

PSYCHIATRY, CRIMINAL-LAW REFORM AND THE "MYTHOPHILIC" IMPULSE: ON CANADIAN PROPOSALS FOR THE CONTROL OF THE DANGEROUS OFFENDER

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I. INTRODUCTION

The broad implications of the "psychiatrization" of criminal justice have, in recent years, been the subject of a wealth of critical comment.¹ Forensic psychiatry's most resolute critic, Thomas Szasz, has made pejorative use of the term "myth" to give analytical expression to his concern about public and professional perceptions of psychiatry, and about the social control functions in contemporary society that the psychiatrist has come, in consequence, to perform.² Seeley has suggested one of the more alarming aspects: "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 . . . [H]is

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¹ See, e.g., Dession, *Psychiatry and the Conditioning of Criminal Justice*, 47 YALE L.J. 319 (1938); Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L.C. & P.S. 226 (1959); J. HALL, THE PURPOSES OF A SYSTEM FOR THE ADMINISTRATION OF CRIMINAL JUSTICE (Edward Douglas White Lecture, Georgetown University, 1963); S. RUBIN, PSYCHIATRY AND CRIMINAL LAW: ILLUSIONS, FICTIONS AND MYTHS (1965); T. SZASZ, LAW, LIBERTY AND PSYCHIATRY (1963). See also Arens, *The Durham Rule in Action: Judicial Psychiatry and Psychiatric Justice*, 1 LAW & SOC'Y REV. 41 (1967); Engelberg, *Pre-Trial Commitment to Mental Institutions: The Procedure in Massachusetts and Suggested Reforms*, 17 CATHOLIC U.L. REV. 163 (1967).

² See T. SZASZ, LAW, LIBERTY AND PSYCHIATRY ch. 1 (1963); T. SZASZ, THE MYTH OF MENTAL ILLNESS: FOUNDATION OF A THEORY OF PERSONAL CONDUCT (1961); Szasz, *The Moral Dilemma of Psychiatry: Autonomy or Heteronomy*, 121 AM. J. PSYCHIATRY 521 (1964). The term employed in the title to this article was borrowed from J. EHRENWALD, PSYCHOTHERAPY: MYTH AND METHOD ch. 9 (1966), although not necessarily with the meaning intended by the author. Among the various descriptions of the concept of "myth," the following may be taken as conveying a sense of the meaning intended: A "welter of unwarranted or frankly misleading beliefs"; "anxiety reducing . . . [or] . . . reassuring . . . observances"; or perhaps "a concatenation of deception on the grand historic scale . . . [such that] . . . [t]he very . . . truths to which it may happen to allude only add to its potential nuisance value." *Id.* at 6-7. The title carries, of course, the implication of an uncritical acceptance, or all-too-ready willingness to believe, in relation to matters that prevailing attitudes have made a part of the contemporary "psychological culture"—the very kinds of matters that require the most conscious exercise of the critical intellect.

ward . . . to escape, must yield not only outerly but innerly. The wildest tyrants in their wildest fantasies have not required more.”³ The therapeutic efficacy of psychiatry has been similarly challenged. As the British psychiatrist Rollin graphically puts it, “[t]ime and again the heralds have proclaimed the advent of the Golden Age of Psychiatry: then the trumpets fade and the same heralds have retreated ignominiously into the wings and are heard no more.”⁴ In the proposed “Dangerous Offender” legislation recommended by the Canadian Committee on Corrections,⁵ the case for substantial psychiatric intervention in the criminal process is heard once more, albeit in slightly muted tones. The issues of psychiatric function and competence that are thus presented, together with the widespread attention that preventive detention is currently receiving in a variety of contexts,⁶ bid promise of making these particular recommendations possibly the most controversial part of the Committee’s Report.

In view of the critical discussion that follows, it is perhaps best to begin by indicating two significant points upon which there will probably be a large body of academic and professional concurrence in the committee’s position. The first is the recognition, in the committee’s words, “that improved methods of identifying the dangerous offender would promote a wider acceptance of community-based treatment for non-dangerous offenders”⁷ Norval Morris has pointed out that a sort of Gresham’s Law, a principle of the lowest common denominator, confines our treatment processes to the needs of the least easily treated, limiting the courts and the correctional system alike, not only in the effective utilization of the dispositional and treatment alternatives that are available, but also in taking the kinds of risks that must be taken if modern treatment approaches are to be attempted.⁸ Thus, it is argued, a more systematic use of procedures to identify and isolate the dangerous offender could well provide that measure of public acceptance of reform proposals that would lead to a gradual modification of the severity of sentences imposed on the offender population as

³ J. SEELEY, *THE AMERICANIZATION OF THE UNCONSCIOUS* 43 (1967).

⁴ H. ROLLIN, *THE MENTALLY ABNORMAL OFFENDER AND THE LAW* 116 (1969).

⁵ REPORT OF THE CANADIAN COMMITTEE ON CORRECTIONS (The Quimet Report, 1969) ch. 13 [hereinafter cited as REPORT].

⁶ See, e.g., Frankel, *Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future*, 78 YALE L.J. 229 (1968); Mueller, Le Poole & Chi-Chung Wang, *Non-Punitive Detention: A Comparative Study*, 2 OTTAWA L. REV. 423 (1968); Aronowitz, *Civil Commitment of Narcotic Addicts*, 67 COLUM. L. REV. 405 (1967); Comment, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489 (1966); Comment, *Civil Restraint, Mental Illness and the Right to Treatment*, 77 YALE L.J. 87 (1967). See also Silving, *Rule of Law in Criminal Justice*, in *ESSAYS IN CRIMINAL SCIENCE* 77 (G. Mueller ed. 1961); Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75 (1968).

⁷ REPORT at 241.

⁸ Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, at 530 (1968). See also N. MORRIS & I. HAWKINS, *THE HONEST POLITICIAN’S GUIDE TO CRIME CONTROL* 186 (1970). Cf. Wolfgang, *Corrections and the Violent Offender*, 381 ANNALS 119 (1969); Edwards, *Social Defence and the Control of the Dangerous Offender*, 21 CURR. L. PROB. 23 (1968).

a whole.⁹ The second major contribution of the committee is to sound, hopefully at last, the quietus to the habitual offender and dangerous offender provisions contained in the present Part XXI of the Criminal Code. These provisions, together with the principal criticisms that have been directed against them, will be reviewed briefly in the next Part of this paper. Suffice it to say here that the present Part XXI provisions have no place in a civilized law of criminal correction. It would be unfortunate indeed, in the light of the committee's sound assessment, if misguided conceptions of the needs of law enforcement should continue to stand in the way of the abolition of these two existing forms of preventive detention.

It is the conclusion that the committee draws from these twin considerations that presents the problem. For the very large question that remains is: What, if anything, should replace the existing Part XXI provisions? The assumption that the committee makes—with much less in the way of exploration of fundamental issues than the importance of the question would seem to dictate—is that the essential difficulty lies, not so much with the imposition through separate procedures on the Part XXI model of an indeterminate life term for a specially designated dangerous offender class, but with the statutory technique for identifying the group subject to preventive detention and with the procedural safeguards that are available to minimize the risk of wrong decisions. At this critical point, the committee have stumbled into some of the more complex and troublesome issues in criminal policy. That the issues are troublesome and complex, however, is small justification for the failure to come to terms with them. A number of important problems are left unresolved, or in many cases neglected altogether, in the Ouimet Committee's recommendations and in the discussion that accompanies them. One senses too, in places, the need for a "demythologizing" voice. It is to these various problems raised by the Ouimet Committee's "Dangerous Offender" proposals that this present article is addressed.

II. PREVENTIVE DETENTION IN CANADA: TWO EXISTING FORMS AND A NEW PROPOSAL

Part XXI of the Criminal Code makes provision for a sentence of pre-

⁹ See, e.g., A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES 163 (Tent. Draft 1967) [hereinafter cited as SENTENCING ALTERNATIVES AND PROCEDURES]; Outerbridge, *Unity and Credibility in Corrections*, 12 CAN. J. CORR. No. 3 (1970). However, this view may well be questioned, especially by those who emphasize the general preventive or the "morality play" functions of the criminal law, and the community responses that can be expected in consequence of these perceptions of the criminal justice system. See generally Andenaes, *The General Preventive Effects of Punishment*, 124 U. PA. L. REV. 949 (1966); T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* chs. 6 & 7 (1935); Erickson, *Notes on the Sociology of Deviance*, 9 SOC. PROBLEMS 307 (1962); J. MORTON, *THE FUNCTION OF THE CRIMINAL LAW* (C.B.C. Lectures, 1962). Nor, as will be suggested, was the committee itself as helpful as it might have been in giving effect to this premise upon which its proposals appear to rest. See notes 80-83 and accompanying text *infra*.

ventive detention, wholly indeterminate in duration,¹⁰ for two classes of convicted persons—the “habitual criminal” and the “dangerous sexual offender.” There is now a large body of critical writing, in Canada as well as in other countries, on the habitual criminal concept.¹¹ The dangerous sexual offender provisions have only recently begun to receive equally careful study in Canada,¹² although a substantial critical literature has appeared in the United States.¹³ It is intended here to do no more than review, in a cursory way, the major difficulties that such legislation presents, especially as these provide some basis for assessing the new scheme of preventive detention that is proposed to replace the two existing forms.

The habitual criminal legislation was enacted in Canada in 1947,¹⁴ and was modelled after an English statute, The Prevention of Crime Act, 1908.¹⁵ It is of interest to note that the Canadian version was more drastic in its effect, specifying a fully indeterminate life term in contrast to the term of five to ten years that could be added to the initial sentence under the original

¹⁰ Preventive detention is defined as meaning “detention in a penitentiary for an indeterminate period.” CRIM. CODE § 659.

¹¹ For Canadian references see *Symposium on The Habitual Criminal*, 13 MCGILL L.J. 533 (1967); Mewett, *Habitual Criminal Legislation Under the Criminal Code*, 39 CAN. B. REV. 43 (1961); Cormier, *The Persistent Offender and His Sentences: A Problem for Law and Psychiatry*, 9 CAN. PSYCHIATRIC ASS'N J. 462 (1964). English references include W. HAMMOND & E. CHEYEN, *PERSISTENT CRIMINALS* (Home Office Research Unit Report 1963); D. WEST, *THE HABITUAL PRISONER* (1963); THE ADVISORY COUNCIL ON THE TREATMENT OF OFFENDERS, *PREVENTIVE DETENTION* (1963); Wilson, *Developments in the Penal System 1954-63*, [1964] CRIM. L. REV. 634, at 642-46. Leading American references are S. RUBIN, *THE LAW OF CRIMINAL CORRECTION* ch. 11 (1963); Brown, *The Treatment of the Recidivist in the United States*, 23 CAN. B. REV. 640 (1945); Tappan *Habitual Offender Laws and Sentencing Practices in Relation to Organized Crime*, in *ORGANIZED CRIME AND LAW ENFORCEMENT* 113 (M. Ploscowe ed. 1952). SENTENCING ALTERNATIVES AND PROCEDURES at 160-71; See generally N. MORRIS, *THE HABITUAL CRIMINAL* (1951); PROCEEDINGS OF QUEEN'S UNIVERSITY'S SEMINAR ON THE PERSISTENT OFFENDER (1963). See also Dunton-Fear, *Habitual Criminals and the Indeterminate Sentence*, 3 ADELAIDE L. REV. 335 (1969).

¹² See Marcus, *A Multi-Disciplinary Two Part Study of Those Individuals Designated Dangerous Sexual Offenders Held in Federal Custody in British Columbia, Canada*, 8 CAN. J. CORR. 90 (1966); Marcus & Conway, *Dangerous Sexual Offender Project*, 11 CAN. J. CORR. 198 (1969); Cormier & Simons, *The Problem of the Dangerous Sexual Offender*, 14 CAN. PSYCHIATRIC ASS'N J. 329 (1969); Price & Gold (study in progress). These provisions were the subject of an earlier official inquiry. See MCRUER COMMISSION, *REPORT OF THE ROYAL COMMISSION ON THE CRIMINAL LAW RELATING TO CRIMINAL SEXUAL PSYCHOPATHS* (1958) [hereinafter cited as *ROYAL COMMISSION REPORT*].

¹³ See, e.g., S. RUBIN, *PSYCHIATRY AND CRIMINAL LAW: ILLUSIONS, FICTIONS AND MYTHS* ch. 5 (1965); Hacker & Frym, *Sexual Psychopath Act in Practice: A Critical Discussion*, 43 CALIF. L. REV. 766 (1955); Tenney, *Sex, Sanity and Stupidity in Massachusetts*, 42 BOSTON U.L. REV. 1 (1962); Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. CRIM. L.C. & P.S. 215 (1960); Kozol, Cohen & Garofalo, *The Criminally Dangerous Sexual Offender*, 275 NEW ENG. J. MED. 79 (1966); SENTENCING ALTERNATIVES AND PROCEDURES 100-07; Note, *Pennsylvania's New Sex Crime Law*, 100 U. PA. L. REV. 727 (1952); REPORT OF THE NEW JERSEY STATE COMMISSION ON THE HABITUAL SEX OFFENDER (1950).

¹⁴ An Act to amend the Criminal Code, Can. Stat. 1947 c. 55, § 18.

¹⁵ 8 Edw. 7, c. 59 (1908).

English act.¹⁶ Moreover, the Canadian provisions were introduced at the very time that preventive detention in the form conceived by the 1908 statute was in the process of being abolished in England.¹⁷ The Canadian law was amended in 1961 and in 1969, but not in any particular that bears significantly on the present discussion.¹⁸ Omitting provisions of a purely technical

¹⁶ The original English Act provided: "Where a person is convicted on indictment of a crime, . . . and subsequently . . . admits . . . or is found . . . to be an habitual criminal, and the court passes a sentence of penal servitude, the court, if of opinion that by reason of his criminal habits or mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence ordering that *on the determination of the sentence of penal servitude he be detained for such period not exceeding ten or less than five years* as the court may determine, and such detention is hereinafter referred to as preventive detention . . ." 8 Edw. 7, c. 59, § 10(1) (emphasis added). The original draft provided for a fully indeterminate sentence, but this was amended after debate in the House of Commons. See N. MORRIS, *THE HABITUAL CRIMINAL* at 34-41 (1951). In actual fact, most sentences of preventive detention were for considerably less than the maximum. Of 1,154 prisoners sentenced to preventive detention between 1928 and 1945, 950 received preventive detention sentences of 5 years, and only 49 received more than 7 years. *Id.* at 63. The Canadian legislation, presumably in imitation of American models, provided for a life indeterminate sentence. Under the original legislation, this was a sentence of preventive detention in addition to any sentence imposed for the offence of which he was convicted. See *Criminal Code And Selected Statutes 1927 Including Amendments to 1952*, c. 36, § 575b. This "dual track" system was abandoned in 1961 in favour of the "single track" system that appears in the present § 660 of the code. A study conducted in 1964 of habitual criminals released on parole indicated that, of 95 persons who had been sentenced to preventive detention as of that date, 34 had been released on parole: 2 in under 5 years; 2 between 5 and 6 years; 25 between 6 and 9 years; and 5 between 9 and 12 years. F. MILLER, *HABITUAL CRIMINALS UNDER PREVENTIVE DETENTION RELEASED ON PAROLE* (1964). In answer to a question asked in the House in March 1969, the Solicitor General stated that of 84 persons sentenced under the habitual criminal provisions between 1960 and 1968, 79 had been paroled, of whom 24 had violated their parole, 9 of which had been paroled again. H.C. DEB. 6379 (1969). Cf. Lynch, *Parole and the Habitual Criminal*, 13 MCGILL L.J. 632 (1967).

¹⁷ The system of preventive detention established by the 1908 act was replaced in 1948 by a new "single track" form of preventive detention, imposed by the court without special consent or application by the Crown, for a "term of not less than five nor more than fourteen years as the court may determine." Criminal Justice Act, 11 & 12 Geo. 6, c. 58, § 21(2) (1948). The 1908 provisions had previously been the subject of substantial criticism in the REPORT OF THE DEPARTMENTAL COMMITTEE ON PERSISTENT OFFENDERS, CMD. NO. 4090 (1932), and changes had been incorporated in a Criminal Justice Bill introduced in England in 1938. Preventive detention has now been abolished altogether in England by the Criminal Justice Act, 1967, c. 80, § 37.

¹⁸ Can. Stat. 1960-61 c. 43, §§ 33, 35-40, and Can. Stat. 1968-69 c. 38, §§ 77, 79-80, and also § 53 relating to proof of prior convictions. The object of the 1961 amendments was essentially fourfold: (1) to substitute a "single track" for a "dual track" system, see *supra* note 16; (2) to require a review of parole suitability annually, rather than every three years as before, cf. note 19; (3) to remove certain evidentiary and procedural difficulties involved in establishing that a person is an habitual criminal, these relating to the time within which notice must be given to the accused by the prosecutor and to the manner in which the consent of the Attorney General to the institution of habitual proceedings could be proved; and (4) to specify more fully the grounds of appeal in proceedings under Part XXI and the powers of the Court of Appeal upon any such appeal. In essence, the 1961 amendments were intended to simplify the procedure from the point of view of the Crown. The amendments did not alter

nature, the relevant sections of the Criminal Code now provide as follows:

660. (1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired, if . . .

- (a) the accused is found to be an habitual criminal, and
- (b) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.

(2) For the purposes of subsection (1), an accused is an habitual criminal if

- (a) he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or
- (b) he has been previously sentenced to preventive detention.

. . . .

662. (1) The following provisions apply with respect to applications under this Part, namely,

- (a) an application under subsection (1) of section 660 shall not be heard unless
 - (i) the Attorney General of the province in which the accused is to be tried consents,
 - (ii) seven clear days' notice has been given to the accused by the prosecutor, either before or after conviction or sentence but within three months after the passing of sentence and before the sentence has expired, specifying the previous convictions and the other circumstances, if any, upon which it is intended to found the application, and

. . . .

(2) An application under this Part shall be heard and determined by the court without a jury.

. . . .

665. . . .

(2) An accused who is sentenced to preventive detention may be confined in a penitentiary or part of a penitentiary set apart for that purpose and shall be subject to such disciplinary and reformatory treatment as may be prescribed by law.

666. Where a person is in custody under a sentence of preventive detention, the Solicitor General of Canada shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be permitted to be at large on licence, and if so, on what conditions.¹⁹

the fundamental conception of the law in any significant way—although this is not to say that, within the conception of this type of habitual offender statute, the "single track" v. "dual track" approaches, do not have important consequences. See Radzinowicz, *The Persistent Offender*, in *THE MODERN APPROACH TO CRIMINAL LAW* 162, 164-66 (L. Radzinowicz & J. Turner ed. 1945). The 1969 amendments were entirely procedural.

¹⁹ One must read § 666 of the Code together with § 24(5) of the Parole Act, which provides: "The powers and functions of the Minister of Justice under section 666

In reference to habitual offender laws in the United States, the chief reporter for the American Law Institute's Model Penal Code has stated: "[T]he consensus is that they are a failure, productive of chaotic and unjust results when they are used, and greatly nullified in practice."²⁰ There is considerable evidence that this is the Canadian experience as well. One of the most serious criticisms is that such provisions are inconsistently applied. Because of the severe nature of the penalties involved, the statutes tend to be strictly construed by the courts,²¹ and judges and prosecutors alike often display reluctance to apply the legislation. Of 80 inmates in Canadian penitentiaries on February 26, 1968, who had been sentenced to preventive detention under the habitual criminal provisions, the Ouimet Committee lists 45 as being from British Columbia, of which 39 were sentenced in Vancouver.²² Equally significant is a Cormier study of 184 penitentiary recidivists, all of whom had been selected because of deep and persistent involvement in a life of crime. Although over half of this group had been convicted on three separate and independent occasions of indictable offences punishable by imprisonment for five years or more, not one of the group had been sentenced to preventive detention under Part XXI of the code.²³ The requirement of consent of the Attorney General to the initiation of habitual criminal proceedings has clearly not served to secure even rough uniformity in practice. Indeed, this very requirement of "consent" constitutes one of the principal objections to this type of proceeding—that such uniformity of practice that the courts could achieve is largely negated by divorcing these special disposition measures from the regular body of sentencing law. In the result, one cannot help but agree with the committee that "legislation which is susceptible of such uneven application has no place in a rational system of corrections."²⁴

There are other objections to the habitual criminal provisions. The

of the *Criminal Code* are hereby transferred to the Board, and a reference in that section to permission to be at large on licence shall be deemed to be a reference to parole granted under this Act." Parole Act, Can. Stat. 1958 c. 38. Also relevant is a new amendment to § 8(d) of the Parole Act, which makes it possible for the Board to "grant discharge from parole to any paroled inmate . . ." Can. Stat. 1968-69 c. 38, § 100.

²⁰ Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, at 483 (1961).

²¹ For a detailed review of the case law to date, see Boilard, *La détention préventive du repris de justice en droit criminel canadien*, 13 MCGILL L.J. 557 (1967). More recent cases of note include Poole v. The Queen, [1968] Sup. Ct. 381 (1967); Hadden v. The Queen, [1968] Sup. Ct. 258 (1967); Mendick v. The Queen, [1969] 2 Sup. Ct. 865.

²² REPORT at 252-53. A review of habitual criminal sentences between 1960 and 1968 provides figures that are even more striking. Of 84 such sentences of preventive detention, 57 were imposed in British Columbia, 12 in Alberta, 8 in Quebec, 3 in Manitoba, and only 2 in Ontario. H.C. DEB. 6737 (1969).

²³ Cormier, *supra* note 11, at 470-71. The authors add: "Of the 80 out of 184 who have not served a third penitentiary term, some are young adults imprisoned for a first or second long term, or very young adults, some still under 20, with a first or second sentence." *Id.* at 470.

²⁴ REPORT at 253.

seriousness of the penalty and the scope for its differential application make a prisoner highly vulnerable to prosecutorial plea bargaining. However unfounded such complaints may often be, one can hardly view with equanimity the frequency with which they are brought by prison inmates.²⁵ Many persons would consider that the indeterminate sentence is too long, or that it is perceived as arbitrary in its imposition.²⁶ In particular, it takes inadequate account of the gravity of the offence of last conviction, in consequence of which the sentence of preventive detention was imposed²⁷—an especially relevant criticism in Canada because of the high maximum sentences of imprisonment that are fixed by law for many offences that are not, in the ordinary case, inherently dangerous.²⁸ Moreover, preventive detention is usually imposed upon an offender when he is in his mid-thirties or older, at the stage of life when, for many offenders at least, criminality begins to abate²⁹—and arguably also, when extended confinement is least likely to

²⁵ This has been a major source of criticism of habitual offender laws in the United States. See Turnbladh, *A Critique of the Model Penal Code Sentencing Proposals*, 23 LAW & CONTEMP. PROB. 544, at 547 (1958); D. NEWMAN, CONVICTION 58 (1966); Cf. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, at 100-05 (1968). There appears to be no actual data available in Canada. Cf. B. GROSSMAN, THE PROSECUTOR ch. 4 (1969). It may be that the Canadian requirement of consent of the Attorney General serves to reduce this danger.

²⁶ The committee noted: "Its discriminatory application against a few offenders, from among the large number of recidivists against whom the legislation might be applied, naturally results in bitterness and feelings of injustice . . ." REPORT at 247. In regard to length of sentence, see the text accompanying notes 35 and 36 *infra*.

