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COMMENT:
**CHEMICAL CASTRATION: OREGON'S INNOVATIVE APPROACH TO SEX OFFENDER
REHABILITATION, OR UNCONSTITUTIONAL PUNISHMENT?**

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In Oregon, a sexual offender is convicted of rape in the first degree, sodomy in the first degree, and sexual abuse in the first degree - his victim, a child under the age of twelve. n1 A father is convicted of raping and sodomizing his ten-year-old daughter. n2 Another offender is convicted of four counts of sodomy in the first degree, three counts of rape in the first degree, four counts of sexual abuse in the second degree, unlawful sexual penetration in the first degree, and two counts of unlawful sexual penetration in the second degree. n3 A defendant, charged with the rape, sodomy, and sexual abuse of a five-year-old, awaits a new trial; n4 he was previously convicted for the attempted sexual abuse of an eleven-year-old whom he babysat. n5

Sex crimes occur with shocking frequency in the United States. The alarming number of sex crime convictions and the seriousness [*268] of victim impacts have prompted government officials to find innovative methods to combat sex crimes. One alternative approach features compulsory chemical castration of convicted sex offenders. Although castration may seem like a step away from modern notions of retribution and rehabilitation, medical advances have turned the use of chemical castration into the new rage for fighting sex crimes. ORS 144.625, n6 passed by the Oregon legislature in the summer of 1999, is one example of castration legislation arising throughout the United States. This statute mandates the Department of Corrections to establish a supervised pilot treatment program for certain convicted sex offenders. n7 Treatment is mandatory for those individuals selected to participate in the program, which involves the injection of sex-drive-reducing hormones. n8

This Comment provides a comprehensive evaluation of the use of chemical castration to treat sex offenders. Part I explores the sex crime epidemic in the United States and the historical and contemporary uses of castration both internationally and in the United States. Part II evaluates current Oregon laws affecting convicted sex offenders, with a specific focus on ORS 144.625, Oregon's chemical castration pilot program. This part also discusses the antiandrogen drug, medroxyprogesterone acetate, and its side effects. Part III analyzes the constitutionality of the new Oregon castration law, focusing on issues of cruel and unusual punishment, double jeopardy, and ex post facto laws. Part IV examines a civil liberties approach to chemical castration and its possible use as an alternative to incarceration.

I

Sexual Assault and the History of Surgical and Chemical Castration

A. The Sex Crime Epidemic

In the United States, incidences of sexual assault and rape occur with outrageous regularity. According to a study by the U.S. Department of Justice, a woman is raped every two minutes in the United States. n9 In 1996 alone, 307,000 women were victims [*269] of rape, attempted rape, or sexual assault. n10 Within a two-year period, more than 670,000 women were victims of rape, attempted rape, or sexual assault. n11 Child molestation also occurs frequently in the United States, with conservative estimates suggesting sexual abuse of 100,000 to 500,000 children each year, costing the United States \$ 2,055,528,000 to incarcerate those offenders in 1990 alone. n12 Sex abuse does not discriminate between the sexes: one study found that approximately one of every six boys is sexually abused before the age of sixteen. n13 In an adult retrospective study, 27% of the women and 16% of the men reported sexual victimization, with a median age for reported abuse of 9.9 for boys and 9.6 for girls. n14 Although statistical estimates n15 show that only a portion of victims report sexual assault to law enforcement officials, n16 sex crime convictions are frequent and numerous. In Oregon alone, sex offenders comprise 29% of all incarcerated inmates in the prison system. n17

Child sexual abuse may lead to long-term traumatic effects, which may subsequently develop into an area of adult conflict. These long-term effects include "fear, anxiety, depression, anger, hostility, inappropriate sexual behavior, poor self esteem, tendency [*270] toward substance abuse and difficulty with close relationships." n18 As adults, these victims have been found to have interpersonal relationship problems associated with an underlying mistrust, along with "sexual guilt," or "guilt derived from sexual pleasure." n19

The effects of child sexual abuse may also increase the propensity for criminal behavior. An estimated 31% of women in prison reported being abused as children, along with approximately 95% of teenage prostitutes. n20 Studies with males found that "one-third of juvenile delinquents, 40% of sexual offenders and 76% of serial rapists report they were sexually abused as youngsters." n21

The frequency and dangerous nature of sexual abuse forces society to treat it as a major social problem. As such, from perpetration of the offense to post-prison supervision of the offender, use of the criminal justice system is required to help protect victims of sexual abuse, to prevent future criminal acts, and to remedy the frequent occurrence of sex crimes.

B. Use of Castration Internationally

Castration is currently used as a form of rehabilitation in western countries such as Denmark, Germany, Norway, Sweden, and Switzerland, with some of these countries physically castrating convicted rapists. n22 The German castration law, however, legalizes only voluntary chemical castration. n23 In effect since 1969, this law provides that an independent commission of experts, after reviewing medical evidence supporting offenders' requests to participate in the procedure, must determine which offenders will undergo treatment. The use of chemical castration in Europe has proven to be very successful, with studies showing a drop in recidivism from 65% to 15% after antiandrogen treatment. n24 A study in Denmark found that only 2.2% of 900 sex offenders relapsed into former deviant behavior after undergoing [*271] the chemical procedure. n25

Although most American courts have rejected the use of surgical castration on grounds such as cruel and unusual punishment, n26 recent medical advances have helped bolster the trend towards acceptance of chemical castration in the legal system. n27

C. Castration in the United States

Castration has been used throughout history to punish sex offenders. In 1776, Thomas Jefferson promoted surgical castration for offenders convicted of sodomy, rape, or polygamy. n28 The sentence of castration given to those convicted of sex crimes continued into the early twentieth century. The eugenics movement of the early twentieth century endorsed both castration and sterilization to punish and to "achieve the elimination of social ills through biological reformation." n29 Certain states even had laws that required castration as a punishment for a variety of infractions, although they focused mainly on recidivists. n30 By the end of World War II, however, the use of castration as a means to regulate criminal behavior fell into disfavor. n31

[*272]

II

ORS 144.625: Oregon's Chemical Castration Pilot Program

A. Current Oregon Laws Affecting Convicted Sex Offenders

Under Oregon law, a sex offender is defined as a person who:

- (1) has been convicted of a sex crime;
- (2) has been found guilty except for insanity of a sex crime;
- (3) has been found to be within the jurisdiction of the juvenile court for having committed an act that if committed by an adult would constitute a sex crime; or
- (4) is paroled in Oregon under ORS 144.610 after being convicted in another jurisdiction of a crime that would constitute a sex crime if committed in Oregon. n32

The Oregon Revised Statutes provide a long list for determining what constitutes a "sex crime," including offenses such as rape, sodomy, and sexual abuse. n33 For purposes of the chemical [*273] castration pilot program, acts of public indecency also constitute "sex crimes."

A person commits the crime of public indecency if while in, or in view of, a public place the person performs:

- (a) An act of sexual intercourse;
- (b) An act of deviate sexual intercourse; or
- (c) An act of exposing the genitals of the person with the intent of arousing the sexual desire of the person or another person. n34

Currently, numerous Oregon laws govern convicted sex offenders. These laws provide for the strict punishment of sex offenses, and/or were put in effect for purposes of rehabilitation and public safety. They range from imposing mandatory minimum sentences for dangerous sex offenders n35 to requiring supervision of persons found to be sexually dangerous. n36 Additionally, anyone convicted of a sex offense in Oregon, or anyone convicted in another jurisdiction of a crime that would constitute a sex crime if committed in Oregon, must complete a sex offender registration form within ten days of discharge from the correctional institution. n37 The offender must also report in person to the Department of State Police, a chief of police or a county sheriff, or to the supervising agency. n38 This must be done once each year and whenever he or she changes residence. n39 If a sex offender is determined to be predatory, the supervising agency may notify anyone whom the agency determines is appropriate concerning the offender's legal status, regardless of the nature of the crime for which the offender is being supervised. n40 Furthermore, state agencies use Internet websites to post general information about sex offenders. These sites may contain the offender's photograph, legal status, and current address. n41 Oregon [*274] also has experimented with innovative therapies for sex offenders, including a program that subjected convicted rapists to electric shock in an attempt to "create a phobic response to rape." n42 Given the current laws affecting sex offenders, it is not surprising that Oregon recently joined several other states n43 in subjecting convicted sex offenders to chemical castration as a condition of parole or post-prison supervision.

