

Legal and Ethical Issues in the Use of Antiandrogens in Treating Sex Offenders

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Antiandrogen treatment of sexual offenders raises serious legal and ethical considerations in both the medical profession and in the courts. Discussion is offered on the use of antiandrogens in both an involuntary and voluntary context. The potential negative impact of this treatment modality on such constitutional issues as privacy interests, right to procreative freedom, freedom of speech and communication, and freedom from cruel and unusual punishment is explored and notable, germane court cases are presented. The need for clear ethical guidelines for the administration of this treatment is stressed.

Sexual deviation in our society is currently the subject of heated medical, legal, and ethical debate. The focal point of this debate is being precipitated by new biological technology which forces a reevaluation of traditional conceptions of how to understand socially undesirable sexual deviation. One notion emerging from the debate is clear: deviant sexual behavior must be controlled. Like alcoholism, drug addiction, contagious diseases, and dangerous mental illnesses, sexual deviation is not defined entirely in terms of the deviate's own suffering; it is largely defined in terms of the suffering these people cause others. Most sexual deviates have victims.

The complexity of the problem is demonstrated by the fact that two powerful groups in our society have incorporated sexual deviance into their camps. The first is the legal system which through the criminal law establishes rules of conduct which, if violated, results in punishment, deterrence, rehabilitation, or some combination of these. The second system laying claim to sexual deviates is the medical system. Psychiatry has chosen to include sexual deviation as a psychiatric disorder. It is classified in the latest DSM-III-R¹ under the heading of sexual paraphilias.

This duality of perceptual construction leads to a conceptual problem of how to define sexual deviation. Is it, in fact, a psychiatric disorder? Or is it merely perverse criminal behavior? The answer to this question is that it is both. Sexual deviation can be both a sexual disorder and a crime. It is a paraphilia

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when a person is psychologically preoccupied with deviant sexual fantasies, or with deviant sexual acts. Once, however, a person acts on these fantasies, the deviant sexual behavior crosses over into the realm of law and becomes a crime.²

How these sexually deviant acts are viewed by our society is critical to our notion of how to control them. If the act violates the criminal law, our legal system will allow us to punish the act, deter it, and perhaps rehabilitate the offender. If, on the other hand, deviant sexual behavior is perceived as a medical problem, punishment may not be a morally appropriate, or even a legal, means of controlling it. Moreover, punishment may not even achieve a long-lasting deterrent effect. Since the state, through its police power, has an obligation to protect society from harm, it may still be ethically obligated to control deviant sexual behavior by deterrence or rehabilitation. The medical model would require that the sexually deviant offender be treated as if he had the symptoms of any other medical disorder. There the goal must be to attempt to cure the underlying disorder, or at the very least to manage its symptoms. Thus, it might be analogous to managing the symptoms of alcoholism or schizophrenia.³

Even within the mental health field there is a wide divergence of views on the causes and treatment of sexually deviant behavior. Some medical researchers believe that deviant sexual behavior is a biological problem which can be treated with antiandrogenic hormones.⁴ Depo-Provera (medroxyprogesterone acetate) is the most common antiandrogen currently being used in the United

States.⁵ The use of Depo-Provera in treating sexually disordered offenders raises serious legal and ethical issues from within the medical profession and in the courts.

The focus of the controversy about Depo-Provera involves its effectiveness as a treatment, including any adverse side effects. How and in what contexts should Depo-Provera treatment be used? Can the state impose Depo-Provera treatment on an offender against his will? If so, is its use medical treatment or punishment? When is the treatment considered voluntary? Even when deemed voluntary, what if any degree of informed consent ought to be required for administration of the drug? Is the use of Depo-Provera experimental? If so, how should it be regulated? Does involuntary administration of Depo-Provera violate any of the offender's fundamental rights? If so, how should the courts balance the rights of the offender against the interests of society? This article will attempt to illustrate and explore some of these issues.

