

reasonable tends to be inconsistent and ambiguous. This is particularly apparent in cases requiring the expunging of records of disability-caused misconduct as a reasonable accommodation of the disabled employee.

A more effective approach involves first differentiating between permissible disciplining of disability-related misconduct and impermissible disciplining of disability-caused misconduct. Under this step, courts should allow employers to act on criminal, egregious misconduct, but not harmless behavior. Courts should apply those same categories when considering expunging files as a reasonable accommodation of an alcoholic employee. Namely, courts should limit the accommodation to instances when the misconduct arose solely because of the employee's alcoholism and the misconduct was neither violent nor criminal. The availability of the accommodation should also correlate to the individual's willingness to enter an alcohol treatment program and to the eventual successful completion of the program. Limiting the accommodation to these situations best comports with the primary ADA goals of encouraging rehabilitation, protecting the disabled from employment discrimination, and balancing the needs of the disabled employee with the legitimate interests of the employer.

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## Note

### Chemical Castration and the Right to Generate Ideas: Does the First Amendment Protect the Fantasies of Convicted Pedophiles?

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The practice of castration<sup>1</sup> has a culturally universal and ancient history.<sup>2</sup> Biblical,<sup>3</sup> mythological,<sup>4</sup> and historical<sup>5</sup> references to castration indicate its popularity as a method of punishment.<sup>6</sup> Today, the punitive characteristics of castration are

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1. Castration is the severance of the testicles, and should not be confused with "demasculinization," which refers to castration *and* the removal of the penis and scrotum. Georg K. Stürup, *Castration: The Total Treatment, in SEXUAL BEHAVIORS: SOCIAL, CLINICAL, AND LEGAL ASPECTS* 361, 361 (H.L.P. Resnik & Marvin E. Wolfgang eds., 1972).

2. Nikolaus Heim & Carolyn J. Hursch, *Castration for Sex Offenders: Treatment or Punishment? A Review and Critique of Recent European Literature*, 8 ARCHIVES SEXUAL BEHAV. 281, 281 (1979); Stürup, *supra* note 1, at 362; Edward S. Tauber, *Effects of Castration upon the Sexuality of the Adult Male*, 2 PSYCHOSOMATIC MED. 74, 74 (1940).

3. See Matthew 19:12 ("[T]here are some eunuchs which were made eunuchs of men.")

4. See Stürup, *supra* note 1, at 362-63 (recounting Zeus's castration of his father, Cronos, for swallowing his brothers).

5. See Heim & Hursch, *supra* note 2, at 281-82 (discussing castration as a punishment for rape or adultery in the Middle Ages, under the doctrine of *jus talonis*, or "an eye for an eye"); *id.* at 282 (describing castration as used to punish sex offenders under the Nazi regime); Stürup, *supra* note 1, at 363-64 (discussing castration as punishment for black men in Kansas Territory who raped, attempted to rape, or tried to force marriage upon white women); *id.* at 364 (discussing castration as used to punish sex offenders under the Nazi regime); Tauber, *supra* note 2, at 75 (discussing castration of male captives by their conquerors).

6. Castration has served preventative purposes as well. Eastern rulers castrated guardians of their harems as a precautionary measure. Tauber, *supra* note 2, at 75. Eighteenth century churches tacitly sanctioned castration to "preserve the angelic elegance of the choir-boys' voices." *Id.* Eugenic castration checked the reproduction of criminals, the feeble-minded, and the insane. *Id.* at 76.

what makes a new law so controversial. California recently enacted a statute<sup>7</sup> punishing child molesters by so-called "chemical castration,"<sup>8</sup> a non-surgical treatment with medroxyprogesterone acetate (MPA), a drug shown to reduce recidivism in male sex offenders by diminishing sexual fantasies and impulses.<sup>9</sup>

Adversaries of the new California law liken MPA treatment to physical castration, and consider it a barbaric form of punishment.<sup>10</sup> Proponents of the measure point to MPA's success in dramatically reducing the recidivism rate of sex offenders in Europe.<sup>11</sup> The statute is certain to draw judicial scrutiny<sup>12</sup> because the nature of MPA treatment triggers several constitutional concerns.<sup>13</sup> In particular, the drug's interference

7. Act of Sept. 17, 1996, ch. 596, 1996 Cal. Legis. Serv. 2711 (West) (codified at CAL. PENAL CODE § 645 (West Supp. 1997)). Although Florida and Wisconsin have considered adding chemical treatment to their anti-pedophile arsenals, H.B. 83, 15th Leg., 1st Reg. Sess. (Fla. 1997) (unenacted), A.B. 594, 92d Leg., 1995-96 Reg. Sess. (Wis. 1995) (unenacted), California is the first state to holster the syringe.

8. "Chemical castration" is a popular misnomer. In high doses, the treatment, like surgical castration, causes impotence. See N. McConaghy et al., *Treatment of Sex Offenders with Imaginal Desensitization and/or Medroxyprogesterone*, 77 ACTA PSYCHIATRICA SCANDINAVICA 199, 203-04 (1988) (suggesting that lowering doses of MPA will prevent chemical castration).

9. See generally *infra* Part I.B (discussing MPA treatment).

10. See Ed Mendel, *Controversial Castration Bill Sent to Governor*, SAN DIEGO UNION-TRIB., Aug. 31, 1996, at A1 (quoting a bill opponent arguing that it is wrong to mutilate citizens).

11. *Id.* (reporting that according to the bill sponsor, the drug has cut the recidivism rate from 90% to 2% in Europe).

12. The American Civil Liberties Union has promised a legal challenge. Burt Herman, *Calif. Ready to Adopt Law for Castrating Molesters; 2-Time Offenders Would Get Injection*, COM. APPEAL (Memphis), Aug. 30, 1996, at 2A; American Civil Liberties Union, *September 3, 1996: Chemical Castration Law Nears Passage: ACLU offices in California Vow Challenge* (visited Apr. 13, 1997) <<http://aclu.org/news/w090396a.html>>.

13. This Note analyzes whether the California chemical castration statute violates the freedom of speech. Other commentators have addressed whether chemical castration constitutes cruel and unusual punishment, infringes upon the right to privacy, or violates equal protection. For authors who believe that chemical castration constitutes cruel and unusual punishment and violates privacy rights, see William Green, *Depo-Provera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues*, 12 U. DAYTON L. REV. 1, 20-25 (1986); John T. Melella et al., *Legal and Ethical Issues in the Use of Antiandrogens in Treating Sex Offenders*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 223, 226, 227-28 (1989); Linda S. Demsky, Comment, *The Use of Depo-Provera in the Treatment of Sex Offenders*, 5 J. LEGAL MED. 295, 303-09, 312-15 (1984). For authors who believe that chemical castration is not cruel and unusual punishment, see Kenneth B. Fromson, Note, *Beyond an Eye for an Eye: Castration as an Alternative Sentencing Measure*, 11 N.Y.L. SCH.

with a sex offender's fantasy life implicates the freedom to generate ideas, a subset of the freedom of speech.<sup>14</sup>

This Note analyzes whether the First Amendment protects the right of convicted child molesters to fantasize about children. Part I describes pedophilia, the administration of MPA and its effects in men, and the substance of California's chemical castration law. Part II discusses the current state of the First Amendment and the law of parole. Part III applies traditional First Amendment analysis to California's chemical castration statute, demonstrates that the analytical framework protecting communication of ideas transfers poorly to protect the generation of ideas, and explains why application of the law of parole fails to remedy this shortcoming. Part IV proposes a new test to determine whether state programs that interfere with mentation—and the concomitant right to generate ideas—pass First Amendment muster, and applies that test to the California provision.

## I. CHEMICAL CASTRATION: AT THE INTERSECTION OF SCIENCE, MEDICINE, AND CRIMINAL SENTENCING

### A. PEDOPHILIA

Pedophilia<sup>15</sup> is a diagnosable<sup>16</sup> psychiatric syndrome characterized by sexual attraction to children or gratification from

J. HUM. RTS. 311, 326-29 (1994); Pamela K. Hicks, Comment, *Castration of Sexual Offenders*, 14 J. LEGAL MED. 641, 657-60 (1993). For authors who believe chemical castration is neither cruel and unusual punishment nor violative of privacy, see Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 31-52 (1990); Kimberly A. Peters, Comment, *Chemical Castration: An Alternative to Incarceration*, 31 DUQ. L. REV. 307, 318-25 (1993). For authors who believe that chemical castration is neither cruel and unusual punishment nor violative of privacy rights nor violative of the Equal Protection Clause, see Daniel L. Icenogle, *Sentencing Male Sex Offenders to the Use of Biological Treatments*, 15 J. LEGAL MED. 279, 294-303 (1994); Dennis H. Rainear, Comment, *The Use of Depo-Provera for Treating Male Sex Offenders: A Review of the Constitutional and Medical Issues*, 16 U. TOL. L. REV. 181, 199-223 (1984).

14. See *infra* text accompanying notes 93-100 (outlining the argument that the First Amendment protects the right to generate ideas). For a primer on the right to generate ideas, see Bruce J. Winick, *The Right to Refuse Psychotropic Medication: Current State of the Law and Beyond*, in THE RIGHT TO ANTIPSYCHOTIC MEDICATION 7, 9-12 (David Rapoport & John Parry eds., 1986).

15. The term "pedophilia" comes from the Greek language and literally means "love of children." ELIZABETH RICE ALLGEIER & ALBERT RICHARD ALLGEIER, *SEXUAL INTERACTIONS* 681 (3d ed. 1991). The American Psychiatric Association identifies pedophilia as a subclass of paraphilias, sexual disor-

sexual intimacy with them.<sup>17</sup> By this definition, pedophilia and child molestation are non-coextensive concepts; pedophilia does not account for incidents of child molestation motivated by hallucination,<sup>18</sup> mental retardation,<sup>19</sup> anger,<sup>20</sup> or similar, non-sexual causes,<sup>21</sup> but only for behavior motivated by sexual urges and fantasies.<sup>22</sup> The discrete causes of pedophilia re-

ders involving "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons," that continue for at least six months. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 522-23 (4th ed. 1994) [hereinafter DSM-IV].

16. Pedophilia has three diagnostic criteria:

A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).

B. The fantasies, sexual urges, or behaviors cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.

C. The person is at least 16 years and at least 5 years older than the child or children in Criterion A.

DSM-IV at 528 tbl.302.2. In making an assessment, diagnosticians typically ask patients about their thoughts, feelings, and behaviors. Fred S. Berlin, *Sex Offenders: A Biomedical Perspective and a Status Report on Biomedical Treatment*, in THE SEXUAL AGGRESSOR 83, 88 (Joanne G. Greer & Irving R. Stuart eds., 1983). Yet the syndrome can always be inferred from objective, deviant behavior. David Finkelhor & Sharon Araji, *Expianations of Pedophilia: A Four Factor Model*, 22 J. SEX RES. 145, 146-47 (1986) (offering a behavior-based definition of pedophilia).

17. Michael Serber & Joseph Wolpe, *Behavior Therapy Techniques, in SEXUAL BEHAVIORS: SOCIAL, CLINICAL, AND LEGAL ASPECTS*, supra note 1, at 239, 239-40; see also Berlin, supra note 16, at 86 (distinguishing ephebophilia from pedophilia); Finkelhor & Araji, supra note 16, at 146-47 (offering an alternative definition of pedophilia). Yet no consensus has gelled as to the exact meaning of pedophilia. See *id.* at 145-46 (reviewing the conflicting ways in which pedophilia has been defined).

