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## **MODELS OF DANGEROUSNESS: A CROSS JURISDICTIONAL REVIEW OF DANGEROUSNESS LEGISLATION AND PRACTICE**

**1994-02**

This report was prepared on contract for the Policy Branch, Ministry of the Solicitor General of Canada and is made available as submitted to the Ministry. The views expressed are those of the author and are not necessarily those of the Ministry of the Solicitor General of Canada.

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## **PREFACE**

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## INTRODUCTION

The purpose of this report is to review dangerousness legislation and practice historically and across jurisdictions and to discuss implications for current Canadian legislation and practice. Data for the report consisted of an extensive review of the published literature on dangerousness legislation and practice, copies of documents provided by the Ministry of the Solicitor-General, and copies of current and draft legislation and policy provided by corrections and mental health departments in the United States (Washington State, Illinois, Massachusetts), Europe (The Netherlands, England and Wales), and Australia (Victoria). In addition, interviews were carried out in Washington with David Boerner, the chief drafter of the **Sexually Violent Predator** (SVP) provisions in the State's Community Protection Act, John Lafond, one of the primary critics of the SVP provisions and legal counsel in a case challenging their constitutionality, David Weston, superintendent of the Special Commitment Center for Sexually Violent Predators, and several staff members and residents.

Part I examines the concept of dangerousness and the societal response to persons considered dangerous. I discuss the main features of dangerousness, long standing socio-cultural perspectives towards dangerousness (religious, legal, and medical), and the social contexts shaping dangerousness legislation, policy, and practice. I note that in the criminal justice and mental health fields there have emerged three major approaches to dangerousness which reflect both community concerns and the concerns of society's medical, legal, and moral spokespersons. These approaches are the **clinical model**, the **justice model**, and the **community protection model**.

Part II examines the clinical model of dangerousness: some key assumptions, principles and practices; some criticisms of the model; and three examples of jurisdictions with legislation and practice which use a clinical model, the Netherlands, England and Wales, and Illinois.

Part III presents a critique of dangerousness legislation and practice from the vantage point of the justice model of social control. I discuss the social context behind the emergence of the justice model and some of the social science research which has been influential in the reform or abolition of legislation based on a clinical model.

Part IV examines the emergence of a community protection model of dangerousness that reflects not only a dissatisfaction with clinical and justice models but also the concerns of community-based movements defending the interests of women and children and calling for a greater emphasis on victims rights and crime prevention. I discuss three examples of

the community protection approach: the Washington State *Community Protection Act*, the Massachusetts Public Safety Measures Proposal, and, the draft community protection legislation in Victoria, Australia.

Part V examines Canadian approaches to dangerousness legislation and practice. I review past and current legislation and practice which reflect the influence of clinical and justice model assumptions and document the recent emergence in legislation, practice, and reform proposals of a community protection model.

Part VI provides a summary, conclusions, and recommendations. I assess current legislation and practice and recent reform proposals on the basis of my cross-jurisdictional and historical analysis and I conclude with some suggestions for further research and policy development.



# **PART I**

## **DANGEROUSNESS AND SOCIETAL RESPONSE**

### **DANGEROUSNESS DEFINED**

The concept of dangerousness or *l'état dangereux* has long been used in criminal justice and mental health legislation to refer to persons considered to be at high risk to physically, psychologically, or morally harm self or others. This concept has several notable features. First, the concept of dangerousness refers not to harmful acts or omissions themselves but to their perpetrators. Second, the concept of dangerousness refers to perpetrators of selected allegedly harmful acts rather than to the entire range of acts that might be considered harmful. Those persons most commonly considered dangerous have been those who have committed sex offences, particularly when the victims have been children. More rarely have perpetrators of other kinds of offences, such as arson and political terrorism, been considered to be dangerous offenders. Third, the concept of dangerousness refers to a state of being of individuals which predisposes them to engage in harmful acts. It is the characteristics which individuals possess more than the situations that might provoke such offences which are seen to constitute the locus of danger. Fourth, the concept of dangerousness is oriented more to the future than to the past. Whatever interest there is in an individual's past is for the purpose of predicting and controlling his future behaviour.

## **RELIGIOUS, MEDICAL, AND LEGAL PERSPECTIVES TOWARD DANGEROUSNESS**

Three major social institutions - religion, medicine, and law - have shaped public conceptions of dangerousness and have had a mandate to determine what kinds of acts or omissions and what kinds of persons are evil or harmful and thereby constitute a danger toward society (Conrad and Schneider, 1981). Although the influence of these institutions has varied historically and in different societies, they each continue to play an important role in the community and State response to the question of what and who is considered dangerous.

From a religious perspective, dangerousness can be understood in terms of a sinful nature or propensity to violate divine law (original sin) and in some cases possession by a demonic force. Wrongdoers are held responsible for choosing evil and are subject not only to divine retribution but also to sanctions by Church, State, and the community as well. The strong concern of Western religion with sexual transgression as a major form of moral evil has been influential in the development of conceptions of the dangerousness of sex offenders.

From a medical perspective, that which is harmful or evil - and thereby dangerous to individuals and to society as a whole - is conceptualized in terms of physical or mental illness, disability, or other disorder. Such illness, disability, or disorder is not understood to be freely chosen although susceptibility or recovery are linked in part to choices persons have made or can potentially make. Persons afflicted with illness, disability, or disorder

are considered to lack responsibility in whole or in part for their condition. They are often considered to be entitled to treatment and subject to State control when their condition or conduct resulting from it is considered to be dangerous to self or others.

As with religious conceptions, medical (or more broadly, clinical) understandings of dangerousness have permeated the public consciousness and shaped how members of the public view the question of what and who is dangerous. There is often a blurring of notions of sickness and moral evil, of madness and badness. In popular conceptions, a person might sometimes be considered as so evil that he must be sick. Whether or not such a person is responsible for his acts is not the public's concern. That he be controlled, and that they be safe, most certainly is.

From a 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 as a whole under civil law. Crimes are forms of wrongdoing which are wilfully chosen or are the result of negligence. Those who violate the law, unless appropriate justifications are judged to have been present, are held accountable for their acts or omissions and subject to presumably rational penalties determined by the State. In civil law, the notion of dangerousness is used to refer to a status of individuals (linked to mental or personality disorder) which requires the protective action of the state. The State's objectives in dealing with dangerous individuals are multiple: to protect society; to provide just retribution for wrongdoing; to deter future wrongful conduct; to rehabilitate offenders; to treat mental or personality disorder; and to give redress to victims and their families.

From a legal perspective, there is also the objective of safeguarding the rights of accused or convicted offenders and allegedly dangerous persons through due process of law and respect for principles of fundamental rights and freedoms. Justice involves a balancing act whereby the interests and rights of dangerous offenders, victims, the community, and the State are all taken into account, although not necessarily to an equal degree.

Actual legislation reflects not only a legal perspective but also religious and medical perspectives. Law incorporates the moral values of major religious traditions (in the jurisdictions examined, the Judaeo-Christian tradition) and even shares a similar image of human nature as characterized by free will and hence responsibility. As medical and other clinical perspectives have become influential in society, some of the values and understandings stemming from this tradition of knowledge, and more broadly from scientific knowledge, have entered the law. This has led to a reliance on a variety of clinical and scientific experts to make diagnoses and predictions with regard to both convicted or alleged offenders and persons with mental illness, disability, or disorder. The law has become an arena of competing perspectives: clinical, scientific, civil libertarian, and moral. It is in such an arena that decisions about dangerousness are made.

## **THE SOCIAL CONTEXT OF DANGEROUS OFFENDER LEGISLATION**

In all societies there are popular conceptions of the kinds of persons who constitute a serious threat to others. Some examples of categories of persons historically perceived to be exceptional sources of danger are witches, persons possessed by demons, the mentally ill, sex offenders, and persons with personality disorders (psychopaths and sociopaths). The risk or danger represented by these categories or persons is understood selectively to refer to certain types of harm (most commonly sexual and violent offences) and certain categories of victim (children and women). Dangerousness legislation has been primarily used 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 are typically overlapping rather than mutually exclusive with the result that dangerousness legislation has often had as its primary focus, recidivist violent sex offenders who are considered to have a mental illness, personality disorder, or other mental abnormality.

A key feature of society's response to persons deemed dangerous is a primal fear of a threat which is irrational and unpredictable and conduct which is physically and morally repulsive or bizarre. This primal fear is greatest when young children, perceived to be the most innocent and vulnerable members of society, are the objects of such a threat. The primal fears of society are expressed in extensive, often sensationalized, media coverage and popular cultural images. (Best, 1990). In creating dangerous offender legislation, societies act more to assuage their sense of primal fear than to address the most frequent and

substantial harms. They respond to the atypical, highly visible case, as opposed to less salient, less sensational higher volume types of offences. For example, research literature reviews (Marshall and Vaillancourt, 1993; Statistics Canada, 1993; Abel and Rouleau, 1990) show that sexual or violent offences most frequently occur in a domestic context or other relationships where the parties involved are acquainted with each other. The creators and enforcers of dangerous offender legislation, however, have made their primary focus the perpetration of sexual and violent offences by predatory strangers. Perpetrators of domestic violence may even be specifically excluded from dangerousness legislation (State of Washington 1989,1991).

Research on the enactment of dangerous offender legislation (Scheingold, 1992; Petrunik, 1982; Sutherland 1950a, 1950b; Swanson 1960-61; Tenney 1962) 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 of legislation and practice. Dangerous offender legislation in many of the jurisdictions where it has been enacted can be better understood as a largely symbolic attempt to appease an angry and fearful populace and serve special interests (for example, politicians seeking re-election, criminal justice and mental health professionals seeking additional resources) than a concerted instrumental effort to reduce the incidence of serious harm to the public.

## **APPROACHES TO DANGEROUSNESS LEGISLATION AND PRACTICE: THE CLINICAL MODEL, THE JUSTICE MODEL AND THE COMMUNITY PROTECTION MODEL**

Dangerousness legislation and practice is intended to meet several major societal objectives including community protection, equality under the law, and individual treatment or rehabilitation. Historically, different models have emerged to address these objectives. Based on distinctive differences in emphasis, I will refer to three models: the clinical model, the justice model, and the community protection model.

**The Clinical Model** reflects the concerns of diagnosis, prognosis, and treatment of mental disorder and personality disorder which come under the mandate of the clinical disciplines of psychiatry, clinical psychology, and clinical social work. Those who work from a clinical model view the commission of sexual and violent offences and the tendency to persistently offend as the product of individual pathology which renders offenders not responsible or only partially responsible for their actions. Policy and practice from a clinical perspective involves the provision of treatment to reduce the risk of re-offending. While punishment is contrary to a clinical perspective, confinement for an indeterminate period may be viewed as necessary, depending on the offender's risk level and the nature and seriousness of his disorder, to protect both the public and the offender and to facilitate treatment.

**The Justice Model** reflects the concerns of Neoclassical Criminology with providing just punishment for wrongful offences to responsible offenders. To the extent that

offenders are considered to be responsible for their actions (i.e. not legally insane), they merit fixed levels of punishment based on the seriousness of their offence and their offence history, and sometimes the assessment of aggravating or mitigating circumstances. The principles of proportionality, determinacy, parsimony, and equal treatment under the law are important elements in the disposition of offenders. Offenders are to be sentenced on the basis of **what they have done, not on the basis of what they might do.** The concept of dangerousness as an attribute of offenders rather than of offences is thus largely at odds with the justice model.

**The Community Protection Model** reflects the concern of victims rights groups, crime prevention advocates, and the women's and children's protection movements that legislation and policy reflecting clinical and justice approaches have failed to protect society from the real and serious danger of violent sex offenders. Proponents of community protection call for measures to maximally safeguard the public, measures that might diminish the rights of offenders in the greater interest of community safety. While treatment or rehabilitation is a concern for community protection advocates, it must not come at the expense of reductions in supervision which might endanger women and children.

Although each of the three models I have described prioritizes fundamental societal objectives differently and each has a clear primary objective, in practice it is not so simple. The clinical model emphasizes the primacy of offender treatment but its proponents experience strong social pressures to place community protection over individual treatment concerns. The justice model gives primacy to the legal rights of allegedly dangerous



offenders but its proponents increasingly face community pressures to give equal or greater weight to the rights of victims and their families and the claim that the community itself has the right to be protected. The community protection model makes the safety of women and children and the reduction of public fear its ultimate objectives but its proponents too face pressures. The constitutionality of recent legislation reflecting a community protection model is under challenge and there are arguments that indeterminate custody without ensuring effective rehabilitation and without establishing measures to prevent violence is no real solution to an enduring problem.

## **PART II**

### **THE CLINICAL MODEL**

#### **ORIGINS OF THE CLINICAL MODEL AND MAJOR ASSUMPTIONS**

The notion of dangerousness to indicate an individual's predisposition to criminal or anti-social activity can be traced back to nineteenth century writings in criminology and psychiatry which refer to the "criminal psychopath", the "born criminal", or "criminal man" and to offenders who are afflicted with a form of "moral insanity" or "moral imbecility" (Rennie 1978; Rieber and Vetter 1979; Werlinger 1978). The concept of psychopathy - an alleged disorder of the individual capacity for empathy and moral judgment - has been particularly important in developing the notion of a type of offender who presents a serious danger to society on the basis of deeply rooted - perhaps inborn - tendencies toward predatory acts of sexual aggression combined with an absence of empathy and moral sensibility.

The origins of a clinical model concerned with the diagnosis and treatment of the criminal psychopath or criminal man and the assessment of his danger to society are discussed in a paper by Michael Foucault (1978). Foucault cites the Italian criminologist Garofalo in arguing that the Classical Criminology of DiBeccaria and Bentham emphasized only two elements: the crime and the penalty. With the challenge of Italy's Positivist School of Criminal Anthropology to Classical Criminology came the recognition of three

elements: the crime, the penalty, and the criminal. Foucault notes that the criminal Garofalo refers to is not just someone who has committed a crime, but a "criminal man", a person who by his very nature is driven to commit the most violent of crimes against the most vulnerable of victims.

Another source of the clinical model to which Foucault refers is the concept of "homicidal monomania" which was used by nineteenth century psychiatrists to explain violent crimes of great brutality or a bizarre nature for which there was no discernible motive of profit or passion and no visible symptoms associated with the common psychiatric diagnostic categories of the day such as "imbecility" "dementia" or "furor". The apparent senselessness of such crimes was thought to reflect a profound form of madness not accounted for in legislative provisions under which individuals could be found not guilty by reason of insanity and hence acquitted and released.

According to Foucault, psychiatrists were able to justify their right to intervene in the case of "mentally abnormal", but legally sane, dangerous offenders on the basis of a clinical model that stressed not just individual treatment but public hygiene. The psychiatrist as a diagnostician and caretaker of the dangerous individual took on the role of public protector just as practitioners of physical medicine diagnosed and quarantined individuals who were actual or potential carriers of contagious disease (see also Bellak, 1971).

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. This notion was transferred to criminal legislation and practice through the concepts of "criminal man" and "*l'état dangereux*" (Foucault, 1978:17) and was used to advocate that social control should be proportionate, not to the seriousness of the offence, but to the offender's "dangerousness" his "capacity for and probability of doing harm" (Ancel, 1965:15). Acceptance of "dangerousness" as the basic grounds 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. "Abnormal offenders" who, according to Classical Criminology, would be outside the scope of criminal law, were to be subject to social controls on the basis of their dangerousness.

Controls were to be: (1) non-punitive - "designed simply to neutralize the offender, either by his removal or segregation or by ... remedial or educational methods"; (2) indeterminate - not fixed in terms of estimates of the nature and seriousness of the crime (Ancel, 1986:25). Custody and treatment for indeterminate periods were appropriate because a "disorder" whose treatment time could not be specified was involved (Kittrie, 1971:37).

In short, for offenders designated as dangerous and disordered in mind or personality, the clinical model of dangerousness presented the questions of the right to equality before the law, liberty, and due process as secondary to the State's duty to ensure public protection; the State, under the aegis of its *police* and *parens patriae* powers, had

the right to confine and treat such offenders for periods of time beyond those otherwise set as appropriate for certain crimes.

With the diffusion of a clinical model of social control amongst policy-makers in the criminal justice and mental health realms in the latter part of the nineteenth and the early twentieth century, special measures for dangerous persons outside of the regular sentencing structure came into being. These usually took the form of indeterminate sentences for persistent offenders and for various categories of individuals viewed as dangerous because of some kind of personality disorder such as psychopathy.

In Europe, the clinical model of dangerousness can be clearly seen in a variety of measures for sexual and violent offenders who were considered to have a mental disorder or personality disorder and recidivist offenders whose failure to learn from punishment was also deemed to indicate a similar form of pathology.

