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INCARCERATION'S INCAPACITATIVE SHORTCOMINGS

Kevin Bennardo*

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INTRODUCTION

Incarceration incapacitates only very incompletely. This observation is not new.¹ It is, however, worthy of further emphasis and discussion because any contrary statement discounts prison crime and excludes inmates from the relevant measuring population (“society”). To arrive at this conclusion, this essay first constructs a definition of incapacitation that recognizes two distinct types of incapacitation: offense-specific incapacitation and victim-specific incapacitation. The former concerns limitations on the offender’s range of conduct while the latter focuses on limitations on the offender’s access to particular populations.² Next, the essay applies this framework to incarceration and determines that this mode of punishment achieves both types

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1. See *infra* note 46.

2. See *infra* Part I.

of incapacitation only to a partial degree.³ However, incarceration's incapacitative benefits are often overstated by excluding inmates from the world of persons worthy of protection.⁴ Such descriptions improperly imply a diminished interest in protecting inmates and should be avoided.⁵

I. THE RESTRAINT OF MISCHIEF

Incapacitation is the removal of an offender's ability to commit future crime against a relevant population.⁶ It has long ago secured itself in the pantheon of generally accepted purposes of punishment⁷ alongside general and specific deterrence,⁸ retributivist notions of just deserts,⁹ and the elusive ideal of rehabilitation.¹⁰ Despite the importance of incapacitation theory in modern sentencing schemes, it has received comparatively little scholarly attention relative to the other, "more sophisticated," purposes of punishment.¹¹ By

3. See *infra* Part II.

4. See *infra* Part II.B.

5. See *infra* Part II.B.

6. More generally, incapacitation is defined as "[t]he action of disabling or depriving of legal capacity" or "[t]he state of being disabled or lacking legal capacity." BLACK'S LAW DICTIONARY 828 (9th ed. 2009).

7. See, e.g., MODEL PENAL CODE § 1.02(2)(a) (1962) (listing crime prevention as a purpose of punishment); MODEL PENAL CODE § 1.02 cmt. 3(a) (1985) (explaining that crime prevention encompasses "incapacitating persons who are dangerously disposed to engage in criminal conduct"); 1 JEREMY BENTHAM, *Principles of Penal Law*, in THE WORKS OF JEREMY BENTHAM 365, 396 (1843) ("If the crime he has committed is of a kind calculated to inspire great alarm, as manifesting a very mischievous disposition, it becomes necessary to take from him the power of committing it again.").

8. See ARTHUR W. CAMPBELL, LAW OF SENTENCING § 2.2 (2d ed. 1991) ("Special deterrence defends criminal penalties as a way to disincline individual offenders from repeating the same or other criminal acts."). Specific, or "special," deterrence differs from general deterrence in that general deterrence is concerned with the future actions of the public at large rather than those of the punished individual. See *id.*

9. "To the retributivist, punishment of a wrongdoer is justified because he deserves to be punished. . . . Unlike utilitarianism, retributivism is premised on the view that punishment of wrongdoers is morally right whether or not it provides any future social gain." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 6 (1st ed. 1987), quoted in CAMPBELL, *supra* note 8, § 2.5.

10. The rehabilitative model "use[s] the correctional system to reform the wrongdoer rather than to secure compliance through the fear or 'bad taste' of punishment. The methods of reformation will vary from case to case, but could consist of, for example, psychiatric care, therapy for drug addiction, or academic or vocational training." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 15 (6th ed. 2012).

11. See FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL

and large, the current incapacitation literature focuses on quantitative analyses of how well incarceration achieves the larger goal of crime reduction.¹² These studies require complex predictions involving the substitution effects of other offenders filling the crime void created by imprisoning the incarcerated offender.¹³ The baser, but more often bypassed, question that remains is whether, how, and to what extent imprisonment incapacitates the incarcerated offender herself.

