CASE COMMENT: LISA NEVE, DANGEROUS OFFENDER

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On November 17, 1994, two months before her 22nd birthday, Lisa Neve became Canada's second and only living female "dangerous offender."[1]

Neve's case has provoked significant controversy, focused mainly on her selection for a dangerous offender application. Other offenders, particularly many male offenders, have committed more crimes and more serious crimes, yet the state has not chosen to affix the label "dangerous" to them. Why Lisa Neve?

I do not pretend to have an ultimate answer. I can only set out some of the facts, rules and issues relevant to Neve's designation as dangerous. I will consider the background of the case, the purpose of the dangerous offender provisions, the hearing and some legal and political issues that arise from the case. I hope to show that while there was evidence on which Neve could have been found to be a dangerous offender, there was also a basis for Murray J. to have exercised his discretion not to find Neve to be a dangerous offender.

I. BACKGROUND

Lisa Neve was born on December 26, 1972, in Prince Albert, Saskatchewan. At the age of three months, she, her older brother Chris and younger sister Nicole were adopted by Jim and Colleen Neve. The family took up residence in Calgary.[2] Her siblings have had no difficulties with the law. Neve's life was unremarkable until age twelve.

Her problems began when she reached junior high school. She (along with some other students) was expelled from school for drinking alcohol and unacceptable conduct.[3] She began a life of drugs, alcohol and prostitution.[4]

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1 *R.* v. *Neve* (17 November 1994), Edmonton No. 9103 - 3599 - C1 (Alta. Q.B.) [hereinafter *Neve*]. The first woman declared a dangerous offender, Marlene Moore, died on December 3, 1988. Moore did not die during her dangerous offender incarceration, but while imprisoned for a subsequently-committed robbery. See A. Kershaw & M. Lasovich, *Rock-a-Bye Baby: A Death Behind Bars* (Toronto: McClelland & Stewart, 1991) at 146, 152, 177, 193. The Ontario Crown has commenced dangerous offender proceedings against a third woman, Wendy Sawatsky. See "Crown Asks for Indefinite Jail Term" *The [Edmonton] Journal* (18 February 1995) A4.

2 *Neve*, *supra* note 1 at 20; S. McKeen, "'I don't know that person at all' — Jim Neve" *The [Edmonton] Journal* (15 October 1994) B3.

3 *Neve*, *supra* note 1 at 21; McKeen, *supra* note 2. Moore, similarly, was committed to the Grandview School for Girls at age thirteen, under the *Training Schools Act (Ontario)*; Moore, like Neve, had become a "management difficulty" before being institutionalized (Kershaw & Lasovich, *supra* note 1 at 30-31).

4 One important issue which I shall not pursue is the contrast between Neve, labelled a dangerous offender, and the johns who purchased her sex when she was a child, johns who have, no doubt, escaped prosecution altogether. Interestingly, Neve was a complainant in the recent Edmonton

Between 1986 and 1990, Neve was in the care of various children's services agencies, including the Calgary Children's Service Centre, the Salvation Army's Children's Village in Calgary and the Children's Guardian. She frequently ran away from her institutional residences, occasionally returning to live with her parents.[5] She was admitted to Alberta Hospital, Edmonton (a psychiatric care facility) six times. While on the street, she worked as a prostitute. She was convicted of fifteen offences under the *Young Offenders Act*.[6] The longest sentence she received was one year of closed-custody, for six counts of break and enter. She was also convicted of uttering threats and assault with a weapon, and was convicted twice for forcible confinement. Both of the forcible confinement convictions concerned hostage-takings in Young Offender Centres. In one instance, Neve pressed a pen to her hostage's eye. In the other, she put scissors to the hostage's throat, and slightly wounded the hostage. In neither case was the hostage seriously physically harmed.[7]

Emery Ewanyshyn, supervisor at the Calgary Young Offenders' Centre and a Crown witness, testified in the dangerous offender hearing that Neve was at the top of the inmate hierarchy at C.Y.O.C. She achieved this position because of her violence. She was a "serious behaviour management problem ... the most difficult female inmate [C.Y.O.C. has] had and probably the most dangerous inmate of either gender."[8] Murray J. commented that

> A review of Ms. Neve's records from the Calgary and Edmonton Young Offenders' Centres and her committals during that period to Alberta Hospital ... are rife with instances of threats of violence to inmates, staff and their families, aggressive undisciplined behaviour, acts of violence and an alarmingly

"preppie rapist" case. The Crown, however, for reasons of trial strategy, did not call her has a witness at trial. Neve wondered whether that might mean that her designation as a dangerous offender stripped her of the protection of the criminal law: T. Barrett, "Neve resents being cut from trial" *The [Edmonton] Journal* (9 February 1995) B1 at B2.

5 *Neve*, *supra* note 1 at 21.

6 R.S.C. 1985, c. Y-1. While the number of the offences seems large, the nature of some of the convictions diminishes the impact of their quantity. The break and enter offences were sentenced together; Neve appears to have gone on a short B & E spree between October 15 and 19, 1989: Schedule "A" to *Neve*, *ibid.* Of the remaining convictions, one was for soliciting, two were for failures to comply with an undertaking and a youth court disposition, and one was for escaping custody.

7 *Neve*, *ibid.* at 24.

8 *Ibid.* at 23.

negative attitude toward life in general and the well-being of others. What the evidence vividly presents is a young woman totally out of control.[9]

From March 20, 1988 (when she was fifteen) until December, 1990 (when she turned eighteen), Neve was out of custody only for about four months. From the time she turned eighteen until March, 1994, she was confined for all but about eighteen months.[10]

Between 1991 and 1994, Neve, now an adult, was admitted to Alberta Hospital three times (apart from her dangerous offender proceedings remands). She was convicted of seven criminal offences, including assault with a weapon, uttering threats, robbery and aggravated assault. The assault with a weapon incident took place on May 1, 1991. Neve and two others assaulted the victim and Neve struck the victim on the face with the butt of a knife, breaking the victim's nose and cheekbone.[11] The robbery offence that founded the dangerous offender proceedings occurred one week later. Neve's next offence occurred on November 21, 1992 in the Edmonton "Rock City" nightclub. Neve and three others caused the victim to enter the club's washroom. A fight developed. Neve slashed the victim's neck with an exacto knife. The wound was seven cm. long and one cm. deep.[12] She received her longest sentence for this offence, two years imprisonment. Neve's last offence occurred on January 21, 1993. Its circumstances warrant review.

In the fall of 1991, Neve began living with Richard Jacobsen (or Jacobson), her pimp. He beat her. She laid a complaint with the police in 1992, and Jacobsen was arrested. In January 1993, Jacobsen was tried for the assault. He was defended by Sterling Sanderman, who cross-examined Neve. Jacobsen was convicted,[13] but Neve was upset with the cross-examination. She admitted herself to Alberta Hospital. She

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9 *Ibid.* Ewanyshyn's institutional impressions of Neve were confirmed by Dr. Keith Pearce, Chief of Psychiatry at the Calgary Correctional Centre. He wrote of Neve as follows:

> I have obtained sufficient history from the file and from information passed on to me from the staff to believe this is one of the most dangerous individuals we have had through this Centre. I believe she constitutes such a homicidal threat that *there are strong grounds for getting a number of senior psychiatrists together who have seen her in the past to make a recommendation to the Deputy Minister concerning her future management.*

Ibid. at 57 [emphasis added]. One might speculate that Neve was selected for the dangerous offender proceedings because of her conduct while institutionalized and, more particularly, because of her interactions with the "psychiatric establishment."

10 *Ibid.* at 20. Moore, like Neve, spent most of her teenage and adult life in penal institutions (Kershaw & Lasovich, *supra* note 1 at 138). Perhaps some conclusions respecting the effects of institutionalization could be drawn. While in custody, Moore, like Neve, frequently had bouts of rage and fought (*Neve, ibid.* at 35). In 1976, while incarcerated at the Vanier Centre for Women, Moore and another (like Neve) took a hostage in the course of an institutional disturbance (*ibid.* at 52).

11 *Neve, ibid.* at 25.

12 *Ibid.* at 31-32.

13 Neve's mother reports that Jacobsen had beaten Neve "to a pulp." He received an eighteen month sentence, but was paroled at six months: S. McKeen, "'Shocked' Lisa Neve branded dangerous," *The [Edmonton] Journal* (18 November 1994) A16.

threatened to kill Sanderman and his children, and was later convicted of two counts of uttering threats.[14]

The offence supporting the dangerous offender application occurred on May 8, 1991. The victim, Rhodora Nicholas, was a member of Neve's social group. She had allegedly been involved in an assault on one of Neve's friends. Neve and an accomplice duped Nicholas into joining them for a drive. Nicholas was taken to a field near the Clover Bar city dump outside Edmonton. Neve and the accomplice beat Nicholas, cut off her clothes, cut her (slightly) in the process, took her money and belongings, and drove off, leaving her naked in the field at night. The temperature was 5° celsius. Neve's motive was to exact revenge for the alleged assault by embarrassing Nicholas.[15] Neve was charged with robbery and assault with a weapon. She was not tried on these charges until February 11, 1994. On February 14, 1994, Murray J. found her guilty of both offences, but stayed the assault charge (applying *Kienapple*).[16] Sentencing was adjourned. Neve remained in custody on the November 1992 charges. On March 2, 1994, Neve was convicted of aggravated assault; the assault with a weapon charged was stayed. On that day, the Crown brought the application before Murray J. to have Neve declared a dangerous offender.

