Patuxent and Discretion in the Criminal Justice System

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In recent years there has been growing disillusionment both with the role of the mental health professional in the criminal justice system and with the role of the forensic expert in the individual criminal case. The first issue raises questions with regard to the efficacy of treatment of offenders. Judge David L. Bazelon, for example, an early proponent of the involvement of mental health professionals in corrections, asserts that they have not produced any remarkable successes in this field. Indeed, Doctors Thomas Szasz[1], Nicholas N. Kittrie[2], and Seymour Halleck[3] have asserted that processes of diagnosis and involuntary commitment are best seen as processes by which "undesirables" who are "odd," at odds with society, or both, can be labelled and conveniently removed from society. As Dr. Alan Stone has observed, "Critics began to suggest that the entire mental health enterprise was ideologically corrupt. Mental illness was a myth, the mental health professionals were the new inquisition, and the mentally ill were the scapegoats of society."[4] But these concerns also raise ideological questions as to the role of the forensic expert in the courtroom. What role should she or he, in an expert capacity, serve in this process? This question arises most frequently in the contexts of determination of competency to stand trial, determination of sanity at the time of a criminal offense, and involuntary civil commitment of individuals as dangerous to society. As the Group for the Advancement of Psychiatry recently observed with regard to competency to stand trial, "[a]ll too frequently, a determination of incompetence becomes a lifetime sentence to a hospital for the criminally insane."[5]

Nowhere, perhaps, is this problem more dramatically represented than in cases falling under "sexual psychopath," "habitual sex offender" and "psychopathic offender" statutes which provide for indefinite, potential life sentences. These statutes were once viewed as a significant reform which brought newly-emerging psychiatric knowledge to bear on the problem of the mentally disturbed offender. Maryland's Defective Delinquency statute, Article 31-B of the Maryland Code, and Patuxent Institution were in the vanguard of this reform. The statute was not limited to offenders committing perserverative or bizarre sex offenses or to "psychopaths," but encompassed any offender demonstrating "persistent aggravated anti-social

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or criminal behavior" evincing "a propensity toward criminal activity" who is found to have "either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society." Treatment was to be provided, not in the state hospital for the criminally insane, but in a facility established specifically for this purpose. In 1951, long before the "criminal law revolution," the statute provided for examination by an independent psychiatrist, appointment of counsel, a jury trial at commitment, annual review of each inmate's status, and the right to petition the court for release by means of a redetermination hearing. Treatment modalities such as the therapeutic community and the Graded Tier system, innovative in the United States in that era, were ventured. These were in part patterned after such unique approaches as that of the Herstedvester Detention Institution for Abnormal Criminals in Denmark, and in part fashioned out of whole cloth. But as disillusionment with the role of the mental health professional in the criminal justice system and in the courtroom has grown, so has disillusionment with Patuxent.

Several factors have contributed to this disenchantment. In the wake of increasing concern for fair and equal justice in our criminal justice system, attention has been devoted to the exercise of discretion at crucial points in the criminal justice process, particularly with respect to arrests, the prosecutor's decision to charge a person with a crime, plea bargaining, and sentencing disparities. While the public's image of criminal adjudication, encouraged by accounts of actual and fictional trials in the media, involves a judge in a solemn black robe, presiding over the trial of an accused, Professor James Q. Wilson posits that the criminal adjudication process is more akin to an administrative one. The role of the adjudicatory process, he asserts, is ". . . to decide what to do with persons whose guilt or innocence is not at issue. Our judiciary is organized around the assumption that its theoretical function is its actual one . . . But most of the time, for most of the cases in our busier courts, the important decision concerns the sentence, not the conviction or acquittal."[6] So, too, has the role of rehabilitation in the correctional system come under challenge.

More specifically germane to the issue of the appropriate role of the mental health professional in the criminal justice system and in the Patuxent setting, judges, lawyers, and mental health professionals have come to the realization that, perhaps, society has been seeking "magic answers" and "magic solutions." In the words of Judge Bazelon, ". . . I cannot avoid the responsibility that I share with other judges and law enforcement officials for having pressed you [psychologists] to assume your present role in the correctional process. To a large extent you did not volunteer – you were asked to come up with answers for problems that seemed too difficult for us to solve . . . We all have to learn some hard truths about uncritical reliance on experts . . . In the area of civil commitment, for example, the courts have frequently abandoned to behavioral scientists and doctors the responsibility for deciding which persons would be subject to involuntary treatment . . . But the questions raised by civil commitment are primarily legal and moral, not medical."[7] The point is frequently made that the terms "incompetency" and "insanity" are legal, not medical terms. So, too, is the term "defective delinquent." But the issue is not one of terminology, but of *criteria*. Because

the consequence of a finding that a person meets these criteria is involuntary commitment, this decision is legal, and ultimately, societal. While the forensic expert can advance an opinion as to whether an individual fits these criteria, the ultimate decision is that of the judge or jury, as the trier of an issue of fact.

Whether or not society was expecting "magic answers" of Patuxent staff as to whether an inmate was a "defective delinquent," or "magic solutions" in the treatment of a class of offenders frequently viewed as "untreatable," is the topic of the diagnosis and treatment, recidivism and cost-effectiveness portions of our study, presented elsewhere in this *Bulletin.* Two concerns were behind the decision-making portion of the Patuxent study: how fairly and uniformly were decisions made to refer, commit or release an inmate, and how smoothly did the process function? The focus of these concerns was largely "outside" Patuxent Institution itself; that is, while Patuxent staff and the Institutional Board of Review were key elements in the process by which these decisions were reached, judges, prosecutors, defense attorneys and defendants were also key elements. So was the Maryland legislature, since legislation defined the purposes of Patuxent, established criteria for "defective delinquents" and formulated procedures to be followed – establishing a basic framework within which these decisions were to be made. The focus of this portion of the Patuxent study, then, was not so much on Patuxent Institution itself, but on Article 31-B and the Maryland criminal justice system.

