

This chapter explores whether chemical castration can be justified as a form of criminal punishment. The author argues that castration via the drug medroxyprogesterone acetate (MPA), or some similar drug, does not achieve the punishment aims of retribution, deterrence, or incapacitation, but might serve as punishment in the form of rehabilitative treatment. However, current U.S. chemical castration statutes are too broad to be justified as rehabilitative. The state is warranted in targeting psychological states in criminal defendants for rehabilitative treatment where such states (a) act as a primary cause of a criminal offender's crime and (b) give rise to extraordinary worries that the offender will recidivate. Current statutes qualify criminal offenders for castration who do not have overwhelming sexual urges or other psychological states causally related to their crime that may be treated with MPA. Thus, even assuming the efficacy of MPA, such statutes are unjustifiable because they apply chemical castration to offenders for whom castration will have no rehabilitative effect.

chemical castration, criminal law, punishment, retribution, deterrence, incapacitation, rehabilitation

## Chapter 13

### Chemical Castration as Punishment

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C13.P1

I begin my analysis of chemical castration as punishment with a case where a criminal defendant in Florida was sentenced to chemical castration. The case of Phu Tran illustrates the way in which current chemical castration statutes may be applied by the courts. Florida passed its statute in 1997. It authorizes trial judges to sentence *any defendant who is convicted of sexual battery* to receive medroxyprogesterone acetate (MPA). If the defendant is convicted of sexual battery and has a prior conviction for sexual battery, the statute *requires* the trial court to impose a sentence of MPA administration (Spalding, 1998, p. 120). The trial judge issuing a sentence of MPA must have a medical consult who determines that the “defendant is an appropriate candidate for treatment” (p. 123). However, the statute does not define “medical expert” or “appropriate candidate.” Informed consent for the treatment is not mandated.

C13.S1

## U.S. Chemical Castration Statutes and the Case of Phu Tran

C13.P2

In 2005, Phu Tran was convicted of sexual battery for digital penetration of two women while they were customers at a nail salon in (*Tran v. State*, 2007). Tran was sentenced to two consecutive terms of incarceration: 8 years in prison for one offense to be followed by 12 years of incarceration for the other offense. At the time of his sentence, the court noted that the 1997 Florida chemical castration statute made a chemical castration order mandatory, but reserved ruling pending an evaluation from an expert regarding whether Tran was a good candidate for castration. Four months later, Tran was sentenced to five years of MPA, the drug most commonly used to chemically castrate, in addition to his prison sentences.

C13.P3

At the court-ordered hearing to determine Tran's candidacy for castration, the state's psychiatrist, Dr. Thomas, testified that she thought Tran might be a sociopath. Dr. Thomas noted that while she was not prepared to say Tran was a "dyed-in-the-wool psychopath," Tran "certainly has some of the

characteristics” (Francheschina, 2005). Dr. Thomas also told the judge that the drugs used in chemical castration were effective in curbing sexual appetite by “shutting down the production of testosterone,” and that persons subject to chemical castration “are eunuchs for all intents and purposes.” In the end, she concluded Tran was indeed a good candidate for the castrating drugs and recommended he be placed on them permanently (although, as already stated, the court gave Tran the much more limited sentence of five years of castration).

C13.P4

In response to Tran’s sentencing appeal, the appellate court said the trial court had made a mistake when it reserved ruling on the duration of Tran’s MPA treatment until four months after the sentencing hearing (Francheschina, 2005). Importantly, the court noted that chemical castration is not to be viewed as pure treatment but instead as a part of a punishment package. This means whether it is to be applied, and its duration, must be determined at sentencing so that the court can ensure that an offender’s punishment package as a whole is proportional to his crime (*Tran v. State*, 2007). The court held that application of additional punishment after a Tran’s sentencing hearing violated

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his constitutional right not to be subject to multiple prosecutions and punishments for the same criminal offense; that is, the trial court had violated the double jeopardy rule. Here is a portion of the court's ruling:

C13.P5

The state contends that the MPA statute is for treatment purposes and does not constitute punishment for double jeopardy purposes. Second, the state argues that even if the statute is for punishment purposes, as long as MPA treatment is ordered at sentencing, the final determination as to the appropriateness of such treatment could be made thereafter without creating a double jeopardy violation. . . . We reject the state's contention that the MPA statute is for remedial treatment purposes, as opposed to punishment. The language of the entire statute speaks of MPA in terms of a sentence and a penalty. In the context of civil commitment proceedings for sexually violent predators, the Supreme Court has indicated that "[t]he categorization of a particular proceeding as civil or

criminal ‘is first of all a question of statutory construction.’ (Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (quoting Allen v. Illinois, 478 U.S. 364, 368 (1986)). As a matter of statutory construction, it would appear that a sentence to administration of MPA does constitute punishment. Pursuant to the statutory scheme, the administration of MPA is imposed as part of a criminal sentence. Indeed, section 794.0235 is placed within Florida’s criminal code, rather than under Florida’s public health code. Compare §§ 394.910-.931, Fla. Stat. (2006) (Involuntary Civil Commitment of Sexually Violent Predators). Since the legislature has deemed MPA treatment a penalty, we conclude that it is part of the defendant’s punishment and sentence. (*Tran v. State*, 2007)

C13.P6

In sum, the appellate court held that once Tran began serving his sentence, the trial court's subsequent order of MPA injections for a period of five years violated Tran’s constitutional rights because it amounted to additional punishment (*Tran v. State*, 2007). And

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because under the statute MPA treatment is a state-imposed punishment, it must be justified as such (i.e., it must serve a purpose of punishment—retribution, incapacitation, deterrence, or rehabilitation).<sup>10</sup>

C13.P7            The Florida chemical castration statute (§794.0235) under which Tran was sentenced has several interesting characteristics. Under the statute, a first-time offender convicted of sexual battery

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<sup>10</sup> Model Penal Code section §1.02(2) states that the general purposes of sentencing is “to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders; and when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i); and (iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (a)(ii)...”

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may be sentenced to castration regardless of the age of the offender's victim. This means that the statute does not target sex offenders who prey upon children, but all sex offenders. As the court in Phu Tran's case noted, chemical castration is mandatory on second offense. The statute also states that the court may sentence an offender to chemical castration, or the offender may voluntarily opt for surgical castration instead. When an offender is sentenced to MPA, this sentence of mandatory if a court-appointed medical expert determines he is a good candidate for MPA treatment (although what makes an offender a good candidate is not specified). Treatment is to begin not more than one week after a defendant who is incarcerated is released. Informed consent for treatment is not required, meaning that the offender subject to an MPA order need not be told of the many side effects of the drug (discussed in detail later in the chapter) If an offender refuses fails to show up for treatment or refuses treatment, he may be found guilty of a second-degree felony and sentenced to life in prison. Finally, a court order must specify a duration for castration, whether it is a specific term or for life (as

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would necessarily be the case if the offender opted for surgical castration).

C13.P8

A few other U.S. states have similar statutes (for an overview of U.S. castration statutes, see Scott & Holmberg, 2003). The California chemical castration statute differs from Florida's because it is aimed at sex offenders who victimize children: any person convicted of a specified sex offense—including sodomy, oral copulation, and sexual penetration—where the victim is under 13 may be punished with castration (Scott & Holmberg, 2003). Similar to Florida, California's statute stipulates that castration may be chemical or voluntary surgical, is at judicial discretion on first offense and mandatory on second offense, and is a condition of parole. However, no medical or psychiatric evaluation is required, and MPA is to be administered until the California Department of Corrections demonstrates to prison board treatment is no longer necessary (Scott & Holmberg, 2003).