A punishment achieves incapacitation when it strips a person of the power to commit future crimes regardless of her will to do so. Because incapacitation focuses on a person's ability rather than on her will, a punishment generally requires a physical component to incapacitate: "body operating upon body is sufficient to the task."¹⁴

CONFINEMENT AND THE RESTRAINT OF CRIME 157 (1995) ("The reliance of incapacitation on the physical control of offenders renders it a low-technology criminal sanction . . ."); 4 JEREMY BENTHAM, *Panopticon Versus New South Wales: Or, the Panopticon Penitentiary System, and the Penal Colonization System, Compared*, in THE WORKS OF JEREMY BENTHAM, *supra* note 7, at 184–86 (discussing the punishment of incapacitation ("it may be aimed at almost without thought") versus rehabilitation ("a very complex object: thought and contrivance are necessary to the pursuit of it")); *see also* Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 U. ST. THOMAS. L.J. 536, 542 (2006) ("As a rationale for current practice, incapacitation . . . has the virtue of avoiding many of the contentious questions that surround other punishment rationales. We need not wrestle with difficult questions of whether higher punishments deter, either specifically or collectively; nor do we need a consensus on whether it is morally appropriate or repellent to give voice to retributive instincts in doling out punishment. We can hope that prisoners are rehabilitated (as most people do), but as long as they are in prison, we worry far less about the downsides of the failures of rehabilitative efforts." (footnote omitted)).

12. *See, e.g.*, WILLIAM SPELMAN, *CRIMINAL INCAPACITATION* (1994); STEPHEN VAN DINE, JOHN P. CONRAD & SIMON DINITZ, *RESTRAINING THE WICKED: THE INCAPACITATION OF THE DANGEROUS CRIMINAL* (1979); ZIMRING & HAWKINS, *supra* note 11, at 79–127; Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103 (1998); Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q.J. ECON. 319 (1996); Emily G. Owens, *More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements*, 52 J.L. & ECON. 551, 551 (2009); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1108 (2008) (concluding that imprisonment may actually cause more crime than it prevents); Ben Vollaard, *Preventing Crime Through Selective Incapacitation*, 123 ECON. J. 262 (2013).

13. *See, e.g.*, ZIMRING & HAWKINS, *supra* note 11, at 55–56 (theorizing that substitution is more likely for offenses that involve a market for illicit goods and services, such as drug distribution and prostitution).

14. BENTHAM, *supra* note 11, at 186. In some instances, non-physical

Incapacitation's focus on the ability of an offender creates an important conceptual distinction between incapacitation and deterrence. A punishment achieves specific deterrence when it alters the will of the person being punished so that the person elects to forgo future crime.¹⁵ No physical component is necessary to alter a person's will—the threat of punishment may be sufficient. The potential of receiving a speeding ticket deters many people from speeding, even though it does not incapacitate them from doing so. Increased likelihood of detection—like monitoring a probationer with an ankle bracelet—may also deter future wrongdoing without actually incapacitating the individual.¹⁶

Thus, to design a punishment that incapacitates, a governing authority must first identify the offense or offenses it wishes to inhibit as well as the relevant population it wishes to protect. Once these two variables are identified, the governing authority must determine what the offender needs in order to commit the identified offenses against the relevant population and deny the offender access to those resources.

The same calculus can be applied—albeit backwardly—to existing punishments to measure their incapacitative achievements and shortcomings. Just as some punishments partially rehabilitate, partially deter, or partially serve up a just desert, most punishments only partially incapacitate. A punishment's incapacitative achievements can be measured with regard to both offense-specific incapacitation as well as victim-specific incapacitation. The former focuses on limitations on the offender's range of conduct. The latter focuses on limitations on the offender's access to particular populations.

With regard to either type of incapacitation, a punishment's effectiveness may be measured along a sliding scale with “negligible inhibition” on one end and “absolute denial of capacity” on the other. Of course, a single

punishments such as fines or shaming carry some crime-inhibiting effects. *See infra* notes 23–26 and accompanying text.

15. Owens, *supra* note 12, at 552 (“A deterred offender is able to commit crime but chooses not to, whereas an incapacitated offender would choose to commit crime but is unable to do so.”).

16. Extremely close monitoring that could actually physically intervene should the offender attempt to commit an offense, such as the constant presence of a band of officers alongside a probationer, could rise to the level of incapacitation.

punishment may partially incapacitate an offender with respect to both categories, but it is the rare punishment that fully achieves both. Only death absolutely incapacitates an offender from committing all future offenses against all potential victims.¹⁷ For all other punishments, incapacitation is a matter of degree along both spectrums.¹⁸

A. Offense-Specific Incapacitation

The degree of offense-specific incapacitation is dictated by two variables: (1) the range of offense conduct that is inhibited by the punishment, and (2) the level of difficulty with which the offender can circumvent the barrier to re-offending. A punishment may be designed to inhibit an offender's ability to commit crime in general or may be specifically tailored to impede the offender from committing a specific category of offenses. Either way, most non-capital barriers to reoffending may be overcome by a particularly strong or cunning offender.