ORS 144.625, which was approved on July 1, 1999 by Governor John A. Kitzhaber, directs the Department of Corrections to establish a supervised pilot treatment program for forty to fifty convicted sex offenders who are eligible for release within six months on parole or post-prison supervision. n44 The purpose of the program "is to reduce the risk of reoffending after release on parole or post-prison supervision" by providing antiandrogen treatment to those selected sex offenders. n45 This is consistent with the Department's policy to promote public safety by "holding offenders accountable for their actions, and by seeking ways to reduce their risk of committing future criminal acts." n46 The Department provides convicted sex offenders with hormones or antiandrogens, such as medroxyprogesterone acetate (MPA), although persons undergoing the treatment must pay all costs of the program. n47 Chemical castration is mandatory for those eligible sex offenders whose "suitability" for hormone or antiandrogen treatment upon release has been determined. n48 The Department must decide which convicted sex offenders would [*275] most likely benefit from the treatment and refer them to a competent physician for medical evaluation. n49 Those identified as medically contraindicated after an evaluation by a physician are excluded from the treatment program. n50 However, nothing prohibits the State Board of Parole and Post-Prison Supervision from requiring hormone or antiandrogen treatment for a person whom the Department of Corrections did not screen or evaluate. n51 The supervising county community corrections agency monitors the offender's compliance with chemical treatment by implementing the following procedures: the community practitioner must (1) promptly notify the offender's assigned parole officer of any failure by the offender to comply with the program; (2) administer treatment and maintain control of the medication between doses; and (3) test the offender's blood at least once every three months to determine if the offender is complying with the treatment program. n52 The community practitioner is also charged with increasing the frequency of testing when relapse warning signs occur. n53 Failure to cooperate in the treatment program, or use of any steroid or other chemical to counteract the treatment, constitutes a violation of a condition of parole or post-prison supervision, and the sex offender becomes subject to sanctions. n54

On its face, ORS 144.625 applies to "persons convicted of sex crimes," which arguably includes female sex offenders. However, MPA does not affect females in the same way males are affected by the drug: it acts as a birth control device for females and does not suppress their "erotic desires." Consequently, it appears ORS 144.625 is targeted specifically at male sex offenders, because providing such "treatment" for female offenders does not comport with the program's goal to reduce the risk of reoffending. n55

[*276] The Department of Corrections views sex offender treatment selection as a medical, rather than a legal, judgment. n56 Suitability for participation in the Department's pilot program is determined by the following criteria: the inmate (1) has a current or past conviction for a sex crime, (2) is within six months of release on parole or post-prison supervision, and (3) the inmate's present incarceration is for a second conviction of a sex crime (recidivistic sex offender), the inmate lacks intellectual capacity for impulse control (mentally retarded or disabled sex offenders) or has demonstrated an excessive sex drive (hyper-sexualism). n57 Recidivistic sex offenders are determined suitable when twice convicted of offenses such as first-degree sexual abuse. n58 Because recidivism best evidences long-term risks of reoffense, these individuals are considered prime candidates for the treatment program. n59 Mentally retarded or disabled sex offenders are also considered prime candidates because these individuals have difficulty controlling their sex drives. n60 Finally, those persons demonstrating hyper-sexualism, which may include frequent masturbation, are targeted as prime candidates. n61 These individuals are referred either by the department's counselors or by state parole and probation officers. n62

B. The Drug: Medroxyprogesterone Acetate (Antiandrogens)

Medroxyprogesterone acetate, better known as the female contraceptive Depo-Provera, n63 is specifically mentioned by the Oregon legislature as the form of antiandrogen or hormone [*277] treatment to be provided for those selected for the procedure. Antiandrogen therapy (estrogen) was first used in 1949 to reduce the sexual drive in a transvestite pedophile. n64 Since then, a raging controversy has arisen concerning the ethical use of MPA on sex offenders as a form of therapy. n65 Similar to the administration of Depo-Provera as a female contraceptive, MPA is given in the form of injections and can therefore be easily administered by the Department of Corrections. n66

MPA is proven to substantially lower serum testosterone by "accelerating the metabolism of testosterone and by inhibiting release of luteinizing hormone from the pituitary gland." n67 This suppresses testosterone production in the testes and facilitates its elimination from circulation. In one report, testosterone levels dropped to as low as one-fourth of the patients' pretreatment levels. n68 Because MPA reduces the level of testosterone circulating through the bloodstream, it may help sex offenders by "lowering the intensity of inappropriate sexual cravings and the frequency of unacceptable erotic preoccupations." n69 When used on males, "MPA effectively suppresses erections, ejaculations, and reduces the frequency and intensity of erotic thoughts." n70 However, MPA is not a "cure" because it does not change the nature of the offender's sexual desire and inclination towards certain individuals, such as children. Because the prescription of MPA for paraphilic and other types of sex offenders remains a non-indicated use (not approved by the U.S. Food and Drug Administration), some argue that it is more difficult to medically justify the prescription of these drugs for paraphilia-related and other sexually related disorders. n71 MPA's effectiveness, however, [*278] is evidenced in a study conducted on twenty men at the Johns Hopkins Hospital in Baltimore. n72 In this study, eleven of twenty men treated with MPA

discontinued the use of the drug during the course of their treatment. n73 Within a year of discontinuing treatment, the recidivism rate rose dramatically: ten of the eleven individuals who ceased taking MPA relapsed by showing recurrences of sexually deviant behavior. In comparison, before those individuals discontinued therapy, only three of the twenty patients relapsed. n74

MPA is most effective with sex offenders who acknowledge the intolerable and uncontrolled nature of their sex drive. Some experts have classified sex offenders into four categories: (1) offenders who are known as "paraphiliacs" or individuals who use unacceptable stimuli such as children for sexual arousal, fantasy, and fulfillment; (2) offenders who generally confess to committing the crime, but transfer blame for the crime to "nonsexual or nonpersonal forces, such as alcohol, drugs, or stress"; (3) offenders who are violent criminals motivated by anger and hostility, rather than by sexual desire; and (4) offenders who normally deny the criminal nature of their actions or deny that they have perpetrated a crime. n75 MPA has proven effective for only paraphiliacs. n76 Many researchers note that the drug is not likely to have any meaningful influence on the three other types of sex offenders that may come within the reach of the program. n77 Studies indicate that the treatment is limited in use, proving ineffective for offenders motivated by anger and hostility. n78 Because distinct forces motivate each of the four types of sex offenders, [*279] legislative measures designed to reduce recidivism rates should specify treatment for offenders that would most benefit from MPA. Experts argue that "the pivotal criterion in calculating the treatability of a sex offender is his acknowledgment that his conduct is intolerable and beyond his control." n79 Thus, primarily those patients who acknowledge that their conduct is uncontrollable will respond favorably to MPA treatment.

Authorities also criticize the mandatory administration of MPA to sex offenders absent evidence that forced treatment is likely to be more effective than voluntary treatment. n80 Studies show that offenders who are involuntarily committed to a treatment facility are less likely to respond to the alternative treatment. n81 "The offender must cooperate with treatment in order to have any chance for containing the deviant sexuality." n82 Thus, the notion of voluntariness is acknowledged as being critical to treatment success. Dr. Fred S. Berlin, founder of the Sexual Disorders Clinic at Johns Hopkins University, also disagrees with involuntary use of antiandrogen treatment and cautions that a law mandating the procedure could actually make sex offenders more dangerous. n83 He reasons that if the sexual predator becomes "angry and bitter" over the treatment, the situation could become "potentially volatile." n84

Finally, physicians face the dilemma of whether professional ethics permit cooperation in oversight and administration of the mandated chemical treatments. Although the American Medical Association's Principles of Medical Ethics recognizes that practitioners have civic duties, a physician is not required to carry out duties that contradict fundamental medical ethical principles. As practitioners are required to avoid doing harm, they may have an ethical obligation to refuse to participate in legal procedures that are based not on sound medical diagnoses, but rather on legislatively defined behaviors. This dilemma is particularly poignant given that the Board of Parole and Post-Prison Supervision has [*280] the authority to require antiandrogen treatment without first obtaining an evaluation from, or having the offender screened by, a Department of Corrections practitioner. This eliminates the assurance an independent medical diagnosis provides by determining the offender's suitability for treatment. Without this determination, the community practitioner providing chemical treatment risks harming the offender if he is not the type of offender MPA treatment is designed to benefit, or if he would have been medically contraindicated after an evaluation by a competent physician.

C. MPA Side Effects

Although MPA diminishes sex drive and induces a feeling of sexual calm (reversible upon discontinuation), n85 its side effects are considerable. ORS 144.625 mandates that the Department of Corrections inform all sex offenders undergoing the procedure not only of the program's effects, but also of the drug's side effects. n86 Common problems include "weight gain, fatigue at the time of injection, hot and cold flashes, headaches, and insomnia." n87 Other reported side effects, although uncommon, include thrombophlebitis, n88 pulmonary thromboembolism, n89 lowered ejaculatory volume, nausea, skin sensitivity reactions, high fever, increased appetite, mental depression, loss of body hair, hyperglycemia, abnormal sperm, nightmares, dyspnea, n90 leg cramps, irregular gall bladder function and gallstones, hypertension, diverticulitis, n91 diabetic sequelae, hypogonadism, n92 malaise, n93 gastrointestinal complaints, and shrinkage of the prostate and [*281] seminal vessels. n94 MPA administration may also result in complete impotence and decreased erotic desire. n95

Although studies differ regarding whether men become feminized in appearance, at least one report recognizes the "rare feminizing effects [of MPA] such as breast enlargement and changes in hair distribution during prolonged treatment." n96 In at least one study, forty of forty-eight subjects taking MPA reported improvement - meaning diminished sexual drive and decreased frequency of sexual fantasies. n97 Also noted in the report was an increase in verbal communication, and patients showing more concern about their families. n98

III

Constitutional Considerations

ORS 144.625 raises multiple constitutional concerns, including violations of both federal and state constitutions prohibiting cruel and unusual punishment, double jeopardy, and ex post facto laws.

