

# Castration of Sex Offenders: Prisoners' Rights Versus Public Safety

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Sexual victimization of children and adults is a significant treatment and public policy problem in the United States. To address increasing concerns regarding sex offender recidivism, nine states have passed legislation since 1996 authorizing the use of either chemical or physical castration. In most statutes, a repeat offender's eligibility for probation or parole is linked to acceptance of mandated hormonal therapy. Future legal challenges to this wave of legislation will probably include arguments that such laws violate constitutional rights guaranteed to the offender by the First, Eighth, and Fourteenth Amendments. When the promise of freedom is predicated on mandated treatment, the clinician must carefully assess the validity of informed consent.

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Surgical castration has been used as a means of social control for centuries. The use of eunuchs (castrated men) to guard women's quarters or act as chamberlains was prevalent in many ancient cultures. During the 18th century, youthful male choir members, known as *castrati*, were castrated to prevent deepening of their high singing voices with the onset of puberty.<sup>1</sup> Efforts to decrease male testosterone are not limited to societies of the distant past. During the late 1800s, Dr. Harry Sharp of Indiana surgically castrated nearly 180 male prisoners for the purpose of reducing their sexual urges. As a result of his efforts, Indiana began using physical castration to decrease recidivism of certain prisoners and became the first state to legalize the sterilization of "mental defectives."<sup>2</sup>

The eugenics movement of the early 20th century continued the push for forced sterilization of people with undesirable traits that scientists believed were genetically transmitted. This movement eventually led to the sterilization of approximately 60,000 mentally handicapped incarcerated women.<sup>3</sup> When the U.S. Supreme Court upheld a state law that sterilized the "mentally infirm," Justice Oliver Wendell Holmes noted, "Better for all the world, if instead of

waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . three generations of imbeciles are enough" (Ref. 4, p 208). These laws, which originated nearly a century ago, persist in 13 states that continue to have sterilization statutes targeted at "mental incompetents" or criminals.<sup>2</sup>

With the advent of modern hormone therapy, the ability to lower a man's testosterone through chemical means surfaced, and the use of drugs to reduce sexual recidivism has become known as chemical castration. The first reported use of hormonally based medications to reduce pathological sexual behavior in men occurred in 1944 when the progesteronal hormonal compound diethylstilbestrol was prescribed to lower male testosterone.<sup>2</sup> During the 1960s, German physicians prescribed antiandrogens in an effort to curb deviant behavior of male paraphiliacs.<sup>5</sup> In 1966, John Money became the first U.S. researcher to use medroxyprogesterone acetate (MPA) in the treatment of sex offenders when he administered the drug to a bisexual transvestite who was in therapy for pedophilic behavior with his six-year-old son.<sup>6,7</sup> Although not approved by the U.S. Food and Drug Administration for the treatment of sex offenders, MPA has been used extensively in the United States for the purpose of diminishing sexual fantasies and decreasing sexual impulses. A similar agent, cyproterone acetate, has been used throughout

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Canada and Europe.<sup>6</sup> In recent years, other agents have been adapted for the treatment of male sex offenders in an attempt to diminish their sexual offending. These medications include the antiandrogens flutamide and nilutamide, the gonadotropin-releasing hormone analogue triptorelin, and the leuteinizing hormone-releasing hormone agonists leuprolide acetate and goserelin.<sup>8</sup>

The use of such medication is understandable when considering the high rate of sexual victimization by offenders against children and adults in our society. Between 3 and 6 percent of boys and 12 and 28 percent of girls in the United States are sexually victimized before the age of 18.<sup>9</sup> Multiple studies indicate that between 10 and 15 percent of women have been raped and nearly 25 percent of adult women have experienced some type of sexual victimization.<sup>10</sup> The magnitude of this problem combined with well-publicized sex crimes has increased society's awareness regarding potential dangers posed by sex offenders. The resulting community outcry has led to the passage of legislation requiring sex offender registration, mandatory community notification, civil commitment of sexually violent predators, and, more recently, castration statutes that include both chemical and surgical treatment options. To date, nine states have successfully passed legislation that authorizes either chemical or surgical castration. A summary of these nine statutes is described in the following sections.