II. PURPOSE OF THE DANGEROUS OFFENDER PROVISIONS

Sentencing in criminal cases serves a variety of purposes, including deterrence, rehabilitation, retribution, denunciation and protection of the public. Purposes predominate depending on, *inter alia*, the nature and circumstances of the offence and the offender. The predominant purpose served by the dangerous offender provisions is the protection of the public.[17] These provisions permit an extraordinary remedy — indeterminate detention — for an extraordinary class of criminals — "dangerous offenders." This point, as we shall see below, is important to bear in mind in Neve's case.

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[14] *Neve*, *supra* note 1 at 27, 38. This incident has at least two noteworthy aspects. First, Neve was turned in by her psychiatrists, who ordinarily keep client communications confidential (*ibid.* at 50); S. McKeen, "Lisa a 'homosexual sadist' who idolized mass killers" *The [Edmonton] Journal* (4 October 1994) B1. Second, some critics point to this and certain other contacts Neve had with lawyers as supporting the hypothesis that Neve was subjected to the dangerous offender application because she ran afoul of the "legal establishment": "Why Lisa Neve?" *The [Edmonton] Journal* (20 November 1994) A6; S. McKeen, "Neve sentence unfair, advocate says" *The [Edmonton] Journal* (18 November 1994) A7.

[15] *Neve*, *supra* note 1 at 26.

[16] *Ibid.* at 2. *R.* v. *Kienapple*, [1975] 1 S.C.R. 729. Despite Murray J.'s characterization of the offence in the dangerous offender proceedings, the offence seems not to be, relative to the everyday carnage in homes and on the streets, particularly horrific. The offence that drew Moore into her dangerous offender proceedings was also relatively mild: she pulled a knife on a police officer, waved the knife, banged on the police cruiser, and made threatening gestures with four hypodermic needles (Kershaw & Lasovich, *supra* note 1 at 115).

[17] *Lyons* v. *R.* (1987), 37 C.C.C. (3d) 1 at 17, 50-51 (S.C.C.), La Forest J. [hereinafter *Lyons*]; *R.* v. *Jones* (1994), 89 C.C.C. (3d) 353 at 396 (S.C.C.), Gonthier J. [hereinafter *Jones*].

Dangerous offenders are not mentally disordered.[18] Neither are they common criminals, even recidivists,[19] to whom the common sentencing provisions of the *Criminal Code* apply. Dangerous offenders are that small minority of offenders (the "residue" of the criminal class) who are not specifically deterred or reformed by ordinary punishment and who pose a serious risk to the mental or physical well-being of other members of society.[20] The indeterminate sentence permits the control of such offenders until their dangerousness abates (if ever). The extraordinary nature of the dangerous offender proceedings may be reflected in the relatively low number of successful invocations of the proceedings. Since 1977, when the current provisions came into force, about 120 offenders have been declared dangerous.

In view of the serious consequences of being found to be a dangerous offender, the dangerous offender proceedings set out elaborate criteria which must be satisfied before a sentence of indeterminate detention may be imposed. These criteria are designed to screen out common criminals, leaving only those who pose a sufficiently grave risk to the public subject to preventative detention:

> Not only has a diligent attempt been made to carefully define a very small group of offenders whose personal characteristics and particular circumstances militate strenuously in favour of preventative incarceration, but it would be difficult to imagine a better tailored set of criteria that could effectively accomplish the purposes sought to be attained.[21]

I shall now turn to the description and application of these criteria in Neve's case.

III. THE HEARING

A dangerous offender application has four main aspects. First, the Crown must establish the "foundation" for the application: the offender must be proved to have committed a "serious personal injury offence," which is appropriately linked to the type of dangerousness the Crown intends to prove. Second, dangerousness must be proved. Third, the court determines whether the offender is a "dangerous offender." Fourth, the court determines whether a determinate or indeterminate sentence should be imposed. In the following, I shall confine myself to the features of the dangerous offender provisions most important to Neve's case.

A. FOUNDATION

Under s. 753(a) of the *Criminal Code*, the Crown must prove, beyond a reasonable doubt, that the offender has been convicted of a "serious personal injury offence."

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18 Dispositions of accuseds held not criminally responsible on account of mental disorder are governed by Part XX.1 of the *Criminal Code*, R.S.C. 1985, c. C-86. Neither the Crown nor Neve's experts testified that Neve suffered from a mental disorder.

19 "Habitual offender" statutes, such as the "three strikes, you're out" statutes, apply to such offenders.

20 J. Floud, "Dangerousness and Criminal Justice" (1982) 22 British Journal of Criminology 213 at 214, 216. See also *Lyons*, *supra* note 17 at 22-23; *Jones*, *supra* note 17 at 396.

21 *Lyons*, *supra* note 17 at 29.

"Serious personal injury offences" are of two types. First, a serious personal injury offence is an indictable offence (other than a murder or treason offence) with a maximum sentence of ten years imprisonment or more, involving the use or attempted use of violence against another person, or conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person (a "Violence Offence").[22] Second, it is an offence or attempt to commit an offence under ss. 271, 272, or 273 of the *Criminal Code* (a "Sexual Offence").[23] Neve was not alleged to have committed a Sexual Offence, so that species of "serious personal injury offence" and the evidential issues relating to that type of offence were irrelevant in her case.

Where an offender is proved to have committed a Violence Offence, the Crown must go on to prove that "the offender constitutes a threat to the life, safety or physical or mental well-being of other persons" on the basis of evidence establishing

> (i) a pattern of repetitive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his behaviour,[24]
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> (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his behaviour,[25] or
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> (iii) any behaviour by the offender, associated with the offence for which he has been convicted, that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.[26]

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22 *Criminal Code*, *supra* note 18, s. 752(a).

23 *Ibid.*, s. 752(b).

24 *Ibid.*, s. 753(a)(i); Murray J. settled the meaning of the word "likelihood" in s. 753(a)(i) in a manner favourable to Neve. "Likelihood" may receive a broad or restrictive interpretation. The broad interpretation takes the term to refer to a mere tendency or real possibility. The narrow interpretation takes the term to refer to a state of being more likely than not, or very likely. Murray J. adopted the narrow interpretation. Thus, the Crown was required to prove (beyond a reasonable doubt) not merely that Neve would possibly behave violently, but that she would very probably behave violently (*Neve*, *supra* note 1 at 13-15). Murray J. followed the decisions of McDonald J. in *R.* v. *Williams* (1993), 140 A.R. 132 at 136 (Q.B.); aff'd (1994), 149 A.R. 229 (C.A.) *per curiam* [hereinafter *Williams*]; and of La Forest J. in *Lyons*, *supra* note 17 at 29.

25 *Criminal Code*, *ibid.*, s. 753(a)(ii). Murray J. also accepted Neve's counsel's submissions and found — again favourably to Neve — that s. 753(a)(ii) requires proof of the likelihood of persistent aggressive behaviour, despite the absence of the term "likelihood" in the subparagraph (*Neve*, *ibid.* at 15-16).

26 *Criminal Code*, *ibid.*, s. 753(a)(iii). These tests are disjunctive; the Crown need establish only one of the tests: *R.* v. *Lewis* (1984), 12 C.C.C. (3d) 353 at 358 (Ont. C.A.), Howland C.J.O. [hereinafter *Lewis*]; *Neve*, *ibid.* at 13-15.

The robbery was not argued to fall under subparagraph (iii). The Crown did argue that the robbery was a Violence Offence that formed part of the patterns of conduct referred to in subparagraphs (i) and (ii). Murray J. found for the Crown.

Neve's counsel (Charles Davison) had argued that since s. 753(a)(i) expressly applies to offences "showing a failure to restrain ... behaviour," and the robbery was not committed in an unrestrained manner — it was not an impulsive act — the robbery could not fall under s. 753(a)(i). Murray J. disagreed. In his view, "it is not necessary that the s. 752(a)(i) crime be impulsive."[27] The subparagraph applies whether the person planned the acts or offended "on the spur of the moment."[28] In either case, the offender has failed to restrain his or her behaviour. One might think that planned behaviour and unrestrained behaviour are opposites: where behaviour is planned, it is restrained to conform to the plan. Planned behaviour, however, may be unrestrained in the sense that the actor does not restrain himself or herself from carrying out the planned act. Hence, Murray J.'s view appears to be semantically correct.

