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# Alternative Sentencing For Sexual Deviates

By Daniel Feeney

The present correctional system has been under heated attack for years as being ineffective and expensive. See, e.g., Lopez, *The Crime of Criminal Sentencing Based on Rehabilitation*, 11 GOLDEN GATE U.L. REV. 533 n.3 (1981). Theories for reforming or changing the system are varied and complex. The purpose of this article is not to examine major proposals to reform the correctional system. Rather, this article will examine a possible alternative to incarceration for a select group of offenders—sexual offenders. This article will suggest that there are alternatives within the present system that can satisfy the objectives of criminal sentencing yet remain cost effective.

Sexual offenders have often been selected for special treatment in sentencing. A. STONE, *MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION*, at 181 (1976) [hereinafter cited as Stone]. The special treatment is generally provided by a statute which is enacted specifically to deal with "sexual psychopaths." The primary reason for this special treatment is to enable the courts to impose longer sentences. Rehabilitative treatment for sexual psychopaths is merely a secondary objective of these types of statutes. *Id.* The statutes provide for indeterminate sentences for those adjudicated "sex psychopaths" the release of the offenders contingent on rehabilitation.

While at present there is no statute specifically geared toward the sex offender, Maryland once had a statute which dealt with emotionally disturbed offenders. Maryland's former Defective Delinquent statute was based on the same premise as the sexual psychopath statutes. *Id.* at 182; See MD. ANN. CODE art. 31b, §§ 1-19 (1976 repl. del.) repealed and reenacted 1977 (1981 cum. supp.). The statute provided for incarceration of individuals who demonstrated persistent antisocial behavior due to an intellectual

deficiency or emotional imbalance. An additional criterion was the individual's threat to society. If the offender was found to be a defective delinquent, he was given an indeterminate sentence and incarcerated at the Patuxent Institute for treatment. *Id.* §1 and §5.

The Defective Delinquent statute came under persistent constitutional attack while it was in effect.

The uncertain statutory language may be 'void for vagueness' under the due process clause of the fourteenth amendment. The undue harshness of unlimited confinement which may arise from a relatively trivial offense, could constitute cruel and unusual punishment. Moreover, the delinquency statute, as construed, does not require the strict constitutional protection applicable to criminal proceedings. Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 VA. L. REV. 602, at 608-610 (1970).

Because the proceeding used to incarcerate the defective delinquent was deemed civil rather than criminal, the constitutionally required safeguards in criminal proceedings were relaxed. *Id.* at 610. Constitutional safeguards are relaxed in proceedings under sex psychopath statutes for the same reason.

Vague standards and a lack of procedural safeguards are characteristic of quasi-criminal statutes. Nevertheless, the Defective Delinquent statute survived numerous constitutional attacks. *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964); *Tippet v. Maryland*, 436 F.Supp. 1153 (4th Cir. 1971); *Director v. Daniels*, 243 Md. 16, 221 A.2d 397, cert. denied, 385 U.S. 940 (1966). "Patuxent Institute has in all probability, been the most sued institution in America, and yet the Courts have consistently upheld the right of the

state to select a special group of individuals for special status of defective delinquent." Rappaport, *Editors Commentary*, 5 BULL. AMER. ACAD. OF PSYCHIATRY AND THE LAW IV at V (1977). While the statute managed to survive constitutional attacks, it failed to survive as a justifiable alternative to conventional incarceration.

Patuxent Institute was built in 1955 to house individuals incarcerated under the Defective Delinquent statute. In terms of size and qualifications, the staff of the institute far exceeded any adult correctional institute in the country. Lejins, *The Patuxent Experiment*, 5 BULL. OF THE AMER. ACAD. OF PSYCHIATRY AND THE LAW 116 at 124-125 (1977). The cost to the state of committing an individual to the institute was twice the cost of sending him to the division of corrections. Shear, *An Overview of the Contract Research Corporation Evaluation of Patuxent Institution*, 5 BULL. OF THE AMER. ACAD. OF PSYCHIATRY AND THE LAW 134 at 141-142 (1977). Despite the staff and high cost of operating Patuxent Institute, measurable benefits were minimal. The inmates incarcerated at the institute had a 69% chance of reincarceration while the inmates at a conventional prison had a 72% chance of reincarceration. *Id.*

There are numerous reasons for the ineffectiveness of the Institute. See *Symposium Issue: Patuxent Institute*, 5 no.2. BULL. OF THE AMER. ACAD. OF PSYCHIATRY AND THE LAW, (1977). It should be emphasized, however, that the primary purpose of the Defective Delinquent statute's framers was to protect society through the imposition of an indeterminate sentence; treatment of the offender was a secondary albeit noble purpose. STONE at 191-192.

