Violence is not a politically neutral concept, it is entwined with the most fundamental questions of state moral authority (Ericson 1991, p. 233).

Penal signs and symbols are one part of an authoritative, institutional discourse which seeks to organise our moral and political understanding and to educate our sentiments and sensibilities (Garland 1990, p. 252).

Notions of 'dangerousness' are closely related to particular value systems, as well as philosophical, moral and ideological perspectives. Clearly the major values and sociopolitical process in a society will tend to determine what will be perceived, defined, and officially labeled as dangerous, and how conditions and behaviors so labeled will be handled. However, the term 'dangerousness' is rather vague and often receives surplus meanings and varying interpretations. Indeed it has been suggested that, like beauty, dangerousness lies in the eye of the beholder (Shah 1981, p. 235).

AN ANNOUNCEMENT WAS MADE IN EARLY 1991 WHICH REVEALED THAT the Victorian Government intended to introduce a Companion Animals' Bill to go before Parliament in November 1991. This Bill is concerned with special measures for dangerous dogs; that is, those who have killed or inflicted serious injury on a person without provocation. There would be identification on the basis of this past violent behaviour and a distinctive collar would then be worn; certain restrictions would be imposed on the dog's movements and, if these protective measures

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failed, the dog would be killed. These suggestions were commended in the press as being most reasonable and there was little public comment.

It is perhaps rather more curious that special legislation for dangerous people has not aroused much general interest either. Here, the author is mindful of the warning given by Lord Allen, who when writing in a publication of the Royal College of Psychiatrists, stated that:

One very important aspect of this question of dangerousness is the reluctance of the general public to try and understand some of the underlying issues (Allen 1982, p. 1).

Certainly, in the case of Garry David, we have witnessed a hiatus in meaningful dialogue between professionals, the government, the public and the media.

The literary allusions to dangerousness are a revealing guide to the use of this term. Lady Caroline Lamb wrote in her diary that her first impressions of Byron were that he was 'mad, bad and dangerous to know'. Walter Bagehot indicated that 'there is a glare in some men's eyes which seems to say, 'Beware, I am dangerous' and he found Lord Brougham to show 'a mischievous excitability [which] is the most obvious expression of it. If he were a horse, nobody would buy him; with that eye no one could answer for his temper'.

Shakespeare was concerned with dangerousness in some of his best known plays, which serve to dramatise the elusiveness of its meaning. For example, Julius Caesar boasted: 'Danger knows full well that Caesar is more dangerous than he' and he referred to portents such as the hooting of birds in the market place and comets as a means of assessing his own personal danger. Personal qualities were added with the comment that 'Yon Cassius has a lean and hungry look, he thinks too much, such men are dangerous'; yet Caesar completely failed to recognise the signs in Brutus, who presented the real danger to him. Hamlet was another Shakespearean character concerned with his own potential violence, when he soliloquised: 'For though I am not splenetic and rash, yet have I in me something dangerous'.

There is a threefold message firmly entrenched in these literary examples. Firstly, there is the perception that dangerousness is expressed overtly; secondly, that it is profoundly linked with masculinity; and thirdly, it is a propensity inherent in those who are otherwise deceptively conformist. Perhaps Shaw most succinctly exposes the tautological nature of dangerousness in an article in Medicine, Science and Law when he maintains that it is a dangerous concept (Shaw 1973). This confusion does not abate by utilising it as a solution to some of society's misfits, since neither the government nor the public appears to recognise the minefield of ethical and professional problems which then ensue (Petrunik 1982; Sleffel 1977). It is, therefore, a salutary exercise to explore some of the nuances which surround the use of this term.

Nigel Walker has pointed out that we should avoid the abstract category of dangerousness and personalise it. Too often we assume the existence of some innate and specific characteristics and use these to invoke a special status category, which can then be applied to designated people (Walker 1977). Once this is formally invoked, there are no clear guidelines to reverse
such a judgment and, in their absence, we may be condemning selected people to a life of social irresponsibility.

There is no doubt that connotations of uncontrolled and unpredictable violence arouse diffuse anxiety, which can most readily be relieved by the powerful mechanism of scapegoating (Chapman 1968). To categorise individual people as 'unacceptable risks' or 'socially dangerous' is stereotypical thinking—that is, the syndrome or entity of the dangerous person is believed to exist beyond argument. When we do this, all other human qualities are annulled or pale into irrelevance. The term 'dangerous' becomes a shorthand expression in much the same way as the term 'witch' signalled deviance beyond redemption to societies in the Middle Ages (Cohn 1970). Stereotypical beliefs are useful for their ease of caricature, their ability to be readily portrayed in the media, and for the reality they have in the public's mind. However, there is an element of political expediency if policies depend on this sort of portrayal for their acceptance.

Although the term 'dangerous' is so often used in an abstract, sanitised and professional way, it is redolent of the moral condemnation invoked by the word 'evil'. This has religious overtones but attained a scientific status with the criminal anthropology movement, which arose at the turn of the century. Lombroso gave respectability to the belief in a frankly dangerous individual with his terrifying portrayal of an atavistic being, who was a throwback to a lesser form of humanity and thus inherently evil, irredeemable and irresponsible (Lombroso 1913). This notion filtered into legal and psychiatric discourse, ultimately reinforcing juridical, political and community belief systems.

