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
It would be no exaggeration to say that during the past two decades the U.S. prison system has been a growth industry. There are now more than 2 million people behind bars in America, with an incarceration rate above 700 per 100,000 (if we include jails), triple what it was 20 years ago. The United States is way ahead of other industrial democracies, whose incarceration rates tend to cluster in a range from around 55 to 120 per 100,000 population. Some countries have incarceration rates well below that range, such as Japan’s rate of 37. Canada has a rate of only 115. The average incarceration rate for all countries of the world is around 80 per 100,000. Thus, America’s incarceration rate is almost nine times greater than the average country.

Table 1 shows changes in the U.S. prison system during the past 75 years. Note that the most significant increases have occurred since the mid-1980s, when the war on drugs began to have its effects on jail and prison populations. Indeed, a recent estimate is that convictions for drugs accounted for almost one half of the increase in state prison inmates during the 1980s and early 1990s. Between 1988 and 1994, the number of prisoners who had been convicted of drug offenses went up by 155.5%. By comparison, only modest increases were seen for violent and property offenders. Between 1980 and 1992, court commitments to state prisons on drug charges alone increased by more than 1,000%.

The increase for women offenders has been even more striking. From 1925 to 1975, there was virtually no change in their rate of incarceration. Then, between 1975 and 2000, their incarceration rate increased by more than 600%, twice the rate of increase for males. Once again, this increase can be explained by drug policies, since the proportion of women sent to prison for drug offenses jumped from around 10% in the early 1980s to more than one third in the 1990s. In the federal system, the growth rate is even more dramatic. Whereas in 1984 a total of 28% of female offenders were drug offenders, by 1995 their percentage had more than doubled to 66%.

That the drug war has contributed to rising prison populations is further supported with data from U.S. district courts (federal system) showing that whereas in 1982 about 20% of all convictions were for drugs, by 1994 this percentage had increased to about 36. During this same period, the proportion of those convicted on drug charges who were sentenced to prison increased from 74% in 1982 to 84% in 1994, and their actual sentences increased from an average of 55 months in 1982 to 80 months in 1994. The average sentences for murder during this time actually decreased from 162 months to 117 months, while for all violent offenses the average sentence declined from 133 months to 88 months. At present, all of these changes have meant that on any given day, almost 60% of all federal