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Dangerous Offenders

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I. Introduction
The specific focus of this paper is on the Dangerous Offender provisions in Part XXI of our Criminal Code. However, the issues that arise in any form of preventive detention go to the heart of our criminal justice system. Hence, these provisions will be used as a vehicle for dealing with the broader issues. Ethical considerations will be discussed as they arise.

The paper begins with an analysis of the history of Part XXI, with emphasis on the moral and legal problems that had to be faced as the legislation developed. The legislative history and the case law are important tools in the analysis but they are only a means to an end. In this case, the end is to present the problems inherent in preventive detention.

The paper then turns to deal with the questions that arise from a "medical model" of dangerousness. Issues to be addressed include methods of prediction, the effect of an indeterminate sentence on an offender and the implications for our criminal justice system if we continue to allow psychiatrists to make determinations of legal status.

The final section deals with the Canadian Charter of Rights and Freedoms as it applies to Part XXI, and with possible legislative alternatives. This section is both the most difficult and the most important because in many ways the conflicting interests involved are hard to balance. However, the criticism contained in this paper would be empty if no viable alternatives were put forth.

II. Legal and Procedural Developments
One fundamental premise of our criminal justice system is that people can only be punished for acts or omissions that contravene the law.
We require the highest standard of proof of a past offence and persons are presumed innocent until proven guilty. Preventive detention is a glaring exception to these principles. The concept of laws to prevent crime is not abhorrent to our sense of justice, but it is a long jump from preventive justice to preventive incarceration. How did this aberration arise?

Price has suggested that the emergence of preventive sentencing was a result of many trends in the popular criminology of the late 19th century. He notes an increase in positivist criminology coupled with the growing influence of psychiatry on the criminal law. Crime was starting to be seen as a symptom of mental illness. Society, and especially the legal profession, were more willing to turn over this aspect of social control to the medical profession. It was assumed that there would be adequate safeguards built in to protect the rights of individuals. Changes were also evident in society's understanding of the role of punishment. Ironically, it was the emergence of the rehabilitative ideal that spawned the use of indeterminate sentences. If the primary goal of imprisonment is rehabilitation, then sentences must be indeterminate so that a prisoner can be released or detained according to his degree of reformation. In addition, an indefinite sentence would motivate the offender to "change his ways" because his release would depend on it.

By the mid 20th century, the growth of science had brought with it a drastic change in ideology. Man was no longer seen as a free moral agent, but rather as a product of "physiologic and ethnic determinism". The rationale for indeterminate sentencing was that a criminal could not change his "criminality", and hence the public had to be protected from it until the threat was gone.

By the late 1960's indeterminate sentences were attracting increasing criticism. They were seen as unnecessarily harsh, and as resulting in disparate sentences for the same offence. What had been a legislative or judicial form of sentencing was increasingly becoming an administrative process. What this means for the offender is that the

5. The use of the male pronoun in this paper reflects the fact that no woman has ever been found to be a "dangerous offender".
The length of his sentence is determined by the Parole Board rather than the court at the end of his trial. In addition, the administrative model provides far less protection for the individual and leaves him fewer avenues of appeal.

What then is the proper role for indeterminate sentencing in 1984 in Canada? Is it a valid process that serves to protect society, or is it largely a symbolic function that allows us to feel protected from dangerous crime? In order to answer these questions it is necessary to look at the evolution of the actual legislation which purports to effect this protection.

1. History
The first Canadian attempt to deal specifically with preventive detention was the Habitual Offender legislation enacted in 1947.8 The provisions were aimed at repeat offenders who had been convicted at least three times of an indictable offence punishable by a sentence of greater than five years. The Crown also had to establish that the offender was leading a persistently criminal life and that such a sentence would be expedient for public protection. Dangerousness was not a requirement.9

In 1948, Parliament enacted similar provisions providing for preventive sentencing for “Criminal Sexual Psychopaths”.10 This legislation had its roots in the United States, where at least one sexual offender statute had already been struck down as unconstitutional.11

There was, and remains to this day, a two-tiered test before one could be incarcerated under the provisions. First, one had to be convicted of one of a number of enumerated offences.12 Following conviction, the Crown could apply to have an individual found to be a C.S.P. This would result in a judicial determination of whether the offender had shown an inability to control his sexual impulses, and whether he was likely to “inflict injury, pain or other evil on any person”.13 If found to be a C.S.P., the offender would be sentenced to an indefinite term of imprisonment in addition to the sentence for

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8. S.C. 1947, c. 55, s. 18.
9. This paper deals only with Dangerous Offenders but until 1977 the Habitual and Dangerous Offender legislation developed along side each other.
10. S.C. 1984, c. 39, s. 43. Herein after Criminal Sexual Psychopath will be referred to as a C.S.P.
12. These offences will be discussed below. Until 1977 only sexual offences were dealt with.
13. Supra, note 9, s. 659(b).
his substantive offence.\(^{14}\)

In 1953, buggery, bestiality and gross indecency were added to the list of offences in addition to attempts at any of the listed offences.\(^{15}\) (One might wonder how bestiality could inflict pain or injury on any person.)

In 1954, Chief Justice McRuer of the Ontario Supreme Court, was appointed to chair a committee on the existing C.S.P. provisions and to report on any necessary amendments. The McRuer Report was released in 1958\(^{16}\) and legislative amendments followed in 1961.\(^{17}\)

The basic premise of the Report was that the legislation was ineffective because so few men had been sentenced under it.\(^{18}\) One might question whether the logical conclusion from the low incidence was that tougher legislation was necessary. The Report blamed the high standard of proof (beyond a reasonable doubt) and procedural difficulties for the ineffectiveness. These “difficulties” were, of course, the few procedural protections given to the offender.

Although the Report was clearly weighted in favour of making the process easier for the Crown, some safeguards for the offender were recommended. What is shocking, however, is that through selective enactment of the “reforms”, the Legislature tipped the scales even further in the direction of the Crown. A brief look at some of the problems found by the Committee illustrates some of the issues that still plague us today.

Psychiatrists testifying before the Committee were highly critical of the term “Criminal Sexual Psychopath” because it had no clear psychiatric (let alone legal) definition. One also gets a sense that the Committee was not quite sure whether what was needed was a medical or a legal definition. As a result, the “Criminal Sexual Psychopath” was replaced by the “Dangerous Sexual Offender” in the 1961 amendments.\(^{19}\) It is not clear just how changing the label would assist psychiatric diagnosis. If there is no psychiatric nosology of “psycho-

\(^{14}\) In 1961 the sentence for the substantive offence was eliminated.
\(^{15}\) S.C. 1953-54, c. 51, ss. 147, 149.
\(^{17}\) S.C. 1960-61, c. 43, ss. 32, 44-40.
\(^{18}\) Between 1948-55 only 23 men had been sentenced under the provisions. The first application to have a woman sentenced to preventive detention was not until 1984 and the application failed.
\(^{19}\) S.C. 1960-61, c. 43, s. 32, herein after referred to as a D.S.O.
path”, then surely “dangerousness” is equally elusive. Perhaps the change was motivated by the feeling that since psychopaths were traditionally regarded as “untreatable”, any sense of benevolent treatment-oriented incarceration could not be justified.

The definitional criteria were also changed. The “inability to control one’s sexual impulses” was changed to a “failure to control one’s sexual impulses”. Psychiatrists had told the Committee that “uncontrollable” could not be distinguished from “uncontrolled”. Whether a sexual offence per se illustrates a failure to control one’s sexual impulses, or whether it is a controlled and deliberate act, is a complex question and the courts seem a strange forum in which to answer it.

The other definitional change was the addition of “or is likely to commit a further sexual offence” as an alternative to “inflicting injury, pain or other evil”. No one seems to know just why this phrase was added; it was certainly not part of the McRuer Report. Whatever its origins, it did not survive long. In 1967, the Supreme Court of Canada handed down a decision involving a man who had been convicted of gross indecency and sentenced to preventive detention. Klippert had been involved in consensual homosexual acts. There had never been, nor (according to the psychiatrists) was there likely to be, any violence, danger or coercion. However, the psychiatrists had testified that further homosexual acts were likely. In a judgment that does not reflect well on the calibre of our judiciary, the majority held that the likelihood of future homosexuality satisfied the criteria: “is likely to commit a further sexual offence,” because homosexuality was a crime. Even though the offence involved consent and thus “excluded danger”, Fauteux, J. stated that the need to protect potential victims was not the only purpose of preventive detention, nor was it even required. This rather bizarre statement was not explained and one can only guess as to what other purpose Fauteux, J. may have had in mind. In addition, why did Part XXI require an initial determination of dangerousness if it was not a sine qua non?

