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## Incapacitating the Habitual Criminal: The English Experience

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# INCAPACITATING THE HABITUAL CRIMINAL: THE ENGLISH EXPERIENCE\*

*Sir Leon Radzinowicz\*\* and Roger Hood\*\*\**

## EDITORS' PREFACE

*In this Article, Sir Leon Radzinowicz and Dr. Roger Hood trace 150 years of unsuccessful English efforts to identify, sentence, and reform habitual criminal offenders. The Supreme Court's recent decision in Rummel v. Estelle<sup>a</sup> has publicized habitual offender statutes in the United States. But Rummel primarily addressed the constitutionality, rather than the desirability, of a state habitual offender statute.<sup>b</sup> This Article examines the broader policy questions common to habitual offender programs in both the United States and Great Britain. It describes the tension between liberal tradition and the state's desire to incapacitate those who repeatedly threaten life or property.*

*The British experience with habitual offender legislation, like that in the United States, encompasses numerous statutory formulations, commission reports, and statistical surveys. And the British experience, like that in the United States, has been one of high hopes and repeated disappointment. While there are major differences between British and American<sup>c</sup> approaches*

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\* This paper grew out of the authors' research into the history of English criminal law and its administration in the nineteenth century, which is being generously supported by a grant from the Home Office. We are indebted to Dr. Philip Jenkins for his assistance.

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a. 100 S. Ct. 1133 (1980).

b. In *Rummel*, the Supreme Court held that a mandatory life sentence imposed under the Texas recidivist statute, TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974), following the defendant's third felony conviction did not constitute cruel and unusual punishment prohibited by the eighth amendment. Rummel's third felony consisted of obtaining \$120.75 by false pretenses. His previous convictions involved fraudulent use of a credit card, and passing a forged check. *Rummel v. Estelle*, 100 S. Ct. at 1134-35. Rummel claimed that a life sentence was so disproportionate to the crimes he had committed as to constitute cruel and unusual punishment. Justice Rehnquist, writing for the Court, affirmed the sentence, noting that Texas had an interest not merely in making Rummel's third felony illegal, but also in "dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." 100 S. Ct. at 1140. The Court also held that a proper assessment of Texas's treatment of Rummel could take into account his possible parole within twelve years. 100 S. Ct. at 1142. Four dissenting Justices wrote that the sentence was disproportionate to the crime, and that the possibility of parole should not be considered in assessing the nature of the punishment. 100 S. Ct. at 1145-46 (Powell, J., dissenting).

c. For a compilation of American habitual offender statutes, see Note, *The Constitutional Infirmities of Indiana's Habitual Offender Statute*, 13 IND. L. REV. 597, 597 n.1 (1980). American state statutes typically call for enhanced sentencing upon conviction for a third or fourth felony. Federal law requires that the "mandatory minimum penalty prescribed by law" be

to habitual offenders (particularly in the degree of sentencing and prosecutorial discretion<sup>d</sup>), the two systems share many difficulties. And in Britain, as in the United States, the failure to reduce recidivism has become a symbol of the larger failure of the penal system.

The most vexing problem of habitual offender legislation confronts every draftsman and special commission right at the outset: How is the habitual offender to be defined? Is he only the violent criminal who poses an immediate threat to public safety, or is he also the bumbling petty thief? The authors outline a series of unsuccessful British definitions of the term; definitions that bear the clear mark of criminologists and legislators preoccupied with the notion of a "criminal class." Once the target of the legislation is defined, further problems remain. What measure of proof is required to show habituality, and who decides when that burden is met? Once identified and convicted, how should the habitual criminal be sentenced?: Proposals vary both in the length of sentence and in the conditions of imprisonment. Some favor indeterminate sentencing, while others require a steady cumulation of sentences. Some suggest harsh confinement for the habitual criminal; others a more gentle environment geared to reforming the criminal and returning him to society. These disagreements reveal an underlying debate about how the state justifies sentencing habitual criminals to extended prison terms: Is the goal to protect the community, to rehabilitate the criminal, or merely to punish him?

These are perennial questions, questions that trouble twentieth century American courts and legislators as much as they troubled the English in the nineteenth century. The comparative and topical significance of *Sir Leon's* and *Dr. Hood's Article* needs no further emphasis.

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served by dangerous special offenders. 18 U.S.C. §§ 3575-77 (1976). Cf. Model Penal Code § 7.03 (Proposed Official Draft, 1962) (granting court discretion to increase sentence for persistent offenders and professional criminals); Model Sentencing Act § 5 (granting court discretion to increase sentence for persistent offenders). But American habitual offender statutes have been no more successful than their counterparts in Great Britain. See L. SLEFFEL, *THE LAW AND THE DANGEROUS CRIMINAL* 155-60 (1977). Sleffel's book contains a long list of objections to the U.S. state and federal habitual offender statutes. A number of recent books and articles discuss habitual offender statutes and their implications. See, e.g., J. PETERSILIA, P. GREENWOOD & M. LAVIN, *CRIMINAL CAREERS OF HABITUAL FELONS* (1978); Y. RENNIE, *THE SEARCH FOR CRIMINAL MAN* (1978); S. VAN DINE, J. CONRAD, & S. DINITZ, *RESTRAINING THE WICKED* (1979); Cook, *Punishment and Crime: A Critique of Current Findings Concerning The Preventive Effects of Punishment*, 41 *LAW & CONTEMP. PROB.* 164 (Winter 1977); Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 *TEXAS L. REV.* 1277 (1973); Katkin, *Habitual Offender Laws: A Reconsideration*, 21 *BUFFALO L. REV.* 99 (1972); von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 *BUFFALO L. REV.* 717 (1972); Note, *A Closer Look at Habitual Criminal Statutes: Brown v. Parratt and Martin v. Parratt, A Case Study of the Nebraska Law*, 16 *AM. CRIM. L. REV.* 275 (1979).

d. For discussion of the divergent English and American approaches to the sentencing of habitual offenders, compare R. CROSS, *THE ENGLISH SENTENCING SYSTEM* 42-51 (2d ed. 1975) (describing the British sentencing of habituals) with L. SLEFFEL, *THE LAW AND THE DANGEROUS CRIMINAL* 4-18 (1975) (describing the harsher American sentencing provisions).

In the area of prosecutorial discretion, there are marked differences between the British and American approaches. In the United States, prosecutors commonly threaten defendants with indictment under applicable habitual offender statutes in an effort to force the defendant to plead guilty to a lesser charge. See Davidson & Krause, *Plea Bargaining: Limits on Prosecutorial Discretion*, 1979 *ANN. SURVEY AM. L.* 27, 36-49. The English prosecutor is far more circumscribed in his ability to plea-bargain. See Davis, *Sentences for Sale: A New Look at Bargaining in England and America*, 1971 *CRIM. L. REV.* 161, 218, 221-28.

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## I. THE ELUSIVE CONCEPT OF CRIMINAL CLASSES

As long as transportation<sup>1</sup> provided the means of flushing large numbers of England's criminals to the antipodes, there was no necessity to consider how to control or incapacitate them at home. The refusal of Australia's eastern colonies to accept more convicts at the end of the 1840s, combined with the rapid growth of the cities and the expansion and consolidation of the police, made the phenomenon of crime appear more real and more tangible. The perception of a mass of offenders at home, moving about and yet anonymous, fostered an escalating fear of a criminal or dangerous class and a resolve to do something drastic about it.

The concept of a criminal class was not new. It can be retraced in Henry Fielding's vivid descriptions of the criminal underworld of London and in the more prosaic but incomparably more systematic census drawn up by Patrick Colquhoun.<sup>2</sup> It was implicit in Edward Gibbon Wakefield's *Householders in Danger From the Populace* and explicit in Frégier's frightening account of the *Classes Dangereuses* in the great cities of France.<sup>3</sup>

Throughout the nineteenth century estimates of the size and nature of the criminal class abounded. Some were based on mere speculation and hearsay, others rested upon the statistics collected by the city police forces, yet others had their foundation in the experiences of prison chaplains such as John Clay of Preston Gaol or of reformers such as Matthew Davenport Hill and Mary Carpenter; and still others had what seemed to be a sure footing in the nascent sociological and medical inquiries of the period. But by all accounts, the criminal class was perceived as vast, self-contained, self-perpetuating, largely unreclaimable, implacably hostile, and alien to the interests of the State.

The first official estimate, based on police records, of the number of "habitual depredators and other criminals" was drawn up by the Constabulary Force Commissioners in 1839. In the London Metropolitan District alone there were said to be over 10,000 persons living

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1. Transportation was a "species of punishment consisting in [sic] removing the criminal from his own country to another (usually a penal colony), there to remain in exile for a prescribed period." BLACK'S LAW DICTIONARY 1344 (5th ed. 1979).

2. See 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 395-407 (1948); 2 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 235-313, 357-63 (1956); 3 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 238-46, 513-20 (1956).

3. FRÉGIER, DES CLASSES DANGEREUSES DE LA POPULATION DANS LES GRANDES VILLES (1840). See L. RADZINOWICZ, IDEOLOGY AND CRIME 38-42 (1966). For a good introductory chapter on the subject, see J. TOBIAS, URBAN CRIME IN VICTORIAN ENGLAND 52-78 (1972).

wholly by violation of the law. Many were prostitutes and vagrants, but about a quarter were thought to be gaining their livelihood entirely from the proceeds of offenses against property. The figures for the new police forces in the large cities were proportionately even higher than those for London. While the London Metropolitan Police counted one criminal for every eighty-nine of the population, Liverpool claimed one in forty-five, Bristol one in thirty-one and Newcastle-upon-Tyne seemed to outdo them all with one in twenty-seven.<sup>4</sup> Sir Edwin Chadwick, looking at the country as a whole, painted a bleak picture of some 72,000 to 120,000 criminals at large, among them a veritable army of migratory professional criminals — “upwards of 40,000 thieves, robbers or marauding hordes” moving from those areas with police forces to those with none.<sup>5</sup> To the Commissioners it seemed extraordinary that the police could readily identify the criminals and yet these criminals could remain at large to pursue their nefarious practices.<sup>6</sup>

In 1856 police forces were established throughout the country. The following year the Criminal Statistics were reorganized and started to give figures of “known thieves and depredators” in each police district. These figures led many contemporaries to conclude that “there exists an enormous class of professional criminals — a class to be numbered by tens of thousands; that their trade is most lucrative and they ply it with complete impunity.”<sup>7</sup> *The Times* insisted that “a good deal more than 100,000 persons live by crime.”<sup>8</sup> Matthew Davenport Hill claimed that the “predatory class” in London was, at its lowest estimate, 5,000 persons, committing 5,000 crimes a day or 1,825,000 a year.<sup>9</sup> Henry Mayhew, extrapolating from the Constabulary Commissioners’ report, estimated that there were, including those in prison, 150,000 persons of “known bad character in England and Wales.”<sup>10</sup> He believed that only one tenth of the thieves were “casual” offenders, from some accidental cause, the remaining nine-tenths he classed as “habitual . . . continually

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4. CONSTABULARY FORCE COMMISSIONERS, FIRST REPORT OF THE COMMISSIONERS APPOINTED TO INQUIRE AS TO THE BEST MEANS OF ESTABLISHING AN EFFICIENT CONSTABULARY FORCE IN THE COUNTIES OF ENGLAND AND WALES, CMD. No. 169, at 12-13, in 19 PARL. PAPERS 13, 13-51 (1839).

5. See S. FINER, *THE LIFE AND TIMES OF SIR EDWIN CHADWICK* 169 (1952) (quoting CONSTABULARY FORCE COMMISSIONERS, *supra* note 4, at 352).

6. CONSTABULARY FORCE COMMISSIONERS, *supra* note 4, at 15.

7. W. CLAY, *THE PRISON CHAPLAIN: A MEMOIR OF THE REV. JOHN CLAY* 440 (1861). See also W. CLAY, *OUR CONVICT SYSTEMS* 69-71 (1862).

8. *The Times* (London), Sept. 10, 1859, at 6, col. 3.

9. M. HILL, *SUGGESTIONS FOR THE REPRESSION OF CRIME* 329 (London 1857).

10. 4 H. MAYHEW, *LONDON LABOUR AND THE LONDON POOR* 34 (London 1861).

offending against the laws of society."<sup>11</sup> T.R.W. Pearson went so far as to estimate that the criminal class comprised 15.4 percent of the population.<sup>12</sup> The criminal class was said to be larger than in any European nation, and still spreading its tentacles.<sup>13</sup>

No wonder an alarm was sounded:

The 5,000 criminals hitherto annually sent to our penal colonies, where they have so corrupted society, that feelings of justice and decency compel the Legislature to abolish transportation, are henceforward to remain, corrupting and increasing the swelling mass of criminals, at home. Already there are upwards of 20,000 working out their sentences, and an equal number annually turned on society, without an easy means of obtaining subsistence, their minds filled with a sense of injustice, and their hearts influenced with hatred and revenge. All that sweltering venom is henceforth to be confined here. . . . There is ground for fear. . . 'lest England herself become a penal settlement.'<sup>14</sup>

When that "wastepipe to the antipodes" was almost completely closed in 1857, it was as if the country had suddenly been invaded by "thousands tainted, stigmatized, corrupted by crime, its slovenly habits and horrid associations."<sup>15</sup> *The Times* painted a bleak picture:

We are surrounded by men, so numerous as to form no inconsiderable percentage of the population, asking for work or for charity, conspiring against our property, and, if need be, our lives; spreading the contagion and art of crime, waking while we sleep, combining while we act each only for himself, and forming an *imperium in imperio*. . . .<sup>16</sup>

The recurrent image was of an 'enemy,' and an enemy 'nation' at that, a nation of 'barbarians,' 'plunderers' and 'savages.' They were, according to Thomas Plint, "in the community, but neither *of* it, nor *from* it." The large majority was "so by descent, and stands completely isolated from the other classes, in blood, in sympathies, in its domestic and social organisation — as it is hostile to them in the

11. 4 H. MAYHEW, *supra* note 10, at 29, 23-35. See also H. MAYHEW & J. BINNY, *THE CRIMINAL PRISONS OF LONDON AND SCENES OF PRISON LIFE* 46-47, 87-90 (London 1862).

12. T. PEARSON, *SOME PRACTICAL SUGGESTIONS AS TO THE BEST MEANS OF PREVENTING CRIME IN ENGLAND AND WALES*, summarized in 1871 NATIONAL ASSOCIATION FOR THE PROMOTION OF SOCIAL SCIENCE TRANSACTIONS 315 (1872) [hereinafter cited as NAPSS TRANSACTIONS].

13. J. SYMONS, *TACTICS FOR OUR TIMES* 1 (1849).

14. *What Is to Be Done with Our Criminals?*, 5 *THE ECONOMIST* 835, 835 (1847). See also *On Captain Maconochie's Proposed System of Convict Management*, 34 *LAW MAGAZINE, Q. REV. JURIS.* 38, 38-39 (1845).

15. *The Times* (London), April 4, 1856, at 8, col. 5.

16. *Id.*

whole 'ways and means' of its temporal existence."<sup>17</sup> The 'dangerous,' as opposed to the 'perishing' classes, were, said Mary Carpenter, "notoriously living by plunder."<sup>18</sup> They were, as Marx had also described them in the *Communist Manifesto*, "the social scum."<sup>19</sup> They were depicted on the one hand as "half-idiots — having scarcely any understanding and no power of will" and on the other as "professionals" indulging in crimes of burglary, robbery, coining and larceny like "regular crafts, requiring almost the same apprenticeships as any other mode of life."<sup>20</sup> Henry Mayhew was convinced that many habituels might be reformed if rightly dealt with, but nevertheless his experience led him "to this melancholy result: that there is a large class, so to speak, who belong to the criminal race, living in particular districts of society; the generations being born, and handed down from one age to another . . . until at last you have persons who come into the world as criminals, and go out as criminals, and they know nothing else."<sup>21</sup> They were "human parasites . . . who object to labour . . . [and] live on the food procured by the labour of others."<sup>22</sup> As *The Times* more sensationally put it, the habitual was "educated and hardened in crime . . . talks the slang, frequents the haunts, loves the fraternity, of crime. . . despises every form of honesty, industry, and goodness as a milksop and unmanly weakness."<sup>23</sup>

No wonder a military metaphor prevailed.<sup>24</sup> Images of warfare,

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17. T. PLINT, *CRIME IN ENGLAND, ITS RELATION, CHARACTER AND EXTENT AS DEVELOPED FROM 1801 TO 1848*, at 144-54 (1851).

18. M. CARPENTER, *REFORMATORY SCHOOLS FOR THE CHILDREN OF THE PERISHING AND DANGEROUS CLASSES, AND FOR JUVENILE OFFENDERS 2* (London 1851). See also M. HILL, *supra* note 9, at 329-30; *Injured Innocents*, 21 *ALL THE YEAR ROUND* 414 (1869); *Our Criminal Classes*, 31 *CHAMBERS'S JOURNAL* 84 (1859); *Thieves and Thieving*, 2 *CORNHILL MAGAZINE* 326 (1860); *Juvenile Delinquency*, 7 *N.S.*, *ECCLECTIC REV.* 385, 387 (1854); *The Police of London*, 1870 *LEISURE HOUR* 701; *The Disposal and Control of Our Criminal Classes*, 3 *ST. PAUL'S* 599-613 (1869); *The Best and the Worst Side*, 7 *TEMPLE BAR* 505 (1863).

19. K. MARX & F. ENGELS, *THE COMMUNIST MANIFESTO* 332 (Modern Library ed. 1932) (1st ed. London 1848).

20. H. MAYHEW & J. BINNY, *supra* note 11, at 88.

21. SELECT COMM. ON TRANSPORTATION, SECOND REPORT, CMD. NO. 296, 17 *PARL. PAPERS* 189, 343 (1856). See also 4 H. MAYHEW, *supra* note 10, at 273.

22. H. Martineau (unsigned), *Convict System in England and Ireland*, 117 *EDINBURGH REV.* 241-58 (1863); see H. MAYHEW & J. BINNY, *supra* note 11, at 89.

23. *The Times* (London), Jan. 6, 1857, at 8, col. 2. See also *The Times* (London), Oct. 11, 1855, at 6, col. 3. But see R. Milnes, *Address on the Punishment and Reformation of Criminals*, 1859 *NAPSS TRANSACTIONS* 87, 88 (London 1860) ("how few symptoms do we discover of any tendency to regard the criminal as a personality endowed with feelings, passions, instincts, hopes and fears like our own, with a past to be repented of, with a future to be provided for, with a reason to be instructed, and with a conscience to be stirred").

24. *The Times* (London), Aug. 14, 1862, at 8, col. 5. See *The Times* (London), Jan. 27, 1869, at 7, col. 1.



against a "standing army of crime," "a host of intestine foes," were employed to justify methods of repression and control — "hunting down and exterminating" — which could not have been advocated for 'ordinary' citizens within the body politic. Indeed, the definition of a criminal class as a separate and foreign social species implied that decent citizens had nothing to fear from a jurisprudence tailored for, and applicable only to, such aliens.

Toward the end of the nineteenth century more sober attitudes and interpretations began to prevail. First, it was recognized that England was not alone; every civilized country had its criminal class. Second, official statistics demonstrated a decline of crime in most of its aspects. Between 1871 and 1894 the population of the convict prisons more than halved, from nearly 12,000 to less than 5,000. Instead of more than 1,600 being committed each year the number was less than a thousand, and those that went received shorter sentences. A substantial decline also occurred in the use of ordinary imprisonment. In 1889 the Criminal Registrar, George Grosvenor, reported that the numbers of the criminal classes at large — the known thieves, depredators and suspected persons — had slumped from 54,000 in 1868-69 to 33,000 in 1887-88. The 'houses of known or suspected bad character' were reduced from nearly 9,000 in 1869 to less than 3,000 in 1888. Taking the increase in population into account, the number of known criminals per every thousand of the population had more than halved between 1868 and 1888, from 2.6 to 1.20. Crimes were also said to be less concentrated in the criminal class — of those charged the proportion who were known thieves or bad characters fell from 28.2 percent to 13.3.<sup>25</sup> Even at the beginning of this period of decline in crime, L.O. Pike in his *History of Crime in England* had felt confident enough to assert that "there never was, in any nation of which we have a history, a time in which life and property were so secure as they are at present in England."<sup>26</sup> This view was echoed by leading foreign authorities.<sup>27</sup>

Third, the statistics themselves underwent a critical scrutiny and reformulation. It had long been recognized that the estimates made

25. Grosvenor, *Statistics of the Abatement in Crime in England and Wales, During the Twenty Years Ended 1887-88*, 53 J. ROYAL STAT. SOC'Y. 377 (1890). See also REPORT OF THE DIRECTORS OF CONVICT PRISONS FOR THE YEAR 1894-95, CMND. NO. 7872, 56 PARL. PAPERS 1177, 1182, 1195 (1895).

26. 2 L. PIKE, A HISTORY OF CRIME IN ENGLAND 480 (1876). See also K. CHESNEY, THE VICTORIAN UNDERWORLD 126-27 (1970). For a modern analysis that confirms the contemporary view, see Gattrell & Hadden, *Criminal Statistics and Their Interpretation*, in NINETEENTH CENTURY SOCIETY 336, 377-79 (E. Wrigley ed. 1972). See also JUDICIAL STATISTICS, ENGLAND AND WALES, 1893. PT. I, CMND. NO. 7725, 108 PARL. PAPERS 1, 23-24 (1895).

27. See, e.g., 1 E. FERRI, SOCIOLOGIA CRIMINALE 408 n.1 (5th ed. 1929).

by the various police forces of the number of known criminals in their jurisdictions showed some absurd variations. London, it appeared, had a lower proportion of criminals than the rural counties in the South West. When the criminal statistics were overhauled by a Home Office committee in 1895, the old figures were pronounced next to useless.<sup>28</sup> The new regulations issued to the police to ensure uniformity had a dramatic impact on the returns. In 1897, there had been 17,000 criminals at large; the next year there were under 6,000. By 1911 there were less than 4,000.<sup>29</sup>

In some ways the decline in criminality emphasized even more sharply the recalcitrance of *recidivists* — a word just then creeping into the language from the International Penitentiary Congresses. It became the acid test of the failure of the penal system. And in the face of social achievements secured in so many fields of national life, habitual criminals were seen less as a warring class and more as social and biological misfits in a forward moving society. As the Gladstone Committee of 1894 put it:

In proportion to the spread of education, the increase of wealth, and the extension of social advantages, the retention of a compact mass of habitual criminals in our midst is a growing stain on our civilisation.<sup>30</sup>

English criminological thought never fully embraced the tenets of Social Darwinism, Italian positivism, and Eugenics, but the influence of these movements, particularly at the turn of the century, should not be underestimated. They had an impact on mental deficiency and habitual drunkenness legislation and they gave a particular bent to the way in which habitual criminals were regarded. J. Bruce Thomson's views on the hereditary nature of crime were widely quoted. He claimed to have discovered a "criminal class *sui generis*." They were "born with crime, as well as reared, nurtured, and instructed in it" and were distinguished by physical and mental peculiarities, inferior intellect, and excessive cunning. As crime was hereditary, and the "proclivity in general quite irresistible," life im-

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28. See JUDICIAL STATISTICS, ENGLAND AND WALES, 1893 — PART I — CRIMINAL STATISTICS, REPORT OF THE COMMITTEE ON THE CRIMINAL STATISTICS, 108 PARL. PAPERS at 23-25 (1895).

29. See JUDICIAL STATISTICS, ENGLAND AND WALES, 1897 — PART I — CRIMINAL STATISTICS, 108 PARL. PAPERS at 108-09 (1895); JUDICIAL STATISTICS, ENGLAND AND WALES, 1911 — PART I — CRIMINAL STATISTICS, 110 PARL. PAPERS at 464-66 (1912-13). It should be noted, however, that a large class of suspected criminals — included in the 1897 figures — were deliberately not counted in 1911. If the 'suspected criminals' figure is removed from the 1897 figures, the reduction in criminals at large from 1897 to 1911 was from 5,400 down to 3,770.

30. REPORT FROM THE DEPARTMENTAL COMMITTEE ON PRISONS, CMND. No. 7702, 56 PARL. PAPERS 1, 9 (1895).

prisonment was the only solution and was necessary on eugenic grounds to stop the "perpetual crime by heritage":

The lesson lies in the law of natural selection so well set forth by Mr. Darwin. When a race of plants is to be improved, gardeners 'go over their seed beds and pull up the *rogues*, as they call the plants that deviate from the proper standard. With cattle this kind of selection is in fact always followed; for hardly any one is so careless as to allow his worst animals to breed.' Why, then, should incorrigible criminals, at the healthy, vigorous period of life, be at large; why should they go into prison for short periods only, to be sent out again in renovated health, to propagate a race so low in physical organisation?<sup>31</sup>

Although he was later to change his mind, the idea of hereditary criminal tendencies received the imprimatur of Henry Maudsley in his *Responsibility in Mental Disease*:

[O]f the true thief as of the true poet it may be indeed said that he is born, not made . . . to add to their misfortunes, many criminals are not only begotten, and conceived and, . . . from their youth . . . bred in crime, but they are instructed in it from youth upwards, so that their original criminal instincts acquire a power which no subsequent effort to produce reformation will ever counteract.<sup>32</sup>

It was an intractable malady: "Can the Ethiopian change his skin or the leopard his spots?"<sup>33</sup> In Maudsley's view the recognition of the moral imbecility of criminals would lead to "more tolerant sentiments, and . . . a less hostile feeling towards them."<sup>34</sup> But that was certainly not the case. The predominant response to this medical diagnosis was to lock them up so that they should not propagate their "degenerate or morbid variety of mankind."<sup>35</sup> It was even suggested that they should be used for physiological, medical and surgical experiments.<sup>36</sup>

Sir Edmund du Cane, Chairman of the Prison Commission, was heavily influenced by this approach. He described the common physical characteristics of habitual criminals as

31. Thomson, *The Hereditary Nature of Crime*, 15 J. MENTAL SCI. 487, 487-89, 495 (1870); Thomson, *The Psychology of Criminals*, 16 J. MENTAL SCI. 321, 321 (1870). See also G. Wilson, *The Moral Imbecility of Habitual Criminals as Exemplified by Cranial Measurements* (paper read to the Exeter Meeting of the British Association, 1869), quoted in Ellis, *The Study of the Criminal*, 36 J. MENTAL SCI. 1, 6 (1890).

32. H. MAUDSLEY, *RESPONSIBILITY IN MENTAL DISEASE* 31 (authorized ed. 1898).

33. *Id.* at 35.

34. *Id.* at 37.

35. *Id.* at 31. See also Maudsley, *Remarks on Crime and Criminals*, 34 J. MENTAL SCI. 159 (1888). On Maudsley, see Scott, *PIONEERS IN CRIMINOLOGY XI; Henry Maudsley (1835-1918)*, 46 J. CRIM. L.C. & P.S. 753 (1956), reprinted in *PIONEERS IN CRIMINOLOGY* 208 (H. Mannheim ed., 2d 1972).

36. See H. RUSDEN, *THE TREATMENT OF CRIMINALS IN RELATION TO SCIENCE* (1872), reviewed in, 19 J. MENTAL SCI. 122 (1873).

entirely those of the inferior races of mankind — wandering habits, utter laziness, absence of forethought or provision, want of moral sense, cunning, dirt, and instances may be found in which their physical characteristics approach those of the lower animals so that they seem to be going back to the type of what Professor Darwin calls 'our arboreal ancestors'.<sup>37</sup>

And du Cane's book was illustrated with some extraordinary Neanderthal-type physiognomies. His solution for those whose "career evidences in them marked criminal tendencies" was to keep them locked up or under close supervision until they were forty years old.<sup>38</sup>

This socio-medical diagnosis of habitual crime was most carefully developed in the writings of W.D. Morrison. He read and translated the Italian masters, Cesare Lombroso and Enrico Ferri. He was the nearest the English got to a true representative of the positivist school.<sup>39</sup> And it was he who was the catalyst for the setting up of a far-reaching enquiry into the traditional structure of the English Penal System in 1894. At times Morrison wrote as if he believed that habitual criminality was the product of a corrupting and debasing prison system which liberated men in a more dangerous state than when they entered.<sup>40</sup> Yet, more fundamentally, he saw the whole class of habituals — professionals and petty misdemeanants alike — as suffering from a common malady. They were "unfit to take part in working the modern industrial machine."<sup>41</sup> In his book *Crime and Its Causes*, published in 1891, and in his testimony before his Gladstone Committee, Morrison saw only one solution for such misfits:

A society based upon the principle of individual liberty is a society of which the members are supposed to be gifted with the virtues of prudence, industry, and self-control; virtues of this nature are indeed essential to the existence of such a form of society. Unfortunately, a certain portion of its members do not possess them even in an elementary degree, and no amount of seclusion in prison will ever confer these qualities upon them. Imprisonment, to be followed by liberty, however rigorous it is made, is accordingly no solution of the difficulty; the only effective way of dealing with the incorrigible vagrant, drunkard, and

37. du Cane, *Address on Repression of Crime*, 1875 *NAPSS Transactions* 271, 302-03.

