

Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case*

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INTRODUCTION

The case of Garry David (otherwise known as Garry Webb) has been a focus for some of the most intractable issues of law, ethics and medicine. The decision of the Supreme Court allowing the Attorney-General of Victoria's application for an order for David's continued detention under the *Community Protection Act* 1990 (Vic) has by no means reduced the controversy surrounding the case. David himself remains an enigma, at once both frightening and pathetic, a living challenge to generally held beliefs as to the proper functioning of the legal system and the scope of the profession of psychiatry.

The aim of the present article is to provide an account of the David case and to attempt a partial resolution of some of the issues raised by it. These issues include the nature of mental illness and psychopathy, the role of the profession of psychiatry and its relation to the criminal justice system, the criteria and procedures to be adopted in respect of civil commitment to psychiatric hospitals, the principles to be applied in determining when and for how long persons representing a danger to the community may be incarcerated, and the arguments for and against a general system of preventive detention.

In considering the David case and the more general issues it raises in relation to psychopathy and commitment to psychiatric institutions, medical knowledge should be taken as the starting point from which reasoning proceeds. This view is simply an application of the basic proposition that theory must be based upon and accommodate facts; facts should not be manipulated to fit theory. Yet in the debate over the David case there appears not infrequently to have been an underlying argument that if medical knowledge, as represented by the views of psychiatrists, flies counter to the theoretical beliefs of lawyers, penologists, civil libertarians and ethical philosophers, then medical knowledge should be reinterpreted and redefined to accommodate these theories. Persons who reason thus have no hope of finding proper solutions.

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A BRIEF OUTLINE OF EVENTS

At age 37 Garry David has spent almost all of his life since early adolescence in institutions. As a child his background was one of brutality and deprivation. He has mutilated his body more than 70 times, has threatened to kill public figures, cause a police bloodbath and commit a massacre that would make Melbourne's mass murders in Queen and Hoddle Street 'look like a picnic'. He was sentenced to 14 years jail after a 1980 gun battle. Newly released from prison at the time, he had shot a woman in a pizza shop leaving her a quadraplegic, and shot two policemen who came to her rescue. In prison he has assaulted more than 15 inmates and guards, but his main victim has been himself. He has sliced off his nipples, drunk acid, mutilated his penis, poked pins in his eyes, nailed his feet to the floor and swallowed razor blades. He has been diagnosed as suffering from borderline personality disorder and antisocial personality disorder or, to use an expression now less in vogue, as being a psychopath.

David was due for release in February 1990. His imminent release produced a flurry of administrative and ultimately legislative activity. In December 1989 the Law Reform Commission of Victoria presented a draft Report to the Attorney-General recommending that 'mental illness' in s 3 of the *Mental Health Act* 1986 (Vic) be defined as including antisocial personality disorder and any other personality disorder. At around the same time the joint party Social Development Committee of the Victorian Parliament was asked to consider and make recommendations in relation to David, and early in the new year conducted a public inquiry and heard evidence in respect of the case.

David was then charged with threatening to kill a former fellow prisoner (*Crimes Act* 1958 (Vic) s 20), and remanded in custody. In the meantime he was certified insane and transferred to J Ward, Ararat, the State's maximum security psychiatric unit. He lodged an appeal to the Mental Health Review Board against that certification. In April the Victorian Parliament passed the *Community Protection Act* 1990 (Vic), an extraordinary and unprecedented piece of legislation giving the Supreme Court power to continue David's detention beyond the expiration of his sentence. Later that month David pleaded guilty in the Magistrates' Court to the charge of threatening to kill, and was remanded in custody to appear in the County Court for sentencing in July. In May the Mental Health Review Board upheld David's appeal and ordered that he be returned to prison. The Attorney-General then successfully lodged an interim application for David's detention under the *Community Protection Act* 1990 (Vic).

In April the Law Reform Commission issued the final version of its Report, *The Concept of Mental Illness in the Mental Health Act* 1986. In June the Social Development Committee of Parliament issued its own Interim Report and recommendations, *Inquiry into Mental Disturbance and Community Safety*.

In July David was sentenced to 12 months imprisonment (with six months

suspended) on the charge of threatening to kill. Because of time spent on remand, however, that sentence had expired. David then remained in custody pursuant to the *Community Protection Act* 1990 (Vic). A hearing under that Act was held before Mr Justice Fullagar, and concluded in mid-August. On 18th September his Honour ordered that David remain in preventive detention for a period of six months.

MENTAL HEALTH LEGISLATION IN VICTORIA

The law relating to mental health in Victoria is contained in the *Mental Health Act* 1990.¹ The Act sets up a Mental Health Review Board (s 21). The Board sits in divisions of three, comprising a lawyer who acts as chairperson, a psychiatrist and a community member. The functions of the Board include the hearing of appeals against the detention of involuntary patients and security patients and the periodic review of such patients (s 22(1)).

An involuntary patient is a person admitted to a psychiatric in-patient service by a process of civil commitment (s 9), by a hospital order made by a Court following conviction for a criminal offence (s 15) or by a hospital order made by the Director-General of Corrections in respect of a person serving a term of imprisonment (s 16(3)(a)). The process of civil commitment involves a request for such commitment which may be made by any person, followed by a recommendation which must be made in the prescribed form by a medical practitioner based upon a personal examination of the person made not more than three clear days before admission (s 9). Upon admission to the psychiatric in-patient service the patient must be examined by the authorised psychiatrist within 24 hours for the purpose of determining whether the continued detention of the person as an involuntary patient is justified (s 12(2)). A person detained may appeal at any time against that detention to the Mental Health Review Board (s 29), and in any event the Board must review the continued detention between four and six weeks from admission and thereafter at intervals not exceeding 12 months (s 30).

The criteria for detention are spelt out in s 8 of the Act. Sub-section (1) provides:

A person may be admitted to and detained in a psychiatric in-patient service as an involuntary patient in accordance with the procedures specified in this Act only if —

- (a) the person appears to be mentally ill; and
- (b) the person's mental illness requires immediate treatment or care and that treatment or care can be obtained by admission to and detention in a psychiatric in-patient service; and
- (c) the person should be admitted and detained as an involuntary patient

¹ For a detailed discussion of the deliberations leading up to the enactment of this legislation, see R Ball, 'The Myers Report, the Mental Health Act 1986 and the Board — An Historical Perspective', paper presented at the conference, 'The Mental Health Act into the 1990's' (Monash University, June 1990).

- for that person's health or safety or for the protection of members of the public; and
- (d) the person has refused or is unable to consent to the necessary treatment or care for the mental illness; and
 - (e) the person cannot receive adequate treatment or care for the mental illness in a manner less restrictive of that person's freedom of decision and action.

Sub-section (2) sets out a number of factors which are not sufficient to warrant a finding that a person is mentally ill, including '(1) [t]hat the person has an antisocial personality'. The Act contains no definition of mental illness.