Cartwright (Hall, J. concurring) wrote a strong dissent decrying

20. S.C. 1960-61, c. 43, s. 32.
22. Ibid., at 836. The Court divided 3:2 against the offender. Spring has noted that prior to 1970, the S.C.C. divided quite consistently on D.S.O. and Habitual Offender appeals, with Fauteux leading the camp against the offender while Cartwright was usually in dissent for the accused. The few occasions where the accused did succeed, were a result of Judson’s defection to the minority.
the literal interpretation given by the majority. He suggested that this was totally at odds with the legislative intent. A “further sexual offence” had to be read *verba generalia restringuntur ad habilitatem rei vel aptitudinem persona*, and thus be interpreted as “a further sexual offence involving an element of danger to another person”.23 The dissent also noted that our prison system would soon become overcrowded if every homosexual in Canada were subject to preventive detention.

*Klippert* probably triggered the 1968 amendment dropping this phrase,24 and may also have triggered the addition of what is now s.158,25 decriminalizing, *inter alia*, all sexual acts between consenting adults in private.

This case startlingly illustrates how subjective and disparate our attitudes towards sexuality are; and how dangerous it can be to put such vague legislation in the hands of a judiciary who may or may not reflect society’s values.

The most comprehensive overhaul of the legislation was done in 1977,26 largely as a result of the Ouimet Report.27 This Report was highly critical of the existing legislation. In fact, protection of the public from dangerous offenders was seen by the Committee as one of the most serious problems in the criminal justice system.28 The basic premise of the Report was that better identification of dangerous offenders (through medical research) would promote a greater acceptance in society of community-based non-penal “treatment” for non-dangerous offenders. However, the Committee’s proposals were:

predicted upon the existence of necessary custodial and treatment facilities appropriate for this class of offender.29

This is a laudable goal; but the striking lack of psychiatric facilities in Canadian penitentiaries makes the premise somewhat questionable.

24. S.C. 1968-69, c. 38, s. 76.
28. *Ibid.*, at 241. This is a surprising given that the vast majority of crimes do not involve violence. Price suggests that misleading and disproportionate attention is given to sexual offences by the press, and this results in an unnecessary degree of public concern. *Supra*, note 4 at 12.
One of the most welcome changes resulting from the Report was the repeal of the Habitual Offender Legislation. It was recognized that indeterminate incarceration of non-violent (and often petty) criminals could not be justified. It is worthy of note that it took until 1984 before the government attempted to deal with the remaining Habitual Offenders.

The other major change in 1977 was a recognition that dangerous sexual offenders are no different from any other class of dangerous criminal. Thus the "Dangerous Sexual Offender" terminology was dropped and replaced by one inclusive category of "Dangerous Offenders".

Another useful contribution made by the Report was the presentation of statistics which reflected great disparity in sentencing throughout Canada. For example, British Columbia had over half of Canada's Habitual Offenders and Vancouver had four times as many C.S.P.'s as did Toronto. Surely these figures reinforce the argument that the entire categorization process is too subjective and lacking in any clear standards.

Unfortunately the new legislation did not provide the clarity and specificity for which one would have hoped. What few protections the Committee did advocate were often watered down. For example, the Committee recommended that in addition to the existing annual review by the National Parole Board, there should be provisions requiring judicial review every three years, with the Court having the jurisdiction to terminate the sentence. The accused would have the right to counsel, which would be provided for him if he could not afford to pay. How were these recommendations translated into legislation? Annual review by the Parole Board was changed to review every two years. There were no provisions for judicial review and no mention of the right to counsel. This reflects a fundamental difference as to who should be making future determinations of dangerousness. By denying judicial review, the legislature was rejecting a legal decision-making process in favour of a psychiatric one. In fact, the Parole Board almost always follows the medical recommen-

30. Herein after referred to as a D.O.
31. One wonders whether the many years of Social Credit government in B.C. had any influence.
32. Ouimet Report, supra, note 27 at 262-3. The Report does not say whether the burden would be on the crown to prove dangerousness or on the offender to disprove it.
Some recommendations that were followed led to provisions requiring that at least two psychiatrists testify, one selected by the accused and one by the Crown, and provisions enabling the Court to remand the offender to a psychiatric facility for observation. Prior to these amendments, diagnoses were often based on one or two interviews with the offender, medical records and perhaps evidence heard at trial; very little on which to base a man's future.

Except for some relatively minor changes made in 1982, the legislation remains as it was in 1978. Very briefly, the provisions provide for two types of offender: those who have committed “a serious personal injury offence” i.e. a serious crime involving violence, which is punishable by more than ten years; and those who have committed certain sexual offences. If the individual fits into the first category, he must have shown a repetitive pattern of violence, indifference to the consequences of his actions or brutality, such that he is unlikely to be inhibited by normal standards of behaviour restraint.

In the case of a sexual offender, he must have shown a failure to control his sexual impulses, and there must be a likelihood of his causing injury, pain or other evil to other persons in the future, through such failure. The use of the word “evil” is particularly strange in this context. It is not to be read *ejusdem generis*, and hence does not have to be related to injury or pain. This is not consistent with the rest of Part XXI which has as its very foundation a psychiatric determination of “dangerousness”. If we are not dealing with illness, then what makes a psychiatrist any more qualified to determine dangerousness than anyone else?

In 1982, the Criminal Code was amended to change the rape laws, and corresponding changes were required in Part XXI. If one examines the 1982 legislation, the enumerated sexual offences in Part XXI were rape, attempted rape, sexual intercourse with a female under fourteen or between fourteen and sixteen, gross indecency and

34. *Criminal Code*, ss. 690, 691.
40. S.C. 1980-81-82, c. 125, s. 19.
In 1984, the enumerated offences are limited to the three levels of sexual assault, i.e. sexual assault, sexual assault with a weapon and aggravated sexual assault.

One can see that sexual intercourse with a female under fourteen, or between fourteen and sixteen, and gross indecency have been dropped. The elimination of offences based on age is interesting because a man could have been convicted of such an offence even if he reasonably believed that the female was over sixteen. In theory, under the pre 1983 legislation, a man could have been found to be a D.O. even if he had no knowledge or intention of committing a crime. In practice, of course, the Crown would not seek to have such a person found to be a D.O. The other interesting element is the obvious sex discrimination in such offences.

The removal of gross indecency was a long overdue change, and is consistent with the belief that Part XXI should only apply to dangerous criminals. If acts of indecency involve violence, they could easily fit under one of the sexual assault offences.

This brief history of Part XXI has sought to illustrate some of the inherent moral and legal problems in any system of preventive justice. Unfortunately, the courts have exacerbated rather than relieved these problems. It is to this that we must now turn.

2. Procedural Issues

Given the severity of an indeterminate sentence one would expect that the judiciary would interpret evidentiary and procedural rules in a manner that would give maximum protection to the accused. To the contrary, they have fallen far short. By relegating a D.O. hearing to the status of "merely part of the sentencing process" and not a trial, the judiciary have effectively robbed the offender of many safeguards.

Perhaps the landmark case in this regard was the Supreme Court of Canada decision in Wilband v. R. Fauteux, J. for the majority held that the hearsay rule excluding second hand evidence did not apply to a Part XXI hearing. It was essential that psychiatrists have

42. Buggery and bestiality were dropped from Part XXI in the 1976-77 amendments. However, since buggery is punishable by 14 years, it could presumably fit under the more general s. 687(a).
43. Criminal Code, s. 687.
44. Criminal Code, s. 146.
access to all possible sources of information including second hand sources like prison files, old medical records, etc. It was deemed to be within the psychiatrist's expertise to determine the accuracy and reliability of such evidence. One might question whether interpreting the accuracy of prison records is something psychiatrists study in medical school!

