THE EMERGENCE AND CONSEQUENCES
OF RISK THINKING
IN BRITISH COLUMBIA
DANGEROUS OFFENDER HEARINGS, 1978-2000

by
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ABSTRACT

In the 1990s, a revengeful and intolerant public demanded harsher punitive measures to deal with society's most hated criminals, the sex offenders. Legal and psychiatric experts responded by re-conceptualizing dangerousness in light of newly created risk assessment tools. In this dissertation, I explore the impact of risk assessment in the construction of Dangerous Offenders adjudicated in the Superior Courts between 1978 and 2000 in British Columbia.

More specifically, I examine the use of risk assessment by psychiatrists and psychologists in Dangerous Offender hearings. I discover that risk thinking allows for the identification and management of 'flows of offenders' characteristic of an actuarial model of justice. Under this model, dangerousness evaluation is directed away from clinical diagnosis and rehabilitation to risk assessment and management. I identify several problems associated with experts' use of risk assessment including: overprediction, the ecological fallacy, the inability to capture relevant individual and environmental variables, as well as, the negatively biased structure and invisibility of the process and experts' unquestioned reliance on pre-formulated information.

My findings suggest that risk thinking is neither a novel strategy of power nor a new form of penology. While dangerousness gets reconstituted, it is not replaced by a contemporary focus on risk. Risk assessment, like dangerousness evaluation, uses historical disciplinary templates of normality by which to judge the criminological 'other'; both strategies of evaluation lead to oppressive social differentiation. Risk thinking also permits novel co-strategies of penal power, but in the end, I discover that there is more evidence of continuity than of change.
I question the proclaimed advancements forwarded by the risk enterprise. Instead, I offer a model of understanding that incorporates the role of state and professional interests, protectionist penal doctrine, technocratic rationality and the self-reflexive nature of risk to explain the emergence and consequences of risk thinking. I urge continued critical analysis of the role of risk expertise in the criminal justice system.
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Last, but not least, I am confident that my dedication will last the test of time.

To Colin—I look forward to benefiting from your wisdom, understanding and respect—forever.
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CHAPTER I

DANGEROUSNESS AND RISK

Danger is one of the central themes in criminology. Dangerous men and women. Monsters hiding in the shadows, or even more dangerous, living among us camouflaged as ordinary beings. (Christie, 2000, p.181)

Dangerousness is a socially constructed idea, influenced by our value systems and our philosophical, moral and ideological perspectives. It has played a central role in the construct of criminality throughout history. Dangerousness has emerged in the Canadian legal arena as a label—sometimes shifting in definition—which courts selectively apply to offenders. The legal definition of dangerousness has evolved to refer to the perpetrator of harm, not to the harm itself. The Criminal Code of Canada has embraced the nomenclature of dangerousness, through a set of procedural “safeguards” geared toward ensuring that only “dangerous” offenders are labelled as such. Serial rapists, repeat pedophiles and incorrigible psychopaths are the usual suspects most often considered dangerous. They are the individuals we are told to fear. Canadian legislation defines as dangerous those 'kinds of criminals' thought most likely to exact that fear.

Accordingly, the criminal justice system subjects the Dangerous Offender (DO) to extreme forms of penal confinement. Indeterminate sentencing—a form of preventative incarceration—encoded in Canadian legislation is considered necessary for offenders designated too dangerous to participate in society. Justice Gautreau in Wooldridge1

described the indeterminate sentence as "the most awesome sanction or punishment" currently available in Canadian criminal law" (p. 21). Throughout history, such laws represented the boundaries of penal segregation, and were generally reserved for repeat offenders as a last-resort control mechanism (Conrad, 1982; Pratt, 1998; Freiberg, 2000).

Today, the courts selectively apply Canada's Dangerous Offender legislation to males who sexually or violently victimize women and children outside of a domestic context (Petrunik, 2003, p. 46). The Alberta Court of Appeal decision in R. v. Neve argued that the Dangerous Offender legislation is meant to target a group of "recalcitrant" offenders. According to that ruling, the DO label applies to a small group of individuals who occupy the extreme end of offenders in Canada. This ruling upheld the Supreme Court of Canada opinion in R. v. Lyons, which stated that DO legislation should be applied to "a small group of highly dangerous criminals" whose "pattern of conduct is substantially or pathologically intractable" (p. 338).

Part XXIV—Dangerous and Long Term Offenders—of the Criminal Code of Canada provides for the indeterminate sentencing of Dangerous Offenders adjudicated through a DO hearing. During a hearing, by law, judges must weigh evidence provided by 'psy' experts to determine dangerousness. Beginning in the early 19th century, the courts charged psy professionals with the clinical task of identifying intrinsically

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4 Donzelot (1979) describes psy professionals as psychiatrists and psychologists called by the courts to judge both the mental state of offenders and the likely effects of particular sanctions on them.
dangerous offenders (Foucault, 1978a). Several Supreme Court cases in Canada have affirmed the significance of psychiatric testimony in hearings.\(^5\)

Historically, psy experts identified appropriate targets for DO designations by diagnosing pathology and disorder (e.g., paraphilia, mental illness and personality disorder) in an offender. Experts considered such diagnoses indications of dangerousness. The psy expert's emphasis on diagnosis characterizes the clinical model of dangerousness (Petrunik, 1994). The courts assumed that psychiatrists, relying on this model, could offer accurate predictions of future violent behaviour. These predictions were a necessary part of the clinical construction of dangerousness, which was oriented to future possibilities rather than to past events (Petrunik, 2003, p. 45). Thus, the perceived clinical ability of psy professionals to predict future criminality secured them a role in DO hearings. This clinical model of dangerousness persisted into the latter half of the 20\(^{th}\) century.

Starting in the early 1990s, significant changes in the way the criminal justice system identifies and deals with Dangerous Offenders occurred. Shifts in legislation and correctional policy around dangerousness reflected increasing societal intolerance for recidivist sex offenders. A vengeful public demanded the government revisit how it dealt with repeat violent and sexual offending. The criminal justice system responded.

A significant reconceptualization of dangerousness was part of this response. The present-day dangerous criminal has emerged as the high-risk offender. He or she is a type of individual particularly vulnerable to repeat criminality. Maintaining focus on future behaviour, today's experts measure this vulnerability in terms of probability, or risk of

reoffence. The concept of risk has become an organizing principle in DO hearings, and more generally in the criminal justice system (Feeley and Simon, 1992).

Risk is a means of calculating and quantifying human nature and, specifically, potentially criminal behaviour. Experts use risk assessment tools to identify high-risk offenders. To do this, a psy expert codes or rates the individual according to a list of risk indicators. Coding directions are provided in accompanying manuals or ‘how to’ handbooks. After coding is complete, the clinician adds the risk items and obtains a final risk score. The score indicates the risk of reoffence or the probability that an offender will engage in future violence.

Risk scores emerging from experts’ employment of the tools are grounded in actuarial logic. Actuarialism entails determining an offender’s risk of reoffence by how well he or she matches with others in a predetermined group of high-(or low-) risk individuals (Brown, 2000). Experts match individuals to groups based on empirical risk factors contained in the tools, such as the absence of remorse, the presence of personality disorder or juvenile delinquency. Each tool, and there is a variety of them, contains different configurations of risk factors.

Actuarial risk assessment has increasingly colonized the evaluation of dangerousness in the Canadian court system. According to The High Risk Offenders Handbook written by the Office of the Solicitor General of Canada (2001), “actuarial, empirically based assessments should always be employed in dangerousness assessments as clinical judgement alone has proved insufficient in assessing risk of reoffence” (p. 7). Eaves, Douglas, Webster, Ogloff and Hart (2000) argue that recent 1997 amendments in Canadian DO legislation have entrenched psy experts’ role in DO
hearings as risk assessors (p.23). They cite several DO case precedents that have cemented this purpose (pp. 24-25). Canada's world leader status in the development of risk assessment tools further solidifies this role of psy experts (John Howard Society of Alberta [JHSA], 2002).

Risk assessment and the identification of the high-risk offender in DO hearings are part of a larger shift in the criminal justice system. The shift in thinking from dangerousness to risk represents the emergence of a "new penology." Feeley and Simon (1992, 1994) coined a term for this new penal agenda: actuarial justice. Actuarial justice encourages as its objectives the identification and management of high-risk individuals rather than the diagnosis and treatment of dangerous offenders. Risk, according to Feeley and Simon, is a hegemonic strategy of power used to manage and govern offenders in contemporary penal arenas.

Actuarial justice is part of an identified trend in society. Risk thinking is a habit that has penetrated all levels of Western thought (Brown and Pratt, 2000, p. 3). An 'at-risk' individual denotes a person who is vulnerable to harm or adverse circumstance. National policies and specialized educational programs deal with at-risk children. Researchers have identified risk factors for disorders, diseases and social behaviours. Internet sites test your risk of being murdered, raped, robbed or stabbed. According to experts, we are putting ourselves at risk if we voluntarily or involuntarily engage in certain behaviours, eat certain foods, walk in certain areas, or think certain thoughts. We live in a society increasingly characterized by risk consciousness (Beck, 1992a, 1992b, 1999).

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6 The current DO/LTO provisions are the result of several legislative amendments enacted in 1997. I discuss the substantive changes brought about by the reform further below.
In the criminal justice system, prison administrators classify inmates according to risk to determine institutional placement, parole eligibility and management schemes (Bonta, 1996, 1997). Police departments and correctional agencies structure community notification of sex offenders around risk categories. Supervision orders and peace bonds ensure offender risk management in the community. Forensic psy experts actuarially assess risk of reoffence in the courts. The shift in thinking from dangerousness to risk, from clinical prediction to actuarial assessment and from treatment to management is a manifestation of contemporary 'risk society' (Castel, 1991; Feeley and Simon, 1992).

Writing in 1997, Menzies argues that the content, properties and implications of risk thinking have not been adequately addressed, even cursorily, in social science literature. Following this lead, I explore the emergence and impact of risk on the construction of Dangerous Offenders in British Columbia. I will not focus primarily on the offenders and their crime(s); instead, my research documents and links the perceptions and practices of psy experts surrounding the DO to emergent risk thinking in the criminal justice system. I analyze risk thinking through an examination of court case files from 100 Dangerous Offender hearings. The hearings were processed through the courts of British Columbia—the Supreme Court and the Provincial Court—between 1978 and 2000.

This dissertation also explores the implications of a penal agenda and wider social control practices organized around risk thinking. In the end, I argue that theorizing about the impact of risk, as outlined in the actuarial justice literature, overestimates the role of

risk as a new strategy of power or as representative of a new penology. Instead, risk thinking and assessment in DO hearings enable the operation of age-old scripts of morality. Risk assessment reproduces templates of normality by which to judge the criminological 'other.' Therefore, I advise that theorists develop an analytical framework that views risk as disciplinary and enabled by other co-strategies of social control.

**ORGANIZATION AND SIGNIFICANCE OF PRESENT STUDY**

In the remainder of Chapter 1, I introduce the reader to the Dangerous Offender hearing and legislation in Canada, and present a historical overview of the risk assessment enterprise in the psy disciplines. Chapter 2 looks at the ideas of social theorists who have addressed the impact of risk thinking in the penal arena. I explore the utility of theoretical insights generated from the actuarial justice literature and link them to the work of other social theorists concerned with a penal agenda organized, in part, around risk. I suggest that contemporary social control analysts' disenchantment with early actuarial justice formulations is warranted. I propose that risk thinking is not a homogeneous grand narrative or governing strategy of penal power. Shifts in models of penology are more accurately described as contested metamorphoses—bewildering, hesitant, incomplete, fragmentary and contradictory (Garland, 1996, 2000; Pratt, 1999, 2000b; Rose, 2000). To guide the analysis of risk thinking in criminology, I recommend a framework that demonstrates how risk enables and operates alongside co-strategies of penal power.

In Chapter 3, I outline the methodological approach used to gather and analyze data in response to both substantive and empirical questions raised in the previous two
chapters. My exploration of 100 DO hearing case files is shaped by the belief that truth is co-created; as a result, the high-risk or Dangerous Offender is viewed as a construction of psy experts’ discourse. The court files provide an opportunity to witness the effects of risk thinking and risk assessment in this construction. Specifically, I focus on the reports and testimonies of the psy experts directly charged with the DO assessments. My study contributes to ongoing academic pursuits which view the legal case file as a truth production site (e.g., Lacovetta and Mitchinson, 1998; Maynard, 1998; Strange, 1998; Yeager, 2000).

I detail the contents of the DO court files included in this study in Chapter 3. I describe the data collection process as well as the data reduction and analysis procedure. This chapter also contains a socio-demographic profile of the offenders in my sample of DO hearings. I discuss the offenders' criminal histories and present a summary of the predicate offences which initiated the DO application. I also provide a profile of the psy experts involved in the DO hearings studied.

Chapter 4 offers a detailed analysis of the role of psy experts in the DO hearing. I document the emergence and increased use of risk assessment by psy experts. By 1995, risk assessment replaced clinical prediction of dangerousness as the preferred form of psy expertise in the DO hearings I examined. I elaborate on this shift by historically sampling experts' perspectives on clinical and actuarial models of prediction in DO hearings over the past two decades. Additionally, guided by an extensive literature review, I present empirical support for several identified problems associated with the use of risk assessment. I provide a voice for those experts who are uncomfortable with the responsibility of predicting future behaviour and the task of risk
assessment.

Chapter 4 also examines what types of information are required and employed in risk assessments for DO hearings, and with what impact. In the last section of this chapter, I expose several problems that emerge from the data concerning the role of psy experts in DO hearings. I explore the impact of these problems on risk assessment and, conversely, I outline how risk assessment may contribute to these problems. The chapter concludes with evidence on how risk expertise creates and enhances the need for itself in the context of DO hearings.

In Chapter 5, I seek to uncover how experts' definitions of dangerousness are implicated in risk assessment. I advance and empirically support an analytical framework that considers the construction of the high-risk offender as an incarnation of traditional creations of the Dangerous Offender. This chapter demonstrates how risk assessment institutionalizes extralegal factors, such as socio-economic status, sexual orientation and family arrangement, as devices to sort the normal from the abnormal, or the dangerous from the non-dangerous. The manner in which traditional and normative scripts of morality enable risk assessment and, in turn, how risk assessment enables these scripts is outlined. I highlight the need to view risk as a penal strategy that depoliticizes crime, leads to the abandonment of reform and rehabilitation goals and furthers social differentiation based on age-old inequalities characteristic of members of disadvantaged groups. In the end, I provide evidence supporting academic study that suggests psy experts are social control agents (e.g., Brown, 1990; Menzies, 1997; Kirk and Kutchins, 1992; Kutchins and Kirk, 1997, Yeager, 2000). I conceptualize risk thinking as a re-embodiment of traditional psy social control.
In the final chapter, I revisit the way in which risk expertise was advanced in the penal arena. I propose that an examination of risk include a hybridized model of understanding that does not view risk as a hegemonic social control strategy or as the advancement of psy expertise driven by improvements in knowledge. I suggest a need for future research that addresses the ways injustice created by risk can be replaced with less oppressive therapeutic models of evaluation.

Psy researchers' claim that the next two decades will be an exhilarating time for the development of risk assessment. To compel research in the area, they use descriptors such as rejuvenation, improvement, new generation, and advancement (e.g., Monahan and Steadman, 1994; 1996; Monahan, 1996; Quinsey, Harris, Rice and Cormier, 1998; Eaves et al., 2000). Social researchers must offer a critical examination of risk thinking and its power to restructure penal agendas in an effort to counterbalance the growing risk assessment enterprise. In this study, I argue, alongside others, that the criminal justice system's reliance on risk assessment also has deleterious effects on human rights and dignity. These effects are largely underestimated and understudied (Mathiesen, 1998a; JHSA, 2002).

This dissertation answers the growing call to validate theoretical ideas around risk in concrete instances of empirically observed operations of risk (e.g., Hannah-Moffat, 1999; Brown and Pratt, 2000; Wilkinson, 2001). According to Brown and Pratt (2000), a significant number of practical penal applications which are grounded in risk thinking have not been adequately theorized. Few have examined the moral and political aspects of risk or the differential impact of actuarial risk on different populations (Hannah-Moffat, 1999, p. 72). Correspondingly, Culpitt (1999) argues that social
researchers have not fully explored the relationship between social policy and the concept of risk.

To answer these calls, I make a substantive link between theory and the operation of risk in the criminal justice system, and, more specifically, in the context of DO hearings. An interpretative framework that investigates the role of risk in shaping and restructuring legislation, public policy and the role of psy professionals in the criminal justice system is defended in this study. I maintain that the most effective approach to analyzing the role of risk thinking in the penal arena is to balance the tendency to view risk as hegemonic authority with a better understanding of its multifaceted role as a social control mechanism.

THE STUDY SITE: DANGEROUS OFFENDER LEGISLATION AND HEARING

The current Dangerous Offender legislation contained in Part XXIV of the Criminal Code represents amendments to over 50 years of law. The first Habitual Offender legislation, enacted in 1947, allowed for the preventative sentencing and indeterminate confinement of "a residue of the criminal class, which is of incurable criminal tendencies." Used sparingly by judges, this legislation focused on the recidivist property offender whom judges viewed as living a "persistently criminal life" (Price and Gold, 1976).

In 1948, the legislature enacted similar laws that allowed for the indeterminate sentencing of sex offenders or those convicted of attempted or actual assault, rape or

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This phrase was included in the Archambault Commission (1938) report. The report recommended preventative detention legislation in Canada (cited in the Ouimet Report, p. 242). For more information on this report, see Canadian Committee on Corrections (1969).
carnal knowledge. The resulting Criminal Sexual Psychopath law responded to social and demographic changes taking place in society during the 1930s. For example, the increased value attached to children during this period of population decline spurred a wave of moral panic regarding child sex offenders (Pratt, 2000a, p. 44). The public demanded that the state protect the interests of children in this time of increased vulnerability caused by urbanization and transiency. The city was perceived as a dangerous place for children. The new legislation reflected this fear.

The Criminal Sexual Psychopath law was unlike the existing Habitual Offender law in that it was predicated on a clinical determination of dangerousness, which situated the source of repeat sex offending in personality disorder or sexual psychopathy (Sutherland, 1950; Petrunik, 1994). As such, the law required the testimony of psy experts skilled in the evaluation of psychopathy and dangerousness. During a typical hearing, the judge would listen to the opinions of experts called on behalf of the Crown and defence before making a sentencing decision.

Numerous problems surfaced with the 1948 legislation, including procedural flaws, discretionary abuses, assessment inaccuracies and vagueness in what constituted a "criminal sexual psychopath" (Petrunik, 1994; Correctional Service of Canada [CSC], 2002). Mounting critique gave way to new Dangerous Sexual Offender laws in 1960. These laws replaced the Criminal Sexual Psychopath legislation but left intact the clinical model of dangerousness, including psy expert evaluation and testimony. In the hearing, if the judge ruled that the offender was dangerous, an indeterminate sentence was the only sentencing option he or she could apply.

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9 In 1953, buggery, bestiality, and gross indecency were added to the list of offences included under this legislation (Correctional Services of Canada [CSC], 2002).
Criticism also cut short the 1960 legislation, and in 1977, the laws were again replaced, this time by the Dangerous Offender provisions (Petrunik, 1994). The 1977 amendments, which allowed for the indeterminate or determinate sentencing of both violent non-sexual and sexual offenders, also replaced the more enduring Habitual Offender laws. The new Part XXIV, originally Part XXI of the Criminal Code, decreed that the potential DO must be convicted of a “serious personal injury offence.” Additionally, the DO had to represent a threat to other persons, demonstrated by a pattern of repetitive and persistent aggressive behaviour, and the prevention of his/her future behaviour had to be unlikely.

Although enacted to address previous criticism, this new set of laws remained problematic. The legislation contained vague legal wording such as “pattern,” “likelihood,” “persistent,” “indifference” and “brutal” (Rogers and Lynett, 1991). The criteria for dangerousness were so broad that the Crown did not have to work hard to meet them (Webster, 1985, p. 7). Moreover, a person could be designated a Dangerous Offender after only one conviction (Jakimiec, Porpino, Addario and Webster, 1987).

Despite mounting scrutiny, the Supreme Court of Canada upheld the constitutionality of the DO provisions in Lyons. According to the Court, the legislation did not contravene the rights guaranteed by the Charter, and the indeterminate sentence did not contradict the principles of fundamental justice. The Court conceptualized the provisions as preventative in nature and argued that the laws safeguarded the rights of

---

10 In 1984, on the recommendation of the Legatt Inquiry, the majority of Habitual Offenders (i.e., 78 out of 86) were granted remissions or pardons. Resources for community reintegration were made available for these offenders. The inquiry labelled the released Habitual Offenders as victims of an arbitrarily applied law that served only retributive objectives at that time (Jackson, 1994).

11 Supra note 3, at 2.
the offender by granting judges the discretion to issue a determinate sentence when appropriate.

The subsequent 1997 *Dangerous Offender* amendments (see Appendix A), forwarded as Bill C-55, removed this discretionary power of judges. Under the new legislation, which is currently in use, if a judge designates an offender a DO, an indeterminate sentence is automatically imposed. According to the Solicitor General (2001), the legal architects enacted these new laws during "a time of growing public concern about 'high-risk offenders' and the risks they posed for Canadians and Canadian society" (p. 4). The purpose of the current legislation as outlined in Part XXIV is:

> [T]o provide a mechanism that allows dangerous convicted offenders to be removed from society for an indeterminate period. Should the offender continue to pose an undue risk to society they will remain in federal custody for life. This legislation also allows for periodic review of that offender's status and for their gradual and supervised return to society should they meet parole criteria in the future. However, even if released to the community with supervision and conditions on their behaviour, these offenders are supervised for the rest of their lives. (Solicitor General Canada, 2001, p. 5)

The new provisions also created the category of the Long-Term Offender (LTO) (see Appendix B). The courts can find a person to be a LTO if a sentence of two years imprisonment is appropriate; a substantial risk of reoffence exists; and, there is a reasonable possibility of eventual control in the community. The LTO provision is characterized as an "intermediate step" between the "awesome" DO designation and regular sentencing (Eaves et al., 2001, p. 21). Table 1.1 summarizes several other

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12 *Criminal Code*, section 753.1.
legislative changes that resulted from the 1997 reformulation. I will discuss specific changes throughout the dissertation, where applicable.

Table 1.1: Summary of 1997 Changes to the Dangerous Offender Legislation\textsuperscript{13}

- Amended the Dangerous Offender designation to streamline the procedure making it more efficient;
- Created the new designation of "Long-Term Offender" and a new "long-term supervision order" that begins upon the completion of the custodial sentence and can be up to 10 years in length. It provides a complementary option to the DO designation and focuses on offenders not captured by the DO provisions, but who still present a substantial risk to reoffend;
- Enacted section 810.2 recognizance or peace bond orders for individuals who are in danger of committing a "serious personal injury" offence;
- Allows the prosecution a six month window after a conviction has been incurred and sentence has been meted out to make a DO application;
- Requires one expert witness (e.g., psychiatrist or psychologist) to give evidence at a DO application; and
- Requires an initial parole review for a DO after seven years and every two years thereafter. Before the amendments, the initial parole review was conducted after three years.

The most significant amendment in the legislation, in relation to the current study, is the requirement that only one mental health expert give psy evidence in the DO hearing. The court nominates this expert who is labelled the "neutral assessor" or "amicus curiae.\textsuperscript{14} According to the Dangerous and Long-Term Offenders Assessment

\textsuperscript{13} Adapted from Correctional Service of Canada (2002, n.p.).
\textsuperscript{14} Latin for 'friend of the court.'
Guide (DO/LTO Guide), the British Columbia Forensic Psychiatric Services Commission (FPSC) provides the court with a list of psychiatrists or psychologists able to conduct an "objective, neutral, and unbiased assessment" of a potential DO (Eaves et al., 2000, p. vi). The DO/LTO Guide suggests that a desire to expedite DO hearings was behind the 1997 legislative changes and that under the new law mental health opinion will be more central than formerly the case.

Also encoded in the legislation is a "community protection" approach to dangerousness. This approach has steadily gained ground in Canada since the 1980s (Petrunik, 1994, 2002, 2003). The community protection model, which implicates an actuarial justice model of penology, replaces the clinical approach to diagnosing and treating dangerousness with the identification and management of high-risk offenders. Legislative changes enabled this shift by providing mechanisms of control that prioritize public safety over clinical and justice concerns. Amendments to the law in 1997 provided for lengthy post-sentence supervision, and extended extralegal controls, such as the peace bond legislation,\(^{15}\) which taken together enabled a community protection model (Petrunik, 2002, 2003).

The community protection model of dangerousness also encouraged and supported a shift in psy thinking from dangerousness to risk. Experts were now concerned with identifying the risk of reoffence and with managing the high-risk offender. In the next section, I address specifically this transformation in expert thinking and practice.

\[^{15}\] Section 810.1 of the Criminal Code of Canada allows judges to hold hearings for persons suspected of being at risk to commit one or more of the 12 specified serious personal injury offences. Hearings can be initiated by anyone who fears that an individual might offend. An individual held under a section 810.1 peace bond does not need to have a criminal record. For more information on this measure, see Petrunik (2002, p.498).
(D)EVOLUTION OF EXPERTISE: FROM DANGEROUSNESS TO RISK

It is quite clear, however, that on both the research and clinical side there has been a radical shift toward a more probabilistic framework associated with the shift to risk assessment of future violent behavior as the clinical enterprise, not the prediction of the presence or absence of dangerousness. (Steadman, 2000, p. 267)

Killing a Spider with a Meat Axe\textsuperscript{16}: Expert (Over)prediction of Dangerousness

Before the 1980s dangerousness, not risk, was regarded as the key psy legal concept in DO hearings (Cocozza and Steadman, 1976, 1978). Experts defined dangerousness as a state of mental abnormality that predisposed an offender to reoffend (Petrunik, 1994). Relying on clinical acumen, psy experts predicted dangerousness for the courts. Faith in the ability of psy experts to predict dangerousness lasted until the mid-1970s (Steadman, 2000). Research emerged in the mid- to late 1970s, exposing the clinicians' inability to predict accurately future dangerous or violent behaviour. Two very influential studies—the Baxstrom study and the Dixon study (Steadman and Cocozza, 1974; Thornberry and Jacoby, 1979, respectively)—revealed the overwhelming tendency of clinicians to assume patients to be more dangerous than they actually proved to be. These studies uncovered substantial false positive rates in the prediction of dangerousness by experts.\textsuperscript{17} A false positive is an overprediction error that occurs if an expert predicts that an offender will reoffend, when in fact no further offence is detected (Eaves et al., 2000, pp. 2-3).\textsuperscript{18}

\textsuperscript{16} Jackson Toby used this phrase in the preface of a book written by Steadman and Cocozza (1974). He is referring to psy experts' overprediction of violence.

\textsuperscript{17} For a review of these studies, see Monahan (1981, 1996).

\textsuperscript{18} On the other hand, a false negative occurs when an individual whom an expert has predicted not to be dangerous goes on to commit an offence.
Along with high numbers of false positive errors, the studies revealed how low base rates affected expert predictions. The low base rate problem occurs because violent behaviour is infrequent. It is easier to make false positive errors with low base rates because experts are attempting to predict rare occurrences (Webster, Menzies and Jackson, 1982; Webster, Harris, Rice, Cormier and Quinsey, 1994, p.5). Historically, false positives and low base rates have plagued psy prediction and can result in the abrogation of the civil liberties of prisoners and patients whom experts wrongly predict to be dangerous (Pfohl, 1977; Monahan, 1981; Wilkins, 1985).

By the early 1980s, psy experts acknowledged that their clinical predictions of violent behaviour were accurate in no more than one in three predictions (Monahan, 1981). Clinical methods of violence prediction were labelled subjective, idiosyncratic, non-scientific and unsubstantiated (Grubin, 1997, 1999; Mossman, 2000). Several other pivotal studies continued to demonstrate that predictions of dangerousness were beset with inaccuracy and high false positive rates (e.g., Sepejak, Menzies, Webster and Jensen, 1983; Menzies, Webster, Sepejak, 1985; Menzies, Webster, McMain, Staley and Scaglione, 1994).

Despite consensus in the psy disciplines that experts could not accurately predict this type of behaviour, the courts appeared to hold out faith in their abilities. The United States Supreme Court, in Barefoot v. Estelle (1983), 463 U.S. 880, rejected evidence presented by the American Psychiatric Association (APA) that

... the unreliability of psychiatric predictions of future dangerousness is by now established fact within the profession. ... The large body of research in this area indicates that, even under the best conditions, psychiatric predictions of long term future dangerousness are wrong in at least two out of every three cases. (cited in Webster et al., 1994, p. 17)
The court ruled that the unreliability of predictions did not preclude the court from considering them in cases involving the death penalty (Webster et al., 1994, p. 20). With the advent of actuarial risk assessment, the tension between experts and the courts over prediction was about to diminish.

**Second Generation Research: Towards Actuarially-Based Prediction**

The courts continued to demand psy input in cases such as DO hearings. In the late 1980s and early 1990s, psy researchers responded to this demand and began a "second generation" of research aimed at improving experts' predictive ability. Monahan (1988, p. 255) called for refined predictor and criterion variables, different research methodologies, and the synchronization of psy research efforts in order to overcome the problems identified with first generation expertise and research. The method of risk assessment and focus on risk factors emerged from this agenda (Menzies, Webster, and Hart, 1995; Steadman, 2000).

A simple bibliometric\(^{19}\) exercise demonstrates the increasing focus on risk assessment between 1970 and 2001. I searched for the keywords 'risk assessment' and 'dangerousness' in the electronic database PsycINFO. The database contains article citations from 1,400 internationally published professional journals, chapters, books, reports, theses and dissertations. The APA supplies the database to academic institutions. The database contained over 1,870,180 records as of September 2002.

\(^{19}\) Researchers use bibliometric mapping of a discipline's publications to generate an overview of research efforts.
The results presented in Figure 1.1, while admittedly crude,\textsuperscript{20} document a research and publication shift from predicting dangerousness to assessing risk.

Figure 1.1: Bibliometric Mapping of the Emergence of Risk Assessment in the Psy Publication Record

By the mid-1990s, risk of reoffence had become the actuarial corollary to dangerousness. Researchers were encouraged by a system of prediction that allowed them to escape the "yes-no" deterministic judgements of dangerousness previously required by the courts. Risk assessment instead relied on modest estimates of probable reoffence. The resulting predictions based on probabilities soothed psy experts'\textsuperscript{20} 

\textsuperscript{20}The database's organization limited the time periods I could explore. The time frames are not equidistant and I did not standardize the number of 'hits' for each keyword according to the number
concerns over false positive or false negative predictions. In response to the growing demand for risk of reoffence predictions, psy researchers developed several risk assessment tools (see Table 1.2).

Table 1.2: The Most Widely Used Risk Assessment Tools in Dangerous Offender Hearings According to the Solicitor General, Canada²¹

<table>
<thead>
<tr>
<th>Risk Assessment Tool</th>
<th>Developers</th>
<th>Objective</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violence Risk Appraisal Guide (VRAG)</td>
<td>Quinsey et al., 1998; Harris, Rice and Quinsey, 1993</td>
<td>assesses risk for general violence</td>
</tr>
<tr>
<td>Rapid Risk Assessment of Sex Offender Recidivism (RRASOR)</td>
<td>Hanson, 1997a</td>
<td>assesses risk of sex offence recidivism</td>
</tr>
<tr>
<td>Level of Supervision Inventory—Revised (LSI-R)</td>
<td>Andrews and Bonta, 1995</td>
<td>assesses needs of the offender and risk of general criminal recidivism</td>
</tr>
<tr>
<td>Statistical Information on Recidivism—Revised (SIR-R1)</td>
<td>Nuffield, 1982; Bonta, Harman, Hann, and Cormier, 1997</td>
<td>assesses general criminal recidivism</td>
</tr>
<tr>
<td>Static-99</td>
<td>Hanson and Thorton, 1999</td>
<td>assesses risk of sex offence recidivism</td>
</tr>
<tr>
<td>Hare Psychopathy Checklist—Revised (PCL-R)</td>
<td>Hare, 1991</td>
<td>assesses psychopathy</td>
</tr>
<tr>
<td>Sex Offender Need Assessment Rating (SONAR)</td>
<td>Hanson and Harris, 2000</td>
<td>assesses sex offender treatment and intervention targets</td>
</tr>
</tbody>
</table>

²¹ Adapted from Solicitor General Canada, 2001, p.8.
The majority of second-generation tools, such as the Violence Risk Assessment Guide (VRAG), involve actuarial logic or the placement of individuals into predictive groups based on matched risk factors. Initially developed in 1993, the VRAG became part of the Violence Prediction Scheme (VPS) developed by Webster et al. in 1994. In 1998, it underwent another revision to become the Violence Risk Appraisal Guide (Quinsey, Harris, Rice and Cormier, 1998). Risk tool developers decide which risk factors to include in an instrument based on how well the factors can predict the outcome variable, which in this case, is reoffence. Researchers developed the majority of risk assessment instruments by studying, retrospectively, populations of individuals who reoffended. By selecting risk factors of interest and running multiple regression techniques, the researchers could isolate those factors that appeared to predict most accurately reoffence rates. Table 1.3 details examples of these factors included in the VRAG.

Table 1.3: An Overview of the Violence Risk Assessment Guide (VRAG) Items

<table>
<thead>
<tr>
<th>Items</th>
</tr>
</thead>
<tbody>
<tr>
<td>- PCL-R score</td>
</tr>
<tr>
<td>- elementary school maladjustment</td>
</tr>
<tr>
<td>- DSM diagnosis of any personality disorder</td>
</tr>
<tr>
<td>- age at index offence</td>
</tr>
<tr>
<td>- lived with both parents to the age of 16</td>
</tr>
<tr>
<td>- failure on conditional release</td>
</tr>
<tr>
<td>- criminal history score for non-violent offences</td>
</tr>
<tr>
<td>- marital status</td>
</tr>
<tr>
<td>- DSM diagnosis of schizophrenia</td>
</tr>
<tr>
<td>- victim injury</td>
</tr>
<tr>
<td>- history of alcohol problems</td>
</tr>
<tr>
<td>- female victim</td>
</tr>
</tbody>
</table>

22 Multiple regression is an inferential statistical technique often used in behavioural studies, to study the separate effects of independent variables on a dependent variable (Hulburt, 2003, p. 56).
23 Adapted from Webster et al. (1994, p. 36).
To rate an individual using risk assessment, the expert preferably conducts an interview and gathers information about the subject. Each risk assessment instrument has coding rules contained in an accompanying manual (see Table 1.4). The expert codes each item using available information and adds up scores from individual risk items to obtain a final risk score. This risk score indicates the probability of reoffence.

Table 1.4: Example of Coding Rules for Two Risk Items on the Static-99

<table>
<thead>
<tr>
<th>Risk Item</th>
<th>Coding Rules</th>
<th>Scoring</th>
</tr>
</thead>
</table>
| Any unrelated victims     | A related victim is someone with whom the relationship is sufficiently close that marriage would normally be prohibited, such as parent, uncle, grandparent, step-sister. | Any unrelated victims?  
   Yes = score of 1.  
   No = score of 0. |
| Single                    | The offender is considered single if he has never lived with a lover (male or female) for a period of at least two years. Legal marriages involving less than two years of co-habitation do not count. | Ever lived with a lover for at least two years?  
   Yes = score of 0.  
   No = score of 1. |

Psy researchers touted risk assessment as the superior mode of evaluation and prediction. They advanced risk assessment tools in an attempt to eliminate the unbridled opinion of clinicians (Webster et al., 1994). Psy literature characterized these tools as objective, reliable, standardized and scientific (Quinsey et al., 1998). Researchers

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claimed that actuarial methods of risk assessment significantly outperformed clinical judgement and decreased false positive errors (e.g., Harris, Rice and Quinsey, 1993). They propose the complete replacement of the clinical evaluation of dangerousness with actuarial risk assessment methods (Quinsey, Harris, Rice and Cormier, 1998).

These predictive tools were also conceived as a means of reducing incarceration costs by systematically identifying lower-risk inmates and ensuring that high-risk offenders would not be unsafely released into the community (Clements, 1996; Taylor, 1997). Correctional researchers argued that the effective classification of inmates based on risk was critical to the success of any justice agency, especially within a climate of declining financial resources, increased accountability and greater demand for public safety (Wormith, 1997). James Bonta, a researcher with Correctional Service of Canada, argues that "[t]he assessment of offender risk should include objective, actuarial measures. Continued reliance on subjective, professional or clinical judgement to gauge risk is no longer empirically defensible" (2002, para. 7).

Disenchantment and the Development of a Third Generation of Risk Assessment Tools

Actuarial risk assessment did not emerge without problems. One of the major shortcomings identified by the psy community was its reliance on static risk factors (e.g. Steadman, 2000). Actuarial risk assessment tools contain mainly static risk factors which do not allow for change in risk status. For example, the Static-99, an actuarially based instrument, codes single marital status, male victims and prior non-contact sex offences as predictors of risk. These variables are historical and tend not to change, especially in the case of an incapacitated offender. Nevertheless, others argue that
recent research has demonstrated that static factors do correspond to outcome to some extent (Eaves et al., 2000, p. 9).

By relying on static evaluation, the tools offer little in the way of treatment or ‘front-line’ practicality to clinicians (Steadman, 2000). Consequently, a third generation of risk assessment tools was created that combined both static and dynamic factors into a template referred to as ‘structured clinical judgement’ or an ‘aide-mémoire’. Examples of such tools are the HCR-20 and the SVR-20 (see Table 1.5). These tools do not provide measures of risk using absolute scores, but instead endeavour to ensure that clinicians consider and weigh all relevant clinical information (Kropp, Hart, Webster, Eaves, 1994).

Risk factors contained in third generation tools were identified by conducting an extensive review of the empirical literature and consulting articles written by clinicians (Webster, Eaves, Douglas, Wintrup, 1997). Identified risk factors capture relevant past, present and future concerns in relation to reoffence risk. The tools, although not actuarial, can involve the calculation of a final score thought to be indicative of risk of reoffence.
Table 1.5: Examples of Third Generation Risk Assessment Tools

HCR-20: Assessing Risk for Violence (Webster et al. 1997)

<table>
<thead>
<tr>
<th>(&quot;H&quot;)istorical Items</th>
<th>(&quot;C&quot;)linical Items</th>
</tr>
</thead>
<tbody>
<tr>
<td>previous violence</td>
<td>lack of insight</td>
</tr>
<tr>
<td>young age at first violent incident</td>
<td>negative attitudes</td>
</tr>
<tr>
<td>relationship instability</td>
<td>active symptoms of major mental illness</td>
</tr>
<tr>
<td>employment problems</td>
<td>impulsivity</td>
</tr>
<tr>
<td>substance abuse problems</td>
<td>unresponsiveness to treatment</td>
</tr>
<tr>
<td>major mental illness</td>
<td></td>
</tr>
<tr>
<td>psychopathy</td>
<td></td>
</tr>
<tr>
<td>early maladjustment</td>
<td></td>
</tr>
<tr>
<td>personality disorder</td>
<td></td>
</tr>
<tr>
<td>prior supervision failure</td>
<td></td>
</tr>
</tbody>
</table>

("R")isk Management Items

- plans lack feasibility
- exposure to destabilizers
- lack of personal support
- non-compliance remediation attempts
- stress

The SVR-20: Sexual Violence Risk (Boer, Hart, Kropp and Webster, 1997)

<table>
<thead>
<tr>
<th>Psychosocial Adjustment</th>
<th>Sexual Offence</th>
</tr>
</thead>
<tbody>
<tr>
<td>sexual deviation</td>
<td>high-density sex offences</td>
</tr>
<tr>
<td>victim of child abuse</td>
<td>multiple sex offence types</td>
</tr>
<tr>
<td>psychopathy</td>
<td>physical harm to victim(s)</td>
</tr>
<tr>
<td>major mental illness</td>
<td>use of weapons or threats of death</td>
</tr>
<tr>
<td>substance abuse problems</td>
<td>escalation in frequency or severity</td>
</tr>
<tr>
<td>suicidal/homicidal ideation</td>
<td>extreme minimization or denial</td>
</tr>
<tr>
<td>relationship problems</td>
<td>attitudes that support/condone sex offences</td>
</tr>
<tr>
<td>employment problems</td>
<td></td>
</tr>
<tr>
<td>past nonsexual violent offences</td>
<td></td>
</tr>
<tr>
<td>past nonviolent offences</td>
<td></td>
</tr>
<tr>
<td>prior supervision failures</td>
<td></td>
</tr>
</tbody>
</table>

Future Plans

- lacks realistic plans
- negative attitude toward intervention
All tools, including actuarially based risk assessment instruments, are subject to on-going testing by psy researchers and developers. Research on the validity and reliability of third generation tools is still in its infancy. A recent publication from the Scottish Executive\(^{25}\) (2003) reviews the status of actuarial risk tools. Based on an extensive literature review of validation and predictive studies, the Executive concludes that:

- the VRAG is the most robust predictor of future violence per se;
- the PCL-R has a proven track record for the identification of psychopathy and for the prediction of predatory violence across a number of offender types, including women and ethnic minorities.

**THE FUTURE OF ACTUARIAL RISK ASSESSMENT: DOES IT WORK?**

Psy researchers advanced risk assessment as an improvement over the clinical prediction of dangerousness, but the accuracy of this methodology is still under debate (Rogers, 2000). The literature surrounding the “forensic sound barrier”\(^{26}\) of accurate prediction is vast and technical. An examination of this domain of risk assessment is beyond the scope of this dissertation. However, according to some researchers, the accuracy of actuarial risk measures is in the 60-80\% range (Douglas, Cox and Webster 1999, p. 184). Levels of accuracy for predicting general recidivism remain somewhat modest at 40\% (Douglas et al., 1999, p. 184). On average, psy experts’ ability to


\(^{26}\) Menzies et al. (1985) used this phrase to indicate the upper limits of prediction accuracy.
accurately predict sex offence recidivism is only slightly better than the results of chance (Hanson and Bussière, 1995, 1998).

Some researchers offer an altogether different picture of risk assessment. Mossman (2000, p. 272) argues that the direction psy research has taken concerning risk assessment does not give clinicians or the judiciary faith in the utility of these instruments. Still others dispute that research to date has demonstrated the superiority of actuarial methods of risk assessment over clinical methods (e.g., Litwack, 2001, 2002; Steadman, 2000). In the context of Dangerous Offender designations, Coles and Grant (1999) caution that it is premature for experts to replace clinical evaluation with actuarial assessment. Janus and Meehl (1997) argue that the predictive accuracy using actuarial risk assessment tools is so low that it threatens the basis of risk-based legal decision-making.

Despite questions surrounding accuracy, risk assessment continues to play an integral role in the determination of Dangerous and Long-Term Offender status in Canadian courts. Psy researchers claim that the actuarial prediction of risk is the most accurate type of forensic assessment (Milner and Campbell, 1995; Quinsey et al. 1998, 1999; Buchanan, 1999). Several social scientists have pointed out that risk analysis is the most influential of a new type of expertise that satisfies the courts' desire for the appearance of rigorous and objective forms of knowledge (e.g., Adams, 1995; Porter, 1995; Silver and Miller, 2002). The Minnesota Supreme Court in the United States has mandated risk assessment in a ruling stating that "actuarial methods of prediction are founded [on] base rate recidivism statistics and are more accurate than 'clinical' predictions, and therefore violence prediction must rely on the former" (cited in Quinsey
et al. 1998, p. 189). In Canada, expert testimony in a Manitoba case which claimed the offender’s reoffence risk was 75% to 85%, satisfied the DO legislative criteria for “likelihood of causing death or injury.” \(^{27}\) Experts will undoubtedly continue to proffer risk assessment in the courts (Eaves et al., 2000, p.25).

My introduction presented a history of DO legislation in Canada, as well as an overview of how the clinical prediction of dangerousness by psy experts has metamorphosed into an assessment of reoffence risk. I acquainted the reader with risk assessment tools and, more specifically, their different methodologies. The introduction sets the stage for the questions this dissertation will address: Do risk thinking and actuarial assessments completely replace traditional definitions of dangerousness and clinical models of prediction? Do risk identification and management supplant the clinical diagnosis and treatment of offenders in the context of dangerousness? What risk assessment tools and forms of risk thinking circulate in DO hearings and with what impact? The starting point, offered in the next chapter, for answering these questions is a strategic re-examination of the theoretical literature concerning actuarial justice, risk thinking, psy expertise, and penal reform.

CHAPTER II

THINKING RISK

*Since risk, and attempts at risk assessment, are so fundamental to the colonising of the future, the study of risk can tell us much about core elements of modernity.* (Giddens, 1991, p. 114)

THE RISK SOCIETY

In this chapter, I give an account of the work of "risk society" theorists and the importation and adaptation of their ideas into the field of criminology. I will demonstrate how the current *Dangerous and Long-Term Offender* legislation in Canada enables a model of actuarial justice, which actively employs risk thinking. I examine the ideas put forth so far by actuarial justice analysts seeking to explain the rise of risk thinking and the emergence of a new penology. Guided by a contemporary reformulation of actuarial justice, my examination seeks to set up an exploratory framework of understanding that accurately and imaginatively addresses the role of risk in the criminal justice system. I investigate how a theoretical reworking of risk thinking as a strategy of governance might implicate different questions about the definition, identification, and management of Dangerous and Long-Term Offenders in Canada.

Social theorists continually search for new ways to explain emerging social configurations. Early risk society theorists were interested in the changes ushered in by risk rationalities characteristic of governance in our late modern or neo-liberal society (e.g., Reiss, 1989; Ewald, 1991; Giddens, 1991; Beck, 1992a, 1992b; Douglas, 1990, 1992; Draper, 1993, Luhman, 1993). These theorists debated the nature, function and implications of risk thinking. They were critical of risk as organizing factor in our society.
The German sociologist Ulrich Beck coined the phrase “risk society.” Beck’s examination of risk—which culminated in a 1992 publication, Risk Society: Towards a New Modernity—was a radical departure in thinking about society. His overarching hypothesis is that risk thinking is central in shaping experience in contemporary social life. Beck defines risk as potential harm, which he says is increasing and pervasive. He views human vulnerability to risk as universal in today’s risk society. For Beck, society must find “a systematic way of dealing with [the] hazards and insecurities induced and introduced by modernization itself” (Beck, 1992a, p. 21).

Subsequently, the consideration of risk thinking has infiltrated all realms of contemporary social analysis (e.g., Bunton, Nettleton and Burrows, 1995; Füredi, 1997; Peterson, 1997; Culpitt, 1999; Franklin, 1998; Sparks, 2000). Criminological work on risk has proliferated. Risk is the subject of numerous recent efforts to explain crime control in Western society (e.g., Feeley and Simon, 1992, 1994; Ericson and Haggerty, 1997; Rose, 1998; Garland, 1996, 2000; Hope and Sparks, 2000; O’Malley, 2000c; Stenson and Sullivan, 2001). Yet, as O’Malley (2000a, p. 458) argues, there is nothing novel about risk. He reminds us that historically we have used risk as a strategy of governance going back to the classical probability advocates of the Enlightenment. However, like Sparks, he is cognizant that in the last thirty years the technology of risk has become more diverse and complex. Compared to any other time in history, risk today is more open to interpretation and more disputed (Wilkinson, 2001).

In this study, I must negotiate the intersection of risk as a governing strategy and risk assessment as the practical application of this strategy. The result is my present empirical analysis of the use of risk assessment in the criminal justice system using the
critical analytical insights of risk society theorists (see Figure 2.1). I am entertained by the assumptions others make when I explain that my area of interest is risk theory. Psychologists, in particular, take for granted that I am a member of the risk assessment enterprise—designing, testing and advocating the use of risk in the forensic context.28

Figure 2.1: Schema of Analytical Framework

![Diagram](image)

The theoretical literature on the risk society is largely unknown to those working in the risk assessment enterprise. Psy professionals operating in this episteme29 do not view risk as an analytical concept used to explain crime control and governance.

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28 Keith Soothill similarly warns the reader in a forward to a critical expose of risk assessment: “This is not a technical book produced by a young technocrat trying to persuade us that a new technique provides the answer to risk assessment” (Prins, 1999, p. xii).
29 Foucault (1972) describes an episteme as a "region of rationality" or a set of fundamental truths organizing "science" and dictating what methods can be employed and what results are expected. The concept of an episteme is similar to Bourdieu's notion of the field (Bourdieu and Wacquant, 1992). Fields, like epistemes, function as external templates for what is thinkable and understandable in a particular profession or expertise. Psychiatry and psychology—the human sciences—operate within a field or episteme.
According to Pate (2000), these proponents of current risk assessment and prediction tools

... tend to denounce and denigrate any attempts to contextualize their findings—deeming such analysis as, in fact, not analytical, but rather, relegating them to the realm of anecdote and unscientific speculation, arrogantly ignoring completely such critique and summarily dismissing it as pedantic and irrelevant (2000, p. 24).

Broadhurst (2000) correspondingly suggests that psy professionals tend to view the proposed implications of actuarial justice as “willful exaggerations” (p. 120). In the end, social theorists and psy professionals are all speaking about risk, but our discourses are radically different in purpose. Wilkinson (2001) addresses this difference: “[I]n recent years [risk] has come to be used not only as a tool of actuarial procedure, but also as a means of debating the acceptability of political, economic and technological decisions made according to the mandate of calculative reason” (p. 90).

In response to and alongside Beck’s work, theorists have come to view risk as a useful heuristic device to explain contemporary phenomena ranging from health-care structure to the organization of the criminal justice system. In almost every field of study, social theorists have expanded, analyzed and supplanted Beck’s original formulations around the risk society. Bronner (1995) calls the approach of Beck a “genuinely experimental sensibility,” yet he is very critical of Beck’s lack of attention to institutions, power and vested interests (p. 78). Bronner accuses Beck of ignoring the political economy of knowledge and the systematic ways in which risk is forwarded and managed. Suggesting that Beck’s approach is limited does not discount his contributions to risk theorizing. His emphasis on risk as a paradoxical organizing factor in today’s society allowed new discourses about risk to emerge.
Beck, however, focuses primarily on the quantifiable aspects of risk, which are the observable and measurable potential harms. Elliot submits that Beck’s work centres too much on risk as an increasingly concrete phenomenon, and he criticizes Beck’s inability to “grasp the hermeneutical, aesthetic, psychological and culturally bounded forms of subjectivity and inter-subjectivity in and through which risk is constructed and perceived” (pp. 300-302). According to Elliot, the number of risks or harms we face today remains relatively constant and has not changed significantly over the last three centuries. Giddens (1991) also believes the preoccupation with risk in modern social life has nothing directly to do with the actual prevalence of life-threatening dangers. Other theorists have also questioned the Beckian assumption that substantive risks are increasing in today’s society. In doing so, these theorists account for the social construction of risk and the operation of risk as a governing strategy (e.g., Giddens, 1991; Douglas, 1992; Feeley and Simon, 1992, 1994; Ericson and Haggerty, 1997; Chan and Rigakos, 2002).

THE EMERGENCE OF ACTUARIAL JUSTICE: FROM DANGEROUSNESS TO RISK

The new penology is neither about punishing nor about rehabilitating individuals. It is about identifying and managing unruly groups. (Feeley and Simon, 1992, p.455).

Critical social theorists argue that risk thinking did not emerge from confrontation with increasing risks in today’s society. In that same way, the DO legislation aimed at high-risk offenders did not respond to an actual increase in victimization. Statistics tell us this is so. Instead, society succumbed to a wave of moral panic regarding sex
offenders. Sensationalist media accounts of high-profile cases of sexual victimization grabbed the attention of North Americans. One such Canadian case was the 1988 kidnapping, sexual assault and murder of a young boy named Christopher Stephenson. The offender, Joseph Fredericks, was described as a “well-known psychopath and homosexual pedophile” who after serving two-thirds of a five-year sentence earned remission and was given statutory release (Ontario Ministry of the Solicitor General, 1993). The coroner’s inquest surrounding this case, released in 1993, recommended tightening up the justice and mental health systems to deal more effectively with dangerous sexual predators.30

After this incident, a task force on High-Risk Violent Offenders was established and a year later, it recommended several reforms, including Bill C-55, an amendment to the Dangerous Offender legislation. Designed to deal more severely with Canada’s worst criminals, Bill C-55’s mandate was proposed in a conservative political climate and heightened panic. Legislators were reacting not to evidence of increased risk, but instead to public fear and demands for protection against perceived risk of sexual offending.

The new DO legislation sought to identify those offenders who were at a high risk of reoffending. This focus on the risk of reoffence maintained the old legislation’s emphasis on what offenders might do and not what they did. Consistent with the language used in Section 753 of the Criminal Code, offenders would be classified high risk or dangerous and sentenced in light of how likely they are to reoffend in the future. Thus, the DO legislation, enabled by risk, thinks to the future. Giddens (1991, p. 28)

30 For a detailed discussion on the instrumental role of high profile cases of child victimization in securing legislative changes around sex offenders in North America, see Petrunik (2003).
asserts that the concept of risk is bound up with the aspiration to control, and particularly with the idea of controlling or "colonizing" the future. In the criminal justice system, risk thinking and its legislative counterparts are emotive manifestations of perceived danger or harm and have little to do with crimes that have actually occurred.

If the risk of sexual victimization is not increasing, does the focus on the risk of reoffence as reflected in the DO legislation represent a new governing strategy in the criminal justice system? The starting point for answering this question is Feeley and Simon's seminal 1992 article *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications.* Drawing on the earlier conceptualizations of Simon (1987, 1988), Feeley and Simon proposed an emerging penal agenda. Alongside and in response to Simon and Feeley, several theorists have contributed their own interpretations of the impact of risk thinking in the criminal justice system (e.g., O'Malley, 1992, 2000c; Garland, 1996, 2000; Ericson and Haggety, 1997; Petrunik, 2002, Pratt, 1999, 2000a; Simon, 1998).

According to Feeley and Simon, beginning in the 1980s, North American society witnessed the emergence of actuarial justice, which is "concerned with techniques for identifying, classifying and managing groups assorted by levels of dangerousness" (1994, p. 173). This new penal agenda employs risk assessment for the prospective identification of recidivism risk. Under an actuarial justice model, management of offenders is then shaped by their membership in subpopulations categorized according to the perceived risk they pose to others. The language of risk and probability replaces clinical diagnosis and description of the individual. The dangerous offender is high-risk.

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31 A subsequent article written by Feeley and Simon in 1994, titled *Actuarial Justice: The Emerging New Criminal Law* solidified their ideas presented two years earlier.
Prior to the penetration of risk thinking in the forensic psy disciplines in the 1990s, psy experts disciplined and normalized the dangerous offender (Foucault, 1975, 1977, 1978a). Normalization through discipline, in the Foucauldian sense, involves the creation and correction of an individual through the development of a causal knowledge of the individual's deviance or pathology. Psychiatry put forward a clinical model of dangerousness. According to the clinical model, dangerousness originates in individual pathology and predisposes the offender to engage in harmful acts (Foucault, 1978a; Petrunik, 1994; 2003). The clinician's responsibility is to identify and potentially cure the individual through treatment and rehabilitation. Locating the site of criminality and dysfunction in the individual pathologizes the offender and leaves intact the socio-cultural factors that subjectively influence the diagnosis in the first instance. It is easier to treat the individual than to address those factors in society that create crime and dysfunction.

