

THE 'DANGEROUSNESS' PROVISIONS OF THE CRIMINAL JUSTICE ACT
1991 - A RISK DISCOURSE?

by

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Abstract

This thesis examines in detail the provisions of the Criminal Justice Act 1991 which allow for the incapacitation of the 'dangerous' offender. Incapacitation has been used as an example of a growing trend in criminal justice towards viewing crime in terms of risk. This risk discourse points to the use of actuarial practices and insurance techniques in this field, with a resultant 'abstraction' of the traditional view of crime as a moral wrong. The technologies of risk assessment are central to the very power of the discourse, it has been argued that these techniques further increase the effectiveness of control and that they are a response to a growing preoccupation in society with security. It is argued that risk is, in a sense, pre-political in that as risk takes hold, overtly political responses to crime become more difficult.

Given that incapacitation has been used as an example of crime as risk, this thesis takes the form of a micro-study of the above incapacitatory legislation. It assesses the degree to which this legislation can be seen to be a part of the risk discourse. It is argued that on a general level the legislation does fit within the risk model, seeking to incapacitate 'bad risks'. However, it is argued that as the legislation has been conceived, formulated and employed, it does not make use of the actuarial techniques of risk assessment - seen as so central to 'internal dynamic' of the risk discourse - to a significant extent. Rather, it is argued that the legislation embodies a politically motivated appeal to the *idea* of risk rather than to risk assessment itself. It is concluded that this use of risk - once shed of its attendant technologies - far from making political responses more difficult, sits well with punitive responses demanded by a government of the right.

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Chapter 1

"In the discourse of modern penal policy, the rationality of risk predominates. Yet the passion to punish remains a powerful political phenomenon"¹

1.1 Introduction

The criminal justice system is seldom out of the political limelight. To ignore the political dimension in criminal justice is to ignore an important factor for change, that of political pragmatism. This thesis has at its root the interaction between a politically convenient criminal justice reform and the discourse of *crime as risk*. At the heart of the crime as risk discourse is the idea that the problem of crime is no longer solved and blame attributed to the guilty criminal, but rather than crime is managed and regulated through actuarial techniques and insurance formulae. Crime is therefore thought of in terms of risk factors rather than of blame and moral wrong. This movement in criminal justice has been noted by a growing body of writers, most notably Jonathan Simon². The crime as risk discourse is said to be exemplified by an increased interest in incapacitation³. Selective incapacitation is the subject matter of this thesis, the basic idea behind it being that by imprisoning some offenders for longer than would normally be the case, a certain amount of crime will be prevented precisely because these offenders are out of circulation. Incapacitation is used as an example of risk assessment in criminal justice because it has at its centre a prediction of future harm. An attempt is made to reduce the risk of victimisation of the population as a whole by

¹ J. Simon, "The Emergence of a Risk Society: Insurance, Law and the State" (Sept-Oct 1988) *Socialist Review* 61 at 81.

² *ibid.* and *infra* notes 3, 21 & 29.

³ M. Feeley & J. Simon, "Actuarial Justice: The Emerging New Criminal Law" in D. Nelken, ed., *The Futures of Criminology* (London: Sage, 1994) 173 at 174-175.

confining a group of offenders judged to be bad risks.

The subject matter of this thesis would more traditionally be termed 'dangerousness'. The reader should not fall into the trap of seeing 'dangerousness' as a certifiable condition; it is not. Hidden behind the emotive nature of the term it too has at its centre a prediction of future harm. Castel has, perhaps, come closest to encapsulating the problem with the terminology of 'dangerousness' when he stated that:

Dangerousness is a rather mysterious and deeply paradoxical notion, since it implies at once the affirmation of a quality immanent to the subject (he or she is dangerous), and a mere probability, a quantum of uncertainty, given that the proof of the danger can only be provided after the fact, should the threatened action actually occur⁴

It is not intended to deal with all the areas in the criminal justice system where decisions as to selective incapacitation or 'dangerousness' are at work. They are many and varied. The role of the sentencer is considered in this work although similar predictive decisions are taken by the Parole Board, the Mental Health Review Tribunal, the Prison Governor and the police to name but a few.

The particular measures considered in some detail in the following chapters are the sentencing provisions of the 1991 Criminal Justice Act⁵ which are aimed at keeping the violent or sexual offender - deemed to be a risk to the public of future serious harm - out of circulation for a period longer than would have been the case if public protection had not been expressly considered. The 1991 Act remains at the centre of the sentencing system in England and Wales, and the

⁴ R. Castel, "From Dangerousness to Risk" in G Burchell, C. Gordon & P. Miller, eds., *The Foucault Effect: Studies in Governmentality* (Brighton: Harvester Press, 1991) 281 at 283.

⁵ Criminal Justice Act 1991 (U.K.), 1991, c.53, s. 1(2)(b), 2(2)(b), 3(3)(b), 31(3).

general sentencing principle contained within it is that the offender's sentence should relate to the seriousness of the offence⁶. The 'dangerousness' provisions are thus an important exception to this principle. While the reader may draw from this thesis a judgement on the desirability of, or justification for, such a public protection sentence, these judgements are not at the centre of this work. Rather through a detailed examination of this legislation, elucidation will be cast on the relationship between the discourse that views crime as risk and the factor of political pragmatism. This broader argument will be made through what can be called a 'micro-study' of the 1991 provisions. As has been noted the general idea of incapacitation has been employed as an example of *crime as risk* at work. My aim is to see to what extent the risk discourse is evident when a detailed examination of such a provision is undertaken. While the analysis of the extent to which the risk discourse is reflected in the legislation will not be undertaken until the final chapter, the reader will see in the earlier chapters how the language of risk is pervasive throughout the statute, its parliamentary background and its judicial implementation.

The following chapter deals with the history of the 'dangerousness' legislation in England and Wales. This chapter contextualises the study as well as making the important point that the character who we view as a danger today, a risk, has not always been thought of in those terms. This chapter also makes the point that the definition of what we mean by the 'dangerous' offender has been shown throughout the last 100 years to be problematic. Previous statutes have trapped those never intended to be covered by the classification. The chapter charts the transformation of the 'dangerous' offender from viewing the petty persistent offender as 'dangerous' to the point we have reached today were we talk of

⁶ *ibid.* s. 1(2)(a), 6(1).

'dangerousness' in terms of the headline hitting violent or sexual criminal. This chapter also introduces the idea of bifurcation - that the less serious offender should be kept out of prison while the more serious offender should be treated with greater severity. The 1991 'dangerousness' provisions are theoretically distinct in that their aim is incapacitation, however, they can be seen in a broader context as part of this "culture of severity"⁷.

The third chapter will offer a critique of the actual provisions of the 1991 Act in terms of their definitional precision. It will be argued that since a predictive judgement is at the centre of the legislation, any attempt to limit its scope by the definition of future harm is unlikely to work. It will be suggested that the only hope for restricting such a statute to those for whom it is intended (if these can be pinpointed) would be the threshold criteria of previous conduct. As we shall see, the 1991 Act falls far short of providing tight threshold criteria. The most important case law relating to the provisions will be discussed, with particular reference to the predictive test developed by the courts and the evidence that the courts require before making this prediction.

Chapter four takes this analysis further by looking at the role of expert witnesses within the legislative scheme. It will be suggested that expert witnesses and especially the psychiatrist play an important role and that they often offer predictions of future harm. These predictions are sometimes in the traditional terminology of 'dangerousness' and sometimes in terms of risk. The empirical evidence regarding the prediction of future harm by such professionals will then be considered and it will be noted that the outlook for an acceptable degree of reliability is bleak. It will be noted, however, that the trend in such research is

⁷ A. Rutherford, *Criminal Justice and the Pursuit of Decency* (Oxford: Oxford University Press, 1993) at 163.

towards actuarial techniques and that within psychiatry risk assessment is seen as a scientifically defensible form of expert testimony.

Chapter five looks at the legislative process that led to the passing of the Act. The importance of bifurcation in criminal justice is picked up on and it will be argued that the risk assessment inherent in the longer than normal sentence became 'blurred' with the greater punitiveness evident at the upper end of the bifurcation scale. It will be suggested that this is evident in the conceptual background to the Act and was exacerbated by structural changes made to the Act during its parliamentary passage. It will be suggested that fear of crime as a policy issue may have been addressed through these provisions. The legislation is aimed at 'protecting the public' but an attempt to address fear of crime in this way is based on the idea that the public assess their own risk of victimisation. If this is so then at one and the same time risk assessment has been appealed to by government and sidelined by greater punitiveness as a result of bifurcation. The government's view of the prediction of future harm within the statute is also assessed in this chapter and it will be concluded that little attention was paid to the problem of prediction by politicians.

Chapter six will assess the extent to which the 1991 provisions can be seen to fall within the crime as risk discourse. It has been argued that viewing crime as risk leads to a particular moral view of crime - that blame is no longer attributed, rather risks are managed⁸. The context of the 'dangerous' offender would seem to be a particularly fertile area for this development. It is precisely because the 'dangerous' offender is seen as an exceptional risk that special measures are

⁸ See, e.g., J. Simon, "The Emergence of a Risk Society", *supra* note 1 where he says "It [risk] distributes losses among various risk communities rather than attributing blame and responsibility" at 73.

deemed to be necessary. It will be argued that the risk discourse can be seen within this legislation at a theoretical level. A policy of selective incapacitation is about attempting to reduce the risk of victimisation of the population as a whole by predicting future harm by a group of high risk offenders. However, it will be suggested that to understand more fully the risk discourse we must look at its interaction with other factors, especially the political process and the move to greater punitiveness within it. It will be argued that while the 1991 provisions are heavy with the dialogue of risk, what has been created is in fact an extremely blunt instrument, poor at risk management and heavily weighed in favour of the political advantage that comes to government from being seen to be 'tough on crime'. It will be argued that the technologies of risk assessment which are so central to the power of the risk discourse as a model of social control - the technologies of aggregation and classification - are largely absent in these provisions. It will be argued that, shed of these technologies, it is the idea of *risk* that has been utilised at a political level. It will be argued that there is no clash between the political utilisation of the *idea of risk* with increased retributive punishment.

The remainder of this introduction will be used to introduce the reader to two central themes. Firstly, the political problem of the serious repeat offender will be considered. Secondly, a review of the literature on *crime as risk* will be undertaken and its essence identified.

1.2 The Serious Repeat Offender

We see in the 1991 Criminal Justice Act the use of the language of risk by the government, the risk of victimisation played on and the reassurance that the

'dangerousness' provisions of the statute provide some kind of protection for the individual against risk⁹. What prompts this rhetoric and what is hidden behind it is the serious offender who, upon release, reoffends. A concrete example of such an offender is found in a report in *The Times* on 31 July 1995. In this case the offender had been released on parole after having served only part of a six year sentence for assault. Nine months after his release the offender committed murder. The spouse of the victim of the murder is quoted as saying "They can't keep letting out prisoners to murder people and not take the blame"¹⁰. The judge sentencing the offender in the latter trial made a classic 'dangerousness' judgement, he said "you are a bestial criminal and a great danger to the public"¹¹. Nothing in this thesis is intended to minimise the past actions of those perceived as 'dangerous' but what I have called here the classic 'dangerousness' judgement is in fact a prediction of future harm. We cannot be sure when such a person is going to offend. It is easy with hindsight, when such a person does commit a horrific crime as in the example just quoted, to say that just such a prediction should have been made. If we kept every criminal in prison to avoid the risk that he or she would reoffend our penal system could not cope. As Castel has put it "One cannot confine masses of people just out of simple suspicion of their dangerousness, if only for the reason that the economic cost would be colossal and out of all proportion to the risks to be prevented"¹². The judge in this case labels the offender a great danger to the public. The judgement sounds

⁹ Members of the government in many contexts often take on the role of the insurer to reassure a concerned public. For example, in a related context of the release of mentally ill people into the community, the Secretary of State for Health proposed issuing a charter for the public which would "include the guarantee that patients will not be discharged from hospital if it is thought that there could be the slightest risk to the carers, relatives or the public" (Stephen Dorell M.P.) quoted in N. Hawkes, "Minister to issue pledge on the release of the mentally ill" *The Times* (28 December 1995) 4. This was a bold claim indeed and one would think one that the Minister is bound to regret making.

¹⁰ M. Darch, "Criminal Let out despite jail attack: Widow sues the Parole Board for freeing husbands killer" *The Times* (31 July 1995) 3.

¹¹ Laws J. quoted in *The Times* *ibid*.

¹² *supra* note 4 at 284.

persuasive but it is a prediction none the less. Statistically, since serious crime is relatively rare it will, *ipso facto*, be difficult to predict.

Repeat serious offenders are particularly problematic for those in charge of the criminal justice system precisely because he or she was in the control of the state in the not too distant past. Blame is placed on the criminal justice system because the offender was safely locked up but was released only to reoffend. This is perceived as worse than if the offender had not previously been a subject of the criminal justice process. Risk of victimisation, it will be argued, can be played on by government in this context by seeking to reassure the voter that action is being taken to minimise the risk of serious reoffending by the 'dangerous' offender. Whether or not the risk is statistically reduced is a vexed question. When the risk materialises, as it must, the state having taken on the role of the predictor will surely take much blame. Even those sentenced under the longer than normal sentence must be released at some point. As was said during the passage of the Bill through parliament, "the only way to protect the public from someone is to put him away for ever"¹³. The prediction of future harm is at the centre of these provisions and the prediction will be shown to be extremely unreliable. This prediction is an essential part of risk management but the political attraction of the risk discourse should be contrasted with the potentially disastrous effects of assuming the role of risk assessor. Headlines such as "Criminal let out despite jail attack: Widow sues Parole Board for freeing husband's killer"¹⁴; "Teacher Attacked by Freed Rapist"¹⁵ and "Mental Hospitals 'ignored' killer's 15

¹³ Mr Peter Archer M.P., U.K., H.C., *Parliamentary Debates*, Standing Committee A, Criminal Justice Bill, Official Report, Session 1990-1991, vol. 1, col. 129. Even this can be seen to result only in containment of the problem, the death penalty is the only punishment that will eliminate the risk completely.

¹⁴ *supra* note 10.

¹⁵ *The Times* (25 November 1995) 5.

years of violence"¹⁶ should warn against undertaking to predict the future conduct of any criminal.

The reader has been introduced to the contemporary problem of the repeat violent or sexual offender. The serious nature of the crime that we seem to want to predict has also been stressed. What is meant by crime as risk will now be considered in greater detail so that as the provisions of the 1991 Act are discussed, the reader will be able to place them in the context of *risk*.

1.3 Crime as Risk

(a) Origins

Much of the literature on crime as risk has been written in the North American context, however, it is interesting that in the British context both Garland¹⁷ and Bottoms¹⁸ have recently made attempts to identify the trend in this jurisdiction. I will attempt in this section to identify the salient points of the crime as risk discourse. Crime as risk owes an obvious debt to Foucault¹⁹. Foucault traced the history of punishment from the gallows, the punishment of the 'body', to the prison where the object of punishment was the 'soul'. The coercion of the 'soul' was through what he described as 'the disciplines' -

... an uninterrupted, constant coercion, supervising the processes of the activity rather than its results and it is exercised according to a codification that partitions as closely as possible time, space, movement. These methods, which made possible the meticulous control of the operations of the body, which assured the constant subjection of its forces and imposed

¹⁶ J. Lawrence, *The Times* (17 January 1995) 5.

¹⁷ D. Garland, "The Limbs of the Sovereign State: Strategies of Crime Control in Contemporary Society" *British Journal of Criminology* (forthcoming).

¹⁸ A. Bottoms, "The Philosophy and Politics of Punishment and Sentencing", in C. Clarkson & R. Morgan, eds., *The Politics of Sentencing Reform* (Oxford: Clarendon, 1995) 17.

¹⁹ P. O'Malley, "Risk, Power and Crime Prevention" (1992) 21 *Economy and Society* 252. He places the discourse in this context at 252ff as does Simon *infra* note 21.

upon them a relation of docility-utility, might be called disciplines²⁰

We have in this quotation both the intellectual background to the crime as risk discourse and the primary departure from it. There is the method of control through the ordering of the functions of the body. The risk discourse is a natural progression from this in that control is made possible through knowledge, knowledge about 'time, space, movement' of the body. However, we also have the primary departure from Foucault whose history of punishment culminated in the prison where the object of the mechanisms of control were to render the body 'docile'. With the risk discourse the object of control through knowledge is not to make the criminal conform; it is not focused on the individual at all. As Simon has put it "Rather than seeking to change people... an actuarial regime seeks to manage them in place"²¹.

It is clear that the risk discourse has many overlapping features and I will attempt to deal with these in turn. This should make the essential difference from, as well as the debt owed to Foucault more transparent. Simon and Feeley note that it is the amorphous quality of risk that gives it its power and thus we cannot define the term simply²².

(b) Actuarialism and Managerialism

The first trend within the discourse is that of 'actuarialism', a term increasingly used to encompass the whole movement. By this is meant the trend to look not to the individual but rather to the aggregate of the population as a whole. The population are aggregated according to the mass of information that is in

²⁰ M. Foucault, *Discipline and Punish - The Birth of the Prison* (New York: Vintage, 1979) at 137.

²¹ J Simon, "Ideological Effects of Actuarial Practices" (1988) 22 Law and Society Review 771 at 773.

²² *supra* note 3. They state that "...it is important to keep in mind that what we describe is not a mentality or a blueprint that can be cleanly separated from the material it analyses" at 174.

circulation about each individual. Pratt defined it as "...the application of base rate data and statistical methods to the task of categorising individuals by locating them within the taxonomic group"²³. Simon gives the concrete example of credit cards and the associated credit rating²⁴. Credit reference agencies compile information about our homes, incomes, family and expenditure to tell other actors in the field whether we are good or bad credit risks. Knowledge of this sort is a source of power and through this a source of social control.

In the field of criminal justice, actuarialism has several consequences. Firstly, we are no longer interested in defeating crime, rather we accept that crime is a given. When victimised we hear people say that they have become yet another crime statistic. That is *exactly* what they are. It is the statistical flow that is important rather than the individual victim or criminal. Rather than fighting crime, crime is there to be managed and our risk of victimisation can be managed through profiling and other technologies that accept that crime is inevitable. Crime is not defeated but managed and perhaps displaced. Perhaps most importantly actuarialism tends to de-moralise crime in the sense that we look not to the criminal as a morally guilty person but rather ask where he or she fits into the population profile. This would seem to be a consequence both of the inevitability of crime and of the methodology employed in risk assessment. We do not seek to punish the offender for the present offence rather we seek to assess the risk that he may, given his offender profile, pose in the future.

Hence the connection with 'dangerousness' legislation: risk assessing is what, on the surface at least, it is all about. Several writers have identified 'dangerousness'

²³ J Pratt, "Dangerousness, Risk and Technologies of Power" (1995) 28 *The Australian and New Zealand Journal of Criminology* 3 at 21.

²⁴ J. Simon *supra* note 1 at 76.

provisions as a 'growth area' given this trend towards actuarialism. Simon notes that "possibly the clearest indication of actuarial justice is found in the new theory of incapacitation"²⁵ and this is so because incapacitation attempts not to change the offender but rather to contain him or her and thus to alter the chance of victimisation. While incapacitation goes back to earlier this century, it is argued that we can see within contemporary incapacitation the idea that we no longer focus on the 'dangerous' individual and the wrong that he or she has committed but rather on the factors of risk. We look to these factors to make the prediction of future harm.

Reichman has called the demoralising nature of the risk discourse the 'abstraction of punishment'²⁶. We do not look upon the crime as a moral wrong nor do we look to the individual, the criminal, the subject. Rather, we look to his or her place in the aggregated population. The term 'the abstraction of punishment' captures this idea much more clearly in that it is clear that risk is not amoral. Rather it has a different moral framework from traditional retributive punishment. We do not attribute blame but we still try to predict and manage crime. We seek to minimise victimisation and therefore the moral framework of risk would seem to run along utilitarian lines. While this framework may be quite similar to Foucaudian analysis (it will be remembered from the quote above that utility was one of the aims of the 'disciplines') we see here the essential difference from the Foucaudian account. Foucault saw punishment in the prison as essentially *individualised*. In the risk discourse the focus is away from the individual to the population at large. We can thus see within actuarialism both a mode of control and a particular aggregative attitude to crime, it is through *classification* that crime

²⁵ Feeley and Simon, *supra* note 3 at 174.

²⁶ N. Reichman, "Managing Crime Risks: Toward an Insurance Based Model of Social Control" (1986) 8 Research in Law, Deviance and Social Control 151 at 165.

is *managed*.

We have already touched on the notion of managerialism, the trend to look upon efficient management as an important target within criminal justice. Traditional models based on the rehabilitation of the criminal do not 'work' and therefore targets are set in terms of internal efficiency rather than in terms of recidivism or reformation. One tendency is to take a *systemic* approach rather than looking at individual parts of the criminal justice system. In the British context, Bottoms identifies a move towards managerialism²⁷. He includes within this what he calls systemic, consumerist and actuarial practices. Managerialism also has as a side effect the same 'abstraction of punishment', Garland notes that "Increasingly ...[criminal justice] organisations seek to be evaluated by reference to internal goals...rather than by reference to social goals such as ... catching criminals..."²⁸. Simon in his study of parole in California identified just such a trend; once the rehabilitative ideal had been shown to be ineffective, the parole system turned to a 'management' ethos where the focus was on internal performance standards rather than reconviction rates²⁹.

(c) Insurance

Related to actuarialism is the technology of insurance. Reichman defines

²⁷ *supra* note 18 at 24. An example of just such 'managerialism' in British criminal justice is the increase in community crime prevention initiatives. Target hardening and Neighbourhood Watch have become the watch words rather than the 'fight' against crime. These programmes presuppose crime; all that the individuals can do is to take steps to avoid their own victimisation. It is also clear that within British criminal justice there is a drive towards internal efficiency. This can be seen as a part of the Conservative government's general emphasis on market forces, the criminal as well as the public become the consumers within the system. Managerialism is extenuated by privatisation in this field with the increasing number of private prisons in which the conditions of the inmates are determined by the contractual provisions between the private company and the state. It was in the 1991 Criminal Justice Act itself that this privatisation movement was first expressed (Part IV of the Act).

²⁸ *supra* note 17 at 16.

²⁹ J. Simon, *Poor Discipline*, (Chicago: University of Chicago Press, 1993). See chapters 6-8, especially at 228-229.

insurance as "... a particular form of social arrangement organised around a set of procedures for allocating risk across a community of risk takers"³⁰. Insurance is both a source of actuarialism and a natural progression from it. While we no longer attempt to 'beat' crime, we can on the basis of the assessment of risk, insure ourselves against it. By this we do not mean only our idea of say car insurance where we get compensation on a given event. Rather 'insurance' also encompasses the notion of predicting and managing risks. Under this model, crime is not seen as a moral wrong but as "fortuitous events, the effects of which can be spread across communities of risk takers"³¹. It is a part of the logic of insurance that the risks to be managed must be relatively easy to predict given aggregative data. It stands to reason that a rare event, the occurrence of which is based on unpredictable events, is not a good 'insurance risk'. Thus Reichman sees the model working best with "Offences which occur in bounded (private) environments [such offences] are more likely to lend themselves to the development of modelling techniques whereas offences in the public arena present a more fluid and difficult situation for risk analysis"³². Under the insurance model the risk is essentially shared across a group of risk takers, again we have the idea of aggregation. Reichman notes that 'hazards' are social and environmental factors which affect the probability calculus and thus the insurance model aims to limit the influence of these hazards so that prediction may be more reliable. Thus we can see within the technology of insurance the idea that moral blameworthiness becomes sidelined. We attempt instead to manage future threats and the keys to this management are information gathering and classification. Security is provided through information rather than punishing the morally depraved criminal.

³⁰ *supra* note 26 at 151.

³¹ *supra* note 26 at 152.

³² *ibid.*

(d) Technology and Security

From this analysis it seems that we must try to think in terms of both the modality of risk and the outcomes suggested by it. That is to say that much of the literature draws our attention to the ability of the modern state to undertake mass surveillance of the population, the "New Technologies of Control"³³. While this development is clearly driven by the technological revolution we must ask to what use this information is put and what effect it has on the notions of crime and the criminal.

Simon has noted that the risk discourse arose out of just this information gathering combined with a move toward viewing *security* as the primary concern of society. He stated that:

The contemporary cultural concern with risk then is really composed of the confluence of two different historical processes. On one hand is the growth of a set of techniques for *aggregating* people...On the other hand, a set of political and economic strategies have made *security* a pervasive task for the state...³⁴

Beck made the point that there has been a change from concern about property to concern about security, and this concern leads to social solidarity. He states that "The ideal type of the risk-society is the social epoch, in which solidarity arises out of fear and develops into a political force"³⁵. Ericson makes a similar point where he states that "solidarity is based in a communality of fear"³⁶. This

³³ *supra* note 26 at 169. In Britain, the government has recently pointed to "a well-deserved worldwide reputation for its crime fighting technology" (*Protecting the Public* (London: HMSO, 1996) at 57). In this publication the government went on to outline 24 different technological advances and registers of criminals, their convictions and their DNA.

³⁴ *supra* note 1 at 67.

³⁵ U. Beck, "Modern Society as a Risk Society" in N. Stehr & R. Ericson, eds., *The Culture and Power of Knowledge* (Berlin and New York: De Gruyter, 1992) 199 at 207.

³⁶ R. Ericson, "The division of expert knowledge in policing and security" (1994) 45 *British Journal of Sociology* 140 at 167.

common concern about security provides the risk discourse with much of its force, risk analysis techniques promise to make us more secure by managing crime risks. Promising to predict the irrational gives the risk discourse something of the allure of the modern day alchemist.

(e) Political and Sovereign Interactions

Simon asks why the risk discourse has increasing prominence. He sees the risk discourse as making power and control more effective. He states "Actuarial practices are emerging as a dominant force because they further intensify the effectiveness of power set in motion by the rise of the disciplines"³⁷. He sees actuarial practices as having an internal dynamic due to the effectiveness of control that they possess. He argues that not only do they change the way in which we view crime but that eventually they will also make political and moral responses more difficult in general. Feeley and Simon argue that the trend towards risk is a 'pre-political' influence that cannot "...easily be associated with conventional labels"³⁸. There are obviously tensions within the model. Simon sees a clash of the sovereign's enduring power to punish with the risk model³⁹. He gives the example of the drink driver, where the reaction is only in part in terms of technologies of risk and insurance (higher premiums) but moral outrage is also retained.

Bottoms also points to a similar clash between what he calls consumerism and actuarialism⁴⁰. The former presupposes a moral actor who can make consumer choices while the latter subordinates the subject to the mass. O'Malley has argued against what he calls the linear pattern put forward by Simon and has

³⁷ *supra* note 21 at 773.

³⁸ *supra* note 3 at 190.

³⁹ *supra* note 1 at 78ff.

⁴⁰ *supra* note 18 at 31-32.

argued that the risk discourse can only be understood in terms of the current political climate⁴¹. He argues that with the rise of neo-conservatism, the risk discourse has been used alongside a return to punitive 'sovereign' responses. Risk has been privatised to what he has called 'prudentialism'. The responsibility for managing crime risks against property, for example, is thrown back to the individual while serious crime is met with a strong moral standpoint and retributive punishment. Rather than the sovereign and risk competing, he argues that they can be complimentary. Significantly he argues that a political response to the risk discourse is both possible and has happened in the 1980s through a return to explicitly punitive policies as he puts it "...while such [risk] technologies undoubtedly have their own internal dynamics of development, these are neither perfectly autonomous nor do they have intrinsic effects which follow automatically from their nature"⁴².

(f) Salient features

This assessment of the risk discourse has of necessity been limited but we can discern its essence. We have trends in *actuarialism* and *insurance* applied to the criminal justice field as methods of control. The effect of these technologies which is perhaps the most notable is the 'abstraction of punishment' and the demoralising of the criminal subject. Indeed both the subject and the victim are lost within the very notion of actuarialism. We also have the element of the focus on security in modern society and the solidarity provided through the fear of insecurity. It is vital to bear in mind that it is not just the outcome which is important but that the actual *technologies* of actuarialism give it much of its force. These technologies aim to gather information and categorise and aggregate the population.

⁴¹ P. O'Malley, *supra* note 19.

⁴² *ibid.* at 268.

