

New Technologies for Correctional Supervision and Treatment

Faced with increasing prison populations, limited capacity, and rising prison construction costs, criminal justice officials have intensified their search for alternatives to incarceration. In doing so, they need to keep in mind the Eighth Amendment prohibition of cruel and unusual punishment, and the guarantees of due process in the Fifth and Fourteenth Amendments.

The penitentiary, as an institution of punishment, is a relatively modern invention. Conceived in the late 1700s as an alternative to the capital and corporal punishments then widely used,¹ the penitentiary was designed to produce penitence and reformation of the inmate:

By sobriety, cleanliness, and medical assistance, by a regular series of labour, by solitary confinement during the intervals of work, and by due religious instruction to preserve and amend the health of the unhappy offenders, to inure them to habits of industry, to guard them from pernicious company, to accustom them to serious reflection and to teach them both the principles and practice of every Christian and moral duty.²

After an initial period of experimentation with different methods of confinement, the Auburn, New York, system of congregate work during the day and solitary confinement at night was adopted as the model upon which

¹The Walnut Street jail in Philadelphia is generally credited as being the first penitentiary to which offenders were sentenced as punishment. See E.H. Sutherland, *Criminology* (Philadelphia PA: J.B. Lippincott, 1924), pp. 391-396; H.E. Barnes and N.K. Teeters, *Horizons in Criminology*, 2d ed. (New York, NY: Prentice-Hall, 1952), pp. 381-398.

²Quoted in Sutherland, *Criminology*, op. cit., p. 395. Sutherland notes that this description of the purpose of penitentiary confinement **actually** comes from an English law, dated 1778 and penned by Blackstone, Eden, and Howard, authorizing a penitentiary. Although the institution was not built, the law likely influenced the Quakers of Pennsylvania, who were responsible for the system of discipline adopted at the Walnut Street jail.

most penal institutions in the United States were subsequently built.³ Penitentiary confinement became the dominant mode of treatment for serious offenders. Penal colonies, another alternative, were widely used by some countries, England included; the State of Georgia and Australia were first settled in this way.

Correctional practices are shaped in large measure by the current penal philosophies. As already noted, rehabilitation, incapacitation, and retribution have at different times been the primary objectives of criminal justice.⁴ There has been much debate during the past decade about rehabilitation. Once highly touted, recent studies have challenged its effectiveness and its basic fairness.⁵ Retributive aims of punishment have had a popular resurgence and are the basis of reforms aimed

³A considerable historic controversy revolved around the Pennsylvania system, which prescribed solitary confinement day and night, and the Auburn system, in which prisoners worked together but in silence during the day, and were confined in solitude at night. Protracted periods of solitary confinement, however, were found to produce a variety of ills, including insanity and self-mutilation. Sutherland, *Criminology*, op. cit., footnote 1, pp. 396-399; Barnes and Teeters, *Horizons in Criminology*, op. cit., footnote 1, pp. 402-416; M. Ignatieff, *A Just Measure of Paz": The Penitentiary in the Industrial Revolution 1750-1850* (New York, NY: Pantheon, 1978), pp. 194-196.

⁴H.L.A. Hart, "Prolegomenon to the principles of Punishment," in *Punishment and Responsibility* (Oxford: Clarendon Press, 1968) pp. 1-13; G. Ezorsky (ed.), *Philosophical Perspectives on Punishment* (Albany, NY: State University of New York Press, 1972); J.B. Cederblom and W.L. Blizek (eds.), *Justice and Punishment* (Cambridge, MA: Ballinger, 1977).

⁵D. Lipton, R. Martinson, and J. Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (New York, NY: Praeger Publishers, 1975); W.C. Bailey, "Correctional Outcome: An Evaluation of 100 Reports," *Journal of Criminal Law and Criminology*, 57 (1966), p. 153. American Friends Service Committee, *Struggle for Justice: A Report on Crime and Punishment in America* (New York, NY: Hill & Wang, 1971); Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment* (New York, NY: McGraw-Hill, 1976); A. von Hirsch, *Doing Justice* (New York, NY: Hill and Wang, 1976); N. Morris, *The Future of Imprisonment* (Chicago, IL: University of Chicago Press, 1974).

at greater uniformity and determinacy to sentencing.⁶

As a result of these reforms, which include preventive detention, determinate sentencing, habitual-offender statutes, and in some jurisdictions the abolition of parole, as well as the coincident aging of the baby boom generation, prison populations have increased dramatically. Despite much State prison construction since the early 1980s, the living conditions of prisoners were more crowded in 1984 than in 1979. Prison housing space increased by 29 per-

⁶A Lipson and M. Peterson, *California Justice Under Determinate Sentencing: A Review and Agenda for Research* (Report No. R-2497-CRB prepared for the State of California, Board of Prison Terms, 1980); S. Lagoy, T. Hussey, and J. Kramer "A Comparative Assessment of Determinate Sentencing in the Four Pioneer States," *Crime & Delinquency*, vol. 24 (1978), p. 385; S. Messinger and Johnson, "California's Determinate Sentencing Statute: History and Issues," *Determinate Sentencing: Reform or Regression?* (Washington, DC: U.S. Government Printing Office, 1978), pp. 13-58.

cent during that period, but the number of prisoners grew by 45 percent.⁷

The new approaches considered in this chapter are all intended to provide alternatives to conventional prisons: commercial or privatized prisons and community service, electronically monitored home arrest, and drug or hormonal therapy and related methods of behavior modification.

⁷U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 1985* (Washington, DC: U.S. Department of Justice, June 1986). BJS reports that the prison population rose by 8.4 percent in 1985 to a record 503,601 inmates. This is the third largest increase in the absolute number of additional inmates since prisoner statistics were first collected in 1926. A recent report of the U.S. Bureau of Justice Statistics indicates that the number of prisoners housed in State prisons has significantly outpaced capacity. U.S. Department of Justice, Bureau of Justice Statistics, *Population Density in State Prisons* (Washington, DC: U.S. Department of Justice, 1986), reported in *Criminal Justice Newsletter*, vol. 18, Jan. 2, 1987, p. 4.

ALTERNATIVES TO CONVENTIONAL OR TRADITIONAL PRISONS

Jurisdictions across the country have intensified their search for viable alternatives to prison. One controversial alternative that several States are seriously considering is the privatization of correctional facilities, or turning correctional facilities over to privately owned companies to run. The issue of such "prisons-for-profit" is heatedly debated by criminal justice experts.

