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CALIFORNIA'S UNCONSTITUTIONAL PUNISHMENT FOR HEINOUS CRIMES: CHEMICAL CASTRATION OF SEXUAL OFFENDERS

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INTRODUCTION

On September 17, 1996, Governor Pete Wilson signed legislation (the "California Statute") making California the first state to require that paroled recidivist sex offenders receive chemical injections that will suppress their sex drives.[1] This injection, of the drug known as Depo-Provera,[2] is popularly called "chemical castration."[3]

The law that Governor Wilson signed, applicable to sex offenses such as sodomy, rape, and child molestation,[4] altered section 645 of the California Penal Code by making chemical castration mandatory for repeat paroled sex offenders.[5] The prior law had left it within the discretion of the judge to offer Depo-Provera as a choice of punishment to a paroled repeat offender.[6] Under the new law, the judge retains discretion to offer the drug to first time offenders.[7]

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1. *See* Cal. Penal Code § 645 (West Supp. 1997); Dave Lesher, *Molester Castration Measure Signed*, L.A. Times, Sept. 18, 1996, at A3. The prior version of section 645 gave courts discretion to direct that an operation be performed upon the defendant for the prevention of procreation where the victim was a female under the age of 10. Cal. Penal Code § 645 (1988). The prior statute applied to men and women guilty of specified sexual offenses, and generated very little case law. In People v. Blankenship, 61 P.2d 352 (Cal. Ct. App. 1936), the court affirmed the sterilization of a defendant for raping a 13-year-old and possibly infecting her with syphilis. The court justified the defendant's sterilization not only on the grounds that he raped the girl, but also because of the threat that he could infect other members of society with syphilis. *Id.* at 353. The legislation signed by Governor Wilson repeals the above provision and instead provides that any person convicted once of a specified sex offense where the victim is under 13 may be punished with Depo-Provera upon parole, in addition to any other punishments prescribed by law. Cal. Penal Code § 645 (West Supp. 1997). Upon a second conviction, the law specifies mandatory imposition of Depo-Provera injections, unless the offender consents to surgical castration. *Id.*

2. The trade name of Depo-Provera is medroxyprogesterone acetate treatment. *See* Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 Am. J. Crim. L. 1, 2 (1991).

3. *Id.* at 3.

4. The revised version of section 645 applies to men and women who violate the following provisions of the California Penal Code: (1) section 286(c) or (d) (sodomy with a person under 14, either alone or in concert, and more than 10 years younger than the defendant, or when force is used); (2) section 288(b)(1) (lewd or lascivious acts with a child under 14, by violence, threat of violence, etc.); (3) section 288a(b) or (d) (acts of oral copulation with a person under 18, either by force or when the victim is unable to consent); (4) section 289(a) or (j) (penetration of genital or anal openings by foreign or unknown objects of a person under 14 and more than 10 years younger than the defendant). Cal Penal Code § 645 (West Supp. 1997).

5. *Id.*

6. Cal. Penal Code § 645 (West 1988).

7. Cal. Penal Code § 645 (West Supp. 1997).

This Note argues that chemical castration, as provided for in the California Statute, is an unconstitutional punishment because it violates the aspirational principles against inhumane treatment embodied in the Eighth Amendment's Cruel and Unusual Punishment Clause.[8] Part I discusses Depo-Provera's effectiveness in reducing sexual recidivism and outlines the controversy surrounding the studies conducted with Depo-Provera. Part II considers the threshold issue of whether the California Statute is punishment or treatment. This determination is necessary in anticipation of the state's defense of the statute on the grounds that it mandates treatment, rather than punishment, and hence is not susceptible to Eighth Amendment scrutiny. After suggesting that the statute is, in fact, punishment, part II illuminates a central issue of constitutional adjudication—the question of when judicial deference to legislative action is appropriate. Whether deference is appropriate reflects the general issue of how courts are to interpret the Constitution generally, and the Eighth Amendment specifically. In light of these questions, part II outlines the various approaches to Eighth Amendment interpretation and the implications of these approaches on the issue of judicial deference to an enactment like the California Statute.[9] Part III draws upon the interpretational theories outlined in part II to argue that a standard of cruelty based on aspirational principles is most consistent with both the Cruel and Unusual Punishment Clause and the role of a judge in a constitutional democracy.

Anticipating that some jurists may not accept an aspirationalist view, part IV examines the California Statute in light of risk of error analysis, which is needed to temper the analysis of legal rules. Part IV first explains that consideration of error is an indispensable element of the analysis of legal rules. Although a judge may properly conclude that a certain legal rule, if always applied properly, may not infringe on constitutionally protected rights, risk of error analysis forces that judge to consider the consequences, in practice, of imperfect applications of legal rules and contemplate the possibility that such imperfect application may infringe on core values. Employing risk of error analysis thus allows the judge to correctly prioritize values in light of the potential for mistake in the application of legal rules and reach a result consistent with all of society's values. Therefore, this Note concludes that the California Statute violate the Cruel and Unusual Punishment Clause's proscription against inhumane treatment. By requiring this punishment, California has unwisely balanced the value of

8. The Eighth Amendment reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

9. One of the commentators with the most thoughtful insights on the tension between judicial review and democratic government is the late Professor Bickel. *See* Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962).

punishment against the potential consequences to individual liberty if punishment is improperly applied. Moreover, precedent and tradition require the state to do exactly the opposite. Thus, this Note argues that the courts should find the California Statute invalid.

I. BACKGROUND

Depo-Provera, a relatively new treatment for sexual offenders is both controversial and misunderstood. To clarify the ambiguity surrounding Depo-Provera, as well as its effects and its success rate in reducing sexual recidivism, this part describes how Depo-Provera works, and then delineates the recognized classes of sexual offenders, outlining the effects of Depo-Provera upon each class of offender. This part also highlights criticisms of the use of Depo-Provera to control paroled sexual offenders. These criticisms will be recalled later to demonstrate that the California Statute is likely to be ineffective, and ultimately, unconstitutional.

A. *What Is Depo-Provera?*

Depo-Provera is a synthetic progesterone approved by the FDA for use in women as a contraceptive.[10] When used in men, it works to reduce sex drive by inhibiting the release of follicle-stimulating and luteinizing hormones from the anterior pituitary gland.[11] Limiting the release of these two hormones reduces the amount of testosterone produced by the testicles.[12] The net effect is a reduction of both the amount of testosterone in the bloodstream and the aggression that it produces.[13] Depo-Provera also increases the metabolism of testosterone by the body, accordingly lowering its presence in the body.[14] In effect, then, Depo-Provera "burns the candle from both ends" by simultaneously limiting the production of testosterone and decreasing

10. Progesterones are a class of female hormones. For a general description of Depo-Provera, see Physician's Desk Reference 2079-81 (51st ed. 1997) [hereinafter PDR]; Fitzgerald, *supra* note 2, at 2 n.7.

11. Fred S. Berlin, *Sex Offenders: A Biomedical Perspective and a Status Report on Biomedical Treatment*, *in* The Sexual Aggressor 83, 106-11 (Joanne G. Greer & Irving R. Stuart eds., 1983) (describing the biological effects of Depo-Provera); Fitzgerald, *supra* note 2, at 6; Paul A. Walker et al., *Antiandrogenic Treatment of the Paraphilias*, *in* Guidelines for the Use of Psychotropic Drugs 427, 432-33 (Harvey C. Stancer et al. eds., 1984).

12. *See* Berlin, *supra* note 11, at 107 (noting the decrease in sperm count after Depo-Provera was administered); Fitzgerald, *supra* note 2, at 6; Pamela K. Hicks, *Castration of Sexual Offenders: Legal and Ethical Issues*, 14 J. Legal Med. 641, 646 (1993); Don Riesenberg, *Motivations Studied and Treatment Devised in Attempt to Change Rapists' Behavior*, 257 JAMA 899, 900 (1987); Walker, *supra* note 11, at 432-33.

13. Berlin, *supra* note 11, at 106; Fitzgerald, *supra* note 2, at 6; Riesenberg, *supra* note 12, at 900; Walker, *supra* note 11, at 432-33.

14. Walker, *supra* note 11, at 433 (Depo-Provera lowers testosterone to prepubertal levels); Berlin, *supra* note 11, at 106-07 (explaining proper dosage levels).

its prevalence in the bloodstream. Not all of the effects of progesterones are positive, however. Synthetic progesterones like Depo-Provera may also produce considerable side effects, including changes in blood pressure, changes in body chemistry, weight gain, decrease in sperm count, changing insulin levels, fatigue, testicular atrophy, diabetes mellitus, and cancer in laboratory animals.[15]

B. *A Partial Success Story: Treatment of Paraphiliacs*

Studies show that Depo-Provera, when administered in conjunction with psychological counseling, is a somewhat effective treatment for a class of sexual offenders known as paraphiliacs.[16] Paraphiliacs are those persons suffering from paraphilias, disorders characterized by hormonal compulsion to commit sexually deviant behavior in order to realize a specific and particularized sexual fantasy.[17] The first experimental use of Depo-Provera as treatment for paraphiliacs was conducted at Johns Hopkins University during the 1960s,[18] and showed definite promise in rehabilitating offenders "where none formerly existed."[19]

In the typical Depo-Provera research protocol, doctors use comprehensive psychological testing to correctly identify paraphiliac test subjects.[20] Comprehensive testing is needed because the mere commission of a sexual offense does not indicate the nature of the offender's psychological problem;[21] such acts may be motivated by a number of different causes.[22] As a result, the offender's cognitive, emotional, and behavioral states must be analyzed in order to correctly distinguish a paraphiliac offender from other types of offenders

15. Berlin, *supra* note 11, at 107; Fitzgerald, *supra* note 2, at 7; PDR, *supra* note 10, at 2081-82.

16. Walker, *supra* note 11, at 436-37; Fitzgerald, *supra* note 2, at 8-9. Professor Fitzgerald reached his conclusions after examining studies of the effects of Depo-Provera on sex offenders. In contrast to those who will receive the injections under the California Statute, however, the patients Fitzgerald described consented to Depo-Provera treatment.

17. The American Psychiatric Association has defined paraphilias as "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons, that occur over a period of at least 6 months." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 522-23 (4th ed. rev. 1994).

18. William Green, *Depo-Provera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues*, 12 U. Dayton L. Rev. 1, 5 (1986); John Money, *Use of an Androgen-Depleting Hormone in the Treatment of Male Sex Offenders*, 6 J. Sex. Res. 165 (1970).

19. Money, *supra* note 18, at 172.

20. 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, 601-02 (1981) (explaining the nature and diagnosis of paraphilias); Berlin, *supra* note 11, at 86-88 (same).

21. *See supra* note 20.

22. Fitzgerald, *supra* note 2, at 5.

who will not benefit from Depo-Provera.[23] The paraphiliac's mental state is characterized by a persistent fantasy about sex, and his emotional state is captivated by an erotic fixation which can only be realized through enactment of the particular fantasy.[24] Once doctors perform a comprehensive medical examination to ensure that the offenders are not be susceptible to any medical complications, they usually administer the participants weekly injections of Depo-Provera.[25]

Because many sexual dysfunctions are not only physical, but also psychological, consent to treatment is important because the function of Depo-Provera is to increase the threshold barrier for sexual arousal, leaving the paraphiliac offender better able to experience a psychological reorientation from counseling.[26] Although the drug treatment facilitates effective psychological counseling by relieving the offender of the constant desire to satisfy his sexual urgings, ultimately the offenders must also want to be treated to cure the psychological component of sexual dysfunction.[27] Thus, to be effective, Depo-Provera and counseling must be jointly administered to the paraphiliac offender.

C. *Criticisms of Depo-Provera*

It should also be noted, however, that medical, scientific, and legal commentators have criticized such use of Depo-Provera.[28] As discussed above, in studies of paraphiliacs, the administration of Depo-Provera in conjunction with counseling has reduced recidivism.[29] But many commentators have noted that research design flaws taint both chemical and surgical castration studies.[30] The use of castration in the

23. *Id.*; *see also* Berlin, *supra* note 11, at 83-88 (outlining the symptoms of various sexual disorders and the importance of correct diagnosis).

