# Dangerous Men

# Dangerous Men:

## *Ideology and the Personification of Evil*

By

Matthew G. Yeager

**Cambridge Scholars** Publishing

Dangerous Men: Ideology and the Personification of Evil

By Matthew G. Yeager

This book first published 2021

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library



Cover image: "Damaged Goods" by artist F. Scott MacLeod, Nova Scotia, Canada © collection of Matthew G. Yeager, 2020



ISBN (10): 1-5275-6210-7
ISBN (13): 978-1-5275-6210-3

# CONTENTS

# ACKNOWLEDGMENTS

This project has been in gestation for over twenty years and has been part of both my clinical practice in sentencing and parole as well as my academic research.

I would like to thank my wife, Carolyn Hallett, and our young lad, Eli, our grandson Jacques, and Carmen for their enduring support while I researched and wrote this book.

Special thanks are extended to the late Robin Neugebauer, the late Tadeusz Grygier, and Aaron Doyle who served on my dissertation committee. A special acknowledgement to professor emeritus Michael Petrunik who acted as my guide into the murky waters of dangerousness.

Finally, I would like to thank my colleagues and the Board of Directors at King's University College, Western University Canada, for giving me this opportunity to take a sabbatical and finish this most fruitful project.

# INTO THE ABYSS OF DANGEROUSNESS: A PERSONAL JOURNEY

No matter what you do as a criminologist, dangerousness seems to be embedded in this field of study. It is such a fundamental assumption which colors the subject of crime, that most of us simply take it for granted in dealing with *The Mad, the Bad, and the Different* (Glantz & Huff, 1981). I have been bouncing off the "dangerous" for decades, but my familiarity with official dangerousness did not start until I picked up a case in 1994 titled *Regina v. Eric Andrew Clark*.

For many years, I have specialized in sentencing alternatives and parole work involving the serious, deep-in convict. This work had taken me into hundreds of courtrooms, and numerous jails and prisons, where I have interviewed convicts, conducted social histories, and designed intervention programs for the jail-bound convict (Yeager, 1992a, 1992b and 1995). Through word of mouth among convicts, I was contacted by Mr. Clark and asked to provide a sentencing evaluation. He was facing a Dangerous Offender application under the Canadian Criminal Code (Section 752), and asked me to provide an assessment of his risk to the Court.

As you will read in Chapter 3, my own evaluation of the *Clark* case raised a number of issues about who was being designated officially dangerous, the nature of an indeterminate (life) sentence, the evidence relied upon in court, and what seemed to be a process almost entirely dominated by the mental health profession, closely followed by workers in the prison industry. I was struck by how an Accused in his fifties with no prior criminal record, and who pleaded guilty to the underlying charges, was supposed to be one of the most dangerous convicts in Canada. Of course, I concluded that Eric Clark wasn't that dangerous, and then proceeded to witness a court system which concluded the opposite. To this day, Mr. Clark, now age 81, resides in a minimum security

halfway house in British Columbia. In point of fact, he was resigned to dying in prison. The irony of the matter, as you will read in the *Clark* chapter, is that the Government's own research data indicated he was at low risk to reoffend, even on sexual matters. Twenty-one years of imprisonment later, the authorities finally agreed with my assessment at sentencing.

I then had an opportunity to contact a Dangerous Offender named Robert Olav Noyes, whose case in British Columbia had attracted some media attention. We corresponded while Rob was incarcerated in Quebec, and this convict began my education in dangerousness by briefing me on what was really going on inside the corrections industry, how DOs were treated, and just how difficult it was to gain a parole. In January of 1986, Robert Olav Noyes was designated a Dangerous Offender. He was an atypical convict because he had a college education and no prior criminal record or history of imprisonment. However, like most DOs, he had been convicted of 19 counts involving sexual and indecent assault on children aged 6 to 15, many of whom were students under his supervision as a teacher, school principal, and coach. Noyes successfully sued the National Parole Board when it denied his release in 1992, arguing that the inmate had "developed a tolerance for treatment and appear[s] to be able to engage in the programs without yourself feeling the full impact of the programs" (Noyes, 1994: 133). Subsequently, the Federal Court found this assumption untenable, concluding that the "Board [had] moved out of its field when it concocted this concept of tolerance to treatment. It is tantamount to telling Mr. Noyes that he has been over-treated and is now tolerant to treatment, thus he now can never be released" (Noyes, 1994: 145). Despite a new hearing, Noyes would remain behind bars until 2001. Many treatment specialists within the prison had recommended his conditional release years earlier. Towards the end of the 15-year period, Noyes had participated in numerous ETAs (escorted temporary absences) and UTAs (unescorted absences), all completed successfully and without incident.