Norway's 1902 **Penal Code** provided for two special security measures: *etterforvaring*, a measure extending the prison terms of "normal recidivists" regarded as too dangerous to release, and *sikring*, a treatment measure for "abnormal offenders" that the court found not responsible or only partly responsible for their actions. In 1929, this was modified to provide for special treatment and security measures for abnormal offenders and dangerous recidivist felony offenders (Antilla, 1975:3, Evensen, n.d.:9, 15, 21-22, Mathiesen, 1965: chapter 3).

Denmark introduced special preventive confinement legislation in 1925 and extended it in the 1930 Criminal Code revision into a complex system of sanctions for special offenders based on imputations of "mental disorder", "dangerousness", and "susceptibility to the influence of punishment". The system consisted of:

- 1) indeterminate preventive confinement for "normal" but dangerous recidivists;
- 2) indeterminate preventive confinement for criminal psychopaths not deemed susceptible to the influence of punishment;
- 3) a determinate sentence for psychopaths considered susceptible to influence by punishment and,
- 4) indeterminate commitment for offenders found not liable for punishment because of mental disorder or other states of mind rendering them non-responsible for their actions (Denmark, Ministry of Justice, 1974:19-24, 1975:18).

Sweden introduced special preventive confinement legislation for recidivists in 1925: forvaring for "abnormal offenders" and **interfering** for "normal recidivists". A decade later, **surrender for special care** replaced forvaring ; offenders the Court judged as mentally disordered were placed under inpatient or outpatient psychiatric care or care by an agency operating under the jurisdiction of the Social Welfare Board (Antilla, 1975:6-7;

Moyer, 1974). During the 1970's a high proportion of violent offenders were handled under this special provision (Sansone, 1976:74; Serrill, 1977:b:19).

In 1925 and 1928, the Netherlands introduced special measures for dangerous offenders providing for various combinations of normal penal sentences, a special indeterminate sentence at the pleasure of the government (known as T.B.R.) and commitment to a psychiatric institution (The Netherlands, Prison Service, n.d.:1,2).

Belgium's 1930 **Social Defense** law provided for indeterminate confinement for mentally abnormal offenders and recidivists (Collignon and van der Made, 1943); it was modified to its present form in 1964 (Tulkens and Digneffe, 1979:18). Italy's 1930 social defence measure provided for the indeterminate confinement of the "socially dangerous" recidivists; it was amended in 1953 and 1971 (Antilla, 1975; Zagaris, 1977).

In Germany, a 1933 law provided for indeterminate preventive confinement in a penal institution for habitual offenders and dangerous sexual offenders. As in Italy and the Netherlands, offenders judged to be psychopaths were subject to both a determinate prison sentence and an indeterminate preventive confinement sentence (Tulkens and Digneffe, 1979:20).

In North America, the clinical model of dangerousness was exemplified in the **Sexual Psychopath, Sexually Dangerous Persons, and Defective Delinquency** statutes enacted between the 1930's and 1960's. In 1938, Illinois was the first American state to

successfully enact special civil commitment legislation for sexual psychopaths to complement sex offender legislation in the State's Criminal Code and Civil involuntary commitment legislation for mentally ill persons. Twenty-five other states and the District of Columbia followed the lead of Illinois by enacting similar legislation (Sleffel, 1977). Canada enacted a criminal sexual psychopath statute as part of its Criminal Code in 1948.

In most states, the enactment of sexual psychopath statutes followed public outcry over a few incidents -sometimes a single incident- involving the sexual assault and murder of a young child (Sutherland, 1950a, 1950b; Tenney, 1962).

Several major premises underlie the sexual psychopath statutes (Sutherland 1950a, 1950b; Tappan, 1950; Swanson ,1960-61; Sleffel, 1977)

- 1) Sex offenders are typically predatory individuals whose victims are strangers rather than family members or 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 even murder.
- 3) The 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.

Sutherland (1950a and 1950b) argued that the sexual psychopath statutes were designed not to solve an objective social problem but rather to serve the interests of the psychiatric profession by expanding their role as agents of social control, albeit under the guise of treatment. Sutherland (1950b:299,287) described the clinical perspective underlying such statutes as follows:

**The sexual psychopath laws are consistent ... with ...a general social movement towards treatment of criminals as patients (p.299). Not only has there been a trend toward individualization in treatment of offenders but there has been a trend toward psychiatric policies. Treatment tends to be organized on the assumption that the criminal is a socially sick person; deviant traits of personality regarded as relatively permanent and generic are regarded as the causes of crime (p.287).**

A consequence of the application of the clinical model to sex offenders was the depiction of dangerousness as a problem of individual pathology. Dangerousness was conceptualized in the clinical rhetoric of the diagnosis and treatment of disease and psychiatrists and other clinicians became the authorized experts pronouncing on the dangerousness of individuals and recommending to the courts and to corrections and mental health officials who should be confined and who should be released.

## **CRITICISMS OF THE CLINICAL MODEL**

The clinical model has been criticized for (1) the circularity of some of its key concepts (2) the low reliability of diagnoses of personality disorder, (3) inaccuracy in predictions of violence, and (4) the generally low success levels of treatment programs.

1) The terms "anti-social personality disorder", and "psychopathy" have often been criticized for their vagueness and circular nature. These categories have often been inferred from sexually deviant and other anti-social behaviour and then treated as a cause or predisposition of these behaviours (Hakeem 1958, Cirali 1978).

2) The reliability of diagnosis of personality disorders is low. In field trials of the DSM-III, agreement on diagnosis of anti-social personality disorder between pairs of raters

occurred less than half of the time. Agreement on diagnosis was even lower for other categories of personality disorder (Wettstein 1992:604).

3) There is a large volume of literature documenting the difficulties of accurately predicting which individuals being assessed to determine their level of dangerousness will subsequently engage in violent behaviour (Monahan 1981, 1984b, 1988; Webster, 1990a and 1990b). Research based largely on samples of involuntary mental patients indicates that false positive predictions of violence exceed true positive predictions at a rate of approximately 2 to 1. Small numbers of false negatives also occur, typically with extensive, often sensational, media coverage and high levels of public indignation. The public reaction to false negatives, however low the risk of their occurrence, is so strong that clinicians are compelled to be very conservative in their diagnosis (Steadman 1972; Wettstein 1992).

Some of the key problems associated with the clinical prediction of violence are as follows : the use of vague criteria for defining the categories of people whose behaviour is being predicted, the failure to take into account the **base rate** or frequency with which a particular behaviour occurs in both a given population (for example, sex offenders) and subgroups within that population (for example, pedophiles and rapists); the failure to incorporate information pertaining to the contexts in which violent behaviour occurs; the greater inaccuracy of longer-term versus short-term predictions; and the type of behaviour (e.g. sexually violent such as rape, and non violent, such as indecent exposure) being predicted (Wettstein 1992:606-608).

4) A major set of criticisms with regard to the clinical model of dangerousness relates to issues of treatment. The value of treatment is most clearly seen in the case of categories of psychoses where somewhat effective treatment regimes have been demonstrated. However, many personality disordered offenders are considered to have a very low likelihood of successful treatment. A study by Ogloff *et al*, (cited in Wettstein, 1992:609), states that "psychopaths were less motivated for treatment, improved less and were discharged from treatment earlier than non-psychopaths". Rice and Harris (1991:18) found that, compared to prison, the therapeutic community had a positive effect (in terms of reducing violent recidivism) for the non-psychopaths and a negative effect for psychopaths. That is to say, psychopaths who participated in a therapeutic community had higher rates of violent recidivism than those exposed to a conventional prison regime.

Major evaluations of sex offender treatment programmes have so far indicated relatively low effectiveness (Wormith and Borzecki, 1985). A comprehensive review by Furby *et al* (1989) argues that, even in studies claiming successful treatment, recidivism rates only appear lower for treated groups than untreated groups. The authors argue that the criteria for admission to treatment programs are based on factors such as admission of responsibility, remorse, and stated desire to reform. Those who meet such admission criteria are likely to have lower recidivism rates than those who do not regardless of treatment (Scheingold, 1992:814).

A study of Washington State's sex offender treatment programs in 1985 found that the recidivism rate of offenders who actually completed the program was about the same as those incarcerated without treatment. If persons who started a program, but later dropped out, were included the success rates were much lower for the "admission to treatment" group than the "non-treatment group" (Wettstein 1992:608).

More recently, a still ongoing California study (Sex Offender Treatment and Evaluation Project ) compared treated and untreated sex offenders and found after a five year follow-up period that recidivism rates were not significantly different and that the cost of the program to the taxpayer was high (Scheingold 1992:815). Furthermore, the offenders most likely to benefit from treatment were those initially deemed at the lowest risk to re-offend (Hanson, 1993).

## **THE FUTURE OF THE CLINICAL MODEL**

While the research results have been overall pessimistic with regard to the effectiveness of clinical diagnosis, prediction, and approaches to rehabilitation, some developments do give grounds for a modest level of optimism.

Recent theoretical and empirical work on psychopathy indicate that the problem of circularity that plagued earlier formulations of psychopathy may have been resolved. A growing body of empirical work shows that Hare's Psychopathy Checklist (PCL and PCL-R) is proving useful in assessing the degree to which offenders are amenable to rehabilitation and the degree to which they are at risk to recidivate (Hart, Kropp and Hare 1988; Hare, Mcpherson and Forth 1988; Harris, Rice and Cormier, 1991).

In the area of dangerousness assessment and prediction of violence, modest improvements can be made by distinguishing subgroups on the basis of clinical diagnosis and offence histories, by combining clinical and actuarial techniques, and by making greater use of contextual information as opposed to just using offender characteristics. While such improvements are unlikely to resolve the problem of high levels of false positives and while there will always be false negatives (Monahan 1981, 1984, 1988; Wettstein 1991), many clinicians (Hanson, 1993) argue that even marginal progress is worth aiming for.

In the area of sex offender treatment, comprehensive cognitive-behavioural approaches have been developed which are geared not toward cure but to "relapse prevention" (Laws, 1989; Pithers, 1990; Marshall and Barrett 1990). While evaluations of the effectiveness of such programs are inconclusive, especially over the long term (Hanson, Scott, and Steffy 1993), initial results are promising enough to warrant further funding for program development and evaluation.

## **EXAMPLES OF THE CLINICAL MODEL IN LEGISLATION AND PRACTICE: THE NETHERLANDS, ENGLAND AND WALES, AND ILLINOIS**

Although many jurisdictions in the United States and Europe have abolished or made major reforms to dangerousness legislation based on a clinical model there are still a number of jurisdictions where a strong clinical emphasis has been retained in legislation and practice. Three examples are the Netherlands, England and Wales, and Illinois.

### ***THE NETHERLANDS***

Special preventive detention measures for dangerous offenders within the Criminal Code are provided for under the TBS legislation of 1988. This legislation is a modification of the TBR (Detention at the Government's Pleasure) legislation of 1928. (The Netherlands Prison Service, n.d., Government of the Netherlands 1992; Derks *et al* 1933; Van Emerik 1993).

A TBS order can be applied when the following criteria are met: (1) commission of a serious offence or a series of offences, generally of a violent nature, that carry a maximum penalty of four years or more imprisonment; (2) a judgment by the court that the offender lacks responsibility, in whole or in part, for his actions due to psychopathy or other defective development or serious impairment of his mental faculties; (3) a judgment by the court that he constitutes a grave danger to the public.

A necessary prerequisite for TBS is a report prepared by a multidisciplinary team which includes a psychiatrist and a psychologist. The purpose of these assessments is to determine degree of criminal responsibility, level of dangerousness, type of disorder, and appropriate form of intervention (Koenradt 1990). Assessments are usually carried out at a special psychiatric observation clinic for a period of approximately seven weeks. Under the old TBR law, an offender being considered for TBR was required to submit to assessment. Under the 1988 law, however, an offender who is considered to be only partially responsible for his actions (personality disordered or psychopathic as opposed to psychotic) has the right to refuse assessment and treatment. If this happens, he will be sentenced under the regular sentencing provisions of the Criminal Code.

A TBS order is meted out by the courts at the time of sentencing in one of two ways, depending on whether the offender is deemed to lack responsibility in whole or in part. If the offender is considered to fully lack responsibility, he is given a TBS order (a "non-punitive" sentence). If the offender is deemed to partially lack responsibility, the judge has the option of combining this "non-punitive" sentence with a prison term (a "punitive" sentence). In this case, the TBS order would come into effect after the offender served his prison term (Government of the Netherlands 1992:20).

A TBS order can either be inpatient or outpatient. If the former, it is typically served at a TBS hospital or special forensic institution for a maximum period of two years. After two years, there is a mandatory review and a possibility of renewal by the court for an additional one or two years. In the case of an offender who has committed a non-violent



offence, the maximum time he can be held under TBS is four years. Persons who have committed one or more violent offences and who continue to be considered too dangerous to release may be held indefinitely through the two year renewal process.

Since 1988, the court has required an independent assessment by a psychiatrist and psychologist before pronouncing on the granting of an extension. Alternately, civil commitment can be sought for those individuals deemed to meet the criteria of mental health legislation.

Under a TBS order, loosening of restrictions gradually takes place (Government of the Netherlands 1992; Tigges 1990). The patient begins with incarceration in a closed treatment institution with few privileges and little freedom of movement. If all goes well, he is given privileges within the institution. Next, there is provisional release within the community for increasing periods of time. At this point, a proposal may be submitted to the Ministry of Justice for probationary leave under the supervision of after-care staff specializing in mentally disordered offenders. While on probation patients are still the responsibility of the hospital but live and work independently. The final stage is the termination of probation and return to society without supervision.

## ***TBS CLIENTELE***

Over 90% of those held under TBS during recent years have been considered to be serious violent offenders. About one third of the patients in TBS hospitals in 1990 had committed sex offences, mostly of a violent nature (Van Emmerik 1993:10).

About 40% of TBS patients are diagnosed as personality disordered, 30% are diagnosed as psychotic, and the remainder are diagnosed as having other types of mental disorder including developmental disability. In 1990, 23% of TBS patients were found not responsible by the courts and the remainder were found to have had diminished responsibility (Van Emmerik 1993). The average stay for TBS patients is six years, eight and half years for sex offenders and five for other patients.

Of all classes of TBS patients, sex offenders are regarded to have the slimmest prospects of rehabilitation. As in other jurisdictions, there has been considerable public and political concern following extensive media coverage of a few cases of serious recidivism (sexual assault and murder) by sex offenders. This concern has spawned a debate over which of the three interests served by the TBS - public safety, offender treatment and offender's legal rights - is to be given the most priority. A major issue

in this debate is the increase in the number of cases in which the courts refuse to accept clinical recommendations to extend a TBS order. Between 1979 and 1989, court refusal of psychiatric recommendations for extensions increased from 20% to 70% suggesting the influence of a justice model in the decision making of judges. However, ex-patients released by the courts against psychiatric advice are estimated by TBS officials to be

considerably more likely to re-offend than those recommended for release (The Netherlands, Prison Service, n.d.; Tigges, 1990). The recidivism rate (for release periods of three to eight years) was 8% for persons released by the court on the TBS Clinic's advice and 27% for those released by the court against the Clinic's advice (Van Emmerik 1993:18).

## **ENGLAND AND WALES**

The jurisdiction of England and Wales has no special indeterminate criminal legislation for dangerous offenders. Dangerous offenders can be dealt with in one of two ways: (1) a system of hospital orders created under the 1959 **Mental Health Act** (revised in 1983); and (2) the provision of discretionary life sentences under the Criminal Justice Act of 1991 (Baker 1993, England and Wales, 1987).

The indeterminate confinement of dangerous offenders under a discretionary life sentence applies 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 1993:543). This measure is considered appropriate in exceptional circumstances, that is for "mentally unstable" offenders who cannot be dealt with under the Mental Health Act but are considered dangerous to the public (Baker 1993:545).

Such a use of the discretionary life sentence has been criticized for vagueness and for not providing criteria to distinguish imputations of mental instability from imputations of dangerousness (Baker 1993:545-546).

The hospital orders system under the Mental Health Act provides for the indeterminate confinement of mentally ill offenders on the basis of an assessment by two registered medical practitioners. For those deemed to have violent or other dangerous propensities (e.g. the commission of sex offences) related to their mental illness, the Crown Court, under Section 97, can make a restriction order mandating that the offender be confined to a high security psychiatric hospital. Under a restriction order a person can be detained for periods in excess of those he would have spent in a penal institution had he received a regular sentence.

Baker (1993:539) notes that there are three ways of placing a dangerous mentally disordered offender under a restriction hospital order.