24. Fitzgerald, *supra* note 2, at 5; Walker, *supra* note 11, at 429.

25. Jonathan R. Kelly & James L. Cavanaugh, Jr., *Treatment of the Sexually Dangerous Patient*, 21 Current Psychiatric Therapies 101, 103-04 (1982); Walker, *supra* note 11, at 433.

26. Fitzgerald, *supra* note 2, at 9; Green, *supra* note 18, at 5-6.

27. Walker, *supra* note 11, at 433; Fitzgerald, *supra* note 2, at 9.

28. The California Psychiatric Association opposes the California Statute because it believes offenders will not be helped by Depo-Provera when it is administered absent counseling and a willingness to take the drug. *See Sex Offenders: Chemical Castration*, AB 3339, Cal. Senate Rules Comm. 8 (1996) [hereinafter Senate Rules Committee Hearings]; Green, *supra* note 18, at 6-8; Hicks, *supra* note 12, at 665-66; 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, 128 (1994); *see also Castration or Incarceration?* 151 New Scientist 3 (1996) [hereinafter *Castration or Incarceration?*] (citing criticism of the proposition that a drug can, by itself, end sexual dysfunction); Philip Cohen, *California Castration Law 'Ill-Judged'*, 151 New Scientist 4 (1996).

29. Hicks, *supra* note 12, at 647.

30. Green, *supra* note 18, at 7. Surgical castration research has been criticized because it has neither been verified by controlled group studies, nor studied on rapists, who comprise a major portion of sexually violent felons. Asher R. Pacht, *The Rapist in Treatment: Professional Myths and Psychological Realities*, *in* Sexual Assault

treatment of sexual disorders is based primarily on case reports and single experimental designs, not on controlled group studies.[31] Furthermore, some critics do not accept the underlying premise of the studies done with Depo-Provera—namely that these offenders are motivated by hormonal impulse.[32] Due to the above mentioned shortcomings, these commentators question Depo-Provera's effectiveness.[33]

Another criticism commentators raise is that Depo-Provera's effectiveness has not been studied on other classes of sexual offenders, primarily out of recognition that different sex crimes have different motivations.[34] There are four recognized classes of sexual offenders,[35] of which paraphiliacs are only one type, called Type IV class offenders.[36] In contrast to paraphiliacs, Type I sexual offenders deny the commission of the crime or the criminal nature of the act.[37] Type II sexual offenders confess to the crime, but place the blame on non-sexual forces such as drugs or stress.[38] Type III sexual offenders are motivated by non-sexual emotions, such as anger or power.[39] Due to the varying causes of sexual dysfunction many commentators do not believe that deviant behavior can be controlled with a drug, because these offenders' motivations are often not hormonal but psychological.[40]

Thus, although Depo-Provera has shown promise in treating paraphiliac offenders when used as part of a comprehensive therapeutic program, most experts agree that any approach, such as Califor-

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90, 92-93 (Marcia J. Walker & Stanley L. Brodsky, eds. 1976); *Castration or Incarceration?*, *supra* note 28, at 3.

31. *See supra* note 30 (describing shortcomings of surgical and chemical castration research designs).

32. *See* Senate Rules Committee Hearings, *supra* note 28, at 8; Hicks, *supra* note 12, at 665; Shari Roan, *No Consensus on Chemical Castration*, L.A. Times, Sept. 26, 1996, at E1, E5; Rhonda L. Rundle, *Will 'Chemical Castration' Really Work?*, Wall St. J., Sept., 19, 1996, at B1; Abigail Trafford, *Castration Complexities*, Wash. Post, Oct. 15, 1996, (Health Magazine) at 6.

33. Hicks, *supra* note 12, at 665-66 (discussing criticism of the idea that sexual dysfunction can be fully explained by hormone irregularity and not other psychological factors); Roan, *supra* note 32, at E5; Rundle, *supra* note 32, at B1; Trafford, *supra* note 32, at 6.

34. Cohen, *supra* note 28, at 4; Hicks, *supra* note 12, at 665 (explaining that some medical commentators believe that sex crimes are motivated by factors such as anger and hatred); Roan, *supra* note 32, at E5.

35. Walker, *supra* note 11, at 429; Fitzgerald, *supra* note 2, at 4; Kimberly A. Peters, *Chemical Castration: An Alternative to Incarceration,* 31 Duq. L. Rev. 307, 312 (1993).

36. Walker, *supra* note 11, at 429; Fitzgerald, *supra* note 2, at 4; Peters, *supra* note 35, at 312.

37. Walker, *supra* note 11, at 429; Fitzgerald, *supra* note 2, at 4.

38. Walker, *supra* note 11, at 429; Peters, *supra* note 35, at 312.

39. Walker, *supra* note 11, at 429.

40. Cohen, *supra* note 28, at 4; Hicks, *supra* note 12, at 665; *Castration or Incarceration?*, *supra* note 28, at 3; Roan, *supra* note 32, at E5.

nia's, that does not properly identify and counsel the paraphiliac, will not be effective.[41] The fact that the regimen in question has so little chance of being effective also suggests that punishment, and not treatment, may be the law's goal. The next part undertakes the inquiry of whether the law is punishment, and thus whether Eighth Amendment analysis is appropriate.

II. FRAMEWORK OF ANALYSIS

As discussed above, much of the scientific literature speaks of Depo-Provera in the context of treating, rather than necessarily punishing, sex offenders. This highlights an important threshold inquiry in Eighth Amendment analysis: whether chemical castration should be considered punishment or treatment.[42] This part establishes that the California Statute is designed to be a punitive measure. After demonstrating that the California Statute is punitive, and hence that Eighth Amendment analysis is appropriate, this part outlines competing constitutional theories and the implications of these theories on Eighth Amendment interpretation.

A. *California's Depo-Provera Regimen: Punishment or Treatment?*

Because Depo-Provera has been the subject of many experimental treatment protocols for sex offenders, any Eighth Amendment challenge to the California Statute could conceivably be rebuked by the contention that the purpose of the statute is to offer treatment, and therefore that the law is not properly subject to Eighth Amendment scrutiny. As a result, any attempt to defeat the argument that the purpose of the California Statute is treatment rather than punishment must undertake the difficult task of determining legislative intent. Fortunately, one case has distilled the factors that courts examine when making a determination of whether a regimen constitutes punishment or treatment. After applying the test articulated by this court and concluding that the California Statute qualifies as a punishment, this section examines two other factors—the intention of the drafter, and the location of the law in the penal code—as dispositive indicators that the purpose of the California Statute is to punish, not to treat.

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41. *See supra* notes 20-27 and accompanying text.

42. Green, *supra* note 18, at 20 (applying Eighth Amendment analysis to probationary conditions such as chemical castration); Peters, *supra* note 35, at 318-21 (explaining that the states' punishment power with respect to chemical castration is subject to the Cruel and Unusual Punishment Clause); Dennis H. Rainear, *The Use of Depo-Provera for Treating Male Sex Offenders: A Review of the Constitutional and Medical Issues*, 16 U. Tol. L. Rev. 181, 207-15 (1984) (performing Eighth Amendment analysis on chemical castration regimen); Elizabeth Symonds, *Mental Patients' Rights to Refuse Drugs: Involuntary Medication as Cruel and Unusual Punishment*, 7 Hastings Const. L. Q. 701, 703-04 (1980) (performing Eighth Amendment analysis on the use of psychotropic drugs).

In *Rennie v. Klein*,[43] a federal district court in New Jersey had to determine whether the forced administration of anti-psychotic drugs to an inmate of a mental institution constituted punishment or treatment to decide whether the inmate brought a valid Eighth Amendment claim.[44] To answer the question whether the inmate's regimen was punishment or treatment, the court distilled from prior case law four factors useful in determining whether a legislative prescription is retributive or rehabilitative: (1) Does the procedure have therapeutic value?; (2) Is its use recognized as accepted medical practice?; (3) Is it part of an ongoing psychotherapeutic program?; and (4) Even though it may have long term benefits, are the side effects unreasonably harsh?[45] Applying these factors to the California Statute leads to the conclusion that the law is punitive.

Depo-Provera fails with respect to the first factor, the therapeutic value of the treatment. The therapeutic effectiveness of Depo-Provera is debatable. While the drug has shown promise when administered to paraphiliac offenders as part of a comprehensive treatment program, the drug has not been shown to be effective when forcibly administered to non-paraphiliac offenders outside of a comprehensive treatment program.[46] Some commentators even question the validity of the studies done with paraphiliacs because of defects in research design.[47]

As to the second factor, whether the procedure is recognized as accepted medical practice, Depo-Provera fails again. The proposition upon which chemical castration rests, that sexual dysfunction can be cured purely via hormonal suppression, is not widely accepted in the medical community.[48] Indeed, a great deal of argument persists in the medical community as to the causes of sexual dysfunction, and no con-

43. 462 F. Supp. 1131 (D.N.J. 1978); Green, *supra* note 18, at 20-21. The *Rennie* Court, in distilling its own test, summarized the factors that other courts have examined to determine whether the law in question is punishment or treatment. The court found that most courts look to various factors such as whether the practice is part of a continuing and medically supervised treatment program. The court looked to the following cases to make this determination: Knecht v. Gillman, 488 F.2d 1136, 1138 (8th Cir. 1973) (looking to whether the drug is effective and accepted medical practice); Mackey v. Procunier, 477 F.2d 877, 878 (9th Cir. 1973) (finding that proof of forced administration of drug to accompany shock therapy could "raise serious constitutional questions respecting cruel and unusual punishment"); Pena v. New York State Division for Youth, 419 F. Supp. 203, 211 (S.D.N.Y. 1976) (inquiring whether administration of drug was part of ongoing psychotherapeutic program); and Nelson v. Heyne, 355 F. Supp. 451, 455 (N.D. Ind. 1972) (stating that administration of tranquilizing drugs should not be considered therapy because it was not part of a continuing treatment program). *Rennie*, 462 F. Supp. at 1143.

44. *Rennie*, 462 F. Supp. at 1143.

45. *Id.*

46. *See supra* notes 20-27 and accompanying text.

47. *See supra* notes 30-31 and accompanying text.

48. *See* Hicks, *supra* note 12, at 665 (citing medical criticism of the idea that sexual dysfunction is motivated purely by hormonal and not psychological problems).

sensus has been reached that synthetic progesterones curb such dysfunctions.[49] There is also considerable debate in the medical community over the adverse health consequences of Depo-Provera.[50] While Depo-Provera has been approved by the FDA for use as a method of birth control for women, there is no research on the long-term adverse health consequences of the drug.[51] Such information is needed because the drug did cause severe, adverse health consequences in laboratory testing.[52] These facts support the claim that the use of Depo-Provera to effectuate castration is not an accepted practice.

Because the California Statute does not prescribe the use of the drug as part of an ongoing psychotherapeutic program, the California Statute does not satisfy the third factor.[53] It is clear that the injections are not part of an ongoing therapeutic treatment program. Rather, the use of Depo-Provera is mandated for repeat offenders, regardless of the particular offender's characteristics and motivations.[54] This is so even though Depo-Provera has been proven successful only in treatment of paraphiliac offenders when administered as part of a comprehensive treatment program.[55] If California desired that these offenders receive treatment, the state would have followed the Depo-Provera research protocols, and limited the Depo-Provera application to paraphiliac offenders engaged in a counseling program.[56] That the state disregarded the elements of the experimental treatment programs like the one conducted at Johns Hopkins suggests that the state is not interested in treating offenders, but rather in punishing them.[57]

The final *Rennie* factor examines whether the treatment protocol at issue will deliver the offender tangible rehabilitative benefits as compared to its adverse side effects.[58] Even paraphiliac offenders do not

49. Hicks, *supra* note 12, at 665; *see supra* note 32-33 and accompanying text.

50. Green, *supra* note 18, at 14-15 (noting that long-term use of Depo-Provera is suspected to cause cancer); John T. Melella et al., *Legal and Ethical Issues in the Use of Antiandrogens in Treating Sex Offenders*, 17 Bull. Am. Acad. Psychiatry L. 223, 225 (1989).