It was Michel Foucault who was quick to point out that it was the development of these anthropological notions around the turn of the century which led to the introduction of social defence principles and encouraged a transposition of the notion of 'no fault liability' embodied in the civil law, to pertain to the criminal law. The existence of dangerous citizens accorded this status on account of both their actions and their personality could be seen to justify the absolute power of the state in such a way that there was no conflict with the ordinary process of the criminal law (Foucault 1978, pp. 16–17).

It is professional understandings of the motivation of criminal and antisocial behaviour which have unwittingly contributed to the political use of dangerousness. For example, there was the firm belief within positivism, which prevailed until the 1960s, that one could draw distinct lines between the dangerous and non-dangerous, just as the criminal and non-criminal could be separated (Petrunik 1982, p. 241). The consequences for the dangerous individual were logical, but severe: either elimination, isolation on an island or in a maximum security institution, or castration in the case of the repetitive sex offender. There is, of course, an historical legacy for such public policy responses to those whose behaviour is perceived to constitute a threat. Foucault refers to the extrusion of lepers in the Middle Ages and the ships laden with the mentally ill and vagabonds floating down the Rhine in a bid to find acceptance elsewhere (Foucault 1965; 1977). We should not dismiss this societal response as the mere ignorance of the times, since in the absence of an immediate cure, we have also seen the enforced isolation of those with syphilis and tuberculosis, and it is worth
noting that we are now reviving this same social defence principle with respect to some AIDS carriers (Sontag 1988).

The significance of professional involvement in defining and accepting the term dangerous cannot be underestimated. One consequence is that the actions of governments in relation to legislation about dangerousness are now affirmed more confidently in the belief that it is a concept with an objective base. Professionals have found themselves unwittingly coopted to use the label formally. In so doing, they have become the experts and have controlled the parameters and consequences of its application. Petrunik suggests that by this mode they have enabled authorities to 'legitimate social control policies and practice' (Petrunik 1982, p. 266). In Foucault's terms, society gains control over the nature and personality of the dangerous individual (Foucault 1978). Dangerousness may, in essence, on this view, be a political and administrative concept and for psychiatrists and lawyers to claim otherwise is a prostitution of their professions.

A further semantic problem arises in the linking of 'dangerousness' with 'psychopathy' or the more fashionable 'antisocial personality disorder' (see DSM–III–R 1987, pp. 346ff.), since this is a further way of reinforcing its special quality. The very term 'psychopath' is ambiguous and acts as a 'persuasive device' to alter the observer's view of the object, so that it is pejorative rather than scientific (Gusfield 1963; 1981; 1986). If one considers closely the way in which terms such as 'dangerous' and 'psychopath' are invoked, then there is a great deal of circularity. A person is dangerous when some form of containment is considered desirable and, as has been endlessly pointed out, a psychopath is a psychopath because he commits antisocial acts and the reason he commits antisocial acts is because he is a psychopath (Ellard 1991). Kittrie reports Seymour Halleck's comments that:

Even within psychiatry, there is widespread disagreement as to whether psychopathy is a form of mental illness, a form of evil or a form of fiction (Kittrie 1972, p. 170).

Nonetheless, from the 1920s onwards legislatures responded to public fears and devised laws specifically referring to 'psychopaths'. In so doing, they invested it with an unwarranted scientific significance and ignored its mythological origins and amorphous nature. One can only conclude that such laws built so freely on such an uncertain legal base had, as their major object, the incapacitation of a wide variety of deviants. The significance of this new sentencing direction cannot be underestimated. Governments were creating a special type of offender with distinctive characteristics, who were considered a priori to be antithetical to the security of society. The performance of a punishable act was not to be dealt with in its own right, but as an indication that more such acts would be committed in the future. The application of this consequent legislation was capricious, draconian in its use of indeterminate confinement and it applied to a broad range of both trivial and serious offences (Sleffel 1977).

Gradually, the self-evident nature of psychopathy began to be questioned as a basis for double jeopardy, which was forbidden by the due process requirements of the American constitution. This was overcome by declaring
such persons to be status offenders and the proceedings to be civil, rather than criminal (Petrunik 1966; Brake & Rock 1971). In resiling from one legal fiction, the courts were clearly creating another, called by Dershowitz the 'labeling game' (Dershowitz 1973, pp. 1277 & 1295). A defendant had no grounds of appeal if the court decided that the intention of the hearing was to treat, rather than punish. This meant that the normal criminal safeguards did not then apply because the hearing fell into the civil category. Thus psychopaths, because of their supposed dangerousness, joined the ranks of other status offenders who needed care and protection—the mentally ill, juveniles, drug addicts and alcoholics. The reason given for the decision varied from the simple assertion that the proceedings were 'clearly, demonstrably or manifestly civil' (Dershowitz 1973, p. 1296) to the fact that the psychopath statute was not incorporated in the criminal or penal code. Even worse, some statutes were deemed to be civil, simply because the usual criminal safeguards were not built in and it could then be claimed that proportionality or protection against cruel and unusual punishment, self-incrimination and ex post facto laws were not applicable (Dershowitz 1973, pp. 1299–1300).

