Sexual Offenders and the Use of Depo-Provera

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Comments

SEXUAL OFFENDERS AND THE USE OF DEPO-PROVERA

Sexual abuse is currently a legal, medical, and social problem of increasing magnitude. The traditional approaches to the disposition of sexual offenders, including incarceration and various psychiatric treatments have been ineffective in interrupting the cycle of recidivism. Studies now show that a specific type of sexual offender can be successfully treated with the drug Depo-Provera. This Comment examines the use of Depo-Provera as an alternative to jail and as a condition of probation or parole, including the legal and ethical concerns of mandated medicine, informed consent, and the necessity for both punishment and rehabilitation. Recognition of a medical component to certain deviant behavior offers hope to both sexual offenders and future victims for protection that incarceration alone has been unable to provide.

INTRODUCTION

Sexual abuse is currently an intense and volatile issue, receiving much public and private scrutiny. The measures taken by society in dealing with sexual offenders raise serious legal questions, as well as social and medical ones. Sexual offenses are not only traumatic for the victim and his or her family, but also involve complex legal issues, demanding a high level of skill from prosecutors, defense attorneys, and judges.

Many approaches to the disposition of sexual offender cases by the criminal justice system, including incarceration, have been unsuccessful in reducing these crimes. A void has existed between

1. The sexually dangerous individual is one who seeks sexual gratification through inappropriate means harmful either to himself or others. Kelly & Cavanaugh, Treatment of the Sexually Dangerous Patient, 21 CURRENT PSYCHIATRIC THERAPIES 101 (1982).
3. Id.
4. Berlin & Coyle, Sexual Deviation Syndromes, 149 JOHNS HOPKINS MED. J.
meeting the community's need for safety and dealing efficaciously with these offenders. Studies, however, presently show that certain sexual offenders can be treated with a drug known as Depo-Provera to reduce the occurrence of further criminal offenses. These medical advances are now being incorporated into the legal handling of sexual offenders.

In view of the high rate of recidivism among sexual offenders, the use of Depo-Provera appears to be highly effective when administered to the appropriate candidates. Depo-Provera offers new hope as a means of controlling repetitive sexual abuse that has continued to plague victims, the sex offenders themselves, and authorities in the legal and correctional system. Although problems exist in using Depo-Provera as a condition of probation or parole, in certain cases the benefits outweigh the risks and controversies. The time has come for the legal system to be innovative and accept the challenge of breaking the cycle of chronic, recurring, sexual offenses. After years of observing that punishment often leads to recidivism, the legal profession should reconsider its options and focus on prevention and rehabilitation.

This Comment will examine the use of Depo-Provera as a method of controlling criminal, sexually offensive behavior. Various legal and ethical concerns will be analyzed. Of particular concern is the issue of informed consent and the use of medication for the sexual offender enmeshed in the legal system. Additionally, criteria for choosing appropriate candidates for Depo-Provera and guidelines to which a treatment program for sex offenders should adhere will be delineated.

THE USE OF DEPO-PROVERA FOR SEXUAL OFFENDERS

When deciding on the appropriate disposition for sexual offenders, it is necessary to make an accurate diagnosis because not all sex

6. Groth, Longo, & McFadin, Undetected Recidivism Among Rapists and Child Molesters, 28 CRIME & DELINQUENCY 450, 458 (1982) [hereinafter cited as Groth]. Id. at 457. Recidivism refers to parole or probation violation or reconviction for similar crimes within a specified period of time. Id.
7. A diagnosis of paraphilia (a type of sexual perversion) is usually made when a cluster of characteristics appears together consistently. These characteristics include recurrent persistent fantasies about deviant sex, erotic cravings that become overwhelming when frustrated (temporary relief occurring only when the fantasies are carried out) and stereotyped sexual activity (as deviant fantasies must be carried out precisely). Berlin & Meinecke, Treatment of Sex Offenders With Antiandrogenic Medication: Conceptualization Review of Treatment Modalities, and Preliminary Findings, 138 AM. J. PSYCHIATRY 601 (1981).
8. Id.
Sexual offenses are committed by persons manifesting a sexual deviation disorder. The sexual deviation disorders, known as "paraphilias," include voyeurism, exhibitionism, erotic sadism, and pedophilia. These disorders are considered to be medically treatable psychiatric syndromes. However, they are not tolerated by society and are classified as criminal offenses. Thus, the legal question that must be addressed is whether sexual offenders should be treated medically rather than punitively.

**Depo-Provera**

Presently there are few effective treatment methods available that significantly reduce the incidence or recurrence of sexually deviant behavior. Depo-Provera has been found to provide dramatic relief from aberrant sexual drives and sexually dangerous behavior by reducing the level of the male hormone testosterone. The level of testosterone in a male is one of the many variables influencing sexual behavior.

When not taking medication to lower their testosterone levels, many sex offenders report being unable to use willpower to control deviant sexual behavior. When on Depo-Provera, however, many

9. *Id.* at 602. Rape may be a paraphiliac behavior if committed in response to recurrent urges and fantasies about coercive sex. However, the same act may be committed by someone hallucinating in response to voices telling him what to do; by a mentally retarded person with conventional drives who does not know any better; or as an act of hostility against women. *Id.*

10. *Id.* at 601.

11. Voyeurism is the act of observing an unsuspecting woman as the basis of sexual gratification. *Id.* at 601.

12. Exhibitionism is a compulsion to expose the genitals to a person of the opposite sex. *Id.*

13. A pedophilic has a sexual craving for children. Sexual activity by pedophiles with children rarely involves physical assaultiveness and is usually (but not always) the result of persuasion rather than coercion. *Id.*

14. *Id.* at 601.


