Patuxent Revisited

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Comments upon "The Evaluation of Prison Treatment and Preventive Detention Programs: Some Problems Faced by the Patuxent Institution," by Nathan T. Sidley, M.D. *Bulletin*, II, 2, June 1974, pp. 73–95.

The opening of the Patuxent Institution in Jessup, Maryland, in 1955 represented an attempt by the Maryland legislature to establish a program for the protection of society and for the treatment, when possible, of those individuals who were felt to be in the category of "defective delinquents." Those individuals were to be given fully indeterminate sentences, sentences of one minute to life. This broad sentence was surrounded by full due process protections. At the initial legislative hearings psychiatrists testified that they believed it possible to delineate a group of offenders who met the criteria proposed by the legislature and who, in fact, represented a serious threat to the community in terms of dangerous, antisocial behavior. While the accuracy of such predictions was open to question, it was recognized that the medical determination would be advisory to a judge or jury who would make the final determination. Offenders who were determined by the courts to be "defective delinquents" would be treated by individual and group psychotherapy and in educational and vocational programs. As their ability to control themselves developed, they would receive increased privileges, followed by a slow but steady, progressive return to the community via work release and halfway house programs in conjunction with outpatient treatment resulting in eventual discharge.

While Patuxent represented "an experiment in modern psychiatric treatment of dangerous offenders," it obviously could not be operated as a truly scientifically controlled experimental institution, since its most important decisions (inclusion in the program and eventual release) were to be controlled by judicial determinations. The indeterminate sentence was conceded to be the "backbone" of the program. The basis for the theory of such sentencing is the fact that those individuals who act out their problems in a predatory fashion are notoriously unable to look at themselves and submit to therapeutic efforts which might help them. The indeterminate sentence would, therefore, function as a "coercive" maneuver. The Institution would be saying, "Either look at yourself and your behavior and try to make use of the help that can be obtained in this Institution, or continue your behavior and perhaps stay here for the rest of your life." Experience has indicated that most patients with "acting out behavior" will not voluntarily seek psychiatric treatment but can be helped when such treatment is forced upon them. Examples of similar successful efforts include the treatment of alcoholics via industrial alcoholic programs which are primarily coercive, the enforced treatment of addicts, and the treatment of certain sex offenders via court-ordered programs.

The concept of the indeterminate sentence flies completely in the face of the cherished legal principle that the sentence should fit the crime, as opposed to a medical principle that the sentence (treatment) should fit the criminal. In my many years of experience

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as a member of the Governing and Advisory Boards of the Patuxent Institution, I have come to accept the fact that very few people with legal training can accept the concept of the indeterminate sentence, since they have been educated in a different model. The exceptions to this rule are the many prosecutors and judges faced with individuals who have, on repeated occasions, committed serious crimes against persons and have not responded to terminate sentences which "fit the crime." Despite fears of the indeterminate sentence, the average stay in the Institution is only four years, plus three years on parole, far less than the original terminate sentence for most violent criminals.

It appears to me that Dr. Nathan T. Sidley's intention in writing his article about Patuxent was to argue that the state of the art of psychiatry is such that we cannot support by scientific evidence the validity of the indeterminate sentence, and, therefore, should eliminate such sentencing. In order to support this opinion he has developed a logical concept of diagnosis, treatment and outcome so rigorous that it could be applied to only very few aspects of the practice of all medicine and in all probability to no aspects of psychiatric treatment. Perhaps mankind cannot be "predicted," at least with the degree of accuracy implied by Dr. Sidley. The regression equation which he praises has serious limitations when applied to the "difficult to predict" *homo sapiens.*