It is easy to understand the rationale behind this finding; surely we want the predictions to be as accurate as possible, which requires as much information as we can get. But, this is precisely why there must be a requirement that the accuracy of such evidence be proven.

Such a broad statement as "any second hand sources" has naturally led to inconsistent decisions, with judges uncertain as to how far this practice should be expanded.

In *R. v. Kanester*, the British Columbia Court of Appeal relied on *Wilband* in making two rather startling findings. The accused was convicted of rape, and found to be a Dangerous Sexual Offender. At the Part XXI hearing, the trial judge allowed testimony of allegations of previous offences which had never been proven. The Court of Appeal affirmed this practice because section 661(2) stated that *any* relevant evidence could be heard. What was totally ignored by the Court was that evidence is only relevant *if it is true*, and that by considering such unreliable and prejudicial testimony, the Court could easily have made an erroneous determination of dangerousness. The Court of Appeal also agreed that the trial judge could admit the testimony of two psychiatrists who had never examined the accused. Their opinions were based on the allegations of previous offences (which multiplies the prejudicial effect) and "extensive reading of medical files". The Court of Appeal simply cited *Wilband* as authority for this, and made no mention of the fact that in *Wilband*, Fauteux, J. had stressed the fact that the hearsay evidence had not had a large impact on the psychiatric opinion.

*Kanester* can be contrasted with *R. v. Knight* where a Crown application for D.S.O. status was dismissed because one of the two examining psychiatrists testified that without the information from

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47. Under what was then s. 661.
48. Now s. 690.
49. (1975), 27 C.C.C. (2d) 343 (Ont. H.C.J.).
police files regarding previous offences (for which the charges had been dropped), he would not have been able to give an opinion as to whether the accused was likely to cause harm in the future. Morden, J. held that when one psychiatrist cannot reach an opinion without reference to materials of which the judge cannot take cognisance, the Crown has not met its burden of proof. Wilband was distinguished because in Knight the psychiatrists were being asked to evaluate police files, and this was not within their skill and training as old medical files might be.

The testimony of Dr. Jerry Cooper, noted by Morden, J. in Knight, casts doubt on the Kanester decision. When asked whether the examination or the extrinsic material was more important in forming an opinion, he replied:

I feel one must consider both... One without the other you just can't, at least I couldn't come to any conclusion.50

One can understand why Kanester was decided as it was. If an offender could thwart the whole process by refusing to speak to the psychiatrists, it would certainly be an easy way out. Lawyers would probably advise their clients to remain silent. However, when an individual refuses to talk, as Mr. Kanester did, the Court should base its decision on the other evidence before it. In these circumstances, psychiatric testimony should be dispensed with.51 This may or may not prejudice an accused but that is the risk he takes. No psychiatric testimony is better than inaccurate testimony.

In Wilband52 the Supreme Court also dealt with the issue of voluntary confessions. In a criminal trial, if an accused has confessed to a person in authority, the Crown must show that the confession was made voluntarily. The argument in the context of dangerous offenders is that an offender who is required to undergo a psychiatric examination which may determine his status, cannot be seen to be in a position where his statements are made voluntarily. The Supreme Court held that a dangerous offender hearing does not involve the conviction of an offence. Rather, it is part of the sentencing process, or “Merely the assertion of a status or condition”.53 Thus, the normal confession rules do not apply, but even if they did, a psychiatrist is

50. Ibid., at 351.
51. As the law stands however, the judge is required to hear the testimony of at least two psychiatrists. See s. 690(1).
53. Ibid., at 19.
not a person in authority. This is fallacious in two ways.

First, it may appear to be part of sentencing, but in fact a Part XXI hearing is much more. The offender is not being sentenced for his substantive offence; he is being punished for what he is, not for what he has done. The determination of dangerousness involves the presentation of witnesses and other evidence from which a decision of mixed fact and law is deduced. This decision determines the ultimate disposition of the offender. Given a positive finding of dangerousness, the substantive offences plays no role in the sentence.

Secondly, saying a psychiatrist is not a person in authority is ignoring the realities of the situation. In most cases the offender is remanded to a psychiatric facility. It does not require much imagination to recognise that the psychiatrist is not only the guardian of the offender’s present liberty; he also has the power to determine the individual’s future. That is authority.

This writer is not suggesting that statements made to a psychiatrist are never voluntary. What is being suggested is that the psychiatrist is as much a member of the criminal justice system, in this context, as a policeman is in some other contexts. Until this is recognized, sufficient safeguards cannot be established.

There are other exceptions to the rules of evidence, but the two discussed above illustrate both the tendency of the courts to steer away from due process and the dubious nature of some of the predictions relied upon. These exceptions are particularly striking in view of the fact that judges frequently rely on the stringent procedural protections to justify indeterminate sentencing.

The judiciary may also feel more secure in their findings knowing that their decisions will be reviewed by the Parole Board after only three years. After all (this reasoning goes) if the individual had been sentenced for the substantive offence, he would not come up for parole until much later. Thus, if a judge makes an error in classifying someone as dangerous, in theory at least, the error can be corrected. If a judge errs in the other direction, the errors will become all too apparent. This leads one to suspect that the judiciary would tend to err on the side of caution. What we have, in effect, is a delegation of the sentencing authority from the judiciary to the Parole Board. This is not satisfactory for several reasons.

First, it is trite to say that an administrative model of sentencing deprives the accused of many of the protections afforded in a judicial model. More importantly, one must realize that the label of “dangerous offender” will inevitably colour the perception of the offender
by virtually everyone in the legal system; from prison guard to psychi-
trist and ultimately the Parole Board. Once this label has been
attached, the onus is inevitably on the offender to establish that he is
not dangerous. This could be a very difficult task in the prison envir-
onment. How does one establish that one would not be dangerous if
one were released into society? In the words of one forensic
psychiatrist

... once you have been defined as dangerous, it is extremely diffi-
cult to prove you are not dangerous. That's because there is not
anyone in this room... who is not capable of violence in a particu-
lar set of circumstances. 54

Moreover, if one were labelled and treated as a dangerous person, is
it not possible that one would learn to react in kind? It is an obvious
case of a self-fulfilling prophecy. The inevitable despair that one
would feel could only foster further emotional problems. Given that a
D.O. serves an average of seventeen years, and that virtually no one
is released after the first three year review, it becomes apparent that
this delegation of sentencing authority is not acceptable. Although
the offender may be at a disadvantage at the Part XXI hearing, it is
only here that his status can be determined with any modicum of
objectivity.

Some commentators have suggested that this regular review by the
Parole Board serves only to enhance the offender's hostility towards
the institution. 55 To go through a process repeatedly that inevitably
results in failure is devastating in any context; but even worse when
one is incarcerated. One cannot help but wonder whether the review
provisions are there to appease our insecurity rather than that of the
offender.

It is not within the scope of this paper to discuss plea bargaining,
but it must be realized that the threat of a Part XXI hearing is a
powerful tool in the hands of a Crown prosecutor. It could easily
coerce an individual into pleading guilty to an offence that he did not
commit, simply to avoid this possibility. 56 For if an individual has a
bad record, and a weak case, it would be far safer to accept a certain
prison term than to face the risk of indeterminate incarceration.

54. Dr. C. Webster testifying before the Leggatt inquiry into Habitual Offenders: quoted in the Ottawa Citizen, January 30, 1984.
55. See Price, supra, note 4. It is also important to note that no D.O. sentenced
under the 1977 provisions has yet been released.
Crim. L.Q.
3. **Standard of Proof**

A further procedural problem with any system of preventive justice is that of finding a reasonable standard of proof; one which will be fair to the accused, yet not place an inordinate burden on the Crown. Although it is generally accepted that the Crown must show beyond a reasonable doubt that the individual is a dangerous offender, this leads to obvious problems.

How does one prove beyond a reasonable doubt that at *some* time in *some* setting, an individual is *likely* to endanger *some* person. Surely if we add "beyond a reasonable doubt" to a "future likelihood" the sum total can be no greater than a balance of probabilities; a standard we would never accept in a criminal trial. Given the judicial recognition that:

> the evidence of a psychiatrist... is at times highly speculative and in certain instances a lay person is in as good a position to make predictions as to future dangerousness

how can one ever feel morally certain as to dangerousness?

