Journal of Criminal Law and Criminology

Volume 57 | Issue 3 Article 10

1967

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THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE
Vol. 57, No. 3

Printed in U.S.A.

PERSISTENT OFFENDERS AND PREVENTIVE DETENTION

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Mr. Wilkins here considers the experience in England in dealing with habitual offenders and the use of preventive detention: in particular, the change in legislation in 1948 is examined.

It appears that preventive detention has been used for persistent nuisances as well as for dangerous offenders, or perhaps more frequently. The author ventures the opinion that the persistent nuisance is not best dealt with by prison treatment, but that some new form of "protected workshop" system might be worth trying.

Mr. Wilkins' present article first appeared, in Japanese, in *Tsumi to Batsu* (Crime and Punishment), published by the Japan Society of Criminal Science (Volume 2, Number 4, June, 1965). We are grateful to the publishers of that Journal for permission to re-publish Mr. Wilkins' article in the English language.

It is commonly believed that the more serious crimes are committed by "habitual" or "persistent" offenders. In most countries special provisions have been made in the criminal law for the detention of such persons as a protection to society. In some states in the United States life imprisonment is prescribed for "habitual" offenders. In England and Wales, what has been called the "dual sentence" system was changed to a single sentence system by the Criminal Justice Act of 1948. Previously an offender was sentenced in respect to the current offense and then a special further sentence of "Preventive Detention" was awarded by reason of the fact that he was an "habitual" offender, and this period was served at the end of the initial sentence. After the Criminal Justice Act of 1948 those persons defined as "persistent" offenders (the term was changed by the Act from "habitual" to "persistent") could be sentenced to "Preventive Detention" in one operation; the part of the sentence due to the current crime was not separated from that part due to the person being a recidivist with the appropriate qualifications.

The purpose of this article is to consider particularly what may be learned from the results, in so far as they are known, of the change in the legislation in England in 1948. But before becoming involved in the detail of the systems, perhaps some more fundamental observations may be made.

DEFINING TERMS

An indication of the doubt in the minds of some British authorities regarding the conventional term "habitual" criminal may be evident from the fact that the adjective was changed from "habitual" to "persistent". Certainly crime is not a continuous process; even the most "persistent" of the offenders spends most of his time *not* committing crimes. Smoking and drug-taking may be defined as "habitual", but the acts of committing crime are not normally habit forming, nor are they characterised by the frequency of behavior with which we usually associate the word "habit". Clearly the legal definition of the "habitual offender", which admits an offender with a record of only three offences, seems scarcely to fit the semantic background of either the term "habitual" or "persistent".

One may consider that the terms used are unimportant, since words may be defined to mean anything we wish them to mean. For legal purposes and other operational matters to which an operational definition applies, the lay meaning attributed to a term may be of no relevance; nonetheless, it may be of considerable significance. We are not able to separate our thinking into

water-tight compartments, and some of the lay meaning of words may obtrude to color our thinking regarding the same terms when they are used in an entirely different connection: when in fact they are different words.

Calling a three-times offender an "habitual criminal" (as technically defined and operationally correct) may lead us to attribute to his behavior some of the content of the thinking we use when on other occasions we use the term "habitual". Even if those of us who are schooled in such matters can successfully partition our thinking, we are subject to pressures from the public who will note the terms we use, and, lacking our special training, will interpret them in their own ways. When we talk about "crime" we mean something technically defined as "crime" (say, "indictable offences"), and if this concept differs from that of the layman when he talks of "crime", the newspapers will present to the public an impression of the situation which essentially must be incorrect. Public clamour for serious action to be taken regarding "habitual" offenders might not extend to the persons who are defined operationally and legally as "habitual". But perhaps the more serious difficulty is in that the word "habit" implies something about the make-up of the person having the habit; it is *he* who has become an "habitual". There are underlying this term many thought patterns relating to basic psychological theory which might be totally inapplicable to "habit" as defined by a previous criminal record.

The word "persistent" may be much more objective. But we also think of people who have the *characteristic* of being "persistent", and usually as being persistent against some odds. For instance, whether a person who tried to hit the jackpot in pin-ball on three separate occasions could be termed "persistent" in this regard is doubtful. At the very least, therefore, it seems that there is a latent exaggeration in the use of the words "habitual" and "persistent" at the levels at which they are operationally defined.

