CHAPTER
SUMMARY

The eight chapters that follow this one all explore different aspects of the criminal justice process – the end point of which involves the imposition of punishment. In this chapter we consider the idea of punishment – what it involves and how it is to be understood. In the main, the chapter focuses on two sets of debates:

☐ the first, a largely philosophical discussion, focuses upon the nature and rationale for punishment: is it primarily imposed in order to prevent criminality in the future, or is it a penalty imposed for misconduct in the past?

☐ the second set of debates is primarily sociological and concerns how we are to conceive of the place of punishment within society and to understand punishment as a set of social practices.

What is punishment?

There are a number of criteria that can be laid down in order to distinguish punishment in the sense that interests us as criminologists from other forms of unpleasant forms of pain. According to various experts (Hudson, 2003b; Zedner, 2004) these include:

1 The involvement of an evil and unpleasantness for the person on whom the punishment is inflicted.
2 It must be for an offence, actual or supposed.
3 It must be of an offender, actual or supposed.
4 It must be the work of personal agencies.
5 It must be imposed by an authority conferred through or by the institutions against the rules of which the offence has been committed.
6 The pain which is infl icted must be intentional, not accidental or coincidental (Hudson, 2003).
7 To interest criminologists, the punishment should be imposed in response to a 'criminal offence'.
8 It should be imposed by a judicial authority. Not surprisingly punishment can and does take a variety of forms, particularly if one looks cross culturally. Until relatively recently most liberal democracies still used the death penalty. However, during the course of the twentieth century most abandoned it. The United States remains the great exception – but even within America there is significant variation, state by state, in the use of the death

penalty (Zimring, 2003; Garland, 2011). In this opening section we will quickly look at some of the central issues in discussions of punishment, what these days is generally referred to as 'penology'.

Having provided a brief overview, we will then look at ideas of punishment in greater detail. In the context of criminal justice, Zedner (2004) says there are six key questions in relation to punishment:
1 What are the prerequisites of formal punishment?
Two basic principles govern punishment:

- a There can be no crime without law.
- b There can be no punishment without law.

2 What are its component parts?
Two components appear key to most, though not all, defi nitions of punishment:

- a censure (the expression of disapproval); and
- b sanction ('pain').

However, as we will see, particularly in relation to what is called 'retributivism', it is sometimes easier to find a justification for the censure than it is for the sanction.
3 By whom is punishment imposed?
Is it by the state only or by other bodies as well? Sometimes there is a distinction drawn between the allocation of punishment on the one hand and the delivery of punishment on the other (allocation usually remains in the hands of the state, whereas, say, in the case of private prisons, the delivery may be via private corporations).

4 Upon whom, and when, is punishment to be imposed?
Must the imposition of punishment follow conviction? If so, what of informal punishment or the infliction of pain for civil wrongs – are they punishments? In this regard the move toward the increasing use of 'on-the-spot penalties' and civil penalties such as Anti-Social Behavioural Orders (ASBOs) is an interesting development (see Chapter 30).

5 What social roles does punishment fulfil?
As we will see, these may vary and may include bolstering what Durkheim referred to as the collective conscience, through to maintaining the position of the powerful.

6 And with what justification or to what end is it inflicted?
Why should offenders be punished? This is the matter that will form the major focus of our concerns in this chapter. Why do we inflict punishment? What are we trying to achieve? And on what basis are we justified in so doing?

There are numerous answers to this question including to:
a Discourage people from offending.

- b Make amends for what they have done.
- c Protect us from those who are dangerous.
- d Reinforce social values and bonds.
- e Simply because they deserve to be punished.

However, as we will see, there are a number of practical problems involved. Centrally, the aims of punishment may be several, but they may also conflict. What someone 'deserves' may not be the same as what is judged necessary to protect society.
The literature generally asks two questions: on what grounds can the state inflict pain, and how much pain is the state justified in using in any particular case? There are no 'final' answers to these questions, but exploring the arguments helps us understand the basis of our (and others') system of punishment, and provides a philosophical and normative basis upon which we can debate and discuss how we think our penal system should operate.

