PREVENTIVE DETENTION IN NEW ZEALAND*

This article deals with the subject of the sentence of preventive detention in New Zealand, which is now limited in its application to sexual recidivists. The sentence is an indefinite one, reviewable annually after an initial seven years by the prisons parole board. Its purpose is to put out of circulation criminals who are considered unreformable. New Zealand penal reform in the last few years has concentrated mainly on the novice offender and the juvenile delinquent, with schemes like periodic detention and the Youth Aid Scheme aimed to prevent a return to criminal ways. It is thus an interesting comparison to observe the penal system as it operates vis-a-vis one type of "old lag" — against the criminal at the other end of the road.

For the material of this study I have relied largely on the Justice Department files relating to the fifteen individuals serving sentences of preventive detention and the one serving a similar sentence under the old habitual criminal legislation as at 1st May 1971. The conclusions I have drawn are entirely my own, based on a reading and interpretation of the files. To preserve the anonymity of the subjects of this paper I have given them the letters A to P in alphabetical order of their names.

I am most grateful to the staff of the Research Division of the Justice Department for the assistance they have afforded me.

HISTORY OF PREVENTIVE DETENTION

The sentence of preventive detention today is a mere shadow of what it once was. Its antecedents, bearing different names, but cast in the same mould and backed by the same philosophy, went through similar mutations to those through which preventive detention can be seen to be going today. There is a cycle of decay for such legislation, which exists not only in New Zealand,[1] which is one of enthusiastic use, followed by stagnation and finally a lingering death, perhaps lengthened by tinkering reforms or judicial pronouncements, which show more of the deficiencies of the sentence than of the possibility of reform.[2]

In New Zealand we have almost gone through two cycles, although the second is not quite finished yet. In the United Kingdom the legislature had sense enough not to whip a dying horse, and the sentence was abolished, leaving only a token memorial.[3] The first period in New Zealand began in 1905 with the Crimes Amendment

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1. See *Preventive Detention, Report of the Advisory Council on the Treatment of Offenders.* (London: H.M.S.O., 1963.)
2. E.g. *R. v. Sedgwick* 34 Cr. App. R. 156.
3. See Criminal Justice Act 1967 (U.K.) s. 37.

Act 1906. It lasted until 1954 when the Criminal Justice Act came into force. Our second period began in 1954, and from 1967 has suffered near-extinction since the category of offenders liable to the penalty has been restricted to the recidivist section of a low-recidivating group, the *persistent* sexual offender. In 1969 sexual offenders made up 3.6% of all convicted offenders.[4] Recidivism to sexual offences is lower than for property offences.[5] A survey of the history of the legislation will give some idea of why the sentence has been in effect relegated to insignificance.

The early legislation provided for special methods of treatment for persons who were declared habitual criminals or habitual offenders. In broad outline the legislation was similar to that existing from 1954 to 1967. But over the period up to the Criminal Justice Act of 1954 the legislation suffered the fate of all similar legislation. At one end the courts showed an increasing reluctance to declare persons habitual criminals or habitual offenders. From a peak of 120 declarations in 1910-15, the number fell to a low of 20 in 1940-45, and 32 in 1945-50.[6] On the other hand the Prisons Board kept prisoners on their indeterminate sentences for an average of only 1.7 years, and the failure rate from 1931 on moved around the 80% mark. In 1954 a remedy to this situation was attempted. A sentence was created "for the criminal who has demonstrated that he will not respond to reformative training and who seems to be determined that he is going to embark on a career of crime. The only thing to bring such people up with a round turn and make them realise that crime does not pay is to sentence them to this form of preventive detention."[7] So the offenders who seemed so pitiable and harmless to the Prisons Board that they were willing to risk an 80% reconviction rate were to be deterred and isolated by a harsh and serious penalty. "The public must be protected against this type of offender."

The Habitual Criminal and Offender legislation was to be replaced because too much attention had been given under it to the type of offence, and too little to the type of offender. The new Bill remedied this by requiring the Court to take note of probation, Superintendents' and Justice Department reports, which *could* be requested by the Judge before sentencing. The classes of offenders liable were enlarged so as to include one-time sexual offenders and three time non-sexual offenders. The summary offence category was increased from six to seven. The Judge in passing sentence was required to be satisfied that it was "expedient for the protection of the public" that a person

4. *Annual Report of the Justice Department,* 1970 (Wellington; Government Printer, 1970.) Appendix 1, Table B, at p. 26.
5. See, for example, *Sexual Offences.* Vol. 9 of the Cambridge Studies in Criminology (London: MacMillan, 1957).
6. See MacKenzie, *The Habitual Criminal and Offender in New Zealand* (unpublished Dip. Soc. Sci. Thesis, V.U.C., 1953), p. 57.
7. Speech by Hon. Mr. Webb, Minister of Justice, introducing *Criminal Justice Bill* 1954; 304 N.Z. Parl. Debates, p. 1925.

should be sentenced to preventive detention.[8] It is hard to see how this in any way improved on the previous pattern. The second failure of the old legislation was that the sentence "seems to have been regarded as a milder kind of gaol sentence." This was remedied by abolishing the dual track nature of the system whereby the preventive sentence had been served after a finite sentence, and making preventive detention a sentence complete in itself, and by placing a minimum of three years and a maximum of fourteen years (except for sexual offences where there was no upper limit imposed) on the sentence.

The new preventive detention legislation proved to have similar faults to the previous habituals' legislation, evidenced by a decline in the number of persons sentenced, and the habit of the Parole Board of releasing detainees "well before the time when they can no longer be regarded as a threat to the community."[9] After something more than a decade of operation a report on preventive detention by a committee of the Justice Department could state[9] that: "the sentence of preventive detention as it exists appears to have several serious disadvantages." The disadvantages the committee outlined included the early release of preventive detainees, the difficulty of determining on the basis of institutional behaviour when release was justified, the harshness of the penalty — especially for those sentences under the provisions for minor offenders, the adverse effects on prisoners of the uncertainty about the release date, and the apparent inconsistency of Parole Board decisions. The only advantage the committee could see in the system, over one involving imposition of long finite sentences, was that the Courts would not be so reluctant to impose such a sentence on a recidivist, for a final minor offence, because of its name. The committee felt, however, that the low three year minimum probably contributed to such readiness as existed on the part of the courts to impose such a sentence. An increase in the minimum would reduce the court's willingness to impose the sentence.