A recent Alberta case illustrates the confusion and lack of conceptual clarity surrounding the burden of proof. In *R. v. Carleton*, the majority of the Court held that the Crown must establish beyond a reasonable doubt that the offender *has* committed a personal injury offence, *has* shown a failure to control his sexual impulses, and *has* shown a likelihood of causing danger to others. This is in stark contrast to the legislation which repeatedly refers to future behaviour and future likelihood. The Alberta Court of Appeal seems to be sentencing the offender to preventive detention for past acts: an obvious contradiction. In effect, they are ignoring the problems inherent in predictive justice, by interpreting the legislation as reactive justice.

In 1958, the McRuer Report suggested that the standard of proof be reduced to a preponderance of probabilities. However, this recommendation was not incorporated into the legislation nor picked up by the judiciary. Schiffer has suggested that the recommendation

60. McRuer, *supra* note 15 at 124. The A.G. of Ontario had gone so far as to suggest that every person should, *prima facie*, be deemed to be a C.S.P. on the prescribed certificates of 2 psychiatrists.
was:

motivated by a desire to make judicial acceptance of psychiatric predictions seem less ludicrous.\(^\text{61}\)

Perhaps the rejection of the lower standard was motivated by a desire to appear to be protecting the rights of the individual. However, this protection is more apparent than real, as was recognized by Morden, J. in *Knight*:

I am not imposing myself an obligation to find it proven beyond a reasonable doubt that certain events will happen — this, in the nature of things, would be impossible in practically every case.\(^\text{62}\)

He went on to require "an existing basis for finding present likelihood of future conduct".\(^\text{63}\) Is this anything more than speculation?

The high standard in criminal law involves a trade off: what we gain in certainty of guilt, we lose in taking the risk that more guilty persons will go free. This is a conscious choice, however, and reflects the value our society places on individual liberty. Part XXI is in stark contrast to this concept. It is almost impossible to predict future behaviour, and all the more difficult when dealing with rare violent behaviour.

The leading American commentator on preventive detention suggests that we:

would have to reverse the traditional maxim of the criminal law and adopt a philosophy that it is better to confine ten people who would not commit predicted crimes than to release one who would.\(^\text{64}\)

This criticism may be slightly unfair in the context of Part XXI. The Americans use preventive detention on a much greater scale than Canada does and we do not begin the prediction process until an individual has been convicted of at least one serious offence. However, the questions raised by Dershowitz and others cannot be ignored; it is on our answers that the legitimacy of Part XXI depends.

III. *The Medical Model*

1. *Predictions*

Many of the problems with the standard of proof arise from the fact


\(^\text{62}\) *R. v. Knight*, supra, note 49 at 356.

\(^\text{63}\) *Ibid.*

\(^\text{64}\) Dershowitz, "Preventive Detention" in Goldstein and Goldstein (eds) *Crime, Law and Society* 1971, at 313.
that Part XXI determinations of dangerousness are based largely on psychiatric predictions of future conduct. It is thus necessary to examine these predictions to determine the validity of this system. How accurate are they; to what use should we put them, and most importantly, what cost, in terms of error, are we as a society willing to accept?

The most commonly used predictive devices are lists of factors which consistently have a high incidence in "dangerous" individuals. A careful analysis of such lists suggests a fundamental limitation. Consider the following factors put forth by the authors of a study on dangerous sexual offenders.

1. brutality sustained in childhood
2. bedwetting, firesetting, and cruelty to animals
3. assorted delinquent acts during puberty
4. escalation of the sexual offences
5. inter-related criminality with sexual offences
6. sustained excitement prior to the act and at the time of the offence
7. lack of concern for the victim
8. bizarre fantasies with minor offences
9. explosive outbursts
10. absence of psychosis
11. absence of alcohol consumption
12. high I.Q.\textsuperscript{65}

Each factor is graded on a 10 point scale and a score of over 90 is "indicative of a very high degree of dangerousness".\textsuperscript{66} In a similar study by Abrahamsen, the list included spelling errors, loneliness and excessive truancy.\textsuperscript{67}

It may well be that all the above factors are frequently found in dangerous individuals. The flaw is that such criteria may also be found in non-violent persons with emotional problems, and such lists fail to discriminate between the two groups. Until such a distinction can be made, surely we cannot accept a method with such inherent weakness.

Probably the most interesting study of dangerousness was that which resulted from the United States Supreme Court decision in Baxstrom v. Herold.\textsuperscript{68} The Court held that it was unconstitutional to


\textsuperscript{66} Ibid., at 205.

\textsuperscript{67} Abrahamsen, Our Violent Society, 1970 at 218.

\textsuperscript{68} Ibid., at 107.
retain indefinitely prisoners who had completed their sentence but were not released because they were deemed to be dangerous. Subsequently, 967 "dangerous" individuals were transferred to civil mental hospitals, and within four years over one third had been released. Of the entire group only 26 (less than 3%) were returned to maximum security hospitals. Steadman tried to differentiate these 26 from the 941 non-returnees. He found that on average the returnees were younger and scored higher on a dangerousness scale. The age factor will be considered later but the important fact here was that over 90% of those who scored highly on the dangerousness scale did not commit further violent crimes. These figures have been criticized by some because obviously in the real world one cannot design an experiment with perfect controls. However, the substance of Steadman's results has stood up to this criticism. One can see that over 97% of the original predictions of dangerousness were incorrect.

The final method of study to be addressed here is that which compares recidivism rates for individuals released as non-dangerous by psychiatrists, with those of individuals released by the courts against the wishes of the psychiatrists. The most impressive statistics in support of prediction come from a 1971 study in the United States.

The authors (the psychiatrists) collected information on 592 patients admitted to their hospital for psychiatric assessments of dangerousness. Of these, 435 were released; 386 on the recommendations of the doctors and 49 against their recommendation. The recidivism rate for those released against psychiatric advice was 35% as compared to 8% in the group who were released with medical approval. Statistically, the difference is highly significant and initially the results appear to be very impressive. However, of the 49 released against medical advice, the error rate in the predictions was still 65%: for every correctly identified dangerous offender detained, the doctors would have had to detain more than twice as many non-dangerous individuals.

All of the above methods of study are subject to two serious conceptual failures which go to the heart of the predictive system. The first of these is the "false-positive" problem; the number of

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71. Kozol, Boucher and Garofalo, "Diagnosis and Treatment of Dangerousness" (1972) 18 Crim. and Del. 371 at 389.
individuals erroneously identified as dangerous. Studies have shown this rate to be anywhere from 2 to 100 times the rate of true positives. What this means in terms of human life is that in order to confine 10 dangerous men, we would have to confine anywhere from 20-1000 non-dangerous men, and it is fair to say that most studies show results closer to the higher figure. In this respect, the Kozol study is an anomaly.

The second problem in these studies flows from the first. The predictors, be they the courts, the psychiatrists or the National Parole Board, only see one type of error. A person mistakenly labelled as non-dangerous will make headlines if he commits another violent offence. What is impossible to measure is how many of those confined as dangerous would not have committed a violent offence if they had been released.

Professor Derschowitz did a survey of all the published literature on predictions of anti-social behaviour. His conclusions were not very encouraging. He found that:

psychiatrists are rather inaccurate predictors, inaccurate in an absolute sense, and even less accurate when compared with other professionals. . . . Even more significant for legal purposes: it seems psychiatrists are particularly prone to one type of error —over-prediction.

As was mentioned above, one can sympathize with the tendency to over-predict. Psychiatrists’ false positives are locked up in prisons or hospitals. Their false negatives may come back to haunt them in headlines or even in law suits. Not only does the individual doctor have a vested interest in over-prediction, the credibility of the profession is also at stake. It is indisputable that the public, where possible, must be protected. However, what is not acceptable is the view that the incarceration of non-dangerous individuals is just an inevitable side effect of preventive detention.

There is a further methodological problem in predictive justice. Ethically we cannot make predictions of dangerousness and then release the individuals to see whether our predictions were accurate.

74. See for e.g., Tarasoff v. Regents of the U. of Cal. (1978) 551 P. 2d 334 where the California Supreme Court found a psychiatrist liable in negligence for releasing a patient without warning his future victim that he might be dangerous.
We are immediately limited to a population already confined; who have already been labelled, at some stage of the process, as potentially dangerous.