It is at this stage that we begin to encounter quite a number of philosophical terms which help us identify different positions in relation to punishment and, most particularly, help us understand the different responses that there are to Zedner's sixth question outlined above. In thinking about justifications for punishments, approaches are generally divided into two main camps. These are consequentialists and retributivists (from 'retribution') on the other. Retributivism is backward-looking rather than directly considering the future good. Retribution implies the imposition of something (punishment) in response to actions already undertaken. By contrast, consequentialist approaches tend to justify punishment on the basis of what it will achieve in the future. That is to say, it is frequently aimed at the prevention of future offending – and, as we will see, there are a variety of means that it can use to do this. These forward-looking theories are generally based on utilitarianism – itself often summarised in Jeremy Bentham's words as the 'greatest happiness of the greatest number'. On this basis, the 'good' brought about by the infliction of punishment must outweigh the pain imposed. In addition to philosophical approaches to the study of punishment there is a developing field, heavily influenced by sociological theory, that focuses on punishment as a set of socio-cultural practices. This field – now generally referred to as penology or the study of penality – examines the structures and systems of punishment and asks

what these have to tell us about the nature of particular social systems. Why, for example, did industrialising societies progressively abandon forms of punishment that were public and spectacular – public executions, floggings, the stocks and so on – and replace them with the prison? What does the nature of punishment have to tell us about contemporary social change? We will return to these questions later in the chapter.

First, we turn to matters of penal philosophy.
Utilitarian or consequentialist approaches Although there is by no means complete overlap between utilitarian philosophy and consequentialist approaches to punishment, much of what we will encounter in this section has been informed or influenced by utilitarian theory. As we saw earlier (see Chapter 6), this is often linked as a starting point with Bentham's advocacy of the idea of the promotion of the sum of human happiness. The utility or goal of punishment – the consequence it seeks to promote – is generally the prevention or reduction of crime. It can do this in three main ways: through deterrence (putting people off), rehabilitation (improving people) or incapacitation (reducing or removing the possibility of offending). We will take each of these in turn.

Deterrence
From Bentham onwards a distinction has been drawn between two types of deterrence: individual and general deterrence (sometimes referred to as specific and general deterrence). The former refers to the aim of deterring those who have already offended from doing so again. The latter is the more general aim of imposing punishment so as to deter other potential offenders. In this regard, according to Bentham, 'The punishment suffered by the offender presents to every one an example of what he himself will have to suffer, if he is guilty of the same offence' (quoted in Hudson, 2003b: 19).

General deterrence
General deterrence has arguably been the predominant justification for punishment and it is something that also benefits from having intuitive appeal. Most of us understand, and may well also believe, that imposing punishment on someone is a sensible way of showing others that such behaviour is unacceptable. A distinction is often drawn between the certainty and the severity of punishment.
Historically – certainly in pre-industrial times – severity was the basis of the system of punishment.

Penalties were often arbitrary and, by contemporary standards, would seem often to be extraordinarily severe. One only has to look at the Bloody Code or the history of transportation, and apply contemporary standards, to see the way in which severity of punishment was a key organising principle up until the eighteenth century (see Chapter 2). As reliance on the death penalty and transportation declined, so the underlying basis of the penal system shifted toward the certainty of punishment.

Important in this regard were the writings of Cesare Beccaria (see Chapter 6). Believing that offenders made decisions based on 'rational choice', and were therefore largely uninfluenced by their social and personal conditions, Beccaria argued that the extent of punishment should be limited by what was necessary to prevent crime, and that the system of punishments should be graduated to fit the severity of the crime and not the nature of the individual criminal:

The purpose of punishment is not that of tormenting or afflicting any sentient creature, nor of undoing a crime already committed . . . Can the wailings of a wretch, perhaps, undo what has been done and turn back the clock? The purpose, therefore, is nothing other than to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise . . .

Punishments and the means adopted for inflicting them should, consistent with proportionality, be so selected as to make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned. (Beccaria, 1767/1995: 31)
As such, as we will see, such ideas have much in common with the 'tariff' approaches to punishment that have been used in Britain and elsewhere in recent decades.