Consider the often specifically targeted effects of punishments that involve physically mutilating the offender. Surgical castration of a sex offender inhibits the offender's ability to engage in only a relatively narrow category of offenses, but is highly effective at inhibiting those offenses.¹⁹ In comparison, cutting off a thief's hands inhibits the offender from committing the entire range of offenses that are made easier by having hands, but likely does not achieve absolute incapacitation with regard to any offense, including stealing.

Other punishments, such as death and imprisonment, are less targeted toward the incapacitation of specific offenses than the offender's ability to commit crime in general. Death, of course, impedes the offender from committing any and all future offense. As described later, imprisonment achieves varying levels of offense-specific incapacitation by impairing the offender's access to the various resources necessary to

17. See JACK P. GIBBS, *CRIME, PUNISHMENT, AND DETERRENCE* 58 (1975); HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 48 (1968).

18. PACKER, *supra* note 17, at 48.

19. See John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 577–78 (2006) (describing castration's incapacitative effects); see also Steven S. Kan, *Corporal Punishments and Incapacitation*, 25 J. LEGAL STUD. 121, 124–26 (1996).

commit certain crimes.²⁰

Whether targeted at certain offenses or criminal activity in general, a punishment only incapacitates to the extent that the offender is unable to overcome the restriction placed upon her. Death is impossible to overcome. Mutilation may be overcome with prosthesis. Effective confinement is limited by the barriers to escape.

Most non-physical restraints fail to incapacitate.²¹ The subject of a restraining order may elect to abide by the restriction for fear of the punishment attendant to violating the order, but such a choice is a product of the deterrent effect of the potential punishment, not of any actual incapacitation. Similarly, taking away a drunk driver's operating license carries no incapacitative benefits because it does not actually impede the offender from committing any future offense, including drunk driving.²² Physically impeding the offender's ability to drive drunk by installing a breathalyzer lock in her vehicle, on the other hand, does inhibit the offender from future drunk driving, albeit only to a minor extent because the offender retains the capacity to drive other vehicles while intoxicated or circumvent the breathalyzer lock with the assistance of a sober person.

Nonetheless, some non-physical punishments carry incapacitative effects in certain circumstances. One study found that fines were more effective than incarceration at reducing the incidence of public drunkenness among the very poor, presumably because the fines drained funds that would otherwise be spent on alcohol.²³ Thus, a fine that is large

20. See *infra* Part I.B.

21. A restraint need not be a "punishment" in the criminal sense to carry incapacitative benefits. Many protective actions may be considered incapacitative shields. Placing a locking mechanism on a vehicle's steering wheel—or simply locking the doors of an unattended vehicle—makes theft of that vehicle more difficult. Likewise, armoring a vehicle with bullet-proof glass makes assassination of the inhabitants of the vehicle more challenging. See ZIMRING & HAWKINS, *supra* note 11, at 156 (discussing "environmental adjustments" as a strategy of crime prevention).

22. See *id.* at 160.

23. See Keith Lovald & Holger R. Stub, *The Revolving Door: Reactions of Chronic Drunkenness Offenders to Court Sanctions*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 525, 529 (1968) (finding that fines were more effective than incarceration at increasing the time between court appearances on charges of public drunkenness among the generally impoverished residents of Minneapolis's "Skid Row").

relative to the financial resources of an offender partially incapacitates the offender from committing future offenses that would be made easier by having money.²⁴ The poor lack the ability to commit some offenses—especially the purchase of expensive illicit items—simply because they lack material resources. Therefore, a fine that impoverishes the offender will impede the offender from committing certain future offenses.

On the other end of the spectrum, researchers have linked shaming to incapacitation of white-collar offenders because future would-be victims will avoid engaging in financial transactions with known criminals.²⁵ However, bad publicity is less likely to incapacitate the super-rich because they are more able to use their considerable means to seek out potential victims in fresh social circles.²⁶ Thus, while non-physical punishments like fines and shaming may carry some incapacitative effects, these effects are highly offense-specific and are likely more than negligible only when applied against the “right” offender.

