Criminal Justice

An introduction to crime and the criminal justice system

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Society may respond to transgressions of the law in various ways. These are associated with diverse objectives, as was made clear in the 2003 Criminal Justice Act which stated that the purpose of sentencing by the courts was to punish offenders, reduce crime (including by deterrence), bringing about the reform and rehabilitation of offenders, protecting the public and providing for offenders to make reparations to those affected by their actions. This chapter examines the way in which the state responds to crime. Specifically the chapter:

- discusses the concept of punishment;
- examines diverse views concerning the purpose of punishment;
- analyses the strengths and weaknesses of restorative justice as a response to crime;
- considers sociological approaches to the study of punishment;
- discusses postwar sentencing trends.

Punishment

The term 'punishment' is capable of several definitions: it has been referred to as 'crime-handling' (Fatić, 1995) and is often used synonomously with 'sentencing' (Daly, 2000), although its meaning is often restricted to measures which are unpleasant and intended to inflict pain on an offender (Christie, 1982) in response to an offence that he or she has committed. In this latter context it has been defined as 'the deliberate use of public power to inflict pain on offenders' (Andrews, 2003: 128). It has further been suggested that the pain that is inflicted should be an essential part of what is intended rather than being an unintended consequence arising from the state's intervention (Benn and Peters, 1959). However, the infliction of pain is not universally accepted as a goal of punishment. Others prefer the use of the term 'sanction' 'as the general term for any measure which is imposed as a response to crime, with adjectives distinguishing the various kinds of sanction according to their primary purpose' – punitive sanctions, rehabilitative sanctions, punitive/rehabilitative sanctions (which are ambivalent about

their aims), reparative sanctions and sanctions designed to protect the public through containment (Wright, 2003: 6–7).

The scientific study of punishment is known as penology which seeks to provide an understanding of the issues that underlie penal strategies. There are a number of perspectives from which punishment can be studied and these are briefly outlined in the following section of this chapter.

The aims of punishment

Strategies that are based upon what is termed the 'juridical perspective' (Hudson, 2003:15) are rooted in moral and political philosophy. They have a practical application in that they seek to link punishment with a desired outcome – what purpose does society wish to achieve through punishment? There are a number of approaches associated with this perspective.

Utilitarian theories of punishment: reductivism

What are termed 'utilitarian perspectives' derive from the approach towards crime that Chapter 1 identified with classicist criminology whose key proponents included Cesare Beccaria and Jeremy Bentham. Utilitarians viewed punishment as 'a prima facie evil that has to be justified by its compensating good effects in terms of human happiness or satisfaction' (Lacey, 2003: 176). A key concern of these political-moral philosophers was how to prevent criminal actions from occurring in society. They were reductivists in that their outlook was fixed on the future and not the past. Reductivism may be carried out by a wide range of strategies including deterrence and incapacitation (which entails depriving an offender of his or her liberty), or programmes that seek to secure the rehabilitation of offenders.

However, a particular problem with all reductivist strategies is whether behaviour can be altered through punishment, whatever form it takes. This is because while punishment may temporarily suppress anti-social behaviour, once the punishment is removed the previous behaviour may return (Huesmann and Podolski, 2003: 77). Accordingly, it is also necessary to identify and remove the factors which underpin that behaviour in order to prevent future offending: 'people must "internalise" mechanisms that regulate behaviour so that in the absence of the threat of punishment, they will choose not to act aggressively – not because of the threat of punishment, but because they agree with the behaviour which has been taught' (Huesmann and Podolski, 2003: 78). The problems inherent in seeking to change behaviour through punishment have led many who advocate restorative justice (an issue which is discussed more fully later in this chapter) to disassociate this response to crime with punishment.

Jeremy Bentham and the panopticon

As has been argued in Chapter 1, Jeremy Bentham was an important influence in the development of classicist criminology in Great Britain. One of his concerns was to use prisons to bring about the reform of inmates thus transforming them into useful members of society.

In 1791 he wrote a three-volume work, *The Panopticon*, in which he devised a blueprint for the design of prisons in order for them to be able to bring about the transformation of the behaviour of offenders. Central to his idea was the principle of surveillance whereby an observer was able to monitor prisoners without them being aware when they were being watched. This 'invisible omniscience' secured the constant conformity of inmates since they were unable to discern when their actions were not being observed. It induced in inmates 'a state of conscious and permanent visibility that assures the automatic functioning of power'. Surveillance was thus 'permanent in its effects, even if it is discontinuous in its action' (Foucault, 1977).

To achieve this function, Bentham proposed that prisons should be designed with a central tower which housed the observers from which rows of single cells arranged in tiers and separate blocks would radiate. These cells would be isolated from each other. He promoted this design in Millbank Penitentiary (whose construction he personally directed and which was opened in 1821). Pentonville Prison (opened in 1842) was also influenced by this concept.

As is argued later in this chapter, Michel Foucault was heavily influenced by Bentham's ideas, especially in connection with the way in which power and knowledge were intertwined: he argued that the disciplinary surveillance of the prison created knowledge of the convict's body thus creating a new kind of power (Foucault, 1977: 27).

Deterrence

Deterrence may be individual or general. Individual deterrence seeks to influence the future behaviour of a single convicted offender whereas general deterrence seeks to influence the future actions of the public at large. Deterrence views offenders as rational beings who calculate the costs and benefits of their behaviour and both approaches also assume that a consensus exists within society as to what constitutes punishment (Fleisher, 2003: 101). A major problem with this approach is that deterrence ignores the possibility that crime may be a spontaneous act, propelled by factors that override logical considerations.

Individual deterrence may be delivered in a variety of ways. These include indeterminate custodial sentences (whereby evidence of changed behaviour will be required before release is granted) or the imposition of severe custodial conditions on an offender which are designed to encourage him or her to refrain from future offending behaviour to avoid a further, and perhaps more severe and/or lengthier, repetition of these unpleasant circumstances.

General deterrence has a broader remit, that of influencing the behaviour of those who might be tempted to commit crime. The approach adopted may entail severe penalties (which in the United Kingdom historically included the death penalty) based on the assumption that it would be illogical for a person to commit an action attached to dire consequences. The logic of this approach is that tougher sentences will reduce the level of crime in society. One difficulty with this approach is that it assumes the behaviour of all members of the general public can be influenced by similar constraints and that it is possible to precisely identify what level of punishment will prevent a criminal act from being committed.

Incapacitation

Incapacitation places potential victims of crime at the forefront of its concern. It seeks to protect society from the actions of criminals by a range of strategies that include physically removing them from society (a goal that was historically implemented through transportation but which is now associated with imprisonment). Incapacitation may also involve various forms of pre-emptive action. This may be directed against those who have already offended with the aim of placing additional restrictions on the ability of the criminal to engage in further criminal actions (for example by increasing the length of sentences meted out to prolific offenders) or it may target those deemed likely to be offenders, even if this behaviour has not manifested itself when the intervention occurred. This latter approach has been associated with attempts to isolate factors that predispose individuals to commit crime and then to implement remedial action.

Reform and rehabilitation

Punishment may be inflicted on those convicted of crime with a view to changing their personal values and habits so that their future behaviour conforms to mainstream social standards. Penal reformers in the late eighteenth and early nineteenth centuries (whether driven by evangelical or utilitarian impulses) viewed prisons as an arena in which bad people could be transformed into good and useful members of society. Contemporary prisons remain charged with bringing about the reform and rehabilitation of inmates but, as Chapter 8 argues, there are several factors affecting the prison environment that serve to undermine this ideal. Reform and rehabilitation may also be attempted through programmes directed at tackling offending behaviour, which are often delivered in prison. A difficulty with this approach is the effectiveness of the programmes that are delivered. More coercive approaches entail interventions that are designed to make it impossible for convicted criminals to repeat their offending behaviour. This goal may be attained by interventions such as aversion therapy or drug treatment.

Retributivism

The various strategies associated with reductivism focus their concern on future behaviour. Punishment is justified because it may persuade a person or

persons not to subsequently indulge in criminal actions. An alternative approach, retributivism, is backward-looking, in which punishment is justified in relation to offending behaviour which has already taken place.

Retributivism insists 'that punishment is justified solely by the offender's desert and blameworthiness in committing the offence' (Lacey, 2003: 176). Expressed simply, criminals are punished because they deserve it. This approach to punishment is akin to vengeance since pain is inflicted on transgressors for pain's sake rather than from a desire to bring about their rehabilitation (Lacey, 2003: 176): it enables society to 'get its own back' on those who commit criminal acts. A difficulty with this approach is that the deliberate infliction of violence by the state may legitimise the use of violence by its citizens, and there is also the problem of what has been termed 'collateral damage', whereby punitive sanctions of this nature have an adverse effect on the offender's family (Wright, 2003: 17).

In addition to exacting revenge, retributivists put forward other reasons to justify punishment. This approach is underpinned by arguments, based on classicist criminology which is discussed in Chapter 1, that crime will be deterred if the pain which is inflicted upon a transgressor will outweigh any possible reward which that person may secure by committing the offence. It may be alternatively argued that punitive responses to crime have a symbolic role, seeking to emphasise that society views crime as unacceptable. Punishment thus constitutes a public censure or denunciation of this form of behaviour (Duff, 1986), an aim of punishment that is considered in more detail below.