There are a number of potential difficulties with the idea of general deterrence (von Hirsch et al ., 1999):
☐ How does one decide how severe punishments have to be in order to make people decide not to commit offences?
☐ Is the same level of severity appropriate for everyone (are we deterred by different things)?
☐ Are all offences rationally assessed? What about those offences where there is a significant degree of emotion?
☐ Is it the case that all those people one might wish to deter will actually know about punishments that have been imposed?
In the 1970s the Home Office undertook a review of existing studies of deterrence. The conclusion to the review (Beyleveld, 1979: 136; quoted in Hudson, 2003) was that:

There exists no scientific basis for expecting that a general deterrence policy, which does not involve an unacceptable interference with human rights, will do anything to control the crime rate. The sort of information needed to base a morally acceptable general policy is lacking. There is some convincing evidence in some areas that some legal sanctions have exerted deterrent effects. These findings are not, however, generalizable beyond the conditions that were investigated. Given the present state of knowledge, implementing an official deterrence policy can be no more than a shot in the dark, or a political decision to pacify 'public sentiment'.

Individual deterrence

Let us move now from general to individual deterrence. Individual deterrence, or what is sometimes referred to as 'specific' deterrence, is again often to be found in contemporary justifications of punishment. Let us take two examples. In the early 1980s William Whitelaw, Home Secretary in Margaret Thatcher's first administration, announced in a speech to the 1983 party conference the introduction of a new regime in juvenile detention centres which would provide a 'short, sharp shock' to those on the receiving end and, consequently, would be more effective in preventing future offending. There have been similar experiments in the United States with what are generally referred to as 'boot camps'. Unfortunately for those who place their trust in such initiatives, the research evidence is not good. The Home Office's own evaluation of the short, sharp shock initiative was that the regimes were no more effective than those they had replaced. Reviews of research evidence on boot camps conclude that the 'evidence suggests that the military component of boot camps is not effective in reducing post-boot camp offending' (Wilson et al ., 2005: 18) or that 'by themselves, [boot camps] typically do not have an effect on participants' odds of recidivism' (Meade and Steiner, 2010: 841). A second example would be the raft of 'three strikes and you're out' sentences that were introduced in America, and to a lesser extent elsewhere, in the 1980s and 1990s. The reasoning that lies behind such sentences is that the extent of punishment increases as the number of previous offences rises, with a cut-off – usually of three – which triggers an exemplary sentence. Huge numbers of offenders have been sentenced to lengthy periods of imprisonment, especially in states such as California, and yet there is little evidence of any particularly significant impact on crime (Zimring et al ., 2001). Finally, in addition to questions of efficacy (whether such approaches work) there are also questions of acceptability (whether they are fair or right). Hudson (2003b) notes three types of moral objection:

☐ It allows for the innocent to be punished (the principle is simply that some punishment must be meted out in order to remind others of its existence).

☐ It allows for punishments to be imposed that are in excess (often well in excess) of the harms done by the offence (in one infamous case in California a twice-convicted felon received a 'third strike' life sentence of 25 years to life for the theft of a slice of pizza from a group of children. The sentence was reduced to six years on appeal).

☐ It allows for the punishment of crimes that have not yet been committed. Of course, in addition to moral difficulties there is the no small matter of evidence for the effectiveness of deterrence. Writing in the 1970s, Robert Martinson (1974: 50) famously queried whether much at all had been learned in this area: We know almost nothing about the 'deterrent effect', largely because 'treatment' theories have so dominated our research, and 'deterrence' theories have been relegated to the status of a historical curiosity. Since we have almost no idea of the deterrent functions that our present system performs or that future strategies might be made to perform, it is possible that there is indeed something that works – that to some extent is working right now in front of our noses, and that might be made to work better – something that deters rather than cures, something that does not so much reform convicted offenders as prevent criminal behaviour in the first place.

Weisburd et al . (1995) examined the behaviour of a group of white-collar criminals in order to test for the possibility of individual deterrence. They found few differences in re-arrest rates for those who had been imprisoned compared with those who had not. By contrast, though in connection with a very different form of offending, the Minneapolis Domestic Violence Experiment appeared to show some impact of arrest – though doubts were later thrown on these fi ndings. One of the more innovative studies was that conducted by Chambliss in the 1960s. Changing procedures so as to increase markedly the certainty and severity of punishment linked to violation of parking regulations on a university campus, Chambliss (1966) found that there were some signifi cant reductions in violations of the rules.

