatment for sex offenders if the goal of the program is to treat, and not to punish, the sex offender.

## II. A BRIEF HISTORY OF CHEMICAL CASTRATION IN THE UNITED STATES

The early twentieth century United States eugenics movement endorsed both castration and sterilization for many of society's ills.<sup>11</sup> Some states implemented laws requiring castration as punishment for a variety of infractions.<sup>12</sup> However, by the end of World War II, such practices waned in popularity.<sup>13</sup>

Recent medical developments have made chemical suppression of the sex drive through the injection of antiandrogen drugs a viable al-

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11. See Vanderzyl, *supra* note 2, at 109-13.

12. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942) (striking down an Oklahoma statute that authorized the sterilization of recidivist criminals). Although *Skinner* is often cited as the leading case on sterilization, the Court did not address castration as a constitutionally impermissible, barbarous punishment. Instead, the Court held that the Oklahoma law permitting the sterilization of habitual criminals violated the Equal Protection Clause of the Fourteenth Amendment. The state law invidiously discriminated against the indigent by exempting defendants who had repeatedly been found guilty of white collar crimes. See *id.* at 537. However, other courts have held that surgical castration is cruel and unusual punishment. See *State v. Brown*, 326 S.E.2d 410, 412 (S.C. 1985) (holding that surgical castration is a form of mutilation and, therefore, cruel and unusual under the South Carolina Constitution); *Davis v. Berry*, 216 F. 413, 417 (S.D. Iowa 1914), *rev'd on other grounds*, 242 U.S. 468 (1917) (striking down an Iowa statute authorizing vasectomies for repeat felons as violative of the Eighth Amendment prohibition against cruel and unusual punishment because vasectomies, like castration, inflict shame, humiliation, degradation, and mental torture on the defendant); *Whitten v. State*, 47 Ga. 297, 302 (1872) (explaining that the Cruel and Unusual Punishment Clause of the Eighth Amendment was intended to prohibit barbaric penal practices, such as quartering, hanging in chains, and castration).

13. See Russell, *supra* note 2, at 439-40 (noting that knowledge of Nazi experimentation with castration and sterilization caused the public to disfavor these procedures as a means to adjust criminal behavior).

ternative to surgical castration.<sup>14</sup> Thus, in 1984 a Michigan judge ordered a convicted sex offender to submit to medroxyprogesterone acetate (MPA) injections as a probationary condition.<sup>15</sup> The appellate court set the sentence aside as a violation of the Michigan probation statute.<sup>16</sup> Nonetheless, in 1996 these medical studies prompted California to become the first state to enact legislation providing for chemical castration of certain sex offenders.<sup>17</sup> Florida's Legislature enacted its chemical castration statute approximately six months after the California bill was signed into law.<sup>18</sup>

### III. FLORIDA'S 1997 CHEMICAL CASTRATION STATUTE

The new Florida statute authorizes a trial judge to sentence *any* defendant who is convicted of sexual battery to receive MPA.<sup>19</sup> If the defendant is convicted of sexual battery *and* has a prior conviction for sexual battery, the trial court is *required* to impose a sentence of MPA administration.<sup>20</sup> The administration of MPA is, however, *contingent* upon a determination by a court-appointed medical expert that the defendant is an appropriate candidate for the weekly drug

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14. See William L. Baker, *Castration of the Male Sex Offender: A Legally Permissible Alternative*, 30 LOY. L. REV. 377, 379, 386 (1984). In 1966, researchers at the Biosexual Psychological Clinic of Johns Hopkins Hospital began conducting some of the first pharmacological studies of chemical castration in the United States. These studies served as a catalyst for laws providing for the chemical castration of sex offenders in this country. See William Green, *Depo-Provera, Castration, and the Position of Rape Offenders: Statutory and Constitutional Issues*, 12 U. DAYTON L. REV. 1, 5 (1986). California and Louisiana have chemical castration statutes. See CAL. PENAL CODE § 645 (West 1997); LA. REV. STAT. ANN. § 15.538(C) (West 1997). In addition, in 1996 and 1997, chemical castration bills were introduced in Alabama, Arizona, Colorado, Hawaii, Michigan, Mississippi, Missouri, New Jersey, New York, Oregon, and Tennessee. See S. 116, 1st Spec. Sess. (Ala. 1997); H.R. 8, Reg. Sess. (Ala. 1997); H.R. 2216, 43d Leg., 1st Reg. Sess. (Ariz. 1997); H.R. 1133, 61st Leg., 1st Reg. Sess. (Colo. 1997); S. 215, 19th Leg. (Haw. 1997); H.R. 4307, 89th Leg., Reg. Sess. (Mich. 1997); S. 2465, Reg. Sess. (Miss. 1997); H.R. 753, 89th Leg., 1st Reg. Gen. Assembly (Mo. 1997); S. 1568, 207th Leg., 1st Ann. Sess. (N.J. 1996); S. 4925, 220th Leg., Ann. Sess. (N.Y. 1997); H.R. 3672, 69th Leg. Assembly (Or. 1997); H.R. 482, 100th Gen. Assembly (Tenn. 1997); H.R. 483, 100th Gen. Assembly (Tenn. 1997); H.R. 585, 100th Gen. Assembly (Tenn. 1997); S. 1152, 100th Gen. Assembly (Tenn. 1997); S. 1153, 100th Gen. Assembly (Tenn. 1997).

15. See *People v. Gauntlett*, 352 N.W.2d 310, 313 (Mich. Ct. App.), *modified*, 419 N.W.2d 909 (Mich. 1984), *appeal after remand*, 394 N.W.2d 437 (Mich. Ct. App. 1986); *Gauntlett v. Kelley*, 658 F. Supp. 1483 (W.D. Mich. 1987) (denying the petition for a writ of habeas corpus), *aff'd*, 849 F.2d 213 (6th Cir. 1988).

16. See *Gauntlett*, 352 N.W.2d at 317 (explaining that the administration of MPA to sexual offenders had not gained acceptance in the medical community as a safe and effective use for males).

17. See Act of Sept. 17, 1996, ch. 596, § 2, 1996 Cal. Stat. 92 (codified at CAL. PENAL CODE § 645 (West 1997)); see also Note, *Constitutional Law—Due Process and Equal Protection—California Becomes First State to Require Chemical Castration of Certain Sex Offenders*, 110 HARV. L. REV. 799, 799 (1997) [hereinafter Harvard Note].

18. See Act effective Oct. 1, 1997, ch. 97-184, § 1, 1997 Fla. Laws 3455, 3456 (codified at FLA. STAT. § 794.0235 (1997)).