Neve's counsel had also argued that the circumstances of the robbery did not show a "substantial degree of indifference" to the "reasonably foreseeable consequences" of the robbery, as required under s. 753(a)(ii). Neve had stated to Alberta Hospital staff after the robbery that she should have killed Nicholas. Since Neve did not kill Nicholas, Neve had not been indifferent to Nicholas' fate. Murray J. rejected this line of reasoning: "In my opinion, assaulting a young woman and leaving her naked in the country late at night at a temperature of five degrees centigrade shows indifference on Ms. Neve's part to the [reasonably] foreseeable risk of harm to Ms. Nicholas."[29] That is, while Neve was not as indifferent to Nicholas' fate as she might have been, she was, nevertheless, substantially indifferent to her fate.

The Crown, then, having established the foundation for the application, could proceed to prove that Neve "constituted a threat to life, safety or physical or mental well-being of others," on the basis of evidence satisfying ss. 753(a)(i) or (ii).

B. PROOF OF DANGEROUSNESS

The *Criminal Code* requires that, in the course of the hearing, at least two psychiatrists present evidence: one for the Crown, the other for the offender.[30]

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27 *Neve, ibid.* at 5.

28 *Ibid.* at 6.

29 *Ibid.* at 7; "It was a vicious, premeditated assault upon a person who had been lured into this very dangerous situation ... the behaviour throughout the assault and subsequent robbery ... was humiliating, sadistic and showed no concern for [Ms. Nicholas'] physical or emotional well-being." (*ibid.* at 76). Moore's counsel had also argued that her assault with a weapon conviction was not a sufficient offence on which to base Moore's dangerous offender proceedings. This argument did not avail Moore, either (Kershaw & Lasovich, *supra* note 1 at 131).

30 *Criminal Code*, *supra* note 18, s. 755. Subject to the restrictions on the number of experts permitted to be called under section 7 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, each party may call additional experts, including psychologists or criminologists. The court may order the offender to attend at a place or before a person for observation or may remand the offender in custody for observation, if, generally, a duly qualified medical practitioner provides evidence that

Generally, the ordinary rules of evidence apply at the hearing,[31] save that the Crown is entitled to lead evidence of character (disposition being in issue),[32] and confessions and incriminating statements are not governed by the common law or *Charter* rules applicable at trial.[33] The Crown will typically adduce evidence of (relevant) prior convictions, probation reports and the circumstances of any relevant prior offences. Evidence relating to the probability of cure is not relevant to the issue of whether the accused is a dangerous offender; that issue turns on past conduct.[34]

Neve's dangerous offender hearing lasted three weeks. The Crown's witnesses included four psychiatrists (each of whom had treated Neve), Ewanyshyn of the C.Y.O.C., and two police officers. Neve's background and the circumstances of the offence bringing her before the bar were considered. Neve's criminal record, Alberta Hospital records, and young offender centre records were admitted, as were documents she wrote. Neve called experts and other witnesses, and testified on her own behalf. I will briefly review some salient evidence and evidential findings, including (1) her criminal record; (2) the evidence of fantasy; and (3) the expert psychiatric evidence.

1. Criminal Record

Neve's counsel argued that her convictions for uttering threats and break and enter should not be considered in her dangerous offender application. He argued that the "threat" contemplated by s. 753 must concern personal injury. The uttering of threats does not create physical harm or the risk of physical harm, and so uttering threats should not be considered under s. 753. Similarly, break and enter offences involve injury to property, not persons; hence these offences should not be relevant to the determination of dangerousness.[35]

Murray J. conceded that it is not possible for an offender to be found to be a dangerous offender on the basis of verbal threats only. Moreover, he conceded that in many cases Neve's threats were not carried out. Murray J. held, nevertheless, that he should take the threats into account. Threats, in conjunction with violent offences, may be evidence of the behaviour and dispositions the Crown must prove under ss. 753(a)(i) and (ii).[36]

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the observation might yield evidence relevant to the application: *Criminal Code*, *supra* note 18, s. 756. Neve was remanded for psychiatric observation twice during the dangerous offender proceedings (*Neve*, *supra* note 1 at 2-3).

31 *R.* v. *Jackson* (1981), 61 C.C.C. (2d) 540 at 544 (N.S.S.C.A.D.), Hart J.A., leave to appeal to S.C.C. refused, [1982] 2 S.C.R. viii. See also *Lewis*, *supra* note 26 at 357.

32 *Criminal Code*, *supra* note 18, s. 757.

33 *Jones*, *supra* note 17 at 398, 400-01.

34 *R.* v. *Carleton* (1983), 69 C.C.C. (2d) 1 at 6 (Alta. C.A.), McGillivray C.J.A.; aff'd (1984), 6 C.C.C. (3d) 480n (S.C.C.) [hereinafter *Carleton*]. See also *Williams*, *supra* note 24 at 137 (Q.B.); *Neve*, *supra* note 1 at 16, 68.

35 *Neve*, *ibid.* at 17-18.

36 *Ibid.* at 18.

The break and enter offences were relevant, according to Murray J., because of the "inherent risk of physical injury or death and severe psychological danger to those who may be lawfully on the premises at the time."[37] Break and enter offences, in their full context, are relevant to the issue of dangerousness. In all of the circumstances, however, Murray J. did not need to give any weight to the break and enter convictions (or the failure to comply and concealed weapons convictions), except to the extent that they were relied on by the Crown psychiatrists for their opinions that Neve is a psychopath.[38] That is, Murray J. viewed the evidence of these convictions as supporting the "criminal versatility" psychopathic characteristic.

2. Fantasy

Much of the police testimony and the documentary evidence concerned Neve's purported fantasy life. Neve's words — recorded by institutional staff, repeated by police officers, or written by her — manifested (in Murray J.'s estimation) "evil, violent, sadistic thoughts."[39] For example, when sixteen, Neve wrote a note specifying how she would torture people; at C.Y.O.C. she filled an exercise book with "bizarre, evil statements."[40] She told police officers of murders she had committed. Sergeant JoAnn McCartney, a nineteen year Edmonton Police Service veteran who investigated pimping and prostitution and had a close relationship with Neve, testified that Neve told of her preference for inflicting neck wounds. Neck wounds squirt blood.[41] Sergeant McCartney related the following in her testimony:

> She talked about the feeling of power, that the best part of all of it was the feeling of power that it gave her to have someone there — she said that in the last few moments before they die they don't know whether they're going to die or not and she said that they all beg God for their life. She said it made her feel like God because she was the only one who knew in that brief point in time whether or not they were going to live or die. She said that made her feel like God and she liked that.[42]

When Neve took the stand she offered an explanation for the fantasy evidence. Her basic claim was that her "evil and bizarre" words were merely ploys, tactical moves. She lied to police officers and caregivers and told them outrageous stories because she did not want to deal with her real problems. The lies diverted officialdom and protected her privacy.[43] She repudiated her past words. They had never been uttered or written seriously. Her threats, too, were never made seriously.

If Neve's expressed evil thoughts were only diversions, one might have inferred that she was manipulative, not dangerous. Murray J., however, rejected her account of her "shock talk": "I am of the view that she did mean what she said in terms of her wishes

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37 *Ibid.* at 19.
38 *Ibid.* at 67-68.
39 *Ibid.* at 66.
40 *Ibid.* at 42.
41 *Ibid.* at 33-34.
42 *Ibid.* at 34.
43 *Ibid.* at 40-41, 44, 45.

and intentions, when she said it."[44] He was satisfied beyond a reasonable doubt that she meant to carry out her threats, when the opportunity arose.[45] Murray J. did find that the killings she referred to were only part of her fantasies; there was no evidence respecting the killings other than her statements:[46] "I do not know if any of these stories of killing people are true and I consider them solely from the point of view that Ms. Neve made these statements. To that extent, they reflect upon her character and personality."[47] Her "many evil statements," however, demonstrated "a state of mind that is most alarming."[48]

Neve's fantasy life gained its pathological relevance to the issue of dangerousness through its interpretation by the Crown's psychiatrists.

3. Expert Evidence

The Crown called four psychiatrists. They had each personally interviewed and tested Neve. The experts relied on her young offender centre, remand centre, and Alberta Hospital files, her diaries, transcripts of her trials and convictions — all of which were entered as exhibits in the dangerous offender proceedings.[49] They also relied on the testimony of police and civilian witnesses.

