INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

**ProQuest Information and Learning
300 North Zeeb Road, Ann Arbor, MI 48106-1346 USA
800-521-0600**

UMI[®]

**Designating "Dangerousness":
Implications of Indeterminacy in Canada's Dangerous Offender Provisions**

by
Joy Irving, B.A. Hons.

A thesis submitted to the Faculty of Graduate Studies and Research
in partial fulfillment of the requirements
for the degree of

(Master of Arts)
Department of Law

Carleton University
Ottawa, Ontario
May, 2001

© Joy Irving, 2001

**National Library
of Canada**

**Acquisitions and
Bibliographic Services**

**395 Wellington Street
Ottawa ON K1A 0N4
Canada**

**Bibliothèque nationale
du Canada**

**Acquisitions et
services bibliographiques**

**395, rue Wellington
Ottawa ON K1A 0N4
Canada**

Your file Votre référence

Our file Notre référence

The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

0-612-60990-1

Canada

**Thesis Acceptance Form
M.A. Candidate**

**The undersigned recommend to the Faculty of Graduate Studies
and Research acceptance of the thesis**

**Designating "Dangerousness": Implications of
Indeterminacy in Canada's Dangerous
Offender Provisions**

Submitted by

Joy Irving, B. A. Hons.

**in partial fulfilment of the requirements for
the degree of Master of Arts**

Thesis Supervisor

Chair, Department of Law

**Carleton University
May 2001**

Abstract

Dangerousness, as an intrinsic characteristic of an individual, has been widely debated in both legal and clinical circles. In response to the controversy such debates have fostered, this thesis proposes that the dangerous offender provisions are highly problematic, both in terms of theoretical structure and practical use. It is also argued that the provisions are contradictory, due to being the legislative result of the merging of two conflicting disciplines, law and psychology. A historical context of how dangerousness legislation has evolved from its origins in England to current Canadian legislation is illustrated, and demonstrates that law has actually regressed as opposed to advanced in time. Legal and procedural application problems with the provisions, as well as the limitations inherent in clinical predictions, are examined. Dangerous offenders are compared to similar offender populations to explore the extent to which they differ from other offenders. It is recommended that future research focus on exploring alternatives to the provisions, and more specifically, the use of standard sentencing procedures for this population of offenders.

Table of Contents

Abstract.....	ii
Table of Contents	iii
List of Charts.....	iv
List of Tables	v
Introduction.....	1
Chapter One:	
The Legal Evolution of Dangerousness	7
Chapter Two:	
The Dangerous Offender Provisions and Alternate Sentencing Procedures	44
Chapter Three:	
The Legal and Clinical Perceptions of Dangerousness	91
Chapter Four:	
The Complexities and Limitations of Clinical Predictions of Dangerousness..	102
Chapter Five:	
Comparing Dangerous Offenders to Other Violent Offender Populations.....	130
Discussion	151
Bibliography	171

List of Charts

Chart One:	
Number of dangerous offender declarations per region.....	64
Chart Two:	
Breakdown of dangerous offender declarations by province	65
Chart Three:	
Percentage of dangerous offenders as compared to all offenders in terms of race	67
Chart Four:	
Dangerous offenders by number of previous federal incarcerations.....	69
Chart Five:	
Dangerous offenders as compared to all offenders by federal security level	70
Chart Six:	
Incidence of parental sexual abuse and neglect as a child	136
Chart Seven:	
Comparing dangerous offenders and detention failures on the results of actuarial assessments	143
Chart Eight:	
Status of dangerous offenders on day parole	145

List of Tables

Table One:

**A comparison of the 10 highest predictors of sexual recidivism,
ranked by crown attorneys and sex offender research 109**

Table Two:

**Comparison of dangerous offenders and detention failures based on
personal and demographic characteristics..... 135**

Table Three:

**Comparison of dangerous offenders and detention failures based on
index offence 138**

Table Four:

**Comparison of dangerous offenders and detention failures based on
criminal history 140**

**"It is impossible to deny that our present system is a half-hearted attempt,
weak in its inception and savage in its execution."**

(Mewett, 1961, p.58)

Introduction

In legal studies, we often view law as representing progress. As society continues to evolve, as time advances, and as knowledge is constantly created and enhanced, it is expected that a general improvement will follow in society and all of its aspects, including law. But does law really progress with time and knowledge? Is Canada currently a more advanced and improved society in terms of law as compared to earlier periods in its history? This thesis will examine the state of progression in Canada's criminal justice system. More specifically, it will explore the extent to which dangerousness legislation, in particular the dangerous offender provisions, has progressed, and the degree to which our knowledge of dangerousness has evolved and influenced Canada's methods of dealing with this population.

Dangerousness and violence are highly emotive subjects. Despite the relatively consistent decline in Canada's violent crime rate, public concern over violent crime remains elevated. Recent public opinion polls reveal that most Canadians still believe that crime is on the increase (Grant, 1998). Furthermore, the public's fear of crime may be misdirected, since the public tends to focus on sexual and violent offences committed by strangers when, in fact, such offenses most frequently occur where the parties involved are acquainted (Petrunik, 1994). Moreover, most people believe that their chances of falling victim to

violent crime are higher than are actually warranted by circumstance (Roberts & Hough, 1998). Such inaccurate perceptions of violent crime often cause the public to have a greater fear for their own safety and contribute to the public's increased fear of crime (Roberts & Hough, 1998).

Statistics reveal that both the overall crime rate and the violent crime rate have been on a decline for seven consecutive years (Canadian Centre for Justice Statistics, 1999). Specifically, from 1992 to 1999, the violent crime rate in Canada decreased from 1084 incidents to 975 per 100,000, indicating that violent crime consists of less than 10% of all reported crime in Canada (Canadian Centre for Justice Statistics, 1999).

Fear of crime and the perception of becoming a victim of crime, whether warranted or not, have serious implications for criminal justice policy (Roberts & Hough, 1998). Public fear, coupled by sensationalized media coverage of violent sexual crime, often result in increased social support for harsher sentences for criminals (Canadian Centre for Justice Statistics, 1999). As a result, the government repeatedly experiences pressure to enact punishment-oriented "get tough" legislation, and may be encouraged to use community-based correctional alternatives less frequently (Canadian Centre for Justice Statistics, 1999). Consequently, higher demands have been placed on the Canadian criminal justice system and, in particular, the dangerous offender provisions, to "handle" the violent sexual offender population.

Dangerous offenders represent individuals judged as the most high-risk offenders in the country, and the management of this population presents one of the most serious challenges for the criminal justice system (Motiuk et al., 1995). Public and criminal justice support of the dangerous offender provisions is widespread. On a societal level, it is comforting to assume that persons declared "dangerous" are quite different from us. They have, after all, been convicted of particularly heinous crimes. On a criminal justice level, it is convenient to assume that the provisions identify a different and an innately dangerous "class" of offenders, because in doing so the imposition of an indeterminate sentence seems essential. As a result, imposing the harshest correctional sanction allowable in Canada has increasingly occurred with this population.

Despite their continued use, the dangerous offender provisions are at the center of controversy and subject to contradictory support by academics, both in the legal and psychological realms. Some research supporting the use of the provisions, particularly in regard to prosecutors in dangerous offender cases, proposes that their application be widened to include offenders who commit crimes outside of the provisions' current jurisdiction (Bonta et al., 1996). However, other research suggests that the very foundation upon which the provisions were constructed is highly questionable (Bonta et al., 1998; Petrunik, 1994; Rogers & Mitchell, 1991; Berzins, 1983). The debate concerning whether the dangerous offender provisions are adequate in dealing with high-risk violent offenders is the primary impetus for the current examination. The extent to which

the law on dangerousness has progressed will be examined throughout the discussion.

It has become evident through my research that the provisions and the preceding dangerousness legislation are, to some extent, the result of moral panics, media misrepresentation and the public's fear of violent crime. However, it is imperative to look beyond the emotional response to violent crime in order to critically question the provisions' bases in legal and psychological theory, and more importantly, in current criminal justice practice. The purpose of this examination is to demonstrate that the dangerous offender provisions, and the deficiencies and inadequacies within them, are an example of what transpires when two conflicting disciplines, law and psychology, come together in the construction of criminal justice legislation. A secondary purpose of this examination is to explore if the use of standard sentencing procedures has the potential to be effective for this population of offenders as opposed to the continued use of the provisions. The synopsis which follows indicates the direction this examination will take.

Chapter one will show how dangerousness legislation emerged in England in the mid-nineteenth century, and how it later evolved in Canada. This will provide a context for the discussion of the current dangerous offender provisions as well as a point from which legal progress can be measured. Chapter two will provide a detailed description of the dangerous offender provisions, including the

criteria, legal process of application, declaration, and the functions of all parties involved (prosecution, mental health professionals, judiciary). This chapter will also outline various demographic characteristics of the dangerous offender population, including race, gender, regional aspects, the nature of the index offence, extent of criminal history, security classification, and the presence of psychiatric disorders. Problems inherent in the legal and procedural application of the provisions will be revealed, and potential alternatives to the use of the provisions will be articulated.

Chapter three will demonstrate the contradictory theoretical frameworks that underlie the provisions, from both the legal and clinical perspectives of dangerousness. It will provide the impetus for the critical analysis of clinical prediction discussed in detail in the next chapter. Chapter four will illustrate the complexities and limitations inherent in clinical predictions of dangerousness. The methodological problems (such as generalization and over-prediction) as well as problems innate to legal applications of dangerousness (lack of standardized predictors, unreliability, inaccuracy) will be explained. This discussion will reveal the problems of inaccurate predictions for both offenders in general and dangerous offenders specifically.

Chapter five will assess the practical application of the provisions in order to examine if they are applied to the "right" offenders. In this chapter, offenders deemed to be "dangerous" under the provisions are compared to a group of

violent sexual offenders who have not been declared "dangerous". Results of the analysis will show the inaccuracy of the provisions in identifying "dangerous" offenders, and will demonstrate an explicit need to explore and develop alternatives for future reform.

Upon completion of this thesis, I intend to accomplish two goals. First, I want to challenge people in the criminal justice field to look beyond the current dangerous offender provisions to identify the problems that exist, both in theory and practice. I encourage these people to explore the possibility that more practical alternatives exist to manage this population of offenders. Second, I will use dangerousness legislation as an example to show that law can be regressive. In contrast to the popular belief in legal studies, time and knowledge do not always result in legal progress. Knowledge may evolve and improve over time, but law does not always follow.

Chapter One: The Legal Evolution of Dangerousness

The notion of “dangerousness” is not new. In fact, dangerousness legislation and preventive detention of individuals presumed to be dangerous began in the mid-nineteenth century (Petrunik, 1982), and reflected a lack of confidence in traditional penal methods (Greenland, 1984). Another factor affecting the emergence of dangerousness legislation was public outcry for harsher sanctions for criminals. Despite recent decreasing crime rates, the public appears to continue to demand a more punitive and retributive criminal justice system within which the perpetrators of crime will be subjected to longer and harsher sentences.

In modern society, sensationalized and extensive media coverage of predatory violence inevitably produces a fearful social reaction and an outraged public. These fears of the community, however, are often the result of heightened media focus on sexual violence by strangers, particularly when the victims are young children (Petrunik, 1994). Despite the fact that acts of stranger violence are infrequent, the social reaction to such crimes is often greater than the reaction to acts of violence in a domestic context, which occur much more frequently (Petrunik, 1994).

Research on the enactment of dangerousness legislation shows that in many instances where such legislation has been passed, it has been in response to a single sensational incident which has outraged the community and led to the mobilization of community action groups and special interest groups which have placed pressure on politicians to carry out reforms in both the legislation and in practice (Scheingold, 1992; Petrunik, 1982; Tenney, 1962; Swanson, 1960-61; Sutherland, 1950a, 1950b). Media misrepresentation and sensationalization of heinous criminal acts, coupled with the public's instinctive fear of violent stranger victimization, led to the emergence of legislation to deal with offenders deemed to be dangerous. The result has often been legislation with the primary purpose of appeasing community outrage rather than a significant effort to reduce the incidence of serious harm to the community (Petrunik, 1994).

Dangerousness legislation has been used primarily to deal with four categories of risk creators (sex offenders, violent offenders, recidivists, and persons considered to have a mental illness or personality disorder). These categories typically overlap rather than being mutually exclusive, with the result that dangerousness legislation primarily focuses on recidivist violent sex offenders who are considered to have a mental illness, personality disorder or other mental abnormality (Petrunik, 1994). Given this, the emergence of dangerousness legislation and practice in Canada was based on a clinical model of dangerousness, namely that dangerousness is a clear and measurable characteristic that can be accurately assessed and predicted.

In recent years, however, such legislation has been critiqued and scrutinized from a justice model perspective citing, among other concerns, the ethical concerns of indeterminately incapacitating an individual on the basis of a clinical prediction. Also in recent years, dangerousness legislation has been used to address the fears of an uninformed and media-influenced public. Public persistence and media sensationalization of violent crime largely influenced the emergence of dangerousness legislation in the hopes that such legislation would serve, at least in theory, a community protection function (Petrunik, 1994).

In this chapter, the evolution of dangerousness legislation, from its origins in England, will be examined as well as the specific legislation that led up to and influenced the current dangerous offender provisions in effect in Canada. Particular emphasis will be placed on the origins of dangerousness legislation, namely the Penal Servitude Acts, the Habitual Criminals Act and the Prevention of Crime Act, in order to demonstrate the trends in the legislation over the years. Previous Canadian legislation, such as the habitual offender, the criminal sexual psychopath, and dangerous sexual offender legislation, will also be illustrated in brief. This discussion will provide an introduction to the legal dimension of dangerousness, and will lead to an examination of the current Canadian dangerous offender provisions in the chapter to follow.

Early English Dangerousness Legislation

The Penal Servitude Acts, 1864 and 1865

The Penal Servitude Acts of 1864 and 1865 in England provided stringent penalties for recidivist offenders. More specifically, the Acts sought to make prison conditions more severe and more uniform throughout England, to increase the prison sentence, to increase the difficulty of earning early release, and to authorize police supervision of offenders released before the expiration of their sentence (Wiener, 1990).

The Acts were characterized by three provisions (Melling, 1982). First, offenders who had been released from penal servitude were subjected to mandatory reports to the police every month. This required that they inform the police of any address change as well. Failure to report in person monthly resulted in a return to penal servitude for the remainder of the offender's sentence or possibly longer, at the discretion of the Magistrate. Second, the police were given the power to arrest without warrant any license holder (license holder meaning any offender who had been issued a "ticket to leave" from penal servitude, and was serving the remainder of the sentence in the community). The police could make arrests based on a reasonable suspicion of the offender having committed an offence or broken conditions related to the offender's release. Third, a mandatory seven year sentence of penal servitude was to be imposed on any offender convicted of a felony, punishable by penal servitude, if

the offender had been convicted previously of a felony. This was a strategy to rid society of twice-convicted felons for a substantial amount of time.

The Penal Servitude Acts, which provided a term of penal servitude for offenders deemed to be of a "habitual" criminal class, were criticized for their perceived leniency in regard to sentences of incarceration (Melling, 1982). In an attempt to repress "habitual crime", not crime in general, Lord Kimberley enacted the Habitual Criminals Act on February 22, 1869 (Melling, 1982). The Act was viewed by many as a logical step evolving from the Penal Servitude Acts, as it moved from providing general incapacitation for "habitual criminals" to controlling this class through more stringent arrest and release policies (Melling, 1982). The Act set a precedent within the realm of criminal justice as it targeted a "criminal class" of individuals in society deemed to possess habitual criminal characteristics.

The Habitual Criminals Act, 1869

In the 1860s in England, the "habitual criminal" received arguably the most interest and attention from Parliament, criminal law reformers, police and law enforcers, as well as the media and the general public. Prior to this period, this population of offenders was controlled mainly through the use of capital punishment; however, by the 1860s, capital punishment was applicable to very few offenders and was viewed as a less desirable option (Melling, 1982).

The Habitual Criminals Act of 1869 promised easier surveillance and arrest of offenders whose criminal behaviour was deemed as "habitual" or chronic in nature (Melling, 1982). First, the police were given the power to arrest a convicted offender on mere suspicion, without physical evidence, witnesses, or any form of concrete proof. In other words, police could arrest persons "whom they suspected were making a living by dishonest means" (Melling, 1982, p.334). If the offender could not prove that he/she was earning a living lawfully, the license was revoked and a term of penal servitude was re-instated. The sentence of penal servitude could either be for one year or for seven years, depending on the number of times the offender had been convicted of a felony. Any twice-convicted felon was subject to sentencing and supervision by police for seven years. However, a once-convicted felon was subjected to one year of imprisonment if any of the three conditions below applied (Melling, 1982, p.336):

- (i) It appeared to the Magistrate that there were unreasonable grounds for believing that the offender in question was gaining his living through dishonest means (for example, the offender was stealing instead of legally working for money).
- (ii) The offender was found in such circumstances that satisfy the Magistrate that he or she was *about* to commit a crime but had not yet done so. In other words, reasonable suspicion existed that would suggest he or she was on the premise for unlawful means.
- (iii) The offender was found in a dwelling house, shop, place of business, or in certain other areas that the offender could not account for, to the satisfaction of the Magistrate, as to his or her presence there.

Second, the onus of proof was placed on the accused. Instead of being defended by legal counsel, the offender was forced to prove himself or herself

innocent through the use of concrete proof, such as an alibi which was deemed by the police to be from a trustworthy source. Third, criminals seen as "habitual" were targeted. In other words, this Act applied to recidivistic offenders who had previously been sentenced to penal servitude. Persons being arrested for the first time were not included, and were not dealt with under this legislation. And fourth, surveillance was allocated as a part of sentencing as opposed to a condition of suspended punishment. This meant that surveillance of a felon released from penal servitude was considered routine instead of being a specific condition of that offender's release. The police, then, kept an open eye on released felons, arguably to the point of intrusiveness (e.g., physically following felons who were suspected of committing a new offence).

Working together with the Penal Servitude Acts, the 1869 Act provided more discipline by reaffirming and extending the sentence of penal servitude for repeat offences, and giving Magistrates the power to imprison such offenders on suspicious grounds only (Wiener, 1990).

As a result of this Act, inevitably, the number of persons admitted to reformatories increased rapidly, rising 40% in 1857 and 65% at the end of the 1870s (Wiener, 1990, p.148). Committals to industrial schools, which expanded state control over the children of "criminal classes", also rose from 170 in 1865 to 1465 in 1868, and continued to rise until 1879 (Wiener, 1990, p.148). Lord Kimberley, who introduced the 1869 Act, argued that there was nothing

repugnant to justice in placing one group of persons (twice-convicted felons) under a different judicial sanction:

Men who by repeated crimes have shown that they set the laws of society at defiance should be placed under a different code (Parliamentary debates, c.340, Feb. 26, 1869).

The characteristics of the habitual criminals population have been described generally in the context of two separate groups, namely as “a small group of hard-core professional outlaws”, and “a much larger group of inadequates, mis-shapen by both nature and nurture, who generally committed petty offenses” (Wiener, 1990, p.300). The abhorrent behavior of the habitual offender was deemed to be deeply rooted in his habits and constitution, only susceptible (if susceptible at all) to deep treatment (Wiener, 1990). Mayhew and Binny also describe habitual crime as being committed primarily by “criminal tribes”, defined as “that proportion of our society who have not yet conformed to civilized habits” (1862, p.384).

Sir Edmund Du Cane, chairman of the Prison Commission, described in 1875 the common characteristics of habitual criminals as:

Entirely those of the inferior races of mankind - wandering habits, utter laziness, absence of forethought or provision, want of moral sense, cunning, dirt, and instances may be found in which their physical characteristics approach those of the lower animals so that they seem to be going back to the type of what Professor Darwin calls 'our arboreal ancestors' (Melling, 1982, pp.302-3).

Within this view, shared by both Liberalists and Conservatives, habitual criminals were more weak, pathetic and feeble-minded than they were violent, intolerant and cruel. However, attempts to sensationalize the habitual offender population were also made, depicting this population perhaps as a criminal would be described in a Victorian crime novel:

They had the same low, retreating foreheads, the same eager cunning of their deep set eyes, the same hard-set, yet shifty contour of the mouth - a kind of mouth that you could see was one that could whine for mercy in one breath and refuse it in another (Letter to the editor, The London Times, March 31, 1869, as cited in Melling, 1982, p.318).

As explored later, such sensationalism in regards to crime during the Victorian era was not surprising; it was reflective of the social attitudes concerning crime, and, as will be shown, proved to have a significant impact on the emergence of the dangerousness legislation in England.

The Habitual Criminals Act proved to be "a product not only of compromise, but of careless and often uninformed compromise" (Melling, 1982, p.343). In other words, the legislation was considered poorly drafted and extremely problematic. The severity of the Act's provisions themselves was criticized. For instance, the imposition of a mandatory sentence of seven years for an offender who had committed three petty and non-serious crimes was viewed as difficult to justify. Furthermore, it was stated that the perceived harshness of the sanction might sway juries to unjustly acquit an offender instead

of using the Act. To illustrate this point, the following offender is an example of someone who would not only be considered a "habitual criminal", but who would also have been eligible to receive the seven year mandatory imprisonment:

J. Preston, convicted before Justices of having stolen, in 1867, four packs of cards, and sentenced to seven days imprisonment. Convicted again in 1867, for stealing butter, and sentenced to two months' imprisonment. Tried at Quarter Sessions, July, 1868, for stealing one pair of boots...
(Melling, 1982, p.339).

Legal journals and media also criticized the Act for being badly drafted (Melling, 1982). It was noted that the term "habitual criminal" had been improperly defined, and should actually have been "professional criminal". "Professional" implied that the criminal was somewhat of a criminal expert, and lived a lifestyle of crime without remorse, as opposed to "habitual", which implied that while criminal behaviour was also a lifestyle, it occurred due to a monetary need, or as a result of low socioeconomic status. Legal journals criticized Magistrates and their practices with regards to the Act. For example, it was common for Magistrates to accept guilty pleas from accused persons without observing documentation of any previous criminal history, and they would subsequently be given a lighter sentence.

The emergence of the Habitual Criminals Act was largely influenced by public fear of crime and an interest in labeling offenders as part of a "criminal class" (Wiener, 1990). While the term "criminal class" was used frequently from

1860 to 1869, the popularity of the phrase decreased thereafter, and public fear surrounding such a "criminal class" was fading in the early 1870s (Wiener, 1990, p.300). It appeared that once the public's concern over crime in the 1860s was met with the Habitual Criminals Act in 1869, the perceived threat of crime seemed to subside and the topic temporarily faded in importance from public consciousness (Wiener, 1990). The social interest in the Act diminished, as did the necessity of sanctioning such offenders. While the creation of the Habitual Criminals Act resulted in an increase in both the reporting of crime and conviction rates, soon thereafter a decline in the proportion of crimes reported and tried was evident. As a result of procedural problems, lack of social support and a decreased need for such harsh sanctions, the Habitual Criminals Act was abolished in 1871, only two years after its enactment.

England's Justice System after Abolition of the Habitual Criminals Act

After the abolition of the Habitual Criminals Act in 1871, and in the latter decades of the nineteenth century, the meanings of criminality and punishment were reshaped (Wiener, 1990). A new concept emerged characterizing the criminal as an individual lacking willpower and self-discipline. This new way of characterizing the criminal raised concerns surrounding the ability of the criminal justice system to assess responsibility, guilt, and how much suffering was deserved through the sentence (Wiener, 1990). In the 1870s through to the 1890s, the basic Victorian paradigm based on deterrence and moralizing punishment was being critically questioned (Wiener, 1990).

Recidivism was the central issue around which criminal justice was reshaping (Wiener, 1990). Interpreted as evidence of the prison's inability to deter and moralize criminals, recidivism rates were steadily increasing (Wiener, 1990). For example, while the prison population was falling, the proportion of recidivists increased 55% in the 1890s, and a further 60 to 75% by the Edwardian era (Wiener, 1990, p.342). The social fear of crime that had been met and subdued by the 1869 Habitual Criminals Act again resurfaced in the 1880s, along with a general discontent with criminal justice policy and increasing recidivism rates (Wiener, 1990). By 1889, strong efforts were made to create a royal commission on sentencing due to the weakened public confidence in the criminal justice system. One year later, prison commissioners recognized recidivism as a distinct problem for the first time (Wiener, 1990, p.342).

The "habitual criminal" had altered in character since the 1860s. This classification of offenders now included more petty criminals as well as social inadequates and misfits (Wiener, 1990). While the 1869 Habitual Criminals Act had been based on the notion that criminal offending was rational and planned, and had hoped to deter offenders from further criminality, the new characterization of the habitual criminal was drastically different:

They are devoid of strong personality and the mass of people in many respects resembles a flock of sheep. They have no desire to do wrong, but they constantly go wrong; they have no particular wish to do evil, but they have little inclination for good. In a word,

weakness, not wickedness, is their great characteristic (stated by Thomas Holmes of the Howard Association, a police court missionary of the Church of England Temperance Society, cited in Wiener, p.346).

While it was desirable to explore new methods of identifying habitual criminals, not everyone agreed on this new illustration of the habitual criminal (Wiener, 1990). For example, opinions of the "habitual criminal" varied in the Gladstone Committee. Some thought habitual criminals were self-willed, autonomous and rational, while others saw them as incompetent and feeble-minded (Wiener, 1990). In 1893, a committee was set up in the Home Office to explore new methods of identifying habitual criminals, with particular emphasis placed on gaining a more thorough knowledge of the personal history of such criminals (Wiener, 1990).

From the late 1890s to just after 1900, the criminal justice focus remained on recidivism, however the recidivism of all types of criminals, from petty and unfit to professional, were examined (Wiener, 1990). Cumulative sentencing as a sanction also came under increasing criticism and was viewed as too harsh, especially when it was applied to petty thieves or drunk and disorderly criminals (Wiener, 1990). By 1892, judges had met and acknowledged both recidivism and cumulative sentencing as problematic, and recommended that a special court be set up to review the fairness of sentences (Wiener, 1990, p.302).

The Gladstone Committee, led by Mr. H. J. Gladstone, recommended a new form of sentencing that consisted of partly cumulative and partly indeterminate sanctions for habitual criminals (Wiener, 1990). This institutionalized the consensus in the Home Office in 1899, which was to treat the habitual criminal as pathological, and when permitted by public opinion, confine such offenders indeterminately (Wiener, 1990). It was stated that this would provide longer periods of less severe detention than existed in the system at the time. The notion that habitual criminals were more pathological than the general offender population, and required a different form of incapacitation than the existing system offered, led to the Prevention of Crime Act in 1908.

The Prevention of Crime Act, 1908

Mr. H. J. Gladstone, leading the Gladstone Committee, transformed the English correctional system through the Prevention of Crime Act (Sorochan, 1989). The reforms were aimed at overcoming the failure of the existing prison system and developing programs to reform young offenders, and resulted in the enactment of the English Borstal System which called for an emphasis on reformation, character building and rehabilitation as opposed to punishment (Sorochan, 1989).