Experts based their diagnoses of dangerousness and other pathologies on prescriptions about morality and normalcy. Increasing critical scholarship exposes how psy expertise and the act of issuing a diagnosis—including for categories of mental illness—are influenced by normative ideas about gender, race and class (Busfield, 1989, 1995; Brown, 1990; Caplan, 1988, 1995; Menzies, 1989, 1997; Hacking, 1995; Young, 1995; Kutchins and Kirk, 1997). The sociology of diagnosis and, more specifically, the sociology of dangerousness reveal the exercise of power relations that perpetuate and maintain the status quo (Menzies, Chunn and Webster, 1995, p. 213). As such, dangerousness becomes a tool of social control aimed at defining "the criminological other" (Brown and Pratt, 2000, p. 5)\textsuperscript{32}.

\textsuperscript{32} For general critiques of the social control role of psychiatry and psychiatric authority, see Szasz (1961, 1972, 1994); Donzelot (1979); Conrad and Schneider (1980); Castel, Castel and Lovell.
Actuarial justice theorists view risk technologies as operating differently from the traditional disciplining and normalization of the offender—they are conceptualized as post-disciplinary or "post-therapeutic" (e.g., Simon, 1987; O'Malley, 1992; Menzies and Webster, 1994; Menzies, Chunn and Webster, 1995). Post-disciplinary technologies are not dependent on the often inefficient and expensive diagnostic and therapeutic regimes of traditional social control (O'Malley, 1992). Consequently, a strictly clinical model and aligned treatment regimes are devalued in a system of actuarial justice. Rather than aiming to normalize the dangerous individual, an actuarial justice model seeks to identify and manage high-risk populations (Castel, 1991; Feeley and Simon, 1992).

As such, the new penology "seeks to regulate levels of deviance, not intervene or respond to individual deviants or social malformations" (Feeley and Simon, 1992, p. 452). According to actuarial justice theorists, risk strategies belong to Foucault's other form of power—the biopolitics of population—that focuses on groups of individuals. Persons are categorized and placed in a group where mechanisms of power operate in an effort to control and manage them (Foucault, 1978b). Actuarial justice and risk assessment assign individuals into groups based on shared risk factors found in the individuals' dossiers. Contemporary risk profiling replaces narratives of the subject with itemizations of risk (Castel, 1991, p. 281). This dissolution of the subject facilitates the management of "flows of population" based not on face-to-face disciplining relations between the expert and the subject but instead on an abstract calculation of risk based on group membership (Castel, 1991).

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REWORKING MODELS OF ACTUARIAL JUSTICE

The role of the social theorist is to account for the “striking” and “dramatic” shift in thinking from the diagnosis of individuals to the classification and management of groups of individuals (Menzies, 1997, p. 43). This task must acknowledge the widespread and growing criticism of the actuarial justice model in social control analyses. Feeley and Simon have been accused of overstating the actuarial justice model and its implications (Broadhurst, 2000). A more eclectic analysis of governing techniques is needed for, as Sparks (2000) asserts, the actuarial justice model leaves many aspects of contemporary penal politics unilluminated. Rose (2000) cautions against misunderstanding the actuarial nature of the new penology, pointing out that risk assessment is seldom strictly actuarial and is only “weakly numericized” (p. 332). Instead, he suggests that “risk thinking” rather than actuarial control characterizes modern penal agendas. Apparent throughout the literature is disenchantment with the early theoretical conceptualizations that viewed risk as a potentially homogeneous, overarching governing strategy. For example, in acknowledging the post-disciplinary nature of risk as a crime control strategy, one cannot overlook how risk enables and operates alongside other modes of governance in our society, including traditional normalizing strategies. For instance, it is O’Malley’s (2000) view that discipline and risk are not hostile to one another but instead work together in a variable relationship. “Risk societies are never simply societies dominated by risk” (O’Malley, 2000c, p. 29). For Douglas (1992), what lies behind the categorization of risk was always an attempt to disguise traditional disciplinary modes of

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33 To Feeley and Simon’s credit, their 1992 article states explicitly: “The new penology is found among criminal justice practitioners and the research community. However, it certainly has not (yet) emerged as a hegemonic strategy for crime and crime policy” (p. 451).
governing. In the end, making a decision about risk still involves ascribing blame or naming folk devils or "criminological others."

Similarly, others suggest that high-risk offenders are constructed by means of traditional normalizing criteria such as employment, skills and class (e.g., Pratt, 1999; Silver and Miller, 2000; Yeager, 2000). Risk assessment tools contain characteristics associated with traditional notions of the criminological "other," those that are perceived to lead to undesirable conduct such as crime (e.g., lack of housing and employment, drug abuse, mental disorder). The risk assessment process codifies societal concerns over such topics as the decline of the traditional family and social ties, the lack of moral consensus and peoples' discomfort with growing social and ethnic diversity (Freiberg, 2000, p. 66). Ericson and Haggerty (1997) similarly argue that "moralities are built into the technologies and expert systems of risk management" (p. 123). In a society where crime control is organized around actuarial logic "deviation from the norm is both statistically and socially significant" (Rigakos, 1999, p. 140). Seeing that, analysts such as Chan and Rigakos (2002) and Hannah-Moffat (1999) urge social theorists to debunk formulations of risk that are deeply embedded in social constructions of normalcy and conformity.

Douglas (1992) also maintains that the appearance of science and objectivity conferred by risk renders moral judgements made in the context of risk assessment incontestable. She argues that the language of risk is treated as the method through which objective "truth" is established and has the respected status of scientific rationality. The language associated with risk and probability makes the predictive decisions of psy experts less vulnerable to scrutiny because it has the aura of scientific rationality.
Mathiesen, 1998a, p. 466).

In this respect, the contemporary penal agenda characterized by a risk focus may not represent a complete break from modern social control by means of discipline. Risk thinking still relies on experts to make predictions and contains a modernist faith in harnessing technology to improve these decisions. For instance, according to psy researchers, the previous inability of psy experts to make accurate predictions was not due to the unpredictability of social life but because they had not yet discovered the laws and science (O'Malley, 2000c, pp. 22-23). Recognizing the old in the new, it becomes important to investigate how risk assessment operates as disguised morality and an instrument of discipline in DO hearings.

Other social control analysts have responded to the need to characterize the contemporary Western penal landscape as a complex mix of strategies not governed by one form of control or the abandonment of modern social control. Pratt (2000b), for example, recognizes the complex meshing of premodern, modern and postmodern strategies of control. Garland (2000) separates crime control efforts into adaptive and sovereign state strategies whereas Petrunik (1994, 2002, 2003) notes the emergence of a “community protection” model of social control. However, despite the complexity and heterogeneity of contemporary crime control efforts, there is a strategic coherence Rose, 2000). Rose divides control strategies into two families: “those that seek to regulate conduct by enmeshing individuals within circuits of inclusion and those that seek to act upon pathologies through managing a different set of circuits, circuits of exclusion” (2000, p. 324).

34 I will discuss the emergence of these new strategies where applicable.
In the next section, taking these themes as my guide, I will elaborate on the original insights of Feeley and Simon and draw upon the work of other theorists engaged in untangling the complexity of contemporary penal agendas and the role of actuarial justice within it. I apply these extrapolations to the specific context of risk assessment and the high-risk offender in Canadian DO hearings.

EXCLUSIONARY PENAL STRATEGIES AND THE ROLE OF RISK THINKING

Advanced liberal democracies are currently witnessing a bewildering variety of developments in regimes of control. These range from the demands for execution or preventive detention of implacably dangerous or risky individuals—sexual predators, paedophiles, persistent violent offenders—to the development of dispersed, designed in-control regimes for the continual, silent and largely invisible work of the assessment, management, communication and control of risk. (Rose, 2000, p.321)

Actuarial justice and aligned post-disciplinary technologies such as risk assessment allow the crime control strategies of inclusion and exclusion based on an offender’s riskiness. One such exclusionary penal sanction is the indeterminate sentence as encapsulated in the DO legislation. The indeterminate sentence was introduced around the turn of the last century in most Western societies (Pratt, 2000a). To rationalize its application, the state encouraged changing conceptualizations of “monstrous individuals” for whom preventative incapacitation was deemed necessary (Pratt, 1999, 2000a). Today, the offender whom experts deem intractably risky is the target of such exclusionary penal sanctions (Rose, 2000, p. 333). These individuals— the pedophiles, serial rapists and psychopaths—constitute criminological “others”

35 For a comprehensive history of the indeterminate sentencing option and its application in Western society, see Pratt (1999; 2000a).
redrawn as high-risk offenders (Pratt, 1999). Rose (2000, p.330) calls these individuals “anti-citizens,” who are too risky for any community affiliation. Through the expert’s risk gaze, high-risk offenders are constructed, identified and managed as anti-citizens.

Theorists variously characterize exclusionary strategies such as the indeterminate sentence. For example, Pratt (2000b, p. 131) sees them as a return to premodern “states of emergency,” where taken-for-granted liberties and rights of the offender have been suspended in favour of communitarian rights and the minimization of social harm. Garland (2000) argues that these strategies, which stress intensive and expressive modes of policing, legislation and punishment including punitive segregation, are reflective of the state’s need to demonstrate its sovereignty and willingness to control (pp. 349-350).

According to theorists like Pratt and Garland, the increased use of these strategies signals a new punitiveness in contemporary penology. Additionally, the category of offenders subject to such strategies has broadened. For instance, laws allowing for the civil commitment of selected sex offenders have flourished throughout the 1990s in the United States. In 1997, that country’s Supreme Court ruled in *Kansas v. Hendricks* that the post-sentence civil commitment of sexually violent criminal offenders was constitutional. Following this ruling and the success of “three strikes” legislation in the

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36 I am referring here to the proclaimed ability of clinicians to see innate dangerousness and risk. For Foucault’s use of the term ‘gaze’, from which I derive this conceptualization, see Foucault (1975).
37 In his list of sovereign state strategies Garland (2000) also includes the following: mandatory minimum sentencing laws, parole release restrictions, no frills prisons, imprisonment of children, revival of chain gangs and corporal punishment, boot camps and sex offender registration systems.
39 For a thorough history and critique of the civil commitment option as a means to manage the risk of sexual violence, see Janus (2000).
40 Modeled after a baseball metaphor, three strikes legislation is in effect throughout the United States and refers to the severe criminal sanction of prison for life for persistent offenders or
United States, persistent offenders have become the targets of statutes allowing for life confinement without parole.

During the mid 1990s, in the state of Washington, exclusionary legislation broadened the definition of persistent offenders to include “two strike” sex offenders. A subsequent revision expanded the list of offences included under the legislation. To qualify as a two strike sex offender, the individual must have committed two separate offences including, among other crimes, rape, indecent liberties by forcible compulsion and child molestation, as well as the finding of sexual motivation with convictions of murder, kidnapping, assault or burglary.

Pratt (1999) observes that indeterminate and preventative sanctions are increasingly applied to a larger underclass of individuals, rather than being reserved only for the monstrous offender or anti-citizen. Enabled by actuarial justice, this net widening operates through the identification and management of high-risk suspect populations. Consequently, the regime of actuarial justice creates an underclass of permanently disadvantaged people excluded from social mobility and economic integration (Feeley and Simon, 1994, p. 192). Members of the underclass or criminogenic group are permanently branded as potentially dangerous in many cases.

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41 For more information on this legislation and aligned policy reform, see Lieb and Matson (1998).
42 An extreme form of branding operates in the state of Delaware where sex offenders are required to have a ‘Y’ designation on their driver’s licenses. The stated objective of this stigma is to enable police officers in other states to identify known sex offenders if they are arrested or questioned (John Howard Society of Alberta, 1999, p. 4). Petrunik (2002, p. 493) chronicles a case in Texas where a judge ordered 14 sex offenders to place bumper stickers on their vehicles and signs on their residences. The sign alerted passer-bys that the occupant of the car or house was a sex offender.
Risk assessment allows for the sorting of high and low risk offenders. The exclusionary strategies of selective incapacitation and preventative detention are applied to high-risk populations, whereas low-risk offenders are sentenced to custody alternatives (Feeley and Simon, 1992; Pratt, 1995). Actuarial justice facilitates this bifurcation in penal policy or what Hudson (2001) refers to as the “twin track” organization of the justice system. Under this structure, control workers, such as DO assessors or psy experts, have the administrative function of ensuring community protection through the identification and management of high-risk offenders.

**Abandonment of Reform: Risk and Waste Management Systems**

Risk assessment and actuarial classification determine how the offender is managed once risk status is identified. High-risk offenders are subjected to “a new archipelago of confinement without reformation" (Rose, 2000, p. 335). The abandonment of reform, or any pretext of benevolence, is characteristic of the new penal agenda (Pratt, 2000b, pp. 133-134). As proposed by Feeley and Simon (1992), with risk thinking, the penological focus shifts “away from an aspiration to affect individual lives through rehabilitative and transformative efforts and towards the more realistic task of monitoring and managing intractable groups" (p. 469). Risk management is a form of political arithmetic aimed at “managing destinies" of various populations “at a distance" (Miller and Rose, 1990).

Risk management, according to theorists, is more efficient and less expensive than the welfarist agenda of the criminal justice system of past decades. This agenda was concerned with rehabilitation, reform and humanitarianism (Pratt, 2000b, p.128). In the
1980s, with increasing public critique of the penal-welfare framework, the popularity of these correctional ideologies declined (Garland, 2000). Criticisms aimed at this framework included the “seemingly excessive lenience of the criminal justice system” (Pratt, 2000b, p.134), the “intrusive authoritarianism” of penal experts and the creation of welfare dependent citizens (O'Malley, 2000c, p. 25). The welfare state and its attendant criminal justice policies were revealed as costly, counterproductive, unaccountable and ineffective (O'Malley, 2000c). Welfare correctionalism was replaced with the professedly cost effective, efficient and accountable model of actuarial justice and, more specifically, with the goals of risk identification and management.

As such, the actuarial justice approach characteristic of DO legislation is far less concerned with rehabilitative regimes than with public safety. Thus, when treatment is offered within a risk management context, the primary aim is the protection of the community rather than an alleviation of the offenders' suffering (e.g., Petrunik, 2003). Glaser (2003), for example, claims that current sex offender programming is almost punitive in nature and requires that a therapist adopt a value system that is contrary to the principles of beneficence and the promotion of the offenders' welfare. Court ordered and involuntary treatment, as well as breaches of confidentiality, loss of choice of therapist and forced confession, all infringe on an offender’s right to self-determination (Glaser, 2003, p. 5). Menzies, Chunn and Webster (1995) also address the continuing trend toward the mutual merging of punitive and therapeutic systems in crime control efforts.

This trend so firmly established has given rise to counter-trends such as “therapeutic jurisprudence” and restorative justice. A developing literature and
movement centered on therapeutic jurisprudence aims to humanize law and "tease out some of the more subtle, more unintended consequences of legal rules that may be antitherapeutic" (Wexler, 2003, p.1). Using this model, supporters call for the re-establishment of boundaries between punishment and treatment.43

With regard to restorative justice, Petrunik (2003) outlines a program aimed at humanizing the reintegration of sex offenders in Canada. The restorative justice approach he discusses is a joint initiative of the Mennonite Central Committee and Correctional Services Canada. The goal of this program is to include both community protection and offender rehabilitation in an approach that addresses offenders’ needs as well as prevention of reoffending (Petrunik, 2003, pp. 503-506).

Alongside the constriction of reform and treatment efforts under an actuarial system of justice, the search for the cause of crime is also less important. Silver and Miller (2002, p. 147) maintain that individual motivation and cause of behaviour are not meaningful in the actuarial calculation of reoffence probabilities based on populations. This is because actuarial risk assessment does not produce dysfunctional individuals in need of treatment; instead, its principal aim is to separate the dangerous from the non-dangerous thereby rendering cause of dangerousness irrelevant. Reichman (1986, pp.158-162) similarly observes how an actuarial justice model of social control directs emphasis away from cause and focuses instead on the probability of offending. Risk thinking does not encourage questions about the causes of crime; its focal point is on the risk of recidivism, not on why reoffending occurs. "A great strength of the actuarial approach," argue risk assessment researchers Quinsey et al. (1998), "is that the

43On the specific application of therapeutic jurisprudence in sentencing sex offenders, see Peebles (1999).
relationships [between risk factors and crime] can be used without knowing for certain why they exist” (p. 182).

In the end, risk assessment deflects attention away from the social causes of crime and the social realities shared by the members of the high-risk population. By reason of this, Silver and Miller (2002) argue that risk assessment tools are politically attractive and economical to policy makers. Risk assessment enables policy makers to thwart the allocation of resources that might alter the criminogenic social and economic conditions of the underclass (Silver and Miller, 2002, p. 144).44

In addition to neglecting the cause of crime, actuarial justice transforms individual offender needs into risk. For example, past abuse suffered by the offender and the presence of mental disorder may reveal obvious needs in terms of therapy, but risk assessment turns these needs into factors that elevate risk. Hudson (2001) observes that risk assessment, like the old “needology” which characterized welfare correctionalist strategies, leads to the overpenalization of the disadvantaged. With the operation of actuarial justice, the needs of the poor, unemployed and minority groups are transformed into risks and, consequently, create and amplify social exclusion leaving overpenalization intact.

Actuarial justice, according to theorists, encourages an anti-therapeutic managerial approach to crime control. They argue that this model of justice seeks to control members of the identified high-risk group at the lowest possible cost and represents the expansion of control through the more efficient strategy of risk management (Feeley and

44 Yet, according to recent US cost assessments, models that aim to manage high-risk offenders by focusing on community protection are expensive and require considerable resources for effective implementation (Petrunik, 2002). Lafond (1998) similarly argues that expenses associated with the Washington and California sexual predator commitment laws, including the costs of inevitable appeals, psychiatric experts and specialized facilities, are very high.

**Populist Politics and the Symbolic Victim**

Viewing risk as the predominant currency of penal policy inevitably blinds us to the role of other factors in shaping crime control (Rose, 1998). For the most part, Feeley and Simon's original actuarial justice formulations neglected the role of populist politics. However, the demands of political and moral entrepreneurs maintain influence on the contemporary penal agenda (Bottoms, 1995; Garland, 1996, 2000; Rose, 2000). Petrunik (1994) argues, "At a populist level, grass roots victims advocacy movements and crime prevention movements have emerged along with a more general public demand for increased attention to law and order" (p. 20). Sensationalized media coverage of serial rapists and mutilating pedophiles and the specter of the monstrous fuel public demand and result in public outcry for protective legislation and policy (Garland, 1996, 2000; Petrunik, 2002, 2003).

As previously chronicled, populist efforts were responsible, in part, for the development and implementation of Canada's current DO legislation.\(^{45}\) Populist politics also spurred on the creation of the Community Protection and Sexually Violent Predator Acts, which have dominated American penal handling of sex offenders since the early 1990s (Petrunik, 2003). In the United States, the state of Washington in 1990 was the first to pass what are commonly referred to as predator laws.\(^ {46}\) These laws focus on the

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\(^{45}\) For a full exploration of populist efforts in Canada in relation to Dangerous Offenders, see Petrunik (2002, 2003).

\(^{46}\) Legislation allowing for the civil indeterminate commitment of such offenders exists in at least 15 states in the United States (Petrunik, 2002, p. 484).
identification and post-sentence civil confinement of the sexually violent predator\(^\text{47}\) whom experts deem untreatable and too dangerous to participate in society.

Populist efforts were a catalyst in the formation of this extra-legal sanction. A strong and vocal group of allied victim advocates called SAVUS (Stop All Violent Unnecessary Suffering) lobbied around high profile cases of sexual victimization\(^\text{48}\) and engaged local and state politicians in an attempt to change sex offender legislation (Websdale, 1999, p. 100). This group sent the state Governor 10,000 sneakers, each representing a child in need of protection. They encouraged the community to hang sneakers on trees around the state capital in what became known as the ‘tennis shoe brigade’ (Websdale, 1999, p. 101).

The sensationalized media reports and the effectiveness of the tennis shoe brigade in symbolic terms created the urgent need for state response. Subsequently, in 1989, the state of Washington established a task force on community protection. The task force invited public participation, including local advocacy groups and the mothers whose children’s victimization incited the populist movement. The state adopted the task force recommendations in the 1990 *Community Protection Act*. Recommendations included, among others, the indeterminate civil commitment of sexually violent predators, community notification and registration system protocols for sex offenders, an increase in the severity of penalties for most sex offences, and mandatory treatment for juvenile sex offenders (Poole and Lieb, 1995).

\(^{47}\) Defined by Washington state statute (RCW 71.09.020), the sexually violent predator is "a person who has been convicted of and/or currently charged with one or more crimes of sexual violence and who suffers from a mental abnormality or personality disorder (not necessarily mental illness) which makes the person likely to engage in predatory acts of sexual violence."

\(^{48}\) In the late 1980s, a repeat sex offender, Earl Shriver, raped, assaulting and mutilated a young boy in a small community in Washington. The mother of this victim spoke in support of the agenda
The reform history and eventual penal measure adopted in both cases—the DO legislation and the *Community Protection Act*—illustrate the populist and politicized nature of crime control strategies (Petrunik, 2002, 2003). According to Garland (2000), policy measures are increasingly constructed in ways that express public opinion. Contemporary policy is more often influenced by political action committees and interest groups rather than by researchers and civil servants (Garland, 2000, p. 350). Not only are strategies instrumental in the sense that they aim to protect the public by punitive segregation but they are also expressive of that public's sentiment.

Examining the role of public lobbying in legislative and penal agendas must also explore how the language of risk and associated thinking about probable future behaviour facilitate populist movements, especially those that are punitive in nature. Garland (2000) maintains that the interests and feelings of the victim, whether actual victims, victims' families or potential victims, are used to solicit support for populist punitive reform. He observes two kinds of symbolic victims who have emerged in the crime control discourse. The first victim Garland discusses is the traditional victim, which involves the projected notion of the “public” as the victim. Crime control discourse talks about the traditional victim when it refers to “protecting the public” or “public safety.” Now, argues Garland (2000), contemporary strategies of crime control invoke a disaggregated symbolic victim—a representative character—whose experience stands in for that of all citizens. The public interest discourse no longer subsumes the victim's concerns; the public good has been individuated. Risk itself helps to disaggregate the collective public victim by personalizing victimization. Everyman and everywoman is at

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of the lobby. Like the Joseph Fredericks case in Canada, the Shriner case was a catalyst for public punitiveness and legislative change (Websdale, 1999).
risk: "It can happen to you" has become the metonym for the problem of victimization (Garland, 2000, p. 351). The notion of ever-present risks and general ontological insecurity (Giddens, 1991) characteristic of the risk society allow the public to articulate anxious concerns about potential or probable victims in the community.

Yet, contrary to Garland's observation of the shifting nature of the symbolic victims, I can still envision how the protectionist doctrines characteristic of contemporary crime control (re)enable a traditional definition of the community as a potential victim at risk. Protection of the "public," "society" or the "community" is the goal of legislation such as the SVP Acts or DO law. These statutes privilege both the rights of potential individuated victims and the right of the community as a symbolic victim over the individual liberties of offenders.

In sum, actuarial justice and risk thinking make possible the continued operation of exclusionary penal sanctions. Risk assessment allows for the identification of individuals too risky to participate in society. The familiar ‘other’ constitutes this traditionally defined and disciplined subpopulation of risky undesirables—the poor, the pathological, the unemployed. Actuarial justice methodologies group undesirables into a potentially risky underclass of anti-citizens. Nevertheless, the monstrous offender still exists as the symbolic intractable risky individual targeted by exclusionary strategies. Populist punitiveness and protectionist doctrines, in turn, fuel increased demands for exclusionary crime control strategies enabled by risk thinking.
CIRCUITS OF INCLUSION: STATE AND CITIZEN PARTNERSHIP IN MANAGING RISK

In advanced liberal societies, one family of control practices operates by affiliating subjects into a whole variety of practices in which the modulation of conduct according to certain norms is, as it were, designed in. ... Control is not centralized but dispersed, it flows through (sic) a network of open circuits that are rhizomatic and not hierarchical. (Rose, 2000, p.325)

Assumable Risk and the Managed Offender

Having demonstrated the exclusionary trends of contemporary crime control and how they are enabled by risk, it is now important to consider how risk thinking might allow inclusionary strategies. Actuarial classifications not only permit the identification of the incorrigible high-risk offender, but they also function to determine whose riskiness can be managed outside the realm of exclusionary penal sanctions. Long-Term Supervision Orders (LTSO), parole, community notification, registration systems for sex offenders and other forms of surveillance and post-sentence supervision are inclusionary strategies of crime control.49 These strategies encourage dispersed control rather than the exercise of totalitarian exclusionary authority usually ascribed by social control theorists (Rose, 2000).50 They comprise a regime of management devices that allow for the sorting and monitoring of populations based on differential risk profiles.

Using Rose’s conceptualization of dispersed control, I propose that the Long-Term Offender (LTO) status and supervision orders enacted alongside the 1997 DO legislation...

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49 Also included in this list of inclusionary strategies of crime control are restorative justice (reintegrative shaming), DNA databanks, surveillance cameras, gated communities, neighbourhood watch and community policing (Rose, 2000).

50 For analyses that view surveillance techniques as more exclusionary than integrative, see Marx (1988, pp. 206-233), Lyon (1994) and Simon (1993). Simon asserts that the new surveillance capacities encourage what he calls an "electronic leper colony" (p. 201). Pratt (2000) also argues, for example, that community notifications represent a form of branding reminiscent of exclusionary premodern strategies of crime control.
reform in Canada are representative of an inclusionary strategy of crime control. LTOs present a substantial risk \(^{51}\) but upon determination by experts can be potentially managed inclusively in the community. LTSoS allow for post-sentence supervision for a period not exceeding ten years. These non-custodial orders represent risk management in the community.

The idea that Long-Term Offenders are an additional subpopulation of the underclass, previously unarticulated in the actuarial model of twin track justice, is compelling. The LTO is evaluated as an assumable or acceptable risk whereas before the legislative changes, which now allow the LTO designation, the offender may have been excluded as a high-risk Dangerous Offender. The 'medium-risk' offender, judged potentially manageable in the community, occupies the space between the segregated high-risk offender and the noncustodial low-risk individual. After serving time in custody, this medium-risk LTO is given the opportunity to 'reattach' to the community, to become virtuous citizen and to achieve full membership in a moral society (Rose, 2000, p. 335).

Rose's definition of community management as an inclusionary strategy of social control gives rise to the notion of a medium-risk offender. Of course, for Rose (2000), one section of the underclass is those anti-citizens—the intractable monsters—who have "refused the bonds of civility and self-responsibility" (p. 331). However, in his formulation there is room for individuals previously unable to assume these connections because they have been segregated or do not have the skills, capacities or means to be afforded a second chance (Rose, 2000, p. 331). The medium-risk offender is such an individual. These offenders are asked to manage their own riskiness and to engage in the reconstruction of their morality. By not viewing risk as a handmaiden of exclusionary

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\(^{51}\) For the use of this phrase in the legislation, see Appendix B.
crime control strategies, what emerges is the empowering discovery that some members of the risky underclass may be afforded another chance.

Yet, failure to remoralize signified by reoffence or a violation of the rules of inclusionary risk management has profound consequences for the medium-risk offender. A breach of an LTSO could result in an indictable offence charge. This form of resentencing is unprecedented in Canada, and is particularly problematic given the anti-therapeutic and almost unmanageable conditions of supervision orders commonly imposed on offenders. Examples of these conditions include: involuntary participation in programs; involuntary adherence to a prescribed medication regime; prohibition on owning pets (to ensure they are not used as lures for children); allowance of random checks of computer hard drives and computer disks; and prohibition from attending a public park or public swimming area where persons under the age of 14 years are present or can reasonably be expected to be present (Solicitor General Canada, 2001, Section 5, Appendix I). Supervision orders, perhaps more appropriately labelled moral management, represent inclusionary crime control strategies that provide restrictive guidelines for the self-motivated offender to avoid reoffence and engage remoralization.

Acknowledging the liberating potential of risk assessment, Webster (1998) argues that the basic function of risk research is not to "endorse the confinement of select people to institutions" but rather to determine "which individuals are and are not likely to be prone to violence under defined conditions, and to suggest possible means by which they might be able to live under the least restrictive conditions possible" (p. 471,

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52 Added to this already 'heavy stick' is the regulation stating that if an offender is convicted under a LTSO, the "clock stops" on the previous order while the offender is serving time for the new offence (Solicitor General Canada, 2001, p. 25).
53 According to Section 133(3) of the Corrections and Conditional Release Act of Canada, conditions must be considered "reasonable and necessary" in order to protect society and to
emphasis in original). Nevertheless, others maintain that actuarial risk assessment is better suited to the incapacitation of high-risk offenders. They claim that there is little political incentive for penal policy makers to adopt these methods to expend rehabilitative resources on high-risk offenders or low risk offenders (e.g., Mathiesen, 1998a; Silver and Miller, 2002).

**Enabling Risk Management: Preventative Partnerships and Information Dissemination**

Effective risk management is not entirely the responsibility of the medium risk offender. Inclusionary crime control strategies are dependent on the development of a community-state coalition. Garland (2000) calls this adaptive coalition a preventative partnership arrangement that involves "a whole new infrastructure of arrangements whereby state and non-state agencies coordinate their practices in order to enhance community safety through the reduction of criminal opportunities and the extension of crime-consciousness" (p. 349). Preventative partnerships provide the means for community protection without necessarily excluding offenders from participation (Petrunik, 2002, p. 506).

The goals of a preventative partnership between the state and its citizens are twofold: crime prevention and the management of risk in the community. The success of these goals relies on responsible individuals who are prudential (O'Malley, 1992). Prudentialism encourages individuals to engage in the "criminology of the self" (Garland, 1996, 1999). The "criminology of the self" promotes activities of self-governance and self-policing. The prudential citizen is responsible for preventing his or her own
victimization in much the same way an offender is being accountable if actively engaged in remoralization. The law-abiding community member who avoids situations, behaviours and populations deemed 'risky' is the prudential citizen. As such, prudentialism prescribes which lifestyle choices and behaviours are normal. The formation of a nuclear family, engagement in the economy through employment and participation in sexual relationships, ideally heterosexual, with consenting adults are prudential.

Prudentialism also implicates community responsibility for ensuring the safe reintegration of the risky offender. Alternatively, at the very least, the state charges the community with the task of preventing the victimization of its members by this known offender. For example, community members are encouraged to actively employ "information systems for public safety" (Solicitor General Canada, 2001, p. 1). According to Pratt (2000b), the desire to know about criminals in the community is not new, but what is novel is the degree of involvement:

[It] is the way in which the public are given a direct (rather than vicarious) involvement in the process of punishment; they can actively participate in this process again, rather than simply read about it second hand; they are offered the chance of reading about and looking for real monsters in their midst rather than fictional ones of those whose geographical distances dissipated their threat. (p. 131)

Using technologies of community notification and sex offender registration, community members continuously monitor their neighbours from the perspective of risk prevention.54 These systems are used extensively in the United States and are gaining

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54 Prudentialism and allied technologies are gendered. They assume preventative monitoring of community members can decrease women’s victimization risk. Research has long demonstrated that women are more likely to suffer physical, psychological and sexual abuse within the home by someone known to them. For a critical analysis of the gendered nature of risk thinking, see Chan and Rigakos (2002).
popularity in Canada. Commonly referred to as Megan's Laws, they require police to notify community members when a sex offender or any high-risk individual is released from prison and takes up residence in their area (Matson and Lieb, 1997; Petrunik, 2002).

Legislation surrounding high-risk offenders in Canada mandates community notification. The Corrections and Conditional Release Act (CCRA) requires the Correctional Services of Canada (CSC) to provide notification to police forces before the release of a federal offender, particularly a DO or LTO. Federal inmates convicted of sexual or violent offences against a child may have their identities revealed to the community via the police (JHSA, 1999, p. 14). In Canada, risk assessment tools are used to aid in the determination of whether or not the public disclosure of an offender's identity and location is necessary (Solicitor General Canada, 2001).

The state of Washington has also institutionalized risk as the currency for information exchange in relation to sex offenders in the community (Poole and Lieb, 1995). The state law requires enforcement officers to assign risk level classifications to all released sex offenders. According to the Whatcom county Sheriff's web site,56 risk level classifications are based on a "science and multidisciplinary perspective using objective scoring criteria to determine an offender's likelihood of re-offence." Police assign risk levels according to predetermined risk factors such as treatment success,

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acceptance of responsibility, victim empathy, as well as drug and alcohol abuse, homelessness, and predatory offending patterns. A Level 3 offender is a high risk to the community and widespread notification of his release is mandated. Level 3 notifications involve the release of an offender's identity, location, crimes and other relevant information to schools, businesses, day cares and organizations serving primarily children, women or vulnerable adults. Police release the identity of Level 3 offenders to the news media and post names and photos on the Internet. In 2001, the state of Washington required sheriff's offices to place information regarding Level 3 or High-Risk sex and kidnapping offenders on their department sites. In the United States, Internet access to sex offender notifications is provided through government sponsored Web sites in at least 30 states (Petrunik, 2002, p.484).

Sex offender registration systems usually accompany notification protocols. Under these systems, the released sex offender is required to register or “check in” with law enforcement officials at designated times for a specific duration. In Canada, Ontario was the first province to implement a registry after passing Christopher's Law in 2001. According to the web site of the Ministry of Public Safety in Ontario, the system, named after victim Christopher Stephenson, became a reality “with the encouragement and support of the Stephenson family, victims' groups and law enforcement organizations.”

Following Ontario’s lead and facing increasing populist support, the Federal Solicitor General proposed the Sex Offender Information Registration Act (SOIRA) in 2002. The SOIRA, also known as Bill C-23, aims to identify “high-risk” sex offenders

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who pose a "risk to the community." The Act, which underwent its second reading in Parliament in February 2003, would establish a national sex offender database containing information on convicted sex offenders. According to the Solicitor General's Office (2002), the database is a new investigative tool that would permit police to quickly locate known sex offenders living near the location of a sex crime. The proposed system requires that sex offenders register with police for at least ten years following their release from prison. Registration involves regular updates on living arrangements, name, and appearance. Failure to register constitutes a criminal offence.

Notification and registration systems encourage citizens to protect their families and join in the social control and remoralization of risky offenders. Legislators and policy makers tout community notification as a regulatory and preventative measure, not a punitive strategy. According to the Whatcom County sheriff's web site, "an informed public is a safer public." The web site notes that if "the public is provided adequate notice and information, the community can develop constructive plans to prepare themselves and their children for the offender's release." Not only do offenders defer to the gaze of custodial agents, but also upon their release, they are subjected to vigilant

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61 According to the backgrounder (Supra note 60), the law will not require registration of persons convicted before enactment of the legislation, consistent with Section 11 (i) of the Charter. This section provides the accused with the benefit of a lesser punishment for an offence committed before the change in legislation. The application of this Section of the Charter to the issue of retroactive registration could foster the perception that legislators designed the registration system to punish or at least have a punitive element.

62 Supra, note 56, at 58.
community surveillance.\textsuperscript{63} Offenders are marked with the modern equivalent of a scarlet letter\textsuperscript{64} (Petrunik, 2003, p. 51).

In Canada, other recently developed information systems rely on risk assessment and provide information on high-risk offenders. For example, changes to the pardon system were enacted alongside existing and proposed registration systems. Bill C-7, legislated in February 2002, allows the use of a high-risk flag within the Canadian Police Information Centre (CPIC) system to denote those offenders who have been pardoned of offences against children and other vulnerable individuals. The provisions of Bill C-7 are retroactive. CPIC also contains a national flagging system for high-risk violent offenders. The system identifies offenders whom the Crown evaluates to be high risk for future violent conduct. The function of this system, according to the \textit{High-Risk Offenders Handbook}, is to help the Crown decide when a DO application is warranted (Solicitor General Canada, 2001, p.38).

And, on February 23, 2003, the Ministry of Public Safety and the office of the Solicitor General of Canada announced a “crime fighting technology that will enhance public safety and improve law enforcement across the province.”\textsuperscript{65} The Police Records Information Management Environment (PRIME) system will connect every municipal and

\textsuperscript{63} One has to consider that notifying a vigilant community of a sex offender who has entered their neighbourhood could set up the opportunity for populist revenge. In Washington, the community burned down convicted sex offender Joseph Gallardo’s residence after they were notified of his criminal history (Donnelly and Lieb, 1993). Yet, a 1996 study conducted in Washington found that the public had harassed only approximately 4% of sex offenders who were subject to notification laws since 1990. In almost half of these cases, the offender’s family was also harassed (Matson and Lieb, 1996).

\textsuperscript{64} The John Howard Society of Alberta (1997) argues that community notification is cruel and unusual punishment which paradoxically prevents the successful reintegration of offenders into the community as long as they are labelled and treated like criminals. They also claim that notification systems give a community a false sense of security, because they encourage the belief that all sex offenders are identified. According to the Society, under-reporting, low clearance rates and the inability of police to maintain current registries curtail the accuracy of such systems.
Royal Canadian Mounted Police (RCMP) detachment in Canada. The stated objective of PRIME is to ensure police forces can share information about criminals and crime within minutes in order to improve public safety.

With such systems, the state expediently transforms the crime control problem into a technical exercise of information management. The managerial configuration of contemporary penal landscapes has the capacity to turn moral and political decisions into technical tasks (Matthew and Pitts, 2001). The sorting and classifying capabilities of risk assessment make possible dispersed governing strategies and provide data for apparatuses of techno-power and “superpanoptic” systems of surveillance without walls, windows, towers or guards (Poster, 1990, p. 93).

If an unprotected member of the community is victimized, the state attributes victimization by a risky offender in the community to the mismanagement of information in the system or to a lack of information in the community. Alternatively, the state conceptualizes the victimization as indication of the community's inability to care for itself and its members. The state perceives the community as failed partner in the preventative alliance necessary for risk management. Consistent with the goals of actuarial justice, the state defines crime control as a technical problem with administrative and information management solutions made possible by preventative partnerships and facilitated by risk thinking.

RESISTING RISK: A DIFFICULT AGENDA

At this stage, strategies of resistance to the oppressive implications of actuarial justice are underdeveloped and untheorized. Many theorists, critical of risk thinking, imagine risk as an opportunity to explore and discover new political strategies of empowerment (e.g., Ericson and Haggerty, 1997; Giddens, 1991; Franklin, 1998). Foucault's notions of power and reverse discourse are relevant in discussions about resistance and empowerment. Foucault (1980, pp. 97-98) envisions power as "omnipresent, not emanating from a central point but rather continuous, capillary and exhaustive." His 'analytic of power' views power as "not merely negative, repressive, and prohibiting, but positive and productive, and explicitly bound to knowledge" (Foucault, 1980, p. 90).

Declaring that the imposition of power can be productive and positive, Foucault envisioned the phenomena of reverse discourse. Reverse discourse is the possibility for an individual to resist by virtue of that which has enabled his or her resistance. It is the ability to use power positively, regardless of its original intent. For instance, Foucault (1980b) explores how the commonly held repressive and prohibiting discourse on sexuality in the nineteenth century enabled the emergence of scripts for various sexual identities. Victorian discourse on sexuality made possible the opportunity for the homosexual to exist and resist. Foucault reveals how the psy expertise about homosexuality allowed for the social control of deviant sexualities, but also permitted for reverse discourse. He observes: "[H]omosexuality began to speak in its own behalf, to demand that its legitimacy or 'naturality' be acknowledged, often in the same vocabulary using the same categories by which it was medically disqualified" (Foucault, 1978b,
The homosexual became the object of a new knowledge that defined and disciplined him. Yet through this objectification he was provided with a 'script for being', which Foucault called the process of subjectification. Homosexuals used this script to identify a collective. This collective spoke its identity and shared life experiences. Through reverse discourse, homosexuals were able to resist oppressive power including the disqualifying gaze of medicine.

Foucault's ideas about reverse discourse can be applied to the high-risk offender. Risk designations, like other classificatory statuses, may involve the awareness of different possibilities of personhood rather than the passive acceptance of identity (Hacking, 1986; Ericson, 1994). Huspeck and Comerford (1996) observe that penal science provides inmates with new identity resources, which are subsequently deployed by inmates to subvert penal knowledge. Several high-risk offenders in the United States, facilitated by reverse discourse and collective interests, have successfully challenged certain features of the registration and notifications provisions, such as the absence of due process and retrospective application (Petrunik, 2002).

Nevertheless, the pragmatics of resistance for the high-risk offender is complicated. Silver and Miller (2002) argue that it is no coincidence that risk instruments were developed and tested on disadvantaged groups such as the mentally disordered, criminal and other institutionalized populations. These groups have the lowest level of political resources and are the least capable of resisting. Silver and Miller ask social researchers to consider the practicalities associated with a group of diagnosed psychopaths who object to being classified as high risk or psychopathic. Few interest groups would leap to their defence (Wilkins, 1985 as cited in Silver and Miller, 2002, p.
Uncovering processes of subjectification and resistance through reverse discourse would require interaction with offenders, which is beyond the scope of this study.\textsuperscript{66} Consistent with the reflexive nature of risk, expert knowledge generated about offenders based on risk influences offenders and how they view and conduct their selves (Holbert and Prabha Unnithan, 1990). Like the effects of the various other labels ascribed to the deviant, risk status might entail self-fulfilling behaviour and, consequently, have an effect on risk prognosis.

On the other hand, reverse discourse and resistance may be more likely to develop if an offender is labelled an iconic sexual predator or serial killer rather than a high-risk criminal. Risk classifications lack the high degree of subjectivity underlying categories of earlier schemes (Castel, 1991). The dispersion of individuals into groups based on statistical and behavioural categories, which tend not to correspond to people's lived experiences, makes both group and individual resistance difficult (Simon, 1988; O'Malley, 1992).

Resistance is also complicated by the paradoxical nature of criticism aimed at actuarial justice and risk thinking. In advocating the need to individualize how the state deals with disadvantaged groups, a situation is created where it is more difficult to contend with collective issues of justice based on group membership such as class and race (Hope, 2001, p. 195). It might be necessary to soften attacks on actuarial justice to leave a space open for critique of the differential treatment of disadvantaged classes.

\textsuperscript{66} Holbert and Prabha Unnithan (1990) similarly call for research that aims to discover whether an offender's self perception matches with ideologies underlying risk assessment. More specifically, they are interested in studying whether offenders' reasons why they commit crime or re-offend are congruent with risk assessment (Holbert and Prabha Unnithan, 1990).
It may be a fact about human beings that we notice who is fat and who is dead, but the fact itself that some of our fellows are fat and others are dead has nothing to do with our schemes of classification. (Hacking, 1986, p. 227)

According to the psy literature on the prediction of dangerousness, detailed in Chapter 1, risk assessment reflects advancement in knowledge. For psy researchers, risk expertise represents scientific evolution. Psy professionals use a similar narrative after each revision of the DSM and the discovery of new diagnostic categories or typologies. For them, changes in classification and evaluation standards are due to improvements in expert knowledge. However, social scientists tell a different story:

To [social scientists] it signifies less science's mastery of madness, and more the rise of influential new professionals that command the power to define the limits of normality and to determine the life courses of those deemed unworthy or unwell (often with disastrous effects) on the basis of standards that are at best nebulous and suspect, and at worst arbitrary, biased, self-interested, and fictitious. (Menzies, 1997, p.43)

Yet, the social scientific literature, which addresses the technologies of actuarial justice, is underdeveloped. Nor has the multiplication of expertise that results from the development and employment of risk thinking been sufficiently explored. Feeley and Simon (1992, 1994) do not specifically examine the experts, their tools, and subsequent expertise which developed under a model of actuarial justice. They discuss in only a cursory manner the rise of a professional class of criminal justice risk managers and the adoption of risk technologies that permit greater coordination within the criminal justice system (Feeley and Simon, 1994, p. 191).
Several theorists, however, have provided a springboard for the examination of risk experts and expertise in the criminal justice system, and, in the psy disciplines (e.g., Hacking, 1990; Castel, 1991; Bauman, 1992; Ericson, 1994; Ericson and Haggerty, 1997; Menzies, 1997; Rose, 1998). In addition to viewing risk expertise as the product of a broader ontological insecurity prevalent in the risk society, and as the outcome of a system of actuarial justice, theorists have also argued that this expertise is advanced to improve the credibility and legitimacy of a waning psy profession (Hacking, 1990).

Before the emergence of actuarial expertise, the public and state questioned the authority of human sciences and the clinical practitioner (Pratt, 1995, 2000a). The enormous costs and low accountability of a clinically oriented welfarist criminal justice system had come under increased public scrutiny. In the psy disciplines themselves, studies that revealed the inaccuracy of clinical prediction were mounting. The literature on the ethics of expertise and, more specifically, critique of criminological prediction was intensifying (e.g., Walker, 1982; Dickens, 1985; Farrington and Tarling, 1985; Webster, Dickens, and Addario, 1985; Golding, 1990; Hart, Webster and Menzies, 1993). And in situations where their legitimacy is considered weak, professions have historically resorted to the objective shelter of numbers and quantifications, which the public view as guarantees against abuses of discretion (Porter, 1995, p. 196). Professionals confident in their expertise have no need to justify their judgements. For Pratt, the emergence of actuarial science was inevitable:

Compared with the arcane, substantive, autonomous, and sometimes conflicting sciences of the welfare professions, the ‘know-how’s of enumeration, calculation, monitoring, [and] evaluation fit well with the enterprise culture, are more transparent to government inspection and provide universal criteria in terms of which all services can be simply measured. (1998, p.26)
Accounting for the popularity of risk thinking must also include an exploration of the symbiotic relationship between the psy disciplines and penal policy (Menzies, Webster and Sepejak, 1985, p. 116). Starting in the 1980s, selective detention was positioned to play a more prominent role in post-welfare penal agendas. The courts asked psy professionals to determine targets for detention. Norko (2000) observes that psy professionals are increasingly called upon to play the role of police and jailer and are expected to "identify dangerous individuals, sound alarms at their discovery, and incapacitate them without failure" (p. 284).

A certain class of psy experts, mostly researchers, responded to the shift in penal agendas by promising new predictive devices that would identify high-risk offenders who were appropriate targets for selective sentencing. In Canada, the developers of risk assessment tools, in fact, claim that it was demands from the court which served as a catalyst for their research (e.g., Hare, 1991; 1998; Webster et al., 1994; Eaves et al., 2000). Webster et al. (1994, p.17) also specifies legal accountability for negligent predictions and increased public scrutiny of psy expertise as reasons for the development of assessment tools. As a result, both Canadian and American courts embraced risk expertise.

I am reminded here of Szasz's (1972) hypothesis suggesting that the courts are historically reliant on experts who can serve as authoritarian father figures and thus legitimate sentencing decisions and share the weight of accountability (see also Foucault, 1975, 1978a). This hypothesis implies that judges use psy experts and expertise to reduce their responsibility in sentencing. Actuarial risk assessment works as the ultimate massager—relieving judicial guilt of both experts and judges in a society
increasingly intolerant of sex offenders and a state unwilling to invest in a 'disposable' subpopulation of anti-citizens.

Explaining the emergence of risk expertise is also complicated by the self-reflexive or paradoxical nature of risk. According to Brown and Pratt (2000), risk is "something that modernity insists we tame and bring under control, and yet our very attempts to do so may lead to the generation of new areas of unpredictability" (p. 2). Knowledge of risk is a producer of risk (Ericson and Haggerty, 1997). Beck (1992a) labels the self-reflexive nature of risk the boomerang effect. He views risks in modern society as self-generating and infinite, caused by the very actions of those who seek to address them. Beck examines the concept of the risk society by focusing on the destruction of the environment through progress brought about by modernization. The assumed progressive and linear path to modernity has generated environmental risk. This state of affairs promotes anxiety and insecurity, which at the same time functions as a source of profit for aligned industrial and bureaucratic systems. These systems are charged with the responsibility of managing and distributing risk. Beck (1992a) anticipates the expansion of risk expertise and of the tools designed to control, predict and prevent risk in our increasingly uncertain risk society.

Similarly, risk experts in the criminal justice system present abstract knowledge systems that cause risk to become visible and dramatic, and consequently identification technologies are needed (Castel, 1991; Ericson and Haggerty, 1997). Expert systems not only operate as a means of discovering a problem, but also may actually bring about this problem through the implantation of classification schemes (Ericson, 1994, p. 157). This process, which I label the "paradox of expertise," represents the iatrogenic aspects
of risk thinking (Castel, 1991, p. 289). The paradox of expertise also reflects Foucault's ideas about power/knowledge. He suggests that power is ultimately related to knowledge and knowledge to power, such that:

power produces knowledge (and not simply by encouraging it because it serves power or by applying it because it is useful); that power and knowledge directly imply one another; that there is no power relation without the correlative constituting of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power. (Foucault, 1975, p. 27)

The exercise of power by psy experts perpetually creates risk knowledge and, conversely, this knowledge induces risk identification and management of the effects of psy expert power. In other words, knowledge about the risk of reoffence creates and justifies its object of study—the high-risk offender. Once the expert categorizes the high-risk offender into a population, the mechanisms of power and knowledge can assume responsibility over this group in an effort to control and manage it. A dependency on expertise is created and subsequently involves submission to the norms, interests and mistakes inherent in the knowledge (Stehr and Ericson, 1992).

Risk knowledge is also self-perpetuating. Castel (1991) alerts us to the "potentially infinite multiplication of the possibilities for intervention brought about by risk knowledge" (p. 289). Psy professionals are responsible for collecting risk information and conducting risk assessment. These data feed the information infrastructure, which in turn is essential for the practice of gathering information for risk assessment. Risk professionals' knowledge becomes expertise when it is plugged into an information infrastructure and web of institutions (Ericson and Haggerty, 1997, p. 104). Risk expertise is fed by and feeds into information systems previously discussed such as PRIME, SOIRA and CPIC. The Offender Intake Assessment (OIA) program
implemented by CSC in 1994 is also an exemplar of this information infrastructure. This program is part of a larger Offender Management System and provides the computerized means to monitor offenders' "risks and needs," as well as supplying the basis for all future decisions and recommendations made about offenders (Motiuk, 1997, p. 2). In May 2001, the federal Solicitor General announced a 47 million dollar project to revitalize Canada's Offender Management system. The unprecedented data from birth to death on criminal subjects make the goals of identification and management prescribed by actuarial justice possible (Broadhurst, 2000).

Who are Risk Experts? Non-experts and the Disappearance of Experts

What makes an individual a risk expert? Ericson and Haggerty (1997, p. 102) define a risk professional as an expert who claims to possess exclusive abstract knowledge on how to address particular risks, and who can provide expert risk management services. Risk experts are one of the many contributors to a system of risk management (Ericson, 1994, p.159). According to Ericson (1994), risk experts usually have little control over a particular outcome or the career of a case they are evaluating. However, in the case of the DO hearing and the indeterminate sentence, the risk expert—although often disconnected from the offender in terms of face-to-face interaction—functions as the risk information collator. The psy expert gathers previous risk expertise (or indications of risk) associated with the offender to provide a calculation of risk that will inevitably influence or dictate further risk management.

Risk knowledge must also be sufficiently inaccessible to non-experts to constitute a form of expertise (Ericson and Haggerty, 1997, p. 104). Accessibility is gained through specialized training and access to the risk information infrastructure. Borum (1996) has
suggested that risk assessment be declared a proficiency area within the psy-
professional domain. The web site of the PCL-R's creator, Robert Hare, contains an
explicit caution: psychiatrists are responsible for ensuring they have proper training
before using the PCL-R. Hare cites Campbell's (2000) warning that psychologists who
use the PCL-R are at risk of violating the American Psychological Association's (1992)
ethical standards associated with "boundaries of competence" if they have not had
"specific PCL-R training" (p. 125). According to Hare (1998), issues surrounding the
qualifications necessary to use the PCL-R have arisen because of the prominent role the
PCL-R plays in the court system and the potentially serious implications a PCL-R
evaluation could have for an offender and the public.

The prominent role played by the PCL-R justifies the increasing concern among
experts about non-expert or amateur access to the tool and, consequently, the need for
training offered by the developers of the instrument. Hare tells his audience that he even
receives requests from administrators and the jurisdictions they represent for lists of
those clinicians who have participated in the training program. The request, according to
Hare, ensures that clinicians meet training standards.

Paradoxically, risk assessment is counterproductive for the operation of certain
kinds of expertise vying for a role in defining dangerousness. The success of a field of
expertise depends on its ability to sustain hegemonic authority by defending what counts
as relevant and superior knowledge (Ericson and Haggerty, 1997, p. 104). In an
actuarial system of justice, predictions of risk are valued over clinical diagnoses and
descriptions of individual pathology. The risk expert and manager displace the clinician
and treatment provider. In the end, risk thinking implicates the subordination of clinicians

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to technicians who stockpile, process and distribute items of information, disconnected from face to face practice (Castel, 1991). With risk assessment, no clinical input is needed—just a translation of relevant material from the offender's dossier to calculate the actuarial score. A one-way exchange of information characterizes the psychoprofessional and offender relationship (Silver and Miller, 2002, p. 140).

Risk experts are therefore more accurately conceptualized as technicians and information managers. Strategies of risk result in the replacement of professionals by forms, computers, check boxes and step-by-step procedures that commodify expertise (Ericson and Haggerty, 1997, p. 102). Management in actuarial systems of penology involves 'scientifically' sorting the dangerous from the endangered through the technical gaze and dissemination of information (Menzies, Chunn and Webster, 1995, p. 213).

Extrapolating from the ideas of Ericson and Haggerty (1997) and Castel (1991) and authors cited above, it is evident that current clinicians testifying in Dangerous Offender hearings under actuarial justice can maintain their legitimacy only by employing tools of risk assessment. If they do not adopt these tools, they 'risk' their own professional standing.

My subsequent examination debunks the purported explanation that improvements in science or advancements in knowledge drive risk expertise. Risk expertise arises from a complex interaction of factors including, among others, professional legitimization, the self-perpetuation and monopolization of knowledge about risk, penal policy and objectives, and the self-reflexive nature of risk.
CONCLUSION

This chapter sets up a theoretical framework for the exploration of risk assessment in DO hearings. I have argued that the shift from dangerousness to risk is representative of a larger trend in society that seeks to address growing ontological insecurity characteristic of the 'risk society.' I discussed theoretical formulations offered by actuarial justice analysts and suggested the utility of these ideas for exploring the DO and LTO legislation and risk expertise in the DO hearing, more specifically.

My investigation of the circulation of risk thinking in DO hearings is attentive to the potentiality that risk operates alongside and through other systems of power including traditional disciplining. My review of the theoretical literature highlights the need to view risk not as a hegemonic and monolithic crime control strategy. As such, one of the objectives in this dissertation is to explore how risk might implicate definitions of the criminological 'other'. With risk, do traditional constructions of dangerousness persist as a means for identifying targets of exclusionary crime control? To answer this question, I will explore how psy experts in the DO hearing define the high-risk offender.