The committee made three main recommendations:

(1) That preventive detention be abolished for all except sexual offenders and that the minimum sentence should be increased to seven years.

(2) That a direction be written into the legislation that where the nature or length of a criminal's record made it desirable, he should be sentenced to a longer period than would otherwise be appropriate; and

(3) That preventive detainees should not be housed in a normal institution, but in a 'therapeutic community' which would encourage individuality, and by release to work and weekend parole schemes

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8. Criminal Justice Act 1954, s. 24(2).
9. *Preventive Detention.* Unpublished Justice Department paper. Undated. Circa 1965.

attempt to counter the effects of institutionalisation and make it possible for them to reintegrate successfully into the community.

The first recommendation was carried out in the Criminal Justice Amendment Act 1967; the second was apparently left to the hortations of the Minister. Two attempts have been made to carry out the third. First the Christchurch South Rotary Club offered to sponsor a "village settlement scheme" in the grounds of Paparua Prison near Christchurch. Some consideration was also given to a scheme which a Swedish visitor, Mr. T. Erickson, had outlined in 1966 which allowed families to live in with long term prisoners. In neither case was anything done.

At present date there are fifteen preventive detainees and one remaining habitual criminal in New Zealand. The habitual criminal is a sexual offender as are fourteen of the preventive detainees. The remaining one was sentenced under s. 24(1)(b) of the Criminal Justice Act less than a month prior to its repeal. Although parolees sentenced under s. 24(1)(b) and s. 24(1)(c) could technically be recalled up till fourteen years after their sentencing, it seems to be Justice Department policy not to do so except in exceptional circumstances.

Whatever its past nature, the sentence of preventive detention can now be seen as applying solely to sexual recidivists. This paper will examine the system as a method of treating such offenders. It does not examine the methods of treatment of non-sexual recidivists only because there is no special treatment provided for them at present in New Zealand. When reform is considered however, my suggestions will not be limited to sexual recidivists.

ADMINISTRATION

In the life of the preventive detainee the significant bodies which he must see as controlling his life are the Court and the Parole Board. In his past the Court, before which he must have appeared on numerous occasions, has the most effect, but when a court has exercised its powers under s. 24 as required by s. 25 of the Criminal Justice Act, and sentenced him to preventive detention, the Parole Board becomes the strongest influence on his life. In the Parole Board lies the only power which can make him once again a free man. Its annual or more frequent deliberations will be the focus of his life and mind. Between the Court and Parole Board is the day to day routine of the life of a prisoner; the life of a prisoner with a difference, for if a preventive detainee is to get an early release he must do more than just behave himself. The length of his sentence is apparently regulated by how much he can remould his character. In fact a reading of Justice Department files on present preventive detainees reveals that such a remoulding is not regarded as likely, in the very nature of the sentence.

At the start, and fading into the past, is the Court.

"S., who had a history of sexual offences, appeared before Mr. J. A. Wicks, S.M., in the Magistrate's Court yesterday and was sent to jail for 18 months on a charge of attempting indecent assault. A psychiatric examination was also ordered.

S., a 54-year-old storeman, had earlier pleaded guilty to attempting to indecently assault a 15-year-old boy he had invited to his room. They drank two glasses of beer and S. began to talk to the boy about sex, and invited him to go to bed with him.

The boy asked to leave and was allowed to do so.

S. told the police he had intended to assault the boy. He said he needed help to get rid of his complaint, and that he had been trying to fight it but had been unable to do so.

'You have a long history of sexual offences, but because this was not a complete offence you are not liable for preventive detention,' Mr. Wicks said. 'Parliament must have had a mental aberration to leave a loophole like that. People should be protected from you.' "[10]

S. was lucky that Parliament had suffered a mental aberration. Sixteen men in New Zealand jails today had no such luck; the histories and offences of most of them are much like that of S.

The first factor the Court must take into account in sentencing a convicted sexual offender is the number of previous offences. According to the legislation[11] the sentence can be imposed if the offender has been convicted on one previous occasion. Almost all the offenders have, like S., a long history of convictions for sexual offences. The sexual offences actually considered in applying the section are limited[12] to rape and attempted rape on women of all ages, incest, sexual intercourse with a girl under care or protection, sexual intercourse with a girl under 12, indecency with a girl under 12, sexual intercourse with a girl aged 12 to 16, indecency between males and sodomy. This means that a person may have a good many more plainly sexual offences than are taken into account when imposing preventive detention, and this clearly influences the court in making its decision. For example C had five previous convictions for sexual offences taken into account when receiving his final sentence. He however has 15 other previous convictions for other sexual offences (indecent language over the phone). Another factor is the number of charges on the last appearance. M had eight previous convictions all occurring on one occasion, but was convicted on 33 charges on his last appearance. Table I gives some indication of practice:

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10. *Evening Post*, May 15th, 1971.
11. Criminal Justice Act 1954, s. 24(1)(a).
12. Ibid., s. 24(6)(a) and (b).

