Criminology and History: Understanding the Present

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A subject without a past

I would like to begin this paper by drawing attention to a special issue of the *British Journal of Criminology* (1982) on the issue of 'Dangerousness'. This volume was compiled in the aftermath of the Floud and Young (1981) *Report on 'Dangerousness and Criminal Justice'*. At that time, in Britain, but in similar jurisdictions as well (see Pratt 1995), the problem of 'what to do with the dangerous' was a crucial issue in penal policy (see, for example, *Report of the Committee on Mentally Abnormal Offenders* 1975, Bottoms 1977). It remains the case today as we see in the crop of legislation across English based jurisdictions in recent years, all of which prescribes some form of indeterminate prison sentence (usually known as preventive detention) for those offenders judged to be 'dangerous': for example, the Victorian State *Sentencing (Amendment) Act* 1993 and the *Community Protection Act* 1990; the Washington State *Sexual Predator Law* 1989; the Canadian federal legislation of 1993 — the *Corrections and Conditional Release Act*; and the New Zealand *Criminal Justice Amendment Act* 1993.

Arguing for the retention but limited use of such measures, Jean Floud (1982), in her introduction to the *British Journal of Criminology* special issue, summarised the position taken as follows:

> we take the view that substantial justice in protective sentencing must depend on severely restricting the class of eligible offenders and on arrangements to ensure that each case is painstakingly adjudicated on its merits in accordance with mandatory evidential and procedural requirements (Floud 1982:224).

The other five contributions to the journal — from distinguished and much respected commentators — deal with what were clearly thought to be the most significant penal issues associated with dangerousness. These were:

(i) *ethics:* to what extent is it justifiable to sentence a person to indefinite imprisonment on the basis of a prediction that they might harm others in the future (see Bottoms and Brownsword 1982)?

(ii) *effectiveness:* what can actually be done for dangerous offenders when sentenced, and what kind of procedural safeguards need to be inscribed to prevent injustice (see Gordon 1982)?

(iii) *justification:* what are the philosophical justifications — for and against — the provision of these special measures (see especially Honderich 1982; Walker 1982)?

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I do not wish to take issue with any of the matters raised by these contributors: all are crucial in deciding how we should punish, in modern society, those offenders who are judged to be dangerous. Instead, I want to use this *British Journal of Criminology* volume as an example of what is typically missing from discussions of contemporary penal issues such as dangerousness: that is, the idea that such matters have any history at all; or, even where this is acknowledged, it can be nothing more than background information, prior to the real body of debate and discussion, as in the recent New Zealand example of the Ministerial Committee of Inquiry into the Prison System (New Zealand Department of Justice 1989). And in this 'Dangerousness' *Special Issue*, there were merely three references, in three paragraphs, in passing, to the history of this matter.

There are a number of reasons why historical analysis seems to have difficulty being incorporated within mainstream criminology as part of its problem-solving pedagogy. One of these relates to the specific site of criminology itself. Most University 'Institutes of Criminology' in English speaking societies were established during the heyday of the postwar rehabilitation era when criminology as a discipline was dominated by a positivistic social science which found expression in psychological knowledge. In short, its structural parameters determined that it was a discipline primarily concerned with providing answers rather than raising questions. Notwithstanding the insistence on the independent status of such sites of learning from the processes and research interests of government (see, for example, Radzinowicz 1988), for the most part they were inevitably bound to an expectation that they would provide 'useful knowledge' for governments to draw on as they saw fit. One clear exception, at least to this rule, can be seen in the development of the multi-disciplinary Centre of Criminology at the University of Toronto (see Edwards 1984); but for the most part they helped to continue the dominance of psychological knowledge and positivist epistemology in relation to the available 'way of seeing' matters related to crime and punishment. One only has to examine the early titles of the Cambridge Institute of Criminology series as confirmation of this: *Murder Followed by Suicide*, *Borstal Reassessed*, *Criminals Coming of Age* and so on. Other than this, it was a discipline that acted as a kind of commentary on sentencing case law, practices and statutes, in a bid to impose 'rationality' on this dimension on the penal realm (see, for example, Walker 1969).

Now, of course, criminology as a discipline has broadened out very considerably since those days (see Rock 1994) and, by and large, *has* become multi-disciplinary, with a strong critical component (even if this reality might give discomfort to those who see it exclusively as some sort of information service for government). This has meant that there has been a significant build up of historico-criminological research. In Britain, those who wish to undertake such enquiries are privileged to be able to draw on Sir Leon Radzinowicz's five volumes, spanning five decades of work, *History of English Criminal Law* to guide them (see Radzinowicz 1948–86). More recently, interest in this aspect of criminological research has been fuelled by the development of 'new histories' — on which I will say more in due course — but which are most notably represented by Garland (1985) and Sim (1990). In the United States, a notable tradition of historical research has now been established through the work of, for example, Platt (1969), Rothman (1971) and Scull (1977). Elsewhere, the Marxist history of punishment of Rusche and Kirchheimer (1939) has been rediscovered — and has been echoed in the work of Melossi and Pavarini (1981). International journals have been established, such as *Criminal Justice History* and the *European Review of Criminal Justice History*.