The goal of the decision-making portion of the Patuxent study was to describe and analyze the processes by which decisions were reached to refer a man* to Patuxent for examination, to commit him as a "defective delinquent" and to release him. Who was involved in these decisions? What roles did they play? Were clear criteria employed? Were these criteria understood and used by all who made these decisions? Beyond these questions, a number of issues were raised as to the theoretical model upon which the Patuxent program and Article 31-B were based. Is it, in fact, possible to identify a group of "defective delinquents" evincing "persistent, aggravated antisocial or criminal behavior," who differ significantly from other felony defendants by reason of an "intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society," as Section 5 of Article 31-B required? Were all such persons identified and set to Patuxent by the criminal adjudication system, without also including those who did not meet these criteria? Were all the factors entering into these decisions germane to these criteria?

It would be helpful at this point to summarize the processes by which

*Although the statute refers to "individuals" without reference to sex, only men are admitted to Patuxent. One prosecutor pointed out that there are female defendants who meet the criteria of defective delinquency – and not just since the dramatic increase in violent crimes among females in recent years. One Patuxent staff member reports that a woman was referred to Patuxent several years ago. She was examined by Patuxent staff at Clifton T. Perkins Hospital and found not to be a defective delinquent. Because so few defendants have requested referral to Patuxent under the old law, this discrimination has not created a problem. It may, under the new legislation, since the only possibility of parole on the mandatory twenty-five year sentence for third-time violent offenders is by way of the Patuxent program. If the effect of this is to give men an opportunity for parole, and deny that opportunity to women because of their sex, it may be held to constitute unconstitutional discrimination.

these decisions were made at the time of this study. Referral to Patuxent occurred after conviction and imposition of sentence. This sentence was suspended and the man transferred to Patuxent for examination. If Patuxent staff determined that the man was not a "defective delinquent," he was transferred to the Division of Corrections to serve the rest of his sentence. This decision was not reviewable in court. If Patuxent found a man to be a "defective delinquent" it filed a report with the court. A hearing was conducted at that point, before a judge or, at the inmate's option, a jury. If a man was found not to be a "defective delinquent" he was transferred to the Divisions of Corrections to serve his sentence. If he was found to be a "defective delinquent" he was committed to Patuxent for life, or until the Institutional Board of Review created by Article 31-B determined that he was no longer a "defective delinquent." Release could also be obtained by a court "redetermination hearing," which an inmate could request after two years, or the equivalent of two-thirds of the sentence suspended at the time of commitment, whichever was longer.

Some 2,944 men had been referred to Patuxent between the time it opened, in January of 1955, and the close of the 1976 fiscal year, and 1,334 had been committed. Of those, 450 had been released by the courts at redetermination hearings, and 207 by the Institutional Board of Review.

Analysis of the decision-making process involved exploration of two issues: was it effective, and was it fair? The second criterion requires some explanation. "Fairness" is a vague term. In the legal context, it frequently translates into issues of "due process" and "equal protection." The first involves such issues as whether there are sufficient procedural due process safeguards (such as proceedings in an open, impartial forum, right to counsel, and in the case of Patuxent, the right to examination by an independent psychiatrist and to a jury trial) to ensure fairness, on the one hand, and whether the rehabilitative and crime-control goals of Article 31-B exceed the bounds of permissible state intervention into the lives of individuals (substantive due process), on the other. The second element, "equal protection," involves an exploration of the uniformity of decision-making. But these decisions were made *by* individuals, *about* individuals, all of whom respond differently to treatment and to imposition of the criminal sanction. Absolute uniformity would be impossible – indeed, undesirable. But there should be sufficient consistency and predictability of decision-making, and sufficient explanation of variations, when they do occur, so that the process cannot be viewed as arbitrary or capricious.

Article 31-B has been challenged on just such grounds in a long series of cases in the state and Federal courts, and its constitutionality has been upheld repeatedly. But these decisions are not dispositive of the issues examined in this study. American courts have unique powers to declare void the acts of a co-equal legislative branch of government, but this is a power which courts are loath to use in the absence of a clear showing that a statute as written or as applied is so vague, arbitrary or over-reaching in scope as to offend constitutional principles. Thus, a finding that a law is constitutional answers the question whether it is *permissible* social policy, but not whether it is *wise* or *efficient* social policy. The courts in *Sas v. Maryland*[8] and other rulings upholding the constitutionality of the statute made it clear that their

decisions rested at least in part on judicial deference to the executive and legislative branches of government in view of Patuxent's role as a social experiment.

It should be pointed out that issues of fairness and consistency in the disposition of offenders are neither new to criminal justice nor unique to the Patuxent setting. Sentencing disparity is viewed as a major issue by many criminal justice experts and by the Law Enforcement Assistance Administration, a concern perhaps best evinced by the title of a book by Judge Marvin Frankel, *Criminal Sentences – Law Without Order.*[9] Indeed, increasing scrutiny of the exercise of judicial discretion in sentencing and a questioning assessment of efforts at rehabilitation have led such experts as Judge Frankel, Norval Morris,[10] Alan Dershowitz,[11] David Fogel,[12] Andrew von Hirsch,[13] and others to urge movement toward swift and certain imposition of sentences tailored to the offense rather than to the offender, in the name of deterrence, incapacitation and retribution rather than rehabilitation. As the Task Force on Criminal Justice Research and Development of the LEAA-sponsored National Advisory Committee on Criminal Justice Standards and Goals recently observed, "The most fervent proponents of this philosophy argue that rehabilitation has been politically abused and transformed into a punitive instrument that has done the offender greater harm than good. Moreover, they claim that rehabilitation has resulted in uncontrolled discretion and miscarriages of justice by parole authorities. Therefore, the proponents of the position that retribution and deterrence should play a dominant role in the sentencing contend that such a policy would at least minimize the inequities and discriminatory practices characterizing the current sentencing process."[14]