**The first is the power of a sentencing court to impose a "hospital order with restrictions" as an alternative to a term of imprisonment under sections 37 and 41 of the Mental Health Act 1983. The second is the obligation on a court under section 3 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 to impose such an order on a defendant found under a disability or not guilty by reason of insanity with respect to a murder charge and discretion to do so in respect of all other offences. The third is the power vested in the Secretary of State to impose restrictions on sentenced prisoners transferred to hospital under sections 37 and 41 of the Mental Health Act 1983.**

The transfer of persons from a prison to a secure mental health hospital is known as a "transfer direction". A person who is deemed to no longer require treatment, or for whom no effective treatment can be given, can be transferred back to a penal institution to serve the remainder of his sentence (England and Wales, 1987).

The term "mental illness" is not defined in the **Mental Health Act** but includes the categories of mental impairment, severe mental impairment, and psychopathic disorder. The term mental impairment refers to cases of mental handicap which are associated with abnormally aggressive or severely irresponsible conduct. The term psychopathic disorder refers to a disorder of mind (whether or not including significant impairment of intelligence)

which results in abnormally aggressive or seriously irresponsible conduct (England and Wales, 1987).

Release decisions for restriction orders are made either by the Home Secretary or by a Mental Health Review Tribunal. The Home Secretary usually has first opportunity to discharge persons on restriction orders, typically on the basis of a recommendation by a Mental Health Advisory Board. Under Section 72 of the 1983 Act, a Mental Health Review Tribunal can also direct the release of a patient on a restriction order. The criteria for release are: (1) that the patient is not suffering from mental illness, mental impairment, or psychopathic disorder to a degree necessitating hospital treatment; and (2) that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment. Patients can continue to be confined and given treatment as long as they are deemed to constitute a risk to public safety.

Patients released from a hospital on conditional discharge are required to be monitored by recognized medical practitioners and subject to re-admission if their condition or behaviour gives cause for concern (England and Wales, 1987; Peay, 1988).

***CONCERNS ABOUT THE USE OF HOSPITAL ORDERS FOR DANGEROUS OFFENDERS***

The major criticisms of the use of hospital orders for dangerous offenders have been with regard to the category of "psychopathically disordered". There is difficulty in determining recovery from psychopathic disorder given that the opportunity to engage in offending behaviour is severely restricted in a custodial setting. There is also a perception, related to a few high profile cases, that psychopathic disorder patients constitute a greater risk to the public than do other hospital order patients. Between September 30, 1983 and December 31, 1985, out of thirty-one psychopathic disorder patients released by the Home Secretary, four re-offended (one seriously). Out of fifty-nine released by the Mental Health Review Tribunal, twelve re-offended (eight seriously). Unfortunately, information was not provided on re-offending by non-psychopathic patients. Nonetheless, the perception that psychopathic disorder patients constitute a greater risk than other patients has led to a proposal that such cases only be transferred to a hospital for treatment after they were convicted. Simply put, psychopathic disorder cases would not be eligible for a hospital order in lieu of a prison sentence.

The proposal, however, was rejected for several reasons. One was that persons with psychopathic disorders who were sent to prison might be at greater risk to re-offend because they would not have had the opportunity to benefit from the treatment afforded by a restriction order. Another concern was that offenders with psychopathic disorders given determinate sentences might be released sooner than if they had been held on an indeterminate restriction order. Furthermore, unlike patients on restriction orders who leave hospital on conditional discharge subject to recall, they could not be returned to

confinement based on a worsening of their disorder rendering them dangerous to re-offend.

Peay (1988: 73) notes:

**Unless released on parole or license from life imprisonment, there is no similar control in the community of offenders released from prison. Since the existing policy is to grant parole only in "exceptional circumstances" to those who have committed offences of sex or violence which merited five years or more it is likely that most psychopathic offenders not receiving life sentences will be released into the community with no control over their actions whatsoever... Therefore, unless psychopathic offenders who had committed offences which were not of the first rank of seriousness were to be given sentences of disproportionate length, it was clear that the public might be less well protected ... in respect of a potentially larger group of offenders than the "small number" of cases... [which were the impetus for the proposal].**



**THE STATE OF ILLINOIS:**  
***THE SEXUALLY DANGEROUS PERSONS ACT***

The Illinois Sexually Dangerous Persons Statute (Code of Criminal Law and Procedure, 1973, Chapter 38) provides for the indeterminate civil commitment of persons suffering from a mental disorder, existing for a period of not less than one year, who have demonstrated a propensity to commit sex offences, in particular the sexual assault or molestation of children.

The purpose of the Illinois Statute is to provide treatment in lieu of conviction and punishment for sex offenders who are deemed to have a clinically recognized mental disorder but who are not legally insane or developmentally disabled. Under Illinois law, the State must either convict and punish a person accused of a sex offence or commit and treat him under the auspices of the **Sexually Dangerous Persons Act**. The State cannot do both.

A person need not be convicted of a sexual offence or any other criminal offence to fall within the scope of the statute. The Attorney-General or County State's Attorney may file a petition against any person charged with a criminal offence in an attempt to demonstrate that the person is a "sexually dangerous person". After the filing of the petition, the court appoints two qualified psychiatrists who have specialized in the diagnosis and treatment of mental disorders for not less than five years to determine whether the person charged meets the criteria set forth in the statute. The report must be submitted in

writing to the court and to the person charged. If proceedings are held, the respondent has the right to demand trial by jury, to be represented by counsel and to have evidence introduced on his behalf. If the court finds that the respondent is a sexually dangerous person, he is committed to the custody of the Department of Corrections until he is judged to have recovered. There is a requirement that persons committed under the **Sexually Dangerous Persons Act** are to be confined only for purposes of treatment and not for punishment. Confinement must take place in a facility providing psychiatric care and treatment which is designed to effect recovery and not simply incapacitation. A person found not to be a sexually dangerous person may be tried for the crime with which he was charged (Fujimoto, 1992).

### ***RELEASE, TRANSFER AND REVIEW PROCEDURES***

There is a requirement that confinement occur only for a period sufficient to bring about recovery, i.e., there is no minimum period of confinement. A committed person may apply for release at any time and the committing court is obliged to hear his petition. To bring about the release of someone defined as a "sexually dangerous person", the Director of the institution where the person is confined must file an application with the committing court indicating that the person has recovered. The Director of the Department of Corrections must have a report prepared on the issue of the person's sexual dangerousness and sent to the court. If the "patient" is found by the court to no longer meet the criteria of the statute, he is discharged. If the court cannot determine, with certainty, the patient's mental health status under institutional care, an order to "be at large" subject to supervision

or other conditions may be made. If the person violates any of the conditions of the order, the court can revoke conditional release and recommit him (Fujimoto, 1992).

### ***CRITICISMS OF THE SEXUALLY DANGEROUS PERSONS STATUTES***

A number of important criticisms of the Illinois **Sexually Dangerous Persons Statute** have been made (Burick, 1968; Nangle, 1976; Grabowski, 1985; Temborious, 1977).

1. A large number of those committed under the **Sexually Dangerous Persons** statute have been non-violent persons such as peeping-toms and exhibitionists. Because of the difficulty of fulfilling the requirement that only persons suffering from mental disorder for at least a year prior to the filing of the petition be committed, the state attorney's office requires that a person must have committed a sex offence one year prior to the filing of the petition. This makes it easier to select non-violent offenders (who are more frequently recidivists) than violent offenders.

2. The **Sexually Dangerous Persons Act** does not take into account the treatability of the offender. To the extent that non-treatable persons are committed, the Illinois statute can be considered to be a form of preventive detention which violates the due process and cruel and unusual punishment statutes of the United States constitution.

3. State attorneys who believe they do not have enough evidence to establish their case beyond a reasonable doubt in a criminal trial may file a Sexually Dangerous Persons petition to increase their likelihood of a successful outcome regardless of whether the person being tried has a treatable disorder. The threat of a **Sexually Dangerous Persons** petition might also be used as a lever to plea bargain. This has been the case in other jurisdictions with special criminal or civil indeterminate confinement measures.

4. The possibility of commitment prior to conviction may violate due process because the inference of dangerousness without legal proof does not constitute proof beyond a reasonable doubt and forces juries to speculate without adequate basis.

## **PART III**

### **THE JUSTICE MODEL: THE DEMYSTIFICATION OF DANGEROUSNESS**

#### **INTRODUCTION**

In the 1960's and 1970's, there was a major shift in philosophies of social control away from approaches which aimed to increase public safety through individual treatment and towards approaches emphasizing the primacy of individual rights over treatment and public safety. This shift was reflected in social movements which promoted the civil rights of prison inmates and mental patients, documented the failures and abuses of institutional psychiatry (Szasz, 1965; Stone 1975) and criticized the criminal justice system's inequalities and inability to reduce crime and rehabilitate offenders. As the influence of the clinical model of social control waned, a justice model emerged in both mental health and criminal justice. In the mental health sphere, the justice model stressed fundamental civil rights, due process, and the use of minimally restrictive controls. In the criminal justice sphere, there was renewed emphasis on the principles of Neoclassical Criminology and the emergence of a justice model of sentencing and corrections (Fogel 1975).

The justice model of sentencing and corrections starts with the premise that all legally sane offenders, including sex and violent offenders, are responsible for their actions and must be punished as retribution for their crimes. The primary concern of the justice model is with the offence rather than the offender. Sentences are to be administered which are proportionate to the seriousness of the current offence and to the offence history of the

offender. In contrast with the clinical model which called for an indeterminate sentence or period of treatment based on assessments of offender pathology and propensity for future harm, sentences are to be for a determinate period only. In the justice model, principles of individual civil rights, equality under the law, and the least restrictive alternative take precedence over community protection and offender rehabilitation.

### **THE JUSTICE MODEL CHALLENGE TO THE CLINICAL MODEL OF DANGEROUSNESS**

As the justice model of social control came into prominence there were efforts to demystify the clinical model of dangerousness and the role of mental health experts in designating dangerousness. Individuals labelled as dangerous were claimed to be the victims of the conservative tendency of clinicians to over-predict the risk of violence by mental patients and sex offenders (Steadman, 1972). The notion of dangerousness as grounds for the restriction of liberty also came to be challenged by civil rights advocates concerned with safeguarding the constitutional rights of offenders and mental patients (Harvard Law Review, 1975; Chandler and Rose, 1973).

An important theme in the demystification of the clinical model of dangerousness was the questioning of psychiatric and clinical psychological theory. A major object of criticism was the concept of psychopathy which was attacked as being little more than a moral judgment of human evil in medical language (Hakeem, 1958; Bleechmore 1975; Cirali 1978). A consequence of the critique of the notion of psychopathy was the renaming

of legislation in several states from **Sexual Psychopathy** statutes to **Sexually Dangerous Persons** statutes. Moving further away from clinical rhetoric, there was increasing use of the term of dangerous offender as in Canada's **Dangerous Sexual Offender** legislation of 1960 and **Dangerous Offender** legislation of 1977. This decreasing use of the term "sexual psychopath" reflected the view that sex offenders were responsible for their offences and thus deserving of punitive sanctions. In this changing usage, treatment became more clearly ancillary to the aims of incapacitation and retribution in sentencing (Weisberg 1984).

A second major theme in the demystification of the clinical model of dangerousness was the presentation of evidence on the ability of clinicians to predict violence by individuals deemed to be dangerous. In a review of major research studies on dangerousness assessment and violence prediction by mental health experts, John Monahan (1981) contended that, at best, clinical predictions of violence were accurate in only one out of three cases. To support his contention, Monahan cited follow-up studies of persons released by court order after a successful challenge on the grounds their constitutional rights had been violated. In the best known of these studies, the Baxstrom studies in New York State (Cocozza and Steadman 1976 and 1978), at least two out of three of the individuals released by court order against clinical advice, did not re-offend during a four year follow-up period.

Similar findings were also noted in Pennsylvania and Massachusetts (Thornberry and Jacoby, 1977; MacGarry and Parker, 1974). This high number of "false positives"

came to be viewed, particularly by civil libertarians, as proof that most so-called "dangerous offenders" were not really dangerous at all and that so-called mental health experts were not as expert as had been assumed.

A third major theme in the demystification of the clinical model of dangerousness was the emergence of a rhetoric of civil liberties and constitutional rights. By citing research showing low reliability in dangerousness assessment and the low effectiveness of treatment programs for persons held under sexual psychopath statutes, civil libertarians were able to successfully lobby for the abolition of sexual psychopath statutes and an end to indeterminate confinement and involuntary treatment. Across the United States, there was a turning away from sexual psychopathy statute and, more generally, systems of indeterminate sentencing (Serrill, 1977c; McGee, 1978). In 1977 Maryland abolished its **Defective Delinquency** legislation (Contract Research Corporation, 1977) and, in 1982, California abolished its **Mentally Disordered Sexual Offender** legislation (Oliver, 1982). In 1981, Washington State enacted its **Sentencing reform Act** which established a standard sentencing range for all offences based on a combination of current and prior convictions. Felony crimes were broken into three categories depending on the statutory maximum: Class A, life imprisonment; Class B, 10 years; Class C, 5 years. Only if a court found a crime involved aggravating or mitigating factors was a departure from the standard range possible. The **Sentencing reform Act** became effective for all crimes committed after July 1, 1984. In 1984, Washington State also prospectively abolished its sexual psychopathy statute as part of its shift in sentencing philosophy, from indeterminate sentencing to



determinate sentences for all offences. Sex offenders were now subject to a fixed range of sentences and participation in treatment programs became voluntary.

The disappearance of high profile sexual psychopath statutes in Maryland, California, Washington, and other states and the introduction of systems of determinate sentencing appeared to signal the end of the era of the sexual psychopath statute. Today, there are only six sexual psychopath statutes in the United States.

With the switch from a clinical to a justice model, the concerns of offender treatment, victims rights, and public safety were downplayed in favour of an emphasis on fundamental principles of justice and the civil rights of offenders and mental patients. Consequently, civil sexual psychopath and sexually dangerous persons statutes were challenged on the grounds that they violated fundamental principles of justice including equal protection under the law, the right to treatment and the right to refuse treatment, the principle of proportionality, and the principle of the least restrictive alternative (Wald and Friedman, 1978). To document the abuse of civil rights on a human level numerous cases were cited of arguably non-dangerous individuals who were held in confinement for periods far longer than those provided under criminal law (Szasz, 1977).

The challenge to the clinical model of dangerousness led to a shift from indeterminate to determinate sentences not only in the criminal justice system but also to the introduction of greater determinacy in civil mental health commitments (Stone, 1975). All offenders, including sex offenders and violent offenders, unless they have been found not guilty by reason of insanity or incompetent to stand trial, were considered to be sufficiently

rational and accountable for their actions that they deserved just punishment. Similarly, all such offenders were deemed to deserve the fullest protection of the law. The notion of special civil statutes permitting indeterminate confinement of sex offenders who were not certifiably mentally ill was particularly repugnant under the justice model. For proponents of the justice model, the claim of enhanced community protection through clinically justified requirements not only was empirically untenable but a violation of rights so fundamental as virtually be sacred.

## **CRITICISMS OF THE JUSTICE MODEL**

While the justice model addresses many of the concerns raised about the inattention to offender's rights under the clinical model, criticisms have been levelled at the lack of safeguards for the community under the justice model and about some of the research used to justify this model.

1. Research pointing to the unreliability of clinical assessments of dangerousness (particularly the high number of false positives) was largely carried out on populations of mentally ill persons who had been found not guilty by reason of insanity or incompetent to stand trial. Findings pertaining to this population cannot necessarily be generalized to populations of sex offenders and violent offenders most of whom have never met clinical criteria for certification as mentally ill (Brooks, 1992:747-748).
2. Although clinical predictions do overestimate the number of false positives, that number may not be nearly so high as much of the research indicates. The use of

conviction statistics for sexual offenders, for example, can lead to a minimization of dangerousness (Groth and Longo 1982; Brooks 1992: 744-746) for several reasons:

(i) Reporting rates for sexual assaults and attempted sexual assaults are very low (Brickman and Briere, 1989; Lizotte 1985; Abel *et al* 1987; Wright 1984; Polk 1985). The Canadian Urban Victimization Survey found that 62% of female sexual assault victims did not report their assault to the police (Solicitor General of Canada 1985). The committee on Sexual Offences Against Children and Youth (1984) found that three quarters of female respondents and nine tenths of male respondents did not report their victimization to someone in authority. Most recently, a Statistics Canada (1993) telephone survey of 2,300 females 18 years and older found that only 14% of all violent incidents were reported to the police and only 9% to a social service agency. The survey defined violence as an experience of physical and sexual assault consistent with legal definitions of these offences and subject to possible police intervention.