²⁷ See, e.g., *Regina v. Hadden*, [1966] 1 Can. Crim. Cas. Ann. (n.s.) 133 (B.C. 1965), where an accused with a record of 14 convictions, all but one relating to vagrancy, possession of narcotics, or petty theft, was sentenced to preventive detention following conviction for stealing a can-opener (theft under fifty dollars). The Supreme Court of Canada set aside the sentence of preventive detention on the ground that the accused was not shown to have been "leading persistently a criminal life." *Hadden v. The Queen*, [1968] Sup. Ct. 258 (1967). It has been affirmatively held that, while the accused must have been convicted on "at least three separate and independent occasions . . . of an indictable offence for which he was liable to imprisonment for five years or more," the offence of last conviction may be any indictable offence. *Regina v. Sneddon*, [1966] 1 Can. Crim. Cas. Ann. (n.s.) 397 (B.C. 1965). See also *Poole v. The Queen*, [1968] Sup. Ct. 381 (1967), where a sentence of preventive detention had been imposed on an offender with a prior record of convictions for robbery, breaking and entering and automobile theft, following conviction on a number of counts of obtaining by false pretences, involving "N.S.F." cheques. The sentence was set aside by the Supreme Court of Canada on the ground that it was not shown that it was "expedient for the protection of the public to sentence him to preventive detention." It is noteworthy that in both *Hadden* and *Poole*, as well as two other recent cases, *Paton v. The Queen*, [1968] Sup. Ct. 341 (1967); and *Mendick v. The Queen*, [1969] 2 Sup. Ct. 865, the Supreme Court of Canada divided five to four. See note 34 *infra*.

²⁸ See, e.g., CRIM. CODE § 280 (theft over fifty dollars—ten years); § 297 (possession of property obtained by crime, valued at over fifty dollars—ten years); § 304 (obtaining by false pretences—most cases, 10 years); § 311 (uttering a forged document—14 years); § 323 (fraud—10 years); § 372 (mischief—most cases, 5 or 14 years). See also Narcotic Control Act, Can. Stat. 1960-61 c. 35, § 3 as amended, (possession of a narcotic—upon conviction on indictment, 7 years).

²⁹ The committee observes: "The average age of the 80 detainees when the sentence of preventive detention was passed was 40.4 years. The youngest was 25 and the eldest 63 These figures tend to support the conclusion that a weakness in

have positive therapeutic value.³⁰ Added to all of this is the very real question about placing such extraordinary sentencing powers in the hands of a magistrate or provincial judge.³¹

One of the most serious criticisms of the habitual criminal legislation is that it does not reach the types of offenders for whom special sanctions might be appropriate. It is ineffective in dealing with those engaged in organized and professional crime because, by reason of the undercover nature of their activities or the use of underlings, such offenders almost invariably escape prosecution under the law. Nor, it seems, is the law an effective device for identifying and isolating the peculiarly "dangerous" offender. Both English and American experience bear these observations out.³² Morris, for example, in summarizing the disadvantages that his study of the 1908 English act had disclosed, concluded: "The Act was aimed at the 'professional' and 'dangerous' criminal—it tended to press largely upon the persistent minor offender, the habitual nuisance. The requirement of penal servitude as a condition precedent to preventive detention did not prevent this; The Act reached an insignificant proportion of the criminals who should have been declared habituals and sentenced to preventive detention."³³ The Canadian experience—in part, perhaps, a reflection of some judicial sentiment for wider application of the provisions³⁴—is similar. Re-

the application of the legislation is that it appears to be most frequently applied against the offender at a time when his behavior pattern has assumed a non-violent character." REPORT at 248. This same criticism has been brought in regard to the imposition of longer sentences for recidivist offenders generally. See Cormier, *supra* note 11, at 467-68. This point is considered further in the discussion of sentencing structure. See text accompanying notes 77-79 *infra*.

³⁰ Cormier, *supra* note 11, at 471-72.

³¹ A "court" for the purposes of Part XXI is defined by § 659 to include "a court of criminal jurisdiction," and thus extends, by reason of § 2(10)(b), to "a magistrate . . . acting under Part XVI." It has been observed: "The Canadian magistrate has a broader jurisdiction to try cases and a greater discretionary power in sentencing than that given to any single lower court judge in Europe, the Commonwealth or the United States Depending on the offence, a magistrate sitting alone may: sentence to life, commit to preventive detention, impose whipping or forfeiture or fines in any amount. In short, he may impose any penalty except death. No lower court judge sitting alone in any other country is given this power." Hogarth, *Toward the Improvement of Sentencing in Canada*, 9 CAN. J. CORR. 122, at 123 (1967). See also Ryan, *The Adult Court*, in CRIME AND ITS TREATMENT IN CANADA 136, at 165-69 (W. McGrath ed. 1965); Silving, *supra* note 6, at 122; George, *An Unsolved Problem: Comparative Sentencing Techniques*, 45 A.B.A.J. 250, at 251-52 (1945).

³² See the references cited in note 11. For a convenient summary of the English studies, see Peterson, *Preventive Detention in England*, in PROCEEDINGS OF QUEEN'S UNIVERSITY'S SEMINAR ON THE PERSISTENT OFFENDER (1963).

³³ N. MORRIS, *THE HABITUAL OFFENDER* 80 (1951).

³⁴ The division of judicial opinion on this issue is evident in the recent decision of the Supreme Court of Canada in *Mendick v. The Queen*, [1969] 2 Sup. Ct. 865. The accused had been convicted of theft of an automobile, and sentenced to three years imprisonment. His record showed 46 prior convictions. Of these, 27 involved possession and use of gasoline credit cards—24 related to a two-month period, and involved a total of two-hundred and forty-five dollars and ninety-five cents. Eight related to theft and use of automobiles. Only one involved a crime of violence—a conviction for robbery in 1957, for which the accused served five years of an eight year

viewing the lifetime criminal records of the 80 habitual criminals in Canadian penitentiaries on February 26, 1968, the Ouimet Committee provided the following breakdown of the 2,228 offences for which this group had been convicted: offences in respect of property and narcotics, as well as miscellaneous offences (including vagrancy, trespass and drunkenness), 2,051; offences against the person, 177, including 79 for robbery and 77 for assault (most of which, the committee concludes, were probably not of a serious nature); wounding, 5; indecent assault, 9; rape and attempted rape, 4; kidnapping and abduction, 2; and manslaughter, 1.³⁵ The committee's conclusions are set out here at some length:

There were, accordingly, approximately 13 offences against property or for offences other than against the person, for every offence against the person.

.
Twenty-three or approximately 27.5 per cent of the 80 persons sentenced to preventive detention as habitual offenders have not been convicted of any offence against the person. An additional eight have no conviction

sentence of imprisonment. A sentence of preventive detention was imposed by a magistrate, and affirmed by the British Columbia Court of Appeal. It was agreed that the accused had been found to be an habitual criminal, the sole issue being whether it was "expedient for the protection of the public to sentence him to preventive detention." Mr. Chief Justice Cartwright, with four other justices concurring, allowed the appeal, stating: "[A]lthough it is impossible to say that the appellant is merely a nuisance, he does not constitute so grave a menace that the protection of the public requires that he be deprived of his liberty for the remainder of his life, subject only to the provisions of s. 666 of the *Criminal Code* and the *Parole Act*." *Id.* at 872. In this, he appeared to reiterate views expressed in *Poole v. The Queen*, [1968] Sup. Ct. 381 (1967), where he placed emphasis on actual "menace to society" and made a contrast with England where "the maximum sentence of preventive detention which can be imposed . . . is 14 years and . . . in the great majority of cases . . . the sentence passed . . . [has] . . . been one of eight years," as opposed to Canada where "if the sentence is passed at all it must decree imprisonment for the remainder of the prisoner's life subject to the possibility of his being allowed out on licence if so determined by the parole authorities, a licence which may be revoked without the intervention of any judicial tribunal." *Id.* at 392. Speaking for four justices in dissent in *Mendick*, Mr. Justice Ritchie stressed the existence of a Parole Board "composed of people who are experienced in dealing with criminals," the right to annual consideration for parole, and in particular whether the prisoner's return to society should be under the supervision and control that parole provides. He then stated: "I do not find any decision so far rendered by this Court which makes it plain that a sentence of preventive detention is only to be imposed on persons who have been guilty of repeated crimes of violence, and I can find nothing in s. 660 itself to indicate that it is directed solely to the protection of the public against violence; it rather appears to me that the section is to be applied in the case of persons who have shown themselves to be so habitually addicted to serious crime as to constitute a threat to other persons or property in any community in which they live, and for so long as they remain at large without supervision." [1969] Sup. Ct. at 876-77. The frequency of five to four divisions in the Court has already been noted. See *supra* note 27. See also *Boilard*, *supra* note 21, especially at 579-84. In a recently reported decision, an Ontario provincial court judge has suggested, in a tentative way, that the "cruel and unusual treatment or punishment" clause in the Canadian Bill of Rights, Can. Stat. 1960 c. 44, § 2(b), may have some application as a guide to the court in exercising its discretion in interpreting the "expedient for the protection of the public" requirement in § 660. See *Regina v. Buckler*, 12 CRIM. L.Q. 214 (1970).

³⁵ REPORT at 247-48.

for a serious offence against the person. Consequently, approximately 37.5 per cent of those sentenced to preventive detention have either no conviction for offences against the person or have committed no serious offence against the person.

Twenty-two of the 80 persons have only one conviction for a serious offence against the person. Only three detainees among this group were sentenced to preventive detention as the result of an application for preventive detention made following such convictions.

Eleven detainees, or 50 per cent of this group, were sentenced to preventive detention as a result of the commission of an offence other than an offence against the person after an interval of more than ten years had elapsed from the termination of the sentence imposed in respect of the single conviction for the serious offence against the person.

....

Twenty-seven of the 80 persons have convictions for two or more serious offences against the person. Two out of this group had convictions for eight such offences.

However, only ten of these 27 persons with convictions for two or more serious offences against the person were sentenced to preventive detention as a result of the commission of a substantive offence against the person . . .

....

It appears to the Committee that an examination of the criminal records of the 80 persons sentenced to preventive detention as habitual offenders supports the following conclusions:

1. That almost 40 per cent of those sentenced to preventive detention would appear not to have represented a threat to the personal safety of the public.
2. That perhaps a third of the persons confined as habitual offenders would appear to have represented a serious threat to personal safety.
3. That there is a substantial number within the 80 persons with respect to whom there is not enough evidence to warrant a conclusion that they represented a serious threat to personal safety.

The Committee concludes that while the present habitual offender legislation has been applied to protect the public from some dangerous offenders, it has also been applied to a substantial number of persistent offenders who may, perhaps, constitute a grave social nuisance but who do not constitute a serious threat to personal safety.³⁶

There is still another criticism brought against the habitual criminal sections: "To reach a conclusion about an individual's criminality requires an awareness not only of his criminality, but a study of his total personality There is no condition which stipulates that there must be a psychiatric assessment, as there is for the criminal sexual psychopath, where the evidence of at least two psychiatrists is required."³⁷ This leads to a

³⁶ REPORT at 248-52. This same conclusion is implicit in the 1964 study, by the present executive director of the National Parole Service, of 34 habitual criminals released on parole: "The group of detainees released on Parole is composed essentially of non-violent men. (It is anticipated that this may be a characteristic of a greater part of all the group sentenced to preventive detention to date). Only one of the 34 men released had an offence involving violence as his current conviction at the time of being found an habitual criminal. None of the group have any significant pattern of violence on their criminal record." Miller, *supra* note 16, at 4.

³⁷ Cormier, *supra* note 11, at 469. This same view is reflected in the special sentencing provisions for dangerous offenders in the Model Sentencing Act in the

consideration of the second form of preventive detention provided for under Part XXI of the code.

The "dangerous sexual offender" provisions were first enacted in 1948, as the "criminal sexual psychopath" provisions of the Criminal Code.³⁸ The sexual psychopath laws are a distinctly American phenomenon. Minnesota, in 1939, passed the first such statute to pass judicial scrutiny, a 1937 Michigan statute having been struck down as unconstitutional.³⁹ Immediately after World War II, sexual psychopath laws—taking a variety of forms, and often later subject to substantial, and sometimes recurring, revision—were passed in state after state in rapid succession, until by 1960 statutes existed in twenty-five states and the District of Columbia.⁴⁰ Their origin has been attributed by one commentator to "the intersection of three general trends in modern criminology: the growing acceptance of the tenets of positivistic criminology, the expanding influence of the psychiatric interpretation of crime as symptomatic of mental disorder, and the greater frequency of attempts at *a priori*, preventive legal action in the criminal law process."⁴¹ The influence of the mass media in generating public pressure for such legislation, through disproportionate and often misleading reporting of sex offences, has also been frequently noted.⁴² Referring to the three "trends" listed, the same writer continues: "All . . . offer techniques and objectives with great reform appeal, and it is perhaps this gloss of desirability that disguises their most alarming aspect: they demonstrate the willingness of lawyers to turn over to the behavioural science disciplines large areas of legal domain, while uncritically assuming that these disciplines 'contain within themselves sufficient safeguards against unwarranted interferences with individual freedom in the exercise of official power in the process of criminal justice administration.'"⁴³ In this context, it is of interest to observe that the debate in the House of Commons on the introduction of the original pro-

United States. See NATIONAL COUNCIL ON CRIME AND DELINQUENCY, ADVISORY COUNCIL OF JUDGES, MODEL SENTENCING ACT § 5 (with commentary 1963) [hereinafter cited as MODEL SENTENCING ACT]. See also Guttmacher, *Dangerous Offenders*, 9 CRIME & DELINQUENCY 381 (1963).

³⁸ An Act to amend the Criminal Code, Can. Stat. 1948 c. 39, § 43.

³⁹ See *People v. Frontczak*, 281 N.W. 534 (Mich. 1938); *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940). See also *People v. Chapman*, 4 N.W.2d 18 (Mich. 1942).

⁴⁰ See Bowman & Engle, *Sexual Psychopath Laws*, in *SEXUAL BEHAVIOR AND THE LAW* 757 (R. Slovenko ed. 1965); Note, *The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence*, 41 NOTRE DAME LAWYER 527 (1965-66). See also Swanson, *supra* note 13; Tenney, *supra* note 13, at 9. By 1965, the number of states had increased to 30. See Bowman & Engle, *supra* at 758.

⁴¹ Gold, *The Dangerous Sexual Offender: 'How Safe is Your Daughter?' Revisited* (unpublished student paper, Queen's University, 1969).

⁴² See, e.g., Sutherland, *The Diffusion of Sexual Psychopath Laws*, 56 AM. J. SOC. 142 (1950); Swanson, *supra* note 13. See also J. NUNNALLY, *POPULAR CONCEPTIONS OF MENTAL HEALTH* 74 (1961). Cf. Glover, *Control of the Sex Deviate*, 24 FED. PROBATION 38 (1960).

⁴³ Gold, *supra* note 41, in part quoting Remington, *Criminal Justice Research*, 51 J. CRIM. L.C. & P.S. 7, at 15 (1960).

visions in 1948 occupies only seven pages of *Hansard*.⁴⁴

The 1948 Canadian "criminal sexual psychopath" provisions were modelled on the Massachusetts law of 1947.⁴⁵ A Royal Commission was appointed in 1954, under the chairmanship of the then Chief Justice of Ontario, "to inquire into and report upon the question whether the criminal law of Canada relating to criminal sexual psychopaths should be amended in any respect and, if so, in what manner and to what extent."⁴⁶ The commission reported in 1958, and legislation followed in 1961 implementing most of its recommendations.⁴⁷ A further amendment of substance was made in 1969, following the celebrated *Klippert* case.⁴⁸ Again, however,

⁴⁴ See 5 H.C. DEB. 5195-200, 5203 (1948). The confusion that is apparent in the debates will be the subject of comment in Price & Gold, *supra* note 12.

⁴⁵ 5 H.C. DEB. 5197 (1948). The Massachusetts statute, in turn, appears to derive almost verbatim from the 1939 Minnesota legislation. See Bowman & Engle, *supra* note 40, at 758. The 1947 Massachusetts legislation has been described as "a classic example of all that has been found objectionable in such laws." Tenney, *supra* note 13, at 758. It differed from the Canadian provisions, however, in that proceedings were brought by petition for adjudication of the offender as a "psychopathic personality," without prosecution for an offence. The Canadian statute followed the less objectionable post conviction model. It is interesting to note that the Massachusetts legislation went through a series of revisions, some of them paralleling changes in our own law, see sections of the Criminal Code quoted in note 47, and some going beyond these. The legislative history and related experience in Massachusetts provides a useful critique of the Canadian legislation. See Tenney, *supra* note 13, at 9-24.

⁴⁶ ROYAL COMMISSION REPORT.

⁴⁷ Can. Stat. 1960-61 c. 43, §§ 32, 34-40. Most of the changes were of a procedural or evidentiary nature. The most important change was in the designation and description of the offenders contemplated. The term "criminal sexual psychopath" was replaced by "dangerous sexual offender," thus taking into account the wide professional and academic criticism that the former term had come to receive. See ROYAL COMMISSION REPORT at 15-20; Bowman & Rose, *A Criticism of the Current Usage of the term 'Sexual Psychopath'*, 109 AM. J. PSYCHIATRY 177 (1952). See also Hakeem, *A Critique of the Psychiatric Approach to Crime and Correction*, 23 LAW & CONTEMP. PROB. 650, at 668-76 (1958). For policy and jurisprudential reasons, the present § 659(b) replaced the offender description which formerly read: "[A] person who, by a course of misconduct in sexual matters, has shown a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, pain or other evil on any person" See ROYAL COMMISSION REPORT at 20-24. Apart from the amendment to § 666 described previously, see notes 18 and 19, the only other change of significance was again to substitute a "single track" for a "dual track" system, removing the previous requirement that the accused be sentenced to "a term of imprisonment of not less than two years in respect of the offence of which he was convicted" in addition to the sentence of preventive detention. Not all of the commission's recommendations were accepted. The most notable exception was recommendation 13, that: "The Criminal Code be amended to provide that every prisoner sentenced as a dangerous sexual offender have the right to have his case reviewed every three years by a superior, county or district court judge for the purpose of determining whether he should be further detained; on such review the judge be required to hear representations on behalf of the prisoner and those in authority over him; and on the hearing the judge have power to discharge the prisoner from the sentence of preventive detention imposed on him, order that he be released on licence on such terms as may seem just, or refuse to make any order." ROYAL COMMISSION REPORT at 130. This recommendation has been taken up again by the Ouimet Committee in its "Dangerous Offender" proposals.

⁴⁸ *Klippert v. The Queen*, 2 Can. Crim. (n.s.) 319 (1967). Prior to its amendment by Can. Stat. 1968-69 c. 38, § 76, § 659 included after the words "through failure

the criticisms of the legislation go to more fundamental issues than those addressed by the 1961 or 1969 amendments. The important sections—in addition to sections 665 and 666, quoted previously—provide as follows:

659. In this Part

....

- (b) "dangerous sexual offender" means 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.

....

661. (1) Where an accused has been convicted of

- (a) an offence under
 (i) section 136,

in the future to control his sexual impulses," the additional phrase, "or is likely to commit a further sexual offence." This phrase did not appear in the pre-1961 wording; nor was it in the wording recommended in the Royal Commission Report. See ROYAL COMMISSION REPORT at 127. Klippert, after conviction on pleas of guilty to four charges of gross indecency under § 149 of the code, was, upon application by the Crown, sentenced to preventive detention as a "dangerous sexual offender." His record showed conviction five years previous on eighteen charges for similar offences. The psychiatric evidence, as presented, was to the effect: that the accused was a homosexual; that the ages of his partners, over 24 years of fairly active homosexual practice, had varied from mid-teens to mid-thirties; that he had obtained his partners through discreet soliciting; that his homosexual activity was likely to continue; and that he was not the sort of person who would injure or coerce persons to take part in this activity. An appeal to the Court of Appeal of the Northwest Territories against the finding that he was a dangerous sexual offender was dismissed. The Supreme Court of Canada, by a three to two decision, affirmed. The majority, speaking through Mr. Justice Fauteux, held that the object of the provisions was not "solely to protect persons from becoming the victims of those whose failure to control their sexual impulses renders them a source of danger," *id.* at 331 relying on the words "is likely to commit a further sexual offence" and the fact that violence is not an element of some of the threshold offences listed in § 661(1)(a), especially the consensual offence in § 149. In a strong dissent, Mr. Justice Cartwright took the view that § 659(b) should be given the meaning "or is likely to commit a further sexual offence involving an element of danger to another person." *Id.* at 327. He observed that otherwise "every man in Canada who indulges in sexual misconduct of the sort forbidden by s. 149 . . . with another consenting adult male and who appears likely, if at liberty, to continue such misconduct should be sentenced to preventive detention, that is to incarceration for life" and adverted as well to "the probable effect which such an interpretation would have on the numbers of those confined to penitentiaries." *Id.* at 328. The 1969 amendment struck out the words "or is likely to commit a further sexual offence"; it also purported (*see* § 7), by a new § 149A in the code, to abolish criminal liability altogether for homosexual activity between consenting adults in private. Given the emphasis in *Klippert* on consensual homosexual activity between adults, it may be doubted that the words "is likely to cause injury, pain or other evil to any person" will be interpreted so as to refer only to offenders who are violent or otherwise present a risk of substantial harm. *See, e.g.*, ROYAL COMMISSION REPORT at 23-24; *Carras v. District of Columbia*, 183 A.2d 393 (1962); and *People v. Stoddard*, 38 Cal. Rptr. 407 (1964), both illustrative as to the interpretation to which the remaining phrase is open. *See also* note — and accompanying text. The question as to what constitutes substantial harm may itself have about it some element of "myth." *See, e.g.*, Bender, *Offended and Offender Children*, in *SEXUAL BEHAVIOR AND THE LAW* 687 (R. Slovenko ed. 1965). Certain procedural changes, not relevant here, were also included in the 1969 amendments.

- (ii) section 138,
- (iii) section 141,
- (iv) section 147,
- (v) section 148, or
- (vi) section 149, or

(b) an attempt to commit an offence under a provision mentioned in paragraph (a),

the court shall, upon application, hear evidence as to whether the accused is a dangerous sexual offender.

(2) On the hearing of an application under subsection (1) the court shall hear any relevant evidence, and shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney General.

(3) Where the court finds that the accused is a dangerous sexual offender it shall, notwithstanding anything in this Act or any other Act of the Parliament of Canada, impose upon the accused a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired.

.....

662. (1) The following provisions apply with respect to applications under this Part, namely,

.....

(b) an application under subsection (1) of section 661 shall not be heard unless seven clear days' notice thereof has been given to the accused by the prosecutor either before or after conviction or sentence but within three months after the passing of sentence and before the sentence has expired, and a copy of the notice has been filed with the clerk of the court or with the magistrate, where the magistrate is acting under Part XVI.