16. Kelly & Cavanaugh, *supra* note 1. Antiandrogen compounds for treatment of sex offenders were first used in Europe in the 1960's. *Id.*

17. *Id.* Depo-Provera is the trade name for Medroxyprogesterone Acetate (MPA), manufactured by Upjohn Company. Although testosterone concentration is not a determinant of individual differences in sexual behavior, variations from the normal level are often associated with behavioral changes. The use of Depo-Provera results in a reduced frequency of erotic imagery, decreased erectile capability, reduced sexual interest, a diminished ability to ejaculate, and an overall reduction of erotic behavior. Additionally, it has been reported that a reduction of aggressive behavior in general occurs when a male's testosterone level is lowered. *Id.* at 103.

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men are able to restrain their behavior. The sex offender experiences relief from an urge that was formerly persistent, commanding, and not subject to voluntary control. During the period of sexual calm, the patient succeeds in encountering life outside of the sexual sphere and, by sublimating himself in socially acceptable activities, has new positive experiences. Thus far, the few serious documented side effects have been shown to be essentially reversible. The possibility of irreversible or long term side effects, however, cannot be excluded.

The more traditional psychiatric approaches to treatment of the paraphiliac (psychotherapy, behavior modification, surgery, long-term institutionalization, and antipsychotic or anti-depressant medication) have produced limited and temporary results. In comparison to other methods, treatment with Depo-Provera has been more specific and enduring in the elimination of sexually dangerous behavior. Only surgical castration has comparable results in reducing recidivism, but this technique is subject to serious moral and ethical criticisms.

18. Berline & Meinecke, supra note 7, at 607.
19. Antianandrogenic and Counseling Treatment of Sex Offenders, (information sheet) the Johns Hopkins University School of Medicine, the Johns Hopkins Hospital, [hereinafter cited as Hopkins]. Deviant sexual cravings are described as intolerable states, similar to addictions, that demand action in order to be alleviated. Id.
21. Bradford, Hormonal Treatment of Sex Offenders, 11 BULL. AM. ACAD. PSYCHIATRY L. 159, 166 (1983). The major side effects have been weight gain, mild lethargy, sweats, nightmares, hyperglycemia, and leg cramps. Malignant breast tumors have been reported in dogs but not humans. The drug causes a decreased sperm count which makes impregnation unlikely; however, the remaining sperm may be atypical, suggesting the possibility of a deformed fetus if impregnation does occur. See infra note 30, at 105.
22. Hopkins, supra note 19, at 2. Use of Depo-Provera remains “investigative” as no large sample double-blind placebo studies (where neither experimenter nor subject knows what is being used) have been conducted. Walker, Meyer, Emory, & Rubin, Antianandrogenic Treatment of the Paraphiliacs, to be published in GUIDELINES FOR THE USE OF PSYCHOTROPIC DRUGS, 427, 438 (Stancer ed. 1984) [hereinafter cited as Walker].
23. In psychotherapy it is generally assumed that sexually deviant behavior is due to unresolved unconscious conflicts. Individual or group therapy has not been demonstrated to result in sustained behavioral changes. Berlin & Meinecke, supra note 7, at 602.
24. Behavior modification has been less concerned with the cause of deviant sexual behavior than with what can be done about it. Unlike behavior modification, which is occasionally successful, Depo-Provera does not attempt to change the object of one’s sexual desires. It suppresses the sex drive in general. Id.
25. Brain surgery has also been attempted but with limited success. The surgery is “stereotactic neurosurgery” which produces minimal size brain lesions. Id. at 603.
27. Id. There has been much confusion about castration, a procedure which does not remove the genitals, but which is performed for the purpose of lowering testosterone (The testes are removed, not the penis). Berlin, Pedophilia, to be published in MEDICAL ASPECTS OF HUMAN SEXUALITY 7. From a criminological point of view, surgical castra-
Depo-Provera appears to be highly effective as a treatment for certain sex offenders. The apparent absence of irreversible side effects and the high percentage of patients who improve within a short period of time indicate that Depo-Provera, along with psychotherapy, may be the preferred treatment for patients with long-standing histories of compulsive sexual deviancy. Although psychotherapy has not been shown to be successful in reducing sexual drive, it is beneficial to sex offenders in other ways. They can be helped to adopt a new life style, to deal with family and adjustment problems, and to control other anxieties. The combined treatment reduces recidivism and the detrimental effect of imprisonment, which in turn makes the sex offender ultimately safer to the community.

Depo-Provera must be used on a long-term basis. It is neither a cure for sex offenders nor is its purpose to be a temporary catalyst until psychotherapy can become effective. In some cases, it is possible for the patient to gradually stop medication, using a careful step-by-step lowering of dosage while the patient's behavior is monitored. In other cases, it is preferable for the patient to continue on a low maintenance level dosage to prevent relapse. No long-term benefit of Depo-Provera alone has been shown after it is discontinued. However, experts emphasize that patients and society are relatively safe during Depo-Provera therapy.

Van Moffaert, supra note 20, at 32. Today it is no longer necessary to perform surgical castration in order to reduce the testosterone levels. This can now be done pharmacologically with the use of Depo-Provera without the physical or psychological trauma of surgery. Unlike surgical castration, "chemical castration" with Depro-Provera is not mutilating, is not irreversible, and is not feminizing. Berlin, supra note 30, at 8.

31. Id.
32. Von Moffaert, supra note 20, at 31. In describing a typical case, Van Moffaert states that, freed from the compulsion of his sexual habits, the inconvenience of spontaneous erections, and the fear of relapsing into a punishable offense, the patient becomes mentally relaxed and more open to psychotherapy. Id.
33. Berlin, supra note 30, at 110.
34. Hopkins, supra note 19, at 2.
35. Walker, supra note 22, at 437.
LEGAL AND ETHICAL CONCERNS

Informed Consent

Depo-Provera, used for many years outside of the criminal justice system to treat sexual deviants, is now increasingly being advocated by judges and local communities as a way of dealing with criminal sex offenders. Some judges are using Depo-Provera as an alternative to a jail sentence. Although Depo-Provera has been shown to be a successful treatment for some sex offenders, mandating its use through sentencing or parole is not without criticism. Critics believe the legal system deprives these criminals of the ability to give informed consent to a mandated medical treatment program.