The American Bar Association (ABA), in February 1986, urged States not to contract with the private sector to operate correctional facilities until a variety of constitutional and legal issues were resolved, although no constitutional issues were specified. A year later, the ABA's criminal justice section initiated a study of statutory and contractual issues regarding privatization, with the goal of researching the legal issues and developing a model statute and contract.⁸

⁸I P. Robbins, "Privatization of Corrections: Defining the Issues," *Federal Probation*, vol. 50, September 1986, p. 24.

But in fact, commercial jails are already in operation. A television commercial shows a man being arrested and led away in handcuffs, followed with the message:

If you've been arrested, there's an alternative to going to jail, called "alternative sentencing." The people to call are Behavioral Systems Southwest. Call us and we'll give you the information.⁹

The alternative operates in California for people who have pleaded guilty to a nonviolent crime, have been sentenced 90 to 120 days, are willing and able to pay about \$1,000 per month, and have the permission of the sentencing court. It involves part-time confinement in a motel-type facility operated by a private company, while the offender carries on his or her regular job during workdays. There are several such facilities in California and other States.

⁹"Paying for Your Own Incarceration," *D&B Reports*, vol. xxxv, No. 1, January/February 1987, pp. 13-14.

Another strategy is to divert from prison those offenders who can safely and successfully be treated in the community. Alternatives include fines, probation, suspended sentences, restitution to the victim, and community service. Pre-release programs, such as work release and halfway houses, shorten the duration of an inmate's term and provide a transitional stage between incarceration and full release, but are not really alternatives to prison because they follow incarceration.

The major constitutional question in regard to all of these alternatives to conventional imprisonment is the question of equity in their application. To the extent that they offer desirable alternatives, such policies and programs may be challenged on the basis of discrimination (i.e., under the Equal Protection and Due Process Clauses) if they are available only to those who can pay for them, or if candidates are categorized or classified in ways that the Supreme Court has found to be suspect.

ELECTRONIC MONITORING

The concept of electronically monitoring the location of parolees and probationers is not new. Dr. Ralph Schwitzgebel, a member of Harvard's Science Committee on Psychological Experimentation, described in 1964a system of "electronic parole" whereby a portable transceiver device could monitor a parolee's location 24 hours a day. Researchers enthusiastically suggested that "when specific offending behaviors can be accurately predicted and/or controlled within the offender's own environment, incarceration will no longer be necessary as a means of controlling behavior and protecting society."¹⁰

Parolees, mental patients, and researchers in Cambridge and Boston, Massachusetts wore the tracking devices between 1964 and 1970 to assist in developing the technique.¹¹ A patent was issued for the device in 1969.¹²

Publicity about the electronic tracking device generated proposals that included adding a microphone to transmit whatever the wearer heard or said; transmitters that might broad-

cast signals from sensors recording blood alcohol levels or other physiological data; and brain monitors to determine if the wearer was asleep, alert, or emotionally agitated. Another suggestion was the creation of a surveillance system that would combine individual, personally worn transponders with transceiver units strategically placed in buildings and alongside streets. This large-scale monitoring system was designed to "transform crime deterrence into a problem in information processing, and real-time cautioning by radio signals."¹³

Nevertheless, the development of electronic monitoring devices made few advances until the early 1980s when prison overcrowding created great demand for alternatives and the market became attractive enough to encourage commercialization.

¹⁰R. K. Schwitzgebel, R.L. Schwitzgebel, W.N. Pahnke, and W.S. Hurd, "A program of Research in Behavioral Electronics," *Behavioral Science*, vol. 9, 1964, pp. 233-238.

¹¹The subjects in a 1969 study ranged from an offender with over 100 arrests and 8 years of incarceration to a young businessman with no criminal history. R.K. Gable (formerly Schwitzgebel), "Application of Personal Telemetering to Current Problems in Corrections," *Journal of Criminal Justice* 14, (1986) p. 168.

¹²*Ibid.*, p. 176. R.K. Schwitzgebel and W.S. Hurd (1969). "Behavioral supervision system with wrist carried transceiver," Patent No. 3,478,344.

¹³Note, "Anthropotelemetry: Dr. Schwitzgebel's Machine" [Hereinafter cited "Schwitzgebel's Machine"], *Harvard Law Review*, vol. 80 (1966), pp. 403-404. See U.S. Congress, Senate Committee on the Judiciary, *Hearings on Invasions of Privacy (Government Agencies) Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Cong., 1st sess., pt. I, pp. 14-63, 323-324 (1965). R.S. MacKay, "Radio Telemetering From Within the Body," *Science*, vol. 134, October 1961, p. 1196; I.J. Young and W.S. Naylor, "Implanted Two Way Telemetry in Laboratory Animals," *American Journal of Medical Electronics*, vol. 3, January/March 1964, pp. 28-33; D.B. Lindsley, "The Reticular Activating System and Perceptual Integration" in D. Sheer (ed.), *Electrical Stimulation of the Brain: An Interdisciplinary Survey of Neurobehavioral Integrating Systems* (Austin, TX: University of Texas Press, 1961), p. 331; and J.A. Meyer, "Crime Deterrent Transponder System," *Institute of Electrical and Electronic Engineers Transactions on Aerospace and Electronic Systems* 7 (1971), pp. 2-22.

One of the first successful personal telemonitoring devices was the "GOSSlink" electronic bracelet, inspired by the Spiderman comic strip. In 1977, New Mexico District Court Judge Jack Love became intrigued with a cartoon in which a villain strapped a special bracelet on Spiderman's wrist to track the hero's whereabouts. Judge Love wrote to his State's corrections department, enclosing a copy of the comic strip and a news article about transmitting devices that could track cargo and animals. Nothing came of the idea for 4 years; then crowding in the county jail motivated the judge to contact several companies to discuss the feasibility of the device. He convinced Michael Goss, a computer salesman, to quit his job to design and produce it. Goss established National Incarceration Monitor and Control Services (NIMCOS) and developed an electronic bracelet that could be used to monitor probationers. In 1983, after wearing the bracelet himself for 3 weeks, Judge Love ordered a probation violator to wear the device; and later added four additional offenders.¹⁴

Since 1983, approximately 20 jurisdictions in 13 States have used electronic monitoring devices in probation and parole, presentence probation, work release, or house arrest programs.¹⁵ At least 12 companies are involved in making electronic monitoring equipment for correctional use.¹⁶ An appraisal of an electronic monitor, funded by the National Institute of Justice (NIJ), concluded that active

