Reconsidering the 'New' Penology: Risk Management, Dangerousness and Judicial Decision-Making

by

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Abstract

As a result of the prevailing sense that 'nothing works' and the proliferation of risk oriented concerns in the criminal justice system, the current penal era has been characterized as a "new penology." According to Malcolm Feeley and Jonathan Simon (1992), this period is identified by the priority of risk management, the use of actuarial risk assessments and the growing need for system efficiency. In this study, discourse analysis was performed on judgments from dangerous offender hearings that took place in Ontario in the year 2010 in order to assess the extent to which the concepts of the new penology have infiltrated the process of judicial decision-making in Canada. Consistent with other research on frontline criminal justice practitioners, results indicate that, while judges do increasingly employ a risk-oriented and actuarial approach, they have not abandoned the individualistic considerations and rehabilitative ideals that characterized earlier penal practices. Implications of this finding and directions for future research will be discussed.

Keywords: new penology, risk management, actuarial assessment, dangerous offender, long-term offender

Dedication

For my Mom and Dad –

Thanks to you, an idea became a dream, and that dream is now a reality.

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Chapter One: Introduction

Assessing the New Penology

Prior to the 1970s, the criminal justice system was guided by rehabilitative ideals in which attempts were made to cure 'maladjusted' individuals of their deviant behaviour. In this period, which is referred to as a modern penal era, the individual offender was considered to be the central unit of inquiry within the administration of justice. However, it has been widely argued that the justice system has undergone a series of transformations that began in the early 1970s as a result of a shift away from rehabilitative goals and the growing belief that 'nothing works' in the effort to treat or cure offenders of their deviance. Malcolm Feeley and Jonathan Simon (1992) have characterized this period as being a "new penology," which is identified by a focus on risk management, the use of actuarial risk assessments, and a growing need for both cost and system efficiency. They argue that these changing priorities and practices are reflected in the use of new discourse, objectives and techniques, all of which deviate from the earlier focus on the individual offender.

While it has been widely observed that the penal system has undergone various transitions following the decline of the rehabilitative ideal in the latter half of the twentieth century (Eaton & Piper, 2008), it remains unclear to what extent Feeley and Simon's (1992) account of a new penal era accurately describes the current state of practices that form a part of the criminal justice system. Despite the claims of a 'new' penology, research has indicated that frontline criminal justice practitioners have not fully adopted the practices associated with the new penal era. Instead, it is argued that these professionals continue to rely on the practices and priorities of the pre-1970s 'modern' penal era, which is characterized by the use of individualized intervention to achieve the

goals of offender treatment and rehabilitation (Bayens, Manske, & Smykla, 1998; Lynch, 1998; Quinn & Gould, 2003). This research, which has primarily focused on the practices of probation and parole officers, thereby contests the practical existence of a new penology.

As a result of the apparent disparity, this thesis will examine the prevalence of the "new penology" within both the legislative and practitioner responses to dangerous offenders in Canada. In order to do this, an analysis has been performed on the judgments from Ontario dangerous offender hearings that were heard in 2010 and that resulted in an individual either being given a dangerous offender designation or a less-restrictive long-term offender designation. As these two designations are primarily distinguishable through considerations of risk management, the judicial reasoning in the cases provides an adequately rich research site that features judicial conceptions of risk and manageability, and that also reveals other priorities and practices that compete with the goal of risk management. The analysis of judicial decisions is especially relevant in the examination of a new penology, as judges shape the law through their interpretation and enforcement of legislation (Heard, 2006).

The central concern of this study is to analyze the various conceptions of risk elaborated in judicial decisions, and how these conceptions contribute to dangerous and long-term offender designations. This study also analyzes judicial perceptions and applications of actuarial risk measurements, individual psychological reports, previous risk management strategies, personal support systems, and institutional behaviour and programs in order to understand how judges conceive of 'risk.' It is expected that this research will contribute to the understanding of the role of risk within the criminal justice system, as a review of the literature indicates that previous examinations of the

implementation of concepts relating to the new penology has primarily focused on the practices of probation and parole officers, and has not specifically considered the practices of members of the Canadian judiciary.

This thesis consists of a total of seven chapters. Following this first chapter, in which I have outlined the importance of assessing the new penology, I review the evolution of the concepts of risk and dangerousness within the criminal justice system, and specifically relate this to the historical evolution of the dangerous offender legislation in Canada. This is followed by a discussion and critique of Feeley and Simon’s (1992) argument that current penal practices reflect a new penology. In the third chapter, I explain the study’s chosen method of discourse analysis and identify the sample of decisions from dangerous offender hearings that form the research site for this analysis. In the fourth chapter, I provide an analysis of the decisions in which an individual is found to be a dangerous offender, and specifically focus on the risk assessment process and consideration of individualized factors that influence an offender’s perceived manageability. This process is repeated in the fifth chapter, as I discuss the decisions in which an individual is given the less restrictive long-term offender designation and thereby reveal judicial conceptions of manageable risk. In the sixth chapter, I provide a synthesis of the analysis from the cases that resulted in a dangerous or a long-term offender designation and show that, while judges have adopted some aspects of the new penology, they still appear to follow the priorities and practices that characterize the earlier modern penal era. Finally, in the seventh chapter, I conclude by reviewing the finding that judges appear to resist a sole reliance on the principles of the new penology and discuss directions for future research on this topic.

Chapter Two: Literature Review

The Evolution of Risk, Dangerousness and the New Penology

Introduction

In this chapter, I begin by explaining society's pervasive preoccupation with future dangers, which I relate to the shifting priorities of the criminal justice system and Feeley and Simon's (1992) conception of a "new penology." Next, I discuss the evolution of the concept of 'dangerousness' in the context of Canadian legislation and review the use of expert testimony and risk assessment tools in the identification of high risk offenders. At the end of this chapter, I provide a critique of the new penology, specifically focusing on the development of crime policy and the practices of frontline criminal justice practitioners.

The Rise of Risk within Society

The criminal justice system's increasingly pervasive preoccupation with risk can be placed in the context of various socio-cultural transitions that, according to Ulrich Beck (2008), have resulted in the creation of a "risk society" in the period of advanced modernity. Despite the consistency in society's understanding of the term 'risk,' the source of perceived dangers and the response that they receive has evolved greatly over time. The concept of risk was first believed to relate exclusively to matters of physical space, which is reflected by its initial use in the sixteenth century by explorers entering unknown bodies of water. Eventually, the concept of risk also infiltrated matters of time, which is shown by its relation to investment and banking practices. Currently, as is reflected by the proliferation of risk-oriented concerns, the term risk is used in relation to any situation that may occur in the future and that provokes a sense of anxiety and uncertainty among individuals or within the population as a whole (Giddens, 2003).

The period of simple modernity, which existed from the late eighteenth century to about 1970 (Beck, 2008), featured the growth of the industrial sector and can be characterized by a preoccupation with the production of wealth and social order (Giddens, 1991). In this era, risks were categorized as being "external" and as either being the result of nature or tradition. Whereas risks that are unleashed by nature can include 'external' occurrences such as a plague or flooding (Giddens, 2003), other individual risks may be the result of dangerous choices that a person makes in order to "indulge…in…a bit of excitement [in] an otherwise orderly and predictable life" (Franklin, 1998, p. 12).

This period is characterized by the public's confidence in science and their unreserved support and acceptance of expert knowledge (Giddens, 2003). As a result, a general sense of predictability surrounding risks developed, which made them increasingly controllable and manageable (Giddens, 1998). The benefit of science in modern society is exemplified by various "risk-reducing" initiatives, such as the development of safe drinking water and advancements in prenatal care, which have played a significant role in improving the health of people around the world (Giddens, 1991, p. 115).

In contrast, the current phase of modernity, which is referred to as being either 'reflexive' or 'advanced,' began in the early 1970s and is identified by the development of Beck's (2008) "risk society" and social preoccupation with large-scale dangers. The types of risk that are present in the risk society are distinct from those that are found in the period of simple modernity, as future hazards are no longer exclusively related to tradition or nature, but are instead "manufactured" by society's use of new technology and the creation of new knowledge (Giddens, 2003). Manufactured risks, which have

been referred to as being either "high-consequence" (Giddens, 1991, p. 114) or "techno-scientifically produced," are created by humanity's alteration of nature in the evolving processes of industrialization and globalization (Beck, 2008, p.19), and include dangers such as global warming and the collapse of the world economy (Giddens, 2003).

In this sense, modernity is "a double-edged phenomenon," as the growth of scientific knowledge has improved both the quality of life and the security of human beings throughout the world (Giddens, 1990, p. 7). Although there may not be an actual increase in the level of danger that individuals face in the period of advanced modernity (Giddens, 1991), the type of risks that have been manufactured transcend the personal and individualized arena of security and exist on a global scale as a result of their potential for irreversible and large-scale destruction. As a result, Beck (2008) argues that whereas the period of simple modernity involved the capitalist distribution of wealth among people of different social classes, the period of advanced modernity is defined by the equal distribution of risk among all members of society.

Furthermore, the degree of uncertainty surrounding manufactured risk is exasperated by the recent recognition of limitations in scientific knowledge. In the absence of an authoritative expert body that fully understands the nature of hazards in the risk society (Giddens, 1990), people are increasingly preoccupied with the avoidance and management of such threats and dangers (Beck, 2008). This behaviour is the result of a realization that the true consequences of a manufactured risk are unknown, and that "if things 'go wrong,' it is already too late." This realization is exemplified by the 1986 Chernobyl nuclear accident in Ukraine, in which the exposure of large amounts of radiation has resulted in irreversible damage to the environment and consequences to the population that are still not fully understood (Giddens, 1991, p. 122).

Transitions in the Criminal Justice System

Society's preoccupation with avoiding and managing risk has paralleled various philosophical changes that have taken place in the criminal justice system (Kemshall, 2003). It has been widely observed that, toward the end of the nineteenth century, the penal system witnessed a shift away from retribution and the focus on punishing an offender for their actions to a treatment model that focused on rehabilitating 'maladjusted' individuals (Eaton & Piper, 2008; Garland, 2003; Kemshall, 2003).

Throughout this period, which David Garland (2003) refers to as "penological modernism," there was a widespread recognition that responses to crime must be tailored to the unique circumstances of the involved individual and that treatment must address the factors that contributed to their deviant behaviour. In order to do this, the penal system formed a reliance on expert knowledge that was guided by scientific research and involved the intervention of medical practitioners or, more specifically, psychiatrists and psychologists.

However, beginning in the early 1970s and paralleling the growth of the risk society, the criminal justice system began to be plagued by a growing sense that 'nothing works' in the effort to rehabilitate offenders. This view was present among academics, penal practitioners and the public, as they experienced a sense of cynicism toward the treatment model and became disillusioned with its effectiveness. Consequently, this period is characterized by a shift away from rehabilitative ideals and the notable absence of a new theoretical approach to take its place (Kemshall, 2003).

Identifying a "New Penology"

As a result of the general consensus that rehabilitative practices have failed and the overall proliferation of risk-orientated concerns, the criminal justice system has

become increasingly preoccupied with the need to manage the threats and dangers that are posed by offenders. Malcolm Feeley and Jonathan Simon (1992) have referred to this era as the "new penology," which has the primary goal of managing offenders as opposed to focusing on their transformation or rehabilitation. Although the rehabilitation of offenders and their reintegration in society still remains an issue of importance in this period, the need to determine and address the underlying pathology of deviant behaviour towards rehabilitation is no longer regarded as necessary for the successful administration of justice (Eaton & Piper, 2008).

According to Feeley and Simon (1992), the "new penology" features three identifiable shifts from the period of penal modernism. The first is the justice system's reliance on new forms of discourse or language, which occurs through the replacement of retributive punishment in the period of pre-modernity and clinical diagnosis and offender treatment in the period of penological modernism with a primary emphasis on probability and risk. The second transformation that takes place in this era is the development of new objectives within the penal system, which is reflected through the growing need for economic efficiency and the effective operation of internal processes. This is exemplified by the use of recidivism statistics, as the detection of criminal activity among released offenders is no longer considered to be a measure of success in offender intervention, but is rather viewed as an indication of the "efficien[t] and effective" operations of the justice system (p. 455). The final transition that occurs in the "new penology" involves the use of new techniques, which are intended to categorize individuals who commit similar offences in order to both facilitate the system's managerial function and to implement uniform levels of intervention based on the type of offence committed.

As an example of the new penology's objective of economic efficiency, Feeley and Simon (1992) have identified various correctional interventions and practices that exist along a "custodial continuum" on which offenders are classified by the risk that they pose to society (p. 459). In order to identify and classify offenders in the new penology, actuarial tools and techniques are used to sort offenders into aggregates of individuals who have committed similar offences and therefore perceivably require similar levels of intervention. This practice, which is referred to as "actuarial justice," is based on the use of risk calculations within the insurance industry and relies on advanced statistical techniques and data gathered from previous offenders in order to calculate the probability of an individual committing future criminal acts (Kemshall, 2003). As support for the rehabilitative philosophy declined, this method of assessing offenders was favoured as a result of growing criticisms of perceived bias and erroneous assessments by those seen as experts within the field (Bonta, 1996).

The Evolution of 'Dangerousness'

Central to the concept of risk management and the need to control and prevent various different types of threats and hazards is the existence of a group of individuals who are believed to pose a danger to society. As a result of their perceived high level of risk, a large emphasis within the criminal justice system has been placed on regulating the behaviour of these individuals as well as containing them from the rest of society (Pratt, 1996).

Although individuals who are currently categorized as 'dangerous' are typically thought to be sex offenders as a result of their public-induced persona as "modern-day monsters" (Simon, 1998, p. 456), the criteria for being given such a designation is quite fluid and has varied greatly over time. As Pratt (1996) explains in his writing on the

evolution of the concept of dangerousness in several English-speaking jurisdictions, the first criminals to have been labelled as being 'dangerous' were either "professional [or] habitual property offenders [or] small-time fraudsters" (p. 23). Such offenders were given this designation as a result of their widespread threat to the entire community; whereas, for example, the risk posed by an act of domestic murder is quite specific, all citizens are consistently threatened by the potential of being victimized by an act of burglary.

Beginning in the 1930s, in addition to property offenders, those who were found guilty of committing a sexual offence were increasingly being categorized as 'dangerous,' especially when their crime involved a child victim (Pratt, 1996). Petrunik (2003) explains that such offenders are often labelled as dangerous because their crimes are viewed as a "violation of the self that damage[s] the very core of victims." Furthermore, he claims that the damage caused by a sexual offence can "involve a sense of moral pollution" and that, with regard to children, "the more sacred, pure, or innocent the victim…the more profane or unclean the assault and the persons committing it are considered to be" (p. 44).

Homosexuals were also being frequently designated as 'dangerous sexual offenders' as a result of a social stigma, which perceived homosexuality as a threat to children, families and the birth rate. This continued until the early 1960s, when developments within the field of psychology resulted in homosexuals no longer being viewed as dangerous, but rather as suffering from a form of mental illness (Pratt, 1996). These stigmas have lessened over time as a result of changing perceptions of sexuality and growing ideals of equality within society; Canada decriminalized homosexual activity

in 1969 (Weiten & McCann, 2007) and homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders in 1973 (Comer, 2007).

Simultaneously, as a result of a reduction in the perceived level of risk that is posed by property offenders, such individuals are no longer categorized as being 'dangerous.' This shift in the conceptualization of dangerousness is the outcome of an increasing public view that products are replaceable within the consumer industry and is also associated with a growing sense of security against loss and damage that is provided by the insurance industry (Pratt, 1996).

Thus, the dangerous offender population now typically consists of either repeat or violent sexual offenders, with such a designation being reserved for those individuals who pose an unacceptably high degree of risk to the public and who commit criminal acts that are deemed to be of the utmost severity (Pratt, 1996). The refining of the criteria used to designate an individual as being dangerous is consistent with Feeley and Simon's (1992) new penology, as it reflects a state of economic restraint within the justice system in which resources are reserved for offenders who pose the most significant degree of risk to society.

Legislative Response to Dangerousness in Canada

In order to protect the public, many governments around the world have enacted legislation that is intended to manage the degree of risk that is posed by dangerous offenders (Bonta, Zinger, Harris, & Carriere, 1998). These statutes are typically "pre-emptive" in nature, as they are meant to respond to acts of violence that have not yet occurred (Hebenton & Seddon, 2009, p. 343). Thus, the effort to manage dangerous offenders reflects the use of a "precautionary logic" among criminal justice officials, as

the courts impose various restrictions on individuals for acts of violence that they may commit in the future (Hebenton & Seddon, 2009, p. 348).

Within the Canadian legal system, the evolution of pre-emptive legislation that targets dangerous individuals reflects the changing criteria that have been used in the designation of such offenders in other English-speaking countries over time. The first example of preventive legislation in this country was the *Habitual Offender Act*, which was implemented in 1947 (Heilbrun, Ogloff, & Picarello, 1999). At the time, a habitual offender was explained in section 660 of the *Criminal Code* as an individual who has, "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 [a] persistent…criminal life" (McRuer et al., 1958, p. 9).

