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Book Review

INCAPACITATION—PENAL CONFINEMENT AND THE RESTRAINT OF CRIME. By Franklin E. Zimring and Gordon Hawkins. Oxford University Press, New York and Oxford. 1995. 188 pages.

Reviewed by Raymond Parnas*

I approached reading this book with two contradictory thoughts in mind. Zimring and Hawkins are among the best thinkers in criminal justice today; but even they can't find enough meaningful data and ideas to justify even a small book on incapacitation. Upon concluding the book I believe I was right on both scores. That is not to say that incapacitation, penal confinement, and the restraint of crime are not important criminological concepts. Indeed they are, but of the three concepts, only the latter is worth writing about.

Incapacitation—making an offender incapable of committing a crime on the already offended society—presents no problem whatsoever if execution is the means. Alternative methods are obviously less conclusive but nonetheless do an excellent job of incapacitation. Exile and banishment have lost favor and (along with many other discarded sanctions) might well be reconsidered in modern guise. They have been replaced by penal confinement—primarily imprisonment. Aside from the important questions of method, place, conditions, and above all duration, incapacitation and penal confinement are quite easily understandable and readily attainable.

But it is the *restraint of crime* by the incapacitative method of penal confinement that this little book ponders. Even as to this overall concern, however, there is a readily apparent partial answer. In other words, one major purpose of incapacitation by penal confinement is to restrain the confined offender from perpetrating additional crimes on outside society during confinement (*i.e.*, specific deterrence). By definition, incapacitation clearly does that. The other less obvious purpose of incapacitation of an offender by penal confinement is to restrain others who are not confined from committing crimes (*i.e.*, general deterrence). Much of this book focuses on the extent to which incapacitation achieves a general deterrence purpose.

To deal with this central question, Zimring and Hawkins present useful literature surveys, candid research critiques, and many interesting ideas. Of particular note is the review and honest appraisal of all the then published data on the economic and social costs of crime. But despite the speculation and imprecision found in all of these studies, there are costs, often considerable, to be

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saved if the offender is confined so that he cannot recidivate at least temporarily—right? Interestingly, their answer is—not necessarily.

The authors' frank review of studies concerning our ability or inability to predict future criminality is directly related to their questioning crime cost savings due to confinement. Of course not all offenders repeat (despite the fact that the best predictor of recidivism is prior conduct). If they do repeat, it isn't necessarily the same kind of crime with the same costs. But most interestingly, the authors point out that even if a hypothetical confined offender could be predicted to repeat with accuracy, there may nonetheless be no reduction in the crime rate by his restraint nor any reduction of economic and societal costs by his penal confinement. How can this be? They put forward two convincing reasons. First, if the confined offender was a member of a criminal group which continues its criminal activities in his absence there will be no reduction. Second, even if the confined offender committed his crime as an individual, if his confinement provides an opening for another person to fill a vacant crime opportunity slot there will again be no reduction.

As I said, some useful surveys, honest critiques, and good ideas, but I wish the authors had rather dealt in depth with, for example, the relationship between age and crime. About twenty-five years ago a former correctional officer countered a rehabilitation focused Jesuit priest in my Sentencing and Corrections Course by arguing that all we really knew about the deterrence of repeat offenders was that at about thirty-five to forty years old most got "burned out" and stopped. Subsequently, I researched age-crime incidence with the result that fifteen to thirty or forty years old were found to be the significant high years. This seemed to verify the burn-out theory at least logically and call for early and lengthy confinement up to age forty *if* one's emphasis, to the exclusion of all else, was incapacitation during high crime years.