Finally, there is also an element in which dangerousness can be viewed in Edelman's terms as a 'condensation symbol', helping to construct and sustain our beliefs (Edelman 1988, p. 22). Once the law attaches the label to a person, it does so with authority and clarity. Competent, respected professionals combine to bring a judgment to bear on someone whose actions or utterances are considered threatening to society. The concept is reified in what is a symbolic exercise of political power, which can then later be invoked in times of fear or uncertainty. Government distances itself by passing the responsibility to a court to persuade us of the rationality and morality of the solution initially devised by Parliament. Once this step has been formally taken, there are a number of consequences which inevitably ensue and these will be sketched in briefly.

At times when such legislation is paramount, it appears that the community has lost its capacity to confront the difficulties some of its antisocial members face and so it engages in a ritualistic process of depersonalisation. This is akin to the status degradation ceremony of which Garfinkel wrote, whereby the 'public identity' of a person 'is transformed into something looked on as lower in the local scheme of social types' (Garfinkel 1956, p. 420). Guilt or innocence is not the issue, but 'total identity', which Garfinkel considers includes motivation or intent, as well as overt behaviour.

The denounced person must be ritually separated from a place in the legitimate order, i.e., he must be defined as standing at a place opposed to it. He must be placed 'outside', he must be made 'strange' (Garfinkel 1956, p. 423).

It is a ritual segregation of the individual from society in both a physical and symbolic sense and it is considered to be necessary in order to reaffirm society's moral boundaries at a time of anxiety. The Community Protection Act 1990 (Vic.) could be said to provide the clearest legislative example of such a
symbolic ceremony because it has been applied to a single person, namely Garry David, who does not otherwise come under the umbrella of the mental health or criminal justice systems. This legislation appears to have been born both of despair and expediency.

Gusfield claims that one form of political symbolism is gestures of differentiation (Gusfield 1963). The government acclaims those of high status with public rewards and it denigrates those who appear to repudiate society's values, especially by threats of violence. In Gusfield's words, symbolic acts function 'to organise the perceptions, attitudes, and feelings of observers' (Gusfield 1963, p. 167). When any specific Act of government is limited in its application to one person, it highlights society's power and acts as a persuasive device by using both law and language to express values. The citizen feels secure and is unlikely to argue against such legislation, which has no direct impact on his or her lifestyle.

The Community Protection Act combines three basic political elements. There is, firstly, the symbolism of the stereotyped portrayal of a violent, dangerous individual; secondly, there is the instrumental intention to keep an evil person locked up; and finally, there is expressiveness in the outcome of harnessing our fears (Gusfield 1963, pp. 167–8). One can perhaps view it as an extraordinary rite for the expulsion of evil (Szasz 1970, pp. 260–75). In this sense, it is 'safe' legislation, expressive of the government's concern for the community and, therefore, it is not surprising that there was no public debate about the nature of the Community Protection Act either during its passage through Parliament or later at the time of its legislative extension. This is even more understandable if one heeds the words of the sociologist, Stivers, who has written that:

> The concept of scapegoating combines both symbolic and expressive dimensions of human action. Scapegoating is an expressive act in which others heap their guilt, anxiety, hatred, and sins upon an object or person in order to purify themselves. The scapegoat carries the burden for the rest of the community. However, the scapegoat also stands symbolically for what is evil. Moreover, communities devise regular procedures or ceremonies for the handling of the scapegoat. If scapegoating provides for the expression of emotions, it occurs within a ritualistic framework (Davis & Stivers 1974, p. 8).

The arch polemicist, Thomas Szasz, conveys a similar message when he describes how rules and ritual, which depend on psychiatric and medical evidence, invalidate the person as psychologically unfit in much the same way as primitive and earlier societies might have done for their own purification and survival (Szasz 1970).

> The scapegoat is necessary as a symbol of evil which it is convenient to cast out of the social order and, which through its very being, confirms the remaining members of the community as good (Szasz 1970, p. 266).

Kenneth Burke has also pointed out that there is a 'constant temptation' of societies to pervert the sacrificial principle by scapegoating and segregation in symbolic action, and man is the only species adept at this response, when no
rational solution presents itself (Burke 1968, p. 451). However, what is generally not recognised is that there is a counter response on the part of the person scapegoated. Not unnaturally, one may expect that there will be resentment at the overwhelming exercise of state authority calculated to induce powerlessness, but there is also likely to be a degree of acceptance of society's damning indictment. This participation in the segregatory process became clear in an observation made to Mr Justice Fullagar during the initial hearing of the Community Protection Act by Dr. John Grigor:

Garry retains such an appalling self-image that he is indeed evil beyond comprehension, that when people respond positively to him he finds this very threatening, becomes so destructive in the relationship that eventually he frightens those who have become revolted by him and let him know this (Hedigan, J., Judgment in case of Attorney-General of Victoria v. Garry David, Supreme Court, October 1990, p. 19).

The identification of a person as 'evil' or 'dangerous' is dehumanising and overrides other human qualities. It is a defence mechanism employed as a response to fear (Bernard et al. 1971) and can be more readily invoked in pluralistic settings than in smaller tightly-knit communities, where the subject of debasement is appreciated in a more fully-human sense. Authoritative action does not then need to be so demeaning and overwhelming in its impact.