(ii) Reported sexual offences often do not lead to a laying of charges or to prosecution because of technical difficulties. For example, there may be a perception by the courts that the evidentiary requirements for a trial might not be met because the victim has dropped the charges, or is unwilling to testify, or because there is difficulty in securing witnesses (Marshall and Barbaree 1990:378).

3. Sentences for sex offenders may not be proportionate to the harm caused. The serious harm sex offenders cause to women and children, even when there is no physical

injury, may be underestimated. Clinical research shows that psychological harm may be long term with signs of such harm emerging even years after the offence. On the other hand, a problem in using such evidence is that some, perhaps much, of the harm experienced by victims may be related as much to how victimization is managed by family members, police, courts, and health care agencies as it is to the trauma of the incident (Finkelhor 1986; Hanson 1990; Kendall-Tackett *et al* 1993).

4. The offence-driven sentencing approach of the justice model may be particularly open to criticism in the case of sex offenders. Not only do low reporting rates for sexual assault mean that sex offenders are less likely to get caught than many other categories of offenders, but also sex offenders, especially repeat sex offenders and sex offenders released on mandatory supervision, are at high risk to recidivate for sex offences than are offenders in general. A recent Canadian study (Research and Statistics Branch, Correctional Services of Canada, 1991:5) of the entire Canadian federal offender population notes as follows:

**Sex offenders are *more likely* than offenders in general to return to prison or to recidivate with a sex offence.**

**Compared to all sex offenders, *repeat sex offenders* (those with a previous federal term for a sex offence) are more than *twice as likely* to commit further sex offences ... (and) *...much more likely* to violate conditional release conditions.**

**Sex offenders ... released on mandatory supervision were *twice* as likely to commit further sex offences than those released on full parole and *more than twice* as likely to commit violent offences.**

Furthermore, there is research indicating that some categories of sex offenders, particularly child molesters, are at a particularly high risk to re-offend. Hanson's study of 197 child molesters sentenced to a Canadian provincial institution between 1965 and 1973 found that 42% were reconvicted for a sexual or violent offence during follow-up periods ranging from 19 to 28 years. Although the greatest risk period appeared to be the first 5-10 years following release, almost one quarter of the recidivists were reconvicted of a new sex offence more than 10 years after release (Research and Statistics Branch, Correctional Service of Canada, 1993:7-10).

Robinson (1989:13) reported on Barbaree and Marshall's study of 170 men assessed after treatment for pedophilia and monitored in the community for an average of four years. Using official court, police, and Children's Aid records, the researchers found 20.7% had re-offended. When unofficial police and Children's Aid sources were also used, almost three times as many sexual re-offences were recorded. The use of Children's Aid records indicates that a significant number of such offences were domestic, with the perpetrator being a spouse, blood relative, or other household member or family friend. While this does indicate substantial recidivism by pedophiles, it does challenge the image of the sex offender as a predatory stranger and draws further attention to the need for measures to deal with perpetrators in a domestic context.

## **CONCLUSION: THE JUSTICE MODEL AND THE CLINICAL MODEL IN PERSPECTIVE**

The justice model of social control had a major influence on dangerousness legislation in the 1960's and the 1970's with the result that in many jurisdictions in the United States, legislation based on a clinical model (the sexual psychopath statutes) was either abolished or drastically revised. Similar trends have been noted in the Nordic Countries (Svendsen, 1977; Petrunik, 1982). In its strictest versions, the justice model suggests that all offenders, except for the criminally insane, should be subject to the same sentencing rationale. This has led to the abolition of indeterminate sentencing and the introduction of a variety of determinate sentencing schemes (Serill, 1977c). Even where indeterminate sentencing has not been abolished, the justice model has had considerable effect: from changes in terminology ("sexual psychopath" to "dangerous person" or "dangerous offender") to court rulings mandating equal protection for persons brought before the courts under special criminal or civil dangerousness statutes.

While a justice model helps to avoid potential abuses of the rights of offenders and mental patients and encourages respect for fundamental principles such as the rule of law, it does nothing to quell community fears about predatory sex offenders. Indeed, the pendulum has swung from a concern with individual rights to a concern with public protection. The result has been a call for a new model of social control which takes more seriously the risk posed to society by violent predators.

## **PART IV THE COMMUNITY PROTECTION MODEL OF DANGEROUSNESS**

### **THE SHIFT FROM A JUSTICE TO A COMMUNITY PROTECTION MODEL**

While the justice model addressed issues of the civil rights of offenders and mental patients that were problematic in the clinical model there was a perception that the risk to public safety had been increased by doing so and that the rights of victims and potential victims has been overlooked. As Monahan (1984:12) noted:

**"[J] ustice, in the broadest sense of this term, requires that one consider not only the effects of sentencing upon offenders, for the crime they have committed but also justice to the innocent people who will be the next victims of recidivists".**

In the late 1980's, in North America and Australia, a community protection model emerged to attempt to address these concerns. A major concern of this model is the perceived threat that predatory violent sexual offenders pose to vulnerable members of the community, particularly women and children. A variety of major social forces have been at work in the emergence of the community protection model. At a populist level, grass roots victims advocacy movements and crime prevention movements have emerged along with a more general public demand for increased attention to law and order. The concerns raised by these movements complement concerns raised by child protection and women's

safety advocates about the dangers and fears faced by women and children, particularly those related to sexual assault. At a political level, government response to populist concerns has meant greater emphasis on law and order policies than on policies oriented toward rehabilitation and social welfare (Scheingold, 1984, 1993).

In the development of a community protection model, the following major claims have been articulated:

(1) Predatory sexual and violent offenders pose a serious and pervasive danger to women and children. Even if the number of such offenders is not very large the amount of damage - physical and psychological - they do can be very great.

(2) Politicians and bureaucrats have given insufficient attention to victims of violent and sexual offences and their families and too much attention to the rights of offenders. Too little has been done to address issues of public safety from violent crime.

(3) Attempts to rehabilitate or treat sexual and violent offenders have had little success with the result that such individuals are being released from a prison are still a great risk to the public. Violent and sexual offenders should be kept locked up until it is clear that they no longer pose a serious threat to the public.

(4) The justice and mental health systems have failed to adequately monitor dangerous individuals who have been released from custody. In addition, these two systems provide



inadequate information about such individuals to communities with the result that community members neglect to take or are unable to take measures to protect themselves.

In Canada, the United States, Australia, and Europe public fears have been fuelled by intensive media coverage of horrifying acts of sexual violence and murder. These acts were perpetrated by men with long histories of violent crime and contact with the criminal justice and mental health systems who nonetheless had been released from custody even though some corrections and mental health officials believed that they continued to be highly dangerous. In some instances, release under existing law was necessary because the sentences of these individuals had expired and they were not deemed at the time to meet the restrictive criteria for involuntary commitment under civil mental health legislation.

Examples of sensational cases which have led to the cry for community protection legislation are the rape and sexual mutilation of a seven year old boy by Earl Shriner in Washington State (Boerner, 1992); acts of attempted murder and threats of murder by Gary David in Victoria Australia (Fairall, 1993) and the abduction, sexual assault and murder of eleven year old Christopher Stephenson by Joseph Fredericks in Ontario, Canada (Ontario, Ministry of the Solicitor General, Office of the Chief Coroner, 1993).

Following is a discussion of three examples of actual or planned community protection legislation, the **Community Protection Act** of Washington State with its **Sexually Violent Predator Statute**, the **Massachusetts Public Safety Measures for Sexually Dangerous Persons**, and the **Community Protection Legislation** and draft

proposals in Victoria, Australia. In a later section I will discuss recent Canadian draft proposals which reflect a community protection model.

## **THE WASHINGTON STATE COMMUNITY PROTECTION ACT**

The Washington State **Community Protection Act** which includes the controversial **Sexually Violent Predators Act** is an exemplar of the community protection approach to dangerousness.

A major factor in the enactment of this legislation was community outrage over several highly publicized incidents. The strongest response followed the sexual assault and mutilation in 1989 of a seven year old boy by Earl Shriner, a slightly retarded man with a bizarre physical appearance who had a history of sadistic sexual assaults but only one conviction. At the time of the assault, Shriner was in the community without supervision because his sentence had expired and a judge had ruled that he did not meet the stringent "imminent danger" criteria necessary for commitment under the State's mental health laws. Outrage over the Shriner incident resulted in the formation of a victims advocacy group called the **Tennis Shoe Brigade**, a name suggested by the discovery of a child's tennis shoe that led police to where the boy was found mutilated and assaulted. The tennis shoe became the group's symbol for all vulnerable children at the mercy of violent offenders.

A second highly vocal advocacy group, **Friends of Diane**, was formed by the mother of a young woman who was the victim of a rape and murder by Gene Kane, a sex offender on a work release program (Boerner, 1992:534-538).

A consequence of the lobbying by these victims advocacy groups was the establishment of a **Task Force on Community Protection** (Government of the State of Washington, 1989) which included as members the mothers of the two victims. In 1990, the Washington State Legislature, acting on the Task Force's recommendations, enacted a comprehensive legislative package, **The Community Protection Act**, designed to meet widespread concerns about the dangers to the community posed by sex offenders. Amongst the measures introduced were the following (Lafond, 1992:655, Lafond 1993).

- ( 1 ) expansion of the list of sexual offences to include crimes such as residential burglary and arson when these were deemed to be sexually motivated;
- ( 2 ) an increase in the severity of penalties for most sex offences;
- ( 3 ) mandatory treatment for juvenile sex offenders;
- ( 4 ) extension of the period of post release supervision for certain sex offenders;
- ( 5 ) a requirement for convicted sex offenders released from custody to register with the police;
- ( 6 ) community notification of the whereabouts of sex offenders;

(7) notification of the court prosecutors at least 90 days before the release of a sex offender;

(8) and finally, the most controversial measure, a provision for the indefinite civil commitment, upon completion of sentence, of sex offenders deemed to be sexually violent predators.

The **Sexually Violent Predators** law was a civil measure designed to deal with gaps in protection that stemmed in part from sentencing reforms based on a justice model that took place in the early 1980's. These sentencing reforms abolished indeterminate criminal sentences, involuntary treatment for sex offenders, and the civil commitment measures for sexual psychopathy and replaced them with determinate prison sentences and voluntary treatment provisions.

An unintended result of these sentencing reforms was that sex offenders who had completed their determinate sentences were being released unsupervised into the community, in many instances after unsuccessfully participating in treatment or having refused treatment. No longer was there the possibility of involuntary commitment under the sexual psychopathy provisions. The civil mental health system was designed primarily for acute cases of mental illness, as opposed to personality disorders such as psychopathy. Involuntary confinement could take place only in cases where medico-legal criteria of imminent danger were met. As a result, a situation existed where individuals, notably

sexual predators, deemed to be highly dangerous, could not be detained (Boerner, 1992:542-544).

According to David Boerner, a member of the Governor's Task Force and the primary drafter of the **Sexually Violent Predator** law, the law was not intended as a model for other jurisdictions. Rather, it was designed to prevent a specific problem in Washington State, that being public outrage and anxiety that the justice system was failing the community. Boerner contended that the guiding principle he used in drafting the legislation is what would it have taken to protect the public from Earl Shriver, the man whose sexual assault and mutilation of a seven year old boy had led to public outrage and the mobilization of the Governor's Task Force (Boerner, D. 1993).

Shriver's brutal assault and mutilation of his young victim occurred in May 1989. While he had a long history of serious violence he had only one conviction up to that point. At the age of sixteen, following the killing of a fifteen year old girl, Shriver was committed as a "defective delinquent" but not convicted of a crime. Between 1977 and 1987, he served a full ten year sentence without parole for abducting and assaulting two sixteen year old girls. An attempt to civilly commit Shriver at sentence expiry was unsuccessful, despite the discovery of detailed plans Shriver had drawn up outlining his fantasies of how he would kidnap, confine, and torture his victims. Between 1987 and his arrest in 1989, Shriver served two county jail terms, one for assault and one for unlawful imprisonment. At the time of his arrest for abduction and sexual assault, Shriver was awaiting trial on yet another charge (Boerner, 1992:526-529, 544-545).

The conclusions of the Governor's Task Force were that Shriner had fallen between the cracks of the criminal justice and mental health systems and that the danger posed by persons like Shriner was so great that the cracks had to be sealed. Rather than use broad legislation, like the previous **Sexual Psychopath Act**, which could, in principle, be applied to most sexual offenders, the Task Force opted for a more restrictive focus on the small numbers of violent sexual offenders judged on the basis of their offence history and mental health history to be highly dangerous to the community. While one rationale for this restrictive focus was that fewer false positives would be identified leading to a better balance of individual civil liberties and community protection than under the more open-ended **Sexual Psychopath Act**, the primary rationale was the reduction of public fear and indignation (Boerner 1993).

Under the **Sexually Violent Predator** provisions of the **Community Protection Act** which became effective on July 1, 1990 (State of Washington, 1990), the State of Washington established a procedure by which a person who has already completed a sentence for one or more sexually violent offences can be subject to a hearing to determine whether he is a Sexually Violent Predator.

A Sexually Violent Predator is defined as any person, previously convicted of and/or currently charged with one or more of several specified crimes of sexual violence, who is deemed to have a mental abnormality or personality disorder which makes him likely to engage in predatory acts of sexual violence. Persons with a developmental disability or

other mental disorder, **in addition to** the aforementioned mental abnormality or personality disorder, are included under the legislation. The law excludes offences by family members or acquaintances of the victim unless it was determined that a relationship was cultivated primarily for the purposes of victimization.

The Sexually Violent Predators commitment process may be initiated when the following criteria are met: the current sentence of a person convicted of a violent sexual offence nears expiration or has expired; a person found incompetent to stand trial for a violent sexual offence is about to be released or has been released, or when a person found guilty of a violent sexual offence by reason of insanity is about to be released or has been released. There is no fixed time period during which an application must be made. Even a person free in the community can be subject to an application.

An application alleging that a particular person is a Sexually Violent Predator is filed by the prosecuting attorney of a county in the State or by the Attorney-General. If the court determines, on the basis of a hearing on the application, that probable cause exists to believe that person is a Sexually Violent Predator, the judge orders that the person be taken into custody and transferred to an appropriate facility for an evaluation to determine whether he meets the criteria for a Sexually Violent Predator. Evaluations are currently carried out by staff at the same Special Commitment Centre where persons found to be Sexually Violent Predators are committed. After receiving the recommendation from the Special Commitment Centre assessment staff, a trial by judge or jury, using a "beyond a reasonable

doubt" standard of proof, is held to determine whether the person is a Sexually Violent Predator. If the judge or jury finds that the person is Sexually Violent Predator he will be indefinitely committed to the Department of Social and Health Services for control, care and treatment until such time as he is judged to be safe at large. An assessment of the committed person's mental health and dangerousness must be carried out at least once a year and the court provided with a report of the results.

Under the Sexually Violent Predator law there is no provision for gradual release. A person may be released in one of two ways. First, if the Secretary of the Department of Social and Health Services determines that the person committed under the Act is no longer likely to commit acts of sexual violence, that person may apply to the court for release. Release may be granted only after a trial to determine if the person no longer meets the criteria for a Sexually Violent Predator. Before trial, the State may request an assessment to determine if the person's mental abnormality or personality disorder has changed sufficiently so that he is no longer likely to commit acts of sexual violence. The onus is on the State to establish beyond a reasonable doubt that a person's mental abnormality or personality disorder remains such that, if discharged, he is likely to again commit predatory acts of sexual violence.

A second method of obtaining release is through an application, without the Secretary's approval, which presents facts about Sexually Violent Predator's mental condition and dangerousness enabling the court to make a determination. An application cannot be made if there was a previous application without the Secretary's approval which



was either deemed to be frivolous or unsupported by an assessment of the Sexually Violent Predator's dangerousness.

## **THE SEXUALLY VIOLENT PREDATORS PROVISION IN OPERATION**

In February of 1993, I visited the Special Commitment Center (SCC) in Monroe, Washington where assessments of individuals under the Sexually Violent Predators Act takes place and where those committed are confined. I interviewed the Superintendent, David Weston (Weston, 1993), members of the assessment and treatment staff, and five of the Center's "residents" (the term staff use instead of "inmates" or "patients"). As of February 27, 1993, 24 sex offenders had been sent for assessment, 21 assessments completed, and 20 individuals found to meet the criteria for a Sexually Violent Predator. Ten of the 20 had already been committed after a trial by jury and the rest were awaiting trial.

Assessments take place over a minimum of 45 days and are based on observation by SCC staff as well as on file information giving offence history, mental health history, and institutional reports.