38. *Id.* at 302-03. See also E. DU CANE, *THE PUNISHMENT AND PREVENTION OF CRIME* 6 (1885); Nicolson, *The Morbid Psychology of Criminals*, 19 *J. MENTAL SCI.* 222, 224 (1873).

39. See Baker, *Some Points Connected with Criminals*, 38 *J. MENTAL SCI.* 364, 364 (1892); Ellis, *The Study of the Criminal*, 36 *J. MENTAL SCI.* 1, 7, 15 (1890); Foard, *The Criminal: Is He Produced by Environment or Atavism?*, 150 *WESTMINSTER REV.* 90 (1898).

40. Morrison, *Prison Reform I — Prisons and Prisoners*, 69 *FORTNIGHTLY REV.* 781 (1898). On Morrison, see Robin, *Pioneers in Criminology: William Douglas Morrison (1852-1943)*, 55 *J. CRIM. L.C. & P.S.* 48 (1964), reprinted in *PIONEERS IN CRIMINOLOGY*, *supra* note 25, at 341.

41. W. MORRISON, *CRIME AND ITS CAUSES* 225-26 (1891).

thief, is by some system of permanent seclusion in a penal colony. All men are not fitted for freedom, and so long as society acts on the supposition that they are, it will never get rid of the incorrigible criminal.<sup>42</sup>

The idea that recidivists suffered from a criminal disease analagous to mental and bodily diseases was widely supported by leading American jurists such as Professor Francis Wayland of Yale. The conclusion seemed obvious: "the less the criminal's will is free, the more his body should be held fast."<sup>43</sup> To Henry Boies, author of *The Science of Penology*, the recidivist was not merely a social pest, but "a reproach upon social intelligences." To discharge him before he was cured was to disseminate contagion.<sup>44</sup>

It was not far from here to a final solution. L.O. Pike, the historian of crime, put it in a nutshell:

Like consumption or other hereditary disease, the criminal disposition would in the end cease to be inherited if all who were tainted with it were compelled to live and die childless. The remedy may be painful, and even cruel, but perhaps greater cruelty and greater pain may be inflicted by the neglect which leaves physical and social ills to spread themselves unchecked.<sup>45</sup>

Social Darwinism sought to make such views respectable. Sir Francis Galton, the father of the Eugenics movement in England, had no doubts that "a source of suffering and misery to a future generation" would be eliminated if habitual criminals were stopped from breeding by resolute segregation "under merciful surveillance."<sup>46</sup>

The Oxford philosopher F.H. Bradley propounded his principle of social, moral, or ethical "surgery." The right of the moral organism "to suppress its undesirable growths" was absolute and the only basis for rational punishment. Justice was a "subordinate and inferior principle" and irrelevant to those who had not the capacity to be moral agents. Darwinism insisted "on the necessity of social amputation." And Bradley did not mean this to be a metaphor. The knife was abhorrent, but less so than life-long imprisonment.<sup>47</sup> The ulti-

42. *Id.* at 183-90. Morrison was skeptical of extreme views on the physical characteristics of criminals, but nevertheless felt it highly probable that a criminal type existed. But it was a distinctiveness acquired largely *by habit* as a response to the vagaries of the profession. *Id.* at 182-95. See also REPORT FROM THE DEPARTMENTAL COMMITTEE ON PRISONS, 56 PARL. PAPERS 184 (1895).

43. For English comments on these American ideas, see HOWARD ASSOCIATION, ANNUAL REPORT 10 (1895).

44. Hopkins, *Penology up to Date*, 112 THE LAW TIMES 526 (1902) (reviewing H. BOIES, THE SCIENCE OF PENOLOGY).

45. 2 L. PIKE, *supra* note 26, at 580.

46. See D. FORREST, FRANCIS GALTON: THE LIFE AND WORK OF A VICTORIAN GENIUS 250 (1974).

47. Bradley, *Some Remarks on Punishment*, 4 INTL. J. ETHICS 269, 272, 276, 281 (1894).

mate solution was put forward with no trace of parody by St. John Hankin in the respectable *Westminster Review*:

There is a good deal to be said after all for the Law of Draco . . . if the criminal, while not in the ordinary sense lunatic, is found to be thoroughly irresponsible, hopelessly perverted, and mentally and physically incapable of reformation, he must be put out of the way. . . . He is a dangerous animal, and society must be protected against him. If it be urged that it will be difficult or impossible to certify absolutely that a man is beyond cure, then a certain number of convictions followed by sentence — say five — must be taken as evidence of a criminal disposition that cannot be successfully combatted. If some one or two are thus destroyed unnecessarily, we can only comfort ourselves by the Abbot of Citeaux' cynical order — "Kill them. God will know His own."<sup>48</sup>

Needless to say, such extreme views were rare. The English never fully accepted the idea that criminals were a separate species of mankind, and they regarded even the worst of them as having some hope of redemption.<sup>49</sup> And the notion of preventive social defense had to contend with deeply felt traditional liberal conceptions of justice.<sup>50</sup> But when all this is said, the resolve to bring habitual criminality under control remained as strong as ever.

## II. FIVE APPROACHES

### A. *Indefinite Confinement and Preventive Policing*

This scheme was sponsored by Matthew Davenport Hill, the Recorder of Birmingham and a leading penal reformer of the period.<sup>51</sup>

48. Hankin, *The Criminal*, 150 WESTMINSTER REV. 24, 29-30 (1898). The idea of perpetual segregation in order to stop procreation of a new generation of criminals lingered on. Habitual criminals, stated a High Court judge, "ought to be detained, and detained long enough to make the chance small of their becoming the parents of criminals." Professional criminals "should be put in Ward for life or for very long periods and so deprived, among other things, of the power of transmitting crime as an heirloom to their posterity." Wills, *Criminals and Crime*, 62 THE NINETEENTH CENTURY AND AFTER 879, 879-94 & 886-87 (1907). Even the well-intentioned penal reformer, Thomas Holmes, favored perpetual confinement: "better by half detain them under reasonable conditions and let them quietly die out, in the hope that few will be found to take their places." See *Prisons and Prisoners*, 9 HIBBERT J. 114, 132 (1910).

49. For example, the Gladstone Committee of 1895 was to conclude:

While scientific and more particularly medical observation and experience are of the most essential value in guiding opinion on the whole subject [of the treatment of criminals], it would be a loss of time to search for a perfect system in learned but conflicting theories, when so much can be done by recognition of the plain fact that the great majority of prisoners are ordinary men and women amenable, more or less, to all those influences which affect persons outside.

REPORT FROM THE DEPARTMENTAL COMM. ON PRISONS, 56 PARL. PAPERS 1 (1895).

50. See Radzinowicz & Hood, *Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem*, 127 U. PA. L. REV. 1288, 1309-13, 1321-27 (1979).

51. See 9 DICTIONARY OF NATIONAL BIOGRAPHY 853 (1921-1922) (Matthew Davenport Hill (1792-1872): Reformer of the criminal law; a founder of the Reformatory School Movement; intimate acquaintance of Jeremy Bentham and other advanced liberals; co-founder of

In his report on *The Principles of Punishment to the Law Amendment Society* in 1846, Hill suggested that the duration of imprisonment should be made dependent on the reformation of the offender. He believed that the experiment should begin with the young. When it had been shown to be free of abuse, it could be extended to adults. Hill was convinced that the vast majority would be reformed, leaving a remainder so small in numbers that they might "without any shock to the public be detained indefinitely on a similar principle to that on which lunatics are kept under restraint, which is only withdrawn when the patient is relieved of his malady . . . ." <sup>52</sup> However, as prison was to be a "hospital for moral diseases," those who proved to be incorrigibly depraved would be detained "until . . . released by death." <sup>53</sup>

Although he came to recognize the political impracticality of the idea of indefinite confinement, Hill stuck with it for the remainder of his life. In 1864 he wrote: "The longer I live the more deeply I am impressed with the necessity of "incapacitating" by imprisonment criminals, whose reformation is all but hopeless, from continuing their course in crime." <sup>54</sup> Such an enactment would in particular lay hold of "veteran criminals, who being past the age of active exertion, aid their younger accomplices by plotting offences, and giving instructions in the best methods of committing them without detection." <sup>55</sup> Detention would be not merely preventive but also prophylactic. <sup>56</sup>

Hill's proposal immediately raised two questions. First, how

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the Society for the Diffusion of Useful Knowledge; Recorder of Birmingham, 1839, for 26 years).

52. M. HILL, DRAFT REPORT ON THE PRINCIPLES OF PUNISHMENT (1846) (presented to the Committee on Criminal Law Appointed by the Law Amendment Society).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* See R. DAVENPORT-HILL & F. DAVENPORT-HILL, THE RECORDER OF BIRMINGHAM: A MEMOIR OF MATTHEW DAVENPORT-HILL (1878). Hill is quoted as saying: "Begin to reform the criminal the moment you get hold of him; and keep hold of him until you have reformed him." *Id.* at 185 (emphasis original). As early as 1839 in his charge to the jury, Hill had referred to "a class of persons who pursue crime as a calling . . . [t]he numbers of [which] I cannot place [a]t much lower for England and Wales than a hundred thousand . . . . [I]f a [first-time convict] shall appear to have resorted to depredation as a stated means of livelihood, then something may be done . . . by permanently withdrawing the criminal upon his first sentence from his career of crime . . . for a long term, whenever the discipline of our prisons shall be so far improved as to make them places where their inmates may be reformed, instead of more deeply corrupted." M. HILL, *supra* note 9, at 7-8. See also *id.* at 462-73, 651-57. At the end of his life, too old and too ill to travel to Cincinnati for an American prison conference, Hill repeated his support for indeterminate confinement. See Hill, *On the Objections Incident to Sentences of Imprisonment for Limited Periods*, in NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE, TRANSACTIONS 105 (1871).

should incorrigibility be defined, and what safeguards should there be to guard against the power being used for "sinister purposes" by government? Hill himself was vague and vacillating in his perception of the numbers who would need to be so detained. At times he spoke of "a small knot of ruffians," at others of a "numerous class of habitual depredators, cheats, forgers, and others, who make crime their ordinary, and, for the most part, their sole occupation."<sup>57</sup> He was clearly content to leave the matter of selection of suitable cases to judicial discretion.

Second, what form was the indeterminate detention of incorrigibles to take, especially if they were to be likened to lunatics? Here again Hill's views vacillated. At first he appeared to believe that the prisoner's position should be made as unenviable as possible, only gradually improving through a system of stages, like that employed in the Irish convict system which he so much admired. By 1856 he favored a form of custody which "need not be made very painful . . . [with] all such indulgencies as their unhappy state permits, short of turning them out again on society."<sup>58</sup> Yet in 1866 he was advocating that incorrigible convicts serving life sentences should be detained in a special prison. There the regime would be "harsher by many degrees" and would never be raised "to a condition which even the humblest member of society would esteem one of even tolerable welfare."<sup>59</sup> Those who refused the benefits of the reformatory would receive their just reward. In putting these ideas forward Hill was influenced by Alexander Maconochie, the originator of the progressive stage system of prison discipline, and by his own brother Frederic, the Inspector of Scottish Prisons and an early advocate of indeterminate sentencing.<sup>60</sup>

In his two noted Charges to the Grand Jury at the Birmingham Quarter Sessions of 1850 and 1851, Hill took a more realistic view of the reformatory achievements of the prison system. He conceded that it was "notorious to all the world" that a large body of men were

57. M. HILL, *supra* note 9, at 327 (quoting an anonymous friend).

58. SELECT COMM. ON TRANSPORTATION, SECOND REPORT, CMD. NO. 296, 17 PARL. PAPERS 189, 210 (1856).

59. Hill, *Brief Remarks on the Treatment of Criminals Under Imprisonment for Life*, 1866 NAPSS TRANSACTIONS 213. See also 2 M. CARPENTER, OUR CONVICTS 301 (London 1864).

60. A. MACONOCHE, CRIME AND PUNISHMENT: THE MARK SYSTEM (1864). This book contains a paper drawn up by M.D. Hill for the Society for Promoting the Amendment of the Law, Committee on Criminal Law, *id.*, at 49-60. See also F. HILL, CRIME: ITS AMOUNT, CAUSES AND REMEDIES 150-55 (London 1853); FREDERIC HILL: AN AUTOBIOGRAPHY OF FIFTY YEARS IN TIMES OF REFORM 274-77 (C. Hill ed. 1894); 9 DICTIONARY OF NATIONAL BIOGRAPHY 853, 854 (Oxford U. Press ed. 1921-1922) P. Bartripp, *Matthew Davenport Hill* (unpublished Ph.D. dissertation, University of Wales, 1975).



released uncured, followed crime as a calling, and had no legitimate source of income. Why should they not remain the object of "just and unavoidable suspicion"?<sup>61</sup>

Hill therefore grafted onto his original scheme the proposal that any person previously convicted of a felony or of a misdemeanor implying fraud would be liable to be charged with still persevering in crime. If two credible witnesses could satisfy a magistrate that the accused was addicted to robbery or theft he would be called upon to prove that he had lawfully obtained the means of subsistence through his property, labor, friends, or through charity. If he failed to do so he would be adjudged a reputed thief and put under recognizances for good behavior. If he failed to give bail his case would be sent to the jury at the Assizes or Sessions and, if the case was proved against him, he would be imprisoned for a term fixed by law but capable of diminution by the judge. Hill claimed that by these means "nine-tenths of the malefactors who now roam the country unmolested" could be withdrawn from society. He was convinced that there would be very few mistakes, but even if there were occasional errors, they were to be preferred to the outrages of criminals. Nor would the powers prove an infringement of the liberty of the subject, for no honest man would have difficulty in proving that he had legitimately come by the means of his subsistence.<sup>62</sup>

There were some who shared Hill's enthusiasm for the indeterminate sentence. The distinguished essayist William Rathbone Greg, for instance, was convinced that incorrigibility was simply, clearly, and incontrovertibly demonstrated by a second conviction. The first offender was a "frail member of society" who could be punished by short imprisonment. But the second offender "becomes a guilty one; he steps from the class of casual into that of professional depredators; and belongs thenceforth to the criminal population." Society then had the right and duty to protect itself "by reforming him and incapacitating him until he is reformed."<sup>63</sup> Greg was unmoved by the argument that the detention would be disproportionately severe for a trifling second offense. "That consideration is wholly beside the question; he has forfeited his citizenship, by abusing it; he has made war against society . . . he has given society a right to protect

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61. M. HILL, *supra* note 9, at 182.

62. *Id.* at 151-57, 180-91. See also *id.* at 468; F. Hill, *Address to the Law Amendment Society — The Means of Freeing the Country from Dangerous Criminals*, summarized in 2. n.s. pt. 2, THE JURIST 560 (1857).

63. *The Management and Disposal of Our Criminal Population*, 100 EDINBURGH REV. 563, 606 (1854).

itself.”<sup>64</sup> Those who proved resistant to prison discipline would have their sentences begun anew. Thus, the truly incorrigible would condemn themselves to perpetual imprisonment and, if released, to constant surveillance.<sup>65</sup>

But Hill's proposal also encountered formidable opposition. It was regarded as an anathema by Sir Joshua Jebb, the powerful first Director of Convict Prisons.<sup>66</sup> In Jebb's view, indeterminate sentencing amounted to “virtually a transfer of legal powers to irresponsible hands.” He was convinced that long determinate sentences of eight to ten years in the public works were the remedy for the eighteen percent of criminals who were “irreclaimable [or] engaged in crimes of violence.” He thought that only about two percent of burglars, robbers, highwaymen, receivers and professional criminals would prove to be “absolutely incorrigible.” For them he did favor imprisonment for life. But he was acutely aware of the dangers of abuse and of the practical consequences:

to brand any class of men in such a way as to be shunned by their fellows is to create a greater evil than that which is sought to be removed.<sup>67</sup>

Thus, Jebb favored a system of selective incapacitation, to be applied only to “exceptional cases” who were to be confined in a special prison at home, rather than abroad, so as to ensure proper supervision and “a humane and moral discipline.”<sup>68</sup>

As Hill's daughters recalled in their biography, his scheme for prosecuting habituals for living off ill-gotten gains “excited opposition to a degree for which he was not prepared.”<sup>69</sup> By one school of critics Hill was designated the “Birmingham Draco.”<sup>70</sup> *The Times*

64. *Id.* at 606.

65. *Id.* at 606-07. See also W. GREG, POLITICAL PROBLEMS FOR OUR AGE AND COUNTRY 84-89 (London 1870). On Greg, see 8 DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 51, at 531. See also G. COMBE, REMARKS ON THE PRINCIPLE OF CRIMINAL LEGISLATION, AND THE PRACTICE OF PRISON DISCIPLINE 95 (1854); W. ELLIS, WHERE MUST WE LOOK FOR THE FURTHER PREVENTION OF CRIME 30 (1857).

66. See 10 DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 51, at 698; (A Royal Engineer; as Surveyor General of Prisons, assisted Crawford and Russell in the design and construction of the Model Prison at Pentonville; First Chairman of Directors of Convict Prisons, 1850).

67. GENERAL REPORT ON THE CONVICT PRISONS WITH OBSERVATIONS ON SEVERAL QUESTIONS CONNECTED WITH MANAGEMENT AND DISPOSAL OF CONVICTS, TICKETS-OF-LEAVE, SUPERVISION OF THE POLICE, THE IRISH SYSTEM &c., TOGETHER WITH SUGGESTIONS CONCERNING PRISON DISCIPLINE AND CONSTRUCTION, 25 PARL. PAPERS 687, 715 (1862).

68. Jebb, *The Convict System of England*, 1862 NAPSS TRANSACTIONS 358, 361. For an earlier classic statement by James Mill against executive interference with the judge's sentence see *Prisons and Prison Discipline*, 6 SUPPLEMENT TO THE FOURTH, FIFTH, AND SIXTH EDITIONS OF THE ENCYCLOPEDIA BRITANNICA 385, 387 (Edinburgh 1824).

69. R. DAVENPORT-HILL & F. DAVENPORT-HILL, *supra* note 56, at 192.

70. *Id.* at 193.

was virulent in its attack. It charged that the idea was both wrong-headed and dangerous. How could one define addiction to robbery or theft? Why should three convictions be the justification for a fourth even before the commission of any proved criminal act? Anyone affiliated to a "gang of marauders" could easily get someone to say they employed him. But above all it was intolerable that the police should have such power. They would be the accusers, the witnesses and the judges, "the strings which regulate their movements would all ultimately terminate in Scotland-Yard." For whatever reasons, whether over-zealousness, innate suspicion, malevolence or stupidity, the police were the last to be trusted with such power over the liberty "of the meanest of our fellow-countrymen." The proposal was "likely to produce greater evils than those it professes to cure . . . you cannot out of any number of unfledged suspicions . . . justify the incarceration of an Englishman." Hill's scheme would admit to the English system of jurisprudence a "theory of guilt, and a manner of proceeding, which could at any time be used against the humbler classes of our countrymen with fearful effect. . . . The tyranny of police *surveillance* on the continent of Europe would be nothing to such a scheme as this."<sup>71</sup>

Hill, along with his brother Frederic, insisted that no new principle was involved. It was found in the Elizabethan Poor Law and the Scottish charge of being "by habit and repute a thief." And were not the powers of the Secretary of State to recall men on ticket-of-leave<sup>72</sup> far more open to abuse than the legal procedures he was not proposing? Yet all this was special pleading. The very idea of arresting men and putting upon them the burden of proof that they lived honestly was, in the climate of the 1850s, quite unacceptable.<sup>73</sup>

### B. *The Cumulative System*

The idea of an indeterminate sentence ending only upon refor-

71. The Times (London), Oct. 24, 1850, at 4, col. 3. See also The Times (London), Oct. 22, 1850, at 4, col. 4; Oct. 23, 1850, at 4, col. 4. Hill was supported by The Spectator. See Mr. M. D. Hill's Suggestion, 23 THE SPECTATOR 1020 (1850); Preventive Justice, 23 THE SPECTATOR 1044 (1850).

72. In English criminal law, "[A] license or permit given to a convict, as a reward for good conduct, particularly in the penal settlement, which allows him to go at large, and labor for himself, before the expiration of his sentence, subject to certain specific conditions and revocable upon subsequent misconduct." BLACK'S LAW DICTIONARY 1652 (4th rev. ed. 1962).

73. The reaction of the press was even more hostile when, in 1851, Hill repeated his scheme in another charge to the Grand Jury. See M. HILL, *supra* note 9, at 191-231. See also F. HILL, *supra* note 60, at 149-50 ("In Scotland, indeed, under the term 'habit and repute', a repeated offence is specifically recognised by the law as a reason for a much greater punishment . . .").

mation or death was largely replaced by what were regarded as more realistic schemes of cumulative sentencing. These were designed to ensure that ever heavier punishment would follow with certainty upon each reconviction. These were schemes to incapacitate a whole class rather than a selective few. Henry Mayhew wanted each man to see "that each additional commitment added something to the chances of being locked up for life eventually."<sup>74</sup> And this method was seen as the only means of finally breaking up the criminal class. At one end young recruits would be removed to the newly established reformatory schools. At the other, the older offenders would, with long imprisonment, lose their skills as thieves. The lower classes would be deprived of their "tempters, instructors and leaders."

This argument was consistently employed by the most ardent champion of cumulative punishment, the Gloucestershire magistrate and philanthropist W. Barwick Baker.<sup>75</sup> In what must have seemed an interminable stream of articles, starting around 1857, Baker put forward his sentencing formula. Under his plan, the first conviction would generally be met with a week's imprisonment as a warning, a second conviction with between two and five years in a reformatory, a third with four years' penal servitude,<sup>76</sup> a fourth with ten years. The system would be reformatory because less hardened and less intractable offenders would be in the convict establishments. It would be deterrent because at each stage the offender would know what he risked. It would be preventive by quickly "getting rid of the old hands" and by relieving temptation, for "there is no temptation half so fatal to boys as that of the companionship of a clever, practised, habitual thief, proving by his very presence his immunity (at least for the time being, which is all that they think of) and showing the way both by precept and example by which others may attain the object of ambition to all — getting money without trouble."<sup>77</sup>

At various times Baker changed the details of his scheme, but he

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74. THE SELECT COMM. ON TRANSPORTATION, SECOND REPORT, CMD. NO. 296, 17 PARL. PAPERS 189, 343 (1856).

75. See 22 DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 51, at 106: (Thomas Barwick Lloyd Baker (1807-1886): Barrister, magistrate, visiting justice Gloucester Prison, one of founders Social Science Association; Founder Hardwicke Reformatory School. Leading member Howard Association. Friend of the eminent German professor of criminal law, Baron von Holtzendorff).

76. Penal servitude is "a term introduced in British criminal law in 1853, to designate imprisonment with hard labor at any penal establishment in Great Britain or its dominions; . . ." 7 OXFORD ENGLISH DICTIONARY 632 (1970).

77. Baker, *On the Possible Extirpation of Regular Crime*, 1857 NAPSS TRANSACTIONS 271, 272-74, 278.

remained firmly wedded to the principle. By 1863 he had decided on a more draconic version: a week or ten days on bread and water only for a first conviction; for the second conviction it would be twelve months; for the third, seven years' penal servitude; and for a fourth, penal servitude for life or for some very long period that would allow surveillance on ticket-of-leave for the greater part of the criminal's life. Baker saw that there might be rare exceptions where the offense committed did not warrant these penalties, but he firmly believed that "if you tell a man clearly what will be the punishment of a crime before he commits it there can be no injustice in inflicting it." It did not matter if weakness rather than wickedness was at the root of repetition. If he reached his third or fourth conviction he would "with his eyes open deliberately sentence himself."<sup>78</sup> Baker backed up his assertion with statistics. Of all criminals first convicted, not quite one in five relapsed, and of these nearly half relapsed a second time. Of those who relapsed a third time nearly three quarters relapsed again. "None can doubt that our three or four times convicted offenders are the most dangerous class, as well as being the most fitted to corrupt and instruct beginners in evil."<sup>79</sup> Although Baker's colleagues on the Social Science Association supported the principle of his scheme, they feared that it would be found "repugnant" because of its harsh details.<sup>80</sup>

The idea of cumulative sentencing was propounded in many other forms. Alexander Thomson of Banchory suggested a "tolerably certain ascending scale of punishment," such as to ensure two or three years imprisonment upon third or fourth conviction. Far from being severe, Thomson's suggestion would be a kindness to the criminal because short sentences destroyed his character. But for confirmed habitual offenders — those who, after repeated slighter punishments, had once or perhaps twice undergone penal servitude and were again reconvicted, and for those housebreakers and garrot-

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78. T. Baker, *Letter to the Gloucester Chronicle*, June 20, 1863, reprinted in T. BAKER, *WAR WITH CRIME* 27, 31-32 (1889).

79. Baker, *Ought the Principles of the Reformatory System, Including Voluntary Management, to be Extended to Adults?*, 1868 NAPSS TRANSACTIONS 315, 319. See also T. Baker, *On a Uniform System of Sentencing*, summarized in 1864 NAPSS TRANSACTIONS 313; Baker, *What Means is it Desirable to Adopt to Prevent the Passing of Sentences Inadequate to the Proper Repression of Crime?*, 1865 NAPSS TRANSACTIONS 203; Baker, *Cumulative Punishment*, 1878 NAPSS TRANSACTIONS 276, 281. Baker's letters to the Editor of *The Times* (London), Jan. 7, 1869, at 5, col. 2; Jan. 13, 1869, at 4, col. 5; Feb. 2, 1869, at 8, col. 3.

80. See the discussion of Baker's paper at 1865 NAPSS TRANSACTIONS 259-60, especially the views of Mr. Hastings, Serjeant Cox and the Reverend W.L. Clay. *Id.* at 259-60. See also the Earl of Carnarvon's opening address, *id.* at 80. For an article supporting Baker, but stating that "the advisability of adopting these principles depends on the accuracy of the statistics," see 12 *THE JURIST* n.s. Pt. II, at 3-5.

ters<sup>81</sup> whose "premeditated conduct proves their depravity," Thomson recommended imprisonment for life. "[I]t is, no doubt, an awful thought that a fellow-creature requires to be shut up, like a noxious animal . . . but still, duty to the unoffending members of society may demand that he be so treated."<sup>82</sup> The number imprisoned for life would, of course, depend on the patience of the public toward habitual offenders "before conclusively disposing of them." Yet unlike Jebb, Thomson did not have in mind a small residuum. He thought it would amount to the number previously transported, about 3,000 each year, which in the course of time would have produced a prison population of about twenty thousand.<sup>83</sup> There ought to be no scruple about "such perpetual sequestration of such an entirely hopeless class," said the noted historian Harriet Martineau:

If these wretches, and the thoroughly depraved and hardened, who have proved themselves to be of an incorrigible quality, were secluded, at any cost, it would be a cheap bargain to even the existing generation, while the next would be grateful to us for having delivered them from the burden and curse of a 'dominant' criminal class.<sup>84</sup>

Others, like Sir Walter Crofton, campaigned for a far more certain system. In his influential pamphlet *The Immunity of Habitual Criminals*, published in 1861, Crofton proposed that those who had previously undergone a sentence of penal servitude should, on due proof being given of their "pursuing criminal courses," be sentenced to not less than seven years penal servitude, of which four years would be in confinement and three years under conditional liberation, systematically enforced. Such a scheme, he believed, was "sounder and more likely to meet with public approval" than the proposals for incarcerating habituals for unlimited periods. The principle was not novel to the criminal law. A conviction for larceny subsequent to one of felony already rendered the offender liable to penal servitude. All Crofton proposed was to "systematise" it by ensuring that former convictions were proved, for under existing practice "the matter is left to the accidental information or power of obtaining proof on the part of the Police Officer; and it is notorious that some of our most "Habitual Criminals" thereby escape with

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81. Garroters were robbers who half-strangled their victims from behind.