A further consequence of basing legislation on the notion of dangerousness is that it is extremely difficult to make operational in any rational way. Norval Morris relates this problem to the 'vagueness' and 'plasticity' of the term itself (Morris 1974, p. 62). There is the problem of deciding just what it is about the person's behaviour which will fulfil the legal criteria of dangerousness. Is it sufficient simply to isolate examples of dangerous behaviour, which have occurred and extrapolate these to some unknown future situation? How many such previous incidents are necessary to confirm dangerousness? What we are really seeking to do is to take behaviour out of context and endow it with special significance to achieve this judgment. It is an ex post facto reconstruction assured of success, especially when the legal standard is the civil one of on the balance of probabilities. If we are to build in a safeguard of judicial review in relation to a person who has been deemed to be dangerous, what evidence could be given of behaviour in an institution with other violent offenders substantial enough to change the initial decision? This is the most compelling doubt to cloud the notion that a provision for reviewable sentences is sufficient to ensure due process (see Svensson 1992). As Shah points out we are making the assumption that:

... samples of dangerous behaviour are fairly typical of the individual and are likely to be displayed in other situations as well. Hence, through a conceptual short-cut, certain aspects of the individual's behavior are defined as dangerous, and then the individual himself comes to be viewed and labeled as dangerous. This, of course, can be quite misleading inasmuch as violent and dangerous acts tend to be relatively infrequent, occur in rather specific interpersonal and situational contexts, may be state-dependent (e.g., under the influence of alcohol or other drugs), and may not be very representative of the individual's more typical behavior (Shah 1978, pp. 227).
There is a sense of unreality in creating special rules to deal with one such individual or a class of individuals, and it is somewhat ironic that the law believes it can objectify dangerousness at a time when psychiatry has finally conceded that it cannot. The exercise loses sight of the fact that violence and dangerousness are quite pervasive in society and that many other people have demonstrated that capacity in actions which have harmed others.

There is as yet another unsatisfactory aspect in the way in which the term 'dangerousness' is used and that relates to its elasticity. It is, as Morris points out, a 'dangerously expansive rubric' (Morris 1974, p. 72). Once it has defused the anxieties engendered by a particular problem, the solution lends itself most readily to related ones. The abuse of civil commitment procedures for political dissidents in the former Soviet Union is just one such example and the proliferation of sexual psychopath laws in America is yet another. Linda Sleffel's analysis of the variants of the latter's use indicates that the perception of dangerousness relates as much to the jurisdiction in which it occurs as to the characteristics of particular offenders (Sleffel 1977, pp. 46–55). The selectivity of presenting individuals for this sort of scrutiny is inevitable and a recent Canadian sentencing study noted that it is unclear why offenders designated as 'dangerous' have attracted the label:

In terms of the extremity of violence displayed in the commission of an offence, there is actually little to set this group apart from many other inmates in the general penitentiary population (Canadian Sentencing Commission 1987).

It would seem from the Canadian data that factors other than the labelled offenders' behaviour appear to be used in the process of designating one offender as more dangerous than another (Webster et al. 1985, p. 143). There was inconsistency in the application of provisions across the country and variability in their use. For example, in 1982, of the thirty-two offenders so designated, eighteen were sentenced in Ottawa, which seems to indicate a local sensitivity to a particular offence or offender, or the inclination of a particular Attorney-General to bring such an action (Webster et al. 1985, p. 144).

Sentencing for future possible dangerousness is unsatisfactory in that one can never be assured of its necessity. For even if we are tempted to extrapolate incidents from the institution and assume that such events would have occurred in a community setting, we can never be certain, nor can we assess those aspects which can act as a counterbalance to violent tendencies. Such legislation has overtones of expediency. It may simply be a pragmatic solution to fill the gap where criminal sanctions appear not to have worked and the mental health option has been closed and, in this sense, can be described as hybrid. There is also a degree of ambivalence about its sense of direction and the options which should be made available. For example, there is a clear distinction between a purpose of treatment and that of management or what may be a warehousing for misfits, and it may well be that such goals become intertwined because of a lack of the necessary facilities (see Victoria. Parliament. Social Development Committee 1990).
Legislation focused on the personality of the individual, rather than the offence, confirms its hybrid quality and bypasses the conventional principles. When the likelihood of future offending is at stake, the consequences cannot be considered in terms of proportionality, which is an accepted sentencing constraint (R v. Veen (No. 1) [1979] 143 CLR 458). Jurisdictions must err on the side of caution and indulge in indeterminate sentencing or guesswork about the necessary period of confinement. It is difficult enough to balance sentencing principles in ordinary cases, but preventive detention seems to base itself on incapacitation and use rhetoric to deny retributive elements in the belief or hope that there will be a positive benefit for the person concerned. The confusion of goals is endemic by the very nature of the legislation.