A. Cruel and Unusual Punishment

Both the Eighth Amendment of the United States Constitution and the Oregon Constitution protect individuals against cruel and unusual punishment. n99 Accordingly, Oregon's chemical castration law is unconstitutional if the procedure inflicts cruel and unusual punishment on the individual subjected to the procedure. To pass constitutional muster, therefore, ORS 144.625 must survive a two-part inquiry: (1) does chemical castration constitute punishment, and (2) if so, does it amount to cruel and unusual punishment?

1. Punishment or Rehabilitative Treatment?

At most, Oregon's chemical castration program may fall somewhere between treatment and punishment. The best way to prevent [*282] sex offense recidivism, studies suggest, is chemical treatment combined with behavioral therapy or psychotherapy. n100 In one study, psychological therapy alone was proven effective in reducing recidivism rates by up to eleven percent. n101 When coupled with MPA treatment, however, recidivism rates were further reduced by up to seventy-two percent. n102

The stated purpose behind ORS 144.625 is "to reduce the risk of reoffending after release on parole or post-prison supervision." n103 ORS 144.625 does not provide for psychological therapy as part of the castration procedure. Given that medical evidence suggests psychological therapy must be combined with the use of MPA for maximum therapeutic potential, n104 the state's ultimate goal is arguably not the treatment of the offenders.

Regardless of whether Oregon's chemical castration program is labeled "treatment for" versus "punishment of" the offenders, ORS 144.625 may still be subject to judicial scrutiny. n105 The legislative classification of a statute is not conclusive in determining a violation of the Eighth Amendment. n106 Despite benign legislative classifications, courts may look to the purpose and effect of the drug to determine if it passes Eighth Amendment scrutiny. n107 [*283] Thus, regardless of the program's legislative classification, it is necessary to determine whether the purpose and effect of the drug is cruel and unusual.

2. Cruel and Unusual?

Throughout history, varying punishments were deemed cruel and unusual, including surgical castration, n108 vasectomies, n109 and certain forms of the death penalty. n110 The Supreme Court has recognized that the meaning of "cruel and unusual" must draw from "the evolving standards of decency that mark the progress of a maturing society." n111 In Oregon, for a punishment to be declared "cruel and unusual" without reference to its duration, the punishment must be so disproportionate to the offense as to shock the moral sense of all reasonable men as to what is right and proper in the circumstances. n112 Under both constitutions, therefore, whether chemical castration is deemed cruel and unusual depends on modern society's values, morals, and notions of decency.

In *Furman v. Georgia*, n113 the Supreme Court of the United States set forth a four-pronged framework that is commonly used to determine whether a given punishment is cruel and unusual. In his concurring opinion, Justice Brennan stated:

The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes. n114

Under this framework, courts must consider under the totality of the circumstances whether the punishment is: "(1) inherently [*284] cruel or severe; (2) excessive, disproportionate, or unnecessary; (3) unacceptable to society; or (4) inflicted arbitrarily." n115

In applying the above criteria to ORS 144.625, MPA treatment is arguably not inherently cruel or severe, because it will most commonly only cause minor side effects, most of which are reversible upon discontinuation of the medication. Another safeguard offers exclusion from the program if the offender is determined medically contraindicated after evaluation by a physician. MPA also actually helps certain sex offenders by lowering testosterone levels, thereby reducing sexual imagery and controlling previously unmanageable urges. Moreover, unlike surgical

castration or vasectomy, MPA treatment does not mutilate the parolee and can have a rehabilitative effect during treatment. Finally, the injections themselves cause minimal discomfort and cannot be considered severe.

However, many courts have determined that even punishment or probation conditions involving little or no pain can be inherently cruel or excessive. n116 Humiliation, degradation, and other severe mental pain may be determined to be as cruel as infliction of physical pain and mutilation. n117 The court in *Davis v. Berry* n118 struck down on Eighth Amendment grounds an Iowa statute, which provided for the vasectomies n119 of repeat felons. Although the court distinguished surgical castration from vasectomy, it also noted that both induced similar effects on the defendant. The court held that vasectomy constituted cruel and unusual punishment because "the humiliation, the degradation, [and] the mental suffering are always present and known." n120

MPA treatment may also be considered inherently cruel or excessive when practiced on sex offenders whose health may be severely affected by the drug. The use of MPA and its uncommon but dangerous side effects may pose serious health risks to certain individuals. As noted earlier, side effects can include pulmonary [*285] thromboembolism (blockage of the pulmonary artery by foreign matter or by a blood clot), high fever, difficulty in breathing, elevated blood pressure, and irregular gall bladder function. n121 The drug may cause physical discomfort to the parolee, with side effects ranging from nausea to gallstones to painful inflammation in the intestinal tract. n122 What seems particularly cruel and excessive is that these side effects may be inflicted upon the sex offender without the individual benefitting from MPA's therapeutic effect. If anger or power motivated the offender to commit the sex crime, MPA will not help in rehabilitation because it has no effect on the focus of the offender's motivation to commit the crime.

However, because ORS 144.625 directs the Department of Corrections to refer those offenders who would most benefit from the treatment, this may not be an obstacle. Those deemed by the Department as most appropriate for the treatment include recidivistic offenders, mentally retarded or disabled offenders, and offenders displaying hyper-sexualism. If the Department selects offenders proven to respond well medically and psychologically to MPA treatment, use of the drug may not be considered inherently cruel, excessive, or unnecessary.

Use of MPA to castrate certain sex offenders does not appear to be unacceptable to society as a whole. Justice Marshall stated that whether punishment is cruel and unusual depends "on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable." n123 Given the complex nature of MPA and its effects on various sex offenders, most people are arguably not fully informed as to the purposes of MPA treatment or its side effects. Although medical and legal experts are split on the effectiveness of the treatment, n124 chemical castration does not appear to be unacceptable to society as a whole.

In fact, the use of chemical castration is often supported as "a fair condition of parole for repeat child molesters." n125 Because molesting or raping a child is also a serious violation of human [*286] rights, what may be termed the "eye for an eye" position rejects the argument that chemical castration violates human rights. n126 The argument is that "the rights of children [should not] be less important than those of convicted sex offenders." n127 Some commentators take a retributivist approach, noting that testosterone-lowering treatment and its side effects "can hardly be described as cruel and unusual" when compared to the crimes for which the sex offenders were convicted. n128

Additionally, the castration alternative should not be considered disproportionate punishment for a sexual abuse conviction given the seriousness of the crime and the impact and suffering of the victims. n129 In *Solem v. Helm*, n130 the Supreme Court expressly determined that the Eighth Amendment guarantees proportionality in non-capital sentencing. However, in *Harmelin v. Michigan*, n131 the Court held that a state may impose life imprisonment without the possibility of parole for possession of 650 grams of cocaine. Although the *Harmelin* Court did not overrule *Solem*, the Eighth Amendment's guarantee of proportionality in non-capital sentencing was left "eviscerated." n132

By contrast, a sentence violates the Oregon Constitution if it "is so disproportionate to the offense as to shock the moral sense of all reasonable persons as to what is right and proper." n133 In spite of this, Oregon courts have repeatedly affirmed lengthy prison sentences and parole conditions, including a twelve-year prison sentence for forging a check, n134 a seventy-month mandatory minimum prison sentence for second-degree robbery, n135 and a seventy-five-month sentence for a fifteen-year- [*287] old's first sexual abuse offense. n136 Although chemical castration may not be considered disproportionate for a sexual abuse or rape conviction, it is possible that a sentence including parole conditions mandating chemical treatment may be held disproportionate to certain sex offenses. For example, acts of public indecency fall within the reach of the chemical castration program. An offender commits the crime of public indecency when he, while in, or in view of, a public place, performs an act of sexual intercourse or deviate sexual intercourse, or exposes his genitals with the intent of arousing the sexual desire of another person. n137 Public indecency is a Class A misdemeanor for first time offenders, or a Class C felony if the person has a prior conviction for public indecency or a crime described in ORS 163.355 to 163.445. n138 The term of imprisonment for a Class A misdemeanor is limited to one year, in comparison to a five-year limitation for a Class C felony. n139 A sex offender convicted twice of public indecency may fall within the reach of antiandrogen treatment. At some point during incarceration, the offender will be within six months of release on parole or post-prison supervision and will have two current crime convictions. If conviction of a public indecency offense is viewed as an offender's demonstration [*288] of an excessive sex drive or hyper-sexualism, the offender is considered suitable for treatment. Additionally, the second crime of public indecency not only turns the offense into a Class C felony, but the inmate's incarceration for the second conviction labels the inmate a recidivistic sex offender. This also puts the offender within reach of the program. Because a repeat public indecency offense is punishable by up to five years imprisonment, mandatory MPA treatment may similarly require up to five years of implementation as a part of parole or post-prison supervision. Applying the Oregon proportionality test to public indecency offenses, mandated chemical castration of these offenders may likely shock the moral sense of reasonable persons as to what is right and proper because chemical treatment may be viewed as unnecessary or excessive punishment.