82. A. THOMSON, PUNISHMENT AND PREVENTION 407 (1857).

83. A. THOMSON, *supra* note 82, at 409-10.

84. Martineau (unsigned), *Convict System in England and Ireland*, 117 EDINBURGH REV. 241, 241-68 (1863). See also *Life in the Criminal Classes*, 122 EDINBURGH REV. 169 (1865); *The Punishment of Convicts*, 7 CORNHILL MAGAZINE 189, 200 (1863) (recommending that "crimes of less magnitude [than atrocious crimes] committed by professional criminals should be visited with disabling punishments").

very slight or inadequate punishment.”<sup>85</sup>

### C. *Requiring Proper Proof of Habituality*

It was the question of proof of habituality which attracted the attention of James Fitzjames Stephen. His views on what to do with habituals, as he himself recognized, went far beyond what public sentiment would accept. Indeed, they were characteristic of an idiosyncratic extremist:

If by a long series of frauds artfully contrived a man has shown that he is determined to live by deceiving and impoverishing others, or if by habitually receiving stolen goods he has kept a school of vice and dishonesty, I think he should die. . . I suspect that a small number of executions of professional receivers of stolen goods, habitual cheats, and ingenious forgers, after a full exposure of their career and its extent and consequences, would do more to check crime than twenty times as many sentences of penal servitude. If society could make up its mind to the destruction of really bad offenders, they might, in a few years, be made as rare as wolves.<sup>86</sup>

But Stephen firmly held that it was entirely wrong, if the sentence — whatever it be — was to rest on imputation of habituality, that the matter should be left solely to the judge acting upon information presented by the police. There should be a full, public, formal inquiry.<sup>87</sup> This idea was taken up by Mr. Sergeant Cox, a pillar of the Social Science Association. The test should be whether the offender was a “professional criminal” and this should be proved subject to all the safeguards of a trial for an offense. If the jury found him to be a professional there would be a sentence “distinct from that inflicted for the particular offence.”<sup>88</sup> Here was an element to be found in yet another scheme: the dual-track sentence.

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85. W. CROFTON, *THE IMMUNITY OF ‘HABITUAL CRIMINALS’ WITH A PROPOSITION FOR REDUCING THEIR NUMBER BY MEANS OF LONGER SENTENCES OF PENAL SERVITUDE: INTERMEDIATE CONVICT PRISONS: CONDITIONAL LIBERATION AND POLICE SUPERVISION* (1861). *See also* Crofton, *Can Intermediate Prisons Materially Aid in Solving the Difficulties of the Convict Question?*, 1858 NAPSS TRANSACTIONS 376, 376-83 (advocating use of intermediate prisons to give prisoners proper work experience prior to release); Crofton’s testimony, SELECT COMM. OF THE HOUSE OF LORDS ON THE PRESENT STATE OF DISCIPLINE IN GAOLS AND HOUSES OF CORRECTION, CMD. NO. 499, 9 PARL. PAPERS 1 (1863).

86. J. STEPHEN, 1 *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 479 (1883).

87. Stephen, *The Classification and Definition of Crime*, in 1 PAPERS READ BEFORE THE JUDICIAL SOCIETY 192, 192-209 (1865). *See also* J. STEPHEN, 2 *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 479 (1883); *The Punishment of Convicts*, 7 CORNHILL MAGAZINE 189, 192-97 (1863); L. Radzinowicz, *Sir James Fitzjames Stephen*, SELDEN SOCIETY LECTURE 33-34 (London 1957).

88. *See, e.g.*, Cox, *The Habitual Criminals Bill*, 46 THE LAW TIMES 404, 404-05 (1869). *See also* 46 THE LAW TIMES 493, 493-94 (1869); *The Habitual Criminals Act*, 47 THE LAW TIMES 323, 323-24 (1869); Cox, *Professional Crime*, 1869 NAPSS TRANSACTIONS 262-65.

#### D. *The Dual-Track Scheme*

In 1856, Charles (later Lord) Worsley, a progressive Liberal and a member of the Select Committee on Transportation, asked Sir Horatio Waddington, the Permanent Under Secretary of State at the Home Office, whether he was in favor of subjecting confirmed criminals "in whom all hope of reformation is delusive":

[I]n the first instance, to the severe punishment of penal servitude, and then during the remainder of their lives . . . to such control, in some place of seclusion and healthy confinement, as would ensure their not escaping?<sup>89</sup>

Waddington was appalled by the very idea of indefinite confinement, calling it "a very frightful punishment under any circumstances, inflicting civil death upon a man without the slightest hope — it destroys every feeling which can render life in any respect desirable, or even tolerable."<sup>90</sup>

The idea of indefinite confinement was revived and elaborated by Henry Taylor in his *Letter to Mr. Gladstone*, published in 1868.<sup>91</sup> Taylor's plan was to extinguish the criminal class by imposing imprisonment for life upon the second or third felony conviction. He believed that it was well nigh impossible for habitual criminals to enter honest employment and that the system therefore merely became one of releasing them to hunt them down again. Perpetual confinement would not only save the great public expense of repeated crimes, trials, and imprisonments, but also save the criminals from a "wretched life" at large. And, to boot, it would shatter all criminal organization. He envisaged dividing imprisonment for habituals into two distinct phases: the first to be penal imprisonment, severely deterrent but perhaps not so long as the equivalent period of penal servitude that might have been served; the second to be protective imprisonment for life, "a lenient confinement . . . so regulated as to afford whatever of comfort and enjoyment of life is compatible with segregation from society, and the necessary disruption of a community of convicts."<sup>92</sup> The protective phase might be broken into three successive terms of five years each. The first would be "exempt from any rigour of discipline not required for the maintenance of order and for pecuniary purposes." The second would

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89. SELECT COMM. ON TRANSPORTATION, FIRST REPORT, 17 PARL. PAPERS 21 (question 173), 22 (question 179) (1856).

90. *Id.* at 22-23 (question 186).

91. See H. TAYLOR, CRIME CONSIDERED IN A LETTER TO THE RT. HON. W.E. GLADSTONE, M.P. 21-24 (1868).

92. Taylor, *The Habitual Criminals Bill*, 79 FRASER'S TOWN AND COUNTRY MAGAZINE 661, 661-77 (1869).



bring more indulgences — tobacco, liquors, books — purchased from additional industry. In the third the prisoner would enjoy spells of absence on leave under prescribed conditions and with sufficient savings to live without the necessity of crime. For the remaining portion of life there might be more relaxed conditions, including more frequent visits from approved persons of the same sex.<sup>93</sup>

Taylor was convinced that the severity of the preliminary punishment was essential to ensure that criminals would not choose prison as a place of retirement. And he was also convinced that the second phase of such a sentence would be far more likely to improve the prisoners, to make them less savage and less desperate, than continuous periods of harsh confinement broken only by short periods of liberty.<sup>94</sup> The scheme was, therefore, more than merely preventive; it was deterrent, reformatory, and humanitarian in one. A further thirty years elapsed before this idea was seriously considered, but neither Worsley nor Taylor was credited with being its originator.

#### E. *Readjusting Controls to Categories of Habitual Criminal*

Inherent in all these schemes was a common fault. They were framed as if to apply to any felony, whatever its degree of seriousness, and they ignored altogether the problems posed by persistent minor misdemeanants. Baker's scheme, which had been adopted in Gloucestershire, met any third felony conviction with a sentence of seven years' penal servitude.<sup>95</sup> It was widely regarded as excessively severe, and so unevenly applied that it led to startling disparities. As the Howard Association<sup>96</sup> complained:

Thus at Anglesey Assizes . . . a man was sentenced to seven years'

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93. *Id.* Also, see the letter from "A Chairman of Quarter Sessions", *The Times* (London), Nov. 4, 1868, at 5, col. 5, advocating a sentence "to labour for life, . . . not exactly in penal servitude, but to work in some Government establishments, under supervision" for the three or four times convicted. For a biography of Sir Henry Taylor (1800-1886), see 19 *DICTIONARY OF NATIONAL BIOGRAPHY* 410, 410-12 (1921-1922). (Author, playwright. Acquainted with J.S. Mill and the Benthamites. Contributor to the *Quarterly Review*. Worked in Colonial Office. As a consequence of *Crime Considered*, a criminal code was prepared for the Crown Colonies by Mr. (afterwards Mr. Justice) R.S. Wright. The Code was finished in 1875, but never passed into law).

94. See Taylor, *supra* note 92, at 661. See also Letter from "A Chairman of Quarter Session," *supra* note 93, advocating a sentence "to labour for life — not exactly in penal servitude, but to work in some government establishment, under supervision" for the three or four times convicted.

95. See T. Baker, *By What Principles Ought the Amount of Punishment Other Than Capital to be Regulated?*, summarized in 1871 *NAPSS TRANSACTIONS* 286; 52 *THE LAW TIMES* 171, 171 (1872).

96. The Howard Association was founded in 1866 for the advancement of penal reform and crime prevention. The organization takes its name from John Howard, the eighteenth century penal reformer. In 1921, the Howard Association merged with the Penal Reform League to form the Howard League for Penal Reform which today remains actively engaged

penal servitude for stealing a hen (after two light committals previously), whilst . . . elsewhere another man was only fined 5s. for deliberately stealing 24 fowls.<sup>97</sup>

Furthermore, they argued:

It is an extreme of severity and a great blunder pecuniarily, to punish with heavy sentences of many years for only two or three acts of minor dishonesty, whilst at the same time breaking up a man's home, and perhaps throwing his whole family on the poor rates for the whole term of his imprisonment. Such a course is the more inconsistent when so many thousands of offenders for other misdemeanors than those against property, are treated with the opposite extreme of a pernicious laxity.<sup>98</sup>

The Association mounted a long campaign for cumulation of sentences for persistent petty offenders.<sup>99</sup> It argued that misdemeanants were neither deterred nor reformed by a succession of short sentences — “in and out, in and out, like water through the gills of a fish . . . their lax treatment produces incalculable mischief among those . . . who frequent the border-land of crime.”<sup>100</sup> The Association proposed a scale of gradual cumulation: three days, a week, a fortnight, a month, three, six, nine, twelve, eighteen months, two years.<sup>101</sup> Only when such longer sentences were imposed would it be possible to instill industry and moral habits through “hard task work of a useful nature.” For a while, in the early 1880s and under the influence of the Elmira system in America, the Association embraced the indeterminate sentence. Habitual misdemeanants would only be liberated on probation or *during good behavior*; their original terms of confinement would be extended or repeated if no real evidence and ‘*proof*’ of reformation were forthcoming:

In his own interests and those of society, every criminal, after a first imprisonment, should be safely “*put through*” into industrious and honest *habits*. And, like a damaged boat, he should be overhauled again and again, until able to float safely along the social stream.<sup>102</sup>

Various other schemes were mooted. The Liverpool justices

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in the promotion of penal reform. See also G. ROSE, *THE STRUGGLE FOR PENAL REFORM: THE HOWARD LEAGUE AND ITS PREDECESSORS* (1961).

97. HOWARD ASSOCIATION, ANNUAL REPORT 5-6 (1874).

98. *Id.* at 6.

99. See *Habitual Misdemeanants, Memorial from the Howard Association to the Secretary of State for the Home Department, Home Office 12/85459* (1870). [Home Office documents cited hereinafter as H.O.] See also W. TALLACK, *HUMANITY AND HUMANITARIANISM, WITH SPECIAL REFERENCE TO THE PRISON SYSTEMS OF GREAT BRITAIN AND THE UNITED STATES, ETC.* (1871); REPORT OF DEPUTATION TO THE HOME OFFICE, in HOWARD ASSN., ANNUAL REPORT 5 (1878).

100. HOWARD ASSOCIATION, ANNUAL REPORT 5 (1874).

101. *Id.*

102. HOWARD ASSOCIATION, ANNUAL REPORT 12 (1881).

wanted to commit to Sessions those with fifteen convictions and an aggregate of not less than three years in prison. The offender would then be imprisoned and made to work at profitable labor for any period of up to four years.<sup>103</sup> Liverpool was quickly followed by Manchester, where a special commission of justices established that of 149 prisoners committed to gaol in early September 1871, 83 had previously been in gaol 835 times, an average of ten times each.<sup>104</sup> Barwick Baker thought that to wait until a fifteenth conviction would prove no deterrent, nor would offenders of this type "keep a sufficiently careful reckoning to know when the 15th was coming."<sup>105</sup> Under his scheme, if a defendant had been convicted and imprisoned within the past two years, the court would have power to double the punishment, and if the imprisonment had been for three months or more the petty sessions could commit for trial and longer sentence at Quarter Sessions. Baker was supported by Mary Carpenter, the leader of the reformatory school movement. She sought a change in the law because for many minor offenses such as assaults, violations of the game laws, and drunk and disorderly conduct, the law allowed no cumulative punishment at all, while for others, such as stealing animals, malicious injury to property, and idle and disorderly conduct, the degree of cumulation allowed was "scarcely sufficient to prevent a determined habit of setting the law at defiance."<sup>106</sup>

It was estimated that longer sentences would reduce the incidence of petty offenses by some 60,000 a year. Even though the offenses taken individually were trifling, their repetition was regarded as "a source of great trouble and annoyance," as undermining the authority of the magistracy, as forming "centres of corruption" and recruitment to the criminal classes, and as producing lives of vice,

103. See Aspinall, Lawrence & Rathbone, *Cumulative Punishments, in PRISONS AND REFORMATORIES AT HOME AND ABROAD — TRANSACTIONS OF THE INTERNATIONAL PENITENTIARY CONGRESS* 623 (E. Pears ed. 1872).

104. COMMITTEE APPOINTED TO REPORT ON THE DESIRABILITY OR OTHERWISE OF EXTENDING THE CUMULATIVE PRINCIPLE OF PUNISHMENT TO ALL CLASSES OF CRIMES AND OFFENCES AS A MEANS OF CHECKING THE GROWTH OF HABITUAL CRIME, REPORT PRESENTED TO THE JUSTICES OF THE CITY OF MANCHESTER (1872), in H.O. 45/9322/17389. See also *The Times*, (London), Oct. 3, 1872, at 7, col. 4.

105. See Baker, *Is It Desirable to Adopt the Principle of Cumulative Punishment?*, 1872 NAPSS TRANSACTIONS 191. Baker pressed the Social Science Association to adopt the resolution of the Liverpool Justices. See also HOWARD ASSOCIATION, ANNUAL REPORT 5-6 (1874). The NAPSS now fully supported the "principle of incapacitation." See Cox, *How Far Should Previous Convictions be Taken into Account in Sentencing Criminals?*, 1874 NAPSS TRANSACTIONS 281; *Discussion, id.* at 297, 301-02 (remarks of the Chairman, Mr. Hastings).

106. Baker, *supra* note 105, at 194. See *Discussion, supra* note 105, at 296 (remarks of Mary Carpenter); Baker, *Cumulative Punishment*, 1878 NAPSS TRANSACTIONS 276, 283-84; *Discussion, id.* at 285, 292.

misery and ultimately a "pauperised burden on the community."<sup>107</sup> Barwick Baker asserted that it was "the scarcely observed *habit* of petty crime that saps the vitals of the nation."<sup>108</sup> The total number of petty offenses were "more pernicious to the good of a nation than thefts and higher crimes . . . ."<sup>109</sup>

In his widely read and widely praised book, *Penological and Preventive Principles*, first published in 1889, William Tallack, Secretary of the Howard Association, drew a sharp distinction between the "wilfully brutal ruffians" and "habitual offenders who are weak and indolent rather than violent or cruel."<sup>110</sup> For the latter he favored "a steady progress of one month, two months, three months and so on — gradual but certain — with really penal conditions of cellular separation and hard labour." But after "three to six opportunities of this kind . . . the aggregate of which need not have exceeded one year's duration, for petty offences, the cumulation . . . should involve, in addition to longer imprisonment, a subsequent training from one year to several years, either in a penal factory, or in the cultivation of the land."<sup>111</sup> This would be followed by supervision, but not "immoderately prolonged."

Tallack was against very long sentences: "The whole process should be sufficient for its purpose, but not extended so far as mercilessly to crush out hope, or put the community to great expense, for a few peccadilloes; or positively to furnish temptations to crimes of brutality."<sup>112</sup> He regarded the extreme periods of imprisonment and subsequent supervision which were already being imposed on the weaker and less dangerous class of habitual property offenders as nothing short of a national scandal and "a positive temptation" to carry pistols and commit brutal crimes in order to avoid arrest. This was one of his many vivid and moving illustrations.

For stealing a piece of canvas, he was sentenced to twelve years' penal servitude, to be followed by seven years' supervision. He had already undergone six minor detentions in jail and three sentences of penal servitude, amounting to twenty-two years, and including one of ten years for stealing a shovel. So that this poor weak creature has been committed to thirty-four years' of imprisonment with seven years' supervision, all for petty thefts; whilst few of the most atrocious ruffi-

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107. Comment by Baker, 1874 NAPSS TRANSACTIONS 299; Baker, *Cumulative Punishment*, 1878 NAPSS TRANSACTIONS 276, 281, 290.

108. 1878 NAPSS TRANSACTIONS 276, 281.

109. *Id.* at 282-83.

110. W. TALLACK, *PENOLOGICAL AND PREVENTIVE PRINCIPLES* 165 (1889).

111. *Id.* at 167-68.

112. *Id.* at 175.

ans, violators, or burglars, of England, have had half such an amount of punishment meted out to them!<sup>113</sup>

Under Tallack's plan, prompt and rapid cumulation of punishment was to be reserved for "brutal criminals." "Any repetition of such acts after a previous punishment, indicates a gross and perilous perversity of character."<sup>114</sup> He no longer favored life imprisonment — he regarded it as a slow form of the death penalty, and he felt behavior in prison was too unclear a criterion of reformation. He proposed instead that "every successive infliction should mark a fixed advance upon the preceding one . . . such as four, six, eight, ten years in succession";<sup>115</sup> relying more on the number of repetitions of brutal crime than on the character of each act. This "moderate scale," applied with certainty, would not only deter but would ultimately secure for "most, if not all of the worst characters, a lifetime of secure detention."<sup>116</sup> For the small class of "extremely brutal and morally insane offenders," described in France by Dr. Prosper Despines as showing an absence of remorse and "past feeling" in the moral sense, Tallack proposed an even sharper cumulation to "seven, ten or twelve years' detention." These violent habituals would be incarcerated in specially adapted island institutions, "where escape would be very difficult . . . but . . . considerable space would be available for agriculture and other industry."<sup>117</sup>

It seems that Tallack had no place in his scheme for long sentences of detention for 'professional' or habitual property offenders. Unlike his contemporaries he wished to restrict preventive confinements to the violent. He regarded other habituals as "pervaded by hereditary moral weakness . . . by nature as well as by habit, very irresolute and easily tempted."<sup>118</sup> While he was worried lest help to criminals would render crime attractive and "place a premium on dishonesty," he concluded that to many habituals "society owes a special debt, of sustaining their attempts at amendment, and sufficiently encouraging their good resolutions, by means of a kindly supervision and control — a "just claim" that had been "too often overlooked by legislation and even by many philanthropists."<sup>119</sup> His

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113. *Id.* at 170-71.

114. *Id.* at 176.

115. *Id.* at 173.

116. *Id.* at 178.

117. *Id.* at 178.

118. *Id.* at 185.

119. *Id.* at 185. See also Peck, *Official Optimism: Prison Reports*, 46 CONTEMP. REV. 72 (1884); Peck, *The Eclipse of Justice*, 59 CONTEMP. REV. 354 (1891); Anon., *Our Present Convict System*, 109 WESTMINSTER REV. 407-430 (1878). The author draws a distinction between

distinction between the violent and the "inadequate" has a modern ring, as do some of the criticisms levelled against the cumulative system.<sup>120</sup>

### III. FIRST LEGISLATIVE ENDEAVORS

#### A. *Attempts to Enforce the Cumulative Scheme*

The gathering fear of ticket-of-leave men, of the thousands "tainted, stigmatised, corrupted by crime," gave way to panic with the outbreak of garrotting in 1862. Commissions were set up to examine the state of both the local and the convict prisons. The Royal Commission on Penal Servitude concluded, in 1863, that the punishment was "not sufficiently dreaded." The main reason, it concluded, was the shortness of sentences. The minimum term had been set at three years in 1857. It should be raised to seven years, the old minimum for transportation, said the commissioners. There should be even longer sentences for habituals. They laid down neither a definition of habituality nor any guidelines for the judiciary other than that they should put into practice the principle "already recognised by the law", that reconvicted criminals should be punished more severely.<sup>121</sup> They may have been influenced both by Crofton's view that nothing short of seven years would suffice for "old offenders" and by the practice in Ireland whereby dangerous criminals were imprisoned for up to thirteen years and might even be kept for twenty.<sup>122</sup>

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petty habituals, who were "not worth powder and shot," and professionals, who should be imprisoned for life.

120. See "Appellant," *The Howard Association and the Punishment of Criminals*, 3 HUMANITY J. 16 (1902) (commenting on Howard Association's Annual Report for 1902).

121. REPORT OF THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE OPERATION OF THE ACTS 16 AND 17 VICT. C. 99 AND 20 & 21 VICT. C. 3, RELATING TO TRANSPORTATION AND PENAL SERVITUDE, CMD. 3190-1, 21 PARL. PAPERS 1, 26, 72 (1863). The Select Committee examining local prisons concluded that they "are satisfied that it is of the greatest importance that those offenders who are commencing a course of crime should be made aware that each repetition of it, duly recorded and proved, will involve a material increase of punishment, pain, and inconvenience to them." REPORT FROM THE SELECT COMMITTEE OF THE HOUSE OF LORDS ON THE PRESENT STATE OF DISCIPLINE IN GAOLS AND HOUSES OF CORRECTION (Cmd. No. 499), 9 PARL. PAPERS, 116-17 (1863). As an example of the fear and the Victorian mood see M. CARPENTER, *OUR CONVICTS* 277 (1864): "[H]ere in a civilised England, in the central part of that Empire, which assumes the position of the most free, the most enlightened, and the best governed in the world, peaceable citizens are not able to pursue their honest callings, or go about their lawful avocations in peace and safety."

122. PENAL SERVITUDE ACTS COMMN., *supra* note 121, [3190-1] Minutes of Evidence, at 283, 567, 574 & 587-88. In his important paper, *The Immunity of Habitual Criminals etc.*, (1861), Crofton put forward a proposal for a sentence of 7 years penal servitude (consisting of four years imprisonment and three years of 'Conditional Liberation') for criminals who have undergone a sentence of penal servitude for three years and upwards, and offend again, on due proof being given of their pursuing courses deemed to be 'Habitual Criminals,' at 39-40.

The Penal Servitude Bill of 1864<sup>123</sup> made five years the new minimum for penal servitude (seven being regarded as too likely to swell the prisons beyond their capacity) and contained no specific provisions for the sentencing of habituals. But under pressure to take more positive action, the Government agreed to make seven years the mandatory minimum term of penal servitude for anyone with a previous felony conviction.<sup>124</sup>

Although the Act was enthusiastically endorsed by the Social Science Association, Matthew Davenport Hill at once saw the flaw in it. The high mandatory minimum only applied to those sentenced to penal servitude. Judges who regarded it as too severe were free to use their discretion to sentence to ordinary imprisonment, the maximum term of which was two years. There was an enormous unfilled gap between the two alternative sentences.<sup>125</sup> In the years that followed there were some extraordinary variations in the proportions of previously convicted felons who received penal servitude; at Bristol it was fifty-four percent, at Bedford twenty-four percent. The legislation was counter-productive, leading to the choice of lower rather than higher sentences. By 1868 it was estimated that 836 persons each year were sentenced to imprisonment for an average of fifteen months whereas before the Act of 1864 they would have received penal servitude of three years or more.<sup>126</sup>

The second attempt to legislate a mandatory minimum sentence tried to plug the loophole. The Habitual Criminal's Bill of 1869 included a clause making seven years' penal servitude mandatory on a third conviction for felony.<sup>127</sup> The Home Secretary, Henry Bruce, was in no doubt that anyone convicted three times was an "habitual criminal," "there was a strong possibility that for every detected crime he had committed ten undetected ones."<sup>128</sup> But he was unable to convince the opposition that such a loose definition based merely on the number of convictions was adequate to justify such sweeping powers.<sup>129</sup> As Sir Thomas Chambers, the prominent Liberal lawyer, graphically put it: "A boy, for instance, stole a bun, some years afterwards he stole a red herring; and, finally, two years later, he stole

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123. An Act to amend the Penal Servitude Acts, 1864, 27 & 28 Vict., c. 47, § 2.

124. See 175 PARL. DEB., H. L. (3d ser.) 897, 908-10 (1865); *id.* at 1341.

125. See generally REPORT OF THE STANDING COMM. OF THE DEPT. [OF PUNISHMENT AND REFORMATION], 1863 NAPSS TRANSACTIONS 453; Hill, *On the Penal Servitude Acts*, *id.* at 236-43.

126. See 198 PARL. DEB., H.C. (3d ser.) 1255-56 (1869).

127. *Id.* at 1257.

128. *Id.* at 1258.

129. *Id.* at 1258.

a piece of cheese. Could it be seriously proposed that for this third offence he was to suffer seven years' penal servitude?"<sup>130</sup> Juries would fail to convict; there would be circumvention of the law rather than severe uniformity.<sup>131</sup> According to Matthew Davenport Hill, if the Bill had been law sixty-one prisoners would have been sentenced to seven years penal servitude in Birmingham alone and 3,750 in the whole of England in just one year. He illustrates how petty were many of the offenses of those at present not sentenced to penal servitude:

J. Preston, convicted before justices of having stolen in 1867 four packs of cards, and sentenced to seven days' imprisonment. Convicted again in 1867, for stealing butter, and sentenced to two months' imprisonment. Tried at quarter sessions, July 1868 for stealing one pair of boots.<sup>132</sup>

Even Hill, that apostle of long reformatory imprisonments, could not stomach seven years' penal servitude for such trivialities.<sup>133</sup> The Home Secretary, conceding that "great hardship" might result from a mandatory penalty based on a simple test of convictions, withdrew the clause.

Ten years later, in 1879, the minimum sentence of seven years' penal servitude for a second felony conviction was repealed.<sup>134</sup> It was called 'unreasonable' by the Royal Commission which considered Sir James Fitzjames Stephen's Code in 1878-1879.<sup>135</sup> And Mr. Justice Lush told the Royal Commission on Penal Servitude in 1878 that the minimum sentence had "worked very ill," hampering the discretion of the judge in such a way that where "there must be an error on one side or the other . . . it cannot be on the side of excess."<sup>136</sup> One lesson seemed to have been learned: inflexible statutes invited evasion.

130. *Id.* at 1269. See 1 DICTIONARY OF NATIONAL BIOGRAPHY SUPPLEMENT 410 (1901).

131. See *id.* at 1270. See also *id.* at 1269-71.

132. 47 THE LAW TIMES 115 (June 5, 1869).

133. See *id.* Even Barwick Baker was opposed to such a rigid rule. See his letters to the Editor of The Times (London), March 8, 1869, at 4, col. 4, and to the Secretary of State, April 15, 1869, H.O. 12/184/85459.

134. See An Act to Reduce the Minimum Term of Penal Servitude in the Case of a Previous Conviction, 1879, 42 & 43 Vict., c. 55. This Act resulted from the REPORT OF THE PENAL SERVITUDE ACT COMMISSIONERS, 1878-1879 (Kimberley Commission), CMD. NO. 2368, 37 PARL. PAPERS 1, 31 (1878-79). The Commissioners had received evidence from the Judges that the minimum sentence of seven years was too long.

135. REPORT OF THE ROYAL COMMISSION APPOINTED TO CONSIDER THE LAW RELATING TO INDICTABLE OFFENCES ETC. 1879, CMD. NO. 2349, 20 PARL. PAPERS 169, 684-85 (1878-79).

136. See REPORT OF THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE WORKING OF THE PENAL SERVITUDE ACTS, 37 PARL. PAPERS 31; *Minutes of Evidence*, CMD. NO. 2368-II, 38 PARL. PAPERS at Q's 11, 609-17 (1878-1879).



