

## LEST WE REGRESS TO THE DARK AGES: HOLDING VOLUNTARY SURGICAL CASTRATION CRUEL AND UNUSUAL, EVEN FOR CHILD MOLESTERS

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Innocence is trampled as debauchery and brutality reign unfettered in the world of child molesters. Reports of the sexual assault and molestation of innocent children—arguably the most vulnerable members of our community—weigh on the hearts and minds of all Americans. The magnitude of this problem is readily conveyed through statistics. One of every four girls is sexually assaulted before the age of eighteen, and one in six boys meets the same unfortunate fate.<sup>1</sup> Though most child sex offenders will harm between one and nine victims, approximately twenty percent will target ten to forty children.<sup>2</sup> Each year an estimated 100,000 to 500,000 children are sexually molested in the United States.<sup>3</sup> Terrifyingly, these staggering rates continue to rise.<sup>4</sup> Though the increase can be attributed at least in part to “an increase in actual identification and reporting of child sexual abuse,” concern for the magnitude of this problem properly remains.<sup>5</sup>

The release of convicted child molesters following the conclusion of their prison terms helps fuel these unsettling assault statistics. In a single year, 4300 convicted child sex offenders were freed from prison.<sup>6</sup> One study suggests that “recidivism in child molesters ranges from twenty-two to forty percent,” whereas other researchers estimate that long-term relapse rates approach fifty percent.<sup>7</sup> These horrific crimes are all too frequent and recidivism rates far too high.

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<sup>1</sup> Darkness to Light, Statistics Surrounding Child Sexual Abuse, [http://www.darkness2light.org/KnowAbout/statistics\\_2.asp](http://www.darkness2light.org/KnowAbout/statistics_2.asp) (last visited Jan. 14, 2008).

<sup>2</sup> *Id.*

<sup>3</sup> William Winslade et al., *Castrating Pedophiles Convicted of Sex Offenses Against Children: New Treatment or Old Punishment?*, 51 SMU L. REV. 349, 359 (1998).

<sup>4</sup> *See id.*

<sup>5</sup> *Id.* Even though reporting rates appear on the rise, child molestation remains one of the most underreported crimes. Yello Dyno, Child Molester Statistics, [http://www.yellodyno.com/html/child\\_molester\\_stats.html](http://www.yellodyno.com/html/child_molester_stats.html) (last visited Jan. 14, 2008). One study shows that less than eleven percent of child molestation cases are ever disclosed. *Id.*

<sup>6</sup> Life Tips, Sex Offender and Child Molester Statistics, <http://childprotection.lifetips.com/cat/63573/sex-offender-statistics/index.html> (last visited Jan. 23, 2008).

<sup>7</sup> The Center for American Cultural Renewal, *Abuser Goes Free Without Restrictions*, <http://www.cfacr.org/pages/article.php?aid=679> (last visited Jan. 28, 2007).

As haunting images of child victims like JonBenét Ramsey's striking bright eyes<sup>8</sup> and Jessica Lunsford's wide smile and fuzzy pink hat<sup>9</sup> blaze across media wires, a resounding outcry is heard demanding protection for our fragile youth. As the traditional formula of incarceration leading to parole is criticized in light of the undeniably high recidivism rates for sexual deviants, several states have responded by providing voluntary castration as an alternative means of rehabilitation, and others consider adding the treatment to their books.<sup>10</sup>

Though lawmakers and convicts alike rally behind enacting statutory provisions for voluntary castration, many opponents are appropriately concerned that the punishment violates the Eighth Amendment.<sup>11</sup> This Note seeks to determine whether the Constitution's prohibition of cruel and unusual punishment should bar sentences with the option of voluntary castration. Part I analyzes the Eighth Amendment, considering both the law's derivation and subsequent case history developing the Cruel and Unusual Punishment Clause's meaning. Applying analytical themes extracted from Supreme Court case law, Part II evaluates whether voluntary castration—achieved chemically or surgically—is constitutional. Concluding that chemical, but not surgical, castration should be deemed permissible, the discussion in Part III examines whether courts should allow waiver of Eighth Amendment protections. This Note suggests that because waiver of Eighth Amendment protections against unjust punishments should never be permitted, only voluntary chemical castration may be adopted as a constitutional punishment.<sup>12</sup> The penalty of surgical castration, even if submitted to freely, is cruel and unusual.

#### I. UNDERSTANDING THE EIGHTH AMENDMENT'S PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT

A short though powerful protection of individual rights, the Eighth Amendment states in full: "Excessive bail shall not be required, nor excessive fines imposed, nor

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<sup>8</sup> See JonBenét-Ramsey.com, <http://jonbenet-ramsey.com> (last visited Jan. 14, 2008).

<sup>9</sup> See The Jessica Marie Lunsford Foundation, <http://www.jessicamarielunsford.com> (last visited Jan. 14, 2008).

<sup>10</sup> See CAL. PENAL CODE § 645 (West 2002) (requiring "medroxyprogesterone acetate treatment or its chemical equivalent" as an element of parole following second sexual offense); FLA. STAT. § 794.0235 (1997) (allowing a court to order a criminal's voluntary physical castration); see also Frank Green, *Crime Commission Seeks Data on Castration*, RICH. TIMES-DISPATCH, Sept. 13, 2006, at B2 (discussing the state legislature's hesitance to accept Virginia Senator Emmett W. Hanger Jr.'s "proposal to permit the voluntary surgical castration of sex offenders to avoid indefinite civil commitment").

<sup>11</sup> See Candace Rondeaux, *Can Castration Be a Solution for Sex Offenders?*, WASH. POST, July 5, 2006, at B1 (discussing the controversy over adopting a castration statute in Virginia).

<sup>12</sup> Though voluntary castration is referred to interchangeably as a punishment and a treatment throughout this Note, a discussion of the merits of voluntary castration as a rehabilitative treatment, as distinct from a punishment, is beyond the scope of this discussion.

cruel and unusual punishments inflicted.”<sup>13</sup> By declining to explicitly enumerate the punishments prohibited by the Amendment, the drafters helped establish a “flexible and dynamic” standard of scrutiny.<sup>14</sup> Consistent with the drafters’ original intent, the Supreme Court has refused to compose an exhaustive list of punishments precluded by the Amendment.<sup>15</sup> In particular, the Court has yet to directly address the constitutionality of voluntary castration.<sup>16</sup> Without such an unequivocal decision, the legality of the punishment can only be deciphered in the context of the Amendment’s origins and the developing case law.

### A. Derivation of the Eighth Amendment

#### 1. European Predecessors

Academic scholars and judges alike trace the underpinnings of the Eighth Amendment to anterior religious teachings and statutory laws.<sup>17</sup> Professor Anthony F. Granucci suggests that one of the early expressions of the Western “prohibition of excessive punishment” is found in the Old Testament’s requirement that punishment equal the crime.<sup>18</sup> The *Book of Leviticus* states, “If a man injures his neighbor, what he has done must be done to him: broken limb for broken limb, eye for eye, tooth for tooth. As the injury inflicted, so must be the injury suffered.”<sup>19</sup> This canonical aversion to extreme punishment is echoed in the Magna Carta, which states: “A free man shall not be fined for a small offence, except in proportion to the measure of the offence; and for a great offence he shall be fined in proportion to the magnitude of the offence, saving his freehold.”<sup>20</sup> Thus, the prohibition of cruel and unusual

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<sup>13</sup> U.S. CONST. amend. VIII.

<sup>14</sup> *Gregg v. Georgia*, 428 U.S. 153, 171 (1976).

<sup>15</sup> *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (acknowledging that the Supreme Court has yet to fix the “exact scope of the constitutional phrase ‘cruel and unusual’”).

<sup>16</sup> See Jeffrey L. Kirchmeier, *Let’s Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 628 (2000) (noting that as of Winter 2000, the Supreme Court had “not had the opportunity” to adjudicate whether castration violated the Eighth Amendment). Subsequent research reveals that this statement remains true.

<sup>17</sup> See generally Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CAL. L. REV. 839 (1969) (providing an extensive analysis of the Eighth Amendment’s development); Kirchmeier, *supra* note 16, at 618 (providing a succinct overview of the derivation of the Eighth Amendment’s language).

<sup>18</sup> *Id.* at 844.

<sup>19</sup> *Id.* (quoting *Leviticus* 24:19–20 (Jerusalem)).

<sup>20</sup> MAGNA CARTA (1215), reprinted in SOURCES OF OUR LIBERTIES 11, 15 (Richard L. Perry ed., 1959); see also Granucci, *supra* note 17, at 845 (suggesting that three chapters of the Magna Carta were written in response to “[t]he problem of excessive amerements”).

punishments evolved out of “the longstanding principle . . . that the punishment should fit the crime.”<sup>21</sup>

Though these spiritual and secular texts introduced the notion of proportion to punishments under the English common law, the language of the Eighth Amendment most closely mirrors the English Bill of Rights.<sup>22</sup> Enacted on December 16, 1689, the pertinent section reads: “That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.”<sup>23</sup> The Eighth Amendment of the U.S. Constitution displays a subtle change from its English predecessor, a superficial alteration in the phrasing—substituting “shall not be required” for “ought not to be required.”<sup>24</sup> Despite this minimal vernacular tweaking, the English Bill of Rights of 1689 is recognized as the first document containing the phrase “cruel and unusual punishments,”<sup>25</sup> and as such, is the “direct ancestor of the bills of rights adopted by the states at the time of the American Revolution.”<sup>26</sup> Though displaying similar phraseology, each version has been applied to prohibit sentencing abuses unique to their respective societies.<sup>27</sup> The English Bill of Rights of 1689 specifically forbade the imposition of disproportionate punishments unauthorized by statute or beyond the court’s jurisdiction.<sup>28</sup> Alternatively, the Founders applied the Eighth Amendment to prohibit categorically “barbarous” and “cruel” punishments.<sup>29</sup> Held against this historical background, the Eighth Amendment’s prohibitions are understood to be drawn from scriptural pronouncements and traditional European law and framed by its distinctly American context.

## 2. Roots of the Eighth Amendment in Early American Law

The English Bill of Rights of 1689 is recognized as the template followed by the Eighth Amendment’s drafters, but several early American statutes also included important protections against unreasonable punishments. These early American laws also likely influenced the Amendment’s final composition.<sup>30</sup>

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<sup>21</sup> Richard L. Perry, *Bill of Rights 1689*, in *SOURCES OF OUR LIBERTIES*, *supra* note 20, at 222, 236.

<sup>22</sup> BILL OF RIGHTS (1689), *reprinted in* *SOURCES OF OUR LIBERTIES*, *supra* note 20, at 245, 245–47.

<sup>23</sup> *Id.* at 247.

<sup>24</sup> Compare U.S. CONST. amend. VIII, with BILL OF RIGHTS, *supra* note 22, at 247.

<sup>25</sup> Granucci, *supra* note 17, at 852.

<sup>26</sup> Perry, *supra* note 21, at 244.

<sup>27</sup> *Gregg v. Georgia*, 428 U.S. 153, 169–70 (1976).

<sup>28</sup> Granucci, *supra* note 17, at 860.

<sup>29</sup> *Id.* at 851, 860.

<sup>30</sup> See generally Mark D. Cahn, *Punishment, Discretion, and the Codification of Prescribed Penalties in Colonial Massachusetts*, 33 AM. J. LEGAL HIST. 107 (1989) (describing the codification of statutory punishments during the colonial era in an effort to reign in the inconsistent and discretionary penal system).

Reverend Nathaniel Ward, a Puritan attorney, is credited with writing the first American prohibition against cruel punishments.<sup>31</sup> The Massachusetts Bay Colony seethed with political unrest during the mid 1600s, as colonists believed “their condition very unsafe, [because] so much power rested in the discretion of the magistrates” who customarily imposed arbitrary and severe punishments.<sup>32</sup> The colonists demanded the “publication of rules to guide the magistrates” in the administration of their office.<sup>33</sup> In response to this “lack of fundamental laws” and the mistrust of judicial authority, committees formed to draft codes establishing the colonists’ rights.<sup>34</sup> Assisting one of these drafting committees, Reverend Ward penned a set of laws entitled the *Body of Liberties*.<sup>35</sup> Enacted in 1641, the *Body of Liberties* contained two clauses prescribing punishment limitations.<sup>36</sup> Clause 43 prohibits “Excessive punishments,” stating, “No man shall be beaten with above 40 stripes, nor shall any true gentleman, nor any man equall to a gentleman be punished with whipping, unles his crime be very shamefull, and his course of life vitious and profligate.”<sup>37</sup> Clause 46 precludes the use of any “Inhuman punishment,” declaring that “For bodilie punishments we allow amongst us none that are inhumane Barbarous or cruel.”<sup>38</sup> These clauses reflect the Bay colonists’ shared concerns with the English—though an ocean apart, both societies were troubled by abuses of the sentencing power wielded by their respective government officials.