(2) An application under this Part shall be heard and determined by the court without a jury.⁴⁹

Before turning to specific criticisms, it should be emphasized that the very concept of the criminal sexual psychopath laws, even as modified, has been subject to radical challenge. The scope and intensity of this challenge is worth emphasizing, even if one may wish to question in detail any individual "demythologizing" assertion upon which it is based. These laws, it is alleged, rest on a number of articles of belief, largely erroneous, which can be summed up in the following propositions: (1) that serious sex crimes are prevalent and rapidly increasing; (2) that the victims of a sexual offence almost invariably suffer substantial physical or psychological harm; (3) that sex crimes are committed by "degenerates", "sex fiends" or "sexual psychopaths", who exist in substantial numbers; (4) that such offenders continue to commit serious sex crimes throughout life because they have no control over their sexual impulses; (5) that the minor sex offender, if unchecked, progresses to more serious types of sexual crime; (6) that it is possible to predict those individuals who are likely to commit serious sex crimes; (7)

⁴⁹ The offences listed in § 661(1)(c) are: rape; sexual intercourse with a female under fourteen; indecent assault on a female; buggery or bestiality; indecent assault on a male; and gross indecency.

that "sexual psychopathy" or sexual deviation is a clinical entity; (8) that reasonable treatment methods to cure deviated sex offenders are known and employed—and, even if they are not, permanent incapacitation is necessary because of the potential danger that such offenders represent; (9) that since the sexual offence is in the nature of a mental malady, professional advice—and possibly even decisions—as to the identification, disposition and release of such offenders should come exclusively from psychiatrists; and (10) that sex control laws of this kind serve to reach the brutal and vicious sex criminal, and should be adopted generally to eliminate sex crimes.⁵⁰ All of these propositions, it is claimed, are either false or, at best, questionable.⁵¹ This is not to say that there are not dangerous sexual offenders—only that

⁵⁰ This list is a composite, drawn from Tappan, *Some Myths About the Sex Offender*, 19 FED. PROBATION 7 (1955) and Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L.C. & P.S. 543, at 543-44 (1950). See also S. RUBIN, *PSYCHIATRY AND THE CRIMINAL LAW: ILLUSIONS, FICTIONS AND MYTHS* ch. 5 (1965). The importance of identifying "the underlying myths which seem to support such legislation in the public mind" is obviously related to the fact "that public outcry has often been the impetus behind its enactment." SENTENCING ALTERNATIVES AND PROCEDURES at 103. For evidence that some of these beliefs influenced the enactment of the original Canadian legislation, see 5 H.C. DEB. 5195-200, 5203 (1948). The A.B.A. Project concluded: "[I]n spite of the longstanding agreement of sociologists, penologists and psychiatrists that . . . [the] . . . bases for sexual psychopath legislation are unfounded, the law continues to recognize them as valid The lesson, of course, is that special terms for exceptional classes of offenders should not be authorized without adequate interdisciplinary foundation. Response to public clamor . . . is not a legitimate basis upon which to build a sentencing structure." SENTENCING ALTERNATIVES AND PROCEDURES at 104.

⁵¹ For support for these various claims, see generally P. TAPPAN, *THE HABITUAL OFFENDER* (1951); Tappan, *supra* note 50; M. GUTTMACHER & W. WEIHOFEN, *PSYCHIATRY AND THE LAW* ch. 6 (1952); M. GUTTMACHER, *SEX OFFENCES: THE PROBLEM, CAUSES AND PREVENTION* (1951); REPORT OF THE ILLINOIS COMMISSION ON SEX OFFENDERS (1953). Thus a Wisconsin study concludes: "[R]eports have found that total sex offences are only about 3% of the total offences reported by the police, that not more than 5% of convicted sex offenders are dangerous, that there is no general trend towards an increase in sex offences, that sex offences rarely progress to a more serious type of sex crime, and that homicide associated with sex crime is rare." Note, [1954] WISCONSIN L. REV. 324, at 327. A number of studies suggest that sex offenders have one of the lowest rates of recidivism of all types of criminals, and most repeaters are minor offenders such as exhibitionists and homosexuals who are seldom seriously harmful. P. TAPPAN, *THE HABITUAL OFFENDER* 14 (1951); M. GUTTMACHER, *SEX OFFENCES: THE PROBLEM, CAUSES AND PREVENTION* 17-18, 131-32 (1951); J. MOHR, R. TURNER & M. JERRY, *PEDOPHILIA AND EXHIBITIONISM* (1964). Not all of these claims however, can be accepted without qualification. The validity of statistics on low recidivism by sex offenders have been challenged. See studies summarized by Bowman & Engle, *supra* note 40, at 769-70. Some pedophilic recidivists may be a justifiable cause of concern. Guttmacher, *supra* at 132. Cormier has pointed out that statistical studies are misleading because more serious acts appear under ostensibly non-sexual crime listings, such as murder or arson, that most dangerous sexual offenders have in fact progressive records and the extent of the problem may be greater than earlier studies have suggested. Cormier, *supra* note 12, at 330-31. But see Mohr & Gray, *Follow-Up of Male Sexual Offenders*, in *SEXUAL BEHAVIOR AND THE LAW* 742, at 746 (R. Slovenko ed. 1965). The fact remains that these types of offenders are rarely the ones reached by the dangerous offender legislation. See *infra* notes 57-59 and accompanying text. Propositions (6), (8) and (9) will be the subject of more detailed discussion later in the paper.

the nature of the problem, and the appropriate legislative response, are popularly misconceived.

Specific criticisms of the dangerous sexual offender provisions include some that have already been mentioned in discussing the habitual criminal sections: that the law is inconsistently applied;⁵² that it renders the accused vulnerable to prosecutorial plea bargaining;⁵³ that the indeterminate life sentence is undesirable;⁵⁴ that the law places too much power in the hands of a magistrate or provincial judge;⁵⁵ and that it does not reach the types of offenders for whom such drastic sanctions should properly be considered. The adequacy of psychiatric assessments under existing law and practice—a matter that will be the subject of more general discussion later—has also been criticized. The Ouimet Committee reported: "Frequently, the opinion of two psychiatrists formed as a result of one or two interviews, supplemented by the evidence given at trial and an examination of such documentary evidence as may be available, constitutes the principal evidence upon which a finding is made The Committee is gravely concerned that the present law permits a determination that a person is a dangerous sexual offender on

⁵² The committee notes: "The present dangerous sexual offender legislation appears to have been more uniformly enforced across Canada than the present habitual offender legislation, although it is obvious that substantial disparity exists with respect to its enforcement in different parts of Canada." REPORT at 255-56. For example, of 57 persons in Canadian penitentiaries on February 26, 1968, sentenced as dangerous sexual offenders, 15 were from the greater Vancouver area, as compared with 4 from Ottawa, 3 from Hamilton, 2 from each of Montreal, Toronto, Edmonton, Quebec City and Regina, and 1 from Winnipeg and Calgary.

⁵³ See *supra* note 25. Again, no Canadian data appear to be available. For practice in one American state, see Burick, *An Analysis of the Illinois Sexually Dangerous Persons Act*, 50 J. CRIM. L.C. & P.S. 254, at 256 (1968).

⁵⁴ See *supra* notes 16 and 26, and accompanying text. In answer to a question asked in the House in March, 1970, the Solicitor General stated that of 64 persons sentenced to preventive detention as dangerous sexual offenders as of February 24, 1970, 21 had been granted parole, of whom 11 had violated their parole. The average stay before release to parole had been 8 years, 5 months and 17 days. H.C. DEB. 5034 (1970). Presumably, the figures relating to average stay referred only to those who had, in fact, been granted parole. It is important also to understand the status of the dangerous sexual offender in the institution. The authors of a British Columbia study have reported:

Regarded with fear, contempt, and disinterest in and out of prison the dangerous sexual offender poses a problem from both the humanitarian and the practical point of view. His plight is perhaps more hopeless than that of any other prisoner, facing, as he does, the prospect of indefinite incarceration and knowing parole to be a remote or even non-existent possibility The dangerous sexual offender in the prison community is a social pariah. Not only is he isolated and spurned by the population of fellow inmates, but he is subject to considerable humiliation and abuse both verbal and physical. He is known as "rapo" or "baby-fucker" and other emotionally loaded basic sexual labels, his possessions are damaged, his cell urinated in or set on fire, his person attacked from unexpected quarters On occasion, some sex offenders have sought protection in a specially isolated area . . . used mainly for punishment, and have been voluntarily confined there for many months or years.

Marcus & Conway, *supra* note 12, at 198-99 and 201.

⁵⁵ See *supra* note 31.

such an inadequate basis”⁵⁶

A frequent complaint made against American sexual psychopath laws is that they tend to be invoked in respect of many nuisance-type, non-dangerous sex offenders.⁵⁷ A related criticism is that they are not effective in reaching those offenders who do present a risk of serious sex crime. Guttmacher, in a study of 100 consecutive sex offenders examined in the Baltimore Supreme Court Clinic, reported that, of 36 who were convicted of crimes involving the use of force or threats of force, only one had been previously convicted of a sex offence, whereas conviction for non-sexual offences was common.⁵⁸ Such limited data as was available to the committee tended to bear out the first of these two criticisms:

A report to the Committee by Dr. George Scott, the consulting psychiatrist at Kingston Penitentiary, indicates that of the 20 persons presently confined in Kingston Penitentiary who have been sentenced as dangerous sexual offenders, nine (45 per cent) are not dangerous in terms of physical violence. Of the remaining 11 (55 per cent) considered dangerous, 5 or almost half are mentally ill and certifiable as such.

It also appears from the study conducted by Dr. Marcus that a significant number of persons found to be dangerous sexual offenders in British Columbia exhibited sufficient evidence of mental illness as to require long term treatment in an appropriate psychiatric setting.⁵⁹

Another criticism—and it is one that greatly influenced the Committee’s ultimate recommendations—was made by Guttmacher, arising out of the same Baltimore study: “I contend that burglary, the offence of breaking and entering at night . . . is far more likely to be a forerunner of rape than homosexuality, voyeurism, exhibitionism or any other type of sexual offence.”⁶⁰ Guttmacher later summarized the policy implications of his conclusions as follows:

[M]any offences which from a legal point of view must be deemed nonsexual are basically sexual. Arson has come to be recognized as such a crime. Burglary, assault and cutting cases often have a sexual origin. In many criminal acts the sexual basis is primary but remains covert.

. . . Our research clearly indicated that the basic personality structure of the burglar resembled that of the rapist far more closely than that of the exhibitionist Thus I find it far sounder psychiatrically to include the really serious sex offenders among the general group of dangerous offenders than to isolate them in a separate category. This is justified from a practical point of view, for the disposition and treatment of the dangerous sex offender need not differ radically from that of the more general group.⁶¹

⁵⁶ REPORT at 254. The existing authorities are reviewed in the recent decision of *Regina v. McAmmond*, 7 Can. Crim. (n.s.) 210, at 212-13 (Man. 1969).

⁵⁷ See Ploscowe, *Sex Offenses: The American Legal Context*, 23 LAW & CONTEMP. PROB. 217 (1958); SENTENCING ALTERNATIVES AND PROCEDURES at 106.

⁵⁸ Guttmacher, *supra* note 51, at 131. See also Wheeler, *Sex Offenders: A Sociological Critique*, 23 LAW & CONTEMP. PROB. 272, at 274 (1958). Cf. Cormier, *supra* note 12, at 330-31.

⁵⁹ REPORT at 255.

⁶⁰ Guttmacher, *supra* note 51, at 131.

⁶¹ Guttmacher, *supra* note 37, at 382-83. This same policy judgment is carried over into the MODEL SENTENCING ACT §§ 5 and 6.

However, there are still other very basic questions about legislation on the present dangerous sexual offender model that remain to be discussed. These concern such matters as: the concept of an appropriate sentencing structure, and the relationship of special terms or the indeterminate sentence to it; the prospects of rehabilitation, and the place that "treatment" considerations should occupy in the formulation of criminal policy; the problem of providing an acceptable legal definition of "dangerousness" for the target offender group; the current status of clinical assessment and statistical prediction as means of identifying those who are "dangerous"; the judgment as to what constitutes adequate procedural and evidentiary safeguards for accused persons under legislation of this nature; and, related to all of these, the proper role of psychiatry as a paralegal agency of social control. All of these larger issues, it is submitted, continue to present serious difficulties with the alternative scheme proposed by the Ouimet Committee. Much of the balance of this article will be devoted to a consideration of the substantial questions outlined. Let us now turn, therefore, to the new legislative plan that the Report recommends.

Taking into account many of the above criticisms—and also, apparently, the rather general recommendations to the same effect of the Committee on Legislation and Psychiatric Disorder of the Canadian Mental Health Association⁶²—the committee recommended that the present habitual criminal and dangerous sexual offender provisions be repealed and replaced by dangerous offender legislation.⁶³ Such legislation should "define with as much precision as possible the criteria of dangerousness, . . . [and] . . . provide an appropriate clinical procedure for identifying a particular offender as dangerous."⁶⁴ The "dangerous offender," as so defined and identified, would be subject to an indeterminate life sentence of preventive detention. On the matter of definition, the committee observed: "The definition must be wide enough to encompass, for example, the emotionally disturbed person who has a compulsion to set fire to dwelling houses, the kidnapper, the person who is likely to sexually molest children by acts which, while not

⁶² REPORT OF THE COMMITTEE ON LEGISLATION AND PSYCHIATRIC DISORDER, THE LAW AND MENTAL DISORDER—VOLUME THREE: CRIMINAL PROCESS chs. 5 and 6 (Can. Mental Health Ass'n 1969).

⁶³ It may be noted, in passing, that the committee also concluded that no special provisions are required for either the persistent non-dangerous offender or those engaged in organized or professional crime. See REPORT at 264-65. These conclusions are, at the very least, debatable. See, e.g., Cormier, *supra* note 11, at 471-74; MODEL SENTENCING ACT §§ 5 and 6 (with commentary); AM. L. INST., MODEL PENAL CODE §§ 6.06, 6.07, 7.03 (Proposed Official Draft, 1962) [hereinafter cited as MODEL PENAL CODE]; SENTENCING ALTERNATIVES AND PROCEDURES at 80-99. Cf. McClean, *Corrective Training—Decline and Fall*, [1964] CRIM. L. REV. 745. The basis of the committee's conclusion is that the maximum penalties under the code are sufficiently high to deal with the problem. The real question that the committee should have considered, however, is whether the basic sentencing structure as a whole should not have been reviewed. See *infra* notes 77-83 and accompanying text. Any further discussion of the persistent non-dangerous offender, and of organized and professional crime, are beyond the scope of this article.

⁶⁴ REPORT at 258.

causing serious physical injury, may cause serious psychological damage," and at the same time "sufficiently restrictive to exclude persons who are likely to commit crimes which do not seriously endanger the person" and to exclude "the situational offender who does not represent a continuing danger."⁶⁵ The following definition is proposed:

Dangerous offender means an offender who has been convicted of an offence specified in this Part [of the Criminal Code] who by reason of character disorder, emotional disorder, mental disorder or defect constitutes a continuing danger and who is likely to kill, inflict serious bodily injury, endanger life, inflict severe psychological damage or otherwise seriously endanger the personal safety of others.⁶⁶

The procedure for identifying the dangerous offender, the committee suggests, should embody the following principles:

- (a) That legislation be enacted to empower the court where an offender has been convicted of any one of certain specified offences, and where from the circumstances under which the offence was committed, the evidence, if any, as to character disorder, emotional disorder, mental disorder or defect, and the criminal record of the offender the court is of the opinion that the offender may be a dangerous offender, to remand the offender in custody to a diagnostic institution for a period not exceeding six months for diagnosis and assessment before imposing sentence.
- (b) If the offender is diagnosed as a dangerous offender, the offender shall be given suitable notice that it is alleged that he is a dangerous offender, whereupon the issue as to whether the offender is a dangerous offender shall be determined by the court.
- (c) A person who is alleged to be a dangerous offender shall have the right to make full answer and defence to the allegation that he is a dangerous offender, and shall be provided with counsel if he lacks the means to employ counsel himself.
- (d) Where the diagnostic facility does not diagnose or assess the offender as a dangerous offender, or where there is a diagnosis of dangerousness but the court does not find the offender to be a dangerous offender, the court shall deal with the accused as an ordinary offender having due regard to all the relevant circumstances.
- (e) If the court finds that the offender is a dangerous offender, the court shall sentence the accused in accordance with the provisions of the Act relating to dangerous offenders.
- (f) The legislation should provide for a right to appeal on any ground of law or fact, or mixed law and fact, by a person found to be a dangerous offender.⁶⁷

A tentative list of specified offences is offered, which includes (with present maximum sentences added): manslaughter when caused by deliberate violence (life); attempted murder (life); robbery (life); doing anything with intent to cause an explosion with an intent to cause death or serious bodily injury or which is likely to endanger life (life); kidnapping or forcible con-

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 259.

finement (life); rape (life); carnal knowledge of a girl under the age of fourteen years (life); breaking and entering a dwelling house when accompanied by violence against any person therein (life); arson (fourteen years); with intent to cause harm, causing bodily harm or shooting (fourteen years); buggery when committed against a person under a stated age (fourteen years); attempted rape (ten years); indecent assault on a male when committed against a person under a stated age (ten years); indecent assault on a female (five years); and gross indecency when committed with or against a person under a stated age (five years). The list does not include the offence of murder, because of the protection that section 656 of the Criminal Code clearly provides in requiring prior approval of the Governor in Council to any release. Nor, because of the requirement that a prisoner be *convicted* of an enumerated offence, do the provisions extend to persons found not guilty by reason of insanity.

As a further procedural safeguard, the committee recommends that a person sentenced to preventive detention be given an automatic yearly assessment and review by the Parole Board, and "be entitled to have a hearing every three years before a superior, county or district court judge or judge of the sessions of the peace, for the purpose of determining whether he should be further detained or his sentence should be terminated if he has been released on parole."⁶⁸ At the hearing, the offender would have the right to be present, to present evidence, to cross-examine witnesses, and to be represented by counsel, to be provided for him if necessary. The report and recommendation of the Parole Board would be available to the court. On the hearing, the court would have the power to: terminate the sentence, when the offender had prior to the hearing for a suitable period been released on parole; remand the applicant to a diagnostic facility for further assessment, and make such further order as deemed appropriate; or refuse to make any order at that time.

On the matter of treatment, the committee states: "The ten year plan of the Federal Penitentiary Service contemplates a medical-psychiatric centre within each regional complex . . . Such medical-psychiatric centres might be used not only for custody and treatment, but for diagnosis and assessment. Mental hospitals, and psychiatric institutes with secure wings . . . might also be used as diagnostic facilities. The Committee wishes to emphasize that the dangerous offender legislation which we have proposed is predicated upon the existence of necessary custodial and treatment facilities appropriate for this class of offender."⁶⁹ The committee follows this statement with a quotation from Guttmacher—a quotation which, by its inclusion, may be taken to embody the spirit of the committee's proposal:

The greatest hope for effective treatment of the dangerous disturbed offender lies in the creation of a distinctive type of correctional institution, one which is therapeutically oriented and employs specialized methods. . . . At present, only the beginnings of such efforts to rehabilitate this type of

⁶⁸ *Id.* at 262-63.

⁶⁹ *Id.* at 263.

offender have been made. Intensive experimentation and fundamental research are needed. The dangerous offender group comprises the most difficult treatment cases. Without treatment, the vast majority of them would continue their criminal activity. Salvaging even only 30 to 40 per cent would be a triumph and would prevent an incalculable amount of pain and misery to society.⁷⁰

The committee makes one final proposal. Anticipating that the criminal law will be able in the future "to draw upon the resources not only of the behavioral sciences, but on those of other sciences such as biology and chemistry," the committee recommends "that government grants be made for research devoted to the development of new and improved methods for identifying and treating the dangerous offender."⁷¹

What has been presented is prologue. It is necessary now to analyze the implications of these proposals in greater detail.

III. PREVENTIVE DETENTION AND THE PROBLEM OF SENTENCING STRUCTURE

A legislative task of no small difficulty is that of developing a framework of sentencing law flexible enough to accommodate the range of dispositional choices required if full effect is to be given to a rational and consistent sentencing policy. The Model Penal Code of the American Law Institute, for example, dispenses altogether with a system of unlimited preventive detention by providing for a coherent scheme of minimum and maximum sentences related to the gravity of certain broad groups of offences, combined with a system of "extended sentences" for those classes of offenders, including the dangerous, who are considered to require longer periods of imprisonment.⁷² Offences of the kind enumerated by the committee would appear as offences of the first or second degree under the Model Penal Code provisions. If the offence were one in the first degree, the offender would be subject to a minimum term fixed by the court of one to ten years, and to a maximum term fixed by law of life imprisonment. Where an extended sentence is ordered, the minimum would be increased to a ten to twenty year range. If the offence were one of the second degree, the respective terms would be from one to three years minimum to ten years maximum—increased, on an extended sentence, to from one to five years minimum to a maximum set by the court of from ten to twenty years. In contrast, the Model Sentencing Act prepared by the National Council on Crime and Delinquency provides for a general system of judicially imposed sentences not exceeding a maximum of five years, but qualified by a provision that makes it possible to classify a prisoner as a "dangerous offender" according to specified criteria and to sentence him to a period of imprisonment of up

⁷⁰ REPORT at 263, quoting Guttmacher, *supra* note 37, at 390 (footnote omitted).

⁷¹ REPORT at 264.

⁷² MODEL PENAL CODE §§ 6.06, 6.07, and 7.03.

to thirty years.⁷³ While one may quarrel with the particular way in which the problem is resolved under either plan, what does characterize both is that the disposition of the dangerous offender is expressly related to the larger body of sentencing law. One need only read the intense debates that have been carried on over these two sets of proposals, including the detailed justifications offered in support of each and alternatives that have been proposed,⁷⁴ to appreciate how complex are the issues of technique and policy that must be thought through if an effective legislative resolution is to be accomplished. The issues become still more complex if one attempts to weigh in the balance the rather different approaches that have been developed for various classes of offenders in other countries, such as the multiple scheme of "measures" that Continental countries adopt in an effort to maintain internal philosophical consistency in penal policy,⁷⁵ or the more sophisticated body of legislation developed in England in an attempt to accommodate, in more pragmatic fashion, a wider range of correctional and mental health dispositional alternatives for offenders.⁷⁶

One looks in vain in the Report of the Canadian Committee on Corrections for any analysis of sentencing structure as a whole, including any attempt to relate length and types of sentences under the Criminal Code either to available criminological and correctional data or to the accumulated experience of other jurisdictions. Where, for example, is there an attempt to justify a fully indeterminate sentence for dangerous offenders in the light of the kinds of sentences that might otherwise be imposed if the basic framework of our sentencing law were itself to be reviewed? Indeed, it would appear that, in most cases at least, the present sanctions available to the courts for the offences specified by the Committee—albeit that the list does not purport to be exhaustive—are already sufficient to protect society. Of the 15 offences listed, 8 are punishable by life imprisonment, 4 by imprisonment for fourteen years, 2 by imprisonment for ten years, and only 2 by imprisonment for the lesser period of five years. One may well wonder whether the committee's concern in many of these cases is less with the adequacy of the available sanction than it is with "feeding the dragon," in the hope that some symbolic (and undemonstrated) value will attach to the designation "dangerous offender" for the comfort of the public at large.

⁷³ MODEL SENTENCING ACT §§ 5 and 6 (with commentary).

⁷⁴ See Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROB. 528 (1958); Turnbladh, *supra* note 25; Wechsler, *supra* note 20; S. RUBIN, PSYCHIATRY AND CRIMINAL LAW chs. 8 and 9; SENTENCING ALTERNATIVES AND PROCEDURES at 80-99.

⁷⁵ See, e.g., Silving, *supra* note 6, Part 3; a paper presented by Ehrhardt, The Concept of Corrective Treatment of Delinquents in the German Penal Law Draft of 1962 (5th International Criminological Congress, Montreal 1965). Cf. N. MORRIS, THE HABITUAL OFFENDER ch. 3 (1951); H. SILVING, THE CONSTITUENT ELEMENTS OF CRIME (1967).

⁷⁶ See, e.g., N. WALKER, CRIME AND PUNISHMENT IN BRITAIN chs. 9 and 10 (1965); B. WOOTTON, CRIME AND CRIMINAL LAW ch. 3 (1963). Cf. N. WALKER, SENTENCING IN A RATIONAL SOCIETY (1969); Hall Williams, *Alternatives To Definite Sentences*, 80 L.Q.R. 41 (1964).