### **An Overview of State Castration Statutes for Sex Offenders**

On September 18, 1996, California became the first state to authorize the use of either chemical or physical castration for certain sex offenders who were being released from prison into the community.<sup>11</sup> Although this legislation was considered extremely controversial at the time, eight additional states have subsequently passed laws that provide some form of castration for individuals who have been convicted of a sex offense and are being considered for parole or probation. Of the nine states authorizing castration for convicted sex offenders, four permit the use of chemical castration only (Georgia, Montana, Oregon, and Wisconsin),<sup>12-22</sup> four allow either chemical castration or voluntary surgical castration (California, Florida, Iowa, and Louisiana),<sup>11,23-27</sup> and one (Texas)<sup>28-29</sup> provides voluntary surgical castration as the only treatment option.

Several important similarities and differences are noted when comparing elements among these nine statutes. First, although all statutes apply to individuals who have been convicted of a sex offense, all nine states vary regarding the sexual behavior that triggers application of their castration statutes. In Louisiana, for example, a conviction for any 1 of 10 specific sex offenses renders an individual eligible for castration,<sup>26-27</sup> whereas Oregon notes only that chemical castration will be administered to "suitable" offenders who are convicted of "sex crimes."<sup>15-18</sup> Second, in five states, castration is authorized only when the victim is younger than a specified age. Two states (Louisiana<sup>26-27</sup> and Montana<sup>14</sup>) permit castration regardless of the victim's age for repeat offenders and two states (Florida<sup>23-24</sup> and Oregon<sup>15-18</sup>) allow castration regardless of the victim's age, even for first-time offenders.

Third, states differ regarding whether the proposed castration is discretionary, mandatory, or voluntary. Only Louisiana<sup>26-27</sup> and Oregon<sup>15-18</sup> mandate chemical castration for eligible first-time offenders. In contrast, five of the nine states mandate chemical castration for designated repeat sex offenders, three allow discretion by the court in whether chemical castration will be required, and Texas<sup>28-29</sup> requires complete voluntary consent for surgical castration under all circumstances.

Fourth, states are nearly equally divided in their designation of who pays for the costs of castration treatment and subsequent monitoring. Four of the nine statutes require the state to pay costs, four require the offender to bear some or the entire financial burden, and one state (Wisconsin)<sup>19-22</sup> does not specify who pays for treatment. Finally, at least four of the states identify consequences for treatment noncompliance, ranging from revocation of probation (Louisiana)<sup>26-27</sup> to potential incarceration for up to 100 years (Montana).<sup>14</sup> Oregon is the only state that specifically includes violation of parole for those individuals who use chemicals to counteract the effect of chemical castration.<sup>15-18</sup> Table 1 compares and contrasts general elements of all nine statutes authorizing some form of castration.

The nine statutes also vary considerably in how they address the assessment and treatment of sex offenders. First, states are not uniform on what specific chemical agents are recommended for treatment. Of the eight statutes that authorize chemical castration, seven specifically identify MPA as a treatment op-

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**Table 1** General Overview of Castration Statutes