## B. Preventive Policing

From its very inception in 1853, the new system of penal servitude raised the question of what, if anything, should be done to control those released before the expiration of their sentence on "tickets-of-leave"? The debate revolved around the merits of Sir Walter Crofton's Irish system which had, as its final stage, registration and close supervision by a prison official (the redoubtable 'lecturer' Mr. Organ) in Dublin and by the police in the country districts of all those on tickets-of-leave.<sup>137</sup> The system was hailed by Hill, Baker, Carpenter, and the whole body of reformers as the prerequisite for effective reformation of criminals. Joshua Jebb, the Chairman of the English Convict Directors, was resolutely opposed. There is no doubt that Jebb was on the defensive in face of criticisms of his "incompetent management." And there is also no doubt that his claim that few criminals were ever reconvicted was disingenuous, for he must have known how unreliable the statistics were.<sup>138</sup> But he did genuinely believe that police supervision in urban England would be quite a different matter from supervision in Ireland. It "would in the great proportion of cases defeat its own object by depriving the men of the means of earning a livelihood."<sup>139</sup> He feared lest England should import the French and Prussian systems of police supervi-

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137. The Irish aid-on-discharge system has been described as follows:

After discharge, there was a system of supervision, mainly carried out by J. P. Organ who acted both as a teacher and aftercourse agent, finding jobs and visiting convicts at regular intervals.

G. ROSE, *THE STRUGGLE FOR PENAL REFORM* 5 (1961). See M. CARPENTER, *REFORMATORY PRISON DISCIPLINE, AS DEVELOPED BY THE RT. HON. SIR WALTER CROFTON, IN THE IRISH CONVICT PRISONS 45-66 (1872)*, for a more complete description. For a first-hand account of the Dublin aid-on-discharge system, see ORGAN, *LECTURER'S REPORT, 7TH ANNUAL REPORT OF THE DIRECTORS OF CONVICT PRISONS IN IRELAND FOR THE YEAR ENDING 31 DECEMBER 1860*, CMD. NO. 2844, 30 PARL. PAPERS 145, 219-28 (1861). See also *The Irish Convict System — Why It Has Succeeded*, 3 CORNHILL MAGAZINE 409 (1861); *The English Convict System*, 3 CORNHILL MAGAZINE 708 (1861); *The Convict Out in the World*, 4 CORNHILL MAGAZINE 229 (1861).

138. See generally *The Irish and English convict system, Captain Crofton and Sir Joshua Jebb*, 19 *THE ECONOMIST* 341 (1861); *The Ticket of Leave and its Abuses*, 20 *THE ECONOMIST* 957 (1862); *Judges and Grand Juries on Convicts and Tickets of Leave*, 20 *THE ECONOMIST* 1364, 1374 (1862); *Transportation: As a Punishment, Reward and a Possibility*, 20 *THE ECONOMIST* 1404 (1862); *Conservatism in the Convict System*, 21 *THE ECONOMIST* 284 (1863); *The Convict System — A Report of the Royal Commissioners*, 21 *THE ECONOMIST* 758 (1863). *The Economist* calculated the "cost of the criminal classes" at no less than a sum between five and five and a half million pounds, *Progress, Amount, and Expensiveness of English Crime*, 21 *THE ECONOMIST* 31, 31 (1863). See also *The Ticket of Leave System*, 113 *QUARTERLY REV.* 72 (1863); *English Convicts: What Should be Done with Them*, 79 *WESTMINSTER & FOREIGN Q. REV.* 1 (1863).

139. J. JEBB, *REPORT ON THE DISCIPLINE OF THE CONVICT PRISON FOR 1856 & 1857 AND OPERATION OF THE ACTS 16 & 17 AND OPERATION OF THE ACTS 16 & 17 VICT. C. (1853), AND 20 & 21 VICT., C. 3 (1857), BY WHICH PENAL SERVITUDE HAS BEEN SUBSTITUTED FOR TRANSPORTATION* CMD. NO. 2414, 29 PARL. PAPERS 285, 394 (1857-1858).

sion, which were "little more than a moral stigma, a predestination to a career in crime."<sup>140</sup> Above all, he feared the extension of power to irresponsible hands:

Our jailers and our policemen are a useful and respectable class of men. But it is only when they are found to possess mental and moral qualifications not to be found in an average chief justice or lord of justiciary, that we shall be disposed to entrust them with irresponsible power over their fellow creatures.<sup>141</sup>

Waddington, the Permanent Secretary at the Home Office, told the 1856 Select Committee on Penal Servitude that no attempt was made to trace men on license, for to do so would make them "marked men." And Sir Richard Mayne, the first Metropolitan Police Commissioner, described surveillance as "inconsistent with our habits here, and offensive." He admitted that the men tore up their tickets-of-leave and were soon indistinguishable from the mass of laborers. He even admitted that he had personally never seen a ticket-of-leave!<sup>142</sup>

England, 'the home of the brave and the free,' calls upon us to take care how we interfere with the rights of her free subjects, even of this class. Ireland says, subject them to surveillance lest they violate again, unseen and unknown, the privileges allowed the honest independent labour-loving members of society, and thus roam at large the abettors of infamy and vice.<sup>143</sup>

It was this Irish view which commended itself to the Penal Servitude Commissioners in 1863. Indeed, so impressed were they by the efforts of Ireland that they recommended supervision by special convict officers rather than the police.<sup>144</sup> The Government was forced to give way. The discretionary and unsystematic supervision carried on

140. Jebb, *The Irish System and Police Supervision*, 27 PARL. PAPERS 767, 768 (1862).

141. *Id.* at 769. See also Jebb, *Objections to the Irish System as Proposed for England*, 1862 NAPSS TRANSACTIONS 411-14.

142. REPORTS FROM THE SELECT COMMITTEE OF THE HOUSE OF COMMONS APPOINTED TO INQUIRE INTO THE PROVISIONS AND OPERATION OF THE ACT 16 AND 17 VICT. C. 99, ENTITLED 'AN ACT TO SUBSTITUTE IN CERTAIN CASES OTHER PUNISHMENT IN LIEU OF TRANSPORTATION,' CMD. NOS. 244, 196, 355, in 17 PARL. PAPERS 1 (1856). See Waddington's testimony at 9, 25, 28; Jebb at 123-24; Mayne at 328-29, 332, 334.

143. SEVENTH ANNUAL REPORT OF THE DIRECTORS OF CONVICT PRISONS IN IRELAND FOR THE YEAR ENDED 31 DECEMBER, 1860, 30 PARL. PAPERS 145, 226 (1861).

144. REPORT OF THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE OPERATION OF THE ACTS (16 & 17 VICT. C. 99 AND 20 & 21 VICT. C. 3) RELATING TO TRANSPORTATION AND PENAL SERVITUDE, CMD. NOS. 3190, 3190-1, 21 PARL. PAPERS 1, 32 (1863); *id.* at 358-71 (testimony of Jebb); *id.* at 317-21 (testimony of Sir Richard Mayne, who now favored rigorous police supervision). See also 22 THE ECONOMIST 228, 228-94 (1894) (favoring strict supervision, presumably by the police); 22 THE ECONOMIST at 769-70 (advocating more frequent reporting by convicts, apparently to the police); 21 THE ECONOMIST 284, 284-85 (1863) (advocating adoption of the Irish system of supervision); 21 THE ECONOMIST at 758-59 (favoring supervision, but not by police unless absolutely necessary).

in England was regarded by *The Economist* as producing "the maximum of danger of mischievous *espionage* and the minimum hope of useful and advantageous relations between the released criminal and the police."<sup>145</sup>

No special convict officers were appointed but the Penal Servitude Act of 1864 made it compulsory for convicts released on tickets-of-leave to report to the police monthly and to notify them of any change of address.<sup>146</sup> Once this systematic supervision had been accepted the next stage was to extend it to the far larger mass of offenders released from ordinary imprisonment. As Jebb had argued, to deal severely with convicts while ignoring the habituals circulating through the county and borough prisons was "to strain at a gnat and swallow a camel."<sup>147</sup>

The campaign for supervision of habituals was instigated and effectively led by Sir Walter Crofton. He had few ideas of his own but he resurrected and publicized Matthew Davenport Hill's scheme for preventive supervision (which had been so violently attacked when it was proposed in 1850), now adding to it police supervision. And he also promoted Frederic Hill's proposal for a Register of all those convicted.<sup>148</sup> Crofton recognized that without registration, identification of previously convicted offenders was an entirely hit-and-miss affair. They were constantly representing themselves as first offenders and being dealt with in the summary courts under the Summary Jurisdiction Act of 1855.<sup>149</sup> Crofton suggested that those proved to be living by crime should by order of a magistrate be placed under police supervision for terms varying from one to five or six years. He

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145. *The Penal Servitude Bill and Mr. Hunt's Clause*, 22 THE ECONOMIST 801, 801 (1864). See *Mr. Whitbread's Proposal to Abolish Tickets-of-Leave*, *id.* at 448. See also *Conservatism in the Convict System*, 21 THE ECONOMIST 284 (1863); *The Convict System — Report of the Royal Commissioners*, 21 THE ECONOMIST 758 (1863); *The Penal Servitude Act*, 22 THE ECONOMIST 228 (1864); *The Policy of the Opposition on the Penal Servitude Bill*, 21 THE ECONOMIST 769 (1864).

146. See An Act to Amend the Penal Servitude Acts, 1864, 27 & 28 Vict., c. 47, § 4, Penal Servitude Acts Amendment Bill [Bill 23] Committee, 174 PARL. DEB. H.C. (3d ser.) 259-68 (April 18, 1864); *id.* at 1961-66 (April 29, 1864); 175 PARL. DEB., H.L. (3d ser.) 882-910 (May 31, 1864); *id.* at 1339-49 (June 7, 1864); *id.* at 1934-38 (June 17, 1864); 176 PARL. DEB., H.C. (3d ser.) 566-67 (June 30, 1864); 176 PARL. DEB., H.L. (3d ser.) 1440-45 (July 14, 1864).

147. F. HILL, *supra* note 60, at 319.

148. For a description of Hill's proposal, see TENTH REPORT OF THE INSPECTORS APPOINTED UNDER THE PROVISIONS OF THE ACT 5 & 6 WILL. IV c. 38, TO VISIT THE DIFFERENT PRISONS OF GREAT BRITAIN, IV. SCOTLAND, NORTHUMBERLAND, AND DURHAM, 24 PARL. PAPERS 399, 406 (1845).

149. See *English Convicts: What Should be Done with Them?*, 79 WESTMINSTER & FOREIGN Q. REV. 1 (1863). This article described editorials in major British newspapers, all complaining of the difficulties encountered by authorities in identifying previously convicted offenders.

claimed that this had proved a success in Continental states such as Bavaria, Baden, Wurtenburg, Nassau, Hanover and Sweden. No new principle was involved. It was simply preventive supervision without the necessity of the preliminary imprisonment — “Our dependence . . . has been too much upon what could be affected within the walls of our prisons; too little upon our own power outside them.”<sup>150</sup> Crofton led a deputation to the Home Office to press for these reforms. They were enthusiastically received by *The Economist* and then taken up by *The Times* in a series of persuasive leading articles which reversed the stand taken against Hill eighteen years earlier.<sup>151</sup> *The Times* now painted a picture, based to large extent on the returns of ‘Criminal Classes at Large,’ of two warring classes in which “the criminals were decidedly getting the best of it.”<sup>152</sup> It was ludicrous, the paper claimed, that the police should know that in the heart of London there were places where no respectable man can venture, and yet remain unable to do anything about it. “[I]s it too much to assume that a thrice convicted thief has forfeited some of the presumptions attaching to a life of industry and honesty?”<sup>153</sup> *The Times* was incensed by the case of three ex-convicts, Summers, Bennett and Smith, who had been seen loitering but, although well-known to the police, had only been arrested once they tried to get into a house with skeleton keys. They each had many convictions and had served six, four and five years penal servitude respectively. Was not the police inaction like “allow[ing] a mad dog satisfactorily to establish its dangerous character by biting some in-offensive passerby before he thought of knocking it on the head. . . . [I]s it not madness to give these men again the same chance, to turn them again loose, and with an honest man’s privileges[?]”<sup>154</sup> They dismissed John Stuart Mill’s objection that it would be “wrong in principle” and “would not work well in practice” to require that a man show he is living honestly or be sent to

150. Crofton, *Address on the Criminal Classes and Their Control*, 1868 NAPSS TRANSACTIONS 299, 305. See also REPORTS OF THE INSPECTORS OF CONSTABULARY FOR THE YEAR ENDING 29TH SEPTEMBER 1886, 31 PARL. PAPERS 1, 13 (1868-1869) (the suggestion of a central office was first made in 1865-1866). H.A.D. Phillips, in a well-documented article, stressed the point that “On the Continent, almost all convictions may carry with them a sentence of police supervision; and, when such an order is passed, the police have considerable control over the movements of convicted offenders and bad characters.” Phillips, *Preventive Jurisdiction*, 10 LAW Q. REV. 180, 191 (1887).

151. Deputation reported in *The Times* (London), Dec. 16, 1868, at 7, col. 3. See also *The Times* (London), Dec. 30, 1868, at 6, col. 6; Dec. 22, 1868, at 7, col. 2; Dec. 2, 1868, at 6, col. 4; Nov. 4, 1868, at 5, col. 2; Oct. 29, 1868, at 9, col. 5; 26 THE ECONOMIST 1188, 1189 (1868).

152. *The Times* (London), Oct. 29, 1868, at 9, col. 5.

153. *The Times* (London), Nov. 4, 1868, at 9, col. 6.

154. *The Times* (London), Dec. 22, 1868, at 7, cols. 3-4.

earn a livelihood in gaol. The burden on a professional criminal of "establishing positive innocence can hardly be very heavy." Four out of every ten men with two convictions would get a third, so "it is at least as possible as not that every person who has been more than once convicted of crime is engaged in the pursuit of Crime as a profession. To that extent there is a fair presumption against him."<sup>155</sup> As a class they were as "a simple matter of fact . . . less likely to be innocent than guilty."<sup>156</sup> Why then should "avowed and organised enemies" not be suppressed and extinguished? No heed was paid to the argument that this system would expose the convict who was honestly trying to mend his ways. That minority would be sacrificed: "If [it] made it hard for habitual thieves to get absorbed into the mass of honest men, it would, at all events, have made it impracticable for them to prey upon honest men."<sup>157</sup> Opinion had been prepared for a major onslaught on the liberty of recidivists and for a drastic change in traditional legal presumptions and procedures. It was time for a marshalling of forces against "the great army of crime" which was now regarded as a contaminating cancer in the industrial order, a disgrace to a Christian country, and an affront to the "civilisation" of the greatest Empire and its proud cities. "It is a shame to modern society that the term 'professional' criminal should have a recognised meaning," proclaimed *The Times*.<sup>158</sup>

It was a Liberal Government which introduced the Habitual Criminals Bill in 1869. It insisted that it was not "activated by any feeling of panic and alarm," that consideration of the statistics showed that crime was no longer on the increase.<sup>159</sup> Yet the legislation they proposed was a heavy baggage of repressive measures.

155. *The Times* (London), Feb. 15, 1868, at 9, col. 2.

156. *The Times* (London), Feb. 15, 1868, at 9, col. 2.

157. *The Times* (London), Jan. 27, 1869, at 7, col. 2.

158. Leading article, *The Times* (London), Jan. 27, 1869, at 7, col. 1. Also, see *The Times* (London), Jan. 7, 1869, at 8, col. 6. The *Times* attributed these facts to "one of our most experienced correspondents," presumably Barwick Baker. *The Times* (London), Feb. 8, 1869, at 9, col. 1. See letters from Barwick Baker, *The Times* (London), Dec. 7, 1868, at 5, col. 4, Dec. 17, 1868, at 10, col. 1; Jan. 7, 1869, at 5, col. 2. Baker preferred supervision as an unexpended part of a prison sentence to supervision as a sentence in its own right, because it gave greater powers to the court. See his letter to *The Times* (London), Feb. 2, 1869, at 8, col. 3. He prepared a memorial which was adopted by the Quarter Sessions for Gloucestershire and was sent to the Home Secretary, urging "protracted supervision as part of [the] sentence." See *The Times* (London), Jan. 11, 1869, at 6, col. 5. See also the letter from the Chief Constable of Chester, *The Times* (London), Jan. 12, 1869, at 5, col. 2; and the Report of a deputation to the Home Secretary seeking strong action on crime, *The Times* (London), Feb. 4, 1869, at 5, col. 5.

159. 194 PARL. DEB., H.L. (3d ser.) 336 (1869). Certainly the Bill could not be justified on the basis of the police returns of the criminal classes, the "known thieves and depredators." In relation to population the figures had fallen in the ten years from 1861-1872 from 3.12 to 2.19 per 1,000 in the boroughs and from 1.67 to 0.91 in the London metropolitan area. See *Criminal*

Barwick Baker described it as “probably the boldest and most sweeping, but at the same time, the most beneficial, reform ever attempted in the repression of crime.”<sup>160</sup>

The strategy of the Bill was to attack on all fronts — to tighten the conditions of the ticket-of-leave; to register all persons convicted of crime; to make all those who were convicted for a second time of felony or certain misdemeanors, “the whole of what are usually called the criminal classes,” subject to police supervision for seven years after they had served their sentences; to make those subject to such supervision, and those on a ticket-of-leave, liable to one year’s imprisonment when proved summarily before magistrates to be acting suspiciously or when they were unable to prove that they were not getting their livelihood by dishonest means; to shift in those cases the burden of proof from the accuser to the accused; to tighten the provisions of the Vagrancy Act so as to make it an offense for landlords or publicans to harbor thieves; to penalize both those lodging or harboring thieves or reputed thieves, and those permitting them to assemble in places of public entertainment or resort — so putting into effect another idea promoted by Matthew Davenport Hill and his brother Edwin Hill;<sup>161</sup> to make previous convictions against those accused of receiving stolen goods admissible as evidence. And the Habitual Criminals Bill had also originally included a clause making seven-years penal servitude mandatory on a third felony conviction.<sup>162</sup> Its only concession was to abolish the duty of ticket-of-leave men to report personally each month to the police, leaving them only a duty to report change of residence or employment.<sup>163</sup>

A small, spirited, but ineffectual opposition complained of the Bill’s attack “on the first principle of common justice.” They claimed that the new jurisprudence was “anti-constitutional.” It opened the door for the extortion of “hush money” and for abuse of power by police and magistracy. With no definition of ‘living hon-

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*Statistics*, 137 QUARTERLY REV. 526, 538 (1874); 198 PARL. DEB., H.C. (3d ser.) 255-56 (1869) (speech by Home Secretary).

160. Letter from Baker, *The Times* (London), March 8, 1869, at 4, col. 6.

161. See M. HILL, *supra* note 9, at 329-34. Edwin Hill, of the Inland Revenue, promoted this idea of attack on all fronts over a number of years. See Hill, *On the Prevention of Crime*, 25 J. ROYAL STATISTICAL SOC. 497 (1862); Hill’s Letters to *The Times* (London), Nov. 4, 1868, at 4, col. 6; Nov. 7, 1868, at 4, col. 6; Hill, *Criminal Capitalists*, TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE 110 (E.C. Wines ed. 1879).

162. See *An Act for the More Effectual Prevention of Crime*, 1869, 32 & 33 Vict., c. 99.

163. See *The Habitual Criminals Act 1869*, 195 PARL. DEB., H.L. (3d ser.) 340-43 (1869); *Memorandum on the Present System of License-Holders Issued by the Commissioner of the Metropolitan Police*, *The Times*, (London), March 10, 1869, at 11, col. 2 (denying allegations of police harassment and blackmail).

estly,' the law would encourage arbitrariness and class bias: Were the dealers in stocks and shares living honestly? Were the young bloods of high society who ate their hostesses' dinners under the false pretenses of an interest in their daughters? The law would never be applied to the rich, they said, but only to the poor and friendless. Inquiry and exposure, a ruthless 'hunting down' of the enemy by the police, compounded by deprivation of "the primary right of every Englishman" to be held innocent until proved guilty, would create an ostracized and "servile class." Would this not change "the temper of large bodies of their fellow countrymen towards the law and its administration"?<sup>164</sup>

All this cut no ice, even with a Liberal government, convinced as it was that "free and innocent men" had nothing to fear from legislation to control an alien class "which has laws which are not our laws." The government argued that police supervision was not "vexatious" to those who honestly sought honest employment. And the "hopelessly irreclaimable" thirty percent roundly deserved to be "hunted down without mercy."<sup>165</sup> It was indeed, as *The Times* said with approval, "rough and ready justice" for those who had been dealing out "rough and ready injustice" to the honest man.<sup>166</sup>

But serious deficiencies in the legislation soon appeared. It had been so hastily pushed through Parliament that many ambiguities soon emerged. But more seriously, its provisions exceeded the capacity, and possibly the willingness, of the police to enforce them. Instructed by the Home Office not to be overzealous and "to use the utmost vigilance and discretion" in their inquiries, the police were soon accused of failing in their duty to arrest suspicious characters. The duty of license holders to report a change of address only if they moved to *another* police district meant that many were soon lost sight of in the metropolis. The reporting provisions for twice-convicted habituals were even more useless, for the prisoner was under no obligation to state where he was going. Consequently no information about his residence was given in the Police Gazette, and "all pretence at supervision [was] abandoned."<sup>167</sup> In any case, the

164. Mr. Newdegate & Mr. Henley, 198 PARL. DEB., H.L. (3d ser.) 1267 (1869).

165. 198 PARL. DEB., H.L. (3d ser.) 1259 (1869).

166. *The Times* (London), Feb. 27, 1869, at 9, col. 2; *id.*, April 7, 1869, at 9, cols. 2-3. *See id.*, April 3, 1869, at 5, col. 4 (letters complaining about the futility of repeated imprisonments).

167. H.O. 12/184/85459, Circular of Nov. 8, 1869. *See* Memorandum to Colonel Henderson, Commissioner of the Metropolitan Police, May 19, 1870. H.O. 12/184/85459; *Presidential Address by Mr. Hastings (Deputy Chairman of Quarter Sessions of Worcestershire) to the N.A.P.S.S.*, 1874 NAPSS TRANSACTIONS 120, 129-30. *See also* Inspectors of Constabulary, *Reports for the Year ending 29 Sept. 1874*, 36 PARL. PAPERS 1, 7 (1875); 205 PARL. PAPERS,

number of criminals involved was far greater than the police could possibly keep under close watch. Inside eighteen months there were already 2,080 under supervision. Over 3,500, all of whom would be subject to supervision for seven years after their release, were sentenced each year. This meant there would eventually be at least 25,000 under police surveillance at any one time.<sup>168</sup>

A new Act, the Prevention of Crimes Act of 1871,<sup>169</sup> set out to remedy these deficiencies. It made three major changes. Quietly, almost surreptitiously — certainly without debate — the offensive formulation of the burden of proof was subtly altered to: “If . . . it appears to such court that there are reasonable grounds for believing. . . .”<sup>170</sup> Whether it made any substantive difference to the position of defendants we cannot say. Certainly some legal commentators still assumed that the burden of proving innocence remained with the accused.<sup>171</sup> We suspect that in practice, the task of proving before magistrates whether an offender was living without visible means of support was decided in a more pragmatic way.

Secondly, the Act reinstated tighter conditions of supervision for ex-convicts. Thirteen out of sixteen Discharged Prisoners Aid Societies had spoken out in favor of a return to monthly reporting. Under the Act, convicts were to report any changes of residence within the same police district within forty-eight hours on pain of forfeiture of their license, and they were to report each month to the police or to any other person whom the chief officer named. But because monthly reporting might severely stigmatize ex-convicts, the report could, at the discretion of the police, be made in writing rather than personally so as to avoid “any personal interference with those whom the police knew to be obtaining their living honestly.”<sup>172</sup>

Thirdly, the courts were given discretion whether to make ‘habituals’ subject to supervision or not. Under Section 7 a twice-convicted offender would be liable, at any time within seven years of release from prison, to a year’s imprisonment if proved to be getting a living by dishonest means or acting in certain suspicious circumstances. But he would be under no supervision. Under Section 8 a

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H.L. (3d ser.) 1679, 1682 (1871); *Questions*, 200 PARL. DEB., H.L. (3d ser.) 563-71 (1871); 200 PARL. DEB., H.C. (3d ser.) 1601 (1871); 201 PARL. DEB., H.C. (3d ser.) 272-73 (1870); 205 PARL. DEB., H.L. (3d ser.) 1678-83 (1871).

168. Mr. Morley, 207 PARL. DEB., H.L. (3d ser.) 1083 (1871).

169. The Prevention of Crimes Act, 1871, 34 & 35 Vict., c. 112.

170. The Prevention of Crimes Act, 1871, 34 & 35 Vict., c. 112, § 7.

171. See 52 THE LAW TIMES 4 (Nov. 4, 1871).

172. 207 PARL. DEB., H.L. (3d ser.) 1084, 1085 (1871). See Prevention of Crimes Act, 1871, 34 & 35 Vict., c. 112, §§ 4 & 5.



twice-convicted person might be placed under police supervision for seven years or for any shorter period, subject to the same conditions of good behavior as under Section 7. In addition, they were also subject to the same requirements regarding notification of residence and monthly reporting as a convict on license, and they were liable to imprisonment for any period not exceeding one year for being in breach of these conditions.<sup>173</sup> It was hoped that, by limiting the numbers, supervision could be made a reality while at the same time the threat of arrest and imprisonment would be a sufficient deterrent to other 'habituals.'

### C. *The Impact of the Habitual Criminals Legislation*

At first both the 1869 and 1871 Acts were credited with great success. The provisions of the 1869 Act aimed at the 'resorts of thieves' were vigorously enforced. It was claimed that in London the Commissioner had broken up "the nests from which proceed the worst villainy" and cut the number of violent crimes from 441 to 326 inside one year.<sup>174</sup> It was said that "thieves rarely now assemble at Public Houses and Beer Shops, as the landlords will not jeopardise their licences."<sup>175</sup> Indeed there was a protest to the Home Office from the Licence Victuallers Association.<sup>176</sup> At Luton the Magistrates claimed that convictions in the town had been reduced by one half by threatening landlords that they would be convicted of "harbouring" if they let the criminal classes stay longer than it took to take refreshment.<sup>177</sup> Returns showed that the police estimate of the number of public houses and beer houses of bad character had been reduced by twenty-one and fifty-one per cent respectively between 1869 and 1870.<sup>178</sup> All this was said to have had an immediate effect on the numbers committed or bailed for trial. At Warwick Assizes in 1871, Mr. Justice Lush remarked that the calendar was

173. See 207 PARL. DEB., H.L. (3d ser.) 1085-88 (1871); *Prevention of Crimes Act*, 1871, 34 & 35 Vict., c. 112, at §§ 7-8. In these sections of the bill, and under section 5, there was confusion about illegal sentences. See H.O. 45/9658/A41414.

174. Stafford, *Crime in the Metropolis*, 21 LAW MAGAZINE 614, 616 (1873).

175. REPORT OF THE COMMISSIONER OF POLICE OF THE METROPOLIS, 28 PARL. PAPERS 557, 564 (1871).

176. Memorial dated April 8, 1870. H.O. 12/184/85459. Even so, Edwin Hill felt that "the punishments were made miserably insufficient in all cases."

177. See Letter from Hugh Smyth to the Editor of *The Times* (London), published with a comment in 50 THE LAW TIMES 5 (1870). Also, see the letter from James Wetherell, Chief Constable of Leeds, *The Times* (London), July 7, 1871, at 12, col. 6.

178. 207 PARL. DEB., H.L. (3d ser.) 1083 (1871). These results were also attributed in part to the Beerhouses Act 1869, 32 & 33 Vict., c. 27.

lower than for the five previous years.<sup>179</sup> For the country as a whole committals were nearly sixteen per cent lower than the average for the preceeding ten years, and even in London they were 6.7 percent lower. When the rise in population was taken into account, there was one offender to every 1,395 persons in 1871, whereas in 1861 it had been one to every 1,094. The decline was also evident in the magistrates' courts and in the number of crimes reported to the police. This "large and remarkable" decrease in crime was attributed by the Home Office to the Acts of 1869 and 1871.<sup>180</sup>

Yet all the evidence suggests that the attempt to convert the police into an effective agency of supervision failed from the very beginning. The Act of 1871 became a "dead letter" because it was interpreted to mean that no one but the Chief Officer of Police had power to enforce supervision and to institute proceedings against habitual criminals for gaining a livelihood by dishonest means.<sup>181</sup> It was not until a Royal Commission on Penal Servitude gave rise to the amending Act of 1879 that it was made clear that the requirement of reporting would be met by having the offender personally presenting himself to the constable or person in charge of the police station.<sup>182</sup> Only then was supervision placed on a more systematic basis. But the question remained: Were the police to hunt the men down or were they to make it their first duty to help them settle in honest employment? Earlier in the century, impressing convicts into the Army had, if nothing else, served the function of re-integrating offenders after release from prison. But now the position was entirely different. As Charles Clode, the military historian, said:

Formerly the offenders were provided with the means of earning an honest living and a good name under the strict discipline of the Army, whereas in recent years they are turned loose upon the civil community, to get — what is next to impossible under the surveillance of the police — an honest living with a dishonest character.<sup>183</sup>

In 1879, the Prisoners Aid Societies brought before the Royal Commission on Penal Servitude serious allegations of police harassment of convicts on license, of men prevented from earning an honest livelihood by malicious policemen informing employers of the offender's

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179. *See* The Times (London), Dec. 20, 1871, at 11, cols. 4 & 5.