All that the Report contains on the questions here raised is the isolated assertion that a fully indeterminate sentence is necessary because "a person who has received a very long definite sentence, say 20 years, may in fact be more dangerous at the expiration of his sentence and return to freedom than when he was sentenced."⁷⁷ The Model Sentencing Act provision, on the other hand, is premised on the judgment that "violent action, is a characteristic of the young rather than the old offender," so that a long definite sentence—under its provisions, thirty years—"would be ample, in almost all cases, to confine him until that period of his life when release would be safe and rehabilitation likely."⁷⁸ The essential point is that, in the absence of some attempt to place the issue to be resolved within the context of a total framework of sentencing structure and to relate a proposed solution to empirical data on the nature of the problem, the result is a legislative plan that loses intellectual persuasiveness to the very extent that it stands in limbo.⁷⁹

Moreover, if the committee really hoped to bring about a reduction of the severity of sentences imposed upon the offender population as a whole, then surely it should have linked its dangerous offender proposals to a basic review of the maximum sentences presently authorized under the Criminal Code. Nowhere in the Report is this question even considered⁸⁰—notwith-

⁷⁷ REPORT at 262.

⁷⁸ MODEL SENTENCING ACT §§ 5 and 6, at 18 (with commentary).

⁷⁹ There is evidence from some studies that criminality, especially in its more aggressive forms, tends to abate with age, although it is far from conclusive. See S. GLUECK & E. GLUECK, *JUVENILE DELINQUENTS GROWN UP* (1940) and *AFTER-CONDUCT OF DISCHARGED OFFENDERS* (1945); Cormier et al., *Presentation of a Basic Classification for Clinical Work and Research in Criminality*, 1 CAN. J. CORR. 21 (1959), and *The Natural History of Criminality and Some Tentative Hypothesis on its Abatement*, id. 35 (1959); Cormier, *Depression and Persistent Criminality*, 11 CAN. PSYCHIATRIC ASS'N J. 208 (Special Supplement 1966). Claims for "abatement" are seriously questioned in a review of the published research in H. MANNHEIM, 2 COMPARATIVE CRIMINOLOGY 682-89 (1965). The important question, however, relates to those offenders who may be considered dangerous, and the prospects of "abatement" over any given period of time from the probable age of sentence. One major study concluded: "In reviewing the literature from various disciplines on the topic of homicide, we are struck by the fact that very violent crimes are rarely committed . . . by persons over forty years of age. When these cases occur, causal agents most frequently concentrate around individual pathologies such as brain damage and abnormal E.E.G. patterns, or clear-cut and marked psychic disturbance, often without the usual accompanying social pathologies . . ." M. WOLFGANG & F. FERRACUTI, *THE SUBCULTURE OF VIOLENCE* 260 (1967). On the other hand, a study of 141 persons committed over a 5-year period under Massachusetts legislation to the Centre for Care and Treatment of Sexually Dangerous Persons, disclosed the following age breakdown: under 20—3; between 21 and 30—42; between 31 and 40—47; between 41 and 50—23; between 51 and 60—15 and over 60—11. Kozol, *supra* note 13, at 81. These figures are not reassuring. Clearly a more detailed assessment of the nature of the risk is required before an appropriate statutory period of maximum confinement can be arrived at. It is not at all clear as to what information, if any, the Committee relied upon in coming to its own conclusion—unless its assumption was that the availability of parole could cure all ills. On this point see notes 173-77 and accompanying text *infra*.

⁸⁰ The closest that the committee comes to considering this is in its recommendations that courts be given "statutory direction on their approach to sentencing" and that courts give reasons for their sentences, and in a hortatory statement emphasizing

standing the widely held view that prison sentences in Canada are not only far too numerous, but also unnecessarily long.⁸¹ It is useful to contrast here the Model Sentencing Act and the American Bar Association Project, both of which recommend "special terms" for designated classes of offenders—to a maximum of thirty years and twenty-five years, respectively—with the specific indication that this should be accompanied by a parallel reduction in the statutory maxima for most other offences. While the problem of excessive prison terms has been a more serious one in the United States, surely this is true only as a matter of degree.⁸² This commentator, for one, would have felt more comfortable about the Ouimet Committee's feeling for the problem had the Report contained something like the following discussion in the A.B.A. study:

. . . The Model Sentencing Act concluded its study of sentences with

"the danger of overestimating the necessity for and the value of long terms of imprisonment except in special circumstances." See REPORT at 191, 192 and 190 respectively. As previously noted, the Committee actually rely on the high existing maxima in concluding that no special provisions are required for persistent non-dangerous offenders and organized or professional crime. See note 63, and REPORT at 264-65. The recommendations in chapter 11 on alternatives to confinement, while commendable, miss the point of this criticism.

⁸¹ Examples of high statutory maxima have already been listed under note 28. Figures for the frequency of committals to penal institutions per 100,000, for the year 1960, have been quoted as follows: Norway, 44; United Kingdom, 59; Sweden, 63; Denmark, 77; United States, 200; Canada, 240. See Hogarth, *Toward the Improvement of Sentencing in Canada*, 9 CAN. J. CORR. 122, at 124 (1967). In regard to the length of prison sentences, Morris provides figures for Sweden in 1964 which indicate that, of 11,227 commitments, only 8 exceeded 10 years, 38 exceeded 4 years, and 206 exceeded 2 years—to which must be added 692 indeterminate commitments, which ordinarily result in release in about 5 years. Morris, *Lessons from the Adult Correctional System in Sweden*, 30 FED. PROBATION 3, at 4 (1966). Danish figures are available for 1954, which show 5,542 sentences of imprisonment, of which only 4 were over 12 years, 11 over 6 years, and 99 over 2 years. Mannheim, *Comparative Sentencing Practice*, 23 LAW & CONTEMP. PROB. 557, at 571 (1958). It may be suggested that the Danish system of preventive detention must be interpreted in the light of these figures. See note 90. In England, figures for the year 1967 show 42,321 total prison sentences: 94 were for life; over 14 years—100; over 10 years—112; over 7 years—196; over 5 years—444; over 4 years—816; over 2 years—3,160. REPORT ON THE WORK OF THE PRISON DEPARTMENT, STATISTICAL TABLES 10-11 (Home Office 1967). The average length of sentence in Britain has increased in recent years, so that 14.7% of sentences of imprisonment were in the 1 to 3 year range during 1953-62, as compared with 4.4% in 1938—although only 3% of those imprisoned still receive sentences of over 3 years. See Williams, *The Use the Courts Make of Prison*, in SOCIOLOGICAL STUDIES IN THE BRITISH PENAL SERVICES 49 (P. Halmos ed. 1965). See also Radzinowicz, *The Dangerous Offender*, 41 POLICE J. 411, at 443-44 (1968). Canadian figures for 1967, compiled by combining STATISTICS OF CRIMINAL & OTHER OFFENCES 140 (1967) and CORRECTIONAL INSTITUTIONS STATISTICS 110 (1968-69) (Statistical Tables on Inmates Released and Admitted to Penitentiaries, 1967-68), suggest the following totals: total sentences of imprisonment—18,674; sentences for life, including preventive detention and commutations—57; over 20 years—63; over 10 years—150; over 6 years—288; over 5 years—478; over 4 years—685; over 2 years—3,106. All the figures are cumulative.

⁸² For data on the length of sentences imposed in American jurisdictions, see Murrah & Rubin, *Penal Reform and the Model Sentencing Act*, 65 COLUM. L. REV. 1167 (1965); Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROB. 528 (1958); SENTENCING ALTERNATIVES AND PROCEDURES 56-61.

the recommendation that five years was a perfectly adequate sentence for most offenders. It based this conclusion on figures which showed that during 1960 more than ninety per cent of the offenders who achieved their first release from federal and state institutions had actually served less than five years.

If such a large number of offenders are being released anyway before the service of five years, it might properly be asked why it is so important that authorized sentences be reduced to the five-year range. There needs to be provision, it could be argued, for the offender who does pose a significant public danger; if authorized sentences are too low, the public cannot adequately be protected.

The Advisory Committee would agree with the basic premise underlying this argument. There should be long sentences available in the limited context where public protection is at stake. But the fundamental error to which the argument leads is that the entire system should be structured to accommodate the unusual case. It would make far more sense to structure the system towards the offender with whom the courts have to deal most of the time, leaving an outlet which permits the special case to be treated with special provisions.

. . . .

The Advisory Committee believes that there are two major impacts of a contrary approach. The first is that the existence of legislation authorizing an exceedingly long sentence tends to drive sentences up in cases where the impetus ought to be in exactly the other direction. . . . The second impact of such a sentencing structure is that it is one of the major causes of the much-discussed disparity problem. If the range is twenty years for an offence where most offenders who should go to prison should get less than five, the authorized range is an open invitation — and the results verify the hypothesis — to sentences which irrationally spread the whole gamut of the authorized term. The result of such disparity is serious injustice and a loss of respect for the system. Increased rationality and order on the other hand — and a consequent reduction of sentencing disparities — should be the result of a structure which is basically oriented towards the usual case.

The Advisory Committee has accordingly concluded that the authorized sentence for most felonies should be in the five-year range. Such a sentence is adequate for the vast majority of offenders who will be processed through the system. There may be some cases, it is conceded, where the term should perhaps be raised to ten. Armed robbery may be one. And finally there may be some very few offences — murder is the only example on which the Advisory Committee can unanimously agree — where the authorized sentence should exceed ten years.

. . . .

. . . A more realistic structure for the ordinary case, the continual focus on criteria designed to distinguish the exceptional cases, the increased visibility which such a process will necessarily have and a movement toward the articulation of reasons for a severe prison sentence should each substantially contribute to a solution to the problem.

. . . .

The Advisory Committee is thus attracted to a sentencing structure which states its limitations in terms more responsive to the needs of the vast majority of cases, and which authorizes a special term as an outlet for the exceptions. . . . [T]he Committee would propose maxima in the range of five years as an adequate limitation for the majority of offenders,

supplemented by a special term which should not exceed twenty-five years in any case. . . .⁸³

Also disturbing is the committee's almost total disregard for the treatment implications of the indeterminate sentence. Although the proposals are expressly "predicated upon the existence of necessary custodial and treatment facilities appropriate for this class of offender,"⁸⁴ the justification for the indeterminate sentence is advanced solely in terms of the dangerousness of the offender, the availability of release through parole—and, *mirabile dictu*, the non-punitive character of the sentence. The means of assessing dangerousness and the actual operation of release practices are, of course, central to the whole discussion. Both are considered separately below. However, the relationship between the indeterminate sentence and therapeutic effectiveness cannot be so lightly ignored. The classic social defence rationale for the indeterminate sentence is concisely stated in an appendix to the leading case on the Maryland Defective Delinquent Act: "The indeterminate sentence can be an incentive to treatment and rehabilitation of inmates, having therapeutic value in and of itself by motivating some patients to become amenable to treatment and making clear to all patients that they must participate in the treatment process in order to become helped and released."⁸⁵ However, as the author of one study of the actual impact of the indeterminate sentence upon prisoners has observed, the "assumption that the indeterminacy of duration of sentence enhances its rehabilitative function has been derived mainly, it seems, from theoretical speculations."⁸⁶ There is, in fact, considerable evidence that the fully indeterminate sentence is basically destructive of rehabilitative objectives. Indeed, prolonged imprisonment with uncertain prospects of release has been known to cause a deterioration in the personality of the offender in the form of prison-induced psychosis. Some of these very concerns are reflected in the Model Sentencing Act, in which the indeterminate sentence is rejected on the stated ground that "[a] life term, even though the offender is subject to release, is a psychological set against any treatment other than the passage of time."⁸⁷

A study of the actual impact of the indeterminate sentence on prisoners

⁸³ SENTENCING ALTERNATIVES AND PROCEDURES 59-61 and 84-85. It should be emphasized that, under the A.B.A. proposals, the enactment and imposition of "special terms" is subject to a number of strict conditions, including a precise legislative statement of the criteria that must be satisfied before the special term can be imposed, with a view to avoiding the danger "that the device of the special term will in fact be a method of increasing sentences across the board." *Id.* at 85. The need to assess special provisions in their relation to sentencing structure as a whole is also suggested by English experience with "extended sentences." See Thomas, *Current Developments in Sentencing—The Criminal Justice Act in Practice*, [1969] CRIM. L. REV. 235, at 242-47.

⁸⁴ See *supra* note 69 and accompanying text (emphasis added).

⁸⁵ Director of Patuxent Institution v. Daniels, 221 A.2d 397, at 424 (1966).

⁸⁶ Reich, *Therapeutic Implications of the Indeterminate Sentence*, 2 ISSUES IN CRIMINOLOGY 7, at 8 (1966).

⁸⁷ MODEL SENTENCING ACT at § 18. Consider, for example, the psychiatric testimony in the celebrated *Robert Roberts* case in the light of his probable fate under the Committee's proposals. See *Regina v. Roberts*, [1963] 1 Ont. 280.

at the celebrated California Medical Facility at Vacaville has led one author to this conclusion:

. . . [t]he actual function of the indeterminacy element is not necessarily related to the way in which it is perceived by the prisoners. They do not automatically accept the implication that their own efforts can affect their release date for they impute their own symbolic meaning to the power invested in the Board.

.
 . . . Because the inmates come before the Board for a yearly review and evaluation, and therefore nearly all have experiences of a 'denial', their sense of injustice and their anger towards this authority is constantly reinforced.

The hope that is built up between appearances, followed by denial, places a heavy strain on the inmate's psychic equipment. Thus, this procedure does seem to make the inmate more prone to feelings of resentment and defiance, concerning his sentence, than a fixed term; as it necessitates a constant readjustment to disappointment, or a blanket-assumption of injustice and unfairness from the beginning [This] . . . does not bear any direct relationship to the 'unfairness' of a decision, since the experiences of being denied tend to trigger off unconscious hostility related to other experiences of rejection

An additional crucial factor which seems to operate against the rehabilitative incentive assumed in the indeterminate element, concerns the time factor itself. In a situation where a time perspective is indefinite, the waiting can . . . constitute an intolerable psychological burden. The need of the individual to perceive experience in a definite way, as having a beginning and an end is fundamental to human existence, and provides a frame of reference and an anchorage for the whole process of living . . . For the individual who is burdened with emotional problems and who has not attained some inner harmony, time and waiting can be a particularly fearful business.

It is clear, therefore, that the use of the indeterminacy element even when combined with the treatment-oriented organization of an institution such as Vacaville, will not, of itself, ensure that the inmates will feel an incentive towards some change in their behavior.⁸⁸

⁸⁸ *Supra* note 86, at 25-26. See also the following commentary on the experience with committals on indeterminate sentence under the California Sexual Psychopath Act: The treatment purpose which the legislation may have intended . . . is clearly less obvious to the offender than the punitive flavor of involuntary confinement under maximum security conditions. Therefore, quite naturally the treatment goal recedes in the minds of the offenders, who feel themselves to be prisoners before they can realize their role as patients. Hence, one meets a great number of offenders whose statements are, consciously or unconsciously, designed to meet the expectations of the authorities, who appear to them as jailers before they can be appreciated as doctors. This accounts for the extraordinary incidence of oral or written outpourings by offenders, fairly dripping with self-accusations calculated to demonstrate what the offender believes the psychiatrist will call "insight" The present set-up compels, for quite realistic reasons of early discharge, the stereotype confession orgies of the more intelligent offenders—which are, of course, travesties of "insight" rather than expressions of it.

Hacker & Frym, *Sexual Psychopath Act in Practice: A Critical Discussion*, 43 CALIF. L. REV. 766, at 774 (1955). The authors conclude: "[I]n a treatment setting where patients feel that only a certain type of response will be tolerated because any

Criticisms of the fully indeterminate sentence, ideological and other, are not hard to find in the literature.⁸⁹ Why, then, has the committee so unquestioningly assumed its acceptability? A not implausible explanation is that they have attempted to take as models the much publicized indeterminate sentence programmes for sociopathic, "emotionally unbalanced," and other offenders similarly characterized, that have been developed at places such as Herstedvester in Denmark, the Van der Hoeven Clinic in the Netherlands, or Patuxent in Maryland. Attractive as these programmes may be, it does not follow that the committee's use of the fully indeterminate sentence can be supported on these precedents alone. In Denmark, sentences on the whole are quite short. The average detention time in Herstedvester itself is now less than two and one-half years, with only 1 in 10 offenders remaining in custody after ten years.⁹⁰ Given the committee's concern with reassuring the public, would it be their expectation that "dangerous offenders" as defined in the Report would be released in this short period of time? If so, then the sentences for the preventive detention group will be considerably shorter than those imposed for nominate offences in the ordinary way. If not, what is the meaning of the committee's assertion that preventive detention is not imposed as punishment, but as a social defence "measure"? "

other leads to prolonged treatment—which also means prolonged incarceration for a period of several more years—no real remedy or cure for subtle, unconscious, repressed mechanisms can be expected, even under the most favourable conditions and the enthusiastic assistance of the professional personnel." *Id.* at 774 n. 14. See also L. FOX, *THE ENGLISH PRISON AND BORSTAL SYSTEM* 306 (1952).

⁸⁹ See S. RUBIN, *CRIME AND JUVENILE DELINQUENCY* (3d ed. 1970); P. TAPPAN, *CRIME, JUSTICE AND CORRECTION* 433-37 (1960); N. MORRIS & C. HOWARD, *STUDIES IN CRIMINAL LAW* (1964); N. CANTOR, *CRIME AND SOCIETY* 267-73 (1939); L. RADZINOWICZ, *THE MODERN APPROACH TO CRIMINAL LAW* 167-69 (1968); L. FOX, *THE ENGLISH PRISON AND BORSTAL SYSTEMS* 305-07 (1952); Goldstein, *The Mentally Disordered Offender and the Criminal Law*, in *THE MENTALLY DISORDERED OFFENDER* 88 (A. de Reuck & R. Porter ed. 1968); Dession, *Psychiatry and the Conditioning of Criminal Justice*, 47 *YALE L.J.* 319, at 329-35 (1968). See Note, *Indeterminate Sentence Laws—The Adolescence of Peno-Correctional Legislation*, 50 *HARV. L. REV.* 677 (1937); Williams, *Alternatives to Definite Sentences*, 80 *L.Q.R.* 41 (1964). See generally U.N. DEPT. OF SOC. AFF., *THE INDETERMINATE SENTENCE* (1954).

⁹⁰ G. STÜRUP, *TREATING THE UNTREATABLE* 8 (1968). Elsewhere Stürup has reported: "We now keep aggressive criminals a comparatively short time. Nine per cent are paroled in under 2 years, 34 per cent between 2 and 4 years, and 57 per cent after more than four years. Only 7 per cent are more than 5 years and it is a rare man that is kept more than 10 years. For many years not one of our paroled serious offenders—rapists, murderers, robbers and arsonists—have repeated such crime after parole." G. Stürup, *Will This Man Be Dangerous?*, in *THE MENTALLY ABNORMAL OFFENDER* 5, at 16 (A. de Reuck & R. Porter ed. 1968). It should be noted that the inmate population at Herstedvester appears to represent a much broader range of offenders than are contemplated under the Committee's proposals. On Danish sentencing practices, see generally note 81.

⁹¹ That such early release is unlikely may perhaps be inferred from the figures relating to parole release for habitual criminals and dangerous sexual offenders. See notes 16 and 54. Nor, without a basic revision of statutory maxima as a whole, is such early release for dangerous offenders probable. See notes 80-83 and accompanying text. One author has noted: "Preventive detention can legitimately be imposed only in cases where, at a minimum, the person to be restrained lacks ordinary capacity to conform

In the Netherlands, an offender can be "placed at the disposal of the Government" only after his sentence has expired—a procedure that has disadvantages as employed in the Netherlands, but one that at least serves to remove the initial sense of unfairness and also to make more plausible the claim that what has been imposed is, in fact, a "measure" rather than a punitive sentence for the specific crime.⁹² Van der Hoeven, it should be added, is a private institution retaining control over its own intake. It is true that in Maryland, a "defective delinquent" is sent on indeterminate committal directly to Patuxent for "confinement and treatment"—with this difference, that the procedure is a "civil commitment" and apparently subject to "right of treatment" review of a kind that will be considered below. But then few inmates have been released from Patuxent, and the success rate for those who have does not inspire confidence.⁹³ The first director at Patuxent has himself observed that committal to a penal institution under extended sentence might well be preferable to the present system: "Treatment at Patuxent would be a bonus for which . . . [a prisoner] . . . would strive, since it would be the best means of securing early release. This would have certain advantages for the Institution, in that it would no longer be necessary to keep in the Institution cases that after trial period, have shown no interest in treatment" ⁹⁴

So far as treatment considerations are concerned, therefore, the case for the fully indeterminate sentence is not proven. That it can be justified on moral, ideological, or even practical grounds, is a dubious proposition at best.

his conduct to the requirements of the law. One who cannot be expected to conform to the law cannot be blamed for nonconformity, but his inability to obey may justify preventive restraints if his inability is sufficiently threatening to the safety and welfare of others." Frankel, *Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future*, 78 YALE L.J. 229, at 249 (1968). If this argument is accepted then the dangerous offender concept should in some way be related to a principle of "diminished responsibility." It would appear that this is how such committals are regarded in Denmark. See the legislative provisions set out in G. STÜRUP, *THE MENTALLY ABNORMAL OFFENDER* 249-51 (1960). The Committee has not considered the question of diminished responsibility at all. It may be asked also whether, if a "diminished responsibility" concept is involved, this doesn't give rise to a legitimate claim of "right to treatment." See note 98 and accompanying text. Cf., Goldstein & Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225, at 238-39 (1960). See generally B. WOOTTON, *CRIME AND THE CRIMINAL LAW* 58 (1963).

⁹² See J. CONRAD, *CRIME AND ITS CORRECTION* 220 (1965). See also Van Rooy, *Findings of an Investigation Into Habitual Offenders*, 3 EXCERPTA CRIMINOLOGICA 11 (1963). But see L. RADZINOWICZ & J. TURNER, *THE PERSISTENT OFFENDER* 164-66 (1945).

⁹³ See *Director of Patuxent Institution v. Daniels*, 221 A.2d 397, at 424-25 (Appendix) (1966); Schreiber, *Indeterminate Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 VA. L. REV. 602, at 627-28 (1970). But see Boslow & Kandel, *Psychiatric Aspects of Dangerous Behavior: The Retarded Offender* (Address delivered at Annual Meeting of American Psychiatric Association, May 4, 1965).

⁹⁴ M. GUTTMACHER, *THE ROLE OF PSYCHIATRY IN LAW* 129 (1968).

IV. OF DANGEROUS OFFENDERS AND THEIR "TREATMENT"

As has been suggested, there is a curious ambivalence in the Report on the matter of treatment for the dangerous offender. We have seen before the introduction of legislation that is "predicated upon the existence of necessary custodial and treatment facilities," without such facilities being, in fact, provided—witness the habitual criminal⁹⁵ and the original criminal sexual psychopath⁹⁶ provisions. One would have been happier if the committee had included in its recommendations—and this would have to have Canada-wide effect—a requirement such as appears in the Connecticut Security Treatment Center Act of 1958 that the law "shall take effect when the Commissioner . . . certifies that the Center, including the diagnostic unit, is established and is adequate to perform the function contemplated" ⁹⁷ Indeed, if the committee were serious about treatment as being central to its proposals, one might have expected to find a recommendation stipulating that there should be a "right to treatment" clause in the legislation. Notwithstanding the conceptual and practical problems that a "right to treatment" presents, the necessity for some such legal remedy has received increasing recognition in recent years.⁹⁸ Failing the provision of treatment adequate to the problems that led to the prisoner being dealt with under the special dangerous offender provisions, he would be entitled to a court order for release, or perhaps to consideration for resentencing on the original offence without reference to a supposed "treatment" that is promised but unproffered.