The Basic Psychopharmacology of Antiandrogens: Their Effectiveness and Side Effects

The rationale for Depo-Provera treatment of sex offenders began to develop out of studies begun in 1966 at Johns Hopkins University.⁶ Studies have shown that sex offenders, or paraphiliacs,⁷ treated with the antiandrogen hormone Depo-Provera, plus counseling have gained better self-regulation of sexual behavior. Depo-Provera suppresses or lessens the frequency of erection and ejaculation and also lessens the desire

for normative sexual as well as deviant sexual behavior.⁸

Depo-Provera is a long-acting, injectable form of medroxyprogesterone acetate—a synthetic progesterone which is classified pharmacologically as an antiandrogen.⁹ Antiandrogens inhibit the release of the male hormone, androgen, from the testicles. Some progestinic hormone is normally present in the male body, but at a very low level. Increasing this level allows progestin to compete with androgen and take over. Androgen is a sexual activator. Progestin is sexually inert. It, therefore, induces a period of sexual quiescence in which the sex drive is at rest.¹⁰

Depo-Provera inhibits, through its effect upon neural pathways in the brain, the release of luteinizing hormone (LH) from the pituitary gland. LH is the chemical messenger which normally stimulates the testicles to produce androgen. Hence the effect of Depo-Provera is to reduce androgen levels, especially testosterone, in the bloodstream. Typically, in the adult male, Depo-Provera reduces the blood level of testosterone to that of a normal prepubertal boy. (i.e., from approximately 575 nanograms/100 milliliters to 125 nanograms/100 milliliters)¹¹

Depo-Provera also has an effect on the brain. In small doses, as it is used in the treatment of sex offenders, the influence on the brain produces a tranquilizing effect. Thus the patient (offender) feels relief from an urge that was formerly insistent, commanding, and not subject to voluntary control.¹²

The peripheral physiological effects are temporary decreases in penile erec-

tions and ejaculations, and reduced production of sperm.¹³ This means that a man, while taking the drug, could probably not father a child. Proponents of the treatment contend that the drug is not feminizing (i.e., men do not grow breasts).¹⁴

Various side effects from Depo-Provera have been reported. The men usually gain weight of 20 to 30 pounds or more and may develop high blood pressure. Some experience hot flashes, cold sweats, strange nightmares, muscle weakness, and fatigue. Depo-Provera also decreases the size of the testes. The most controversial side effects are serious but have only been demonstrated in animal studies. They have shown that the drug causes breast cancer in female beagle dogs and uterine cancer in monkeys.¹⁵

The physiological changes attributed to Depo-Provera are believed to be reversible. Within seven to 10 days after cessation of treatment, erectile and ejaculatory capacities return, as well as the formerly suppressed sexual drive.¹⁶ Because of the relatively short period of time that Depo-Provera has been used, its long-term irreversible side effects are not yet known.¹⁷ The research to date has demonstrated that Depo-Provera usage does have a significant short-term impact on sexually deviant behavior, as long as the drug is being administered.¹⁸

Legal and Ethical Issues

Because antiandrogen therapy is currently being used¹⁹ to change the behavior of those who have either committed or are plagued with fantasies of committing illegal sexual offenses, some

have called for ethical guidelines to be established for its use.²⁰

On the legal front, one judge has recently sentenced a sex offender to Depo-Provera treatment.²¹ Depo-Provera has been used as a condition for probation in lieu of a suspended prison sentence or as part of an apparently voluntary rehabilitative treatment program.²²

The different issues raised by the involuntary and voluntary aspects of Depo-Provera treatment will be discussed.

Involuntary Treatment and Fundamental Rights

The context in which the antiandrogen treatment is given is critical to both its legality in treating sex offenders and to its ethical usage. Thus, it is doubtful that the state in a criminal context can impose Depo-Provera treatment on an offender without violating some fundamental right. In closely selected situations where the courts have made rulings, constitutional values have usually overridden the state's interest in compelling treatment against one's will. Absent a compelling state interest, the government cannot interfere with an individual's fundamental right of privacy.²³

Privacy Interests Privacy interests encompass a right to bodily autonomy that includes a *prima facie* right to refuse intrusive medical treatment.²⁴ This right was argued by the plaintiffs in the well-known *Rogers v. Okin* and *Rennie v. Klein* cases concerning a competent defendant's right to refuse psychotropic medication except in emergency situations. In such cases, the courts have bal-

anced the individual's right to bodily autonomy against the state's interest in compelling psychotropic medication. The *Rogers* and *Rennie* cases were civil cases. Both plaintiffs in those cases were in civil psychiatric hospitals. In the context of a penal institution, it would be hard to find a situation where the balance would weigh in favor of the state's interest. Courts have compelled medical treatment in state institutions on the grounds of (1) preserving life, (2) protecting innocent third parties, (3) preventing suicide, and (4) maintaining ethical integrity of the medical profession.²⁵ Although there may be a state interest in protecting third-parties such as other inmates, this interest could probably be achieved by other means such as isolation, or by less intrusive forms of treatment.

