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# Voluntary Surgical Castration of Sex Offenders

## WAIVING THE EIGHTH AMENDMENT PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT

### INTRODUCTION

In July 2005, Keith Raymond Fremin was about to go on trial in Covington, Louisiana for four counts of aggravated rape<sup>1</sup> involving an eleven-year-old girl and her thirteen-year-old sister.<sup>2</sup> Fremin, a neighborhood resident, first gained the girls' trust before victimizing them.<sup>3</sup> Fremin started playing basketball with the young girls,<sup>4</sup> eventually invited them to his home and sexually abused them.<sup>5</sup> One of the victims told a classmate about the abuse and later reported the incidents to her teacher.<sup>6</sup> Police arrested Fremin on January 27, 2004.<sup>7</sup> Like most sex offenders, this was not Fremin's first offense. When police charged him with the 1999 rapes of these sisters,

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<sup>1</sup> Under Louisiana law, aggravated rape occurs when

the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

- (1) When the victim resists the act to the utmost, but whose resistance is overcome by force.
- (2) When the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.
- (3) When the victim is prevented from resisting the act because the offender is armed with a dangerous weapon.
- (4) When the victim is under the age of thirteen years.

LA. REV. STAT. ANN. § 14:42 (Supp. 2006).

<sup>2</sup> Meghan Gordon, *Child Rapist OKs Surgical Castration: Rare Penalty Avoids Possible Life in Jail*, TIMES-PICAYUNE (New Orleans), July 13, 2005, at 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

Fremin was already on probation for molesting another young girl in 2003.<sup>8</sup>

Fremin would face life imprisonment if a jury convicted him of this latest sexual offense.<sup>9</sup> But prior to the start of trial, Fremin decided to plead guilty to two counts of forcible rape<sup>10</sup> and two counts of molestation.<sup>11</sup> He also volunteered to be surgically castrated.<sup>12</sup> The victims, then seventeen and nineteen-year old young women, agreed to the plea bargain.<sup>13</sup> The Louisiana State Court judge, Donald Fendlason, accepted the plea bargain and agreed to reduce Fremin's sentence from forty years to twenty-five years in prison without parole or probation if Fremin underwent surgical castration.<sup>14</sup> If Fremin did not undergo the procedure by August 18, 2005, the judge retained the authority to revoke the reduced sentence.<sup>15</sup>

Due to the unique nature of sex offenders,<sup>16</sup> it has been difficult for government agencies and courts to effectively punish sex offender activity. Research has shown that sex offenders do not change their behavior in response to

<sup>8</sup> Gordon, *supra* note 2.

<sup>9</sup> See LA. REV. STAT. ANN. § 15:537 (2005). Prosecutors decided to seek a sentence of life in prison. Gordon, *supra* note 2.

<sup>10</sup> Forcible rape, as compared to aggravated rape, is committed when

the anal, oral, or vaginal sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) When the victim is prevented from resisting the act by force or threats of physical violence under circumstances where the victim reasonably believes that such resistance would not prevent the rape.

LA. REV. STAT. ANN. § 14:42.1 (Supp. 2006). The maximum sentence for forcible rape under Louisiana law is forty years. See *id.*

<sup>11</sup> Gordon, *supra* note 2.

<sup>12</sup> *Id.* Surgical castration is an irreversible procedure that involves removal of the testes, which produce male hormones. See *infra* Part I.

<sup>13</sup> Gordon, *supra* note 2.

<sup>14</sup> *Id.*

<sup>15</sup> *Plea Agreement Includes Castration*, N.Y. TIMES, July 14, 2005, at A20. As of late August 2005, Fremin had not undergone the procedure and subsequent hearings on his case were postponed due to Hurricane Katrina. E-mail from Meghan Gordon, Staff Writer, TIMES-PICAYUNE (New Orleans) (Jan. 3, 2006, 12:43:00 EST) (on file with author).

<sup>16</sup> Sex offenders are divided into four types. A Type I offender denies commission of the crime. The Type II offender will admit to committing the crime but will blame the commission on nonsexual or non-personal forces, such as drugs or stress. A Type III offender engages in violent behavior prompted by non-sexual gain, such as power or anger. The Type IV offender is a paraphiliac who demonstrates a pattern of sexual arousal, erection, or ejaculation. Kimberly A. Peters, *Chemical Castration: An Alternative to Incarceration*, 31 DUQ. L. REV. 307, 312 (1993).

traditional deterrents, such as prison, reproach from society, and other shame-inducing alternatives.<sup>17</sup>

Sex offenders are not a homogenous group and motivations to commit sex offenses vary.<sup>18</sup> This makes categorizing or treating sex offenders difficult.<sup>19</sup> “Studies have shown that incarcerated child molesters continue to victimize young children once they are released on parole.”<sup>20</sup> The United States Department of Justice reports that sex offenders are four times more likely than non-sex offenders to be rearrested for another crime after their discharge from prison.<sup>21</sup> High recidivism rates suggest that incarceration alone is ineffective and does not deter future sex offenses.<sup>22</sup> As a result, state legislatures have turned to innovative and unusual approaches to punish sex offenders.<sup>23</sup> Castration of sex offenders is among

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<sup>17</sup> Avital Stadler, *California Injects New Life Into an Old Idea: Taking a Shot at Recidivism, Chemical Castration, and the Constitution*, 46 EMORY L.J. 1285, 1285 (1997) (“[S]exual offenders apparently do not change their behavior in response to traditional disincentives such as prison, shame and the like, to the same degree that ordinary criminals do.”).

<sup>18</sup> Carol Gilchrist, *An Examination of the Effectiveness of California’s Chemical Castration Bill in Preventing Sex Offenders from Reoffending*, 7 S. CAL. INTERDISC. L.J. 181, 186 (1998) (“Although all pedophiles exhibit [an] attraction to prepubescent children, child molesters are not a homogenous group. No accepted or empirically derived reason explains why people are attracted to minors . . .”).

<sup>19</sup> *Id.* (stating that “because sex offenders’ motivations vary, sex offenders cannot be easily categorized or cured”).

<sup>20</sup> Jennifer M. Bund, *Did You Say Chemical Castration?*, 59 U. PITT. L. REV. 157, 162 (1997).

<sup>21</sup> Bureau of Justice Statistics, Criminal Offenders Statistics, <http://www.ojp.usdoj.gov/bjs/crimoff.htm#sex> (last visited Sept. 14, 2006).

<sup>22</sup> Bund, *supra* note 20.

<sup>23</sup> Such innovative and unusual approaches to punishing and deterring sex offender activity include two recent appellate court decisions. Those cases held that sexually explicit writing can be considered child pornography and that a person can be punished for sexually fantasizing about children. Jennifer B. Siverts, *Punishing Thoughts Too Close to Reality: A New Solution to Protect Children from Pedophiles*, 27 T. JEFFERSON L. REV. 393, 407 (2005) (discussing *State v. Dalton*, 793 N.E.2d 509 (Ohio Ct. App. 2003) and *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004)). One attempt to deter sex offender activity requires sex offenders to register with the local communities in which they settle after completing their prison sentence. Katie Granlund, *Does Societal Input Lead to Successful Sex Offender Legislation?*, 29 LAW & PSYCHOL. REV. 197, 206 (2005) (discussing Megan’s Law, which requires a state to release information to the public about registered sex offenders). A recent development in imposing harsher penalties for sex offenders involves requiring offenders to wear global positioning ankle bracelets for a decade or more after they get out of prison. Kim Chandler, *Tougher Penalties OK’d for Sex Offenders: Some Must Wear Ankle Bracelet Monitors for Decade or Longer After Leaving Prison*, BIRMINGHAM NEWS (Ala.), July 27, 2005, at 1. Alabama’s legislature became one of the first to enact this program. *Id.* Florida also requires certain offenders to wear the bracelets for life and New Jersey has approved a two-year pilot program. *Id.* Other states are currently experimenting with the idea. *Id.* Additionally, one recent case highlights the newest approach states might use to preempt sex offenders from re-offending. In

the methods states are using to fill the gaps left by more traditional punishments.

The case of Keith Fremin adds a new dimension to the ongoing debate about using castration to punish sex offenders<sup>24</sup> since Fremin volunteered<sup>25</sup> for surgical castration in exchange for a reduced sentence.<sup>26</sup> First, surgical castration raises the issue of whether such a punishment violates the Eighth Amendment prohibition against cruel and unusual punishment.<sup>27</sup> Second, since the procedure has been considered cruel and unusual punishment by one state supreme court<sup>28</sup> and is unlikely to pass constitutional scrutiny if it reaches the United States Supreme Court,<sup>29</sup> surgical castration raises the

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Pennsylvania, a young woman married for three years to a previously convicted sex offender became pregnant with his child. The husband had been convicted twenty-two years earlier of rape and sodomy of two teenage girls and served ten years in jail. Pennsylvania authorities monitored the woman's pregnancy and, upon her giving birth, removed the newborn from its home pursuant to a court order. Kate Zernike, *Officials Remove Newborn over Father's Abuse Case*, N.Y. TIMES, Oct. 22, 2005, at A5. Even the power of celebrity is being used to protect children from sex offenders. In October 2005, Oprah Winfrey launched a campaign on her daytime television show in which she appealed to the public to help locate, arrest, and convict sex offenders on the run. See Child Predator Watch List, [http://www2.oprah.com/presents/2005/predator/predator\\_main.jhtml](http://www2.oprah.com/presents/2005/predator/predator_main.jhtml) (last visited Sept. 14, 2006).

<sup>24</sup> See generally Linda Beckman, *Chemical Castration: Constitutional Issues of Due Process, Equal Protection, and Cruel and Unusual Punishment*, 100 W. VA. L. REV. 853 (1998) (listing the constitutional issues that mandatory chemical castration raises).