Reaffirming the desire to curb the use of unconstitutional penalties, sections of Ward’s *Body of Liberties* were incorporated into the Massachusetts Bay Colony’s Code of 1648.<sup>39</sup> The Code, also referred to as the *Laws and Liberties*, retained a general restriction prohibiting “in-humane, barbarous or cruel” punishments.<sup>40</sup> While preserving some of the language from the *Body of Liberties*, the Code diverges through its detail. Unlike the general principles outlined by its predecessor, the Code was composed as a “handbook for justices” in order to greatly restrict discretionary sentencing.<sup>41</sup> Exact penalties were prescribed for an extensive list of offenses, thereby establishing “precise measures of punishment.”<sup>42</sup> Read in its historical context, the

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<sup>31</sup> See Granucci, *supra* note 17, at 851.

<sup>32</sup> Cahn, *supra* note 30, at 108 (quoting 1 WINTHROP’S JOURNAL 1630–1649, at 323 (J. Hosmer ed., 1908) (1639)).

<sup>33</sup> *Id.* at 115.

<sup>34</sup> Granucci, *supra* note 17, at 850–51.

<sup>35</sup> Richard L. Perry, *Massachusetts Body of Liberties*, in SOURCES OF OUR LIBERTIES, *supra* note 20, at 143–44.

<sup>36</sup> MASSACHUSETTS BODY OF LIBERTIES (1641), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 20, at 148, 153.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Granucci, *supra* note 17, at 860.

<sup>40</sup> Cahn, *supra* note 30, at 132.

<sup>41</sup> *Id.* at 131–32.

<sup>42</sup> *Id.* at 132–33. For example, the severity of the punishment for burglary was gauged

*Laws and Liberties* reflects the colonists' increasing demand for justice in the prescription of penalties.<sup>43</sup> As anxiety over unreasonably harsh and arbitrary sanctions spread, the Code of 1648 influenced laws enacted in several other American colonies, including neighboring Connecticut and New Haven.<sup>44</sup>

Though one can argue the political impact of the Massachusetts laws reached beyond settlements adjacent to the Bay Colony and traveled south,<sup>45</sup> the English Bill of Rights of 1689 clearly affected the 1776 Virginia Declaration of Rights. When drafting Section 9 of the Virginia Constitution's Bill of Rights, George Mason copied the exact language of the tenth section of the English Bill of Rights of 1689.<sup>46</sup> Through this adoption, Mason perpetuated the "general political philosophy" that the power of the judiciary to impose cruel and unusual punishments required constraints in order to protect individual rights.<sup>47</sup> The American Declaration of Rights is appropriately recognized as a "restatement of English principles—the principles of Magna Charta [sic]" and the English Bill of Rights.<sup>48</sup> Even before the Eighth Amendment was enacted, the right to be free from cruel and unusual punishment was a familiar protection espoused in English law and deeply rooted in the developing American legal tradition.

### *B. Case Law Interpreting the Application of the Eighth Amendment*

As the Constitution's drafters likely drew from several documents when composing the Eighth Amendment, it is understandable that "effort[s] to define [the Amendment] with exactness" are difficult.<sup>49</sup> Members of the first Congress acknowledged the ambiguousness of the Eighth Amendment's prohibitions: Mr. Smith of South Carolina "objected to the words 'nor cruel and unusual punishments'" for "being too indefinite," while Mr. Livermore opposed the Clause's adoption on the grounds that "it seems

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using the offender's previous record and "by the day upon which the offense occurred." *Id.* at 133.

<sup>43</sup> Cf. Cahn, *supra* note 30, at 133–34 (arguing that although the effect of the Code was to "restrict[] the discretion of the magistrates," much of the magistrates' "traditional discretion" was preserved).

<sup>44</sup> Granucci, *supra* note 17, at 860 (citing George L. Haskins & Samuel E. Ewing, *The Spread of Massachusetts Law in the Seventeenth Century*, 106 U. PA. L. REV. 413, 414 (1958)).

<sup>45</sup> *Id.* at 860–61. Professor Granucci hypothesizes that George Mason may have "learned of Ward's work through an intercolonial process of diffusion." *Id.*

<sup>46</sup> Compare VIRGINIA DECLARATION OF RIGHTS (1776), reprinted in A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 452, 454 (1968), with BILL OF RIGHTS, *supra* note 22, at 247.

<sup>47</sup> Richard L. Perry, *Constitution of Virginia*, in *SOURCES OF OUR LIBERTIES*, *supra* note 20, at 301, 303.

<sup>48</sup> *Solem v. Helm*, 463 U.S. 277, 286 n.10 (1983) (quoting A. NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION* 146 (1924)), overruled by *Harmelin v. Michigan*, 501 U.S. 957 (1991).

<sup>49</sup> *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878).

to have no meaning in it.”<sup>50</sup> As Mr. Livermore correctly concluded, “[i]t lies with the court to determine” the Amendment’s meaning.<sup>51</sup>

### 1. The Supreme Court’s Approach to the Eighth Amendment

Though the Eighth Amendment was ratified with the Bill of Rights on December 15, 1791,<sup>52</sup> the Supreme Court did not hear a case dealing squarely with the constitutionality of a punishment until 1878.<sup>53</sup> Following the Amendment’s adoption, several themes emerged in the Supreme Court’s review of penalties under the Eighth Amendment.<sup>54</sup> The Court’s Eighth Amendment analysis focused on five primary issues: (1) the inherent cruelty of the punishment; (2) the proportionality of the crime to the punishment; (3) whether the Court should give deference to the legislature; (4) the prevalence of the punishment’s use; and (5) public opinion surrounding the punishment’s application. Each of these themes is further described below.

#### *a. Prohibition of “inhumane, barbarous, or cruel” punishments*

In its most straightforward and historically contextualized reading, the Eighth Amendment is recognized as protecting against “inhumane, [b]arbarous, or cruel” treatment.<sup>55</sup> Restated, all punishments must “comport[] with human dignity.”<sup>56</sup> As Justice Brennan hauntingly articulated:

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<sup>50</sup> *Furman v. Georgia*, 408 U.S. 238, 244 (1972) (Douglas, J., concurring) (quoting 1 ANNALS OF CONG. 754 (1789)).

<sup>51</sup> *Id.*

<sup>52</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 12 (2d ed. 2002).

<sup>53</sup> *See Wilkerson*, 99 U.S. 130 (upholding the sentence of a convicted murderer to be publicly shot). *See generally* Kirchmeier, *supra* note 16, at 619–29 (providing an excellent chronological analysis of the Supreme Court’s Eighth Amendment jurisprudence).

<sup>54</sup> Although the Supreme Court developed a series of factors to guide review of sentences, the Court has not formally adopted a specific test for its Eighth Amendment analysis. *See Rummel v. Estelle*, 445 U.S. 263, 295 (1980) (Powell, J., dissenting) (proposing an objective three factor test for Eighth Amendment review based on prior case law); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (developing a loose two-prong test which assesses the “contemporary values concerning the infliction of [the] challenged sanction” and whether the sentence is in “accord with ‘the dignity of man’” (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958)); *see also* Winslade et al., *supra* note 3, at 388 (noting that “the U.S. Supreme Court has established no clear standard for determining whether a particular punishment or term of incarceration is permissible under the Eighth Amendment”).

<sup>55</sup> *In re Kemmler*, 136 U.S. 436, 446–47 & n.1 (1890) (quoting COLONIAL LAWS OF MASSACHUSETTS 43 (1889)).

<sup>56</sup> *Furman*, 408 U.S. at 270 (Brennan, J., concurring); *see also Trop*, 356 U.S. at 100.

The true significance of [unconstitutional] punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.<sup>57</sup>

Merciless punishments imposed without regard for the offender's humanity are prohibited for their truculence.

Beginning with the earliest Eighth Amendment cases, the Supreme Court considered "the element of cruelty present" in the challenged punishment.<sup>58</sup> The Court readily acknowledged that the Amendment precluded punishments that "involve[d] torture or a lingering death."<sup>59</sup> Inflicting "acute pain and suffering,"<sup>60</sup> particularly "unnecessary and wanton" pain, was also prohibited.<sup>61</sup> Assessments of sanctioned punishments were not limited to reading sentences in their black and white terms. Punishments considered just in the abstract were held unconstitutional if cruelty and unnecessary pain were "inherent in the method of punishment."<sup>62</sup> Furthermore, the Eighth Amendment not only protected against physically intolerable punishments; sentences that produced severe mental suffering were also held unconstitutional.<sup>63</sup> Therefore both the method and result of a punishment must be considered when the constitutionality of a punishment is assessed under the Eighth Amendment.

#### *b. Proportionality*

When assessing the cruelty inherent in a punishment, early courts compared the character of the crime to the severity of the punishment. Reflecting on this convention, the Supreme Court acknowledged that "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."<sup>64</sup> Thus, while Professor Granucci argues that the Eighth Amendment

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<sup>57</sup> *Furman*, 408 U.S. at 272–73.

<sup>58</sup> *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring).

<sup>59</sup> *In re Kemmler*, 136 U.S. at 447; *see also* discussion *infra* Part I.B.2 (listing unconstitutional torturous punishments).

<sup>60</sup> *O'Neil v. Vermont*, 144 U.S. 323, 339 (1892) (Field, J., dissenting) (discussing established concepts of which punishments the Eighth Amendment targeted).

<sup>61</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

<sup>62</sup> *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947).

<sup>63</sup> *See Trop v. Dulles*, 356 U.S. 86, 102–03 (1958) (holding denationalization unconstitutional because it "subjects the individual to a fate of ever-increasing fear and distress"); *In re Medley*, 134 U.S. 160, 168 (1890) (noting that many prisoners subjected to solitary confinement for the duration of imprisonment proceeding execution became either semi-fatuous or violently insane, and thus extreme isolation paired with capital punishment was considered "too severe").

<sup>64</sup> *Solem v. Helm*, 463 U.S. 277, 284 (1983).

was primarily adopted to prohibit torturous punishments, the Court suggested that the Framers “also adopted the English principle of proportionality” when incorporating language from the English Bill of Rights.<sup>65</sup>

A foundational Eighth Amendment case supports the use of this balancing inquiry. In *O’Neil v. Vermont*, Justice Field’s dissent recognized that the Eighth Amendment’s “inhibition is directed, not only against punishments of the character mentioned, [atrocious conduct], but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged.”<sup>66</sup> Subsequent Courts applied Justice Field’s comparative analysis.<sup>67</sup> When weighing the crime against its sentence, the Court would not consider the punishment in the abstract but looked to the circumstances particular to the case.<sup>68</sup> Judges strove to render informed sentences, taking “the circumstances of the offense together with the character and propensities of the offender” into account.<sup>69</sup> The symmetry between punishments and the crime precipitating the extreme penalty was highly scrutinized.<sup>70</sup>

Under the rubric of proportionality, the Court also considered the availability of alternative punishments when assessing the sentence imposed. Punishments that offered the “most humane and practical method known to modern science” to carry out the intended sentence, and did so instantaneously and painlessly, were typically upheld.<sup>71</sup> Punishments that were unnecessarily brutal when compared to statutory alternatives were more likely to be considered unconstitutional.<sup>72</sup>

In a more recent decision, the Court overruled prior cases as “simply wrong” and forcefully stated “the Eighth Amendment contains no proportionality guarantee.”<sup>73</sup> Writing for the majority in *Harmelin v. Michigan*, Justice Scalia referred to the historical context of the Eighth Amendment’s adoption and concluded that the drafters were concerned with the “illegality, rather than disproportionality, of punishment in general.”<sup>74</sup> The Court rejected the proportionality inquiry as an “invitation to

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<sup>65</sup> *Id.* at 285–86; *see also* text accompanying note 28.

<sup>66</sup> *O’Neil v. Vermont*, 144 U.S. 323, 339–40 (1892) (Field, J., dissenting).

<sup>67</sup> *See, e.g.*, *Robinson v. California*, 370 U.S. 660, 667 (1962).

<sup>68</sup> *Id.* “To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the ‘crime’ of having a common cold.” *Id.*; *see also* Kirchmeier, *supra* note 16, at 627 (suggesting that the Court considered “objective criteria” of proportionality when assessing the facts in *Solem v. Helm*).

<sup>69</sup> *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (citing *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937)).

<sup>70</sup> *Id.* at 187.

<sup>71</sup> *See In re Kemmler*, 136 U.S. 436, 443–44 (1890).

<sup>72</sup> *Id.* at 444 (upholding a New York law that replaced hanging with electrocution as the means to carry out a death sentence because electrocution was considered less barbarous).

<sup>73</sup> *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991).

<sup>74</sup> *Id.* at 966–74. Justice Scalia reasoned that the drafters purposefully failed to adopt a prohibition of “disproportionate” or “excessive” punishments despite their common usage

imposition of subjective values.”<sup>75</sup> This seemingly inflexible rejection of proportionality review was tempered by the concession that proportionality can be assessed when reviewing capital sentences, because “death is different” from other punishments.<sup>76</sup> Death, unlike a lengthy prison sentence or an unwieldy fine, is irrevocable.<sup>77</sup> In *Harmelin*’s wake, Eighth Amendment jurisprudence only allows for subjective proportionality review in cases dealing with the most extreme punishments.