51. Green, *supra* note 18, at 14-15; Roan, *supra* note 32, at E5; Rundle, *supra* note 32, at B7; Richard Stone, *Controversial Contraceptive Wins Approval from FDA Panel*, 256 Sci. 1754 (1992).

52. Green, *supra* note 18, at 14-15; Melella, *supra* note 50, at 225.

53. Cal. Penal Code § 645 (West Supp. 1997). Assemblyman Hoge, the drafter of the Depo-Provera measure, used the research of Dr. Berlin, the author of several papers on Depo-Provera, to justify his call for chemical castration of repeat sexual offenders. Dr. Berlin, however, is against the use of Depo-Provera when its administration is not voluntary and accompanied by counseling. *Sex Offenses: Chemical Castration*, AB 3339, Cal. Senate Comm. on Crim. Procedure 5-6 (1996).

54. *See* Cal. Penal Code § 645 (West Supp. 1997).

55. *See supra* notes 16-19 and accompanying text.

56. *See supra* notes 20-25 (outlining typical Depo-Provera research protocols).

57. *See supra* notes 16-19.

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

benefit from the regimen that California prescribes;[59] indeed the only rational benefit that could be perceived to flow from the statute is its retributive effect. Instead of offering rehabilitative benefits, Depo-Provera causes considerable adverse side effects.[60] While the FDA approved the drug for a short-term use for female birth control, controversy persists over the drug's adverse long-term effects, such as diabetes, insulin fluctuations, testicular atrophy, sperm deformities, and cancer, that would manifest themselves if the drug is used for the extended periods required to effectively castrate a man.[61] These potentially serious adverse health effects on the offender as compared to the virtually nonexistent therapeutic value indicate that the California Statute is retributive.

In addition to the California Statute's failure to satisfy any of the four *Rennie* factors, even the statute's legislative history reveals that it was intended to be a punitive measure. The statute's author made clear that one of the law's primary purposes was to specifically define those sex crimes that would be eligible for the penalty of chemical castration.[62] Moreover, the law's placement in the penal code, as a replacement punishment for surgical castration for certain sex crimes, also indicates that the drafters intended the law to be retributive.[63]

The above factors strongly suggest that the California Statute is not an experimental treatment program, but rather is a punitive measure.[64] Accordingly, its provisions are susceptible to Eighth Amendment analysis. This analysis is difficult, however, because there are competing theories of constitutional interpretation in general, and Eighth Amendment interpretation in particular, that complicate the consideration of the statute's constitutionality. This Note now turns to the leading theories of Eighth Amendment interpretation and some of the prominent proponents of these theories, and attempts to discern the competing interpretive options in the hope of choosing the best one for evaluating chemical castration under the California Statute.

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59. *See supra* part I.C (arguing that the involuntary use of Depo-Provera absent counseling is unlikely to be effective).

60. Melella, *supra* note 50, at 225; Stone, *supra* note 51, at 1754.

61. Green, *supra* note 18, at 14-15 (arguing that the long term use of the drug would be suspect as a valid condition of probation because it could lead to cancer); Stone, *supra* note 51, at 1754.

62. *See* Senate Rules Committee Hearings, *supra* note 28, at 7.

63. *See* Cal. Penal Code § 645 (referencing the sexual offenses to which § 645 is applicable); 1996 CA AB 3339 (stating that the chemical castration provision repeals the surgical castration requirement and is to be used in its place).

64. This Note does not consider the constitutionality of using Depo-Provera under proper medical supervision as part of an ongoing consensual treatment program; rather it focuses solely on the drug's application under the system created by the California Statute, which does not contemplate ongoing consensual therapeutic treatment.

B. *Different Approaches to Eighth Amendment Interpretation*

1. Introduction: How Does the Eighth Amendment Limit Punishment?

Courts have categorized five types of limitations that the Eighth Amendment[65] places on punishments:[66] (1) means of punishment;[67] (2) proportionality;[68] (3) power to criminalize;[69] (4) conditions of confinement;[70] and (5) procedural due process.[71] For the purposes of determining its constitutionality, chemical castration falls into the means of punishment category.[72] Means of punishment analysis asks the question: "Is it constitutional for the government to impose punishment X for *any* crime?"[73]

2. Disagreements over the Clause's Meaning

Currently, there is no dominant judicial theory of Eighth Amendment interpretation.[74] The variety of views on the Clause's meaning has precluded consensus on an appropriate standard of review, and

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65. The Supreme Court has held the Eighth Amendment to be applicable to the states via incorporation through the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660, 666-67 (1962).

66. *See* Margaret J. Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. Pa. L. Rev. 989 (1978) (applying categories in the capital punishment context). Professor Denno updated these categories to reflect current developments in Eighth Amendment case law. *See* Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. (forthcoming January 1997).

67. *See, e.g.*, Weems v. United States, 217 U.S. 349, 382 (1910) (proscribing cadena temporal, the Philippine punishment of binding the hands and ankles in chains, followed by the loss of basic civil rights).

68. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 976-86 (1991) (discussing whether the Eighth Amendment contains a proportionality requirement).

69. *See, e.g.*, Robinson v. California, 370 U.S. 660, 667 (1962) (holding it unconstitutional to penalize a person because he is a drug addict).

70. *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 9-10 (1992) (beatings by prison guards permissible to limited extent).

71. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 241 (1972) (Douglas, J., concurring) (stating that "the requirements of due process ban cruel and unusual punishment").

72. The issue is whether the state can impose chemical castration as a legal condition of parole, irrespective of whether such a condition is proportional to the crime committed. Chemical castration may well be invalid as a disproportionate punishment. Such a discussion, however, is beyond the scope of this Note.

73. Radin, *supra* note 66, at 993.

74. *See id.* at 1002 (suggesting that in cruel and unusual punishment cases, "confusion about the appropriate adjudicatory attitude has prevailed"); John C. Shawde, *Jurisprudential Confusion in Eighth Amendment Analysis*, 38 U. Miami L. Rev. 357, 372 (1984) (noting the failure of Supreme Court Justices to agree on a justification for the death penalty cases); Richard L. Slowinski, South Carolina v. Gathers: *Prohibiting the Use of Victim-Related Information in Capital Punishment Proceedings*, 40 Cath. U. L. Rev. 215, 249 (1990) (citing persistent disagreement in Eighth Amendment interpretation).

the cases reflect this disagreement.[75] In *Furman v. Georgia*,[76] a case involving the constitutionality of Georgia's capital punishment statute, the Supreme Court handed down nine separate opinions.[77] Practically, this means that the only time the Supreme Court agrees that a punishment is unconstitutionally cruel is when the punishment is one of the core cases of cruelty known to the Framers. Absent the presence of a quintessential example of cruelty—such as disemboweling alive, public dissection, burning at the stake, quartering, or physical castration—the Court has argued over the definition of cruelty.[78] The general source of this difficulty is a familiar one in constitutional adjudication. On the one hand, the legislative enactment represents the will of the people, which is not to be disregarded lightly in a democracy.[79] On the other hand, the law in question may violate the Constitution, which must be protected from the encroachments of the ordinary law.[80]

75. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976) (opinion of Stewart, Powell and Stevens, JJ.) (articulating procedural rationale for the death penalty); Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280 (1976) (requiring concurrence of Justices Brennan and Marshall to obtain five vote majority); Roberts v. Louisiana, 428 U.S. 325 (1976) (same).

76. 408 U.S. 238 (1972).

77. *Furman*, 408 U.S. at 240-42 (Douglas, J., concurring) (asserting that the death penalty is cruel and unusual because it is meted out in a discriminatory fashion); *id.* at 257 (Brennan, J., concurring) (arguing that that the death penalty is substantively cruel in principle); *id.* at 306, 310 (Stewart, J., concurring) (stating that the death penalty is cruel because it is "wantonly and so freakishly imposed"); *id.* at 311, 312 (White, J., concurring) (arguing that capital punishment is cruel because it no longer serves any "discernible social or public purposes"); *id.* at 314 (Marshall, J., concurring) (asserting that capital punishment is cruel because it is morally unacceptable to the people, it fails as a deterrent, and lesser forms of retribution are adequate); *id.* at 375 (Burger, C.J., dissenting) (arguing that capital punishment is constitutional because it was acceptable to the Framers of the Amendment and is consistent with evolutionary standards of decency as evidenced by legislative sanction); *id.* at 405, 413 (Blackmun, J., dissenting) (stating that the death penalty, while repugnant personally, is not in itself unconstitutional); *id.* at 414 (Powell, J., dissenting) (arguing that the Constitution itself and society's standards of decency, as evidenced by legislative enactments, opinion polls, etc., demonstrate the death penalty to be constitutional); *id.* at 465 (Rehnquist, J., dissenting) (stating that death penalty is constitutional because it has been thought necessary by the nation's legislatures since the time of the nation's founding); *see also* Radin, *supra* note 66, at 998 (calling *Furman* a "jurisprudential debacle").

78. Weems v. United States, 217 U.S. 349, 377 (1910) (identifying quintessential examples of cruelty); Radin, *supra* note 66, at 1001-02 (describing disagreement over means of Eighth Amendment interpretation); Shawde, *supra* note 74, at 370-72 (same); Slowinski, *supra* note 74, at 249 (noting disagreements over Eighth Amendment interpretation in the area of victim information in capital punishment proceedings).

79. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law, in* Legal Essays 9-12 (1908) (arguing for deference to the democratic process).

80. The problem of judicial annulment of legislative enactments has been called the "countermajoritarian difficulty" by one commentator. *See* Bickel, *supra* note 9, at 16. Professor Bickel justified judicial review on the basis that the courts were protect-

Justices have responded differently to the interpretational challenge posed by the Cruel and Unusual Punishment Clause. Resolution of the question of whether a punishment is cruel will rest upon the Justices' interpretation of the Clause.[81] For example, if the Clause is read to prohibit only historically cruel punishments, then deference should be given to the legislative judgment unless it sanctions a punishment considered historically cruel.[82] If the Clause is given an evolutionary reading, then the legislative judgment should be accorded deference when the evolutionary meaning of the Clause is not violated.[83] In considering chemical castration, then, only after the meaning of the Clause is determined can an evaluation of the constitutionality of the California Statute can be made.

3. The Interpretive Options

Interpreting the Cruel and Unusual Punishment Clause poses a familiar two level problem.[84] On the first level is the question of whether to read evolutionary intent into the Constitution. Some theorists believe that fidelity to the Constitution requires following historical practices (the "Originalists").[85] Others argue that the Constitution must be read in an evolutionary fashion that protects individual liberties (the "Evolutionists").[86] The second level of the problem is that if,

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ing the people's fundamental law, the law that governs their political life, i.e., the Constitution, from the ill considered encroachments of the ordinary legislative enactment. When courts invalidated such enactments, they were acting to protect the people's fundamental law, and as a result not acting contrary to democratic rule. *Id.*; *see also* Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) [hereinafter Federalist No. 78] (elaborating on the role of courts in defending the Constitution from legislation that contravenes it).

81. *See* Bickel, *supra* note 9, at 16 (stating that a Justice's opinion may be independent of popular will).

82. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 977 (1991) (Scalia, J.) (using historical analysis to argue that the language of the Eighth Amendment does not embody a proportionality requirement).

83. *See infra* note 86 and accompanying text (giving a sample of those commentators who have argued for evolutionary reading of the Constitution).

84. Radin, *supra* note 66, at 1030.

85. *See generally* Robert Bork, The Tempting of America: The Political Seduction of the Law (1990) (critiquing those scholars who read the Constitution in an evolutionary fashion as revisionists who manipulate the text to suit political ends); Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 37-47 (1997) [hereinafter Scalia, Interpretation] (arguing for the originalist position because it is the only position compatible with popular rule and constitutional democracy); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989) [hereinafter Scalia, *Originalism*] (admitting that while the originalist position is flawed, its flaws are less striking than any of the other methods of constitutional exegesis).

