

# Revisiting the Politics of Dangerousness

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Just over a quarter century ago, Michael Petrunik, Senior Research Officer in the Research Division of the Ministry of the Solicitor General of Canada, wrote an article entitled “The Politics of Dangerousness.”<sup>1</sup> The specific impetus for Petrunik’s paper was the then recently enacted 1977 Canadian Dangerous Offender Legislation. He sought to explain the political underpinnings of recent legal developments in Europe and North America aimed at controlling this population.

Petrunik adopted the title of his manuscript from, among other concepts, the previously used but undefined political psychopathology and the role of political factors in the enactment of the 1977 Canadian legislation. He argued that psychopathology, as used in this context, involves the influence of social control ideologies and interest group pressures and pragmatic political adaptations. For example, he noted that the law did not classify offenders causing harm resulting from pollution, shoddy manufacturing, child abuse and neglect, and drunk driving as dangerous, whereas harm resulting from personal or sexual violence was so classified. The law then directed more stringent social control toward the identified dangerous group.

Petrunik noted that the term dangerousness, as applied to criminal offenders, had been used in three major ways: as a product of mental illness; as a product of either actually committing or threatening to commit a violent or sexually violent act; and to de-

scribe the dangerous state (*l'état dangereux*). In general, the first type of dangerousness gives rise to involuntary civil commitment, the second type gives rise to legislation aimed at violent or violent sexual offenders, and the third type gives rise to laws dealing with habitual or persistent offenders. In the first sentence of his final paragraph, Petrunik concluded: “In the end, whether we decide to retain or abolish legislation based on the dangerousness standard, ultimately the question is a moral one and a social policy one: Where do we draw the line in establishing a balance between individual rights and social protection?” (Ref. 1, p 246).

## Seven U.S. Supreme Court Cases

Petrunik focused on the politics of dangerousness as applied to statutory law in Canada aimed at a criminal population. In contrast, the present revisiting of the politics of dangerousness uses a sampling of seven U.S. Supreme Court cases involving psychiatric dangerousness (i.e., the dangerousness criterion that is in some fashion linked to the professional involvement of psychiatry or other mental health professionals) to explore the politics of dangerousness as viewed from the ultimate point of judicial review in the United States. Only one of the cases antedates the publication of Petrunik’s article, but by only a few years. It should be pointed out that this sample is neither comprehensive nor based on statistical methods, but was chosen to illustrate the politics of dangerousness.

*O'Connor v. Donaldson*<sup>2</sup> was among the first cases in the contemporary era of forensic psychiatry to consider the role of dangerousness in the civil commitment process. The U.S. Supreme Court wrote:

A finding of “mental illness” alone cannot justify a State’s locking a person up against his will and keeping him indef-

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initely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the “mentally ill” can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and live safely in freedom [Ref. 2, p 575].

The Court continued:

In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends [Ref. 2, p 576].

In *Barefoot v. Estelle*,<sup>3</sup> the Court ruled that the use of hypothetical questions to arrive at an opinion regarding a capital defendant’s dangerousness is permissible.

In *Washington v. Harper*,<sup>4</sup> the Court recognized a “prison inmate’s liberty interest in avoiding the involuntary administration of antipsychotic medication and the State’s interests in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others” (Ref. 4, p 236).

In *Jones v. United States*,<sup>5</sup> the Court ruled that a mentally ill insanity acquittee can be hospitalized until such time as he is no longer dangerous to himself or others.

In *Foucha v. Louisiana*,<sup>6</sup> the Court held that a State cannot keep hospitalized an insanity acquittee who is dangerous (and carries a diagnosis of antisocial personality disorder) but no longer mentally ill.

In *Kansas v. Hendricks*,<sup>7</sup> the Court opined that neither due process nor double jeopardy was violated in the post-prison sentence civil commitment of a convicted violent sexual predator who had a “mental abnormality” or “personality disorder” and posed a danger to others (by way of committing predatory acts of sexual violence). A mental abnormality was defined as a congenital or acquired condition affecting emotional or volitional capacity that predisposes a person to commit sexually violent offenses.