Another concern involves the possible duration of chemical treatment for offenders on parole or post-prison supervision. ORS 144.103 provides that any person sentenced to a term of imprisonment for violating or attempting to violate statutes prohibiting rape in the first or second degree, sodomy in the first or second degree, unlawful sexual penetration in the first or second degree, or sexual abuse in the first or second degree, "shall serve a term of post-prison supervision that shall continue until the term of the post-prison supervision, when added to the term of imprisonment served, equals the maximum statutory indeterminate sentence for the violation." n140 In addition to any sentence of imprisonment required by law, ORS 137.765 mandates a period of

post-prison supervision that extends for the life of any offender determined to be a "sexually violent dangerous offender." n141 To put this in context, an offender who is convicted [*289] of sexual abuse in the first degree is guilty of a Class B felony, which provides a maximum sentence term of ten years. n142 The offender must serve a term of post-prison supervision that shall continue until the term of the post-prison supervision, when added to the term of imprisonment served, equals the maximum statutory indeterminate sentence of ten years.

In comparison, post-prison supervision extends for the life of an offender determined to be a "sexually violent dangerous predator." Although the offender convicted of first-degree sexual abuse may be subject to chemical treatment up to ten years minus his imprisonment term served, "a sexually violent dangerous predator" may be subject to lifelong MPA treatment. In such circumstances, a proportionality challenge may arise based on the length of treatment and the lack of medical data on the effects of lifelong MPA usage or data suggesting safe lifelong treatment.

[*290] Another approach is to view the program as allowing the offender to decide whether to undergo chemical castration as an alternative to incarceration. Because MPA treatment is a condition of parole or post-prison supervision, the inmate may decide to either undergo treatment as a part of parole or post-prison supervision, or remain incarcerated while serving the remainder of his sentence. The inmate's desire for freedom will likely weigh heavily in favor of giving consent to undergo treatment. It does not seem irrational or involuntary to undergo treatment so as to avoid a lengthy incarceration period, and therefore the offender's consent may be considered voluntary even under coercive circumstances. When compared to imprisonment, castration may be considered a more humane form of punishment. Weighed against lengthy prison sentences that may subject a convicted offender to daily life-threatening violence and sexual abuse, castration appears to be a reasonable alternative. Others argue, however, that states should eliminate the use of chemical castration altogether. They suggest alternative measures of punishment that are clearly more cruel and severe than castration, such as mandatory life in prison without the possibility of parole for first-time sex offenders. n143

In summary, under both the Federal and Oregon Constitutions, MPA usage is probably not cruel and unusual if limited to the appropriate type of offender and if it is not considered disproportionate punishment for the offense committed. Psychological therapy should also be combined with MPA usage for maximum treatment potential.

B. Double Jeopardy

Both the United States and Oregon Constitutions also protect an individual's right to be free from double jeopardy. n144 The Double Jeopardy Clause of the United States Constitution provides protection in three situations: "a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the [*291] same offense." n145 Similar to the previous Eighth Amendment analysis, whether ORS 144.625 violates the Double Jeopardy Clause first depends on whether the procedure constitutes punishment. n146

In *Kansas v. Hendricks*, the U.S. Supreme Court upheld the Kansas Sexually Violent Predator Act, which establishes procedures for the civil commitment of persons who, due to a "mental abnormality" or "personality disorder," are likely to engage in "predatory acts of sexual violence." n147 *Hendricks*, who had an extensive history of molesting children, challenged the Act on constitutional grounds when the state found that pedophilia qualified as a mental abnormality under

the Act, and ordered him committed when he was scheduled for release from prison. n148 In analyzing Hendricks' double jeopardy claim, the Court found that the Act did not violate the Constitution's double jeopardy prohibition because the Act did not establish criminal proceedings, and involuntary confinement under it was not punishment. n149 The court reasoned that commitment under the Act did not implicate the two primary objectives of criminal punishment: retribution or deterrence. The Court explained:

The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes[; it] does not make a criminal conviction a prerequisite for commitment[; and], unlike a criminal statute, no finding of scienter is required... . Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a "mental abnormality" or a "personality disorder" that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement. And the conditions surrounding that confinement [- essentially the same as conditions for any civilly committed patient -] do not suggest a punitive purpose on the State's part. n150

The Court's conclusion that the Act was nonpunitive removed the essential predicate for a double jeopardy claim.

Similarly, ORS 144.625 may not implicate the objectives of retribution [*292] or deterrence. The stated purpose behind ORS 144.625 is the nonpunitive treatment of the offender, and it is difficult to find anything on the face of ORS 144.625 suggesting that the Oregon legislature sought to create anything other than a treatment program. n151 Moreover, the threat of chemical castration may not deter sex offenders, such as pedophiles, if their sexual inclinations result from a "mental abnormality," "personality disorder," or other "uncontrollable" urge.

Assuming that the castration procedure is in fact punishment, failure to comply with the program and its consequent sanctions do not appear to violate the Double Jeopardy Clause. ORS 144.625 provides that an offender's failure to comply with the program violates a condition of parole or post-prison supervision. n152 This does not constitute a second prosecution for the same offense after acquittal or a second prosecution for the same offense after conviction. Likewise, the mandated sanctions implemented upon failure by the offender to comply with the chemical treatment program arguably do not amount to multiple punishments for the same offense, as the sanctions would not be an added punishment for the sex crime conviction, but rather the consequence of a parole or post-prison supervision violation. As such, it does not appear that ORS 144.625 implicates Fifth Amendment protections.

Finally, ORS 144.040 to ORS 144.109 and Oregon case law suggest that the Board of Parole and Post-Prison Supervision has broad discretion in implementing and determining special conditions as part of an offender's parole or post-prison supervision. In *Rund v. Board of Parole & Post-Prison Supervision*, n153 a petitioner sought judicial review of orders of the Board of Parole and Post-Prison Supervision, contending that the Board acted outside its authority when it required him, as a condition of his post-prison supervision, to participate in a sex offender treatment program. n154 The petitioner violated that condition, and the Board imposed a local sanction of ninety days incarceration. n155 The court held that the "Board's authority to require special conditions [was] restricted to those conditions that are necessary for 'the protection of public safety

and the reformation of the offender." n156 [*293] Because the Board determined, based on the petitioner's history, that he would both benefit from sex offender treatment and present a danger to society if released without treatment, the court held that the Board acted within its authority in imposing the special conditions. n157 Following Rund, it appears that the Board of Parole and Post-Prison Supervision will also be afforded broad discretion in implementing special conditions as part of a sex offender's parole or post-prison supervision pursuant to ORS 144.625. It does not appear, therefore, that an Oregon court will find a double jeopardy violation based on increased parole or post-prison supervision conditions.

C. Ex Post Facto Laws

Article I, section 21, of the Oregon Constitution provides that "no ex post facto law ... shall ever be passed." n158 Ex post facto laws punish acts that were legal before the enactment of those laws, impose greater or additional punishment than that available before the enactment of those laws, and deprive the defendant of a defense. n159 ORS 144.625 involves persons convicted of sex offenses and appears to apply to offenders convicted and sentenced before the bill came into effect in the summer of 1999. Because ORS 144.625 applies retroactively n160 to convicted sex offenders, a determination must be made as to whether ORS 144.625 requirements constitute increased "punishment" for the underlying sex offenses. Resolving this issue requires a two-step inquiry:

The first question is whether the legislative purpose in enacting [*294] the ... [chemical castration requirement] was punitive. If it was, [chemical castration] constitutes punishment. Determining that the purpose was not punitive does not end the inquiry, however, but simply leads to the second question, whether the ... [chemical castration requirement] is so punitive as to negate the nonpunitive intention. n161

Assuming that the chemical castration program amounts to punishment, n162 ORS 144.625 may violate the Oregon Constitution's prohibition of ex post facto laws. The court of appeals noted that "not every change in law which has a deleterious effect on an individual constitutes an ex post facto violation." n163 To survive a constitutional ex post facto challenge, mandated chemical castration must not relate to the length or nature of incarceration or constructive custody. The purpose of the program must also be protective, not punitive. n164

The Oregon Constitution also prohibits changes in punishment that make the punishment more burdensome. n165 If the chemical treatment restrictions applied to a parolee on supervised parole are sufficiently different or more burdensome in comparison to those placed on a parolee without treatment, mandated castration may constitute an increase in punishment, thus triggering ex post facto protection. n166 Finally, ex post facto protection distinguishes between an increase in a parole term and adding a new condition of parole. In *Thierman v. Board of Parole & Post-Prison Supervision*, n167 the Oregon Court of Appeals determined that "because parole is a component of a sentence, no law that increases the term of parole may be applied to a convicted person [*295] to the person's detriment if the law was adopted after the date on which the person committed the underlying crime." n168 ORS 144.625 purports to add a new condition to the offender's parole or post-prison supervision: mandatory MPA injections. Violation of the medical program's terms is considered a violation of a condition of parole or post-prison supervision, which may result in sanctions. Mandatory use of MPA, when applied to those individuals who committed sex offenses before the legislation's enacted date, is not an increase in the convicted offender's parole term, but

rather a new condition of his parole or post-prison supervision. n169 Therefore, the added condition and possible sanctions do not trigger automatic protection against laws that increase the term of parole if the law was adopted after the date on which the offender committed the crime.

