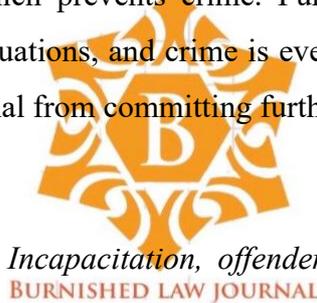


ABSTRACT

Economic analyses of criminal law is a subject which has been for years criticized for the reason that it has been unable to explain numerous criminal law doctrines and policies that society finds to be apt and just. It is indeed a factor of consideration because the given existing economic models have failed to inculcate within the practical nuances of human behaviour. This Article proposes a replacement in the standard economic theory of crime. The article places reasoning of changing the parameters of the Cost-Benefit Analysis by giving the due attention to 'rehabilitation', and by proposing a combination of deterrence and incapacitation, unlike the existing model. Moreover, this article delves into acknowledging the fact that people have fluctuating and not constant criminal tendencies. Fluctuating criminal tendencies give recognition to the proposition where a person who is generally not into the commission of criminal or wrongful act *can*, in rare circumstances, commit one.

It emancipates the requirement of imprisonment as a punishment in all the circumstances as it is the threat of imprisonment which prevents crime. Furthermore, even when deterrence proves to be a failure in certain situations, and crime is eventually committed, imprisonment aids society by deterring the criminal from committing further wrongs.

Keywords- *Law and Economics, Incapacitation, offender, crime, theories of punishment, rehabilitation, deterrence.*



THE LAW AND ECONOMICS OF FLUCTUATING CRIMINAL TENDENCIES

Introduction

Law and Economics (L&E) is one of the presiding areas for scrutinizing legal subjects and the most important subject under this domain is criminal law¹. Despite its logic-driven concepts this approach of Law and Economics encroaching into the aspects of criminal law has been controversial.² Paralleling and consequential intersecting with the growing scholarly exchange over consequentialist and retributive theories of criminal punishment has opened new avenues for enormous debates regarding the legitimacy and functionality of the economic analysis of criminal law. Throughout these debates, it has been observed that the contemporary Law and Economics model that deals with the analysis of deterrence, rehabilitation, and incapacitation cannot provide satisfying rationales for practices of criminal law.

To address this, there is an urgent need for modification in the standard economic model of crime and deterrence. Such a modification can be in two ways. *Firstly*, by replacement of the assumption of constant criminal tendencies with the assumption of *fluctuating criminal tendencies*, and *secondly*, by segregating criminals from the rest of the society by basing the presumption on the fact that imprisonment lowers crimes.

The first proposed modification considers the standard L&E model which presupposes that people have constant criminal tendencies. The standard model impractically assumes that a person's illicit benefit from committing a given act is constant over a while and bases itself on the assumption that he has perfect self-control.³ The model presupposes consistent and same choices made by the people over both legal and illegal options, submitting that people consistently try to commit the crimes until they know that the fines have been increased for a particular offence.

Such flaws or presupposition can be replaced with better analyzing tools with the existing economic theories and the new theory has to put in a new presumption which is, 'fluctuating

1 Nuno Garoupa, *The Theory of Optimal Law Enforcement*, 11 J. ECON. SURVEYS 267, 291–95 (1997). A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. Econ. LITERATURE 45, 73–76 (2000).

2 Nuno Garoupa, *Behavioural Economic Analysis of Crime: A Critical Review*, 15 EUR. J.L. & Econ (2003).

3 Richard A. Posner, *Economic Analysis of Law*, Wolters Kluwer Law & Business (2014).

criminal tendencies'. This new assumption envisages a common and practical belief that crimes may occur "from the infirmity of passion to which even good men are subject."⁴

The second proposed modification requires reading into the trends in the economic analysis of criminal law. Most often the economic analyses of criminal law are fundamental to deterrence and ignorant of other potential justifications for punishment, including incapacitation. Ignoring that the reductions in crime rates are positively a contribution by incapacitation function of punishment.⁵In the realm of normative economic analyses of criminal law, the benefits conferred by such incapacitation are largely ignored because their inclusion has not been seen to dramatically alter the implications of standard crime and deterrent models.⁶However, by replacing the constant model with fluctuating tendencies and adding a focus on incapacitation, simple yet rational analytical theory can be effectuated.

Consequentialist Justifications for Punishment and Normative Economic Analyses of Criminal Law

Naturally, the economic analysis of crime focuses on some or all of the three main consequentialist justifications for punishment, namely deterrence, rehabilitation, and incapacitation.⁷Amongst these fields, the economic theories predominately focus on deterrence⁸ and pay very little heed to the other two justifications that are rehabilitation and incapacitation. A suggested inclusion of incapacitation and rehabilitation as a justification is the requirement.