Rehabilitation

If the highpoint of deterrence was around the eighteenth century, then it is to the nineteenth and twentieth centuries that we must turn in looking for the era when rehabilitation was at its height. As we discussed in greater detail in Chapter 2, there

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are a number of core reasons why deterrence-based approaches to punishment declined in infl uence and the aims of rehabilitation and reform gained precedence. In part, the change was a consequence

of the very signifi cant social changes that took place in this period. The processes of industrialisation and urbanisation lent weight to views that suggested that social and political circumstances were important in understanding human behaviour. Industrialisation also created a vastly increased demand for labour and, consequently, pressure increased to fi nd ways of ensuring that offenders were made available for work rather than, for example, being transported for use as forced labour in the colonies.

Second, as implied initially, positivistic-infl uenced social sciences began to develop. They questioned the idea of crime as simply the outcome of rational choice-based decisions by individuals and focused rather on notions of individual pathology, seeking to distinguish criminals from non-criminals according to their physical features or other aspects of their circumstances. As Zedner (2004) notes, 'At its height, punishment was recast as a means of restoring the offender to good citizenship through programmes of training, treatment, counselling, psychotherapy, drug and even shock treatment.'

By and large, however, there was relatively little distinction drawn between types of offender in the nineteenth century, and treatments were not generally geared to individual differences or perceived needs.

Again, a number of shortcomings in rehabilitative approaches to punishment can be identifi ed. As

Zedner (2004) and others (see, for example, Ward and Maruna, 2007) note, rehabilitative approaches rely on a number of core assumptions, each of which is at least challengeable:

☐ D elinquency has causes that are discoverable .

As we saw in Chapters 6 to 17, there is a long-standing debate within criminology between those who, largely working in the positivist tradition, assume that the causes of delinquency are discoverable and that this is an appropriate aim for criminology and those working in critical and constructivist traditions who tend to be more concerned with the ways in which state power is used to criminalise particular sections of the population.

☐ T hese causes are open to treatment .

For a considerable period it was assumed that offenders could be reformed or rehabilitated. From the 1970s onward considerable doubt was thrown upon such claims, not least as a result of the publication of a review of existing research evidence by Robert Martinson. Though it was entitled What Works (1974), Martinson's work is generally credited with ushering in a period in which faith in rehabilitation declined almost to invisibility, leading to the use of the term 'nothing works' to describe the new era.

☐ I f not treated, they will get worse .

Labelling theorists (see Chapter 11) would argue quite the reverse. There is much evidence

that the criminal justice process is itself criminogenic. Many who come into contact with the criminal justice system will, in fact, go on to display more extensive patterns of offending than might otherwise be the case.

☐ T reatment, even if coerced, is not punitive, as it is for the offender's good .

However, considerable criticism has been aimed at indeterminate sentencing and at what is justifi ed as being 'welfare-oriented interventions for their punitive and inequitable nature'. One example of this concerns the use of 'care orders' in juvenile courts during the 1970s in particular. Designed to allow intervention by social workers in response to the young person's particular welfare needs, they also had the effect of increasing any subsequent punishment. As Morris and Giller (1987: 101) noted, 'While one can understand the benign motives of those who used a care order for a juvenile who had committed an offence in order to facilitate social work ends, their contribution in producing as an unintended consequence

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severe responses by magistrates when the juvenile returned to the juvenile court cannot

be minimised.’
☐ Overlooks the fact that much offending is opportunistic .
Thus, rather than taking the view that there are deep, underlying causes that must be ‘treated’, there are schools of thought within criminology (particularly those we discussed under the heading of ‘Contemporary classicism’ in Chapter 15) which take the view that, even if this is the case, such causes have not shown themselves to be especially amenable to manipulation and, consequently, we are better advised to manipulate the circumstances in which offending takes place.
In addition, rehabilitative approaches are criticised for holding to an overly determined view of behaviour, placing too much emphasis on social and cultural conditions, and too little on the ability of individuals to make decisions and choices. Much of the history of traditional criminological approaches to female offending, for example, has rested on sexist assumptions about how women’s biology is a crucial determinant of their behaviour (see Chapter 16). One, if not the , core aim of feminist scholarship in this area has been to challenge such views and to assert the importance of individual agency in decision-making.
For a whole host of reasons, rehabilitative ideas have had a rough ride over the past few decades. And yet, as Ward and Maruna (2007) argue, perhaps

in this period the wrong question has been asked. Rather than obsessing about 'What works?', they suggest that a much more practical and realistic question is 'What helps people go straight?'