TABLE I

Case	Previous eligible sexual convictions	All previous sexual convictions	Convictions on last occasion
A	2	2	1
B	5	20	4
C	7	7	5
D	2	11	5
E	3	4	2
F	2	2	6
G	8	9	1
H	18	18	14
I		(Non-sexual)	
J	8	11	3
K	3	3	1
L	9	9	12
M	8	9	33
N	8	8	1
O	2	3	1
P	2	5	7

It can be seen that none of the offenders had the minimum number of sexual offences, though in a number of cases the previous eligible convictions all occurred in one appearance, and are thus the minimum for the purposes of the Act. These are A, who was in fact committed under s.24(1)(a), though he remains in jail because of his sexual propensities; O had one previous offence which was considered as probably sexually based (peeping) and a few other criminal offences. His two previous sexual offences were a dual rape which earned him a six year sentence, and his qualifying crime was an attempted rape committed in prison. His case would appear to be the only one in which there was no clear evidence of a long history of recidivist sexual offending. K does not appear to have a long history of sexual offending, but since his offences occurred on each occasion almost immediately upon release from custody, he would appear to be thoroughly confirmed in his offending. D had a long history of sexual offending in Australia prior to his coming to New Zealand.

These figures would seem to indicate that the courts are not misusing their powers to commit on the second conviction. On the few occasions where this power has been used there have been other factors which have meant the sentence was clearly within the spirit of the legislation.

Once the qualification of previous convictions has been satisfied, the next relevant consideration is whether the sentence is expedient in the public interest. It is difficult to say to what extent this factor is taken into account. It would seem however to be assumed that a repeated sexual offender against young children is considered *ex facie*

to be eligible for preventive detention on this ground. In O's (the double rapist) case this factor was clearly a highly pertinent one. In the case of G (an offender who had covered almost the whole range of sexual crimes) similar considerations must have been uppermost. In the case of J the judge stated this as the main reason. The question whether the recidivist offender against young children deserves to suffer preventive detention "in the public interest" will be considered in the section of this paper discussing sexual crimes.

In reaching his decision, the judge must consider reports which he may receive from the Justice Department, by the prison superintendent, or by a probation officer; but there is no requirement that these be furnished. This in fact places them on the same level as psychiatric reports, which, though not required by the Act are sometimes furnished, and are then considered. (See Table II.)

TABLE II

REPORTS AVAILABLE TO THE COURT

Case	Probation Report	Justice Department	Psychiatric Report
A		*	
B			*
C			
D	*		
E	*	*	
F			
G		*	
H			
I	*	*	
J	*	*	
K	*		
L	*	*	
M	*		*
N		*	
O	*	*	
P		*	*

In most cases some kind of report is available, and often where there is more than one report, the two cover similar ground. This applies particularly in the cases of probation reports and Justice Department Preventive Detention reports. Although a psychiatric report is rare, there are commonly a number of reports available on the prisoner which are referred to in the Probation or Justice Department reports. In those cases where there are no reports: C was sentenced under earlier legislation as an habitual criminal in 1938; H was apparently sentenced on the basis of an extremely bad record (in 1957). F is a special case. He was apparently sentenced to preventive

detention without the benefit of any reports. During the period of his offending he had never had a psychiatric report. He was examined shortly after the commencement of his sentence. It seems incredible that there should be no record of any psychiatric examination of F at any time, and that a sentence such as preventive detention could be imposed in such circumstances. Apparently F had served his previous sentences in smaller institutions where psychiatric services were not readily available, but this can scarcely excuse the sentencing court for not calling for a report when it became obvious that a lengthy sentence was called for. If ever there was a situation in which such an examination should be mandatory it is in relation to persistent sexual offenders. Furthermore the very nature of preventive detention should oblige the courts to act only when in possession of the fullest possible information. In practice most preventive detainees have undergone psychiatric examination during previous sentences, and the results of these reports figure, if they are relevant, in the comments of the Justice Department or a Probation Officer.

The Justice Department Preventive Detention report, which figured in nine of the fifteen cases where it could have been called for, is of some interest. It amounts to a summary of the file of the offender, listing his previous offences, adding a summary of such comments of the probation officers, prison officials, and medical personnel who have reported on him during his prison career as seem helpful, and concluding with a recommendation regarding sentence. These reports can plainly be of great value to the sentencing court. One problem which may arise is that they could be regarded as interfering unduly with judicial discretion. Even probation officers' reports have not been immune from this criticism and clearly those prepared by a government department could be expected to carry more weight. Nevertheless the fact that such reports are prepared exclusively from file material would tend to detract from their value and the Department itself has made it clear that the purpose of the report is simply to give the benefit of the Department's experience, not to pre-empt the court's decision. The logical purpose of the Preventive Detention report is to provide the Judge with the material, drawn from the file, on the basis of which he can make his own decision.

The Probation Officer's report, available in eight cases, tends to provide information and advice on much the same basis. Reading through a series of reports on one offender, one becomes aware that the majority of the information is gleaned from the work of earlier officers, and the information on probation files covers much of the same ground as that in the Justice Department file. Mention is made of medical and psychiatric reports, comments by the prisoner, and the probation officer's opinions.

Psychiatric reports are of value to the sentencing court, in that they can show the likelihood that the offender will respond to treatment; if the likelihood is high a preventive detention sentence is not called for. In most cases a psychiatric opinion appears to be taken

into account, though only indirectly from second-hand reportage in Probation or Justice Department reports. Before one demands a more positive policy as regards psychiatric reports, it is necessary to consider how effective or ineffective the court's present prediction methods are. This will be considered in the section relating to the philosophy of preventive detention.

After the passing of the Court's sentence, the preventive detainee, as he now is, is committed to jail. It is Justice Department policy that for the initial part of the sentence the prisoner shall be considered a case for maximum security. As a result of this policy all preventive detainees serve at least the first part of their sentence at Paremoremo. It is suggested that such a policy can have no value at all especially in the case of preventive detention. The sentence exists less as a punishment than as a means of protection for society. It would seem from file material that only a minority of preventive detainees require the sort of restraint envisaged by maximum security. Nevertheless, the nature of preventive detention is such that the detainee will be subject to considerable stress in the initial period of his incarceration, and it may well be that secure surroundings are required in which he can adjust to the realities of the sentence. If this end can be achieved without resort to the inhumanity of maximum security, surely this is the most desirable course. The only policy reason apparent is the peace of mind of other long term prisoners who are subject to the same rather arbitrary policy. It is not an excessive burden on the prison classification system to be required to classify preventive detainees on their merits as opposed to classification by means of an arbitrary rule.