This position, to be sure, is not one uniformly accepted by judges, lawyers or criminal justice experts. However, it lay behind Patuxent critics' opposition to the indeterminate, potential life sentence embodied in Article 31-B. The danger perceived by critics of Article 31-B was that it offered a potential for compounding whatever disparities may exist in the plea-bargaining and sentencing practices in the Maryland criminal justice system (a topic, it should be pointed out, which was not addressed in the Patuxent study) by subjecting some offenders, not to sentences ranging from probation to the statutory maximum for the crime for which they were indicted, but to terms which could be significantly longer. The potential for sentencing disparity inherent in any statutory scheme of indefinite sentences assumes a much larger significance in the context of Maryland's indeterminate sentence.

It should also be pointed out, however, that effectiveness and fairness are frequently conflicting goals. Professor Herbert L. Packer of Stanford posits two models of the criminal justice system, a "Due Process" model and a "Crime Control" model, and demonstrates their frequent conflict in the administration of criminal justice.[15] Effectiveness of treatment or of incapacitation is a crime control goal, and fairness a due process goal. Article 31-B itself attempts to resolve these conflicts by providing, for example, for jury determination of defective delinquency and redetermination hearings at which inmates can obtain periodic court reviews of their commitment. Tension between the crime-control and due-process goals makes it impossible

to obtain maximum effectiveness and maximum fairness at the same time in all cases.

Conflicts between the crime-control and due-process models were, in fact, observed in the Patuxent study. The practice of holding Diagnostic Staff Conferences prior to court appearances was discontinued prior to the time of our study. The diagnosis and treatment chapter of our report observed that these conferences were alleged by some psychiatrists to be counterproductive because attorneys in cases where staff were not unanimous in finding a man to be a "defective delinquent" would subpoena the dissenting Patuxent staff member to challenge the Institution's findings. Staff was reported to feel that conference records were being deliberately used by attorneys to precipitate disagreements among staff and promote "battles of the experts" in court, thereby undermining the Institution's credibility, although the study team found no evidence to corroborate this belief. A proponent of the due-process model would assert that any dissenting opinion should be explored by the court if it is to make an informed decision. Thus, while use of testimony of Patuxent staff disagreeing with the findings in the Patuxent report would decrease effectiveness in achieving crime-control and rehabilitation goals, it would allow a more thorough in-court examination of the issue of the inmate's mental status, consonant with the due-process model.

Even *within* the crime-control model, conflict between goals of rehabilitation and "prevention" or "incapacitation" also occurs. This clash may well be inherent in the dual mandate of Patuxent, to protect society and to treat the offender. This situation is by no means unique to Patuxent. As Gaylin and Rothman point out: "Confront an administrator with the fact that his institution is not rehabilitating, and he would tell you he was confining dangerous people; tell him that not everyone inside the walls was dangerous and he would respond that his was a therapeutic effort designed to rehabilitate the offender. The two goals seemed so in opposition to each other as to make us wary of just what social function the ethic of rehabilitation fulfilled."[16] Differing judicial attitudes as to whether the goal of Patuxent was incapacitation, rehabilitation, or both, are reported in an appendix to the Patuxent study, and these differences should be borne in mind in reviewing the data and conclusions presented in this article.

Methodology

Once the theoretical issues in this study had been formulated, the problem facing the study team was that of developing questions to be explored. The public input phase of the project was invaluable in formulating issues for exploration, especially in view of the dearth of empirical research into the question of how decisions are made in the criminal justice system.[17] It presented the study with a unique opportunity to obtain directly from judges, prosecutors, defense attorneys, legislators and others their perceptions of how the process worked in practice and where the problem areas lay.

The most significant finding of this survey was that these practitioners varied markedly in their perceptions of how the process worked. This fact

underscored for us the importance of a descriptive analysis of how the decisions to commit or release an inmate were reached in individual cases.

The public input survey also alerted the study team staff to a substantial body of "courthouse folklore" on the use of the Patuxent commitment process by judges, prosecutors, and defendants. Major questions for researchers were whether effective treatment occurred and whether society was protected. For the prosecutor, defense attorney and defendant in the individual case, the question frequently translated into how long the defendant would be put away. Practical insight was provided into the adequacy of information available at the time that referral, commitment and release decisions were made, and into the factors considered by each participant in the adversary process at the time that these decisions were made. One criticism of research voiced by some policy-makers is that it provides esoteric answers to questions that are irrelevant to the "real world" concerns of practitioners and policy-makers. The decision of the State of Maryland to build a public input phase into the study represents one intriguing solution to this problem.

The evaluation of judicial decision-making with respect to Article 31-B rests on statutory and case law analysis, a review of Patuxent records, a search of court files, and interviews with a number of judges, prosecutors, and defense attorneys in urban, suburban and rural jurisdictions. This methodology is described in some detail in an Appendix to the Patuxent evaluation report.

Referral

At the time of this study, referral to Patuxent could be made by the judge, the prosecutor, the defendant or his attorney, or the Division of Corrections, provided that the man had been convicted of a felony or specific categories of misdemeanors and met the statutory criteria enumerated earlier. Although referral following conviction for property crimes was permitted, the number of such persons referred or committed was reported by judges and Patuxent staff to have declined. Referral could be made any time until within six months of expiration of sentence, but it typically occurred at sentencing.