Punishment may further be used as a mechanism to take away from criminals the unfair advantages they have derived over other members of society as a consequence of their illicit activity. Punishment thus seeks to restore the 'balance of advantage and disadvantage disturbed by crime' (Hudson, 2003: 48), thereby restoring the principles of fairness and equality of treatment that underpin citizens' political obligation to the society in which they live (Rawls, 1972). Although this aim of punishment has been criticised for ignoring the extent to which society is characterised by inequalities, the objective of removing unfair advantages derived from crime has underpinned some legislation. For example, in the United Kingdom, the 2002 Proceeds of Crime Act established the Assets Recovery Agency to investigate and recover criminal assets and also provided for a civil recovery scheme to facilitate the recovery of proceeds of unlawful conduct if a criminal prosecution was not initiated. The perspective that punishment serves to uphold the core values which hold society together has been further developed into the view of punishment as an expression of the rational will of citizens who, by entering into a social contract, expect that those who violate the rules of society should be punished (Rawls, 1972).

New retributism

Many societies have based their response to crime on the principle of retributivism. The *lex talionis* was referred to in the Bible whereby the response to crime was of an equivalent nature to the crime itself ('an eye for an eye and a

tooth for a tooth'). Other retributive penal systems were based upon a proportionate response to crime, in which the punishment reflected the seriousness of the crime (as this was perceived by either society or the victim). However, the association of retribution with vengeance made this response to crime an unpopular one for much of the twentieth century in Western societies. It became resurrected because problems were perceived in the sentencing policies associated with the reductivist goal of rehabilitation that were fashionable in a number of postwar Western societies. Left-wing critics of rehabilitation argued that the discretion accorded to sentencers (who could, for example, mete out indeterminate sentences) could be abused or used in a discriminatory fashion. Those on the right were concerned that the desire to achieve an offender's rehabilitation resulted in the use of non-custodial alternatives to imprisonment that they viewed as being too soft on crime (Hudson, 2003: 39–43). Accordingly, what has been termed a 'new retributivism' (Hudson, 2003: 40) emerged in America during the 1970s. The report of the Committee for the Study of Incarceration (Von Hirsch, 1976) was an important statement of the new penal philosophy.

The key features of new retribuvitism were:

- *Focus on the offence an offender had committed*. His or her circumstances were judged irrelevant to the sentence that was dispensed
- *The response to crime should be proportionate to the seriousness of the offence*. Since this could be regarded as subjective, 'seriousness' was often defined by devising guidelines which stipulated the appropriate response to specific types of crime. These guidelines further served to reduce the discretion possessed by sentencers
- *Punishment was the main aim of the penal system*. All disposals (whether custodial or community-based) were to reflect this objective.

Reductivism and retributivism may be united in what is referred to as a 'mixed' theory of punishment, one which argues that 'people should be punished because punishment has good social effects, but that only those who deserve it should be liable to punishment' (Lacey, 2003: 176).

Distinguish between reductivist and retributivist approaches to punishment. Which do you regard as the most appropriate response to criminal behaviour?

Denunciation

Denunciation places the concerns of the community at the forefront of the state's response to crime. The punishment meted out to an offender reflects the seriousness with which the community views the offence and provides it with a mechanism through which it can express its sentiments thereby

reinforcing the official disapproval of the act that has been committed with the community's social censure. In the words of Lord Denning, 'the ultimate justification of punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime' (Lord Denning, quoted in Cavadino and Dignan, 1992: 41). This implies that punishment is justified not because it influences the behaviour of others not to commit similar acts but simply because it expresses society's abhorrence of crime, an approach that is termed 'expressive denunication' (Cavadino and Dignan, 1992: 42). This argument has been presented with specific reference to prisons where it has been contested that 'the separation of prisoners from the rest of society represents a clear statement that physical and social exclusion is the price of nonconformity' (Matthews, 1999: 26).

It is often the case, however, that public sentiments regarding how a particular crime should be dealt with are out of line with the views of officials, in particular with politicians (who make the law) and sentencers (who implement it). However, the ability of the public to air their concerns (for example on what they regard as an over-lenient sentence to a specific crime) may encourage public debate that helps to set the boundaries of society – 'we collectively define what sort of people we are by denouncing the type of people we are not' (Davies, 1993: 15).

Although the ability of citizens to air their views on any aspect of public policy might be seen as the hallmark of a liberal democratic political system, there are dangers that may arise if the official response to a crime fails to match the public's level of denunciation of it. This may fuel direct action in the form of vigilantism that at its worst may degenerate into mob rule and lawlessness. An example of this occurred in connection with the campaign by the *News of the World* newspaper directed against paedophiles in 2000 which resulted in acts of violence against those who were suspected (in some cases erroneously) of involvement in crimes of this nature.

Restorative justice

Restorative justice can be seen as a further practical measure which society might adopt as a response to crime, but it has the potential to develop into a penal strategy which might either replace or supplement existing penal objectives that have been described above (Hudson, 2003: 92). This new principle views the reintegration of offenders as the key rationale underpinning society's response to crime.

It has been argued (Hudson, 2003: 75–6) that restorative justice is underpinned by a number of impulses. These include the abolitionist tradition which sought to move away from an agenda driven by crime and punishment towards an approach that emphasised harm and redress, those who wished to ensure that the needs and sufferings of victims of crime were placed at the forefront of the response to crime, and minority (or 'first nation') groups who sought to retain their own values and traditions of crim-

inal justice in the face of prosecution and sentencing processes which they felt acted in a discriminatory fashion towards them.

Restorative justice has been defined as consisting of 'values, aims and processes that have as their common factor attempts to repair the harm caused by criminal behaviour' (Young and Hoyle, 2003: 200). This approach entails a wide range of activities. Initially it was 'virtually synonomous with a specific model of practice called Victim–Offender Reconciliation Program (VORP) or Victim–Offender Mediation (VOM)' (Roberts, 2004: 241). VOM entailed a one-to-one mediation meeting facilitated by a neutral mediator and the term 'restorative justice' initially referred to the values and principles underpinning VOM (Roberts, 2004: 241).

Latterly, however, restorative justice has been identified with other models, including community mediation and conferencing. Conferencing was first developed in New Zealand under legislation enacted in 1989 and was subsequently developed in Australia, North America and Europe. It takes several forms – family group conferencing, community group conferencing and peace-making circles (McCold, 2003: 72–3). A particularly important role is performed by the facilitator, who should have no personal agenda in the questions they ask or who they invite to participate (Young and Hoyle, 2003: 211). The principle of restorative dialogue is at the heart of conferencing (Roberts, 2004: 245). This is an umbrella term that 'refers to a process that brings people together in dialogue to gain understanding and repair the harm caused by a crime or conflict' (Roberts, 2004: 251). A number of terms are associated with restorative justice, including 'positive justice', 'reintegrative justice', 'relational justice', 'reparative justice' and 'restitutive justice'. They are linked by the objective of seeking to 'build peace' rather than to 'fight crime' (Wright, 2003: 21).

Restorative justice was not entirely novel in Britain. It takes an approach that bears many similarities to the system of Children's Hearings utilised in Scotland that adopts a welfare-based stance focusing on future action rather than the determination of guilt of innocence (Muncie, 2002: 153). This approach also formed the basis of a number of community-based, dispute-orientated schemes. These included the four victim–offender mediation schemes that were piloted by the Home Office in 1985 but failed to produce changes in penal policy. Restorative cautioning was introduced by the Thames Valley Police Force in 1995, and victim–offender conferences for offenders aged 10–17 who pleaded guilty to an offence had been piloted in Lambeth and Hackney.

It is underpinned by a number of key principles which are discussed below.

Rejects retributive objectives

The main aim of punishment is to censure wrongful behaviour. As is argued in Chapter 6 the criminal justice process in the United Kingdom was traditionally founded on retributive principles. This meant that the sentencer deliberately intended to inflict pain on the offender. It has been argued that

restorative justice is a 'more effective and more ethical way to censure behaviour' (Walgrave: 2004: 47). Although various aspects of the process of restorative justice may cause pain to the offender (such as meeting with the victim of crime and having to perform agreed tasks to make good the wrong done), this is not intentionally inflicted on him or her. Instead restorative justice emphasises why bad behaviour is being censured by focusing on the harm that a criminal act has inflicted on another member of the community (Walgrave, 2004: 55). It seeks to replace the values of vindictiveness and vengeance which underpin criminal justice interventions (values which may legitimise the use of violence by criminals) with those of healing and conciliation (Braithwaite and Strang, 2001: 1–2).

Takes the state out of sentencing

Restorative justice provides a mechanism whereby communities can sort out their own problems arising from the criminal behaviour of some of its members. Although the state may still have important roles to play in restorative justice by acting as an enabler (in the sense of providing a legal framework for the process), a resource provider, an implementer and a guarantor of quality practice (Jantzi, 2004: 190), the way in which offenders make amends for their actions is not determined by professional sentencers but is instead community-orientated to secure the interaction of victims, offenders and other participants to a conferencing process (Johnstone, 2004: 6). The purpose of intervention is to 'ensure that the community's adopted values are taken seriously by expressing and symbolising, unambiguously, those defining values' (Lacey, 2003: 187).