<sup>25</sup> Some scholars have argued that waiver of a constitutional right pursuant to plea bargaining can never be voluntary. Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 21 (1990) ("Critics contend that since a convicted offender will go to great lengths to retain his freedom—including bartering his body—voluntary consent to [chemical castration] is precluded."); Pamela K. Hicks, *Castration of Sexual Offenders: Legal and Ethical Issues*, 14 J. LEGAL MED. 641, 651 (1993) ("The mere fact that the accused must face the consequences of his crime does not make consent invalid. The pressure in making a decision alone does not vitiate a voluntary act or admission if state actors do not impose any coercion or duress."); Jeffrey N. Hurwitz, *House Arrest: A Critical Analysis of an Intermediate-Level Penal Sanction*, 135 U. PA. L. REV. 771, 794-95 (1987) ("[A]lthough the doctrine appears to expand individual choices by allowing a person to forego a given right in exchange for some benefit, waiver of rights often occurs in situations where the individual has, in fact, no real choice at all."). While there are strong arguments in support of that position, for the purposes of this Note, we assume that sex offenders who choose surgical castration make a voluntary rather than coerced choice.

<sup>26</sup> Gordon, *supra* note 2 (stating that "Fremin . . . volunteered to undergo castration, a move criminal justice experts called extremely rare" and that the "[P]resident of the Louisiana Association of Criminal Defense Lawyers . . . said the surgery is a 'very unusual' penalty that could only be initiated by the defendant").

<sup>27</sup> U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

<sup>28</sup> See discussion *infra* Part II.B.

<sup>29</sup> See discussion *infra* Part III.

question of whether a sex offender who has voluntarily chosen to undergo the procedure should be able to waive the Eighth Amendment protection.

This Note focuses on the legal and practical reasons sex offenders should be able to waive the Eighth Amendment protection and choose surgical castration. Part I of this Note discusses why surgical castration is an effective approach to punishing sex offenders and the growing acceptance of the procedure. Part II examines the history of the Eighth Amendment's protection from cruel and unusual punishment and cases interpreting the constitutionality of surgical castration. Part III of this Note then applies the analytical framework created by the Supreme Court to determine when a punishment violates the Eighth Amendment and argues that surgical castration is cruel and unusual punishment.

Part IV examines waiver of the Eighth Amendment protection and asserts that, in cases where sex offenders volunteer for surgical castration, society's interest in the Eighth Amendment is diminished. Therefore, sex offenders should be permitted to waive the Eighth Amendment and choose surgical castration. Finally, Part V proposes that the best approach to determining when surgical castration, and therefore a waiver of a constitutional protection, is acceptable requires courts to balance the interests of the defendant, criminal justice system, and society.

## I. SURGICAL CASTRATION AS A RESPONSE TO SEX OFFENDER ACTIVITY

Surgical castration,<sup>30</sup> also known as orchiectomy, is an irreversible procedure that involves the removal of the testes, which produce the male hormones.<sup>31</sup> It does not involve amputation of the penis.<sup>32</sup> The procedure itself is simple and

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<sup>30</sup> Castration of sex offenders is not a new concept. In the past decade, chemical castration has emerged as a response to sex offender activity. The procedure involves the use of medroxyprogesterone acetate ("MPA"), which is more commonly known as Depo-Provera, a birth control drug for women. The drug restricts the release of luteinizing hormones from the pituitary gland. This treatment addresses sex offenders' inability to control their sexually offensive behavior. Peters, *supra* note 16, at 310-11. By reducing testosterone levels, the drug also diminishes compulsive erotic fantasies and lowers male sex drive. *Id.* at 311. The drug does not cause impotence during treatment and individuals can still experience erections and ejaculations. Karen J. Rebish, *Nipping the Problem in the Bud: The Constitutionality of California's Castration Law*, 14 N.Y.L. SCH. J. HUM. RTS. 507, 518 (1998). In 1996, California became the first state to enact chemical castration legislation in response to sex offender activity. See Philip J. Henderson, *Section 645 of the California Penal Code: California's "Chemical Castration" Law—A Panacea or Cruel and Unusual Punishment?*, 32 U.S.F. L. REV. 653, 653 (1998). A number of other states followed California's lead and more than half have either considered or passed chemical castration legislation. Robert D. Miller, *Forced Administration of Sex-Drive Reducing Medications to Sex Offenders: Treatment or Punishment?*, 4 PSYCHOL. PUB. POL'Y & L. 175, 188 (1998). There has been a vocal community of critics, including medical practitioners and the American Civil Liberties Union, against chemical castration of sex offenders. Hicks, *supra* note 25, at 665-66; Siverts, *supra* note 23, at 403 ("California's bold measure has raised the eyebrows of more than a few critics, most notably the American Civil Liberties Union, which has condemned the law as cruel and unusual punishment."). *But see* Lisa Keesling, *Practicing Medicine Without a License: Legislative Attempts to Mandate Chemical Castration for Repeat Sex Offenders*, 32 J. MARSHALL L. REV. 381, 395 n.129 (1999) (In a June 1994 survey of American voters conducted by Princeton Survey Research, 59% of respondents said they supported surgical or chemical castration for repeat sex offenders.). See also Douglas J. Besharov & Andrew Vachhs, *Sex Offenders: Is Castration an Acceptable Punishment?*, 78 A.B.A.J. 42 ("[C]hemical 'castration' . . . has been an accepted treatment for many sex offenders."). Chemical castration is not an effective method of dealing with sex offender activity for a number of reasons. Unlike surgical castration, chemical castration does not permanently alter the sex offender since testosterone levels can normalize once the injections cease. Stadler, *supra* note 17, at 1290. This is of particular concern because, when not taking the drugs, the sex offender "will not have the willpower to control his deviant sexual behavior." Rebish, *supra*, at 517. Further, in states with chemical castration laws, the decision to administer the procedure is not left up to the defendant. Rather, these laws often mandate court-ordered chemical castration for repeat sex offenders. William Winslade, T. Howard Stone, Michele Smith-Bell & Denise M. Webb, *Castrating Pedophiles Convicted of Sex Offenses Against Children: New Treatment or Old Punishment?*, 51 SMU L. REV. 349, 376-81 (1998) [hereinafter Winslade et al.]. Experts claim that deterrence of future sexual offenses depends significantly on whether the sex offender understands that what he did was wrong and whether he has volunteered for the procedure. Peters, *supra* note 16, at 313.

<sup>31</sup> Rebish, *supra* note 30, at 517; Winslade et al., *supra* note 30, at 369 (discussing the details of surgical castration).

<sup>32</sup> Winslade et al., *supra* note 30, at 369.

involves a small incision in the scrotum to remove the testes.<sup>33</sup> The procedure's "primary effect is to diminish [the sex offender]'s physical and emotional ability to respond to sexual stimuli."<sup>34</sup>

Surgical castration has been used successfully by other countries to treat sex offenders.<sup>35</sup> Research from these countries indicates that the removal of the testes is an effective method in reducing recidivism rates.<sup>36</sup> A 1979 European study of sex offenders found that the recidivism rate of castrates was 2.3 percent, compared to thirty-nine percent for non-castrates.<sup>37</sup> Still another study indicates that only three percent of surgically castrated offenders committed a subsequent sex offense, while members of the non-castrate control group had a forty-six percent recidivism rate.<sup>38</sup> These studies provide strong evidence that surgical castration is an effective method of deterring sex offenders.

Proponents of the procedure argue that surgical castration is minimally invasive because it is not major surgery and is often performed on an outpatient basis.<sup>39</sup> Further, the primary advantage of surgical castration to other forms of punishment is in its permanence. In fact, there is no risk that offenders will manipulate the procedure as they could with drug therapy<sup>40</sup> and this produces long-lasting results.<sup>41</sup>

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<sup>33</sup> Kris W. Druhm, *A Welcome Return to Draconia: California Penal Law § 645, The Castration of Sex Offenders and the Constitution*, 61 ALB. L. REV. 285, 294 (1997).

<sup>34</sup> Rebish, *supra* note 30, at 515 (discussing the effectiveness of surgical castration).

<sup>35</sup> Surgical castration has been used by many European countries, including Denmark and Germany, and studies show that those countries have drastically reduced recidivism rates compared to sex offenders who were not surgically castrated. Winslade et al., *supra* note 30, at 370, 372. See also Stacy Russell, *Castration of Repeat Sexual Offenders: An International Comparative Analysis*, 19 HOUS. J. INT'L L. 425, 442-47 (1997) (surveying surgical castration legislation in European countries).

<sup>36</sup> Amy Dorsett, *Castration Success Considered*, SAN ANTONIO EXPRESS-NEWS, May 8, 2005, at 1B ("Surgical castration, when used in conjunction with other forms of therapy, can dramatically reduce sexual predators' rates of re-offending.").

<sup>37</sup> Jodi Berlin, *Chemical Castration of Sex Offenders: "A Shot in the Arm" Towards Rehabilitation*, 19 WHITTIER L. REV. 169, 179 (1997) (discussing a study of the effects of castration on sex offenders in Germany).

<sup>38</sup> Winslade et al., *supra* note 30, at 371 (discussing another study in Germany of surgically castrated sex offenders).

<sup>39</sup> Druhm, *supra* note 33, at 295.

<sup>40</sup> Hicks, *supra* note 25, at 646.

<sup>41</sup> Winslade et al., *supra* note 30, at 353.

Others argue that surgical castration is a fitting punishment for heinous sexual crimes.<sup>42</sup> An ardent supporter of surgical castration, Texas district court judge Michael T. McSpadden, subscribes to this justification.<sup>43</sup> In 1992, McSpadden presided over the case of Steven Allen Butler, who sexually assaulted<sup>44</sup> a thirteen-year-old girl while he was still on probation for fondling a seven-year-old girl in 1989.<sup>45</sup> Butler volunteered to be surgically castrated in exchange for a lighter sentence<sup>46</sup> and McSpadden agreed.<sup>47</sup> While surgical castration is still only rarely used in the United States to respond to sex offender activity, there have been recent indications that the procedure is becoming more acceptable to society as a way to punish sex offenders.