From the offender's point of view, the side effects, especially the long-term unknown side effects, should weigh heavily in the balance in favor of the offender under the *Rennie* and *Rogers* right to refuse treatment rationale.

The Right to Procreative Freedom Even without the right to refuse treatment, Depo-Provera treatment would probably interfere with the right to procreative freedom, another constitutionally protected autonomy interest.²⁶ Although the right to procreate cases involved sterilization of repeat criminal offenders, the U.S. Supreme Court has called marriage and procreation "basic civil rights."²⁷

Proponents of Depo-Provera treatment have argued that its effects are only temporary and that the ability to pro-

create would return upon cessation of the treatment.²⁸ Another argument could be that if the offender is incarcerated, he may be deprived of any conjugal rights anyway. This is a seemingly plausible argument if taken alone, but there are other constitutional arguments against interfering with a person's autonomy rights.

Freedom of Speech and Communication Depo-Provera interferes with the offender's thought processes. By its very nature Depo-Provera inhibits—through its effect on neural pathways in the brain—LH, the chemical messenger which stimulates the production of androgen. This in turn inhibits the offender's sexual fantasies. The first amendment protects communication. A prerequisite to communication is the production of ideas through mentation.²⁹ Mentation actually used in communication cannot be distinguished from other mentation. This inability to separate and distinguish mentation requires that the first amendment protect all mentation regardless of whether it is normal or abnormal.³⁰ The Supreme Court in *Stanley v. Georgia*³¹ stated that "whatever the power of the state to control public dissemination of ideas inimical to public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."³² Therapies which intrude upon the idea and thought processes go beyond permissible limitations on first amendment protections.³³

Proponents of antiandrogen therapy contend that when a person commits a felony (e.g., rape), society decides that

his freedoms and rights should be diminished. Thus a convicted sex offender does not possess all the rights of a person who has not violated the law.³⁴

Furthermore, one proponent, Berlin, contends that the antiandrogens are not given to control attitudes and behaviors which impact on political beliefs or personal affiliations, presuming this is the type of first amendment right the constitution was designed to protect. In fact, Berlin contends that the antiandrogens are not "mind controlling."³⁵

This is a seductive, albeit spurious, argument. Although convicted felons may lose some rights, the cases cited above demonstrate that felons have not lost: (1) the specific right to procreate, (2) the right to refuse intrusive medical treatments, nor (3) the right to generate ideas. All of these rights are infringed upon by involuntary antiandrogen treatment.

Cruel and Unusual Punishment Furthermore, in a criminal context, compulsory use of Depo-Provera may be a violation of the Eighth Amendment prohibition against cruel and unusual punishment.³⁶

The psychopharmacological effect of Depo-Provera treatment has been characterized as "chemical castration." Since the beginning of the twentieth century, castration has been used as a treatment for sex offenders in a number of European countries.³⁷ In the United States, however, state statutes providing for physical castration by vasectomy have been found unconstitutional as cruel and unusual punishment.^{38,39} In *Davis v. Berry*³⁸ and *Mickle v. Henricks*,³⁹ the

court stated that modern society would not accept castration as a means of punishment for any crime. The courts in both *Davis* and *Mickle* emphasized the permanent nature of the procedure, mindful that after the offender pays his debt to society he is free to resume normal activities.