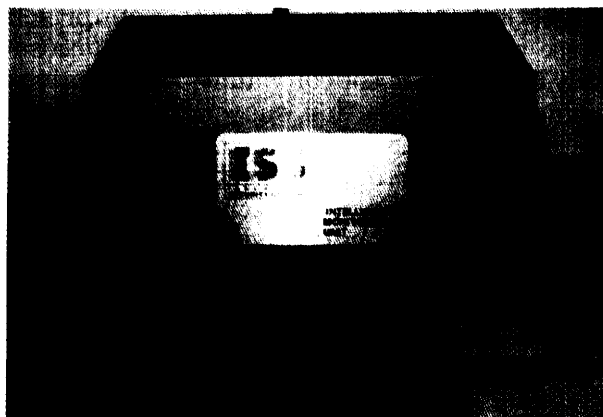


Photo credit: Innovative Security Systems, Cupertino, CA

The electronic bracelet and monitor allow some offenders to remain in the home and aid in monitoring those on probation or parole.

monitors have "promise" as an alternative to traditional incarceration.¹⁷

Electronic systems can monitor an offender's presence in a specific environment, usually the home, during curfew hours or during the entire day. They include:

- telephone calls to probationers during curfew hours;
- computerized telephone calls to the probationer that require voice and electronic identification;
- transmitting devices worn by the probationer that emit radio signals to a receiver attached to the phone, that, in turn, communicates with a receiver.¹⁸

Some house-arrest programs involve electronic monitoring; all electronic monitoring systems involve house arrest. Depending on the design, equipment can monitor offenders intermittently or continually and are thus called "passive" or "active" systems. Passive monitoring systems have an automated caller programmed to dial the probationer's home.

¹⁴Criminal Justice Newsletter, vol. 15, Mar. 15, 1984, p. 4.

¹⁵The number of electronic monitoring programs is growing rapidly, making a count difficult. In January 1986, the Texas Criminal Justice Policy Council conducted a 6-month feasibility study, surveying 10 programs located in 7 States. In December 1986, the National Institutes of Justice (NIJ) reported that 45 programs were operating in 20 States; NIJ is reviewing these programs. See J.B. Vaughn, *Potential Applications for Electronic Monitoring and House Arrest in the State of Texas* (Huntsville, TX: Sam Houston State University, July 1986) [Hereinafter cited *Potential Applications*]. In addition, in October and November 1986, EMT Group, Inc. surveyed 20 programs in 12 States. T. Armstrong, G. Reinger and J. Phillips, *Electronic Surveillance: An Overview* [draft report] (Sacramento, CA: The EMT Group, December 1986).

¹⁶C.M. Friel and J. B. Vaughn, "A Consumer's Guide to the Electronic Monitoring of Probationers," *Federal Probation*, vol. 50, September 1986, p. 4.

¹⁷See R.K. Gable, "Applications of Personal Telemonitoring to Current Problems in Corrections," *Journal of Criminal Justice*, vol. 14, 1986, p. 169; W. Niederberger and W.F. Wagner, U.S. Department of Justice, National Institute of Justice, "Electronic Monitoring of Convicted Offenders: A Field Test," *Report to the National Institute of Justice, 1985*.

¹⁸Friel and Vaughn, *op. cit.*, footnote 16, p. 4.

They are frequently used in conjunction with a wristlet encoder device that the probationer inserts into a verifier box attached to the telephone. The verifier box sends a signal to a computer, which records a violation if the telephone is not answered or the bracelet is not inserted. Such systems are relatively inexpensive, simple to operate, and free of false alarms.

Some systems also use computerized "voice verification" to ensure that the respondent is actually the offender.¹⁹ One system has an optional second test that requires the offender to repeat a series of digits, using the telephone's touchtone keys. This tests manual dexterity as a possible indication of drug or alcohol use.

Active monitoring systems usually consist of three components:

1. a transmitter device worn by the offender around the ankle, neck, or wrist, which transmits an encoded signal at regular intervals over a range of approximately 200 feet;
2. a receiver unit located in the offender's home that detects signals from the transmitter and periodically reports to a central computer; and
3. a control computer located at the criminal justice agency that accepts reports from the receiver unit over telephone lines, compares them with the offender's curfew schedule, and alerts correctional personnel to unauthorized absences.

The ankle transmitter used in several active monitoring systems is about the size of a cigarette package, weighs about 5 ounces, and is strapped around the leg above the ankle with a strap containing an electronic circuit that detects tampering and sends an alarm to receiving unit.²⁰

Most of these programs have only been in existence for a few years and typically involve

¹⁹Vaughn, *op. cit.*, footnote 15, p. 23.

²⁰G. Kennedy, Control Data Corp., Minneapolis, MN, interview conducted Apr. 11, 1985, reported in R.v.del Carmen and J. Vaughn, "Legal Issues in the Use of Electronic Surveillance in Probation," *Federal Probation*, vol. 50, June 1986, pp. 60-61 [Hereinafter cited "Legal Issues"],

a small number of screened offenders, making evaluation preliminary and perhaps misleading.²¹ Electronic monitoring costs more than traditional probation, but less than prison confinement. Society and the prisoner benefit from the latter's continued ability to work and support himself and perhaps a family. Such programs add to tax revenues, reduce welfare costs, and relieve the need to build additional prisons. They also allow a prisoner to retain family and community ties. This is a benefit if those ties are healthy and supportive, but there is also the risk of continuing unhealthy associations-e. g., access to liquor and drugs.

A potential societal risk is that of widening the net of social control. Some critics contend that there will be a tendency to criminalize all mildly socially unapproved behavior or to sanction longer terms or other harsher penalties for minor misdemeanors. Society derives no benefit if offenders who would otherwise have successfully been placed on probation without monitoring are now electronically tracked. For these people, a less costly probationary program would have proven just as effective and the level of social control less intrusive, yet consistent with their rehabilitation and the protection of society. If it is used for serious felons, there is the possibility that they will elude monitoring long enough to commit other crimes.

Some people think that the use of house arrest and monitoring devices has "Orwellian overtones";²² others rejoin that surveillance by a computer is less intrusive than confinement in a prison.²³

²¹B. Berry, "Electronic Jails: A New *Criminal* Justice Concern," *Justice Quarterly*, Mar. 21985, pp. 1-22; Friel and Vaughn, *op. cit.*, footnote 16; J. Petersillia, "Exploring the Option of House Arrest," *Federal Probation*, vol. 50, June 1986, pp. 50-55.

²²R.A. Ball and J. Lilly, "The Potential Use of Home Incarceration With Drunken Drivers," in J.E. Scott and T. Hirschi (eds.), *Critical Issues in Criminal Justice* (Beverly Hills, CA: Sage, 1984). B. Beck, "Commentary: Issues in the Use of an Electronic Rehabilitation System With Chronic Recidivists," *Law and Society Review*, May 3, 1969, pp. 111-114.