However, in this part of the world, it remains the case that historical criminology is rather more scarce. Nonetheless, as regards Australia, I would draw particular attention to the work of Mark Finnane on policing (1994). Not only this, but the institutional establishment of the Unit for the Study of Comparative Criminal Justice History at Griffith

University is likely to mean that such research will continue to have a more secure footing in the future. In New Zealand, I would draw attention to the work of Richard Hill — of Radzinowiczian dimensions on the history of New Zealand policing (see Hill 1986–95). There is Fairburn (1989) on patterns of crime in nineteenth century New Zealand — a text which draws on a Durkheimian theoretical framework. And there is my own work, such as it is, on the history of the New Zealand penal system (Pratt 1992) and a near to completion history of dangerous offender legislation, across a range of jurisdictions but including New Zealand and Australia. All these trends, then, point to the development of a significant body of research in historical criminology which has been developed in recent years.

Where is my armchair?

And yet, as I indicated at the outset, there still seems to be a barrier between the two disciplines of criminology and history. Perhaps another reason for this has been the nature of much historical inquiry itself, at least until recently: as if the purpose of history was *not* to address the present — which was what criminology as a problem-solving discipline was interested in — but to uncover the past. This would be undertaken in the form of empiricist, fact finding voyages of discovery — but backwards through time (see, for example, Bailey 1987). Again, I do not wish to deny the legitimacy of such scholarship: one only has to read Hughes (1987) to realise how important the criminological past is to the cultural and institutional legacy of the societies on which such research is based (see also Neal 1991; Beattie 1986). However, what this form of historical scholarship seemed to confirm was the idea that history itself was of little relevance to criminology. It was something of an esoteric luxury: the perusal of dusty old volumes to communicate with the dead should be secondary to the more important issues of communicating with the living through surveys and all the other research methods and technology that criminology had at its disposal.

However, what has helped to dramatically recast the possibilities that historical research may have to offer criminology has been the development of a form of scholarship which claims that it consists of 'histories of the present':

> such a history has to take the current image of its [subject] as both a claim and a problem. A claim in that we need to examine this image neither as myth nor as reflection but in terms of how it operates and the function it performs within [the subject] today. And a problem in that we cannot ourselves use it as the basis of our investigation of the past. What today appears marginal, eccentric, or disreputable was frequently, at the time when it was written, central, normal. and respectable. Rather than marginalize these texts of the past from the point of view of the present, we might do better to question the certainties of the present by attention to such margins and to the process of their marginalization (Rose 1988:180).

Here, then, was a different role for history: *not to hide in the past but to critically interrogate what had made possible the present.*

Such scholarship, such a way of trying to understand the world, I would argue, has only been possible through the work of Michel Foucault. In his various histories (for example 1965, 1977) he seeks to question the forms of power and rationality which structure the modern world. As David Garland writes,

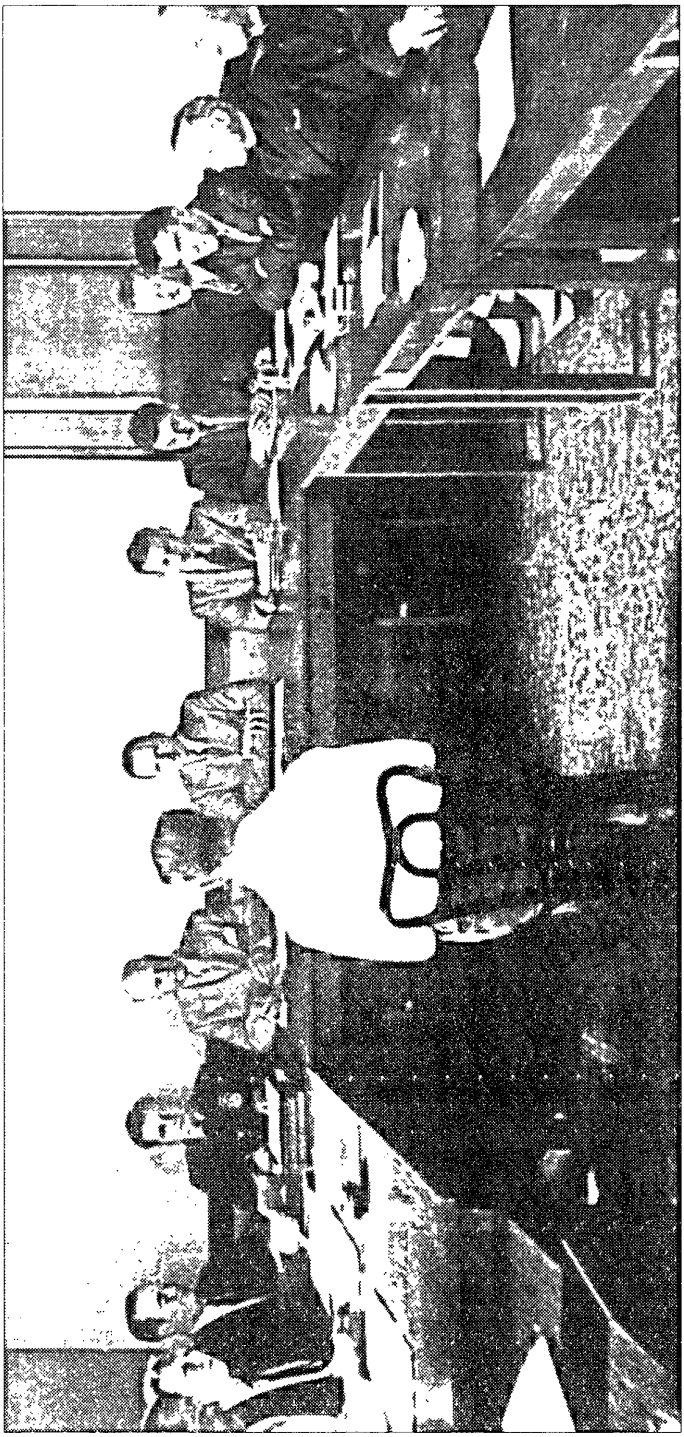
> running through all his many studies ... there is a concern not just to describe the conventions through which we organize our knowledge of ourselves and our world, but also to show the costs of these conventions and the forms of oppression they entail (Garland 1990:133).