Can we expect that serious efforts will be made to provide treatment? There is certainly room for doubt. One author noted in 1964 that there were only about 56 psychiatrists employed full-time in the approximately 230 adult correctional institutions in the United States, and a large percentage of these were concentrated in a few major centres.⁹⁹ Canadian Penitentiary Service figures list 23 psychiatrists employed, although almost certainly most of these are part-time staff.¹⁰⁰ Moreover, as Norval Morris points out, "these figures conceal the scarcity of psychiatric *treatment* resources in corrections, since most of the energies of the psychiatrists working in the correctional system are devoted to diagnosis and classification."¹⁰¹ The fact

⁹⁵ See REPORT OF THE ROYAL COMM'N TO INVESTIGATE THE PENAL SYSTEMS OF CANADA ch. 19 (1938); Mewett, *Habitual Criminal Legislation Under the Criminal Code*, 39 CAN. B. REV. 43 (1961).

⁹⁶ H.C. DEB. 5196-97 (1948). See also REPORT OF THE ROYAL COMMISSION ON THE CRIMINAL LAW RELATING TO CRIMINAL SEXUAL PSYCHOPATHS 91-96 (1958).

⁹⁷ The Security Treatment Centre Act, CONN. GEN. STATS. § 17-253 (1958).

⁹⁸ See *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Symposium on the Right to Treatment*, 57 GEO. L.J. 673-90 (1969), especially Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 GEO. L.J. 782; *Symposium on the Right to Treatment*, 36 U. CHI. L. REV. 742-801 (1969), especially Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742; Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 YALE L.J. 87 (1967).

⁹⁹ Smith, *Psychiatry in Corrections*, 120 AM. J. PSYCHIATRY 1045 (1964).

¹⁰⁰ See H.C. DEB. 4650 (1970).

¹⁰¹ Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. REV. 514, at 537

of the matter is that most programmes of this kind have been established without adequate provision for staff and—a few highly visible institutions aside—treatment has tended to become little more than an indefinite and purely custodial confinement behind bars.¹⁰²

Nor is this all that is involved in implementing a treatment programme. While one may have reservations about psychiatric claims to therapeutic accomplishment, for a treatment programme to be effective a psychiatric facility must have a substantial measure of independence from control by central correctional authorities.¹⁰³ Surely this is the lesson of Herstedvester and Van der Hoeven. Is this measure of independence planned for the Canadian Penitentiary Service medical-psychiatric centres? Experience to date is hardly reassuring. Why has the committee not spoken on the issue?

Or perhaps much of this is beside the point. For are there developed treatment techniques that have demonstrable effect upon the kinds of offenders about which the committee is concerned? The evidence to date is that, for many such offenders at least, there are not.¹⁰⁴ In these circumstances, is it not questionable to premise preventive detention upon its treatment implications for a dangerous offender class as a whole? Indeed, the concept of a "right to treatment" ceases to have much meaning. Preventive detention "can mean nothing more than benign and comfortable custody, which is treatment . . . [only] . . . in the sense that the patient is kept from manifesting his symptoms."¹⁰⁵ But if this is the case the situation should be frankly recognized for what it is. The "rehabilitative ideal" has given rise

(1968). Personal interviews in Kingston suggest that this is the situation in Canadian Penitentiary Service institutions as well.

¹⁰² See F. LINDMAN & D. MCINTYRE, *THE MENTALLY DISABLED AND THE LAW* 306-08 (1961), and references cited therein; Hacker & Frym, *Sexual Psychopath Act in Practice: A Critical Discussion*, 43 CALIF. L. REV. 766 (1955); Tenney, *Sex, Sanity and Stupidity in Massachusetts*, 42 BOSTON U.L. REV. 1 (1962); Note, *Pennsylvania's New Sex Crime Law*, 100 U. PA. L. REV. 727 (1952); REPORT OF THE NEW JERSEY STATE COMMISSION ON THE HABITUAL SEX OFFENDER (1950).

¹⁰³ On the importance of program autonomy, see E. STUDD, S. MESSENGER & T. WILSON, C-UNIT: SEARCH FOR COMMUNITY IN PRISON 280-81 (1968).

¹⁰⁴ See F. LINDMAN & D. MCINTYRE, *THE MENTALLY DISABLED AND THE LAW* 507 and references cited therein; H. ROLLIN, *THE MENTALLY ABNORMAL OFFENDER AND THE LAW* (1969); Note, *Pennsylvania's New Sex Crime Law*, 100 U. PA. L. REV. 727. Cf. Kozol, Cohen & Garofalo, *The Criminally Dangerous Sexual Offender*, 275 NEW ENG. J. MED. 79, at 81-83 (1966); note 93 and accompanying text. Two of the leading Canadian proponents of this type of legislation recognize this when they state: "If only thirty per cent were recovered, it would be a victory for therapy and a relief to society." Turner & Stokes, *The Dangerous Patient Offender*, in PROCEEDINGS OF THE FOURTH RESEARCH CONFERENCE ON DELINQUENCY AND CRIMINOLOGY 253, at 257 (1964). It is evident that the committee were aware of the limitations of treatment. See note 70 and accompanying text. Cf., Outerbridge, *The Tyranny of Treatment . . . ?*, 10 CAN. J. CORR. 378 (1968). But cf., note 90 and references cited therein.

¹⁰⁵ Frankel, *Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future*, 78 YALE L.J. 229, at 241 (1968). It has been suggested in the United States that, on these very grounds, criminal sexual psychopath legislation should be considered "cruel and unusual punishment" within the meaning of the Eighth Amendment to the United States Constitution. See Burick, *An Analysis of the Illinois Sexually Dangerous Persons Act*, 50 J. CRIM. L.C. & P.S. 254, at 258-59 (1968). See also notes 34 and 91.

to enough self-deception among judges and correctional administrators, without spawning still more confinement disguised as therapy.¹⁰⁵ The moral dilemma posed by the imposition of sanctions addressed to potential future criminal conduct cannot be resolved, nor should it be "tranquilized," merely by the use of medical labels.¹⁰⁷

V. THE CRITERIA OF "DANGEROUSNESS" AND THE PROBLEM OF PREDICTION

Not the least of the problems with the committee's proposals concerns the identification of the dangerous offender. The Report itself recognizes this, stating that the legislation "should not only define with as much precision as possible the criteria of dangerousness, but . . . should provide an appropriate clinical procedure for identifying a particular offender."¹⁰⁸ Apart from the "specified offence" limitation, however, the committee's definition can lay no claim to precision at all. Nor, as will be suggested, should a clinical procedure be the means of supplying a definition which the legislature has failed to provide—a result which can almost certainly be expected if the committee's definition of a dangerous offender is adopted. It will be remembered that the Report offers the following definition:

Dangerous offender means an offender who has been convicted of an offence specified in this Part [of the Criminal Code] who by reason of character disorder, emotional disorder, mental disorder or defect constitutes a continuing danger and who is likely to kill, inflict serious bodily injury, endanger life, inflict severe psychological damage or otherwise seriously endanger the personal safety of others.¹⁰⁹

One writer has observed that, "[w]hile a healthy judicial skepticism concerning the sufficiency of predictions based on psychiatric diagnosis would go far to cure the dangers inherent in such predictions," his own reading had left him with a "skepticism as to how skeptical judges are."¹¹⁰ It hardly requires resort to Szaszian polemic to justify the concern thus expressed. The case law and legal literature are replete with examples of an all too ready

¹⁰⁶ See F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* (1965); Morris, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627, at 637-44 (1966); Outerbridge, *The Tyranny of Treatment . . . ?*, 10 CAN. J. CORR. 378 (1968).

¹⁰⁷ See Hall, *The Purposes of a System for the Administration of Criminal Justice*, (Edward Douglas White Lecture, Georgetown University, 1963). Frankel offers the interesting proposal that "[w]henver the state finds it necessary to take an innocent man's liberty for a public purpose, due process should require the state to pay adequate compensation for the taking . . ." He argues: "Paradoxically perhaps, the fixing of a cash price which must be paid for a man's liberty would not cheapen his liberty but instead give it greater meaning. Payment of compensation would serve significant social purposes as well." Frankel, *Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future*, 78 YALE L.J. 229, at 257 (1968). The "practical purposes" he develops at some length, and suggests an interesting, albeit radical, approach to the problem before us.

¹⁰⁸ See note 64 and accompanying text.

¹⁰⁹ REPORT at 258.

¹¹⁰ Frankel, *Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future*, 78 YALE L.J. 229, at 241 (1968).

judicial acceptance of psychiatric opinions as determinative on what are properly legal issues, both in cases where the statute is vague and where the relevant legal test gives central place to loosely defined psychiatric criteria.¹¹¹ Who constitutes a "continuing danger" is, after all, a matter of opinion—not a definition. A definition must contain objective factual elements by which a given subject can be accepted or rejected; it must "draw lines." Of the "dangerous sexual offender" definition in the Criminal Code—which is conceived in essentially the same way as the committee's proposed "dangerous offender" definition—it has been well said: "Since the definition can obviously fit, or be made to fit, all offenders convicted of one of the specified sex offences, the real criteria for selection or rejection . . . is a function of the examiner not the examinee It is drawn not by objective, scientific elements, but rather by the subjective expectations held by the particular psychiatrist, such as his own estimate of the prevalence of 'psychopathy', his allegiance to a particular school of psychiatry and . . . his estimate of his own accuracy in diagnosis. . . ." ¹¹² Surely it is not inapposite to ask, as has

¹¹¹ Arens, *The Durham Rule in Action: Judicial Psychiatry and Psychiatric Justice*, 1 LAW & SOC'Y REV. 41 (1967); Engelberg, *Pre-Trial Commitment to Mental Institutions: The Procedure in Massachusetts and Suggested Reforms*, 17 CATHOLIC U.L. REV. 163 (1967); Van & Morganroth, *The Psychiatrist as Judge: A Second Look at the Competence to Stand Trial*, 43 U. DETROIT L.J. 1 (1965); T. SCHEFF, *BEING MENTALLY ILL: A SOCIOLOGICAL THEORY* ch. 5 (1966). See generally T. SZASZ, *LAW, LIBERTY AND PSYCHIATRY* (1963); T. SZASZ, *PSYCHIATRIC JUSTICE* (1965). For obvious reasons, case examples are not given.

¹¹² *Supra* note 41. It is interesting in this connection to note that the Maryland Defective Delinquent Act was conceived as a civil rather than a criminal statute because, as its Director explained: "[There is] . . . the question of whether it can be attacked for vagueness as being a criminal statute which does not sufficiently inform the accused of the nature of the offence for which he is to be punished. The principal answer to such attack would seem to be in the fact that the statute is not criminal in character. Its purpose is not to punish for the crime committed, but to remove the punishment from an offender who has been determined to be not fully responsible for his actions and to treat him until he can be restored to a state where it is safe for him to be restored to society." Boslow, *Mental Health in Action: Treating Adult Offenders at Patuxent Institution*, 12 CRIME & DELINQUENCY 22, at 24 (1966). The definition of "defective delinquent" under the Maryland Act is "an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity to criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment." Public General Laws of Maryland, § 5, art. 31B. The Model Sentencing Act formulation is similarly rejected by the American Bar Association Project because of its "lack of precision." SENTENCING ALTERNATIVES AND PROCEDURES 98. The Model Sentencing Act § 5(a), would authorize a "special term" where the convicted person "is being sentenced for a felony in which he inflicted or attempted to inflict serious bodily harm, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity." The Model Penal Code formulation (§ 7.03(3)) is "a dangerous mentally abnormal person . . . [who] has been subjected to a psychiatric examination resulting in the conclusions that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others." The A.B.A. Project, while deciding not to recommend specific criteria "in the belief that this is a

been asked in a somewhat related context of the *Durham* rule, whether "even-handed justice" can properly be "measured out with a 'rubber' yardstick."¹¹³

What criteria, then, are we to supply? Clearly a "treatability" test of the kind employed in some preventive detention statutes is inappropriate, because it is apparent that the legislation is directed at the untreatably dangerous equally with those for whom a "cure" is an anticipated consequence of the confinement. Would it be feasible, as one author seems to suggest, to attempt by statute or perhaps by some rule-making process, "to distinguish varying probabilities and degrees of danger as between persons falling within generally defined categories"?¹¹⁴ Perhaps—if we had available defined typologies of dangerousness. But have we? Marcus and Conway feel that they have isolated twelve factors "as a method of quantifying data so that we can begin to establish criteria regarding the *degree of dangerousness of the sexual offender*"¹¹⁵—specifically, brutality sustained in childhood; bedwetting, fire setting and cruelty to animals; assorted delinquent acts in puberty; escalation of sexual offences; interrelated criminality with sexual offences; sustained excitement prior to the act and at the time of offence; lack of concern for victim; bizarre fantasies with minor offences; explosive outbursts; absence of psychosis; absence of alcohol consumption; and high I.Q.¹¹⁶ Each of these factors is evaluated and rated on a ten-point scale as a means of establishing a "dangerousness" score. Are these the kinds of "objective factual elements" that we wish in some way to establish as a formal basis for judicial decision? The problems that any such development in legal technique would present are formidable.¹¹⁷ The point can be no more than

subject on which continued debate is desirable before a firm position should be taken," expressed a preference for the Model Penal Code definition supplemented by a requirement that the court make a formal finding "that a special term is necessary for the protection of the public." SENTENCING ALTERNATIVES AND PROCEDURES 96 and 98-99. On the relevance of this last requirement, see note 34.

¹¹³ *Blocker v. United States*, 288 F.2d 853, at 861 (D.C. Cir. 1961) (Burger C.J.). In a vigorous attack on the "vagueness" of the Maryland statute, the author of a recent article reports: "In 1964 the staff found 84 per cent of the convicts whom they evaluated to be defective delinquents. Since 1964 this figure has dropped to the 45 per cent level, although neither the definition of 'defective delinquent' nor the type of convicts referred to Patuxent has changed . . . Dramatic shifts in interpreting a statute that allows indefinite confinement of individuals should be made by the courts or by specific legislative amendment—not by unarticulated, clinical diagnoses by administrative officials." Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 VA. L. REV. 602, at 616 (1970).

¹¹⁴ Frankel, *Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future*, 78 YALE L.J. 229, at 242 (1968).

¹¹⁵ Marcus & Conway, *Dangerous Sexual Offender Project*, 11 CAN. J. CORR. 198, at 204-05 (1969).

¹¹⁶ *Id.*

¹¹⁷ The jurisprudential concept suggested here has never been fully developed. There appear to be substantial elements of it in Dession's Final Draft of the Code of Correction for Puerto Rico ch. 4, *Situations Subject to Correction*, reproduced with annotations in 71 YALE L.J. 1062 (1962). Also relevant are the following two papers, J. Mohr, *Towards Phenomenological Models of Criminal Transactions: Actus Reus Reconsidered*, 1965 (unpublished paper presented at the Fifth International Criminological Congress, Montreal); A. Gigeroff, *Phenomenological Investigation of Criminal Offences:*

speculative because the Marcus and Conway criteria have not as yet been validated by research—indeed, there are research findings that place their criteria in some doubt.¹¹⁸ Nor does it appear that anyone else has provided an empirical listing of behavioural criteria that could serve the requirements of a legislative typology of dangerousness.¹¹⁹ The committee itself recognizes the gap in available data in the recommendation “that Government grants be made for research devoted to the development of new and improved methods of identifying . . . the dangerous offender.”¹²⁰ Is there not irony in a recommendation that calls for research into “new and improved methods for identifying” the very offenders who the committee already proposes to detain for life before it is satisfied that there exists adequate means of identifying them?

It may be noted also that there are at least two other serious situations that the committee's proposals do not reach. The purpose is not to suggest that these situations should be brought within dangerous offender legislation. Rather, it is to place in perspective the nature of the problem and the degree of protection that the proposed legislation actually affords. One such situation is the case of homicidal threats.¹²¹ Here, the difficulty is that very few persons who make such threats actually commit homicide, but some do.¹²² The question then is how to predict which persons are likely to follow through on their threats, and further, whether such a prediction can

Its Relevance to the Legislator, 1965 (unpublished paper presented at the Fifth International Criminological Congress, Montreal). Cf., PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF CRIMINAL JUSTICE, SCIENCE & TECHNOLOGY 66 (Task Force Report, 1963); Arens & Lasswell, *Toward a General Theory of Sanctions*, 49 IOWA L. REV. 233 (1964). But cf., Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453 (1927-28).

¹¹⁸ See J. MACDONALD, *PSYCHIATRY AND THE CRIMINAL* 91-92 (2d ed. 1969).

¹¹⁹ For examples of attempts to identify the relevant groups, see H. TOCH, *VIOLENT MEN* ch. 5 (1969); D. GLASER, D. KENEFICK & V. O'LEARY, *THE VIOLENT OFFENDER* ch. 6 (1966); Boslow, Rosenthal & Gliedman, *The Maryland Defective Delinquency Law*, 10 BRIT. J. CRIMINOLOGY 5, at 6-10 (1959-60); Spencer, *A Typology of Violent Offenders* (California Dept. of Corrections, Research Report No. 23, 1966); Turner & Stokes, *The Dangerous Patient Offender*, in *PROCEEDINGS OF THE FOURTH RESEARCH CONFERENCE ON DELINQUENCY & CRIMINOLOGY* 253, at 257 (Montreal 1964); Kozol, Cohen & Garofalo, *The Criminally Dangerous Sexual Offender*, 275 NEW ENG. J. MED. 79 (1966). None of these categorizations would appear to be specific enough for the specialized purpose contemplated here. It would take us too far afield to attempt to describe the typologies listed. Another question, if only of theoretical interest, is whether any such typology should take into account in some manner a “typology of victims” or a “typology of criminal-victim relationships.” S. SCHAFER, *THE VICTIM AND HIS CRIMINAL: A STUDY IN FUNCTIONAL RESPONSIBILITY* (1968); Book Review, 43 S. CAL. L. REV. 128 (1970).

¹²⁰ See *supra* note 71 and accompanying text.

¹²¹ CRIM. CODE § 316. This offence is not included in the Committee's list of designated offences. It is punishable, in the case of threats “to cause death or injury to any person” by imprisonment for ten years.

¹²² MacDonald reports on a five to six year follow-up study of one hundred persons who were admitted to a psychiatric hospital specifically because they had made threats to kill. Three of the seventy-seven traced had, in fact, committed homicide. Four had committed suicide. J. MACDONALD, *PSYCHIATRY AND THE CRIMINAL* 74-75 (2d ed. 1968). See generally J. MACDONALD, *HOMICIDAL THREATS* (1968).

serve as the basis for a legislative judgment of the kind that the committee make in their dangerous offender recommendations. The homicidal threat cases raise questions concerning prediction techniques generally, a matter that is considered below.¹²³ The other problem concerns the violent crime coming from the totally unexpected source. It seems that the truly terrifying crimes, the ones that inspire the public stereotype of the dangerous offender, are very frequently of this nature.¹²⁴ In these situations such warning signals as there may be are subtle, and almost certainly not of the kind that would justify definition in terms of dangerous offender provisions—although a given individual may, if “warning signals” are detected and the statutory conditions are met, be liable to committal under mental health legislation.¹²⁵ Megargee records the following examples:

In case after case the extremely assaultive offender proves to be a rather passive person with no previous history of aggression. In Phoenix an 11-year-old boy who stabbed his brother 34 times with a steak knife was described by all who knew him as being extremely polite and soft spoken with no history of assaultive behavior. In New York an 18-year-old youth who confessed he had assaulted and strangled a 7-year-old girl in a Queens church and later tried to burn her body in the furnace was described in the press as an unemotional person who planned to be a minister. A 21-year-old man from Colorado who was accused of the rape and murder of two little girls had never been a discipline problem and, in fact, his step-father reported, ‘When he was in school the other kids would run all over him and he’d never fight back. There is just no violence in him.’¹²⁶

Given the problems of definition outlined, and possibly others,¹²⁷ it

¹²³ See notes 139-41 and accompanying text.

¹²⁴ See H. TOCH, *VIOLENT MEN* 214-16 (1969).

¹²⁵ See, e.g., The Mental Health Act, 1967, Ont. Stat. 1967 c. 51, §§ 8 and 9. Presumably the celebrated Texas Tower killings by Charles Whitman (brain tumor) is a case in point. On the hazards of attempting to extend preventive detention legislation to such cases, see, e.g., the issue of chromosomal abnormality as presented by the killing of eight Chicago nurses by Richard Speck in 1966, and “XYY mythology,” as discussed by Fox, *XYY Chromosomes and Crime* (Lecture delivered by Fox at Centre of Criminology, Toronto, November 26, 1969).

¹²⁶ Megargee, *Undercontrolled and Overcontrolled Personality Types in Extreme Antisocial Aggression*, *PSYCHOLOGICAL MONOGRAPHS* 80 (1966), as quoted in H. TOCH, *VIOLENT MEN* 214-15 (1969). Megargee suggests that, while “moderately assaultive” offenders fit the classic pattern of high aggression levels with weak personality controls (“undercontrolled”), the “extremely assaultive” offenders are, in fact, “overcontrolled.” They are introverted, rigid, and frequently have no criminal record before an explosive act erupts. For data supporting this view, see Blackburn, *Personality in Relation to Extreme Aggression in Psychiatric Offenders*, 114 *BRIT. J. PSYCHIATRY* 821 (1968). But see Warder, *Two Studies of Violent Offenders*, 9 *BRIT. J. CRIMINOLOGY* 389, at 392-93 (1969).

¹²⁷ A study committee composed of psychiatrists, correctional workers and lawyers has also made the following criticisms: “[We find] . . . the proposed definition of ‘dangerous offender’ to be at best vague. The terms ‘character disorder, emotional disorder, mental disorder or defect’ are not defined. Are these terms meant to limit the scope of the proposed legislation? If so, they cannot accomplish this function unless, and until, they are defined. If they are not defined, then their scope will be just as wide or narrow as the diagnostician chooses to make them. The proposed definition also fails to specify *how* great a danger must lie posed by an offender before he may

seems evident that what the committee has in mind is that the decision in regard to preventive detention will be based essentially on clinical judgment, or perhaps on the development of experience tables. Here, however, we are faced with a new set of problems.

The reliability of clinical psychiatric judgment, especially in relation to the prediction of future criminality, has been much discussed in the literature.¹²⁸ Psychiatrists with extensive experience in dealing with prisoners

become liable to preventive detention under the legislation. This creates a multitude of problems for the diagnostician. He must not only determine whether an offender represents a 'continuing danger,' but also 'how great' a danger. It would seem reasonable to expect that the margin of error in determining degree of danger would be even greater than in determining the presence or absence of dangerous propensities." REPORT OF A WORKING GROUP ON CH. 13 OF THE REPORT OF THE CANADIAN COMMITTEE ON CORRECTIONS, IN ONTARIO ASS'N OF CORRECTIONS AND CRIMINOLOGY, *Toward Unity: Criminal Justice and Corrections* 4 (Conference Documents, May 1970) [hereinafter cited as ONTARIO ASS'N OF CORRECTIONS AND CRIMINOLOGY WORKING GROUP]. For a discussion of the second point, see Dershowitz, *Psychiatry and the Legal Process: A Knife that Cuts Both Ways*, 2 PSYCHOLOGY TODAY 43, at 46-47 (1969). This point is of importance in connection with the burden of proof. See notes 148 and 178 and accompanying text. On the study committee's first point, see T. SZASZ, LAW, LIBERTY AND PSYCHIATRY, Part One, especially ch. 3; Fingarette, *The Concept of Mental Disease in Criminal Law Insanity Tests*, 33 U. CHI. L. REV. 229 (1966). Cf. Director of Patuxent Institution v. Daniels, 221 A.2d 397, at 407-09 (1966); Leifer, *The Competence of the Psychiatrist to Assist in the Determination of Incompetency: A Sceptical Inquiry Into the Courtroom Functions of Psychiatrists*, 14 SYRACUSE L. REV. 564 (1963). It is interesting that the Ouimet Committee would describe the offender as being "diagnosed as a dangerous offender," notwithstanding the fact that "dangerousness" is not a clinical entity and the criticism that has been directed in the past at psychiatric testimony that purports to present essentially legal issues in the form of medical diagnosis. On the first point, see Kozol, *supra* note 13, at 80; on the second, see *Regina v. Neil*, 119 Can. Crim. Cas. Ann. 1 (Sup. Ct. 1957); *Blocker v. United States*, 288 F.2d 853, at 862-64 (Burger, C.J.).