86. The following is a sample, by no means exhaustive, of those commentators who have argued for reading evolutionary intent into the Constitution: Bickel, *supra* note 9; Ronald Dworkin, Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom (1993); John H. Ely, Democracy and Distrust: A Theory of Judicial Review (1980); Cass R. Sunstein, The Partial Constitution (1993); Charles L. Black, Jr., *On Reading and Using the Ninth Amendment*, *in* Power and Policy in

in interpreting the Constitution, one believes that evolutionary intent is to be read into the Clause, from what source does one derive such content?[87]

a. *The Originalists*

Some current Justices rely on the force of history when interpreting the Constitution. In the context of Eighth Amendment interpretation, these Justices, such as Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, would argue that the Court's role is to disallow only those punishments that were historically contemplated as cruel.[88] Under this view, courts have a limited and deferential role, and may overrule a legislative enactment only if it sanctions a punishment clearly considered barbaric at the time of the framing.[89] Punishments fitting this description—such as disemboweling, public dissection, and the like—are rare.

b. *The Evolutionists*

In contrast, some Justices, such as Justices Brennan, Marshall, and Powell, believe that evolutionary intent should be read into the Con-

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Quest of Law: Essays in Honor of Eugene Victor Rostow 187 (Myres S. McDougal & W. Michael Reisman eds., 1985); James E. Fleming, *Constructing the Substantive Constitution*, 72 Tex. L. Rev. 211 (1993); Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993); and Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063 (1980).

87. Each of the writers who favor examining evolutionary intent would fill the open provisions of the Constitution with meaning based upon their respective theories. For example, Professor Thayer would argue that the Constitution sets up a system of democracy akin to England's. Thus, democratic outcomes should generally not be disturbed. Thayer, *supra* note 79, at 9. Professor Dworkin argues that the Constitution's open provisions must be filled with our aspirational principles, and those principles are discovered via good argument. For an explanation of discovering aspirational principles via good argument, see Dworkin, *supra* note 86, at 145-46. Professor Ely would fill in the open provisions of the Constitution by making the courts the guardians of democratic procedure. Ely, *supra* note 86, at 73-74. Professor Sunstein would fill in the open provisions of the text with liberal republicanism, or "deliberative democracy." Sunstein, *supra* note 86, at 123.

88. Hudson v. McMillian, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting) (arguing that traditionally the Eighth Amendment only applied to punishments given out by judges, not inhumane prison conditions); Harmelin v. Michigan, 501 U.S. 957, 968-73 (1991) (Scalia, J.) (using historical analysis to argue that the cruel and unusual language referred to punishments considered barbaric and inhumane, such as drawing and quartering, burning, disemboweling alive, etc.); Furman v. Georgia, 408 U.S. 238, 465 (1972) (Rehnquist, J., dissenting) (arguing for judicial deference towards a "penalty [the death penalty] that our Nation's legislators have thought necessary since our country was founded"); *see also* Scalia, *Originalism*, *supra* note 85, at 862 (arguing that the evolutionary intention of the words of the Eighth Amendment is "far from clear; and I know no historical evidence for that meaning").

89. *Furman*, 408 U.S. at 465 (Rehnquist, J., dissenting) (arguing that the death penalty is constitutional based upon its historical acceptance); Radin, *supra* note 66, at 1012-13.

stitution.[90] These Justices diverge, however, on the proper source of the Cruel and Unusual Punishment Clause's content. Proponents such as Justice Powell read contemporary standards of decency into the language of the Clause as expressed by statutes, public opinion polls, and other indicia of public sentiment.[91] This approach, also known as a positive approach, keeps the Clause consonant with society's current conception of cruelty, a goal that proponents of this view would argue is sought by the Clause's vague language.

The approach of Justices Brennan and Marshall, on the other hand—also known as a normative approach—attempts to identify an underlying societal consensus,[92] to discern whether, if fully informed as to both the purposes and drawbacks of the penalty, society would find the penalty unacceptable.[93] The normative approach requires the judge to discover society's underlying aspirational values and then apply those values to a given punishment to ascertain whether it is cruel.[94] This approach also keeps the Cruel and Unusual Punishment Clause in tune with society's current values, but does so by looking to the underlying aspirational principles embodied in the Constitution.[95]

90. *Furman*, 408 U.S. at 263-68 (Brennan, J., concurring) (arguing that the Clause's indefiniteness is intentional, and designed to limit the legislature's power to inflict punishment); *id.* at 329 (Marshall, J., concurring) (arguing that the most important principle in the Clause is that it must have evolutionary meaning); Coker v. Georgia, 433 U.S. 584, 603 (1977) (Powell, J., concurring in part and dissenting in part) (defining "evolving standards of decency" via legislative actions and jury behavior in capital cases). Many scholars also endorse this view. *See, e.g.*, Bickel, *supra* note 9, at 106-10 (arguing for the judicial vindication of individual liberties); Dworkin *supra* note 86, at 118-47 (defending an aspirational reading of the Constitution that vindicates fundamental liberties); Sunstein, *supra* note 86, at 1-39, 347-54 (advocating judicial enforcement of liberal republican values). For a critique of commentators, who, like Professor Bickel, favor evolutionary meaning, see Bork, *supra* note 85, at 187-93, 213-14 (discussing the proponents of evolutionary intent as "revisionists" who alter the meaning of the Constitution to suit political ends), and Ely, *supra* note 86, at 43-72 (criticizing those who believe that judges should protect substantive liberties instead of acting as guardians of procedural fairness).

91. *Coker*, 433 U.S. at 603 (Powell, J., concurring in part and dissenting in part) (stating that decency must be defined by indicators like legislative enactments and jury sentencing behavior); *Furman*, 408 U.S. at 385-86 (Burger, C.J., dissenting) (relying on indicators like public opinion polls and legislative enactments to determine constitutionality).

92. *See Furman*, 408 U.S. at 271-79 (Brennan, J., concurring) (suggesting the Eighth Amendment prohibits punishments that are degrading to human dignity, inflicted arbitrarily, unacceptable to modern society, or excessive); *id.* at 360-69 (Marshall, J., concurring) (determining the extent to which there is an underlying consensus regarding capital punishment); Radin, *supra* note 66, at 1039 (explaining that Justice Marshall has attempted to discern the public's deeply held beliefs about a particular punishment when analyzing it under the Eighth Amendment).

93. *See* Gregg v. Georgia, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting).

94. *See, e.g.*, *Furman*, 408 U.S. at 341-42 (Marshall, J., concurring) (attempting to discern underlying consensus regarding capital punishment); Dworkin, *supra* note 86, at 135-38.

95. *Furman*, 408 U.S. at 270 (Brennan, J., concurring); Dworkin, *supra* note 86, at 135-38.

Because this reading looks to underlying aspirational principles, it is aptly titled the aspirational approach.

The imprecise language of the Cruel and Unusual Punishment Clause therefore defies easy explanation and challenges judges to fill its vague contours with content that is consistent with both the language of the Clause and with the institutional role of the courts. The next section presents a reading of the Clause that is consistent with the imprecise language of the Clause and with the institutional role that the Constitution contemplated for the judiciary.

III. A SUBSTANTIVE STANDARD OF EIGHTH AMENDMENT INTERPRETATION

As demonstrated above, the Constitution in general, and the Eighth Amendment in particular, offer judges many interpretational options. This part argues that the approach advocated by Justices Brennan and Marshall is most consistent with the meaning of the Cruel and Unusual Punishment Clause. The argument is divided into two sections. The first explains why the aspirational approach advanced by Justices Brennan and Marshall is the best way to interpret the Cruel and Unusual Punishment Clause. The second section applies the jurisprudence of Justices Brennan and Marshall to chemical castration, demonstrating why the California Statute violates the Eighth Amendment's Cruel and Unusual Punishment Clause.

A. *Arguments for Evolutionary Meaning of the Clause*

As stated above in Part II, two levels of analysis are required in order to determine the substantive content of the Eighth Amendment.[96] The first level is whether the Clause is to be read with evolutionary intent;[97] in the event the answer is yes, the second level seeks to identify the source of that evolutionary intent.[98] This section argues that the Clause should be read to encompass evolutionary intent, and that this evolutionary intent should be derived from the "evolving standards of decency that mark the progress of a maturing society."[99] To support the contention that the Clause should be interpreted with evolutionary intent, this section argues that the aspirational reading is most consistent with both the text and the institutional role of the judge in a constitutional democracy. This section finally provides democratic justification for the aspirational reading.

96. *See supra* notes 84-87 and accompanying text.

97. *See supra* part II.B.3.

98. *See supra* part II.B.3.b.

99. Trop v. Dulles, 356 U.S. 86, 101 (1958).

1. The Language of the Clause Refutes the Notion of a Fixed Meaning

The open language of the Clause indicates that the Framers desired it to be read flexibly so as to evolve over time.[100] One can argue that the Framers intended to ban cruelty as that term was specifically understood at the time of ratification. But as Professor Dworkin has argued, to phrase the Clause as they did was an imprecise way to simply ban those penalties that the Framers thought cruel.[101] The Framers knew how to be precise, as exemplified by other provisions of the constitutional text listing specific requirements. For example, the Sixth Amendment lists the exact requirements the Framers thought necessary for a fair criminal trial.[102] The Framers could have been similarly specific in the Eighth Amendment. Professor Dworkin argues that the Framers' use of more capacious language indicates that the Clause is open not only to encompassing those punishments that the Framers thought cruel, but also those punishments that violate evolving conceptions of cruelty.[103] If the Framers wanted to proscribe a specific list of punishments, they could have done so.[104] Courts have

100. For a more general discussion of how the open provisions of the Constitution should be read, and the textual justification for such a reading, see, for example, Dworkin, *supra* note 86, at 132-44 (arguing that the text should be interpreted as a framework of aspirational principles). *See also* Sunstein, *supra* note 86, at 93-104 (interpreting the Constitution as embodying liberal republican values); Black, *supra* note 86, at 187 (using the Ninth Amendment as a rule of construction to justify the protection of unenumerated rights).

101. Ronald Dworkin, Taking Rights Seriously 135-36 (1977).

102. The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

103. Dworkin, *supra* note 86, at 135-36; Radin, *supra* note 66, at 1031-32.

104. In Harmelin v. Michigan, 501 U.S. 957 (1991), Justice Scalia argued that the Eighth Amendment contains no proportionality guarantee because the language of the Clause does not bear such a construction. Justice Scalia claimed that "cruel and unusual" was not the way that the Framers would have stated a proportionality principle because it was too vague. If the Framers had wanted proportionality, Justice Scalia contended, they would have said so explicitly. To support his contention that the Framers did not use language carelessly, he gives the example of Thomas Jefferson's introduction in the Virginia legislature of a proposal entitled a "Bill to Proportion Punishments" that was intended to make punishments proportional. *Id.* at 977. Thus, if the Framers had wanted a proportionality requirement, the Framers knew how to so specify, and would not have used such imprecise language. Although the question of whether the Eighth Amendment contains a strict proportionality guarantee is outside the consideration of this Note, Justice Scalia's analysis can be used to show that the Clause should not be interpreted as a static list of cruel punishments. Rather, as Justice Scalia points out, the Framers knew how to express what they wanted precisely. If they had wanted to confine cruel and unusual punishments to

recognized the validity of this argument, and this understanding is evidenced by the fact that they must sometimes reject punishments that were historically acceptable so as to remain faithful to the Constitution.[105] This is not to say that the Eighth Amendment does not preclude the administration of punishments that the Framers thought unacceptable, but rather that the language of the Clause is not exhausted by those practices considered cruel in the late 1700s.[106] It is entirely appropriate, therefore, to widen the inquiry into whether chemical castration is cruel beyond the historical meaning of cruelty.[107]

The more natural reading of the Clause indicates that rather than intending to proscribe a limited set of punishments considered cruel in their own time, the Framers instead desired to proscribe cruelty as a general principle[108]—to proscribe whatever society would deem cruel at a particular stage in American history.[109] Thus, cruelty is not only confined to those specific practices that the Framers found offensive, but also consists of aspirational principles capable of application to future circumstances.[110] Thus, fidelity to the text may require courts go beyond historical practices. Justice McKenna stated this proposition eloquently in *Weems v. United States*:[111]

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be

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those specific practices that they considered cruel, they would have provided correspondingly more specific and precise language to express that intention. Their use of the capacious language forbidding "cruel and unusual" punishments, however, supports the contention that the Framers intended that the Clause be given evolutionary meaning. Thus, the Clause should be read to allow future generations to determine what punishments they consider cruel and unusual. This view of the Eighth Amendment leaves it vital and applicable to changing times. *See* Dworkin, *supra* note 101, at 136 (stating that the Clause's appeal to moral concepts cannot be fixed and must remain open to changing interpretations).