As such, Foucault has not only added a new vitality to historical criminology but has been highly influential in generating succeeding 'histories of the present', through which it has been possible to critically interrogate the usual way of understanding the development of particular institutions or practices as being the result of progress or rationality. Instead, it becomes possible to understand the forces of power that underpin them, their role in normalisation and the silence they impose on 'voices' that might depart from these standards. In addition to the work of Garland and Sim noted above, one of the most recent such studies has been the highly acclaimed work of Simon (1993) on the history of parole. As for my own work on the history of the New Zealand penal system, I attempted to show how 'punishment today' in that society is a reflection of underlying cultural, social and political forces stemming from its colonial past and which impinge upon and inform penal policy making today. Equally, the current work I having been undertaking on the history of dangerous offender legislation begins, I hope, to interrogate exactly what the role, function and effects of these laws have been, what makes them work in a particular way and with what consequences. In effect, instead of the usual framework of analysis of dangerousness — ethics, effectiveness, prediction about/diagnosis of a particular offender, it is an examination of the way in which it has been possible to think about dangerousness, the knowledges that have made this possible, and the tactics and strategies that have been developed from this. As in the remarkable photograph from Pollens (1939), what is in focus is not the offender but the forces which adjudicate him/her as dangerous (see overleaf).

Apart from anything else, surely this approach enables us to address some very important questions, before anything further is done to the dangerousness laws: how successful do these laws seem to have been so far in controlling the dangerous?

Undertaking such research, however, is not without its own problems. It can generate suspicion and hostility from within criminology from those who still insist that criminology's inquiries into the present cannot reference the past. Leave all that to 'armchair academics', they seem to say, while we get on with the 'real business' of finding out what is happening today. Furthermore, historians themselves have been very critical of this form of historical scholarship: both in terms of the genealogical method it professes ('partial', 'reads too much into trifling discourses', 'deals too much with the transformation of ideas rather than institutional practices' and so on) — and the way in which this in turn is then theoretically interpreted rather than leaving historical fact to speak for itself (see, for example, Perrot 1980). Not that a Foucauldian theoretical perspective is the only form such a history can take. Apart from the critical Marxist tradition, to be found, for example, in Scull (above), one of the most recent and important theoretical innovations is to be found in the work of Pieter Spierenburg (1984). Here, he draws on the work of Norbert Elias to illustrate the role of changing sensibilities on penal reform — in effect allowing us to recognise the symbiotic relationship between punishment and culture.

Nonetheless, those who undertake research of this nature may find themselves living in a curious academic hinterland, somewhere between criminology and history, but dealt with at arms length by both: unwanted history as far as criminology is concerned; not proper history as far as history is concerned. However, I do not see how it is possible to understand the present, let alone think about the future, if we are unable to recognise those forces and influences which help to constitute what we recognise as the present.



The Classification Board at the New York Penitentiary,
considering the case of a sex criminal to decide upon his institutional program.

Having provided this overview of the uneasy relationship between criminology and history, let me now return to the issue of dangerousness to try and establish how history can help us understand the present. To an extent, this had actually been hinted at in the three historical references in the *Special Issue*, all to the work of Sir Leon Radzinowicz and Roger Hood (1978, 1981). These were:

(i) *'the plasticity of the dangerousness concept'* (Bottoms and Brownsword 1982:252). In other words, dangerousness itself is not a fixed attribute possessed by a known group of offenders but is a social construction that changes historically.

(ii) *'the history of preventive detention, the extended sentence and the discretionary life-sentence in the hands of the judiciary does little to encourage the fear that, with more comprehensive provision, the courts would seek to extend the practice of protective sentencing'* (Floud 1982:227). In other words, even when such special measures of protection against the dangerous have been provided, they have hardly ever been used.