Incapacitative punishments—or, indeed, restraints of any kind—are rarely so well designed so as to incapacitate only the targeted activity. Rather, a restraint of an offender’s ability to commit further illegal activity will invariably lead to collateral incapacitation that inhibits the offender’s ability to engage in legal, potentially beneficial activity as well. The handless thief will find it challenging to engage in a variety of constructive undertakings. The offender impoverished through a fine is unable to invest in a small business or

24. Although wealth may also enhance an offender’s ability to escape apprehension or conviction, that aspect is one of deterrence rather than incapacitation.

25. See Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 370–71 (1999) (arguing that publicized shaming effectively incapacitates a white-collar criminal because others avoid dealing with the offender and “[i]t is as though he walks around surrounded by bars”); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1899–1900 (1991) (arguing that incapacitation theory supports shaming sanctions because other members of society may avoid contact with known offenders).

26. See Michael Levi, *Suite Justice or Sweet Charity? Some Explorations of Shaming and Incapacitating Business Fraudsters*, 4 PUNISHMENT & SOC’Y 147, 158–59 (2002) (concluding that white-collar offenders “with limited social and geographic mobility” are most susceptible to shaming but that the punishment is less effective against the super-rich, especially in a “mobile, global culture”).

donate money toward charitable purposes. The executed criminal is unable to contribute to society at all. At some point, the disutility associated with the collateral incapacitation of valuable activity outweighs the utility conferred by the incapacitation of harmful activity and makes punishment irrational from a utilitarian perspective.²⁷

In summary, a punishment's effectiveness at achieving offense-specific incapacitation depends on the degree to which the punishment inhibits the offender from committing future offenses—measured by the range of future offenses inhibited, the extent to which the punishment restricts the commission of those future offenses, and the ease with which the offender can overcome the barrier to reoffending.

B. Victim-Specific Incapacitation

Incapacitation can also be measured by the degree to which a punishment alters the population of potential victims. Some punishments inhibit an offender's ability to victimize a particular population without interfering with the offender's ability to commit any particular offense. The measuring population may be as specific as a single individual or "preferred victim." To achieve victim-specific incapacitation, a punishment must separate the offender from the relevant population or impose some sort of barrier between the offender and the relevant population of potential victims.

A classic example of victim-specific incapacitation is the punishment variously known as exile, transportation, or deportation. Exile physically removes an offender from a particular jurisdiction; thus, it limits the offender's ability to commit future crimes in that jurisdiction. On its own, however, exile imposes no incapacitative restraints on the offender in the land of banishment. By only relocating the mischief-maker, exile simply exchanges one population of potential victims for another.²⁸ Thus, the incapacitative

27. Weighing collateral incapacitation against crime prevention could lead to the reluctance to punish "productive" members of society. Such determinations, however, are well beyond the purview of this essay, which is aimed at measuring the nuts and bolts of incapacitation in practice rather than its theoretical underpinnings.

28. To the extent that exile separates the offender from a preferred victim, it inhibits the offender's ability to victimize the preferred victim. But, on the

“success” of exile is jurisdictionally-dependent. If the justice system measures success only with regard to the sentencing jurisdiction, then exile may be quite an effective means of incapacitation.²⁹ But if incapacitative success is measured on a global scale, then exile is a decidedly ineffective punishment.

Offense-specific incapacitation is always a rational goal of punishment because it reduces the offender’s ability to commit crime. However, victim-specific incapacitation is not always rational because it may simply trade one population of potential victims for another.³⁰ Victim-specific incapacitation is only a rational goal of punishment to the extent that the sentencing entity (1) prefers the victimization of one population over another or (2) knows that the offender is more likely to victimize one population relative to another.

To illustrate, the victimization of the inhabitants of Australia was unimportant to the British sentencing authority at the close of the eighteenth century.³¹ Thus, exile of British offenders to New South Wales was a rational punishment. Likewise, if a sex offender is known to be more likely to victimize females than males, it is rational to segregate the sex offender from females because such segregation will likely decrease the offender’s rate of offending. But assuming that the federal government has no preference with regard to the victimization of Kansans or

converse, it also exposes the offender to an entire population of potential victims that may have previously been beyond her reach.

29. But note that exile’s incapacitative effects are only offense-specific: although exile may impose a formidable barrier against an offender assaulting an inhabitant of the sentencing jurisdiction, it imposes a markedly less formidable barrier against committing other offenses against the inhabitants of the sentencing jurisdiction that do not require physical presence in the jurisdiction.