*c. The Court’s deference to the legislature*

As a basic rule, the Supreme Court granted deference to the legislature in assessing a penalty’s relative cruelty and proportionality. State legislatures were entrusted to “define offences and prescribe the punishment of the offenders.”<sup>78</sup> Legislative exercises of power were “fortified by presumptions of right and legality, and [were] not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety.”<sup>79</sup> As a result, statutory punishments were presumed valid.<sup>80</sup> When considering the appropriateness of any punishment, the Court recognized that “some State will always bear the distinction of treating particular offenders more severely than any other State.”<sup>81</sup> Furthermore, the federal system allowed sovereign states to “criminalize an act that other States do not criminalize *at all*.”<sup>82</sup> Thus, Eighth Amendment jurisprudence recognized a strong presumption of legislative constitutionality in order to support the democratic ideals of federalism.

Pursuant to this high level of deference, the Court repeatedly upheld seemingly unreasonable sentences. Cumulative punishments for distinct offenses<sup>83</sup> and severe penalties under recidivist statutes were upheld.<sup>84</sup> Solidifying the principle of deference, *Rummel v. Estelle* established the “proposition that federal courts should be ‘reluctan[t] to review legislatively mandated terms of imprisonment.’”<sup>85</sup> But

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in contemporary laws. *Id.* at 967. Thus, he argued that “the phrase ‘cruell and unusuall’ [was] treated as interchangeable with ‘cruel and illegal.’” *Id.* at 973.

<sup>75</sup> *Id.* at 986.

<sup>76</sup> *Id.* at 994.

<sup>77</sup> See *Furman v. Georgia*, 408 U.S. 238, 287 (1972) (“The only explanation for the uniqueness of death is its extreme severity.”); cf. *Kirchmeier*, *supra* note 16, at 627 (suggesting that a majority of the Justices reaffirmed proportionality analysis under the Eighth Amendment despite Scalia’s articulated rejection of such a review).

<sup>78</sup> *Wilkerson v. Utah*, 99 U.S. 130, 133 (1878).

<sup>79</sup> *Weems v. United States*, 217 U.S. 349, 379 (1909).

<sup>80</sup> *Gregg v. Georgia*, 428 U.S. 153, 175 (1976).

<sup>81</sup> *Rummel v. Estelle*, 445 U.S. 263, 282 (1980).

<sup>82</sup> *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991).

<sup>83</sup> See *Hutto v. Davis*, 454 U.S. 370, 371 (1982) (upholding a verdict fining the defendant “\$10,000 and [imposing] a prison term of 20 years on each of the two counts” of marijuana possession with intent to distribute).

<sup>84</sup> *Rummel*, 445 U.S. at 285.

<sup>85</sup> *Hutto*, 454 U.S. at 374 (quoting *Rummel*, 445 U.S. at 274).

because the prohibition of cruel and unusual punishments was intended to restrain the legislature, which “would otherwise have had the unfettered power to prescribe punishments for crimes,” the ultimate “responsibility lies with the courts to make certain that the prohibition of the Clause is enforced.”<sup>86</sup> The Court is obligated to reject statutory sentences if the punishment violates the Eighth Amendment.

*d. Prevalence of the punishment’s use*

Consistent with the Court’s deference to the legislature, the more widely used the punishment, the more likely the Court found the sentence constitutional. Courts exercised wide discretion when defining the prevalence of a punishment’s use.<sup>87</sup> The historical application of the punishment,<sup>88</sup> military customs,<sup>89</sup> and society’s response to the punishment<sup>90</sup> all functioned as indicators of the extent of a punishment’s practice. Reframed, this inquiry considered whether the punishment was “unusual” according to the common denotation of the word—whether the punishment is an “ordinary one, [or whether it] signif[ies] something different from that which is generally done.”<sup>91</sup>

In addition to considering the historical use of the punishment, the Court also looked at the punishment’s demographic application. *Furman v. Georgia* held that the Eighth Amendment is a “proscription against selective and irregular use of penalties.”<sup>92</sup> A punishment could not be reserved and applied “selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society, is willing to see suffer though it would not countenance general application of the same penalty across the board.”<sup>93</sup> Otherwise appropriate penalties would be applied unconstitutionally if used “sparsely, selectively, and spottily.”<sup>94</sup> Therefore,

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<sup>86</sup> *Furman v. Georgia*, 408 U.S. 238, 263, 267 (1972) (Brennan, J., concurring).

<sup>87</sup> *Cf. Kirchmeier, supra* note 16, at 624 (suggesting that the Justices rejected the idea of applying a “strict historical interpretation of the Eighth Amendment” when deciding *Furman*, as they “refused to limit the amendment’s restrictions to punishments that were prohibited in the late Eighteenth Century”).

<sup>88</sup> *Furman*, 408 U.S. at 278.

<sup>89</sup> *Wilkerson v. Utah*, 99 U.S. 130, 133–34 (1878).

<sup>90</sup> *Furman*, 408 U.S. at 279.

<sup>91</sup> *Trop v. Dulles*, 356 U.S. 86, 100 n.32 (1958).

<sup>92</sup> *Furman*, 408 U.S. at 245 (Douglas, J., concurring).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 256. Justice Douglas suggested:

Any penalty, a fine, imprisonment or the death penalty could be unfairly or unjustly applied. The vice . . . is not in the penalty but in the process by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, *regardless of what the penalty is.*

*Id.* at 247–48 (quoting *Hearing before Subcomm. No. 3 of H. Comm. on Judiciary*, 92d Cong. 116–17 (1972) (statement of Earnest van den Haag)).

punishments that are arbitrarily or discriminatorily imposed, and not customarily applied, are unconstitutional.<sup>95</sup>

*e. Public opinion*

While considering past assessments and present applications of sentences, the Supreme Court recognized that punishments acquire new meaning under the Eighth Amendment through the evolution of public opinion.<sup>96</sup> The challenged punishment should be acceptable to contemporary society in order to be determined constitutional.<sup>97</sup> Public opinion can be gauged by legislative response,<sup>98</sup> jury verdicts,<sup>99</sup> and public reaction to sentencing practices.<sup>100</sup> “Rejection by society . . . is a strong indication that a severe punishment does not comport with human dignity” and should be held unconstitutional.<sup>101</sup>

## 2. Punishments Held Unconstitutional

The Eighth Amendment and its precursors were drafted to protect citizens from punishments that “disgraced the civilization of former ages” and would “make one shudder with horror to read of them.”<sup>102</sup> These statements reflect social abhorrence to the “violent proceedings [that had] taken place in England in the arbitrary reigns of some of the Stuarts.”<sup>103</sup> Without applying the five analytical themes discussed above, the Court established the per se illegality of many disturbing archaic punishments. Certain punishments, such as torture by use of “the rack, the thumb-screw, the iron boot, [and] the stretching of the limbs,”<sup>104</sup> or by “cutting off the hands or ears,

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<sup>95</sup> *Id.* at 249; see also Kenneth Fromson, Note, *Beyond an Eye for an Eye: Castration as an Alternative Sentencing Measure*, 11 N.Y.L. SCH. J. HUM. RTS. 311, 317 (noting that one of the elements of Eighth Amendment review applied by Justice Brennan in his concurring opinion to *Furman v. Georgia* was whether “there [was] a strong probability that [the punishment was] inflicted arbitrarily” (citation omitted)).

<sup>96</sup> See *Weems v. United States*, 217 U.S. 349, 378 (1919).

<sup>97</sup> *Furman*, 408 U.S. at 277 (Brennan, J., concurring).

<sup>98</sup> *Coker v. Georgia*, 433 U.S. 584, 593–94 (1977); see also *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976).

<sup>99</sup> *Gregg*, 428 U.S. at 181 (finding “[t]he jury also is a significant and reliable objective index of contemporary values because it is so directly involved”).

<sup>100</sup> See Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43, 59–62 (1998) (discussing the forces behind the promulgation of sex crime laws and identifying the “three key forces” as “psychiatrists, the news media, and an anxious public”).

<sup>101</sup> *Furman*, 408 U.S. at 277 (Brennan, J., concurring).

<sup>102</sup> *Whitten v. Georgia*, 47 Ga. 297, 301 (1872); see also *Weems v. United States*, 217 U.S. 349, 373 (1910).

<sup>103</sup> *Weems*, 217 U.S. at 371.

<sup>104</sup> *O’Neil v. Vermont*, 144 U.S. 323, 339 (1892) (Field, J., dissenting).

branding on the face or hand, slitting the nostrils, [or] placing the prisoner in the pillory” were considered by certain Supreme Court Justices and the lower courts to be inherently unconstitutional.<sup>105</sup> Several methods of capital punishment, including disembowelment, beheading, quartering, and burning alive at the stake were readily recognized as violating the Eighth Amendment.<sup>106</sup> Crucifixion and breaking on the wheel were similarly repulsive.<sup>107</sup> All of these “‘barbarous’ methods [of punishment] . . . were generally outlawed in the 18th century” with the Amendment’s adoption.<sup>108</sup>

But because the scope of the Eighth Amendment is “not static” and must “draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” punishments classified as cruel and unusual continue to expand with the growing case law.<sup>109</sup> As Justice McKenna aptly stated, “[t]ime works changes, [and] brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.”<sup>110</sup> In response to evolving social conditions, solitary confinement coupled with withholding the prisoner’s execution date,<sup>111</sup> denationalization,<sup>112</sup> and imprisonment for mere status<sup>113</sup> were all held as unconstitutional punishments despite their once accepted use. A current determination of a punishment’s constitutionality does not preclude the Court from later finding an Eighth Amendment violation.

## II. VOLUNTARY CASTRATION UNDER THE EIGHTH AMENDMENT

Even though the Supreme Court has yet to establish a definitive standard for assessing a punishment’s permissibility under the Eighth Amendment,<sup>114</sup> the analytical themes described in Part I can be applied to consider the constitutionality of voluntary castration. But before proceeding, a brief description of the punishment in question is required.

### A. Defining Voluntary Castration

Voluntary castration as related to criminal punishment takes two forms: chemical and surgical.<sup>115</sup> Chemical castration, the less invasive of the two methods of

<sup>105</sup> *Davis v. Berry*, 216 F. 413, 417 (S.D. Iowa 1914), *rev’d*, 242 U.S. 468 (1917).

<sup>106</sup> *See Wilkerson v. Utah*, 99 U.S. 130, 134–35 (1878).

<sup>107</sup> *In re Kemmler*, 136 U.S. 436, 446 (1890).

<sup>108</sup> *Gregg v. Georgia*, 428 U.S. 153, 171 (1976).

<sup>109</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>110</sup> *Weems v. United States*, 217 U.S. 349, 373 (1910).

<sup>111</sup> *See In re Medley*, 134 U.S. 160 (1890).

<sup>112</sup> *Trop*, 356 U.S. at 101.

<sup>113</sup> *See Robinson v. California*, 370 U.S. 660, 667 (1962) (holding imprisonment for having a drug addiction as cruel and unusual).

<sup>114</sup> *Winslade et al.*, *supra* note 3, at 388.

<sup>115</sup> *See generally id.* at 365–76 (discussing possible treatment options for sex offenders).

treatment, “involves the use of various types of medications and hormones, most intended to inhibit testosterone production in the body.”<sup>116</sup> Patients are given periodic injections for the duration of treatment in order to achieve the desired effects.<sup>117</sup> Unlike chemical castration, the surgical alternative, also called orchiectomy, is complete after a single procedure.<sup>118</sup> The operation involves the “removal of a man’s testes.”<sup>119</sup> Both methods of castration lower the level of testosterone in the body.<sup>120</sup> The end result sought by both procedures is to treat the offender’s deviant sexual behavior by decreasing his sex drive.<sup>121</sup>

### *B. Assessing the Constitutionality of Voluntary Castration*

#### 1. Voluntary Castration as Cruel

A basic understanding of the challenged punishment provides a basis for determining whether voluntary castration is an inhumane and torturous punishment forbidden by the Eighth Amendment. In addition, court assessments of castration and medical appraisals of the physiological effects of the two methods of treatment can help determine whether voluntary castration is indeed cruel.

Courts commonly reference castration when listing forbidden punishments. In *Weems v. United States*, the Supreme Court described a group of punishments—castration, quartering, and hanging in chains—as barbaric.<sup>122</sup> Castration is linked to other gruesome punishments traditionally employed in Europe during the seventeenth century.<sup>123</sup> This grim coupling expresses the *Weems* Court’s objection to the brutality of surgical castration, which during the 1600s consisted of violent mutilation.<sup>124</sup> As chemical castration was not yet developed by the turn of the twentieth century,<sup>125</sup> the Court’s 1909 condemnation cannot extend to the modern treatment.

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<sup>116</sup> *Id.* at 366.

<sup>117</sup> Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 6 (1990). When medroxyprogesterone acetate is used for treatment, the offender is given “weekly intramuscular injections” of the drug. *Id.*

<sup>118</sup> See Winslade et al., *supra* note 3, at 369.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 366, 369.

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

<sup>122</sup> 217 U.S. 349, 377 (1910).

<sup>123</sup> *Id.*; see Granucci, *supra* note 17, at 853–54. The penalty for treason in England during the “Bloody Assize” trials of 1685 “consisted of drawing the condemned man on a cart to the gallows, where he was hanged by the neck, cut down while still alive, disemboweled and his bowels burnt before him, and then beheaded and quartered.” *Id.*

<sup>124</sup> *Weems*, 217 U.S. at 377.