There has been a clear tendency that, as legislatures have lost their more draconian powers to impose capital punishment or indeterminate sentencing, the notion of identifying and imprisoning the dangerous offender comes to have greater appeal. With the current emphasis on community-based corrections, there is a bifurcation with prisons becoming associated with the retention of only the most inhumane and violent members of society. In the public's mind, this reinforces an immediate symbolic link between the prison and dangerousness. The paradox here is that, in a law and order environment, a government may be seen to be acting fearlessly in reinforcing this perception through preventive detention and longer sentences for notorious offenders, while actually increasing the 'softer' community-based sentencing options, which are less visible and may otherwise generate alarm. Once again, it would appear that scapegoating has become a mechanism to camouflage a political agenda. One need go no further than an American National Advisory Commission report of 1973 to find evidence for such a possibility. Here it was suggested that 'clear authority to sentence the dangerous offender to a long term of incapacitation may induce the legislature to agree more readily to a significantly shorter sentence for the nondangerous offender' (United States. National Advisory Commission on Criminal Justice Standards and Goals 1973, p. 156). As Norval Morris comments, this is tantamount to the government asking for a mandate 'to deal unjustly with a few so that we can persuade the legislature to deal more effectively with the many!' (Morris 1974, p. 65). One must question whether the effectiveness of an official policy of decarceration is dependent on devising special dispositions for a few who do not readily fit within the existing system.

Shah has rightly pointed to the dual powers of the state to create a framework of preventive detention or enforced treatment (Shah 1981). The basis lies in its parens patriae function, which has two deceptively separate arms. It is the attempt to combine these that leads to confusion over what to do with someone who seems to have characteristics of both madness and badness. On the one hand, the state has a duty to act as a guardian to those unable to care for themselves and to provide them with care, protection and treatment, as in the case of children and the aged. On the other, the state must also accept authority for the enforcement of laws and regulations for the protection of public health and safety, which is essentially a coercive police-type power. For the state to assume the welfare function of treating a defective personality on the grounds
that the public requires protection from the danger which that person poses is to combine both parens patriae roles in the one operation. As a consequence, those jurisdictions experimenting with specialised legislation have straddled the criminal/civil area, because the court's interest focuses not on the offence, but on the potential for doing further harm as a consequence of personality characteristics (Ancel 1965; Foucault 1978).

In the light of this general overview of dangerousness legislation, it is proposed now to consider some of the features of Victoria's foray into the area of preventive detention with the initial warning that the mere existence of legislation confirms, in the minds of most people, its necessity (Arendt 1951).

The Community Protection Act empowers the Attorney-General of Victoria to apply to the Supreme Court for an order that Garry David be placed in preventive detention (s. 4). Power is granted to the court to make an interim order for detention pending a hearing. The test to be applied by the court in determining whether to order preventive detention for Garry David is set out in s. 8(1) as follows:

If, on an application under the Act, the Supreme Court is satisfied, on the balance of probabilities, that Garry David —

(a) is a serious danger to the safety of any member of the public; and

(b) is likely to commit any act of personal violence to another person—

the Supreme Court may order that Garry David be placed in preventive detention.

The original Act stated that such an order is required to specify the period of detention which must not exceed six months (s. 8(2)(b)). On application by the minister, orders for further detention may be made by the court for periods of up to six months at a time (s 9)—later extended legislatively to twelve months.

When the Act was first introduced into Parliament, many politicians of both persuasions were on record as saying that they were voting for it reluctantly solely because of the sunset clause limiting its operation to twelve months (Victoria. Parliament. Legislative Assembly 1990; Legislative Council 1990). Yet, with little further debate, there was an amendment passed in 1991 to increase the possible term for a further three years, creating a total of four years in all. No doubt, the view was taken that this period could be used to devise a satisfactory management program and prepare Garry David for release, yet it has been the uncertainty of his status and the varied locations within the prison and mental health systems which have militated against such an objective. The ambiguous intent of the legislation is indicated in a further statement of its purpose, which is '[to provide for] the care or treatment and the management of Garry David'. It is a very powerful piece of legislation in that it co-joins the interests of Parliament, the Supreme Court, the Office of Corrections and the Health Department.

The perceived necessity for such legislation must be understood against the background of the random violence of the Hoddle Street and Queen Street massacres which had shaken the community. Garry David's chilling threats, published prior to the completion of his lengthy sentence, invoked fears of
such a repetition, and the fact that he had been involved in unusual and dramatic forms of violence previously strengthened the Government's resolve and led to public statements by ministers that he would not be released. As Petrunik has noted, considered objectively, there may be other 'harmful situations or practices which, although more widespread or greater in impact, are less salient' (Petrunik 1982, p. 242). Wittingly, or unwittingly, Garry David himself by his threats had set the agenda.

The media reinforced the stereotype with an intense flurry of reporting both before Garry David's due date for release and during the 1990 hearing of the Community Protection Act. It certainly paved the way for the 'degradation ritual' with the use of headlines which were dehumanising or distancing. Phrases such as 'Danger Man', 'Psychopath', 'Madman', 'Australia's Most Unwanted Man', 'Gunman', 'Scarred Legacy of the 60s', 'Public Enemy' and 'Monster' titillated the imagination. Other headlines referred to likely future actions as 'Vows He'll go on Killing Spree', 'Torture Target Living in Fear', 'Danger to Police', 'Murder Threats', 'Wanted to Torture Fellow Inmate', 'Sex, Drugs and Abuse', 'Forty-Nine Steps to Bloody Terror', 'Blueprint of Death', and 'Guerilla Warfare'. The message clearly being conveyed by the media throughout was that this man encapsulates evil and must be removed from society.