30. If a punishment were to inhibit an offender’s ability to victimize *all* people, the punishment would achieve both offense-specific incapacitation as well as victim-specific incapacitation. For example, banishing an offender to an uninhabited desert island creates offense-specific incapacitation because it impedes the offender’s ability to commit a whole host of offenses *at all* rather than merely inhibiting the offender’s ability to engage in victim selection or access a particular population.

31. BENTHAM, *supra* note 11, at 183 (noting that the exile of British offenders to New South Wales “render[ed] it impossible for a man to do any more such mischief in the only spot in the world worth thinking about. . . . [H]ow the people thus sent thither behaved while there, was a point which, so long as they did but stay *there*, or, at any rate, did not come back *here*, was not worth thinking about.”).

Nebraskans and offenders would victimize the inhabitants of either state at the same rate, it would be irrational for the federal government to exile offenders from one state to another as part of a scheme of victim-specific incapacitation.

Like offense-specific incapacitation, the second component of victim-specific incapacitation is the effectiveness of the barrier that separates the offender from the relevant measuring population. Exile's effectiveness at impeding an offender from physically harming an inhabitant of the sentencing jurisdiction is largely dependent on how difficult it will be for the offender to re-enter the sentencing jurisdiction. Kansas state authorities may favor the exile of offenders to Nebraska, but the ease with which offenders can cross back over the state line greatly decreases the effectiveness of protecting Kansas citizens by transporting offenders from Topeka to Omaha. In the late eighteenth century, the prospect of an offender making his way back to England from Australia was unlikely.³² But the ease of modern global transportation has greatly reduced the effectiveness of exile at producing a high degree of victim-specific incapacitation, although tighter international border security has perhaps counterbalanced this reduction to some degree.³³

Mere physical distance between an offender and a would-be victim no longer impedes all offenses. In modern times, a person with an Internet connection in Australia can work all manner of mischief on residents of the United Kingdom. But the intervening distance reduces the types of offenses the offender can commit against the relevant population (here, Britons)—assault or burglary would be difficult, for example. This example illustrates the intersection of offense-specific and victim-specific incapacitation—potential offenses against Australians are disregarded by the sentencing authority (a function of victim-specific incapacitation), but the punishment selected fails to totally impede all offenses against the relevant population and therefore reveals a lack of total offense-specific incapacitation.

32. *Id.* at 186 (“The moon was then, as it continues to be, inaccessible: upon earth there was no accessible spot more *distant* than New South Wales.”).

33. *See* Pritikin, *supra* note 12, at 1099 n.245 (declaring that exile is “no longer a viable option” given the “political subdivision of most inhabitable lands, as well as advances in communications and transportation technology”).

II. INCARCERATION'S INCAPACITATIVE SHORTCOMINGS

After the fall of widespread notions of the rehabilitative benefits of imprisonment,³⁴ incapacitation may now well be the primary purpose of incarceration.³⁵ However, this “central technique of punishment”³⁶ only partially incapacitates.³⁷ Proper framing of this partial incapacitation sheds light on the benefits and shortcomings of imprisonment as a punishment. It is unfortunate then, that all too often imprisonment is trotted out as a poster child for something that it is not—absolute incapacitation.³⁸ Suggesting that inmates lose all ability to commit crime for the duration of a prison sentence is simply outlandish and, as explained below, carries with it dangerous implications for how the justice system should view prison crime. It is therefore important to be mindful of incarceration’s incapacitative shortcomings lest prison crime is discounted to zero and inmates are marginalized by exclusion from the relevant measuring population of “society” worthy of protection by the criminal law.

A. Imprisonment’s Partial Offense-Specific Incapacitation

Imprisonment reduces inmates’ ability to commit certain offenses, but falls well short of achieving total incapacitation of all offense conduct. To recap, offense-specific incapacitation depends upon the amount of offense conduct that the punishment inhibits, and the amount of difficulty with which the offender can circumvent the barrier to re-offending. As discussed below, imprisonment impedes a fair amount of illegal conduct and generally places a relatively formidable barrier to escape.

34. See 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 1.5(b) (2d ed. 2003) (chronicling criticism of rehabilitation as a justification for imprisonment); CAMPBELL, *supra* note 8, § 2.4 (same).

35. See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001); ZIMRING & HAWKINS, *supra* note 11, at v, 14–15, 72.

36. ZIMRING & HAWKINS, *supra* note 11, at 158.

37. Incarceration comes in many forms. The severity of the restrictions imposed upon prisoners largely dictates the incapacitative success of incarceration. Solitary confinement in a secure facility unquestionably incapacitates more completely than imprisonment among a general prison population. See PACKER, *supra* note 17, at 48. For purposes of this essay, incarceration and imprisonment generally refer to general prison populations.