The defendant was not entitled to a hearing as to whether referral to Patuxent was appropriate. Nor was he entitled to any notice that Patuxent was being considered. Generally, a defendant entering a guilty plea must be aware of the consequences of his plea for the plea to be considered voluntary, but because referral to Patuxent had been deemed by the courts to be a "collateral" rather than a "direct" consequence of a plea, the courts ruled that a defendant did not need to be apprised of the possibility of referral to Patuxent at the time he entered his plea.[18]

All interviewers noted that defendants generally were opposed to being referred to Patuxent, although several noted that defendants with long sentences were increasingly willing to be referred to Patuxent – a number of them had initiated requests themselves. It was pointed out that, for defendants facing longer terms, the Patuxent program offered an opportunity for earlier release. These impressions were confirmed by

interviews with inmates at Patuxent. A few prosecutors and defenders stated that this willingness was more frequently found among intelligent, articulate, "manipulative" defendants. Surprisingly, two of eight prosecutors interviewed, and two of the fourteen judges, indicated that they would not refer a man to Patuxent. One judge stated that Article 31-B should be repealed, but the reason advanced by the other judge was that men sent there are released too soon.

The significance of this information lies not in the reasons given for declining to refer a defendant to Patuxent, but in the fact that such attitudes existed among those with responsibility for referring defendants to Patuxent. Indeed, one of the judges who opposed referral to Patuxent presides in the same county as one of the prosecutors who stated that he did not refer people to Patuxent. Thus, defendants in that county who met the statutory criteria were not referred to Patuxent unless they so requested. As to these defendants, referral was voluntary; as to most defendants it was not.

Generally, in making a decision, the judge had presentence reports which supplied sufficient background information about a defendant's social history. These reports only occasionally recommended referral to Patuxent. By contrast, psychiatrically-oriented information about a defendant was less frequently available. Courts in urban and suburban jurisdictions have access to a Court Medical Examiner or other court psychiatrist, but this resource was rarely used for an examination on the specific issue of Patuxent. Rural jurisdictions reported that they had to refer a man to Maryland's medium security mental health facility for any psychiatric assessment. In Baltimore County, courts frequently referred to a Court Medical Examiner anyone being considered for Patuxent. The proportion of the persons referred to Patuxent who were later confirmed by Patuxent to be defective delinquents was reported to be much higher since this "pre-screening" began.

In the other counties, however, examination by a court psychiatrist occurred only in conjunction with determination of competency to stand trial or with the insanity defense. Judges in Baltimore City stated that the report of a Court Medical Examiner or from Perkins State Hospital was in the file in some 24 to 40 per cent of the cases, but in the other counties such reports were said to be rare. Prosecutors reported no use of psychiatrists, except in connection with competency or insanity issues. While the same was generally true of Defenders and private defense counsel, one Public Defender reported that he had an examination done in every case where a defendant requested referral to Patuxent.

Examinations of the court files of 65 cases indicated that in somewhat over half the cases, the defendant had undergone prior psychiatric evaluation or treatment (excluding competency or criminal insanity examinations). Fewer than 10 per cent had been under care for more than a year, and a somewhat greater number for less than six weeks. Competency examinations had been conducted in ten per cent of the cases. Of course, these figures include only *identified* problems; one may assume that a portion of the defendants had yet-unidentified problems.

The reason for referral to Patuxent was rarely shown in court files. This does not mean that no reason was given: for example, the files did not contain information on concerns stated orally at the time of referral.

Reasons for referral were found in only 13 of the 65 court records examined, by no means a representative sample. Twenty-one were given as follows:

Previous criminal record	8
Conviction for a violent crime	5
Need for psychiatric treatment	3
Referral indicated in psychiatric report	2
Nature of the crime committed	1
Retarded child; inadequate personality	1
Police believe defendant to be a defective delinquent	1

Factors considered at referral as stated in interviews included:

	Judges (N=14)				Prosecutors (N=8)				Defenders (N=7)			
	1st	2nd	3rd	4th	1st	2nd	3rd	4th	1st	2nd	3rd	4th
Prior record	11	3			5				1	0	1	1
Offense/nature of the crime	7	3	3		4	1					1	2
Prior mental health history	6	1	3	1			3				1	2
Court behavior			1	1				1				0
Demeanor/ appearance of prisoner				2								2

Other: Callous disregard for life and progressively worse record (1 judge); In-depth family history (1 judge); refer only on motion of State's Attorney (1 judge); night-time crimes and "quirks" indicated on investigation (1 prosecutor); known to police as "habitual criminal" (1 prosecutor); lifetime bent on crime (1 defender); only on client request (1 defender).

When asked whether they routinely referred persons to Patuxent whom they believed to meet the statutory criteria, five of the 14 judges answered that they did not. Two indicated that they excluded persons they felt were not serious offenders, although they met the statutory criteria. Other reasons advanced were that Patuxent was overcrowded and lacked adequate staff, that men were released too quickly, and that men who had already been there and been released should not be sent back again.