C13.P9

In Louisiana, any person convicted of aggravated rape, forcible rape, second degree sexual battery, aggravated incest, or molestation of a juvenile when the victim is under the age of 13, or any repeat sex offender, may be sentenced to chemical

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castration (Scott & Holmberg, 2003). Castration is mandatory if a qualified mental health professional specifies it is necessary in a treatment plan (Scott & Holmberg, 2003). A particularly interesting aspect of the Louisiana statute is its stipulation that the offender must pay the ongoing costs for evaluation, treatment plan, and treatment (including MPA injections). (It is unclear what happens if the offender cannot pay for his injections—I assume he would still be subject to the drug.) In addition, in Louisiana castration is not a condition for release; it is a punishment to be applied in addition to incarceration (Scott & Holmberg, 2003).

C13.P10

Chemical castration works via antiandrogen drugs, often by way of large weekly injections. Depro-Provera® is the brand name for MPA, the drug most often used for chemical castration in the United States. MPA is an analogue of the female hormone progesterone, used to reduce the normal level of testosterone in a male by 50%—a level equal to the level found in prepubescent boys (Smith, 1998). MPA inhibits, through its effect upon neural pathways in the sexual system of the brain, the release of luteinizing hormone from the pituitary gland (Mellella et al., 1989). Luteinizing hormone is the chemical messenger that

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normally stimulates the testicles to produce androgen. Hence, the ultimate effect of MPA is to reduce the level of androgen, especially testosterone, in the blood stream (Mellella et al., 1989). The drug is thought to reduce sex-drive and levels of aggression in men and to reduce the capacity for an erection (Smith, 1998), although the exact impacts of the drug differ from person to person (Stinneford, 2005). MPA has significant side effects, such as osteoporosis, changes in cardiovascular health, blood fat levels, blood pressure and symptoms that mimic women's menopause (Stinneford, 2005). Although chemical castration can be applied as a temporary punishment, and the injections may be halted and offender's sexual function restored, some of these side effects have been found to linger long after injections are stopped.

C13.P11

There is some evidence that judges are not sentencing eligible offenders to chemical castration in the few U.S. states that allow it, even in cases where castration is made mandatory by

statute.<sup>24</sup> However, how the statutes are currently applied is less important than how they *could be applied* in any particular case. Where a certain punishment is legal, the possibility remains that it may be applied to eligible offenders, and if a law is written such that it is likely to generate unjustifiable applications of criminal punishment, the law should be rewritten or repealed. Further, the lack of use means that in the rare cases where an offender is sentenced to chemical castration, his sentence is arbitrary. In his concurring opinion in *Furman v. Georgia* (1972), which found the death penalty to be unconstitutional because its application to a tiny subset of homicide defendants was necessarily arbitrary, Justice Stewart wrote:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . I simply conclude that [the constitution] cannot tolerate the infliction of a

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<sup>24</sup> One law review article notes that from the time the Florida statute was enacted in 1997 to 2005, judges had ordered chemical castration in three of 107 eligible cases (see Simpson, 2007).

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sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed. (*Furman v. Georgia*, 1972)

C13.P13

My analysis here takes the three previously discussed statutes at face value. I will examine whether the aims of retribution, deterrence, incapacitation, or rehabilitation—the four most prominent aims of punishment in the U.S. criminal justice system—can be achieved by chemical castration. I conclude that the only possible aim to be met by chemical castration is rehabilitation; however, as the statutes are written, this aim is not achieved. Thus, all three statutes represent an unjustifiable use of state power.

C13.S2

## The Functions of Punishment

C13.P14

Criminal sanctions, including incarceration, are designed to serve particular functions. These are often called the principles of punishment, and the four primary functions are retribution, deterrence, incapacitation, and rehabilitation.<sup>26</sup> According to the

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<sup>26</sup> Although both restoration of the victim, and reintegration of the offender into the community are mentioned in the Model Penal

principle of retribution, violators of the law should get their “just deserts” such that public censure or punishment is an appropriate response to a wrongful act. The principle of deterrence attempts to influence an offender and other’s decision-making with the threat of punishment. Both the general population and the specific offender who is punished may be deterred from choosing to commit criminal acts by punishment. The principle of incapacitation also aims to stop defendants from offending, but there is no attempt to influence decision-making; instead, the offender’s environment is manipulated to make reoffending impossible, typically via incarceration. Finally, rehabilitation is the idea that offenders can be reformed so that they won’t reoffend.

C13.P15

Most legal scholars agree that punishment aims to fulfill these multiple functions, although adherents of different ethical theories emphasize the importance of different functions. As

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Code purposes section, I discuss neither here, in part because neither seem sufficiently influential in the generation of verdicts or policy in the United States.

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Brown (2002) notes, one of the central problems in the criminal law is that it cannot be justified by a single ethical theory.

Deterrence, incapacitation, and rehabilitation are easily understood as supporting the utilitarian aim of social order because they focus on the harmful consequences of crime.

Deontological moralism, on the other hand, tends to stress the aim of retribution, where punishment is based upon blame and must be proportional to wrongfulness of the crime: criminal offenders deserve moral condemnation and punishment proportional to the harm caused by and/or the moral wrongfulness of their action.

C13.P16

I used to see the functions of punishment as a checklist where the aims were ordered by relative importance: (a) retribution, (b) deterrence, (c) incapacitation, and (d) rehabilitation. But I have come to see this as an extreme oversimplification.<sup>28</sup> Western systems of criminal justice seem to

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<sup>28</sup> I have also come to see deterrence as a less important aim, due to the overwhelming research that offenders tend not to be deterred by threat of punishment (Mendes, 2004; Tonry, 2008) and rehabilitation as more important. Rehabilitation is an

embrace all four of the functions listed, but the relationship between the aims is more complex than an ordered list. Although I cannot give a detailed account of interactions of the functions of punishment and justifying ethical theories here, I now feel that retribution should act as a general constraint on the total *amount* of punishment that can be applied in any case, and the other principles, especially incapacitation and rehabilitation, should primarily inform the *type* of punishment that is applied within the range of appropriate punishment proportional to the offender and his wrongdoing. That is, the total amount of punishment must be proportionate to the crime and to the type of offender (e.g. homicide vs. theft, adult vs. youth offender, offender with full mental capacity vs. diminished capacity); however, questions regarding whether the offender needs to be incapacitated via incarceration, or whether certain types of punishment are likely to deter other offenders similar to this offender in the future or whether certain punishments will rehabilitate (or will reduce the

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especially worthwhile principle of punishment from the virtue theory perspective (Sifferd, 2016).

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possibility of rehabilitation) should also be considered within the overall parameters of proportionality.

C13.P17

Norval Morris (1974) famously advocates this kind of account, often called *limiting retributivism*, and some argue that it is the consensus model of criminal punishment in the United States and Europe.<sup>30</sup> Limiting retributivism is a hybrid theory of punishment, where retributive notions of just deserts provide an appropriate range of justified penalty within which an offender might be sentenced. Backward-looking retributive considerations of proportionality must then be balanced with forward-looking considerations of social order to create a punishment package that first and foremost is proportional to crime and offender, but that also aims to reduce recidivism and overall crime rates.