State/Ref.	Included Offenses	Victim Age (y)	Castration Method	Discretionary (D) Mandatory (M) Voluntary (V)	Person/Agency Financially Responsible	Consequences of Noncompliance
California <sup>11</sup>	Sodomy, aiding/abetting sodomy, lewd and lascivious act with force/menace, oral copulation, aiding/abetting oral copulation, sexual penetration (with a foreign object)	<13	Chemical or voluntary surgical	D—First offense M—Second offense	State	Not specified
Florida <sup>23,24</sup>	Sexual battery	Any	Chemical or voluntary surgical	D—First offense M—Second offense	State	Second degree felony
Georgia <sup>12,13</sup>	Child molestation; aggravated child molestation (involving physical injury to the child or sodomy)	<17	Chemical only	D—First offense aggravated child molestation D—Second offense child molestation	Offender pays for counseling; unclear who pays for MPA	Not specified
Iowa <sup>25</sup>	Sexual abuse, lascivious acts, assault with intent, indecent contact, lascivious conduct, exploitation by a counselor, sexual exploitation of a minor	<13	Chemical or voluntary surgical	D—First “serious sex offense” M—Second offense unless determined “not effective”	Offender pays “reasonable fees”	Not specified
Louisiana <sup>26,27</sup>	Aggravated rape, simple rape, forcible rape, sexual battery, aggravated sexual battery, oral sexual battery, aggravated oral sexual battery, incest, aggravated incest, aggravated crimes against nature	<13 years or any repeat sex offender	Chemical or voluntary surgical	M—If specified in mental health treatment plan	Offender pays costs of evaluation, treatment plan, and treatment	Revocation of probation, parole, or suspension of sentence; good time earned may be forfeited
Montana <sup>14</sup>	Sexual assault, sexual intercourse without consent, incest	<16-first offense; any age-second offense	Chemical only	D—First offense if victim <16 and offender ≥3 years older D—Second offense	State	Criminal contempt of court with incarceration of 10–100 years
Oregon <sup>15–18</sup>	Pilot program of 40–50 persons each year convicted of “sex crimes”	Any	Chemical only	M—For all offenders deemed “suitable” without a medical contraindication	Offender (all costs)	Parole violation; “subject to sanctions” if fails to cooperate with program or takes any chemical to counteract treatment
Texas <sup>28,29</sup>	Indecency with a child, sexual assault	<17	Surgical only	V—All offenses	State	Not applicable
Wisconsin <sup>19–22</sup>	Aggravated sexual assault Sexual assault of a child Second degree sexual assault of a child	<14 <13 13–15	Chemical only	D—All offenses	Not described	Not described

tion, and seven allow the use of other pharmaceutical agents in addition to MPA.

Whether a medical or psychiatric evaluation is required prior to castration (either chemical or surgical) represents a second important area that is treated

very differently among these nine statutes. California requires no medical or psychiatric evaluation of the offender prior to mandatory chemical castration.<sup>11</sup> As a result, both male and female offenders, rapists and child molesters, and psychotic and nonpsychotic

offenders are all eligible for mandated treatment, whether or not such treatment is clinically appropriate. The Montana statute does not specifically require a mental health or medical assessment, but does specify that the treatment must be “medically safe drug treatment.”<sup>14</sup> The Wisconsin statute is exceptionally vague about the type of evaluation, if any, required prior to treatment. This statute notes that the decision to grant supervised release may not be based on the fact that the person is a “proper subject” for antiandrogen treatment.<sup>19–22</sup> This statement implies that some form of evaluation is warranted to determine which offenders are appropriate for chemical castration.

In those six states that mention a pretreatment evaluation, the stated qualifications of the examiners vary. For example, Georgia requires a “psychiatrist or qualified mental health professional,”<sup>12–13</sup> Oregon specifies that a “competent physician” is necessary,<sup>15–18</sup> and Texas mandates both a “psychiatrist and psychologist who have experience in treating sex offenders.”<sup>28–29</sup>

How states chose to address informed consent for both chemical and surgical castration represents a third important clinical component of this legislation. Of the nine statutes, three states (Iowa,<sup>5</sup> Florida,<sup>23–24</sup> and Oregon<sup>15–18</sup>) do not address whether any element of informed consent is required prior to administration of a chemical agent. The informed consent process in the remaining five chemical castration statutes requires only that the offender be informed regarding the side effects. Three of these five states require that the offender acknowledge receipt of this information and Georgia specifies that the offender must have consent to treatment in writing.<sup>12–13</sup>

The Texas statute provides the most detailed process for obtaining informed consent for surgical castration. For example, the inmate must be at least 21 years old and must meet with a psychiatrist and psychologist as part of the informed consent evaluation. A “monitor” with a background in mental health law, and ethics is appointed and assists the inmate with understanding the risks and benefits, to ensure that the consent is informed and voluntary. Furthermore, the inmate must request surgical castration in writing, may change his mind at any time, and should he ever withdraw consent, is no longer eligible for the procedure in the future.<sup>28–29</sup>

The fourth clinical issue raised by chemical castration statutes involves whether psychological counseling is required in conjunction with chemical or surgical castration. Georgia is the lone state that mandates some form of psychological counseling for all designated sex offenders.<sup>12–13</sup> Louisiana requires counseling only if the counseling is specified in the individual’s treatment plan but otherwise does not require additional treatment.<sup>26–27</sup> The remaining seven states do not require additional therapy other than chemical or surgical castration.