All but 4 persons sent for assessment had refused to co-operate in the assessment process, generally on the advice of their attorneys. Three of these four admitted, during the course of their trial, that they felt they met the SVP statute's criteria. At the time of my visit

to the SCC, there were only four residents who were participating in treatment programs. Several residents complained to me that the SCC staff was not qualified to provide treatment. At least one of the residents had made a "right to treatment" suit on the grounds that meaningful treatment is absent. The complaints I heard were congruent with Quinsey's (1992:4) observation that "[r]esidents perceive the ... [Sexually Violent Predator Statute] ... to be arbitrary and excessive". Other critics are expressing concern that the SVP Statute does little more than to provide for the warehousing of a few dangerous individuals at great cost and little or no increase in public safety. Lafond (1993) even argues that danger to the public could be increased if the SVP statute discourages sex offenders from seeking treatment on the grounds that what they reveal may be used against them.

## **CRITIQUES OF THE WASHINGTON STATE LEGISLATION**

Washington State's civil community protection legislation has been subjected to intense criticism which reflects concerns of a justice model of social control (Lafond 1992; Gleb 1991; Greenlees 1991; Bodine 1990). Currently, the statute is being challenged before the Washington State Supreme Court on the grounds that it violates rights guaranteed by the United States constitution. The challenges include violation of the right to freedom from cruel and unusual punishment, differential and inequitable treatment contrary to the rule of law, and abuse of the State's police and *parens patriae* powers.

In their *Amicus Curiae* Brief to the Washington State Superior Court on behalf of the appellants Andre Young and Vance Cunningham, Lafond and Kagan (1992) cite the Supreme Court decision in **Foucha v. Louisiana** 1992 to argue that the **Sexually Violent Predator's Statute** is unconstitutional for a number of reasons.

First, the statute violates the right of the individual to "freedom of bodily restraint" without appropriate justification. It unconstitutionally authorizes lifetime preventive detention for convicted offenders "who have fully served determinate sentences and are legally due for release from custody" (1992:17) on the conjecture that they are likely to commit crimes of sexual violence in the future. The statute does not pose a limit on the period of preventive detention as in the case of bail, nor is there a requirement to prove that other less restrictive controls would adequately protect the public (1992:19).

Second, the statute cannot be justified as an exercise of the State's police power to punish past criminal acts. A person not convicted for a new crime or who has served his punishment for an old one may not be subjected to confinement whose purpose is punitive: this would be double jeopardy.

Third, the statute is an invalid use of the State's *parens patriae* powers. It authorizes the involuntary civil commitment of individuals who are not demonstrably mentally ill but allegedly suffer from a "personality disorder" or "mental abnormality". There is no known effective treatment for personality disorders.

Fourth, the statute violates the right to equal protection because (1992: 17) it "grants the state the authority to hold some sex offenders longer than other sex offenders convicted and sentenced for the very same crimes although neither group is certifiably mentally ill. Lafond and Kagan argue that prisoners whose sentences are expiring or have already expired "are entitled to their freedom unless the state can commit and retain them pursuant to commitment standards and procedures applicable to **all** mentally ill or mentally disabled citizens" (1992:19).

Fifth, the statute is unconstitutional because it does not adequately delimit dangerousness and provide criteria for designating individuals as dangerous. There is no requirement (1992:38) for "evidence of recent behaviour indicating that an individual may be dangerous". In addition, a "time frame within which the defendant is considered likely to commit another crime" is not specified (1992:39).

Sixth, the statute is "void for vagueness" because it provides for lifetime confinement on the basis of a single past conviction (which is not itself sufficient to justify such confinement), together with a speculative prediction to commit certain kinds of crimes against certain victims any time in the future (1992:42-45).

An *Amicus Curiae* brief (Summers, 1991) by the Washington State Psychiatric Association (WSPA) further challenges the **Sexually Violent Predators Statute** on three grounds: (1) that the statute does not use "psychologically meaningful criteria"; (2) that

recognized effective treatment does not exist for the class of offender -"sexual predators"- as defined under the statute; and (3) that evidence of recent behaviour is not required (1991:2).

The WSPA contends that there is no substantial consensus that sexual predation is caused by a mental illness or personality disorder although some sex offenders may be deemed to be suffering from such conditions. They note that many sex offences are better understood in terms of situational factors as opposed to individual pathology.

The WSPA also notes that, because of clinically vague criteria (e.g. the terms "mental abnormality" and "personality disorder") and the absence of a recent overt behaviour requirement, application of the statute is likely to be characterized by a great deal of speculation and inconsistency.

Given that there is no widely accepted body of scientifically reliable data showing either that violent sex offenders can be successfully treated or that future acts of sexual violence can be clinically predicted, the WSPA (p.11) notes:

**Doubt will always exist in release proceedings. In the absence of effective treatment there will be no reason for the mental health professional to believe the offender has changed. Since the offender will have been continually incarcerated (in most cases), there is also no opportunity for the mental health professional to observe his (or her) recent behaviour in situations**

**similar to those he will encounter outside the prison facility. Without such information, and in the absence of effective treatment, it would be remarkable if any mental health professional even took the risk of predicting an offender was now "safe" to be released into the community.**

## **THE MASSACHUSETTS PUBLIC SAFETY MEASURES FOR SEXUALLY DANGEROUS PERSONS**

In 1990, the Massachusetts Sexually Dangerous Persons (SDP) Statute, one of the most researched statutes of its kind, (Kozol, 1972; Ross and Hochberg, 1978) was repealed. It was replaced with legislation that prohibited new admissions to the Mental Health Treatment Center at Bridgewater but continued programs for the 222 persons already committed. In 1992, however, several incidents of serious violence by individuals discharged from the Bridgewater Center led to a demand for further reform. In February 1993, a new proposal for legislation was introduced entitled "An Act to Transfer Control of the Treatment Center from the Department of Correction to Further Protect the Public Safety and to Improve the Quality of Treatment".

The new proposed legislation (Commonwealth of Massachusetts, 1993) has several features which are more congruent with a community protection model than a clinical or justice model. First, control of the SDP population is to be under the Correction rather than the Mental Health Department. Second, the Commission of Correction would have the discretion to transfer SDP's held at the Treatment Center to a prison setting. Third, a Community Access Board under correctional jurisdiction would replace a Mental Health

Board in controlling the release of SDP's. Release could not take place before the expiry of a period equivalent to what would have been the criminal sentence for the admitting offence. Fourth, a jury, which would presumably be more representative of community interests than a judge, would hear cases to determine whether the continuing dangerousness of an SDP warranted continued confinement.

In sum, the proposed Massachusetts legislation can be considered to reflect a community protection model in its prioritization of the community rights to protection over the concerns of sex offender rehabilitation and civil rights.

## **COMMUNITY PROTECTION LEGISLATION IN VICTORIA, AUSTRALIA**

A third example of the community protection approach to dangerousness can be found in the **Community Protection Act** (CPA) enacted in 1990 by the District of Victoria in Australia. Unlike Washington State's **Sexually Violent Predators Act** which is a civil statute, Victoria's statute is part of the Criminal Law. The CPA, however, lacks the generality typically associated with criminal law. It was not enacted to protect the community from a class of dangerous offenders but rather one specific individual deemed to be highly dangerous. Currently, a draft proposal, the **Community Protection Violent Offenders Bill**, which applies to personality-disordered violent offenders is being considered by the Victorian government (Victoria, 1992).

The 1990 Act was enacted to deal solely with the case of Gary David, an individual with a long history of violent offences, threats of extreme violence, and self-mutilation who had received considerable attention from journalists and politicians. The circumstances behind the Act were the expiry of David's sentence for attempted murder, his threat to murder several individuals and poison the water supply, and the refusal by the Mental Health Review Board of an attempt to certify him as mentally ill. While the Board found that David suffered from anti-social or borderline personality disorder, this was not considered sufficient to meet the criteria for certification under the Mental Health Act. The Community Protection Act applies only to Gary David. Under **Section 4** of the Act, the Attorney General may apply to the Supreme Court for a preventive detention order which comes into immediate effect. Under Section 5 of the Act, if David is a prisoner or a secure mental health patient he can continue to be confined. If he is deemed under the Act to be a prisoner he must be detained in a prison or psychiatric in-patient service until a ruling on the application by the Supreme Court. If the Supreme Court is satisfied on the balance of probabilities, that ( i ) Gary David is a serious risk to the safety of any member of the public; and ( ii ) is likely to commit any act of personal violence to another person, it may order that he be placed under preventive detention. Initially, this was for a period of six months but was amended shortly after to twelve months. The amendment also gave David a right to appeal "to the full court from any determination of a single judge" (Fairall, 1993). Following passage of the amendment, Gary David received a sentence of twelve months, (October 1992 to October 1993) under the special law constructed to detain him.



After much criticism of the *ad hoc* nature of the CPA, in 1992 the Victoria Government introduced into Parliament a general provision, the **Community Protection (Violent Offenders) Bill**, to better protect the public against a class of dangerous offenders who, like David, presumably were not adequately covered under existing legislation. While elements of this Bill suggest a clinical model, the primary emphasis is on community protection. The Bill has the following features: (1) it applies to persons who have committed one or more specific serious offences (including murder, attempted murder, threatening to kill, aggravated rape, sexual penetration of a child under sixteen, and false imprisonment) and who have at least one involuntary psychiatric confinement; (2) it applies only when an offender has completed a custodial sentence, not at the time of sentencing; (3) the application must include a recommendation by two psychiatrists that, by reason of a severe personality disorder characterized by violence against another person or persons, there is a serious risk the offender will commit one or more specific serious offences.

Applications under the Act are to be heard by the Supreme Court. If the court is satisfied, on the balance of probabilities, that the above criteria are met, it may place the offender under a **Community Protection Order**. There are two options: a "post-sentence supervision arrangement" and "preventive detention" which must be in the least restrictive place necessary to provide community protection. The maximum period for which an order can apply is three years. A new hearing by the Court is required to extend the order. An offender can appeal to the Full Court against an order being made and, during the life of an order, can apply to the Supreme Court to have it changed or revoked. The Attorney-General must be provided with an annual report on the offender's welfare, treatment, and

behaviour as well as an assessment of whether continued detention is necessary. The Attorney-General must provide a copy of this report to the Supreme Court (Government of Victoria, 1992).

## **CRITIQUES OF THE VICTORIA LEGISLATION**

The draft 1992 **Community Protection Bill** has been strongly criticized most notably in the Third Report of the Social Development Committee of the Government of Victoria's **Inquiry into Mental Disturbance and Public Safety** (Fairall, 1993). This measure has been described as a form of "preventive detention" or "punishment in advance of crimes which may never be committed" (Fairall, 1993:50). Other criticisms of the draft law are noted below.

- (1) The clinical prediction of dangerousness required under the law has been demonstrated in social science research to be of low accuracy (1993:51).
- (2) The imposition of preventive detention conflicts with the principle of proportionality in sentencing by demolishing the relationship between act and punishment (1993:52).
- (3) Post-sentence preventive detention destroys the function of the maximum penalty to promote maximum deterrence within clearly defined limits.

(4) Such legislation erodes human rights in a variety of ways. These include: use of a civil standard of proof in a criminal law proceeding; inadequate detention criteria, lack of procedural safeguards to avoid bias; questionable review and appeal mechanisms; and inadequate post-sentence supervision provisions (1993:53).

## **PART V DANGEROUSNESS LEGISLATION AND PRACTICE IN CANADA**

### **THE HISTORICAL DEVELOPMENT OF CANADIAN DANGEROUS OFFENDER LEGISLATION**

Dangerousness legislation and practice in Canada historically can be understood in terms of the initial emergence of legislation based on a clinical model, the critique of this legislation from a justice model but with few modifications, and the emergence in recent years of a community protection model.

The first special preventive detention measures for dangerous offenders were enacted in Canada in the form of the 1947 Habitual Offender and the 1948 Criminal Sexual Psychopath measures. The Habitual Offender Statute was designed to deal with "habitual criminals" (Canadian Committee on Corrections, 1969) but did not make specific use of a clinical model. The Criminal Sexual Psychopath measure, however, was part of the same movement that led to the enactment of the Sexual Psychopath Statutes in the United States and shared the same assumptions of the Clinical Model including the need to protect the public through the diagnosis, confinement, and treatment of dangerous sexual offenders (House of Commons Debates 1948: 5196).

The Criminal Sexual Psychopath provisions of the Criminal Code 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 sexual impulses and who as a result is likely to attack or otherwise inflict injury, loss, pain or other evil on any person. (McRuer, 1958:13)**

Upon application by the Crown and at least 7 days notice, a hearing under criminal standards of evidence could be held in the case of persons convicted of, attempted or actual, indecent assault on a male or female, rape, or carnal knowledge. In 1953, the statute was revised to include actual or attempted buggery, bestiality or gross indecency (McRuer, 1958:12). At least two qualified psychiatrists were required to give evidence on the question of the accused's status.

The criminal sexual psychopath provisions combined a determinate sentence with an indeterminate sentence, similar to the TBR measure used in the Netherlands. A person adjudicated as a criminal sexual psychopath was required to serve a sentence of at least two years imprisonment for the crime for which he had been convicted plus a life-indeterminate term under preventive detention in a penitentiary (McRuer, 1958:12-13). The Minister of Justice was required to review each case at least once every three years to determine whether or not the person should be placed on parole and, if so, on what conditions (McRuer, 1958:13).

The criminal sexual psychopath provisions were subjected to a great deal of criticism. First of all, there was criticism of the use of the term "criminal sexual psychopath" on the grounds that it was vague and unscientific. Secondly, there was a

concern over the difficulty of obtaining convictions under this section of the Code. Between 1948 and 1955 only 23 persons were sentenced under the statute. In this regard, McRuer cited the contention that the high standard of proof (i.e. "criminal" as opposed to "civil") required to adjudicate an offender as a criminal sexual psychopath meant that many sexual offenders could only be confined for definite terms under the regular sentencing structure and would thus constitute a danger on release (McRuer, 1958).

In response to criticisms of the measure, a Royal Commission was appointed under Justice McRuer. The Commission's report in 1958 reflected criticisms of the sexual psychopath statutes and legislative changes in the United States and resulted in a number of amendments in 1960. The term "criminal sexual psychopath" was dropped and replaced with the term "dangerous sexual offender" (D.S.O.). The latter 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, 1976:272)**

The primary aim of the amendments was to make adjudication as a dangerous sexual offender easier in a number of ways (Greenland, 1976:272):

1. by making it clear that dangerous sexual offender hearings could be held in the case of individuals who had only one conviction but who appeared to be highly dangerous on the basis of their personal history and the circumstances of their offence.
2. by changing the requirement of proving the offender's **lack of power** to control his sexual impulses to his **failure** to do so.
3. by changing the phrase "**inflict** injury" to a phrase with a broader meaning, to "**cause** injury".

A number of other important changes were also made. An adjudicated dangerous sexual offender was no longer sentenced to a determinate period to precede the indeterminate one, but to an indeterminate period only. The period of time within which an application to have a person declared a dangerous sexual offender was extended to three

months after conviction, providing the sentence was still in effect. Finally, the Ministry of Justice was obliged to review the case of each DSO once a year rather than every three years.

In 1967 an important qualification of the meaning of the DSO section occurred in the Wilband v. The Queen decision. This decision allowed involuntarily obtained evidence in a DSO hearing on the grounds that the issue

**is not whether he should be convicted of another offence,  
but solely whether he is afflicted by a state or condition  
that makes him a dangerous sexual offender.  
(Price and Gold, 1976: 236, f.n. 140)**

This qualification was a further recognition and affirmation of the Clinical Model of Social Control at the heart of the DSO legislation.

Another major change occurred following the Supreme Court decision in Klippert v. The Queen, 1967. Klippert, after a conviction of 4 charges of gross indecency, preceded by a conviction 5 years earlier, was found to be a dangerous sexual offender. All the offences were apparently consensual and there was no indication that Klippert was a physically dangerous person. An appeal was made based on the contention that although Klippert might (because of his personality makeup) engage in other sexual offences, these were likely to involve other adults and to be consensual. Hence, it was argued, Klippert was not likely to "cause injury, pain or other evil". The conviction, however, was upheld upon appeals to first the Court of Appeal, Northwest Territories, and then the Supreme Court of Canada, on the basis that the "further offence" specified in the phrase "likely to commit a further offence" need not be one which would "cause injury, pain or other evil".



Although Klippert's appeals were unsuccessful his case became a *cause célèbre*. The Klippert affair, along with other developments, such as the diffusion of the findings of Britain's Wolfenden report which de-criminalized consensual homosexual activity between adults in private, led to amendments in the Canadian Criminal Code. A new section 149A was introduced to abolish criminal liability for homosexual activity between consenting adults in private. An amendment was also introduced in the dangerous sexual offender section of the Code which struck out the words "or is likely to commit a further sexual offence" which had been a major consideration in the Court's decision to rule against Klippert's appeal (Price and Gold, 1976:218, f.n. 40; Greenland, 1976:273,274).