To address a deficiency in the actuarial justice literature, I also aim to examine empirically the specific operation and implications of risk expertise and technologies in DO hearings. My analysis of the use of risk assessment in DO hearings seeks to contribute to theoretical understanding on how risk thinking impacts forensic decision-making and the evaluation of dangerousness by psy professionals. I will discover how risk influences the way psy experts think, act and justify their decisions (Rose, 2000, p.332). In the end, I attempt to answer the question: does the practice of judging dangerousness change with actuarial risk assessment; and, if so with what implications?
CHAPTER III

METHODS AND METHODOLOGY

In the present chapter, I describe the research design and methodology I used to respond to both substantive and empirical questions raised in Chapters 1 and 2. The research is largely exploratory and provides a venue to investigate the penetration of risk thinking and the use of risk assessment in the criminal justice system. It offers a snapshot of the circulation of risk in the context of the Dangerous Offender (DO) hearing and the construction of the high-risk offender by psych experts. This chapter outlines the data collection and analysis process involved in my research, and speaks to confidentiality issues and the limitations of the research design. I have presented a summary overview of the social demography and criminal history of offenders included in the current sample. The chapter ends with a description of the psych experts included in the present study.

I use a methodological approach derived from the basic tenets of Foucault’s (1972) “archaeology of knowledge.” This approach seeks to uncover “rules of formation” for privileged knowledge and social practices that shape and allow the construction of a certain reality and truth. Its “…aim is to rediscover on what basis knowledge and theory became possible; within what space of order knowledge is constituted” (Foucault, 1972, p. xxi). The task of the archaeologist is to elucidate the apparatus of power/knowledge proposed by Foucault, which I have introduced in Chapter 2. In Discipline and Punish (1977), Foucault demonstrates how the production of new knowledge granted access to

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68 I refer here to the epistemological assumptions that guide my research process as differentiated from the methods or actual tools I will employ to conduct the research.
new kinds of power. The criminal and the idea of the criminal mind were objects of knowledge created by criminologists and, in turn, these objects were subject to control and regulation in the prison by experts. The prison, according to Foucault, allowed for strategies of power such as the examination and classification of individuals. Through the process of identification and sorting, experts were able to create a source of knowledge about the prisoner, and subsequently use this knowledge to discipline individuals whom they labelled criminals. My methodology seeks to reveal risk power/knowledge implicated in the construction of the high-risk offender.

As an archaeologist of knowledge, I have explored each case file employing post-structural text analysis. Reflecting on legal case file research, Strange (1998) argues that the post-structural text analyst aims to demonstrate how truth is formed by examining the language, competing claims and attributed meanings of the different narrators who are granted a voice. Smart (1985) argues that an archaeologist of knowledge is responsible for discovering what may be spoken of in relation to power/knowledge, and seeking out which statements survived, disappeared, were reused, repressed or censored (p.48).

It is my task, as the researcher, to uncover the rules and conditions of existence necessary for the creation of power/knowledge as it relates to risk in the DO hearing. What is it about society, penal policy and the psy enterprise that makes the high-risk offender possible? More specifically, how, in the process of a DO hearing, is someone identified as a high-risk offender? What is the impact of such identification? By exploring the legal case file and expert discourse contained within that file, I attempt to proceed as Foucault (1975) did in "I, Pierre Rivière ... ," to study the relations between
psy knowledge and penal policy and “to draw a map, so to speak, of those combats, to reconstruct these confrontations and battles, to rediscover the interaction of those discourses as weapons of attack and defence in the relations of power and knowledge” (p. xi).

**RECRUITMENT OF LEGAL CASE FILES FOR THE STUDY SAMPLE**

Consistent with the methodological perspective adopted, I was guided by the belief that truth is co-created in a Dangerous Offender hearing. I analyzed the legal and psy texts and have charted the ways in which they enable each other—or fail to do so—in the production of power/knowledge in DO hearings. The unit of analysis in this study was the legal case file of potential Dangerous Offenders. The case file or dossier is a product of authorities exercising power over individuals. It reflects, for example, the dialectical encounter between experts and clients, and implies the intervention of institutional and bureaucratic power into clients’ lives (lacovetta and Mitchinson, 1998, pp. 6-9). According to lacovetta and Mitchinson, the case file offers a rare window on human interactions and illuminates the ways in which dominant class, gender and race ideologies structure official discourse (p. 6).

I was primarily interested in DO legal case files heard in British Columbia since the enactment of the 1977 Dangerous Offender legislation. I produced a list of files with information obtained from two public Reasons for Judgement (RFJ) sources. The first source, located on the British Columbia Superior Court Web site, allows users access to

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89 Maynard (1998) distinguishes between the case history and the legal case file, with the latter containing multiple and varied case histories linked together for the purposes of defining legal truth.
the full text of the Reasons for Judgement written by judges for select cases. This Web page also contains links to the British Columbia Court of Appeal and to the Provincial Court, both of which have similar RFJ databases. The second source of information was the Quicklaw™ database.70 I searched all databases for Dangerous Offender hearings, and collated and printed all Reasons for Judgement, including Court of Appeal and trial judgements associated with the hearings.

I solicited additional assistance from the Attorney General's office and the Dangerous Offender hearing coordinator for British Columbia. Each office contributed to the comprehensiveness of the final list of cases by providing information about cases not included in the databases that I initially searched. I proceeded to generate a final list of DO cases heard in British Columbia from 1977 to July 1, 1999. I included cases that were heard as DO applications but did not result in a DO designation.

Associate Chief Justice Dohm of the Supreme Court of British Columbia and Chief Justice Metzger of the British Columbia Provincial Courts both granted access to legal case files, while Chief Justice McEachern denied permission to Court of Appeal files.71 Access to the case files was collaboratively secured and shared with Susanna Steinitz, a Masters student studying the influence of the Psychopathy Checklist-Revised (PCL-R) on Dangerous Offender decisions.

For a historical overview of the development and employment of a case history by psy experts, see Maynard (1998). Also see, Danzinger (1990).

70 The Quicklaw™ database provides lawyers and legal researchers with an efficient cost-effective on-line research service. The service entails access to over 2,500 databases, including case law from Canadian courts. For more information, see <www.quicklaw.com>.

71 The Chief Justice denied access based on concerns about the sensitive nature of information found in criminal law files.
We viewed and documented the legal case files by travelling to various court registries scattered throughout the province of British Columbia. Twenty-eight of the 100 cases examined took place in Vancouver, 20 in New Westminster and ten in Victoria. The rest of the cases were spread out throughout the province. Our access to legal case files was limited to on-site data collection using our own database system and laptop computers. We could not directly copy the files but we could reproduce the contents on our computers. We were able to obtain and access all the DO legal case files on our list (N=96). My final sample consisted of all the cases I accessed, but excluded three incomplete files heard in 1994, 1995 and 1998. These files did not contain sufficient information on the offender or on the context of the hearing. The files appeared stripped or purged in accordance with evidentiary statutes. In two instances, I collapsed repeat hearings for an offender into one file. In reference to these cases, I make note throughout the dissertation if I am referring to the original or to the more recent hearing for the offender.

72 Due to distance and scheduling constraints, we were unable to view cases in Fort St. John, Kelowna and Revelstoke. The Vancouver Provincial Court registry requested these files and we were able to view them at the local registry.
73 According to the office of the Attorney General of British Columbia, an Operational Records Classification System (ORCS) was approved by the legislature in 1993 as provided by the Document Disposal Act. For more information on the act, see <http://www.qp.gov.bc.ca/statreg/stat/D/9609901.htm>. The ORCS states that exhibits including documents, merchandise and contraband must be retained by the court until the case has concluded and the appeal period has expired. Similarly, Rule 4 (5) of the Criminal Rules for the Supreme Court of British Columbia [SI/97-140] states "[s]ubject to any disposition required by law and to any order of a court or a judge thereof, the Attorney General of British Columbia may direct the disposition of exhibits after one year from the expiration of the time allotted for appeal or, where an appeal has been filed, after one year from the date of the final determination or withdrawal of the appeal."
74 Two additional offenders in the sample were subject to multiple hearings. We were able to obtain information on only the most recent hearing.
75 In one of these cases, the judge declared the offender a DO and gave him a determinate sentence. Before he served his required sentence the Crown—revealing further charges—initiated a second DO application. The Attorney General approved this application and the judge, subsequently, imposed an indeterminate sentence.
After addressing problems with regard to the completeness of files and the issues of repeat hearings, I was left with a sample of 91 files. Four extra cases heard after our cutoff date of July 1, 1999 were available at the court registries for our examination. I have included these cases in my sample, as well as five other cases for which I obtained sufficient information. The five additional cases dealt with offenders who were ‘next in line’ for hearings on the list provided by the DO hearing coordinator. These hearings were conducted either in 1999 or in 2000 at the Supreme Court of British Columbia. Preceding these hearings, I obtained the full text of the Reasons for Judgement and assessed these in combination with the file information. With the addition of these nine most recent files detailed above, I achieved a sample of 100 hearings.

The majority (70%) of DO hearings included in the sample took place at the Supreme Court level. The selected cases involved 72 judges, with some of those judges presiding over more than one hearing. One judge in the sample sat for six different hearings, whereas other judges who sat for multiple hearings ruled, on average, in two to three cases. Of those 100 hearings included in the sample, 76 took place before the 1997 legislation changes, 16 cases involved ‘hybrid’ application of the legislation, and 8 cases were decided under the new legislation.

Section 11(i) of the Charter provides that an accused is entitled to the benefit of lesser punishment if the punishment for an offence of which he was or has been found guilty has been varied between the time of the commission of the offence and the time of the imposition of the sentence. Based on this Section, 10 cases involved judicial consideration of the less restrictive status of the Long Term Offender or the judicial discretion to impose a determinate sentence for an offender declared dangerous if the predicate offence occurred before the legislative changes. In R. v. Johnson 2001 BCCA 456 and R. v. Edgar 2001 BCCA 457, the British Columbia Court of Appeal upheld the applicability of Section 11(i) and concluded that a sentencing judge must consider the applicability of the Long-Term Offender status even if the offence for which the accused was convicted was committed prior to the 1997 amendments. On Appeal from the Court of Appeal for British Columbia, the Supreme Court of Canada upheld this ruling in R v. Johnson, 2003 SCC46. Writing for the Court, Iacobucci and Arbour JJ. stated at para 40, that "... the British Columbia Court of Appeal was correct to conclude that a sentencing judge must take into account the long-
All hearings started out as DO applications. Table 3.1 summarizes the outcome of the hearings. The success rate for DO applications was extremely high, with success defined from the perspective of the Crown prosecution. A DO application initiated by the Crown is successful if the judge designates an offender as dangerous and sentences him indeterminately. Without accounting for subsequent appeals, and including those cases that resulted in the Dangerous Offender designation and an indeterminate sentence, the Crown had a 77% rate of success in the current sample. If I also include those offenders who were designated dangerous but received a determinate sentence, the success rate increases to 88%. In one of the only systematic studies of DOs in Canada\(^7\), Bonta, Harris, Zinger and Carriere (1996) found a success rate of 97% for 64 DO applications in British Columbia and Ontario.

Table 3.1: Outcome of Dangerous Offender Hearings in Sample (N=100)

<table>
<thead>
<tr>
<th>Designation and Sentence</th>
<th>Cases</th>
<th>Average Sentence Length/Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dangerous Offender designation and indeterminate sentence</td>
<td>77</td>
<td>N/A</td>
</tr>
<tr>
<td>Dangerous Offender designation and determinate sentence</td>
<td>11</td>
<td>9 yrs. range = 5-16 yrs.</td>
</tr>
<tr>
<td>no Dangerous Offender designation and determinate sentence</td>
<td>10</td>
<td>5 yrs. range = 1-10 yrs.</td>
</tr>
<tr>
<td>Long-Term Offender status and determinate sentence</td>
<td>2</td>
<td>2.5 yrs. a</td>
</tr>
</tbody>
</table>

a Information on sentence length was available for only one LTO at the time of study cut-off. In Canada, the average custodial sentence for a LTSO is approximately 4.6 years and the majority of LTOs (63%) are sentenced to a 10-year supervision period (Correctional Service Canada, 2002).

Data-Collection and Confidentiality

I began to collect data in 1999 and continued this process for the next 16 months. I continue to log and explore each new DO case in British Columbia that becomes available on the Reasons for Judgement databases. The approach Steinitz and I took to the voluminous amount of information in the case files was to begin by recording essential information about the offender and the hearing. We identified and listed the witnesses, experts and other participants in each hearing. Additionally, we listed and detailed all file contents. Then, for each report or document contained in the case file, we transcribed information into categories of interest. Appendix C provides the template we used for data input. This template, although tedious and detailed, captured the

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broadest range of data possible because of the open and flexible coding categories it presented. We then matched cases to available Reasons for Judgement and all additional information gleaned from this document, including judicial perception, was added to our database of files. Reasons for Judgement written by the judge presiding over the hearing proved a rich source of information. Table 3.2 presents the typical pattern of judicial reasoning and details the information available within the RFJ.

Both Steinitz and I inputted data from the files into our database. In some cases the amount of information available made it necessary for us to work jointly on a file. For the majority of files we worked independently, ensuring inter-coder reliability by pilot-testing two cases and engaging in constant dialogue while coding.

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79 One day during data collection we walked into our office at the registry and observed at least six boxes of material. We both commented on how fast targeted cases had arrived. Upon further investigation, we discovered that all six boxes contained information pertinent to one case.
Table 3.2: Typical Reasoning Pattern and Information Contained in a Reasons for Judgement Document

| 1) Acknowledgment of Crown application and consent of Attorney General  |
| a) Relevant Criminal Code section and criteria |
| 2) Description of predicate offence  |
| a) Date(s), victim(s), and injuries |
| 3) Description of offender  |
| a) Birth date and age |
| b) Childhood history—mother and father |
| c) Family life—past and present |
| d) Employment and education |
| e) Substance abuse and medical history |
| 4) Examination of past criminal offences and interaction with criminal justice system |
| 5) Expert opinion  |
| a) Description of experts and their expertise |
| b) Methods employed by experts—interview/file review |
| c) Insight into criminal behaviour |
| d) Diagnosis and risk assessment  |
| -Description of tools and techniques |
| e) Prognosis |
| f) Opinion on Dangerous Offender status and indeterminate sentence |
| g) Judge’s comments on differences in opinion and consensus |
| h) Judicial opinion on expert opinion |

6.1) Prior to 1997 Amendments
Finding: Dangerous Offender or Not
a) Why or why not? Legal criteria

Sentence: Indeterminate or Not
b) Expert opinion on recidivism/prognosis, treatment options and risk
c) Judicial opinion on recidivism/prognosis, treatment options and risk

6.2) After 1997 Amendments
Finding: Dangerous Offender or a Long-Term Offender
a) Why or why not? Legal criteria
b) Expert opinion on recidivism/prognosis, treatment options and risk
c) Judicial opinion on recidivism/prognosis, treatment options and risk

Sentence: Indeterminate if Dangerous; Determinate if LTO

7) Additional instructions
Dangerous Offender hearings are usually held in open court, and the Reasons for Judgement are available to the public. However, we decided that every attempt would be made to ensure that the identity of individuals involved in a hearing—including the offenders, victims, judges and experts—would remain confidential. We did not obtain consent from the offenders and if we had named experts or judges involved in their hearings, this could have led us to reveal an offender’s identity. Steinitz or I will destroy identifying information following the completion of this dissertation and any ensuing publications.

To ensure confidentiality, we assigned each offender a DO number unrelated to any identifying numbers on the original file. Files accessed and coded by Steinitz were identified chronologically, starting with the number 201. The files that I worked on started with the numbers 101 and 301. Files that I obtained after the initial sample cut-off date and included in my study only are numbered starting at 601. Files we both worked on are numbered according to who began the coding process. We then cross-referenced these joint files and collated data into a complete file.

I use a standard notation device to reference all files or hearings in this dissertation. I provide the DO number and year for each file (e.g., DO106, 1991). I identified all participants in the hearing using this same system (e.g., Crown expert, DO106, 1991; Judge, DO140, 1998). We did not record victims’ names and we used initials in cases involving multiple victims. Several files contained sealed documents, usually youth reports or records. We did not open these documents. Where data indicated the presence of possible identifying information, such as family history or unique biographical experience, I have used an alternative notation to avoid possible
DATA ANALYSIS AND REDUCTION

After data collection was complete, I created two separate databases for the purposes of my study. The first database summarized information about the offender and the hearing itself, with variables of interest relating to the social demography of the offender, as well as the hearing procedure and outcome. In the second database, I documented information about each expert participating in the hearing, including the expert's method of assessment, testimony, diagnosis and use of risk assessment tools.

Next, I engaged in the inductive process of constant comparison (Glaser and Strauss, 1967; Strauss and Corbin, 1990). Consistent with this process, the researcher explores each file, guided by an in-depth literature review, and then generates categories of interest. Table 3.3 provides a list of the final categories used in this study. I then searched the files again, sorting and recording any text relating to these categories. I compared the text across case files applicable to each category, and documented any patterns and themes that emerged relating to the study's objectives. I was vigilant in letting new categories materialize, and searched for new incidents indefinable by my categories. I was also very alert to the diversity of incidents within categories.
Table 3.3: Data Reduction Categories of Interest

<table>
<thead>
<tr>
<th>Offender</th>
<th>Experts (for each expert charged with a DO assessment)</th>
</tr>
</thead>
<tbody>
<tr>
<td>childhood/family</td>
<td>criminal history/institutionalization</td>
</tr>
<tr>
<td>family type</td>
<td>offender voice/perception</td>
</tr>
<tr>
<td>abuse/trauma</td>
<td>Crown strategy</td>
</tr>
<tr>
<td>intelligence</td>
<td>defence strategy</td>
</tr>
<tr>
<td>employment history</td>
<td>other</td>
</tr>
<tr>
<td>institutionalization</td>
<td></td>
</tr>
<tr>
<td>sexuality</td>
<td></td>
</tr>
<tr>
<td>medical problems</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>type of expert</td>
</tr>
<tr>
<td></td>
<td>role of expert in hearing/perceptions of role</td>
</tr>
<tr>
<td></td>
<td>offender commentary (history, criminality, demeanour, etc.)</td>
</tr>
<tr>
<td></td>
<td>method/process of assessment</td>
</tr>
<tr>
<td></td>
<td>treatment/prognosis</td>
</tr>
<tr>
<td></td>
<td>view of dangerous offender legislation</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>interview</td>
</tr>
<tr>
<td></td>
<td>assessment tools</td>
</tr>
<tr>
<td></td>
<td>use of risk discourse</td>
</tr>
<tr>
<td></td>
<td>what is risk assessment?</td>
</tr>
<tr>
<td></td>
<td>use of risk assessment</td>
</tr>
<tr>
<td></td>
<td>utility and accuracy</td>
</tr>
<tr>
<td></td>
<td>perceptions surrounding prediction</td>
</tr>
<tr>
<td></td>
<td>diagnosis and etiology</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>perception of offender and offence</td>
</tr>
<tr>
<td></td>
<td>perception of experts</td>
</tr>
<tr>
<td></td>
<td>perception of risk and risk assessment</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>factors considered in designation/sentencing</td>
</tr>
<tr>
<td></td>
<td>perception of DO legislation &amp; legal notables</td>
</tr>
<tr>
<td></td>
<td>other</td>
</tr>
</tbody>
</table>

The next stage in my research was finding the discourse within my data. Discourse, in this context, refers to the patterns that reveal themselves across and within categories. Maynard (1998) identifies discourse as texts that work to define, regulate and implicate. Documenting the discourse in DO hearings is what I call the small 'a' of analysis. Smart (1985) describes this process as microanalysis, or "a decomposition of
the processes constitutive of a particular event” (p. 59). Once I had identified the patterns in my data, I connected my findings to the psy literature on dangerousness prediction and risk assessment. I then established links to the theoretical literature on the risk society and to the new penology—actuarial justice. This linking task is what I call the ‘big A’ of Analysis, or the connection and location of smaller themes and patterns in relation to larger theoretical ideas. Smart sees this process as the concomitant “construction of [the] external relations of intelligibility” (p.59).

**DESCRIPTION OF THE CASE FILES: DATA CAVEATS AND STRENGTHS**

This study focused on hearings in a specific province in Canada during a particular time frame (1978-2000), and is not representative of all DO hearings in general. The underlying intent of file recruitment was to capture the emergence and initial impact of actuarial justice as identified in the literature. The current sample is representative of the time period before the hypothesized emergence of actuarial justice (i.e., 1978-1988), the penetration of risk thinking and assessment (i.e., 1989-1994), and the eventual institutionalization of risk (i.e., 1995-2000). Table 3.4 summarizes the case distribution in these time frames of theoretical significance. The cases are not equally distributed in the time frames and the frames are not equidistant. Moreover, not all DO hearings conducted in British Columbia in the year 2000 were available and therefore they are not included in the current sample. Because of these inequities, I have standardized most of the findings in this dissertation using percentages. Frequencies are difficult to use for comparison purposes because of the uneven distribution of cases in the years explored.
Another disadvantage of the snapshot method of DO file exploration relates to appeals. Many of the cases included in the sample have since been subjected to the appeal process. Some offenders had their DO designation reversed, while others were designated DOs upon Crown appeal. My sample reflects the offenders' designation status at the time of data collection cut-off.

Each file that I examined contained a selection of documents and reports that Crown and the defence counsel considered evidence for their respective opinions concerning the 'dangerousness' of the offender in question. As such, the case file is not a complete institutional or official interactional history of the offender (see Table 3.5). It varied in content and completeness.

Steinitz and I often supplemented missing reports and assessments with information provided in the RFJs. We were also able to obtain several documents, including unpublished RFJs from the DO trial coordinator during our data collection phase. In 90 out of 100 cases, I was able to access the RFJs. Transcripts or partial transcripts of trial proceedings were available for 73 of the hearings and psy reports were included in 65 files (see Figure 3.1). In some cases, I supplemented the information in the files by attending a hearing depending on my knowledge of the hearing and scheduling concerns.

Table 3.4: Distribution of Cases According to Hypothesized Categories

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Cases</td>
<td>30</td>
<td>22</td>
<td>48</td>
</tr>
</tbody>
</table>
Table 3.5: Typical Contents of Dangerous Offender Court Files

- warrants of committal and remand
- police report of predicate offence
- information of charges(counts/indictment
- exhibit cards and documentation
- victim impact statements
- personal correspondence
- educational/programming certificates
- prior criminal convictions (juvenile)
- child welfare reports
- youth corrections reports
- prior criminal convictions (adult)
- Correctional Service of Canada documents
  - incarceration records (progress, disciplinary)
  - parole/probation records
  - pre-sentence reports
  - treatment and program reports
  - discharge summaries
  - case conference reports
  - community risk/needs assessment
  - social histories
  - bail documents
  - crime cycles
- full or partial transcripts from a preliminary trial or other court appearances and sentencing hearings
- psychiatrist/psychologist reports
- curriculum vitae of experts
- reasons for judgement
- court memos, nomination of psychiatrists, subpoenas, trial record
- case law: book of authorities
- selected empirical research articles
- Crown notice of application for the DO hearing
- consent of attorney general
- Court of Appeal documents

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A few files contained journals, diaries, personal correspondence and previous treatment worksheets belonging to the offender. The Crown used this material to provide evidence for a Dangerous Offender designation. For example, Crown called as evidence to suggest dangerousness, journal and diary entries, as well as reflection exercises written by offenders while in treatment that detailed an offender's sexual fantasies. For the most part, the offender's voice or perspective is often missing in the files. Maynard (1998) cautions us that case files reveal more about the assumptions of the people who created them than about the individuals they describe. This observation does not jeopardize my study's validity. I am not studying Dangerous Offenders per se, but rather how experts designate them as such, specifically, in relation to risk. The case file represents the gaze of institutions such as medicine, psychology, law, the police and
corrections. The cumulative effect of this gaze is observed in some of the more complete files. Referring to the same sample of case files, Steinitz (2001) in an earlier study observes:

The manner in which realities are constructed—relying on a variety of sources, earlier reports and impressions—is illuminating, particularly when files are relatively complete and one can observe, to an extent, the manner in which previous documents are read and interpreted to provide a “new” and “complete” assessment (pp. 63-64).

Qualitative researchers have clearly articulated the limitations of studying archival case files (e.g. Lacovetta and Mitchinson, 1998). I have touched on some of these limitations including issues of representativeness, official bias, and the fragmentary nature of case files, and more specifically, the muted voice of the case file’s subject. Perhaps the most widely discussed of these limitations is the acknowledgement that researchers’ analytical efforts reflect a selected ideological position that inevitably interacts with the positions being discovered. In my study, which seeks to understand the process whereby “truth” is constructed, it is important to recognize that my own interpretive process does not result in an account of objective reality. I am providing yet another interpretation or way of understanding the operation of risk thinking in DO hearings.

The researcher must be attentive to the dynamics of the “triple hermeneutic.” I record an expert interpretation and subsequently offer my own interpretation. Both of these interpretations are embedded in a particular social and ideological standing. Finally, the audience is reading this doubly filtered information using their own interpretative lens, influenced by their reality. I would even add a fourth dimension to this hermeneutic of the case files. The expert’s interpretation, in part, is a result of both other
experts’ discourse and the interpretation of biographical information provided by the offender in question. Geertz (1972) summarizes the hermeneutic of interpretation in a famous passage:

The culture of a people is an ensemble of texts, themselves ensembles, which the anthropologist strains to read over the shoulders of those to whom they properly belong. There are enormous difficulties in such an enterprise, methodological pitfalls to make a Freudian quake, and some moral perplexities as well. Nor is it the only way that symbolic forms can be sociologically handled. Functionalism lives, and so does psychologism. But to regard such forms as "saying something of something," and saying it to somebody, is at least to open the possibility of an analysis which attends to their substance rather than to reductive formulas professing to account for them.... But whatever the level at which one operates, and however intricately, the guiding principle is the same: societies, like lives, contain their own interpretations. One has only to learn how to gain access to them. (p.29)

THE DANGEROUS OFFENDER FILES: A PROFILE

Current statistics on Dangerous Offenders indicate that, as of August 2001, there were 280 active\textsuperscript{81} Dangerous Offenders and approximately 61 Long-Term Offenders (SGC, 2001; CSC, 2002). At this time, there were also 52 Dangerous Sexual Offenders and eight Habitual Offenders sentenced under previous but analogous legislation. There are currently no female Dangerous Offenders.\textsuperscript{82} In 2001, seven DOs were under supervision in the community, 13 were serving determinate sentences, and 291 had indeterminate sentences. Dangerous Offenders represent approximately 2% of the total federal offender population (CSC, 2001b). According to a report released by

\textsuperscript{81} According to the Solicitor General’s report this figure does not include those offenders whom the courts declared dangerous but subsequently overturned the decision, or those offenders who have died since receiving designations.

\textsuperscript{82} Two women have been declared Dangerous Offenders since 1977; however, Marlene Moore is deceased and Lisa Neve’s designation was overturned upon appeal. As of June 2001, there was
Correctional Service Canada in 2002, titled *A Profile of Federal Offenders Designated Dangerous Offenders or Serving Long-term Supervision Order*, 6% of the offenders serving time in federal institutions are either DOs or LTOs. No DOs designated between January 1, 1994 and June 30, 2001 have been released from federal penitentiaries (CSC, 2002).

The number of DO designations in Canada has increased over the years especially since the inception of the new DO legislation in 1997. In the nine months following the enactment of new legislation, 26 more offenders were declared dangerous (JHSA, 1999, p.18). This jump in numbers, according to the John Howard Society of Alberta, is reflective of the new legislation's implicit goal of widening the Dangerous Offender net. Table 3.6 presents the average number of DO designations in Canada during selected periods.

Grant (1998) similarly argues that the new legislation is not designed to decrease the number of DOs, but instead aims to increase the population of offenders eligible for strict supervision. She predicts that there will be a substantial increase in applications because, at the very least, prosecutors can expect that a Long-Term Offender status will be imposed (Grant, 1998). In fact, according to the DO/LTSO Profile Report (2002), the number of LTSOs has increased each year. The report also indicates that Quebec and the Prairie region have larger proportions of LTSOs than DOs. The reverse is true

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83 This report [hereinafter DO/LTSO Profile Report or CSC, 2002] is the result of a joint project between Correctional Service of Canada and the Department of Justice Canada. The project will address the impact of the new 1997 legislation. The profile report is the first phase of the current project and provides a comprehensive comparison of DOs and LTOs. For more information, see <www.csc-scc.gc.ca/textlrsrch/reports/rl25lr125_e.shtml>. Retrieved May 2003.
84 According to Section 753(5) of the *Criminal Code*, the court can consider a Long-Term Offender status only after it has decided that the individual is not a Dangerous Offender.
for Ontario and Pacific regions. The Atlantic region has similar proportions of DOs and LTSOs.

Table 3.6: Average Number of Dangerous Offender Declarations Per Year Over Selected Time Frames

<table>
<thead>
<tr>
<th>Time Period</th>
<th>Average # of Dangerous Offender Declarations/Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978-1988</td>
<td>7.7</td>
</tr>
<tr>
<td>1989-1996</td>
<td>13.7</td>
</tr>
<tr>
<td>1997-2000</td>
<td>27.3</td>
</tr>
</tbody>
</table>

Figure 3.2 details the number of Dangerous Offenders declared per year in Canada (Solicitor General Canada[SGC], 2001). It also shows the yearly distribution of cases heard in British Columbia included in my sample. The distribution of cases is quite similar, keeping in mind that my sample includes both successful and unsuccessful hearings in British Columbia, incorporates minor adjustments to accommodate missing files, and does not involve all cases in the year 2000. This match in data seems sensible given that, historically, British Columbia has the highest number of DO designations per capita in Canada (Bonta, Harris, et al., 1996; CSC, 2002). As of September 24, 2000, 28% of all designations in Canada, not including those decisions that the appeal court overturned, were in British Columbia (CSC, 2002).

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85 Adapted from Solicitor General Canada (2001).
Social Demography of the Current Sample

The DO/LTSO Profile Report (2002) notes that only a few researchers have attempted to provide a systematic description of the DO population in Canada (e.g., Pepino, et al., 1993; Bonta, Harris, et al. 1996; Zanatta, 1996). Systematic demographics on the offenders involved in the DO hearings for this study were not always available. I gathered available information from reports, police records, and other sources in the case file. For that reason, the demographics presented should be treated

86 Ibid
87 A similar dearth in research exists regarding LTOs. The DO/LTSO Profile (2002) is the largest study of LTOs. Johnson (1999) provided a description of the first 19 offenders serving LTSOs.
with caution. Additionally, the data are not necessarily reflective of the offenders' perception of identity or experience (e.g. racial identification). However, viewed properly, the information provided about the offenders does help to contextualize cases and to supplement other research findings.

All individuals in the sample were male. Offenders ranged in age from 17 to 65. Average age in the sample at time of hearing was 36.7 years with a modal age of 30 years; this is comparable to the findings of the CFRP (1996), which indicate an average age of 34.3 years among the 64 DOs studied. However, my sample is younger than the sample in the DO/LTSO Profile Report, where the average age for DOs was 41. Marital status was recorded in the files for 98 individuals in my study. Of those men, 67% were single and 30% were married or in common-law relationships. Both the DO/LTSO Profile Report and the CFRP found that 50% of their samples were single. Of the 74 offenders who had recorded dependents in my sample, the average number of children was 1.24 with a range from zero to seven.

Educational status was available for 95 individuals. Approximately 58% had completed some high school, 5% had graduated from high school, and an additional 18% had gone on to complete some college or university. Five percent of the sample had university degrees, whereas 12% of offenders had only elementary school experience. The CFRP found that 63% of their sample had some high school education, with grade eight as the average grade completed. Fifty-nine percent of those offenders examined in the DO/LTSO Profile Report had grade nine education or less.

Racial background was available for 86 individuals in my study. Aboriginal men (N=18) constituted the largest minority group in my sample (21%). Aboriginal offenders following the enactment of the new legislation.
account for approximately 4.8% to 23% of sampled DOs depending on which report is consulted (Petrunik, 1994; Bonta, Harris, et al., 1996; SGC, 2001; CSC, 2002). Aboriginals are over-represented amongst Dangerous Offenders, and more generally in the Canadian criminal justice system (CSC, 2002; LaPrairie, 1996). Aboriginal individuals comprise approximately 3% of Canada’s adult population (CSC, 2002).

In 95 of the cases studied, police, experts or judges recorded the employment status of the offender at the time of the hearing or of the arrest. Of those individuals, 74% were described as having unstable employment records, whereas 21% had stable employment histories. Figure 3.3 categorizes in detail the identified employment status of offenders in my sample of offenders. In comparison, the largest proportion of DOs in the CFRP and the DO/LTSO Profile were unemployed (63% and 76%, respectively). Grouped according to socio-economic status (SES) based on occupational category, 76% of the offenders in my sample were below poverty level or low SES status, 17% were of low to middle SES, and 7% of middle to high SES.

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88 In 2001, 16-17% of the total federal inmate population was Aboriginal (CSC, 2001b). The inmate profile in 2000-2001 provided by Correctional Service of Canada (2000a, 2001b) indicates that 20% of men serving life or indeterminate sentences are Aboriginal.
Figure 3.3: Recorded Employment Status of Offender (N=95)

Figure 3.4 presents identified drug and alcohol use among offenders in my sample. In almost half (46%) of the cases where there was known drug use, the offender was labelled an addict, whereas in cases where alcohol use was recorded, 76% of the offenders were described as alcoholics.

Figure 3.4: Number of Cases of Recorded Drug and Alcohol Abuse
Experts noted medical problems in 45 of the cases studied. The most common medical complication documented in the cases was a suspicion or a confirmed diagnosis of head injury (N=7) or possible brain damage (N=10). Epilepsy was mentioned in four cases while information about blackouts experienced by the offender was presented in another four hearings. Five offenders were diagnosed with chronic illnesses such as cancer and HIV/AIDS.

Experts diagnosed mental illness or personality disorder in almost all cases. In the CFRP, the researchers ascertained that a psychiatric diagnosis of antisocial personality disorder (APD) was evident in approximately 73% of the cases. The CFRP researchers also scored 48 offenders on Psychopathy Checklist-Revised (Hare, 1991) and, using a cut-off score of 30, discerned that approximately 40% of the offenders were psychopathic. The authors of the CFRP study note that this is probably a conservative estimate, citing research that demonstrates a psychopathy diagnosis is more probable with the benefit of an interview (Wong, 1988). Consistent with these statistics, I found that the most prevalent diagnoses in my sample were those of APD and psychopathy. Table 3.7 presents the frequencies of diagnoses contained in the files.

Evidence of psychoses (e.g., schizophrenia, delusions, psychotic disorder) was mentioned in only four cases. The CFRP also observes that DOs, as a group, appear to be relatively free from major mental illnesses such as extreme moods and psychoses. The researchers suggest that offenders who behave in a violent manner and are mentally ill may be dealt with under civil commitment procedures. However, an

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89 The researchers had only enough information in 48 out of the 64 files to score the PCL-R.
90 Frequency is based on both diagnoses made with and without the PCL-R.
examination of this division—between those who are considered ‘mad’ and those who are identified as ‘bad’—is beyond the scope of my study.

Table 3.7: General Categories of Mental Illness/Personality Disorder Documented in Case Files

<table>
<thead>
<tr>
<th>Documented Category</th>
<th># of Cases Where Diagnosis was Evident</th>
</tr>
</thead>
<tbody>
<tr>
<td>depression/bi-polar</td>
<td>17</td>
</tr>
<tr>
<td>suicide attempt</td>
<td>18</td>
</tr>
<tr>
<td>personality disorder(^\text{b})</td>
<td>37</td>
</tr>
<tr>
<td>sexual disorder(^\text{c})</td>
<td>36</td>
</tr>
<tr>
<td>psychopathy</td>
<td>45</td>
</tr>
<tr>
<td>antisocial personality disorder</td>
<td>51</td>
</tr>
<tr>
<td>pedophilia</td>
<td>30</td>
</tr>
</tbody>
</table>

\(^{a}\)These figures represent the frequency of diagnoses. Experts diagnosed some offenders with more than one illness or disorder. I included all diagnoses for each offender.

\(^{b}\)Included in this category are mixed personality, narcissism and borderline personality disorder.

\(^{c}\)This category includes paraphilias such as fetishism and sexual sadism but excludes pedophilia.

As I examined a file, a primary dominant diagnosis usually emerged. I defined primary diagnosis as a label or description of mental illness or personality disorder that several experts have agreed upon. In cases of consensus, the judge at the hearing would often use the diagnosis to describe the offender in his or her finding. Figure 3.5 categorizes 92 offenders based on the judicial note of consensus as to the most

\(^{91}\)I based these categories loosely on the DSM IV (APA, 1994) categorizations of mental illness and personality disorder.
appropriate diagnosis reached at the time of the hearing. Experts diagnosed the majority of offenders with pedophilia (33%), antisocial personality disorder (29%) or psychopathy (25%).

Figure 3.5: Primary Diagnostic Agreement in Dangerous Offender Hearings (N=92)

In the majority of sample cases, a history of childhood victimization was a shared experience among the offenders. Experts recorded physical abuse in 66 cases and psychological abuse in 86 cases. Of those cases, 49 included possible sexual abuse of the offender (see Figure 3.6). There are discrepancies in the psy research concerning the relationship between sexual victimization and subsequent sexual offending (Starzyk & Marshall, 2003). I will address this literature in relation to my findings in Chapter 5.
Information from files showed that 34% of the sample had been in foster care as children. Similarly, 32% of offenders had been in youth custody at some point in their lives. Institutionalization in mental health or mentally handicapped facilities was documented in 13% of the cases. Four percent of the sample had been identified as students of the residential school system. Several offenders fall into multiple categories of institutionalization, whereas 14% had no record of childhood institutionalization.

Information on IQ and/or intellectual functioning was available for 84 of the 100 offenders in my sample (see Figure 3.7). Experts classified 31% of the sample with above average intelligence, 22% with average intelligence, and 28% with low average
intelligence. Experts described 19% of the sample as "mentally retarded."

According to the American Association on Mental Retardation (AAMR) definition of mental retardation, the low average group in my sample could be combined with the "mentally retarded." By combining categories of low average and mental retardation, almost half of my sample is classified as intellectually disabled. These results are contradictory to the CRFP's findings in relation to intelligence. Their study found that

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92 An intellectually disabled offender is defined based on the American Association on Mental Retardation (AAMR) definition of "mental retardation" (Grossman, 1983). This definition includes "borderline mental retardation." The three components of the AAMR definition include: 1) significantly below average intellectual functioning (i.e., 71-79 IQ range); 2) existing concurrently with limitations in two or more adaptive skills areas such as communication, self-care, home living, social skills, community use, health and safety and leisure and work; and 3) manifesting itself before the age of 18. Many professionals working in the area of intellectual disability caution against a definition that relies strictly on IQ scores in favor of an approach that emphasizes the degree of a person's support needs or developmental and/or adaptive disabilities. The American Psychiatric Association (1987) admits that "Since any measurement is fallible, an I.Q. score is
where experts identified intellectual functioning, 95% of the DOs were of average intelligence. In Chapter 5, I will address the obvious polarity in intelligence ratings (i.e., low IQ–above average IQ) in my sample.

Various international studies have suggested that the “mentally retarded” are over-represented in the prison population. The Intellectual Disability Rights Service (IDRS)\(^{93}\) of New South Wales surveyed the international literature on the subject and found that the percentage of offenders in criminal justice systems across the world who are “mentally retarded” ranged from 2% to 37% (2001, p.8). My findings also suggest the possibility of over-representation, given that the prevalence of mental disability in the general population is approximately 2.5% to 3% (Conley, Luckasson, Bouthilet, 1992). Endicott (1991) studied intellectually disabled inmates in Canada. While Endicott claims that data are insufficient to provide a precise number of inmates who are intellectually disabled, he argues that the numbers are significant enough to suggest a problem worthy of investigation.

In five of the cases included in my sample, experts either explicitly suspected or diagnosed Fetal Alcohol Syndrome (FAS). The syndrome is a result of fetal exposure to mother’s alcohol and/or drug consumption during pregnancy.\(^{94}\) Researchers consider FAS the leading cause of mental retardation in North America. In four of the five cases of FAS identified in the current sample, the offender was labelled “mentally retarded.”

The worldwide estimate of FAS is 1.9 cases per 1000 (Boland, Burrill, Duwyn and Karp, generally thought to involve an error of measurement of approximately five points; hence an I.Q. of 70 is considered to represent a band or zone of 65 to 75” (p. 28).


\(^{94}\) Diagnosis of FAS requires a positive history of maternal alcohol and/or drug consumption during pregnancy, as well as the presence of three criteria, including prenatal and/or postnatal growth delay, characteristic cranio-facial anomalies and central nervous system impairments (Boland et al., 1998).
Canadian research reveals higher incidence rates for FAS among Aboriginal people (Bray and Anderson, 1989). A study conducted in British Columbia and the Yukon revealed a 10.9 to 1 ratio of Natives with FAS to Caucasians (Sandor et al., 1981 as cited by Boland et al., 1998). Similarly, Habbick, Nanson, Snyder, Casey and Schulman (1996) found that 86% of a sample of 207 FAS cases in Saskatchewan was Aboriginal. In four out of the five cases where experts diagnosed FAS in my sample, the offender was an Aboriginal individual.

The earliest case documentation of FAS in this study's sample was in 1995. The potential problems faced by FAS individuals within the criminal justice system have only recently become an area of study. A Correctional Service of Canada report on FAS argues that despite substantial evidence suggesting a link between FAS and crime, there still exists a dearth of research examining FAS in the criminal justice system (Boland et al., 1998). Several research studies conclude that a disproportionate number of FAS and Fetal Alcohol Effects (FAE) 95 sufferers will spend most of their lives in prison. One of Canada's leading FAS researchers, Dr. Christine Loock (2001), estimates that at least one in every four inmates in federal institutions suffers from the syndrome. In sum, FAS is considered one of the most pressing issues facing the Canadian correctional system (Boland et al., 1998).

95 FAE sufferers exhibit milder symptoms associated with maternal alcohol and/or drug consumption during pregnancy. Virtually all epidemiological studies have concluded that the incidence rate for FAE is 3 to 4 times higher than for FAS (Habbick et al. 1996). However, because FAE are less likely to be diagnosed or to be observed by a health care professional, these cases continue to go undetected.
Criminal History of Offenders in Current Sample

Table 3.8 summarizes the criminal history of the offenders included in this sample. For purposes of comparison, I have added two columns to present the findings of the CFRP and DO/LTSO Profile Report. The majority of offenders in my sample have a formal history of criminal conviction, imprisonment and revocation. Five offenders, according to the file information, did not have any history of criminal convictions. The DO/LTSO Profile similarly found that 7% of the DOs in their sample did not have previous adult convictions. In my sample, the average number of prior convictions for the DOs was 8.1. The largest proportion of DOs in the DO/LTSO Profile had 15 or more prior adult convictions (45%).

Seven percent of the offenders I studied had not spent any time in prison, whereas 32% had spent less than five years, 39% five to nine years, and 22% of the offenders had been imprisoned for 10 years or over. Only 12% of offenders had no history of parole or probation revocations (N=91). The DO/LTSO Profile researchers found that 77% of the DOs they studied had served a federal sentence of over two years. The majority of DOs in Canada had spent prior time in a federal prison.

The Crown used juvenile records in 83% of my cases suggesting that the majority of offenders had been involved in the system from an early age. In their study of offenders, Motiuk and Nafekh (2000) found significant differences between indeterminate offenders and other long-term offenders (those serving life sentences or 10 years or more) in terms of young offender histories, with the former more likely to have youth records.
Table 3.8: Percentage of Dangerous Offenders and DO Applicants with Criminal Histories

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>juvenile records/ used</td>
<td>83% (N=84)</td>
<td>75%</td>
<td>NA</td>
</tr>
<tr>
<td>with adult record</td>
<td>95% (N=95)</td>
<td>NA</td>
<td>93%</td>
</tr>
<tr>
<td>with previous incarceration</td>
<td>91% (N=95)</td>
<td>89%</td>
<td>NA</td>
</tr>
<tr>
<td>revocation (parole/probation failure)</td>
<td>88% (N=91)</td>
<td>73%</td>
<td>NA</td>
</tr>
<tr>
<td>prior sexual offence convictions</td>
<td>75% (N=93)</td>
<td>39%</td>
<td>80%</td>
</tr>
</tbody>
</table>

*The CFRP includes only prior violent sex offences in this category.*

The predicate or index offence initiates the DO application process. The potential DO must be convicted of a “Serious Personal Injury Offence” (SPIO) as defined by Section 752 of the *Criminal Code* (see Table 3.9).96

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96 In the majority of cases in my sample, judges proceeded quite academically, without hesitation, to explain how the predicate offence met the criteria of a SPIO outlined in the *Criminal Code*. Only two cases involved considerable discussion and debate about whether or not the predicate offence constituted a SPIO. In one of these cases, the Crown attempted to convince a judge that arson was a SPIO. The judge and counsel spent considerable time deciding if burning an unoccupied building endangered the life or the safety of the community. In the end, the judge considered the possibility that fire fighters might experience vehicle accidents, inhalation of substances, and scrapes and bruises while attending the fire. He concluded that the arson was a SPIO. This hearing set a case precedent by widening the net of potential offenders considered for DO applications.
Table 3.9: Definition of Serious Personal Injury Offence

"serious personal injury offence" means

(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 of 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).

Figure 3.8 presents a summary of the predicate offences committed by the offenders in my sample. Consistent with the CFRP and the DO/LTSO Profile, the majority of potential DOs in my sample were convicted of sexual offences. Zanatta (1996) similarly found that 89% of the DOs he studied had committed a sexual predicate offence.

Of those offenders in my study who committed a sexual offence, 30 were convicted of sex offences involving children. Thirty-three percent of the child victims were female and 47% were male. In contrast, the DO/LTSO Profile found female child victims to be more prevalent than male child victims (44% versus 36%). Compared to my sample, a larger proportion of offenders in the DO/LTSO Profile had a current offence related to a

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97 Criminal Code, s.752.
child victim (49% versus 30%). Only 9% of those child victims in my study were related to the offender (e.g., child, niece, step-child). Similarly, few DOs (14%) were convicted of a predicate “incest” offence in the DO/LTSO Profile study. I identified 15 additional victims as teen or youth from file information. Approximately half of the sex offences involved the victimization of female adults. Only one case in the sample involved sexual assault against an adult male. Seven cases involved the sexual victimization of women working in the profession of prostitution.

Figure 3.8: Index or Predicate Offence for the Dangerous Offender Application (N=100)

Thirty percent of all the cases in my sample involved victims who were strangers to the offenders; 46% involved acquaintances. Overall, adult females were the most

96 It is not clear what ages the DO/LTSO Profile used to define ‘child’. I defined a child in my study according to the DSM criteria of pedophilia as under the age of 13 years old. The difference in child
common victims. The largest proportion of victims in the DO/LTSO Profile was adult and female (61%) and known to the offender (62%). Figure 3.9 summarizes the relationship of the predicate victim to the offender.

Figure 3.9: Relationship of Offender to Predicate Victim (N=100)

![Pie chart showing the relationship of offender to predicate victim](image)

In 42% of the sample cases, there was a record of physical injury to the victim. Five of those cases involved children. Adult female victims were the most likely to be physically injured (74%) and male children (7%) the least likely. Where use of a weapon was explicitly mentioned, the case typically involved sexual victimization of an adult female (93%). The average number of individuals listed as victims on the predicate offence notice was 2.8, with a range of one to 19 and a mode of one victim. Similarly, victims between my study and the Profile report may result from varying definitions of 'child,' 'youth,' and 'adult'.

99 Nineteen cases involved five or more victims cited on the list of charges. These cases usually involved the discovery of a previously undisclosed history of offending.
the largest proportion of DOs in the DO/LTSO Profile had victimized one individual during the predicate offence (62%). Table 3.10 outlines the characteristics of the index offences in my sample as compared to the CFRP and DO/LTSO Profile.

Table 3.10: Characteristics of the Index or Predicate Offence in Dangerous Offender Hearings

<table>
<thead>
<tr>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>sexual offences</td>
<td>87%</td>
<td>92%</td>
<td>85%</td>
</tr>
<tr>
<td>child victim</td>
<td>30%</td>
<td>59%</td>
<td>45%</td>
</tr>
<tr>
<td>teen victim</td>
<td>15%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>female victim (both sexual and non-sexual)</td>
<td>78%</td>
<td>86%</td>
<td>61%</td>
</tr>
<tr>
<td>with mention of physical injury to the victim</td>
<td>42%</td>
<td>62%(^b)</td>
<td>29%(^c)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>with mention of weapon or possible weapon</td>
<td>14%</td>
<td>50%</td>
<td>40%</td>
</tr>
</tbody>
</table>

\(^a\) Includes two cases involving the kidnapping and confinement of a female victim.

\(^b\) Defined in the CRFP as any victim injury. Brutality is cited in 70% of these cases and excessive violence in 19% of CRFP cases.

\(^c\) Includes minor injury.

\(^d\) Includes serious injury.
THE PSY EXPERTS

Dangerous Offender hearings prior to 1997 required the testimony of at least two psychiatrists, one of whom was nominated by the defence, and the other by the Crown. Currently, upon application for a finding of Dangerous Offender status, the Criminal Code of Canada, Section 752.1 (1) instructs that the court may remand an offender for a period of less than sixty days to the custody of the neutral court assessor (i.e., amicus curiae or friend of the court). The assessment conducted by the expert is evidence in the DO hearing. However, in the cases under study, the experts played a variety of other indirect roles in the hearings, sometimes unanticipated to the experts themselves. For instance, many reports or psy assessments that dated as far back as 20 years could be entered as evidence in the hearing without the permission of the expert. In the 100 case files I explored, close to 400 experts were cited or involved in the hearings.\textsuperscript{100} The DO hearing is anomalous in terms of evidentiary guidelines and information requirements. Judges demand access to as much information as is available in order to evaluate a DO application.

During the data collection phase of this study, I used a template to gather information about each expert (see Appendix C). Yet, in order to conduct a meaningful exploration and fulfill the objectives of this study, it was necessary to limit in-depth examination to individual experts directly charged with the DO hearing assessment. In the majority of cases those experts also testified in-person at the hearing. I thus reduced my sample of experts to 216. My sample included assessors nominated by the Crown and the defence, or those who were court-appointed. The average number of assessors

\textsuperscript{100} This figure is an underestimate given the incompleteness of some of the files.
directly and indirectly involved in each DO hearing was four. As was to be expected, the percentage of Crown and defence experts in this reduced sample was very similar (46% to 42%, respectively). However, when you examine the total sample of approximately 374 experts, Crown-consulted experts are over-represented (58% to 28%). I have presented the expert counsel affiliations for both samples in Figure 3.10. In the next chapter, I will discuss issues such as the total number of experts, the discrepancies in expert numbers for each counsel, and dual roles played by experts in hearings.

Figure 3.10: Counsel Affiliation of Experts Involved in Dangerous Offender Hearings

![Bar chart showing expert affiliation]

Approximately 20% of the hearings studied involved more than five experts directly participating in the DO hearing. Both psychiatrists and psychologists testified in various capacities in the DO hearings. The majority of experts called upon directly to assess the
potential DO were psychiatrists (87%). Figure 3.11 breaks down the experts’ professional statuses by counsel affiliation.

Figure 3.11: Expert Counsel Affiliation by Type of Professional (N=213)

Psychologists (14% versus 8%) were slightly overrepresented among those experts called by the defence. I will address in more detail the disproportionate employment of specific types of professionals by Crown and defence in Chapter 4. Many psy experts appeared in more than one DO hearing in this sample. The psychiatrist most active in hearings over the time frame studied testified in 44 cases. This particular doctor testified for the Crown in 33 of those cases, for the defence in seven cases, and as a neutral assessor in four cases. Prior to the enactment of the new legislation in 1997, what becomes evident in the hearings is a preference on the part of

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101 I was unable to identify counsel affiliation in all cases.
counsel to select certain experts or experts' preference to select a specific adversarial position. The over-representation of some experts could be identified as a study caveat. For example, one could argue that over-representation of one expert may lead to the disproportionate documentation of a certain dominant voice. However, it is primarily my purpose in this study to document which voices and opinions are dominant in the identification of dangerousness and risk.

CONCLUSION

This chapter has laid out the methodological foundations of my project. The research design draws attention to historical sources as active texts (Maynard, 1997). Maynard recognizes that court files are unique in their "discursive practice of centralizing a number of disparate case histories into one textual site, linking them all to the powerful truth effects of the law" (p. 83). Using a Foucauldian analytic of power/knowledge, I will explore the process of creating meaning and constructing truth in the Dangerous Offender hearing. Prefacing this understanding, and included in this chapter, was an overview of the social demography and criminal histories of those offenders who are objectified in the DO hearings I examined.

What emerges in my study is a typical profile of the 'kind of individual' who is designated dangerous. This individual is underemployed and undereducated, with a history of psychiatric diagnosis. He is a middle-aged, single male sex offender, who is of either above average intelligence or intellectually disabled. Individuals who have been institutionalized as children and who have suffered some form of childhood abuse are over-represented in my sample. The majority of offenders were convicted of a sexual
offence against a female victim with just under half of the cases involving children or teen victims.

I also presented a brief overview of the psy experts included in this sample. I have defined my sample as limited to 216 psy professionals directly charged with conducting a DO assessment. A preliminary examination of the experts' involvement reveals a pattern of partiality, on the part of either counsel or the assessor. It appears that certain doctors work with Crown and others with the defence counsel. It is also apparent that the Crown is more likely to enlist the services of psychiatrists rather than psychologists. Crown, it appears, has better access to the opinions of a larger number of experts for each hearing. In the next chapter, I will discuss the role of psy experts in the DO hearings, including a detailed analysis of the use of risk assessment tools.
CHAPTER IV

TOOLS OF THE TRADE: EXPERTS AND THE USE OF RISK ASSESSMENT IN DANGEROUS OFFENDER HEARINGS

In very general terms, psychiatry is attempting to be a scientific study of behaviour and it's scientific by both the aim and the method. The aim is the attempt to establish general law or principles of human behaviour. The method is characterized by an attempt to quantify information, to translate observation into numbers and to obtain information under conditions that would permit replication by others (Crown psychiatrist, DO106, 1991).

This chapter provides a detailed analysis of experts' use of risk assessment in the 100 Dangerous Offender hearings included in my sample. I outline the historical shift in thinking between 1978 and 2000 from the prediction of dangerousness to assessment of risk that is evident in the DO files and hearings. This examination focuses on the time period surrounding the implementation of the new legislation (1995-2000) and reveals how psy experts have increasingly employed risk assessment in DO hearings. In keeping with the psy researchers' belief that they now have tools to predict who will reoffend, they perceive risk assessment to be a necessary part of a DO hearing. Psy experts use these tools to identify high-risk offenders who are subsequently designated Dangerous Offenders.

In this chapter, I outline the risk assessment methods used by experts in DO hearings. The majority of psy experts view risk assessment as the more accurate and objective method, compared to inferior clinical models of dangerousness prediction. However, my research reveals that risk assessment has not addressed the historical inaccuracies associated with the prediction enterprise. Informed by an extensive review of the literature, I present an outline of the various problems associated with risk
assessment in the DO hearings examined. My findings provide a voice for those experts, largely affiliated with defence counsel, who are uncomfortable with the use of risk assessment in DO hearings. I also question the ethics of using expert testimony in DO hearings in the context of risk assessment and look briefly at judicial perceptions of these tools.