A factor which must be seriously considered when evaluating predictions of human behavior, one which is not adequately commented on in Dr. Sidley's article, is the point in time at which a prediction is made. All outcome studies in the psychiatric literature, including studies of the population at Patuxent, the Baxstrom studies, Farview State Hospital, Kozol's work, etc., which have raised questions concerning psychiatric predictability of dangerousness, do not take into account the time at which the *initial* prediction was made. It does not take much expertise to predict that an individual who has, within the past two years, committed three aggravated rapes, is likely to commit another one in the next two years if given his freedom. It is clearly more difficult to say what he is likely to do after he has been incarcerated, with or without treatment, for five or ten years. The same would apply to the paranoid schizophrenic who has an active delusional system and on several recent occasions has assaulted one of his neighbors whom he believes to be one of his persecutors. To release him from the hospital immediately represents a different degree of risk than to release him following two or three years of hospitalization. To state that the initial prediction was in error, when after his eventual release several years later he no longer is involved in difficulty, seems grossly erroneous. Of course, a psychiatric prediction that he is just as likely to get into difficulty after three years of hospitalization flies in the face of the scanty data from the studies mentioned above, including Patuxent's data. In fact, Patuxent does often state at rehearing that a patient has improved greatly, but still represents a risk, albeit a reduced one.

Unfortunately, the collection of data of proper value would require our behaving in a way which Dr. Sidley clearly recognizes would be unacceptable. Medicine as an exact science has been plagued by its moral and ethical commitments. We cannot allow ten patients to bleed to death in order to perform a controlled experiment upon another ten patients who are given a transfusion of item Z and who probably will not die. In the same way, Patuxent may not state that ten men are, in their opinion, not defective delinquents when they believe they are. Besides, Patuxent does not control the final decision; it is the courts that make the final determination of whether or not a person is a delinquent.

Because of these limitations, it is clear that statistical evidence which we may obtain from Patuxent treatment programs will, at this time, not meet the high level of scientific and logical inquiry desired by Dr. Sidley. On the other hand, Patuxent has presented the available data. It would seem to be society's decision as to whether or not they wish to accept this level of prediction as a reasonable basis to indeterminately confine men for society's protection and for treatment when possible.

Another major point not adequately clarified by Dr. Sidley is the fact that the status of "defective delinquent" is established as a legal definition, not a medical definition. Psychiatrists have the same problem with reference to the various legal definitions of criminal responsibility (McNaghten, Durham, ALI). Some commentators, like Dr. Sidley, state that the psychiatrist is then placed in the position of making the final judgment which should be the responsibility of the judge and/or jury. In countering this argument the law states that what the psychiatrist presents is only an opinion and represents only a part of the evidence upon which the judge and jury rely in order to make their decision. The fact that psychiatrists appear for the defendant with opposite opinions certainly supports this argument. It is even further substantiated when only one psychiatrist appears or both psychiatrists present the same opinion and the jury or judge then decide in opposition to these opinions. Psychiatric testimony is seen only as advisory and not as determining by the decider of the issue, despite our most grandiose delusions of our importance.

I wish to comment further, out of my long experience with the Patuxent Institution, upon certain points raised by Dr. Sidley.

The patients at Patuxent clearly do not fit a specific psychiatric diagnostic category, but they do meet the requirements of the legal definition of defective delinquent. That this definition is interpreted "clinically" as opposed to actuarily must certainly be admitted. Dr. Sidley comments, "In fact one of the major problems in legal decision-making in this field is that there is not a sufficient basis and knowledge to permit even the remote possibility of rational decisions. That non-rational decisions are made anyway is well known. Perhaps, however, ultimately the situation and the results can be improved" (p. 79). Dr. Sidley appears to believe that only decisions that are based on his logic and his model are to be considered rational decisions—scientifically rational, logically rational, or humanely rational? The courts have generally made decisions on far less data than they receive from Patuxent. Does Dr. Sidley believe that the decision-making of the law is within certain limits rational? Or is he, under a rubric of "scientific and rational," making the same type of "clinical" judgments that he finds so unacceptable at Patuxent?

In considering Dr. Sidley's discussion of predictions by Patuxent Institution, note carefully that the primary purposes of the defective delinquent law were, first, to protect society from individuals who commit violent crimes; second, to provide decent and humane conditions for offenders; and third, to rehabilitate offenders as far as possible through psychiatric treatment. These purposes, of course, have immediately placed upon the institution the burden of making predictions with the aim of protecting society from those who are likely to commit crimes of violence. That such a demand might contribute to overprediction by the staff appears quite probable.