Although on the surface the difference between the two may not seem great, this is deceptive:

For one thing, it is easy to declare that 'nothing works' when 'works' implies some degree of predictable consistency (i.e. 'reliably works every time'). Nothing 'works' for every offender in every circumstance. Yet it would require an extremely unusual view of the social world for someone to declare 'Nothing helps people go straight'. Although many things might hinder this process, surely some things can help it.

(Ward and Maruna, 2007: 12)

Incapacitation

This approach at preventing or reducing crime holds no assumptions about our ability to rehabilitate offenders, includes nothing which seeks to bring about reform and shows no interest in the harm caused by crime other than the general displeasure signalled by the imposition of the punishment. As Hudson (2003: 31) puts it:

If general deterrence and individual rehabilitation are diffi cult to achieve, it perhaps seems a plausible goal to protect potential victims from further crime by known offenders through physical incapacitation, either by rendering criminals physically harmless, or by removing them from

circulation.
This approach is based upon the assumption that the state has a duty to protect and that, in the absence of other approaches that can be shown to work, such protection can be provided through some form of incapacitation. Incapacitation may take various forms. When Michael Howard as Home Secretary announced in 1993 that 'Prison works', he did so not on the basis of a belief in its ability to rehabilitate offenders but, rather, because he felt that there were good reasons to think that it might deter offenders and, even if it did not, it would certainly incapacitate: 'Let us be clear. Prison works. It ensures that we are protected from murderers, muggers and rapists – and it makes many who are tempted to commit crime think twice.'
At its most extreme, of course, the death penalty is the ultimate form of incapacitation. The death penalty was abolished in Britain in the mid-1960s and the vast majority of developed countries have also ceased using execution as a punishment for crime. One of the major exceptions is the United States, which had a moratorium on executions between 1967 and 1977, but since that time – in some states – has once again begun using the death penalty.
A number of other forms of incapacitation exist. One area where there is considerable debate concerns sex offending and whether there is anything that can be done to prevent further offending. Some

countries still use surgical castration – the removal of the testicles – but this is regarded by many as being in contravention of the Convention on Human Rights. There are countries which use what is euphemistically termed 'chemical castration' of sex offenders, whereby drugs are used artifi cially to lower the production of testosterone in the body (see box) and, indeed, the possibility of introducing such approaches was briefl y mooted in the UK in 2007.

In England and Wales, high-risk sex offenders who have served their sentences are managed and monitored by Multi-Agency Public Protection Arrangements (MAPPA) and a variety of techniques including supervision, surveillance, curfews and restrictions on various activities are used. As yet, 'chemical castration' has not been used to any signifi cant extent in the UK, with perhaps 100 or so offenders volunteering for such 'treatment' in the period since 2007.

Much contemporary policy interest in incapacitation has centred on the belief – underpinned by a considerable body of research evidence – that a small proportion of offenders are disproportionately responsible for a signifi cant proportion of crime. Estimates vary, and are all probably fairly inaccurate, but the general idea is captured by former American President Gerald Ford (quoted in Zimring and Hawkins, 1995: 18):

> The crime rate will go down if persons who habitually commit most of the predatory crimes are

kept in prison for a reasonable period . . . because they will not then be free to commit more crimes . . . one obvious effect of prison is to separate law breakers from the law-abiding society.

The problem lies not in the logic, but in the practice. What is problematic is the process of identifying the 'habitual' or 'persistent' offender. In a study conducted in one Midlands county in England in the mid-1990s, when interest in this idea was particularly high in government, Hagell and Newburn (1994) examined how the use of different means of defi ning a 'persistent' offender might work in practice. They applied three similar, but slightly different, defi nitions, to a sample of young offenders.

The three defi nitions were:

☐ Definition 1 – The most active 10 per cent of offenders in terms of number of arrests and offences.

☐ Definition 2 – Frequency of known and alleged offending over any three-month period during the course of one year.

☐ Definition 3 – (the government's preferred defi nition) Any juvenile who has committed one imprisonable offence whilst subject to a supervision order, and who has committed two other similar offences.

Applying the three defi nitions produced the result shown in Figure 23.1.