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<sup>42</sup> *Id.*

<sup>43</sup> See Michael T. McSpadden, Op-Ed., *Conventional Therapy Doesn't Stop Sexual Predators. A Simple Surgical Procedure Will*, TEX. LAW., June 30, 1997, at 22.

<sup>44</sup> Under Texas law, a person commits sexual assault on a child when the person intentionally or knowingly:

- (A) causes the penetration of the anus or female sexual organ of a child by any means;
- (B) causes the penetration of the mouth of a child by the sexual organ of the actor;
- (C) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;
- (D) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or
- (E) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.

TEX. PENAL CODE ANN. § 22.011(a)(2) (2005).

<sup>45</sup> Robert Crowe, *Castration no Cure for Pedophilia: Drugs, Surgery May Temper Drive, but Sexual Interest Won't "Normalize,"* HOUS. CHRON., May 10, 2005, at B1.

<sup>46</sup> Peters, *supra* note 16, at 307 ("In March, 1992, Steven Allen Butler, an accused rapist, asked a Texas District Judge to punish him via castration rather than imprisonment.").

<sup>47</sup> Crowe, *supra* note 45. However, the surgery never took place due to public opposition. Kari A. Vanderzyl, *Castration as an Alternative to Incarceration: An Impotent Approach to the Punishment of Sex Offenders*, 15 N. ILL. U. L. REV. 107, 107 (1994) ("In March of 1992, Steven Allen Butler . . . requested that [Judge McSpadden] order surgical castration rather than sentencing him to prison. Judge McSpadden initially assented to the request, but ultimately withdrew approval in the wake of national publicity and protests by civil libertarians. Physicians in the area refused to perform the operation, and even Butler found himself reconsidering his unusual request."). See also John Makeig & Julie Mason, *Butler's Family Relieved: Controversy Kills Castration Plan: Physicians won't Do Procedure on Accused Child Rapist*, HOUS. CHRON., Mar. 17, 1992, at A1.

### A. *State Legislation and Surgical Castration*

Texas is currently one of a few states that have passed legislation explicitly allowing surgical castration.<sup>48</sup> On May 21, 1997, then Governor George W. Bush signed into law a bill entitled *Orchiectomy for Certain Sex Offenders*.<sup>49</sup> The bill provides that prison inmates over the age of twenty-one “who have been twice convicted for indecency, sexual assault, or aggravated sexual assault involving a child younger than seventeen [may]...undergo surgical castration.”<sup>50</sup> The offender must submit to a mental health examination before it can be performed.<sup>51</sup>

The legislation expressly forbids judges and the parole board from requiring defendants to be surgically castrated.<sup>52</sup> Instead, the offender must volunteer for surgical castration.<sup>53</sup> Notably, the legislation is entirely devoid of any penal objective and the state is not allowed to offer reduced sentencing or probation in lieu of sentencing to induce sex offenders to volunteer for the procedure.<sup>54</sup> This might explain why only a few Texas inmates have volunteered to have the surgery since the procedure became available in 1997.<sup>55</sup> Without the promise

<sup>48</sup> Other states that allow for surgical castration include California and Montana. *See generally* Winslade et al., *supra* note 30. In 1999, the Oklahoma legislature considered a bill that would allow surgical castration for convicted sex offenders, but “[e]ven its most ardent supporters in the House believe it is unconstitutional because it would impose cruel and unusual punishment.” Tim Talley, *Politically Charged Legislation*, *THE JOURNAL RECORD* (Okla. City), Mar. 16, 1999, available at [http://www.findarticles.com/p/articles/mi\\_qn4182/is\\_19990316/ai\\_n10125190](http://www.findarticles.com/p/articles/mi_qn4182/is_19990316/ai_n10125190). However, Oklahoma senators passed legislation to give judges the option of sentencing sex offenders to chemical castration or surgical castration. John Griener, *Senate Approves Castration of Sex Offenders*, *DAILY OKLAHOMAN*, Mar. 11, 1999, at 8.

<sup>49</sup> Associated Press, *Bush Signs Child Molester Castration Bill*, *FORTH WORTH STAR-TELEGRAM*, May 21, 1997, at 6 (reporting the signing of TEX. GOV'T CODE ANN. § 501.061 (2006)).

<sup>50</sup> Winslade et al., *supra* note 30, at 385 (describing the Texas legislation).

<sup>51</sup> *Id.* (“Additionally, a psychiatrist and a psychologist who have experience in treating sex offenders must evaluate the inmate . . .”).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (“There are several provisions in [the Texas bill] that . . . are clearly intended to ensure that surgical castration is a voluntary, non-coercive, and clearly therapeutic undertaking.”).

<sup>54</sup> *Id.*

<sup>55</sup> Dorsett, *supra* note 36; Robert Tharp, *Molester is Judged Threat to Dallas: Pedophile Jones to Remain under House Arrest Indefinitely*, *DALLAS MORNING NEWS*, June 17, 2005, at 1B. “The first castration [occurred] in December 2001. The other [two] took place in March 2004.” Crowe, *supra* note 45. “[Texas] officials will not release the names of the three who [opted for] the procedure.” *Id.* However, notorious

of reduced incarceration, sex offenders are less willing to undergo the procedure.

A number of states have considered or are now considering following Texas and enacting surgical castration laws. In Minnesota, a group of legislators proposed that serious sex offenders should be subject to court-ordered castration, either surgical or chemical.<sup>56</sup> The legislation received significant public support. A 1991 poll found that fifty-six percent of the public support surgical castration of repeat sex offenders.<sup>57</sup>

In Alabama, Rep. Steve Hurst pre-filed a bill in September 2005 that would allow persons over the age of twenty-one who are convicted of sex offenses against a child younger than twelve to be surgically castrated before gaining their release from the Department of Corrections.<sup>58</sup> Hurst introduced an amendment in 2005 providing for surgical castration that passed in the House, but later withdrew it because of concerns that the amendment could be unconstitutional.<sup>59</sup> His new bill was scheduled to be considered in the 2006 legislative session.<sup>60</sup>

Notably, in most states that allow chemical castration, surgical castration is often an option for the sex offender.<sup>61</sup> In California, Florida, and Montana, states which have chemical castration laws, a defendant may also voluntarily undergo surgical castration.<sup>62</sup> The Florida legislation places a premium on the sex offender's consent to the procedure. In emphasizing the requirement that the defendant must consent to surgical castration, the law refers to language used to describe when waivers of constitutional rights are valid. The law provides that sex offenders may request surgical castration only if their

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child molester Larry Don McQuay admitted that he is one of three to have undergone surgical castration. Dorsett, *supra* note 36. See also discussion *infra* Part I.B.

<sup>56</sup> Conrad deFiebre, *Bill Proposes Castration for Some Sex Offenders*, STAR TRIBUNE (Minneapolis, Minn.), Feb. 18, 2005, at 4B.

<sup>57</sup> *Id.*

<sup>58</sup> John Davis & Jannell McGrew, *Alabama Lawmakers Line up Crusades for Next Session*, MONTGOMERY ADVISER (Ala.), Sept. 6, 2005, at A1.

<sup>59</sup> *Id.* See also Chandler, *supra* note 23 ("Some House members reluctantly agreed to remove language that would have required mandatory surgical castration for sex offenders convicted of crimes against children under 12. [Attorney General] King and some lawmakers said they feared the castration provision would make the bill unconstitutional because of inhumane punishment.").

<sup>60</sup> Davis & McGrew, *supra* note 58.

<sup>61</sup> Winslade et al., *supra* note 30, at 377, 381 (discussing state chemical castration bills, some of which also allow surgical castration).

<sup>62</sup> *Id.* at 383.

consent is “intelligent, knowing, and voluntary.”<sup>63</sup> Based on this language, it appears that involuntary or court-mandated surgical castration is more of a concern to states than when the defendant volunteers for the procedure.

*B. A Growing Number of Sex Offenders Have Volunteered for Surgical Castration When Reduced Sentencing is an Incentive*

A number of sex offenders have chosen to undergo surgical castration.<sup>64</sup> Sex offenders who volunteer for surgical castration often do so because they believe their chances of an early release from prison will increase and the likelihood of re-offending will decrease. In these cases, courts must determine whether the procedure is an effective substitute to the more traditional punishment of prolonged incarceration.

If the court considers the procedure an effective substitute, the sex offender might gain his release from prison or a lighter prison sentence. Of paramount consideration is whether the sex offender is likely to commit more sex crimes. A number of courts have granted sex offenders their freedom for undergoing the procedure or given drastically reduced sentences.<sup>65</sup>

Jim Elkins, a former baseball coach in Bossier, Louisiana, pled guilty to three counts of fondling juveniles in

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<sup>63</sup> *Id.* (citing FLA. STAT. ANN. § 794.0235).

<sup>64</sup> Guy Ashley, *Sex Offender at ASH is Set for Castration: Greg Grant is Convinced Surgery Will Bring a Cure for the Fantasies That Have Ailed Him; The Procedure Puts Him at the Center of Decades-old Controversy*, THE TRIBUNE (San Luis Obispo, Cal.), Aug. 29, 2005, available at 2005 WLNR 13556669 (“Greg Grant is scheduled for castration this morning, convinced that [it is] a cure for the deviant sexual fantasies that have ailed him for decades”); Dorsett, *supra* note 36 (Larry Don McQuay, “who claimed to have molested more than 200 children and animals, was granted his wish of surgical castration within the last year by the Texas Department of Criminal Justice”); Monte Morin, *Graduate of Sex Offender Program is Released*, L.A. TIMES, Sept. 14, 2004, available at 2004 WLNR 19749979 (stating that “[i]n an effort to win his freedom, [Brian] DeVries underwent voluntary chemical and surgical castration”); Tharp, *supra* note 55 (stating that David Wayne Jones elected to undergo surgical castration as his parole date approached); Terry Vau Dell, *Trial Begins in Molester’s Bid for Freedom/Castration*, OROVILLE MERCURY REGISTER (Cal.), Sept. 2, 2005 (LexisNexis) (stating that Bruce Clotfelter underwent voluntary surgical castration after he was released on parole for a prior conviction but arrested a few months later when he was found near elementary schools); Brian Vernellis, *Keeping Sexual Predators out of Youth Sports*, THE TIMES (Shreveport, La.), June 26, 2005 (Lexis Nexis) (“Jim Elkins, a former Bossier Police Jury president and longtime Bossier Dixie baseball coach, pleaded guilty to three counts of fondling juveniles in 1997. He volunteered for surgical castration and is serving a 25-year sentence.”).