180. MEMORANDUM RESPECTING THE DECREASE IN CRIME IN ENGLAND AND WALES, ESPECIALLY IN CRIMES AFFECTED BY THE HABITUAL CRIMINALS ACT, 1869, AND THE PREVENTION OF CRIME ACT, 1871, 50 PARL. PAPERS 179, 180 (1872).

181. *See* Papers Relating to the Prevention of Crimes Act 1871, H.O. 45/9320/16629A; Police Supervision under the Prevention of Crimes Act 1871, H.O. 45/9570/76871.

182. *See* Prevention of Crimes Act, 1879, 42 & 43 Vict., c. 55, § 2.

183. 2 C. CLODE, THE MILITARY FORCES OF THE CROWN 14 (1869). *See* 4 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 103-04 (1956).

record. The police strenuously denied them all, yet they did acknowledge the advantages of employing specially trained officers for the delicate task of supervision.<sup>184</sup> When the Convict Supervision Office was set up by the London police later in 1879, the plainclothed officers began to work in closer association with the Prisoners Aid Societies. Their objectives were "the reformation or restoration to honest labour of old offenders, thereby preventing fresh crime" and "the prosecution and punishment of habitual criminals who wilfully and persistently break the law."<sup>185</sup>

Sir Walter Crofton proclaimed himself satisfied with the care exercised by the carefully trained plainclothes officers under the command of Superintendent Neave. There was no hardship to those who wished to live an honest life, "no authenticated complaints" about loss of employment through police interference. On the contrary there was much practical assistance by "friendly . . . well intentioned . . . police."<sup>186</sup> In Gloucestershire, Barwick Baker instituted a scheme to encourage offenders not to conceal the fact that they were under supervision, claiming that it was an advantage, not a disadvantage, to those seeking employment. Sir Howard Vincent, head of the Criminal Investigation Department, had ensured that all those under supervision were reporting regularly. And this, it was said, had been done so tactfully that no ill will had arisen.<sup>187</sup> Prison Chaplains and Discharged Prisoners' Aid Societies sang the praises of the police. There was no foundation in the complaints of hunting down and harassment, these officials claimed; on the contrary, convicts were given every assistance to start afresh.<sup>188</sup>

There are many reasons to doubt the authenticity of this view of police supervision through the rose-tinted spectacles of Crofton, Barwick Baker, and their colleagues. It is inconsistent with Dr. Barnardo's complaints of police harassment and with the reality of life portrayed in such works as Arthur Morrison's *Child of the Jago*.<sup>189</sup> Yet there can be little doubt that the view of the proper role

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184. See REPORT OF THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE WORKING OF THE PENAL SERVITUDE ACT, CMD. NO. 2368, 37 PARL. PAPERS 1, 336-38, 387-88, 422-29, 433-34, 468-70 (1878-1879); 38 PARL. PAPERS 326-28, 387-88, 410-11, 423-30, 497-98 (1878-1879).

185. The Times (London), Dec. 2, 1886, at 9, cols. 4-5 (quoting "A Report on the History of the Department of the Metropolitan Police Known as the Convict Supervision Office," by J. Monro, Assistant Commissioner of Police for the Metropolis).

186. *Chairman's Address by Sir Walter Crofton*, 1880 NAPSS TRANSACTIONS 271-80. See Solly, *Our Vagrant and Criminal Classes*, 36 LEISURE HOUR 761, 766-67 (1887).

187. T. Baker, *The System of Police*, 1880 NAPSS TRANSACTIONS 327-35.

188. See C. CLARKSON & J. RICHARDSON, POLICE! 354-61 (1889).

189. See the attack on police supervision by Dr. Barnardo in 1881 NAPSS TRANSACTIONS 314-16.

of police supervision moved away from that of repressive control and closer to a conception of aftercare and social aid. The figures speak for themselves. The number of convicts on license who were prosecuted each year was well under a hundred. In 1890 over 21,000 were subject to police supervision under the Prevention of Crimes Act, yet just over a hundred were prosecuted. And in 1893 only 55 of the vast mass of men who were liable to be prosecuted as twice-convicted persons were brought before the courts. No wonder Sir Robert Anderson, the Head of the Criminal Investigation Department, pronounced the habitual criminals legislation "almost a dead letter."<sup>190</sup> Indeed, Sir James Frazer, the chief of the City of London Police, "used to say that the statute . . . was the most absurd measure that ever was passed; that only those who chose to report themselves did so, and that they were the men who wanted to live honestly, but those who would not report themselves disappeared."<sup>191</sup> As a consequence the Central Criminal Court never used its powers to order supervision.<sup>192</sup> There remains the strong suspicion that the plan championed by Hill and Crofton to eliminate the criminal class by the simple expedient of forcing men to give an account of their honesty was too impracticable and too foreign to the body politic of England ever to be put into effect.

#### D. *Toward Accurate Identification*

The only tangible success to emerge from the Habitual Criminals legislation was the system of registration and identification. A prerequisite for an effective policy of controlling habituals was the recording of all convictions. But it was one thing to record and quite another to prove positively that prior convictions belonged to a particular offender.

The first step was the Register established in 1869. It was a list of every person convicted of felony and certain misdemeanors — a nascent criminal records office. Between December 11, 1869 and December 31, 1870, 35,633 persons were registered, and about the same number were added each year after that.<sup>193</sup> Such a vast list of

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190. Anderson, *Morality by Act of Parliament*, 59 CONTEMP. REV. 77 (1891).

191. Pickersgill, *Police Supervision*, 100 LAW TIMES 494, 495 (1896).

192. See REPORT OF THE COMMISSIONER OF POLICE OF THE METROPOLIS FOR THE YEAR 1890, 42 PARL. PAPERS 360 (1890-1891). See also Anderson, *Morality by Act of Parliament*, 59 CONTEMP. REV. 77, 78 (1891).

193. 207 PARL. DEB., H.L. (3d ser.) 1083 (1871). See the Circular of February 1870 instructing Governors of Prisons to send photographic likenesses of all offenders convicted of felony and certain misdemeanors, as laid down in the first schedule of the Habitual Criminals Act to the Commissioners of the Metropolitan Police, H.O. 12/184/854459.

names, such a vast mound of photographs, proved useless as a means of identification.<sup>194</sup> And in any case, the larger urban police forces relied upon their own information. There was not a single inquiry made about the Register in 1870 from Liverpool, Manchester, Birmingham, Sheffield, or Bristol, where "it is presumed the criminal classes abound."<sup>195</sup> By 1875 the Howard Association noted that out of about 150,000 criminals nominally registered on the lists, only about 5,000 had been made the subject of a police inquiry, "and only 1,000 identified in consequence."<sup>196</sup>

Pressure from Sir Edmund du Cane led, in 1879, to the Register being restricted to every person convicted of a crime who was discharged from a sentence of penal servitude and to "every 'habitual criminal,' that is, every person who within Section 7 of the Prevention of Crimes Act, is convicted on indictment of a crime, a previous conviction of a crime being proved against him."<sup>197</sup> The *Alphabetical Register of Habitual Criminals*, first published in 1877, contained 12,164 persons, but because of the widespread use of aliases, 22,115 names.<sup>198</sup> It was hoped that the list would establish "a *prima facie* identification," but proof would have to be sought at the prison from which the information came. A typical entry was:

B3215 Burt, Charles, 44, 5'5 ¾", brown hair, green eyes, sallow complexion, weaver, released Dorchester 28/12/70, convicted of larceny, simple. Sentenced to 6 months with 7 years supervision. Intended residence after liberation Bridport, Dorset, 'marks and remarks': cut back of right thumb, bald on forehead.<sup>199</sup>

This register, also, was rarely used by the police, and it is not hard to see why. It would have been extremely difficult to identify anyone so vaguely described from such a vast list who did not give

194. *Photographs of Criminals*, 54 PARL. PAPERS 783 (1873). But under Metropolitan Police it was stated that 373 cases of detection had occurred by the identification of photographs registered in the Habitual Criminals Office. *Id.* at 788.

195. REPORT OF THE COMMISSIONER OF POLICE OF THE METROPOLIS, 1870, CMD. No. 358, 28 PARL. PAPERS 557, 564 (1871).

196. HOWARD ASSOCIATION ANNUAL REPORT at 7 (1875).

197. du Cane, *Address on Repression of Crime*, 1875 NAPSS TRANSACTIONS 271, 281-332. See also *Register of Habitual Criminals, Working of Prevention of Crimes Amendment Act, 1876, 39 & 40 Vict., ch. 23, § 2*, Home Office Circular dated March 15, 1879, H.O. 45/9518/22208.

198. *Alphabetical Register of Habitual Criminals Who have been liberated, subject to the penalties of the 8th Clause of "The Habitual Criminals Act, 1869", or of the 7th or 8th Clauses of "The Prevention of Crimes Act, 1871" to 31 March, 1876* (1877) in *Pri. Com.* 2/404.

199. *Id.* See *Report of the Committee Appointed by the Secretary of State to Inquire into the Best Means Available for Identifying Habitual Criminals*, 72 PARL. PAPERS 209, 214-18 (1893-1894) (The Register contains "all the names in alphabetical order, and giving, in columns opposite each name, the prisoner's full description at the time of his discharge including his distinctive marks, the particulars of his last conviction, his destination on discharge and the number of his previous convictions, with reference to entries in previous registers").

his or her correct name or a known alias. Even when used in conjunction with the *Register of Distinctive Marks*, which was circulated among the police, offenders were hard to trace, for contrary to popular myth, many criminals had no such marks. In any case the Register covered one year only; no volume consolidated information on all those habituals in circulation. Moreover, it was published almost a year after criminals had been discharged from prison, and thus was unavailable during that period when offenders were particularly at risk of re-offending.<sup>200</sup>

Elaborate records were kept by the Convict Supervision Office at Scotland Yard — photographs, a register of tattoo initials, a classification of distinctive marks, and an index of each prisoner's *modus operandi*. And then there was the Police Gazette list of wanted persons and the twice-annually circulated descriptions and photographs of "the more eminent criminals" known to be at-large. Yet the system remained ineffectual. In 1881 Sir Howard Vincent complained that a quarter of the reported criminals, "the worst characters," had left London in the previous year and were exceptionally difficult to trace.<sup>201</sup>

The means of identifying a prisoner as likely to have a criminal record were rudimentary, resting upon "an organised form of personal recognition" by police officers and prison wardens who inspected prisoners at exercise while awaiting trial. It was both inadequate and unfair.<sup>202</sup> There were various ideas for improvement, such as Tallack's plan for an indelible mark tattooed on a part of the body where it would not normally be seen.<sup>203</sup> But the impetus for change came from the remarkable developments in physical anthropology — the body measurement system described by Alphonse Bertillon in Paris. It was a retired English civil servant, E. R. Spearman, who alerted the Home Office, in 1887, to take advantage of Bertillon's idea. Over the next six years he became its propagan-

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200. *Id.* The registers at Convict Prisons have nearly all been destroyed. The only extant registers are for Birmingham Prison, 1871. Pri. Com. 2/430; Wandsworth Gaol, 2/290; and Birmingham, 2/434. For a description of police photographs, see Metropolitan Police Circular in H.O. 45/9518/22208. On some of the problems of photographic identification, see the interesting memorandum from H.K. Wilson, Governor of Maidstone Gaol, sent to the Secretary of State, March 10, 1876, in H.O. 45/9518/22208.

201. Letter from Vincent to the Home Office, October 26, 1881, H.O. 45/9518/22208.

202. See the correspondence in H.O. 45/9568/76073.

203. See W. TALLACK, *supra* note 99, at 196-97. Tallack endorsed the views of Colonel Fraser, Chief of the City of London Police. See Fraser's Letter to the Editor of The Times (London), March 13, 1869, at 11, col. 2; *Chairman's Address by Sir Walter Crofton*, 1880 NAPSS TRANSACTIONS 271-80.

dist.<sup>204</sup> The Home Office dragged its feet, despite being assured of the practicality, the accuracy, the simplicity and the low cost of the system. Not until 1893 did it bow to pressure for an inquiry from the British Association for the Advancement of Science, backed by Sir Francis Galton, whose "finger mark" system had already attracted much attention.<sup>205</sup>

The Committee on the Identification of Criminals, under the Chairmanship of C.E. Troup of the Home Office, decided that the existing criterion for inclusion in the Habitual Criminals Register — "every person convicted on indictment of a crime, a previous conviction of a crime being proved against him" — appeared to be "the best legal definition of 'Habitual Criminal' which it is possible to obtain."<sup>206</sup> They concluded that few prisoners had been incorrectly identified as habituals, but that a new method which would give "an absolute safeguard . . . would be a great gain to the administration of justice."<sup>207</sup> On the other hand, failures to identify "an appreciable proportion" of old offenders did occur, especially in London. The Committee deduced this from the fact that in Lancashire, the West Riding of Yorkshire, and Staffordshire about seventy per cent of the prisoners listed were known to have been previously convicted, while in London the proportion only amounted to forty-seven per cent: "It is impossible to suppose that the proportion of habitual criminals in London is smaller than in other districts . . ."<sup>208</sup> They attributed the figures to London's vast and shifting population, and to "the impossibility of any officer acquiring personal knowledge of more than a few criminals."<sup>209</sup> Among the examples given was Case No. 2 who,

[W]as convicted summarily, and had a sentence of three months at Southwark Police Court in December, 1892, for attempting to pick pockets. He was not at that time known to the Metropolitan Police, but in the January following, from information received, he was discovered to be an old offender several times convicted of theft at Birmingham, Norwich and elsewhere and given a life sentence at

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204. For correspondence and memoranda see *Anthropometric System*, H.O. 144/530-532/A46508; A. BERTILLON, INSTRUCTIONS FOR TAKING DESCRIPTIONS FOR THE IDENTIFICATION OF CRIMINALS (G. Muller trans. 1889); Spearman, *Mistaken Identity and Police Anthropometry*, 53 THE FORTNIGHTLY REV. 65-84 (1890); *Criminals and Their Detection*, 9 THE NEW REV. 65-84 (1893).

205. REPORT OF THE COMMITTEE APPOINTED BY THE SECRETARY OF STATE TO INQUIRE INTO THE BEST MEANS AVAILABLE FOR IDENTIFYING HABITUAL CRIMINALS, CMND. NO. 7263, 72 PARL. PAPERS 209 (1893-94). See also F. GALTON, FINGER PRINTS (1892).

206. REPORT, *supra* note 205, at 214.

207. *Id.* at 223.

208. *Id.* at 226.

209. *Id.*

Leicester in 1877 for a murderous attack on a policeman. He had been released on licence in November 1892, and had gone to Manchester, but he left that place the same month, and coming to London failed to report himself to the police in pursuance of the conditions of his licence. . .<sup>210</sup>

The Committee found technical faults with both Bertillon's and Galton's systems, and in typical British fashion plumped for a hybrid: measurements would be used to obtain a primary classification and fingerprints to identify individuals with absolute accuracy — "the scientific proof" — within each class.<sup>211</sup> But even this modified Bertillonism was short lived. In 1900 another Committee recommended its replacement by the fingerprint classification invented by E.R. Henry, formerly the Inspector General of Police in Bengal.<sup>212</sup> A foolproof system, easily used, had been found. In the long run, as all criminals were fingerprinted it would ensure that no more men like the unfortunate Adolph Beck would be confused with another known offender.<sup>213</sup>

These scientific developments, which made possible more effective means of enforcing legislation against habituals while at the same time providing a safeguard against the wrongful application of severe sanctions, were exactly what Troup's committee had seen as the prerequisite for a new attack upon the problem:

[I]f any improvement can be made by which the antecedents of prisoners can be more easily and more accurately ascertained, it will be easier and safer for judges to discriminate in favour of the less criminal portion of the offenders on whom they have to pass sentence.

Indeed, we ourselves would venture to go further than this, and to look forward to a time when an even more marked distinction may be made between different classes of criminals. When experience has at last shown that on a certain class of criminals long sentences and short sentences fail equally to produce any reformatory or deterrent effect, we believe that the country and Parliament will be ready to make provision by which the incurably criminal may be treated in the same way as the incurably insane, and subjected, alike in their own interest and in that of the public, to some form of more or less permanent detention. As there are some criminals who ought never to be sent to prison, there are others who ought never to be released; and when this distinc-

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210. *Id.* at 225.

211. REPORT, *supra* note 205, at 214, 223, 224-26, 238.

212. See REPORT OF COMMITTEE ON METHOD OF IDENTIFICATION OF CRIMINALS, 1900, H.O. 144/566/A62042. The Habitual Criminals Registry had been moved back to the Metropolitan Police to be amalgamated with the Anthropometrical Registry. See H.O. 144/191/A46508D and Pri. Com. 7/248.

213. For a description of this dramatic case, see Radzinowicz & Hood, *Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem*, 127 U. PA. L. REV. 1288, 1334 (1979).



tion is established, and provided for by legislation, it will be of even greater importance than at present to have an exact record of each criminal's offences.<sup>214</sup>

#### IV. LAUNCHING A NEW ATTACK

##### A. *The Gladstone Committee*

When William Douglas Morrison launched his attack on Sir Edward du Cane's administration of the prison system, recidivism was one of his main targets. The soulless system of uniformly applied harsh discipline and useless labor neither reformed nor deterred. In fact, it was a breeding ground for crime. Morrison sought to prove his points by international comparisons, a method still fashionable today, but still as often misleading. In England forty-eight percent of prisoners were "old offenders," whereas the proportion in Austria was twenty-eight percent, in Germany twenty-nine percent and Italy thirty-six percent. And he claimed that things were actually getting worse. Before the centralization of the prison system in 1877, the proportions of prisoners "reconvicted" after one or more convictions amounted to forty percent of the prison population, whereas from 1882 to 1892 it averaged forty-eight percent.<sup>215</sup> But both these sets of statistics could not support the inferences Morrison drew from them. The statistics indicated only the proportions of defendants *sentenced* who had a prior conviction, not the proportions reconvicted *following* a sentence. All they showed was that fewer nonrecidivists were being committed to prison. Du Cane, Morrison's *bête noire*, saw this not as a sign of failure, but as one of success. For him the right test was the number of persons prevented from embarking upon a career of crime through fear of imprisonment. "I should rejoice to see the day when no persons were convicted except those who had already been convicted before; . . . clearly the criminal army would not be receiving recruits, and we should be one step nearer to the full attainment of our object."<sup>216</sup> Du Cane believed that the prison system could deter others but that it was "a delusion" to suppose that there is any process by which a rogue can be converted into an honest man."<sup>217</sup>

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214. REPORT, *supra* note 205, at 224.

215. See Morrison, *Are Our Prisons a Failure?*, 61 THE FORTNIGHTLY REV. 459, 465-67 (1894).

216. du Cane, *Address on Repression of Crime*, 1873 NAPSS TRANSACTIONS 271, 279. See *The Prison Bill and Progress on Penal Treatment*, 43 THE NINETEENTH CENTURY 809, 809-21 (1898).

217. du Cane, *Address on Repression of Crime*, 1873 NAPSS TRANSACTIONS 271, 279.

Whatever the correct interpretation of these figures, the Departmental Committee on Prisons, set up in 1894 under the chairmanship of Herbert Gladstone, son of W.E. Gladstone and a future Home Secretary, soon identified recidivism as "the most important of all prison questions, . . . the most complicated and difficult."<sup>218</sup> What could be done to remove this recalcitrant cancer? The Committee's main hope was that habitual criminality could be eradicated altogether by subjecting young criminals under the age of 23 — 'the dangerous age' — to a 'penal reformatory'; by "lay[ing] hold of these incipient criminals and preventing them . . . from recruiting the habitual class."<sup>219</sup> It firmly believed that "Habitual criminals can only be effectively put down in one way, and that is by cutting off the supply."<sup>220</sup> This was the foundation for the Borstal System.<sup>221</sup>

When the Committee turned its attention to those who were already habituals, it recommended a new form of sentence to ensure long periods of detention. Habituals would be "kept as a class apart" but would not be subjected to the severe conditions of first class hard labor or penal servitude: they would be "forced to work under less onerous conditions."<sup>222</sup> It was an important and influential recommendation, but a close examination of the proposal reveals all the old problems still unresolved.

Who was an "habitual criminal"? An attempt was made to draw some distinctions between petty misdemeanants and those who repeated serious crime, but there was a fatal lack of precision throughout the evidence. On one occasion the Chairman referred to "that class of criminals who are distinctly from calculating motives going in for a class of crime which only exposes them now and again, when they are caught, to short terms of imprisonment."<sup>223</sup> On another, he referred to "the habitual prisoner who is constantly in prison for small offences and who is constantly suffering small terms of impris-

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218. REPORT FROM THE DEPARTMENTAL COMMITTEE ON PRISONS 1895, CMND. NO. 7702, 56 PARL. PAPERS 1, 9 (1895).

219. *Id.* at 15.

220. *Id.*

221. See R. HOOD, BORSTAL RE-ASSESSED (1965). The Borstal System was England's progressive attempt to remove young adults from the ordinary penal system, and place them in institutions which emphasized reform and prevention of future crimes. The system was established by the Prevention of Crime Act, 1908, 8 Edw. 7, c. 59. It provided that criminal offenders between the ages of 16 and 21 could be placed in special reformatories for a period of not more than three years, subject to the possibility of early release on license. The name "Borstal System" resulted from the location of the first of these institutions, in Borstal, Kent. See generally L. FOX, THE ENGLISH PRISON AND BORSTAL SYSTEMS (1952).

222. REPORT, *supra* note 218, at 35.

223. *Minutes of Evidence Taken Before the Departmental Committee on Prisons*, 56 PARL. PAPERS 95, 348 (1895).

onment” as “one of the most dangerous classes of offenders.”<sup>224</sup> Then there were: “Men and women who have taken to crime as a profession”; “Habitual offenders who come in repeatedly”; “[A] class of people who are principally thieves and pickpockets who go on practicing their vocation and do not allow a temporary retirement of a few months in prison to interfere with them.”<sup>225</sup> The Committee seemed to want to exclude men who committed serious offenses, believing that very heavy sentences “frequently make [them] desperate and determined when again at large not to be taken alive.”<sup>226</sup> There was no mention of crimes of violence.

While it was anxious not to exclude “coiners, receivers and other criminals by profession” who were rarely caught, it nevertheless mainly had in mind:

a large class of habitual criminals not of the desperate order, who live by robbery and thieving and petty larceny, who run the risk of comparatively short sentences with comparative indifference. They make money rapidly by crime, they enjoy life after their fashion, and then on detection and conviction they serve their time quietly with the full determination to revert to crime when they come out . . . . [T]he bulk of habitual criminals are of this class.<sup>227</sup>

Thus, the Committee defined as habitual criminals many relatively small fry who populated the local prisons, not just those whose crimes led to long spells of penal servitude. Above all, it was concerned with property crime. The aim was to combat repetition rather than gravity as such. Repetition was highest, as statistics showed, “where the offense offers . . . the best means of obtaining a livelihood.” It is true that nearly eighty percent of those convicted of larceny were ‘recommittals.’ But the Committee seemed to overlook the fact that the sums involved in these thefts were trivial — hardly in keeping with its image of a predatory class enjoying, for however short a time, the fruits of its crimes. The Committee simply assumed that “when an offender has been convicted a fourth time or more, he or she is pretty sure to have taken to crime as a profession, and sooner or later to return to prison for the fifth time or more.”<sup>228</sup> This was an altogether curious, inconsistent, and confusing use of the word ‘profession.’ The truth is that the crimes themselves were not regarded as of prime importance. In a telling sentence the Committee concluded: “the real offence is the wilful persistence in the delib-

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224. *Id.* at 175.

225. *Id.* at 303.

226. *Id.* at 335.

227. *Id.*

228. *Id.*

erately acquired habit of crime."<sup>229</sup> In the end the problem of definition was evaded:

We have not attempted a definition of 'habitual criminal.' This is a question which must be taken in conjunction with our suggestion that a new form of sentence must be set up. To lay it down that a prisoner should be regarded as an habitual criminal does not meet the case . . . it probably would be necessary to give a certain amount of discretion to the Court.<sup>230</sup>

Of course the Committee was to some extent right to contend that the form of the new sentence would determine whom the courts would be willing to so punish. But at the same time, the sentence and the specific regime of the detention could hardly be devised without a clear idea of the sorts of criminal for whom it was intended. Here again it was evasive, merely suggesting "some kind of cumulative sentence" of detention.<sup>231</sup> Perhaps part of the problem was a failure to spell out the purpose of the lengthened confinement. It was certainly not mere incapacitation, for it was claimed that the longer sentence would "prove eventually the chief deterrent."<sup>232</sup> Nor was reformation ruled out, for even in the case of habituals "there appears to come a time when repeated imprisonments or the gradual awakening of better feelings wean them from habitual crime . . . . Given more time and opportunity for the work of reclamation, it is certain that in proportion there would be an increased measure of success."<sup>233</sup> The new system was to be incapacitative, deterrent, and reformatory all in one.

In the end the Committee left the vital details entirely in the air. How was habitual criminality to be proved? How long was the detention to be? What was to be its relationship to imprisonment and penal servitude? Who would decide when the prisoner was fit for release? In truth, it was a half-baked proposal which gave much scope for divergent interpretations.

At the same time, in Scotland, a Departmental Committee on Habitual Offenders had recommended extended confinement for persistent petty offenders. Anyone imprisoned four times in one year would be placed on a list of habitual offenders for at least two and

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229. *Id.*

230. REPORT, *supra* note 218, at 35.

231. *Id.*

232. *Id.* See also Strahan, *What to Do with Our Habitual Criminals*, 143 THE WESTMINSTER REV. 660 (1895). duCane and Tallack were opposed to the indeterminate sentence. REPORT, *supra* note 218, at 429; W. TALLACK, EUROPEAN AND AMERICAN PROGRESS IN PENAL REFORM 4 (1895).

233. REPORT, *supra* note 218, at 17.

one-half years and if again convicted during that period would be sentenced, in addition to the usual short imprisonment, to an adult reformatory or labor settlement for a term of not less than twelve nor more than thirty months.<sup>234</sup> They were to be treated in much the same way as habitual drunkards and vagrants. Indeed they were said to be "chiefly drunken women." The implementation of anything like this in England was regarded by the Home Office as an entirely unrealistic aspiration. They had enough on their plate in trying to translate the Gladstone proposals into a workable definition and policy.

The Prison Commissioners were asked to present their *Observations* on the Gladstone Committee's proposals. Finding no definition of habituality, the Commissioners "infer[red] from the context that it is proposed to apply the novel mode of treatment to those guilty of larceny in particular, and that the number of convictions is to be the criterion of habituality."<sup>235</sup> They whole-heartedly disagreed. They were not against special measures being taken against recidivism in petty offenses, as the Scottish Committee had suggested, but they opposed the application of this principle to more serious crime "such as robbery and larceny." They believed that

the law, as it stands, gives very ample power for punishing with long sentences, reconvictions for larceny. . . . [T]he most effectual safeguard against habitual recidivism in the graver forms of crime is to be found in the firm and judicious application of the existing law, and, secondly, in a keener and more sustained vigilance over the man on his discharge.<sup>236</sup>

The Prison Commissioners were in favor of giving judges power to sentence to "long or indeterminate periods" only where "the criminal tendency is inveterate, and the resources of the law and of human effort have failed. . . ."<sup>237</sup> They had in mind a small class, for they envisaged making provision for them in just one prison. Already one sees an attempt to employ a narrower definition of habitu-

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234. See REPORT FROM THE DEPARTMENTAL COMMITTEE ON HABITUAL OFFENDERS, VAGRANTS, BEGGARS, INEBRIATES, AND JUVENILE DELINQUENTS, CMND. NO. 7753, at xvii, 37 PARL. PAPERS 1, 21 (1895). Pressure for something similar in England had come from the Society of Chairmen and Deputy Chairmen of Quarter Sessions. See H.O. 45/10027/A569020/1/2/3 and /4; HOWARD ASSOCIATION, THE ESSENTIAL ELEMENT OF TIME, FOR REFORMATIVE OR RESTORATIVE SUCCESS, ESPECIALLY IN REFERENCE TO HABITUAL OFFENDERS, DRUNKARDS AND TRAMPS (1895).