IV

Chemical Castration as an Alternative to Incarceration: A Civil Liberties Approach

Although the Oregon branch of the American Civil Liberties Union (ACLU) has not published an opinion to date concerning its position on ORS 144.625, ACLU branches in other states have taken firm stances on laws mandating chemical castration. The ACLU of Florida, for example, asserts three positions on the use of MPA as an alternative to incarceration for sex offenses: (1) the use of drugs on sex offenders is impermissible per se, (2) the use of MPA as a condition of parole is impermissible because it is involuntary and coerced, and (3) the procedure may be a permissible alternative to incarceration when administered in conjunction with psychotherapy. n170 Because these positions address the full scope of potential MPA use, they inform the analysis of ORS 144.625.

[*296]

A. Impermissible Per Se

The First Amendment protects individuals' freedom to express and receive ideas and to make choices in their lives. n171 Relying on First Amendment protections, the position that use of MPA on sex offenders is impermissible per se derives from the possibility that "the use of behavioral drugs unduly intrudes on the personality of the individual." n172 Thus, because the forced use of MPA may violate an individual's right to mental autonomy by suppressing sexual desire based on thoughts deemed "deviant" by society, mandatory treatment may be unconstitutional. n173

B. Involuntary and Coerced

This approach rests on the notion that the use of drugs as a condition of parole or post-prison supervision is impermissible because it is involuntary and coerced. It "rejects the argument that an individual, with informed consent, can rationally and permissibly choose drugs over incarceration." n174 In comparison, ORS 144.625 treatment is a mandatory condition of parole for those selected. The bill provides that failure to cooperate in the treatment program amounts to a violation of the offender's condition of parole or post-prison supervision. Treatment refusal also subjects the offender to sanctions. Given that the offender may be subject to longer incarceration periods for refusing to accept his parole or post-prison supervision condition, or incarceration as a violation of his parole if the offender refuses treatment after he is released, it is questionable whether the offender's "consent" to undergo treatment is truly voluntary. Thus, if Oregon civil libertarian groups take similar positions against the use [*297] of mandatory chemical castration as a condition of parole or post-prison supervision, ORS 144.625 may likely face legal challenges.

C.

"Last Resort" Permissible Alternative to Incarceration

As an alternative to incarceration and a procedure of "last resort," treatment may be permissible when administered in conjunction with psychotherapy. The main issue for civil libertarians is whether the goal of the chemical castration program is to punish the offender or to treat and rehabilitate the patient. n175 If treatment of the individual is the goal, then few libertarians will challenge the use of MPA. However, for the drug to be considered rehabilitative treatment, it must be medically proven to be effective on the sex offender, and its side effects must be safe and reversible. n176 Additionally, civil libertarians are only willing to accept such treatment provided that voluntary participation in the treatment program is assured. n177 Another concern involves the possibility of a systematic bias in favor of MPA use, leading to the drug's overuse and misjudgment regarding which type of offender benefits from treatment. n178 Civil libertarians warn that under the wrong conditions, the "therapeutic treatment could victimize rather than benefit patients, much like a 'Clockwork Orange' scenario." n179

Although Oregon may eventually enact a statute mandating the use of chemical castration as an alternative to incarceration, ORS 144.625 was not enacted to replace incarceration. ORS 144.625 does not shorten an offender's criminal sentence. Rather, it adds a new condition to the inmate's parole or post-prison supervision and implies that non-compliance with the treatment procedure - a violation of parole or post-prison supervision - will result in the offender's re-incarceration. n180

Conclusion

The sex crime epidemic in the United States and its victim impact have prompted government officials to find new ways to [*298] combat sex crimes. Medical advances have turned the use of chemical castration into the new rage for sex crime legislation.

Mandatory use of chemical castration on sex offenders as a condition of their parole or post-prison supervision has not escaped medical or legal criticism, however. Medical experts insist that MPA is proven effective for only one type of offender: the paraphiliac. Many authorities also argue that the drug is unlikely to have any meaningful influence on other types of sex offenders, especially those motivated by anger or hostility. Moreover, mandatory, as opposed to voluntary, use of MPA has not been proven to be effective. For maximum drug potential and treatment effect, MPA usage should be limited to the paraphiliac sex offender, should be voluntary as opposed to forced, and should be combined with psychological or behavioral therapy for maximum treatment potential.

ORS 144.625 raises multiple constitutional concerns and implicates both federal and state constitutional prohibitions on cruel and unusual punishment, double jeopardy, and ex post facto laws. First, even assuming that ORS 144.625 constitutes punishment, MPA usage is probably not cruel and unusual if limited to the appropriate type of offender, and if it is not considered disproportionate punishment for the offense committed. However, the program's requirement for mandatory participation and MPA's uncommon, but dangerous, side effects could arguably make the "treatment" cruel or excessive on offenders whose health may be severely affected by the drug. With regard to double jeopardy, failure to comply with the program and its resulting sanctions do not appear to violate the Double Jeopardy Clause because the mandated sanctions do not appear to amount to multiple punishments for the same offense. Rather, it appears to be a consequence of a parole or post-prison supervision violation. Finally, if the chemical treatment restrictions applied to a parolee on supervised parole are sufficiently different or more burdensome in comparison to those

placed on parole without treatment, mandatory MPA injections for offenders convicted and sentenced before the bill's enactment in July 1999 may violate the Oregon Constitution's guarantee prohibiting ex post facto laws.

In addition to legal challenges, chemical castration use has also drawn criticism from civil libertarians. The Florida ACLU has asserted three positions on the use of MPA as an alternative to [*299] incarceration for sex offenses, all of which are applicable to ORS 144.625. The Florida ACLU argues that chemical castration is impermissible per se, impermissible if involuntary, and only appropriate if used as an alternative to incarceration and in conjunction with psychotherapy.

Because of the high-profile nature of sex offenses and pressure on government to find new ways to combat these crimes, the use of MPA as a part of an offender's reentry into society seems inevitable. However, given the medical, legal, and moral consequences of such chemical castration legislation, ORS 144.625 may be challenged as a violation of both federal and state constitutions.

FOOTNOTES:

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n1. See *State v. Lajoie*, 316 Or. 63, 849 P.2d 479 (1993).

n2. See *State v. Barkley*, 108 Or. App. 756, 817 P.2d 1328 (1991), *aff'd in part and remanded*, 315 Or. 420, 846 P.2d 390, *cert. denied*, 510 U.S. 837 (1993).

n3. See *State v. Bullock*, 135 Or. App. 303, 899 P.2d 709 (1995).

n4. See *State v. Sheets*, 160 Or. App. 326, 981 P.2d 815 (1999) (reversing lower court and remanding due to admission of improper evidence).

n5. *Id.*

n6. Or. Rev. Stat. 144.625 (1999).

n7. *Id.*

n8. *Id.*

n9. Changes in Criminal Victimization, 1994-95, *Crim. Victimization* (Bureau of Justice Statistics, Washington, D.C.), Apr. 1997, at 2 [hereinafter *Criminal Victimization*].

n10. *Id.*

n11. *Id.*

n12. Jennifer M. Bund, Comment, *Did You Say Chemical Castration?*, 59 U. Pitt. L. Rev. 157 (1997); John M.W. Bradford, *Treatment of Men with Paraphilia*, 338 *New Eng. J. Med.* 464, 464 (1998), available at <http://www.nejm.org/content/1998/0338/0007/0464.asp>. Contra Jim Hopper, *Child Abuse: Statistics, Research, and Resources*, at <http://www.jimhopper.com/abstats/#caut> (last revised Oct. 12, 2001) (noting that statistics on rates of child abuse and neglect are controversial

and that "complex and subtle scientific issues are involved, including various criticisms of the methods used in the studies that generate these statistics").

n13. Hopper, *supra* note 12.

n14. Dr. Nancy Faulkner, *Sexual Abuse Statistics* (1999), at <http://www.prevent-abuse-now.com/stats.htm> (last visited Oct. 15, 2001).

n15. See *id.* (noting that statistics on rates of child abuse are controversial and are disputed by some experts).

n16. Rape, Abuse and Incest National Network (RAINN), *RAINN Rape Facts*, at <http://feminist.com/rainn.htm> (last visited Oct. 15, 2001) (noting that in 1996, less than one victim in every three reported the sex crime to law enforcement officials).