(iii) *'the common sense of the general public tells it that there is indeed such a person as a dangerous offender, and that when he is identified he should be kept in confinement, often for life ... This demand is not new ...'* (Conrad 1982:256). In other words, it is as if in modern society, public sentiments have always insisted that the state protect them from the dangerous.

But, as indicated above, cursory acknowledgment is paid to these matters, before the respective authors get down to the 'real' business of dealing with the issues of the day, rather than the perceived problems of the past. And yet all three of these points that have emerged in the past would seem to have the potential to shed vital light on dangerousness today. Let me now try and expand on these three points by drawing on my own research on the history of dangerous offender legislation — with a view to showing how the problem of 'dangerousness today' can be made understandable through an analysis of its own history.

Plasticity, dangerousness and modernity

The first laws against dangerous offenders were introduced in a cluster of legislation in the early part of this century. For example: the New South Wales *Habitual Criminals Act* 1905, New Zealand *Habitual Criminals Act* 1906, England and Wales *Prevention of Crime Act* 1908 Part II, Victoria *Indeterminate Sentencing Act* 1908, Western Australia *Criminal Code* 1913. From that time, as I have pointed out elsewhere (see Pratt 1996a), dangerousness has assumed a number of different guises. These have included habitual criminals, small-time 'conmen', child molesters, homosexuals, and most predominantly in the last two decades, violent and sexual offenders, particularly rapists. The fact that, over the course of its century-old history, the dangerousness laws have been targeted at such a diverse group of offenders certainly illustrates the malleability of this concept, as well as the kinds of values, economic forces and class and gender interests that have continuously shaped and reshaped the form that it has taken. For example, the dangerous offenders at the beginning of this period consisted, in the main, of petty property offenders — a reflection of the way in which, at that time, property had a value above that of the human body. Post 1970, it is the human body — particularly the bodies of women — which is prioritised. Hence the specific emphasis on violent and sexual offending in the dangerousness laws of this latter period.

But there is more to dangerousness than this. What unites the diffuse mass of criminals who at one time or another have been perceived to be 'dangerous' is the stipulation that

they have to be *repeat* offenders.[1] In these respects, it seems that dangerousness is a creation of modernity itself and the penal values and sensitivities it represents — as well as the bureaucracies and systems of record keeping that it engenders. Thus modern societies do not execute (at least non-capital) offenders; do not banish or maim them; and modern societies also insist that one takes responsibility for one's actions — what happens in one's life cannot be put down to an Act of God or Fate. Modern societies provide due processes of law, inscribe fairness into judicial proceedings, avoid arbitrariness in punishing their offenders by trying to ensure that punishments are determinate and proportionate to the harm done. This is in line with its broader insistence on the logic of rationality as the driving force of legal and scientific progress and decision making.

The problem is though that the 'dangerous' — those offenders who not only cause greatest offence to prevailing sensitivities and values but, who, *in addition*, continue to commit such offences — are clearly not 'rational' in the penological context of this term. How can they be, when they keep on breaking the law and by so doing ignore all the warning signs that a tariff system of penal measures of progressive unpleasantness tries to put in their way? How can they be when they continue to ignore one of the foundation stones of modern penality itself — the less eligibility principle (Pratt 1993)? Instead of recognising the way in which their pattern of crime can only disadvantage them, as any rational citizen would, they continue to ignore this and march onwards to prison and ruination. How can they be rational? And yet, at the same time, they are not sufficiently *irrational* to be accommodated within that small space that modernity has allowed to develop as an exception to its insistence on criminal responsibility — the insanity defence. If the dangerous, by continuing to break it, put themselves beyond the law, they also put themselves beyond psychiatry: they were not demonstrably mad, as the insanity defence insisted that they must be; nor were they murderers — those in whom insanity was usually found in the criminal courts (see Foucault 1988; Wiener 1990).

But at the same time as the record keeping systems of modern societies became more sophisticated (for example, the incremental sophistication of fingerprinting, photography, registers of tattoos, initials, classification of distinctive marks, indexes of criminals' modus operandi, radio communication, computerisation and so on), so they revealed the extent and persistence of persistent offending: an affront to the very rationality on which, it was thought, modern penality should be based (see Glueck 1927). Furthermore, by the beginning of this century, it was apparent that the existing framework of punishment was not sufficient to contain them:

> the habitual offender becomes so case hardened that imprisonment is no punishment whatever to the great majority of the class of offenders I now refer to — the prison is simply a house of refuge. Many of them go there for the winter, to recuperate, and are then prepared for a fresh outbreak upon society. It is a well-known fact that once an individual, whether man or woman, has been converted into an habitual criminal, that individual is just as difficult to reform as a wild beast is to tame (New Zealand *Parliamentary Debates* 1893 vol 81:595).