This approach views humans as fundamentally cooperative beings as opposed to individualistic beings in need of coercive forms of social control to suppress their innate warlike and competitive nature (Napoleon, 2004: 34). It places social cooperation at the heart of the definition of justice, regarding it as 'a system of social cooperation that supports and encourages peaceful coexistence' (Sharpe, 2004: 22). Social cooperation is achieved through social contracts – 'an implicit agreement about how we will treat each other and what we can expect from each other under certain circumstances' (Sharpe, 2004: 31). It is argued that those most affected by a violation of a social contract are the most appropriate persons to determine how to renegotiate them in order to restore justice between them (Sharpe, 2004: 24).

Although community-based interventions frequently form an aspect of the criminal justice process, activities such as mediation may operate outside of the formal criminal justice system, providing a mode of informal justice and thereby avoiding the danger of 'net widening and increasing state intrusion' (Marsh, 1988: 176).

Empowerment

It has been argued that traditional forms of justice have the effect of disempowering those who are most affected by an offence, transforming victims and offenders into 'idle bystanders in what, after all, is *their* conflict' (Barton, 2003: 26–7), whereas approaches associated with restorative justice such as family group conferencing seek to empower the primary stakeholders in a conflict – the victim, offender and their respective circles of social support, influence and care such as family, friends, peers and colleagues – so that they can 'address the causes and the consequences of the occasioning incident in ways that are meaningful and right for them' (Barton, 2003: viii and 15). This process also accords with republican theory (Braithwaite, 1995) that seeks to promote participatory democracy by fostering civil society's active participation in justice-related affairs (Strang and Braithwaite, 2001).

Victim involvement

Restorative justice intimately involves the victim of crime in the post-crime process, thereby elevating the victim to the position of being a stakeholder in the criminal justice process rather than being confined to the sidelines (Achilles, 2004: 65). In this way, the needs of the victim are placed at the very heart of the criminal justice process (Blunkett, 2003: 4). The involvement of the victim is designed to induce the offender to empathise with the victim (Wright, 2003: 9). It emphasises to the offender that crime is a violation of people and interpersonal relations (Achilles, 2004: 66) and does not permit him or her to neutralise their actions as infractions of an abstract ethical or legal code (Walgrave, 2004: 55). It is in this sense that restorative justice promotes a new understanding of crime as behaviour that causes tangible harm to real people and relationships (Johnstone, 2004: 8) rather than it being viewed as an impersonal infraction of the law.

Offender participation

Restorative justice does not marginalise the offender who is accepted as a key contributor to the decision-making process (Hudson et al., 1996). The role given to the offender is an active one – he or she has to make an active contribution to putting wrong to rights by accepting responsibility for their actions and agreeing to undertake measures to repair the negative consequences of the offence (Braithwaite and Roche, 2001). By contrast, retributive justice relegates the offender to the role of a passive recipient of a sentence handed out by a magistrate or judge.

Dialogue

It has been argued above that dialogue in the sense of 'a face-to-face encounter between the principal stakeholders' (Barton, 2003: 4) is a crucial

underpinning of restorative justice. However, the adversarial system used in British courts does not promote dialogue between all parties to a crime, nor does it help offenders to repent for their actions (Walgrave, 2004: 50). It has been argued that the main weakness of the traditional criminal justice system is that it 'disempowers the primary stakeholders in the conflict' (Barton, 2003: 15) and that, by contrast, 'informal deliberative processes that include all parties with a stake in the aftermath of the crime' (Walgrave, 2004: 54) provides a more effective way to repair the harm caused by crime.

Effectiveness

The punitive response to crime fails to provide a greater level of security within society, does not provide relief for the victims of crime and fails to reintegrate offenders into society. By contrast, restorative justice 'appears to open ways of dealing with the aftermath of crime which is more satisfactory for victims, more constructive for communities, and more reintegrative for offenders' (Walgrave, 2003: ix). Arguments related to the effectiveness of restorative justice insist that punitive responses to crime give the victim only a short-lived sense of justice by inflicting pain on the offender. However, restorative justice has the potential for providing an enhanced sense of justice to the victim by ensuring that something positive is done by the offender to meet the needs of those who have been harmed by a crime (Johnstone, 2004: 9–10). Additionally, whereas the punitive response to crime is both costly and frequently fails to rehabilitate those who have broken the law (Wright, 2003: 4–5), the reintegrative aspects of restorative justice offer a better hope for reducing the level of recidivism since the approach is not socially destructive (Walgrave, 2004: 47).

There is evidence that approaches associated with restorative justice 'work'. The hurt experienced by victims may be ameliorated by their involvement in forums such as Youth Offender Panels (YOPs) (Crawford and Clear, 2003), and this approach may have a beneficial effect on rates of recidivicism. An evaluation of YOPs in eleven pilot areas revealed that, overall, young people completed the contract successfully in 74 per cent of cases where a panel had met (Newburn et al., 2002: 30). Experiments conducted by the Thames Valley Police which commenced in 1994 with restorative (as opposed to traditional) cautioning initially pointed to a lower reoffending rate (Tendler, 1997), and it was later observed that around 25 per cent of offenders stated that they had either not reoffended or had reduced the scale of their offending behaviour (Hoyle et al., 2002). Findings of this nature induced the government to propose placing restorative cautioning on a statutory basis as an aspect of its restorative justice strategy (Home Office, 2003: 7). However, a subsequent study which compared the use of restorative cautioning by Thames Valley with two forces (Sussex and Warwickshire) which used the traditional caution and which also evaluated the use of different types of caution within Thames Valley concluded that 'there was no evidence to suggest that restorative cautioning had resulted in a statistically significant reduction in either the overall resanctioning rate (which consists

of either a conviction or a police disposal such as a reprimand or final warning) or the frequency or seriousness of offending', although it was accepted that restorative cautioning had other benefits for both victims and offenders (Wilcox et al., 2004: ii and vi).

Research into family group conferencing in New Zealand also pointed to relatively high levels of reconviction. It was reported that 26 per cent of a sample of 14–16-year-olds who took part in Youth Justice Conferences were reconvicted within twelve months, 64 per cent were reconvicted after just over four years, and 24 per cent were persistently reconvicted over the same period (Maxwell and Morris, 1999). It was argued, however, that these 'disappointing' findings which 'fall short of legitimate expections' (Barton, 2003: 46–7) were mainly reflective of poorly organised conferences in which one or more of the main stakeholders felt 'silenced, marginalized or disempowered' (Barton, 2003: 30), and that family group conferences were effective in preventing reconviction provided that certain conditions (such as the offender feeling a sense of participation and not being stigmatically shamed or made to feel a bad person) were fulfilled (Maxwell and Morris, 1999). It has been further suggested that aspects of restorative justice such as family group conferences do not provide a similar experience for all young offenders and that factors which include the nature of the offence committed, how the young offender was treated in the family group conference, how young people interpreted and reacted to events in the conference and the history and backgrounds of the young offenders were all factors which affected the impact made by the conference on the offender's subsequent behaviour (Maxwell et al., 2003: 146–7).

Shaming

'Shame is the emotion a person feels when confronted with the fact that one's behaviour has been different to what one believes is morally required. Shame is moral self-reproach' (Crawford and Clear, 2003: 222). The importance of shaming to the process of restorative justice is contentious. Braithwaite (1989) emphasised the importance of reintegrative shaming to restorative justice. He asserted that countries such as Japan that shamed effectively had lower crime rates and drew attention to the manner whereby traditional conflict resolution in Maori communities in New Zealand placed great importance on ceremonies to communicate 'the shame of wrongdoing' (Braithwaite, 1993: 37). The process of shaming has been described as central to the reintegration of wrongdoers – 'reintegrative shaming means that expressions of community disapproval, which may range from a mild rebuke to degradation ceremonies (serious denunciations) are followed by gestures of reacceptance into the community of law-abiding citizens' (Braithwaite and Roche, 2001: 74). Shaming seeks to make those who have broken the law aware of the consequences of their crime, in particular to appreciate the denial of trust accorded to them by other members of their community (Fatic, 1995: 220). Offenders then become susceptible to undertaking measures designed to redress the harm their actions have caused.

However, others contend that shaming is not an essential aspect of restorative justice (Maxwell and Morris, 2004: 133). The problems posed by this approach are discussed in more detail below.

Repairing the harm

The aim of restorative justice is to enable those who have broken the law to be given the opportunity to make good the harm they have caused. Typically this will involve an agreement by the offender to make reparation to the victim or to the community.

Reintegration

The requirement of the offender to accept responsibility for his or her actions, apologise and make recompense to the victim is designed to help both parties put past events behind them, thereby facilitating the offender's reintegration into the community. The ethos of restorative justice is thus inclusionary, an alternative to the 'criminology of the other' in which offenders are viewed as a class distinct from the law-abiding and against whom the public needs to be protected (Young and Hoyle, 2003: 205).

A broad agenda

Restorative justice may require an approach which goes beyond events such as victim–offender mediation to embrace a wide range of measures to help repair the harm suffered by victims of crime (Bazemore and Walgrave, 1999: 48), and also to address social conditions which are conducive to crime.

Problems with restorative justice

There are, however, a number of difficulties with restorative justice. Some of the problems it poses are discussed below.

Public scepticism

There may be much popular support for punitive responses to crime, and restorative justice thus becomes viewed as a soft option, an alternative to punishment. However, there is also countervailing evidence which suggests that reparation to the victim or community are popular responses to crime (Wright, 2003: 12) and that, in the United Kingdom, 'a majority think that restorative sanctions … make more sense than retributive ones' (Walker and Hough, 1988: 6). Additionally, some who advocate the merits of restorative justice suggest that this approach does not totally remove the use of punitive

aspects of sentencing. Some argue that punitive responses to crime may be acceptable if restorative justice fails to work (Braithwaite, 1999) or provided that they constitute part of an overall sentencing package in which they are complemented 'with genuine caring, acceptance and reintegration of the person, as opposed to stigmatising, rejecting or crushing them' (Barton, 2003: 23). Others, however, disagree, and contend that retributive justice is 'fundamentally at odds with the defining values of restorative justice and cannot, therefore, be part of it' (Morris and Young, 1999).