The leading Crown psychiatrist was Dr. Pierre Flor-Henry, Director of General Psychiatry and Director of Acute Psychiatry and the Clinical Diagnostic and Research Centre at Alberta Hospital Edmonton. He described Neve as extremely dangerous. He testified that she is "homosexual" and "sadistic," the "female equivalent of a male lust murderer."[50] Furthermore, "She is both psychopathic in her personality structure and antisocial."[51]

Dr. Flor-Henry accepted the following definition of "psychopath":

> Psychopaths are ... grandiose, egocentric, manipulative, dominant, forceful, coldhearted. [Affectively] they display shallow and labile emotions; are unable to form long-lasting bonds to people and principles or goals; are lacking in empathy, anxiety, in genuine guilt or remorse. Behaviourally, psychopaths are impulsive and sensation-seeking, and tend to violate social norms. The most obvious expressions of these predispositions involve criminality, substance abuse, and a failure to fulfil social obligations and responsibilities.[52]

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44 *Ibid.* at 45-46.
45 *Ibid.* at 18-19.
46 *Ibid.* at 37.
47 *Ibid.* at 38-39.
48 *Ibid.* at 46.
49 *Ibid.* at 48.
50 *Ibid.* at 50; cf. 37.
51 *Ibid.* at 60. Drs. Cadsky and O'Mahoney concurred (*ibid.* at 53).
52 *Ibid.* at 49. The definition is drawn from a work by Stephen, Hart, Hare and & Forth, not cited in Murray J.'s reasons.

An apparently important element of the foundation for Dr. Flor-Henry's opinion was Neve's score on the "Hare Psychopathy Checklist." This is a test designed by psychologist Dr. Robert Hare for diagnosing psychopathy. The test lists twenty behavioural and personality traits characteristic of psychopathy. These include lack of remorse, shallow affect, promiscuity, early behavioural problems and criminal versatility. The traits are rated from zero (never present) to two (always present). A score of thirty or more out of a possible forty indicates psychopathy.[53] Neve's main expert, Dr. Brooks, acknowledged that the Hare Psychopathy Checklist improves the predictability of psychopathy in an individual.[54] Dr. Flor-Henry gave Neve a score of thirty-four on the test, as did Dr. Cadsky, another Crown witness.[55] Dr. O'Mahoney also testified that Neve was psychopathic.[56]

Drs. Flor-Henry and Cadsky testified that Neve was sadistic.[57] The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, or DSM - IV,[58] sets out two main criteria for sexual sadism. Criterion A requires evidence, covering a period of at least six months, of "recurrent, intense sexually arousing fantasies, sexual urges, or behaviours involving acts (real, not simulated) in which the psychological or physical suffering (including humiliation) of the victim is sexually exciting to the person."[59] Criterion B requires evidence that the "fantasies, sexual urges or behaviours cause clinically significant distress or impairment in social, occupational, or other important areas of functioning."[60] The diagnosis of sadism was supported by the evidence of the robbery (interpreted as an act of sexual humiliation), and of another incident in which Neve, on the pretext that a "date" had made a special bondage request, deceived a prostitute into joining her in a hotel room, where Neve bound the prostitute, naked, with duct tape, and threatened to assault her, apparently with a knife. Dr. O'Mahoney testified that "for a person to be found naked is a huge humiliation for that person to suffer and to do this to a person is the manifestation of an extreme attempt at humiliation."[61] Neve's fantasies took on significance as Criterion A indicators of sadism.

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53 *Ibid.* at 50. The test schema is reproduced in S. McKeen, "Lisa likened to 'male lust-murderer'" *The [Edmonton] Journal* (5 October 1994) B1; and "Without Remorse: Searching for the Psychopaths among us" *The [Edmonton] Journal* (28 November 1994) C1.

54 *Neve, supra* note 1 at 61. Dr. Brooks' concession appears to be consistent with the views of a significant number of other players in the North American criminal justice system. The National Parole Board and the Correctional Service of Canada are, apparently, considering the adoption of the test. Dr. Hare has taught his risk-assessment method to corrections and mental health officials in Florida, Wisconsin, Texas, Washington and Maine: K. Pemberton, "Screening tool used only sporadically" *The [Edmonton] Journal* (11 February 1995) C2.

55 *Neve, ibid.* at 50, 53.

56 *Ibid.* at 53.

57 *Ibid.* at 37, 52.

58 (Washington, D.C.: American Psychiatric Association, 1994).

59 *Ibid.*, para. 302.84 ("Sexual Sadism") at 530.

60 *Ibid.*

61 *Neve, supra* note 1 at 30, 55, 7. Dr. Flor-Henry's view was that Neve's behaviour was "illustrative of homosexual sadism" (*ibid.* at 37).

The finding of sadism was not gratuitous. It was a link between Neve's diagnosed condition and her dangerousness. DSM - IV warns that "When Sexual Sadism is severe, and especially when it is associated with Antisocial Personality Disorder, individuals with Sexual Sadism may seriously injure or kill their victims."[62] The next step to dangerousness, then, was a finding of antisocial personality disorder.

All four Crown psychiatrists testified that Neve had this disorder.[63] DSM - IV sets out three main criteria for the disorder. Criterion A requires evidence of "a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years," as indicated by three or more of the following:

> (1) failure to conform to social norms with respect to lawful behaviours as indicated by repeatedly performing acts that are grounds for arrest
>
> (2) deceitfulness, as indicated by repeated lying ... or conning others for personal profit or pleasure ...
>
> (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults
>
> (5) reckless disregard for safety of self or others ...
>
> (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt [or] mistreated another ....[64]

Antisocial personality disorder is frequently associated with a lack of empathy with others, an inflated and arrogant self-appraisal, and a glib and superficial charm.[65] Criterion B is that the person be at least eighteen years old (the diagnosis is not made for younger persons). Criterion C is that "there is evidence of Conduct Disorder ... with onset before age 15 years."[66] "Conduct Disorder" is characterised by a pattern of behaviour that violates the basic rights of others, as evidenced, for example, by bullying, threatening, or intimidating behaviour; initiating fist fights; using a weapon that can cause serious physical harm; or physical cruelty to other people.[67] Further evidence includes running away from home over night, and frequent truancies. Conduct Disorder is associated with a lack of empathy with or concern for others; low self-esteem, compensated for by a veneer of toughness; the early onset of sexual behaviour, and drinking and smoking.[68] It is fair to observe that there was some evidence in Neve's case which could be interpreted to support a diagnosis of antisocial personality disorder.

Neve's chief expert was Dr. Hamilton Brooks, Clinical Director of Forensic Psychiatry at Alberta Hospital. He had both treated and tested Neve. Dr. Brooks

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62 DSM - IV, *supra* note 58 at 530.
63 *Neve*, *supra* note 1 at 52, 53, 54, 56, 60.
64 DSM - IV, *supra* note 58, para. 301.7 ("Antisocial Personality Disorder") at 649-650.
65 *Ibid.* at 647.
66 *Ibid.* at 650.
67 *Ibid.*, para. 312.8 ("Conduct Disorder") at 85-86.
68 *Ibid.* at 87.

cautioned against giving undue weight to psychiatric testimony on the issue of Neve's dangerousness. In his opinion, psychiatrists are inaccurate predictors of future behaviour.[69] In Dr. Brooks' opinion, Neve was not a psychopath. Dr. Brooks testified that she had some psychopathic characteristics, but did not display the egocentricity, grandiosity, and lack of empathy typical of psychopaths.[70] Neve had demonstrated compassion, love, remorse, and nurturing.[71] Dr. Brooks weighted these facts heavily, and found them inconsistent with psychopathy.[72]

Dr. Brooks' testimony, unfortunately for Neve, was not all to her benefit. He did feel that Neve satisfied the DSM - IV criteria for antisocial personality disorder.[73] He testified that Neve had the potential to reoffend, possibly in a violent fashion.[74] He testified that past behaviour is the best indicator of future behaviour. Since Neve had a violent past, she had a higher potential for violently reoffending than a normal person.[75] Dr. Brooks felt that Neve was "immature"; her psychological development had not advanced since she was seventeen. She had "not begun to deal with life's problems," she had not furthered her education and she was not emotionally stable. Nonetheless, as immature, she had a greater potential for improvement than if she had reached her adult personality.[76]

Murray J. held that the conclusions reached by the Crown psychiatrists more accurately described Neve's character than those reached by her expert witnesses.[77] Murray J. did not find it necessary to determine whether Neve was a psychopath, although noting that the evidence strongly pointed in that direction. He did determine that she had a severe antisocial personality disorder.[78]

C. DETERMINATION OF DANGEROUS OFFENDER STATUS

The determination of dangerous offender status has two aspects. First, the court must determine whether the Crown has proved the statutory conditions beyond a reasonable doubt. Second, the court must determine whether it shall exercise its discretion to find the offender to be a dangerous offender — Murray J. held that the court has a discretion, even where the evidence satisfies the statutory tests for dangerous offender status beyond a reasonable doubt, not to declare an offender to be dangerous.

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69 *Neve*, *supra* note 1 at 58.

70 *Ibid.* at 58-59. See also S. McKeen, "Psychiatrist sees good, bad in Lisa" *The [Edmonton] Journal* (19 October 1994) B3.

71 Corinne Stepanko of the Elizabeth Fry society testified to the same effect (*Neve*, *ibid.* at 75). Dr. O'Mahoney testified, relying on the work of Sir Peter Scott, that psychopathy and nurturing relationships are not mutually exclusive (*ibid.* at 55).

72 *Ibid.* at 61.

73 *Ibid.* at 58; Murray J. added that Dr. Brooks also felt, though, "that the better prognosis would be one of borderline [personality disorder]." (*ibid.*).