The Prevention of Crime Act recommended a new form of sentence for habitual offenders which would segregate them for long periods of time under onerous conditions which, it was suggested, would deter persistent offenders

from committing further crime while protecting the community (SoroChan, 1989). Young offenders, under this Act, were subjected to less harsh penal conditions than other offenders because it was hoped that they had a better chance for reform (SoroChan, 1989). Habitual offenders were also not treated as harshly as other offenders because the primary purpose of the Act was to prevent future criminal offences, as opposed to detaining them for their present offences (SoroChan, 1989). After evidence that the Habitual Criminals Act had not been applied to the "dangerous" population for which it was meant, the Prevention of Crime Act attempted to reach the "dangerous" and "persistent" criminals (SoroChan, 1989). Based on the fact that only one-tenth of the offenders detained under the Habitual Criminals Act had committed violence against a person, sexual crimes or robbery, the Prevention of Crime Act advocated that while detention had not been advantageous for the petty or "nuissance" offenders of the previous Act, it may "fulfill its purpose as an additional means of protecting the public" from the offenders detained under the Prevention of Crime Act (SoroChan, 1989, p.4).

In order for the Act to be applied to an offender, the offender had to fit the following criteria:

When a person is convicted of an indictment of a crime - and subsequently - admits that he is or is found by the jury to be a habitual criminal, and the court passes a sentence of penal servitude, the court, if of opinion that by reasons of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened

period of years, may pass a further sentence ordering that on determination of the sentence of penal servitude he be detained for such further period not exceeding 10 not less than 5 years, as the court may determine... (Sorochan, 1989, pp. 2-3).

The basis for the Prevention of Crime Act was a method of detention for offenders referred to as the "dual track system", in that the offender was subjected to double punishment (Sorochan, 1989). This double punishment, coupled with the amount of discretion afforded to the judge or jury in defining the offender as "persistent", was largely criticized (Sorochan, 1989). In 1948, after forty years in place, the Prevention of Crime Act was superseded by the Criminal Justice Act, which enabled corrective training or preventive detention to be imposed in lieu of any other sentence (Sorochan, 1989). Less than twenty years after the enactment of the Criminal Justice Act in 1948, preventive detention in England was abolished, and the use of extended sentences as a means of dealing with recidivists was introduced (Sorochan, 1989).

Reasons for the Emergence of English Dangerousness Legislation

The Penal Servitude Acts, the Habitual Criminals Act, and the Prevention of Crime Act were implemented to achieve specific goals, and to serve specific agendas. Influences on the emergence of dangerousness provisions included social attitude, political beliefs of the Victorian Liberalism of the time, and, to a lesser degree, economic circumstances. Each will be explored in detail as to its individual influence on the emergence of the English dangerousness legislation.

Social Thought

According to legal historians, "Victorians remained a bloodthirsty lot" (Englander, 1991, p.235). Early Victorians saw a "constant and uninterrupted increase in crime" everywhere they looked, consistent with the criminal statistics of the time (Wiener, 1990, p.14). Between 1805 and 1842, the number of persons committed to trial for non-trivial indictable offences had risen sevenfold (Wiener, 1990). Capital punishment took the lives of 4605 offenders by quarterings and beheadings in 1805, and increased almost by eight times to 31,309 deaths in 1842 (Englander, 1991, p.236).

Newspapers were littered with details of monstrous murders, poisonings, and extreme violence. The Law Magazine, a reformist magazine in the Victorian era, cited "the immense increase which has notoriously taken place in the whole catalogue of personal injuries, from common assaults up to attempt to shoot, stab and poison" (Law Magazine, vol 44, p. 122). The Morning Post, a highly respected newsletter, regularly depicted horrifying details of barbarous murders and provided numerous gory details (Morning Post, Jan.8, 1845). It is clear that public interest in criminality was growing; in fact, crime and criminal behaviour became the subject of innumerable works of fiction and nonfiction, some literary works of which sold over two million copies to the intrigued public (Wiener, 1990).

Accounts of criminality in the 1830s and 1840s often took the form of melodrama (Wiener, 1990). Within literary and nonfiction representations of criminal accounts, crime was portrayed in a theatrical manner, as described below:

Crime tended to follow the line of melodrama, drawing sharp lines between good and evil characters, placing the good into harrowing dangers while in the end bringing the evil to punishment and banishing chaos. Moral issues were starkly clear, and criminality was dramatically at war with virtue (Wiener, 1990, p.21).

Although there is no evidence to suggest that a crime wave existed at the time of the passing of this Act, the protection of the public from habitual crime was cited to be a strong motivator for its passing:

(t)he Act has been formed with a view to the protection of the public from the deprivations(sic) of detected offenders by restraining them from lapsing into their old habits of crime (E.W. Knatchbull-Hugessen, then the Under-secretary of the State for the Home Department to the Lord Mayor of London, cited in Melling, 1982, p.320).

Political Agendas

Interest in the Penal Servitude Acts, the Habitual Criminals Act and the Prevention of Crime Act came from across the political spectrum, from Liberals to radicals to Conservatives. Particularly with respect to the Habitual Criminals Act and the Prevention of Crime Act, the principle of cumulative sentencing was

strongly advocated by both reformers and Conservatives in the 1860s and had already been recommended by the 1863 Royal Commission (Thomas, 1979).

Liberals, Conservatives and radicals all tended to see the “crime wave” as a message of moral decay. In fact, however, “there is little evidence of a reluctant Liberal government being stampeded by a crime wave and public hysteria into ideologically repugnant action” (Wiener, 1990, p.142). This legislation illustrates the inclinations of mid-Victorian liberalism. The concerns of Gladstone’s Liberal government of 1868 to 1874 suggests that this government saw the fullest development of the disciplinarian concerns that had been evolving through the nineteenth century (Wiener, 1990):

The Victorian age was a moral age, and one task of politicians was held to be educative: to guide public opinion; to teach citizens, many of them newly enfranchised, the basic tenets of good political behaviour; and to establish the conditions in which spiritual progress could be generated (Parry, 1986, p.5).

Gladstone himself was more familiar with the penal system than most other politicians, but observed no need to soften or loosen the system. He held deeply rooted religious beliefs which “provided him with a lifelong faith in the reality of sin, the necessity of retribution, and the validity of reformation through suffering and repentance” (Wiener, 1990, p.145).

Henry Austin Bruce, Gladstone’s Home Secretary, represented a liberal who faced crime with sternness. During the mid-Victorian era, Liberal leaders

expressed few reservations about strict criminal measures. In fact, "this government saw the fullest development of the disciplinarian concerns with popular character formation that had been developing through the nineteenth century" (Wiener, 1990, p.142).

Politics of this time were characterized by discipline and education (Wiener, 1990). In fact, the duty of the state to promote morality in society was part of the common change of Victorian political debate (Watson, as cited in Wiener, 1990). Most participants in the mid-Victorian political discussion believed that a person's character was the prerequisite for responsible behaviour, which set forth a vision of the "respectable working man" as the desired or ideal character illustrating social salvation (Wiener, 1990).

Although no apparent "crime wave" was occurring at the time of the Acts' passing, the end of the transportation of criminals during the 1850s increased fear among the English political system as to how such populations would be dealt with (Simon, 1996). Because Great Britain had relied heavily on the transportation of serious felons to eastern Australia, execution rates had been lessened and less investment in prisons had been needed. Instead of turning to the transportation process as a solution, Britain was faced with increased reliance on the deterrent power of the penitentiary to deal with recidivist offenders. In this sense, "the habitual offender provided a key reason for expanding government and penal agencies in particular" (Simon, 1996, p.30).

The Historical Importance of English Dangerousness Legislation

The Habitual Criminals Act, although only in force for two years, represents the first English legislation in a common law system enacted specifically to deal with "habitual" offenders and recidivists (Melling, 1982). The Act attempted to distinguish between the "poor but honest" population of the working class, and the habitually dishonest criminal class (Stephenson, 1986). As Melling states, the Act "pioneered a system for the isolation, supervision and control of recidivistic offenders that, although crude in retrospect, later matured into the sophisticated regime of crime prevention that is seen in England today" (1982, p.354). It acted as the first step in dealing with the recidivist class of offenders, and was followed by the Prevention of Crime Act.

The nature of the two acts is quite unique. While previous legislation had upheld a retributive theory of punishment for crime, such as the use of capital punishment and transportation, these Acts identified a specific class of offenders to be incapacitated for longer periods of time with the belief that some might reform. It was implied that through a harsh sentence of penal servitude and continued supervision and control, some offenders could reform. Due to the departure from retributive thought, Melling argues that "the (Habitual Criminals) Act is one of the most significant developments, from a penological point of view, in the Victorian era" (1982, p.347).

From a political perspective, the Acts represent a significant attempt to control "criminal capitalists" (Melling, 1982, p.354). Viewed as *progressive* legislation in this light, Parliament recognized that criminal activity was not exclusive to the lower class population. With this in mind, the Acts illustrate an attempt to control not only the members of the lower economic class who habitually committed crime, but also members of a slightly higher economic class, including tradesmen, who committed crime for personal benefit.

In the judicial implementation of the Habitual Criminals Act, it becomes apparent that reversing the burden of proof and placing it on the accused was a technique central and unique to this legislation (Melling, 1982). The Prevention of Crime Act also potentially placed the burden of proof on the accused, as he or she was sometimes required to render an opinion regarding the pattern of their criminal offending, and this self-report was taken into consideration in the court (Sorochnan, 1989). While pre-existing legislation denied the accused the right to submit evidence on his or her own behalf, these Acts gave the "right" to society to deprive certain populations of the rights they would normally have, and place specific people under a different code of law than the rest of society. The extent to which rights were taken away from habitual offenders represents the extent to which Victorian government was willing to protect non-criminal society at the expense of this population.

The Habitual Criminals Act and the Prevention of Crime Act set a precedent for the Canadian criminal justice system in several ways. For example, today's modern system of offender identification also emerged out of the Habitual Criminals Act. While historically offenders were required to register themselves at the police district nearest to them, computerized criminal files and identification pictures are an evolved form of this registration. Also, the electronic monitoring devices of today, though rarely utilized on dangerous offenders, may also be attributable to the "tracking" purpose that registration-in-person attempted to serve. Community notification strategies and offender registries, usually used with high-risk sexual offender populations released into the community, may have also been influenced by the Act. These represent modern methods of tracking the location of an offender deemed "habitual" by the criminal justice system. The Habitual Criminals Act and the Prevention of Crime Act were the first of their kind to address the recidivistic criminal population, and Canada has modeled its existing Dangerous offender provisions on the basic ideology, concepts and structure of these Acts.

Canadian Dangerousness Legislation

The Habitual Offender Legislation, 1947

Canada's dangerousness legislation reflected the dual influence of the British habitual offender measures and the growing popularity of sexual psychopath laws in the United States in the 1940s (Petrunik, 1984). As a result of a series of prison disturbances in the mid-1930s, a Royal Commission of Inquiry chaired by Mr. Justice Archambault, called for numerous reforms in prison administration and programs (Sorochnan, 1989).

The Archambault Commission had been preceded by a study in England by a departmental committee appointed by the Home Secretary which had studied social defence measures for recidivists in Europe (Archambault, 1938), and recommended changes to the English system of preventive detention (Sorochnan, 1989). Nine years later, in 1947, the recommendations from the Archambault Commission were put into practice in the form of the habitual offender provisions. Ironically, while the Canadian habitual offender provisions were in the process of being enacted, the Prevention of Crime Act in England was undergoing major revisions; the year after the Canadian law came into effect, the Habitual Criminals Act was abolished in England (Sorochnan, 1989).

Modeled on its English predecessor, the Prevention of Crime Act, Canada enacted its first preventive detention legislation, the habitual offender legislation,

in 1947. Like the Habitual Criminals Act, this legislation tended to target repeat property offenders, many of whom had no prior record of violence (Grant, 1998). The habitual offender legislation defined a habitual offender as someone who was 18 or older, and who, on at least three separate occasions, had been convicted of an indictable offence for which the minimum sentence was five years or more, and who was seen as living a "persistently criminal life" (Ouimet, 1969, p.242). It was viewed as expedient for the protection of the public to sentence an offender fitting this profile to preventive detention. While in the Prevention of Crime Act in England habitual offenders were incarcerated for five years, Canada's legislation was far more strict as it subjected habitual offenders to an indeterminate sentence (Price & Gold, 1974).

However, only one year after the enactment of Canada's preventive legislation, concern over this legislation was emerging. The primary concern was that the legislation was not an effective device for identifying and isolating the "dangerous" offender, for which the legislation was originally intended (Price & Gold, 1974). In fact, the legislation was targeting primarily "nuisance" property offenders (Soroohan, 1989). Also, preventive detention was usually imposed on offenders when they were in their mid-thirties or older, when criminality, for many offenders, begins to abate (Price & Gold, 1974).

The reluctance of judges and prosecutors to apply this legislation was also of concern. Due to the severity of an indeterminate sentence, it was found that

the legislation did not take adequate account of the gravity of the third (or last) conviction (Price & Gold, 1974). To illustrate this uneven application, a study selected 184 penitentiary recidivists based on their persistent involvement in crime (Price & Gold, 1974). While over half of this group had been convicted on three separate occasions of indictable offences punishable by five years or more (which made them all eligible for indeterminate incarceration under this legislation), not one offender in the group had been sentenced to preventive detention under the habitual offender legislation. During its thirty years in existence, only 173 offenders were ever declared "habitual offenders", an inconsistent application which was deemed by the Ouimet Committee to have "no place in a rational system of corrections" (Price & Gold, 1974, p. 5).

A third concern was the extraordinary sentencing powers placed in the hand of judges to sentence indeterminately (Price & Gold, 1974). Also, with no condition stipulating that a psychiatric assessment must be conducted on the offender, the judge was given a great deal of discretion (Price & Gold, 1974). With the increasing popularity of clinical and psychiatric perspectives of dangerousness, coupled with the public's outcry for legislative action to be taken to deal with sexual offenders, the enactment of sexual psychopath legislation was soon to follow (Sutherland, 1950a, 1950b).

The Criminal Sexual Psychopath legislation, 1948

In 1948, only one year after the habitual offender legislation was enacted, the criminal sexual psychopath legislation was introduced. Because the habitual offender legislation was still viewed as effective in dealing with the non-violent property offender, the criminal sexual psychopath legislation merged with the habitual offender legislation to form Part XXI of the Criminal Code.

The criminal sexual psychopath legislation had a "dual heritage", in that it closely reflected the philosophy and concerns of the habitual offender legislation, but it borrowed its definition of the "criminal sexual psychopath" from the 1947 Massachusetts Criminal Sexual Psychopath law (Petrunik, 1984, p. 30). Sexual psychopath laws are a distinctly American phenomenon, the first legislation having been passed in Minnesota in 1939, and by 1960 such laws existed in 25 states (Price & Gold, 1974). With growing concern over sex crimes by strangers in the United States, Canada soon shared the same concern. Following the proposal for the criminal sexual psychopath legislation, Mr. Diefenbaker stated the following:

In my opinion, this provision represents the first actions on the part of this parliament of Canada to meet a type of offence that is becoming general; a type of offence that creates fear in the mind of mothers and fathers of children who, by reason or residence in cities, are brought into close contact with strangers (Hansard, June 14, 1948, pp. 5195-5199).

The origin of sexual psychopath legislation is attributed to the intersection of three general trends in modern criminology (Price & Gold, 1974, pp.9-10). The three trends include the growing acceptance of positivistic criminology, the influence of psychiatric interpretation of crime as symptomatic of mental disorder, and a greater frequency of attempts to use preventive detention in criminal law procedures. Also influential was the media's misleading reporting of sex offenders, which generated public pressure for such legislation to be enacted.

The criminal sexual psychopath legislation targeted sex offenders who were thought likely to re-offend in the future (Grant, 1998), and defined a "criminal sexual psychopath" as "...a person who by a course of misconduct in sexual matters had evidenced a lack of power to control his impulses and who as a result is likely to attack or otherwise inflict injury, loss, pain or other evil on any person" (McRuer, 1958, p.13). At least two psychiatrists were required to testify at the proceedings, and the sentencing of the criminal sexual psychopath was, to an extent, up to the judge's discretion. The legislation allowed for either a fixed term of imprisonment of over two years or an indeterminate sentence (Grant, 1998). In 1953, the legislation was revised to include the offences of actual or attempted buggery, bestiality or gross indecency (McRuer, 1958).

While the habitual offender legislation did not make specific use of the clinical model of dangerousness, the new criminal sexual psychopath legislation was part of the same movement which led to the enactment of the sexual

psychopath statutes in the United States and shared the same assumptions of the clinical model (such as the need to protect the public through the diagnosis, confinement, and treatment of dangerous sexual offenders) (House of Common debates, 1948, p.5196).

The criminal sexual psychopath legislation, as well as all sexual psychopath statutes, hold several major underlying premises (Sutherland, 1950a, 1950b; Tappan, 1950; Swanson, 1960-61; Sleffel, 1977), which include:

1. Sex offenders are typically predatory individuals whose victims are strangers rather than family members of acquaintances.
2. Sex offenders start by less serious offences such as "flashing" and peeping and tend to move on to progressively more serious offences including rape and sometimes murder.
3. Tendency to commit sex offences stems from a personality disorder or mental abnormality (sexual psychopathy) which predisposes those afflicted to continue to re-offend despite penal sanctions.
4. Psychiatrists and other mental health experts can reliably diagnose sexual psychopaths and predict which individuals are most likely to re-offend.
5. Sexual psychopathy is not amenable to control through punishment but rather requires indeterminate confinement and treatment until the disorder is cured or the offender, by virtue of increased age and maturity, is no longer deemed to be dangerous.
6. The rise in sex offences by predatory strangers is a serious menace to society requiring urgent action by the community and its elected representatives.

Because the legislation rested on a number of beliefs that proved to be either false or, at best, highly questionable (Price & Gold, 1974), the criminal

sexual psychopath laws were soon subject to radical challenge. To address this challenge, a Royal Commission was appointed in 1954 under the chairmanship of the then Chief Justice of Ontario to question whether the criminal law relating to sexual psychopaths should be amended in any respect (Price & Gold, 1974).

While the criminal sexual psychopath legislation was the first of its kind in Canada to deal with sex offenders, the legislation was problematic. The definition for "criminal sexual psychopath" was vague and unscientific, making it difficult to obtain convictions under the section (Petrunik, 1994). For example, from its enactment in 1948 until 1955, the legislation was only applied to 23 offenders (Jackson, 1994). Procedural problems also existed with the use of the legislation, such as rendering the accused more vulnerable to plea bargaining, placing too much discretion in the hands of the judge, and questioning the adequacy of psychiatric assessments used (Price & Gold, 1974). Also, like the habitual offender legislation, the criminal psychopath legislation did not reach the types of offenders for whom such drastic sanctions were intended (Price & Gold, 1974).

In 1960, criticisms resulted in the removal of the term "criminal sexual psychopath" from the statute (Sorochnan, 1989). The description of sexual offenders subject to preventive detention was changed to "dangerous sexual offender" (Sorochnan, 1989).

The Dangerous Sexual Offender Legislation, 1961

In response to the above-mentioned criticisms, the Royal Commission appointed under Chief Justice McRuer in 1960 resulted in numerous amendments being made. The term "dangerous sexual offender" was defined as a person who... "by his conduct in any sexual matter, has shown a failure to control his sexual impulses, and who is likely to cause injury, pain or other evil to any person through failure in the future to control his sexual impulses or is likely to commit a further sexual offence" (Greenland, 1976, p.272). An example of "other evil" in this definition referred to damage caused by an accused to the morals of the children which could lead them to participate in prostitution or some form of exploitive behaviour (Jackson, 1994).

The dangerous sexual offender legislation, like the criminal sexual psychopath legislation, required that an offender subject to the legislation be sentenced either indeterminately, or with the imposition of a fixed term of imprisonment (Grant, 1998). With the introduction of the dangerous sexual offender legislation, and the definition of "dangerous sexual offender", the new legislation carried implicit assumptions about the ability of professionals to predict future criminal behaviour (Wormith & Ruhl, 1986), which will be illustrated in more detail in the following chapters. The legislation also provided the determination of dangerousness for sex offenders through the expert testimony of psychiatrists in court (Greenland, 1984). However, numerous problems became evident shortly after the enactment of the legislation.

Wormith and Ruhl (1986) conducted a retrospective study on offenders sentenced under the dangerous sexual offender legislation, indicating in their findings that gross geographical disparities existed in the frequency of applications, and that the applications were largely inaccurate. For example, they identified 47 incarcerated dangerous sexual offenders across Canada, 20 of whom were held in minimum security, 15 in medium security, and one in multi-level security, while only one was in maximum security. Furthermore, it was concluded that one-third of dangerous sexual offenders were rated as very low risk, and 40% presented only a low to moderate risk to reoffend (Jackson, 1994).

The offences which caused a dangerous sexual offender designation were also viewed as inappropriate in terms of the severity of the title "dangerous sexual offender". For example, Wormith and Ruhl indicated that a sizeable proportion of dangerous sexual offenders had no prior record of violent re-offending (1986). Although the legislation clearly targeted only sex offenders, less than 3% of all sex offenders were ever designated as dangerous sexual offenders (Jackson, 1994). Moreover, recidivism rates for violent sexual offences suggest that the vast majority of sex offenders targeted by the legislation did not re-offend in this manner. For example, Jackson (1994) studied the recidivism of 44 dangerous sexual offenders who were released on some form of conditional release. He found that while 68% of the offenders were reconvicted of another offence upon release, only 7% of the offences committed were of a violent sexual nature. If the legislation was targeting the right group of offenders, it would be

expected that the rate of recidivism for violent sexual offences would compose the majority of the reconvictions. Moreover, there is an indication that, at the time of sentencing, the offenders deemed to fit the criteria of the legislation, in fact, did not. This is illustrated by the fact that, of the hearings that resulted in a declaration of a dangerous sexual offender, 82% of mental health professionals who gave an opinion at the hearing did *not* favour a dangerous sexual offender designation (Wormith & Ruhl, 1986).

The dangerous sexual offender legislation was also criticized due to the very limited availability of sexual treatment services to offenders while incarcerated (Wormith & Ruhl, 1986). Greenland studied the dangerous sexual offender population, finding that only 11% of the incarcerated dangerous sexual offenders were being treated in specialized treatment facilities such as regional psychiatric centres (Jackson, 1994). Furthermore, if the offenders did receive treatment, the vast majority of them participated in treatment at the beginning of their sentences as opposed to near the time of release. For example, while 88% of dangerous sexual offenders had received some form of treatment since sentencing, only 20% had been receiving therapy in the year that the survey was conducted (Jackson, 1994).

Other problems existed with the legislation. In terms of application, the dangerous sexual offender legislation was scrutinized for its inconsistent, disproportionate, and infrequent application. With more than two-thirds of

dangerous sexual offenders designated in Ontario (31%) and British Columbia (37%) alone (Jackson, 1994), it was evident that there was wide regional disparity in the designation of dangerous sexual offenders. The legislation was also criticized for its restrictive definition, as it applied only to sex offenders, and its ambiguous definition of "dangerous sexual offender". In 1969, the Ouimet Committee suggested that the dangerous sexual offender legislation was capturing many non-dangerous sex offenders and was missing others who were considered dangerous (Jackson, 1994). These multiple criticisms, coupled with the need to reform the habitual offender legislation, led to modifications of these provisions.

The Enactment of the Dangerous Offender Provisions, 1977

As a result of the numerous problems with the habitual offender and dangerous sexual offender legislation, the provisions were repealed in 1977. The new legislation, re-named the dangerous offender provisions, was enacted on October 16, 1977, and seemed to provide "an answer" to the problems inherent in the above legislation. The provisions broadened the population of offenders it was capable of covering by providing a more generic definition of dangerousness based on "serious personal injury offence", and broadened the scope of the law to include non-sexual dangerous offenders (Jackson, 1994).

Upon the enactment of the dangerous offender provisions, a large number of offenders were still incarcerated under the habitual offender legislation. An

inquiry was held to review the habitual offender legislation for the purpose of examining if the habitual offenders fell under the new dangerous offender criteria. In April of 1984, Judge Stuart Leggatt was asked to determine whether each offender previously labeled as a "habitual offender" indeed presented a danger to society and should continue to be detained (Jackson, 1994).

After reviewing the cases of 86 offenders, Leggatt concluded that "the overwhelming majority of habitual offenders were found to be little more than nuisance offenders who did not meet the dangerousness criteria" (Jackson, 1994, p.11). More specifically, 73 of the offenders were found not to meet the dangerous offender criteria, and were recommended for a remission of their sentence and a sealing of their criminal record. Of the 86 men, only eight were found to present a danger to society, but did not qualify as candidates under the new dangerous offender provisions. The remaining five men were deemed to represent a danger to the personal safety of others, and therefore they remained incarcerated (Jackson, 1994).

During the Leggatt Inquiry, it was found that the habitual offender legislation was applied arbitrarily, and the retributive aspect of the law had far surpassed even the expectations of those who had prosecuted the men under the legislation (Jackson, 1994). A similar study by Michael Jackson (1980) focused on 18 habitual offenders who were still imprisoned in four British Columbia institutions in September of 1980. Upon review of parole and criminal

record files, and interviews with the institutional staff and offenders themselves, Jackson found that the length of time they served as habitual offenders was greatly disproportionate to the harm or damage they had caused, and to the risk of further harm they may have posed to the public. He stated that these offenders had served more time than any other group of prisoners in Canada, including those convicted of murder. It was found that the continued confinement of these men under sentences of preventive detention was unnecessary, measured against both the purposes of criminal punishment and the existence of adequate alternatives. Further incarceration was deemed only to make their reintegration into the community more difficult (Jackson, 1994).

The great majority of habitual offenders received remissions in May of 1984 because of the reviews conducted for the Leggatt Inquiry (Jackson, 1994). As a result of a second recommendation of the inquiry, resources were made available to the pardoned habitual offenders to assist them in seeking employment, accommodations, and social services and support (Jackson, 1994). The financial cost of providing such resources was viewed as a small cost to help restore freedom and dignity to individuals who had served an inordinate amount of time for their crimes against society (Jackson, 1994).

This chapter has presented a brief overview of dangerousness legislation in England as well as in Canada, up to the enactment of the dangerous offender provisions. The legislation illustrated has influenced and shaped, both directly

and indirectly, the manner in which Canada currently deals with high-risk violent offenders. The dangerous offender provisions are the newest Canadian legislation in this legal evolution of dangerousness. The chapter to follow will provide an in-depth examination of the current dangerous offender provisions, which includes a discussion of the legislation, a detailed description of the dangerous offender population, an examination of the application and declaration process, and a critical look at the legal and procedural problems inherent in them.

Chapter Two: The Dangerous Offender Provisions and Alternative Sentencing Procedures

As previously discussed, misinterpretations about crime, the sentencing process, and rates of recidivism are held by the public, and are nurtured and reinforced by the media (Grant, 1998). Such misinterpretations often spark public outrage over heinous crimes. This has led to further punitive legislative action focusing on violent sexual recidivists, specifically the current dangerous offender provisions. In this chapter, the dangerous offender provisions will be illustrated, including their criteria, the application and declaration process, and a detailed profile of the dangerous offender population. Discussion about the legal and procedural problems with the provisions will follow, and standard sentencing procedures will be considered as existing alternatives to the provisions.

