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The specific deterrent effect of custodial penalties on juvenile re-offending

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Introduction

The following paper deals with the question of whether custodial penalties are a deterrent to subsequent offending among young people sentenced in the NSW Children's Court. It will do so by reporting the results of a study undertaken in the court between 2004 and 2007. The aim of this study, amongst other things, was to determine whether being sentenced to a control order led to greater or lesser offending compared to a group sentenced to community-based orders.

The structure of this paper will be as follows. Firstly, in my introductory remarks I will give some historical background to juvenile detention in NSW. I will then discuss justifications commonly given for incarcerating young people, and in particular the argument that such a sentence will act as a deterrent for the young person involved. How one might demonstrate this is an important matter to consider, and to this end, various methodological challenges facing researchers in this field will be discussed. I will then go on to describe the results of our study, and conclude by firstly raising alternate justifications for incarceration, notably the idea that by incapacitating known offenders it will reduce crime in the community, and secondly briefly describing possible alternatives to detention.

Although records remain incomplete, it appears that some 48 of the convicts transported to Australia on the First Fleet were under the age of 18 (Gillen, 1989). These 48 young people therefore hold the distinction of being the first juvenile detainees in this country. In the early years of the new colony, children continued to be sentenced to imprisonment on a regular basis. For example, John Seymour reports that 20 juveniles were incarcerated in the notorious Darlinghurst gaol between September 1849 and October 1850 (Seymour, 1988, p. 9). Although the introduction of reformatories throughout the country was intended to avoid such obviously unfortunate situations, juveniles continued to be detained in adult prisons in NSW until the passing of the *Neglected Children and Juvenile Offenders Act* that established the NSW Children's Court in 1905. Indeed, one of the primary motivations of this legislation was to ensure that juvenile and adult offenders were dealt with (and incarcerated) separately, largely because it was believed that such contact could accelerate the young person's criminal career. Since this time, juveniles detainees in this state have been held in specialised detention centres that at present are administered by Juvenile Justice, which is now part of the NSW Department of Human Services. The exception to this is the high security unit at Kariong which has been administered by Corrective Services since 2004.

In 2008-2009 711 young people were admitted to NSW Juvenile Justice Centres after having been sentenced to control orders. On average, 417 young people were held in detention centres each day, although it should be noted that the majority of these were subject to remand orders (NSW Department of Juvenile Justice, 2009). However, although these young people comprised only a minority of all offenders dealt with by juvenile justice (by contrast, 4554 community based orders commenced in 2008-2009), it was reported that some 121 million dollars out of an overall expenditure of 183 million were spent on custodial services in 2008-2009. Sixty-six percent of Juvenile Justice's overall budget appears to have been spent on custodial services, in other words (NSW Department of Juvenile Justice, 2009).

Given this huge expenditure, it is worth considering what we are receiving in return. It may be redundant to say so before this audience, but there have been three commonly stated aims of punishment: namely deterrence, incapacitation, and retribution. In the next section of this paper, I will briefly consider what the evidence is for deterrence theory, and how one might go about testing the hypothesis that a control order will act to prevent future offending by the young person concerned.

Deterrence

To state something that will be self-evident to most in this room, deterrence theory holds that the actions of the criminal justice system reduce crime. It may be that fear of apprehension and punishment will prevent individuals from engaging in criminal activity: that is, the criminal justice system will exert a *general* deterrent effect. Alternatively, it may be that experience of punishment will prevent future offending by the sanctioned offender: that is, punishment will exert a *specific* deterrent effect. As the study I will describe today investigates the specific deterrent effect of control orders for juvenile offenders in NSW, it is this aspect of deterrence theory that I will concentrate on in my subsequent remarks.

To start with, it should be stated that there is general agreement among scholars that the criminal justice system is indeed a deterrent to criminal activity in the community (Blumstein, Cohen, & Nagin, 1978; Cook, 1980; Nagin, 1998). What is not so clear is how this deterrent effect operates. Much modern deterrence research revolves around Bentham's so-called 'dimensions' of political sanctions, and in particular the relative efficacy of certainty and severity of punishment as deterrents (Bentham, 1823/1948). The study we conducted investigated the extent to which more severe penalties act as a specific deterrent for juvenile offenders in NSW.

This is a less straightforward matter to investigate than might appear to be the case. The primary problem facing researchers interested in looking at this question is what is known as selection bias. It will be clear to you that Magistrates and Judges do not lock young people up on a whim. In fact,

there are usually very good reasons to justify this decision. Indeed, for juveniles, it is the last option utilised, when all other approaches appear to have failed. What this means is that the young people who are sentenced to control orders usually will have a more serious criminal history, have been convicted of a more serious offence, and exhibit a far greater range of risk factors commonly associated with an increased likelihood of re-offending. In short, a bare comparison of the re-offending rates of these young people with a group sentenced to community based orders is not valid because it is impossible to rule out the possibility that any differences in re-offending patterns are determined by these pre-existing differences, rather than the sentence received.

There are a number of ways to address this problem. From a methodological point of view, the best way to avoid selection effects is to randomly assign offenders to either a control or community order. For reasons that should be obvious, such an approach has not been commonly adopted. A recent review conducted by Daniel Nagin and colleagues in fact identified only five randomised trials of this type (2009). A further approach is to match subjects on salient factors and then compare recidivism rates. Finally, the most common method is the use of what are known as regression-based studies. This type of study attempts to equalise the two groups statistically using multivariate regression analyses to account for potentially confounding variables. It is this latter approach that we took in our study of the effects of juvenile detention.