¹²⁸ See, e.g., Livermore, Malmguist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, at 76-77 n. 14 (1968) and references cited therein; Note, *Pennsylvania's New Sex Crime Law*, 100 U. PA. L. REV. 727 (1952); Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, at 533-36 (1968). See also L. WILKINS, EVALUATION OF PENAL MEASURES (1969). Cf. Tao, *Some Problems Relating to Compulsory Hospitalization of the Mentally Ill*, 44 J. URBAN LAW 459, at 474-82 (1963); Beck, *Reliability of Psychiatric Diagnosis: 2 A Study of Consistency of Clinical Judgments and Ratings*, 119 AM. J. PSYCHIATRY 351 (1962). But see discussion in A. DE REUCK & R. PORTER, THE MENTALLY ABNORMAL OFFENDERS 184-87 (1968). One writer reports:

Over this past year, with the help of two researchers, I conducted a thorough survey of all the published literature on the prediction of antisocial conduct. We read and summarized many hundreds of articles, monographs and books. Surprisingly enough, we were able to discover fewer than a dozen studies which followed up psychiatric predictions of antisocial conduct. And even more surprisingly, these few studies suggest that psychiatrists are rather inaccurate predictors—inaccurate in an absolute sense—and even less accurate when compared with other professionals, such as psychologists, social workers and correctional officials; and when compared to actuarial devices, such as prediction or experience tables. Even more significant for legal purposes, it seems that psychiatrists are particularly prone to one type of error—overprediction.

Dershowitz, *Psychiatry and the Legal Process: A Knife that Cuts Both Ways*, 2 PSYCHOLOGY TODAY 43, at 47 (1969).

freely express their discomfort about the kinds of predictions that they are frequently called upon to make by courts and correctional agencies. Of the dangerous sexual offender group, for example, a British Columbia panel of psychiatrists concluded: "The panel feel we can make certain statements regarding diagnosis, but as to prognosis—can this man adjust, contribute to society, use his potential—we are unanimous in saying that this is involving us in a great deal of speculation without accurate clinical evidence to back it up."¹²⁹ More frequently, one senses that the psychiatrist's discomfort occurs in cases where he wants to release an offender but feels hesitant about offering the clear-cut assurances of future conduct that are asked of him. Here, of course, he assumes a measure of responsibility for the release. However, there is little evidence that the psychiatrist's clinical predictions of probable criminality are substantially less speculative.¹³⁰

One problem relating to psychiatric diagnosis is that "there is often an implicit assumption that personality characteristics as ascertained by tests, interviews and other diagnostic procedures have a relationship to what the person in fact is going to do"¹³¹—an assumption that is frequently not borne

¹²⁹ Marcus, *A Multi-Disciplinary Two Part Study of Those Individuals Designated Dangerous Offenders Held in Federal Custody in British Columbia, Canada*, 8 CAN. J. CORR. 90, at 100 (1966). The form of wording of this statement of "prognosis" is itself of interest, having regard to the problem of securing release. See text at note 173.

¹³⁰ There is some recent evidence of interest, in a communication on "a 10 year experience in attempting to define criteria of dangerousness" at the Treatment Centre, Bridgewater, Massachusetts: "Our case material consists of 651 convicted male sex offenders who were remanded to a special facility for intensive diagnostic study. The offences had been compounded by extreme violence in a number of cases: 8 by murder, 2 by manslaughter, 5 by assault with intent to murder, 28 by assault with a dangerous weapon . . . [criteria described] We favored the release of 386 patients of whom 31 (8%) subsequently committed serious crimes including one murder. Out of 49 patients who were released over our objection 17 (35%) subsequently committed serious crimes including 2 murders and 2 assaults with dangerous weapons." Kozol, Garofalo & Boucher, *The Diagnosis of 'Dangerousness'*, in PROCEEDINGS OF THE 123D ANNUAL MEETING OF THE AMERICAN PSYCHIATRIC ASSOCIATION 121 (1970). Leaving aside any question of interpretation of these findings, the fact still remains that 32 of 49 nonoffending prisoners were released who would not have been released if the psychiatric recommendation had been followed. We are thus left with the major policy issue posed by Morris: "What degree of risk should the community bear in relation to the countervailing values of individual freedom? That is, how many 'false positive' predictions (he is predicted to be a danger, but does not prove to be) are justified for the social benefits derived from the 'true positive' predictions?" Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, at 532-33 (1968). See notes 139-41 and accompanying text.

¹³¹ Letter from J. Mohr to Ronald Price (March 10, 1970). Dr. Mohr continues: As you know, the problem concerning dangerousness is that persons who could generally be considered as aggressive do not proceed to dangerous behaviour because there is sufficient awareness and control, whereas, on the other hand, persons who are generally mild and passive may under given circumstances explode. The overwhelming impression from our study of the hundred homicide cases in Penetang was certainly in this direction. It is true that there are a few isolated cases in which a statement of dangerousness could be made with a high probability that the person would act out, but those are cases in which there is no problem anyway because the behaviour clearly shows that constraint is needed. In the majority of other

out in fact. Moreover, much inevitably depends upon the kinds of situations with which the prisoner is presented (or unconsciously seeks out) upon his release. As Stürup points out: "[H]is reactions will depend on how he experiences himself after having served his sentence. He may think of himself as a former offender. He may believe that all other people think of him as a former offender, which means that he expects that everyone expects him to react as a criminal . . . [His] . . . choice of behaviour is . . . conditioned . . . also by situational stimuli which are dependent on other people's determined psychological experience. Thus there are important accidental factors influencing behaviour."¹³²

In these circumstances, the "safe" psychiatric decision is perhaps understandable. However, the problem that it creates for the prisoner is a particularly difficult one. As Brancale suggests:

Clinical criteria that point to the possibility of further dangerous behaviour cannot always be dogmatically defined. Only in clearly psychotic conditions, with a history of previous psychotically-aggressive episodes, can medical opinion find common agreement An offender who is placed in further jeopardy on the basis of a clinical opinion may thus be called not only to defend his guilt, but to defend himself against the clinical findings

This does not minimize the importance of clinical findings, but research and experience have not brought us yet to the point where it can clearly and absolutely be indicated that certain classes of individuals will inevitably commit certain crimes.¹³³

The committee does not ask that the prediction be "clear and absolute"—only that the offender be "likely" to inflict serious harm. The task of defending oneself against the clinical findings thus becomes all the more difficult. Moreover, experience in both the correctional and mental health fields has shown that there is a strong tendency to "over predict" when the question of potential dangerousness is in issue. Nowhere has this been more clearly demonstrated than in "Operation Baxstrom," the celebrated mass transfer to civil state mental hospitals of large numbers of so-called "danger-

cases, however, there would definitely be a tremendous amount of over prediction It is on this basis that I felt that the act should speak for itself like any other criminal act, and if an offence indeed has elements of personal harm, then it seems to me that the sentence structure, as it is, should be able to take care of the need for institutional constraint.

¹³² G. STÜRUP, *TREATING THE UNTREATABLE* 10-11 (1968).

¹³³ Brancale, *Diagnostic Techniques in Aid of Sentencing*, 23 *LAW & CONTEMP. PROB.* 442, at 459 (1958). Similar disclaimers by psychiatrists of their ability to predict the likelihood of future criminality are common. See, e.g., S. HALLECK, *PSYCHIATRY AND THE DILEMMAS OF CRIME* 313-14 (1967); White, Krumholz & Fink, *The Adjustment of Criminally Insane Patients to a Civil Mental Hospital*, 53 *MENTAL HYGIENE* 34, at 39 (No. 1 1969), based on experience with "Operation Baxstrom" (see note 135 and accompanying text); Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 *MICH. L. REV.* 1335, at 1343 (1965); ONTARIO ASS'N OF CORRECTIONS AND CRIMINOLOGY WORKING GROUP; Note, *Contemporary Studies Project: Detection, Treatment, and Control of the Potentially Violent Person*, 55 *IOWA L. REV.* 118, at 141 (1969) (report of interviews with psychiatrists). Cf., J. MACDONALD, *PSYCHIATRY AND THE CRIMINAL* 74, at 76-77 and 91-92 (2d ed. 1968).

ous" inmates held in secure custody in the New York State correctional institutions at Matteawan and Dannemora following the successful challenge to the legal basis for such commitments by the United States Supreme Court in *Baxstrom v. Herold*.¹³⁴ Few of the 992 inmates transferred were found in fact to require secure custody, and a substantial number were in very short order released altogether or continued as "voluntary" patients.¹³⁵ Does this suggest that "dangerousness" is in large part a function of the observer?¹³⁶ Probably to some degree. What also seems evident, however, is the strength of bureaucratic resistance to release, especially when the future conduct of the inmate may be a possible source of embarrassment to the person responsible for initiating or approving the termination of custody. As is indicated below, this fact—and it is one that seems to be little appreciated either by the courts or by those proposing indeterminate commitment statutes—has important implications in terms of the kind of release procedures that are required for persons held in "psychiatric" custody.¹³⁷

To say all of this is not to minimize the difficulties of clinical prediction. Possibly the greatest of these is that of making predictions based almost exclusively on institutional performance. As the British Columbia group concluded, "it was felt impossible . . . to accurately assess, in a psychiatric evaluation, the possibility of future aberrant activities of an individual who has adapted to the environment of an institutional setting—an environment in which the stresses of community living are non-existent."¹³⁸ Presumably this problem would be less acute with a more therapeutically oriented environment and more flexible arrangements relating to trial release and aftercare services. Still, notwithstanding the necessity of relying on clinical judgment in making release decisions within the context of sentencing powers conferred for purposes that are otherwise acceptable, it is very questionable indeed whether it is safe to rely on clinical judgment as the essential legislative basis for a system of indeterminate committal. The psychiatrist as

¹³⁴ *Baxstrom v. Herold*, 383 U.S. 107 (1966).

¹³⁵ See Morris, *The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of New York State*, 17 BUFFALO L. REV. 651 (1968). See also White, Krumholz & Fink, *The Adjustment of Criminally Insane Patients to a Civil Mental Hospital*, 53 MENTAL HYGIENE 34, at 39 (No. 1 1969). For a similar experience with recidivism rates following the early release through court order of over one thousand inmates from the Florida prison system, see Eichman, *Impact of the Gideon Decision Upon Crime and Sentencing in Florida: A Study of Recidivism and Socio-Cultural Change* (Florida Division of Corrections 1966), as summarized in SENTENCING ALTERNATIVES AND PROCEDURES 58-59. See also Radzinowicz, *The Dangerous Offender*, 41 POLICE J. 411, at 445 (1968).

¹³⁶ See, e.g., Morris, *The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of New York State*, 17 BUFFALO L. REV. 651 (1968); Wolfgang, *Corrections and the Violent Offender*, 381 ANNALS AM. ACAD. OF POL. & SOC. SCI. 119, at 121 (1969). See also Sarbin, *The Dangerous Individual: An Outcome of Social Identification Transformations*, 7 BRIT. J. CRIMINOLOGY 285 (1967).

¹³⁷ See notes 173-76 and accompanying text.

¹³⁸ *Supra* note 129, at 100.

"gentle jailer" simply does not have the techniques of identification to warrant any such allocation of authority.

Can we, then, look to statistical prediction techniques for a solution? This is certainly questionable. To begin with, the prediction made about a single case can at best be probable, never certain. As Morris states: "Every consideration of the individual is inevitably a consideration of the ways in which, and the extent to which, he conforms to and varies from classes of people about whom we have defined experience. If our experience is ample and quantified, and if our perceptions of his similarities to and dissimilarities from these classes are precise, then we may be able to state that 'this offender belongs to a group of whom n in every hundred commit a crime of defined gravity within Y months or years.'"¹³⁹ The hazards of prediction as a basis for a separate legislative categorization become evident when we consider the problem of the "false positive," and particularly the problem that it presents when one attempts to predict the "rare event." Consider, for example, the matter of prediction of violent offences on parole, as discussed by Glaser and Kenefick. The authors note that, "if a board were given all the psychiatrists, sociologists, statisticians, and other experts it desired to make a thorough analysis of each case, it is doubtful if it could achieve 80 per cent accuracy in identifying the less-than-5-per cent of parolees who commit clearly violent offences after release," this being "about the greatest precision that has been demonstrated by any man or any prediction system, applied to a cross-section of prisoners, for predicting parole violation in general, rather than the more difficult task of predicting violence on parole."¹⁴⁰ They continue:

If a board were 80 per cent accurate in identifying the most violent parolees, they would still make more than 2 erroneous predications in 10 as long as the violence they sought to predict occurred in less than 20 per cent of the cases. This is simply a matter of mathematics. For example, if violence were committed by 5 per cent of prison releases in every 1,000 releases, a parole board would have to identify 50 men who would commit violence among 950 who would not. With 80 per cent predictive accuracy, we could expect the board to predict violence for 20 per cent of the 950, or 190 cases, and for 80 per cent of the 50, or 40 cases. However, in this total of 230 designations as probably violent, one could not know in advance which actually would be the 40 who would be violent. They would make a total of 200 erroneous predictions, the 190 nonviolent designated as violent and the 10 violent not designated as violent, in identifying correctly the 230 cases in 1,000 which include 40 of the 50 violence cases

The foregoing theoretical analysis assumes 80 per cent accuracy in predicting violent parole infractions, and that 5 per cent of the men released will commit such infractions If we have 80 or even 90 per cent accuracy in predicting an event occurring in only 1 per cent of the cases, such as the commission of a violent sex offence by a paroled sex offender our ratio of errors to correct predictions would be much greater than 200 to

¹³⁹ Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, at 535 (1968).

¹⁴⁰ D. GLASER, D. KENEFICK & V. O'LEARY, *THE VIOLENT OFFENDER* 35 (1966).

40.¹⁴¹

Silving has pointed out that the "prediction of future conduct . . . whatever might be the improvements of predictive techniques, is to a large degree uncertain, not only because of inadequacies inherent in prediction systems, but also because of the numerous potentialities of error in gathering the pertinent factual data."¹⁴² As she quite properly indicates, "[m]uch of the raw material used to determine personality factors is, in itself, very elusive."¹⁴³ It is arguable, of course, that the problem of accurate factual determination is present in all judicial and clinical decision-making, and that the difficulty here is only one of degree. It should be said, however, that the courts have yet to solve the problem of evaluating statistical material introduced to establish substantive issues of the kind presented here, as opposed to matters involving broad social effects or those in which there is large scope for judicial discretion.¹⁴⁴ What is inescapable is that incorrect decisions are inherent in the prediction method itself.¹⁴⁵ It is arguable that the committee has reduced at least the potential impact of error by confining the dangerous offender provisions to persons already convicted of offences punishable by lengthy terms of imprisonment—although it should also be noted that, by removing recidivism as a criterion, they have eliminated probably the most reliable predictor of future criminality.¹⁴⁶ But the important point is that

¹⁴¹ *Id.* at 36. For a more detailed analysis of a similar kind of problem, see Rosen, *Detection of Suicidal Patients: An Example of Some Limitations in the Prediction of Infrequent Events*, 18 J. CONSULTING PSYCHOLOGY 397 (1954). See also Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, at 84-86 (1968). And see also the study in the District of Columbia of prediction of future criminality as a basis for bail release decisions, reported in Portman, "To Detain or Not to Detain?"—A Review of the Background, Current Proposals and Debate on Preventive Detention, 10 SANTA CLARA LAWYER 224, at 249-53 (1970); *supra* note 130.

¹⁴² H. SILVING, *ESSAYS IN CRIMINAL SCIENCE* 147 (G. Mueller ed. 1967).

¹⁴³ *Id.* at 147 n.57. See, e.g., the information listed in D. GLASER, D. KENEFICK, & V. O'LEARY, *THE VIOLENT OFFENDER* ch. 6 (1966).

¹⁴⁴ See, e.g., *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968). Cf., Rafalki, *Sociological Evidence As a Criminal Defence*, 10 CRIM. L.Q. 77 (1967); Zeisel, *Dr. Spock and the Case of the Vanishing Women Jurors*, 37 U. CHI. L. REV. 197 (1969). It might be noted that a fairly liberal interpretation of admissibility of evidence has been adopted in dangerous sexual offender cases in Canada because the proceedings have been regarded as in the nature of a sentence determination, rather than analogous to the trial of an offence. See *Wilband v. The Queen*, [1967] 2 Can. Crim. Cas. Ann. (n.s.) 6 (Sup. Ct. 1967). Contrast the American position as elaborated in *Specht v. Patterson*, 386 U.S. 605 (1967). The issue is one of principle, and should be clarified in any proposals that are adopted.

¹⁴⁵ In a "Chapter on The Inevitability of Error," Wilkins observes: "It is interesting that there has been so little discussion of this problem in the criminological literature. There is much discussion of decisions in the form of court orders, case work and the like, but the emphasis is on getting the decisions correct rather than accommodating uncertainty and probability of incorrect decisions If it is accepted that wrong decisions will be made from time to time, then it is reasonable to go on to consider what types of error will be made, with what probability, and with what impact The error system is as it were, a subsystem of the total decision-making system and an integral part of it." L. WILKINS, *EVALUATION OF PENAL MEASURES* 126-28 (1969).

¹⁴⁶ See, e.g. J. MOHR, R. TURNER & M. JERRY, *PEDOPHILIA AND EXHIBITIONISM* 83

the question as to what kinds of errors we are prepared to accept, and in what context, is not one of technique, but of value. The moral issue remains: Can society justify the cost, in terms of deprivation of human liberty and potential injustice to those incorrectly designated "dangerous," of what may in fact be marginal protection afforded by provisions for indeterminate preventive detention?

VI. SOME MATTERS OF PROCEDURE

The effectiveness of any arrangement for the disposition and processing of offenders almost invariably depends upon the adequacy of the procedures that are devised to accomplish the objectives sought. In contrast to many proposals of this kind, the committee has attempted to build in substantial procedural safeguards for the prisoner. Note might be taken here of the right to an annual assessment and review by the National Parole Board and to access to the courts on a triennial basis to determine whether continued detention is required, of the right to counsel at court hearings, and of the arrangement—and this is most interesting—whereby the court is precluded from adjudging the prisoner to be a dangerous offender where there is a negative diagnostic finding on the issue. Nevertheless, there are a number of matters of procedure, as well as evidence, that require comment.

It has been noted that an accused is in a peculiarly difficult position in conducting a defence in a proceeding of this nature because, in effect, he is forced to defend himself against a "clinical finding."¹⁴⁷ As a Kingston study group has observed, this creates a particular problem in regard to the burden of proof:

Does the Crown have to prove that an offender constitutes a continuing danger "beyond a reasonable doubt", or merely "on a balance of probabilities"? The term "likely" in the definition of "dangerous offender" seems to indicate the lesser burden of proof. Then, in all likelihood, an offender will be totally unable to adequately defend himself at trial in the face of an unfavourable diagnostic report. Even if he is able to muster the financial resources to retain expert witnesses, it is difficult to imagine how they could show that the offender does *not* represent a continuing danger (on a balance of probabilities), when the crown has all of the resources of a large diagnostic facility to support the application. On the other hand, if the burden of proof is "beyond a reasonable doubt", then we are returned to the question: Is the degree of certainty of diagnosis now at the level where experts can say: "This man, beyond a reasonable doubt, represents a continuing danger to society"? Can such a prediction of future human conduct *ever* be made? The Committee feels that psychiatry and related professions have not yet reached this level of competence.¹⁴⁸

and 156 (1964); Walker, Hammond & Steer, *Repeated Violence*, [1967] CRIM. L. REV. 465.

¹⁴⁷ See note 133 and accompanying text.

¹⁴⁸ ONTARIO ASS'N OF CORRECTIONS AND CRIMINOLOGY WORKING GROUP 5.

Curiously, under the dangerous sexual offender provisions—which also require a showing that the accused is “likely” to cause a particular harm—the question of burden of proof has been little discussed by the courts, although it seems fairly clear that the “proof beyond a reasonable doubt” standard is required.¹⁴⁹ The McRuer Commission “argued with great force that to require proof beyond a reasonable doubt in the trial of the issue tends to render the law ineffective.”¹⁵⁰ It took the position that “the considerations that arise in deciding whether in the circumstances an indeterminate sentence is the proper one to be imposed are not the same considerations that arise in proof of the guilt of crime” and that, provided adequate review procedures are available, “a standard of proof no higher than preponderance of probability would afford greater protection to society and impose no injustice on the prisoner.”¹⁵¹ The “considerations that arise” doubtless refers to the commission’s strongly held view that the then criminal sexual psychopath hearing was in the nature of a pre-sentence hearing, not a criminal trial in the ordinary sense.¹⁵² This view, which has been supported by judicial interpretation,¹⁵³ is in the writer’s opinion unfortunate. In dealing with the procedural requirements under the Colorado Sex Offenders Act, the United States Supreme Court in *Specht v. Patterson* quoted with approval the following statements from a Court of Appeals decision on a comparable Pennsylvania statute: “It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is en-

¹⁴⁹ The McRuer Commission referred to the unreported Ontario Supreme Court decision of *Regina v. Leshley*, and to the reasons for judgment of Mr. Justice Rand in *The Queen v. Neil*, [1957] Sup. Ct. 685, as holding that the proof beyond a reasonable doubt standard applies. None of the other members of the Court discussed the standard of proof in *Neil*. This was clearly the standard the court addressed to itself in *Regina v. Binette*, [1965] 3 Can. Crim. Cas. Ann. (n.s.) 216 (B.C.). In a number of cases, the court speaks of there being “no doubt in my mind,” and so on. See, e.g., *Regina v. McAmmond*, 7 Can. Crim. (n.s.) 210, at 220 (Man. 1969). It is clear that, under the habitual criminal provisions, the proof beyond a reasonable doubt requirement applies to every element specified in § 660 of the code. *Poole v. The Queen*, 3 Can. Crim. (n.s.) 214 (1968).

¹⁵⁰ ROYAL COMMISSION REPORT 38 and 124.

¹⁵¹ *Id.* at 38.

¹⁵² *Id.* at 31-32, in rejecting a proposal for jury trial on the application to have a prisoner declared to be a criminal sexual psychopath.

¹⁵³ Thus, in rejecting the rule against admissibility of involuntarily obtained confessions in a dangerous sexual offender proceeding, the Supreme Court of Canada stated: “One of the reasons flows from the very nature of the issue involved in these proceedings. The issue, . . . which can only be resorted to if the accused has been convicted of a sexual offence, 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” *Wilband v. The Queen*, [1967] 2 Can. Crim. Cas. Ann. (n.s.) 6, at 9 (Sup. Ct.) (Fauteux J.). But see *Poole v. The Queen*, 3 Can. Crim. (n.s.) 213 (1968), in which the Supreme Court of Canada allowed an appeal against a “sentence of preventive detention” in an habitual criminal proceeding notwithstanding the fact that the Supreme Court has no jurisdiction to hear appeals against sentence. Cf. notes 112 and 144.

titled to the full panoply of the relevant protections which due process guarantees in . . . criminal proceedings.”¹⁵⁴ This is surely the preferable view, and requires an appropriately higher standard of proof. For reasons that will be suggested,¹⁵⁵ it is submitted that this standard should apply, not only on any initial determination of “dangerousness,” but also in proceedings by way of review of continued confinement. If the “proof beyond a reasonable doubt” standard is considered to present unnecessary difficulties of the kind that the Kingston study group suggest, then the intermediate standard of proof by “clear and convincing evidence” should be insisted upon.¹⁵⁶

The experience in hearings involving psychiatric evidence suggests other procedural safeguards that are required. While it was probably not the responsibility of the Ouimet Committee to provide a comprehensive discussion of such matters, it is well to list some of these points. (1) Any legislation should provide that the prisoner, or his counsel, should have access to all records, reports and papers of the institution relating to his case, including all psychiatric records, and should have available all additional avenues for discovery that may be necessary for the proper presentation of his case;¹⁵⁷ (2) The prisoner should be entitled, on request, to be examined by a private psychiatrist of his own choice, where necessary at the expense of the Crown;¹⁵⁸ (3) There is considerable evidence that psychiatric reports in hearings of this kind are not as complete as the seriousness of the proceeding would seem to require.¹⁵⁹ Consideration should be given, there-

¹⁵⁴ *Specht v. Patterson*, 386 U.S. 605, at 609 (1967) quoting *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, at 312 (1965).

