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Is Punishment Unjust?

2.1 We need to ask the question: is punishment unjust? In Chapter 1 we argued that the most crucial factor in the current malaise in the penal system is the 'crisis of legitimacy'. A social institution is 'legitimate' if it is *perceived as morally justified*; the problem with the penal system is that this perception is lacking, and many people inside and outside the system believe that it is morally indefensible, or at least defective. We need to investigate whether such moral perceptions are accurate, if only to know what should be done about them. If they are inaccurate, then the obvious strategy would be to try to rectify the perceptions, by persuading people that the system is not unjust after all. But if the perceived injustices are real, then it is those injustices which should be rectified. This chapter accordingly deals with the moral philosophy of punishment and attempts to relate the philosophical issues to the reality of penal systems such as that of England and Wales today.

The basic moral question about punishment is an age-old one: 'What justifies the infliction of punishment¹ on people?' Punishing people certainly needs a justification, since it is almost always something that is harmful, painful or unpleasant to the recipient. Imprisonment, for example, causes physical discomfort, psychological suffering, indignity and general unhappiness along with a variety of other disadvantages (such as impaired prospects for employment and social life). Also, and not to be overlooked, punishments such as imprisonment typically inflict additional suffering on others, such as the offender's family, who have not even been found guilty of a crime (Codd, 1998). Deliberately inflicting suffering on people is at least *prima facie* immoral, and needs some special justification. It is true that in some cases the recipient does not find the punishment painful, or even welcomes it – for example, some offenders might find prison a refuge against the intolerable pressures of the outside world. And sometimes when we punish we are not trying to cause suffering: for example, when the punishment is mainly aimed at reforming the offender, or at ensuring that victims are benefited by reparation. But even in these cases, punishment is still something imposed: it is an intrusion on the liberty of the person punished, which also needs to be justified.

As well as having a *general justification* for having a system of punishment, we will also require morally valid '*principles of distribution*' for punishment, to determine how severe the punishment of individual offenders should be. This distinction (from Hart, 1968) will be of recurring importance in the following discussion.

The two most frequently cited justifications for punishment are *retribution* and what we call *reductivism* (Walker, 1972). Retributivism justifies punishment on the ground that it is *deserved* by the offender; reductivism justifies punishment on the ground that it helps to *reduce the incidence of crime*. We begin with reductivism.

Reductivism

2.2 Reductivism is a forward-looking (or 'consequentialist') theory: it seeks to justify punishment by its alleged *future consequences*. Punishment is justified because, it is claimed, it helps to control crime. If punishment is inflicted, there will be less crime committed thereafter than there would be if no penalty were imposed. Reductivist arguments can be supported by the form of moral reasoning known as *utilitarianism*. This is the general moral theory first systematically expounded by Jeremy Bentham (1748–1832) (an important figure in penal thought and history), which says that moral actions are those that produce 'the greatest happiness of the greatest number' of people. If punishment does indeed reduce the future incidence of crime, then the pain and unhappiness caused to the offender may be outweighed by the unpleasantness to other people in the future which is prevented – thus making punishment morally right from a utilitarian point of view. But it is not necessary to be a utilitarian to be a reductivist. Indeed, at the end of this chapter we shall be arguing an alternative position (based on human rights) which, although non-utilitarian, nevertheless takes account of the possible reductivist effects of punishment.

How is it claimed that punishment reduces crime? There are several alleged mechanisms of reduction, which we shall discuss in turn.

Deterrence

Essentially, deterrence is the simple idea that the incidence of crime is reduced because of people's fear or apprehension of the punishment they may receive if they offend – that, in the words of Home Secretary Michael Howard addressing the Conservative Party conference in 1993, 'Prison works ... it makes many who are tempted to commit crime think twice.' There are two kinds of deterrence, known as 'individual' and 'general' deterrence.

Individual deterrence occurs when someone commits a crime, is punished for it, and finds the punishment so unpleasant or frightening that the offence is never repeated for fear of more of the same treatment, or worse. This sounds a plausible theory, but unfortunately it seems not to work too well in practice. If individual deterrence did work as the theory suggests, we would expect that if we introduced a new kind of harsh punishment designed to deter, the offenders who suffered the new punishment would be measurably less likely to reoffend than similar offenders who underwent a more lenient penalty. However, as was found with the 'short, sharp shock' detention centre regime for young offenders introduced in the early 1980s, this simply does not seem to work.² Indeed, there is some research that indicates – quite contrary to what the theory of individual deterrence suggests – that offenders who suffer more severe or punitive penalties (including penalties specifically aimed at deterrence) are *more* (not less) likely to reoffend (West, 1982: 109; Brody, 1976: 14–16; Lipsey, 1992: 139; Lipsey, 1995: 74). And one particularly thorough

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research study on boys growing up in London seemed to find that if a boy offends, the best way to prevent him from offending repeatedly is *not to catch him* in the first place (West, 1982: 104–11)!

This research evidence seems contrary to common sense, but such findings are not as incomprehensible as they look at first sight. They do not show that punishment has no deterrent effect on offenders, or that no offender is ever deterred. But they suggest that punishment has other effects which may cancel out and even outweigh its deterrent effects. These anti-deterrent effects of punishment are known as '*labelling effects*'. 'Labelling theory' in criminology claims (and is supported by research studies such as those just mentioned) that catching and punishing offenders 'labels' them as criminals, stigmatizing them, and that this process can in various ways make it more difficult for them to conform to a law-abiding life in future. They may find respectable society and lawful opportunities closed to them while unlawful ones are opened up (custodial institutions are notoriously 'schools for crime' where offenders can meet each other, learn criminal techniques and enter into a criminal subculture), and their self-image may change from that of a law-abiding person to that of a deviant. Harsher penalties in particular could help to foster a tough, 'macho' criminal self-image in the young men who predominate in the criminal statistics. (For a fuller discussion of labelling theory, see I. Taylor et al., 1973: ch. 5.)

So the notion of individual deterrence seems to be of little value in justifying our penal practices. But there is another, perhaps more promising category of deterrent effect: *general deterrence*. This is the idea that offenders are punished, not to deter the offenders themselves, but *pour encourager les autres*.³ General deterrence theory is often cited to justify punishments, including those imposed on particular offenders. One faintly ludicrous example is a 1983 case⁴ where the Court of Appeal said that a particular sentence would 'indicate to other people who might be minded to set fire to armchairs in the middle of a domestic row that if they do, they were likely to go to prison for as long as two years'.

Now, there can be little doubt that the existence of a *system of punishment* has some general deterrent effect. When during the Second World War, the German occupiers deported the entire Danish police force for several months, recorded rates of theft and robbery (though not of sexual offences) rose spectacularly (Christiansen, 1975; Beyleveld, 1980: 159). And if, for instance, on-the-spot execution were to be introduced for parking on a double yellow line, there might well be a significant reduction in the rate of illegal parking. But short of such extreme situations, it seems that *what punishments are actually inflicted* on offenders makes little difference to general deterrence. For example, in Birmingham in 1973 a young mugger was sentenced to a draconian 20 years' detention amid enormous publicity, and yet this sentence made no difference to the incidence of mugging offences in Birmingham or in other areas (Baxter and Nuttall, 1975; Beyleveld, 1980: 157). Similarly, studies have found little if any evidence that jurisdictions with harsh levels of sentencing benefit as a result from reduced crime rates (von Hirsch et al., 1999: ch. 6).⁵

This does not mean that deterrence never works, but it does mean that its effects are limited and easy to overestimate. There are several reasons for this. First, most

people most of the time obey the law out of moral considerations rather than for selfish instrumental reasons (Tyler, 1990; Paternoster et al., 1983). Second, people are more likely to be deterred by the likely moral reactions of those close to them than by the threat of formal punishment (Willcock and Stokes, 1968). Again, potential offenders may well be ignorant of the likely penalty, or believe they will never get caught. Research has found that bank robbers tend to be dismissive of their chances of being caught even when they already have been caught and sent to prison, and as a result most do not think twice about the kind of sentence they might get (Gill, 2000). Much the same seems to be true of burglars (Bennett and Wright, 1984: ch. 6). Or the offender may commit the crime while in a thoughtless, angry or drunken state. There is some good evidence that general deterrence can be improved if potential offenders' *perceived likelihood of detection* can be increased,⁶ but little to suggest that severer punishments deter any better than more lenient ones (see Bottoms, 2004: 63–6).

These truths were officially recognized by the then Conservative government in 1990 (before Mr Howard's announcement that 'prison works'). The 1990 White Paper *Crime, Justice and Protecting the Public* (Home Office, 1990a: para. 2.8) stated:

There are doubtless some criminals who carefully calculate the possible gains and risks. But much crime is committed on impulse, given the opportunity presented by an open window or unlocked door, and it is committed by offenders who live from moment to moment; their crimes are as impulsive as the rest of their feckless, sad or pathetic lives. It is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation. Often they do not.

All of this suggests that, while general deterrence might form the basis of a plausible *general justification* for having a *system* of punishment, it is more difficult to argue that the *amount of punishment imposed* by our system can be justified in this way. In terms of its deterrent effects, it seems almost certain that the English penal system is engaging in a massive amount of 'overkill'. As we saw in Chapter 1 (especially Table 1.2), England has more prisoners proportionate to its population than any other country in Western Europe (apart, currently, from Luxembourg). For example, contrast England with Finland, which in 2004 had 71 prisoners per 100,000 population compared with England and Wales's 141. Unlike England, Finland from the mid-1970s onwards has as a deliberate matter of policy sought to reduce its prison population (Törnudd, 1993; Cavadino and Dignan, 2006: 160–7), and has succeeded in doing so without noticeably poor effects on its crime rate (which has risen at a similar rate to that of other European countries). Similarly, a significant reduction in the West German prison population in the 1980s did not lead to an increase in major crime or make the streets less safe (Feest, 1988; Flynn, 1995).