Shortly following the emergence of this legislation, the *Criminal Sexual Psychopath Act* was enacted in 1948 (Heilbrun et al., 1999). A criminal sexual psychopath was explained in section 659 of the *Criminal Code of Canada* as "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 persons" (McRuer et al., 1958, p. 8). According to the initial legislation, in order to be given such a designation, an offender must have a history of convictions for "attempted or actual assault, rape, or carnal knowledge." This list was expanded when the *Act* was amended in 1953 to include offenders who have been convicted of "buggery, bestiality, or gross indecency" (Trevethan, Crutcher, & Moore, 2002, p. 3).

Therefore, both of these statutes, which were modelled after similar pre-emptive legislation that was in place in England and the United States at the time (Heilbrun et al., 1999), targeted persistent criminal offenders that were perceived to pose an unacceptable degree of risk to society. In order to protect the public from these offenders, the *Habitual Offender Act* and the *Criminal Sexual Psychopath Act* both allowed the courts to sentence an individual to an indeterminate period of imprisonment (Valiquet, 2008).

The *Criminal Sexual Psychopath Act*, however, was criticized as being ineffective in the management of violent sexual offenders (Bonta et al., 1998), as it was applied to fewer than twenty-five individuals in the seven years following its enactment (McRuer et al., 1958). A significant procedural challenge that the courts faced when applying this legislation involved the requirement that an offender be diagnosed as a 'criminal sexual psychopath' by two psychiatrists (Bonta et al., 1998). At the time, many health care professionals did not feel that the term 'psychopath' had a "precise clinical meaning." This view often caused conflict between psychiatrists and members of both the legal profession and the public, as the latter two groups were of the position that the term could indeed be defined and applied in an accurate and consistent manner (McRuer et al., 1958, p. 15).[1]

As a result, the *Criminal Sexual Psychopath Act* was replaced by *Dangerous Sexual Offender* legislation in 1960 (Bonta et al., 1998). One of the key differences between the two statutes is that the newly enacted law did not require an individual to have a history of persistent criminality; rather, a person could be declared a dangerous

[1] This difference between medical reluctance to use the term psychopath due to its clinical imprecision and the public and legal community's accepted use of the term still continues to exist (Taylor & Gunn, 2008).

sexual offender and given an indeterminate sentence after having committed only one offence if they "appeared to be highly dangerous on the basis of their personal history and the circumstances of their offence" (Petrunik, 1994, p. 78). Additionally, in a manner that is consistent with the eventual demise of the penal system's emphasis on the rehabilitation of offenders, "a dangerous sexual offender's *lack of power to control* his/her sexual impulses was changed to his/her *failure to do so*" [emphasis in original] in the newly enacted legislation (Trevethan et al., 2002, p. 3).

As was the case with the *Criminal Sexual Psychopath Act*, the *Dangerous Sexual Offender* legislation was plagued by a significant amount of criticism. One of the primary concerns with this pre-emptive law is that it "focused exclusively on sex offenders" and did not address the threat posed by "violent nonsexual offenders" (Bonta et al., 1998, p. 379). Furthermore, there appeared to be "regional disparities" in how the legislation was applied to offenders throughout Canada as well as many objections surrounding the requirement of only a "brief psychiatric interview" to establish one's degree of dangerousness (Trevethan et al., 2002, p. 3).

Consequently, in 1977, the *Dangerous Sexual Offender* provision of the *Criminal Code* was replaced by a new form of pre-emptive legislation that was intended to target dangerous violent offenders. At the same time, the *Habitual Offender Act* was repealed as a result of growing criticism for not addressing the public's fear of violent offenders and instead focusing on what was deemed to be " 'persistent petty' offenders" (Bonta et al., 1998, p. 379). The demise of the habitual offender legislation was in accordance with society's evolving perception of dangerousness and also reflected Feeley and Simon's (1992) new penology, as the economic burden of indefinite imprisonment dictates that it

should be reserved for only those offenders who are at the extreme end of the continuum with regard to risk.

In response to the various criticisms of previous preventive measures, the Canadian government implemented *Dangerous Offender* legislation in 1977 (Trevethan et al., 2002). The current version of this legislation is set out in section 753(1) of the *Criminal Code* (1985), which states that:

> The court shall find the offender to be a dangerous offender if it is satisfied
>
> (a) that the offence for which the offender has been convicted is a serious personal injury offence…and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
>
> (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
>
> (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or
>
> (iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature

> as to compel the conclusion that the offender’s behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or
>
> (b) that the offence for which the offender has been convicted is a serious personal injury offence…and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

Central to the dangerous offender designation is the concept of a “serious personal injury offence,” which is defined in section 752 of the *Criminal Code* (1985) as:

> (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
>
> (i) the use or attempted use of violence against another person, or
>
> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,
>
> and for which the offender may be sentenced to imprisonment for ten years or more,
>
> or
>
> (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

Thus, the dangerous offender provisions of the *Criminal Code* deviate from previous legislation that exclusively targeted individuals who commit crimes of a sexual nature and instead attempt to protect the public from both sexual and nonsexual violent high-risk offenders (Bonta, Harris, Zinger, & Carriere, 1996). In order to do this, the concept of a 'serious personal injury offence' was created, which "was introduced with the intent of bringing into focus the perceived 'dangerousness' of the offender" (MacAulay, 2001, p. 70). Individuals who are convicted of either treason or murder are not categorized as having committed a 'serious personal injury offence' and, therefore, do not qualify for a dangerous offender designation, as "these crimes already require a sentence of life imprisonment" (Bonta et al., 1998, p. 379).

The dangerous offender legislation outlines various procedural requirements that must be adhered to prior to a judicial determination of an individual's 'dangerousness.' Following the approval of the province's attorney general, a dangerous offender application can be initiated by a Crown attorney once an individual has been convicted of an offence and prior to their sentencing hearing. In order for a person to be designated as a dangerous offender, the Crown must present evidence before a judge, who is sitting without a jury (Valiquet, 2008), that shows, beyond any reasonable doubt, that "the underlying offence is a 'serious personal injury offence' " and that the offender is "an actual threat and a risk of recidivism for society" (Valiquet, 2007, p. 14-15). With regard to the burden of proof, a reverse onus is placed on the offender if he has been convicted of three 'primary designated offences'[2] for which he has, or will likely be, imprisoned for

[2] A primary designated offence includes attempt to commit murder, sexual assault, aggravated assault, assault with a weapon or causing bodily harm, discharging a firearm with intent, and kidnapping. For a full list of offences that qualify as a primary designated offence, see section 752 of the *Criminal Code*.

two or more years. In these cases, once the Crown brings forward a dangerous offender application, the individual is presumed to be a dangerous offender unless he can show that, on a balance of probabilities, he does not meet the dangerous offender criteria (Public Safety Canada, 2009).

Since the legislation's enactment in 1977, there have been a series of amendments to the options that a judge has when sentencing an individual who has been designated as a dangerous offender. In 1997, an amendment to the *Criminal Code* stripped judges of their discretion when sentencing dangerous offenders by requiring that such individuals be given an indeterminate sentence (Petrunik, 2003). However, this changed in 2008 with the passage of the *Tackling Violent Crime Act*, which gave judges "the option of sentencing dangerous offenders to indeterminate detention, a determinate sentence plus a long-term supervision order, or simply a determinate sentence" (Public Safety Canada, 2009, s. 1.2.2). This reflects an increasingly prevalent undertone within penal culture that the courts must be conscientious of less restrictive options when sentencing offenders, which is re-affirmed by the provision of the *Criminal Code* (1985) that states that "the court shall impose a sentence of detention in a penitentiary for an indeterminate period unless it is satisfied…that there is a reasonable expectation that a lesser measure…will adequately protect the public" (s. 753(4.1)). It also reflects the new penology's emphasis on economic efficiency, as indeterminate sentences tend to be a very expensive option.

Although dangerous offenders who are given indeterminate sentences are "monitored for the rest of their lives" (Valiquet, 2008, p. 6), they can apply for full parole after being in custody for seven years (Public Safety Canada, 2009). This is significantly longer than the three years that a dangerous offender was originally required to wait before applying for full parole (Coles & Grant, 1999) and reflects a growing sense of

managerialism within the criminal justice system. The reduction in the frequency of parole hearings for dangerous offenders is indicative of an increased focus on internal efficiency within the penal system and, to a certain extent, also reflects a lost expectation of rehabilitation and a growing emphasis on simply containing high risk populations from the public.

Following the enactment of the dangerous offender provisions of the *Criminal Code*, the most notable change to Canada's preventive legislation occurred in 1997 with the creation of a new long-term offender designation (Valiquet, 2008). The existence of this measure can be seen as another node on Feeley and Simon's (1992) concept of a "custodial continuum" (p. 459), as it is intended to address the "substantial risk [of] those offenders who have a high likelihood of committing further sexual offences, but who do not meet the criteria for [the] designation of [d]angerous offender" (MacAulay, 2001, p. 102). According to section 753.1 (1) of the *Criminal Code* (1985):

> The court may…find an offender to be a long-term offender if it is satisfied that
>
> (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
>
> (b) there is a substantial risk that the offender will reoffend; and
>
> (c) there is a reasonable possibility of eventual control of the risk in the community.

Therefore, with regard to dangerousness, the long-term offender provision differs from the more restrictive dangerous offender designation. While it does attempt to address those individuals who pose a significant risk of reoffending, the 'risk' of a long-term offender is comprehended as being foreseeably manageable in the community. In

order to do this, section 753.1 (3) of the *Criminal Code* (1985) provides that, after finding an individual to be a long-term offender:

> The court….shall
>
> (a) impose a sentence for the offence for which the offender has been convicted, which must be a minimum punishment of imprisonment for a term of two years; and
>
> (b) order that the offender be subject to long-term supervision for a period that does not exceed 10 years.

This provision is significant because it allows for high-risk offenders to receive community supervision and ongoing support from members of the Correctional Service of Canada following the completion of their "regular sentence." Although the Crown can pursue a long-term offender application at its discretion (MacAulay, 2001, p. 103), offenders who are the subject of an unsuccessful dangerous offender application can also be considered for this less-restrictive designation (*Criminal Code*, 1985, s. 753(5)).

Expert Testimony and the Assessment of Risk

According to Heilbrun et al. (1999), the Courts rely heavily on forensic mental health experts in their assessment of an offender's propensity to cause future harm to society. This reliance is necessitated by the current dangerous offender provisions of Canada's *Criminal Code*. If a prosecutor initiates a dangerous offender application and the Court concludes that there are "reasonable grounds" to believe that it "might" be successful, the offender is required to have "an assessment performed by experts" (*Criminal Code*, 1985, s. 752.1(1)). This is in order to provide evidence regarding an offender's risk of violent recidivism and potential for treatment. Although the current model only requires the testimony of one 'expert,' prior to a 1997 amendment, the Court

needed to have separate assessments completed by two psychiatrists or psychologists (Bonta et al., 1998), one of whom was responsible for testifying on behalf of the Crown, and the other on behalf of the defense (MacAulay, 2001).

The changes to the assessment process were intended to diversify the pool of professionals who can provide evidence at a dangerous offender hearing and permits for "the use of only one 'neutral' expert" (MacAulay, 2001, p. 74). However, despite the attempt to attract the testimony of different types of professionals, Heilbrun et al. (1999) claim that psychiatrists and psychologists are still predominantly used in order to help the court to assess an offender's risk and criminality. Even though not put into common practice, this legislative change reflects the new penology's focus on efficiency and was one of a series of procedural changes to Canada's dangerous offender legislation that attempts to "streamline the procedure" (Trevethan et al., 2002, p. 4).

In testifying at a dangerous offender hearing, psychiatrists and psychologists often make reference to actuarial data and clinical experience (Coles & Grant, 1999) in order to inform the court on issues of public safety and an offender's propensity for treatment. In addition, such experts often present evidence to the court regarding the likelihood of an offender to recidivate as well as the presence or absence of any psychopathologies that may play a role in explaining their behaviour (Heilbrun et al., 1999).

It is apparent that Canadian judges tend to be persuaded by the assessments that are provided by experts. According to Zinger and Forth (1998), this is evident by the fact that judges "dedicate a large portion of their deliberations to the evaluation of expert testimony," and they make frequent reference to the information provided by these professionals in order to support their decisions (p. 238). Moreover, in a review of Canadian criminal court cases, Zinger and Forth (1998) found that an expert's testimony

regarding the presence of an offender's psychopathy[3] is typically associated with what they qualify as being "harsher dispositions" (p. 244). This result is further substantiated by Lloyd, Clark and Forth's (2010) review of 136 dangerous and long-term offender hearings, in which they identified a "moderate [and] tentative" trend between offender psychopathy scores and trial outcome (p. 334). At a minimum, these findings indicate that expert testimony regarding the outcome of an offender's risk assessment does appear to be an influential factor in the process of judicial decision-making.

Despite the frequent reliance on actuarial instruments when assessing the risk posed by an offender, such tools have been heavily criticized because of issues with their accuracy (Heilbrun et al., 1999). According to Lave (2011), actuarial tools are particularly vulnerable to accuracy concerns because of their low base rate, which refers to the fact that, of a population of offenders, very few actually reoffend. Additionally, there is a significant amount of doubt regarding the reliability of these tools as the majority of these instruments have been developed from populations of either incarcerated prisoners or institutionalized psychiatric patients and have not been validated on an 'outside' or secondary population (Coles & Grant, 1999).

Even if actuarial tools provide an accurate assessment of the probability that an offender will commit future harm, such results are problematic because it is difficult to make an inference about a specific individual based on the statistically reported findings (Vess, 2008). This is particularly concerning when one considers the practice of pre-

[3] 'Psychopathy' is considered in judicial decisions despite its lack of a 'precise clinical definition' as mentioned in footnote 1. For the purpose of this study, a psychopath is defined as having a personality disorder that is characterized by manipulative and anti-social behaviour, acts of impulsiveness, and an absence of empathy. A higher score on a psychopathy measure is generally associated with high risk behaviour and is often considered to be a risk factor in the prediction of an offender's criminality and propensity to commit future acts of violence (Pozzulo, Bennell, & Forth, 2009).

emptive sentencing as, in the interest of protecting society, the erroneous assessment of an individual's level of risk can result in unnecessary and unfounded restrictions to their liberty (Henham, 1997).

Critique of the New Penology

Although Feeley and Simon's (1992) "new penology" does appear to explain various transitions that have taken place within the criminal justice system and the new focus on offender risk, their conception of a new penal era has been criticized as a result of its perceived incompleteness and for its inaccurate portrayal of frontline criminal justice practitioners. This sentiment is consistent with David Garland's (2001) observation that the justice system's "new practices and mentalities co-exist with the residues and continuations of older arrangements" (p. 167).

The development of crime policy.

Of specific relevance to the development of dangerous offender statutes, it has been widely observed that the new penology neglects to account for the role of an increasingly punitive populous in the development of crime legislation. This concept, which Anthony Bottoms (1995) refers to as "populist punitiveness," explains that politicians enact harsh and punitive legislation because they believe that such measures will address perceived growths in the crime rate and will satisfy the public's desire for 'tough on crime' laws.

In a subsequent article, Simon and Feeley (2003) do concede that recent developments in crime policy do not reflect the new penology and its focus on economic efficiency, but rather appear to be a response to a "near-primitive public anger" (p. 77) toward matters of crime and deviance. This is consistent with Simon's (1998) earlier evaluation of sex offender laws in the United States, as he recognizes that such legislation

reflects a merge of the new penology and populist punitiveness, as “politicians pass laws expressing populist punitiveness while relying on the managerial skill of penal professionals to keep the costs down by applying the techniques and strategies of the new penology” (p. 455). Alternatively, Garland (2001) claims that politicians may deviate from economic forms of crime control in an attempt to protect society from dangerous offenders at “ ‘whatever the cost,’ ” which derives from a “ ‘value rational’ ” as opposed to “ ‘purpose rational’ ” approach to managing crime (p. 191). Despite the differences between the new penology and populist punitiveness, both approaches to crime policy are similar in that they reject any principles of rehabilitation.

The practices of criminal justice practitioners.

Despite Feeley and Simon’s (1992) claim that the work of criminal justice practitioners has transformed to reflect the principles of the new penology, many studies that have examined the practices of probation and parole officers have indicated that the managerial characteristics of the new penal era have not infiltrated frontline criminal justice employees to the extent that was originally believed. This is apparent in a twelve month ethnographic study at a parole field office in central California, in which Lynch (1998) found that most parole officers managed the risk posed by offenders using “hands-on [and] ‘proactive’ crime-fighting” techniques, which include fieldwork, surveillance and “being ready and able to make arrests at the first sign of trouble” (p. 855). Thus, despite the increased system-wide use of actuarial risk assessment tools to categorize individuals into aggregates and the growing focus on internal management processes and efficiency, parole officers preferred the use of traditional investigative skills when assessing and managing offenders.

A quantitative analysis of data collected from 559 parole officers in Texas indicates that, contrary to the new penology, parole officers still have a strong desire for additional treatment resources to aid in the rehabilitation and reintegration of offenders (Quinn & Gould, 2003). The fact that frontline professionals have not adopted the principles of the new penology is further illustrated by a sixty day study of the practice of intensive supervised probation in a mid-western county of the United States. Bayens et al. (1998) found that probation officers do not provide uniform levels of support and supervision to offenders based on their risk classification. Rather, in contrast with new managerial objectives, the study shows that, on average, probation officers often spend more time monitoring and interacting with offenders who are placed in a lower risk category than those who are categorized as posing a high degree of risk.

