

▣ INCAPACITATION THEORY

Proponents of the incapacitation theory of punishment advocate that offenders should be prevented from committing further crimes either by their (temporary or permanent) removal from society or by some other method that restricts their physical ability to reoffend in some other way. Incarceration is the most common method of incapacitating offenders; however, other, more severe, forms such as capital punishment are also used. The overall aim of incapacitation is to prevent the most dangerous or prolific offenders from reoffending in the community.

EXPLANATION

Incapacitation is a reductivist (or “forward looking”) justification for punishment. Reductivism is underpinned by the theory of moral reasoning known as utilitarianism, which maintains that an act is defensible and reasonable if its overall consequences are beneficial to the greatest number of people. Thus, the pain or suffering imposed on an offender through punishment is justified if it reduces or prevents the further harm that would have been caused to the rest of society by the future crimes of that offender. The concern here is with the victim, or potential victim. The rights of the offender merit little consideration.

Incapacitation has long been a significant strategy of punishment. For example, in Britain during the 18th and 19th centuries, convicted offenders were often transported to Australia and the Americas. In the 21st century, the physical removal of offenders from society remains the primary method of incapacitation in most contemporary penal systems. This usually takes the form of imprisonment, although other methods of incapacitation are in operation.

The most severe and permanent form of incapacitation is capital punishment. Capital punishment is often justified through the concept of deterrence, but whether the death sentence actually deters potential offenders is highly contested. What is indisputable is that once put to death an individual

is incapable of committing further offenses. Capital punishment is therefore undeniably “effective” in terms of its incapacitative function.

Other types of severe or permanent incapacitative punishments include dismemberment, which is practiced in various forms. For example, the physical or chemical castration of sex offenders has been used in some Western countries, notably North America. Less severe forms of incapacitation are often concerned with *restricting* rather than completely *disabling* offenders from reoffending. These include sentences such as disqualification from driving or curfews. In the United Kingdom, attendance center orders are used for individuals under the age of 21. Their aim is to restrict the leisure time of offenders by requiring them to attend a center in order to engage in some form of activity for a specified number of hours.

However, as mentioned above, the primary method of incapacitation is imprisonment. As with capital punishment, incapacitation in the form of imprisonment is considered to be a strategy that “works” because, for the duration of their prison sentence, offenders are restricted from committing crimes within the community.

So, according to this theory, punishment is not concerned with the nature of the offender, as is the case with rehabilitation, or with the nature of the offense, as is the case with retribution. Rather, punishment is justified by the risk individuals are believed to pose to society in the future. As a result, individuals can be punished for “hypothetical” crimes. In other words, they can be incarcerated, not for crimes they have actually committed but for crimes it is *anticipated* or *assumed* they will commit.

DEVELOPMENT AND DETAILS

Since the 1970s, and the demise of rehabilitation as a primary aim of punishment, incapacitation has become a significant goal of penal systems in both the United States and the United Kingdom. Two strategies have influenced penal policy and practice on both sides of the Atlantic: the “three strikes and you’re out” policy and the practice of “selective incapacitation.”

The three-strikes policy is partly informed by the theory of deterrence but is primarily underpinned by the concept of incapacitation. It has been influential in the United States since the early 1990s and aims to remove the most prolific or habitual offenders from society. Such offenders are given long sentences of up to life imprisonment for a third offense, regardless of the nature or gravity of that crime, if one or both of their previous offenses was a “serious” felony. In practice, this means that offenders can be given sentences that are disproportionately harsh for the offense committed. One of the most oft-cited examples of the severity of the three-strikes principle is the case of Jerry Williams, who, in 1995, was sentenced to life imprisonment without parole for stealing a piece of pizza.

The three-strikes principle has also had an impact on penal and criminal justice policy in the United Kingdom. The Crime Sentences Act (1997) proposed the use of harsh sentences, lengthier than the seriousness of the crime would normally warrant, for “serious” or prolific offenders. In addition, discretionary life sentences were introduced in the Powers of Criminal Courts (Sentencing) Act of 2000.

The second strategy, selective incapacitation, is concerned with identifying “risk” and predicting “dangerousness.” This strategy emphasizes the proactive nature of incapacitative sentences. The aim is to incarcerate selectively those individuals who would pose a serious risk to the public if left within, or released back to, the community. Identifying risk is inherently problematic, and there have been many criticisms leveled at the subjectiveness of the methods and criteria used to predict future dangerousness. Indeed, as Norwegian sociologist Thomas Mathiesen has commented, many of the so-called aggravating factors often used to predict future behavior—such as previous periods of imprisonment, drug use, and unemployment—might actually be considered, by some, to be mitigating factors.

CRITIQUE

The use of incapacitation as a justification for punishment can be inherently problematic in both theory and practice. First, incapacitative sentences

such as the three-strikes principle effectively repunish individuals for previous crimes. Alternatively, sentences based on selective incapacitation punish individuals for crimes not yet committed. There is an inherent risk with selective incapacitation that some of the individuals who are identified as “dangerous,” and thus incarcerated, would not have gone on to offend. However, even if the methods of prediction were accurate, there are naturally moral and ethical questions about incarcerating individuals for what they *may* do rather than what they have actually done.

Incapacitative sentences also maintain and legitimize structural divisions within society. U.S. sociologist Christian Parenti comments that the excessive use of incarceration in the United States is indicative of a growing class-based, racial intolerance. The three-strikes principle, as with imprisonment in general, is disproportionately applied to minorities and the poor. While African Americans make up only 7% of the Californian population, for example, they constitute 31% of the state prison population and 44% of its “three-striker” population.

At the same time, a penal strategy based around the concept of incapacitation places no emphasis on the crimes of the powerful. So white-collar, corporate, and environmental crimes, which are more costly and, some would argue, more harmful to society, are overlooked. The emphasis instead is placed on street crime, which is disproportionately committed by the young and the poor.

Finally, incapacitative sentences, which are frequently dispensed to young people, take no account of the fact that most individuals “grow out” of their criminal activity. Many “criminal careers” do not last beyond the late teen years. Thus, long sentences without the possibility of parole make no allowance for the transitory nature of much law breaking.

—Alana Barton

See also Civil Commitment of Sexual Predators; Corporal Punishment; Determinate Sentencing; Deterrence Theory; Increase in Prison Population; Indeterminate Sentencing; Just Deserts Theory; Life Without Parole; Megan’s Law; Parole; Parole Boards; Prison Industrial Complex; Race, Class, and Gender of Prisoners; Rehabilitation Theory; Sentencing

Reform Act 1984; Sex Offenders; Three-Strikes
Legislation; Truth in Sentencing; War on Drugs

Further Reading

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