In the early habitual criminal legislation and in legislation in other countries, for example, England, the intention was expressed of creating a special sort of regime for prisoners serving indeterminate sentences. This idea was however scrapped at an early stage, it appears, from Hansard, for economic reasons, and since that time there has been no special treatment accorded to preventive detainees. Preventive detainees are not concentrated in any one prison, but are scattered around the country. As a class they appear to be well behaved and to make good prisoners (this relates back to the factors which lead to their type of offending; it is also related to institutionalisation). Eleven of the sixteen at present imprisoned are classed as well behaved. As a natural result of the long period they spend in prison they tend to gain the maximum privileges available to the prisoner. In England preventive detainees are given special conditions;[13] this would seem in some ways to be a desirable concomitant of a sentence which is intended to be not punitive but preventive and perhaps reformative. The last two factors are of course claimed to be part of all imprisonment in New Zealand. The last is however not a common factor.

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13. See West, *The Habitual Prisoner*, Vol. 14 of the Cambridge Studies in Criminology (London: MacMillan, 1963).

This was recognised in the Justice Department paper on Preventive Detention mentioned earlier in its recommendation for a therapeutic community.

The final aspect of administration which remains to be considered is the functioning of the Parole Board.

The duties of the Parole Board in regard to preventive detention are as follows. First it must have regard to the safety of the public, and those persons likely to be affected by the release of the offender. It must also consider the welfare of the offender, and the report of the prison superintendent. The Board must not release a preventive detainee unless it is of the opinion that when he is released he is unlikely to commit further sexual crimes.[14] Until 1967 it was the law that annual Parole hearings must commence once the first three years of the sentence had been served. In the 1967 Amendment which limited preventive detention to sexual criminals the minimum period was increased to seven years. This was apparently the result of the Justice Department paper[15] which recommended the increase to seven years to discourage the courts from imposing the sentence except in the worst cases. It is interesting to note that the 1970 Report of the Prisons Parole Board[16] recommends that the period be reduced to three years again.

The 1960 Report of the Prisons Parole Board[17] neatly summarises its duties. "Generally, before an offender is sentenced to preventive detention he has been a persistent offender over a comparatively long period of years, and it is necessary for the Board gravely to consider in such cases the protection of society, for which purpose the offender has been sentenced to preventive detention. The necessity for the protection of society varies considerably in the light of the class of offences in respect of which the prisoner has been convicted during his criminal history, but the Board is not empowered to recommend release unless it is of the opinion that the offender, if released, is not likely to offend again. In the case of graver offences, and more especially in the case of persistent sexual offences, it is obvious for the protection of society that the prisoner should be detained for a long period. Again his general character and conduct in the institution is considered, and the Board has made recommendations for release in some exceptional cases shortly after the minimum period of three years has expired. Such recommendations however, have been made generally only in cases where, despite the long record of convictions of the prisoner, such are of a comparatively minor nature, and the prospect of further offences is unlikely. On the other hand, where the prisoner's record consists of the graver type of crime, the Board in general consider that society still needs protection from such an offender for a much longer period, and a recommendation will not be made until

14. Criminal Justice Act 1954, s. 33A(6) and (7).
15. *Op.cit.* supra, n. 9.
16. Parliamentary Paper H20(A), 1971.
17. Parliamentary Paper H20(A), 1961.

the Board is satisfied that the risk of the prisoner offending again is a remote one."

This would seem to be a fairly accurate summary of the manner in which the Board carries out its duty. The materials which the Board has available to it in making its decision, excluding as they do a crystal ball, are rather limited. This makes accurate prediction near to impossible.

The materials generally available are:

(1) The report of the controlling officer of the institution in which the offender is resident.
(2) The record of the offender.
(3) Often the report of a psychiatrist.
(4) Letters and pleas from friends, relatives and visitors.
(5) The appearance of the inmate himself.

The Controlling Officer's report is taken very seriously by the Board in reaching its decision. It relates essentially to performance within the institution. The conduct of the inmate, his work performance, his attitude and behaviour, his participation in prison activities are stated, comments are made on his plans after release and a recommendation made. In the cases at present in jail the Controlling Officer's report repeats the same theme again and again. His conduct is exemplary, he works well, he takes part in all activities, in any other case a favourable recommendation would be certain, but in light of his past record . . . . Other things being equal the Controlling Officer's report is given great weight, and is probably the most influential factor on the Board.

Incorporated in the recommendation of the Superintendent is usually some comment based on any psychiatric or other interviews performed on the inmate in the course of the period since the last sitting of the Parole Board. Where the Board considers that such would be helpful it can call for a psychiatric report to be made available to it. This seems to apply particularly in the cases where the prisoner has already served a particularly long term and is clearly suffering from the effects of the length of time spent in prison. Perhaps not coincidentally, psychiatric reports in all cases studied strongly bore out the prognoses the non-expert judiciary, prison officers and probation officers made respectively in their decisions and their reports, differing only in the amount of jargon used to prove the point.

Of vital importance to the solution of the question of whether the inmate is likely to offend again, are the conditions he is likely to encounter upon release. The Board is strongly influenced by practical and sincere promises of assistance by friends and relatives on the outside. This can work both ways; the unbalanced character of H's wife, to whom he meant to return, was a factor in the Board refusing parole. A was unsuccessfully paroled as a result of good contacts

being made with prison visitors from Alcoholics Anonymous, which led the Board to hope that he would be able to control his drinking on release.

The appearance of the prisoner before the Board has some influence on his fate, and is taken into account as one factor in the Board's judgment of his level of reformation. The Board in recommending the release of K, commented how much it was impressed by the way he presented himself.