A utilitarian deterrence theorist ought to conclude from this that the English penal system is an immoral one. Jeremy Bentham (1970: 179) himself propounded the principle of 'frugality', more often referred to as '*parsimony*' in punishment, which states that penalties should be no more severe than they need to be to produce a utilitarian quantity of deterrence. 'Overkill' causes unnecessary suffering to

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the offender, and all suffering is bad unless it prevents a greater amount of suffering or brings about a greater quantity of pleasure.⁷ So although utilitarian deterrence might justify having a penal system, it does not justify the one we actually have. We shall argue later that the same is true for our preferred approach based on human rights.

Incapacitation

Prison works, according to Conservative Home Secretary Michael Howard in 1993, not only by deterrence, but also because 'it ensures that we are protected from murderers, muggers and rapists' – a reference to the reductivist mechanism known as 'incapacitation'. Incapacitation simply means that the offender is (usually physically) prevented from reoffending by the punishment imposed, either temporarily or permanently. The practice in some societies of chopping off the hands of thieves incapacitates in this way (as well as possibly deterring theft). Similarly, one of the few obviously valid arguments in favour of capital punishment is that executed offenders never reoffend afterwards. Lesser penalties can also have some incapacitatory effects. Disqualification from driving may do something to prevent motoring offenders from repeating their crimes. Attendance centres can be used to keep hooligans away from football matches. And imprisonment normally ensures that the offender is deprived of the opportunity to commit at least some kinds of offence for the duration. Not all crimes, by any means: many thefts and assaults (on staff and other inmates) take place in prison, as do drug offences, while headlines such as 'Bootlegger ran £23m empire from prison' (*Guardian*, 2 December 1999) exemplify some of the other criminal opportunities open to the incarcerated felon. But it is true that offences such as domestic burglary and car theft become somewhat more difficult when you are locked up in prison.

Life imprisonment is one sentence which is specifically used in many cases for the purposes of incapacitation. A 'life imprisonment' sentence would be more precisely described as a *potentially* lifelong prison sentence, since most 'lifers' are eventually released; but the life sentence means that they will not be released as long as it is believed that they pose an unacceptable risk or serious reoffending (see Chapter 8). Life sentences may be imposed, and lifers kept in prison, even though this exceeds what would be a normal length sentence proportionate to the seriousness of the offence. The sentences of 'imprisonment for public protection' and the 'extended sentences' created by the Criminal Justice Act 2003 (see Chapters 4 and 8) are also aimed at incapacitating offenders.

It is certainly a plausible claim that incapacitation could be a justification (or partial justification) for punishments such as disqualification from driving and attendance centre orders. As to whether and how far incapacitation can serve to justify imprisonment, one key issue is the factual question of how effectively prison reduces crime in this way. Although only rough estimates are possible, the best calculations suggest that the incapacitation effects of imprisonment are only modest. This is largely because most 'criminal careers' are relatively short, so that by the time offenders are locked away they may be about to give up crime or reduce their offending

anyway.⁸ Moreover, supporters of incapacitation (see, for example, Green et al., 2005) tend to overlook the fact that offenders who are locked up are often replaced by a new generation of criminals. One authoritative estimate, by the former head of the Home Office Research and Planning Unit, Roger Tarling (1993: 154), is that 'a change in the use of custody of the order of 25 per cent would be needed to produce a 1 per cent change in the level of crime'.⁹ On the other hand, the prison population could be substantially *reduced* without creating a massive crime wave: if the numbers in prison were cut by 40 per cent, this could be expected to lead to an increase in criminal convictions of only 1.6 per cent (Brody and Tarling, 1980).

Nor is there much evidence that incapacitatory sentences can be targeted with any great success or efficiency on more selected groups of repeat offenders who are especially likely to reoffend.¹⁰ Nor can we accurately predict which offenders are likely to commit particularly serious crimes if they do reoffend (Ashworth, 2005: 206–7, 215–16): our powers of prediction are simply not up to the job, whether we use impressionistic guesswork, psychological testing, statistical prediction techniques or any other method. If we do try to pick out individuals in any of these ways and subject them to extra-long sentences on the basis of our predictions, we will be imprisoning a large number of people who would not in fact reoffend; typically at least twice as many as those who actually would offend again. And even if it were possible to target potential recidivists or those likely to commit grave crimes, this would run into the ethical objection that we were punishing people not for what they have done but for what they *might* do in the future – punishment for imaginary crimes in the future rather than real ones in the past – which might not be fundamentally wrong in principle to a utilitarian, but is a serious objection for most moral codes, including retributivism and human rights theory.

It seems unlikely, then, that incapacitation can provide a general justification for our present practice of imprisonment, let alone justify increasing our use of imprisonment, or introducing any new incapacitatory measures.¹¹ Nevertheless, the current trend in both England and the United States is for governments to create new sentences explicitly aimed at achieving incapacitation, even if the punishment inflicted is out of all proportion to the offence committed.¹² Most US jurisdictions now have so-called 'three strikes and you're out' laws, whereby repeat offenders are automatically jailed for life for a third offence. Under these laws, people have literally been sent to prison for life for offences such as stealing a slice of pizza, which was the third offence of the unfortunate Jerry Williams in California in 1995 (*Guardian*, 13 October 1995). Since 1997 England has also adopted the 'three strikes and you're out' principle, with various mandatory prison sentences for burglars, drug dealers and those convicted of unlawful possession of firearms, as well as introducing new extended and indefinite sentences to protect the public from offenders who are thought to be dangerous (see Chapter 4).

Reform

Reform (or 'rehabilitation')¹³ is the idea that punishment can reduce the incidence of crime by taking a form which will improve the individual offender's

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character or behaviour and make him or her less likely to reoffend in future. Reform as the central aim of the penal system was a highly popular notion in the 1950s and 1960s, when penological thought was dominated by 'the rehabilitative ideal'. Some proponents of reform (of a kind known as 'positivists': see later in this chapter) have favoured a particularly strong version of this ideal called the 'treatment model'. This viewed criminal behaviour not as freely willed action but (either metaphorically or literally) as a symptom of some kind of mental illness which should not be punished but 'treated' like an illness.

For some advocates of rehabilitation, optimism about reforming offenders has extended to the sentence of imprisonment, with incarceration being seen not so much as a retributive or deterrent punishment but as an opportunity to provide effective reformatory training and treatment. For most rehabilitationists, however, the conventional wisdom has long been that 'prison doesn't work' in reforming offenders, and so cannot be justified in these terms.¹⁴ Figures showing high rates of reoffending following release from custody are often quoted as bearing this out; for example, 66 per cent of offenders released from prison in 2003 (and 76 per cent of males aged 18 to 20 released from custody) were reconvicted within two years (Shepherd and Whiting, 2006: 19). After seven years, 73 per cent of released prisoners are reconvicted (Kershaw, 1999: 11).¹⁵ Statistics such as these led the government to famously state in the White Paper which preceded the Criminal Justice Act 1991 that imprisonment 'can be *an expensive way of making bad people worse*' (Home Office, 1990a: para. 2.7; our italics).

Although once dominant in penal discourse, the ideal of reform became discredited in the early 1970s, a development known as the '*collapse of the rehabilitative ideal*' (Bottoms, 1980). This was partly due to research results which suggested that penal measures intended to reform offenders were no more effective in preventing recidivism than were punitive measures. The received wisdom about reform came to be that '*nothing works*', that 'whatever you do to offenders makes no difference', although this was always an exaggeration. It is true that in the 1970s extensive reviews of research in the United States (Lipton et al., 1975) and in Britain (Brody, 1976) found it to be generally the case that different penal measures had equally unimpressive outcomes in terms of reoffending. Similarly, recent studies¹⁶ have found that, when account is taken of the differing characteristics of offenders¹⁷ sentenced to custody and various types of community sentence, the type of sentence they receive seems to make no discernible difference to whether they reoffend or not. However, studies from the 1970s onwards – including those most often quoted as evidence that 'nothing works' – have also found examples of reformatory programmes which seem to work to some extent with certain groups of offenders (see Palmer, 1975). The generalized conclusion (associated with the American Robert Martinson)¹⁸ that 'nothing works' became widely accepted – not so much because it had been shown to be true, but more because the disappointment of the high hopes invested in reform led to an over-reaction against the rehabilitative ideal.

In recent years (since the early 1990s in Britain) there has been something of a revival of the reformatory approach. The new attitude – sometimes associated with

the managerialist Strategy B approach to criminal justice (see the Introduction) – has been that *'something works'*: that systematic experimentation, research and monitoring can identify effective methods of dealing with offenders and are already doing so. The current New Labour government accepts this new conventional wisdom, and an important strand of its criminal justice policy is to elicit evidence as to *'what works'* to reduce offending and apply the results of research evidence in practice: an *'evidence-based'* policy of trying to increase the effectiveness of the criminal justice system. (Although as we shall see, especially in Chapter 11, it is arguable that government policy is still based more upon ideological and political considerations than upon any dispassionate consideration of the evidence.)

The claims that are now made for the effectiveness of reformative measures are usually more modest than those that were put forward during the period of rehabilitative optimism. Few nowadays hold to the 'medical' or 'treatment' models of punishment, or claim that science can provide a cure for all criminality. Reform tends now to be seen not as 'treatment' which is imagined to work independently of the will of the offender, but as measures that enable or assist rather than force offenders to improve their behaviour – what has been called 'facilitated change' rather than 'coerced cure' (Morris, 1974: 13–20). Many currently popular programmes are based on the *'cognitive behavioural'* approach,¹⁹ which attempts to change how offenders think by improving their cognitive and reasoning skills, often by confronting them with the consequences and social unacceptability of their offending in the hope that they will as a result decide to change their attitudes towards breaking the law. Cognitive behavioural training also seeks to teach offenders skills and techniques for altering and controlling their behaviour. ('Anger management' is one kind of training that is based on cognitive behavioural principles.) Claims have been made that programmes based on the cognitive behavioural approach can reduce reoffending by around 10–15 per cent, and by more if they are effectively targeted on those offenders who can best benefit from them. Some of the same researchers also maintain that punishments that are designed as deterrents can be shown to *increase* delinquency.²⁰ The cognitive behavioural approach has won official backing, and accreditation processes were set up both within the Prison Service (in 1996) and in the probation service (in 1998) to ensure that training programmes are in accordance with its principles (Debidin and Lovbakke, 2005: 32).