18. Fred S. Berlin & Carl F. Meinecke, *Treatment of Sex Offenders with Antiandrogenic Medication: Conceptualization, Review of Treatment Modalities, and Preliminary Findings*, 138 AM. J. PSYCHIATRY 601, 602 (1981).

19. *Id.* About 20% of child molesters are mentally retarded. ALLGEIER & ALLGEIER, supra note 15, at 682.

20. Berlin & Meinecke, supra note 18, at 602; Paul A. Walker et al., *Antiandrogenic Treatment of the Paraphilias*, in GUIDELINES FOR THE USE OF PSYCHOTROPIC DRUGS 427, 429 (Harvey C. Stancer et al. eds., 1984).

21. Diagnosis of pedophilia may be complicated, however, where it occurs in combination with other sexual disorders. See DSM-IV, supra note 15, at 523 (explaining that sexual preferences can meet the diagnostic criteria for more than one paraphilia).

22. See Paul A. Walker & Walter J. Meyer III, *Medroxyprogesterone Acetate Treatment for Paraphiliac Sex Offenders*, in VIOLENCE AND THE VIOLENT

main unknown, but plausible theories focus on psychological and socio-cultural<sup>23</sup> or biological<sup>24</sup> explanations. Importantly, studies demonstrate a positive correlation between the reduction of testosterone<sup>25</sup> in men and the reduction of sexually deviant behavior, including pedophilia.<sup>26</sup>

Pedophilic fantasies about sexual encounters with children are persistent and recurrent.<sup>27</sup> The erotic cravings that accom-

INDIVIDUAL 353, 354-56 (J. Ray Hays et al. eds., 1981) (distinguishing paraphiliac sex offenders from violent, disinhibited, or denying sex offenders).

23. Psychological and socio-cultural theories of pedophilia generally try to answer one of four inquiries: why a person would find it emotionally satisfying to relate sexually to a child (emotional congruence), why a person would find children sexually arousing (sexual arousal), why a person would be unable to satisfy sexual and emotional needs in socially approved relationships (blockage), and why conventional inhibitions against having sex with children are absent or overcome in some persons (disinhibition). Finkelhor & Araji, supra note 16, at 147-55, 147 tbl.1 (reviewing 10 years of literature on pedophilia and extracting four explanatory themes).

24. Biological theories of pedophilia arise from the etiology of deviant sexual desires generally, and focus on genetic, hormonal, or neurological anomalies. See Berlin, supra note 16, at 93-100, 93 fig.5-2, 95 fig.5-3, 95 tbl.5-3, 98 figs.5-4a & 5-4b, 101 tbl.5-4 (analyzing Klinefelter's syndrome as a genetic condition predisposing toward pedophilia, identifying hormonal imbalances in animals as dispositive of sexual behavior generally, and associating electroencephalographic dysfunction with pedophilia and other sexual disorders). But see Finkelhor & Araji, supra note 16, at 152 ("[B]iological factors are seen as a source of instability which may predispose a person to develop deviant patterns of arousal [generally] . . . [H]owever, such theories, useful as they may be for treatment, are not really specific explanations of how a person comes to find children arousing.") (citation omitted). There is one constant, however—the disorder is an almost exclusively male phenomenon. Berlin, supra note 16, at 87; Finkelhor & Araji, supra note 16, at 146 n.1.

25. Testosterone is the primary male sex hormone. Hormones are substances released by endocrine glands and transported through the bloodstream to other tissues where they act to regulate the functions of the target tissue. John D. Baxter, *General Concepts of Endocrinology*, in BASIC & CLINICAL ENDOCRINOLOGY 1, 2 (Francis S. Greenspan & John D. Baxter eds., 4th ed. 1994).

26. Jonathan R. Kelly & James L. Cavanaugh, Jr., *Treatment of the Sexually Dangerous Patient*, 21 CURRENT PSYCHIATRIC THERAPIES 101, 102-03 (1982); McConaghy et al., supra note 8, at 203-04.

27. Berlin, supra note 16, at 85; Berlin & Meinecke, supra note 18, at 601. One pedophile, "Mr. A.," described the irrepressibility of his fantasy:

If I have seen an exceptionally nice looking boy I get aroused. . . . I know I am going to start fantasizing. I have noticed that the first thing is I drop my eyes to his genitals. It gets more intense, the fantasies, that is. I dream about a South Sea island, nothing but boys on the island. . . . [Sometimes] I get so aroused I just have to get it sexually together. . . . I know that the legal issues are, but at the time I am not thinking of legal issues. All I can think about is getting the boy. I want to keep doing it, and doing it, and doing it. No matter how. Getting the boy.

pany these fantasies, if left unsatisfied, frustrate the pedophile.<sup>28</sup> Although self-gratification can temporarily stay these impulses,<sup>29</sup> pedophiles achieve sexual relief only when they enact their fantasies precisely.<sup>30</sup>

Although most pedophiles are nonviolent,<sup>31</sup> some victims experience significant physical<sup>32</sup> and psychological<sup>33</sup> harm. Fur-

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Berlin, *supra* note 16, at 85. Compare Humbert Humbert's fictitious confession in *Lolita*:

I would have the reader see "nine" and "fourteen" as the boundaries—the mirrory beaches and rosy rock—of an enchanted island haunted by those nymphets of mine and surrounded by a vast, misty sea. . . .

The dimmest of my pollutive dreams was a thousand times more dazzling than all the adultery the most virile writer of genius or the most talented impotent might imagine. . . .

. . . Humbert Humbert tried hard to be good. Really and truly, he did. . . . But how his heart beat when, among the innocent throng, he espied a demon child, "enfant charmante et fourbe," dim eyes, bright lips, ten years in jail if you only show her you are looking at her.

VLADIMIR NAROKOV, *LOLITA* 17-20 (Alfred A. Knopf, Inc. 1992) (1955).

28. Berlin, *supra* note 16, at 88; Berlin & Meinecke, *supra* note 18, at 601.

29. See Berlin, *supra* note 16, at 85 (describing patient who would masturbate to "cure" his arousal); Henry Fitzgerald Jr., *Molester Going Back to Prison*, SUN-SENTINEL (Ft. Lauderdale), Dec. 7, 1995, at 2B (describing pedophile who, to fight his urges to molest boys, would wear boys' underwear while masturbating in a child-size chair); Larry Don McQuay, *The Case for Castration, Part I*, WASH. MONTHLY, May 1994, at 26, 27 (describing prisoner, who, until he is released from prison, has sex with younger-looking men, pretending they are children while letting his imagination do the rest).

30. Berlin, *supra* note 16, at 88; Berlin & Meinecke, *supra* note 18, at 601. Fantasy reenactment helps to explain why the pedophile's *modus operandi* is stereotypical. *Id.* Moreover, because the pedophile has likely reinforced his fantasy with many thousands of orgasms, the fantasy must accompany almost every erection and ejaculation. Walker et al., *supra* note 20, at 429.

31. Berlin, *supra* note 16, at 87 (observing that pedophiles usually persuade, rather than coerce, their victims). The rate of physical injury may be below nine percent. *Id.* (citing a Michigan study of 1252 sex offenses against children).

32. Some pedophiles kill their victims. See, e.g., Nancy Vogel & Ilana DeBare, *Polly Found Dead in Sonoma Woods*, SACRAMENTO BEE, Dec. 5, 1993, at A1 (Polly Klaas); *Suspect Confessed in the Murder of a 7 Year Old*, *Prosecutors Say*, N.Y. TIMES, Aug. 2, 1994, at B2 (Megan Kanka) [hereinafter *Suspect Confessed*]; see also McQuay, *supra* note 29, at 26-27 (prisoner predicting that he will rape and murder children when he is paroled, unless first castrated).

33. The child may suffer emotionally from the sexual relationship itself, from the reactions of other adults who discover the forbidden activity, or from self-blame when the pedophile—a person the child may like a great deal, such as a relative—is punished. Berlin, *supra* note 16, at 87. Moreover, because a positive correlation exists between sexual victimization as a child and pedo-

thermore, the general failure of rehabilitative approaches<sup>34</sup> leads to high recidivism rates for pedophiles.<sup>35</sup> Faced with these problems, and confronted with extensive media coverage of particular child killings by released sex offenders,<sup>36</sup> states are abandoning rehabilitative strategies<sup>37</sup> and adopting more innovative approaches like sex offender registration and community notification laws.<sup>38</sup> The chemical treatment of sex offenders with MPA is the latest of these innovative approaches.

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philia as an adult, *id.* at 88, there may be reason to believe that the victim will become the predator in a reprise of the childhood experience.

34. See Lita Furby et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 27 (1989) (reviewing 42 treatment studies and concluding that "[t]here is as yet no evidence that clinical treatment reduces rates of sex reoffenses in general"). Generally, laws facilitating institutionalized rehabilitation instead of incarceration, enacted during the "buoyant therapeutic optimism" of the mid-twentieth century, have failed. John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 661, 667-69 (1992) (outlining the history of sexual psychopath laws in comparison to the changing ideologies of the criminal justice system).

35. Whereas experts agree that the recidivism rate for untreated child molesters is high, there is disagreement as to the precise figure. Compare Sarah Glazer, *Punishing Sex Offenders*, 6 C.Q. RESEARCHER 25, 30 tbl. (1996) (10% to 40% recidivism, according to an international study), with Herman, *supra* note 12, at 2A (75% recidivism, according to Attorney General Janet Reno). Child molesters are at significant risk of reoffending throughout their lifetime. R. Karl Hanson et al., *Long-Term Recidivism of Child Molesters*, 61 J. CONSULTING & CLINICAL PSYCHOL. 646, 650 (1993). Those pedophiles most prone to recidivism, nonincestuous pedophiles targeting boys, average approximately 280 sexual crimes in their lifetime. Gene G. Able et al., *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. INTERPERSONAL VIOLENCE 3, 15, 16 tbl.1 (1987). Moreover, there is a positive correlation between the number of sex crimes committed and the likelihood of future relapse. Jorgen Ortman, *The Treatment of Sexual Offenders*, 3 INT'L J.L. & PSYCHIATRY 443, 443-44 (1980). For a comprehensive review of empirical studies of sex offender recidivism, see Furby et al., *supra* note 34, and Gordon C. Nagayama Hall, *Sexual Offender Recidivism Revisited: A Meta-Analysis of Recent Treatment Studies*, 63 J. CONSULTING & CLINICAL PSYCHOL. 802 (1995).

36. See Vogel & DeBare, *supra* note 32 (discussing the Polly Klaas case); *Suspect Confessed*, *supra* note 32 (discussing the Megan Kanka case).

37. See La Fond, *supra* note 34, at 659-63 (explaining the abandonment of rehabilitative strategies for sex offenders according to a shifting legislative perception that sex offenders are not so much mentally ill as they are evil). See, e.g., Phil Manzano, *Sex Crime Program Will End*, PORTLAND OREGONIAN, May 25, 1996, at B1 (reporting Oregon's decision, in the face of budget cuts and a lock-them-up-and-throw-away-the-key mentality, to end a treatment program that had served as a national model).