Two questions to be addressed regarding voluntary informed consent for Depo-Provera programs are: (1) what circumstances justify the state in compelling an individual to take medication, and (2) what constitutes legally effective consent to treatment?

One of the principle interests supporting intervention by the state is the protection of innocent third parties, a strong consideration in mandatory treatment programs. Courts have resolved issues of mandatory treatment by balancing the individual’s right to refuse treatment and the state’s interest in compelling it. In this balancing process, the right of self-determination is defined as the right of an individual to freely choose his actions as long as these actions do not adversely affect the rights of others. However, a convicted sex offender, by committing a felony, no longer possesses all of the rights of a person who has not violated the law.

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36. Letter from Attorneys for Health Research Group, Public Citizen Litigation Group, to Acting Commissioner FDA, at 5 (March 15, 1984). Approximately 3000 prescriptions were written for Depo-Provera between October 1982 and September 1983 to treat sexual deviation. Id.

37. Castration or Incarceration?, TIME, Dec. 12, 1983, at 70. As recently as 1983 in South Carolina, following a violent rape, three men (ages 19, 21, and 27) were sentenced to 30 years in confinement or suspension of the sentence “upon the defendants’ voluntary agreement to be castrated and the successful completion of that surgical procedure.” Id. Castration was seriously discussed in the United States as an alternative to prison in 1975 in San Diego, but it was impossible to find a doctor in California who would do the surgery. Id.


40. Id. at 322.

41. Jehovah’s Witnesses, prisoners, mental patients, and incompetents exemplify groups whose individual rights have been in conflict with the state’s interests. Id.


The mandating of a medication for the protection of the community is not a recent course of action for the courts. There is legal precedent for requiring individuals to take medication when not doing so threatens the well-being of others.44 In *Jacobson v. Massachusetts*,45 the United States Supreme Court found the state's police power sufficient to justify a mandatory vaccination statute. By analogy, requiring a sex offender to either take medication or go to prison so that others can be safe is not necessarily an unethical violation of human rights.46

Although some patients may have been induced to participate in treatment because the alternative has been imprisonment, this is not necessarily evil or immoral.47 As long as federal and state laws, regulations, and ethical codes safeguarding convicted sex offenders are rigorously applied, the efficacy of procedural protection will be preserved.49 In addition, advocates of mandatory treatment argue that such programs are still less intrusive on personal liberty than incarceration.50

Because Depo-Provera has not been approved by the Food and Drug Administration (FDA) for use in the treatment of sex offenders,51 and because there is the possibility of unknown long-term side effects, its use remains experimental.52 The state must receive the defendant's informed consent to administer it.53 The question of

44. *Id.*
45. 197 U.S. 11 (1905).
48. Federal laws and regulations include the Food and Drug and Cosmetics Act (FDA), the National Commission for the Protection of Human Subjects of Biomedical Research, and the Department of Health and Human Services. State laws include Institutional Review Boards and Committees, the Patient's Bill of Rights, and case law interpretations of informed consent. *Id.* at 58-61.
49. *Id.* at 78.
50. *Id.* at 69. However, forcible treatment with a drug is arguably a more fundamental loss of human rights than loss of liberty. *Id.*
51. Depo-Provera is used to treat women for a variety of medical reasons including contraception, prevention of miscarriage, treatment of menstrual disorders, and menopause symptoms. ISSAC REY CENTER, RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER, DEPO-PROVERA GENERAL INFORMATION 2.
53. The Food and Drug Administration has long taken the position that the Federal Food, Drug and Cosmetic Act regulates investigation, not the "practice of medicine," and that once a drug product has been approved for marketing, a physician may, in treating patients, prescribe the drug for uses not included in the drug's approved labeling. This position was stated in the preamble to a proposal to clarify the legal status
informed consent seems to be the most difficult ethical and legal problem in human experimentation. To be characterized as legally adequate informed consent, a subject’s consent must be competent, knowing, and voluntary.

In cases of medical experimentation, the standard utilized in determining the validity of an inmate's consent is that the individual must be fully informed of the procedures and risks involved in the experimentation and must not be pressured to participate. However, if this standard is rigidly enforced, an entire group of potential Depo-Provera patients may be denied treatment that could be helpful to them. Convicted sex offenders would be excluded from treatment if courts or legislatures determined that they were unable to give informed consent.

In addressing the question of legally effective consent to treatment, there is no legal or moral opposition to the participation of normal volunteers in research. The objections surround the participation of volunteers who are incarcerated. The concern is that the rewards of involvement in the program may be so great as to constitute undue influence. Many aspects of institutional life may influence a decision to participate; the extent of that influence might appear to be coercion, whether intended or not. To assess the voluntariness of consent, one must determine whether a person who has been convicted of a crime and who is faced with choosing between two options (going to jail or treatment with Depo-Provera) can be said to be acting under such duress and under such coercive circumstances that he is deprived of consensual capacity.


55. Id.

56. Woody, supra note 47, at 68.

57. Id. at 55.

58. See infra text accompanying notes 51-76.


60. The reward may be seen as so large as to diminish one's will for self-preservation. Silva, supra note 42, at 39.

61. Bailey, 481 F. Supp. at 215. Research offers relief from boredom, opportunities for additional money, possibility of better living conditions, the hope that participation will be viewed favorably by authorities, and the hope for earlier parole. Id. Yet in one prison setting, only 14% of all prisoners chose to be involved in a research study. The program was not overwhelmingly attractive to most inmates. Id. at 220. In another study, conducted by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, most prisoners did not regard their consent to research as consent obtained under coercion or undue influence. Woody, supra note 47, at 68.