n17. Telephone Interview with Gary Fields, Mental Health Psychologist, Oregon Department of Corrections (Feb. 24, 2000) [hereinafter *Fields Interview*]. Fields suggests that this percentage may be disproportionate to the actual ratio of sex offenses to other crimes. He reasons that pursuant to Oregon's Measure 11 (mandatory minimum sentencing) sex offenders are incarcerated for longer periods of time and thus may be over-represented.

n18. Faulkner, *supra* note 14.

n19. *Id.*

n20. *Id.*

n21. *Id.*

n22. See Bryan Keene, Note, *Chemical Castration: An Analysis of Florida's New "Cutting-Edge" Policy Towards Sex Criminals*, 49 Fla. L. Rev. 803, 810 (1997).

n23. See Lisa MacGillivray, Note, *California's Mandatory Chemical Castration Program for Repeat Sex Offenders: An Analysis of the Legislation Under German and American Constitutional Law*, 21 Suffolk Transnat'l L. Rev. 143, 163 (1997).

n24. David Van Biema, *A Cheap Shot at Pedophilia?*, Time, Sept. 9, 1996, at 60.

n25. Nely Mendoza, *Chemical Castration*, at <http://www.geocities.com/Athens/Troy/7573/nely.html> (last visited Oct. 15, 2001).

n26. See, e.g., Kimberly A. Peters, Comment, *Chemical Castration: An Alternative to Incarceration*, 31 Duq. L. Rev. 307, 309-10 (1993).

n27. See Kenneth B. Fromson, *Beyond an Eye for an Eye: Castration as an Alternative Sentencing Measure*, 11 N.Y.L. Sch. J. Hum. Rts. 311, 313-16 (1994).

n28. See Jodi Berlin, Note and Comment, *Chemical Castration of Sex Offenders: "A Shot in the Arm" Towards Rehabilitation*, 19 Whittier L. Rev. 169, 171 (1997).

n29. Kari 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 (1994). For a description of the early twentieth-century eugenics movement which targeted convicted felons and the mentally retarded, see *id.* at 109-13.

n30. See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 536-37 (1942) (holding an Oklahoma statute that authorized the sterilization of recidivist criminals violative of the Equal Protection Clause of the Fourteenth Amendment); *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 that authorized vasectomies for repeat felons, and holding inherently cruel and unusual the compulsory castration for all second convictions, including those crimes formerly misdemeanors).

n31. See Stacy Russell, Comment, *Castration of Repeat Sexual Offenders: An International Comparative Analysis*, 19 *Hous. J. Int'l L.* 425, 439-40 (1997) (noting that the public may have disfavored these procedures due to the knowledge of Nazi experimentation with sterilization and castration); William Winslade et al., *Castrating Pedophiles Convicted of Sex Offenses Against Children: New Treatment or Old Punishment?*, 51 *SMU L. Rev.* 349, 386 (1998) (explaining that the history of castration "is marked chiefly by abuse and injustice: castration was used on slaves and captives of war, and was widely practiced in Nazi Germany as a compulsory punitive procedure for sex offenders").

n32. Or. Rev. Stat. 181.594(3) (1999).

n33. ORS 181.594 provides that a "sex crime" means:

- (a) Rape in any degree;
- (b) Sodomy in any degree;
- (c) Unlawful sexual penetration in any degree;
- (d) Sexual abuse in any degree;
- (e) Incest with a child victim;
- (f) Using a child in a display of sexually explicit conduct;
- (g) Encouraging child sexual abuse in any degree;
- (h) Transporting child pornography into the state;
- (i) Paying for viewing a child's sexually explicit conduct;
- (j) Compelling prostitution;
- (k) Promoting prostitution;
- (l) Kidnapping in the first degree if the victim was under 18 years of age;
- (m) Contributing to the sexual delinquency of a minor;
- (n) Sexual misconduct if the offender is at least 18 years of age;
- (o) Possession of materials depicting sexually explicit conduct of a child in the first degree;
- (p) Kidnapping in the second degree if the victim was under 18 years of age, except by a parent or by a person found to be within the jurisdiction of the juvenile court;
- (q) Any attempt to commit any of the crimes set forth in paragraphs (a) to (p) of this subsection;
- (r) Burglary, when committed with intent to commit any of the offenses listed in paragraphs (a) to (p) or (s) of this subsection; or

(s) Public indecency or private indecency, if the person has a prior conviction for a crime listed in paragraphs (a) to (r) of this subsection.

Or. Rev. Stat. 181.594(2). *Contra* Or. Rev. Stat. 421.590(1)(c) (1999) (stating that for purposes of medical treatment programs, "'sex crime' means rape in any degree, sodomy in any degree, unlawful sexual penetration in any degree and sexual abuse in the first or second degree").

n34. Or. Rev. Stat. 163.465 (1999); Or. Admin. R. 291-202-0020(5) (2000).

n35. See Or. Rev. Stat. 137.700 (1999) (Ballot Measure 11).

n36. See Or. Rev. Stat. 426.510-.670 (1999).

n37. See Or. Rev. Stat. 181.595-.601.

n38. See Or. Rev. Stat. 181.595(3)(a).

n39. See *id.*

n40. See Or. Rev. Stat. 181.586.

n41. See, e.g., Benton County Sheriff's Office, Predatory Sex Offender Community Notification, at <http://www.co.benton.or.us/sheriff/corrections/bccc/sonote> (last visited Feb. 16, 2000) (notifying the Benton County community, in accordance with ORS 181.585 to 181.589, that certain previously convicted, predatory sex offenders are residing in Benton County). Internet publication may include general information about the offender, the address of the offender's current residence, the offender's legal status, the offender's target victims, and special conditions of the offender's parole (e.g. prohibition from any form of contact with males or females under the age of eighteen; no frequent visits to places designed for primary use of children). This site notes that the majority of registered sex offenders in Benton County are not included in the Sex Offender Community Notification web page. Only selected "predatory" sex offenders are listed, which include offenders who exhibit characteristics showing a tendency to victimize or injure others.

n42. Fromson, *supra* note 27, at 329 (quoting Don Riesenber, Motivations Studied and Treatments Devised in Attempt to Change Rapists' Behavior, 257 JAMA 899, 900 (1987)).

n43. See, e.g., Fla. Stat. Ann. 794.0235(1)(b) (West 2000) (providing that the court "shall 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"); Cal. Penal Code 645 (West 1999); Ga. Code Ann. 42-9-44.2 (Harrison 1998); Mont. Code Ann. 45-5-512 (1999).

n44. 1999 Or. Laws 435 (codified at Or. Rev. Stat. 144.625 (1999)).

n45. Or. Rev. Stat. 144.625(1).

n46. Or. Admin. R. 291-202-0010(3)(a) (2000).

n47. Or. Rev. Stat. 144.625(2)(a)-(c); Or. Rev. Stat. 144.629.

n48. Or. Rev. Stat. 144.625(3).

n49. Or. Rev. Stat. 144.625(2)(b).

n50. Or. Rev. Stat. 163.465(2)(c) (1999). At a minimum, the evaluation typically includes a review of the inmate's corrections file, an interview with the inmate, the completion of a psychosocial history, and a diagnostic summary. The consulting physician may, however, determine that an offender is not a suitable candidate and deliver the report without first completing a full evaluation of the inmate. Or. Admin. R. 291-202-0030(1)(c).

n51. Or. Rev. Stat. 144.631.

n52. Or. Admin. R. 291-202-0030(3).

n53. Or. Admin. R. 291-202-0030(3)(c).

n54. Or. Rev. Stat. 144.625(4)(a)-(b).

n55. The Fourteenth Amendment prevents any state from making or enforcing laws that would deny to any person the equal protection of the laws. U.S. Const. amend. XIV, 1. This applies to equal protection based on gender and bars an unequal treatment of classes when the statute creates classes that are wholly unrelated to its purpose. Although it may be that the majority of sex offenders are male, ORS 144.625 must still serve an important governmental function and must be substantially related to the achievement of those objectives in order to pass judicial scrutiny ("intermediate scrutiny"). See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

n56. Fields Interview, *supra* note 17.

n57. *Id.*; see also Or. Admin. R. 291-202-0030(1).

n58. Fields Interview, *supra* note 17.

n59. *Id.*

n60. *Id.*

n61. *Id.*

n62. *Id.*

n63. See Pharmacia & Upjohn, Inc., *Why More & More Women Are Choosing Depo-Provera* (1998). Over the past thirty years, Depo-Provera has been used by more than thirty million women in Europe. More than one million American women have started using Depo-Provera since its introduction to the United States in 1992.

n64. See Walter J. Meyer III, *Depo Provera Treatment for Sex Offending Behavior: An Evaluation of Outcome*, 20 *Bull. Am. Acad. Psychiatry L.* 249 (1992).

n65. See *id.*

n66. Fred S. Berlin, *The Paraphilias and Depo-Provera: Some Medical, Ethical and Legal Considerations*, 17 *Bull. Am. Acad. Psychiatry L.* 233, 235 (1989); see also Arthur L. Brody & Richard Green, *Washington State's Unscientific Approach to the Problem of Repeat Sex Offenders*, 20 *Bull. Am. Acad. Psychiatry L.* 343, 350 (1994) (noting that MPA is usually injected because the stomach has difficulty absorbing the oral form). But see Martin Kafka, *Psychopharmacologic Treatments for Nonparaphilic Compulsive Sexual Behaviors, Part II* (2000) (on file with author).

n67. Brody & Green, *supra* note 66, at 350.

n68. *Id.* at 351.