Criticism of the habitual offender and dangerous sexual offender provisions continued throughout the 1960s, reflecting the emergence of a justice model of social control.

In Canada the major criticisms were made in the Ouimet Report of 1969 and in the writings of Greenland (1972), Price and Gold (1976), and Klein (1973, 1976).

The Ouimet report advocated the abolition of the Habitual Offender provisions because its application was so uneven across Canada and because it was used largely for property offenders who did not represent a serious threat to the personal safety of others (Canadian Committee on Corrections, 1969:257).

The Ouimet Committee criticized the DSO legislation on the basis of regional disparities in its application (the majority were made in British Columbia), the difficulty of determining an individual's dangerousness on the basis of a brief psychiatric interview (as opposed to a psychiatric remand for 30 to 60 days), the affirmation of the inclusion under the law of persons who were not physically dangerous in the Klippert decision, and the failure to include dangerous non-sexual offenders (Canadian Committee on Corrections, 1969:258).

The Committee recommended the appeal of both the Habitual and Dangerous Sexual Offender provisions and their replacement with dangerous offender provisions along the lines of that recommended by the Model Sentencing Act in the United States.

The Ouimet Committee, however, retained under the garb of new language, the clinical model underlying the original criminal sexual psychopath legislation. They saw the legislation as appropriate for

**the offender who is suffering from a severe personality disorder which causes him to be dangerous in terms of the physical safety of others ... [T] he punitive or deterrent aspect of sentencing is absent in the case of the offender who is dangerous because of a character or personality disorder.**

**(Canadian Committee on Corrections., 1969:265)**

Continued adherence to a clinical model can also 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, 1969:263). The Committee also put forth the view, in keeping with a clinical model, that sciences such as biology and chemistry would in the foreseeable future assist in the development of methods for identifying and treating the dangerous offender (Canadian Committee on Corrections, 1969:264).

The Senate Committee chaired by Senator Goldenburg, which reported in 1974, basically followed the recommendations of the Ouimet Committee in calling for dangerous offender legislation to replace the habitual and DSO measure with a few exceptions. They included the possibility of sentencing individuals involved in organized crime as dangerous offenders. They also treated "propensity toward violence" as a factor to be considered by the court, not as a criterion for finding someone a dangerous offender (Goldenburg, 1974).

The Law Reform Commission's working paper on Imprisonment, 1975, used the notion of dangerousness but argued that the indeterminate sentence was inappropriate. More in keeping with a justice than a clinical model, the Commission recommended that dangerous offenders be sentenced under the regular sentencing structure. Individuals found to be dangerous offenders on the basis of conviction for a "serious offence that endangered the life or personal security of others" would be eligible for their proposed maximum 20 years separation sentence. Assessing the probability of further serious offences was recognized to be a problematic matter likely to result in two or more false positives for every instance of conviction for a serious personal injury offence. The Commission, however,

noting the real, if empirically rare problem of the repeat violent offender participating in organized crime, recommended attempting to determine dangerousness on the basis of careful consideration of the offender's prior record, personality, pre-sentence report and "expert opinion" from the behavioural sciences.

In 1975, proposals to reform the dangerous sexual offender legislation were put forth as a part of the "Peace and Security Package", a series of measures to ease public concern about the possible increased risks posed by violent offenders associated with the abolition of capital punishment. Although strong criticisms of the dangerous offender proposals reflecting a justice model were made both from within and outside government, they were largely ignored. A clinical model of dangerousness was retained in Bill C-51, the Criminal Law Amendment Act. With the enactment of Bill-51 in 1977, the Habitual Offender and Dangerous Sexual Offender provisions were repealed. The new measure provided for a court hearing on whether a person is a dangerous offender in cases where the following criteria (House of Commons of Canada, 1977:52-54) were met:

**1. conviction for a serious personal injury offence**

**a) an indictable offence (other than high treason, first degree murder or second degree murder) for which the offender may be sentenced to 10 or more years of imprisonment, which involves the use or attempted use of violence against another person or conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person;**

**b) one of the sexual offences previously enabling conviction as a dangerous sexual offender, i.e. rape, attempted rape, sexual intercourse with a female under 16, indecent assault on a male or female, or gross indecency.**

**2. The offender meeting the criteria of (a) above is believed to constitute a threat to the life, safety or physical or mental well-being of others on the basis of evidence establishing**

**( i ) a pattern of repetitive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons or inflicting severe psychological damage upon other persons, through failure in the future to restrain his behaviour;**

**( ii ) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he has been convicted forms a part showing a substantial degree of indifference on the part of the offender as to reasonable foreseeable consequences to other persons of his behaviour, or**

**( iii ) any behaviour by the offender associated with the offence for which he has been convicted that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.**

**The offender convicted of a serious personal injury offence meeting the criteria of part (b) above must demonstrate "by his conduct in any sexual matter including that involved in the commission of the offence for which he has been convicted ... [that he has] ... shown a failure to control his sexual impulses and a likelihood of his causing injury, pain in the future to control his sexual impulses ....**

A person found to be a dangerous offender may be sentenced by the Court to an indeterminate period in a penitentiary in lieu of any other sentence that might be imposed for the offence for which he has been convicted.

Application for a hearing on whether or not a person is a "dangerous offender" must be made after a person has been convicted of a "serious personal injury offence" but

before he has been sentenced. The Attorney-General of the province in which the offender was tried must give his consent to the application either before it is made or after. The prosecutor must give at least seven days notice to the offender following the making of the application and within the same time limit must inform the offender of the basis on which the application has been made. A copy of the application must be filed with the clerk of the court or the magistrate.

Applications are heard and determined by the Court without a jury. Right to counsel for the offender is not specifically provided for in the legislation. The Court must hear the evidence of at least two psychiatrists (one nominated by the prosecutor and one by the offender) as well as **all** other evidence the Court judges, **in its opinion**, to be relevant, including the evidence of any psychologist or criminologist called as a witness by the prosecution or the offender. The introduction of criminologists as expert witnesses is an apparent first in legislation of this kind.

Following application for a dangerous offender hearing the court may specify the time and place for observation by expert witnesses or remand the offender in custody for observation for a period not exceeding thirty days (or in exceptional cases, 60 days) if there is reason to believe that relevant evidence might be obtained as a result of such a remand. Request for a remand must be made with the consent of the offender and prosecutor or be supported in writing by the report of at least one qualified medical practitioner (unless compelling circumstances exist for not doing so or a medical practitioner is not readily available).

Both the Court and the offender have the right to present evidence on the character and repute of the offender. The offender has a right to be present at the hearing on the issue of his dangerousness unless the Court causes him to be removed because he is disrupting the proceedings or permits him to absent during the whole or part of the hearing on conditions it considers proper.

An offender sentenced for an indeterminate period to a penitentiary has the right of appeal on any ground of law or fact or mixed law and fact.

If a person is found to be a dangerous offender, the court must forward to the Solicitor General of Canada a transcript of the trial, a copy of all reports or testimony given by psychiatrists, psychologists, or criminologists, and any observations of the court with respect to the reasons for the sentence. The provision is designed to ensure that correctional agencies have all available court information on dangerous offenders to assist in their treatment and sentence management.

A person receiving an indeterminate sentence as a dangerous offender is entitled to a review of his case by the National Parole Board **three years** after being taken into custody and not later than every two years afterwards.

Since its enactment, the Dangerous Offender legislation has withstood a number of challenges in the courts. A notable case was **R.v. Lyons**, 1987 37 c.c.c. (3d )

(s.c.c.), in which the court ruled that the legislation did not (despite the false positive problem in clinical prediction) provide unfairly for indeterminate detention. The Court in the Lyons case also ruled that the legislation did not violate the unfair deprivation of liberty (section 7), arbitrary detention (section 9), and cruel and unusual punishment (section 12), provisions of the Charter of Rights and Freedoms (Solicitor General of Canada, 1993, 36-38).

### **THE 1977 CANADIAN DANGEROUS OFFENDER LEGISLATION IN OPERATION**

As of December 1992, there were 121 persons serving indeterminate sentences under the Dangerous Offender provisions. In addition, several individuals have been declared dangerous offenders but sentenced for determinate periods (Shore, 1984: 419-420). Almost half (59 or 48.8%) of indeterminately sentenced dangerous offenders were declared in Ontario, a little over a quarter (32 or 26.4 %) in British Columbia, and the remaining quarter in the Atlantic and Prairie provinces. Québec has had no declarations of dangerous offenders (Ministry of the Solicitor General, 1993: 21, 24).

A substantial proportion (24%) of declared dangerous offenders are non-Caucasian which indicates a potential bias against minority group offenders. Furthermore, several observers (Berzins, 1983:3; Websters and Dickens, 1983:109; Esses and Webster, 1988) have suggested that a bizarre or unusual appearance may have been a factor in the adjudication of a number of individuals as dangerous offenders



Very little research has been carried out on the dangerous offender application, and adjudication processes (Webster and Dickens, 1984; *et al*, 1987). The suggestion has been made, however, that the threat of a Dangerous Offender application is used by Crown Attorney as a lever in plea bargaining (Shore, 1988: 418; Webster and Dickens, 1984:109).

Over one half of dangerous offenders have a sex offence as their major admitting offence and 90% had one or more sexual offences in their offence history (Ministry of the Solicitor-General, 1993: 24-25). The number of persons declared as dangerous offenders (an average of 8 per year) is likely only a small proportion of violent offenders and sex offenders who might fit the provisions of the legislation. Take just the case of sex offenders. As of Oct. 31, 1992, there were 1,814 offenders (14.5% of the incarcerated population in federal institutions) whose major admitting offence was a sex offence (Ministry of the Solicitor General, 1993:20). If the 1991 National Sex Offender Census is an indication, a substantial portion of these offenders had child or adolescent victims. This Census indicated that, in 43.6% of the cases, there were "adult only" victims and in over half of the cases there was a child or adolescent victim.

Given the small numbers of persons formally declared dangerous (just over 120 in a 15 year period), the reluctance of crown attorneys in some provinces (notably Quebec) to make dangerous offender applications, and the presumably large number of offenders (including a substantial number of federally sentenced sex offenders) that meet the legislative criteria, the dangerous offender legislation is clearly not a major source of community protection. Further, despite being premised upon a clinical model of social

control, the dangerous offender legislation has done little to stimulate the development of effective forms of clinical intervention whether in diagnosis, prediction or treatment.

## **POST 1977 DANGEROUSNESS LEGISLATION AND PRACTICE: THE EMERGENCE OF A COMMUNITY PROTECTION MODEL**

With an average of only 8 new declarations a year, Canada's Dangerous Offender legislation has offered minimal comfort to members of the community concerned about high risk violent and sexual offenders. Since the early 1980's, a body of dangerousness legislation and practice has been developed in response to public and interest group pressure and extensive media coverage of incidents of sexual violence.

Perhaps the first significant development was the establishment in 1980 of the **Committee on Sexual Offences Against Children and Youth** chaired by Dr. Robin Badgley. The Committee's report in 1984 heightened public concern about the sexual victimization of children with the publication of survey data from hospitals, police forces and child protection services and a national population survey of 2,008 Canadians from 120 communities. The population survey found that just over 1 in 2 females (53.5%) and just under 1 in 3 males (30.6%) had been victims of at least one unwanted sexual act and that the majority of victims (4 out of 5) were children or youth at the time such acts occurred. Following the recommendations of the Committee and an extensive consultation process, Bill C-15 was enacted in 1988 to amend the **Criminal Code** and the **Canada Evidence Act**.

Three new Criminal Code Offences were created: (1) "sexual interference", which made it an offence to touch anyone under the age of 14 for a sexual purpose with any part of the body or an object; (2) "sexual exploitation", which made it an offence for persons in position of trust or authority to have sexual contact with youths between the age of 14 to 18; and (3) "invitation to sexual touching" which made it an offence to invite a child under 14 to touch another person or himself in a sexual way. In addition, amendments were made to the **Canada Evidence Act** to: (1) permit the court, provided certain conditions were met, to hear the testimony of children without corroboration; (2) eliminate the time limitation on the prosecution of sexual offences against children; and (3) allow as evidence a video tape of a child's statement made soon after the offence was committed provided that the contents of the tape were adopted by the child in testifying before the court (Lowman *et al* 1986:11,16)

An important consequence of the Badgley Report and Bill C-15 and the extensive media coverage of the issues they dealt with was the sensitization of the public to the seriousness of child sexual victimization as a social problem. These events can be seen as playing an important background role in the emergence of a community protection model of dangerousness.

The first major post-1977 development in correctional legislation and practice with regard to dangerousness, occurred following two separate incidents of sexual assault and murder carried out in 1981 by Paul Kocurek and Duane Taylor, both sex offenders who had

been released on mandatory supervision. The fact that both victims were children particularly aroused the fury of the public (Marshall and Barrett, 1990:24-25).

Because the remission provisions of the Parole Act required the release of inmates after serving two thirds of their sentences, the National Parole Board responded with a practice referred to as "gating". This involved authorizing the release of an inmate on mandatory supervision and then immediately issuing a warrant of apprehension suspending mandatory supervision on the grounds that the inmate presented such a risk of re-offending that he should be returned to custody. After eleven cases of "gating", the Supreme Court ruled against the practice in 1983 on the grounds that without specific legislation enabling the power to suspend mandatory supervision prior to release, any such suspension had to be based on post-release conduct (Government of Canada, 1993:3).

In 1984, the sexual slaying of Celia Ruygrok, a female half way house employee, by paroled offender Allan Sweeney, mobilized further government action which culminated in the introduction of Bill C-67 in 1985. The passage of this bill in 1986 allowed the National Parole Board to detain individuals convicted of a serious violent offence beyond their mandatory release date if there were reasonable grounds to believe they were likely to commit, before warrant expiry, an offence causing death or serious harm (Government of Canada, 1993: 14; Marshall and Barrett, 1990: 32-34).

In 1987, one year after the enactment of Bill C-67 there was another resurgence of public indignation following the rape-murder of Tema Conter, a young woman, by

Melvin Stanton, a sex offender on temporary absence leave (Marshall and Barrett, 1993: 32). Following a period of intense debate and lobbying, Bill C-36, the **Corrections and Conditional Release Act** was enacted in 1992. Bill C-36 made possible the application of the following public safety measures to high risk violent and sexual offenders:

**exclusion from the accelerated parole and unescorted temporary absence programs; delay of parole eligibility from 1/6 of sentence to 6 months before full parole eligibility date; judicial determination of parole eligibility at 1/2 of sentence rather than 1/3.  
(Corrections and Conditional Release Act, 1992  
Government of Canada, 1993)**

Also in 1992, Bill C-30 was enacted to amend the Mental Disorder provisions of the Criminal Code. Among other things this legislation created a "cap" or outer limit on the length of time a person found criminally insane could be held in custody. The "cap" was set as the equivalent to the maximum possible sentence in a guilty finding. In the interest of public safety, however, the Attorney-General is allowed to make application to have someone who has been found "not criminally responsible", but who meets the legislative criteria for a dangerous offender, declared a "dangerous mentally disordered accused" person. If the court makes such a finding, an individual can be held indefinitely under secure custody in a mental health facility until release is ordered by a Criminal Code Review Board (Government of Canada 1993: 10-11). To date, neither the "capping" nor the "dangerous mentally disordered accused" provisions have been proclaimed.

Throughout 1992, media coverage continued to put the spotlight on cases involving the sexual victimization of children and women and the need to find new ways to protect

vulnerable members of the community. One such case involved a Parole Board decision to release Wray Budreo, a chronic pedophile with 23 charges of sexual assault since 1963, who was currently serving a six year sentence for 3 offences that involved paying youth to sexually touch him. Under **the Corrections and Conditional Release Act**, Budreo was considered to be entitled to release after 2/3 of his sentence unless there was a likelihood he would commit a "serious harm" offence. However, the public outcry was so great that the Parole Board based on the claim of new evidence of Budreo's dangerousness, reversed its decision and required Budreo to serve his full sentence (Appleby, 1992; Vienneau, 1993).

The strongest public reaction however, came in response to the Ontario Coroner's inquest into the death in 1988 of Christopher Stephenson, an 11 year old boy who had been abducted, sexually assaulted and murdered by Joseph Fredericks, a sex offender referred to as a sadistic psychopathic pedophile. At the time of the murder, Fredericks was on mandatory supervision after serving two thirds of a five year prison term for sexually assaulting another 11 year old boy. Fredericks had been considered for a dangerous offender application but the wishes of the victim's family to avoid the ordeal of testifying led to a plea bargain for a five year prison term and the abandonment of the application.