The role of shaming

Shaming is often viewed as a key aspect of restorative justice. It has been observed, however, that cultural factors underpin the potential of shaming: it is easier to generate shame in group-orientated societies such as Japan rather than societies that are rooted in individualism, such as America (Benedict, 1946). Shaming has been described as a complex set of emotions (which include embarrassment, contempt, ridicule and humiliation) – there is no general theory of shame nor of the emotions which restorative justice seeks to invoke (Tomkins, 1987). Further, although shaming is designed to encourage a lawbreaker to avoid further offending behaviour, it does not necessarily have this consequence and may instead result in negative responses such as withdrawal or hostility. In this context, shaming has been described as the 'bedrock of much psychopathology' (Miller, 1996: 51). Although, in an attempt to avoid such negative reactions, those who advocate shaming as an aspect of reintegrative justice draw a distinction between stigmatic/disintegrative shaming (which arises when a person is stigmatised, demeaned and humiliated for what they have done) and reintegrative shaming (whereby a person's behaviour is condemned but their self-esteem and confidence is upheld) (Braithwaite, 1989: 4, 55 and 58), it cannot be guaranteed that those on the receiving end of the process will appreciate this distinction regarding the intention of their treatment and may instead view their experiences as punitive, in which pain is inflicted for pain's sake. To be effective, shame has to come from within an individual (Maxwell and Morris, 2004: 139). Some people do not accept that their behaviour has been wrong, and shame cannot be artificially induced by others.

Level of victim involvement

Although the involvement of victims is an important aspect of restorative justice, this is not consistently forthcoming. An evaluation of YOPs in eleven pilot sites revealed that the level of victim involvement was low, and 72 per cent of Community Panel Member (CPM) respondents reported that they had not sat on a panel with a victim present (Newburn et al., 2002: 78). Further, the feelings and needs of a victim of crime may take a long while to come to the surface (Achilles, 2004: 69) and there is the danger that decisions taken at a case conference close to the event will not, in the long run, prove adequate to those who have suffered from crime.

The nature of community involvement

Restorative justice developed as a community-based movement that was in direct opposition to the large-scale institutional way of conducting the affairs of the criminal justice process (Erbe, 2004: 289). It seeks to enable communities to take responsibility for responses to crime, but traditional communities (defined in terms of locality) are often absent in Westernised urban settings. Restorative justice could be used as a tactic to prevent crime by refashioning traditional communities (as did old-style community policing, an issue which is discussed in Chapter 3) but there arises the danger that what is (re)constructed is an oppressive social organisation in which the unequal division of power and resources results in displays of intolerance and prejudice (Crawford and Clear, 2003: 221), thus serving to promote the further exclusion of those who are already marginalised. This problem might be avoided if the reform agenda focused on the problems which contribute directly or indirectly towards crime (especially in high-crime communities) by seeking to improve the quality of community life, an approach which is associated with community justice (Crawford and Clear, 2003: 216) rather than restorative justice which 'cannot resolve deep structural injustices that cause problems' (Braithwaite, 1998: 329).

There is a further danger that the process can be detached from the community in particular by individuals who became involved in the process at an early stage and who became 'the de facto voice of their community efforts' (Erbe, 2004: 294). A key danger with this approach is that the involvement of these individuals may substitute for the active involvement of the community, thereby disengaging restorative justice from its local roots. It is important, therefore, that those who act on behalf of the community in this capacity are genuinely representative of it, but this is not a guaranteed outcome. An evaluation of the operations of YOPs in eleven pilot sites revealed that Community Panel Members were mainly white (91 per cent of the respondents), female (69 per cent), over 40 years of age (68 per cent) and employed in professional or managerial occupations (50 per cent). Nonetheless, 53 per cent of the respondents felt that CPMs represented the community 'reasonably well' (Newburn et al., 2002: 66 and 71).

The place of restorative justice in the criminal justice system

A key issue regarding restorative justice is whether this approach should be confined to the margins of the criminal justice system, being especially used in connection with juvenile offending, or whether it should become a mainstream response to crime (Johnstone, 2002: 15) in which the 'restoration of harm' becomes the core value of the criminal justice process (Willemsens, 2003: 25). In America restorative justice has been used in connection with serious crimes of violence and some experiments to apply restorative justice to more serious offences have also been conducted in England and Wales (Young and Hoyle, 2003: 210). Attempts have also been made to apply the

principles of restorative justice more widely throughout the criminal justice system in England and Wales, thereby moving it from the margins towards the mainstream (Restorative Justice Consortium, 2000). The 2003 Criminal Justice Act introduced restorative justice as a component of the conditional caution (in which the offender agrees to the imposition of conditions on his or her behaviour), and pilots were initiated to test restorative justice as an alternative to prosecution for adults. It has also been suggested that this approach is successful in securing a more compliant approach to the law by companies (Young and Hoyle, 2003: 209).

Evaluate the advantages and disadvantages of restorative justice as a response to crime.

The rationale of punishment – sociological perspectives

It has been argued above that approaches to punishment rooted in moral and legal philosophy focus on the practical aspects of punishment and seek to provide an understanding as to how various forms of state intervention seek to influence future behaviour. Sociological perspectives concentrate on the concept of punishment itself and seek to 'explore the relations between punishment and society, its purpose being to understand punishment as a social phenomenon and thus trace its role in social life' (Garland, 1990: 10). The focus of sociological perspectives is theoretical rather than practical, aiming to provide an understanding of the factors that underpin a coercive response to crime.

In attempting to provide an understanding of the role served by punishment, sociological perspectives analyse penal change and development (Hudson, 2003: 96), seeking to provide an understanding as to why the aims of punishment and the manner in which those aims are delivered is subject to wide variation both between countries and also within the same country through historical time. In Britain, for example, methods of punishment that included execution, transportation, various forms of corporal punishment and placing people in the stocks have passed out of favour and are no longer used. Sociological accounts of punishment seek to provide an understanding of the rationale of these changes by providing an understanding of what has been termed the 'penal temper of society' (Hudson, 2003: 96) that asserts the relationship between punishment and other aspects of social life and views changes to the forms of punishment as indicative of the changing nature of society. It is in this respect that it has been argued that styles and institutions of punishment should be studied as social constructions (Garland, 1990).

The following section briefly discusses a number of key developments affecting the sociology of punishment. It has been argued, however, that the sociology of punishment requires 'an analytical account of the cultural forces which influence punishment, and, in particular, an account of the patterns imposed upon punishment by the character of contemporary sensibilities' (Garland, 1990: 197). Leading social theories have been accused of providing a selective account of culture and it has been asserted that the historical development and present-day operation of penality require 'a pluralistic, multidimensional approach' that recognises punishment as a social institution conditioned by an array of social and historical forces (Garland, 1990: 280–3).

Durkheim and the sociology of punishment

Emile Durkheim (whose views on crime are briefly discussed in Chapter 1) played an important role in developing sociological approaches to the study of punishment. He focused on the key issue of how social order was maintained in societies, and asserted that it was based on consensual values and moralities. Crime was thus depicted as an act that was widely condemned throughout society because it conflicted with its core values. Punishment thus played a crucial role in securing social solidarity by providing a means whereby the conscience collective of that society (that is, 'the totality of beliefs and sentiments common to average members of society') (Cavadino and Dignan, 1992: 69–70) could be both expressed and regenerated (Garland, 1990: 23). The 'conscience collective' has been depicted as the 'foundation stone' of Durkheim's theory of punishment, being 'the ultimate source of the passionate reaction which motivates punishment' (Garland, 1990: 50). Crime was depicted as an attack on the 'conscious collective' of society that resulted in 'healthy consciences' uniting to reaffirm society's shared beliefs (Durkheim, 1893). Crime thus served to provoke 'a sense of outrage, anger, indignation, and a passionate desire for revenge' (Garland, 1990: 30). It has been argued that for Durkheim, 'punishment was primarily construed … as symbolic of group values and not as merely instrumental' (Valier, 2002: 29). However, he did not totally ignore the role which punishment might also play as a strategy to control crime.

Durkheim's view of punishment as the expression of moral outrage (Valier, 2002: 30) suggested that punishment reflected the nature of society's collective conscience at any one point in time. Changes to society's commonly held beliefs and values would be reflected in alterations to the mode of punishment. Durkheim held that punishment became less repressive in modern societies based on organic solidarity compared to traditional ones based on mechanical solidarity because the intensity of the conscience collective was based on consensual values that resulted in draconian measures being pursued against crime in primitive societies. However, it produced a more moderate reaction in advanced societies since its collective sentiments were characterised by moral diversity and the interdependence of cooperating individuals (Garland, 1990: 37). He argued that imprisonment became the main form of

punishment in industrial societies, the leniency of which (compared to earlier reliance on capital or corporal punishment) reflected an increased degree of sympathy for the plight of the criminal (Durkheim, 1900).