Between December 2004 and June 2007, some 400 young people were interviewed using a set questionnaire, with over 100 items measuring things as diverse as the young person's perceptions of their sentencing hearing, their family background, school performance, past criminal history and licit and illicit drug use. Of these young people, 243 had received community-based sanctions ranging from cautions to probation orders, and 152 had received control orders. The former group were interviewed at court immediately after their sentencing hearing, while the latter were interviewed in custody. Participants were recompensed with gifts of the value of \$20. Offending subsequent to these interviews was measured using a database maintained by the NSW Bureau of Crime Statistics

and Research. For more details in this regard, please refer to Weatherburn, Vignaendra, and McGrath (2009).

Our basic procedure in analysing these data was as follows. Firstly we compared the likelihood of re-offending of the community with the control order group. The slide you can see here shows the survival rate of each group. Free days until the first offence is shown on the x-axis, whereas the proportion of the group not re-offending is on the y-axis. One would expect the detention group to have a higher likelihood of re-offending (for reasons previously explained, namely that on all objective measures they are a more serious group of offenders), and that is indeed what was observed. The next step saw the introduction of various controls into the analyses. The first was previous offence history, as this was the best predictor of re-offending for the entire sample. The question being asked here is, is there any difference in re-offending rates between young people on control and community orders, *with equivalent prior offences*? Once this was done, the difference in re-offending evident in the earlier slide disappears, and the two group's likelihood of re-offending becomes equivalent, as shown in this slide. For those who might find this model somewhat crude, I will add that we tried a large number of different models, with various control variables, none of which changed the picture. The conclusion we drew was that juvenile detention did not lead to a lower likelihood of re-offending as deterrence theory would suggest. In fact, if anything, it has a criminogenic effect. This conclusion is consistent with the results of two recent and comprehensive reviews of the evidence (Killias, Villettaz, & Zoder, 2006; Nagin et al., 2009).

Incapacitation

If juvenile detention serves no deterrent purpose, why do we continue to lock young people up?

The most commonly given answer to this question is that incarcerating offenders will act to *incapacitate* them. Incapacitation strategies attempt to reduce crime by preventing individual offenders from committing crimes by locking them up (Piquero & Blumstein, 2007). This contention does make some intuitive sense, which is reinforced by considering the commonly observed finding

in criminology that a small number of offenders account for a high proportion of offences (Blumstein, Cohen, Roth, & Visher, 1986). It suffices to say here that the literature on incapacitation is both large and technical; it can be concluded from reading this literature that increasing the prison population would indeed decrease crime: a typical estimate is that an increase of 5% in the prison population would result in about 1% less crime (Piquero & Blumstein, 2007).

It will probably occur to you that this is a pretty blunt instrument as crime control measures go. You might also question the relevance of such a finding to sentencing policy, particularly decisions made in regard to individual offenders. Determining whether an individual offender should be incapacitated requires an accurate estimate of their likelihood of re-offending, and in this regard it might be argued that judicial officers are not greatly aided by the current state of risk assessment. Taking terminology coined by Terri Moffitt, psychologists and criminologists are better at retrospective than prospective risk assessment. That is, we can take a group of (say) 25-year-old offenders, and quite easily identify risk factors that we think led them to their involvement with the criminal justice system (deficient family background, involvement with deviant peers, drug use and so on). However, it is far more difficult to identify which individuals, out of a group of juvenile delinquents, will re-offend, using such risk factors. We can make a reasonable estimate about risk of re-offending, but these are only estimates. Risk assessment instruments such as the Youth Level of Service Inventory (used by Juvenile Justice) typically classify youths as either low, medium or high risk. These classifications can be useful institutionally, however, what is typically seen is that some 30 to 40% of the so-called low risk group will re-offend, while an equivalent proportion of the high risk group will fail to re-offend. Figures such as these provide limited assistance to sentencing officers. In addition, we know from research conducted in this country that it is possible that incapacitation might be a marginally cost effective method of reducing burglary, which is an offence characterised by high frequency offenders (Weatherburn, Hua, & Moffatt, 2006). However, we don't know if the same conclusion holds for lower frequency offences such as assault. Does this

justify longer (and therefore) harsher sentences for property offenders? Finally, there also seem to be considerable ethical problems associated with sentencing offenders based on their likelihood of future infractions, rather than the offence that has brought them before court. In conclusion, while intuitively appealing, considerable doubts arise when considering incapacitation as a justification for locking people up.

Conclusion: what are the alternatives?

So, if we can conclude that juvenile detention has no deterrent and doubtful incapacitative properties, what then are the alternatives? Interventions for juvenile offenders in NSW are guided by what are known as risk-need inventories. Risk, in this context, refers to the likelihood of future offending, whereas need refers to deficiencies or factors in the young person's life which we think might contribute to their offending behaviour. As I have argued elsewhere, in my view, the emphasis in the procedure should be on the need, rather than risk, aspect of the assessment (McGrath & Thompson, 2009). We need to know far more on an individual basis, about what is happening in these young people's lives, and we need to use this information to design effective intervention programs. Because the good news is, research has shown that intervention programs that target different aspects of young offender's lives, such as their families, schooling, peer group and drug use can be effective in reducing offending among even the most serious and violent of juvenile offenders (Borduin et al., 1995; Loeber & Farrington, 1998; MacKenzie, 2002). I should raise a word of caution here however. There is a danger in introducing a program designed in another country and automatically expecting it to work here, particularly in regard to the large number of Indigenous offenders who come into contact with our criminal justice system. It is possible that these individuals might have different criminogenic needs that might not be addressed by a so-called 'off-the-shelf' program. This is why I am arguing that we should spend more time understanding such potentially subtle differences in need, and using this information to inform our interventions. Of course, such an approach is both time-consuming and resource-intensive. However, given the

savings that could potentially accrue from reducing the number of juvenile offenders in detention, it is perhaps an approach worth considering.

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