<sup>65</sup> See *infra* Part I.B.

1997 and volunteered for surgical castration as part of the plea bargain.<sup>66</sup> After learning that Elkins had been surgically castrated, the judge sentenced Elkins to twenty-five years in prison.<sup>67</sup> The judge admitted that if Elkins had not been castrated, he would have imposed the maximum penalty of forty-five years in prison.<sup>68</sup>

Brian DeVries served an eight-year prison sentence for molesting nine young boys.<sup>69</sup> He became California's first sexually violent offender to receive treatment at Atascadero State Hospital<sup>70</sup> where he underwent seven years of intensive psychiatric treatment.<sup>71</sup> In an effort to win his freedom, DeVries also underwent voluntary surgical castration in 2001.<sup>72</sup> DeVries spent one year of strict monitoring that a state court judge called severe and extreme supervision.<sup>73</sup> In September 2004, the judge graduated DeVries from the state treatment program and granted him unconditional release.<sup>74</sup> The judge stated that surgical castration and time spent in the treatment program meant DeVries was no longer a danger to the public<sup>75</sup> and pointed to the fact that DeVries was not aroused by deviant pornography during treatment.<sup>76</sup>

Larry Don McQuay is one of the few sex offenders in Texas known to have been surgically castrated. He molested more than 200 children and animals.<sup>77</sup> McQuay's first prison sentence for child molestation came in 1990 for a term of eight years.<sup>78</sup> But a jury again indicted him in 1996 on three new charges for which he was convicted and sentenced to twenty years.<sup>79</sup> In 1996, McQuay waged a public campaign to be

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<sup>66</sup> Vernellis, *supra* note 64.

<sup>67</sup> *Id.*

<sup>68</sup> The judge also stated that "[t]here's no way I can make you be castrated. . . . If you plea and don't get castrated, [it could mean] 45 years." Briefly/Nation, THE HERALD SUN (Durham, N.C.), Aug. 9, 1998, at A9.

<sup>69</sup> Morin, *supra* note 64; Alan Gathright, *Judge Declares Molester Free to Leave*, S.F. CHRON., Sept. 14, 2004, at A1.

<sup>70</sup> Alan Gathright, *supra* note 69.

<sup>71</sup> Morin, *supra* note 64.

<sup>72</sup> *Id.*; Gathright, *supra* note 69.

<sup>73</sup> Gathright, *supra* note 69.

<sup>74</sup> Morin, *supra* note 64.

<sup>75</sup> Gathright, *supra* note 69.

<sup>76</sup> *Id.*

<sup>77</sup> Dorsett, *supra* note 36.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

surgically castrated<sup>80</sup> because he believed it would prevent him from committing future sexual assaults.<sup>81</sup> McQuay's case pushed Texas to allow surgical castration of repeat sex offenders under the 1997 Texas Bill.<sup>82</sup> Finally, in 2004, the Texas Department of Criminal Justice granted his request for surgical castration.<sup>83</sup> In May 2005, the court released McQuay from prison for good behavior.<sup>84</sup> These cases suggest that voluntary surgical castration can not only convince courts that the offender is less likely to re-offend, but can also be an effective punishment of sex offender activity.

## II. SURGICAL CASTRATION AND CRUEL AND UNUSUAL PUNISHMENT

Despite some acceptance and positive findings, surgical castration remains rare and is not widely supported in the United States.<sup>85</sup> In fact, one court has held, and others have intimated, that surgical castration is cruel and unusual punishment.<sup>86</sup> With the possibility that more states will enact legislation allowing surgical castration or courts will confront more cases where the defendant volunteers for the procedure,

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<sup>80</sup> *Id.*

<sup>81</sup> Crowe, *supra* note 45.

<sup>82</sup> Dorsett, *supra* note 36. Interestingly, McQuay's case came only two years after public outrage over Steven Allen Butler's request for surgical castration. *See infra* Part I (discussing Steven Allen Butler and his request for the procedure). McQuay's request did not produce the same opposition and, in fact, led to public pressure on Texas to allow the procedure, mainly because McQuay's request was based on his belief that he would continue to re-offend if he was not castrated. Druhm, *supra* note 33, at 291-92 (discussing McQuade's case).

<sup>83</sup> Dorsett, *supra* note 36.

<sup>84</sup> *Id.*

<sup>85</sup> Larry Helm Spalding, *Florida's 1997 Chemical Castration Law: A Return to the Dark Ages*, 25 FLA. ST. U. L. REV. 117, 121 (1998). *See also* Besharov & Vachhs, *supra* note 30 ("Surgical castration has never been very popular in this country . . . . Although many castrated men may be capable of intercourse, the limited research that exists suggests that the repeat-offense rate is low. On humanitarian and civil liberties grounds, however, most experts now oppose the procedure and it is unlikely that many courts will turn to it as an alternative to incarceration"); Druhm, *supra* note 33, at 296 ("Despite the evidence indicating its effectiveness, surgical castration as a treatment is not widely accepted, especially in America"); Rebish, *supra* note 30, at 523 ("Surgical castration of sexual offenders has not been well received in American courts."). *But see* deFiebre, *supra* note 56 ("A 1991 Star Tribune Minnesota Poll found support among 56 percent of the public for surgical castration of repeat sex offenders").

<sup>86</sup> *State v. Brown*, 326 S.E.2d 410, 412 (1985) (holding that surgical castration is a form of mutilation and, therefore, cruel and unusual punishment under state law). *See infra* Part II.B.

courts must consider whether this type of punishment is constitutional under the Eighth Amendment.

A. *History and Purpose of the Eighth Amendment*

The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>87</sup> In *Trop v. Dulles*,<sup>88</sup> the Supreme Court observed that the Eighth Amendment protection is aimed at preserving “nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”<sup>89</sup> This articulation describes the purpose and spirit of the amendment.

The Court has established certain criteria to determine when a punishment violates the Eighth Amendment.<sup>90</sup> First, a court must determine whether the punishment is inherently cruel. This is done by examining “objective indicia that reflect the public attitude toward a given sanction.”<sup>91</sup> The analysis must consider that the Amendment draws its meaning “from the evolving standards of decency that mark the progress of a maturing society.”<sup>92</sup>

The punishment must not be unacceptable to society.<sup>93</sup> Whether a punishment conforms to society’s contemporary standards of decency 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.”<sup>94</sup> A society that once considered a particular punishment acceptable may later consider it indecent and, therefore, a violation of the Eighth Amendment.<sup>95</sup> Similarly, a punishment that might have been indecent decades ago might be appropriate today.

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<sup>87</sup> U.S. CONST. amend. VIII.

<sup>88</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>89</sup> *Id.* at 100.

<sup>90</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *See also* Jeffrey L. Kirchmeier, *Let’s Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 625 (2000) (discussing the test created by *Gregg*).

<sup>91</sup> *Gregg*, 428 U.S. at 173.

<sup>92</sup> *Trop*, 356 U.S. at 101.

<sup>93</sup> *Hicks*, *supra* note 25, at 658 (“In determining whether a punishment falls within the meaning of the Eighth Amendment ban, the Supreme Court has used several criteria, including whether the punishment is . . . unacceptable to society”).

<sup>94</sup> *Furman v. Georgia*, 408 U.S. 238, 361 (1972) (Marshall, J., concurring).

<sup>95</sup> *Id.* at 329-30.

Second, a punishment must not exceed what is necessary to accomplish the state's legitimate aims.<sup>96</sup> This means that the punishment must be commensurate with the offense for which it is imposed rather than be grossly out of proportion to the severity of the crime.<sup>97</sup> Also, the punishment must not be inflicted arbitrarily.<sup>98</sup>

The Supreme Court has held certain kinds of punishments to be unconstitutional. It has found extreme physical suffering to be cruel and unusual because it is disproportionate to the crime.<sup>99</sup> The Court has also considered severe mental pain cruel and unusual punishment even though there may be "no physical mistreatment."<sup>100</sup> In dicta, the Court has mentioned that beheadings, burning alive, and emboweling would all violate the Eighth Amendment.<sup>101</sup>

While the Court has not addressed the particular issue of whether surgical castration imposed as part of a sentence would violate the Eighth Amendment, there is language in lower court Eighth Amendment cases that intimate that castration would be unconstitutional. In *Whitten v. State*,<sup>102</sup> a jury convicted the defendant of assault and battery and sentenced him to six months in prison. On appeal to the Supreme Court of Georgia, the defendant claimed that his sentence was cruel and unusual.<sup>103</sup> Concerning whether the punishment was cruel and unusual, the court observed that the clause "was, doubtless, intended to prohibit the barbarities of quartering, hanging in chains, [and] castration".<sup>104</sup> The court affirmed the punishment, stating that "the object of punishment is to prevent crime."<sup>105</sup>

In *Davis v. Berry*,<sup>106</sup> the Iowa Board of Parole ordered that a prison inmate receive a vasectomy, pursuant to a state statute requiring the procedure for repeat felons.<sup>107</sup> The court compared vasectomy to castration and observed that castration

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<sup>96</sup> *Gregg*, 428 U.S. at 173.