Durkheim's views about punishment have been challenged on many fronts. His attempt to link forms of society to forms of punishment by arguing that punishments became more lenient as society developed from pre-industrial to industrial has been opposed by arguments that suggested advanced societies utilised more coercive forms as punishment as they had a greater capacity to adopt this course of action (Spitzer, 1979). It had further been argued that he tended to overstate the importance of repressive law in primitive societies and to understate its role in advanced ones (Garland, 1990: 48). His view that imprisonment became the main form of punishment in advanced capitalist societies has also been difficult to square with progressive leniency. Although his views on the existence of a collective conscience in society were not totally consistent, he ultimately argued that this constituted a crucial fact in any society that was conducive to maintaining social order (Durkheim, 1900). This view of punishment as a group phenomenon has been criticised for drawing heavily on primitive rather than advanced societies (Garland, 1990: 26), and has also been challenged for ignoring the power relationships within society whereby the law reflects the interests of the dominant group.

Analyse the contribution made by Emile Durkheim to the evolution of the rationale of punishment.

Max Weber

Weber differentiated between the concepts of 'power' and 'authority' and concluded that these terms were distinguished by the notion of consent. An individual or organisation that possessed authority secured compliance to its demands because there was general agreement that those who put these ideas forward had the right to propose them – their exercise of leadership was widely viewed as legitimate. He further suggested that authority could be derived from one or other of three sources. These were traditional authority (whereby acceptance of the right to rule was based on custom), charismatic authority (in which the personal characteristics of a political leader determined the obedience of the public to his or her decisions) and legal-bureaucratic (or legal-rational authority). Weber believed that the latter was most appropriate to modern capitalist society characterised by the division of labour and the differentiation of tasks. In this case, public compliance to a leader's demands was accorded because of the office held by that individual (Weber, 1922) who governed according to formal rules and procedures.

Weber thus saw bureaucratic rationality as the key characteristic of an efficient, legitimately governed, modern state whereby 'judgements must be made according to rules; authority is vested in position-holders rather than in people themselves' (Hudson, 2003: 106). Bureaucracy was characterised by features that included 'impersonality, the inter-changeability of officials, routinization of procedure and a dependency on the existence of recorded information' (Cavadino and Dignan, 1992: 74). This was contrasted to the irrational means of social control that he contended were found in primitive societies. Rationality was thus seen as the hallmark of advanced societies and this characteristic was mirrored in its modes of punishment that were administered in a dispassionate, impartial and consistent manner by the professional functionaries of the central state. Aspects of the application of the principle of bureaucratic rationality in modern societies may be found in attempts to eliminate the discretion wielded by professionals in areas such as sentencing and in changes to the methods of punishment, which have been guided 'not so much by progress in humanitarianism as progress in bureaucratized rationalism, necessary to meet the social control needs and legitimacy conditions of modern society' (Hudson, 2003: 107). However, it has been argued that Weber overemphasised the extent to which rationalisation had succeeded in monopolising 'the realm of penality' (Garland, 1990: 189) and, like Durkheim, he has also been criticised for failing to devote attention to the manner in which power was wielded.

Marxist approaches to punishment

Marxist approaches to punishment are underpinned by their concept of the relations of production. This describes a social situation in which the means of production are owned by a few (the bourgeosie) and in which the many (the proletariat) sell their labour. This gives rise to a society that is fragmented into social classes whose interests are seen to inherently contradict, since in order to function capitalism requires that those who sell their labour should not be given its full value by those who own the means of production. Marxists contend that the unequal power relationships within society that derive from the relations of production are reflected in all its key institutions. These are not neutral but reflect the interests of the economically dominant class and exist to serve their key aim, that of self-preservation by maintaining the capitalist system of production. Penal policy is thus depicted as an aspect of a more general concern to regulate and control the activities of the poor.

Marxist penology places particular emphasis on the manner in which methods of punishment are fashioned by economic considerations. A key text in Marxist penology viewed punishment as determined by the mode of production whereby the way in which economic activity is organised and controlled shapes the rest of social life (Garland, 1990: 85). It was contended that changes affecting the mode of production and the consequential

adjustments to the labour market were directly related to developments affecting the way in which society punished offenders resulting in punishment being a historically specific phenomenon. Rusche and Kirchheimer trace alterations to the methods of punishment from the Middle Ages to the rise of capitalism in the late sixteenth century and thence to the Industrial Revolution and argue that the labour market, rather than the role played by penal reformers, was the key factor that underpinned alterations to both the severity of punishment in society and the nature it assumed (Rusche and Kirchheimer, 1939).

This approach meant Durkheim's view of an ordered progression from severe to more lenient forms of punishment was replaced by an account that emphasised fluctuations in the way society responded to crime arising from changes affecting the labour market. A shortage of labour resulted in lenient punishments whereas an abundance of labour predicated a more severe response to crime. Accordingly, therefore, the rationale for punishment altered during the Industrial Revolution whereby the need to use prisons as mechanisms to reform inmates and thus provide a supply of labour gave way to an objective that these institutions should impose discipline and control over those whose criminal actions threatened to undermine the work ethic.

This approach has been criticised for failing to explain how the economic imperative is translated into penal practice (Cavadino and Dignan, 1992: 61) and for failing to explain how societies sharing similar economic conditions adopt a wide variation of penal practices (Garland, 1990: 107). Further, what has been criticised as a conspiratorial analysis of the rationale of punishment (Ignatieff, 1981) has also been criticised for oversimplifying the link between the labour market and the penal strategy adopted by a society since changes to the latter may be fashioned by factors additional to this explanation (Hudson, 2003: 117) such as ideology, political forces and the internal dynamics of penal administration (Garland, 1990: 108). However, it does emphasise that coercive responses to criminality (entailing strategies such as the increased use of imprisonment and enhancing the austerity of the prison environment) are not necessarily related solely to factors such as rising crime rates but may have other ulterior motives, namely as a method of social control to manage the reaction of those hardest hit by economic downturn.

Other accounts that accept the argument that the economic climate fashions the manner in which society punishes crime, devote attention to explaining the processes involved in bringing about transitions from leniency to severity (or vice versa). Periods of economic severity threaten to undermine the legitimacy normally accorded by large sections of society to capitalist values. However, the widespread use of repressive forms of punishment to uphold these values in times of economic difficulty is likely to create widespread social resistance. Accordingly it is necessary to change the underlying mood of the public to secure an acceptance of more coercive responses to crime. This is achieved through the use of what has been described as the ideological state apparatus (Althusser, 1971), whereby transitions in methods of punishment from leniency to severity are preceded by campaigns that seek to

justify the new approach by highlighting anti-social activities associated with minority groups. This approach (which is compatible with the discussion of moral panics in Chapter 1) seeks to explain how the capitalist ruling class can secure widespread endorsement for the adoption of harsh penal strategies.

Foucault and the disciplined society

A further sociological account of the sociology of punishment was provided by Michel Foucault (1977) who developed the phenomenon of *penality* which has been described as 'a complex of theories, institutions, practices, laws and professional positions which have as their object the sanctioning of offenders'.

Foucault's key concern was the maintenance of social discipline. He discussed the manner in which fundamental economic and social changes in society had necessitated the development of new forms of social control. He graphically described the harsh mode of punishment associated with the *ancien régime* in France but argued that this display of what he termed 'sovereign power' became ineffective to maintain social order because it was only used intermittently. He believed that modern society required a system of social control, that of disciplinary power, whose hallmarks were 'uninterrupted, constant coercion' (Foucault, 1977: 137) implemented not by a central form of authority but through a myriad of mechanisms that were dissipated throughout society. Thus, for Foucault, punishment was viewed as a system of power through which domination over the individual was achieved in the modern world. It was based on the three interrelated concepts of 'power', 'knowledge' and 'the body' whose aim was to secure a self-controlled individual in the sense of a person whose obedience and conformity was based on internal constraints rather than external force (Garland, 1990: 137).

Foucault discussed the manner in which the prison system evolved as a mechanism of punishment to become an instrument of social control in response to the Industrial Revolution and the growth of towns. The infliction of pain associated with previous forms of punishment such as mutilation and execution was replaced by the deprivation of rights in the sense that inmates lost the ability to control their own time and space. Their main concern was thus to exercise power over the body. This new approach did not necessarily entail a movement towards a more lenient form of punishment but, rather, was designed to produce a system that operated more effectively (Foucault, 1977: 82).

Prisons were seen to serve numerous functions. These included the possibility of transforming inmates from criminals into useful and productive members of society by changing their moral habits and providing them with the skills to undertake a socially useful life in the future. However, as with Durkheim, Foucault also viewed prisons as institutions that served to affirm the values of society. They provided for the spatial separation of criminals from the remainder of society and in so doing transformed them into a sepa-

rate and subordinate social category, delinquents. What was termed the 'disciplinary partitioning' of delinquents induced other members of society to accept that their punishment was legitimate thereby enhancing the overall level of social cohesion. It was in this sense that the impact of prisons permeated throughout society thereby serving to establish them as a mechanism of social control.