Judges, prosecutors, and defense counsel were also asked if they were ever reluctant or hesitant to refer a man to Patuxent who might otherwise qualify. Ten of the fourteen judges, six of the eight prosecutors, and five of the seven defense counsel replied yes. The reasons given included:

	Judges (N=10)	Prosecutors (N=6)	Defenders (N=5)
Disapproval of indeterminate sentence (including reluctance to release inmates)	3	1	2
Distrust of administration of Patuxent	2	1	
Doubts about utility/effectiveness of treatment	2	2	2
Overcrowding	1	1	

Other: Reservations about physical conditions at facility (1 judge); men released too soon (1 judge); poor attitude of Patuxent staff (1 judge); staff "couldn't agree on anything" (1 prosecutor); irreconcilable parts of statute (not specified) (1 prosecutor); and diagnosis by poorly qualified staff, on one short psychiatric interview (1 defender)

The most frequently cited problem with the referral process was the lack

of specific criteria specifying the types of inmates which should be referred. One judge, for example, had asked Patuxent to prepare a "profile" of the type of person who should be referred, for circulation to every judge in the state, but that has not happened. The statute itself offered little specific guidance as to what particular personality traits, patterns of behavior, or patterns of social history indicate defective delinquency.

Pre-screening of potential defective delinquents was recommended by one judge as a solution to the problem of lack of guidelines or criteria. He believed that pre-screening of defendants who may be incompetent to stand trial, prior to referral to Perkins, had cut down the incidence of inappropriate referral and saved the state time and expense.[19] A similar pre-screening procedure for persons being considered for Patuxent, he felt, might well reap similar benefits – especially if done in conjunction with guidelines or an inmate "profile" prepared by Patuxent staff and distributed to all judges, prosecutors and interested defense counsel.

Examination at Patuxent

The Patuxent examination process is described in the article on diagnosis and treatment, which follows. We should, however, briefly note three issues.

First, as mentioned earlier, persons found not to be "defective delinquent" were transferred to the Division of Corrections, without a hearing on the issue. As pointed out by the diagnosis and treatment team, an informal assessment of treatability frequently entered into this decision. Also, some cases were found in which the Patuxent report stated that, although the inmate fell within the criteria of "defective delinquent," the interests of society were adequately protected by the length of the sentence imposed.

In this context, it should be noted that the Maryland Court of Appeals has declared in the case of *Gee v. Director, Patuxent Institution* (239 Md. 604, 212 A 2d 269, 1965) that "Article 31-B was never meant to provide for the commitment of all persons who may be defective delinquents." The decision cites four government commission reports on Patuxent. But neither the *Gee* case, nor any of the reports cited, provides any guidance as to which defective delinquent *should* be committed to Patuxent and which should not, or as to the criteria that should be applied in making this decision.

Second, a problem arose with regard to the inmates who refused to be interviewed or to participate in the evaluation process. In a situation broadly analogous to that presented in the Baxstrom[20] case, the Supreme Court ruled in *McNeil v. Director* (407 U.S. 245, 1972) that persons detained beyond expiration of their sentence, but not yet diagnosed, must be released. The courts have held that this examination is not an attempt to elicit evidence of guilt, but a search for information as to his mental status, and thus does not violate the inmate's right against self-incrimination (see *e.g., Tippett v. Maryland,* 436 F. 2d 1153 (4th Cir., 1971)), and elaborated that an inmate cannot obtain release by refusing to cooperate until expiration of his sentence. They have fashioned two remedies. They have held that a personal examination is not required for a determination of defective delinquency. (See, *e.g., State v. Musgrove,* 241 Md. 521, 212 A 2d 247 (1966)). Prior

psychiatric reports and observations of the non-cooperating inmate may be relied upon instead. However, there must be at least minimal contact and confrontation between the inmate and staff, and a note of the refusal to be examined (*Lawless v. Director,* 27 Md. App. 453, 340 A 2d 756 (1975)). Also, an uncooperative inmate could be returned to court for a hearing on the issue of whether he should not be held in contempt of court for refusing to cooperate. The inmate could then be held in contempt and returned to Patuxent to remain in the diagnostic wing until he agreed to cooperate (*Marsh v. State,* 22 Md. App. 173, 322 A 2d, 247 (1974)). This refusal to cooperate was reviewed in court every six months (the maximum period a person can be incarcerated for contempt without a jury trial), and the commitment continued if the inmate still refused to cooperate.

Third, a high rate of agreement was found between the Patuxent staff opinion that the man is a defective delinquent, the findings of independent psychiatrists retained by defendants for the commitment, and the decision of the judge or jury at the commitment hearing. From the time Patuxent opened to the end of the 1976 fiscal year, the court has agreed with Patuxent in 88 per cent of the cases, and juries have agreed in 79 per cent. This rate of agreement compares favorably with expected rates of judicial agreement. A project involving presentence reports in misdemeanor cases, which made sentence recommendations on the basis of an objective point scale, was considered successful when the rate of judicial agreement with the sentencing recommendation was 86 per cent.[21]

Commitment Hearings

Once Patuxent found a man to be a defective delinquent, the report was filed with the court. The finding was contested in the vast majority of the cases; the judges interviewed generally stated that this occurred in 80 to 100 per cent of the cases. Unless the defendant himself had requested referral to Patuxent, he could request an examination by an independent psychiatrist, at state expense if he was indigent. Judges reported that such requests occurred in some 60 to 90 per cent of the cases, although they were uncertain of these figures. One stated that defendants rarely requested an independent examination when the Patuxent staff report was unanimous, but routinely requested one when the report was not unanimous. In the 65 court files examined, about a third contained reports of independent psychiatrists. About half of these made no findings, and most of the other half found the man to be a defective delinquent. Of the 45 Patuxent files examined, about one-third contained reports of independent psychiatrists, most of which stated that the man was a defective delinquent.

A defendant was entitled to a jury trial at commitment. As mentioned earlier, such trials have occurred in 35 per cent of the cases since Patuxent opened, although the percentage rose to 55 in the 1976 fiscal year. The standard of proof was "preponderance of the evidence," as in most civil litigation, rather than the higher standard of "clear and convincing evidence" required for civil mental commitment of an individual as dangerous in some states, or "proof beyond a reasonable doubt" in criminal cases.