In 1977 the dangerous offender provisions were enacted, providing determinate or indeterminate preventive detention for violent or sexual offenders who commit a "serious personal injury offence", and who constitute a threat to the life, safety or physical or mental well-being of other persons (Webster, Dickens & Addario, 1985). To date, there exists considerable, and I argue well-founded, criticism of the provisions.

Criticism of the provisions permeates every procedural level, from the application for "dangerous offender" status, to the court declaration of an offender as "dangerous", and through to issues related to the indeterminate incarceration, such as treatment and parole. The dangerous offender provisions will be set out below and examined, and this chapter will set the stage for a more detailed analysis in the chapters that follow.

The Criteria of the Dangerous Offender Provisions

In order for an individual to meet the legislative criteria of a "dangerous offender", the individual must be convicted of a "serious personal injury offence", or attempts thereof, punishable by at least ten years of imprisonment. The definition of a "serious personal injury offence", as stated in the Criminal Code, is outlined below:

- a) An indictable offence, other than high treason, first degree murder or second degree murder¹, involving:
 - 1. The use or attempted use of violence against another person, or
 - 2. Conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict serious psychological damage upon another person, and for which the offender may be sentenced to imprisonment for ten years or more, or
- b) An offence or attempt to commit an offence mentioned in S. 271 (sexual assault), S. 272 (sexual assault with a weapon, threats to a third party or causing bodily harm), or S. 273 (aggravated sexual assault) (Criminal Code, S.752).

¹ Murder is not included in the DO provisions since a conviction results in an automatic life sentence (Bonta & Motiuk, 1996).

The Crown must prove, once the offender has committed what constitutes a "serious personal injury offence", or has been convicted of an attempt to commit such an offence or a sexual offence, that he or she constitutes "a threat to the life, safety or physical or mental well-being of other persons" (Criminal Code, S.753a, i-iii). This conviction is used in combination with other criteria, such as the brutality of the act, the indifference of the offender as to the consequences to others of his or her offensive behaviour of the offence, the failure to control one's sexual impulses, and the likelihood of causing pain, injury or other evil through such a failure in the future (Grant, 1998).

The construct of brutality has not been examined in psychological literature, and no attempts have been made to operationalize the concept or apply the concept to predictions of dangerousness (Rogers & Mitchell, 1991). Brutality, in legal definitions, is related to the seriousness or viciousness of the offence, and is generally measured by the intensity of injury to the victim or victims (Rogers & Mitchell, 1991). However, brutality in psychological literature is consistent with numerous references to sadism and torture, a description that is not necessarily consistent with legal definitions (Jackson, 1994).

Due to the generality of this construct, mental health experts are unsure whether brutality should be operationalized as the intent of the offender to inflict harm, the amount of suffering the victim endured, and/or the extent of injuries inflicted (Jackson, 1994). In fact, "mental health experts have virtually no

evidence of any general association of brutality and predictions of future dangerousness" (Jackson, 1994, p.256). Moreover, in a survey conducted of Crown attorneys who prosecute dangerous offenders, it was shown that the "brutality" criterion is considered unhelpful in the court process (Bonta et al., 1996). Given that one single act of "brutality" may qualify an individual as a "dangerous offender" (Jackson, 1994), too much emphasis is placed on this criterion, which is neither supported empirically through literature nor by the attorneys who must operationalize it.

Indifference and failure to control sexual impulses are equally generalized constructs, either too broad for accurate operationalization or considered not helpful in the provisions. A study by Menzies, Webster and Sepejak (1985) found that the construct of "indifference" is most comparable to an incapacity for empathy, and that "indifference" was only slightly associated with the potential for future dangerous behaviour, an association which is unacceptably low for clinical use (the result of the correlation was .27). Furthermore, failure to control sexual impulses is a construct too general for practical use. As no definition is given, attorneys, judges, and mental health experts are left to question whether this means an "inability" or an "unwillingness" to control sexual impulses, which have the potential to be interpreted quite differently. For example, should an indeterminate sentence be afforded to an offender who is able but *unwilling* to control his sexual impulses, just as readily as an offender who is *incapable*,

perhaps due to an undiagnosed or untreated psychiatric or sexual disorder, of controlling his sexual impulses?

Despite the problems existing with the criteria for the dangerous offender provisions, the broad definitions and the inability to practically operationalize constructs to any degree of certainty, Crown attorneys have proposed that other offences should be included under the definition of "serious personal injury offence" (Bonta et al., 1996). Proposed offences, all of which currently provide maximum sentences of less than ten years, include uttering threats, sexual interference, criminal harassment, common assault, and attempted assault with a weapon (Bonta et al., 1996). Given that two of the five proposed offences, uttering threats and common assault, are officially categorized as "minor" offences (Correctional Service of Canada's Custody Rating Scale's offence classification), there are countless ethical implications to applying an indeterminate offence to an individual who has committed an offence of minor severity.

The Dangerous Offender Provisions, Revised - The Enactment of Bill C-55

In 1988, the horrific murder of a young boy generated increased fear and anger within the Canadian public. Christopher Stephenson, at age eleven, had been kidnapped, sexually assaulted and murdered by Joseph Fredericks, a "well-known psychopath and homosexual pedophile" (Cairns, 1993, p.1).

Fredericks was serving a five year sentence for the sexual assault of another young boy, and had earned remission and was therefore entitled to be released after serving two-thirds of his five year sentence, on statutory release (Grant, 1998). For the previous sexual assault, a "dangerous offender" application had been considered but not pursued because the victim's family wished to spare their child the ordeal of testifying (Grant, 1998).

The Coroner's Inquest into the death of Christopher Stephenson was conducted from the fall of 1992 to the winter of 1993 and received national media attention, particularly when its recommendations were released (Hudson, 1991; Sarick, 1993). There were 71 recommendations pertaining to tightening up of the justice and mental health systems to better deal with dangerous sexual predators (Cairns, 1993). The Stephenson case was the main precipitant to Bill C-55. Four years later, on August 1st, 1997, Parliament passed Bill C-55, a new federal government measure to deal with offenders who are thought to be at high risk of violently re-offending (Grant, 1998).

Bill C-55 was enacted to increase the scrutiny and supervision over a broader group of violent offenders than was covered by existing dangerous offender provisions, and was influenced by social pressure on the government to protect the public from their fear of the "violent stranger" (Grant, 1998). A number of revisions pertaining to sentencing and parole reviews were made to

the dangerous offender provisions through Bill C-55. Some of the most questionable reforms will be examined here.

Prior to the enactment of Bill C-55, it was left to the discretion of the sentencing judge to either impose a determinate or indeterminate sentence for a dangerous offender. With Bill C-55, a judge is now required to impose an indeterminate sentence once an offender has been declared a "dangerous offender" (Grant, 1998). This change is not surprising given the public's perception of violent crime as increasing, and the severity of the offences committed by Fredericks. It was also the opinion of criminal justice personnel that conducting a dangerous offender hearing, finding the offender meets the criteria, but not issuing an indeterminate sentence was time-consuming and self-defeating (Department of Justice, 1995).

Changes were also made to the parole reviews of dangerous offenders. Prior to the enactment of C-55, a dangerous offender was entitled to a parole review after three years of incarceration, and every two thereafter. In 1996, the average time period served by a dangerous offender before release on parole was fourteen years (Ole Ingestrup, Commissioner, CSC, testimony before the Standing Committee on Justice and Legal Affairs, Dec 11, 1996). It is also worth noting that no dangerous offender has ever been released at his or her first parole review (Grant, 1998). Under the new Bill C-55, the first parole review

would take place after seven years of imprisonment, with subsequent reviews at two year intervals (Grant, 1998).

Bill C-55 represented a political compromise between the harsh measures advocated by some anti-crime groups in Canada, and doing nothing (Grant, 1998). The reforms seem innocuous at first glance, however, if they are simply minor reforms, are they necessary (Grant, 1998)? There is no empirical evidence that any of these changes respond to problems with the previous legislation (Grant, 1998). For example, they do not broaden the scope of the group of offenders covered, and do not enhance the Crown's ability to make sure the right individuals are chosen for the "dangerous offender" designation (Grant, 1998).

Although the reforms do not attend to the problems with the dangerous offender provisions, they tend to create new problems within the provisions. In terms of sentencing, the new mandatory sentencing of a dangerous offender to an indeterminate sentence takes away the only discretion afforded to the judge hearing a dangerous offender application. Without discretion, the judge is forced by law to treat all dangerous offenders in the same manner, irrespective of individual uniqueness, circumstances, offences, and background. This means that a young male convicted of a single sexual assault along with an older pedophile convicted of multiple sexual assaults on children could both be

sentenced to an indeterminate sentence and designated "dangerous", despite any indication that one may be more treatable than the other.

Bill C-55 also enacted the long-term offender legislation which targets only sex offenders (Solicitor General, 2000). The long-term offender legislation allows the court to impose a sentence of two years or more for the sexual offence, and, instead of imposing an indeterminate sentence, order that the offender be supervised in the community for a period of up to ten years (in addition to the time spent in a penitentiary as a result of his or her sentence). In other words, sex offenders who do not meet the dangerous offender criteria (i.e., perhaps their offence was not considered "brutal" under the definition set out), but who are viewed as still at risk of committing sexual offences upon release, can be designated long term offenders. To date there are over sixty long-term offenders in Canada (Solicitor General, 2000).

This legislation is not designed to decrease the number of dangerous offenders, but rather to increase the population of offenders eligible for strict supervision (Grant, 1998). In fact, it is likely that the number of dangerous offender applications will increase with prosecutors aware that a long-term offender designation is, at the very least, what will be imposed (Grant, 1998). However, the effectiveness and feasibility of this legislation, like the dangerous offender provisions, is questionable. For example, in order to declare an offender a "long term offender", the courts need to determine, at the time of

sentencing, which offenders can be managed in the community and which need indeterminate incarceration (Grant, 1998). In other words, the courts will be asked to assess if an offender can be managed in the community years before the offender is released, without any idea of the impact it may have (Grant, 1998). In terms of feasibility, resources need to be made available for the intensive supervision that this legislation requires, and for the length of time it is required (Grant, 1998).

The narrow target population for the long-term offender legislation is also debated. For example, a man repeatedly convicted of domestic assault is as great a risk for recidivism, and probably in a shorter period of time, as a sex offender (Grant, 1998). This problem is also evident in the dangerous offender provisions, as only in very rare cases do dangerous offender applications occur on the basis of spousal assault (Grant, 1998). Other offenders such as those who commit impaired driving, robberies, or possess weapons also present a comparable or even greater risk of recidivism than do the majority of sex offenders, but these populations are not targeted under the long-term offender legislation or the dangerous offender provisions (Grant, 1998). In sum, "it would appear that this legislation was designed to appease public concern about pedophiles, not to maximize the safety of the public" (Grant, 1998, p.234).

Another problem created by the Bill is the longer parole review period of a dangerous offender. Whereas, prior to the Bill, the parole review occurred three

years after the individual was admitted, there is concern that the parole review will now take seven years. This means that a delay in treatment being given to the dangerous offender in the penitentiary may result, due to the fact that treatment is usually focused on offenders who are soon to be paroled (Grant, 1998). In essence, there is no indication that the public will be better protected by or benefit from Bill C-55's new revisions. In contrast, there are indications that this Bill inhibits judges from making the most accurate and appropriate decisions regarding dangerous offenders, and inhibits those labeled dangerous offenders from promptly receiving the treatment that is desperately needed.

Preventive and indeterminate detention is the "hallmark" of legislation that deals with high-risk offenders in Canada, and, in particular, offenders who commit sexual crimes. With the exception of life sentences for murder or being found unfit or incompetent to stand trial (which may lead to indefinite confinement), violent sex offences are the only other group of offences that carry with them the potential of indeterminate incarceration (Jackson, 1994). Ironically, it can be argued that the theoretical orientation of Canada's criminal justice system is one of treatment and rehabilitation. In practice, however, punishment-oriented indefinite incapacitation remains the primary purpose of the provisions (Petrunik, 1994).

The Application and Declaration Process

To further understand the dangerous offender provisions, and the legal complexities and shortcomings within them, it is important that the application and declaration process of the dangerous offender be examined. Very briefly, a dangerous offender application is heard by the court that convicted the offender for the offence for which the application has been made. Evidence on the psychological profiling of the offender is gathered through one court-ordered psychiatric assessment. If all the statutory criteria are satisfied, the trial judge must declare the offender to be "dangerous", and, under Bill C-55, sentence the offender indefinitely. This process will be examined in more detail, and the individual roles of the court, legal professionals, psychiatrists, judge, as well as the implications of holding a "dangerous offender" label.

The Court Procedure

The purpose of the dangerous offender hearing is not to secure additional convictions or punishment, but simply to determine whether the offender fits within the definition of the provisions set out in the Criminal Code, as outlined earlier (Rogers & Mitchell, 1991). The application for a dangerous offender designation occurs after the conviction(s) and is in the form of a sentencing hearing (Bonta & Motiuk, 1996). The dangerous offender hearing is decided by a judge, as no jury is present, and the offender must attend (Griffiths & Verdun-Jones, 1989).

While the provisions require that the offender must have committed an offence which constitutes a "serious personal injury offence", the particular details of the crime do not necessarily need to also satisfy the dangerous offender criteria (Grant, 1998). In other words, the Supreme Court of Canada has held that there is no requirement to focus on the triggering "serious personal injury offence" in making a dangerous offender designation, so long as there is other evidence of a pattern of violence or deviant sexual conduct that meets the criteria of the provisions (Grant, 1998).

The Role of the Prosecution

The Crown counsel enters a formal application before the court to hold a hearing to determine whether the offender should be designated as a dangerous offender, which can be done up to six months after the time of sentencing. During the dangerous offender hearing, the Crown must show a pattern of repeated aggressive behaviour and a likelihood of harm to others in the future (Grant, 1998).

Dangerous offender applications succeed in the large majority of cases. While current success rates for the provisions are unavailable, six years after their enactment a dangerous offender application succeeded in 78% of all cases (MacKay, 1983). This suggests that the Crown attorneys have either raised this sentencing option judiciously or that the adversarial process is tilted in favour of the prosecution at this stage of the proceedings (Rogers & Mitchell, 1991, p.257).

There are definite operational concerns about the dangerous offender trial in this respect. First, it has been documented that 52% of Crown attorneys, when faced with a dangerous offender application, are unsure of the type of information needed to secure a dangerous offender declaration, and express a need for clearer policies and procedures (Bonta et al., 1996). Coupled with this problem, prosecutors also reported receiving little workload adjustment to deal with dangerous offender applications, which require a substantial amount of work compared to standard criminal sentencing proceedings (Bonta et al., 1996).

The fact that most applications succeed with a dangerous offender designation, while 52% of prosecutors are unaware of the necessary policies and procedures needed to sustain a declaration (Bonta et al., 1996), is a somewhat disturbing statistic. If less than half of prosecutors are familiar with the dangerous offender criteria and application process, why is it that most cases succeed? A possible answer is that an overabundance of information that implies that an offender is dangerous is not necessarily needed for a declaration. In other words, it may be possible that the prosecution's lack of awareness of the policies does not necessarily affect the outcome of a dangerous offender hearing. If this hypothesis is true, it is unsettling that so little effort is needed to indefinitely sanction an offender. At any rate, the dangerous offender application process places a great amount of discretionary power in the hands of the prosecutor.

The Role of Mental Health Experts

As the dangerous offender criteria require predictions to be made about the offender's future conduct, it was assumed by Parliament that psychiatric evidence would be necessary for an accurate determination to be made (Griffiths & Verdun-Jones, 1989). Until 1996, at the hearing of the application, psychiatric evidence was heard from both the prosecution and defense as to the offender's "failure to control sexual impulses", "indifference", "brutality" and if he or she "constitutes a threat to the life, safety or physical or mental well-being of other persons" (Jackson, 1994). Both the Crown and the Defense nominated their own psychiatrist or mental health expert, both of whom interviewed the offender in detail and provided assessments outlining their professional opinions as to whether this person should be declared a dangerous offender or not. While the offender can refuse to talk to the psychiatrist nominated for him or her, a refusal to talk is in itself admissible evidence against the offender.

With the enactment of Bill C-55, the process by which the psychiatric assessments are conducted has altered. The necessary testimony from two psychiatrists has been replaced by a single court-ordered psychiatric assessment. It was thought that having one psychiatrist would allow the assessment to be more objective than having two psychiatrists, each generating an assessment for opposing legal parties (Grant, 1998). However, the move toward one court assessment, and reliance upon one team exclusively, could provide a misleading or biased perception (Grant, 1998). Literature on risk

prediction reveals a divided discipline with many different approaches to risk assessment, and different claims as to its accuracy (Grant, 1998). Basing a dangerous offender declaration on one assessment, rather than on two psychiatric opinions, may mislead judges who are not well informed of risk prediction literature (Grant, 1998).

To illustrate that psychiatric risk assessments are questionable at best, Lynett (1990) conducted the first experimental study of psychiatric opinions in a dangerous offender case. She found, in a survey of 333 Canadian psychiatrists, that psychiatrists were most influenced by the presence of factors that are not strongly linked to future dangerousness in research. For example, psychiatrists were most influenced by a victim statement and a formal diagnosis of anti-social personality disorder (Lynett, 1990), while more influential factors such as level of prior aggressiveness and treatment potential did affect psychiatric views of dangerousness, but were not deciding factors in rendering a psychiatric decision (Rogers & Mitchell, 1991). Lynett concluded that a "halo effect" is operative among psychiatrists, which overshadows relevant data when assessing dangerousness, such as prior history of violence (Rogers & Mitchell, 1991). While assessments are necessary to measure dangerousness, the danger of inaccuracy is ever-present and must be acknowledged. This point, as well as the role of psychiatrists and mental health professionals, will be further analyzed in discussing the clinical perspective of dangerousness and predicting dangerousness, in the chapters to follow.

The Role of the Judiciary

Before 1996, when rendering a dangerous offender designation, the judge was given the discretion to issue either a determinate or indeterminate sentence on the offender. A determinate sentence was rendered if it was accepted by the court that the potential for treatment was quite high, or if the offences for which the offender was convicted were less serious than the majority of offences committed by dangerous offenders. An indeterminate sentence was rendered if it was shown that the possibility of rehabilitation for the offender was small or uncertain (Rogers & Mitchell, 1991).

This represented the limited discretion afforded to the judge in a dangerous offender hearing. For example, in the Ontario case of *Poutsoungas* (1989), the trial judge refused to impose an indeterminate sentence on the dangerous offender, and the decision was then overturned on appeal because no credible evidence was offered that the offender could be "cured" within a fixed time (Rogers & Mitchell, 1991).

With Bill C-55, judges must automatically render an indeterminate sentence when an offender is declared "dangerous" (Grant, 1998). This has left judges with no discretion in dangerous offender cases, and very few legal means by which to deal with dangerous offenders. Because of the dangerousness factor, judges cannot sanction a dangerous offender with a regular determinate

sentence if a declaration has been given. The only other option available is to impose a long-term offender designation.

In terms of treatment, while the long-term offender legislation imposes a maximum of ten years supervision in the community, there is no indication that a sex offender under this designation will receive the appropriate treatment needed. For example, resources for this legislation are allocated to the parole system for the supervision of these offenders. It was estimated that there could be up to 2000 offenders eligible for the long-term offender designation annually, which could potentially add to the cost of the parole system by \$240 million annually (Grant, 1998, for Dr. Stephen Easton, testimony before the Standing Committee on Justice and Legal Affairs, February 12, 1997). With the enactment of this legislation, there has been no increased funding allocated for community treatment programs and facilities for sexual offenders to compensate for the resources spent on increased parole supervision of these offenders.

Also evident in the dangerous offender provisions, there are very few legal means by which to distinguish between offenders who may have the potential to be rehabilitated and those who have demonstrated no response to being treated, and forces them to deal with all offenders deemed to be dangerous in a standardized manner, irrespective of their individual circumstances and uniqueness.

Parole Eligibility and Treatment for the Dangerous Offender

Once an offender has been labeled "dangerous" and incarcerated indefinitely, it is extremely difficult for that individual to receive treatment or be considered a potential candidate for parole. In regard to treatment, dangerous offenders are placed at the lowest priority for rehabilitation due to the length of their sentences and the demand for other offenders with shorter sentences to be treated.

As previously documented, the offender must wait seven years before his or her case is reviewed for parole, and every two years thereafter. However, the mandatory requirement for a review every two years is simply a safeguard created by Parliament for the illusory benefit of dangerous offender. This review is illusory because unless treatment is provided which might reduce the offender's risk of violently re-offending or danger to public, the offender will not be granted parole.

Concerns about public outcry if a dangerous offender were to re-offend on parole results in the National Parole Board being extremely reluctant to grant parole (Grant, 1998). This predicament is described by the Ontario Court of Appeal as a "catch-22" for the offender, as "he cannot get parole until treated but he cannot get treatment until he is near the end of his sentence... but his sentence is indeterminate so he does not qualify for treatment and never will" (R. v. Forster, 1995; Grant, 1998).

Along with the difficulty in receiving treatment and therefore being eligible for parole, the situation is aggravated by the stigma attached to the label of being a "dangerous offender" (Grant, 1998). Sex offenders who are not labeled dangerous offenders are much more likely to receive treatment, as the status of being a "dangerous offender" acts as an obstacle as opposed to an avenue to treatment (Rogers & Mitchell, 1991).

The Dangerous Offender Population

The dangerous offender population represents a very small fraction of the total group of violent repeat offenders in Canada's correctional system. As of September 24, 2000, there were 276 active dangerous offenders, representing approximately 2% of the total federal inmate population (Solicitor General, 2000). Despite their small numbers, the dangerous offender population has grown steadily over the last 15 years, to the point where 30 declarations were made in 1999 (Grant, 1998; Solicitor General, 2000).

In terms of release, the most recent information is from September of 1998, in which only five out of the 206 active dangerous offenders had been released on some form of conditional release (Bonta, personal communication, July 13, 2000). The release rate for dangerous offenders has remained at approximately one release per year from 1985 to 1992 (Jackson, 1994). The

issue of releasing dangerous offenders on conditional release will be examined in detail in chapter five.

Regional Application

One of the strongest criticisms of the dangerous offender provisions is the regional disparity in their application. The vast majority of applications for dangerous offender declarations take place in Ontario and British Columbia, Ontario having the largest number of dangerous offenders in absolute terms, but British Columbia having the largest number of dangerous offenders per capita (Bonta et al., 1996). As illustrated in Chart One, statistics support both the huge regional disparity in the application for dangerous offenders, and the notion that there is too much prosecutorial discretion involved in deciding to proceed with an application (Grant, 1998).

**Chart One:
Number of dangerous offender declarations per region (Solicitor General, 2000)**

As shown in Chart One, the percentage of dangerous offenders in the Atlantic, Quebec, Prairie and Pacific regions (56%) is only slightly higher than the percentage of Ontario's dangerous offenders (44%) alone (Solicitor General, 2000). A provincial breakdown of dangerous offender declarations gives a clearer view of the disparity of application, and is shown in Chart Two.

**Chart Two:
Breakdown of dangerous offender declarations by province
(Solicitor General, 2000)**

The lack of uniform application of the provisions is problematic in that it indicates that not all provinces are equally accepting of the provisions; some smaller jurisdictions (such as Prince Edward Island and the Yukon) are not utilizing them at all. But some larger jurisdictions, such as Quebec, have had very few dangerous offender declarations. Given this, and recognizing that the possibility of Quebec holding offenders that Ontario and British Columbia would consider "dangerous offenders" is quite high, it becomes apparent that Quebec is

managing this population of offenders in an alternative manner. Potential alternatives to the dangerous offender provisions will be illustrated in the final section of this chapter.

Profiling the Dangerous Offender

In order to have a more informed idea of the common characteristics of offenders declared "dangerous" by the provisions, numerous perspectives are examined to illustrate this population.

Race

The overwhelming majority of dangerous offenders in Canada are Caucasian. Depending on the source, it is estimated that 75% to 85% of dangerous offenders are Caucasian (Motiuk & Belcourt, 1996, p.3; Jackson, 1994). However, a substantial proportion, approximately 24%, of dangerous offenders are non-Caucasian, which indicates a potential bias against minority group offenders (Petrunik, 1994). For example, Aboriginals are over-represented in the provisions, comprising approximately 10% of all dangerous offenders (Jackson, 1994). Chart Three compares dangerous offenders and all offenders in terms of race.

Chart Three:
Percentage of dangerous offenders as compared to all offenders in terms of race
(Jackson, 1994)

Gender

According to research, only three women have ever been declared dangerous offenders (Solicitor General, 2000). Therefore, although the dangerous offender provisions are not gender-specific, their application seems to be quite gendered. Given that the vast majority of dangerous offenders are sex offenders, and that over 99% of sex offenders are male (Motiuk & Belcourt, 1996, p.3), this gendered application is to be expected. However, if the provisions were to focus on *all* violent offenders, which was the original intent of the provisions, the end result might be more women offenders being labeled as "dangerous".

Nature of Offences

After the repeal of the dangerous sexual offender legislation, and during the period from 1977 to 1985 when the dangerous offender provision had just

been enacted, 78% of offenders labeled "dangerous" were convicted of a sex offence (Jakimiec et al., 1986). This may be demonstrative of the broadening of the new provisions from targeting only sex offenders to beginning to encompass all violent crime. However, over ten years later, 92.2% of all designated dangerous offenders were sex offenders (Bonta & Motiuk, 1996:10). Not surprisingly, the majority of Crown attorneys indicated that a sexual offence initiated the dangerous offender application process, and that non-sexual violent behaviour rarely resulted in an application (Bonta et al., 1996).

Research focusing on the criminal backgrounds of dangerous offenders concludes that most dangerous offenders have diverse criminal histories (Jakimiec et al., 1986). For example, the criminal histories of dangerous offenders may include violent crimes such as assaults and attempted murder, and also non-violent crimes such as arson and break and enter (Jakimiec et al., 1986). Based on the severity of their current offence(s), virtually all dangerous offenders would have been sentenced to at least 10 years for their offences (Grant, 1998).

Age

The average age of dangerous offenders is approximately 40 years at the time of declaration, the oldest being 66 years of age, and the youngest being 23 years of age (Jackson, 1994). This average age is quite old, considering that criminal offending generally tends to taper off as the offender ages. In fact,

research suggests that male offenders who fit the profile of psychopaths (which a great proportion of dangerous offenders are generally stated to fit) dramatically reduce their pattern of re-offending by the age of 40, and are no more likely than any other offender to be re-convicted after that age (Hare, McPherson & Forth, 1988).

Incarceration History

It is rational to presume that an offender designated as "dangerous" would have a long history of incarceration for committing numerous violent offences, would exhibit severe behaviour problems or would incur discipline charges while incarcerated; after all, they are "dangerous". In reality, however, this is not the case. Chart Four outlines the previous federal incarceration history of dangerous offenders.