<sup>97</sup> *Weems v. United States*, 217 U.S. 349, 367 (1910).

<sup>98</sup> *Gregg*, 428 U.S. at 173 (citing *Weems*, 217 U.S. at 381).

<sup>99</sup> *Weems*, 217 U.S. at 370.

<sup>100</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>101</sup> *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878).

<sup>102</sup> *Whitten v. Georgia*, 47 Ga. 297 (1872).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 301.

<sup>105</sup> *Id.*

<sup>106</sup> *Davis v. Berry*, 216 F. 413 (S.D. Iowa 1914).

<sup>107</sup> *Id.* at 417.

is more severe and that, for each procedure, “[t]he physical suffering may not be so great, but that is not the only test of cruel punishment; the humiliation, the degradation, the mental suffering are always present and known by all the public, and will follow him wheresoever he may go.”<sup>108</sup> The court held that the procedure was unconstitutional on cruel and unusual punishment grounds.<sup>109</sup>

Aside from judicial opinions on the subject, there is a plethora of scholarly articles suggesting that surgical castration would not pass constitutional scrutiny. These arguments focus on the nature of the procedure, that it is permanent and disfiguring, and that surgical castration is more akin to other physical forms of punishment that courts consider unconstitutional or society finds repugnant.<sup>110</sup>

*B. The Leading State Decision on the Constitutionality of Surgical Castration: State v. Brown*

The only court to have ruled on the constitutionality of surgical castration of sex offenders is the Supreme Court of South Carolina in *State v. Brown*.<sup>111</sup> In that case, three defendants committed a brutal gang rape.<sup>112</sup> Instead of going to trial, the defendants pleaded guilty to first-degree criminal sexual conduct.<sup>113</sup> At sentencing, the trial judge ordered that each defendant be imprisoned for thirty years, the maximum

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<sup>108</sup> *Id.* at 416.

<sup>109</sup> *Id.* at 417.

<sup>110</sup> Druhm, *supra* note 33, at 315 (“Surgical castration is very severe and unlikely to pass any Eighth Amendment analysis because it is permanent and disfiguring.”); Stadler, *supra* note 17, at 1322 (“There is little question that actual castration would be considered a violation of the Eighth Amendment.”).

<sup>111</sup> *State v. Brown*, 326 S.E.2d 410 (1985).

<sup>112</sup> Keesling, *supra* note 30, at 390 n.87 (discussing the facts of *State v. Brown*, 326 S.E.2d 410 (1985)).

<sup>113</sup> *Brown*, 326 S.E.2d at 410. Under South Carolina law,

(1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:

(a) The actor uses aggravated force to accomplish sexual battery.

(b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act.

sentence under South Carolina law at that time.<sup>114</sup> The judge, however, went on to state a condition of probation that could reduce the sentence.<sup>115</sup> The defendants could receive suspended sentences and probation imposed for five years if they agreed to surgical castration.<sup>116</sup> The defendants initially appealed the sentence but later withdrew their appeals<sup>117</sup> and defendant Brown sought a writ of mandamus to compel the execution of the suspended sentence.<sup>118</sup>

On appeal, the Supreme Court of South Carolina ruled that voluntary surgical castration as a condition of a suspended sentence and probation was unconstitutional under the state constitution.<sup>119</sup> While the court recognized that a trial judge has wide discretion in imposing conditions on sentences and probation, it emphasized the fact that a judge may not impose or accept conditions that are against public policy.<sup>120</sup> In determining public policy, the court looked to the state constitution, statutes and judicial decisions,<sup>121</sup> and determined that castration is a form of mutilation.<sup>122</sup> Therefore, it constituted cruel and unusual punishment.<sup>123</sup>

Given that the procedure would be cruel and unusual under the South Carolina constitution, the court rejected that the defendant could waive this constitutional right. The court stated that, “notwithstanding that the defendant accepted the condition, thereby attempting to waive his right to be free from cruel and unusual punishment, the condition was void because a state ‘cannot impose conditions which are illegal and void as against public policy.’”<sup>124</sup> A defendant “may not waive the constitutional ban [on cruel and unusual punishment] and thus empower the state to impose a punishment that it is otherwise

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<sup>114</sup> Hicks, *supra* note 25, at 652 n.101.

<sup>115</sup> Druhm, *supra* note 33, at 289 (“No South Carolina statute required castration at the time; instead, the judge was using his discretion to suspend sentences subject to court-imposed conditions.”).

<sup>116</sup> Brown, 326 S.E.2d at 410.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 412. The South Carolina state constitution is similar to the United States Constitution. It states that: “Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained.” S.C. CONST. art. I, § 15 (2005).

<sup>120</sup> Brown, 326 S.E.2d at 411.

<sup>121</sup> *Id.* at 412.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 411.

forbidden to inflict.”<sup>125</sup> Notably, the court’s argument was not that courts allowing defendants a choice is unconstitutional, but rather that conditioning parole on an impermissible alternative to incarceration is unconstitutional.<sup>126</sup>

*State v. Brown* does not involve a similar set of facts to Keith Fremin’s case. Fremin is a repeat sex offender and molested children.<sup>127</sup> However, the case suggests that, even if a defendant decides of his own volition to undergo the procedure, surgical castration might still implicate the Eighth Amendment’s ban on cruel and unusual punishment, making waiver of this constitutional protection complicated for courts.<sup>128</sup>

### III. APPLICATION OF THE EIGHTH AMENDMENT: VOLUNTARY SURGICAL CASTRATION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

The most likely constitutional challenge surgical castration faces is under the Eighth Amendment. Surgical castration evokes aversion from people because it compromises a defendant’s bodily integrity by permanently altering the body.<sup>129</sup> This conflicts with the idea that “[t]here should be an overwhelming presumption against having the long arm of government touch the human body . . . in intimate ways.”<sup>130</sup> It

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<sup>125</sup> Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1371 (1988).

<sup>126</sup> Hicks, *supra* note 25, at 653 (“This decision should not be misinterpreted as holding that allowing a defendant to choose between castration and a substantial prison sentence constitutes cruel and unusual punishment. What the court found to be cruel and unusual was the castration of criminals, not the allowance of a choice.”).

<sup>127</sup> See discussion *supra* Introduction.

<sup>128</sup> *But see* Briley v. California, 564 F.2d 849, 852 (9th Cir. 1977) (discussing the case in which a convicted child molester was allowed to plead to a lesser charge with a suspended sentence if he voluntarily submitted to surgical castration, which he did).

<sup>129</sup> Druhm, *supra* note 33, at 315 (“Surgical castration is very severe and unlikely to pass any Eighth Amendment analysis because it is permanent and disfiguring.”); Miller, *supra* note 30, at 178-79 (“There have continued to be attempts to use surgical castration to reduce inappropriate sexual behavior; however, because the procedure is irreversible, because the clinical evidence demonstrates that it is not always effective, and because reversible medications are now widely available, it has largely fallen into disfavor.”); Stadler, *supra* note 17, at 1322 (“There is little question that actual castration would be considered a violation of the Eighth Amendment.”).

<sup>130</sup> Richard Lacayo, *Sentences Inscribed on Flesh: The Prospect of Castration for a Sex Offender Raises Questions About When the Law Can Invade the Body*, TIME, Mar. 23, 1992, at 54 (quoting Laurence Tribe, a Harvard Law School professor).

also conflicts with society's values of physical autonomy and personal privacy.<sup>131</sup>

Opponents of the procedure argue that surgically castrating sex offenders is nothing more than bodily mutilation and a return to a time when hangings and beheadings were acceptable punishments.<sup>132</sup> These arguments suggest that surgical castration will have a difficult time passing constitutional scrutiny under the Supreme Court's Eighth Amendment jurisprudence.<sup>133</sup>

#### A. *Voluntary Surgical Castration is Punishment*

Some scholars have suggested that castration might pass constitutional scrutiny if it is prescribed as treatment rather than as punishment.<sup>134</sup> To determine whether something is punishment rather than treatment, many courts have used a four-part test established in *Rennie v. Klein* as a useful guide.<sup>135</sup> Under that test, a court must consider whether surgical castration has any therapeutic value, is recognized and accepted medical practice, "is . . . part of an ongoing psychotherapeutic program," and has unreasonably harsh adverse effects.<sup>136</sup> If surgical castration meets all four prongs, then it is considered treatment rather than punishment.<sup>137</sup>

While surgical castration may have therapeutic value and may be imposed as part of an ongoing psychotherapeutic program, a court would consider the procedure punishment rather than treatment because it fails the second prong of the test. The procedure is not recognized as an acceptable medical treatment for sex offenders in this country.<sup>138</sup> Further, a court may find that the adverse effects of surgical castration are unreasonably harsh. Side effects of surgical castration are permanent and include "excessive perspiration and blushing,

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<sup>131</sup> Spalding, *supra* note 85, at 127 (discussing the importance of requiring a sex offender's consent to chemical castration).

<sup>132</sup> See *supra* note 129 and accompanying text.

<sup>133</sup> *Id.*

<sup>134</sup> Winslade et al., *supra* note 30, at 387 ("Used therapeutically, surgical castration may very well survive a constitutional 'cruel and unusual punishment' challenge").

<sup>135</sup> *Rennie v. Klein*, 462 F. Supp. 1131 (D. N.J. 1978).

<sup>136</sup> *Id.* at 1143; Rebish, *supra* note 30, at 527-28.

<sup>137</sup> Rebish, *supra* note 30, at 527-28.

<sup>138</sup> *Id.* at 528 ("First, surgical castration fails the second prong of the [Rennie] test because it is not a medically acceptable treatment for criminals in the United States.").

loss of hair both on the body and face, increase in body weight, and softening of the skin.”<sup>139</sup>

Where a sex offender volunteers for surgical castration, the issue is simpler. In this situation, the defendant knows that if he volunteers for the procedure pursuant to a plea bargain or in post-trial sentencing, his sentence will likely be reduced.<sup>140</sup> When the judge accepts surgical castration and where the procedure is a condition for a reduced sentence, the procedure becomes part of that reduced sentence. Therefore, it qualifies as punishment and is subject to constitutional scrutiny under the Eighth Amendment.