Perhaps the analogy to castration is too extreme. The sexually inhibiting functions and suppression of the sex drive in Depo-Provera treatment are only temporary. Unlike vasectomy, or physical castration, the effects are reversible. Full sex drive, fantasy, and function return to the offender soon after the drug ceases to be injected.⁴⁰

The experimental nature of Depo-Provera provides the basis for another Eighth Amendment argument against the use of mandatory treatment. The long-term side effects are, as yet, unknown. The drug has caused cancer in laboratory animals.⁴¹ Even without these problems the forced punitive use of drugs having noxious side effects would probably be prohibited by the Eighth Amendment. In *Knecht v. Gillman*⁴² the Eighth Circuit Court of Appeals held that it was cruel and unusual punishment where a behavioral modification program at a hospital for the criminally insane used a drug which induced vomiting, because vomiting was a painful and debilitating experience.⁴³

Similarly, in *Mackey v. Procunier*⁴⁴ the Ninth Circuit ruled that injecting inmates with Anectine, a paralysis-inducing drug, in order to control their behavior, was deemed cruel and unusual and hence unconstitutional.

Given the various court rulings on the

punitive use of noxious drugs, it seems certain that attempted involuntary Depo-Provera treatment would meet with formidable constitutional obstacles.

Forced Depo-Provera Treatment as a Condition of Probation One court has recently addressed the issue of whether Depo-Provera treatment can be ordered by a judge as a condition of probation for a convicted sex offender. In *People v. Gauntlett*,⁴⁵ the Michigan Supreme Court affirmed the finding by the appeals court "that the condition of the defendant's probation, that he submit to Depo-Provera treatment is clearly an unlawful condition of probation and invalid . . ." under state statute.

Ironically, in *People v. Gauntlett*, the defendant, Roger A. Gauntlett, heir to the Upjohn Pharmaceutical Corporation's fortune (the manufacturer of Depo-Provera) was convicted of criminal sexual misconduct arising from sexual acts with his 14-year-old stepdaughter and 12-year-old stepson. As part of his sentence, the trial judge ordered that the defendant "within 30 days submit . . . to castration by chemical means patterned after the research and treatment of the Johns Hopkins Hospital in Baltimore, Maryland, and continue same for five years, under the supervision of this Court".⁴⁶

On appeal, Gauntlett argued that the condition was illegal and unconstitutional. He argued that it violated his fundamental rights of liberty, privacy, bodily integrity, equal protection, due process, and constituted cruel and unusual punishment.⁴⁷

The appeals court reversed the order. It found the order unlawful without hav-

ing to reach the constitutional questions. In its analysis the court stated that Depo-Provera treatment was an unlawful condition of probation, because it was still experimental. As a result, it had not gained acceptance in the medical community as a safe and reliable procedure.⁴⁸ Second, the court was especially concerned about the virtual impossibility of carrying out the condition of probation.⁴⁹ The court was particularly concerned about the vagaries of: (1) where the treatment could be gotten, (2) who was to administer the treatment, (3) whether or not the defendant would be entitled to collateral psychotherapy along with the drug treatment, and (4) how the treatment might affect his current health. The court was also concerned about the need for informed consent for experimental treatments.⁵⁰

Given the results of this case and the formidable constitutional barriers raised previously, one can only conclude that in all probability efforts to impose involuntary Depo-Provera treatment on a defendant in any criminal context would not survive an appeals court reversal if challenged. From this it cannot be concluded that Depo-Provera treatment is not a good treatment for sexually deviant behavior. Nor should it preclude the possibility of the lawfulness and appropriate use of Depo-Provera used on a voluntary basis outside of a criminal context.

Voluntary Treatment with Antiandrogen Drugs

Proponents of antiandrogen treatment feel strongly that patients should

not be denied access to the drugs which may be helpful in their treatment.⁵¹ Even a prisoner should have the right to treatment with Depo-Provera if properly informed.⁵² Berlin argues that Depo-Provera benefits the patient by his gaining greater capacity for self-control,⁵³ obtaining relief from intrusive erotic obsessional fantasies, and by avoiding the necessity for quarantine from the community.⁵⁴ He believes that these factors increase rather than decrease autonomy interests if given voluntarily, and with informed consent.⁵⁵

If Berlin is correct, perhaps the sex offender should have a right to treatment with Depo-Provera. There is a current trend in the courts to extend due process to afford defendants some kind of treatment, a right to treatment.⁵⁶

In *Arizona v. Christopher*,⁵⁷ a repeat sex offender recently used this argument. The offender contended that he had an equal protection right to effective treatment. The Arizona Supreme Court denied any right to effective treatment. In *Christopher*, the defendant had been previously placed on probation for child molestation. While on probation he committed more child molestations. As a result, he was sentenced to two concurrent 25-years-to-life prison terms—one for the violation of probation and the second for the new offenses. Prior to probation the defendant had a psychiatric examination wherein a psychiatrist specifically recommended behavior modification, including possible Depo-Provera treatment, rather than insight therapy. The treating doctor nonetheless used insight-oriented therapy. The treatment was unsuccessful. The defendant

then committed more child molestations.