105. *See* Ingraham v. Wright, 430 U.S. 651, 670-71 n.39 (1977) (suggesting that ear cropping, acceptable at the time of the Founding, would now be unacceptable); Jackson v. Bishop, 404 F.2d 571, 578-79 (8th Cir. 1968) (tradition of using strap as disciplinary device on inmates was not determinative of whether it is cruel for Eighth Amendment purposes); Dworkin, *supra* note 86, at 135-38.

106. Dworkin, *supra* note 86, at 132-44.

107. *See, e.g.*, Sunstein, *supra* note 86, at 93-104, 107-10.

108. Dworkin, *supra* note 86, at 135-38; Radin, *supra* note 66, at 1032; *see also* Sunstein, *supra* note 86, at 97 (citing the negative effects that the Originalist reading would have on fundamental liberties).

109. Bickel, *supra* note 9, at 106-07 (arguing against interpreting the Constitution with the specific intent of the Framers); Dworkin, *supra* note 86, at 136-37; Radin, *supra* note 66, at 1032. For an example of criticism of this approach to Eighth Amendment interpretation, see Scalia, Interpretation, *supra* note 85, at 39-41, 144-49.

110. *See* Bickel, *supra* note 9, at 106-08; Dworkin, *supra* note 86, at 135-36; Radin, *supra* note 66, at 1032.

111. 217 U.S. 349 (1910).

> capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. . . . They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.'. . . Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power . . . [and] [r]ights declared in words might be lost in reality.[112]

The text of the Cruel and Unusual Punishment Clause, then, contemplates incorporation of contemporary standards of decency. This evolutionary reading, based on underlying aspirational principles, is often criticized, however, on the basis that it is anti-democratic. Critics charge that an evolving constitution, and the active judiciary that results, has two detrimental effects on democratic government. The first critique is that an active judiciary constantly places new limitations upon democratic government,[113] thus becoming an institutional obstacle to self rule and societal change.[114] The second related criticism of the aspirational approach is that it is fundamentally inconsistent with democratic rule.[115] This criticism basically argues that the judge will often substitute his own judgment for what the people think under the guise that his judgment is what the people should think, and therefore acts in a anti-democratic or paternalistic manner.[116] The next two sections refute these criticisms in turn.

2. Why Aspirational Principles Fit the Institutional Role of Judges in a Constitutional Democracy

As stated above, some commentators criticize an aspirational reading of the Clause on the grounds that it allows courts to place new restrictions upon democratic rule.[117] Thus, the judiciary is placed in an institutional position that actually impedes democratic governance. This is not the case, however, when one considers that our government is a constitutional democracy; the purpose of having a written constitution is to constrain the power of majorities when democratic outcomes infringe upon the higher law of the Constitution.[118] Thus, when courts act contrary to the will of the majority and defend the higher law of the Constitution, they are acting in the role envisioned for them by the Framers.[119] Accordingly, any criticism of this practice

112. *Id.* at 373.
113. *See* Scalia, Interpretation, *supra* note 85, at 41-44.
114. *Id.*
115. *See* Bork, *supra* note 85, at 252-53; Scalia, Interpretation, *supra* note 85, at 9-10 (discussing the uncomfortable relationship of common law courts and democratic rule).
116. *See* Scalia, Interpretation, *supra* note 85, at 9-14.
117. *See supra* notes 115-16 and accompanying text.
118. Bickel, *supra* note 9, at 16; Federalist No. 78, *supra* note 80, at 467 (stating that the Constitution ought to be preferred over a statute when the two conflict).
119. *See* Federalist No. 78, *supra* note 80, at 469 (calling judges the "bulwarks of a limited Constitution"); Bickel, *supra* note 9, at 16.

is really an argument against constitutional democracy itself, not an argument against the aspirational reading of the text.

The positive approach advocated by Justice Powell and Chief Justice Burger, an attempt to reconcile judicial review with democratic governance, is also inconsistent with the institutional role of judges in our system,[120] primarily because the judiciary will not protect the higher law of the Constitution from outcomes which contravene it.[121] Reliance upon public opinion to determine constitutionality effectively reads the Cruel and Unusual Punishment Clause out of the Constitution by conferring constitutionality upon any legislative enactments by mere virtue of their popular endorsement.[122] One purpose of the Constitution is to limit the actions of the majority, but those advocating Justice Powell's approach would look specifically to majorities to determine the parameters of constitutionality, thereby eliminating the role of the Constitution as a check on majorities.[123]

The shortcomings of both the positive and originalist positions highlight the fact that the Clause must be filled with conceptions of cruelty that are consistent with the purpose of a constitutional democracy—to place limits on what popularly elected majorities can do.[124] A source of content based on aspirational principles embodied in the Constitution would fulfill the purpose of the Clause, which is to insulate society "from our baser selves" by protecting individuals from the occasional collective temptation to be cruel.[125]

The question of whether a punishment is cruel and unusual should depend on whether people who were fully informed as to the purposes of the punishment and its potential drawbacks would find the penalty unacceptable on the whole.[126] While there are good justifications for

120. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 436-40 (1972) (Powell, J., dissenting); *id.* at 385-88 (Burger, C.J., dissenting); *see supra* part II.B.3.b.

121. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 102 (1958) (invalidating legislature's punishment of expatriation for certain criminal offenses); Weems v. United States, 217 U.S. 349, 382 (1910) (proscribing Philippine punishment of cadena temporal); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810) (Marshall, C.J.) (explaining the sensitive function of the judiciary in reviewing legislative enactments for constitutionality); Dworkin, *supra* note 86, at 122-23; Ely, *supra* note 86, at 73-104; Radin, *supra* note 66, at 1034-36.

122. *See Furman*, 408 U.S. at 263 (Brennan, J., concurring) (arguing that a primary purpose of the Bill of Rights was to check the power of the legislature); *see also* Dworkin, *supra* note 101, at 191-92 (suggesting that certain rights must be placed outside the reach of majorities because they are preconditions to proper democratic functioning); Fleming, *supra* note 86, at 217-18 (explaining the role of the Constitution in securing fundamental rights as preconditions of deliberative democracy); Radin, *supra* note 66, at 1035-36 (arguing that it is improper to rely on opinion polls in constitutional adjudication).

123. *See supra* note 120-22.

124. *See supra* note 118-22 and accompanying text.

125. *Furman*, 408 U.S. at 345 (Marshall, J., concurring); *see* Dworkin, *supra* note 86, at 122-23; Radin, *supra* note 66, at 1035-36.

126. *Furman*, 408 U.S. at 361 (Marshall, J., concurring); Radin, *supra* note 66, at 1039.

this idea, it too is criticized on the grounds that judges are allowed to substitute their own opinions of what people should think for what they actually do think, and therefore are acting in an anti-democratic manner.[127]

3. The Aspirational Reading Is Not Anti-Democratic

Two arguments refute the contention that judges act anti-democratically when they invalidate popular outcomes. First, Professor Dworkin argues that the Constitution is a constitution of abstract principles that sets forth general, yet comprehensive, moral standards.[128] If the Constitution is read as a compilation of the people's aspirational principles, then the role of judges is to identify these deeper abstract moral principles[129] and determine whether the ordinary laws are consistent.[130] When conceived in this manner, the role of judges is democratic because they serve to protect the people's higher law from encroachments of ordinary law.[131]

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127. John Hart Ely has written that gleaning the content of the Cruel and Unusual Punishment Clause from consensus is vulnerable to being directly contradicted by subsequent legislative enactments. Ely, *supra* note 86, at 65, 173-74. As an example of the dangers of the consensus approach, he points to Justices Brennan and Marshall's concurring opinions in *Furman*, in which they stated their beliefs that capital punishment is unconstitutional because it is out of accord with society's values. Stated differently, Justices Brennan and Marshall expressed their belief that the Constitution embodies an aspirational principle inidcating that, at this point in our history, capital punishment is unconstitutional. *See Furman*, 408 U.S. at 279 (Brennan, J., concurring) (stating that legislative authorization of a punishment does not establish acceptance of the punishment); *id.* at 361 (Marshall, J., concurring) (stating that, in determining whether a punishment is cruel, public opinion is of limited utility, and that the determination really 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"). Shortly after the Supreme Court issued its judgment in *Furman*, however, Ely pointed out that the "virtual stampede" of reenactments of the death penalty sharply rebuked the belief that capital punishment was not in accord with society's values. *Id.* But the validity of Ely's criticism depends upon how one defines "consensus." If one accepts the proposition, advocated by those such as Justice Powell, that consensus is found in legislation and public opinion polls, then Ely's criticism is exactly right. Justices Brennan and Marshall look to higher aspirational principles when determining consensus. Ely's criticism is not germane to the aspirational model because according this model, legislation is valid only when it is in accord with the Constitution's higher aspirational principles. *See* Dworkin, *supra* note 86, at 135-38 (arguing that the Constitution is a constitution of comprehensive aspirational principles). Justices Brennan and Marshall would argue that capital punishment statutes are inconsistent with the higher aspirational principles of the Constitution, and thus the numerous capital punishment statutes passed after *Furman* are not proper indicators of the constitutionality of capital punishment. *See also supra* notes 118-22 and accompanying text.

128. *See* Dworkin, *supra* note 86, at 119-25.

129. *Id.*

130. *Id.*; *see supra* part III.A.2 (discussing the judge's role in protecting the higher law of the Constitution from the encroachments of legislative enactments).

131. Bickel, *supra* note 9, at 16; Federalist No. 78, *supra* note 80, at 467-69.

The second reason the aspirational reading is not anti-democratic is based on the concept of reflective equilibrium, the process by which we conform our individual decisions to the general principles in which we believe.[132] The approach advocated by Justices Brennan and Marshall assumes that the populace is rational enough to conform its views to the realities of the penalty in question.[133] Assuming that the populace's decisions can be made according to the available information, the judge must require a certain minimum rationality on the part of the populace before its views can be taken seriously.[134] Consequently, a court should be influenced by the moral consensus of the populace only when that judgment can be inferred as part of a coherent moral position for each person who believes it.[135] This reflective equilibrium is reached after each moral position is measured against the person's deeply held convictions to assure consistency.[136] Because no public opinion poll exists that can ensure reflective equilibrium, the judge must seek to discern society's deeply held values and compare these values to the punishment in question.[137]

The two arguments mentioned above are closely related. The public's position on an issue will hopefully reflect an underlying societal consensus. Principles upon which there is clear societal consensus can be the same aspirational principles embodied in the Constitution. When the two are in disagreement, however, the higher aspirational principles of the Constitution govern.[138] This relationship can be better demonstrated by example. Suppose the legislature passed a measure allowing the police to perform random searches of convicted drug dealers' homes to assure that the former convicts were acting lawfully. Such a law may be said to represent the consensus of the majority, but is inconsistent with the Constitution's deeply rooted aspirational principle of freedom from government intrusion in the home as embodied in the Fourth Amendment.[139] The judge would be correct in invalidating the statute due to its inconsistency with society's deeply held aspirational principle that privacy is a fundamental

132. John Rawls, A Theory of Justice 48-51 (1971) (describing reflective equilibrium); *see* Dworkin, *supra* note 101, at 248-53 (describing the same basic concept in terms of a moral position); Radin, *supra* note 66, at 1041.

133. *See* Rawls, *supra* note 132, at 48; Radin, *supra* note 66, at 1041.