235. OBSERVATIONS OF THE PRISON COMMISSIONERS ON THE RECOMMENDATIONS OF THE DEPARTMENTAL COMMITTEE ON PRISONS, CMND. NO. 7995, at 29 (1894), 44 PARL. PAPERS 185, 215 (1896).

236. *Id.*

237. *Id.*

ality than that sought by the Gladstone Committee.<sup>238</sup>

### B. *Devising a New Legislative Formula*

It took eight years before a draft Bill was presented to Parliament and thirteen years before Gladstone's proposals were translated into legislation. This may partly have been because habitual criminality did not seem to be on the increase. The new Introductions to Criminal Statistics, written by senior Home Office officials, concluded that "there is no reason to think that professional criminals are greatly increasing, some kinds . . . are probably diminishing."<sup>239</sup> And there was little pressure from the press. *The Times* accepted that there was a substantial decline "in the standing army of crime."<sup>240</sup> But by far the most important reason for the delay was the inherent difficulty of defining "habitual criminality" in legislation and in reaching agreement on the conditions under which the new sentence should be imposed and served.

If the Home Secretary, Sir Matthew Ridley, had not dismissed the idea as "a little utopian," Home Office officials would have settled straight away for an indeterminate sentence, which "once fully understood" would be "more humane and economical."<sup>241</sup> They looked with interest to the United States where a special report had been prepared for the International Prison Commission by S.J. Burrows on *The Indeterminate Sentence and the Parole Law*.<sup>242</sup> One senior official endorsed it enthusiastically. An habitual criminal

238. For favorable comments in relation to habitual offenders, see du Cane, *The Prison Committee Report*, 38 *THE NINETEENTH CENTURY* 278, 290 (1895); Laslett-Browne, *Common Sense and Crime*, 64 *THE FORTNIGHTLY REV.* 224, 231 (1895). Ruggles-Brise had spoken, at the International Penal Congress in Paris in 1895, against attempts at legislative enforcement of long periods of detention:

Such deprivation is . . . not only opposed to public conscience, but the system which compels it, must seriously impair that free discretion in the award of punishment with which experience has shown that the judges may be safely entrusted. . . .

E. RUGGLES-BRISE, DISCRETIONARY POWERS OF JUDGES IN ENGLAND, IN REPORT OF THE PROCEEDINGS OF THE FIFTH AND SIXTH INTERNATIONAL PENITENTIARY CONGRESS, CMND. No. 573, 33 *PARL. PAPERS* 1, 131-34 (1901).

239. *Introduction by H.B. Simpson*, in *JUDICIAL STATISTICS, ENGLAND & WALES, PART I. CRIMINAL STATISTICS FOR THE YEAR 1897*, 108 *PARL. PAPERS* 1, 12-13, 16-17 (1899); *Introduction by C.E. Troup*, *CRIMINAL STATISTICS FOR THE YEAR 1898*, 103 *PARL. PAPERS* 1, 24-25, 29 (1900). See also Simpson, *Penal Servitude: Its Past and Its Future*, 15 *LAW Q. REV.* 30, 49 (1899); REPORT OF THE COMMISSIONS OF PRISONS AND DIRECTORS OF CONVICT PRISONS FOR THE YEAR 1897-8, 48 *PARL. PAPERS* 23 (1898); Morrison, *Prison Reform: I. Prisons and Prisoners*, 69 *THE FORTNIGHTLY REV.* 78 (1898); Lecture to the Cambridge Ethical Society, quoted in Gregory, *Crime in England*, 185 *QUARTERLY REV.* 408 (1897).

240. Leading article on Criminal Statistics, *The Times* (London), July 23, 1901, at 9, col. 10.

241. HOME SECRETARY, comment dated 20 June 1899, H.O. 45/10027/A56902c/6.

242. See S. J. BURROWS, *THE INDETERMINATE SENTENCE AND THE PAROLE LAW*, S. DOC. No. 159, 55th Cong., 3d Sess. (1899) (an interestingly marked copy is in the Home Office files).

should be locked up like a lunatic and “locked up again without mercy immediately if he fails to observe the conditions — without waiting until he has committed a fresh crime and received a fresh sentence.”<sup>243</sup> But as his colleague observed, however “logical” it might be to lock up an inveterate thief for ten years for stealing sixpence, “the ordinary feelings of humanity, however hard it may be to defend them on reasonable grounds, have to be taken into consideration. . . .”<sup>244</sup> The question of balancing the new preventive principles with the traditional classical tenets of just proportion between crime and sentence remained to be resolved. As Home Office officials noted, there was a growing reluctance to impose sentences of penal servitude for “trifling” offenses, so either recidivism had to be made a separate offense as in France, or some less severe form of sentence had to be introduced.<sup>245</sup>

One widely preferred solution was the dual-track system. It was championed both by Sir Robert Anderson, former head of the Criminal Investigation Department, and by Sir Evelyn Ruggles-Brise, Chairman of the Prison Commissioners. Anderson became the scourge of the Home Office, the seat of “official complacency.” Writing with fervor and hyperbole, and ignoring all the problems of interpreting statistics, he painted a wildly exaggerated picture: “The community is being preyed upon by a gang of habitual criminals. . . . [N]o citizen’s property is safe. Doors can no longer be left on the latch. Not even a window can be left unbarred. The whole community is thus kept in a state of siege.”<sup>246</sup>

Despite his rhetoric, Anderson put forward a carefully thought out scheme, which was to form the basis of much of the subsequent debate. He wanted the perfunctory and inadequate inquiries sprung upon offenders in court replaced by an official dossier. Here he took up James Fitzjames Stephen’s proposal for a formal public inquiry to establish whether the criminal “really was an habitual, hardened, practically, irreclaimable offender.” The prime question was to establish “what he is . . . . Is he a citizen or an outlaw?”<sup>247</sup> Anderson had in mind a very small category of offenders: 70 ‘professionals’—not 70,000 ‘habituals.’ “A single prison would suffice . . . and a single wing of any one of our gaols would more than suffice to provide

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243. H.O. 45/10027/A56902c/6.

244. *Id.* See also Simpson, *Crime and Punishment*, 70 THE CONTEMP. REV. 91, 108 (1896).

245. H.O. 45/10027/A56902c/6.

246. Anderson, *Our Absurd System of Punishing Crime*, 49 THE NINETEENTH CENTURY 268, 274 (1901).

247. *Id.* at 278.

for the band of outlaws who may be described as the aristocracy of crime in England."<sup>248</sup> He advocated leniency for casual offenses by "citizens . . . betrayed into the commission of a crime," "asylum prisons" for the "poor wretch . . . begotten and born and bred in crime [without] the moral stamina to resist when opportunity for theft presents itself."<sup>249</sup>

In principle Anderson would have preferred complete deprivation of liberty for criminals by profession — the "moral leper," the "outlaw." Yet he recognized that even when professionalism was established the judges would not impose nor the public tolerate sentences of penal servitude for life for property offenses. It was for this reason that he advocated the dual-track system, the term of punishment to be followed by "discipline of a different character," "[the prisoner to] be allowed, conditionally . . . upon good conduct and industry, every relaxation which may be found consistent with order in the prison and the safe custody of the prisoner."<sup>250</sup> Sentences would be mitigated for those who made restitution, but if they refused "let there be but one sentence — imprisonment for life."<sup>251</sup> Anderson's plan was widely supported as "simply a precept of common sense."<sup>252</sup>

Ruggles-Brise's scheme, first prepared for the International Prison Congress (held in Brussels in 1900), differed from Anderson's in several important respects. Although his paper was entitled "Professional Criminals," he wanted the new form of sentence to apply to all crimes of acquisitiveness, "all forms of burglary, larceny etc," where the record showed there had been more than four previous convictions. There were over 2,700 such prisoners in the convict and local prisons. Even when he later modified his definition to include only those with a previous sentence to penal servitude or three or more imprisonments for serious crime, there were still over 1,100

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248. *Id.* at 283.

249. *Id.* at 278.

250. *Id.* at 279.

251. *Id.* at 280. See also Anderson, *Morality by Act of Parliament*, 59 THE CONTEMP. REV. 77, 77-78 (1891); Bromby, *Judicial Sentences and the Habitual Criminal*, 14 LAW Q. REV. 154 (1898); Bromby, *The Hardened Criminal*, 83 THE SPECTATOR 777 (1899).

252. *Professional Criminals*, 86 THE SPECTATOR 196, 197 (1901). See also 110 THE LAW TIMES 383 (Feb. 25, 1901); 113 THE LAW TIMES 540, 541 (Oct. 25, 1902). Anderson was supported by Mr. Justice Wills, Letter to the Editor of The Times (London), Feb. 21, 1901, at 8, col. 1. The dual track system had been favored by Walter Crofton, Sir Walter Crofton's son, first in a letter to The Editor of The Times (London), April 16, 1896, at 177, col. 5; see a leading article, The Times (London), April 17, 1896, and also another letter to the Editor of the Times, on April 5, 1901, at 10, col. 4. Tallack did not favor such long sentences, but he did approve of more care being taken to investigate the antecedents of supposed professional criminals. See W. TALLACK, HOWARD LETTERS 69 (1905).



men in the convict prisons alone. Ruggles-Brise was concerned on the one hand that habituals should not be better treated than ordinary criminals, for that would put a premium on repeating, and on the other that the penalties imposed on habituals should not be grossly excessive in relation to their latest offense. He therefore insisted that the penalty for the offense must first be served, be it a long sentence of penal servitude or a short one of imprisonment. Second, the period of preventive detention should be limited to the legal maximum for the offense, thus avoiding long detention for petty offenses. Third, in order to avoid inequality of treatment between long term prisoners committed for grave crimes and habituals detained in better conditions, the former should after seven and one-half years be transferred to a separate 'penal colony' so that they would also benefit from a more liberal regime.<sup>253</sup>

But it was an entirely different scheme which almost reached the statute book. The initiative originated from the Judges of the King's Bench. They resolved at their meeting in 1901 that the time was ripe for an inquiry into the best way of dealing with "habitual and professional criminals." The Home Secretary sent Ruggles-Brise's scheme to the Lord Chief Justice.<sup>254</sup> The Judges claimed they were for it in theory but that the public would be against it. Yet it is clear that the Judges were entirely antagonistic to the basic elements of the

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253. H.O. 45/10027/A56901c/7 and /9. See also MEMORANDUM AS TO CERTAIN PROPOSED CHANGES IN THE PENAL SERVITUDE SYSTEM, *id.* at App. III; Paper Contributed to the International Prison Congress, held at Brussels, 1900, by Mr. E. Ruggles-Brise, C.B., on the treatment of professional crime, *id.* at 11; 33 PARL. PAPERS 120-30 (1901); HOME OFFICE, MEMORANDUM, *supra*, on *Convict Census 15 July 1901 and Notes on the History of Specimen Habitual Criminals*. It is interesting to note that in 1899 Sir Richard Harrington had sent details of the case of Samuel Holmes with his letter to the Home Secretary. Holmes had since 1871 been convicted 15 times for theft and damage. His offenses included stealing a book, a ham, 2 pairs of shoes, for which he received 7, 5 and 3 years penal servitude respectively. His imprisonments ranged from 3 months to two years for similar offenses and there were 14 summary convictions in addition. Ruggles-Brise said he was not a petty offender, but a "professional criminal . . . a danger to society. His . . . immediate offense may be trifling, e.g., the theft of a bootlace or a postage stamp, but his previous record . . . proves the absolute inefficiency of passing an ordinary sentence of imprisonment to meet the particular offence." H.O. 45/10027/A56901c/9. See also *Indeterminate Sentences for Professional Criminals*, 3 THE LAW TIMES 291-92 (July 27, 1901).

254. See H.O. 45/10027/A56902c/12, dated March 22, 1902. The Home Office had not endorsed Ruggles-Brise's scheme. The minutes read,

For the professional criminal a mere indeterminate sentence would not suffice: there should be (1) the penalty for the offence, (2) the preventive detention in addition . . . [T]he Judge should pass a sentence of P.S. or of imprisonment with hard labour and in addition, having regard to the number of the convict's previous convictions . . . he should proceed on the principles of preventive justice to order his detention on the expiration of such sentence in a state institution of the nature of a penal colony . . ." *Id.* at /11.

The outline of the proposal was made public in the Report of the Commissioners of Prisons and the Directors of Convict Prisons for the Year 1901-1902. See COMMISSIONERS OF PRISONS AND DIRECTORS OF CONVICT PRISONS, REPORT FOR THE YEAR 1901-02, 46 PARL. PAPERS 5, 5-6 (1902).

dual-track scheme. To avoid "friction and delay" they proposed that the Prison Rules be attuned so that a judge sentencing an habitual could order that a proportion of the sentence be served in a separate habitual offender's division. It was what is now called a 'single-track' system. They were opposed to any element of indeterminacy. The period to be spent under the ordinary rules and under the rules for habituals should be "definite, absolute and final," subject only to remission or pardon. "The mixing up . . . of judicial functions with the administrative and executive [is] . . . likely to be as unsatisfactory in practice as it is unsound in principle." They were entirely against the jury being asked to decide whether someone was or was not an habitual — it could not be done "without a mischievous relaxation of the law of evidence." What is perhaps more important, they wanted to include among those who could be sentenced under the new rules the "happily rare . . . habitual and dangerous crimes which are not crimes of 'acquisitiveness' at all" as well as those "weak and immoral beings who are not professional thieves or burglars, and generally have no sufficient cleverness or audacity for such a role, but whose abstinence from crime is so infrequent that society is justified in requiring special protection from their habits of deprecation."<sup>255</sup> The net was to be cast even wider.

The Government's Bill, published in 1903, and introduced in Parliament in 1904, was a compromise between the Judges' proposal and its own commitment to some element of indeterminacy in the sentence for habituals. The Courts were to be given power,

where any person who has previously been convicted more than twice of an indictable offence is convicted on indictment of an offence punishable, with penal servitude, and it appears to the court —

- (a) that at the time when he committed the offence for which he is sentenced, he was leading a persistently dishonest or criminal life; and
- (b) that by reasons of his criminal antecedents and mode of life, it is expedient for the protection of the public that he should be kept in detention for a lengthened period of years,<sup>256</sup>

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255. REPORT OF HIS MAJESTY'S JUDGES OF THE KING'S BENCH DIVISION IN REPLY TO THE LETTER OF THE RT. HON. THE HOME SECRETARY OF THE 22ND MARCH 1902, dated 6 April 1903. The Judges rejected the argument put forward in a memorandum to the Home Office by Mr. Justice Kennedy. He had suggested that the judges should have power to order a sentence of ordinary imprisonment followed by penal servitude in the fifth stage. Some Home Office officials felt that this would mean giving better treatment to habituals than to a first offender sent to penal servitude, and that such a wide discretion given to judges would lead to scandalous disparities in sentences, *id.* at /13. In 1904 a request was made in the Commons for the communications between the Home Office and the judges to be placed upon the Table of the House. This was refused as they were of a "confidential nature." *Id.* at /30.

256. A Bill to Amend the Law Relating to Penal Servitude in England and Wales, 1904, 4 Edw. 7.

to pass a sentence of penal servitude for any term not less than seven years, and to direct that after serving a portion of it under the general rules the remainder should be served in the "habitual offender division." The Court had complete discretion whether or not to impose the sentence. The period to be spent under the general rules of penal servitude was to be not less than a quarter of the total, and for someone who had previously been sentenced to penal servitude, not less than five years. Under the Draft Rules drawn up by the Prison Commission, the question of release on license would be considered "from time to time" by the Home Secretary on the basis of periodic reports by the Directors of Convict Prisons. The Directors would be assisted by a Committee at the prison which would report on the prisoners' "conduct and industry during detention and their prospects and probable behaviour on release."<sup>257</sup> The Committee would consist of Governor, Chaplain and members of the Board of Visitors or of the Discharged Prisoners Aid Society. It was in essence a parole scheme with a review Committee at the prison. The regime of the habitual offenders division was not spelled out in detail, but concessions such as the wearing of special dress, earning and spending a gratuity, eating in association, and talking at exercise and meals (but not at labor) were to be allowed.<sup>258</sup>

The Bill was vigorously attacked from several angles. If fear of the severe discipline of convict prisons had not kept someone from crime, how could a less severe regime, even if imposed for longer periods? Only the fear of an indeterminate penalty could make them "moral by Act of Parliament." Others considered long sentences to penal servitude, with a mere modification of regime, "contrary to modern usages and ideas."<sup>259</sup> The criteria were too vague, too likely to include those whose previous convictions were for minor offenses, and there was no reference to "professional criminals," for whom the special powers had been sought. Persistent dishonesty ought to be properly proved: "[I]f a man's sentence was to be doubled because of the life he had been leading there should, surely, be adduced some evidence of the life he had been leading?"<sup>260</sup> And Parliament was not anxious to sanction preventive confinement without the rules describing it being put before the House. They must be able to judge

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257. See Draft of New Rules, H.O. 45/10027/A56902c/31.

258. A plan for a single track system along these lines had been prepared in the Home Office in 1899 as a response to a letter to the Home Secretary from Sir Richard Harrington, President of the Herefordshire and Radnorshire Discharged Prisoners' Aid Society. See H.O. 45/10027/A56901c/7 and /9.

259. 135 PARL. DEB., H.C. (4th Ser.) 730 (1904).

260. 135 PARL. DEB., H.C. (4th ser.) 730 (1904).

whether preventive confinement was "intelligible, rational, and as far as consistent with the dictates of justice, mitigatory of the hardship of [the criminal's] position."<sup>261</sup> The opposition caused such delay that the Bill had to be withdrawn.<sup>262</sup> When in the following year the Home Secretary was asked when he intended to introduce it, he replied that he was not prepared to do so unless it was likely to be treated as non-contentious.<sup>263</sup>

### C. *The Triumph of the Dual-Track*

Within the Home Office opinion hardened in favor of the indeterminate sentence.<sup>264</sup> The officials were particularly impressed by *The Habitual Criminals Act* of New South Wales, passed in 1905, which empowered judges to impose a sentence of detention during His Majesty's pleasure following a definite sentence served under ordinary prison conditions. In the indeterminate portion of the sentence "the conditions are relaxed as far as possible, consistent with security of detention, and the preservation of good order. Release will be obtained when reform has been accomplished and when suitable employment has been obtained, and then only 'on probation.'"<sup>265</sup> Sir Edward Troup, by now permanent Under-Secretary of

261. 135 PARL. DEB., H.C. (4th ser.) 751 (1904).

262. Anderson, *The Home Office Scheme for 'Professional Criminals'*, 55 THE NINETEENTH CENTURY & AFTER 117 (1904); *An Ex-Prisoner on Professional Criminals: A Rejoinder*, 55 THE NINETEENTH CENTURY 811 (1904). See also *An Important Social Reform*, 92 THE SPECTATOR 79-80 (Jan. 16, 1904), which strongly supported the indeterminate sentence. Anderson was made the object of a vehement and persistent attack by H.J.B. Montgomery, a former convict. See Montgomery, *The Abolition of the Professional Criminals*, 30 THE LAW MAGAZINE 186 (1904-05); *Am I My Brother's Keeper? A Reply to Sir Robert Anderson*, 5 HUMANE REV. 108 (1904); *The Extinction of Criminals*, 7 HUMANE REV. 27 (1906); *The Sermon on the Mount (according to Scotland Yard)*, 9 HUMANE REV. 53 (1908); *Sir Robert Anderson's Theological Penology*, 37 HUMANE REV. 11 (1909); 'Lex', *The Problem of Habitual or Professional Crime*, 5 HUMANE REV. 11 (1904).

Ruggles-Brise supported Anderson's idea of a separate count of habitual criminality to be proved to the satisfaction of the court. See H.O. 45/10027/A56902C/23. See also the MEMORANDUM EXPLANATORY OF THE PROVISIONS OF THE PENAL SERVITUDE BILL, 55 PARL. PAPERS 595 (1903), and Pri. Com. 7/287; and analysis of 100 habitual criminals in Pri. Com 7/286.

263. See 143 PARL. DEB. H.C. (3d ser.) 454 (1905). All that remained was the power to allow those serving very long sentences to pass, after seven years, into a "long sentence division." Rules dated Jan. 21, 1905, as to Division and Classification, made by the Secretary of State under the Prison Act, 1898. H.O. 45/10027/A56902c/31. See also COMMISSIONERS OF PRISONS, REPORT FOR THE YEAR 1903-04, 36 PARL. PAPERS 15, 15-17 (1905).

264. See *Papers on Indeterminate Sentences*, H.O. 45/14099/145740; 120 THE LAW TIMES 365 (Feb. 17, 1906); Letter from A.B.H. to The Times (London), April 13, 1906, at 8, col. 4 (advocating "permanent incarceration"); E. CARPENTER, PRISONS, POLICE AND PUNISHMENT 36-38 (1905).

265. New South Wales Habitual Criminals Act 1905. H.O. 45/10307/120865. See also Suggestions for Indeterminate Imprisonment of Professional Criminals, H.O. 45/10371/159955.

State, remarked that the scheme was "well worth considering when we attempt to legislate" and the Secretary of State noted the "useful precedent."<sup>266</sup> A draft outline of a bill for a similar measure was drawn up and made ready for the new Home Secretary, now, most appropriately, Herbert Gladstone.

Gladstone was convinced that the time was now ripe to try the indeterminate sentence. He believed that the reforms in prison regimes, which had been put into effect by his old school friend Ruggles-Brise since 1898 would allay strong opposition. Furthermore, the Government needed to show that these reforms were not a sign of weakness. The "continuance of progressive improvement in our prisons for the benefit of the large majority of [our] inmates" would only be politically acceptable if those "who deliberately take up a life of crime" were subjected to the toughest measures.<sup>267</sup>

In introducing the Prevention of Crime Bill in 1908,<sup>268</sup> Gladstone admitted that the issue was contentious. He went out of his way to give assurances, first that the finding of habitual criminality was to be made by the jury, second that the Bill was intended for a small and carefully selected category of the most "formidable" offenders, third that the indeterminate sentence, which would follow an initial sentence to penal servitude, would be surrounded by safeguards to individual liberty, and fourth that "[i]n no case . . . is life imprisonment contemplated."<sup>269</sup> In addition, he was anxious to find a way of limiting the number of cases brought before the courts.<sup>270</sup> He therefore decided that the Director of Public Prosecutions would be made responsible for giving his consent to any prosecution as an habitual criminal. As one of the senior Home Office officials had observed: "unless there is a rigid check there is a danger that local police may use the Act to get rid of troublesome persons who are not real criminals, but merely steal ducks or fowls occasionally or pick up casual odds and ends."<sup>271</sup> As an additional safeguard the prisoner would have an unqualified right to appeal both against conviction and sentence to the newly established court of Criminal Appeal.

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266. See H.O. 45/10307/120865.

267. 189 PARL. DEB., H.C. (3d ser.) 1123-25 (1908). Gladstone, when he became Home Secretary, "found his old friend Ruggles-Brise — who could remember him as a senior boy at Eton and as 'one of the keenest and bravest of the Oxford Eton Football XI' — working steadily as Chairman of the Prison Commission." See C. MALLETT, HERBERT GLADSTONE, A MEMOIR 205 (1932).

268. Prevention of Crime Act, 1908, 8 Edw. 7.

269. 189 PARL. DEB., H.C. (3d ser.) 1121, 1122 (1908).

270. *Id.*

271. *Prevention of Crime Bill*, H.O. 45/10381/166876/1a and /2a.

Throughout the debates Gladstone made it clear that the measures he proposed were not meant for those who "are a nuisance rather than a danger to the State, those who are criminals chiefly because of physical or mental deficiency rather than by reason of a settled intention to pursue a life of crime."<sup>272</sup> He promised a new and more appropriate system for them in the near future — but this was soon forgotten. The 1908 Bill was for "the professional . . . men with an object, sound in mind — so far as a criminal could be sound in mind — and in body, competent, often highly skilled, and who deliberately, and with their eyes open, preferred a life of crime and knew all the tricks and manoeuvres necessary for that life."<sup>273</sup> A number of examples were given of the sort of men he had in view:

A., thirty-eight years of age, received his first conviction at twenty-five; had served sentences of two and six years penal servitude for forgery; now undergoing ten years for the same offence; time actually spent in prison, seven and a half years; a well-educated man, a professional forger. B., forty-five years of age, received his first conviction at twenty-nine; served three terms of penal servitude and eleven sentences for stealing; now undergoing three years penal servitude for stealing and receiving; eleven and a half years in prison. C., forty years of age, received first conviction at twenty-seven; served thirteen sentences for stealing and housebreaking; now serving five years larceny; nine years actually spent in prison. D., thirty-one years of age; first conviction, eighteen; served nineteen sentences for stealing and shopbreaking; now serving three years penal servitude for stealing; seven and a half years in prison. These were no ordinary cases. They were not men who had fallen into crime in their youth, who were bred up among evil surroundings. Except the last man, they began their criminal career when nearly thirty years old, and then took to it professionally. As they took to it, so, if they chose, they could leave it.<sup>274</sup>

As a prelude to preventive detention the offender would first have to be sentenced to at least three years' penal servitude. If preventive detention had been made available following a sentence of ordinary imprisonment, as many as 60,000 offenders would be eligible. The insistence on the preliminary penal servitude would reduce that number to about 5,000 — sufficient to fill at any one time a prison for five hundred. The preliminary period of penal servitude also restricted the imposition of the indeterminate period of preventive detention to those whose last crime was serious enough to warrant a heavy penalty. And this dual-track system would ensure that

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272. 197 PARL. DEB., H.C. (4th ser.) 247-48 (1908).

273. 197 PARL. DEB., H.C. (4th ser.) 499 (1908).

274. 197 PARL. DEB., H.C. (4th ser.) 247-48 (1908). Gladstone claimed that 8,000 police were deployed each night to deal with a mere few hundred house breakers, whose punishment, when caught, was "little better than a farce."

habituals would not gain any better treatment than non-habituals until they had served the punishment they deserved.<sup>275</sup>

Yet, despite Gladstone's statement, there was nothing in the Bill itself to define the class to whom it was to apply as "professional" or "dangerous" criminals. In addition to three previous convictions since the age of sixteen, it had to be proved that the person charged was "leading persistently a dishonest or criminal life."<sup>276</sup> Given the long sentences already handed down to persistent thieves, the preliminary penal servitude was, in reality, only a modest safeguard.

Criticism came from two opposing angles. Those who were in the vanguard of 'progressive' penal thought opposed the dual-track system, arguing that the reformatory benefits of the indeterminate sentence should be made available to habitual nuisances. If they were forced first to undergo a preliminary sentence prior to penal servitude, the sentences would be far too long. After all, there was no preliminary sentence of punishment preceding Borstal Detention, so why should one precede Preventive Detention?

The consequences of the dual-track were accurately predicted: the regular professional criminal found guilty of acts of violence or armed robbery would in any case get a long period of penal servitude, and the Bill would have little effect upon him. On the other hand, the Bill would break down in operation to dealing with men "who habitually stole small articles of the value of 10s. or perhaps even £1. . . ."<sup>277</sup> But the jury, knowing the consequences of finding him an habitual criminal, might refuse to convict and the Act "would become a dead letter."<sup>278</sup>

On the other side, civil libertarians put up an overwhelming opposition to the indeterminate sentence. Try as Gladstone did, to make the analogy to the treatment of criminal lunatics at Broadmoor; to praise the composition of the Committee who would

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275. 198 PARL. DEB., H.C. (4th ser.) 130, 130-31 (1908). In criminal statistics for 1904 it was estimated that, using as a "very rough test of the numbers of the criminals classes those who have been convicted five times or oftener, there would be in prison at any one time about 5,000 belonging to these classes." 98 PARL. PAPERS 1, 15 (1907). Also, see REPORT OF THE COMMISSIONERS OF PRISONS AND DIRECTORS OF CONVICT PRISONS FOR THE YEAR 1907-08, CMND. NO. 4300, 52 PARL. PAPERS 467 (1908). *The Nation* put the number nearer to 500, but *The Law Times* supported the Prison Commissioners' estimate of 5,000. See 125 THE LAW TIMES 534 (Oct. 10, 1908).