A security patient means a person who is serving a lawful term of imprisonment and who is transferred to a psychiatric in-patient service by the Director-General of Corrections making a hospital order pursuant to s 16(3)(b) of the Act, or a person ordered to be kept in safe custody during the Governor's pleasure under the *Crimes Act* 1958 (Vic). As is the case with involuntary patients, a security patient may appeal to the Mental Health Review Board at any time (s 29), and in any event the Board must review that person's status between four and six weeks of admission and thereafter at intervals not exceeding 12 months (s 30). In the case of security patients, however, the consequence of a finding that the person's detention in a psychiatric in-patient service is not justified is that the person is transferred into the prison system to serve her or his sentence or until the Governor's pleasure is known. The criteria for detention as a security patient is spelt out in s 16(2)(a) of the Act as requiring that:

- (i) the person appears to be suffering from a mental illness that requires treatment; and
- (ii) the treatment can be obtained by admission to and detention in a psychiatric in-patient service; and
- (iii) the person should be admitted to and detained in a psychiatric in-patient service for her or his health or safety or for the protection of members of the public.

The decision to certify David as a security patient, and his appeal to the Board against that certification, did not directly involve an issue as to his liberty or continued incarceration. His detention as a security patient could only continue as long as his sentence ran, and his appeal to the Board against that certification could only result in his transfer back into the prison system. The criteria for detention as a security patient (s 16) and as an involuntary patient (s 8) are, however, closely similar although not identical. The two key criteria, common to both, are the existence of a mental illness and the possibility of treatment. Thus, if David's certification as a security patient could be upheld, then immediately his sentence expired he could be civilly committed as an involuntary patient.

THE CONCEPTS OF BORDERLINE PERSONALITY DISORDER AND ANTISOCIAL PERSONALITY DISORDER

The immediate reaction of most lay people (by which in the present context I mean all persons other than psychiatrists) would, of course, be that someone such as David must be insane. Mr Justice Vincent, Chairman of the Adult Parole Board, expressed this view with succinctness in giving evidence to the Social Development Committee of the Victorian Parliament:

I have a great deal of difficulty coming to terms with the concept that if somebody cuts his ears off, and slices part of his penis off, and tries to burn himself with petrol, and wants to shoot people, he is not mentally ill. It seems to me that any definition of the role of psychiatric medicine that seems to exclude this extraordinary section of significant mental disturbance is itself crazy!²

The use by Mr Justice Vincent of the word 'crazy' to describe a body of thinking profoundly at variance with his own experience and view of human nature is illustrative of the fallacy inherent in much thinking on the subject.³ The strange, the bizarre and the peculiar cannot properly be equated with, or necessarily regarded as symptomatic of, insanity or mental illness.

Within psychiatry, as in other disciplines, there exists substantial levels of disagreement. The impression of an outsider, however, is that the levels of disagreement are no greater than are to be found in other established disciplines or bodies of knowledge. In respect to personality disorder and its relationship to mental illness it would seem possible to isolate a general body of mainstream opinion, a set of views with which most, but not all, psychiatrists would agree. The following statements are intended as a description of that mainstream opinion.⁴

A person with a personality disorder is not, for that reason, regarded as being mentally ill within the discipline of psychiatry. The word 'personality' refers to an individual's characteristic way of functioning psychologically. Some persons have traits of character that are abnormal or socially undesirable. At an extreme level such persons are described as having a personality disorder. The position of such persons is, however, quite different from that of a person suffering from a disturbance of mental functioning which is what a mental illness is. The fact that a person's behaviour is deviant, maladapted or

² Quoted in *Time* (Aust ed, January 29, 1990) p 42.

³ For a detailed criticism of this form of reasoning, see J Ellard, 'The Psychopathology of Sin', *Modern Medicine of Australia* (March, 1985) p 18. Note also J Ellard, 'The History and Present Status of "Moral Insanity"' in G Parker (ed), *Some Rules for Killing People: Essays on Madness, Murder and the Mind* (Angus and Robertson, 1989) p 115.

⁴ In determining and describing what may be regarded as the mainstream of psychiatric opinion I am relying to a substantial degree upon the analysis of the psychiatric evidence contained in the Statement of Reasons of the Mental Health Review Board in the *Garry David* case. In addition to that Statement of Reasons and references quoted in this section, see Kaplan and Sadock, *Comprehensive Textbook of Psychiatry* (5th ed, Baltimore, Williams & Wilkins, 1989) Vol II; H M Cleckley, *The Mask of Sanity* (St Louis, Mosby, 1964). Note also B Hoggett, *Mental Health Law* (2nd ed, London, Sweet and Maxwell 1984); S Dell and G Robertson, *Sentenced to Hospital: Offenders in Broadmoor* (Oxford, OUP, 1988), Chs 6 and 9.

non-conformist does not necessarily mean that it is the product of any disturbance in mental functioning. It may simply mean that that is the sort of person the particular individual is.

The distinction between the concepts of 'personality disorder' and 'mental illness' was carefully stated in a paper prepared by the Royal Australian and New Zealand College of Psychiatrists for the Social Development Committee of State Parliament:

Within the discipline of psychiatry there has traditionally been made a significant distinction between "mental illness" and "personality disorder". Personality refers to enduring characteristics of a person shown in his or her ways of behaving in a wide variety of circumstances. It is usually described in terms of traits such as sensitivity, suspiciousness, conscientiousness, shyness, aggressiveness and so on. Such traits are present in all of us to a greater or lesser degree and are thus dimensional. People with a personality disorder are generally defined as (i) those in whom some of these traits are present to a statistically abnormal or extreme degree and (ii) who as a consequence of this suffer emotionally or who cause others to suffer. Element (ii) clearly reflects purely a social value judgment. People with an antisocial personality disorder, for example, show to an abnormal degree, a disregard for social obligations and rules, a lack of feeling for others, aggressive behaviours, irresponsibility, callous unconcern, a low tolerance of frustration and a number of other similar traits which bring them into conflict with society. These traits can be identified from late adolescence when personality is essentially formed and are an enduring feature of the person. Discrete symptoms of mental illness are absent.

A mental illness such as schizophrenia, on the other hand, is associated with the emergence of characteristic symptoms (such as delusions, hallucinations, pathological mood states), develops in someone who was previously free of such symptoms, and represents a disruption or discontinuity of their usual personality and their normal modes of psychological functioning.⁵

Talk of 'care' or 'treatment' is of limited application in relation to personality disorder; the very notion of being 'cured' of one's personality has little meaning. In the paper of the Victorian Branch of the Royal College it is stated:

Most of us know how hard it is to change undesired aspects of our personalities. This experience also is borne out in attempts to treat personality disorders. There is little evidence that personality disorders change significantly as a result of any of the psychiatric treatments available at present. In particular, no treatment has been shown to have an impact on the behaviour of persons with antisocial personality disorders. A prerequisite for any change in personality functioning is a desire by the individual to deal with his or her problems. Psychotherapeutic approaches may then result in some improvements in some cases. Involuntary treatments imposed on a person not motivated to change have no chance of success.⁶

For completeness, a description of the two key personality disorders, borderline personality disorder and antisocial personality disorder, may be helpful.