The specific duration of medication treatment in the eight chemical castration statutes is a fifth important treatment component of these laws. Because six of the eight statutes mandate that either the state or offender demonstrate that the chemical castration is no longer necessary prior to cessation of treatment, chemical castration is potentially life-long for some offenders. Finally, six of the nine statutes are silent regarding whether liability immunity applies to those providers who comply with the standards as set forth in their state statute. Both Georgia<sup>12–13</sup> and Louisiana<sup>26–27</sup> note that providers are not civilly or criminally liable if they act in good faith. The Texas surgical castration statute provides the most explicit immunity for providers and specifies that physicians are “not liable for an act or omission related to the procedure” unless they are negligent in their care.<sup>28–29</sup> Table 2 compares and contrasts these clinical questions as addressed in the nine castration statutes.

## Commentary

The recent revival of castration legislation to diminish sexually deviant behavior is likely to face several challenges under the federal Constitution. Opponents of such legislation argue that castration reduces or eliminates deviant sexual thoughts and fantasies, thereby infringing on the sex offender’s First Amendment right to entertain sexual fantasies. The First Amendment protects a person’s freedom of speech,<sup>30</sup> which the Supreme Court has generally held to include the right to generate ideas, regardless of their social worth. In 1969, the Supreme Court addressed the right of individuals to generate ideas without government interference as it related to the possession of pornography. In the case of *Stanley v. Georgia*,<sup>31</sup> police found pornographic materials in the defendant’s home and a Georgia court subsequently found the defendant guilty of possessing ob-

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**Table 2** Clinical Issues and Castration Statutes

State/Ref.	Chemical Agent Specified	Required Medical or Psychiatric Evaluation	Informed Consent Issues	Required Counseling	Cessation of Treatment	Provider Liability Immunity
California <sup>11</sup>	MPA or its chemical equivalent	No	Must inform regarding side effects	No	Until no longer necessary (until DOC demonstrates to Board of Prison Terms that it's not necessary)	Not specified
Florida <sup>23,24</sup>	MPA	Yes—court appointed “medical expert”	Not mentioned for MPA; described for voluntary physical castration	No	Until no longer necessary Court order specifies duration; either a specific term of years or for life	Not specified
Georgia <sup>12,13</sup>	MPA or its chemical equivalent	Yes—psychiatrist or qualified mental health professional for aggravated child molestation	Must be informed regarding side effects and consent to treatment in writing	Yes	Defendant must demonstrate no longer necessary	Not liable civilly or criminally if provider acts in good faith
Iowa <sup>25</sup>	MPA or “approved pharmaceutical agent”	Yes—“appropriate assessment” required to determine if treatment would be effective	Not addressed	No	Until the agency in charge of supervising the treatment determines that is no longer necessary	Not specified
Louisiana <sup>26,27</sup>	MPA or its chemical equivalent	Yes—“qualified mental health professional with experience in treating sexual offenders”	Must inform regarding uses and side effects with written acknowledgement of information	Yes (if in treatment plan)	Shall continue unless it is determined that the treatment is no longer necessary	Not liable civilly or criminally if provider acts in good faith
Montana <sup>14</sup>	MPA or chemical equivalent or other medically safe drug treatment	No—but treatment must be “medically safe drug treatment”	Must inform regarding side effects	No	Until DOC determines that the treatment is no longer necessary	Not specified
Oregon <sup>15–18</sup>	“Hormone or antiandrogen, such as MPA”	Yes—by a “competent physician”	Must inform regarding side effects and offender must acknowledge receipt of the information	No	“State . . . shall require . . . treatment . . . during all or a portion of parole or post-prison supervision”	Not specified
Texas <sup>28,29</sup>	Not applicable; surgical castration only option	Yes—physician; psychiatrist and psychologist who have experience in treating sex offenders evaluate inmate for “suitability”	Detailed informed consent, counseling by a psychiatrist and a psychologist, and appointed monitor; inmate must request procedure in writing	No	Not applicable	Physician “not liable for an act or omission relating to the procedure” unless negligent
Wisconsin <sup>19–22</sup>	Antiandrogen or its chemical equivalent	Unclear—decision to grant supervised release “may not be based on the fact that the person is a proper subject” for antiandrogen treatment	Not addressed	No	Not described	Not specified