In discussing the statute's phrase "aggravated antisocial or criminal behavior," Dr. Sidley says, "An ordinary burglary, for example, would not be regarded as an aggravated crime" (p. 82). How would one consider the burglar who has been found guilty of committing ten burglaries and who has, in each of the unattended homes that he burglarized, methodically slashed most of the female wearing apparel present and mutilated all pictures of female persons? He would not, of course, be an "ordinary" burglar, and yet he would have committed only "property offenses" and would not have committed an "aggravated" crime as Dr. Sidley seems to interpret the word. It is my belief that such an individual, showing other expected features in his psychiatric and psychological evaluation, might well be recommended as a defective delinquent. This brief example clearly shows the difficulties that occur in attempting to delineate human behavior in tightly defined terms.

Further discussing the statute's definition of "defective delinquent," Dr. Sidley writes, "The second ostensible requirement is that the individual show an intellectual or emotional deficiency. In effect, that is no substantive requirement. It can be argued

that anyone who commits at least two aggravated crimes is emotionally deficient. . . ." (p. 82). Intellectual deficiency, however, clearly applies to what we term "mental defectiveness" and can be estimated on the basis of I.Q. and other psychological testing as well as psychiatric interview material. Emotional deficiency likewise is in practice not attributed to "anyone who commits at least two aggravated crimes. . . ." In practice the mere fact that a person has committed crimes does not suffice as evidence of his "emotional deficiency." Obviously, such reasoning would be circular.

Dr. Sidley goes on, "Thus the true second requirement is that the individual 'clearly demonstrate an actual danger to society'. . . ." (p. 82). He then interprets this as meaning "an unambiguous indication of danger as opposed to a probability or other less definite indication." In practice, when the courts interpret the word "clearly" and the phrase "clear and convincing evidence," they do not demand a level beyond probability or demand the guarantee that such a group will "virtually all commit aggravated crimes within a reasonable period of time" as Dr. Sidley states. This is *his* interpretation and not the usual legal interpretation of the terms "clearly" and "clear."

In an aside, Dr. Sidley then raises the issue of what can be done with the untreatable patients at Patuxent. They clearly pose a problem. Those who are believed untreatable and who have time remaining on their original sentences may be transferred to a regular correctional institution until their terminate sentences have expired. Because they are still defective delinquents, however, they then have to be returned to Patuxent for as long as the Institution and the courts continue to believe that they represent a danger to society—its first responsibility. (Of course, they have regular hearings to redetermine their status.) Some may never get out. The actual number of such individuals whom the Institution believes are making no progress and whose initial terminate sentences have expired remains exceedingly small despite the almost twenty years of existence of the Institution. (No one has been there over fourteen years.) In fact, the Institution itself has never "given up" on any inmate whom they must keep but continues to do its best to assist him; he has a rehearing every three years.

Dr. Sidley goes on to speak of criteria for commitment and of those for release. At the original commitment hearing of an individual, the staff must "prove clearly that he is a danger"; at the time of a rehearing for his release, the burden is on the individual to "prove that society is reasonably safe if he is released." Dr. Sidley then goes on to say, "It appears to me that the two different criteria are not strictly comparable." (I wholeheartedly agree with that statement.) "The law seems to demand a weaker criterion to retain a man when he is locked up at the time of determination than when he's not locked up at that time. In effect a person must be more dangerous to be committed for the first time than *to be kept* longer when he's there at the time of possible recommitment" (p. 82). I agree that the criteria are different and believe that they should be different, and that the burden on the inmate at a redetermination hearing should be less than that placed upon the staff at the time of initial commitment. "Clearly a danger" is certainly stronger language than "*reasonably safe*." The establishment of such different burdens at different times demonstrates the excellent draftsmanship of the Defective Delinquent law and follows a time-honored legal practice of shifting or changing the burden of proof under specific circumstances.