<sup>125</sup> Chemical castration was first used approximately forty years ago. Douglas J. Besharov & Andrew Vachhs, *Sex Offenders: Is Castration an Acceptable Punishment?*, A.B.A.J., May 1992, at 42.

State courts have adopted a similar tone towards surgical castration. When reviewing a state statute requiring criminals to submit to vasectomies, District Judge Smith McPherson noted Blackstone's failure to "mention castration as one of the cruel punishments," hypothesizing that the omission reflected modern society's view that "the operation was . . . too cruel."<sup>126</sup> In *Mickle v. Henrichs*, the Nevada district court held that imposing a vasectomy as punishment for rape, "or any other similar mutilation of the body," was "ignominious and degrading, and in that sense is cruel."<sup>127</sup> In *State v. Brown*, the Supreme Court of South Carolina specified that castration is "a form of mutilation" prohibited by the state's constitution.<sup>128</sup> Like the Supreme Court in *Weems*, these state tribunals vehemently disapproved of the disfiguring punishment, even if performed using modern medical practices.

The objections to the castration punishment are most applicable to the surgical procedure. The injection of medications or hormones with a thin hypodermic needle<sup>129</sup> is not nearly as invasive as the surgical removal of internal glands.<sup>130</sup> Chemical treatments merely inhibit hormone production;<sup>131</sup> surgical castration permanently destroys part of the anatomy that produces testosterone.<sup>132</sup> Temporary changes in hormone secretion do not equate to mutilation, but the excision of the genitals perfectly fits the definition.<sup>133</sup> As the Supreme Court considered mutilation a punishment "wholly alien to the spirit of our humane general constitution,"<sup>134</sup> even though castration was never held definitively unconstitutional under the Eighth Amendment,<sup>135</sup> the opinions expressed by both federal and state judges establish grounds for a presumption of surgical castration's illegality as a cruel punishment of mutilation.

In addition to reviewing court assessments of the direct results of chemical and surgical castration, the lingering effects of each procedure must also be considered. Both castration techniques are accompanied by significant side effects. Estrogens used in chemical treatments may "cause nausea, vomiting, feminization, and . . . carcinoma of the breast."<sup>136</sup> Medroxyprogesterone acetate, the most common synthetic

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<sup>126</sup> *Davis v. Berry*, 216 F. 413, 416 (S.D. Iowa 1914) (emphasis added), *rev'd*, 242 U.S. 468 (1917).

<sup>127</sup> 262 F. 687, 690–91 (D. Nev. 1918).

<sup>128</sup> 326 S.E.2d 410, 412 (S.C. 1985). The South Carolina Constitution mirrors the Eighth Amendment, the pertinent clause reading: "Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted . . ." S.C. CONST. art. I, § 15.

<sup>129</sup> Fitzgerald, *supra* note 117, at 36.

<sup>130</sup> Winslade et al., *supra* note 3, at 369.

<sup>131</sup> *Id.* at 366.

<sup>132</sup> *Id.* at 369.

<sup>133</sup> Mutilation is defined as "the excision or maiming of a limb or bodily organ." OXFORD ENGLISH DICTIONARY 1870 (5th ed. 2002).

<sup>134</sup> *Harmelin v. Michigan*, 501 U.S. 957, 981 (1991) (citing BENJAMIN OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 186 (1832)).

<sup>135</sup> See *supra* note 16 and accompanying text.

<sup>136</sup> Winslade et al., *supra* note 3, at 367.

drug used for chemical castration, is known to “cause weight gain, hypertension, mild lethargy, cold sweats, nightmares, hot flashes, and muscle aches.”<sup>137</sup> These unpleasant side effects are diminutive in comparison to surgical castration’s severe consequences. Physical responses following removal of the testes include “changes in metabolic processes, . . . lowering of hemoglobin percentage, changes in fat distribution in the body, diminution of the calcium content of bones . . . and diminishment of beard and body hair.”<sup>138</sup> In addition to these biological shifts, surgery patients also suffer from depression and suicidal tendencies.<sup>139</sup> Similar psychological repercussions are not associated with chemical treatment.<sup>140</sup> The secondary effects of surgical castration are cumulatively much more damaging to the offender’s physical and mental health than the side effects associated with the chemical alternative.

As traditional Eighth Amendment case law focuses on the brutality of surgical castration and current medical research reveals the operation’s uniquely severe side effects, surgical castration is readily identified as a cruel punishment.

## 2. Weighing the Proportionality of Voluntary Castration Against the Crime of Sexual Assault and Alternative Punishments

Even though the Supreme Court largely repudiated proportionality analysis under the Eighth Amendment,<sup>141</sup> the traditional test remains helpful in highlighting current concerns over voluntary castration’s relative cruelty. Acknowledging the Court’s current limited proportionality review,<sup>142</sup> it is also appropriate to compare voluntary castration to capital punishment—to which the test is still applied.

Under traditional Eighth Amendment proportionality analysis, the Court compared the severity of the crime to its punishment.<sup>143</sup> A typical statute defines the felony offense of child rape as when a “person has sexual intercourse with another person by the use of forcible compulsion” and “[t]he victim is a child less than twelve years of age.”<sup>144</sup> The stark simplicity of the statutory language fails to convey the seriousness of the crime and its consequences. Children and adolescents—the “most vulnerable victims”—are commonly the targets of sexual assault.<sup>145</sup> After surviving sexual attacks, many child victims “suffer[] traumatic and frequently life-long physical and emotional damage.”<sup>146</sup> The shattering effects of these crimes are truly troubling, as

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 371.

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

<sup>140</sup> See Fitzgerald, *supra* note 117, at 7.

<sup>141</sup> See *supra* text accompanying notes 73–75.

<sup>142</sup> See *supra* text accompanying notes 75–76.

<sup>143</sup> See *supra* text accompanying notes 64–70.

<sup>144</sup> *E.g.*, MO. REV. STAT. § 566.030 (2007).

<sup>145</sup> Winslade et al., *supra* note 3, at 351, 358.

<sup>146</sup> *Id.* at 351. Research suggests that sexual crimes cause more psychological harm to victims than do other assaults. Lieb et al., *supra* note 100, at 49. Rape victims commonly

“[c]hildren who have been sexually abused are more likely to engage in unusual sexual behaviors than are those who have not.”<sup>147</sup> Eliciting even greater concern, many child molesters were once victims of sexual assault; the crime morbidly perpetuates itself through successive generations of victims.<sup>148</sup> In part because of their unique victim impact, such vulgar and brutal acts are “universally decried as heinous crimes that merit severe penalties.”<sup>149</sup>

In comparison to the disturbing physical and haunting psychological consequences endured by a non-consenting victim of rape, voluntary castration is a light sentence. Whether chemically or surgically produced, the convicted felon is given a choice in avoiding extended incarceration by submitting to treatment.<sup>150</sup> Though both medical procedures may be accompanied by uncomfortable side effects,<sup>151</sup> the offender retains some ability to shape his own destiny, unlike his child-victim whose autonomy he irreparably subjugated.<sup>152</sup> As several commentators assert, there is no “disproportionality issue [because] ‘[s]exual offenses such as rape and child molestation cause a tremendous amount of social harm.’”<sup>153</sup> Not only is the victim scarred for life; entire

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experience Post-Traumatic Stress Disorder, which is “characterized by intrusive recollections, avoidance responses, and hyperarousal.” *Id.*; see also Arthur H. Garrison, *Rape Trauma Syndrome: A Review of Behavioral Science Theory and Its Admissibility in Criminal Trials*, 23 AM. J. TRIAL ADVOC. 591 (2000).

<sup>147</sup> Lieb et al., *supra* note 100, at 49.

<sup>148</sup> Winslade et al., *supra* note 3, at 351. One study found that seventy-eight percent of pedophile offenders were victimized during their childhoods. Tom O’Connor & William Carson, *Understanding the Psychology of Child Molesters: A Key to Getting Confessions*, POLICE CHIEF, Dec. 2005, available at [http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=770&issue\\_id=122005](http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=770&issue_id=122005).

<sup>149</sup> Lieb et al., *supra* note 100, at 45–46.

<sup>150</sup> Some convicted rapists request castration in exchange for a lenient prison term. See J. Michael Bailey & Aaron S. Greenberg, *The Science and Ethics of Castration: Lessons from the Morse Case*, 92 NW. U. L. REV. 1225, 1225 (1998).

<sup>151</sup> See *supra* text accompanying notes 136–40.

<sup>152</sup> The importance of personal autonomy cannot be overemphasized. Philosophical scholars recognize that:

[T]o be autonomous is to be one’s own person, to be directed by considerations, desires, conditions, and characteristics that are not simply imposed externally upon one, but are part of what can somehow be considered one’s authentic self. Autonomy in this sense seems an irrefutable value, especially since its opposite—being guided by forces external to the self and which one cannot authentically embrace—seems to mark the height of oppression.

John Christman, *Autonomy in Moral and Political Philosophy*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Aug. 27, 2003), available at <http://plato.stanford.edu/entries/autonomy-moral/#3.1>.

<sup>153</sup> Courtney Flack, *Chemical Castration: An Effective Treatment for the Sexually Motivated Pedophile or an Impotent Alternative to Traditional Incarceration?*, 7 J.L. SOC’Y 173, 194 (2005) (citing Jason O. Runckel, Comment, *Abuse It and Lose It: A Look at California’s Mandatory Chemical Castration Law*, 28 PAC. L.J. 547, 585 (1997)).

communities are left reeling.<sup>154</sup> The crime of rape is far more damaging than the punishment of voluntary castration.

In addition to balancing the crime against its punishment, the Supreme Court traditionally weighed the severity of the challenged penalty against other available punishments.<sup>155</sup> Under the American system of federalism, each state employs its own criminal code containing sentencing guidelines for recognized offenses. Child molesters are typically incarcerated in prison or confined in a state behavioral rehabilitation center.<sup>156</sup> Prison sentences imposed for a pedophile's first conviction of child rape can extend from a minimum of five years<sup>157</sup> to life "without benefit of probation, parole or any other reduction."<sup>158</sup> Many state codes also include statutes for increasing the duration of incarceration for a second or subsequent rape conviction.<sup>159</sup> In addition to imprisonment, several states reserve the right to fine convicted sex offenders; these fines range from a minimal \$200<sup>160</sup> to a bank-breaking \$250,000.<sup>161</sup> As the most severe punishment, several states "authorized the death penalty in some cases, but only where the victim was a child and the rapist an adult."<sup>162</sup> Though statutes imposing fines and mandating execution remain on the books in a handful of states, confinement is the most common method of punishment for sex offenders.<sup>163</sup>

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<sup>154</sup> Jim Doyle, *Public's Overriding Fear: Will They Do It Again?*, S.F. CHRON., July 12, 2004, at A1.

<sup>155</sup> See *supra* text accompanying notes 71–72.

<sup>156</sup> See generally Madelyn J. Daley, Comment, *Do Sexually Violent Predators Deserve Constitutional Protections?*, 23 S. ILL. U. L.J. 715, 718 (1999) (discussing the penal system's adoption of civil confinement).

<sup>157</sup> E.g., OKLA. STAT. tit. 21, § 1115 (2002).

<sup>158</sup> E.g., DEL. CODE ANN. tit. 11, § 773 (2003).

<sup>159</sup> See IDAHO CODE ANN. § 19-2520C (2007) (providing that recidivist offenders are subject to an "extended term of imprisonment . . . computed by increasing the maximum sentence authorized for the crime for which the person was convicted by fifteen (15) years"); NEB. REV. STAT. § 28-319.01 (2006) (providing that a first offense of sexual assault of a child is punishable by fifteen years in prison; a second offense will receive twenty-five years); S.C. CODE ANN. § 16-3-655 (2006) (providing that a person guilty of first degree sexual battery against a minor may receive the minimum sentence of twenty-five years of imprisonment for a first offense, but "must be punished by death or by imprisonment for life" if convicted of a second offense when the prior offense involved a minor less than eleven years old).

<sup>160</sup> 730 ILL. COMP. STAT. ANN. 5/5-9-1.7 (West 2005).

<sup>161</sup> D.C. CODE § 22-3008 (2001).

<sup>162</sup> *Coker v. Georgia*, 433 U.S. 584, 595 (1977) (citing FLA. STAT. ANN. § 794.011(2) (1976); MISS. CODE ANN. § 97-3-65 (Supp. 1976); TENN. CODE ANN. § 39-3702 (1974)). Both Florida and Mississippi retain the death penalty for offenders in qualifying child molestation cases. See FLA. STAT. ANN. § 794.011(2) (2006); MISS. CODE ANN. § 97-3-65 (1998). Tennessee once imposed capital punishment for rape, but the state since repealed its statute. See 2005 Tenn. Pub. Acts 353; see also *Coker*, 433 U.S. at 595.

<sup>163</sup> Only ten percent of violent child molesters are sentenced to life or given the death sentence. See Yello Dyno, *supra* note 5.