19. See FLA. STAT. § 794.0235(1)(a) (1997).

20. See *id.* § 794.0235(1)(b).

injections. Likewise, the continued use of MPA is not required when a determination is made that it is not medically appropriate.<sup>21</sup> The trial judge must specify the duration of the treatment that, in the discretion of the court, may be for life.<sup>22</sup>

The Florida Department of Corrections (DOC) will provide the services necessary to administer the MPA.<sup>23</sup> Once the defendant begins receiving court-ordered MPA injections, the failure to continue to use the drug, without authorization by the court, is both a violation of probation and the commission of a separate and distinct second degree felony.<sup>24</sup> The defendant does, however, have a choice: he may choose surgical castration in lieu of chemical castration.<sup>25</sup>

### A. *The Wonder Drug: MPA*

Florida's chemical castration statute permits sex offenders to elect physical castration,<sup>26</sup> but it is unlikely that many defendants will choose this option. Although a number of European countries have used surgical castration as a punitive measure during the past century, the procedure has never been regarded with favor in the United States.<sup>27</sup> Most Americans object to the procedure on humanitarian and civil liberties grounds such as cruel and unusual punishment.<sup>28</sup>

MPA, the drug mandated by the Florida Legislature for use in chemical castrations, is more commonly known as Depo-Provera.<sup>29</sup> The Food and Drug Administration (FDA) originally approved the drug for irregular uterine bleeding, threatened miscarriage, and

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21. See *id.* § 794.0235(2)(a). Although the new law does not contemplate that a defendant will receive the MPA treatment until one week prior to his release from prison, the medical determination of "appropriate candidate for treatment" must be made no later than 60 days after the imposition of sentence. *Id.* Thus, the law provides for a medical diagnosis that could have a profound impact on an individual's health to be made, in most instances, years before the treatment is actually administered. See *id.* It is difficult to imagine that any competent health care professional would be willing to testify at an adversarial hearing on her diagnostic report that a defendant *will be* an "appropriate candidate for treatment" at some *future* date, possibly years in advance.

22. See *id.* This section of the statute clearly demonstrates the law is punitive, not therapeutic. Imagine a judge ordering someone to participate in a biological experiment for an indefinite period of time, to begin at some unspecified future date, based upon a diagnosis that as of *today*, with no guarantees about next month or next year, that individual is an appropriate candidate for the administration of the drug.

23. See *id.* § 794.0235(3). The statute does not state whether the physicians who administer the drug shall be state employees or private physicians operating under an employment contract. This decision will be made by the DOC. The DOC has the authority to adopt administrative rules applicable to the statute. See *id.* § 120.54; *id.* § 944.09.

24. See FLA. STAT. § 794.0235(5)(a)-(b).

25. See *id.* § 794.0235(1)(b).

26. See *id.*

27. See Douglas J. Besharov & Andrew Vachs, *Sex Offenders: Is Castration an Acceptable Punishment?*, A.B.A. J., July 1992, at 42, 42.

28. See Peters, *supra* note 1, at 309.

29. See *supra* note 5.

amenorrhea, or the absence of menstruation.<sup>30</sup> Today, it is marketed world-wide as a female contraceptive.<sup>31</sup>

The FDA has not approved MPA specifically for use in chemical castrations.<sup>32</sup> Nonetheless, it is not considered an experimental drug and, therefore, can be prescribed by any physician under the FDA Guidelines relating to the "use of approved drugs for unlabeled indications."<sup>33</sup> In men, the drug reduces the production of the hormone testosterone in the testes and the adrenal glands, and, therefore, reduces the level of testosterone circulating through the bloodstream.<sup>34</sup> As testosterone levels drop, so does the putative sex drive in most men.<sup>35</sup>

MPA has been used successfully with only one type of sex offender, the paraphiliac, who demonstrates a pattern of sexual arousal, erection, and ejaculation that is accompanied by a distinctive fantasy or its achievement.<sup>36</sup> While MPA has proven successful

30. See Green, *supra* note 14, at 5 n.23.

31. See George R. Huggins & Anne Colston Wentz, *Obstetrics and Gynecology*, 270 JAMA 234, 235 (1993) (tracing the turbulent history of MPA approval in the United States). Until 1992 MPA was banned in the United States for use as a female contraceptive because of concerns linking the drug to breast and uterine cancer. See *id.*

32. See Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 3 (1990).

33. *Id.* at 6. It is important to note that the FDA does not approve of or regulate the use of MPA for chemical castration. Thus, while it is technically correct for proponents to claim that the drug is not experimental, those in opposition have a valid argument that the use of MPA to control the male sex drive is the latest development in a long tradition of dangerous experimentation by psychiatrists and clinical psychologists with bieterministic and reductionist views of human sexuality. See Daniel C. Tsang, *Policing Perversions: Depo-Provera and John Money's New Sexual Order*, 28 J. HOMOSEXUALITY 397, 402 (1995).

34. See Raymond A. Lombardo, *California's Unconstitutional Punishment for Heinous Crimes: Chemical Castration of Sex Offenders*, 65 FORDHAM L. REV. 2611, 2613 (1997); Tsang, *supra* note 33, at 399. In adult males, studies have proven that the prolonged use of MPA can reduce testosterone to the level of a prepubescent boy. See *id.*

35. See Fitzgerald, *supra* note 32, at 6-7; Fred S. Berlin & Carl F. Meinecke, *Treatment of Sex Offenders with Antiandrogenic Medication: Conceptualization, Review of Treatment Modalities, and Preliminary Findings*, 138 AM. J. PSYCHIATRY 601, 603 (1981).

36. See Fitzgerald, *supra* note 32, at 5; Daniel L. Icenogle, *Sentencing Male Offenders to the Use of Biological Treatments: A Constitutional Analysis*, 15 J. LEGAL MED. 279, 285, 288-93 (1994). Paraphiliacs include, but are not limited to, people suffering from pedophilia, exhibitionism, fetishism, sadism, and other psychosexual disorders, including some forms of rape. See Fitzgerald, *supra* note 32, at 5. The medical community considers paraphilia to be a psychiatric syndrome. See Berlin & Meinecke, *supra* note 35, at 603. The success of MPA treatment is, according to studies, contingent upon the following conditions being met: the offender must volunteer for the treatment; the offender must not have an anti-social personality pathology; the offender must not have a severe substance abuse problem; the dosage must be sufficient to suppress testosterone production; and a consenting pair-bonded partner must be available. See Fitzgerald, *supra* note 32, at 9 (citing Paul A. Walker et al., *Antiandrogenic Treatment of the Paraphiliacs*, in GUIDELINES FOR THE USE OF PSYCHOTROPIC DRUGS 427, 435 (Harvey C. Stancer et al. eds., 1984)). Further, "the treatment should be accompanied by psychotherapy to help the offender readjust to a new lifestyle." *Id.* The treatment has been successful with most paraphiliacs in controlled situations where hormone therapy was coupled with appropriate counseling. See Icenogle, *supra*. Recidivism rates were under five percent. See *id.*

for some paraphiliacs, there is considerable scientific opinion that the drug is not likely to have any meaningful influence on three other types of sex offenders who come within the purview of the new statute: defendants who deny the perpetration of the offense; defendants who admit the perpetration of the offense, but who blame their behavior on non-sexual or non-personal forces, such as drugs, alcohol, or job stress; and defendants who are violent and appear to be prompted by non-sexual factors, such as anger, power, or violence.<sup>37</sup> However, the new statute makes no distinction among the four different types of sex offenders.<sup>38</sup>

### *B. The Role of the Medical Expert*

The new statute provides that "[a]n order of the court sentencing a defendant to medroxyprogesterone acetate (MPA) treatment under subsection (1), shall be contingent upon a determination by a court-appointed medical expert, that the defendant is an appropriate candidate for treatment."<sup>39</sup>

This subsection raises several interesting medical, legal, and ethical issues regarding who qualifies as a medical expert, who qualifies as an "appropriate candidate for treatment," whether the candidate has the right to be informed of any potential medical risks, and whether the candidate can rebut the medical expert's findings concerning the appropriateness of the "treatment." How the trial courts address these issues may hold the key to both the acceptance of the procedure in Florida by professionals in the applicable fields of medicine, psychology, and psychiatry, as well as the appellate courts' determination of the statute's constitutionality.<sup>40</sup>

First, does the term "medical expert" include medical doctors, psychiatrists, and psychologists? Who qualifies as a "medical expert" may determine who is "an appropriate candidate for treatment."