Another meaning associated with the word "persistent" is the continuance of something despite all that can be done to remove it. Thus a coffee stain on a table cloth may be called "persistent" if our efforts to remove it fail. In such cases we may realize that the persistence of the stain may not be due only to the quality of the stain itself, but also to our failure to use the appropriate methods for its removal. The persistence, in this case, is the result of an interaction, not only a property of the stain itself. Perhaps the persistent offender may be seen as a product of an interaction? The commission of a crime may not be a comment only upon the offender's own way of life (a psychological factor), but it may also be a comment upon the society of which he is part (a sociological factor).

The Nature of the Problem

We began by noting that it is a common belief that the most serious crimes are committed by the "persistent offender". It is more than strange that this assumption does not seem ever to have been put to the test. A search of the literature has failed to reveal any rigorous study of offenders which could justify this belief, nor indeed any studies which could be taken as proving otherwise. The absence of information in this regard is quite astonishing. It is, however, known that the majority of murders (usually regarded as the most serious of crimes) are seldom committed by persons who have committed crimes before.

Where so little is known about the phenomena of recidivism it is difficult to put forward any rational analysis. It must be agreed, however, that whether or not the more serious crimes are committed by recidivists, recidivists are considered to present a serious problem to society. Perhaps the "persistent offender" is more of an annoyance than a menace to society? If so, should the same action be taken in regard to those who are menaces as for those who are merely nuisances? There are some data which were recently examined by the *British Home Office Research Unit*.[1] Before these data may be considered it may be necessary to outline the legal provisions for the treatment of recidivist offenders under the law of England and Wales.

The System in England and Wales for the Treatment of Recidivists

Perhaps it must first be emphasised that there is no restriction on the use of probation for recid-

[1] The Home Office is a Department of State of the Government of England and Wales which deals with internal security and control; including police, probation, prisons, criminal policy, civil defense, and other matters. The Home Office Research Unit was established to implement the provision of the Criminal Justice Act of 1948 which enabled the Secretary of State to expend money on research into the "causes of crime and the treatment of offenders". See Hammond & Chayen, *Persistent Offenders*, Home Office Research Monograph #5 (1963).

ivists. Probation, which does not involve any term of incarceration as a "condition", may be used if the court so decides, instead of any other sentence that might be imposed. Indeed, it has been known for the Court of Criminal Appeal to substitute probation for a sentence of ten years preventive detention, although, of course, such cases are rare.

(*a*) *Qualifications for Preventive Detention:*

Preventive detention (somewhat the equivalent of the increased penalty for "habitual offenders" in the United States) may be ordered only by a higher court. Liability of preventive detention is defined under Section 21 of the Criminal Justice Act, 1948 as follows:

> An offender *becomes liable* to preventive detention (subsection 2) if he is not less than 30 years of age and "(a) he is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and (b) he has been convicted on indictment on at least three previous occasions since he attained the age of 17 of offences punishable on indictment with such a sentence, and was on at least two of those occasions sentenced to borstal training, imprisonment or corrective training."

There are certain technical defining conditions relating to the meaning of the terms used, but the quotation is, perhaps, sufficiently clear without further specification here.

Persons subject to preventive detention must be given written notice of the fact. It is also not an infrequent practice for a court, in sentencing an offender for an offense prior to one which might render the offender liable to preventive detention, to warn him of the preventive detention possibility. The warning may be conveyed as a suggestion that if he does not benefit from the treatment he will receive with respect to the current offense, the next offense will make him liable for preventive detention.

If preventive detention were serving the purposes for which it was intended, it might be expected that there would be a sharp decline in the rate of recidivism immediately prior to qualification for it, but no such evidence has been found.

(*b*) *Previous Systems of Preventive Detention:*

The language in which the earlier references to "habitual offenders" was couched would scarcely find acceptance today, but it is well to remember the ancestry of the system. Perhaps linguistic styles change faster than basic attitudes?

An early reference may be found in a report to the House of Lords in 1863. This refers to "habitual thieves" as "inveterately addicted to dishonesty and so averse to labour that there is no chance of their ceasing to seek their existence by depredations on the public unless they are compulsorily withdrawn for a considerable time from their accustomed haunts. Such persons may sometimes be guilty of only minor offences, yet by their continual repetition of such offences they may inflict more loss upon the public . . . than men who, under great temptation commit a grave but single crime".