These findings are particularly interesting, as they indicate that the practices of frontline criminal justice practitioners in the United States do not fully reflect the managerial and risk-oriented principles of the new penology. As a result of these inconsistencies between the theoretical and practical accounts of the new penology, it is somewhat unsurprising that similar discrepancies are found in studies that assess the prevalence of a new penology in the work of criminal justice practitioners in countries outside of the United States (e.g., Deering, 2011; Fitzgibbon, Hamilton, & Richardson, 2010; Kemshall & Maguire, 2001; Robinson, 2002).

With a specific focus on Canada, Hannah-Moffat (2005) claims that correction officers have never exclusively used actuarial tools in order to assess an offender's risk and manageability. Instead, offenders in this country are typically assessed through a consideration of both their risk and their 'needs,' which accounts for "theoretically relevant items that [are] statistically shown to be correlated with criminal conduct," such

as employment, personal relationships and the presence of substance abuse (p. 33). This process, which is referred to as a "third-generation risk assessment," reflects a merger of sorts in the tools and techniques that form a part of both first-generation and second-generation risk assessments. A first-generation risk assessment uses "unstructured clinical judgment" and is typically associated with a rehabilitative approach and a second-generation risk assessment uses "static historic factors" in order to statistically predict an offender's future behaviour, which reflects the practices of the new penology (p. 32). Third-generation risk assessments were developed in the last decade of the twentieth century, and rely on professional judgment and clinical discretion as a result of both "interpretive" and "subjective rating scales" that allow for the use of an "override" when it is deemed to be appropriate (p. 36).

According to Hannah-Moffat (2005), the merger of both an actuarial and clinical approach in the evaluation of offender risk is favoured among criminal justice professionals, as it is believed that this will create a more accurate assessment and will "allow for targeted interventions" (p. 32). As such, it appears that Feeley and Simon's (1992) claim that criminal justice practitioners primarily rely on managerial and risk-oriented priorities is overstated and does not entirely apply in Canada, as frontline workers do appear to rely on actuarial techniques in order to support, rather than replace, their clinical judgment and offender rehabilitation ideals.

Summary

While it is apparent that aspects of Beck's (2008) "risk society" have infiltrated the criminal justice system, research has indicated that Feeley and Simon's (1992) concept of a "new penology" overlooks the significance of non-managerial factors in the development of crime policy and also undermines the contribution of criminal justice

practitioners. This finding is particularly interesting in the context of dangerous offenders, as such individuals are considered to be of an extreme degree of risk when compared to the general population of offenders and are, therefore, the subject of intense restrictions that are put in place by the justice system (Pratt, 1996). In this thesis, I examine the applicability of the risk-oriented new penology in terms of both the legislative and judicial practitioner responses to Canadian dangerous offenders in order to identify whether a dichotomy exists between the concepts of the new penology and the treatment of high risk offenders within the criminal justice system.

Chapter Three: Method

A Discourse Analysis of Court Judgments

Introduction

In order to assess the extent to which the concepts of the new penology have infiltrated the practices of judicial decision-making, a discourse analysis was performed on a selection of court judgments from Canadian dangerous offender hearings. In this chapter, I review the significance of discourse analysis and explain why it is the appropriate research method for this study. Next, I identify the research site and describe the significance of including the chosen decisions in the sample. Finally, I discuss the techniques for data analysis and will review the limitations of this study.

Discourse Analysis as a Research Method

Discourse analysis is a qualitative research method that is used to "explore how…socially produced ideas and objects [are] created[,] maintained and held in place over time" (Phillips & Hardy, 2002, p. 6). The rationale for this method of study is explained by Kress (1995), who states that "texts are the sites of the emergence of the complexes of social meanings," and are created in a way that reflects individual and institutional histories, the present context, and unequal distributions of power (p. 122). Therefore, the use of discourse analysis, which evolves from the recognition that text produces a social reality, involves a focus on "how language constructs phenomena, not how it reflects and reveals it" (Phillips & Hardy, 2002, p. 6).

In this study, judicial decisions are used as a research site in order to examine how judges conceptualize risk. A research site is comprised of "bodies of texts," and it is through identifying and comparing the construction of text that a researcher is able to identify discourse (Phillips & Hardy, 2002, p. 5). Judicial decisions are particularly

important sites for discourse analysis, as judges are seen as culturally authoritative and their decisions are backed up by the power of the state. While judges are well-trained in applying legal principles to facts, they are not immune to broad social trends, such as popular understandings of risk (Merry, 1995). Thus, judicial decisions are sites where 'social realties' of risk are both produced and applied.

Selection of the Research Site

Judgments from dangerous offender hearings were collected from the online database 'Quicklaw,' which catalogues judges' written decisions for court cases that have taken place in Canada (Lloyd et al., 2010). These judgments are considered primary sources of information, as they provide the written reasons for a judge's decision in a particular case. Also, it should be noted that court judgments are particularly significant within the field of law, as a judge's decision creates a precedent for other courts to follow.

Using the Quicklaw database, a search of the term "dangerous offender" was performed, and the results were limited to cases that took place in an Ontario court between the dates of January 1, 2010 and December 31, 2010. For the purpose of this study, the sample of dangerous offender applications was restricted to judgments that took place in the year 2010, as this was the most recent and complete calendar year at the beginning of the research project. Also, the sample was restricted to dangerous offender applications that were heard by a lower court in Ontario, as previous research has consistently shown that the provinces of Ontario and British Columbia are the two jurisdictions in this country that sentence the largest number of dangerous offenders in a year (Trevethan et al., 2002). The study focuses on lower court decisions because these are the first hearings of dangerous offender applications where judges hear evidence, decide facts and then apply the law. Appeal courts primarily focus on errors in

applications of law made by lower court judges, and thus are less central to the judicial construction of certain facts as 'more risky' than others.

The search of the Quicklaw database returned forty Ontario court rulings that included the term "dangerous offender" in the year 2010. Twenty-eight of these documents were excluded from the study because they did not feature a judge's decision at a dangerous offender hearing as to whether an individual is either a dangerous or a long-term offender. Instead, many of the excluded documents featured either a ruling that is related to a procedural requirement of the dangerous offender legislation or a finding of the Ontario Court of Appeal as it relates to an application to overturn the decision of a lower court.

Therefore, the research site for this project consists of all 12 judgments from dangerous offender hearings that resulted in an individual being given either the dangerous or long-term offender designation in the province of Ontario in the year 2010. In seven of these cases, the presiding judge declared that the subject of the application is a dangerous offender, and in the remaining five cases, the individual was found not to be a dangerous offender, but rather a long-term offender (see Appendix A for summaries of all 12 decisions). As a result of the potential for severe consequences, it is expected that decision-making at dangerous offender hearings provokes a "discursive struggle" about the meanings and proper applications of risk among involved actors – which consist of Crown prosecutors, defense lawyers, psychological and actuarial experts, the legislature (as represented by the dangerous offender legislation) and judges, with judges holding the final power to define risk and apply the concept of 'dangerousness' in individual decisions. Thus, the examination of these cases should produce a "discursive activity [that is] clearly evident" to the researcher (Phillips & Hardy, 2002, p. 6).

Techniques for Data Analysis

There is no uniform or systematic method to conduct discourse analysis. Rather, Phillips and Hardy (2002) claim that:

> What makes a research technique discursive is not the method itself but the *use* of that method to carry out an interpretive analysis of some form of text with a view to providing an understanding of discourse and its role in constituting social reality [emphasis in original]. (p. 10)

This process is further explained by Peräkylä (2008), who states that "by reading and rereading…empirical materials, [researchers] try to pin down their key themes and, thereby, to draw a picture of the presuppositions and meanings that constitute the cultural world of which the textual material is a specimen" (p. 352). In this sense, the examination of discourse is different than other forms of more mechanical analysis; it does not involve the grouping of text into categories, but instead focuses on how the writers of text are using and creating categories through their discourse (Wood & Kroger, 2000).

Although this method may be criticized for lacking a degree of rigor and consistency, Wood and Kroger (2000) defend the fluid process of conducting discourse analysis by explaining that it:

> is also like writing a paper in that although we sometimes follow the order of the final paper – writing the introduction, then the body, then the conclusions – we may also start in the middle, and regardless of where we begin, we expect that we will return to and revise that section after we have written the others….And as in writing a paper, it is not always easy to decide when to stop and go with what you have….Analysis usually continues until the analyst is satisfied that the research

> questions have been addressed and that a reasonable reading of the discourse…can be offered. (p. 97)

Therefore, in conducting a discourse analysis of the twelve judicial decisions from 2010 Ontario dangerous offender hearings, specific effort was made to identify what judges are saying, and also not saying, with regard to the priorities and goals of sentencing, the consideration of expert testimony, the conceptualization of offender risk, and also determinations of offender manageability. This was done not with the objective of classifying a judge's text and discourse into themes, but rather with the intention of identifying the themes and ideas that judges are creating and maintaining through their decisions. By examining the construction of concepts in a judgment, and also between different judgments, it is expected that the social reality of judicial reasoning and decision making around conceptions of risk, management and efficiency will be identified in a way that allows for an assessment of the extent to which the new penology has been adopted by Canadian judges.

Limitations of the Study

All of the judges in the sample conceptualize a dangerous offender designation as resulting in an indeterminate period of detention and a long-term offender designation as resulting in a determinate period of detention followed by up to a ten year long-term supervision order. It should be noted that the current distinction between the dangerous and long-term offender designation is somewhat unclear as a result of the 2008 passage of the *Tackling Violent Crime Act*, which has expanded the range of sentencing options that a judge has when designating an individual as a dangerous offender. One such option closely parallels the current sentence given to long-term offenders, as judges can now sentence a dangerous offender to a determinate period of detention followed by up to ten

years of community supervision (Public Safety Canada, 2009). Many of the judges in the sample note that this legislation has no bearing in the present case they are deciding because the predicate offence occurred prior to the expansion of sentencing options in 2008. Thus, it remains unclear what the practical effect of this new sentencing option will be on the continued use of the long-term offender designation. As the new law did not yet affect dangerous offender applications decided in 2010, however, the study reflects the prior associations between dangerous offender designations and indeterminate sentences, and between long-term offender designations and ten year supervision orders.

The sample is limited to Ontario and to one specific year. While this is an important sample because of the high number of dangerous offender applications in this jurisdiction, results may not be generalizable to other provinces. Also, as this study focuses on decisions in which an individual is found to be either a dangerous or long-term offender, the results may not be generalizable to other types of decisions that involve the potential for less severe consequences.

Summary

A discourse analysis of the sample of judgments from Ontario dangerous offender hearings that took place in the year 2010 allows for an assessment of the extent to which the concepts of the new penology have infiltrated the process of judicial decision making with regard to high risk offenders in Canada. This is particularly important, as previous research is unclear on whether the Canadian judiciary has adopted the risk managerial approach of the new penology, or if it exercises a sense of 'resistance' to non-reformative ideals that ignore the individual needs of the offender.

Chapter Four: Results

Judicial Reasoning in Dangerous Offender Judgments

Introduction

The dangerous offender designation is a form of preventive sentence that allows a judge to sentence a high-risk offender to an indeterminate period of detention. As such, offenders given this designation are positioned at the extreme end of Feeley and Simon's (1992) "custodial continuum" (p. 459), as the management of their risk is achieved through their indefinite segregation from the public. In this chapter, I examine the seven Ontario judgments in which an individual is found to be a dangerous offender in the year 2010 in order to assess the extent to which the judicial decision-making in these cases reflects the new penology.

First, I begin by describing the offender and offence details for the seven dangerous offender cases and discuss the offender risk assessment process as it relates to clinical diagnosis, actuarial predictions, the role of forensic mental health experts, and the goal of efficiency. Next, I examine the consideration of previous treatment efforts to modify an offender's behaviour and explore various individualized factors that influence an offender's perceived manageability. Among these factors are the existence of personal support, the effect of prior risk management efforts and judicial interventions, and an offender's institutional behaviour. Finally, I discuss the potential of pharmaceutical treatment as a control mechanism and explain the judicial considerations involving a dangerous offender's eligibility for parole.

Criminal History and Offence Details

In all seven of the cases in which an individual is found to be a dangerous offender in the province of Ontario in the year 2010, judges note that the applicant has a

lengthy and extensive criminal record. In six of the cases (85.7%), the dangerous offender has a predicate offence that includes at least one sexual assault and a criminal record for having committed sexually-related offences in the past. In contrast, only one of the cases (14.3%) involves an individual who was convicted of a violent, non-sexual predicate offence. Thus, as only 18% of the males in Canadian federal correctional facilities are serving a sentence for a sex-related offence (Correctional Service Canada, 2012), it is apparent that the sample of dangerous offenders is disproportionately comprised of sex offenders. This finding is consistent with previous research, which has found that the 1977 statutory attempt to expand the target of Canada's preventive dangerous offender legislation to include both sexual and non-sexual violent offenders has been unsuccessful (Bonta et al., 1996).

In addition, of the seven cases in which a judge rules that an individual is a dangerous offender, three (42.9%) involve at least one victim who was unknown to the perpetrator prior to the predicate offence and one (14.3%) involves a victim who was unknown to the perpetrator prior to the evening of the predicate offence. In the predicate offence of the three remaining cases, one (14.3%) involves an offender who was a previous client of the victim's massage parlour, one (14.3%) involves an offender who had previously "groom[ed]" his victim (*R. v. Mumford*, 2010, para. 77), and one (14.3%) involves a relationship between the victim and offender that is unclear.

Since each of these cases resulted in an individual being designated as a dangerous offender, it is apparent that the judiciary's conceptualization of high-risk offenders parallels society's view of 'dangerousness.' This is evident by the overrepresentation of sex offenders among the dangerous offender population (Bonta et al., 1996; Bonta et al., 1998; Trevethan et al., 2002), as individuals who commit such

offences are often perceived by the public as being "modern-day monsters" (Simon, 1998, p. 456).

Moreover, the fact that a majority of the dangerous offenders in this study (57.1%) committed an offence against a stranger does appear to be related to the perceived widespread risk that was attributed to habitual property offenders until the beginning of the 1960s in several English-speaking jurisdictions. Although it is no longer the case, such offenders were considered to be dangerous as a result of the threat that they were perceived to pose to the entire community (Pratt, 1996). Using similar reasoning, if a person violently victimizes an individual who he does not know, the risk that he poses appears to be unspecified and everyone is therefore burdened by his high degree of dangerousness. Similarly, despite the fact that women are more likely to be sexually victimized by an acquaintance, Scott (2003) explains that there is a disproportionate "fear [of] the danger posed by strange men," as a "level of intimacy between the victim and offender…offers a buffer to thoughts of victimization" (p. 212).

Judges also see some social groups as particularly vulnerable, and thus in need of protection through designating those that would target them as 'dangerous offenders.' The practical effect of this is that a dangerous offender cannot reoffend as long as he remains in prison and is thereby segregated from the community. Judges presiding over dangerous offender hearings recognize children as being in particular need of protection from sexual predators. This is evident when Justice Lalonde, in quoting a remark made by Justice Moldaver in *R. v. D.V.B.* (2010), states that " 'children cannot protect themselves [because they] are generally vulnerable and helpless,' " and that " 'when it comes to their safety, we must be vigilant' " (*R. v. Radcliffe*, 2010, para. 172). This remark is consistent with society's common recognition that children are particularly

vulnerable and in need of protection as a result of their perceived "innocence" and "sacredness" (Petrunik, 2003, p. 44).

It is apparent that judges have expanded this traditional group of vulnerable individuals in need of protection to also include the elderly. This is illustrated in *R. v. Solano* (2010), as the offender in this case unlawfully entered the home of William and Simone Lagassé and took the elderly couple hostage. In his decision, Justice Pelletier states that "the circumstances at the Lagassé…residence are troubling." The judge noted that, as the couple were quite elderly but able to live independently, they "represent a particularly vulnerable element of society" (para. 60). This sentiment is repeated when Justice Dunnet comments on the physical or sexual assaults of G.W., A.U. and F.G., as she notes that they are all "older and thus, more vulnerable female victims" (*R. v. Nicholas*, 2010, para. 128).

Whereas child victims are seen as being vulnerable because of their "innocence" (Petrunik, 2003, p. 44), it appears that elderly individuals are perceived as being in need of protection as a result of an image that they are frail and helpless. This is evident when Justice Pelletier makes reference to the victim impact statements of the elderly couple in *R. v. Solano* (2010), as it is revealed that William Lagassé "takes blood thinners because of a [prior] heart attack" and that Simone Lagassé is "legally blind [and] hard of hearing" (para. 174). Similarly, in consideration of the fact that two of the victims in *R. v. Nicholas* (2010) were assaulted in the presence of their elderly and incapacitated husbands, Justice Dunnet concludes that their perpetrator "demonstrates disrespect for the elderly and intolerance for persons with disabilities" (para. 128).

Risk Assessment and Clinical Diagnosis

In the seven dangerous offender judgments, it is apparent that members of the judiciary rely heavily on forensic mental health experts in order to assess the risk posed by an offender and to inform the Court of an offender's likelihood of causing future harm to society. As Hart (1998) observes, a risk assessment consists of an evaluation that is meant to both predict "the likelihood [that an individual] will commit acts of violence" and to "develop interventions to manage or reduce that likelihood" (p. 122). This is done through the consideration of various risk factors, which Pozzulo et al. (2009) categorize as historical (events from one's past), dispositional (an offender's traits and habits), clinical (the presence of mental disorders) and contextual (factors related to one's environment).