THE PREDICTION OF FUTURE BEHAVIOUR: EARLY PESSIMISM AND CRYSTAL BALL GAZING

As a teacher, researcher and clinician who specializes in the reliability and validity of clinical assessment and prediction, I must point out that the prediction of future dangerousness is fraught with difficulty and that both the psychiatric associations have cautioned their members to inform courts, as an ethical duty, of the scientific limits of the prediction of dangerousness (Crown Expert, DO301, 1983).

In the early to mid 1980s, experts in the DO hearings were critical and pessimistic about their ability to predict dangerousness. In these earlier cases, it is much more common to find the prediction of future behaviour described as an "imperfect science." Experts warned that research demonstrated psychiatric predictions of dangerousness were no more accurate than chance. During hearings, they would cite the research that claimed psychiatrists "could do no better" than the average layperson in predicting dangerousness. In DO248 (1980), the Crown expert opined: "I don't think psychiatry really has much to contribute to long distance range or prediction of violence." Both Crown and defence experts told judges that accurately predicting dangerousness is "way beyond anything we know" (DO246, 1984), "notoriously difficult" (DO303, 1983) and "crystal ball gazing" (DO103, 1986). Defence experts in DO233 (1984) and DO106 (1991) warned that prediction was impossible because people were "very variable" and
life events including imprisonment and treatment influence human behaviour. The consensus during the 1980s was that mental health professionals could not accurately predict future behaviour and therefore determine dangerousness. Even in the early 1990s a Crown expert noted: “We have no crystal ball. The effectiveness of psychiatrists or anybody else to predict future violence has never been demonstrated” (DO126, 1993).

Experts also explicitly cautioned the court about the more specific problem of false positives. They were reluctant to offer predictions because of the ramifications that a false positive could have in a DO hearing. Experts conceptualized overprediction as a tendency of psy experts to err on the side of caution, not a bias per se. This tendency protected experts from being in a position where they had opined someone could be safely released, only to find in the newspaper a year later the offender had committed some horrendous crime (Crown expert, DO117, 1994).

However, some experts resisted making predictions, acknowledging that an individual opinion was too fallible a measurement to factor into a decision about whether an offender would receive an indeterminate sentence. In DO121, the defence expert stated that he believed it was archaic to ask experts what they think someone will do in the future. He similarly called the exercise “crystal ball gazing” which could “confine a man to a situation where he has no definite date of release” (DO121, 1980). Correspondingly, the judge in a 1986 case stated, “[T]he most compelling argument against indeterminacy is the manifest unreliability of predictions regarding the future of most such offenders” (DO103, 1986).

Despite the identified difficulty with prediction, some judges appeared reluctant to abandon faith in psy expertise. In a 1983 case, the judge acknowledged that the future
cannot be predicted but that past events coupled with expert opinions were the only
guides the Court had to answer the difficult question of dangerousness (DO301, 1983).
The judge in DO216 (1988) clearly deferred to the law when he stated that the debate
about future prediction was irrelevant because Parliament had required prediction by
enacting the DO legislation. Overall, the pessimism around experts' ability to predict
violence in DO hearings mirrored the more general cynicism about prediction accuracy
and concern over high false positive rates in the psy literature and research at that time.

The inability of experts to predict future behaviour was not the only problem
identified in the DO hearings. Definitions of dangerousness also proved unworkable.
Experts pointed out that psy professionals had not reached a consensus on an
acceptable definition of dangerousness and that "lots of people are working on it but
none of them have yet to define dangerousness except to state anybody could be
dangerous and it is hard to predict who could be dangerous tomorrow or the day after or
next year" (DO101, 1983).

In summary, before the emergence of actuarial justice in the early to mid 1990s,
the majority of experts, both Crown and defence, were very cautious about whether
clinicians could predict future behaviour or dangerousness. References to prediction
inaccuracy permeated psy experts' testimony and reporting. Experts and judges
appeared to take largely for granted the limits of prediction. Instead, the debates centred
on whether or not prediction, given its imperfection, was a useful or an ethical activity for
experts to undertake in DO hearings.
THE PENETRATION OF RISK THINKING IN DANGEROUS OFFENDER HEARINGS

I am faced with his sworn evidence that at the present time this man is a danger to society. (Judge referring to Crown expert, DO7, 1984)

Mr. J presents a serious potential risk to the children of our community. (Judge, DO251, 1997)

During the period of explicit pessimism regarding the prediction of dangerousness, references to risk are noticeably absent. Instead, several different terms signified what is today constitutive of risk. These terms included “posing a significant threat,” “virtual inevitability of committing further acts,” “dangerousness,” “causing evil” and being “a threat to society.” And at the end of the 1980s, experts and judges used risk primarily in conjunction with victim status, such as in referring to “risk to victim” or victims “at risk.” Experts also discussed “risk-taking” behaviour, “high-risk situations” and “high-risk neighbourhoods.” In the 100 cases comprising this study, it is clear that by the early to mid 1990s these risk descriptors were overshadowed by the predominant use of risk to mean an attribute inherent in the offender. Risk had come to represent the degree to which the offender posed a “risk to reoffend.”

Ironically, in earlier cases, dangerousness for the most part was also pragmatically defined as what will happen in the future concerning reoffending. Clearly, both risk and dangerousness implicate future behaviour. Yet, in the 1990s there was an attempt to delineate between the similar definitions for risk and dangerousness. Illustrative of this attempt, a Crown expert in 1994 stated that the question “is this man dangerous” was largely meaningless for a psychiatrist. Instead, the expert argued that the real question was: “[G]iven what you know about this individual and his offences what factors would
you consider when attempting to gauge the risk of further violence and what can be done, if anything to minimize the risk of future violence?” (DO211, 1994). By replacing the term “dangerousness” with that of “risk of reoffending” and attempting to separate meanings, experts advanced risk assessment as an improvement in the prediction of future behaviour. The consensus reached in the 1980s—that experts could not clinically predict dangerousness—created a space for the new “science” of assessing risk.

The conflation of objectivity with risk assessment was evident in DO hearings at the time of this definition shift. “The science of risk prediction,” one Crown expert reasoned, “is quite accurate [and] allows us to predict with a high degree of certainty the likelihood that someone will reoffend” (DO132, 1998). A standard formula for presenting the utility of actuarial risk assessment emerged. It was disproportionately Crown affiliated. First, the expert acknowledged that actuarial methods were not ‘foolproof’; second, the expert argued that, although not foolproof, these ‘mechanical’ tools did add an element of objectivity and accuracy to clinical prediction; third, the expert presented clinical prediction as ‘inherently subjective’ and second rate compared to the actuarial prediction of future behaviour. In the end, experts had constructed, in words and practice, actuarial methods of risk assessment as the opposite of clinical opinion. Actuarially based risk assessment was objective and scientific compared to the inaccurate and subjective clinical prediction of dangerousness. Table 4.1 outlines descriptors regularly enlisted by experts to describe each method of evaluation.
Table 4.1: Common Descriptors of Evaluation Methods Found in Dangerous Offender Hearings

<table>
<thead>
<tr>
<th>Descriptors of Clinical Methods</th>
<th>Descriptors of Actuarial Methods</th>
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<tr>
<td>• simple, ordinary</td>
<td>• statistical, mechanical</td>
</tr>
<tr>
<td>• less scientific, subjective</td>
<td>• systematic, objective</td>
</tr>
<tr>
<td>• judgement, opinion, reasoning</td>
<td>• calculation, scoring, formula</td>
</tr>
<tr>
<td>• flawed</td>
<td>• accuracy, greater consistency</td>
</tr>
<tr>
<td>• traditional</td>
<td>• advancement</td>
</tr>
<tr>
<td>• inferior, underperforming</td>
<td>• superiority, outperforming</td>
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</table>

In the DO hearings, risk assessment ushered in a renewed optimism in the ability of psy experts to aid the court in forensic decision-making. Risk assessment became the currency of objectivity and the superior method of evaluation. With increased faith in risk assessment, the courts asked experts to offer opinions as to whether an offender posed a high risk of reoffence, and for advice on whether or how that risk, if present, might be mitigated.

I begin my detailed examination of risk thinking in DO hearings with a case illustration that I have constructed from information found in several DO files. Following this example, I present a report written by a psy expert charged with the responsibility of a DO assessment. This report is also a compilation of data taken from the DO files. The case example and the report help to contextualize the subsequent examination of the risk assessment enterprise in DO hearings.
Case Illustration of Expert Assessment: Dr. Peters and Rob Fox

The court calls on Dr. Peters, a neutral psy expert, to perform an assessment of Robert Fox for Mr. Fox’s upcoming DO hearing. Dr. Peters receives a package of materials from the Crown. The package contains Rob’s criminal and incarceration history, along with all previous psychological reports and assessments performed. Other documents in this package include Rob’s pre-sentence reports, parole and probation documents, Victim Impact Statements and Rob’s personal diary entries for the past year.

Dr. Peters reviews all of the material and constructs a chronology of Rob’s violent behaviour and other notable events. He then conducts two interviews with Mr. Fox at the local remand center. He tells Mr. Fox that he is there to do a court assessment for the DO hearing. Rob asks him if he works for the Crown or the defence. Dr. Peters, surprised by Rob’s question, replies that he is the neutral assessor called by the court. Altogether, the interviews last a total of three hours.

To loosely structure interview questions, Dr. Peters employs both the PCL-R and HCR-20. After the interview the doctor returns to his office and collates information he gained through the interview process with information provided in the Crown package. Next, he scores Rob on the items in the PCL-R and the HCR-20. He then adds up the results from the PCL-R and records a final score of 32. This score indicates to Dr. Peters that Rob is a psychopath. According to Dr. Peter’s interpretation of the PCL-R, a diagnosis of psychopathy is indicative of a high risk of recidivism. Next, Dr. Peters codes the HCR-20 to rate Rob’s risk of reoffence. Dr. Peters adds the HCR-20 items. He concludes that a score of 33 on the HCR-20 indicates that Rob is at a high risk to reoffend. Lastly, for ‘good measure’ Dr. Peters employs the VRAG. The VRAG score can determine the probability of violent recidivism at two different mean lengths of opportunity—seven years and ten years. Dr. Peters has scored Rob on both the HCR-20 and the VRAG after completing the PCL-R because both these instruments incorporate the PCL-R score. Rob Fox’s VRAG score puts him in the group of offenders who have a 76%
chance of reoffence within seven years of release and an 82% chance within ten years of release.

Next, Dr. Peters summarizes clinical variables or factors that might indicate that Rob presents a lower risk. These factors include Rob’s use of alcohol as a disinhibitor and his average intelligence which Dr. Peters claims is necessary to gain insight about offending. Notwithstanding, the doctor decides against lowering the actuarially based predictions. Dr. Peters acknowledges that lowering the actuarial risk of reoffending based on clinical variables is not recommended. He believes that his clinical opinion regarding Rob Fox is supported by the results obtained on the PCL-R, HCR-20 and the VRAG.

Dr. Peters writes his report and subsequently testifies at the hearing. The doctor is confident that Rob is a psychopath, incapable of empathy and remorse, and represents a high risk to reoffend. Moreover, Dr. Peters tells the judge that an effective program in corrections to deal with psychopathic offenders is not currently available. The judge sees no alternative to declaring Mr. Fox a Dangerous Offender and therefore imposes an indeterminate sentence.

Case Illustration of Expert Report Written by Dr. Peters

Name: Robert Fox D.O.B. September 10, 1969
Index Offence: Sexual Assault Date of Offence: October 10, 1998

This report requested by the court summarizes the risk of reoffence for the inmate named above. The individual is currently subject to a Dangerous Offender application initiated by the Crown. The assessor is acting as a ‘friend of the court’ according to the Criminal Code of Canada, Section 753, and understands that the court will use the assessment, including report and testimony, as evidence in the application under this Section. The individual in question has been informed of the nature of the assessment. He has signed a statement of informed consent. To conduct this assessment I consulted prison, school and hospital records, as well as correctional program summaries, pre-sentence reports, psycho-social evaluations conducted in prison and all other information forwarded by the Crown and listed on
the exhibit summary. I also had the opportunity to conduct two 1.5-hour interviews with Mr. Fox while in remand following his notification of the Dangerous Offender application. Mr. Fox was cooperative and eager to answer the questions I asked him.

Robert Fox lived with his biological mother until the age of 12. He completed grade 10. He was arrested at the age of 15 after a violent assault on his half-brother. Rob denies any history of juvenile offending. He does not know his biological father or his whereabouts. Rob’s childhood history is marked with behavioural problems including truancy, suspension from elementary school and early use of drugs and alcohol. According to a high school report, Mr. Fox was caught several times sniffing glue and gasoline.

According to Mr. Fox, his mother was emotionally unavailable throughout his childhood. She was known to frequent bars and engage in promiscuous sexual liaisons with several men on a weekly basis. She was convicted of fraud and spent time in prison where she eventually committed suicide. Rob grew up without positive male role models. Currently, he does not have any family contact. He thinks his half-brother is serving time in a federal institution for attempted murder. After his mother’s death, at age 14 Mr. Fox was placed in foster care but shortly thereafter ran away. Mr. Fox has not maintained meaningful or lasting employment. He identifies himself as a general labourer holding short-term jobs at gas stations, roofing companies and within the forest industry. He is of average intelligence. Mr. Fox has had several short-term common law relationships. The longest relationship with an older woman lasted one year. Mr. Fox mentioned that he is certain that he has children somewhere in the province of British Columbia.

He was living alone and unemployed at the time of the index offence. Rob was on parole for a prior sex conviction. Throughout the past 20 years, Rob has been in and out of prison for various criminal offences including four previous sexual assaults. On the night of the offence, Mr. Fox was drinking at a bar with a friend and two females. After the hotel closed, one female summoned a cab home. The other female, according to Rob, ‘hung out’ with him and his friend. The police report indicates that he and his friend forced the female into the friend’s car and
subsequently 'took turns' sexually assaulting the 19-year-old victim. The victim escaped and ran for help. She was treated that night at the hospital emergency department for various cuts and scrapes, including vaginal and anal lacerations. Later that night, the police arrested both Mr. Fox and his friend while they tried to sleep in the friend's car. Mr. Fox showed no remorse; he denied using force, and felt that his actions, along with his friend's participation in the assault, were twisted into a crime by the victim. Rob claims that it was the victim's suggestion that the three of them 'get together'. Convicted of sexual assault, the friend is currently serving his sentence. Unlike Rob, it was his first sexual assault offence on record.

Rob's previous sexual assault convictions also involved forced intercourse after a night of alcohol consumption. He states that he has never had problems getting girlfriends and maintaining relationships but admitted that he prefers to pick up women at bars for sex. This way, according to Mr. Fox, you do not have to get 'really' involved with them. He reported that he masturbates at least once a day but denied interest in pornography and/or sexual fantasizing. When talking about sexual activities and preferences, Mr. Fox often wanted to change the topic of discussion. He would not make eye contact and shifted his body frequently throughout the interview. Before ending the first interview, Mr. Fox informed me that he was planning to appeal the current conviction, which he felt was 'bullshit.'

Mr. Fox scored 32 on the PCL-R, an actuarial empirically-based risk assessment tool. It is known to be the best predictor of violent reoffence. This score indicates that Rob is psychopathic. He meets the cut-off score of 30 out of 40, which indicates psychopathy. The psychopath is at a high risk to reoffend and is a very challenging treatment prospect. Mr. Fox is an impulsive, opportunistic rapist. He does not exhibit the highest degree of sexual deviancy I have witnessed but certainly reveals it to a degree that makes him a current threat to women in the community. Without treatment, reoffending would almost be a certainty provided he was in a place where opportunity presented itself. As previously stated, psychopaths are very difficult to reform and no known treatment modality exists in our system to address these individuals' sexual deviance. The results on both the HCR-20 and VRAG risk assessment tools also indicate a high-risk to reoffend. His
average violent recidivism risk is 76-82% over seven to ten years. There is significant consistency between the actuarial and clinical predictions of risk, in that both describe an unacceptably high likelihood of reoffence.

Mr. Fox's current state renders him dangerous to society and especially to vulnerable women. With prolonged therapy and alcohol abuse counselling he might be able to return to the community with intense supervision, but there is no guarantee. I cannot make any predictions as to how long it would take to successfully address the serious constellation of problems Mr. Fox exhibits. In the end, the only factors that can be relied upon to prevent future offending are incarceration and the passage of a lengthy amount of time.

THE EMERGENCE OF TECHNOCRATIC RATIONALIZATION: EXPERTS' USE OF RISK ASSESSMENT IN DANGEROUS OFFENDER HEARINGS

In the final analysis the actuarial estimate of this man's risk for reoffending is at 50-60% in the 7-10 year range respectively. (Neutral assessor, DO212, 1999)

Prior to the 1997 legislation change, experts were more likely to discuss risk assessment when determining whether an offender could be successfully treated under a determinate sentence than determining if the offender was dangerous in the first instance. After 1997, a new space for the operation of risk assessment opened. Under the new provisions, judges first decide whether an offender can be eventually controlled in the community after serving a determinate sentence. If so, the case proceeds as a Long-Term Offender application and, if not, the Crown must prove that the defendant is a Dangerous Offender. As such, risk assessment plays a significant role in the first half of the hearing under the new provisions. Table 4.2 presents a visual mapping of the differing roles that risk assessment played over the last decade.
By 1995, responding to the demand for risk evaluations, the majority of Crown experts offered predictions using risk assessment tools. Table 4.3 displays the percentage of cases where experts used risk assessment tools in each identified theoretical time period. All percentages are conservative estimates generated without the benefit of complete testimonies and records for all psy experts in the sample. Additionally, only DO hearings conducted between January and August are included in the year 2000.
Table 4.3: Percentage of Cases Employing Risk Assessment Tools by Theoretical Time Frame

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<tr>
<td>% of Cases</td>
<td>3%</td>
<td>18%</td>
<td>73%</td>
</tr>
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A detailed examination of the increasing use of risk assessment tools is offered in Figure 4.1. What is apparent from the data is that risk assessment tools emerged in the early 1990s and by 1998 had become a permanent feature of the DO hearing landscape. Figure 4.2 presents frequencies for the top five risk assessment tools employed in DO hearings. Both figures start at 1991 when the first actuarial risk assessment tool explored—the PCL-R—was formally offered by the distributor. A ‘how-to’ manual accompanied this formal distribution (Hare, 1991). Since 1993, use of risk assessment tools by experts in DO hearings has steadily climbed. Actuarial risk assessment has been normalized in DO hearings.

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102 Reference to the first version of the Psychopathy Checklist (PCL) was found in two cases before 1991—one in 1985 and the other in 1987.
Expert preference for the PCL-R remained consistent over the past decade (see Figure 4.2). The PCL-R was the most popular tool of choice used by 51 experts in my sample. The VPS and VRAG were employed by 16 and 9 experts, respectively. The next ranking in terms of popularity was the HCR-20, followed by the SVR-20. The *High-Risk Offenders Handbook* does not mention either of these non-actuarially based tools (Solicitor General Canada, 2001). However, the *DO/LTO Assessment Guide* recommends both these *aides mémoire* (Eaves et al., 2000).

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103 The peak at 1992 must be viewed in the context of only one DO hearing conducted during that year.
104 I counted the VPS and VRAG as separate tools. If, for the purposes of analysis, I consider the VRAG a component of the VPS, then 21 experts used the VRAG.
The relationship between expert's counsel affiliation and the use of risk assessment tools was statistically significant\textsuperscript{105} ($\chi^2=6.42$, df = 2, \(p<.05\)). Experts who testified for Crown or as a neutral assessor were more likely than defence experts to use risk assessment tools. In the instances where experts used risk assessment tools, Crown experts were responsible for 38% of use, defence for 25% and neutral assessors for 59%.

\textsuperscript{105} Only DO experts involved in hearings after 1994 were included in this analysis to account for the development of risk assessment tools (N=94).
Although not statistically significant, a pattern does emerge when comparing psychologists' and psychiatrists' respective use of risk assessment in the current sample. Psychologists who testified in DO hearings practiced risk assessment 50% of the time, whereas psychiatrists utilized these tools 37% of the time. When this pattern is examined further, a few trends emerge which elaborate on the non-significance of the relationship between risk assessment use and professional status. Neutral assessors, both psychiatrists and psychologists, are more likely to use risk assessment than not (53% vs. 47% and 71% vs. 29%, respectively). Defence psychologists are equally distributed with regard to risk assessment tool use (i.e., 50% used risk assessment vs. 50% who did not), whereas 79% of the defence psychiatrists did not employ risk assessment compared to 21% who did. Forty-two percent of Crown psychiatrists used these tools whereas Crown psychologists (N=3) did not.

When the data is explored qualitatively, a number of themes emerge. The psychologists that testified can be divided into two groups. The first group was comprised of those experts, mainly defence affiliated, who were ideologically opposed to prediction and the indeterminate sentence. They are less likely to employ risk assessment tools than a second group of psychologists. This second group of psychologists consisted of experts closely affiliated with the development and testing of risk assessment tools. These psychologists were likely to employ risk tools. This second group of experts belongs to what has been described as the research penal

\[106\] Chi-square \((\chi^2)\) is a statistical test of independence that computes the significance of a pattern in variables measured at the nominal or ordinal level (Hurlburt, 2003, pp. 272-273).

\[107\] Coles and Grant (1991) similarly note a tendency of defence experts in DO hearings to address political and philosophical questions in relation to the DO legislation. Coles and Grant claim that these issues “divert” and “obscure” some of the fundamental issues relevant to expert witnesses such as diagnosis and treatment (p. 541).
culture or the group of research experts who are the driving force behind the risk assessment enterprise (Mathiesen, 1998).

The second theme that emerges from the examination of individual experts is that psychiatrists who testify for the Crown or as neutral assessors are evenly divided with respect to their use of risk assessment tools. Only those psychiatrists who testify for the defence are markedly resistant to risk assessment use. Several of the same psychiatrists testified for the Crown and as neutral assessors in multiple cases. Among those experts were professionals who clearly showed a tendency to testify for Crown and to rely on risk assessment.

As such, clinical opinion did not disappear entirely with the advent of risk assessment. Experts offered clinical opinion as a supplement to risk assessment. In turn, experts used actuarial risk scores to support and confirm the value of clinical insight. In DO104 (1996), a Crown expert explained to the judge that his approach to evaluation was not to rely simply on actuarial scores but instead to ask whether the number makes some sort of common sense. The judge in a 2000 case conceded that the risk assessment method was the best by far of any other known method of prediction. He does acknowledge, however, that experts still need to use some clinical judgement in performing risk evaluations (DO602, 2000).

Several experts in the DO hearings noted when there was a difference between calculated actuarial scores and their clinical opinion as to the offender's risk of reoffence. Overall, they gave priority to actuarially based opinions of reoffence risk. Tools such as the VPS advocate that experts adjust statistically determined risk only if clinically necessary. However, experts are cautioned not to vary far from the actuarial estimate.
The VPS authors warn that clinical judgement should be "strongly anchored" by the actuarial prediction of risk and not the other way around (Webster et al., 1994, p.57). This sequence of priority was expected given that researchers advanced risk assessment as an improvement over clinical opinion.

The only scenario where clinical opinion was privileged occurred when experts felt that there was an actuarial underestimation of risk. Experts used clinical opinion to increase but never to decrease actuarial estimates. For instance, in DO107 (1998) the neutral expert explained how low results for both the PCL-R and HCR-20 should be disregarded because other factors such as motivation, "failure to express a desire for a constructive life," and "no significant change in personality" must lead to the conclusion that the offender is a very high risk for reoffending. This line of reasoning that resulted in the clinical inflation of scores was a consistent feature of experts' treatment of low actuarially assessed risk.

According to experts in the DO hearings, one could be extremely confident in an assessment of reoffence risk if agreement between the two models of prediction—actuarial and clinical—was achieved. Additionally, both experts and judges highly valued consensus between professionals regarding actuarial scores. In the DO hearings, experts construed consistency among models of prediction and among experts' scores as indications of the objectivity of risk assessment. They did not interpret that similar conclusions could have resulted because the models employed the same methods, or the experts succumbed to the same subjectivity.

The consistency of raters and ratings, rather than the validity of the instrument, was constructed as proof of the quality of predictions. Technocratic rationalization
clearly came into play. Discussing such Weberian rationalization, Simon and Feeley (1994) argue that one of the characteristics of modern penology is that the efficiency and effectiveness of its own system ascertain the quality of justice. They use the example of how the number of cases processed through a court system has become the measuring rod for the quality of justice that that system maintains (Simon and Feeley, 1994, p. 456). With technocratic rationalization, experts equate reliability with validity and quantity becomes a criterion of quality. In DO hearings, this same form of technocratic rationalization was evident in the experts’ interpretation of rater and rating consistencies as indicative of the validity of risk assessment.

(Re)Discovering Dangerousness: From Diagnosis to Risk Assessment

I think that you know courts are not well served by experts giving numbers (Defence Expert, DO124, 1997).

(De)valuing Diagnosis

While the use of risk assessment tools has increased in DO hearings, the employment of the Diagnostic and Statistical Manual (DSM) has correspondingly decreased. Experts explicitly referenced the DSM in only 20% of the hearings included in my sample. As early as 1983 a Crown psy expert warned that the DSM, and more specifically the Antisocial Personality Disorder diagnosis, employ “criteria not intended to be absolute truth but simply a guide so that one discipline may know what another is talking about” (DO101, 1983). Before 1995, Antisocial Personality Disorder (APD) was the primary diagnosis in 64% of the hearings in my sample; after 1995, experts...
diagnosed APD in only 36% of the cases.

Mounting critique of the blanket use of APD was evident in earlier cases. In a 1984 hearing the defence expert called APD a "'garbage bag" diagnosis and a "crude concept" (DO233, 1984). "There is a tendency in forensic psychiatry to reduce people to labels," argued a defence expert in DO204 (1990). He told the judge that up to 80% of the individuals in Canadian federal prisons have APD, so as a prognostic tool it was not very helpful. In a 1988 case, another defence expert explained that the diagnosis of APD covers roughly 75% of individuals in prison and is therefore meaningless. To illustrate his case, the defence expert outlined the circular logic employed by the Crown expert in the hearing: the offender breaks the law and therefore he is antisocial; because he is antisocial, he breaks the law (DO216, 1988).

In the DO hearings other DSM diagnoses and aligned traits, which fell out of favour over time, included sociopathy, narcissism, mixed personality disorder, inadequate personality and dependent or avoidant personality. Still, other diagnoses, such as the paraphilias of pedophilia, fetishism and sadism, remained consistent markers for dangerousness and risk. Over time, however, these diagnoses were more likely used by experts in a descriptive manner. Experts were less concerned about how offenders fit into the specific diagnostic criteria prescribed by the DSM.

Along with the abandonment of some diagnoses and the consistent reference to others, new diagnostic categories and descriptions emerged in the DO hearings. In accordance with the use of risk assessment tools, experts discussed with increasing

\[108\] I am assuming the expert was referring to the common phrase—waste paper basket diagnosis—often used in the psy literature to indicate a category of illness that has been employed historically by psychiatrists as a catchall diagnosis (e.g., schizophrenia).
frequency the high-risk offender. The prototypical high-risk offender was the psychopath.

**THE PCL-R AS THE “GOLD STANDARD” MEASUREMENT OF RISK**

In the DO hearings after the mid 1990s, psychopathy began to replace APD as the premier prognostic and predictive diagnosis. An expert in 1997 explained to the judge that he prefers to use the “widely accepted diagnostic conceptualization of psychopathy” rather than APD. He acknowledged that psychopathy “for reasons that he doesn’t quite understand hasn’t made it in the DSM” (DO124, 1997). “Psychopathy is a construct, it’s not something concrete,” a defence expert in DO127 testified, “It’s not like a diseased liver that you can – you can look at it.” He continued: “Psychopathy is widely accepted, and in my view, a valid clinical construct but in our kind of bible of diagnosis there’s no mention of psychopathy. [It’s] sort of a separate clinical construct and knowledge about it is just ongoing” (DO127, 1997). After 1995, psychopathy was the primary diagnosis in 64% of the cases compared to only 34% of the cases before that date.

Expert confusion regarding whether or not psychopathy was a form of APD, or whether APD was a characteristic of psychopaths, was evident in hearings. Some experts argued that it was possible to be psychopathic without a diagnosis of APD, while others disagreed. Hare (1996) points out that most psychopaths are antisocial but not all

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110 Although psychopathy is a very popular diagnosis in forensic psy practice, it is not included in the current DSM. A defence expert in 1993 predicted that psychopathy would more than likely make incorporation into the DSM in 1999. We have yet to witness this inclusion. One might hypothesize that the incorporation of psychopathy into the DSM would be unusual in the sense that it violates the clinical assumption that those mental disorders found in the DSM are treatable. The psy research claims that experts cannot cure psychopathy with current treatment modalities.
antisocials are psychopathic. For Hare (1996), the DSM defines APD solely on
behavioural criteria, whereas the concept of psychopathy distinguishes individuals based
both on behaviour and on affective and interpersonal factors. Hare (1991) defines
psychopathy as a characteristic pattern of interpersonal, affective and behavioural
symptoms:

Interpersonally, psychopaths are grandiose, egocentric, manipulative,
dominant, forceful, and cold-hearted. Affectively, they display shallow and
labile emotions, are unable to form long-lasting bonds to people, principles,
or goals, and are lacking in empathy, anxiety, and genuine guilt and remorse.
Behaviorally, psychopaths are impulsive and sensation seeking, and they
readily violate social norms. The most obvious expressions of these
predispositions involve criminality, substance abuse, and a failure to fulfill
social obligations and responsibilities. (p. 3)

Hare developed the Psychopathy Checklist Revised (PCL-R) in the early 1990s to
reflect this definition (see Table 4.4). This checklist, considered the premier diagnostic
tool for psychopathy, is based on earlier work conducted by Cleckley in 1941. In his
book, The Mask of Sanity, Cleckley outlined a list of 16 criteria common to psychopaths.
Hare adopted and modified these characteristics to develop and test the PCL-R.111

111 Much of this conceptualization work on the psychopath is contained in Hare’s 1993 publication,
Without Conscience. The Disturbing World of the Psychopaths Among Us.
The PCL-R is the most common risk assessment tool used in the current sample. Experts employed the PCL-R in approximately 75% of the hearings since 1995. The majority of judges and experts in the DO hearings spoke of the PCL-R as an accurate predictive device. In a 1994 hearing, the judge observed that all eight experts who testified in the hearing agreed that Dr. Hare had developed a reliable tool to diagnose psychopathy and determine reoffence risk (DO151, 1994). A Crown expert in DO104 (1996) described the PCL-R as "a means of more precisely defining and objectively measuring the trait of psychopathy." In 1999, a Crown expert argued that the PCL-R "at this point is quite widely used in forensic psychiatry and psychology ... really throughout the world" (DO114, 1999). Speaking about the PCL-R, the Crown expert in another case

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112 Adapted from Hare (1991).
stated: "Indeed this instrument has found very wide acceptance within forensic and criminology kind of studies and is really more widely used than any other single instrument that one can identify for these kinds of purposes" (DO114, 1999).

Into the 1990s, the PCL-R became defined as a necessary feature in DO hearings. The neutral court-appointed psychiatrist in a hearing warned defence counsel that one ignores the actuarial risk assessment tools such as the PCL-R at one's peril (DO602, 2000). The DO/LTO Assessment Guide strongly recommends that the assessment of psychopathy using the PCL-R by a properly trained person forms a part of every DO evaluation. The guide's authors continue: "In fact, it may be fair to state that psychopathy must be assessed" (Eaves et al., 2000, p.34, my emphasis). Both researchers and clinicians in the psy forensic community consider the PCL-R one of the stronger tools for predicting reoffence risk.

**Tarnished Gold: Problems with the PCL-R**

Despite the increasing use of the PCL-R and its favourable reputation, it has its critics. Freedman (2001) advises us that "[t]he PCL-R may be, as its proponents argue, the strongest in a field of weaklings, but it is by no means reliable and valid in the prediction of future dangerousness" (p. 94). Similarly, in several DO hearings in the late 1990s, experts were critical of risk assessment and more specifically of the PCL-R, but such disenchantment was mainly confined to defence experts. A defence expert in DO238 acknowledged that there was a division of opinion within the psychiatry community regarding the PCL-R. He informed the judge that "[t]he PCL-R has become a very controversial matter since it moved from purely research purposes to practical application" (DO238, 1998). The expert warned that the PCL-R was never intended for
assessment in court proceedings.

In fact, Hare (1991) himself advocates that experts use the PCL-R for psycho-diagnostic purposes keeping in mind “the potential harm if the PCL-R is used incorrectly” (p. 5). He reminds us that “an individual’s score may have important consequences for his or her future” (p. 5). Other experts cautioned that the PCL-R had not maintained the same level of reliability that it had initially promised in its research phase. The following statement by a defence expert exemplifies disenchantment: “The PCL-R after all is just a glorified piece of work based on a popular book called the Mask of Sanity. [It] doesn’t really tell you any more than an impression but it gives the air of pseudo-science to the field” (DO237, 1998).

Several problems surfaced with the application of risk assessment in DO hearings. For example, experts attached confusing and often contradictory meanings to final risk scores. The PCL-R score, which ranges from 0 to 40, appeared to be the most problematic or misinterpreted in DO hearings. In the cases I examined, 34 PCL-R scores were available. The average PCL-R rating in those 34 instances was 25, with a mode of 23. If I employed a cut-off score of 30 for a diagnosis of psychopathy, 32% (11) of the offenders, for whom experts recorded scores, would be viewed as psychopathic. Bonta, Harris, et al. (1996) similarly found that 40% of the 48 DOs they examined would ‘qualify’ as psychopathic using a cut-off score of 30. Hare (1991, p.17), however, advocates against using the PCL-R to determine the presence or absence of psychopathy. The PCL-R score, according to Hare, was not meant to be a threshold or cut-off score for psychopathy. Instead, the PCL-R generates a dimensional rating, which indicates how closely the individual matches the prototypical psychopath (Hare, 1991).
Contrary to Hare's warnings, the majority of experts (80%) who employed the PCL-R used a cut-off score of 30 to indicate whether the offender was a psychopath or not. The Crown expert in DO238 told the court that the score of 30 was "the Hare level of a subject being classified a psychopath" and therefore could be used to judge someone as likely to reoffend (DO238, 1998). In a hearing in 2000, the judge concluded that the offender's "score of 35 clearly fell within the high rank for the label psychopath [because] the evidence is that the PCL-R is scored on 0 to 40 [and] a score of 30 or higher is good evidence that the individual rates the label psychopath" (DO604, 2000). Other experts perceived a PCL-R score of 25 or higher as indicative of psychopathy. In opposition to the belief that a cut-off score exists, the defence expert in DO151 points out that there is "no statistical or investigative or scientific basis in which to say 25 means you're whatever percent psychopath" (DO151, 1994).

Interestingly, the majority of experts did not interpret a low score on the PCL-R as indicative of a low risk to reoffend. It is true that experts judged 11 offenders not to be psychopathic after calculating a score below 20 on the PCL-R. Still, in seven of those cases the offender received an indeterminate sentence. In the majority of cases where the PCL-R score was low, the offender was diagnosed a pedophile which experts also interpreted as indicative of inevitable risk. In a 1995 case the judge reviewed the defendant's PCL-R score and concluded that "it [was] so far removed from a rating of psychopathy that [he] [paid] it no attention whatsoever" (DO231, 1995). In the end, low scores did not mean a more positive prognosis; they were not considered useful in sentencing decisions and were often overshadowed by the experts' clinical opinion of high risk. Correspondingly, the DO/LTO Assessment Guide cautions experts to note
Hart's (1998) research that a low score on the PCL-R "does not equate necessarily with low risk for violence" (Eaves et al., 2000, p.34, n.5).

The error margin associated with the PCL-R added further inconsistencies in the interpretation of scores in DO hearings. Hare (1991) directs experts to acknowledge that the standard error of measurement for the PCL-R is plus or minus three. In other words, a score of 27 out of 40 could be either 30 or 24. Often if an offender scored between 25 and 29 on the PCL-R, the professional described him as moderately psychopathic but not within the range of a formally labelled psychopath. In one case, the defence expert claimed that the Crown expert's diagnosis of psychopathy based on a PCL-R score of 33.7 was misleading. The defence expert argued that a cutoff score of 34 was more appropriate because of the margin of error involved in PCL-R scoring.

To some, slight differences in scores may appear to be a hair-splitting exercise. However, a score within three or four points of a diagnosis of psychopathy is of concern to an offender. The majority of professionals testifying in hearings felt that psychopaths could not be effectively treated, and therefore presented an "unassumable" risk. Experts constructed psychopaths as innately high risk and the appropriate targets for the indeterminate sentencing option. Furthermore, not all differences in scores were subtle. A defense expert in a 1988 case reported that he had seen a 12 to 14 point variation in PCL-R scores presented in the court (DO131, 1998). In two cases in the current study, PCL-R scores for the same offender varied by 10 points between experts.113

Another problem that surfaced with the PCL-R in DO hearings was the tool's self-fulfilling nature. By way of illustration, when the expert in a 1996 hearing was asked by
Crown counsel what characterizes a psychopath's behaviour, he replied, "the only proper answer to that is to refer to the psychopathy checklist and to say that a psychopath is a person who is diagnosed—any other definition is necessarily simplistic" (DO104, 996).

In fact, in the majority of cases, where experts used the PCL-R a diagnosis of psychopathy resulted ($\chi^2=8.8$, df=1, p<.01).

Several social scientists working in the area of the sociology of diagnosis have revealed the iatrogenic nature of psycho diagnostic tools. They caution that assessment or diagnosis methods and schemes can lead to the construction of that diagnosis (e.g., Pfohl, 1978; Brown, 1990; Menzies, 1989). Steadman (2000) observes that psycho experts have a tendency to reify risk as a trait of a person rather than a product of the assessment. Experts thus reduce people to a risk rating and treat them accordingly. Moreover, in the DO hearings this process of reduction (i.e., PCL-R score) involved inconsistent interpretation of scores, the devaluing of low scores and the misapplication of cut-off scores.

In sum, experts' use of the PCL-R in DO hearings was problematic. Experts, mainly defence, raised reliability and validity issues associated with risk tools and, more specifically, the PCL-R. Their testimonies echoed concern over assigning too much weight to an untestable number or score. Experts also identified several specific problems with the application of the PCL-R and the diagnosis of psychopathy. Defence

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113 I will discuss possible reasons for these discrepancies in an upcoming section of this chapter.

114 Another example of this self-fulfilling evaluation surfaces in hearings that involved “mentally retarded” offenders. In a 1998 case, the Crown expert outlines factors that are important in determining risk in these cases. He lists several risk factors including inappropriate sexual behaviour since an early age; sexual deviation; repeated offences against children; lack of age appropriate relationships; limited intelligence; and, past supervision failures. The result was measurements of risk in a mentally retarded offender using criteria that were, in part, constitutive of being a “mentally retarded” offender. Given these criteria, one wonders how these individuals could escape assessments of high-risk.
counsel and experts argued that psychopathy had become the new waste-paper basket diagnostic and that Crown experts were skilled in “shoehorning” offenders into that basket.

THE RISKY LOGIC OF ACTUARIAL RISK: GROUP DATA AND COOKBOOKS

Experts in the current sample, for the most part, did not entertain the low base rate problem or the potential for false positives that historically plague the prediction of violence. Nor did experts generally acknowledge that probabilities of reoffending generated through risk assessment were based on group data. Actuarial placement of individuals in predictive groups runs the risk of perpetrating a very basic methodological flaw—that of the ecological fallacy. Ecological fallacy involves the error of perceiving that relationships proven true of groups will be true of individuals. With risk assessment experts make highly consequential decisions about unique individuals based on how a group of offenders behaved in the past. One exception to the expert’s pattern of inattentiveness to the ecological fallacy involved a psychiatrist who assessed 19 offenders profiled in this sample. In 14 cases he was defence-affiliated, in two hired by the Crown and in the remaining three cases, he was a neutral psychiatrist. This

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115 In the past, similar criticism was directed at the diagnoses of schizophrenia and Antisocial Personality Disorder (see note 108, at 133). This commonality in critique and, perhaps, more generally patterns in the ‘life-cycle’ of a diagnostic category would be intriguing areas of study. Stages in the biography of a diagnosis such as ‘growing up,’ ‘reaching age or acceptance of majority,’ and perhaps—like homosexuality—becoming ‘de-diagnosticated,’ or eventually ‘burning out’ and desisting are apparent. For more information on the history and politics of diagnosis, see Bayer (1981); Caplan (1995); Young (1995); and Kutchins and Kirk (1997).
psychiatrist reiterated to the court on several occasions the limits of actuarial prediction based on group data:

"There's always some confusion regarding actuarial prediction of risk and individual prediction of risk because while one can predict on an actuarial basis a risk factor for violence, the same way as for heart attack or suicide or other cardiac events, in reality a person will either have that outcome or not have that outcome. So I think it's very important to take the actuarial data and then apply it to the clinical situation so that you can strengthen an individual assessment. It's not enough to say that of 100 inmates, you know 80 will recidivate, unless you can speak about a specific inmate and say this person has a significantly higher risk than others. [My approach is] basically the individualization of risk as opposed to just taking a cookbook approach (DO232, 1997).

This psychiatrist touched on what other clinical researchers have pointed out—risk assessment is incapable of capturing unique information surrounding an offender's risk of reoffence. In the DO hearings, several defence experts alerted the court to this disadvantage of risk assessment. For example, in a 1998 case the defence expert pointed out that "[the] problem with risk is they're generalized and many individuals have unique qualities that don't fit the generalizations" (DO131, 1998). According to a neutral expert testifying in another 1998 case, the strength of clinical methods over risk assessment lies in the former's ability to tap subtle inter-relationships between factors in the individual offender's dossier (DO244, 1998). A defence expert in DO238 (1998) similarly acknowledged that "[t]he actuarial method is mechanical and objective, but doesn't take into account information in as full or rich or complex a way as one does through the ordinary clinical reasoning and judgement process."

As such, a minority of experts, again mainly nominated by defence, stated that they preferred clinical opinion to actuarial assessment because it relied on the experience and skill of the examiner and "[t]he articulation of relevant issues beyond a cookbook format"
According to these experts, cookbook formats replete with checklists and precise measurements often require assessors to engage in tedious calculations. To illustrate, the Sex Offender Needs Assessment Rating (SONAR) requires the assessor to code the risk item “social influences.” Experts measure this item by naming “all the people in the offender’s life who are not paid to be with him” (Hanson and Harris, 2000, p.14). For each person identified the assessor must indicate whether the influence is positive, negative or neutral. When this task is complete, experts calculate the social balance score using the formula outlined in Table 4.5. After having the opportunity to view the files, read the psy reports and listen to testimony in DO hearings myself, I envision that the pragmatics of accurately representing social influences were overlooked by the creators of the instrument.

Table 4.5: Sonar Calculation of Social Balance

<table>
<thead>
<tr>
<th>Calculation of Social Balance Score</th>
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<tr>
<td>1. Positive influences minus negative influences</td>
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<tr>
<td>2. Recode social balance</td>
</tr>
<tr>
<td>If score is 2+</td>
</tr>
<tr>
<td>If score is 0 or 1</td>
</tr>
<tr>
<td>If score is less than 0</td>
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Additionally, the cookbook formula considers only certain factors as significant in assessing an offender’s risk of reoffending. Contrasted with the clinical approach, risk assessment tools contain limited and specific risk items, which developers chose from a

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116 Interestingly, all of these defence experts and the one neutral assessor I have cited used risk assessment in their evaluation of the offender for the DO hearing.

117 Hanson and Harris (2000, Appendix I).
review of relevant clinical and empirical literature. Menzies and Webster (1995) caution against this type of 'shotgun empiricism.' Instead, they favour an approach to the selection of items guided by theory. Moreover, empirically guided risk assessment minimizes the importance of human agency and intangible factors like motivation, expectations and family support (Broadhurst, 2000, p. 119). Similarly, the risk assessment process offers only minimal consideration, if any, of the impact of institutionalization or previous treatment experience on the offender's risk level.

Overall, the majority of experts in my sample were uncritical of the use of risk assessment and the problems associated with actuarial evaluation such as low base rates, the ecological fallacy and limited focus on a predetermined set of checklist items. Acceptance of the accuracy and utility of risk assessment contrasts greatly with the experts' pessimism in the 1980s regarding the prediction of dangerousness. The defence psychiatrist in DO132, an exception to this uncritical acceptance, summed up what he felt was problematic about the risk enterprise:

I have some difficulty in being very confident with the actuarial approach to prediction. [I]t is a fairly subjective opinion. I am suspicious of numbers and percentages and things like that—I think they convey a degree of certainty that just is not there in what we do. I prefer the heavy clinical approach, which is to look at the particulars of the individual and then use research about the broad world of sex offenders as a background to really speak to this individual in particular. [I]t is very hard to do that when the focus shifts on actuarial methods, which are very attractive because it sounds very scientific and in fact, it isn't (DO132, 1998).
Experts cannot apply all risk assessment tools equally to everyone. Researchers have developed risk instruments to predict specific behaviours (e.g., sex offending). Researchers also validate tools on specific populations (e.g., adult men). The Sex Offender Need Assessment Rating (SONAR) developers warn that "anyone choosing to use or adopt the risk assessment procedures, including SONAR, in any way, does so on the sole basis of their responsibility to judge their suitability for their own specific purposes" (Hanson and Harris, 2000, p.1, my emphasis). Miller and Morris (1998) maintain that because tools are specific, experts must make a variety of assumptions in order to use properly risk assessment for court ordered evaluations. For example, the tool needs to be validated for the same crime or type of offending, and the level or degree of harm caused by the individual must match the level of harm perpetrated by the members in the prediction group. Additionally, the individual profile (e.g., prior record, gender, age) of the offender must "fit" the profile of the comparison population (Miller and Morris, 1998, p.266). In my sample, achieving such a match was highly improbable, given the diverse criminal histories of offenders and the varying predicate offences committed by the potential DOs.

Contrary to these warnings, several experts in the current sample employed risk assessment instruments in situations outside the accepted use of the tool. Grubin (1997, 1999) warns that neither sex offenders nor violent offenders can be considered homogeneous groups thereby making transferability of risk assessment tools across offender groups problematic and questionable. By way of illustration, the PCL-R was not
Initially developed to measure the specific risk of non-violent sexual reoffence, yet experts interpreted a high PCL-R score in many cases to indicate such a risk (Hare, 1991). In several cases in the early 1990s, experts described the PCL-R as a reliable test of sexual recidivism. In the current sample, the PCL-R was often the adopted assessment tool for diagnosed pedophiles whose offending careers were limited to non-violent sexual victimization. Pedophiles commonly scored very low on the PCL-R.

In accordance with the PCL-R's intended application (Hare, 1991), a defence psychiatrist warned in the DO hearing that the offender under evaluation cannot be diagnosed a psychopath using the PCL-R because "he hasn't been in trouble with the law other than [for his] sexual behaviour" (DO105, 1994). Another astute defence psychiatrist pointed out the problem of a mismatch of tools and offending behaviours:

"[I]t is important to keep in mind that any discussion of violence prediction or violence recidivism on this case, using actuarial or clinical methods is of necessity limited... [O]ne has to be cautious in applying that knowledge to an individual whose violence has been limited to fire setting. (DO234, 1996)"

Subsequent studies have said to demonstrate the accuracy of the PCL-R for measuring risk of sexual recidivism (e.g., Quinsey, Lalumiere, Rice and Harris, 1995). However, there are as many studies that show that the PCL-R does not have predictive validity when measuring sexual reoffence rates (e.g., Barbaree, Seto, Langton, and Peacock, 2001). An insurmountable logical shortcoming associated with actuarial risk assessment is the assumption that reoffending correlates with reconviction and rearrest (Copas and Marshall, 1998). This assumption is particularly problematic in cases involving sex

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118 Some experts argued that all sexual offences because of their nature should be considered violent even if direct physical harm was not part of the act.
offenders. The vast majority of sex offences remain undetected and therefore correlation between risk and actual reoffence tends to be misleading (Broadhurst, 2000).

In my sample, experts also applied instruments to populations that they had not been tested on. Researchers and psy professionals caution against the generalized use of tools on such populations as "mentally retarded" defendants, Aboriginal offenders, young offenders and individuals with substance abuse problems (e.g., Miller and Morris, 1998; Litwack, 2001, 2002). Hare (1991) developed and tested the PCL-R on a sample of predominantly adult white male prisoners. Experts employed the PCL-R in just under half of the cases involving below average intelligence (42%) and "mentally retarded" offenders (44%). In cases heard after 1995, this percentage use increased to 75% and 77% respectively. Furthermore, experts applied the PCL-R in 81% of those cases involving defendants with substance abuse problems. Experts must employ caution when using the PCL-R with substance abusers. There is a tendency to interpret interpersonal or behavioural characteristics stemming from addiction or an intoxicated state as indicative of psychopathy (Richards, Casey and Lucente, 2003).

Experts in the current sample also assessed half of the identified minority offenders with the PCL-R. After 1995, the percentage of minority offenders subjected to actuarial risk assessment increased to 71%. Although at that time it was not validated on Aboriginal offenders, Hare (1991) himself claims that there is no reason to assume that the PCL-R is ethnically biased or ethnocentric. However, Dawson (1999) has examined the implications of assessing Aboriginal offenders' risk of reoffending with tools designed for dominant or majority populations. Dawson (1999) and others conclude that risk markers do vary as a function of ethnicity and therefore tools are not ethnically neutral.
(e.g. Hudson, 2001, p.109). For example, many risk assessment tools code information such as poor employment record, low educational level, and residential and family instability as indicative of higher risk. These characteristics are found more often among minority communities. It follows that risk assessment may disproportionately burden minorities (Miller and Morris, 1998, p. 278).

Correspondingly, a neutral expert warned in a 1998 case that it was his personal view that applying the PCL-R to Aboriginal offenders was somewhat hazardous. This same expert warns in an earlier case that “[w]hen the person is from a minority culture or from a subculture of some kind you may misread a lot of cues, and if people are retarded factors that influence their acting out are quite different” (DO243, 1993).

Despite this expert’s caution, the majority of experts did not acknowledge the problems associated with the validation and application of risk assessment tools. Often, experts haphazardly used tools to predict behaviours beyond their prescribed capability. Experts also applied tools to non-validated populations. In fact, researchers have never tested the prediction accuracy of actuarial tools for DOs and LTOs. DOs are rarely granted full parole; thus, it is impossible to determine reoffence rates for this subpopulation of offenders. The authors of the DO/LTO Assessment Guide warn that there is no strong evidence that violence risk assessment has actual validity or reliability for DOs or LTOs (Eaves et al., 2000, p. 2).
At the beginning of April 2003, a second edition of the PCL-R was released. The distributor advertises the new version as:

The definitive resource in assessing psychopathic personality disorders — The Hare PCL-R!

Based on the proven PCL-R, the Hare PCL-R™: 2nd Edition contains a great deal of new information on the use, generalizability, and applicability of the PCL-R. The Hare PCL-R™: 2nd Edition indicates the degree to which the individual matches the prototypical psychopath and is used to assess male and female offenders, substance abusers, sex offenders, African-American offenders, and forensic psychiatric clients. This 2nd Edition has also been expanded for international use.\footnote{119}

The second edition of the PCL-R claims to provide answers to some of the concerns around specific population use and inappropriate interpretation of scores. The degree to which it addresses these problems and questions surrounding ethnic and gender neutrality is an area for future research.

‘NO CONVERSION ON THE ROAD TO DAMASCUS’: THE ABSOLUTE NATURE OF RISK STATUS

Evident in the hearings I examined was the often contradictory meaning ascribed to risk probability. Researchers proclaimed that the probabilistic nature of risk assessment was advantageous because it precluded the expert from having to give dichotomous classifications of an offender’s either/or status as dangerous (Webster et al., 1994; Steadman, 2000; Silver and Miller, 2002). As part of its methodology, the actuarial method assumes the failures of yes/no predictions by allowing experts to offer opinions based on continuous probability statements (Coles and Veiel, 2001; Silver and Miller, 2002).

In the hearings, experts provided probabilistic estimates of the offender’s risk of reoffence, such as 44-58% of recidivism risk over 7 to 10 years. However, in the majority of cases I examined, the expert concluded with a description of the offender as posing an “unacceptable” or “unassumable” risk. In their conclusions, experts reverted to the assumed authority of deterministic yes-no decisions or acceptable-unacceptable risk. As such, an oxymoronic situation emerged in the hearings, where experts provided the court with an ‘absolute probability.’ A situation arose in many of the hearings where the court was witnessing the contradictory phenomenon which I label the “low probability risk” problem. In the end, experts enacted their historical role of deterministic decision-making by antithetically conflating the possibility of recidivism with the probability of reoffence risk (Coles and Veiel, 2001).

Equally problematic, and contradictory to probabilistic science, is the observation that the majority of the Crown experts saw the degree of risk posed by an offender as static or unchanging. Experts were more likely to discuss risk management and containment rather than risk reduction and elimination thereby suggesting a fixed risk level or status. Additionally, when experts measured risk with the PCL-R and subsequently diagnosed psychopathy, the consensus that psychopaths could not be treated or cured only contributed to furthering this static perception of risk.

Critical of this position, a psychiatrist known in the courts for his stance against the use of actuarial methods states that “risk management is a matter of degree and I can’t agree that there are offenders where you cannot touch ... the degree of risk whatsoever” (DO131, 1998). According to some defence experts, offenders were “getting stuck” with a risk assessment evaluation that could not change. For example, most risk assessment
tools do not factor in age as a dynamic variable. Age is a mitigating risk factor in the sense that as one becomes older the phenomenon of burnout\textsuperscript{120} or maturation may reduce risk. It makes sense that an expert's attempt to predict future behaviour—perhaps five to ten years down the road—is influenced by the offender's increasing age. As one judge states, "I accept that there is clearly a decline in offending the older a person gets, generally and/or statistically speaking. This I can take judicial notice of, that is, it is notorious and undisputed that the older one gets the more likely one is to become physically disabled and/or die" (DO604, 2000).

Risk assessment tools that focus on historical and static factors negate this common sense model advocated by the judge quoted above. Risk status as derived from actuarial instruments, such as the PCL-R, is not fluid or flexible. This static approach typical of risk assessment neglects the reflexive nature of risk status (Nuffield, 1989). As previously outlined, there is a need for research that addresses the nature of risk status and, more specifically, approaches how a risk label might affect an offender's self-perception, which in turn, could alter his or her behaviour. Adams (1995, p. 215) argues that expert predictions based on risk will inevitably guide that individual's subsequent behaviour, thereby influencing that which experts are trying to predict in the first instance. Traditional labelling theory, including the concepts of self-fulfilling prophecy, master status and amplification of deviance, is notably absent in the psycho literature and psy expert discussions in DO hearings.