⁵ Page 2.

⁶ Pages 3-4.

In the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (3rd ed., revised), known as DSM-III-R, borderline personality disorder is described as follows:

The essential feature of this disorder is a pervasive pattern of instability of self-image, interpersonal relationships, and mood, beginning by early adulthood and present in a variety of contexts.

A marked and persistent identity disturbance is almost invariably present. This is often pervasive, and is manifested by uncertainty about several life issues, such as self-image, sexual orientation, long-term goals or career choice, types of friends or lovers to have, or which values to adopt. The person often experiences this instability of self-image as chronic feelings of emptiness or boredom.

Interpersonal relationships are usually unstable and intense, and may be characterized by alternation of the extremes of overidealization and devaluation. These people have difficulty tolerating being alone, and will make frantic efforts to avoid real or imagined abandonment.

Effective instability is common. This may be evidenced by marked mood shifts from baseline mood to depression, irritability, or anxiety, usually lasting a few hours or, only rarely, more than a few days. In addition, these people often have inappropriately intense anger or lack of control of their anger, with frequent displays of temper or recurrent physical fights. They tend to be impulsive, particularly in activities that are potentially self-damaging, such as shopping sprees, psychoactive substance abuse, reckless driving, casual sex, shoplifting, and binge eating.

Recurrent suicidal threats, gestures, or behaviour and other self-mutilating behaviour (eg wrist-scratching) are common in the more severe forms of the disorder. This behaviour may serve to manipulate others, may be a result of intense anger, or may counteract feelings of "numbness" and depersonalization that arise during periods of extreme stress.

Some conceptualize this disorder as a level of personality organization rather than as a specific Personality Disorder.⁷

Antisocial personality disorder is described as follows:

The essential feature of this disorder is a pattern of irresponsible and antisocial behaviour beginning in childhood or early adolescence and continuing into adulthood. For this diagnosis to be given, the person must be at least 18 years of age and have a history of Conduct Disorder before the age of 15.

Lying, stealing, truancy, vandalism, initiating fights, running away from home, and physical cruelty are typical childhood signs. In adulthood the antisocial pattern continues, and may include failure to honor financial obligations, to function as a responsible parent or to plan ahead, and an inability to sustain consistent work behaviour. These people fail to conform to social norms and repeatedly perform antisocial acts that are grounds for arrest, such as destroying property, harassing others, stealing, and having an illegal occupation.

People with Antisocial Personality Disorder tend to be irritable and aggressive and to get repeatedly into physical fights and assaults, including spouse — or child-beating. Reckless behaviour without regard to personal safety is common, as indicated by frequently driving while intoxicated or

⁷ (3rd ed, revised) p 346.

getting speeding tickets. Typically, these people are promiscuous (defined as never having sustained a monogamous relationship for more than a year). Finally, they generally have no remorse about the effects of their behaviour on others; they may even feel justified in having hurt or mistreated others. After age 30, the more flagrantly antisocial behaviour may diminish, particularly sexual promiscuity, fighting, and criminality.⁸

THE LEGAL DILEMMA

Few would deny the proposition that in the case of a person suffering from a personality disorder of an extreme form and representing a grave threat to the physical safety of members of the public, society must be able to protect its members, if necessary, by depriving that person of their liberty. Such a view would be held by the overwhelming majority of members of the community, and a Government that failed to respond to it would be widely and properly perceived as failing in its duty to protect its citizens.⁹

Yet an appropriate response runs counter to traditional legal thinking as to the nature of punishment and the principles to be applied in determining the limits to be set to periods of incarceration. Such thinking proceeds from the proposition that deprivation of liberty, involving harm to the individual and the infringement of that person's rights, normally must be viewed as punishment and must be justified in terms of the legal and ethical principles applicable to punishment. Theories of punishment stipulate that a person may only be punished for that which they have done, not for that which they are likely to do. Professor HLA Hart, for example, explains the concept of punishment in criminal law theory as follows:

- (i) It must involve pain or other consequences normally considered unpleasant.
- (ii) It must be for an offence against legal rules.
- (iii) It must be of an actual or supposed offender for his offence.
- (iv) It must be intentionally administered by human beings other than the offender.
- (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.¹⁰

Such thinking is retributive in nature, and heavily dependent upon the concepts of individual human responsibility and moral wrongdoing. It requires both that the individual to be punished must have offended against legal rules, and stipulates a proportionate relationship between the offence and the nature and degree of punishment to be administered. The only exception to the principle of proportionality recognised by such thinking is the case of insanity. Those who commit crimes while insane act without moral cul-

⁸ Id p 342.

⁹ See, for example, the statements of the then Victorian Premier, Mr Cain, reported in *The Age*, 10/4/90, p 3.

¹⁰ 'Prolegomenon to the Principles of Punishment' in *Punishment and Responsibility* (Clarendon Press, Oxford, 1968) pp 4-5.

pability.¹¹ They may, because of their insanity, be detained for treatment. Since such cases involve treatment rather than punishment considerations of desert and proportionality are not applicable.¹²

The essentially retributive nature of the common law in respect of sentencing was highlighted with particular clarity by the decisions of the High Court in *Veen v R (No 1)*¹³ and *Veen v R (No 2)*.¹⁴ The accused suffered from alcohol induced brain damage and experienced uncontrollable urges leading him to commit violent crimes. In 1975 he was charged with murder in New South Wales, but convicted of manslaughter having regard to the defence of diminished responsibility (a defence available in that State¹⁵ but not in Victoria). The trial judge, having regard to the needs of community protection, sentenced the accused to life imprisonment. The accused appealed successfully to the High Court, where a sentence of 12 years was substituted for the life term. The view taken by the majority was that while the protection of the community was a factor in determining sentence it was not a consideration which would justify what was in substance a sentence of preventive detention.

Veen was released after serving eight years and, tragically, killed again later that year. He was charged with murder, found guilty of manslaughter on the same basis as before, and again sentenced to life imprisonment. He again appealed to the High Court against sentence, but on this occasion his appeal was dismissed. The two cases were different in material respects; the mitigating factor of youth was no longer present, an element of provocation possibly present in the first case was absent in the second and, most notably, the accused's earlier less serious criminal record had on the occasion of the second conviction now been supplemented by the previous conviction for manslaughter. While on this occasion upholding the sentence of life imprisonment, the High Court affirmed its decision in *Veen v R (No 1)*. In sentencing an accused the requirement of proportionality must, the Court held, be adhered to. It is only within the range of what is proportionate to the personal circumstances of the offender and the offence that regard may be had to considerations of community protection. In a joint judgment Mason CJ, Brennan, Dawson and Toohey JJ expressed the proper role of considerations of community protection at common law in the following terms:

It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of

¹¹ It is clear that antisocial personality disorder does not fall within the M'Naghten formulation of the insanity defence: *Willgoss v R* (1960) 105 CLR 295. Note P A Fairall and P W Johnston, 'Antisocial Personality Disorder and the Insanity Defence' (1987) 11 *Crim LJ* 78.