This kind of approach does not deny the offender's free will, rather it appeals to it, aiming to better enable offenders to do what they really want to do. It follows that reform can never be guaranteed to work (as of course research well and truly confirms). But it may still be well worth trying, even though we retain a degree of scepticism about some of the more enthusiastic claims for the effectiveness of reformative programmes. The empirical evidence may have destroyed the reformative aim as a plausible *general justification of the penal system*, but reform remains a reductionist aim which it may well be right to pursue *within* a system of punishment – provided we can find some other general justification.

Retributivism

2.3 The retributivist principle – that wrongdoers should be punished because they deserve it – is in some ways the complete antithesis of reductivism. Where reductivism is forward-looking, retributivism looks backwards in time, to the offence. It is the fact that the offender has committed a wrongful act which deserves punishment, not the future consequences of the punishment, that is important to the retributivist. Retributivism claims that it is in some way morally right to return evil for evil, that two wrongs can somehow make a right.

If people are to be punished because they deserve it, it is natural to say that they should also be punished as severely as they deserve – that they should get their *just deserts*. Retributivism thus advocates what is known as a *tariff*, a set of punishments of varying severity which are matched to crimes of differing seriousness: minor punishments for minor crimes, more severe punishments for more serious offences.²¹ The punishment should fit the crime in the sense of being in proportion to the moral culpability shown by the offender in committing the crime. The Old Testament *lex talionis* (an eye for an eye, a life for a life, etc.) is one example of such a tariff, but only one: a retributive tariff could be considerably more lenient than this, as long as the proportionate relationship between crimes and punishments was retained.

This is a point that needs stressing, because it is a common mistake – certainly among our own students – to assume that retributivists are those who advocate the harshest punishments, and to equate retributivism with a draconian, Strategy A approach to criminal justice. In fact, it is often the case that retributivists (for example, those who follow the ‘justice model’ of punishment we discuss in section 2.5) favour relatively lenient punishment. (But punishment that is ultimately justified by the fact that it is deserved and proportionate.) On the other hand, some notable exponents of Strategy A – such as Michael Howard, Conservative Home Secretary from 1992 to 1997 – have attempted to justify their harsh penal policies by appeals to their supposed effectiveness in controlling crime by reductivist mechanisms such as deterrence and incapacitation. The mistake is understandable, and there may be a certain psychological truth behind it. Maybe, whatever their proclaimed motives, many advocates of Strategy A are primarily motivated more by a hatred of criminals and a wish to see them ‘get what they deserve’ than by a desire to pursue rational steps to reduce crime. But retributivism is not inherently harsher than other philosophies, and indeed it has certain attractive features to those of a humane disposition.

One of these attractive features is its consonance with what is generally acknowledged to be one fundamental principle of justice: that *like cases should be treated alike*. (‘Like’ for retributivists means alike in the intuitively appealing sense of ‘similarly deserving’.)

Another attractive feature of retributivism is that there is a natural connection between the retributive approach and the idea that both offenders and victims have *rights*. Reductivist theory (at least in its utilitarian form) has always found it

difficult to encompass the notion of rights, even when it comes to providing entirely innocent people with a right not to be punished. (For if we could achieve the desired reductive consequences by framing an innocent person, and if these effects are all that is needed to justify punishment, what would be wrong with punishing the innocent?) Retributivism has no such problem, since it follows automatically from the retributive principle that it must be wrong to punish non-offenders. Nor may we punish criminals to a greater extent than their crimes are felt to deserve (for example, in the hope of reforming or incapacitating them or deterring others): under the retributivist principle offenders have a right to go free once they have 'paid their debt to society'. Life imprisonment for stealing a pizza would be ruled out as disproportionate, for example. Retributivism thus fits in well with our common-sense intuitions which insist that it is indeed morally relevant whether the person punished has behaved well, badly or very badly. Probably for this reason, it has proved a remarkably resilient idea. For many years retributivism was regarded (at least in academic circles) as outmoded and even atavistic, but it enjoyed a major revival from the early 1970s onwards, notably in the form of the 'justice model' (see section 2.5 of this chapter) – though at the moment it is less fashionable again.

But retributivism is not without its own philosophical difficulties. One problem is how to justify the retributive principle itself. It may accord with some of our moral gut reactions, which seem to tell us that wrongdoers should be made to suffer. But maybe these reactions are merely irrational vindictive emotions (akin to vengeance) which, morally speaking, we ought to curb rather than indulge. A related objection is that it is not immediately clear how the retributivist principle relates to any general notion of what is right or wrong. At least utilitarian reductivism has the virtue that it can be derived from the general moral and political theory of utilitarianism.

Some theorists have attempted to counter these objections by reference to the 'social contract', a theory which provides a general account of political obligation (see especially Murphy, 1979). The idea is that all citizens are bound together in a sort of multilateral contract which defines our reciprocal rights and duties. The terms of this contract include the law of the land, which applies fairly and equally to all of us. The lawbreaker has disturbed this equilibrium of equality and gained an unfair advantage over those of us who have behaved well and abided by the rules. Retributive punishment restores the balance by cancelling out this advantage with a commensurate disadvantage. It thus ensures that wrongdoers do not profit from their wrongdoings, and is justified because if we failed to punish law-breakers it would be unfair to the law-abiding.

This 'modern retributivism' was highly influential for a time, although it was always far from universally accepted and it eventually became discredited even in the eyes of some of its foremost former advocates (Murphy, 1992: 24–5, 47–8; von Hirsch, 1986: ch. 5; von Hirsch, 1993: ch. 2). But even if we assume that it is sound at an abstract philosophical level, it would be extremely dubious to assert that this theory can justify our present practices of punishment or anything like them. One serious difficulty is that the theory only applies if our society is a just one in which

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all citizens are genuinely equal; otherwise there is no equilibrium of equality for punishment to restore. If – as appears to be the case – detected offenders typically start from a position of social disadvantage (which means that the obligation to obey the law weighs more heavily upon them than on others), then punishment will tend to increase inequality rather than do the opposite. In fact, this was exactly the conclusion once reached by the modern retributivist Jeffrie Murphy (1979: 95), who stated that ‘modern societies largely lack the moral right to punish’.²² Even if such a sweeping conclusion is not warranted, retributivists should be strongly critical of many aspects of our penal system. Not least among these are the lack of consistency in sentencing practices (see Chapter 4), and an increasing number of mandatory and incapacitatory sentences (see Chapters 4 and 8), which mean that offenders are to a great extent not dealt with in proportion to their just deserts. They should also disapprove strongly of the growing trend to concentrate more punishment on persistent offenders rather than those whose current offences are the most serious.²³ So despite its resilience and its various attractions, retributivism remains an implausible justification for our actual practices of punishment.

More promisingly, perhaps, retributivism is sometimes combined with reductivism to produce hybrid or ‘compromise’ theories (Honderich, 1984: ch. 6). Often these compromise theories state, in effect, that punishment is justified only if it is both deserved *and* likely to have reductivist effects on crime (for example, von Hirsch, 1976: chs 5 and 6). One such compromise theory is ‘*limiting retributivism*’. This theory states that punishment may be inflicted for forward-looking purposes such as the reduction of crime, but it is nevertheless wrong to punish anyone by more than they deserve. Thus the retributive principle limits the amount of punishment which may be imposed for reasons other than retribution. We shall return to this principle of limiting retributivism in section 2.7, and shall find reasons to approve of it – which are also, however, reasons to criticize many of the punishments that are actually inflicted within the penal system that we have.

Other Justifications

2.4 Reductivism and retributivism do not exhaust all the possible justifications for punishment, or the aims which it has been suggested punishment can rightly pursue. We now proceed to deal with two of these: denunciation and restorative justice, and the notions of reparation and reintegrative shaming with which restorative justice is associated.

Denunciation

Giving evidence to the Royal Commission on Capital Punishment in the 1950s, Lord Denning (Gowers, 1953: para. 53) made the following statement:

The punishment for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment

as being deterrent or reformatory or preventive and nothing else. . . 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.

The idea that punishment does and should demonstrate society's abhorrence of the offence, and that this in some way justifies punishment, is quite a popular one. It was explicitly cited as a rationale for the sentence in the 1981 case of Marcus Sarjeant, an unemployed teenager who fired blanks at the Queen during the Trooping the Colour ceremony. Sentencing Sarjeant to five years' imprisonment, Lord Lane (the Lord Chief Justice) said: 'The public sense of outrage must be marked. You must be punished for the wicked thing you did' (*The Times*, 15 September 1981). Similarly, a 1990 White Paper (Home Office, 1990a: para. 2.4) stated that 'punishment can effectively denounce criminal behaviour'.

Denunciation might be advocated for more than one reason. What we term *instrumental denunciation* is actually a form of reductivism (which we discuss at this stage for convenience). This is the idea that denunciation can help to reduce the incidence of crime – a notion which may at first seem somewhat obscure, but which has a distinguished intellectual pedigree. Émile Durkheim (1960: vol. 1, ch. 2; see below, Chapter 3, section 3.3) argued that one function of the criminal law and punishment was to reinforce the *conscience collective* of society and thereby ensure that members of society continued to refrain from crime. Punishment, Durkheim thought, has an educative effect. It not only teaches people to obey the law out of fear and prudence (which is deterrence); it also sends a symbolic moral message that the offender's action is socially abhorred, and therefore wrong.