As is shown in Table B1, the risk assessments in all seven of the cases involve the diagnosis of psychological abnormalities that play a role in offending behaviour. It is apparent that this information is influential in the decision-making process at dangerous offender hearings, as the judge in each case relies on such diagnoses to make presumptions regarding an offender's treatability. This reliance on medical experts to diagnose the conditions that contribute to an offender's deviant behaviour does appear to be consistent with the priorities of the modern penal era, as the purpose of treating 'maladjusted' individuals is in order to eliminate the risk that they pose to society (Garland, 2003).

As can perhaps be expected as a result of their eventual designation as a dangerous offender, the judge in each of the seven cases concludes that the psychological conditions influencing the defendant's behaviour cannot be cured. Despite the fact that the focus on diagnosis and treatability resembles the priority of offender transformation, it

does appear that judges share a prevailing interest in managerialism, which is a key component of Feeley and Simon's (1992) new penology. This is evident in *R. v. Solano* (2010), as the expert witnesses involved in the case are unable to reach a consensus as to whether Solano suffers from paranoid schizophrenia. In response to this, Justice Pelletier states that she puts "little importance on whether [Solano] is schizophrenic or merely suffering from hallucinosis," as "the factors that result in [his] anti-social behaviour are present and constant, regardless of the actual diagnosis of his condition" (para. 175). Thus, it would appear that judges are less concerned with accurately diagnosing the conditions that may contribute to an offender's deviance, and instead classify them into aggregates of dangerousness depending on the practical manifestations of their psychological disorder or mental illness.

The Role of an Actuarial Assessment

In all seven of the dangerous offender hearings, the Court relies on mental health experts in order to perform actuarial assessments, which comprise one part of the overall evaluation of an offender's risk. An actuarial assessment, which is a key component of Feeley and Simon's (1992) new penology, is a "mechanical prediction" that calculates the statistical likelihood of an individual committing a future violent offence (Pozzulo et al., 2009, p. 346). It is apparent that this form of evaluation is favoured among the legislature, as a national guide that has been created by the Government of Canada in order to assist criminal justice professionals who are dealing with high-risk offenders states that "it is generally preferable that experts use actuarial, empirically based tools in assessing dangerousness" (Public Safety Canada, 2009, s. 2.1.10).

Despite this preference, as is illustrated by the different value that experts give actuarial results in their assessment, it is apparent that the role of such tools in the

evaluation of an offender's risk is somewhat contested. For example, in *R. v. Nicholas* (2010), Dr. Klassen, who is a forensic psychiatrist, remarks that "scientific research has consistently shown that actuarial methods of risk assessment are the most accurate, because they provide probabilistic estimates of risk [that are] based solely on empirically established relationships between predictors and the outcome of interest" (para. 51). On the other hand, in *R. v. Radcliffe* (2010), Dr. Bradford undermines the value of actuarial predictions by warning that such "risk assessment measures have significant [margins of] error…in the direction of false positives" (para. 135).

Regardless of these competing opinions, judges do tend to accept the accuracy and predictive value of actuarial risk assessment tools. This is evident in *R. v. Radcliffe* (2010), as the judge in this case does not specifically address the margin of error towards false positives in actuarial results, and therefore appears to give little weight to Dr. Bradford's evidence pertaining to the inaccuracies associated with such instruments. Instead, the judge accepts Dr. Woodside's position that, because of the "convergence" in the results of all of the actuarial instruments used, Radcliffe can be accurately described as having a high risk of recidivism (para. 136).

In the seven dangerous offender cases, multiple different actuarial tools are used as a part of an offender's risk assessment. Despite the noticeable variance in the types of actuarial tools used, Table B1 shows that there are three instruments that experts consistently rely upon in their assessment – namely, the Sex Offender Risk Appraisal Guide (SORAG), the Static-99 and the Violence Risk Appraisal Guide (VRAG). Both the SORAG and the Static-99 are used primarily on individuals who have been convicted of a sexually-related offence; the former is used in order to predict an offender's risk of violent recidivism (Campbell, 2007), and the latter is used in order to predict sexual

recidivism specifically among male offenders (Anderson & Hanson, 2010). The VRAG, which is also used on general offenders, was originally created in order to predict the risk of violent recidivism among offenders who had been clinically diagnosed with a mental disorder (Pozzulo et al., 2009).

All of the actuarial assessments that were performed on those found to be dangerous offenders in this study indicated a 'high' risk of recidivism. Although this may be expected as a result of their eventual designation as dangerous offenders, it is noteworthy that the actuarial predictions for future violence varied widely among this sample of high risk offenders. While comparing the actuarial risk of those who are eventually declared a dangerous offender is difficult because of both the variation in the types of actuarial tests used and the differences in how judges present actuarial results in their decision, Table B1 indicates that the predicted risk of committing a future violent act over a ten year period of opportunity for this small group of dangerous offenders ranged from 35 to 89 percent.

In addition to the significant variance that may be present in the actuarial predictions for the same offender, many of the predictions that experts reply upon to classify an individual as being at high risk for violent recidivism do not appear to be overly persuasive. For example, in *R. v. Veysey* (2010), Justice Thompson accepts Dr. Hucker's finding that, based on his Static-99 and SORAG results, Veysey is of either a 45 or a 59 percent likelihood of reoffending within ten years of opportunity. Although these actuarial predictions indicate that Veysey poses a certain degree of risk, the stated probabilities are not overly compelling and do not imply a state of extreme dangerousness. Thus, since individuals with such actuarial scores are designated as

dangerous offenders, it would appear that judges are considering other, non-actuarial factors when making decisions regarding the use of preventive legislation.

This is supported by the written judgments from the dangerous offender hearings in this sample, which suggest that judges understand the actuarial predictions that are given by experts as comprising only one component of the overall analysis of an offender's risk. With a specific focus on the results of an actuarial assessment, Justice Pelletier writes:

> I hasten to add that while helpful and scientifically derived from the examination of large populations of violent offenders, these figures are at best illustrative and must not be substituted for a complete examination of the particular offender's history, psychological composition and peculiarities in the [risk] assessment….When considered together with personal history, offense history, treatment history, parole and probation performance and the offender's stated position regarding rehabilitation and social re-integration, these studies can serve to compliment the assessment, but must not be seen as simply replacing the assessment. (*R. v. Solano*, 2010, para. 95-96)

Therefore, through his remarks, Justice Pelletier appears to be resisting the sole reliance on actuarial predictions, and is instead asserting the importance of an individualized and comprehensive assessment of an offender's risk.

Reliance on Mental Health Experts

While judges are unwilling to solely rely on actuarial predictions when making a decision, it is clear that mental health experts, and more specifically psychologists and psychiatrists, play an integral role in the judicial decision making process. As is shown in Table B1, each of the seven cases where a judge found the individual to be a dangerous

offender involved at least one, and most commonly three, mental health experts performing a risk assessment. The fact that judges tend to be persuaded by the evidence provided by such expert witnesses is illustrated by Justice Thompson, who states:

> I was *struck* by the fact that many of the professionals involved in the assessment and treatment of Timothy Veysey repeatedly cautioned that [he] was gaining little from the treatment plans he was engaged in and repeatedly predicted that [he] would reoffend in a sexually deviant manner. I was further *struck* by the fact that Timothy Veysey validated their predictions by in fact reoffending [emphasis added]. (*R. v. Veysey*, 2010, para. 48)

Thus, Justice Thompson acknowledges the predictive abilities of the assessments performed by expert witnesses. Although a judge who is presiding over a dangerous offender hearing may have a strong degree of confidence in the accuracy and reliability of such testimony, it is apparent that judges maintain their authority as the sole adjudicators with regard to an offender's 'dangerousness.' The Supreme Court of Canada has confirmed the importance of judges being the final decision-makers in dangerous offender hearings, as they have stated that:

> The evidence of a psychiatrist, psychologist or criminologist is at times highly speculative and in certain instances a lay person is in as good a position to make a prediction as to future dangerousness. In *the final say, the court, however, must be so satisfied and not the expert witness. That is not to say that experts may not assist the court*, especially as to whether the offender currently suffers from a psychological disorder…which may be relevant to the likelihood of future dangerous conduct [emphasis in original]. (*R. v. Lyons*, 1987, para. 98)

Risk Assessment and the Goal of Efficiency

Judges' apparent resistance to the exclusive use of actuarial predictions and their heavy reliance on mental health experts does appear to impede the goal of efficiency, which is another component of Feeley and Simon's (1992) new penology. This is evident by the fact that judges consider statistical risk predictions to comprise only one component of an individualized and comprehensive analysis of an offender's risk. It is also apparent that the new penology's focus on efficiency may be sacrificed in dangerous offender hearings in an attempt to ensure that judges are accurately informed on matters pertaining to an offender's risk. This is supported by the fact that judges are often left to consider lengthy and conflicting assessments as a result of the involvement of multiple experts in a particular case as well as previous assessments that were performed by psychiatrists and psychologists who were involved in an offender's care prior to the predicate offence.

As judges are relying on multiple mental health experts in order to get the most complete picture of an offender's risk, it is apparent that the 1997 legislative amendment that now requires only one expert to perform an assessment on the subject of a dangerous offender application (Bonta et al., 1998) has not had the intended effect of "streamlin[ing] the procedure" (Trevethan et al., 2002, p. 4). Since judges are required to consider the evidence presented by both the Crown and defense counsel, it is unclear whether this inefficiency is the result of judges wanting to hear multiple perspectives on an offender's risk assessment, or whether the use of multiple experts is simply a product of the adversarial legal system. The latter possibility is supported by the fact that, in each of the dangerous offender cases, one assessment was provided by the required court-appointed

expert, and any additional assessments were conducted at the request of the offender's defence counsel.

Consideration of Previous Treatment Efforts

Despite the fact that the judge in each case concludes that the psychiatric conditions contributing to an individual's deviance are untreatable, each decision includes a thorough review of the significant treatment efforts that the offender has been subject to in the past. Although this may seem counterintuitive as a result of the negative prognosis that the individual is given by mental health experts, the consideration of treatment options is consistent with the Ontario Court of Appeal's ruling that:

> The determination of whether an offender's risk can be reduced to an 'acceptable' level requires consideration of all factors, including treatability, that can bring about sufficient risk reduction to ensure protection of the public. This does not require a showing that an offender will be 'cured' through treatment or that his or her rehabilitation may be assured. What it does require, however, is proof that the nature and severity of an offender's identified risk can be sufficiently contained in…a non-custodial setting, so as to protect the public. (*R. v. L. (G.)*, 2007, para. 42)

Therefore, despite the unfavourable assessments that the offenders in this study are given, judges consider treatment options not necessarily with the intention of curing the conditions that cause an individual to be of a high-risk, but rather in order to manage their risk and to reduce the threat that they pose to society. In the seven cases where the judge designated an individual as being a dangerous offender in Ontario in the year 2010, there is a sense that all reasonable treatment options had been pursued and that 'nothing works.' Specifically, it would appear in these cases that the offender is either not

motivated to participate in available treatment programs, or that they have successfully completed treatment programs, but failed to "integrate…anything [that they] might have learned…into actual, positive, behavioural change" (*R. v. D.M.L.*, 2010, para. 178).

The finding that these offenders are "a treatment failure" (*R. v. Radcliffe*, 2010, para. 157) often follows the judge's recognition that they have failed to benefit from the best available treatment resources. This recognition is evident by Justice MacLeod-Beliveau's comment that D.M.L. "has received the benefit of very sophisticated, high-intensity, sexual offender treatment [that] is recognized internationally as being [of] a very high-quality" (*R. v. D.M.L.*, 2010, para. 180), as well as by Justice Lalonde's acknowledgement that Radcliffe "was treated…on multiple occasions…at the best facilities of the Ontario Correctional Institute" (*R. v. Radcliffe*, 2010, para. 101). Consequently, as Dr. Hucker indicates in his assessment report of D.M.L., there is a sense that " 'it would be difficult to conceive of a treatment…strategy much superior to that which was provided' " (*R. v. D.M.L.*, 2010, para. 143). Nevertheless, the fact that each individual in this study who was eventually designated as being a dangerous offender had a history of failed treatment indicates that rehabilitative efforts were made in the past and that sentencing judges still prioritize the goal of offender treatment and are not simply engaged in a practice of "waste management" (Simon, 1998, p. 456).

The Role of a Personal Support System

Following the recognition that the subject of a dangerous offender application cannot be cured, judges consider non-actuarial and individualistic factors in order to assess the manageability of their risk in a non-custodial setting. One common consideration in the decisions where an offender is found to be dangerous involves either the existence or absence of an established support system. Accordingly, it is apparent that

judges believe that offenders require personal support in order to both motivate them to pursue "rehabilitative opportunities" (*R. v. Nicholas*, 2010, para. 171) and "to report bad behaviour to a probation officer" (*R. v. Radcliffe*, 2010, para. 104).

In the seven cases in this sample where a judge found an individual to be a dangerous offender, there is a general sense that the offender either lacks a personal support system or that the support system that they have in place is inadequately equipped to control their high degree of risk. One example of having an inadequate level of personal support is given when Justice Dunnet recounts Dr. Klassen's written assessment that Nicholas has " 'no history of meaningful attachments [to others] and [that] he [can be] described as a loner, except for those typically superficial connections he has had with like-minded criminal peers' " (*R. v. Nicholas*, 2010, para. 160). This suggests that the moral character of an offender's acquaintances is a determining factor in whether such individuals are perceived as being well-positioned to help manage the offender's risk.

Additionally, of the dangerous offenders who do have supportive family members, there is a sense that such personal support is unsuitable for the purpose of assisting with their risk management. This is illustrated by Justice Pelletier, who states that, although both Solano's mother and sister are "very well intended and remarkably insightful," they both "demonstrate…the same tendency to attribute [his] difficulties to the actions, demands and influences of others" (*R. v. Solano*, 2010, para. 158). Thus, it is apparent that, in order to be perceived as an effective contributor to an offender's risk management, a potential support person cannot rationalize the offender's behaviour and must understand the true causes of their deviance. This is further supported by Justice Lalonde's reference to Dr. Woodside's claim that Radcliffe may receive "unhelpful

assistance from his wife [who] did not have a good understanding of her husband's psychiatric diagnosis and risk of re-offending" (*R. v. Radcliffe*, 2010, para. 104).

Finally, it appears that having formerly failed to control the actions of an offender can result in a person being classified as an inappropriate source of personal support. This is evident when Justice Pelletier is discussing the role of Solano's mother in her son's risk management and states that she "has had to request police intervention *herself* concerning her son's conduct on certain occasions" [emphasis added] (*R. v. Solano*, 2010, para. 157). Similarly, when reviewing Mumford's lack of "personal community support," Justice Marrocco makes reference to his late partner and says that "this person was obviously not able to supervise [him] because [they were] living [together] throughout the time that [he] was abusing the victim in this case" (*R. v. Mumford*, 2010, para. 49). These examples indicate that a person may be excluded as an appropriate source of personal support for an offender if they have shown an inability to control the offender's behaviour in the past. Additionally, the previous failure of an offender to have controlled his deviant behaviour in the presence of personal support may reduce the perceived ability of the offender to be managed in general.

Response to Previous Risk Management Efforts

Another recurring theme in the seven judgments where an individual is found to be dangerous is that the offender has failed in the past to actively participate in strategies that were intended to manage their risk in the community. As is shown in *R. v. D.M.L.* (2010), such findings are often the result of an individual's prior record of poor self-disclosure and the failure to "indicate that he was re-entering his offence cycle" (para. 20). This is exemplified by Justice MacLeod-Beliveau, who states that, with regard to his "actual sexual activities and deviant thoughts," D.M.L. "was not forthcoming, and in fact

was deceitful, with the Salvation Army and the Kingston police, as…[h]e failed to indicate to anyone that he was having deviant sexual thoughts, and using prostitutes" (para. 181).

Similarly, many of the judgments make note of an offender's lack of cooperation with community partners who are involved in the risk management of offenders. One such organization is referred to as 'Circles of Support and Accountability,' which forms a circle of volunteers around a released offender with the intention of providing support to help the offender lead a pro-social life (Kemshall, 2008). Community partners of this type are especially important in cases where an offender does not have any personal support, as they help to "monitor and validate what [the offender] tells the parole officer responsible for…supervision" (*R. v. Mumford*, 2010, para. 50).

In addition to a judge forming negative inferences of an offender's manageability as a result of their lack of cooperation with recent community supervision efforts, it is also apparent that judges unfavourably view those offenders who fail to utilize all of the resources available to help them with their rehabilitation. This is illustrated when Justice Pelletier reviews Solano's time on probation and parole, and observes that his "files are replete with references to services offered to him in the community and his failure to take full advantage of [these resources]" (*R. v. Solano*, 2010, para. 137). Thus, as is emphasized by Justice Dunnet in *R. v. Nicholas* (2010), an offender's lack of motivation to change his behaviour and "a demonstrated disinclination to improve himself in any way in the face of repeated offers of assistance," is perceived as being indicative that the offender "will leave the correctional system as he entered and…will represent a significant risk to the community" (para. 174).