Redetermination Hearings

As discussed earlier, release following a redetermination hearing was the most common form of release from Patuxent. If a man was found to be a defective delinquent at a redetermination hearing, his commitment to Patuxent was continued. He could request another redetermination hearing after three more years. Judges reported that these hearings were virtually identical in nature to commitment hearings.

If he was found not to be a defective delinquent, the judge could "order him discharged from . . . confinement and custody, or in the discretion of the court, committed under his original sentence" with credit for time at Patuxent. The usual disposition was release, but this was not always the case. In such circumstances, re-incarceration seemed incongruous to the study team, since an inmate was not even eligible for a redetermination hearing until expiration of two-thirds of his sentence, and since a finding that a man is no longer a defective delinquent represented a determination that he had benefitted from his stay and no longer constituted a danger to society, there appeared to be little to gain by returning him to prison to serve any unexpired portion of the underlying sentence.

Release by the Institutional Board of Review

Inmates considered by Patuxent no longer to be defective delinquents were released by court order on the recommendation of the Institutional Board of Review (IBR), a Board created by Article 31-B and retained in the 1977 Patuxent legislation. The Board, by statute, is composed of the Director and three Associate Directors of Patuxent, a law professor, two lawyers and a professor of sociology. The IBR is the only legal paroling authority for men committed to Patuxent. It also determines eligibility of inmates for "status," or "pre-parole," which includes work or school release, weekend and holiday leaves, and leaves granted on special request. Board decisions regarding the granting of "status" or parole have not been subject to court review (*State v. Blakney,* 8 Md. App. 232, 259 A. 2d 100 (1969)). The Board also reviews an inmate's status annually. The composition and powers of the IBR remain virtually unchanged under the 1977 amendments to Article 31-B. Proceedings for parole violations are also conducted by the IBR.

In practice, a finding by the IBR that a man is no longer a defective delinquent has been tantamount to release, although the court, in reviewing the IBR recommendations, is empowered to order the inmate to serve any remaining time on his original sentence or to continue him on parole. The court was directed by statute to make "such further study of such persons as seems necessary," and "may, in its discretion" hold a hearing. Most judges interviewed indicated that a release order was signed after a brief review in chambers, although in one county the State's Attorney requested a hearing. Nobody interviewed could recall an instance of the court declining to release a person approved for release by the IBR, and our search of court and Patuxent records revealed no instance where this occurred, but the study team did encounter one instance where the court continued a man on parole

for an additional year.

Many persons recommended for release by the IBR had been at Patuxent longer than the time specified in their original sentences. It is not clear, however, what occurred if a man had time remaining on his sentence at the time of the IBR release. When asked whether or not any remaining time was set aside at the time of release by the IBR, three judges replied that they do not have the power to do so – that the power to modify a sentence expires in 30 days, when the time in which an appeal can be taken expires. One indicated that the IBR set aside any remaining time. Two said that the sentence is routinely set aside – and added that if the Institutional Board of Review feels that any remaining time is likely to be imposed, it will continue the man until parole or until the sentence has expired.

Effectiveness of the Process

The concept of effectiveness of the decision-making process encompasses a number of issues. Are there delays in the process? Is there agreement on the decisions being made? Where disagreement exists, is it resolved expediently? Are the right decisions being made? The issues, it should be noted, are broader than those explored by the decision-making study team. Thus, the discussion of findings in the decision-making section of the Patuxent study drew also from the findings of the diagnosis and treatment, recidivism and cost-effectiveness teams.

The decision-making procedures appeared to be efficient. No gross inefficiencies in the judicial process or in the interaction between Patuxent and the courts were encountered. The rate of judge or jury agreement with Patuxent findings was found to be high; while this does not tell us in and of itself that the decisions being made were the *correct* ones, it indicates that there was *consistency* between Patuxent and the courts at this stage.

The only point of procedural inefficiency in the process appeared at the point of referral. Several judges and prosecutors pointed out the need for more specific criteria or guidelines as to who should be referred to Patuxent. Only one county employs pre-screening of defendants by psychiatric experts prior to referral. The net result of this is that, over the history of the Institution, 34 per cent of those referred to Patuxent were found not to be defective delinquent. (This figure had declined to 28 per cent in fiscal 1976.)

The data were less clear on the effectiveness of the release process. One measure of the effectiveness of crime control through rehabilitation can be gleaned from the recidivism data presented in Dr. Steadman's article, which follows. One conclusion of that section of the Patuxent evaluation was that the difference between recidivism of those released by the court and those paroled by the Institutional Board of Review was not significant, but that there was a positive difference. The issue is not one of crime control alone, however, but of maximizing crime control consonant with the due process goal of minimizing the number of individuals deprived of their liberty. This, ultimately, is a matter for decision by the legislative and executive branches of government. But in the study team's opinion, the large number of people released by court action despite a finding by the IBR that the person was not a safe candidate for release, who did not commit new crimes of violence –

74.3 per cent – or new crimes of any type – 45.7 per cent – indicated that the release process, considered in its entirety, was ineffective. The problem of "false positives" in the prediction of dangerousness, widely reported elsewhere, was present in the Patuxent setting as well. One finding of our study was that people were detained at Patuxent in order to prevent them from committing new crimes, but many of those so detained did not, in fact, constitute a risk.