62. Marco, supra note 39, at 311.
In *Kaimowitz v. Michigan Department of Mental Health*, the Michigan Circuit Court dealt with the issue of the ability of an involuntarily detained patient in a state institution to consent to an experimental surgical procedure. The court held that the most important objective of an involuntarily detained person is to gain freedom. According to the court, when freedom is dependant upon a patient’s cooperation with the authorities, it is impossible for the patient to be free of ulterior forms of restraint or coercion when giving his consent to experimental freedom.

Courts have acknowledged the coercion inherent in the offer to a prisoner of probation, release, or a reduced sentence in return for consent to participate in a medical experiment. The less invasive the treatment, however, the more inclined a court will be to find that voluntary consent is possible. The more invasive the treatment (e.g. psychosurgery), the more inclined the court will be to find that an incarcerated individual cannot give voluntary consent.

Under this analysis, it is possible for sex offenders to give voluntary consent to the use of Depo-Provera. Depo-Provera does not involve the uncertainties of psychosurgery as in *Kaimowitz*, nor does it have the same magnitude of dangerousness, intrusiveness, irreversibility, and uncertainty of benefit to the patient and to society as psychosurgery.

In *Bailey v. Lally*, prisoners participated in “non-therapeutic” experiments (the testing of live viruses). The Supreme Court held that conditions of incarceration were not so oppressive as to make participation involuntary. There had been no violation of prisoners’ constitutional rights to due process, privacy, and protection against cruel and unusual punishment. In addition, the Court found that the authorities were acting in good faith.

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64. Id. at 2063.
65. Marco, supra note 39, at 312.
67. Marco, supra note 39, at 315.
68. Bailey v. Lally, 481 F. Supp. 203, 221 (D. Md. 1979). Rather, Depo-Provera is easily administered and can be stopped at any time. Its side effects are believed to be reversible.
69. Id.
70. Id. In this case the plaintiff argued that the totality of circumstances affecting his ability to make a decision must be scrutinized. However, the Court noted that offering a choice to an inmate to participate in a worthwhile but unpleasant activity which is made more attractive because of his predicament is not unconstitutional.
established in Bailey, imprisonment, by itself, is not sufficient to render a jaillee incapable of voluntary consent. Thus, a sex offender whose constitutional rights are not violated maintains the ability to freely choose to participate in a Depo-Provera treatment program. Moreover, in contrast to Bailey, the sex offender is engaging in a "therapeutic" experiment. The inmate benefits from the program itself rather than merely benefitting society, as would be true in the case of non-therapeutic medical experimentation.

The action of a court in giving the appropriate type of sex offender a choice between prison and treatment with Depo-Provera is condemned by certain civil libertarian groups as not truly constituting free choice.\(^7\) If the courts or legislatures agree with this position and decide that individuals under legal constraint cannot make a free choice, the effect is to remove treatment by Depo-Provera as an alternative to incarceration. These sex offenders would have prison as their only option and would be denied the benefits of Depo-Provera.

In Cobbs v. Grant,\(^7\) the California Supreme Court held that informed consent means that patients must assess benefits and risks in light of their own values, and their judgments should be controlling in beginning, continuing, or ending treatment.\(^7\) The benefit that the individual or society receives as a result of the experiment should outweigh the risks to the individual.\(^7\) The benefits which the individual receives as a result of Depo-Provera are freedom from disturbing symptoms and a better opportunity to remain law-abiding. These benefits must be balanced against possible uncomfortable side effects or unknown future risks. The sex offender himself must conclude whether the benefits outweigh the risks.

The viewpoint of the sex offender must be considered when examining the issue of voluntary consent. He may actually be grateful for the opportunity to change behavior that up to now has been resistant to other modes of treatment. Should the sex offender be denied the opportunity to take Depo-Provera because he is on probation or imprisoned? An individual does not lose the capacity to choose simply because the consequences of his decision may be unpleasant. A convicted criminal's capacity to make rational decisions is not diminished because the decisions are difficult.\(^7\) If Depo-Provera is offered as a choice, the final decision to use this treatment should be made by the sex offender, not by those who oppose such programs. He is

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71. Walker, supra note 22, at 439.
72. 8 Cal. 3d 229, 104 Cal. Rptr. 505 (1972).
73. Id. at 242, 104 Cal. Rptr. at 516.
74. Woody, supra note 47, at 70.
75. Berlin, supra note 43, at 1516. In spite of concern about the potential abuse or coercion, the prisoner's ability to choose whether or not to give informed consent allows the prisoner to retain some autonomy and personal choice about his life. Woody, supra note 47, at 68.
best able to decide if the potential risks or any unpleasant side effects outweigh the benefits of treatment. The general population accepts many common pharmacological treatments whose long-term effects have not been proven. Uncertainty by the scientific community regarding unknown risks does not vitiate informed consent.

While critics of Depo-Provera are concerned about the ethics regarding informed consent for such a program, they do not offer the prisoner any other alternative. Rather, by adding an option that did not previously exist, freedom of choice has been increased. Proponents of Depo-Provera acknowledge that an offender considering such treatment has a difficult decision to make; nevertheless, they argue that the programs are not so coercive as to deprive a person of the ability to make an informed and voluntary decision.

**Fear of Abuse**

Another legal-ethical concern expressed by opponents of Depo-Provera is that the current work with anti-androgens will inspire demands for escalated use of biological treatments by those who desire more societal control for aberrant members. Opponents fear that this type of treatment will be expanded or abused to control those people who do not readily fit into a special category of sexual offenders, but instead have a generally anti-social pattern of behavior. For example, the Connecticut Department of Corrections rejected the use of Depo-Provera for fear of ushering in the use of a wide array of mind and behavior altering drugs that are now in the experimental stages of development.