Dr. Sidley goes on to complain of the fact that "As noted above, the statute does not specify what the probability of aggravated recidivism (*i.e.*, 'clear demonstration' of 'actual danger') should be before the examinee is diagnosed a Defective Delinquent" (p. 83). This law certainly does not define all its terms, nor does any law define such terms as "substantial" or "reasonable" when used in other statutes. It is interesting to note that despite the fact that Patuxent holds the singular honor of being the most frequently sued institution in the United States, no court involved has ever defined "probability." There are standard legal definitions of this word; obviously we are not able to define it more specifically. I agree with Dr. Sidley that the world would be a

better place if we had the data so that we might apply a specific percentage level of probability.

Dr. Sidley proceeds to discuss the lack of homogeneity in the selection of cases by the courts and in the diagnoses by Patuxent (pp. 84–85) and refers to this lack throughout the rest of the article. One cannot argue with the fact: the homogeneous selection of cases in the judicial system, and more specifically in medicine, is exceedingly difficult. There clearly were differences in the types of cases that the courts, over the years, sent to Patuxent and in the decisions made by the Patuxent staff. It is unfortunate that such changes have disrupted the development of a truly *scientific* experiment. Unfortunately, that is the price which scientists must pay when dealing morally with dangerous individuals and living in our current society. The changes that have occurred in the courts and in the Institution are the result of Patuxent's experience. It is possible that some of this experience was acted upon prematurely; that is, before clear and convincing proof was developed. When Patuxent opened, no one had experience in interpreting the law. When professionals or judicial bodies must interpret a new law, they do the best they can until a decision is appealed and Appeals Court renders a clarification. In Patuxent's case, after a number of years, the court made it clear that those who had committed property crimes only should not be committed to Patuxent, unless there was clear evidence that their psychological make-up was such that there was a clear probability that they were quite likely to commit aggravated assaults. Such persons, obviously, are very few. Further, the sentencing habits of the judges in the late '50s were examined and it was discovered that while the average sentence available to the judges for a group of inmates was fifteen years, they, in fact, were given average sentences of only five years. It became clear that some judges often decided that they would give a particular inmate a short sentence since they felt convinced that the Institution would find him to be a defective delinquent and that, therefore, society would, in fact, be protected from him. Thereby the judge avoided imposing a long sentence and facing possible pleas, complaints and criticism from the defendant or his attorney. Instead, Patuxent not only got the blame but also had the difficult task of dealing with an inmate who constantly stated that the judge hadn't thought his offense was very serious since he had only sentenced him to five years in prison. In a case of an inmate who committed a sexual crime with a great disparity between his age and that of the victim, the judge stated that he believed the person probably was very dangerous. Lacking psychiatric consultation, however, he was afraid that should he be wrong he might saddle the man with an unduly long sentence. If he were believed to be dangerous after an examination at Patuxent and was committed by a court, then he would face an indeterminate sentence and society would be protected. (When in doubt, give a short sentence and let Patuxent's indeterminate sentence, if indicated, take care of the situation.) After discovering these results the Institution did approach the courts and indicate to them that such a philosophy worked a hardship on the inmate and the treatment goals of the Institution. They suggested that judges give the sentences they felt warranted and let the defective delinquency determination and its indeterminate sentence stand by themselves.

Further, through the years of actual experience the entire judiciary in Maryland has become more aware of the type of offender who is appropriate for Patuxent. Consequently, the courts and the staff have learned from each other. The courts refer more appropriately and the staff has been able to make more appropriate decisions, thereby accounting for the increased rate of consistency betwen those determined to be defective delinquents by the Institution and those subsequently affirmed as such by a judge or jury. It is, therefore, clear that both the courts and the institutional staff are constantly changing their criteria. I am sorry that this condition does not meet the rigorous demands of science, but I am sure that Dr. Sidley would not want the marijuana laws and abortion laws to have remained static so that rigorous scientific criteria could be met

in the effort to prove whether the old laws were adequate. Despite the legal concept of *stare decisis,* which causes us enough difficulty, the law grows and changes as cause for change is demonstrated. It is unfortunate that we cannot always clearly prove what we would like to prove when we change our baseline, but that also is a price that we must pay for liberty and growth.