C13.P18

Morris's (1974) limiting retributivism specifically places strict upper limits on punishment based on desert, but no lower limit (Frase, 2003). Morris also promotes the principle of

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<sup>30</sup> The recently redrafted language of the Model Penal Code's "purposes" section appears to reflect limiting retributivism (Frase, 2003).

parsimony in punishment, which requires that “the least restrictive sanction necessary to achieve defined social purposes should be imposed” (Morris, 1974, p. 59). Courts ought not to impose the maximum an offender deserves unless there are very good reasons to do so and, indeed, should aim to assign lesser sentences and community-based sanctions whenever appropriate (Frase, 2003). Reasons to impose a sentence toward the more severe end of the retributive range include forward-looking considerations such as the need to incapacitate an offender considered especially dangerous.

C13.P19

A limiting retributive account of the aims of punishment diminishes the importance of deterrence in comparison to a pure utilitarian justification of punishment, because retributive considerations set the upper limit of punishment. However, limiting retributivism does not depend solely on notions of just deserts. Limiting retributivism is a “mixed” account of punishment that applies principles from both utilitarianism and legal moralism. Many important legal scholars have adopted some version of a hybrid theory, including H. L. A. Hart (1968), who also viewed desert as providing an upper limit on criminal

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sanctions (p. 237). Hart indicated that one must appeal to a retributive account of appropriateness of punishment given the crime committed, which “set[s] a maximum within which penalties, judged most likely to prevent the repetition of the crime by the offender or others, are to be chosen” (pp. 236–237).

C13.P20

There are worries regarding how any retributive theory, including limiting retributivism, can distinguish wrongful behavior deserving punishment from behavior which the state oughtn't punish (e.g., adultery) and how such a theory can clearly articulate degrees of wrongfulness (Kaplow & Shavell 2002, pp. 303–305). However, I agree with Frase (2003) that the criminal law, especially U.S. state law, already does a pretty good job providing a proportional structure of offenses. There is general agreement that state criminal codes address behavior that ought to be considered criminal and deserving of criminal punishment and do so utilizing a sliding scale matching wrongfulness to degree of punishment. This is the case despite clear instances of overcriminalization of some behavior (as many would argue was the case with the United States' so-called war on drugs) and the fact that the U.S. criminal justice system as a whole may have

failed meet Morris's (1974) principle of parsimony. (That is, while the scale matching wrongfulness of crime to severity of punishment may be in one sense somewhat accurate, the whole continuum of punishments is too severe.)

C13.P21

With regard to articulating degrees of wrongfulness, the Illinois Criminal Sexual Assault Act (720 ILCS 5/12-12, et seq.) provides a good example. Illinois's statute stipulates a wide range of possible sentences for conviction of a sex offense (defined as sexual penetration with force or threat of force) from four years to natural life, depending on the presence of aggravating circumstances. Such circumstances include whether this is a defendant's first offense, whether the victim suffered bodily harm, whether the offender used a deadly weapon, and the age of the victim (both a minor and an elderly victim enhances the sentence). Thus, a first conviction of simple sexual assault might result in anything from a 4-year to a 16-year prison sentence, and aggravating factors may further increase the range of sentence: sexual assault resulting in bodily harm or of a young victim carries a sentence of 6 to 30 years on a first conviction and natural life if the offender is being sentenced for a second sexual assault.

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C13.P22

However, as previously indicated, Morris's (1974) limiting retributivism does not generally provide minimum sentences. The Illinois statute stipulates a four-year minimum. In addition, Morris encouraged judges to cluster sentences around the lower end of the range indicated by considerations of desert, which I can say from experience the Illinois Cook County Criminal Courts often do not do. Even so, the Illinois statute, like many state statutes can be taken as an example of limiting retributivism in action. All of the aggravating factors listed in the statute represent aspects of the crime that speak to a retributive assessment of desert and incrementally increase punishment based on these factors.

C13.P23

Although the Illinois statute provides an example of retributive notions of just desert acting to delimit the appropriate range of punishments, it does not invite serious consideration of forward-looking aims of punishment except those automatically achieved by incarceration (e.g., incapacitation and possibly deterrence). There are no specifically rehabilitative options available to the court sentencing a sex offender in Illinois, as there are for offenders sentenced for a drug conviction, where an Illinois drug court may order mandatory addiction treatment (see 720

ILCS 5/12-12, et seq.). I will argue that chemical castration cannot be justified as appropriate retributive punishment or as achieving the aims of deterrence or incapacitation, but might be justified as part of an punishment package by the forward-looking aim of rehabilitative treatment for a small subset of sex offenders, in the same way that coercive medical treatment for drug-addicted offenders is a justifiable punishment.

C13.S3

## Retribution

C13.P24

As previously discussed, limiting retributivism aims to use considerations of just desert and proportionality to set the upper limits of a criminal sentence. Such a sentence often consists in a stint in prison, but Morris also supported community-based sanctions and treatment programs (Morris & Tonry, 1991). Indeed, Morris and Tonry wrote an entire book in support of what they called “intermediate punishments” that lie between prison and probation in response to the explosion of the U.S. prison population, advocating sentences of intensive probation, substantial fines, community service orders, residential controls, and treatment orders (Morris & Tonry, 1991, p. 4). They argued

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that such sentences are a more proportional response to many felonies, less expensive than traditional incarceration, and more likely to accomplish treatment objectives than prison-based treatment (Morris & Tonry, 1991). Thus, the hybrid theory of limiting retributivism is certainly compatible with sentences other than prison.

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Even so, I do not think the particular sentence of chemical castration cannot be directly justified as a state-sanctioned punishment on retributive grounds. As University of Chicago law professor Dan Kahan (1996) has noted, although we seem comfortable with the notion that the purpose of sending offenders to prison is at least in part to cause suffering, European countries and the United States openly reject states using alternative means of causing suffering, especially corporal punishment. In 1978, the European Court of Human Rights found corporal punishment violated Article 3 of the European Convention on Human Rights because it was fundamentally degrading (*Tyrer v. United Kingdom*, 1978). In the United States, the last instance of state-imposed corporal punishment occurred in Delaware in 1952 (a flogging). Since this time the legal community appears to be

operating as though corporal punishment violates the Constitution's prohibition against cruel and unusual punishment (although the Supreme Court has not decided the question). If chemical castration is cast as a purely retributive punishment, it seems to be the type of inhumane corporal punishment no longer practiced.

C13.P28

Further, retributive punishments must be proportional to the type of agent and degree of harm caused, and chemical castration would seem to be proportional in the *lex talionis* sense. *Lex talionis* punishments are retaliatory eye-for-an-eye punishments similar in kind to the crime committed. One can see *lex talionis*-type retributive sentiment in this statement on chemical castration found in a New York University Law School forum blog (in the blog's corpus, not in the comments): "I fail to see the problem with irreversibly invading and mutilating a child-rapist, much less causing him to suffer the side effects of menopause. In fact, there seems no more fitting a punishment for the child rapist (NYU Forum on Law, Culture, and Society, 2012).