¹² For detailed consideration of the rules and principles applicable in relation to sentencing in England and Australia respectively, see D Thomas, *Principles of Sentencing* (2nd ed, London, Heinemann, 1979); N Walker, *Sentencing Theory, Law and Practice* (London, Butterworths, 1985); R G Fox and A Freiberg, *Sentencing State and Federal Law in Victoria* (Melbourne, OUP, 1985).

¹³ (1979) 143 CLR 458.

¹⁴ (1988) 62 ALJR 224. For valuable discussion of these cases, see R Fox, 'The Killings of Bobby Veen: The High Court on Proportion in Sentencing' (1988) 12 *Crim LJ* 339.

¹⁵ *Crimes Act* 1900 (NSW) s 23A.

society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.¹⁶

The decisions in *Veen v R (No 1)* and *Veen v R (No 2)* may be regarded as a correct institutional response on the part of the Courts to issues of community protection. It is properly the role of the Courts to protect rights, and to focus attention upon the individual case before the Court. The Courts would serve their function less well if they were to allow the essentially individual focus of their attention and the consideration of issues of desert which this involves to be replaced by a primary concern for issues of community protection. It by no means follows as a proposition of logic, however, that it is not equally proper for the legislature to intervene in respect of such cases with a response which places greater emphasis on considerations of protection and less, if indeed any, emphasis on considerations of desert and proportionality. This view was expressly affirmed by Deane J in *Veen v R (No 2)*. His Honour stated:

[T]he protection of the community obviously warrants the introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of violent crime and who, while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence. Such a statutory system could, one would hope, avoid the disadvantages of indeterminate prison sentences by being based on periodic orders for continuing detention in an institution other than a gaol and provide a guarantee of regular and thorough review by psychiatric and other experts. The courts will impede rather than assist the introduction of such an acceptable system if, by disregarding the limits of conventional notions of punishment, they assume a power to impose preventive indeterminate gaol sentences in a context which lacks the proper safeguards which an adequate statutory system must provide and in which, where no non-parole period is fixed, the remaining hope of future release ultimately lies not in the judgment of experts but in the exercise of a Ministerial discretion to which political considerations would seem to be relevant.¹⁷

GARRY DAVID'S APPEAL TO THE MENTAL HEALTH REVIEW BOARD

The Garry David Appeal is by far the most lengthy and complex heard by the Mental Health Review Board thus far.¹⁸ The Board sat for a total of 16 days between January and March 1990. The proceedings resulted in a transcript of over 2,100 pages and the Board received 58 exhibits which comprised

¹⁶ (1988) 62 ALJR 224, 227.

¹⁷ *Id* 237.

¹⁸ No 230190:XO1:300512. The Board comprised the President, Mr Neil Rees, Dr David Barlow (psychiatrist member) and Dr Julianne Mulvaney (community member).

thousands of pages of documents. The Board heard evidence from 16 witnesses, including 11 psychiatrists. The Board's statement of reasons was 131 pages in length.

As a security patient, David's appeal was governed by s 44 of the *Mental Health Act* 1986 (Vic), which requires the Board to consider whether the threefold criteria specified in s 16(2)(a) of the Act, set out above, are satisfied.

It does not, however, inevitably follow that unless all three criteria are satisfied the person must inevitably be transferred back into the prison system, for s 44 confers a discretion on the Board to decline to order that the person be discharged as a security patient and returned to prison.

Following a careful review of the psychiatric evidence the Board concluded that it was not satisfied that David 'appears to be suffering from a mental illness that requires treatment'. The view of the Board was that the words 'mental illness' in s 16(2)(a)(i) should be given their technical meaning as understood by psychiatrists.¹⁹ The Board settled on the following as an appropriate definition of mental illness:

A person appears to be suffering from a mental illness if he/she has recently exhibited symptoms which indicate a disturbance of mental functioning which constitutes an identifiable syndrome or if it not be possible to ascribe the symptoms of such a disturbance of mental functioning to a classifiable syndrome, they are symptoms of a disturbance of thought, mood, volition, perception, orientation or memory which are present to such a degree as to be considered pathological.²⁰

The evidence established that David satisfied the diagnostic criteria for both borderline personality disorder and antisocial personality disorder. The Board held that these personality disorders did not constitute a mental illness. In so holding the Board overruled its earlier decision in the *Appeal of KMC*.²¹ The Board concluded:

After considering the medical evidence . . . we believe that the conclusion which must be reached is that a personality disorder alone is not such a condition, entity or disease. It is nothing more than a term, rather subjectively applied, to people with a personality which falls outside the range of that which is considered normal. It is used in the same fashion as terms which may describe a person having physical proportions which are outside the normal range. The mental functioning of a person with a personality disorder does not appear to be disturbed in ways which indicate illness or an absence of health. Whilst the content of the person's thoughts may be frightening and socially undesirable the person is not deluded, hallucinating, unable to process thoughts and information, or severely depressed or manic. The evidence in this case is that Mr David has no such disturbances of mental functioning on an ongoing or regular basis.²²

The Board went on to hold that, even were David suffering from a mental

¹⁹ Pages 73–4.

²⁰ Page 79.

²¹ 130989:Z26:588371.

²² Pages 108–9.

illness, no treatment for that mental illness within the meaning of s 16(2)(a)(ii) of the Act can be obtained. The Board stated:

The evidence indicates that Mr David's personality disorder is highly unlikely to be assisted by the most sophisticated regime theoretically possible. There are great difficulties formulating such a treatment regime because of the lack of research data and successful experience in treating people with personality disorders. We believe that the actual treatment regime available at J-Ward at the moment, or in the immediate future, is such that no treatment can be obtained for him at J-Ward.²³

The third requirement contained in s 16(2)(a) in fact adds little to the other two. Issues of the patient's health or safety are largely covered by sub-paragraphs (i) and (ii), and since the choice is between prison and a psychiatric hospital questions of the protection of members of the public are of little significance. Nonetheless, the Board properly considered the third criteria and concluded that David's detention was warranted for the protection of members of the public. In the light of the totality of the evidence the Board might, perhaps, be thought to have somewhat underestimated the nature and extent of the danger posed to the public by David. The Board stated:

The evidence convinces us that Mr David would pose a threat to the safety of the community if he were to be released now. We believe it unlikely that he would carry out any of his threats of violence directed towards the community at large or named public officials. However there is evidence to suggest that he does pose a threat to members of the police force and to people in his immediate surrounds if he were placed under stress with which he could not cope. We do not believe that Mr David is likely to embark upon a crazed rampage as soon as he is released into the community. However, he, like many other people who come before the Board, does pose a threat to the safety of particular members of the community.²⁴

An application by the Attorney-General to the Administrative Appeals Tribunal seeking to appeal against the decision of the Board was rejected by the Tribunal in July.²⁵ The Tribunal concluded that since David's sentence had expired at that time and he remained in custody solely pursuant to the *Community Protection Act* 1990 (Vic), no live issue existed between the parties over which the Tribunal had jurisdiction.