²³B.L. Ingraham and G. Smith, "Use of Electronics in Observation and Control of Human Behavior," *Issues in Criminology* 7, fall 1972, pp. 35-53.

There are several constitutional questions. The first issue involves the Fourth Amendment guarantee of "the right of the people to be secure in their persons, houses, papers, and effects. . . ." ²⁴ Electronic monitoring coupled with home arrest is typically used with those who otherwise would be in prison, that is, they are probationers. The courts have consistently held that probationers enjoy only a restricted scope of constitutional protection. ²⁵ They have somewhat broader protections than confined prisoners, ²⁶ but less than the general public.

Electronic monitoring is also used in pretrial releases, where the issue is less clear-cut. Although the Supreme Court has ruled that the rights of pretrial detainees are subordinate to maintaining order and security, ²⁷ defendants released pending trial continue to enjoy the presumption of innocence. Although their release may be subject to conditions in order to ensure their appearance at trial, they have not been convicted of a crime nor do they suffer the legal disabilities of convicted felons. In these cases, the courts often defer final disposition of the case while the defendant serves a term of probation. The defendant typically enters a guilty plea, but the court withholds final judgment until probation is completed. Assuming it is completed without incident, the court may then dismiss the case, thus averting the stigma of a criminal record.

²⁴Several contemporary papers provide an overview of the legal and constitutional issues surrounding the use of electronic monitoring equipment. See del Carmen and Vaughn, "Legal Issues," footnote 20; see note 111, p. 60; Note, "Electronic Monitoring of Probationers: A Step Toward Big Brother?" *Golden Gate Law Review* 14 (1984), p. 431; Berry, "Electronic Jails," Friel and Vaughn, "Consumers Guide."

"*State v. Culbertson*, 563 P. 2d 1224 (Or. Ct. App. 1977); *United States v. Consuelo-Gonzales*, 521 F. 2d 259 (9th Cir. 1975); *Malone v. United States*, 502 F. 2d 554 (9th Cir. 1974), cert. denied, 419 U.S. 1124 (1975); *People v. Mason*, 488 P. 2d (Cal. S. Ct. 1971); *In re Martinez*, 463 P. 2d 734 (Cal. S. Ct. 1970). Also see Note, "Fourth Amendment Limitations on Probation and Parole Supervision," 1976 *Duke Law Journal* 71 (1976).

²⁶*Hudson v. Palmer*, 468 U.S. 517 (1984) [prisoners have reasonable expectation to privacy in their cells, or in property in their cells, entitling them to the protection of the Fourth Amendment against unreasonable searches]; *Block v. Rutherford*, 468 U.S. 576 (1984) [Prisoners have no right to be present when authorities search their cells].

²⁷*Bell v. Wolfish*, 441 U.S. 520 (1979).

Sentencing courts are given wide latitude in setting the terms of probation, including restricting the probationer's exercise of constitutional rights, ²⁸ but they do not have completely unfettered discretion in establishing conditions or release. ²⁹ Generally, conditions of probation must have a reasonable relationship to the treatment of the accused and the protection of the public.

Requiring an offender to abide by a curfew is not an infrequent condition of probation, one that has not been found to violate the probationer's rights nor to be an abuse of judicial discretion. ³⁰ The courts are likely therefore to find no violation of Fourth Amendment rights where probationers are ordered to stay within their own homes for prescribed hours (tantamount to a curfew), and where an electronic monitor is used simply to verify the probationer's compliance. When probationers have agreed to conditions, the courts have generally held that they have effectively waived the exercise of any constitutional rights abridged by the conditions. For example, a defendant's agreement to probation on the condition that she submit to polygraph examination effectively waived any Fourth or Fifth Amendment claims. The Court said that the defendant's waiver was voluntary despite the unattractive choice between agreement to the condition or imprisonment. ³¹

²⁸*State v. Cooper*, 282 S.E. 2d 439 (NC S.Ct. 1981); *State v. Sprague*, 629 P. 2d 1326 (Or. Ct. App. 1981); *Malone v. United States*, 502 F. 2d 554 (9th Cir. 1974), cert. denied, 419 U.S. 1124 (1975); *People v. Mason*, 488 P. 630 (Cal. S. Ct. 1971); *In re Bushman*, 463 P. 2d 727 (Cal. S. Ct. 1970); *In re Martinez*, 463 P. 2d 734 (Cal. S. Ct. 1970).

²⁹Conditions which unnecessarily encumber the exercise of constitutional rights, bear little or no relationship to the rehabilitation of the offender or the protection of society, impose impossible burdens on the probationer, are vague, or require banishment of the offender have been struck down by the courts. See, *United States v. Abushaar*, 761 F. 2d 954 (3rd Cir. 1985); *Panko v. McCauley*, 473 F. Supp. 325 (E.D. Wis. 1979); *People v. Smith*, 232 N.W. 397 (S. Ct. Mich., 1930); *People v. Dominguez*, 256 C.A. 2d 623 (1967); *Sweeney v. United States*, 353 F. 2d 10 (7th Cir. 1965); *Dear Wing Jung v. United States*, 312 F. 2d 73 (9th Cir. 1962).

³⁰*State v. Sprague*, 629 P. 2d 1326 (Or. Ct. App. 1981); *Johnson v. State*, 291 S.E. 2d 94 (Ga. S. Ct. 1981); *State v. Cooper*, 282 S.E. 2d 436 (NC S. Ct. 1981).

³¹*State v. Wilson*, 521 P. 2d 1317 (Or. Ct. App. 1974) See the earlier *Zap v. United States*, 328 U.S. 624 (1946) [Fourth Amend-

On the other hand, home arrest anti electronic monitoring could be held to violate the Equal Protection of the Laws Clause, if such programs remain limited to a small percent of all offenders.³² The alternative of incarceration is for most people probably much more undesirable. Most electronic monitoring programs require the probationer to have a home and a telephone line and to pay the costs associated with the program. The Equal Protection of the Laws Clause could be involved if participation is denied to those defendants who cannot pay the program's costs. In a recent case³³ the Supreme Court held that a defendant's probation could not be revoked for failure to pay a court ordered fine and make restitution when the defendant was unable to pay.

ment rights may be waived, and where defendant specifically agreed to governmental inspection of his business records, in order to obtain the government's business, he voluntarily waived any claims to privacy with regard to his records].

³² . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws. *United States Constitution, Article, XIV.*

³³ *Bearden v. Georgia*, 461 U.S. 660 (1983).

This issue could become even more important if the AIDS epidemic increases the risks entailed in incarceration. The disparity between alternative punishments for the same offense would then seem much greater. Since maintaining a prisoner almost certainly costs much more than electronic monitoring, it may be cheaper to forego user fees. However, this would still not solve the problem of the offender with no settled abode, no telephone, and no employment.

There are additional policy issues to be considered in electronic monitoring that probably do not impinge on constitutional protections; for example, the rights of others in the family or household. The electronic monitoring devices presently used with home arrest transmit neither images nor oral communications, only a radiofrequency signal indicating the presence of the probationer within the prescribed range of the transceiver. Earlier electronic surveillance cases restrict the use of electronic monitoring devices that operate with the principal aim of eavesdropping and seizing video or audio evidence against a suspect.

DRUG THERAPY AND HORMONE MANIPULATION

Many scientists think it will become increasingly possible in the future to identify biochemical or hormonal factors in human behavior and eventually to modify behavior by manipulating these factors. A popular film of the early 1970s, "A Clockwork Orange," explored the implications of behavior modification for controlling antisocial or criminal behavior. Already a few, relatively ineffective forerunners of these biological technologies are being used or experimented within criminal justice. These include Antabuse for those whose offenses are related to alcohol abuse, and Depo-Provera for sexual offenders. These early examples have raised a large number of objections: that they allow criminals to escape punishment, that they violate professional ethics, that they dehumanize the subjects, that they are unconstitutional as "cruel and unusual punishment,"

and that they are unconstitutional because they are not equally available to all offenders as a substitute for punishment, *or* as a needed medical treatment. A closer look at Antabuse and Depo-Provera may help in evaluating these objections.

Antabuse and Alcohol

Antabuse is used to treat alcoholism. While alcoholism is not a crime, public intoxication, disturbing the peace, disorderly conduct, and driving under the influence of alcohol are. The recent get-tough attitude toward drunk driving has resulted in strictly enforced laws that may include jail terms. This could further burden the criminal justice system and worsen the shortage of prison cells, but still do little to

solve the underlying problem by preventing recurrence or deterring potential offenders.

Traditional treatment for alcoholism, based on the view of alcoholism as a disease, includes counseling, group therapy, and support networks, such as Alcoholics Anonymous. Such treatment is effective only when it is voluntary and actively sought. Some research indicates that when appropriately applied, either the administration of drugs or behavioral modification programs, including chemical and electrical aversion conditioning, may be as effective as the more conventional forms of treatment.³⁴

Tranquilizers are among the most frequently prescribed drugs for the treatment of alcoholism.³⁵ First introduced in the 1950s, they may relax a person and relieve anxieties or tension without seriously impairing judgment or alertness. Hypnotics are also frequently prescribed. These drugs must be carefully monitored because the alcoholic may simply substitute dependency upon the drugs for alcohol.

Disulfiram, commonly known as Antabuse, is used in quite a different manner. It is a water soluble, almost tasteless tablet that is incompatible with alcohol. Alcohol in interaction with Antabuse causes extreme nausea or vomiting, difficulty in breathing, headaches, blurred vision, and a marked drop in blood pressure. Antabuse blocks the complete breakdown of alcohol in the body, making the imbibor ill from the accumulation of toxic byproducts. One must wait 72 hours after taking Antabuse before drinking. When used in a treatment program, the drug is frequently used in conjunction with psychotherapy.³⁶

Antabuse conditions deterrence by the fear or expectation of severe reaction to alcohol. It provides drinkers with social justification for

³⁴G. Litman and A. Topham, "Outcome Studies on Techniques in Alcoholism Treatment," in M. Galanter (ed.), *Recent Developments in Alcoholism, Volume I* (New York, NY: Plenum Press, 1983), p. 187.

³⁵H.H. Siegel, *Alcohol Detoxification Programs: Treatment Instead of Jail* (Springfield, IL: Charles C. Thomas Publisher, 1973), p. 56.

³⁶*Ibid.*, p. 57.

abstinence;³⁷ enhancing their ability to benefit from more traditional group or individual therapy by keeping them out of trouble with the law.³⁸ Research has indicated, however, that the success of the drug may be due more to psychological factors than to the physical reaction, and that only highly motivated persons are appropriate candidates for treatment.³⁹ The trouble with Antabuse treatment, in lieu of conventional punishment, is that the alcoholic may terminate the medication and resume drinking.

Depo-Provera and Sex Offenses

A more controversial form of drug therapy for criminals is Depo-Provera. In recent years, the number of serious sex offenses, notably forcible rape, has increased considerably,⁴⁰ or, as some claim, society is ceasing to condone or ignore these crimes and they are more often reported. In addition, there seems to have been a big increase in sex offenses involving children. Again, this increase may represent in part a growing inclination to report such crimes. Sex offenders seem particularly likely to repeat their crimes after punishment.⁴¹

The sexual offender may be, but is not necessarily, violent. He is a person who "seeks sexual gratification through inappropriate means, such that the sexual activity or the repercussions of the sexually exciting behavior are harmful to self or others." A distinction

³⁷D.F. Horrobin, *Alcoholism Treatment*, Alcohol Research Review Series, vol. 5 (New York, NY: Human Sciences Press, 1980), p. 133.

³⁸W. Poley, G. Lea, and G. Vibe, *Alcoholism: A Treatment Manual* (New York, NY: Gardner Press, Inc., 1979), p. 61.

³⁹Horrobin, *Treatment, Op. cit.*, see note 130, pp. 133-134, and Poley, et. al., *Alcoholism: A Treatment Manual*, op. cit., 1979, see note 131, p. 61.

⁴⁰The FBI Uniform Crime Reports indicate a 74-percent increase in reported rapes between 1971 and 1981, and a 57-percent increase in aggravated assault for the same period. U.S. Department of Justice, Bureau of Justice Statistics, *Report to the Nation on Crime and Justice* (Washington, DC: U.S. Department of Justice, 1983), p. 9. In addition, from 1984 to 1985 the number of forcible rapes increased 3.7 percent. U.S. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports for the United States* (Washington, DC: U.S. Department of Justice, 1985), p. 13.