Having identified what, in essence, is meant by *crime as risk*, it is necessary to take a step back. It has been indicated that a major problem facing modern penalty is the repeat violent or sexual offender. This was not always a problem for the criminal justice system. Rather, attention was focused for many years on the 'dangerous' persistent property offender. It is now necessary to look at the last one hundred years to see how the problem of the repeat violent or sexual offender evolved. Violent and sexual criminals, it seems, were not always stylised as the 'dangerous' class.

Chapter 2

"Dangerousness, in fact, is never constant. It varies with time and circumstance... militant classes and groups are more or less powerful according to the political, moral and social health of the communities in which they operate"¹

2.1 Introduction

The purpose of this chapter is not simply to plot the history of protective sentencing in Twentieth Century England and Wales by way of introduction². My intention is, rather, to highlight through an historical overview the definitional problems in conceptions of 'dangerousness' and to argue that the concept of 'dangerousness' has changed substantially through the course of this century. The Gladstone Committee³ of 1895 saw the 'dangerous class' as "... a large class of habitual criminals not of the desperate order, who live by robbery and petty larceny..."⁴. Ninety-five years later, on the eve of the 1991 Criminal Justice Act, the government saw the problem as one of a "... small number of [persistent violent and sexual] offenders who become progressively more dangerous and who are a real risk to public safety"⁵. A constant theme within these differing conceptions of the 'dangerous class' is the belief that if only we could identify and incapacitate a distinct group of offenders we could reduce the level of crime.

¹ Leon Radzinowicz, "The Dangerous Offender, The Fourth Frank Newsam Memorial Lecture" (1968) 41 *Police Journal* 411 at 428.

² The history of incapacitation of the habitual criminal has been definitively told by Sir Leon Radzinowicz and Roger Hood in chapter 8 of *The Emergence of Penal Policy in Victorian and Edwardian England* (Oxford: Clarendon Press, 1990) and in "Incapacitating the Habitual Criminal: The English Experience" (1978) 78 *Michigan Law Review* 1305. My aim here is not to go over old ground but to compare attempts at incapacitation earlier this century to the contemporary measures which are at the centre of this thesis.

³ Herbert Gladstone (Chairman), *Report of the Departmental Committee on Prisons* (London: HMSO, 1895)

⁴ *ibid.* at 31.

⁵ *Crime, Justice and Protecting the Public* (London: HMSO, 1990) para. 3.31 at 14.

It will be suggested that there is a tension throughout the century between targeting persistence *per se* and targeting persistence only when associated with crimes of a certain degree of gravity. All three legislative attempts this century, it can be suggested, were aimed at the 'professional' criminal rather than the petty inadequate offender but all three failed to provide criteria that allowed for the detention of one but not the other. What is clear is that none of these measures were either aimed at, or fell largely upon, the violent or sexual offender. These legislative attempts to incapacitate the persistent property offender highlight the difficulties in definition and of translating any definition into statutory language. We can see in the 1991 Criminal Justice Act the legislative recognition of a marked shift in emphasis away from taking special protective measures against the habitual property offender towards taking such measures against those who it is believed may commit headline-hitting crime against the person if released sooner, rather than later. This focus on the violent or sexual offender is also a feature of three reports published in the late 1970s and early 1980s which, while not leading directly to legislation, deserve consideration for what they tell us about the changing concept of the 'dangerous' and the inherent problems of definition. It is also essential to place the 1991 'dangerousness' provisions in the context of the bifurcation in British penal policy, between treating the violent and sexual offender more harshly while relaxing penalties for property offenders. The result of this bifurcation, even before the protective legislation of 1991, was a *de facto* policy of general incapacitation.

2.2 Three Statutes

(a) Preventive Detention of 1908

The Prevention of Crime Act 1908 introduced Preventive Detention which

according to the Home Secretary, Herbert Gladstone, was aimed at the 'professional criminals' those who "deliberately, and with their eyes open, preferred a life of crime and knew all the tricks and turns and manoeuvres necessary for the life"⁶. Under the Act, an offender who had been convicted of an indictable offence, if found to be a 'habitual offender' could be sentenced to between five and ten years Preventive Detention⁷. To be declared a 'habitual offender' by the jury it had to be shown that the offender had been convicted on three previous occasions since the age of 16 and that he "is leading a persistently dishonest or criminal life"⁸. The Gladstone Committee which foreshadowed the Prevention of Crime Act, had shied away from a definition of the 'habitual criminal' favouring the argument that it would be difficult to define one but that the courts would know one when they saw one⁹. This ambiguity is continued in the Act in that the jury must conclude that the offender was leading 'persistently a dishonest or criminal life'. While the criteria for preventive detention were aimed at avoiding the petty recidivist and catching the 'professional', the legislation was not aimed specifically at the violent or sexual offender as its 1991 counterpart is. We can see in the early years of the century a conception of the 'dangerous' that has since diminished. Clearly crimes of violence were treated seriously but the courts were not in need of any particular measure to incapacitate the perpetrators of these crimes. Since the maximum sentence for such crimes was either a long period in prison or the death penalty, the courts could keep these offenders out of public circulation for a very long time, or in the case of capital

⁶ quoted in *The Emergence of Penal Policy* *supra* note 2 at 274.

⁷ Prevention of Crime Act, 1908 (U.K.), 1908 c. 59, s. 10(1).

⁸ *ibid.* s. 10(2)(a). Section 10(2)(b) provides an alternative criteria - that on a previous occasion he had been found to be an habitual offender and sentenced to Preventive Detention.

⁹ The committee (*supra* note 3 at 31) say that "We have not attempted a definition of 'habitual criminal'. This is a question which must be taken in conjunction with our suggestion that a new form of sentence should be set up... it probably would be necessary to give a certain amount of discretion to the court".

sentences, forever¹⁰. It was property offenders who kept coming back for more who were seen as the 'dangerous class'. It was the persistence in the offending rather than the seriousness intrinsic in the crime that led this group to be seen as a danger.

The problem with the legislation was obviously the need to add a criterion of seriousness to the requirement of persistence in order to catch the 'professional' but not the petty offender. If it would have been possible to draw up such criteria, they were clearly not in the Act. When Winston Churchill became Home Secretary in 1911 he issued new guidelines to stop its use as a managing device for the inadequate. He suggested that the most recent offence ought to have been "substantial and serious" and that while "... mere pilfering, unaccompanied by any serious aggravation, can never justify proceedings under the Act... Violence conjoined with other crimes will always count as important adverse factors"¹¹. Churchill's idea of who the public ought to have particular protection from was considerably before its time. His concern to link selective incapacitation with crimes of violence echoes the 1991 legislation eighty years before its enactment.

In many ways Churchill's criteria did not make sense since, as already mentioned, the courts had the power to send such violent offenders away for long periods of time. It is thus not surprising that Churchill's tightening of the criteria spelled the end of Preventive Detention in its initial form. It was eventually repealed after many years of near disuse by the Criminal Justice Act 1948. Again

¹⁰ In a way, this is why the proposals in the White Paper, *Crime Justice and Protecting the Public* for protective sentences were not directed at the most serious offenders. It was thought that these offenders ought to be left out of the provisions for the special protective sentences since the judge would pass a long sentence on the basis of other sentencing rationales.

¹¹ Memorandum by the Secretary of State for the Home Department, prefixed to a draft of the rules prescribing conditions in Preventive Detention, laid before Parliament on 17 February 1911, reproduced as Appendix 4 to the *Report of the Departmental Committee on Persistent Offenders* (London: HMSO, 1932).

with a view to a comparison with the legislation of 1991, it is interesting to note that Morris has calculated that only 7 of the 325 criminals committed for Preventive Detention between 1928 and 1948 were sentenced for violence, a threat of violence or danger to the person¹². It is obvious that the courts were in no need of a special sentence to incapacitate the violent.

One further interesting feature of the 1908 scheme with contemporary relevance is its 'dual-track' approach. The habitual criminals had first to serve their sentence of penal servitude and only after it had been completed did they move on to Preventive Detention which was to be a less rigorous, protective rather than penal, regime¹³. We see here the idea that the 'dangerous' offender ought first to be punished and then incapacitated. This is similar to the contemporary discretionary life sentence which, since it does not actually mean detention for life, is in effect an indeterminate sentence. Under section 34 of the 1991 Criminal Justice Act the trial judge must set a 'tariff' which represents the length of determinate sentence the offender would have received on the basis of the seriousness of the offence had he not been given a discretionary life sentence. The tariff is used to set the date at which his or her case will be reviewed by the Parole Board with a view to his or her early release. While the conditions of containment are the same before and after this tariff period (unlike Preventive Detention) we see here a similar dichotomy between punishment and

¹² N. Morris, *The Habitual Criminal* (London: Longmans, Green & Co, 1951) at 63-65. Quoted in "Incapacitating the Habitual Criminal: The English Experience" *supra* note 2 at 1379.

¹³ For details of how this 'less rigorous' regime worked in practice see Radzinowicz and Hood *supra* note 2 at 278ff.

incapacitation¹⁴.

(b) Preventive Detention of 1948

On the recommendation of the Dove-Wilson Committee on Persistent Offenders¹⁵, the old form of Preventive Detention was repealed by the Criminal Justice Act 1948 and replaced with Corrective Training for offenders under thirty and Preventive Detention for those over thirty. The most notable change between the 1908 and the 1948 variety of Preventive Detention was the abolition of the dual-track system. The new sentence was to be a substitute for the normal sentence of imprisonment rather than an addition to it¹⁶. Among the catalogue of reasons given by the Dove-Wilson committee as to why the distinction between punishment and incapacitation ought to be abolished, they note that it is "... apt to create the impression that the offender is being punished twice for the same offence"¹⁷. While the regime under preventive Detention may have been more relaxed than that of Penal Servitude, the basic liberty of the offender was restricted just as much under the protective part of the sentence as it was under the penal part. The problem of how to keep such 'dangerous' offenders secure, while at the same time drawing a distinction between punishment and preventive detention, is bound to be a feature of any sentence which seeks to create a 'dual-track'.

The confusion as to which class of offender the public needed particular

¹⁴ While the 1991 scheme does not separate the protection period from the retributive period, such a proposal was made during the passage of the Bill through Parliament. See Mr Peter Archer M.P. *Parliamentary Debates*, Standing Committee A, Official Report, Session 1990-1991, vol. 1, col 123. The proposal got a short shift from the Home Office Minister who states "The idea of chopping up the sentence into a bit for the offence and another bit of the protection of the public and making that public in open court is misconceived, because the court would give a total sentence which would reflect both considerations" per J. Patton M.P., at col 129.

¹⁵ *Report of the Departmental Committee on Persistent Offenders*, *supra* note 11.

¹⁶ See Criminal Justice Act 1948 (U.K.), 1948 c.58, s. 21.

¹⁷ *supra* note 11 at 62.

protection from persisted throughout this period. While the Dove-Wilson committee saw that certain sexual offenders who re-offend against children were a legitimate target for protective legislation, they also felt that the public deserved protection against "...those who practice thefts or frauds on a comparatively small scale, - the victims being usually poor people on whom the loss of a small sum may inflict a more serious injury than the loss of valuable property on a person of means"¹⁸. The 'dangerous' were still predominately thought of as a band of 'professional' property criminals. The criteria as to who could be sentenced to Preventive Detention had been tightened only slightly by the 1948 Act as compared to the 1908 scheme as applied under Churchill's 1911 rules¹⁹. While the new criteria were a virtual enactment of Churchill's criteria, the problem again was that the measure fell on the inadequate rather than the 'professional'. As Norval Morris notes "In short the [preventive detainees] were nuisances rather than serious dangers to society"²⁰. This is slightly surprising in that after the tightening of the criteria by Churchill in 1911, Preventive Detention fell into virtual disuse. The fact that it once again sprang to life in 1948 after the virtual enactment of Churchill's criteria may show how difficult tightening such criteria actually is. It may be that the fall off in the use of Preventive Detention after 1911

¹⁸ *supra* note 11 at 18.

¹⁹ The condition that the offender be at least 30 years of age (s. 21(2)) was in effect only giving statutory effect to the rule that Churchill had introduced in 1911. Similarly the new condition in 1948 that the offenders instant conviction must have been for an offence punishable for a term of two years or more (s.21(2)(a)) was foreshadowed by the Churchill rule that the instant offence must have been a "substantial and serious crime". Finally, the third condition in the 1948 scheme that two of the prerequisite previous sentences be for either Borstal training or imprisonment or corrective training (s. 21(2)(b)) was similar to Churchill's rule that one of the previous convictions must have been penal servitude. Thus, the changes made by the 1948 Act were not substantial as compared with Preventive Detention under Churchill's 1911 rules.

²⁰ Norval Morris, *The Habitual Criminal* *supra* note 12 at 296. Several other studies were conducted on samples of offenders sentenced to Preventive Detention. D.J. West found in *The Habitual Offender* (London: Macmillan, 1963) on a sample of 50 offenders that "Contrary to what one might expect... the preventive detainees... included a substantial proportion of habitually petty thieves and very few enterprising swindlers on a grand scale" at 15. Similar conclusions were reached by W.H. Hammond and E Chayen, *Persistent Criminals, A study of all offenders liable to Preventive Detention in 1956* (London: HMSO, 1963).

had more to do with a change in judicial attitude than with an actual change in criteria.

Between 1950 and 1961 Preventive Detention was used a total of 2525 times for men and 68 times for women²¹. Again with a view to comparison with the targets of sections 1(2)(b) and 2(2)(b) of the 1991 Criminal Justice Act, between these dates only 131 of the 2593 offenders had committed violent or sexual offences²². Violent or sexual offenders had clearly not become the main targets of protective legislation. Rather the legislation had been used to catch the property offender. Of the 2525 men sentenced under Preventive Detention 2294 were sentenced for breaking and entering, larceny or fraud. Similarly, of the women sentenced, 65 of the 68 were for these three categories of offence²³. While repeat violent or sexual offenders could have been caught by the criteria for Preventive Detention the judiciary obviously did not often feel the need to protect society in this way. Certainly one reason for this is that maximum sentences remained high, the Court of Appeal in a practice direction in 1962 noted that "in the case of a serious crime a sentence of imprisonment of sufficient length may often properly be given which will give adequate protection to the public as well as punishment to the prisoner"²⁴.

(c) The Extended Sentence

It is interesting that even in the 1960s the Advisory Council on the Treatment of Offenders, whose 1963 report advocated the abolition of Corrective Training and

²¹*Report of the Advisory Council on the Treatment of Offenders - Preventive Detention* (London: HMSO, 1963) See Appendix C.

²²*ibid.* It is interesting to note that all 131 offenders were male.

²³*ibid.*

²⁴(1962) 1 W.L.R. 402 at 403. Quoted in part in the *Report of the Advisory Council on the Penal System, Sentences of Imprisonment: A Review of Maximum Penalties* (London: HMSO, 1978) at 50.

Preventive Detention, felt that the public still needed protection against a band of fairly minor recidivating property criminals. While the public in 1991 were thought to need protection from the violent or the sexual offender, in 1963 the Council stated that "It must, we think, be recognised that the community ought to be protected, by some means or other within the Penal system... from the ... numerous offenders who practice thefts or frauds on victims who may be severely afflicted by the loss of a small sum or seriously distressed by what may rank as very minor housebreakings"²⁵. This bears a striking resemblance to the worries expressed by the Dove-Wilson Committee exactly thirty years previously. While no one would deny that property crime can be devastating on the victim, it is perhaps of note that in the 1960s the concept of the 'protection of the public' was much broader than in the 1990s.

Given this continued confusion as to the 'class' of offender against whom the public required protection in the report which foreshadowed the extended sentence, it is not surprising that it fell to roughly the same fate as both attempts at Preventive Detention. The White Paper which proceeded the 1967 Criminal Justice Act stated that "The first need [of the criminal justice system] is to protect society against the dangerous man or woman who by crime will disturb its peace if at large"²⁶. Again it was not the 'dangerous' violent or sexual offender against whom the public were perceived to be in need of protection by a special sentencing measure. Rather, it was "... those delinquents whose character and record of offences are such as to put it beyond all doubt that they are a real menace to society..."²⁷. Those persistent offenders who were a menace to society were to be distinguished from offenders who were merely a nuisance.

²⁵ *supra* note 21 at 13.

²⁶ *The Adult Offender* (London: HMSO, 1965) para. 2 at 3.

²⁷ *ibid.* at para.15 at 5.

Presumably the former could be justifiably incapacitated while the latter had to be tolerated. The White Paper claimed that this distinction ought to be clear in the statutory definition of the persistent offender but it is arguable that the distinction is so fine as to be meaningless and in any case impossible to legislate. The government would have done well to pay close attention to the results of research which suggest that the typical preventive detainee was of the nuisance variety²⁸. We can see in sharp contrast here the definitional problems of the previous half century. At the third attempt since 1908 the threshold criteria had reached epic proportions. It will be instructive to set them out in full to highlight the problems of drawing up such criteria and also because the extended sentence was the immediate predecessor of section 2(2)(b) of the 1991 Criminal Justice Act²⁹. To be sentenced to an extended sentence of imprisonment the offender must have been:

...convicted on indictment of an offence punishable with imprisonment for a term of two or more years ... and the offence...[must have been committed]... before the expiration of three years from the previous conviction of an offence punishable on indictment for a term of two years or more or from his final release from prison after serving a sentence of imprisonment, corrective training or preventive detention passed on such a conviction, and the offender has been convicted on indictment on at least three previous occasions since he attained the age of twenty-one of offences punishable on indictment with imprisonment for a term of two years or more and the total length of sentences of imprisonment, corrective training or preventive detention to which he was sentenced on those occasions was not less than five years and on at least one of those occasions a sentence of preventive detention was passed on him or on at least two of those occasions a sentence of imprisonment or of corrective training was so passed and of those sentences one was a sentence of imprisonment for a term of three years or more in respect of one offence or two were sentences of imprisonment each for a term of two years or more in respect of one offence³⁰

²⁸ *supra* note 20.

²⁹ See the White Paper *Crime Justice and Protecting the Public* *supra* note 5 at paragraph 3.17 where it is stated that "To the extent that it may have been useful for dealing with persistent violent of sexual offenders and protecting the public, it will be replaced by the new Crown Court power..."

³⁰ Criminal Justice Act 1967(U.K.), 1967, c.58., s. 37.

It is not surprising that one of the reasons suggested for the demise of the extended sentence is the complicated nature of the criteria. If the offender satisfied the above criteria and had been convicted of an offence carrying a maximum of two, three or four years he or she could have his or her sentence extended up to five years and for an offence carrying a maximum between five and nine years they could have their sentence extended up to ten years³¹. Again with a view to comparing the extended sentence with the targets of the 'dangerousness' provisions of the 1991 Act, of extended sentences passed in the Crown Court between 1967 and 1976 only 94 out of 512 sentences were for violent or sexual offences³². As far as property offenders are concerned, 412 extended sentences were passed for such offences during this period with by far the largest percentage being for the offence of burglary - some 51%³³.

There is no guidance in this legislation (or either of the previous attempts) as to what type of future conduct the legislation was aimed at preventing. While it is the case that the most likely way to limit the use of such legislation to a 'class' of offenders is by criteria aimed at defining the offenders past conduct, it would also seem desirable to make the prediction element explicit. While such legislation could have a number of aims besides incapacitation, for example, deterrence, the idea behind the extended sentence and Preventive Detention was to 'protect the public' from some future harm. It is therefore strange that the harm that the public were to be protected from was not made explicit in the legislation. Before its abolition by the 1991 Criminal Justice Act the extended sentence had fallen into virtual disuse in any case - 8 extended sentences were passed in 1986, 13 in

³¹ *ibid.* s. 37(3).

³² See appendix K of the *Report of the Advisory Council on the Penal System* *supra* note 24 at 207.

³³ *ibid.*, those sentences not accounted for are classed as 'other' and total 6.

1987 and only 5 in 1988³⁴. The government accepted the assessment of the Carlisle Committee that "... because the maximum penalty had been increased since 1967, the courts did not need to use the extended sentence"³⁵. This is perhaps a rather charitable explanation of the demise of the extended sentence. Maximum sentences were high long before 1967 and the complicated criteria for the extended sentence are likely to have contributed to its demise.

2.3 Three Proposals 1975-1982

The late 1970s and the early 1980s was a period of intense interest in the idea of 'dangerousness' in Britain. While three important reports in these years proposed new protective sentences, none found its way onto the statute books. The extent to which these reports are of interest is thus limited to how they conceptualised the 'dangerous' offender and how they hoped to limit the courts so that only this class could be incapacitated. It is clear that the preoccupation with the persistent property offender was at an end.

(a) The Butler Committee 1975³⁶

The Butler committee dealt with a wide range of issues concerning the mentally abnormal offender within both the prison and the hospital systems. The committee was set up in 1972 jointly by the Home Secretary and the Secretary of State for Social Services under the Chairmanship of Lord Butler. In setting up the Committee the Home Secretary, Reginald Maudling, had in mind the case of Graham Young. This is an example of a spectacular crime leading to government

³⁴ These figures are given in paragraph 3.17 of the White Paper *Crime Justice and Protecting the Public*, *supra* note 5.

³⁵ Lord Carlisle (Chairman), *The Parole System in England and Wales, A Report of the Review Committee* (London: HMSO, 1988) at 113.

³⁶ *Report of the Committee on Mentally Abnormal Offenders* (London: HMSO, 1975).

action, at least in the form of the setting up of a committee of enquiry. Graham Young had been sentenced to four life sentences in 1972. He had previously been sent to Broadmoor after being found guilty of administering poison. After release he went on to cause the death of several of his work-mates by administering poison for which he was sentenced in 1972. Lord Windlesham tells us that "In his memoirs Maulding acknowledged that further deaths had resulted from a decision for which he took responsibility..."³⁷. The committee's remit was wider than the particular problems thrown up by the case of Graham Young. The committee considered the problem of the 'dangerous' mentally abnormal offender who could not be dealt with under the Mental Health Act or be given the indeterminate discretionary life sentence. Such offenders would be given a determinate sentence at the end of which release was inevitable even if they were thought to pose a significant risk of future harm. The case of Graham Young differed from this in that he had been dealt with under the Mental Health legislation and had been sent to a secure hospital from where he had been conditionally discharged. In their chapter on the Dangerous Mentally Disordered Offender the committee specifically refer to the case of Graham Young, they state that "We recognise the anxiety and concern felt by members of the public and voiced in the Press when serious offences are committed by people released from institutions to which they were sent, following earlier acts of violence because of their mental disorder"³⁸.

While the remit of the Butler Committee was confined to problems posed by mentally abnormal offenders³⁹, the committee went on to consider 'dangerousness' as a problem in itself. The committee obviously had

³⁷ Lord Windlesham, *Responses to Crime Volume 1* (Oxford: Clarendon Press, 1987) at 271.

³⁸ *supra* note 36 at 56.

³⁹ *ibid.* at 1.

considerable problems defining dangerousness and in the end "...came to equate dangerousness with a propensity to cause serious physical injury or lasting psychological harm"⁴⁰, clearly a very different 'dangerous' offender from the 'professional' property offender. They proposed a 'reviewable sentence', a sentence based entirely on a perception of dangerousness which was to be indeterminate and subject only to periodic review. Of interest with regard to the 1991 Criminal Justice Act is the way in which the Butler committee proposed to limit the use of the sentence to those who represented a "...substantial probability of committing a further offence involving grave harm to another person"⁴¹. Amongst many proposed safeguards, before a reviewable sentence could be passed the offenders current offence must have been contained in a list⁴². In the 1991 Act, as we will see below, a protective sentence can only be passed against a violent or sexual offender. While the definition of violent offence is broad, "sexual offence" is defined by a list of specific offences. The criticism of the Butler committee and the corresponding criticism of the 1991 provisions is that since offence categories grew up in a piecemeal fashion, criteria that rely on them are likely to be arbitrary. Also of note in the Butler committee's report is the primacy given to psychiatric evidence⁴³. Before a reviewable sentence could have been passed the court must have considered the evidence of two psychiatrists as to the mental disorder of the offender. This is perhaps not surprising when the concern of the committee was the dangerous offender who was mentally disordered but who could not be dealt with under the Mental Health Act. The validity of psychiatric evidence when considering 'dangerousness' is considered in

⁴⁰ *ibid.* at 59. They say that "In our discussions we were not entirely satisfied with any of these definitions".

⁴¹ *ibid.* at 73.

⁴² The offender must have either been convicted of an offence carrying the possibility of a life sentence listed in list 'A' or a lesser offence listed in list 'B' which ran the risk of causing grave harm. To avoid giving too much discretion to the judge they proposed that if the instant offence was in list 'B' the offender must also have been previously convicted of a list 'A' offence.

⁴³ *supra* note 36 at 73.

subsequent chapters⁴⁴.

(b) Report of the Advisory Council on the Penal System 1978⁴⁵

It has been a theme of this chapter that, historically, maximum sentences were so high that there was no need to have a special sentence for the 'dangerous' violent or sexual offender. The report of the Advisory Council specifically addressed the whole question of maximum sentences and their role in structuring the discretion of the courts. The Advisory Council on the Penal System had been set up in 1966 to provide the government of the day with independent advice on penal matters. The report considered here was its last before being abolished by the newly elected Conservative government of 1979. Lord Windlesham tells us that "For a decade, under both Labour and Conservative administrations, the ACPS [Advisory Council on the Penal System] enjoyed unusual authority"⁴⁶. Thus while the report considered here was not implemented, it ought not to be brushed aside as a report by an inconsequential body⁴⁷. In their report the Advisory Council state that the question of maximum sentences had been referred to it in 1975⁴⁸. During the passage of the Criminal Damage Bill of 1971 it was suggested in the House of Lords that "the Council should be given an opportunity at least to comment on the penological implications of new maximum penalties in any future legislation reforming the substantive criminal law"⁴⁹. Following this suggestion the Council approached the Home Office which accepted that the question of maximum penalties ought to be referred to the Council. Thus the problem of the

⁴⁴ See below chapters 3 & 4.

⁴⁵ *supra* note 24.

⁴⁶ Lord Windlesham, *Responses to Crime Volume 2* (Oxford: Clarendon, 1993) at 146.

⁴⁷ As Louis Bloom-Cooper puts it "ACPS was dissolved because of the Conservative Government's distaste for independent advice. It was not axed because it was ineffective. Apart from its last report, every other report ultimately found its way either on to the statute book or to a change in penal practice", Letter [presumably to Lord Windlesham] dated 29 August 1991, quoted in *Responses to Crime* *ibid.*

⁴⁸ *supra* note 24 at 4-5.

⁴⁹ *ibid.* at 4.

'dangerous' offender was not the subject of the reference to the Council, rather it became part of their proposed solution to the 'problem' of maximum sentences not corresponding closely enough to judicial sentencing.

Not surprisingly the Council found that the court's usual range of penalties was well below the statutory maximum. They proposed that new maximum sentences ought to be more realistic and ought to be reduced to about the level given in practice for unexceptional sentences. As part of their proposals they advocated a public protection sentence for the top 10% of offenders who currently were sentenced to more than the judicially created notional maximum sentence. For these offenders the new lower maximum sentence could be extended without limit. Again they did make an attempt to define the harm that they hoped to guard against, but their definition was equivocal. Serious harm included "serious physical injury; serious psychological effects of the kind which impair a person's enjoyment of life or capacity for functioning normally...; exceptional personal hardship...; and damage to the security of the state..., or to the general fabric of society". What constituted serious harm was, however, "open to debate"⁵⁰. While this committee had also moved away from the preoccupation with the 'professional' property offender, we can see in their 'exceptional personal hardship' category an endurance of the idea that when a property offence causes financial hardship it can be a legitimate ground for incapacitation. While these four categories represent the kind of harm that the Council would aim to prevent with this special sentence, they obviously found it impossible to suggest a definition which would have been capable of statutory implementation. They were able to give examples but found that while they "... attempted to embody them in a single formulae to govern the conduct of the courts..., after much

⁵⁰ *ibid.* at 89.

deliberation [we] abandoned the attempt because we felt that an over-specific formula ran the risk of excluding relevant cases by mischance"⁵¹. They opted instead for a general formulation that the courts must think that the exceptional sentence was "...necessary to protect the public from serious harm"⁵². Again it seems that while the dangerous offender could not be encompassed by language, it was felt that the courts would know one when they saw one.