38. See *infra* note 43 and accompanying text.

Incarceration in a general prison population totally removes inmates' capacity to commit some offenses (like traffic infractions), partially impedes inmates' ability to commit other offenses (like drug use), and imposes no barrier to inmates' ability to commit other offenses (like assault). The level of difficulty an inmate has in accessing the resources necessary to commit the offense dictates the degree of incapacitation (in the above examples: a vehicle, a controlled substance, another person). For some offenses, the barrier to re-offending is high—a prisoner will likely need to escape the prison in order to commit a traffic infraction. For other offenses, the barrier to re-offending is relatively low—an inmate may need to exert an extra measure of caution in procuring narcotics, but by no means is wholly incapacitated from doing so.

Imprisonment *confers* the ability to commit some prison-specific offenses. Certain acts that are legal in the outside world—like tattooing—may be criminalized or penalized in the prison environment.³⁹ The offense of escape is a prime example: a non-incarcerated person cannot commit this offense. Thus, the punishment of imprisonment *enables* the commission of an offense that the inmate was previously unable to commit.⁴⁰

On the whole, incarceration has significant incapacitative effects for a number of offenses. But because escape is always possible, it fails to totally incapacitate inmates from committing any offenses. And it enables the commission of certain offenses and has no incapacitative effect on others. Thus, imprisonment falls well short of achieving total incapacitation of all offense conduct.

B. Imprisonment's Partial Victim-Specific Incapacitation

On the victim-specific incapacitation front, imprisonment is conceptually similar to exile. The punishment redefines the population to which an offender has access: it trades the

39. Cf. Clifford Krauss, *A Prison Makes the Illicit and Dangerous Legal and Safe*, N.Y. TIMES, Nov. 24, 2005, at A4 (describing a pilot program for legal tattooing instituted in select Canadian federal prisons).

40. The same is true of any partially incapacitative punishment that does not truly remove the offender's ability to overcome the restraint, but outlaws the offender from doing so (e.g., deportation confers the ability to commit the offense of illegal re-entry).

population outside the prison walls for the population within. This trade erects a stiff barrier for offenders with a single preferred victim—an inmate who desires to assault his ex-wife will find it difficult to do so. Although incarceration causes a net loss of access to potential victims because the population inside the prison is undoubtedly smaller than the population outside of the prison, the world of likely future victims merely shifts away from non-incarcerated persons to inmates and correctional personnel.⁴¹

Highly restrictive forms of imprisonment, such as solitary confinement, have much greater incapacitative effects than confinement in a general prison population.⁴² This incapacitative benefit is largely a product of reducing the population to which the inmate has access. Like exile on a deserted island, solitary confinement sharply diminishes an inmate's range of offenses because she lacks ready access to victims.

Returning to inmates confined in a general prison population, the victim-specific incapacitation attendant to imprisonment may be either a neutral byproduct of the punishment or a purposeful feature of the punishment. Key to that determination is whether the governing authority includes other prisoners in the relevant measuring population worthy of protection. If so, then imprisonment's victim-specific incapacitation is neutrally viewed by the governing authority: the inmate is surrounded by a different set of potential victims (other inmates rather than members of the "outside world"), but the governing authority does not prefer the victimization of either group. If not, and the governing authority prefers the victimization of inmates to residents of the "outside world," then the governing authority should view the victim-specific incapacitation positively.

By expressing a lack of regard for the victimization of other inmates, here is where numerous descriptions of the incapacitative benefits of imprisonment go off track. Incarceration is frequently described as achieving incapacitation, even absolute incapacitation, by removing

41. Likewise, release from prison carries victim-specific incapacitative effects by imposing barriers to access to inmates. Upon release from prison, an inmate will find it virtually impossible to assault a former bunkmate who remains locked behind the prison walls.

42. *See supra* note 37.

inmates from “society.”⁴³ If for no other reason, claims of absolute incapacitation fail because prisons are vulnerable to escape, and escapees unquestionably work mischief in the outside world.⁴⁴ As explained above, the degree of incarceration’s victim-specific incapacitation is dependent upon the effectiveness of the barriers to escape. If an inmate can escape imprisonment with ease, the punishment produces negligible victim-specific incapacitation because it creates little impediment to accessing any population—much like exiled offenders crossing the border back into Kansas. Most prisons, while not easy to escape, are not impermeable.⁴⁵ Thus, claims of absolute incapacitation through incarceration descriptively miss the mark.