276. 190 PARL. DEB., H.C. (4th ser.) 505-07 (1908).

277. *Id.* at 506.

278. *Id.* at 507. See also 198 PARL. DEB., H.C. (4th ser.) 124 (1908); *id.* at 127-29; 198 PARL. DEB., H.L. (4th ser.) 686-88 (1908); *id.* at 1535-37 (1908). The Humanitarian League argued that "the infliction of two punishments — the first retributive and the second utilitarian — for the same offence is obviously unfair," "Lex," *The Prison System; The Home Secretary's Reform*, 5 THE HUMANITARIAN 68-71 (Sept. 1910).

be guided by the judgments of those "in actual daily contact with prisoners"; to appeal to "the authority of many criminologists in America"; to insist that in practice men would not stay for more than three or four years — the opponents remained implacably hostile.<sup>279</sup> Nor were they persuaded by a novel and far-reaching safeguard, a safeguard which today would be regarded as a progressive step in protecting the liberty of prisoners. It would be mandatory to release a prisoner after ten years unless the Home Secretary "had definite reason to believe, on information given to the police, that the prisoner would relapse into crime."<sup>280</sup> The onus would be upon the Secretary of State to give reasons for not releasing the man, and he would have to make a special report to Parliament, stating the grounds upon which he had decided not to charge him.<sup>281</sup>

The fact of the matter is that civil libertarians regarded the indeterminate sentence as "an awful punishment — that he should be immured for the rest of his life at the tender mercies of the prison officials."<sup>282</sup> The strongest protests came from Hilaire Belloc, the well-known writer and controversialist, then a Liberal Member of Parliament:

[The] provisions . . . were so utterly at variance with every political or social principle that Western Europe had ever known or any Christian country had ever held, that he could promise the House that his protest would be echoed, if not in the House in the constituencies, if the Bill passed into law. The first principle was that the liberty of the man who committed the pettier crimes of violence and larceny — not the most dangerous to society but the most irritating to the wealthier classes — and not the greater crimes against society which so easily go unpunished, should be, at the discretion of the governing classes of this country, imprisoned for life. A more monstrous principle had never been put forward, certainly by the Parliaments of countries which boasted of a high civilisation and a system of law.<sup>283</sup>

Belloc inveighed against "pseudo-scientists with broken down reputations like Lombroso's" and appealed to "3,000 years of European tradition": "A due punishment was weighed against [his] offence, and, after enduring it, he was free again, and a responsible citizen

279. See Mr. Gladstone, 197 PARL. DEB., H.C. (4th ser.) 491, 501-02 (1908); 197 PARL. DEB., H.C. (4th ser.) 246-55 (1908).

280. See also Prevention of Crime Bill, in H.O. 45/10381/166876/14. The Archbishop of Canterbury had welcomed the elasticity provided by the Bill and thought that sociology had provided valuable knowledge which should be used in planning the prison system. 197 PARL. DEB., H.L. (4th ser.) 248-55 (1908). For contemporary support of the concept of "scientific penology," see Rev. Canon Horsley's comments in the Morning Leader, June 1, 1908.

281. 190 PARL. DEB., H.C. (4th Ser.) 501-02 (1908).

282. 190 PARL. DEB., H.C. (4th ser.) 472 (1908).

283. Mr. Belloc, 197 PARL. DEB., H.C. (4th ser.) 190 (1908).



again." "When it was passed into law they would have entered for the first time that path which all modern pseudo-sociology was trying to face them with, at the end of which they had the tyranny of bureaucrats."<sup>284</sup> It all has a very modern ring.

The Government was forced to give way. Instead of detention during His Majesty's Pleasure, the Court would be given power to sentence to preventive detention for a maximum of ten years and a minimum of five, with discretion to choose any period between the maximum and minimum. Release would be at the discretion of the Advisory Board. Nevertheless, the English dual-track system was hailed as a landmark. The Prison Commissioners could rightly claim that it had no analogy in contemporary European law. It was the closest that those conservative nations would come to meeting the American clamor for truly indeterminate sentences.<sup>285</sup>

## V. PREVENTIVE DETENTION IN PRACTICE

The new system, hardly born, gave rise to three complex and controversial issues. One revolved around the way in which the courts exercised their discretion in choosing the appropriate periods of penal servitude and preventive detention. There were those who regarded the government's compromise between judicially fixed sentences and a proper indeterminate sentence as fatal to the scheme. The second issue concerned the types of habitual prisoners who should properly be made subject to the Act. Conflicting interpretations of the purpose of preventive detention had to be resolved. Third, a satisfactory regime for the new prison for preventive detainees on the Isle of Wight had to be devised. The general idea of disci-

284. 197 PARL. DEB., H.C. (4th ser.) 236-38 (1908). Later, Belloc yet again attacked modern thought for "confounding speculation and analogy with rigid proof and positive fact; and he denied that the complexities of that vast mystery were to be explained by a man of the type of Lombroso." 198 PARL. DEB., H.C. (4th ser.) 164, 166 (1908). See also 197 PARL. DEB., H.C. (4th ser.) 236 (1908) (Atherley-Jones); 197 PARL. DEB., H.C. (4th ser.) 464-65 (1908) (Pickersgill); *id.* at 507-08 (Rawlinson); H. BELLOC, *THE SERVILE STATE* (1913).

285. See COMMISSIONERS OF PRISONS & DIRECTORS OF CONVICT PRISONS, REPORT FOR THE YEAR 1908-09, 45 PARL. PAPERS 13 (1909); *Prevention of Crime Act, 1908*, 8 Edw. 7, ch. 59, Part II — Detention of Habitual Criminals. See also Sattelmacher, *Schutzhaft gewohnheitsmüssiger Verbrecher in England (Prevention of Crime Act, vom Dezember 1908)*, 30 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 635 (1910); E. RUGGLES-BRISE, PRISON REFORM AT HOME AND ABROAD 92-95, 162-63 (1924). The Congress of the International Penal and Penitentiary Commission at Washington in 1910 endorsed the principle of the indeterminate sentence. For a useful summary and discussion, see N. TEETERS, DELIBERATIONS OF THE INTERNATIONAL PENAL AND PENITENTIARY CONGRESSES, QUESTIONS AND ANSWERS — 1872-1935 at 137-44 (1949). For a review of the European codes, see Radzinowicz, *The Persistent Offender*, in *THE MODERN APPROACH TO CRIMINAL LAW* 162-73 (L. Radzinowicz & J.W.C. Turner eds. 1945). The movement to control habitual criminality on the Continent, with its remarkable affinities yet basic differences from the English experience, will be more fully examined in a later article.

pline "less rigorous . . . as regards hours, talking, recreative occupations and food"<sup>286</sup> now had to be translated into rules.

#### A. *Length of Sentences*

Sir Robert Anderson was not alone in expressing dismay that indeterminacy — "the very element which alone would have made [preventive detention] efficacious and therefore justifiable"<sup>287</sup> — had been eliminated. E. G. Clayton, the Chairman of the 'Advisory Board' set up to review cases for suitability for release, described as "absurd" a system whereby those who had not reformed after ten years would be released, and he objected strongly to judges fixing an exact maximum term for detention somewhere between five and ten years. The Act, in his opinion, had been reduced to merely "a faltering step forward in the right direction."<sup>288</sup> He was encouraged in that opinion by the resolution in favor of the indeterminate sentence passed by the International Prison Congress in 1910. Clayton hoped for long periods of detention combined with severe preceding terms of penal servitude. "A sentence of three years' penal servitude, which to a man well conducted in prison means two and a quarter years only," followed by detention for five years "was neither likely to be deterrent nor a long respite for the public."<sup>289</sup> And yet he found that within the first year most of the sentences imposed were for three years plus five years. He claimed they were given as if by rote, "without regard to the offence and the offender."<sup>290</sup> This was his caricature of the system:

The Court having taken into consideration the frequency and the enormity of your offence, and the necessity for restraining it with the utmost severity of punishment do order and adjudge that you be confined for a few years in a house larger, better-aired and warmer than your own, in company with others in as good health and spirits as yourself. You need do little work and you may have plentiful breakfast, dinner and supper. In passing this sentence the court hopes that

286. 189 PARL. DEB., H.C. (4th ser.) 1123-24 (1908).

287. Anderson, *The Prevention of Crime Act*, 65 THE NINETEENTH CENTURY & AFTER 241, 249 (1909). See also R. ANDERSON, *Criminals and The Crime: Some Facts and Suggestions* (1907); critical reviews by Hopkins, 124 THE LAW TIMES 133-34 (Dec. 7, 1907), "Lex", *Criminals and Crime*, 33 LAW MAGAZINE & REV. 129-40 (1908), and Anderson's reply, 33 LAW MAGAZINE & REV. 257-66 (1908). Compare Wills, *Criminal and Crime*, 62 THE NINETEENTH CENTURY & AFTER 879 (1907) (article supporting Anderson by Sir Alfred Wills, a former High Court Judge) with *Criminals and Crime; A Reply By an Ex-prisoner*, 63 THE NINETEENTH CENTURY & AFTER 80 (1908) (a reply by Montgomery).

288. Clayton, *The Working of the Prevention of Crime Act*, 68 THE NINETEENTH CENTURY & AFTER 307, 314 (1910).

289. *Id.* at 314.

290. *Id.*

your example will be a warning to others; and that evil-disposed persons will perceive from your suffering that the laws of their country are not to be broken with impunity.<sup>291</sup>

Gladstone, worried by this pattern of sentences, wrote to Lord Alverstone, the Lord Chief Justice, urging the judges to consider longer periods of preventive detention, irrespective of the offense or number of previous convictions. Instead of being set at the minimum of five years, sentences should be nearer the maximum of ten, so that men could be given a trial on license after serving three, four, or five years of detention. Gladstone looked to the Court of Appeal to give guidance along these lines to Quarter Sessions which tried the bulk of habitual criminals. In his reply, Lord Alverstone pointed out that because preventive detention had to follow a minimum of three years penal servitude, the total sentence was already very severe in many cases.<sup>292</sup> In *Franklin's* case in 1909, the Court of Appeal reduced a sentence of ten years' detention to five. It was not persuaded by the argument that Franklin could earn his release when reformed; the Lord Chief Justice said, "yet the fact remains that, if the man does not behave properly, he would be in prison for thirteen years,"<sup>293</sup> and this he regarded as excessive in the light of the circumstances of the case. The Judges were restrained from following the Home Office line by their adherence to classical notions of justice. And they continued to follow this more lenient policy. In 1913, out of 184 criminals sentenced under the Act, 148 received the minimum periods of penal servitude and preventive detention.<sup>294</sup>

### B. *What Sort of Prisoner?*

As soon as the Act came into force Chief Constables were reminded that it was "only for professional criminals or criminals who definitely give themselves up to a career of crime and pursue it, not merely from time to time under stress of special circumstances, but

291. *Id.* at 315. See also E. RUGGLES-BRISE, *THE ENGLISH PRISON SYSTEM* 56 (1921); "Lex", *Crimes and their Treatment*, 174 WESTMINSTER REV. 392-98 (1910); Gamon, *The Punishment of Crime and the Indeterminate Sentence*, 35 LAW MAGAZINE & REV. 191 (1910).

292. Prevention of Crime Act, 1908, in H.O. 45/10381/184160. *Letter from the Home Secretary to the Lord Chief Justice on the Subject of Sentences of Preventive Detention*, Dec. 4, 1909, and *Reply*, Jan. 12, 1910, *id.*

293. *R. v. Franklin*, 3 Crim. App. 48, 53 (1909).

294. See *R. v. Hamilton*, 9 Crim. App. 89 (1913); *R. v. Crowley*, 9 Crim. App. 198 (1913). See also *The Prevention of Crime Act, 1908*, 45 LAW J. 487 (1910); *Persistent Criminals*, 75 J.P. 30 (1911); COMMISSIONERS OF PRISONS & DIRECTORS OF CONVICT PRISONS, *REPORT FOR THE YEAR 1909-10*, 45 PARL. PAPERS 277, 284 (1910). For the Home Office views, see H.O. 144/957/A63571 and H.O. 144/935/A58244.

regularly and habitually as their ordinary mode of life.”<sup>295</sup> This was their guideline:

If a labourer, when out of work, is guilty of occasional minor larcenies, but does not make his living by crime, he ought not to be charged as a habitual criminal, even though the habit of petty dishonesty is persistent and has led to frequent convictions. The crimes must be of a serious character — such as burglary, housebreaking, coining, larceny from the person, robbery with violence, and the like; there must be evidence that the dishonesty is persistent, and there must be good reason to believe that such dishonesty is part of the prisoner’s ordinary mode of life, and is not due to drunkenness or destitution, or a mere aberration of intellect.<sup>296</sup>

Immediately upon his arrival at the Home Office in February 1910, Winston Churchill expressed his alarm as reports reached him of the sentences passed under the Act. He saw preventive detention not as a progressive measure but as potentially reactionary:

I have serious misgiving lest the institution of preventive detention should lead to a reversion to the ferocious sentences of the last generation. After all preventive detention is penal servitude in all essentials, but it soothes the consciences of judges and of the public and there is a very grave danger that the administration of the law should under softer names assume in fact a more severe character.<sup>297</sup>

When Churchill tested this against individual cases he found his apprehension fully confirmed. He was shocked by the disparities the system produced and he was determined to ensure that the Act was applied more fairly and uniformly to a much more restricted category of offenders. He was appalled to find that repetition was the criterion for imposing preventive detention irrespective of the gravity of the offenses committed. The information he called for showed long lists of offenders sentenced for such trivialities as stealing a pair of boots, or two shillings, or four dishes, or handkerchiefs, or fowls or slates or whatever. Generally speaking he distrusted indeterminate sentences of all sorts — even including Borstal — and perceived the danger of their use as an instrument of political oppression. And John Galsworthy, who influenced Winston Churchill greatly in his critical assessment of penal arrangements, described “the spirit of [the] Act . . . [as] a lazy spirit, which top-dresses the evil instead of attacking it at the root — The Act encourages us . . . to go on making recidivists because we have a handy means of dealing with them when made, . . . crowning all that is unsatisfactory in our prison

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295. *Circular on Prevention of Crime Act, 1908*, dated Sept. 6, 1909, (175,865/19), and *Draft Memorandum*, H.O. 45/10570.

296. *Id.*

297. H.O. 144/1002/134165.

system."<sup>298</sup> Churchill's strictures on the Judges, his battle against the Director of Public Prosecutions and against his own Home Office advisers makes fascinating reading. He was not content to show the inconsistencies and injustices, but evolved a new and stricter set of criteria of eligibility. The formula he put before his astonished officials would have ruled out preventive detention for eighty-eight and one-half percent of those who had been sentenced. It would have required not merely three previous convictions, but three sentences of penal servitude or of imprisonment of eighteen months or over, and the immediate conviction would have to be for a serious crime "such as burglary, housebreaking, coining, blackmail, robbery with violence [or] the like, excluding all forms of larceny unaccompanied with violence."<sup>299</sup> A new circular was issued setting out the guidelines:

Mere pilfering, unaccompanied by any serious aggravation, can never justify proceedings under the Act. The amount stolen or embezzled is of course no certain measure of the criminal's guilt; but where the amount is small and there is no violence or treachery, public feeling is shocked, and more harm than good is done, by the imposition of a long term of detention. On the other hand, violence conjoined with other crimes, skill in crime, the use of high class implements of crime, and the possession of fire-arms or other lethal weapons, will always count as important adverse factors. The general test should be — is the nature of the crime such as to indicate that the offender is not merely a nuisance but a serious danger to society? . . . In any event . . . the Act must not be resorted to as an easy and painless solution of the difficult problem of habitual crime, but must be regarded as an exceptional means of protecting society from the worst class of professional criminals.<sup>300</sup>

Churchill was accused of flying in the faces of judges and juries and attempting to "make the salutary provisions of the Act of 1908 a dead letter";<sup>301</sup> and if that was his goal, he was eminently success-

298. Letter to the Editor of *The Times* (London), July 23, 1910, at 4, col. 4.

299. See Correspondence from Churchill to Matthews, Oct. 30, 1910, and Matthews to Churchill, Nov. 7, 1910, H.O. 45/10589/184160/23; *Home Office (Supply) Report*, 19 PARL. DEB., H.C. (5th ser.) 1351-54 (1910). For a fuller discussion of Churchill's attitudes and actions see Radzinowicz and Hood, *supra* note 50, at 1340-49.

300. *Draft of Rules, Proposed to be Made by the Secretary of State for the Home Department Under the Prison Act, 1898, and the Prevention of Crime Act, 1908, with Explanatory Memorandum* (52), Feb. 17, 1911, see Pri. Com. 7/288. For criticisms of Churchill for stamping his own interpretation on the 1908 Act without seeking amending legislation, see *The Detention of Habitual Criminals*, 46 LAW J. 121 (1911); *The Court of Criminal Appeal and the Home Office*, 55 THE SOLICITORS' J. & WEEKLY REP. 399-400 (1911); *Mr. Churchill's Memorandum on Preventive Detention*, 106 THE SPECTATOR 277 (Feb. 25, 1911); 13 THE LAW TIMES 363 (Aug. 19, 1911); *The Morning Post*, (Feb. 18, 1911); *Question*, 24 PARL. DEB., H.C. (5th ser.) 39-40 (1911).

301. 130 THE LAW TIMES 330 (Feb. 4, 1911).

ful.<sup>302</sup> The whole movement toward indeterminate sentencing was put into abeyance. In 1910, 177 men had been sentenced to preventive detention; the following year there were fifty-three. The momentum was lost, and forever.

Yet Churchill was not impervious to the problem posed by the petty habitual offender. He had another scheme up his sleeve. For these offenders, he suggested suspending short sentences of under a month, so that sentences would cumulate and only be served when over a month in length, and then under "very severe correction." For "habitual drunkards, rogues and vagabonds" he wanted to allow courts to order a year's "training in a suitable institution" for anyone convicted three times within twelve months. Detention would last up to two years for six convictions within twenty-four months. Churchill did not say how these institutions would differ from prison, and he went out of office before these "Abatement of Imprisonment" proposals could make progress.<sup>303</sup> But he did have time to abolish police supervision for ex-convicts and to set up, in 1911, the Central Association for the Aid of Discharged Convicts.<sup>304</sup>

### C. *At Camp Hill*

The rules governing the regime of preventive detention were not published until 1911, the year in which the first of those sentenced finished their preliminary period of penal servitude and were ready to move on to Camp Hill, the newly built prison for preventive detainees. Parliament had endorsed preventive detention and judges had imposed it without any clear indication of what the "less rigorous regime" would entail. Churchill was clear in his own mind that whatever the rhetoric, "preventive detention was penal servitude in

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302. See the attack on Churchill, and Lloyd George, and Churchill's reply, in *The House of Commons*, 27 *PARL. DEB.*, H.C. (5th ser.) 238-59 (1911). See also *Leading Articles*, *The Times* (London), Jan. 11, 1911, at 9, col. 4; Jan. 27, 1911, at 11, col. 2; Letters from Sir Alfred (formerly Mr. Justice) Wills to the Editor of *The Times* (London), Aug. 2, 1910, at 3, col. 1; Jan. 16, 1911, at 9, col. 6; Jan. 30, 1911, at 4, col. 1; Letter from R.L.L. Kenyon, Deputy Chairman, Shropshire Quarter Sessions, to the Editor of *The Times* (London), Nov. 29, 1910, at 10, col. 3; Letter from W. Bramwell Booth (Salvation Army) to the Editor of *The Times* (London), Jan. 30, 1911, at 4, col. 1; 130 *THE LAW TIMES* 330 (Feb. 4, 1911); *Criminology and Common-Sense*, 105 *THE SPECTATOR* 1160 (Dec. 31, 1910); R. QUINTON, *THE MODERN PRISON CURRICULUM* 128-30 (1912).

303. See *Abatement of Imprisonment*, British Museum State. Papers, B.P. 2/4 (15).

304. The Association was established to coordinate efforts to give, for the first time, practical help to convicts on their discharge from prison. The First Annual Report of the Central Association, describing its work, was reproduced in the Report of the Commissioners of Prisons and Directors of Convict Prisons for the Year Ending 31 March, 1912, 43 *PARL. PAPERS* 461 (1911-12).

all its aspects.”<sup>305</sup> He did not believe that minor improvements could camouflage the basic nature of penal confinement:

These rules will no doubt effect a mitigation of the rigours of penal servitude, in extension to that now accorded to long-sentence division convicts. But the limitations which circumstances impose are rigid, and it ought not to be imagined by the courts or by the public, that a period of prolonged confinement amongst the worst of men within the walls of a prison, with a diet which must not be too stimulating, with toil which must be arduous and constant, under inflexible discipline and the brand of shame is not, whatever name it may be called by, a most serious addition to any other punishment. . . .<sup>306</sup>

And, of course, this was even more likely to be the case now that the measure was to be used, at least in principle, for “several hundred criminals of the most skillful and determined class . . . [who] must always be either within locked cells or under close supervision.”<sup>307</sup> It was a far cry from the penal asylum or the farm colony, the early models for the system.

Even so, from 1911 until the outbreak of World War I, the Prison Commissioners, prompted by incipient mutiny among the preventive detainees, endeavored to make the period of detention something different from the period of punishment which theoretically ended upon discharge from penal servitude. The rules specified three grades of preventive detainees: Ordinary, Special and Disciplinary (for those guilty of prison offenses). Those in the Ordinary and Special Grades would work at trades or agriculture and earn a small gratuity, part of which they could use to purchase items from a canteen. After eighteen months of good behavior a garden allotment could be cultivated and the products could be consumed or could be sold to the prison. The Ordinary Grade would be allowed to associate at meal times and, after a year, to play chess, draughts, and dominoes in the evenings. But it would take two years to earn entry to the Special Grade, where they could enjoy “relaxations of a literary and social character . . . and selected weekly papers” and tobacco.<sup>308</sup> “I am sorry that it will be two years after the opening of Camp Hill before an habitual enjoys a pipe” declared Sir Edward Troup.<sup>309</sup> Yet the Home Office was worried that any improvements, especially in the quality of the diet, “would cause some grumbling

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305. *The Old Shepherd of Dartmoor*, Statement by Mr. Churchill, Jan. 26, 1911, in H.O. 144/10086/106362/29.

306. *Id.*

307. *Id.* See also *Standing Orders for the Treatment of Persons Undergoing Preventive Detention*. H.O. 45/20330/19277.

308. *Id.*

309. Pri. Com. 7/288.

among poor tax payers who remain honest," and it thought it unfair that persistent and dangerous criminals should be better fed than "mere vagrants" in labor colonies.<sup>310</sup> This view proved to be far too cautious. While it is true that the press greeted the announcement of the Rules with headlines such as "Convicts to be paid for work, Social Clubs, Allotments for the best behaved, Gaol Canteens," it was a warm and ungrudging welcome for what the *Daily Express* called "a striking step in prison reform."<sup>311</sup>

The prisoners themselves were more than dissatisfied. There was considerable unrest "culminating in actual insubordination," refusal to obey orders, and talk of "claims" and "rights," but no violence.<sup>312</sup> After all, the detainees claimed, had not judges and recorders and governors and chaplains in the convict prisons told them that they would be in an "Institution" or a "Home" quite different from prison? According to the authorities at Camp Hill, "they somehow became possessed by the idea . . . they would have everything they desired" — except liberty — "and be allowed to act exactly as they pleased."<sup>313</sup> They were quickly disabused. The ringleaders were transferred to convict prisons and the others made to realize "that they are prisoners under strict discipline until, by good conduct, they rise to a certain grade."<sup>314</sup>

Although, as usual, the trouble was put down to the influence of "a few malcontents" and the "pernicious discontent" endemic among habituels, it had to be admitted that the only difference between Camp Hill and the convict prisons was that at Camp Hill prisoners could talk within reason and could "buy jam and sweets." Ruggles-Brise put the men's case forcefully to the new Home Secretary, Reginald McKenna:

The Directors are led to the opinion that the somewhat severe conditions of detention during the first six months of detention are calculated rather to foster the feeling of rebellion and anger than to inspire a mood of contrition and repentance, which would render any case a proper subject for conditional discharge under the safeguards which exist.

The men have been led to believe, from one source or another, that

310. See *Papers Relating to Preventive Detention Rules*, H.O. 45/20330/19277/20.

311. The *Daily Express* (London), Feb. 18, 1911. See The *Daily Chronicle*, *Daily Mail*, and *Daily News* of that date.

312. COMMISSIONERS OF PRISONS & DIRECTORS OF CONVICT PRISONS, REPORT FOR THE YEAR 1912-13, CMND. NO. 7092, 45 PARL. PAPERS 27, 27-28 (1914), and EXTRACTS FROM THE GOVERNORS', CHAPLAINS' AND ROMAN CATHOLIC PRIESTS' REPORTS, PREVENTIVE DETENTION AT CAMP HILL, *id.* at 291-98.

313. *Id.* at 133.

314. *Id.* at 139.



they had been sentenced to detention *simply*, and not to punishment; that the punishment had been expiated by the sentence of penal servitude: and that their liberty would only be restrained as a precaution against their committing new offences if at large. They ask, therefore, so far respectfully, and with some reason, that the conditions of free life may be extended to them short of liberty; and the two conditions on which they set the greatest value are naturally tobacco and newspapers.<sup>315</sup>

The indulgences were granted, and an intermediate or 'parole stage' was introduced where the conditions in the 'parole-lines' (cabins in the prison grounds) were to approximate those of free life as closely as possible. The Commissioners believed they had resuscitated preventive detention as a reformative as well as a deterrent and incapacitating sentence.

By the outbreak of the Great War in 1914, the regime of Camp Hill was receiving high praise as a progressive experiment in penal discipline. Hans Von Hentig, the leading German criminologist, came to visit, and he published a vivid account in the *Revue Penale Suisse*.<sup>316</sup> Camp Hill was described in glowing terms by *The Times*: the "individual cells are roomy and each has a window to the open air," the dining hall with "white tablecloths, clean white crockery and excellent cutlery," the standard of food ("[n]ot many British artisans fare better"), the luxury of tobacco, the 'comforts' of being able to spend some pence a week on sweets and cakes.<sup>317</sup>

The Commissioners were convinced that their new enterprise could not only be rescued from Churchill's wrecking tactics, but actually expanded. Experience would show, they insisted, that the five years' standard detention was useless, if true reformation was to be achieved. The better the conditions could be made, the more "we shall be in a . . . position to insist upon longer terms," said Ruggles-Brise.<sup>318</sup> And did not the release of eight men, within the first two years that the prison had been open, prove that the authorities would not abuse the indeterminate element in the sentence?<sup>319</sup> The White-

315. See The Governor's Report; Letter from Ruggles-Brise to Secretary of State; Comment by Troup, in Pri. Com. 7/288. See also H.O. 45/20330/197277/24.

316. See von Hentig, *Ein Besuch in Camp Hill, der englischen Verwahranstalt für gewohnheitsmässige Verbrecher*, 26 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT 403 (1913).

317. See Camp Hill Prison, *The Times* (London), Feb. 16, 1914, at 3, col. 4; Leading article, *The Times* (London), Feb. 16, 1914, at 9, col. 3.

318. Pri. Com. 7/288.

319. See COMMISSIONERS OF PRISONS & DIRECTORS OF CONVICT PRISONS, REPORT FOR 1913-14, CMND. NO. 7602, 45 PARL. PAPERS 127 (1916) (Governor of Camp Hill's Report). By 1914, 37 had been discharged, of whom 26 were reported satisfactory. COMMISSIONERS OF PRISONS & DIRECTORS OF CONVICT PRISONS, REPORT FOR 1914-15, CMND. NO. 7837, 33 PARL. PAPERS 20 (1914-16).

hall Positivists were not going to give up without a struggle.

## VI. EPILOGUE: FAILURE TO EVOLVE A VIABLE SYSTEM

The subsequent history of habitual offender legislation in England and Wales has been often told. It is a story of continuing failure to resolve the problems of definition and its legislative formulation, of continuing failure to convince the Courts to make use of their powers, and of continuing failure to devise a form of detention significantly different from ordinary imprisonment.