**Chart Four:
Dangerous offenders by number of previous federal incarcerations
(Jackson, 1994)**

As illustrated, while 49.6% of dangerous offenders had been incarcerated two or more times prior to their current incarceration, one might assume that this percentage would be larger considering that these offenders have been labeled "dangerous". In fact, 50.4% of dangerous offenders had either no prior federal incarceration (28.1%) or had only one prior federal incarceration (22.3%) (Jackson, 1994). An earlier study indicated that as many as 34% of dangerous offenders had never been incarcerated in a federal penitentiary prior to the current incarceration (Jakimiec et al., 1986).

In terms of federal security levels, dangerous offenders, as expected, are classified to higher levels of security as compared to all offenders in general. The chart below illustrates that the general population of offenders comprises the majority of offenders in minimum and medium security institutions, while dangerous offenders are almost twice as likely to be in maximum security, and are almost five times as likely to be in regional psychiatric or treatment centres as compared to the general population of offenders (Jackson, 1994).

Chart Five:
Dangerous offenders as compared to all offenders by federal security level, 1992
(Jackson, 1994)

It is not surprising that offenders designated as "dangerous" are classified to higher levels of security than the general offender population, as it is easily believable that these offenders would present a higher risk of violence or behavioural problems. However, in reality, the reasons why these offenders are disproportionately classified to high security levels are entirely the opposite. In fact, once incarcerated, dangerous offenders in general do not represent a behaviour problem. For example, none of the dangerous offenders in the study required placement in a special handling unit due to behaviour problems, and very few incurred any institutional discipline charges (Jakimiec et al., 1986). Ironically, quite the opposite occurs. The physical restrictions on offender movement and environment of this population are so great, and are not necessarily due to the offender's potential to act out aggressively. While these restrictions attempt to ensure that an offender's behaviour is acceptable, in fact, they also act to safeguard protected offenders (such as dangerous offenders) from other general population offenders, due to their identity as a sex offender, as well as having been given the label of "dangerous".

Psychiatric disorder

Antisocial personality is a common characteristic found among dangerous offenders (Bonta et al., 1996). In fact, a diagnosis of anti-social personality disorder (APD) was found in 72.9% of all dangerous offender cases, and 39.6% met the criteria for psychopathy, a rate almost twice that of the regular penitentiary population (Bonta et al., 1996). However, due to the subjectivity of

diagnosing psychiatric disorders, and due to the different methods of assessment for APD, there is high variability in diagnosis (Bonta et al., 1996). Also, it has been illustrated that Crown attorneys are especially influenced by the presence of an APD diagnosis in a dangerous offender application (Bonta et al., 1996).

It may be incorrect to infer that dangerous offenders possess a higher likelihood of being diagnosed with APD or other psychiatric disorders. It may simply be that Crown attorneys place more weight on psychiatric diagnoses, which may, in turn, lead to those offenders being declared "dangerous" at a higher rate than those without such diagnoses. In fact, if APD is present in most dangerous offender cases, as clinical research suggests, this may imply quite the opposite. For example, a diagnosis should take a great degree of responsibility off the accused by suggesting that he or she has a "disorder". Given that it is treatable, mental health experts bear some responsibility to go beyond simply labeling the offender as "dangerous", and to offer real treatment (Rogers & Mitchell, 1991).

To summarize, in consideration of the small number of offenders declared as dangerous offenders, approximately 288 over a 23 year period (Solicitor General, 2000), and the reluctance of Crown attorneys in some provinces to make dangerous offender applications, it can be concluded that the provisions are clearly not utilized as originally intended. Also, given the presumably large number of offenders that meet the legislative criteria that are not targeted, the

dangerous offender provisions are clearly not a major source of community protection (Petrunik, 1994). With a small annual average of new declarations, and the increasing fear of violent crime pervasive in Canadian society, the provisions have failed to offer even minimal comfort to concerned members of the community, which was the original intent.

Legal and Procedural Problems with the Provisions

Given the discrepancies of the dangerous offender provisions outlined, critics have suggested that the present provisions are inadequate, and that new approaches must be taken to deal with this population of offenders (Bonta et al., 1996).

Defining "Dangerousness"

The presumption upon which the dangerous offender provisions are based is that dangerousness is a detectable characteristic of an individual, and a person deemed to be "dangerous" should be controlled for the protection of society. But how is "dangerousness" defined, and how can we understand it?

The construct of dangerousness is multi-faceted. For example, medical and clinical understandings of dangerousness are quite different from a legal understanding. From a medical and clinical point of view, the offender may be viewed as so evil that he must be sick to have committed his heinous acts

(Petrunik, 1994). On the other hand, the legal understanding of "dangerousness" involves viewing the heinous act as a rational choice, therefore the control of the offender is necessary for public safety (Petrunik, 1994). In essence, "dangerousness" is not a concrete or monolithic term. It is a blurred notion, different and conflicting depending on the perspective one uses to examine the issue, a notion where a fine line exists between whether an offender is considered *mad* or *bad* (Petrunik, 1994).

There are many complications and implications when defining and labeling a person as dangerous. An offender labeled as a "dangerous offender" will mostly likely spend the rest of his or her life incarcerated, whereas, depending on the offence committed, he or she may have been incarcerated for only a limited term if found not to be dangerous. Given this, it is imperative to examine the extent to which "dangerousness" is defined, to detail its components, and to determine if dangerousness can be accurately determined in a measurable and standardized manner.

In examining the definition of "dangerousness", Petrunik (1994) argues that the term is comprised of four components. First, dangerousness refers to the perpetrators of the offences, not to the offences themselves. Second, only perpetrators of selected offences are considered dangerous, as opposed to the range of offences that might be considered harmful. More specifically, while offences such as armed robbery and assault are considered harmful, the

provisions have been used primarily in relation to a narrow population of offenders, most of whom are sex offenders with child victims. Third, dangerousness refers to a state of being, where individuals are predisposed to engage in harmful acts. In this context, it is the characteristics of the individual that lead him to commit harmful acts as opposed to the situations that he is in which may provoke such acts. Lastly, dangerousness is mostly associated with an individual's future behaviour rather than with his past. Any interest in the individual's past is for the purpose of predicting and controlling his future.

However, the description of dangerousness held by academics fails to concord with the description of dangerousness set out in the dangerous offender provisions. The fundamental factor of dangerousness for Petrunik (1994) is that dangerousness refers to the individual committing the acts, not to the acts themselves - in other words, dangerousness is an inherent characteristic of a person. In the provisions, it is stated that three dimensions of dangerousness exist, namely the extent of injury to the victim(s), the duration of the injury, and the offender's intent (Rogers & Mitchell, 1991). Therefore, in opposition to Petrunik's stand, the actual injury inflicted on the victim(s) and the extent of the injury comprise two-thirds of the provisions' criteria for dangerousness.

Moreover, it is argued that because most physical injury can be directly observed and thus objectively measured, and because most physical injury will have psychological effects as a result, the extent of the injury to the victim(s)

tends to be the factor of "dangerousness" that is seen as the most reliable and is given the most weight in the declaration process (Rogers & Mitchell, 1991). During the declaration process, the provisions' description of dangerousness is wide open to the unique interpretation of all parties involved (judge, Crown and Defense attorneys, psychiatrists and other experts), and alters depending on the individual case and the availability of information (Rosen & Webster, 1984).

Given that the criteria for dangerousness are completely contradictory to an academic perspective on the provisions, and given that the provisions lead legal professionals to interpret dangerousness according to their own standards, how is it possible to assess, to any degree of accuracy, dangerousness if its descriptions are so broad and even contradictory, depending on the source?

Targeting the Sex Offender

The most obvious procedural problem with the provisions is the type of offender being targeted. The few research studies that have examined the provisions found little change in the type of offender being declared "dangerous" as compared to the earlier dangerous sexual offender legislation (Bonta et al. 1996). In fact, "non-sexual, but potentially violent offenders are less likely than sexually violent offenders to receive the restrictions on their liberty that are available through detention and dangerous offender provisions" (Bonta & Motiuk, 1996, p.10). Thus, even though the provisions provide indeterminate

incarceration for non-sexual violent offenders, they appear not to be used to the extent possible (Bonta & Motiuk, 1996).

Ignoring Systemic Crime

The dangerous offender provisions emerged at a time when the public demanded harsher sanctions for the perpetrators of sexual and violent offences, and the media misrepresented crimes committed by predatory strangers. In fact, most sensationalized cases of dangerous offenders also represent crimes committed by strangers. In doing so, the provisions draw attention away from systemic forms of violence (Petrunik, 1994). Research reviews indicate that sexual or violent offences most frequently occur in a domestic context or in other relationships where the parties involved are acquainted with each other (Petrunik, 1994; Marshall & Vaillancourt, 1993; Statistics Canada, 1993; Abel & Rouleau, 1990). By concentrating only on a narrow range of violent sexual offenders, the provisions wrongly paint dangerousness as "a product of the pathology of individual male offenders who prey on vulnerable and innocent children and women" (Petrunik, 1994, p.124). Controlling and incarcerating those legally labeled as "dangerous" and at highest risk to violently or sexually re-offend is not addressing effectively the problem of violence in modern society, particularly the more pervasive causes of violence against women and children (Grant, 1998).

Justice typically involves a balancing act whereby the interests and rights of offenders, victims, the community and the state are all taken into account. However, in the case of the dangerous offender provisions, not all perspectives are necessarily taken into account to an equal degree (Petrunik, 1994). It has previously been illustrated that dangerousness legislation has not evolved without the influence, however small, of the public thought pertaining to that time. The media, and, in turn, society, respond to the most atypical and highly visible cases, as opposed to the less sensationalized cases which encompass the higher volume of offences in Canada (Petrunik, 1994). The media have portrayed the crime rate as consisting of mainly violent and/or sexual offences, thus resulting in the public's demands for harsher sanctions based on its sense of fear (Petrunik, 1994). Given this, while 95% of Crown attorneys indicate that media coverage did not influence the decision to proceed with a dangerous offender application (Bonta et al., 1996), it is highly unlikely that the media depiction of crime and the public's fear do not influence the courts to some degree.

Conflicts between Mental Health and the Law

Conceptualized by the clinical realm, the emphasis on dangerousness in the provisions allowed psychiatrists and clinicians to become "authorized experts" pronouncing on the dangerousness of individuals, and recommending to the courts who should be confined (Petrunik, 1994). The dominant clinical focus on dangerousness as a product of the pathology of individual male offenders is of

concern in the provisions (Petrunik, 1994), given that research does not concur with this notion of dangerousness. Research portrays violence as a pervasive problem largely occurring in a domestic context or in relationships between acquaintances, and shows that violence is not so much a product of exceptional pathological individuals, but a product of fundamental social structures and cultural patterns in society (Petrunik, 1994).

The dangerous offender provisions, prior to Bill C-55, acknowledged psychiatrists as "experts" (Rogers & Mitchell, 1991). For example, the application procedure was such that the Crown and Defense attorneys nominate their own experts, a process that implicitly questions the objectivity and impartiality of the experts in dangerous offender cases (Rogers & Mitchell, 1991). Currently, with the use of one court-ordered psychiatric assessment, reliance on psychiatrists and acknowledgements of them as "experts" has not changed. Ironically, even before Bill C-55 was in effect, 64% of psychiatrists surveyed by Webster, Dickens and Addario (1985) favoured some form of dangerous offender disposition, however, *none* felt that it was workable in its present form. In other words, all of the psychiatrists surveyed, who act on behalf of the Crown in a dangerous offender application, were not confident in the procedure, a procedure that has the potential to indefinitely incarcerate an individual. Moreover, 83% of mental health experts who have participated in a dangerous offender hearing felt that indeterminate sentencing had a deleterious effect on treatment (Rogers & Mitchell, 1991).

While psychiatrists did not find the procedure workable before Bill C-55, their primary reason, that an indeterminate sentence is not conducive to treatment (Jakimiec et al., 1986), holds true under the new revisions of Bill C-55. For example, while judges had the discretion to impose a determinate sentence on an offender declared dangerous, with the enactment of Bill C-55, sentences for dangerous offenders are indeterminate, leaving the judge with little discretion. Also, the provisions are more likely to be applied when there is some uncertainty about the offender's dangerousness (Jakimiec et al., 1986). For example, where an offender commits a very brutal offence, and where the prosecutors "sense themselves on insecure terrain", prosecutors are "apt to want psychiatric support in reaching decisions" to declare an offender "dangerous" (Jakimiec et al., 1986, pp.17-18).

The Arbitrariness of Indeterminacy

The most compelling argument against the dangerous offender provisions, however, is the arbitrariness of the indeterminate sentence. The capricious manner in which the provisions are applied represents "a severe challenge to the value that Canadians place on basic fairness in the system of criminal justice" (Griffiths & Verdun-Jones, 1989, p.299). Due to the harshness of the provisions, they have been subject to a number of legal challenges under the Charter (Gordon & Verdun-Jones, 1989). While the constitutionality of the provisions continues to be upheld in the courts, numerous factors (such as the inability of psychiatrists to accurately predict future dangerousness, as discussed in chapter

4) still exist that may impede the provisions' potential to be an effective sentencing option (Griffiths & Verdun-Jones, 1989).

The provisions continue to arouse a great degree of uncertainty and criticism among commentators on the criminal justice system. The power of the court to impose a term of indefinite incarceration, in lieu of any other punishment that may be imposed for the offence(s) for which the offender was convicted, is so vast that some researchers are skeptical to leave such power to the courts (Grant, 1985). For example, the Law Reform Commission's (1975) working paper on Imprisonment argued that the indeterminate sentence for dangerous offenders was inappropriate. In keeping with a judicial rather than a clinical model, the Commission recommended that dangerous offenders be sentenced under the regular sentencing structure. It was recommended that individuals found to be "dangerous" on the basis of conviction for a "serious personal injury offence" would be eligible for a proposed maximum 20 year sentence (Petrunik, 1994).

The humanitarian considerations of being declared a dangerous offender must not be forgotten. Offenders sentenced to life-long preventive detention are particularly vulnerable to the de-humanizing effects of imprisonment (Jackson, 1994), such as loss of identity, depersonalization, and demoralization. These individuals would likely experience some benefit from available treatment programs or psychological counseling. However, with no available treatment or

services offered to them, the "savage sentence of perpetual incarceration defeats any hope of reform" (Mewett as cited in Jackson, 1994, p.174).

The Likelihood of Parole

Indeterminate sentences are only acceptable in Canada under The Charter of Rights and Freedoms because parole exists and is available to mitigate the severity of the sentence (Jackson, 1994). The Ouimet Committee's original recommendation of an indeterminate sentence for dangerous offenders was "predicated upon the existence of necessary custodial and treatment facilities appropriate for this class of offender" (Canadian Committee on Corrections, 1969, p.263). However, these statements, while made for the benefit of the offender, actually work counter-productively. This was briefly illustrated previously in this chapter, referred to as the "catch-22" in the provisions. To illustrate this point, parole will most likely only be granted to offenders who address their problem areas through treatment programs and/or counseling. Due to the fact that dangerous offenders are given indeterminate sentences, their priority for treatment is extended and delayed, while offenders with shorter sentences, who are sooner to be released, are given first treatment priority. Given that dangerous offenders are the last priority for treatment, their likelihood of parole (as well as their likelihood of receiving treatment) is miniscule.

While parole review for dangerous offenders is expected to ensure that the sentence is tailored to fit the circumstances of the individual offender

(Jackson, 1994), the likelihood of the National Parole Board releasing a dangerous offender on conditional release without having received treatment is extremely low. At the same time, however, Canada's correctional system has been criticized for its failure to provide special facilities and treatment programs to this offender population (Leggatt, 1984). Due to the indeterminacy of their sentences, and the extremely low likelihood of their release, dangerous offenders are usually viewed as a "lost cause" for treatment.

Despite being premised on a clinical model, the dangerous offender provisions have done little to stimulate the development of effective forms of treatment intervention (Petrunik, 1994). Furthermore, while based on a clinical model, the very fact that the offender is indeterminately sentenced implies that he or she is "untreatable", a concept usually foreign to the clinical realm. However, the fact that a dangerous offender is viewed as "untreatable", or may have untreated problems unrelated to risk of re-offending, does not automatically compel the conclusion that the offender cannot be manageable in the community (Jackson, 1994). There are innumerable residential treatment programs in the community which provide, along with secure accommodation, intense treatment for many of the problems that these offenders need to address. The problem is that they are never given a chance to address them. Dangerous offenders, then, are quite easily lost in the criminal justice system, and remain untreated as a result. Given the shortcomings addressed, it is beneficial to identify alternatives

to the provisions that better address the needs of the offender while not compromising public safety. In fact, such alternatives already exist.

Standard Sentencing Procedures as Existing Alternatives

In the course of Canada's efforts to expand the 'habitual or dangerous offender' legislative net, Canadian law has captured and incarcerated a combination of property and nuisance offenders as well as sexually dangerous offenders. The use of the dangerous offender provisions has led to a variety of questions ranging from concern over the effectiveness of indeterminate sentencing in controlling these highly dangerous criminals, to the general characteristics of those offenders declared as dangerous offenders (Jackson, 1994). In light of such concerns, it is not clear whether the current dangerous offender provisions will make Canada a safer country in which to live (Grant, 1998). In fact, from a legal perspective, quite the opposite is implied. The provisions' focus on a very narrow range of offenders, its allocation of huge resources to this small group, and, as illustrated in the following chapters, its inability to accurately predict future dangerousness, all suggest that the current provisions need critical attention and future reform.

As discussed, support for the dangerous offender provisions is very limited. The Canadian Sentencing Commission recommended that the provisions be repealed, stating that they offend two basic beliefs in criminal law

(Canadian Sentencing Commission, 1987, p.213). More specifically, an indeterminate sentence is not preferred due to its harshness in terms of incarceration length, and placing the primary emphasis on the offence type and severity as opposed to the offender's individual characteristics and needs (Canadian Sentencing Commission, 1987). In place of the dangerous offender provisions, the Commission recommended that the courts be given the power to impose an "extended" sentence only in the case of particularly heinous crimes (i.e., an unusually brutal attempted murder). An extended sentence would exceed the regular maximum for the offence for which the offender has been convicted by up to 50%, but would not impose an indeterminate sentence. Their proposal would abolish the indeterminacy that is such a controversial feature of the existing provisions.

However, the popularity of the provisions is fed by the sensationalism of brutal violence, and the perception that psychological and mental disorder perpetuate such violence (Scheff, 1967). Psychiatry provides pseudo-scientific explanations for the public which are easily accepted, and laws proceed to be written accordingly (Petrunik, 1982). Psychiatry also offers a perceived randomness and unpredictability to the potential victim of violent crime. In other words, public fear of the "violent stranger" and of being victimized (Steadman & Cocozza, 1974) allows the dangerous offender provisions to stay in place and be socially accepted. These misrepresentations of violent crime, such as the focus on the "violent stranger", draws attention away from more common forms of

violence and diverts a disproportionate amount of scarce resources to a very small group of offenders (Petrunik, 1994). For example, the most notorious dangerous offenders in Canada are offenders who were strangers to their victims, such as Paul Bernardo. In this sense, the dangerous offender provisions can be viewed as counter-productive. Media attention focusing on the "violent stranger" detracts from efforts to address the most prevalent form of violence, domestic abuse (Grant, 1998). For the above reasons, it is necessary to understand that alternatives to the provisions, which hold many problems and inconsistencies, do exist, and do provide viable means by which to deal with a population of people considered to be "dangerous".

Standard Terms of Incarceration

Realistically, whether declared dangerous offenders or not, these offenders are likely to be incapacitated for at least five years on the basis of the severity of their offences and prior criminal records (Rogers & Mitchell, 1991). In fact, the average maximum sentence for offenders not labeled "dangerous", but who commit similar offences, is 12.5 years (Wormith & Ruhl, 1986). This length of time served is quite comparable to the average time period served by the dangerous offender before first release, which is 14 years (Ole Ingestrup, Commissioner, CSC, testimony before the Standing Committee on Justice and Legal Affairs, Dec. 11, 1996). Changes in the legislation for homicide as well as maximum terms of imprisonment set out in the Criminal Code for indictable offences would both deal with the dangerous offender population with longer

periods of incarceration, yet provide an environment where treatment is more available and where the label of being "dangerous" is not inhibitory.

The homicide legislation in 1976 introduced a prison term of a minimum of 25 years before parole eligibility for 1st degree murder, and from 10 to 25 years for 2nd degree murder (Porporino, 1991). Periods of parole ineligibility for numerous serious offences under S. 743.6 also exist and make it more difficult for offenders to obtain earlier parole eligibility dates, without being declared a dangerous offender (Grant, 1998). Other standard sentencing options also exist to potentially replace the dangerous offender provisions, both at the level of sentencing and at parole.

At sentencing, judges can use their discretion to impose the maximum sentence for violent or sex offenders, if the severity of the offence warrants the maximum penalty (Grant, 1998). The Criminal Code makes provisions for five categories of maximum terms of imprisonment for indictable offences, namely life, 14 years, 10 years, 5 years, and 2 years (Griffiths & Verdun-Jones, 1989). However, the maximum penalty fixed by Parliament is intended to be applied only to the 'worst case' of the particular offence concerned, referring to both the offence as well as to the offender, and the severity of the prior criminal record (Navin-Davis, 1982). If the offences are numerous yet not severe enough to warrant a maximum penalty, but the offender's prior criminal record or other indicators lead the judge to believe that the offender may be potentially

dangerous in the future, the judge may impose consecutive sentences as opposed to concurrent sentences which will lengthen the time incarcerated (Grant, 1998). As a last resort, the National Parole Board (NPB), under the Corrections and Conditional Release Act (CCRA), has the power to detain certain offenders in order to serve their full sentences in a penitentiary (Grant, 1998).

Detaining Offenders Beyond Statutory Release

Harsh punishments are required for some serious violent and sexual offenders, but to a great extent, the Criminal Code and the Corrections and Conditional Release Act (CCRA) already provide for harsh sanctions, provided that these options are fully utilized by the courts and National Parole Board (NPB) (Grant, 1998).

The CCRA, enacted in November of 1992, allows the Correctional Service of Canada to refer an incarcerated offender to the NPB for a detention hearing to determine whether or not detention should be continued. This sanction is applicable to offenders serving a term of imprisonment (except for life or indeterminate sentences) for an offence which caused the death of or serious harm to a person (either physical or psychological), and where reasonable grounds exist to believe that the offender is likely to commit an offence of this nature prior to the expiration of the sentence (Motiuk et al., 1995). If these criteria are met, and if the NPB is satisfied that the offender may re-offend in this

manner, the offender is detained and not eligible for another hearing for one year after the date of the detention order (Motiuk et al., 1995). Offenders released on statutory release (after two-thirds of the sentence has been completed) are supervised until their warrant expiry under the CCRA.

As well, if the NPB is particularly concerned about the release of an offender on statutory release, it has the authority to impose a residency requirement in a half-way house or to grant an offender a "one-chance" statutory release. If the offender violates this "one-chance", the conditional release is revoked, regardless of the reason for violation (i.e., technical violation or new charges) and detention follows until the expiration of the sentence (Motiuk et al, 1995). Annual reviews are conducted on the offenders who have been detained when their "one-chance" release was revoked, as well as for offenders released on statutory release with a residency order.

The above are just a few examples of the alternative sentencing options that currently exist with the potential to deal with violent sexual offenders. One item should be made very clear; looking for alternatives to the provisions does not ignore the fact that offences take place that could be classified as dangerous, but rather that the financial and social costs of selecting the few that act in this way is very high, while the amount of protection actually afforded to society is very low (Petrunik, 1994). The potential success of utilizing existing sentencing procedures in dealing with dangerous offenders will be examined in more detail

in chapter five, where a population of dangerous offenders is compared with a population of detained offenders. This comparison will demonstrate that alternatives exist which could potentially provide realistic and viable alternatives to the use of the dangerous offender provisions. In the next chapter, the theoretical framework of the dangerous offender provisions will be examined, from the legal and clinical perspectives, to challenge the foundation on which the provisions were built.

Chapter Three: The Legal and Clinical Perceptions of Dangerousness

The dangerous offender provisions represent a largely symbolic attempt to appease the Canadian public, angry at a perceived increase in the rate of violent crime and fearful of criminal victimization (Petrunik, 1994). The provisions also act to serve the special interests of numerous groups, such as criminal justice agents and mental health professionals who seek additional resources, or politicians who seek re-election (Petrunik, 1994). The dangerous offender hearing brings into sharp focus the uneasy alliance between mental health and the law (Rogers & Mitchell, 1991). In short, law has become an arena of competing perspectives, legal and clinical being the most pervasive yet most contradictory perspectives within the context of dangerousness (Petrunik, 1994). Civil libertarians largely endorse the view that the involvement of clinical judgements in legal decisions should cease, but paradoxically, legal concerns to restrict dangerousness criteria have led to an increased reliance on clinicians to identify dangerousness (Bowden, 1985; Stone, 1984).

Given the harsh sanctions for an offender deemed a "dangerous offender", a *dangerous offender standard* exists as a template to experts on what characteristics constitute a dangerous offender (Rogers & Mitchell, 1991). Assumptions regarding dangerousness as well as in predicting violence comprise

the dangerous offender standard. The standard holds assumptions that foster tension between mental health experts and the law, inevitably resulting in paradigmatic conflicts within both the legal and clinical perspectives of dangerousness. Both perspectives will be examined.

The Legal Perspective of Dangerousness

In the aftermath of a single high profile crime having been committed, such as a sexual offence against a child, the media sensationalize the event and the community often channels its outrage into forming action and special interest groups. These groups often place pressure on politicians to carry out criminal justice reforms, while psychiatrists serve on legislative committees and recommend solutions that promote a psychopathological explanation for such crimes (Petrunik, 1994). The end result can be the enactment of preventive detention legislation such as, in Canada's case, dangerous offender provisions (Scheingold, 1992; Petrunik, 1982; Tenney, 1962; Swanson, 1960-61; Sutherland, 1950a, 1950b). Although built on the notion that dangerousness is a clearly predictable trait, the law challenges the validity and reliability of clinical diagnoses of the assessments of dangerousness, and the very efficacy of clinical treatment in general (Petrunik, 1994).

From the legal perspective, the dangerousness of individuals has been conceptualized in terms of violations of criminal law and the need to provide

protection for individuals and society (Petrunik, 1994). The law incorporates the moral values of major religious traditions, and is characterized by free will, responsibility, and equal treatment under the law on the part of the offender, and proportionality, determinacy and parsimony on the part of the law (Petrunik, 1994). The law sentences offenders on the basis of their actions, not on the basis of the harm they may inflict in the future.

The dangerous offender provisions, built on the notion of clinical prediction, punish both on the basis of the offender's past and present actions, and also on their predicted potential for future violent criminal behaviour. Thus, the dangerous offender provisions are based on the premise that a number of violent characteristics can be reliably predicted (Bonta & Motiuk, 1996). For example, "failure to control sexual impulses" is one of the criteria that must be met for declaring dangerous offender status. While this criterion must be proven to be applicable to the offender, "failure" is not clearly defined in this context in the Criminal Code. Proponents of the clinical perspective of dangerousness focus on the offender's "inability" to control sexual impulses, while proponents of the legal perspective focus on the offender's "unwillingness" to control sexual impulses (Rogers & Mitchell, 1991).