The more troubling subtext presented by these descriptions is the exclusion of people in prisons from the relevant measuring population of “society.”⁴⁶ Here again the

43. See, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2053 (2010) (Thomas, J., dissenting) (explaining that sentences of life imprisonment without the possibility of parole “[b]y definition . . . serve the goal of incapacitation by ensuring that . . . offenders . . . no longer threaten their communities”); 1 LAFAVE, *supra* note 34, § 1.5(a)(2) (“If the criminal is imprisoned or executed, he cannot commit further crimes against society.”); Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316 (2000) (“Incapacitation uses imprisonment to remove the offender from society to protect it from the danger he poses.”); Richard S. Frase, *A More Perfect System: Twenty-Five Years of Guidelines Sentencing Reform*, 58 STAN. L. REV. 67, 70 (2005) (“Incapacitation prevents crime by imprisoning high-risk offenders, thus physically restraining them from committing further crimes against the public.”); James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL’Y REV. 173, 176 (2010) (“Incapacitation separates a defendant from society and physically prevents further crime.”); Daniel Kessler & Steven D. Levitt, *Using Sentence Enhancements to Distinguish between Deterrence and Incapacitation*, 42 J.L. & ECON. 343, 347 (1999) (“While incarcerated, the agent is unable to commit further crimes.”); Ledger Wood, *Responsibility and Punishment*, 28 J. AM. INST. CRIM. L. & CRIMINOLOGY 630, 639 (1938) (discussing imprisonment: “It is one of the primary functions of organized society to protect itself against the criminal elements within it and this can ordinarily be accomplished only by completely isolating them.”). This list could be expanded significantly; the cited works are merely illustrative.

44. See, e.g., Bob Ortega, *2 Plead Guilty in Fatal Prison Escape*, ARIZ. REPUBLIC (Phoenix), Jan. 21, 2012, at B2.

45. See, e.g., *id.*

46. See Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 110 n.154 (2010) (noting that the general failure to factor prison crimes into analyses of whether utilitarian rationales justify punishment is a weakness of such justifications); Leipold, *supra* note 11, at 556 (“Inmate-on-inmate crime

exile analogy is useful. Imprisonment exiles inmates from the “outside world” to the “prison world.” By measuring the incapacitative effects of imprisonment by how well it protects those in the “outside world,” these descriptions ascribe no negative value to offenses committed in the “prison world.”⁴⁷ If offenses committed in the prison world are ignored, then imprisonment achieves a high level of incapacitation by safeguarding the relevant population (here, the outside world).⁴⁸

But such is not the case. The governing authority should and does have an interest in crimes committed in the prison world. Solid evidence of this interest exists in the form of the criminalization of offenses committed against fellow inmates.⁴⁹ If the governing authority truly had no interest in what occurred in the prison world—like Britain’s lack of concern for what went on in New South Wales—then it would not criminalize and prosecute conduct that occurred there. Even so-called ‘victimless crimes’ such as drug use remain illegal in prison.⁵⁰ Such criminalization demonstrates that

may be largely invisible to the larger world, but that is no excuse for ignoring crimes committed while in prison in our [crime-reduction] calculations.” (footnote omitted); Catherine M. Sharkey, *Out of Sight, Out of Mind: Is Blind Faith in Incapacitation Justified?*, 105 YALE L.J. 1433, 1433 n.3 (1996) (reviewing FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* (1995)) (“Studies of the effect of incarceration on crime rates usually ignore crime within prisons. Crimes committed within prison walls, if explicitly acknowledged in a utilitarian analysis of incapacitation, would reduce the calculated social benefit of crimes averted in society.”) (citations omitted).

47. See JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, *CRIMINAL LAW: CASES AND MATERIALS* 57–58 (6th ed. 2008) (suggesting that “incapacitation” may be better termed “segregation” of offenders from society both physically and symbolically “by implying that their welfare does not count as part of the social welfare.”); Guyora Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888, 895 (1988) (“We may, in other words, isolate convicted criminals in order to convince ourselves that they are not a part of ‘society’ rather than because we think that we thereby protect a society that includes criminals. Imprisonment may change ‘society’ more by redefining its meaning than by reducing its level of violence.”).

48. Inmates do retain the ability to victimize people outside of prison in limited ways, such as by making threatening phone calls.