134. Radin, *supra* note 66, at 1040-41.

135. *Id.*

136. *Id.*

137. *Id.* at 1041-42. For an example of a judge discerning underlying consensus, see Justice Brennan's concurrence in *Furman v. Georgia*, 408 U.S. 238, 257-306 (1972).

138. *See* Bickel, *supra* note 9, at 16 (explaining that when there is conflict between the Constitution and ordinary law, the Constitution governs); Dworkin, *supra* note 86, at 137 (stating that the Constitution was designed to lay out aspirational principles of government).

139. *See* Poe v. Ullman 367 U.S. 497, 548-51 (1961) (Harlan, J., dissenting) (explaining that the Fourth Amendment's role is to protect the home from government intrusion absent compelling justification).

liberty.[140] The judge could not take the popular view seriously in this case because it is not internally consistent with our fundamental political beliefs. Thus, aspirational principles will often be the yardstick by which we measure the internal consistency of the populace's opinions. This Note now seeks to discern those underlying aspirational principles to guide the inquiry into whether a given punishment, in this case chemical castration, is cruel.

B. *Determining Our Underlying Values in the Context of Chemical Castration*

How do we determine our underlying principles? Because no public opinion poll can perfectly determine the public's reaction to specific punishments, judges must use concepts upon which there is a consensus to infer what a coherent position would be with respect to the particular punishment.[141] Justice Brennan, in his *Furman* concurrence, suggested several principles to guide a judge in determining whether a given punishment is cruel.[142]

1. The Gratuitous Infliction of Suffering

One principle that Justice Brennan identified is whether a given punishment amounts to the gratuitous infliction of suffering.[143] If there is no justifiable reason for inflicting suffering, then there can be little doubt that the method in question is cruel,[144] because a measure that neither protects society from future crimes, nor rehabilitates the perpetrator is purposeless punishment.[145] The California Statute will not serve to rehabilitate the offender because it disregards well accepted medical distinctions between classes of sexual offenders, and instead groups all sexual offenders into an amorphous collection.[146] Additionally, the law requires that all sex offenders undergo a treatment that has been shown to have only arguable success with one dis-

140. *See* Roe v. Wade, 410 U.S. 113, 152-53 (1973) (holding Texas' abortion statute unconstitutional because it was inconsistent with the fundamental right to privacy).

141. *See Furman*, 408 U.S. at 271-74 (Brennan, J., concurring) (discerning society's underlying values and comparing them to the punishment in question to determine constitutionality); Radin, *supra* note 66, at 1042-47.

142. *Furman*, 408 U.S. at 271-79. Justice Brennan also discussed proportionality and excessiveness as criteria to guide a judge. *Id.* This Note, however, does not utilize these two inquiries because they raise the question of whether the Clause contains a proportionality requirement. Rather, this Note focuses on whether castration is cruel, not on whether it is proportional. *See supra* part II.B.1.

143. *Furman*, 408 U.S. at 280 (Brennan, J., concurring).

144. *Id.*; Radin, *supra* note 66, at 1043.

145. *Furman*, 408 U.S. at 280-82 (Brennan, J., concurring). Another objective of punishment is retribution. The Eighth Amendment limits the extent to which society may punish; punishment may not be cruel. Thus, arguing that retribution is a sufficient basis to justify chemical castration assumes what must be proven through good argument, i.e., that chemical castration is not cruel.

146. *See supra* part I (explaining that Depo-Provera research was done only with paraphiliac offenders, and not with other recognized classes of sexual offenders).

tinct class of offenders.[147] Furthermore, the one class of offenders who arguably have been responsive to the drug have shown this improvement only when the drug is administered in conjunction with counseling.[148] Because the California Statute does not provide for such counseling, Depo-Provera will not be effective in treating any offenders, and, as a result, paroled offenders will likely present a substantial risk to society.[149] The law does not offer the promise of effective rehabilitation and worst of all leaves innocent persons at risk of future attacks. From a public safety perspective, continued imprisonment of sexual offenders is much more desirable then the ineffective regime created by the California Statute. Therefore, because chemical castration is ineffective and cruel, a judge could conclude that it violates the people's higher law against gratuitous punishment.

2. The Denial of Human Dignity

The deprivation of rights without good reason brings into focus another underlying theme of cruel punishment. A cruel act violates the collective dignity of both the individual and society.[150] The notion that a punishment must not violate human dignity is based on the moral obligation to treat other people with the kind of respect that must be accorded all persons because of their humanity;[151] violations of respect and dignity are manifested by deprivations of fundamental rights.[152] California's eradication of basic fundamental rights, accorded a person because he is human, such as the right to procreate,[153] the right to decisional autonomy,[154] and the right to privacy,[155] amounts to a denial of that person's dignity as a human being. The fact that sex offenders commit vile crimes does not give the legislature

147. *See supra* part I.B.
148. *See supra* part I.B.
149. *See supra* part I.C.
150. Furman v. Georgia, 408 U.S. 238, 270-73 (1972) (Brennan, J., concurring) (arguing that the import of many of the Court's cruelty cases is that "even the vilest criminal remains a human being possessed of common human dignity"); *cf.* Robinson v. California, 370 U.S. 660, 666-67 (1962) (holding that the state is not permitted to treat disease as a crime because "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"); Trop v. Dulles, 356 U.S. 86, 101 (1958) (explaining that expatriation amounts to denial by society of the individual's membership in a human community); Weems v. United States, 217 U.S. 349, 366 (1910) (stating that the punishment of cadena temporal, the binding of hands and ankles in chains, followed by the loss of all civil rights, is completely degrading); *see also* Radin, *supra* note 66, at 1043. Professor Dworkin uses language of "equal concern and respect" when referring to the requirement that all persons be treated with dignity. *See* Dworkin, *supra* note 101, at 180.
151. *See supra* note 150.
152. *Cf.* Trop v. Dulles, 356 U.S. 86, 101-02 (1958) (holding the punishment of denationalization inhumane and cruel because it involves the loss of the right to have rights).
153. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
154. Planned Parenthood v. Casey, 505 U.S. 833, 857 (1992).
155. Roe v. Wade, 410 U.S. 113, 153 (1973).

authority to treat them inhumanely. The purpose of the Cruel and Unusual Punishment Clause is to ensure that under these tempting circumstances "even the vilest criminal remains a human being possessed of common human dignity."[156] The elimination of these fundamental rights is especially unjustifiable when California has no argument that these measures will further any legitimate state goal.[157]

Analysis of the above factors indicates the infirmity of the California Statute. It violates the principles against undignified and inhumane treatment embodied by the Cruel and Unusual Punishment Clause and hence should be found unconstitutional. Part IV utilizes risk of error analysis to further demonstrate the infirmity of the California Statute to those judges who believe that mistake-free application of the California Statute would not violate the Eighth Amendment. Part IV argues that, despite their rejection of the aspirationalist reading, these judges should still find the law unconstitutional because error in the application of the law poses too great a threat to society's other aspirational principles. In demonstrating that a judge must account for error in the application of any legal rule—here the mandatory imposition of chemical castration—part IV shows that even opponents of the aspirationalist reading must conclude that the California Statute is unacceptable.

IV. Risk of Error and Judicial Discretion

Even if one accepts that the Cruel and Unusual Punishment Clause should be read to embody aspirational principles, the inevitability of error in human institutions will often lead to mistakes in application of these principles, and these errors could, in turn, sacrifice other core aspirational values. This part presents an argument developed by Professor Radin in the capital punishment context that gives criteria by which judges can choose the preferred error in light of the reality that legal rules will inevitably be applied incorrectly.

A. *The Necessity of Risk of Error Analysis*

This Note has argued that the proper way to define the Cruel and Unusual Punishment Clause of the Eighth Amendment is by reference to aspirational principles[158] that the higher law of the Constitution embodies.[159] Thus, a judge determining the validity of a particular enactment with no specific guidance from an open provision of the Constitution must look to these aspirational principles to determine the validity of the law. Professor Radin has forcefully argued, however, that the fallibility of human institutions makes it likely that

156. Furman v. Georgia, 408 U.S. 238, 273 (1972) (Brennan, J., concurring).
157. *See supra* notes 146-49 and accompanying text.
158. *See supra* part III.A.
159. *See supra* part III.A.

these principles will be compromised by error in application.[160] For example, in ideal terms we know that it is wrong to murder. But human error in applying the rule against murder makes it likely that this rule, manifested in convicting and punishing offenders, will compete with another important value that it is wrong to imprison an innocent person.[161] Human error could lead a judge who correctly identifies the principle that murder is wrong to the wrong result. How? The judge could say that because we so cherish human life, society must put the burden of proof on the accused. If our law enforcement mechanisms were perfect, such an approach would be justified; the allocation of the burden would be inconsequential. Such a holding, however, fails to recognize that law enforcement agencies could apprehend the wrong person. The inability to recognize human fallibility would lead to society's infringing another core value—that it is wrong to imprison an innocent person. Risk of error thus serves to adjust society's competing values in light of the recognition that our laws, as principled as they may be in theory, are likely to be erroneously applied in practice.[162] Accordingly, to justify any law it is also necessary to account for error so as to maintain fidelity to all of society's values.[163] In the context of interpreting the Constitution, then, it is necessary not only to evaluate whether the law, in theory, is consistent with the Constitution; it is also necessary to determine whether society can accept the consequences that will follow from the inevitable error that will occur when the law is applied in practice.[164] In this fashion, risk of error analysis is the critical last step that judges must take to adjust and prioritize society's underlying principles in light of uncertainty and error in application,[165] and courts have taken account of risk of error in a variety of criminal and non-criminal cases.

Consideration of risk of error is particularly relevant in the criminal context. One example is the criminal guilt standard requiring proof beyond a reasonable doubt. A system without proof standards could work in theory—but we all know that errors would occur, and the consequences would be severe. Hence this standard exemplifies society's belief, in light of inevitable error, that it is better to let a guilty person go free than to convict an innocent person.[166] Related is the

160. Margaret Jane Radin, *Risk-of-Error Rules and Non-Ideal Justification*, *in* Justification 33, 34 (J. Roland Pennock & John W. Chapman eds., 1986) (Nomos XXVIII) [hereinafter Radin, Justification]; Radin, *supra* note 66, at 1017.

161. *See* Radin, Justification, *supra* note 160, at 37.

162. Radin points out that the reality of error calls into question the usefulness in practice of rules that are developed in the errorless ideal world, because the certainty of error undermines their justness. *Id.*

163. *Id.* at 34.

164. *Id.* at 39.

165. *Id.* at 34.

166. *In re* Winship, 397 U.S. 358, 369-72 (1970) (Harlan, J., concurring) (stating that standards of proof represent the confidence that we require to find a person guilty); Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion*

presumption that an accused is innocent until proven guilty.[167] These standards reflect society's view that the government must be put to the test of proving the person's guilt before being able to deprive him of his liberty.[168]

Similarly, the exclusionary rule in evidence is based upon the importance of the right of privacy in the home as embodied in the Fourth Amendment.[169] A judge made rule, the exclusionary rule reflects the reality that a judge may be called upon to create a preferred risk of error to fully comply with the spirit of the constitutional text. Thus, if the police violate the sanctity of the home as embodied in the Fourth Amendment without showing cause before a neutral magistrate, they will be punished by not being able to introduce the evidence obtained from the illegal search.[170] The rule reflects the judgment that we want the police to intrude upon the privacy of the home only when there is probable cause to do so, and that we will tolerate some loss of police efficiency as a result.[171]

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in Criminal Cases, 86 Yale L.J. 1299, 1331-38 (1977) (explaining the policies served by evidentiary burdens); *see also* John Kaplan, *Decision Theory and the Factfinding Process*, 20 Stan. L. Rev. 1065, 1071-77 (1968) (noting that the choice of standard of proof in a case reflects a judgment of the comparable social costs of erroneous determinations).