Like Maryland's Defective Delinquent statute, few, if any of the sexual psychopath statutes have had success in treating sexual offenders. *Id.* at 185. As with the Defective Delinquent statute, the main purpose of sexual psychopath statutes was to incapacitate rather than to treat the offender. This attempt merely to incapacitate the offender through im-

position of an indeterminate sentence is being challenged with some success in the courts. In *Ohlinger v. Watson*, 652 F.2d 775 (9th Cir. 1980), the court held that if an offender is incarcerated under Oregon's sexual deviate statute and given an indeterminate sentence due to a mental condition, he must be given adequate treatment. *Id.* at 778. The court reasoned that adequate treatment cannot be based merely on what the state considers to be reasonable in terms of time and cost but must be tailored to the individual needs of the inmate with the reasonable objective of rehabilitation. *Id.* at 779.

The sex offender exception has been sharply criticized. *STONE* at 193. One critical argument is that only a small percentage of sex offenders are dangerously assaultive and that if there is a treatment for the sexual offender it should be provided in prison. *Id.* The question becomes why imprison non-dangerous sexual offenders at all? Incarceration could only add to already overpopulated and financially constrained penal institutions.

It is also contended that assaultive sex offenders have fewer prior convictions than other criminals. *STONE* at 194. While this premise may be statistically valid, it is also true that a large percentage of sexual offenses go unreported. Berlin and Coyle, *Sexual Deviation Syndromes*, 149 *JOHNS HOPKINS MED. J.* 199 at 121 (1981). This phenomenon probably also bears on recidivism statistics giving the appearance that sexual offenders have changed their behavior when in reality they may have merely eluded detection.

The main argument for not treating the sex offender differently from other criminals is that none of the existing treatments work. *STONE* at 185. This intimates there is no illness, therefore the offender will not benefit from medical treatment. Thus, he should be treated like any other offender. While the statutory treatment of sexual offenders has met with little success and may have perpetrated some harm, this may be a condemna-

tion of the methods not necessarily the objectives.

Dr. Fred Berlin, M.D., a psychiatrist at the Johns Hopkins Hospital, points out that there is a means of treating some sex offenders that protects society, effectively treats the offender and is cost effective. Interview with Dr. Fred Berlin, M.D., Director of the Biosexual Psychohormonal Clinic at The Johns Hopkins Hospital Department of Psychiatry and Behavioral Sciences (1/26/81) (Tape on file office of *Forum*, U. of B. School of Law) [hereinafter cited as Berlin Interview]. Dr. Berlin is quietly

sexual orientation that may be biologically determined. Berlin, 149 *Sexual Deviation Syndrome*, *JOHNS HOPKINS MED. J.* 119 at 121 (1981). To punish such a person does nothing to alter his sexual orientation. Thus temporary incarceration fails to protect society from the harm caused by the individual acting on this orientation. Berlin Interview.

Dr. Berlin has been able to treat sexual deviates through the use of hormonal therapy. The therapy consists of injections of medroxyprogesterone acetate which diminishes the amount of the hormone testoste-



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but effectively offering an alternative to incarceration of sexual deviates to Maryland's courts. He contends that incarceration of the sexual deviate is, in many instances, an ineffective means of dealing with either the offender or the crime.

Dr. Berlin points out that the sexual deviate is not a normal person merely misbehaving who can be effectively dealt with through punishment. He asserts that it is not symptomatic of a normal person to continually subject himself and family to the risk of humiliation, loss of job and incarceration in an attempt to gratify sexual urges. It is, however, very probable that, in many instances, an offender's actions stem from an unconventional

hormone. Berlin, 149 *Sexual Deviation Syndrome*, 149 *THE JOHNS HOPKINS MED. J.* 119 at 121 (1981). The effect of lowering the offender's hormone level is a decrease in the intensity and frequency of his deviant sexual fantasies making self control easier, thereby diminishing the chance that he will engage in illicit sexual activity. Dr. Berlin emphasizes that the treatment does not change a man who desires young boys (homosexual pedophile) or the compulsive rapist (raptophilic) into a man with conventional heterosexual desire. Berlin Interview. Dr. Berlin's primary data suggests that recidivism in offenders receiving hormonal therapy is significantly lower than similar offenders who are incar-

cerated or who are receiving conventional psychotherapy.