Like Jeremy Bentham (whose views are discussed in Chapter 1), Foucault focused on the disciplinary nature of prisons and he identified its key features as surveillance, categorisation, classification and regimentation. He viewed discipline as a method to master the body and make it obedient and useful (Foucault, 1977: 137) – 'the prison seizes the body of the inmate, exercising it, training it, organizing its time and movement in order to ultimately transform the soul' (Garland, 1990: 143). However, he discussed the way in which these methods of discipline that were developed within the prison system during the nineteenth century subsequently extended outwards to influence other aspects of social life. He contended that the techniques extended beyond the prison walls to penetrate the whole of society giving rise to what he referred to as the 'disciplinary society', the aim of which was to shape and train the body thereby upholding what he referred to as the power of the norm – 'there exists a kind of carceral continuum which covers the whole social body, linked by the pervasive concern to identify deviance, anomalies and departures from the relevant norms' (Garland, 1990: 151). Modern methods of surveillance made it possible for social conformity to be secured throughout society and it was in this sense that he referred to modern capitalist societies as 'confinement societies' (Foucault, 1977: 159). This view tended to blur the distinction between punitive and non-punitive institutions 'and presents a view of society that is a mesh of disciplinary relations' (Marsh, 2004: 53).

Foucault's main concern was the manner in which power was exercised within society in order to produce conformity, obedience and behavioural control (Garland, 1990: 171). He held that knowledge and power were both inseparable and interdependent (Foucault, 1977: 27) in the sense that the disciplinary procedures developed within prison provided knowledge of the convict's body that could be translated into a new kind of power over him or her (Cavadino and Dignan, 1992: 67). Although, as is argued in Chapter 8, aspects of his arguments related to the dispersal of discipline have been applied to critiques of community sentences, his views have been criticised for concentrating on the mechanics of power to the detriment of a detailed consideration of its sources, who wields it and the context in which it is deployed. Punishment may be underpinned by factors additional to the desire to exert control in order to enforce social conformity, and the fact that rebellions and riots occur within prisons (an issue that is discussed in Chapter 8) may also question the extent to which these institutions always succeed in promoting an effective form of discipline.

Alternative perspectives on punishment

It has been argued that 'jurisprudence and the philosophical tradition are concerned with the *ought* of punishment … the sociological perspective is concerned with the *is* of punishment' (Hudson, 2003: 10). There are, however, other streams of penology that are briefly outlined below (Hudson, 2003: 10–13).

- *Technicist penology*. This approach to the study of punishment is concerned with efficiency and is an aspect of administrative criminology (that is discussed in Chapter 1). It seeks to assess the extent to which stated goals are being accomplished by the policies that have been adopted to implement them. This approach does not seek to provide an understanding of why certain goals have been put forward and what these are designed to achieve. Technicist penology accepts the agenda with which it is presented and focuses on its attainment.
- *Penology and oppression*. The link between penology and oppression stems from the Marxist view that punishment is designed to uphold capitalism and is thus directed against those whose views, values or attitudes imperil this economic system. The belief that punishment is a mechanism whereby the economically dominant can retain their power has been extended by some aspects of penology to embrace other forms of inequality, viewing punishment as a mechanism to secure gender or racial subordination.
- *Abolitionist penology*. This perspective is diverse. It encompasses approaches that suggest punishment is an inappropriate response to crime since this derives from social inequality. The state should thus focus on redressing this rather than punishing those whose actions stem from inferiority. Other approaches target specific forms of punishment that they wish to abolish (such as the use of the death penalty) or ameliorate (such as reducing the size of the prison population in the belief that this should not be used as a routine response to most forms of crime). A further aspect of abolitionist penology focuses on the victim rather than the offender and seeks to devise strategies to satisfy those adversely affected by crime. Restorative justice stems in part from this tradition.

Sentencing trends in England and Wales in the late twentieth century

The latter decades of the twentieth century witnessed the development of new approaches towards the punishment of offenders in which the welfare concerns of the treatment model that aimed to secure the rehabilitation of offenders gave way to more punitive sentiments that were associated with retribution. This change of direction was justified by arguments suggesting this approach was failing to address current levels of crime and lawlessness.

The new approach (which has been discussed above in connection with 'new retributivism') derived from the justice model that was augmented by a law and order ideology.

The justice model embraced what has been described as a minimalist approach that 'justified a neglect of offenders and their problems … the state … washed its hands of responsibility for anything other than punishing deviants, it … absolved itself for the situation in which they find themselves' (Hudson, 1987: xi–xii). The compassion felt towards the less fortunate members of society was thereby eroded in favour of pursuing punitive action against criminals.

The justice model originated in America in the 1970s. Its key features have been listed (Hudson, 1987: 38) as:

- proportionality of punishment to crime;
- determinate sentences;
- an end to judicial and administrative discretion;
- an end to disparity in sentencing;
- protection of rights through due process.

This new approach sought to imbue punishment with a retributivist objective and was reinforced by a political goal to 'get tough with criminals'. The latter was a key aspect of law and order ideology embraced by Conservative governments between 1979 and 1997 (Cavadino and Dignan, 1992: 26–7) which resulted in significant departures from the justice model, in particular the 1997 Crime (Sentences) Act that provided for stiff sentences to certain categories of repeat offenders that took into account past offending behaviour in addition to the current offence.

As is argued in Chapter 8, the Conservative perception that the public required evidence that the government was pursuing a punitive approach towards those who committed crime served to place prisons at the forefront of their thinking.

The new trend in punishment has variously been depicted as marking the end of penal modernism and its replacement by a postmodern penality (Pratt, 2000) or as the penality of late modernity (Garland and Sparks, 2000: 199). These changes were pursued against the background of neo-liberalism (that sought to reduce the role of the central state) whereby punishment became one tactic of crime control directed at the most serious criminals that was pursued alongside a range of other methods located at the local and individual level operated by public bodies, private individuals and business concerns which were especially concerned with crime prevention and the creation of community safety (Hudson, 2003: 160). The role played by crime prevention and community safety in crime control are discussed in Chapter 2.

Bifurcation

Legislation that included the 1972, 1982 and especially the 1991 Criminal Justice Acts sought to introduce the principle of 'bifurcation' into sentencing

policy. This approach sought to give criminals their 'just deserts' by matching punishment to the severity of a crime so that imprisonment was reserved for the most serious offenders and a range of non-custodial sentences were directed at less serious offending behaviour.

The 1991 Criminal Justice Act grouped offences under three headings – minor (which could be responded to by a fine or discharge), more serious (which merited a community sentence) and serious offences (which required a custodial sentence to be imposed). This legislation emphasised that the goal of non-custodial sentences was that of punishment. One difficulty with this approach was that the focus on the offence committed was seen as inadequate for prolific offenders. This resulted in the 1993 Criminal Justice Act allowing sentencers to take previous convictions into account when they dispensed a sentence. A further difficulty with this approach was the perception that offenders who escaped imprisonment had 'got off lightly'. There are various reasons for this belief, which included non-custodial sentences not being seen by the public or by sentencers as effective forms of punishment and that in a two-tier sentencing structure, those who received the lower-tier sentence were perceived as having been dealt with leniently. This situation tended to increase the use of custodial sentences, resulting in a prison population of unsustainable numbers.

The sentencing reform of Labour governments

When Labour assumed office in May 1997, the prison population in England and Wales stood at 60,131. On 3 January 2003 it had risen to 69,522, an important explanation for which was the rise in the number of long-term prisoners. England and Wales had the highest imprisonment rate in Western Europe at 134 per 100,000 population (Lyon, 2003). Ministerial perceptions that a prison population of this size was insupportable resulted in the 2001 Labour government embarking on its own review of sentencing policy. The key aspects of these reforms are discussed below.

The Halliday Report

In May 2000 the government initiated a review of the sentencing framework in England and Wales. Its aim was to ascertain whether change could be made to improve outcomes (especially in connection with reducing crime) at justifiable expense (Halliday, 2001: ii).

The key limitations affecting the present framework were stated to be 'the unclear and unpredictable approach to persistent offenders, who commit a disproportionate amount of crime, and the inability of short prison sentences (those of less than 12 months) to make any meaningful intervention in the criminal careers of many of those who receive them'. It was observed that short prison sentences were frequently inflicted on persistent offenders and were ineffective in that 66 per cent of those released were reconvicted within two years (Halliday, 2001: 22). Adverse comment was also made regarding the erosion of the principles contained in the 1991 Criminal Justice Act that sought to link punishment to the seriousness of the crime,

which had resulted in 'muddle, complexity and lack of clear purpose or philosophy'. A new framework was proposed which 'should do more to support crime reduction and reparation, while meeting the needs of punishment' (Halliday, 2001: ii).

The reforms which were put forward included retaining the principle that punishment should be proportionate to the seriousness of the crime which had been committed, but modified to take recent and relevant previous convictions into 'clearer and more predictable account' – there should be 'a new presumption that severity of sentence will increase as a result of recent and relevant previous convictions that show a continuing course of criminal conduct' (Halliday, 2001: iii).

It was also argued that sentencing decisions should be structured so that if a prison sentence of 12 months or more was not necessary to meet the needs of punishment, sentencers should consider whether a non-custodial sentence would meet the assessed needs for crime reduction, punishment and reparation. This decision would be taken on the basis of an assessment related to the risk of their reoffending, the seriousness of the harm likely to result if they did reoffend and the measures most likely to reduce those risks. Imprisonment should be used when no other sentence would be adequate to meet the seriousness of the offence (or offences), having taken account of the offender's criminal history (Halliday, 2001: iii).