Chemical castration, at least when viewed as a retributive punishment, would seem to harken back to the days when Thomas

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Jefferson (1778) wrote a bill that included sentences of up to 15 lashes for witchcraft; death by poison for those who killed by poisoning; castration for men guilty of rape, polygamy, or sodomy; and a minimum half-inch hole bored in the nose cartilage of women convicted of sex crimes. Morris and Tonry (1991) refuse to even discuss the idea of retaliatory corporal punishments in their book on limiting retributivism:

C13.P29            We shall not discuss corporal punishments, the lash, the birch, the chopping of hands and tongues, the slitting of lips and noses, the slicing of ears. They are less romantic than brutalizing, not only to those who suffer such punishments but—and the historical record is clear on this—to the society that applies them. (pp. 5–6)

C13.P30            In sum, cast as a retaliatory corporal punishment, chemical castration would seem to be degrading, brutalizing, or cruel such that it may violate the U.S. Constitution Eighth Amendment’s prohibition against cruel and unusual punishment. Certainly, the punishment is unusual in that it only seven states have chemical castration statutes (Stinneford, 2005, p. 559). Scholars also argue

that the practice is cruel because its aim to “exert control over the mind of the offender by rendering it incapable of experiencing sexual desire” which violates offenders’ dignity and has painful, disabling, and possibly fatal long-term effects (Stinneford, 2005, p. 559), thus the practice may be seen as violating contemporary standards of decency.

C13.P31

In addition to these concerns, there are other, more pragmatic worries about chemical castration as retributive punishment. As famous jurist William Blackstone (1879) argued:

C13.P32

Retaliation may sometimes be too easy a sentence; as if a man maliciously should put out the remaining eye of him who had lost one before, it is too slight a punishment for the maimer to lose only one of his. . . . Besides there are many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like. (p. 13)

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C13.P33

One can imagine cases where castration of a sex offender might be both too easy and too tough a retributive sentence. Imagine a pedophile who is disgusted with himself for committing sex crimes against children to the point where he is suicidal.

Treatment that diminishes his sexual desire for children may be a relief for this offender, not painful retaliation for his crimes. On the other hand, an undergraduate man who date-raped another undergraduate might legitimately argue that a sentence of chemical castration for even an intermediate length of time—let's say, 10 or 15 years—would be too severe a sentence, especially given that it is likely to impact his ability to obtain a partner and have children during the normal span of time within which most persons start a family.

C13.P34

Blackstone's worries about state "wickedness" are also important. State-endorsed physical harm of citizens can undermine the state's authority to impose legal duties and thus rule of law. A state that performs violent acts against its citizens, even in response to violence, may lose the moral high ground in the eyes of the citizenry necessary to request that citizens do not respond similarly to violence committed against them. From the

perspective of the theory of law proposed by Hart (1961), state-imposed violent corporal punishment may degrade the social acceptance he claimed was vital to citizens' felt obligation to follow the law.

C13.P35

It seems clear that chemical castration does not achieve aim of retribution in a way acceptable to a modern liberal democracy. Retaliatory physical harm by way of direct brain manipulations ought not be considered an appropriate response to sex crimes, because such a punishment (a) is degrading, inhumane, and may be unconstitutionally cruel and unusual; (b) may constitute both too lenient and too severe a punishment, depending on the case; and (c) may undermine the state's moral authority and thus rule of law.

C13.P36

Therefore it seems chemical castration as a state-sanctioned criminal punishment must accomplish a forward-looking aim of punishment to be justifiable. Next I will consider whether castration achieves the aims of deterrence, incapacitation, and rehabilitation.

C13.S4

## Deterrence

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C13.P37 There are two ways in which a potential offender may be deterred by punishment. First, criminal punishments may reduce the overall rate of crime in the general population. This is termed *general deterrence*. Second, an offender who has experienced criminal punishment may be deterred from committing future crimes because of this experience. This is called *specific deterrence*. In both cases persons considering committing a crime are dissuaded from doing so to avoid the unpleasantness of punishment.

C13.P38 Deterrence anchors many utilitarian accounts of punishment. Bentham (1996) argued that more severe punishments were necessary to convince potential offenders not to commit more serious crimes (which, in many cases, have a bigger payoff for offenders), while lesser punishments were enough to convince citizens not to commit lesser crimes. Thus a fine might be enough to stop people from speeding or parking in a handicapped spot, but a hefty penalty such as a long prison sentence might be needed to convince a potential offender not to kill someone they really wanted dead. In this way some utilitarians argue the appropriate criminal punishment for a crime is (at least

in part) determined by the rational calculus of costs and benefits of the crime to the potential offender.

C13.P39

However, this sort of utilitarian way of determining criminal penalties has been undermined by research on deterrence. Although it seems that in general the existence of a criminal justice system may deter some persons from crime, and thus societies with state-enforced criminal penalties may have lower crime rates than they would have without criminal penalties, 30 years of studies on deterrence have made clear that even very broad changes in punishment regimes have almost no effect on rates of offending (Tonry, 2008). That is, even very severe increases in punishments, such as three-strikes laws that applied life in prison sentences to an offender's third felony conviction, or the death penalty to aggravated homicides, have little or no effect on crime rates (Tonry, 2008). Even though persons who commit crimes must in some sense know that their acts may be subject to criminal punishment, the type or severity of punishment that may be applied seems to have little effect on their decision-making (Tonry, 2008).

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C13.P40

Because of this, it is exceedingly unlikely that potential offenders within the few states with chemical castration statutes will be deterred from sex crimes by the specific threat of castration. First, many potential sex offenders in these states won't know that their act may be subject to a chemical castration statute. In this case the threat of castration can have no deterrent effect in addition to a general desire to avoid criminal punishment. Second, even if a potential sex offender knew he was committing a crime within a state with a chemical castration statute, he may not think his act in particular would be likely to result in castration: in the previously discussed case, even the judge seemed surprised that castration was a mandatory penalty for Tran because the two incidents amounted to repeat sex crimes. And, as we have already noted, many judges within the states that have chemical castration as a possible penalty fail to apply the penalty when offenders qualify. In general, sex offenders may experience less fear of criminal punishment than other types of offenders because of the large percentage of sex crimes that are not reported—the majority, according to the National Institute of Justice (2010b). An even smaller subset of sex crimes reported actually result in a criminal

conviction. For all of these reasons, the particular punishment of chemical castration cannot be considered a *general deterrent* for persons who may commit qualifying sex crimes and thus cannot justify the previously discussed castration statutes.<sup>57</sup>

C13.P41

There is a somewhat stronger likelihood that chemical castration could act as a *specific deterrent*. We might imagine a case where an offender who was chemically castrated decides not to commit another sex crime for fear of another round of MPA

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<sup>57</sup> It is unclear whether proposed penalties would have a robust deterrent effect in an ideal criminal justice system, where the application of criminal penalties was swift and 100% accurate. Even in this case, there would be epistemic and other agential limitations on deterrent effect. Given this, it is so unlikely our criminal justice system will approach ideal deterrent effect that we need not discuss the possibility further. (Note the difference, too, between the likelihood that a judge will unjustly apply a chemical castration statute as written in a particular case and the likelihood that our criminal justice system and possible offenders will function so as to have a better deterrent effect.)