When it came time for a hearing to consider Noyes' release on full parole (no halfway house requirement) in June of 2003, the National Parole Board finally granted full parole. What was the media reaction? To quote the *Globe and Mail* (Hume, 2003),

"Dangerous Pedophile Noyes is given full Parole." The *Ottawa Citizen's* (McCooey, 2003) headline noted that "Notorious Pedophile Gets Full Parole." Noyes' case was given extensive radio coverage, with many articles quoting officials opposed to his release and suggesting that pedophilia can never be cured. Despite being a model inmate and being on day parole for a period of about two and a half years without incident, Noyes' final release on full parole (for life) was still met with acrimony and moral panic.

My next encounter with official dangerousness is when I contacted a convict by the name of Charles Abel Armstrong. He had been featured in a *Globe & Mail* article by the investigative writer Kirk Maken (1996). I began corresponding with Chuck, who had this hilarious sense of humor and could make me laugh about a system most thought unfunny, to say the least. For instance, he had a business card which read: "Law Courts & the Correctional Service, Inc., Sock'em & Lock'em, Then Throw Away the Key!" Chuck had a lengthy history of multiple rapes (at least nine), dating back to 1969, and by the time I knew him, he was about 59 years of age and in failing health due to advanced celiac disease. I picked up his parole case *pro bono* (for the "good of the people," as my wife describes it), and proceeded to represent him before a panel of three National Parole Board members. Prior to his hearing, Chuck had nearly died while hospitalized for his medical condition.

What I learned in the course of preparing a parole plan for Mr. Armstrong was the antipathy that programs felt toward anyone with a Dangerous Offender designation. I was not able to find any retirement home which would take Chuck as a resident, and his family was uniformly hostile to any parole whatsoever. Actually, Chuck came from a relatively well-to-do family that would ultimately disown and disinherit him.

In the course of the hearing, Mr. Armstrong was accused by one Board member of malingering about his medical condition in order to justify a conditional release. In outrage, I responded that the Board's de facto policy of "killing convicts off" was intolerable. Some days later, I received a letter from the Board threatening me with removal from any future hearings if I did not recant my allegations. Well, I never did recant my diatribe. Instead, I hired counsel and requested a copy of the hearing transcript in which the

offending remarks by the Board member were inscribed – much to the consternation of the Board. What then happened is that Chuck Armstrong died about two months after his parole hearing, and the Board, facing embarrassment, simply dropped the matter of my discipline.

So, I was steeped in dangerousness when I began my graduate studies at Carleton University in 1998. From the very beginning, even in my initial university application, I wanted to do research on Dangerous Offenders in Canada. This led to collecting research on the subject, and in short order, I came across the work of Michael Petrunik (1979, 1982, 1984, 1994, 2002, 2003 and 2005). Petrunik took his doctorate in sociology from the University of Toronto in 1977, focusing mainly on the sociology of deviance as it related to persons who stutter. As fate would have it, while finishing his doctorate, he secured a position with the Solicitor General of Canada, in their corrections secretariat. One of his first tasks as a sociologist was to study the pending recodification of the *Dangerous Sexual Offender Act* (1960). His conclusion, not widely reported, was that the effort to reconstitute this much criticized legislation was largely a campaign by correctional psychologists and forensic psychiatrists to "colonize" their expertise and preserve a venue where their work was essentially required in Court for the Crown to obtain a finding of official dangerousness. In fact, he found that most of the research literature was quite skeptical of the ability of the mental health profession to predict future dangerousness. Thus, he concluded that the latent purpose of the legislation was more symbolic than instrumental.

For a period of three years, beginning in 1979, Petrunik worked on a major article titled "The Politics of Dangerousness," later published in 1982 in the *International Journal of Law and Psychiatry*. In reviewing most of the research in Canada, it soon became obvious that Petrunik's 1982 article would become a classic on the subject of Dangerous Offenders. Fate also intervened in that Michael Petrunik was a teaching professor nearby at the University of Ottawa, specializing in criminology. He became my guide into the murky waters of dangerousness, and served as a technical advisor to my dissertation throughout its gestation (Yeager, 2006).

In the course of trying to finish a dissertation, I discovered just how difficult it would be to conduct research on Dangerous Offenders. It is certainly acceptable, from the Punishment Industry's perspective, to approach these subjects from a character disorder point-of-view – traditional criminological positivism and especially individual pathology. However, when you assume a more critical, ethnographic approach (convict criminology) and ask these so-called Dangerous Offenders about how the system has treated them, you engender an entirely different reaction from those holding the keys to the penal institutions. In Chapter7, titled "Getting the Usual Treatment: Researching Dangerous Offenders in Canada," I go into detail in my experiences to get permission to interview Dangerous Offenders in penitentiary, as well as my University's use of ethics approval as a de facto obstacle course in support of state censorship. In the end, I was forced to abandon the original design of the dissertation, and opt for case studies based on public trial records. Obviously, from the perspective of the State, the questions one asks do matter when it comes to official dangerousness.

