Empirical Verification of the Effects of General Prevention and Incapacitation

1. INTRODUCTION TO THE PROBLEM

An empirical verification of the preventive effect of penalties would be of major importance. The other tasks attributed to penalties, which include the ideology of treatment, have entered a deep crisis. Considering the limited possibilities of identifying the criminal personality, in recent years the ideology of treatment has entered a deep crisis. The traditional concept of re-education of the delinquent, with its implications of social conformism, can hardly be reconciled with the current assumptions of democratic societies, in which every person aspires to full liberty. On the other hand, criminality, if unchecked, would be alien to the functioning of a modern State.

In such conditions a ‘legitimization’ of criminal law can only be found again in its capacity to prevent crimes.

We can analyze, on the one hand, general prevention as constituting the effect that penalties have in dissuading members of the public from committing illicit deeds. The other aspect to be considered is special prevention, which consists of attempts to prevent those who have committed a crime, from committing further crimes.

A correct evaluation of empirical studies on the effects of prevention requires, however, that one is guided solely by scientific criteria. Other considerations, which might be of moral, political or religious character, need to be excluded, as they might prejudice a purely scientific approach. This needs to be said because many empirical studies have taken as their starting point the superior preventative effect of capital punishment over other forms of punishment. As a result, it has been shown that scholars who are in favour of capital punishment have verified a higher degree of prevention, while other scholars, who are against capital punishment for ideological reasons, have maintained that it does not prove itself effective in preventing crime. From this perspective, one might wonder if the evaluation of the results, and maybe the studies themselves, are conditioned, maybe unwittingly, by preconceptions; preconceptions

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which are in themselves fully respectable, but which should be excluded from scientific research aimed at finding out whether punishment has preventative effects against crime or not, and, if so, when and to what extent.

One might add that results obtained in terms of the death penalty have tended to be extrapolated into the more general area of prevention with regards to all penal punishment. However, the ideological basis which was part of the treatment of the effectiveness of capital punishment has not been purged. More particularly, if ideological reasons have led to the denial of the preventative effect of capital punishment and this result has been applied to all forms of punishment, consistency should also lead us to deny any rational legitimization for all penal law, even for all law itself.

Another premise needs to be stated: anyone wishing to test any scientific proposition empirically should first of all define the hypothesis to verify. Scholars who have carried out empirical studies, in so far as they are experts in econometrics, but not penal law, have indicated the basis of their research into preventative effect in a crude and incomplete way as far as the most up-to-date penal doctrines are concerned. In all this the first task of anybody who wants to evaluate empirical studies, or propose new ones, is to define precisely the hypothesis which needs to be verified.

Using these premises as a basis we will try to show the following:

1. Since the synchronic type of empirical research takes an imperfect theory of deterrence as its criteria for evaluating the effect of prevention, it can do no more than corroborate the preventive effect of ‘certainty’ when enforcing penalties, but only corroborate indirectly the preventive effect of appropriate levels of punishment.
2. The diachronic type of empirical research is more suited for demonstrating the preventive effect of punishment and thus succeeds in obtaining acceptable results even if based on that imperfect theory.
3. When dealing with undifferentiated incapacitation, no effect of incapacitation appears at all since the ‘criminal workplace’ is immediately blanketed by other issues.
4. There is, on the other hand, an effect of selective incapacitation (in the cases of recidivism).
5. However, empirical research must be redefined using the up-to-date theory of general prevention as its principal element.

2. GENERAL PREVENTION

The theory of general prevention, in its classical form dating back to the works by Cesare Beccaria and Jeremy Bentham, holds that criminal behavior is regulated by the laws of utility. Thus, connecting a consequence having negative utility – i.e. the punishment – to the commission of a certain kind of crime, one would expect that the frequency of that crime should decrease as the punishment provided becomes more severe or more certain in its application.

A first clarification must immediately be added to this theory – one contained already in the writings by Beccaria and Bentham, yet sometimes forgotten. The rationale of