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treatment. But this scenario assumes an offender who, like Phu Tran in Florida, is given a sentence of MPA for a limited duration. In California, however, MPA is to be administered as a condition of parole until the California Department of Corrections demonstrates to prison board treatment is no longer necessary. If the California Department of Corrections made a point of demonstrating to the prison board that MPA is no longer necessary, we might assume the offender in question is reformed such that a specific deterrent effect is unnecessary.

C13.P42

In Florida and Louisiana, it is possible a castrated offender might be taken off MPA and then deterred by the possibility of being recastrated. However, in both states MPA sentences can be quite long, even lifelong. And in the case of a shorter sentence, say, where the offender is given the drug until he is in his 50s, it may be that by this point in his life he is less likely to suffer from very strong sexual urges due to old age and thus would have less need for a deterrent. (Indeed, many offenders may “age out” of criminal tendencies.) Finally, it is obvious that if an offender opts for voluntary surgical castration under the Florida or California statutes, there can be no specific deterrent effect. But, in small

number of cases in Florida and Louisiana, it is possible, if extremely unlikely, chemical castration could serve as a specific deterrent.

C13.P43

There is a deeper problem than worries about duration with the notion of castration as specific deterrent, however. To be deterred by the threat of chemical castration an offender must experience chemical castration as unpleasant, so he will choose not to commit another sex crime so as to avoid being recastrated. But this may not be the case. Some sex offenders choose to be surgically castrated because they wish to be rid of their deviant sexual urges forever, and other sex offenders feel that administration of MPA helps them become a fully responsible agent, because, as Cephalus in the Pato's *Republic* might say, it rids them of a "mad master" (Book I). If chemical castration acts as some psychiatrists and psychologists say it should, and it reduces overwhelming sexual urges so as to allow offenders to make more responsible sexual choices, it may be experienced as a positive treatment for an unwanted affliction. In this case, the drug would certainly have no specific deterrent effect, although it may

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have a therapeutic and possibly incapacitative effect (see the following discussion).

C13.P44

Because chemical castration is extremely unlikely to have a general deterrent effect and because chemical castration may have a specific deterrent effect only a very small number of offenders who qualify for castration under the statutes, it seems that the Florida, California, and Louisiana chemical castration statutes cannot be justified by appeal to castration's deterrent effect.

C13.S5

## Incapacitation

C13.P45

The aim of deterrence focuses on the way punishment might convince a person not to commit crimes. Punishment that incapacitates, on the other hand, *forces* an offender not to reoffend. If chemical castration incapacitates sex offenders from committing sex crimes, without the cost of keeping them in prison, then it seems this might be a good forward-looking justification for the punishment.

C13.P46

However, as previously discussed, under limiting retributivism (the justification of punishment manifest in the U.S.

Model Penal Code), use of MPA as incapacitation of criminal offenders ought to be limited by retributive considerations of proportionality of crime and type of offender to sentence. For example, we ought not to incapacitate offenders in prison indefinitely if the proportional upper limit of punishment for their crime is a 15-year sentence, regardless of how dangerous we think they are. Partly, of course, this is because any assessment of dangerousness is only a best guess regarding an offender's likelihood of recidivism. The length of a castration sentence ought to be limited to the amount of punishment allowed by notions of just desert. The appellate court in Pho Tran's case recognized this limitation when it demanded the length of the administration of MPA be determined at sentencing: administration of MPA must be viewed as one component of a sex offender's punishment package, where the total amount of a sex offender's punishment must be made to fit within the proportional limiting range of appropriate punishments.

C13.P47

This means that the California statute, which indicates that MPA should be used as a condition of parole for as long as the

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Department of Corrections deems necessary,<sup>59</sup> probably consists in an unjustified use of MPA as incapacitation. In the absence of an effort on the part of the Department of Corrections to show the offender no longer needs the MPA, the default will be to continue MPA injections for the rest of his life. Thus, the length of time the offender is subject to administration of MPA is dependent not on a proportional period of time given the offender's offense and level of responsibility, but instead, on the Department of Corrections' determination that the treatment is "necessary" (where the reasons it might be necessary are not specified in the statute). In addition, the Florida and California statutes, which indicate that an offender may have voluntary surgical castration in lieu of administration of MPA, may also generate sentences meant to be incapacitative that

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<sup>59</sup> California Penal Code 645(d) reads in full: "(d) The parolee shall begin medroxyprogesterone acetate treatment one week prior to his or her release from confinement in the state prison or other institution and shall continue treatments until the Department of Corrections demonstrates to the Board of Prison Terms that this treatment is no longer necessary."

violate proportionality. Surgical castration is obviously a lifelong punishment. In many cases this permanent sanction will exceed the upper limit of proportional punishment for a particular offender, regardless of whether this was his “choice.”

C13.P48

However, there is another, more important concern regarding chemical castration as incapacitative punishment: namely, that MPA may not actually incapacitate sex offenders from sex crimes. Prison incapacitates by removing an offender from society, thus making it impossible to commit most crimes. Castration does not, however, remove an offender from situations where he may commit a sex crime; instead, it attempts to address the cause of sex crimes (sexual urges, assuming that this is indeed the cause; see the following discussion) regardless of where he is located (and often, castration is a condition of release into the community). Some proponents of chemical castration (i.e., politicians) seem to think that MPA removes an offender’s ability to have an erection—although it is not clear MPA does this—and thus his ability to commit a sex offense is removed. But, of course, this is not the case, as Phu Tran’s sexual assault shows (Phu Tran digitally penetrated his victims).

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C13.P49

Studies of recidivism rates of chemically castrated offenders clearly show that MPA should not be considered incapacitative despite evidence that it reduces sexual desire (see Chapter 12 of this volume). Anecdotally, psychiatrist Chris Ryan tells me that some sex offenders experience better sexual function on MPA. But even if chemical castration severely limits sexual desire—and reduces sexual capacity to some extent—a sex offender’s sexual desires and capacity may not be causally related to his past sex offense or to the likelihood he will commit another sex offense in the future. Remember the Pho Tran case. It seems likely that Tran was motivated to sexually assault the two clients of the nail salon where he worked because of the sexual desire he felt for the two women. In this case MPA may work to reduce the overwhelming sexual urges Tran feels toward women once he is released, and it *may* have an effect on reducing the likelihood of recidivism. But there are other stories we might tell about the motivations of Tran. It is at least possible that instead of experiencing overwhelming desire for sex with the women, Tran has a deep-seeded hatred of women. (Maybe he was sexually abused by a woman as a child, or maybe he was ridiculed one too

## Chemical Castration as Punishment

many times by women in school.) On this story of Tran's crime, when Tran sexually assaulted the women, he felt no sexual desire at all, but instead felt hatred and anger and thus wanted to make the women feel powerless and under his control. Or, imagine Tran has a low IQ and some intellectual disabilities and was raised in a very sheltered environment where his overbearing mother ignored his sexuality. His first job outside of the home was at the nail salon, and a vindictive neighbor told him that if he thought a woman was pretty, she would like it if he assaulted her. In this case, sexual desires are one of the causes of Tran's assaults, but he isn't suffering from overwhelming sexual desires such that administration of MPA seems to be the best means to reduce Tran's likelihood of recidivism. Certainly, in this third set of imagined circumstances, it makes more sense to educate Tran than to castrate him. And if his hatred for women was the primary cause of his crime, Tran is unlikely to be incapacitated by the reduction of his sexual urges, although the level of aggression he feels toward women might be impacted by the drugs (but not, probably, his hatred).