In *Sell v. United States*,<sup>8</sup> the Court tackled the question of involuntary medication in a defendant found incompetent to stand trial. Relying heavily on the prior cases of *Washington v. Harper*<sup>4</sup> and *Riggins v. Nevada*,<sup>9</sup> the Court specified what has come to be known as the *Sell* criteria in determining the involuntary administration of antipsychotic medications for a proposed attempted restoration of competence to stand trial. These criteria can be paraphrased as follows:

Did the defendant commit a serious crime?

Is there a substantial likelihood that involuntary medication will restore the defendant’s competence and do so without causing side effects that will significantly interfere with the defendant’s ability to assist counsel?

Is involuntary medication the least intrusive treatment for restoration of competence?

Is the proposed treatment medically appropriate?

In addition, the Court thought that other grounds for the involuntary administration of medication should be utilized before applying these criteria to order involuntary medication. It wrote, “For another thing, courts typically address involuntary medical treatment as a civil matter, and justify it on these alternative, *Harper*-type grounds” (Ref. 8, p 182). It then stated, “If a court authorizes medication on these alternative grounds, the need to consider authorization on trial competence grounds will likely disappear” (Ref. 8, p 183). In specific reference to *Sell*’s case, the Court ruled:

The Government may pursue its request for forced medication on the grounds discussed in this opinion, including grounds related to the danger *Sell* poses to himself or others. Since *Sell*’s medical condition may have changed over time, the Government should do so on the basis of current circumstances” (Ref. 8, p 186).

In other words, the Court would like the involuntary administration of medication to be based on “*Harper*-type grounds,” or present dangerousness.

### The Politics of Dangerousness

This sampling of seven U.S. Supreme Court cases involving dangerousness over the past approximately three decades concerns involuntary civil commitment (*O’Connor v. Donaldson*), capital case testimony (*Barefoot v. Estelle*), commitment of insanity acquittees (*Jones v. United States* and *Foucha v. Louisiana*), violent sexual predators (*Kansas v. Hendricks*), and involuntary administration of antipsychotic medication in the criminal system (*Harper v. Washington* and *Sell v. United States*). Each of these cases has significantly influenced psychiatric practice. On brief analysis, to mitigate an individual’s due process rights, the presence of dangerousness is required for involuntary civil commitment, continued involuntary commitment of insanity acquittees, and involuntary administration of antipsychotic medication; and in regard to expert witness testimony, opin-

ions regarding dangerousness can be offered in the hypothetical. In other words, at first glance, these cases do not appear “political” in nature. A closer exploration of these cases, however, may suggest otherwise.

Both *O’Connor v. Donaldson* and *Kansas v. Hendricks* involved involuntary civil commitment. In *O’Connor v. Donaldson*, the functional result was to apply stringent criteria to insure that it would be difficult to deprive an individual’s liberty interest by involuntary hospitalization without the presence of both a mental disorder and present dangerousness. In contrast, the effect of *Kansas v. Hendricks* was to approve of a circular argument to ensure that a certain class of despised individuals (who occupy the lowest social strata in the state prison population hierarchy) would remain under social control, even after serving their criminal sentences. To satisfy the mental disorder criterion, the Court allowed the use of a circular definition of mental abnormality to append to the dangerousness criterion. These two cases support the hypothesis that the U.S. Supreme Court accepts the politics of dangerousness. Borrowing from Petrunik, the Court appears to use a balancing of individual rights against public safety concerns to obfuscate the real basis for a decision based on moral and/or social policy concerns. Although there remains tremendous economic pressure to reduce the number of inpatient psychiatric hospital beds in the public sector as politicians scramble to fund other projects with limited funds, it remains politically popular to be against violent sexual predators. In fact, when the only capital projects for state psychiatric facilities nationwide have been to replace existing facilities due to physical deterioration or unsafe conditions (such as earthquake liability), the recent construction of an entire state psychiatric hospital in Coalinga, California, illustrates what society in general is willing to pay for the social control of violent sexual predators. The Court is not immune to this pervasive societal value.