As though the term "addicted" were not already too strong, the report adds redundancy by describing these persons as "inveterately addicted", and the same basic concept remains today in the use of the term "habitual". The reference to "no chance of ceasing criminal activity" is today regarded as ethically unacceptable as well as being factually wrong. The specific point that the current offense may on any occasion be only a minor one is much the same as in current philosophy regarding the treatment of multiple recidivists. The latter point was reinforced by the Gladstone Committee of 1895 which says, "to punish them (habitual offenders) for the particular offences of which they are detected is almost useless". The Committee recommended "a new form of sentence which would enable offenders to be segregated for long periods of detention during which they would not be treated with the severity of . . . hard labour of penal servitude but would be forced to work under less onerous conditions". When the Committee findings were incorporated into the Prevention of Crime Act, 1908, it was required that an offender should be found guilty by a jury of being an "habitual criminal". The sentence of preventive detention was then one of from five to ten years, and was served after completion of the sentence in respect of the current offence—that is, a "dual sentence" system was used between 1908 and 1948. The first part of the sentence was of fixed duration, while there was provision for the offender to be released on license in respect to the preventive detention part of the dual sentence.

By 1932 when a further committee was set up to consider the problem of persistent offenders, the use of preventive detention under the provisions then existing had almost ceased. Less than 40

persons a year were so sentenced. The reason given for the failure to make use of the early dual form was that judges and juries were reluctant to to use a procedure which seemed as though it meant giving a double sentence. In particular it seems that juries were hesitant to define a person as an "habitual offender".

(c) Method of Treatment:

The form of preventive detention provided in the Criminal Justice Act 1948 is said to have the following intent, as contained in a Home Office report: "It is the essence of the system that the offender is not being punished for the last offence of which he was convicted but is confined for the protection of society and for a period which will, in all probability, far exceed any period for which he would have been imprisoned as a punishment".[2] The report continues, "The conditions of his confinement must therefore be as little oppressive and as much superior to the conditions of ordinary imprisonment as may be compatible with safe custody and good order. On the other hand, they must take account of the fact that the system deals with men who include a high proportion of difficult and dangerous prisoners, for whom maximum security and close control are essential". Upon what basis the assumption is made that a large proportion of preventive detainees are "dangerous" is unclear. Indeed, it is upon the basis of evidence that this statement is not true that preventive detention has been subject to much recent criticism.

To revert to the intention to make preventive detention "much superior to the conditions of ordinary imprisonment"—what exactly was done with regard to this.

Preventive detention is normally carried out in three stages. Stage 1 consists of a comparatively short period under ordinary prison conditions in a local prison. This is followed by a less rigorous form of imprisonment with a higher standard of living served in a central prison to which the offender is allocated. From 1956 special allocation centers were established for this purpose. Stage 2 lasts until the offender appears before a Special Advisory Board for selection for Stage 3. Return to Stage 1 can be ordered at any time as a disciplinary action. Stage 3 has many more facilities and serves as a pre-release training. It also involves working outside the prison and normally it includes a period in a hostel where life is as near to normal conditions as can be secured. Offenders granted Stage 3 usually get one-third remission of their sentences and their training begins a year before their time expires. Those not selected for Stage 3 remain in Stage 2 and serve five-sixths of their time unless time is forfeited for disciplinary purposes. Until recently men who remained in Stage 2 did not get the pre-release training, but now they spend their last six months in huts within the prison walls while undertaking work outside the prison under supervision.

(d) Evaluation of System:

Superficially at least this seems to be a flexible system which ought to work. But does it? It may appear that these provisions overcome the difficulty inherent in the double sentence; for those who can benefit from the Stage 3 treatment, good rehabilitative measures would seem to be available.

The Court of Criminal Appeal recently varied a sentence of eight years preventive detention to two years imprisonment and commented that, ". . . the Recorder in passing a sentence of eight years preventive detention was no doubt actuated by the thought that the appellant was a petty pilferer and it was necessary to protect the public, but in the opinion of the Court, a sentence particularly of preventive detention ought really to have relation to the gravity of the crime itself".[3] The layman may be pardoned if he finds it difficult to consider this interpretation of law as in accord with the provisions of the law. It would seem that the principles upon which preventive detention is founded are very difficult of acceptance as being in accord with prevailing concepts of justice.

On the question of the effectiveness of preventive detention, it is, of course, possible only to consider evaluation in terms of the degree to which what is attempted is in fact achieved. In the case of preventive detention it is difficult to find much accord as to what it ought to achieve. If we consider the requirement to keep the "habitual offender" out of circulation for a long period, then, since there are few or no escapes, the provisions meet the requirement; in this regard preventive detention is successful. If more is required, then there are many more doubts as to its success. Detention of offenders in security conditions is a costly procedure and it is extremely doubtful whether the public gets an adequate value for its investment. If dangerous criminals were so detained, perhaps they would re-

[2] *Prisons and Borstals*, Home Office Report (1960).