When sentenced to confinement, child molesters only serve an average of eleven years in prison for their crimes.<sup>164</sup> Though a decade's time is an arguably short incarceration term for such a barbarous crime, many offenders opt for the castration alternative if available.<sup>165</sup> Preferring the freedoms of probation or parole is understandable when juxtaposed to confinement in a small cell. For good reason "child molesters [also] fear going to prison."<sup>166</sup> Other prisoners abhor sex offenders, "especially those convicted of victimizing children."<sup>167</sup> Once in jail, many child molesters become targets of violence by other inmates—some suffer severe beatings, others lose their lives.<sup>168</sup> Rapists may become victims of sex crimes while behind bars.<sup>169</sup> Mere imprisonment—particularly for such a short period—is a trifling punishment when compared to the monstrous offense of child rape; but, when considering the substantial threats child rapists are exposed to while in prison, whereby many perversely become the victims of their own crimes, imprisonment begins to appear proportional to voluntary castration. There may not be a better alternative between these two punishments.

As traditional proportionality analysis of voluntary castration is inconclusive, further assessment utilizing the contemporary death penalty proportionality rhetoric is desirable. In *Furman v. Georgia*, Justice Brennan powerfully articulated the characteristics contributing to the unique severity of the "ultimate sanction."<sup>170</sup> He described death as "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity."<sup>171</sup> Although "no primitive torture" may be involved, the physical and mental suffering attending capital sentences could be considered cruel and unusual.<sup>172</sup> Lacking an existing method that ensured "an immediate and painless death," death

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<sup>164</sup> *Id.*

<sup>165</sup> See Rondeaux, *supra* note 11; Besharov & Vachhs, *supra* note 125, at 42 (discussing Steven Butler's request for "surgical castration and 10 years of probation as his punishment instead of imprisonment" after being convicted of raping a thirteen-year-old girl).

<sup>166</sup> O'Connor & Carson, *supra* note 148.

<sup>167</sup> See James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 462 & n.216 (2003).

<sup>168</sup> See Jessica Gardner, *Ex-Superintendent Beaten: Molester Injured in Holding Cell*, TIMES HERALD-REC. (Middletown, N.Y.), Sept. 26, 2003, available at <http://archive.recordonline.com/archive/2003/09/26/jgsigler.htm> (discussing the beating of convicted pedophile Robert Sigler and the murder of "[d]efrocked priest and convicted child molester" John Geoghan).

<sup>169</sup> In a survey of federal and state correctional facilities, there were an estimated 6241 reported allegations of sexual violence during 2005. ALLEN J. BECK & PAIGE M. HARRISON, DEP'T. OF JUST., USDOJ BSJ SPEC. REP. 214646, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2005 (July 2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca05.pdf>; see also Joanne Mariner, *Behind Bars in America*, HUM. RTS., Spring 2002, at 9, 10 ("Certain prisoners are targeted for sexual exploitation upon entering a penal facility, particularly those who are . . . convicted of a sexual offense against a minor.").

<sup>170</sup> 408 U.S. 238, 286 (1972) (Brennan, J., concurring).

<sup>171</sup> *Id.* at 287.

<sup>172</sup> See *id.* at 271.

row inmates were certain to suffer when executed.<sup>173</sup> Many capital convicts also endured mental breakdowns; the “onset of insanity while awaiting execution” was relatively common.<sup>174</sup> Adding to this psychological trauma was the enormity of the state’s proclamation in handing down the death sentence, as “[t]he calculated killing of a human being by the State involves, by its very nature, a denial of the executed person’s humanity.”<sup>175</sup> A criminal awaiting capital punishment lost the “right to have rights.”<sup>176</sup> Under Justice Brennan’s conception, a death row inmate abjectly agonized in his misery until his painful sentence was carried out.<sup>177</sup>

The physical and mental plight of a capital punishment inmate are important to the proportionality assessment, but the inescapable finality inherent in the punishment is the weightiest element implicated under Eighth Amendment analysis.<sup>178</sup> The distinction between life and death is not “negligible.”<sup>179</sup> Unlike a prison sentence, capital punishment destroys an individual’s “very existence”; once a sentence is carried out, the “punishment is not irrevocable.”<sup>180</sup> As Justice Brennan articulated, “Death is truly an awesome punishment.”<sup>181</sup>

While capital punishment is rightfully recognized as being “in a class by itself,”<sup>182</sup> echoes of Justice Brennan’s arguments in *Furman* are heard in assessments of castration’s relative severity. Though researchers cite the immediate physical suffering and the following side effects associated with castration when characterizing the punishment as torturous,<sup>183</sup> judges highlight the punishment’s severe psychological effects. When arguing against the use of either vasectomy or castration as punishment for rape, Judge Smith McPherson stated:

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<sup>173</sup> *Id.* at 287.

<sup>174</sup> *Id.* at 288–89 (quoting *Solesbee v. Balkoom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting)). The California Supreme Court noted, “the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.” *Id.* (citing *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972)).

<sup>175</sup> *Id.* at 290.

<sup>176</sup> *Id.*

<sup>177</sup> *Cf.* RICHARD B. LILICH ET AL., *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 107–08 (4th ed. 2006) (discussing *Soering v. United Kingdom*, in which the European Court of Human Rights held the applicant’s pending extradition a violation of Article 3 of the European Convention on Human Rights because “it was reasonably foreseeable that he would be subjected to a ‘death row’ phenomenon once in the U.S.,” and such a fate would expose the applicant to “torture and cruel, inhuman, degrading treatment”).

<sup>178</sup> *See Furman*, 408 U.S. at 289 (Brennan, J., concurring) (“The unusual severity of death is manifested most clearly in its finality and enormity.”).

<sup>179</sup> *Reid v. Covert*, 354 U.S. 1, 77 (1957).

<sup>180</sup> *Furman*, 408 U.S. at 290.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 289.

<sup>183</sup> *See supra* Part II.A.

[E]ach operation is to destroy the power of procreation. It is, of course, to follow the man during the balance of his life. The 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>184</sup>

Four years later in *Mickle v. Henrichs*, District Judge Farrington quoted Judge Smith McPherson<sup>185</sup> and proceeded by describing a criminal who underwent a vasectomy as “handicapped by the consciousness that he bears on his person, and will carry to his grave, a mutilation which, as punishment, is a brand of infamy.”<sup>186</sup> Judge Farrington further argued that such a punishment “unnecessarily obstruct[s]” the offender’s life and concluded by asserting that “[i]t will not do to argue that, inasmuch as the death penalty may be inflicted for this crime, vasectomy, or any other similar mutilation of the body, cannot be regarded as cruel, because the greater includes the less.”<sup>187</sup>

Judge Smith McPherson and Judge Farrington’s objections, focused on the detrimental psychological and permanent physical effects of court-ordered vasectomies, are easily extrapolated to surgical castration. When compared to surgical sterilization, castration is a “similar mutilation of the body.”<sup>188</sup> Like a death row inmate awaiting execution, the State’s castration patients are burdened by the crushing “infamy” of their operation. And like a prisoner whose capital sentence was carried out and his life cut short, a convicted rapist must endure “an invasion of bodily integrity” and the end of his “reproductive freedom.”<sup>189</sup> He is denied one of the “basic civil rights of man,” “the right to have offspring.”<sup>190</sup> An executed criminal is denied life; a castrated rapist is deprived of the right to create new life. Though certainly not attaining the gravity of capital punishment, due to these analytical similarities, surgical castration must be recognized as an extreme sanction.

In comparison to the highly objectionable physical and psychological effects of surgical castration, offenders treated with chemical castration are not as intensely affected. Of fundamental distinction, all of the side effects associated with medroxy-progesterone acetate use are “reversible once the treatment ceases.”<sup>191</sup> Furthermore, patients undergoing chemical treatment can still have families.<sup>192</sup> The injections rarely

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<sup>184</sup> *Davis v. Berry*, 216 F. 413, 416 (S.D. Iowa 1914) (emphasis added), *rev’d* 242 U.S. 468 (1917).

<sup>185</sup> 262 F. 687, 690 (D. Nev. 1918).

<sup>186</sup> *Id.* at 691.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Besharov & Vachhs*, *supra* note 125, at 42.

<sup>190</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541, 536 (1942).

<sup>191</sup> *Fitzgerald*, *supra* note 117, at 7.

<sup>192</sup> *Id.*

cause impotence; subjects merely experience “erotic apathy.”<sup>193</sup> As the excruciating and permanent physical and psychological effects associated with surgical castration are absent from the chemical treatment, analogies to the death sentence discourse of unique severity have limited application to surgical castration. The similarities between the rhetoric of death’s uniqueness and discussions of surgical castration indicate that the punishment should be approached cautiously. Surgical castration alone is recognized as problematic under contemporary Eighth Amendment proportionality review.

### 3. The Courts’ Deference to Castration Legislation

Without a Supreme Court case on point, state and lower federal court cases must be relied upon to gauge the judiciary’s current deference to legislative provisions for voluntary castration.

In a rare case, the Supreme Court of South Carolina directly assessed the constitutionality of voluntary castration under the state’s constitution. In *State v. Brown*, three defendants pled guilty to first-degree criminal sexual conduct.<sup>194</sup> The trial judge sentenced each defendant to thirty years imprisonment but provided that the balance of the sentences could be suspended if the defendants voluntarily agreed to be surgically castrated.<sup>195</sup> After filing then subsequently abandoning their appeals, each defendant requested castration in order to obtain the suspended sentence.<sup>196</sup> On review of defendant Roscoe James Brown’s motion for a writ of mandamus to exercise the suspended sentence, the Supreme Court of South Carolina recognized that although statutory language gave trial courts “wide . . . discretion in imposing conditions of suspension or probation [the tribunal] cannot impose conditions which are illegal and void as against public policy.”<sup>197</sup> The court held that castration was “a form of mutilation” prohibited by the state’s constitutional ban of cruel and unusual punishment.<sup>198</sup> Though the statutory provision relied upon by the trial court in offering the suspended sentence did not explicitly permit castration as a prerequisite to probation, the state’s supreme court rejected any statutory construction authorizing voluntary castration.<sup>199</sup> The court rendered its prohibition without regard to legislative intent.<sup>200</sup>

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<sup>193</sup> *Id.* Dr. John Money asserts that “chemical castration” is a misnomer, clarifying “I know people call it chemical castration, but it’s reversible, and it’s not castration at all.” Tamar Lewin, *Texas Court Agrees to Castration for Rapist of 13-Year-Old Girl*, N.Y. TIMES, Mar. 7, 1992, at A12.

<sup>194</sup> 326 S.E.2d 410, 411 (S.C. 1985).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 412.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 411–12.

With the exception of *Brown*, federal and state courts confronted with ancillary Eighth Amendment questions refused to entertain constitutional challenges on their merits.<sup>201</sup> Therefore, another method of assessing whether the Supreme Court would defer to a legislature's enactment of a castration statute is to analyze courts' treatment of cases concerning issues of bodily integrity.

Statutes ordering convicted felons to undergo vasectomies have been questioned for nearly a century. In *Davis v. Berry*, the court assessed the constitutionality of an Iowa statute that required performance of a vasectomy following a defendant's second felony conviction.<sup>202</sup> Similarly, in *Mickle v. Henrichs*, the Nevada court reviewed a state law that permitted courts to "direct an operation to be performed upon [a defendant convicted of sexually abusing a child], for the prevention of procreation."<sup>203</sup> Then, in *Skinner v. Oklahoma*, the Supreme Court reviewed Oklahoma's Habitual Criminal Sterilization Act, which allowed state courts to require "habitual criminal[s]"—those convicted of two or more "felonies involving moral turpitude"—to "be rendered sexually sterile."<sup>204</sup> In each case, the reviewing court held the challenged statute unconstitutional on either Eighth Amendment or Equal Protection grounds.<sup>205</sup>

A common element in the constitutional objections voiced in the *Davis*, *Mickle*, and *Skinner* opinions is the argument for protecting the defendant's right to bodily integrity. While each court couched this argument in the basic liberty to procreate, all three opinions recognized the inherent cruelty in denying a criminal the right to physical self-preservation.<sup>206</sup>

Though the relevant contexts—forced submission as opposed to voluntary consent—are decidedly different, the bodily integrity argument is directly applicable to surgical castration. Like a vasectomy, surgical castration is intrusive and permanent. But surgical castration is a more severe denial of bodily integrity than vasectomy, as a part of the anatomy is not only severed, but also permanently removed and discarded.<sup>207</sup> As chemical castration leaves no lasting physical handicap once treatment is discontinued, the arguments against vasectomy are inapplicable.<sup>208</sup> In light of the judiciary's consistent refusal to defer to legislative intent when statutes provide for the destruction of bodily integrity, the Supreme Court should be equally unlikely to defer to legislative claims of voluntary surgical castration's constitutionality.

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<sup>201</sup> See, e.g., *ACLU of Ark. v. State*, 5 S.W.3d 418 (Ark. 1999); *People v. Steele*, No. C044408, 2004 WL 2897955, at \*2 (Cal. Ct. App. Dec. 15, 2004).

<sup>202</sup> 216 F. 413, 414 (S.D. Iowa 1914), *rev'd*, 242 U.S. 468 (1917).

<sup>203</sup> 262 F. 687, 687 (D. Nev. 1918).

<sup>204</sup> 316 U.S. 535, 536–37 (1942).

<sup>205</sup> See cases cited *supra* notes 203–05.

<sup>206</sup> See *Skinner*, 316 U.S. at 541; *Mickle*, 262 F. at 691; *Davis*, 216 F. at 416.