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As the bills proceeded through the committee process, the primary sponsors of the legislation, Representative Ogles and Senator Cowin, argued that scientific trials over the past 20 years have conclusively shown that the drug leads to a dramatic decrease in sexual thoughts and fantasies in most men. See Fla. H.R. Comm. on Crime & Pun., tape recording of proceedings (Feb. 25, 1997) (on file with comm.) (discussion of HB 83).

37. See Fitzgerald, *supra* note 32, at 4.

38. See FLA. STAT. § 794.0235 (1997) (sentencing a defendant to MPA injections for a number of sexual offenses, including pedophilia, committing a sexual battery that causes serious physical injury, and committing a sexual battery upon a physically or mentally incompetent person). The Florida law is broader in application than its California counterpart. See CAL. PENAL CODE § 645 (West 1997) (mandating chemical castration for child molesters only).

39. FLA. STAT. § 794.0235(2)(a) (1997).

40. See generally Fred S. Berlin, *The Paraphiliac and Depo-Provera: Some Medical, Ethical and Legal Considerations*, 17 BULL. AM. ACAD. PSYCHIATRY L. 233, 234-36 (1989) (advocating the use of MPA as mandatory treatment, but not as punishment, for willing sex offenders).

Education, experience, and philosophical attitudes toward drug therapy may play a role in deciding whether an individual is "an appropriate candidate for treatment."

Second, there is no definition of "appropriate candidate for treatment." Does the term mean that if the defendant can physically *tolerate* the administration of the drug, its use is mandated by statute? While the broad language of the new statute suggests this is the legislative intent, it is questionable whether this is a sound medical and ethical practice.<sup>41</sup>

Third, the new statute does not require the court-appointed expert or the court to advise the defendant of the medical risks in taking the drug.<sup>42</sup> Regrettably, there were few prisoners' rights advocacy groups walking the halls of the Florida Capitol demanding that these defendants be fully informed of the medical risks of undergoing mandatory chemical castration. The lack of focus on "informed consent" is rather ironic considering the contentious legislative debate during the 1997 Regular Session<sup>43</sup> that led to the enactment of the Woman's Right-to-Know Act.<sup>44</sup>

When used on males, MPA effectively suppresses erections, ejaculations, and reduces the frequency and intensity of erotic thoughts.<sup>45</sup> Side effects include increased appetite, weight gain of fif-

41. See *id.* at 236-39; Pamela K. Hicks, *Castration of Sexual Offenders: Legal and Ethical Issues*, 14 J. LEGAL MED. 641, 665-66 (1993) (noting opposition from the medical community on medical and ethical grounds).

42. Of course, there is an ethical and professional obligation for any treating physician to advise her patient of the risks of a particular treatment. Under the mandated guidelines of the Omnibus Budget Reconciliation Act (OBRA), every person receiving medication, whether Medicaid-funded or not, must be informed of the side effects. See 42 U.S.C. § 1396r-8(g)(2)(A)(ii)(I)(dd) (1994). Further, under FDA guidelines regarding experimental drugs or use of drugs, a detailed form must be completed by the patient and signed and witnessed, before the patient may receive the treatment. See 21 C.F.R. §§ 50.20, .27 (1997).

However, the circumstances are somewhat different here. The plain language of the legislation shows a clear intent to limit the defendant's choices between chemical or surgical castration. He may not refuse, if found to be an "appropriate candidate for treatment," without severe consequences. See FLA. STAT. § 794.0235(5)(a)-(b) (1997) (charging a probationer who refuses or fails to appear at the DOC for MPA treatment with a second degree felony).

43. See Diane Rado, *Late Abortion Ban Sent to Gov. Chiles*, ST. PETE. TIMES, May 2, 1997, at A1 (highlighting some viewpoints expressed in the debate on the Woman's Right-to-Know Act).

44. Act effective July 1, 1997, ch. 97-151, §§ 1-13, 1997 Fla. Laws 2501 (amending FLA. STAT. ch. 390 (1995 & Supp. 1996) (mandating that certain physicians provide detailed information, including a brochure with graphics, about the risks of terminating a pregnancy and the alternatives to the procedure).

Of course, there are few prisoners' rights advocacy groups compared to the numerous organizations that lobby at the Florida Capitol as part of the right-to-life movement. Moreover, legislators are aware that pro-life constituents have a strong political voice, while convicted sex offenders are not only disenfranchised, they are often a despised minority even within the prison community.

45. See Fitzgerald, *supra* note 32, at 7 (explaining that the drug suppresses spontaneous erections but does not cause total sexual impotence); John T. Melella et al., *Legal and*

teen to twenty pounds, fatigue, mental depression, hyperglycemia, impotence, abnormal sperm, lowered ejaculatory volume, insomnia, nightmares, dyspnea (difficulty in breathing), hot and cold flashes, loss of body hair, nausea, leg cramps, irregular gall bladder function, diverticulitis, aggravation of migraine, hypogonadism, elevation of the blood pressure, hypertension, phlebitis, diabetic sequelae, thrombosis (leading to heart attack), and shrinkage of the prostate and seminal vessels.<sup>46</sup>

Fourth, the new statute directs the trial judge to have the defendant examined by a medical expert who then reports her findings to the court.<sup>47</sup> Are these findings rebuttable by either the defendant or the state? May the court reject the testimony of its own witness?

In *Specht v. Patterson*,<sup>48</sup> the United States Supreme Court found that the opportunity for indeterminate confinement under a sexual psychopath statute warranted certain procedural protections.<sup>49</sup> Those protections include the right to be heard, to be represented by an attorney, to present evidence, and to cross examine adverse witnesses.<sup>50</sup> The Court did not, however, articulate the standard of proof to be used in such cases. Nonetheless, because the proceeding is criminal in nature, the standard of proof employed in evaluating the testimony of the medical expert should, at a minimum, be clear and convincing evidence.<sup>51</sup>

#### IV. CONSTITUTIONAL CONSIDERATIONS

The new statute raises several constitutional issues, including possible violations of the right to refuse non-consensual medical

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*Ethical Issues in the Use of Antiandrogens in Treating Sex Offenders*, 17 BULL. AM. ACAD. PSYCHIATRY L. 223, 225 (1989).

46. See Melella et al., *supra* note 45; John McD. W. Bradford, *The Hormonal Treatment of Sexual Offenders*, 11 BULL. AM. ACAD. PSYCHIATRY L. 159, 163 (1983).

47. See FLA. STAT. § 794.0235(2)(a) (1997).

48. 386 U.S. 605 (1967) (finding that Colorado's Sex Offenders Act, which permitted a court to sentence a sexual offender to an indeterminate sentence not specified in the criminal statute, violated the Due Process Clause of the Fourteenth Amendment).

49. See *id.* at 608 (explaining that pursuant to Colorado's Sex Offenders Act, a sex offender would be sentenced based upon a report made by a court-designated psychiatrist without permitting the defendant an opportunity to rebut the psychiatrist's findings).