The period of parole is preceded by a period of work parole, in which the prisoner is given a chance to get settled in a job, and possibly to get used to life in the outside world. He works in a job in the community by day and returns to the prison by night. His performance on work parole is strongly influential on the Board's final decision on whether or not to give him full parole status. It is doubtful whether performance on work parole gives any real indication of likely performance on full parole, as the parolee is allowed into society only to the extent of his working hours, and still has his spare time occupied for him in prison. On the other hand it has little value for him as an individual as he does not have to face the stresses and strains of a completely unrestricted life.

Once released, the offender is deemed to be on probation for life.[18] This has the effect that at any time the Minister can recall him to continue his sentence.[19] There is no need for him to commit another offence to be recalled, but he is not automatically recalled on re-offending. Only two preventive detainees at present serving sentences have ever been subjected to recall. A was recalled on the first occasion after he had served a large part of a sentence for a sexual offence committed while on parole. The judge had declined to exercise his power to impose a new sentence of preventive detention, but the Minister exercised the power of recall some months later. There is some question as to whether this power was validly exercised. The Justice Department took the view that probation, and thus the Minister's power to recall, continued during subsequent prison sentences. It would seem that this interpretation is the valid one. A was subsequently recalled from work parole after he had been found smuggling alcohol into the prison. C was recalled from parole after a conviction for being a rogue and vagabond, in which the Police had suspicions of sexual overtones, and had evidence of advances with sweets and ice-cream to small children. He had previously been recommitted to prison after conviction on indecent assault charges.

The power of recall still exists technically speaking for those sentenced to preventive detention for non-sexual offences less than 14 years ago, but Justice Department policy is that it will not be exercised in such cases. There appears to be agreement in principle that after the provisions of preventive detention relating to dishonesty were

18 Criminal Justice Act 1954, s. 35(1)(c).
19. Ibid., s. 36(1).

repealed, the Department would scrutinize closely only cases of sexual offences against children.

For the preventive detainee life is very much like that of any other prisoner, with the added burden that his fate depends to the maximum degree on the image he can present to the Parole Board. The only way he can ensure his release is to convince the Parole Board that he has changed; whether he does that by acting or by real change is irrelevant. (See Table III for an analysis of Parole Board handling of preventive detainees.)

TABLE III

PAROLE BOARD PREVENTIVE DETENTION CASES

Year	No. of cases heard by Parole Board	No. sentenced	No. recommended for release	No. in prison at end of year
1955	—	14	—	14
1956	—	28	—	42
1957	—	62	—	104
1958	16	13	2	117
1959	54	13	2	128
1960	84	17	14	131
1961	70	12	20	123
1962	75	6	28	101
1963	58	8	7	102
1964	83	6	16	92
1965	81	3	18	77
1966	71	2	32	47
1967	40	3	9	41
1968	47	4	11	34
1969	34	2	17	19
1970	21	2	8	13

THE JUSTIFICATION FOR PREVENTIVE DETENTION FOR SEXUAL OFFENDERS

The logical argument.

The basic argument of most proponents and supporters of preventive detention would run as follows:

1. Precautionary custody is so costly in terms of hardship to the offender and resources that it should be used sparingly and selectively, and should not only be limited to certain types of offence (against which society feels it needs most protection), but also to offenders who seem likely to repeat these offences in future.

2. Sexual offences can have effects sufficiently serious to be included in this short list.

3. The evidence shows that the probability of the commission of further sexual offences by offenders who have committed two such offences is substantial.

4. Although correct treatment earlier in the sexual offender's career might have prevented further offending, we must accept that the offender is now confirmed in his ways and that in the present state of knowledge we cannot protect society against him except through custody.

Each of the links in this chain of argument will be examined separately so as to determine its validity in the light of the literature and statistics, and also to determine the extent to which such a policy basis is apparent as the foundation of the New Zealand system of preventive detention.

1. Precautionary custody is so costly in terms of hardship to the offender and resources that it should be used sparingly and selectively.

At the basis of this first link in the chain is the presumption that preventive detention exists purely as a method of isolating the individual from society, and not as a means of reforming him. Clearly the name itself implies this function; the legislation implies the same intention in its criteria — "the public interest". The statements of successive Ministers of Justice in introducing such legislation say the same: "The challenge offered to society by the persistent wrongdoer, the man who seems to have embarked on a career of crime will be accepted by the state. The only adequate remedy for that type of person is a long period in prison, an indeterminate sentence.": Mr. Webb, 1954.[20] "In the case of sexual offenders I think it [preventive detention] should be retained, since there is no doubt about the dangerous character of their offences, and the nature of the offences demands that the authorities should have power to keep the offenders out of circulation for a very long time.": Mr. Hanan, 1967.[21] The opinion of the Courts is that the sentence exists for this purpose: "People should be protected from you.": Mr. Wicks S.M.[22] This all adds up to the fact that preventive detention is considered as a protective measure for society. The interests of the individual offender are not the greatest concern.

Having said this we can return to the question which is essentially one of the effects of long term imprisonment on the individual personality, and also whether the indeterminateness of a sentence in fact increases its harmful effects.

It is common to speak of institutionalisation of offenders as *one* of the effects of long term imprisonment on offenders. It would however be more accurate to describe it as a catch-all word designed to

20. 304 N.Z. Parl. Debates, p. 1925.
21. 1967 N.Z. Parl. Debates, p. 3628.
22. Expressing frustration at a legislative loophole which prevented him imposing a sentence of preventive detention. *Evening Post,* May 5th, 1971.

describe the multifarious physical and psychological effects which prison has on the individual. It is furthermore a dangerous term for it is hard to isolate the results of imprisonment from the factors which put the individual in prison. The essential attribute of institutionalisation is the removal of the ability of the subjected individual to adjust to the normal demands of society. The regulated life of the prison removes personal initiative and the ability to handle difficult situations in life because the environment is such that similar situations do not arise, or are handled by orders from others. Thus is created what West calls the "habitual prisoner", rather than the habitual criminal — the person who returns again and again to prison because it is the only way in which he can handle problems of insecurity.