[3] R. v. Grimwood, (1958).

gard the expenditure as worth while. But in a recent study[4] it was shown that in England very few of the offenders in fact sentenced to preventive detention could be regarded as in any way "dangerous" and the same seems to be also true in many other countries. Considering only offenders qualified for preventive detention, it was shown that English courts used preventive detention rather less than the average for those guilty of sex crimes or of violence against the person, whereas it was those guilty of fraud and breakings who had a higher probability of being selected for preventive detention. Nor was preventive detention a very much more favored disposal where the sums of money involved in property cases were large. Only 19% of all cases of persons qualified for preventive detention were in respect of crimes involving amounts of one-hundred pounds or more, and among the total of 120 such cases, 31 (25%), were sent to preventive detention. Since the cost of maintaining an offender in prison for one year would be about five-hundred pounds, the British public seems to be paying rather excessively for the protection that preventive detention may afford them.

It should also be noted that only 13% of offenders who qualify for preventive detention are are actually sentenced to it. It is possibly known to offenders that liability to preventive detention carries only a small risk of it being put into effect. Perhaps if the definition according to the law were more in accord with the lay interpretation of "persistent offender" this situation might be different also.

One hundred years ago an "habitual offender" was a person who was seen as having "no chance" of rehabilitation. Although the probability of reconviction among those sentenced to preventive detention in England and Wales is high, it is not 100%, but seems to be of the order of 75%. Whether this success rate is less than or greater than that for other forms of treatment for similar types of offenders is, of course, the main question. Hammond and Chayen, after a most detailed study, report that the reconviction records subsequent to a period of preventive detention and other sentences are similar. They also add that "We have no evidence of any marked deterrent effect of the sentence of preventive detention in so far as the interval before and after an offender was at risk of being given such a sentence were not substantially different".[5]

Current Questions

It is abundantly clear that the problem of what should be done with the persistent offender beyond giving him repeated short sentences is one which has not been solved in England, either by the dual sentencing system or by the system provided by the 1948 Criminal Justice Act. If then, there is anything to learn from the English experience, it is only that they have tried different methods and have been successful only in demonstrating their total inadequacy to deal with the real problem.

It seems from the recent research findings that the protection of the public from the dangerous criminal and the problem of the persistent offender are not by any means one and the same problem. Persistent offenders (in England, certainly, and possibly elsewhere) are not normally what are usually understood as "dangerous criminals". Perhaps it is necessary to sort out the criminal who persists in crime because it is his business, at which he is neither particularly successful nor unsuccessful, and the totally inadequate offender who is neither a success as a criminal nor as a law abiding citizen. The latter may make ideal inmates in our prisons, but that does not justify our filling the vacancies in the cells from their ranks in such large proportions. At the present time, it seems, similar treatments are being given to the dangerous (possibly "psychopathic") offenders, professional criminals, and the inadequate personalities who continuously fail in their attempts at crime as they would fail in any other attempted activity.

It is generally believed that the criminal way of life is easier than the honest earning of a living, and that is why some ill-disposed persons adopt it, but the inadequate personality is totally unsuccessful even in this "easy" way of life. How can we expect prisons, which would not claim to be the best known forms of educational establishments, to train the least likely material to be successful not only in the "easy" but in the difficult way of life?

Of course, the most likely reason why we have not found the right answers is simply because we have not been asking the right questions. At this stage of development of our social control systems

[4] *Supra* note 1.

[5] *Ibid.*

we should, perhaps, concentrate more on finding the right questions than in seeking answers to those questions which are most probably unrelated to the main task society places upon us.

For the inadequate personality, whether criminal or marginally surviving on the "right" side of the law, perhaps something like the system of "protected workshops" along the lines of those developed for the physically handicapped might be the more appropriate. This would certainly cost less in real terms than incarceration in maximum security conditions with all the provision of similar treatment to that given to "dangerous" offenders.

Perhaps we should accept as a fact that some persons will not be able to cope with our present day technological ("rat race") society, either by legitimate or illegitimate means. Perhaps these persons should be given an opportunity to *function at a reduced level* and contribute what they can to their society and gain a sense of dignity thereby. The general public would then be saving money by the positive, although perhaps small, contribution which these persons could make. Imprisonment demands nothing from them and permits them to make no contribution, and their inadequacy is continuously reinforced by the dependence of their situation.