The Effect of Previous Judicial Intervention

Judges also appear to be persuaded that an individual is unmanageable by the lack of deterrent effect that previous sentences have had on their offence cycle. This is particularly notable in several of the cases where an offender is found to be dangerous, as the presiding judge makes reference to the offender's quick recidivism and, in some cases, to the escalation in the severity of their offences. The ineffectiveness of previous judicial intervention also appears to be in spite of specific warnings that are made by sentencing judges with regard to a pending dangerous offender application. For example, to no effect, Justice MacPhee warned Solano at a previous sentencing hearing that he is " 'on the precipice of making jail your home for the rest of your life' " (*R. v. Solano*, 2010, para. 130).

Moreover, in addition to an individual not being deterred by previous sentences, it is apparent that the behaviour of those found to be dangerous offenders was not controlled in the past by court orders. This is evident by the multiple charges and convictions that the individuals in the sample have accumulated for breaching conditions that were mandated by the Court. The extent of such breaches is exemplified in *R. v. Nicholas* (2010) when Justice Dunnet reports that, "between the ages of thirteen and twenty-four, Mr. Nicholas accumulated a significant criminal record of thirty-six convictions[,] [a]lmost one-third of [which] demonstrate a disregard for orders of the court or law officers" (para. 23). Additionally, Justice Lalonde comments that having "repeatedly… contravened the terms of court orders" does not bode well for an offender's perceived manageability, and also "demonstrat[es] a disrespect for the judicial system" (*R. v. Radcliffe*, 2010, para. 157).

Consideration of Institutional Behaviour

Another factor that judges consider at dangerous offender hearings is the behaviour of the offender while in a custodial setting. Although Justice Pelletier claims that such information is of a "limited significance in the…analysis of risk and risk management" (*R. v. Solano*, 2010, para. 138), it is noteworthy that the offender's institutional behaviour is discussed in five of the seven written judgments in this sample. While one of the five offenders "appeared to function well in a custodial setting" (*R. v. D.M.L.*, 2010, para. 118), the institutional records for the remaining four offenders appear to have been problematic.

The nature of the institutional misconduct committed by these four offenders varies widely, and includes the possession of contraband, aggressive behaviour, and acts of violence. Although it is unclear to what extent judges rely on this information, it is apparent that a problematic institutional record may negatively influence a judge when making decisions regarding an offender's manageability in the community. In *R. v. Pascal* (2010), Justice Platana considers an offender's behaviour while incarcerated as comprising one component of a larger analysis of their manageability. This is shown when he comments that "the numerous assault convictions, the incident reports of aggressive behaviour *both in and outside of institutions*, and his demonstrated lack of concern or understanding satisfy me that Mr. Pascal is indifferent to reasonably foreseeable consequences…of his behaviour" [emphasis added] (para. 137).

Similarly, in *R. v. Veysey* (2010), there is a sense that an offender's poor behaviour while in a custodial setting does not bode well for his prospect of better behaviour in a less secure environment. This is evident when Justice Thompson comments on the fact that, "although in a custodial setting and in a treatment program[,]

Veysey groomed a fellow inpatient and propositioned him for sexual purposes" (para. 42). In his written judgment, Justice Thompson places great significance on this event when he concludes that Veysey's behaviour cannot be modified, as he states that Veysey "continued to be sexually aggressive *even in a secure setting*" [emphasis added] (para. 55).

The Role of Medication as a Control Mechanism

In all seven of the cases where a judge found an individual to be a dangerous offender, consideration was given to the potential use of medication as a way of minimizing their risk to society. However, there is a sense that such intervention is not appropriate in these cases, as the offenders have a long history of not cooperating with both pharmaceutical and non-pharmaceutical risk management strategies. This view is expressed by Justice Dunnet, who makes reference to Dr. Klassen's comment that "anti-androgen medication can be effective if the patient takes the drug, communicates honestly about his response and continues to take it [as prescribed]" (*R. v. Nicholas*, 2010, para. 64). Thus, while the use of medication does have the ability to reduce an offender's risk, it appears that having a record of failing to participate in risk management efforts and a demonstrated lack of honesty can exclude an offender as a suitable candidate for such intervention.

This is apparent in *R. v. Pascal* (2010), as Justice Platana discusses the possibility of medication being used to inhibit Pascal's alcoholism and concludes that his "past history of not following through with court orders…does not lead…to the conclusion that imposing such a condition…would have any effect" (para. 150). The need to have confidence in an offender's ability for honest self-disclosure is further emphasized by the fact that it is quite possible for an individual to circumvent the intended effect of such

medication. This is illustrated in *R. v. Radcliffe* (2010), as Justice Lalonde recounts Dr. Woodside's testimony that an offender can take Viagra or Cialis in order to counter the intended effect of sex-drive reducing medication.

It is clear in these cases that judges are skeptical of relying on pharmaceutical interventions as a form of risk management, as offenders cannot be forced by the Court to take medication. When the National Parole Board does deem it to be necessary that an offender take behaviour-inhibiting medication, they "may fashion conditions that require the offender to engage in psychiatric counselling and to follow the recommended treatment [of their physician]" (*R. v. Radcliffe*, 2010, para 78). However, it is apparent that judges take issue with the Parole Board's inability to enforce the Court's recommendation that an offender take medication that is intended to reduce their risk to the public. This is illustrated by Justice Thompson's assertion that:

> As a result of the National Parole Board refusing to order the administration of Lupron…and as a consequence of their delegating to [a] psychiatrist the decision as to whether Lupron should be administered, and if so, for how long, the National Parole Board has left the management of Mr. Veysey's risk to the community solely in the hands of the psychiatrist assigned to oversee his treatment for sexual deviancy. To put it bluntly, neither the National Parole Board nor Correction Services Canada has any control over the management of Mr. Veysey's risk[,] but are compelled to accept the psychiatrist's philosophy on the use of drugs in [his] treatment and the psychiatrist's decision to administer the drug or not, and if so, for what period of time. (*R. v. Veysey*, 2010, para. 24)

Therefore, although judges do rely on mental health experts in order to inform the Court on matters pertaining to an individual's risk assessment (Heilbrun et al., 1999), it

does appear that judges resent the management of an offender's risk being held solely by medical professionals in the community. In *R. v. Veysey* (2010), Justice Thompson's unhappiness with this situation is emphasized by his remark that "there are some very disturbing deficiencies in the decision-making process as to whether [a particular medication] should be administered to an offender" (para. 28). This emphasis on the problems associated with supervising the use of medication suggests that, while judges have formed a reliance on psychiatrists and psychologists for the purpose of assessing risk, they perceive themselves as being the 'gatekeepers' of an offender's risk identification and their corresponding risk management.

Consideration of Parole Eligibility

Finally, in all seven of the cases where a judge rules that an individual is a dangerous offender, consideration is given to the possibility that the offender will be eligible for parole at some point in the future. This consideration is consistent with the finding in *R. v. Jones* (1994), as the Supreme Court of Canada ruled that:

> The overriding aim [of the dangerous offender designation] is not the punishment of the offender but the prevention of future violence through the imposition of an indeterminate sentence. An indeterminate sentence is not an unlimited sentence….The offender faces incarceration only for the period of time that he poses a serious risk to the safety of society. (para. 124)

The consideration of parole typically involves a comparison of the practical differences between the dangerous offender and the long-term offender designation. In *R. v. Radcliffe* (2010), Justice Lalonde refers to the submissions of Crown counsel in order to distinguish between the effects of these two designations with regard to the management of an offender's risk outside of a custodial setting:

> Where there is a discernable escalation of risk presented by a dangerous offender, or an offender on parole or statutory release, but no breach has yet occurred, the parole officer has the option to suspend [their release] on the basis of the prevention of breach or protection of society. On the other hand, where the same situation arises during [a long-term supervision order], suspension is still available but release occurs in a period of 30 [to] 90 days and revocation is not an option. (para. 78)

Thus, it is clear that judges do not consider the dangerous offender designation as meaning that the offender will be incarcerated for the remainder of his life. Rather, in their written decisions, judges discuss the possibility of a dangerous offender's eventual release on parole, which suggests that they have not lost all hope that such individuals can be rehabilitated and that their risk can eventually be reduced to an acceptable level. Moreover, in repeating the sentiments of her colleagues, Justice MacLeod-Beliveau claims that "the National Parole Board…is in a better position to monitor [the offender's] efforts and progress…through the parole process [that] is available to dangerous offenders" (*R. v. D.M.L.*, 2010, para. 188). This position reflects the new penology's focus on efficiency. Judges appear to have a preference for the dangerous offender designation, as even if an offender is released on parole, the National Parole Board is well-positioned to intervene if their condition changes.

Summary

The analysis of judicial decision-making in Canadian dangerous offender hearings indicates that judges have adopted some aspects of the philosophy of Feeley and Simon's (1992) new penology. Although it is unclear to what extent judges rely on actuarial findings and it is apparent that they consider individualistic factors when making a

decision regarding an offender’s dangerousness, the primary goal in this process appears to be the management of an offender’s risk. As such, it would appear that judges have adopted the new penology’s primary objective of risk management, however that they prefer to use traditional techniques and individualistic considerations when determining the level of intervention that is required to manage an offender’s risk.

In the next section, I examine the five Ontario cases from the year 2010 in which a judge determined that an individual is not a dangerous offender, but rather a long-term offender. As the main distinction between these two designations involves an offender’s propensity to be managed within the community, the analysis of these five decisions provides rich insight into how judges conceptualize an offender as having an acceptable and manageable degree of risk.

Chapter Five: Results

Judicial Reasoning in Long-Term Offender Judgments

Introduction

The long-term offender designation is a second form of preventive sentence that can be used in order to protect the public from the threat posed by high-risk offenders. This sentencing option represents another node on Feeley and Simon's (1992) concept of a "custodial continuum," as unlike dangerous offenders who are sentenced to an indeterminate period of detention, long-term offenders are monitored in the community for up to ten years following the completion of their custodial sentence (p. 459). As the primary difference between these two designations is the perceived manageability of an offender's risk in the community, the focus on judgments in which an individual is found to be a long-term offender provides particularly rich insights into how judges conceptualize both acceptable and manageable risk.

In this chapter, I discuss the judicial reasoning in the five Ontario cases from the year 2010 where a judge decided that an individual is not a dangerous offender, but rather a long-term offender. First, I describe the offender and offence details for the five cases in which an individual is found to be a long-term offender. Next, I explain where the long-term offender designation fits on Feeley and Simon's (1992) concept of a "custodial continuum" (p. 459), and I relate this to how judges perceive both offender risk and dangerousness. Finally, I examine the role of mental health experts in the assessment of an offender's risk and discuss an offender's institutional behaviour, prison experience and community as they relate to the goals of rehabilitation, deterrence and risk management.

Criminal History and Offence Details

Of the five individuals who were found to be a long-term offender, three (60%) had committed a predicate offence that included at least one sexual assault. In the remaining two cases (40%), the offender committed a non-sexual predicate offence that included assault causing bodily harm. Thus, the long-term offenders in this sample appear to have more diverse predicate offences when compared to the seven dangerous offenders referred to in the previous chapter, of whom 85.7% had committed a predicate offence of sexual assault. This observation indicates that the predicate offences for cases in the sample are different than those of the overall population of dangerous and long-term offenders, as previous research has found that more long-term offenders (91%) than dangerous offenders (85%) have committed a sexually-oriented predicate offence (Trevethan et al., 2002).

One of the five individuals who was designated a long-term offender was the subject of an earlier dangerous offender application. In *R. v. Cumming* (2010), Justice Langdon determined Cumming to be a long-term offender after the Ontario Court of Appeal ordered that he be given a new dangerous offender hearing one year earlier. The Court of Appeal took this action after they overturned Cumming's 2005 dangerous offender designation, as they found that the sentencing judge erroneously ruled that "motivation [is] a necessary prerequisite to controlling [his] behaviour" (*R. v. Cumming*, 2009, para. 20). This decision reflects the focus of offender management instead of rehabilitation, as the Ontario Court of Appeal acknowledged that an offender does not need to be motivated to change his behaviour in order for his risk to be managed within the community.

Long-Term Offenders and the 'Custodial Continuum'

In the five decisions, it is apparent that judges consider the dangerous offender designation as being at the extreme end of the continuum with regard to available sentencing options. On this continuum, the long-term offender designation precedes the dangerous offender designation and, "as a general rule…is reserved for an offender who is one step from being sentenced to an indeterminate period of imprisonment" (*R. v. Thomas*, 2010, para. 77). In distinguishing between these two preventive sentences, the main issue that judges must address is whether there exists a "reasonable possibility" that an offender's risk can be managed in the community (*R. v. P.J.W.*, 2010, para. 115). As Dr. Klassen indicates in his testimony, this consideration and the very existence of the long-term offender designation reflects the justice system's transition from " 'institution-based care to intensive community supervision' " (*R. v. Cumming*, 2010, para. 84). This transition reflects the new penology's focus of managing an offender's risk through the least restrictive means, which coincides with the growing recognition of the high costs associated with incarceration.

Perception of Offender Risk and Dangerousness

The judicial decisions in which an individual is found to be either a dangerous or long-term offender do reveal how judges conceptualize 'dangerousness' and further indicate how being characterized as such affects an offender's sentence. Similar to how society's perception of dangerousness has evolved over time (Pratt, 1996), judges recognize that the criteria for being given such a designation is fluid and subject to change. This is evident in *R. v. Stratton* (2010) when Dr. Langevin expresses his view that Stratton not be declared a dangerous offender because his criminal history is different than those currently holding the designation and " 'the net [has already been] broadened

too far' " (para. 51). In response to this, Justice Bellefontaine asserts that the target of dangerous offender legislation is not static and that a comparison between current offenders and previously designated dangerous offenders does not help to clarify whether an offender meets the statutory requirement to be given this designation. He further explains that:

> Prosecutorial discretion is a significant factor in all criminal prosecutions and especially so in dangerous offender applications given the costs and resource implications and the serious infringement of individual liberty imposed on an offender by virtue of the in-determinant sentence….The fact that prosecutors have in the past confined their dangerous offender applications to a particularly dangerous group of offenders does not mean that a less dangerous group of offenders may not also meet the constitutionally approved criteria. (para. 81)

The majority of individuals in the sample (60%) who were found not to be a dangerous offender, but rather a long-term offender, have committed either a specific predicate offence or have a notable offence history that includes violent incidents of a domestic nature. Unlike many of the dangerous offenders who are perceived as posing a high level of risk to an unspecified target, judges view these long-term offenders as being more manageable as a result of the specified and focused target of their risk. This is shown in *R. v. Cumming* (2010) when Justice Langdon recognizes that "Cumming is a substantial risk to re-offend *especially* in the context of a relationship with an intimate partner" [emphasis added] (para. 90). As a result of this identified risk, Justice Langdon emphasizes Cumming's manageability by citing a correctional program officer's testimony that his " 'future intimate partner relationships must be closely monitored [and

that] case supervis[ors] will be attentive [to] help…Cumming assess that he is in a healthy relationship' " (para. 17).

Despite the differences between the perceived target and manageability of a dangerous and long-term offender's risk, both groups do share a sense of unpredictability with regard to the offences that they may commit in the future. Whereas a dangerous offender's risk may be unpredictable in the sense that it is unclear who will be victimized, a long-term offender's risk may be perceived as unpredictable with regard to the escalating severity of future offences. This is shown when Justice Keast remarks that P.J.W.'s previous offences have occurred "in an unrelenting atmosphere of anger" (*R. v. P.J.W.*, 2010, para. 96). As a result, Keast explains that:

> The suggestion that any future violence would remain so-called 'low grade' is not realistic. The biggest risk factor in violent and angry environments is *volatility*. When a person such as P.J.W. is chronically angry and fuelled by cocaine, he cannot precisely measure [his] degree of violence. Look at many of the histories of female victims of domestic homicide – a topic which has been studied extensively in Coroner's Inquests, various reports of an investigative nature and social science research. In many cases, there is a plateau of violence and anger over a period of time – then suddenly with little warning it escalates to a much higher level – wherein the victim is killed. There is often no known reason why the violence suddenly escalated from the historical pattern [emphasis in original]. (*R. v. P.J.W.*, 2010, para. 98)

In addition to a sense of unpredictability, there are many similarities between the crimes committed by both dangerous and long-term offenders. This suggests that the difference between these two classes of offenders is not one of perceived

'dangerousness,' but rather one of anticipated manageability. In *R. v. Stratton* (2010), Justice Bellefontaine confirms this distinction when he finds that Stratton, who committed "violent [and] sexual crimes" against multiple children, is not a dangerous offender, but rather a long-term offender (para. 36). Stratton was given the less-restrictive sentence in spite of the extensive harm he caused to both his victims and the community, which is illustrated when Justice Bellefontaine remarks that:

> The videotaped abuse against K.M. is a heart wrenching insight into a pedophile at work. The long-term grooming and pressing for more intrusive sexual behavio[u]r over four years is disturbing. The level of callousness and cruelty reaches the level of sadistic as he relentlessly pursues his goal of stealing her virginity. The 21 occasions where he videotapes himself having intercourse with her [despite] her pleas for him not to and her crying while he is assaulting her are shocking and horrifying to view, and have justifiably outraged the community. (para. 121)

In sentencing Stratton, Justice Bellefontaine recognizes that the victims "want justice to be done" and that they believe Stratton "should be made to give up his life" in order for "a sense of balance and a sense of fairness [to] be achieved" (*R. v. Stratton*, 2010, para. 115). In response to this, the judge states:

> It is not within my power, nor is it my role as a Criminal Court judge, to impose a sentence that will, in any meaningful way, even the scales of suffering or right the balance between…Stratton and his victims. Ultimately, our goal as a Criminal Court is the protection of society by imposing the least restrictive sentence that will deter the accused and others and insure his rehabilitation….Given the nature of the [d]angerous [o]ffender and long-term offender findings, the protection of

> the community is the paramount factor for me to consider. (*R. v. Stratton*, 2010, para. 116-118)

Here, Justice Bellefontaine recognizes that the dangerous and long-term offender regimes are not retributive in nature, but that they rather serve a utilitarian function. This is evident by the focus on protecting the public by using the least restrictive means necessary to manage an offender's risk of committing future crimes. While this is consistent with the new penology's priority of risk management, Justice Bellefontaine's explanation of the purpose of the dangerous and long-term offender regimes is interesting, as it suggests that judges recognize Canada's preventive legislation as being unable to address the increasingly punitive views of the public. This appears to be inconsistent with the situation in the United States, where sex offender laws are observed as reflecting the managerial views of the new penology and as also appealing to the increasingly punitive views of the electorate (Simon, 1998).