In regard to insanity acquittees, as exemplified by *Jones v. United States* and *Foucha v. Louisiana*, the Court’s rulings appear to give more constitutional protection to antisocial individuals such as Mr. Foucha than to mentally disordered individuals such as Mr. Jones, who had committed the equivalent of a misdemeanor theft. Of the two individuals, based on the clinical information that was contained in the rulings, Mr. Foucha would arguably appear to pose a greater risk for violence than Mr. Jones. Moreover,

the Court later allowed the use of personality disorder in *Kansas v. Hendricks* to qualify for commitment, but did not recognize it as a legally viable mental disorder criterion for purposes of keeping Mr. Foucha committed based on his diagnosed antisocial personality. Although the politics of dangerousness may not be discernible when comparing *Jones v. United States* with *Foucha v. Louisiana*, when comparing *Foucha v. Louisiana* with *Kansas v. Hendricks*, it becomes clearer.

In the involuntary administration of antipsychotic medication, the Court (as with lower courts) requires that the dangerousness criterion be satisfied for medication to be administered to an individual involuntarily, to overcome an individual’s due process or liberty interest. In *Washington v. Harper*, the Court considered an administrative review to be sufficient for making a determination for involuntary administration of antipsychotic medication. This solution would not appear to be overly burdensome for mental health service providers in either criminal or civil treatment settings. In *Sell v. United States*, the Court in essence said that it divided crimes into serious and nonserious categories, and that those who were not dangerous, accused of committing nonserious crimes and found incompetent to stand trial, could not be involuntarily treated to restore competence. For those accused of serious crimes and who are presently dangerous, the Court suggested other pathways for involuntary medication and that such pathways would be adequate to address the problem. Unfortunately, there would be only one other route to take: involuntary medication according to a jurisdiction’s procedure in the involuntary civil commitment system and its attendant problems. The Court also raised other conundra in *Sell*. For example, in regard to incompetent pretrial defendants accused of nonserious crimes, unless such individuals qualify for treatment in the involuntary civil commitment system, which currently is not an easy system for a defendant to enter and then for only brief periods of time, the Court in essence encourages the perpetuation of a continuous feedback loop to the local jails without a connection to mental health services for many of these individuals.

*Barefoot v. Estelle* appears to illustrate the politics of dangerousness indirectly. The U.S. Supreme Court for all of its concern about the dangerousness criterion when other matters are involved, such as involuntary commitment or involuntary administra-

tion of antipsychotic medications, appeared unwilling to intervene when expert witness testimony involved the use of a hypothetical in formulating an opinion regarding dangerousness in a capital case. Moreover, the dangerousness question posed to the expert witness involved future but not present dangerousness. This case could be considered the one in which the politics of dangerousness is the most evident.

### Conclusions

This analysis of the politics of dangerousness in a review of rulings from the bench of the U.S. Supreme Court has attempted to paint a broad overview of how the Court (as a reflection of societal values at the time of the ruling) has viewed dangerousness in the context of various psychiatric settings. Setting aside the legal reasoning to justify the Court's ultimate decisions, the politics of dangerousness, as raised by Petrunik about a quarter century ago, remains a potent force in the outcome of the U.S. Supreme Court's judicial decisions.

While the Court's rulings involving dangerousness in many respects reflect the moral choices and social policy concerns of the greater society, it is incumbent on psychiatrists to continue to educate the judiciary about clinical realities (see e.g., Refs. 10, 11) or else we can only expect more of the same politics of dangerousness, not only from legislatures,<sup>1</sup> but from those empowered to interpret the law.

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