Rehabilitation: Ignored factor

Rehabilitation has been a victim of ignorance over years, supported by the fact that the trends and developments in the 1970s led to the 'trashing of rehabilitation'⁹ Isaac Ehrlich in his 1981 article identified ignorance of the rehabilitation and declared its counter deterrent effects as the reason. According to Ehrlich "the reason for this counter deterrent effect is that an implicit subsidy is conferred on potential offenders through the process of rehabilitation by

⁴*State v. Cook*, 1859 WL 4467, on page 144.

⁵Steven D. Levitt, *Why Do Increased Arrest Rates Appear to Reduce Crime: Deterrence, Incapacitation, or Measurement Error?* *Econ Inquiry* 353, 353–55 (1998).

⁶Miceli, Thomas J., *Deterrence, Incapacitation, and Repeat Offenders* *Economics Working Papers* (2008).

⁷Ehrlich, *supra* note 19, at 311.

⁸Deryck Beylveled, *EHRlich'S ANALYSIS OF DETERRENCE: Methodological Strategy and Ethics in Isaac Ehrlich's Research and Writing on the Death Penalty as a Deterrent*, *The British Journal of Criminology* Vol. 22, No. 2 (April 1982).

⁹ Francis T. Cullen & Paul Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, 3 *Crim. Just.* 109, 112 (2000).

offering training and employee benefits at the public expense. The rehabilitation benefits provided to actual offenders *ex post*-produce a counter deterrent effect on potential offenders *ex-ante*.¹⁰ Social choice theory is another factor contributing to the negligence of rehabilitation. The definition of rehabilitation is a problem for social choice theory because it goes with the presumption that considers the members of society having certain fixed preferences, whereas rehabilitation involves externally incited changes to a person's preferences.

A practical theory analysis requires the presumptions that are rational and common to an average number of potential populations. It submits thus that the Social Choice theory is indeed a problem in arriving at a rational standard of reference. Further, the argument as to public expense on the rehabilitation of the offenders if analyzed on the principles of criminal law jurisprudence weigh the balance in favor of rehabilitation, for a crime is against the society and according to the Social Contract theory, it is the society which is obliged to keep intact the terms of the agreement it has entered upon with the government, herein the law enforcement agencies.

Incapacitation: An incomplete tool

The rational Cost-Benefit-Analysis establishes that an offender will commit a crime only when the gain is more than the harm and not vice-versa. In other words, if the potential to cause harm, per unit of time exceeds the cost per unit of imprisonment then in the presence of such a scenario an offender ought to be imprisoned.¹¹ The analysis is based on the consideration of the application of monetary fines, instead of imprisonment for minor offenses.¹² The theories which promote the ideas for deterrence provide more rationale to the reason for reserving imprisonment for major offenses. One of the rationales behind this was to create terror among the minds of the people. On the other hand, the harm inflicted through a minor offense not calculated to come to the determination as to imprisonment because this harm which is exacted does not need an extravagant application of imprisonment as public money is also involved and in the name of such minor offenses cannot be relinquished. In such a case, through the application of exclusive use of monetary fines degree of deterrence

¹⁰*Supra* note 8.

¹¹A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. Econ. Literature 585–87 (2000).

¹²Steven Shavell, *The Optimal Structure of Law Enforcement* The Journal of Law & Economics Vol. 36, No. 1, Part 2, John M. Olin Centennial Conference in Law and Economics at the University of Chicago (Apr. 1993)

can be achieved to a great extent. In case of more serious crimes, to increase the level of deterrence use of imprisonment or other exclusive monetary fines can be effectuated. It simply pay-off to incur the expense of imprisonment to marginally reduce social harms inflicted through the commission of more serious crimes.

For the exclusive use of monetary sanctions, it can be observed that the theories about incapacitation as a focal point cannot provide satisfying rationales. This is backed up by the fact that the monetary fines imposed on the offender do not ordinarily prevent them from committing subsequent crimes. A weak thesis can be provided when the crime commission requires some financial derivatives or investment to perpetrate the crime. But such explanations certainly cannot compare to the convincing explanations provided by deterrence based theories.

Deterrence: A predominant element

Deterrence is the focal point of economic theories of crime it being considered as a tool to attract reaction from the potential criminals. Sustaining the deterrent effect on various laws and procedure propagates by the assumption that changes in criminal law rules make potential criminals react in the domain and make it a common normative economic tool for analysis. However, this comes with huge costs with the increasing expected punishment to achieve deterrence, detection, and imprisonment being the most commonly found costs. Since there is a presence of several variables available at work, the correct trade-off requires a situation-specific approach.