The Stephenson Inquest which ran from the fall of 1992 into the winter of 1993 received national media attention particularly when its recommendations were released (Hudson, 1993; Sarick, 1993). All told, there were 71 recommendations pertaining to tightening up of the justice and mental health systems or other ways of protecting the community.

The number one recommendation was "that legislation be created which shall provide for the protection of the community by permitting the continued detention of sexually violent predators beyond expiration of their sentences or other dispositions of detention as authorized by the **Criminal Code of Canada** as well as the provision of treatment during their confinement". The suggested model for such legislation was the Washington State **Community Protection Act** (Government of Ontario, 1993:8).

The second recommendation was that the "provision" of Bill C-30 providing for a "cap" on the length of detention of the criminally insane not be proclaimed "unless and until community protection legislation is enacted (Government of Ontario 1993:8).

Other major recommendations of the Stephenson Inquest were as follows:

**the development of a "national strategy for the assessment, management, and treatment of sex offenders" (p.13);**

**the creation of a "National Coordinator for the treatment and management of Sexual offenders" (p.13);**

**the redefinition of the notion of "serious harm" in the detention provisions of the *Corrections and Conditional Release Act* to give greater recognition to psychological as well as physical harm;**

**the funding and expansion of "established community based sexual offender treatment programs for offender aftercare" (p.14);**

**the referral before release of all dangerous high risk sexual offenders to a psychiatric facility for a psychiatric assessment pursuant to the involuntary admission provisions of the *Mental Health Act* (p.16);**

**the more aggressive use of the Dangerous Offender Provisions of the Criminal Code (p.20);**

**the establishment of a "registry for convicted, dangerous high risk sexual offenders" and the requirement that such offenders register with the police in each jurisdiction in which they reside (p.22).**

Even before the Stephenson Inquest had made its recommendations, the Federal Solicitor General's Department was carrying out internal studies and policy and program reviews to come up with answers to what had become a very hot public and political issue.

In May of 1993, the Solicitor General of Canada, Doug Lewis, issued a package of proposals to address the issue of high risk repeat sexual and violent offenders and to respond to the recommendations of the Stephenson Inquest. In a news release (Solicitor General of Canada, May 25, 1993) commenting on the proposals, Mr. Lewis clearly signalled the need for measures based on a community protection model.

**Violent tragic cases of recent years underlined to me that we needed to take a fundamental leap forward in the way society and its institutions deal with that small albeit highly dangerous group of offenders that we cannot rehabilitate but who we cannot now keep beyond the end of the original sentence.**

**The public is fed up with a system that lets out known high-risk violent offenders almost certain to commit other heinous crimes. They rightly ask where are our rights, where are the rights of victims, especially children, not to be violated or killed by these offenders?**

**... I have seen a clear consensus emerging among Canadians that the government must have the power to**



**keep these violent offenders in custody as long as they pose a threat to society.**

The proposals (Ministry of the Solicitor General, 1993) put forth by Mr. Lewis consisted of the three measures outlined below:

1. A revision of the **Criminal Code** and the **Corrections and Conditional Release Act** to provide an expanded "window of opportunity" to make a dangerous offender application in the case of offenders already under determinate sentence for a serious personal injury offence. Upon the advice of the Correctional Service of Canada, the National Parole Board would have the power to refer an inmate for a possible dangerous offender application. Such referral would be made to the Attorney General of the province where he received his most recent sentence for a serious personal injury offence. The basis for the referral would be the satisfaction of four criteria:

(a) a current sentence for a serious personal injury offence; (b) an order of detention **until** sentence expiry based on the likelihood of an offence causing death or serious harm; (c) a National Parole Board judgment of the likelihood of an offence causing death or serious harm **after** sentence expiry; (d) evidence of dangerousness not presented to the court that sentenced the offender for one or more serious personal injury offences.

If the Provincial Attorney-General was satisfied these criteria were met, authorization could be given to make a dangerous offender application within the last year of sentence. In the case of expected sentence expiry before a decision on a dangerous offender application, the Attorney-General could apply to the Court to have the offender kept in custody until a decision was made.

In the case of a successful dangerous offender application, the following dispositions would be possible: (a) indeterminate detention; (b) a determinate period of detention; (c) supervised release in the community for a period of ten years; d) detention plus community supervision. The Correctional Service of Canada would administer custodial orders and supervised release. Parole eligibility for the offender would be one year from the date of the order and parole review would be every year thereafter.

2. The elimination of the "serious harm" criterion for "a sexual offence involving a person under the age of eighteen" to allow referral of sex offenders to the National Parole Board in order to determine whether they should be held in detention until sentence expiry. The grounds for a review would be a current sentence of two years or more for a sex offence against a child and a reasonable belief that another sex offence against a child would be likely before sentence expiry.

3. A tightening up of the method of sentence calculation to ensure that offenders on conditional release convicted of any new federal offence would be automatically returned to custody and have to serve additional time before parole eligibility. The cap on the total period of parole eligibility would be raised from seven to fifteen years.

While the draft legislation was designed to provide increased community protection against predatory sex and violent offenders through changes in sentencing and correctional practice, other community protection concerns have been reflected in policing practice. A

major debate has taken place over the propriety or usefulness of police notification of the public of the whereabouts of sex offenders (Rogers, 1993a). An Angus Reid- Southam News telephone survey of 1,501 adult Canadians released on Feb. 27, 1993 indicated that 69% were in favour of the police releasing to the media the names of high risk offenders released from prison (Bindman, 1993: A3). In the absence of legislation or formal policy, several Ontario police departments (including those in Ottawa, Gloucester, Nepean, North Bay, Barrie, Peterborough, and Brantford) have taken the initiative to release the names of sex offenders to the media (Rogers, 1993b; Richardson, 1993a).

While some community groups have applauded the proposals to deal with sexual predators, some critics (notably those representing the women's movement) have been less pleased. A suggested implication of several recent reports dealing with violence against women (Marshall and Vaillancourt, 1993; Statistics Canada, 1993) is that the major policy focus with regard to controlling violence against women should not be the relatively rare, apparently pathological, predatory male offender. Rather the focus should be on the far more pervasive aggressive offences of apparently "normal" males - husbands, boyfriends, blood relatives, and acquaintances. With limited resources to deal with the reduction of the incidence and impact of violence, the question that arises is where the resources might be most effectively used.

In the concluding section, I will assess the findings of my cross jurisdictional and historical review of dangerousness legislation and practice and present some suggestions to consider in developing policy and conducting further research.

## **PART VI**

### **SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS**

#### **INTRODUCTION**

This report critically reviewed dangerousness legislation and practice in Canada and selected jurisdictions in the United States, Europe, and Australia. The current situation in Canada was assessed and recommendations were made with regard to policy and research.

The concept of dangerousness was defined as a state of being of individuals rendering them at high risk to physically, psychologically, or morally harm self or others. Four major features of the concept were noted: dangerousness as a property of offenders rather than offences; selective application to certain forms of harm (sexual and violent); a focus on dangerous persons as opposed to the situations influencing the persons; a focus on the future rather than the past.

The social context behind the emergence of dangerousness legislation was described in terms of the primal fears of the community with regard to sexual violence by predatory strangers, particularly when the victims are young children. These primal fears are expressed in extensive, often sensationalized, media coverage and popular cultural images. The reaction to infrequent acts of stranger violence is often greater than the reaction to acts of violence in a domestic or acquaintanceship context which occur far more frequently. Dangerousness legislation was described as more of a symbolic attempt to appease

community outrage over sensationalized but relatively infrequent incidents of predatory violence against children than a demonstrably effective instrumental effort to reduce the incidence of serious harm to the community.

Three models of social control and their assumptions about dangerousness were identified and examined: The **Clinical Model**, the **Justice Model**, and the **Community Protection Model**.

## **THE CLINICAL MODEL**

The **Clinical Model** assumes that sexual and violent offences and persistence in offending are the product of pathology which renders offenders not responsible or only partially responsible for their actions. Punishment is contrary to a clinical perspective but indeterminate confinement accompanied by treatment may be viewed as necessary in the interests of public safety.

An examination of research on dangerousness legislation and practice using a clinical model indicated that clinical practitioners working with sex offenders and violent offenders have at best had modest success in diagnosing personality disorder, predicting violence, and carrying out effective treatment programs. The diagnosis of personality disorders was often found to be unreliable, the clinical prediction of violence subject to high levels of false positives, and treatment and behavioural management programs for sex offenders shown to be of modest effect, especially for high risk offenders and over long periods.

The Clinical Model had its origins in nineteenth century Positivist Criminology and forensic psychiatry. The use of a clinical model in civil and criminal legislation was widespread in Europe and North America from the turn of the century until the early 1960's. Since then, most legislation (e.g. the sexual psychopath statutes in the United States) which explicitly uses a Clinical Model has either been abolished or drastically reformed. Three jurisdictions which continue to make extensive use of a clinical model in legislation were discussed: The Netherlands, England and Wales, and Illinois.

**The Netherlands** uses a special Criminal Code provision called TBS to deal with offenders who are found to lack responsibility in whole or in part for their offence because of mental disorder or personality disorder and who are considered to be dangerous. TBS is applied at the time of sentencing, in one of two ways: as an alternative to a prison sentence, or as a measure coming into effect after a determinate criminal sentence has been served.

A TBS order is for a two year period but can be renewed an indefinite number of times for violent offenders considered to be dangerous.

Over 90% of TBS patients have committed a violent offence, and about 1/3 a sexual offence (most of these of a violent nature). Of all classes of TBS patients, sex offenders are said to arouse the greatest concern. This concern has been related to extensive media coverage of a few cases of serious recidivism.

The jurisdiction of **England and Wales**, under its Mental Health Act, uses a hospital order with restriction to indeterminately confine mentally disordered offenders who are considered to be dangerous. The order can be made after a criminal insanity verdict or can be applied by the Courts to legally sane mentally disordered offenders at the time of sentencing. A hospital order with restriction can also be applied to an inmate serving a sentence who is found to be mentally disordered. This is referred to as a "transfer direction."

As is the case with the Netherlands, psychopathic disorder is considered to be a form of mental disorder. Only those sexual and violent offenders considered to be suffering from psychopathic disorder or some other form of mental disorder can be held under a hospital order. Hospital orders are thus a measure for dangerous mentally disordered offenders, not all dangerous offenders.

Decisions to release persons held under a restriction hospital order are made by the Home Secretary or a Mental Health Review Tribunal. The criteria for release are that the patient not be suffering from a mental disorder necessitating hospital treatment and that the public safety or the patient's safety not be jeopardized by the absence of treatment in a confined setting.

A major concern expressed with regard to the use of restriction hospital orders relates to their use for psychopathically disordered offenders. Some critics argue that

psychopathically disordered offenders, being more bad than mad, might be better managed in a prison than in a hospital setting.

There is a perception, however, that psychopathic patients are at a greater risk to re-offend than other categories of mentally disordered patients. This perception has given support to those who believe that hospital orders offer a greater protection to the public than a determinate sentence because of the opportunity for treatment (however slim the rate of success might be) and, particularly, because of the ability to indeterminately confine.

**The Illinois Sexually Dangerous Persons Statute (SDPS)** provides for the indeterminate civil commitment of persons charged with a sexual offence who have been assessed to be mentally disordered for a period of at least one year. The State must either convict and punish a person accused of a sex offence or commit and treat him. It cannot do both.

The statutory period of commitment is entirely indeterminate. At any time, if a person is found by Court to no longer meet the criteria of the **SDPS**, he must be released.

The **SDPS** has been criticized as a way of confining, under civil standards of proof, individuals who might not be found to meet the "beyond a reasonable doubt" standard of criminal law.

## **THE JUSTICE MODEL**



The Justice Model assumes that all legally sane offenders, including sexual and violent offenders, are responsible for their actions and merit fixed levels of punishment proportionate to the seriousness of their offence and offence history. Offenders are to be sentenced on the basis of **what they have done, not what they might do.**

During the 1960's and 1970's a justice model of social control developed in response to social science research challenging the validity and reliability of clinical diagnoses of personality disorder and assessments of dangerousness and questioning the efficacy of clinical treatment and rehabilitation generally. Also influential, was a civil rights revolution in mental health and criminal justice in which claims were made that indeterminate confinement without the right to voluntarily receive (or reject) treatment was a violation of fundamental civil rights.

As a consequence of the adoption of a justice model, most legislation using a clinical model (notably the sexual psychopath statutes in the United States) was abolished or amended. Often, the term "sexual psychopath" was replaced by the term "sexually dangerous person" or "dangerous offender". Many jurisdictions such as Washington State and California adopted determinate sentencing systems. Other jurisdictions retained indeterminate sentences or commitment procedures but introduced stricter procedural safeguards to protect the rights of offenders and mental patients.

The justice model has been subject to considerable criticism for giving greater emphasis to the rights of offenders than to the rights of victims and the community. First,

victimization surveys indicating low reporting rates for sexual and violent offences have been used to suggest that the number of false positives reported in violence prediction research may not be so high as previously thought. Second, research indicating the long-term consequences of sexual victimization (even when there has been no direct physical harm), has been cited to suggest that sentences for sex offenders are often not proportionate to the seriousness of the harm caused. Third, follow up research of treated and non-treated sex offenders has been cited to indicate that, even with treatment, levels of recidivism are so high, especially over the long term, that special community protection measures are required.

## **THE COMMUNITY PROTECTION MODEL**

The community protection model makes protection of vulnerable members of the community its primary objective. Treatment of offenders and the civil rights of offenders are considered ancillary to the right of the public to be protected from serious harm.

Since the 1980's, a community protection model has been emerging in a number of jurisdictions in response to social movements advocating victims rights and greater protection for women and children from sexual violence. There is a view developing that legislation and practice based on either a clinical or justice model does not offer adequate protection against high risk sexual predators.

The major example of a community protection model in legislation is Washington State's **Community Protection Act(CPA)**, a comprehensive legislative package, which

established a variety of measures to safeguard the public against sexual offenders. These measures included community notification of the whereabouts of sex offenders, a sex offender registry system, and longer sentences for sex offenders. The most controversial part of the CPA has been the **Sexually Violent Predators** (SVP) law, a civil measure which allows for the indeterminate confinement of dangerous sexual offenders whose period of custody in prison or a mental hospital has expired or is about to expire. An SVP is defined as any person previously convicted or currently charged with one or more of several specified crimes of sexual violence who is deemed to have a mental abnormality or personality disorder which makes him likely to engage in future predatory acts of sexual violence. Offenders who are family members or acquaintances of their victims cannot be considered under the SVPS statute unless it was determined that a relationship was cultivated with the victim primarily for the purposes of victimization. A person found to be an SVP, after a trial by judge or jury, is indefinitely confined at the State's Special Commitment Center (SCC). There is no provision for conditional release. Release can only take place following a decision of the Court, after a trial by judge or jury, that the offender no longer meets the criteria for an SVP.

The SVP law has been in operation for a little over three years. As of Feb., 1993, 20 individuals had been assessed as meeting the SVPS criteria and 10 committed by the courts. Currently, the constitutionality of the law is under challenge on the grounds that fundamental rights of persons held under the law are being violated. These include the right to freedom from cruel and unusual punishment and the right to equal protection under the law.

Two other examples of a community protection model in legislation are Massachusetts's proposed public safety measures for Sexually Dangerous Persons and the **Community Protection (Violent Offenders) Bill** in Victoria, Australia. A key feature of the Massachusetts proposals is the establishment of a Community Access Board to replace a Mental Health Board in deciding the release of S.D.P's.

The Victoria proposals are designed to replace a preventive detention statute (the "Gary David Law") whose purpose is to protect the public against one specific dangerous individual. The new Bill incorporates some features of a clinical model but its primary emphasis is on community protection. It applies to serious violent offenders who have completed a custodial sentence and are still considered dangerous. A person considered for a community protection order must have a history of at least one previous involuntary psychiatric hospitalization and be judged by two psychiatrists to have a serious personality disorder which renders him at serious risk of a violent offence against another person.

As was the case with Washington State's SVPS, the Victoria Legislation has been criticized, from a justice model, as an unjust form of preventive detention which violates a number of fundamental civil rights.

## **DANGEROUSNESS LEGISLATION AND PRACTICE IN CANADA**

Dangerousness legislation and practice in Canada historically can be understood in terms of the initial emergence of legislation based on a clinical model, the critique of this legislation from a justice model but with few modifications, and the emergence in recent years of a community protection model.