From a legal perspective, the law exhibits a fundamental distrust of the judgements of clinical experts (Rogers & Mitchell, 1991). Accepting that mental health experts have no proven ability to predict dangerousness undermines

much of the credibility of the dangerous offender provisions (Rogers & Mitchell, 1991). It is argued by proponents of the legal perspective of dangerousness that predictions of dangerousness for the courts should include statements regarding their limitations or be considered professionally unethical (Ewing, 1987; Monahan, 1981a; Monahan, 1981b; Jackson, 1980). However, in its present state, clinical experts are not discouraged from making and presenting predictions to the court, and the judge is not formally made aware of the inadequacies and unreliability of expert opinions on future violence.

The legal perspective, then, is focused on the offender's past and present criminal behaviour as compared to the clinical perspective, which is a prediction on the offender's future violence.

The Clinical Perspective of Dangerousness

The clinical perspective of criminal behaviour emerged in the nineteenth century, within the context of positivist criminology and forensic psychiatry. This perspective was widely accepted in both Europe and North America until the 1960s. A key factor in the legal acceptance of the clinical model of dangerousness was the development in civil law of the notion that individuals could be held accountable for their actions strictly on the basis that they created risk for others whether or not they intended such risk to occur (Petrunik, 1994). Most offender legislation which explicitly used the clinical model, such as sexual

psychopath statutes in the United States, has since been abolished or drastically reformed (Petrunik, 1994).

Clinical and medical understandings of dangerousness have permeated the public consciousness and shaped how we view the question of what and who is dangerous (often a blurring of notions of sickness and moral evil, of madness and badness; in popular conceptions, a person might be considered as so evil that he must be sick; that this person must be controlled and the public be safe is the prime concern) (Petrunik, 1994). The acceptance of "dangerousness" as the basic ground for social control meant a change in the conception of the relationship between an individual's responsibility for an offence and the sanction appropriate for an offence (Petrunik, 1994).

The clinical model of social control, amongst policy makers in the criminal justice system and mental health realms, spread in the latter part of the nineteenth and early twentieth century (Petrunik, 1994). At this time, special measures for dangerous persons outside of the regular sentencing structure came into being, usually taking the form of indeterminate sentences for persistent offenders and various categories of individuals viewed as dangerous because of some kind of personality disorder, such as psychopathy (Petrunik, 1994). Within the clinical model, the tendency to sexually and violently offend is viewed as a product of individual pathology, and treatment is viewed as a means to reduce the risk of re-offending (Petrunik, 1994). Depending on an offender's risk level

and the nature or seriousness of his or her disorder, confinement for an indeterminate period is viewed as sometimes necessary to protect the public and facilitate treatment (Petrunik, 1994).

In the midst of public panic about high profile sex crimes sensationalized by the media, psychiatrists and the clinical community recommended solutions that promoted a psychologically-based explanation for such crimes (Rogers & Mitchell, 1991). Due to the seriousness of sex offences, and the physical and psychological impacts that these offences have on the victims, the clinical model is primarily applied to sex offenders. A consequence of the application of the clinical model to sex offenders is the depiction of dangerousness as a problem of individual pathology. Dangerousness is conceptualized in the clinical rhetoric as a disorder, depicted as a diagnosis, however the offender is deemed responsible for his or her own behaviour despite this "condition". The decreasing use of the term "sexual psychopath" reflects the view that sex offenders are responsible for their offences and thus deserving of punitive sanctions, and treatment has become ancillary to the aims of incapacitation and retribution in sentencing (Weisberg, 1984). Psychiatrists and other clinicians are viewed as authorized experts who pronounce on the dangerousness of individuals and recommend to the courts and to corrections and mental health officials who should be confined and who should be released (Petrunik, 1994).

Adherence in the dangerousness literature to a clinical model can be noted in the Ouimet Committee's recommendation of an indeterminate sentence for dangerous offenders and their statement that their support of such a measure was "predicated upon the existence of necessary custodial and treatment facilities appropriate for this class of offender" (Canadian Committee on Corrections, 1969, p.263). However, the clinical model has done very little to stimulate the development of effective forms of clinical intervention whether in diagnosis, prediction or treatment of dangerous offenders (Petrunik, 1994). While the clinical model acknowledges psychiatrists (as well as psychologists and criminologists, although to a lesser extent) as "experts", the application process of dangerousness demonstrates a fundamental distrust of the judgements of these "experts" (Rogers & Mitchell, 1991). In recognition of the shortcomings of the clinical model, efforts need to be made to demystify the clinical model and the role of mental health experts, specifically in the context of designating dangerousness (Petrunik, 1994).

Legal and Psychological Assumptions Regarding Dangerous Offenders

Several assumptions are made by law in regards to the dangerous offender standard and the characteristics of someone who is declared as a dangerous offender (Rogers & Mitchell, 1991, pp.239-240). All of these assumptions are psychologically-based, however, most of these assumptions are debatable as to their credibility in psychological research literature. Incongruity

between the assumptions upon which the dangerous offender provisions are based, and the accurate predictors of dangerousness, renders the capability of the provisions to capture suitable offenders for preventive detention very limited (Zinger & Wormith, 1994). Each assumption is stated and explored in more detail.

The first assumption made by law is that "dangerousness is an enduring trait or characteristic of an individual" (Rogers & Mitchell, 1991, p.239). Essentially, this assumes that dangerousness is not the end result of violent criminal behaviour, but is inherent in the individual for most if not all of the individual's life. Once an offender is placed in this category of presenting "indefinite dangerousness", the law emphasizes this assumption at the dangerous offender hearing, justifying that an indeterminate sentence is the only manner in which to deal with a person who is inherently dangerous. Although this assumption is based purely in psychology, available research offers little predictive evidence for a trait model of this nature.

The second assumption is that the "physical threat to a victim's life is roughly equivalent to a threat to his or her mental well-being" (Rogers & Mitchell, 1991, p.239). Although this is presumed by law, this assumption is not held by most behavioural scientists, who are likely to view physical violence which endangers life as substantively more severe than the psychological damage that the victim may endure. Because physical injury is easily identifiable and less

controversial than psychological damage, clinicians are more likely to emphasize the physical injury component of the offence in a dangerous offender hearing as compared to the less apparent psychological damage. The differential practices of courts and clinicians are most obvious in cases of child abuse, within which the courts emphasize both components of the offence equally, but clinicians tend to focus more on the physical threat or injury to the victim (Rogers & Mitchell, 1991; Melton et al., 1987).

The third and fourth assumptions of the law are purely psychologically-based, however, neither is supported empirically by psychological or psychiatric research. The third assumption, that "indifference for the victim is a predictor of recidivism" (Rogers & Mitchell, 1991, p.239), has been comparable in research to possessing an incapacity for feeling empathy, and was found to have a very low association with future dangerous behaviour (Hanson & Bussiere, 1995; Menzies, Webster & Sepejak, 1985). Indifference as a concept on its own has not been documented in research, thus it is unknown if an offender's feelings of indifference are an actual predictor of future violent behaviour. The fourth assumption, that "the brutality of a crime is a predictor of recidivism" (Rogers & Mitchell, 1991, p.239), is not supported in research findings. The law assumes that only "hardened criminals" are capable of committing the most brutal and violent of crimes, and this assumption is certainly worthy of investigation. Existing psychological research findings show that this assumption may be true only in the most extreme cases (Rogers & Mitchell, 1991). There are problems

inherent in the criterion of "brutality" in the dangerous offender standard because it is non-scientific and emotionally-based (Zinger & Wormith, 1994). Because of this, no attempts have been made to operationalize the concept of brutality, thus virtually no evidence exists of any association of brutality and predictions of future dangerousness (Rogers & Mitchell, 1991).

The fifth and final identified assumption of law in dangerous offender hearings is that "prior sexual conduct (regardless of treatment) is a predictor of recidivism for sexual offences" (Rogers & Mitchell, 1991, p.240). Research illustrates that this assumption may be true only in cases of offenders with paraphilic disorders and highly repetitive histories of dysfunctional sexual conduct (Rogers & Mitchell, 1991). However, in most other cases, there is substantial doubt regarding the validity of this presumption. For example, in none of the sex offender studies illustrated by Rogers & Mitchell (1991) did the recidivism rate for treated or untreated sex offenders exceed 50%. Quite the contrary, Furby, Weinrott and Blackshaw (1989) found that sex offenders who had received treatment recidivated at a rate of 19.4% for sex offences. While the law implies that "once a sex offender, always a sex offender", psychological research illustrates the opposite.

The clinical model has clearly influenced the criteria of the dangerous offender, and the manner in which the provisions have been applied to offenders. Arguably the greatest influence the clinical model has had on the provisions is

the notion of predicting future dangerousness, a process that is critical in order for an offender to be declared "dangerous". The next chapter will examine clinical predictions of dangerousness, with particular emphasis on the limitations of prediction and the difficulties inherent in their use, specifically within the criminal justice system.

Chapter 4: The Complexities and Limitations of Clinical Predictions of Dangerousness

Predicting dangerousness is extremely difficult, and a prediction of dangerousness holds enormous practical, moral and political implications (Blackburn, 1993). Evidence suggests that prediction is problematic under the best of circumstances (Monahan, 1981), is highly inaccurate (Ennis & Litwack, 1974), and that the level of accuracy is sufficiently low that it threatens the very basis of risk-based legal sanctions for sex offenders (Janus & Meehl, 1997).

Dangerousness is not a clearly measurable and tangible trait - it is rarely observed and is typically inferred by clinical experts from perceived symptoms or self-reports - thus, reliance on clinical experts to make reliable diagnoses and predictions that directly and indirectly affect numerous people is very controversial (Petrunik, 1994). If judges and courts are made to believe that clinical assessments of dangerousness are strictly scientific, subject to rigorous standards of proof and verification, then they are more likely to rely unquestionably on such assessments for reliable results (Grant, 1998). And by doing so, the inaccuracies of prediction are not acknowledged.

To thoroughly understand the complexities of clinical predictions of dangerousness, several issues will be discussed in more detail. They include the

methodological problems arising through prediction (including generalizations and over-prediction), as well as problems when predictions are used in the criminal justice system (such as over-reliance on predictions, absence of reliable predictors for sexual recidivism, and inaccuracy). The implications of prediction in general and specifically on dangerous offenders will also be examined. Numerous issues are explored within these categories so as to provide a more thorough examination of clinical prediction.

Methodological-based Problems with Prediction

Generalizations

In examining research on predicting dangerousness using a clinical model, it becomes evident that psychiatric predictions of dangerousness are, at best, highly speculative (Griffiths & Verdun-Jones, 1989). Clinicians working with violent or sex offenders have reported only modest success in diagnosing various personality disorders and predicting future violence (Petrunik, 1994). Moreover, the criteria used to define an offender as "dangerous" are far from concise.

The criteria used for defining an offender as "dangerous" are vague and leave ample room for interpretation among clinicians. The type of behaviour that an offender is predicted to engage in is also not described (Wettstein, 1992). For example, if a sex offender is deemed to be dangerous by the clinician, and future

sex offences are predicted if the offender does not remain incarcerated, it is not necessary for the clinician to predict the type of offence the offender is predicted to engage in. In other words, a clinician's prediction that the offender will engage in a "sex offence" if released could mean a sexually violent crime such as rape, or a non-violent sexual crime such as indecent exposure. Both are sex offences, however, only one offence would be considered *dangerous*.

A problem when describing an offender as dangerous is that without being required to specify the nature of the dangerous acts to which the person is disposed, or the conditions under which the person will engage in those acts, "the adjective is merely a vague judgement" that may be applicable to most sex offenders (Blackburn, 1993, p.329). Similarly, research illustrates that clinicians view dangerousness as dichotomous as opposed to being composed of varying degrees of dangerousness (Rogers & Mitchell, 1991). This means that dangerousness is either present or absent in the offender, with no degree in between.

Over-Prediction

Dangerousness is largely over-estimated. Clinical judgements of dangerousness have been notorious for their conservatism in identifying many as dangerous who subsequently do not behave in a violent manner (Bonta & Motiuk, 1996). The over-prediction of dangerousness can imply that some dangerous offenders were not really dangerous, and, due to this over-prediction

by mental health experts, "so-called mental experts were not as expert as had been assumed" (Petrunik, 1994, p.20).

There are two types of errors in preventive sentencing, namely false negatives and false positives, that lead to either over-prediction or under-prediction of dangerousness. A false negative is a prediction that an individual is not dangerous but he/she consequently re-offends violently. A false positive is a prediction that an individual is dangerous, found to be a dangerous offender, is detained indeterminately, but who would not have violently re-offended after released. The consequences of some false negatives are devastating, such as death or serious physical harm to a victim, however, the bulk of recidivism results in non-violent offences. Mental health professionals are subject to unspoken pressure, prompting them to label offenders as dangerous because of the threat that they pose to others on the basis of their criminal behaviour. While it is true that some false negatives have tragic consequences, this logic leads one to err on the side of indeterminately detaining all potentially dangerous offenders (Grant, 1998).

The most devastating danger of over-prediction is that it is an undetectable and unfalsifiable phenomenon. Dangerousness is not a clear and tangible term; labeling an offender as "dangerous" does not mean that he *will* re-offend, nor does it mean that the prediction was wrong if violent offences do not follow (Grant, 1998). It may be more appealing to label an individual as

dangerous, even if the clinician is relatively unsure, simply because of the implications which may follow should that individual be deemed "not dangerous" but violently re-offend. Consequently, as greater efforts are made to avoid false negatives, the number of false positives increases (Grant, 1998). For example, the largest follow-up studies specifically examining the prediction of violent recidivism among released offenders were conducted by the California Youth Authority (Wenk et al., 1972; Molof, 1965). Both studies of youthful offenders indicated that "attempts to predict which offenders would commit violent crimes on release resulted in unacceptably high numbers of people misclassified as dangerous" (Quinsey et al, 1998, p.34). More recent research on samples of offenders who were involuntarily detained in a mental hospital setting indicates that false positive predictions of violence exceed true positive predictions at a rate of approximately 2 to 1 (Wettstein, 1992; Steadman, 1972). In order to prevent increased over-prediction of dangerousness, the ideal system of preventive detention should aim to find a just balance between both types of errors and attempt to minimize both (Grant, 1998).

While small numbers of false negatives also occur, these events typically receive extensive sensational media coverage and high levels of public indignation. Due to the highly charged public reaction to false negatives, however low the risk of their occurrence, clinicians generally feel compelled to exercise conservatism in their diagnoses (Wettstein, 1992; Steadman, 1972). Although the consequences of false negatives can be both physically and

psychologically devastating for the victim and those intimately involved, it is not actively acknowledged that the consequences of false positives also have the potential to be devastating. Indeterminate incarceration and the indefinite loss of freedom constitute the fate of an individual who has been inaccurately assessed as dangerous.

Designating dangerousness is unreliable for a wide variety of reasons, including the fact that the baseline incidence of violent crime is extremely low, limiting any accuracy (Grant, 1998). From both a public safety and clinical responsibility perspective, it is more desirable to have over-predicted the number of offenders who are dangerous than to have under-predicted; the potential for a violent offence to be committed is somewhat more "controlled". It is unknown how many offenders labeled as "false negatives" exist, and how many false positives there will be to come. The consequences of falsely designating or not designating dangerousness are many. But how is it decided how much risk justifies detention, and how many false negatives can be justified in "protecting" society?

Problems with Using Prediction in the Criminal Justice System

Absence of Reliable and Standardized Predictors

The dangerous offender provisions, and the criteria upon which they are applied, are based on the premise that violence can be reliably clinically

predicted (Bonta & Motiuk, 1996). In fact, each phase of incarceration (namely sentencing, admission, classification, parole, discharge, and adjustments in conditions of supervised community release) necessitates implicit and usually explicit judgements about the likelihood of future criminal behaviour (Quinsey et al., 1998). While it is presumed that certain characteristics and traits of an individual are directly related to predictors of future criminal conduct, those characteristics identified as being predictive by both clinicians and legal personnel are not necessarily predictive of future behaviour to any degree.

Clinical and Legal Dependence on Unreliable Predictors

Mental health professionals commonly weigh cues that are not empirically related to actual violence or dangerousness, resulting in numerous unreliable or even inaccurate predictions of dangerousness (Cooper & Werner, 1990; Quinsey & Maguire, 1986; Werner et al., 1983). For example, clinicians place importance on prior homicide, however, homicide has been examined in research and found to be correlated with a non-dangerous outcome as opposed to a dangerous outcome (Black & Spinks, 1985). Moreover, clinicians place importance on institutional adjustment factors such as incurring assault charges, while these factors are found to be unrelated to violent re-offending in discharged offenders (Quinsey & Maguire, 1986).

Legal personnel, such as Crown attorneys, are also unaware of the most reliable predictors of violent recidivism. Bonta, Harris, Zinger & Carriere (1996)

interviewed 21 Crown attorneys, all of whom were selected due to their direct experience with dangerous offender applications and hearings. Each attorney was asked to rate, in order of predictive ability, a list of 37 possible predictors for violent sexual recidivism, selected from a review of sex offender research. Table One compares the top ten ranked predictors as nominated by the Crown and by sex offender research:

Table One:
A comparison of the 10 highest predictors of sexual recidivism,
ranked by crown attorneys and sex offender research

1	Diagnosis of psychopathy/APD	Preference for children (shown by phallometric assessment)
2	Lack of remorse	Severe psychiatric disorder
3	History of assaults and violence	Prior sex offence
4	History of sexual assault	Diagnosis of psychopathy/APD
5	Treatment provided but failed	Poor relationship with mother
6	Impulsivity	Low treatment motivation
7	Brutal nature of the crime	Prior criminal history
8	Child molester	Young victim
9	Use of a weapon	Victim is a male child
10	Index offence was sexual	Early sex offending

(Bonta et al., 1996, p. 44).

The three factors deemed by the Crown attorneys to be highly predictive (namely a diagnosis of psychopathy of anti-social personality disorder, lack of remorse, and a history of assault or violence) showed very weak empirical relationships to sexual recidivism. According to sex offender research, these

three factors are relatively insignificant predictors of sexual recidivism (Hanson & Bussiere, 1995).

As indicated previously, the primary purpose of the dangerous offender provisions is the protection of the public from offenders who have been predicted to violently or sexually recidivate if released. By examining the chart, it becomes evident that the very people who make applications for dangerous offender trials, and who push for declarations, are largely unaware of the actual predictors of violent sexual recidivism. Why, then, are Crown attorneys given the power to advocate for the indeterminate incarceration of an individual when their assumptions about violent sexual recidivism are not based on sex offender research?

Research-based Predictors of Violent Sexual Recidivism

The predictors of violent recidivism are essentially the same in the populations of prisons, psychiatric facilities and mental hospitals due to the fact that the personal characteristics empirically related to violent recidivism do not vary as a function of the type of population studied (Bonta et al., 1998). Such predictors, according to research, are usually based on static factors, which are unchangeable and easily measurable, with very little concern for changeable dynamic factors.

Accurately predicting dangerousness, as previously illustrated, is a highly complex and next to impossible task. Mental health professionals' uncertainty

over which factors are indeed predictive of violence, coupled with their ability to deem an offender as "dangerous", make for a precarious combination. In fact, the most obvious behaviours that one would presume to be predictive of violence are, in reality, not predictive. For example, the criminal history of an offender, as a predictor of violent recidivism, is examined below.

Mental health professionals place great importance and reliance on official arrest records, particularly past violence, when predicting future violence. Numerous studies, both previous and recent, confirm that the number of previous and current convictions for general or violent crime are positively related to the probability of criminal recidivism (Motiuk & Porporino, 1991; Cooper & Werner, 1990; Bonta & Motiuk, 1985, 1987, 1990; Gabor, 1986; Quinsey, 1984; Monahan, 1981; Quinsey & Abtman, 1979; Waller, 1974). However, some studies have shown that while the current offence is somewhat helpful in predicting dangerousness, the presence of past violence is not a consistent predictor of future violent re-offending (Hanson & Bussiere, 1995; Holland et al., 1982; Kozol et al., 1972; Wenk et al., 1972). Despite the fact that many researchers accept this variable as a reliable predictor of future recidivism, there are significant problems in relying on criminal records for predicting future dangerousness. The most apparent problem is that reliance on historical records is merely more convenient for the clinician. The information may not be complete or accurate, it may be based purely on the self-report of the offender, and usually no attempts at corroboration are made for verification (Quinsey et al., 1998).

Thus, it is questionable if using prior criminal record as a predictor is actually reliable in predicting future violent crime, or if it is used simply because it is easy, convenient and saves time for the clinician.

Very few reliable factors appear to be analyzed regularly or as a standard in predicting dangerousness. For example, Menzies, Webster, & Butler (1981) found that psychiatrists reported examining the current offence, criminal record, childhood pathology, social and family circumstances, and even physical cues during the interview. Predictors of criminal recidivism found to be particularly weak in research yet still used to make clinical predictions include age at first arrest, criminal versatility (variety of offending), alcohol abuse, childhood pathology, low educational attainment, and escape attempts or escape (Motiuk & Porporino, 1991; Bonta & Motiuk, 1990, 1987, 1985; Gabor, 1986; Quinsey, 1984; Monahan, 1981; Waller, 1974; Justice et al., 1974). As a result, clinicians rely on "predictors" to assess the possibility of future dangerousness, upon which a recommendation for the offender to be deemed "dangerous" may be made. In reality, many of these "predictors" may not predict at all.

Current Risk Assessment Measures for Sex Offenders

Given the significance that risk assessments are afforded in the process of a dangerous offender application, it is helpful to present a very brief illustration of the assessments currently in use to determine both the likelihood of recidivism and the public safety risk of the offenders labeled dangerous. Assessments

predicting potential future violent or sexual recidivism are of vital use in the decision to declare or not declare an offender as dangerous.

There are two types of risk factors; static and dynamic (Andrews & Bonta, 1994). Static risk factors, also described as objective or standardized, are unchangeable items, often aspects of the offender's past (i.e., age, previous convictions, age at time of conviction). Dynamic risk factors represent the present behaviour and circumstances of the offender, and are changeable over time (i.e., the presence of psychiatric diagnoses, the family background of the offender). There is considerable debate over which type of risk factor is most predictive of criminal offending.

Some research has found that objective and static criminal risk scales have worked quite well at predicting general, non-sexual and non-violent recidivism among sex offenders (Bonta & Hanson, 1995; Motiuk & Brown, 1993). For example, research indicates that the Statistical Information on Recidivism scale (Bonta et al., 1996; Nuffield, 1982), developed by the Department of the Solicitor General, has been a consistent predictor of recidivism among general offender populations (Hanson, 2000). Another well-reputed risk scale, the Violence Risk Appraisal Guide (Quinsey et al., 1998; Webster et al., 1994), predicts violent recidivism for both mentally disordered and sexual offenders (Rice & Harris, 1995). However, while both risk assessments have shown a degree of success in predicting general recidivism among sex offenders, neither

is a reliable predictor of sexual recidivism among sex offenders. In fact, Bonta and Hanson (1995) found that the Statistical Information on Recidivism was a poor predictor of sexual offence recidivism, and the Violence Risk Appraisal Guide was reported to predict sexual recidivism at less than half of the degree that it accurately predicts general and violent recidivism (Rice & Harris, 1995).

While the use of dynamic risk factors has been criticized because of the likelihood of change and thus unreliability, it has been noted more recently that the inclusion of dynamic factors may increase the predictive accuracy of risk assessments (Hanson & Harris, 1998). While dynamic factors tend to predict general recidivism among non-sexual criminals better than static factors (Gendreau et al., 1996), research on the use of dynamic factors as related to sexual offending is not well developed.

Previous reviews of sexual offender recidivism have been limited to a narrow range of predominantly static risk factors (Quinsey et al., 1993; Hall, 1987; Furby et al., 1989), instead of a combination of both static and dynamic factors. Because not enough empirical evidence is available to establish dynamic risk factors for sexual recidivism, assessments about an offender's risk of sexual recidivism can only be based on the specifics of individual cases (Hanson & Bussiere, 1996). However, it is possible that modest improvements in the prediction of dangerousness can be made by combining actuarial and clinical assessments (Petrunk, 1994).

While more recent risk assessment measures, such as the Level of Service Inventory (Andrews & Bonta, 1995) and the Psychopathy Checklist (Hare, 1991), combine both static and dynamic factors into their assessments, neither are specific to the sex offender population. Furthermore, while the Level of Service Inventory is presently in use in correctional facilities for risk assessment and classification purposes, it is indicated that the Psychopathy Checklist is primarily a research instrument as opposed to a clinical application (Serin, 1989). While the Psychopathy Checklist has shown impressive validity with respect to the prediction of violent behaviour (Solicitor General, 1999), the fact that currently the Checklist is not used in official security classification practices or in predicting risk to recidivate may be indicative that it is still primarily used as a research tool.

There have been limited attempts to develop objective risk assessments specifically for sexual recidivism (Hanson, 1997). Despite the success that the above-mentioned measures have shown toward general recidivism, it appears that sexual offending is a more unique type of crime which holds its own unique risk factors (Hanson & Bussiere, 1998; Hanson et al., 1993), most of which are not examined in current risk assessments. In recognition of this fact, the Violence Risk Appraisal Guide was altered in order that it could be used on sex offenders specifically.

The development of this version, the Sex Offender Risk Appraisal Guide (SORAG), was based on a follow-up study of 178 sex offenders released from a maximum-security psychiatric facility (Belanger & Earls, 1996). Because the test sample was comprised of sex offenders at a psychiatric facility, it is not clear whether the SORAG would be useful when applied to sex offenders who are not incarcerated in a psychiatric facility (Belanger & Earls, 1996). And, due to the fact that only approximately 10% of all dangerous offenders are housed at psychiatric facilities (Jackson, 1994), the SORAG may not be a helpful measure for dangerous offenders at all. Overall, the SORAG is deemed to be "a good predictor of general violent recidivism, but only a moderate predictor of sexual recidivism" (Hanson, 2000, p.4).

Other risk assessment measures for sex offenders include the Rapid Risk Assessment for Sexual Offence Recidivism (RRASOR) (Hanson, 1997), and the Static-99 (Hanson & Thornton, 1999). The RRASOR, tested on a number of different samples in Canada, the United States, and the United Kingdom, is moderately accurate in the prediction of sexual recidivism, "but has little relationship to general or non-sexual violent recidivism" (Hanson, 2000, p.4). The Static-99 is also moderately accurate in the prediction of sexual recidivism, and shows at least moderate accuracy in predicting any violent recidivism (Hanson, 2000).

Arguably, many risk assessment tools have the potential to measure, to varying degrees of accuracy, violent and sexual recidivism. However, it is the enthusiasm of the courts to overly rely on the results of such measures in dangerous offender applications that is the most problematic. While many risk assessments measure recidivism, multiple other factors must be considered in order to ensure more accuracy in the prediction process. For example, risk evaluators should "always consider whether external factors could influence the score" provided by the risk scale (Hanson, 2000, p.6), such as social, familial or environmental factors that may not be incorporated into or measured in the risk scale. The degree to which risk scales should be adjusted to account for this is yet to be determined (Hanson, 2000). Therefore, while risk assessments provide a basis for determining "dangerousness", it is unknown how much reliance should be placed on their results as compared to other external factors.