For want of better organization, this monograph is divided into three parts. The first summarizes the little known literature on dangerousness in Canada. Here, I have come across several works which have not been published, particularly some very useful master's theses. The second section departs from the usual managerial approach to criminology – one which would favor large samples and statistical analysis. Instead, we return to narrative sociology and therefore focus on three case studies. It is in these case studies of Dangerous Offenders that one gets a better sense of politics, the interpretation of evidence, the application of power, ideology, and questions of political economy (cf., Chapter 8). In conducting statistical analysis of large samples, one simply loses this perspective. It either vanishes entirely or is partitioned out into a distant wilderness.

Finally, we return in the last section to a political economy of dangerousness. Here, the operating assumption is that criminal dangerousness is a political concept (Quinney, 1970; Chapman, 1968). Any attempt to theorize cannot simply concentrate on the bad acts and character defects of these so-called "monsters," but

must address the sociology of law, its construction, and the latent purposes of this legislation within the larger body politic. In this part, I address the difficulties in doing research on Dangerous Offenders, matters of political economy, and the views of a small haphazard sample of the dangerous classes on these questions. In other words, how do the dangerous see themselves? Of particular interest is the issue of gender: most (99%) of the current Dangerous Offenders in Canada are males. Why is this so?

I am certain that more than one conclusion in this book will offend some in Government, in the judiciary, and among the mental health professions. If dangerousness is, indeed, a political concept, this sense of reproach cannot be avoided. So, this criminologist apologizes in advance to all who might be insulted, outraged, miffed, or otherwise disheartened by this line of inquiry. Some may criticize this monograph as both a personal journey and an academic treatise, and they may even object to my having a history of *praxis* with the dangerous classes. My only defense is that debate is good for the soul, and you need to listen to the voices of the damned. The notion that only "pure" academics can study Dangerous Offenders without getting their hands "dirty" with the actual legal process is a concept ripe for the proverbial dustbin.

# INTRODUCTION:
# ON METHODS

This monograph proceeds by way of a multi-method approach. This includes the time-honored case study, institutional ethnography, a haphazard interview sample of Dangerous Offenders, archival and records work, and lastly, the application of theory (Yin, 2003: 41; Ruddin, 2006). In particular, we analyze three Dangerous Offender trials in Canada, relying exclusively upon the public record: court transcripts and court documents, including motions by the two parties – the Crown and the Accused. So, to invoke the proper nomenclature, our "unit of analysis" is the DO trial proceeding (Stake, 2000; Patton, 1980; Berg, 1998).

The case study, as a sampling approach in sociology, has a long and honorable history. Notable classics in sociology range from William Whyte's (1943) **Street Corner Society**; Elliot Liebow's (1967) **Tally's Corner**; and **Middletown** by Lynd and Lynd (1929); to Thomas and Znaniecki's (1918) **The Polish Peasant in Europe and America**. Within criminology as subgenera, we have Edwin Sutherland's (1937) **The Professional Thief**; Frederic Thrasher's (1927) **The Gang**; and Clifford Shaw's (1930) **The Jack-Roller**. Even when Herbert Blumer (1939: 39) criticized the use of personal diaries and letters in **The Polish Peasant in Europe and America,** he would remark:

> To set aside the documents as having no scientific value would be to ignore the understanding, insight, and appreciation which their careful reading yields.

Stake (2000: 435) is probably correct when he concludes that the "case study is not a methodological choice but a choice of what is to be studied." There are a number of approaches, ranging from biography, autobiography, ethnography, and formal interviewing, to

content analysis and narrative. We will follow Yin's (2003: 22-23) definition that the essence of a case study is to "illuminate a decision or set of decisions." In other words, why they were taken, how something was implemented, and with what result. Here, the actual methodology varies. Within business and legal circles, the case method approach usually focuses on a particular business experience or legal case, and proceeds to analyze that case (Ronstadt, 1980; Masoner, 1988; MacEllven, 1993). In case studies, we often see a reliance on text, or research (such as interviews) which generates text. Content analysis is then often used to analyze words, phrases, or various themes in a mathematical approach (Krippendorff, 1980; Carney, 1972; Gahan & Hannibal, 1998).

This brings us to an enduring debate within the philosophy of the social sciences over the mathematization of sociology (Cicourel, 1964; Berger and Quinney, 2005). Stemming as it does from the positivist origins of sociology, especially its founder, Auguste Comte (Marcuse, 1960; Comte, 1893; Hartung, 1945), this notion sees sociology as a value-free, non-ideological science on a par with chemistry or physics. It is concerned with measuring the true nature of object reality or phenomena, and gives greater cultural significance to mathematical or quantitative output (Andreski, 1972). However, there have long been alternative interpretations to empirical positivism. For our purposes here, the case study method represents just such an alternative approach (Flyvbjerg, 2006).