50. See *id.* at 610.

51. See generally Fitzgerald, *supra* note 32, at 12 (explaining *Allen v. Illinois*, 478 U.S. 364 (1986), which held that the introduction of a psychiatric report in a civil commitment proceeding does not violate the Fifth Amendment privilege against self-incrimination because those safeguards are designed to protect the defendant's due process rights in a criminal proceeding only). In practice, the medical expert is more likely than not to be the state's witness, appointed by the court because the expert believes in the use of MPA for almost all sexual offenders subject to section 794.0235, *Florida Statutes*, a criminal statute. In such a circumstance, the defendant should be afforded the opportunity to rebut the adverse findings of the medical expert. Conversely, if the court selects a medical expert who is not predisposed to the state's position, the prosecutor should have the opportunity to present expert testimony expressing a different opinion.

treatment, the right to privacy, the prohibition against cruel and unusual punishment, due process and equal protection, and double jeopardy.<sup>52</sup>

### *A. Involuntary Treatment and Informed Consent*

The new statute suggests that the Legislature intended to include a broad range of sex offenders within the purview of the statute.<sup>53</sup> However, many doctors believe MPA should be administered to a more narrowly delineated class of persons.<sup>54</sup> According to these doctors, the pivotal criterion in calculating the treatability of any sex offender is the patient's acknowledgment that his conduct is intolerable and beyond his control.<sup>55</sup>

Moreover, according to health care professionals who have been at the forefront of advocating the use of chemical castration as an effective alternative to incarceration, successful treatment requires competent psychotherapy and close monitoring in addition to the administration of MPA.<sup>56</sup> Regrettably, neither psychotherapy nor any other kind of treatment beyond the mandatory, weekly injection of the drug is mentioned in the new statute.<sup>57</sup>

It appears that the Legislature, in enacting the chemical castration statute, has proceeded on the belief, or perhaps more accurately, on the *hope*, that administering a single drug—even involuntarily—can effectively alter abusive behavior in all categories of sexual offenders. However, given the statute's broad application to the four types of sexual offenders,<sup>58</sup> each with different underlying causes for their exhibited criminal behavior, and the omission of the critical element of therapeutic counseling for those forced to undergo the procedure, it is difficult to conclude that the Legislature seriously viewed chemical castration as a form of treatment rather than punishment. To paraphrase the old truism about the duck: if it looks like punishment, if it operates like punishment, and if the Legislature intended for it to be punishment, then it must be punishment.

Obtaining a defendant's informed, voluntary consent for the administration of any drug, particularly one that has never received

52. See ACLU POSITION STATEMENT, *supra* note 10.

53. See FLA. STAT. § 794.0235 (1997).

54. See Talev, *supra* note 4; *supra* Part III.A.

55. See Fitzgerald, *supra* note 32, at 9.

56. See *id.*

57. The explanation is probably more fiscal than philosophical. The current cost of an MPA 400 mg intramuscular injection is \$40.00 per week. See Fla. S. Comm. on Crim. Just., CS for SB 774 (1997) Staff Analysis 7 (Apr. 22, 1997) (on file with comm.). The Legislature did not analyze the cost for psychotherapy. However, it is not unreasonable to project the cost at several thousand dollars for each individual ordered to undergo weekly MPA injections.

58. See *supra* text accompanying note 37.

FDA sanction for the legislatively mandated purpose, is not only sound medical practice, it is constitutionally required.<sup>59</sup> The U.S. Supreme Court has recognized that an individual possesses a liberty interest that includes the right to withhold consent to intrusive medical treatment.<sup>60</sup> Courts have also held that prisoners and competent patients involuntarily committed to state mental institutions do not forfeit their fundamental right to refuse non-consensual medical treatment.<sup>61</sup> However, courts have also recognized that in the face of legitimate prison regulations to preserve prison safety and security met by reasonably related procedures, the rights of prisoners may be limited.<sup>62</sup> A court must weigh the prisoner's decisional autonomy and bodily integrity interest against the nature of the government's compelling interest.<sup>63</sup>

In *Canterbury v. Spence*,<sup>64</sup> the court stated that "[t]he root premise [to the doctrine of informed consent] is the concept, fundamental in

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59. See Fitzgerald, *supra* note 32, at 18-25 (discussing informed consent).

60. See *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 277 (1990) (holding that an incompetent person's wishes to withhold medical treatment must be proven by clear and convincing evidence); see also *Thor v. Superior Court*, 855 P.2d 375, 383 (Cal. 1993) (balancing a prisoner's right to be free from non-consensual intrusions into his bodily integrity against the countervailing state interests of the preservation of life, prevention of suicide, integrity of the medical profession, and protection of innocent third parties); *Singletary v. Costello*, 665 So. 2d 1099, 1104 (Fla. 4th DCA 1996) (recognizing a prisoner's fundamental right to refuse medical treatment after he engaged in a hunger strike).

61. See *Washington v. Harper*, 494 U.S. 210, 227 (1990) (holding that antipsychotic medication may be administered to a mentally ill state inmate only after determining that the inmate was dangerous and that the drug was in the inmate's best interest); *Mills v. Rogers*, 457 U.S. 291, 299 n.16 (1982) ("[I]nvoluntarily committed mental patients do retain liberty interests protected directly by the constitution . . . and these interests are implicated by the involuntary administration of antipsychotic drugs."); *Vitek v. Jones*, 445 U.S. 480, 493-94 (1980) ("A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the State to . . . subject him to involuntary psychiatric treatment without affording him additional due process protections."); *Rogers v. Okin*, 634 F.2d 650, 653 (1st Cir. 1980) ("[A] person has a constitutionally protected interest in being left free by the state to decide for himself whether to submit to the serious and potentially harmful medical treatment . . . as part of the penumbral right to privacy, bodily integrity, or personal security."); *Runnels v. Rosendale*, 499 F.2d 733, 735 (9th Cir. 1974) (performing a hemorrhoidectomy without the prisoner's consent implicated the prisoner's right to refuse medical treatment); *Singletary v. Costello*, 665 So. 2d 1099, 1104 (Fla. 4th DCA 1996) (recognizing a prisoner's right to refuse medical treatment after he engaged in a hunger strike); *In re K.K.B.*, 609 P.2d 747, 751 (Okla. 1980) (holding that a legally competent patient has the right to refuse treatment with antipsychotic drugs).

62. See *Washington*, 494 U.S. at 223 (citing *Turner v. Safley*, 482 U.S. 78, 79 (1987)). But see *Singletary*, 665 So. 2d at 1105 (applying strict scrutiny analysis and holding that the prisoner retained the constitutional right to privacy, despite the state's interest in the preservation of prison security, safety, and rehabilitation).

63. See *Washington*, 494 U.S. at 229 (recognizing a significant liberty interest in avoiding the unwanted administration of an antipsychotic drug); *Thor*, 855 P.2d at 383 (upholding an inmate's right to refuse life-sustaining treatment); see also *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down a forced sterilization statute).

64. 464 F.2d 772 (D.C. Cir. 1972) (discussing a patient-initiated action against a surgeon).

American jurisprudence, that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."<sup>65</sup> The question thus becomes whether court-ordered chemical castration of a defendant at the time of his release from confinement, as required by the new statute, is *voluntary*.