More specific to the dangerous offender application process, it is important to note that research indicates that the use of current assessment scales improves the decisions of those tasked with making risk determinations by only 30% (Andrews & Bonta, 1998). This is a very small fraction when considering that an individual's freedom may be indeterminately affected by such a determination.

Factors Ignored when Predicting Dangerousness

While definite problems exist in the ability of mental health professionals to predict future dangerousness, numerous other factors (aside from the absence of reliable predictors) impede the clinician's ability to accurately assess an offender's behaviour. Clinical assessments must encompass the broader information about the offender as opposed to relying solely on official criminal records or past psychiatric diagnoses (Kleinmuntz, 1990; Faust, 1986; Quinsey & Maguire, 1986). Special attention to situational factors and environmental characteristics, such as employment, living location and atmosphere, may improve predictability over focusing on dispositional variables (Petrunik, 1994; Monahan, 1981). In short, rather than continuing to search for empirical predictors, it is perhaps more appropriate to focus on a theoretically-based decision making process for arriving at clinical decisions about dangerousness (Pollock et al., 1989).

Moreover, in their examination of dangerousness, mental health professionals do not even consider many forms of dangerousness, such as child neglect and impaired driving (Petrunik, 1982). If clinical assessments are to be considered even moderately accurate, mental health professionals must take into account all of the information on the offender, as opposed to selecting what is readily available and convenient.

Inaccuracy

Predicting violence to any degree of certainty and accuracy is next to impossible without an "almost inconceivable degree of control over key environmental, treatment, and biomedical variables", such that the most a clinician can ever offer is an estimate on the *probability* rather than prediction of future violent behaviour (Webster et al, 1985b, p.xviii). It is evident that a drastic change in the prediction of dangerousness is necessary, yet it cannot be forgotten that the current clinical system of prediction and management of dangerous offenders is part of a much larger legal and bureaucratic enterprise with a lengthy history (Quinsey et al., 1998). In other words, it is unlikely that improvement in prediction will be obtained without attempting to change a variety of institutional and systemic practices first (Quinsey et al, 1998).

Inherent in the current clinical system of prediction, as noted previously, is the over-prediction of dangerousness, the result of utilizing a system of insufficient ability to predict. Steadman and Cocozza (1974) studied 970 psychiatric patients released under judicial order in the United States. While 107 of the patients were considered "too dangerous" to be placed in regular psychiatric facilities, only 16 of these 107 patients (15%) were re-arrested or re-hospitalized for assaultive or violent behaviour. The identical results were also found in a population of Canadian patients judicially released from a maximum security mental hospital (Quinsey et al., 1975).

These studies do not prove the complete inability of mental health experts to predict dangerousness accurately, but they demonstrate not only the over-prediction, but also the blatantly wrong prediction of dangerousness for 85% of the psychiatric patients above. Should the clinicians' initial predictions have led to successfully declaring each patient a dangerous offender in Canada, this may have meant that 107 offenders would be serving indeterminate sentences, 91 of whom should have never been deemed as dangerous. To personalize this more, 91 offenders may have potentially had their freedom stripped from them as a result of the impact of a clinician's assessment on the courts. This "false negatives" rate would be unacceptably high, yet virtually undetectable because the offender is incarcerated indefinitely.

Intuition-based Prediction

Due to the harsh consequences of declaring an offender "dangerous", it is desirable to believe that the predictions of dangerousness flow from established research findings. However, empirical research has not completely established that clinical predictions can attain a respectable degree of accuracy (Janus & Meehl, 1997; Webster et al., 1985), as such a prediction is never likely to reach more than 40% accuracy (Menzies et al., 1985; Monahan, 1981). Therefore, predictions of dangerousness are more representative of the ad hoc reasoning of clinician-based intuition. Such "clinical sloppiness is unforgivable given the gravity of these hearings both for the accused and the community" (Rogers &

Mitchell, 1991, p.261). Although it may be "unforgivable", clinical sloppiness is inherent in prediction.

Ultimately, prediction is a judgement based on available objective and subjective factors. The clinician is a subjective being, influenced by his or her personal experiences, beliefs, and physical surroundings. Due to this inherent subjectivity, the clinician making the judgement is, to a certain degree, biased, and either aware or unaware of his or her biases. For example, a bias which may impact on the clinician's judgement without his or her knowledge includes possessing certain emotions toward the crime committed by the offender, such as a child molester. Or a clinician may be aware of his or her biases, such as making a judgment which seeks out confirmatory rather than disconfirmatory evidence (Faust, 1986).

Formally predicting dangerousness is a two-fold judgement, considering both the act and the person's likelihood of committing such an act in the future need to be evaluated (Rogers & Mitchell, 1991; Mulvey & Lidz, 1984). In practice, this is not the case. It is not necessarily true that because an individual has committed an offence, he or she will commit it again. For example, it is easier to identify a substance as soluble in water, but it is quite difficult to predict the likelihood of its getting wet (Rogers & Mitchell, 1991). While research assumes that clinicians are forecasting an outcome, they may in practice simply

be judging only the probability or strength of a person's tendencies (Gordon, 1977).

Pursuing this argument further, if a prediction is simply a judgement based primarily on intuition as opposed to objective fact, are the predictions of clinicians more "expert" than the predictions of laypeople? Quinsey and Abtman (1979) compared the judgements of dangerousness of four forensic psychiatrists and nine schoolteachers to observe if there was any difference in how mental health "experts" predict dangerousness. They concluded that both groups predicted using similar methods, suggesting that there is nothing distinctive or "expert" in the judgements made by psychiatrists concerning dangerousness. Similarly, Motandon and Harding (1984) found that psychiatrists exhibited no higher agreement in rating dangerousness than did other professionals or laypeople. While there is no recent evidence to suggest that this is still the case, there is also no evidence to imply that the judgements of psychiatrists and mental health experts are any more "expert" than the common individual.

If laypeople and clinicians alike dispense comparable predictions, there exists an obvious lack of professionalism and scientism in predicting dangerousness. Further, it is implied that the offender's life, whose fate rests in the court's hands, is not significant enough to warrant a more detailed assessment. Is Canadian society justified in sentencing an offender to an indeterminate detention based on the mere probability that he may commit such

an offence in the future, let alone that the prediction upon which this is based is seriously flawed (Petrunik, 1982)?

The Implications of Inaccurate Prediction

In being aware of the inaccuracy of clinical prediction, it is evident that numerous implications result from a prediction of dangerousness. These implications include an increased false positives rate, major ethical issues resulting from the prediction, and implications for those touched the most by these predictions, the offenders designated as "dangerous".

Increased False Positives Rate

Due to the pressures on clinicians to over-predict dangerousness, given that the clinician may be held partially responsible or professionally liable for false negatives, it is not implausible to suggest that clinicians may tend to err on the side of over-predicting. The publicity of a false negative may hurt the clinician both professionally and personally, whereas the probability of a false positive even being identified is highly unlikely (Grant, 1998).

The existence of recent false positives is rarely evident due to the fact that offenders wrongly labeled as dangerous are already incarcerated. Because few studies delve into the issue of false positives, the frequency of false positives is rarely illustrated. One study, performed just prior to the enactment of the

dangerous offender provisions, compared mentally disordered offenders released after treatment with those identified as dangerous, and still released. Although it is somewhat dated, research conducted in the same time frame, coupled with the heightened concern of the false positives rate pertaining the dangerous offender provisions, suggest that the results of the study may still be representative.

Kozol, Bucher and Garofalo (1972) conducted a five year follow-up on a sample of sex offenders, 386 released and deemed non-dangerous following treatment, and 49 released against clinical advice that they were dangerous. Although 8% of the offenders deemed as non-dangerous and 35% of the offenders deemed as dangerous committed further serious offences, suggesting that treatment had some effect in reducing violent recidivism, this leaves a 65% false positive rate for those judged as dangerous. In other words, the clinical predictions of dangerousness in this sample were accurate in only 35% of the cases. Other studies of a similar nature (Steadman, 1977; McGarry & Parker, 1974; Hodges, 1971) had relatively the same false positive rate, and Steadman and Keveles (1972) even had a false positive rate of 80%.

It is not surprising that no recent research has been conducted to determine the false positives rate present today in the dangerous offender provisions. Throughout the 1970s and 1980s, because of the low predictive accuracy of the available risk assessment instruments, researchers focused on

false positives (Motiuk & Serin, 1998). This research was fueled by public concerns for community safety. However, by the late 1980s and 1990s, with the existence of the provisions and society's low tolerance for false negatives, research has shifted its concern to offenders who are not labeled "dangerous" but who subsequently re-offend violently or sexually (Motiuk & Serin, 1998). Due to this shift, it can be seen that this excessive concern for false negatives may actually be impeding reintegration potential and efforts (Motiuk & Serin, 1998). Furthermore, due to the low societal tolerance for false negatives, it is intuitively more pleasing for the public to believe that all "dangerous" offenders have been labeled and sentenced accordingly under the provisions. To conduct research that would uncover a large proportion of offenders who are actually dangerous but are not labeled as such, or a proportion of offenders labeled as dangerous who, in fact, are not dangerous might possibly result in social disrespect of the criminal justice system and its procedures.

The Morality of Prediction

Given that the freedom of an offender is determined by the declaration of "dangerous" by a court, it is not surprising that the dangerous offender provisions are the subject of controversy. However, it is surprising that the American Psychiatric Association, the very association which sets the standards and boundaries for all psychiatrists, found it professionally unethical for psychiatrists to make determinations of dangerousness (Ewing, 1987)! If the association that guides psychiatrists in their professional careers indicates that deeming an

offender "dangerous" is professionally unethical, how are we to expect that legal personnel and the courts will have any confidence in the clinicians who predict dangerousness, let alone any confidence in the provisions themselves?

Some arguments have been made that might discourage most experts from making predictions about dangerousness. Ewing (1987) indicates that a prediction of dangerousness should be considered professionally unethical if it fails to include a statement regarding the limitations or potential for inaccuracy inherent in such predictions. This would act to warn the judge of the inadequacies of expert opinions on future violence. Although this system would mandate that chosen experts would present a more honest, humanist and ethical assessment, the system would still remain the same. The method of prediction used by the clinician would remain flawed and unchanged, and although a new requirement would be made to notify the court of the limitations of prediction, it is ultimately the judge who may still accept the prediction at face value and declare the offender "dangerous" (Rogers & Mitchell, 1991).

Despite both the inability of clinicians to accurately predict dangerousness, and the ethical issues surrounding an offender being deemed "dangerous" through such a flawed process, numerous decisions in the criminal justice realm are based on clinical assessments. Decisions regarding bail, fitness to stand trial, mental disorder dispositions, sentencing, parole determinations, and dangerous offender hearings all involve risk assessments as crucial elements in

the decision-making process. Moreover, in the United States, some states allow risk assessments to impact decisions about whether or not to impose the death penalty on an offender (Grant, 1998). Ethically, should the ultimate power of finality and indeterminacy be placed in the hands of "experts" whose predictions are even 99% accurate?

The Impact of Prediction for Dangerous Offenders

"Dangerousness is in the eye of the beholder" (Rogers & Mitchell, 1991, p.249). When a mental health professional makes a prediction as to an offender's potential to commit further violent crime, the prediction is based on available and convenient information, and observations of the offender during incarceration (Jackson, 1994). In reality, what the clinician observes may not be comparable with the behaviour that the offender exercises in the community.

Literature on predicting dangerousness criticizes the degree to which clinicians can accurately predict who presents a danger and who does not (Ennis & Litwack, 1974). Despite this, courts continue to have faith in psychiatry. Courts impute abilities to psychiatry and related professions "which by and large they do not possess" (Webster, 1994, p.17). As a result of this movement toward psychiatry, the criminal justice and mental health systems have progressively introduced more junctures at which a prediction of dangerousness is required (Webser, 1994). Given that the prediction of dangerousness is a necessary

component of the dangerous offender provisions, and given that mental health professionals cannot predict, with any degree of certainty, whether an individual will commit a serious personal injury offence in the future, the dangerous offender provisions are "difficult to justify on a logical basis" (Griffiths & Verdun-Jones, 1989, p.299).

If legal decision-makers and mental health professionals are to continue to work together, they must relate the legislative language to the empirical literature on the prediction of recidivism in order to balance effectively the rights of the offender with the protection of the public (Quinsey et al, 1998). Also, both parties need to, at a bare minimum, be aware of the social and legal context of the criminal justice system, understand the implications that their judgements hold over the offender, and recognize that "psychology does not have all the answers" (Blackburn, 1993, p. 412).

Summarizing Prediction

In summary, the predictive abilities of mental health "experts" in the early studies reviewed "did not surpass the flip of a coin" (Rogers & Mitchell, 1991, p.255). While it is undisputed that more reliable measures for predicting violence have been developed recently in the field of clinical psychology, the large degree of subjectivity inherent in the application of these measures and the interpretation of the results render too many inaccuracies. This, coupled with the court's over-

reliance on the results of such inexact measures in dangerous offender hearings, has the potential to result in dangerous offender designations that may be unwarranted.

More importantly and ultimately, the question is deeper than whether mental health professionals can really assess dangerousness accurately. Instead, it should be asked what level of certainty should the criminal justice system demand before such grave deprivations of liberty, based on a preventive rationale, can be premised on assessments of risk (Otto, 1994)?

In recognition that the so-called evidence provided by mental health experts in dangerous offender trials is largely based on opinion as opposed to predictive factors of violent sexual recidivism, and in accepting that mental health experts cannot predict dangerousness accurately, the credibility of the dangerous offender provisions is greatly undermined (Rogers & Mitchell, 1991). A constructive and practical method to determine if the dangerous offender provisions are being applied to the right offenders is to compare a population of offenders declared "dangerous" to a population of offenders who offend in a similarly violent and/or sexual manner. The next chapter will examine the similarities and differences between these two groups.

Chapter Five: Comparing Dangerous Offenders to Other Violent Offender Populations

Up until now, the theoretical foundation upon which the dangerous offender provisions were built has been critically examined. This thesis has identified theoretical and conceptual inconsistencies within the provisions, conflicting perspectives and definitions of dangerousness held by both the legal and mental health realms, and problems inherent in predicting dangerousness. However, do such flaws exist in the practical application of the provisions? In other words, are the right people being declared "dangerous"?

In order to examine if the practical application of the provisions is more successful than standard sentencing procedures in predicting future dangerousness, it is necessary to compare dangerous offenders to other similar offenders. More specifically, the two populations of individuals judged by the criminal justice system to be the most high-risk violent offenders in the country, and considered more likely to violently or sexually re-offend upon release, are detained offenders and dangerous offenders (Bonta & Motiuk, 1996; Bonta et al., 1996). In order to evaluate if the dangerous offender provisions are indeed more successful than standard sentencing procedures in identifying only "dangerous" offenders, the population of offenders labeled "dangerous" under the provisions

should be distinctly different from the population of detained offenders, who are not labeled "dangerous".

Detaining Offenders Beyond Statutory Release

While the majority of offenders are released after completing two-thirds of their sentence, at their statutory release date, a small number of offenders are detained at this date. Under the Corrections and Conditional Release Act (CCRA), an offender can be detained in prison until the sentence has expired, otherwise known as the warrant expiry date.

In order for an offender to be subjected to further detention, the CCRA stipulates specific criteria that must be present in the offender's case. An offender currently serving a term of incarceration for an offence which caused serious harm (either physical or emotional) or death to another person is subject to further detention if there are reasonable grounds to believe that this offender is at high-risk to commit another violent offence, or offence of this same nature, before completing his or her sentence (Bonta & Motiuk, 1996; Motiuk et al., 1995). The likelihood of an offender being detained also depends on the length of the sentence being served, as the CCRA detention provisions exclude offenders serving life or indeterminate (dangerous offender) sentences.

When all of the above criteria are met, the offender must be referred to the National Parole Board for a detention hearing in order to determine whether or

not detention should be maintained. If the Board is satisfied that the offender may re-offend in a violent or threatening manner, the offender is detained and is not eligible for another hearing for one year after the date of the detention order (Motiuk et al., 1995). However, the Board also has the authority to impose other dispositions on the offender. For example, the Board can release the offender on statutory release with a requirement that the offender reside at a half-way house and be subject to monitoring. Also, the Board can choose to grant the offender a "one-chance" statutory release. Should the offender violate his or her "one-chance", the conditional release is then revoked regardless of the reasons for the violation (e.g., technical breach or incurring new charges), and detention follows (Motiuk et al., 1995).

If detention can be imposed on offenders deemed to be "dangerous" by the National Parole Board due to their violent offences and the perceived likelihood of violent re-offending, what makes a dangerous offender more "dangerous" than a detained offender?

Comparing Dangerous Offenders to Detained Offenders

Given that detained offenders are viewed to be at a very high risk to re-offend if released, and are thus incapacitated until sentence expiry, are offenders labeled as dangerous offenders at an even higher risk to re-offend, since they

are incarcerated indeterminately? The only reliable answer to this question can be found in a comparison of dangerous offenders and detained offenders.

In order to perform such a comparison, Bonta et al. (1996) performed a study in which 64 dangerous offenders were compared to a known group of 34 violent offenders. The violent offenders, who had been detained until their sentence expiration, and subsequently re-offended violently upon release, are referred to as "detention failures". The offences for which the detention failures re-offended include homicide, assault, robbery, and sexual crimes. The project thoroughly reviewed both penitentiary and court files, collecting a range of information on dangerous offenders from Ontario and British Columbia. The sample of dangerous offenders represented 43.8% of the total dangerous offender population in Canada (Bonta et al., 1996). The results of the comparative study are illustrated here in terms of personal and demographic characteristics, family characteristics, index offence, criminal history, and psychological assessment results and diagnoses.

In this study it is argued that the group of detention failures, in retrospect, represents a population of offenders who could have been designated as dangerous offenders, as they share many of the characteristics of offenders labeled "dangerous" (Bonta et al., 1996). Also, because both groups of offenders share similar characteristics and are both high-risk violent offender groups, the study stated that the appropriate population is being targeted through the

dangerous offender provisions (Bonta et al., 1996). This argument would support the increased use of the dangerous offender provisions, stating that the provisions should have declared dangerous the 34 individuals who violently re-offended upon release.

On the other hand, this thesis argues the opposite. This argument presumes that the provisions do target a very distinct population of high-risk offenders, especially given the harshness of the indeterminate sentence afforded to offenders declared "dangerous", as well as the specific court procedures necessary in the application and declaration process. Given this, it is very reasonable to believe that there must be several apparent and substantial differences between the 64 dangerous offenders and the 34 detention failures in order for detention failures to have not been declared dangerous. Instead of arguing for the increased usage of the provisions, this thesis argues that if the two groups of offenders are strikingly similar, yet the provisions only declare one group as "dangerous", the provisions are neither consistent nor applied appropriately to the "right" offenders.

Comparing Personal and Demographic Characteristics

In general, dangerous offenders and detention failures are strikingly similar in terms of personal and demographic characteristics. More specifically, the two populations of offenders were statistically indistinguishable in terms of characteristics such as educational level, employment status, and marital status

(Bonta et al., 1996, p.20). Although the differences between these factors are not statistically significant, differences in these factors still exist. For example, while dangerous offenders and detention failures have no noteworthy differences in respect to educational level, the vast majority of dangerous offenders are Caucasian, whereas less than two-thirds of detention failures are Caucasian. Noteworthy is the fact that detention failures have a higher unemployment rate, and tend to be younger and single, characteristics that are typically associated with violent criminal involvement. This would tend to imply that this population of offenders is unstable as compared to dangerous offenders, a population that is generally older, more readily employed, and more likely to be involved in a relationship with a significant other. Table Two outlines the personal and demographic characteristics of both dangerous offenders and detention failures.

**Table Two:
Comparison of dangerous offenders and detention failures
based on personal and demographic characteristics**

Age (mean)	34.4 (56)	26.7 (32)
Grade last completed	8.5 (62)	8.0 (33)
% Caucasian	95.2 (63)	64.7 (34)
% single	48.4 (62)	64.7 (34)
% unemployed	63.3 (49)	72.4 (29)

(Bonta et al., 1996)

Comparing Family Characteristics

While no statistically significant relationships exist between dangerous offenders and detention failures in terms of personal and demographic

characteristics, the family is an area where differences are quite apparent. From the evidence, it appears that dangerous offenders are subjected to increased family dysfunction and violence. For example, the dangerous offender population experienced sexual abuse inflicted by a parental figure at over twice the rate that the detention failure population experienced (Bonta et al., 1996). Dangerous offenders were also neglected by their parents as children over four times as frequently as experienced by detention failures. From these results, it is possible to infer that dangerous offenders have a higher incidence of diagnoses for psychological disorders because this population has been subjected to such antisocial behaviour from a young age and has modeled that behaviour over time. Chart Six outlines the incidence of parental sexual abuse and neglect both dangerous offenders and detention failures were subjected to as children.

Chart Six:
Incidence of parental sexual abuse and neglect as a child

(Bonta et al., 1996)

Comparing Index Offence

The most noticeable difference between dangerous offenders and detention failures in terms of index offence is that dangerous offenders were almost three times as likely to have been convicted of a sexual offence than detention failures (Bonta et al., 1996). In fact, 92.2% of the dangerous offenders were sex offenders, versus 35.3% of detention failures (Bonta et al., 1996, p.21). While this factor is the only statistically significant difference between dangerous offenders and detention failures with respect to index offence, differences also existed in the manner in which the offence was committed. For example, dangerous offenders tended to have more victims, and more commit index offences classified as "brutal" (according to the criteria of the provisions) than detention failures. Interestingly, detention failures tended to use physical violence and brutality with their victims almost twice as often as dangerous offenders, while dangerous offenders tended to use threats and other non-physical brutality rather than physical violence.

Detention failures appear just as, if not more, violent. For example, while detention failures had fewer victims, their victims were more likely to experience physical injury, and a weapon was used in almost two-thirds of the cases. Detention failures also tended to be under the influence of drugs or alcohol more than dangerous offenders for the index offence, and also tended to drug or intoxicate their victims at twice the rate of dangerous offenders.

The data presented may suggest that detention failures act more impulsively as compared to dangerous offenders. However, despite the differences illustrated, none (with the exception of the index offence as sexual) is statistically significant. Table Three compares the index offence and related characteristics of dangerous offenders and detention failures.

Table Three:
Comparison of dangerous offenders and detention failures based on
index offence

	Dangerous Offenders	Detention Failures
Sexual offence	92.2 (64)	35.3 (34)
Number of victims¹	3.2 (58)	1.5 (12)
Any brutality	69.6 (56)	48.4 (31)
Excessive violence	19.6 (56)	35.5 (31)
Any victim injury	62.3 (61)	67.6 (34)
Weapon used	50.0 (60)	64.7 (34)
Victim drugged or intoxicated	12.3 (57)	29.0 (31)
Under influence of drugs or alcohol	46.3 (41)	76.7 (30)

(Bonta et al., 1996)

1 For sex offenders only

Comparing Criminal History

Dangerous offenders and detention failures differed little with respect to their criminal history. Given the harshness of the dangerous offender sanction, one would expect that dangerous offenders who have committed sexual offences would have more extensive and brutal histories of sexual deviance than that of sexual detention failures. However, this is not the case, as both groups showed early sexual offending behaviours. For example, all of the detention failures and

97% of the dangerous offenders examined who had committed sexual crimes had, prior to the age of 16, forced a victim into sexual activity (Bonta et al., 1996, p. 22).

Detention failures were also more likely to have been previously incarcerated and revoked on conditional release than were dangerous offenders. In other words, dangerous offenders, who are more successful on parole than detention failures, are subjected to indeterminate sentences by the provisions, while detention failures, 97% who have been revoked on parole, are detained until warrant expiry and then released. The results of this comparison indicate that no distinguishable difference in criminal history sets these two populations apart, which further illustrates that dangerous offenders are not labeled as such because their behaviour is considered more violent, dangerous, or repetitive than those of other aggressive offenders (Webster & Dickens, 1983). While differences have been illustrated, once again, there are no statistically significant differences between dangerous offenders and detention failures with respect to any factor related to criminal history. Table Four compares the criminal histories of dangerous offenders and detention failures.

Table Four:
Comparison of dangerous offenders with detention failures based on
criminal history

	Dangerous Offenders (in percent) (number)	Detention Failures (in percent) (number)
Age at first arrest	16.3 (52)	15.6 (27)
Juvenile record	75.0 (56)	70.0 (30)
Prior incarceration	88.5 (61)	96.4 (28)
Failure of parole or probation	73.0 (63)	97.1 (34)
Prior assault	45.9 (61)	53.6 (28)
Prior violent sex	39.3 (61)	25.0 (28)

(Bonta et al., 1996)

Comparing Psychometric Assessment Results and Diagnoses

Despite the illustrated similarities between dangerous offenders and detention failures, it may be understandable to believe that dangerous offenders must measure higher on risk assessment scales than do detention failures, in order for them to be declared "dangerous". However, this is not the case. Scoring results from a number of psychometric assessments find that the two populations of offenders are quite similar in terms of their risk to re-offend.

In order to differentiate between dangerous offenders and detention failures in terms of psychopathy and future dangerousness, results from Hare's Psychopathy Checklist (PCL-R) should be different for both populations. However, this tool, described in chapter four as consisting of twenty factors measuring psychopathy, did not generate statistically significant results between dangerous offenders and detention failures. With the psychopathy cut-off score

as 30, dangerous offenders yielded an average score of 27.7, while detention failures scored an average of 27 (Bonta et al., 1996, p.23). While there are no differences in the mean scores between the two groups, on a case-by-case basis some evidence exists that the PCL-R distinguishes between dangerous offenders and detention failures, as 39.6% of dangerous offenders were classified as psychopaths, while only 3.24% of detention failures were classified as such (Bonta et al., 1996, p.23). Given that the mean scores of the PCL-R for the two groups are statistically indistinguishable, an increased classification of dangerous offenders as psychopaths might be the result of clinician's paying more attention to their criminogenic factors as compared to detention failures.

Results of the Statistical Information on Recidivism scale (SIR), a risk assessment measure outlined in chapter four which uses primarily static variables to determine risk to re-offend, were compared for dangerous offenders and detention failures. The SIR measures unchangeable factors, such as age at sentencing and number of convictions, and a greater risk to re-offend is characterized by a more negative score. Dangerous offenders scored an average of -5.3 while detention failures scored an average of -1.6 (Bonta et al., 1996). The difference in scores is not statistically significant, and more specifically, the risk to re-offend as interpreted by the SIR is indistinguishable between the two groups of offenders (Bonta et al., 1996).

The Violence Risk Appraisal Guide (VRAG), a tool outlined in chapter four and used to determine the potential for violent recidivism, also showed results that were not statistically significant between the two groups. With a higher score indicating an increased possibility to violently recidivate, the dangerous offenders scored an average of 12.9, while the detention failures actually scored higher, implying that they are more violent, at an average of 16.9 (Bonta & Motiuk, 1996).

Although the SIR and PCL-R lack items specific to sex offenders and thus function poorly with this offender population, the VRAG tends to predict recidivism among sex offenders somewhat successfully (Rice and Harris, 1997). It is expected that dangerous offenders fall in the extreme range of scores, given that they have been sanctioned indeterminately due to possessing what is thought to be the highest level of dangerousness. It is therefore problematic that risk scales show dangerous offenders as very comparable to other offender populations (Bonta et al., 1998).