The late Nils Christie (1976: 64), in talking about this debate between "hard" and "soft" data, observes that "you cannot understand anything through quantities that are not linked to qualities." No important evaluation of a social phenomenon can be made without some explication of the normative system upon which the social action is embedded. Both Yin (2003) and Cicourel (1964) point out that case studies are very useful to the investigation of properties that are simply too complex, too nuanced, or which simply don't yield to mathematical reduction techniques. To quote Cicourel (1964: 209):

> This is true of our determinations of violations of rules or law; the police, witnesses, the jury, the judge, the defense and

> prosecuting attorneys, the victim and the accused may all seriously entertain judgments which taken together are at once contradictory, overlapping, and vague.

These chronologies, grounded in real life experiences are, to many of us "noncalculable" in the sense of conventional mathematical sociology. To Cicourel (1964: 210), they are "not sufficiently detailed to handle the nuances of the role-taking process or how the actor defines the situation and shapes his self-role." Indeed, it has been argued by Stake (2000: 439) and Patton (1980) that the case study method gives us "thick description." Here, we seek detail about the complexities of cases, their idiosyncrasies, and competing meanings. With respect to a legal process – such as a Dangerous Offender hearing and its construction of a label – the case study may be one of the best vehicles to delve into the "Belly of the Beast" (Abbott, 1981).

To this extent, a return to narrative sociology, the telling of stories allows the researcher to interpret the "whole" of a person's life history, or the "whole" of an event under study (Ezzy, 2002: 95-101; Stake, 2000: 441; Maruna, 2001; Berger and Quinney, 2005). The researcher who resorts to narrative sociology is intimately involved in extracting meaning from the event through the use of chronology, summaries, thick description, or even plot. Denzin (1997) distinguishes two general orientations: analytic versus storied narration. The analytic is more positivist in orientation where the author tries to maintain a neutral stance, provide balanced description, and interpret the events derived from pre-existing theory or induced from the data themselves. The storied approach is often more personal, biographical or autobiographical, and often contains more reflexive commentary about feelings, emotions, and why the author selected the topic. This treatment is undoubtedly closer to the analytic approach as it seeks to provide thick description, but in a format that attempts a balance of the evidence both for and against dangerousness.

This brings us to another aspect of methodology which is the relationship between data and theory. The classic approach is the logico-deductive method of theory verification which begins with propositions deduced from theory and attempts to verify or

falsify the theory via experimentation or the examination of raw evidence (Ezzy, 2002: 7). However, there are eminent researchers who argue that theory construction, and its testing, should proceed through inductive methods largely separate from existing theory, often called grounded theory (Glaser and Strauss, 1968; Ruddin, 2006) . The reality may actually be a combination of the two. In the words of the late Bronislaw Malinowski (1922, 1984: 8-9):

> Good training in theory, and acquaintance with its latest results, is not identical with being burdened with 'preconceived ideas.' If a man sets out on an expedition, determined to prove certain hypotheses, if he is incapable of changing his views constantly and casting them off ungrudgingly under the pressure of evidence, needless to say his work will be worthless. But the more problems he brings with him into the field, the more he is in the habit of moulding his theories according to facts, and of seeing facts in their bearing upon theory, the better he is equipped for the work. Preconceived ideas are pernicious in any scientific work, but foreshadowed problems are the main endowment of a scientific thinker, and these problems are first revealed to the observer by his theoretical studies.

This monograph will proceed in the classical logico-deductive fashion, but with the recognition that we will often be "shuttling back and forth between general propositions and empirical data" (Ezzy, 2002: 15). Indeed, by using a multi-method approach, we are constantly "shuttling" back between different data sets, and different narrative interpretations.

So, how did I pick our three case studies? Your author selected the Lisa Neve case because at the time, she was the only female Dangerous Offender in the Canadian criminal justice system. Her adjudication as a Dangerous Offender was overturned by the Alberta Court of Appeal. The other two DO cases featured male convicts, and the reason for selecting these studies was because your author was involved in both as an expert witness for the defense. In the case involving Karl Rowlee, we were successful in stripping away his DO label before the trial court on remand from the Ontario Court of Appeal. With respect to the other case study (Eric Clark), we lost before the trial part and on appeal all the

way to the Supreme Court of Canada. All three case studies give us an in-depth view of the dangerous-making process, including its ideological and empirical foundations.