74 *Ibid.* at 60.

75 *Ibid.* at 59.

76 *Ibid.* at 58.

77 *Ibid.* at 62.

78 *Ibid.* at 66.

The Ontario Court of Appeal had held, at the expense of Marlene Moore, that a court has no discretion not to find an offender to be dangerous, if the evidential basis is satisfied.[79] In the *Lyons* case, however, La Forest J., without dwelling on the point or considering the jurisprudence, declared that "the court has the discretion *not to designate the offender as dangerous* or to impose an indeterminate sentence, even in circumstances where all of these criteria are met."[80] Murray J. took La Forest J. to have overruled *Moore.*

Murray J.'s position has the virtues of making the same word have the same meaning in two occurrences in the same sentence and of leaving the term "may" with its usual permissive sense. Moreover, the recognition of a discretion allows justice to be done in particular cases, despite the satisfaction of the formal preconditions of dangerous offender status.

Discretion is an important component of the dangerous offender provisions. A very large array of offences might be classified as Violence Offences. The lives of many persons might be said, without semantic impropriety, to be classifiable under ss. 753(a)(i) or (ii). The dangerous offender provisions do apply very broadly. Perhaps the provisions could not be drafted in a more restricted fashion. Given the extensive sweep of the provisions, a safety valve is required to spare individuals who satisfy the literal application of the provisions from being labelled as "dangerous." That label should be left for members of that small number of exceptional criminals for whom the ordinary criminal sentencing provisions are inappropriate.

Although Murray J. did not set out a list of factors to be considered in the exercise of the discretion, he did consider the following matters before exercising his discretion: Neve's maturity, her past sentences, and whether the labelling as a dangerous offender would be grossly disproportionate to the offence bringing her before the court.[81]

We can, I suggest, discover at least one additional important factor by a reflection along the following lines: When would we not want a person declared a dangerous offender, even though the statutory conditions for that status are manifestly satisfied? One situation would be where the acts in question do not have the meaning or significance that the acts apparently have; that is, where the nature of the acts differs from their appearance. When might acts not have the significance they appear to have? When acts are put in their proper context, their true nature may become apparent. We are all familiar with situations where one set of words can have different meanings, depending on (*inter alia*) the context in which the words are spoken. One set of physical acts may also have different meanings, depending on the context in which the acts take place. When considering whether a person should be labelled a dangerous offender, then, the acts of the person should be put in their context. The acts should not

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79 *R.* v. *Moore* (1985), 16 C.C.C. (3d) 328 at 329 (Ont. C.A.), MacKinnon A.C.J.O. [hereinafter *Moore*]. The Ontario Court of Appeal followed Clement J.A.'s minority decision in *Carleton* on this issue (*Carleton, supra* note 34 at 21).

80 *Lyons, supra* note 17 at 29 [emphasis added].

81 *Neve, supra* note 1 at 65.

be considered only in isolation. This is not to suggest that considerations of context will de-criminalize conduct. The issues of excuse or justification are considered at the liability stage of proceedings, not in the dangerous offender proceedings. Context may be relevant, though, to the issue of whether the behaviour was merely criminal, or warrants labelling the offender as dangerous.

Murray J. was satisfied, beyond a reasonable doubt, that "the test of dangerousness has been met by the Crown."[82] He was satisfied beyond a reasonable doubt that the robbery was not an isolated occurrence, that Neve had displayed both a pattern of repetitive behaviour described by s. 753(a)(i) and a pattern of aggressive behaviour described by s. 753(a)(ii), and that she constituted a threat to the life, safety, and physical or mental well-being of other persons.[83]

Murray J. exercised his discretion to find that Neve was a dangerous offender.[84] He did not accept that a dangerous offender designation would be disproportionate to the robbery offence.[85] Neve, he found, was not as immature as Dr. Brooks had claimed; but if she was, if her personality had not changed since age seventeen, that fact would raise concern.[86] Murray J. did not consider the context of Neve's criminal behaviour.

D. SENTENCE

The court has the discretion either to impose the determinate sentence warranted by the offence for which the offender was convicted, or in lieu of this sentence, to impose a sentence of indeterminate detention. The court's decision is based on evidence relating to the offender's possible cure and treatment. In Alberta, a court first decides what a fit determinate sentence for the offence would be. The court then considers whether the offender's condition could be ameliorated within that time. If so, the determinate sentence is appropriate; if not, where the offender will remain dangerous for an indeterminate period, an indeterminate term of imprisonment is warranted.[87]

On the issue of treatment, Dr. Flor-Henry testified that psychopaths are not good candidates for treatment, and the risk of recidivism is high.[88] Psychopaths do not burn out between ages thirty-five and forty-five; their behaviour remains the same. Dr. Cadsky agreed.[89] Dr. Cadsky added that recent opinions indicated that psychopaths may not derive much benefit from milieu therapy in a therapeutic community, which had been thought to be the best available treatment for psychopaths. Psychopaths may, in fact, get worse with treatment.[90] Dr. O'Mahoney indicated that Neve would gain

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82 *Ibid.* 65-66.

83 *Ibid.* at 63-64.

84 *Ibid.* at 67.

85 *Ibid.* at 65.

86 *Ibid.*

87 *Carleton*, *supra* note 34 at 8, McGillivray C.J.A.; at 22-23, Clement J.A.; *R.* v. *Poutsoungas* (1989), 49 C.C.C. (3d) 388 at 390 (Ont. C.A.) *per curiam*; *Williams*, *supra* note 24 at 154-155.

88 *Neve*, *supra* note 1 at 70.

89 *Ibid.*

90 *Ibid.* Dr. O'Mahoney concurred (*ibid.* at 71).

from treatment only if she willingly sought and accepted help.[91] Dr. Singh testified that Neve is unlikely to willingly accept treatment.[92]

Dr. Brooks agreed that psychopaths become "slicker" in group therapy, do not make fundamental changes in their personality, and are difficult to treat. He agreed that a person must be committed to treatment and that Neve has not shown that commitment.[93] Since he felt that Neve was not psychopathic, however, he believed she could be helped.[94]

Neve testified that she had "wasted" her life and was prepared to make changes.[95]

Murray J. found that Neve did not intend to change her ways or accept treatment: "I strongly suspect that the enormity of the risk she now faces has finally hit home and this has brought about the position she is now taking before this Court."[96]

Murray J. considered the determinate sentence he would have imposed, had he not imposed the indeterminate sentence. He found the robbery to be a vicious, premeditated assault; it was humiliating to the victim and sadistic; it showed no concern for the physical or emotional well-being of the victim. He would have imposed a period of imprisonment of three years for this offence.[97]

Murray J. sentenced Neve to indefinite detention, in lieu of sentencing her to a determinate period for the predicate offence of robbery. He did take her youth into account.[98] He noted that the majority of psychiatrists held out only a "grim prognosis" for Neve.[99] In his view, the evidence did not suggest that Neve's condition would be improved with treatment in any definite period.[100]

IV. SOME LEGAL AND POLITICAL ISSUES

Neve's case is a nest of difficult issues. Some of these — the logical difficulties of proving probability beyond a reasonable doubt, the role of threat as a basis for punishment, the propriety of reliance on expert psychiatric evidence on the issue of threat, the existence of prosecutorial discretion *per se* — have received authoritative (if not necessarily satisfactory) consideration in the *Lyons* case, and I will not consider them here. I will also not consider other general issues — the social responsibility for child prostitution and its consequences, the role of the helping professions in the manufacture of delinquency, the epistemological profile of psychiatry, and the

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91 *Ibid.*
92 *Ibid.*
93 *Ibid.* at 71-72.
94 *Ibid.* at 72.
95 *Ibid.* at 73-74.
96 *Ibid.* at 75.
97 *Ibid.* at 76.
98 *Ibid.* at 77.
99 *Ibid.*
100 *Ibid.*

transformation of the law and the normalization of the judicial function through the absorption of psychiatric discourse. I will raise only three issues particular to Neve's case: (1) the use of evidence of fantasy; (2) the nature of the psychiatric opinions given in the case; and (3) the apparent arbitrariness of the application concerning Neve.

A. FANTASY

The fantasy issue has two aspects. First, some of the fantasy evidence was drawn from diary entries. The use of diaries in litigation is problematic. Second, it might be argued that Murray J. used the evidence of fantasy improperly. No legal error, however, appears to have been committed respecting this evidence.

1. Diary Evidence

Diary evidence is being increasingly used in a wide variety of litigation. Diary evidence has been used in matrimonial cases, many construction law cases, sexual assault cases (where the diary of the complainant is pursued by the defence), and now in dangerous offender proceedings. Frequently, diaries are employed only to support testimonial evidence, through the past recollection recorded or present memory refreshed rules, or to undermine the credibility of testimony, through the use of the diaries in cross-examination. Diaries may also be adduced as evidence of the truth of their contents, through applicable exceptions to the hearsay rules. In Neve's case, the diaries were original evidence of her state of mind, which was relevant to her disposition for dangerousness; the diaries were also legitimate bases for opinion evidence. Diary evidence raises problems of process and privilege.