Thus far, this paper has dealt with the most straightforward aspects of the prediction process. It is now necessary to consider some of the more subtle influences. In his recent study of dangerous offenders, Professor Dickens found that almost half of those studied had:

something physically peculiar about them... It is very much the Frankenstein factor. It is fear of the unknown.\(^75\)

This raises interesting questions about causation. Are the diagnoses influenced by such peculiarities or are individuals with such abnormalities more likely to turn to violence in an attempt to deal with society's reaction to them? Although both suggestions are purely speculative, there is evidence that could be used to support either. It is well documented that dangerous offenders have a high incidence of childhood abuse; the problem is drawing any causal link.

The possibility that diagnoses may be affected by such traits raises some troublesome questions. Klein, a sociologist, has suggested that psychiatric labelling is largely an outcome of the setting in which the patient is seen, the social class of the patient, and the biasing effect of other clinicians' diagnoses.\(^76\) Consider the following study. Subjects were required to observe a film in which a healthy man was labelled as psychotic by a well known psychiatrist. All subjects, including psychiatrists, then tended to diagnose the man as being mentally ill even though he did not behave as such.\(^77\) A further study found similar results even where the suggestion of psychosis was made by someone other than a renowned psychiatrist.

In the context of dangerousness, the implications are obvious. When psychiatrists assess patients for a Part XXI hearing, the Crown, and probably the police, have already labelled the individual as being dangerous. Add to this the physical oddities noted by Dickens and one can see how the assessment could lose all neutrality. As Wenk suggests:

the prediction equation contains the seed of a self-fulfilling prophecy: those who have been noticed before, will be noticed

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75. Professor Dickens quoted in the Globe and Mail November 14, 1983 at 4.
77. Ibid., at 112.
again...... the decisions involved vary by characteristics of persons other than the offender.\(^78\)

That such factors can influence our perception of an individual has not been lost on the offender. The following is from the Leggatt inquiry into Habitual Offenders:

I've always been described as that big negro. When I'm outside I can't walk two feet without a cop stopping me. And when they write about me it's always "Sam Cleveland that big negro."\(^{79}\)

Much medical and scientific study has been devoted to dangerousness. Most of the conclusions are, at best, tenuous. However, one finding that appears to be made consistently is that dangerousness decreases as an offender reaches middle age.\(^80\) This has ramifications for the entire process. First, Part XXI is set up to deal with individuals who have committed several offences. Most individuals classed as D.O.'s are well over thirty. (Thomas Lyons is the obvious exception at age 16.) Hence it is quite possible that we are confining individuals at the end of their "dangerous years". Secondly, if this finding about age is accurate, it is harder to justify long indeterminate sentences. If, as the psychiatrists claim, dangerousness diminishes at middle age, why do sentencing practices not reflect this? It is not being suggested that we lock up individuals idenfinitely in the early stages of their "criminal career". What is being suggested is that indeterminate sentencing cannot be justified even as a necessary evil. The sentences in the Criminal Code for substantive offences are more than adequate for public protection.

2. **Effectiveness of Medical Model**

As we have seen in the previous section, there is a real danger in the use of psychiatric predictions; errors are perpetuated rather than discovered. As soon as a label is attached, all of the offender's behaviour is seen as a function of that label. If the offender protests, it is seen as a problem with him rather than with the system. Perhaps most importantly, the onus inevitably shifts to the offender to establish that he is not dangerous.

\(^78\) Wenk, Robinson and Smith, "Can Violence Be Predicted?" (1972), 18 Crime and Del. 393 at 401.

\(^79\) Quoted in the Ottawa Citizen, January 30, 1984 at p. 6.

The medical model is paramount at all stages of the process. The psychiatrist has a great influence on who is labelled a D.O., how that individual will be treated in the system, and ultimately, on whether the offender is fit for release:

The psychiatrist becomes gentle jailer, polite policeman. His patient is no longer, except marginally, his client. He serves the public order — with such kindness, at best, that constraint permits . . . (to) escape, (one) must yield not only outerly but innerly. The wildest tyrants in their wildest fantasies have not required more.\footnote{Seeley, \textit{The Americanization of the Unconscious}, 1967, at 43.}

Viewing crime as sickness brings in the concepts of treatment and cure. However, because ‘‘dangerousness’’ is said to be untreatable, the only option may be to confine the individual indefinitely until the disease ‘‘Burns itself out’’.

This is not to suggest that the psychiatric profession has a vindictive attitude towards the offender. In many cases the aim is to help the offender as well as to protect his potential victims. The question that arises is whether these two objectives can be met concurrently. The dangerous offender is already the lowest of the low in the prison hierarchy; if he is a sexual offender, as most D.O.’s are, he faces constant abuse and even threats to his life from the other inmates.

It is not surprising that if and when a D.O. does get out, his anger and sense of persecution could add to an already violent potential. The system perpetuates violence, it does not alleviate it. This is why a population of inmates appealed to the Attorney General of Nova Scotia not to allow a sixteen year old boy to serve an indeterminate term. It is also why the Ouimet Report felt that indeterminate sentences were necessary. The reasoning in the report suggests that an offender would probably be more violent after a long prison sentence than he was on entering the institution; hence the necessity of an indeterminate term.\footnote{Ouimet Report, \textit{supra}, note 27.}

Violence is not the only possible response. The prison environment may also require complete submission and dependence. The offender must play by the rules if he hopes to secure release; or as Ericson puts it: ‘‘sell out to get out’’.\footnote{Ericson, ‘‘Penal Psychiatry in Canada: The Method of Our Madness’’, (1976), 26 U. of T. L.J. 17 at 26.} The Catch 22 here is obvious. If an offender does not yield to the demands for passivity, he will not get out. If he does, how will he ever cope in a competitive society, especially since
he has been branded for life? It is uniformly accepted that prison at best does not rehabilitate and at worst can result in "fragmentation of the personality".84 In the words of the head of Special Treatment Services at Kingston Penitentiary:

I have the feeling that 15 years solid time is as much as anyone can handle. If society hates someone so much, why don't they bring back the death penalty?85

Before concluding this section, it is important to touch on the grave moral and political implications for a system which allows determinations of legal status to be delegated to the psychiatric profession. The label of dangerousness is a political choice. It is a reflection of the degree to which we are willing to infringe on the liberty of others for the benefit of society as a whole. As Dershowitz has suggested, as long as we deny that it is a political decision, we will never be in the position to make an informed choice.

The testimony of the expert must be exposed to the glaring light of public understanding, so that the people and not the pundits, may decide how much deprivation of human liberty should be permitted to achieve a tolerable level of safety.86

It appears that we do not feel able to deal with the dangerous offender without relying heavily on the medical profession. But this reliance has caused contradictions within the philosophic assumptions behind preventive detention. Our criminal justice system is founded on the belief that man is, within limits, a free agent who chooses his actions. If one does not have the capacity to choose, one should not be held responsible. However, if we follow through the logic of preventive detention, it runs as such: "This individual must be detained indefinitely, because if released he will commit further offences". Free will presupposes the ability to choose to act and to refrain from action; preventive incarceration presupposes determinism. There is no recognition that the individual could choose not to offend, or that he could change. If we are saying he cannot choose and cannot change, then he should be relieved of responsibility. In effect, we are deciding for him that he will choose to be violent because he has done so in the past. We are punishing him for acts he chose, yet denying he could choose otherwise in the future. Such a

86. Dershowitz, supra, note 73 at 31.
contradiction goes far beyond the individual offender to reflect ominously on our criminal justice system. For as Ericson suggests:

to the extent that we remain content to hire "dirty workers" to carry out the unpleasant tasks of social control, and enshrine them to the point that we really think that they are doing something for the offender's therapeutic benefit as well as our own social benefit, we are all responsible for displacing our responsibilities.87

It is the legal system which has granted this inordinate power to psychiatrists and it is thus the legal profession who must ensure that the power is used appropriately.

IV. Potential for Reform

1. The Charter of Rights
Any area of law that deals with basic individual rights must now be re-examined in the light of our new Canadian Charter of Rights and Freedoms.88 However, those critics of Part XXI who hoped that the Charter would be a vehicle for reform will be sadly disappointed. The judiciary has shown a disheartening lack of imagination in interpreting the Charter as it applies to Part XXI. There seem to be pat answers which are applied almost by rote with virtually no analysis of the issues involved. There is also great reliance on the Canadian Bill of Rights89 case law.