The reader must also be cognizant that your author was not allowed to interview Dangerous Offenders in federal penitentiary, as outlined in Chapter 7. The case study thus provides a backup to research obstacles placed in front of your author by the State. Importantly, the politics of studying Dangerous Offenders, and what the State allows one to study, are as important as the individual views of the dangerous convicts themselves.

With respect to our haphazard sample of the dangerous, we managed to "work around" the federal penitentiary bureaucrats, and found our subjects on bail, on parole, in the community, and in local provincial lockups. For those convicts in the community, permission was secured directly from the subjects. In other cases, permission was obtained from attorneys for those in provincial lockups.

Our example of institutional ethnography was a very fortuitous conference held in Ottawa, Ontario, in November 2006. The subject of this national conference was "high risk" offenders, a frequent pseudonym for the dangerous. Your author attended the conference as a paid participant, mingled with other attendees, and collected presentation material.

Lastly, your author engaged in extensive archival and document analysis concerning the denial of his entry into Canadian federal penitentiaries to interview a representative sample (N=100+) of Dangerous Offenders. That access was never granted, and both the federal penitentiary service and my own university ethics review board ran interference on the research project. Here, the maintenance and protection of the dangerousness project are constructed by various power brokers, and both ideology and power, in their application, are important theoretical constructs which help to explain the role of Dangerous Offender legislation in Canada.

As noted by Angell and Freedman (1953: 300), documents do present interpretative problems inasmuch as the researcher has no control over their production, nor can he or she follow up with a clarifying question.

> Documents, census materials, and indices characteristically bring the data to the social scientist in a form over which he has little control. In contrast, when the social scientist uses the method of observation, either participant or non-participant, he can focus on those aspects of the behavior of the subject that have theoretical interest for him; if he uses tests and questionnaires, he chooses to frame the instrument to suit his scientific needs; during the interview, the Subject may be guided by the interviewer and if crucial points are unclear, the interviewer can probe until the matter is elucidated.

Of course, one might argue that since the case study is designed to examine a process – here the adjudication of an Accused with respect to the Dangerous Offender designation – it is essential to examine court records. Indeed, validity may actually be enhanced since the researcher is not attempting to "disrupt" the hearing to pursue a particular theoretical issue (Webb, et al., 1966). Nor, in this instance, must we worry about the motivations of the Subject to attempt to deceive the researcher in the production of personal memories, letters, diaries or biographies. We have the benefit of sworn testimony, of numerous witnesses and evidentiary submissions (reports) – all of which help with construct validity (Yin, 2003: 35; Stake, 2000: 443).

Colleen Dell (2001) illustrated this approach by relying upon public hearing transcripts from the Commission of Inquiry into Certain Events at the Prison for Women in Kingston, Ontario (1995). This inquiry (Arbour, 1996) related to a prison disturbance which occurred in the segregation section of the now defunct Prison for Women in Kingston, Ontario, circa April 22, 1994. An all-male extraction unit proceeded to remove and strip eight female convicts, leaving them wearing paper gowns and manacled to their cells. Dell (2001: 136) specifically took this approach because she felt that the Federal Penitentiary Service would be opposed to allowing interviews of both their staff, and even the inmates – largely due to political reasons. Court transcripts are another source of data amenable to analysis (Neuman, 1997; Monette, et al., 1998), and form a type of narrative chronology. Unlike a lot of content analysis approaches, we are not using statistical techniques to "count" words, phrases, points of contention, ideas, or themes (Neuman,

1997; Weber, 1990; Carney, 1972). Sometimes, however, a specific exhibit will be tendered that has statistical qualities as well as normative ones. Hence, we did not employ a "coding" scheme of sorts, but relied upon analytic narrative and taking the testimony at face value.

Research reflexivity is always an important issue, even when working with secondary data sources like trial transcripts and court evidence. Data still must be interpreted and extracted in a fashion that the reader understands and which makes sense – i.e., face validity. Much traditional content analysis is so statistical that the narratives and meanings put forth get lost in data reduction techniques. More pointedly, court trials often do not lend themselves well to data reduction and statistical coding. One often finds quite disparate and conflicting testimony about an event, as is the case with the Commission of Inquiry into the case of Maher Arar (Curry, 2005). Here, both the Canadian intelligence agency (CSIS) and the Royal Canadian Mounted Police denied providing any "information to any American entity that would have led to the arrest and detention and ultimately the removal of Mr. Arar from the U.S." Conversely, the U.S. authorities have consistently alleged that Mr. Arar's arrest and expulsion to Syria (where nearly everyone concedes that Arar was tortured) was "based on information provided by Canadian security organizations."