¹⁵⁵ See notes 173-76 and accompanying text.

¹⁵⁶ For a discussion of the “clear and convincing evidence” standard, see 32A C.J.S. § 1023 (1964). See also J. WIGMORE, *EVIDENCE* § 2498 (3d ed. 1940). There has been some debate as to whether the civil and criminal standards of proof are, in fact, distinguishable. See, e.g. *Regina v. Summers*, 36 Cr. App. 14 (1952); *Regina v. Hepworth*, [1955] 2 Q.B. 600 (Ct. Crim. App.); G. WILLIAMS, *THE PROOF OF GUILT* 190-94 (3d ed. 1963). It is submitted that there is a basis for identifying separate evidentiary standards. See McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944).

¹⁵⁷ Express provision to this effect is provided for under the Maryland Defective Delinquent Act. See *Director of Patuxent Institution v. Daniels*, 221 A.2d 397, at 413 (1966). It is doubtful whether a prisoner could require production of such material in Canada. Cf. *Regina v. Patterson*, 8 Can. Crim. (n.s.) 27 (Alta. 1969).

¹⁵⁸ Again, there is provision in law for this in Maryland. See *Director of Patuxent Institution v. Daniels*, 221 A.2d 397, at 413 (1966). For an imaginative discussion of the role that an independent psychiatrist might serve in the prisoner's behalf, see Frankel, *supra* note 6, at 259-62. For an indication of the importance of independent psychiatric testimony to defence counsel, see Arens, *supra* note 1, at 62-66; Arens, *The Defence of Walter X. Wilson: An Insanity Plea and a Skirmish in the War on Poverty*, 11 VILLANOVA L. REV. 259 (1966).

¹⁵⁹ See, e.g., Arens, *supra* note 1, at 72-75; Comment, *Sexual Psychopathy: A Legal Labyrinth of Medicine, Morals and Mythology*, 36 NEBRASKA L. REV. 320, at 337 (1957); Tenney, *supra* note 13, at 3-4. The questions of “psychiatric reports” and “psychiatric examinations” are obviously related. See notes 56 and 171-72 and accompanying text. In Canada, there is evidence from reported cases that psychiatric examinations on dangerous offender applications are sometimes quite perfunctory. See, e.g., *Regina v. Neil*, 26 Can. Crim. (n.s.) 281 (Sup. Ct. 1957), where Justice Locke records that one psychiatrist gave his opinion on the evidence heard at trial and the

fore, to setting out specific provisions relating to the content of the report under which the offender is "diagnosed" as a dangerous offender, including a specific requirement that any dissenting views that have been expressed by clinical personnel in the assessment process be recorded and included in the report to the court;¹⁶⁰ and (4) Consideration should be given also to a provision that will ensure adequate qualifications on the part of psychiatrists rendering an opinion having such important consequences. For example, the California Welfare and Institutions Code specifies that, in proceedings on the question as to whether an accused is a "mentally disordered sexual offender," all examining psychiatrists must have at least five years' experience in the practice of psychiatry, and at least one must hold a hospital appointment.¹⁶¹ Danish law makes provision for the appointment of a Medico-Legal Council of senior psychiatrists, to which the courts and government agencies can refer for review of psychiatric reports submitted in the first instance.¹⁶² In view of criticisms that have been made of psychiatric examinations in cases of this kind it may be well to ensure that some such control is established.

Certain features of the procedures proposed by the committee give cause for concern. The power to remand in custody "to a diagnostic institution . . . for diagnosis and assessment before imposing sentence" may serve to remove the most objectionable aspects of psychiatric testimony as it is now frequently given in dangerous sexual offender proceedings.¹⁶³

other on the basis of an examination of the accused of "some one and one-half hours while he was in custody . . ." *Id.* at 288. *Cf.* Marcus, *supra* note 12, at 95. An examination of the trial transcript in the leading case of *Wilband v. The Queen*, [1967] 2 Can. Crim. Cas. Ann. (n.s.) 6 (Sup. Ct. 1966) raises serious questions as to the adequacy of examinations conducted.

¹⁶⁰ While required periods of remand for mental examination should do much to solve the problem of superficial psychiatric reports, it may be desirable to specify standards by law. It is interesting that, while psychiatrists frequently disagree on their assessment of individual cases, it is apparently the practice, as reported to the author, not to record disagreement on the patient's medical record. Knowledge of such disagreement could be invaluable to defence counsel, and should be available. For a discussion of this problem, see Arens, *supra* note 158.

¹⁶¹ CALIFORNIA WELFARE & INSTITUTIONS CODE § 5504 (West 1955).

¹⁶² See G. STÜRUP, *TREATING THE UNTREATABLE* 3 (1968). Note the observation by Szasz:

I would consider a panel of impartial psychiatric experts much more attractive if its advocates had also foreseen the need for "higher courts" of panels. In other words, if they had anticipated stupidity or malfeasance on the part of experts, and had provided for the orderly review, and, if necessary, reversal of their findings This lack of foresight—if that is what it is—is disturbing, for it reflects the consistent expectation that, while other people in society need watching to ensure their honesty and correct performance, doctors do not [I]f psychiatric experts are to wield more power, they should also be supervised more carefully. T. SZASZ, *LAW, LIBERTY AND PSYCHIATRY* 116 (1963).

¹⁶³ Reference has been made previously to the nature of the psychiatric evidence that has been considered acceptable in dangerous sexual offender proceedings. See note 56 and accompanying text, and note 159 and references cited therein. It should be noted that section 661 of the code requires the court to "hear any relevant evidence" and "the evidence of at least two psychiatrists." It has been held that this does not require that the psychiatrists have actually examined the accused. See *Regina*

Nevertheless, the procedure as proposed seems questionable on several counts. For one thing, the specified "period not exceeding six months" that may be ordered is too long. The usual period of remand in statutes of this kind is three months, in some cases subject to extension upon application.¹⁶⁴ There is serious doubt as to the desirability of leaving the prisoner's status undetermined for such a lengthy period of time. This comment has reference primarily to the psychological effect on the prisoner, although presumably it would be necessary to settle also the question as to whether this period of time should count against sentence in the event of a negative finding on the dangerous offender issue, with the consequent implications in terms of statutory and earned remission.¹⁶⁵ Moreover, as will be suggested,¹⁶⁶ one can foresee a number of potentially serious difficulties arising in relation to the status of the inmate in the diagnostic centre itself. One wonders also, notwithstanding the present section 666 of the Criminal Code, about the wisdom of an automatic yearly assessment and review by the Parole Board for an offender who by reason of the gravity of the threshold offence, is unlikely to receive a favourable recommendation for parole in the early stages of his confinement. There is considerable opinion that the continuing experience of parole rejection that such a procedure inevitably brings with it creates an increasing sense of frustration and desperation in the

v. Kanester, [1968] 1 Can. Crim. Cas. Ann. (n.s.) 351 (B.C. 1967). All that is required is that the psychiatrist have access to sufficient information upon which to form an opinion. Canadian law allows a psychiatrist wide latitude in regard to the information that he can utilize in forming a professional opinion. See *Wilband v. The Queen*, [1967] 2 Can. Crim. Cas. Ann. (n.s.) 6 (Sup. Ct. 1966), and more particularly the trial transcript. Indeed, the psychiatrist may form his opinions merely by hearing the evidence presented in court. See, e.g., *Regina v. Binette*, [1965] 3 Can. Crim. Cas. Ann. (n.s.) 216 (B.C. 1964). It would seem also that the conception of the proceeding as being in the nature of a hearing on sentence has tended to lessen the rigour of the ordinary trial requirements of proof. See *Wilband* and *Binnette*. There are understandable difficulties where the accused refuses to co-operate in a psychiatric examination. See *Regina v. McAmmond*, 7 Can. Crim. (n.s.) 210, at 212 (Man. 1969). See also *Kanester*. At least one American jurisdiction has made failure to co-operate with the psychiatric examination contempt of court. See Comment, *Sexual Psychopathy: A Legal Labyrinth of Medicine, Morals and Mythology*, 36 NEBRASKA L. REV. 320, at 336 n. 66 (1957). However, considering official psychiatric pronouncements on the importance of detailed observation and examination of the subject for a proper assessment, one must surely question the reliability of such "diagnoses at a distance." See e.g., Overholser, *Criminal Responsibility: A Psychiatrist's Viewpoint*, 48 A.B.A.J. 527, at 529 (1962); H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 334 (1954). When there is added to this the more than reasonable doubt about prognostic accuracy of psychiatric assessments under the best of circumstances, see notes 128-33 and accompanying text, one may well ask whether the uses of psychiatry are not being outweighed by its abuses.

¹⁶⁴ See, e.g., MODEL SENTENCING ACT § 6; 18 U.S.C. § 4208(b); CALIFORNIA WELFARE & INSTITUTIONS CODE § 5512 (West 1955).

¹⁶⁵ See Penitentiary Act, Can. Stat. 1960-61 c. 53, §§ 22(1) and 24 providing, respectively, for "statutory remission amounting to one-quarter of the period for which he has been sentenced or committed as time off subject to good conduct" in the case of a fixed term sentence, and "three days' remission of his sentence in respect of each calendar month during which he has applied himself industriously to his work . . ."

¹⁶⁶ See notes 171-72 and accompanying text.

prisoner that has serious adverse effects in terms of his prospects for rehabilitation.¹⁶⁷ On the other hand, it is arguable that the procedures for judicial review may well be perceived as unfair by other long-term prisoners who do not have the same right to triennial "appeal."¹⁶⁸ Still another danger is that the proposed medical-psychiatric centres will become overburdened with diagnostic referrals. Indeed, a serious criticism of the proposals as a whole is that they do not seem to have addressed themselves to the issue as to whether the medical-psychiatric centres will have control over their own intake. What seems to be implied, although the committee is unpardonably vague, is that a prisoner found to be a dangerous offender will be sentenced directly to a medical-psychiatric centre, as is the case at Patuxent and Herstedvester. The problem that this procedure presents for the institution has already been mentioned.¹⁶⁹ Having regard to the necessity for selective intake, and to the difficulties presented by the status in the penitentiary system of the prisoner thought to be a dangerous offender, perhaps a better solution to the problem of securing an assessment from Canadian Penitentiary Service institutions would be a provision along the lines adopted for the United States Bureau of Prisons, where the law provides:

¹⁶⁷ See text at note 88. See also note 91, references cited therein and accompanying text.

¹⁶⁸ This criticism has been made by the Kingston study committee, whose membership included experienced correctional officials. See ONTARIO ASS'N OF CORRECTIONS AND CRIMINOLOGY WORKING GROUP, *supra* note 127, at 5. The recommendation may have had its source in the McRuer Commission. See note 47. If this criticism has substance, it may be that this is another indication that the provision of "special terms" should properly be linked with a downward revision of statutory maxima as part of a general review of sentencing structure. See notes 80-83 and accompanying text.

¹⁶⁹ See note 94 and accompanying text. The problem would seem to be less acute at Herstedvester because the director of the institution has direct access to the court to "alter the earlier decision made concerning the nature of the measure." G. STÜRUP, *TREATING THE UNTREATABLE* 251. It would appear also that the director has a very substantial voice in the decision to release. *Id.* at 219.

On the question of the use of the proposed medical-psychiatric centres for diagnostic referrals, the following comments are relevant:

Use of the Regional Medical Centre for this purpose presents four fairly serious problems Second, such men will have to be isolated from the offender population, thereby restricting to some degree the use of the facilities by the men for whom they were primarily designed. Third, the argument has been made that the establishment of a therapeutic relationship with an inmate is greatly hampered when the inmate has reason to believe that the doctor himself, or his colleagues, are responsible for his presence in the institution. Fourth, psychiatrists and other treatment personnel do not like to spend the bulk of their time on diagnostic tasks, especially when they are not diagnosing people they can view as their patients. The attractiveness of the Centre as a place to work will vary inversely with the amount of routine 'service' work that must be done [T]he impact . . . (of these problems) . . . is sufficient to warrant a strong recommendation that every effort be made to avoid use of the Centre as a routine diagnostic facility.

Pickard, Project and Research Design for the Proposed Regional Medical Centre of the Canadian Penitentiary Service, Millhaven, Ontario 51-52 (LL.M. thesis, Queen's University, first draft, June, 1970). See also note 101.

If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation . . . or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.¹⁷⁰

What creates the problem in regard to the status of the prisoner is the fact that he is not, under the committee's proposals, a prisoner under sentence. Moreover, during his stay in the diagnostic facility, he still stands in jeopardy of future proceedings of a peculiarly drastic character. The self-incrimination aspect of the question has already surfaced in the case law on the existing dangerous sexual offender provisions.¹⁷¹ No attempt will be made to

¹⁷⁰ 18 U.S.C. § 4208(b). One danger is that this procedure may tend to lead to a number of unnecessarily long sentences unless it is confined to cases where a "special term" only is under consideration. The following appears in correspondence received from a former United States Attorney:

The deferred sentencing provision of the U.S. Code is intriguing but my experience was that it was relatively useless in practice and merely served as reinforcement or rationalization for a judge's pre-determined disposition towards the imposition of a prolonged sentence. Used usually in serious felonies and often in bank robbery cases, the judges utilizing the services of the medical centre seldom received the information they sought nor were capable of acting upon that which they did receive. A number of reports filed under the Act provided the court with an in depth analysis of the prisoner's personal and sometimes personality problems—but there appeared no clear formula for the judge to use to translate this into a meaningful sentence. Told that a prisoner was anti-social, had paranoid ideation or what have you, this didn't assist the court in arriving at any relevant sentence. It might well be of assistance to prison personnel after sentence as a guide to treatment To the judge, it simply confirmed the need for a lengthy sentence.

Letter from Travis Lewin to Ronald R. Price, February 27, 1970.

¹⁷¹ It has been held that an accused may not exclude statements made to a psychiatrist from evidence under the involuntary confession rule because a psychiatrist is not a "person in authority," and because (see note 153) the proceeding is not in the nature of a criminal trial, but rather a hearing on sentence. *Wilband v. The Queen*, [1967] 2 Can. Crim. Cas. Ann. (n.s.) 6 (Sup. Ct. 1966). See also *Regina v. Johnston*, [1965] 3 Can. Crim. Cas. Ann. (n.s.) 42 (Man.). The *Wilband* reasoning on both grounds has been strongly criticized. See Note, 10 CRIM. L.Q. 12 (1967). See also the earlier decision in *Regina v. Leggo*, 133 Can. Crim. Cas. Ann. 149 (B.C. 1962). In contrast, see the developing American position as expressed in *United States v. Albright*, 388 F.2d 719 (1968); *In re Spencer*, 406 P.2d 33 (1965). See also Note, *Changing Standards for Compulsory Mental Examination*, [1969] WISCONSIN L. REV. 220; Note, *Right to Counsel at the Pretrial Mental Examination*, 118 U. PA. L. REV. 448 (1970). Where the accused has stood on his right not to "incriminate" himself he has, under the existing Code provisions, not advanced his position appre-

explore this problem in depth here. The nature of the issues involved, however, is suggested in the report of the Kingston study group:

The Report recommends that an offender be notified that it is alleged that he is a dangerous offender only *after* he has been diagnosed as such. Certainly an offender will be fully aware of what is at stake when he enters the diagnostic centre. What if he then decides not to co-operate with the diagnostic personnel? The only potentially effective way of assessing potential dangerousness appears to be personality assessment by means of interviews and tests. It would appear to be virtually impossible to force a determined offender to submit to such devices against his will. According to the Report, only a positive diagnosis of dangerousness can lead to preventive detention. If it is impossible to make any diagnosis as to dangerousness it then follows that the court is *precluded* from ordering preventive detention.

If an offender can prevent diagnosis by merely refusing to co-operate, will the institution have to rely merely on the chance that the offender won't realize this? Will they be given the right to use certain drugs to extract information from him? Will diagnoses have to be made on perhaps less reliable bases that are not dependent upon co-operation from the offender? What will be the legal position of lawyers or others who advise the offender that he might be able to prevent diagnosis by refusing to co-operate? These and other questions must surely be answered before the proposed legislation can be adopted.

. . . .

[Moreover] . . . it is not made clear whether the offender is merely to be diagnosed while at the centre, or whether he may also be subjected to treatment — perhaps against his will. It would be argued that compulsory treatment may not be administered until there has been a judicial determination of dangerousness, although the Report makes no mention of this issue.¹⁷²

A final point—and it is a crucial one—concerns procedures for release. There is considerable evidence from studies that have been done of the process of application for release by persons held on psychiatric grounds in both mental hospitals and correctional institutions that it is extremely difficult for an inmate to persuade a court or board to authorize release in the face of a negative recommendation from the institution concerned.¹⁷³ This

ciably. See, e.g., *Regina v. Kanester*, [1968] 1 Can. Crim. Cas. Ann. (n.s.) 351 (B.C. 1967); *Regina v. McAmmond*, 7 Can. Crim. (n.s.) 210 (Man. 1969). See also notes 159 and 163 *supra*.

¹⁷² ONTARIO ASS'N OF CORRECTIONS AND CRIMINOLOGY WORKING GROUP, *supra* note 127, at 9-10. One danger is that, in the event of failure to co-operate, the process would revert to the standard that has obtained in dangerous sexual offender hearings. See note 163 and references cited therein. A more subtle, and perhaps greater, danger is that this very failure to co-operate will be taken as an aspect of the prisoner's "problem" and thus become part of the clinical basis for a negative evaluation. See, e.g., *In re Maddox*, 88 N.W.2d 470 (1957); Hacker & Frym, *supra* note 13, at 774 n.14. On the use of drugs with the non-co-operative patient offender, see Morris, *Criminality and the Right to Treatment*, 36 U. CHI. L. REV. 784, at 799-800 (1969).

¹⁷³ See, e.g., Hacker & Frym, *supra* note 13; Morris, *supra* note 135; T. SCHEFF, *BEING MENTALLY ILL: A SOCIOLOGICAL THEORY* ch. 5 (1966). Private discussions, and some limited observations, suggest that this may in fact be a problem in proceedings on applications for release before area review boards and advisory review boards under the Ontario Mental Health Act, 1967, Ont. Stat. 1967 c. 51.

has often proved to be the case even where the basis of the institution's position has been highly suspect in relation to the criteria for committal as defined by law.¹⁷⁴ Regrettably, the tendency has been to rubber-stamp institutional decisions on questions defined as "psychiatric" on the disquieting rationale that professional judgment should not be overridden by a lay judge.¹⁷⁵ For reasons that have already been outlined, and perhaps understandably, the institutions for their part have been quite hesitant about courting the embarrassment of releasing inmates who *might* prove to be dangerous. Institutional considerations generate "over prediction"—if for no other reason than the fact that clinical assessment is so uncertain.¹⁷⁶ Herein lies one inherent danger of justifying longer terms of confinement on the ground that parole is available to reduce the actual period of time that will be served in institutional custody.¹⁷⁷

¹⁷⁴ See, e.g., R. ROCK, M. JACOBSON & R. JANOPAUL, *HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL* 215-18 and 261-63 (Am. B. Foundation Special Comm. on Procedures for Hospitalization and Discharge of the Mentally Ill, 1968). There is some indication that a higher standard of social adjustment is often applied in considering eligibility for release than would have been employed in making a decision on initial committal. See, e.g., Kozol, *supra* note 13, at 83. Cf. Hess, Pearsall, Slichter & Thomas, *Competency to Stand Trial*, 59 MICH. L. REV. 1078 (1961); Engelberg, *supra* note 1; note 129 and accompanying text.

¹⁷⁵ See generally Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424 (1966); Vann & Morganroth, *supra* note 111, Engelberg, *supra* note 1. For an excellent, and not intemperate discussion of the problem, see Szasz, *Hospital Refusal to Release Mental Patient*, 9 CLEV.-MAR. L. REV. 220 (1960).

¹⁷⁶ See, e.g., G. STÜRUP, *TREATING THE UNTREATABLE* 11 (1968); Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, [1966] WASH. U.L.Q. 244, at 265-66 and 276-77. Wilkins recognizes this fact in making the following observations:

In the case of violent offenders who appear before parole boards, it is known that the boards' decisions are determined by factors other than the likelihood of recidivism. Although all prediction tables that have taken account of the factor have consistently shown that the violent offender is a relatively good risk in terms of recidivism, yet parole boards will be more reluctant to release such persons than similar nonviolent offenders with higher risk factors. The decision to release on parole cannot, therefore, be a direct function of the risk of recidivism. It may be that some simple conversion of the simple risk probability could suffice to explain the general nature of the decisions, such as for example, the multiplication of the risk estimate by some factor that relates to the type of crime for which the offender was first incarcerated The parole board's (decision-maker-producer's) risk would require larger odds in its favor in the case of certain types of offenses, because, should the offender in fact commit a further crime, the publicity attending the case would reflect adversely upon the board. L. WILKINS, *EVALUATION OF PENAL MEASURES* 121 (1969).

¹⁷⁷ See *Mendick v. The Queen*, 8 Can. Crim. (n.s.) 4 (Sup. Ct. 1969) and the discussion in note 34. This same issue earlier received attention in a series of cases, notably *Regina v. Holden*, [1963] 2 Can. Crim. Cas. Ann. (n.s.) 394 (B.C. 1962) and *Regina v. Wilmott*, 58 D.L.R.2d. 33 (Ont. 1966). What is not always appreciated is that to lengthen sentences with a view to parole release is, in the light of the "principle of legality," to so shift the centre of the system as to alter the claims that an inmate can legitimately make upon the parole system. Cf. *Silving*, *supra* note 6, at 89-93. What comes in issue is the conception of parole solely as a "privilege" and the "judi-

There is a strong case for saying, therefore, that if adequate protection is to be given to preventive detainees through commitment review procedures, this can only be accomplished effectively by placing the burden on the institution to establish affirmatively—and, as suggested,¹⁷⁸ by “clear and convincing evidence”—that a prisoner should be retained beyond a period of time prescribed by law. However, such a requirement seems basically incompatible with the committee’s dangerous offender proposals, which presuppose long-term confinement and provide triennial access to the courts only as a guarantee against unnecessarily prolonged detention. Thus, for example, it may be assumed that in fairness to other long-term prisoners, rarely as a practical matter would offenders of the kind that the committee is concerned about be considered eligible for release in only three years—at least without release being premised either upon some concept of diminished responsibility or upon a general downward revision of sentencing maxima, neither of which the committee has seen fit to incorporate into its proposals.¹⁷⁹ And yet without readiness by the courts to release, the proffered triennial review becomes, in fact, little safeguard at all.¹⁸⁰

VII. THE ALTERNATIVES

The arguments against the dangerous offender proposals advanced in the Report of the Canadian Committee on Corrections are substantial. Indeed, in its present form, the plan seems quite unacceptable. The question that remains, then, is what is to be done if the present Part XXI provisions are repealed.

One possibility—and it has eminent support—is to do nothing. Morris argues:

Whom shall we trust? Our reply, for the time being, is: Nobody
Within the ambit of power defined by other purposes, mostly retributive,

cialization” in some appropriate manner of the parole-granting decision process. Cf. K. DAVIS, *DISCRETIONARY JUSTICE* 126-33 (1969).