167. *See, e.g.*, Lego v. Twomey, 404 U.S. 477, 494 (1972) (Brennan, J., dissenting) (arguing that the standard of requiring guilt beyond a reasonable doubt provides substance for the presumption of innocence); *cf.* Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1173 (1995) (arguing that in criminal appeals, judges should attempt to determine the overall effect on the verdict that error may have had in order to preserve the fundamental individual liberties at stake).

168. For a general discussion of the role that evidentiary burdens play in the courts, see George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880, 894 (1968) (stating that burdens of persuasion function to adjust the interests of competing classes of litigants).

169. The Fourth Amendment provides that, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. *See also* Donald L. Doernberg, *"The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. Rev. 259, 260 (1983) (stating that one of the Fourth Amendment's purposes is to protect the personal privacy rights of individuals).

170. *See* Weeks v. United States, 232 U.S. 383 (1914) (holding that letters obtained by a United States official without a warrant were not admissible as evidence because they were obtained in violation of the defendants' constitutional rights).

171. *See* Payton v. New York, 445 U.S. 573, 584-90 (1980) (protecting the home and the privacy of the individual from search absent a magistrate's finding of probable cause); Rakas v. Illinois, 439 U.S. 128, 143 (1978) (holding that society protects the expectation of privacy in the home); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 Va. L. Rev. 881, 924-25 (1991) (explaining that the privacy of the home protected by the probable cause warrant requirement); *see also* Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 1001-02, (1982) (discussing risk

The risk of error principle manifests itself in other areas of the law as well. In *Roe v. Wade*,[172] the Court stated that there was no answer to the question of whether the fetus was a person in the constitutional sense.[173] In light of this uncertainty, the Court argued that it was better to vindicate the right of the mother to choose whether to carry the fetus to term.[174] In *Cruzan v. Missouri Department of Health*,[175] the Court argued that it was better to leave Nancy Cruzan, a young woman in a permanent vegetative state, on life support in light of the uncertainty surrounding her wishes concerning the subject. The Court stated that it was preferable to err on the side of preserving life as compared to turning off the life support because if the Court was wrong, the latter choice would constitute irreversible error.[176]

In all of these cases, it would be preferable, of course, to have perfect application of the rule; for instance, one that would send all the guilty to jail and set all of the innocent free. But because perfect enforcement is not possible, judges select a preferred error which reflects a decision about which interests society values as most compelling.[177]

B. *Factors Examined in Allocating Error*

Recognizing that the inevitability of error will often cause society's core values to conflict highlights the need to have a principled means of determining which interests should be vindicated in anticipation of the inevitability of error. In the context of chemical castration, the reality of error places the liberty interest of the individual against those interests asserted by the state. Professor Radin has argued that courts should look to the factors discussed below to guide the inquiry as to whether deference to individual rights or state interests is appropriate in a particular case. These factors will, in other words, determine the preferred risk of error and in so doing determine whether deference to the legislature's actions is appropriate. This section proceeds by evaluating chemical castration in light of these factors, concluding that in determining its constitutionality under the Eighth Amendment's Cruel and Unusual Punishment Clause, courts should

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of error in the context of the Fourth Amendment's protection of "houses, papers, and effects").

172. 410 U.S. 113 (1973)

173. *See id.* at 159-60 (stating that the Court need not resolve the question of whether the fetus was alive).

174. *See id.* at 162-66 (holding that the state could not choose to err against the rights of the pregnant woman in the absence of consensus that the fetus was a full person).

175. 497 U.S. 261 (1990).

176. *Id.* at 283 (arguing that it is preferable to leave the patient on life support rather than remove her because the latter action would, if wrong, constitute irreversible error).

177. Radin, *supra* note 66, at 1024-25.

err on the side of protecting fundamental rights. This leads to the conclusion that chemical castration should be barred as a mandatory condition of probation.

1. Is the Punishment Irrevocable?[178]

When a punishment or a deprivation of rights is irrevocable, a court's mistaken punishment or deprivation of rights cannot be reversed. As a result, Professor Radin argues, decisions that are irrevocable cause courts to more stringently scrutinize the corresponding irrevocable deprivation of rights.[179] For example, in *Skinner v. Oklahoma*,[180] the Court alluded to the irrevocability of sterilization as the reason why the Court had to closely scrutinize it. The Court stated that "[t]here is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury."[181] The *Cruzan* Court[182] also stressed that the decision to turn off life support, if incorrect, would be irrevocable.[183]

Although chemical castration is not an irrevocable procedure in a physical sense, there are two ways in which one could argue that the procedure is, in fact, irrevocable. First, making repeat sex offenders submit to a lengthy cycle of Depo-Provera administration may arguably have long-term side effects.[184] Although no research has been done on the exact long-term adverse health effects of Depo-Provera, there is considerable suspicion among some researchers who claim that the short-term contraindications are serious enough to make long-term use of the drug problematic.[185] These researchers' suspicions provide a plausible basis to suggest that the continuous use of the drug, which would be necessary to successfully suppress the sexual

178. *Id.* at 1022.

179. *Id.* at 1024-25; Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding a state law subject to stringent review because the state, if wrong, would do "irreparable injury" to the individual); Addington v. Texas, 441 U.S. 418, 423-24 (1979) (stating that the graver the deprivation of rights, the more the state bears the risk of error upon itself); Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 283 (1990) (stating that "[t]he more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision").

180. 316 U.S. 535 (1942).

181. *Id.* at 541.

182. *See supra* note 175 and accompanying text.

183. *Cruzan*, 497 U.S. at 283.

184. Green, *supra* note 18, at 7 (pointing out that Depo-Provera causes cancer in laboratory animals); Melella, *supra* note 50, at 225 (stating that studies have shown that the drug causes breast cancer in female dogs and uterine cancer in monkeys); Stone, *supra* note 51, at 1754 (discussing uncertainty surrounding the potential long-term adverse health effects of Depo-Provera, including cancer and osteoporosis); Vanderzyl, *supra* note 28, at 117-18; PDR, *supra* note 10, at 2082 (indicating potential side effects of Depo-Provera).

185. *See* Melella, *supra* note 50, at 225; Stone, *supra* note 51, at 1754.

drive of the offender, poses adverse health consequences that could prove irreversible.[186]

There is a second way in which the use of Depo-Provera could be deemed irreversible. The defendant is deprived of his fundamental procreative rights during the period in which he undergoes the injections.[187] Administered to women, a possibility that the California Statute countenances,[188] Depo-Provera definitely eliminates procreative ability because the primary indication of Depo-Provera is as a female contraceptive.[189] There is debate, however, about whether the drug eliminates the procreative ability of men. Indeed, some medical and legal commentators have stressed that those undergoing the treatment suffer no decrease in consensual sexual activity, and that the recipient of Depo-Provera only suffers erotic apathy.[190] Other commentators, however, have argued that Depo-Provera does effectively eliminate procreative ability.[191] This Note submits that there is a high likelihood that the procreative liberty of the male offender is eliminated for two related reasons. First, there is a consensus that Depo-Provera lowers testosterone levels by reducing its prevalence in the bloodstream and limiting its production; this is the very purpose of using the drug on sexual offenders.[192] It is therefore absurd to argue that a drug, that specifically seeks to decrease a man's sexual drive, could not in fact limit that drive.[193] Second, because Depo-Provera must be administered continuously to be effective, commentators point out that the net effect of the drug is that it effectively eliminates procreative ability.[194] Accordingly, the California Statute will undoubtedly eliminate the procreative liberty of women offenders, and should be expected to do the same in male offenders.

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186. *See supra* note 15; Stone, *supra* note 51, at 1754.

187. *See* Melella, *supra* note 50, at 225; Green, *supra* note 18, at 24; Hicks, *supra* note 12, at 661; Vanderzyl, *supra* note 28, at 122.

188. The California Statute is written to apply to all offenders guilty of repeat sexual offenses; insofar as a woman commits two sexual offenses, she is subject to the law. Cal. Penal Code § 645 (West Supp. 1997); *see* Senate Rules Committee Hearings, *supra* note 28, at 8 (explaining that as written the statute applies to women as well as men).

189. PDR, *supra* note 10, at 2079-81.

190. Walker, *supra* note 11, at 435; Fitzgerald, *supra* note 2, at 7.

191. Melella, *supra* note 50, at 228 (noting that administration of Depo-Provera probably prevents recipients from fathering a child); Green, *supra* note 18, at 24; Hicks, *supra* note 28, at 122; Money, *supra* note 18, at 168.

192. *See supra* notes 11-14 and accompanying text.

193. *See supra* note 26 and accompanying text.

194. Melella, *supra* note 50, at 225 (recipient of Depo-Provera could probably not father a child); *see also* Green, *supra* note 18, at 24 (arguing that Depo-Provera eliminates a man's ability to procreate); Hicks, *supra* note 12, at 646 (stating that Depo-Provera causes temporary impotence); Money, *supra* note 18, at 168 (stating that Depo-Provera induces erotic apathy and thereby eliminates any behavior "requiring an erect penis").

Many proponents of chemical castration have argued in response that the elimination of procreative liberty in question is not really problematic because the deprivation is temporary and reversible.[195] Two arguments suggest this contention is ill considered.

First, the deprivation of a fundamental liberty should not be taken lightly simply because it presumably can be undone.[196] The erroneous deprivation of procreative rights can be analogized to the wrongful deprivation of liberty during mistaken imprisonment. If the justice system convicts wrongly, and sends an innocent person to prison, the loss of freedom for the period of imprisonment is irrevocable, even though the person could ultimately be released. This is why the Court has interpreted the Constitution to mandate proof of guilt beyond a reasonable doubt before the state can imprison someone.[197] Chemical castration is irrevocable in the same way because the loss of procreative rights is irreversible for the time that the drug is given, even though the treatment could ultimately be terminated.[198] Thus, the fact that the deprivation of the fundamental right in question can be undone does not mean that the law does not take that deprivation seriously.

Second, the context of the California statute negates the argument that chemical castration is fully reversible. In order to be effective, Depo-Provera must be continually administered to the offender.[199] The only way that a proponent of the California law could argue that reversibility is significant is by contending that the offender could be withdrawn from the medication.[200] Arguing in this manner, however, undermines the purpose and the effectiveness of the California Statute.[201] So, while chemical castration is a reversible procedure, the context of the California Statute diminishes the force of this distinction.

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195. *See, e.g.*, Fitzgerald, *supra* note 2, at 6 (stating that all effects of the drug cease with suspension of treatment); Melella, *supra* note 50, at 225 (stating that effects are temporary and reversible).

196. *See* Margaret J. Radin, *Cruel Punishment & Respect for Persons: Super Due Process for Death*, 53 S. Cal. L. Rev. 1143, 1162 (1980) (arguing that the fact that the effects of a punishment can be undone does not make the original deprivation any less unjust).

197. *In re* Winship, 397 U.S. 358, 362 (1970) (explaining that a higher standard of proof of guilt is needed to protect individual rights).

198. Melella, *supra* note 50, at 225 (stating that Depo-Provera deprives the offender of reproductive freedom); Vanderzyl, *supra* note 28, at 122.

199. *See supra* note 25 and accompanying text.

200. The California Statute provides that the offender will be given Depo-Provera until he no longer poses a threat. Because the law, as written, will not result in rehabilitating any offenders, the administrants will arguably never cease to be a threat to society. *See supra* notes 16-41 and accompanying text. Thus, the most likely result of the California Statute is that recipients will be administered Depo-Provera indefinitely.

201. *See supra* notes 62-63 and accompanying text (discussing the legislative history of § 645).

2. Is the Punishment Severe?

Professor Radin points out that courts also consider the severity of a punishment.[202] Severity is a measure of the strength of the individual interest it inflicts, which in turn is measured by the extent of the pain or suffering involved, and the question of whether the punishment implicates a fundamental right.[203] The more severe the punishment, the more extensive the deprivation of liberty.[204] The California Statute implicates several fundamental constitutional rights. This Note has already established that chemical castration infringes upon the right to procreate because the offender's ability to reproduce has been effectively eliminated;[205] it violates the offender's right to privacy[206] because the state has thrust itself into procreative decisions; and it violates the offender's right to refuse medical treatment because he has no choice but to accept the treatment.[207] Because it impinges on such fundamental rights, the California Statute is a severe punishment and merits close judicial scrutiny. Courts typically undertake such close scrutiny whenever fundamental rights are jeopardized by the state.[208]

202. Radin, *supra* note 66, at 1025.

203. *Id.*; Furman v. Georgia, 408 U.S. 238, 271-73 (1972) (Brennan, J., concurring) (explaining the nature of severe punishments); Vanderzyl, *supra* note 28, at 129.