The review commented on the proliferation of community penalties in recent years, each containing its own content and enforcement, was complicated and had increased the risks of inconsistent sentencing. It was thus proposed that existing community sentences should be replaced by a new generic community punishment order, enforced by the court, which would be made up of elements designed to secure the objective of crime reduction. These elements might include accredited programmes to tackle offending behaviour, or provide treatment for substance abuse or mental illness, or embrace aspects such as compulsory work, curfew and exclusion orders, electronic monitoring and reparation to victims and communities. The punitive weight of this sentence should be proportionate to the current offence and any additional severity for previous convictions (Halliday, 2001: vi–vii).

The 2003 Criminal Justice Act

Following the Halliday Report, the government introduced the 2003 Criminal Justice Act that introduced significant reforms to sentencing policy. The legislation sought to combine the retributivist concern of delivering a tough response to crime (albeit through an approach that made placed less reliance on prisons) with the reductivist goal of lowering the overall level of crime. The measure emphasised that the aim of sentencing was to bring about the reform and rehabilitation of offenders, and sentencers were required to consider how the penalty (or penalties) that they meted out would achieve these goals. The Sentencing Guidelines Council (which was established by the legislation) further emphasised the need to limit the use of custodial sentences and its work has also attempted to bring about a reduction in the length of typical sentences.

The 2003 legislation made a clear distinction between dangerous and non-dangerous offenders. It introduced a new community order available to all offenders aged 16 and above that enabled sentencers to draw from a list of 'requirements' to enable them to produce a sentence that was specifically tailored to each offender in order to accomplish the dual aims of punishment and rehabilitation. These requirements were:

- the unpaid work requirement (this is a reparative, payback element involving community service);
- the activity requirement;
- the programme requirement;
- the prohibited activity requirement;
- the curfew requirement;
- the exclusion requirement;
- the residence requirement;
- the mental health treatment requirement;
- the drug rehabilitation requirement;
- the alcohol treatment requirement;
- the supervision requirement;
- the attendance centre requirement;
- the electronic monitoring requirement.

The community order is implemented by the Probation Service or the YOT and may not last for more than three years.

Following the passage of the 2003 Act, the government suspended the implementation of the community order for offenders below the age of 18. Existing sentencing options remained in force for those aged 16 and 17 until new legislation affecting youth justice could be introduced.

The 2003 Criminal Justice Act also introduced the new sentences of Custody Minus and Custody Plus. Custody Minus entailed an offender being given the chance to undertake a community-based punishment rather than serve a custodial sentence of between 28 and 51 weeks with the sanction of automatic imprisonment for any failure on his or her part. It replaced the disposal of a suspended sentence and although different from a community order utilised the same requirements as were contained in the latter penalty.

Custody Plus was designed to replace prison sentences of below one year. It involved a short term of imprisonment (of between two weeks and three months) followed by a longer period of at least nine months supervision in the community. This might entail a drug user being detoxed while in custody and then being given 'strict supervision, support and treatment in the community to help keep him off drugs and away from crime' (Home Office, 2004: 8). The aspect of the sentence that was served on licence in the community was similar to requirements imposed by community orders.

A further sentence also introduced by the 2003 legislation, that of intermittent custody, was designed to help offenders stay in employment while

serving their sentence by combining a custodial sentence (served for part of the week, perhaps at weekends) with community punishment. Custody Plus and intermittent custody were designed to replace short terms of imprisonment which were regarded as 'ineffective' and associated with negative consequences such as 'loss of employment or accommodation and family break-up which are factors known to increase the risk of re-offending' (Home Office, 2004: 8).

The new direction of sentencing policy – towards trifurcation?

The sentencing policies of the Labour government amount to a system of trifurcation that is underpinned by the common objective of punishment. One benefit of trifurcation is that community-based sentences no longer constitute the bottom rung of the sentencing ladder, and may find favour with the public especially if their rationale and content is seen to be inflicting punishment on offenders. Additionally, community penalties that involve an element of supervision and imprisonment are closely intermeshed, emphasising the punitive aspects of the non-custodial responses to crime.

This three-tier sentencing structure consists of:

- *Fines and fixed-penalty notices*. These (and new disposals which include the conditional caution) are designed to punish for the least serious criminal offences such as anti-social behaviour and minor public order offences. One benefit of this approach is that this penalty places no demands on the Probation Service. As has been indicated in Chapter 3, the enforcement of the law relating to these low-level offences is increasingly discharged by officials such as police community support officers rather than members of the police service. As is discussed in more detail in the following chapter, attempts have been made (in particular by the 2003 Courts Act) to improve the collection rate of fines, thereby making this a more effective form of punishment.
- *Community penalties*. These embrace a range of non-custodial sentences which include supervisory and/or monitoring aspects, and are designed to punish for a wide range of offences which fall short of the most serious. Their rationale as forms of punishment is sometimes enhanced by being incorporated in a single sentence that combines both custodial and non-custodial dimensions.
- *Imprisonment*. This is reserved for the most serious offences. This approach was advocated in the Carter Report (Carter, 2003) and the 2003 Criminal Justice Act provided that the sentences for the most serious offenders could be indeterminate.

Parole and early release

The sentencing reforms contained in the 2003 Criminal Justice Act had a significant impact on parole.

The system of parole (whereby prisoners could be released before they had served the full sentence ordered by the court and be placed under the supervision of a probation officer until the original date for remission of sentence had been met) was introduced into the criminal justice system of England and Wales by the 1967 Criminal Justice Act. This legislation provided that a prisoner was eligible for release after serving one-third of the sentence imposed on him or her or 12 months, whichever was the longer. The 1982 Criminal Justice Act amended this to provide for eligibility for release after having served one-third of the sentence or six months, whichever was the greater. The decision as to whether early release should be granted was made by the Parole Board.

The 1990 White Paper, *Crime, Justice and Protecting the Public*, and the resultant 1991 Criminal Justice Act, introduced significant changes to the system of parole. Under the 1991 Criminal Justice Act, an adult offender serving a custodial sentence of at least 12 months and less than four years would be automatically released at the halfway point of the sentence and then be supervised under licence until the three-quarter point of the sentence had been reached. An offender serving a determinate sentence of four years or more would be eligible for release on parole from the halfway point of the sentence and would automatically be released at the two-thirds point. Following release the offender would be supervised under licence until the three-quarter point of the sentence had been reached.

These provisions sought to reduce the amount of discretion exercised by the prison authorities, so that the courts would be more able to determine the actual sentence served. However, a White Paper in 1996 acknowledged that the arrangements introduced in the 1991 legislation were 'complicated' and that 'the public, and sometimes even the courts, are frequently confused and increasingly cynical about what prison sentences actually mean' (Home Office, 1996: 43). New proposals were thus put forward in order to 'introduce greater honesty and clarity into the sentencing process, so that the sentence actually served will relate much more closely to the sentence passed by the court'. To achieve this, it was suggested that all offenders aged 16 and over who received a determinate custodial sentence should serve the full term ordered by the court and that automatic early release and parole would be ended. Instead, prisoners would be required to earn remission. It was argued that this philosophy of 'honesty in sentencing' would be coupled with greater transparency into the arrangements for calculating sentences so that 'all those involved – offenders, judges and the public – will know exactly where they stand' (Home Office, 1996: 45).

The incoming Labour government in 1997 decided not to implement the 'honesty in sentencing' provisions of the 1997 Crime (Sentences) Act. Its initial approach towards time served in prison entailed the introduction of a system whereby the magistrate or trial judge would provide full details concerning a sentence. This information would entail announcing the minimum time to be served with parole, the minimum time without parole, the maximum term possible and the earliest release date. The victim of the crime would be informed in writing of the sentence and the earliest possible release

date. The 1998 Crime and Disorder Act introduced changes affecting the early release of short-term prisoners subject to a curfew condition, but a more comprehensive reform was put forward in the 2003 Criminal Justice Act.

The 2003 legislation limited the use of parole by introducing new arrangements for automatic release, whereby prisoners serving 12 months and over could be released at the half-way point of their sentence but be subject to licence requirements, which might include requirements such as curfews or undertaking rehabilitation programmes. Compliance with these requirements would be monitored by supervision in the community that would continue until the full sentence dispensed by the court had been served. Any breach of the conditions imposed by the licence could result in a return to custody. Separate provisions applied to prisoners who were deemed to pose a danger to the public, who would be released only when it was deemed safe to do so.

The release of prisoners serving discretionary life sentences is determined by the Parole Board's Discretionary Lifer Panel (DLP) that was established by the 1997 Crime (Sentences) Act. When a prisoner who is serving a discretionary life sentence has completed the tariff imposed by the trial judge (that is, the term of imprisonment which must be served to provide for 'punishment and deterrence'), the Home Secretary refers the prisoner's case to the DLP which then conducts an assessment of the risk which the prisoner will pose to the general public if released. The DLP uses this risk assessment to make recommendations to the Home Secretary as to whether the prisoner should remain in custody, be moved to an open prison or released. These Panels may also recall a paroled prisoner to prison. There are problems with this system and in particular with the process of risk assessment. It has been observed that 'there is an inherent difficulty in predicting and assessing a person's future behaviour at liberty whilst they are in captivity, (Padfield et al., 2003: 115).

Tackling recidivism by reintegrating offenders

It has been estimated that more than one million crimes – around 18 per cent of the total number of crimes committed each year – were carried out by released prisoners at an annual cost of around £11 billion per year (Ramsbotham, 2005: 69). Fifty-eight per cent of all adults, 78 per cent of all young offenders under the age of 21, and 88 per cent of all children aged 15–18 reoffend within two years of release (Ramsbotham, 2005: 70). Considerations of this nature prompted Labour governments to reassert the role of rehabilitation in their penal policies. This goal would be achieved by measures enabling offenders to be reintegrated into their communities.