Figure 23.1 shows that there was relatively little

overlap between defi nitions and that only three juveniles were identifi ed as 'persistent' according to all three. The researchers concluded that 'The fact that a discrete group of persistent offenders cannot be identifi ed in this manner suggests that any defi nition of persistence will inevitably be arbitrary' (Hagell and Newburn, 1994: 122). Put another way, what this fi nding points to is a constant problem with incapacitation: the diffi culty of 'false positives'. This was described by Norval Morris (1974: 72–73) in the following way:

> Even when a high-risk group of convicted criminals is selected, and those carefully predicted as dangerous are detained, for every three so incarcerated there is only one who would in fact commit serious assaultive crime if all three were released . . . [A]s a matter of justice we should never take power over the convicted criminal on the basis of unreliable predictions of his dangerousness.

The false positive problem raises both practical and moral problems. Not only can it not be shown to work – at least not without considerable collateral damage – but it is also diffi cult to justify imposing particularly harsh terms of imprisonment on people who are highly likely not to offend in future. Nevertheless, as we have seen with the rise of mandatory minimum sentencing (along the lines of 'three strikes and you're out'), incapacitative sentencing has proved popular with contemporary politicians

and has clearly played a role in the very substantial rises in prison populations in England and beyond (Newburn, 2007; Zimring et al ., 2003).

Retributivism

Perhaps the most straightforward expression of retributivism is to be found in the lex talionis – 'an eye for an eye, a tooth for a tooth, a life for a life' (Exodus 21, 23–5). Is this simple idea a potential basis for organising our system of punishment? Bluntly, no. Lacey (1988) suggests that there are two fundamental problems:

☐ Although this sort of equivalence might help us in relation to some offences – say murder – it provides us with no guidance as to the appropriate punishment for other offences such as fraud or blackmail.

☐ It pays scant regard to the notion that punishment should only be infl icted upon those that are held to be responsible for an offence (i.e. whether a killing was an accident or a deliberate act).

Following Immanuel Kant, retributivists hold that punishment should not be a means to an end, but an end in itself. Clearly, by contrast, anything that is consequentialist – concerned with consequences – is a means to an end. In relation to retributivism the justifi cation for punishment is because the offender is held to deserve it – it has no purpose beyond that.

Retributivism in criminology has an interesting history. Until relatively recently it was regarded as a less promising basis for sentencing than consequentialist approaches which allowed for aims such as rehabilitation and reform. However, as doubts grew about the effi cacy of rehabilitative programmes and, at least as importantly, concerns grew about the unfairness of indeterminate sentencing, so there developed renewed interest in a particular form of retributive thinking known as 'just deserts' or 'desert theory' – in short, the argument that the punishment ought to be proportionate to the harm caused. We will return to this shortly, but fi rst it is worth saying a little more about the reasons for declining faith in rehabilitative sentencing.

The attack on rehabilitative sentencing came from both ends of the political spectrum. On the 'liberal left' there was increasing concern about the inequities and excesses of indeterminate sentencing. Indeterminate sentencing exists where the length of sentence is left to the discretion of the sentencer. Such approaches were viewed as a necessary part of a rehabilitative approach in order to allow sentencing to be moulded to fi t the type of 'treatment' imposed. However, the absence of any obvious direct relationship between the offence and the scale of punishment was viewed by many as being an inappropriate basis for sentencing. It also allowed for considerable variations in the punishments

imposed upon people who had ostensibly committed similar offences.

Moreover, the lack of clarity that often existed in rehabilitative sentencing about the precise length of the sentence – because of the vagaries of the parole system – led to inequity and in some wellpublicised cases not only to resentment but also to prisoner unrest.

At the other end of the spectrum there was increasing criticism of rehabilitative sentencing for its apparent ineffectiveness, and commentators from the 'new right' increasingly called for tougher incapacitative sentencing. In some respects the emergence of mandatory sentencing – 'three strikes' and the like – was a product of precisely such calls for exemplary measures, especially against repeat offenders.

Just deserts

It was against this background that what has been referred to as the new retributivism emerged. Also known as the 'back to justice' movement, it grew in popularity from the mid-1970s onward. The key text in the new movement was called Doing Justice (von Hirsch, 1976). At the heart of this approach was the assertion that punishment should be linked to the nature of the crime that had been committed, that is, it should be proportionate .