- n69. Berlin, *supra* note 66, at 235.
- n70. Larry Helm Spalding, Florida's 1997 Chemical Castration Law: A Return to the Dark Ages, 25 Fla. St. U. L. Rev. 117, 124 (1998).
- n71. Kafka, *supra* note 66.
- n72. 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, 603-05 (1981).
- n73. *Id.* at 604-05.
- n74. *Id.*
- n75. Edward A. Fitzgerald, Chemical Castration: MPA Treatment of the Sexual Offender, 18 Am. J. Crim. L. 1, 4-5 (1990).
- n76. See Winslade et al., *supra* note 31, at 355 (describing pedophilia as one disorder loosely categorized as paraphilias, including "psychosexual disorders such as transvestitism, exhibitionism, sexual masochism, and sexual sadism in which unusual or bizarre imagery or acts are necessary for realization of sexual excitement").
- n77. See, e.g., Fred S. Berlin, "Chemical Castration" for Sex Offenders, 336 New Eng. J. Med. 1030, 1030 (1997) (noting that MPA "may be helpful only for that group of persons whose crimes are driven by abnormal erotic cravings, such as persons with pedophilia").
- n78. See Vanderzyl, *supra* note 29, at 117 (noting that the treatment may be ineffective for non-paraphiliac sex offenders because it does not target other motivations for sex crimes, such as anger and hostility).
- n79. Peters, *supra* note 26, at 312.
- n80. See, e.g., Berlin, *supra* note 77; Brody & Green, *supra* note 66, at 345 (noting that forced treatment is less effective than voluntary treatment).
- n81. See Brody & Green, *supra* note 66, at 352; Meyer, *supra* note 64, at 256-57 (noting that "patients who were compliant with MPA were much less likely to re-offend than those who refused the medication and those who stopped the medication").
- n82. Brody & Green, *supra* note 66, at 352.
- n83. See Mendoza, *supra* note 25.
- n84. See *id.*
- n85. Brody & Green, *supra* note 66, at 350-51.
- n86. Or. Rev. Stat. 144.625 (1999).
- n87. Brody & Green, *supra* note 66, at 351. Side effects resulting from the use of MPA are also common in women who use the drug as a form of birth control. Most women gain weight and have irregular or unpredictable menstrual bleeding. Other side effects include nervousness, dizziness, headaches, stomach discomfort, and fatigue. MPA may also be associated with a decrease in the amount of mineral stored in bones, which is a risk factor for the development of osteoporosis. See Pharmacia & Upjohn, Inc., *supra* note 63.

- n88. Inflammation of a vein caused by or associated with the formation of a blood clot.
- n89. Blockage of the pulmonary artery by a blood clot.
- n90. Difficulty in breathing.
- n91. Inflammation of diverticula in the intestinal tract, causing fecal stagnation and pain.
- n92. A condition resulting from or characterized by abnormally decreased functional activity of the gonads, with retardation of growth and sexual development.
- n93. Sense of physical ill-being.
- n94. See Spalding, *supra* note 70, at 125; Brody & Green, *supra* note 66, at 351; Meyer, *supra* note 64, at 254.
- n95. Brody & Green, *supra* note 66, at 351.
- n96. Kafka, *supra* note 66. But see Berlin & Meinecke, *supra* note 72, at 603.
- n97. Brody & Green, *supra* note 66, at 351.
- n98. *Id.*
- n99. U.S. Const. amend. VIII; Or. Const. art. I, 16 (providing that "cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense").
- n100. See John B. Murray, *Psychopharmacological Therapy of Deviant Sexual Behavior*, 115 *J. Gen. Psychol.* 101, 1007 (1998).
- n101. Meyer, *supra* note 64, at 255 (assuming an average recidivism rate of 65%, behavioral or psychotherapy treatment alone could lower the rate by 11%).
- n102. *Id.* (assuming the average recidivism rate of 65%, recidivism can be further reduced by up to 72% when both chemical and behavioral or psychotherapy treatment are used).
- n103. Or. Rev. Stat. 144.625(1) (1999).
- n104. See 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, 310 (stating "[MPA] must be used in conjunction with specialized treatment to maximize the drug's potential to intervene in sexually abusive behavior"); Murray, *supra* note 100, at 106-07 (noting that the most effective approach to reduce the offender's sex drive is the combination of chemical treatment and psychotherapy or behavioral therapy).
- n105. See *Knecht v. Gillman*, 488 F.2d 1136, 1139-40 (8th Cir. 1973) (noting that "the mere characterization of an act as 'treatment' does not insulate it from eighth amendment scrutiny," and that "neither the label which a State places on its own conduct, nor even the legitimacy of its motivation, can avoid the applicability of the Federal Constitution").
- n106. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 95 (1958).
- n107. See *Knecht*, 488 F.2d at 1138-40 (holding that subjecting inmates to a morphine base drug as a form of aversion therapy - which induces vomiting for an extended period of time - "for committing some minor breach of the rules can only be regarded as cruel and unusual unless the treatment is being administered to a patient who knowingly and intelligently has consented to it").

n108. See *Whitten v. State*, 47 Ga. 297 (1872) (explaining that quartering, burning, hanging in chains, and castration are cruel and unusual punishments).

n109. See *Davis v. Berry*, 216 F. 413 (S.D. Iowa 1914), rev'd on other grounds, 242 U.S. 468 (1917) (striking down as cruel and unusual punishment an Iowa statute that authorized vasectomies for repeat felons).

n110. See *Furman v. Georgia*, 408 U.S. 238, 244 (1972) (Douglas, J., concurring).

n111. *Gregg v. Georgia*, 428 U.S. 153, 172-73 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

n112. *State v. Ronniger*, 7 Or. App. 447, 461, 492 P.2d 298, 304 (1971).

n113. 408 U.S. 238 (1972).

n114. *Id.* at 283 (Brennan, J., concurring).

n115. Pamela K. Hicks, Comment, *Castration of Sexual Offenders*, 14 J. Legal Med. 641, 658 (1993).

n116. See Kristyn M. Walker, Note, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78 Iowa L. Rev. 779, 804-06 (1993).

n117. See *id.* at 805.

n118. 216 F. 413 (S.D. Iowa 1914), rev'd on other grounds, 242 U.S. 468 (1917).

n119. It is important to note, however, that vasectomy differs significantly from chemical castration because vasectomy involves surgical removal of all or part of the vas deferens as a means of sterilization. The vas deferens is the duct through which sperm is carried from a testis to the ejaculatory duct.

n120. *Davis*, 216 F. at 416.

n121. See Spalding, *supra* note 70, at 125; Brody & Green, *supra* note 66, at 351; Meyer, *supra* note 64, at 254.

n122. See Spalding, *supra* note 70, at 125; Brody & Green, *supra* note 66, at 351; Meyer, *supra* note 64, at 254.

n123. *Furman v. Georgia*, 408 U.S. 238, 361 (1972) (Marshall, J., concurring).

n124. See discussion *supra* Parts II-III.

n125. See Mendoza, *supra* note 25.

n126. Mendoza argues that these child victims are not given the chance to have a normal childhood, and that "taking a child's youth away is a serious violation of human rights." *Id.*; see also *Castration Isn't Enough*, Oracle, June 2, 1997 (on file with author).

n127. *Castration Isn't Enough*, *supra* note 126.

n128. See *id.*

n129. See Fromson, *supra* note 27, at 319-21.

n130. 463 U.S. 277 (1983).

n131. 501 U.S. 957 (1991).

n132. *Id.* at 1018 (White, J., dissenting).

n133. *State v. Isom*, 313 Or. 391, 401, 837 P.2d 491, 497 (1992).

n134. See *State v. Teague*, 215 Or. 609, 611, 336 P.2d 338, 340 (1959) (holding that a twelve-year prison sentence for uttering a false check did not "shock the moral sense of all reasonable men").

n135. See *State v. George*, 146 Or. App. 449, 934 P.2d 474 (1997), review denied, 326 Or. 465, 952 P.2d 64 (1998) (rejecting the defendant's argument that a seventy-month mandatory minimum prison sentence for second-degree robbery was cruel and unusual); see also *State v. Gee*, 156 Or. App. 241, 244, 965 P.2d 462, 463-64 (1998), review denied, 328 Or. 594, 987 P.2d 515 (1999) (holding that a ninety-month sentence for first-degree robbery was not unconstitutionally cruel and unusual, even though the court found that mental health and drug abuse treatment was more beneficial to defendant than imprisonment).