⁴¹L.R. Tancredi and D.N. Weisstub, "Forensic psychiatry and the Case of Chemical Castration," *International Journal of Law and Psychiatry* 8 (1986), p. 259.

is often made however between 'sex offenses' (a legal term) and sexual deviation disorders (a medical term).⁴² But even where sexual offenses against victims do not involve physical damage, there is often significant emotional damage.⁴³

Some experts identify four primary types of sex offenders:⁴⁴

1. denying offenders who deny their crime or the criminal nature of the crime (i.e., they claim the rape was consensual or the pedophilia was initiated by the prepubertal child);
2. *disinhibited* offenders who confess to the crime but claim their behavior was due to nonsexual factors such as alcohol, drugs, or stress;
3. *violent* offenders who appear to be motivated primarily by some nonsexual force, such as anger or drive for power; and
4. *paraphiliac* offenders, especially males, in which fantasy or the actuality of a specific deviation accompanies nearly every sexual arousal; or with "recurrent, persistent fantasies about deviant sex. . . erotic cravings perceived as noxious when frustrated. . . and relatively stereo-typed sexual activity. "

Paraphiliac behaviors may include fetishism, transvestism, sadism, masochism, pedophilia, exhibitionism, and voyeurism. More violent illegal behaviors, such as rape and incest, and the lack of sexual impulse control may be associated with paraphiliacs or with other psychiatric disorders, such as schizophrenia.

At certain periods there has been a strong tendency to subject sex offenders not to punishment, but to treatment. In the search for new approaches for managing sex offenders, there is no clear consensus on which sexual offenders are "sick" and merit compassion and treatment, and which are "evil" and merit severe punishment. Many people are ambivalent and troubled on this subject. Nor is there unanimity among either medical or law enforcement experts. This contributes to the high degree of inconsistency in treatment of sex offenders. Knowledge and theory in this area are both inadequate, and research is hampered by the peculiar difficulties of obtaining data on sexual behavior, which makes diagnosis and effective treatment difficult.

Traditional treatment of sex deviants takes several forms: mental health therapy, psychotherapy, life skills training, behavior modification, and hormonal manipulation. Increasingly, behavior change programs involve a combination of methods and techniques, and almost always include some form of counseling and peer group treatment.⁴⁵ Other strategies use a variety of aversive conditioning techniques, including electric shock treatments, shame-aversion, and covert sensitization.⁴⁶ Few if any treatment methods have been proven effective in significantly reducing the incidence or recurrence of sexually deviant or dangerous behaviors.

One mildly promising but controversial treatment for use with certain sex offenders is hormonal manipulation through injection of

⁴²F.S. Berlin and C.F. Meinecke, "Treatment of Sex Offenders With Antiandrogenic Medication: Conceptualization, Review of Treatment Modalities, and Preliminary Findings," *American Journal of Psychiatry* **138** (1981), pp. 601-646, at p. 602 [Hereinafter cited "Treatment of Sex Offenders"]. See also, P. Walker and W. Meyer, "Medroxyprogesterone Acetate for Paraphiliac Sex Offenders," in J.R. Hays, T.K. Roberts and K.S. Solway (eds.), *Violence and the Violent Individual* (Jamaica, NY: Spectrum Publications, 1981), pp. 354-356.

⁴³J. Kelly and J. Cavanaugh, "Treatment of the Sexually Dangerous Patient," *Current Psychiatric Therapies* **21** (1982), p. 101 [Hereinafter cited "Sexually Dangerous"].

⁴⁴*ibid.*

⁴⁵D.J. West, "Sex Offenses and Offending," in M. Tonry and N. Morris (eds.), *Crime and Justice: An Annual Review of Research*, vol. 5 (Chicago, IL: University of Chicago Press, 1983), p. 216. Comprehensive surveys of programs in the United States include E.M. Brecher, *Treatment Programs for Sex Offenders* (Washington, DC: U.S. Government Printing Office, 1978); B. Delin, *The Sex Offender* (Boston, MA: Beacon Press, 1978). Also see *Report on Nation wide Survey of Juvenile and Adult Sex-Offender Treatment Programs and Providers* (Syracuse, NY: Safer Society Press, 1986). [Hereinafter cited *Nationwide Survey Sex-Offender Treatment Programs.*]

⁴⁶M. Serber and J. Wolpe, "Behavior Therapy Techniques," in H.L.P. Resnick and M.E. Wolfgang (eds.), *Treatment of the Sex Offender* (Boston, MA: Little, Brown & Co., 1972), pp. 59-64.

the antiandrogen progesterone, a technique sometimes called chemical castration. Used in Europe for many years, hormonal manipulation has only recently been used in the American criminal justice system. The usual form is Depo-Provera.

A 1986 survey of 650 U.S. programs specializing in the treatment of sex offenders found that 14 percent of the adult programs and 6 percent of the juvenile programs were using Depo-Provera on an experimental basis.⁴⁷ Their goal is to determine if it, in conjunction with extensive counseling, could reduce the probability of recidivism.

Testosterone, found in varying levels in both men and women, is the sex hormone responsible for the male sex drive. Male sexual behavior is related to many variables, only one of which is the serum level of testosterone. But variations from the normal range of testosterone concentration are frequently associated with behavior changes; a reduction in the hormone due to castration may reduce sexual activity and conversely, an injection of testosterone to androgen-deficient men can increase sexual activity.⁴⁸

The first clinical use of antiandrogen compounds to treat sexual offenders occurred in West Germany and Switzerland in the 1960s.⁴⁹ Experimenting with rats, scientists discovered the antiandrogenic properties of cyproterone and cyproterone acetate, and began applying the new drug to selected human beings. The compounds were found to suppress the production of testosterone. In contrast to estrogen compounds,⁵⁰ which in the male produce effeminate body changes and may cause irreversible infertility, cyproterone and cyproterone acetate are progesterone derivatives that have fewer unpleasant side effects, most re-

versible, and no known permanent adverse side effects.⁵¹

The drug was approved in the United States for several medical applications, but the Food and Drug Administration has not released it for general treatment of sexually deviant behavior. It has been possible, however, for researchers working with sex offenders to substitute medroxyprogesterone acetate, a synthetic progesterone known as Depo-Provera, manufactured by the Upjohn Co.

Effective treatment with Depo-Provera depends on careful selection of candidates." The personal commitment of the patient is important. Patients typically receive a 300 to 400 mg. injection of the drug every 7 to 10 days, depending on physique and body weight. The drug is regularly monitored in an attempt to lower the amount of testosterone from normal male levels (400 to 1,000 mg) to normal female levels (40 to 100 mg),⁵³ with the objective of reducing potency and ejaculation, reducing the frequency of erotic imagery, and diminishing sexual interest. Behavioral and cognitive therapies are almost always part of the treatment.⁵⁴

In contrast to other, more traditional forms of treatment (e.g., psychotherapy, behavior therapy, long-term institutionalization, or anti-psychotic chemotherapy), Depo-Provera is said to be more specific and longer-lasting in eliminating sexually dangerous behaviors.⁵⁵ There is also some evidence indicating that lowered

⁴⁷Nationwide Survey of Sex-Offender Treatment Programs, see note 142, reported in *Criminal Justice Newsletter* 17 (June 16, 1986), p. 6.
⁴⁸Kelly and Cavanaugh, "Sexually Dangerous," op. cit., footnote 43, p. 103.