As with general deterrence, it is difficult on the evidence to make very strong claims about the effectiveness of denunciation. Research suggests that members of the public are not influenced in their moral attitudes towards offences by the punishments that are imposed (or which they believe are imposed). People seem to have sufficient *respect for the law* to disapprove more strongly of an action when a law is passed against it, but they do not have sufficient *respect for the criminal justice system* to be influenced by the severity of punishment inflicted (Walker and Marsh, 1984; cf. Tyler, 1990: 44–7). This suggests that (like general deterrence) instrumental denunciation cannot justify any particular level of severity of punishment; nor can the penal system (as is sometimes fondly imagined)²⁴ 'give a lead' to public opinion about the rights and wrongs of how people should behave.

A different version of denunciation theory (and the one we suspect Lords Denning and Lane subscribe to) is what we term *expressive denunciation*. This is the (non-forward-looking) notion that punishment is justified *simply* because it is the expression of society's abhorrence of crime. Sometimes this is explained in terms of the community showing its recognition of and commitment to its own values (for example, Lacey, 1988).

The claim is therefore that denunciatory punishment is justified *even if it has no good consequences* such as educating the public conscience and thereby reducing the amount of crime. When posed in such stark but accurate terms it becomes difficult to see why this is supposed to amount to a distinct moral justification for punishment. It looks suspiciously like knee-jerk retributivism, spuriously ennobled by

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reference to the 'community'. Perhaps it is right that the official institutions of a community should express moral judgements on behalf of its law-abiding members – but why should it have to take the form of punishment? Why – unless perhaps we are closet retributivists or reductivists – should not offenders simply be formally denounced with words and ceremony and then set free? Unless we care nothing for human freedom and are impervious to human suffering, denunciation seems an implausible *general justification* for a system which deliberately inflicts punishment on people.

Nevertheless, there may be something to be said for the notion of denunciation. Whether or not things could be otherwise in a radically different society, as things are, the conviction and punishment of an offender necessarily carry a moral, condemnatory message and are seen as so doing. Perhaps, as we have seen, members of the public are currently not greatly influenced by such messages; but there is still something morally wrong about making incorrect moral statements (cf. von Hirsch, 1986: ch. 5). It follows that it is wrong to convict and punish someone who has done nothing morally wrong. And if it makes sense to punish at all, there is some point in trying to punish offenders at least roughly in proportion to the moral gravity of their offences. Denunciation may not on its own provide a general justification for having a penal system, but it may help provide us with one²⁵ acceptable *principle of distribution* for punishment.

A theory that resembles denunciation (but which also contains elements of reform and reintegrative shaming) is the 'communicative theory' of punishment put forward by Antony Duff (1986). Duff sees punishment as an attempt at moral dialogue with offenders, censuring their actions and hoping to secure their 'contrition', with the result that they mend their ways. We doubt whether this theory can on its own provide an adequate justification for punishment, let alone for our current practices. But the idea that penal practices can and should be designed to foster this kind of moral dialogue is an attractive one. It fits in well with the 'cognitive behavioural' approach to reforming offenders (see above, section 2.2), and with the ideas and practices we discuss under the next heading.

Restorative Justice: Reparation and Reintegration

The idea of *restorative justice* is an approach to offending and how we should respond to it which has come very much to the fore in recent years, including finding a degree of favour with the current New Labour government (Home Office, 2003b), although it has made only limited inroads into criminal justice practice (see generally Dignan, 2005a). Restorative justice seeks to restore or repair the relations between the offender, the victim and the community that have been damaged by the commission of the crime. To put things right, the offender is encouraged to accept responsibility for having committed the crime, to acknowledge its wrongfulness, and to make amends to those who have been hurt or harmed by the crime.

This restoration may be pursued by a variety of methods, which seek to provide an opportunity for those affected by the offence to deliberate together on the most

appropriate way of responding to it. The three most important 'restorative justice processes' which have been used in this country are *victim/offender mediation*, *conferencing* and *citizen panels*. Of these, only mediation actually requires the victim to participate, whether directly (involving face-to-face dialogue between victim and offender in the presence of a neutral mediator) or indirectly (where the mediator acts as a go-between). People other than the direct victim – including the families of both victim and offender, and representatives of the local community – may also be 'stakeholders' with an interest in how the offence is resolved, and other restorative justice processes such as conferencing provide a forum within which they too may participate. 'Police-led conferencing', as the name suggests, is convened and facilitated by the police, whereas in 'family group conferencing' the facilitator is more likely to be a government official. Citizen panels provide an informal forum in which lay people may deliberate with offenders, family members and others (possibly including victims) about the offence and its impact with a view to negotiating a 'contract' with the offender who undertakes to make amends in agreed ways. (See further Chapters 5 and 9.)

Restorative justice's aim of communicating with the offender about the wrongfulness of the crime has clear affinities with Antony Duff's 'communicative theory' discussed briefly under the previous heading. Two other aims of restorative justice, which we now proceed to discuss, are 'reparation' and 'reintegrative shaming'.

Reparation is the notion that people who have offended should do something to 'repair' the wrong they have done. This can take the form of compensating the victim of the offence or doing something else to assist the victim. If there is no individual or identifiable victim (or if the victim is unwilling to accept it), reparation can be made to the community as a whole by performing community service or paying a fine into public funds. 'Symbolic reparation' can also occur, for example, in the form of an apology for having committed the offence. Reparation is a sound and valid principle which we strongly favour (Dignan, 1994; Dignan and Cavadino, 1996; Cavadino and Dignan, 1997b); one of its virtues is that it could be of great value in assisting the 'reintegration' of offenders, as we discuss shortly. Reparation can be seen either as a desirable aim in its own right, or as a valuable but secondary aim which may be pursued when imposing punishment which is justified on other grounds (such as reductivism). If punishment is to be inflicted, it is surely better that the punishment should directly benefit the victim or society than that it should merely hurt or restrict the offender.

Restorative justice has also increasingly been linked to and underpinned by a general theory of crime and punishment propounded by John Braithwaite (1989). Braithwaite claims that successful societal responses to crime are those that bring about the *reintegrative shaming* of the offender. Offenders should be dealt with in a manner that shames them before other members of their community. But the shaming should not be of a 'stigmatizing' nature, which will tend to exclude them from being accepted members of the community; this (as the 'labelling theory' we mentioned in section 2.2 suggests) will be counter-productive, as it will make reoffending much more likely. Instead, the shaming should be of a kind which serves to reintegrate offenders, by getting them to accept that they have done wrong while

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encouraging others to readmit them to society. The measures and processes associated with restorative justice are particularly suitable for pursuing reintegrative shaming (Dignan, 1994), for the performance of reparation shames the offender symbolically while seeking to set matters right between the offender, the victim and the community. If such a strategy were to be an effective one – and the jury is still out on this,²⁶ although it seems a promising idea – then reintegrative shaming would be a valuable method of reforming offenders, which we see as a valid reductivist aim which could be pursued within a morally defensible penal system.

Even if restorative justice is no more effective in controlling crime than the traditional criminal justice system, it is in our opinion a preferable approach wherever it can feasibly be applied. (We shall return to this in Chapter 11.) It is obvious, however, that the principles and aims of restorative justice cannot begin to justify the penal system that we have, since most punishments (and most notably imprisonment) contain little or no restorative element, and may even make it difficult or impossible for the offender to make amends. But if restoration were more consistently pursued, we should have a much more civilized and morally acceptable penal system than the present one.

Schools of Penal Thought

2.5 The various justifications for punishment we have outlined have waxed and waned in relative popularity over time. In this section we provide a brief history of the development of penal thought in the West to show how different combinations of penal justifications have found favour in different eras.

The Classical School: Deterrence and the Tariff

The year 1764 saw the publication of one of the most influential works of penal philosophy of all time – *Dei Delitti e delle Pene* [On Crimes and Punishments] by the Italian, Cesare Beccaria (Beccaria, 1963). This book, the seminal work of the ‘classical’ schools of criminal law and penology, provided a thoroughgoing critique of the criminal justice systems of eighteenth-century Europe along with a blueprint for reform along more rational and humane lines.

To understand the classicists, it helps to have some understanding of what they were reacting against. Punishment under the *ancien regime* of eighteenth-century Europe was both arbitrary and harshly retributive, dominated by capital and corporal penalties. Moreover, ‘due process’ in the form of effective legal safeguards against wrongful conviction was all but absent in the criminal justice system of the time, and even the laws that defined which actions were criminal were vague and extremely wide. On the other hand, the existence of wide discretion in the hands of judges and of the sovereign (notably in the form of the pardon, which was extensively used) meant that the guilty were as likely to go unpunished as were the innocent to be wrongly convicted and harshly dealt with. The classicists claimed

that such a system was not only inhumane and unfair, but profoundly irrational and inefficient for the task of controlling crime.

Beccaria's blueprint called for clarity in the law and due process in criminal procedure combined with certainty and regularity of punishment. There should be a definite, fixed penalty for every offence, laid down in advance by the legislature in a strict tariff. These penalties should be proportionate to the gravity of the offence but as mild as possible, in contrast to the 'useless prodigality of torments' which characterized the existing system. Once an offender was found guilty, however, the sentence should follow automatically; in the strict classicism of Beccaria there was no room for clemency by way of pardons, reduction of sentences because of mitigating circumstances, or early release from the punishment laid down. All people were to be treated as fully responsible for their own actions, including their own offences.

The intellectual influence of classicism, and of Beccaria in particular, was enormous. Its principles were praised by reforming monarchs such as Frederick II of Prussia, Maria Theresa of Austria and Catherine the Great of Russia; the French Code introduced by the revolutionary regime in 1791 was an attempt at direct implementation of his plan for a rigid tariff of punishments; and Beccaria also greatly influenced such English jurists as Romilly and Blackstone. Its greatest impact was, however, on the framing of codes of criminal law rather than on penal systems. Beccaria's blueprint was never implemented in full.