Immediately after the Great War, spirited attempts were made to revive preventive detention, that "invaluable instrument for social defence", as Sir Evelyn Ruggles-Brise still described it.<sup>320</sup> He painted an extraordinarily optimistic picture of the rehabilitative impact of detention at Camp Hill, a picture which was whole-heartedly endorsed even by those arch-critics of the penal system, Hobhouse and Brockway, in their trenchant report, *English Prisons Today*.<sup>321</sup> High rates of success were claimed from shaky statistical evidence. The Lord Chief Justice, Lord Reading, joined the Prison Commissioners in urging the abolition of the preliminary period of penal servitude, so that all long term prisoners could benefit from what Hobhouse and Brockway envisaged as "a new and better epoch in the slowly moving development of penal reform in this country."<sup>322</sup>

But the dual-track system was patently breaking down. Between 1922 and 1928 only thirty-one criminals, on average, were sentenced to preventive detention each year and this, coupled with the general sentencing policy of reducing the numbers sent to lengthy periods of penal servitude, led the Prison Commissioners to conclude that "in the face of this . . . the increased protection of the public effected . . . [by] Preventive Detention is almost negligible."<sup>323</sup> At the 1925 International Penitentiary Congress in London, the Home Secretary, Sir William Joynson-Hicks (afterward Viscount Brentford) and the Lord Chancellor, Lord Cave, admitted that the 1908 policy was

320. E. RUGGLES-BRISE, *THE ENGLISH PRISON SYSTEM* 49, 58 (1921). See Letter from Lord Chief Justice Reading and Memorandum prepared by Ruggles-Brise in *Prevention of Crime Act, Rules etc.*, H.O. 45/20331/197277.

321. See *ENGLISH PRISONS TODAY* 459-62 (S. Hobhouse & F. Brockway eds. 1922).

322. *Id.* at 465. Cf. *COMMISSIONERS OF PRISONS & THE DIRECTORS OF CONVICT PRISONS, REPORT FOR THE YEAR ENDED 31ST MARCH 1918*, CMND. NO. 9174, at 14-15 (1918), 12 *PARL. PAPERS* 589, 600-01 (1918) (hope for renewed and more extended application of the indeterminate sentence).

323. See *COMMISSIONERS OF PRISONS & DIRECTORS OF CONVICT PRISONS, REPORT FOR THE YEAR 1928*, CMND. NO. 3607, 17 *PARL. PAPERS* 279, 293 (1929-30).

bankrupt.<sup>324</sup> There could be no appeal against this verdict. To Enrico Ferri, the head of the positivist school, at that time at the height of his influence, the explanation was simple: it was the vindication of one of the major tenets of his school that there was no justification for a dual-track system and that a straightforward indeterminate sentence was the only logical answer.<sup>325</sup>

A new English approach originated in the radical shift in penal ideas and practices inspired by the eminent Prison Commissioner, Sir Alexander Paterson. Like a latter-day Matthew Davenport Hill, Paterson justified indeterminate sentences by his belief that penal institutions could be made theaters of reformation. For him "the problem of recidivism is small, diminishing, and not incapable of solution."<sup>326</sup> It merely required treating the convicted recidivist "on the merits and demerits not of the specific offence but of his career and prospects as a whole."<sup>327</sup> What was wrong with Preventive Detention was not the length of the sentence but its manifest failure to achieve a reformatory effect. Paterson was simply not willing to regard any men as beyond reclaim.<sup>328</sup> And this belief was reflected in the thinking of the influential Departmental Committee, set up in 1932 to inquire into the operation of preventive detention.

The *Report of the Committee on Persistent Offenders* stands as a beacon of the penitentiary optimism of the thirties. Its terms of reference were narrower than those of Herbert Gladstone's Committee of 1895, but its analysis of the problem of habitual criminals was far more thorough and penetrating, and its recommendations for legislation were far more precise. The Committee put the blame for the failure of the 1908 Act squarely on the dual track system. It claimed that the total length of the sentence was excessive; that the preliminary period of penal servitude ensured that those whose last offense did not warrant penal servitude escaped detention, and as penal servitude was declining in use (1182 sentenced in 1908 and only 483 in 1928) fewer were eligible; and lastly that it created the impression that the offender was being punished twice over for the same offense. All this, the Committee said, conspired to "limit the operation of the Act more closely than was contemplated when the Act was passed in

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324. See Joynton-Hicks, *Opening Address*, 1a ACTES DU CONGRÈS PENITENTIAIRE INTERNATIONAL DE LONDRES, AOÛT 1925 at 3, 13 (1927); Cave, *The Indeterminate Sentence*, 1a ACTES DU CONGRÈS PENITENTIAIRE INTERNATIONAL DE LONDRES, AOÛT 1925 at 410, 412-13 (1927).

325. See E. FERRI, *STUDI SULLA CRIMINALITÀ* 673 (2d ed. 1926).

326. PATERSON ON PRISONS 55, 55-66 (S.K. Ruck ed. 1951).

327. *Id.* at 61.

328. See *id.* at 55-66.

1908.”<sup>329</sup> The fault could not be laid entirely, nor even largely, at the door of the judiciary. Discretion to charge a recidivist as an habitual offender lay first with the police and second with the Director of Public Prosecutions. The police sent only sixty cases each year to the Director, and he in his turn refused to prosecute thirty percent of them. This left only forty cases before the courts. And there, again, a third were weeded out. Despite these “cumbrous safeguards,” as Lionel Fox, then Secretary of the Prison Commission, called them,<sup>330</sup> those who did end up in detention were not the small band of the most professional or dangerous criminals that Herbert Gladstone and Winston Churchill had so clearly in mind when the law was enacted and put into effect. The analysis of the Home Office Chief Clerk, H.B. Simpson, in 1913, had proved to be correct: the “more dangerous and enterprising criminals usually escape the net, and Preventive Detention convicts are mostly thieves of a minor kind who have been thieves from childhood and never go far in crime.”<sup>331</sup> As Norval Morris was later to discover, only seven of the 325 criminals committed between 1928 and 1945 were sentenced for violence, threat of violence, or danger to the person.<sup>332</sup> They were, in the words of the Committee:

with few exceptions . . . men with little mental capacity or strength of character. Some of them may be skilled in the acts of forgery or false pretences, many are cunning, and most of them have strong belief in their own cleverness, but generally they are of the type whose frequent convictions testify as much to their clumsiness as to their persistence in crime.<sup>333</sup>

The Committee found the regime of Camp Hill more comfortable and less irksome than penal servitude, but they condemned it as un-reformative and sterile; “It is an empty life. There is little to stimulate interest or mental activity.”<sup>334</sup> And the results provided the most dismal news. Almost all the men were reconvicted within a

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329. DEPARTMENTAL COMMITTEE ON PERSISTENT OFFENDERS, REPORT 1932, CMND. NO. 4090, 12 PARL. PAPERS 553, 618 (1931-32).

330. L. FOX, *THE MODERN ENGLISH PRISON* 167, 174 (1934).

331. H.O. 45/20331/197277/32.

332. N. MORRIS, *THE HABITUAL CRIMINAL* 63-65 (1951). Also see Mannheim’s study of recidivists, in H. MANNHEIM, *SOCIAL ASPECTS OF CRIME IN ENGLAND BETWEEN THE WARS* 375 (1940), in which he concludes: “[P]articularly impressive is the fact that in so many cases an accumulation of long terms of penal servitude and preventive detention apparently had not the slightest effect as a deterrent.”

333. DEPARTMENTAL COMMITTEE ON PERSISTENT OFFENDERS, *supra* note 329, at 611.

334. *Id.* at 612-13. See also H. MANNHEIM, *THE DILEMMA OF PENAL REFORM* 72 (1939). Writing about the preventive detention prison at Portsmouth (to which the detainees had been moved when Camp Hill became a Borstal in 1932), he concluded that the English Prison Commissioners have “certainly succeeded in making their own Preventive Detention establishment more comfortable than a prison without converting it into a Ritz Hotel.” *Id.*

short period after their discharge. Faced with such failure, the indeterminate element in the sentence, with its selective release by the Advisory Committee, had given way to a rigid and "exactly predetermined" sentence with release earned after three quarters had been served.<sup>335</sup>

Not surprisingly, the Departmental Committee recommended that detention be an alternative, and not supplementary to any other punitive sentence. They put forward two schemes, one of 'medium-term' and the other of 'prolonged' detention. The first was to be for those between twenty-one and thirty years of age, to fill an "illogical gap" between Borstal training for the young and preventive detention for those who had proved to be virtually hopeless.<sup>336</sup> The detention would last between two and four years and would be "remedial and custodial rather than penal."<sup>337</sup> It owed its philosophy more to the idea of training than to incapacitation. The second, prolonged detention, would be reserved either for those whose offenses were of a very serious nature or for those who had failed to respond to the shorter period of detention. Those eligible were defined first and particularly as "professional criminals who deliberately make a living by preying on the public."<sup>338</sup> The 'danger' they posed lay not merely in the offenses they committed "but also in the contamination of other — particularly younger — men."<sup>339</sup> But the net was cast much wider to include "those who practice thefts or frauds on a comparatively small scale — the victims usually being poor people on whom the loss of a small sum may inflict a more serious injury than the loss of valuable property on persons of means."<sup>340</sup> Also to be included were "certain sexual offenders . . . particularly those who commit repeated offences against children or young people and those who corrupt boys."<sup>341</sup> The chief objects of detention were to be "custodial and remedial." To be eligible an offender would have to have three convictions since the age of sixteen, and proof would have to be given to the judge (not the jury) of "such criminal habits or mode of life that is expedient for the protection of the public"<sup>342</sup> to order "prolonged detention" for a period of between five and ten

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335. N. MORRIS, THE HABITUAL CRIMINAL, *supra* note 332, at 68-69.

336. See DEPARTMENTAL COMMITTEE ON PERSISTENT OFFENDERS, *supra* note 329, at 571.

337. *Id.* at 572.

338. *Id.* at 574.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* at 576.

years. It was to be a partly indeterminate sentence subject to eligibility for release on license after one third of the sentence had been served.<sup>343</sup>

With some minor modifications, these proposals were incorporated into the Criminal Justice Bill of 1938, which was abandoned at the outbreak of war. Ten years later they reappeared, as "Corrective Training and Preventive Detention," in the Criminal Justice Act of 1948. The definition of those eligible for preventive detention was more constricted than that recommended in 1932, but in practice it still encompassed a large body of offenders. The offender had to be at least thirty years old, convicted on indictment of an offense punishable with imprisonment for two years or more (which included all thefts), and previously convicted at least three times since the age of seventeen, and had to have served at least two sentences of either Borstal training, imprisonment, or corrective training. The court had to be satisfied "that it is expedient for the protection of the public that he should be detained in custody for a substantial time. . . ." <sup>344</sup> The court was to fix a term of detention of not less than five years nor more than fourteen. If released before the expiration of the sentence, the offender would be subject to supervision.<sup>345</sup>

It is curious to note that while England was abandoning its dual-track system, many of the Penal Codes of Europe turned their backs on their earlier attempts to introduce an indeterminate sentence and embraced the dual-track approach. The terms coined on the continent to describe 'Preventive Detention' were in France *Mesures de Sûreté*, in Italy *Misure di Sicurezza*, and in Germany *Sicherungs-massregeln* — terms which defy translation into English.

Within twenty years both corrective training and the new-style preventive detention proved to be failures.<sup>346</sup> In 1950 as many as 1,198 men received corrective training, in 1965 only 151. The courts soon rebelled against sentencing men to long terms for trivial offenses when the form of their so-called training seemed to differ so little from that received by other long term prisoners. The realization that the 'training' which justified the longer sentences did not produce lower rates of reconviction turned optimism into pessimism. Inevitably, the prisoners resented such a blatant injustice.

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343. *Id.*

344. Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 58, § 21.

345. *Id.*

346. It is interesting to note that the Canadian legislation of 1947 which was influenced by the English 1908 Act has collapsed for much the same reasons. See MacDonald, *A Critique of Habitual Criminal Legislation in Canada and England*, 4 U. BRIT. COL. L. REV. 87 (1969).

The same fate befell preventive detention. In 1956, 1,384 men were eligible to be sentenced to preventive detention, yet only 178, about one in eight, were caught in the net. Despite the abolition of the dual-track, and the new emphasis on a more positive regime, the courts could not be persuaded to make wide use of their new powers. And whenever they were tempted to do so, the Court of Appeal stood in their way: by 1961 it was reversing a third of all appealed sentences of preventive detention. In 1962 the Lord Chief Justice, Lord Parker, added an effective nail to the coffin in directing that detention should only be given as a last resort. By 1965 only 42 men were sentenced to preventive detention — a number no higher than those committed under the 1908 Act.

The system was finally damned by yet another inquiry. This time it was carried out by the Home Secretary's Advisory Council on the Treatment of Offenders. Their thorough and influential report, *Preventive Detention*, found a host of faults.<sup>347</sup> It was fortified by the empirical studies carried out for the Home Office Research Unit by Dr. Hammond, by Dr. West at Cambridge, and by Dr. Taylor in the prison service. They all showed the same pattern. The majority of men sentenced were neither professional nor dangerous; they were persistent but their crimes were in the main petty. Dr. West classified half of them as "passive inadequate deviants."<sup>348</sup> They were precisely those nuisances who Herbert Gladstone half a century earlier had been at pains to see excluded from preventive detention. The legislation has been commonly criticized for 'catching the wrong fish' so to speak, but that misconceives what happened. The plain fact is that the entire philosophy and legislative prescription of the new single-track system, as laid down by the Persistent Offenders Committee in 1932, inevitably led to this result. As Sir Lionel Fox said with approval, there was "no longer any attempt to distinguish between the 'a-social,' the nuisances and inadequates, and the 'anti-social.'"<sup>349</sup> Whereas the memoranda circulated in 1908 and 1911 had made it clear that preventive detention was for the professional and dangerous and not for the nuisances, the memorandum which went out in 1948 "imposed no such limitation on the discretion of

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347. GREAT BRITAIN, ADVISORY COUNCIL ON THE TREATMENT OF OFFENDERS REPORT — PREVENTIVE DETENTION (1963).

348. D. WEST, THE HABITUAL PRISONER 31-32 (1963). See also W. HAMMOND & E. CHAYEN, PERSISTENT CRIMINALS (1963); Taylor, *The Habitual Criminal: Observations on Some of the Characteristics of Men Sentenced to Preventive Detention*, 1 BRIT. J. CRIMINOLOGY 1, 21-36 (1960).

349. L. FOX, THE ENGLISH PRISON AND BORSTAL SYSTEM 297, 299 (1952).

the courts.”<sup>350</sup> Like the 1908 legislation, the 1948 Act had made preventive detention an addition to, not a substitute for, the already extensive powers of the courts to sentence serious offenders to long periods of imprisonment. As a consequence, the courts in cases of serious or professional crime preferred to use long prison sentences rather than the cumbersome system of preventive detention.

The hopes of the thirties and the immediate post-war years — that a lengthened period of custody could be combined with a positive program of rehabilitation — were in shreds. On examining the evidence, the Advisory Council concluded that the imposition of preventive detention was too arbitrary, too severe, and too ineffective a penalty for the type of men subjected to it. The difference between getting preventive detention and being a ‘near-miss’ was the difference between seven years and perhaps two years or even probation. The regime itself, which was supposed to provide both conditions superior to ordinary imprisonment and some positive training, was found to be sterile and institutionalizing. The system whereby some men could be selected for discharge to a third-stage ‘hostel’ after two thirds of the sentence had been served, rather than serving five-sixths, was “neither understood or accepted by prisoners.”<sup>351</sup> Only a minority of prisoners were chosen, and the Home Office research showed that the men selected by the Board as “better risks” did not in fact fare any better than those rejected.<sup>352</sup> To cap it all, the research of Dr. Hammond revealed a reconviction rate of 73 per cent within three years of release.<sup>353</sup> Those sentenced to detention did just as badly as those who were eligible but received a shorter sentence. It is of course true that criminals were kept out of circulation longer, but by the late sixties there were no longer any voices left to claim that it was justifiable to incarcerate the petty habitual offender — now socially defined as “inadequates” — for so long for so little. As Charlie Smith, the hero of Tony Parker’s *The Unknown Citizen*, was to say:

The total sentences of imprisonment so far given to me amount to twenty-six years. This exceeds what I might have expected to receive had I been a traitor to my country, a dangerous gangster, or a murderer.

‘But,’ your Lordship might say — and in fact has said — ‘society must be protected.’ Yet the sum involved in all my thefts to date is £178, and to be sentenced to twenty-six years’ imprisonment for this is

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350. *Id.*

351. ADVISORY COUNCIL ON THE TREATMENT OF OFFENDERS, *supra* note 347, at 25-26.

352. *Id.*

353. W. HAMMOND & E. CHAYEN, *supra* note 348, at 83.



out of proportion to what I would probably have received if my deprecations had been committed all at once and on a far greater scale.

I am dealt with, my Lord, as though I were one of the toughest and most dangerous criminals in the land; for crimes that are not much more than nuisances, that I am utterly inept at committing, and which bring me benefits in no way comparable with those popularly supposed to be gained from a life of crime. Not for me any of the spuriously glamorous rewards: no planning or excitement of carrying out major coups, no extravagant living, penthouses, gambling, big cars, and lovely girls. Only the loneliness of furnished rooms, meaningless wandering in and out of pubs, and patent medicines for the pains in my stomach.<sup>354</sup>

And, for good measure, Smith added that the cost of confining him alone had been £9,200 — an enormous sum at that time.<sup>355</sup>

It might have seemed logical to do away with the whole apparatus of special sentences for habituals, but the Advisory Council tried yet another formula. Believing it justifiable to impose heavier penalties on persistent offenders, the Council recommended a scheme to cast the net even wider. What was wrong with preventive detention, it claimed, was “that it creates an unduly rigid and largely artificial distinction between preventive detainees and other persistent offenders”: the minimum, which in practice was seven years, was too long.<sup>356</sup> The solution was to fill the gap between “a comparatively short sentence of imprisonment and a substantial term of preventive detention.”<sup>357</sup> This could be done by specifying in a new statute that persistent offenders should receive longer sentences. For those convicted on indictment of an offense punishable by a term of five years or more, but less than ten years, the sentence could be extended up to ten years where the court was satisfied it was desirable, “having regard to his antecedents and to the need to protect the public.”<sup>358</sup>

The Criminal Justice Act of 1967 introduced this new “extended sentence,” adding the power to extend a sentence up to five years where the maximum for the offense was less than five years. The object, of course, was to maintain closer relationship between the period of detention and the seriousness of the offense committed. Even so, persistent offending was again supposed to be defined in the statute “in such a way as to apply only to delinquents whose character and record of offences are such as to put it beyond all doubt that they are a real menace to society,” and to exclude the petty criminal

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354. T. PARKER, *THE UNKNOWN CITIZEN* 154-55 (1963).

355. *Id.*

356. ADVISORY COUNCIL ON THE TREATMENT OF OFFENDERS, *supra* note 347, at 24.

357. *Id.* at 25.

358. *Id.* at 24.

who commits a series of lesser offenses.<sup>359</sup> And although the conditions of eligibility for an extended sentence were made more stringent (by insisting that the offender must already have served three substantial periods of imprisonment), they were such that hardly any of those sentenced under the 1948 Act would have been excluded. In any event, the Act did not matter, for the power to extend sentences has been used even less frequently than preventive detention. Although it is still on the statute book, the number sentenced is so small that they are not even mentioned in official criminal statistics. Habitual offender legislation in England is all but dead.

The upsurge of crime in post-war Britain brought once more to the fore a growing concern with professional criminality, criminality carried out by small, closely-knit, organized teams for large stakes. The Great Train Robbery of 1963 still stands out as the archetype and symbol, but it was followed by a spate of daring and successful bank robberies and bullion snatches. These 'professionals,' as they are now called in sociological as well as popular literature, have never been considered to be a large group.<sup>360</sup> But their crimes have been on such a scale of depredation that the courts have responded with a policy of exceptionally long deterrent sentences — thirty years for the train robbers; more recently eighteen for those involved in the Wembley bank raids. These sentences are far above the maxima available under both preventive detention and the extended sentence. Once again it has been shown that when crimes are serious, the sentencing powers of the courts are sufficient without recourse to special legislation for the professional habitual criminal.<sup>361</sup>

While few in England now champion extra lengthy sentences for the 'inadequate' persistent recidivist or even for the daring professionals, the spectre of so-called 'dangerous offenders' — violent men who may remain unpredictably violent when the sentence for their latest crime expires — remains to haunt the traditional system of determinate sentencing. Two forms of indefinite detention already exist in English law: life imprisonment and detention under Section

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359. HOME OFFICE, *THE ADULT OFFENDER*, CMND. No. 2852, at paragraph 15 (1965).

360. For a general work on professional criminality, see J. MACK, *THE CRIME INDUSTRY* (1975). For a study of changing patterns of robbery, see *McClintock & Gibson, Robbery in London* in 14 *CAMBRIDGE STUDIES IN CRIMINOLOGY* (1961). For an historical and contemporary account see Radzinowicz, *The Dangerous Offender*, 41 *POLICE J.* 411 (1968).

361. The Royal Commission on Criminal Procedure, which is currently sitting — Sir Cyril Phillips is chairman — is not concerned with professional criminals as such, but it has had presented to it a lot of evidence from the Commissioner, and former Commissioner, of the Metropolitan Police, and others suggesting that the rules of evidence and the powers of the police are restricted or bent too far in the direction of protecting professional criminals when brought to trial.

65 of the Mental Health Act of 1959.<sup>362</sup> Life imprisonment is the maximum penalty for a wide variety of offenses, including rape, arson, causing grievous bodily harm with intent, and aggravated burglary. Over the past decade, an average of twenty-four prisoners each year have received a life sentence on the ground that they were too dangerous to be released at some foreseeable date. The power to order mentally disordered offenders detained until the Home Secretary decides they are safe to be released is more widely used. About one hundred and twenty offenders are detained each year, a considerable number when compared with the two hundred prisoners who receive definite sentences of seven years or more. Both these types of indeterminate detention have been subjected to extensive criticism on the ground that the time prisoners are detained greatly exceeds what the seriousness of their crimes warrants.<sup>363</sup> And yet the urge to distill from the mass of criminals a distinct group of dangerous persons, and to devise for them distinctive penal measures, still endures, and has in recent years received the imprimatur of three committees of high standing.

In Scotland, the Scottish Council on Crime recommended the introduction of a 'public protection order,' a euphemism for an indeterminate sentence, for offenders with past histories of violence where there was, according to the evidence of two psychiatrists, a clinical psychologist, and a social worker "the probability that he will inflict serious and irremediable personal injury in the future."<sup>364</sup> The sentence was to be for a minimum of two years, and would be reviewed every two years by the Scottish Parole Board, with an appeal to the court if further detention was recommended. The onus would be upon the court to show that a positive case had been made for further confinement to protect the public. The Council also advocated conditions of confinement that would reflect the fact that habituels were held merely for preventive purposes.<sup>365</sup>

In England, following the multiple poisonings carried out by Graham Young after his release on license from Broadmoor Special Hospital, the Butler Committee concluded that a small number of dangerous men in the prisons were not acceptable for treatment in

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362. Mental Health Act, 1959, 7 & 8 Eliz. 2, c. 72, § 65 (governs situations in which courts can restrict discharge of patients when necessary to protect the public).

363. See LIFE SENTENCE PRISONERS — HOME OFFICE RESEARCH STUDY No. 51 (D. Smith ed. 1979); HOME OFFICE, SENTENCES OF IMPRISONMENT: A REVIEW OF MAXIMUM PENALTIES 98-105 (1978). See generally L. GOSTIN, 2 A HUMAN CONDITION 60-106 (1977).

364. SCOTTISH COUNCIL ON CRIME, SCOTTISH HOME AND HEALTH DEPT., CRIME AND THE PREVENTION OF CRIME ch. 4, § 2, ¶ 122 at 60 (1975).

365. *Id.* at 60.

hospital but had to be released under the present law at the end of their determinate sentence. For these prisoners, the Committee recommended a 'reviewable sentence' — yet again a form of indeterminate sentence reviewable by the Parole Board every two years, but without the additional safeguards recommended in Scotland. On the other hand, the sentencing requirements were more rigidly defined in that the offender would first have to be convicted of one of a list of offenses carrying a maximum sentence of life imprisonment, or would have to have a previous conviction for such an offense and a current conviction for one of a list of offenses of violence or threat of violence. Once again, psychiatric testimony was required. Dangerous behavior was defined as "a substantial probability of his committing a further offence involving grave harm to another person," and the harm included lasting psychological as well as physical injury.<sup>366</sup>

And quite recently, in 1978, the Home Secretary's Advisory Council recommended a restructuring of the system of maximum penalties. The new maxima would be set at a point which encompasses the sentences presently imposed on ninety per cent of the criminals sent to prison. Thus, as ninety percent of rapists get seven years or less, and ninety percent of burglars get three years or less, the recommended maxima were seven and three years respectively instead of the current maxima of life imprisonment and fourteen years. But the Council left a loophole for those whose offenses involve 'serious harm'. These offenders could be sentenced to an 'exceptional sentence,' which in practice meant any determinate sentence chosen by the judge — and one which would not be subject to any statutory maximum. The length actually served would be determined in practice by the Parole Board. The idea of 'serious harm' is akin to the idea of 'dangerousness,' for it was defined as including

serious physical injury; serious psychological effects of the kind which impair a person's enjoyment of life or capacity for functioning normally (for example, some sexual offences); exceptional personal hardship (for example, financial loss which markedly affects a person's way of life); and damage to the security of the State (for example, as a result of espionage), or to the general fabric of society.<sup>367</sup>

As we have pointed out elsewhere,<sup>368</sup> the Council's notion of 'serious harm' was an even more elastic concept than that proposed by

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366. REPORT OF THE COMMITTEE ON MENTALLY ABNORMAL OFFENDERS, CMND. NO. 6244, at 71-73, 271-72, 303-04 (1975).

367. HOME OFFICE, *supra* note 363, at 89-97.

368. See Radzinowicz & Hood, *An English Attempt to Reshape the Sentencing Structure*, 78 COLUM. L. REV. 1145, 1145-58 (1978).

Lord Butler's Committee. It embraced not only the violent offenders, but also the more serious property offenders; it expanded the scope of judicial discretion, and it offered no substantial safeguards in the parole procedures nor any ameliorations in the conditions of confinement.<sup>369</sup>

All three of these proposals have been subjected to the well worn criticisms of lack of precision in definition and prognosis, and of the potential for abuse inherent in the indeterminate sentence and in all forms of executive discretion concerning the lot of prisoners. As yet there are no signs that a dangerous offender statute will be adopted in Great Britain. In these circumstances, the report of a distinguished Committee on Dangerousness and Criminal Justice, chaired by Mrs. Jean Floud, is awaited with particular interest.

It is a long, a very long story: nearly one hundred and fifty years of endeavor. And it cannot be said that there was a lack of imagination, ingenuity, experimentation, or perseverance. It cannot be said that the debate and the search were confined to one political stance or wing, for it was joined by Conservatives, Liberals, Socialists, philanthropists, moralists, doctors, social inquirers, and prison administrators. Six major statutes have been passed, and none of them on the spur of the moment. On the contrary, each was preceded by informed and reflective discussion and inquiry. Nor can it be said that these things were done in an insular way, merely drawing upon English tradition and experience. Indeed, a watchful eye was kept on similar endeavors abroad. Neither were each of these changes abandoned abruptly. The causes of failure were identified and dissected in order to make a fresh and better start.

And yet after 150 years we are back to the neo-classical approach. Persistence is recognized as one factor to be taken into account with others in the exercise of judicial discretion. It is true that as a general rule, criminals with previous convictions receive harsher sentences than those without. But it is taken as axiomatic that criminals should not thereby receive a sentence out of proportion to the gravity of their latest offense. There is a fundamental difference between this policy and a policy of punishing people for the 'offense of being persistent,' and a fundamental difference between it and deliberate, systematic, and inflexible policies of incapacitation. There remains, in particular, a strong aversion to the indeterminate sentence. The attempt to distill from the mass of persistent offenders the so-called 'dangerous' criminals has fared no better. And today, more

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369. *Id.*

than ever, that attempt is regarded with suspicion — not to say with enmity — because it is identified with oppressive and arbitrary systems of criminal justice. When one reflects over this checkered history, one is struck by the fact that it was the progressives and social activists and social engineers who have championed preventive control of habitual criminality, whereas its staunchest opponents have been those who have remained true to the liberal tradition of protecting the rights of citizens against extensive and arbitrarily imposed powers of the executive arm of government.