One further aspect of the Council's proposals is of interest. They do not make any specific provision for a threshold criteria of past offending which must be met before a protective sentence can be given. In fact, they specifically say that it would not be a requirement that the offender must already have caused serious harm since "...it is the potential victim we are particularly concerned with protecting"⁵³. This, of course, is an enduring problem with sentences of this sort. Many offenders will have offended in a more minor fashion before 'the big one' that we would all like to prevent. To limit protective measures to those offenders who have already committed a very serious offence would be rather ineffective protection. To abandon such threshold criteria, however, would have serious implications for the justification for such measures. The problem of the false prediction of future harm will be considered at length in chapter four.

Given the failure of previous incapacitatory legislation to catch the intended class of offender, these proposals for a respected advisory body are quite remarkable. Not only could the maximum sentence be extended without limit but the harm that was to be prevented was unclear and the threshold criteria were practically nonexistent. While the definition of the harm to be prevented and the structure of

⁵¹ *ibid.* at 92.

⁵² *ibid.*

⁵³ *ibid.* at 90.

threshold criteria are both inherently problematic, this proposal represented a virtual clean slate to judicial discretion. If we decide that we must adopt protective legislation then taking these inherent problems into account we must attempt to draw up the best possible legislation. We can breathe a sigh of relief that these proposals did not find their way onto the statute books. That they did not seems to have had more to do with unpalatable general reductions in maximum sentences rather than the idea of a special sentence for the 'dangerous' violent or sexual offender. Lord Windlesham notes that "The new maxima recommended by the ACPS were judged by the Home Office to be unacceptable to the preponderance of Parliamentary, judicial, and public opinion"⁵⁴. It must be remembered that a minority Labour government were in power during 1978 thus there would not have been the necessary parliamentary majority to pass a radical reshaping of the structure of maximum sentences. While the 'preponderance' of parliamentary opinion may have been against the proposed new maxima in 1978, this would certainly have been the case in late 1979 when a Conservative government were elected. It would have been unthinkable for a Conservative government, which traditionally pride themselves as being tough on 'law and order', to reduce maximum penalties across the board, even if this had led to a new 'dangerousness' sentence.

(c) The Floud Report⁵⁵

The Floud Report is of most interest. It was set up in 1976 by the Howard League for Penal Reform and reported in 1981. The working group had an impressive membership of academics and government officials both retired and those still involved in the formation of penal policy. There is little indication in the report to suggest why the Howard League decided to instigate the report other than a

⁵⁴ *supra* note 46 at 148.

⁵⁵ J. Floud & W. Young, *Dangerousness and Criminal Justice* (London: Heinman, 1981).

reference to the interest in the subject in the United States of America and the 'dangerous persons' legislation in that jurisdiction⁵⁶. Unlike the other two reports considered, its brief was specifically to consider the problem of the 'dangerous' offender. Floud and Young felt that there would only be a need for a legislative framework for protective sentencing if the high maximum sentences were reduced. It is a fair assumption that within the high maximums there is a good deal of implicit protective sentencing at work. They felt that maximum sentences ought to be reduced and the protective part of sentencing made explicit. To this end they made proposals for legislation. They proposed what they called a semi-determinate sentence which would take the form of a very long fixed-term sentence but which would be subject to periodic review to determine the continuing risk of future 'grave harm'.

Grave harm was defined as "...death, serious bodily injury; serious sexual assault; severe or prolonged pain or mental distress; loss of or damage to property which results in severe personal hardship; damage to the environment which has serious adverse effects on public health or safety; serious damage to the security of the state"⁵⁷. Again Floud and Young were clearly not concerned with the 'professional' property criminal, the 'dangerous' had become primarily the violent or sexual repeat offender. However, the 'severe personal hardship' category could allow property offenders to be labelled as 'dangerous'. The environmental pollution category was a more contemporary concern, one which is unlikely to have crossed the minds of the legislators in the previous attempts at protective sentencing. It is, of course, true that environmental pollution has the potential to kill and injure more people in a potentially more dramatic way than conventional

⁵⁶ *ibid.* at xiv.

⁵⁷ *ibid.* at 118-119. It is clear that the offender did not need to have intended to cause grave harm. The Report states that "... any offence which *has caused* or was intended to cause grave harm could lead to a protective sentence" (my emphasis) at 118.

crime. It would seem odd, however, that environmental crime should be considered under the rubric of the 'dangerous' offender since much environmental crime is corporate and the issues involved differ markedly from those surrounding crime by an identifiable individual. The committee opted for a very general threshold criteria: to be sentenced protectively the offender must have done or attempted, risked, threatened or conspired to do 'grave harm' in the instant offence and have previously committed a similar act on a previous occasion⁵⁸. An offender could thus be sentenced protectively on the basis of this criteria if she or he had never actually caused any harm of any kind providing the risk had been there on at least two occasions. While Floud and Young suggest a more significant threshold criteria than the Advisory Council, the fact is that under their proposals an offender could be sentenced protectively even if he or she had never caused any harm. This is illustrative of the problem of prediction which lies at the heart of such sentences. If we do not want to be 'too late' in most cases then we must be able to base our prediction on behaviour short of serious crime. As will be discussed below, if we wish to avoid being 'too late' in too many cases we risk predicting future harm in many cases where no such harm would in fact occur. The sceptre of the false positive has appeared.

2.4 Persistent Problems

We can see from the review of these three sets of proposals the enduring problems with this kind of legislation. There are two ways in which it can be hoped that the discretion of the court can be limited. One way is to define the kind of harm that it is hoped will be prevented. As is evident from the reports of these committees it is extremely difficult to define the type of harm that we wish to

⁵⁸ *ibid.* at 154.

prevent. All three committees make an attempt at definition but we can see, especially from the Floud Report and the Advisory Council criteria, that while it is clear that serious personal crime is at the forefront of concern, the tendency is to include categories that may extend the classification, perhaps anachrostatically, to the 'professional' property offender and beyond. Even if we were to confine the definition of the future harm to the violent and sexual crime as the 1991 Criminal Justice Act attempts to do, because the definition represents what we wish to prevent in the future, it has limited value in structuring the discretion of the judge. If the offender has satisfied any threshold criteria of past crime the judge must make a prediction and it would be difficult if not impossible to structure this predictive judgment.

I would suggest that the only possible way of limiting 'dangerousness' legislation is through the threshold criteria of past criminal conduct. As we saw in the first half of this chapter, when the 'dangerous class' was the 'professional' property offender the draughtsmen found it difficult, if not impossible, to stop protective measures being used to confine repeat petty offenders. This was due, at least in part, to the legislation relying on the number of times the offender had been convicted of a felony rather than specifying the degree of seriousness of the crime. Relying on the old felony/misdemeanour distinction did not provide an adequate criterion of seriousness due to the minor nature of many felonies. To the extent that they relied on the length of time that the offender had been previously incarcerated or the type of punishment imposed it certainly did limit the discretion of the court. However, even with the extended sentence, where the offender had to have been previously imprisoned for a period of two years this was not such a strict criterion in a jurisdiction with high sentences. The complicated criteria for the extended sentence show that even after placing many

obstacles in the offender's path before a protective sentence can be passed, it may be that the petty offender can still qualify. The problem is also that even if we were to be successful in drawing these threshold criteria so tightly that only a very serious offender could receive a protective sentence, we are using protective sentences when it is already too late to protect the public. If the instant offence is of sufficient severity it will be open to the court to pass a long determinate sentence on the basis of retribution which is likely to offer all the protection society is thought to need. These major problems of defining the harm that we seek to prevent and drawing up threshold criteria will be returned to throughout this thesis.

From the three sentences and the three proposals considered above there is a discernible shift from limiting the protective sentence according to the crimes the offender has committed in the past to looking to what we wish to prevent in the future. The extended sentence is the high point of drawing up elaborate, backward looking criteria while the proposals of the Advisory Council look only to what is to be prevented in the future. Pratt noted such a shift in a more general study of dangerousness provisions: "What we find around 1970 and beyond... a growing interest in *the kind of crime one might commit in the future*, rather than the quantity of crimes one had committed in the past, as was originally the case"⁵⁹. In none of the three legislative attempts at incapacitation was the prediction of future harm a part of the scheme. However, in all three committee reports we can see at least impliedly that such a prediction would have played a part.

How do we account for this change? As already pointed out, once the decision has been made to try and prevent serious offending through incapacitation it

⁵⁹ J. Pratt, "Dangerousness, Risk and Technologies of Power" (1995) 28 *Australia and New Zealand Journal of Criminology* 3 at 14.

makes little sense to rely on past serious offending. The whole point seems to be that we wish to prevent 'the big one' before it happens. Hence the introduction of prediction is inextricably linked to the change in the nature of the 'dangerous' offender. Once the 'dangerous' offender becomes the serious or violent offender, prediction of future harm logically follows. It would not seem that this change is directly related to any 'medicalisation' of the criminal justice system. Only the Butler Committee place any reliance on psychiatric testimony. In that report, as mentioned above, the evidence of two psychiatrists was required⁶⁰. However, these professionals were to give evidence of mental disorder, a requirement that would seem to follow from the Committee's terms of reference. The report did not provide that the psychiatrists were to predict 'dangerousness' *per se*. The report of the Advisory Council does not mention expert testimony⁶¹ and while the Floud Report considers the use of psychiatric testimony in the USA and the associated problems of such testimony, it makes no recommendations as to the use of such evidence⁶². Instead the Floud Report makes a general recommendation that "...the judge should be required when imposing a protective sentence to review the evidence and give reasoned and so far as possible particularised statements of the risk represented by the offender"⁶³. Hence it could not be said that the introduction of prediction at this time was based on a perceived ability of any expert to make a reliable prediction.

If we look at the terminology used by the legislators and the three committees, it is possible to see a corresponding shift away from language that sees the offenders in question as having the inherent 'dangerousness' towards the language of risk.

⁶⁰ *supra* note 36 at 73.

⁶¹ *supra* note 24 at 92 where the Council provide for the sentencing procedure for passing an extended sentence.

⁶² *supra* note 55 at 33-37.

⁶³ *ibid.* at 37.

For example, in the White Paper of 1967 the government referred to the offenders in question as the "dangerous man or woman", "delinquents" and as a "menace"⁶⁴. The Butler Committee on the other hand aimed their measure as "those who represented a substantive *probability* of committing further offences"⁶⁵ while the Floud Committee recommended a periodic review based on the *risk* of grave harm⁶⁶. Undoubtedly the language of dangerousness persisted throughout this period, the very title of the Floud Report was "Dangerousness and Criminal Justice". However, it is perhaps significant that once the prediction of future harm is introduced into the discourse this risk based terminology appears.

2.5 The 'Mad' and the 'Bad'

It has been argued that for much of this century legislators attempted (with little success) to identify and confine a group of persistent criminals, principally those who made their living out of property crime. It has been suggested that there has been a movement away from this concern with the persistent property offender to attempt to confine a group of offenders who represented a risk of principally serious violent or sexual crime. The three reports just considered suggest that there has been such a shift in emphasis. However, as already pointed out only the Floud Report was specifically referenced to consider the problem of the 'dangerous' offender and this Report was prompted by American developments as much as anything else. During the period of the Floud Committees' deliberations Bottoms wrote on what he called the 'renaissance' in 'dangerousness' and this journal article⁶⁷ was specifically referred to by the Floud

⁶⁴ *supra* note 26.

⁶⁵ *supra* note 36 at 73 (emphasis added).

⁶⁶ *supra* note 55.

⁶⁷ A. E. Bottoms, "Reflections on the Renaissance of Dangerousness", (1977) 10 Howard Journal of Penology and Crime Prevention 70.

Committees as having aroused interest in this jurisdiction with the problem of 'dangerousness'⁶⁸.

Bottoms argued that a bifurcation was emerging in British penal policies in the late 1970s between isolating "...selected groups of the 'mad' and the 'bad' as those against whom we really wish to take serious action, while we are prepared to reduce penalties for the remainder, for whom so called 'situational' theories seem more plausible"⁶⁹. This bifurcation can be seen to be emerging throughout the 1980s with the dichotomy being between violent and sexual offenders on the one hand and property offenders on the other. The 'dangerous' class had become those offenders who were thought to pose a risk on release of a headline hitting and thus politically damaging crime. It will be suggested later in this thesis that the protective measures of the 1991 Criminal Justice Act can be seen to be a part of this bifurcation.⁷⁰ For the present it will be sufficient to consider the extent to which this trend can be seen in other areas of penal policies during the 1980s, a period during which there was no specific legislative attempt to isolate any one group of offenders as particularly 'dangerous'.

In the judicial setting we can see a greater distinction being drawn between crimes of drugs, sex and violence and property crime. The average length of sentence passed on males over 21 in the Crown Court for violence against the person rose from 17.5 months to 19.2 months between 1980 and 1990 and for sexual offences from 30.2 to 37.3 months during the same period⁷¹. On the other hand the average sentence length for burglary and theft and handling stolen

⁶⁸ *supra* note 55 at xv.

⁶⁹ *supra* note 67 at 89.

⁷⁰ See below at chapter 5

⁷¹ These statistics are taken from *Criminal Statistics, England and Wales* (London: HMSO, 1990) Table 7.18 at 179.

goods fell from 17.4 months to 16.4 months in the case of burglary and from 11.4 months to 10.3 months in the case of theft and handling stolen goods. This distinction is clearly discernible in the 'guideline' judgements of the Court of Appeal. In *R. v. Bibi*⁷² the Lord Chief Justice held that, in view of serious prison overcrowding, the courts should be slow to send minor offenders to prison. He drew a distinction between offences like minor shop and factory breaking and petty fraud for which offenders should be given sentences as short as possible and robbery and crimes of serious violence for which longer terms would be appropriate. Other cases like *R. v. Billam*⁷³ reinforce the point that, for example, rape is a serious crime where a sentence of at least five years should be the norm. Even without specific legislation, thus, it can be argued that the judiciary were actively incapacitating a group of 'dangerous' offenders. It has been suggested above that the courts were always able, due to high maximum sentences, to do just this. However, judgements like *R. v. Billam* and the changes in average sentence length suggest that there has been a discernible shift in judicial sentencing practice in line with the bifurcation noted by Bottoms.

In a period of intense criminal justice legislation, evidence can be found of this bifurcation. In the 1988 Criminal Justice Act the maximum sentences for various firearms offences were increased from 14 years to life imprisonment⁷⁴ and the maximum term of imprisonment for cruelty to children and young persons was increased from 2 to 10 years⁷⁵. At the lessor end of the scale of severity the 1982 Criminal Justice Act abolished the sentence of imprisonment for both vagrancy

⁷² (1980) 2 Cr. App. R. (S.) 177 (C.A.), see also *R. v. Upton* (1980) 71 Cr. App. R. 102 (C.A.) where, at 104 the Lord Chief Justice stated that "... the time has come to appreciate that non-violent petty offenders should not be allowed to take up what has become valuable space in prison".

⁷³ (1986) 82 Cr. App. R. (S.) 347 (C.A.).

⁷⁴ Criminal Justice Act 1988 (U.K.), 1988 c.33 section 44(3). The increase in maximum sentences applies to the offences of possessing firearms or imitation firearms at a time of committing or being arrested for certain offences and carrying firearms or imitation firearms with criminal intent.

⁷⁵ *ibid.* s. 45.

and prostitution⁷⁶ and the 1991 Criminal Justice Act takes this trend further with decreases in maximum sentences for certain types of theft from ten to seven years and for non-domestic burglary from fourteen years to ten years⁷⁷. While the effect of changing maximum sentences is limited when the vast majority of sentences imposed are well below the maximum, they do indicate the shift in policy of drawing a distinction between crimes against the person and crimes involving property.

Bifurcation does seem to have become an explicit part of government parole policy during this period. This change was probably driven by a perception of public alarm at crimes of sex and violence and a consciousness of the expense of incarceration. In 1983, in a widely publicised and much criticised change of policy, the Home Secretary announced that he intended to exercise his discretion by ensuring that offenders who had been sentenced to over five years for offences of violence or drugs would be virtually denied parole. In addition he changed the policy on the release of life sentence prisoners so that murderers of police and prison officers, terrorist murderers, sexual or sadistic murderers of children and those who murdered by firearms in the course of a robbery would serve at least 20 years in custody before being considered for release on licence. The Home Secretary claimed that both these policies were in a response to "...general public concern about the increase in violent crime..."⁷⁸ and it is of note that these policy changes were first announced, not in parliament, but in the Conservative Party conference in October 1983⁷⁹. The Home Secretary also announced that the minimum qualifying period for parole was to be reduced from

⁷⁶ Criminal Justice Act 1982 (U.K.), 1982 c. 2, s. 70 & 71.

⁷⁷ Criminal Justice Act 1991 (U.K.), 1991 c.53, s. 26.

⁷⁸ Leon Brittan, Written Answer, *Parliamentary Debates*, 30 November 1983, vol 49 col. 505-507.

⁷⁹ See A. Bevins, "Police Killers will serve at least 20 years - Brittan" *The Times* (12 October 1983) 1.

12 to six months which had the practical effect of shortening the sentences of those sentenced to between roughly 12 to 18 months⁸⁰. The other practical effect of this policy was to empty the prison system of about 2500 prisoners at a time of extreme overcrowding. Thus we can see in government policy both the harsher treatment of the violent and sexual offender and some degree of leniency extended to the less serious property offender.

We thus have evidence for the existence of bifurcation, but can we offer any explanation for this trend? The motivation behind bifurcation was, at least in part, economic. When the Conservative government came to power in 1979 they did so on the back of the rhetoric of 'law and order' as Brake and Hale note the Conservative Party "...has successfully portrayed itself as the only political party which takes the issue of law and order seriously"⁸¹. The early years of the Thatcher administration focused on increasing the deterrent effect of punishment and of generally toughening up 'law and order'. One of the first acts of the administration was to approve a large pay rise for the police⁸² and as has already been noted certain maximum penalties were increased. However, by the mid 1980s it was clear that crime was continuing to rise despite the increase in spending on 'law and order'. A discernible shift in government policy is evident with the increase in appeals to the need for the community (or rather the responsible individual within the community) to help the state in the maintenance of 'law and order'. Taylor summed up this movement when he stated that "...establishment opinion unmistakably began to move towards a more skeptical,

⁸⁰ See *The Parole System in England and Wales*, *supra* note 35 at 10-13.

⁸¹ M. Brake & C. Hale, *Public Order and Private Lives, The Politics of Law and Order* (London & New York: Routledge, 1992) at 2.

⁸² See I Taylor, "The law and order issue in the British general election and the Canadian Federal election of 1979: crime, populism and the state" (1980) 5 *Canadian Journal of Criminology* 285 at 299.

not to say resigned approach to questions of law and order"⁸³.

Crucially, the encouragement of tough sentencing policies and the resultant increase in incarceration not only causes crisis in an overcrowded prison system but it is also extremely expensive. Bifurcation allowed the government to economise by keeping less serious offenders out of prison while appearing to be tough in the fight against the really 'dangerous' offender. Appearing tough on crime is especially important for a Conservative Home Secretary before the "notoriously hard line audience"⁸⁴ that is the Conservative Party conference. Thus bifurcation ought to be seen, at least in part, as a product of political pragmatism in the sense that one of the ideas behind it is that it may reduce prison numbers and thus the calls on the exchequer.

Bifurcation may, of course, encompass a distinct moral shift of recognising that violent and sexual crime is *per se* morally worse than property crime. However, it may also be a more complicated notion. This is also reflected, to a certain extent, with the changes in judicial sentencing. In the cases of *Bibi*⁸⁵ and *Upton*⁸⁶ explicit mention was made of the overcrowding crisis in the prison system as a reason to keep sentences short. While the judiciary may not have been directly concerned with the cost of incarceration, bifurcation in their sentencing practice was not solely based on a changing conception of the relative moral gravity of crimes against the person and crimes against property.

Treating violent and sexual crime as more serious is, *de facto*, a policy which

⁸³ I Taylor "Law and Order, Moral Order: The Changing Rhetorics of the Thatcher Government" (1987) *Socialist Register* 297 at 303.

⁸⁴ *The Times*, *supra* note 79 at 1.

⁸⁵ *supra* note 72.

⁸⁶ *ibid.*

increases incapacitation. It is certain that bifurcation is not based solely on the idea that the longer sentences given to these criminals will keep them behind bars and thus reduce future reoffending. This is surely part of it but it is likely that the rationale of bifurcation is also based on the idea that increased sentences may be in line with changes in the notion of retribution or the idea that it will enhance individual or general deterrence. Thus while the 1980s did not see any new legislative attempts to incapacitate a category of 'dangerous offenders', *de facto* incapacitation had increased. It is important to distinguish between general lengthening of such sentences and special legislation aimed at incapacitating a class of offenders on an individualised prediction of future harm. A policy not based on the individual prediction of future harm is almost certain to require a different analysis. Even so, it is essential to assess the 'dangerousness' provisions of the 1991 Criminal Justice Act in the context of the general rise of incapacitation. The place of these 'dangerous' provisions within bifurcation will be considered in detail below in chapter five.

2.6 Explaining the Change

The case has been made in this chapter that the offender who we view as a 'danger' has changed over the course of this century. How can we account for this? As part of the analysis of bifurcation in the previous section it has been argued that a major reason for the 'twin-track' approach was political expediency. While the transformation of the 'dangerous offender' from the property offender to the serious violent or sexual offender may have been the result of many factors, I would suggest that in the 1980s it was largely politician driven. Being seen to take action against a small group of serious offenders allows government to give the impression that they are 'tough on crime', something which is essential for the

'party of law and order'. At the same time the popularisation of the serious violent or sexual offender as the 'danger' to society allows the government to take more lenient and cheaper action against the property offender without being seen to 'go soft' on crime. While no 'dangerousness' legislation was introduced until the 1991 legislation, the whole trend towards bifurcation, I would argue, had a great deal to do with the emergence of the serious violent or sexual offender as the 'danger'. Beyond bifurcation, what factors can be seen to be contributing to the metamorphosis of the 'dangerous' offender?

While it has already been pointed out that crime continued to rise during the early Thatcher years, it is clear both in terms of crimes recorded and in terms of sentenced prisoners, that violent and sexual criminals accounted for an increasing proportion of offenders. Violent and sexual crime in 1979, the year the Conservatives came to power, accounted for 5.1% of all recorded offences⁸⁷ while it accounted for 5.5% in 1990⁸⁸. While the percentage increase seems small it must be remembered that it is a proportionate increase. Overall, crime rose from two and a half million recorded offences in 1979⁸⁹ to four and a half million in 1990⁹⁰. Given this very large increase in overall crime it is not difficult to see why there might have been increased concern about violent and sexual crime. Within the prison system the proportion of violent offenders had increased, in 1979 they accounted for 29% of the population while by 1989 they accounted for 42% of the population⁹¹. Increases in maximum sentences and the judicial change in attitudes which have already been noted may account for some of this increase.

Other events of the 1980s may have led to greater concern about violence in

⁸⁷ See *Statistics of the Criminal Justice System, England and Wales, 1969-1979* (London: HMSO, 1980) at 3.

⁸⁸ *supra* note 71 at 26.

⁸⁹ *supra* note 87.

⁹⁰ *supra* note 88.

⁹¹ J. Patton M.P., "The Criminal Justice Act 1991" (1991) 155 *Justice of the Peace* 745 at 746.

general. The early 1980s saw serious riots in several major cities, in Brixton in London, in Toxteth in Liverpool and in St. Paul's In Bristol for example⁹². In addition industrial relations were at a low point and the miners strike of 1984-1985 turned violent on many occasions⁹³. During the decade Northern Ireland's 'troubles' continued to spill onto the streets of the United Kingdom mainland⁹⁴. Even leaving aside the increase in violent crime these events may have led to increased awareness of violence in society in general and in the perception of the 'dangers' to society in particular. As Taylor states "all of these developments - riot, racial assault and the escalation of soccer violence - provide sure evidence... that this is a society caught in the midst of deep crisis"⁹⁵.

The case has been made that there was interest in the 'dangerous' violent or sexual offender before the ascendancy of the Conservative Party in the 1980s. This much is shown by the reports referred to in this chapter. However, having considered the genesis of each of the reports, it would seem that there was no single unifying theme. The only report that had the problem of the 'dangerous' offender at its centre was the Floud Report and as we have seen this report was prompted by developments in North America as much as anything else. I wish now, to suggest several other factors which may have contributed to the change in 'dangerousness' before 1980.

We have seen that there was a marked proportionate increase in crimes of sex and violence throughout the 1980s. During the 1970s the increase in violent crime seems to have been even more marked. While sexual crime fell on average by 1% annually throughout the 1970s the average increase in violent crime stood

⁹² See I Taylor, *supra* note 83 at 304.

⁹³ See Brake and Hale, *supra* note 81 at 51-53.

⁹⁴ In general see Brake and Hale, *supra* note 81 at 58-68.

⁹⁵ *supra* note 83 at 305.

at 10% per year⁹⁶. This was higher than the 7% average annual increase recorded in the 1980s⁹⁷. In terms of proportionate increase during the 1970s crime as a whole increased by 5% per year which indicates that the increase in violent crime was significant indeed.

In attempting to explain the metamorphosis in 'dangerousness' we must not only look to why the focus was towards the violent and sexual offender but also to why it was away from the property offender. It is clear that as far as property crime is concerned the focus has been, over the last number of decades, on finding alternatives to custody in the form of community penalties. Community Service Orders, for example, were introduced by the Criminal Justice Act 1972 and changes to Probation were also made during the 1980s⁹⁸. After the introduction of the 1991 Act the Court has open to it the following non-custodial orders: absolute discharge; conditional discharge; fines; compensation orders; probation orders; curfew orders and electronic monitoring; community service orders; combination orders and suspended sentences of imprisonment⁹⁹. It may be that earlier this century when there were fewer alternatives to imprisonment the property offender who came before the courts repeatedly posed a problem that they do not pose today. A repeat property offenders today can work his or her way up the ladder of non-custodial sentences until imprisonment is reached rather than having to be repeatedly sent back for more of the same. This trend of finding alternatives to custody seems to have begun well before the bifurcation of the 1980s and may be a significant reason for the change in the nature of 'dangerousness'.

⁹⁶ *supra* note 87 at 5.

⁹⁷ *supra* note 71 at 27.

⁹⁸ See A. Ashworth, *Sentencing and Criminal Justice* (London: Weidenfeld and Nicholson, 1992) at 242.

⁹⁹ *ibid.*

2.7 A New Proposal

While it is to jump ahead of the 1991 legislation, mention must be made of a new proposal that may lead to legislation within the next year¹⁰⁰. In October 1995 at the Conservative Party conference the Home Secretary announced plans to introduce a 'two strikes and you are out' sentence for repeat violent or sexual offenders. He proposed that automatic life sentences would be introduced for second time offenders of violent and sexual crime and that they would only be released if they were no longer a risk to the public. It was proposed that the automatic life sentence on the second time offender would include a tariff that the judge felt necessary for retribution and deterrence. Once that term had been served the Parole Board would have to assess the prisoner for release. The prisoner would have to persuade the Board that he or she was no longer a danger to society¹⁰¹.

The 'two strikes and you are out' policy was warmly welcomed by the conference¹⁰² but it would seem from the Home Secretary's speech that the motivation behind the proposals is similar to that behind legislation recently introduced in the USA¹⁰³, namely a strong deterrent. As the White Paper puts it, the government proposes "mandatory sentences for certain serious crimes so that the offenders know what to expect when they are caught"¹⁰⁴. However, since the

¹⁰⁰ See the White Paper, *Protecting the Public* (London: HMSO, 1996).

¹⁰¹ See Philip Webster, *The Times* (12 October 1995) 1.

¹⁰² Matthew Paris writes that "Michael Howard [the Home Secretary] cheered them [the conference] up a lot with a characteristically conference-curdling performance, conveying the general impression that most of Britain will be behind bars by 2001, and a jolly good thing too" *The Times* (13 October 1995) 2.

¹⁰³ President Clinton in his 'State of the Union' address in 1994 proposed a federal 'three strikes and you are out' piece of legislation, he said "... we must recognise that most violent crimes are committed by a small percentage of criminals... those who commit repeat violent crimes should be told when you commit a third violent crime you will be put away and put away for good. Three strikes and you are out" *New York Times* (26 January 1994) A11.