There are several sections of the Charter which bring into question the validity of Part XXI: section 7 which guarantees the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice; section 9 which guarantees the right not to be arbitrarily imprisoned; section 11(c) protecting the right not to be a witness against oneself; section 11(d) guaranteeing the right to be presumed innocent; section 11(f) guaranteeing the right to a jury trial and probably most importantly, section 12 which protects the right not to be subject to cruel and unusual punishment or treatment. Emphasis will be put on ss. 7, 9 and 12 because these sections raise the most serious questions. Two

87. Ericson, supra, note 83 at 18.
88. Supra, note 3.
recent Canadian cases, *Re Moore and the Queen*,90 and *R. v. Lyons*91 will be heavily relied on because they provide an interesting context in which to examine these issues: the *Moore* case being the first Part XXI application brought against a female offender and *Lyons* the first application brought against a sixteen year old boy. Before dealing with the major questions of ss. 7, 9 and 12, there will be a brief discussion of the other sections which have led to Charter challenges.

**Section 11(c)**
The right not to be compelled as a witness against oneself has been narrowly interpreted so as to apply only to testimony against oneself on the witness stand.92 There have not been any Charter cases on whether the mandatory psychiatric examination violates the right against self-incrimination. However, this argument was rejected in *R. v. Gribble*93 in which the forerunner of s. 11(c) in the Bill of Rights was challenged. The Court held that an individual could refuse to talk to a psychiatrist or to call him as a witness on his own behalf. The Court noted that in these circumstances, the judge would be free to nominate a psychiatrist for the accused and to call him as a witness.

**Section 11(d)**
There has been a surprising lack of attention given to the presumption of innocence with regard to Part XXI. Although no application can be made under Part XXI until after a conviction, the offender is by no means being sentenced for only his substantive offence. Rather, he is being detained for offences he might have committed if released. This is clearly offensive to our usual requirement that the Crown prove all aspects of an offence that has been committed. This issue was also raised in *Gribble*94 under the Bill of Rights. Cavanagh, J. held that a Part XXI hearing was to be treated as an additional element of guilt in which the Crown must prove dangerousness. The presumption of innocence applies only in so far as the accused is presumed not to be a dangerous offender until

90. *Supra*, note 58.
92. See for e.g., *R. v. Altseimer* (1982), 1 C.C.C. (3d) 7 (Ont. C.A.).
proven so. This approach clearly suggests that dangerousness is a status offence and that an individual is being punished not for what he has done but for what he is.

Section 11(f)
This is the one legal right in our Charter that has no forerunner in the Bill of Rights and thus we are not restricted by earlier decisions. However, the courts have made it abundantly clear that a Part XXI hearing is only part of the sentencing process and the right to a jury trial does not extend to sentencing; it applies only prior to conviction.95

It seems safe to say that none of the above sections present any real threat to Part XXI. It is thus necessary to look at those sections which raise more serious problems.

Section 7
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The forerunner of s.7 was s. l(a) of the Bill of Rights, under which one could only be deprived of life, liberty or security of the person if it was done by due process of law. In R. v. Roestad,96 the accused argued that the Dangerous Sexual Offender provisions were discriminatory because: i) one group of offenders was being treated differently from other offenders, and ii) all the offenders within the group were not treated equally because not all D.S.O.'s were sentenced to preventive detention.

Graburn, J. rejected both of these arguments. The principle of equality before the law was not violated by treating dangerous individuals differently because this difference was authorized by legislation. This logic seems to rob s.1(a) of any real substance. It would be all too easy for a government to deny these rights if done by legislation. Graburn, J. also held that equality before the law mandated a fair hearing; it did not require similar treatment for all offenders. Section 1(a) was of no effect because any discrimination there was in the process was not based on “race, national origin, colour, religion or sex”, and since these were the only forms of

96. (1971), 5 C.C.C. (2d) 564 (Ont. Co. Ct.).
discrimination expressed in the Bill of Rights, the argument failed. 97

A similar argument was made under s.7 of the Charter in R. v. Gustavson. 98 It was argued that dangerous offenders form a homogenous group and thus should all be subject to the same punishment. The British Columbia Supreme Court held that Part XXI was designed to enable a judge to acquire a complete picture of the offender. This enables the judge to tailor the sentence to the individual.

Section 7 has also been used to challenge the predictive aspects of Part XXI. In Re Moore and the Queen 99 the applicant argued that psychiatric predictions are so speculative that they violate the principle of fundamental justice that requires all evidence to be of probative weight. Ewaschuk, J. acknowledged the inaccuracy of such evidence but discarded this argument because the final determination of dangerousness is always made by a judge. Although the probative value of predictions diminishes over time, he relied on the Parole Board to correct any errors that might be made. The initial three years before review could be:

justified on the basis that the applicant must be punished for the predicate offence as well as detained because of the potential danger. 100

Was the learned Justice unaware that the legislature had dropped this two-tiered sentencing structure in 1961?

Section 9

Everyone has the right not to be arbitrarily detained or imprisoned.

Part XXI allows for discretion at several levels of the process. Each level has been the subject of an unsuccessful Charter challenge. The major areas of concern are the initial prosecutorial discretion as to when to bring a Part XXI application, and the subsequent judicial discretion as to whether to sentence the individual to preventive

97. It is certainly arguable that there is sex discrimination. There are a disproportionate number of homosexual D.O.'s and in almost 40 years of preventive detention, there has yet to be a female D.O. This is also interesting in light of the broad wording of s.15 of the Charter which does not limit the protection to the rights enumerated therein.
99. Supra, note 58. This does not really answer Ms. Moore's argument because the judge will inevitably be influenced by the very evidence being challenged.
100. Ibid., at 311.
detention.\textsuperscript{101} It is perhaps unnecessary to state that in all of these cases it is assumed that arbitrary application of the provisions necessarily results in arbitrary imprisonment.

i) \textit{Prosecutorial Discretion}

Since there is no obligation on the Crown to bring a Part XXI application, nor any clear statutory guidelines, it has been argued that the provisions have been applied arbitrarily, resulting in discrimination against certain groups of offenders. Support for this argument can be found in the vast disparity with which the provisions have been applied throughout Canada. As has been discussed above, Vancouver had four times as many dangerous offenders as did Toronto prior to 1975. The figures for habitual offenders were even worse with almost half occurring in British Columbia.\textsuperscript{102}

These statistics recently received judicial notice in the \textit{Lyons} case:

\ldots one prosecutor in Vancouver had made (Part XXI) his pet field so that you had more prosecutions in that province than in all the other provinces combined.\textsuperscript{103}

Mr. Justice O Hearn does not seem very distressed by these figures. Despite the blatant abuse of power that the statistics reflect, he simply pays lip service to them and then goes on to hold that the provisions are not arbitrary. He simply reiterates that the procedural protections are sufficient to prevent arbitrary application. At no stage does he attempt to reconcile the figures he has noted with the provisions of section 9. They are simply discarded as "past history".\textsuperscript{104}

Other cases have not added greatly to this judicial wisdom. There has been great reliance on the Supreme Court of Canada decision \textit{Ex Parte Matticks}\textsuperscript{105} in which it was held that the Habitual Offender provisions did not offend the \textit{Bill of Rights}. However, \textit{Matticks} is of questionable application to Part XXI. The decision consisted of:

We are also satisfied that s. 688 of the \textit{Criminal Code} is not rendered inoperative by the \textit{Canadian Bill of Rights}.\textsuperscript{106}

It is this judgment that has been relied on as decisive for our present

\begin{itemize}
\item \textsuperscript{101} The discretion of the Parole Board was challenged in \textit{Re Mitchell and the Queen} (1983), 6 C.C.C. (3d) 193 (H.C.J.). The s. 9 challenge failed but Mitchell succeeded on other grounds.
\item \textsuperscript{102} \textit{Supra}, note 32.
\item \textsuperscript{103} \textit{Supra}, note 91 at 386.
\item \textsuperscript{104} \textit{Ibid.}
\item \textsuperscript{105} (1973), 10 C.C.C. (2d) 438.
\item \textsuperscript{106} \textit{Ibid.}, at 438.
\end{itemize}
legislation. What has not been recognized, however, is that *Matticks* involved the Habitual Offender provisions in which the sentence was determined by the *past* criminality of the offender. Part XXI deals with *future* predictions of behaviour which is fundamentally different from the situation in *Matticks*. It is true that D.O.’s are more serious criminals than habitual offenders, but this does not validate the process by which they have been confined. Surely this difference warrants at least a fresh analysis of Part XXI under section 9 of our entrenched *Charter*.