The offender argued on appeal that being placed on probation constitutionally entitled him to be effectively treated as a matter of due process. By not providing Depo-Provera treatment, he contended, the state had denied him this right.⁵⁸ The court in *Christopher* held that being placed on probation does not constitutionally entitle a sex offender to be effectively treated and rehabilitated with Depo-Provera.⁵⁹ The right to treatment with Depo-Provera argument is unlikely to succeed as an extension of due process, in light of the Supreme Court decision in *Youngberg v. Romeo*.⁶⁰ There Justice Powell, in writing for a unanimous Supreme Court said "... the state concedes a duty to provide adequate food, shelter, clothing, and medical care. These alone are the essentials of the care the states must provide."⁶¹

Although the *Romeo* case involved the right to the rehabilitation of a mentally retarded, civilly committed person, it can be applied by analogy to the sex offender. In *Romeo* the court did hold that a state is required to provide "minimally adequate training" necessary to enable the patient to go without restraints. If Depo-Provera is a "chemical strait jacket," as some have metaphorically suggested, then it might be argued that Depo-Provera treatment is minimally adequate treatment which could prevent the sex offender from having to be incarcerated. If the state is required to provide only essential medical care to incarcerated persons, then it is doubtful

that a state would be required to offer Depo-Provera to a nonincarcerated person. Even requiring it for an incarcerated person seems unlikely unless it can be categorized as essential medical care. The idea seems somewhat farfetched.

But what about the use of Depo-Provera treatment on a purely voluntary basis as an alternative to incarceration? If a convicted sex offender can make an uncoerced choice after being properly informed, then the treatment alternative appears to be plausible. Demsky⁶² concludes that as long as the offender is offered a choice, and that consent is knowingly, intelligently, and voluntarily given, Depo-Provera treatment is a viable and constructive alternative to imprisonment.

Halleck calls for ethical guidelines to be developed by the medical profession.⁶³ He calls for a balancing test, weighing the benefits and potential risks of antiandrogen treatment to both the individual and society. The benefits to society from effective treatment are greater public safety for less money. His concern is that we risk an expansion of the definition of deviance to put relatively harmless people in jeopardy of powerful social control. He is concerned that our society will be especially tempted to expand the use of antiandrogens because of the feasibility that violence itself may be linked to androgen activity. He fears that the boundaries of nonpolitical use will become difficult to define.

The benefits to the offender using Depo-Provera, according to Halleck, may include freedom from painful

symptoms, and a better opportunity to become a law-abiding citizen. Treatment may also eliminate the need for imprisonment. The risk to offenders is that it may cause excessive physical and psychological harm.

Conclusion

The problem of sexual deviation is a complicated one, the causes of which are still within the realm of experimental theories. The biological theory of deviant sexual behavior is reductionistic and fails to take into account psychological, sociological, learning, and other variables which may contribute to, if not actually cause, sexually deviant behavior. Because deviant sexual behavior overlaps with the criminal law, theories of medical treatment and social control tend to become obfuscated. This makes it more difficult to separate punishment from treatment. Ethical and legal issues therefore come into play. Enforced use of Depo-Provera can possibly interfere with constitutionally protected autonomy rights. Cruel and unusual punishment becomes a serious issue whenever Depo-Provera treatment is compared with physical castration.

In light of these constitutional prohibitions, it is doubtful whether involuntary antiandrogen treatment can be imposed upon a criminal offender in any context, including its use in parole or probation conditions. However, voluntary treatment looks promising, as long as an offender is offered a noncoerced choice. The treatment, if it proves to be effective after more rigorous experimentation, can be of benefit to both the

sexual offender and society at large by reducing the need for imprisonment.

Ethical guidelines for the administration of Depo-Provera treatment will be required to prevent its inappropriate use for broader social control purposes, and also to prevent overzealous researchers from inflicting unnecessary physical and psychological harm on individuals desperate to avoid imprisonment.

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