Nevertheless, a researcher's background is important because it may shed light upon the reason for this project, the expertise of the researcher, and his or her ideological biases – which exist and should be duly noted (Kirby and McKenna, 1989). I came to this subject matter as an expert witness for the defense in *Regina v. Eric Andrew Clark*, a case which is featured in Chapter 3. In that case, I prepared a lengthy sentencing and social history report, and testified under oath as an expert criminologist. Mr. Clark's case raised a number of issues for me about our notions of dangerousness, some of which are presented here. So, in thinking about this case, I came to the issue not as a neutral observer, but as an expert witness who was asked to assess dangerousness and came to very different conclusions than those put forward by the Crown. Hence, I was not a totally unobtrusive observer (Webb, 1966). In fact, I have been doing this sort of work for about fifty years as a

clinical criminologist and defense expert. The same situation occurred in the re-trial of *Regina v. Karl Rowlee*, discussed in Chapter 4. Here, the inmate actually contacted me from penitentiary and asked for my help. I kept in touch with his counsel, a well-regarded prison lawyer from Kingston, Ontario, and eventually testified in this retrial on the research literature concerning psychopathy and the maturation effect in criminology. The Court actually cited my testimony as one reason, among many, to rescind the DO designation.

Nevertheless, when summarizing the context of the trials, I have strived to present a description of the evidence put forward by the various witnesses – in a fashion which others would likely replicate. As Berg (1998: 232) notes: "If the investigator's findings and analysis were correct, subsequent research will corroborate this." While there may be disagreements about theoretical interpretation, I would argue that the descriptive work with the trial documents and transcripts is, on its face, valid and reliable. Quinney (1998) makes it a point to say that the practice of criminology is a "moral philosophy," whose ideological assumptions should be manifest and have moral implications. It is important for the critical criminologist to act as a witness, and address these assumptions about dangerousness. Of importance here is that this researcher has never worked for the Prison Industry as a guard, parole officer, or classification worker. The underlying normative approach to this topic is therefore suspicious of state-defined dangerousness and that normative (moral) stance runs throughout this monograph.

# PART I –

# CLASSICAL APPROACHES TO CRIMINAL DANGEROUSNESS

# CHAPTER ONE

# THE SOCIOLOGY OF DANGEROUSNESS

In discussing the debate about classifying offenders as "dangerous," John Klein (1979: 5) argues, regardless of the civil liberties concerns, that if

> we can find acceptable criteria for what constitutes dangerous behavior and can accurately predict who will not engage in such behavior in the future, most would not feel all that uncomfortable about incapacitating such individuals until such time as the threat of such behavior is absent.

Nonetheless, he concludes that because serious violent behavior has such a low base rate (Roesch, 1978), our actuarial or clinical ability to predict dangerousness produces a high failure rate – those we say are "dangerous" turn out not to be so. Indeed, Klein (1979: 13) suggests that it is unlikely we will ever be in a position to test our predictions of dangerousness because of the reluctance of the State to "test" the proposition by neither treating nor incarcerating a sample of such offenders. As well, the numbers paroled may be too low in any case.

This chapter is a review of the Canadian literature on the Dangerous Offender, and its focus is exclusively sociological. Hence, it does not include the usual positivist literature invoking the pathological character defects of the convicted. Neither is this a survey of the international literature on dangerousness, nor a treatise on Foucault's own commentary on the subject (1973, 1978, 1979, 1996, 2000, 2003). Much of this literature has not been assembled in one place, and a lot of it is unpublished or even represents the contribution of master's theses. While a master's thesis is often derided by "pure" academics, some of this young

research actually constitutes unvarnished gems that deserve our attention.

Michael Petrunik's (1984) survey of Dangerous Offender laws in both Europe and North America suggests that much of this legislation has its origins in the early part of the twentieth century. Petrunik (1984: 13) attributes this legislation to the notion of social defense, which combined assumptions from both classical and positivist criminology at the turn of the century. Here, crime became a characteristic of individual pathology. It was necessary to diagnose and incapacitate a variety of persons thought to be dangerous, notably the habitual offender and those mentally disordered. This resulting state of "dangerousness" became synonymous with an inherent psychological abnormality – and hence required special legislation to sequester the offender, often for an indeterminate period of time.

John Pratt (1997) tells us that so-called habitual criminals were at this time seen – largely in anthropomorphic terms – as degenerates. This meant that the movement to incarcerate them was associated with eugenics, the rise of psychiatry as a profession, with a good dose of criminal anthropology thrown in for good measure, *à la* Lombroso (Wolfgang, 1973; Foucault, 2000: 176-200). As well, much of the new discipline of criminology was under the influence of the Italian positivist school, which placed its emphasis on the pathological traits of the individual criminal. Thus, in 1900 at the International Prisons Conference in Brussels, a group of elite penal reformers, psychiatrists, and anthropologists developed the notion of the indeterminate sentence. This new penal sanction was to be used sparingly, of course – in special cases because of the assumption of future harm. Persons subject to this provision were assumed to be at high risk for future, serious criminality even if they had not yet been adjudicated guilty of those “predicted” offenses. Public protection was the ostensible rationale and it was a justification which fitted neatly within industrial capitalism. The focus was on individual maladaptation to society, not on the structures of society.