It is certainly true to say of the majority of preventive detainees in New Zealand at present that they lack the ability to integrate themselves successfully in outside society, but are well-adjusted to prison life. Thirteen of the sixteen are consistently described in psychiatric, probation and prison reports as "inadequate" and unable to cope with the normal strains of outside life, ten are described as unable to form stable personal relationships, yet the behaviour in jail of eleven out of sixteen is good, and of the other five whose behaviour is not good as far as the prison authorities are concerned, four maintain good relationships with the prisoner population, which indicates another form of successful adaption. It is hard to say whether these symptoms of institutionalisation are caused by the imprisonment or by factors in the psychological makeup of offenders of this class. The Justice Department Report[23] describes preventive detainees as a group as "the inadequate, irresponsible, silly offenders, unable to cope with the normal demands of living, often addicted to alcohol, unable even to offend intelligently. Many of them could be classed as psychopathic." "They live maximum security. They like regimentation. They 'know where they are' at Mt. Eden. They have senior status and are on good terms with the staff. They are well behaved prisoners, useful as workers and sometimes as informers — 'moleskin screws'. They are gaol-wise and know every dodge to get what they want. Because of this they have high nuisance value. They are also adept at self-transfer from one job or one prison to another. They come from poor homes, have extremely bad work histories and fail to make satisfactory relationships in marriage . . . . Most of these men do not need maximum security — many could be held in minimum security." This description carries the implication (not surprising in a Justice Department report) that the cause of the personality factors noted lies in the individual himself, rather than in his term of institutionalisation by the prison system. However, if one examines the prison records of the individuals presently serving preventive detention, one finds in 1971 in a group with an average age of 47 years, an average 45% of total adult life (after age 17), spent in prison, which is an average total of fourteen years in jail (twelve if

23. *Op.cit.* supra, n. 9 at p. 3.

C who has spent 43 years in jail is excluded). On the other hand those who have spent a lesser time in jail (6 have spent 40% or less of their adult lives in jail, 7 had spent 5 years or less in jail prior to preventive detention) would seem from their files to show no significant difference in prison behaviour.

The offender who comes to preventive detention is either already thoroughly institutionalised by his previous prison experience, or appears to have a need or even desire for institutional treatment. This is not to say that that need or desire is for prison treatment, which is generally geared to punishment and security. The preventive detainee is generally not in prison for punishment but as a measure of protection for society and he does not need to be kept under heavy security.

In at least one instance, however, it is clear that the term of imprisonment was in fact the *cause* of the offence. O is the only rapist at present serving preventive detention. The offence for which he was committed occurred while he was serving a six year term for a double rape, which was his only previous sexual offence. He was described as highly sexed and sadistic, but his original offences had been an isolated incident in the life of a man who was in general a good worker and good provider for his family. He achieved a position of responsibility in the prison and was thus in a position to be alone with a woman visitor whom he attempted to rape. It would however be hard to attribute any of the other crimes directly to the prison environment, though the notoriously abnormal sexual conditions in prison are hardly likely to be conducive to a readjustment by the sexual offender.

It is clear from the files that, though he is in general well able to cope with prison life, the average preventive detainee does not find the experience pleasant in any sense. In a number of cases prison staff note behaviour problems in the weeks before and after Parole Board hearings, and the attention which individual prisoners give to preparing their cases for, and adjusting their behaviour to the imagined requirements of the Board, indicates that a great deal of hope is placed on eventual release. Life in prison is harsh; a punitive atmosphere where punishment is not required.

The indeterminate nature of the sentence is a special aspect which distinguishes it from the normal prison sentence. Cohen and Taylor[24] write of the ways in which the long term prisoner wards off mental breakdown. One system they note is that of serving time in five year bursts. The twenty year prisoner is unable to look to the end of his sentence, so he breaks it up into manageable parts. This is impossible with the indeterminate sentence; there is no end in sight. Cohen and Taylor also point out that events which the prisoner can look forward to, and which provide food for thought, are something

24. *The Experience of Time in Long-Term Imprisonment*, New Society, 31/12/70, p. 1156.

else which make the sentence bearable. Parole Board hearings can and do, fulfil such a function; yet for the first seven years the preventive detainee is deprived of even this comfort. Cohen and Taylor speak of the complete dislocation from reality which occurs under conditions of long-term imprisonment. With all the factors which could alleviate this dislocation removed in the indeterminate sentence, the harshness is compounded.

Although a case might be made out for long-term institutionalisation (more of this in the next part of this article), the first link in the chain is correct. The degree to which the terms "sparingly and selectively" will apply must depend on the individual offender, but present-day strict limitations are not strict or selective enough.

2. Sexual offences can have sufficiently serious effects to be included as offences against which society must take special precautions.

This is an attitude almost universally held amongst all those concerned with penal matters — from the legislature to the reformers. The Justice Department Report[25] talks of the "potential danger to the community from the worst type of sexual offender." These it defines as being those covered by the preventive detention provisions. It also refers to the (adverse) "public reaction to any amelioration of the provisions concerning these people." This is probably an accurate characterisation of public reaction to this type of sexual offence. Nigel Walker [26] who advocated a complete reform of treatment for habitual criminals of the passive inadequate type, excluded from his recommendation the "child molester". The comments of Ministers of Justice quoted above indicate the same sort of attitude. Is it justifiable?