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C13.P50

I'm willing to go out on a limb and speculate that the reason why studies find chemical castration has little to no effect on recidivism—although there is anecdotal evidence that voluntary administration of MPA can help some sex offenders and others who suffer from sexual disorders—is because sex offenses are committed for a plethora of reasons, and overwhelming sexual urges are just one category of such causes. Decreasing sexual urges, and even decreasing overall levels of aggression, may have no impact on some sex offender's likelihood of committing a sex offense because it might not address many of the psychological causes of his past antisocial decisions and might thus also fail to address his likelihood of recidivism. Anecdotal stories may identify a sex offender who is plagued by strong, unwanted desires for illegal sexual partners or acts and who can successfully use MPA as a means to decrease his attraction to illegal sex partners, along with therapy and other tools. But the larger studies identified by Ryan (see Chapter 12 of this volume) tend to focus on administration of MPA to large categories of offenders, where the category is defined by the type of crime an offender committed. Within these categories many offenders may not have

overwhelming sexual urges, nor the desire to alter their decision-making or access to multiple sources of treatment. Even if administration of MPA impacts sexual capacity, it will not incapacitate most of these offenders from sex offenses.

C13.P51            In sum, there is some evidence that MPA may lessen sexual desire and/or levels of aggression, but it isn't at all clear that this creates an *incapacity* to commit sex crimes. Studies indicate that most of the offenders who qualify for chemical castration under the Florida, California, and Louisiana chemical statutes will not be incapacitated by administration of MPA (or surgical castration, for that matter). It could be that a detailed medical exam could be used to identify the subset of sex offenders who suffer from overwhelming sexual urges and thus who might be less likely to recidivate if given MPA. But note, even these offenders will not be incapacitated by the drug in the same way they would be by incarceration. Instead, it makes more sense to consider MPA a rehabilitative tool that could help them decide not to recidivate. For these reasons, the previously discussed castration statutes cannot be justified on incapacitative grounds.

C13.S6            **Rehabilitation**

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C13.P52

While it is tempting to see rehabilitation as incompatible with punishment, this view is incorrect. Punishment is best understood as a *response to crime*. . . . Rehabilitation is one of many possible responses.

C13.P53

—Thom Brooks (2012) p. 56

C13.P54

A punishment is rehabilitative if it reforms an offender such that he chooses not to commit further crimes. Rehabilitative programs attempt to influence offenders' rational processes such that they are more easily able to follow legal norms, either by giving them skills that will improve situational factors and decrease their likelihood of recidivism, or, in some cases, attempt to address specific problems directly related to an offender's past crime. For example, job training or the opportunity to earn a GED (high school diploma equivalent) may make it more likely an offender will get a job upon release, and thus decrease his chance of performing illegal acts as a way to earn money. Anger management therapy or mindfulness training, on the other hand, attempts to directly impact offender's decision-making processes

by teaching him to slow down and more carefully consider the consequences of behavior.

C13.P55

Some scholars have worried about chemical castration as punishment because it consists in a court-ordered direct brain intervention (Stinneford, 2005). However, there is another direct brain intervention already widely accepted as part of a court-based rehabilitative program: drug courts often mandate medical treatment of addicted drug offenders. A drug court is a specialized or problem-solving court that targets criminal offenders who have alcohol and other drug addiction and dependency problems. As of 2013, there were over 2,800 drug courts operating throughout the United States (National Institute of Justice, 2010a), and roughly half of them offered medication as a part of addiction treatment (Matusow et al., 2013). Such treatment is rehabilitative in that it reduces the strength of, or eliminates, persistent, intrusive psychological states directly related to offender's crime and likely to cause recidivism (e.g., cravings). Although drug treatment regimens are rehabilitative, they are also coercive in that if an offender refuses treatment he is removed from the program. Often an offender has to plead guilty to the charges against him to stay

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within the drug court system, but the normal penalties for the charges are held in abeyance during treatment (Bahr, Masters, & Taylor, 2012). If the offender finishes his or her treatment successfully, the charges are dropped. If he or she fails to finish treatment, the offender is sent to jail or prison to serve their sentence (Bahr et al., 2012).

C13.P56

One example of a medical treatment used by drug courts is topiramate, which treats alcohol and cocaine addiction.

Topiramate is thought to decrease cravings and has been found to significantly improve addiction treatment outcomes (Bahr et al., 2012). Importantly, treatment of offenders handled by drug courts is almost always initiated and guided by a medical professional (Bahr et al., 2012). Medication is often given in conjunction with therapy, which assists the offender in behavior modification to avoid triggers for their addiction and seek healthy alternatives such as exercise. The best outcomes for drug court programs are associated with a multifaceted treatment approach (Bahr et al., 2012).

C13.P57

I have shown that it is unlikely chemical castration can be justified by the aims of retribution, deterrence, and incapacitation.

But the similarities between the overwhelmingly accepted administration of medicine to drug offenders to reduce cravings by drugs and administration of MPA to reduce overwhelming sexual urges in sex offenders indicate that chemical castration might be properly seen as rehabilitative treatment. However, as I will show, there are many difficulties fitting chemical castration within the rehabilitative treatment model. In the end, I argue that chemical castration as currently allowed under U.S. statutes cannot be considered rehabilitative treatment because of the way in which these statutes administer MPA to sex offenders.

C13.P58

The biggest problem with the chemical castration statutes is that there is no consistent matching between psychological disorders or symptoms and MPA as treatment for such disorders or symptoms. Let's just assume for the sake of argument that MPA acts to lessen sexual urges and urges to act aggressively. Let's also assume, as I previously argued, that sex crimes are committed for any number of (often compound) reasons, including overwhelming sexual urges; feelings of aggression, hate, frustration, and confusion; false beliefs; and plain old selfishness or narcissism. Some sex offenders captured by the chemical

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castration statutes probably have overwhelming sexual urges, but many do not. Some sex offenders captured by the statutes probably have strong aggressive urges, but many do not. Some sex offenders captured by the statutes may have both sorts of urges, but many may not have either. Again, even assuming the efficacy of MPA in reducing these urges on its own without supplementary treatment such as therapy—something I don't think it is safe to assume—the administration of MPA to the group of offenders that qualify for chemical castration in Florida, California, and Louisiana will treat a psychological disorder or symptom in only some (likely small) subset of these offenders.

C13.P59

This means the state will end up “treating” psychological states within offenders that are unrelated to his crime and unrelated to concerns that he will recidivate with regard to a similar type of crime—and this is worrying for reasons other than just MPA's inefficiency as treatment. Imagine if, once an offender was found guilty of a crime, the court was justified in targeting for rehabilitation *any* psychological aspect of the offender that the state determined was dangerous. The state could then decide to “rehabilitate” any psychological traits correlated with higher rates

of recidivism with regard to any type of crime. For example, an offender convicted of theft might be coerced into anger management, or addiction treatment, or even administration of MPA, if the court determined he had psychological symptoms or disorders that might lead to future crimes.