In criminal cases, diaries may be obtained by the Crown through the search warrant procedure, by the Crown or defence through the subpoena *duces tecum* provisions of the *Criminal Code*,[101] or by the defence through the Crown's disclosure of documents or by orders to produce directed to third party documentary custodians.

No issues of process were, it appears, raised in Neve's case. The Crown seems to have been in possession of all of the documents it required. Presumably, all of the documents were collected and retained in the course of Neve's legitimate institutional care, supervision and training. Given the institutional contexts in which many of the documents were produced, Neve may not have had a reasonable expectation of privacy respecting many of the documents. Furthermore, even if some limitation of Neve's right to be secure against unreasonable search or seizure occurred in the passage of the documents from her hand to the hand of the Crown, insofar as the documents were not extracted from Neve by law enforcement officials, the diaries probably would not be held to be "conscripted" evidence, and the admission of the documents probably could not be argued to bring the administration of justice into disrepute.[102]

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[101] *Criminal Code*, *supra* note 18, ss. 698, 699, Form 16.

[102] *R.* v. *Colarusso* (1994), 87 C.C.C. (3d) 193 at 230-231 (S.C.C.), La Forest J.

What does seem offensive to some, however, is that diary entries were used against Neve at all. Why should her inmost thoughts have been thrown back against her? Should she not have been free from incrimination by her notes to herself? William Safire has raised these questions:

> What right does Congress — or the cops, for that matter — have to pry into anybody's personal diary? ... All of us ... should take a serious look at the rush to break the seal of the self-confessional. Just as our home is our castle, our mind is our citadel of privacy — and so should be our mind's most intimate expressions in a personal diary.[103]

Section 8 of the *Canadian Charter of Rights and Freedoms*[104] does protect "a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual."[105] Information contained in a diary fits this description. Section 8, however, does not absolutely immunize types of information from being introduced as evidence. So long as a search yielding evidence is reasonable, and so long as no rule of evidence forbids the introduction of the evidence, the State is entitled to adduce information it collects in the course of investigations, including diary entries.

At present, no class or *prima facie* privilege exists for diary entries. Diaries might be held privileged under the "Wigmore criteria." These are the criteria which the Supreme Court of Canada has indicated may be satisfied for a privilege to be recognized. There are four criteria:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the community ought to be sedulously *fostered.*
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of the litigation.[106]

These criteria are applied on a case-by-case basis.

Thus, for example, in the civil case of *K.L.V.* v. *D.G.R.*, the B.C. Court of Appeal held that a plaintiff sexual-assault victim's diary was privileged on the basis of the Wigmore criteria:

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103 "On Keeping Diaries" *The New York Times* (18 August 1994); quoted in *K.L.V.* v. *D.G.R.*, [1994] 10 W.W.R. 105 at 110 (B.C.C.A.), Hutcheon J.A. [hereinafter *K.L.V.*].

104 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

105 *R.* v. *Plant* (1994), 84 C.C.C. (3d) 203 at 213 (S.C.C.), Sopinka J.

106 *Slavutych* v. *Baker*, [1976] 1 S.C.R. 254 at 260; *R.* v. *Gruenke* (1992), 67 C.C.C. (3d) 289 at 306 (S.C.C.), Lamer C.J.C. [emphasis in original].

> (1) the writings originated in a confidence that they would not be disclosed (even though no party other than the writer was involved in that "confidence");
>
> (2) the activity of secret writing was found, on the basis of expert evidence, to be essential to the plaintiff's healing process;
>
> (3) the healing process should be socially encouraged; and
>
> (4) the possible injury to the healing process would have been far greater than the benefit that would have been gained by disclosure to the defendant in the lawsuit.[107]

Neve's case, though, is not similar to *K.L.V.* There was no expert evidence supporting the claim that Neve's writings had therapeutic value, or that the prejudice to diary-writing caused by the admission of Neve's diaries would exceed the benefit to be gained in the litigation from the admission of the evidence.

Furthermore, where a person stands accused of being a dangerous offender, the evidential goal of determining the truth, in addition to the social interests in the proper prosecution of crime and in protecting members of the public from danger, should generally override individuals' interests in keeping diary entries private. Gonthier J. wrote in *Jones* that "[i]n the case of dangerous offender proceedings, it is ... important that the court be given access to the widest possible range of information in order to determine whether there is a serious risk to the public safety."[108]

Recognition of a diary privilege in circumstances like Neve's is unlikely.

2. Context of Fantasy

One might feel that Murray J. paid insufficient attention to Neve's social and institutional contexts. One might suggest that Neve was playing authority figures like a violin. She was, as against the authority figures, in a position of relative subordination. Her means of fending them off, of resisting their attempts to control her, was to express shocking ideas. When they took these ideas seriously, she controlled them. She briefly reversed the course of domination.

Whatever merit there may be in such speculations, Murray J. was entitled to make findings of credibility. No appeal court will lightly interfere with his findings of fact.

One might protest, nonetheless, Murray J.'s reliance on fantasy. Even if Neve truly meant what she said, what she said was not true. The talk of bodies in fields, hands in the mail, multiple murders, spurting neck wounds, was just talk. How can talk be translated into dangerousness? Can we expect Stephen King to be the next candidate for a dangerous offender application? Assume that Neve was obsessed with death and violence (that is, assume that Murray J. correctly found that she meant what she said).

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[107] *K.L.V.*, *supra* note 103 at 108-110.

[108] *Supra* note 17 at 396.

Doubtless there are many people who have roughly similar obsessions. Witness the commercial success of "true crime" literature (now meriting a separate section in mass-market book stores), horror literature, "slash and splatter" and evermore grotesque horror movies, various species of "metal" rock 'n' roll, and video games that involve pulling the heads and spines from electronic opponents. Much of our popular culture betrays an obsession with the ideas Neve entertained. Yet those ideas in themselves do not make consumers of such popular culture dangerous offenders.

Were her ideas all, Neve would not have been found to be a dangerous offender. Neve, though, unlike most others, not only conceived horrors, she acted them out. (One might see her as a concrete expression of contemporary popular culture). She did take hostages, she did attack others. On the evidence, her violent ideations had a more proximate relation to practice than is the case with most dreamers and consumers of horror. Moreover, the psychiatric evidence established a connection between Neve's fantasies and her alleged pathology.

B. PSYCHIATRIC OPINIONS

At least outside the courtroom, lawyers should be as leery of criticizing psychiatrists as psychiatrists should be of criticizing lawyers. The psychiatric testimony in Neve's case, however, contained at least two elements which attract comment: the description of Neve as (a) a "psychopath," and (b) the equivalent of a "male lust murderer."

1. Neve as a Psychopath

Neve's characterization as a "psychopath" has troublesome aspects.

First, the term has an uncertain status in psychiatric discourse.[109] It was a vogue word some thirty years ago; for example, prior to the current dangerous offender provisions, Canada (like some of U.S. jurisdictions) had "sexual psychopath" legislation. Since the late 1960s, however, the term has been dropped from some "official" usages. The term was omitted as a diagnostic category description in the 1968 DSM - II, and does not appear in the 1969 American Psychiatric Association glossary. Dinitz refers to the terms "sociopathy" and "psychopathy" as "obsolete."[110] DSM - IV does not employ "sociopathy" or "psychopathy" as diagnostic terms. It states that these

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[109] Nicholas Kittrie, quoted in L. Sleffel:

> "Psychopath" is one of the most criticized words in the psychiatric vocabulary.... Dr. William A. White, an early leader in the field of criminal psychiatry, declared that psychopathy had become a wastebasket diagnosis.... [The American Psychiatric Association] notes that the term is considered poor and inexact by many members.

The Law and the Dangerous Criminal: Statutory Attempts at Definition and Control (Toronto: Lexington Books, 1977) at 56. Nevertheless, numerous psychiatrists (the Crown witnesses among them) defend the use of the term (*ibid.*). One matter perhaps worthy of further pursuit is that all four Crown psychiatrists worked or trained in England, before coming to Canada: (*Neve, supra* note 1 at 47). One wonders whether the discourse of psychopathy has a stronger tradition in England (or did, when these psychiatrists were trained) than in the United States.

[110] S. Dinitz, "The Antisocial Personality" in W.J. Curran, A.L. McGarry, & C.S. Petty, eds., *Modern Legal Medicine, Psychiatry and Forensic Science* (Philadelphia: F.A. Davis, 1980) 799 at 799.

terms were previously used to describe what is now classified as antisocial personality disorder.[111] Insofar as DSM - IV may be understood as an official or authoritative codification of psychiatric diagnostic discourse,[112] one might feel that the reference in Neve's case to psychopathy was suspect.