scene matter. On appeal, the U.S. Supreme Court reversed the conviction on the grounds that the Constitution protects the right to receive information and ideas. Writing for the majority, Justice Marshall stated:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. . . . Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds [Ref. 31, p 565].

A counterargument to this First Amendment challenge emphasizes that these offenders have committed a sex crime and as a result have demonstrated a lack of mastery over their fantasies. Because of their actions, not their thoughts, they have effectively forfeited their First Amendment rights, and castration is justified to help control their behavior.

A second potential legal challenge involves whether forced castration violates the Eighth Amendment's ban on cruel and unusual punishment.<sup>32</sup> Three questions that the Supreme Court asks when assessing whether a punishment violates the Eighth Amendment include: Is the punishment inherently cruel or excessive? Is the punishment or condition proportional to the crime? Can the state achieve its goal through less intrusive means?<sup>33</sup> Although the U. S. Supreme Court has yet to hear a case that addresses whether castration represents cruel and unusual punishment, the South Carolina State Supreme Court has ruled on this question. In the case of *State v. Brown*,<sup>34</sup> three defendants pled guilty to first-degree criminal sexual conduct in connection with a brutal sexual assault. Their sentences were suspended, conditioned on the defendants' completion of surgical castration. In reviewing the case on appeal, the South Carolina Supreme Court held that surgical castration was cruel and unusual punishment, as prohibited by the South Carolina Constitution.<sup>34</sup>

Proponents of chemical castration for sex offenders propose that the use of antiandrogens such as MPA does not satisfy the three-pronged test for cruel and unusual punishment articulated earlier. In particular, antiandrogens are not considered inherently cruel and assist the offender in desisting from behavior that could result in further crimes and future punishments. Furthermore, the use of chemical agents is not excessive when considering previous harm and the importance of preventing future sexual victimization. Finally, because the offender is af-

forded increased freedom as a result of castration treatment, the state could not achieve its objective in a less restrictive manner.<sup>35</sup>

Convicted sex offenders may also challenge forced castration under the Fourteenth Amendment's guarantee of both due process and equal protection. The Fourteenth Amendment prohibits a state from depriving its citizens of "life, liberty, or property, without due process of law."<sup>36</sup> In examining what procedural due process is warranted, the procedures surrounding either chemical or surgical castration must be sufficient to protect the offender's interests against the state.<sup>37</sup> Various U.S. Supreme Court cases have addressed procedural protections for an inmate refusing treatment and this analysis includes four general considerations.<sup>38</sup> There must first be a determination that a mental illness or abnormality is present.<sup>39</sup> Next, the proposed treatment must be in the inmate's medical interest. Third, the mandated treatment must be essential for the inmate's safety or the safety of others. Finally, there should be no less intrusive alternatives to the medical treatment ordered.<sup>40</sup> The California castration statute appears potentially vulnerable under this analysis. In particular, under the California statute, mandated treatment is based solely on the offender's having committed an enumerated offense, does not require a mental disorder or abnormality, and does not provide an assessment process to determine the appropriateness of castration treatment.<sup>11</sup>

Substantive due process "involves a definition of the protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it" (Ref. 41, p. 291). In *Washington v. Glucksberg*,<sup>42</sup> the U.S. Supreme Court emphasized that the Due Process Clause specially protects those fundamental rights and liberties that are, "objectively, deeply rooted in this Nation's history and tradition" (Ref. 42 at 728). The Court also noted that the Fourteenth Amendment forbids the government to infringe on fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest (Ref. 42 citing *Reno v. Flores* 507 U.S. 292 at 302 (1993)).