¹⁰⁴ *supra* note 100 at paragraph 1.9.

Parole Board is to have a 'dangerousness' judgement before release of the offender it would seem that at least part of the idea behind the proposal is that prediction 'works' and that therefore serious crime can be reduced through targeted incapacitation¹⁰⁵. This proposal further supports the point made here that the target for 'dangerousness' provisions in the 1990's is the serious violent or sexual offender. It has also been argued in this chapter that definitional precision is virtually impossible and that in the past such legislation has trapped a wider section of offenders than intended. It is likely that the same difficulties will arise if this new sentencing proposal reaches fruition. As far as bifurcation is concerned, there are conflicting trends within the proposal. On the one hand there are automatic harsh sentences for the violent and sexual offender but on the other hand there is the proposal of stiff new minimum sentences for burglary¹⁰⁶. This proposal would seem to be based entirely on the idea of providing a stiff deterrent rather than containing any 'dangerousness' element since there was no proposal for the Parole Board to control release on the basis of a prediction. The argument that the 'dangerous' offender has metamorphosed from the petty persistent property offender to the repeat violent or sexual offender remains intact.

2.8 Conclusion

The 'dangerous' offender' has been legislatively transformed during the course of the last one hundred years. For most of this century the class of offender we wished to incapacitate on the basis of the prediction of future offending was the

¹⁰⁵ The White Paper *ibid.* states at paragraph 10.6 "It is essential that the public receives proper protection from serious dangerous and persistent offenders. Long sentences are not sufficient, of themselves, to provide that protection: before potentially dangerous offenders are released an assessment must be made to see whether they still pose a risk. If the offender cannot safely be released he or she must continue to be detained - if necessarily indefinitely".

¹⁰⁶ See the White Paper *supra* note 100 chapter 10.

'professional' property offender who made a career out of crime. While long maximum sentences allowed the courts to incapacitate the violent or sexual offender, and arguably still do, concern has shifted to taking special measures against those commonly regarded as 'psychopaths' rather than 'professionals'. While the twentieth century has witnessed the transfiguration of the concept of the 'dangerous', the constant idea behind such legislation is that by keeping a small group of offenders locked up for a longer time the risk of victimisation of this type of crime will be reduced. While it may not have been phrased in these terms, each of these pieces of legislation attempted to manage the risk of reoffending. What is, perhaps, remarkable about the changes throughout the course of the twentieth century is that between the legislation and the proposals a shift has taken place from selection on the basis of past offending to selection on the basis of the prediction of future harm very much as Pratt has suggested.

All three legislative attempts at incapacitating the habitual offender and the three reports considered which advocated protective sentencing illustrate the problems of definition. Given this initial definitional imprecision, it is not surprising that drafting statutes around the idea of danger is virtually impossible. It has also been suggested that the definition of future harm is only of limited value in controlling discretion, the only effective limit being the threshold criteria. However, as Preventive Detention and the Extended Sentence illustrate, carefully drawn up threshold criteria can still capture an unintended class of offenders. Finally this chapter has been used to introduce the concept of bifurcation, the treating of violent and sexual crime as more serious while treating the property offender with a degree of leniency. This has resulted in *de facto* protective sentencing although not explicitly based on individual prediction. The political motivation behind bifurcation has been examined and it has been suggested that

political expediency may have been influential in the transformation of the 'dangerous' offender outlined in this chapter. It is in the context of this bifurcation that we now must consider the 'dangerousness' provisions of the 1991 Criminal Justice Act.

Chapter 3

“...one is concerned with evaluating amongst other things the nature of that future danger, and that is a very difficult exercise to carry out”¹

3.1 Introduction

This chapter addresses the ‘dangerousness’ provisions of the Criminal Justice Act 1991². Following on from the previous chapter, the definitional and threshold criteria will be analysed and again it will be argued that the prediction of future harm is difficult to structure. In the case of this legislation no serious attempt has been made to structure this central prediction. The most important case law will be examined to analyse the type of prediction the courts are being asked to make and to begin to ask how they make it. It will be suggested that the only hope of limiting the use of such legislation is by tightly drawn threshold criteria. It will be argued that this legislation lacks such criteria and thus that it is unlikely that the legislation will be limited to a small number of ‘dangerous’ individuals as ostensibly intended by the government. It will be noted that expert opinion has a significant role to play when the courts are searching for an evidential basis for their prediction of future harm. It will be suggested that in addition to the more traditional language of the ‘dangerous’ person, the courts often resort to the language of *risk*.

3.2 The ‘Dangerousness’ Provisions of the Criminal Justice Act 1991

This Act amounts to a radical change in the sentencing structure in England and

¹ per Schiemann J. in *R. v. Williams* (1994) 15 Cr. App. R. (S.) 330 (C.A.) at 332.

² Criminal Justice Act 1991 (U.K.), 1991 c. 53.

Wales. The first two sections of the Act attempt to structure the discretion of the courts in sentencing in a way that has never before been attempted in this jurisdiction. The Act provides in section 1(2)(a) that a custodial sentence shall not be passed unless the offence was "so serious that only such a sentence can be justified for such an offence" or under section 1(2)(b), because "where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from him". The second section of the Act perpetuates this dichotomy between 'normal' sentences and sentences passed to protect the public from serious harm with regard to the length of custodial sentences. Sentences are either to be commensurate with the seriousness of the offence under section 2(2)(a) or under section 2(2)(b) "where the offence is a violent or sexual offence, for such a longer term (not exceeding the maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender". Thus while the legislation nowhere mentions the word 'dangerousness', its essence is that not only can the court extend the sentence of an offender on the basis that he or she is 'dangerous', but an individual perceived to be 'dangerous' can be sent to prison where such a sentence would not otherwise have been appropriate on the basis of the seriousness of the offence. It is to be remembered that sections 1(2)(a) and 2(2)(a) embody an attempt at 'just deserts' sentencing. These 'dangerousness' provisions amount to the major exception to the proportionality requirements of the Act.

3.3 Duration of Detention, Mitigation and Release

(a) Duration of Detention

The only limit on the amount by which the sentence can be extended under section 2(2)(b) is the ceiling set by the maximum sentence for the particular

offence. As noted in chapter two, it is often the case that the maximum sentence is considerably longer than the average sentence³ and thus section 2(2)(b) gives the judges considerable discretion. This statute allows the courts to sentence an offender to as little as a week or as much as many more years on the basis of a prediction of future harm. As noted above the Extended Sentence was under-used because when faced with a serious offender the courts could sentence the offender to long period of custody which took into account the protection of the public⁴. A similar point can be made in relation to the 1991 provisions. It can be argued that a sentence passed under section 1(1)(a) of the Act, a sentence which is commensurate with the seriousness of the offence, will often be long enough to offer the public some protection from this offender in the future. In the case of *R. v. Walsh*⁵, for example, a longer than normal sentence was quashed because the Court of Appeal felt that it could not be predicted that the offender would commit further similar offences. As Potter J. put it "It also seems to us that a period of five years imprisonment will itself afford protection to the public for a substantial period. Accordingly, we do not consider that any increment under section 2(2)(b) is called for"⁶. In any event, the arbitrariness which results from the use of maximum sentences is undesirable. It may be some consolation that at least there is a limit on the length of sentence, a limit which there would not have been had the proposals considered above⁷ of the Advisory Council on the Penal System been adopted.

Any hope the the Court of Appeal would have been able to give guidance on sentence length for the longer than normal sentence has been eradicated by the

³ See the discussion of the report of the Advisory Council on the Penal System on Maximum Sentences above, chapter 2.3(b).

⁴ See above at chapter 2.2(c).

⁵ (1995) 16 Cr. App. R. (S.) 204 (C.A.).

⁶ *ibid.* at 210.

⁷ See above at chapter 2.3(b).

decision of the Court in *R. v. Mansell*⁸. In this case the defendant was sentenced to five years imprisonment for indecent assault as a longer than normal sentence. The Lord Chief Justice giving the judgment of the Court held that

It is quite impossible to give any guidance as to what length of sentence is appropriate for the purposes of protecting the public as between one case and another. Each case turns on its own facts, and different offences committed in different ways may require different responses from the Court in regard to protecting the public⁹.

One cannot help having sympathy for the Lord Chief Justice. Since the section requires the court to make a predictive judgement as to future harm it would indeed seem impossible to give guidance in advance as to what is the appropriate sentence length.

One glimmer of hope does come from *Mansell*. It was noted above that the 'dangerousness' provisions are a major exception to the proportionally requirements of the 1991 Act. In *Mansell*, however, the Lord Chief Justice held that while on the basis of a prediction of future harm an offender may have to be detained for a very long time the judge "...in each individual case had to try to balance the need to protect the public with the need to look at the totality of the sentence and see that it was not out of all proportion to the nature of the offending"¹⁰. This is a somewhat different approach than that adopted by the Court of Appeal in *R. v. Bowler*¹¹. In this case Smith J. drew attention to the mandatory language of section 2(2)(b) that where the court is of the opinion that there is a danger to the public, a protective sentence *shall* be passed. Thus he held that "...the protection of the public from serious harm becomes in the view of this court ,

⁸ (1994) 15 Cr. App. R. (S.) 771 (C.A.) (hereafter *Mansell*).

⁹ *ibid.* at 775.

¹⁰ *ibid.*

¹¹ (1994) 15 Cr. App. R. (S.) 78 (C.A.) (hereafter *Bowler*).

the overriding factor"¹². Thus while there is some confusion in the jurisprudence of the Court of Appeal as to the influence of proportionality on a longer than normal sentence, it is submitted that an extension of the approach adopted in *Mansell* may provide some limit to an otherwise dangerously open-ended provision.

So, how long are sentences being extended under section 2(2)(b)? This is a difficult question to answer because the sentencer does not always address his or her mind to the question of how long the sentence would have been had it not been for the 2(2)(b) extension¹³. Even if sentencers' minds do work like this they do not always express the tariff sentences. Of the 42 reported cases on section 2(2)(b) analysed later in this thesis¹⁴, it is possible in 19 of them to discern what the tariff sentence would have been. This can be done in two ways. It may be clear from the judgement what the sentencer considered to be the tariff sentence. In other cases the Court of Appeal, for one reason or another, decided that the section had been wrongly applied to the case and thus reduced the sentence to the commensurate length from that which had been passed under section 2(2)(b). In none of these cases was there any criticism of the length of the extension which resulted from the misuse of section 2(2)(b). These 19 cases are a small sample of the total sentences passed under this section and these cases are exceptional by virtue of the fact that they were appealed on the question of sentence and hence reported. Bearing all this in mind the average extension was some 66.5%¹⁵. The longest extension was that in the case of *R. v. Henry*

¹² *ibid.* at 83. A similar approach was adopted by Blofeld J. in the case of *R. v. Coull* (1994) 15 Cr. App. R. (S.) 305 (C.A.). He took the view that "...it is our clear view that ... the protection of the public from serious harm... is a paramount consideration" at 307.

¹³ No published data is available on this point precisely because the trial judge need not make explicit the protective part of the sentence.

¹⁴ See below at chapter 4.2 and see appendix 1 for a list of these cases.

¹⁵ See appendix 2.

*George L*¹⁶, an extension from 3 years to 7 years, some 133%. The shortest extension was in the case of *R. v. Palin*¹⁷ where the extension was from 8 to 10 years, some 25%. From this we can conclude that in some cases at least, the application of section 2(2)(b) has had a dramatic effect on the length of time spent in custody. These cases also show the arbitrary nature of the longer than normal sentence. Why, for example, in the case of *R. v. Palin* was 10 years thought to protect the public when 8 years, a long sentence in itself, was thought not long enough to protect the public?

(b) Mitigation

The mitigation rule in section 28(1) states that "Nothing in this part shall prevent a court from mitigating an offender's sentence by taking into account such matters as, in the opinion of the Court, are relevant in the mitigation of the sentence". This rule does not sit well with the 'dangerousness' provisions of the Act. The concept of mitigation is coherent when an offender is being sentenced on the basis of the seriousness of the offence but it makes little sense when he or she is being sentenced to protect the public. Since under the 'dangerousness' provisions it is the duty of the court to protect the public, it would seem impossible for a court to say that while, for example, five years custody is necessary to protect the public from serious harm, because of the age of the offender or the fact that he or she pleaded guilty the sentence will be reduced to four years. The court would not be protecting the public as it would be bound to do. The whole scenario is, of course, a little unreal since the judge would never be able to say that after x years an offender will definitely be safe for release or that after x minus one years the offender will definitely not be safe for release. However, these are the kinds of judgements the courts are required to make under these provisions and it would

¹⁶ (1994) 15 Cr. App. R. (S.) 501 (C.A.).

¹⁷ (1995) 16 Cr. App. R. (S.) 889 (C.A.).

seem that section 28(1) contradicts section 2(2)(b). While section 28(1) is not mandatory it does extend to the whole of the first part of the Act including section 2(2)(b). As we have already seen the 'dangerousness' provisions are expressed in mandatory terms.

The courts have begun to grapple with this inconsistency. In *Bowler* the Court of Appeal held that in section 2(2)(b) cases "...mitigating factors will not carry the weight or have the same effect as they usually do in cases where the Court passes a sentence which is commensurate with the seriousness of the offence"¹⁸. This, of course, corresponds to the finding in this case that section 2(2)(b) is mandatory. However, the Court did not rule out mitigation completely saying that it "...is not to say that mitigating factors are to be ignored..."¹⁹ and in other cases mitigating factors have been taken into account. In *R. v. Bingham*²⁰ the Court of Appeal approved taking into account a plea of guilty and in *R. v. Meikle*²¹ it was held that the judge had to strike a balance that was both just and in the interests of the public and this balance striking included taking into account the appellant's age and his disabilities.

The problem of mitigation adds to the lack of clarity over the proper duration of the longer than normal sentence but it does illustrate the point that it is impossible to say that a sentence of a specific length will protect the public while a shorter sentence will not.

(c) Release

In addition to the restrictions on sentencing contained in Part One of the Act, Part

¹⁸ *supra* note 11 at 82.

¹⁹ *ibid.*

²⁰ (1994) 15 Cr. App. R. (S.) 205 (C.A.).

²¹ (1994) 15 Cr. App. R. (S.) 311 (C.A.).

Two substantially revises the parole system following the review of parole carried out by the Carlisle Committee²². It is not necessary to dwell on these changes. Suffice to note that while the Act allows for the extension of the sentences of violent or sexual offenders to protect the public, there is no corresponding provision in Part Two to allow for review of these extended sentences once the notionally proportional part of the sentence has been served. Take, for example, an offender sentenced to a term of eight years under section 2(2)(b) as a longer than normal sentence and let us assume that the normal sentence if 'dangerousness' had not been taken into account would have been two years²³. Since under the new arrangements for release those sentenced will not be considered for parole until half their sentence has expired²⁴, this hypothetical 'dangerous' offender will have served three years longer²⁵ due to his perceived 'dangerousness' before the prediction of future harm can be reviewed. If we conclude that the predictions of future harm are unreliable then it is unlikely that the prediction made at this stage by the Parole Board will be much more reliable than the original prediction²⁶. Even if this is the case, it would seem to be fundamentally unjust to sentence an offender to longer than is commensurate with the seriousness of the offence and fail to provide for an automatic review at the end of the notionally proportionate part of the sentence.

If we continue with this hypothetical example and further assume that the offender has been sentenced to a longer than normal sentence on the basis that the court

²² Lord Carlisle (Chairman), *The Parole System in England and Wales, Report of the Review Committee*. (London: HMSO, 1988).

²³ Admittedly this is an extreme example, see above at chapter 3.3(a) for the average extension time.

²⁴ *supra* note 2, s. 35(1).

²⁵ If the offender had been sentenced to two years, under section 33(1) of the Act (*supra* note 2) he would have been automatically released after half his sentence and thus the extra time served under the example would have been three years.

²⁶ A great deal would seem to depend on the time scale of the prediction. As will be seen below (chapter 4.3(c)) some studies indicate that the ability of experts to predict future harm in the short term is markedly better than their ability to predict future harm over the long term.

thinks that he or she will seek revenge against a certain person and assume that that person for some reason is no longer at risk (for example because they have left the country), then we could reach the position where the offender has been incarcerated for at least three years longer on the basis of a redundant prediction. Under the current legislative scheme there is no way that this change in circumstances could be taken into account before the half way point in the sentence. It seems to have been accepted in the case of *R. v. Nicholas*²⁷ that a longer than normal sentence could be passed under 2(2)(b) to protect a specific member of the public so my example is not far fetched. One is forced to agree with Thomas that "What is remarkable about the scheme for custodial sentences for offenders convicted of violent or sexual offences and in particular 2(2)(b) is the absence of any serious attempt to safeguard the position of the offender, either by establishing criteria for the use of the power to pass longer than normal sentences, or creating procedures to be followed before the power is exercised"²⁸.

A special provision for the sexual offender is contained in section 44 of the 1991 Act. When the offender is sentenced for such an offence the sentencing court can decide that after the offender is released on licence that he or she shall be required to serve out the full length of the sentence under supervision in the community. Normally the offender would be released unconditionally after three-quarters of the sentence is served. Section 44 directs the sentencer once again to have regard to the need to protect the public and to prevent further offending. Without dwelling on this provision it is clear from the case of *R. v. Apelt*²⁹ that in employing this section the sentencer will make a prediction of future harm as he

²⁷ (1994) 15 Cr. App. R. (S.) 381 (C.A.).

²⁸ D.A. Thomas, "The Criminal Justice Act 1991: Custodial Sentences" (1992) Criminal Law Review 232 at 238-9. Thomas has repeatedly criticised the Act for its failure to link section 2(2)(b) with the release provisions. See, for example, his comment on *R. v Coull* (*supra* note 12) in (1994) Crim. L. R. 978.

²⁹ (1994) 15 Cr. App. R. (S.) 420 (C.A.) (hereafter *Apelt*).

or she will with section 2(2)(b) itself. In this case the judge relied on the pre-sentence report and a psychiatric report, both of which actually recommended the use of section 44, to invoke it. The pre-sentence report stated that the offender "...undoubtedly presented a danger..."³⁰ and the psychiatrist stated that he thought that the offending would continue³¹.

3.4 Threshold Criteria

(a) Violent Offences

The Act defines 'sexual offence' and 'violent offence'; these definitions represent the threshold through which the offender must pass before the question of prediction becomes relevant. Past violent conduct would seem to be one of the few significant factors in the prediction of future violence³² and thus it is reasonable to have this as a primary threshold. I would argue that the threshold criteria provide the best chance of limiting the discretion of the court and of preventing the use of these provisions to catch the petty persistent offender. However, a violent offence is defined broadly as "one which leads or is likely to lead, to a person's death or physical injury..."³³ and is thus hopelessly inadequate to act as a limitation device.

If we take the first limb of the definition - that the offence has already lead to death or physical injury - it would seem that even the most minor assault could come within the definition. The definition does not require that there have been serious

³⁰ *ibid.* at 422.

³¹ *ibid.*

³² See R.J. Menzies, *Survival of the Sanest, Order and Disorder in the Pre-trial Psychiatric Clinic* (Toronto: University of Toronto Press, 1989). At 216 he states that "Apart from a few relevant factors such as age or prior violence... most variables employed in these [predictive] efforts are superfluous and have little predictive value".

³³ *supra* note 2, s. 31(1).

personal injury. Minor offenders could be subject to disproportionately long sentences and it seems unlikely that these provisions will only catch the "... small number of offenders who become progressively more dangerous and who are a real risk to public safety"³⁴ as the government ostensibly intended. The government showed good sense in the Green Paper which foreshadowed the Act stating that "... violent offences can vary from the premeditated and unprovoked assault with a knife, a drunken quarrel which deteriorates into a fight in which someone is injured, throwing a stone or giving someone an unnecessary and hefty shove"³⁵. This good sense left the government at some point since the recognition that there is a sliding scale of violent offences, not all of which should be thought of as serious, had disappeared by the time the bill was drafted.

The Court of Appeal has not read a criterion of seriousness into the definition of violence. On the contrary, they have given the definition a literal interpretation. In *R. v. Robinson*³⁶, after quoting the definition of violent offence from the Act, the Lord Chief Justice stated that "by contrast with section 31(3) this definition does not include psychological harm nor the requirement that the physical injury should be serious"³⁷. This tells us what the section says but it does not tell us how it ought to be interpreted in the light of the other provisions. It is now clear from the case law that no serious harm needs to have been caused in the past for the protective sentence to be passed. In the context of a sexual offence, the Court of Appeal in *Bowler*³⁸ stated that:

We consider that it is not necessary for there to be evidence that serious harm has been actually caused in the past for the judge reasonably to form the opinion that there is danger that serious harm might occur in the future.

³⁴ *Crime, Justice and Protecting the Public* (London: HMSO, 1990).

³⁵ *Punishment, Custody and the Community* (London: HMSO, 1988) at 9.

³⁶ (1993) 2 All. E.R. 1 (C.A.).

³⁷ *ibid.* at 4.

³⁸ *supra* note 11.

It is the view of this court that the risk of serious harm in the future is sufficient to bring these provisions properly into operation³⁹

There would seem to be very little effective limit on section 2(2)(b) due, at least in part, to the amorphous quality of the definition of violent offence.

If we look at the second limb of the definition we see that not only is there no requirement that there has been past serious harm but there is no requirement that there have been any harm at all. All that is necessary is that the offence "...is intended or likely to lead" to death or physical injury. In *R. v. Fowler*⁴⁰, the defendant was convicted of snatching a bag from a woman, something for which he had been convicted of on five previous occasions. In this incident no actual violence was used although the woman was left "physically shaking and suffering from shock"⁴¹. The Court appears to have assumed, without any consideration of section 31(1), that the offence amounted to a violent offence. While it is, of course, possible that if the Court had given the section proper consideration it could have concluded that violence had been likely, it is deplorable that closer attention has not been paid to the definition. More recently in *R. v. Zosco*⁴², a case which involved burglary with intent to rape, the Court of Appeal went further and held that the fact that the injuries in this case resulted only *indirectly* from the burglary did not prevent the offence being treated as one which leads to physical injury. It was the wording "which leads to" in the section which allowed the Court to reach this decision and this case surely shows how broad the definition is. 'Dangerousness' is all about prediction, but not only does this statute ask the court to make a prediction of future harm once the offender has passed through

³⁹ *ibid.* at 82.

⁴⁰ (1994) 15 Cr. App. R. (S.) 456 (C.A.).

⁴¹ *ibid.* at 457.

⁴² (1995) 16 Cr. App. R. (S.) 354 (C.A.).

the threshold of having committed a violent or sexual offence, it also allows the court to make a 'post-diction' as to whether or not violence was likely to have taken place. It is bad enough that the deprivation of the liberty of an offender turns on the speculation as to the likelihood of future harm without also guessing whether or not violence might have taken place had things been different in the commission of the current offence. In the example of burglary with intent to rape the Court also held in *R. v. Zoszo* that this particular offence would always be within the definition of violent offence since it was always *intended* to lead to physical injury in that rape was itself a physical injury.

It is remarkable that the legislation does not require the offender to have committed a specific number of previous serious offences or that a previous conviction led to a particular type of sentence. This is especially so given that past violence has been shown to be statistically significant with future violent conduct⁴³. It will be remembered that both of these devices were employed with little success in the Preventive Detention and Extended Sentence criteria. We saw in the past that persistence was one of the qualities in an offender which marked him out as a 'dangerous' offender but that the legislation failed to distinguish between the petty persistent offender and the professional offender. However, it is one thing to try to limit the legislation to an intended class of offender and to fail and it is quite another not to make any attempt at all. In the White Paper which preceded the Act it was clearly stated that "The government proposes to take the [bifurcated] approach further by giving the Crown Court the power to give custodial sentences longer than would have been justified by the seriousness of the offence to *persistent* violent and sexual offenders"⁴⁴. No

⁴³ See above, *supra* note 32 and see below at chapter 4.4, note 71 where further literature is quoted in support of this point.

⁴⁴ *supra* note 33 at para. 3.13 (emphasis added).

requirement of persistence appears in the Act.

(b) Sexual Offences

In stark contrast to the generality of the definition of violent offence, 'sexual offences' are defined by a list of statutory provisions in a similar way to that recommended by the Butler Committee⁴⁵. It does not seem at all self-evident that this is a satisfactory definitional approach. Much British criminal legislation has an *ad hoc* nature and it may have been advisable to have some super added condition of seriousness. Thus the definition of sexual offences falls foul of the same criticism as was levelled against the definition of violent offences. For example in *Apelt*⁴⁶ the Court seemed to accept that the indecent assault for which the defendant had been convicted was 'at the lower end of the scale' of seriousness but felt justified in passing a longer than normal sentence to protect the public.

Apart from this general criticism, the omissions made in drafting the list in the Act can only be greeted with incredulity. Thomas noted among the omissions the offence of burglary with intent to rape and most notably any *attempt* to commit the offences listed in the section. The Court of Appeal has held in the case of *R. v. Robinson*⁴⁷ that attempted rape does fall within the definition of 'sexual offence' but only after adopting a rather tortuous argument. Thus not only is the list system of definition inherently flawed (not taking into account degrees of seriousness within the offences) but in the case of the 1991 Act it is further weakened by obvious omissions.

⁴⁵ See above at chapter 2.3(a).

⁴⁶ *supra* note 29 at 420.

⁴⁷ *supra* note 36.

3.5 The Predictive Criteria

It has been argued above that the threshold criteria offer the best way to limit this type of legislation. It has already been argued that in this case these are seriously flawed. Once we proceed to the predictive stage, while criteria may give the impression that the judgement of 'dangerousness' is a structured one, the decision cannot escape a strong element of judicial intuition. It is how the judiciary rationalise this intuitive decision and the language that they use to express it that is interesting. In the reported cases on this legislation the judiciary use a mixture of the language of 'dangerousness' and the language of risk assessment. The significance of the terminology of risk will be discussed later⁴⁸. Suffice to say that to label someone as a danger or as 'dangerous' imports to them a quality of moral blameworthiness which is perhaps even greater than if they had simply been convicted of an offence. To define them in terms of risk has the effect of de-personalising the subject of the judgement and does not carry with it the same connotations of moral blame. It can be argued to classify offenders in terms of risk has the effect of legitimising the prediction of future harm. It would be wrong to overstate the degree to which the language of risk is used in this context, as will be seen below, both terminologies are employed in the context of sentencing under section 2(2)(b) and they are often intermingled.

(a) What harm must be predicted?

It was noted above that the three previous legislative attempts this century to incapacitate the 'dangerous' did not define the type of conduct which was to be prevented by incapacitation. The focus was, rather, on the type or number of crimes that the offender had committed in the past. The 1991 Act, in contrast,

⁴⁸ See below at chapter 6.3.

does offer a definition of what is meant by the 'protection of the public from serious harm'. This key predictive criteria is a "reference to protecting members of the public from death or serious injury, whether physical or psychological occasioned by further such offences committed by him"⁴⁹. While this definition may not get us very far in terms of structure, it is in fact somewhat better than those offered by either the Floud Committee or the Advisory Council on the Penal System. As we saw earlier, both their attempts to define what was meant by 'dangerous' contained criteria that may have allowed the property offender to be included. It would be a tortuous construction indeed that allowed offenders who were thought to pose a risk to property rather than to people into this predictive criteria unless, of course, the courts took the view that property offending, especially against those who are on low income, could be protecting the public from future psychological injury.

The inclusion in the definition of serious psychological injury would seem to broaden the criteria considerably. In *Bowler*, an indecent assault case, this part of the criteria was invoked and it was held that while it was not necessary for serious harm to have been caused in the past it was enough that serious psychological injury was predicted in the future. Smith J. stated that:

Many women might shrug off this kind of unwelcome attention which this man gives to women indiscriminately, but some would not. It seems to us that the purpose of this section should include the protection of those women, less robust than average, who may be vulnerable to the kind of conduct that this man is likely to perpetrate and who might, in these circumstances, suffer serious psychological harm⁵⁰

At least the criteria of psychological injury includes the qualification 'serious' but as *Bowler* shows the courts may take into account not just 'the public' but in particular sections of it that they consider to be more vulnerable.

⁴⁹ *supra* note 2, s. 31(3).

⁵⁰ *supra* note 11 at 82.

(b) To what degree of certainty must this prediction be made?