Classicism grew out of the Enlightenment, the eighteenth-century philosophical movement which stressed the importance of human reason and which undertook the critical reappraisal of existing ideas and social institutions. Beccaria made particular use of the Enlightenment notion of the 'social contract' as the source of legitimate political authority. He argued that rational people drawing up a just social contract would only be willing to grant governments the power to punish to the extent that was necessary to protect themselves from the crimes of others. It followed that punishments should be no harsher than was necessary to achieve reductivist ends by means of deterrence. From this he derived his proposal for a tariff of fixed, certain penalties, proportionate to the offence but relatively mild by the standards of his own day. (Thus, like retributivists, he advocated a proportionate tariff, although he was himself a reductivist.) Beccaria opposed capital punishment as being cruel and inefficient as a deterrent. Punishments should, he said, be public and of a kind appropriate to the type of offence: corporal punishments for crimes of violence, public humiliation for 'crimes founded on pride' and so on. This would, he thought, assist in deterrence because 'in crude, vulgar minds, the seductive picture of a particularly advantageous crime should immediately call up the associated idea of punishment' (Beccaria, 1963: 57).

In general, Beccaria's philosophy exhibits what could be regarded as a curious combination of concern with the rights of the individual under the social contract on the one hand, and utilitarian reductivism on the other – curious because rights theory and utilitarianism are often thought to be philosophically incompatible. Yet he explicitly appeals to both concepts. (Indeed, not only did Beccaria use the concept of utility, but Bentham himself acknowledged his intellectual debt to Beccaria

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in the most fulsome terms and is even believed to have first encountered the phrase 'the greatest happiness of the greatest number' in Beccaria's master work: see Beccaria, 1963: x–xi, 8.) This intriguingly attractive blend of rights theory with forward-looking reductivism is one of the features that make Beccaria a continually fascinating and influential penal thinker even today.

Bentham and Neo-Classicism: Deterrence and Reform

The Englishman Jeremy Bentham (1748–1832), the main founder of the utilitarian philosophy, was also a major penal thinker and reformer. His penal thinking was an application of his general philosophy that law and government should pursue 'the greatest happiness of the greatest number'. This logically led him to espouse a purely reductivist approach to punishment, with no place for retributivism of any description. Despite the intellectual debt he acknowledged to Beccaria, his ideas differed from those of his Italian predecessor in several respects. At a philosophical level he had no time for notions of the social contract or human rights (he famously described the idea of natural rights as 'nonsense upon stilts'). Like Beccaria, he regarded clarity and due process in the criminal law as desirable, but from a purely utilitarian point of view. Similarly, he followed Beccaria in advocating a proportionate tariff of punishments for offences. Like Beccaria, he said that punishment should be primarily justified because of its deterrent effects, but he also proclaimed that punishment of the right kind could serve a further reductivist aim: that of reform.

His model of utilitarian punishment was exemplified most famously in the Panopticon – a prison he designed and narrowly failed to persuade the British government to let him build. The Panopticon was designed in such a way that prisoners were under constant surveillance by inspectors in a central observation tower. Prisoners were to be made to perform productive work within the prison in a consistent and regular manner in order that they should acquire rational work habits which they would retain after release instead of returning to crime. Thus, whereas classicism's image of human nature portrayed all human beings as being fully responsible for their own actions, Bentham saw criminals as having limited rationality and responsibility, but thought that they could be made more rational by the correct application of reformatory techniques in his 'mill for grinding rogues honest', as he called the Panopticon. His thinking also took account of limited human rationality on the question of responsibility for offences; unlike Beccaria, he allowed for mitigating circumstances such as duress, infancy and insanity to reduce or even remove an individual's liability to punishment.

Beccaria's ideas had been fated to win great praise but achieve less by way of practical influence in the running of penal systems. Bentham's success was greater but far from total. Utilitarian reductivism became a prominent rationale for punishment but never displaced retributivism entirely. Criminal justice systems in the nineteenth century developed along *neo-classical* lines. This meant that criminal laws were clarified and in some countries codified, as both Beccaria and Bentham advocated, but leaving a greater degree of flexibility and judicial discretion than

either would have found congenial. For example, the highly Beccarian French Code of 1791 was soon revised to reintroduce recognition of mitigating circumstances, judicial discretion in sentencing and the prerogative of mercy.

The Benthamite approach had its greatest impact in respect of one of its greatest points of difference from Beccarian classicism: the *form* punishment should take. Beccaria's scheme had no place for imprisonment as a punishment. (He only discussed imprisonment as the temporary incarceration of a suspect before trial, and while he did advocate penal servitude as a punishment for certain offences, this was not to be served in prison.) Bentham by contrast saw prison, in the shape of the Panopticon, as a useful method of dealing with offenders. Although the Panopticon was never built exactly as he designed it (a modified version was constructed at Millbank on the Thames and opened, with extremely poor results, in 1817), imprisonment rapidly became the pre-eminent method of punishment. As Foucault (1977) famously observed, the end of the eighteenth century and the early nineteenth century saw a massive shift (which Foucault (1977: 15) called 'the great transformation') from *corporal* to *carceral* punishment (see further Chapter 5). Moreover, this was a new form of imprisonment, the aims of which were not confined to containing offenders for a period and deterring the populace from crime. It also set out to retrain (or 'discipline' to use Foucault's word) the inmates, along the kind of lines Bentham advocated. As Foucault (1977: 16) put it, punishment no longer addressed itself to the body of the criminal, but to the soul.

Positivism: The Rehabilitative Ideal

A century after Cesare Beccaria's *Dei Delitti e delle Pene* saw the light of day, there came the publication of another work by an Italian called Cesare, equally seminal and revolutionary but in most respects diametrically opposed to Beccaria's way of thinking. This was Cesare Lombroso's *L'Uomo Delinquente* [The Criminal Man] (1876). Lombroso is best known for his theory, an extension of Charles Darwin's ideas, that criminals were atavistic throwbacks to an earlier stage of evolution. But more important than this particular theory (which he was later to modify substantially) was Lombroso's role as the founder of the *positive school of criminology*. The positivist view is that crime, along with all other natural and social phenomena, is *caused* by factors and processes which can be discovered by scientific investigation. These causes are not necessarily genetic, but may include environmental factors such as family upbringing, social conditioning and so on. Positivists believe in the doctrine of *determinism*: the belief that human beings, including criminals, do not act from their own free will but are impelled to act by forces beyond their control. Thus, where Beccaria's vision of human nature had been one of untrammelled free will and while Bentham had admitted that the responsibility of some humans was limited, positivism denies responsibility altogether.

It follows (for the positivist) that it is wrong to hold people responsible for their crimes and punish them in ways that imply that their crimes are their own fault. Criminality is no more the fault of the offender than illness is the fault of the invalid, and both require treatment not blame. So retributivism is clearly excluded

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as a justification for punishment. Positivism is also typically sceptical about deterrence, on the grounds that empirical evidence scientifically assessed demonstrates that punishment is ineffective as a deterrent. The reductivist methods favoured by positivism are incapacitation, and especially reform. Criminological science should be able to predict which offenders (and perhaps even which people who have not yet offended) are likely to commit further crimes. Such people should be diagnosed by experts and given appropriate treatment which will prevent them from reoffending; if necessary they can be detained to incapacitate them in the meantime and ensure that they are available to be treated.

Positivism in its purest form rejects two important doctrines common to both classicism and neo-classicism, namely due process and proportionality. Due process is not appropriate in the diagnosis and treatment of crime any more than it is in medicine, since the scientific investigative process does not and should not proceed along legalistic lines. Proportionality is similarly seen as a mistaken notion, since there is no reason why the treatment needed by the offender should be in proportion to the gravity of the offence. Instead of the punishment fitting the crime, the treatment should fit the individual criminal. (For this reason the positivistic approach is sometimes referred to as the '*individualized treatment model*'). Positivism particularly favours the *indeterminate sentence*: it is premature to decide at the time of sentence how long the offender should be detained for, since this may depend on how quickly the treatment works; ideally, therefore, the release decision should be left in the hands of treatment experts to take at a later date.

Positivism, and the *rehabilitative ideal* associated with it, gradually came to dominate criminological thinking and rhetoric, reaching its zenith in the 1950s and 1960s, especially in the United States. For example, indeterminate and semi-indeterminate sentences (such as 'one year to life') became more and more common in the USA, with release dates dependent not upon the sentence passed at the trial but upon the parole process. This was a time of 'rehabilitative optimism': there was a widespread belief that criminology and other behavioural sciences would progressively discover the causes of crime and the way to cure all offenders of their criminality. In the 1970s, however, the positivist approach was dealt a series of severe blows which led to the collapse of the rehabilitative ideal. One of these blows (mentioned under 'Reform' in section 2.2 above) was cruelly self-inflicted: positivistic criminological research, far from demonstrating the effectiveness of treatment measures, seemed instead to show that treatment did not work. At much the same time, positivism came under a powerful and sustained political and theoretical critique associated with the 'justice model'.

The Justice Model: Just Deserts and Due Process

The justice model (Bottomley, 1980; Hudson, 1987) first emerged in the US as a critique of the positivistic '*individualized treatment model*'.²⁷ The first book-length statement of the justice model in the 1970s was the American Friends Service Committee's report *Struggle for Justice*, published in 1971. The authors claimed that the treatment model was 'theoretically faulty, systematically

discriminatory in administration, and inconsistent with some of our most basic concepts of justice' (American Friends Service Committee, 1971: 12). Theoretically faulty, because the individualized treatment model identified the cause of crime as a pathology within the individual, whereas the authors saw the true causes of crime as structural, resulting from the way in which society is organized. Systematically discriminatory, because the wide discretion which positivism vested in supposed experts within the criminal justice system operated in practice to disadvantage offenders from poorer sections of society. And inconsistent with justice, because the lack of due process and proportionality in the treatment model offends our moral intuitions about the rights of the individual and the unfairness of treating offences of similar gravity in possibly widely varying ways. It was also felt that the positivistic notion that offenders were not rational and responsible agents, and that they should be reprogrammed until they conform to society, was a profound insult to human dignity.