Chemical castration is an intrusive and invasive procedure with many known side effects and long-term health risks.<sup>66</sup> Mandatory weekly drug injections qualify as an unjustified interference of a defendant's constitutionally protected rights, absent a demonstrated showing of a "compelling state interest."<sup>67</sup> Protecting society from recidivist child molesters and rapists is unquestionably a compelling governmental interest. Nonetheless, given the paucity of evidence that chemical castration is an effective means of treatment for non-paraphiliacs and involuntarily-treated paraphiliacs, mandatory administration of MPA is not reasonably related or narrowly tailored to the state's legitimate goals of rehabilitation and public safety.

Proponents of chemical castration emphasize that because the offender can choose, at least in theory, to not submit to the procedure, the medical treatment is consensual.<sup>68</sup> But the *choice* to discontinue the administration of MPA can result not only in a violation of probation, but also in an indictment for an additional second degree felony.<sup>69</sup> Consequently, exercising the option to withdraw from the medical treatment, without the consent of the court, is no option at all. Given this reality, the choice cannot be held to be made freely, knowingly, or voluntarily.

### B. *The Right to Privacy*

Unlike article I, section 23 of the Florida Constitution, the U.S. Constitution does not provide an explicit right to privacy. The U.S. Supreme Court has, however, acknowledged an implied right to privacy under the Fourteenth Amendment.<sup>70</sup> This fundamental guaran-

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65. *Id.* at 780.

66. *See supra* text accompanying note 46.

67. *See generally* Green, *supra* note 14, at 17.

68. *See* Fitzgerald, *supra* note 32, at 22 (arguing that if the defendant is permitted the option of accepting the treatment as a condition of probation or parole, then it is voluntary because there has been a rational decision to undergo treatment rather than remain in prison).

69. *See* FLA. STAT. § 794.0235(5)(a)-(b) (1997).

70. *See* Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965) (holding that a state law forbidding the use of contraceptives was unconstitutional because the statute intruded upon the right of marital privacy and was not supported by a compelling state interest). When a statute infringes on a fundamental right or appears to invidiously discriminate against a suspect class, the court applies a strict scrutiny analysis, requiring that the action be justified by a compelling state interest, and that it be the least restrictive means for achieving the state's asserted goal. *See* Washington v. Glucksberg, 117 S. Ct. 2258, 2268 (1997) (upholding a statutory ban on assisted suicide).

tee protects an individual's decisional autonomy and right to bodily integrity with respect to decisions concerning childbearing and contraception.<sup>71</sup>

State-mandated administration of an impotence-inducing hormone not only involves compelled medical care, but also invades the constitutionally protected right to privacy. Like forced sterilization and contraception, an order directing periodic injections of MPA implicates the rights of bodily integrity and reproductive autonomy.<sup>72</sup> In *Skinner v. Oklahoma*,<sup>73</sup> the Court acknowledged that the right to procreate represents one of the basic civil rights of humanity and that such a right is fundamental to the very existence and survival of the race.<sup>74</sup>

The Court has expressed "great resistance to expand the substantive reach of [the Due Process Clause], particularly if it requires redefining the category of rights deemed to be fundamental."<sup>75</sup> In this effort, the Court has rendered precise requirements for those rights that should be protected, insisting "not merely that the interest denominated as a 'liberty' be 'fundamental' . . . but also that it be an interest traditionally protected by our society."<sup>76</sup> Yet, a finding by the courts that procreation is fundamental did not unduly jeopardize the reach of the Due Process Clause because "[t]he rights to conceive and to raise one's children have been deemed 'essential' . . . 'basic civil rights of man' . . . and '[r]ights far more precious . . . than property rights."<sup>77</sup>

The Court in *Paul v. Davis*<sup>78</sup> recognized that legislation infringing on the right of procreation invokes a heightened constitutional analysis.<sup>79</sup> Chemical castration as a punitive measure for convicted

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71. See *Carey v. Population Serv. Int'l*, 431 U.S. 678, 684-85 (1978) (recognizing that the constitutional privacy protection implicit in the Fourteenth Amendment extends to individual childbearing decisions); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (holding that the privacy right encompasses the right of unmarried persons to use contraception); *Roe v. Wade*, 410 U.S. 179, 211-13 (1973) (Douglas, J., concurring) (describing the privacy right as encompassing the freedom from bodily restraint and compulsion, the liberty of caring for one's own health and person, and the freedom to decide fundamental issues of one's life, such as procreation and child-rearing).

72. See Peters, *supra* note 1, at 322-23 (discussing the right to procreative freedom).

73. 316 U.S. 535 (1942).

74. See *id.* at 541.

75. *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) (upholding a sodomy statute).

76. *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (footnote omitted) (upholding a California statute establishing paternity).

77. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (holding that an unwed father was entitled to a hearing on his fitness as a parent before his children could be removed in a dependency proceeding) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *May v. Anderson*, 345 U.S. 528, 533 (1953)).

78. 424 U.S. 693 (1976). The Court clarified the scope of privacy deserving constitutional protection and held that without more, damage to reputation alone does not implicate a fundamental liberty interest. See *id.* at 713.

79. See *id.* at 713.

sex offenders violates the right of procreative freedom. To render a convicted sex offender virtually impotent is to deprive him of his right to procreate, a right characterized in cases such as *Skinner* as "one of the basic civil rights of man."<sup>80</sup> In addition, castration by periodic injections represents a more intrusive procedure than a vasectomy because it results in a diminution of the sex drive. While proponents of the new statute argue that the chemical castration procedure involves only a temporary interference with an individual's ability to reproduce, the individual's ability to procreate is still infringed upon during the period of treatment. Moreover, the new statute provides courts with the authority to order that the injections be administered for life.<sup>81</sup>

### C. Cruel and Unusual Punishment

Techniques outside the scope of traditional penalties, such as fines and incarceration, are constitutionally suspect.<sup>82</sup> Courts have invalidated several medical treatments as cruel and unusual punishment and view with particular disfavor experimental, peculiar, and ineffective "therapies."<sup>83</sup> In *Skinner*, Justice Jackson wrote, "[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>84</sup>

In reasoning that echoes a cruel and unusual punishment analysis, the court in *People v. Gauntlett*<sup>85</sup> struck down a sentence compelling a man convicted of a sexual offense to submit to MPA injections as an unlawful condition of probation and unauthorized by state law because MPA had not received FDA approval specifically for chemi-

80. *Skinner*, 316 U.S. at 541.

81. See FLA. STAT. § 794.0235(2)(a) (1997). Given the current levels of concern about sexual predators, the author believes that a sentence of weekly drug injections "for life" will be the norm, rather than the exception, should the new law be held constitutional.

82. See *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (holding that the expatriation of a U.S. Army deserter exceeded Congress' war power).

83. See *Knecht v. Gillman*, 488 F.2d 1136, 1140 (8th Cir. 1973) (disallowing the administration of a vomit-inducing drug to nonconsenting mental institution inmates); *Mackey v. Procunier*, 477 F.2d 877, 877-78 (9th Cir. 1973) (holding that a prisoner challenging the use of a fright drug as aversive therapy had sufficiently alleged a claim of cruel and unusual punishment); *Rennie v. Klein*, 462 F. Supp. 1131, 1143 (D. N.J. 1978) (finding that the forcible administration of psychotropic medication was a treatment plan and not punishment because the medication had therapeutic value, was recognized as an acceptable medical practice, did not cause unnecessarily harsh side effects, and was part of a continuing psychotherapeutic program).

84. *Skinner*, 316 U.S. at 546 (Jackson, J., concurring).