In effect, at the birth of the concept of dangerousness itself, its offspring had become not only exceptional but also *ungovernable* figures. And it is this ungovernability of the dangerous — a combination of offending of a certain kind and its repetition (in the past or

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1 One of the very few exceptions to the repetition principle that I have been able to find is to be found in the New Zealand *Criminal Justice Act* 1993. Here, preventive detention was made available for first offenders convicted of rape.

the future) — which has led to the creation of the special and exceptional laws to deal with them, as we see from the beginning of this century through to the present time. It has not simply been the case, then, that there has been a 'renaissance of dangerousness' (Bottoms 1977) in the last two decades. Dangerousness has been a constant but perpetually shifting problematic in the penal policies of modern societies throughout this century. And, in keeping with the theme of this volume, all the indications are that it will continue to be so in the future development of penal policy in these societies. For example, across English based jurisdictions at the present time we find a range of initiatives aimed at extending the principle of indeterminate imprisonment (to a greater or lesser extent) to those whose crimes and their repetition have brought them into the class of 'ungovernability'.

Perhaps the most striking example is the United States 'Three Strikes' legislation that has been introduced in both federal and state law in the last two years. In most manifestations, it would appear, two previous offences for sexual or violent offending followed by a third for felony render one 'out' and liable to life imprisonment. Most notoriously, in California, it can be applied to those with two previous convictions for 'serious felony' (Skolnick 1995): in other words, dangerousness has been extended to incorporate a range of non-violent offences. Then there is the Western Australian *Crime (Serious and Repeat Offenders) Sentencing Act* 1992, in addition to reaffirming the viability of the indeterminate sentence, was also prepared to considerably extend the concept of dangerousness to, specifically, 16-year-olds guilty of motor vehicle crime. In Britain, a profound shift in penal thought has been signalled by proposals to introduce a form of 'Two Strikes' life imprisonment for those who commit 'serious violent or sexual offences' and perhaps even more significantly (again demonstrating a retreat from the specificity of dangerousness), 'burglars convicted three times would be subject to a minimum sentence yet to be fixed' (*The Independent* 13 October 1995). The purpose of these measures, it is claimed, is to 'send shock waves through the criminal community ... [and to] put honesty back at the heart of sentencing and it will build a safer Britain' (*The Independent* 13 October 1995). In addition, there are plans to introduce 'secure training centres' for juvenile offenders aged 12 to 14, 'who have committed one imprisonable offence whilst subject to a supervision order, *and have committed two similar offences* ... sentencers will be asked to consider whether or not the offences are serious enough for such an order to be made' (see Hagell and Newburn 1994). In related areas, there have been recent suggestions in New Zealand (Law Commission 1994) for the introduction of a form of 'reviewable sentence' (as proposed in the English *Report of the Committee on Mentally Abnormal Offenders* 1975, but not followed up). This would be able to deal with 'a small number of people who pose a serious danger', drawing on the example of the Washington State *Community Protection Act* 1990:

> the legislation authorises a judge or jury to determine that an offender who is about to be released or has been released is a 'sexually violent predator'. If a judge or jury, after the offender has been evaluated by a professional, determines that the offender is a sexually violent predator, the offender is committed to a secure facility of social and health services (New Zealand Law Commission 1994:88).

In these respects, it is as if dangerousness has become both a creation of modernity and the standards, expectations, values and record keeping it makes possible; and an unsolvable problem for modernity: unsolvable in the sense that it is impossible to pin down — it keeps changing its identity in line with changing penal values and sensitivities — and unsolvable in the sense that the processes of modernity have the technology and sophistication to be able to discover those who keep committing or are likely to continue committing such offences. As such, the continuing debate about the ethics and effectiveness associated with these laws, and which most of the *Special Issues* volume was taken up with, stems from their problematic place within the modern penal framework: we recognise that the

laws may be undesirable — but we can justify a place for them, and we can also bring to bear appropriate knowledge and technology to ensure that they are used in appropriate case, and no more than this. But what happens is that these matters become debates within the broader debate of dangerousness itself, with their own dynamics of expansion (clinical methods of diagnosis against actuarial calculation, new philosophical justifications and so on). Unresolvable in themselves, they also ensure that once the principle of dangerousness is written into penal systems, then it too can never be resolved — only perpetuated in a series of amendations, reformulations, modifications and technological refinements, as its history tells us (see Pratt 1996b). To paraphrase the response of Radzinowicz and Hood (1981) to the Floud and Young Report, the further we go down the thorny road of dangerousness, the thornier it becomes: 'if there is no need to travel [it], why begin?'

The lack of use of the dangerousness laws

Why begin, indeed, to legislate against the dangerous if we know that this will not solve the problem, only perpetuate it? And why begin if we can also see from historical analysis that these laws are hardly ever used, whatever the anxieties that helped to give birth to them. In New Zealand, for example, by 1945, only 605 habitual criminal declarations had been made in the 40 years of existence of the empowering legislation. Furthermore,

> notwithstanding that approximately 30 per cent of total receptions in our prisons are of the petty recidivist type who are not deterred, or in respect of whom society is not protected, by repeated short sentences, there has been no recourse by the Court to [habitual criminal declarations] at least during the past 20 years and possibly longer (New Zealand Department of Justice 1948:4).

A similar picture emerges across the separate jurisdictions of the Australian States over this period (see Morris 1951; Daunton-Fear 1968).