The generation of fact-specific trade-offs has made the standard economic model of crime and deterrence, more attractive at least in part. In between reduction in costs required to increase expected punishment and increment in the benefits associated with deterrence the main trade-offs continue to lie. “*Ceteris paribus*, the greater the harm associated with crime, the more important the benefits associated with deterrence”¹³ is a base statement of this Cost-Benefit Analysis. Similarly, it can be observed that the greater the justification for imposing punishment can be made out by analyzing how greater the deterrent effect of punishment flows.¹⁴

13 Steven Shavell, *Specific v. General Enforcement of Law*, 99 J. Pol. Econ. 1088, 1094–95 (1991).

14 Mungan, Murat C., *Optimal Warning Strategies*: (July 29, 2012). Review of Law and Economics 303 (2013); FSU College of Law, Law, Business & Economics Paper No. 11-8; FSU College of Law, Public Law Research Paper No. 505.

The need, therefore, arises for a combination of the two elements that are, incapacitation and deterrence.

Incapacitation and Deterrence: a combined effect

A standard model would always take into account all the possibilities available given the formulae. For example, a society comprising of a population that does not fear deterrence and at the same time have no-criminals (that is individuals who have the history of no commission of a crime). In such a society, deterrent centric theories suggest that the crime should go without the exaction of any punishment because in such a case punishment would have absolutely no deterrent effect. The reason being that in such a case an economic deterrent model will incur only costs in detection and imprisonment with no benefits. Therefore, it would be optimal in such a society not to punish any criminal acts thereto.¹⁵

This admonition indicates the standard economic model of crime which can be further assisted by gathering the principles of the functionality of the incapacitation and benefit of punishment. Imprisonment of undeterrable criminals is justified when the theory suggests the continuous frequency of criminals to commit crimes,¹⁶ is read with the theory establishing the requirement of imprisonment to prevent future crimes. This combination of theories applies even if the punishment does not affect the deterrence of crime at its present application. This caveat further leads to an inquiry into the capability of the economic model to persist the criticisms when both the elements are combined.

The answer to this question is a clear “No”.

This does not mean that combining deterrence and incapacitation is fruitless. It is indeed a rationale tool given the standard economic model of crime is injected with a novel and more useful proposition. For punishing a repeat offender and punishing a first time offender in standard economic models of crime, the combined incapacitation and deterrent benefits are almost of similar magnitude. However, in the future, a first-time offender has a soaring and constant proclivity towards the commission of a crime.

An economic model that is capable of providing an acceptable explanation to the question about the reason for more severe punishment for the repeat offenders should be ideally based on the informative value of the said offender's previous record. This cannot be

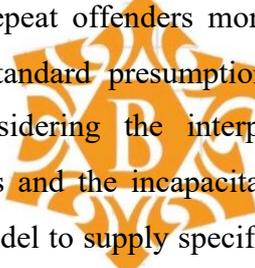
¹⁵ T.J. Miceli, *Deterrence, and Incapacitation Models of Criminal Punishment: Can the Twain Meet?* Research Handbook on the economics of Criminal Law (2012).

¹⁶ *Ibid.*

achieved in the current standard model of crime and deterrence if the existing unrealistic assumptions are not replaced with the new, realistic, and useful alternatives as mentioned above.

Conclusion

The analysis after taking into account all the factors relating to the study of crime and punishment results in a conclusion that the Law and Economics is not a uniform subject as considered for years, and do not always come with inference in favor of severe punishment to the repeat offenders. For instance, the simplest model of deterrence suggests the independence of the detection history of the offender coupled with the only objective of determining the optimal sentences. The heterogeneous and chartered implications of L&E studies relating to optimal punishments for the repeat offenders are directing towards a solution that should be discerned as if a solution to a 'puzzle'. The bemusing status of soaring punishments for repeat offenders in the L&E literature places it in contradistinction with the broad acquiescence for punishing repeat offenders more critically in actual practice thus, requiring the replacement of the standard presumption which is currently in favour of constant criminal tendencies. Considering the interplay between fluctuating criminal tendencies of the potential offenders and the incapacitation function of imprisonment, the suggested replacement allows the model to supply specific, consequentialist justifications for repeat offender laws.

The logo for Burnished Law Journal is a stylized, circular emblem with intricate, interlocking patterns in shades of orange and brown. It is centered on the page, partially overlapping the text.

BURNISHED LAW JOURNAL