Given that the prediction of future harm, even within a crude judgement as to 'dangerousness', is at the centre of this legislation, it is strange that the degree of predictive certainty required is not addressed in the Act. If my argument that predictive criteria provide very little limit on the discretion of the courts is valid, then my critic would say that the fact that this legislation does not make explicit the test is not a major fault. However, since the prediction of future harm is at its centre some attempt to give structure to this prediction could have been expected. The legislation simply states that a longer than normal sentence shall be passed if in the opinion of the court it is *necessary* to protect the public. The only word which suggests that the court is guessing is *opinion* but the word *necessary* suggests that the resultant protection of the public is something of a certainty. Thus not only does the language of the section fail to express the degree of certainty necessary before a prediction can be made, it also gives the impression that no prediction is actually taking place.

The degree of predictive certainty has been addressed by the Court of Appeal. As Ashworth and Von Hirsch put it the "statute does not generally make risk the criterion for sentence"⁵¹. While risk is not mentioned in the Act the assessment of risk does seem to be central to the process required by the legislation. The subsequent case law has been littered with the language of risk assessment⁵² and the standard of predictive certainty employed by the courts is often in the language of risk. Intermingled with the language of risk remains the phantom of

⁵¹ A. Von Hirsch & A. Ashworth, "Protective Sentencing Under Section 2(2)(b): The Criterion For Dangerousness" (1996) Criminal Law Review 175 at 178.

⁵² In *R. v. Danso* (1995) 16 Cr. App. R. (S.) 12 (C.A.), for example, the sentencer states that "Manifestly this was a case, therefore, in which the appellant represented and still represents a significant risk as to his future violent offending if he were to remain at liberty" at 14.

the 'dangerous' man⁵³ and it was with the concept of danger that the courts began to define the predictive criteria. In *Bowler* the Court of Appeal stated that it simply could not accept the submission that "... section 2(2)(b) should only be brought into operation in exceptional cases where the danger of serious harm is an obvious one", all that the judge must do is to "reasonably form the opinion that there is a danger that serious harm might occur in the future"⁵⁴. This standard is clearly a low one and in this case it was also simply expressed in terms of the "risk of serious harm"⁵⁵.

In *R. v. Danso*⁵⁶ the Court did not discuss in detail the standard of prediction but the psychiatric report stated that the offender represented a significant risk and without argument this was thought to be a high enough standard. *Substantial risk* was explicitly adopted by the Court of Appeal in the important case of *R. v. Crow/Pennington*⁵⁷. In this case the Lord Chief Justice set out to give some general guidance on the use of section 2(2)(b). He stated that "If... the offence before the court is an isolated one, and there is no reason to fear a substantial risk of further violence or sex offending, then clearly the subsection would not apply"⁵⁸. He emphasised that it should not be in every case of a violent or sexual offence that the subsection should be brought into operation. One would have thought that this much should have been obvious given that the legislation does include the test that it be 'necessary for the protection of the public from serious harm'.

⁵³ In *R. v. Swain* (1994) 15 Cr. App. R. (S.) 765 (C.A.), for example, the sentencer states that "I am of the opinion that you are a danger to children" at 767 and in *Mansell* (supra note 8) the sentencer states that "I believe that you are a very real danger to the public" at 774.

⁵⁴ *supra* note 11 at 82.

⁵⁵ *ibid.*

⁵⁶ *supra* note 52.

⁵⁷ (1995) 16 Cr. App. R. (S.) 409 (hereafter *Crow/ Pennington*).

⁵⁸ *ibid.* at 411.

Other cases have simply restated this statutory test of necessity and in *R. v. Fawcett*⁵⁹ it was held that this judgement that the sentence was necessary to protect the public from serious harm must be taken to the criminal standard of beyond reasonable doubt. In several cases a distinction has been drawn between indeterminate sentencing and the longer than normal sentence under section 2(2)(b). When sentencing an offender to an indeterminate sentence (the discretionary life sentence) the court needs to decide that there is a high degree of danger⁶⁰. In *R. v. Dawes*⁶¹ and *R. v. Helm*⁶² it has been held that the 2(2)(b) sentence can be passed where the prediction is less than this and in *R. v. Helm* it is interesting that the Court spoke of a different "quality"⁶³ in the risk posed by the offender.

It is quite clear that to come to the conclusion that a longer than normal sentence must be imposed because it is necessary to protect the public from serious harm, the courts are engaged in assessing both the degree of harm that might result if the offender re-offends and the likelihood or risk that the offender will re-offend. Surely both these elements must be assessed. The Court of Appeal, however, in *R. v. Creasey*⁶⁴ held in a case where there seemed to be a high risk of less serious harm that the judge had erred into assessing the seriousness of the *risk* rather than the seriousness of the *harm* that might be caused. Such confusion in the case law surely shows that the predictive process that is being carried out by the courts has not been clearly defined by the legislation. If we are going to require the courts to carry out risk assessment, which is what they are doing,

⁵⁹ (1995) 16 Cr. App. R. (S.) 55. This standard of proof would seem to be strictly correct. See C. Tapper, *Cross and Tapper on Evidence*, 8th ed., (London: Butterworths, 1996) at 10-12.

⁶⁰ *R. v. Hodgson* (1967) 52 Cr. App. R. 113 (C.A.) as interpreted in *R. v. Dawes* *infra* note 61

⁶¹ (1995) 16 Cr. App. R. (S.) 491 (C.A.).

⁶² (1995) 16 Cr. App. R. (S.) 834 (C.A.).

⁶³ *ibid.* at 836.

⁶⁴ (1994) 15 Cr. App. R. (S.) 671 (C.A.).

would it not be better to delineate the process and to educate the assessor?

It can be concluded that the sentencer is involved in predicting future harm and that this process is described by the sentencer in a variety of ways. The language of both 'dangerousness' and risk is used by the judiciary although the leading case on the degree of predictive certainty, *Crow/Pennington*⁶⁵, places this decision clearly in the dimension of risk. We now need to ask on what evidence the courts rely on in their prediction of future harm and how sophisticated is their process of risk assessment?

3.6 Evidential Requirements

The purpose of this section is not to assess whether the prediction of future harm is reliable but rather to assess what actual evidence the courts claim to use when making this judgement. The Act does not provide for specific evidence which must be called for before the prediction of future harm is made. However, there are requirements that in certain cases reports must be provided before sentencing. Under section 3(1) of the Act in all cases other than cases triable only on indictment the court must obtain a 'pre-sentence' report usually supplied by a probation officer or social worker. In addition, where the offender appears to be mentally disordered the court must obtain a medical report⁶⁶. When forming an opinion that a custodial sentence is necessary to protect the public or that a longer than normal sentence is necessary to protect the public the court is empowered to "...take into consideration all such information about the circumstances of the *offence* as is available to it..."⁶⁷. Where the court is

⁶⁵ *supra* note 57 I would class this as the leading case because it gives general guidance as to the use of section 2(2)(b).

⁶⁶ *supra* note 2, s. 4(1).

⁶⁷ *ibid.*, s.3(3)(a), (emphasis added).

considering whether to pass a longer than normal sentence under section 2(2)(b) (but not when considering whether to pass a custodial sentence for protection under section 1(2)(b) when it would not be justified by the seriousness of the offence) the court is additionally empowered to "take into account any information about the *offender* which is before it"⁶⁸. The Court of Appeal has gone further in its case law than is required by either of these provisions and has held that a "proper basis"⁶⁹ in evidence must be established before the court can pass a longer than normal sentence. Two broad categories of evidence can be discerned.

(a) Medical Reports

The use of medical reports is widespread. It was held in *R. v. Fawcett*⁷⁰ that where a danger is thought to be due to mental illness the court should have a medical report. In this case it was held that minor offending in the past and a severe personality disorder diagnosed by a psychiatrist was enough to invoke the section. The type of information contained in such reports and these professionals' ability to predict future harm will be assessed in the following chapter. It is sufficient to note here that psychiatric and other medical reports are a principal source of evidence used by the courts when sentencing under 2(2)(b). In some cases, however, the courts have shown a refreshing degree of independence from the confines of such expert opinion. In *R. v. Hashi*⁷¹, the Court of Appeal refused to rule that a medical report should be before the court in all cases of sentencing under section 2(2)(b).

It would be easy to fall into the trap of associating violent and sexual crime

⁶⁸ *ibid.*, s.3(3)(b), (emphasis added).

⁶⁹ *R. v. Samuels* (1995) 16 Cr. App. R. (S.) 856 (C.A.). Hobhouse J. stated "The powers under section 2(2)(b) are only to be exercised where a proper basis has been laid for them" at 859. Similar dicta can be found in *R. v. Oudkerk* (1995) Cr. App. R. (S.) 172 (C.A.).

⁷⁰ *supra* note 59.

⁷¹ (1995) 16 Cr. App. R. (S.) 121 (C.A.).

inextricably with mental illness⁷². It is part of this thesis to question the courts' reliance on such 'expert' evidence. Ashworth and Von Hirsch seem to have fallen into the very trap just identified, they state that:

Since the purpose of the provision [section 2(2)(b)] is to target especially dangerous offenders, almost all of whom will have 'personality problems' courts should resist the temptation to draw inferences simply from the offender's previous record and from the manner of the commission of the offence(s) and should obtain a medical opinion⁷³

On the contrary I would suggest that if the court must make a prediction of future harm then they need to be alert to the degree to which, if any, these professionals are able to predict such harm. Is their predictive ability any better than that of the layman? If it turns out that psychiatrists and other professionals are labellers of offenders as 'dangerous', then are they, in effect, demonizing offenders in the eyes of the sentencer?

(b) Past Wrongdoing

Published research suggests that a person who has committed a serious offence in the past is much more likely than the average person to commit such a crime in the future⁷⁴. It is reasonable, therefore, that the court should take into account past wrongdoing when assessing the risk of future offending. Evidence of past wrongdoing can be sub-divided between the circumstances of the present offence and previous similar convictions. For example, in a case where the offender assaulted his victim by hitting him on the head three times with a hammer the circumstances of the present offence were thought to be important⁷⁵.

⁷² In the Canadian Dangerous Offender legislation, for example, the evidence of two psychiatrists is required before sentence, see Criminal Code, R.S.C. 1985, c. 46, s. 755(1).

⁷³ *supra* note 51 at 179.

⁷⁴ See references referred to *supra* notes 32 & 43.

⁷⁵ *R. v. Clarke* (1994) 15 Cr. App. R. (S.) 102 (C.A.). Holland J. stated "In our judgement the circumstances of the offence taken in conjunction with the information about the appellant which was before the court and by way of the reports cited, could justify a longer than normal sentence being necessary to protect the public" at 102.

However, it is clear from the discussion above⁷⁶ and from the jurisprudence of the Court of Appeal that the present offence need not necessarily be serious before a longer than normal sentence can be passed. It is clear that the courts sometimes look for "common strands"⁷⁷ in previous convictions. Again it is clear that the offender need not have previous convictions if there is other evidence available⁷⁸.

It is difficult to be any more specific about what information the courts use when predicting future harm other than to say that these two areas of evidence are employed depending on the facts of the case. However, neither of these areas of evidence are vital. Examples have already been given of cases where there was no relevant previous convictions and of cases where no reports were thought necessary. There is also an indication that the courts may look to what can be called 'risk factors'. In one case⁷⁹, the Court of Appeal in addition to listing the two categories of evidence discussed above went on to say that the Court would take into consideration 'prominent factors' such as

- (i) Irrationality of behaviour
- (ii) Selection of vulnerable people
- (iii) Unexplained serious violence
- (iv) Unusual obsessions or delusions
- (v) Inability on the part of the offender to appreciate the consequences of his actions
- (vi) Lack of remorse
- (vii) Unwillingness to accept medication

I have called these 'risk factors' but it would be wrong to give the impression that they are used methodically or are based on any information about their reliability

⁷⁶ See above at chapter 3.4.

⁷⁷ *Fawcett supra* note 59.

⁷⁸ *R. v. Jeffreys S* (1995) 16 Cr. App. R. (S.) 303 (C.A.)

⁷⁹ *Fawcett supra* note 59.

in the prediction of future harm. However, if these 'risk factors' are widely used by sentencers then the predictive process may be more sophisticated than I have given it credit for. It would seem, therefore, that in attempting to lay a 'proper basis' for the prediction of future harm, the courts rely essentially on a mixture of an intuitive judgement⁸⁰, that if the offender has done something once they are more likely to do it again, and on expert opinion. What these expert reports tend to suggest and the reliability of expert opinion will be considered in the next chapter.

3.7 Conclusion

The purpose of this chapter has been to analyse the 'dangerousness' provisions of the 1991 Criminal Justice Act and to analyse the case law that has followed. It is clear from the legislation that at the centre of the sentencer's task is the prediction of future harm. Once this prediction is made the sentence can be extended up to the limit of the maximum for that offence and examples have been given of sentences being more than doubled. It has been argued that the only effective way legislation of this kind can be limited is through strict threshold criteria. The definitions of violent and sexual offence in the Act fall far short of this. Once we get beyond the threshold criteria the prediction of future harm by the sentencer is at its base intuitive. This is assuming, of course, that there has not been a total abdication of the predictive function from the sentencer to the expert. The criteria and the evidence used have been assessed and it can be concluded that little structure has been added to the bare bones of the Act by the jurisprudence of the Court of Appeal. While the language of 'dangerousness' is still present in the case law it is interesting that the predictive test has been

⁸⁰ This intuitive judgement is backed up by published research, *supra* notes 32 & 43.

framed by the Court of Appeal in terms of *risk*. The evidential requirements do not extend far beyond evidence of past offending and reports of the all important expert. It is to the role of the psychiatrist and other experts that we now turn. Are they experts in the sense of being expert in the prediction of future harm?

Chapter 4

4.1 Introduction

The previous chapter introduced the reader to the 'dangerousness' provisions of the Criminal Justice Act 1991. It looked at the principles that have been developed by the Court of Appeal for the use of section 2(2)(b), and noted that the predictive test was whether or not there was a 'substantial risk' of future serious harm. It was noted that the medical report was one of the two main sources of information through which the court found an 'evidential basis' for their predictions. Given these points, this chapter will take the analysis further in a number of respects. Firstly, some of the case law will be analysed in more detail to see what it can tell us about the content of these medical reports and the extent to which the sentencer is influenced by them. A wider body of research will also be analysed to see what effect expert evidence has on the sentencer in similar contexts. Little, if any, questioning of the ability of these experts to predict future harm is evident in the decided cases on section 2(2)(b). It will be suggested that there is likely to be a strong association between the recommendations of the doctors, principally the psychiatrist, and the judicial decision. In the context of section 2(2)(b), examples will be given of experts framing their predictions in terms of both 'dangerousness' and 'risk'.

Secondly, given the relevance of the expert and especially the psychiatrist, the ability of these professionals to make reliable predictions of future harm will be assessed on the basis of published research. It will be concluded that these experts are not able to predict future harm to a high degree of accuracy. It will be argued that while the Court of Appeal has adopted the test for prediction of

'substantial risk', it has not paid any attention to the punished research on prediction. What is interesting is a movement in the published research to assess how actuarial techniques can assist the clinician in the prediction of future harm. Running parallel with the movement in the research is the questioning of the ethical dimension to psychiatrists predicting 'dangerousness'. It has been argued that predictions by these professionals of 'dangerousness' are unethical but that the psychiatric profession view predictions framed in terms of risk assessment as more ethical. It will be argued that there are elements of a 'risk' discourse in both the sentencing practice of the courts under section 2(2)(b) and the wider practice of 'dangerousness' prediction. These elements will then be assessed in the final chapter.

4.2 The Use and Influence of Medical Reports in Section 2(2)(b) Sentencing

(a) Section 2(2)(b)

It was noted in the previous chapter that medical reports were endorsed by the Court of Appeal as part of the 'evidential basis' for sentencing under section 2(2)(b)¹. We must now look at what the cases tell us about the reliance of the sentencer on these reports. It is only possible to get an indication of the degree of reliance placed by the sentencer on the opinion of experts from the reported cases on section 2(2)(b). The number of cases reported is small and we are restricted to what is contained in the report of the case on appeal. However, we would expect that when a sentence is appealed the Court of Appeal would look to see how the original sentencer decided to pass the sentence. We would therefore expect the most important factors in the view of the Court of Appeal to be repeated in their judgement. Many of the reported cases do refer to the use of

¹ See above at chapter 3.6(a).

expert opinion and many of these expert opinions include predictions. Forty two cases were studied², and of these cases in 22 cases the Court of Appeal noted that a psychiatrist had given evidence. In these 22 cases, a prediction was offered and mentioned by the Court of Appeal in 12 cases. Out of the total of 42 cases, the Court of Appeal noted that in four cases the expert opinion of a psychologist was given and two predictions made. In 12 others cases out of the total of 42 it was noted that an unidentified medical opinion³ was sought and that four predictions were made. Taking into account an overlap in two cases, out of the 42 cases studied some kind of medically qualified person's evidence was mentioned in the report in 32 cases. In a total of 16 of these 32 cases the report of the case mentioned that a prediction was made by at least one professional.

In general the courts have not questioned the ability of 'experts' to predict future harm. The built in checks in the adversarial process do not come into play in this context. Expert opinions are generally submitted in report form after conviction. Thus there is no 'battle of experts' with each side putting forward the expert most favourable to them nor indeed is there any cross-examination. The lack of questioning would tend to suggest that there is a degree of reliance by the sentencer on the perceived ability of the expert to predict future harm. The only hint of such questioning to be found in the reported cases is in *R. v. Thomas*.⁴ In this case the psychiatrist had stated that "...he [the offender] must be considered to represent a danger to the public..."⁵ and he indicated that this view was based as much on the offender's need to feed his drug habit as it was on any degree of mental illness. The Court of Appeal asked the psychiatrist what he had meant in

² See appendix 1.

³ It is likely that within this residual class of 'medical reports' there are a number of psychiatric reports which have been referred to by the court in this more general fashion.

⁴ (1995) 16 Cr. App.R. (S.) 616 (C.A.).

⁵ *ibid.* at 618.

his report by 'a danger to the public'. The doctor admitted that "...it was not my intention to convey the impression that the defendant was an imminently or persistently a grave danger to public safety. The issue of dangerousness is likely to arise when he finds himself wanting drugs and is without the funds to purchase them"⁶. In this case at least the Court of Appeal was not satisfied with the unqualified assessment that the offender was a 'danger'.

R. v. Thomas provides us with evidence for two other important points. Firstly, it is clear that the psychiatric reports do, at least sometimes, go beyond the realms of mental illness to other societal pressures on the subject⁷. Secondly, it is clear that the terminology of 'dangerousness' is alive and well, at least with some clinicians. It will be convenient to note here that the predictions contained in the expert reports in the reported cases on section 2(2)(b) are not all in terms of 'dangerousness'. In other cases the prediction offered by the 'expert' is framed in terms of risk. For example, in *R. v. Dootson* the psychiatrist stated that there was a "high risk of this man re-offending"⁸. Again reliance was placed by the judge on this prediction with the judge stating that on the basis of the evidence including the reports, he was satisfied that the appellant was *likely* to commit such crimes⁹. Again in *R. v. Crow/Pennington*¹⁰ the psychiatrist stated his or her prediction in terms of the offender representing a "high risk". This predictive terminology is, of course, consistent with the test of 'substantial risk' adopted by the Court of Appeal in this case. Beyond these examples it is also arguable that within forensic

⁶ *ibid.* at 619.

⁷ See, for example, R.J. Menzies, *Survival of the Sanest, Order and Disorder in the Pretrial Psychiatric Clinic* (Toronto: University of Toronto Press, 1989). In the brief assessment unit of METFORS (see below at chapter 4.2(b)), he found that the psychiatric decisions made were "...products of cognitive strategies, *ad hoc* theorising and moral choices of team members..." at 120.

⁸ (1995) 16 Cr. App. R. (S.) 223 (C.A.) at 225.

⁹ *ibid* at 226.

¹⁰ (1995) 16 Cr. App. R. (S.) 409 (C.A.).

psychiatry in this country, the model of risk assessment is all important. As a leading forensic psychiatrist states:

...although the word 'dangerous' is hardly used in British legislation and British psychiatrists tend to play down their role in the assessment of dangerousness, it is an inescapable part of every day psychiatry to make judgements about dangers and risk which the patient poses to himself and other people¹¹.

R. v. Thomas is very much the exception to the rule that the courts accept the predictive ability of these experts without question. *R. v. Meilke*¹² shows us what an influence the evidence of the expert can have. In this case the psychiatrist stated that "...the conclusion must be that from a psychological point of view he remains a danger to the public..."¹³. We can see that the Court of Appeal was strongly influenced by this prediction when Waterhouse J. stated that "Having reflected upon the matter and having considered, in particular, the full psychiatric report provided for this Court, *with the disturbing final opinion expressed by the consultant psychiatrist*, we find it impossible to say that there was an error by the sentencing judge..."¹⁴. In one case, the sentencer went beyond adopting the prediction of the expert and seemed to adopt the very diagnosis of the psychiatrist. In this case the expert report stated that the offender was suffering from a personality disorder because he suffered from antisocial and aggressive behaviour¹⁵. In the judge's comments he states that "This young man's personality disorder renders him prone to antisocial and aggressive behaviour

¹¹ Dr John Gunn, "Dangerousness" in J Gunn & P.J. Taylor, eds., *Forensic Psychiatry* (Oxford: Butterworth-Heinman, 1993) 624 at 624.

¹² (1994) 15 Cr. App. R. (S.) 311 (C.A.).

¹³ *ibid.* at 313.

¹⁴ *ibid.* at 314 (emphasis added). Another example is provided by the case of *R. v. Lyons* (1994) 15 Cr. App. R. (S.) 460 (C.A.) where the psychiatrist stated that the offender "...was a great danger to women..." at 461. The Court stated that "we have regard to the concern expressed in the reports...about the danger to women which the appellant constitutes..." at 463.

¹⁵ *R. v. Clarke* (1994) 15 Cr. App. R. (S.) 102 (C.A.) at 104.

which as this offence demonstrates, can lead him to cause serious harm”¹⁶. We would thus seem to have evidence that these expert reports, which often contain predictions of future harm, are influential on the sentencer’s mind. What can published research tell us about this connection between expert prediction and sentence?

(b) Beyond 2(2)(b)

Clearly, no research can enter the judicial consciousness to tell us how much notice the judge took of expert evidence. Rather, it can tell us the percentage of cases where the judicial decision corresponds with the recommendation of the psychiatrist. On a purely intuitive basis one would think that the judge would be strongly influenced by the expert.

Menzies study of the of the Metropolitan Toronto Forensic Service (METFORS)¹⁷ found that, as with other studies, the correspondence between judicial and psychiatric recommendations depended on the type of recommendation made. Where the recommendation from the Brief Assessment Unit psychiatrist was incarceration the actual sentence corresponded in 77% of cases, while with a recommendation of probation the correspondence figure was 50%¹⁸. Corresponding with my suggested intuitive connection between psychiatric recommendation and sentence, Menzies notes that “Typically, the persuasive power of psychiatric letters was enhanced by the proliferation of diagnostic labels intended to impress legal authorities”¹⁹. A similarly strong association was found by Coccozza and Steadman²⁰. In a study of 257 male felons who were assessed to

¹⁶ *ibid.* at 106.

¹⁷ *supra* note 7.

¹⁸ *ibid.* at 166.

¹⁹ *ibid.* at 170.

²⁰ Coccozza & Steadman, “The Failure of the Prediction of Dangerousness - Clear and Convincing Evidence” (1976) 29 Rutgers Law Review 1084.

be "dangerous", they found that 87% of the recommendations as to dangerousness provided by psychiatrists to the court corresponded with judicial decisions²¹.

The evidence is not all one way however. A less significant association was found by Bohmer²². On the basis of a sample of 824 male convicted sex offenders she found that sentences of incarceration corresponded with psychiatric recommendations in only 42% of cases. This result suggests a great deal more willingness on the part of the sentencer to depart from the recommendation of the expert. However, after concluding an extensive review of the literature including nine studies carried out in Britain (the vast majority of which found a correspondence rate of between 70%-100%)²³, Menzies notes that "the close correspondence between recommendations and dispositions suggests that judges are at least partially reallocating their sentencing authority to psychiatric experts..."²⁴. Our conclusion must be that when faced with an expert opinion the judge is likely to be significantly influenced by it. This is supported by the evidence from the reported cases on 2(2)(b) including the lack of questioning of the ability of experts to predict future harm and by the published research.

Given the likely high reliance of the judiciary on the predictive ability of experts, especially the psychiatrist, we must now go on to ask how reliable these predictions are. Given that it is a strict rule of evidence that "A witness may not give his opinion on matters which the court considers call for special skill or

²¹ *ibid.* at 1095, they say that "In only 34 out of 257 cases did the judge differ from the testimony offered by the psychiatrists".

²² C Bohmer, "The psychiatrist in the Sentencing Process" (1976) 4 *Journal of Psychiatry and Law* 23.

²³ *supra* note 7 at 160-164.

²⁴ *ibid.* at 160.

knowledge of an expert unless he is an expert in such matters..."²⁵ is it not strange that the courts have not considered the expertise of these 'experts'? I would suggest that we look for an expert, especially to psychiatrists, to explain what we cannot understand (the commission of serious violent or sexual crime) and that we care little whether or not they can actually do this. More importantly the courts look to experts as a legitimising force and responsibility for mistaken predictions can be displaced to them. It is therefore less likely that the courts would want to examine closely the predictive ability of experts.

4.3 Predictive Research

(a) Methodological Weaknesses

Given the association between psychiatric testimony and judicial decision making noted above, the question we must now ask is not only how accurate are predictions made by psychiatrists, but through them, how accurate are predictions made by the judiciary. Much of the empirical evidence deals with the former profession rather than the latter. Before examining the body of empirical evidence we must be alert to methodological weaknesses with this type of research.

It is impossible to construct a perfect methodology since once predictions are made in the affirmative the authorities are naturally reluctant to release the whole cohort so that social scientists can evaluate their predictive ability. Besides this problem, Monahan amongst others has emphasised the inherent problem with

²⁵ C Tapper, *Cross and Tapper on Evidence*, 8th ed. (London:Butterworths, 1995) at 543.

this type of research²⁶. Violent crime is rare and rare events are much more difficult to predict than common events. The predictions are often made long before the release of the subjects²⁷ and much of the violence that might have been committed by subjects of the study fails to be reported²⁸. It is also clear that what we classify as 'dangerous' behaviour during the follow up period will affect the results. Monahan and Steadman point out that what we employ as predictor variables - for example, age, past violent conduct and so on will also reflect onto predictive accuracy. Finally, we have the problem that whether or not a particular person will commit a violent act if released will depend on what the Butler committee called the 'trigger'²⁹. The prediction of violence becomes even more problematic since we cannot hope to foresee the multifarious situations the subjects will find themselves in upon release. The problem of the trigger would seem to be intractable. Bearing all these methodological limitations in mind, let us consider the empirical evidence on the prediction of serious crime.

(b) Research in the 1970s

Volumes of literature on the prediction of serious crime have been produced, only a sample of the most important can be discussed here. The most commonly cited natural experiment followed the case of *Baxstrom v Herald*³⁰ where a cohort of 970 patients was released from a secure hospital to either a civilian hospital or

²⁶ J. Monahan, *Predicting Violent Behaviour* (Beverly Hills: Sage, 1981). For a recent reiteration of these problems see Monahan & Steadman, "Towards a Rejuvenation of Risk Assessment Research" in J. Monahan and H Steadman, eds., *Violence and Mental Disorder*, (University of Chicago Press: Chicago, 1994).

²⁷ This was the case with the famous Baxstrom case to be reviewed shortly (see below at chapter 4.3(b)). The average time spent in hospital for the Baxstrom patients was 15 years and while the fear that the release of these people turned out to be misplaced, it is impossible to tell what the violent recidivism rate would have been had they been released closer to their hospitalisation date.

²⁸ See Wenk et al, "Can Violence be Predicted?" (1972) 18 Crime and Delinquency 393. They state that "The problem then is this: Most of the violent behaviour we would wish to predict never comes to our attention, and the part that does is far from a representative sample" at 401.

²⁹ Lord Butler (Chairman), *Report of the Committee on Abnormal Offenders*, (London:HMSO, 1975) at 58.