In regard to psychiatric diagnoses, no evidence exists to differentiate between dangerous offenders and detention failures in terms of psychiatric disorder. For example, a psychiatric diagnosis of antisocial personality disorder (APD) was found in 72.9% of dangerous offender files, compared to 73.1% of detention failure files (Bonta et al., 1996). On the contrary, when using Diagnostic and Statistical Manual for Mental Disorders, Fourth Edition (DSM-IV)

criteria, 54% of dangerous offenders met the APD diagnostic criteria, while 64.7% of the detention failures met the criteria (Bonta et al., 1996). In other words, there were no differences between both populations of offenders in terms of APD, despite the criteria upon which it was assessed (Bonta et al., 1996). Chart Seven illustrates the results of actuarial psychometric assessment for dangerous offenders and detention failures.

**Chart Seven:
Comparing dangerous offenders and detention failures based on the
results of actuarial assessments**

From Bonta & Motiuk, 1996.

Dangerous Offenders on Conditional Release

Information on both released habitual and dangerous offenders is virtually non-existent (Bonta, personal communication, July 13, 2000). However, the information available suggests that the recidivism rates of such populations of offenders are much lower than that of general population offenders (Jackson, 1994). This evidence should prompt us to critically question the practicality of dangerousness provisions.

Like the dangerous offender provisions, the habitual offender legislation represents legislation in which offenders were deemed to be habitually and inherently criminal, and as a result are detained. However, at the time of the Leggatt Inquiry, when the majority of habitual offenders did not fit the criteria to be dangerous offenders, 67 were released on conditional release. The Inquiry tracked the offenders for eight years after their release, and their recidivism rates were consistently lower than the recidivism rates of released offenders who were never labeled as "habitual". The recidivism rates for habitual offenders released for one year, three years and eight years, were 15%, 34% and 48%, respectively (Jackson, 1994, p.48). The recidivism rates for the general population were not available at the one and eight year mark, but at the three year mark the general population's recidivism rate was 49% (Jackson, 1994, p.48). To explain, more general population offenders had recidivated after three years than habitual offenders after eight years (Jackson, 1994, p.48).

Under the dangerous offender provisions, as of December 1998, eight of 206 dangerous offenders had been released into the community, all on day parole (Solicitor General of Canada, 1998). Of the eight released, the parole was revoked for three offenders, either due to technical breaches or incurring new charges (Solicitor General of Canada, 1998). However, one offender was successful and completed his sentence on day parole, while the remaining four had been successful (without incident) up until the time that this information was

gathered. Furthermore, three of the four offenders still on day parole applied for full parole, and all were granted it. The fact that *any* dangerous offenders are released on parole, let alone that 37.5% of those released were granted full parole, illustrates that some dangerous offenders are not viewed as threatening or "dangerous" at all to the public after having received treatment. To illustrate, Chart Eight shows the success rate of dangerous offenders released on day parole.

Chart Eight:
Status of dangerous offenders on day parole, 1998
(Solicitor General, 1998)

Exploring Alternatives

Due to the fact that no significant differences in characteristics or behaviour distinguish dangerous offenders from detention failures, how can the use of special provisions be logically justified for dangerous offenders and not for detention failures? Indeed, an argument can be made that detention failures, due to their resemblance to dangerous offenders, should have been labeled as dangerous offenders and been given indeterminate sentences. However, why

should the opposite logic, dangerous offenders being handled in the realm of standard sentencing procedures, not prevail?

The exploration of alternatives to the dangerous offender provisions may lead to creative and innovative options for correctional policy. Although the purpose of this thesis is not to seek out such alternatives, but rather to investigate if alternatives to the provisions are necessary and justified, it is noteworthy to identify that potential alternatives exist in the standard sentencing procedures currently in use for detained offenders. For example, granting a "one-chance" statutory release to an offender viewed as dangerous may be a viable option instead of indeterminate incarceration within the existing provisions (Grant, 1996). In practice, only 7.4% of "one-chance" offenders returned to federal custody within one year of being released (Motiuk et al., 1995). This would be a potential alternative if the recidivism rates of detained offenders and dangerous offenders are similar (Motiuk et al., 1995).

Although reliable recidivism rates for dangerous offenders do not exist, given that few are released, it has been noted that 38%, or three out of eight dangerous offenders were revoked on conditional release (though it is unsure if the revocation was a result of technical breaches or incurring new charges) (Bonta, personal communication). Using this recidivism rate as a guide, let us assume that the entire 38% of the released dangerous offenders were revoked due to violent charges. In comparison to a larger sample of detained offenders,

of whom 40% are revoked for violent recidivism (Bonta & Motiuk, 1996), and coupled with the strikingly similar characteristics in offence severity and criminal history between the two offender groups (Bonta et al., 1996), it may be fair to assume that the recidivism rates are quite similar. This implies that detention, either until warrant expiry or indeterminate, does not prevent recidivism, but rather yields comparably the same results in both detained and dangerous offenders. More specifically, it has been documented that the amount of time detained has no effect on post-release recidivism (Motiuk et al., 1995). In fact, the "effort required for detention review does not seem to contribute to a reduction in the likelihood of re-offending" (Grant, 1996, p.57). Given that the amount of time a person is detained is irrelevant concerning recidivism rates, why is indeterminate sentencing (within which a portion of dangerous offenders face the possibility of release at some point) viewed as the most appropriate sanction for this population?

While detention does provide protection for society during the period of detention, most offenders are released eventually (Grant, 1996). As seen, even dangerous offenders who are sentenced indeterminately are sometimes released. Protection of society must always remain the prime consideration, however, the increased costs of detention may not be achieving any benefit (Grant, 1996). Therefore, a more viable option for dangerous offenders than detention may be community supervision:

If one considers the 235 offenders detained to the end of their sentence and assumes a readmission rate similar to the statutory release groups of about 50% in 2 years, then 118 of the detention offenders would return. However, 117 would remain in the community. Given an average detention period of 415 days and \$46,000 per day for custody, the cost of maintaining these offenders in prison would be about \$6.1 million. It would cost about \$1.13 million to supervise the offenders in the community. The net savings would be \$4.77 million over five years accounted for in this study, or about \$1 million per year (Grant, 1996, p.57).

Given that 63% of released dangerous offenders remain successfully in the community, community supervision and work or treatment programs (indeterminate or not) would be a more viable option, both financially for the criminal justice system, as well as socially for both the community and the offender. Because of the possibility of recidivism, a detained offender in the community may be past his or her warrant expiry date and thus not under community supervision. However, a dangerous offender would be under constant community supervision, thus any technical breach or recidivism while on release would result in immediate re-incarceration.

The alternatives depicted here are by no means an exhaustive list, but have been illustrated for the purpose of demonstrating that the current special provisions for dangerous offenders are not necessary. There are numerous viable options existing within the standard sentencing procedures that may even be more helpful for this population of offenders. Changes will only occur if the criminal justice system acknowledges the many inconsistencies and

imperfections of the dangerous offender provisions, and decides that reforms need to be made.

Recent studies examined here (Bonta et al., 1996; Bonta & Motiuk, 1996), as well as previous surveys conducted by two different researchers (Berzins, 1983; Jakimiec et al., 1986), reach the same conclusions about dangerous offenders. While dangerous offenders no doubt represent the most high-risk offenders in the criminal justice system, they are, by comparison to detained offenders, strikingly similar in regard to characteristics, and are thus viewed as no more likely to be dangerous than other inmates in similar institutions.

Having stated this, the actions of the criminal justice system appear to work toward the opposite cause. The number of dangerous offender declarations has steadily increased from its enactment until now. In 1999, thirty dangerous offender declarations were made (Solicitor General, 2000). In perspective, this is over three times the number of declarations made ten years prior, and almost eight times the number of declarations made twenty years prior (Solicitor General, 2000). While the number of declarations has increased consistently since the enactment of the provisions, the harshness of the provisions has also increased, as shown in chapter two with the mandatory indeterminate sentence imposed by the 1997 amendments. If the offenders labeled "dangerous" under the provisions are predicted to be inherently

dangerous, and dangerous enough to warrant an indeterminate sentence, why are *any* of them ever released, on *any* type of conditional release *at all*?

However, working within the context in which the provisions are practically imposed, some dangerous offenders are released. Given this, one would logically expect that the criminal justice system would make a priority to research those dangerous offenders who are released, especially to show that they have been reincarcerated for similar violent or sexual offences in order to "prove" that the existing provisions are needed. Instead, ironically, very little information exists on the success or failure of dangerous offenders on conditional release. Unpublished results have illustrated that 63% of released dangerous offenders were successful, without incident, in the community. The results of this small amount of unpublished research that exists on released dangerous offenders should challenge the perceived need for the dangerous offender provisions, and should assist in undermining the very foundation upon which the provisions stand.

Discussion

Based on the research presented in the previous chapters, it has become apparent that the dangerous offender provisions have received mixed acceptance in the legal and mental health realms. In practice, the provisions have both failed miserably and succeeded tremendously, depending on what one perceives the main purpose of the provisions to be. For example, if the primary purpose of the provisions is viewed as incapacitating all offenders predicted to be dangerous, then the provisions fail. As illustrated in the previous chapter, the provisions have failed to target detention failures, a population shown to be identical to dangerous offenders in terms of risk to commit future violent behaviour. This is illustrative that at a practical level, heavy reliance on clinical assessment and prediction, processes that present a large degree of inaccuracy, result in an inability to distinguish which offenders are dangerous and which are not dangerous.

However, the provisions are a great success if the primary purpose of them is to deal with many dangerous offenders in the simplest and most effortless manner possible. For example, all that is required for the indefinite incarceration of an offender is a prison cell and the appropriate security measures. This is especially easy, considering that the alternative is to provide counseling and intensive treatment programming for the purpose of possible

community reintegration. Incapacitating offenders because they are high-risk and violent requires little effort; it is more challenging to actually examine and address the reasons as to why they are high-risk and violent to begin with.

Despite the problems with the provisions, they are still in effect in Canada today. Has Canada not advanced to the point where improvements in our understanding of dangerousness since the provisions' enactment in 1977 would promote legal change? To understand the context of this question in Canada, and to be able to provide an answer, it is essential to reflect on the origins of the English dangerousness legislation, examined in chapter one. Given that dangerousness legislation originally emerged in England, the manner in which England dealt with dangerous offenders in the past and currently will provide insight into how time and improvements in the knowledge of dangerousness have influenced the progression or regression of criminal law. This illustration will also refresh our understanding of the origins of Canada's past dangerousness legislation, and might present possible directions for Canada's dangerousness legislation.

England's Current Dangerousness Legislation

Subsequent to the repeal of the Habitual Criminals Act and the Prevention of Crime Act, England enacted major reforms to its dangerousness legislation. Currently, there is no special "indeterminate" legislation for dangerous offenders.

Dangerous offenders are dealt with either by a provision of discretionary life sentences under the Criminal Justice Act of 1991, or through a system of hospital orders created under the 1983 revised Mental Health Act (Baker, 1993).

A discretionary life sentence is applied to offenders convicted of a violent or sexual offence who are considered to pose a threat of "death or serious injury" to members of the public (Baker, 1993, p.543). This provision also applies to offenders who are deemed to be mentally unstable, and who cannot be dealt with under the Mental Health Act, but are nevertheless considered dangerous (Baker, 1993). This discretionary life sentence has not existed without criticism. The provisions have been criticized for their vagueness in their definition of "mentally unstable", and for combining (while not distinguishing between) the mentally unstable offender who commits a dangerous act, and the mentally stable offender who commits a dangerous act (Baker, 1993).

The hospital orders system, under the Mental Health Act of 1983, provides for the indeterminate confinement of offenders in high security psychiatric hospitals (Baker, 1993). The offenders are assessed by two registered medical practitioners to be "mentally unstable", and to possess violent or other dangerous propensities. Under this system, offenders can be detained for periods in excess of those they would have spent in a penal institution after having received a regular sentence. Offenders confined in this system can be reviewed by the Home Secretary and the Mental Health Review Tribunal (Petrunik, 1994), but are

rarely discharged. This model is criticized because it is difficult to determine if an offender has recovered from a psychopathic disorder, and it is also difficult to determine the degree of dangerousness posed by an offender with a psychopathic disorder. For example, between 1983 and 1985, the Home Secretary released 31 offenders deemed to have a psychopathic disorder (Baker, 1993). Of the 31 released, 4 (13%) reoffended, while only one offender (3%) reoffended violently. In a different study, while 59 offenders were released by the Mental Health Review Tribunal, 12 reoffended (20%), 8 violently reoffended (14%) (Baker, 1993).

Although clearly England's methods of dealing with dangerous and habitual offenders have reformed since the previous legislation examined, this reformation does not necessarily translate into legal "progress". There is still a substantial clinical emphasis on how dangerous offenders are dealt with in the criminal justice system. While previous legislation focused exclusively on the number of offences committed, present legislation relies almost completely on clinical diagnosis and prediction, measurements that exist in Canada's dangerous offender provisions. Over one century later, after an accumulation of information surrounding dangerousness characteristics and problems with clinical prediction, England's dangerousness legislation has not evolved to incorporate such knowledge.

The future of Canada's dangerousness legislation is unknown, however, a glimpse into the development of other dangerousness legislation may provide relevant possibilities. England, as illustrated, was the influence for Canada's first dangerousness legislation. Because England's criminal justice system influenced Canada's dangerousness legislation in the past, it also may provide insight into Canada's future. However, it is also essential to examine the United States, much closer in proximity to Canada and arguably more influential in all facets of life, from legal influences to social attitudes and pop culture. It is not implausible that, given the influence and pressure, in time, Canada may deal with its dangerous offenders in a manner similar to that of the United States. In an attempt to show a possible direction in which Canada's dangerousness legislation may go, a description of the "three strikes" legislation, currently in use in the majority of the states in the United States, may provide some insight.

The United States' Current Dangerousness Legislation

Passed first in 1994 in California, three strikes legislation gained momentum across the United States (Greenwood et al., 1996). As of 1996, over 30 individual states had enacted three strikes legislation, or such legislation was currently under active consideration (Greenwood et al., 1996). California's version of three strikes legislation, deemed to be the harshest of all such legislation, will be examined as an example of this type of legislation.

To place this legislation into its proper context, it must be understood that California's budget for corrections far surpasses its budget for university education. For example, between 1980 and 1990, 16 new prisons were built in California, while only one university was established (Canadian Centre for Justice Statistics, 1996). In fact, it has been estimated that by the year 2002, 18% of California's budget will go to corrections, compared to 1% for higher education (Canadian Centre for Justice Statistics, 1996). California represents just one state in an on-going American trend to lock up more and more offenders, exemplifying a government relying heavily on incarceration.

California's three strikes law mandates 25 years to life imprisonment for an offender charged under this legislation (Greenwood et al., 1996). The legislation broadly defines "strikeable" offences, and doubles sentences for offenders convicted of any felony following two prior convictions for serious crimes (Greenwood et al., 1996). The legislation also hands down consecutive sentences for multiple charges, limits "good time" credits for incapacitated habitual offenders who are not problematic within the institution, and includes, as "strikes", crimes committed by a minor who is at least 16 years of age (Austin, 1996).

The Emergence of the Three Strikes Legislation

The harshness of three strikes legislation produced academic proponents and critics from its inception (Greenwood et al., 1996). Proponents of the

legislation stated that it would serve to protect the public by incapacitating chronic offenders who have demonstrated that they are dangerous and unwilling to reform. The notion of deterrence was also key to this argument, as proponents argued that the legislation would deter repeat offenders still on the street from committing further felonies. Financially, it would save resources by cutting down on the number of times that career criminals needed to be processed in the system. And, appealing to the public's conscience, proponents stated that it was simply the "right thing to do" morally to deal with those who repeatedly cause injury to innocent people.

Critics, however, believed that substantial increases in the use of prison over the previous decade had had few, if any, effects on violent crime. Critics also indicated that life terms of imprisonment would be expensive in terms of the required prison space. Increased resources for the criminal justice system would be needed due to the demand for jury trials, and, in turn, cause further delays in resolving criminal cases. Lastly, critics argued that the legislation was too harsh for criminals convicted of certain non-violent and so-called victimless felonies such as drug possession. However, despite the critics, a combination of social attitudes and political agendas were at play, resulting in the passing of this legislation.

Social Attitudes

It is intuitively pleasing to the average citizen, perhaps of any country, for habitual criminals to receive increased punishment. California's three strikes legislation possessed such an appeal, matched a popular and intuitive response to crime, and seemed to be based in common sense for the public. However, other influences aided in setting the tone and prepared a receptive social setting for the enactment of three strikes legislation.

The 1970s and 1980s were characterized in American media by depictions of serial homicides and mass murderers (Surette, 1996). The image of the roaming, predatory killer, a more vicious type of murderer than previously encountered in history, was dominant in most forms of the media. Within popular culture, for example, the movie "The Silence of the Lambs" horrified the public, but received rave reviews and was tremendously popular. Multimedia coverage of serial murderers like Jeffrey Dahmer and Ted Bundy exposed the gruesome details of particularly notorious killers in history. The "true crime" genre of books was introduced during this period out of high demand and intrigue, exemplifying the popular culture's interests (Surette, 1996).

Also of importance for the law's passing was the new visibility of crime statistics. Despite the existence of crime statistics prior to this time period, "it was not until the first national victimization surveys were conducted in the 1960s in the United States that something approaching what criminologists had always

meant as the "crime rate" became a visible object of public discourse" (Simon, 1996, p.38). In other words, the "crime rate" was more than just a term used by politicians to sway the public. It became visible and tangible, perhaps restating what the general public already felt - a lingering fear of crime.

Political Agendas

The three strikes legislation of California appeared "like a lightening strike in the political world of criminal justice policy" (Surette, 1996, p.198), as the evidence concerning the emergence of this legislation illustrates the undeniable political influence on its passing. It is argued by American criminologists that the relationship between government and crime was "a relationship of conscience and convenience" (Simon, 1996, p.26). The reproduction of this relationship in the making of different legislative efforts reflects this compatibility:

That there is a special subpopulation of dangerous offenders whose identification and neutralization would result in dramatic reductions in the overall crime rate without resulting in a massive increase in the portion of that population undergoing incarceration is a solution that is deeply compatible with the ambitions of modern governments (Simon, 1996, p.26).

The notion that small populations of recidivists are responsible for a large portion of crimes in society has dominated penal policy, both past and present, and works to accommodate the political interests of the time. Possessing the ability to appeal to the conscience of the public, even at a time when governmental spending was "generally in disrepute", demonstrates the influence

of some punitive criminological ideas over the political efforts to govern American society (Simon, 1996, p.26). In other words, the crime rate was deemed to be such a large social problem that exercising harsh criminological sanctions would invoke the trust and support of the public even while other political efforts such as governmental spending would not.

Predicting Downfall

Central to the debate over this controversial legislation was the issue of whether the application of three strikes legislation could be construed as leading to cruel and unusual punishment. The nature of the offence, which directly results in an offender being incarcerated for life, is currently under debate. For example, in California, if an offender has two "serious" felonies, the third, which may evoke the three strikes penalty, can be *any* felony. Thus, there is an ongoing debate concerning whether non-serious offences, such as stealing, should result in a life sentence under this legislation.

The number of offenders tried under three strikes legislation is also viewed as problematic. The prison population has dramatically increased due to this legislation, and the law is handling fewer violent offenders than originally anticipated as it tends to target petty recidivists instead (Austin, 1996). Ironically, the California Department of Corrections originally estimated that this law would increase the prison population from 125,000 in 1994 to 210,000 in 2000 (Austin, 1996, p.163)! While the prison population in the United States has not yet met

this number, the present overcrowding of American prisons as a result of this law is perhaps an indication that it is, although not having met its estimation, overused. The manner in which such offenders are prosecuted is also controversial. The prosecutors are given great discretionary power, much like the police with the Habitual Criminals Act, as the prosecutors ultimately decide how an offence will be charged (Shichor & Sechrest, 1996). This poses a problem due to the fact that prosecutors are often politically-motivated in their decision making and may feel pressured. As a result, courts have been overloaded with cases as a result of this law (Shichor & Sechrest, 1996).

Incarcerating these offenders will become incredibly expensive in time, and prison overcrowding and potential violence are issues that have not yet been seriously examined (Shichor & Sechrest, 1996). Some judges who are not in favour of the legislation or are dissatisfied with their lack of discretion under it attempt to avoid using the new law in their courts, while some citizens refuse to testify where a third strike is possible (Shichor & Sechrest, 1996).

Two other concerns with the law are the failure to extend the "three strikes and you're out" policy to white-collar offenders and the overwhelming proportion of offenders targeted who belong to a visible minority group (Geis, 1996). It is alleged by some critics that this legislation is applied in a discriminatory manner, allowing white-collar offenders to avoid the law's sanction while the law appears to be applied more consistently to visible minority groups (Geis, 1996). This is

insightful and “provides persuasive evidence of the class bias that fuels this viciously punitive policy” (Geis, 1996, p.244).

The Applicability of Dangerousness Legislation in Modern Society

Law reflects the social, political and moral characteristics of the society it regulates. Because dangerousness legislation emerged over one century ago in response to the social, political and moral demands of Victorian England, it can be argued that dangerousness legislation is archaic and not applicable in modern society. If law has advanced, if knowledge has improved, and if society has evolved since the 1860s, it is difficult to justify the three strikes legislation as it exists in today's society. In fact, there is no reason to believe that such legislation will be more successful than previous attempts to control habitual offenders. To illustrate, Shichor and Sechrest present a typology of how a society would be perceived through a reflection on the three strikes legislation (1996, p.275):

1. A seriously crime-ridden society which created anarchy at the level that prompted a search for extreme and desperate crime control measures.
2. A very punitive and vengeful society.
3. An alienated and anomic society that is using the punishment of criminals as a cry to reestablish some level of societal cohesion.
4. Any combination of the above.

If we were to determine how Victorian England society appeared solely by looking at the Habitual Criminals Act, this description would also be apt.

Interestingly, this same description can be applied to the United States with the three strikes legislation, over one century later. If the above description can be applied to both Victorian England society as well as current American society, this illustrates that neither society nor legislation has evolved and progressed as much as we would have anticipated. Given this, can the use of the three strikes legislation be justified in modern society? To answer this, several components of both pieces of legislation will be illustrated.

Both the Habitual Criminals Act and the three strikes legislation leave the determination of "habitualness" to the number of current offences committed and the arbitrariness of the past criminal record. A tally of three, understood by lawmakers as an "escalation" in that person's criminal career, caused the "habitual" offender to be imprisoned for seven years under the Habitual Criminals Act, and currently, an offender is given life imprisonment under the three strikes law in many states in the United States.

If advances in society have indeed occurred in regard to our dealing with dangerousness, it is not evident in existing legislation. Both then in England and now in the United States, the legislation for habitual offenders imposes a mandatory sentence as a result of a simple tallying of offences, however unrelated they may be, resulting in the "throwing together (of) the professional criminal" (Simon, 1996, p.35).

Moral Panics, Politics and Social Attitude

The social attitude of the English in the 1860s and 1870s appears to be quite similar to that of Americans in the 1990s and today. Such legislation as the Habitual Criminals Act and three strikes legislation re-affirm the public's opinions about and reinforce the concern for crime and victimization. With this in mind, three strikes legislation should be seen as "the latest of a long line of laws associated with episodic moral panics and wars on crime, another in a series of attempts to limit the discretion of criminal justice actors perceived to be too lenient by a fearful public or cynical legislature" (Feeley and Kamin, 1996, p.145).

Moral panics of both present and past have played a large role in the enactment of such legislation. However, while some believe that "once moral panic subsides or takes another form, that the United State's three strikes law will eventually be robbed of much of its draconian strength", the argument can be made, after historical analysis, that moral panic rarely "subsides" (Feeley and Kamin, 1996, p.151). The social fear of crime, which aided greatly in the enactment of both laws, had existed before the Habitual Criminals Act and acted as a driving force for the law. As described in chapter one, an increased social fear of crime in England resulted in the enactment of dangerousness legislation such as the Habitual Criminals Act. While this Act temporarily resulted in the subsiding of the moral panics, such panics were transformed into other fears that were addressed through later legislation, such as the Prevention of Crime Act.

Given this, it is highly likely that moral panics and social fear of crime will continue to reappear in the future.

The Function of the Law

Historically, English society in the 1860s had shown a decreased desire for capital punishment as a method of criminal justice. Incapacitation as an alternative was widely accepted, as illustrative in the Penal Servitude Acts and the Habitual Criminals Act. However, as discussed before, the latter legislation was the first of its kind to focus on the reformation and deterrence of the habitual offender, as opposed to the preceding alternatives that promoted retribution.

Existing three strikes legislation, however, has abandoned the notion of reform and rehabilitation; it appears that the function of habitual offender legislation has come full circle. Three strikes legislation's emphasis on deterrence is also controversial. Presently, given the high incarceration and crime rate in the United States, many critics would argue that the ideal of deterrence is not being met. This legislation, failing to recognize that incarceration does not deter individuals from committing crime, and placing no emphasis on offender rehabilitation as a priority once incarcerated, deals with repeat offenders within a retributive justice perspective (Simon, 1996). Furthermore, with many states still utilizing the death penalty, present American society may even be more vengeful than its predecessor, the Victorian society.

Past and Present Legislative Failures

Dangerousness legislation inevitably “resemble(s) in many respects its predecessors... but whereas then they represented a limit on what was perceived as an ascendant rehabilitative penalty, today they represent a goad to a punitive, incapacitation-oriented penalty that is perceived as too slow” (Simon, 1996, p.39). Although built on the same foundation as the Habitual Criminals Act, past and present provisions seem to be just as archaic as their predecessor. In fact, especially in terms of American three strikes legislation and the dangerous offender provisions, current dangerousness legislation is harsher, more punitive, retributive, and vengeful than the Habitual Criminals Act. The dangerous offender provisions, the dangerousness legislation from England and the three strikes legislation in the United States, all represent failed attempts to deal with “dangerous” criminal behaviour.

The dangerousness legislation to date fails because it over-simplifies the criminal experience. Such legislation do not truly appreciate the complexity of crime by addressing the underlying problems plaguing society, nor do they examine the offender as an individual person, with unique social circumstances, motivations, and other criminogenic factors of the offender that may lead to increased understanding. Ideally, an offender should not be characterized and classified by the *number* of offences he or she has committed, but by the *elements* of the person which ultimately lead to the commission of the offences.

Unfortunately, what is ideal is not necessarily what will occur.

Dangerousness legislation has existed since the 1860s and has shown no legal progression and advancement up until now. In effect, law has regressed to the point where the United States currently deals with offenders in a more vengeful manner than did Victorian England. In Canada, although working alternatives to the dangerous offender provisions already exist and have the potential to be successful with this population (such as conditional release and community treatment, discussed in chapter two), relying on such alternatives is, at this point in time, unrealistic. This is partly because public support for dangerousness legislation has not allowed law to progress in step with our knowledge of dangerousness.

Due to the strong and continuous public support for such legislation, it is unrealistic to believe that, even in light of the problems inherent in the dangerous offender provisions, there will be a demand in the near future for new measures to replace the provisions. Even though dangerousness legislation has not worked since its inception in the 1860s, and does not work currently with the dangerous offender provisions or the three strikes legislation, it is likely that Canada will continue to use the provisions in the future.