C13.P60

But this would clearly be a violation of the offender's agency (and as I will argue, constitutional rights): state-sanctioned punishment is a response to a specific commission of a crime, and forward-looking aims of punishment ought to target recidivism via mandatory or coercive programming only with regard to the type of crime for which the offender was convicted. Imagine the alternative: what if a person arrested and convicted of stealing an automobile were subjected by the state to a battery of psychological tests to determine if he had a likelihood of committing other crimes, including sex crimes? What if this offender was then forced into mandatory rehabilitative programming for these proclivities (unrelated to his crime)? In this case a person arrested for theft might be subject to anger management therapy or even chemical castration during his time under state supervision resulting from his theft conviction.

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C13.P61

I think this would be problematic for several reasons. First, forcing an offender convicted of theft to take such wide-ranging psychological tests seems to be a clear invasion of privacy and possibly an unconstitutional search.<sup>69</sup> The state is not entitled to review and assess the entire psychology of an offender just because he has committed a crime. Second, tailoring coercive punishment to psychological proclivities unrelated to an offender's crime would seem to violate due process.<sup>70</sup> The Fifth

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<sup>69</sup> In the United States, courts can force defendants to undergo a mental evaluation, but only in certain circumstances (e.g., cases where the defendant has claimed legal insanity or incompetence).

<sup>70</sup> In *Washington v. Harper* (1990), the U.S. Supreme Court held that the due process clause permits a state to treat an incarcerated inmate for a serious mental disorder with antipsychotic medication against his will only where he is dangerous to himself or others, and the medication prescribed is in his best medical interest. It thus seems likely involuntary treatment of criminal proclivities unrelated to an incarcerated offender's crime may violate due process.

## Chemical Castration as Punishment

Amendment of the U.S. Constitution guarantees of due process provides that “no person shall . . . be deprived of life, liberty, or property, without due process of law.” In this case, the court would seem to deny liberties (very important liberties, in the case of chemical castration) via rehabilitative programming in response to criminal proclivities without using the judicial process to find the offender guilty of a crime related to those proclivities. I would argue that there is no clear difference between the state looking for and addressing criminal proclivities unrelated to an offender’s crime and the state randomly reviewing law-abiding citizens for criminal proclivities and then addressing such proclivities.

C13.P62

In other words, the state has no more right to address the possibility that an offender convicted of theft will commit a sex offense than they have to address a worry that an as-of-yet law-abiding citizen will commit a sex crime based upon the presence of certain psychological states. The state is not justified in coercive rehabilitative treatment in an attempt to reduce recidivism with regard to other types of crime than the one for which the offender is being punished.

## Healing People

C13.P63

This becomes even more clear when one notes that if the drug court statutes were written like the chemical castration statutes, every offender who committed certain drug crimes or committed a repeat drug crime might be mandated by statute to undergo medical treatment for addiction, *regardless of whether they have a drug addiction*. Instead, drug courts are designed by statute to identify drug-addicted offenders and to mandate treatment only for such offenders (Bahr et al., 2012). In general, drug offenders whom the court suspects are addicted undergo a medical evaluation. If the offender is found to have an addiction that led to his drug crime, the court may then offer treatment for that addiction, although again, the “offer” is coercive in that refusal will usually result the offender serving their sentence.

C13.P64

Of course, the state may be justified in offering offenders *volunteer* rehabilitative opportunities that may impact many aspects of their psychology, and it should: yoga, chess, gardening programs, job training in demolition, and bee-keeping are all programs offered to offenders housed in the Cook County Jail (the county Chicago is located within) as a means to occupy inmates’ time in a constructive way, with hopes that they may increase the

inmates' mindfulness and job prospects. But when the state wishes to treat an offender via *coercive medical treatment* such as MPA, the treatment must be narrowly tailored to address an aspect of an offender's psychology that was a primary cause of their crime and, further, is a cause for extraordinary worries that the offender will commit the same type of crime once he is released. Again, this is because any coercive rehabilitative punishment must be a narrowly targeted response to the crime committed such that it constitutes a proportional response to the criminal act that is likely to actually reduce the likelihood of recidivism with regard to the type of crime committed.

C13.P65

Assessment of drug court programs indicate that they do indeed reduce rates of recidivism (Bahr et al., 2012). This may be because they are designed to target rehabilitative treatment more carefully at a group of offenders who suffer from a common psychological disorder. This targeted psychological disorder, addiction, is quite likely to be a primary cause of their crime and also a likely cause of recidivism. This may also be due to the multifaceted approach to treatment of addicted offenders, where offenders are also given drug tests and therapy or because drug-

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addicted offenders are more likely than sex offenders to be willing participants in their treatment program. Drug-addicted offenders can choose to reject their treatment and go to prison to serve their regular sentence, whereas sex offenders subject to MPA orders may face a significantly increased sentence, such as life in prison.

C13.P66

Thus, while chemical castration bears some surface-level resemblances to the treatment model of the drug courts, the latter succeeds as a rehabilitative treatment (and reduces recidivism) because it narrowly targets the psychological states that led to an offender's crime, encourages offender "buy-in" and supports medication with other forms of treatment, such as therapy. Chemical castration statutes lack any of these features and therefore cannot be justified as rehabilitative punishment.

C13.P67

But readers at this point may be forgiven for thinking I have forgotten an important aspect of the Florida and Louisiana statutes: the required medical evaluation. Isn't this part of the statute precisely meant to require a psychiatrist to identify a sex offender's primary reasons for committing their sex crime and then to use this information to determine eligibility for MPA, in the same way a drug court may use medical professionals to

determine who is a drug addict? I think it isn't at all clear that the statutes were written to include a medical examination for this purpose, and in practice, it seems unclear that courts and court-ordered psychiatrists understand this to be the aim of medical evaluations under the castration statutes. The Florida statute (§794.0235(2)(a)), for example, provides that "an order of the court sentencing a defendant to medroxyprogesterone acetate (MPA) treatment under subsection (1), shall be contingent upon a determination by a court-appointed medical expert, that the defendant is an appropriate candidate for treatment." As Spalding (1998) notes, there is no stipulation as to who counts as a medical expert (any MD? a MD with a certain specialization? a nurse? a psychologist?), nor any information on what qualifies an offender as an "appropriate candidate" for treatment. Is the medical experts just looking to see if the offender could physically tolerate the treatment, or is he or she looking for whether the treatment will be effective—and if yes, effective in what sense?

C13.P68

Consider again Phu Tran's case. Tran was convicted of digitally penetrating two clients of the nail salon where he worked. The court record doesn't make it at all clear *why* he assaulted the

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women: he could have experienced overwhelming sexual desire and acted upon it, or he could have hated the women and wanted to violate them due to this hate, or he could have desired the women and not really understood his actions were unwanted (or at least criminal). Tran's reasons for breaking the law aren't really relevant to his guilt: if he sexually penetrated the women by force or without consent, Tran committed a crime. But Tran's reasons for committing the crime *are* relevant to whether or not Tran should be considered a good candidate for the rehabilitative treatment of MPA. If Tran committed the crimes from overwhelming sexual urges MPA might be a useful tool for his rehabilitation, by diminishing his sexual urges in such way that he might be able to make better sexual choices. But if Tran committed the sex crimes from an overwhelming hatred for women or out of a misguided attempt to secure a date or a sexual experience, application of MPA will address a part of Tran's psychology that is irrelevant to his crime and unrelated to his likelihood of recidivism.