The study team speculated that one effect of the former Article 31-B and Patuxent was that Maryland's "habitual offender" statute (Art. 27, s. 643 B) was little used. This law imposed life sentences on offenders who had served three separate confinements for specified crimes of violence, but did not impose a defective delinquent label. The law was so rarely invoked that one prosecutor who was interviewed stated that a recidivist statute was needed – apparently unaware that one was already on the books. This statute, it should be pointed out, was a new law, passed only in 1975. Its requirement for three separate *incarcerations* rather than convictions, for a narrow list of specified crimes of violence, limited the number of eligible defendants. Other jurisdictions have reported a reluctance of prosecutors to invoke the mandatory sentence provisions of "habitual offender" or "big bitch" statutes except as a tool in plea negotiations. But use of Article 31-B, rather than the state's "habitual offender" statute, had at least two deleterious consequences:

> Because of the broader category of offenders eligible to be referred to Patuxent, the indefiniteness of the criteria for defective delinquency, and the conservative release policy of Patuxent, a larger number of persons were detained potentially for life.
>
> Inmates who had returned to society after prison incarceration reported to the study team observers that the label "defective delinquent" and the incarceration at Patuxent stigmatized a newly-released man more severely than the label "ex-con." The inmate was not just seen as "mad" or "bad" but as "mad and bad."

Fairness of the Process

The Patuxent report raised substantial question as to whether Article 31-B was fair – whether or not effective – as applied. The statute withstood judicial scrutiny as to whether the procedures and criteria were unconstitutional. But, as indicated earlier, many inmates who were no longer dangerous were retained at Patuxent. Further, data revealed that some judges and prosecutors had a policy of never or rarely referring a man to Patuxent. Thus, whether or not a man was committed depended to a large extent on the county in which he committed his crime and on the luck of the defendant as to which judge sentenced him. The courts' response to this problem had been to state that the statute was *never intended* to result in commitment of all defective delinquents to Patuxent, yet there were no guidelines outlining a rational basis on which to decide whether someone admittedly a defective delinquent should be committed to Patuxent. Men

who wished to go to Patuxent and who seemed to meet the criteria (and who, presumably, would be more amenable to treatment than those sent there involuntarily) were sometimes refused admission – for example, by an unreviewable decision by Patuxent staff that, while an offender fit the criteria, "the interests of society are adequately protected by the length of sentence imposed." Patuxent had the power – whether or not used – to select only those whose incarceration would reflect favorably on the institution, rather than those most in need of or amenable to treatment.[22] On the other hand, persons convicted of such minor property crimes as false pretenses, or roguery and vagabondage, were committed to Patuxent against their will – potentially for life.

Courts also had difficulty in applying the commitment criteria uniformly. First, they comported with no medically recognized diagnostic categories. While the legislative history indicates that Article 31-B was intended to encompass "psychopaths" or "sociopaths," this has been a point of debate and confusion traceable to the very inception of Patuxent. Judge Ulman's opinion in the *Duker* case in 1931, in which he sentenced Mr. Duker to death and simultaneously described the lack of facilities to deal with defective delinquents, stated that the need was for a place of psychopaths. Mr. Duker himself was diagnosed to be a psychopath. Maryland's Governor Richie, in commuting Mr. Duker's sentence to life, stated that the term "defective delinquent" was not intended to be synonymous with the term "psychopath." He asserted that Judge Ulman was incorrect in asserting that Bridgewater Hospital in Massachusetts, cited by Ulman as a model for what was needed in Maryland, was intended for defective delinquents. It was intended for psychopaths instead, the Governor stated. This ambiguity has been reflected in subsequent court decisions. In *Palmer v. State* (215 Md. 142, 137 A 2d 119, 1957), for example, the court held that the term defective delinquent subsumed the diagnostic category of psychopath. But in later decisions the court held that the two were not synonymous.

In sum, an analysis of the decision-making process by which individuals were committed to Patuxent revealed a number of serious problems that worked to impede both the effectiveness and the fairness of the process.

Standards for referral to the Institution were neither clear not uniformly applied, yet referrals resulted in commitment about half the time.

Judicial and prosecutorial policies against referring men to Patuxent resulted in wide geographic variations in referral and commitment rates.

Statutory ambiguity (including ambiguity in the definition of "defective delinquent"), and case decisions that permitted Patuxent unreviewable power to include or exclude inmates who met the statutory criteria, both created serious threats to due process.

The infrequency of IBR recommendations to release inmates contrasted markedly with the more liberal policies of the courts.

Beyond that, it still is impossible to predict with any accuracy which inmates continue to be a danger to society.

All these considerations led the study team to conclude that Article 31-B was not working as intended in an efficient, fair, or uniform manner, and further, that because of its inherent ambiguities and the limited state of present knowledge regarding dangerousness, significant improvement in the operation of the law was impossible.