³⁰ 38 U.S. 107 (1967).

the community. In Coccozza and Steadman's four year follow-up of 967 patients, only 26 exhibited sufficiently violent behaviour to be readmitted to civil hospitals for the criminally insane³¹. In a sample of 98 patients who returned to the community, there were 20 arrests, 11 convictions and only 2 individuals that researchers considered 'dangerous'. Even if we take the crude reconviction rate, the prediction of violence was wrong in 79.6% of cases. The authors themselves recognised the problems inherent with the study, some of which have already been alluded to.

Kozol *et al*³² based their study on a group of offenders predicted to be dangerous and who received treatment. A degree of success was noted in the treatment regime but the predictive ability of psychiatrists was shown to be only slightly better than that found by Coccozza and Steadman. The number of mistaken predictions was still disturbingly high - for every 100 offenders incarcerated on the basis of a prediction of dangerousness, 65 were still needlessly incarcerated. Furthermore for every 100 offenders released after being adjudged not dangerous, nine would commit a serious crime.

In a subsequent study by Coccozza and Steadman³³, they offered what they claimed to be 'clear and convincing evidence' that "...there is no empirical evidence to support the proposition that psychiatrists have any special expertise"³⁴. In a three year follow-up of those determined dangerous but released under an amended New York State law, 59.9% of felons were considered dangerous while 40.1% were evaluated not to be dangerous. In quite

³¹ The follow statistics are taken from summary of the study in Coccozza & Steadman's "The Failure of Psychiatric Prediction of Dangerousness" *supra* note 20.

³² H. Kozol, R. Boucher & R Garofalo, "The diagnosis and Treatment of Dangerousness" (1972) 18 Crime and Delinquency 371.

³³ *supra* note 20.

³⁴ *ibid.* at 1099.

startling results only 14% of the dangerous group were subsequently arrested for violent crime while 16% of those considered non-dangerous were subsequently arrested. The false positive³⁵ rate was thus 84% and the false negative³⁶ rate was 16%. These figures do not instil confidence in the predictive ability of psychiatrists.

Several other studies from the 1970s deserve mention. Following the case of *Dixon v. Attorney General of Commonwealth of Pennsylvania*³⁷ a similar situation to *Baxstrom* arose. Thornberry and Jacoby who followed up the cohort found only 14.5% exhibited 'dangerous' behaviour.³⁸ The researchers noted that "If these political predictions [to continue incarceration] had been accurate, the majority of *Dixon* patients would have been dangerous after their release to the community"³⁹.

Quinsey et al⁴⁰ followed-up 91 mental patients who had been released by the Central Ontario Regional Board of Review as not suffering from a "...mental disorder of a nature or degree so as to require hospitalisation in the interests of his own safety or of the safety of others"⁴¹. While this judgement was not framed in terms of 'dangerousness' *per se*, it was a determination that they would not harm themselves or others. They found that only 16.5%⁴² of the cohort committed a violent crime during the follow up period, the cohort had "...done reasonably well

³⁵ A false positive is one who has been predicted to be dangerous but who during the follow up period is not known to have committed any such crime.

³⁶ A false negative is one who has been predicted not to be dangerous but who during the follow-up period is known to have committed such a crime.

³⁷ 325 F. Supp. 966 (M.D. Pa 1971).

³⁸ T.P. Thornberry & J.E. Jacoby, *The Criminally Insane, A Community Follow up of Mentally Ill Offenders* (Chicago: University of Chicago Press, 1979).

³⁹ *ibid* at 192.

⁴⁰ V.L. Quinsey et al, "Released Oak Ridge Patients: A follow-up Study of Review Board Discharges" 15 *British Journal Of Criminology* 264.

⁴¹ Mental Health Act, S.O. 1967, c.51, Quoted in Quinsey *ibid* at 264.

⁴² *ibid* table 1 at 266.

as a group in the sense that most of them had not committed serious crimes against the person”⁴³.

We must obviously be cautious about how we apply the results of this early research to contemporary predictive sentencing in Britain⁴⁴. These studies deal mostly with predictions by psychiatrists and with the release of those who were thought to be so mentally ill to need hospital rather than prison confinement. However, the startling suggestion thrown up by these studies is that when we attempt to predict violence, for every correct prediction that is made between two, three or perhaps even four offenders will erroneously be predicted as violent. We must not forget that those sentenced under section 2(2)(b) are being detained for a period of time in the belief that if they were released at the end of their commensurate sentence they would reoffend seriously. Sentencing under 2(2)(b) probably does prevent some offending but, at what cost?

(c) Research in the 1980s

Is prediction so unreliable that we should give it up altogether? Monahan argues that it is not the case beyond doubt that psychiatrists cannot predict future harm to a degree that would be accurate enough for practical use. He argues that the whole area has been under tested and that more attention ought to be given to combining *actuarial* and clinical techniques⁴⁵. Mixed results have emerged from what Otto⁴⁶ has described as the second generation of research. In Menzies major

⁴³ *ibid.* at 269.

⁴⁴ While much of this research has been carried out in North America, as Gunn puts it “The American view is particularly important here not only because most of the empirical research on this topic has been conducted in the USA but also because American mental health professionals give this topic a much greater prominence and are more candid about the immense difficulties surrounding it” *supra* note 11 at 624.

⁴⁵ J Monahan, *Predicting Violent Behaviour*, *supra* note 26 at 95 ff.

⁴⁶ R.K. Otto, “Prediction of Dangerous Behaviour: A Review and Analysis of Second Generation Research” (1992) 5 Forensic Reports 103.

METFORS study, he found that while, as expected, the cohort was 'highly criminalised'⁴⁷, with regard to the prediction of dangerousness the five professions who rated the 'dangerousness' of the cohort had Pearson coefficients ranging from 0.18 for psychiatrist to 0.05 for social workers⁴⁸. This suggests that of the professions tested (psychiatrists, psychologists, social workers, nurses and correctional workers) the psychiatrist performed the best, but all five groups fell far short of the 0.4 "forensic sound barrier"⁴⁹ that had been considered to represent the lowest predictive ability that would be acceptable. In percentage terms the Brief Assessment Unit's psychiatrists predictions of violence were confirmed in only 25% of cases over the two year follow up period while they erroneously predicted that the subject would not be violent in 15% of cases⁵⁰. Menzies reminds us that these are particularly discouraging results in a cohort with a very high base rate of violence, as he says "Even among a METFORS cohort that generated a 40% base rate over 24 months, the best prediction was that none of these subjects would ever commit a violent act"⁵¹.

In another METFORS study⁵² the researchers constructed a fifteen item 'Dangerousness Behaviour Rating Scheme' and two trained non-clinicians raters used the index on a cohort. They were able to achieve a Pearson Coefficient of 0.34 (still short of the magic 0.4). This model produced 28 true positives, 25 true negatives but 18 false positives and 6 false negatives. Perhaps the most significant conclusion of the researchers was that when compared to previous studies as to the predictive ability of psychiatrists they found that "non-clinicians

⁴⁷ *supra* note 7 at 200. Menzies tells us that out of "...the 571 patients, 423 were involved in at least one officially reported incident" at 198.

⁴⁸ *ibid.* at 223.

⁴⁹ *ibid.* at 225.

⁵⁰ *ibid.*

⁵¹ *ibid.* at 227.

⁵² Menzies et al, "The Dimensions of Dangerousness: Evaluating of the Accuracy of Psychometric Predictions of Violence among Forensic Patients" (1985) 9 Law and Human Behaviour 49.

with minimal exposure to forensic patients can achieve levels of accuracy at least equal to those of psychiatrists"⁵³.

Mullen and Reinehr⁵⁴ attempted to construct a study drawing on the methodological criticisms of the previous research using a "broad spectrum of demographic and psychological test data"⁵⁵ to construct an actuarial predictive instrument. The results of the study were generally discouraging, the authors note that "...even under unrealistically favourable conditions it was not possible to relate demographic variables or psychological test data to expert judgements of dangerousness when a cross validation process was employed"⁵⁶. Only 11% of those judged dangerous and discharged were subsequently arrested while 7% of those judged not dangerous were arrested.⁵⁷

The 'second generation' does restore some faith in the ability of psychiatrists to predict violence in the short term. For example in a study by McNeil and Binder⁵⁸, the authors set out to determine whether patients involuntary committed to a mental hospital due to their perceived danger to others were violent during the 72 hours of emergency confinement as compared with those who were not judged to be a danger. They found that more than two thirds of those committed as 'dangerous' committed some type of violence compared to less than one third of the other group. This suggests that the short-term predictive ability of psychiatrists may be rather better than their long term predictive ability. An ability to predict 'dangerousness' in the short term will not, of course, be of assistance to the judge attempting to make such a prediction over the long or medium term. In

⁵³ *ibid.* at 67.

⁵⁴ J.M. Mullen & R.C. Reinehr, "Predicting Dangerousness of maximum security forensic mental patients" (1982) 10 *The Journal of Psychiatry and Law* 223.

⁵⁵ *ibid.* at 224.

⁵⁶ *ibid.* at 228.

⁵⁷ *ibid.* at 229.

⁵⁸ D. McNeil & R. Binder, "Predictive Validity of Judgements of Dangerousness in Emergency Civil Confinement" (1987) 144 *American Journal of Psychiatry* 197.

another study, McNeil, Binder & Greenfield⁵⁹ attempted to compare actuarial techniques with clinical predictions. The actuarial table was based on nine background variables, seven of which were found to be significant regardless of whether violence was committed in the community or in the institution. Using a cross-validation analysis they were able to reach a false positive rate of 50%. When they compared this actuarial analysis with the clinical predictions made when the patients were involuntarily committed, they found that over three-quarters of those patients committed on the basis of 'dangerousness' committed some type of violence during the subsequent 72 hours. The authors conclude that "...statistical approaches described here have promise in improving clinical predictions among the acutely ill civilly committed"⁶⁰.

In another promising short term study, Klassen and O'Connor⁶¹ were able to reduce the false positive rate to 40.7% while the false negative rate was 6.1%. They attributed their success to the study design which utilised actuarial measures, psychiatric diagnosis and short term treatment and a short follow-up period. The researchers argue that the prediction of violence may be of value in the short term to clinicians who have to decide whether to compulsorily admit a patient to hospital and that false positives may not be so objectionable in the short term. The authors note that "...continued research is likely to elevate the state of the art of violence prediction and provide the basis of policy decisions"⁶².

⁵⁹ D McNeil, R. Binder & T Greenfield "Predictors of Violence in Civilly Committed Acute Psychiatric Patients" (1988) 145 American Journal of Psychiatry 965 .

⁶⁰ *ibid.* at 969-970.

⁶¹ D. Klassen & W.A. O'Connor, "A Prospective Study of Predictors of Violence in Adult Male Mental Health Admissions" (1988) 12 Law and Human Behaviour 143.

⁶² *ibid.* at 156.

(d) The 1990s, The Quest Continues.

A recent Finnish study⁶³ had as its subjects those convicted of manslaughter, attempted murder and arson. The researchers assessed multiple factors at the time of incarceration including demographic, behavioural and family characteristics and psychiatric diagnosis, thus combining actuarial and clinical predictive techniques as Monahan suggested. The authors conclude that "while some sensitivity was achieved in discriminating recidivists, analysis did not succeed in lowering the rate of false positives to an acceptable level"⁶⁴. More promising results were noted by Clark *et al*⁶⁵ who attempted to assess the risk of offending behaviour whilst in custody on the basis of the behaviour that the offender had already manifested in committing the crime itself. The methodology of the study was actuarial and it was noted that the level of information available about the offending behaviour was important. The researchers were able to reach a level of accuracy in prediction of 65% and suggested that this model could be used to predict behaviour once the offender had been released from incarceration.

It is argued by leaders in the field of predictive techniques that we are on the brink of a new generation of research. Monahan and Steadman point to the McArthur Risk Assessment Survey as a major example of innovative research in this area. While the researchers seem confident that improved prediction will be the result, they note that "...if the study is not successful, it will stand as a testimony to the intractable difficulties clinicians face in assessing the likelihood of a behaviour as complex and multi-determined as violence in a population as diverse and poorly

⁶³ J DeJong et al, "Factors Associated with Recidivism in a Criminal Population" (1992) 180 The Journal of Nervous and Mental Disease 543.

⁶⁴ *ibid.* at 549.

⁶⁵ D. A. Clark, M.J. Fisher & C. McDougall, "A New Methodology for Assessing the Level of Risk in Incarcerated Offenders" (1993) 33 British Journal of Criminology 436.

understood as the mentally disordered¹⁶⁶.

What conclusions can we draw from this body of research that has been briefly reviewed here? It is clear that the predictive ability of psychiatrists must be questioned - the conclusion is that for every correct prediction of future harm there is likely to be two, three or even four incorrect predictions. If these results were translated to the sentencing practices under section 2(2)(b) then surely they would call into question, firstly, the amount of crime that is being prevented by this protective sentencing and, secondly, the ethical nature of sentencing an offender on the basis of a prediction of future harm. My point is not that sentencing under 2(2)(b) is unjustified on the basis of the research findings - although the reader may well be justified in drawing this conclusion. Rather my point is that the courts seem to have paid virtually no attention to this body of research. There seems to be a willingness to accept the predictions made by 'experts' simply because they are experts in the sense that they are qualified in their field. No attention has been paid to the degree to which these professionals are able to assess risk. There is a huge body of research which speaks in terms of the false positive and the statistical chance of re-offending. While the Court of Appeal has adopted a test for the prediction of future harm of 'substantial risk', no attempt has been made to assess whether the predictive ability of the expert corresponds to this standard. The Court of Appeal has at one and the same time adopted the discourse of *risk* and rejected it in favour, often, of unsupportable statements both from experts and the Court about *danger*. We must still attempt to account for this juxtaposition of danger and risk. Before doing so in the final chapter of this thesis some mention will be made of the development of actuarialism in the prediction of future harm.

¹⁶⁶ Steadman et al, "Designing a New Generation of Risk Assessment Research" In *Violence and Mental Disorder*, supra note 26.

4. 4 Actuarialism in Prediction

Thus far we have considered the use of prediction in the context of section 2(2)(b) of the 1991 Act and broader research findings have been considered regarding the ability of 'experts' used in the courtroom to predict future harm. Attention has been drawn to the use of both the language of risk and that of 'dangerousness'. In this section actuarial trends in predictive research will be examined to suggest that within the use of the expert in the courtroom there is at least the scope for the development of much actuarialism in this field. It is possible that through experts giving considered evidence in terms of the risk of future harm, these developments in actuarial prediction have already found their way into section 2(2)(b) sentencing even if the Courts pay little attention to the way expert testimony is phrased.

As noted above⁶⁷ Monahan suggested that predictive reliability could be increased through the use of actuarial practices to aid the clinical prediction of harm.⁶⁸ Actuarial prediction makes use of objective factors to produce a statistical prediction of harm⁶⁹. Monahan in his review of predictive research listed seven factors which have been consistently found to be statistically significant⁷⁰. These

⁶⁷ see above at chapter 4.3(c).

⁶⁸ J Monahan, *Predicting Violent Behaviour* *supra* note 26 at 127 he suggests that "one of the most promising avenues for improving the accuracy of clinical prediction of violent behaviour appears to be a increased emphasis upon incorporation of statistical concepts into clinical decision making". The reader will note from the review of these "second generation" studies that the results have been very mixed.

⁶⁹ *ibid* at 95 ff. Monahan quotes Meehl, *Psychodiagnosis: Selected Papers* (Minneapolis: University of Minnesota Press, 1973) who defines actuarial techniques as "The mechanical combining of information for classification purposes, and the resultant probability figure which is empirically determined relative frequency, are the characteristics that define the actuarial or statistical type of prediction" at 95-96.

⁷⁰ *supra* note 26 at 104-112.

were: past crime, particularly violent crime⁷¹ ; age; sex; race; socioeconomic status and employment stability and opiate or alcohol abuse. Clinical prediction would seem to be more subjective as it is based on interview and "other data from the history and possibly psychometric information..."⁷². From the review of research in part 4.3 of this chapter it seems clear that actuarial predictive techniques have been around since the early days of research⁷³. However, it would seem that there was a trend in the research in the 1980s to combine clinical and actuarial techniques very much as Monahan had recommended⁷⁴. The point here is not that these studies broke new ground in showing that psychiatrists had a significant predictive ability (they did not). Rather, it is the focus on the actuarial over the clinical that is interesting. Menzies and Webster have noted this movement to risk assessment in predictive research and suggest that "the risk construct has been advanced because it is considered a rigorous and operationally testable construct..."⁷⁵. In a similar vein it has been argued that while it is unethical for psychiatrists to give evidence in court in terms of 'dangerousness', it can be ethical for them to give what in effect are risk assessments⁷⁶. Grisso and Appelbaum note that predictions may be in terms of a dichotomous assessment regarding dangerousness, or they may also be graduated assessments in terms of risk. They argue that "...not all predictive statements about future violence are unethical owing to the lack of scientific

⁷¹ In the study by Mullen & Reinehr noted above (*supra* note 54) the authors conclude "of the demographic and psychological test information processed, only a few variables proved to be of use in the predictive equation ... marital status and a history of fighting\ violent crime" at 229. Likewise in the study carried out by McNeil, Binder & Greenfield (*supra* note 59) the authors found that "a recent history of violent behaviour in the community was significantly associated with violence during the first 72 hours" at 969.

⁷² Meehl *ibid*.

⁷³ See the study by Wenk et al *supra* note 28.

⁷⁴ The studies by Mullen and Reinehr (*supra* note 54), McNeil Binder & Greenfield (*supra* note 59) and Klassen and O'Connor (*supra* note 61) noted above are examples of such studies.

⁷⁵ R.J. Menzies & C Webster, "Dangerous Liaisons" (unpublished).

⁷⁶ T. Grisso & P. Appelbaum, "Is it unethical to Offer Predictions of Future Violence" (1992) 16 Law and Human Behaviour 621.

support because predictive testimony stated as a risk estimate sometimes is scientifically supportable"⁷⁷.

Psychiatrists have been much criticised for their predictions of 'dangerousness', not only because they are seen as unreliable but also because they are seen as unethical. An assessment of an offender as 'dangerous' is clearly not a diagnosis⁷⁸. Yet we have seen above that even in the modern context of section 2(2)(b) psychiatrists persist in the use of the language of the 'dangerous'. It is clear that within the term 'dangerous' there is a prediction of future harm yet there is also another element. Gunn draws our attention to this where he states that "...dangerousness is something attributed to people or things, partly taking account of actuarial risk which can be calculated, and partly subjective fear"⁷⁹. The problem for an expert making a judgement of 'dangerousness' is that it has this subjective element. A person labelled as 'dangerous' is seen as having an inherently evil characteristic that has little to do with the statistical chance that he or she may commit another crime. Thus psychiatrists have been criticised, rightly in my view, for using this terminology since it goes far beyond any expertise they may have in the prediction of future harm. The point is that it is much more than a prediction of future harm, it is a moral judgment. This explains why Grisso and Appelbaum consider risk assessments to be supportable on scientific grounds and thus ethical and why 'dangerousness' judgements can be considered unethical. Psychiatric predictive testimony in terms of percentage risk can, of course, still be criticised as unethical. Offenders could be sentenced to a longer term on the basis of a low degree of predictive accuracy. However, the point is that if the psychiatrist gives testimony in terms of percentage risk then this

⁷⁷ *ibid.* at 628.

⁷⁸ As Dr John Gunn puts it "Above all, it [dangerousness] is not a diagnosis" *supra* note 11 at 625.

⁷⁹ *ibid.*

evidence is supportable by research findings. What the legal system wants to do with low degrees of predictive accuracy is, in a sense, one step away from the professional ethics of the psychiatric profession.

The argument of Grisso and Appelbaum links in with the view of Gunn noted above that risk assessment is part of the *forensic* role of the psychiatrist in this country⁸⁰. In a more specifically *clinical* context, it seems that risk analysis is also important. Gunn has stated that, in effect, while the courts may require decisions as to 'dangerousness', the psychiatrist when dealing with a clinical case ought to think in terms of risk⁸¹. This is so because the role of the psychiatrist is the management of dangerousness, and as he states, this is "...for the most part the management of risk"⁸². He advises that a plan of management for the patient must be drawn up which will assess the short term risks that he poses to himself and others in various circumstance⁸³. It is clear that at least within the psychiatric profession in Britain risk assessment is seen as the medical, if not the legal, construct of 'dangerousness'.

Thus we can conclude that the way in which the prediction of future harm is phrased by the expert witness has been viewed as all important from the point of view of the ethics of predictive testimony. The Court of Appeal has, as we have already seen, paid little attention to this. We have also seen a movement towards actuarial techniques in predictive research and it has been suggested that risk is the medical construct of 'dangerousness' within the psychiatric profession. It is likely that these trends are translated into the sentencing practices under section

⁸⁰ see above at chapter 4.2 .

⁸¹ *supra* note 11 at 638.

⁸² *ibid.*

⁸³ Gunn states that "Lawyers... will want to retain the dangerousness concept... the doctor... dealing with the individual patient will... want to eschew 'dangerousness' and concentrate on risk" *ibid.*

2(2)(b) to some degree by considered testimony by some experts, examples of which have been given above.

4.5 Conclusion

It can be concluded that there is a risk discourse within the sentencing practice of the courts in the context of section 2(2)(b) of the 1991 Criminal Justice Act 1991. The predictive criteria development by the Court of Appeal on the bare bones of the Act of Parliament are in terms of a "substantial risk" of serious future harm. It is clear from the case law that the courts rely to a significant extent on the expert testimony, often of the psychiatrist. The content of expert reports has been shown to contain predictions of future harm both in terms of the 'dangerous' man and in terms of the degree of risk that the offender poses. Given what has been said about the inherent moral judgement in the term 'dangerous' it has been argued that such experts should avoid the use of such language. The research on prediction of future harm, principally by psychiatrists, has been assessed and the conclusion has been reached that for every five offenders that are predicted to be violent, two, three or even four of these predictions may be wrong. While it has been suggested that there is in this context a risk discourse, it runs counter to this that the courts are prepared to rely (more or less without question) on a predictive ability of experts who the research shows cannot predict future harm any better than the judge could if he were to toss a coin⁸⁴. While the impression of risk assessment is given, in reality it is little more than rhetoric. However, it has been noted that there is a trend in research on prediction that suggests focusing on the actuarial techniques in an attempt to improve prediction. The extent to which

⁸⁴ The reader is reminded of the recommendation of Ashworth and Von Hirsch mentioned above at chapter 3.6(a) that the judge when sentencing under section 2(2)(b) should *always* have a medial report on the offender!

such actuarial techniques are in fact used by British experts is an open question, however, the use of risk assessment within the psychiatric profession has been noted. In sum, I would suggest that there is evidence that in the context of section 2(2)(b) there is a risk discourse intermingled with the more traditional discourse of the 'dangerous' man. An attempt will be made in the next chapter to assess the extent to which this risk discourse can be seen in the legislative process of the 1991 Act. The final chapter will then analyse this risk discourse in the wider context of a trend in criminal justice towards risk assessment.

Chapter 5

"My local paper is filled with details of the most appalling crimes...We are becoming more like Chicago every day"¹

5.1 Introduction

Now that the structure of the 1991 Criminal Justice Act, the predictions it requires and the judicial response to it have been assessed, we must turn to the genesis of the Act. This chapter has several purposes within the wider arguments put forward in this thesis. The notion of bifurcation, introduced in the second chapter, will be picked up on. It will be argued that while the longer than normal sentence under section 2(2)(b) of the Act is in essence an incapacitatory sentence, the risk assessment aspect of the sentence becomes confused with the greater punitiveness levied against the more serious offender required by bifurcation. It will be argued that this 'blurring' of punitiveness and risk was evident conceptually in the government's proposals and that this confusion was exacerbated by structural changes made to the Act during its legislative process. How Government Ministers viewed the central predictive process will be assessed. It will be suggested that only cursory attention was paid to this problem. In distinct contrast to the marginalising of risk assessment within bifurcation, it will be suggested that 'fear of crime' as a policy issue, expressed within the legislation as the need to 'protect the public' makes an explicit appeal to risk and the ability of the public to assess risk of victimisation. Thus we have aspects of risk assessment both being marginalised and emphasised within one statute. Finally, having looked at how the judiciary view the subjects of this

¹ Baroness Phillips, U.K., H.L., *Parliamentary Debates*, 5th Series, Vol. 528, col.1518 (14 May 1991).

legislation - as either 'dangerous' or in terms of risk - we must be alert to the use by legislators of the language of risk.

5.2 Bifurcation and the Confusion of Risk and Punitiveness

Bifurcation can be defined as increasing the punishment of those offenders who have committed more serious crimes, while treating those at the lower end of the seriousness scale with a degree of leniency. The trend towards bifurcation in British Criminal Justice was noted as early as 1977 by Bottoms² who states that "This bifurcation tendency seems increasingly to be isolating selected groups of the 'mad' from the 'bad' as those against whom we really wish to take really serious action, while we are prepared to reduce penalties for the remainder, for whom so called 'situational' theories seem more plausible"³. As noted in chapter two⁴ this trend was evident in the early 1980s, for example, in the parole reforms introduced in 1983 and also to some extent in judicial sentencing. However, it was not until the late 1980s that bifurcation became an explicit part of government sentencing policy.

That bifurcation became part of sentencing policy at all is remarkable given that the Conservative party had formed the government since 1979. The Conservative Party portrays itself as the 'Party of Law and Order' while its political opponents are dismissed as 'soft on crime'⁵. The image of the criminal in Conservative ideology is that of the wicked and morally depraved individual. Conservatives

² A. E. Bottoms, "Reflections on the Renaissance of Dangerousness" (1977) 10 Howard Journal of Penology and Crime Prevention 70.

³ *ibid.* at 89.

⁴ See above at chapter 2.5.

⁵ See Peter Riddell, "Making a Killing in Crime" *The Times* (1 September 1993) where he notes that the Labour Party and the Liberal Democrat Party were both trying to muscle in on the 'traditional' tory ground of Law and Order.

see the root of crime in individual pathology rather than in social depravation⁶. Thus it should come as no surprise that the first Thatcher administration came into power with all guns blazing in the 'war' against crime⁷. Lord Windlesham notes that the 1979 election campaign saw a marked change in political approaches to criminal policy. Crime was approached in a more populist way, as a vote winner rather than a shared problem⁸. This populist approach during the election campaign was carried through into policy with a general punitive response to crime. He notes that as late as 1988 "...the belief that imprisonment was the proper penalty for all save the most minor or out-of-character criminal offences remained deeply ingrained in the penal culture"⁹. Crime figures continued to rise, however, leading to the conclusion that a general punitive response to crime was both expensive and a failure. As Stenson observes "...despite the recruitment of 15% more police officers and constant real increases in the law and order budget, there was a 79% increase in officially reported crime between Mrs Thatcher's ascension to power in 1979 and 1990"¹⁰. We can see here the background to the more explicit adoption of bifurcation in the late 1980s. Prison for longer was seen as the appropriate response to crimes of sex and violence, while community penalties for property crimes were more appropriate and cheaper than prison. Running alongside this change in sentencing was a greater emphasis on crime prevention and an appeal to the 'community' to play its part in the 'war against crime'. Neighbourhood Watch and the Safer Cities programme,

⁶ E Currie, "The Politics of Crime: The American Experience, A debate between Elliot Currie and James Q Wilson" in Stenson & Cowell, eds., *The Politics of Crime Control* (London: Sage, 1991) 32. Currie states that "For most conservative writers, crime still represents a weakening of controls over what is solemnly regarded as an obdurate and fundamentally wicked human nature" at 41.

⁷ R. Reiner & M. Cross, *Beyond Law and Order* (Basingstoke: Macmillan, 1991). They note that initial Conservative policies were intended to reduce crime by strengthening the deterrent effect of the Criminal Justice System at 2-3.

⁸ Lord Windlesham, *Responses to Crime Volume 2* (Oxford: Oxford University Press, 1993). See especially chapter 4.

⁹ *ibid.* at 208.

¹⁰ Stenson and Cowell *supra* note 6.

amongst others, were aimed at 'community' crime prevention¹¹. Undoubtedly "...the twin track approach, ...[was a]... calculated means to politically desirable ends"¹² as Lord Windlesham puts it .