There are two distinct elements to proportionality, however. The fi rst concerns the need to rank offences hierarchically according to their seriousness.

This is generally referred to as ordinal proportionality . In addition, there is the question of the overall scale of punishments. This is generally referred to as cardinal proportionality and refers to the question of what the most serious punishment in the scale is to be: the death penalty? Imprisonment? The answer to this question is obviously crucial in establishing the basis on which the ordinal scale is constructed.

According to von Hirsch (1993) the argument for proportionality involves three steps:

1 The state's sanctions against proscribed conduct should take a punitive form, that is, visit deprivations in a manner that expresses censure or blame.

2 The severity of a sanction expresses the stringency of the blame.

3 Hence, punitive sanctions should be arrayed according to the degree of blameworthiness (i.e. seriousness) of the conduct.

There are a number of points to note here. First, the justifi cation for punishment is that it is necessary for the state to express censure. Desert theorists proceed on the assumption that offenders are freewilled and can therefore be held morally to account for their actions. Second, that censure is connected with a crime that has been committed. There is no reference to, or concern with, any future offending. Third, according to von Hirsch, therefore, sanctions

should be ordered, in a schedule, in order to correspond with the seriousness of the crimes concerned. Such a schedule is often referred to as the tariff . By making punishment proportionate, desert theory aims to make punishment certain, consistent and fair.

This raises a further question, however, which is how are offences to be ranked? How is seriousness to be assessed? Sometimes, indeed most often, this has been left to sentencers. An alternative is to establish a formal body to construct guidelines which can be used to structure sentencing. The most famous case of this was in the American state of Minnesota, where guidelines took effect in 1980. Essentially, such guidelines (see Table 23.1) comprised a grid with two axes. Down one axis is the 'offence score' indicating the gravity of the particular offence and along the other axis is the 'criminal history score' indicating the number and gravity of prior convictions. The grid contains a line that distinguishes the point above which prison would be the usual sentence and below which a different type of penalty would be used. The boxes contain numbers indicating the expected duration of the prison sentence (in months) where a prison sentence is imposed.

In England and Wales, the just deserts-infl uenced 1991 Criminal Justice Act contained a somewhat simpler attempt at grading punishments, dividing

them into three groups according to seriousness: those warranting a fi ne or discharge; those that should result in a community punishment; and those that are so serious that a custodial sentence is necessary.

There are a number of problems relating to proportionality. First, in relation to ordinal proportionality it seems clear that some offences are obviously easy to rank in relation to one another (serious assault versus theft from a car, for example) but in other cases this is less straightforward, perhaps especially in relation to minor offences (Zedner, 2004). In relation to cardinal proportionality one of the major problems concerns the basis on which the decision is made. As Hudson (2003: 45) puts it, 'the problem is that deserts theory can help with the graduation of punishments within the most severe and least severe points, but can do nothing to tell us what those anchoring points should be'. The consequence is that cardinal proportionality tends to have been much infl uenced by political considerations.

What then of the reason why offenders should be punished? As with von Hirsch's three steps outlined above, the core of punishment concerns the expression of blame. Social disapproval is indicated through such censure.

Censure addresses the victim. He or she has not only been injured, but wronged through someone's culpable act. It thus would not suffi ce just

to acknowledge that the injury has occurred
or convey sympathy (as would be appropriate
when someone has been hurt by a natural catastrophe).
Censure by directing disapprobation at
the person responsible acknowledges that the
victim's hurt occurred though another's fault.
Censure also addresses the act's perpetrator.
He is conveyed a certain message concerning his
wrongful conduct, namely that he culpably has
injured someone, and is disapproved of for having
done so.
(von Hirsch, in Duff and Garland, 1994: 119)
Of course, punishment generally involves more
than just censure. In desert theory a distinction is
often drawn between the censure (the expression of
disapproval) and the sanction , the deprivation or the
hard treatment (the 'pain' that is infl icted as a consequence).
The justifi cation in desert theory for the
use of sanctions varies, but in general terms tends
to rest on the idea that the censure must be backed
up by a prudential disincentive – something extra, as
it were, to persuade us to resist the temptation to
offend. The censure or blame is the primary reason,
but it is backed up by sanctions.
Crucially, within this approach it is argued that
these sanctions – penalties – must not be too severe
or it will be fear rather than the moral sense of something
being wrongful that will become the primary
reason for obeying the law. A variant of this form

of desert theory sees punishment as a form of moral communication. So-called 'penal communication' theories fi nd the justifi cation for punishment in the communicative power of censure backed up by 'hard treatment' (Duff, 2003). The serving of the sentence is an indication of the fact that the offence has been accepted as being wrong; in this process the offender demonstrates that they accept general social values about the nature of wrongdoing.