### B. *Voluntary Surgical Castration is Cruel and Unusual*

Surgical castration would fail most prongs of the Eighth Amendment’s test to determine what punishment is cruel and unusual. First, a court would find the procedure to be inherently cruel for a number of reasons. The procedure involves permanent change to the body<sup>141</sup> and eliminates the ability of the offender to procreate.<sup>142</sup> The Supreme Court has held procreation to be a fundamental right.<sup>143</sup> This severe consequence of surgical castration renders the procedure inherently cruel.

Society’s support of using the procedure to punish sex offenders is also questionable. Physical torture and mutilation, once accepted in American society, are no longer so. Since the operation involves injury to the body, this would shock the conscience.<sup>144</sup> Further, the criminal justice system is no longer primarily focused on retribution in the form of an eye-for-an-eye.<sup>145</sup> The public would not support surgical castration as a

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<sup>139</sup> *Id.* at 515.

<sup>140</sup> Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 118 (1999) (stating that a defendant enters into a plea bargain in exchange for a prosecutor’s “promise to forego or reduce charges against the defendant . . . and her promise to recommend a more lenient sentence”).

<sup>141</sup> William Green, *Depo-Provera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues*, 12 U. DAYTON L. REV. 1, 3 (1986) (stating that surgical castration would shock the conscience because it permanently mutilates the body).

<sup>142</sup> Peter J. Gimino III, *Mandatory Chemical Castration for Perpetrators of Sex Offenses Against Children: Following California’s Lead*, 25 PEPP. L. REV. 67, 92 (1997).

<sup>143</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

<sup>144</sup> Rebish, *supra* note 30, at 529.

<sup>145</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 11 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975) (“Physical pain, the pain of the body itself, is no longer the constituent element of the penalty. From being an art

sanction of sexually deviant behavior<sup>146</sup> given the nature of surgical castration and its side effects.<sup>147</sup>

Second, a court would find surgical castration to be excessive compared to what is necessary for the state to accomplish its goals. Certainly, protecting children and deterring sex offender activity are legitimate state aims. But surgical castration would fail this test since there are less intrusive and traditionally accepted punishment alternatives available, such as imprisonment and therapy.<sup>148</sup> There are also innovative methods that are available or being tested that are less intrusive than surgical castration, such as chemical castration, requiring sex offenders to register with local communities, and tracking devices.<sup>149</sup>

Another reason courts would find that surgical castration is excessive is that research remains inconsistent on whether surgical castration does more to deter perpetrators from re-offending than other punishment methods.<sup>150</sup> If it were otherwise, courts might consider the procedure more favorably under this test, but that is not currently the case.

Surgical castration would also fail the proportionality prong of the test. Surgical castration is an irreversible procedure and has numerous and long-lasting adverse side

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of unbearable sensations punishment has become an economy of suspended rights.”); Miller, *supra* note 30, at 178 (“As physical torture and mutilation lost favor as legitimate methods of punishment in U.S. law, the retributive justification for castration virtually disappeared”).

<sup>146</sup> Rebish, *supra* note 30, at 529.

<sup>147</sup> Side effects include “excessive perspiration and blushing, [and] loss of hair both on the body and face.” *Id.* at 515. Unlike with chemical castration, these side effects are permanent. *Id.*

<sup>148</sup> Green, *supra* note 141, at 22 (“Surgical castration would fail the . . . test for cruel and unusual punishment because the less intrusive alternatives of imprisonment or psychotherapy are available.”).

<sup>149</sup> One attempt to deter sex offender activity requires sex offenders to register with the local communities in which they settle after completing their prison sentence. Granlund, *supra* note 23, at 205-06 (discussing Megan’s Law, which requires a state to release information to the public about a registered sex offender). A recent development in imposing harsher penalties for sex offenders involves requiring offenders to wear global positioning ankle bracelets for a decade or more after they get out of prison. Chandler, *supra* note 23. Alabama’s legislature enacted this program and Florida followed by “requiring certain offenders to wear [the bracelets] for life. New Jersey [has] approved a two-year pilot program.” *Id.* Other states are currently experimenting with the idea. *Id.*

<sup>150</sup> Miller, *supra* note 30, at 178-79 (“There have continued to be attempts to use surgical castration to reduce inappropriate sexual behavior; however, because the procedure is irreversible, because the clinical evidence demonstrates that it is not always effective . . . it has largely fallen into disfavor.”)

effects.<sup>151</sup> “[P]hysical side effects include excessive perspiration and blushing, loss of hair . . . body weight [gain], and softening of the skin.”<sup>152</sup> Psychological side effects are unclear, but some research points to increased suicidal tendencies.<sup>153</sup> However, the possibility of a court finding that surgical castration is disproportionate is less certain than the other prongs of the test. If one considers that offenders often commit multiple crimes over a long period of time and that sex crimes leave deep permanent emotional marks on the victim, a court might find that the procedure is proportionate to the offense.<sup>154</sup>

Finally, the last element of an Eighth Amendment analysis is irrelevant. Since sex offenders would volunteer for surgical castration, there is no risk that the punishment would be inflicted arbitrarily. Still, this would not be enough for a court to uphold surgical castration since the procedure fails the other elements of the test. Therefore, a court would find that the procedure is unconstitutional as cruel and unusual punishment under the Eighth Amendment.

#### IV. WAIVING THE EIGHTH AMENDMENT PROTECTION

While a court is likely to find that surgical castration is cruel and unusual punishment, a court should allow a sex offender who volunteers for the procedure to waive the Eighth Amendment protection. So long as the waiver is done voluntarily, knowingly and intelligently and “with sufficient awareness of the relevant circumstances and likely consequences,”<sup>155</sup> the defendant’s choice is valid. Voluntary waiver means that there is “no physical or mental coercion” that prompts the defendant to waive the right.<sup>156</sup> Even though

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<sup>151</sup> Rebish, *supra* note 30, at 515.

<sup>152</sup> *Id.* (listing the side effects of surgical castration).

<sup>153</sup> Druhm, *supra* note 33, at 296 (“Furthermore, some research suggests that surgically castrated men may be more likely to commit suicide following the operation.”).

<sup>154</sup> Kenneth B. Fromson, *Beyond an Eye for an Eye: Castration as an Alternative Sentencing Measure*, 11 N.Y.L. SCH. J. HUM. RTS. 311, 321 (1994) (“[W]hen one considers the seriousness of sexual abuse, and the suffering that victims are subjected to as a result of sexual abuse, castration should not be seen as a punishment disproportionate to the offense.”).

<sup>155</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970).

<sup>156</sup> Beckman, *supra* note 24, at 894 (arguing that sex offenders should have the opportunity to waive constitutional protections).

a defendant may be motivated by the possibility of a reduced sentence, such a waiver may still be voluntary.<sup>157</sup>

The Supreme Court has recognized in numerous cases that a defendant may waive fundamental constitutional rights.<sup>158</sup> When a defendant enters a guilty plea, he waives a number of constitutionally protected rights.<sup>159</sup> By not going to trial, the defendant waives his right to a trial by jury and his right to see and confront witnesses.<sup>160</sup> If a defendant is an American citizen and pleads guilty to a crime, he might waive his right to vote.<sup>161</sup>

Waiver of the Eighth Amendment protection pursuant to a plea bargain raises thornier issues than waivers of procedural protections.<sup>162</sup> Unlike with other constitutional rights, the Eighth Amendment analysis is based largely on current societal standards.<sup>163</sup> “The [E]ighth [A]mendment represents a societal interest above and beyond that of the individual.”<sup>164</sup> The Supreme Court has noted that the Eighth Amendment is not only intended to protect defendants but “also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric

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<sup>157</sup> *Id.* (citing *Brady*, 397 U.S. at 751) (arguing that sex offenders should have the opportunity to waive constitutional protections). See also *Hicks*, *supra* note 25, at 651 (“The mere fact that the accused must face the consequences of his crime does not make consent invalid. The pressure in making a decision alone does not vitiate a voluntary act or admission if state actors do not impose any coercion or duress.”).

<sup>158</sup> For example, the Court has recognized the ability to waive the right to counsel. *Gannett Co. v. DePasquale*, 443 U.S. 368, 417-18 (1979). See also Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95, 128 (1987) (“Limits on an individual defendant’s ability to waive constitutional rights are warranted when society’s interests are balanced against those of the defendant”).

<sup>159</sup> *Hicks*, *supra* note 25, at 652 (“A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers.” (quoting *McCarthy v. United States*, 394 U.S. 495, 466 (1969))).

<sup>160</sup> *Kirchmeier*, *supra* note 90, at 630.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 646 (“The justification for disallowing waiver of constitutional rights applies with more force where the issue involves a barbaric punishment instead of a procedural violation.”).

<sup>163</sup> *Id.* at 643. Arguments against a defendant waiving the Eighth Amendment focus on the strong societal interest in this constitutional protection. See *id.* at 617-18.

<sup>164</sup> *Carter*, *supra* note 158, at 144-45.

punishments.”<sup>165</sup> Society has a stake in protecting defendants from cruel and unusual punishment.<sup>166</sup>

Typically, debates involving waiver of the Eighth Amendment protection arise in cases involving a defendant who accepts the death penalty without going to trial or who, having been sentenced to death, waives his right to appeal and “volunteer” for execution.<sup>167</sup> However, the arguments raised in the death penalty context are also relevant for the purposes of deciding when a sex offender should be allowed to waive the Eighth Amendment protection. Those opposed to waiver of the Eighth Amendment argue that the Amendment is fundamentally different from other constitutional protections that a defendant has in the criminal justice process.<sup>168</sup> This is primarily because of the purpose behind the Amendment, which is to limit the state’s power to inflict punishment on an individual.<sup>169</sup>

Further, while some critics recognize that a defendant has an interest in controlling his defense and deciding his fate,<sup>170</sup> they claim that, from a public policy perspective, the

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<sup>165</sup> *Gilmore v. Utah*, 429 U.S. 1012, 1019 (1976) (Marshall, J., dissenting).