THE RECOMMENDATIONS OF THE LAW REFORM COMMISSION

The preliminary views of the Law Reform Commission of Victoria were contained in a Report to the Attorney-General in December 1989. The final recommendations of the Commission are contained in a Report, *The Concept*

²³ Page 125.

²⁴ Page 127.

²⁵ Appeal No 1990/18016, judgment delivered 12 July, 1990.

of *Mental Illness in the Mental Health Act 1986* (Report No 31, April, 1990).

In the Preliminary Report it was recommended that s 3 of the *Mental Health Act 1986* (Vic) be amended by inserting a definition of 'mental illness'. That expression is at present undefined in the Act. It was recommended by the Commission that the expression be defined as including 'antisocial personality disorder and any other personality disorder'. In the Final Report it was sought to achieve the same result by leaving the expression 'mental illness' undefined, but introducing a new s 8(4) into the Act. The new sub-section would specify that sub-section (2)(1) of s 8, which provides that a person is not to be considered mentally ill by reason only of the fact that the person has an antisocial personality, 'does not prevent a person who is suffering only from antisocial disorder from being considered to be mentally ill'. In fact this method of proceeding would seem to be unlikely to achieve the Commission's intended result. The proposed amendment would not touch the central difficulty in bringing antisocial personality disorder within the ambit of the Act; that antisocial personality disorder simply does not of itself, and quite apart from s 8(2)(1), constitute a mental illness.

The Preliminary Report of the Commission attracted considerable media and public support.²⁶ It is, however, submitted that the reasoning adopted by the Commission in both its Preliminary and its Final Report is unconvincing.

In part the Commission relied upon an argument of language, reaching the conclusion that the meaning of the expression 'mental illness' should be determined by reference to the opinion of ordinary sensible people rather than the views of psychiatrists. As a matter of interpretation, it is submitted that the contrary view of the Mental Health Review Board in the *David* case is to be preferred. *Cozens v Brutus*²⁷ stands as authority for the proposition that ordinary words of the English language should be interpreted in the way that ordinary sensible people would construe them. In *Cozens v Brutus* the expression involved was 'insulting behaviour', a non-technical expression which ordinary members of the community would be well qualified to interpret. Such an approach is, however, best regarded as not appropriate to what is more properly regarded as a technical medical expression.²⁸ In any event, canons of statutory construction form no basis upon which a Law Reform

²⁶ See, for example, the report by Ms Prue Innes in *The Age*, 3/5/90. In that story the Victorian Council for Civil Liberties is described as 'cautiously' welcoming the Commission's Report.

²⁷ [1973] AC 854.

²⁸ Such authority as exists on the approach to be taken in defining the expression 'mental illness' is inconclusive. In *W v L* [1974] QB 711 Lawton LJ held that the words 'mental illness' in the *Mental Health Act 1959* (UK) were ordinary words of the English language. The other judges in the case, Lord Denning MR and Orr LJ, would appear to have adopted the opposite view. In *B v Medical Superintendent of Macquarie Hospital* (1987) 10 NSWLR 44 Kirby P adopted a similar view to that taken by Lawton LJ. However, the opposite view has been adopted by Powell J in the same Court: see *RAP v AEP* [1982] 2 NSWLR 508; *CCR v PS (No 2)* [1986] 6 NSWLR 622. In the *Garry David* case the Mental Health Review Board held that the words 'mental illness' should be given their technical meaning as understood by psychiatrists.

Commission should approach its task of determining what the law should be. In considering an issue involving questions of psychiatry a Law Reform Commission should obviously prefer medical knowledge over the views of ordinary lay people however sensible.

The Law Reform Commission sought to rely upon the decision of the Mental Health Review Board in the *Appeal of KMC*²⁹ that a person suffering from a borderline personality disorder does fall within the meaning of mental illness. Apart from the possible significance of the distinction between borderline personality disorder and antisocial personality disorder, that decision has now, of course, been overturned by the Board itself in the *Garry David* case.

The Commission sought to rely upon the fact that 'a significant number of psychiatrists concede that the dividing line between mental illness and antisocial personality disorder is far from precise and that, in some cases at least, such a disorder can amount to a mental illness'.³⁰ Lack of complete unanimity within a professional discipline is not surprising and, absent a sound reason for supporting the views of the minority, carries the Commission's argument no further.

The Commission also sought to draw support from the fact that 'psychiatrists regularly treat [persons with personality disorders] as voluntary patients'.³¹ Such a line of argument is fallacious. It is the case that psychiatrists regularly treat as voluntary patients persons suffering from alcoholism or job related stress. It obviously does not follow from the fact that such people may be helped by psychiatrists that alcoholism and job related stress constitute mental illnesses.

Upon analysing the Report of the Law Reform Commission it is difficult to avoid the conclusion that they were, in part at least, influenced by a desire to achieve a particular result in a manner calculated to minimise public criticism. The desired result was the incarceration of dangerous psychopaths beyond the expiration of their sentences. The anticipated criticism was from the adherents of traditional criminal law and sentencing theory and civil libertarians. The device to achieve this was the fiction that borderline personality disorder and antisocial personality disorder are mental illnesses. Indeed, the Commission conceded its preference for camouflaging difficult issues of principle when rejecting the suggested alternative of creating a system of preventive detention on the basis that such a recommendation would raise 'substantial civil liberties issues which are not raised by the proposed amendment to the *Mental Health Act*'.³²

Finally, it should be noted that even if the Law Reform Commission's recommendation, that the Act be amended so that personality disorder would be regarded as a mental illness, is adopted, that change would be unlikely to produce the desired result of enabling the involuntary commitment of such

²⁹ Supra, fn 21.

³⁰ Page 6.

³¹ Pages 8-9.

³² Page 16.

persons. For a person to be detained as an involuntary patient, s 8(1)(b) of the Act stipulates that it must be the case that 'the person's mental illness requires immediate treatment or care and that treatment or care can be obtained by admission to and detention in a psychiatric in-patient service'. It has been stated above, and was the view of the Mental Health Review Board in the *Garry David* case, that in the case of an unwilling patient no treatment offering any prospect of success exists in respect of antisocial personality disorder. The Commission sought to avoid this difficulty by focusing on the word 'care', stating:

Care is the operative concept in relation to people who happen to be senile. It is also the operative concept in relation to people who are detained and committed for the protection of the public.³³

Such an argument seems misconceived. To describe a healthy, violent psychopath as in need of care, when the only form of harm or debilitation that person is in danger of suffering is from the consequences of her or his own criminality, is a misuse of language and one which is, it is submitted, unlikely to commend itself either to the Mental Health Review Board or to the Courts.