As has been stated before, the recidivist sexual offender in New Zealand is generally of the passive inadequate type. Of the 15 sexual offenders presently doing preventive detention 13 are of the "child molester" variety, but none of them committed their acts in any violent manner. The majority committed the indecent acts in the context of a fairly long relationship with the children, in which the sexual activities were only one part of a friendship from which both derived pleasure and satisfaction. P for example, committed all his offences in the context of fairly long relationships with young boys of about his own mental age. At one stage a probation officer commented that P did not consider that he molested young boys, rather, he thought, they seek him out. Clearly, however, such a relationship is found repulsive by most members of the community, and there is the suggestion that the child who is the partner in such activities suffers psychologically or sexually. The former is in fact the basic reasoning behind this, as behind many other penal policies. The latter point is stated, but rarely debated or supported by empirical data. It stems

25. *Op.cit.* supra, n. 9 at p. 3.
26. *The Habitual Criminal: An Administrative Problem.* Jo. Pub. Admin. Vol. 41, p. 265.

from the Freudian sex obsessive psychology, which enjoys less and less support.

The Cambridge Report on Sexual Offences[27] comments that in relation to sexual offences: "In 60 per cent of the cases there was some objection or resentment by the victims, at the time of the offence or later, but in many of these cases it could not be regarded as positive or active resistance to the sexual misconduct of the offenders. If the victims under the age of 16 are considered separately, it is found that 43 per cent of the boys and 63 per cent of the girls showed resentment or offered some objection to the sexual misconduct of the offenders." "In respect of 91 per cent of the victims the offences had no notable physical consequences." "At any rate the effects of sexual offences must be assessed more by the results they may have on the moral and emotional development of the victim than on the basis of physical injury sustained. There is very little information and considerable difference of opinion concerning the moral and emotional effects of sexual misbehaviour on young children. Although reliable information in individual cases was available, it was too slight to justify any general conclusions."

Two points at least can be drawn. Firstly that as far as the child is concerned he or she is in many cases a willing assistant and does not view the offence as being as outrageous as the parent, the police or the courts. Secondly there is little evidence that these offences cause permanent damage. In the light of modern research such as that embodied in the Kinsey Report, it is known that many children indulge in abnormal sexual activity at an early age and apparently suffer no permanent harm. There is no reason why they should suffer any more permanent harm from the activities of older people. Unless some real and permanent harm can be proven no justification is made for special precautions.

3. The evidence shows that the probability of the commission of further sexual offences by offenders who have committed two such offences is substantial.

The wording of this justification is not quite accurate for in only two of the cases (A and O) did the number of offences approach the minimum. In each of the other cases there was evidence of a much longer record of recidivism.

The Cambridge Report[28] quotes the report of a 1925 Committee of Inquiry into Sexual Offences. "We find that, except in cases of indecent exposure, and to a lesser extent in indecent assault, it is not common for the sexual offender to have previously been convicted of a similar offence." "In cases of indecent exposure, in cases of gross indecency, and in cases of indecent exposure coupled with occasional offences of indecent assault, the lists of previous convictions are some-

27. *Op.cit.* supra, n. 5 at p. 103.
28. Ibid., p. 435.

times very long; the offence has been persistently committed over very many years and no punishment appears to have acted as a deterrent." This general comment is borne out by figures given in the Cambridge Report which show an increasing likelihood of reconviction according to the number of previous convictions. Unfortunately the figures are so grouped as to make it impossible to isolate the indecent assault category and link it with the obscene exposure.

TABLE IV[29]

Convictions for sexual offences	All sexual recidivism	Heterosexual and Indecent Exposure	Homosexual
Offenders with 2 convictions	213	96	117
Reconvicted No.	60	28	32
Percentage	28.2	29.2	27.4
Offenders with 3 or more convictions	117	62	55
Reconvicted No.	60	30	30
Percentage	51.3	48.4	54.5

Based on follow-up of all convictions in Britain in 1947.

A report on recidivism among sexual offenders in Sweden[30] reached the conclusion that: "The likelihood of recidivism to the same type of sexual crime is greatest in the case of the more deviating forms of sexual criminality (indecency towards boys and girls and exhibitionism)." And, "The fact that recidivating sexual criminals who had previously exclusively committed sexual crimes were more likely to recidivate underlines the influence of a previous criminal record."

Unfortunately no similar analysis is available for New Zealand, but there is no reason to believe the situation differs markedly.

These figures and general observations give strong support to this link in the chain.

4. Although correct treatment earlier in the sexual offender's career might have prevented further offending we must accept that the offender is now confirmed in his ways and that in the present state of knowledge about treatment we cannot protect society against him except through custody.

This justification seeks simply to avoid entanglement with arguments about the possibility of treatment for sexual offenders at an earlier stage in their career. It is correct to the extent that the treat-

29. Ibid., p. 290.
30. Christiansen, Elers-Meilsen, Le Naire and Sturup, *Recidivism Among Sexual Offenders,* Scandinavian Studies in Criminology, Vol. 1, p.p. 55-85.

ment of long term recidivists is a different matter from the treatment of first offenders; however it goes on to deny the existence of alternative forms of treatment. It also does not apply specifically to the indeterminate sentence. If the necessity for custody is conceded, why should the period be indefinite? Surely a very long finite term would be equally effective, and possible more humane. To this query the response of the advocate of the indeterminate sentence is to comment that the interests of humanity in fact require that the period of imprisonment be subject to review, in the unlikely event that the prisoner reforms. A sentence supposedly based not on punitive but preventive notions should not be too inflexible; it should not condemn a reformed prisoner to further punishment. This argument of course assumes that the Parole Board is capable of making an accurate prediction about whether the prisoner has reformed. Past Boards have, on their own admission, found themselves unable to do this.

In summary this chain of argument states that in recidivist sexual offenders we have a group of dangerous, incorrigible criminals from whom the public must be protected. Taking a realistic view of our penal system, past and present, the only method which is at once humane and effective of achieving this end is the sentence of periodic detention.

The argument is attractive to the extent that it takes a pragmatic view of the situation, and provides a reasonably logical argument for what one may intuitively accept as an effective solution. It however ignores any possibility of reform in a field in which certain reforms are possible. In the long term, any reform would include reform of treatment of sexual offenders at the earliest level, in the hope that the recidivist would not develop. Even in the short-term a number of reformative courses are available, and one of these will be considered in the last part of this article.