Mental Health Experts and the Assessment of Actuarial Risk

Similar to the judicial decisions in which an individual is found to be a dangerous offender, all of the cases that resulted in a long-term offender designation make significant reference to the testimony provided by mental health experts. This reliance is illustrated by Justice Keast, who notes that "psychiatrists are experts in assessing the prediction of human behaviour and trial [j]udges *cannot* perform [their] analysis without taking into account [this] evidence" [emphasis in original] (*R. v. P.J.W.*, 2010, para. 88). As is shown in Table B2, each of the long-term offender judgments make reference to the risk assessment that was conducted by at least one, and most frequently three, mental health experts.

One component of the evidence provided by these experts is the results of an offender's actuarial risk assessment, which involves a statistical prediction of the likelihood that an individual will commit a violent crime in the future. While all of the dangerous offenders were classified as being of a 'high' risk, the long-term offenders were classified as being one of a 'moderate,' 'moderate-high,' or 'high' risk of violent recidivism (see Table B2). It is evident that judges recognize the value of actuarial tools, as Justice Keast comments that these instruments are "distinctly superior" to solely relying on clinical assessments of risk, which have an accuracy rate that is "slightly higher than chance" (*R. v. P.J.W.*, 2010, para. 64-65).

With this said, as was the case in the decisions that resulted in a dangerous offender designation, judges clearly recognize that actuarial assessments only comprise one aspect in the overall evaluation of an offender's risk. This is apparent when Justice Keast cautions that, despite their usefulness, actuarial results only reflect the statistical risk among a group of offenders, and do not reveal an offender's "individual risk" (*R. v. P.J.W.*, 2010, para. 68). Additionally, it is evident that judges acknowledge the limitations associated with actuarial risk predictions when Justice McGrath discusses the results of Weigel's assessment and states that the "tests [used] are merely actuarial tools which ultimately cannot predict whether a *particular* individual will reoffend" [emphasis in original] (*R. v. Weigel*, 2010, para. 65).

The Goal of Offender Treatment

In addition to advising the Court of the results of an offender's risk assessment, mental health experts provide information pertaining to an offender's state of mind, the presence of psychiatric disorders (see Table B2) and the availability of treatment options. This reflects the priority of offender transformation and rehabilitation, which is evident

when Justice McGrath states that he "accept[s] the *medical* opinion…that, with effective treatment, Mr. Weigel's risk of reoffence can likely be managed in the community" [emphasis in original] (*R. v. Weigel*, 2010, para. 91). Thus, while it is clear that judges do value the priority of offender treatment, it appears that this consideration may exist within the context of a larger goal of offender management. This is further supported by Justice Keast, who makes reference to Dr. Pallandi's testimony and remarks that "the best approach to [P.J.W.'s] treatment is through management of several factors," which will serve as "damage control around all the related problems of anti-sociality" (*R. v. P.J.W.*, 2010, para. 119-122).

Regardless of whether judges prioritize rehabilitation or management at a dangerous offender hearing, it is apparent that they generally recognize the value and effectiveness of treatment initiatives. This is illustrated in *R. v. Cumming* (2010) when Justice Langdon discusses Dr. Dickey's testimony:

> He said that "if taking [correctional] programs could cure or even vastly reduce re-offending…we'd read about it everywhere, even in Time Magazine"….It does not change apples to oranges and, if it did, he said, criminality would be well on the way to being cured….He said that we, [in Canada] try it with people, but other jurisdictions don't because they view it as ineffective. (*R. v. Cumming*, 2010, para. 20-29)

In response, Justice Langdon says:

> No one expects that a particular course of treatment will cure alcoholism or family violence. Rather, if alcoholism is to be controlled in an individual, experience has demonstrated that it will happen as part of a continuing process that consists of a number of elements, of which treatment programs are a part. Yet, Dr. Dickey

> again and again consigns such programs to the waste bin…I find it hard to believe that [the Correctional Service of Canada] spends large sums of public funds on programs that have no practical value. Many individuals have overcome alcoholism and remained abstinent. One is forced to ask how this can happen, if one accepts the negative view that everyone is condemned to repeat their history endlessly. (*R. v. Cumming*, 2010, para. 74-75)

Therefore, it appears that when sentencing an offender, judges hold treatment initiatives in a high regard and value the effectiveness of correctional programs. This is consistent with the finding that, while judges do recognize that 'nothing works' in the effort to rehabilitate those who were designated dangerous offenders, such a conclusion is only formed after the consideration of an offender's long history of failed treatment and previous ineffective interventions. Additionally, the close association between an offender's rehabilitation and management is further evident when Justice Langdon clarifies that the goal is not to eliminate the risk of recidivism, but rather to achieve a situation where "there is a reasonable possibility of eventual control of the risk Mr. Cumming presents in the community" (*R. v. Cumming*, 2010, para. 73).

Consideration of Institutional Behaviour

Similar to the dangerous offender judgments, many of the long-term offender decisions indicate that judges consider an offender's institutional behaviour in order to form inferences about their manageability within the community. Unlike dangerous offenders, who often have a record of problematic institutional behaviour, there is a sense that long-term offenders may be more manageable as a result of their positive behaviour while incarcerated. This is illustrated in *R. v. P.J.W.* (2010), as one of the factors that

Justice Keast relies on when concluding that P.J.W. has "a greater genuineness of his insight and motivation to change" is that:

> It appears [he] has now become a model prisoner and is well-behaved within the prisoner population. Within the population, he has segregated himself voluntarily, in order to…distance himself from detrimental elements….this is a sharp contrast from his historical pattern in the prison population. (para. 149)

Justice Langdon also affirms the importance of considering an offender's institutional behavior when he addresses the testimony of Dr. Dickey, who:

> dismissed any possibility that…Cumming's improved behaviour within the prison system might augur improved behaviour upon release. He stated rather cynically in his testimony that bad behaviour in prison was a good predictor of future behaviour, but that good behaviour was not. (*R. v. Cumming*, 2010, para. 76).

In response to Dr. Dickey's testimony, Justice Langdon states:

> But it is clear that [the Correctional Service of Canada] and the [National Parole Board] place considerable weight on institutional behaviour. Indeed, if it is irrelevant, one wonders how any inmates can make a case for conditional release. It is patently impossible for an offender to demonstrate how he will perform in the community when he is incarcerated. If his institutional behaviour is irrelevant, is he not caught in the perfect Catch-22? (*R. v. Cumming*, 2010, para. 77)

These remarks indicate that judges do consider institutional behaviour to be a predictor of how an offender will act in a less restrictive, non-carceral setting. While judges do share the view that 'nothing works' in the dangerous offender cases, Justice Langdon's response to Dr. Dickey's testimony shows that judges are very cautious to accept this position. Instead, it appears that judges actively pursue rehabilitative ideals

when sentencing an offender and that they generally believe in the effectiveness of the correctional system as a means to prevent future crime.

The Goals of Imprisonment

Another theme that is present in the long-term offender cases is that judges consider the prison experience as being an integral component of an offender's rehabilitation and specific deterrence. Coinciding with Justice Langdon's defence of the effectiveness of correctional programs, it is apparent that judges view a custodial sentence as being required for an offender to receive adequate treatment resources. This is illustrated in *R. v. Weigel* (2010) when Justice McGrath discusses the testimony of a Correctional Service of Canada employee, who informed the Court that "community sex offender treatment programs are for maintenance only [and that] high-intensity core programs are only offered within the institutional setting" (para. 46).

Judges determine the appropriate length of a long-term offender's custodial sentence by considering the offender's 'needs,' which are typically related to the goal of rehabilitation. One way that judges ensure that an offender will be imprisoned for an appropriate period of time is through the determination of pre-sentence credit, which is noted as not being "an automatic or mathematical" calculation, but rather a "discretionary application wherein there are exceptions" (*R. v. P.J.W.*, 2010, para. 157). In effect, it appears that judges first determine how long an offender needs to be incarcerated, and then they determine the amount of credit that should be given for pre-sentence custody. As a result, judges are ensuring that offenders spend an adequate amount of time in prison, which will allow them to have appropriate and sufficient access to treatment resources within the institution.

A second way that judges achieve this is through placing restrictions on an offender's eligibility for parole. This is illustrated in *R. v. Thomas* (2010) when Justice Warkentin says that:

> The evidence overwhelmingly points to the conclusion that…Thomas will not be deterred and rehabilitated within the normal period of parole ineligibility because he will not have had sufficient time within the penitentiary setting to complete the high intensity and medium intensity programming for alcohol dependency and sexual offenders. While the reality is that, given…Thomas' dangerousness, he may well serve in custody the full extent of any determinate sentence imposed for the predicate offences, there will be an order…that [he] serve at least one half of his sentence before consideration for release under the…long-term supervision order. (para. 89-90)

Thus, while judges are guided by both legislation and precedence, it does appear that they make sentencing decisions in a way that addresses the offender's institutional and treatment needs. In addition to considering one's access to resources, judges also account for an "administrative component" of a long-term offender's sentence, which is required to ensure that a proper risk management plan can be created and implemented prior to the offender's release. This is explained by Justice Langdon, who says that:

> In order for [Cumming's] release into the community to have a reasonable chance of success, he needs to be sentenced to a period of incarceration that is sufficient to enable him to be re-admitted to the penitentiary system, to be assigned to an institution…and for him to attend an inpatient treatment program for alcohol abuse. His performance in that program will have to be evaluated before the [National Parole Board] can receive submissions on and prepare a proper plan of

> release. *All this takes time*….Mr. Cumming "*needs*"…to serve a further sentence of twelve months in order to assure that…his release plan on parole can be properly formulated and set into motion [emphasis added]. (*R. v. Cumming*, 2010, para. 98-99)

Additionally, it is clear in the long-term offender decisions that judges consider the prison experience as a tool to specifically deter offenders from committing future crimes. This is evident in a comment made by Justice Keast, who states that, in P.J.W.'s case, the "lengthy period of continuous incarceration has brought about greater depth of contemplation and reflection" (*R. v. P.J.W.*, 2010, para. 149), which may be otherwise absent among "offenders [who have] become habituated to sentences in the range of 'short, sharp, raps' " (*R. v. Cumming*, 2010, para. 87). It also appears that judges consider the very prospect of a dangerous offender designation as having a deterrent effect, which is shown when Justice Langdon says that Cumming:

> now faces the prospect of spending the rest of his life in prison. One does not need to have an IQ of 150 to appreciate…that he has entered a whole new arena of consequences for his behaviour, where zero tolerance is the rule and where re-offending can have catastrophic consequences on his future and on his liberty. (*R. v. Cumming*, 2010, para. 89)

Using similar reasoning, judges believe that a long-term supervision order will be successful because, despite inevitable "gaps in the supervision," a "fear of re-arrest [will] ensure there is no reoffending" (*R. v. Stratton*, 2010, para. 101). This is exemplified when Justice Bellefontaine says:

> I am satisfied that Mr. Stratton can be specifically deterred. He values having a job, and money and his possessions….His past four and half years in solitary

> confinement have clearly been difficult enough for him to create a significant incentive…to avoid reoffending in the future….Unlike many offenders who live on the margins of society and have little to live for…Stratton has been in many respects a normal middle class working person with good job qualifications and prospects. He has a lot to lose by reoffending which should reduce his future risk *independent* of his successful treatment and any motivation that may be imposed on him [emphasis added]. (*R. v. Stratton*, 2010, para. 100)

Therefore, Justice Bellefontaine believes that the deprivations resulting from Stratton's "difficult" prison experience will deter him from committing future crimes. Although Stratton may indeed have less 'needs' when compared to other offenders, the judge's remarks are problematic, as they suggest that offenders of a lower social class may be given a more restrictive sentence if it is perceived that they "have little to live for," and therefore have no incentive to remain out of prison (*R. v. Stratton*, 2010, para. 100). This form of reasoning appears to be consistent with the perceived danger that is associated with the "underclass," which is a group of people who are seen as being of a high risk as a result of the belief that they are "permanently excluded from social mobility and economic integration" (p. 467).

The Role of Community

Finally, in two of the long-term offender decisions, the judge considers the role of an offender's community as it relates to one's offending behaviour and risk of recidivism. This is evident in *R. v. P.J.W.* (2010), as Justice Keast imposes a condition of P.J.W.'s long-term supervision order that he "not reside in the City of Sault Ste. Marie," which is where he has committed all but one of his previous criminal offences (para. 168). Such a condition is said to be necessary in order to prevent P.J.W. from reoffending, as the judge

recognizes that an offender's "neighbourhood of release [is] a significant determinant of relapse" (para. 145).

Judges may consider a community to be a hindrance in the effort to rehabilitate and manage an offender if there is an absence of pro-social support for the offender, and also if there are uncontrollable "historical triggers" that have played a role in one's past offending behaviour. This is shown when Justice Keast remarks that "moving away from his brother and extended family members who have few pro-social values will help P.J.W. further reduce stress and be far away from powerful, environmental inducements to relapse" (*R. v. P.J.W.*, 2010, para. 145). Similarly, there is a sense that an offender may be unable to lead a pro-social life in a community in which he has an existing deviant reputation. This is evident when Justice Keast states that P.J.W.:

> wants to avoid those triggers and the branding that comes with his well-known presence in Sault Ste. Marie….A different environment will allow him to re-brand without the criminal behaviour expectations of residing in an environment in which he is well-known. (*R. v. P.J.W.*, 2010, para. 149)

Additionally, there is a sense that an offender should not return to a dysfunctional environment that is perceived as being plagued by anti-social elements. This is illustrated in *R. v. Thomas* (2010), as Justice Warkentin accepts defence counsel's submission that:

> Preparing Mr. Thomas to return to and reconnect with his community and his aboriginal roots would not assist [him] in remaining sober and keep him from future violent conduct….because of the rampant alcohol abuse coupled with the isolation and lack of supervision available in Fort Severn, the likelihood that Mr. Thomas would reoffend if returned to that community [is] virtually guaranteed. (*R. v. Thomas*, 2010, para. 55)

Therefore, in deciding whether an offender is a suitable candidate for the less restrictive long-term offender designation, judges consider whether factors within an offender’s community will either support or hinder the goals of rehabilitation and risk management. One such consideration is the availability of both community and correctional resources, which are notably absent in Thomas’ community of Fort Severn because it is “one of the most isolated and remote [areas] in Canada” (*R. v. Thomas*, 2010, para. 5). As a result of this, when sentencing Thomas as a long-term offender, Justice Warkentin “strongly recommended that the [National Parole] Board [require him to] enroll in a community based programme such as the Circle of Support and Accountability and that he be released into a community where this or a similar programme operates” (*R. v. Thomas*, 2010, para. 84).

Summary

The analysis of the judicial decisions in which an individual is found not to be a dangerous offender, but rather a long-term offender, supports the argument that judges do attempt to modify an offender’s behaviour through the goals of rehabilitation and deterrence. With this said, it does appear that these goals are either closely paralleled, or superseded in significance by the priority of risk management. However, contrary to the new penology, the long-term offender cases indicate that judges do not manage offenders in aggregates, but rather through consideration of the individual factors that are unique to their offending behaviour.

Chapter Six: Discussion

Judicial Decision-Making and the New Penology

Introduction

The previous two chapters have outlined the findings from the discourse analysis of the twelve judicial decisions from the dangerous offender hearings that took place in Ontario in the year 2010. In this section, I synthesize these results in order to explain how the process of judicial decision-making in the current penal era compares to the transitions that are said to have taken place in the new penology. In order to do this, I first discuss the judicial priorities and practices at dangerous offender hearings, and I relate these findings to other research on the practices of frontline criminal justice practitioners. Next, I explain how the priorities and practices of judges affect the current state of the law in Canada, and I give reasons as to why judges may resist the concepts of the new penology. Finally, I critique the way that judges conceptualize the prison experience and their consideration of a dangerous offender's parole eligibility.