38. The federal government has spurred state activity in these areas. In 1994, President Clinton signed into law the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as

## B. MEDROXYPROGESTERONE ACETATE

MPA<sup>39</sup> is a synthetic progesterone compound classified pharmacologically as an antiandrogen.<sup>40</sup> Scientists first observed that progesterone compounds inhibit male sexual drive in 1958.<sup>41</sup> The first clinical treatment of sex offenders with MPA followed in the 1960s.<sup>42</sup> The results proved promising,<sup>43</sup> and today MPA treatment is no longer considered experimental.<sup>44</sup>

amended in scattered titles of U.S.C.), requiring states to enact registration laws by 1997 to retain their share of federal crime-fighting funds, *id.* § 170101, 108 Stat. at 2038-42 (codified at 42 U.S.C. § 14071), and encouraging them to enact community notification laws, *id.* § 170101(d)(3), 108 Stat. at 2042 (codified at 42 U.S.C. § 14071(d)(3)). More recently, the President ordered a nationwide computer network to track sex offenders. Memorandum on the Development of a National Sexual Offender Registration System, 32 WEEKLY COMP. PRES. DOC. 1137 (June 25, 1996); *see also* President's Radio Address, 32 WEEKLY COMP. PRES. DOC. 1497 (Aug. 24, 1996) (describing the tracking system to the nation).

As of January 1996, 47 states had enacted laws requiring sex offenders to register with local police. Glazer, *supra* note 35, at 28 map. The three hold-outs, Massachusetts, Nebraska, and Vermont, have since followed suit. MASS. ANN. LAWS ch. 6, §§ 178C-178O (Law. Co-op. Supp. 1997); NEB. REV. STAT. §§ 29-4001 to 29-4013 (Supp. 1996); VT. STAT. ANN. tit. 13, §§ 5401-5413 (Supp. 1996). At least 30 states require some kind of community notification when sex offenders move into the neighborhood. Glazer, *supra* note 35, at 28 map.

39. Medroxyprogesterone Acetate is manufactured by Upjohn and is sold in the United States for intramuscular injection under the trade name Depo-Provera. AMERICAN MEDICAL ASS'N, PHYSICIAN'S DESK REFERENCE, 2079-84 (51st ed. 1997) In the United States, Depo-Provera contraceptive injection is indicated only for the prevention of pregnancy. *Id.* at 2080. Nevertheless, this approval does not limit the circumstances under which MPA may be administered, Fred S. Berlin, *The Paraphilias and Depo-Provera: Some Medical, Ethical and Legal Considerations*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 233, 235 (1989), because physicians may legally prescribe approved drugs for non-approved uses. FOOD AND DRUG ADMINISTRATION, U.S. DEPT OF HEALTH AND HUMAN SERVICES, 12 FDA DRUG BULL. 4, 4-5 (1981).

40. Melella et al., *supra* note 13, at 225. In men, antiandrogens inhibit the release of the male hormone androgen from the testicles. *Id.*

41. Carl G. Heiler et al., *Effects of Progestational Compounds on the Reproductive Processes of the Human Male*, 71 ANNALS N.Y. ACAD. SCI. 649, 660, 661 tbl.2 (1958).

42. For a discussion of the first clinical treatment of sex offenders with MPA, see John Money, *The Therapeutic Use of Androgen-Depleting Hormone*, in SEXUAL BEHAVIORS 351, 351-52 (H.L.P. Resnik & Marvin E. Wolfgang eds., 1972) [hereinafter Money, *Therapeutic Use*]; John Money, *Use of an Androgen-Depleting Hormone in the Treatment of Male Sex Offenders*, 6 J. SEX RESEARCH 165, 165 (1970) [hereinafter Money, *Treatment*].

43. For articles describing the behavioral responses to MPA and offering a case illustration, see Money, *Therapeutic Use*, *supra* note 42, at 354-58; Money, *Treatment*, *supra* note 42, at 167-71. MPA treatment has proven to be superior to the traditional use of estrogen compounds, which subdued the libido, but which had feminizing effects in men and could cause nausea, vomit-

MPA treatment<sup>45</sup> acts on the male endocrine system,<sup>46</sup> decreasing the level of plasma testosterone<sup>47</sup> in two ways. First, MPA inhibits the testicular production of testosterone.<sup>48</sup> Second,

ing, and permanent infertility. John McD. W. Bradford, *The Hormonal Treatment of Sexual Offenders*, 11 BULL. AM. ACAD. PSYCHIATRY & L. 159, 161 (1983) (describing nausea, vomiting, and feminization); Kelly & Cavanaugh, *supra* note 26, at 102 (discussing feminization and infertility).

44. See Berlin, *supra* note 39, at 235 (noting that the use of MPA is supported by a large volume of medical literature, that it is used all over the country, and that it has been the subject of intense research for over 20 years).

45. Sex offenders treated with MPA typically receive 300 to 400 milligram doses injected intramuscularly every 7 to 10 days. Bradford, *supra* note 43, at 163. Doctors can adjust this dosage depending upon its clinical effectiveness in reducing sex drive and sexually deviant behavior. John Money et al., *47,XXY and 46,XY Males with Antisocial and/or Sex-Offending Behavior: Antiandrogen Therapy Plus Counseling*, 1 PSYCHONEUROENDOCRINOLOGY 165, 167 (1975) [hereinafter *Antisocial and/or Sex-Offending Behavior*]; John Money et al., *Combined Antiandrogenic and Counseling Program for Treatment of 46,XY and 47,XXY Sex Offenders*, in HORMONES, BEHAVIOR, AND PSYCHOPATHOLOGY 105, 108, 114-15 (Edward J. Sachar ed., 1976) [hereinafter *Antiandrogenic and Counseling Program*]. Without questioning the patient, who might not be truthful, objective monitoring of the level of testosterone in the bloodstream can guarantee effectiveness. See Kelly & Cavanaugh, *supra* note 26, at 104 (noting that incidence of sexually deviant behavior can be monitored objectively by measuring serum testosterone level).

Although MPA's mode of action in reducing testosterone, sex drive, and sexually deviant behavior is not precisely known, it probably resembles the process reflected *infra* notes 47-50 and accompanying text (decreased testosterone production via inhibition of pituitary secretion of luteinizing hormone, increased hepatic metabolism of testosterone by inducing liver enzymes, and direct suppressant effect on the cerebral cortex). Conversely, it is conceivable that MPA's therapeutic effect on sexual functioning may be attributed to a competitive inhibition of testosterone action at central and peripheral receptor sites, a direct effect on the gonads, or a displacement of testosterone from steroid-binding proteins. Kelly & Cavanaugh, *supra* note 26, at 103.

46. The endocrine system is one of the major means by which the body communicates information between different cells and tissues so as to regulate body functions. Baxter, *supra* note 25, at 1. The system uses hormones to convey its information. *Id.* at 2.

47. Berlin, *supra* note 39, at 235; Berlin & Meinecke, *supra* note 18, at 603; Dietrich Blumer & Claude Migeon, *Hormone and Hormonal Agents in the Treatment of Aggression*, 160 J. NERVOUS & MENTAL DISEASE 127, 134 (1975); Gregory K. Lehne, *Treatment of Sex Offenders with Medroxyprogesterone Acetate*, in 6 HANDBOOK OF SEXOLOGY: THE PHARMACOLOGY AND ENDOCRINOLOGY OF SEXUAL FUNCTION 516, 516 (J.M.A. Sitsen ed., 1988); McConaghy et al., *supra* note 8, at 201-02; Walter J. Meyer III et al., *Depo Provera Treatment for Sex Offending Behavior: An Evaluation of Outcome*, 20 BULL. AM. ACAD. PSYCHIATRY & L. 249, 254 & tbl.5 (1992).

48. MPA inhibits the release of the chemical messenger LH, causing the testes to produce less testosterone. Bradford, *supra* note 43, at 159; Lehne, *supra* note 47, at 516; Melella et al., *supra* note 13, at 225.

the drug accelerates the liver's metabolism of testosterone.<sup>49</sup> The indirect effect of MPA, therefore, is to bathe the brain with less of the hormone. Studies indicate that MPA also has a direct tranquilizing effect on the brain.<sup>50</sup>

MPA's effects on the brain interrupt the fantasies of the sex offender by diminishing their frequency<sup>51</sup> and intensity.<sup>52</sup> Furthermore, MPA's tranquilizing effect on the brain reduces aggressive behavior generally.<sup>53</sup> Patients typically express relief as the drug suppresses their nagging sexual compulsion and increases their control over sexual urges.<sup>54</sup> As a result of these mechanisms, the patient is much less likely to re-offend.<sup>55</sup> The legislative proponents of California's chemical castration statute seized upon this diminished likelihood.<sup>56</sup>

49. MPA accelerates the metabolism of testosterone by inducing an enzyme catalyst. Bradford, *supra* note 43, at 163; Lehne, *supra* note 47, at 516.

50. Blumer & Midgeon, *supra* note 47, at 128; Lehne, *supra* note 47, at 517; Melella et al., *supra* note 13, at 225; see Berlin & Meinecke, *supra* note 18, at 603 (offering support for the proposition that MPA acts directly on the brain).

51. Bradford, *supra* note 43, at 163-64; Pierre Gagne, *Treatment of Sex Offenders with Medroxyprogesterone Acetate*, 138 AM. J. PSYCHIATRY 644, 645-56 (1981); Lehne, *supra* note 47, at 518.

52. Lehne, *supra* note 47, at 518.

53. Blumer & Midgeon, *supra* note 47, at 131-32; Kelly & Cavanaugh, *supra* note 26, at 102-03; Money et al., *Antisocial and/or Sex-Offending Behavior*, *supra* note 45, at 168-70. Because high testosterone correlates with crimes of aggression, LAWRENCE TAYLOR, BORN TO CRIME 95-105 (1984), some commentators have gone so far as to suggest that male defendants charged with crimes of aggression should be able to assert high testosterone level as a defense. See, e.g., Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80, 128-34 (1994).

54. Gagne, *supra* note 51, at 645; Melella et al., *supra* note 13, at 225; Money, *Therapeutic Use*, *supra* note 42, at 354; Money, *Treatment*, *supra* note 42, at 168.

55. For studies and commentary illustrating reduced likelihood of reoffending, see Berlin & Meinecke, *supra* note 18, at 603-05, 604 tbl.2; Blumer & Midgeon, *supra* note 47, at 130; Bradford, *supra* note 43, at 163; J. Paul Fedoroff et al., *Medroxy-Progesterone Acetate in the Treatment of Paraphilic Sexual Disorders*, 18 (3/4) J. OFFENDER REHABILITATION 109, 117, 118 fig.1, 120 (1992); Gagne, *supra* note 51, at 645; McConaghy et al., *supra* note 8, at 202 tbl.2; Meyer et al., *supra* note 47, at 255-58; Money, *Therapeutic Use*, *supra* note 42, at 354-55; Money, *Treatment*, *supra* note 42, at 167-69; Money et al., *Antisocial and/or Sex-Offending Behavior*, *supra* note 45, at 174; Money et al., *Antiandrogenic and Counseling Program*, *supra* note 45, at 114-15.

56. See Mendel, *supra* note 10 (reporting bill sponsor trumpeting MPA's reduction of child molester recidivism in Europe).