85. 352 N.W.2d 310 (Mich. Ct. App. 1984), *modified*, 419 N.W.2d 909 (Mich. 1984), *appeal after remand*, 394 N.W.2d 437 (Mich. Ct. App. 1986); *Gauntlett v. Kelley*, 658 F. Supp. 1483 (W.D. Mich. 1987) (denying the petition for writ of habeas corpus), *aff'd*, 849 F.2d 213 (6th Cir. 1988).

cal castrations, and had not gained acceptance in the medical community as a safe and effective treatment for males.<sup>86</sup> While chemical castration has yet to be analyzed pursuant to the federal Constitution, courts have held surgical castration to be violative of the Eighth Amendment's proscription against cruel and unusual punishment. In holding that a fine for assault and battery was within the sentencing parameters established by a Georgia statute, the court in *Whitten v. State*<sup>87</sup> explained that quartering, burning, hanging in chains, and castration are cruel and unusual punishments.<sup>88</sup> In *Davis v. Berry*,<sup>89</sup> the court struck down an Iowa statute that authorized vasectomies for repeat felons as cruel and unusual punishment, and as violative of both equal protection and due process.<sup>90</sup> The court distinguished vasectomy from surgical castration, but reasoned that the two procedures induced similar effects on the defendant.<sup>91</sup> Vasectomy, like castration, was held to be cruel and unusual punishment because "the humiliation, degradation, and mental suffering are always present and known."<sup>92</sup>

#### D. Due Process and Equal Protection

Although courts maintain great discretion in imposing terms of probation, all probationary conditions must meet the requirements of the reasonable relationship test.<sup>93</sup> Probationary conditions must be reasonably related to the crime for which the offender was convicted, to the rehabilitation of the offender in order to prevent future criminality, or to the promotion of public safety.<sup>94</sup> The imposed condition

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86. See *Gauntlett*, 352 N.W.2d at 315-17. The *Gauntlett* court explained it was not deciding the case on constitutional grounds because the case could be decided pursuant to state law. See *id.* at 314.

87. 47 Ga. 297 (1872).

88. See *id.* at 302.

89. 216 F. 413 (S.D. Iowa 1914), *rev'd on other grounds*, 242 U.S. 468 (1917).

90. See *id.* at 416.

91. See *id.*

92. *Id.* at 416-17.

93. See *United States v. Stine*, 521 F. Supp. 808, 809 (E.D. Pa. 1981), *aff'd*, 675 F.2d 69 (3d Cir. 1982) (holding that a condition of probation requiring convicted felons to submit to psychiatric counseling satisfied the reasonable relationship test).

94. See *United States v. Tonry*, 605 F.2d 144, 148 (5th Cir. 1979) (affirming the condition that the probationer not participate in any political activities because the restriction was reasonably related to his conviction of illegally accepting campaign contributions); *Higdon v. United States*, 627 F.2d 893, 897 (9th Cir. 1980) (holding that the probationary conditions requiring the forfeiture of assets and charitable work were not intended as rehabilitative); *M.C.L. v. State*, 682 So. 2d 1209, 1213 (Fla. 1st DCA 1996) (upholding the moral probation requirement because it was reasonably related to the crime); *Fernandez v. State*, 677 So. 2d 332, 335 (Fla. 4th DCA 1996) (invalidating a probation requirement that the defendant submit to and pay for random alcohol tests); *Howland v. State*, 420 So. 2d 918, 919-20 (Fla. 1st DCA 1982) (holding a condition of probation prohibiting a convicted child abuser from fathering a child invalid because it interfered with noncriminal conduct and was not reasonably related to past or future criminality).

may not be overbroad in its application.<sup>95</sup> The condition must also be narrowly tailored to meet the goal of rehabilitation "without unnecessarily restricting the probationer's otherwise lawful activities."<sup>96</sup>

Chemical castration fails both prongs of the reasonable relationship test with regard to non-paraphiliacs and involuntarily-treated paraphiliacs. First, those who assert that the government's interest in protecting the public is met by removing an offender's ability to commit future sex crimes fail to recognize that continued incarceration is a more narrowly tailored means of furthering the state interest than chemical castration. Second, because the non-paraphiliac's conduct is often motivated by anger and hatred rather than sexual desire, a treatment that merely curbs sexual desire bears no reasonable relationship to the offender's criminal behavior.<sup>97</sup> Third, application of chemical castration to all repeat offenders violates the requirement that a condition of probation not be overbroad. Because chemical castration is an ineffective treatment for non-paraphiliacs, it cannot meet its intended goal in this class of sex offenders where the purpose of probation is to rehabilitate.<sup>98</sup> Fourth, the statute strips the courts of any discretion to make an individual determination of the suitability of MPA treatment for repeat sexual offenders. Periodic, indefinite injections are mandated for repeat sex offenders, regardless of how dangerous the drug may be and whether the procedure offers any effective treatment.<sup>99</sup> The statute's mandate is particularly inappropriate for a sentence that requires the ingestion of a drug that may be totally ineffective and may inflict serious side effects.<sup>100</sup> Fifth, chemical castration does not necessarily prevent future

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95. See *Hughes v. State*, 667 So. 2d 910, 912 (Fla. 4th DCA 1996) (striking down as overbroad a probationary condition that forbid the defendant from coming within 250 miles of the victim); *Williams v. State*, 661 So. 2d 59, 61 (Fla. 2d DCA 1995) (invalidating a probationary condition that the defendant waive confidentiality of random blood and urine tests because it was overbroad); *People v. Zaring*, 8 Cal. App. 4th 362, 371 (Cal. Ct. App. 1992) (invalidating a condition of probation that the defendant not become pregnant because it was not reasonably related to the crime committed or to future criminal behavior).

96. *Higdon*, 627 F.2d at 898; see also *Brodus v. State*, 449 So. 2d 941, 942 (Fla. 2d DCA 1984) (invalidating the condition prohibiting a drug user from living with an unrelated female); *Rodriguez v. State*, 378 So. 2d 7, 10 (Fla. 2d DCA 1979) (invalidating a condition prohibiting a convicted child abuser from marrying or becoming pregnant).

97. See *Russell*, *supra* note 2, at 426-59; *Fitzgerald*, *supra* note 32, at 4-5; *Icenogle*, *supra* note 36, at 285, 288-93.

98. See *Komisky v. State*, 330 So. 2d 800, 801-02 (Fla. 1st DCA 1976) (finding that the purpose of probation is primarily to rehabilitate, not to punish).