49. See, e.g., *United States v. Delaney*, 717 F.3d 553 (7th Cir. 2013) (affirming first-degree murder conviction of federal inmate who strangled his cellmate).

50. See, e.g., 18 U.S.C. § 1791 (2012) (criminalizing the possession of controlled substances in prison); U.S. SENTENCING GUIDELINES MANUAL § 2P1.2 (2013) (sentencing guideline for possessing contraband in prison).

prisons are part of “society” and inmates “count” as part of the relevant measuring population.

But the governing authority’s interest in deterring crime in the prison world is not in pure equilibrium with its interest in deterring crime in the outside world. Although the federal government has no rational preference for the victimization of Kansans versus Nebraskans, it may have a rational preference for the victimization of inmates versus the victimization of those in the outside world. A rational reason for preferring prison crime over non-prison crime is the deterrent effect of the victimization of inmates. Publicizing the victimization of inmates makes prison unattractive.⁵¹ Thus, prison crime, especially violent personal offenses, may deter some would-be criminals from offending because they wish to avoid imprisonment. All other things being equal, a governing authority may therefore rationally prefer an assault of one of its inmates to an assault outside of prison.

On the other hand, prejudice against inmates should form no part of a preference for inmate victimization over non-inmate victimization.⁵² By definition, inmates are receiving their state-sanctioned just deserts through the punishment of incarceration. Victimization of inmates at the hands of other prisoners should form no part of that desert, especially when such victimization is doled out non-proportionately to the seriousness of the inmate-victim’s offense conduct. Indeed, it is likely that the least hardened (and least culpable) offenders are the most likely to fall victim to inmate-on-inmate prison crime. If anything, offenders in the *outside world* who have evaded punishment are more deserving of victimization than inmates; unlike inmates, these individuals owe an outstanding debt to society.

In any event, a deterrence-based preference for the victimization of inmates does not justify the conclusion that prison crime does not “count” or that inmates are not members of “society” worthy of protection. If the governing

51. See, e.g., Sean Fewster, *Fear Frees Drug Dealer*, THE ADVERTISER (Austl.), Jan. 29, 2007, at 3 (reporting that sentencing judge found that offender’s fear of prison would serve as an “effective deterrent” against future crimes).

52. See KAPLAN, WEISBERG & BINDER, *supra* note 47, at 57 (“The prevalence of prison violence raises the question [of] whether incapacitation theory is truly concerned with reducing the risk of violent crime, or merely redistributing its risk from innocents to past offenders.”).

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authority were so enamored with the deterrent effect of inmate victimization that it found that such victimization achieved a net positive, then it would institutionalize and package inmate victimization as part of the punishment. The fact that governing authorities are unwilling to go so far demonstrates that inmate victimization is still viewed a net negative event even if it is preferable to the victimization of a non-inmate. Thus, when properly viewed as a negative event, inmate victimization “counts”—and counts negatively—as an event within the relevant measuring population known as “society.”

Wholly excluding people inside prisons from the measuring population implies that society lacks an interest in protecting prisoners and correctional personnel. Lest we totally dehumanize prisoners by discounting prison crime to zero, this proposition fails on its face. Crimes occur in prison. These crimes “count” because the people who commit those crimes and their victims are part of “society.” Any statement that fails to account for prison crime in measuring the incapacitative effect of incarceration is both factually inaccurate and demeaning to people in prisons.

CONCLUSION

Incapacitation must be measured in both offense-specific and victim-specific terms. Punishments that inhibit the commission of offenses achieve offense-specific incapacitation to the extent that the inhibition poses a barrier to reoffending. Punishments that protect a particular population from victimization achieve victim-specific incapacitation to the extent that the punishment poses a barrier to victimizing a particular population.

Incarceration achieves offense-specific incapacitation by wholly or partially restricting prisoners’ ability commit certain offenses. Incarceration also achieves victim-specific incapacitation by redefining the population to which the prisoner has access. However, the victim-specific incapacitation is only a beneficial byproduct of imprisonment to the extent that the governing authority prefers the victimization of inmates to the victimization of those in the outside world. While the governing authority may rationally possess a marginal preference for the victimization of inmates because of the deterrent effects of deglamorizing prison life,

the victimization of inmates remains a net negative event. As such, descriptions of the incapacitative effects of imprisonment that overstate its incapacitative benefits improperly exclude inmates from the relevant measuring population.