The successful use of Depo-Provera in the specific circumstances of the paraphilic sexual offender, however, does not necessarily lead
the way to the abuse of other biological treatments for socially unac-
ceptable behavior. Moreover, it does not follow that the use of Depo-
Provera should be restricted from criminal sex offenders because of
the fear of abuse. Any type of beneficial tool or treatment has the
potential for misuse.82

PUNISHMENT VERSUS REHABILITATION

Punishment

There are four recognized goals for punishing one who has com-
mitted a crime; retribution, deterrence, prevention, and rehabilita-
tion.83 Imposing punishment as retribution is of psychological value
to the victim and the rest of society.84 Punishment serves as a device
for the expression of feelings of resentment, indignation, and vindica-
tion.85 It is a way to penalize the wrongdoer for the injury he has
caus ed, even if punishment results in no benefit to himself or
others.86

The present social climate regarding sex offenders suggests that
there is strong pressure to imprison those who are convicted of sexual
offenses.87 The problem of sex offenders is not defined entirely in
terms of their own suffering; it is largely defined in terms of the
difficulties created for others.88 A legitimate concern is the safety of
the community from offensive sexual acts. The very real tragedy that
sex offenses pose for victims and their families cannot be ignored. An
adult rape victim is often severely traumatized by the event. It is
common for the resulting psychological scars to affect the victim
throughout his or her life.89 Children who are victimized are likely to
suffer severe and long-lasting effects from sexual abuse.90 Molested
children often become "psychological time bombs" suffering from a
multitude of disorders.91 The most serious consequence of child

82. Walker, supra note 22, at 439.
83. Taylor & Dalton, Premenstrual Syndrome: A New Criminal Defense?, 19
84. Id.
85. S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESS, CASES AND
MATERIALS 2-3 (3d ed. 1975).
86. Id.
87. Kopetski, Psychotherapy for People Who Molest Children, 13 COLO. LAW.
246 (1984). For example, in 1980 an organization known as S.L.A.M. (Concerned Cit-
zens for Stronger Legislation Against Child Molesters) was formed. This group lobbies
for prison terms for child molesters, for safeguards against their release from state hospi-
tals, and for greater public awareness about the crime itself. Molesters: Causes, Penal-
88. Halleck, supra note 38, at 642.
89. Prager, "Sexual Psychopathy," and Child Molesters: The Experiment Falls,
6 JUV. L. 49, 63 (1982).
90. Id.
91. Id. at 64.
sexual molestation is that these victims often become the child abusers and rapists of the future.  

The fact that many sex offenders were once victims of sexual abuse themselves, and the fact that the compulsive sex offender may be driven by a hormonal imbalance, are mitigating circumstances to be considered when punishment is intended as retribution. The dilemma is whether retribution should be the motivation for punishment of an individual who is physiologically or psychologically influenced to commit an act. A growing body of medical research suggests recognition of criminal defenses based on psychological dysfunction resulting from physical conditions. Under these circumstances, the defense of diminished capacity, a variant of the insanity defense, is sometimes recognized for persons with impulsive, uncontrollable behavior.  

The diminished capacity defense assumes that one with an abnormality is not as culpable for his acts as one who is not acting under a disorder. "Hormonal influence" has recently been discussed as a category to be encompassed within the diminished capacity defense (as exemplified by uncontrolled, impulsive behavior in epilepsy, diabetic hypoglycemia, and premenstrual syndrome). There are many factors contributing to the etiology of sexually deviant behavior. However, it is believed that a hormonal aberration may be a strong component of the deviancy. The use of Depo-Provera to lower testosterone in sex offenders has been compared to the use of insulin in diabetics. Treatment with Depo-Provera alleviates the underlying pathological condition which contributes to the paraphiliac's adverse behavior. Therefore, by analogy, the paraphiliac group of sex offenders may fit into the category of diminished capacity.  

The reasoning behind this defense is based upon the awareness that disease or defect is not an all-or-nothing proposition. There is a fine line between those who are deemed not criminally responsible due to mental defect and those whose defects are not quite sufficient to avoid responsibility. While the individual may not be completely

92. Id. The overwhelming majority (75% according to one study) of child molestors and rapists reported that they were molested during their childhood. Id.
94. Id.
95. S. KADISH & M. PAULSEN, supra note 85, at 865.
96. Taylor & Dalton, supra note 83, at 281.
97. Berlin & Meinecke, supra note 7, at 606.
98. Finklestein, supra note 78, at 60.
incapacitated, he may still suffer an impairment. Since minimization of responsibility for criminal behavior is not the goal, the combination of psychotherapy and treatment with Depo-Provera is a possible answer to both society’s demand that action be taken and the sexual offender’s need for adequate treatment.\textsuperscript{100}

The goal of deterrence is specifically to discourage the sex offender himself from committing the same act again and generally to deter others by showing what happens to offenders.\textsuperscript{101} Imprisonment, however, has little deterrent effect on an individual who is incapable of restraining his sexual conduct. If a sexual offender commits an anti-social act because of a complex interplay of factors beyond his control, the threat of punishment is not sufficient to force him to change his pattern of behavior. His sexual deviation is persistent and impels him towards repeated offenses. The inadequacy of the effect of deterrence is demonstrated by the compulsive nature of the paraphiliac and his high rate of recidivism.\textsuperscript{102}

In order to deal effectively and meaningfully with the problem of sexual assault, paraphilia must be recognized as a repetitive pattern of behavior, much of which goes undetected.\textsuperscript{103} Many victims of sexual assault do not report the fact that they have been molested.\textsuperscript{104} An investigation of recidivism indicates that sexually offensive behavior is a chronic problem, the extent of which is not apparent from the offender’s record of conviction.\textsuperscript{105} The results of an anonymous questionnaire given to convicted sex offenders indicates that, although the majority of the offenders had been convicted more than once, they admitted to having committed two to five times as many sex crimes for which they were not apprehended.\textsuperscript{106}