\textsuperscript{120} Burnout occurs when the individual is no longer a high recidivism risk because of age related impediments such as reduced hormone levels and physical disabilities. Interestingly in a 1983 case, the defence expert defined burnout as a stage of insight the offender reaches that is akin to menopause in a woman (DO101, 1983). He did not provide additional information as to what type of insight a woman might gain. The courtroom players appeared satisfied with this definition. For a comprehensive overview of desistance, age and crime, see Sampson and Laub (1993).
In the end, experts offered deterministic opinions that risk would not necessarily change over time. The offender's risk level was not probable; it was defined as unacceptable. Mary Douglas (1992) suggests that we have already witnessed the materialization of this logic in wider arenas of risk assessment application:

The probability theorists who developed risk assessment as purely neutral, objective tool of analysis, must find it is much transformed as it moves into national and international politics. Though the public seems to be thinking politically in terms of comparative risks, the number crunching does not matter; the idea of risk is transcribed simply as unacceptable danger. So 'risk' does not signify an all-round assessment of probable outcomes but becomes a stick for beating authority (p. 39).

INFORMATION AND EXPERT OVERLOAD: THE QUANTITY QUESTION

Judge: "Is there anything you wish to say, before I pass sentence upon you?"
Offender: "It's all been said." (DO106, 1998)

[O]ffences that the person has admitted to but not been charged or convicted are of importance to the risk assessment process. (neutral assessor, DO212, 1999)

Risky Evidence: He said, she said

Observing the sample cases as a whole, it is evident that the assessed degree of offender risk operates, in part, as a function of the amount of information available to the experts. In other words, the more information the expert had at his or her disposal, the more likely he or she was able to find data for risk items for that offender. This relationship is problematic given the massive amount of file data accumulated on a given offender by the Crown.121 In the Crown Files Research Project (CFRP), Bonta, Harris et al. (1996) also observed that, overall, considerable information was available to the

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121 In one case, an expert noted that in order to complete his risk assessment, he reviewed over 2000 pages of collateral information, including over 30 reports from mental health professionals.
Crown attorneys before the DO hearing. All Crown prosecutors surveyed in that study agreed that, compared to normal criminal sentencing, a DO application involves three times or more the amount of work and information. The authors of the HCR-20 explicitly caution experts to be aware that “average judgements of risk will vary positively and monotonically as a function of the number of factors present in a given case” (Webster et al., 1997, p.23). It makes sense that the number of risk factors present in each case will be correlated with the amount of information available for that case.

The Dangerous Offender hearing—which is a sentencing hearing—is an anomaly compared to other hearings in the amount of information brought forward and accepted as evidence. Judges demanded as much information as possible to make a determination. In Jones, a case involving a mentally retarded defendant, Justice Gonthier spoke for the majority: “In the case of dangerous offender proceedings it is all the more important that the court be given access to the widest possible range of information in order to determine whether there is risk, serious risk, to public safety” (p.396).

As such Part XXIV of the Criminal Code, which deals with Dangerous Offenders, relaxes evidentiary laws. For example, in one case included in this study taped conversations about an offender’s fantasies with children—obtained undercover—were discarded at trial because of constitutional issues. They were subsequently allowed at the individual’s DO hearing. Safeguards concerning youth records were not applicable in DO hearings. In the present study, judges and experts considered youth records relevant to the hearing, and if they were available, they were unsealed. Eight-four

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122 Supra note 5, at 2.
percent of the cases I examined involved the use of youth records. Similarly, in 73.6% of the CFRP files, juvenile records were available (Bonta, Harris, et al., 1996).

Defence counsel challenged the unsealing of youth records in a 1998 case. Counsel argued that the Crown coerced the offender to plead guilty to charges of sexual assault that he committed almost a decade ago when he was still a juvenile. According to defence, the Crown told the offender at that time that records would be destroyed in two years because of his status as a young offender. Defence counsel argued that the offender might not have been so quick to plead guilty had he known that the Crown could bring forward those records at a hearing such at this—the DO hearing. Even if judges disallowed youth records, numerous other reports (e.g., school, social services) written while offenders were young and included in the files, usually discussed juvenile arrests and convictions.

Judges and experts also considered suspected criminality and deviant behaviour as relevant to the DO hearing and risk assessment, more specifically. In Gardiner, Justice Dickson affirmed that hearsay evidence is acceptable in a sentencing hearing if found to be credible and trustworthy. The Justice argued that:

> The judge traditionally has had wide latitude as to the sources and types of evidence upon which to base his sentence. He must have the fullest possible information concerning the background of the accused if he is to fit the sentence to the offender rather than to the crime. (p. 414)

Sixty-eight of the hearings examined in this study included reference to the alleged behaviors of the defendant. In the CFRP, 65.5% of the files contained information pertaining to sex offences that had not resulted in a conviction (Bonta, Harris, et al., 1996). DO applications initiated by Crown often contained the phrase “offences that

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123 Supra note 5, at 2.
have been reported, alleged or suggested but not convicted.” Specific examples of information used by the Crown in my sample included:

- ‘jailhouse informant’ testimony for a suspected rape perpetrated by the offender124 (DO202, 1994);
- diary entries regarding thoughts about convictions, evidence of conduct at youth camp, and evidence of other acts which resulted in charges yet pending trial (DO206, 1995);
- alleged assaults when the offender was 16 years old and the victim was 12 years old (DO131, 1998); and
- offender’s in-custody125 writings about deviant sexual thoughts and fantasies (DO132, 1998).

The High-Risk Offenders Handbook for criminal justice professionals, prepared by the Solicitor General Canada (2001), states that DO applications should include information on “any alleged criminal offences that were not the subject of criminal charges,” and that “these could be considered aggravating factors” (p. 9). The handbook warns that allegations should be proven beyond a reasonable doubt. In my sample, in the majority of hearings, this was not the case.

Most judges encouraged experts to consider alleged behaviours and second-hand information in formulating opinions about defendants. The judge in a 1998 hearing ruled that second hand statements are admissible “for the limited purpose of showing the facts upon which the experts relied in forming their opinions” and not for proof of the truth of the facts stated (DO107, 1998). The judge in this case was paraphrasing Wilband,126 the

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124 This suspected rape was the predicate offence listed for the second DO hearing after the Court of Appeal had overturned the first Dangerous Offender designation.
125 In some cases, these writings were treatment assignments required in sex offender programming.
leading authority on second-hand information. In *Wilband*,\textsuperscript{127} Justice Fauteux states:

The value of a psychiatrist’s opinion may be affected to the extent to which it may rest on second hand source material but that goes to the weight and not to the receivability in evidence of the opinion, which opinion is no evidence of the truth of the information but evidence of the opinion formed on the basis of that information. (no para.)

In one case, the judge gave little weight to an expert’s opinion because the expert “simply discounted any evidence that was not a matter of conviction in criminal court” (DO602, 2000). The judge in this case noted that the doctor’s opinion was “ill thought out and in more than one respect failed to take into account in any meaningful way uncontradicted evidence inconsistent with his assessment.” Experts, for the most part, were very explicit in their belief that it was important to consider unconvicted offences as part of the risk assessment process.

Both experts and judges also hypothesized about the intentions and possible criminality of offenders. For instance, the judge in a 1988 case imagines the worst-case scenario:

[The] sexual misconduct of the accused was limited [because of the resistance of victim] but there is no doubt that if the accused had chosen a more compliant victim and the accused was possibly less intoxicated, forcible sexual intercourse would have occurred. It was the resistance of the victim, which was successful for whatever reason, not a change in the accused’s intentions that limited the sexual acts perpetrated upon the victim. (DO225, 1988)

In a similarly accusatory vein, the Crown expert in a 1998 hearing testified: “I doubt very much that the victim is the first women than Mr. R has sexually assaulted, or the last” (DO122, 1998). Discussing and reporting on suspected or hypothesized behaviours inevitably increased the risk status of the assessed individual.

\textsuperscript{127} Ibid.
Even when judges were protective and discounted evidence, the implications of experts knowing this evidence was not considered. For example, speaking about allegations of sexual abuse brought forward by a Crown witness, the judge assured defence in one case that he was “capable of disabusing [his] mind of things not proven” and that he had “faith that psychiatrists won’t find that an offence committed at age 12 is a predictor of dangerousness” (DO244, 1998).

This is a problematic assumption. The fact that many risk assessment instruments use the age at which a first violent incident takes place as indicative of higher risk was not addressed in the court. For instance, the HCR-20 includes a separate item for “young age at first violent incident” which instructs the clinician to rate the offender a ‘2’ on the three point scale, if the incident happened when the offender was under 20 years of age (Webster et. al., 1997, p.31). In the case cited above, how will the expert score this item with the knowledge that when the offender was 12 years old, he might have sexually abused someone? Does the expert also disabuse his or her mind of this information for the purposes of risk assessment?

Most risk assessment instruments allow for the integration of hearsay and allegations. For example, both the PCL-R and the HCR-20 have built-in defaults for this integration. The HCR-20, as outlined in Table 4.6, suggests that the assessor assign a score of ‘1’ if the item or behaviour is possibly present. If the item applies to a certain degree or is a match in some respects but with too many exceptions or doubts to warrant a score of ‘2’, then a score of ‘1’ is also suggested for PCL-R items. If there are uncertain conflicts between interview and file information that experts cannot resolve by a ‘2’ (highest) or a ‘0’ (lowest), the assessor is similarly instructed to assign a ‘1’ (Hare,
The HCR-20 also recommends using "uncorroborated self-reports from asessees to help score items when the revelations are self incriminating, but not when they are self promoting" (Webster et al., 1997, p.16). The authors of the HCR-20 explain that people in forensic settings tend to minimize the extent to which they have harmed others or do not disclose whether they have behaved in harmful ways.

Table 4.6: HCR-20 Three Point Rating Scale

<table>
<thead>
<tr>
<th>Rating</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>No — The item definitely is absent or does not apply.</td>
</tr>
<tr>
<td>1</td>
<td>Maybe — The item possibly is present, or is present to a limited extent.</td>
</tr>
<tr>
<td>2</td>
<td>Yes — The item definitely is present.</td>
</tr>
<tr>
<td>Omit</td>
<td>Don't Know — There is insufficient valid information to permit a decision concerning the presence or absence of the item.</td>
</tr>
</tbody>
</table>

In its entirety, the DO hearing is biased in favour of Crown prosecution in relation to the amount of information or evidence that Crown can forward to warrant a finding of high risk. Additional biases in the DO hearing resulted from information based on allegations, suspicions, youth records and hearsay. Hearsay was often not proven beyond a reasonable doubt. In several cases, judges encouraged experts to consider this information. The template and coding directions for risk assessment tools enabled consideration of this information by experts, which eminently increased the offender's reoffence risk.

128 Dr. Hare, the creator of the PCL-R, developed this coding template. He suggests that there is not much benefit in requiring clinicians to make "fine grained" ratings beyond a scale of 3 points (Webster et al., 1997, p. 20, fn1).
The More the Merrier and the Riskier: Over-representation of Crown Experts

A parallel relationship existed in the DO hearings between Crown experts and reoffence risk; as the number of Crown experts involved in a hearing increased, the perceived risk posed by an offender also increased. This relationship is detrimental to the offender given the disproportionate number of experts in my sample who testified for the Crown in support of a dangerousness decision. The Crown called on or provided evidence from the majority of the other experts who were not directly charged with the DO assessment. Seeing that, defence consistently commented on the use of auxiliary experts by Crown. These experts testified in the capacity of once having treated or assessed offenders. Defence pointed out that Crown expert testimony and reports were necessarily limited because the expert was “providing opinion on a defendant who they hadn't seen in years” (DO218, 1990), or that the expert “saw Mr. S through a one-way glass for an hour and 15 minutes eight years ago” (DO103, 1986). Defence counsel in DO117 disputed that an expert be allowed to testify. The expert last saw the defendant four years ago. Defence cited that “obviously at th[at] time there was no hint of dangerous offender proceedings, so Mr. F was not advised that three or four years later [the expert] may be in court testifying in these proceedings based on what he told [him]” (DO117, 1994).

Defence counsel and defence experts brought to the attention of the court several alleged violations of professional and ethical conduct by Crown experts. For example, defence pointed out that the Crown called psy experts to testify who had treated the offender in the past. Both the American and Canadian Psychiatric and Psychological Association offer specific guidance to practitioners concerning treatment and advocacy.
roles. The *Specialty Guidelines for Forensic Psychologists* (1991), endorsed by the American Academy of Forensic Psychology and adopted with minor changes by the Canadian Academy of Psychiatry and the Law (CAPL),\(^{129}\) advocates that:

> Treating psychiatrists should avoid being expert witnesses or performing evaluations of their clinical patients for legal purposes. A treating psychiatrist providing opinion about a patient in treatment seriously risks destroying the treatment process and thereby causing harm to the patient. This violates a central ethical imperative of all medical practice. (CAPL, 1999, p. 3)

These guidelines suggest that members avoid providing services to parties in a legal proceeding for whom they are treating. They do not explicitly address if experts should provide opinion for legal purposes on clinical patients they have treated in the past. More than 35 psychiatrists who were treating or had treated the defendant were called as witnesses in the hearings I examined.\(^{130}\)

Several experts also played dual roles in the same hearing. For example, doctors who screened and recommended individuals as likely candidates for DO applications subsequently testified in their hearings for the Crown. My research revealed that, in some cases, the Crown employed an expert to conduct a screening assessment. This expert's role was to establish for the Crown whether or not there was enough evidence to constitute a pattern within the meaning of the *Dangerous Offender* provisions (Crown expert, DO116, 1998). The purpose of these assessments was to determine whether

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\(^{129}\) The CAPL is a division of the Canadian Psychiatric Association. For more information on the Ethics Guidelines for CAPL, see their web site. Retrieved January 2003, from www.caplnet.org

\(^{130}\) In one case convened in 2000, the defendant—a potential DO—wrote a letter to psy professionals he had seen while in custody. The letter informed the doctors that they did not have his permission to attend an interview with Crown nor to disclose information resulting from patient-doctor communication. In this case, the court ruled that the offender should not expect confidentiality with psy professionals under contract with the custodial agent.
the defendant would be, so to speak, at a high risk for a DO designation. The Crown subsequently called the screening assessor to testify in seven known cases.\textsuperscript{131}

Yet, the \textit{DO/LTO Assessment Guide} warns that, in order to demonstrate Forensic Psychiatric Services Commission’s neutrality to the court, “[i]n general, any professional who has examined the offender prior to the current assessment should not be assigned to that case” (Eaves et al., 2000, p. vi). Elsewhere, the guide more explicitly warns that prior consultation by Crown officials as to whether DO/LTO proceedings might be appropriate is a form of expert bias that should preclude participation as a neutral assessor (Eaves et al., 2000, p. 7). Whether it is ethical for experts to testify at a hearing for which they have predicted the outcome is a question worthy of investigation by governing associations.\textsuperscript{132}

Seven hearings also involved expert testimony from a psy professional who had previously performed a fitness to stand trial assessment on the defendant. The Crown called such experts in five hearings and defence counsel in the remaining two. The majority of these hearings occurred before 1990. An appeal of a 1988 case helps to crystallize some of the issues resulting from experts playing dual roles in an offender’s assessment, treatment and subsequent hearing. In this appeal, the defence attorney argued that the defendant’s right to remain silent was violated when a Crown psychiatrist, who had examined him to determine fitness to stand trial, then became the DO assessor. The Crown psychiatrist did not inform the defendant that he might use the assessment in subsequent DO proceedings and, because of the nature of the fitness

\textsuperscript{131} Defence counsel in a 1995 case directly asked the Crown expert if he was the individual whom the government (Crown) goes to for a preliminary opinion. The expert replied, “Yes, there’s at least a couple of us—it’s the Crown’s policy that in contemplation of a possible DO proceeding that they ask a forensic psychiatrist to give a preliminary opinion in most cases.” In this case, defence counsel accused the expert of being a “puppet” for the Crown.
proceedings, did not require his consent. Defence maintained that this situation was a violation of the defendant’s rights. The Court dismissed the appeal, reasoning that the defendant knew he was not protected by confidentiality and that after the expert told him the results would be used in court, the defendant chose to speak freely. Although, the defendant was not made aware of the type of court proceeding awaiting him (DO216, 1988).

One might question if it is ethical for the courts to hear evidence from an expert who interviewed a defendant in relation to a completely separate legal issue such as fitness to stand trial. The Canadian Academy of Psychiatry and the Law (CAPL) does not provide explicit guidance on this scenario. The CAPL instructs psychiatrists to notify the individual about any limitations on confidentiality. Psychiatrists are also obligated to disclose for whom they are conducting the examination and what they will do with the information obtained as a result of the assessment (CAPL, 1999). Nevertheless, can experts know that the offender they are treating or assessing will be the subject of a Dangerous Offender status application five years down the road? A full exploration of these ethical issues is beyond the scope of this study but requires further inquiry.

In several cases heard after the implementation of the 1997 legislation, Crown solicited the opinion and testimony of experts, in addition to the court appointed assessor. The *High-risk Offenders Handbook* claims that both the Crown and the defence can call any other experts they feel are relevant and “[a]s a general rule, the defence will almost always get an independent assessment but may not bring this

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132 For a critical article on the incompatibility of clinical and forensic roles, see Appelbaum (1997).
assessment before the judge, and can not be forced to do so" (Solicitor General Canada, 2001, p.7).\textsuperscript{133}

Crown was more likely to call additional experts, especially if the neutral expert reported that there was no need for a DO designation. Alternatively, when experts who had traditionally testified for the Crown and who had a reputation of finding dangerousness were called as neutral assessors, Crown was less likely to solicit the opinion of additional witnesses.\textsuperscript{134} In one case, the court hired as the neutral assessor the expert who did the initial screening evaluation for the Crown.

In sum, Crown experts were over-represented in DO hearings. Crown experts were also more likely than defence experts to play a dual role in the hearings. They were often past treating psy professionals or previous evaluators. Consequently, the court spent a disproportionate amount of time on testimony and reports that supported a finding of dangerousness and high risk.

\textsuperscript{133} The exact mechanics of these instructions are not clear. For example, could a judge decide to hire the defendant's independent assessor as the neutral expert? Who decides what independent assessor will evaluate the defendant? If a list of available experts was constructed to guide court appointments of neutral assessors, who constructed the list (see note 135)? Does the offender, in the majority of legal aid cases, have the absolute right to an independent assessment?

\textsuperscript{134} It was reported that, if Crown does not have experience with or faith in the expertise of the neutral assessor, it is their policy to call an additional expert witness with a "proven track record" for the DO evaluation (Crown representative, personal communication, September 8, 2003). The Crown representative claimed that there were many experts on the neutral assessor "court list" whom Crown had not worked with and were therefore skeptical of their abilities. Furthermore, the representative mentioned several psychologists on the list who were, in his opinion, more academically inclined and ill-suited to conduct evaluations compared to the experienced clinicians Crown had come to rely upon. Several of the academic experts mentioned by the representative were developers and researchers associated with the risk assessment enterprise.
Enabling Non-contact: Risk and Relationships

The positive correlation between risk status, information and experts is particularly problematic given that Crown experts were more likely than defence experts to employ risk assessment instruments. This correlation is further exacerbated by the observation that experts conducted a high number of assessments in the absence of a personal interview with the offender. According to the available file and testimony information, 62% of the experts in the current sample had an opportunity to interview the defendant, whereas 21% did not. I could not find mention of an interview in 17% of the cases. Table 4.7 illustrates an observable pattern in interviewing opportunity and expert counsel affiliation. This pattern is statistically significant ($\chi^2=49.5$, df=2, $p<.01$). Defendants were more likely to grant interviews to defence experts rather than Crown experts.

Crown would point out that when an offender refused an interview, this refusal permitted the court and the experts to form an adverse inference about that offender. Defence, in countering that statement, would alert the court to the Crown experts' reputation for finding evidence of dangerousness or risk in any DO applicant. Due to this reputation, defence counsel would often advise the defendant against cooperation with the Crown expert, implying that an interview would automatically and adversely affect the applicant's outcome.
Table 4.7: Interviewing Opportunity and Counsel Affiliation

<table>
<thead>
<tr>
<th>DO Experts (N=192)</th>
<th>Interview</th>
<th>No Interview</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crown</td>
<td>38%</td>
<td>37%</td>
</tr>
<tr>
<td>Defence</td>
<td>85%</td>
<td>2%</td>
</tr>
</tbody>
</table>

Ironically, some experts—mainly Crown—used the amount of information available for hearings to rationalize an evaluation of the defendant without an interview. For example, in a 1998 case, the Crown expert claimed that the substantial body of prior professional assessments largely compensated for his failure to conduct an interview (DO238, 1998). In DO104 (1996), the Crown expert stated: "I very much doubt that a current direct personal interview would provide any additional material of substantial significance." This same expert in a 1999 case argued: "Given the extent and comprehensiveness of these other professional reports, I felt that the lack of an interview myself, in practice, creates very little limitation in the conclusion that I'm able to reach" (DO114, 1999). However, most Crown experts conceded that without an interview their opinion was limited. They differed in perspective concerning the extent to which the assessment was limited. On the other hand, judges were consistent in their comments regarding the limitations of an expert's opinion if formulated without an interview.

Crown experts also argued that the prediction accuracy of risk assessment instruments was not contingent on interviewing the offender. Table 4.8 demonstrates a pattern of decreasing significance placed on the importance of an interview with a Crown expert ($\chi^2=20.0$, df=4, p<.01). In the last time period, among the 58% of Crown experts
who did not interview the defendant, 70% used risk assessment instruments. Thirty percent of the Crown experts whom defendants granted an interview during this same period employed risk assessment tools.

Table 4.8: Patterns in Crown Expert Interviewing Over Time (N=100)

<table>
<thead>
<tr>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Interview</td>
<td>56%</td>
<td>25%</td>
<td>30%</td>
</tr>
<tr>
<td>No Interview</td>
<td>11%</td>
<td>42%</td>
<td>58%</td>
</tr>
</tbody>
</table>

Most risk assessment manuals recommend but do not require that the assessor conduct an interview before coding items. The PCL-R manual states that: "[v]alid PCL-R ratings may be made solely on the basis of collateral information if there is sufficient high-quality information available" (Hare, 1991, p. 6). In my sample, the data reveal that, as employment of risk assessment tools increased, the perceived need for an interview or the ability to interview a defendant decreased.

Overall, risk assessment enables a belief that interviews are not as crucial or important as once envisioned. The construction of actuarial risk assessment as antithetical to clinical evaluation fosters a perception that prediction is not necessarily contingent on a personal interview. With the advent of risk assessment, the focus shifted to historical information and not current mental state or diagnosis, as derived from an interview.

Defence experts repeatedly commented on the Crown’s tendency to minimize the
need for an interview. In one hearing, a defence expert told the court that he found it "frankly unacceptable" that the expert testified without having interviewed the defendant.

In an earlier hearing in my sample, this same defence expert argued that ethics do not allow experts to give opinions without a direct interview unless they emphasize limitations of opinion throughout the entirety of the report and testimony. The expert then suggested that several experts who participate in British Columbia DO hearings violate these ethics and thus present unreliable assessments in court (DO117, 1994). The Canadian Academy of Psychiatry and the Law (1999)\textsuperscript{135} states:

\begin{quote}
While some authorities would bar an expert opinion in regard to an individual who has not been personally examined, it is the position of the Academy that, if, after earnest effort, it is not possible to conduct a personal examination, a general opinion may be rendered based on other information. (p.3)
\end{quote}

The academy statement sides with the position of the Crown expert. Another expert in 1998 argued that the Canadian Psychiatric Association held that it is not proper for a psychiatrist to offer a substantial diagnosis without interviewing a patient (DO131). The question thus becomes: Is an opinion on the risk of reoffending or the presence of psychopathy considered a substantial diagnosis? Hare (1999) himself argues that the PCL-R is a diagnostic instrument, therefore implying that psychopathy is a diagnosis.\textsuperscript{136}

\textsuperscript{135} Supra, note 129, at 166.

\textsuperscript{136} Confusion about the PCL-R and its status as a risk assessment instrument tool and the appropriateness of its application without an interview was furthered by a recent Federal Court of Canada decision [Inmate Welfare Committee, William Head Institution v. Canada (Attorney General) (2003 FC870)]. The Inmate Welfare Committee applied for judicial review of a Commissioner's Directive (CD 803) that allowed risk assessment (including the PCL-R) to be done without the offender's consent. The committee submitted that this directive violated the Charter and Canadian Bill of Rights. The court ruled that a risk assessment which is done for the protection of the public is not the same as a medical or psychological assessment conducted for the benefit of the offender or to establish a diagnosis (mental health procedures) (para. 10). Due to this distinction, the court reasoned that the directive in question was not a violation of inmate rights. The court specifically acknowledged that, although the PCL-R was developed for psychodiagnostic
In sum, the data in my sample clearly illustrated the Crown's ambition to gather as much expertise and information as possible to support a finding of high risk. The use of allegations and loosening of evidentiary rules furthered this partiality in hearings. Crown's disproportionate use of risk assessment, along with defendants' reluctance to grant Crown experts interviews, made this bias additionally apparent. Taken together, these influences resulted in a build-up of negative prognostic opinion, perceptions of high reoffence risk and a shift in the way the courts envisioned justice. The focus on risk assessment and actuarial logic has led to the unquestioned use of information and diminished importance placed on face-to-face interaction with the subject. The DO hearing becomes an exercise in establishing “flows of population” based on the abstract collection of risk factors deemed to be indicative of dangerousness (Castel, 1991, p. 281).

(IN)VALID EVIDENCE AND (UN)RELIABLE INFORMATION IN DANGEROUS OFFENDER HEARINGS

Offender to Crown Expert: Why should I let you go on a fishing trip? (DO101, 1983)

_Tailoring Information: Subjectivity and the Expert ‘Fit’_

Several experts in the sample accused other experts of sifting and sorting through interview and file data to code risk factors. Defence counsel also argued, in more than one case, that the DO proceedings were designed to produce a particular result—a designation of dangerousness. According to several defence attorneys, Crown ensured that both the quality and quantity of information amassed about the offender were

purposes, "[it] can be used to predict recidivism which in turn, can be use to measure the degree of
negatively biased. In one case, a defence lawyer explicitly argued that the DO application should be quashed because the “Crown ploughed each successive document into the next one,” thereby disseminating “material that has germinated into the reports sought by the Crown” (DO158, 2000). The lawyer warned the judge that the Crown had sent selected materials and “tailored evidence” to the assessors.

Because of the dual roles played by experts, and the adversarial nature of the DO hearing, several cases contained in the current sample involved both defence and Crown attacking the subjectivity of each other’s experts. Overall, in the DO hearings, threats to professional objectivity hinged on the following factors: whether the doctor usually worked for only one counsel; their perceived faith in either clinical or actuarial risk assessment techniques; personal bias against individual offenders or certain kinds of offenders; and their overall perspective on the indeterminate sentence option.

For instance, in DO117 (1994) the defence expert is directly critical of the Crown expert, stating that no psychiatrist should be a “psycho-cop.” Another defence expert accused the Crown psychiatrist in a 1996 case of making sweeping conclusions about an offender not supported by data or an interview. He called the expert the “Crown’s hit man” for DOs. He faulted the Crown expert for making significant errors in diagnosis and saying outrageous statements about the offender (DO150, 1996). The Crown psychiatrist, in DO103 (1986), accused the defence expert of being an advocate for the offender and not an “objective” witness. In another case, in an effort to discredit the defence, the Crown revealed that a previous risk assessment conducted by the defence expert was misinformed. The Crown stated that the expert had assessed an individual as ready for parole and the offender, once released, committed murder.

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risk that an offender poses to society” (para. 14).
Defence experts contended in several cases that Crown experts had selected a prognosis or diagnosis first (e.g., psychopathy) and then sought out information to support that finding. Douglas, Cox and Webster (1999) suggest that actuarial risk assessment enables this self-fulfilling process by leading experts to seek out confirmatory rather than disconfirmatory evidence in support of a high-risk designation.

A case in point: the following illustration builds on the Robert Fox case study presented at the beginning of the chapter, and incorporates evidence found in the DO files surrounding subjectivity in scoring and selective information gathering. Suppose that Crown had asked Dr. Peters to conduct an evaluation of Rob and testify at the upcoming hearing. Dr. Peters complies and Crown sends him Rob's file. Dr. Ramsey starts his evaluation with the Violence Risk Appraisal Guide (VRAG). Experts using this tool calculate an actuarial score based on twelve predictor variables. Elementary school maladjustment is one such predictor variable (see Table 4.9).

<table>
<thead>
<tr>
<th>Elementary School Maladjustment</th>
<th>Scoring</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Problems</td>
<td>-1</td>
</tr>
<tr>
<td>Slight (minor discipline or attendance) problems</td>
<td>+2</td>
</tr>
<tr>
<td>Severe (serious discipline and/or attendance) problems</td>
<td>+5</td>
</tr>
</tbody>
</table>

Dr. Peters has two elementary school reports on Mr. Fox. Rob moved and transferred schools when he was a child. One report describes Rob as a very quiet child and a cooperative student. It mentions Mr. Fox's reluctance to participate in class but
notes his consistent effort in completing homework and attending class. The other report—written two months prior—warns Mr. Fox’s mother of his continued truancy and behavioural problems. He is described as a schoolyard bully who averages at least two fights every week. The report continues: “Robert presents a serious dilemma for school administrators as all possible disciplinary action and remedies have been exhausted.”

Dr. Peters decides to assign a score of +5 to Rob on the elementary school maladjustment item even though he is unable to ask Rob about his school experiences. Rob’s attorney had advised him against speaking to the Crown expert for his DO hearing. Instead, Dr. Peters surmises that Rob’s shyness and cooperative attitude in the latter school were a result of being uncomfortable in a new institution. He hypothesizes that Rob would act out, as he did in the past, once he integrated into the new school. Yet, defence experts would often formulate opposite interpretations. For example, in relation to this case, perhaps Rob was reacting to his mother’s abusive partner in the home during his first school experience. When his mother left the relationship, the family moved and Rob’s new school experience was influenced by the absence of conflict in the home. This expert could just as easily code Rob a ‘-1’ or possibly even a ‘+2’ on this item. The difference in the two interpretations results in a three to six point variation in scoring.

The structure and content of risk instruments add to the disconfirming bias of risk assessment. Risk instruments neglect protective or mitigating factors that might lower the risk of reoffence. As one defence psychiatrist ironically stated in a 1998 case, using actuarial methods runs the increased risk of confirming a negative bias (DO131, 1998, my emphasis). In fact, experts rarely considered prosocial behaviour in the context of

137 Reproduced from Webster et al., (1994, p. 36).
the DO hearing. In an exceptional case in 1998, the psy expert noted that good social skills, willingness to engage in treatment and the presence of a therapist in the community willing to work with the defendant lowered his risk of reoffence (DO132, 1998). He cautioned, however, that these factors would only reduce risk by a maximum of 10%. The expert did not share how this risk reduction was calculated but, nonetheless, the percentage carried a degree of confidence and certainty in the hearing.

Observation of the sample cases as a whole revealed that both Crown and defence experts, prior to the legislation amendment in 1997, regularly accused their opposing counsels of acting as "hired guns." Coles and Veiel (2001) note that it is common for a psy expert to take pride in knowing how to write a "typical" defence or Crown report. They state that experts who develop a reputation for typical reports derive a substantial amount of their annual income from testifying in court (Coles and Veiel, 2001, p. 619).

The CAPL's (1999) endorsement of the AAPL Guidelines for the Practice of Forensic Psychiatry addresses the reality of this bias:

The adversarial nature of our Anglo-American legal process presents special hazards for the practicing forensic psychiatrist. Being retained by one side in a civil or criminal matter exposes forensic psychiatrists to the potential for unintended bias and distortion of their opinion. It is their responsibility to minimize such hazards by carrying out their responsibilities in an honest manner striving to reach an objective opinion (p. 2).

The CAPL (1999, n.p.) warns that the impression of psy bias must be "assiduously avoided."
Second-hand Information and Discourse Accretion

This section addresses problems brought on by the breadth of documents and reports involved in a typical DO hearing. The examples and illustration I provide demonstrate that risk assessment often involves relying on invalid and unreliable information. Both the validity and reliability of this second-hand information was, for the most part, unquestioned by experts. For example, in my sample I found that experts relied heavily on the reports, diagnoses and previous scores of others to complete risk assessments. PCL-R scores are required to complete the HCR-20, SVR-20 and VRAG, among others. Scores obtained from previous reports often went unquestioned and subsequently replicated. A neutral assessor in 1999 explained to the judge that he did not code the PCL-R because he expected to arrive at the same conclusion as another doctor who had scored the offender earlier (DO302, 1999). The developer of the PCL-R cautions assessors about the possibility of having to deal with unreliable information. Less comforting is his instruction that items should be omitted only when “absolutely necessary” and not because the “rater is uncertain about what score to assign” (Hare, 1991, p. 7, emphasis in original).

Many risk assessment tools also require a mental health diagnosis. Yet, the DO/LTO Assessment Guide warns that the “wide array of diagnoses” available in DO files “often do not accord with any published or recognized scheme” (Eaves et al., 2000, p.10). The authors of the Guide note that what is remarkable about the files is perhaps “the extent to which diagnoses are offered quite unsupported by systematic study” (Eaves et al., 2000, p.10). Nonetheless, the SARA explicitly instructs non-mental professionals to code these items by referring to existing psychological or psychiatric
In several hearings, experts noted elementary school reports or youth detention records which described offenders as exhibiting a wide range of disorders from hyperkinesis to Attention Deficit Disorder. Subsequently, experts used these reported conditions to solidify a diagnosis of entrenched deviance and personality disorder. Experts did not challenge the source of these reports or the validity of the diagnoses.

In the following scenario, by referring to the previous case illustration of Mr. Fox, I demonstrate an expert's unquestioned use of information. Dr. Peters assessed Mr. Fox using the HCR-20. The HCR-20 requires an expert to code 20 items on a three-point scale (see Table 4.6, p. 162). Major mental illness is one of the historical items rated on the HCR-20. Dr. Peters observed in Mr. Fox's file that at various times professionals diagnosed Rob as manic and suffering from disturbances of thoughts and affect. Various correctional staff also described Rob's moods as unpredictable and fluctuating. During the interview, Dr. Peters noted that Rob did not appear to be suffering from an active mental disorder. Dr. Peters consults the manual for coding the HCR-20 item—Major Mental Illness—which instructs that a score on this item be based on history and not necessarily depending on whether the disorder is currently active or in remission (Webster et al., 1997, p. 39). Dr. Peters decided to give Rob a score of '2' on this item given the consistent file observation of manic moods and diagnosis of mania by a doctor who he assumed was using the DSM.
Another expert, Dr. Leyton, assessed Rob Fox in prison after he was indeterminately sentenced. He coded this item on the HCR-20 as a '0'. Dr. Leyton was unsure whether the doctor’s diagnosis cited in the file was valid or reliable, or even if the doctor, who appeared to be a general practitioner, had experience with DSM diagnosis. He considered the descriptions of moodiness in the corrections reports but did not place great weight on the diagnoses provided by correctional staff. Dr. Leyton then interviewed Rob, and as anticipated, he could not confirm a diagnosis of manic mood disorder. A two point difference now exists between the final scores obtained on the HCR-20 between Dr. Peters and Dr. Leyton. This vignette reveals the subjectivity inherent in coding risk assessment and resulting inconsistencies in scoring.

In the DO hearings, there was not a complete disregard for the quality of information relied upon. Several cases in the sample included instances where an expert disputed an earlier diagnosis made by another professional. These exceptions were largely limited to defence experts’ critique of previous assessments. For example, a defence expert in a 1990 case argued that he usually graded or evaluated other assessments based on his knowledge of the bias or reputation of the clinician who produced the report. In DO218 (1990), the defence expert alleged that the Crown expert’s approach to the proceedings was unprofessional. As a result of the censure, the judge found it “necessary not only to closely examine the evidence of these experts but also to review the evidence of the witnesses upon which the experts relied on for opinions.” The adversarial nature of this hearing worked to ensure that the judge scrutinized the reliability and validity of the evidence. In those cases, the judge would direct experts to outline explicitly their scoring methodology, as well as to present what
information they relied upon to obtain each score.

Overall, consistency in previous reports was valued by experts and was used as an indication that limits on the reliability and validity of their opinion were likely minimal. Again, we see technocratic rationality in operation. Experts perceived consistently reproduced results in reports as indicative of the reports' accuracy. Experts did not question, for the most part, whether reliability or consistency over time was a result of unquestioned replication of results, or was a product of what I label discourse accretion.

Discourse accretion is the build-up of diagnosis and evaluation throughout time. This build-up appears to be a common feature in DO hearings. Experts make diagnoses, which other experts and staff transferred into other reports to the point where the original source is lost and in the majority of cases, the source goes unquestioned. The result was the advancement of information as fact on the sole basis that it had survived inclusion in a chain of documents or reports. Recognizing this tendency, the DO/LTO Assessment Guide warns that, in many DO files, errors entered by experts and other staff are carried forward from one report to the next. The guide cautions experts to be attentive to this situation "given that such errors can result in offenders being placed in the wrong risk categories [and] such errors can obviously do the individual under assessment great harm (or put society unduly at risk)" (Eaves et al., 2000, p.8).

The recent case of Neve,\(^\text{138}\) at the Alberta Court of Appeal, addressed problems associated with the use of secondary source information, discourse accretion and expert opinion. Lisa Neve, a 21 year old female defendant, was the second woman in Canada whom the courts declared a Dangerous Offender. The Court of Appeal subsequently

\(^{138} Supra, note 2 at 2.\)
overturned the designation. Its decision addressed the propensity of DO hearings to be biased against offenders. In this ruling, the Court instructs judges to use defined criteria to evaluate expert testimony in an attempt to address this bias. These criteria include, among others, the: specific and precise documents used by the psychiatrist to review the case and formulate assessment (e.g., institutional records); consideration of the strengths and weaknesses of those documents and consultations that experts relied upon; and, specific and precise method used and information relied upon in coming to an opinion. The full impact of these instructions was not readily apparent in the hearings I examined that took place after the Neve decision. However, in the next section, I present further evidence supporting the conclusion that experts practice risk assessment contrary to these requirements outlined in Neve.

THE INVISIBILITY OF RISK ASSESSMENT, PROFESSIONAL STRUGGLE AND THE COMMODIFICATION OF EXPERTISE

Besides evidence of misinterpretation, discourse accretion, negative bias and technocratic rationality associated with risk assessment, a few other patterns emerged in the DO hearings and files. For example, contrary to the evaluation criteria for psychiatric testimony presented by the court in Neve, risk assessment is normally offered without context in DO hearings. Precise and specific instructions on how experts performed risk assessments, including how they coded items, were observably absent. Instead, the experts cited the probability of reoffence and the PCL-R score in one or two paragraphs
and concluded with a statement about the treatability of the offender. A report or testimony will often read something like this:

Mr. C's VRAG score fell into the sixth of nine risk categories. Offenders with similar scores have a 44% probability of violently reoffending within seven years of release, and a 58% probability of reoffending within a 10 year period. On the SARA, Mr. C showed clear evidence for a high proportion of the risk factors (16/20). The suggested guidelines for summary risk ratings from the SARA manual indicate that offenders similar to Mr. C represent an EXTREMELY HIGH risk (the highest risk rating) to commit spousal violence in the future (DO602, 2000, emphasis in original).

What constitutes clear evidence, and how experts obtained these scores are less obvious. There were very few instances where an expert would methodologically outline how he or she had scored an individual or coded each risk item. Interpreted as the objective truth, experts actively defended the final actuarial or risk score, regardless of the subjectivity involved in the process of coding. In the DO hearings, experts minimized discrepancies in scoring and coding between experts. According to these experts, differences in coding would “tend to average out” and the total score would fall within certain limits.

Yet, as previously chronicled, the only specific evidence of scoring was prompted by the critique of Crown experts by defence experts or by disparate scores experts obtained in their assessments of an individual offender. Incidentally, Hare notes on his Web page that both prosecuting and defence attorneys are participating in PCL-R workshops. He suspects that expert witnesses will face increased scrutiny of their PCL-R scoring by attorneys. However, this type of cross-examination, for the most part, did not materialize in my sample of DO hearings.

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The invisibility of evaluation is paradoxical because—compared to clinical judgement—risk assessment was put forward as a more transparent and accountable process (e.g., Webster, 1998; Broadhurst, 2000). Still, I have witnessed the use of risk assessment as a trump card operating to solidify opinions in DO hearings. Experts were not challenged to reveal what was in their hand, so to speak, that predicated their final risk score. Instead, the scores emerged from a 'black box' calculus characteristic of risk assessment.

The implementation of the 1997 DO legislation and the neutral assessor further exacerbated the problems associated with the invisibility of the risk assessment process. At first glance, a neutral assessor might appear well suited to eliminate the bias present in earlier DO hearings. Yet the scenario that in fact emerged from the 24 cases where a court ordered expert was called was one in which the expert, barring additional Crown expert witnesses, could assess risk with impunity. Contrary to Hare's prediction detailed above, the absence of both a Crown and defence expert muted court debates surrounding the utility and accuracy of risk assessment. This observation is even more troubling, given that 59% of the neutral assessors employed risk instruments.

Psychologists were overrepresented among neutral assessors compared to the total sample of experts (26% versus 13%). Perhaps the court was acting with fiscal responsibility in mind since it appeared that the average psychologist charged less than a psychiatrist for court assessment. The alternative explanation is based on the

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140 One could also envision a situation, where interviewing the offender becomes less problematic because of the non-adversarial role of the expert. In the current sample, 18 out of the 24 neutral assessors secured an interview with the defendant.

141 Several files still contained billing information for experts who testified at the DO hearings. In the majority of cases, psychiatrists appeared to charge more than psychologists for expert assessments. In an informational interview I conducted with a Crown representative, it was
observation that psychologists who testified as neutral assessors in DO hearings disproportionately employed risk assessment tools in their evaluations (71%). Perhaps the court, influenced by the need to expedite hearings, seeks those experts—mainly psychologists—who employ actuarial modes of risk assessment. Or, psychologists may be influencing courts to adopt actuarial assessment in the most recent manifestation of the struggle between psychiatry and psychology for the authority to diagnose criminals (Rafter, 1997).

There is paucity of research on possible sources of advocacy or resistance to risk assessment methodologies. Similarly, study has not adequately addressed the contours of professional struggle that have accompanied the penetration of risk in the forensic psy discipline. Heilbrun, Philipson, Berman and Warren (1999) interviewed 55 clinicians in one of the only empirical studies I found that addresses psy professional resistance to actuarial risk assessment. The study revealed that many clinicians were reluctant to offer predictions of violence based on actuarial assessment because they felt that the state of research did not justify using specific numbers and being so precise. Whereas other researchers in the psy disciplines claim that clinicians’ resistance to risk assessment results from an uneducated reluctance to adopt new methods or a general unawareness of improved methods:

Research does not affect the training of psychiatrists, psychologists, or other mental health professionals to any appreciable extent. Sometimes sitting in court watching mental health professionals being cross-examined it is hard not to wonder why clinicians do not avail themselves of easily found knowledge. (Webster et al. 1997, p. 1).

revealed that the Crown pays psychiatrists almost twice the amount paid to psychologists for expert testimony (personal communication, September 8, 2003).
Clinicians, in turn, accuse researchers of not appreciating the complexities and practical impediments in conducting risk assessments (Webster et al., 1997, p.1). Douglas, Cox and Webster (1999) argue that opposition to risk assessment is a function of the mutual disdain and resulting distance between researchers and clinicians. These authors document a historical unwillingness of the two professions to reconcile differences in opinion about the ability of psy experts to predict future behaviour.

In my sample, a unified front of resistance to risk assessment is notably absent. Psychologists in the sample, who were inclined toward research and the development of risk tools, disproportionately employed these instruments. Still, resisting actuarial logic myself, I observed that the most favourable opinion and advocacy of risk assessment came from a few clinicians operating in DO hearings. Moreover, a few psychologists in the sample espoused the most unfavourable evaluations of risk assessments. Therefore, the hypothesis that resistance to risk assessment is a function of clinicians' lack of awareness or undereducated opinion or aligned professional status oversimplifies the penetration of risk assessment in DO hearings.

Instead, the evidence suggests that one could explain advocacy or resistance to risk assessment more appropriately using Kirk and Kutchins's (1992) model of political decision-making, proposed in relation to the DSM. Their model examines the role of vested professional and political interests in the creation and marketing of the DSM. A full exploration of factors associated with resistance or advocacy is beyond the scope of this study; however, a few patterns did emerge that would support a more political model as outlined by Kirk and Kutchins. For instance, in my sample, epistemological faith in prediction did not appear to be a function of researcher versus clinician role; or
psychologist versus psychiatrist status. Instead, experts' faith in actuarial prediction was often associated with their philosophical position on the indeterminate sentence. Experts who were critical of the DO legislation and indeterminate sentence were less likely to advocate prediction and the risk assessment methodology.  

Furthermore, Crown experts were more comfortable with actuarial prediction compared to those experts affiliated with defence. The adversarial nature of the court system could lead Crown experts to more readily adopt methods of assessment that have the reputation of producing a high risk offender and therefore a dangerousness designation.

In keeping with an explanatory model that acknowledges stakes in the development of diagnostic schemes, experts in my sample who were less likely to advocate risk assessment commented on the intentions of those who did. They accused these psy professionals of being self-interested and motivated by profit. Steinitz (2001) writes in her study on psychopathy that "the market for instruments such as the PCL-R is both competitive and richly rewarding, and the commodification of risk assessment lends important dimensions to this trend" (p.105). She cites a defence psychiatrist's opinion expressed in DO237 (1998): "[M]ost of these authors review each others' work and all report them as being 'you must go out and buy it' ... even the most robust of these, the Hare PCL, [has] become a commercial enterprise and that's one of the unfortunate things, that once they become commercial enterprises it's hard to see them as research instruments purely" (as cited in Steinitz, 2001, p.105).

142 During the informational interview I conducted, the Crown representative referred to some of these experts as "independent witnesses" not affiliated with Crown or the Psychiatric Services Commission (personal communication, September 8, 2003).
Several psy experts in the current sample also remarked on how risk assessment developers expected professionals to enroll in training workshops and purchase tools and manuals from a distributor, adding that the assessment kits themselves are dear in price. One defence expert felt that "[t]he PCL-R and the 30 cut-off are a sale" (DO151, 1994). A judge in a 1994 case appended the PCL-R to the back of his written reasons for the DO hearing. Counsel for Dr. Hare later informed the judge that the checklist was protected by legal copyright and should not be available for public consumption. Counsel for Dr. Hare was presumably acting on concerns surrounding issues of ownership, illegal reproduction and continued training enrollment, quite apart from an admirable attempt to ensure the validity and reliability of the test by controlling its use. Steadman (2000) acknowledges the politics associated with the risk assessment when he calls for a "commitment [by psy professionals] that minimizes personal and professional competition in favour of scientific and clinical advances to improve the lives of the disadvantaged people who may benefit from our services" (p.270).

CONCLUSION

An overview of the use of risk assessment tools in a sample of Dangerous Offender hearings has revealed an increasing reliance on these tools among experts charged with DO evaluations. In the 1980s, the notion that psychiatry could not predict dangerousness became firmly established in the minds of the public and the court. Discussions regarding the risk of reoffence started to enter DO hearings in the late 1980s and early 1990s. Risk discourse displaced articulations of threat, evil and dangerousness despite its fundamentally similar focus on the prediction of future
behaviour. Researchers created a space for the definition and operation of a supposedly superior and objective mode of prediction (re)introduced as the actuarial prediction of the risk of reoffending. A certain class of psy professionals, mostly researchers, constructed actuarial risk assessment as a superior alternative to the subjective clinical model of dangerousness prediction. With the introduction and solidification of risk assessment, focus on the identification of reoffence risk replaced questions surrounding the ability of psy experts to predict dangerousness.

Focusing mainly on cases between 1990 and 2000, I have presented several patterns and emerging trends associated with the use of risk assessment in DO hearings. The PCL-R and the resulting determination of psychopathy became fixtures in the DO hearing by the mid-1990s. Experts, mainly Crown affiliated, extolled the ability of the PCL-R and other risk assessment tools to accurately evaluate the risk of reoffending. Other experts, mostly acting for defence, resisted the application of risk assessment and actuarial logic. Questions, which in the 1980s had been directed at the clinical prediction of dangerousness, resurfaced in the 1990s regarding the issue of actuarially predicting risk of reoffence. The problems raised included: ambiguities pertaining to the meaning of risk scores; inattention to unique individual and dynamic risk factors; misapplication of tools; and focus on negatively biased information. However, technocratic rationality prevailed over these questions. In the end, the invisibility of the risk assessment process made challenges to the tools difficult.

Many factors contributed to the hearings’ evident bias towards a ruling of high risk: the Crown’s use of experts in a dual capacity; discourse accretion; a lack of interview contact; and the over-representation of Crown experts and information. In the
end, the cards were stacked against the defendant, so to speak. The defendant's master status became that of a high-risk offender, a label that acts to structure all subsequent decisions. Chapter 5 will unpack the construction of the high-risk offender in the context of the DO hearing. It challenges the assumption that risk knowledge and expertise are new and improved.
CHAPTER V

THE EMPEROR’S NEW CLOTHES: EXPERT (DE)CONSTRUCTION OF HIGH-RISK DANGEROUS OFFENDERS

[W]ords have profound memories that oil our shrill and squeaky rhetoric... That is why the benign and sterile sounding word ‘normal’ has become one of the most powerful ideological tools of the twentieth century (Hacking, 1990, p.169).

The belief that risk assessment is objective ignores the human component of the assessment process and obscures the social construction of the high-risk offender. In this chapter, I will demonstrate further how subjectivity is involved in determining who is considered high risk and dangerous. In this sense, risk assessment constructs objectivity by imposing a mechanical framework onto subjective judgements. Stories of risk, I discover, sustain the creation of the dangerous offender by employing the same norms and ideologies that have identified the sexual psychopath or monstrous criminal of days past (Freedman, 1987; Rafter, 1997; Pratt, 2000a). In those cases, the expert identified the offender using patriarchal, classist and racist assumptions that surround the notions of citizenship, families, relationships and sexuality. Enabled by risk, assumptions about normalcy and morality are left intact in today’s DO hearing, facilitated, in part, by the invisibility of the risk assessment process.

A solid constellation of risk factors emerges from the DO files in my sample. Extralegal factors such as remorse, responsibility, employment status and an assessment of psychopathy or mental disorder were important determinants of risk in the DO hearings. Table 5.1 presents what experts considered the most frequent
characteristics of dangerousness and a high risk of reoffence. In subsequent sections of this chapter, I examine these factors and detail how they operate to produce and discipline the subjects of DO hearings. This examination will involve looking at how risk assessment operationalizes and obscures extralegal factors, and to lesser degree legal factors. I will also question whether the concept of risk has shifted thinking about dangerousness—and if so, in what ways?

Table 5.1: Legal and Extralegal Factors Considered Constitutive of Dangerousness

<table>
<thead>
<tr>
<th>Factors Associated with Dangerousness Across Files</th>
</tr>
</thead>
<tbody>
<tr>
<td>empathy and remorse; acceptance of responsibility</td>
</tr>
<tr>
<td>diagnosis of psychopathy</td>
</tr>
<tr>
<td>insight into offending; intelligence</td>
</tr>
<tr>
<td>sex offending; homosexual pedophilia</td>
</tr>
<tr>
<td>age and burnout</td>
</tr>
<tr>
<td>childhood instability and family dysfunction</td>
</tr>
<tr>
<td>criminal history and revocation</td>
</tr>
<tr>
<td>antisocial behaviour; diagnosis of antisocial personality disorder</td>
</tr>
<tr>
<td>employment and relationship instability</td>
</tr>
<tr>
<td>resistance to treatment; unavailability of treatment</td>
</tr>
</tbody>
</table>

For comparison purposes, it is useful to examine findings in the Crown Files Research Project (CFRP). In this study, Bonta, Harris, et al. (1996) asked 21 Crown prosecutors a series of questions. They asked the prosecutors to describe the circumstances of the offence and the offender that prompted a DO application and to
identify which characteristics, in particular, they thought indicated dangerousness. Table 5.2 presents the factors they identified alongside the percentage of attorneys who thought each factor was significant. The results of the comparison indicate consistency in Crown and expert opinion in relation to the importance of sexual offending, child victims, psychiatric diagnosis, treatment issues, criminal records and revocation. Consistency is also evident with regard to those factors that are of minimal influence in defining dangerousness including degree of harm and previously served time. Crown opinion, ascertained by the CFRP, largely conforms to the patterns I discovered in expert opinion on factors indicative of dangerousness. The result provides insight into a generic model of how the Crown and experts perceived and defined Dangerous Offenders.

Table 5.2: Important Factors for Initiating Dangerous Offender Applications (N=21), According to Crown Attorneys

<table>
<thead>
<tr>
<th>Offence Characteristics and Circumstances</th>
<th>%</th>
<th>Characteristics of Offender</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>sexual offence</td>
<td>86</td>
<td>criminal record</td>
<td>67</td>
</tr>
<tr>
<td>child victim</td>
<td>48</td>
<td>psychiatric diagnosis (e.g., APD)</td>
<td>62</td>
</tr>
<tr>
<td>violent offence</td>
<td>29</td>
<td>prior treatment efforts failed</td>
<td>29</td>
</tr>
<tr>
<td>reoffended while on parole</td>
<td>24</td>
<td>conviction for similar offences</td>
<td>29</td>
</tr>
<tr>
<td>repetitiveness/number of victims</td>
<td>24</td>
<td>previously served time</td>
<td>19</td>
</tr>
<tr>
<td>brutal nature of attack</td>
<td>19</td>
<td></td>
<td></td>
</tr>
<tr>
<td>inability of Parole Board to keep dangerous offenders incarcerated</td>
<td>19</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

143 Adapted from CRFP (1996).
SOWING THE SEEDS OF DANGEROUSNESS: PAST BEHAVIOUR IS THE BEST PREDICTOR OF FUTURE BEHAVIOUR

When you have a track record like Mr. F basically nothing will surprise me, you will have further acts of aggression. (Crown expert, DO129, 1997)

We are really back to what you said earlier, and that is the more that you have done it in the past, the greater chance of you doing it in the future ... in that respect, risk assessments of the four experts are of assistance, but are not determinative. (Judge, DO302, 1999)

As evidenced in the above quotes, the consensus among experts and judges in DO hearings was that past behaviour is the best predictor of future behaviour. As such, the criminal records of offenders suggested, in part, that they would inevitably reoffend. In cases where offenders had short criminal histories other information sources such as alleged or suspected criminal behaviour, provided evidence of a pattern of entrenched criminality.

In the hearings, experts also used youth records, convictions and, more generally, childhood behaviours to demonstrate entrenched criminality and patterns of prior violence. A defence expert in DO131 (1998) pointed out “the most powerful predictor of future violence is if somebody’s first violent offence occurred at 20 years [of age] or less.” Considering this, experts often commented on the violent propensities demonstrated by the offenders at a young age (e.g., 4-10 years old). In some cases, experts reviewed what they perceived to be an offender’s antisocial behaviour during infancy (e.g., DO600, 1999). In DO241, an expert noted that the offender had committed theft and defaced pictures of nude women at the age of two and a half (DO241, 1994). Throughout the hearings, experts consistently viewed dangerousness as inherent in persons, suggesting that the Dangerous Offender was a “bad seed,” and perhaps the result of faulty genetic material.
In keeping with the perceived importance of past behaviour, the majority of risk assessment tools measure the offender's criminal or antisocial history. Several items in the PCL-R codify criminal history as indicative of higher risk. For instance, item 20 on the PCL-R—Criminal Versatility—"describes an individual whose adult criminal record involves charges or convictions for many different types of offenses" (Hare, 1991, p.28). The manual instructs assessors to count all offences on the individual's record. If the offender has committed six or more types of offences as outlined in the prescribed categories, then the highest score of '2' applies. By exploring the DO files, it was revealed that experts would often use suspected offences to code this item. Item 18—Juvenile Delinquency—includes observation of both charges and convictions for criminal and statutory offences perpetrated by the offender aged 17 and below (Hare, 1991, p. 27). The VRAG requires experts to assign a score to all criminal charges for non-violent offences to yield a single history score for the same (Webster et al., 1994, p. 43).