<sup>207</sup> See *supra* text accompanying note 119.

<sup>208</sup> See *supra* text accompanying note 191.

#### 4. Customary Use of Voluntary Castration

Though penal statutes providing for voluntary castration are a relatively new legislative invention,<sup>209</sup> mandatory castration has been practiced for centuries. In twelfth-century England, treason was punished with both the loss of one's eyes and castration.<sup>210</sup> Voluntary castration is still used in several Western European countries for prisoners with sexual disorders, but this practice has decreased in recent years.<sup>211</sup> Castration has an equally dark history in the United States. The punishment was originally imposed on slaves and prisoners of war.<sup>212</sup> Beginning at the close of the nineteenth century, incompetents were targeted by the eugenics movement on the pretense of protecting the "welfare of society."<sup>213</sup> But castration was not only used as a punishment. Before the practice was banned, castrati—young boys castrated to preserve their high falsetto—proudly appeared in operas.<sup>214</sup> In current medical practice, the procedure is a life-saving treatment for men suffering from testicular or prostate cancer.<sup>215</sup> Some cases of testicular injury also require castration.<sup>216</sup> Transsexuals suffering from gender identity disorder also seek castration as a component of sex reassignment surgery.<sup>217</sup>

Currently, when castration is used as a punishment, it is the exception not the rule. Only eight of the fifty states have statutes authorizing either chemical or surgical castration of sex offenders.<sup>218</sup> Of those eight, seven states offer chemical castration as the primary means of treatment; Texas is the lone state to require the surgical

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<sup>209</sup> Kevin Giordano, *The Chemical Knife*, SALON, Mar. 1, 2000, <http://archive.salon.com/health/feature/2000/03/01/castration/> (noting that in 1996 California was the first state to enact a chemical castration law).

<sup>210</sup> *Davis*, 216 F. at 416.

<sup>211</sup> Winslade et al., *supra* note 3, at 372–76 (including Denmark, Germany, Norway, Sweden, the Netherlands, and Switzerland). No sex offenders have been castrated in Denmark since 1972. *Id.* at 374. The reliance on castration in Germany has also diminished, as four hundred sex offenders underwent orchiectomies between 1970 and 1980, but only about fifty offenders had the surgery between 1980 and 1989. *Id.* Researchers suggest that this decrease in practice is related to the growing sentiment that castration is "ethically problematic." Bailey & Greenberg, *supra* note 150, at 1229.

<sup>212</sup> Winslade et al., *supra* note 3, at 386.

<sup>213</sup> *See* *Buck v. Bell*, 274 U.S. 200, 205 (1927) (upholding a Virginia law that provided for sterilization of persons with mental defects).

<sup>214</sup> Terry Teachout, *He Sings Higher*, TIME, June 7, 1999, at 77.

<sup>215</sup> Winslade et al., *supra* note 3, at 369.

<sup>216</sup> *Id.*

<sup>217</sup> *See* *White v. Farrier*, 849 F.2d 322, 324 (8th Cir. 1998); *Farmer v. Moritsugu*, 163 F.3d 610, 611 (D.C. Cir. 1998).

<sup>218</sup> *See* CAL. PENAL CODE § 645 (West 2006); FLA. STAT. § 794.0235 (2007); IOWA CODE § 903B.10 (2007); LA. REV. STAT. ANN. § 15:538 (2008); MONT. CODE ANN. § 45-5-512 (2007); OR. REV. STAT. § 144.625 (2007); TEX. GOV'T CODE ANN. § 501.061 (Vernon 2004); WIS. STAT. § 304.06 (2007).

procedure.<sup>219</sup> Though the majority of states with castration statutes show a bias for chemical programs, four states also have statutes that recognize the availability of a voluntary “permanent, surgical alternative.”<sup>220</sup> Although the use of chemical castration is far from widespread, the surgical procedure is far less prevalent.

Considerations of current practice are critical in analyzing the customary use of a punishment, but the dynamic quality of state criminal procedure codes must also be recognized. While legislatures in Virginia,<sup>221</sup> Mississippi,<sup>222</sup> and New York<sup>223</sup> recently considered adding castration provisions to their books, Georgia’s legislature repealed its provision for the punishment.<sup>224</sup> In the past, several legislatures also reviewed bills that would have incorporated castration treatment statutes into state penal codes, but these bills were subsequently defeated.<sup>225</sup> All told, only eighteen states have given serious consideration to adopting or have adopted castration provisions. Fewer of these statutes are in force than were initially proposed. Within this relatively limited practice, chemical castration is more widely accepted among the states than surgical castration, but neither punishment is popular.

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<sup>219</sup> See TEX. GOV’T CODE ANN. § 501.061 (Vernon 2004).

<sup>220</sup> See CAL. PENAL CODE § 645(e) (West 2007); see also FLA. STAT. ANN. § 794.0235(1)(b) (West 2006); IOWA CODE § 903B.10.1 (2007); LA. REV. STAT. ANN. § 15:538:C(8) (2008). Furthermore, if a defendant volunteers for surgical castration he would not be subject to chemical treatment.

<sup>221</sup> S.B. 1203, 2007 Leg., Reg. Sess. (Va. 2007). Senator Emmett W. Hanger, Jr. introduced a bill which, if enacted, would allow a prisoner convicted of a sexually violent offense to file a petition requesting a court order providing “that the prisoner undergo physical castration and be placed on conditional release” as an “alternative to involuntary secure inpatient treatment.” *Id.* The bill was vetoed on April 10, 2007. Press Release, Governor Kaine Announces Action on Legislation from 2007 Reconvened Session (Apr. 10, 2007), available at <http://www.governor.virginia.gov/mediarelations/newsreleases/viewRelease.cfm?id=376>.

<sup>222</sup> H.B. 103, 122nd Leg., Reg. Sess. (Miss. 2007) (leaving the method of castration unspecified). The proposal died in committee on Jan. 30, 2007. Mississippi Legislative Information Systems, House Bill 103, <http://billstatus.is.state.ms.us/2007/pdf/history/HB/HB0103.htm> (last visited Feb. 8, 2008).

<sup>223</sup> S.B. 02680, 230 Leg., Reg. Sess. (N.Y. 2007) (providing for chemical castration). The bill died in assembly on Jan. 9, 2008. New York State Assembly, Bill Summary-S02680, <http://assembly.state.ny.us/leg/?bn=S02680> (last visited Feb. 8, 2008).

<sup>224</sup> See GA. CODE ANN. § 42-9-44.2 (West 1997), repealed by GA. CODE ANN. § 42-9-44.2 (West 2006). The deleted section related to medroxyprogesterone acetate treatment and counseling for child molesters as parole requirements.

<sup>225</sup> See H.B. 3, 2006 Leg., Reg. Sess. (Ala. 2006) (surgical castration); H.B. 1131, 84th Leg., Reg. Sess. (Minn. 2005) (chemical or surgical castration); S.B. 1585, 50th Leg., 2d Reg. Sess. (Okla. 2005) (voluntary chemical or surgical castration); S.B. 1061, 189th Gen. Assem., Reg. Sess. (Pa. 2006) (chemical castration with surgical alternative); see also Fromson, *supra* note 95, at 315 (identifying castration bills proposed in Hawaii, New Mexico, and Washington, all of which were eventually struck down).

## 5. Public Opinion of Voluntary Castration

Even though sex offenders are “some of the most hated and reviled members of society,”<sup>226</sup> there is great divergence in public opinion concerning whether states should provide voluntary castration. Interest groups at both ends of the spectrum justify their arguments in the frequently contradictory and inconclusive research available on castration.

The most vocal opponents of voluntary castration are victims’ rights activists and civil liberties groups. Drawing on impermissibly high recidivism rates,<sup>227</sup> victims’ rights activists argue that sexual predators cannot be rehabilitated and should remain in prison.<sup>228</sup> Understandably, for victims and their loved ones who have lived through the devastation of sexual assault, the only means of protecting society is to keep convicted rapists separated from the rest of the population.<sup>229</sup> As District Attorney Tony Rackauckas opined, “[j]ust because [sexual deviants] have been castrated doesn’t change what’s going on in their minds.”<sup>230</sup> This skepticism of rehabilitation leads many victims’ rights activists to share the sentiment that “[i]ncarceration and civil commitment are the only 100-percent-effective methods of preventing sex-offender recidivism.”<sup>231</sup>

Though arguing in favor of the same outcome, interest groups focused on humanitarian issues assert that castration should not serve as an alternative to imprisonment because the punishment is “ethically problematic.”<sup>232</sup> Surgical castration, characterized as physical mutilation, is criticized as an “abhorrent”<sup>233</sup> and barbaric procedure.<sup>234</sup> The operation is considered “a nearly unthinkable invasion of a person’s body.”<sup>235</sup> Physicians fostering these convictions have refused to perform state-authorized operations on convicted rapists.<sup>236</sup> In addition to drawing attention to castration as

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<sup>226</sup> Adam Shajnfeld & Richard B. Krueger, *Reforming (Purportedly) Non-Punitive Responses to Sexual Offending*, 25 DEV. MENTAL HEALTH L. 81, 99 (2006).

<sup>227</sup> See *supra* text accompanying note 7.

<sup>228</sup> Robert Crowe, *Drugs, Surgery May Temper Drive, but Sexual Interest Won’t Normalize*, HOUSTON CHRON., May 10, 2005, at B1.

<sup>229</sup> See Julian Guthrie, *Care or Jail for Molesters?*, S.F. CHRON., Sept. 4, 2002, at A1. John Walsh created the television program *America’s Most Wanted* after his six-year-old son was murdered by a pedophile. *Id.* Walsh argues, “[t]he longer these monsters are in prison, the less chance they have to hurt kids. I don’t buy this notion of treatment.” *Id.*

<sup>230</sup> CourtTV.com, *Castrated Child Molester Wants to Be Freed from Mental Hospital*, July 6, 2006, [http://www.courtTV.com/news/2006/0703/molester\\_ap.html](http://www.courtTV.com/news/2006/0703/molester_ap.html).

<sup>231</sup> Paul Martin Andrews, Letter to the Editor, *What It Takes to Stop Sexual Predators*, WASH. POST, July 12, 2006, at A14.

<sup>232</sup> Bailey & Greenberg, *supra* note 150, at 1229.

<sup>233</sup> Besharov & Vachhs, *supra* note 125, at 42.

<sup>234</sup> Winslade et al., *supra* note 3, at 353.

<sup>235</sup> Francine Russo, *How to Change a Personality*, TIME, Jan. 18, 2007, at 101.

<sup>236</sup> Besharov & Vachhs, *supra* note 125, at 42. Though urologists’ reluctance to perform the surgery “reflects the unusual nature of the procedure,” many practitioners do “not want to become involved because of fear of bad publicity or lawsuits.” Bailey & Greenberg, *supra*

a potentially cruel punishment,<sup>237</sup> the American Civil Liberties Union (ACLU) has been a leader in spotlighting the likelihood of “far-reaching abuse” associated with voluntary castration.<sup>238</sup> In an interview sponsored by the ACLU, lawyer and social critic Wendy Kaminer voiced concern over the potential for corruption inherent in voluntary sentencing practices.<sup>239</sup> Kaminer emphasized her difficulty in “imagin[ing] that when confronted with prison, the choice to have yourself castrated ever could be voluntary. It seems like cruel and unusual punishment to me when it’s coerced.”<sup>240</sup> Thus, opponents of voluntary castration focus on the punishment’s ineffectiveness, brutality, and great potential for abuse.

The proponents of voluntary castration come from disparate backgrounds, including doctors, academics, politicians, and convicted rapists. Contrary to claims made by victims’ rights activists, medical researchers assert that sex offenders can be treated.<sup>241</sup> Some mental health professionals liken pedophilia to alcoholism; as both disorders have genetic origins, many doctors believe both are equally treatable.<sup>242</sup> Some studies indicate that the results of surgical castration are highly successful, as “recidivism rates of non-castrates [were found to be] up to eighty percent compared to as little as 2.2% for castrates.”<sup>243</sup> Others studies show that chemical treatment is effective for paraphiliacs and may be as effective as surgical castration.<sup>244</sup> Proper treatment merely requires accurate diagnosis.<sup>245</sup>

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note 150, at 1245.

<sup>237</sup> See Giordano, *supra* note 209; see also *ACLU of Ark. v. State*, 5 S.W.3d 418 (Ark. 1999) (claiming next-friend standing, the ACLU intervened on behalf of a convicted child rapist to have the surgical castration element of the rapist’s plea agreement set aside).

<sup>238</sup> Larry Helm Spalding, *Florida’s 1997 Chemical Castration Law: A Return to the Dark Ages*, 25 FLA. ST. U. L. REV. 117, 136 (1998); see also Larry Helm Spalding, *Chemical Castration: A Return to the Dark Ages*, TORCH, Aug. 1997, <http://www.aclufl.org/about/newsletters/1997/chem.cfm> (arguing that Florida’s castration statute is “a horrific new punishment [based] on a faulty premise”).

<sup>239</sup> Wendy Kaminer on Crime, June 24, 1995, <http://www.aclu.org/police/gen/14567res20020304.html>.