AN ALTERNATIVE SYSTEM

There is more than one way in which a satisfactory alternative to the present preventive detention sentence could be achieved. However the only fully successful alternative is likely to be a system which takes account of all the weaknesses in the present one, and attempts to remedy them to the fullest possible extent.

The present system of preventive detention lives up well to the promise of its name. While the offender is detained he is prevented from committing further crimes; on the other hand, he is prevented from committing further crimes only while he is detained. If a system of treatment of the persistent sexual criminal is to be called effective, it should aim not only to prevent crimes while the criminal is under restraint, but also to change his character in such a way that he is able to avoid committing crimes when he is not under restraint; at the end of his period of institutionalisation. Clearly such a concept is far removed from the present system.

It is proposed to suggest an alternative system, based on the concept of the therapeutic community, but before any re-organisation in that direction can occur there must be certain changes in the attitudes of the legislators and the administrators of the penal system.

First there must be a recognition that the passive-inadequate sexual offender is not in any relevant way different from the ordinary passive-inadequate offender, be he a petty thief, an habitual confidence trickster or a disorderly drunk.

Next, it must be accepted that such persons require intensive and possibly expensive, treatment for their shortcomings, be they psychological, physiological, or sociological.

Reforms of the present system of treatment should be made in the following areas:[31]

(1) Sentencing methods
(2) Detention methods and conditions
(3) Post-release assistance.

SENTENCING METHODS

The present system gives the ultimate responsibility for all sentencing procedures to the judge. This may be satisfactory as a method in the normal sentencing situation, but it is more doubtful if it is satisfactory here. The judge is aided by a variety of reports which may or may not be of real use to him, but, even if he is genuinely assisted in his endeavours to choose the appropriate sentence for an offender by these reports, he is in fact unable to make use of that assistance. His choice in all cases is whether to jail the offender for some finite time or whether to jail him for life. In the case of non-sexual offenders there is not even that degree of choice.

A more sophisticated sentencing system thus presupposes a more sophisticated sentence, and when the sentence merits the sophistication, it will be desirable to create a body constituted of medical and legal experts to which could be delegated the sentencing decisions, and which would also have a continuing role somewhat similar to that presently taken by the Prisons Parole Board. At the beginning of the sentence individual subjects would be referred to the Board on a similar arbitrary basis to that used at present for the determination of eligibility for preventive detention. Once a case had been referred to the Board, it would be in their hands whether to send the person to the special institution for treatment, or whether to return him to the court for normal sentencing.

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31. The Danish system has been heavily drawn on in suggesting these reforms. See Sturup, *Treating the "Untreatable" — Chronic Criminals at Herstedvester* (Baltimore: John Hopkins Press, 1968).

DETENTION METHODS AND CONDITIONS

As the Justice Department report[32] recommended, the basis of the treatment of persistent offenders should be a therapeutic community created for the purpose and dedicated to treatment rather than to punishment.

The offender should be sent to the institution on an indefinite sentence, but with the possibility of review by the Board at any time at the instigation of the superintendent, and after a moderate period, perhaps a year, at the instigation of the inmate, with reviews at regular intervals at the instigation of the superintendent or the inmate.

A wide range of treatment should be available in the context of a medium or minimum security environment. Herstedvester, the Danish institution for persistent offenders, operates on this basis.[33] The aim of such an institution is to provide the support the inadequate institutionalised criminal needs, while at the same time providing him opportunity through individual and group therapy for insight into his problems. Herstedvester reports a recidivism rate as low as 10% after 10 years.

AFTER CARE

If the aim of a reformed system of treatment is to produce well adjusted individuals, assistance must be available for the recent inmate in his first attempts to re-integrate himself into society. This can be done by a system of work parole and hostels. The inmate who has secured a date of release from the Board should be transferred to a hostel where he would remain as an inmate for a limited period, but working in the community, paying his own way, and assisting in the day to day running of the institution. At the end of the period he should be free to go where he will, but he should have the alternative open to him to remain in the hostel or to leave and return as and when he wants to. The hostel will thus perform the dual purpose of providing an easy transition back into society for those who are capable ultimately of handling life in society, and also of providing a sheltered atmosphere for those individuals who need such in order to survive.

PERSONAL ASSISTANCE

The Danish system provides for "social aides" who are persons who have a supervisory function over the prisoner while he is incarcerated; who act as an intermediary between him and the authorities; who keep the prisoner in touch with family and friends, who attempt to bring them into the picture to assist the prisoner; and finally who remain as a backstop, people with whom the released

32 *Op cit.* supra, n. 9.
33. See Sturup, *op.cit.* supra, n. 31.

inmate can communicate once he is on his own in society. In this capacity they are performing a function which if it is performed at all in New Zealand is performed by a multiplicity of prison officers, social workers, and probation officers. The effect of combining all the roles into one functionary has the enormous advantage that it enables the aide and the inmate to build a genuinely close relationship where real support and assistance can be provided. In New Zealand it would have the additional advantage of clearly differentiating the persistent criminal who has been placed in the therapeutic institution from the ordinary criminal.

If only because of the radical way in which it differs from the present methods of treating the persistent criminal in New Zealand, the introduction of a new treatment concept as suggested would do much to solve the present problem of the persistent criminal. Its expense would not exceed that of the present system to any large degree. The pre- and post-release hostel would be largely self-supporting. The major institution would be burdened with its inmates for a shorter period of time, and the prison system as a whole would experience a reduction in the number of inmates. These savings would more than offset the expense of the major institution itself.

The sentence for the old lag is itself the old lag of New Zealand's penal system. While penal reform seems to have disappeared from the agenda of the Justice Department with the disappearance of imagination from the Justice portfolio, it is to be hoped that when reform once again finds a place, a prime target for the reformers' zeal will be this dead end of our criminal treatment system.

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