Judicial Priorities and Practices at Dangerous Offender Hearings

While the twelve judgments from the 2010 Ontario dangerous offender hearings do clearly indicate that judges are prioritizing the goal of risk management, it appears that Feeley and Simon's (1992) claim that the individual is no longer the focus of consideration within the criminal justice system does not apply in these cases. This is evident as, contrary to the transitions that are said to have taken place in the 'new' penology, the judges continue to use a discourse that reflects the objectives of offender treatment and rehabilitation. One way that these goals are achieved is through the consideration of testimony provided by mental health experts, who provide the Court with information pertaining to an offender's risk.

In their decisions, judges account for the testimony provided by mental health experts and give specific attention to the diagnosis of any psychological abnormalities that are believed to play a role in an individual's offending behaviour. This is consistent with the practices of the earlier modern penal era, as judges appear to be identifying the unique and individual factors that cause an offender's deviance, and are not simply focusing on the management of an offender's risk. Furthermore, the written decisions indicate that judges are actively considering an offender's available treatment options and the possibility of individualized interventions when sentencing an offender, both of which reflect the goal of rehabilitation.

This is evident in the long-term offender cases, as judges decide the appropriate length of the determinate sentence by considering how long an offender requires to be incarcerated in order to have his 'needs' addressed within the institution. Similarly, while it is true that the dangerous offender cases all involve a recognition that no degree of intervention has worked, judges only reach this conclusion after considering the offender's long history of failed treatment. The fact that dangerous offenders have such long histories of failed intervention further affirms that judges do still actively consider the goals of treatment and rehabilitation when sentencing an offender, and that they are particularly cautious when forming the conclusion that 'nothing works.'

With this said, it does appear that judges are not engaging in treatment considerations with the goal of curing 'maladjusted' individuals of the factors related to their deviance, but instead with the intention of managing offender risk. This is consistent with the observation that judges perceive themselves as the sole adjudicators of decisions related to an offender's dangerousness and risk, which means that such findings are not medical or clinical decisions, but rather legal decisions. An example of this is the

consideration of pharmaceutical intervention, which is seen by the judges as a potential way to control an offender's deviant sexual behaviour. Despite this, the dangerous offender cases indicate that judges may not view this form of intervention as being appropriate, as the administration of sex-drive reducing medication is controlled by medical practitioners. As such, it appears that judges have appointed themselves as being the 'gatekeepers' of determinations of offender risk, which may be a response to the recognition that there are no accurate and authoritative scientific experts in the determination and prevention of dangers in the current "risk society" (Beck, 2008).

Therefore, although judges have adopted the risk-oriented and managerial focus of the new penology, their discourse indicates that the individual offender remains the central unit of inquiry at dangerous offender hearings. This reflects, not surprisingly, an understanding of the individual as the subject of the law, and individual liberty as a primary concern of law (Comack, 2006). Significantly, it is also contrary to Feeley and Simon's (1992) claim that current penal practices address individual offenders as an aggregate, which primarily occurs through the increased use in "actuarial language of probabilistic calculations and statistical distributions" (p. 452). As a result of these changes, it has been argued that the current penal era is characterized by the presence of "a new 'actuarial' criminology," in which practitioners are now trained in "operations research" and "systems analysis" instead of more traditional disciplines like sociology (p. 466).

While both the dangerous and long-term offender cases do indicate that the accuracy of actuarial risk assessments are somewhat contested among mental health experts, the results of these tools do appear to be generally accepted by judges. However, it is clear that judges actively resist a sole reliance on actuarial instruments, and instead

consider these tools as only comprising one component of the overall evaluation of an offender's risk. In doing this, judges appear to be undermining the predictive value of actuarial instruments and are asserting the importance of an individualized risk assessment.

Throughout the twelve decisions, the judges' discourse on risk appears to be tightly fused with, and often superseded in importance by, issues of manageability. In this sense, offenders are not conceptualized as dangerous because of their high degree of risk, but rather as a result of an inability to manage this risk. Therefore, in conducting an individualized risk assessment, judges examine current and historical factors that are unique to the offender in order to evaluate the likelihood of his manageability. Such factors include the presence of a personal support system, responses to past risk management strategies and an offender's institutional behaviour.

By relying on a philosophy of risk management, it is clear that judges have adopted a utilitarian theory of crime control when designating an individual as either a dangerous or a long-term offender. This is evident by the many similarities in the offences committed by both dangerous and long-term offenders, which indicates that judges do not distinguish between these two designations in terms of perceived dangerousness or inflicted harm, but rather by considering the least restrictive means necessary to manage an offender's risk. As a result, judges appear to prioritize the management of an offender's risk in order to prevent the commission of future crimes, and are not attempting to punish or exact some form of revenge on offenders for the crimes that they have committed in the past. Thus, there is a deviation between the judiciary's conception of dangerousness and the public's conception of dangerousness, the latter of which forms a strong basis for the enactment of punitive laws that politicians

create in order to appeal to the views of the electorate. Contrary to the public’s perception that an offender is dangerous as a result of an offence that he has committed in the past, judges appear to label offenders as such according to the perceived manageability of their risk in the future.

The practice of managing an offender’s risk using the least restrictive means necessary does reflect the new penology’s objective of cost efficiency, as judges appear to be relying on “more cost-effective forms of custody and control” when sentencing offenders (Feeley & Simon, 1992, p. 457). The long-term offender designation is a key example of this new objective, as it allows for an offender’s risk to be managed within the community and thereby limits the costs associated with long-term imprisonment. Furthermore, even in the case of dangerous offenders who are sentenced to an indeterminate period of detention, judges are quick to emphasize that the offender is not being given a sentence of life in prison, but is rather eligible to apply for parole after serving seven years of his sentence.

Despite the focus on cost efficiency in the twelve judgments, there is a notable absence of discourse involving the new penology’s objective of system efficiency. As a result, it can be inferred that judges are not prioritizing the efficient “ ‘systemic’ ” operation of judicial processes when sentencing offenders (Feeley & Simon, 1992, p. 450). This is supported by their resistance to relying solely on actuarial predictions when determining an offender’s risk. In this sense, judges appear to be sacrificing the goal of efficiency in order to identify and address the unique individual factors that contribute to an offender’s deviance and manageability.

The New Penology and Judicial Decision-Making

These results indicate that Canadian judges who are making decisions at dangerous offender hearings are similar to other frontline criminal justice practitioners in that they resist the transformative concepts associated with the 'new' penology (Bayens et al., 1998; Lynch, 1998; Quinn & Gould, 2003). While it is clear that Canadian judges have adopted a philosophy of risk management, their discourse continues to reflect the individual offender as being the primary unit of inquiry and it is apparent that they still actively consider rehabilitative and transformative ideals when sentencing high-risk offenders. Therefore, as opposed to Feeley and Simon's (1992) claim that the justice system has undergone a transformation to now focus on offender risk through the classification of offenders into aggregates and the use of actuarial predictions, it appears that any "new practices and mentalities co-exist with the residues and continuations of older arrangements" (Garland, 2001, p. 167).

The finding that judges have not fully adopted the principles of the new penology is particularly significant as a result of the powerful role that members of this profession play in the criminal justice system. Unlike other 'frontline' criminal justice practitioners, judges make decisions in matters that are brought before them, and are tasked with interpreting statutes that are "necessarily worded in ambiguous ways" because, at the time of their creation, one "cannot foresee all the future circumstances to which they must be applied" (Heard, 2006, p. 215). Thus, in addition to their decisions creating a particular social reality, judges have the ability to shape the current state of the law through their interpretation and enforcement of legislation.

Although it is unclear in the written decisions why judges have not adopted the actuarial and aggregate-classifying approaches of the new penology, it is quite likely that

judges resist these new techniques in an effort to maintain the integrity, independence and value of their profession, as well as in respect to the idea of the individual as the subject of the law. After all, at their extreme, the principles of the new penology have the potential to transform judges from being authoritative decision makers to statistical interpreters who sort offenders based on actuarial " 'indicators,' prediction tables, [and] population projections" (Feeley & Simon, 1992, p. 452).

Additionally, it is likely that judges continue to focus on the individual offender at sentencing because this is how they were taught to practice law. If transformations have taken place within the criminal justice system, it is possible that these changes have not infiltrated law school education, which is often criticized for being outdated because of its focus on teaching theory as opposed to practical skills (Dolin, 2007; Edwards, 1992). This possibility is further supported by Feeley and Simon's (1992) explanation of the 'old' penology; they acknowledge that the "modern…law…concentrates on individuals," and that this "concept…still form[s] the core of law school education" (p. 451). As a result, despite changes in the criminal justice system, judges may continue to make decisions in accordance with the way that they were trained to practice law. This undoubtedly has implications on the social reality of how the law is interpreted and enforced by judges, which is reflected in Felix Frankfurter's 1927 remark that "in the last analysis, the law is what the lawyers are…[a]nd the law and the lawyers are what the law schools make them" (as cited in Edwards, 1992, p. 34).

Regardless of the reasons why, the fact that judges may resist the " 'actuarial' criminology" of the new penology (Feeley & Simon, 1992, p. 466) does appear to reflect a form of responsible decision making when sentencing offenders. This is because of the many acknowledged frailties associated with the use of actuarial instruments, which often

produce erroneous or false positive risk predictions (e.g., Coles & Grant, 1999; Heilbrun et al., 1999; Lave, 2011; Vess, 2008). Thus, the fact that judges rely on individualistic and offender-personalized assessments instead of impersonal and potentially erroneous actuarial predictions does appear to be fair, and also likely minimizes the potential for miscarriages of justice. This is especially true at dangerous offender hearings, as the erroneous assessment of an offender's risk can result in pre-emptive intervention that unnecessarily restricts an individual's liberty (Henham, 1997).

Judicial Conceptions of the Prison Experience and Parole Eligibility

With this said, there are some concerning trends in how judges conceptualize the prison experience when considering an offender's 'needs' and manageability. According to Goffman (1961), prisons are an example of a "total institution" because of the inmate's involuntary isolation from the social world that exists outside of the facility. This causes "processes by which a person's self is mortified," and can result in a " 'disculturation' " that leaves inmates unable to function upon their release from prison (p. 13-14). Additionally, Sykes (1958) identifies various "pains of imprisonment" that result from an inmate's deprivation of liberty, goods and services, heterosexual relationships, autonomy and security. While these modern pains of imprisonment are different than the "severe bodily suffering [that] has long since disappeared" from prisons, they do produce "a residue of apparently less acute hurts [that] can be just as painful [and] pose profound threats to the inmate's personality or sense of personal worth" (p. 64).

Thus, the fact that judges perceive a prison sentence as being instrumental in addressing the 'needs' of an offender is problematic, as it seems likely that the prison experience may undermine the effectiveness of any rehabilitative efforts that do take place. Also, there appears to be a misperception among the judiciary with regard to the

availability of institutional resources, which are used to both treat offenders and minimize their risk. Whereas judges calculate the length of a determinate sentence by considering how long offenders 'need' to be incarcerated in order to have adequate access to resources within the institution, it appears that, in practice, offenders are given access to such resources based on their projected parole eligibility. This is shown in the case *R. v. Cumming* (2010), as until his dangerous offender designation was overturned by the Ontario Court of Appeal, Cumming had not been given access to what were considered necessary treatment programs because he "was being offered [such] programs on a schedule that was consistent with a vastly delayed parole date" (para. 67).

With regard to parole, there does appear to be a disconnect between the judges' perception that a dangerous offender may be granted parole and the practices of the National Parole Board in making such decisions. In each of the seven cases in which an individual is found to be a dangerous offender, the judge emphasizes that the offender is not being given a sentence of life in prison, as he is eligible to be considered for parole after serving seven years of the indeterminate sentence. However, such statements overlook the reality that being granted parole is quite rare for a dangerous offender; in fact, in the year 2011, less than four percent of the country's "active" dangerous offenders were in the community on parole (Public Safety Canada, 2012). Although the low rate of being granted parole may indicate that judges have accurately identified those individuals who are at the extreme end of the continuum with regard to risk and dangerousness, it does seem troubling that judges are not acknowledging that, in designating an individual a dangerous offender, they are more than likely handing down a de facto sentence of life in prison. Finally, in light of the profound differences between prison and the 'free' community, it is somewhat concerning that judges rely on institutional behaviour in order

to predict how an offender will behave if released into the community. It is important to distinguish between the range in severity and type of institutional offences, as an inmate’s rule infractions may occur in direct response to the deprivations associated with the pains of imprisonment. These offences are presumably less predictive of how an inmate will behave in the community upon release, and should therefore be differentiated from the violent infractions committed by an aggressive inmate who continues his offence cycle while in prison. Offenders who fit in the latter category are especially problematic, as while they are removed from the community in order to protect the public, their violent offences while in prison indicate that they continue to cause significant harm by victimizing members of what Sykes (1958) calls the “society of captives.”

Summary

While Canadian judges have adopted the risk management philosophy of the new penology, it is clear that they have not abandoned rehabilitative ideals and that they still consider the individual offender as being the primary unit of analysis when making decisions at a dangerous offender hearing. Additionally, it is apparent that judges resist a sole reliance on actuarial predictions when assessing an offender’s risk and that they have not fully adopted the goal of efficiency when making decisions in these cases. These results suggest that judges have adopted the principles of the new penology to some extent, and that the new priorities and practices operate in conjunction with those that characterize the ‘old’ or modern penology.

Chapter Seven: Conclusion

Reconsidering the 'New' Penology

Judicial Resistance and the New Penology

The discourse analysis of judgments from Ontario dangerous offender hearings that took place in 2010 indicates that judges are similar to other frontline criminal justice practitioners (see Bayens et al., 1998; Lynch, 1998; Quinn & Gould, 2003) in that they have not fully adopted the principles of the new penology when making decisions in these cases. While it is true that judges appear to be guided by a philosophy of risk management, it is evident that they have not abandoned rehabilitative and treatment-oriented goals when sentencing an offender. Additionally, when deciding whether an individual is either a dangerous or a long-term offender, it is clear that judges do not rely solely on actuarial predictions in order to assess an offender's risk, but that they rather consider individual factors that are unique to the offender's deviance and manageability. These factors include the offender's response to previous treatment and risk management efforts, the existence of a personal support system and the offender's 'needs,' and the nature of the offender's behaviour while institutionalized. The fact that judges engage in such individualized assessments instead of exclusively relying on actuarial risk predictions is inconsistent with the new penology's focus on system efficiency.

Therefore, it is apparent that Canadian judges resist Feeley and Simon's (1992) conceptualization of the 'new' penology when designating an individual as either a dangerous or long-term offender. Although judges have adopted some aspects of the new penology, the new priorities and practices appear to exist in conjunction with, as opposed to in replacement of, the principles of the earlier modern penal era. While judges have not abandoned the understanding that individual offenders are the primary unit of analysis

at sentencing, their apparent conceptualization of the prison experience and their general remarks regarding parole eligibility for dangerous offenders do not appear to be consistent with the social realities of these institutions and processes. These misperceptions may result in judges inadvertently undermining the goals of rehabilitation and risk management when sentencing an offender.

Directions for Future Research

This research project is significant as, according to a review of the available literature, it is the first to examine whether judges are similar to other frontline criminal justice practitioners who have been found to resist the priorities and practices of the 'new' penology (see Bayens et al., 1998; Lynch, 1998; Quinn & Gould, 2003). Future research should examine a larger sample of judicial decisions from dangerous offender hearings, and should consider decisions that have taken place throughout the different regions of Canada over a set period of time. This will allow for an evaluation of geographic differences in judicial decision-making, which is particularly meaningful as a result of the significant variations in the number of dangerous and long-term offender designations that occur in the different Canadian provinces and territories (Trevethan et al., 2002). Additionally, the examination of cases that are heard over multiple years will allow for the identification of any changes in the judiciary's conceptualization of risk over time. Future research should also examine judicial decisions that do not involve the use of preventive legislation in order to see whether the extent to which judges have adopted the new penology is influenced by the potential for severe consequences, which are associated with both the dangerous and long-term offender regimes.

Finally, while a discourse analysis of judicial decisions does allow for the nuanced examination of the priorities and practices that guide a judge's decision making, there are

limits associated with this method. Court judgments are formal documents that reveal the official reasons for a judge's decision, and they are undoubtedly written in a manner that is meant to withstand the scrutiny presented at a review or appeal. As a result, subsequent research could use a method that combines the discourse analysis of judicial decisions with semi-structured ethnographic interviews of judges, which will likely reveal and clarify aspects of the judicial decision-making process at dangerous offender hearings.

One consideration that remained ambiguous in the judicial decisions and that could be further explored in interviews with judges is the effect of an increasingly punitive political culture on the decision-making process. Since an offender's risk is managed through the least restrictive means necessary, it appears that Canadian judges may not have adopted the 'tough on crime' philosophy that is increasingly reflected in the development of crime policy. As is explained by Bottoms (1995), such policies are the result of politicians passing laws that are intended to appeal to the growing punitive views of the electorate. This finding is particularly interesting, as the current Conservative Party of Canada has recently enacted punitive sentencing laws that are intended to respond to the public's concern with what is widely perceived to be "judicial leniency" (Roberts, Crutcher, & Verbrugge, 2007, p. 84). Among the enacted sentencing laws are the development and expansion of mandatory minimum sentences, which do not have a " 'judicial discretion' clause" to allow for judges to account for "the individual circumstances of the case" (Roberts et al., 2007, p. 80). This undoubtedly has the potential to pose a dilemma for judges, as they are inevitably tasked with sentencing offenders in a way that deviates from their traditional philosophies and practices.