Experts can also use the criminal history of offenders to score other items. For instance, experts can measure Pathological Lying—item 4 on the PCL-R—from an individual's "conflicting accounts of crimes," which may result from the expert's comparison of the actual criminal record to that of the offender's version. If experts find discrepancies in the accounts, the PCL-R manual suggests they be resolved in the following manner:

If the individual admits to more offenses than are contained in the files, or if there are no files, accept the interview information as valid. If he admits to fewer offenses in the interview than the files indicate, accept the files as valid. If he denies any other offenses and no collateral file information is available, omit the item. (Hare, 1991, p. 28)
With this item, experts gain information about both the potential for deception and the offender's past behaviour. Item 5 on the PCL-R—Conning/Manipulative—also uses the type of crime committed by an offender to assess risk. To score this item, the assessor is told to look for, among other things, a record of criminal charges or convictions for fraud, embezzlement, impersonation, etc.\textsuperscript{144} (Hare, 1991, p. 20). Experts can also use criminal records as a source of information for Poor Behavioral Controls andIrresponsibility—items 10 and 15, respectively.

In sum, experts variously used the criminal record of the offender, whether official or alleged, to indicate a high risk to reoffend. Risk assessment tools codify the belief that past behaviour is a predictor of future behaviour. As such, the criminal record becomes an invaluable source for the process of risk assessment, in addition to its more obvious use by experts to describe entrenched criminality.

(Re)Pathologizing and Depoliticizing: Psychiatric Diagnosis and Other Mental 'ills'

The experts in my sample equated a psychiatric diagnosis with high risk and dangerousness, as did the Crown prosecutors. Experts diagnosed almost all the offenders in the files that I studied with some type of mental illness or personality disorder specified in the DSM. In earlier cases during the 1980s, before the penetration of risk thinking, experts tended to explain dangerousness in terms of disorder or illness. They connected sex offending to pathology such as sexual sadism or pedophilia. This pattern of attribution was instrumental in two ways. First, experts ensured a role in the

\textsuperscript{144} The use of etc. makes it easy for experts to infer—subjectively—that any crime could be conceptualized as conning and manipulative.
determination of dangerousness by enlisting the DSM vocabulary and the process of diagnosis. If the criminality was a result of pathology, then experts could treat and potentially cure the offender. Second, conceptualizing criminality as the result of sickness or disorder located within the individual allows experts to emphasize the diseased body or mind over social inequalities in society or social causes of the offender's behaviour. To cite an example, the perception that rape is a product of pathology ignores the power and control dynamics of much sex offending. Left untouched are the patriarchal ideologies and gender stereotypes including masculine ideals in society that underlay these acts of power.

In the same way, some experts in my sample viewed sex offending as the outcome of dysfunctional sexual need or abnormal physical arousal. For example, the Crown expert in DO131 (1998) told the judge that if an offender had a record of sex offences, the general rule was to anticipate further incidents. He explained that "sexual behaviour is essentially repetitive because of the self-reinforcing nature of sexual arousal and satisfaction" (DO131, 1998). The expert de-contextualized the political nature of sex offending by referring to individual biology. Similarly, in DO211 (1994), the expert claimed that the offender's "rape is not hostility towards women, this is political, [instead] it is about arousal to specific situations or material." According to both these professionals, a pattern of sex offending—once developed—tends to repeat itself because it is pleasurable. The individualization and medicalization—or pathologization—of crime and, therefore, the depoliticization of behaviour, are entrenched historical tendencies of the psy disciplines (Foucault, 1977, 1978a; Conrad, 1980; Ingleby, 1980; Conrad and Schneider, 1980; Brown, 1990).
The function of diagnosis in DO hearings appeared to change over the past two decades. After the penetration of risk, experts enlisted disorder and illness in a descriptive and instrumental fashion rather than in an analytical and attributive manner. They employed diagnosis to meet the information needs of risk assessment rather than to contextualize or understand the underlying cause of criminality. The presence of mental illness or personality disorder added to an offender's risk profile.

For instance, in the VRAG an expert adds three points if the offender has a DSM personality disorder or subtracts two points in the absence of diagnosis.145 Similarly, in the HCR-20, item H9 (Personality Disorder) is scored based on a past history of diagnosis, and if present, warrants the highest score of ‘2’. According to the authors, a possible or less serious personality disorder including a diagnosis of personality disorder traits should be coded with a ‘1’ (Webster et al., 1997, p.45).

Risk tools also codify mental illness, as well as personality disorder, as likely to increase the risk of reoffending. Item C3 on the HCR-20 is Active Symptoms of Major Mental Illness. If symptoms are present, the offender receives a score of ‘2’ (Webster et al., p. 55). A history of major mental illness, codified in item H6 in the HCR-20, also warrants a score of ‘2’.

By using diagnoses in a descriptive and instrumental manner, risk assessment and a focus on reoffence risk contributed to the depathologization of criminality. With risk thinking, experts were less likely to speak about causes of criminality such as individual pathology. However, like pathology, risk operated in the DO hearings to depoliticize crime and de-emphasize social causes in society that may have led to the criminality.

145 The VRAG is one of the only tools allowing experts to reward, so to speak, an absent risk factor.
Experts also repathologized the defendant by turning those needs, which arose because of mental illness or a personality disorder, into risks.

In the DO hearings, experts also pathologized the offender by turning their attention to the diagnosis of psychopathy, as measured by the PCL-R. As the PCL-R became a popular and accepted tool, so did the diagnosis of psychopathy. Courts increasingly relied on its supposed predictive ability. Steinitz (2001) has argued “[w]hen conditions such as psychopathy or APD are raised in legal proceedings it is evident that law and medicine have begun to seduce each other into condemning defendants as both responsible for their behaviour and compulsively driven towards it” (p.40).

However, I observed differences in the way psychopathy operated in DO hearings as compared to traditional DSM diagnosis. The most obvious manner in which psychopathy differs from DSM pathology was the way in which it was identified by experts. As outlined in Chapter 4, experts now need risk assessment skills rather than clinical acumen. Actuarial risk expertise was defined as a necessity in the later DO hearings. The second important change brought about by the assessment of psychopathy involved issues surrounding treatment and cure. I discuss these issues in the next two sections.
A POSSIBLE CURE? TREATMENT CONSIDERATION IN THE DANGEROUS OFFENDER HEARINGS

Keep in mind that no evidence of program success doesn't mean there is no cure (Defence expert, DO233, 1984).

His current state of mind renders him dangerous to society and women but [he] might with prolonged therapy be able to function effectively in society, but there is no guarantee (Crown Expert, DO236, 1983).

In cases adjudicated prior to the 1997 amendments and the solidification of psychopathy and risk, the following factors were all considered to be significant indicators of an offender’s dangerousness: response to previous treatment, participation in treatment, and treatment motivation and availability. Under the old legislation, both judges and experts considered treatability to be an essential factor to consider in determining dangerousness. For example, if experts were not confident that the offender could be treated within a specific time period, an indeterminate sentence was deemed appropriate. “From a treatment perspective,” according to one Crown expert, “an indeterminate sentence is appropriate for all serious violent repeat offenders, given the inability to predict in advance who will likely respond to treatment or how long it might take” (DO214, 1995, my emphasis). The uncertainty regarding required time for treatment success was a result of a variety of expert identified factors, including: the unavailability of treatment; the unsuitability of a defendant for treatment; and, as demonstrated in the above statement, the inability to predict treatment success.

Discussions around treatment availability specifically for DOs took place in the majority of cases explored before 1997. Most Crown prosecutors and Crown experts maintained that DO status had no bearing on treatment prospects for the motivated offender. These experts and prosecutors argued that institutional program availability
was blind to the nature of the sentence. Defence counsel and defence experts, however, consistently pointed out that an indeterminate sentence decreased treatment opportunities for the offender. They argued in the hearings that those offenders with shorter sentences, and those closer to their release date, had treatment priority. In a 1986 case, a correctional psychologist testified that, in fact, several programs offered at a local institution did not admit offenders serving indeterminate sentences because, according to him, there was no hope (DO103, 1986).

In another study, Rogers and Mitchell (1991) discovered that 83% of the mental health officials they surveyed felt that an indeterminate sentence had a deleterious effect on treatment options for DOs. Grant (1998) reasons that an indeterminate sentence presents a catch-22 situation. She points out that an offender cannot be paroled until treated, but he cannot get treatment until he is near the end of his sentence. Since his sentence is indeterminate, he does not qualify for treatment, and possibly never will (Grant, 1998).

Concerning treatment motivation, experts, mainly for the defence, testified that an indeterminate sentence conveys a sense of hopelessness and presents a psychological disincentive for an offender. The indeterminate status, according to a defence expert, "really presents a sense of total doom ... every inmate wishes to at least put up some diary on the wall where he can tick off the days" (DO101, 1983). Defence experts spoke about "squashing hope" for offenders who were "put at the back of the treatment line." 146

Many of the defence experts who testified in the DO hearings sampled were of the opinion that a DO status was counterproductive to the rehabilitative goals of correctional

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146 An expert in one case explicitly discussed evidence of preferential treatment allocation. The expert told the court that he had ordered treatment for a DO client three years ago and to date the
services. In several cases, the situation arose where experts perceived that treatment was unavailable because the offender’s motivation had decreased as a result of an indeterminate sentence and not because treatment did not exist or the offender was not initially motivated.

Perhaps even more problematic was the expert opinion that a specified number of years would be required to achieve treatment success. This reasoning is contradictory in light of the consensus that experts could not predict treatment success. Often such an opinion would provoke a situation where the number of years experts felt was needed for treatment success was greater than that which the judge could legally apply as a determinate sentence. According to some judges, the disparity between the necessary treatment time and the sentencing limits necessitated imposing an indeterminate sentence.¹⁴⁷

Interestingly, judges in the majority of cases were cautious, especially prior to the 1997 legislative scheme, to ensure that all appropriate treatment options were available to the motivated offender. In these earlier cases, several judges searched for “faint hope” that an offender might be treatable. Appropriate treatment must have been offered to the offender before a judge accepted that an offender failed treatment. If not all rehabilitative options were tried, or the treatment had been inappropriate, the majority of judges did not label the offender incorrigible or dangerous. For instance, in DO229 (1995), the judge reasoned that the defendant needed another chance because he had not received any treatment.

¹⁴⁷ This situation is further compounded by the perceived requirement that judges ought to double pre-sentence custody time periods when calculating an appropriate sentence. Doubling this time would result in a three to four-year sentence credit in some cases. With this credit, offenders would be released earlier, making it unlikely that the determinate sentence would meet expert predictions as to the needed treatment time span. In the end, judges resorted to an indeterminate sentence to ensure adequate time for treatment.
not received treatment while in prison for the previous six years. The judge designated him a dangerous offender but sentenced him to a determinate time period.\textsuperscript{148}

**'NO HOPE' CLAUSE: THE TREATMENT (NON)QUESTION**

*I mean it's hopeless, let's not be naïve. [W]ith this offender I really don't know what you can do, besides locking him up. I can't imagine a strategy...* (Crown expert, DO 105, 1999)

*There is no cure—just reduce and manage the risk that he presents.* (Crown expert, DO251, 1997)

Starting in the mid-1990s, with the penetration of risk assessment in the courts, treatment issues were reshaped. This reconfiguration resulted, in part, from the consensus reached by the majority of Crown experts that certain types of offenders were untreatable. Both pedophiles (especially homosexual pedophiles)\textsuperscript{149} and psychopaths were included in this group of offenders whom experts considered highly resistant to treatment efforts. Experts defined the psychopath as virtually impossible to treat, often incapable of change and posing a lifelong danger or unacceptable risk. The neutral assessor in DO600 (1999) advised that with psychopaths “there can be no assumption that any fixed period of time in prison, with or without treatment, will effectively lower the risk to the community” (DO600, 1999).

\textsuperscript{148} The judge in this case empathized with the defendant, and addressed the unfairness of the situation, but stated in the end that fairness was not part of the test to be applied in a Dangerous Offender hearing.

\textsuperscript{149} Coles and Grant (1991) comment on the tendency of experts to explain typical pedophilic criminality in terms of mental illness and personality disorder. With a conceptualization of illness, treatment issues then become relevant. However, Coles and Grant (1991) argue that “reliance by the correctional system on psychiatrists to reform sexual offenders is analogous to the use of psychiatric treatments in the USSR for the reform of political dissidents” (p.542).
It is quite clear that in the past few decades we have witnessed a return to the 'nothing works' doctrine surrounding the treatment of select offenders. The majority of offenders subjected to DO hearings were described by experts as poor or challenging candidates for treatment, or not treatable at that point in time. Experts' most frequently cited reasons for a negative treatment prognosis were a diagnosis of psychopathy, lack of motivation and lack of intelligence. For a positive treatment prognosis, experts cited the same three factors. Intelligence, motivation and the absence of psychopathy improved chances of treatment success. Experts also reported that an offender's attachment to conformity and to the community contributed to his treatment potential. For example, they noted that offenders with supportive wives, families, communities or churches were more likely to benefit from treatment. Moreover, experts tended to give a positive prognosis to those offenders with stable work histories.

During the mid-1990s, experts increasingly acknowledged that treatment could make some offenders—such as psychopaths—worse. Reiterating an expert's opinion, the judge in DO602 (2000) explains that treatment makes psychopaths worse because they "learn, through the treatment process, to feign remorse, empathy and other skills, which will allow them to gain a foothold in the community." Thirty-one experts in my sample testified that treatment efforts would increase a psychopathic offender's risk or dangerousness. The Crown had nominated 68% of those experts (N=21).

Robert Martinson, an American sociologist, wrote a famous article in 1974 titled What Works? Questions and Answers About Prison Reform. His article stated that, so far, rehabilitative efforts in prison had not had an appreciable effect on recidivism rates. Martinson’s ideas were nicknamed the 'Nothing Works!' doctrine. His conclusions were treated as facts in a campaign by the Right to increase the retributive impact of sentencing which included the push for longer prison time. For a revealing article on the socially constructed reality of 'nothing works,' see Rick Sarre's (1999) article Beyond "What works?" A 25 Year Jubilee Retrospective of Robert Martinson," presented at the History of Crime, Policing and Punishment Conference convened by the Australian Institute of
Perceptions that treatment might make offenders worse accompanied discussions about the ability of sex offenders and psychopaths to manipulate therapists. Illustrative of these perceptions is the following opinion from a Crown psychiatrist:

Violent rapists with strong psychopathic tendencies can simply extract from the therapy experience that which perpetuates and builds on their previous fantasies, thoughts and behaviors. They become better at conning therapists, lawyers, judges and victims. [M]y opinion will support very strongly to have him declared a dangerous offender. (DO122, 1998)

Experts accused offenders whom they diagnosed as psychopathic of repeating statements they heard in therapy (e.g., DO122, 1998) and being conning about treatment motivation (e.g., DO124, 1997).

Glaser (2003) observes that psy professionals have an “almost comorbid and irrational preoccupation with the ability of sex offenders to manipulate gullible and vulnerable therapists” (p. 5). This preoccupation seems contradictory to the historical desire of psy professionals to claim expertise on dangerousness. It could be that psy experts who do not define themselves as therapists or practicing clinicians—such as expert witnesses or researchers—see themselves as immune from this manipulation. I suspect—though only further investigation could validate—that this contradictory preoccupation is reflective of professional struggles and hierarchies of knowledge and practice in the arena of forensic expertise.

Adding to pessimism surrounding treatment desire and outcome, starting in the 1990s, experts and judges in DO hearings were more likely to admit the ineffectiveness of treatment. Experts described treatment for offenders in prison as insufficient,

ineffective and lacking. Similarly, the judge in DO126 (1993) concluded that:

It is a tragedy when society is forced to decide whether or not it is necessary, for its own protection to deprive a man of his freedom for the rest of his life, because through no fault of his own, he has become a dangerous sexual predator not subject to normal human constraints. The current state of psychiatric knowledge offers no hope of a cure.

Judges often felt compelled to sentence the offender to an indeterminate sentence, even if the offender was motivated for treatment. For example, the judge in a 1997 case sentenced the offender to an indeterminate period and argued:

There is no way to put a positive spin if I can use that word, on Mr. N's future. If there were alternative treatment facilities available in the community, he may not be in the position he is now in, but those facilities were not and [are] not now available. (DO215, 1997)

Lack of treatment options led some defence experts to accuse the courts of warehousing offenders. Several defence witnesses were critical of the abandonment of reform efforts. In a 1992 case, the defence expert cautioned the judge that the "courts [were] being asked to warehouse [the offender], because [the experts] don't know what else to do with him" (DO125, 1992). In sum, expert pessimism continued to increase surrounding treatment opportunities and offender treatability. After 1995, almost half of the experts in the sample felt comfortable recommending an indeterminate sentence for the offender they had evaluated. Seventy percent of those experts were Crown nominated.

The relative absence of treatment issues in risk assessment tools is possibly reflective of this decreased faith in treatment or, perhaps, indicative of an increased confidence in experts' ability to identify those offenders who were incapable of reform. Others have suggested that risk assessment neglects treatment variables because the
researchers who developed the tools have little experience in clinical settings. For example, Steadman (2000) argues that risk assessment has not "delivered very much that is really useful to frontline clinicians making violence risk assessment in the wide variety of settings [in] which these assessment are required" (p. 269). He also points out that the static nature of risk factors included in an assessment contributes to the neglect of dynamic treatment issues, such as motivation and response to treatment.

Developed, in part, as a response to this criticism of fixed assessment, the HCR-20 includes the items "Unresponsiveness to Treatment," "Prior Supervision Failures," and "Noncompliance with Remediation Attempts." These three items reflect dynamic issues. However, as evidenced in the wording of these items, they focus on increasing offender risk because of treatment failure rather than decreasing risk because of treatment success.

The PCL-R does not focus on treatment. Hare (1991,1996) forwarded the PCL-R as a diagnostic instrument intended to measure a stable or fixed personality type. Only item 5—Conning/Manipulative—indirectly refers to treatment programs. Hare (1991) argues that this item can apply to the individual who engages in institutional programming in order to appear sincere in his efforts to rehabilitate. Experts can use treatment reports as a source of information to code this item. Overall, the PCL-R does not capture specific treatment variables, propagating the assumption that psychopaths are untreatable. Treatment variables are also not included in the VRAG.

The absence of treatment issues in risk assessment tools is problematic in light of the amended DO provisions. The new legislation, in relation to the LTO status, requires experts to give opinion on whether the offender's risk can be reduced to an acceptable
level after treatment (Eaves et al., 2000, p.49). As such, experts discuss treatment issues at the designation stage of the DO hearing. In this way, the LTO status creates potential for renewed discussions about treatment. However, in the few cases I examined where the LTO status was considered, experts focused not on curability through treatment but on management of risk and relapse prevention.

Indeed, theorists argue that the identification and management of risk, rather than the treatment and cure of disorder, constitute the objectives of an actuarial model of justice (e.g., Castel, 1991; Feeley and Simon, 1992, 1994). In DO hearings, expert discussions about reoffence risk and the protection of the community through risk management have replaced dialogue about treatment and rehabilitation. Contributing to this anti-therapeutic focus was the growing expert perception that any reformative investment in a certain type of offender, such as the psychopath or the pedophile, was futile. It is much easier to find judicial and expert discussion about potential redemption or chance of offender rehabilitation in pre-actuarial DO hearings.

As reform efforts were abandoned and experts adopted a ‘why bother’ attitude, a philosophy of despair also emerged in the DO hearings in the mid 1990s. For many of the judges in my sample, the decision to declare an offender dangerous was very "painful," but often represented what judges perceived to be the only practical solution, as no alternatives were evident. In DO125 (1992), the judge commented that an

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151 Twelve experts in the sample, when asked about treatment prospects, responded very definitely with “why bother—it won’t work” statements.

152 In a case before the legislative changes in 1997, a judge specifically called for “less draconian” legislation resembling the Long Term Offender Supervision Order. He argued, perhaps with knowledge of the LTO proposals or, alternatively, with incredible foresight that “Parliament should enact provisions such that offenders such as Mr. S can be supervised after the expiry of their sentence and perhaps for life, in doing so, courts might be able to better tailor the custodial portion of the sentence to better suit the offender, while offering a good measure of protection to the public” (DO235, 1997).
indeterminate sentence was the "last resort" for an offender he described as nonviolent, nonaggressive and not antisocial. Experts described the offender as a mentally retarded serial arsonist. In another case, the defence expert recommended an indeterminate sentence and urged the judge to let the National Parole Board decide when to release the offender. The judge, however, did not seem to have faith in the Parole Board playing an active role in the offender's release:

Dr. M said the chance of [the offender] dying in captivity was real if given an indeterminate sentence. Even allowing for the hyperbole, this prediction cannot be discounted. Although the statute provides automatic review, it is a somewhat illusory relief. Dr. M's words are haunting. (DO214, 1995)

In the DO hearings I examined, one can observe what Pratt (2000b) argues is characteristic of the new penal agenda: there no longer seems to be any anxiety on the part of penal authorities to mask the futility of punishment and the hopelessness of rehabilitation. The 1990s brought risk thinking to the courtroom accompanied by extreme pessimism around the treatment of high-risk offenders. Expert suspicions about the treatment motivation of offenders peaked. The net of untreatable offenders expanded and faith in treatment programs decreased. The philosophy of despair and the abandonment of reform have helped to solidify the existence of an unreformable underclass, identified through risk assessment and deemed too dangerous to participate in society. There is no alternative to waste management.

153 Interestingly, the defence expert explained to the judge that the National Parole Board (NPB) does not respond to advice from experts that DOs are ready for release. Instead, argued the expert, they warehouse inmates. The High Risk Offenders Handbook outlines the role and duties of the NPB concerning DOs (Solicitor General Canada, 2001). Nowhere in the handbook, where the Solicitor General's office describes the three-step process of granting parole for DOs, is the opinion of an independent forensic expert mentioned. Reports that are generated from the offenders' treatment participation during incarceration appear to be the only psy opinion formally necessary for NPB hearings.
LACK OF EMPATHY, REMORSE AND RESPONSIBILITY

Can I say sorry to the family? ... Um ... I'm sorry for what I've done and I will be agreeable to sentence, and I'm very very sorry. I've done a lot of thinking about what I've done and I'm sorry. Sorry. (Words of an offender before the judge passed down an indeterminate sentence, DO129, 1997)

In the DO hearings, alongside lack of treatability, one of the most constant factors thought to be indicative of dangerousness, and consequently a high risk of reoffending, was the absence of genuine offender remorse. Experts in my sample equated an offender's lack of emotion during trials and interviews with a lack of remorse. Experts assumed a lack of empathy when offenders spoke about criminal events like "normal" occurrences or described their criminal behaviour in a matter-of-fact manner. Experts considered offenders who showed no remorse as less treatable and incapable of insight into their offending behaviour. They viewed the absence of remorse or "fleeting remorse" as a significant disinhibitor for future violence. It was a sign of entrenched criminality. "Lack of Remorse," formalized as item 6 on the PCL-R, describes an individual "who shows a general lack of concern for the negative consequences that his actions, both criminal and noncriminal, have on others" (Hare, 1991, p. 20). The majority of expert witnesses in the sample reasoned that, without empathy, remorse was impossible. True empathy for victims was the most consistent definition of remorse advanced by witnesses. "Lack of Empathy" is defined by the PCL-R as "a callous disregard for the feelings, rights and welfare of others" (Hare, 1991, p. 22).

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154 Discussing the construction of the 'predator' in the media, Websdale (1999) argues that use of the phrase 'emotionless' or 'lack of emotion' is meant to imply that the offender is subhuman. Websdale contends that we have no way of knowing the offender's emotions. He advocates that a more accurate statement by the media might be that there were no visible signs of emotion and we did not get a sense of what the offender was feeling (Websdale, 1999, p. 103).
"Failure to Accept Responsibility for Own Actions," item 16 on the PCL-R, characterizes an individual who is unable or unwilling to accept personal responsibility for his own actions (both criminal and noncriminal) or for the consequences of his actions (Hare, 1991, p. 22). In the DO hearings I studied, this item was paradoxical for the offender because in order for an expert to deny that an offender was dangerous, the offender needed to confess or acknowledge his dangerousness.

All three items discussed above—lack of empathy, lack of remorse and failure to take responsibility—are vague and similarly defined. What becomes apparent in the case files and PCL-R item descriptions is a domino effect. This effect is present in most risk assessment tools. If an expert assigns a high score on one item, it becomes logical to follow through with high scores on the others. This domino effect reinforces the negatively biased evaluation of risk and is not restricted to remorse, empathy and responsibility. For instance, if an expert believes that an offender does not have the ability to feel remorse or empathy, this belief commonly entails the perception that he or she is incapable of experiencing a normal range of emotions, a sign of "Shallow Affect." Shallow affect is item 7 on the PCL-R. The presence of such correlative items is a problematic feature associated with the design and use of risk assessment tools. The correlative nature of the PCL-R items made a diagnosis of psychopathy almost inevitable if the offender scored high on several items.

Another case in point: experts in the DO hearings tended to stress the psychopath’s lack of empathy and remorse, but, if an offender was labelled a psychopath, it would follow that empathy and remorse were impossible. According to experts, offenders who exhibited these traits were feigning. Consequently, experts
interpreted signs of empathy as an indication of the “Conning/Manipulative” nature of the psychopath and his tendency for “Pathological Lying,” both items on the PCL-R. The consensus among the majority of experts about the psychopath’s emotional ability is illustrated by this Crown psychiatrist’s opinion:

[Y]ou simply cannot teach empathy to a psychopath. He does not experience human relationships in the ways that most people do. He is not capable. It’s not that he doesn’t want to, [but rather that] he is not capable of feeling what the other person is asking him to feel. (DO126, 1993)

Moreover, if psychopaths do exhibit empathy or remorse it is because “they try to figure out what you want to hear and they’ll try to say the right things” (Crown expert, DO125, 1996). It appears as if the experts at the hearings—once they had decided that the offender exhibited psychopathic traits—selectively rationalized and ensnared a diagnosis of psychopathy using correlative PCL-R items.

An equally problematic snare emerged in cases involving “mentally retarded” offenders. Experts felt that offenders needed insight into their own behaviour and its consequences in order to feel remorse and empathy. The majority of mentally retarded offenders in my sample did not have this insight. It is for this reason that one could argue against the use of the PCL-R with this subpopulation of offenders. Nevertheless, as previously discussed, experts used the PCL-R in 42-77%155 of cases dealing with offenders identified as “mentally retarded.” Experts diagnosed psychopathy in 35% of these cases.

155 Percentages vary depending on the time frame examined.
‘CATCH-22’ DISCRETIONARY GAPS: DAMNED IF YOU DO ... DAMNED IF YOU DON’T

Catch-22 discretionary gaps or no-win situations\(^{156}\) characterized expert decisions around dangerousness and risk in the DO hearings. Experts often assigned to certain risk factors opposite prognostic values. In other words, a factor thought to enhance the possibility of treatment success by one expert was at the same time seen as detrimental to success by another expert. The existence of such catch-22 discretionary gaps demonstrated the inherent subjectivity of risk assessment. Given the adversarial nature of the hearings, it follows that defence experts were consistent in viewing such factors as indicative of lower risk, whereas Crown experts were more likely to interpret the same factors as contributing to higher risk. For instance, assessors evaluated an attempted suicide by an offender differently.\(^{157}\) Crown psy experts consistently interpreted suicide and self-mutilation as attention-seeking behaviour or as an “attempt to sabotage proceedings” (DO219, 1987). According to Crown, this behaviour revealed that the offender was manipulative and represented a higher risk to reoffend. Defence experts, on the other hand, were more prone to conceptualize suicide as an acknowledgement by the offender of the damage inflicted on victims or as a manifestation of his remorse.

Several other factors associated with a high-risk offender and subsequently a DO designation occupied catch-22 gaps. For example, experts viewed drug and alcohol abuse both as contributing to higher risk (N=23) and, alternatively, as decreasing risk (N=9). For some assessors, treatment could successfully address drug or alcohol addiction and therefore lowers an offender’s risk. In some cases, experts viewed drug or

\(^{156}\) A no-win situation was from the perspective of the offender and his desire not to be designated high risk and consequently, a Dangerous Offender.

\(^{157}\) Experts reviewed attempted suicide by an offender in 18 cases.
alcohol use as indicative of an offender's troubled conscience, since the offender needed artificial disinhibitors to commit an offence. In both situations, experts evaluated substance use and/or abuse as a positive factor.

However, in other cases, experts assessed drug and alcohol abuse as a negative prognostic factor. These experts considered substance abuse as an additional problem area and a sign of intractability. Accordingly, the majority of risk assessment tools, such as the PCL-R, HCR-20, VRAG, and SORAG, include a history of substance abuse as an important item that increases an offender's risk. Alcohol or drug use is one source of information for coding seven PCL-R items.

In some cases, because of the catch-22 nature of risk items, offenders could not escape a negative evaluation. For example, experts considered an offender's behaviour more entrenched if it occurred in a non-stressful situation. However, if offending occurred as a reaction to stress, experts also considered this pattern to indicate higher risk. Reactionary behaviour signified the offender's inability to cope or poor behavioural control. Similarly, some experts evaluated impulsivity as an indication of high risk. Both impulsivity and poor behavioural controls are items on the PCL-R indicating signs of psychopathy. Others viewed lack of impulsive thought and action as a risk factor. Experts felt that if the offender was not impulsive, then the criminal behaviour contained elements of planning and the offender was predatory—and thus a higher risk.

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158 For a comprehensive collection of critical perspectives on the usefulness and limitations of the concept of impulsivity, see Webster and Jackson (1997).
Age and Burnout: "Rape is a young man's game"\textsuperscript{159}

The age of an offender represents another catch-22 discretionary gap used by the experts in the hearings to justify an interpretation of risk. Experts considered the youthfulness of some offenders and the elderly status of others as important in the evaluation of risk. In relation to the older offender, 43 experts discussed the notion of burnout, either in their reports or in testimonies, as a potential factor in lowering risk. Discussion of burnout decreased in DO hearings but not significantly across time periods. Between 1978 and 1988, 73\% of DO hearings involved a discussion of burnout, compared to 65\% from 1995 to 2000.

Consensus did not emerge in the files as to the threshold age for burnout. Experts discussed burnout with one 35 year-old offender whereas other experts opined that burnout did not factor into prognosis until the offender reached 60 or 65 years of age. In some cases, experts referred to burnout as the offender's "only hope." The Crown expert in a 1984 case explained to the judge that the offender and other "social misfits in general tend to show a decrease in antisocial behaviour as the years go by" (DO227, 1984). In 19 cases, experts gave the older offender a more optimistic prognosis based on the phenomenon of burnout.

When experts considered burnout in the context of lowering risk, the offender was generally non-psychopathic, over or near 60 years old and had committed physical sexual assaults against adult females. Experts often assumed that this type of offence would become biologically impossible as an offender's age increased and arousal decreased. Yet in several later cases judges mentioned the potential influence of

\textsuperscript{159} The judge in DO126 (1993) used this phrase.
Viagra, a drug used to fight impotence, in helping older offenders regain their sex drive and sexual capacity. As was discussed earlier in this chapter, this type of reasoning negates a theory of sexual assault based on power and control and instead envisions sex crimes as linked to sexual arousal and vaginal or anal intercourse.

In contrast, some Crown experts interpreted the aging offender to be a higher risk. These experts argued that older offenders were harder to treat because of their ingrained behaviour. Yet, they also argued that the youthfulness of an offender did not necessarily mean decreased risk. Instead, the argument was that the youthfulness of an offender meant that he was probably "hard-wired" to commit the crimes, or a genetically predisposed psychopath. He was therefore resistant to treatment. Defence experts, on the other hand, interpreted the youthfulness of an offender as a positive prognostic factor. A younger offender was less resistant to treatment efforts because of the plasticity and flexibility of his identity. Experts, in these cases, viewed criminality as less entrenched and possibly curtailed by maturation.

The percentage of experts in the DO hearings who felt that some offenders (e.g., psychopaths and homosexual pedophiles) do not experience burnout increased over the decades. The increasing value placed on the diagnosis of psychopathy could explain why they felt burnout to be less relevant in later hearings. The majority of experts agreed that psychopaths are not likely to burn out. Research, they said, had shown that psychopathy was a life-long disorder. In a 1999 hearing, a Crown expert argued that burnout is less common in psychopathic pedophiles who may "continue robust offending careers into their later decades and even into [their] geriatric years" (DO140, 1998). In my data, the relationship between a diagnosis of psychopathy and expert denial of
possible burnout is statistically significant ($\chi^2=11.7$, df=3, p<.01).

The majority of risk assessment instruments do not measure dynamic variables such as the age of the offender. Several instruments and items, however, do view age as a historical factor. For example, the HCR-20 contains the item “Young Age at First Violent Incident.” This item encodes the belief that the younger a person is at the time of committing his first known violence (not necessarily one for which he was convicted or charged), the greater is the likelihood of subsequent violent conduct (Webster et al., 1997, p. 30). Authors of the HCR-20 admit that the age divisions (under 20 years, 20-39 years and 40 years and older) and corresponding scores are arbitrary (Webster et al., 1997, p. 31).

Several instruments assume that the offender is of a certain age. The PCL-R is validated on individuals 18 years or over (Hare, 1991). Most risk assessment tools can be applied only to an adult population. Instruments also contain coding schemes that disproportionately penalize the older offender in terms of an elevated risk score. Take for example item 17, “Many Short-term Marital Relationships,” on the PCL-R (Hare, 1991, p. 27). This item, although scored based on the individual’s current age (under or over the age of 30), may still disadvantage the older offender. An offender who is 68 years old has probably had more opportunity in terms of time and experience to engage in relationships than an offender who is 31 years old.

Age, although not formally coded in risk assessment tools, was an important factor in determining risk in DO hearings. However, this importance decreases over time with the perception that some offenders, like the psychopath, are immune to age-related
burnout. Experts also variously interpreted age as both increasing and decreasing risk of reoffence.

**Knowing Better and Better Knowing: The Role of Intelligence and Risk**

I feel bad ... I ended up this way ... one day I knew I will be in trouble. It’s a good thing I got caught. I am scared I will be locked up. I was attracted to the boys ... I never thought ahead. I never thought of what would happen ... I knew it was wrong ... I never thought I would get away with it. I am not a faggot. I wanted to play with the boys. How come I am like this? Why can’t I stop it? Why don’t I have the power to stop it? (borderline mentally retarded offender, DO217, 1988)

Although not specifically measured in risk assessment tools, intelligence—or a perceived lack thereof—played a central role in the construction of the high-risk offender. Intelligence was the most consistent and problematic catch-22 discretionary gap that emerged in the assessments of DOs. Experts perceived low intelligence and “mental retardation” (MR) as aggravating factors that contributed to the risk of reoffending. Yet, high or above average intelligence was also judged to elevate one’s risk of reoffending. This paradoxical interpretation of intelligence and risk might account for the bimodal distribution of assessed intelligence levels in the sample, as discussed in Chapter 3. Only when the offender was of average intellect (22% of cases) was intelligence level not a factor in considering risk.

According to some experts in the sample, limited intelligence and a lack of insight hampered the treatability of offenders. Experts felt that most treatment options were limited or inappropriate for the MR offender. A defence expert in a 1993 case noted

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160 According to Dr. Hare’s website, a derivative of the PCL-R, for use with children and adolescents between the ages of 12 and 17, is available for purchase from the Multi-Health Systems distributor. Retrieved August 2003, from <www.hare.org>.

161 Also includes those classified as “mildly mentally retarded.”
that the management of MR offenders was difficult because, among other reasons, people “don’t want to be around them.” The expert explained that the attitudes of other offenders in prison reinforced a sense of rejection for the MR individual. He elaborated on the situation by telling the judge that MR offenders are very sensitive to criticism and confrontation, which are both hallmarks of sex offender programming (DO123, 1993).

Discussing the treatment of MR offenders, a Crown expert in a 1994 hearing suggested that what was needed in the current case was a “profound altering of the entire human being,” but he warned that “you can’t do that with someone who doesn’t have the intelligence to even identify in any kind of reasonable way the factors that are relevant to his offending” (DO241, 1994). Experts agreed that the mentally retarded offender presented a unique treatment challenge.162

Contradictory to the above interpretation of intelligence and risk, defence counsel in my sample often presented MR offenders as less culpable and inappropriate targets for DO designations because of their limited intellectual functioning. Defence experts and attorneys requested that judges view mental retardation as a mitigating factor in the decision to designate dangerousness. Defence, in several cases, argued that failed treatment and reoffence by MR offenders were indications of system failure. According to defence experts, given their intellectual functioning, MR offenders often do not receive appropriate treatment and therefore cannot be viewed as untreatable.

In several cases in my sample, defence attempted to negate the culpability of the MR offender. In DO123 (1994), the expert argued that the offender’s pedophilic behaviour was a result of mutual childish experimentation. The defendant was relating

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162 For information on Canada’s programming for “mentally disabled” offenders, see Dorward and Dolton (1995). Also, see Boer, Dorward, Gauthier and Watson (1995).
appropriately to children, given his mental age. He did not perceive his "play" to be
criminal. The expert continued with the rationale that the offender's mental age was
lower than his chronological age and, consequently, the offender believed children were
his peers. In this case, the judge dismissed the expert's logic, which he called a
"stretch." Similarly, in a 1996 hearing, the defence expert observed that the offender
was comfortable around children because they helped him remember his childhood and
he was curious about his childhood. The Crown expert dismissed this reasoning by
labeling the offender a sexual predator with bizarre fantasies (DO118, 1996).

More problematic than the opposing assessments of mental retardation as both a
mitigating and aggravating factor was the frequency of MR individuals subjected to DO
hearings. The underlying logic of many Crown experts that I observed in the files and
hearings was that mental retardation was somehow connected to dangerousness.
Alerting us to this damaging perception, researchers such as Bright (1989) and Endicott
(1991) argue that there is no reliable evidence suggesting that MR individuals are more
notes that "[t]he literature reveals no consistent pattern in which persons with intellectual
disability are found to be more likely than other offenders to commit crimes of violence,
or that they tend to commit crimes against the person more frequently than crimes
against property."

According to these researchers, the historical assumption that mental retardation is
a cause of criminality must be rejected in favour of a contextualized approach. This
approach asks why this sub-population might be over-represented in the offender
population. To view mental retardation as a cause of criminality ignores the role of the
criminal justice system in perpetuating a bias towards a historically discriminated-against population. More generally, Swanson and Garwick (1990) argue that the neglect of MR offenders may reflect current attitudes in our community, which are negatively biased against mentally retarded individuals who commit sexual offences. Moreover, they claim that “sexual offences by individuals with mental retardation will be ignored as long as possible and then approached in a crisis-oriented, fragmentary, and intrusive manner” (Swanson and Garwick, 1990, p. 155).

Historically, MR offenders have fallen between systems of prevention and care. As a result of this precarious position, they become over-institutionalized in correctional facilities. Some researchers hypothesize that the deinstitutionalization of the mentally retarded from custodial facilities has led to their re-institutionalization in prison settings (e.g., French, 1983; Papaleo, 1985 as cited in Endicott, 1991). According to the Law Reform Commission of New South Wales (LRCNSW) (1996), it is well documented that

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See Rafter (1997) for a historical exposé of the connection between notions of ‘born’ criminality, feeblemindedness and mental defects.

There is some indication that our attitudes are changing in relation to the “mentally retarded” who commits serious crimes. Nevertheless, as demonstrated by the recent Supreme Court ruling in the United States, attitudinal change appears to be limited to reactive decisions rather than proactive or preventative arenas. On June 20, 2002, in Atkins v. Virginia (536 U.S. 304), the Supreme Court of the United States declared that the execution of mentally retarded offenders violated the 8th Amendment. The 8th Amendment states that: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted” (U.S. Constitution, 1791). Justice Stevens cited a shift in public attitude toward the practice of executing mentally retarded killers since the court ruled on the issue more than a decade earlier. He wrote in his ruling: “Those mentally retarded persons who meet the law’s requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgement, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants” (Atkins v. Virginia 536 U.S. 304 [2002]). If moral culpability of the mentally retarded offender is limited, as decided in this case, we as Canadians ought to question the application of our country’s most extreme sentencing option, the indeterminate sentence, to mentally retarded offenders. The DO designation of intellectually disabled individuals represents an extreme form of over-institutionalization and possibly a violation of their constitutional rights.
people with intellectual disabilities in all parts of the world fail to receive the services they need to keep out of trouble with the law. In 1996, the LRCNSW produced the often-cited report *People with an Intellectual Disability and the Criminal Justice System*. This report details several gaps in the criminal justice system for MR individuals. Common to most developed nations, these gaps include: insufficient preventative services; shortage of programs addressing offending; lack of alternatives to prison for people who require secure or supervised accommodation; and not enough support to enable people with intellectual disabilities to have normal access to bail, parole and non-custodial sentencing options (LRCNSW, 1996).

Additionally, the literature suggests that mentally retarded defendants are not represented fairly or reliably in the court system or during the interrogation phase of criminal investigations. For example, Santamour and Watson (1982) observe that persons with intellectual impairment are more likely to receive prison sentences for crimes of violence because prosecutors and judges regard them as inherently dangerous due to their disability. Studies have revealed that mentally retarded defendants tend to provide more incriminating evidence to prosecutors compared to other defendants (LRCNSW, 1996). In the current sample, a Crown expert warned that in the prison population "it is often very common amongst the not very bright to make outlandish claims and confessions among those with narcissistic and histrionic personalities" (DO131, 1998). Mentally retarded offenders are also less successful at plea-bargaining and more likely to enter a guilty plea (LRCNSW, 1996). Sixty-five percent of the MR offenders in the current sample entered a guilty plea for the predicate offence, compared
to 50% of the offenders with average intelligence. The Intellectual Disability Rights Service Framework Report (2001) concludes that if major gaps in services were filled, many people with intellectual disabilities would not enter the criminal justice system and many others would not reoffend.

Several hearings contained testimony and discussion about the applicability of the DO legislation to MR and borderline MR offenders. The defence expert in a 1992 case cautioned that it was “not the point of the legislation to catch people who fall through the cracks of the system.” He warned that this rationalization could create a dangerous precedent. It might lead to the cessation of other needed programs for individuals in circumstances similar to those of his client (DO125, 1995). Defence counsel similarly argued in DO215 (1997) that it would be wrong to indeterminately incarcerate the borderline mentally retarded defendant simply because there is no suitable alternative in the community. A Crown expert observed in another case: “[T]here is not presently a system in place to handle the small but increasing numbers of persons who have a number of comorbid diagnoses and conditions. They tend to become square pegs in round holes” (DO132, 1998). The expert had diagnosed the defendant as mildly

165 The difference in guilty pleas is not statistically significant for each category of intelligence. Crown experts often used a non-guilty plea entered by the offender at the predicate offence trial to indicate lack of remorse, empathy and denial of responsibility. This tendency may have led defence counsel to advise defendants to plead guilty.

166 Supra note 3, at 2.
mentally retarded and a fixated pedophile. In this case, the judge reasoned in the following manner:

Mr. S is in the grey area between the mandates of mental health services and the correctional service[s] due to the fact that he was released on warrant expiry and is not mentally ill; however he is of both borderline intellectual and psychosocial functioning. This societal gap is presently being bridged by correctional staff working above and beyond the present mandate of the service in conjunction with various community services and physicians. ... Mr. S falls in between the cracks in services here, because while he is mildly retarded, he is not sufficiently retarded for social services to place him in a handicap group home. (DO132, 1998)

The judge in a 1992 case used similar language in his ruling: "[The] public must be protected from this unfortunate man. [T]he sad truth of the matter is that the mentally defective offender, as opposed to the mentally ill offender, is the forgotten man in our correctional system" (DO125, 1992).

The increasing use of risk assessment in forensic contexts disadvantages MR offenders, including those who suffer from Fetal Alcohol Syndrome. Several risk assessment tools include items such as responsibility, behavioural controls, parasitic lifestyle and employability, realistic long-term goals, prior supervision failures and revocation. These items, among others, are not applicable in cases where mental retardation precludes scoring the offender in a positive light. Similarly, how can it be expected that the MR offender will improve in any of these areas if services and programs are clearly lacking?

On the other end of the scale, experts also viewed being of above average intelligence as a negative prognostic factor. According to their analyses, intelligent offenders, usually described as psychopathic, are incurable. The relationship between intelligence level and psychopathic diagnosis is statistically significant ($\chi^2 = 9.15, df=3,$
p<.05). This relationship is graphically presented in Figure 5.1.

Figure 5.1: Intelligence Level of Diagnosed Psychopaths (N=31)

Experts described intelligence in terms of being "calculating" and "knowing the correct answers in order to play the system" (DO124, 1997). I have discussed why experts feel treatment of the psychopath is iatrogenic. According to experts, intelligent psychopaths learn in treatment what to say in order to manipulate assessors. In one case, the Crown expert described this manipulation:

[Psychopaths distort their own perceptions of their behaviour ... so they don't have to deal with wrongness of behaviour. ... There are a number of individuals I have dealt with in DO hearings before who have in fact carried out some of their reoffending on the very day they went to their group therapy program while on parole and in fact had a glowing report logged into their progress notes. ... So it is unfortunately extremely difficult to be able to say for offenders with any social skills or intelligence ... [whether] they truly changed or not. (DO117, 1994)

In the end, the majority of experts and judges agreed that while intelligence was a prerequisite for learning and benefiting from available treatment, some offenders used their intelligence to manipulate others. As one defence expert pointed out, intelligence is
a double-edged sword because it indicates the capacity to learn and benefit from treatment but also "allow[s] Mr. M to play the game, con the experts, and if he is a cold, calculating psychopath, he is clearly smart enough to know how to do this and receive the benefits of a positive report" (DO124, 1997).

THE SEX OFFENDER: THE COMMON 'DEMON'INATOR

Sexual deviants are like junkies. (Crown expert, DC100, 1991)

Even animals in their sexual pursuits do not visit this kind of behaviour on members of the opposite sex. (Judge, DO227, 1984)

*Child Molesters and Serial Rapists: The Stranger Danger* Disclosure

Undoubtedly, the most common characteristic shared among DOs was that of sex offending. The DO legislation targets those who repeatedly offend in a sexual manner. The Long-Term Offender Status explicitly targets offenders “who have a likelihood of committing further sexual offences, but who do not meet the criteria for a designation of Dangerous Offender” (Solicitor General Canada, 2001, p. 21). This designation was created primarily to deal with those who commit sexual offences, particularly against children (Motiuk, 2001 as cited in DO/LTO Profile Report, 2002). The law reflects the connection of risk with sex criminals.

Society, experts and judges perceive the sex offender as high risk. While critically assessing the purpose of the DO legislation, a defence expert described both his
perceptions of sex offenders and the views he perceived to be common to society and judges:

[B]ecause the sex offenders evoke such an emotional reaction in the general public and also among the legislators and judiciary, it is essential that correctional procedure be based on what the problem is and not on what it is feared to be ... the dangerous offender legislation does not protect the public ... it gives the public a false sense of security by incarcerating, virtually for life, in conditions of appalling degradation, a pathetic group of socially and sexually inadequate misfits. (DO121, 1980)

Descriptions of sex offenders included "lowest of the low," "outcasts," and a "special type of junkies" and, when in a prison environment, as "scapegoat[s]" on whom attacks are "inevitable."

Specific types of sex offenders emerged from expert constructions of dangerousness and high risk. In the majority of cases, the dangerous sex offender will be a rapist (usually a stranger) or an extra-familial child molester. One of the more typical high-risk sex offenders emerging from this study was the hypermasculine psychopathic serial rapist. The serial rapist was the prototypical psychopath. Experts noted that the serial rapist exhibited a pattern of hostility toward women, including a "substantial element of hatefulness towards women" and "mother figures." Experts viewed him as typically angry and impulsive yet conning and glib. The PCL-R captures his personality and his behaviour.

For the most part the prototypical serial rapist victimized a stranger or individual he was briefly acquainted with, and not a girlfriend, wife or partner. In the current sample,

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167 Joel Best, a sociologist, first used this term in relation to the common perceptions of who victimizes children. For more information see, Best (1990).
approximately 90% of the adult and teen female sexual victims were either strangers or briefly known to the offender. Laws that target high-risk sex offenders, like the DO and LTSO legislation in Canada and the numerous forms of sexual predator laws in the United States, encourage the construction of this high-risk category. The Sexually Violent Predator laws in Washington state exclude family members or acquaintances as victims unless it can be discerned that the relationship was initiated for the sole purpose of victimization (Lafond, 1992). Websdale (1999) argues that predator laws suggest "the real dangers to women and children come from freakish strangers rather than intimates or companions" (p. 111).

Interestingly, Crown put forward spousal assault as an aggravating factor in three cases in the late 1990s and early 2000s. In one of these cases, the judge stated, "[t]he fact that physical assaults, death threats and coercive sex occur within a spousal type relationship does not, in my view, lessen the dangerousness of that conduct to the public. Potential spouses are members of the relevant public" (DO604, 2000).

The consideration of and weight accorded to abusive spousal relationships by the Crown and the judge are encouraging, given the law's historical application in the context of extra-familial relationships. Yet, tempered optimism is warranted. Out of the 100 cases explored, only one case was predicated on spousal assault as the index offence. The Crown argued in this hearing that it is "one thing to brutalize a stranger but to repeatedly commit the same acts and observe the damaging effects on what is supposedly a loved one is indicative of a far more profound tendency to brutality and callousness" (DO127, 1997). This offender in the context of a domestic relationship perpetrated sexual violence, of an extreme form. In the end, the offender was not
declared dangerous but was instead designated a Long-Term offender by the judge. The potential application of the LTO status for repeat spousal violence perpetrators warrants further study.

Other hearings that involved spousal assault (usually alleged) contained testimony from ex-partners and were constitutive of the Crown's attempt to establish a pattern of aggressive behaviour. The victims of the predicate offences in these cases were not spouses but strangers. It appears that the increased consideration of spousal assault in DO hearings was confined to those cases where extreme sexual violence was perpetrated or where the offender subsequently victimized a stranger. The marginalization of abuse within an intimate relationship remains, for the most part, intact.

The PCL-R and VRAG do not contain items specifically correlated with the incidence of spousal assault, and thus they perpetuate this marginalization. Consideration of mistreatment or abuse of intimate partners is markedly absent in risk assessment. Instead, several instruments that measure the risk of sexual recidivism (e.g., RRASOR, Static-99) contain items which construct the unrelated perpetrator as the high-risk offender. In these tools, victimization of strangers in the predicate offence elevates an offender's risk level.

The existence of a separate risk assessment tool addressing spousal assault (SARA) also encourages the perception that psychopathic or high-risk offenders do not victimize their families, especially their intimate partners. Experts employed the SARA in two of the spousal assault cases discussed above. In many ways, the SARA also depoliticizes the experience of violence within the home. For example, items on the SARA that increase the risk of reoffending include recent psychotic and/or manic
symptoms and personality disorder with anger, impulsivity or behavioural instability (Kropp et al., 1994). These items do not question why wives and girlfriends, not bosses and co-workers, are targets of violence. The tool locates the cause of behaviour in individual pathology. Several other items—recent relationship problems, employment problems, substance abuse/dependence, and suicidal or homicidal ideation/intent—favour an individualistic clinical model of spousal assault over a socio-cultural examination of gendered violence. To their credit, the SARA developers did include three items which appear to forward this examination of patriarchal violence. These items include childhood abuse and neglect experiences, the witnessing of family violence as a child or adolescent, and attitudes that support or condone spousal assault (Kropp et al., 1994).

In fact, the debate about nature and nurture and, more specifically, the role of family violence in the offender's childhood did enter DO hearings. Several experts in my sample pointed out that the inability of offenders to form lasting relationships could be the result of a dysfunctional family history. This connection would suggest a belief by experts that family violence is transmitted from one generation to the next through early socialization and learned behaviour in the home. However, experts tended to focus more on the genetic transmission of propensity for violence than on the role of learning and socialization. Their discourse was reminiscent of theoretical explanations of crime, dominant in the early twentieth century, that centred on the notion of degeneracy.¹⁶⁸

¹⁶⁸ Intriguing descriptors found in files provide evidence that the Lombrosian "born criminal" and atavist thinking have not been laid to rest. The Crown psychiatrist in a 1991 case explained that, "as a group, pedophiles tend to have thinner and less dense skulls than normal and have lowered cerebral blood flow" (DO106). Experts made biological references that implied a predisposition to criminality. Offenders were described, often without context, as: "a blue baby" (DO108, 1999); "a large man with brown hair" (DO110, 1993); presenting a "poor complexion" (DO118, 1996); and having "severe problem[s] with acne and size, [as well as exhibiting] mirthless smiles" (DO126,
Theories that linked intelligence, pauperism and crime to a criminogenic underclass resurfaced in the DO hearings. In DO233 (1984), the Crown expert argued "if you take the child of a psychopathic father and you take him away and put him in a normal environment he is more likely than average to become a psychopath anyway." Several experts noted a genetic predisposition for antisocial personality traits. A neutral assessor in a more contemporary case described the offender as suffering from a "very untoward childhood." Taken together, this factor and the offender's "genetic antecedents have combined in him to produce a man with serious psychopathic traits" (neutral expert, DO212, 1999).

Risk assessment tools, the explanations of violence that they engender and the laws they accommodate serve to divert attention away from patriarchal violence within an intimate relationship. The diversion results in the presumption of safety in the home and the sanctity of the traditional marriage union. The prototypical DO is not the serial wife assaulter. By focusing on stranger danger and the hypermasculine serial rapist, violence within the home remains unchallenged.

In addition to serial rapists, experts constructed the homosexual pedophile as an incorrigible and innately high-risk offender in the DO hearings studied. Pedophilia was described by experts as a "lifelong condition" that was "almost a hardwired preference" which was "extremely resistant to treatment." They viewed pedophilia as intractable: "Pedophiles can't be cured. The reason it can't be cured is because it's not really an illness, it's a sexual orientation. I mean it's like saying blue eyes can't be cured" (Crown 1993). Experts also reported in their assessments the presence of tattoos, slash marks and nicotine-stained fingers. Tattoos were often displayed during the interview at the request of the expert, implying their worthiness or 'truth' value in the construction of danger associated with the offender. In a study examining potential biases in the use of DO legislation, researchers found that
expert, DO302, 1999, my emphasis). The expert in this case depersonalizes the individual by reconstituting him as a pedophile and then as an object—as the "it." Pedophilia becomes a master status. The individual is no longer a person, but a pedophile.