Dr. Thomas, the psychiatrist who examined Tran to determine eligibility for administration of MPA testified that Tran

exhibited signs of having a sexual disorder and that he was likely to commit sex crimes again after his release (Franceschina, 2005). Remember that Dr. Thomas also testified that Tran might suffer from psychopathy, saying “I’m not prepared to say he’s a dyed-in-the-wool psychopath, but he certainly has some of the characteristics.” A journalist present reported that Dr. Thomas offered evidence of Tran’s psychopathy as relevant to his candidacy for MPA. Dr. Thomas indicated that MPA would make Tran “similar to a eunuch” by “shutting down his testosterone”—presumably with the idea that would make him less dangerous—and in the end, Dr. Thomas recommended Tran be castrated permanently (although the court sentenced him to five years of MPA).

C13.P70

Dr. Thomas’ testimony seems to support chemical castration of Tran as either a retributive or incapacitative punishment, not as rehabilitative treatment. A recommendation for permanent administration of MPA indicates she did not think she was performing a medical evaluation of Tran to determine if MPA might help him tone down overwhelming sexual urges, such that he could learn to make better sexual decisions. If Dr. Thomas did

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think there was any chance that Tran would be rehabilitated by the administration of MPA, she probably wouldn't have recommended Tran be made a "eunuch" for life: this sort of recommendation does not offer any hope that Tran will be reformed by MPA so as to make better sexual choices. A eunuch is a male whose external genitals are removed, often before puberty, so that secondary male characteristics fail to develop. Dr. Thomas' use of this term indicates that she viewed MPA as a means to incapacitate Tran from sexual choices. And although Dr. Thomas stated that Tran suffered from a "sexual disorder," there is no indication she testified that Tran suffered from overwhelming sexual urges that led to his crime—urges that might be dampened with the administration of MPA.

C13.P71

Dr. Thomas's testimony regarding Tran's psychopathic characteristics is especially worrying. If Tran assaulted his victims due to lack of empathy for his victims or from a desire to violently control them, then administration of MPA may have little impact on the psychological causes of Tran's crime. Dampening sexual desire will have little to no impact on his psychopathy, and if psychopathy or narcissism (which often coexists with

psychopathy; Paulhus & Williams, 2002) were the primary cause of Tran's crime, MPA may have little effect on his likelihood of recidivism.

C13.P72

Finally, note that there is no indication that Dr. Thomas recommended therapy or any other treatment in conjunction with the MPA. Just like medication to reduce cravings for illegal drugs, medication to reduce sexual or aggressive urges is most likely to have a rehabilitative effect when therapy is utilized in conjunction with medication.

C13.P73

It might be that other medical health professionals performing examinations under the Florida and Louisiana's chemical castration statutes were more attuned to the idea of chemical castration as rehabilitative treatment aimed at persistent and overwhelming sexual urges. But there is nothing in either statute requiring a medical professional to make a finding that some disordered aspect of the offender's psychology will be treated with MPA or that the offender may be less likely to recidivate due to the treatment. Instead, the statutes leave courts and medical professionals free to determine what it means for an offender to be a "good candidate" for castration, such that the

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examiner may look solely for ability to tolerate the medication, or worse, feel they are asked to determine whether an offender *deserves* MPA. And because California doesn't even require a medical evaluation before the administration of MPA, there is no chance that offenders castrated under the California statute will be screened with regard to whether MPA might have a rehabilitative effect.

C13.P74

Further, in Florida and California, an offender may choose surgical castration instead of administration of MPA. It seems exceedingly unlikely that offenders who choose surgical castration ought to be considered "rehabilitated" with regard to sexual choices. Due to the permanency and stronger effect of surgical castration, it is more likely to achieve the forward-looking end of (permanent) incapacitation than rehabilitation, although it is unlikely surgical castration would lead to complete incapacitation with regard to sex crimes, and in most cases, permanent incapacitation will violate the upper limits of retributive proportionality.

C13.P75

To sum up the argument: the state can't target any aspect of offenders' psychology it doesn't like for rehabilitation when

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rehabilitative treatment is mandatory or coerced. To be justified as rehabilitative, coercive medical treatment must be narrowly tailored to address a primary psychological cause of an offender's crime and address extraordinary worries about recidivism with regard to the type of crime for which the offender is being punished. This means that the statutes that allow for such coercive rehabilitative treatment must clearly articulate a means for identifying those offenders who have a psychological problem, such as addiction or overwhelming urges, that were a primary cause of their crime and that might be rehabilitated via medication or other treatment. As such the Florida, California, and Louisiana statutes are not written so that they might be justified in mandating chemical castration as rehabilitative treatment. The two states that require a medical evaluation, Florida and Louisiana, do not make clear that these evaluations are meant to determine candidacy for rehabilitative treatment, and California does not require a medical evaluation and instead applies castration purely based upon aspects of the crime, not the criminal offender. Finally, none of the three statutes provide for other common aspects of the drug court's rehabilitative programs (that are likely correlated with

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their efficacy): a component that would allow offenders to “opt out,” other treatment options provided in conjunction with medical treatment such as therapy, and a lessening of penalties if the treatment program is successfully completed. Thus, none of the three statutes can be justified by the forward-looking aim of rehabilitation.

C13.S7

## Conclusions

C13.P76

To be a legitimate use of state power, punishment statutes must be written so as to achieve one or more of the primary functions of punishment. I have argued here that chemical castration of criminal offenders does not achieve the punishment aims of retribution, deterrence, or incapacitation and that the most likely justification of the practice is rehabilitation. However, the Florida, California, and Louisiana chemical castration statutes cannot be justified as providing rehabilitative treatment because they qualify offenders for chemical castration based upon features of their sex offense and do not provide a method for parsing out the small subset of offenders who possess a psychological symptom or disorder that MPA might treat. Further, these statutes fail to put

into place other aspects of a treatment program likely to make rehabilitative medical treatment more successful, such as therapy.

C13.P77

I think the previous discussion supports the claim that any state-imposed coercive medical treatment of criminal offenders, including any direct brain intervention, must meet three criteria. First, the state may only target an offender's psychological states for rehabilitative treatment where such states are directly tied to a psychological disorder or symptom—there must be a disorder or symptom present to justify medical treatment. Second, because rehabilitative treatment of offenders is applied as punishment, the state may only target psychological states that (a) act as a primary cause of the offender's crime and (b) give rise to extraordinary worries that the offender will recidivate with regard to a similar type of crime. Third, the state must have some confidence that the rehabilitative treatment imposed will be effective in treating the offender's mental disorder or symptom such that the offender will be less likely to recidivate with regard to the same type of crime for which he is being punished.

C13.P78

Further, state-enforced medical rehabilitative treatment programs are more likely to be effective if they also have a

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voluntary component and where treatment includes a nonmedical component, such as therapy. Drug court rehabilitative treatment programs for drug-addicted offenders meet all of these requirements: they target cravings for illegal substances, a symptom of addiction, where such symptom is a cause of an offender's crime and are also likely to cause him or her to recidivate; medical treatment programs for addiction have been shown to be effective; and finally, drug court treatment programs, including medical treatment, have been shown to be effective in lowering rates of recidivism. Chemical castration programs such as the ones in Florida, California, and Louisiana meet none of these requirements. Thus, the chemical castration statutes in these states represent an unjustifiable use of state power.

C13.S8

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