The press had a field day and, at some stages, their behaviour was quite appalling. Not only was there a concerted campaign by one daily to convince the public of Garry David's dangerousness before he was due for release, but there were attempts to preempt the issue during the hearing of the Community Protection Act. Both sides complained and were in agreement that it was 'outrageous' and tried on numerous occasions to have the style and nature of the reporting restricted. Attempts by the judge to moderate this press activity were hampered by what he perceived as a fundamental lack of power. As there was no jury to be influenced, he was the only person, apart from future witnesses, who might conceivably be affected. Yet, it was a matter of some concern when documents labelled 'Confidential' and 'Privileged' at the Mental Health Review Board hearing, were reprinted in the evening paper for community consumption.

Dialogue between the public and media throughout the case was of a different order to that occurring between psychiatry and the law, where there was a more realistic appreciation of the complexity of the issues at stake. The former was more in the nature of a 'spectacle' for a receptive public, whose helplessness was emphasised by being informed of the negotiations and policy occurring at the most senior levels of government (see Edelman 1988; Cohen & Young 1973; 1981; Ericson et al. 1987; 1989). As Edelman has indicated, action may then be instituted on the basis of nebulous phrases which have no specific referent—such as 'in the public interest'—thus instantly creating a framework where there can be no compelling counter-argument. Even the wording of the Act has something of this generalised appeal when its purpose is stated as being 'to provide for the safety of members of the public'. Certainly, during the ensuing court hearings, it proved difficult to give this phrase any precise legal definition.

In view of the fact that the matter is again before the Supreme Court (as at October 1991), the author shall confine comments to the initial hearing which
took place in 1990 and make some general observations about legislation of this sort. Under the Community Protection Act there is no charge and there has been an excessive period of remand—some five months in 1990 and six months in 1991. Clearly, the situation might possibly have arisen whereby the Supreme Court found Garry David not to be dangerous and he would then have been held in custody in the absence of a charge for substantial periods of time. The mode of substantiating dangerousness raised issues when it was recognised that the Community Protection Act allows for unfettered judicial discretion to gather evidence, including hearsay, which is generally not admissible. This raises the jurisprudential issue of whether anyone should be deprived of liberty on the basis of hearsay evidence, and it highlights the lack of guidance given to the court, since the strict rules of evidence pertaining to its usual criminal jurisdiction do not apply.

It is interesting to note that it is the Attorney-General of Victoria who initiates the action in the Supreme Court and, at the same time, becomes a party to the action. In addition, the custodial time limits established by the Act were set by Parliament, thus infringing the separation of powers of the executive and judiciary and also raising the spectre of 'cruel and unusual punishment'. On the surface, it appears that the Victorian Government intended to allow the Supreme Court a discretion, but gave it no guidance as to its exercise, which creates a new power or duty to restrict the liberty of one named person. In its usual jurisdiction, the court is bound by the standard of proof being 'beyond reasonable doubt', but this Act puts the onus of proof at the civil standard of 'on the balance of probabilities'.

In the 1990 hearing, the Judge was concerned with the time that the matter could be expected to take, given Garry David's counsel's wish to argue the constitutional right of the Victorian Parliament to enact such legislation while Garry David himself was being held on an interim order. It is not often that a Supreme Court Judge directs his comments to the government, but in this case it was noted that 'this should be a matter of concern to the Attorney-General and his advisers'.

In the hearing itself, the court was empowered to call extraordinarily wide-ranging evidence but, as has already been argued, any decision as to future possible dangerousness must remain speculative, rather than factual, despite the care taken in the handling of such a case. Relevant material tendered in this instance related to judgments made within a prison environment, where violence is to some extent condoned and, on such a basis, incidents were extrapolated as being relevant to future living arrangements in the community. Given the issues at stake, it was inevitable that an adversarial element crept into the court process and psychiatrists were placed in the awkward position of having to predict dangerousness, no matter how equivocally they phrased their evidence. For some time, Alan Stone has argued that the role of psychiatrists should be restricted in court, so that they are not 'alternately seduced and assaulted by the power of the adversarial system' (Stone 1984, p. 58). There is an argument that predictive evidence should not be provided to the court, especially given its considerable weight in such an unusual hearing and the fact that the solution sought is essentially of a political/administrative nature, rather than treatment-oriented.
There were some drafting faults, which became clear in the early directions' hearings, when the procedure for handling the issue was being identified. Even if the judge were to be satisfied that Garry David, the subject of the Act, posed a serious danger to any member of the public and was likely to commit any act of personal violence to another person, the legislation stated that he 'may' order his detention in a psychiatric in-patient service, a prison or another institution. This can only appear as a further abrogation of responsibility and was the subject of comment from Mr Justice Fullagar that Parliament 'had thrown the buck to this court'. It is legitimate to question whether the legislation was designed to fully allow the court to have a real discretion in the matter of outcome, even given a finding of dangerousness. Should its role perhaps have been limited to such a finding and then a special tribunal convened to consider the options, including the real one—that of taking no further action? Nigel Walker makes the suggestion that there would be two advantages with this arrangement: the sentencing functions of the court would not be compromised, and the protection of society would be seen as something apart from other sentencing. A separate authority would then have the opportunity to build up expertise in this very limited area of law (Walker 1978, p. 65).