<sup>166</sup> *Lenhard v. Wolff*, 444 U.S. 807, 811 (1979) (Marshall, J., dissenting) (“Society’s independent stake in enforcement of the Eighth Amendment’s prohibition against cruel and unusual punishment cannot be overridden by a defendant’s purported waiver.”).

<sup>167</sup> John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 939-40 (2005) (stating that “there have been 885 executions, 106 of which, including the first, involved ‘volunteers,’ or inmates who waived their appeals and permitted the death sentence to be carried out.” (footnotes omitted)); Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant’s Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75, 76 (2002); Tim Kaine, *Capital Punishment and the Waiver of Sentence Review*, 18 HARV. C.R.-C.L. L. REV. 483, 487 (1983) (“So-called ‘voluntary’ executions raise difficult questions in . . . death penalty jurisprudence. Allowing a defendant to terminate the review of his capital sentence injects a disturbingly arbitrary element into the infliction of the death penalty.”).

<sup>168</sup> See Kirchmeier, *supra* note 90, at 617. See also Steven A. Blum, *Public Executions: Understanding the “Cruel and Unusual Punishments” Clause*, 19 HASTINGS CONST. L.Q. 413, 451 (1992) (“One may not consent to cruel and unusual punishment. For example, even if given the choice of punishments between torture and death, the prisoner could not choose torture.”).

<sup>169</sup> *Gilmore*, 429 U.S. at 1019 (Marshall, J., dissenting) (“[T]he Eighth Amendment . . . also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments.”); Casey, *supra* note 167, at 94 (“The rights created by the Eighth Amendment are not merely personal. They are guarantees to society that the integrity of the criminal justice system will be maintained.”).

<sup>170</sup> Bonnie, *supra* note 125, at 1366-67 (recognizing that the prisoner has an interest in controlling his own fate); Casey, *supra* note 167, at 76 (stating that an individual has “autonomy interests in controlling her own defense”).

interests of the states must trump the defendant's interests.<sup>171</sup> Prohibiting a capital defendant from waiving the Eighth Amendment right and essentially choosing death assures society that no person in a democratic nation will receive such a punishment without a rigorous process.<sup>172</sup>

The rights created by the Eighth Amendment are not simply individual rights. They offer security and assurance to society of the integrity of the criminal justice system, that punishments will not be inflicted arbitrarily or with undue harshness.<sup>173</sup> The Eighth Amendment provides society with the comfort of knowing that the criminal justice system is a fair one. The Amendment's goal of ensuring society that it will be free from cruel and unusual punishments suggests that waiver of this protection is prohibited when it would undermine this societal interest.

A. *Societal Interest in the Eighth Amendment is Weak When Sex Offenders Volunteer for Surgical Castration*

While the Eighth Amendment is an important guarantee against unchecked state powers, the societal interest in the prohibition against cruel and unusual punishment is weak when sex offenders volunteer for surgical castration pursuant to a plea bargain.<sup>174</sup> This situation is significantly different from defendants in capital cases or inmates on death row who want to waive their appeals, where the societal interest is strongest. For this reason, sex offenders who choose

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<sup>171</sup> Carter, *supra* note 158, at 144-45; Kirchmeier, *supra* note 90, at 649 ("In the Eighth Amendment context, there is generally no benefit for defendants or society in allowing defendants to be punished in a cruel and unusual manner. In fact, such punishments would have a detrimental effect on society.").

<sup>172</sup> FOUCAULT, *supra* note 145, at 217 ("Our society is one not of spectacle, but of surveillance; . . . it is not that the beautiful totality of the individual is amputated, repressed, altered by our social order, it is rather that the individual is carefully fabricated in it").

<sup>173</sup> *Gilmore*, 429 U.S. at 1019 (Marshall, J., dissenting) ("I believe that the Eighth Amendment not only protects the right of individuals not to be victims of cruel and unusual punishment, but that it also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments"). See also Casey, *supra* note 167, at 94 ("The rights created by the Eighth Amendment are not merely personal. They are guarantees to society that the integrity of the criminal justice system will be maintained.").

<sup>174</sup> *But see* North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970) ("Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court . . .").

to undergo the procedure should be able to waive the protection from cruel and unusual punishment.<sup>175</sup>

First, society's interest in the Eighth Amendment protection is diminished when the sex offender volunteers for surgical castration. The purpose of the prohibition against cruel and unusual punishment expresses "a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments."<sup>176</sup> The Amendment is also about the dignity of man.<sup>177</sup> "[I]nherent in the concept of human dignity is an assurance that a penalty is not imposed which offends the dignity and integrity of society."<sup>178</sup> These arguments presuppose that the state initiates and inflicts the barbaric punishment on the defendant without his consent. But when it is the defendant himself who initiates the procedure and volunteers for surgical castration, this argument loses strength.

Second, the Eighth Amendment right in the particular context of sex offender cases is more like other constitutional rights a defendant may waive, such as the right to trial by jury,<sup>179</sup> because waiver of this right can benefit the defendant. Waiving trial by jury can spare the defendant and his family the expense and stress of enduring a public trial.<sup>180</sup> Waiving the Eighth Amendment and volunteering for surgical castration pursuant to a plea bargain is a similar strategic move since the defendant hopes to be treated for his deviant tendencies and receive a more advantageous sentence than may be expected if he went to trial.<sup>181</sup> Viewed in this light, society's interest in prohibiting the state from inflicting cruel

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<sup>175</sup> Fromson, *supra* note 154, at 335 ("Consequently, if a court finds a defendant's request for castration to be reasonable, it could grant the constitutional waiver of the right to be protected from cruel and unusual punishment." (footnote omitted)). *But see Gilmore*, 429 U.S. at 1018 (White, J., dissenting) ("I believe, however, that the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment.").

<sup>176</sup> *Gilmore*, 429 U.S. at 1019 (Marshall, J., dissenting).

<sup>177</sup> *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

<sup>178</sup> Carter, *supra* note 158, at 144.

<sup>179</sup> Kaine, *supra* note 167, at 502 ("Pleas of guilty are the rule in criminal cases even though such pleas involve waiver of many constitutional rights of the defendant, including his privilege against compulsory self-incrimination, his right to trial by jury, and right to confront his accusers [sic]." (internal quotes and citation omitted)).

<sup>180</sup> Kirchmeier, *supra* note 90, at 649.

<sup>181</sup> *See Hicks*, *supra* note 25, at 652 (discussing the reasons for plea bargaining).

and unusual punishment on a criminal defendant is diminished.

Finally, sex offenders waiving the Eighth Amendment are justified and less of a concern to society because the harm sex offenders suffer when they waive the protection is not comparable to the harm that results when defendants waive the Eighth Amendment in death penalty cases.<sup>182</sup> Sex offenders are still able to function normally after being surgically castrated.<sup>183</sup> And their motivations in waiving the protection are to stop committing sex offenses and to gain early release from prison or a reduced sentence.<sup>184</sup>

#### V. BALANCING THE VARIOUS INTERESTS: WHEN SEX OFFENDERS MAY WAIVE THE EIGHTH AMENDMENT AND VOLUNTEER FOR SURGICAL CASTRATION

Given that society's interests in the Eighth Amendment protection is weak in cases where sex offenders volunteer for surgical castration, a sex offender may waive this right and consent to an otherwise unconstitutional punishment. But it does not follow that a judge must accept the waiver as part of a guilty plea<sup>185</sup> or that a state must impose such a punishment for which a defendant volunteers.<sup>186</sup> Castration places the judicial system in a unique position because judges may be sanctioning a procedure that some consider an intrusion into one's right to bodily integrity.<sup>187</sup> This is of particular concern to jurists since the Supreme Court has dealt with the procedure's

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<sup>182</sup> See discussion *supra* Part IV.

<sup>183</sup> See discussion *supra* Part I.

<sup>184</sup> Hicks, *supra* note 25, at 652 (discussing the reasons for plea bargaining). See discussion *supra* Part I.B.

<sup>185</sup> North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970) ("Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court . . .").

<sup>186</sup> Gilmore v. Utah, 429 U.S. 1012, 1018 (1976) (White, J., dissenting) ("I believe, however, that the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment."). See also Bonnie, *supra* note 125, at 1371 (stating that "it is clear that [one] may not waive [a] constitutional ban and thus empower the state to impose a punishment that it is otherwise forbidden to inflict. Similarly, although it is easy to understand why a rational prisoner might prefer castration to a lengthy penitentiary sentence, it is unlikely that the state would be permitted to offer such a choice.").

<sup>187</sup> Druhm, *supra* note 33, at 315 ("Surgical castration is very severe . . . because it is permanent and disfiguring."); Spalding, *supra* note 85, at 127.

constitutionality only in dicta and not through a definitive ruling.<sup>188</sup>

Courts must fashion ways to decide when it is reasonable for sex offenders to choose surgical castration. A defendant should be able to choose surgical castration when doing so meets the interests of the defendant, criminal justice system, and society. Courts should use a balancing test to determine when the various interests are aligned and waiver of the Eighth Amendment is permissible.

In sex offender cases, the defendant has an interest in shaping his own defense and a right to make decisions related to his physical autonomy.<sup>189</sup> The state has an interest in promoting the integrity of the criminal justice system.<sup>190</sup> Finally, the public has an interest in protecting itself from criminals while also promoting the values of a democratic society.<sup>191</sup> If surgical castration preserves the dignity of the defendant and furthers the interests of the criminal justice system and society, then a sex offender should be allowed to waive the Eighth Amendment protection.