The difficulties inherent in socially integrating sexual offenders may be gauged by the high frequency of recidivism even where long term prison terms have occurred.\textsuperscript{107} Most legal commentators generally agree that detention tends to aggravate rather than to solve the

\begin{itemize}
\item \textsuperscript{100} Van Moffaert, supra note 20, at 30.
\item \textsuperscript{101} S. Kadish & M. Paulsen, supra note 85, at 14.
\item \textsuperscript{102} Van Moffaert, supra note 20, at 30.
\item \textsuperscript{103} Groth, supra note 6, at 457.
\item \textsuperscript{104} A Hidden Epidemic, Newsweek, May 14, 1984, at 30.
\item \textsuperscript{105} Groth, supra note 6, at 457.
\item \textsuperscript{106} Id. It is more characteristic for sex offenders to minimize their wrongdoing than to exaggerate their criminal activity. One study of arrest records and confessions showed an average of 73 victims for each heterosexual pedophile and 30 for each homosexual child molester. A Hidden Epidemic, supra note 104, at 31. There is a need to concentrate on juvenile sexual offenses, many of which are dismissed as adolescent curiosity or experimental deviant behavior following puberty. Intervention frequently does not occur until the offender is an adult, by which time he has committed many sexual assaults and victimizations. Groth, supra note 6, at 457.
\item \textsuperscript{107} Van Moffaert, supra note 20, at 29. This author cites the rate of recidivism at 43.2% to 51.5%.
\end{itemize}
The recidivism rate is extremely high when incarceration is used without medical treatment, since punishment alone does not enable a sex offender to resist his deviant sexual drive. This high rate of recidivism indicates that penal sanctions are not effective in preventing a relapse and the goal of deterrence is not achieved.

The implication of prevention by punishment is that society is safeguarded while the sex offender is incarcerated. The premise is that society should restrain a defendant who may repeat his offense. Although imprisonment protects society while the offender is incarcerated, it does nothing to alter his behavior. At the end of his prison term the sex offender is released, even though it is highly probable that he is still dangerous. The goal of protection is better served by rehabilitation and the utilization of methods that promise long-term public safety from the acts of the compulsive, repetitive sexual offender.

Rehabilitation

The theory of rehabilitation assumes that punishment should not be the primary objective in dealing with the criminal offender. Rather, both society and the sex offender will receive greater benefit if the offender is rehabilitated and does not resume his unlawful activities.

Not all medical, legal, and mental health professionals involved in sexual abuse cases are seeking punishment for the offender. In fact, there are those who do not report cases of sexual abuse. They fear that the punitive measures of our criminal justice system will destroy any hope of successful treatment of the offender and be detrimental to the future psychological health of the victim. Criminally prosecuting a family member or relative may have devastating results on children and the family. The application of criminal sanctions, therefore, may increase the trauma of families and prevent many

108. See, e.g., id.
110. Ortmann, supra note 5, at 444. Recidivism is lower in those who have committed only one offense because that offense is not always caused by sexual deviation. It may be caused by a variety of other external factors that may not occur again.
112. Prager, supra note 89, at 63.
113. Id.
115. Bulkley & Davidson, supra note 2, at i.
116. Id.
Currently, imprisonment of serious offenders and recidivists is statutorily mandated, but exemptions from some of the mandatory prison categories for sex offenders are allowed in cases where rehabilitation appears feasible. Some states allow judges the discretion to grant probation and to include conditions of probation that would serve other purposes including rehabilitation. Rehabilitation is one of the goals of probation. Probation, for those who qualify, represents a humane alternative to incarceration. Probation conditioned on treatment offers a sex offender the chance to participate in a treatment program of Depo-Provera and therapy while the state maintains leverage for control of his behavior.

Without a combination of medical and psychiatric intervention, most sexual offenders will never change. Yet at the present state of scientific development, effective rehabilitation cannot be guaranteed to all offenders. Even if successful rehabilitation were universally possible, it would not satisfy most segments of the community, as sex offenders are so abhorred by society. To preserve order and prevent vigilante justice, rehabilitation must be balanced along with the other goals of punishment, i.e., retribution, prevention, and deterrence. The concrete symbol of the criminal justice system is needed to confirm the unacceptability of the sex offender's behavior. The use of Depo-Provera and psychotherapy for the compulsive sex offender as a condition of probation or parole satisfies the demand for punishment and the need for rehabilitation, while attempting to break the cycle of recidivism.

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117. Id.
118. Prager, supra note 89, at 59. See, e.g., CAL. PENAL CODE § 1203.066 (West 1982). Treatment of fathers and step-fathers is regarded by many mental health professionals as potentially very successful. Prager, supra note 89, at 59.
120. Id. at 515, 652 P.2d at 1033. There is some evidence to indicate that the subsequent rate of imprisonment is lower for those granted probation than for those sentenced to imprisonment. Id.

In State of Arizona v. Christopher, the benefits of probation were enunciated as follows:

(1) it maximizes the liberty of the individual while vindicating the authority of the court;
(2) it eases the hidden costs that imprisonment places on the family of the offender;
(3) it eases reintegration of the offender into the community; and
(4) it is the most economic form of correctional supervision.

Id. at 514, 652 P.2d at 1033.
122. Berlin, supra note 30, at 111.
123. Christopher, 133 Ariz. at 516, 652 P.2d at 1034.
124. Bulkley & Davidson, supra note 2, at i.
APPROPRIATE CANDIDATES FOR DEPO-PROVERA

Experts are able to distinguish types of sex offenders and to predict which group is likely to be most amenable to treatment with Depo-Provera. The most important criterion considered in deciding a sex offender's acceptability for treatment is his acknowledgement that his behavior is socially unacceptable and beyond his control. An individual who denies that his behavior is wrong probably cannot be helped.