Another problem which surfaced during the court hearings related to the definition of key phrases—such as 'safety of any member of the public', 'serious danger' and 'likely to commit any act of personal violence'—and these were the subject of extensive argument. How can the precise degree of risk be defined for the purpose of confinement in the absence of a specific charge? Presumably, as Garry David's counsel argued, the risk must be substantial and real, not just a remote chance and 'safety' must infer protection from a serious and life-threatening injury. Counsel for the Attorney-General argued that it was sufficient if any member of the public had a justifiable fear of Garry David and if this affected their perception of their own safety or caused them to adjust their life-style in any way. It would, of course, be surprising if no reader of the Sun-Herald newspaper remained unfearful considering some ten months of consistently lurid headlines. Do published threats of a frightening nature constitute a real threat 'to the safety of any member of the public'? Is it sufficient if evidence can be given that the public has become convinced that there is a possible danger? The term 'personal violence' in s. 8(1)(b) was also subjected to scrutiny. There is no suggestion that general threats are to be included here, but that the violence must be to another person. This violence may be some sort of assault, but not necessarily of a serious nature.

The interpretation of such key phrases was clearly crucial to the evidence called and the outcome of the hearing. For example, at one stage counsel sought to argue that a serious risk existed a priori because it had already been established and accepted by both parties that Garry David had both borderline and antisocial personality disorders. In itself, this becomes an insidious argument, because mere reference to this label from the earlier Mental Health Review Board hearing and the use of that transcript of the evidence, could perhaps have preempted the immediate hearing. Fortunately, this was not a course of action taken by the court.
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The written judgment of the initial hearing draws attention to some of these inherent difficulties with the comment that 'it is not surprising that the wording of the Act gives rise to some difficulties of construction, having regard to the controversy which must have surrounded its origin and formulation'. At another point, Mr Justice Fullagar said 'all I can do is complain about the legislation'.

There were further difficulties which became apparent because of the unique nature of the legislation itself. The Act was intrusive and breached confidentiality. This matter was noted at the outset, when the Judge inquired as to the reasons why the confidentiality exercised so carefully by the Mental Health Review Board did not subsequently apply. As already mentioned, there were clearly grave problems regarding the justice of proceedings constituting various opinions about Garry David's dangerousness being reported in the press with the likelihood of influencing future witnesses.

There were also few ground rules in the case. The Judge was empowered in s. 7 of the Act to receive reports relating to Garry David including 'reports made to, or by, the Adult Parole Board'. (The 1990 Act states that the Judge 'may' receive or require reports relating to Garry David, and the 1991 amendment is that he 'must' receive, if tendered, or may order such reports.) This, in itself, raised a problem of a different sort, whereby such Parole Board material would not be divulged to the open court and, hence, would not be available to Garry David himself, although it could provide the Judge with convincing evidence as to his dangerousness. Yet the same section of the Act allows for the 'right of Garry David in proceedings before the court to appear to be represented and to cross-examine witnesses'. Clearly, this was a problem not foreseen in the drafting of the Act and in the haste to have it debated in Parliament. (In reality, the only confidential material admitted to the court was that relating to the security provisions of Ward M6 at Mont Park and not that relating to the health of Garry David.)

But the fact that s. 7 of the Act stipulated that the Supreme Court is to be bound 'by the rules and practice as to evidence' (except as otherwise provided) meant that the material had to be openly available to allow for rebuttal. This entailed several days of reading out aloud detailed nursing, prison and medical notes from the beginning of 1990, in order to highlight and submit as evidence incidents of Garry David's dangerousness when thwarted and his unpredictable violence. Such microscopic examination of daily events in a controlled environment might lead to a similar conclusion about many custodial inmates, if tested in the courts. The chance of effective rebuttal would seem to be slight indeed, and the hypothetical nature of an exercise which extrapolates likely behaviour to some unknown, future setting is clearly evident.

Garry David's counsel indicated, at the outset, that his client objected to the use of such material from the notes because, if he were to be confined later in a particular facility, the chances of a therapeutic relationship could be destroyed—a not unreasonable proposition, given that treating personnel were also forced into the invidious position of offering frank assessments about Garry David's dangerousness in front of him in the courtroom and were cross-examined on their views at some length.
It was heartening that Mr Justice Fullagar, in his findings, referred to 'one unhappy consequence of the Act' as being to require the Judge 'to engage in a kind of character assassination in public' by having to weigh up Garry David's character, propensities, 'intimate details of past conduct' and his mental condition in published reasons. The medical evidence was given in front of him 'without any inquiry before the court as to any possible adverse consequences to him of the adoption of this course'. Thus, it is the very nature of the Community Protection Act per se which contravenes the current emphasis on the protection of confidentiality and provides a source for real conflict between the law and psychiatry.