n136. See *State v. Rhodes*, 149 Or. App. 118, 123, 941 P.2d 1072, 1074-75 (1997), review denied, 326 Or. 390, 952 P.2d 63 (1998). This case involved a fifteen-year-old defendant who had sexually abused his half-sister more than twenty times after being reprimanded by his mother to stop the abuse. Although the defendant had no prior record, the court held that a seventy-five-month sentence for first-degree sexual abuse was not unconstitutionally cruel and unusual. *Id.*; see also *State v. Silverman*, 159 Or. App. 524, 532, 977 P.2d 1186, 1190, review denied, 329 Or. 528, 994 P.2d 129 (1999), cert. denied, 531 U.S. 876 (2000) (holding that "a sentence of 75 months for sexual abuse of children, particularly when the defendant is a mental health professional who treats child sex abuse victims, does not shock the conscience such that the sentence is 'cruel and unusual'").

n137. Or. Rev. Stat. 163.465 (1999).

n138. Or. Rev. Stat. 163.465(2)(a)-(b).

n139. ORS 161.615 provides that sentences for misdemeanors shall be for a definite term: "The court shall fix the term of imprisonment within the following maximum limitations: (1) For a Class A misdemeanor, 1 year. (2) For a Class B misdemeanor, 6 months. (3) For a Class C misdemeanor, 30 days. (4) For an unclassified misdemeanor, as provided in the statute defining the crime." Or. Rev. Stat. 161.615 (1999). ORS 161.605 provides the maximum term of an indeterminate sentence of imprisonment for a felony: "(1) For a Class A felony, 20 years. (2) For a Class B felony, 10 years. (3) For a Class C felony, 5 years. (4) For an unclassified felony as provided in the statute defining the crime." Or. Rev. Stat. 161.605.

n140. Or. Rev. Stat. 144.103 (1999).

n141. ORS 137.765 provides:

(1) As used in this section:

(a) "History of sexual assault" means that a person has engaged in unlawful sexual conduct that:

(A) Was not committed as part of the same criminal episode as the crime for which the person is currently being sentenced; and

(B) Seriously endangered the life or safety of another person or involved a victim under 12 years of age.

(b) "Sexually violent dangerous offender" means a person who has psychopathic personality features, sexually deviant arousal patterns or interests and a history of sexual assault and who the court finds presents a substantial probability of committing a crime listed in subsection (3) of this section.

(2) Notwithstanding ORS 161.605, when a person is convicted of a crime listed in subsection (3) of this section, in addition to any sentence of imprisonment required by law, a court shall impose a period of post-prison supervision that extends for the life of the person if:

(a) The person was 18 years of age or older at the time the person committed the crime; and

(b) The court finds that the person is a sexually violent dangerous offender.

(3) The crimes to which subsection (2) of this section applies are:

(a) Rape in the first degree and sodomy in the first degree if the victim was:

(A) Subjected to forcible compulsion by the person;

(B) Under 12 years of age; or

(C) Incapable of consent by reason of mental defect, mental incapacitation or physical helplessness;

(b) Unlawful sexual penetration in the first degree; and

(c) An attempt to commit a crime listed in paragraph (a) or (b) of this subsection.

Or. Rev. Stat. 137.765 (1999).

n142. ORS 163.427 provides:

(1) A person commits the crime of sexual abuse in the first degree when that person:

(a) Subjects another person to sexual contact and:

(A) The victim is less than 14 years of age;

(B) The victim is subjected to forcible compulsion by the actor; or

(C) The victim is incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless; or

(b) Intentionally causes a person under 18 years of age to touch or contact the mouth, anus or sex organs of an animal for the purpose of arousing or gratifying the sexual desire of a person.

(2) Sexual abuse in the first degree is a Class B felony.

Or. Rev. Stat. 163.427; Or. Rev. Stat. 161.605 (stating maximum penalty for a Class B felony).

n143. See *Castration Isn't Enough*, supra note 126.

n144. U.S. Const. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"); Or. Const. art. I, 12 ("No person shall be put in jeopardy twice for the same offence (sic), nor be compelled in any criminal prosecution to testify against himself.").

n145. *United States v. Halper*, 490 U.S. 435, 440 (1989), abrogated by *Hudson v. United States*, 522 U.S. 93 (1997).

n146. See discussion *supra* Part III.A.1.

n147. 521 U.S. 346 (1997).

n148. *Id.* at 350.

n149. *Id.* at 382.

n150. *Id.* at 362-63.

n151. See *id.* at 361-69.

n152. Or. Rev. Stat. 144.625 (4) (1999).

n153. 152 Or. App. 231, 953 P.2d 766 (1998).

n154. *Id.* at 235, 953 P.2d at 768.

n155. *Id.*

n156. *Id.* at 236, 953 P.2d at 769 (quoting *Martin v. Bd. of Parole*, 147 Or. App. 37, 43, 934 P.2d 626, 628 (1997), *rev'd*, 327 Or. 147, 957 P.2d 1210 (1998)).

n157. *Id.*

n158. Or. Const. art. I, 21. This section of the Oregon Constitution mirrors Article I, section 10, of the United States Constitution: "No state shall ... pass any ... ex post facto Law" U.S. Const. art. I, 10, cl. 1.

n159. See *State v. Cookman*, 324 Or. 19, 32, 920 P.2d 1086, 1094 (1996) (holding that article I, section 21, of the Oregon Constitution "prohibits the retroactive application of an amended criminal statute of limitations, extending the period of limitations, to revive prosecutions that already were time-barred when the amendment took effect").

n160. But see *Kansas v. Hendricks*, 521 U.S. 346, 347 (1997) (holding that since the Civil Commitment Act for predatory sex offenders was not punishment, its application does not raise ex post facto concerns). The Court held that the Act clearly did not have a retroactive effect because it did not criminalize conduct legal before its enactment or deprive the defendant of any defense that was available to him at the time of his crimes. *Id.*

n161. *State v. Matthews*, 159 Or. App. 580, 585, 978 P.2d 423, 425 (1999) (quoting *Gress v. Bd. of Parole & Post-Prison Supervision*, 143 Or. App. 7, 15-16, 924 P.2d 329, 333 (1996), vacated by *Gress v. Bd. of Parole & Post-Prison Supervision*, 152 Or. App. 491, 950 P.2d 418 (1998)); see also discussion *supra* Part II.A-B.

n162. See discussion *supra* Part III.A.

n163. *Williford v. Bd. of Parole & Post-Prison Supervision*, 137 Or. App. 254, 256-57, 904 P.2d 1074, 1075 (1995).

n164. *Id.* (stating that notification of sex offender status was protective, not punitive: it allowed professions such as day care to discover if they had been contacted by a job applicant who had been convicted of child abuse).

n165. See *State v. Cookman*, 324 Or. 19, 920 P.2d 1086 (1996).

n166. See *Brynes v. Bd. of Parole & Post-Prison Supervision*, 134 Or. App. 296, 301-02, 894 P.2d 1252, 1255 (1995), review denied, 322 Or. 613, 911 P.2d 1231 (1996) (stating that the petitioner did not offer authority suggesting that the restrictions applied to a parolee on supervised parole versus those placed on a parolee on unsupervised parole were sufficiently different or more burdensome to constitute an increase in punishment).

n167. 134 Or. App. 304, 894 P.2d 1250 (1995).

n168. *Id.* at 306, 894 P.2d at 1251 (emphasis added).

n169. See *id.* (holding that a statute subjecting the petitioner to a longer minimum period of parole than he would have faced under the rules in effect when he committed his crimes violated the state constitutional guarantee against ex post facto laws). But see *Frey v. Bd. of Parole & Post-Prison Supervision*, 152 Or. App. 462, 464, 950 P.2d 418, 419, review denied, 327 Or. 173, 966 P.2d 217 (1998) (holding that designation of an individual as a predatory sex offender based on a sex offense he committed before the effective date of the statute did not constitute punishment in violation of the ex post facto clause).

n170. *Spalding*, supra note 70, at 135-36 (citing ACLU of Fla., ACLU Position Statement on Chemical Castration (on file with the ACLU of Florida)).

n171. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (holding that the Constitution protects the right to "receive information and ideas"). The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

n172. *Spalding*, supra note 70, at 135.

n173. See *Fitzgerald*, supra note 75, at 28-29 (noting that six criteria are assessed to determine whether a medical treatment is so intrusive as to violate an individual's First Amendment rights: (1) the extent to which the effects may be reversed; (2) the extent to which the person can resist acting in a manner compelled by the drug; (3) the effect's rapidness; (4) the expanse of the changes to the individual; (5) the extent to which the resulting state of mind is foreign, abnormal, or unnatural to the person undergoing treatment; and (6) the duration of the change).

n174. *Spalding*, supra note 70, at 135.

n175. *Id.*

n176. *Id.*

n177. *Id.* at 136.

n178. *Id.* at 135.

n179. *Id.*

n180. See Or. Rev. Stat. 144.625(1)-(3) (1999).