Dr. Sidley wonders why the rise in the crime rate has not resulted in significantly larger numbers of referrals to Patuxent; he suggests the possibility of a "quota system" and quotes, in support of that possibility, the 1965 report of a governor's commission to study Patuxent. But the relative stability of the number of inmate population is more likely the result of other factors. For one thing, referrals from the Department of Correction have had to be limited in order to control the tendency of that institution to use Patuxent as a dumping ground for rioting inmates and others who cause them difficulties. (It must be remembered that Patuxent is not a part of either the Department of Correction or the Department of Mental Health but is an autonomous institution currently reporting to the Secretary of Corrections and Public Safety and not to the Commissioner of Correction, as it did originally.) Further, the Department of Correction used to refer supposedly dangerous men to Patuxent at times just prior to the expiration of their terminate sentences. This policy has been halted. Patuxent accepts only limited referrals from the Department of Correction and only those who have at least a year to serve on their original terminate sentences. For the past ten years there has been no overcrowding problem at Patuxent. To my knowledge this fact has not resulted from any comment by the institution to the courts. It is possible that at times the Board of Review, which makes parole decisions and is composed of staff and "outsiders," might tend to be somewhat more lenient in their discharge criteria because of the approach of capacity conditions.

As indicated, I cannot agree with Dr. Sidley that, "In any case, change in criteria neither serves justice nor is it consistent with proper public policy" (p. 86). I assert the opposite: that rigidity of criteria would, in fact, be an abuse of justice and inconsistent with public policy. Such changes, of course, are not consistent with scientific research policy, but such policy cannot be the institution's first concern. The suggestion that it should be our first concern leaves me troubled about the power that might be placed in the hands of the psychiatrist. To place full research power in his hands and not to allow criteria to change would be reprehensible, even though the changes make it more difficult to prove the effectiveness of our efforts.

I agree with Dr. Sidley, however, in deploring the lack of data on those patients whom the Institution did not recommend for commitment as defective delinquents (p. 87). There is no follow-up data on this group other than the general recidivism data from the correctional system of Maryland, where these individuals were then incarcerated. Recidivism in the Maryland correctional system is reported to be at least 65%. The lack of more specific data for this group is a serious shortcoming, and attempts will be made to obtain such data.

Dr. Sidley goes on to state, "Next, the efficacy of the treatment program should be surveyed, for despite its limitations the system may work" (p. 90). I feel that it does. To my knowledge Patuxent represents the only institution in the country devoted to the psychological treatment of this class of dangerous offenders. There are other institutions limited to sexual offenders or to the criminally insane, but Patuxent does not so limit itself. The ratio of professional staff to inmates is higher in Patuxent than in any other institution in the world. The educational and vocational facilities available at Patuxent are probably better than those in any other institution in the country.

Patuxent certainly admits to many shortcomings. The major one in Dr. Sidley's view appears to be the lack of a disciplined, rigorous research framework. While I admit that lack, I have stated why I believe such scientific demands are neither possible nor in the public interest. Nevertheless, the institution has produced some data of interest.

Dr. Sidley's manipulation of some of these data represents serious assumptions and suppositions on his part which, as I have pointed out, are not necessarily valid.

Generally speaking, I find it irrefutable that the Institution has served a useful purpose. There is no question that the staff has made some false positive predictions. This uncertainty is the current state of the art. The question whether a free society can allow any false positives might be countered with the question whether psychiatrists can support punishment to fit the crime and not the criminal. Dr. Sidley has devoted much time to his evaluation of Patuxent and the requirements he feels it should meet. I would have to wonder whether in his position with the courts in Massachusetts he has available the data base which he demands of Patuxent. I wonder whether he uses a regressive equation in making his recommendations for incarceration or treatment to his court. If not, then one might wonder why not? While the recommendations that he makes to the courts may not be as frightening as an indeterminate sentence, they may, in fact, result in longer periods of incarceration than does an indeterminate sentence to Patuxent. We must keep in mind that despite the specter of the indeterminate sentence, most of the inmates currently at Patuxent will be released before the expiration of their terminate sentences and will have a greater chance of avoiding further difficulties with the law than they would have if they had served their terminate sentences in a regular correctional institution.