In the cases I examined, pedophilia was diagnosed in 30 instances. Pedophilia is listed as a paraphilia under the 'Sexual and Identity Disorders' section of the DSM IV-TR (APA, 2000):

[Paraphilia is] characterized by recurrent, intense, sexual urges, fantasies, or behaviors that involve unusual objects, activities, or situations and cause clinically significant distress or impairment in social, occupational, or other important areas of functioning. (p. 571)

Sexual arousal or behaviour directed at prepubescent children (usually 13 or younger) is generally classified as pedophilia (Eaves et al., 2000. p. 42). In the current sample, 30 offenders were charged with sex offences involving children and 15 offenders had predicate offences involving pre-teens or teens.

The overrepresentation of pedophiles among those individuals designated as Dangerous Offenders is problematic given recent research demonstrating that, on average, over a long-term period pedophiles have lower recidivism rates than non-sexual violent offenders (61% versus 83% respectively) (Hanson, 1996). A subsequent study found that in a 4-5 year follow-up period only 13.4% of the studied sex offenders recidivated sexually (Hanson, 1997b).

In the majority of hearings involving pedophiles, experts were very explicit in acknowledging that treatment modalities were lacking or ineffective. Speaking about physical unattractiveness of offenders was a factor in influencing judgements of higher levels of dangerousness (Esses and Webster, 1988).
pedophilia in 1988, a Crown expert argued, "there is little in the way of treatment that makes this condition reversible" (D0217). However, according to experts, the pedophile—unlike the psychopath—could be potentially managed or controlled in the community. It follows that experts viewed the psychopathic pedophile as the most incorrigible offender in DO hearings. In seven out of the eight cases where experts diagnosed pedophilia and psychopathy, the offender received an indeterminate sentence.

Experts predicted treatment success and manageability in the community based on, in part, the gender of pedophiles' victims. Homosexual and bisexual pedophiles were considered the most resistant to treatment. The pedophile who chose both male and female victims was at the highest risk to reoffend (N=6). Homosexual pedophiles (N=14) were next in terms of high-risk evaluations, whereas heterosexual pedophiles (N=10) presented the lowest risk. Experts perceived the latter to be more amenable to rehabilitative efforts.

Risk assessment tools, such as the SORAG and VRAG, institutionalize this expert interpretation of treatability and ensuing hierarchy of risk as it relates to victim preference. Item 9 on the VRAG requires assessors to subtract one point if the index offence involved a female victim. One point is added if the offender victimized a male, thereby elevating risk level. The RRASOR and the SORAG also contain reverse scoring formulas for female victims.

This gendered coding system is evidence of the dialectical relationship between risk and reality. Risk assessment instruments potentially create and reflect ideologies that support patriarchal interpretations of violence. The items in the tools reflect the
differential treatment of male and female sexual victimization in society. Risk assessment enables a construction of reality that marginalizes females, both women and girls, and their experiences of violence. Coding in the tools also reflects a homophobic society that is more preoccupied with the sexual victimization of boys than girls.

Instruments that measure the risk of sexual offending do not contain specific items related to child victims but do include items researchers say are correlated with pedophilia. Some of these items include unmarried status, a deviant phallometric test response, a history of alcohol problems and the presence of a personality disorder (Hanson, 1998). These factors also operate to pathologize and consequently depoliticize pedophilia. For instance, experts code the married offender as a lower risk. A number of presumptive elements are involved in this assessment. There is the casting of a married family man as low risk, and a supposition that marriage could insulate an offender against reoffending. There is also the assumption that offending is not perpetrated on victims within the family or marriage union. Moreover, as previously outlined, unrelated victims elevate an offender’s risk level in several instruments. In the current sample, of the 30 offenders charged with a predicate offence against a child, only seven of those cases involved a biological or step or blood-related child. Again, risk assessment coding and psy discourse are preoccupied with extra-familial victimization and consequently reinforce the stranger danger myth.

In the same way, by relating the high-risk pedophilic offender to personality disorder or deviant sexual arousal, the patriarchal home and the most common form of

\[169\] In the current sample, all offenders were male.
\[170\] The SORAG is an exception. This instrument uses a reverse scoring system exclusively for female victims under 14 years old.
\[171\] This figure is somewhat misleading given that four of those cases also involved predicate child victims who were unrelated to the offender.
sexual abuse against children—incest—are unchallenged. The pedophile, like the rapist, is individualized and medicalized. Risk discourse alleviates the need to examine the vulnerability of children in a family context where "father knows best" and his "home is his castle."

In the hearings, experts often explained incest in terms of extreme sexual disorder or disease. In 1998, a Crown expert pointed out that the fact that the offender was able to victimize his own child was "in itself indicative of quite severe sexual deviance" (DO140, 1998). Carol Smart (1989) points out in her discussion on the history of child sexual abuse that "the more child sexual abuse is depicted as a horrible pathology, the less could ordinary fathers be seen as enacting such deeds" (p. 52). By portraying the pedophilic father as a "sick man," fatherhood is also uncontested.

Another rationalization of incest emerged in the hearings. Experts constructed incest as the result of a dysfunctional family not protected by a traditional nuclear arrangement. The individual who victimized his own children or stepchildren was viewed as a product of the sins of his parents—usually an unfit or inadequate mother—in a pathological family. He was repeating the cycle and belonged to a criminogenic underclass that refused or was unable to play by the rules of traditional family composition.

Experts in my sample assigned minimal importance to the past sexual victimization of the offender. They discussed past abuse but not as correlative to current offending. By negating this correlation, incest and pedophilia are further depoliticized. The DO files are quite striking in their casual mention of abuse by sea cadet leaders, janitors, foster
brothers and fathers, family doctors, uncles, stepfathers and institutional staff.172 Several files contained information on sexual abuse experienced by the offender in the residential school system, in prisons and in schools for the mentally retarded.

In a similarly cursory fashion, risk assessment tools, such as the SVR-20, consider past sexual abuse but only as a factor that elevates one’s risk to reoffend. Instruments transform needs that arise from past trauma or abuse into risk. Overall, the socio-historical realities shared by offenders were left unchallenged in the hearings.173 The majority of experts did not appear to support the cause-and-effect theory of the abused-abuser or what is referred to in the clinical literature as the “vampire syndrome” (St-Yves and Pellerin, 2002). In fact, several Crown experts questioned the legitimacy of the pedophiles’ reported sexual victimization. ‘Pseudo-victimization,’ according to researchers, is frequent among offenders who are looking for empathy and want to excuse their behaviour (e.g., Hilton, 1993). Researchers and clinicians label deceit in relation to past sexual victimization as the “Pinocchio syndrome” (St. Yves and Pellerin, 2002).

In addition to minimizing the impact of past sexual victimization, risk assessment instruments and research surrounding sex offending tend to homogenize individuals who commit sex offences. A very confusing and often contradictory profile of sex offending emerges from the application of these tools. For instance, several studies have revealed that psychopathy, lack of empathy and denial of offences are unrelated to sexual recidivism (e.g. Hanson and Bussière, 1996, 1998; Barbaree et al. 2001). Yet, the SVR-20—the most popular tool for assessing the risk of sexual reoffending among experts in

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172 Two files contained evidence that the offender had been sexually assaulted in the past by an individual currently in custody and designated a Dangerous Offender.
my sample—incorporates the PCL-R score and extreme minimization or denial of sex offences as risk factors (Boer et al., 1997).

Commenting on the inappropriateness of assessing all sex offenders with the PCL-R, a neutral assessor testified in a 1998 hearing that “at levels of both clinical and research there is great difficulty in devising reliable methods for estimating the future re-offence risk for sexual offenders.” He cited numerous reasons why sex offending is a difficult behaviour to assess using a standardized framework. These reasons include an incomplete understanding of sex offending and the highly varied characteristics of the sex offender, as well as the uncertain effects of treatment and supervision. The expert told the judge “estimation methodologies are necessarily crude and approximate and can at best provide ballpark estimates of re-offence risk. [There is] nothing close to a gold standard for re-offence risk estimation” (DO108, 1999).174

In the examined hearings, the prototypical Dangerous Offender emerges as the psychopathic serial rapist or the extra-familial pedophile. In both cases, focus on these offenders negates attention to the more prevalent frequency of violence within the home in the context of a spousal, guardian or parental relationship. This negation is problematic given that in my sample the majority of offenders were victims of intra-familial violence. If offending did occur within the family unit, the behaviour was pathologized, further leaving normative prescriptions of family and relationships intact.

173 Numerous studies reveal that, when asked, 30 to 60% of individuals diagnosed as pedophilic report past sexual victimization. For more information, see Hanson and Slater (1988).
174 Interestingly, this expert, while testifying for the Crown in the past, had been an avid supporter of the use of the PCL-R. Incredible faith in the accuracy of risk assessment had formerly characterized his testimony.
Sexual (Ab)normality and the Confession

I continue to improve control over so-called impulsive behaviours like fantasies and masturbation. [And] I now fully understand deterrence. I have lots of it, lots and lots [of deterrence]. (offender, DO122, 1998)

Every fantasy is pathologized—even consenting sex. (offender, DO233, 1984)

Due to the overrepresentation of sex offenders among DO applicants, discussions about sexual deviancy or perceived sexual abnormality were an integral part of the hearings. In order to evaluate an offender's risk of sexual reoffence, experts employed prescriptive norms surrounding sexual practices and preferences. Experts did not explicitly define normalcy but instead offered default or negative evidence to imply an image of what is normal. If the offender's sexuality or sexual practices deviated from what was perceived as socially and morally "normal," the predilection was reported by experts and added to the offender's risk profile. Experts interpreted excessive masturbation, fetishes, sexual fantasizing and interest in pornography, as well as promiscuity, as indicative of a higher risk to reoffend and, accordingly, of a threat to the community. The question thus becomes: to which communities are these practices and interests threatening? Are experts applying sexual norms and standards reflective of the actual sexual behaviour of the general population? In the DO hearings, experts employed 'middle class' standards of appropriate sexual behaviour to define sexual deviance.

For example, the judge in a 2000 hearing reiterated what an expert in testimony viewed as the defendant's development of an "abnormal pre-occupation with sex." The judge imagined that this abnormal behaviour started when the defendant was six years old, when a 19-year-old female boarder engaged him in mutual masturbation. The judge
then listed behaviours that he and the expert felt reflected the offender's pre-occupation. These behaviours included early sexual activity, "rock band membership which entailed readily available 'groupies' for sex," "a self-reported history of arousal to deviant sexual stimuli," "acting out sex roles and watching kinky movies with a common-law partner" (DO601, 2000). Experts in this hearing constructed the dominant and voyeuristic scenarios played out by the offender and his common-law partner as evidence of deviant sexual arousal. They saw these behaviours as rehearsals for criminal activity and indicative of high risk. In the alternative, one could equally describe such consensual behaviours as having positive prognostic value, representing a healthy and safe outlet for sexual experimentation and arousal.

Often, assessors would report at what age offenders first had sexual intercourse. They would also note how many sexual partners the defendant claimed to have had since then. Remarkably on these activities implied that there was a norm surrounding age at first sexual intercourse or standard number of sexual partners on which to evaluate offender responses. Experts commented on an offender's sexual behaviour only when it violated the constructed boundaries of normalcy. The court was therefore unlikely to learn if an offender had two sexual partners, but if the expert discovered that the defendant had 150-200 sexual partners, this was reported. In another case, the Crown psychiatrist reported that the offender had had crabs at one point in his life. By noting this contagious affliction, the psy expert said something about what he perceived to be as normal, without explicitly stating his perception of what was abnormal.

In a recent case, a judge listed the multiple sexual paraphilias exhibited by the offender and described by the experts. This list included the fact that the offender found
older females sexually arousing. The judge defined the older female as being beyond the age of 40. By including this preference as a paraphilia, the judge and experts pathologized sexual preference and naturalized the norm that sexual partners are age-related and therefore younger men should not be attracted to older women. In this context, I doubt that an expert could concur that the attraction to older women by younger men was normal without being accused of supporting the sexual assault of a 50 year-old woman perpetrated by the defendant. Naturalization of norms within the context of behaviour already deemed criminal is a powerful weapon used to preserve the norms of society.

Sexual norms embedded in risk assessment instruments are often more explicitly stated than those found in the psy discourse circulating in DO hearings. Item 11 on the PCL-R measures “Promiscuous Sexual Behaviour” and item 17 codifies “Many Short-term Marital Relationships.” Experts give a lower score (0 or 1) to offenders under the age of 30 who have had two or fewer intimate partners.\[^{175}\] A score of ‘2’ is given if the offender has had three or more relationships (Hare, 1991, p. 27). Monogamy is equated with normalcy and lower risk of reoffence. However, the PCL-R fails to reward offenders who maintain stable marital relationships other than to ‘score with a no score’ of ‘0’ on this item.

Additionally, if experts perceive the offender to be promiscuous, a diagnosis of psychopathy is more likely and the offender is ultimately described as a high risk to reoffend. Yet, the absence of these items does not protect the offender who may score higher on another item. The PCL-R defines promiscuous behaviour with restrictive

\[^{175}\] This item is scored differently for offenders who are age 30 and over. For instance, when assessing an offender over the age of 30, experts give a score of ‘0’ for two or fewer relationships,
normative criteria. An individual scores a '2' if the expert can deduce a "reasonably good match in most essential respects and/or the behaviour is consistent with the flavor and intent of the item" (Hare, 1991, p. 23). According to the PCL-R, individuals who engage in promiscuous behaviour have

sexual relations with others [that] are impersonal, casual, or trivial. This may be reflected in frequent casual liaisons (e.g., one-night stands), indiscriminate selection of sexual partners, maintenance of several sexual relationships at the same time, frequent infidelities, prostitution, or a willingness to participate in a wide variety of sexual activities. (Hare, 1991, p. 23)

This definition suffers from the use of vague descriptors such as "impersonal," "casual" and "indiscriminate." Note the use of the word "or" instead of "and" before the phrase "willingness to participate in a wide variety of sexual activities." This choice of conjunction broadens the behaviour that would warrant a score of '2' on this item. Also, consider what constitutes a variety of sexual activities. For instance, does viewing pornography with a partner fall into this category? Where evidence of scoring existed in the DO hearing files, the experts scored most offenders a '2' on this item, mainly relying on the defendants' sexual fantasizing to justify that score.

In several cases experts commented on how offenders, when asked, denied an attraction to pornography. Consider for a moment attraction as something to be denied regardless of its presence. Pornographic interest was part of the dossier of a sexual deviant. If denied it was portrayed as something that the offender needs to confess to, thereby implying guilt. Use of pornography is also a risk factor in the ASSESS-LIST, a component of the VPS. If the offender views pornography, the scheme tells experts to

'1' for three relationships and '2', the highest score, for four or more relationships (Hare, 1991, p. 27).
assign an unfavourable checkmark under 'sexual adjustment.' The manual explains:

Assessors will ordinarily be concerned about sex offenders who continue to maintain a pornography collection or show a sustained preference for sexually violent films or magazines. Also, the assessor should determine whether previous and current fantasies are directed towards specific individuals or types of individuals, and whether the person spends increasing amounts of time immersed in fantasies. The assessor must also consider the likelihood that the person will enact the fantasy. (p. 56)

In DO127 (1997), the Crown alerted the court to the fact that the defendant had adult pornography on his prison computer. According to the Crown, this evidence contributed to his risk of reoffending. The defence expert argued that pornography was not an issue unless it was degrading. He then told the court that it was no surprise to him that the defendant would want to look at naked women in prison.

Seventeen files or hearings involved evaluation of defendants' sexual fantasies. The consensus among the majority of experts was that a sexual fantasy life increased the offender's risk of reoffending. In an exception to this consensus, a judge noted in DO229 (1995) that sexual fantasies were common to all and it was not surprising to him that they occur in jail. Experts, however, typically interpreted sexual fantasizing as a "trial run" for resultant criminal activity perpetrated by offenders. The neutral assessor in DO132 (1998) testified that psy experts believe that the more persistent and preoccupying a fantasy the greater the risk that a person might act upon it. The psy literature surrounding reoffence risk also suggests a link between sexual fantasy, especially sadistic fantasizing and criminality (Prentky et al., 1989).

However, most studies conducted on sadistic and/or sexual fantasizing start backward by identifying first the sex offender and then his or her fantasy life. The
connection between sexual fantasy and criminality is less than convincing when we consider how many individuals engage in sadistic or sexual fantasy without ever offending. By assuming this link, the psy literature pathologizes sexual fantasizing, and denies it the status it is often granted among the ‘non-criminal’ population—that of being healthy, cathartic sexuality and a quite common element of sexuality.  

The experts in my sample viewed fantasy in the same way as pornography—it was to be confessed to or denied by the offender. Experts accused offenders of “not giving full accounts of fantasies,” “denying sexually deviant thoughts,” “admitting to excessive masturbation” and “accepting admissions of fantasizing.” Foucault (1978b) links the ritual of confessing with sexuality. Admitting sexual practices to an evaluative authority figure, according to Foucault, is a consistent strategy of power in the expert’s production of truth. Truth formulated through a confession “holds out like a shimmering mirage” and as a result the confession is one of the most valued methods for the production of truth in justice, medicine, education, family relationships and love relations (Foucault, 1978b, p. 59).

Foucault (1978b) argues that, starting in the nineteenth century, the nature and function of the confession shifted. It was no longer confined to admitting that which the subject wished to hide, but also involved what was hidden from him and thus only exposed through the power relations of the questioner and the questioned (p. 66). The expert discourse around sexual acts, which has been encapsulated in risk assessment tools, has the effect of reconstructing sexual acts and preferences as confessionary.

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176 A pioneer in sexuality research, Kinsey noted in 1953 that as many as half of Americans participate in mildly masochistic or sadistic sexual activities. In a more recent study of college students, it was reported that 61% of the students had been sexually aroused while imagining or participating in these same activities (Donnelly and Fraser, 1998). For more information, see Kinsey, Pomeroy and Martin (1948) and Kinsey, Pomeroy, Martin and Gebhard (1953).
These acts are something to be denied and then rediscovered by experts in the quest for truth. This truth lies dangerously hidden from those without the power or tools to define it. It is the role of the expert, armed with suitable instruments, to expose this danger.

Phallometric testing is a truth-telling technique used to score several risk assessment tools. This type of testing involves gauging psychophysiological changes in an individual who is responding to visual and auditory sexual content. More specifically, the instrument measures changes in penile blood flow. The phallometric test is the ultimate confessionary device—a tool used to force confession with built-in preventative strategies to ensure discovery of truth. During the test, cognitive tasks are often given to offenders to keep them from having the mental resources to feign a response. The literature claims that few offenders spontaneously and successfully fake responses in their first phallometric assessment. The clear implication is that there is no escaping confession under the expert gaze.

**Sexual (Dis)orientation and Symbolic Violence**

The more generally removed from a normal, healthy pattern of sexuality an individual is, the more likely they are to reoffend in the future. (Crown expert, DO140, 1998)

In my sample of DO hearings, the majority of experts and judges perceived that any sexual orientation which deviated from the norm of heterosexual adult relations contributed to the risk posed by the offender. Discourse around sexual orientation contained elements of the historical medicalization and criminalization of homosexuality. Experts referred to the homosexual offender as ill and mentally disordered by virtue of his homosexuality, rather than his criminality.

177 For more information on testing, see Langevin (1988).
Psychiatric discourse and practice have pathologized homosexuality since the early 1900s (Bayer, 1981; Kutchins and Kirk, 1997). The discourse generated in the 1950s by the psy disciplines linked violence and especially the corruption of minors for illicit sexual activity to the homosexual (Freedman, 1987). The APA eliminated homosexuality from the Diagnostic Statistical Manual in 1974 and it was removed from the Canadian Criminal Code in 1969 (Bayer, 1981). Reflecting on the change in law, a judge noted in a 1980 DO hearing that the homosexual is still conceived in terms of criminality and "while the Parliament of Canada has declared that homosexuality between consenting adults is no longer a crime, it seems to have done nothing to encourage it" (DO121, 1980).

Earlier DO hearings in my sample contain evaluations involving the explicit medicalization and criminalization of homosexuality. The Crown notice for a 1980 case included in its facts that the offender is a "confirmed homosexual" and "no treatment will eradicate homosexuality" (DO121, 1980). In 1983, a Crown expert diagnosed the offender with abnormal psychosexual development "proven by episodes of homosexuality" (DO236, 1983). The Crown expert in DO202 (1985) told the court that, because the offender victimized through anal intercourse, he represented a more serious threat compared to the perpetration of "other intercourse."

The expert formulation of homosexuality as abnormal, although less explicit, also pervaded more recent cases. Experts viewed heterosexuality as natural and evolved, whereas homosexuality was something to be confessed to or denied by the offender.

178 A diagnosis of ego-dystonic homosexuality replaced homosexuality in the third edition of the DSM in 1980. This label described an individual who exhibited a persistent lack of heterosexual arousal, which the patient experienced as interfering with initiation or maintenance of wanted heterosexual relationships; and persistent distress from a sustained pattern of unwanted homosexual arousal. The APA removed this diagnosis in 1986 (Edgerton, 1994).
The judge in a 1986 case observed that the offender “admitted” he was a homosexual and had never had a relationship with a female. Experts described homosexuality in terms of “latent drives,” “confused sexual identities” and “hidden issues.” As evidenced by these phrases, experts also viewed homosexuality as a repressed state and a source of concealed danger.

Experts and judges regularly evaluated offenders’ morality based on sexual orientation and linked this to the illegal behaviour they perpetrated. For instance, the judge in DO245 described the offender as a person crying for help, which indicates that he recognizes he has a serious problem. The judge continued: “[W]e are dealing with a man who has limited intelligence, limited moral/social skills ... and has apparently in his early years been involved with homosexual activity with adults. This degenerated into a form of sexual activity with children” (DO245, 1986). The judge’s use of the word degeneration implies belief in a normative pathway model of criminality. This mentality is characteristic of degenerative theories which assume that one’s perceived immorality—that of homosexuality—can and will lead to the illegality of child victimization.

In DO hearings, the discourse about sexual preference enabled the equation of criminality with homosexuality, especially in terms of the “corruption of children.” In DO106 (1991), an expert argued that he doubted that the defendant’s bisexual and pedophilic sexual direction would be altered substantially twenty years from now (my emphasis). Experts did not afford a separation of the offender’s sexual orientation from his pedophilic tendencies. A judge in a 1997 case described the offender as an untreated bisexual pedophile who would never be cured of this disorder, clearly equating bisexuality and pedophilia as one affliction.
Similarly, in the context of DO hearings involving child victimization, experts offered opinions that there was no cure for homosexuality or pedophilia. One psychiatrist, when speaking about a homosexual pedophile, claimed that he had never met a pedophile who could change his sexual behaviour. "[Y]ou can't change sexual orientation," he continued, "by the time someone reaches age 45 their behaviour is cast in stone" (DO105, 1994). Again, the impression conveyed by the expert is that both pedophilia and homosexuality are illnesses in need of a cure.

In the explored hearings, heterosexuality is exposed as the default discourse used to label a pedophile. Both Crown and defence experts discussed homosexual pedophiles but not typically heterosexual pedophiles. In the majority of cases, the heterosexual pedophile is just the "pedophile." Figure 5.2 demonstrates labeling patterns used to describe individuals diagnosed with pedophilia.

Figure 5.2: Expert Descriptions of Individuals Diagnosed with Pedophilia (N=30)
Regardless of original intent, the pairing of sexual orientation with pedophilia, followed by a statement surrounding cure or illness, is problematic. By using sexual orientation as an adjective qualifying pedophilia, the expert pathologized sexual choice or the right to sexual determination. According to Bourdieu (1991), this form of “spoken truth” represents a symbolic domination or violence that involves

[a] power of constituting the given through utterances, of making people see and believe, of confirming or transforming the vision of the world and thus the world itself. [I]t is a power that can be exercised only if it is recognized, that is misrecognized as arbitrary. (p. 170)

Symbolic violence or power can impose and indoctrinate systems of classification that function to naturalize structures of domination such as homophobia. In psy expert discourse in my sample, the homosexual pedophile was represented as unable to exist independently as a homosexual or as a pedophile. The experts’ combining of homosexuality with pedophilia in the DO hearings added to the further criminalization of sexuality. In the end, the homosexual pedophile was automatically understood as a high-risk offender and a likely candidate for a DO designation.

In sum, expert discourse in DO hearings contains implicit prescriptive norms about human sexuality. Risk assessment tools explicitly encode some of these norms. Sexual abnormality defined and discovered by experts, often through confessionary devices, is indicative of dangerousness and a high risk to reoffend.
THE TRAGIC PERSONAL HISTORIES AND SCRIPTS OF THE “OTHER”

This certainly appears to be a case where the sins of the parent are visited upon the child. (Judge, DO107, 1998)

Most introductions to the offender in psy reports and reasons for judgements started with an account of family life and childhood history. When experts or judges in my sample spoke about a given offender’s background, descriptions of family dysfunction were predominant. The family dysfunction script was warranted. The majority of defendants in the sample had experienced abuse from their family or in state institutions. I discovered the alternative—a definition of a ‘healthy family’—emerging from the experts’ script centred on dysfunction. Discourse around family dysfunction was revealing in that it defined what experts considered normal family life. This practice of definition by omission of normalcy is a consistent feature of psy discourse in DO hearings.

Several themes circulate in the DO hearings to describe the dysfunctional family arrangement or childhood experience. These included the unfit mother; the absent father; the criminogenic family; the presence of foster care/absence of biological parent; and abuse within the family unit. For example, in their testimony and psy reports, experts consistently noted whether the offender:

- was “born out of wedlock” or had “parents who separated before birth”;
- was without “next of kin” or had an “unknown father”;
- had a “biological mother unable to care for him,” “no contact with [the] biological mother,” “siblings all from different fathers”;
- was “apprehended” as “a temporary ward of the state”;
• had a family "known to social services" or "Childrens' Aid Society exposure";
• had a "chaotic," "transient" childhood; or
• belonged to a "most dysfunctional family" with "inappropriate sexual modeling," and was exposed to a "sick situation."

Experts chronicled the relationship between the offender's mother and father, often perceiving an inability to parent children. Parents were described as "inadequate" and alcoholism was noted in the majority of the families. Experts discussed siblings but usually only in relation to criminogenic characterizations of the family. They noted whether criminality was present in the family or if any family member had committed suicide or had been institutionalized. In three cases, the judge observed that the offender was a witness to the murder of a family member. Experts also commented on spousal violence in the home.

Item 12 on the PCL-R—Early Behaviour Problems—captures the possible implications of a dysfunctional family. Behaviours that arise from children coping within an unstable environment are transformed into risk factors. Item 12 describes an individual who at the age of 12 or below already had serious behavioural problems (Hare, 1991, p. 24). Problems listed in the manual include, among others, persistent lying, cheating, theft, fire setting and substance abuse. The PCL-R manual advises that the rater should be satisfied that these behavioural problems were not solely due to subcultural or familial factors (p. 24, my emphasis). Yet, Hare (1991) himself observes that the tool he formulated tends to target individuals with family problems, as well as low socioeconomic status and education level. The PCL-R becomes a sorting tool for the identification of the underclass. The experts in the DO hearings furthered the
disadvantage experienced by the offender when they used the PCL-R as a confirming device for a high risk of reoffence.

**MY MOTHER: MATERNAL ATTRIBUTION DISCOURSE**

*My mom hated me because I had red hair and looked like my dad's side of the family.* (offender, DO217, 1988)

The experts in my sample focused on the perceived role of the mother in the offender's family situation. They consistently reported the mother as an active agent in the offender's life. The father's role was minimized compared to the weight they gave to maternal influence. Offenders’ mothers were the direct subjects of various adjectives and attributions in 64 out of the 100 cases explored. Fathers, on the other hand, seemed to escape judgement, frequently because the experts reported the father to “be gone” or “unknown” whereas experts described mothers as “cold, uncaring, distant” and “neglecting.” Offenders were reported to be “abandoned” or “deserted” by their mothers. In the hearings, experts accused mothers of failing to protect their children against abuse by the fathers, and of being “not very physically or emotionally available.” Mothers were “dependent,” “negative role models,” and “known to frequent bars.”

The court heard stories about mothers who threatened to cut the legs and arms off their children. Another mother was noted to have run her son over with a bus and a different mother was accused of trying to shoot her son. The Crown expert in DO130 (1997) detailed how the offender's relationship with his “alcoholic, violent, promiscuous” mother was “uncaring, hostile, [and] abusive.” The expert concluded that because the offender did not receive love as a child, he was not able to develop the ability to feel guilt. In another case, an offender was described as the recipient of both covert and
overt rejection by his mother, while the father was characterized as ineffective (DO201, 1980). In DO102 (1988), the judge cited a psy expert who reported that the offender’s promiscuous mother had allegedly sexually abused the offender. The judge in this hearing acknowledged the damage:

[His family life had] disastrous effects upon his psyche. [T]he word tragic is much too mild a term to apply to his upbringing—or rather lack thereof—I can well understand his hatred of women and his desire to inflict pain on them—but cause is of no importance. (DO102, 1988)

The father in this case was determined to “be gone.”

The offender in DO103 (1986), described as a bright kid, had suffered, according to the defence expert, from having a “distant father and Dickensian mother” (DO103, 1986). The Crown expert in DO106 (1998) described the offender’s mother, by then deceased, as a brooding, unpredictable, moody and violent alcoholic. The expert suspected that the offender had incestuous relations with his mother and that her children may have been “farmed out” for sexual relations with adults. Consequently, he noted the offender’s contempt for women and “their lack of parenting skills.” The expert in a 1994 case observed that the defendant’s abusive father had been convicted of gross indecency and was suspected of committing incest. Yet, his examination of the offender’s life history revealed that a “controlling grandmother” was “believed to be the source for his behaviour” (DO211, 1994).

An expert quoted an offender in DO140 (1998) as saying that females had always abused him and therefore he had grown up without a conscience. According to the offender, “the one that did the most damage was my mommy.” The judge noted in this case that the offender had experienced a difficult physical birth and that “his own family background and upbringing by his mother was grim beyond words” (DO140, 1998). The
father was present during this offender's childhood.

A pattern emerged in the expert testimony and assessments included in my sample, exhibiting a clear trend toward mother-blaming discourse or a "matriarchally produced narrative."\(^{179}\) Experts consistently evaluated the negative influence of mothers, stepmothers or grandmothers. Fathers were more apt to be described as abusive, alcoholic, protective and/or gone/unknown. When experts considered paternal influence, they used less emotive language to describe the father. This conclusion is similar to Tithecott's (1997) who investigated the social construction of the serial killer. He argues that the dysfunctional family unit is usually defined in expert discourse as a place lacking a father and with paternal influence gone, maternal influence rules. Experts evaluate this maternal influence as "monstrous" and "inevitably chaotic" (Tithecott, 1997, p. 45).

Clinical psy discourse and expertise historically blame mothers for all kinds of deviant behaviour, ranging from bed-wetting to schizophrenia and from aggression to homosexuality.\(^{180}\) An entry in a 1998 file is reflective of the impact that these perceptions have on a larger audience. An offender's sister claimed that her brother was unusually attracted to their mother. The sister recalled feeling concerned that he would "turn out queer in some way" because he was so attached to his mother (DO239, 1996).

The pattern is less subtle in another case. The expert described the offender's closeness to his father. His father subsequently disappeared and, according to the expert, the offender resorted to developing strong emotional bonds with women in his family. The development of these bonds "created problems with respect to identification with a male figure and identity" (Defence expert, DO133, 1999). The expert described

\(^{179}\) Tithecott (1997) uses this phrase in his examination of Jeffrey Dahmer and the psy construction of serial killers.

\(^{180}\)
the mother as a very dominant parental figure: "[The] mother's avowed feminist convictions, and actions and one might surmise thoughts and utterances must have been threatening to whatever male identity Mr. E was developing." The expert reasoned that the offender's attack on prostitutes was retaliation for the "pain inflicted on him by various females and womanhood in general."

The consistent reporting of family dysfunction and negative maternal influence as indicative of high risk says something about the perceived link between criminality and the breakdown of the traditional family structure, including ascribed gender roles. The family dysfunction script and the matriarchally produced narrative subscribed to by the experts revealed what they considered normal: a devoted and selfless mother and a disinterested but absolved father. The expert discourse supported the mystique of motherhood, and left fatherhood unchallenged.

In an ironic twist, the judge noted in DO134 (1996) that the offender's mother, because of previous psychological consultations of her son, was ultra-sensitive to the idea that she may have been a contributing factor to his problems. Expert opinion described the mother as cold, distant, demanding and disinterested. The offender felt he was unloved and, in fact, hated by his mother. The mother's ultra-sensitivity may have been warranted and rational given societal and psy propensity to prescribe women as primary care givers and then to scapegoat them for a wide range of social issues and problems.

\[180\] For a critical sociological examination of mother blaming, see Caplan (1998).
THE OFFENDER AS THE VICTIM IN THE "TOXIC" FAMILY: LINKING TRAUMA WITH THE NON-TRADITIONAL FAMILY

The combined effects of genetic predisposition and a toxic family and a toxic family environment apparently have a negative effect. (Judge, DO114, 1999)

One of the most striking features of the DOs' biographies that I discovered was the range of abusive situations they experienced. The files described every imaginable crime and trauma, ranging from a mother-killing father to a father-killing mother. An offender was hung upside down and burned with cigarettes. Another's mother forced him to perform fellatio on his father. Teachers or foster family members repeatedly raped the offenders. One offender was dressed up in a dead child's clothes by a grieving aunt. Some were "farmed out" by fathers to family friends for sexual abuse. Others were taken out of abusive homes and placed in sexually abusive foster homes. One offender witnessed his mother's suicide.

Experts and judges consistently described the offenders' life histories as tragic. As one judge noted "tragic in the sense that all the internal and external mechanisms to assist are lacking ... no one is suggesting he didn't try" (DO110, 1993). The judge in this case chronicled the life events of the offender, including the sexual and physical abuse perpetrated by his father and mother over several years. The offender's grandmother eventually shot her son after disclosure of the abuse. The children were apprehended and placed into foster homes and boarding schools. Staff and residents at the school were then reported to have sexually abused the offender.

Judges were very explicit in describing the offenders as victims of their own "dismal" biographies. They often referred to the impact of growing up in a "toxic" family. Judges characterized offenders' childhoods as "horrendous" and "diabolical." Experts
provided this information but were less likely than judges to view the offender's biography as causative or as the source of the offender's criminality. In a 1997 hearing, the judge noted, "[I]t is necessary to point out that to a large extent Mr. F. is and has been as much a victim. He was brought into the world with not a great deal of privilege, and with many serious deficits that were inflicted on him negligently. He was given virtually no start in life" (DO129, 1997). In another 1997 case the judge opined: "One cannot help but be sympathetic to the background and life circumstances experienced by Mr. K...." (DO130, 1997). In 1993, the judge in DO243 concluded: "It is regretful that society must impose harsh penalties to ensure protection, especially on persons whose background of deprivation and abuse such as yours make resistance to offending difficult if not impossible." The judge's words in a 1983 case are especially provocative, even after repeated readings:

> I cannot imagine a more tragic case than this. Tragic for the victims, tragic for this young man. This is a section of the code that should never be used lightly. The prospects of sentencing a 27-year-old man under this section are frightening. It is a section designed to protect the community and the tragic aspect of this case, as I say, is a tragedy for the victim, tragedy for [the offender]. A young man who had none of the advantages that come through a loving family, through an upbringing that had with it a certain discipline, expelled from his community at the age of 15, none of the advantages of a good mind, all the disadvantages we've heard about and are referred to in those pre-sentence reports he suffers from. I cannot imagine a more tragic case for all concerned. (DO119, 1983)

The judges' efforts to bring attention to the offenders' disadvantages are commendable. Yet, what emerged in the files I studied was a constitutive trauma discourse. As constructed by judges and experts, traumas or tragedies were experiences of abuse and neglect that happened because the offender was without the protection of a traditional family structure. Traumatic experiences and the absence of a
traditional family arrangement were not defined in succession of one another, but instead were intertwined to create one solid conduit of discourse. This discourse directly connected the non-traditional family structure to trauma. One implied the other. Judges and experts defined the non-traditional family as a site of toxicity and trauma.

At this intersection of meaning, a construction of the “underclass” akin to the historical idea of the “degenerate dangerous class” was encouraged and perpetuated. The words of a judge in a 1994 case illustrate how, in comparison, the non-dangerous class and normal families are defined. The judge described the offender as the oldest of three siblings, with hard-working parents. Experts had remarked on the offender’s strong work ethic. The judge did not declare the offender dangerous. Instead, he sentenced him to a determinate sentence of eight years. In the hearing, the judge observed that the offender’s “family life is quite ordinary without the trauma or disorder one usually associates with someone having a similar criminal history” (DO151, 1994). In this case, the connection between criminality and family toxicity was made visible by its absence.

Experts and judges in the DO hearings furthered the connection between trauma and a nontraditional family by making similar observations about an offender’s immediate family (e.g., wife, common-law, dependants). In the majority of cases where offenders had wives or common-law partners, experts viewed this status as indicative of relationship stability and lower risk. However, marital status was qualified according to the perceived role of the wife. Experts described wives as either supportive or blameworthy. Wives were often seen as catalysts for the offender’s criminality. For instance, experts would typically note if the offender’s wife was promiscuous or had alcohol or drug abuse problems.
The cumulative effect of this discourse in the DO hearings was the assumption that dangerous and high-risk offenders do not come from normal families. As Hacking (1990) maintains, "the significance of family in discourses about risk is obvious, the family is used rhetorically as an exemplar—and as a means to further stigmatize those who have no family or whose family falls outside the norm of respect" (p.62). In the end, experts' broken family script implicitly defined the normal family as a biological unit with married parents, a selfless mother and without abuse or other “family secrets.” When this normal family arrangement was violated, criminality was expected.

**THE (RE)SEXUALIZED DRIFTER: ECONOMICS AND DANGEROUSNESS**

*I'm a loser from both ends.* (offender, DO232, 1997)

*I'd have to describe him as a loser.* (Crown expert, DO216, 1988)

In almost all the cases in my sample, experts referred to the offender's employment status. Job instability and unemployment were considered risk factors. After commenting that the offender had worked only 10-20% of his life, the Crown psychiatrist rather derogatorily called the offender's life “a sorry state” and him a “tragic and pathetic individual” (DO104, 1996); others were reported to be “lazy” and “transient.” Experts quantified employment status by indicating what percentage of the offenders' lives had been characterized by steady employment. Frequent descriptors of employment status included “sporadic,” “intermittent,” and “disjointed.” Experts observed that the offenders had “many short term jobs,” “no career goals,” and “unstable job to job histories.” A neutral assessor in a 1998 hearing commented on the offender's "almost complete lack of ability to engage in diligent, steady hard work with any kind of focus,
discipline or real productivity” (DO238, 1998). Significantly, 22% of the 95 cases where employment status was known involved work histories that were perceived by experts as favourable or stable. In approximately 40% of those cases, judges did not declare the offender dangerous or did not give him an indeterminate sentence.

Freedman (1987) argues, “[f]rom the origin of the concept, the psychopath had been perceived as a drifter, an unemployed man who lived beyond the boundaries of familial and social controls” (p. 89). During the 1930s, psy professionals sexualized this drifter. Economic and psychological identities were merged to form a portrait of the psychopath, who then became the target for concerns about social rules and norms. The masculine man was employed and had a family; those without these trappings of normalcy were interpreted to be psychosexually maladjusted, and thus psychopaths (Freedman, 1987). Today, the same connection is made between unproductive members of the underclass and sexually dangerous high-risk offenders.

Throughout history, the courts and psy professionals have intimately connected a person’s identity and moral worth to employment and economic productivity. Consider the telling observations of a judge in DO234 (1996): “[C]onsidering [the offender’s] age, lack of skills, and relatively poor motivation for education and employment it would seem most likely that he is not going to be able to attain anything of substantial value in this area.” The judge described the offender as a transient person who had seemed to find “little purpose or point [in] life other than day-to-day survival and alcohol.”

Consensus exists in the psy literature that employment problems are linked to general recidivism (Andrews and Bonta, 1995). The PCL-R, HCR-20 and VRAG formalize employment status as a risk factor. Item 9 on the PCL-R measures “Parasitic
Experts assigned a higher risk level to an offender if "although able-bodied, he avoids steady, gainful employment; instead, he continually relies on family, relatives, friends, or social assistance" (Hare, 1991, p. 22). Item 13, "Lack of Realistic, Long-Term Goals," requires an assessor using the PCL-R to evaluate, in part, if the individual is interested in having a steady job or, conversely, whether he leads a nomadic existence and describes himself as a “drifter” (p. 24). “Irresponsibility,” item 15 on the PCL-R, also discusses work behaviour. The manual defines irresponsibility, to a certain extent, as frequent lateness or absence, and careless or sloppy performance at work, not attributable to lack of ability, etc. (p. 25). Quitting one’s job is evidence for “Impulsivity,” item 14 on the PCL-R. Item 3, “Need for Stimulation and Proneness to Boredom,” considers complaints about the boring nature of school and work as evidence for increased risk.

The domino effect or overlapping nature of risk items, previously discussed, is also evident with respect to these items which address employment history. In the Violence Prediction Scheme (VPS) manual, the authors provide an example of how to code the PCL-R using file information (Webster et al., 1994, Appendix A). The file information provided below, taken from the manual, illustrates the problematic overlapping quality of PCL-R items with reference to employment history. The information reads: “David has only held short labouring jobs on construction sites and in factories. His last employment and his longest, was for the five months prior to his arrest for the current offence.”

From this information, the VPS manual suggests that the assessor could score PCL-R items 9, 14 and 16 (Parasitic Lifestyle, Impulsivity, and Failure to Accept Responsibility for Actions, respectively). The report in the manual continues: “He claims
the arrest 'screwed up' his life as he feels the construction company would have made him foreman by now." The manual suggests that the assessor could score PCL-R items 2, 5, 13, and 16 (Grandiose Sense of Self-Worth, Conning/Manipulative, Lack of Realistic Long-Term Goals, and Failure to Accept Responsibility for Actions, respectively) using this information. To interpret reports in this way accepts the validity of the assessor's conclusions and the reliability of the link between economic productivity and risk.

In sum, experts and judges in the DO hearings viewed productivity and employment status as indicative of an offender's risk of reoffending. Experts judged offenders to be a lower risk if a "stake in conformity," as demonstrated by legitimate economic system participation, could be established. Hacking (1990) similarly observes, "processes of renumeration and categorization institutionalize a division between the successful and a nascent welfare population" (p. 66). McLaren (1998), in an archival study of the trials of male murderers in British Columbia in the early 1900s, notes that lawmakers seemed particularly taken by the notion that a man's morality could be judged by his attitude to work (p. 159). Young (1999) contends that normalcy as defined by the majority assumes that the vehicle of work can miraculously help an offender achieve the transition from socially excluded to socially included.

**WHO IS NOT DANGEROUS? DEFINING ACCEPTABLE RISK**

Another way to provide a snapshot of the factors indicative of high risk is to examine those offenders not designated dangerous or those given a determinate sentence prior to the 1997 legislative changes. These offenders are variously described
by experts as "not the most disturbed or untreatable," "not the worst of the worse," or "not belonging to the small number of exceptionally dangerous offenders."

By collapsing this group of offenders into a sub-sample of what I will call "failed applicants," I can make some preliminary comparisons (see Table 5.3).¹⁸¹ Several patterns and themes emerge. Offenders who were of minority status, single and "psychopathic" are over-represented in the sample of Dangerous Offenders who received an indeterminate sentence. Failed applicants were older and more likely to have post-secondary education; to victimize a relative; and to be steadily employed before arrest, compared to DOs. It is not surprising that drug and alcohol abuse was consistent across both groups given its interpretation by experts as either a low or high risk factor.

¹⁸¹ These categorizations are based on the original decision in court and do not account for subsequent appeals. I have included two defendants deemed Long-Term Offenders in this sub-sample.
Table 5.3: Comparing Failed Applicants with Dangerous Offenders Given an Indeterminate Sentence

<table>
<thead>
<tr>
<th></th>
<th>Failed Applicant (N)</th>
<th>Indeterminate Sentence (N)</th>
<th>$\chi^2/t$</th>
<th>p&lt;sup&gt;a&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>mean age</td>
<td>41 (23)</td>
<td>35 (76)</td>
<td>2.20</td>
<td>&gt;.05</td>
</tr>
<tr>
<td>single</td>
<td>56.5% (13)</td>
<td>74.0% (57)</td>
<td>2.58</td>
<td>&gt;.10</td>
</tr>
<tr>
<td>with dependants</td>
<td>57.9% (11)</td>
<td>60.0% (33)</td>
<td>.026</td>
<td>ns</td>
</tr>
<tr>
<td>high school completion</td>
<td>26.1% (6)</td>
<td>22.2% (16)</td>
<td>.146</td>
<td>ns</td>
</tr>
<tr>
<td>university/college degree</td>
<td>26% (6)</td>
<td>15% (11)</td>
<td>1.39</td>
<td>ns</td>
</tr>
<tr>
<td>minority race</td>
<td>15.8% (3)</td>
<td>29.2% (20)</td>
<td>1.50</td>
<td>ns</td>
</tr>
<tr>
<td>steady employment</td>
<td>34.8% (8)</td>
<td>18.1% (13)</td>
<td>2.83</td>
<td>&gt;.10</td>
</tr>
<tr>
<td>drug/alcohol abuse&lt;sup&gt;b&lt;/sup&gt;</td>
<td>70.0% (16)</td>
<td>71.4% (55)</td>
<td>.03</td>
<td>ns</td>
</tr>
<tr>
<td>psychopathy diagnosis</td>
<td>26.1% (6)</td>
<td>39% (30)</td>
<td>1.27</td>
<td>ns</td>
</tr>
<tr>
<td>sex offences</td>
<td>78.3% (18)</td>
<td>89.6% (69)</td>
<td>2.02</td>
<td>ns</td>
</tr>
<tr>
<td>serious physical injury</td>
<td>30.4% (7)</td>
<td>46.8% (36)</td>
<td>1.92</td>
<td>ns</td>
</tr>
<tr>
<td>related victim</td>
<td>18.2% (4)</td>
<td>10.4% (8)</td>
<td>.97</td>
<td>ns</td>
</tr>
</tbody>
</table>

<sup>a</sup>p=probability level based on t test or chi square.
<sup>b</sup>Described by an expert as an alcoholic or addict.
ns=nonsignificant

This comparison illustrates how dangerousness and high-risk status were related to an offender's perceived conformity to societal norms. Experts and the court were reluctant to advocate an indeterminate sentence if the offender was understood to be a capable<sup>182</sup>, productive citizen with some indication of membership in a community.

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<sup>182</sup>In three of these cases, the judge evaluated mental deficiencies as mitigating factors in the risk posed by the offender. Two of these cases ended in the judge designating the defendant a Long-Term Offender. These decisions might point to an emerging trend—that of using the LTO.
Several factors emerged that negate high-risk status. These factors included family support, marital stability and the ability to develop relationships. Experts also viewed stable work histories, church involvement and the support of children as positive prognostic factors in the majority of these files. In these cases, the offender was not perceived as willingly disengaging from society and therefore had not forfeited his participation in society. As anticipated in the theoretical literature, offenders who 'try hard to fit in' earn the right not to be excluded from the community (Freiberg, 2000, p.110).

However, these perceptions of forfeiture assume that the offender who was designated dangerous chooses freely and without influence not to participate in society. What was often ignored is the reality that past participation in society might have been abusive or that the system had previously failed the offender. For example, a Crown expert in a 1996 case involving a mentally retarded individual explained that the offender preferred life in jail to his life in the community. Prison assured food and accommodation for the offender rather than his "usual living in a squalid room in a house scheduled for demolition" (Crown expert, DO118, 1996). Unlike the sub-sample of failed applicants, the offenders who were declared dangerous are often doubly burdened with the evaluation that they have little to motivate them to stay out of jail or to change.

As expected, those diagnosed as psychopaths were under-represented among the sub-sample. Non-psychopathic offenders were more likely to be deemed treatable and, according to experts, were remorseful, cooperative, passive not aggressive, inadequate but not predators. Several other commonalities among these offenders related to designation for mentally deficient individuals rather than imposing the indeterminate option. The LTO status would still allow for long-term supervision of these offenders.
treatability surfaced, including treatment motivation, absence of mental illness and good insight.

One might expect to observe more physical injury to the victims of those offenders designated dangerous, compared to failed applicants. The overall low victim injury rates in this sample (30% and 47%) said something about the declining significance of harm as a determinant of punishment. Laws and sentences are no longer largely influenced by what the offender did—but rather by what he might do. The DO/LTO Assessment Guide makes clear that “[v]ictim injury is not so much relevant to risk for re-offending” (Eaves et al., 2000, p. 45).

Also noteworthy is the discrepancy in the two samples pertaining to the percentage of victims related to the offender. The offenders in the failed applicant sub-sample were more likely to victimize family members or related victims, relative to the number of relations victimized in the indeterminate sample. An offender’s risk appeared lower if he victimized family members or acquaintances instead of strangers. A case in point: In a 1995 hearing the judge explained that the offences committed by the pedophilic offender did not involve violence and that the victims, who were the offender’s grandchildren, were still ambivalent in their feelings about their victimizer. The judge reasoned that the ability of the offender’s grandchildren to forgive his actions might indicate in the offender a capacity to show genuine concern for their welfare. He also observed that the offender’s present wife was strong-willed and intelligent and if their present relationship continued their grandchildren would not be in any danger from him (DO231, 1995). The judge did not declare the offender dangerous and consequently sentenced him to a fixed term.
In sum, several interrelated themes emerge from this examination of the sub-sample of failed applicants. Experts assessed those offenders with stable employment histories, supportive families and community connections as less dangerous or risky. Positive family influence was characteristic of those offenders who were seen as an "acceptable risk" or not dangerous. This pattern suggests that those following the rules of society and conforming to normal lifestyles were considered "worthy" of another chance. Conversely, experts evaluated the drifter or the unconnected offender as a high risk, while those offenders not exhibiting "profound psychopathy" were deemed treatable and a lower risk. Finally, this examination supports the claim that the danger posed by strangers was magnified compared to the experiences of violence within the family. Clearly, courts have constructed Dangerous Offenders in response to stranger danger rather than intra-familial sexual violence.

As the factors noted above make clear, the group of offenders deemed dangerous and high risk was relatively homogeneous in composition. The experts' construction of this group corresponds to Simon and Feeley's (1994) definition of the underclass.

[The underclass] is a permanently dysfunctional population without literacy, without skills and without hope: a self-perpetuating and pathological segment of society that cannot be integrated into the larger whole, and whose culture fosters violence. Actuarial justice invites it to be treated as a high-risk group that must be managed for the protection of the larger society. (p. 192)

Risk assessment allows the identification and sorting of individuals according to this definition. Yet, the factors indicative of high risk, and therefore underclass or dangerous class membership, have remained consistent over the last century. Risk operates through and alongside traditional disciplining techniques. Traditional scripts of morality enable risk, and risk enables the construction of normalcy. Family dysfunction scripts,
pathological mothers, psychiatric diagnosis, tragic and toxic childhood environments and
drifter discourse emerged as predominant tools of discipline in the DO hearings. These
discourses are empowered by risk assessment. These scripts, used in conjunction with
risk assessment, constructed a group of offenders whom experts perceived to be
permanently dysfunctional and “have little to lose by way of reoffending.” This group was
variously described as having “very few joys in a meaningless life,” “disconnected from
others,” “no life stabilizing features,” and “too many issues.” Members of this group
constitute the underclass, which is controlled and managed through risk and the
mechanics of actuarial justice.

WHAT IS OF LITTLE IMPORTANCE? (RE)INSTITUTIONALIZATION AND
RACE

He has developed an increasing perception that the world is a cruel, hostile
and unfair place, both through his dealing with society in general and in his
relationship with the criminal justice system and professional treatment
providers. (Judge speaking to the court about an Aboriginal individual
sentenced to an indeterminate sentence. DO202, 1994)

I want to conclude this chapter by looking at what appeared to be minor in experts’
calculation of reoffence risk and dangerousness. In exploring the files as a whole, what
became apparent was an inattention to the role of the criminal justice system and, in
particular, the impact of institutionalization on offenders. This inattention is significant
given that almost all offenders included in the sample had been in prison for over five
years. Many documents and reports in the files detailed the offenders’ experiences in
prison. These reports were often used in a way that decontextualized the behaviour of
the offender. Assessors often failed to note the fact that the behaviour occurred within a
prison environment.
Conspicuously absent from the DO hearings was expert discussion of the long-term effects of institutionalization or the criminogenic impact of prison. In an exceptional case, defence counsel put an interesting twist on the impact of institutionalization when he argued that the Crown expert had already formed an opinion of the defendant before he was interviewed. According to counsel, the expert's opinion was influenced by the fact that the defendant was in a maximum-security institution. He accused the Crown expert of assuming that, if the defendant was in "max," he must be dangerous (DO101, 1983).

The judiciary, more so than the experts, appeared to be alert to the impact of institutionalization on the offender's behaviour. One judge cautiously noted that the behaviour described in correction records provided by the Crown was "indicative of relatively minor incidents which probably are not unexpected within the correctional system" (DO124, 1997). The judge did not place much weight on the records. In a 1995 case, the judge adopted a critical perspective on prison reports when he described them as "rote and repetition." In another hearing, the judge reviewed what he called a "horrendous experience" suffered by an offender when he was forced to spend two years and three months in solitary confinement. In DO214 (1995), evidence surfaced that corrections had not followed through on recommended treatment prescribed by experts in an offender's previous contact with the courts. The judge characterized this evidence as very depressing.

If we accept that the longer individuals remain incarcerated, the more they become institutionalized, then we must acknowledge that institutionalization lessens the chance of the offender successfully reintegrating into society. One has to question whether
Parliament intended to allow for the eventual release of a rehabilitated Dangerous Offender. Moreover, we have to envision that, if released, a DO represents an increased risk because of the effects of long-term incarceration.

Similarly, experts did not address in any significant manner the over-representation of Aboriginal offenders among DO applicants. When an offender's Aboriginal status was mentioned, racial disadvantage became a problem "owned" by the offender. Offenders were said to have problems arising "from being an Indian in a fostered white family" (judge, DO104, 1996), or were considered to be "ghosts in the prison because of an inability or unwillingness to articulate their needs" (Crown expert, DO214, 1995). Experts more often employed Aboriginal descent as a descriptor for the offender rather than as an indication of possible unique lived experience arising from historical oppression.

An exception to this pattern emerged in a 1994 hearing, when a defence expert argued that the Aboriginal status of an offender should have been seen as a mitigating factor in the DO sentencing. The defence expert acknowledged that the Aboriginal offender had received little relevant counseling during his more than 20 years in prison. He cited the lack of appropriate treatment for Native offenders as partly responsible for what he considered the "warehousing" of these offenders in prison. The expert pointed to recent developments in programming suited to Aboriginal inmates as an incentive to view the offender as potentially treatable.

In another case included in my sample involving an Aboriginal offender, the Court of Appeal overturned the imposed indeterminate sentence because of racial bias. The court ruled that, in the DO hearing, the judge had erred in considering the offender's childhood behaviour as evidence of a pattern of aggressive behaviour. Instead, the
appeal judges determined that:

The dangerous offender provisions may fall more heavily on the poor and disadvantaged members of our society if their childhood misconduct is counted against them. This appellant had to face school as an aboriginal foster child living in a non-aboriginal culture with an I.Q. at or near the retarded level, without ever acquiring a sense of discipline or self-control.