204. *See* Radin, *supra* note 66, at 1026; *cf.* Trop v. Dulles, 356 U.S. 86, 101-02 (1958) (noting that expatriation is the most severe punishment because it involves the loss of the right to have rights).

205. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Melella, *supra* note 50, at 226-27; Vanderzyl, *supra* note 28, at 121-24; *see supra* notes 189-94 and accompanying text.

206. Roe v. Wade, 410 U.S. 113, 153 (1973); Melella, *supra* note 50, at 226; Vanderzyl, *supra* note 28, at 118-21.

207. Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 278 (1990); Melella, *supra* note 50, at 226; Vanderzyl, *supra* note 28, at 124-26. It is possible to argue that the opportunity to refuse parole provides a choice for the offender. *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, 332-33 (1994). This Note submits, however, that the alternative to accepting the treatment, remaining in prison, is coercive, and therefore does not give the opportunity for free choice. *See* United States v. Pierce, 561 F.2d 735, 739 (9th Cir. 1977) (stating that the defendant's consent to a probation condition is "likely to be nominal where consent is given only to avoid imprisonment"); Jeffrey N. Hurwitz, *House Arrest: A Critical Analysis of an Intermediate-Level Penal Sanction*, 135 U. Pa. L. Rev. 771, 795 (1987).

208. *See Skinner*, 316 U.S. at 541; *Roe*, 410 U.S. at 153; *see also Cruzan*, 497 U.S. at 278 (holding that the patient has right to refuse medical treatment); Furman v. Georgia, 408 U.S. 238, 286-88 (1972) (Brennan, J., concurring) (stating that the more severe a punishment is, the stricter the review that the Court should apply); *cf. Trop*, 356 U.S. at 101-02 (scrutinizing the punishment of expatriation because it denies the right to have rights).

3. Has the Punishment Been Traditionally Sanctioned?

Another factor that Professor Radin identified is whether the punishment has been traditionally sanctioned.[209] There is no historical precedent for chemical castration because it is a relatively new procedure.[210] Chemical castration can, however, be analogized to surgical castration,[211] the punishment that it replaces in the California penal code.[212] In order to analogize chemical castration to surgical castration, it is necessary to first discern what is unacceptable about traditional castration. There are two possibilities, each examined below.

The first possible reason that surgical castration has been proscribed is because it constitutes an impermissible restriction of the rights of bodily integrity and procreative freedom.[213] Thus, any punishment like surgical castration that infringes on fundamental liberties such as bodily integrity and procreative freedom is subject to the Supreme Court's most stringent scrutiny.[214] If one accepts this account of why surgical castration is historically proscribed, then chemical castration must also be proscribed as an impermissible infringement upon the fundamental rights to bodily integrity and procreative freedom.[215] The forced administration of the drug violates the right to bodily integrity.[216] Additionally, the right to procreative freedom is also violated when people are forcibly injected with a drug that eliminates reproductive ability.[217]

209. Radin, *supra* note 66, at 1028-29; *see also* Harmelin v. Michigan, 501 U.S. 957, 979-85 (1991) (Scalia, J.) (stating that the Clause was intended to prohibit punishments that were historically proscribed).

210. *See supra* note 18 and accompanying text (discussing early Depo-Provera research).

211. *See* Weems v. United States, 217 U.S. 349, 377 (1910) (characterizing as cruel various types of physical alteration, such as castration). Many commentators have concluded that the word "unusual" in the Clause refers to those punishments that were traditionally illegal, or unavailable, to judges as a means of punishment. Because American courts have not had access to castration as a punishment, castration is "unusual" in that it has never been a legally available punishment in the United States. *See* Anthony Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 Cal. L. Rev. 839, 859 (1969).

212. *See* 1996 CA AB 3339 (repealing the law authorizing surgical castration and instead providing that, upon parole, a judge may order a first time offender, and must order a second time offender, to be chemically castrated, in addition to any other punishments prescribed by law).

213. *See, e.g.*, Cruzan v. Missouri Dep't of Health, 497 U.S. 261 (1990) (upholding the individual's liberty interest in refusing unwanted treatment); *see also* Skinner v. Oklahoma, 316 U.S. 535 (1942) (prohibiting the use of compulsory vasectomies as criminal punishment, on the grounds that such a punishment violates the fundamental rights component of equal protection).

214. *See, e.g.*, *Skinner*, 316 U.S. at 541; Roe v. Wade, 410 U.S. 113 (1973).

215. *See supra* notes 189-94 (arguing that Depo-Provera eliminates procreative ability in men and women).

216. *Cruzan*, 497 U.S. at 280 (upholding the right to refuse medical treatment).

217. *See supra* notes 189-94 and accompanying text (arguing that Depo-Provera will eliminate the procreative ability of men and women).

The second possible reason why surgical castration has been historically unacceptable is that it involves a degree of physical mutilation and suffering that our society has simply found unacceptable.[218] If this is the reason that surgical castration has been traditionally prohibited, then chemical castration should also be prohibited. While the mutilation caused by physical castration is obvious, permanent, and horrendous, chemical castration also causes unacceptable physical mutilation because the continuous use of Depo-Provera entails many frightening, adverse health effects.[219] These adverse effects include testicular atrophy, deformed sperm, and diabetes mellitus, to name just a few.[220] The fact that chemical castration, like surgical castration, causes physical pain and mutilation, albeit in a more subtle form, indicates that it merits the same legal treatment as surgical castration and should thus be proscribed.

4. Does the Punishment Advance a Strong Government Interest?

In determining whether to err on the side of individual rights, courts also consider the strength of the government's interest and its chosen means.[221] The strength of the government interest has two components: the value of the government's goal, and the degree of certainty that the means in question will further that goal.[222]

The government's goal with respect to the chemical castration statute is to protect society from repeat offenders, and is obviously important.[223] Recidivism rates for sexual offenses are incredibly high; the average adolescent sex offender can be expected to commit an astonishing 380 sex crimes.[224] Society needs to be protected from such criminals.

The method of punishment at issue, however, does not protect society. The use of Depo-Provera on non-paraphiliac offenders has not been shown effective in reducing recidivism among non-paraphiliac offenders.[225] Depo-Provera's effectiveness with paraphiliacs, further-

218. *See* Weems v. United States, 217 U.S. 349, 366 (1910) (invalidating the use cadena temporal because it entails great physical hardship); Harmelin v. Michigan, 501 U.S. 957, 981 (1991) (arguing that the purpose of the Clause was to prevent "horrible tortures" such as maiming, mutilating and scourging to death).

219. *See supra* note 15 and accompanying text.

220. *See supra* note 15 and accompanying text.

221. Radin, *supra* note 66, at 1026-27.

222. *Id.* at 1027-28.

223. *See infra* note 224 (outlining the prevalence of the problem).

224. Riesenberg, *supra* note 12, at 900; *see also* A. Kenneth Fuller, *Child Molestation and Pedophelia: An Overview for the Physician*, 261 JAMA 602 (1989) (discussing the prevalence of child sex abuse); Hicks, *supra* note 12, at 664 (same); Vanderzyl, *supra* note 28, at 138 (noting that 40% of sexual offenders will commit repeat offenses); Sandra G. Boodman, *Does Castration Stop Sex Crimes? An Old Punishment Gains New Attention, But Experts Doubt Its Value*, Wash. Post, Mar. 17, 1992, (Health Magazine) at 7 (stating that 40% of sexual offenders will commit repeat crimes).

225. *See supra* part I.C (discussing that research has not been done with non-paraphiliac offenders). It is also important to note that non-paraphiliac offenders

more, depends on these offenders being offered counseling in conjunction with the use of Depo-Provera.[226] California's law fails to recognize these two distinctions.[227] It does not differentiate among different types of sexual offenders, and it fails to offer psychological counseling to those offenders who could be treated with Depo-Provera.[228] As a result, there is no evidence that the positive results achieved when Depo-Provera was used in conjunction with counseling on paraphiliacs will be realized in the vast majority of paroled sexual offenders.[229] Consequently, because Depo-Provera will be ineffective as prescribed by the California Statute, there is a strong likelihood that those punished with castration will continue to victimize society once they are paroled. Thus, California cannot demonstrate that the punishment in question furthers the goal of protecting society from repeat sexual offenses. Under Professor Radin's analysis, then, this factor weighs against judicial deference to the legislature and instead favors a result that vindicates individual liberty.

These factors—that castration has been historically proscribed in America, the loss of procreative rights, the serious adverse health consequences that accompany long-term use, and the doubtful relationship of the government's chosen means to the goals that can be plausibly asserted—indicate that courts, after acknowledging the possibility of error in application, must forbid the state from mandating chemical castration as a condition of parole, so as to avoid the possibility of serious deprivations of constitutional rights.

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compose a significant percentage of sex offenders. *See* Kee MacFarlane, *Program Considerations in the Treatment of Incest Offenders, in* The Sexual Aggressor 62, 62-63 (Joanne G. Greer & Irving R. Stuart eds., 1983) (stating that incest, a form of sexual dysfunction distinguishable from a paraphilia, is a considerable and widespread problem); Stuart B. Silver & Michael K. Spodak, *Forensic Mental Evaluation of the Violent Sexual Offender, in* The Sexual Aggressor 42, 42-58 (Joanne G. Greer & Irving R. Stuart eds., 1983) (demonstrating the prevalence of violent sexual offenders, or Type III offenders, by giving a means of evaluating such offenders for the purposes of criminal prosecution).

226. *See supra* part I.B.

227. In fact, the revised version of § 645 does not recognize any classes of offenders. The law simply mandates that all repeat offenders without reference to category, shall be chemically castrated upon parole, in addition to any other punishment prescribed by law. *See* Cal. Penal Code § 645 (West Supp. 1997).

228. *See* Fitzgerald, *supra* note 2, at 5 (discussing the use of Depo-Provera after comprehensive diagnosis and as part of a comprehensive treatment program).

229. Hicks, *supra* note 12, at 648, 665. Dr. Fred Berlin believes that the California Statute will prove ineffective because it does not require an assessment of the participants, their willingness to be treated, or any other form of counseling that could end their dysfunction. He stated, "I would never drop off someone once a week for a shot [of Depo-Provera] and think that constitutes adequate treatment." Cohen, *supra* note 28, at 4; *see also* Douglas J. Besharov, *Sex Offenders: Is Castration an Acceptable Punishment?*, 78 A.B.A. J., July 1992, at 42 (stating that "hormone treatment does not work for anti-social personalities or for those whose sex offenses are motivated by feelings of anger, violence, or power").

CONCLUSION

The open language of the Cruel and Unusual Punishment Clause challenges us to find a source of content that is consistent with both the text of the Clause and with the institutional role occupied by judges. The aspirationalist reading meets this challenge by guaranteeing that the judiciary will act to protect human dignity from the inhumane punishments that atrocious crimes engender. When the Constitution is read in an aspirationalist fashion, the California Statute emerges as an impermissible and unconstitutional punishment. Nonetheless, the aspirationalist reading of the Constitution in general, and the Clause in particular, is fundamentally incomplete if one does not account for error in the application of legal rules. Routinely undertaken by courts in cases where the interests of the individual are opposed to the state's, risk of error analysis—the essential last step that a judge must take to prioritize society's values in light of error in their application—conclusively demonstrates to judges of all interpretational persuasions that the California Statute is unacceptable. In the context of chemical castration, risk of error analysis demonstrates that the preferred error is to protect individual liberties. Because California has chosen to err against individual liberties even though chemical castration is severe, irreversible, ineffective, and arguably analogous to a core case of cruelty, the California Statute must be invalidated.