### C. CALIFORNIA'S CHEMICAL CASTRATION LAW

The new California statute<sup>57</sup> provides that paroled violators<sup>58</sup> of specified sex offenses<sup>59</sup> where the victim is younger than thirteen,<sup>60</sup> undergo MPA treatment at the court's discretion.<sup>61</sup> With twice-convicted offenders, however, MPA treatment is mandatory.<sup>62</sup> In either case, the treatment is in addition to any other punishment prescribed by law.<sup>63</sup>

57. Act of Sept. 17, 1996, ch. 596, 1996 Cal. Legis. Serv. 2711-12 (West) (codified at CAL. PENAL CODE § 645 (West Supp. 1997)). The law reads as follows:

645. (a) Any person guilty of a first conviction of any offense specified in subdivision (c), where the victim has not attained 13 years of age, may, upon parole, undergo medroxyprogesterone acetate treatment or its chemical equivalent, in addition to any other punishment prescribed for that offense or any other provision of law, at the discretion of the court.

(b) Any person guilty of a second conviction . . . shall, upon parole, undergo medroxyprogesterone acetate treatment or its chemical equivalent . . . .

(c) This section shall apply to the following offenses:

(1) Subdivision (c) or (d) of Section 286.

(2) Paragraph (1) of subdivision (b) of Section 288.

(3) Subdivision (b) or (d) of Section 288a.

(4) Subdivision (a) or (j) of Section 259.

(d) The parolee shall begin . . . treatment one week prior to his or her release from confinement . . . and shall continue treatments until the Department of Corrections demonstrates to the Board of Prison Terms that this treatment is no longer necessary.

(e) If a person voluntarily undergoes a permanent, surgical alternative to hormonal chemical treatment for sex offenders, he or she shall not be subject to this section.

(f) The Department of Corrections shall administer this section and implement the protocols required by this section. . . . These protocols shall include . . . a requirement to inform the person about the effect of hormonal chemical treatment and any side effects that may result from it.

*Id.* § 2. The law also repeals former section 645, a 1923 law allowing judges to order surgical sterilization of those "adjudged guilty of carnal abuse" of girls under age 10. Act of May 25, 1923, ch. 224, § 1, 1923 Cal. Stat. 448, 448 (codified at CAL. PENAL CODE § 645 (West 1988) (repealed 1996)).

58. CAL. PENAL CODE § 645 (a) (West Supp. 1997).

59. *Id.* § 645(c). The specified sex offenses are sodomy, § 645(c)(1), lewd or lascivious acts, § 645(c)(2), oral copulation, § 645(c)(3), and penetration of genital or anal openings by foreign or unknown objects, § 645(c)(4).

60. *Id.* § 645(a).

61. *Id.*

62. *Id.* § 645(b).

63. *Id.* § 645(a), (b).

Administered by the California Department of Corrections,<sup>64</sup> MPA treatment begins one week before the offender is released from prison and continues until the state determines that the treatment is no longer necessary.<sup>65</sup> In all circumstances, the parolee is informed of the intended effects and possible side effects of MPA treatment.<sup>66</sup> Finally, the statute does not apply to any offender who volunteers to be surgically castrated.<sup>67</sup>

## II. FIRST AMENDMENT JURISPRUDENCE AND THE LAW OF PAROLE

### A. THE FIRST AMENDMENT: FREEDOM OF SPEECH AND THE RIGHT TO GENERATE IDEAS

The First Amendment<sup>68</sup> protects the freedom of speech, of which the "bedrock principle" is that the government may not suppress the communication of an idea on the grounds that the idea is itself objectionable.<sup>69</sup> The government can regulate ideas by placing restrictions on two logically distinct activities. The first activity is communication (the expression of an idea); the second, mentation (the formulation of an idea).

#### 1. First Amendment Protection of Communication

Government restrictions on communication may be classified as categorical restrictions, content-neutral restrictions, or content-based restrictions. The First Amendment does not protect categories of speech "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>70</sup> These categories are defined by their proscribable content and may be regulated on that basis<sup>71</sup> because their prevention and punishment have never been thought to pose constitutional problems.<sup>72</sup> Examples of unprotected speech

64. *Id.* § 645(f).

65. *Id.* § 645(d).

66. *Id.* § 645(f).

67. *Id.* § 645(e).

68. The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

69. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

70. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

71. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992).

72. *Chaplinsky*, 315 U.S. at 571-72.

categories include obscenity,<sup>73</sup> defamation,<sup>74</sup> and illegal advocacy.<sup>75</sup>

A restriction on speech is content neutral if it is "justified without reference to the regulated speech."<sup>76</sup> Content-neutral restrictions, therefore, must serve governmental interests unrelated to the message expressed.<sup>77</sup> Legitimate time, place, and manner restrictions are typical examples of this class.<sup>78</sup> A content-neutral restriction will be upheld if it is "narrowly tailored to serve a significant governmental interest."<sup>79</sup> Narrow tailoring is satisfied when the government furthers a substantial interest more effectively with the regulation than without it,<sup>80</sup> but does not regulate in such a manner that a substantial portion of the burden on speech fails to promote the government interest.<sup>81</sup>

A restriction is content-based, on the other hand, if the government targets a particular message or applies a facially-neutral regulation so as to subject certain speech to disfavored treatment.<sup>82</sup> Because content-based regulations raise the specter of government censorship, they are subject to strict judicial scrutiny.<sup>83</sup> A content-based regulation will be upheld only where it is necessary to achieve a compelling governmental interest and the regulation is narrowly tailored to that end.<sup>84</sup>

73. *R.A.V.*, 505 U.S. at 383 (citing *Roth v. United States*, 354 U.S. 476 (1957)).

74. *Id.* (citing *Beauharnais v. Illinois*, 343 U.S. 250 (1952)).

75. *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (per curiam).

76. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis omitted) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

77. *Id.*

78. *See id.* at 791 (noting that content-neutral time, place, and manner restrictions are acceptable).

79. *Id.* (quoting *Clark*, 468 U.S. at 293).

80. *Id.* at 799.

81. *Id.*

82. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 407-08 (rejecting Texas's claimed interest in preventing breaches of the peace to justify a prohibition on flag burning, where no disruption had occurred or even threatened to occur); *Brown v. Glines*, 444 U.S. 348, 357 & n.15 (1980) (cautioning that the Air Force's policy requiring preapproval to circulate petitions would give rise to legitimate First Amendment claims if applied "irrationally, invidiously, or arbitrarily").

83. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (identifying the strict judicial test for content-based regulations).

84. *Id.*

The existence of adequate, content-neutral alternatives significantly undercuts an assertion that a regulation is necessary.<sup>85</sup>

Finally, the First Amendment's protection of communication extends to expressive conduct as well as speech itself.<sup>86</sup> Conduct is expressive if the actor intends to convey a particular message and if it is highly likely that those viewing the conduct will understand that message.<sup>87</sup> Examples of expressive conduct include burning the American flag,<sup>88</sup> wearing black armbands,<sup>89</sup> and staging a sit-in.<sup>90</sup>

## 2. First Amendment Protection of Mentation

The Supreme Court has never directly addressed whether government restrictions on mentation violate the freedom of speech, but it has held that the First Amendment protects the right to receive ideas.<sup>91</sup> In striking down a law prohibiting the private possession of obscene materials, the Court explained that "[i]f the First Amendment means anything, it means that a [s]tate has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."<sup>92</sup>

From the premise that the First Amendment protects the right to receive ideas, lower courts have extrapolated a free speech right to *generate* ideas.<sup>93</sup> According to the argument, if

85. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992).

86. *Johnson*, 491 U.S. at 404.

87. *Id.*

88. *Id.* at 406.

89. *Id.* at 404 (citing *Tinker v. Des Moines Indep. Community Sch. Dist.* 393 U.S. 503, 505 (1969)).

90. *Id.* (citing *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966)).

91. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

92. *Id.* at 565. The Court similarly rejected, for lack of an empirical basis, the argument that exposure to obscene materials might lead to deviant sexual behavior. *Id.* at 566. An empirical basis does exist, however, for the conclusion that a pedophile's "exposure" to his own fantasies leads to deviant sexual behavior. See *supra* notes 27-30 and accompanying text (noting that pedophilic fantasies are persistent, recurrent, and have to be fulfilled).

93. See *Bee v. Greaves*, 744 F.2d 1387, 1393-94 (10th Cir. 1984) (holding that the right to generate ideas gives rise to a liberty interest in a pretrial detainee to avoid the unwanted administration of antipsychotic drugs); *Rogers v. Okin*, 478 F. Supp. 1342, 1366-68 (D. Mass. 1979) (holding that the right to generate ideas gives rise to a liberty interest in mental patients at a state hospital to refuse treatment of psychotropic drugs in a nonemergency), *aff'd in relevant part and rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded on other grounds sub nom. Mills v. Rogers*, 457 U.S. 291 (1982); *Rennie v. Klein*, 462 F. Supp. 1131, 1143-44 (D.N.J. 1978) (holding that forcible administration of psychotropic drugs does not so disable involuntary patient

the right to receive ideas is a protected prerequisite to communication, then the right to generate ideas must be a protected prerequisite as well; the freedom to express ideas is meaningless without the freedom to generate them.<sup>94</sup> One commentator has offered a thesis outlining the core logic:

(1) The [F]irst [A]mendment protects communication of all kinds, whether in written, verbal, pictorial, or any symbolic form, and whether cognitive or emotive in nature.

(2) Communication entails the transmission and reception of whatever is communicated.

(3) Transmission . . . necessarily involve[s] mentation on the part of . . . the person transmitting . . . .

(4) It is in fact impossible to distinguish in advance mentation that will be involved in or necessary to transmission . . . from mentation that will not.

(5) If communication is to be protected, *all* mentation (regardless of its potential involvement in transmission . . . ) must therefore be protected.<sup>95</sup>

According to this thesis, communication, or more precisely, the potential of mentation to be involved in the communicative process, is the linchpin that brings mentation within the scope of constitutional protection.<sup>96</sup>

Moreover, the right to generate ideas may be justified on the grounds that it is presumptively immoral for government to substantially alter a person's mentation against his will.<sup>97</sup>

at state psychiatric hospital that his right to generate ideas is violated); *Kaimowitz v. Department of Mental Health*, 1 Mental Disability L. Rep. (A.B.A.) 147, 151-52 (Mich. Cir. Ct. 1973) (holding that state may not perform experimental psychosurgery on involuntarily detained "sexual psychopath" where surgery could abridge psychopath's First Amendment right to generate ideas).

94. See *Kaimowitz*, 1 Mental Disability L. Rep. (A.B.A.) at 152 (concluding that right to generate ideas necessarily follows from right to express ideas).