⁴⁹J. Money, "The Therapeutic Use of Androgen-Depleting Hormones," in H.L.P. Resnick and M.E. Wolfgang (eds.), *Treatment of the Sex Offender*, see note 143, p. 165. [Hereinafter cited "Therapeutic Use"]

⁵⁰Estrogen is the main female sex hormone.

⁵¹M.K. Spodak, Z.M. Falk, and J.R. Rapoport "The Hormonal Treatment of Paraphiliacs With Depo-Provera," *Criminal Justice and Behavior* 5 (1978), pp. 304-314.

⁵²Walker and Meyer, "Medroxyprogesterone Acetate for Paraphiliac Sex Offenders," 1981.

⁵³Kelly and Cavanaugh, "Sexually Dangerous," op. cit., footnote 43, p. 104. Research also suggests that some offenders have excessively high levels of testosterone. Berlin and Meinecke, "Treatment of Sex Offenders," op. cit., footnote 42, p. 605; P. Gagne, "Treatment of Sex Offenders With Medroxyprogesterone Acetate," *American Journal of Psychiatry* 138, May 1981, p. 645.

⁵⁴With counseling only, the patient often becomes discouraged as a result of relapses into deviant behavior. With counseling and Depo-Provera there are almost immediate behavioral changes, thus increasing the effectiveness of psychological therapy.

⁵⁵Kelly and Cavanaugh, "Sexually Dangerous," op. cit., footnote 43, p. 102.

testosterone levels may decrease aggressiveness.⁵⁶ Other researchers have found that Depo-Provera does not affect aggression per se, but reduces sex-related aggression.⁵⁷ There are several theories, but as yet no conclusive evidence, to explain the multiple biochemical and clinical effects of Depo-Provera.

The Biosexual Psychohormonal Clinic at the Johns Hopkins University Hospital in Baltimore, Maryland, was one of the first programs to treat sex offenders with Depo-Provera, in the late 1960s. In 1982-83, the program treated approximately 150 sex offenders, mostly as a condition of probation.⁵⁸ Program research suggests that Depo-Provera, when combined with counseling, can reduce the risk of recidivism.⁵⁹ But when medication is stopped, recidivism may recur. The drug has been effective with paraphiliacs (i.e., those requiring bizarre imagery, voyeurs, sex masochists, pedophiles, etc.), but does not work well with "antisocial career criminals."

New research at the sex offender program of the Connecticut Department of Corrections has indicated that Depo-Provera is unsuitable for most rapists because of their violent behavior, which is "primarily the sexual expression of aggression, rather than the aggressive expression of sexuality."⁶⁰ Other research indicates that it is not effective with alcohol and drug abusers.

The drug has several possible side effects, including those that frequently accompany the use of oral contraceptives; that is, fatigue, de-

pression, weight gain, change in the growth of body hair, nausea, elevated blood glucose, and headaches.⁶¹ These side effects appear to be temporary and reversible when treatment is terminated. Within 6 to 12 months following the last administration of the drug, a man's testosterone level returns to its pretreatment level." Some controversy regarding the drug's possible carcinogenic effects has been reported in research literature."

At best, Depo-Provera is a temporary solution to sexually deviant behavior. With short-term use, a high percentage of relapse occurs after the drug is withdrawn. But as sex crimes are highly age correlated, Depo-Provera treatment administered over several years may reduce the likelihood of recidivism until the patient ages, or makes sufficient progress in behavioral therapy to control antisocial behavior.⁶⁴

Alternative Techniques for Behavior Control

The questions raised about drug or hormonal therapy would also apply to other kinds of scientific behavior modification if and when they become available. The techniques popularly and loosely called brainwashing, and certain surgical procedures, including castration and lobotomy, have been suggested at various times, although there is little evidence that they would effectively control undesirable behavior. If techniques are developed that are

⁵⁶Ibid., p. 103.

⁵⁷Bradford, "The Hormonal Treatment of Sex Offenders," *Bulletin of the American Academy of Psychiatry and the Law* 11, 1983, p. 167, cited in Larry McFarland, "Depo Provera Therapy as an Alternative to Imprisonment," *Houston Law Review* 23, 1986, Note 114, p. 810. Bradford believes there is little evidence of a correlation between serum testosterone and aggression, although there is a highly complex relationship between aggression and various biological factors.

⁵⁸Criminal Justice Newsletter 14 (Sept. 12, 1983), p. 3.

⁵⁹These findings have been supported by the results of a similar program in Galveston, TX; the Rosenberg Clinic reports that 70 to 80 percent of the men treated with Depo-Provera in conjunction with psychological treatment did not repeat their offensive behavior. See *Houston Post*, June 29, 1985, at 4A, col. 1.

⁶⁰Criminal Justice Newsletter 15 (Feb. 15, 1984), P. 4. Also see N. Groth, *Men Who Rape: The Psychology of the Offender* (New York, NY: Plenum Publishing Corp., 1979).

⁶¹P. Gagne, "Treatment of Sex Offenders With Medroxyprogesterone Acetate," *American Journal of Psychiatry* 138, May 1981, p. 645; Kelly and Cavanaugh, "Sexually Dangerous," op. cit., footnote 43, p. 104.

⁶²J. Money "Therapeutic Use," see note 143, pp. 166; Kelly and Cavanaugh, "Sexually Dangerous," op. cit., footnote 43, p. 104.

⁶³Researchers opposing the use of Depo-Provera claim that high doses of medroxyprogesterone acetate have caused breast cancer in female dogs (See A. Rosenfield, et al., "The Food and Drug Administration and Medroxyprogesterone Acetate," *Journal of the American Medical Association* 249 (1983), pp. 2924-2925). Several other researchers, however, believe that these findings are inconclusive as to the carcinogenic effects the drug may have on human beings. Berlin and Meinecke, "Treatment of Sex Offenders," op. cit., footnote 42, see note 139, p. 603; A. Liang, et al., "Risk of Breast, Uterine Corpus and Ovarian Cancer in Women Receiving Medroxyprogesterone Injections," *Journal of the American Medical Association* 249 (1983), p. 2909.