In the United States, the concept of dangerousness came to encompass sexual psychopathy between the 1930s and 1950s. Even so, Sutherland (1950:553) found that 'although these sexual psychopath laws are dangerous in principle, they are of little importance in practice. They are never used in some states and seldom used in the others'. In England and Wales, 'between 1922 and 1928 only 31 criminals, on average, were sentenced to preventive detention each year' (Radzinowicz and Hood 1980:1377); 'between 1928 and 1945 there were 325 such committals (only 7 for offences of violence)' (Morris 1951:65); and 'by 1962 the numbers had declined to only 7 for that year' (Radzinowicz and Hood 1980:1383).

The position seems to have been the same in continental Europe (see Morris 1951), even though it might be thought that the more inquisitorial systems of justice to be found would encourage the use of these measures, given the lesser opposition to be expected from the judiciary in these countries. Indeed, in Western society as a whole it seems that the only three jurisdictions where any significant use was ever made of the power to award indefinite detention on the grounds that one constituted a danger to society were Soviet Russia, Fascist Italy and Nazi Germany (see, for example, Morris 1951) — which in itself provided such power with a postwar taint (Ancel 1965). It would appear that the picture is the same today: for example, the new powers against the dangerous in recent New Zealand and Western Australian legislation have hardly been used (see New Zealand Law Commission 1994; Harding 1995).

But why should they have been so seldom used? Most obviously, there has not been a need for them: there are likely to have been already existing measures of punishment sufficient to contain those thought to be dangerous. A case in point here would be the way in which, in postwar societies, dangerousness underwent one of its periodic shifts and targetted

male homosexuals (see the American sexual psychopath laws of this period, their equivalent in the Canadian *Criminal Code* 1948 and the Queensland *Criminal Law Amendment Act* 1946). But in Britain, the homophobic climate seems to have been just as strong over the same period, there was little use of preventive detention against such offenders. Apart from any other reason, this is likely to have been because the offence of 'gross indecency' (as such practices were referred to in law) then carried a maximum penalty of life imprisonment. In addition, we periodically find new sites of administration being opened up through which it may be possible to govern the dangerous — outside of the specific legal provisions for them. In England, the *Mental Health Act* 1959 introduced 'restriction orders' (another form of indefinite sentence) as a more palatable and progressive means of disposition for 'mentally abnormal offenders'. And what kind of criminals were so judged? One such group were the petty criminals and so on, who previously had been thought dangerous. Now, though, in line with changing values, knowledges and sensitivities, they were in the process of being reclassified as 'inadequate'. This in turn led to a redesignation of the appropriate means of disposition for them: benevolent psychiatric care, as it was thought to be, rather than the harshness of prison.

But perhaps the main (and to some) the most surprising factor responsible for the lack of use of these laws has been the history of judicial opposition to them. Why should this be so? Clearly this is a reflection of the classical jurisprudence in which most judges were and still are trained and the way in which this provides a judicial *weltanschauung* antithetical to dangerousness and the principles and practices on which it is based. Of course, the history of these laws is littered with exceptions to this rule. There are numerous cases where petty thieves or homosexual men have been imprisoned for many years under these measures: we find such cases outrageous today because our thinking about 'what is dangerous' has changed historically, and such offenders no longer come within its frame of reference.

Nonetheless, there is a long line of judicial opposition which has significantly curtailed their use. Indeed, it found expression very soon after their introduction: in *R v Sullivan*, the English Court of Appeal stated that:

> it was necessary in the interests of the prisoner that very watchful care should be exercised by this court and also by those who preside over trials in which a prisoner is charged with being a habitual criminal [and thereby liable to preventive detention], to see that the prisoner's interests are jealously safeguarded, because ... he stands in a peculiar position, which is, to say the least of it, not a favourable one, when the trial of the particular matter takes place before the jury; that is to say, he is first of all convicted of the offence for which he is indicted, then he is put upon trial as an habitual criminal, and consequently, it is enough to say that one must be scrupulously careful to protect him when this particular question whether he is a habitual criminal or not is put to the jury.

During the era of the Sexual Psychopath laws in the United States, it was the judiciary and legal profession that frequently contested — sometimes successfully — their constitutionality (see Pratt 1996b). And at the present time, it has been opposition from the British judiciary which has already made the Conservative government rethink its current proposals to extend the indeterminate sentence and the concept of dangerousness (*The Guardian Weekly* 10 December 1995).

Public demand for protection against the dangerous is not new

However, even though the laws themselves have never been used to a significant extent, there still seems to be an expectation from the public at large that they have a 'right to protection' from such offenders — and indeed, that this is one of the most potent justifications

for their continuation today (Conrad 1982). Politicians frequently justify their introduction of such measures by claiming to act on behalf of these sentiments and expectations. This is clearly illustrated in the New Zealand parliamentary debates on the dangerousness issue during the 1980s. For example: 'the [Criminal Justice] Bill tries to achieve two separate purposes. *They are, first, that people have the right to be protected from violent crime and violent criminals and they expect the house to take a severe attitude towards violent crime*' (NZPD 1985 vol 464:5833, emphasis added). These sentiments are illustrative of what Bottoms (1995:40) has referred to as 'populist punitiveness'. This concept is rather different from 'public opinion' pure and simple; instead, it 'is intended to convey the notion of politicians tapping into, and using for their own purposes, what they believe to be the public's generally punitive stance' (Bottoms 1995:40).