95. Michael H. Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, in *BIOLOGICAL AND BEHAVIORAL TECHNOLOGIES AND THE LAW* 49, 54 (Michael H. Shapiro ed., 1982) (footnote omitted). Disfavored categories of speech are an exception to the premise stated in (1). *Id.* at 98-99 n.29

96. Mentation is involved in the communicative process by definition. Shapiro, *Id.* at 55. As a matter of logic, we know that *some* mentation is involved in the communicative process, but we may not know *which* mentation is involved in any given circumstance. It is therefore an empirical issue as to whether a given incursion into mentation indeed affects communication. *Id.*

97. *Id.* at 53. This moral thesis is closely related to, but distinct from, the inviolability-of-the-brain thesis, which argues that because the brain is "the essence of what is human," this sanctum of "humanly prized emotions and thought" should remain undisturbed. SAMUEL I. SHUMAN, *PSYCHOSURGERY AND THE MEDICAL CONTROL OF VIOLENCE* 97, 98 (1977). The thesis has been criticized on the grounds that "inviolability of the brain is only a social con-



The Supreme Court has recognized this moral proposition in a variety of rulings,<sup>98</sup> although it has never formally found a constitutionally protected right to generate ideas.<sup>99</sup> The courts that have extended First Amendment protection to antecedent thought have failed to forge a test outlining the extent to which the government may control mental processes without violating the freedom of speech.<sup>100</sup>

struct, like nudity." Jose M.R. Delgado, *Physical Manipulation of the Brain*, in HASTINGS CENTER REP. 11 (Special Supp. May 1973). Yet even if the thesis "ha[s] no scientific basis and lack[s] any clear articulation in ordinary, nonpoetic, nonmetaphorical language," it may nevertheless be justified on the grounds that "widely shared moral feelings" deserve legal protection. SHUMAN, *supra*, at 100.

98. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977) ("[I]n a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973) ("The fantasies of a drug addict are his own and beyond the reach of government . . ."); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) (stating that the Bill of Rights safeguards the "freedom to be intellectually and spiritually diverse or even contrary").

99. In *Washington v. Harper*, 494 U.S. 210 (1990), the Supreme Court held, on substantive and procedural due process grounds, that a state prisoner could be treated with psychotropic drugs against his will and without a hearing. Although the prisoner had raised the First Amendment issue below, it was not before the Court because the case had originally been decided on due process grounds. *Id.* at 218 n.5; *id.* at 258 n.32 (Stevens, J., dissenting).

100. *But see Green, supra* note 13, at 19; Peters, *supra* note 13, at 326. Although both commentators cite *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978), for a test determining constitutionality according to the intrusiveness of the government action as measured by the actual effects of a drug on a patient's ability to think and speak, the court in that case never claimed to create such a test. Rather, the court simply compared the case at bar to *Kaimowitz v. Department of Mental Health*, 1 Mental Disability L. Rep. (A.B.A.) 147 (Mich. Cir. Ct. 1973), and found that the effects of psychotropic drugging would not "rise to the level of first amendment violations" as experimental psychosurgery. *Rennie*, 462 F. Supp. at 1143-44.

The courts finding a free speech right to generate ideas never invented a constitutional test because, except for *Rennie*, they used the First Amendment issue to implicate other legal questions, without reaching the merits of the First Amendment issue itself. See, e.g., *Bee v. Greaves*, 744 F.2d 1387, 1391-96 (10th Cir. 1984) (holding that First Amendment right to generate ideas gives rise to liberty interest of pretrial detainee to avoid unwanted administration of antipsychotic drugs, such that the Due Process Clause of the Fourteenth Amendment requires state concerns to be sufficiently compelling to overcome such interest); *Rogers v. Okin*, 478 F. Supp. 1342, 1366-67 (D. Mass. 1979) (holding that generation of ideas is a fundamental right, such that a state institution for the mentally ill violates the right to privacy, in a nonemergency situation, if it overrides decisions of involuntary patients to avoid treatment of mind-altering drugs), *aff'd in relevant part and rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded on other grounds*

## B. THE LAW OF PAROLE: LIMITING PRINCIPLES FOR CONDITIONS OF RELEASE

A condition of parole<sup>101</sup> may be challenged on statutory<sup>102</sup> or constitutional<sup>103</sup> grounds. These two approaches lead, respectively, to "reasonable relationship" and "overbreadth" tests.

*sub nom Mills v. Rogers*, 457 U.S. 291 (1982); *Kaimowitz*, 1 Mental Disability L. Rep. (A.B.A.) at 152 (holding that involuntarily detained "sexual psychopath" could not effectively give informed consent to experimental psychosurgery because the First Amendment right to generate ideas would be abridged if the state were to perform the operation). The same is true for the cases that, without expressly identifying a First Amendment right to generate ideas, nevertheless recognize a free speech hurdle to state interference with mental processes. See *United States v. Charters*, 829 F.2d 479, 492 (4th Cir. 1987) (holding that administration of mind-altering medication to pretrial detainee implicates the freedom of thought, giving rise to a liberty interest such that government justifications must be sufficiently compelling to overcome such interest); *Lojuk v. Quandt*, 706 F.2d 1456, 1465-67 (7th Cir. 1983) (holding that First Amendment interests in being able to think and communicate effectively give rise to a liberty interest such that plaintiff psychiatric patient treated with electroconvulsive therapy could state a cause of action under the Fifth Amendment's Due Process Clause); *Scott v. Plante*, 532 F.2d 939, 945-47 (3rd Cir. 1976) (holding that plaintiff patient, indefinitely committed in a state hospital as mentally incompetent to stand trial, could state a claim for relief under the Fifth Amendment); *Davis v. Hubbard*, 506 F. Supp. 915, 929-39 (N.D. Ohio 1980) (holding that First Amendment interests in being able to think and communicate freely give rise to a liberty interest under the Due Process Clause of the Fourteenth Amendment).

101. The term "parole" comes from the French *parole d'honneur*, meaning "word of honor." NEIL P. COHEN & JAMES J. GOBERT, *THE LAW OF PROBATION AND PAROLE* § 1.01 (1983 & Supp. 1993). In general, parole is an administrative procedure whereby a parole board permits an offender who has already begun part of a prison term to serve the remaining part of the sentence in the community, but requires the offender to abide by a set of release conditions that, if breached, may result in the offender's return to prison for the remaining part of the original sentence. *Id.*

Parole and probation are conceptually different conditional releases. *Id.*; see also Bruce D. Greenberg, Note, *Probation Conditions and the First Amendment: When Reasonableness Is Not Enough*, 17 COLUM. J.L. & SOC. PROBS. 45, 46 n.6 (1981) (cautioning against confusing the two doctrines). Yet because parole and probation are so similar, COHEN & GOBERT, *supra*, at 4-5; Greenberg, *supra*, at 46 n.6, courts construe the two analogously. See, e.g., *United States ex rel Demarois v. Farrell*, 87 F.2d 957, 961 (8th Cir. 1937) (adopting the parole law rule that when offender breaks parole, the running of his sentence is suspended until he is returned to the penitentiary, citing the identical purposes of the two laws). Likewise, this Note, in analyzing the law of parole, will use probation case law.

102. See generally COHEN & GOBERT, *supra* note 101, § 5.09.

103. See generally *id.* § 5.10.

### 1. The Reasonable Relationship Test

Because parole is a creature of statute, a "reasonable relationship" must exist between a parole condition and the goals of parole, or the condition may face an *ultra vires* challenge.<sup>104</sup> The recognized goals of parole are usually rehabilitation and public safety,<sup>105</sup> although deterrence and condign punishment are also acceptable ends.<sup>106</sup> Hence, a condition of parole that relates to the crime for which the offender was convicted or that involves conduct related to future criminality is likely to satisfy these goals.<sup>107</sup> For example, in *United States v. Holloway*,<sup>108</sup> a defendant who cashed prisoners' refund checks generated by false tax returns was convicted of conspiracy to make a fraudulent claim against the United States.<sup>109</sup> The Sixth Circuit upheld a condition of her parole<sup>110</sup> forbidding her from communicating by mail with prisoners.<sup>111</sup> The court found that the reasonable relationship test was satisfied because Holloway would likely be rehabilitated if deprived of the cause and instrumentality of her crime, and because the restriction would protect the public from future tax frauds.<sup>112</sup>

### 2. The Overbreadth Test

Alternatively, a condition of parole may be challenged as unconstitutional. While it is true that parolees "properly are

104. See *id.* § 5.09 (explaining that a parole condition may violate the statute authorizing parole if the condition fails to satisfy the jurisdiction's rationale for imposing a parole term).

105. *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975) (en banc).

106. *United States v. Tonry*, 605 F.2d 144, 148 (5th Cir. 1979). Other permissible goals include incapacitation, retribution, favorable impact on prison management, equalization of sentencing, and "fine tuning" sentences. COHEN & GOBERT, *supra* note 101, § 1.06, although these goals have generally gone without mention by the courts.

107. Cf. *People v. Dominguez*, 64 Cal. Rptr. 290, 293 (1967) (invalidating a condition of probation forbidding offender from becoming pregnant, on the grounds that the condition neither related to the defendant's crime, nor to criminal conduct in general, nor to the offender's likely involvement in future criminality).

108. 740 F.2d 1373 (6th Cir. 1984).

109. *Id.* at 1375.

110. The court actually upheld a condition of her probation, but her probation was contingent upon her first serving six months behind bars. *Id.* at 1381.

111. *Id.* at 1383.

112. *Id.*

subject to limitations from which ordinary persons are free,"<sup>113</sup> the overbreadth doctrine dictates that a condition of parole must not infringe a parolee's constitutional rights more than is necessary to achieve government purposes.<sup>114</sup> Because the government's purposes are the goals of parole, the overbreadth test requires an investigation similar to the reasonable relationship test.<sup>115</sup> The functional difference between the two tests is that the overbreadth analysis eliminates only those portions of an otherwise valid condition which bear no relation to parole's goals, while the reasonable relationship test invalidates entirely unrelated conditions.<sup>116</sup> For example, in *United States v. Smith*,<sup>117</sup> a defendant whose income tax returns contained nothing but zeroes and constitutional objections was properly convicted of failing to file tax returns.<sup>118</sup> The Fifth Circuit modified a condition of his parole directing him not to make statements advocating disobedience of "any local, state or federal law" by replacing that phrase with "the Internal Revenue Code."<sup>119</sup> While otherwise acceptable, the restriction was overbroad, the court reasoned, because Smith's convictions were for tax offenses only.<sup>120</sup> Although several courts have applied the overbreadth test to parole conditions challenged on First Amendment grounds,<sup>121</sup> no court has applied the test to parole conditions that burden mentation specifically.<sup>122</sup>

113. *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975) (en banc).

114. *Greenberg*, *supra* note 101, at 77.

115. Because both tests operate by reference to the goals of parole, several courts have failed to make a clean distinction between the two tests, or have treated the constitutional analysis as a second step in the reasonable relationship test. See, e.g., *United States v. Terrigno*, 838 F.2d 371, 374 (9th Cir. 1988) (calling the reasonable relationship inquiry a "determin[ation] of whether the sentencing judge imposed the conditions for permissible purposes," and calling the overbreadth inquiry a "reasonable relationship" test); *United States v. Holloway*, 740 F.2d 1373, 1383 (6th Cir. 1984) (concluding that probation condition is not reasonably related to goals of probation because it is overbroad); *United States v. Smith*, 618 F.2d 280, 282 (5th Cir. 1980) (per curiam) (same, except parole).

116. *Greenberg*, *supra* note 101, at 79.

117. 618 F.2d 280 (5th Cir. 1980) (per curiam).

118. *Id.* at 281-82.

119. *Id.* at 282.

120. *Id.*

121. See, e.g., *United States v. Terrigno*, 838 F.2d 371 (9th Cir. 1988); *United States v. Holloway*, 740 F.2d 1373 (6th Cir. 1984); *United States v. Lowe*, 654 F.2d 562 (9th Cir. 1981); *United States v. Patterson*, 627 F.2d 760 (5th Cir. 1980) (per curiam); *United States v. Smith*, 618 F.2d 280 (5th Cir.