ii) *Judicial Discretion*

The second area of challenge is based on the fact that even if an individual meets the criteria of Part XXI, the Court still has the discretion not to sentence him to preventive detention. *Re Moore and the Queen* is a good example of this.107 Ewaschuk, J. found that Ms. Moore *was* likely to cause death or other injury in the future. However, he did not sentence her to preventive detention because he felt that she had not caused enough serious injury to warrant such harsh measures. Moore had more than 25 convictions including abduction, arson, and serious weapons’ offences. She had been labelled “the most dangerous woman in Canada”.108 Yet because of the judge’s uncertainty, she was sentenced to two years less a day in a reformatory. Ewaschuk, J. admits he came very close to sentencing her to preventive detention. It is this narrow shadow of doubt that made the difference between two years and potentially a lifetime in prison.109

Before determining the case on the merits, Ewaschuk, J. ruled that judicial discretion could be to the offender’s benefit and thus could not be challenged. It is difficult to explain this logic to those who are on the other side of the discretion.

The fact that all D.O.’s are not treated equally has met the same response under section 9 as it did under section 7. The discretion and flexibility are necessary to make an accurate assessment of each offender.110

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109. One cannot help but wonder whether a man with such a record would receive such lenience. The *Star* depicts the rather bizarre scene of Ms. Moore thanking the judge as she is “led away beaming” to serve her reformatory sentence. Perhaps women are seen as less threatening than men.
In a survey of all the Charter decisions on Part XXI, this author has been unable to find any serious attempt to deal with or justify the vast disparity of application at either level of the process.

Section 12

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

It was suggested earlier in this paper that an indeterminate sentence can have devastating effects on an offender. One would expect, therefore, that the judiciary would give serious consideration to the question of cruel and unusual punishment. With perhaps one exception, this has not been the case.

Section 2(b) of the Bill of Rights is virtually identical to section 12. Much of the debate surrounding 2(b) centered on i) whether the “and” between cruel and unusual was to be read conjunctively or disjunctively and ii) whether American jurisprudence was relevant in Canada given that the Bill of Rights was not a constitutional document.

Prior to 1976, the courts tended to read the “and” conjunctively so that a punishment could only violate 2(b) if it was both cruel and unusual; unusual in this context meaning infrequent. This presents obvious problems. A government could virtually insulate itself from challenge as long as it applied any cruel punishment frequently. By definition then, all wide scale forms of punishment would be excluded from the analysis.

R. v. Roestad11 was the first dangerous offender case to raise section 2(b). The Court held that a punishment had to be cruel and unusual; cruelty being determined by the object of the punishment. Since the object of Part XXI was public protection, it could not be seen as cruel. Therefore, the Court did not bother to address the meaning of unusual. Graburn, J. did concede that if the object were to inflict suffering, an indeterminate sentence would be cruel.

This is rather bizarre logic. It ignores the means by which a punishment achieves its object. To the offender, an indeterminate sentence is an indeterminate sentence, whatever the object. By defining cruelty from the perspective of the state, rather than that of the offender, it would be easy to sustain cruel punishments. Just because the object is valid, it cannot absolve the Court from scrutinizing the

111. Supra, note 96.
means.

Several recent decisions have relied on the Supreme Court of Canada case which held that the death penalty was not cruel and unusual punishment under the *Bill of Rights*.\textsuperscript{112} It is necessary to look at this decision because it is often used as the standard against which indeterminate sentences are compared.

Ritchie, J. for the majority, held that section 2(b) was subordinate to section 1(a) under which an individual could be deprived of life, liberty and security of the person if it was done by due process of law. He also held that the “and” was conjunctive, requiring a punishment to be both cruel and unusual. Most astoundingly, he held that the *absence* of a *non obstante* clause indicated that the legislature did not intend that the *Bill of Rights* should apply to the death penalty. Finally, Ritchie, J. rejected the relevance of American jurisprudence because the status of the *Bill of Rights* was fundamentally different from that of the American constitution.

Not surprisingly, Laskin, C.J.C. (Spence and Dickson, JJ. concurring) could not sit back and accept this narrow literal approach. We thus have a second judgment, concurring in result, but not in tone. Laskin rejected both the subordination of section 2(b) and the conjunctive interpretation found in the Ritchie decision. The proper way to interpret “cruel and unusual”, according to Laskin, was to see the words as:

interacting expressions colouring each other, so to speak, and hence to be considered together as a compendious expression of a norm.\textsuperscript{113}

Although most of the cases on Part XXI have generally accepted that the approach of the late Chief Justice is the preferable one, few have applied it in the spirit in which it was written. Great reliance has been placed on the result of *Miller and Cockriell* for if the death penalty is not cruel, then what lawful punishment could be? Unfortunately, this reliance has taken the place of any careful analysis of the issues involved. In *R. v. Simon (No. 3)* for example, section 12 was dispensed with in one sentence:

As to section 12, it need only be mentioned that both capital punishment and long minimum sentences . . . have also been held not to conflict with s. 2(b) of the *Canadian Bill of Rights*.\textsuperscript{114}

\textsuperscript{112} *R. v. Miller and Cockriell* (1976), 31 C.C.C. (2d) 177.

\textsuperscript{113} Ibid., at 184.

\textsuperscript{114} (1982), 66 C.C.C. (2d) 557 (N.W.T.S.C.) at 561.
O Hearn, J. in *Lyons* held that the Laskin approach was correct and then went on to discuss what punishments would be considered cruel:

For example, in certain countries today where they use torture and things of that kind to inflict pain... We no longer stretch people on the rack. We no longer... use the iron maiden... People no longer have their eyes gouged out or their noses docked or their ears docked or their hands cut off.\textsuperscript{115}

Is it to this that we should turn for guidance?

In *R. v. Morrison*,\textsuperscript{116} the Court merely relied on dictionary definitions of "cruel" and "unusual" and then went on to follow *Simon* in holding that if the death penalty is not cruel, neither could indeterminate sentences be.

Because the courts have brushed aside *Charter* arguments so rapidly, there has been little need to deal with the reasonable limits clause in section 1. It has received some attention under section 12 although the correct interpretation is by no means clear. In *Re Moore and the Queen*, Ewaschuk, J. held that section 1 had no application to section 12 because section 12:

contains its own modifier... (and) the provision is self defined as to what constitutes a reasonable limitation.\textsuperscript{117}

In *Re Mitchell and the Queen*,\textsuperscript{118} however, Linden, J. left open the role of section 1 in his observation that the Crown had not presented evidence to show that the indeterminate sentence was a reasonable limit.

It is this writer's opinion that the approach of Ewaschuk, J. is the appropriate one. If a punishment can be justified in a free and democratic society, then surely it cannot be considered cruel and unusual. Put the other way, surely we in Canada cannot justify cruel and unusual punishment as reasonable.

Ewaschuk, J. also showed a willingness to use the criteria set out by Tarnopolsky in his definitive article on section 2(b) of the *Bill of Rights*.\textsuperscript{119} Although there was an attempt to analyze the section 12

\textsuperscript{115} Supra, note 91 at 388.
\textsuperscript{116} (1983), 10 W.C.B. 171 (Ont. Co. Ct.).
\textsuperscript{117} Supra, note 58 at 313.
\textsuperscript{118} (1983), 6 C.C.C. (3d) 193 (Ont. H.C.J.).
\textsuperscript{119} Tarnopolsky, “Just Deserts or Cruel and Unusual Treatment or Punishment” (1978), 10 Ott. L. Rev. 1.
issue, it leaves the reader with more questions than answers.

First, Ewaschuk, J. merely assumed that a large majority of Canadians would approve of indeterminate sentences if they knew about them.