According to Petrunik (1982 and 1984), the Canadian version of early Dangerous Offender Legislation – the *Habitual*

*Offenders Act of 1947* – originated with the much-criticized *1908 England and Wales Prevention of Crime Act*. A year later, Canada's *Criminal Sexual Psychopath Act of 1948* was passed, grafting some of the language from a similar statute in Massachusetts onto the habitual offender statute. This act was amended in 1960, and replaced with the notion of a dangerous sexual offender (Greenland, 1976).

Joy Irving's (2001) recent master's thesis provides some historical perspective on the origin of Canada's DO statute. The precursors, according to Irving, were the *Penal Servitude Acts of 1864 and 1865*, which provided for a mandatory, 7-year prison sentence to any convict who had been previously convicted of a felony. A few years later, England passed the *Habitual Criminals Act of 1869*, in part because capital punishment was no longer available to most recidivist property offenders. Similar to the *Penal Servitude Acts*, this legislation allowed police to arrest convicts who they merely suspected of "making a living by dishonest means" (Irving, 2001: 12). The onus of proof was on the convict to demonstrate that he or she was making an honest living. This legislation, which applied to convicts who had previously served a term in one of England's prisons, provided for a mandatory sentence ranging from one to seven years.

Of relevance was the political or social context of this legislation during the mid-19$^{th}$ century in Great Britain. The demise of capital punishment in England, the end of transportation to the colonies circa the 1850s, the protection of the propertied class, notions of social Darwinism, the "criminal class," and positivism prevailed. What is unique about this legislation is that it was abolished after only two years in 1871, largely due to criticism that it was unfair, poorly drafted, and opposed by the criminal bar. As well, the whole notion of the "dangerous classes" had faded from public attention.

What next emerged in England was the *Prevention of Crime Act of 1908*, the nearest precursor to Canada's own Dangerous Offender legislation because it was studied by the Archambault Commission (1938). Once again, the question of recidivism, professional criminals, and the failure of the penitentiary to contain them came to the forefront. While this act is also credited with

creating the English Borstal system for young offenders, thereby emphasizing the treatment and reformation of prisoners, it also addressed habitual convicts. Here, a judge could label an offender a "habitual criminal," which thereupon permitted a mandatory sentence of five to ten years on top of the usual tariff for the instant offenses.

The 1977 recodification of both Canadian statutes under the general heading of Dangerous Offender legislation was strongly influenced by a committee of forensic and correctional psychiatrists who had been assembled to brief the Solicitor General (Petrunik, 1984: 41-42). Though the Solicitor General's own research unit prepared a literature review which questioned the ability of psychiatrists to predict violent behavior, this and related civil rights concerns were ignored. While the Law Reform Commission of Canada (1976a) published its own criticisms of the Habitual Offender and Dangerous Sexual Offender statutes, its recommendation for fixed, determinate sentences was also by-passed.

In part, the 1977 amendments were influenced by the Federal Government's reaction to Philippe Gagnon, a mentally-disordered prisoner who, upon release in 1974, killed a policeman and wounded six others before dying in a shoot-out. To quote Petrunik (1984: 58):

> The Gagnon incident...occurred at a crucial time in the public debate over the abolition of capital punishment. Government officials were seeking alternatives to control violence that would allay the public's fears. The spectre of the Gagnon incident and its aftermath and the anticipation of other such incidents were likely factors in the Government's decision to ignore criticisms of the proposed dangerous offender legislation and include it as part of its Peace and Security Package against violent crime.

Fundamental to this legislation has been the dominant role of psychiatry and clinical psychology, although empirical evidence suggests that psychiatrists have not been particularly accurate in identifying so-called Dangerous Offenders. For example, one such experiment occurred in New York State following the U.S. Supreme Court's 1966 decision in *Baxstrom v. Herold*, 383 U.S.

107. That decision resulted in the release of over 900 allegedly dangerous, insane persons from indeterminate, civil commitment in the State of New York. Follow-up studies by Steadman and Cocozza (1975) in New York, McGarry and Parker (1974) in Massachusetts, and Joseph Jacoby (1976) in Pennsylvania found that few labeled "extremely dangerous" by psychiatrists were detected in acts of violence (Menzies, 1977: 34-36).

Notwithstanding such criticisms, Petrunik suggests that this legislation largely survives for symbolic reasons – to give the government the appearance that they are "doing something" about highly visible, violent offenders. The legislation thus gives legitimacy to the widespread tendency to associate violent and sexual offenses with untreatable mental disorder; permits the confinement of offenders who are ostensibly not psychotic or mentally ill, and is justified as a result of more lenient sentences for the non-dangerous.