### III. CALIFORNIA'S CHEMICAL CASTRATION STATUTE: APPLYING THE FIRST AMENDMENT AND THE LAW OF PAROLE TO MENTATION

Analysis of California's chemical castration statute under the First Amendment and law of parole is unsatisfactory. The narrow tailoring requirement of the constitutional test for content-based restrictions is impossible to apply to the California law. Because the overbreadth test of the law of parole is functionally equivalent to the narrow tailoring test, it too is inadequate. The failure of these tests demonstrates that a new constitutional test is needed to subject state infringements on mentation to First Amendment analysis.

#### A. FIRST AMENDMENT ANALYSIS: REFORMULATING THE RIGHT TO GENERATE IDEAS AND APPLYING THE TRADITIONAL FIRST AMENDMENT TESTS TO MENTATION

Before measuring the California statute against the First Amendment right to generate ideas, an analysis of the right itself reveals significant problems in its formulation. These problems can be overcome by recognizing that the right to generate ideas is not absolute, but is protected only to the extent that the First Amendment would protect the communication of such ideas. Hence, an analysis of the California law must proceed by determining whether the law restricts mentation for categorical, content-neutral, or content-based reasons. Although the statute is content-based, the narrow tailoring requirement of the content-based test is impossible to apply. Thus a First Amendment analysis of chemical castration yields no conclusion as to its constitutionality.

#### 1. Problems with the Current Formulation of the Right to Generate Ideas

The first problem with the current formulation of the right to generate ideas is that the moral principle supporting the right is not absolute, and may be overcome by a countervailing

1980) (per curiam); *United States v. Tonry*, 605 F.2d 144 (5th Cir. 1979); *Porth v. Templar*, 453 F.2d 330 (10th Cir. 1971); *Hyland v. Proconier*, 311 F. Supp 749 (N.D. Cal. 1970).

122. In *United States v. Stine*, probationer argued that revocation of his probation was improper because the condition he had violated—required psychological counseling—was void *ab initio* as an unconstitutional infringement of his right of mentation. 646 F.2d 839, 841 (3d Cir. 1981). The Third Circuit rejected this challenge without reaching its merits. *Id.* at 844-47.

moral justification.<sup>123</sup> Recall that the justification for the right to generate ideas is the presumption against the government substantially altering a person's mentation against his will.<sup>124</sup> Conversely, the protection of innocent third parties is the principal moral justification militating against the right to generate ideas.<sup>125</sup> The significance of this countervailing proposition is that it provides a competition between principles, the point at which one principle surpasses the other plotting a point on the line separating the moral from the immoral. While the pursuit of the moral and the constitutional may trace divergent paths, the inquiry, at a minimum, establishes a compelling state interest at odds with a convicted child molester's right to fantasize.<sup>126</sup>

Second, the core thesis behind the right to generate ideas implies an absurd constitutional test. To recount the argument, the right to generate ideas is inviolable, in short, because all communication is protected,<sup>127</sup> because all communication requires mentation,<sup>128</sup> and because it is impossible to preselect for disfavored mentation that will be unnecessary to communication.<sup>129</sup> This argument leaves no avenue for state-imposed restrictions on the right to generate ideas.<sup>130</sup> Hence, a

123. Shapiro, *supra* note 95, at 53.

124. See *supra* note 97 and accompanying text (identifying moral theses against interfering with thought).

125. See Lauren J. Abrams, Comment, *Sexual Offenders and the Use of Depo-Provera*, 22 SAN DIEGO L. REV. 565, 570 (1985) (identifying circumstances in which the state may compel individuals to take medication). This justification squares with the Millian principle that "the only purpose for which power can be rightfully exercised over any other member of a civilized community, against his will, is to prevent harm to others." JOHN STUART MILL, *ON LIBERTY* 13 (Elizabeth Rapaport ed., Hackett Publ'g Co., Inc. 1978) (1859).

126. A compelling state interest is necessary to satisfy the constitutional test for content-based restrictions on communication, see *supra* text accompanying note 84 (identifying the standard of review for content-based restrictions), and is more than necessary to satisfy the test for content-neutral restrictions. See *supra* text accompanying note 79 (identifying the lesser standard for content-neutral restrictions).

127. See *supra* note 95 and accompanying text. This shorthand is extracted from premise (1).

128. See *supra* note 95 and accompanying text. This shorthand is extracted from premises (2) and (3).

129. See *supra* note 95 and accompanying text. This shorthand is extracted from premise (4).

130. Despite phrasing the argument in absolute terms, the argument's author would permit coercive intrusions on the right to generate ideas where

constitutional test premised on this reasoning would be purely fact-based; if state action would in fact interfere with a person's generation of ideas, then such action would be unconstitutional.

This constitutional test is absurd because it simply goes too far. On the one hand, a state's control over the minds of public school children would be an obvious constitutional violation.<sup>131</sup> More abstractly, any state-sponsored stimulus affecting perception, such as the wail of a police siren, could interfere with the generation of ideas, thereby triggering the First Amendment.<sup>132</sup> The consequences of this constitutional test, in either case, are unsatisfactory. One way to resolve the problem would be to incorporate the maxim "no right is absolute."<sup>133</sup> Alternatively, the right to generate ideas may be salvaged, in a weaker form, after recognizing that its core thesis, as currently formulated, is at odds with First Amendment jurisprudence.

A final justification for limiting the right to generate ideas is that the core thesis in support of the right erroneously states the law. Contrary to the logic supporting the right to generate ideas, not all kinds of communication are protected. For example, certain categories of speech<sup>134</sup> and expressive conduct<sup>135</sup> remain unprotected. Moreover, government may restrict speech and expressive conduct if it satisfies the applicable content-neutral or content-based test.<sup>136</sup>

Correcting this error has important consequences for outlining the extent to which the government may control mental processes without violating the freedom of speech. From the proposition that not all kinds of communication are protected, it follows as a corollary that not all infringements of the right

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the state's rationale could survive a "compelling state interest" standard of review. Shapiro, *supra* note 95, at 55.

131. See *id.* at 56 (identifying "state-sponsored stimuli" that, absent limiting principles on the right to generate ideas, will trigger a threshold First Amendment claim).

132. Cf. *id.* 56 (observing that the "act of walking through a person's field of vision" affects their mentation).

133. "It would be idle and trite to say that no right is absolute." *Orient Ins. Co. v. Daggs*, 172 U.S. 557, 566 (1869).

134. See *supra* notes 70-75 and accompanying text (identifying permissible categorical restrictions on speech).

135. See *supra* notes 86-90 and accompanying text (identifying examples of permissible expressive conduct).

136. See *supra* text accompanying notes 79, 84 (outlining the narrow-tailoring requirements for content-neutral and content-based restrictions on speech).

to generate ideas are unconstitutional.<sup>137</sup> In other words, the right to generate ideas is safeguarded only *to the extent* that the First Amendment would protect the communication of such ideas.<sup>138</sup> Because communication remains the linchpin that brings mentation within the scope of constitutional protection, therefore, the extent of a pedophile's right to generate sexual fantasies may be analyzed in terms of categorical, content-based, and content-neutral restrictions on mentation.

## 2. Application of Traditional First Amendment Analysis to California's Chemical Castration Statute

Application of the traditional First Amendment tests to the California law reveals that the statute properly merits analysis under a content-based standard. In assessing the constitutionality of chemical castration according to that standard, however, the narrow tailoring requirement is impossible to apply, due to our lack of knowledge about mentation and communication.

### a. Determining the Proper First Amendment Test

The extent of a pedophile's right to generate sexual fantasies may be gauged by determining the nature of the government restriction involved in MPA treatment and classifying it within the existing framework of categorical, content-neutral, and content-based speech restrictions.

Pedophilic fantasies arguably constitute "obscenity"<sup>139</sup> such that they would be proscribable under a categorical restriction of obscene speech. The effect of the California statute, in pro-

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137. Candace J. Fabri, *An Involuntarily Detained Mental Patient's Informed Consent Is Invalid for Experimental Psychosurgery*, 50 CHI.-KENT L. REV. 526, 536-37 (1973); Jay Alexander Gold, Comment, *Kaimowitz v. Department of Mental Health: Involuntary Mental Patient Cannot Give Informed Consent to Experimental Psychosurgery*, 4 N.Y.U. REV. L. & SOC. CHANGE 207, 219-22 (1974). Case law bears out this conclusion. See, e.g., *Rennie v. Klein*, 462 F. Supp. 1131, 1143-44 (D.N.J. 1978) (holding that the involuntary administration of a psychotropic drug is not an unconstitutional infringement on the right to generate ideas).

138. *Kaimowitz v. Department of Mental Health*, 1 Mental Disability L. Rep. (A.B.A.) 147, 161 (Mich. Cir. Ct. 1973).

139. For the sake of convenience, "obscene," as used in this Note and as defined *infra* text accompanying notes 142-144, refers to that which is obscene according to the Supreme Court's definition of obscenity in *Miller v. California*, 413 U.S. 15, 24 (1973) and that which is defined in *New York v. Ferber*, 458 U.S. 747, 764 (1982), as *non-obscene* but nevertheless categorically proscribable because it involves children engaged in sexual acts.

viding for MPA treatment of convicted child molesters,<sup>140</sup> is to suppress the generation of sexual fantasies.<sup>141</sup> Since the First Amendment protects the right to generate ideas only to the extent that it would protect the communication of such ideas, a pedophile's right to generate sexual fantasies is protected only if his communication of such fantasies would be protected. If communication of pedophilic sexual fantasies constitutes proscribable obscenity, therefore, MPA's interference with the right to generate ideas poses no First Amendment problems.

This argument fails because pedophilic fantasies probably do not constitute obscenity for First Amendment purposes. Where the subject matter of what is communicated involves children engaged in sexual acts, such communication may only be prohibited as obscene if it "depicts or describes . . . sexual conduct specifically defined by . . . state law;"<sup>142</sup> if it "appeal[s] to [a] prurient interest in sex;"<sup>143</sup> and if it "lacks serious literary, artistic, political, or scientific value."<sup>144</sup> It is impossible to make these determinations in advance for any given pedophilic fantasy.<sup>145</sup> While classifying pedophilic fantasies as proscribable obscenity is a novel approach, it would be unworkable in practice.

140. See generally discussion *supra* Part I.C (describing the operation of the California statute).

141. See *supra* text accompanying notes 48-52 (explaining MPA's effects on the brain).

142. *Miller v. California*, 413 U.S. 15, 24 (1973) (as qualified by *New York v. Ferber*, 458 U.S. 747, 764 (1982)).

143. *Id.* (as qualified by *Ferber*, 458 U.S. at 764).

144. *Id.* (as qualified by *Ferber*, 458 U.S. at 764).

145. A counterargument might be that a pedophile's conviction of child molestation demonstrates that his motivating fantasy, by definition, satisfies the obscenity standard. This argument is without merit. The pedophilic fantasy described *supra* note 27, which fails to meet the definition of obscenity, demonstrates that a *per se* rule is inappropriate. Moreover, the argument does not apply to cases where the act for which the offender is convicted is not identical to the pedophilic fantasy, such as where the fantasy changes between the time of the crime and the offender's parole, or where the fantasy *does*, for example, have literary value (imagine a pedophile selling the book rights to his crime story).