The priority accorded to tackling recidivism was made clear by the Home Secretary in a speech to the Prison Reform Trust in September 2005 when he laid down the penal strategy of the third Labour government (Clarke, 2005). He made it clear that the prevention of reoffending had become the central focus to achieve the government's objective of reducing the overall level of crime. He accordingly put forward proposals to achieve the objective of

're-socialising offenders back into society'. The reintegration of offenders thus became a key aim of sentencing policy.

He argued that securing the reintegration of offenders into society required a thorough and systematic assessment of their needs and also their desire to reform that would be formalised in offender contracts. These required the offender to state his or her intention not to reoffend in return for which the state (in the form of the National Offender Management Service) would provide individualised help and/or treatment (delivered in prison or in the community or in a combination of both) to address the root cause of the offending behaviour. The Home Secretary stated that the key components of this individualised support package embraced the policy areas of health (including alcohol and substance abuse), education, employment, social and family links and housing and its effective delivery required a partnership between the state, private sector and voluntary agencies.

The government's policy thus sought to emphasise the rehabilitative function of prisons which Clarke now wished to be seen not as 'universities of crime' but as 'colleges of constructive citizenship'. Individualised treatment in prisons (or initiated in prisons and continued upon release in the community) was at the heart of the new thinking. However, this policy has a number of repercussions for the organisation and management of the prison estate to bring about individualised reform, in particular in connection with the provision of personal supervision to each prisoner and the acceptance of the importance of community prisons to achieving successful rehabilitation. Although in his speech the Home Secretary sought to move on from the debate about prison numbers and onto future statistics related to the reduction of reoffending, factors such as prison overcrowding (an issue which he acknowledged was considerably aggravated by the high numbers of persons remanded in custody) threatened to undermine his best intentions in this matter.

The key reforms to tackle recidivism are briefly discussed below.

The creation of the National Offender Management Service

The merger of the Prison and Probation Services into the National Offender Management Service (NOMS) (a reform that is discussed in greater detail in Chapter 8) provides a unified system of offender management. This means that each offender is provided with a single person (usually a probation officer) to oversee the implementation of their sentence plan as it is served both in prison and in the community. This approach emphasises the importance of continuity to secure the goal of resettlement. One difficulty with this approach is that the offender may become over-reliant on his or her case worker and may not be able to cope when this support is terminated once the full sentence has been served.

Resettlement

Resettlement entails the delivery of practical services to offenders to enable offenders to be reintegrated into communities. Traditionally resettlement programmes were delivered by the statutory and voluntary sectors whose

work was guided by various models whereby some resettlement teams focused their work in prisons and others in the community. Mentoring was a key ingredient of resettlement practice. NOMS will integrate prison and community-based resettlement work and Regional Offender Managers will coordinate the work of various government departments in the region whose responsibilities for reducing reoffending were identified in the Social Exclusion Unit's 'seven pathways out of reoffending'. This report made it clear that resettlement was not an issue that criminal justice agencies alone could successfully promote (Social Exclusion Unit, 2002).

Actuarial justice

Contemporary penal policy emphasises the importance of risk. There are two main aspects associated with this development (Hudson, 2003: 161):

- the move from risk management to risk control, whereby attempts to reduce risk by interventions such as education and treatment programmes for offenders and post-release supervision give way to an approach whereby those who pose risks to society are physically removed from it. This approach ensures that the increased use of custodial sentences is a key aspect of contemporary penal trends;
- the reorientation of penal policy whereby the provision of security takes precedence over the imposition of discipline. This means that interventions targeted at individuals give way to approaches whereby communities define risks and develop strategies to respond to them.

The emphasis placed on the assessment of risk has given rise to what is termed 'actuarial justice' which forms the basis of what has been referred to as the 'new penology' (Feeley and Simon, 1992). It has been argued that this approach was underpinned by the cultural characteristics of late modernity embracing factors such as individualism and distrust of the role of the central state, the power of the media and the nature of contemporary forms of governance (Garland, 2000: 35). Changes of this nature were underpinned by the abandonment of attempts to secure a more equal distribution of wealth and resources and, instead, to manage the risks derived from these inequalities (Beck, 1992: 19).

Actuarial justice entails offenders being treated not as individuals but according to characteristics such as 'the type of offence, previous record, education and employment history, family size and income, residence, alcohol and addictions and relationship problems' (Hudson, 2003: 162). The aim of the new actuarial techniques of offender risk assessment 'is to place offenders into the categories of risk, and then isolate and exclude the high-risk, allowing only the low-risk to be punished by proportionate penalties' (Hudson, 2003: 163). This approach was embodied in the bifurcation principle governing sentencing in the late twentieth century.

Evaluate the significance of changes to sentencing policy that were introduced by the 2003 Criminal Justice Act.

Conclusion

This chapter has considered a number of issues connected with the concept of punishment. It has examined the concept of punishment and differentiated between reductivist and retributionist approaches and has further discussed the aim of reintegrating the offender into society through the use of restorative justice. The strengths and weaknesses of this approach have been fully evaluated. The chapter contrasted these approaches to the study of punishment with sociological accounts that seek to explain why societies adopt different forms of punishment across historical periods. The contribution made by key thinkers (in particular Durkheim, Weber, Foucault and Marxist penologists) has been briefly examined. The chapter also sought to adapt the theoretical account of punishment by relating the themes that have been discussed to sentencing trends in England and Wales in the late twentieth century. It drew attention to the shift from the welfare model to the justice model and examined the aims and content of the sentencing policy pursued by post-1997 Labour governments.

The chapter has suggested that prisons play an important part in punishing those who commit criminal acts, especially in industrial and post-industrial society. The importance of this response to crime was emphasised by the law and order ideology initiated by the Conservative government in 1993 and continued by its Labour successors. The following chapter develops this argument by considering the development of prisons in England and Wales and assessing the role they are designed to fulfil. It also looks at the range of non-custodial disposals that are available to sentencers.

Further reading

There are many specialist texts that will provide an in-depth examination of the issues discussed in this chapter. These include:

Braithwaite, J. (1989) *Crime, Shame and Reintegration*. Cambridge: Cambridge University Press.

Foucault, M. (1977) *Discipline and Punish: The Birth of the Prison*. London: Allen Lane.

Garland, D. (1985) *Punishment and Welfare: A History of Penal Strategies*. Aldershot: Gower.

Garland, D. (1990) *Punishment and Modern Society*. Oxford: Clarendon.

Hudson, B. (2003) *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory*, 2nd edn. Buckingham: Open University Press.

McConville, S. (ed) (2003) *The Use of Punishment*. Cullompton: Willan Publishing.

Tonry, M. (2004) *Punishment and Politics*. Cullompton: Willan Publishing.

Key events

- **1717** Enactment of the Transportation Act. This Act provided for the transportation of criminals to the American colonies. It was designed as a means of punishment and deterrence but also helped to redress the shortage of labour experienced in these colonies.
- **1820** The last beheadings took place in Great Britain when five members of the Cato Street Conspiracy led by Arthur Thistlewood suffered this fate. They had plotted to kill the cabinet and overthrow the government.
- **1821** Opening of Millbank Penitentiary. Its design was heavily influenced by Jeremy Bentham's panopticon blueprint and he personally supervised the construction of this institution.
- **1843** Abolition of gibbeting whereby executed corpses were displayed in public. The last person to be gibbeted was James Cook in 1832.
- **1868** The last transportations (to Fremantle in Western Australia) took place.
- **1868** Public executions were ended.
- **1900** Publication of *Deux Lois de L'évolution Penale* (*Two Laws of Penal Evolution*) by Emile Durkheim in which he put forward the view that there was an ordered progression from severe to more lenient forms of punishment as society progressed.
- **1955** Ruth Ellis was the last woman to be executed in Britain.
- **1964** The last executions (of Peter Allen and Owen Evans) took place in Britain.
- **1965** Enactment of the Murder (Abolition of the Death Penalty) Act that abolished the death penalty for murder in Great Britain. The measure provided for a temporary five-year ban, but in 1969 Parliament voted to make abolition permanent. In 1973 permanent abolition was extended to Northern Ireland. However, the United Kingdom only became truly abolitionist with the enactment of the 1998 Human Rights Act which removed the death penalty as a possible punishment for military offences committed under the Armed Forces Acts.
- **1972** Enactment of the Criminal Justice Act. This introduced the principle of bifurcation into sentencing policy that sought to punish serious offenders harshly but treat the perpetrators of less serious crime more leniently, typically by the imposition of non-custodial sentences. Subsequent Criminal Justice Acts enacted in 1982, 1991 and 2003 sought to enforce this principle of sentencing.
- **1997** Enactment of the Crime (Sentences) Act. This measure sought to curb the discretion of sentencers by introducing a range of mandatory sentences for crimes involving violence, drug trafficking and burglary. It was subsequently modified by the 2000 Powers of the Criminal Courts (Sentencing) Act.
- **1999** Enactment of the Youth Justice and Criminal Evidence Act. This measure introduced referral orders that considerably extended the principle of restorative justice into the youth justice system.
- **2003** Enactment of the Criminal Justice Act. This measure made important changes to sentencing policy, including the introduction of community orders, Custody Plus and Custody Minus, and put forward provisions to provide for the early release of prisoners.

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