What are the problems with just deserts? A number of criticisms have been made of retributivism and of just deserts more particularly (Braithwaite and Petit, 1990; Hudson, 2003b; Zedner, 2004):

☐ Is it always appropriate for proportionality to be the primary aim of sentencing? Are there not cases – exceptional perhaps – where matters of public protection outweigh individual rights?

☐ Is it really possible to order offences, and those matters which might act as aggravating or mitigating factors, in a way that is clear and just? What is to prevent the creation of ever more fi nely graded punishments and creating a system that is overly complex and possibly incoherent?

☐ A danger with retributivism is that it is easily subverted by repressive and punitive political intentions.

☐ More generally, radical critics have argued that retributivist theory pays insuffi cient regard to

the social conditions that produce criminality; it individualises and over-rationalises offending behaviour.

Review questions

1 What are the main philosophical justifi cations for punishment?

2 What are the main differences between utilitarian and retributive approaches to punishment?

3 What is meant by 'just deserts'?

4 What is the difference between ordinal and cardinal proportionality?

The sociology of punishment

Thus far in this chapter we have looked at some of the main ways in which legal philosophers have talked about the justifi cations for both the imposition of punishments and the nature and scale of those punishments. We turn now to another body of work, this time emanating from sociology. By contrast with philosophical questions, this is more concerned with what punishment has to tell us about the nature of society, about the functions or roles that punishment plays, and how the changing nature of punishment is related to broader and deeper socio-cultural changes. Readers who have already worked their way through earlier chapters (9 and 17 in particular) will have encountered some of these ideas already. In what follows we look at the ideas associated with those who are often referred to

as the ‘founding fathers of sociology’ – Durkheim, Weber and Marx – and conclude with a brief discussion of the more recent sociology of punishment associated with Norbert Elias and particularly with the work of Michel Foucault.

É mile Durkheim

As we saw in Chapter 9, Durkheim’s particular concern in analysing the emergence of modern industrial society focused on the nature of social solidarity. Durkheim’s concerns with punishment were, like most sociologists who have subsequently worked in this area, to understand what the nature of punishment says about social order and what functions it plays, particularly in relation to social solidarity. To recap briefl y, Durkheim in The Division of Labour in Society (1893) distinguished between two ideal-typical representations of social solidarity, which he called mechanical and organic .

Mechanical solidarity was characteristic of preindustrial societies, where the division of labour is far from advanced and, indeed, most people are engaged in the same jobs or tasks. In such societies solidarity is based on this absence of differentiation; it is based on similarity. There are shared values, norms and beliefs and social rules are likely to be broadly accepted by all. In industrial society, by contrast, which is characterised by a much more highly differentiated division of labour with people undertaking very specialised

jobs and tasks, solidarity is based on difference. Within such organic solidarity, beliefs are not shared in the way they are within simpler forms of social order.

Durkheim then proceeded to examine the implications of his analysis of social solidarity for punishment. In societies characterised by similarity, he argued that law would tend to be repressive in order to signify that collectively agreed norms had been breached. By contrast, in more complex societies, where there is no such collective agreement about rules, it is necessary for law to reconcile differences and repair harms among people with differing opinions and sentiments. In consequence, it will tend to be less repressive and more restitutive.

As such, he argued that the use of prison – which is largely absent in primitive societies – would tend to replace death and torture as the main form of penalty in industrial societies. In societies characterised by mechanical solidarity, where repressive sanctioning is typical, punishment is meted out by and on behalf of the group, and its primary purpose or function is to uphold moral values through indignation. By contrast, under conditions of organic solidarity, where restitutive law is the norm, crime and deviance disturb social order

rather than moral sentiments and rehabilitative, restorative action by offi cials is necessary in order to restore the status quo.