The purpose of the Community Protection Act is quite clearly expressed as being that of 'preventive detention' (s. 4), but this also was the source of some confusion serving to put Garry David into limbo with no guidelines as to his rights, and it is also antithetical to the ideology of both the 

Corrections Act 1986 (Vic.) and the Mental Health Act 1986 (Vic.)—both of which were proud cornerstones of the Victorian Labor Government's social justice strategy. As an ordinary prisoner, Garry David would be allowed to refuse treatment, but within the mental health system this right could be overborne. What, then, is the right of someone who has an order for preventive detention? Does lack of cooperation entail indefinite incarceration? Such questions are indicative of the lack of clarity even surrounding the espoused purpose of the legislation. Certainly, the responsibilities of Garry David's custodians—whether prison officers or therapists—are not clearly defined. As Dr. John Grigor explained about Garry David's treatment during the 1990 court hearing, 'I am not his treating doctor now, but a guardian under the Community Protection Act. He is not technically a patient'.

Garry David himself is adept at exploiting this confusion and refuses to cooperate with an enforced management plan by referring to other societal values; that is, freedom of choice in the absence of a criminal conviction or civil commitment. In the Weberian sense, he is effectively challenging professional power to control a certain course of action (see Cicourel 1986). He is also challenging the power of the state to bring the action when he refers to himself as 'a political prisoner'. This evocative phrase shifts attention from his own behaviour to the motives of those bringing the action against him. It is the framework of the legislation which allows him the recourse to construct his social world as a battleground and thereby avoid responsibility for his own behaviour. If the Community Protection Act is seriously intended to be the vehicle for his rehabilitation, then its very nature constitutes a barrier.

The appropriateness of the Act is also clouded when it is viewed as an explicit status degradation ceremony created to enforce compliance with society's values. Such ceremonies are based on the cultural mechanism of shaming which reinforces the values of the group. However, what has not been recognised by the legislators is that this social and psychological pressure for conformity may be irrelevant to someone who has not passed through the ordinary processes of socialisation. In the case of Garry David, there is every evidence that he has been stunted socially and emotionally at an early childhood level. The very diagnosis of antisocial personality disorder or borderline personality disorder confirms an imperviousness to group
values and processes. In this sense, the Community Protection Act may be based entirely on a false premise.

Although the Act is deceptively simple, it raises a host of issues because of its unusually oppressive nature and the difficulty of balancing the interests of the community with the rights of Garry David. For example, should there be a right to counsel during psychiatric or other interviews, which after all may provide the main basis of evidence? Would Garry David’s refusal to cooperate constitute contempt of court? Does he have a right to an independent private psychiatrist? What is really the nature of the medical testimony required by the court—can it go to the ultimate issue which is that of dangerousness? How can the evidence be rebutted satisfactorily? If we are to have some form of dangerous offenders’ legislation in the future, as has been signalled by the Attorney-General, should there be a right to jury trial and what appeal processes would be allowed? The questions are endless and raise a myriad of libertarian issues yet, in reality, custodial options are limited, despite all the safeguards which may be put in place. Victoria does not have any specialised facility for those with personality disorders.

There are also a number of moral dilemmas which arise when trying to make the general principle of social defence operational in a sense consistent with legal principles. One might argue, for example, that human beings have the right to choose to be bad, in which case they will suffer the punitive consequences; but that the state has no right to impose enforced therapy to correct such a possible future choice. This argument becomes even stronger when the past bad behaviour has already been punished, yet society acts in the belief that it is going to continue and disregards the principle of proportionality. In the High Court hearing of R v. Veen (No. 2) ((1988) 62 ALJR 224), Deane J. (at p. 495) did allow for some extension of this principle should a community wish to introduce a separate system of preventive detention for those who might possibly represent a grave threat to society if released, providing that review mechanisms were built in. There is certainly more honesty in having a separate process not linked to moral culpability and retribution, provided that community protection is believed to be necessary. This avoids the uneasy compromise represented by the current Community Protection Act, although some of the more general problems must remain inherent. (Victoria formerly had legislation targeted at habitual offenders, but it fell into disuse because it was simply a harsher form of sentence, without procedural safeguards, and it bore little relationship to the seriousness of the offending pattern.)

Some would take the view that legal theory needs to be flexible enough to accommodate solutions, but must do so openly and not through the ordinary sentencing or mental health processes. As Williams has argued, preventive detention may, therefore, really be an ideological choice between civil liberties and those wishing the reframing of legal options on the ground of community protection (Williams 1990). Proponents of the latter course must at least recognise the difficulties which arise in legislating for dangerous persons. No amount of care for due process can conceal the fact that the state is acting belatedly, although in a politically tenable manner, to restrain rather than improve child welfare services, which may have served to prevent the outcome of prolonged neglect or abuse and sporadic attempts at treatment.
In the case of Garry David, there are lessons to be learned. Not only has he been the victim of institutional neglect over a prolonged period of time, but he has also tested the system in a most dramatic way which, in turn, has provoked a unique counter reaction in the form of a personal Act of Parliament. In relation to his dangerousness, we can only really be certain that he is a danger to himself and that he perceives the outside community to be dangerous to him. In this sense, the Community Protection Act may be something of a misnomer and, paradoxically, it may serve to prolong Garry David's need for care and a custodial environment. The belated attempts to overcome the gross social and emotional deprivations which he has suffered have led us into a legal and psychiatric morass. There is now an obligation to design rational preventive and remedial measures within the limits of our knowledge to forestall an uncritical acceptance that a more broadly-based system of preventive detention is a necessary component in society's armoury.

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