Moreover, if, as DSM - IV tells us, psychopathy and antisocial personality disorder are descriptions of the same condition, the use of both terms — as if they denoted separate conditions — is improper. A comparison of the Hare Psychopathy Checklist and the DSM - IV criteria for antisocial personality disorder described above will show that the criteria for psychopathy and antisocial personality disorder do overlap significantly.

In fairness to proponents of the term psychopathy, however, psychopathy could be distinguished from antisocial personality disorder by understanding psychopathy to be a particular species of antisocial personality disorder, satisfying more detailed criteria than anti-social personality disorder *simpliciter*. There would be, then, no logical difficulty with a finding that antisocial personality disorder was made out, while psychopathy was not.

Murray J. did not distinguish the two disorders in his reasons, save to find that while Neve is not a psychopath, she does suffer from an antisocial personality disorder. Some indication that Murray J. had a principled basis for distinguishing the two disorders would have been comforting. Otherwise, if the two disorders were not properly distinguished, the term psychopathy, freed from a precise denotation, could have functioned as more an emotive term of condemnation than as a diagnosis.

Second, psychopathy is neither a necessary nor a sufficient condition of dangerousness. A person may be dangerous, without satisfying the criteria for psychopathy. A person may be psychopathic (or, *a fortiori*, may suffer from an antisocial personality disorder) without ever having broken the law, let alone having committed a violent crime. The observation is commonplace that the criteria for psychopathy (particularly those of the Hare Psychopathy Checklist) could be satisfied by many people in positions of power, and by many that we might have called heros or leaders. Fortunately, criteria such as egocentricity, glibness, manipulativeness, lack of concern for others, parasitic lifestyle, promiscuity, and irresponsibility are not determinative of dangerousness. Intuitively, one might feel that a history of law-breaking, rather than the satisfaction of the criteria for psychopathy, is the only safe indicator of dangerousness. This takes us, however, to the empirical questions of the usefulness of the labelling as "psychopathic" which I cannot pursue here.

Third, the very labelling of a person as "psychopathic" may be problematic. We are not embarrassed to diagnose or accept diagnoses of cognitive disorders. We might feel

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[111] DSM - IV, *supra* note 58 at 645.

[112] The DSM projects have severe critics. See J. Ziskin & D. Faust, *Coping with Psychiatric and Psychological Testimony*, vol. 1, 4th ed. (Los Angeles: Law and Psychiatry Press, 1988) at 160-225.

that there are adequate objective bases for such diagnoses. Psychopathy, however, cannot be straightforwardly analogized to diagnoses of cognitive disorder. The psychopathic disorder does not involve some inability to appreciate the facts or physical reality. Rather, the disorder is affective: the psychopath does not "feel" as we do, emotionally or morally. The disorder is evidenced, primarily, by instances of rule-breaking, be those rules of etiquette or the criminal law. Psychopathy, we should keep in mind, was originally described as "moral insanity."[113] Psychopathy appears as a disorder closely connected to social conventions reflected in rules. Ultimately, all human life may be conventional in a deep sense, and so, in principle, all mental disorders may be describable as convention-related disorders; nonetheless, psychopathy has a more direct link than cognitive disorders to convention. The main difficulty posed by this link is that the parties attaching the label determine which instances of rule-breaking are significant. This determination may or may not accord with the views of others; and how, one might ask, are judgments of significance to be made? When is rule-breaking liberatory, and when pathological? When is it simply behaviour in accordance with alien norms? We should be cautious about describing psychopathy as a mental "illness" or "disorder"; we should consider what we are doing when we label certain rule-breakers as "psychopaths."

I suspect that much of the uneasiness people may have with the psychopathic label is that they fear that one day we shall awaken, and find that the label has been consigned to the drawer of historical oddities, along with phrenological diagnoses and astrological predictions.

Murray J.'s reasons disclose no challenge to the concept of psychopathy. Since the diagnosis is consistent with significant, if not majority psychiatric opinion, since no empirical shortcomings of the concept seem to have been raised at trial (save for Dr. Brooks' remark on the poor performance of psychiatrists as readers of the future), and since Neve was not found to be, in any event, a psychopath, no prejudice appears to have been occasioned through the testimony respecting psychopathy.

2. Neve as the Equivalent of a "Male Lust Murderer"

The description of Neve as the equivalent of a "lust murderer" is particularly disturbing. Neve was not a murderer. She had not been convicted of attempted murder. To suggest an equivalence between her and a murderer is to suggest a level of dangerousness not supported by the evidence. The prejudice caused by the comparison is that the comparison may prompt improper reasoning: a murderer would be dangerous, Neve is the equivalent of a murderer, therefore Neve is dangerous. Neve's disposition should have been based on her facts, not on an improper analogy.

Moreover, the phrase "lust murderer" is prejudicial. DSM - IV contains no classification for "lust murderer." The term appears to have no officially recognized

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[113] W. McCord & J. McCord, *The Psychopath: An Essay on the Criminal Mind* (Toronto: Van Nostrand, 1964) at 24. See also M. Craft, "The Meanings of the term 'Psychopath'" in M. Craft, ed., *Psychopathic Disorders* (Toronto: Pergamon Press, 1966) 1 at 16.

diagnostic or clinical significance. I do not suggest that the term was invented by Dr. Flor-Henry, or that it is attended by no literature. Nietzsche, a great psychologist among his other accomplishments, wrote of the pale criminal, who relished the bliss of the knife: "his soul wanted blood, not robbery; he thirsted after the bliss of the knife."[114] German students of murder use the term *lustmörd* to describe those who kill for its pleasure.[115] Incidently, the German term is not properly rendered in English by the phrase "lust murderer": the phrase "joy murderer" is more accurate.[116] The phrase "lust murderer" is used by some modern American researchers.[117] The lack of DSM - IV recognition, however, casts doubt on the appropriateness of the use of the term in a legal setting, where the liberty of the offender — indeed the rest of the life of the offender — depends on accuracy.

Insofar as the term "lust murderer" connotes some sort of sexual component of the motivation to murder (the murder is "lusted" for), the term may betray analytical commitments (perhaps psychoanalytical commitments) which may not be congruent with the facts of the murderers the term is meant to describe. Leyton's burden, in part, is to show that serial killers are motivated by more than sexuality. Their predominant motivations may have more to do with class, culture, disappointed expectations and social frustrations than with sex. The term "lust murderer" may be an expression of (at least) an incompletely verified analytical framework.

Furthermore, if the term "lust murderer" has a proper use, it appears to apply to serial killers. Ted Bundy or Andrei Chikatilo[118] might be described as "lust murderers." Why, though, should we compare Neve to these men? Where is the connection between her deeds and theirs? How is the comparison between her and them justified? To suggest that Neve is their equivalent is, again, to base her disposition on an improper analogy.

The "lust murderer" language may well have been inappropriate and inadmissible (its prejudicial effect outweighing its probative value). It was, however, only one relatively minor element in extensive psychiatric testimony. Murray J. does not appear to have fastened onto it in his reasons. The reference does not appear to have tainted all of the psychiatric evidence; no miscarriage of justice appears to have occurred.

One further curiosity in Dr. Flor-Henry's use of the term "lust murderer" should be noted. Neve was said to be the equivalent of a "*male* lust murderer." Female lust murderers are, no doubt, rare. Nonetheless, what is the significance of the gender reference? What difference does it make that Neve was the equivalent of a *male* lust murderer? One might infer that part of her crime was to act as a man. Her gender

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114 F. Nietzsche, *Thus Spake Zarathustra*, trans. W. Kaufmann (New York: Viking Press, 1966) at 38-39.

115 E. Leyton, *Hunting Humans: The Rise of the Modern Multiple Murderer* (Toronto: Seal Books, 1986) at 14. See also C. Wilson, *A Casebook of Murder* (London: Leslie Frewin, 1969) at 109.

116 Wilson, *ibid.*

117 R.R. Hazelwood & J.E. Douglas, "The Lust Murderer" (April, 1980) *F.B.I. Law Enforcement Bulletin*; cited in Leyton, *supra* note 115 at 291, 343.

118 See R. Lourie, *Hunting the Devil* (New York: Harper Collins, 1993).

transgression was so significant that it transmuted her deeds into the equivalents of murder. Perceiving Neve's acts as gender transgression may explain or be a factor in the explanation of the apparent arbitrariness of her selection for the dangerous offender proceedings.

C. ARBITRARINESS

The incontestable fact is that many other offenders — in particular, many other male offenders — have criminal histories worse than Neve's. The complaint may be cast in the rhetoric of a simple liberalism: to select Neve, and not others more deserving, was not fair. This complaint might be constitutionalized in two ways. One might argue that Neve's rights under s. 15 of the *Charter* were violated. She was the victim of discrimination based on sex. If a man had done what she had done, no dangerous offender application would have been brought. Yet the application was brought in her case; her (irrelevant) personal characteristics, not her criminal behaviour, led to the dangerous offender application. One might also rely on s. 7 of the *Charter* or an "abuse of process" argument to challenge the Crown's exercise of its discretion in selecting Neve for the dangerous offender application, on grounds similar to those for the s. 15 argument. The Crown must have been biased in its selection of Neve for the application, and it must have relied on improper or arbitrary reasons in bringing the application, since many male offenders are not targeted as dangerous offenders. The fairness argument might be supported by two more theoretical reflections.