But it has not always been the case that the various articulations and sentiments of the public at large have lent themselves to such special measures. We know through historical analysis of pre-modern societies that the relationship between law enforcement, punitiveness, and the general public was much more fragile than appears to be the case today (see for example Hay et al 1975). What tends to be neglected though, is the way in which this fragility continues into modernity itself. Thus, as we see detailed by Radzinowicz and Hood (1986) and Wiener (1990), a number of the early attempts to introduce laws against the dangerous in the latter part of the nineteenth century came to grief because of politicians' fears that the public would be very *hostile* to such measures. At that time, it was clear that the relationship between state and citizen, the scope of protection that this entailed, and the ways of enforcing this, was perceived in much narrower terms than today: there was, it seems, a great deal of suspicion of state power and the way in which this might be used.

Such hostilities continued into this century, after the introduction of the first dangerousness laws. Indeed, we see the depth of these hostilities in the 1910 New Zealand case of the convict Joseph Pawelka. He had escaped from custody three times while awaiting sentence for offences of burglary, and committed further offences of burglary and arson while a fugitive. He was also alleged to have killed a policeman. On his final recapture he was sentenced to three consecutive terms of seven years' imprisonment and also sentenced to the equivalent of preventive detention, to be served thereafter. And yet, despite his crimes, public sentiments seemed very much on his side. Petitions against the *severity* of the sentence were sent to Parliament. *The New Zealand Times* protested that:

> from Pawelka expiation was due to society for many offences against the law. From society which shared so heavily in this man's guilt something was due to him, and the least of this was that he should have been given opportunity to atone for his sins. Has he been afforded this by a sentence declaring him a habitual criminal and sending him to gaol for so many years that on release he will be approaching fifty? It is impossible to think so (*The New Zealand Times* 9 June 1910).

Such sentiments would, I suspect, and particularly in view of Pawelka's record, be remarkable today. There may well be occasional cries for leniency in exceptional cases (for example, pregnant women, pensioners, or again, reflecting changing values and sensitivities, abused women who defend themselves), but generally, as Bottoms (1995) indicates, the general mood is one of populist punitiveness: a demand for more and fiercer punishment. Nonetheless, the Pawelka case is indicative of the historicised nature of the demand for public protection. It has *not* been a permanent feature of modern societies. Indeed, the last formal record of such opposition to special measures against the dangerous appears in the English *Report of the Committee on Sexual Offences Against Young Persons* (Home Office 1925). Here, it was argued that preventive detention should be made available to

the courts to sanction such offenders, notwithstanding the unpopularity amongst the public of such measures.

From that time on, though, there is a very clear shift in public sentiments. From the late 1920s, it was as if a 'right to protection' was gradually being embedded into the framework of modern society, something akin to the 'right to life' which Foucault (1979) saw as marking the point at which a society could be said to have passed 'the threshold of modernity'. This right to protection would take the form of a contractual relationship between the state and its citizens: protection would be provided from the state (against risks of various kinds, not just dangerous offenders); and in return for which, the state would have the right to assume greater powers over the lives of its subjects. In the *Report of the Departmental Committee on Persistent Offenders* (Home Office 1932), public support for preventive detention as a means of controlling the dangerous is treated unproblematically. There is merely an acknowledgment that 'the present system fails to provide adequate protection for society' (Home Office 1932:4). Indeed, concerns for the need to 'protect the public' came to be increasingly used to justify the special laws against dangerous offenders (see Pratt 1995), to the point now where it seems generally assumed by politicians that the public not only support such measures, but are very punitive in general towards criminals. And in the name of public protection, special measures against the dangerous have been introduced by political parties representing both Left and Right of the political spectrum, have been introduced during the welfare era which dominated political thought for most of this century, and have continued to be introduced during the shift to neo-liberalism in the last two decades or so.

This process seems to have become something of an unending spiral. Despite the elimination of most of the dangers that beset pre-modern and early modern societies (contagious fatal diseases, destitution, arbitrary arrest, and so on), the world still seems to be a 'scary place'. Furthermore, with the proliferation of the news media and information services in the last two decades especially, it seems to be getting scarier all the time. If the old risks we might have faced have largely been eliminated, or at least brought under control, we are constantly informed of new risks that we face: new dangers to the health of our body, for example, not from smallpox or bubonic plague of course, but from smoking, dieting, lack of exercise, too much sun and so on; and new risks from new kinds of dangerous offenders. As Anthony Giddens (1990) has commented, one of the crucial signifiers of modernity is the way in which sources of information about matters such as crime have been transformed. Instead of being learnt from neighbours and extended family they are modulated instead through a news media and other formal information services provided by 'experts' that simultaneously globalises and localises danger.[2] In other words, the risks that we assess ourselves to face from dangerous offenders is brought home to us much more vividly from further afield than was ever likely to have been the case in the past. This informs and fuels the 'right to protection' and so the whole process starts again.