The Future of Canadian Dangerousness Legislation

What choices exist for Canada in dealing with the dangerous offender population? The most realistic options for Canada are either continuing to use the present provisions, or enacting a variation of the harsher American three strikes legislation.

Continued Use of the Dangerous Offender Provisions

Canada's dangerous offender provisions are replete with imprecision and arbitrariness. Designations of dangerousness are based largely on risk assessments that have been criticized as subjective and inaccurate. However, it is difficult to detect a recognition of these failures in the design and operation of the provisions because the concept of risk assessment is not well understood in the legal realm. Risk assessment is highly specialized and its results can be easily misrepresented, particularly by a criminal justice system that relies heavily on such results yet simultaneously fails to fully comprehend and appreciate their meaning.

If the Canadian criminal justice system continues to use the dangerous offender provisions, it must begin to both understand and acknowledge the faults of the legislation. Currently, it does neither. While American three strikes legislation is undeniably harsh and punitive, at the very least its application process is easy to understand. It is, of course, easy to criticize the three strikes

legislation because of its very simplicity; and for this reason establishing a similar law in Canada might ultimately represent a more feasible alternative than continuing to use the current dangerous offender provisions.

Enacting Three Strikes Legislation

The mechanical nature and apparent simplicity of the three strikes legislation is what Canada's dangerousness legislation lacks. Ironically, this very simplicity might prove attractive to advocates of a more punitive approach in Canada. Three strikes legislation is less arbitrary than the dangerous offender provisions because a decision to incarcerate an offender for twenty-five years or more is objectively based on a count of his or her convictions. There is no reliance on faulty risk assessment practices and no judicial discretion of application. Perhaps the only practical argument in favour of the continued use of the dangerous offender provisions is the fact that they are applied to very few offenders as opposed to the danger under the three strikes legislation in the United States of including many more. However, this seemingly positive result also works to the detriment of Canadian law.

Because the dangerous offender provisions affect very few offenders, and because of the public's lack of knowledge about the provisions, there is no reason for the larger population to even question the existence or success of them. Enacting three strikes legislation, however, would cause questions to be asked. Paradoxically, the harshness of the sanction and the overcrowding of

Canadian penitentiaries that would soon result might be the push that would force the legal community as well as the public to re-evaluate our treatment of this population.

Enacting the three strikes legislation in Canada would by no means represent legal progress. Quite the contrary, with the United States imprisoning 645 for every 100,000 citizens, at a rate five times greater than that of Canada (Canadian Centre for Justice Statistics, 1996), a failure to advance would continue to plague Canadian dangerousness legislation. However, Canadian dangerousness legislation is already extremely problematic. Given that the only other probable option is to continue using the current dangerous offender provisions, the choice we are facing is not a desirable one. If Canada continues to use the provisions, they should be used with the knowledge that dangerousness legislation will inevitably evolve to become more punitive. Given the lack of legal progress witnessed in dangerousness legislation to date, and with three strikes legislation representing an attractive alternative to some members of the public and the political class, the practice of dealing with offenders deemed dangerous will remain unjustifiably punitive.

Bibliography

Abel, G., & Rouleau, J. (1990). "The nature and extend of sexual assault" in Marshall, W. (ed.) **Handbook of sexual assault: issues and treatment of the offender**. New York: Plenum Press.

American Psychiatric Association. (1994). **Diagnostic and statistical manual of mental disorders (4th edition)**. Washington: American Psychiatric Association.

Andrews, D. & Bonta, J. (1998). **The psychology of criminal conduct, second edition**. Cincinnati, Ohio: Anderson Publishing.

Andrews, D., & Bonta, J. (1994). **The psychology of criminal conduct**. Cincinnati, Ohio: Anderson Publishing.

Archambault, J. (1938). **Report of the royal commission to investigate the penal system of Canada**. Ottawa: King's Printer.

Austin, J. (1996). "The effect of "three strikes and you're out" on corrections", in Shichor, D., & Sechrest, D. (eds.) **Three strikes and you're out: vengeance as public policy**. California: Sage Publications.

Baker, E. (1993). "Dangerousness, rights, and criminal justice". **The modern law review** 56, pp.528-547.

Belanger, N., & Earls, C. (1996). "Sex offender recidivism prediction". **Forum** (vol. 8, no. 2). Ottawa: Correctional Service of Canada.
 Bernard, T., & Vold, G. (1979). **Theoretical criminology**. New York: Oxford University Press.

Berzins, L. (1983). **A study of the dangerous offender legislation, october 1977 - march 1983: application and associated management and treatment problems**. Ottawa: Correctional Service of Canada.

Black, D. & Spinks, P. (1985). "Predicting outcomes of mentally disordered and dangerous offenders", in Farrington, D. & Tarling, R. (eds.), **Prediction in criminology**. Albany: State University of New York Press.

Blackburn, R. (1993). **The psychology of criminal conduct: theory, research and practice**. Toronto: John Wiley and Sons.

Bonta, J. & Hanson, R. (1995). **Violent recidivism of men released from prison**. Paper presented at the 103rd annual convention of the American Psychological Association, New York.

Bonta, J., Harris, A., Zinger, I., & Carriere, D. (1996) **The crown files research project: a study of dangerous offenders**. Ottawa: Solicitor General of Canada.

Bonta, J., Law, M., & Hanson, R. (1998). "The prediction of criminal and violent recidivism among mentally disordered offenders: a meta-analysis". **Psychological bulletin** 122, pp.123-142.

Bonta, J., & Motiuk, L. (1996). **High-risk violent offenders in Canada**. Ottawa: Correctional Service of Canada.

Bonta, J., & Motiuk, L. (1990). "Classification to halfway houses: a quasi-experimental evaluation". Criminology 28, pp.497-506.

Bonta, J., & Motiuk, L. (1987). "The diversion of incarcerated offenders to correctional halfway houses". Journal of research in crime and delinquency 24, pp.302-323.

Bonta, J., & Motiuk, L. (1985). "Utilization of an interview-based classification instrument: a study of correctional halfway houses". Criminal justice and behaviour 12, pp.333-352.

Bowden, P. (1985). "Psychiatry and dangerousness: a counter renaissance?", in L. Gostin (ed.) Secure provision: a review of special services for the mentally ill and mentally handicapped in England and Wales. London: Tavistock.

Cairns, J. (1993). Guide to assist in the understanding of the verdict of the jury serving on the inquest into the death of christopher stephenson (February 8,1993).

Canadian Centre for Justice Statistics. (1999) "Crime Statistics in Canada, 1998", Juristat (vol. 19, no. 9). Ottawa: Statistics Canada.

Canadian Centre for Justice Statistics. (1997). Juristat. Ottawa: Statistics Canada.

Canadian Centre for Justice Statistics. (1996). Juristat. Ottawa: Statistics Canada.

Canadian Committee on Corrections. (1969). **Toward unity: criminal justice and corrections**. Ottawa: Queen's Printer.

Canadian Sentencing Commission. (1987). **Sentencing reform: a canadian approach**. Ottawa: Department of Justice.

Cooper, R. P., & Werner, P.D. (1990). "Predicting violence in newly admitted inmates: a lens model analysis of staff decision making". **Criminal justice and behaviour** 17, pp.431-447.

Department of Justice. (1995). **Report of the federal/provincial/territorial task force on high-risk violent offenders: strategies for managing high-risk offenders**. Ottawa: Department of Justice.

Englander, D. (1991). "Criminality upon and beneath the surface in Victorian England". **Criminal justice history** 12, pp.235-239.

Ennis, B., & Litwack, T. (1974). "Psychiatry and the presumption of expertise: flipping coins in the courtroom". **California law review** 62, pp.694-753.

Ewing, C. (1987). "Diagnosing and treating "insanity" on death row: legal and ethical perspectives". **Behavioural sciences and the law** 5, pp.175-185.

Faust, D. (1986). "Research on human judgement and its application to clinical practice". **Professional psychology: research and practice** 17, pp.420-430.

Feeley, M. & Kamin, S. (1996). "The effect of "three strikes and you're out" on the courts: looking back to see the future", in Shichor, D., & Sechrest, D. (eds.) **Three strikes and you're out: vengeance as public policy**. California: Sage Publications.

Foucault, M. (1978). "About the concept of the 'dangerous Individual' in 19th century legal psychiatry". **International journal of law and psychiatry** 1, pp.1-19.

Furby, L., Weinrott, M., & Blackshaw, L. (1989). "Sex offender recidivism: a review". **Psychological bulletin** 105, pp.3-30.

Gabor, T. (1986). **The prediction of criminal behaviour: statistical approaches**. Toronto: University of Toronto Press.

Geis, G. (1996). "A base on balls for white-collar criminals", in Shichor, D., & Sechrest, D. (eds.) **Three strikes and you're out: vengeance as public policy**. California: Sage Publications.

Gendreau, P., Little, T., & Goggin, C. (1996). "A meta-analysis of the predictors of adults offender recidivism: what works!" **Criminology**, 34, pp. 575-607.

Gordon, R. (1977). "A critique of the evaluation of patuxent institution, with particular attention to the issues of dangerousness and recidivism". **Bulletin of the american academy of psychiatry and the law** 5, pp.210-255.

Gordon, R., & Verdun-Jones, S. (1987). "The impact of the canadian charter of rights and freedoms upon canadian mental health law: the dawn of a new era of business as usual?". **Law, medicine and health care** 14, pp.190-197.

Grant, B. (1996). **Inmates referred for detention (1989-90 to 1993-94) : a comparative analysis**. Ottawa: Correctional Service of Canada.

Grant, I. (1998). "Legislating public safety: the business of risk". Canadian criminal law review (vol.3, no.2).

Grant, I. (1985). "Dangerous offenders". Dalhousie law journal 9, pp.349-382.

Greenland, C. (1984). "Dangerous sexual offender legislation in Canada, 1948-1977: an experiment that failed". Canadian journal of criminology 26, pp.1-13.

Greenland, C. (1976). "Dangerous sexual offenders in Canada". Studies on imprisonment. Ottawa: Law Reform Commission of Canada, pp.247-281.

Greenwood, P., Rydell, C., Abrahamse, A., Caulkins, J., Chiesa, J., Model, K., & Klein, S. (1996). "Estimated benefits and costs of California's new mandatory sentencing law", in Shichor, D., & Sechrest, D. (eds.) Three strikes and you're out: vengeance as public policy. California: Sage Publications.

Griffiths & Verdun-Jones. (1989). Canadian criminal justice. Toronto: Butterworths.

Hall, H. (1987). Violence prediction: guidelines for the forensic practitioner. Springfield, Illinois: Charles C. Thomas.

Hansard (June 14, 1948), Canada, pp.5195-5199.

Hanson, R. (2000). Risk assessment. Beaverton, Oregon: Association for the Treatment of Sexual Abusers.

Hanson, R. (1997). **The development of a brief actuarial risk scale for sexual offence recidivism.** Ottawa: Solicitor General of Canada.

Hanson, R., & Bussiere, M. (1996) "Sex offender risk predictors: a summary of research results". **Forum** (vol. 8, no. 2). Ottawa: Solicitor General of Canada

Hanson, R., & Bussiere, M. (1995). **Predictors of sexual recidivism.** Ottawa: Solicitor General of Canada.

Hanson, R., & Harris, A. (in press). **Where should we intervene? dynamic predictors of sex offense recidivism.** Ottawa: Solicitor General of Canada.

Hanson, R., & Harris, A. (1998). **Dynamic predictors of sexual recidivism.** Ottawa: Solicitor General of Canada.

Hanson, R., Scott, H., & Steffy, R. (1993). **A comparison of child molesters and non-sexual criminals: risk predictions and long-term recidivism.** Ottawa: Unpublished paper, Solicitor General of Canada.

Hanson, R., & Thornton, D. (1999). **Static 99: improving actuarial risk assessments for sex offenders.** Ottawa: Solicitor General of Canada.

Hare, R. (1991). **The hare psychopathy checklist - revised.** Toronto: Multi-Health Systems.

Hare, R., McPherson, L., & Forth, A. (1988). "Male psychopaths and their criminal careers". **Journal of clinical and consulting psychology** 56, pp.710-714.

Hodges, E. (1971). "Crime prevention by the indeterminate sentencing law". American journal of psychiatry 128, pp.291-295.

Holland, T., Holt, N., & Beckett, G. (1982). "Prediction of violent versus nonviolent recidivism from prior violent and nonviolent criminality". Journal of abnormal psychology 91, pp.178-182.

House of Common Debates, 1948.

Hudson, K. (1993). "Keep sexual predators behind bars jury urges". Toronto Star. Toronto: January 23, 1993, A1, A2.

Jackson, M. (1994). Final report on special parole review of dangerous sexual offenders. Ottawa: Draft report, Solicitor General of Canada.

Jackson, M. (1980). Sentences that never end: the report on the habitual criminal study. Ottawa: Minister of Justice and Solicitor General of Canada.

Jakimiec, J., Porporino, F., Addario, S., & Webster, C. (1986). "Dangerous offenders in Canada, 1977-1985". International journal of law and psychiatry 9, pp.479-489.

Janus, E., & Meehl, P. (1997). "Assessing the legal standard for predictions of dangerousness in sex offender commitment proceedings". Psychology, public policy, and law 3, pp. 33-64.

Justice, B., Justice, R., & Kraft, J. (1974). "Early warning signs of violence: is a triad enough?". American journal of psychiatry 131, pp.457-459.

Kleinmuntz, B. (1990). "Why we still use our heads instead of formulas: toward an integrative approach". Psychological bulletin 107, pp.296-310.

Kozol, H., Bucher, R., & Garafalo, R., (1972). "The diagnosis and treatment of dangerousness". Crime and delinquency 18, pp.371-392.

Law magazine 44 (August-November 1850), England, p.22.

Leggatt, S. (1984). The report of the inquiry into habitual criminals in Canada. Ottawa: Solicitor General of Canada.

Lynett, E. (1990). "The effects of a stated diagnosis of APD, victim statements, and offender's antisocial history on psychiatrists' opinions in the dangerous offender determinations". Unpublished doctoral thesis, Ontario Institute of Education.

Mackay, D. (1983). "Dangerous offenders in Ontario 1977-1983: making the decision to proceed". Unpublished masters dissertation, University of Toronto.

Marshall, P., & Vaillancourt, M. (1993). Changing the landscape: ending violence and achieving equality: final report of the canadian panel on violence against women. Ottawa: Ministry of Supply and Services.

Mayhew, H., & Benny, J. (1862). The criminal prisons of London and scenes of prison life. London: Griffin, Bohn, and Company.

McGarry, A., & Parker, L. (1974). "Massachusetts' operation baxstrom: a follow-up". Massachusetts journal of mental health 4, pp.27-41.

Melling, M. (1982). "Cleaning house in a suddenly closed society: the genesis, brief life and untimely death of the habitual criminals act, 1869", in Osgoode hall law journal. (vol.21, no.2), pp.315-362.

Melton, G., Bonnie, K., Roth, L., & Monahan, J. (1987). Psychological evaluations for the courts: a handbook for mental health professionals and lawyers. New York: Guilford Press.

Menzies, R., Webster, C., & Butler, B. (1981). "Perceptions of dangerousness among forensic psychiatrists". Comprehensive psychiatry 22, pp.387-396.

Menzies, R., Webster, C., & Sepejak, D. (1985). "Hitting the forensic sound barrier: predictions of dangerousness in a pretrial psychiatric clinic". In Webster, C., Ben-Aron, M., & Hucker, S. (eds.) Dangerousness: probability and prediction, psychiatry and public policy. Cambridge: Cambridge University Press, pp.115-143.

Menzies, R., Webster, C., & Sepejak, D. (1985). "The dimensions of dangerousness: evaluating the accuracy of psychiatric predictions of violence among forensic patients". Law and human behaviour 9, pp.49-70.

Mewett, A. (1961). "Habitual criminal legislation under the criminal code". Canadian bar review 39, pp.43-58.

McRuer, J. (1958). Report of the royal commission on the criminal law relating to criminal sexual psychopaths. Ottawa: Queen's Printer.

Ministry of the Solicitor General of Canada. (2000). **Corrections and conditional release: statistical overview**. Ottawa: Solicitor General Canada.

Ministry of the Solicitor General of Canada. (1999). **Corrections and conditional release: statistical overview**. Ottawa: Solicitor General Canada.

Ministry of the Solicitor General of Canada. (1998). **Corrections and conditional release: statistical overview**. Ottawa: Solicitor General Canada.

Molof, M. (1965). **Prediction of future assaultive behaviour among youthful offenders**. Sacramento, California: Department of Youth Authority.

Monahan, J. (1988). "Risk assessment of violence among the mentally disordered: generating useful knowledge". **International journal of law and psychiatry** 11, pp.249-257.

Monahan, J. (1984). "The prediction of violent behaviour: Toward a second generation of theory and policy". **American Journal of Psychiatry**. (vol.10, no.41), pp.10-15.

Monahan, J. (1981a). **Predicting violent behaviour: an assessment of clinical techniques**. Beverly Hills: Sage.

Monahan, J. (1981b). **The clinical prediction of violent behaviour**. Rockville, MD: National Institute of Mental Health.

Morning post (January 8, 1845), England.

Motandon, C., & Harding, T. (1984). "The reliability of dangerousness assessments: a decision making exercise". British journal of psychiatry 144, pp.149-155.

Motiuk, L., & Belcourt, R. (1996). Temporary absence program participation and the release of federal offenders. Ottawa: Correctional Service of Canada

Motiuk, L., Belcourt, R., & Bonta, J. (1995). Managing high-risk offenders: a post-detention follow-up. Ottawa: Correctional Service of Canada.

Motiuk, L., & Brown, S. (1993). Survival time until suspension for sex offenders on conditional release. Ottawa: Correctional Service of Canada.

Motiuk, L., & Porporino, F. (1991). The prevalence, nature and severity of mental health problems among federal male inmates in Canadian penitentiaries. Ottawa: Correctional Service of Canada.

Motiuk, L., & Serin, R. (1998) "Situating risk assessment in the reintegration potential framework". Forum (vol.10, no.1). Ottawa: Correctional Service of Canada.

Mulvey, E., & Litz, C. (1984). "Clinical considerations in the prediction of dangerousness in mental patients". Clinical psychology review 4, pp.379-401.

Nadin-Davis, R. (1982). Sentencing in Canada. Toronto: Carswell.

Nuffield, J. (1982). Parole decision-making in Canada: research towards decision guidelines. Ottawa: Supply and Services Canada.

Otto, R. (1994). "On the ability of mental health professionals to 'predict dangerousness': a commentary on interpretations of the 'dangerousness' literature". Law and psychology review 18, p.43.

Ouimet, R. (1969). Report of the canadian committee on corrections : towards unity, criminal justice and corrections. Ottawa: Solicitor General of Canada.

Parliamentary Debates, c.340 (February 26, 1869).

Parry, J. 1986. Democracy and religion: gladstone and the Liberal party, 1867-1875. Cambridge: Cambridge University Press.

Pepino, J. (1993). Report of the preliminary recommendations by the working group on high risk offenders. Ottawa: Solicitor General of Canada.

Petrunik, M. (1994). Models of dangerousness: a cross jurisdictional review of dangerousness legislation and practice. Ottawa: Solicitor General of Canada.

Petrunik, M. (1984). The makings of dangerous offenders: the origins' diffusion and use of legislation for dangerous offenders in Europe and North America. Ottawa: Solicitor General of Canada.

Petrunik, M. (1982). "The politics of dangerousness". International journal of law and psychiatry 5, pp.225-253.

Pollock, N., McBain, I., & Webster, C. (1989). "Clinical decision making and the assessment of dangerousness", in Howells, K., & Hollin, C. (eds.) **Clinical approaches to violence**. Chichester: Wiley.

Porporino, F. (1991). **Differences in response to long-term imprisonment : implications for the management of long-term offenders**. Ottawa: Correctional Service of Canada.

Price, R., & Gold, A. (1974). **Legal controls for the dangerous offender**. Ottawa: Canadian Penitentiary Service.

Quinsey, V. (1984). "Sexual aggression: studies of offenders against women", in D.N. Weisstub (ed.) **Law and mental health: International perspectives** 1 (pp.84-121), New York: Pergamon.

Quinsey, V., & Abtman, R. (1979). "Variables affecting psychiatrists' and teachers' assessments of the dangerousness of mentally ill offenders". **Journal of consulting and clinical psychology** 47, pp.353-362.

Quinsey, V., Harris, G., Rice, M., & Cormier, C.. (1998). **Violent offenders: appraising and managing risk**. Washington, DC: American Psychological Association.

Quinsey, V., Rice, M., Harris, G., & Lalumiere, M. (1993). "Assessing treatment efficacy in outcome studies of sex offenders". **Journal of Interpersonal Violence** 8, pp.512-523.

Quinsey, V., Warneford, A., Pruesse, M., & Link, N. (1975). "Released oak ridges patients: a follow up study for review board discharges". **British journal of criminology** 15, pp.264-270.

Rice, M., & Harris, G. (1995). "Violent recidivism: assessing predictive validity". Journal of consulting and clinical psychology 63, pp.737-748.

Roberts, J., & Hough, M. (1998) Attitudes to punishment: findings from the british crime survey. London: Home Office, Research and Statistics Directorate.

Rogers, R., & Mitchell, C. (1991). Mental health experts and the criminal courts: a handbook for lawyers and clinicians. Toronto: Carswell.

Rosen, J., & Webster, C. (1984). How significant is significant?: complications arising from the use of words to estimate potential for dangerousness. Nassau, Bahamas: Paper presented at the American Academy of Psychiatry and the Law Conference in October.

Sarick, L. (1993). "Stephenson inquest: a predator observed". Toronto Globe and Mail (January 23, 1993), D1.

Scheff, T. (1967). Mental illness and social processes. New York: Harper and Row.

Scheingold, S. (1992). "The politics of sexual psychopathy: washington state's sexual predator legislation". University of puget sound law review 15, pp.809-820.

Serin, R. (1989) "Can Criminal Psychopaths be Identified?" Forum (vol.1, no.2). Ottawa: Correctional Service of Canada.

Shichor, D., & Sechrest, D. (1996). **Three strikes and you're out: vengeance as public policy**. California: Sage Publications.

Simon, J. 1996. "Criminology and the recidivist", in Shichor, D., & Sechrest, D. (eds.) **Three strikes and you're out: vengeance as public policy**. California: Sage Publications.

Sieffel, L. (1977). **The law and the dangerous criminal: statutory attempts at definition and control**. Lexington: Lexington Books.

Sorochan, D. (1989). **Preventive detention of habitual criminals and dangerous offenders**. Vancouver, British Columbia: University of British Columbia, Faculty of Law.

Statistics Canada. (1993). **Violence against women survey**. Ottawa: Statistics Canada.

Steadman, H. (1972). "The psychiatrist as a conservative agent of social control". **Social Problems** 20, pp.263-272.

Steadman, H., & Cocozza, J. (1974). **Careers of the criminally insane**. Lexington, MA: D.C. Heath and Company.

Steadman, H., & Keveles, G. (1972). "The community adjustment and criminal activity of the baxstrom patients: 1966-1970". **American Journal of Psychiatry** 129, pp.304-310.

Stevenson, S. (1986). "The "habitual criminal" in 19th century England: some observations on the figures". **Urban history yearbook** 1986, pp.37-51.

Stone, A. (1984). **Law, psychiatry, and morality: essays and analysis.** Washington, D.C.: American Psychiatric Press.

Surette, R. (1996). "News for nowhere, policy to follow: media and the social construction of "three strikes and you're out", in Shichor, D., & Sechrest, D. (eds.) **Three strikes and you're out: vengeance as public policy.** California: Sage Publications.

Sutherland, E. (1950a). "The sexual psychopath laws". **Journal of criminal law and criminology** 40, pp.443-454, reprinted in Schuessler, K. (ed.) **Edwin h. sutherland on analyzing crime.** Chicago: University of Chicago Press, 1973.

Sutherland, E. (1950b). "The diffusion of sexual psychopath laws". **American journal of sociology** 56, pp.142-148, reprinted in David, F., & Strivers, R. (eds.) **The collective definition of deviance.** New York: The Free Press, 1975.

Swanson, A. (1960-1). "Sexual psychopath statutes: summary and analysis". **Journal of criminal law, criminology and political science** 51, pp.215-236.

Tappan, P. (1950). "Sex offender laws and their administration". **Federal probation** 14, pp.32-37.

Tenney, C. (1962). "Sex, sanity and stupidity in massachussets". **Boston university law review** XLII, pp.2-31.

Thomas, D. (1979). **Constraints on judgement.** Cambridge: Cambridge University Press, Institute of Criminology.

Thornberry, T., & Jacoby, J. (1979). **The Criminally Insane: A community follow-up of mentally ill offenders**. Chicago: University of Chicago Press.

Waller, I. (1974). **Men released from prison**. Toronto: University of Toronto Press.

Webster, C. (1994). **The violence prediction scheme: assessing dangerousness in high-risk men**. Toronto: University of Toronto, Centre of Criminology.

Webster, C., Ben-Aron, M., & Hucker, S. (1985a). **Dangerousness: probability and prediction, psychiatry and public policy**. Cambridge: Cambridge University Press.

Webster, C., Dickens, B., & Addario, S. (1985b). **Constructing dangerousness: scientific, legal and policy implications**. Toronto: University of Toronto, Centre of Criminology.

Webster, C., Harris, G., Rice, M., Cormier, C., & Quinsey, V. (1994). **The violence prediction scheme: assessing dangerousness in high risk men**. Toronto: University of Toronto, Centre of Criminology.

Weisberg, D.K. (1984). "The 'discovery' of sexual abuse: experts' role in the legal policy formulation". **U.C. davis law review** 18, pp.1-57.

Wenk, E., Robison, J., & Smith, G. (1972). "Can violence be predicted?". **Crime and delinquency** 18, pp.393-402.

Werner, R., Rose, T., & Yesavage, J. (1983). "Reliability, accuracy and decision-making strategy in clinical predictions of imminent dangerousness". Journal of consulting and clinical psychology 51, pp.815-825.

Wettstein, R. (1992). "A psychiatric perspective on Washington's sexually violent predators statute". University of puget sound law review 15, pp.597-633.

Wiener, M.J. (1990). Reconstructing the criminal: culture, law, & policy in England, 1830-1914. Cambridge: Cambridge University Press.

Wormith, J., & Ruhl, M. (1986a). "Preventive detention in Canada". Journal of interpersonal violence 1, pp.399-430.

Zinger, I., & Wormith, J. (1994). The development of empirically-based preventive measures in Canada : an impossible task? Ottawa: Solicitor General of Canada

Cases

R. v. Forster (1995), 82 O.A.C. 78 at 80 (Ontario, Canada)

R. v. Poutsoungas (1989), 49 C.C.C. (3d) 333 (Ontario, Canada)

Legislation

Canadian Charter of Rights and Freedoms, R.S.C. 1982.

Canadian Criminal Code, R.S.C. 1985.

England and Wales Mental Health Act, 1983 London: MMSO, 1991.