99. See FLA. STAT. § 794.0235(1)(b) (1997).

100. See *Washington v. Harper*, 494 U.S. 210, 227 (1990) (allowing antipsychotic medication to be administered only after a determination that an inmate is dangerous and that the drug is in the inmate's best medical interest); *Vitek v. Jones*, 445 U.S. 480, 493-94 (1980) ("A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the State . . . to subject him to involuntary psychiatric treatment without affording him additional due process protections."). The author does not doubt that some prosecutors and some trial judges will read section 794.0235, *Florida Statutes*, to require "the weekly ad-

criminality because the treatment does not address the offender's violent tendencies and thus does not curb an offender's urge to commit acts of sexual battery. In fact, some experts fear that chemical castration will, because of the shame it instills, augment the violent nature of some offenders.<sup>101</sup> Moreover, because non-paraphiliac offenders are motivated not by sexual drive, but by intense feelings of hatred and hostility, the procedure may cause an increase in the occurrences of this type of sexual battery.<sup>102</sup>

Finally, there is the issue of gender. On its face, the statute is gender neutral. The consequences, however, are not. Both males and females who commit sexual battery are theoretically subject to the statute. MPA was designed to be used by women as a safe contraceptive. It has no effect on the female sex drive.<sup>103</sup> In contrast, MPA has been legislatively mandated for use in a biological experiment designed to curb the sex drive of men convicted of sexual battery. The long-term physical and psychological effects of the administration of the drug are unknown.<sup>104</sup>

In sum, the diagnosis of the cause of a particular sexual battery is difficult and requires a comprehensive evaluation of the driving forces behind the behavior as well as the emotional responses to the behavior.<sup>105</sup> The new statute does not take into account the complexities of the causes of sexual battery. Instead, it provides the court with a single solution—the involuntary injection of drugs into the body of a defendant over an extended period of time—which is highly problematic and perhaps dangerous.

### *E. Double Jeopardy*

The Double Jeopardy Clause of the Fifth Amendment and article 1, section 9 of the Florida Constitution provide that no person shall be subject for the same offense "twice put in jeopardy of life or limb."<sup>106</sup> These provisions protect against a second prosecution for the same offense after conviction or acquittal, and multiple punishments for the same offense.<sup>107</sup>

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ministration of injections of MPA for the natural life of the defendant" based upon the finding of a "medical expert" who has never treated a sex offender with MPA. The "expert" will likely predict that the defendant will not have an allergic reaction to MPA nor will he experience any unanticipated side effects.

101. See Vanderzyl, *supra* note 2, at 133.

102. See *id.*

103. See Harvard Note, *supra* note 17, at 803.

104. See Fitzgerald, *supra* note 32, at 9.

105. See Berlin & Meinecke, *supra* note 35, at 601.

106. U.S. CONST. amend. V.

107. See *Arizona v. Manypenny*, 451 U.S. 232, 246 (1981) (holding that a criminal appeal by the prosecution is permissible when such an appeal is permitted by federal statute); *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (finding that a trial court divided a charge into separate parts, resulting in multiple convictions and subjecting a defendant to double

In *State v. Woodland*,<sup>108</sup> the court held that the prosecution for violation of probation and contempt would subject the defendant to double jeopardy.<sup>109</sup> Because the defendant's violation of probation would result in sanctions or revocation of probation, double jeopardy attaches and the state cannot also charge the defendant with a separate felony. This is distinguishable, however, from a violation of probation that would constitute a crime whether it is committed by a probationer or not.

Under the new law, submission to MPA treatment is a condition of probation for repeat sexual offenders, and can be a condition of probation for first-time offenders.<sup>110</sup> Should a defendant decide to withdraw from the administration of MPA, he will be guilty of a violation of probation.<sup>111</sup> In sentencing a defendant for violation of probation, a judge may not impose a subsequent sentence that exceeds the sentence he or she might have originally imposed.<sup>112</sup> Failure to comply with medical treatment is not a criminal act *except* as a violation of probation.<sup>113</sup> Thus, double jeopardy prohibits the state from charging a defendant who withdraws from treatment with a crime other than violation of probation.

The new statute, however, attempts to circumvent these problems by classifying this specific violation of probation—failure to submit to MPA treatment—as a separate and distinct second-degree felony. If valid, this provision will permit the court to sentence the offender to serve the remainder of his sentence for sexual battery, as well as an additional fifteen years as provided in section 775.082, *Florida Statutes*, for terminating the drug treatment.<sup>114</sup>

The purpose of the federal and state prohibitions against double jeopardy is to prevent the government, with all its resources and power, from making repeated attempts to convict or punish an individual for an "alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."<sup>115</sup> It should be equally impermissible for the Florida Legislature to circumvent this constitutional principle by criminalizing the decision to withdraw from medical treatment. Because failure to submit to medical treatment is not inherently a

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jeopardy); *Lippman v. State*, 633 So. 2d 1061, 1064 (Fla. 1994) (holding that a modification of probation that has a punitive effect is double jeopardy).

108. 602 So. 2d 554 (Fla. 4th DCA 1992).

109. *See id.* at 555.

110. *See* FLA. STAT. § 794.0235 (1997).

111. *See id.* § 794.0235(5)(a)-(b).

112. *See Poore v. State*, 531 So. 2d 161, 164 (Fla. 1988).

113. *See Green v. State*, 463 So. 2d 1139, 1139 (Fla. 1985) (holding that the state can try the probationer for a crime that triggered probation revocation proceedings, even though there was insufficient evidence to revoke the probation).

114. *See* FLA. STAT. § 775.082(3)(c) (1997).

115. *Green v. United States*, 355 U.S. 184, 187 (1957).

criminal activity, as opposed to proactively committing a robbery while on probation, the courts should view this legislative attempt to avoid the application of the double jeopardy clauses as suspect.

## V. A CIVIL LIBERTIES ANALYSIS

Civil libertarians assert three positions on the use of MPA as an alternative to incarceration in sex offender cases. First, the use of drugs on sex offenders is impermissible per se.<sup>116</sup> This position rests on the notion that the use of behavioral drugs unduly intrudes on the personality of the individual in violation of the First Amendment<sup>117</sup> and could amount to cruel and unusual punishment under the Eighth Amendment. Second, the use of drugs as a condition of probation is impermissible because it is involuntary and coerced.<sup>118</sup> This approach rejects the argument that an individual, with informed consent, can rationally and permissibly choose drugs over incarceration.

Third, as a procedure of "last resort," treatment administered in conjunction with psychotherapy can be a permissible alternative to incarceration.<sup>119</sup> Few civil libertarians would assert a per se position against the use of behavioral drugs if the prescribed treatment is medically proven to be safe with reversible side effects. However, civil libertarians are unable to enthusiastically embrace the idea of drug therapy on defendants for fear that the use of drugs to protect the public safety will supersede other legitimate concerns, such as the rehabilitation of the defendant. In addition, a systematic bias in favor of drug therapy can lead to overuse and misjudgment about who receives treatment. If placed in the wrong hands and under the wrong conditions, supposedly therapeutic treatment could victimize rather than benefit patients, much like a "Clockwork Orange" scenario.<sup>120</sup>

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116. See Memorandum from the Due Process Committee to the ACLU Board of Directors (Mar. 28, 1991) (on file with the ACLU of Florida, Tallahassee, Fla.) [hereinafter Due Process Memo].

117. MPA effectively suppresses the paraphiliac's erotic fantasies. See Berlin & Meinecke, *supra* note 35, at 603. In this way, one could argue, the drug interferes with the paraphiliac's thought processes. See Melella et al., *supra* note 45, at 227. The U.S. Supreme Court has held that the state has no right to control an individual's thoughts even if they are immoral. See *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969) ("Whatever the power of the state to control public dissemination of ideas inimical to public immorality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."). In *Rogers v. Orkin*, 478 F. Supp. 1342 (D. Mass. 1979), the court enjoined doctors from forcibly medicating patients in a mental institution because the capacity to think and decide unencumbered by the state is a fundamental right. See *id.* at 1366-67.