A. *Defendant's Interests in Waiving the Eighth Amendment Right*

When a defendant enters a plea bargain, he does so after careful negotiations between his attorney and prosecutors and after considering his chances at trial.<sup>192</sup> A defendant also enters a plea bargain with the expectation that his punishment will be more favorable to him than if he had been convicted after trial.<sup>193</sup> This is what induces sex offenders to plead guilty and volunteer for surgical castration.<sup>194</sup> When deciding to volunteer for surgical castration, a sex offender has a number

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<sup>188</sup> Spalding, *supra* note 85, at 131 (discussing Eighth Amendment Supreme Court cases that mention castration).

<sup>189</sup> Casey, *supra* note 167, at 76 (stating that an individual has "autonomy interests in controlling her own defense").

<sup>190</sup> See Fromson, *supra* note 154, at 323.

<sup>191</sup> Bonnie, *supra* note 125, at 1369 ("[S]ociety has an interest, independent of the prisoner's own interest, in the integrity of its institutions of criminal punishment and in the dignity of the processes through which these punishments are carried out.").

<sup>192</sup> Hicks, *supra* note 25, at 652 (discussing the reasons for plea bargaining).

<sup>193</sup> *Id.* ("In return, the accused receives the certainty of a more advantageous sentence than may be expected if the accused were to stand trial and be convicted.").

<sup>194</sup> *Id.*

of interests.<sup>195</sup> These include controlling his defense and his bodily integrity.

First, in some states, sex offenders face life in prison if they go to trial and a jury convicts them. In these situations, the interest in controlling their defense and entering into an advantageous plea bargain is significant.<sup>196</sup> Defendants have the right to choose options that are more favorable to their case and to control their own fate.<sup>197</sup> They also have an interest in avoiding the burdens of trial.<sup>198</sup> Second, inherent in our legal and judicial system is respect for autonomy and personal dignity.<sup>199</sup> This suggests that the informed and voluntary choice of the defendant deserves respect.<sup>200</sup>

Voluntary surgical castration furthers these interests. Not only would defendants be able to choose a procedure they believe will help control their sexually deviant behavior, but they also would have decision-making power in the plea bargaining process. This self-determination and freedom to choose may enhance the dignity of their lives and further the purpose of the Eighth Amendment.<sup>201</sup>

### *B. Interests of the Criminal Justice System*

The state has a legitimate interest in protecting its citizens, especially the most vulnerable members. Surgical castration may achieve the goals of the criminal justice system. These goals are retribution for crime victims, deterrence of future criminal conduct by the offender and others, rehabilitation of the offender, and denunciation by society of

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<sup>195</sup> See discussion *supra* Part I.B.

<sup>196</sup> Casey, *supra* note 167, at 76 (stating that there is a “tension between society’s interest in the appropriate application of the death sentence and an individual’s autonomy interests in controlling her own defense.”).

<sup>197</sup> Bonnie, *supra* note 125, at 1376 (“[A] prisoner has [the] right to control his own fate within the constraints established by the law.” (emphasis omitted)).

<sup>198</sup> Casey, *supra* note 167, at 104-05.

<sup>199</sup> *Id.* at 101 (“The respect for autonomy and personal dignity inherent in our judicial system suggests an interest of the individual in determining whether an argument will be made on her behalf.”).

<sup>200</sup> Blume, *supra* note 167, at 941 (“Were it not for the fact that the client’s choice, if unfettered, will result in his death, it would be clear that this is the kind of ultimate . . . decision that a client is entitled to make for himself . . . . Viewed from the client-choice vantage point, the only question is whether the client is competent to make that choice.”); Kaine, *supra* note 167, at 497 (discussing the rationale for waiver of a constitutional protection).

<sup>201</sup> Blume, *supra* note 167, at 941 (examining arguments in favor of allowing death-row inmates to waive their appeals).

the conduct.<sup>202</sup> Retribution involves revenge for the harm which society has suffered due to the criminal act.<sup>203</sup> Deterrence is aimed at discouraging and preventing future criminal activity.<sup>204</sup> Rehabilitation is an attempt at reforming the wrongdoer so that he does not commit more crimes.<sup>205</sup> And denunciation is an expression of society's condemnation of the criminal act.<sup>206</sup>

Surgical castration in sex offender cases accomplishes the retribution and denunciation goals of the criminal justice system.<sup>207</sup> If the victims accept the offender's choice of surgical castration, this creates a sense of retribution and justice. Surgical castration also allows the community in which the sex offender committed the heinous acts to denounce his and similar behavior and reassures the community that the sex offender will not re-offend.

The procedure may also deter future sex offenses and help rehabilitate sex offenders. Surgical castration reduces the recidivism rate for sex offenders.<sup>208</sup> It can also prevent the offender from experiencing the urge to commit sex crimes. With these results, the offender may re-enter society, "rebuild family ties, pursue employment," and become an active participant in society.<sup>209</sup>

Further, in the case of Keith Raymond Fremin, the police Sergeant said Fremin's castration request and the twenty-five year sentence handed down so late in his life (Fremin was fifty-two when the sentence was imposed) satisfied the department that he posed no future threat.<sup>210</sup> When sex offenders like Fremin are surgically castrated and must serve still lengthy prison sentences, it is unlikely that

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<sup>202</sup> Fromson, *supra* note 154, at 323 (discussing the goals of the criminal justice system).

<sup>203</sup> *Id.* at 323 n.71 (citing WAYNE LAFAVE & AUSTIN SCOTT, CRIMINAL LAW § 1.5(a)(6) 25 (2d ed. 1986)).

<sup>204</sup> *Id.* (citing JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 5 (1987)) (discussing the goal of deterring crime).

<sup>205</sup> *Id.* (discussing the goal of rehabilitation (citing DRESSLER, at 5)).

<sup>206</sup> *Id.* (discussing the goal of denunciation (citing DRESSLER, at 8)).

<sup>207</sup> *Id.* at 323 ("Castrating sexual offenders would serve both the retributive and denunciation goals of the criminal justice system because, as a punishment, it serves as a 'device for the expression of feelings of resentment, indignation, and vindication.'" (quoting Lauren J. Abrams, *Sexual Offenders and the Use of Depo-Provera*, 22 SAN DIEGO L. REV. 565, 576 (1985))).

<sup>208</sup> See discussion *supra* Part I.

<sup>209</sup> Jason O. Runckel, *Abuse It and Lose It: A Look at California's Mandatory Chemical Castration Law*, 28 PAC. L.J. 547, 591 (1997).

<sup>210</sup> Gordon, *supra* note 2.

they will commit similar crimes once they gain their release from prison.

### C. *Society's Interests*

Society has dual interests in protecting the individual integrity of the defendant while appropriately punishing the offender. The public legitimately wants to protect people from sex offenders who might commit crimes again and again.<sup>211</sup> Because an offender has broken the law, society has an interest in seeing him punished.<sup>212</sup>

Surgical castration of sex offenders might meet these interests. First, surgical castration furthers society's interest in protecting the integrity of the defendant. The defendant himself has made the decision to undergo a medical procedure. By respecting this decision in the context of the other interests involved, the defendant's integrity may be maintained.

Second, surgical castration can give the victims and community a sense of justice, denunciation, and retribution.<sup>213</sup> Statistics reveal that the average sex offender may commit almost 400 sex crimes.<sup>214</sup> Since surgical castration reduces recidivism rates among sex offenders, public safety is protected. Further, voluntary surgical castration shows that the defendant is publicly accepting responsibility for his acts, admitting guilt, and showing remorse.<sup>215</sup> If courts allow sex offenders to volunteer for surgical castration, society stands to gain an enormous benefit.

## VI. CONCLUSION

In today's world, it is clear that incarceration alone is an insufficient punishment and deterrent for sex offender activity. Children continue to be molested<sup>216</sup> and society is constantly seeking ways of preventing sex offenders from committing

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<sup>211</sup> See discussion *supra* Part I.B. Larry Don McQuay told a reporter on the television news program 20/20 that "we just bide our time in jail, daydreaming about children." Berlin, *supra* note 37, at 169 (footnote omitted).

<sup>212</sup> FOUCAULT, *supra* note 145, at 90.

<sup>213</sup> See discussion *supra* Part V.B.

<sup>214</sup> Runckel, *supra* note 209, at 589.

<sup>215</sup> Casey, *supra* note 167, at 101 (discussing the respect for autonomy and personal dignity inherent in the judicial system).

<sup>216</sup> Runckel, *supra* note 209, at 589 (stating that the average sex offender is likely to commit numerous crimes over his lifetime).

more crimes.<sup>217</sup> The debate surrounding castration as a form of punishment for sex offenders began when California enacted the first chemical castration legislation.<sup>218</sup> The growth in state legislation allowing surgical castration and the willingness of sex offenders to volunteer for the procedure suggest growing acceptance of the procedure among sex offenders as well as the court system.<sup>219</sup>

Considering that deterring sex offender activity has been difficult and that sex offenders tend to re-offend, surgical castration is an effective punishment of sex offender activity. Unlike other forms of punishment, surgical castration is permanent and drastically reduces the sex offender's recidivism rate.

Surgical castration likely violates the Eighth Amendment's guarantee that individuals shall be free from cruel and unusual punishment. But when an informed sex offender volunteers for surgical castration, the arguments in support of the Eighth Amendment protection diminish. Therefore, a sex offender who volunteers for surgical castration should be allowed to waive the Eighth Amendment protection from cruel and unusual punishment. Courts may accept the waiver only when doing so meets the goals of the defendant, criminal justice system, and society.

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<sup>217</sup> See *supra* note 23 and accompanying text.

<sup>218</sup> See Stadler, *supra* note 17, at 1288, 1294.

<sup>219</sup> See discussion *supra* Parts I.A, I.B.

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