First, Neve's case may demonstrate that a woman who behaves outside of her allotted social role, who acts like a man — like an aggressive, violent, predator — is intolerable. She is an anomaly; she falls outside the limit of our gendered concepts. Her actions condemn her to be placed physically in the zone she has occupied conceptually. She must be put beyond the pale, in prison. In prison she must remain, until she becomes what gender demands, or until she dies.

Second, Neve's case may demonstrate that a woman who does not behave like many men, who is (admittedly) aggressive and violent, but much less so than many men, is intolerable: "What makes a woman so incredibly dangerous? And the answer has to be, It's not the same conduct that makes a man so incredibly dangerous."[119] Neve ceased to be a woman and became a threat to gender not by becoming a man, but only by trespassing in the behavioural territory reserved for men. A woman who is violent is, again, an anomaly, even though many men are far more violent. More extreme male violence is comprehensible. It lies within the bounds of gender job-description. A woman's violence, though, even if less severe than male violence, is unthinkable. It is an astounding thing, so astounding that the heavy state wheel of the dangerous offender provisions must be deployed to crush it:

> Pick up half of these files; and I'll show you far more dangerous men [than Marlene Moore], and no one would dream of bringing a dangerous offender action against these guys.[120]

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[119] R. Shamai, quoted in Kershaw & Lasovich, *supra* note 1 at 151.

[120] D. Martin, quoted in *ibid.* at 150.

> The thing I wanted to say so much ... was, dammit, there are guys out there who have raped and sexually abused countless little girls or little boys, and yet they were testing their dangerous offender legislation on a woman who had never seriously hurt anyone.... It was the oddest thing they would pick on [Marlene Moore][121]

Perhaps the selection of Neve was not so much odd as completely rational, given her transgression not of the *Criminal Code*, but of the gender code.

A general response to the arguments of fairness and gender bias might be assayed along the following lines: Of the approximately 120 offenders found to be dangerous since 1977, only two have been women. There does not seem to be a bias toward women as a group manifested through the application of the provisions. The factual basis seems to be too slight for the propounding of gender generalizations. The "abuse of process" argument would succeed only if Neve's case were one of the "clearest of cases" involving prosecutorial conduct "which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention."[122] Generally, the courts are (and should be) reluctant to review exercises of prosecutorial discretion. Myriad factors, beyond the competence of courts to review, govern exercises of prosecutorial discretion; furthermore, courts would sacrifice impartiality if they interfered in decisions concerning which cases should or should not be brought.[123] Moreover, the procedure by which offenders are selected for dangerous offender applications is multi-levelled and cautious. The decision to bring the application is not made by police officers or front-line prosecutors (although they may have some input into the initiation of the procedures leading to a decision). The merits of a proposed application are considered by the area's Chief Crown, the Crown "board of directors," the Assistant Deputy Minister - Criminal Justice, and finally the Deputy Minister or Attorney General (Minister of Justice), who must consent to the application.[124]

Bias might be perceived to have been directed at Neve in particular. If, however, the Crown psychiatrists and Murray J. were right, Neve is dangerous. The problem with her selection is not that she is not dangerous, but that there are many more offenders who should also be designated as dangerous. Neve's selection may be unfair only in the way that many beginnings are unfair. Steps taken to ensure public safety must begin somewhere, sometime, with someone.

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121 M. Barlow, quoted in *ibid.* at 137.

122 *R.* v. *Power* (1994), 89 C.C.C. (3d) 1 at 10 (S.C.C.), L'Heureux-Dubé J. Overwhelming or conspicuous evidence of improper motives or bad faith or of an act so wrong that it violates the conscience of the community would be necessary (*ibid.*).

123 "A judge must keep out of the arena": *D.P.P.* v. *Humphrys*, [1976] 2 All E.R. 497 at 511 (H.L.), Viscount Dilhorne; quoted in *R.* v. *Power*, *ibid.* at 17.

124 *Criminal Code*, *supra* note 18, s. 754(1). Under *Criminal Code* s. 2, "Attorney General" includes his or her "lawful deputy." In Neve's case, the final decision was made by the Deputy Minister, Neil McCrank, Q.C. See M. Gold, "Minister wasn't told about Neve" *The [Edmonton] Journal* (7 March 1995) A5.

This answer, whatever merit it may have, manifests a sort of betrayal. It shows an operational inconsistency in the pursuit of Neve as a dangerous offender. The answer, we should note, transforms Neve from an extraordinary to an ordinary offender. She is just like many others. But the greater the number of the "dangerous," the less appropriate the application of the dangerous offender provisions. If for many other offenders the ordinary sentencing provisions of the *Criminal Code* suffice, why not for Neve? If the ordinary sentencing provisions should not apply to Neve, why should they be applied to many others?

The issue of Neve's ordinariness did arise during the proceedings. Neve gave some evidence that her behaviour, particularly the robbery, followed the conventions for her social group.[125] Murray J. was not swayed by this evidence. He did not pursue the problem of whether, by her subculture's standards, her behaviour was not dangerous, but normal. He seems to have rejected such speculation entirely, referring to her "so-called society."[126]

Neve may, in fact, have been empirically correct. Her behaviour may have been normal in her subculture. Two lines of research support Neve. First, life in the institutions that were Neve's home is frequently violent. Inmates cannot just talk problems away. Unless inmates have demonstrated an ability to protect themselves physically and decisively, they may wind up as punks for more ruthless neighbours. This violent inmate subculture has migrated onto the streets, where many former inmates ply their trades.[127]

Second, Murray J. could have taken judicial notice of the violence that plagues the lives of street prostitutes. In the *Downey* case, the Supreme Court of Canada recognized the violence of the mean streets walked by women like Neve. Cory J., writing for the majority, cited American research which "has detailed the threats, exploitation and violent physical abuse suffered by prostitutes at the hands of pimps...."[128] Cory J. also accepted *inter alia* the findings in the Fraser Committee and the Badgley Committee Reports. The Badgley Committee Report, which confirmed the pertinent Fraser Committee Report findings, referred to the general violence attending life on the streets of major Canadian cities.[129] The Committee described the fear female prostitutes have of their pimps — "these violent and often sadistic persons who wield commanding power over their lives":

> Many girls who work on the streets believe that a prostitute who gives evidence against a pimp is almost certain to be murdered, if not by her own pimp, then by his fellow pimps. These murders are

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125 *Neve*, *supra* note 1 at 27.

126 *Ibid.*

127 Penologist Jerome Miller described this infiltration of prison morals into street culture in a radio interview with the C.B.C.'s David Cayley.

128 *R.* v. *Downey* (1992), 72 C.C.C. (3d) 1 at 16-17 (S.C.C.).

129 Canada, *Sexual Offences Against Children: Report of the Committee on Sexual Offences against Children and Youths*, vol. 2 (Ottawa: Ministry of Supply and Services Canada, 1984) at 1027.

> purported to be extraordinarily brutal and the prostitutes claim they are accomplished by severe beatings to the head and face.[130]

The Committee went on to state that "[t]he regimen of the pimps is characterized alternately by extremes of affection and brutality ... beatings and other forms of physical abuse and emotional degradation and humiliation were common...."[131] The Report lists accounts of vicious abuses of prostitutes by pimps.[132]

At this point we return to the discretion recognized by Murray J. Neve does appear to have satisfied the criteria for dangerous offender status. She committed a Violence Offence; her life displayed the statutorily requisite patterns of dangerousness; she satisfied the criteria for psychiatric diagnoses of dangerousness. But is she the sort of person the dangerous offender provisions were meant to catch? Set against the context of her life, does Neve appear to be a member of a small recalcitrant criminal residue? She appears to be but one of many. She appears to have displayed a learned lifestyle, rather than a pathology. None of this excuses Neve's behaviour. She committed criminal acts, and should be punished for them. Street people, Neve's victims, are as entitled to the protections of the criminal law as other citizens. The issue, though, is whether Neve should have been labelled a "dangerous offender." Unless we should be filling our prisons with pimps labelled as "dangerous," Neve should have been punished as an ordinary offender, not as one of the special, small criminal class the dangerous offender provisions were designed to control. Murray J. could have exercised his discretion not to find Neve to be a dangerous offender.

Why Lisa Neve? Perhaps her selection was merely contingent, an accident of personal relationships; perhaps she is a victim of gender politics; perhaps, through her history of criminal conduct, she is responsible for her designation as dangerous; perhaps her fate is a resultant of all of these and other vectors. Regardless, she remains, until a higher court disposes otherwise, Canada's only female dangerous offender.

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130 *Ibid.* at 1057.

131 *Ibid.* at 1058.

132 "Worst Personal Experiences with Pimps" and "Worst Known Incidents Involving Pimps" (*ibid.* at 1070-72).