References

1. See, *e.g.*, Szasz T: The Myth of Mental Illness. New York, Harper and Row, 1961
2. Kittrie NN: The Right to be Different: Deviance and Enforced Therapy. Baltimore, Johns Hopkins Press, 1971
3. Halleck SL: The Politics of Therapy. New York, Science House, 1971
4. Stone AA: Mental Health and Law: A System in Transition. Washington, D.C.: National Institute of Mental Health, Center for Studies in Crime and Delinquency, 1975, p. 1 (footnotes omitted)
5. Committee on Psychiatry and Law, Group for the Advancement of Psychiatry, Misuse of Psychiatry in the Criminal Courts: Competency to Stand Trail. New York, GAP, 1974 (Pub. No. 89), p. 905. See also Stone, *op.cit. supra* at note 4, chap. 12; Note, Incompetency to stand trial, 81 Harv Law Review 454 (1967); Comment, Commitment to Farview: Incompetency to stand trial in Pennsylvania, 117 U Pa L Rev 1164 (1969)
6. Wilson JQ: Thinking About Crime. New York, Basic Books, 1975, p. 173. See, generally, Davis KC: Discretionary Justice: A Preliminary Inquiry. Urbana, University of Illinois Press, 1971; Aaronson DE, Hoff BH, Jaszi P, Kittrie NN and Saari D: The New Justice: Alternatives to Conventional Criminal Adjudication. Washington D.C., U.S. Department of Justice, Law Enforcement Assistance Administration, publication pending
7. Bazelon DL: Psychologists in corrections – Are they doing good for the offender as well as for themselves? in Brodsky SL, ed: Psychologists in the Criminal Justice System. Marysville, Ohio, American Association of Correctional Psychologists, 1972 (Appendix A), p. 151
8. 334 F. 2d 506 (4th Cir. 1969), *aff'd sub nom Tippett v. Maryland*, 436 F 2d 1153 (4th Cir., 1970), *cert. den. as improvi. granted, Murel v. Balti. Crim. Ct.*, 407 U.S. 355 (1972)
9. Frankel ME: Criminal Sentences: Law Without Order. New York, Hill and Wang, 1972. Studies describing factors contributing to sentencing disparities within statutory schemes incorporating wide judicial latitude in sentencing include Dawson RO: Sentencing: The Decision as to the Type, Length and Conditions of Sentence. Boston, Little, Brown and Co., 1969; Gaylin W: Partial Justice: A Study of Bias in Sentencing. New York, Alfred A. Knopf, 1974; and la Riviere A: L'effroyable Scandale des Sentences Judiciares. Montreal, Les Editions Psychologiques Enr., 1968, the latter two by psychoanalysts. An excellent synopsis of issues in sentencing disparity, with citation of some 18 references, can be found in the Report of the Task Force on Criminal Justice Standards and Goals, Criminal Justice Research and Development. Washington, D.C., U.S. Dept. of Justice, Law Enforcement Assistance Administration, 1976, pp. 114-17.
10. Morris N: The Future of Imprisonment. Chicago, University of Chicago Press, 1974
11. Dershowitz A: Indeterminate confinement: Letting the therapy fit the harm, 123 U Pa L Rev 297 (1974); ---------, Letting the punishment fit the crime, The New York Times Magazine, Dec. 28, 1975, p. 7
12. Fogel D: We Are the Living Proof! The Justice Model for Corrections. Cincinnati, W. H. Anderson Co., 1975
13. von Hirsch A: Doing Justice: The Choice of Punishments. New York, Hill and Wang, 1976 (Report of the Committee on Incarceration)
14. Task Force on Criminal Justice Research and Development, National Advisory Committee on Criminal Justice Standards and Goals, *op. cit. supra* at note 9, p 110
15. Packer HL: The Limits of the Criminal Sanction. Palo Alto, Stanford University Press, 1968
16. Gaylin W and Rothman D: Introduction, to von Hirsch, Doing Justice, *op. cit. supra* at note 12, pp. xxxii – xxxiii
17. Empirical studies may be found, *e.g.*, in Nagel SS: Improving the Legal Process: Effects of Alternatives. New York, Lexington Books, 1976, Sheldon CH: The American Judicial Process: Models and Approaches. New York, Dodd, Mean and Co., 1974, Schubert's works on jurimetrics, application of decision-game methodologies to studies of sentencing and presentence reports, and juror simulation studies such as those the late Kalvin Zeisel, Simon and Padawar-Singer. But research in this area typically consists of interviews, case studies and the drawing of causal inferences from correlations between socioeconomic variables and outcomes. The latter is

dangerous, since without an experiment design or thorough documentation of the processes involved, one can never rule out the influence of variables outside the parameters of data being examined.

18. *Bailey v. State*, 12 Md. App. 397, 277 A. 2d. 246 (1971); *Cuthrell v. Director, Patuxent Institution*, 475 F. 2d. 1364, *cert. den.* 414 U.S. 1005 (1973)
19. In fiscal 1973 in Maryland, 284 persons were committed to Clifton T. Perkins Hospital Center for 60-day pretrial evaluations on competency and sanity at the time of the offense, and 53 for 30-day competency exams. Some 73, or 19.21% of these, were found to be not legally responsible at the time of the offense, and the vast majority of even this population was found competent to stand trial. Sauer RH: The insanity defense in Maryland, Md St Med Journal, March 1974, p. 51, McGarry found that only 4.1% of those committed to Massachusetts hospitals for competency examinations were found not competent (McGarry AL: Competency to Stand Trial and Mental Illness. Washington, D.C., Center for Studies in Crime and Delinquency, National Institute of Mental Health, 1972). Stone (*op. cit. supra* at note 4, Chapter 12) and others have advocated use of outpatient screening. See, *e.g.*, note 5, *supra*. Following legislation enacted in November, 1971, mandating competency screening in Massachusetts, for example, the rate of competency examinations dropped from about 2,000 to 1,000. McGarry AL: Competency to Stand Trial and Mental Illness. Washington, D.C., National Institute of Mental Health, Center for Studies in Crime and Delinquency, 1973, pp 48-51. The rates cited therein, encompassing the first six months' operation under the law, have held constant to the present time. Personal communication with Dr. McGarry, May 16, 1977.
20. *Baxstrom v. Herold*, 383 U.S. 107 (1966)
21. Lieberman JB, Schaffer SA and Martin JM: The Bronx Sentencing Project of the Vera Institute of Justice. Washington, D.C., U.S. Department of Justice, Law Enforcement Assistance Administration, 1972
22. Selection of clients who would reflect favorably on the program – "creaming" – has been documented in several contexts in the criminal justice system, perhaps most notably in Professor Franklin Zimring's re-analysis of favorable data on the Manhattan Court Employment Project, a pre-trial diversion project. Zimring FE: Measuring the impact of pretrial diversion from the criminal justice system, 41 U Chicago Law Review, 224 (1974)