THE GOVERNMENT RESPONSE: THE COMMUNITY PROTECTION ACT 1990

The *Community Protection Act 1990* (Vic) is unique in Australian legal history as being the only occasion on which an Act of Parliament has been passed for the expressly stated purpose of enabling the detention of a named individual. Notwithstanding the general title of the Act, s 1 states its purposes as being (a) to provide for the safety of members of the public and the care or treatment and the management of Garry David, and (b) to provide for proceedings to be instituted in the Supreme Court for an Order for the detention of Garry David.

The Act empowers the Minister to apply to the Supreme Court for an Order that David be placed in preventive detention (s 4). Power is granted to the Court to make an interim order for detention pending a hearing (s 6). The test to be applied by the Court in determining whether to order preventive detention for David is set out in s 8(1) as follows:

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

- (a) is a serious risk 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.

Such Order is required to specify, inter alia, 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

³³ Page 8.

months at a time (s 9). Upon the making of an Order, David must be detained in the psychiatric in-patient service, prison or other institution specified in the Order (s 10). Where an Order is in force, David must not be discharged or released from preventive detention except in accordance with an Order of the Supreme Court (s 12).

The *Community Protection Act* 1990 (Vic) is expressly stated to expire 12 months after receiving the Royal Assent, ie 24th April, 1991 (s 16). The Act is thus a means of seeking to incarcerate David while the Government considers the three available options of (1) releasing him in the hope that he will not carry out further acts of violence, (2) adopting the recommendations of the Law Reform Commission, and (3) introducing a more general scheme of preventive detention for dangerous offenders.

Section 8(1) of the Act gives rise to significant problems of interpretation. The operation and relationship of the two sub-sections is uncertain. The word 'and' appearing between them clearly means that both need be satisfied. Focusing first on sub-paragraph (b), what is meant by 'likely'? Does it mean 'probable' in the sense of more likely than not, or is a higher degree of probability required? What is meant by an 'act of personal violence'? Presumably 'personal violence' is something less than 'grievous bodily harm', which is bodily harm of a really serious nature.³⁴ Is it then an equivalent of 'actual bodily harm', an expression interpreted as extending to any hurt or injury calculated to interfere with the health or comfort of the victim, provided that it is something more than merely transient and trifling.³⁵ Turning to sub-paragraph (a), what is meant by 'a serious risk to the safety of any member of the public'? The concept of serious risk does not necessarily narrow the operation of sub-paragraph (b), for it would seem that the likelihood of serious risk may be independent of the likelihood of commission of an act of personal violence. Thus, if David were found to be suffering from AIDS he could be said to constitute a serious risk to the safety of the public which, in combination with the likelihood of commission of an assault involving actual bodily harm, could be argued to be sufficient to satisfy the dual test laid down by s 8.

If the test spelt out in s 8 is found to be satisfied, it does not necessarily follow that David must be detained. The power to detain remains a discretionary one which 'may' be exercised by the Court if it finds the two criteria to be satisfied. How should the Court exercise such discretion? Would the Court be entitled to have regard to concerns of a civil liberties nature in exercising the discretion? It may seem surprising that such a discretion should have been conferred. In the context of an Act designed to achieve the detention of a particular individual consistency would seem to suggest that if the twofold test of s 8 is satisfied then detention should necessarily follow.

The Act is, however, open to more serious criticisms than its lack of clarity

³⁴ *Director of Public Prosecutions v Smith* [1961] AC 290, at 334-5; *R v Saunders* [1985] Crim LR 230.

³⁵ *R v Donovan* [1934] 2 KB 498, at 509; *R v Miller* [1954] 2 QB 282, at 292; *R v Percali* (1986) 42 SASR 46; *Coulter v R* (1988) 62 ALJR 74.

and inadequacies of drafting.³⁶ It is an item of legislation which would appear to offend against both the principle of the rule of law and the doctrine of separation of powers. The rule of law requires that laws be of general application; that all members of the community be equally subject to the law. Yet this Act, penal in its effect, specifically applies only to a named individual. The shadow Attorney-General described the Bill as creating 'a process that must be compared with the historical Bills of Attainder', and characterised it as 'one of the most obnoxious Bills that has ever been introduced into Parliament'.³⁷ The doctrine of separation of powers provides that it is for the legislature to pass general laws, for the courts to determine particular cases under them, and for the executive to make specific administrative decisions. Thus a more correct approach to the issue would have been to pass an Act giving the Minister power to detain David, and for that power to have been exercised on the responsibility of the Minister.³⁸

THE DECISION IN KENNAN v DAVID

In May 1990, following the upholding of David's appeal by the Mental Health Review Board, the Attorney-General of Victoria, the Hon JH Kennan, made application to the Supreme Court for an Order under s 8 of the *Community Protection Act* 1990 (Vic) that David be placed in preventive detention for a period of six months at J-Ward, Ararat. The application was heard before Mr Justice Fullagar, who first made an interim Order under s 6 of the Act which had the effect of detaining David while the application was heard. The case occupied 22 sitting days. On 18th September His Honour delivered judgment, making an Order in the terms sought by the Attorney-General.³⁹

Mr Justice Fullagar engaged in a careful review of the facts and the medical evidence presented to the Court, paying particular regard to the psychiatric evidence and the evidence of those who had been responsible for David's case and supervision during his period at J-Ward. His Honour did not venture to comment on issues of principle raised by the Act, nor to any extent upon the difficulties of interpretation to which it gives rise.⁴⁰ His Honour specifically declined to consider the question of whether David suffers from a mental

³⁶ In the course of a careful analysis of the Act, Dr D Wood has suggested that it might be unconstitutional: D Wood, 'A One Man Dangerous Offenders Statute — The Victorian Community Protection Act 1990' (1990) 17 MULR 497. Such an argument is, it is suggested, not convincing. Certainly the High Court has left open the question of whether the legislative power of State Parliament 'is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law': *Union Steamship Co of Australia Ltd v King* (1988) 62 ALJR 645, at 648. Even if such a view is ultimately accepted by the High Court, it seems unlikely that the Court would hold that a State Parliament lacks competence to achieve the continued detention of an individual believed to pose the public risk that David presents.

³⁷ *Daily Hansard* (proof edition) 10/4/1990 (Legislative Assembly) pp 10–11.

³⁸ This view is adopted by Dr Wood, *op cit* fn 36.

³⁹ *Kennan v David* (Unreported, 18 September, 1990).