<sup>240</sup> *Id.*

<sup>241</sup> See Flack, *supra* note 153, at 182–83 (discussing Dr. Fred Berlin’s successful treatment of pedophiles).

<sup>242</sup> See Guthrie, *supra* note 229.

<sup>243</sup> Winslade et al., *supra* note 3, at 370–71.

<sup>244</sup> See Fitzgerald, *supra* note 117, at 5. Paraphiliacs are offenders “who exhibit[] a pattern of sexual arousal, erection and ejaculation, which is characterized by a specific fantasy or its actualization.” *Id.* at 4. Sex offenders are categorized according to particular behavioral traits:

Type I denies the commission of the crime or the criminal nature of the act. Type II confesses to the commission of the crime, but places the blame for the crime on nonsexual or nonpersonal forces, such as alcohol, drugs, or stress. Type III is the violent criminal who is motivated by nonsexual gain, such as anger, power, or violence. Type IV is the paraphiliac . . . .

*Id.*

<sup>245</sup> *Id.* at 5.

Confronted with the reality that the “sexually motivated sex offender will not likely be deterred by lengthy incarceration,”<sup>246</sup> many academics are willing to support alternative treatment programs developed by medical researchers. Responding to the promising statistics that show a substantial decrease in recidivism rates for surgically castrated convicts<sup>247</sup> and relying on studies suggesting that both methods of castration are equally effective,<sup>248</sup> some researchers argue that testosterone-reducing drugs should be accompanied by psychotherapy to help “free[] the offender from his compulsive sex drive” and “reorder his life” while remaining in the community.<sup>249</sup> Rebutting claims of cruelty inherent in the procedure, other legal scholars argue that neither form of voluntary castration infringes Eighth Amendment protections if such decisions are made in “a carefully regulated therapeutic context, accompanied by heightened precautions that bar any penological considerations.”<sup>250</sup> One commentator even argues “castration may even be a more humane form of punishment than incarceration.”<sup>251</sup> But, while calling for “less restrictive alternatives” to traditional incarceration and civil commitment, many scholars are careful to point out that further research is essential to “examining, evaluating, and improving the efficacy of non-biological and biological treatment.”<sup>252</sup>

In addition to looking for methods of lowering recidivism rates and accordingly protecting their constituency from crime, politicians trumpet the tax-saving virtues of voluntary castration. As the U.S. inmate population has dramatically increased to “2.2 million on a given day,” with 13.5 million adults passing through the nation’s prisons and jails each year, the government is required to spend “an estimated \$60 billion on corrections” annually.<sup>253</sup> Furthermore, a recent report counted that “roughly 566,700 registered sex offenders” have been processed by the U.S. legal system.<sup>254</sup> “[T]he cost of operating special facilities for the commitment of sex offenders at the national level is estimated to be \$244 million per year.”<sup>255</sup> In response to this enormous drain on state treasuries, lawmakers are considering ways to combat the overwhelming financial burdens and overcrowding faced by the prison system.<sup>256</sup> When Senator Hanger initially introduced his castration bill to the Virginia Senate, the punishment was included in a list of “cost-reduction methods” intended to cut government spending

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<sup>246</sup> Flack, *supra* note 153, at 179.

<sup>247</sup> See *supra* text accompanying note 243.

<sup>248</sup> See Winslade et al., *supra* note 3, at 371–72.

<sup>249</sup> Fitzgerald, *supra* note 117, at 9, 16–17; Winslade et al., *supra* note 3, at 368–69.

<sup>250</sup> Winslade et al., *supra* note 3, at 411.

<sup>251</sup> Fromson, *supra* note 95, at 320–21.

<sup>252</sup> Shajnfeld & Krueger, *supra* note 226, at 98–99.

<sup>253</sup> Peter Slevin, *U.S. Prison Study Faults System and the Public*, WASH. POST, June 8, 2006, at A4.

<sup>254</sup> Shajnfeld & Krueger, *supra* note 226, at 83.

<sup>255</sup> *Id.* at 93.

<sup>256</sup> See Slevin, *supra* note 253.

in Virginia.<sup>257</sup> As several states require sex offenders to pay treatment expenses, castration programs allowing for reduced sentences can potentially save the states hundreds of thousands of dollars in incarceration costs.<sup>258</sup> Political advocates of voluntary castration thus focus on the treatment's dual benefits of reduced recidivism rates and increased available state funding.

While sentence reductions are certainly appealing when facing decades of confinement, some convicted rapists submit to castration to escape their sexual disorders and take a step toward rehabilitation.<sup>259</sup> Sex offenders suffering from paraphilia "experience 'recurrent intense sexual urges and sexually arousing fantasies of at least six months duration.'"<sup>260</sup> Paraphiliacs are primarily motivated by their consuming sexual desires.<sup>261</sup> These sexual compulsions produce "dangerously insatiable" appetites.<sup>262</sup> Recognizing the severity of their conditions, some convicted rapists seek an equally extreme remedy.<sup>263</sup> Many child molesters make newspaper headlines and draw the attention of legal scholars by choosing to go under the knife.<sup>264</sup>

With powerful interest groups lobbying against one another, there is no dominant and clear public policy position on castration. But, when comparing the two methods of castration, society at large is characterized as more "squeamish" about surgical castration.<sup>265</sup>

In applying the Supreme Court's Eighth Amendment analysis to the castration punishment, a trend emerges pointing towards rejection of voluntary surgical

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<sup>257</sup> See Green, *supra* note 10.

<sup>258</sup> See IOWA CODE § 903B.10.5 (2007); LA. REV. STATE ANN. § 15:538:C(5) (2008); see also Flack, *supra* note 153, at 181 (describing the cost saving benefits of implementing a chemical castration program; the chemical treatment costs \$7000 per year, as compared to the \$24,000 a year to keep a criminal behind bars); Shajnfeld & Krueger, *supra* note 226, at 95 & n.174 (noting that medroxyprogesterone acetate injections, which are effective for up to three months, cost between \$30 and \$75 per treatment, while depot-leuprolide acetate injections cost \$2660 per four-month dose).

<sup>259</sup> See Sam Howe Verhovek, *Texas Frees Child Molester Who Warns of New Crimes*, N.Y. TIMES, Apr. 8, 1996, at B7.

<sup>260</sup> Flack, *supra* note 153, at 175 (citing THE MERCK MANUAL ONLINE, <http://www.merck.com>).

<sup>261</sup> Bailey & Greenberg, *supra* note 150, at 1227.

<sup>262</sup> Flack, *supra* note 153, at 177.

<sup>263</sup> Larry Don McQuay, a self-proclaimed "child-molesting demon" who assaulted approximately 240 children, believed surgical castration might "stop his urge to molest." *Molester Faces Lock-and-Key Parole*, CNN, Apr. 8, 1996, <http://www.cnn.com/US/9604/08/molester/index.html>. Inmate James Jenkins castrated himself with a razor after Virginia officials refused his request for the operation. Rondeaux, *supra* note 11, at B1. Reflecting on his drastic actions, Jenkins said "Castration has done precisely what I wanted it to do . . . I have not had any sexual urges or desires in over two years. My mind is finally free of the deviant sexual fantasies I used to have about young girls." *Id.*

<sup>264</sup> See *supra* text accompanying notes 196, 263.

<sup>265</sup> Winslade et al., *supra* note 3, at 367.

castration and acceptance of voluntary chemical castration. Though arguably proportional in severity to the offense of child rape, surgical castration is a cruel mutilation of the body that has received little support from the courts or legislatures, while garnering substantial public protest. As the objections leveled against surgical castration are largely inapplicable to the chemical treatment, voluntary surgical castration alone should be held unconstitutional.

### III. WAIVING CONSTITUTIONAL PROTECTIONS

As established in Part II, while chemical castration should not be considered an unconstitutional treatment, surgical castration is a cruel and unusual punishment. If the courts accept this argument should a criminal defendant be allowed to waive his Eighth Amendment protections and submit to surgical castration?

#### *A. Establishing the Appropriateness of Waiver*

Though a presumption against waiver is firmly rooted in case law, with “‘courts indulg[ing] every reasonable presumption against waiver’ of fundamental constitutional rights,” defendants are regularly permitted to relinquish some of the protections afforded by the Bill of Rights.<sup>266</sup> In *Johnson v. Zerbst*, Justice Black, writing for the majority, recognized that criminal defendants are entitled to waive certain rights—to “intentional[ly] relinquish[] or abandon[] . . . a known right or privilege.”<sup>267</sup> As waiver jurisprudence developed, safeguards were established to protect defendants from unjust deprivations of their constitutional rights.<sup>268</sup> In certain contexts, only if a defendant’s decision to relinquish his constitutional rights constituted a “voluntary, . . . knowing, intelligent act[.]” would the waiver be recognized.<sup>269</sup> Under this test, voluntariness requires that the waiver “not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.”<sup>270</sup> Additionally, the stipulation that the waiver must also be knowing and intelligent prescribes that the defendant have “sufficient awareness of the relevant circumstances and likely consequences” of his resolution.<sup>271</sup> Furthermore, the knowing and intelligent element presupposes that the

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<sup>266</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

<sup>267</sup> *Id.*

<sup>268</sup> See Kirchmeier, *supra* note 116, at 631–32 (discussing “various situations that do not require voluntary, intelligent and knowing waiver” of constitutional rights).

<sup>269</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970).

<sup>270</sup> *Id.* at 753 (quoting *Bram v. United States*, 168 U.S. 532, 542–43 (1897)).

<sup>271</sup> *Id.* at 748. In the context of inmate medical treatment, a cognizant waiver follows if the defendant is first made to understand the “nature of the treatment, [given] a written description of the purpose, risks and effects of treatment, and advis[ed] . . . of his right to terminate the consent at any time.” *Knecht v. Gillman*, 488 F.2d 1136, 1140 (8th Cir. 1973).

defendant is “mentally competent.”<sup>272</sup> A finding of competency requires that there be no “meaningful evidence that [the defendant] was suffering from a mental disease, disorder, or defect that substantially affected his capacity to make an intelligent decision.”<sup>273</sup> Once a court acknowledges that a competent defendant has voluntarily, intelligently, and knowingly waived a right, efficacy is typically given to the defendant’s resolution.

Criminal defendants are entitled to waive a lengthy list of constitutional protections. Accordingly, the Fifth Amendment protection against self-incrimination<sup>274</sup> and the right to trial<sup>275</sup> can be relinquished. Additionally, the rights of representation by counsel,<sup>276</sup> trial by jury,<sup>277</sup> public trial,<sup>278</sup> prosecution in the jurisdiction where the offense was committed,<sup>279</sup> presence at trial,<sup>280</sup> and provision for a speedy trial,<sup>281</sup> all of which are provided by the Sixth Amendment,<sup>282</sup> can also be abandoned.

These waivable Fifth and Sixth Amendment guarantees display an important commonality—they are all “considered fundamental to the fair *administration* of American justice.”<sup>283</sup> In *Faretta v. California*, Justice Stewart appropriately characterized the criminal defendant’s right “to have the assistance of counsel for his defence,”<sup>284</sup> along with the other Sixth Amendment protections, as “defense tools.”<sup>285</sup> The Sixth

<sup>272</sup> *Knecht*, 488 F.2d at 1140.

<sup>273</sup> *Whitmore v. Arkansas*, 495 U.S. 149, 166 (1990).

<sup>274</sup> *See* *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (holding that the individual has the right to remain silent, but he can waive the right by “choos[ing] to speak in the unfettered exercise of his own will”).

<sup>275</sup> *See* *Brady v. United States*, 397 U.S. 742, 748 (1970) (holding that a defendant’s guilty plea constitutes “consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge” (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964))).

<sup>276</sup> *See* *Johnson v. Zerbst*, 304 U.S. 458 (1938) (holding that the accused can waive the right to counsel).

<sup>277</sup> *See* *Singer v. United States*, 380 U.S. 24 (1965) (holding that a criminal defendant can waive his right to a jury trial if the prosecution and the trial court approve the waiver).

<sup>278</sup> *See id.* at 35 (holding that while “a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial”).

<sup>279</sup> *See* *Platt v. Minn. Mining & Mfg. Co.*, 376 U.S. 240 (1964) (recognizing that a defendant may request change of venue under Federal Rule of Civil Procedure 21(b)).

<sup>280</sup> *See* *Diaz v. United States*, 223 U.S. 442 (1912) (holding that a defendant who voluntarily absents himself from trial waives his right to be present and to confront adverse witnesses testifying during his absence).

<sup>281</sup> *See* *New York v. Hill*, 528 U.S. 110 (2000) (holding that defense counsel can waive the defendant’s right to be tried within a statutorily prescribed period).

<sup>282</sup> U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence.”).

<sup>283</sup> *Faretta v. California*, 422 U.S. 806, 818 (1975) (emphasis added).

<sup>284</sup> U.S. CONST. amend. VI.

<sup>285</sup> *Faretta*, 422 U.S. at 820.