It is also truly unfortunate that the research and publication of this book came just before the highly publicized arguments of politicians causally linking recent crime rate decreases to "Three Strikes" legislation. Therefore, although the book contains a lengthy (and tedious) description of incarceration and crime trends in California throughout the 1980s, it cannot explicitly address the arguably irrational progressions in California's subsequent "Three Strikes" law, which confines for life persons to whom the "burn-out" theory is applicable as well as those whose lesser last offense may be a positive rather than a negative sign (*i.e.*, an armed robber turned burglar could be considered a "success" in a realistic criminal justice process). Nonetheless, by implication, much of this little book questions the real impact on crime rates and the economic and societal costs of crime by "Three Strikes" incapacitation by penal confinement legislation. (Of course if the anecdotal allegations that criminals are leaving California in significant numbers because of its "Three Strikes" law are true, then general deterrence by a novel kind of self-imposed banishment-exile would in fact be working and must be weighed against the law's defects.)

Ultimately, however, cost considerations will prevail whether one is a "Three Strikes" proponent or any other kind of imprisonment exponent. More prisoners require more prisons which require more money. Eventually, penal confinement emphasis must give way to less costly alternative sanctions. This is the real reason behind many conservatives' change in thinking about drug policy which will, I believe, ultimately result in a dramatic switch in direction soon. Correctional theory may be the stated reason but economic determinism will be the real cause. (On this fact of life a basic premise of communism lives on). Zimring and Hawkins also recognize flaws in current selective incapacitation techniques and call for more research to help identify those who are more likely to repeat crimes of the greatest cost to society.

My foregoing verbiage has caused me to remember another reason I approached doing this review with much trepidation. After his retirement from teaching, the founding Dean of the University of California at Davis Law School, Ed Barrett, agreed to speak to my Criminal Justice Law Reform Seminar. We looked forward to his ideas with great anticipation since he was one of the foremost scholars in the field for fifty years. What a shock when he opened his comments by saying that he felt that he had made little impact of significance on the administration of criminal justice. And now after thirty years in this business I too have finally learned that we academicians, scholars, professors, and so-called intelligentsia do not really know as much as we think or say we do. Our trade requires articles and books full of big words, weighty thoughts, and sometimes graphics and statistics, but it is the rare piece that adds much meaning to what is already thought to be known about the subject (even by the "non-expert" average person). That is what really troubles me about this book.

Here is what I believe we already knew, most of which was touched upon by the authors but its importance underemphasized. The Penal Law and its sanctions, more than any other body of law, is directly related to the desires of the people it's supposed to protect. The people want at least serious offenders punished. Feelings of vengeance and retribution, though denigrated by jurists, are common. The people do not want any offenders to repeat. They also want at least serious offenders gone from their midst. They believe prison can and should accomplish all of these wishes. (That is one reason California's Determinate Sentence Law says "the purpose of imprisonment for crime is punishment").

Although these common desires are nothing new, Zimring and Hawkins were nonetheless astonished that so little was written on incapacitation over the years. But what was the need to write about something we knew how to do as long as we were only thinking about its effect on the offender during his confinement? The possible effect of incapacitation on those outside did have much written about it, but under the rubric of general deterrence. Furthermore, although the authors acknowledge that for most of the twentieth century penal confinement was theoretically based on notions of rehabilitation, they apparently do not recognize that to the average person, so long as serious offenders were being

punished by imprisonment out of their midst, what it was called didn't make any difference. And as far as rehabilitation, treatment, reformation, education, general deterrence and perhaps any penal goal other than incapacitation and punishment physically or by penal confinement the people know the "experts" don't know very much.

We also knew before this book and with comparative certainty the costs of confinement, and that the people will not continue to bear those costs forever. Lastly, we knew that crime has been cyclical and tends to be dependent more on a variety of uncertain social variables rather than changes in the criminal process. Therefore, it seems to me going into this study that we knew what its major conclusion would be, namely that only selective and not general incapacitation is a feasible goal of restraint by penal confinement and that better research (a scholarly cop out I too have used) is necessary to make our choices most efficient and cost effective for serious and frequent recidivists.

Finally let me add my suggestions for additional relevant future research:

- 1) Is the oft-used polemic that prison is merely a school for crime fact or fiction?
- 2) Is the burn-out theory fact or fiction?
- 3) What alternatives to penal confinement can be created to include elements of punishment sufficient to satisfy public needs?
- 4) Is California's "Three Strikes" law really causing criminals to leave the state in significant numbers?