⁴⁰ His Honour made brief mention of difficulties of construction in relation to s 8 of the Act at p 1 of his judgment.

illness within the meaning of the *Mental Health Act* 1986 (Vic), taking the view that that question is not relevant to the issue of whether the requirements of s 8(1) of the *Community Protection Act* 1990 (Vic) are satisfied.⁴¹

After a careful review of the evidence presented, His Honour concluded that the test laid down by s 8(1) of the *Community Protection Act* 1990 (Vic) was satisfied to the standard of the balance of probabilities. His Honour stated:

I have arrived at the clear conclusion that, if Garry David were to be released forthwith into the community, there would be a real and grave risk that within a short time he would by violent acts cause harm to members of the public and especially to members of the police force, and accordingly that he at large would constitute a serious risk to the safety of members of the public. He would be likely to commit acts of violence upon other persons. He would be likely to stage something like the scenario he planned at the outset of the [1980 shooting] incident. I think that, despite his intelligence and his substantial rational periods, if he were now to be released he would be full of anger at a community which he would blame, if not for institutionalising him, at least for sending him out into the community in a hopeless state for managing life as a member of it, and without having made a sustained and lengthy effort to put him into a condition where he *could* manage as a member of society. His underlying anger and resentment would be almost certain to rise to an explosive level as soon as he felt thwarted or subjected to stress, and this would be very likely to result mediately if not immediately in causing serious harm by violence to some members or member of the public.

The Court having arrived at these conclusions after the fullest consideration, it is inevitable that, in the public interest, there should be an order that the respondent be placed in "preventive detention".⁴²

PREVENTIVE DETENTION AS AN UNAVOIDABLE ISSUE

If the fiction that persons suffering from an antisocial personality disorder and constituting a significant danger to the public are necessarily suffering from a mental illness is rejected, what would appear to be a reasonably straightforward choice is presented. Such persons may be released in the ordinary way at the expiration of their sentences in the knowledge that the public is being placed at substantial risk. Alternatively, a mechanism for preventive detention can be introduced for reasons of public protection on the understanding that such action is being taken for reasons unrelated to moral culpability and that such a mechanism may properly be thought to pose a potential danger to civil liberties.

Attempts are, however, on occasion made to avoid this stark but inevitable choice. In their Interim Report, *Inquiry into Mental Disturbance and Community Safety*, the Social Development Committee of the Victorian Parliament was strongly critical of the recommendations of the Law Reform

⁴¹ Id p 22.

⁴² Id pp 31-2.

Commission, concluding that the *Mental Health Act* 1986 (Vic) should not be amended to include persons with personality disorder. The Committee recognised that 'a case could be made for incapacitation to apply in a small number of cases where the offender has a history of severe acts of violence and is considered to be dangerous'.⁴³ The Committee declined to make such a recommendation, however, on the basis that it 'would be a radical departure from the principles and values under-pinning this State's criminal justice system', and that such a measure 'should not be introduced prior to extensive public debate'.⁴⁴

The Report recommended instead that where an offender currently serving a sentence is thought to be dangerous, a range of special programs should be implemented to facilitate their re-entry into society. Further, statutory provisions should be developed to enable the Government and such offenders to establish individually negotiated agreements as to how rehabilitation and release will occur. The idea of special programs and advance planning for release is, of course, sensible and worthwhile. It is doubtful, however, if the overall scheme proposed is adequate to ensure public protection. The idea of individually negotiated agreements with such offenders is highly questionable. Psychopaths are frequently highly manipulative and are anything but consistently rational. Ultimately the point will come at which their existing sentences will have expired, at which time no basis for continued detention or further negotiation will exist.

On occasion the attempt is made to seek a medium course between the supporters and the opponents of preventive detention by arguing in support of a system of incarceration that is said not to involve a punitive element.⁴⁵ The argument is put that if the system of incarceration can be classified as civil and non-punitive in nature, then the legal and ethical objections to detention based other than on desert are removed. Such an argument seems mistaken. The essence of incarceration from a punitive point of view is the deprivation of liberty, and this is in no way lessened by claiming the incarceration is civil. When a person is sent to prison following conviction for an offence, tremendous variations exist as to the nature of the institution to which he or she will be committed, and the form that incarceration will take. Ideally, the form of imprisonment will be the least harsh that can be imposed having regard to the need to prevent the particular individual from escaping or from doing further harm while incarcerated. In the case of a person said to be detained civilly precisely similar considerations would apply. Such incarceration is, accordingly, properly classified as a form of preventive detention akin to imprisonment. To make use of less harsh sounding labels is merely to seek to escape from the gravity of the issues inevitably involved in arguing in support of preventive detention.

⁴³ Page 55.

⁴⁴ Page 60.

⁴⁵ See D Wood, 'Dangerous Offenders and the Morality of Protective Sentencing' [1988] *Crim LR* 424; D Wood, 'Dangerous Offenders and Civil Detention' (1989) 13 *Crim LJ* 324.

THE CASE FOR PREVENTIVE DETENTION

Faced with the choice between no effective action and a strictly and carefully limited system of preventive detention, the arguments in favour of the latter would appear the stronger.⁴⁶ Such a decision is inevitably subjective, and involves a decision in favour of the potential victims of violent psychopaths over the claim of persons possibly mistakenly or unnecessarily incarcerated under such a system.

Professor Nigel Walker, an influential proponent of preventive detention, argues that the incapacitation of those clearly known to be dangerous should be regarded as a justification which is quite as sound as retribution, deterrence or the need for treatment. He seeks to refute the proposition that the concept of desert must always operate as a pre-condition to, or a limitation upon the extent of, incarceration by posing two hypotheticals, the latter of which closely parallels the David case. In Situation A:

the offender to be sentenced is certain to commit a crime of serious violence unless detained for longer than the 'just deserts tariff' would allow. Must he be released and re-incarcerated only when he has committed the crime he was certain to commit? Or would certainty justify incarcerating him before he commits it? To be consistent the pure retributivist must insist on the former. He might protest that the case as posed is unreal and artificial; but the answer to that is that an uncompromising philosophical position must be defensible in any conceivable situation.⁴⁷

In Situation B:

the violent offender declares his intention of committing further violence when he is released, and there is no reason to disbelieve him or to doubt his capacity for doing what he says he will do. Would the retributivist allow him to be kept inside any longer than the just deserts tariff permits, in order to stop him doing what he promises to do? Must his answer in this situation also be 'No'? If so, he is in effect saying that his principles do not allow him to take any steps to save a person from becoming a victim of violence if those steps involve the extension of incarceration. If he is completely con-

⁴⁶ For discussion of the issue of preventive detention, see J Floud and W Young, *Dangerousness and Criminal Justice* (Cambridge Studies in Criminology XLVII, Heinemann, London, 1981); J Floud, 'Dangerousness and Criminal Justice' (1982) 22 *British Journal of Criminology* 213; A E Bottoms, 'The Dangerousness Debate after the Floud Report' id 229; J P Conrad, 'The Quandary of Dangerousness' id 255; T Honderich, 'On Justifying Protective Punishment' id 268; N Walker, 'Unscientific, Unwise, Unprofitable or Unjust?' id 276; R A Gordon, 'Protective Sentencing and the Dangerous Offender' id 285; I Grant, 'Dangerous Offenders (Canada)' (1985) 9 *Dalhousie Law Journal* 347; V M Esses and C D Webster, 'Physical Attractiveness, Dangerousness and the Canadian Criminal Code' (1988) 18 *Journal of Applied Social Psychology* 1017; Social Development Committee of the Victorian Parliament, *Inquiry into Mental Disturbance and Community Safety, Interim Report, Strategies to Deal With Persons With Severe Personality Disorder Who Pose A Threat to Public Safety* (May, 1990), Ch 3. For a detailed historical account of various forms of preventive detention, see A Dershowitz, 'Origins of Preventive Confinement in Anglo-American Law' (1974) 43 *University of Cincinnati Law Review* 1 and 781.