Amendment provides basic procedural protections to “our adversary system of criminal justice.”<sup>286</sup> The Fifth Amendment’s requirement of indictment by a grand jury, elimination of double jeopardy, and barrier against self-incrimination<sup>287</sup> are comparable to the Sixth Amendment’s protections. Waivers of these rights reflect the criminal defendant’s “choice of procedure” during the process of determining guilt.<sup>288</sup>

### *B. Waiving the Eighth Amendment Protection Against Cruel and Unusual Punishments*

Recognizing criminal defendants’ entitlement to relinquish certain procedural rights, the Supreme Court also requires that the principles of waiver “be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty.”<sup>289</sup> Because the Eighth Amendment serves as the final line of protection of constitutional freedoms prior to punishment within the criminal justice system, a defendant should not be entitled to voluntarily waive this essential aegis against cruel and unusual punishment.

#### 1. Contrasting the Results of Waiving Criminal Procedure Rights and Eighth Amendment Protections

The rights protected by the Fifth and Sixth Amendments and the Eighth Amendment are fundamentally different, and unsurprisingly, the results of waiving these liberties are equally divergent. As described above, the Fifth and Sixth Amendments protect procedural rights throughout trial.<sup>290</sup> These provisions assist the trier of fact in making an accurate determination of guilt. A waiver of procedural rights may strategically benefit a defendant<sup>291</sup> without hindering the fact-finder’s assessment of the evidence. In contrast, while the Eighth Amendment includes a procedural component (by prohibiting a tribunal from imposing an unconstitutional sentence),<sup>292</sup> the central import of the provision is to protect a defendant from enduring a brutal and

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<sup>286</sup> *Id.* at 818.

<sup>287</sup> U.S. CONST. amend. V.

<sup>288</sup> *Faretta*, 422 U.S. at 814–15 (quoting *Adams v. United States*, 317 U.S. 269, 279 (1942)).

<sup>289</sup> *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

<sup>290</sup> *See supra* text accompanying notes 283–88.

<sup>291</sup> Fearing jury prejudice, some defendants believe there is an advantage in having a judge decide their case. *See Singer v. United States*, 380 U.S. 24, 25–26 (1965). Other criminal defendants, concerned that an overburdened public defender will fail to represent them adequately, choose to represent themselves. *See Faretta*, 422 U.S. at 807; *see also* Kirchmeier, *supra* note 16, at 646 (suggesting that the defendant’s waiver of procedural rights may not only benefit the defendant, but society as well).

<sup>292</sup> Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 174 (1999) (differentiating between the Eighth Amendment’s “procedural” and “substantive” requirements).

extreme punishment after an establishment of guilt.<sup>293</sup> Unlike the relinquishment of procedural rights, a dismissal of Eighth Amendment safeguards undermines the essential purpose of the constitutional resolution. Sacrificing Eighth Amendment protections following waiver will only subject the offender to tortuous penalties unauthorized in all other circumstances.<sup>294</sup> Even if the choice is made intelligently and knowingly, waiver of the Eighth Amendment immediately exposes the defendant to greater perils than could waiver of Fifth or Sixth Amendment rights. Errors in trial procedure are grounds for appellate review and reversal; a punishment, once inflicted, can never be fully amended. In light of these intrinsic differences, general waiver provisions for criminal procedural rights should not apply to Eighth Amendment protections.

## 2. Court Treatment of Eighth Amendment Waivers

Recognizing this essential distinction between the Fifth and Sixth Amendment rights and the Eighth Amendment protections, several state and federal courts inflexibly held that cruel and unusual punishments may not be imposed, even if the defendant submits to the unconstitutional penalty. In *Henry v. State*, the Supreme Court of South Carolina addressed a defendant's punishment for thirty counts of forgery.<sup>295</sup> A component of the defendant's sentence required banishment from the state "in the event of revocation of his probation."<sup>296</sup> Chastising the trial court's momentously flawed sentence, Chief Justice Lewis asserted that the lower court "was without authority to impose banishment from the State as a condition of probation, even if appellant agreed to the sentence."<sup>297</sup> The probation conditions of the sentence were inherently "invalid."<sup>298</sup> Though Chief Justice Lewis did not directly refer to the Eighth Amendment, he recognized that the defendant's implied waiver of his protections against cruel and unusual punishment failed to give the tribunal power to impose an unconstitutional sentence.<sup>299</sup>

In *Commonwealth v. McKenna*, the Supreme Court of Pennsylvania reviewed a jury sentence imposing imprisonment for ten to twenty years for rape and capital punishment for a murder conviction.<sup>300</sup> The jury submitted this punishment on the

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<sup>293</sup> See *supra* Part I.B.1.a; see also Kirchmeier, *supra* note 16, at 646 (drawing a distinction between the Eighth Amendment's prohibitions of "procedural violation[s]" and "barbaric punishment[s]").

<sup>294</sup> Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die*, 57 HASTINGS L.J. 693, 712 (2006) (arguing that allowing the waiver of Eighth Amendment protections "transmutes what would otherwise be an unconstitutional governmental action into a constitutional one"); see also *infra* text accompanying note 311.

<sup>295</sup> 280 S.E.2d 536, 536 (S.C. 1981).

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* Banishment from a state can be analogized to denaturalization. See *supra* note 112 and accompanying text.

<sup>300</sup> 383 A.2d 174, 176 (Pa. 1978).

basis of an unconstitutional statute granting the panel immense discretion.<sup>301</sup> Though the defendant initially moved to have his sentence reduced, he later withdrew his motion for review.<sup>302</sup> When hearing the case on appeal, Pennsylvania's Supreme Court recognized that the motion's revocation functioned as the defendant's waiver of his right to challenge the constitutionality of both the statute and his sentence.<sup>303</sup> In spite of this waiver, the court concluded that the "sentence [could] not stand and must be vacated, appellant's professed desire to the contrary notwithstanding."<sup>304</sup> Disregarding standard appellate procedure, the court refused to impose a sentence "in a manner clearly contrary to the express law of the land."<sup>305</sup>

Ninth Circuit precedent also held that Eighth Amendment protections cannot be waived. In *Dear Wing Jung v. United States*, the Court of Appeals reversed a lower court sentence that suspended imprisonment on the condition that the defendant leave the country.<sup>306</sup> The appellate court asserted "it is not enough for the government to answer that such condition merely gave the defendant a 'choice.'"<sup>307</sup> The Ninth Circuit reasserted its previous pronouncement on "choice" in *Campbell v. Wood*, stating "the government may [not] cloak unconstitutional punishments in the mantle of 'choice.'"<sup>308</sup> When the Ninth Circuit revisited the issue in *LaGrand v. Stewart*, the principle that "Eighth Amendment protections may not be waived" was affirmed once again.<sup>309</sup>

Although the Supreme Court has yet to refuse a defendant's waiver of Eighth Amendment protections,<sup>310</sup> several Justices have strongly voiced their dissenting belief that Eighth Amendment protections cannot be abandoned.<sup>311</sup> In *Gilmore v. Utah*, Justice White, joined by Justices Brennan and Marshall in dissent, unambiguously stated, "the consent of a convicted defendant . . . does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment."<sup>312</sup> In full agreement, Justice Marshall asserted that the Eighth Amendment protects both the defendants' right "not to be victims of cruel and unusual punishment" and society's interest "in

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<sup>301</sup> *Id.* at 178.

<sup>302</sup> *Id.* at 176.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 177.

<sup>305</sup> *Id.* at 180.

<sup>306</sup> 312 F.2d 73 (9th Cir. 1962).

<sup>307</sup> *Id.* at 75–76.

<sup>308</sup> 18 F.3d 662, 680 (9th Cir.), *cert. denied*, 510 U.S. 1215 (1994).

<sup>309</sup> 173 F.3d 1144, 1148 (9th Cir. 1999).

<sup>310</sup> *See Stewart v. LaGrand*, 526 U.S. 115 (1999) (upholding a criminal defendant's waiver of the right to challenge the constitutionality of his sentence of execution by lethal gas). Professor Kirchmeier believes *Stewart* sets the precedent for arguing that "an elected punishment may never be a cruel and unusual punishment." Kirchmeier, *supra* note 16, at 617.

<sup>311</sup> *See Kirchmeier, supra* note 16, at 633–34 (discussing Justices White, Marshall, and Brennan's analysis of Eighth Amendment waiver in the *Gilmore*, *Lenhard*, and *Whitmore* cases).

<sup>312</sup> 429 U.S. 1012, 1018 (1976) (White, J., dissenting).

ensuring that state authority is not used to administer barbaric punishments.”<sup>313</sup> In *Lenhard v. Wolff*, Justice Marshall reasserted his convictions expressed in *Gilmore* and continued by arguing that “there can be no such waiver” of Eighth Amendment protections because society has an “independent stake in enforcement of the Eighth Amendment’s prohibition against cruel and unusual punishment.”<sup>314</sup> Later, arguing against a defendant’s ability to waive appellate review of his death sentence, Justice Marshall once again argued against waiver, stating that “[b]ecause a wrongful execution is an affront to society as a whole, a person may not consent to being executed without appellate review” in contravention of the Eighth Amendment’s protections.<sup>315</sup> Justice Marshall vividly stressed “a defendant’s consent to being drawn and quartered or burned at the stake would not license the State to exact such punishments.”<sup>316</sup> Beyond considering the immediate, repugnant consequences of enforcing a convicted offender’s waiver of his Eighth Amendment rights, the Justices also acknowledged their duty to act in the best interests of society when handing down sentences.

### 3. Permitting Waiver of Eighth Amendment Rights Is Atrocious Policy

The policy implications of imposing punishments in violation of the Eighth Amendment can never be far from a judge’s mind. As Judge Pomeroy reflected in *Commonwealth v. McKenna*, courts “must consider the interests of society as a whole in seeing to it that justice is done, regardless of what might otherwise be the normal procedure.”<sup>317</sup> Indeed, “giving effect to a strong public interest” is itself deemed “a jurisprudential concern.”<sup>318</sup> Therefore, even when “a defendant may normally make an informed and voluntary waiver of rights personal to himself, his freedom to do so must give way where a substantial public policy is involved.”<sup>319</sup> The social policy embodied by the Eighth Amendment—that of protecting Americans from torturous and extreme punishments—is undeniably one such weighty matter.

As the “evolving standards of decency” must be the lodestar for constitutional analysis under the Eighth Amendment,<sup>320</sup> contemporary societal standards should guide the judiciary’s policy considerations. Though surgical castration has received less support from alternative sentencing proponents than its chemical alternative, public opinion towards voluntary castration remains highly fractured.<sup>321</sup> Without an overwhelming consensus opposing surgical castration, the courts should be directed

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<sup>313</sup> *Id.* at 1019 (Marshall, J., dissenting).

<sup>314</sup> 444 U.S. 807, 811 (1979) (Marshall, J., dissenting).

<sup>315</sup> *Whitmore v. Arkansas*, 495 U.S. 149, 172–73 (1990) (Marshall, J., dissenting).

<sup>316</sup> *Id.*

<sup>317</sup> 383 A.2d 174, 180 (Pa. 1978).

<sup>318</sup> *Id.* at 181.

<sup>319</sup> *Id.*

<sup>320</sup> *See Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>321</sup> *See* Part II.B.5.

by the fundamental and uncompromising dictate articulated by the Amendment itself: “Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.”<sup>322</sup> The cruelty of surgical castration can no longer be questioned. Furthermore, waiving the right to challenge a punishment’s constitutionality does not alter the punishment’s character. Several academics astutely argue that allowing the government to inflict brutal punishments on willing convicts would greatly injure society by ushering in “social and moral decay” through the toleration of “barbarous penalties” and the simultaneous abandonment of “interest in the integrity of the justice system.”<sup>323</sup> The effects of unconstitutional punishments are felt beyond the few directly suffering the sentence. Adopting the medical profession’s mantra of “do no harm,” the courts should err on the side of caution and reject waivers of Eighth Amendment rights rather than allowing offenders to submit to unconstitutional punishments. As Illinois Judge Donald Hudson recognized astutely when sentencing a convicted child rapist, “‘the trading of body parts for a lesser sentence’ would set a ‘dangerous precedent.’”<sup>324</sup>

#### CONCLUSION

The Bill of Rights was penned to fill the need for “essential barriers against arbitrary or unjust deprivation of human rights.”<sup>325</sup> The right to be free from cruel and unusual punishment is one of these indispensable liberties.<sup>326</sup> Though child molesters are among the vilest of criminals, these criminals’ Eighth Amendment rights must be protected, lest we socially regress and re-adopt the barbarous tortures of the Dark Ages.<sup>327</sup> Public policy surrounding established case law suggests that because Eighth Amendment protections should not be waived only chemical castration may be imposed as a just punishment. Surgical castration, even if submitted to voluntarily, is an unconstitutional punishment. Our justice system would become equally as depraved as the child rapists it seeks to prosecute and punish if surgical castration were accepted as an appropriate alternative to incarceration.

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<sup>322</sup> U.S. CONST. amend. VIII (emphasis added).

<sup>323</sup> King, *supra* note 293, at 173; *see also id.* at 172–76 (discussing the slippery slope of Eighth Amendment waiver); Kirchmeier, *supra* note 16, at 642–52 (discussing the public’s overriding interest in Eighth Amendment enforcement).

<sup>324</sup> Bailey & Greenberg, *supra* note 150, at 1225.

<sup>325</sup> Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

<sup>326</sup> U.S. CONST. amend. VIII.

<sup>327</sup> *See supra* Part I.B.2 (discussing the horrific historical means of punishment used in Europe).