The justice model asserts two central principles, both of which hark back to the classicism of Beccaria. The first is due process in procedure, and the general limitation of official discretion within the criminal justice system. The second is proportionality of punishments to the gravity of offences – or in other words, that offenders should receive their *just deserts*.²⁸ Disproportionate sentences with the alleged purpose of reforming the offender are to be rejected. This is so whether the reformatory sentence would be disproportionately long or disproportionately short, although most adherents of the justice model in the 1970s (who tended to be liberal or moderately radical in political persuasion) wanted a just deserts system which would punish less harshly overall – again like Beccaria two centuries previously.

It is not only reform as an aim of punishment that the justice model eyes with suspicion. Justice model writers are also mostly sceptical of the effectiveness of deterrence and even more so of the validity of deriving a just tariff from deterrent considerations (as Beccaria and Bentham claimed to do). The justice model's philosophy consequently relies heavily on either retribution or denunciation as at least a partial justification for punishment. The most definitive justice model statement of the 1970s, the Committee for the Study of Incarceration's *Doing Justice* (von Hirsch, 1976: chs 5, and 6), adapted Jeffrie Murphy's (1979) modern retributivist theory and concluded that retribution and deterrence in combination provided the general justification for punishment. Subsequently, Andrew von Hirsch (1986: ch. 5, 1993: ch. 2) has claimed that punishment is justified on the two grounds of reductivism (which he calls 'the preventive function' of punishment) and denunciation (or 'the blaming function'), the latter being the basis for adopting proportionality as the principle for the distribution of punishment.²⁹

The justice model made its impact on both sides of the Atlantic and elsewhere.³⁰ In the USA many states moved substantially away from indeterminate sentences and positivistic devices such as parole.³¹ The high-water mark of the justice model's influence in Britain was the 'just deserts' strategy which was pursued by the British Conservative government prior to 1993 and which centred around the Criminal Justice Act 1991 (see the Introduction and Chapters 4 and 11). Although by no

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means representing the justice model in a pure form, the 1991 Act sought to establish 'just deserts' as the primary aim of sentencing (Home Office, 1990a: paras 2.1–2.4). But as we shall see in more detail in Chapters 4 and 11, both the 1991 Act and its just deserts principles were to come rapidly to grief.

From 'Just Deserts' to 'the New Punitiveness' – and Beyond?

It is sometimes said that the justice model, although originally proposed by liberals and radicals who wished to reduce the overall harshness of punishment, was 'co-opted' from the late 1970s onwards by the political Right (for example, Bottoms, 1980: 11; Hudson, 1987: 72). Whether or not this is the best way of describing the situation, it is true that some important strategies and approaches to punishment in this period combined aspects of the justice model with a generous dash of the populist, punitive ideology of 'law and order', which we discussed in Chapter 1 and which has gathered ever greater influence since the 1970s. Indeed, the 'just deserts' strategy in the Criminal Justice Act 1991 can be seen as a hybrid of this kind, for along with pursuing a greater proportionality in sentencing in general, the government insisted that community penalties should be made more toughly punitive ('punishment in the community') and that custodial sentences for violent and sexual offenders should be increased.

Other just deserts/law and order hybrid approaches have been considerably more punitive than this. It is possible to discern – for example, in the United States for much of the late 1970s and 1980s – a kind of 'right-wing just deserts' approach which shares with the liberal version a retributivist approach and a preference for proportionate, 'just deserts' punishments, but advocates *more severe* fixed-term sentences. Reformatory measures are disfavoured by this approach not because they might be disproportionately harsh, but because they may be too soft. However, this approach departed from the liberal justice model markedly in its attitude to due process: if anything it disapproved of excessive procedural safeguards on the grounds that they are likely to act as an obstacle to ensuring offenders receive their just deserts.

From the vantage point of the present day, these more punitive versions of 'just deserts' assume the appearance of temporary staging posts on a rapid journey heading towards a 'new punitiveness' (see the Introduction and Chapter 3). In Britain, we have heard little about 'just deserts' – certainly from either Conservative or Labour politicians – since the 'law and order counter-reformation' of 1992–3. In terms of the philosophy of punishment, the Conservative government then abandoned 'just deserts' in favour of the assertion that 'prison works' by incapacitation and deterrence – although this was perhaps not so much philosophy as a rationalization designed to legitimate a populist set of 'tough' (Strategy A) penal policies. Arguably, the historical role of the justice model – entirely contrary to the intentions of its progenitors – was to pave the way for the transition to a more punitive penal system and a more authoritarian society. As we shall see throughout this book, much of this punitiveness lives on under the New Labour government first elected in May 1997, which remains little influenced by the philosophy of 'just

deserts'.³² One illustration of this is the government's insistence that the penalty of imprisonment is appropriate not only for serious offenders but also for persistent petty offenders, a policy which offends against the idea that the punishment should fit the crime.³³ More generally, the government justifies its policies not on the basis that they provide a fair amount of punishment for offenders, but because they are claimed to be effective in controlling crime – which is of course reductivism. For the moment at least, 'just deserts' is out of fashion with those who have most power to determine the shape of criminal justice. What reigns in its place at the moment is not simply 'law and order', but a combination of philosophies and strategies, as we shall see throughout this book.

Philosophies, Strategies and Attitudes

2.6 It is not as simple as one might imagine to relate these philosophies and schools of thought to the broad 'Strategies' (Strategies A, B and C) we detailed in the Introduction. (To recap briefly, Strategy A is harshly punitive, Strategy B is managerialist, and Strategy C is humane and rights-based.) Newcomers to the subject tend to assume that retributivism (with its traditional overtones of 'an eye for an eye') is the harshest philosophy and the one underlying the punitive Strategy A. It is indeed possible to espouse Strategy A and call for maximum punishment on the basis of a harsh interpretation of retributivism. But, as we have seen, some notable proponents of Strategy A (such as Michael Howard) have justified their policies on *reductivist* grounds, claiming for example, that 'prison works' to deter and incapacitate. On the other hand, the retributivist philosophy insists not only that punishment should be proportionate to the offence, but that it *should not be disproportionately severe because this would be undeserved*. This is, indeed, a central message of the justice model, most of whose proponents we would place under the heading of Strategy C, because they were concerned to minimize the violation of human rights involved in the infliction of excessively severe punishments.

So Strategy A can be based – although not necessarily with any great intellectual coherence – on either retributivism or reductivism (or indeed on the theory of denunciation). Proponents of the lenient, human rights-based Strategy C can also draw on any of these philosophies and justifications for punishment. Those whose humanitarianism takes the form of advocating reformative measures invoke reductivism (and the belief that reformative treatment can help reduce future crime); while, as we have seen, proponents of the justice model can appeal to either retributivism or denunciation, typically combined with reductivism in a hybrid justification for punishment. Those who favour restorative justice may be reductivists (believing that this kind of justice is the most effective at controlling crime) or may appeal to the desirability of reparation as an independent aim in its own right.

There is therefore no simple equation between the *philosophies* of punishment and what we term *strategies*. Both reductivism and retributivism can be either harsh

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or humane. However, when it comes to Strategy B – the managerialist strategy – there is one general philosophy which fits it very neatly. This is the philosophy of *utilitarianism*, the notion that one should always act in the interests of the ‘greatest number’ of people. The emphasis that managerialism places on effectiveness and cost-efficiency has a decidedly utilitarian tinge. So does the way in which managerialism is not greatly concerned about the human rights of individual offenders or about ensuring that offenders get their ‘just deserts’ (however much or little that is conceived to be). It follows that a proponent of Strategy B should, if consistent, espouse utilitarian *reductivism* as the basic aim of punishment. And indeed, the rise of managerialism in criminal justice has occurred in conjunction with an increasing interest in ‘what works’ to reduce crime (by both general crime prevention measures and penal sanctions aimed at reducing recidivism, including reformatory treatments) – and, significantly, what works most efficiently and cost-effectively. This utilitarian (Strategy B) agenda is currently very prominent in New Labour’s criminal justice policies, combined with a strong streak of (Strategy A) new punitiveness and a slight dash of Strategy C, notably in the introduction of ‘restorative justice’ measures for some young offenders (see Chapter 9).

Underlying much of the conflict between different penal philosophies and strategies, we can perhaps discern a very general tension between what could be termed two fundamentally different attitudes towards offenders. This is the contrast between *exclusive* and *inclusive* attitudes. The exclusive attitude rejects offenders as members of the community and seeks to shut them out of mainstream society by measures such as imprisonment. This attitude is allied to notions of deterrence, incapacitation and an illiberal version of retributivism. The inclusive attitude, on the other hand, seeks to maintain offenders within the community and reintegrate them into mainstream society. It can be found embodied in notions and practices of reform, resocialization, restorative justice and more liberal versions of retributivism (such as the ‘justice model’). (See further Cavadino et al., 1999: 48–50.) Strategy A is clearly aligned with the exclusive attitude and Strategy C with the inclusive; Strategy B, however, is essentially indifferent to the inclusion/exclusion dimension, and would favour whichever approach happens to work best in practice. We can see this conflict between inclusion and exclusion of the offender being played out throughout this book, including the philosophical debates covered in this chapter.