The Court of Appeal held that the social realities of the offender's background, especially his Aboriginal status, required that experts differentiate between childhood aggression and adult criminality. The offender was eventually given a determinate sentence of four years after spending two years in prison waiting for the appeal and the new sentencing hearing.

One other case in the current sample involved the legal recognition of an offender's Aboriginal status. A DO designation was overturned on appeal because of new case law pertaining to jury selection and racial prejudice. The defendant argued that the jury was racially prejudiced against him because of his status. The Court of Appeal ruled that the offender had a right to challenge prospective jurors regarding racial prejudice. The judges ordered a new jury selection and a new trial.183

Section 718 of the Criminal Code outlines the principles of sentencing in Canada. More specifically, Section 718.1(e), passed in 1996, addresses the sentencing of Aboriginal offenders. This section makes it mandatory for judges to consider all reasonable sentencing options before imprisonment, with particular attention to the circumstances of the Aboriginal offender. Judges must consider the unique systemic or background factors that may have played a part in bringing the particular offender before the courts. They must also look into the types of sentencing procedures and sanctions which may be appropriate in the circumstances because of his or her particular
Aboriginal heritage or connection. The objective of this section is to address the problem of overrepresentation of Aboriginal people in prison. It is remedial in nature.

In R. v. Wells, the Supreme Court of Canada held that this section does not alter the fundamental duty of the judge to impose a sentence appropriate for the offender and the offence. Section 718.2(e) did not appear to have had any substantial impact on the Dangerous Offender hearings included in my study. However, several potential issues in relation to the LTO status and Aboriginal offenders may emerge. For example, under the new LTO legislation, if an offender plans to return to an Aboriginal community, assessors will need to evaluate the circumstances in that community. Dysfunctional norms such as inter-generational abuse, identified as an epidemic in Aboriginal communities, will demand judicial and professional attention (Ellerby and McPherson, 2002). These norms resulted from years of sexual, physical and psychological abuse experienced by Aboriginal children in substitute caregiver and residential school systems.

Management programs for the release of offenders into Aboriginal communities must be sensitive to the specific needs and unique history of that community (Green, 2002). In sum, the LTO designation and community management focus may open court discussions about the particular circumstances of Aboriginal offenders, and more specifically, the over-representation of Native individuals among DOs and LTOs.

\[^{183}\text{The final disposition of this case is not known.}\]
\[^{184}\text{On the failure of this legislation to address the over-representation of Aboriginal individuals in prison, see Stenning, LaPrairie and Roberts (2001). For an overview of Section 718.2(e), see the Native Law Centre of Canada. Retrieved July 2002, from <http://www.usask.ca/nativelaw/publications/jah/gladue.htm>.}\]
\[^{185}\text{R. v. Wells, [2000] 1 S.C.R. 207.}\]
\[^{186}\text{For more information on the impact of childhood experiences on Aboriginal offenders and implications for treatment and community management, see Ellerby (2002); Ellerby and McPherson (2002) and Trevethan, Moore, Auger, MacDonald and Sinclair (2002).}\]
CONCLUSION

When combined with the mystique of a final risk score, the perception of objectivity associated with risk assessment becomes a powerful tool for tranquillizing critique of dangerous and high-risk determinations. Underneath this mystique and perception, I revealed that risk assessment is a subjective process involving subjectively defined risk factors. Taken together, the files reveal a pattern as to how experts construct dangerousness and high risk.

Risk assessment tools code traditional extralegal factors associated with dangerousness now indicative of reoffence risk. The expert's gaze is on the high-risk offender—who is as much a creation of prescriptive and disciplining morality as the dangerous individual, the pathological monster, or the atavistic criminal. Binaries of social exclusion such as employment/unemployment, welfare dependency/independency and stable/dysfunctional family continue to operate through psychiatric power/knowledge (Young, 2001, p.43). Traditional scripts of normalcy enable risk assessment, and, in turn, risk enables moralistic vocabularies and judgements. Dangerousness is influenced and reconstituted by risk thinking, not replaced by it.

As such, the increasing use of risk assessment in DO hearings did not result in a completely different form of power. Instead, what emerged was a reembodiment of the dominant disciplining discourse historically employed by psy authority. With the aid of risk assessment, the experts, in their roles as technicians of behaviour, sorted out the "indefinite domain of the non-conforming" (Foucault, 1977, p.179).

As social scientists, we cannot 'risk' overlooking what is old in the new. In short,
we need to expose the imposition of a mechanical, statistical and supposedly objective framework onto a subjective and inherently oppressive decision-making framework. Analyses that debunk the traditional social control role of psychiatry are still productive. We need to question decisions made under the auspices of risk assessment and unearth the ability of risk to (re)construct and (re)define the criminological “other.” In Chapter 6, I argue that risk assessment does contribute to a slightly different configuration of power but that there is more evidence of continuity than of change.
CHAPTER VI

CONCLUSIONS AND FURTHER CONSIDERATIONS

In closing, I would like to add, Mr. H, that as you well know, you have committed terrible offences. But, in my view, you have shown strength and courage in your efforts to seek help and prevent yourself from reoffending. Your life will continue to be difficult. It will be a daily battle to control your desires. You will have to call on all the courage and strength you have demonstrated to do so. For many years to come, you will often be in my thoughts. (Judge sentencing offender as a LTO, DO132, 1998)

In this dissertation, I examined the operation and impact of risk thinking and risk assessment in Dangerous Offender hearings, and discussed the role risk plays in the continued construction of dangerousness. I linked the ‘everyday’ operation of risk assessment to larger theoretical issues proposed by those working in the fields of risk society and actuarial justice models of understanding. I explored a model of understanding that views risk thinking as enabling traditional modes of disciplining the criminological other, as well as giving rise to new strategies of governance aimed at managing problem populations.

In Chapter 1, I reviewed the historical and current DO legislation relevant to my examination. With legislative changes in mind, I chronicled the shifting conceptualizations of dangerousness in the psy professions. Where before psy experts focused on dangerousness, now they consider the risk of reoffence. This switch in methodology took place at a time in history when the public and critical researchers questioned the professional legitimacy of psy experts’ role in forensic decision-making. The consensus in the psy literature throughout the 1980s was that clinicians could not predict dangerousness any better than laypersons. Psy organizations expressed
concern over the courts' dependence on such unreliable expertise. And starting in the early 1990s, psy researchers advocated a model of prediction based on the risk of reoffence. Risk assessment was offered as replacements for the subjective, idiosyncratic and non-scientific practice of clinical judgement.

Like the architects or 'psychocrats' of the DSM, a certain class of psy experts responded to this research agenda. They offered a definition of what was risky, and subsequently, developed the how-to tools to measure that riskiness. Researchers promised that the new predictive devices could identify high-risk offenders, thus allowing courts to incapacitate individuals who threatened community safety. Risk assessment was touted as objective, mechanical, accurate and reliable. Using these instruments, clinicians could now predict with precision the probability or risk of reoffence.

Chapter 2 contextualized the shift from dangerousness to risk by examining the theoretical literature that attempts to explain the contemporary restructuring of penal agendas. I explored the insights of risk society theorists who propose that society is increasingly organized around risk thinking. More specifically, I looked at arguments, claiming that the criminal justice system, a component of the risk society, is colonized by risk rationalities. The result of this colonization is actuarial justice (Feeley and Simon, 1992, 1994).

Risk assessment enables the identification and management of subpopulations, or 'flows of offenders,' necessary for the operation of an efficient and managerial system of actuarial justice (Castel, 1991). Under this system, attention is directed away from diagnosis, treatment and rehabilitation to identification, selective incapacitation and "waste management" of a permanently dysfunctional subpopulation of high-risk offenders.
(Feeley and Simon, 1994).

Yet, I suggested that a purely actuarial justice model could not explain current criminal justice system policy and legislation, including those dealing with Dangerous and Long-Term Offenders. I identified two primary areas in need of reworking. First, the role of risk as a new governing strategy in restructuring penology should not be overestimated. Instead, I argued that exploration of risk should seek to discover ways in which risk operates as disguised morality (Douglas, 1990, 1992). Critical analysis requires uncovering the social construction of risk that results from the traditional normalizing gaze of experts. Risk assessment and management disciplines the individual while it supports the post-disciplinary strategies of biopolitics that address groups and populations.

Building on recent theoretical formulations, I also proposed that risk is enabled by, and, in turn, permits co-strategies of power that must be accounted for in risk theorizing. Risk operates as both an exclusionary and inclusionary strategy of social control, each with unique implications for the Dangerous and Long-Term Offender (Rose, 2000). For example, risk thinking allows for the management of the risky offender in the community. This inclusionary strategy of crime control enlists the support of the community in a preventative partnership with the state. This strategy intends to govern—at a distance—those offenders experts deem 'acceptable risks' (Garland, 2000; Rose, 2000). Community notification, registration systems and long-term supervision orders make this type of inclusionary governance possible. The identification of high-risk offenders through risk assessment also allows for traditional exclusionary strategies of crime control, such as selective incapacitation (Pratt, 2000a). Psy experts can selectively
identify offenders who are too risky for community management, and consequently courts may impose an indeterminate sentence.

In relation to risk expertise, I outlined how the psy expert working in the penal arena becomes an information technician charged with the responsibility of risk assessment. Disconnected or post-disciplinary evaluation of risk replaces the face-to-face interaction between the offender and the expert (Castel, 1991). In order to facilitate this type of evaluation, a growing technocratic infrastructure has developed within the criminal justice system. This infrastructure enables experts to select and codify documented risk factors present in the offender's dossier. In the end, the underlying causes of criminality are unimportant and individual needs are transformed into risk items, adding to the overall probability of reoffence.

I examined the dialectical relationship between penal policy, populist politics and allied social forces, technocratic rationality, and professional and political interests. The self-reflexive nature of risk and the paradoxical nature of power/knowledge were also useful conceptualizations for the exploration of risk expertise. The operations of expertise that help perpetuate the continued dominance of risk thinking, such as abstraction, inaccessibility, and supportive information infrastructures, were identified.

In Chapter 3, I outlined the methods and procedures I followed in linking the empirical examination of risk in DO hearings to the theoretical insights provided in the previous chapter. I used post-structural analysis techniques, guided by Foucauldian methodology, to explore 100 Dangerous Offender case files. My methodology and examination of the operation of risk answered a growing call to ground theoretical discussions about risk in empirical observations of risk practices (e.g., Hannah-Moffat,
The DO hearings took place in the British Columbia Superior Courts between the years 1978 and 2000. I reviewed the characteristics of my sample of offenders and compared them with the socio-demographic profiles, criminal histories and predicate offences of other DOs in Canada. The raw findings support the proposal that the exclusionary penal apparatus is disproportionately applied to disadvantaged males who commit repeat sex offences against women and children. Chapter 3 ended with an examination of the characteristics of psy experts involved in DO hearings. The sample of experts explored in this dissertation was restricted to those professionals charged with the evaluation of an offender of the DO hearing (N=216).

Chapter 4 uncovered the increasing circulation of risk thinking and risk assessment in DO hearings. The purpose of this chapter was to determine how risk assessment may have reshaped the psy experts' role in the identification of dangerousness and the prediction of future behaviour. Observing the cases as a whole, I found that opinions regarding the prediction of dangerousness echoed concerns outlined in the psy literature. For instance, in the DO hearings, experts spoke about the overprediction of dangerousness and high rate of false positives. Both Crown and defence experts explicitly warned the courts of the limitations associated with prediction. Several experts resisted making predictions, in an acknowledgement that indeterminate sentencing should not be based on such fallible measures of future behaviour. Despite these warnings, the courts continued to rely on the input of psy experts to determine dangerousness.

In the 1990s, optimism generated by the risk assessment enterprise replaced
pessimism associated with the prediction of dangerousness. Like the circulating psy literature, experts in DO hearings constructed risk assessment as the opposite of clinical prediction. The majority of Crown experts viewed it as remedying the subjectivity and inaccuracy inherent in clinical decision-making. By 1995, risk as measured by assessment instruments became the accepted currency of evaluation by Crown experts in DO hearings. Risk assessment did not completely replace clinical opinion in DO hearings. However, the majority of Crown experts defined the value of clinical acumen restrictively as confirmation for the accuracy of risk assessment. Experts used clinical opinion to support the results of actuarial assessment, rather than the other way around.

Contrary to the objectives of an actuarial justice model (Feeley and Simon, 1992, 1994), experts did not completely abandon treatment issues with the emergence of risk assessment in the 1990s. They still viewed sexual offending as precipitated by disorder, and therefore potentially treatable.\textsuperscript{187} A glimpse of the LTO cases heard after my sample cut-off date reveals that psy experts are attempting to defend a professional role in the treatment of sex offenders. Further research is needed on the impact of the LTO status on the psy sex offender treatment complex.

The creation of the indeterminate LTO status has the potential to fuel a treatment culture reminiscent of pre-actuarial rehabilitative efforts. However, as anticipated in the actuarial justice literature, treatment issues are confined mainly to management concerns and relapse prevention rather than the aspiration to cure. In the United States, evidence of this trend is currently manifested in laws that make it mandatory for judges to impose chemical castration as a condition of parole for sex offenders who repeatedly

\textsuperscript{187} Correspondingly, Petrunik (2003) notes that corrections in Canada offers extensive sex offender programming which attracts participation of many offenders (p. 59).
victimize children (Petrunik, 2002, p.484). Chemical castration is concerned with management of desire and drive, not cure. Still, focus on individual disorder in need of treatment or cure depoliticizes crime and serves the overall interests of actuarial justice, leaving the societal causes of crime unchallenged and intact.

Risk assessment also widened the net of offenders deemed untreatable and intractably high risk. For example, the PCL-R, a risk assessment tool measuring psychopathy became the premier instrument of prediction in DO hearings, followed by the VPS and the VRAG. An assessment of psychopathy, although variously defined, indicated an unreformable offender who presented a permanently high risk. Experts saw this risk as static and immutable and therefore untreatable.

My research showed that evaluation with the PCL-R and other risk tools in DO assessments was problematic. Several experts, mainly called by defence counsel, were critical of the use and misuse of the checklist. Experts accused other experts of misinterpreting PCL-R scores and applying the tool to offenders for whom it was not validated. Defence experts warned that use of the PCL-R had significant consequences for offenders, given the weight attached to the diagnosis of psychopathy as prescribed by the instrument. My research revealed how the PCL-R led to the construction of psychopathy. In the majority of cases where experts used the PCL-R, the result was a diagnosis of psychopathy.

I identified several other problems associated with the use of risk assessment in DO hearings. These included: a low base rate issue resulting in overprediction; the ecological fallacy, which produced decisions about individuals based on group data; and the inability of risk assessment instruments to capture relevant individual and
environmental variables of interest to the clinician. Defence experts criticized other professionals for relying on a cookbook formula characteristic of risk assessment. This formula, according to experts, negated the consideration of positive prognostic factors. Defense experts were also critical of the objectives motivating the developers of risk assessment tools. They accused the developers of selling their expertise in return for personal gain, in terms of both profit and professional legitimacy.

Adding to the negative bias of risk assessment was experts' unquestioned reliance on pre-formulated information. The experts in my sample, mainly Crown affiliated, consistently relied on information with unknown source or validity. In addition, to construct an offender's risk profile in DO hearings, where legal evidentiary standards are relaxed, experts used both allegations and suspicions. This reliance on questionable information was further problematic because Crown experts were less likely than their defence-aligned counterparts to interview a defendant. In keeping with the technocratic rationality of risk assessment, the experts justified the lack of interview by noting the massive amount of information available in a DO file.

The Crown's questionable use of expertise and overrepresentation of experts reinforced the negative bias in DO hearings. This problem was particularly acute prior to the 1997 legislative amendments. Experts often played dual roles in an offender's biography. For instance, I discovered that experts who had evaluated an offender for fitness to stand trial subsequently testified in that offender's DO hearing. Additionally, treating psychiatrists often gave an opinion on the offender, a practice that runs contrary to the principles of their professional organizations. These principles stipulate that experts avoid playing both a treatment and advocacy role.
Experts, again mainly Crown-affiliated, offered opinions about the offenders' high risk to reoffend without contextualizing these opinions. They infrequently conveyed how they had coded offenders with risk assessment instruments. Except on a few occasions, assessors did not detail in the hearing what information was relied on to code each risk item. Instead, risk probabilities or PCL-R scores acted as trump cards to solidify the expert's opinion that the offender was an 'unassumable' or 'unacceptable' risk to the community. The supposedly transparent process of risk assessment was, in practice at least, invisible. The only methodical examination of the mechanics of coding came after psy experts acting on behalf of defense counsel challenged and debunked the mystique of an actuarial score.

However, the debate necessary to convey the shortcomings of risk assessment and the motivations of risk experts was overshadowed by the predominant acceptance of risk assessment in DO hearings in the 1990s. This acceptance was furthered by the 1997 amendments to the Criminal Code. The legislative changes, resulting in the requirement of a single neutral assessor, guaranteed the unchallenged use of risk assessment. The critique of risk assessment and its role in the determination of dangerousness was muted in the courts because of this legal restructuring. The Crown expert, in the majority of post-1997 cases included in this study, was now the neutral assessor and the defence expert was no longer needed in the "objective" exercise of assessing risk.

However, I did not witness the complete solidification of risk assessment in DO hearings in the time frame studied. Currently, there are experts playing a role in DO hearings who choose not to privilege risk assessment modes of evaluation. Additionally,
judges still reached determinations by appealing to a common-sense model of dangerousness buttressed by a community protectionist stance. Further research addressing the continued impact of legislative changes on risk assessment advancement is needed. Similarly, a research agenda that seeks to uncover how judges and criminal lawyers might be instrumental in resisting or supporting actuarial risk assessment would be productive.

In the end, I discovered that fundamental flaws in logic surrounding the prediction of dangerousness remain unchallenged with the exercise of risk assessment. Insurmountable obstacles associated with the prediction of human behaviour are buried in actuarialism and risk probabilities. Miller and Morris (1998) argue that "punishment should not be imposed, nor the term of punishment extended by virtue of a prediction of dangerous[ness], beyond that which would be justified as a deserved punishment independently of that prediction" (p. 265). My findings suggest that the prediction of dangerousness and the evaluation of risk involve too many uncertainties and unchallenged assumptions to guide the sentencing of offenders in a manner that would adequately protect their Charter rights.

In Chapter 5, I revealed how risk implicates traditional constructions of normalcy. Risk expertise does not dismantle or replace old constructions of criminality. The psycho expert remains engaged in the process of discipline and normalization. To a critical scholar, risk thinking involves the layering of constructions based on a preservation of the status quo (e.g., Hannah-Moffat, 1999; Yeager, 2000; Chan and Rigakos, 2002; Pate, 2000). Risk, like dangerousness before it, is a metaphor for ‘otherness.’ Risk assessment is gendered, culturally relative and classist.
In my analysis, I discussed several factors that emerged as characteristic of DOs. These factors appeared consistently throughout the sample. They were codified both explicitly and implicitly in risk assessment instruments. For example, both judges and experts viewed past behaviour as the best predictor of future behaviour. The majority of risk assessment instruments included criminal history and past antisocial behaviour as indicative of risk. Psychiatric diagnosis was also part of this generic model of dangerousness and subsequently risk. Experts still pathologized and depoliticized criminality with risk thinking. But with the penetration of risk assessment, experts viewed diagnosis descriptively and instrumentally as a risk factor, and not as an analytical device. Diagnosis requires face-to-face contact. Actuarial justice disabled this contact. Instead, the expert codified stockpiled diagnoses found in the offenders' dossiers.

Experts' opinions regarding treatability also factored into their predictions of dangerousness. However, these opinions changed over time. After 1990, the majority of Crown experts had reached the consensus that certain classes of offenders were untreatable. The psychopath, detected by the PCL-R, became the prototypical untreatable Dangerous Offender. According to experts, psychopaths did not burn out. Burnout and age became less important considerations, though they were still discussed in later hearings.

Treatment issues do not occupy a large space in risk assessment tools. I have suggested that this lack of attention to treatment issues reflects the static or fixed nature of actuarial assessment, a decreased faith in treatment regimes, and increased confidence in experts to identify those incapable of reform. A philosophy of despair and decreased faith in the criminal justice system, as well as abandonment of reform efforts
for a growing subpopulation of offenders operated alongside the penetration of risk thinking in DO hearings. Despair and abandonment of reform coincide with the focus on management rather than treatment in a model of actuarial justice (Pratt, 2000b).

The domino effect and catch-22 gaps characteristic of risk thinking also reinforced the negatively biased evaluation of risk. With the domino effect, factors such as remorse, empathy and denial or minimization of an offence are scored separately, despite their similar definitions. If an expert scores an offender high on one item, it is logical to follow through with high scores on the others. The domino effect supports the previous finding that use of the PCL-R was most likely to produce a diagnosis of psychopathy.

Catch-22 gaps allow different experts to conceptualize the same risk factor as either decreasing or increasing the risk of reoffence. Interestingly, the majority of these factors—such as intelligence and age—were not formally codified in risk instruments but were considered important risk factors. With no clear coding guidelines, experts used the factors to support a desirable prognosis.

The opinions surrounding “mentally retarded” or low intelligence offenders were particularly disturbing. Experts often described mentally retarded offenders as lacking the necessary insight to benefit from treatment. Lack of insight was also considered a detriment to feeling or behaving in ways that would lower their risk (e.g., responsibility, empathy, long-term goals). Judges often turned to the DO designation for these offenders as the last resort. They criticized the system for neglecting the needs of the mentally retarded.

According to the experts in my sample, “tragic” personal histories and “toxic
families” with “bad mothers” were characteristic of Dangerous Offenders. The experts constructed the dysfunctional family and maternal influence as potentially criminogenic and indicative of high risk. This construction revealed the experts’ perceived connection between criminality and the breakdown of the nuclear family and traditional gender roles.

The most commonly observed attribute shared by individuals in my sample and consistently reported by experts was that of their history of victimization as children. Experts interpreted these experiences as typical of high-risk offenders. In the DO hearings, needs stemming from this abuse were transformed into risk. Experts also implied that the absence of a non-traditional family structure contributed to these experiences of abuse. Ironically, the majority of this victimization stemmed from patriarchal violence within the family, and state or religious institutions. Risk expertise leaves these structures of domination intact and enables the perpetuation of a cycle of victimization.

The experts also viewed productivity and employment status as indicators of risk to reoffend. Several risk assessment tools codified this perception. An offender’s risk rating was increased if there was evidence of employment problems, lack of goals and irresponsibility.

In the final accounting, the 'stranger sex offender’—particularly the homosexual pedophile and the psychopathic serial rapist—remained the folk devil. Risk assessment tools use rigid definitions of sexual normalcy, often classist, sexist and homophobic. This encoding ensured that offenders represented a host of abnormal and potentially dangerous and often hidden risks. It became the role of the expert, employing the precise gaze of risk assessment, to discover the truth, to solicit a confession and to
dismantle the offender's denial and minimization about his sexuality. With risk assessment tools, experts identified the stranger sex offender as the appropriate target of DO legislation and the indeterminate sentence. The patriarchal home and the most common forms of abuse—incest and intimate partner abuse—remained unchallenged.

In the end, I discovered that experts continued in their historical practice of judging and dividing in DO hearings. Risk assessment largely operated to identify the underclass, a discernible group of nonconforming individuals. The underclass experiences life without the normalizing influence of work, family and economic consumption. Binaries of social exclusion continue to structure state responses to this disadvantaged group (Young, 2001). Dangerousness—represented by the risk of reoffence—becomes a means to exclude this group from the community. Furthermore, risk assessment expands the net of offenders deemed dangerous or in need of risk management. The result is a broader group of individuals permanently branded by legal and penal apparatuses of control.

Finally, risk assessment does little to contribute to our understanding of dangerousness. Instead, risk thinking operates as disguised morality (Douglas, 1992), a social control mechanism employed by the psy disciplines in the medico-legal juncture of DO hearings. Through risk, the identification of the parameters of normality continues to operate. Risk thinking belongs to the modernist episteme of the 'calculable man,' defined and judged by disciplining psy experts.
MYTH MAKING AND PSY EXPERTISE

I therefore claim to show, not how men think in myths, but how myths operate in men's minds without their being aware of the fact (Lévi-Strauss, 1970, sct.1).

My research explored the relationships between expertise, penal policy (both inclusionary and exclusionary), public demands and state interests (both symbolic and instrumental). An inclusive model for understanding risk expertise investigates, as I have, the self-reflexive nature of expertise in perpetuating the need for itself and providing the infrastructure to accommodate it, especially in times when professional legitimacy is questioned. As a whole, my findings question the assumption that advancements in expertise are science driven or represent a promotion in knowledge.

For instance, did claims regarding risk assessment's objectivity and accuracy convince legislators that the 'right' offenders—i.e., the high-risk criminal—could be identified without debate or discussion? Did psy professionals carve out a more secure role to make these kinds of judgements by advancing the enterprise of risk assessment? In the end, regardless of intention or motivation, the state augmented the authority of psy expertise, which inevitably left structures of domination and normative judgement intact. Risk, after all, does not address the social inequality that is behind criminality in the first instance. Given this, it is possible that risk expertise was offered as a mock resolution or a symbolic message of change intended to contribute to the legitimacy of both psy professionals and the state. In what way does this affect the legitimacy of the criminal justice system?

In order to suggest answers to these questions I will recall a well-known
experiment on police decision-making. The Minneapolis experiments in the United States, conducted by Sherman and Berk (1984a, 1984b), used a controlled comparison of alternative methods for dealing with spousal assault. Their objective was to determine if arrest might deter recidivism. Sherman and Berk conducted the experiment, in part, to address mounting critique that police used idiosyncratic and discretionary judgement when deciding whether to arrest a perpetrator. The results of the experiment supported a mandatory arrest policy directive, which police forces in Canada and the United States subsequently adopted. The researchers demonstrated that arrest was clearly an improvement over other police responses. Arrest resulted in fewer repeat incidents. Sherman and Berk concluded that arrest acted as a deterrent.

The mandatory arrest policy was straightforward. Upon arrival at the scene of a spousal assault, if police believed beyond a reasonable doubt that an assault had occurred, then arrest was the only option available to the officer. Subsequently, numerous studies debated both the validity and reliability of the experiment and, more specifically, the evidence that deterrence is the specific mechanism that links arrest to recidivism reduction (e.g., Sheptycki, 1991). Sherman and Berk were accused of taking a “test tube” approach to a complex social problem and of ignoring other relevant variables that may have affected the internal validity of the findings (Lerman, 1992).

In response to growing criticism, Sherman (1992) conducted several replication studies. He found that, in the long term, arrest actually increased violence or had a criminogenic effect among certain subpopulations of perpetrators (i.e., the unemployed, unmarried and those of minority status). Sherman (1992) called for the repeal of mandatory arrest policies, based on the evidence that arrest might help some victims,
but at the expense of others. He advocated the restoration of police discretion or what he called "smart policing" rather than reliance on the blanket policy of arrest. Smart policing, according to Sherman, is informed discretion. Police respond to incidents of spousal assault with a battery of knowledge obtained from research, and the skills and experience they have gained in the field. This knowledge and experience ascertained under what circumstances arrest would serve as a deterrent.

Was the mandatory arrest directive a form of mock change? The response by the state in the form of mandatory arrest forwarded an ideological message of change. This message symbolically contributed to the legitimacy of the state. The state was able to respond to growing concerns, especially by feminists and the women's movement, about its lack of cooperation and attention to violence against women. As a result, Currie and MacLean (1992) argue that the issue of violence against women was transformed into a technical matter of policing "wife assault," which could be met safely within the current system without any significant changes in the relations of power.

Several parallels can be drawn between this dialectical examination (Chambliss 1979) of the dilemma of wife assault and the penetration of risk thinking. In both cases the public's growing dissatisfaction with the criminal justice system and with the measures in place to protect the community acted as a catalyst for reformulation of how the state and the system dealt with criminals. In the case of risk assessment, populist punitiveness demanded that the state address the seemingly increased vulnerability of the community to recidivist sex offenders. In response, the state put in place laws targeting high-risk offenders. Extra-legal control mechanisms were constructed in a way that privileged public sentiment (Garland, 2000, p 350).
The psy research community easily accommodated this state privileging of populist politics. Risk expertise enabled punitive reforms and, in turn, gained momentum from the specific tasks required by reforms. These tasks included the identification and management of the high-risk offender. The community and psy professionals were both experiencing ontological insecurities. Identification and management of risk by experts, in partnership with the community, tranquilized this insecurity and soothed self-doubt. The community was empowered in this preventative partnership and the psy experts, for their part, gained immunity from increased professional scrutiny.

Similarly, by naming the problem of violence against women—wife assault—the state was able to restrict response to the problem within the arena of policing and the criminalization of domestic violence. Police responded and implemented the mandatory arrest directive. Since revoked, the policy initially gave the impression of state response to protective demands. In both scenarios—risk assessment and mandatory arrest—the appearance of change or advancement appealed to populist politics, and tranquilized critical exposure of the professionals' and the state's ability to offer solutions.

Risk assessment gave the appearance of change from the prediction of dangerousness to the assessment of reoffence risk. This impression symbolically legitimized psy professionals' role in the courts. As evidenced in this study, upon further examination, dominant knowledge and practice in the psy profession before the change remains dominant after it. The rise of risk expertise might not have been a deliberate application of mock change by psy professionals. However, in the end, they were able to

188 For a critical paper on how reliance on the criminal justice system to promote feminist concerns about violence against women is practically and theoretically wrong, see Snider (1991).
maintain their position as normalizing agents in the face of legislative changes which, in part, sought to address mounting fears around their role in determining dangerousness. The failure of psy professionals to predict dangerousness was excused in such a way as not to undermine their position. The clinical prediction of dangerousness was replaced by actuarial risk assessment. Yet, risk assessment continues to enable disciplining modes of social control and sends the message, again, that psy experts can predict human behaviour.

Psy researchers put forward risk assessment as a response to the perceived failures of clinical evaluation. The question becomes: how long can risk expertise quell criticism of its practices? If risk knowledge emerges from the same episteme as traditional psy decision-making, it could be revealed as ineffective and inaccurate. Risk assessment is enabled by the same paradigm as the clinical gaze. It would appear that this episteme spawned its own critique, which in turn recreated the same rationality, but equipped with a different lens. This way of thinking, although packaged differently, is actually similar to that which it is supposed to be replacing.

Considering the above line of reasoning, I am reminded of the parallels between actuarial risk expertise and the exercise of myth making. As with myths, psy expertise is repetitive, offering the same message repeatedly, although changing in form. Psy experts assess risk using the same prescriptions of normalcy that historically operated to construct dangerousness. Risk tools are different in form from clinical diagnosis and opinion but, like clinical diagnosis, they continue to pathologize and depoliticize

189 Here I draw on the work of an influential mentor. This mentor, Dr. Stanley Barrett, applies Lévi-Strauss's conceptualization of myths to the discipline of anthropology (Barrett, 1984). For more information on myths, see Lévi-Strauss (1978).
criminality. Risk thinking maintains engagement with prescriptive norms to define the criminological other.

The significance of the myth is in its message and not the style or sequence in which it is told (Barrett, 1984, p. 104). Risk assessment forwards the message that psy experts can predict future behaviour, and that their instruments are capable of capturing the complexity of the social world. Myths do not get better with each new version—they are not cumulative. Like history, myths are rewritten from the vantage point of the present, so those past events become compatible with current realities (Barrett, 1984, p.104). The current reality associated with risk thinking portrays the history of psy expertise as the steady progression of improvements in classifying and analyzing, measuring and predicting.

Eventually, psy researchers might be forced to face those who question the goals of their knowledge, rather than just challenge their ability to determine and identify those who are unsafe. To answer those questions is a far greater task. By questioning the goals of risk expertise, we exploit the paradoxical nature of risk knowledge. For instance, experts can use the identification of risk to reassure society and to defend against anxiety and uncertainty. However, risk knowledge also unsettles understanding, and reinforces unawareness of the possible future: “of the dark reaches of our uncertainty” (Wilkinson 2001, p. 91). In this way, we can use risk expertise against itself in an effort to challenge its authority. Myths contain such internal contradictions (Barrett, 1984). Challenge to myth making exploits these contradictions.
FURTHER IMPLICATIONS OF MYTH-MAKING

In the extreme circumstance, need for risk assessment may disappear. This potentiality calls to mind the popular discussions about whether three strikes sentencing laws or some version thereof should be part of the Canadian penal agenda. A growing number of politicians are pushing for US-style sentencing laws. Canadian provinces are building ‘no-frills’ maximum-security warehouse prisons.190 A strong ‘law and order’ campaign and increasing public intolerance for sex offenders, buoyed by sensational cases of child sex abuse and murder, have created a conservative 'get tough' populist movement (Garland, 2000).

What is the fate of risk assessment if Canada, the Charter permitting, resorts to harsher punitive sentencing grids? The identification of high-risk offenders becomes a legislative task of counting convictions. Similarly, with maximum-security warehouses, offenders are supervised and managed under one security level; consequently administrators will no longer need risk assessment to identify and sort. Further inquiry into the role of risk assessment in national systems that employ mandatory minimums and maximums in sentencing laws would help determine the adaptability of risk expertise in relation to extreme exclusionary strategies of social control.

Additionally, a “criminology of the other” (Garland, 1999) encouraged by popular punitiveness may mean that experts will be increasingly called upon to identify iconic monsters. However, as evidenced in DO hearings, risk status blurs the boundaries

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190 Supermax facilities house 2% of the US prison population. According to a Human Rights Watch report released in 2000, prisoners typically spend 23 hours locked in small cells sealed with solid steel doors. Supermax prisoners have almost no access to educational, recreational or other sources of mental stimulation. They are ostensibly designed to house incorrigibly violent or dangerous inmates. Retrieved May 2003, from <http://www.hrw.org/reports/2000/supermax/Sprmx002.htm#P40_391>.
between the offender who emerges from the disadvantaged underclass, and the offender
who is the monstrous criminal. In my sample, members of the underclass, a
subpopulation of the disadvantaged, remained the primary targets for DO legislation and
the indeterminate sentence option. Is the blurring between this underclass
subpopulation and iconic offenders desirable to the public? The public could demand to
know about the ‘predator’ or ‘child molester,’ instead of the high-risk or Level III risk
offender. For now, the PCL-R and the identification of the prototypical psychopath might
satisfy this need to know and recognize those who have historically haunted the
community. Experts have successfully reincarnated the psychopath under the auspices
of an objective tool, which purports to measure his presence. How far could this
iconography go? Could experts be ‘safe’ for now?

One could argue that with the creation of a new risk status—the Long-Term
Offender—the indeterminate sentence option and DO designation will be reserved for
offenders identified as monstrous or incorrigible. In this way, judges might selectively
apply the indeterminate sentence option to a smaller group of offenders. A more precise
targeting of certain offenders by Crown and the courts appears favourable at first glance.
It would limit the number of individuals caught in the net of the most extreme sentencing
option available in Canada.

Indeed, several theorists and researchers argue that risk thinking has the potential
to encourage inclusionary strategies of crime control by sorting out those who are
acceptable risks and therefore manageable in the community (e.g., Webster, 1998;
Rose, 2000). Writing before the formal 1997 changes to the DO legislation, Petrunik
(1994, p. 44) points out that compared to Washington State’s Community Protection
Legislation, Canada's proposals for high-risk violent offenders are advantageous because they allow flexibility and choice among a range of pre- and post-sentence options, which may potentially include non-custodial community supervision after serving a determinate sentence. A situation transpires where the medium-high risk offender escapes the cast of the indeterminate net and is given a chance to re-attach and remoralize himself in the community.

However, I can also envision a situation where the courts apply Long-Term Offender status to an increasingly larger number of offenders who are mainly members of the underclass. Fewer offenders receive the indeterminate sentence, but at the expense of a larger number of offenders who are restricted by post-sentence and, in some cases, life-long supervision. Five years after the enactment of the new legislation, Petrunik (2003, p. 61) tells us that, in Canada, police departments and Crown prosecutors are finding it difficult—with resource deficits—to deal with the increase in DO/LTO applications and Section 810 orders for sex offenders.191

Other theorists are less optimistic about the liberating potential of post-sentence supervision and aligned strategies such as community notification and sex offender registration. They argue that these crime control efforts represent exclusionary rather than inclusionary approaches, which serve to permanently brand offenders from full participation in the community (e.g., Pratt, 1999, 2000b). Garland (2000) characterizes these strategies as representing the "punitive segregation" version of crime control. By conceptualizing these control efforts as exclusionary, we envision a situation where the offender faces restrictive boundaries and vigilant surveillance in the community. If

191 Supra note 15, at 16. Section 810 recognizance or peace bond orders are used for individuals who are at-risk of committing a "serious personal injury" offence.
treated like a criminal, how long will it be before the offender recidivates or violates the restrictive rules of his quasi-reintegration? The John Howard Society of Alberta (1999) cites possible violations of the Charter presented by the new restrictive arm of LTO legislation. They conceive of a situation where released offenders who are subject to high-risk peace bonds and unrealistic conditions may find it difficult or even impossible to stay out of jail. They question whether making a breach of LTO conditions an indictable offence could be in violation of Section 7 of the Charter. 192

An iatrogenic implication of this penal arrangement could be that the Crown or the court looks to a pool of failed LTOs in order to identify potential DOs. Ironically, in this case, risk status would be dynamic and changing. The LTO, formally a medium risk, becomes a high risk DO after breaching his restrictive supervision terms. Risk assessment results would support this offender's newly perceived risk status. The negatively biased tools focus on revocation and supervision failure rather than treatment and management success.

Moreover, another iatrogenic effect surfaces in relation to cases where an offender is identified as high-risk, and subject to community notification upon parole. Often day-paroled, the offender is placed under supervision in a halfway house. Penal authorities use this strategy, known as cascading, to support and supervise the offender as he reintegrates into the community. But increased intolerance for sex offenders has spurred a very vocal populist movement. This movement, informed through community notification policies, is resistant to placement of high-risk offenders in neighbourhood halfway houses. Often, the result is that, under intense public scrutiny, an offender

192 Section 7 of the Canadian Charter of Rights and Freedom guarantees "the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the
chooses to go back to prison to serve his full term. Eventually, the offender is released, without the benefit of cascading, and the support or guidance that goes with it.

All these possibilities emerge from a theoretical framework, such as the one presented here, which explores the complexity of risk as a governing strategy. Without a framework that views risk as a diverse strategy of social control, we unproductively ascribe an omnipotent role to risk in the criminal justice system.

THE GENUINE HUMANIZING OF PSY EXPERTISE: A CONCLUDING GOAL

Reviewing Lévi-Strauss's work on myths, Barrett (1984) tells us that the non-cumulative nature of myths allows them to run backward. Acknowledging this, should clinicians resistant to the risk enterprise sit back and wait for the risk assessment project to turn in on itself, thereby creating another crisis of legitimacy in the psy disciplines? This crisis could precipitate the return of the clinical model of dangerousness prediction or "smart psychiatry"? Alternatively, clinicians could take a more active role in developing alternative methods and even new paradigms of forensic evaluation that are both sophisticated and humanistic.

Concerning alternative methods, this study revealed that risk thinking and assessment have not completely bridged the clinical and research arms of the psy discipline. Instead, I argued that risk assessment might contribute to the gap between principles of fundamental justice."

Hunting Bobby Oatway, a documentary film directed by John Kastner (1997) for the Canadian Broadcasting Corporation (CBC) program Witness, chronicled the release of a convicted pedophile to a Toronto halfway house. His release inflamed a Toronto community and gave rise to rallies and protests in the local neighbourhood where the house is located. Other inmates of the house ostracized Oatway. Due to this stressful attention, Oatway requested to return to jail to serve out his term. For a critical article on the role of the sex offender as a societal scapegoat including reference to the Bobby Oatway case, see Kirkegaard and Northey (1999).
these historically antagonistic branches. Examining the formation of expertise, Berger and Luckman (1967) have proposed that a division in labour or practice will often result in a division of expert knowledge. Thus, it is not unrealistic to expect new forms of clinical knowledge and methodology to emerge from this division.

To take up this challenge, Tuddenham (2000) suggests that clinicians engage in a process of reflexive risk assessment. This process involves a dynamic self-questioning methodology, which acknowledges the social and political context of the risk assessment process (Tuddenham, 2000, p. 174). He proposes a series of questions that clinicians should answer when conducting risk assessment evaluations (see Table 6.1).

Sreenivasan, Kirkish, Garrick, Weinberger and Phenix (2000) advocate a "heteromethod" approach to evaluation that combines a solid theoretical understanding of behaviour, clinical acumen and actuarial data, while also remaining attentive to both mitigating and aggravating factors. In other words, the clinician considers factors that add to or decrease your risk profile.
Table 6.1: Reflexive Risk Assessment

- How does my knowledge, skill base and personal history inform my decisions?
- How does my agency remittance inform the purpose and proposals of the risk assessment?
- In what way is the assessment honest about its gaps, omissions and limitations?
- What evidence do I have to validate what I believe to be the indicators of serious harm?
- Have I consulted significant others in the lives of the people and shared my assessment in the multi-agency setting?
- Have I fully considered the experience of past victims and integrated this into all parts of my assessment?

Others call for the replacement of the myth of prediction expertise. An alternative paradigm acknowledges that social life and human behaviour are disorderly and unpredictable. This model does not aspire to control and impose regularity. For instance, Menzies (1997) calls for "[a] genuine humanization of the 'human sciences' and 'helping professions'" which "would constitute an outright abandonment of the rigid, centralized, expert-driven, top-down, instrumental (and not incidentally, highly profitable) classificatory schemes of the institutional monopolies like the APA and World Health Organization... " (p. 58). In their place, Menzies (1997) suggests a model based on a feminist therapeutic context, which advocates localized, personalized, reciprocal, reflexive and nonhierarchical knowledge and practice (p. 58).

An alternative paradigm of expertise questions the assumption that subjectivity is an undesirable quality and that flexible patient-clinician interaction is always bad
psychiatry. It challenges the mythical authority of psy expertise and requires the dismantling of epistemic power/knowledge.

Overall, my objective in this dissertation was to explore risk thinking and risk assessment in DO hearings in an attempt to engage with the power/knowledge of psy expertise. My exploration entailed an examination of risk expertise in the context of penal policy, legislative reform, populist politics, and state and professional expert interests in maintaining legitimacy.

I experimented with theoretical formulations, which go beyond viewing risk as an invariable strategy of exclusionary crime control. I offered empirical support for a hybridized understanding of how risk thinking operates in the criminal justice system, and more specifically, in Dangerous Offender hearings. I discovered how strategies of risk encourage other modes of penal governance such as normalization through discipline. My research also shows how risk thinking can enable inclusionary strategies of social control including community management for medium risk offenders.

By viewing risk as a heterogeneous crime control strategy and as an exercise in myth making, we can envision productive avenues of resistance and expose areas of critique, which push the limits of risk expertise and actuarial justice. Resistance to oppressive strategies of control and authority within our penal system will not come from viewing the high-risk offender as the subject for a new manuscript or book on the advancement of psy expertise. Instead, resistance will come from viewing the high-risk offender and actuarial justice as the start of another chapter in the historical treatise titled—The Myth of Dangerousness Prediction and the (Re)construction of the Criminological Other.
APPENDIX A
DANGEROUS OFFENDER LEGISLATION

CONSOLIDATED STATUTES OF CANADA

Criminal Code

PART XXIV
DANGEROUS OFFENDERS AND LONG-TERM OFFENDERS

Interpretation

Definitions

752. In this Part,
"court" means the court by which an offender in relation to whom an application under this Part is made was convicted, or a superior court of criminal jurisdiction;
"serious personal injury offence" means
(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).

R.S., c. C-34, s. 687; 1976-77, c. 53, s. 14; 1980-81-82-83, c. 125, s. 26.

Application for remand for assessment

752.1 (1) Where an offender is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) and, before sentence is imposed on the offender, on application by the prosecution, the court is of the opinion that there are reasonable grounds to believe that the offender might be found to be a dangerous offender under section 753 or a long-
term offender under section 753.1, the court may, by order in writing, remand the offender, for a period not exceeding sixty days, to the custody of the person that the court directs and who can perform an assessment, or can have an assessment performed by experts. The assessment is to be used as evidence in an application under section 753 or 753.1.

Report

(2) The person to whom the offender is remanded shall file a report of the assessment with the court not later than fifteen days after the end of the assessment period and make copies of it available to the prosecutor and counsel for the offender.

1997, c. 17, s. 4.

Application for finding that an offender is a dangerous offender

753. (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), 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 described in paragraph (a) of the definition of that expression in section 752 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 described in paragraph (b) of the definition of that expression in section 752 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.

Time for making application
(2) An application under subsection (1) must be made before sentence is imposed on the offender unless

(a) before the imposition of sentence, the prosecution gives notice to the offender of a possible intention to make an application under section 752.1 and an application under subsection (1) not later than six months after that imposition; and

(b) at the time of the application under subsection (1) that is not later than six months after the imposition of sentence, it is shown that relevant evidence that was not reasonably available to the prosecution at the time of the imposition of sentence became available in the interim.

Application for remand for assessment after imposition of sentence

(3) Notwithstanding subsection 752.1(1), an application under that subsection may be made after the imposition of sentence or after an offender begins to serve the sentence in a case to which paragraphs (2)(a) and (b) apply.

If offender found to be dangerous offender

(4) If the court finds an offender to be a dangerous offender, it shall impose a sentence of detention in a penitentiary for an indeterminate period.

If application made after sentencing

(4.1) If the application was made after the offender begins to serve the sentence in a case to which paragraphs (2)(a) and (b) apply, the sentence of detention in a penitentiary for an indeterminate period referred to in subsection (4) replaces the sentence that was imposed for the offence for which the offender was convicted.

If offender not found to be dangerous offender

(5) If the court does not find an offender to be a dangerous offender,

(a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or

(b) the court may impose sentence for the offence for which the offender has been convicted.
APPENDIX B
LONG-TERM OFFENDER LEGISLATION

CONSOLIDATED STATUTES OF CANADA

Criminal Code

PART XXIV
DANGEROUS OFFENDERS AND LONG-TERM OFFENDERS

Application for finding that an offender is a long-term offender

753.1(1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), 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.

Substantial risk

(2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if

(a) the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), subsection 163.1(3) (distribution, etc., of child pornography), subsection 163.1(4) (possession of child pornography), subsection 163.1(4.1) (accessing child pornography), section 172.1 (luring a child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and

(b) the offender

(i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or

(ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.
If offender found to be long-term offender

(3) Subject to subsections (3.1), (4) and (5), if the court finds an offender to be a long-term offender, it shall

(a) impose a sentence for the offence for which the offender has been convicted, which sentence must be a minimum punishment of imprisonment for a term of two years; and

(b) order the offender to be supervised in the community, for a period not exceeding ten years, in accordance with section 753.2 and the Corrections and Conditional Release Act.

Exception -- if application made after sentencing

(3.1) The court may not impose a sentence under paragraph (3)(a) and the sentence that was imposed for the offence for which the offender was convicted stands despite the offender's being found to be a long-term offender, if the application was one that

(a) was made after the offender begins to serve the sentence in a case to which paragraphs 753(2)(a) and (b) apply; and

(b) was treated as an application under this section further to the court deciding to do so under paragraph 753(5)(a).

Exception -- life sentence

(4) The court shall not make an order under paragraph (3)(b) if the offender has been sentenced to life imprisonment.

Exception to length of supervision where new declaration

(5) If the offender commits another offence while required to be supervised by an order made under paragraph (3)(b), and is thereby found to be a long-term offender, the periods of supervision to which the offender is subject at any particular time must not total more than ten years.

If offender not found to be long-term offender

(6) If the court does not find an offender to be a long-term offender, the court shall impose sentence for the offence for which the offender has been convicted.

1997, c. 17, s. 4; 2002, c. 13, s. 76.

Long-term supervision

753.2 (1) Subject to subsection (2), an offender who is required to be supervised by an order made under paragraph 753.1(3)(b) shall be supervised in accordance with the Corrections and
Conditional Release Act when the offender has finished serving

(a) the sentence for the offence for which the offender has been convicted; and
(b) all other sentences for offences for which the offender is convicted and for which sentence of a term of imprisonment is imposed on the offender, either before or after the conviction for the offence referred to in paragraph (a).

Non-carceral sentences

(2) A sentence imposed on an offender referred to in subsection (1), other than a sentence that requires imprisonment of the offender, is to be served concurrently with the long-term supervision ordered under paragraph 753.1(3)(b).

Application for reduction in period of long-term supervision

(3) An offender who is required to be supervised, a member of the National Parole Board, or, on approval of that Board, the parole supervisor, as that expression is defined in subsection 134.2(2) of the Corrections and Conditional Release Act, of the offender, may apply to a superior court of criminal jurisdiction for an order reducing the period of long-term supervision or terminating it on the ground that the offender no longer presents a substantial risk of reoffending and thereby being a danger to the community. The onus of proving that ground is on the applicant.

Notice to Attorney General

(4) The applicant must give notice of an application under subsection (3) to the Attorney General at the time the application is made.

1997, c. 17, s. 4.

Breach of order of long-term supervision

753.3 (1) An offender who is required to be supervised by an order made under paragraph 753.1(3)(b) and who, without reasonable excuse, fails or refuses to comply with that order is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Where accused may be tried and punished

(2) An accused who is charged with an offence under subsection (1) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but if the place where the accused is found, is arrested or is in custody is outside the province in which the offence is alleged to have been committed, no proceedings in respect of that offence shall be instituted in that place without the consent of the Attorney General of that province.

1997, c. 17, s. 4.

Where new offence
753.4 (1) Where an offender who is required to be supervised by an order made under paragraph 753.1(3)(b) commits one or more offences under this or any other Act and a court imposes a sentence of imprisonment for the offence or offences, the long-term supervision is interrupted until the offender has finished serving all the sentences, unless the court orders its termination.

Reduction in term of long-term supervision

(2) A court that imposes a sentence of imprisonment under subsection (1) may order a reduction in the length of the period of the offender's long-term supervision.

1997, c. 17, s. 4.

Hearing of application

754. (1) Where an application under this Part has been made, the court shall hear and determine the application except that no such application shall be heard unless

(a) the Attorney General of the province in which the offender was tried has, either before or after the making of the application, consented to the application;

(b) at least seven days notice has been given to the offender by the prosecutor, following the making of the application, outlining the basis on which it is intended to found the application; and

(c) a copy of the notice has been filed with the clerk of the court or the provincial court judge, as the case may be.

By court alone

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

When proof unnecessary

(3) For the purposes of an application under this Part, where an offender admits any allegations contained in the notice referred to in paragraph (1)(b), no proof of those allegations is required.

Proof of consent

(4) The production of a document purporting to contain any nomination or consent that may be made or given by the Attorney General under this Part and purporting to be signed by the Attorney General is, in the absence of any evidence to the contrary, proof of that nomination or consent without proof of the signature or the official character of the person appearing to have signed the document.

R.S., 1985, c. C-46, s. 754; R.S., 1985, c. 27 (1st Supp.), s. 203.
755. and 756. [Repealed, 1997, c. 17, s. 5]
APPENDIX C
CODING TEMPLATE

SECTION A

1. IDENTIFICATION:

Coder: ________________  Our File #: ________________
Indexed as: ________________

Full Name: ____________________________
Registry No.: ____________________________
Registry Location: ____________________________
Date: ________________

Crown: ____________________________  Defence: ____________________________
Justice: ____________________________

2. FILE CONTENTS:

List of File Contents:

3. EXHIBITS LISTED:

4. PUBLICATION BAN/REASON?:

SECTION B

1. FILE/CASE CHRONOLOGY: (HEARINGS, FINDINGS, APPEALS, and INCARCERATION)

SECTION C: PROFILE OF OFFENDER

1. DEMOGRAPHICS (TIME OF PROCEEDINGS)

Age: Sex:
Marital Status: Dependents:
Education: Employment:
IQ: Ethnicity:
Other:
2. PERSONAL HISTORY
   a. OFFENDERS' PERSPECTIVE

   b. OTHER HISTORY

   History - Drugs
   History - Alcohol
   Family History
   Past Mental Health Diagnosis/Treatment
   Employment History
   School History
   Relationship History
   Incarceration/Case Management/Parole/Probation

SECTION D: PREDICATE OFFENCE (S)

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<th>Date:</th>
<th>Age:</th>
<th>Sex:</th>
<th>Relation:</th>
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<tbody>
<tr>
<td>Victim:</td>
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<tr>
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<tr>
<td>Victim Injury:</td>
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<td>Weapon(s) Used:</td>
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<td>Under Influence:</td>
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<tr>
<td>Offender:</td>
<td>Victim:</td>
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<tr>
<td>Other information:</td>
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SECTION E: OFFENCE HISTORY

Juvenile:
Adult:

SECTION F: WITNESS TESTIMONY

Witness:
Relation to Offender:
Testimony:

SECTION G: SATISFYING DANGEROUS OFFENDER PROVISIONS: Crown
(reasons given by the court for/against the DO finding)

Crown (FOR)

a. Repetition/
   Unrestrained

b. Persistent
   Aggression/Indifference

c. Brutality

d. Failure to Control
   Sexual Impulses/
Serious Personal Injury
Case Law Cited

MATERIAL/INFORMATION RELIED UPON:

SECTION Gd: SATISFYING DANGEROUS OFFENDER PROVISIONS: Defence
(reasons given by the court for/against the DO finding)

Defence (AGAINST)

a. Repetition/
Unrestrained

b. Persistent
Aggression/Indifference

c. Brutality

d. Failure to Control
Sexual Impulses/
Serious Personal Injury
Case Law Cited

MATERIAL/INFORMATION RELIED UPON:

SECTION I: EXPERT WITNESS ASSESSMENT

ATTENDING EXPERT: __________________________
STATUS: ________________________ CROWN: ______ DEFENCE: ______

DIAGNOSTIC INSTRUMENTS UTILIZED AND RATIONALE:

PROCESS/PROCEDURE/PROTOCOL:

DIAGNOSIS:

PROGNOSIS:

OTHER:

OFFENDER PERSPECTIVE:

CONTEXT:

QUOTES:

OTHER:

FOCUS On PCL-R/PSYCHOPATHY: Susanna's Objectives

RELEVANT QUOTES:
FOCUS ON RISK/RISK ASSESSMENT: Jacqueline's Objectives

RELEVANT QUOTES:

SECTION J: SATISFYING DANGEROUS OFFENDER PROVISIONS - JUDGEMENT/ADJUDICATION

FINDING: 
SENTECE: 

__________________________________________
JUDGE

a. Repetition/
Unrestrained

b. Persistent
Aggression/Indifference

c. Brutality

d. Failure to Control
Sexual Impulses/
Serious Personal Injury

JUDICIAL INTERPRETATION OF DIAGNOSIS (Risk, PCL-R)

PROGNOSIS

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JUDICIAL COMMENTS ON EXPERT WITNESS TESTIMONY

JUDICIAL COMMENTS ON WITNESS TESTIMONY

JUDICIAL COMMENTS ON SENTENCING

OTHER

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1. Availability of Information (missing/not to be searched)
2. Role of Media
3. Others

SECTION L: ADDITIONAL INFORMATION/ COMMENTS/ NOTES
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