There are clearly several themes apparent within bifurcation. Firstly there is the economic motive of cutting public spending through cheaper punishment. Secondly, from a more overtly political standpoint, harsher punishment at the upper end of the seriousness scale is intended to off-set any allegations that the government are going 'soft on crime' at the lower end of the scale. Thirdly, bifurcation has within it a particular moral response to serious crime. Crimes of sex and violence are viewed as the most heinous and thus the most *deserving* of punishment. This aspect of bifurcation is evident from the White Paper which preceded the 1991 Act. The government states that "Peoples' attitudes to crime and punishment seem to vary with the passage of time. Today, people are quite rightly much less tolerant of violence than they were and they expect violent crimes to be punished more severely"¹³. The government goes on to state that punishment commensurate with the seriousness of the offence should be the underlying principle of sentencing and that "This is consistent with the government's view that those who commit very serious crimes, particularly crimes of violence, should receive long custodial sentences"¹⁴. Bottoms has developed his analysis when he argues that one of the themes in sentencing internationally is 'populist punitiveness'¹⁵. In essence what he means by this is that at the upper

¹¹ See Peter Evans, "Thatcher Leads Crime Fight" *The Times* (8 January 1985) 3. Mrs Thatcher is quoted as saying that "The Government has strengthened our police forces ... we have toughened up the law and the criminal justice system", but she emphasised that the Government, the Courts and the forces of law and order needed the support and close collaboration of the community.

¹² *supra* note 8 at 253.

¹³ *Crime Justice and Protecting the Public* (London: HMSO, 1990) at para. 1.3.

¹⁴ *ibid.* at paragraph 2.2.

¹⁵ Anthony Bottoms, "The Philosophy and Politics of Sentencing" in *The Politics of Sentencing Reform*, Chris Clarkson & Rod Morgan, eds., (Oxford: Clarendon, 1995) 17 at 40.

end of the seriousness scale of crime politicians respond with a greater harshness since this is deemed to be what the public wants. Thus, while the greater punitiveness evident in bifurcation is not solely a response to a moral shift of viewing crimes of sex and violence as the most heinous, this is one of its important features.

The 1991 Criminal Justice Act can be seen as the *piece de la resistance* of bifurcation. At the second reading of the Bill in the House of Commons, the Home Office Minister stated that

When the Bill is enacted... it will be seen as a benchmark and as a twin-track approach to crime and punishment that leads to fewer persons being imprisoned for longer for serious and violent crimes and people who used to be imprisoned for minor or petty crimes being punished more effectively in the community¹⁶.

The clearly stated aim of the government was to reduce the number of those going to prison¹⁷ by introducing a general threshold criteria (under section 1(1)(a) that the courts would have to decide that imprisonment was commensurate with the seriousness of the offence and under 2(2)(a) that the length of custodial sentence was also commensurate). At the same time greater emphasis was placed on community penalties and some maximum sentences were altered to draw a clearer distinction between crimes of violence and property crime¹⁸.

So, where do the 'dangerousness' provisions of the 1991 Act fit within the bifurcation trend? This is a difficult question given the different elements in

¹⁶ U.K., H.C., *Parliamentary Debates*, 6th ser., vol. 180, col.277 (8th November 1990, John Patton M.P.).

¹⁷ See U.K., H.C., *Parliamentary Debates*, 6th ser., vol. 166, col. 761 where the Home Secretary when launching the White Paper stated that "...we know that prison can all too often enforce criminal habits, and many more people convicted of less serious offences could be punished in the community...".

¹⁸ See section 26 of the 1991 Criminal Justice Act 1991, where the maximum penalty for theft was reduced to seven years from ten years.

bifurcation noted above. Since the longer than normal sentence is in part retributive punishment and in part prevention, it would seem logical that the retributive part of the sentence should be part of the bifurcated trend while the protection part of the sentence ought to be beyond it. Not surprisingly the two parts of the sentence become merged precisely because imprisonment has an inherent protective element. In addition, there is a lack of structural clarity within the Act. It does not require the judge when passing the longer than normal sentence to address his mind to two distinct parts of the sentence - the tariff sentence and the public protection sentence¹⁹ - nor is there the requirement to review the prediction of future harm at the end of the tariff sentence²⁰. Can this 'blurring' be seen in the legislative process?

5.3 The Green²¹ and White²² Papers

The Green Paper "Punishment, Custody and the Community" was published in 1988 at the culmination of a period of consultation within government as to how to respond to the fact that crime had continued to rise in spite of 'tough' action against crime in the early 1980s. After the general election of 1987 Douglas Hurd was appointed Home Secretary. Lord Windlesham asserts that the governments proposals in this Green Paper were largely the result of the right individual being in the right place at the right time²³, he states that "two forces then emerged... the penological arguments for sending fewer offenders to prison were joined by the increasingly unacceptable levels of cost and manpower that would be

¹⁹ See above at chapter 3.3(a).

²⁰ See above at chapter 3.3(c).

²¹ *Punishment Custody and the Community* (London: HMSO, 1988). A Green Paper is a government discussion document which foreshadows legislative proposals. More concrete proposals are usually put forward in a White Paper.

²² *supra* note 13.

²³ See *Responses to Crime Volume 2 supra* note 8 at 210-211.

unavoidable if the existing patterns of offending and detention continued and no changes were made in the sentencing of offenders by the courts"²⁴. Hurd believed that it was as important to prevent crime as it was to punish offenders²⁵. His proposals for structuring sentencing to reduce imprisonment and increased reliance on community penalties had been mooted during informal meetings with back-benchers before the publication of the Green Paper. The provisions regarding the longer than normal sentence did not appear at this stage in the government's proposals.

The Green Paper recognised that imprisonment was not the most effective form of punishment for most crime. Rather "Custody should be reserved as punishment for very serious offences, especially when the offender is violent *and* a continuing risk to the public"²⁶. Bifurcation is evident here but so too is the merger of the punitive response with the element of risk assessment. More specifically, the punitive response is seen as a part of a popular moral response to this type of crime. Thus the Green Paper states that "Most people would agree that offenders convicted of rape, robbery, aggregated burglary and other serious offences should be sent to prison for a long time; some of these offenders will be a continuing risk to the public"²⁷.

The White Paper actually sets out the proposals for the longer than normal sentence. These proposals were added when the White Paper was in draft form and were added at the behest of the new Home Secretary, David Waddington²⁸. Waddington, as Lord Windlesham puts it "...was not cast in the mould of a penal

²⁴ *ibid.* at 239.

²⁵ *ibid.* at 210.

²⁶ *supra* note 21 at paragraph 1.8 (emphasis added).

²⁷ *ibid.* at paragraph 3.6.

²⁸ *Responses to Crime, Volume 2 supra* note 8 at 450-451.

reformer”²⁹ and sought to toughen-up the governments proposals by the addition of the longer than normal sentence - “a sterner touch was needed, he felt, if the legislation was to be presented convincingly as being ‘tough’, as well as a reformist measure”³⁰. The target of the measure was “a small number of offenders who become progressively more dangerous and who are a real risk to public safety”³¹. The proposal was to give the Crown Court the power to pass a longer than normal sentence: “Some offenders will be convicted of less serious offences but the Crown Court will recognise that they are a serious risk to the public”³². Thus the test for future harm is framed in terms of serious risk, a test not unlike that finally adopted by the Court of Appeal³³. It is clear that the sentence was indeed to be a public protection sentence and thus had a distinct risk assessment element apart from the punitive response proposed for the more serious offender. However, even within the White Paper we can see what I have called the ‘blurring’ effect at the upper end of the bifurcation trend. In paragraph 3.12 of the White Paper the government sets out its punitive response by proposing an increase in maximum sentences for various serious offences. In the next paragraph the government goes on to make the proposals for the longer than normal sentence by stating that “The government intends to take this approach [bifurcation] further....” by giving the Crown Court the public protection power.

5.4 The Legislative Process - Risky Swings and Punitive Roundabouts

It was during the legislative process that changes were made to the structure of the Act which led to a greater ‘blurring’ of risk assessment and punitive

²⁹ *ibid.* at 242. Lord Windlesham notes that David Waddington succeeded Douglas Hurd on 26 October 1989.

³⁰ *ibid.* at 451.

³¹ *supra* note 13 at paragraph 3.13.

³² *ibid.* at paragraph 3.13.

³³ See above at chapter 3.5(b).

responses. The original proposal in the White Paper was to give this extra sentencing power only to the Crown Court when sentencing for 'either way offences'. These offences are generally medium ranking crimes which can be tried either in the Crown Court or the Magistrates Court at the election of the offender, the prosecution or both. An example was given of an assault where the offender might be given 12 months on the grounds of seriousness but the Crown Court could extend this up to five years if they viewed the offender as a *serious risk* to the public³⁴. It will be noted that this original proposal bears little resemblance to the final scheme which covers all offences in the Magistrates Courts and Crown Courts apart from those offences where the sentence is fixed by law (principally murder). Indictable only offences were excluded from the original scheme because it was thought that for such serious offences it would not be necessary to make the Courts jump through the hoops of considering reports and asking whether or not custody was commensurate with the seriousness of the offence³⁵. This much, it was thought, would be obvious. With regard to section 2(2)(b) it is clear that it was thought that for indictable only offences a public protection element would already be built into what, under bifurcation, would be longer prison sentences in any case. As far as Magistrates Courts are concerned, they were excluded from the scheme for the longer than normal sentences, presumably because they could only give very short sentences of imprisonment in any case.

The government extended the provisions to all indictable offences except those for which the penalty was fixed by law after the Committee stage of the Bill in the

³⁴ *supra* note 13 at paragraph 3.13.

³⁵ See U.K., H.C., Standing Committee A, Official Report, Criminal Justice Bill in *Sessional Papers* (1990-1991) vol. 1 col. 21ff (19 November 1990). At col. 22 the Minister states "It would serve no purpose if the Crown Court had to go through the hoops in the case of a man who had raped again and again and was found guilty before the court".

House of Lords³⁶. The arguments were focused on the need to have a scheme which was consistent across all sentencing where the courts would be asking the same basic question - is the sentence commensurate with the seriousness of the offence and how long should the sentence be, based on commensurability? Attention was not focused on what this extension of the scheme would mean to the longer than normal sentence. As far as the extension of the scheme downwards is concerned, we are told that the government extended the measure to the Magistrates Courts to aid "consistency in drafting"³⁷.

These extensions of the provisions had two effects which will be briefly noted. At the upper end of the scale of offences, the extension to indictable only offences tended to confuse the distinction between sentencing on the basis of the seriousness of the offence and sentencing on the basis of public protection. Indictable only offences are likely to lead to long prison sentences in any case which leaves little room for a conceptually distinct risk assessment element to the sentence. Thus the 2(2)(b) sentence can be seen to be more fully integrated with the notion of bifurcation - that the more serious offender deserves a more punitive response. The notion that the sentence should be longer because the offender poses a serious risk of future offending becomes even more marginalised than is evident from the lack of conceptual clarity in both the White and Green Papers.

At the lower end of the scale in the Magistrates Court the maximum custodial sentence is 6 months in prison³⁸. Thus the very short time that could be added by the longer than normal sentence makes it more difficult to see this legislation as a

³⁶ U.K., H.L., *Parliamentary Debates*, 5th ser., vol. 528, col. 480ff (14 May 1991).

³⁷ Lord Windlesham, U.K., H.L., *Parliamentary Debates*, 5th ser., vol. 528, col.1492 (14 May 1991) states that "It [the inclusion of Magistrates Courts] was an addition at the Report stage in the House of Commons. I made some enquiries... I was told that... it was added by the Home Office in the interests of consistency of drafting".

³⁸ Magistrates Court Act 1980, (U.K.), 1980, c. 43, s.31.

genuine attempt at risk assessment. In the House of Lords several attempts were made to exclude the Magistrates Courts from the longer than normal sentence³⁹. The government was forced to defend this change and did so in terms that on some occasions the offence may not be serious enough to justify custody on the basis of the seriousness of the offence under section 1(1)(a) but it may be a case where the public needed protection by the use of custody. Thus it was justified only in terms of section 1(2)(b) rather than in terms of section 2(2)(b)⁴⁰. We are forced to agree with Lord Richard who stated that "It is almost a distortion of language to argue that a three month sentence imposed by the magistrates court is one which is necessary to effectively protect the public from serious harm"⁴¹.

To conclude this part of the chapter, it can be noted that the 1991 Act and the longer than normal sentence are part of the bifurcated trend in criminal justice. The punitive response at the upper end of the scale of seriousness was in part a response to a moral shift which viewed these offences as morally more reprehensible as well part of a political balancing exercise. We can see that both conceptually and structurally the longer than normal sentence, while in theory a sentence based on the assessment of risk, became 'blurred' with this greater punitive response. In addition, the major differences between the government proposals in the White Paper and the final Act emphasises the *ad hoc* nature of criminal justice reform.

³⁹ U.K., H.L., *Parliamentary Debates*, 5th ser., vol. 527, col. 1008ff (26 May 1991) and vol.528, col. 1484ff (14 May 1991).

⁴⁰ See U.K., H.L., *Parliamentary Debates*, 5th ser., vol. 528, col. 1489 (14 May 1991) where Earl Ferrers gives this justification.

⁴¹ *ibid.* vol. 528, col. 1487 (14 May 1991).

5.5 The Predictive Process

What can we tell about the legislators' view of the predictive process that is so central to the longer than normal sentence? From the parliamentary debates and committee proceedings it is possible to conclude that Ministers seem to have paid little attention to the reliability of prediction or the way in which the prediction would be made by the courts. The government resisted attempts by the opposition to amend the legislation to provide for a level of persistence⁴². It was said that the legislation must be broad enough to provide for the exceptional case and that they could not rule out the overriding need to protect the public where in these exceptional cases the risk was present without a pattern of offending. The Minister stated that the court may be able to see a pattern of behaviour beyond convictions, perhaps where the offender was young which would "... show the way in which they were developing"⁴³.

Beyond this rejection of persistence as a check on the scope of the legislation, the government - given what was said in the previous chapter about the ability to predict future harm to a reliable degree - made astounding claims about predictive ability and about the evidence required before such a prediction could be made. The Minister stated in standing committee that "In the case of sexual or violent offences we can make a reliable prediction of the *risk* to the public. If a person has committed a serious sexual offence in the past and then is caught committing a less serious but similar offence, then it is *a fairly safe bet* that if that person is left at liberty in that frame of mind, he or she could commit the same

⁴² Amendment no. 87, U.K., H.C., *Parliamentary Debates* 6th ser., vol. 186, col. 398 (20 February 1991).

⁴³ U.K., H.C., *Parliamentary Debates*, 6th ser., vol. 186, col. 389 (20 February 1991) per John Patton M.P. Minister of State for Home Affairs.

offence again”⁴⁴. The Minister speaks in terms of a reliable prediction of risk but then undermines this appeal to statistics by framing the level of certainty as a ‘fairly safe bet’⁴⁵. This language, I would argue, suggests a rather low standard of reliability in prediction. The Minister went on to state that “However, differences arise when the offending behaviour is not violent or sexual. It is then more difficult to predict future conduct from past behaviour”. Surely this is statistically incorrect, since property crime is by far the most common type of crime⁴⁶ the statistical base rate must be higher than that for violent crime. It should therefore be correspondingly *easier* to have a higher degree of accuracy in prediction. The Minister uses the language of risk but, crucially, not the logic of prediction.

How then did the government see the predictive process working, what factors would the sentencer take into account? In the committee stage of the Bill in the House of Commons the government were asked “How will the Courts decide to extend sentencing beyond the criterion of the seriousness of the offence”⁴⁷. The Minister’s reply is revealing when he states that “...*I imagine* that the thoughts that will be going through the mind of the learned Judge or the learned Recorder will be about the offence that has been committed, the number of times that the defendant has committed an offence in that category and any evidence of the aggravating factors such as compulsion or inability to control...”⁴⁸. It comes as no surprise that no more attention was paid to prediction given the gloomy prospects for a reliable standard. We can see from this passage that the predictive

⁴⁴ Standing Committee A *supra* note 35 at col.58 (emphasis added).

⁴⁵ The government Minister in the House of Lords, Earl Ferrers placed the level of certainty as much higher yet provided no more elucidation about how this was to be achieved *supra* note 39 at col. 1016 he states that “the power is available only where the offender clearly represents a danger to the public and only where the court has a very clear ground for imposing such a sentence and makes those grounds clear”.

⁴⁶ *Criminal Statistics, England and Wales 1994* (London: HMSO, 1995). Property crime accounted for 93% of recorded offences while violent offences accounted for 6% of recorded crime at 25.

⁴⁷ Standing Committee A, *supra* note 35, at col. 128 (6 December 1991).

⁴⁸ *ibid.* per John Patton M.P. Minister of State for Home Affairs at col. 130.

difficulties were not addressed in any detail during the legislative process and the language of the Minister (“...I imagine...”) suggests that little attention was paid to it. The Minister did, of course, identify the type of factors the Courts do in fact use although he did not make reference to the all important expert through whom an independent force of the predictive vogue can be injected into the process. The Minister also stated that the factors he mentions “...are things that he [the offender] deserves for the offence, but they also demonstrate to the Judge or the Recorder whether this man, for the protection of the public, should be kept from an early opportunity of re-offending. The judge may wish to punish and to protect and may decide on a sentence which will be expressed in one lot of years”⁴⁹. Thus again we have the evidence that the punishment and protective parts of the sentence were not kept distinct.

5.6 Terminology

It will be noted that much of the terminology of politicians during the legislative process was in terms of the *risk* to the public. However, the process was not free of the more emotive language of the ‘dangerous offender’. The Home Office Minister did use language like “people whom I regard as dangerous to society”⁵⁰ and “there may be exceptional cases where an offender is dangerous”⁵¹. Can we account for this in the context of bifurcation? It is argued that the ‘dangerousness’ provisions of the Act were in part a political balancing exercise. It was necessary to emphasise that the government was getting tough at the upper end of the seriousness scale to allow the more lenient measures for the property offenders to pass. It is clear that if an appeal was to be made to the right wing, then an

⁴⁹ *ibid.*

⁵⁰ Standing Committee A *supra* note 35 at col. 126.

⁵¹ *ibid.* col. 127.

appeal to the phantom of the 'dangerous offender' may have scored more political points. However, the use of the language of the 'dangerous' offender is open to the criticism that the 'rights' of the offender are being ignored - that each one of them is more than a label. The language of risk on the other hand clearly has within it a scientific lure that may ward off criticism of such legislation based on the 'rights of the offender'⁵². It is significant that within the parliamentary debates little attention was paid to the 'rights' of offenders in terms of the inability of the courts to predict future harm. Criticism was confined to the point that having a predictive process without a requirement of *persistence* would lead to subjectivity in the prediction of future harm⁵³. Thus within bifurcation we can find one explanation for the use of competing terminology within the political process.

5.7 Fear of Crime and Risk Assessment

At the end of each monthly edition of the well known BBC Television crime solving programme "*Crime Watch UK*", the presenter assures us that serious crime is rare, the trite message being 'do sleep soundly'. Having watched an hour of violent crime reconstructions few are likely to be convinced by a reference to statistical chance since the outcome of such victimisation can be so serious. Fear of crime itself has become a policy issue⁵⁴. The British Crime Survey has highlighted the fact that fear of crime is a problem and that it is a problem that is most serious among the elderly, women and those who live in the inner cities⁵⁵. It

⁵² This is not to suggest that there are not problems with sentencing an individual on the basis of actuarial assessment, there clearly are. Rather it is suggested that the appeal to expert testimony may have deflected such valid criticism from this proposal.

⁵³ See the comments of Mr Randall *ibid.* at col. 130.

⁵⁴ See the most recent government White Paper on Crime, *Protecting the Public* (London: HMSO, 1995) where at paragraph 1.3 it is stated that "Fear of crime is something which affects everyone, even if they have not personally been a victim of crime".

⁵⁵ See M Maxfield, *Fear of Crime in England and Wales* (London: HMSO 1984). See also C Mirrless-Black & N Aye Maung, *Fear of Crime: Findings from the 1992 British Crime Survey* (London: HMSO, 1994).

is clear from these surveys that the public perception of fear is not in proportion to the level of risk. For example, the population group most at risk from street crime, young men, are the least afraid while the most afraid, elderly women, are the least at risk⁵⁶. Maxfield has pointed out that there are several reasons why fear of crime may be a policy issue⁵⁷. He states that it may lead to the corrosion of communities and the erosion of the willingness of people to co-operate. It may also lead to people changing their behaviour to avoid risk, which, while it may be seen as a good thing, can be economically costly and have implications for individual liberty. Action to combat fear of crime may of course take the form of trying to cut crime itself. However, other approaches may take the form of environmental manipulation, such as improved street lighting or of information campaigns to educate people as to the very low level of risk.

Government may be reluctant to admit that fear of crime as distinct from crime itself is a problem. The current Home Secretary, for example, addressed the problem with ambiguity when he stated that "There is a tidal wave of concern about crime in this country. I am not going to ignore it... I am going to take action, tough action"⁵⁸. The implication was, of course, that the tough action would be against crime itself rather than directly against the fear of crime. Governments are unlikely to admit that they are attempting to address fear of crime in any other way than by 'fighting' crime itself. To do this would be an admission of failure in their self-professed 'war on crime'. However, I would suggest that one explanation for the longer than normal sentence is that it is an attempt, at least in part, to address the problem of the fear of crime. It is clear from the rhetoric surrounding the Act that one of the key phrases was 'protecting the public'. The White paper

⁵⁶ *ibid.* at 37ff.

⁵⁷ *ibid.* at 40ff.

⁵⁸ Michael Howard, M.P., Philip Webster, "Howard Leads Right Wing Policy Charge" *The Times* (7 October 1993) 1.

assessed above had this phrase in its title and time and again the government has stated that it was in the business of protecting the public. In the House of Lords the government spokesman, Earl Ferrers, when asked why the longer than normal sentence had been limited to crimes of sex and violence stated that "sexual and violent offences have been isolated in this case because we are in the business of protecting the public. It is in regard to sexual and violent offences that the public are most vulnerable"⁵⁹. On the basis of the published statistics it is incorrect to say that the public are most *at risk* from crimes of sex and violence, they only make up 6% of all offences⁶⁰. However, it may be true to say that at least within certain sub-groups of the population it is crimes of sex and violence that make us most afraid.

We have seen that as a risk assessment device the 1991 Act is an extremely rough instrument indeed. In the previous section it was suggested that little attention was paid by Ministers during the legislative process to the ability of the courts to predict future harm. Nor did the government provide any evidence that the overall rate of victimisation would be significantly reduced by the introduction of the longer than normal sentence. The legislation may be a rough risk assessment technique simply because the government were only interested in the symbolism of the legislation. It may not have been important whether or not the courts are able to assess risk of future harm as long as the public got the impression that we are indeed keeping a "small group of the most dangerous" off the streets. Pratt has made this point more generally about "dangerousness" legislation. He asks "...more symbolically may it not be the case that these laws

⁵⁹ U.K., H.L., *Parliamentary Debates*, 5th ser., vol. 527, col. 1018.

⁶⁰ *supra* note 46. It is true, of course, that the frequency of crime is not the only factor in assessing the affect of crime on the victim.

themselves were never intended to be a significant option?"⁶¹ The point that the legislation was merely symbolic, and that whether or not the legislation 'worked' was not important, will be returned to in the final chapter. In itself this is not a startling conclusion and it is not necessarily based on the government addressing the problem of fear of crime. Indeed during the legislative process just such allegations were made by members of Parliament, for example Lord Ackner stated that "This provision seeks to redress the balance by saying 'look how tough we are. We have provided greater protection for the public'"⁶² and Lord Windlesham noted that "This is not the first time it has occurred to legislators that public support can be gained in this way"⁶³.

The important suggestion here is that if some of the thinking behind the legislation was based on the need to address the problem of *fear of crime* then there was then an explicit appeal on the part of government to the notion that the public assess the risk of their own victimisation. If I am right to suggest that the longer than normal sentence was a manipulative response on the part of government to the problem of the fear of crime then the government was also assuming that the public has an ability to and do in fact assess the risk of their own victimisation⁶⁴. The symbolism of keeping the most risky individuals out of circulation, as a response to fear of crime, can only work if the public engage in some sort of risk assessment. It has been argued above that there was a subordination of *risk* to *punitiveness* as a result of bifurcation. If we accept the argument based on fear of crime then we have at one and the same time an

⁶¹ J. Pratt, "Dangerousness Risk and Technologies of Power" (1995) 28 *Australia and New Zealand Journal of Criminology* 3 at 12.

⁶² U.K., H.L., *Parliamentary Debates*, 5th ser., vol. 527, col. 1008 (26 March 1991).

⁶³ U.K., H.L., *Parliamentary Debates*, 5th ser., vol. 528, col. 1520 (14 May 1991).

⁶⁴ The public clearly have little ability to assess the risk of their own victimisation in empirical terms, Maxfield, *supra* note 55 at 38 that "This is one of the paradoxes of fear, that those who are most frequently victimised are least fearful".

explicit appeal to the public to assess the risks of victimisation and the blurring of risk assessment within the punitive responses required by bifurcation.

5.8 Conclusion

We can conclude from this chapter that there was a trend to bifurcate the system of punishment and this trend was a response to both the perception that prison does not 'work', especially for the petty offender, and that increased incarceration requires many tax pounds. This punishment (as can be seen from the just deserts sentencing philosophy of the 1991 Criminal Justice Act) was not based on the discredited rehabilitative idea but rather on the basis of retribution. The serious violent and sexual offender was seen to deserve more retributive punishment since the societal view was perceived to be that these are the most morally bankrupt characters. This chapter has argued that while the 'dangerousness' provisions of the Act are framed in the legislative process in terms of risk assessment, little attention was paid to the prediction of future harm which is so central to them. Perhaps the most important aspect of this chapter is that it has been argued that a certain degree of 'blurring' took place between the notion of protecting the public *via* risk assessment with the severe punitive response to serious crime. Those viewed as the morally bankrupt were also seen, not surprisingly, to be the risky individuals. Fear of crime had also entered the policy field and it has been suggested that the longer than normal sentence may have been in part an attempt to address this problem. So little attention may have been paid to the problem of prediction simply because the value to the government of the legislation was on the symbolic level. However, even at this level, the use of the legislation to address the problem of the fear of crime required the individual to assess their own risk of victimisation. It has been

argued that risk assessment was appealed to at the political level at the same time as risk was being marginalised by punitive responses based on moral judgements. These finding will have implications in the final chapter which will address the extent to which the crime as risk discourse can be seen to be operating through the 'dangerousness' provisions of this Act.

Chapter 6

“...risk creates its own collective order. It is the subtle but totally coordinated order of the actuarial table”¹

6.1 Introduction

Up to this point in this thesis I have engaged in what I have described as a ‘micro’ study of the ‘dangerousness’ provisions of the 1991 Criminal Justice Act. My interest in this legislation was sparked by a belief that the ‘longer than normal sentence’ was unjust. The legislation has within it a prediction of future harm and such a prediction, even without having examined the published research on the matter, seemed to be an unsound basis for the deprivation of liberty. The reader will have recognised by now that this thesis is not centred upon the ethics or the justification for such a sentence, more than enough has been written on this topic elsewhere². Rather the approach taken has been to look in detail at the provisions in an attempt to shed light on the so called ‘risk discourse’. The idea that there is within contemporary criminal justice theory a ‘risk discourse’ was introduced in the first chapter. The idea behind the thesis and the theme running through its course is that while such a discourse may be discernible on a more general level, it may be instructive to examine one piece of legislation in much more detail. Where else, I thought, would such a trend be more obvious than in a statute that required an assessment of risk? This final chapter will examine the extent to which crime as risk can be seen to be reflected in these provisions. Clearly this area of study does not allow for a dichotomous conclusion, rather we

¹ Jonathan Simon, “The Emergence of a Risk Society: Insurance, Law and the State” (Sept-Oct 1988) *Socialist Review* 61 at 87.

² See, e.g., J. Floud and W. Young, *Dangerousness and Criminal Justice* (Cambridge University Press: Cambridge, 1981)

must grapple with conflicting trends often influenced by the political reality of criminal justice reform. This chapter will have two broad sections. Firstly, the reader will be reminded of what has gone before both in terms of what is meant by crime as risk and of what has been said about the 1991 Criminal Justice Act. Secondly, the extent to which this discourse is reflected in the 1991 provisions will be assessed. It will be concluded that the micro-study has much to recommend it as a model of research if we wish to elucidate much broader trends in criminal justice. Broader arguments about the extent of the risk discourse across the span of criminal justice will not be attempted.