In 1947 and 1948 respectively the Habitual Offender and Criminal Sexual Psychopath measures were enacted as part of the Criminal Code. In 1960, the Criminal Sexual Psychopath measures were amended and replaced with provisions for Dangerous Sexual Offenders.

The Criminal Sexual Psychopath, Dangerous Sexual Offender, and Habitual Offender measures were all criticized for regional disparities in their application (particularly a disproportionate number of applications in British Columbia), the targeting of non-violent sexual and property offenders, and the failure to include dangerous non-sexual offenders.

In 1977, Dangerous Offender legislation was passed which rescinded both the Habitual Offender and Criminal Sexual Psychopath statutes. The new legislation continued to apply to dangerous sexual offenders but also made possible the inclusion of dangerous offenders whose admitting offence was violent but non-sexual in nature.

Despite the wave of criticisms reflecting a justice model that were current at the time, the new legislation retained a strong emphasis on clinical model assumptions through its reliance on psychiatric testimony in the adjudication of dangerousness. Since its enactment,

the Dangerous Offender legislation has withstood several court challenges on the grounds that it violated the Charter of Rights and Freedoms.

As of December, 1992, there were 121 persons serving indeterminate sentences under the Dangerous Offender provisions, an average of 8 declarations a year. Almost half of indeterminately sentenced dangerous offenders were declared in Ontario, a little over a quarter in B.C., and a quarter in the Atlantic and Prairie provinces. Québec has had no declarations of dangerous offenders.

Little research has been carried out on the process of selecting and adjudicating dangerous offenders. The suggestion has been made, however, that the threat of a dangerous offender application is often used in plea bargaining.

Over one half of dangerous offenders have a sex offence as their major offence and 90% have a history of one or more sex offences. The small number of adjudicated dangerous sex offenders contrasts with the large number of federally sentenced offenders(1,814 as of Oct.31,1992)whose major admitting offence was a sex offence.

Given that the small numbers of sex and violent offenders who are declared dangerous offenders are in all likelihood only a small portion of all the sex and violent offenders who might in principle meet the criteria for a Dangerous Offender application, the Dangerous Offender legislation has not played a major instrumental role in community protection. Furthermore, despite the legislation's clinical premises, little has been done to

develop effective forms of clinical intervention (diagnosis, prediction, or treatment) for the specific needs of the dangerous offender population.

Since the early 1980's, there has been a move toward a community protection model of dangerousness fostered by victims rights and child protection advocates, the women's safety movement, and an emerging body of research on the victimization of women and children.

In response to public outcry over a series of incidents of sexual violence against children and women committed by offenders on mandatory supervision or temporary absence, the Federal Government enacted legislation designed to detain high risk violent offenders and sex offenders until sentence expiry date and exclude them from early parole eligibility and unescorted temporary absence programs. This legislation included Bill C-67 in 1986 and certain provisions of Bill C-36 in 1992.

The problem remained of what to do with high risk offenders whose determinate sentences had expired. It was clear that the Dangerous Offenders legislation with its narrow "window of opportunity" (between conviction and sentencing) had been of little help.

A major impetus toward the development of Canadian community protection legislation occurred as a consequence of the Ontario Coroner's inquest into the sexual

slayings of 11 year old Christopher Stephenson in 1988 by Joseph Fredericks, a violent pedophile offender, who was on mandatory supervision at the time. A dangerous offender application had been previously considered for Fredericks after his last conviction for sexual assault of a child, but the application had been dropped when the victim's family did not agree to let him testify.

When the Stephenson Inquest released its report in January of 1993, the number one recommendation of the jury was the enactment of community protection legislation modeled after Washington State's Sexually Violent Predators Act. The inquest also called for mandatory registration of sex offenders with the police and amendment of the definition of a serious harm offence to include any sexual offence against a child.

In May 1993, the Solicitor General of Canada responded to the Stephenson Inquest's recommendations by releasing two draft bills designed to "strengthen the correctional system to deal effectively with the management of high risk offenders, especially high risk repeat offenders who victimize children" (Solicitor General of Canada, 1993 a : 1). Washington State's civil commitment model was rejected as inappropriate for Canada. Instead, the draft legislation proposed to better protect the public against high risk offenders by allowing a dangerous offender application to be made during the last year of an offender's sentence as well as during the period between conviction and sentencing. The expanded window of opportunity for application was intended to enable Correctional Service of Canada officials and the National Parole Board to monitor violent offenders and sex offenders while they



served their sentences and presumably be able to better assess which ones would be at greatest risk to engage in a serious harm offence if released.

Whereas Washington State provides only for post-sentence indeterminate commitment without the possibility of conditional release, the Solicitor General's proposals offer a range of post-sentence community protection orders: an indeterminate sentence; a new form of intensive post-custodial supervision for up to 10 years; or a determinate sentence alone or followed by a supervision order. The conditional release provisions already established in existing legislation would continue to apply.

## **IMPLICATIONS OF LEGISLATION AND PRACTICE IN OTHER JURISDICTIONS FOR CANADA**

Examining legislation and practice historically across jurisdictions is useful in pointing out the variety of options societies have exercised in dealing with sexual and violent offenders whether through the criminal justice system, the mental health system, or some hybrid system designed to deal with those who fall between the other two systems. It is apparent from such a review, however, that dangerousness legislation and practice in Canada cannot readily be modeled after what occurs in other jurisdictions. The major problem is that such legislation is often based on quite different understandings of criminal responsibility and different understandings of the linkage between dangerousness and mental and personality disorder. In both England and Wales and the Netherlands, the dangerous offender provisions are more closely tied to the diagnosis of mental disorder and the determination of criminal responsibility than they are in Canada. Canadian jurisprudence and forensic practice does not explicitly link the designation of dangerousness to diminished responsibility due to psychopathy or other forms of personality disorder. In England and Wales and, to a considerable extent, the Netherlands, assessing dangerousness of offenders is as much an issue of mental health as it is of criminal justice. In Canada, despite the use of psychiatric experts in the adjudication of dangerousness, this is not so clearly the case. The Canadian approach to dealing with dangerousness more closely parallels Washington State's concerns with community protection. However, the use of civil legislation to achieve this end is not considered appropriate given Canada's Federal-Provincial jurisdictional splits in

the areas of criminal justice and mental health. Canadian dangerous offender legislation would thus seem to require a made-in-Canada solution respecting Canadian traditions.

## **A CRITICAL ASSESSMENT OF CURRENT CANADIAN DANGEROUS OFFENDER LEGISLATION AND PRACTICE**

Before commenting on the Solicitor-General's draft high risk offender proposals, a comment on current legislation and practice is necessary. Since the draft proposals are not intended to replace the current dangerous offender provisions but rather to build on them, some major difficulties are likely to be retained and perhaps even exacerbated.

These problems include the reluctance of many crown attorneys (particularly in some provinces) to apply the legislation, the apparent use (how frequently this occurs is not known) of the threat of a dangerous offender application as an inducement to plea bargain, and the apparent lack of attention to adjudicated dangerous offenders as a class of offenders who might merit close monitoring to assess whether they have special treatment needs.

Webster and Dickens (1983:109) noted that no studies have been done to show that adjudicated dangerous offenders "were singled out because their behaviour had been demonstrably more violent, dangerous, or repetitive than those of other aggressive criminals." There is a need to assess how similar or different the small pool of adjudicated dangerous offenders is from the larger pool of violent and sexual offenders. What are the characteristics that led some offenders and not others to be selected as candidates for a dangerous offender application? What discernible differences might there be in terms of

such factors as: major admitting offence; offence history; psychiatric history; substance abuse; sexual or physical abuse as a child or other exposure to serious violence; race or ethnicity; physical appearance ("bizarre" or "normal"); social class; and family background? Are adjudicated dangerous offenders significantly different from other violent sexual offenders or are the contingencies of differential community and criminal justice response the key factors in their selection?

In their analysis of Canadian preventive detention legislation, Wormith and Ruhl (1987:425) contend that "[r]egional differences indicate serious problems of reliability and professional agreement". In this regard, research might be carried out on how and why candidates for dangerous offender applications are selected by crown attorneys in different provinces. What are the reasons behind Quebec's neglect of the Dangerous Offender provisions and different levels of use elsewhere? Interviews with provincial crown attorneys might also reveal the extent to which the threat of a dangerous offender application is used in plea bargaining.

Risk assessment, risk management, and treatment issues with regard to dangerous offenders need to be examined in the context of how similar, or different, offenders from this group are from the larger pool of sexual and violent offenders.

Further research needs to be encouraged with regard to on the etiology and phenomenology of sexual violence and other age and gender related violence as well as to approaches to treatment and relapse prevention.

## **A CRITICAL ASSESSMENT OF THE SOLICITOR-GENERAL'S PROPOSALS FOR HIGH RISK VIOLENT OFFENDERS**

A community protection model of dangerousness has emerged in recent years in response to populist forces advocating the primacy of the rights of victims and the right of the community to protection over the rights of offenders. Scheingold *et al* (1992: 17) in a paper on Washington State's Community protection movement, have argued that such populist advocacy "tends to build idiosyncratically on the public's reaction to extreme crimes" and that "these extreme events exaggerate the social costs of crime and ignore its complexity". Nonetheless, the mere fact that reform proposals are driven by populist response to extreme events does not mean that such proposals are without merit. Following, is a critical assessment of a Canadian approach that would include the high risk offender proposals.

Compared to Washington State's Community Protection Legislation, Canada's approach would have some distinct advantages:

- (1) the ability to deal with both sex offenders and violent offenders whose admitting offence is not sexual in nature;
  
- (2) the ability to flexibly adopt a range of post-sentence options (including non-custodial intensive supervision and determinate sentences) to meet public safety needs and the needs of particular offenders;

(3) the possibility of conditional release

Furthermore, unlike legislation in England and Wales and the Netherlands, candidates for a dangerous offender application even now do not have to be diagnosed as having a mental or personality disorder. The question of their responsibility, in whole or in part, for their offence is also not at issue. Finally, unlike Victoria, Australia, there is no requirement of a previous involuntary psychiatric hospitalization.

The Canadian proposals to modify the Dangerous Offender legislation do, however, share some problems with legislation or draft legislation elsewhere.

One possible concern with regard to post-detention measures for offenders already serving a sentence for a specific offence is that of double jeopardy. Presently, application for a hearing on whether or not a person is a "dangerous offender" must be made after a person has been convicted of a "serious personal injury offence" but before he has been sentenced. As things now stand, an individual already sentenced to a determinate period for a particular offence or set of offences cannot be sentenced a second time for the same offence or set of offences. This clearly satisfies the fundamental requirement in British and Anglo-American legal tradition that an individual not be placed in the situation of double jeopardy - a double trial and double punishment for a single offence or set of offences (Sears, R. 1960-61: 236)

With regard to the draft high risk offender proposals, it is not so clearly the case that the requirement to avoid double jeopardy is met. For offenders who have completed or are about to complete their sentence for a particular offence or set of offences, it may be a violation of the Charter of Rights and Freedoms to hold a dangerous offender hearing and impose a post-detention order when assessments of the likelihood of future harm have been made but no new serious personal injury offence has been committed. This may particularly be a problem given that the Canadian Dangerous Offenders provisions are part of the Criminal Code and not a civil statute as in Washington State. In 1938, The United States Supreme Court ruled that Michigan's **Criminal Sexual Psychopath** statute, enacted in 1937 as part of its Criminal Code, was unconstitutional on the grounds, amongst other things, of double jeopardy. This led to the enactment of the first civil sexual psychopath statute in Illinois in 1938. Henceforth subsequent sexual psychopath and sexually dangerous person statutes in the United States have been enacted as civil statutes. This was also one of the reasons why Washington State enacted its **Sexually Violent Predators** statute as a civil measure.

Victoria's **Community Protection** legislation is part of criminal law but makes both an involuntary confinement to a psychiatric hospital on at least one previous occasion and a diagnosis of serious personality disorder necessary features for preventive detention via a community-protection order. This has some similarities with Canada's legislative provisions for persons found not guilty by reason of insanity or incompetent to stand trial, in the sense that the measure serves to protect society from a class of psychiatric patient. Canada's **Dangerous Offender** legislation, on the other hand, while it does call for psychiatric

assessments, does not require either previous psychiatric hospitalization or a diagnosis of mental or personality disorder. In short, Canada's proposed use of a post-sentence Dangerous Offender designation as part of the Criminal Code may be more clearly a case of double jeopardy than the Washington State civil legislation and Victoria's draft criminal legislation. The issue of double jeopardy is one that may have to be decided upon by the courts, should legislation modeled on the present draft proposals be enacted.

A second concern that might be raised about the draft proposals is the new powers they propose giving to correctional officials and the National Parole Board in the dangerous offender designation process. While it is true that such officials are already involved in the risk assessment of all offenders with regard to decisions pertaining to custody and release, the new proposed legislation's effects on the sentence-management of inmates need to be carefully considered. The possibility of a post-sentence dangerous offender application may be used by officials to persuade inmates to cooperate with their institutional regime. What might some of the unintended or latent consequences of the threat of a post-sentence dangerous offender application be? Will inmates be less co-operative or more cooperative with institutional regimes? Will offenders have less or more incentive to change their behaviour?

Lafond (1993), a critic of Washington State's legislation, has suggested that there are signs that at least some sex offenders in Washington prisons are refusing to participate in treatment for fear that information gathered during the course of the treatment might be used against them in a Sexually Violent Predator application. Lafond (1993) argues that the



threat of post-sentence detention, to the extent that it undermines the incentive to participate in treatment or relapse prevention programs, may even increase the risk to the public.

A third area of concern relates to the development of a jurisprudence dealing with the balancing of the rights of the individual offender against the rights of the community to protection and to victims and their families for redress. The emerging community protection model of risk management clearly seems to conflict with the longer standing justice model of social control as indicated by the civil libertarian critiques of Washington State's SVP law and Victoria's Community Protection Bill. Pepino (1993:13) argues that "risk management must be offender driven, not offence driven, and certainly not sentence driven." In her view:

**Judges are still labouring under a body of sentencing precedence that was framed in the days when ... [they] ... heard character evidence supporting the convicted offender but no victim impact statements to weigh against it.**

Can risk management in the interest of community protection be satisfactorily reconciled with principles of individual justice as elaborated in the Charter of Rights and Freedoms and other declarations of fundamental human rights?

Perhaps the broadest area of concern with regard to both the new community protection proposals and the current dangerous offender legislation is their dominant focus on exceptional dangerousness as a product of the pathology of individual male offenders who prey on vulnerable and innocent children and women. Increasingly, recent theory and research on violence has painted a different picture.

First, a body of research has portrayed violence as a pervasive problem largely occurring in a domestic context or relationships between acquaintances. Secondly, a picture has been developing of violence, not so much as a product of exceptional pathological individuals but rather as a product of fundamental social structures and cultural patterns in society. Gender socialization practices, portrayals of violence in popular culture, inconsistent (too lax or too harsh) disciplinary practices in families and schools, and the commodification of female sexuality have all been cited as important influences in discussions of violence and sexual aggression as major social problems with a serious impact on society.

The history of dangerous offender legislation indicates that such legislation has focused somewhat selectively on a few sexual and violent offenders many of whom are not demonstrably more dangerous than most of the offenders from the larger pool of sexual and violent offenders from which they are drawn. To the extent that dangerous offender legislation draws attention away from routine frequently occurring forms of violence in favour of a focus on the violence of a few predatory offenders such legislation may be problematic. This is not to say that there are not exceptional individuals from whom society needs special protection (Earl Shriener and Joseph Fredericks would be examples). Rather, it is to say that the financial and social costs of selecting these few might be very high and the amount of protection actually afforded to society very low.

## **RECOMMENDATIONS FOR FURTHER RESEARCH AND POLICY**

1. That research be carried out:
  - (a) to assess disparities and idiosyncracies in the application of dangerous offender legislation and the extent to which this legislation is used as a lever in plea bargaining;
  - (b) on how indeterminate sentenced dangerous offenders compare on selected characteristics with sexual and violent offenders serving determinate offences;
  - (c) on the etiology and phenomenology of sexual aggression and other forms of violence and approaches that might be taken to the prevention of such violence as well as to its treatment or management.
  
2. That the Attorney-General of Canada and the attorneys-general of the provinces and territories work together to establish standards, guidelines, and co-ordinating mechanisms to ensure that the dangerous offender provisions are used effectively to control those offenders at highest risk to commit a serious personal injury offence, to balance public safety and fundamental rights and freedoms, and to minimize disparities in application between different parts of the country.

3. That an analysis be carried out on the jurisprudence of the rights of individuals versus the rights of the collectivity and the extent to which a community protection model of social control is congruent or in conflict with documents such as the Charter of Rights and Freedoms.



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