Mandated chemical castration affects the fundamental right to procreation. In *Skinner v. Oklahoma*, Justice Douglas (writing for the Court majority) described procreation as one of the "basic civil rights of man," which is "fundamental to the very existence and survival of the race."<sup>43</sup> All eight chemical castra-

tion statutes apply equally to men and women and therefore the impact of hormonal therapy on future fertility must be considered. Proponents of castration legislation argue that although castration may decrease a male's fertility, the compelling state interest involves public protection against sexual victimization without a less restrictive means for the government to accomplish its goal. More serious substantive due process claims are raised in reference to female offenders. Antiandrogens, such as MPA, have not been shown to diminish significantly the likelihood that women will reoffend, thereby weakening the argument that forced chemical castration for females furthers a compelling government interest.

Chemical castration statutes may also be vulnerable to constitutional challenges under the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment prohibits states from "denying to any person within its jurisdiction the equal protection of the laws."<sup>44</sup> Two distinct arguments that castration statutes violate equal protection can be made. First, chemical castration statutes may represent gender discrimination, based not on unequal treatment, but on unequal effect: the physiologic gender-related effect of antiandrogen treatment on women. In males, antiandrogen treatment decreases sexual urges primarily by lowering testosterone levels that occur at higher levels in men than in women. In females, medroxyprogesterone acetate reduces libido in less than 5 percent of cases and poses unique side effects in women that include irregular menses and breast swelling.<sup>45</sup> Second, those statutes that do not require an assessment of the offender potentially represent an unconstitutional classification among male offenders. In particular, equal protection rights are violated because sex offenders are required to undergo chemical treatment without differentiating between those offenders who would benefit from treatment and those who would not.<sup>38</sup>

The most apparent ethics dilemma raised by these statutes involves the extent that informed consent issues are sufficiently addressed with eligible offenders. The doctrine of informed consent requires that the individual be competent to consent to treatment, that the consent be informed, and that the consent be given free of coercion.<sup>46</sup> The difficulty in achieving informed consent for MPA treatment from a convicted sex offender was addressed by the court of appeals in Michigan in the 1984 case of *State v. Gauntlett*.<sup>47</sup> A convicted sex offender contended,

among other things, that the condition of his probation that required him to submit to MPA treatment was unconstitutional. The court held that requiring such treatment was an unlawful condition and that the use of MPA had not gained acceptance in the medical community as a safe and reliable medical procedure. The court expressed grave concerns regarding the ability of the offender to provide informed consent and commented, "Even mentally incompetent persons, committed under court process, enjoy a greater degree of protection from extraordinary medical procedures."<sup>47</sup>

With increasing evidence that pharmacologic treatments can reduce sexual reoffending in some male offenders, there is less likelihood that the appropriate use of these agents will continue to be viewed as novel or experimental. However, all chemical castration statutes fail to differentiate between male and female offenders or age of offender. This broad approach raises serious concerns regarding the actual indications for treatment in some individuals who may be forced to accept treatment. Although most of the statutes require that information about the side effects of chemical or surgical treatment be provided to the offender, none of the chemical castration statutes discusses whether the offender must be competent to accept treatment. Finally, because most of these statutes mandate chemical castration as a condition of parole, opponents of these laws argue that the offender's decision to accept mandated treatment in lieu of additional incarceration is inherently coerced and therefore not truly voluntary.

## Summary

Sex crimes are a significant public health problem, and efforts to deter offenders and protect the community are worthy. Concerns regarding these legislative efforts include the one-size-fits-all approach for the treatment of both male and female sex offenders, the potential of life-long treatment with a requirement that the offender prove such treatment is no longer necessary, the failure of some statutes to determine whether the treatment is appropriate for the offender, and the minimal consideration of informed consent in the chemical castration statutes. To date, no case challenging the constitutionality of these statutes has reached the U.S. Supreme Court. Future cases will help determine whether these legislative efforts have struck the appropriate balance between

sex offenders' rights and society's right to be free of their criminal behavior.

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