Especially troublesome is the application of this fact-intensive test—traditionally applied to "capturable" media, like magazines and videos—to fantasies "seen" only by the offender. This test is thus problematic because it requires analysis of facts known only to the offender, rather than focusing on the nature of pedophilia itself.

Pedophilic fantasies arguably constitute illegal advocacy, another category of unprotected speech.<sup>146</sup> According to the Supreme Court, the government may prohibit, as illegal advocacy, messages "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action."<sup>147</sup> It makes no difference that the messages are mental and directed to oneself rather than verbal and directed towards an audience, since First Amendment protection of mentation extends only to those ideas that would be protected were they communicated to others.

The illegal advocacy argument is unworkable because the "directed to" requirement of the illegal advocacy test is not provable as applied to pedophilic fantasies. The "directed to" language requires specific intent on the part of the pedophile; not an intent that he molest a child, but an intent that his fantasy incite or produce such conduct. In the first place, such intent would be impossible to prove absent an admission by the actor, significantly restricting application of this test. More importantly, the feelings of relief reported by MPA-treated sex offenders, as they gain freedom from deviant fantasies and take control over their sexual urges,<sup>148</sup> demonstrate that such intent does not exist. If it did, treated offenders would instead register disappointment as their fantasy-motivated compulsions cease.

It is also questionable whether the "imminency" requirement of the illegal advocacy test could be satisfied as applied to pedophilic fantasies. The ability of pedophiles to stay erotic impulses<sup>149</sup> in the face of persistent, recurrent fantasies<sup>150</sup> casts doubt on the proposition that the lawless action motivated by such fantasies is properly characterized as imminent.<sup>151</sup>

146. See *supra* note 75 and accompanying text (citing illegal advocacy as a category of unprotected speech).

147. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

148. See *supra* note 54 and accompanying text (describing the psychophysiological effects of MPA treatment).

149. See *supra* note 29 and accompanying text (identifying self-gratification as a technique to quench erotic cravings).

150. See *supra* note 27 and accompanying text (illustrating the irrepressibility of pedophilic fantasies).

151. Courts have determined whether the imminence requirement is met by reference to the passage of time between the purported incitement and the lawless action, see *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) (concluding that acts of violence occurring weeks or months after a civil rights speech are not imminent); by reference to the instantaneity of the lawless action, see *United States v. Rowlee*, 899 F.2d 1275, 1280 (2d Cir. 1990)

In assessing whether California's suppression of pedophilic fantasy is content-neutral or content-based, the answer hinges upon whether the restriction is justified without reference to the regulated mentation.<sup>152</sup> Because the statute targets the content of the sex offender's fantasy and is only justifiable by reference to that content, it is a content-based restriction. It is apparent, for example, that there would be no rationale for chemical castration if the sex offender were consumed with vacation fantasies as opposed to pedophilic fantasies. The content-based analysis is bolstered by the statute's failure to fall within the time, place, and manner restrictions typical of content-neutral regulations.<sup>153</sup> Although the California statute makes no reference to the content of the sex offender's mentation, the argument proceeds on the theory that a facially-neutral regulation is being applied so as to subject certain mentation—pedophilic fantasies—to disfavored treatment.<sup>154</sup>

b. *Unsatisfactory Application of the Content-Based Speech Test's Narrow Tailoring Requirement*

Because the California castration statute is justified by reference to the pedophilic content of child molesters' thoughts, its constitutionality depends on whether it is necessary to achieve a compelling governmental interest and whether it is narrowly tailored to achieve that end.<sup>155</sup> At the outset, California may claim a compelling interest in preventing the physi-

(concluding that mail fraud, as a slowly-developing wrong, is not imminent); and by reference to the instantaneity of the medium by which the purported incitement is conveyed, see *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1022-23 (5th Cir. 1987) (finding no imminence where adolescent dies attempting auto-erotic activity described in magazine). As applied to pedophilic fantasies, it appears that despite the instantaneity of the medium, pedophiles can prolong amount of time between the fantastic incitement and the lawless action.

152. See *supra* text accompanying note 76 (identifying the critical inquiry to determine whether a restriction of speech is content-neutral or content-based). "Mentation" is substituted for "speech" here to make the test normally applicable to the communicated word applicable to idea-generation as well. This contortion is crucial to the First Amendment analysis because communication is the linchpin that brings mentation within the scope of the First Amendment. See *supra* text accompanying notes 95-97 (explaining the linchpin argument).

153. See *supra* text accompanying note 78 (identifying time, place, and manner restrictions as typical content-neutral approaches).

154. See *supra* text accompanying note 82 (identifying methods of content-based restriction).

155. See *supra* note 84 and accompanying text (identifying the standard of review for content-based restrictions).

cal and emotional harm that convicted child molesters will otherwise inflict on the state's youngest citizens.<sup>156</sup> The issues then become fact-based questions of necessity and narrow tailoring.

California's chemical castration statute is necessary to diminish the recidivism of child molesters. This conclusion relies upon the absence of adequate, content-neutral alternatives to achieve the same objective.<sup>157</sup> While extended prison sentences for child molesters or other alternatives could reduce recidivism, the inadequacy of a lock-them-up-and-throw-away-the-key approach<sup>158</sup> and the success of MPA as compared to rehabilitative strategies<sup>159</sup> permit a finding of necessity.

Narrow tailoring requires that chemical castration promote a compelling government interest that would be achieved less effectively absent the California castration statute, but does not effect the body in such a way that a substantial portion of the regulation of mentation does not advance the government interest.<sup>160</sup> MPA's effectiveness in reducing recidivism guarantees that the first half of this test is satisfied. Parolees treated with MPA—or at least those parolees who are

156. See *supra* notes 32, 33 and accompanying text (describing the harm pedophilia victims suffer); *supra* text accompanying note 126 (deriving a compelling interest from the moral justification to protect innocent victims). The state could also assert a significant, if not compelling, governmental interest in punishing child molesters by way of MPA treatment. The statute itself implies that MPA treatment is punitive rather than therapeutic or preventative. See CAL. PENAL CODE § 645 (a) (West Supp. 1997) (providing that MPA treatment will be in addition to "any other punishment prescribed"). The problem with relying on punishment as a compelling state interest is that it would swallow all constitutional liberties, as deprivation of a liberty is itself punishment.

157. See *supra* text accompanying note 85 (explaining that the existence of alternative means to secure state interests demonstrates that the policy facing challenge is not narrowly tailored).

158. This approach is inadequate *not* because it would fail to reduce recidivism. It would probably accomplish the governmental interest more completely than would chemical castration. Instead, its inadequacy stems from abandoning competing policy preferences for spending as little revenue as is necessary on new prisons, preventing prison overcrowding, and reintegrating offenders into mainstream society. The point is that the necessity requirement does not completely invalidate legislative policy preferences by demanding that the means chosen to effectuate the governmental interest be absolutely necessary, but only that they be "reasonably necessary." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992).

159. Compare *supra* text accompanying notes 35, 36 (citing the failure of rehabilitative approaches and accompanying high rates of recidivism), with *supra* text accompanying notes 52-57 (explaining why MPA treatment works).

160. See *supra* text accompanying notes 81-82 (outlining the requirements of narrow tailoring).

pedophiles or have aggressive tendencies—will be significantly less likely to subject other children to physical or emotional harm.

The second half of the test, which is designed to ensure that state restrictions are not overinclusive with regard to the amount of mentation that is burdened, poses considerable difficulty for California's chemical castration law. Examination of the facts reveals that California's remedy is overinclusive with respect to those paroled child molesters who are neither pedophiles nor prone to aggression. Because MPA treatment is nontherapeutic for those who molest children, for example, due to hallucination or mental retardation, any interference with such parolees' mentation fails to effectuate the governmental interest and is therefore an unconstitutional burden on their right to generate ideas.<sup>161</sup>

With respect to parolees who are pedophiles or prone to aggression, the overinclusiveness requirement of the narrow tailoring test is impossible to apply. The problem here is our state of knowledge regarding the nexus between mentation and communication, and the effect of MPA on that nexus. The difficulty arises because some mentation is involved in the communicative process, but it is impossible to ascertain which mentation is involved in any given circumstance, or which mentation is interrupted by MPA.<sup>162</sup> Perhaps MPA only burdens mentation necessary to create pedophilic fantasies, as opposed to mentation necessary to communicate. Perhaps the converse is true. Because it is impossible to make these determinations, the narrow tailoring test is inadequate as applied to the California statute and yields no conclusion as to its constitutionality.

## B. ANALYSIS UNDER THE LAW OF PAROLE

Thus far the analysis has treated convicted child molesters as if they are to be accorded the same First Amendment rights as the population at large. In recognition that parolees are

161. Because there is no rational basis for applying the statute to paroled child molesters who are neither pedophiles nor prone to aggression, the law would fail any rational relationship test, much less the strict scrutiny required of content-based restrictions.

162. See *supra* text accompanying note 95 (quoting premise (4) of the thesis supporting free speech right to generate ideas); *supra* note 96 (identifying our lack of knowledge about how mentation is involved in the communicative process).

properly subject to conditions that infringe otherwise inviolable constitutional rights,<sup>163</sup> the law of parole should be applied to California's chemical castration statute to determine its constitutionality. Unfortunately, the reasonable relationship<sup>164</sup> and overbreadth<sup>165</sup> tests do not resolve the tailoring dilemma from First Amendment analysis.<sup>166</sup>

### 1. Application of the Reasonable Relationship Test

Because parolees—or at least those parolees who are pedophiles or have aggressive tendencies—treated with MPA will be significantly less likely to subject additional children to physical or emotional harm, the condition of parole is reasonably related to the goals of rehabilitation and public safety.<sup>167</sup> This conclusion is supported by the nexus between the condition and conduct related to past and future criminality.<sup>168</sup> Moreover, the reasonable relationship test should pose no problem here because the inquiry is conducted to determine whether statutory authority exists for the parole condition in question.<sup>169</sup> In the case of chemical castration, the condition is specifically authorized by California law.

### 2. Unsatisfactory Application of the Overbreadth Test

The overbreadth test, like the narrow tailoring requirement, is impossible to apply to the chemical castration statute. This should come as no surprise because the two tests are functionally equivalent; they both allow only so much infringement of constitutional rights as is necessary to achieve government's goals.<sup>170</sup> As with narrow tailoring, the difficulty

163. *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975) (en banc).

164. See discussion *supra* Part II.B.1 (discussing the reasonable relationship doctrine).

165. See discussion *supra* Part II.B.2 (discussing the overbreadth doctrine).

166. See discussion *supra* Part III.A.2.b (explaining why the content-based narrow-tailoring test is appropriate but impossible to apply to California's chemical castration statute).

167. See *supra* note 105 and accompanying text (identifying public safety and rehabilitation as twin goals of parole).

168. See *supra* note 107 and accompanying text (arguing that the reasonable relationship nexus is likely to be satisfied by a parole condition relating to the parolee's past or future conduct).

169. See *supra* text accompanying note 104 (characterizing the reasonable relationship test as an *ultra vires* inquiry).

170. Compare *supra* note 81 and accompanying text (identifying non-

arises from knowing that some mentation is involved in the communicative process, but not knowing which mentation is involved in any given circumstance, or which mentation is interrupted by MPA. This lack of knowledge makes it impossible to determine whether the condition of parole limits parolees' First Amendment rights more than is necessary to achieve the government's purposes.