Some sex offenders have little regard for the damage they do to their unconsenting sex objects; others feel guilty and are remorseful but are unable to control their behavior. It is this latter group which is appropriate for treatment by medication. Compulsive sex offenders represent a danger to the community; their mental structure is such that it is unlikely they can be helped by psychological treatment. From a criminology point of view, it is reasonable, therefore, to consider other methods that are effective for treating this difficult group.

Hostile rapists cannot be controlled by Depo-Provera. Because most rapes are an acting out of other criminal impulses in addition to being sex offenses, therapy which focuses on reducing the sex drive holds little promise for this group. Non-sexual violent offenders, or those who commit "sexual" crimes which are primarily motivated by a pathological need for power or anger, are not amenable to treatment with Depo-Provera. In addition, some sexual offenders cannot be considered as appropriate candidates because of certain medical conditions and other social-psychological variables.

125. Walker, supra note 22, at 429. Pedophiles, exhibitionists, and certain categories of rapists have been the main sexual offenders treated successfully with Depo-Provera. Id. "The paraphiliac rapist who craves coercive sex activities may repeatedly rape in spite of incarceration because punishment does little to reduce his intense unconventional sex drives." Berlin & Coyle, supra note 4, at 120.

126. Finklestein, supra note 78, at 60.
127. Berlin & Meinecke, supra note 7, at 606.
128. Ortmann, supra note 5, at 443.
129. Id.
130. CONN. REPORT, supra note 81, at 5.
131. Id.
132. Walker, supra note 22, at 428.
133. Contraindications include drug abuse, organic brain impairment, severe mental retardation, psychosis, and neurotically-based sexually-offensive behavior which is not due to uncontrollable sex drive, but to interpersonal contact with inappropriate sex partners. Alcoholism may adversely influence the success of Depo-Provera in that necessary compliance with regular injections and periodic blood tests is less likely. Control over sexual impulses is generally diminished while the individual is intoxicated. Certain medical conditions may be exacerbated by Depo-Provera, such as epilepsy, asthma, migraine headaches, and cardiac or renal impairment.
Four types of sex offenders have been differentiated. Type 1 offenders totally deny their crime. Type 2 offenders confess to their crime but blame their behavior on non-sexual or non-personal forces (such as alcohol, drugs, or job stress). Type 3 offenders are violent and appear to be motivated primarily by some non-sexual gain (e.g. anger or power). Type 4 offenders are paraphiliacs who are characterized by a pattern of sexual arousal in which the fantasy or the actuality of a specific deviation accompanies nearly every erection and ejaculation. This pattern typically begins in puberty. These persistent fantasies which accompany sexual arousal are a primary clinical feature for diagnosing and monitoring progress.

Therapists advocate that incarceration exclusively be used for the first three types of sex offenders, as these men are not responsive to the combined program of Depo-Provera and counseling. However, type 4 paraphiliacs are recommended as excellent candidates for rehabilitation through Depo-Provera treatment, as the medication is highly effective in this group for control of their unremitting fantasies and the cessation of unwanted sexual acting out. It is therefore crucial that when a sex offender is being considered as a candidate for treatment with Depo-Provera, a careful screening and evaluation process be performed by a competent therapist to ascertain that the offender is an appropriate candidate for such treatment. It is also important to recognize that Depo-Provera is not being advocated for all sex offenders, but only for one particular sub-group.

GUIDELINES FOR SEX OFFENDER TREATMENT PROGRAMS

As discussed above, potential dangers and certain ethical problems are posed by the use of hormonal therapy for criminal sexual offenders. Therefore, if Depo-Provera is to be used to treat sexual offenders, specific guidelines should be established regarding informed consent, appropriate candidates for such a program, standards for mitigation of sentences, and the rights of the victim. The development of guidelines for Depo-Provera treatment programs can provide the beginning of an ethical and therapeutic approach to the disposition of individuals who have not benefitted from incarceration or other types of intervention.

In Knecht v. Gillman, a federal court of appeals held that

134. Walker, supra note 22, at 429.
135. They claim that the rape was consensual or was initiated by the victim. Id.
136. Id.
137. Id.
138. Id.
139. Id.
140. Id. at 433.
141. See supra text accompanying notes 51-62.
142. 488 F.2d 1136, 1140 (8th Cir. 1973). In Knecht, inmates of a state mental
certain medical procedures could be justified only if carried out as treatment and with the knowing and intelligent consent of the inmate. The court addressed the question of how to prevent abuse in the treatment of consenting participants and how to make certain that the consent is knowingly and intelligently given.

Following the requirements outlined in Knecht, any prisoner interested in participating in a study of anti-androgens should first be carefully screened to determine that he meets the qualifications of an appropriate candidate for treatment with Depo-Provera. He should then be assured that refusal to participate or subsequent withdrawal will not put him in jeopardy, legally or otherwise. Proper informed consent forms, countersigned by his attorney, should be required.

Individuals should be allowed to ask questions concerning the treatment at all times. In addition, information concerning the treatment should be updated as circumstances change. A new consent should be obtained if information upon which the individual based his initial consent has changed. Informed consent forms should include no exculpatory statements by which individuals waive their legal rights.

A primary problem concerning the use of Depo-Provera in prison is that a prisoner may enroll in a program merely as a means of persuading his parole board to advance his release. Thus, because of his desire to secure freedom, the prisoner may not properly balance the potential risks that must be considered.

One possible way
to bypass the above concern would be to provide Depo-Provera after a favorable parole decision has been reached. A period of only two to three months is required to initiate psychotherapy and to build up the dosage of Depo-Provera. Treatment with Depo-Provera could begin prior to release where parole decisions are made in advance.

A California statute offers an example of another mechanism by which a prison treatment program of Depo-Provera can be instituted without compromising the sex offender's ability to weigh the inherent risks. This statute provides a voluntary experimental treatment program for individuals convicted of sexual offenses against persons under fourteen years of age. The screening of inmates is performed jointly by the California Department of Mental Health and the Department of Corrections. The treatment is offered only during the last two years of incarceration by voluntary consent of the inmate. Participation in this program may not affect the release date, but outpatient treatment may be made a condition of parole. This program is used to test the most effective, innovative, and promising methods of treatment of sex offenders. It affords an excellent opportunity for sex offenders to receive Depo-Provera before release from prison.