118. See Due Process Memo, *supra* note 116.

119. See *id.*

120. See *id.*

However, the critical issue in this debate is whether the use of MPA is part of a program of punishment or part of a program of treatment.<sup>121</sup> If treatment is the goal, civil libertarians are willing to countenance a program, provided the drugs are safe and the procedural requirements for assuring voluntary participation in the treatment are met. Where punishment is the goal, civil libertarians categorically oppose the use of behavioral drugs. Consequently, it is not surprising the ACLU of Florida opposed the enactment of chapter 97-184, Florida Laws.<sup>122</sup>

#### VI. A MORE RATIONAL APPROACH: THE ACLU OF FLORIDA POLICY ON THE USE OF ANTIANDROGEN DRUGS IN SEX OFFENDER CASES

When the state seeks to rehabilitate an offender through drug therapy, serious civil liberties concerns arise. The ACLU of Florida opposes forcible medication in any context because administration of behavior-modifying drugs by the state is open to far-reaching abuse.<sup>123</sup> Individuals have the right to make autonomous decisions about the use of any drug that might affect their cognitive or physical functions, which includes the right to refuse unwanted medications.

Even the consensual use of a drug does not eliminate all civil liberties concerns. Consent given in the context of a choice between incarceration and non-incarceration may not be fully voluntary. Additionally, drugs, even when consensually taken, pose a risk of cognitive or physical side effects, not all of which may be known to the individual at the time of choice. The ACLU of Florida opposes any attempt to coerce an individual into taking the drug. The ACLU of Florida also opposes the failure to advise the individual fully of the legal and medical consequences of taking the drug. Furthermore, the ACLU of Florida opposes any attempt to offer a defendant the opportunity to avoid incarceration by taking a drug that is dangerous or that has a significant irreversible effect on an individual's cognitive

121. See *supra* Part IV.C.

122. See ACLU POSITION STATEMENT, *supra* note 10.

123. Subsequent to the announcement by Governor Chiles that he would allow House Bill 83 to become law without his signature, the ACLU of Florida state legal panel requested authorization to file a constitutional challenge to the new law, based upon the principles set forth in this policy statement. The request was approved by the ACLU Affiliate Board of Directors at its spring meeting in West Palm Beach, Florida, on May 17, 1997. The ACLU cannot challenge the statute until someone who committed a sex offense on or after October 1, 1997, is sentenced under the statute. See FLA. STAT. § 794.0235 (1997). Much of the language of the policy statement was adapted from the Report of the National ACLU Due Process Committee, dated September 24, 1993. The Due Process Committee studied the use of antiandrogen drugs as an alternative to incarceration in sex offender cases for over three years. However, the National ACLU Board of Directors was not able to reach a consensus as to a specific policy on the issue.

capacity or an important physical function, such as the ability to conceive children.<sup>124</sup>

The ACLU of Florida does not oppose the use of antiandrogen drugs under certain controlled circumstances as an alternative to incarceration for convicted sex offenders. Because the ACLU of Florida respects individual autonomy and supports the principle that punishment should be no more restrictive of liberty than necessary, an individual's choice of whether to accept an antiandrogen drug is entitled to considerable respect. In addition, because this choice arises in the inherently coercive context of sentencing, and because of the capacity for abuse of this sentencing option, such treatment should be available only under the most carefully controlled circumstances.

The following are procedures that the ACLU of Florida would require in a probationary drug treatment program for sentenced sex offenders. A psychologist or psychiatrist must certify that the defendant's sexual disorder is one that may be treated effectively with the drug. Drug treatment may be used in lieu of incarceration only when the use does not pose significant health risks to the defendant. The drug must not be experimental and must be customarily prescribed by the medical community for this use. Moreover, the effects of the drug must be reversible when treatment ceases. Finally, the drug must be used in conjunction with appropriate psychotherapy.

The defendant must consent to the treatment program after consultation with counsel. To ensure that the defendant's consent is informed, the alternative incarceration sentence should be devised without regard to available drug treatment and in accordance with normal sentencing practices. The defendant should have a consultation with appropriate medical professionals informing him of the effects the drug will have on him, including possible long- and short-term side effects, and the proposed course of psychotherapy. If the defendant cannot afford the consultation, the state should bear the cost.

At sentencing, the court must ask the defendant on the record if he fully understands the treatment and whether he has been provided with all necessary information. The court must inform the defendant of the sentence the court will impose if the defendant does not undertake drug treatment, and the maximum length of the alternative probationary term. Finally, the court must inform the defendant that he may withdraw from treatment at any time and return to the court for sentencing. If the defendant does not wish to undertake the treatment, the court may not order it.

If the defendant begins treatment and subsequently decides to withdraw, the court should not automatically impose the sentence of

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124. See Due Process Memo, *supra* note 116.

incarceration announced at the original sentencing. Instead, the court should consider the defendant's reasons for withdrawing from treatment along with any other possible mitigating information. In addition, the court may not impose a longer sentence of incarceration than the sentence announced at the original sentencing hearing.

## VII. CONCLUSION

The reasoning advanced for the enactment of Florida's chemical castration statute is that rehabilitation of sex offenders and the safety of Florida's citizens are sufficient justifications for establishing chemical castration as a condition of release for convicted sex offenders.<sup>125</sup> In response, the medical experts, whom the Legislature chose to ignore, maintained that rehabilitation and reduction in recidivism can only occur when the drug addresses the specific behavioral abnormality of the particular sex offender, the treatment is voluntary and not coerced, the individual genuinely wants to address his aberrant behavior, and there is extensive therapeutic counseling and monitoring of the individual.<sup>126</sup>

How 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? How can Floridians have confidence in a legislative enactment, adopted under the guise of rehabilitation, that mandates a medical practice that is condemned as experimental and even irresponsible by medical authorities?<sup>127</sup>

One of the nation's leading authorities on MPA, Dr. Fred Berlin, founder of the Biosexual Psychological Clinic at the John Hopkins Hospital, believes that prevailing research demonstrates that MPA will drastically reduce the rate of recidivism, or reversion to criminal behavior, of *some* sex offenders after they are released from prison.<sup>128</sup> Most medical experts agree that, under proper conditions, the drug can be an effective rehabilitative tool for a narrow category of sex offenders.<sup>129</sup> Consequently, there is no reason to propose an absolute

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125. See *supra* note 8.

126. See Fitzgerald, *supra* note 32, at 9.

127. See *id.* Absent a more proven and effective treatment for the causes of acts of sexual battery, incarceration will always provide greater protection to the public because it removes the offender from society. Chemical castration, improperly prescribed, allows the offender greater access to potential victims without eliminating the hostility and rage that precipitates most criminal sexual conduct. In addition, chemical castration subjects an offender to immediate, potentially adverse physiological effects and significant future health risks. Since continued incarceration does not expose a convicted sex offender to these varied risks, it constitutes a less restrictive means of dealing with sex offenders.

128. See Fred S. Berlin, *The Case for Castration, Part 2*, Wash. Monthly, May 1994, at 28, 29.

129. See *supra* note 36.

ban on the use of antiandrogen drugs, like MPA, as an alternative to incarceration for some convicted sex offenders. We can, however, do far better than Florida's new chemical castration statute.

The Florida Legislature, in its haste to address a serious societal problem, has enacted a statute that not only ignores sound medical judgment, but is in all probability unconstitutional. One cannot simply provide trial judges with the authority to direct individuals to have chemicals injected into their bodies on a weekly basis for perhaps the rest of their lives without more thought than is evidenced in this legislation. In any other context, the action of the Florida Legislature would be deemed practicing medicine without a license.