#### IV. REMEDYING THE UNSATISFACTORY APPLICATION OF THE NARROW TAILORING AND OVERBREADTH TESTS: A NEW TEST TO DETERMINE THE CONSTITUTIONAL LIMITS OF STATE ACTION INTERFERING WITH MENTATION

The impossibility of applying the narrow tailoring and overbreadth tests to the chemical castration statute demonstrates that a new test is necessary to make content-based state infringements on mentation susceptible to constitutional analysis. The necessity of a new test is not limited to circumstances where state infringement on mentation is content-based. The constitutional test for content-neutral restrictions likewise incorporates a narrow tailoring requirement<sup>171</sup> that will fail if applied to state action burdening mentation. So long as no new test is developed, the right to generate ideas will enjoy none of the protections accorded the right to communicate them.

A new test should satisfy at least four objectives. First, a new test should recognize the absurdity of protecting individuals from every possible interference with mentation, no matter how slight.<sup>172</sup> Second, a new test should retain some semblance of its First Amendment background so that, when applied, it does not achieve results that stray radically away from the intuitive results of a narrow tailoring analysis.<sup>173</sup> Third, in recognition of the principle that those convicted of

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overinclusiveness requirement of narrow tailoring) with *supra* note 114 and accompanying text (identifying non-overinclusiveness requirement of the overbreadth test).

171. See *supra* notes 79-81 and accompanying text (identifying the standard of review for content-neutral restrictions).

172. See *supra* text accompanying notes 130-132 (providing examples demonstrating the absurdity of a test absolutely protecting idea generation).

173. Measuring the success of a new test against this goal may be difficult, because the task requires an intuition as to where the constitutional line would be drawn were the narrow tailoring test functional in the first place—a condition contrary to fact.

crimes do not enjoy the same constitutional protections as others,<sup>174</sup> a new test should not protect equally the First Amendment rights of convicted and nonconvicted persons.<sup>175</sup> Finally, a new test should apply universally to state action interfering with mentation so that the content-based *and* content-neutral hemispheres of state regulation may be measured against the First Amendment.<sup>176</sup>

In light of the foregoing principles, content-based, coercive state action interfering with mentation should only be allowed where all of the following conditions are met. First, the person aggrieved by the state action interfering with mentation has been convicted of a crime. Second, the state action is directed toward ameliorating a condition that has significantly contributed to such criminality. Third, the condition the state seeks to ameliorate is corrigible, and the method the state employs to ameliorate the condition neither carries with it an unreasonable degree of psychological risk nor is regarded as experimental by the relevant scientific community. Fourth, the state action that incidentally or directly interferes with mentation is supported by a compelling state interest and is necessary to achieve that interest. In the case of content-neutral, coercive state action interfering with mentation, the fourth prong would require only that the state action interfering with mentation be supported by a substantial state interest. A threshold First Amendment claim that the government has violated an individual's right to generate ideas would require that the individual is substantially unable to resist the psychic effects of state action interfering with mentation.

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174. See *supra* note 113 and accompanying text (observing that parolees are properly subject to restrictions from which others are free).

175. This goal responds to the identical constitutional scrutiny of the First Amendment's narrow tailoring test and the law of parole's overbreadth test. See *supra* text accompanying note 170 (comparing the narrow tailoring and the overbreadth test). A criticism of the goal might be that although the constitutional test is identical, the underlying state action to which the test is applied is not, and so convicted persons *do* sacrifice more constitutional liberties than do non-convicted persons. Although this criticism is accurate, it does not follow that the procedural application of the constitutional tests should not discriminate as well.

176. This goal is desirable because the need for a new test extends to content-neutral policies as well. See *supra* note 171 and accompanying text (showing that the narrow tailoring dilemma is a feature of both kinds of regulations).



This proposal<sup>177</sup> accomplishes the goals required of the new test. For those who have not been convicted of a crime, the uncertainty as to whether a state activity interfering with mentation is narrowly tailored is resolved in favor of the person aggrieved by such activity. For those who have been convicted, the uncertainty is resolved in favor of the state. This dual approach satisfies the goal of differential treatment. In combination with the requirements that the individual be convicted of a crime and that the state action be directed toward ameliorating a condition which has significantly contributed to such criminality, the compelling-interest requirement contemplates that the parolee or probationer has probably committed a felony and that, absent state activity, the person will continue to impose significant social costs upon the community.

The goal that the new test maintain some semblance of First Amendment underpinnings is supported by the compelling interest and necessity standards and the requirements that state action be directed toward ameliorating a condition that has significantly contributed to criminality, that the condition the state seeks to ameliorate is corrigible, and that the method the state employs to ameliorate the condition neither carries with it an unreasonable degree of psychological risk nor is regarded as experimental by the relevant scientific community. Specifically, the compelling interest and necessity requirements match the current compelling interest and necessity requirements of content-based restrictions. Fulfillment of the other requirements protects against interference with mentation where such interference is unlikely to achieve governmental goals or is likely to interfere with mentation much more than is necessary to achieve such purposes. Hence, it approximates the narrow tailoring requirement of the test governing content-based restrictions.

Insofar as the improved test addresses both content-neutral and content-based restrictions on mentation, it satisfies the goal of universal applicability.<sup>178</sup> Moreover, the narrow

177. The proposed test was inspired by a proposal to compromise the "right to be unhealthy," SHUMAN, *supra* note 97, at 205, and by commentary offering the optimal conditions under which the state may prescribe "internal punishment." Connie S. Rosati, *A Study of Internal Punishment*, 1994 WIS. L. REV. 123, 128-36.

178. The new test is universally applicable even though it does not address categorical restrictions on mentation. Where a categorical restriction is found, it does not usurp constitutional analysis under the content-neutral/content-based dichotomy. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

tailoring requirement of the content-neutral test necessitates that the new test apply to content-neutral restrictions to avert the same narrow tailoring dilemma encountered by analysis of mentation under the content-based test. By requiring, under a content-neutral analysis, that state action interfering with mentation be supported only by a substantial state interest, the new test likewise retains the First Amendment balance of the old test in furtherance of the goal of maintaining some semblance of First Amendment underpinnings.

Finally, the threshold standard for stating a First Amendment claim under the right to generate ideas recognizes that not every possible interference with mentation will merit a constitutional remedy. By requiring that an individual be substantially unable to resist the psychic effects of state action interfering with mentation, *de minimus* or persuasive intrusions, like police sirens or public school instruction, are distinguished from coercive mind control.

A primary criticism of the new test and of limiting the right to generate ideas generally might be that individuals should be absolutely free from government meddling with their thoughts. In the first place, this argument simply goes too far, as demonstrated by the absurd results it would generate.<sup>179</sup> A respectable fall-back position might be, however, that even if *de minimus* or persuasive instances of government interference with mentation are not absolutely forbidden under the First Amendment, instances of coercive mind control should be. According to the argument, it is unacceptable to place restrictions on mentation by reference to the restrictions that government may legitimately place on communication, because there is a difference between thinking and speaking. Likewise, it is unacceptable to place restrictions on mentation to prevent lawless action, because there is a difference between thinking and acting. According to the argument, the danger in permitting coercive mind control is that individuals will be punished for their thoughts which are separate from their proscribable actions.

This criticism is misplaced. The new test only permits coercive mind control where it is necessary to prevent acts which themselves may be prohibited, and where that necessity has been demonstrated by an individual's past criminality. Hence,

179. See *supra* text accompanying notes 131-132 (providing examples demonstrating the absurdity of a test absolutely protecting idea generation).

where an individual's mentation motivates lawless action and where the actor is unable to independently suppress that motivation, the individual's behavior has already erased the distinction between thinking and acting.<sup>180</sup>

Moreover, under this test, government may never regulate ideas solely because it could prohibit their communication; the state must also demonstrate that such regulation is necessary to prevent prohibited *conduct*. This additional requirement explains why the new test is warranted, notwithstanding the difference between thinking and speaking. To the extent that government has traditionally been permitted to regulate speech and not mentation, such regulation has been justified by the potential harmful effects of the former. This distinction is erased by the likely harmful effects of certain thoughts when an individual is unable to control the compulsions they induce.<sup>181</sup>

Application of the proposed test to California's chemical castration statute produces mixed results. Because the California law only applies to convicted child molesters,<sup>182</sup> it meets the first prong of the test. Second, because MPA treatment is directed toward ameliorating the pedophilic fantasies and aggressive tendencies that lead to child molestation,<sup>183</sup> it satisfies the second prong of the test, but only for those parolees for whom pedophilia or a tendency to aggression actually led to criminality.<sup>184</sup> Third, the condition which MPA treatment seeks to correct is corrigible,<sup>185</sup> and MPA treatment is neither

180. Where thought does not motivate conduct, and the state nevertheless infringes mentation, the state is not suppressing ideas in order to restrict conduct, but is doing so only incidentally. The criticism does not apply in this circumstance because there is no danger that individuals are being punished for their thoughts.

181. As to the related question why regulation of thought should be governed by a test formulated by reference to the protection of communication, as opposed to being governed by a test formulated by reference to permissible conduct, it is sufficient to answer that the right to generate ideas is protected by the First Amendment's freedom of speech guarantee.

182. CAL. PENAL CODE § 645(a), (b) (West Supp. 1997).

183. See *supra* text accompanying notes 43-55 (describing the intended effects of MPA treatment).

184. This result is consistent with the portion of the narrow tailoring test that is applicable to the California chemical castration statute. Like the old test, the improved test forbids state action interfering with mentation where no government interest may plausibly be achieved by such action. See *supra* text accompanying note 161 (applying narrow tailoring to MPA treatment where such treatment would be non-therapeutic).

185. See *supra* text accompanying notes 25-26 (demonstrating that deviant behavior may be a function of the level of testosterone in the bloodstream).

experimental<sup>186</sup> nor does it carry with it an unreasonable degree of psychological risk.<sup>187</sup> Finally, the compelling interest and necessity requirements have already been established.<sup>188</sup> In sum, application of the improved test would invalidate California's chemical castration statute as applied to those parolees who are neither pedophiles nor harbor aggressive tendencies, but it would uphold the statute as applied to those parolees who *are* pedophiles or harbor aggressive tendencies. The obvious solution is for California to limit chemical castration to those child molesters who are pedophiles.

### CONCLUSION

Just as the right to communicate ideas is protected under First Amendment jurisprudence, so must the antecedent right to generate ideas be protected. While traditional free speech analysis works well to distinguish between protected and unprotected speech, that framework of analysis does not transfer well to mentation, because it is impossible, under the current state of knowledge, to differentiate mentation which deserves First Amendment protection from mentation which does not. Analysis of California's new chemical castration law bears out this conclusion and dictates an improved test limiting the extent to which state action may interfere with mentation. When faced with government intrusions on the right to generate ideas, courts should adopt this improved test which, as applied to the California law, upholds the innovative policy as against a convicted pedophile's right to fantasize.

186. See *supra* text accompanying note 44 (explaining why MPA treatment is no longer experimental).

187. See Kelly & Cavanaugh, *supra* note 26, at 104-05 (providing a comprehensive list of complications and side effects).

188. See *supra* note 156 and accompanying text (offering a compelling justification for chemical castration); *supra* notes 157-159 and accompanying text (demonstrating the necessity of chemical castration).