Psychotherapy as a means of rehabilitating criminals has been deemed a failure by many. See Lopez, *supra*, at 552. Individual and group psychotherapy was administered to 80-90% of the Patuxent Institute inmates. Hoffman, *Patuxent Institute from a Psychiatric Perspective*, BULL. OF THE AMER. ACAD. OF PSYCHIATRY AND THE LAW 171 at 186 (1977). Patuxent's lack of success seems to support the view that psychotherapy alone is not an effective means of rehabilitating criminals.

An important aspect of Dr. Berlin's program is that the majority of the individuals participating in his program (approximately 40) are holding down jobs and caring for their families. Berlin Interview. The alternative is to incarcerate them at the taxpayers expense, use methods of rehabilitation that don't work, and return them to society to begin the process over again a few victims later.

It would be misleading to suggest biological treatment of sexual offenders will eradicate all sex crimes. Dr. Berlin points out that not all sex offenders are motivated by a biological condition, or by an aberrant sex drive. For example, hormone therapy will not work on an offender who is motivated by cruelty. It should also be noted that the therapy only suppresses the patient's hunger for deviant sexual activity. Upon discontinuing treatment the offender again runs the risk of engaging in illicit sexual activity. Berlin, *Sexual Deviation Syndrome*, 149 JOHNS HOPKINS MED. J. 119 at 123 (1981). One possible way of ensuring adequate treatment is to make continued treatment a condition of parole or probation. Berlin and Meinke, *Treatment of Sex Offenders with Antiondroenic Medication*, 138 AMER. J. OF PSYCHIATRY 601 at 605 (1981); see MD. ANN. CODE art. 27, §§ 641-646 (1980 cum. supp.); MD. ANN. CODE art. 41, §§ 107-129 (1976 repl. vol.). Further, psychiatric counseling, which is given in conjunction with the hormone therapy, has helped some patients establish a more appropriate sexual pattern. Berlin and Meinke, *supra* at

123. After the parole or probation period ends, however, the ultimate success of the program depends on establishing a means of ensuring a more permanent change in the sexual offenders' behavior than is now possible. For a good discussion of some possible problems associated with biological treatment of sexual deviates see Halleck, *The Ethics of Antidrogen Therapy*, 138 AMER. J. PSYCHIATRY 642 (1981).

Assuming that there are differences between sex deviates and other criminals, the difficulty is how to recognize this difference and sentence accordingly. This problem in sentencing could be significantly reduced by adequate pre-sentencing investigation by defense counsel. "Information concerning the defendants' background, education, employment record, mental and emotional stability, family relationships and the like will be relevant [in determining a sentence], as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to the fulfillment of [the lawyer's function]." ABA *Standards Relating to the Prosecution Function and Defense Function in Sentencing*, §41, comment at 227, quotes in *The Adequacy of Criminal Defense Lawyers Preparation for Sentencing*, 1981 ARIZ. STATE L.J. 585 at 601. The present sentencing system depends largely on those charged with implementing it. Some of the shortcomings of the system may be due to a lack of effective participation by defense counsel in the sentencing process. The lack of effectiveness may be partially because defense attorneys have not generally sought an active role in sentencing. Law schools have failed to provide students with sentencing skills. As a result, the defense attorney contribution to sentencing is often little more than a plea for leniency. *Id.* at 595. It is imperative that the attorney provide the court the necessary background information in order for programs such as Dr. Berlin's to act as viable alternatives to incarceration. Dr. Berlin has met with good success in dealing with Maryland's courts. He has found that prosecutors, defense counsel, and judges have been receptive to

his program when given facts based on statistical evidence. Berlin Interview.

It would be unwise and untrue to suggest that the success of one program, such as Dr. Berlin's, is reason to treat rather than incarcerate all sexual offenders. It is suggested, however, that there are instances when methods other than incarceration are sometimes more effective in protecting society. The present system has the flexibility necessary to implement these methods. There is, without doubt, a need to search for ways to further improve the present system, such as providing more effective participation by counsel in sentencing. However, before the present system based on tenuous theories of rehabilitation is scrapped, and a system based on retribution implemented, certain problems need be recognized. A system based on retribution could lead to more prisoners, more prison facilities, and greater expense at a time when local and federal budgets are being cut. More prisoners would further compound the problem of overcrowding and the resulting tension it creates. At least one writer has suggested that a possible reason for the bloody New Mexico state prison riot in February, 1980 was overcrowding due to the implementation of a sentencing system based on retribution. See Lopez *supra*, at 536. Before wholesale changes in the present system are implemented, it may be wise to explore ways of making the system work more effectively in its present form, or alternatively, to carefully study proposed reforms before implementing them and finding out that they cause more problems than they solve. ♣



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