Conclusions: Punishment And Human Rights

2.7 This chapter has been a complex one, but it has nevertheless been an exercise in oversimplification. As well as reducing some sophisticated philosophies down to some relatively crude statements, we have probably also given the impression that penal systems ‘in the real world’ at different stages in history possess a consistency and coherence that is in fact largely lacking. The philosophies we have described do exert a very real influence on the shaping of penal systems and penal practices, but none of the various schools of thought

has ever been totally dominant, even at the height of its popularity. No penal system has ever been entirely retributivist, or entirely reductivist, or thoroughly Beccarian. This impurity of the real world can be seen in the existing English system: the legally accepted justifications for punishment include retribution, deterrence, incapacitation, denunciation, reform and reparation in a promiscuously eclectic mixture.³⁴ Government policies have been similarly eclectic, as a variety of penal aims and philosophies have been cited (often simultaneously) to justify policies whether harsh or relatively lenient. Reductivism rather than retributivism is currently in the ascendancy as a general principle, but with deterrence, incapacitation, reform and reparation all finding favour to various degrees.

Given this confusing welter of competing and combining philosophies, can we reach any valid conclusions about the rightness or otherwise of punishment? We think we can, although any such conclusions (which we can only sketch out here) will inevitably be inherently controversial.

Any verdict we pass on punishment must be soundly based on an acceptable general moral philosophy. This does not necessarily mean that a diversity of penal aims is ruled out, but each of the different aims must be justified by the same general philosophy if our position is to be coherent. Our preferred philosophical basis is *human rights theory* rather than utilitarianism. Along with theorists such as Ronald Dworkin (1978) and Alan Gewirth (1978), we hold that each individual human being has certain fundamental rights which we possess equally by virtue of being human. These fundamental rights are variously described and vindicated by a variety of philosophical arguments to which we cannot do justice here. Suffice it to say that we think that at least one important human right can be described as a right – belonging equally to each human individual – to maximum ‘positive freedom’, by which we mean the ability of people to make effective choices about their lives.³⁵

If there is a right to positive freedom, then punishment (which reduces the freedom of the person punished) is *prima facie* wrong and requires special moral justification. It is difficult to see how punishment could be justified on purely retributivist grounds consistently with the positive freedom principle, and the same would seem to go for expressive denunciation as a general justification of the system. For if retribution and denunciation were all that punishment achieved, the criminal’s freedom would be gratuitously diminished without this doing anything to improve anyone’s prospects for exercising choice. However, rights theory allows for one person’s *prima facie* right to be overridden in the interests of other individuals’ more important ‘competing rights’ (see Dworkin, 1978). The relevant competing rights here are those of the potential victims of crime in the future. The commission of crimes against them will have the effect of diminishing their positive freedom, to which they also have a right. For example, crimes of injurious violence reduce the victims’ freedom to operate physically free from pain, while property offences will deprive them of resources and thereby remove their freedom to choose to act in ways that require the use of those resources.³⁶ *The general justification for having a system of punishment must therefore be forward-looking and primarily*³⁷ *reductivist*, based on the claim that punishment does something to reduce the incidence of crime, and thereby prevents the diminution of some other people’s positive freedom. The most plausible mechanism by which

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punishment may be thought to achieve this aim is general deterrence, although other reductivist effects such as instrumental denunciation and incapacitation may make a secondary contribution.

The reductivist aim must, however, be pursued in a manner consistent with the human rights of the offender (or suspected offender). We think that retributivists and denunciationists are right to insist that there is no justification for punishing someone who has not deliberately and wrongfully broken a just law and thereby exercised a freedom to which they are not entitled (because to do so has diminished other people's freedom or has threatened to do so). Rights theory therefore provides a basis for a principled compromise between reductivism and retributivism. It also follows that, although offenders do forfeit some portion of the rights citizens should normally enjoy, they still retain the status of human beings and therefore retain important human rights (Richardson, 1985) – a point on which we are closer to some retributivist thinkers than to classical utilitarianism.

We further agree with retributivists, denunciationists and justice model theorists that one valid general principle for the *distribution* of punishment is that offenders should be punished at least roughly in proportion to the moral gravity of their offences. Our main reason³⁸ for this is an argument we referred to when discussing denunciation: that to punish disproportionately is to convey incorrect moral messages about the relative gravity of offences. But this principle – called by Hart (1968: 9) 'retribution in distribution' – is only one valid principle among others,³⁹ and is hardly inviolate in every single instance. We would take some convincing that it can be right to depart from it by punishing more harshly than an offender 'deserves' on a standard tariff, for example, by sentencing an offender to an exceptionally long custodial sentence for purposes of reform or incapacitation.⁴⁰ But we see no reason why it should not be acceptable (and consistent with our human rights philosophy) for aims such as reform,⁴¹ reparation and reintegration to be considered and pursued when it has to be decided what punishment (if any) should be allocated to individual offenders, as long as this does not have the result of making the punishment harsher. The operative principle should therefore be a *limiting retributivism*, or a '*retributive maximum*' (as advocated by Norval Morris, 1974: 75). An offender may be punished up to the level indicated by the tariff, but no more harshly; and there is no obligation to exact punishment of this severity if other valid considerations indicate that a more lenient course will be more constructive or humane. As Morris says, 'deserved justice and a discriminating clemency are not irreconcilable'.

This human rights-based approach leads, naturally enough, to the 'inclusive attitude' towards offenders and to a Strategy C-type approach to criminal justice: one, indeed, that incorporates the concerns of the different varieties of Strategy C which we have identified. There is a place in this approach for proportionality in punishment ('just deserts') – as explained in the previous paragraph – and also for reformative and restorative measures where it is possible and appropriate to apply them (cf. Cavadino, 1997b: chs 2 and 3; Cavadino and Dignan, 1997b). We particularly favour the restorative justice approach, for a variety of reasons. For example, one virtue of many reparation schemes is that they afford both offender and victim a say in determining the nature of the offender's punishment. This increases

the positive freedom of the victim as well as the offender, a consideration which should normally justify a downwards departure from the proportionate tariff. (See further Cavadino and Dignan, 1997b; Dignan, 2003.)

Strategy A is, as one would expect, anathema to this human rights approach for at least two reasons. First, it leads to punishments – such as ‘three strikes and you’re out’ sentences – which are unfair to individual offenders because they are disproportionate, exceeding the offender’s ‘just deserts’ for the crime committed. And second, the general levels of punishment called for by Strategy A are also grossly excessive because of the ‘overkill’ involved: the suffering and loss of liberty caused is outweighed by the relatively small amount of crime which is prevented by such heavy penalties compared with a more lenient regime (Cavadino et al., 1999: 37–41). There is, however, room in our approach for Strategy B-type managerial techniques, provided these are used in the pursuit of human rights-based aims (Cavadino et al., 1999: ch. 2). For example, there is nothing wrong with using techniques such as research and monitoring to discover and apply ‘what works’ to reform offenders or help secure reparation for victims, and indeed we strongly favour such an evidence-based approach.

If our rights-based theory is the correct moral framework for punishment, how should we judge our current penal practices? Our own judgement is a severely negative one, and for one central reason: *we punish too much* – and in particular, we imprison far too much. For the ‘principle of parsimony’ applies as much to our forward-looking human rights theory as it does to utilitarianism: offenders have a right not to have their freedom gratuitously diminished to a degree greater than is necessary to produce the desired reductivist results. We would go so far as to argue that a thoroughgoing application of the principle of parsimony means that imprisonment should be used very sparingly indeed. It should be reserved for offenders who represent a serious danger to others and need to be ‘incapacitated’, and perhaps also – for very brief periods only – for offenders who intransigently refuse to cooperate with non-custodial measures. Otherwise, there is no morally legitimate aim of punishment which cannot be achieved just as well and more humanely by the use of non-custodial punishment (Cavadino et al., 1999: 117–20). But it is not necessary to follow us as far as this to accept the evidence that – as we saw under the heading of deterrence in section 2.2 – the penal system is engaging in a massive ‘overkill’ operation. This amounts to a scandalous infringement of the human rights of those who are punished excessively. And as punishment levels continue to increase, so does the immorality of our penal practices.

It is not necessary to subscribe to human rights philosophy to agree with this conclusion. Indeed, we find it impossible to imagine a plausible and consistent moral philosophy which could justify our present penal practices or anything like them. (We have already seen that utilitarians and retributivists should also condemn our existing system.) It is difficult to resist the implication that our penal system is morally unjustifiable – morally bankrupt might not be too strong a phrase. Of course, not everyone is well versed in moral philosophy. But this is hardly necessary in order to make valid observations about how the penal system treats people unfairly, causes unnecessary suffering, does little to reduce crime, and fails

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to punish offenders in accordance with their moral deserts. So perhaps it is no wonder that we are not the only ones who perceive the system as unjust, and that it finds itself with a crisis of legitimacy on its hands.