Secondly, he held that the provisions were applied in accordance with ascertained standards throughout Canada. He did not say why or what the standards were. One need only recall the appalling statistics from the Ouimet Report and this blanket assertion becomes questionable.

Thirdly, Ewaschuk, J. found that there was a social purpose for Part XXI: public protection. This is indisputably a valid purpose but there is little evidence that the provisions are really achieving this objective.

The fourth criteria considered was whether Part XXI accords with public standards of decency or whether it offends our social conscience. Unfortunately, Ewaschuk, J. is probably correct in assuming that it does not shock our social conscience. Perhaps however, this says more about our social conscience than it does about Part XXI.

The final criterion was similar to the fourth: is preventive detention degrading to human dignity? Again we are presented only with a conclusion:

...the punishment is not grossly disproportionate to the crime and the offender's potential harm to others.\(^\text{120}\)

This writer is not suggesting that D.O.'s necessarily spend more time in prison than their crimes warrant. What is being suggested is that indeterminancy is neither necessary nor in fact beneficial for the offender or for society.

This discussion would not be complete without mentioning the one case where section 12 prevailed. Since it is not a decision on the present Part XXI provisions, it is of limited application.

In *Re Mitchell and the Queen*,\(^\text{121}\) the applicant sought a writ of *habeus corpus* and *certiorari* to quash his sentence under the old Habitual Offender legislation. It was argued that continued detention under the pre-1977 legislation was both arbitrary (s. 9) and cruel and unusual (s. 12) because the legislation had been repealed and there was no suggestion that Mitchell was dangerous.

The section 9 argument was rejected. However, Linden, J. did agree that the sentence was so excessive that it outraged standards of

\[^{120}\text{Re Moore and the Queen, supra, note 58 at 313.}\]
\[^{121}\text{Supra, note 118.}\]
decency. Mr. Mitchell had served over thirteen years for fourteen property offences each involving less than fifty dollars! Linden, J. found that the sentence was totally out of proportion to the severity of the offences and that continued detention could not be justified. However, there was one caveat to this decision. The Court agreed to grant a remedy under section 24 of the Charter only if Mitchell could show that he was not dangerous. This onus is extraordinary given that the Crown had never been required to prove that he was dangerous. The Habitual Offender legislation had nothing to do with dangerousness. Although Mitchell subsequently met this burden, surely the Court was misguided in requiring him to disprove what had never been proven.

It is important to stress that Mr. Justice Linden did not find preventive detention per se to be cruel and unusual. Rather, continued detention, under legislation since repealed, would violate section 12 if the applicant were not dangerous. This last requirement would take the existing provisions outside the realm of Mitchell. Nevertheless, it is a welcome decision and reflects the failure of the government to enact reasonable provisions for the existing Habitual Offenders when the legislation was repealed.

2. Legislative Options

It will be apparent by this stage that there is room for much improvement to Part XXI. Alternatives range from increasing procedural protections through to the possibility of repealing all provisions dealing with dangerous offenders as a special group. This paper will by no means cover all options. What will be attempted is to present a workable alternative which, although still fraught with problems, is better than our existing legislation. Options that will not be explored here include the use of the civil commitment procedures if offenders are dangerous on release, providing for jury trial-type hearings to determine status, and detailed provisions for judicial review as the Ouimet Report recommended years ago.

The aim of any replacement for Part XXI should be to protect the public without sacrificing the rights of the offender. Implicit in our present system is the belief that a fixed sentence is not adequate because the offender might still be dangerous after this term. The
great difficulty then, is that we are relying on a present prediction to establish dangerousness many years in the future. All predictions are of dubious value, but their accuracy must surely diminish as time passes.

In response to this criticism, one could consider the following alternative. Sentence the offender to a fixed term for his substantive offence. This term could be extended for a specific length of time, if it could be established that the offender were still dangerous at the time of release. A very similar alternative would be to sentence the individual for the offence he was convicted of and to hold a Part XXI hearing only at his release date, if he were still believed to be dangerous.

There are certainly disadvantages to these models. Questions about double jeopardy might be raised. The threat of extension may seem very like an indeterminate sentence; in the eyes of the offender it might appear to be an arbitrary abuse of power. There is also the danger that some judges might impose harsher sentences on those they fear to be violent without adequate proof of their suspicions.

However, either of these alternatives would be better than our present system. First, the onus of establishing dangerousness, after the offender has served his sentence, would be on the Crown. At present the offender has the burden of satisfying the Parole Board that he is no longer dangerous. As was discussed above, this is especially difficult in a prison setting.

Secondly, it would be up to the court to determine whether an extension were justified, and not the Parole Board. Although procedures in parole hearings are gradually improving, the procedures are still far less than those offered by a court.

Thirdly, it is likely that the accuracy of predictions would increase because they would be limited to the immediate future. The question becomes “is he dangerous now?” not “will he be dangerous in x number of years?”

Fourthly, both of these models would decrease the prosecutor’s unfair bargaining power. The threat of a Part XXI hearing could no longer be held over the head of an offender who had bad criminal record and a weak case.

The advocates of preventive detention say that indeterminancy is an essential element in motivating the individual to rehabilitate himself in order to secure release. It has already been suggested that in fact indeterminate sentences feed the offender’s sense of hopelessness and despair, since there is no real chance of earning release. These
two alternatives might truly encourage an individual to “behave” in prison, because the result of the hearing after release would depend on it. And of course, if he behaves there may not be a hearing.\textsuperscript{122} In this sense, at least, the offender might have something to work for. Also, the stigma which a dangerous offender carries with him would no longer colour the perceptions of the correctional staff.

Finally, our criminal justice system would benefit, albeit perhaps only symbolically. We would then sentence all offenders for the crimes they have committed, and the judiciary would reclaim much of the power to control sentencing.

One of the more unusual alternatives is that suggested by Frankel.\textsuperscript{123} It is important to note that Frankel believes we punish people in order to feel we are in control of such arbitrary events as violent crime. It is precisely for these symbolic reasons that he rejects preventive detention. In order to retain any sense of rationality we must not depart from our present “criminal act — punishment” paradigm.

It is within this context that Frankel puts forth the suggestion that we should pay individuals when we subject them to preventive detention. Just as we compensate someone with money for the expropriation of his property, we should also pay a man for the freedom we are denying him beyond the sanction for his particular offence. Frankel sees this gesture as vindicating the value of human liberty. Rather than cheapening this value, the symbolic recognition of it would make us more aware that we are consciously depriving an individual of his rights. An inherent safeguard would be built into this system. If the Crown had to pay individuals subject to preventive detention, Part XXI would not be applied capriciously. The issues raised by Frankel are of tremendous importance. In a symbolic way, his suggestion is a good one; in a practical sense, it would probably fail.

V. Conclusion

This paper has been highly critical of the existing “dangerous offender” provisions. However, this is not to suggest that these persons are really misunderstood social outcasts who should be released and allowed to live freely in society. They are not. They are convicted criminals and should be treated as such. But this criminality is but a chosen part of these individuals’ lives, and it should not be used to

\textsuperscript{122} This raises the question of whether prison behaviour is ever a reliable predictor of behaviour outside the prison.

\textsuperscript{123} Frankel, “Comments on Preventive Detention”, (1970), J. of Legal Ed. 53.
define their existence. Just as no human life is expendable, so it is equally important to maintain a criminal justice system that will protect the rights of every individual. By relegating one group of offenders to this unusual status, we not only subject them to an extraordinary form of punishment, but we are also abandoning some of the most fundamental tenets of our criminal justice system.

Perhaps the most apt commentary on preventive detention comes from neither a psychiatrist nor a lawyer:

"There's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all."

"Suppose he never commits the crime?" asked Alice.

"That would be all the better, wouldn't it?" the Queen responded...

Alice felt there was no denying that. "Of course it would be all the better," she said: "But it wouldn't be all the better his being punished."

"You're wrong..." said the Queen. "Were you ever punished?"

"Only for faults," said Alice.

"And you were all the better for it, I know!" the Queen said triumphantly.

"Yes, but then I had done the things I was punished for," said Alice: "That makes all the difference."

"But if you hadn't done them," the Queen said, "that would have been better still; better, and better, and better!" Her voice went higher with each "better" till it got quite to a squeak... . . .

Alice thought, "There's a mistake somewhere—"124

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