⁴⁷ N Walker, id 281.

sistent he would also be unwilling to allow any non-custodial precautionary measure that would involve even inconvenience for the offender.⁴⁸

Predicting dangerousness is, of course, notoriously difficult.⁴⁹ Professor Walker, however, has argued that it is possible to isolate a group of offenders of which a majority will commit further violence.⁵⁰ A higher probability can, of course, be achieved if the target group is narrowed so that only those regarded as extremely dangerous are subject to the possibility of preventive detention and it is accepted as a corollary that persons of considerable dangerousness should be released at the expiration of their sentence. Preventive detention should, it is submitted, be reserved only for the most extreme cases; the human time bombs waiting for the opportunity of exploding on release.

Systems of preventive detention which have existed in the past have been unsatisfactory, but have usually been misconceived.⁵¹ First, because they have defined the concept of dangerousness too widely and have properly been seen to pose unwarranted threats to civil liberties. Secondly, because they have, as with s 192 of the *Community Welfare Services Act 1978* (Vic) (now repealed), normally involved a decision to impose an additional period of detention at the time of original sentence.⁵² Thus, they have operated in the context of the normal sentencing process which is essentially retributive in nature, and have required the judge to assess what is warranted in retributive terms and supplement that by an additional period imposed for reasons of community protection. Since the judge is required to impose the additional term as part of, and therefore at the same time as, the original sentence, the judge is called upon to determine the risk that may be posed to the community by the offender at some considerable point of time in the future. Any such system is bound to fall into disrepute and fail.

A legislative scheme designed to provide for the further detention of highly dangerous persons after the expiration of their regular sentence would not seem impossible to develop incorporating appropriate safeguards. Such a system would come into operation at a point of time approaching the normal release date of the offender rather than at the time of original sentence. It would operate only in respect of persons who had proved their danger to the community by the commission of crimes of the most serious kind. The list should possibly be limited to murder, attempted murder and rape. Decisions made, towards the end of such offenders' sentences, that there was a strong

⁴⁸ Ibid.

⁴⁹ See H J Steadman and J J Coccozza, 'We Can't Predict Who is Dangerous' [1975] *Psychology Today* 32 and 84; J J Coccozza and H J Steadman, 'The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence' [1976] *Rutgers Law Review* 1074; A E Bottoms, 'Reflections on the Renaissance of Dangerousness' [1977] *Howard Journal of Penology and Crime Prevention* 70; N Walker, 'Unscientific, Unwise, Unprofitable or Unjust?' op cit fn 46.

⁵⁰ Walker, op cit 277.

⁵¹ Note generally Fox and Freiberg, op cit p 344; A Dershowitz, 'Origins of Preventive Confinement in Anglo-American Law' op cit.

⁵² An exception is s 17 of the *Crimes Act 1914* (Cth). That section, however, is drafted in extremely wide terms and appears never to have been invoked.

probability of further acts of serious violence on their part would, it would seem, be likely to be reliable. While potential for violence is in general extremely difficult to estimate, the issues which would be involved in such a scheme would be far more specific and the evidence available more extensive. In the case of a person convicted of a major crime of violence, who has a lengthy history of criminality, who has behaved violently while in prison and in respect of whom there is a strong body of psychiatric opinion to the effect that their propensity for violence remains undiminished and is likely to be acted upon in the future, a prediction of future violence is likely to be highly accurate.

Decisions as to the requisite degree of dangerousness should be made by a single judge of the Supreme Court, from which there should be an appeal to the Full Court. The Court should be empowered to order a not insubstantial period of further detention based upon perceived risk of future violent acts.

CONCLUSION

The Garry David case is far from concluded, and the issues raised by it little closer to resolution than when the series of events described above began to unfold. Over the coming months, a decision must be made whether to release David at the expiration of the Order imposed by the Court in *Kennan v David*, to seek an extension of that Order and possibly extend the life of the *Community Protection Act* 1990 (Vic), to adopt the recommendations of the Law Reform Commission of Victoria or to enact legislation establishing a system of preventive detention. For reasons elaborated above, my preference is for the adoption of a carefully limited and controlled system of preventive detention.

A number of general lessons can, at this stage, be drawn from the Garry David case. The following seem to me among the more obvious.

Difficult problems need to be recognised and addressed as early as possible. That David would eventually become eligible for release has been obvious since 1980, as has the danger that his release might pose. Yet little attempt appears to have been made to prepare him for that release. Likewise, the problem of detaining him further, the methods by which this might be achieved and the issues it would raise, appear to have been largely ignored until late 1989.

Theory and consequent action need to be based upon knowledge; facts cannot conveniently be changed to conform to theory. An understanding of Garry David's mental state lies in the realm of the discipline of psychiatry. If the knowledge and the insights contributed by psychiatry are discomfiting, it is pointless to protest that the realities of that science should change.

Fictions should be avoided. By the simple fiction of deeming David to be mentally ill community protection can be ensured and the claims of civil libertarians and the views of adherents of traditional legal theory accommo-

dated. The experience of the common law, however, is that the adoption of fictions ultimately gives rise to new problems as the internal contradictions of the fiction become apparent. Difficult issues are best faced and faced squarely.

Legal theory needs to be sufficiently flexible to accommodate solutions to pressing problems. If it is accepted that detention beyond the period of her or his sentence of an individual posing a sufficiently grave threat to the community is necessary, then theories of punishment and sentencing need to be adapted to accommodate this requirement. The theory underlying the principles of the common law in the areas of substantive criminal law and sentencing have served to assist in the protection of our liberties for centuries, and are one of the most valuable aspects of our legal heritage. Nonetheless, the principles of the common law are not immutable, and the theory underlying these principles must be regarded as sufficiently adaptable to accommodate changing circumstances and new necessities.

After this article went to press, the *Community Protection (Amendment) Act 1991* (Vic) extended the life of the *Community Protection Act 1990* (Vic) for a further three years. At the time of writing Garry David remains incarcerated while an application for his further detention is considered by the Supreme Court.

POSTSCRIPT

After this article went to press, the *Community Protection (Amendment) Act 1991* (Vic) extended the life of the *Community Protection Act 1990* (Vic) for a further three years. At the time of writing Garry David remains incarcerated while an application for his further detention is considered by the Supreme Court.