Notes

- 1 By 'punishment' we mean any measure that is imposed on an offender in response to an offence, even if it is intended to help the offender (or victim) rather than to hurt or harm. However – and for want of a better word – we use the word 'punitive' in this book as an adjective referring to measures whose primary purpose is to confine offenders or otherwise make their lives less pleasant, for purposes such as retribution or deterrence. Thus, in our terminology there are 'punitive punishments' such as imprisonment and 'non-punitive punishments' which have aims such as the reformation of the offender or providing reparation to victims. Both types of punishment require a moral justification.
- 2 Home Office (1984b). See further Chapter 9, section 9.3.
- 3 This famous phrase is from Voltaire's *Candide* (1947: 111), in which the hero witnesses the execution of the luckless English Admiral Byng who lost Minorca to France in a sea battle. An Englishman explains to Candide that 'in this country we find it pays to shoot an admiral from time to time to encourage the others'.
- 4 *R. v. Fairman* [1983] *Criminal Law Review* 197. It is quite possible that the court's tongue may have been in its collective judicial cheek.
- 5 Incidentally, there is no good evidence that capital punishment is a more effective deterrent than alternative penalties for murder, and for all we know it could even be less effective. See, e.g., Fagan (2005), or evidence collected at <http://www.deathpenaltyinfo.org>
- 6 See Beylvelde (1980: 147–9, 209–11); von Hirsch et al. (1999: 13, 45). It is the offenders' subjective *perception* of the risk of detection which counts. It is often difficult to affect this perception even by increasing the real risk (Maguire, 1982: 88). On the other hand, it is sometimes possible to deter people by merely increasing the *apparent* risk, as when the Copenhagen police claimed to have reduced speeding offences by 33 per cent by placing cardboard cut-out policemen by the side of the road (*Guardian*, 9 February 1988). Similar results have been claimed for devices such as plastic cut-out police cars positioned beside roads and on flyovers (*Guardian*, 6 May 1992).
- 7 Nor should the utilitarian overlook the economic cost of punishments such as imprisonment. On average it cost around £40,000 to keep a prisoner in custody for a year (see Chapter 6, note 1), whereas the estimated average annual costs of probation and community service orders are about £3,000 and £2,000 respectively (Coultsfield, 2004: 21). So each unnecessary inmate represents significant resources which could have been deployed for any number of more utilitarian purposes such as health or education.
- 8 There is also evidence that non-custodial measures can often be equally effective at preventing or at least postponing reoffending at much lower cost than imprisonment (See, for example, Ashworth, 1983: 32; Raynor, 1988: 111).
- 9 In 2003 it was estimated (on the basis of unpublished research by the Prime Minister's Strategy Unit) that a 22 per cent increase in the prison population since 1997 had reduced crime by around 5 per cent during a period when overall crime fell by 30 per cent (Carter, 2003: 16). The contribution to the reduction brought about by the increasing use of imprisonment during this period was thus relatively small and achieved at enormous expense. Carter went on to state that there was 'no convincing evidence that further increases in the use of imprisonment would significantly reduce crime' (2003: 30) See further Bottoms (2004: 66–71).

- 10 Ashworth (2005: 80–1); Tarling (1993: 154–160); Hagell and Newburn (1994). We return to the question of ‘targeting persistent offenders’ in Chapter 11.
- 11 The Halliday Report (2001: 10) agreed that ‘the available evidence does not suggest a case for changing the [sentencing] framework in any particular direction for the sole purpose of increasing an “incapacitation” effect’, as did the 2004 Carter Report (see note 9 above).
- 12 ‘Three strikes and you’re out’ sentences have also been defended on the grounds that they enhance deterrence; potential offenders are supposedly deterred by the knowledge that if caught and convicted they will receive an automatic prison sentence. Given what we have already said about deterrence, this seems unlikely. In any event, studies of ‘three strikes’ laws have demonstrated that, like so much else in criminal justice, they make no measurable difference to crime rates (Stolzenberg and D’Allessio, 1997; Zimring et al., 2001) whether by deterring or incapacitating.
- 13 We use the words ‘reform’ and ‘rehabilitation’ interchangeably, although some writers have defined them in different ways (for example, Bean, 1981: 46).
- 14 However, while it may not be justifiable to imprison offenders *in order to* reform them, it does not necessarily follow that it cannot be worthwhile to offer rehabilitative training to those whom we do imprison (perhaps for other reasons). Research on the effectiveness of rehabilitative programmes suggests that well-designed programmes can make a difference to reoffending rates whether they take place in prison or in the community (although they work better in the community: Andrews et al., 1990: 382, 384).
- 15 It is not clear that imprisonment performs any worse in this respect than ordinary non-custodial penalties. Kershaw et al. (1999) found that 58 per cent of prisoners released in 1995 were reconvicted within two years compared with 56 per cent of those sentenced to ‘community penalties’ (probation and/or community service), an insignificant difference when all possible relevant factors were taken into account. However, since non-custodial penalties fare *no worse* than imprisonment, it can be forcibly argued that they should be preferred because they are both cheaper (see above, note 7) and more humane than custody.
- 16 For example, Kershaw et al. (1999): see previous note.
- 17 This adjustment needs to be made because offenders who are sentenced to custody are usually more likely to have those characteristics (especially extensive previous records of offending) which make reoffending more likely in any event.
- 18 In fact Martinson (1974) never said ‘*nothing works*’, and he later (1979: 244) revised his views and asserted that ‘some treatment programs *do* have an appreciable effect on recidivism’.
- 19 For example, Ross et al. (1989). As the name suggests, this approach is based on a synthesis of methods drawn from behavioural and cognitive psychology (Hollin, 1990; Meichenbaum, 1977).
- 20 See Lipsey (1992, 1995), Vennard et al. (1997: 15) and more generally McGuire (1995, 2002). However, the results of recent evaluations of the effects of cognitive behavioural programmes (summarized in Debidin and Lovbakke, 2005) have been variable. The Halliday Report (2001: para. 1.49) advised the government that the correct national application of offending behaviour programmes of this kind could be expected to reduce offenders’ reconviction rates by between 5 and 15 per cent – a claim that was (for various reasons) always rash, and was not borne out by subsequent events (Bottoms, 2004: 61–3).
- 21 Standard retributivist theory leads to the logical conclusion that there should be an ‘*offence-based tariff*’: punishment should be in proportion to the seriousness of the *current offence*, and therefore it is generally wrong to increase a sentence on the grounds of the offender’s past record of previous convictions (for offences for which the offender has already been punished). In practice, however, courts tend to operate two tariffs in

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tandem: an '*offence-based tariff*', and an '*offender-based tariff*' which punishes recidivists more severely. (See further Cavadino, 1997b: 35–40.) This distinction between the two kinds of tariff will become important in Chapter 4.

- 22 However, Murphy suggested (1979: 107) that retributivism might justify punishing some offenders, for example business executives who commit tax fraud, who start off in a position of equality or better. It is also arguable that criminals who offend against victims who are less well off than themselves, or whose actions leave their victims in a situation of severe disadvantage, could have their punishments justified in a similar manner.
- 23 See above, note 21.
- 24 See, for example, *R. v. Sargeant* (1974) 60 Cr App Rep 74, where Lord Justice Lawton said that 'society, through the courts, must show its abhorrence of particular types of crime, and the only way in which courts can show this is by the sentences they pass ... Perhaps the main duty of the court is to lead public opinion.' (The Sargeant in this case was not the Marcus Sarjeant who shot blanks at the Queen, but an over-enthusiastic disco bouncer.)
- 25 The 'justice model' theorist Andrew von Hirsch (1993: ch. 2) argues in effect that what he calls 'the blaming function of punishment' requires that punishments should in general be *strictly* proportionate to the gravity of the offence, so that proportionality is not just one, but the only or paramount principle of distribution. In our opinion this approach is both over-rigid in practice and unjustified in principle (Cavadino and Dignan, 1997b).
- 26 The results of evaluations of restorative justice schemes have varied as regards their reformatory effectiveness: see e.g. Halliday (2001: 132); Wilcox et al. (2004).
- 27 Critics included not only liberal academics and penal administrators, but prisoners themselves: the rôle of prisoners' protests in the rise of the justice model is often unjustly overlooked (see Cavadino and Dignan, 2006: 61n).
- 28 For justice model theorists, this usually means that there should essentially be an offence-based rather than an offender-based tariff (see note 21 above), although they are not always entirely consistent on this point (see, e.g., von Hirsch, 1976).
- 29 See above, note 25.
- 30 Other countries where similar developments occurred include Canada, Australia, New Zealand, Sweden and Finland. For the latter four countries, see Cavadino and Dignan (2006).
- 31 However, many of these American developments, although moving towards more predictable and often fixed-term sentences, did not adhere to the 'just deserts' principle of proportionality between offence gravity and sentence severity (see von Hirsch, 1993: ch. 10). Thus, in our terms, these developments can be seen as owing more to 'law and order ideology' than to the justice model.
- 32 Jack Straw (New Labour Home Secretary 1997–2001) said explicitly that he wanted to end the just deserts philosophy underlying the 1991 Criminal Justice Act and that it was time to make the sentence fit the offender rather than the offence (*Guardian*, 1 February 2000).
- 33 The idea that there should be progression in the sentencing of petty offenders (see further Chapter 4, section 4.4) so that persistent offending will earn them custody means espousing the kind of 'offender-based tariff' (see note 21 above) which offends against just deserts philosophy.
- 34 Criminal Justice Act 2003, s. 142; see Chapter 4, section 4.5.
- 35 This 'positive freedom principle' is discussed more fully in Cavadino (1983; 1989: ch. 10; 1997a). Some rights theorists, including Dworkin (1978), justify rights on the relativistic ground that people in our society happen to accept that such rights exist. We find more interesting the non-relativistic argument of Alan Gewirth (1978) to the effect that

human reason can establish that human beings in any society possess certain definable fundamental rights. A similar argument for the positive freedom principle is put forward by Cavadino (1983, 1997a).

- 36 Not all crimes have individual victims; but many crimes that do not have indirect effects that threaten to reduce the positive freedom of (perhaps many) individuals. For example, defrauding the Inland Revenue depletes the public purse, which may have the effect of reducing public provision and thereby removing choices of various kinds from members of the public. Punishment cannot be justified on this basis if the law that the offender has broken itself violates the positive freedom principle. The law should not forbid harmless actions which do nothing to reduce anyone's positive freedom, however indirectly. More generally, if society is to be just, it should be organized so as to uphold everyone's equal right to positive freedom. The less just society is in these terms, the less just its penal system will tend to be.
- 37 The aims of restorative justice, which include reparation and the promotion of cohesive communities, can be seen as independent, auxiliary justifications for the appropriate kind of restorative measures.
- 38 The principle of justice that like cases should be treated alike is also relevant here.
- 39 See further Cavadino and Dignan (1997b).
- 40 In the case of 'protective sentences' – exceptionally long custodial sentences for the purpose of incapacitating supposedly dangerous offenders – we would adopt the rights-based reasoning of Bottoms and Brownsword (1983). This rules out protective sentences for all but the most 'vividly dangerous' offenders.
- 41 Not all methods of attempted reform are acceptable, however. To be consistent with the positive freedom principle, reform must take the shape of 'facilitated change' rather than 'coerced cure' (Morris, N., 1974: 13–20). Coerced cure is inconsistent with the offender's right to freedom.