Although the regulation of Depo-Provera treatment for sex offenders can be accomplished in the pre-release stage, such regulation is valueless unless there are available clinical resources in the area to continue administration of the drug, maintenance of the dosage, and psychotherapy after release from prison. Community clinics, therefore, must continue any treatment that might have begun while the offender was in prison. Where clinics are not available, a relationship with a psychiatrist in the community could be established as an alternative.

Because the effect of Depo-Provera is reversible and dependent on the dose received, a number of problems have arisen concerning the duration of treatment, the size of the dose, and compliance with the medication plan. It is very important that any such program include regular follow-up procedures. Legal sanctions serve best to prevent

151. Kelly & Cavanaugh, supra note 1, at 105.
152. Id.
153. Id.
154. CAL. PENAL CODE § 1364 (West 1982).
155. Id.
156. CAL. PENAL CODE § 1365 (West 1982). An Oregon statute has also established a pilot program to administer Depo-Provera to “persons convicted of any sexual offenses involving forcible compulsion.” A sentencing court may order the convicted person to be evaluated, and, if he is found suitable, the court may make participation in the program a condition of any probation it imposes. The State Board of Parole likewise may make participation in the program a condition of that person’s parole. 62nd Leg. Reg. Sess., 1983 Or. Laws 284.
157. Kelly & Cavanaugh, supra note 1, at 105.
offenders from dropping out of treatment programs.\textsuperscript{158} The authority of the criminal justice system can be used to legally mandate long-term treatment for sex offenders.\textsuperscript{159} Some overly confident patients may drift into non-compliance; others may neglect their medication scheduling.\textsuperscript{160} For this reason, it is recommended that Depo-Provera be used as a condition of probation or parole and that follow-up supervision be legally required in order to ensure strict compliance in adhering to the treatment.\textsuperscript{161} In this manner, both the demand for punishment of sex offenders and the necessity for long-term rehabilitation to prevent sex offenders from resuming their deviant activities are satisfied.

CONCLUSION

The problem of sexual offenders will not be assuaged or solved by the traditional methods used by the legal system. The occurrence of sex offenses actually appears to be on the rise.\textsuperscript{162} The paraphiliac sex offender is not capable of controlling his deviant sexual behavior, whether punished by incarceration or treated with psychotherapy or behavior modification. Depo-Provera is presently the only treatment shown to be highly successful for this type of individual. The medication permits the sex offender to experience relief from his obsessive sexual urges. During the period of medication, he becomes more amenable to psychotherapy which assists him in adjusting to a more socially acceptable life style.

Because Depo-Provera is not approved by the FDA for use with sex offenders and there is a risk of unknown side effects, the sex offender must give voluntary, informed consent to have the drug

\begin{itemize}
\item \textsuperscript{158} Bulkley & Davidson, \textit{supra} note 2, at ii.
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} Hopkins, \textit{supra} note 19, at 3.
\item \textsuperscript{161} \textit{Id.} Since Depo-Provera is given by injection, it is easy to monitor compliance with the treatment. In one recent case, James A. Malkus, Judge of the Superior Court for the County of San Diego, California, sentenced a sex offender to treatment with Depo-Provera along with incarceration for four hours every Sunday for a fixed number of years. Under this sentence, the sex offender is closely monitored and also experiences a restriction of his freedom. Interview with Judge James A. Malkus, Superior Court, District 12, San Diego, California (June 11, 1984).
\item Drug and alcohol offenders have often been given a similar choice of going to jail or submitting to a treatment program of Methadone or Antabuse, respectively. These programs have been quite effective because of continued supervision. Supervision of sex offenders sufficient to ensure compliance with the terms of probation or parole is likewise feasible. Rees, \textit{"Voluntary" Castration of Mentally Disordered Sex Offenders}, 13 CRIM. L. BULL. 45 (1977).
\item \textsuperscript{162} See \textit{A Hidden Epidemic}, \textit{supra} note 104, at 30.
\end{itemize}
administered to him. Civil libertarians feel that a criminal sex offender who is enmeshed in the legal system is not capable of giving voluntary consent. However, if Depo-Provera is not offered as a treatment choice, sex offenders are left with no options and no chance to improve the quality of their lives. Society's hopes for a change in the offender's behavior and for a safer community are also removed. A convicted sex offender is still capable of weighing the benefits and risks of Depo-Provera and once treatment begins, he reserves the option of discontinuing it. Additionally, it remains open to question whether a criminal should have the same level of choice as a non-criminal. Perhaps his lack of concern for his victims should serve to restrict the amount of choice offered to him.

The current system of incarceration and eventual release has proved to be a failure. The rate of recidivism for sex offenders is very high. The sexual offender does merit punishment because society must observe that there are consequences for illegal actions. In addition, the victim deserves the peace of mind that action has been taken against the violator. However, prison sentences are not sufficient.

The sex offender requires rehabilitation if there is to be any long-term protection and security for the community. Depo-Provera treatment can now be utilized to grapple directly with the complexities of a select group of sex offenders. For the non-violent, paraphiliac sex offender, Depo-Provera offers promise. While it is not the total answer, it may prove to be a start toward a more effective and pervasive form of eliminating sexual offenses. No other treatment program is available at this time to effectively interrupt the well-established pattern of recidivism of sex offenders.

The use of Depo-Provera may result in breaking new ground and setting a precedent in the disposition of legal offenders. The criminal justice system is beginning to acknowledge that there is a medical component to some repetitive, deviant behavior. This recognition could pioneer the medical treatment of certain criminals and may be the key to the protection of future victims. Incarceration alone has been unable to provide this protection.

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