¹⁷⁸ See text at note 155.

¹⁷⁹ See note 91, and notes 80-83 and accompanying text.

¹⁸⁰ Beyond the scope of this paper is the question as to whether the regular courts constitute the most appropriate reviewing body for correctional decisions at all. Some continental countries have developed the institution of the “judge supervising execution of sentence.” See Silving, *supra* note 6, at 127-38. This institution was adopted in the German Draft Penal Law of 1962, in the *Vollstreckungsgerichte*, or “court of enforcement.” See Ehrhardt, *supra* note 75, at 20-21. It seems that the “court of correction” has, among its functions, a review or intermediate review of the necessity for continued preventive detention. See Ehrhardt, *supra* note 75, at 40-42. Ehrhardt also proposes that the “court of correction” be made collegiate, adding to it members from psychiatry and social work. Collegiate courts of sentencing are the rule in continental countries. See George, *supra* note 31, at 251-52. It may be suggested that the “court of correctional supervision” concept merits serious exploration in relation to a variety of kinds of judicial decisions that may be required in the correctional process. Cf. Silving, *A Plea for a New Philosophy of Criminal Justice*, 35 *REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO* 406 (1966); Kimball & Newman, *Judicial Intervention in Correctional Decisions: Threat and Response*, 14 *CRIME & DELINQUENCY* 1 (1962).

we must frequently relate sentences and parole decisions to our best judgments of the offender's dangerousness; but we should not rely on such inadequate judgments to increase our power over him, to raise the limits of punishment [T]he central policy issue . . . [is] . . . what *degree of risk* should the community bear in relation to the countervailing values of individual freedom? . . . [H]ow many "false positive" predictions . . . are justified for the sake of avoiding the "true positive" predictions? This is a sociolegal question, not one within the psychiatrist's particular competence. We cannot, however, even reach that question, let alone answer it, until psychiatry has more amply contributed the data within its competence relevant to posing the question for diverse categories of offenders.¹⁸¹

Elsewhere he states:

For the crime he has committed . . . the offender, sane or insane, should properly be punished or treated . . . for no longer than would be regarded as just and deserved punishment were his sanity or psychological balance not in issue. If he is to be held for any period in excess of that, we should apply to him only the other existing powers that a state takes over all its citizens, criminal and not criminal, on grounds of their mental health The protections that we have afforded the non-criminal citizen in relation to his commitment to mental institutions, may or may not be adequate; but at least they are more likely to be clearly defined than those available to the convicted criminal, and their application will minimize the double stigmatization which is such a fertile source of injustice.¹⁸²

Is any acceptable kind of special provision for a dangerous offender group feasible? If it is, then clearly the scheme will have to meet the basic requirements that have been discussed: that there be a satisfactory legislative definition of the criteria of "dangerousness" and appropriate procedures, clinical or other, for identifying those offenders who can legitimately be regarded as dangerous; that it allow for the various procedural difficulties that have been outlined; and that it be carefully related to the overall legislative plan of sentencing provisions as a whole. Moreover, it would appear that the scheme would have to take one of the following forms:¹⁸³ (1) the imposition at the end of a sentence for a specific offence of a special preventive detention measure, either up to a fixed maximum or for one or more short periods of time; (2) a restricted form of "extended sentence," conceptually related in some manner or degree to the sentence that might otherwise have been imposed; (3) a "special term," unrelated to the sentence that might otherwise have been imposed; or (4), some combination of (1) and (2), or (1) and (3). The life indeterminate sentence, and the "dual track" system of a definite sentence supplemented by a sentence of preventive detention imposed concurrently with it, are rejected in principle.¹⁸⁴

¹⁸¹ N. MORRIS & T. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 189 and 191 (1970). See also note 130.

¹⁸² Morris, *supra* note 8, at 541-42.

¹⁸³ No attempt is made here to consider whether special forms of sentence may be required for sex offenders as a separate category. It is intended to deal with this problem in another paper. See Price & Gold, *supra* note 12.

¹⁸⁴ See notes 18, 77-79 and 85-94, and accompanying text. It is of interest that

The Model Sentencing Act and the American Bar Association Project have opted for alternative (3). The Model Penal Code incorporates alternative (2). Recent legislation in England is also based on the "extended sentence" concept.¹⁸⁵ The English provisions would appear to be more in the nature of a "persistent offender," rather than a "dangerous offender" law. They have been the subject of severe criticism,¹⁸⁶ and will not be discussed further. The Model Penal Code provisions are applicable, not only to the "dangerous offender," but also to the "persistent offender," the "professional criminal" and the "multiple offender"¹⁸⁷—all problem areas that are beyond the scope of this paper. The relevant provisions of the Model Penal Code,¹⁸⁸ the Model Sentencing Act¹⁸⁹ and the American Bar Association Project¹⁹⁰ have been set out previously.

Recent proposals put forward by the California Joint Legislative Committee for Revision of the Penal Code are of interest because they provide a carefully considered combination of (1) and (2) above.¹⁹¹ With reference to extended sentences, they reflect the judgment that the imposition of a longer term of imprisonment at the time of sentencing is justified for dangerous offenders, provided that the criterion of dangerousness is relatively specific and the term of imprisonment imposed is kept within reasonable limits. Under the Legislative Committee's larger proposals, sentencing courts will impose maximum terms of imprisonment only. Ordinary terms will be up to a maximum of life imprisonment for a felony of the first degree, up to ten years for a felony of the second degree, and up to five years for a

the German Draft Penal Law of 1962 provides for precisely this kind of "dual track" system, but goes on to provide that, at the end of the definite sentence, the "court of correction" must then determine if the sentence of preventive detention is still necessary. See Ehrhardt, *supra* note 75, at 41. See also note 180.

¹⁸⁵ Criminal Justice Act 1967, c. 80, §§ 37 & 60. The act provides for extended terms upon conviction of an offence punishable with imprisonment for two years or more—to a maximum of 10 years, in the case of offences punishable by less than five years' imprisonment, §§ 37(1) & 37(3). The court must be satisfied that certain conditions are met and "by reason of his previous conduct and of the likelihood of his committing further offences, that it is expedient to protect the public from him for a substantial time." *Id.* at § 37(2). The conditions are set out in § 37(4):

Upon conviction of an offence punishable with imprisonment for two years or more (a) less than three years have elapsed since the last release from prison; and (b) there have been at least three convictions for serious offences (punishable with two years or more) since the age of twenty-one; and (c) the aggregate of previous sentences is not less than five years; and (i) on at least one of those occasions a sentence of preventive detention [now abolished] was passed; or (ii) on at least two of those occasions a sentence of imprisonment (excluding non-activated suspended imprisonment) or corrective training [now abolished] was passed and of those sentences one was of three years or more or two were of two years or more.

¹⁸⁶ See Thomas, *supra* note 83; Samuels, *Extended Sentences*, 120 NEW L.J. 146 (1970).

¹⁸⁷ MODEL PENAL CODE § 7.03 (Proposed Official Draft 1962).

¹⁸⁸ See note 72 and accompanying text, and note 112.

¹⁸⁹ See note 73 and accompanying text, and note 112.

¹⁹⁰ See note 83 and accompanying text, and note 112.

¹⁹¹ California Joint Legislative Committee for Revision of the Penal Code, *Penal Revision Project* (Tent. Draft No. 2, 1968).

felony of the third degree. Provision is then made for an extended term, to a maximum of fifteen years of imprisonment, for persons convicted of a felony of the second or third degree, who are "persistent offenders," "multiple offenders" or what might be designated "dangerous prisoners." The definitions of "persistent offender" and "multiple offender" both incorporate an element of "dangerousness." The section relating to those two classes provides as follows:

Section 207. Criteria for Sentence of Extended Term of Imprisonment.

The court may sentence a person who has been convicted of a felony of the second or third degree to an extended term of imprisonment if it makes a finding incorporated in the record that his commitment for an extended term is necessary for protection of the public, on either of the following grounds:

- (1) that the defendant,
 - (a) has previously been convicted of two or more felonies committed at different times when he was over the age of sixteen; and
 - (b) has on the present occasion been convicted of a felony under circumstances which created a danger of death or serious bodily injury to others or which involved sexually aggressive conduct toward children; and
 - (c) was over twenty-one years of age at the time he committed the offence for which he is now being sentenced; or
- (2) that the defendant,
 - (a) has been convicted under a judgment of conviction which includes two or more felonies,
 - (i) whose maximum aggregated sentences exceed fifteen years, and
 - (ii) which were committed under circumstances which created a danger of death or serious bodily injury to more than one person or which involved sexually aggressive conduct against more than one child; and
 - (b) was over twenty-one years of age at the time he committed the offence for which he is now being sentenced.

The test of "dangerousness" that these provisions incorporate is suspect. Moreover, the section cannot be properly evaluated without some knowledge of what constitutes offences of the first, second or third degree. Nevertheless, if a limited system of extended sentences were considered desirable, either solely or in combination with a post-imprisonment preventive detention provision, the California plan suggests a model that, with appropriate modifications, might have much to recommend it. It would be necessary to review the grading of offences under the code, as well as the various maximum sentences that may be imposed in the ordinary case. The proposed maximum term of confinement on "extended sentence" could be increased if necessary¹⁹²—although this is probably undesirable, having regard to the fact that the offences involved are of the second and third degree, and the essence of the "extended sentence" concept is that the special sentence must not be out of all proportion to the sentence that might otherwise be imposed. The case is strong for retaining, as the Ouimet Committee proposals do not, some

¹⁹² But see notes 77-79 and accompanying text.

multiple offence condition of eligibility.¹⁹³ However, psychiatric criteria could be introduced as a *supplementary* requirement—possibly along the lines of the Model Penal Code formulation.¹⁹⁴ A provision for psychiatric assessment would then be required, which might take the form of a ninety-day remand or an interim sentence of the kind provided for under the United States federal system.¹⁹⁵ Having regard to the advantages that may accrue from examining the subject in a prison setting, probably both alternatives should be available. Finally, it is suggested that a full hearing on the issue—including all of the procedural safeguards discussed in the previous section—should be required.¹⁹⁶

Proposals for a term of preventive detention imposed at the end of a prison sentence have been criticized on the ground that they have a psychologically harmful effect on the offender.¹⁹⁷ It is arguable as to whether this is more damaging than the imposition of a fully indeterminate sentence at the time of trial. One can conceive, however, that the possibility that preventive detention proceedings might be instituted could create a grave feeling of disquiet among portions of the inmate population generally. This objection may be fatal to any such scheme¹⁹⁸—although it should be noted that there is evidence that some prisoners are at present confined beyond the term of their sentence on grounds of alleged mental illness.¹⁹⁹ Notwithstanding this

¹⁹³ See note 146 and accompanying text.

¹⁹⁴ See note 112. The phrase "mental condition is gravely abnormal" may present difficulties. Perhaps the "intellectual deficiency or emotional unbalance" language in the Maryland statute, or some other formulation, would be preferable. See *supra* note 112. The phrase "emotional unbalance" is interpreted in *Director of Patuxent Institution v. Maryland*, 221 A.2d 397 (1966).

¹⁹⁵ See text at note 169.

¹⁹⁶ This is not to suggest that these are all of the problems with the scheme as described. For example, there is the test of recidivism itself—the nature of the preceding convictions, and their frequency. Presumably the psychiatric criteria would help to fill this gap. Moreover, it would be necessary to so word the section as to avoid problems of interpretation of the kind that have occurred in England. See references cited in note 186. On the matter of the appropriate age for its imposition, see the references cited in note 79.

¹⁹⁷ See, e.g., Radzinowicz, *supra* note 18, at 164-66.

¹⁹⁸ See, e.g., Conrad, *Violence in Prison*, 364 ANNALS AM. ACAD. OF POL. & SOC. SCI. 113, at 118 (1966).

¹⁹⁹ See Jobson, *Commitment and Release of the Mentally Ill under Criminal Law*, 11 CRIM. L.Q. 186, at 197-200 (1969). After a review of cases committed to mental hospitals, the author concluded: "[I]t would appear that some scrutiny should be given the procedures by which a person is certified insane at Dorchester Penitentiary. The records suggest that federal authorities may use mental hospitals as a warehouse for troublesome prisoners about to be released on expiration of sentence." *Id.* at 199. Cf. Morris, *supra* note 135; White, Krumholz & Fink, *supra* note 135. The special problem that this presents for the inmate is suggested by the last mentioned authors on the basis of their "Operation Baxstrom" experience: "[E]arlier judgments . . . [had been] . . . that these men represented a group with a higher risk for aggressive, destructive behavior than either the criminal who had served his sentence or the psychotic requiring hospitalization. Superficially it appears that, somehow, a sum was taken of two negative labels, 'criminal' plus 'psychotic,' that yielded a supernegative value of 'the psychotic criminal'. These two labels derive from two different philosophies of human behavior and are perhaps complementary approaches to the same phenomenon. In any case, they do not have additive properties." *Id.* at 39.

significant objection, there are distinct advantages to preventive detention on the post-sentence model. It tends to keep separate the considerations that are relevant to ordinary sentencing decisions from those that apply in relation to preventive detention, thus reducing the likelihood that sentences will be imposed that are perceived as unjust.²⁰⁰ The post-sentence approach helps to avoid unnecessary "double stigmatization."²⁰¹ It is less open to prosecutorial plea-bargaining abuse—a practice that has been a major source of complaint about the use of the dangerous sexual offender and the habitual offender provisions of the Criminal Code. Moreover, the potential dangerousness of some offenders does not become apparent until they are observed in the prison setting—and, indeed, may develop as a response to the prison experience itself. For these several reasons, assuming the necessity of preventive detention, the imposition of the measure at the end of a term of imprisonment has much to recommend it—provided that it is carefully regulated in terms of the degree of social danger that is presented and that adequate procedural guarantees are provided.

Basically, two forms of post-sentence preventive detention have been suggested. The Legislative Committee in California have proposed a scheme that is closely related to its recommendations relating to extended sentences. The draft section reads, in part, as follows:

208. Extended Term on Petition of Adult Authority

On petition . . . to the court . . . the court may extend his sentence to the term prescribed by Section 206 [*i.e.*, fifteen years] if it finds that such extension is necessary for the protection of the public. Such a finding, which must be incorporated in the record, shall be based on the grounds that:

- (a) the person's record, both within and without the correctional system, reveals a clear pattern of assaultive or sexually aggressive behaviour; and
- (b) there is a substantial risk that he will at some time in the future inflict death or serious bodily injury upon another,

In making such a finding, the court shall proceed upon the same basis as in an original sentencing hearing and the person shall have the same rights as any person being sentenced.

The other approach, advocated by Dession and Silving, among others,

²⁰⁰ See, *e.g.*, *Regina v. Roberts*, [1963] 1 Ont. 280 (1962). Would this case have given rise to the controversy that it did if the issues of punishment and preventive detention had been kept separate, and if means had been available to retain the prisoner in the event that a lesser period of confinement failed to produce an amelioration of the condition that made Roberts a social danger? See also note 87 and accompanying text.

²⁰¹ The phrase is Morris's. See Morris, *supra* note 8, at 538. The question of stigma has been much discussed in the literature. One reference will suffice to indicate the problem that "labelling" can present: "It is generally believed that when an object is defined, the definition (attachment of a label) does not change the thing so defined. When human beings are defined (classified, and so forth), the act of definition itself modifies the information setting and may thus be said to change the object (person) defined through the definition process. The self-fulfilling prophecy is a factor to be reckoned with in all aspects of criminological and penological research." L. WILKINS, *EVALUATION OF PENAL MEASURES* 110-11 (1969). It may be, however, that the "stigmatization" issue will simply present itself at a later stage. See note 199.

is suggested by the provisions contained in Dession's Final Draft of the Code of Correction for Puerto Rico.²⁰² It provides that, in specified cases, "a person who is serving an ordinary or extended term of corrective custody which will expire in not more than 6 months may, where he is found to be less than responsible and socially destructive and is estimated that he will remain so constituted after the expiration of such term, be subjected . . . to extraordinary custody for so long as he may remain so constituted and destructive." The draft then goes on to provide as follows:

Periodic Review. In every case wherein an extraordinary measure subject to periodic review is in effect the Department of Justice shall at least once in every two years apply to the Court for a new determination in respect of the continuance of such measure. Such application shall include a recommendation with supporting information, and shall be on reasonable notice to the respondent. Where the respondent is in custody or irresponsible the Court shall appoint an attorney as guardian ad litem for the respondent if the respondent is not represented by an attorney of his own choice. In any event the respondent shall be entitled to a full hearing on the issue of further need for an extraordinary measure and shall be entitled to be present in person as well as represented by attorney at such hearing. Failure to afford such periodic review shall automatically terminate the extraordinary measure.

It will be noted that, under each of these proposed provisions, the medical-psychiatric centres will not be burdened with offenders on direct committal who are unresponsive to treatment. At least the possibility of selective intake will be retained.²⁰³ Nor will the sentencing judge be so easily led to assume that treatment will follow upon court disposition, when in many cases the offender is untreatable or the treatment is unavailable. The same may be said of the Model Sentencing Act and American Bar Association Project proposals—both of which have the further advantage that they are more explicitly directed to an overall reduction of long terms of imprisonment for the offender population as a whole.²⁰⁴ While it is not the intention to suggest that these various alternatives meet all of the objections raised in the preceding pages, it would appear that they are open to much less criticism than the proposals advanced in the Report of the Canadian Committee on Corrections.²⁰⁵

²⁰² See Professor George H. Dession's *Final Draft of the Code of Correction for Puerto Rico (with annotations)*, 71 YALE L.J. 1050, § 95 and § 85, at 1128-29 (1962). See also Silving, *supra* note 6, at 144. Cf. *German Penal Code*, Arts. 42e, 42f (Am. Ser. For. Penal Codes ed. 1961).

²⁰³ See note 94 and accompanying text. See also, McGarry & Cotton, *A Study in Civil Commitment: The Massachusetts Sexually Dangerous Persons Act*, 6 HARV. J. ON LEGISLATION 263, at 298-99 (1969) where the importance of control over intake receives special emphasis in the design of an appropriate legislative framework.

²⁰⁴ See notes 80-83 and accompanying text.

²⁰⁵ A great variety of statutory formulations is apparent in the legislation of other countries relating to special provisions for recidivistic, dangerous, incorrigible or similarly designated offender groups. See N. MORRIS, *THE HABITUAL CRIMINAL* 174-227 (1951); Radzinowicz, *supra* note 18. No attempt has been made to analyze these provisions in detail for purposes of this article. The Model Penal Code provisions have not been separately discussed because of their similarity, for present purposes, to parts of the California proposals.

VIII. CONCLUSION

Even these several alternative approaches, however, do not entirely lay to rest the moral dilemma that preventive detention legislation presents. Are we justified in imposing sanctions addressed exclusively to the prevention of future criminal conduct? Or, to phrase the issue in Morris' terms, "Whom shall we trust?"

It has been frequently enough observed that the gradual absorption of psychological and psychiatric concepts into popular consciousness has brought with it a very considerable expansion of penological expectations. Less frequently has it been noted that such expectations far outstrip the record of performance.²⁰⁶ More recent has been the recognition that psychiatry has come to serve, in the contemporary criminal justice and mental health systems, as a paralegal agency of social control—often in ways that cannot be explained or justified in purely medical terms. One need not accept extravagant challenges to psychiatry as a legitimate branch of medical science to appreciate the issues of social policy that this new psychiatric role raises, any more than one need allocate responsibility for this development as between psychiatry and law. It is enough that a problem exists. The nature and immediate relevance of the problem—although probably not its solution—are conveniently summed up in the following remarks by one of forensic psychiatry's more forceful critics:

While the mutual advantages of the collaboration of psychiatry and the law are emphasized, the disadvantages of this application are frequently overlooked. One disadvantage is . . . that psychiatric testimony tends to camouflage ethical issues by treating them as psychiatric facts. This discourages the consideration of these issues in the context of . . . law In the light of these considerations, serious consideration should be given to the advantages of an increased separation of the concepts and operations of psychiatry and the law. But just as there are pressures favoring the collaboration . . . , there are pressures opposing their separation Without the aid of psychiatrists, the law will be thrown back to its own difficult task of arbitrarily choosing those standards of conduct which will form a basis for distinguishing the legally franchised from the disenfranchised . . . with no pseudo-scientific justification for social action without a full airing of the ethical issues.²⁰⁷

Szasz has quite rightly questioned the assumption "that so-called 'knowledge', irrespective of its source of origin or function, can be usefully applied to problems in areas of inquiry other than the ones in which the 'knowledge' to be applied arose," pointing out that "[w]hile at times this may be possible, at other times such ventures mislead" ²⁰⁸ The more fundamental ques-

²⁰⁶ See in particular Dession, *supra* note 1, at 326-27.

²⁰⁷ Leifer, *The Competence of the Psychiatrist to Assist in the Determination of Incompetency: A Sceptical Inquiry Into the Courtroom Functions of Psychiatrists*, 14 SYRACUSE L. REV. 564, at 574-75 (1963).

²⁰⁸ Szasz, *Some Observations on the Relationship Between Psychiatry and the Law*, 75 A.M.A. ARCHIVES OF NEUROLOGY & PSYCHIATRY 297 (1956).

tion, perhaps, is what constitutes psychiatric "knowledge" for purposes of social application at all, and what is mere speculation or heuristic formulation deriving from clinical inference or theoretical postulate. The warning given by Jerome Michael, in a 1934 address to an eminent medical gathering, still holds true:

[W]e can justify radical changes in our methods of treating criminals in order to make our criminal law a more effective instrumentality of crime prevention, only if we possess a great deal of knowledge Now, legislators and judges and lawyers do not have that knowledge; and I ask you to tell me in all good conscience if it is to be found in medicine or elsewhere. I do not assert that it does not exist; I assert only that from my own researches I do not believe that it exists, and I think that most lawyers who have considered the matter thoughtfully share my belief. They are especially skeptical of psychiatry, and for a number of reasons which can be quickly summarized. They are skeptical of psychiatry because of the immodesty of some psychiatrists which has led them to make extravagant claims regarding their power of diagnosing and solving not only individual but also social problems. They are skeptical because of what they have been able to learn . . . regarding the unreliability of psychiatric diagnoses and the uncertainty of psychotherapy They are skeptical because of the widespread disagreement among medical psychologists about fundamental problems both of theory and of practice

. . . I do not mean that we should not try to make our criminal law a more effective instrumentality of crime prevention. I mean only that it is my belief that changes in the treatment content of the criminal law must be justified at the present time not by our knowledge but rather by our ignorance and the exigent character of the problem of crime control which warrants our proceeding more or less blindly In the absence of knowledge we must proceed tentatively and cautiously and we should regard whatever we do as an experiment to gain knowledge²⁰⁹

Notwithstanding claims of skepticism, the "sway of influence" of modern psychiatry runs strong. In the face of complex questions of legal policy, the will to believe in a "psychiatric solution" is compelling, and the capacity to separate the "myth" from the "accomplishment" is sorely tested. It is left to the reader to form his own judgment as to whether any form of preventive detention legislation for the "dangerous offender" can be justified. Hopefully the issues, and the alternatives, have been fairly set out. If there is one preferred note upon which to conclude, it is perhaps the now much-quoted warning of Francis Allen that "the values of individual liberty may be imperiled by claims to knowledge and therapeutic techniques that we, in fact, do not possess and by our failure to concede candidly what we do not know."²¹⁰ Without such candour and realism, criminal law reform may accomplish little more than substituting new myths for old.

²⁰⁹ Michael, *Psychiatry and the Criminal Law*, 21 A.B.A.J. 271, at 276 (1935).

²¹⁰ F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 37 (1965).