⁶⁴Berlin and Meinecke, "Treatment of Sex Offenders," op. cit., footnote 42.

proven effective, however, these questions will certainly be raised.

Thus, some critics challenge any behavior modification treatments as “cruel and unusual punishment,” which is prohibited by the Eighth Amendment. The courts have interpreted this clause to ban punishments involving torture or a lingering death,⁶⁵ and those that are disproportionately severe.⁶⁶ Courts have applied the proscription at various times to capital punishment,⁶⁷ corporal punishments,⁶⁸ and degrading conditions of confinement.⁶⁹

It has also been applied to use of “aversion stimuli” in the form of an unproven drug that caused vomiting, when used to punish inmates or involuntarily committed patients who violated minor institutional rules.⁷⁰ A prisoner who undergoes treatment must consent, and must be able subsequently to withdraw consent and halt treatment.

The nature of the treatment, and what it does to the subject, is clearly relevant. For example, the effects should not be “shocking to the

⁶⁵In *re Kemmler*, 136 U.S. 436 (1889), at 447: “Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there’s something inhuman and barbarous, something more than the mere extinguishment of life.”

⁶⁶*Weems v. United States*, 217 U.S. 349 (1910): a sentence of 15 years at hard labor in wrist and ankle chains is disproportionate to the crime of falsifying a public record. *Coker v. Georgia*, 433 U.S. 584 (1977): the death penalty for the crime of forcible rape is grossly disproportionate and excessive, in violation of the Eighth Amendment. *Solem v. Helm*, 463 U.S. 277 (1983): a life sentence without possibility for parole for seventh non-violent felony is significantly disproportionate to the crime and is thus a violation of the Eighth Amendment. But compare *Rummel v. Estelle*, 445 U.S. 263 (1980): a mandatory life sentence imposed under a recidivist statute does not constitute cruel and unusual punishment, even though the three successive felonies were nonviolent, property-related offenses.

⁶⁷*Furman v. Georgia*, 408 U.S. 238 (1972)

⁶⁸*Jackson v. Bishop*, 404 F. 2d 571 (8th Cir. 1968) [Whippings administered with a leather strap]

⁶⁹*Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff’d* 442 F.2d 304 (8th Cir. 1971) [The totality of conditions of confinement within an institution may amount to cruel and unusual punishment “where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people . . .” p. 365.]

⁷⁰*Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973).

conscience of reasonably civilized people,” a test that has been applied in determining what constitutes cruel and unusual treatment.⁷¹ Surgical or pharmaceutical treatment that deprived a prisoner of the use of general mental faculties (i.e., made him a passive “zombie”) or of physical faculties (i.e., crippled, blinded, or permanently castrated him) might be found to be “shocking to the conscience of reasonably civilized people”; but courts have allowed lobotomies to be performed on involuntarily committed patients.

Another general question that could arise, however, is whether a prisoner could demand treatment as an alternative to prison or if it affords an improved chance at probation. Should certain treatments prove effective and reliable methods for reducing violent behavior or propensity to rape or other sexual offenses, for example, prisoners may demand such treatment on grounds of “equal protection” or as medical care to which they are entitled. The Supreme Court has ruled that prison officials are obligated to provide inmates with adequate medical care.⁷² The constitutional duty stems from the inmates’ total dependence on prison officials to provide for their medical needs. The Court established a two-pronged test. Prison officials have violated the Eighth Amendment if: 1) the prisoner has serious medical needs, and 2) by an act or omission, officials have demonstrated deliberate indifference to those needs.⁷³ This requirement would not apply to experimental or unconventional treatments.

The suggestion that Depo-Provera, still considered experimental, could involve such long-term risks has led some critics to object to it. An opponent of Depo-Provera treatment protested,

It makes a mockery of the whole concept of informed consent when your option is to go

⁷¹*Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970)

⁷²*Estelle v. Gamble*, 429 U.S. 97 (1976) [Deliberate indifference by prison personnel to a prisoner’s serious illness or injury constitutes cruel and unusual punishment contravening the Eighth Amendment.]

⁷³*Ibid.*, pp. 104-105.

to jail or get injected with a carcinogen that can increase the risk of heart attack.⁷⁴

The American Civil Liberties Union has protested the conditions under which sex offenders usually participate in the program, arguing that it is an indirect form of coercion⁷⁵ because, for sex offenders especially, prison can be so dangerous as to force them to accept any alternative.

The courts have not established a clear doctrine on refusal of treatment even when it is intended to be rehabilitative.⁷⁶ At present,

⁷⁴Criminal Justice Newsletter 14, Sept. 12, 1983, p. 3. Comments of Dr. Sidney Wolfe, Director of the Health Research Group.

⁷⁵Criminal Justice Newsletter 14 Sept. 12, 1983 p. 3.

⁷⁶Compulsory treatment was not held violative of Eighth Amendment in *Rutherford v. Hutto*, 377 F. Supp. 268 (E.D. Ark. 1974). [Prison officials compelled, under threat of institutional punishment, an illiterate inmate to attend school.] The court noted, 'if a State can compel a convict to perform uncompensated labor for the benefit of the State, as can constitutionally be done [citation omitted], a fortiori a State has the constitutional power to require a convict to participate in a rehabilitation program designed to benefit the convict.' Ibid., p. 272. Also see *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978). For a review of the right to refuse treatment, see Comment, "The Right Against Treatment: Behavior Modification and the Involuntarily Committed," *Catholic University Law Review*, 23, 1974 p. 774.

Depo-Provera is typically used in conjunction with other psychotherapeutic or behavioral treatments as a condition for probation. The defendant, in agreeing to the conditions, is considered to have waived his constitutional rights.

Critics have said that since research has demonstrated that Depo-Provera also reduces aggression, some prison administrators might attempt to use the drug on all inmates in an effort to control violence and homosexual activity. In fact, at least one criminal justice official has advocated such use.⁷⁷ Such broad and general use of the drug might meet the Supreme Court's test for cruel and unusual punishment: "shocking to the conscience of reasonably civilized people."⁷⁸

⁷⁷Comments of Oklahoma Corrections Director, Larry Meachum, who "would like to see Oklahoma become a 'front-runner' in studying the use of 'chemical castration' to control sex offenders in overcrowded prisons." Quoted in, Comment, "Medical Treatment for Imprisoned Paraphiliacs: Implementing a Modified Standard for Deliberate Indifference," *Yale Law & Policy Review* 4 (1985), p. 251, at p. 275, note 106.

⁷⁸*Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970)