Noting the symbolic functions of the criminal law (Gusfield, 1963), Petrunik also concluded that the Dangerous Offender statute serves an important political function. Critiques which focus on powerlessness, race, ethnicity, poverty, and class are purposefully excluded from the courtroom (Pfohl, 1978 and 1979a).

A decade later, Petrunik (1994) undertook an update of his previous study, this time comparing Dangerous Offender legislation in North America, Europe, and Australia. His review was organized around three approaches to understanding dangerousness: (a) the clinical model, (b) the justice model, and (c) the community protection model. Here again, Petrunik (1994: 9-10) observed how much legislation devoted to this issue is the result of a single, sensational "incident which has outraged the community." Thus, he concludes that (1994: 10; 1982: 237):

> Dangerous offender legislation…can be better understood as a largely symbolic attempt to appease an angry and fearful populace and serve special interests (for example, politicians seeking re-election, criminal justice and mental health professionals seeking additional resources) than a concerted

> instrumental effort to reduce the incidence of serious harm to the public.

The origins of the "clinical model" have, according to Petrunik, a long history – dating back to the positivist school of criminal anthropology (Garofalo, 1885). Central to this notion of dangerousness was the assumption of an identifiable personality disorder for which treatment was not likely to be effective. This led to the imposition of an indeterminate (life) sentence and civil commitment in countries such as Norway (1902), Denmark (1925), Belgium (1930), Germany (1933), and the United States (starting in the 1930s). Dominated as it was by a medical model, this legislation codified the ability of psychologists and psychiatrists to diagnose and treat such offenders. Under the guise of treatment, the interests of the mental health profession were incorporated into legislation (Sutherland, 1950a and 1950b).

During the 1970s, proponents of the "justice model" began to criticize Dangerous Offender legislation, and especially the mental health profession which dominated decision-making about individual pathology. Here, the notion of individual pathology, the ability to predict dangerousness, and the success of treatment were challenged as civil rights violations. This led many jurisdictions to abolish the indeterminate sentence for so-called sexual psychopaths, institute fixed sentences in both criminal and civil settings, and provide more due process protections in civil commitment proceedings.

More recently, the "community protection" model has been resurrected as the appropriate means to respond to Dangerous Offenders. Essentially a model supporting incapacitation via prison or surveillance, the notion of "community protection" is heavily dependent on the prediction of future, harmful conduct – using women and child victims as a key justification. In large part, the call for greater "community protection" has often followed sensational cases of offenders with long histories of violent sexual crimes who are released from custody after serving their determinate sentence and re-offend yet again (Petrunik, 1994: 55). Based on 121 offenders having been declared dangerous since 1977 in Canada, Petrunik summarized several well-reported findings: (1)

that most cases originated in Ontario and British Columbia; (2) that a substantial portion of DOs were non-white; and (3) that most DOs were sex offenders. Petrunik (1994: 90) thus observed that with an "average of only 8 new declarations a year, Canada's Dangerous Offender legislation has offered minimal comfort to members of the community concerned about high risk violent and sexual offenders."

In concluding his review of Dangerous Offender legislation, Petrunik (1994: 118) asked a key question: are adjudicated Dangerous Offenders significantly different from other violent sexual offenders or are the contingencies of differential community and criminal justice response the key factors in their selection?

Petrunik (2002 and 2003) would continue his interest in social policy and the response to sex offenders. A decade later, he again returned to the subject of Dangerous Offenders through a case study of Joseph Fredericks, one of Canada's most infamous child sex murderers (Petrunik and Weisman, 2005). Fredericks abducted and murdered 11-year-old Christopher Stephenson in 1988. His case reached the national spotlight through a concerted campaign by his parents and a Coroner's inquest (Ministry of the Solicitor General of Ontario, 1993).

Petrunik and Weisman (2005: 77) spend a great deal of time detailing how Fredericks' life was constructed over time in the form of competing analyses that reflected different "approaches to social and political analysis and social policy." What they found was a variety of categories beginning with an abused and neglected child, retarded child, mentally ill person, criminal, predatory monster, and even tragic victim. Fredericks begins as a child born into a very impoverished and mentally disadvantaged family who became a ward of the Court at nine (9) months of age, and was thereupon shuffled through a variety of foster homes. There, he describes great loneliness and many instances of sex play with boys and girls of his own age. Because he was falsely diagnosed as developmentally disabled, he was transferred to an institution for the "mentally retarded," where he was raped three times by another resident and himself engaged in both consensual and forced sex with other inmates. He later escaped from this facility, where he had a horrendous disciplinary record, and sexually assaulted a