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Appendix A

Case Summaries

R. v. Cumming **(2010)**

Gary William Cumming, who was forty-seven years of age at the time of the predicate offence, was designated as a dangerous offender in 2009 after he was convicted of eight offences that arose from two separate incidents of domestic violence. In these incidents, Cumming assaulted his partner and either one or both of her children, which resulted in both serious and significant injuries. Cumming's designation as a dangerous offender was overturned by the Ontario Court of Appeal and, in the present case, he is the subject of a second application by the Crown to have him declared a dangerous offender.

At the conclusion of the second hearing, Justice Langdon found that there is a reasonable possibility that Cumming's risk can be controlled in the community. In making his decision, Justice Langdon made reference to the fact that Cumming has had "excellent" institutional behaviour and has made "significant positive gains" in a program that is designed to prevent domestic violence (para. 10). As a result, Cumming was sentenced to a term of imprisonment of seven years and four months, which is to be followed by a ten year long term supervision order.

R. v. D.M.L. **(2010)**

D.M.L., who was twenty-seven years of age at the time of the predicate offence and is of Jamaican descent, is the subject of a dangerous offender application after he pled guilty to the charges of aggravated sexual assault, attempting to choke with intent to enable sexual assault with a weapon, possession of a weapon for the purpose of committing an offence, forcible confinement and breach of recognizance. These charges are the result of D.M.L. having "violently attacked" and sexually assaulted Ms. Y.P., after

which he took various counter-detective measures in order to destroy the evidence of his crime (para. 23).

D.M.L. has a lengthy criminal history of committing sexual assault with a weapon and he was previously referred to by the media as the "Scarborough Rapist" (para. 123). At a sentencing hearing in 2001, D.M.L. was referred to by the presiding judge as a " 'serial, coercive, sadistic, predatory convict [who perpetuates] against female strangers [with] the use of a knife, or the threatened use of a knife' " (para. 107). The predicate offence occurred approximately two months following his release from prison, where D.M.L. had participated in various sex offender treatment and counselling programs. D.M.L. neglected to alert authorities of any issues or problems prior to his assault on Ms. Y.P. despite the fact that, the day prior to the offence, he had attended the police department for his weekly report and had attended a meeting with his Circle of Support.

In the end, Justice MacLeod-Beliveau designated D.M.L. as a dangerous offender and sentenced him to an indeterminate period of incarceration. This ruling is consistent with the testimony provided by all three of the forensic psychiatrists who testified that D.M.L. is of a high risk to reoffend in a sexually violent manner.

***R. v. Mumford* (2010)**

Mumford, who was fifty-seven years of age at the time of his dangerous offender hearing, was found guilty of two counts of aggravated sexual assault, two counts of invitation to sexual touching and two counts of sexual interference. These charges are the result of Mumford's repetitive acts of anal penetration and oral sex with a seven year old male, who he recorded "experiencing pain" (para. 15). Despite his knowledge of being HIV-positive, Mumford engaged in acts of unprotected oral sex with the victim and did

not advise the victim to seek medical attention after his condom broke during an act of anal penetration.

Mumford has a criminal history of sexually assaulting male victims between the ages of seven and fourteen years and was described by a forensic psychiatrist as "exploitive and unempathetic [*sic*]" (para. 22). While serving a period of incarceration prior to the predicate offence, Mumford underwent "the most extensive [sex offender] treatment available from Correctional Services of Canada" and, upon his release, he engaged in "deceitful" behaviour with his community support workers (para. 54).

Justice Marrocco did designate Mumford as a dangerous offender and sentenced him to an indeterminate period of incarceration, as there is a "reasonable expectation that [he] will commit a serious personally [*sic*] injury offence in the future" (para. 29). Additionally, Mumford lacks a degree of personal support and previous attempts to monitor his behaviour in the community have been unsuccessful.

***R. v. Nicholas* (2010)**

Eli Stewart Nicholas, who was thirty-one years of age at the time of his dangerous offender hearing, is the subject of an application to have him declared a dangerous offender after he was convicted on the charges of break and enter, sexual assault and failure to comply with a recognizance. In addition to the predicate offence that was committed against a fifty-four year old female, Nicholas had committed two other relevant offences of unlawfully entering a residence and assaulting an elderly female in the presence of her disabled husband. As a result of his actions, a police task force was created in the summer of 1999 in order to capture an offender who was referred to as the "Scarborough Bedroom Rapist" (para. 1).

After being assessed by a psychologist, Nicholas was found to be in the fourth percentile of intelligence for people of his age, which places him slightly above the cut-off to be declared mentally retarded. Additionally, of the two assessing psychiatrists, both agreed that Nicholas poses a high risk of recidivism. This is reflected by Dr. Klassen's comment that "Nicholas cannot be managed in the community at this point in time because of his poor self-disclosure, poor engagement, criminal lifestyle and rapid recidivism" (para. 68), which is further evident by the fact that, of the thirty-six convictions he attained between the ages of thirteen years and twenty-four years, approximately one third of these were the result of a "disregard for orders of the court or law officers" (para. 23).

In the end, Nicholas was declared a dangerous offender and was sentenced to an indeterminate period of incarceration. In making this decision, Justice Dunnet referred to the fact that Nicholas has "a demonstrated disinclination to improve himself in any way in the face of repeated offers of assistance [and] [t]here is no reliable evidence that he will be [any] different in the future" (para. 174).

***R. v. Pascal* (2010)**

Pascal, who is of Aboriginal heritage and was twenty-nine years of age at the time of the predicate offence, is the subject of a dangerous offender application as a result of his conviction for committing a sexual assault causing bodily harm and for failing to comply with the condition of an undertaking. Prior to this, Pascal had twenty-four convictions for violent offences and two convictions for sexual assault.

Pascal, who was born in a remote First Nation community in Northwestern Ontario, used solvents for the purpose of becoming intoxicated and abused alcohol as a

teenager. His family does have a history of substance abuse and "criminality," and he claims to have been abused by both family members and strangers as a child (para. 25).

At the end of the hearing, Justice Platana did designate Pascal as a dangerous offender and sentenced him to an indeterminate period of imprisonment. This decision is supported by the separate assessments performed by a forensic psychiatrist and a forensic psychologist, both of whom advised the Court that Pascal is of a high risk to reoffend. Additionally, actuarial testing indicates that Pascal is "less likely to abide by conditions of release and [is] less likely to benefit from treatment" (para. 135), which is compounded by Dr. Klassen's report that he appears to have "a sense of entitlement, explosiveness and a lack of empathy" (para. 37).

***R. v. P.J.W.* (2010)**

P.J.W. is the subject of a dangerous offender application after he was convicted of committing multiple offences, which include assault causing bodily harm, forcible seizure and confinement, pointing a firearm and breach of probation. He has a lengthy criminal record that includes seventy-four convictions, all of which he attained between the ages of twelve and thirty years. At the hearing, reference was made to the fact that P.J.W.'s "violent behaviours are increasing" in nature (para. 104).

At the end of the hearing, Justice Keast declared P.J.W. to be a long-term offender because, although he does meet the criteria to be declared a dangerous offender, there is a reasonable possibility that his level of risk can be controlled in the community. In making this decision, reference was made to P.J.W.'s Aboriginal heritage and the fact that he has suffered "unique and systemic background factors…that have contributed to [his] lengthy criminal history" (para. 152). Despite this recognition, Justice Keast noted that P.J.W. is not being "treated differently" as a result of his Aboriginal heritage" (para. 154).

***R. v. Radcliffe* (2010)**

Frederick Radcliffe, who is of an Aboriginal heritage, is the subject of a dangerous offender application after he was convicted of sexual assault, touching the body of a person under fourteen years of age and breach of recognizance. Prior to the predicate offence, Radcliffe had been convicted of sexual assault, sexual interference, failure to comply with a probation order, and multiple indecent acts, which are the result of him having exposed himself to numerous females. Additionally, at the dangerous offender hearing, the Crown introduced evidence of various offences that Radcliffe had not been charged for in order to establish his lengthy history of committing acts of sexual assault and forming inappropriate relationships with female teenagers.

Radcliffe was categorized by actuarial tests as being of a high risk to reoffend in a violent and sexual manner, and a forensic psychiatrist characterized him as being unable to change his behaviour as a result of his "failure to develop coping mechanisms over time" (para. 87). This is evident by the fact that he has undergone treatment at "the best facilities of the Ontario Correctional Institute" on three separate occasions, but he has still continued to re-offend (para. 101). Radcliffe does submit that alcohol and drug use have been a factor of his criminality in the past.

In the end, Justice Lalonde declared Radcliffe as a dangerous offender and sentenced him to an indeterminate period of imprisonment. The judge noted that, although family support "could be helpful," Radcliffe's wife does not have an adequate understanding of his risk and is "too tolerant" of his deviant behaviour (para. 104).

***R. v. Solano* (2010)**

Solano is the subject of a dangerous offender application after he was found guilty of eleven charges, which include robbery, hostage taking and assaulting a peace officer.

Prior to the predicate offence, Solano had an extensive criminal record that consisted of twenty-eight convictions for violent offences, property offences and administrative offences.

Following an assessment, a forensic psychiatrist concluded that many of Solano's prior offences have been the result of his extended abuse of drugs. Additionally, there was a "significant disagreement" among the mental health experts as to whether Solano actually suffers from schizophrenia (para. 90). This is shown by the fact that one of the experts at the hearing did diagnose him with schizophrenia, while the other did not.

At the conclusion of the hearing, Justice Pelletier did declare Solano a dangerous offender and sentenced him to an indeterminate period of incarceration. In explaining this decision, Justice Pelletier made reference to Solano's "very high" risk of recidivism, both his and his family's "rationalization" of his behaviour and the fact that all of the previous risk management efforts and judicial interventions have been unsuccessful (para. 175).

***R. v. Stratton* (2010)**

Michael Stratton, who is forty-three years of age, is the subject of a dangerous offender application after he pled guilty to thirteen predicate offences, which include assault, sexual assault, invitation to sexual touching, possession of child pornography and making child pornography. His offences primarily involved female victims between the ages of nine and fifteen years, with whom he had developed a manipulative and coercive relationship. Stratton has a previous conviction for abducting his thirteen year old girlfriend when he was seventeen years old and, as a result of their age discrepancy, was found guilty of engaging in "unlawful but consensual sexual intercourse" (para. 22).

Stratton also has prior convictions for mischief, threatening death, uttering threats, failure to comply with an undertaking and failure to comply with a recognizance.

Stratton, who does have one son, admitted that he has a sexual preference for females between the ages of ten and fourteen years. He frequently uses alcohol and cannabis and he also admits to being dependent on cocaine. As is said to be reflected by his plea of guilt, Stratton has a high degree of remorse for his crimes and has indicated that he will pursue whatever treatment is required to ensure that he does not reoffend.

At the dangerous offender hearing, all three of the forensic psychiatrists who performed an assessment agreed that Stratton has a moderate risk of recidivism. Although Justice Bellefontaine did find that the dangerous offender criteria had been met, he used his discretion to designate him as a long-term offender. As a result, Stratton was sentenced to a twelve year period of incarceration that is to be followed by a ten year long term supervision order.

***R. v. Thomas* (2010)**

Randy Burton Thomas, who is thirty-seven years of age, is the subject of a dangerous offender application after he was convicted of sexually assaulting a seventeen year old female. He has an extensive criminal history, which includes multiple offences for both violent behaviour and acts of noncompliance.

Thomas, who is of Aboriginal heritage, was raised in a remote First Nations community on Hudson Bay. In 2008, he claimed to have been sexually abused as a child and further submits that he suffers from schizophrenia, bi-polar disorder and post-traumatic stress disorder. Despite this, after conducting an assessment, Dr. Steven Hucker reported that he is doubtful that Thomas suffers from schizophrenia and bi-polar disorder, and found that he has a moderate to high risk of recidivism.

Justice Warkentin found that Thomas should not be designated a dangerous offender and should instead be declared a long-term offender, as there is a reasonable possibility that his level of risk can be controlled in the community. In making her decision, Justice Warkentin stated that Thomas' "unique systemic or background factors have played a part in bringing [him] before the court" (para. 53). The judge further stated that, upon his release, Thomas should not return to his community because of concerns with "rampant alcohol abuse" and isolation, both of which would present difficulties for maintaining his sobriety and his supervision (para. 55).

***R. v. Veysey* (2010)**

Timothy Wayne Veysey is the subject of a dangerous offender application after he was found guilty of sexually assaulting a fourteen year old and a sixteen year old male in the yard of a public school. Veysey, who has a long history of committing sexual assaults against child victims, has been diagnosed as having a sexual attraction to both pubescent and pre-pubescent males.

At the end of the hearing, Veysey was designated as a dangerous offender. In his ruling, Justice Thompson explained that Veysey poses a substantial risk of future harm to members of the public and that his "sexual deviances" are incurable (para. 4). The judge concluded that Veysey could not be managed in the community because he requires sex drive reducing medication, and the National Parole Board has no way of enforcing a requirement that a parolee take such medication.

***R. v. Weigel* (2010)**

Paul Gregory Weigel, who is forty-two years of age, is the subject of a dangerous offender application after he was convicted of the predicate offence of sexual assault. This conviction is the result of Weigel's physical assault on M.H., who he mistakenly

thought was a prostitute. Following his arrest, Weigel cooperated with the police and admitted that he punched, grabbed and tore M.H.’s clothing in an attempt to gain control of her.

Prior to the predicate offence, Weigel was convicted of sexual assault in both 1998 and 2003, and he has admitted to having “violent sexual fantasies about raping women” (para. 10). In 2007, Weigel was found guilty of public mischief after he reported to police that he had been robbed and stabbed. It was later found that his injuries were self-inflicted as a result of his attempt to gain “help and relief” from his sexual thoughts of harming others (para. 11).

At the conclusion of the dangerous offender hearing, Justice McGrath found that, although Weigel does pose a substantial risk to the public and does meet the designation criteria of a dangerous offender, his risk of reoffending can likely be managed within the community through close monitoring, treatment programs and sex-drive reducing medication. As a result, he was found to be a long term offender and was sentenced to serve an additional two years of incarceration followed by a ten year long term supervision order.

Appendix B

Results of Offender Risk Assessment

Table B1

Results of Risk Assessment for Individuals Designated a Dangerous Offender

Offender	Mental Health Experts (#)	Diagnosis[a]	Classification of Actuarial Risk	Risk of Recidivism within 10 Years of Opportunity[b]
D.M.L.	3	-Coercive sexual preference with sadistic overtures	High	SORAG: 89%
Mumford	1	-Pedophilia & Hebephilia -Sexual preference for aggression against children	High	SORAG: 80% Static-99: 35%
Nicholas	3	-Gerontophilia -Antisocial personality disorder -Psychopathy	High	SORAG: 89%
Pascal	3	-Gerontophilia -Antisocial personality disorder -Psychopathy -Substance abuse disorder	High	Static-99: 40-60%
Radcliffe	3	-Coercive sexual preference -Pedophilia & Hebophilia -Sexual sadism -Exhibitionism & Voyeurism -Antisocial personality disorder -Psychopathy	High	VRAG: 64% SORAG: 89%
Solano	2	-Paranoid schizophrenia[c] -Antisocial personality disorder -Psychopathy -Substance abuse disorder	High	VRAG: 64%
Veysey	3	-Pedophilia & Hebephilia -Sexual sadism tendencies -Antisocial personality disorder	High	SORAG: 59% Static-99: 45%

[a] Listed are the diagnoses that are generally accepted by the judge. [b] For comparative purposes, results are only given for calculated risk over ten years of opportunity. [c] Justice Pelletier is uncertain whether or not Solano suffers from paranoid schizophrenia.

Table B2

Results of Risk Assessment for Individuals Designated a Long-Term Offender

Offender	Mental Health Experts (#)	Diagnosis[a]	Classification of Actuarial Risk	Risk of Recidivism within 10 Years of Opportunity[b]
Cumming	3	-Substance abuse disorder[c]	Moderate	-
P.J.W.	3	-Antisocial personality disorder -Substance abuse disorder -Personality disorder with borderline traits -Oppositional defiant disorder	High	VRAG: 82%
Stratton	3	-Hebephilia -Substance abuse disorder -Sexual sadism tendencies -Antisocial personality disorder -Sexual dysfunction -Hypersexuality -Voyeurism	Moderate	VRAG: 48% SORAG: 76% Static-99: 38-48%
Thomas	1	-Substance abuse disorder -Personality disorder, not otherwise specified -Possible schizophrenia -Possible post-traumatic stress disorder -Possible malingering	Moderate – High	-
Weigel	3	-Coercive and sexual violent preference -Personality disorder, not otherwise specified -Substance abuse disorder	Moderate – High	SORAG: 76%

Note. (-) indicates that the judge classified the offender's actuarial risk without making reference to any statistical predictive values.

[a] Listed are the diagnoses that are generally accepted by the judge. [b] For comparative purposes, results are only given for calculated risk over ten years of opportunity. [c] This decision involves the re-hearing of a dangerous offender application after Cumming's 2005 dangerous offender designation was overturned by the Ontario Court of Appeal. While specific diagnoses are not discussed in the 2010 decision, a diagnosis of substance abuse is inferred by reference to the continued need for drug and alcohol treatment.