6.2 A Summary

Chapter two noted the shift in the notion of the 'dangerous' from the petty persistent offender to the serious violent or sexual offender. It is just such an offender that the provisions of the 1991 Act were intended to incapacitate. Incapacitation, significantly, is the basic idea behind all of the special sentences directed at the 'dangerous' offender. It was argued in both chapters two and three that the only way, from a drafting point of view, to limit such legislation to the desired group of offenders was to have tightly drawn threshold criteria. Once we progress to the prediction of future harm it is virtually impossible to provide any meaningful limit. Pratt made the significant point in a broader study of 'dangerous' provisions internationally that as the 'dangerous' person metamorphosed from the petty persistent offender to the violent or sexual offender, the focus of the legislation went from the offences the offender had committed in the past to the 'danger' that was to be predicted in the future³. This point is reflected in my findings of the British position. Chapter three looked in

³J. Pratt, "Dangerousness, Risk and the Technologies of Power" (1995) 28 Australian and New Zealand Journal of Criminology 3 at 14.

detail at the 1991 provision themselves. It was noted that there was no requirement of persistence, that the predictive test was not made clear but that the Courts did look for an evidential basis. This basis was found in the nature of the current offence and the degree of past offending as well as in reliance on the all important expert witness. Chapter four looked at the jurisprudence of the Court of Appeal where it was noted that the test for prediction for future harm adopted by the court was that of 'substantial risk'. The role of expert testimony was more fully investigated in this chapter and the predictive ability of experts was assessed. Not surprisingly, the ability of experts to predict future harm is poor. More significantly it was noted that psychiatrists did often frame their predictions in terms of risk while the more traditional terminology of the 'dangerous' person persisted. It was noted that the predictive vogue did seem to be to limit expert testimony to the more scientifically defensible language of risk. Finally in chapter five the political process was examined where it was noted that little attention had been paid to the problem of prediction. Bifurcation and 'fear of crime' were examined. It was suggested that on the one hand the element of risk assessment had been usurped by punitiveness at the upper end of bifurcation while on the other hand risk assessment may have been explicitly appealed to in an attempt to respond to the problem of *fear of crime*.

6.3 Crime as Risk - A Summary

The literature of the risk discourse was reviewed in the introductory chapter. Attention was drawn to actuarialism as an essential aspect of the risk discourse. By this is meant the aggregation of the population and the resultant focus away from the individual. What Feeley and Simon call the 'Old Penology' focused on

"criminal sanctioning ...aimed at individual based theories of punishment"⁴. Actuarialism on the other hand has the effect of de-moralising the criminal and the victim, we think not in terms of moral guilt but rather in terms of where the victim and the criminal fit within the population and risk profile. This is what Reichman has most appropriately called the "abstraction of punishment"⁵. An important part of actuarialism and the whole risk discourse is the technologies associated with offender profiling. Modern technology is employed to identify and classify the risky individual and it is through the use of these technologies that it is hoped that crime will be predicted and thus managed.

A related aspect of the risk discourse is the notion of managerialism. This can be seen in the systemisation of criminal justice. It was noted in the introduction that the trend is to look across the whole criminal justice system to plan the response to crime. It is also a feature of this movement that the performance targets of crime control agencies are in terms of internal efficiency rather than in terms of crimes solved or criminals punished. As Feeley and Simon state "by emphasising correctional programs in terms of aggregate control and systems management rather than individual success and failure, the new penology lowers one's expectations about the criminal sanction"⁶.

Associated with the technologies of actuarialism are the technologies of insurance. Again the focus is on the assessment of risk and the attempt to share risk across a group of risk takers. The insurance model of crime control works best with events that are more easily predicted, where the assessment of risk is

⁴ M.M. Feeley & J. Simon, "The New Penology: Notes on the Emerging Strategy of Corrections and its Implications" (1992) 30 Criminology 449 at 451.

⁵ N. Reichman, "Managing Crime Risks: Towards an Insurance Model of Social Control" (1986) 8 Research in Law, Deviance and Social Control 151 at 165.

⁶ *supra* note 4 at 455.

more reliable. Again we see within insurance that there is little room for the attribution of moral blameworthiness. It was noted in the introduction that along with these new technologies of risk, aggregation and insurance a movement was discernible within society towards *security* being the pervasive concern. It is hoped that by using these new technologies we will be able to increase our security or at least be able to manage the (criminal) acts which threaten our security.

It is essential to remember that the reason given for the increased prominence of risk by writers like Simon is that these technologies make control more effective. As Feeley and Simon put it "the actuarial logic of the new penology dictates an expansion of the continuum of control for more efficient risk management"⁷. In a sense the risk discourse is seen to have an 'internal dynamic'⁸ and this dynamic is seen to make political choices more difficult. Just as crime is taken off the moral plane so crime loses its political or 'sovereign' dimension. What is clear from the review of the risk discourse undertaken in the introduction is that the technologies of aggregation are as important to the movement as any resultant outcome.

6.4 The 1991 Act - A New Penology?

I will now seek to assess the extent to which the crime as risk discourse can be seen in the 'dangerousness' provisions of the 1991 Criminal Justice Act. My critic may argue that this has really been the wrong place to start looking for the trend since judicial sentencing is surely the cutting edge of (what remains) of the sovereign power to punish. However, as we have seen the practice of

⁷ *supra* note 4 at 461.

⁸ See above at chapter 1.3(g).

incapacitation has been used as an example of risk in action. For Simon and Feeley the 'New Penology' "...is concerned with techniques for identifying, classifying and managing groups assorted by levels of dangerousness"⁹. Can we see in the 1991 provisions a New Penology?

(a) The General Theory

It is within the general theory behind the Act that we can see the greatest exemplification of crime as risk. The idea behind the legislation was clearly that we would be able to identify a group of the most risky individuals and that by containing them for longer the risk to the *population* as a whole of serious crime would be reduced, even if only incrementally. As the White Paper stated "...imprisonment can effectively protect the public from further offences by an offender for a period of time"¹⁰. Feeley and Simon made this point when they stated that incapacitation "promises to reduce the effects of crime in society not by altering either the offender or social context, but by rearranging the distribution of offenders in society"¹¹. The dangerousness provisions direct the court to look to the "protection of the public from serious harm". It has been noted that little attention was paid to the type of crime the offender had committed in the past. There is no requirement of persistence and the threshold criteria of past violent conduct were seen to be very weak. The focus is therefore on the prediction of future harm rather than on what the offender has done in the past.

Much emphasis throughout this thesis has focused on the use of the terminology of risk. We saw in the parliamentary debates and in the jurisprudence of the Court of Appeal that much reference was made to the risk posed by the offender. The

⁹ M.M.Feeley & J. Simon, "Actuarial Justice: the Emerging New Criminal Law" in D. Nelken, ed., *The Futures of Criminology* (London: Sage, 1994) 173 at 173.

¹⁰ *Crime Justice and Protecting the Public* (London: HMSO, 1990) at paragraph 2.5.

¹¹ *supra* note 9 at 174.

test for prediction in the leading case of *R. v. Crow/Pennington*¹² was that the offender must represent a 'substantial risk' of serious harm. In the earlier legislation discussed in chapter two, more emphasis was placed on the 'dangerous' offender. The terminology of 'dangerousness' gives the impression that the offender has an inherent characteristic. The language of risk, however, conveys a different impression of the offender, indeed it obscures the very presence of the offender. It is the risk to the population that is important rather than any 'risky characteristics' inherent in the individual.

We can see at this general level that this legislation has within it the idea that crime and the criminal become, in a sense, less morally guilty. We look to the population rather than the morally guilty individual. This was one feature that ran throughout the risk discourse. One explanation offered above for the use of the language of risk rather than the language of danger is that it has within it an appeal to technology. The lure of science in the courtroom is not new, in this case it is the science of the psychiatrist, the psychologist and the statistician. We have the appeal to the *technologies* of identifying the risky. We saw above that the technologies of classification are central to the whole risk discourse and it is through their power that control becomes more effectively exercised. So in the courtroom an appeal to the technologies of risk provide legitimisation. It is significant that the legislation does not allow for indeterminate sentencing¹³ nor does the release of those sentenced ultimately depend on a further assessment of risk¹⁴. The risky individual will be released finally into the community whether or not he is still a 'risk' to the community. Legislation clearly was intended to

¹² (1995) 16 Cr. App. R. (S.) 409 (C.A.).

¹³ The discretionary life sentence, which has been in existence for some time, is such a sentence and is also applied to the dangerous offender.

¹⁴ If released on Parole then the decision is dependent on risk but if not paroled they must be released at the end of the sentence.

manage risk not to 'solve' the problem of violent crime¹⁵.

(b) Solidarity

The material assessed in this thesis suggests that we can indeed see a manipulation of solidarity through the fear of crime. I say 'manipulation' because it seems that much of this solidarity is a product of political engineering. My point is not that serious crime does not exist or that people are not really frightened by the prospect but merely that politicians play on these fears. While a decade ago the watch words were the 'fight against crime' or the 'war on crime' a strong theme in contemporary criminal justice is the 'protection of the public'. First we had a White Paper entitled 'Crime, Justice and Protecting the Public'¹⁶ and earlier this year the importance of crime and justice were dropped when we had a White Paper entitled 'Protecting the Public'¹⁷. Garland¹⁸ has drawn our attention to a White Paper of 1964 - 'The War Against Crime' which can be contrasted with the government policy statements in the late 1980s and early 1990s. Security would indeed seem to be a pervasive concern. Community crime prevention programmes place our domestic security in our own hands while policies like the 'dangerousness' provisions of the 1991 Act place security against the violent or sexual criminal in the hands of the state.

Since security is of utmost importance, prison takes on the character of a containment device rather than a place of punishment *per se*. In chapter five it was suggested that fear of crime is now on the policy agenda and that the 1991

¹⁵ This is not to suggest that indeterminacy would in any way be better, rather the suggestion is that the longer than normal sentence, since it does not involve indeterminacy, is an attempt to manage the problem at one point in time.

¹⁶ *supra* note 10.

¹⁷ *Protecting the Public*, (London: HMSO, 1996).

¹⁸ D. Garland, "The Sovereign State: Strategies of Crime Control in Contemporary Society" *British Journal of Criminology* (forthcoming).

Act can be seen as an attempt to address this. This would seem to back up the suggestion that security is a pervasive concern. It may be the case, however, that much of the talk of 'protecting the public' is political manipulation of the public. We are in a period where we seem to accept crime as inevitable, this itself can be seen to be part of the risk discourse. In the previous chapter bifurcation was addressed and it was suggested that part of this trend was the need to find a new approach after the failure of the punitive approach of the early 1980s. Rehabilitation had been tried and had failed, harsh punishments alone have been tried and have failed, nothing indeed 'works'. Government, however, must still be seen to be 'fighting' crime even if they are only really managing it. By placing the 'protection of the public' at the centre of the agenda the government at one and the same time is saying that security is most important and that the government is able to improve security. The government is able to both create and offer a solution to the problem with one slight of hand.

(c) Actuarialism

It has been noted in this section that on a theoretical level the 1991 provisions do contain some of the important elements of *crime as risk*. We can see in the theory of incapacitation an attempt to manage one part of the population to reduce the risk of victimisation of another part. Central to the legislation is the prediction of future harm, the assessment of risk. We can see as a result of this focus on prediction that the criminal has escaped some of the traditional moral condemnation. In short the legislation would seem to correspond to Feeley and Simons' definition of actuarial justice as concerning "...techniques for identifying, classifying and managing groups assorted by levels of dangerousness"¹⁹. However, it is here that theory and reality take separate courses and that we can

¹⁹ *supra* note 9 at 173.

see the benefits of this micro study. It has been noted above that the *technologies* of aggregation are themselves part of the very power of the risk discourse. It has been suggested that through the language of risk the court's sentencing the offender to longer than normal sentence makes an *appeal* to the technologies of risk assessment. I would suggest, however, that the actual *use* of these technologies is largely absent in this legislative scheme. In this context the technologies of risk assessment are largely an illusion.

It has been noted that on the political level the government expressed that there was an ability to predict future harm with a high degree of reliability. They did not however provide any evidence for this. Nor did they provide any evidence that the risk of future harm to the victim would be decreased to any appreciable extent although this was the general theory behind the provisions. There was reliance on the logic of risk assessment but no use of information at their disposal to back up this reliance. The empirical studies reviewed in chapter four show that it is very difficult either through clinical or actuarial techniques to get any acceptable degree of reliability. What we clearly have is a risk assessment technique that does not rely on the technologies of actuarialism to a significant extent. The legislation is based on perceived 'common sense' as expressed by the government; that if we lock up some offenders who look as if they may reoffend then we will prevent reoffending. The classification that is carried out by the courts is at base an intuitive one, and one that may not be any more reliable than the toss of a coin. The courts do require an 'evidential basis' before they are prepared to predict future harm. This 'evidential basis' is limited, however, to past conduct of the offender and the opinion of an expert. The information before the court about the offender is therefore limited, haphazard and not based in any sense on the profile of the offender within an aggregated population. To call what

the courts are doing when using section 2(2)(b) 'risk assessment' gives the largely inaccurate impression that they are employing actuarial techniques. The important point is not only that the prediction of future harm is more likely to be wrong than right but that the technique of 'risk assessment' is very crude indeed. Is it possible to see actuarial techniques creeping into the legislation at any point? It was noted in chapter three that in *R. v. Fawcett*²⁰ the Court employed what could be called 'risk factors'. Feeley and Simon have argued that actuarialism is evident in contemporary incapacitation because factors of risk are considered instead of looking to the character of the individual²¹. However, even in *Fawcett*, the risk factors are entirely to do with that particular offender and how he or she has faced up to their crime. For example, the court looked to lack of remorse and irrationality of behaviour on the part of the offender. So here again there was no real aggregation, rather an individualised approach to risk assessment.

The role of the expert witness does provide at least the *potential* for actuarial techniques. We saw that the experts do sometimes express their opinions in terms of risk. It was also noted that the vogue in terms of professional ethics was for forensic psychiatrists to give evidence in these terms, terms that are more scientifically supportable than the old 'diagnosis' of 'dangerousness'. It was also noted that there was a trend in research on prediction to look at the use of actuarial techniques and to see how their use could improve clinical prediction. Taken together these points provide the potential for aggregation and population profiling within the sentencing under section 2(2)(b). They take the prediction of future harm beyond the intuitive response. The central point remains, however, that the legislation does not reflect the use of the kinds of technologies seen as so

²⁰ (1995) 16 Cr. App. R. (S.) 55 (C.A.).

²¹ *supra* note 9 at 175.

central to the effectiveness of control within the risk discourse. There is little if any reference to "statistical correlations of heterogeneous elements... [they] ...deconstruct the concrete subject of intervention, and reconstruct a combination of factors liable to produce risk"²².

(d) Insurance

As far as insurance is concerned the reader ought to have seen trouble ahead when it was pointed out that rare events which are caused by a variety of uncontrollable hazards are not the stuff of successful insurance. As Reichman put it "Although the effects may be uncertain, the behaviour must be relatively easy to predict or anticipate if risk management is to be successfully applied"²³. Pratt has argued that through 'dangerousness' legislation governments are offering a type of insurance to the public²⁴. He argues that through this notion of insurance we can see actuarialism in action. I would argue that insurance is not present in this legislation in any meaningful sense. The government is not insuring the public in the sense that it is assuming the risk of violent and sexual crime and that if victimisation occurs compensation will be made. We do have a system of criminal injuries compensation but it has been in existence since the 1960s, in this sense government have been assuming the risk and spreading the financial consequences across the population for three decades. It was noted above that insurance in this context was a broader notion than simply providing compensation. It encompasses the whole idea of predicting and managing risks and spreading risk across a community of risk takers. It is true that we do have a prediction in the 1991 Act but it is difficult when this prediction is so crude to see

²² R. Castel, "From Dangerousness to Risk" in G. Burchell *et al*, eds., *The Foucault Effect* (Brighton: Harvester Press, 1991) 281 at 288.

²³ N. Reichman *supra* note 5 at 154

²⁴ *supra* note 3 at 18 Pratt states that "...it is as if governments through the dangerousness legislation, are offering their citizens a form of enhanced insurance against the risks they face from such criminals of today".

that in any sense the risk is effectively managed or indeed that the risk is spread across the risk community. We have no idea how crime risks in the population as a whole are affected by this attempt at selective incapacitation. It is true that the government does seem to assume responsibility for serious crime and that in a sense the risk of reoffending is allocated to those given the longer than normal sentence. However, it has been argued that this should not be viewed in terms of insurance but rather as part of the manipulation of fear of crime by government.

So, we have a basic prediction of future harm and a decision based on the need to protect the population from victimisation. Both these features are consonant with the risk discourse. We do not, however, have a significant reliance on the technologies of risk assessment. We have used the *idea* of risk analysis but not the actuality of it. We do not have to any significant degree the assessment of the correlation between factors of risk and the characteristics thrown up by each individual. A relevant statistic would seem to be that violent and sexual crime accounts for only 6% of all crime²⁵. This is the one statistic, however, that is not emphasised; there is the need for solidarity.

(e) Politics and Risk

Simon has argued that the risk discourse makes political and moral responses more difficult because the focus is on the aggregate rather than the individual²⁶. However, we have here a situation where risk is used alongside a greater punitive response by government. In the last chapter it was argued that the appeal to risk within the legislation was marginalised by this punitive response.

Simon saw the perpetuation of punitiveness as part of the clash between the Old

²⁵ *Criminal Statistics, England and Wales* 1994, (London: HMSO, 1995).

²⁶ J. Simon, "Ideological Effects of Actuarial Practices" (1988) 22 *Law and Society Review* 771.

Simon states that "As the institutional fabric of society is colonised by actuarial practices it becomes more difficult to invoke political and moral responses in ourselves and others" at 797.

Penology and the New, between risk and the sovereign²⁷. I believe that an explanation can be offered for the parallel use of both risk and punitiveness which does not involve a clash between sovereign power and the risk discourse. O'Malley²⁸ offered a related explanation based on what he called the privatisation of risk, 'prudentialism'. He argued that right wing governments combine punitive responses with crime prevention strategies which threw the responsibility for property crime back onto the individual through the lack of the use of risk technology. Thus by privatising risk assessment, risk can be manipulated by politicians to serve their own ends. No clash between sovereign and risk was evident. In the context of the 1991 Act I would argue that we can also see political manipulation of risk. In this case it is not based on the privatisation of risk but on an appeal to the idea of risk without use of the attendant technologies. For Simon the technologies were central to the power exercised through actuarialism becoming more effective. Once we take away the use of the technologies I would suggest that we lose the unilinear pattern as O'Malley²⁹ has called it of the increased effectiveness of control. Within the legislation considered in this thesis we can see that risk is used on a more symbolic level. Pratt made the point that 'dangerousness' provisions we always intended to be symbolic rather than effective, but he did see within them the trend towards actuarialism³⁰. We must agree that there is a large degree of symbolism within these provisions but it is the symbolism of the *idea* of risk assessment.

I would argue that once we take the technologies of risk assessment away from the idea of risk we have a very powerful political weapon indeed. Solidarity through fear is evident within society and it has been suggested that the

²⁷ *supra* note 1 at 78 ff.

²⁸ P. O'Malley, "Risk, Power and Crime Prevention" (1992) 21 *Economy and Society* 252 at 261.

²⁹ *ibid.* at 256.

³⁰ *supra* note 3 at 26.

government may indeed seek to manipulate this fear. A governmental response is therefore necessary and the idea that the government is taking steps to give the courts the power to assess the risk of offenders appeals to the fearful population. The appeal to the population is effective on one level but on another government will be open to the accusation it has have gone 'soft on crime'. Thus at the same time as the idea of risk is appealed to, there is a strong punitive and moral response to crime. Punitive responses sit well with the Conservative view of the criminal and of crime, one based on individual pathology. At the same time the use of risk assessment blends in with the neo-conservative appeal to market forces and internal efficiency within the criminal justice system. Far from the clash of the risk and sovereignty we can see the manipulation of risk by a 'sovereign' government of the right. This may be possible precisely because the technologies of risk assessment have not been substantially invoked. The risk discourse in this context is not allowed a internal dynamic, the technology, the source of power is denied to it .

Perhaps one reason why no attempt is made to employ actuarial techniques in this field is that in the context of the really serious offender such techniques would not provide for any reliable degree of risk assessment. The phantom of the low base rate comes back to haunt us. Is it not the case that risk assessment technology could never be a source of power in this context because probability statistics have little power in relation to low base rate events? We saw above that for this very reason insurance techniques were not appropriate to this field. It is ironic that the solidarity of fear is evident with regard to the very kind of crime for which reliable risk assessment is not possible. Reichman notes that it is the habitual offender who would be best suited to insurance techniques³¹, the very

³¹ *supra* note 5 at 155.

offender that was left behind by 'dangerousness' many years ago.

6.5 Conclusion

At the general level it has been argued that the 'dangerousness' provisions of the 1991 Criminal Justice Act have within them elements of the risk discourse. The focus of the legislation is away from the offender to the reduction of the chance of victimisation of the population as a whole, as an aggregate. The prediction of future harm is central to the legislation and this alone detracts from the traditional moral response to the criminal. It has been argued that security is a pervasive concern and indeed that we can see an appeal to solidarity through fear. Simon notes that the risk discourse arose out of this concern for security and the new actuarial practices. It has been argued here that these actuarial practices are largely absent from this legislation. Thus instead of a clash between the sovereign punishment and the risk discourse we have the manipulation by government of the notion of aggregation of the population and the assessment of risk. The *idea* of risk in this context has a strong pragmatic appeal and it has been suggested that it can be used in this way precisely because there has been little employment of actuarial practices. Simon argues that risk takes on an internal dynamic because the use of actuarial techniques serves to intensify further the effectiveness of control. He argues that political responses become harder and indeed that risk is a pre-political notion. I have argued that far from being pre-political, risk, shed of its technologies, is a powerful political weapon. Castel has argued that there has been a paradigm shift "From Dangerousness to Risk"³² and he has identified many of the trends reviewed in the first half of this chapter. He is writing from the perspective of forensic psychiatry where it has been noted above that the predictive vogue is in terms of risk. It is through

³² *supra* note 22.

predictive testimony of experts that we have found the potential for the employment of actuarial practices within the Criminal Justice Act 1991. Castel notes that "Like all important transformations, this one presupposes a slow preceding evolution of practices which, at a certain moment, passes a threshold and takes on the character of a mutation"³³. We certainly do not have a mutation, indeed it could be argued that we have a charade, instead of a risk discourse, an *idea* of risk discourse. It has been argued that this is a powerful political weapon, perhaps as powerful, but in a different sense, as the internal dynamic of crime as risk. Whether the reader agrees with this conclusion or not, it is surely the case that this detailed study of the 'dangerousness' provisions of the 1991 Act shows that crime as risk is be a highly complex notion. This work will serve as a warning to those who emphasise the general theory behind a provision without paying attention to its detailed workings. The 'micro-study' has much to recommend it.

³³ *supra* note 22 at 281.

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Appendix 1

List of 42 Cases Studies. Each case is a report of a appeal to the Court of Appeal. Each case is reported in the style *R. v Case Name*. For the purpose of this appendix, only the name will be listed and the suffix (C.A.) will be omitted.

Case Name	Report
Ali	(1995) 16 Cr. App. R. (S.) 692
Apelt	(1994) 15 Cr. App. R. (S.) 420
Bacon	(1995) 16 Cr. App. R. (S.) 1031
Bingham	(1994) 15 Cr. App. R. (S.) 205
Bowler	(1994) 15 Cr. App. R. (S.) 78
Clarke	(1994) 15 Cr. App. R. (S.) 102
Coull	(1994) 15 Cr. App. R. (S.) 305
Creasey	(1994) 15 Cr. App. R. (S.) 671
Christie	(1995) 16 Cr. App. R. (S.) 469
Crow/ Pennington ¹	(1995) 16 Cr. App. R. (S.) 409
Danso	(1995) 16 Cr. App. R. (S.) 12
Dawes	(1995) 16 Cr. App. R. (S.) 491
Dawson	(1995) 16 Cr. App. R. (S.) 710
Dootson	(1995) 16 Cr. App. R. (S.) 223
Ely	(1994) 15 Cr. App. R. (S.) 881
Fawcett	(1995) 16 Cr. App. R. (S.) 55
Fisher	(1995) 16 Cr. App. R. (S.) 642
Fleming	(1994) 15 Cr. App. R. (S.) 861

¹ Two cases are reported together under the title Crow/Pennington, hence the total is 42 not 41.

Case Name	Report
Fowler	(1994) 15 Cr. App. R. (S.) 456
Gardiner	(1994) 15 Cr. App. R. (S.) 747
Groves	(1995) 16 Cr. App. R. (S.) 366
Hashi	(1995) 16 Cr. App. R. (S.) 121
Helm	(1995) 16 Cr. App. R. (S.) 834
Henry George L	(1994) 15 Cr. App. R. (S.) 501
Jeffreys S	(1995) 16 Cr. App. R. (S.) 303
Kennan	(1996) 1 Cr. App. R. (S.) 1
Jeffreys S	(1994) 15 Cr. App. R. (S.) 460
Mansell	(1994) 15 Cr. App. R. (S.) 771
Meikle	(1994) 15 Cr. App. R. (S.) 311
Nicholas	(1994) 15 Cr. App. R. (S.) 381
Oudkerk	(1995) 16 Cr. App. R. (S.) 172
Palin	(1995) 16 Cr. App. R. (S.) 888
Samuels	(1995) 16 Cr. App. R. (S.) 856
Spear	(1995) 16 Cr. App. R. (S.) 242
Swain	(1994) 15 Cr. App. R. (S.) 765
Thomas	(1995) 16 Cr. App. R. (S.) 617
Walsh	(1995) 16 Cr. App. R. (S.) 204
Watford	(1994) 15 Cr. App. R. (S.) 730
Williams	(1994) 15 Cr. App. R. (S.) 330
Utip	(1993) 14 Cr. App. R. (S.) 746

Case Name

Report

Zoszco

(1995) 16 Cr. App. R. (S.) 354

Appendix 2

Cases where either a longer than normal sentence was affirmed on appeal or where a longer than normal sentence was reduced on appeal. In each of these cases both the 'normal' sentence and the 'longer than normal' sentence were specifically expressed in terms of years and months in the judgement.

1. Cases which were affirmed:

Name of Case	Normal Length (years)	Increased Length (years)	%increase
Bingham	3	5	66.6
Coull	2	4	100
Crow	4	7	75
Danso	8	11	37.5
Dawes	8	12	50
Groves	6	9	50
Hashi	3.5	5	43
Mansell	2.5	5	100

2. Cases which were reduced:

Ali	2	3	50
Gardiner	1.5	3	100
Henry George L	3	7	133.3
Jeffreys S	5	7	40
Nicholas	3	4	33
Oudkerk	2.5	5	100
Palin	8	10	25
Swain	2	4	100

Thomas	6	9	50
Walsh	5	8	60

Appendix 3 - Psychiatric Evidence

The references for these cases are to be found in appendix 1.

1. Cases in which a psychiatrist gave evidence and a prediction was offered:

Apelt	Bacon	Crow ¹	Dootson	Henry George L
Lyons	Meikle	Pennington	Swain	Spear
Thomas	Zoszco			

2. Cases in which a psychiatrist gave evidence but where no prediction was offered:

Bowler	Danso	Dawes	Dawson	Fawcett
Helm	Jeffreys S	Palin	Samuels	Walsh

3. Cases in which a psychologist gave evidence and a prediction was offered:

Creasey	Williams
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4. Cases in which a psychologist gave evidence but where no prediction was offered:

Bowler	Dawes
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5. Cases in which another another unspecified medical opinion was given and a prediction was offered:

Crow	Meikle	Palin	Watford
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6. Cases in which another unspecified medical opinion was given where no prediction was offered:

Bowler	Clarke	Fisher	Fleming	Hashi
Kennan	Oudkerk	Pennington		

¹ There is an overlap in two of these cases, in Crow and in Meikle. In both these cases was there a prediction by both a psychiatrist and another unspecified clinician. This accounts for the total figures given at page 75 above.