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2 As an example, Lees (1993:27) refers to one such trial in America, televised for eight days in 1991 which 'highlighted so clearly, in the eyes of the law and the press, that having a sexual history makes a woman a bad girl', and therefore, in part at least, responsible for her rape. As such, even in those jurisdictions where law reform of recent years has intended to reduce victim blaming, these much more significant sources of information from the media are likely to shape and control women's self-reflective ideas about appropriate conduct and their own levels of responsibility for inviting or prohibiting attack. Normative standards and expectations are much more likely to be established by the global media than by local law reforms.

To my mind, the shifts in public mood and sentiments that we can trace back to the 1920s are clearly connected to the growth of these new sources of information that begin to become more extensive from around the same time: together, they help to cement this new contractual relationship between individual and the state, creating a different set of expectations altogether about life and security. We find the end result of these processes today: a populist punitiveness, which insists on 'the right to protection' from (here) the dangerous; and a proliferation of sources of information which constantly tell us how imperilled this right is. If we want to assess our risk of becoming a crime victim today, on what do we base this? Probably not through discussion with neighbours or kin, as would have been the case in pre-modern societies; nor even sole reliance on the official crime statistics and the way in which these are reported to us and interpreted for us. Indeed, these are now only one amongst a number of statistical sources of information on crime. These new sources include university-organised crime surveys, independent victim surveys, self-report studies, surveys conducted by phone, those organised by sections of the media and so on — all of which claim to represent the reality of crime, albeit a different version of this reality; and a good many of which tell us that the world is an even scarier place than we thought it to be. As such, one of the more recent lines of criticism of the official crime statistics is that they minimise the crime risks faced by particular sections of the population (see Young 1994).

It is not the authenticity of such surveys and reports that is the point here, nor do I wish to contest the very real levels of fear that some of them indicate. What I do want to suggest, though, is that these disparate 'regimes of truth' about crime risk that they constitute are likely to have a dual effect. They do not simply tap into and report back hitherto unexpressed or unacknowledged fears and risks; they may also actually enhance fear, encourage its growth, add to the sense of uncertainty through their generalising and localising effects. Indeed, the self-protection and security industry has a vested interest in ensuring precisely these effects (see Stanko 1990). Not surprisingly the end result of the popularisation of such truths is that they are accepted as such; and they become truths with effects such as the following, regarding women's fears of sexual attack:

> Violence Traps Women in Web of Fear. Women feel virtual prisoners in their homes after dark and want harsher punishments for sex offenders, including the return of capital punishment, a national survey of women's attitudes shows. A report compiled from 2250 postcards from women reveals that they feel 'like outsiders, marginalised in a violent society, where they have little influence' (*The Australian* 18 May 1994).

This, in turn, although by no means unproblematically,[3] feeds back into the sentiments of populist punitiveness and the need for special measures of protection.

And yet, as the foregoing historical research has illustrated, these laws against the dangerous on which we base our protection are hardly ever used. Certainly, they will ensnare a few from time to time, but perhaps this is not their only function. Perhaps, in addition, the discourse of fear that helps to produce them has a much wider effect: the control of the behaviour of the potential victims of such crimes. Indeed, guidance on how to protect the self from a dangerous offender takes the form, not of specific forbearances, nor of warnings about particular individuals or localities to avoid at all costs whereby, if avoided, danger could be effectively written out of one's life. Instead, they consist of an infinite series of

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3 By no means all the social movements that involved in the demand for protection see this as taking the form of tougher laws.

instructions and tactics whose very diffusion makes them more embracing — 'meticulous, often minute ... they [define] a certain mode of detailed political investment of the body' (Foucault 1977:139). Thus Stanko refers to the 1989 Home Office publication *Practical Ways to Crack Crime* as an example of how these forms of crime prevention have come to be normalised routines. For women, to prevent sexual attack, protecting the self includes:

> keeping curtains drawn at night; using only initials on the flat or telephone directory to avoid being identified as a woman ... face traffic when walking down the street and walk on the road side of the pavement so that an attacker lurking in an alley has further to come to reach you ... scream if approached by a car ... refuse rides from strangers and ... avoid picking up hitch-hikers ... hide expensive looking jewellery [and so on] (Stanko 1990:177).

In effect, the dangerousness debate and the laws that emerge from it have the consequence of controlling the behaviour of a small number of criminals; it has also had the effect of controlling the behaviour of a much larger number of potential victims.

Again, I do not wish to deny such dangers nor the harm that can follow if there is no protection from such risks. What I am suggesting, though, is that as criminologists, instead of continuing the dangerousness debate along its existing contours, which produces laws that are hardly ever used while at the same time endangering the quality of life of the potential victims of dangerous offenders, we should instead be trying to develop, for future purposes, a way of governing the dangerous that does not take us down this 'thorny road'. It is a route, as I have argued that is a creation of modern society itself, but although it is likely to make us more desirous of protection, it does not provide us with much protection. But the task of sketching in a different kind of route is for the future. What I have tried to do, in the form of historical analysis pursued, is to provide comment on dangerousness today, and its effects and functions. This, I hope, will have served the broader purpose of showing how, through history, we can move towards an understanding of present issues and dilemmas within criminology.

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